

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ROBERT R. REED PART 43

Justice

-----X

ELISABETH MORSE,

Plaintiff,

- v -

LOVELIVE TV US, INC., RICHARD COHEN

Defendant.

-----X

INDEX NO. 650110/2017

MOTION DATE 08/26/2020,
10/13/2020

MOTION SEQ. NO. 003 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81

were read on this motion for DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 004) 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129

were read on this motion for DISMISSAL

ROBERT R. REED, J.:

In this breach of contract action, plaintiff Elisabeth Morse, acting pro se, alleges that defendant LoveLive TV US Inc. (LoveLive US), the wholly owned subsidiary of defendant LoveLive TV Limited (LoveLive UK), terminated her employment and failed to award her the severance package provided for in her employment agreement. Plaintiff further alleges that LoveLive US informally dissolved without accounting to creditors, including plaintiff, and that defendant Richard Cohen (Cohen), the chief executive officer and sole director of LoveLive US, remains personally liable to plaintiff for the failure to account to creditors, pursuant to New York Business Corporation Law (“BCL”) § 1006, due to the informal dissolution of LoveLive US.

Motion sequence nos. 003 and 004 are consolidated for disposition. In motion sequence no. 003, plaintiff moves, pursuant to CPLR 3124, for an order compelling discovery or, in the alternative, pursuant to CPLR 3126, for an order striking defendants’ answer for failure to provide

discovery.

In motion sequence no. 004, defendants LoveLive US and Cohen move: (1) pursuant to CPLR 3211 (a) (8), for an order dismissing all claims against each of them for lack of personal jurisdiction; and (2) pursuant to CPLR 3211 (a) (7), dismissing all claims against each of them with prejudice, for failure to state a claim.

For the reasons set forth below, defendants' motion to dismiss is denied, and plaintiff's motion to compel discovery is granted.

FACTS

Plaintiff's Employment

Accepting the allegations of the amended complaint as true (*Leon v Martinez*, 84 NY2d 83, 88 [1994]), the following facts emerge: LoveLive US was an agency producing audio-visual content. On July 1, 2016, plaintiff and LoveLive US entered into an employment agreement (the Employment Agreement [NYSCEF Doc No. 88]) for plaintiff's employment as Senior Vice President of Business Affairs and Strategic Development (amended complaint [NYSCEF Doc No. 85], ¶ 14). The Employment Agreement provided that, should plaintiff and defendants extend plaintiff's employment with LoveLive US through 2017, plaintiff would receive an increase in salary of \$50,000 in January of 2017, and a bonus of 20% payable in the next calendar year (Employment Agreement at 1).

The Employment Agreement further states that:

"If by the end of 2016, either you or the Company decide not to extend to 2017, and assuming targets are met, you will be granted a lump sum payment equivalent to 20% of annual 2016 salary (to be paid in early 2017)"

(*id.*). Plaintiff refers to this lump sum payment as the "Severance Amount."

Plaintiff alleges that, during negotiation of the Employment Agreement, she and LoveLive

US agreed that “targets” meant satisfactory performance by plaintiff of her services for LoveLive US (amended complaint, ¶17). Plaintiff agreed to accept the Severance Amount provision of the Employment Agreement in lieu of a “market” salary (*id.*, ¶ 19).

Plaintiff commenced employment with LoveLive US on July 18, 2016, and provided legal, business affairs, and strategic development services to LoveLive US (amended complaint, ¶¶ 20-21). Plaintiff alleges that she consistently received positive evaluations and feedback from her supervisor, LoveLive’s Chief Operating Officer, Marisa Bangash, and that she met all the “prerequisite [sic] targets” for LoveLive US necessary for the payment of the Severance Amount (*id.*, ¶¶ 22-23).

On November 15, 2016, Bangash informed plaintiff that, due to Lovelive US’s financial difficulties, LoveLive US would not extend plaintiff’s employment into 2017 (*id.*, ¶ 24). Bangash further informed plaintiff that LoveLive US was “downsizing,” and that plaintiff’s position would not be replaced (*id.*, ¶ 25). Plaintiff alleges that Bangash told her that she had met her targets, and would be entitled to the Severance Amount (*id.*, ¶ 26). On November 23, 2016, Cohen stated in an email provided to Bangash that plaintiff was owed the Severance Amount, stating: “It seems perfectly obvious to me that the 20% bonus is due, as we have no intention of making performance an issue” (*id.*, ¶ 27; *see* exhibit D [NYSCEF Doc No. 89]).

On December 2, 2016, LoveLive US ceased doing all business (*id.*, ¶ 28). On December 3, 2016, LoveLive UK, LoveLive US’s parent company, terminated the employment of all LoveLive US employees, including plaintiff (*id.*, ¶ 29).

LoveLive US has not filed for bankruptcy, nor has it assigned its assets to a third-party fiduciary for the benefit of its creditors (*id.*, ¶ 31). LoveLive US has not sent any formal communication to its creditors accounting for or regarding the disposition of LoveLive US assets

(*id.*, ¶ 32). According to plaintiff, LoveLive US has paid other former LoveLive employees amounts they were contractually owed upon termination (*id.*, ¶ 33).

On December 27, 2016, plaintiff sent a letter to James Holland (Holland), LoveLive's Chief Financial Officer, and inquired whether LoveLive US had filed for bankruptcy (*id.*, ¶ 34; *see* exhibit F [NYSCEF Doc No. 91]). In response, Holland informed plaintiff that LoveLive US "ceased to trade on 2nd December 2016 pursuant to a resolution of the directors," but had "decided against bankruptcy" (*id.*, ¶ 34; *see* exhibit E [NYSCEF Doc No. 90]).

On February 10, 2017, defendants' attorneys sent a letter to plaintiff's attorney stating that defendants had no intention of paying plaintiff the Severance Amount, or any other compensation (*id.*, ¶ 37; *see* exhibit H [NYSCEF Doc No. 93]).

Cohen is the sole registered and active director of Lovelive US (*id.*, ¶ 39). Plaintiff alleges that all material business decisions of LoveLive US are subject to Cohen's approval (*id.*, ¶ 40).

Plaintiff asserts that, under New York law, where it is impossible or futile to obtain a judgment against a defunct corporation that has defaulted on debts by "informal dissolution," creditors can maintain an action directly against the directors or shareholders, and that under BCL § 1006, directors incur derivative personal liability when they undertake to divest a corporation of all its property. Plaintiff alleges that defendants' counsel has confirmed on the record that LoveLive US has defaulted against creditors by informal dissolution, stating that LoveLive US "went bust," is a "now-defunct New York company," and an "out-of-business enterprise" (*id.*, ¶ 44; *see* exhibit M, defendant's memorandum of law at 1, 6 [NYSEC Doc No. 97]; exhibit N, 8/8/17 transcript of oral argument in *TV Tech Managers, Inc. v Cohen*, Index No. EF001342-2017 [Sup Ct, Orange County, Civil Term] [NYSCEF Doc No. 98]).

Plaintiff further alleges that, on December 8, 2016, after defaulting on creditors by informal

dissolution, LoveLive US disbursed cash assets to select employees as payroll compensation (*id.*, ¶ 45; *see* exhibit O [NYSCEF Doc No. 99]). On or about December 2016, Gemma Rowe Johnson (Johnson) was contracted by LoveLive UK to liquidate LoveLive US's material assets (*id.*, ¶ 45). In Holland's January 4, 2017 email to plaintiff, Holland stated that "[LoveLive US has] made payments to staff in respect of accrued PTO and salary to December 2, 2016. We further understand that this has exhausted the company's cash on hand. The contractor is in the process of liquidating the remaining assets of the company..." (*see id.*, exhibit E [NYSCEF Doc No. 90; *see also* exhibit P, 1/18/17 Rowe email to Morse [NYSCEF Doc No. 100] ["I have been contracted to perform some administrative tasks related to the liquidation"]).

Plaintiff alleges that, in addition to cash, LoveLive US transferred and/or informally liquidated various non-cash assets by informal dissolution, including office equipment, computer equipment, and kitchen equipment (*id.*, ¶ 49). On March 5, 2020, during oral argument, defense counsel confirmed that no formal notice of dissolution or accounting was ever provided to creditors of LoveLive US (*id.*, ¶ 50; *see* 3/5/20 transcript of oral argument at 9 [NYSCEF Doc No 109]).

Procedural History

1. Defendants' First Motion to Dismiss

On March 16, 2017, plaintiff filed the initial complaint, seeking payment of the Severance Amount. Plaintiff sought to pierce the corporate veil and hold both Cohen and LoveLive UK liable for the contractual obligations of LoveLive US, its subsidiary, by alleging that LoveLive UK and Cohen were alter egos of LoveLive US.

On June 22, 2017, defendants filed a motion to dismiss the initial complaint as against them for failure to state a claim, on the ground that the contractual provision upon which plaintiff sues is conditional, and that plaintiff failed to satisfy the condition precedent – i.e., that "targets" were

“met” – prior to suing. Cohen and LoveLive UK also sought dismissal as against them for lack of personal jurisdiction. In opposition to the motion (NYSCEF Doc No. 19), plaintiff clarified that her cause of action against Cohen “is dependent not on [a] veil piercing doctrine, but on the informal dissolution of LoveLive US” pursuant to BCL § 1006 (b) (plaintiff’s opposition at 6).

By decision dated August 1, 2019 (NYSCEF Doc No. 36), this court granted defendants’ motion to dismiss with respect to LoveLive UK, finding that plaintiff had failed to demonstrate the necessary elements for piercing the corporate veil as against it (8/1/19 decision at 6). With respect to plaintiff’s BCL § 1006 claim, the court rejected defendants’ argument that no assets of LoveLive US were transferred to shareholders or officers, and denied the motion to dismiss with respect to Cohen:

“In the instant action, defendant corporation LoveLive US was informally dissolved by Cohen, the CEO and sole board member. It seems to this court, from what is alleged, that Cohen may have failed to provide for or to pay corporate liabilities for LoveLive US, and, thus, obtaining a judgment against LoveLive US by plaintiff may now be futile. As such, it would seem inefficient to require plaintiff to first obtain judgment against LoveLive US and then move the court to amend her complaint to include Cohen or, alternatively, to institute a new, plenary action against Cohen at some later time. Defendants’ motion to dismiss all claims against individual defendant Robert Cohen is, therefore, denied”

(8/1/19 decision at 9).

2. Plaintiff’s Discovery Demands and Motion to Compel

On August 22, 2019, the parties met with the court, which issued a preliminary conference order regarding the timing of discovery demands (NYSCEF Doc No. 75). On October 17, 2019, a status conference was held (*see* status conference order [NYSCEF Doc No. 77]), during which the timing and scope of discovery were discussed, with plaintiff noting that her ability to hold depositions would depend on defendant’s complete and responsive production of discovery materials. The court ordered that EBTs be conducted before January 10, 2020.

On September 23, 2019, plaintiff served demands for discovery and inspection to defendants (NYSCEF Doc No. 76). On November 12, 2019, defendants submitted their response to plaintiff's discovery demands (NYSCEF Doc No. 78). Plaintiff asserts that defendants served incomplete responses and non-responsive objections to her demands.

Plaintiff contends that she unsuccessfully attempted to locate and subpoena certain third parties for deposition prior to January 10, 2020. On January 16, 2020, the parties met in person to attempt to resolve discovery disputes, but were unable to reach resolution on many disputed issues. Subsequent to meeting, the parties appeared before this court, at which time plaintiff unsuccessfully sought responses to outstanding demands. The court then directed plaintiff to file a motion to compel discovery (*see* status conference order [NYSCEF Doc No. 80]). On February 14, 2020, plaintiff filed the instant motion to compel discovery (NYSCEF Doc No. 66).

3. Defendant's Motion to Reargue the First Motion to Dismiss

On February 2, 2020, defendants filed a motion to reargue this court's August 1, 2019 decision with respect to defendants' first motion to dismiss (NYSCEF Doc No. 43). Defendants argued that this court should have dismissed the complaint as against Cohen, because it does not allege that Cohen received any corporate asset. Defendants further argued that this court should have dismissed the breach of contract cause of action because plaintiff failed to allege that the "targets were met," or what the "targets" were, as set forth in the Employment Agreement, that would trigger the need for the Severance Payment.

On March 5, 2020, this court heard oral argument regarding the motion to reargue. During that oral argument, with respect to BCL § 1006, this court recognized that "you have a fiduciary duty as a director [and] one of the things that you don't do as a director is sell off assets while knowing that you have creditors who are entitled to notice before you sell those assets. That's

what the case law says” (3/5/20 transcript of oral argument at 10 [NYSCEF Doc No. 101]). This court further recognized if “someone at some point s[old] off any kind of physical assets, any other type of monetizable assets [and] if they did that without notice to their creditors [t]hat’s where the director liability stems from” (*id.* at 14-15).

This court then granted defendants’ motion to reargue on the record, and dismissed the complaint as against Cohen and LoveLive US without prejudice, with leave to file an amended complaint:

“With respect to the claim against Richard Cohen, counsel for defendants has articulated that for there to be director liability in formation with the informal dissolution of the corporation, there has to have been some transfer of assets that was done without appropriate notice to creditors. The complaint does not allege that.

To the extent that the complaint’s language does not exclude that possibility, the Court believes that dismissing the complaint without prejudice will allow for a correction in addition of that answering if it is in fact the case.

With respect to Lovelive TV U.S., any condition precedent with lack of specific language regarding condition precedent being satisfied, the Court believes, too, that if it is the case, that that those targets were met and plaintiff can in good faith make those allegations, then the deficiency of the complaint can be cured and thus dismissing it in its current form without prejudice addresses the problem of the complaint and allows for its -- allows for it to be fixed.

Accordingly, it is hereby ordered that the motion for leave to reargue is granted and upon reargument, it is hereby ordered [that the] motion to dismiss the claim against Richard Cohen and Lovelive TV U.S., Inc. is granted without prejudice. It is further ordered that the plaintiff should within 30 days of today’s date make all efforts to - - the Court is giving plaintiff leave to refile an amended complaint on this index number within 30 days of today’s date. If that’s not done within those 30 days, then the plaintiff will need to purchase a new index number”

(3/5/20 transcript of oral argument at 17-18).

4. The Amended Complaint

On April 3, 2020, plaintiff and defense counsel agreed that all notices should be served to each other via email until otherwise agreed (*see* emails dated April 3, 2020 [NYSCEF Doc No.

124]). On April 3, 2020, plaintiff informed defense counsel that she was unable to file the amended complaint due to the court's COVID restrictions, but would file as soon as the court allowed (*see id.*).

On May 19, 2020, plaintiff filed the amended complaint with the changes as directed by this court, and served notice to defense counsel via email with receipt of opening (*see* proof of receipt [NYSCEF No. 125]). The amended complaint contains two causes of action. The first cause of action is for breach of the Employment Agreement. The second cause of action is for director liability under BCL § 1006.

On June 18, 2020, plaintiff filed and served a supplemental summons corresponding to the amended complaint, as well as a letter to the Court explaining the delay between filings:

“On May 19, 2020, as the plaintiff pro se, I filed an Amended Complaint in the above matter. At that time, I failed to file the Supplemental Summons; I blame my ignorance as a transactional attorney. I have now filed the Supplemental Summons backdated to May 19, 2020”

(6/18/20 letter from plaintiff to court [NYSCEF Doc No. 119]).

On June 22, 2020, defendants filed the instant motion to dismiss plaintiff's amended complaint (NYSCEF Doc No. 109).

DISCUSSION

MOTION TO DISMISS THE AMENDED COMPLAINT (MOTION SEQUENCE NO. 004)

Defendants' motion to dismiss the amended complaint is based on three grounds: (1) lack of personal jurisdiction based upon the alleged untimely filing of the amended complaint and supplemental summons; (2) lack of jurisdiction over Cohen as the amended Complaint does not allege that assets were transferred to Cohen during LoveLive's informal dissolution; and (3) plaintiff's failure to state a breach of contract claim.

Motion to Dismiss Based on Lack of Personal Jurisdiction

Defendants contend that plaintiff has failed to establish personal jurisdiction over either of them because plaintiff failed to file or serve a supplemental summons in this action within 30 days of March 5, 2020. On that date, the court dismissed this action, but ruled that if plaintiff wanted to re-file upon an amended pleading, she could utilize the instant Index Number. However, the Court noted that, “[i]f that’s not done within those 30 days, then the Plaintiff will need to purchase a new index number” (3/5/20 transcript of oral argument at 17-18).

On March 22, 2020—17 days after the court’s March 5 directive—Chief Administrative Judge Lawrence K. Marks issued an Administrative Order (AO/78/20) directing that “effective immediately . . . no papers shall be accepted for filing by a county clerk or a court in any matter of a type,” with limited enumerated exceptions. On May 20, 2020, Chief Administrative Judge Marks issued a Memorandum (“Filing of New Cases”) which ordered that “e-filing through the NYSCEF system . . . will be restored in several counties, including the five New York City counties,” as of May 25.

Defendants contend that plaintiff waited 41 days to file the supplemental summons, which does not include the approximately 64 days during which COVID-19 caused the courts to ban non-essential e-filing. When plaintiff filed a supplemental summons via NYSCEF on June 18, 2020, she wrote the court a contemporaneous letter admitting the “fail[ure] to file the Supplemental Summons” and “blame[d]” the failure on “my ignorance” of the process. Defendants contend that this filing was 11 days too late, because, after the passage of 30 days, plaintiff no longer had leave of Court to issue a supplemental summons under this Index Number. According to defendants, the amended pleading is therefore a nullity under New York law, because no process has been served nor proved, and personal jurisdiction has not been established.

The court rejects this argument, as it fails to take into account the executive orders issued by Governor Andrew Cuomo. On March 5, 2020, this court encouraged plaintiff to refile an amended complaint within 30 days of its ruling. The resulting filing deadline would have been April 3, 2020. However, all filings in this court (except for those in “essential matters”) were prohibited as of March 22, 2020 pursuant to Judge Marks’ administrative order, as well as three Executive Orders issued by Governor Cuomo: No. 202.8, issued March 20, 2020; No. 202.14, issued May 7, 2020; and No. 202.38, issued June 6, 2020 (collectively, the COVID orders).

Governor Cuomo’s Executive Order 202.8, entitled “Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency,” provides:

“I hereby temporarily suspend or modify, for the period from the date of this Executive Order through April 19, 2020 the following:

- In accordance with the directive of the Chief Judge of the State to limit court operations to essential matters during the pendency of the COVID-19 health crisis, ***any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding***, as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate’s court procedure act, and the uniform court acts, ***or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof***, is hereby tolled from the date of this executive order until April 19, 2020”

(Executive Order 202.8 [emphasis added]).

Executive Order 202.14 extended the suspension through May 7, and Executive Order 202.48 extended the suspension through July 6, 2020. The specific language of Governor Cuomo’s executive orders applies to the facts at hand, mandating the suspension and tolling of any specific time limit for “the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by” any “order,” such as the court’s March 5th order requiring plaintiff to re-file her amended pleading within 30 days.

This court finds that plaintiff’s filing of the supplemental summons on June 18, 2020 falls

easily within the tolling deadline for this court's request for the filing of an amended complaint. Various interpretations of the COVID orders regarding the tolling deadlines are possible. For deadlines that fell between March 20 and July 7, the new deadline might be calculated by either: (1) extending the length of the tolling period (109 days) because the COVID orders should be understood as permissive for any time that lapses during the COVID emergency (i.e., July 21, 2020); or (2) the new deadline should be the next business day after the tolling period expires, (i.e., July 8, 2020). Under either interpretation of the COVID orders, plaintiff filed both the amended complaint and the supplemental summons in accordance with the timeline ordered by this court (i.e., prior to July 8, 2020 or July 21, 2020).

Accordingly, defendants' motion to dismiss for lack of personal jurisdiction is denied.

Motion to Dismiss for Failure to State a Claim

It is firmly established that, on a motion to dismiss a complaint pursuant to CPLR 3211(a) (7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Landon v Kroll Lab. Specialists, Inc.*, 22 NY3d 1, 5-6 [2013]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon*, 84 NY2d at 87). The sole inquiry is whether a cognizable legal theory is contained in the pleading, not whether there is evidentiary support or whether the claimant can ultimately succeed on the merits (*African Diaspora Mar. Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 211 [1st Dept 2013]; *Philips S. Beach, LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 497 [1st Dept 2008]). If the four corners of the complaint provide potentially meritorious claims, the motion to dismiss should be denied (*see Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 10 [1st Dept 2012]). “‘However imperfectly, informally, or even illogically the facts may be stated, a complaint, attacked for insufficiency, must

be deemed to allege ‘whatever can be implied from its statements by fair and reasonable intendment’” (*Feinberg v Bache Halsey Stuart*, 61 AD2d 135, 138 [1st Dept 1978] [citation omitted]).

Construing the amended complaint in the generous manner to which it is entitled, this court concludes that the amended complaint contains sufficient allegations to withstand dismissal.

1. BCL § 1006

In support of its motion to dismiss, defendants contend that the amended complaint fails to state a claim for relief against Cohen because “[n]othing in the Amended Complaint alleges that LoveLive US transferred anything to any Shareholder or Director (and certainly not to Cohen)” (defendants’ memorandum of law at 2 [NYSCEF Doc No. 122]).

Once again, defendants mischaracterize the facts that must be pled to sufficiently allege a BCL § 1006 claim. This court has already twice directly addressed and rejected defendants’ argument that a director must receive a transfer of assets for liability to accrue: first, when it granted jurisdiction over Cohen in its August 1, 2019 order, and then again during oral argument of defendants’ motion to reargue on March 5, 2020, stating that:

“The *Darcy* court was unequivocal in its determination that it is the neglect to afford creditors an opportunity for court review of their claims that constitutes a violation of the directors’ duties. And it matters not that they may have supposed that they were not required to do any more, but then they did for the protection of creditors.

It doesn’t say anything about transferring assets to the directors. It says that when you dissolve the corporation without giving notice to the creditor. If you take your -- if you take your corporation and you know you owe creditors \$100,000 and you dissolve your corporation and sell off \$50,000 to someone else, you sell off bits and pieces of your corporation to some other entities and don’t tell those creditors, then you as director have a responsibility for overseeing the corporation [and] have failed in your obligation as a director.

Normally, as a director . . . you have a fiduciary duty as a director [and] one of the things that you don’t do as a director is sell off assets while knowing that you have creditors who are entitled to notice before you sell those assets. That’s what the

case law says.

* * *

Nothing says [directors] have to receive [assets]. That's for shareholders. For directors, the failure is the failure to give proper notice. So there needs to be a transfer, yes. The director's failure is in failing to follow the steps necessary to give adequate notice to the creditors, so they can maintain their claims"

(transcript of 3/5/20 oral argument at 9-10, 13-14; see *Darcy v Brooklyn & N.Y. Ferry Co.*, 196 NY 99, 103 [1909]; see also *Matter of Hartley*, 479 BR 635, 640-641 [SD NY 2012] [under New York law, where it is impossible or futile to obtain a judgment against a defunct corporation that has defaulted on debts by "informal dissolution," creditors can maintain an action directly against the directors or shareholders]; *Parent v Amity Autoworld, Ltd.*, 15 Misc 3d 633, 640 [Suffolk Dist Ct 2007] ["the cost of an informal dissolution is that directors cannot shield themselves against corporate creditor liability. Directors who undertake to divest a corporation of all its property without taking the proceedings for a voluntary dissolution do so at their peril"]).

In the amended complaint, plaintiff alleges that, on December 8, 2016, after defaulting on creditors by informal dissolution, LoveLive US disbursed cash assets to select employees as payroll compensation (amended complaint, ¶ 45). Plaintiff further alleges that Johnson was contracted by LoveLive UK to liquidate LoveLive US's material assets, and that, in addition to cash, LoveLive US transferred and/or informally liquidated various non-cash assets by informal dissolution, including office equipment, computer equipment, and kitchen equipment (*id.*, ¶¶ 46, 49). Finally, plaintiff alleges that, during the March 5, 2020 oral arguments, defense counsel confirmed that no formal notice of dissolution or accounting was ever provided to creditors of LoveLive US (*id.*, ¶ 50). This court finds that these allegations are sufficient to state a claim for liability against Cohen pursuant to BCL § 1006.

Although defendants also argue that the tort of deepening insolvency is not recognized by

New York courts, this argument is irrelevant, as plaintiff has never argued that deepening insolvency applies to this case.

Accordingly, defendant's motion to dismiss plaintiff's BCL § 1006 claim is denied.

2. Breach of Contract

Defendants argue that plaintiff's cause of action for breach of contract must be dismissed as against LoveLive US because, although "the Amended Complaint does, at long last, allege that the contract obligation that Plaintiff invokes has a condition precedent in the meeting of 'targets,' the Amended Complaint still makes no effort to explain what those targets were, nor how they were met" (defendants' memorandum of law at 3-4). This court disagrees.

In its decision on the record on March 5, 2020, this court stated that "[w]ith respect to Lovelive TV U.S., any condition precedent with lack of specific language regarding precedent being satisfied, the Court believes, too, that [if] it is the case, that those targets were met and plaintiff can in good faith make those allegations, then the deficiency of the complaint can be cured" (3/5/20 transcript of oral argument at 17).

In the amended complaint, plaintiff specifically alleges that "targets" meant satisfactory performance by plaintiff of her services for LoveLive US, that plaintiff met all the "prerequisite [sic] targets" for LoveLive necessary for the payment of the Severance Amount, and that Cohen stated that such targets were met (*see* amended complaint, ¶¶ 17, 23, 26, 27). This court finds that these allegations are sufficient to state a cause of action for breach of contract against LoveLive US.

Thus, defendants' motion to dismiss plaintiff's breach of contract cause of action is denied.

MOTION TO COMPEL DISCOVERY (MOTION SEQUENCE NO. 003)

Plaintiff moves to compel complete responses to her outstanding discovery demands.

Plaintiff asserts that, at the meeting on January 16, 2020, the parties agreed that plaintiff would drop certain discovery demands to which defendants had previously provided incomplete and unresponsive answers, and that the parties were unable to come to resolution regarding the remainder of the discovery demands.

It is well established that the failure to provide good-faith responses to discovery demands “impairs the efficient functioning of the courts and the adjudication of claims;” (*Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201, 207 [2d Dept 2012], quoting *Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 81 [2010]). Under CPLR 3101(a), “full disclosure” is required for “all matter material and necessary in the prosecution or defense of an action.” The Court of Appeals has held that “material and necessary” is “to be interpreted liberally,” and that the test of whether matter should be disclosed is “one of usefulness and reason” (*Allen v Crowell–Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). The Court of Appeals specifically interpreted “material and necessary” to mean nothing more or less than “relevant” (*id.* at 407; see e.g. *Osowski v AMEC Constr. Mgt., Inc.*, 69 AD3d 99, 106 [1st Dept 2009] [“it was proper for the trial court to compel disclosure of [the settlement agreements] because these agreements were ‘material and necessary’ to the issues raised in the third-party action”]).

As set forth below, the disclosure sought by plaintiff is relevant, material, and necessary to her claims against defendants. Importantly, defendants have submitted no opposition to plaintiff’s motion. Thus, an order compelling such disclosure is warranted (see CPLR 3124; see also *City of New York v Maul*, 118 AD3d 401, 402 [1st Dept 2014] [compelling disclosure of documents relevant to plaintiff’s claims]).

First, defendants claim that plaintiff’s demand for production of “board minutes” for one year prior to the date of commencement of this action is “irrelevant” and “overbroad” (see

defendants' response to document requests, section b). However, LoveLive US's board minutes prior to its dissolution are certainly relevant to determine when and whether it lost all of its assets, and who made the decision to consider the company as insolvent and no longer functional.

Defendants also object to plaintiff's demand for a list of LoveLive US's directors for one year prior to the commencement of this action to the present (*see id.*, section e). Because this court has ruled that Cohen may be liable in this action due to his role as a director of LoveLive US, establishing that Cohen was and is the only director of LoveLive US is directly relevant to this matter.

Defendants object to plaintiff's demand for internal emails, working notes, documents and communications relating regarding plaintiff's hiring by defendants, as well as any drafts of the Employment Agreement, as overbroad (*see id.*, sections j, l, m and n). However, such emails and other documents are clearly relevant, and likely critical, to deciphering the meaning and intent of the Employment Agreement, given that the phrase "targets are met" is not defined in the Employment Agreement itself.

Defendants also object to plaintiff's demands for materials relating to the nature and quality of her performance as a LoveLive US employee, as well as materials regarding the termination of the Employment Agreement by LoveLive US, as "overbroad" (*see id.*, sections p and q). These documents, however, are also directly relevant to the issue of whether plaintiff has met her performance "targets," as set forth in the Employment Agreement.

Defendant further object to the production of discovery materials relating to the dissolution of LoveLive US, stating that "no dissolution has occurred" (*see id.*, section v). Defendants also failed to completely answer plaintiff's interrogatories regarding: the timeline of dissolution of LoveLive US, the finances of LoveLive US causing such dissolution, the process and parties

involved in making the decision to dissolve LoveLive US, the involvement by Cohen in the process of LoveLive US's dissolution, and the disposition of LoveLive US's assets at time of dissolution (*see* defendants' response to interrogatories [NYSCEF Doc No. 79], sections p, q, r, s and t). As the Court has permitted jurisdiction over Cohen due to LoveLive US's informal dissolution, these documents, as well as full and complete answers to plaintiff's interrogatories, are certainly relevant and material.

Defendants object to the production of discovery materials relating to substantiation of their affirmative defenses for failure to state a cause of action, equitable principles of release, failure of consideration, laches, privity, waiver, unclean hands and/or estoppel, the statute of frauds, abandonment of rights, and impossibility to plaintiff's causes of action, as "overbroad" (*see* defendants' response to document requests, section x), as well as failing to answer plaintiff's interrogatories regarding the factual basis for such affirmative defenses (*see* defendants' response to interrogatories, sections l, m, n and o). Again, production of documents relating to defendants' affirmative defenses, as well as responses detailing the factual basis for such affirmative defenses, are certainly relevant.

Because the record demonstrates that plaintiff's requests seek material and necessary information, the motion to compel is granted (*see O'Halloran v Metropolitan Transp. Auth.*, 169 AD3d 556, 557 [1st Dept 2019]; *Portillo v Carlson*, 167 AD3d 792, 793 [2d Dept 2018]).

The court has considered the remaining arguments, and finds them to be without merit.

Accordingly, it is

ORDERED that defendants' motion to dismiss the amended complaint (motion sequence no. 004) is denied; and it is further

ORDERED that plaintiff's motion to compel discovery (motion sequence no. 003) is granted, and defendants are directed to serve all documents in their possession that are responsive to plaintiff's outstanding demands for discovery, as well as to serve and full and complete response to plaintiff's interrogatories, within 20 days of service upon defendants of a copy of this decision with notice of entry. If no such documents exist, defendants are directed to so state in a sworn affidavit by an officer or someone with personal knowledge of the facts, within such 20-day time period.


12/15/2020
DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED			<input type="checkbox"/>	SUBMIT ORDER				
<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	FIDUCIARY APPOINTMENT			<input type="checkbox"/>	REFERENCE
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN								



 ROBERT R. REED, J.S.C.