

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

-----X  
ELISABETH MORSE,

Plaintiff,

- v -

LOVELIVE TV US, INC., LOVELIVE TV  
LIMITED\* and RICHARD COHEN,

Defendants.  
-----X

Index No. 650110/2017

**AFFIRMATION IN OPPOSITION  
TO DEFENDANTS' PRE-ANSWER  
MOTION TO DISMISS**

\**Discontinued as to this Defendant.*

Elisabeth Morse, Esq., an attorney duly admitted to practice law in the Courts of the State of New York, hereby affirms under the penalties of perjury pursuant to CPLR §2106 as to the truth of the following:

1. Plaintiff has brought this action for breach of contract *pro se*, and as such, Plaintiff submits this Affirmation in Opposition to Defendants' Pre-Answer Motion to Dismiss Amended Complaint, together with the Exhibits annexed hereto.
2. The Exhibits hereto (including the Amended Complaint, Exhibit A) support a finding that Defendants' Motion should be denied, and, respectfully, that this Court should enter an Order directing Defendants to interpose an Answer and to engage in discovery.
3. Defendant's Motion should be denied on its face as procedurally defective for failing to conclusively establish by the documentary evidence a defense to the asserted claims as a matter of law (see., e.g., *Leon v Martinez*, 84 N.Y.2d 83, 88 [1994]).

4. This Court has jurisdiction in this matter as Plaintiff's Amended Complaint (Exhibit A) was properly filed with this Court on May 18, 2020, with Supplementary Summons filed on June 19, 2020 (Exhibit B).

5. The Court has jurisdiction to hear this action because: (a) Plaintiff is an individual residing in New York State and was employed by Defendant LoveLive TV, US, Inc. ("LoveLive") in New York State; (b) Defendant LoveLive registered to do business and maintained offices in New York State; (c) Richard Cohen, as the sole director of LoveLive, caused the informal dissolution of New York-based LoveLive, including the divestiture of all LoveLive's assets, subjecting Defendants Cohen to liability pursuant to NYBCL §1006; and (d) the damages accrued in New York State.

6. This Court previously granted jurisdiction in this matter over Defendant Richard Cohen (see Exhibit C, Decision and Order on Motion, August 1, 2019).

7. This Court previously agreed that the Court would have jurisdiction over Richard Cohen pursuant to NYBCL §1006 and New York's Informal Dissolution Doctrine, should Plaintiff amend her initial Complaint (the "Initial Complaint") to allege that (a) Plaintiff met all conditions in the contract between the parties necessary for the payment sought in the Initial Complaint; and (b) Defendant Cohen, as director of Love Live, sold assets of LoveLive during the company's insolvency without giving proper notice to creditors. (See Exhibit D, March 5, 2020 Transcript, p. 10.)

8. Venue is proper in New York Supreme Court because Plaintiff resides in New York, New York, and was contracted by Defendants therefrom.

***SUMMARY OF FACTS***

9. LoveLive was an agency producing audio-visual content.
10. LoveLive and Plaintiff entered into an employment agreement for Plaintiff's services on July 1, 2016 (the "Employment Agreement," see Exhibit A).
11. The Employment Agreement states, "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" (the "Severance Amount").
12. Plaintiff provided services as SVP of Business Affairs and Strategic Development for LoveLive until December 3, 2016.
13. On December 3, 2016, LoveLive terminated the employment of all its US, including LoveLive's Chief Operating Officer, Chief Marketing Officer, and Plaintiff.
14. Although LoveLive has claimed it ceased operations and terminated the employment of a majority of its employees due to bankruptcy, LoveLive US has not filed for bankruptcy, nor has it given official notice to creditors of its dissolution.

***PROCEDURAL HISTORY***

15. On March 16, 2017, Plaintiff filed the initial Complaint, seeking payment of the Severance Amount (the "Initial Complaint).
16. On June 22, 2017, Defendants' Counsel filed a Pre-Answer Amended Notice of Motion, and an Amended Memorandum of Law in Support of Motion to Extend Time and Motion to Dismiss with Prejudice (Exhibit E, the "Defendants' First Motion to Dismiss").
17. On August 1, 2019, this Court filed the Answer and Decision on Defendants' First Motion to Dismiss, allowing jurisdiction over Defendant Richard Cohen (see Exhibit C).

18. On September 23, 2019, Plaintiff served Demands for Discovery and Inspection to Defendants, pursuant to CPRL §3134.
19. On November 12, 2019, Defendants served incomplete and non-responsive objections to Plaintiff's discovery demands.
20. On January 16, 2020 the parties appeared before this Court, which directed Plaintiff to file a motion to compel discovery.
21. On February 2, 2020, Defense counsel filed a Motion to Reargue the Court's Answer and Motion regarding Defendants' First Motion to Dismiss (Exhibit F, "Defendants' Motion to Reargue").
22. On February 14, 2020, Plaintiff filed a Motion to Compel Discovery.
23. On March 5, 2020, this Court heard arguments regarding Defendants' Motion to Reargue (see Exhibit D).
24. In the Court's Decision and Answer to Defendants' Motion to Reargue, this Court dismissed Plaintiff's Initial Complaint without prejudice, and ordered Plaintiff to file an amended complaint within 30 days: "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." (See Exhibit D, pgs. 17-18).
25. On April 3, 2020, Plaintiff and Defense counsel agreed that all notice should be served to each other via email until otherwise agreed (see Exhibit G, emails dated April 3, 2020).
26. 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 Exhibit G).

27. 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 Exhibits A and H, Notice to Defense Counsel of Filing, Proof of Receipt).
28. On May 29, 2020, Plaintiff and Defense counsel discussed the timeline for response to the Amended Complaint and agreed to an extension until June 22, 2020 (see Exhibit J, Email Regarding Timeline and Stipulation to Extend Timeline).
29. On June 11, 2020, Defendants' counsel asked Plaintiff for another extension to respond (see Exhibit K, Emails Regarding Further Extension).
30. 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 (see Exhibit B).
31. On June 18, Plaintiff denied Defendants' request for a further extension (see Exhibit K).
32. On June 22, 2020, Defendants filed a Motion to Dismiss Plaintiff's Amended Complaint (Exhibit L, the "Motion to Dismiss the Amended Complaint").

***DEFENDANTS' PRE-ANSWER MOTION TO DISMISS***

33. Defendants' Motion to Dismiss the Amended Complaint is made pursuant to CPLR §3211(a)(7) and (a)(8), based on: (a) lack of personal jurisdiction due to alleged untimely filing of the Amended Complaint and Supplemental Summons by Plaintiff; (b) lack of jurisdiction over Richard Cohen as the Amended Complaint does not allege that assets were transferred to Defendant Cohen during LoveLive's Informal Dissolution; (c) alleged failure by Plaintiff to state a breach of contract claim.

34. Defense counsel offers no proof that Plaintiff did not file the Amended Complaint and Supplemental Summons in a timely manner as so ordered by this Court. In calculating the timeline of Plaintiff's filing of the Amended Complaint, Defense counsel has completely failed to understand or address the proscribed procedure for tolling deadlines in this Court due to Covid-19, pursuant to the following: (a) 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; and (b) Administrative Order of the Chief Administrative Judge of the Courts AO/78/20, dated March 22, 2020.

35. Additionally, Defense counsel offers no proof that Plaintiff's filing of the Supplemental Summons on June 18, 2020 is an error which cannot be corrected or is in any way prejudicial to the Defendants. CPLR §2001 allows the court "at any stage of an action... [to] permit a mistake, omission, defect, or irregularity, to be corrected upon such terms as may be just." Even should Defense counsel claim prejudice based on the separated filings by Plaintiff of the Amended Complaint and the Supplemental Summons, New York courts, in disregarding an error or allowing the correction thereof, do not have to give consideration to potential prejudice to a party disadvantaged by the court's grant of such relief. (*Grskovic v. Holmes*, 2013, 111 A.D.3d 234, 242-243.)

36. Defense counsel offers no documentary evidence that Defendant Cohen did not informally dissolve LoveLive US without giving proper notice to creditors. Such actions, by Defendant Cohen, as stated in the complaint, give this Court jurisdiction over Defendant Cohen. Defendants do not deny that LoveLive and Richard Cohen have transacted business in New York. Defendants do not deny that Richard Cohen was the sole member of the board of directors of LoveLive US. Defendants do not deny that Mr. Cohen informally dissolved LoveLive.

Defendants do not deny that assets of LoveLive were sold post-dissolution. Defendants do not deny that LoveLive did not provide proper notice to creditors of its dissolution and disposition of assets.

37. Defense counsel offers no documentary evidence that Plaintiff has failed to state a claim for breach of contract. Plaintiff states in the Amended Complaint that she is owed money under the Agreement by Defendants. Plaintiff states in the Amended Complaint that she met her “targets” under the Agreement. Defendants offer no proof that Plaintiff did not meet her “targets” under the Agreement. Defendants do not deny that Plaintiff met such targets. Defendants do not deny LoveLive is in breach of contract to Plaintiff, only that the definition in the Amended Complaint of “targets” as “satisfactory performance of [Plaintiff’s] services for LoveLive” is not fleshy enough. This lack of definition does not negate the claim. If Defense counsel wishes to provide more information about the specifics of Plaintiff’s satisfactory performance, thus meeting the “targets,” Plaintiff respectfully submits that discovery would be the appropriate time to do so.

### *DISCUSSION*

#### *FILING DEADLINE*

38. On March 5, 2020, this Court encouraged Plaintiff to refile an Amended Complaint within thirty (30) days of its ruling. The resulting filing deadline would have been April 3, 2020.

39. All filings in this Court (except for those in “essential matters”) were prohibited as of March 22, 2020 pursuant to: (a) Executive Orders issued by Governor Cuomo: No. 202.8, issued March 20, 2020; No. 202.14, issued May 7, 2020; and No. 202.38, June 6, 2020; and (b) Administrative Order of the Chief Administrative Judge of the Courts AO/78/20, dated March 22, 2020 (collectively, the “Covid Orders”).

40. The Covid Orders mandate the suspension and tolling of any specific time limit for “the commencement, filing, or service of any legal action, notice, motion, or other process of proceeding” for the period from March 20, 2020 through July 7, 2020.

41. Plaintiff notified Defendant on April 3, 2020 that she would file the Amended Complaint as soon as the Court allowed (see Exhibit G).

42. Plaintiff filed the Amended Complaint on May 19, 2020, the first date this Court actually permitted the e-filing of Amended Complaints under the Covid orders (see Exhibits A).

(Technically, e-filing for Amended Complaints was not restored until May 20, 2020, pursuant to Administrative Order of the Chief Administrative Judge of the Courts A0/114/20). Plaintiff additionally served notice of such filing to Defense Counsel via email (see Exhibit H).

43. 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: (a) 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 (b) the new deadline should be the next business day after the tolling period expires, (i.e., July 8, 2020).

44. 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)

45. The Court only specified in its ruling that Plaintiff should submit an amended complaint (the Court did not mandate a supplemental summons): “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." (See Exhibit D, pgs. 17-18.)

46. Due to a strict reading of this Court's order, Plaintiff did not initially file a Supplemental Summons with the Amended Complaint.

47. Plaintiff, erring on the side of caution and procedure, filed a Supplemental Summons corresponding to the Amended Complaint on June 18, 2020 (see Exhibit B).

48. Plaintiff's initial filing of the Supplemental Summons still falls easily within the tolling deadline for this Court's request for an Initial Complaint.

49. Hypothetical argument by Defense counsel that the separate filings of the Amended Complaint and the Supplemental Summons may cause prejudice is spurious at best: Defense counsel was notified on April 3, 2020 that the Amended Complaint would be filed, and served with the Amended Complaint on May 19, 2020. Defense counsel directly responded to receipt of the Complaint on May 29, 2020. Defense had notice, as of April 3, 2020, that Plaintiff would file an Amended Complaint. Defense counsel received a Supplemental Summons on June 18, 2020. Therefore, Defense counsel has no argument whatsoever that he did not have notice of the Amended Complaint.

50. The cases cited by Defense counsel in support of dismissal based on Plaintiff's separate filing of the Amended Complaint and Supplemental Summons all have fact patterns that differ from this matter: in the cited cases, the plaintiff failed to submit a supplemental summons and an amended complaint within the time mandated by the applicable court. (See, *Weiss v. Superior Jamestown Corp.*, 18 Misc 3d 1139 (A) and *Nikolic v. Federation Empl. & Guidance Serv. Inc.*, 18 A.D.3d 522, 421 (2d Dep't 2017). In this matter, Plaintiff did submit both an Amended Complaint and a Supplemental Summons within the timeframe mandated by the Court.

51. Finally, should this Court wish to view the initial separate filings of the Supplemental Summons and Amended Complaint as an error by Plaintiff, the Court has full authority to disregard such error or allow Plaintiff to correct it, pursuant to CPRL §2001, which allows the court “at any stage of an action... [to] permit a mistake, omission, defect, or irregularity, to be corrected upon such terms as may be just.”

52. Even should Defense counsel claim prejudice based on the separated filings by Plaintiff of the Amended Complaint and the Supplemental Summons, New York courts, in disregarding an error or allowing the correction thereof, do not have to give consideration to potential prejudice to a party disadvantaged by the court’s grant of such relief. (*Grskovic v. Holmes*, 2013, 111 A.D.3d 234, 242-243.)

53. If this Court regards a two-date filing as an error in need of correction, Plaintiff seeks leave to refile the Amended Complaint and Supplemental Summons concurrently prior to July 7, 2020. This is still within the tolling deadline mandated by the Covid Orders.

#### *INFORMAL DISSOLUTION*

54. Defense counsel does not allege that Plaintiff fails to state a claim for LoveLive’s informal dissolution in the Amended Complaint. Defense counsel does not claim that LoveLive provided proper notice to creditors of sale of assets upon dissolution.

55. However, Defense counsel once again argues that a company’s director must receive a transfer of assets in order to be liable under the Informal Dissolution Doctrine; Defense counsel continues to fail to note that the case law differentiates the treatment of shareholders and directors upon Informal Dissolution. Every case cited by Defense Counsel in the Motion to

Dismiss in which a transfer of assets was necessary for liability involved company shareholders, not company directors.

56. This Court has already twice directly addressed and rejected Defense counsel's argument that a director must receive a transfer of assets for liability to accrue: first when it granted jurisdiction over Richard Cohen on August 1, 2019, and then again 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...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...then you as a director...have failed in your obligation as a director...Nothing says [directors] have to receive [assets]. That's for shareholders. For directors, the failure is the failure to give proper notice." (See Exhibit D, pgs 9-10, 13-14; see *Darcy v. Brooklyn N.Y. Ferry Co.*, 196 N.Y. 990, 103 (N.Y. 1909); *Parent v. Amity Autoworld, Ltd.*, 15 Misc. 3d 633, 638-40 (N.Y. 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.")

57. Defense counsel also presents an argument that the tort of Deepening Insolvency is not recognized by New York courts. Plaintiff has never argued for liability due to Deepening Insolvency, so this argument by Defense counsel is irrelevant and inapplicable.

*BREACH OF CONTRACT*

58. This Court, in its March 5, 2020 order, stated: “any condition precedent with lack of specific language regarding precedent being satisfied, the Court believes, too, that 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.”

59. In the Amended Complaint, Plaintiff specifically alleges that “targets” meant satisfactory performance by Plaintiff of her services for LoveLive, that Plaintiff met all the prerequisite targets for LoveLive necessary for the payment of the Severance Amount, and that LoveLive’s COO and Defendant Cohen stated that such targets were met (see Exhibit , §§17, 23, 26, 27).

60. Defense counsel’s argument that Plaintiff has no breach of contract claim because she did not identify what “targets” means is simply incorrect: Plaintiff clearly states that “targets” means satisfactory performance of her services for LoveLive, and that Plaintiff met such targets.

61. It is well settled in New York State that a Plaintiff is free to plead liberally, in good faith, upon information and belief. Plaintiff need only plead on facts that may exist, and whether they do exist is a matter resolved through discovery (See e.g., *Peterson v. Spartan Ind*, 33 N.Y.2d 463 [1974]; see also CPLR §3026).

62. Defense counsel does not allege or offer any proof that Plaintiff did not meet these targets. If Defense counsel further wishes to explore the specifics of Plaintiff’s satisfactory performance and meeting the “targets,” Plaintiff respectfully submits that discovery would be the appropriate forum to do so.

**CONCLUSION**

63. Under CPLR §3211, “a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (see, e.g., *Heaney v Purdy*, 29 N.Y.2d 157 [1971]).” Defendants’ Motion to Dismiss the Amended Complaint does not offer any documentary proof or legal theory in support of a dismissal. Defense counsel does not deny the essential allegations of the Complaint nor does he establish that Plaintiff cannot prevail as a matter of law.

**WHEREFORE**, given the foregoing, Plaintiff respectfully requests that this Court enter an Order (a) denying Defendants’ June 22, 2010 Motion to Dismiss, in its entirety; (b) directing all Defendants to interpose an Answer by August 7, 2020 (30 days after the NY Covid Order tolling deadline); and (c) such other relief as this Court deems just and proper.

Dated: July 1, 2017  
New York, New York

Certified pursuant to Court Rule 130-a



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**TABLE OF EXHIBITS**

- Exhibit A—Amended Complaint, May 19, 2020 (with exhibits)
- Exhibit B— Supplemental Summons, dated May 19, 2020, filed June 18, 2020 (with exhibits)
- Exhibit C—Decision and Order on Motion, August 1, 2019
- Exhibit D—Decision and Order on Motion (Transcript), March 5, 2020
- Exhibit E—Defendants’ First Motion to Dismiss (Memorandum of Law), June 22, 2017
- Exhibit F—Defendants’ Motion to Reargue (Memorandum of Law), February 2, 2020
- Exhibit G—Plaintiff and Defense Counsel Email re Amended Complaint notice, April 3, 2020
- Exhibit H—Notice to Defense of Amended Complaint, Receipt of Opening, May 19, 2020
- Exhibit J—Plaintiff and Defense Counsel Email re Extension; Stipulation, May 29, 2020
- Exhibit K—Plaintiff and Defense Counsel Emails re Further Extension, June 11-18, 2020
- Exhibit L—Defense Counsel’s Motion to Dismiss Amended Complaint (with exhibits), June 22, 2020