

Chen v Romona Keveza Collection LLC
2024 NY Slip Op 31637(U)
May 6, 2024
Supreme Court, New York County
Docket Number: Index No. 153413/2020
Judge: Emily Morales-Minerva
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. EMILY MORALES-MINERVA

PART

42M

Justice

-----X

JOSEPH CHEN, JOSEPH CHEN, INC., DINA
KOZLOVSKA,

Plaintiff,

INDEX NO. 153413/2020MOTION DATE 12/18/2023MOTION SEQ. NO. 007

- v -

ROMONA KEVEZA COLLECTION LLC, ROMONA KEVEZA
ONE ROCK, LLC, ROMONA KEVEZA 1 ROCK LLC, and
ROMONA KEVEZA

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 007) 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294

were read on this motion to/for

JUDGMENT - SUMMARY

APPEARANCES:

Virginia & Ambinder, LLP, New York, NY (James E. Murphy, Esq., and Jenny S. Brejt, Esq., of counsel), for plaintiff-movant.

Herlihy LLP, White Plains, NY (Ali R. Jaffery, Esq., of counsel), for defendants.

HON. EMILY MORALES-MINERVA, J.S.C.

In this action, pursuant to the Freelance Isn't Free Act (See Administrative Code of the City of New York, title 20, ch 10), plaintiffs JOSEPH CHEN, INC. (J. Chen, Inc.), and DINA KOZLOVSKA move, pursuant to CPLR 3212, for an order granting it (1) summary judgment on liability against defendants ROMONA

KEVEZA COLLECTION LLC, ROMONA KEVEZA ONE ROCK, LLC, ROMONA KEVEZA 1 ROCK LLC and ROMONA KEVEZA, individually (collectively RKC), (2) scheduling an inquest on damages, and (3) other relief as the Court deems just and proper. RKC replies in opposition and cross-moves for summary judgment, pursuant to CPLR 3212. J. Chen, Inc., and Dina Kozlovskaya submit a reply to the cross motion.

Upon RKC's request, the Court scheduled oral arguments in Part 42, at 9:30 A.M., on March 21, 2024 (See 22 NYCRR § 202.8 [d] [governing motion procedure]). At the call of the calendar, J. Chen, Inc., and Dina Kozlovskaya appeared, by counsel, and RKC did not appear or contact the Court with an excuse. On record, the Court noted defendants' absence and heard arguments on J. Chen, Inc., and Dina Kozlovskaya's motion. The Court marked the matter submitted for disposition, on March 21, 2024.

For the foregoing reasons, the Court denies both the motion and cross motion for summary judgment.

BACKGROUND

Defendants ROMONA KEVEZA COLLECTION LLC, ROMONA KEVEZA ONE ROCK, LLC, ROMONA KEVEZA 1 ROCK LLC and ROMONA KEVEZA, individually (collectively RKC) are in the business of fashion design. Among other things, they create a variety of bridal dresses and evening wear.

Joseph Chen, Inc. (J. Chen, Inc.)

Plaintiff J. Chen, Inc., is allegedly a single-entity corporation, operating as a photography business.

On or around September 23, 2019, RKC and J. Chen, Inc., entered into a Photography Service Agreement. Among other things, the contract explicitly describes RKC as engaging J. Chen, Inc. in an "Independent Contractor Relationship" (motion seq. no. 007, dated November 28, 2023, exhibit 9, photography services agreement; affirmation in opposition and in support of cross motion, dated January 02, 2024, exhibit D, photography services agreement). The contract states that J. Chen, Inc. and its "employees, if any . . . shall retain sole and absolute discretion in the manner and means of performing the services pursuant to this Agreement" (id. [emphasis added]).

According to the contract, J. Chen, Inc. was to perform the job with the following staff at differing rates of pay: "photographer," "[f]irst assistant photographer," "[s]econd assistant photographer," and a "[d]igit tech" (id.). J. Chen, Inc. provided photography services to RKC, and the parties are now in dispute.

On October 12, 2019, pursuant to the Freelance Isn't Free Act (FIFA) (Administrative Code of City of New York § 20-927 et. seq.), plaintiff J. Chen, Inc., filed a complaint against RKC

with the New York City Department of Consumer and Worker Protection's Office of Labor & Policy Standards (Office of Labor and Policy). Therein, J. Chen, Inc., alleged RKC "fail[ed] to pay the freelancer [J. Chen, Inc.] the agreed amount" (notice of motion 007, dated November 28, 2023, exhibit 15, J. Chen, Inc.'s Complaint with the Office of Labor & policy Standards). J. Chen, Inc., also indicated therein that the company was hired to work as a group of two or more (id.).

RKC did not respond to the Office of Labor & Policy's notice of complaint. Said office then sent both J. Chen, Inc., and defendant Romana Keveza Collection, LLC, a "Notice of Hiring Party's Failure to Respond to Complaint" (see id., exhibit 17). The notice provides, in part, as follows:

"When a hiring party fails to respond to a Notice of Complaint within 20 days it creates a rebuttable presumption in any civil action commenced pursuant to the Law that the hiring party committed the violation(s) alleged in the complaint"

(id. [emphasis added]).

The notice also informed that the Office of Labor & Policy closed the complaint, "[b]ecause the hiring party has not responded within the timeframe required under the Law" (id.).¹

¹Administrative Code § 20-931 [e] [3] provides: "If the commissioner receives no response to the notice of complaint within the time provided by paragraph 1 of this subdivision, the commissioner shall mail a notice of non-response to both the freelance worker and the hiring party by regular mail and shall include with such notice proof that the commissioner previously mailed the

DINA KOZLOVSKA

Plaintiff DINA KOZLOVSKA is a professional model, who is represented by nonparty VNY Model Management, Inc. (VNY Model Agency). RKC and nonparty VNY Model Agency have a long-standing working relationship whereby RKC contracts with the agency to provide models for RKC's marketing purposes or RKC events.

On or around April 2019, DINA KOZLOVSKA accepted a modeling job with RKC as "Dina Kozlovskaja of [nonparty] VNY Models" (notice of motion 007, dated November 28, 2023, exhibit 27, "April 19 Model Booking Agreement" [emphasis in original]). In their Model Booking Agreement, "DINA KOZLOVSKA" appears on "model's name and signature" line and the name "Alana Samuel's" appears on the line for "Agency Rep Name and Signature" (id.). The agreement identifies the "Agent" as nonparty "VNY Models" and lists the agency telephone number" for contact purposes (id.).

Dina Kozlovskaja provided services to RKC, and alleged that Romona Keveza Collection refused to pay her as agreed.

Consequently, on November 14, 2019, Dina Kozlovskaja filed a complaint against RKC with the Office of Labor & Policy, alleging failure of the "hiring party" to pay for the job done

notice of complaint to the hiring party by certified mail. Upon satisfying the requirements of this paragraph, the commissioner may close the case."

(notice of motion 007, dated November 28, 2023, exhibit 36, Dina Kozlovskas's complaint with the Office of Labor and Policy Standards). On the complaint form, she indicates being hired to work as a group of two or more.

RKC did not respond to the Office of Labor & Policy's notice of complaint, and said office sent to both RKC and Dina Kozlovskas a "Notice of Hiring Party's Failure to Respond to Complaint" (notice of motion 007, dated November 28, 2023, exhibit 38, notice of hiring party's failure to respond to complaint). The notice provides, in part, as follows:

"When a hiring party fails to respond to a Notice of Complaint within 20 days it creates a rebuttable presumption in any civil action commenced pursuant to the Law that the hiring party committed the violation(s) alleged in the complaint"

(id. [emphasis added]).

The notice also informed the parties that the Office of Labor & Policy "closed" Dina Kozlovskas's complaint as RKC did not respond "within the timeframe required under the Law" (id.; see also Administrative Code § 20-931 [e] [3]).

JOSEPH CHEN, INC. (J. CHEN, INC.) AND DINA KOZLOVSKA

On May 26, 2020, J. Chen, Inc., and Dina Kozlovskas jointly commenced this action, seeking payment of wages, statutory damages, double damages and reasonable attorneys' fees and costs, pursuant to Freelance Isn't Free Act (FIFA) (see

Administrative Code of City of New York § 20-927 et. seq.).

RKC filed a pre-answer motion, pursuant to CPLR § 3211 (a) (1), (3), and (7), for an order, among other things, dismissing the complaint of plaintiff Joseph Chen, individually, and for an order dismissing the complaint of Dina Kozlovskaya.² Plaintiffs opposed the motion.

By decision and order, dated March 04, 2021, the Court (N. Bannon, J.S.C.), granted defendants' motion dismissing the complaint of Joseph Chen, individually, and of Dina Kozlovskaya as against defendants Romona Keveza One Rock, LLC, Romona Keveza 1 Rock, LLC and Romona Keveza, "for the reasons stated in the defendants' motion papers." Said order left remaining as plaintiffs J. Chen, Inc., and Dina Kozlovskaya against only ROMONA KEVEZA COLLECTION, LLC. The same decision also directed defendant ROMONA KEVEZA COLLECTION, LLC, to file an answer.

Thereafter, prior to joinder of issue and discovery, defendant ROMONA KEVEZA COLLECTION LLC filed a second motion (sequence number 002), for an order of summary judgment, pursuant to CPLR § 3212, dismissing the complaint against it. On May 28, 2021, the Court (N. Bannon, J.S.C.), issued a decision and order, denying defendant ROMONA KEVEZA COLLECTION LLC's motion (sequence number 002). Said Justice reasoned that

² RKC did not include J. Chen, Inc. in its pre-answer motion to dismiss.

"absent joinder of issue, the court has 'no power to grant summary judgment. . .'" (decision & order, dated May 28, 2021, [N. Bannon, J.S.C.], p 3). The same court added that, in any event, defendant's second motion "reasserts the same unsuccessful arguments made in [the initial] motion to dismiss, which is the law of the case" (id.).

Defendant ROMONA KEVEZA COLLECTION LLC then filed motion (sequence number 003), seeking an order, pursuant to CPLR 2221, granting it renewal of its summary judgment motion or, in the alternative, seeking an order, pursuant to CPLR 3102 (d), compelling the acceptance of ROMONA KEVEZA COLLECTION LLC late answer.

The Court (N. Bannon, J.S.C.) issued a decision and order, dated June 09, 2021, denying defendant ROMONA KEVEZA COLLECTION LLC's application entirely. The Court reasoned (1) that no new facts existed for the granting of a renewal of defendant's summary judgment motion and (2) that ROMONA KEVEZA COLLECTION LLC asserted no reason for failing to file a timely answer; the same court also found that permitting a late filing would prejudice plaintiffs (see decision and order, dated June 09, 2021, p 4-5). Finally, the court sanctioned ROMONA KEVEZA COLLECTION, LLC's counsel for frivolous conduct.

Thereafter, J. Chen, Inc. and Dina Kozlovskaya moved, pursuant to CPLR 3215, for leave to enter a default judgment

against defendant ROMONA KEVEZA COLLECTION LLC and for dismissal of defendant's counterclaims (motion sequence number 004).

Defendant ROMONA KEVEZA COLLECTION LLC opposed the motion and cross-moved, again for leave to file a late answer. J. Chen, Inc., and Dina Kozlovska opposed the cross-motion as procedurally improper and without merit.

In a decision and order, dated June 17, 2021, the Court (N. Bannon, J.S.C.) (1) granted J. Chen, Inc., and Dina Kozlovski's motion for a default judgment on the issue of liability against defendant ROMONA KEVEZA COLLECTION, LLC, and set the matter down for an inquest on damages, (2) dismissed ROMONA KEVEZA COLLECTION LLC's counterclaims as moot, and (3) denied said defendant's cross-motion for an extension of time to appear and plead.

Thereafter, defendant KEVEZA COLLECTION LLC filed its motion (sequence number 005), seeking an order vacating the decision and order, dated June 17, 2021, which granted default judgment on liability against it (see decision and order, dated June 30, 2021). The Court (N. Bannon, J.S.C.), denied said application as "procedurally improper and without merit, [stating ROMONA KEVEZA COLLECTION LLC] failed to demonstrate 'excusable default'" (id.). The same court sanctioned defense counsel for Romana Keveza Collection, LLC., for frivolous

conduct in the form of payment of plaintiffs' counsel fees to defend against motion sequence number 005.

Defendant ROMONA KEVEZA COLLECTION, LLC then, at once, appealed from several decisions and orders of the Court (N. Bannon, J.S.C.): (1) the decision and order, dated March 11, 2021, to the extent that the order did not dismiss the claims of J. Chen, Inc., against defendants; (2) the decision and order, dated June 30, 2021, to the extent the Court granted a default judgment against defendant ROMONA KEVEZA COLLECTION, LLC, on liability; (3) the decision and order, dated May 28, 2021, which, among other things, denied defendant ROMONA KEVEZA COLLECTION, LLC's motion for summary judgment as made prior to joinder of issue; (4) the decision and order, dated June 17, 2021, denying defendant ROMONA KEVEZA COLLECTION, LLC's motion to renew its summary judgment motion; and (5) the decision and order, dated June 30, 2021, denying defendant ROMONA KEVEZA COLLECTION, LLC's motion to vacate the default.

Plaintiff Dina Kozlovska cross-appealed from that portion of the decision and order, dated March 11, 2021 (N. Bannon, J.S.C.) to the extent that said court granted RKC's motion to dismiss claims against defendants ROMONA KEVEZA ONE ROCK, LLC, ROMONA KEVEZA 1 ROCK LLC and ROMONA KEVEZA, individually.

The esteemed Appellate Division, First Department, issued a decision on the appeal and cross appeal (see Chen v. Romona

Keveza Collection LLC, 208 AD3d 152 [1st Dept 2022])). In the decision, the First Department granted the cross-appeal to the extent of modifying the order (N. Bannon, J.S.C.), dated March 11, 2021, to reinstate Dina Kozlovska' s claim against all defendants, and otherwise affirmed the order (see id.).³

The First Department granted defendant ROMONA KEVEZA COLLECTION, LLC's appeal, reversing the order (N. Bannon, J.S.C.), entered on or about June 30, 2021, and vacating the default judgment in favor of Dina Kozlovska against ROMONA KEVEZA COLLECTION LLC (id.). In this regard, the Appellate Division reasoned, among other things, that it is possible that RKC has a meritorious defense and that policy favors resolution on the merits (id.).

The First Department reasoned that the record before it was "inconclusive" for purposes of determining that plaintiff Dina Kozlovska fell outside of FIFA's definition of a freelance worker (id. at 152). While noting the "broad statutory term" of "freelance worker," the Appellate Division advised the parties "should engage in discovery to ascertain whether

³ The remaining parties to this action are plaintiffs Joseph Chen, Inc., and Dina Kozlovska, and Defendants ROMONA KEVEZA COLLECTION LLC, ROMONA KEVEZA ONE ROCK, LLC, ROMONA KEVEZA 1 ROCK LLC and ROMONA KEVEZA, individually (collectively RKC). Joseph Chen, as an individual, withdrew his claim, as noted in the Appellate Division decision.

Kozlovska has a viable cause of action" (id. at 159 [citations omitted])).

As to the orders (N. Bannon, J.S.C.) entered on or about May 28, 2021, June 10, 2021, June 17, 2021, and June 30, 2021, the First Department dismissed the appeals as either rendered academic or taken from non-appealable orders.

Following the determination on appeal, the parties filed note of issue on September 28, 2023. Thereafter, on October 12, 2023, RKC filed a "Second Amended Verified Answer & Counterclaims" for civil and criminal usury, breach of contract, conversion, unjust enrichment, trover, and replevin.

Plaintiffs J. Chen, Inc., and Dina Kozlovska then moved, pursuant to CPLR 3211 (a) (7), for an order dismissing RKC's counterclaims (motion sequence number 006). By decision and order, dated December 08, 2023, the Court (N. Bannon, J.S.C.), granted their motion, dismissing RKC's counterclaims.

Now, in the subject motion (sequence number 007), J. Chen, Inc., and Dina Kozlovska move, pursuant to CPLR § 3212, for an order (1) granting them summary judgment on liability for non-payment of wages, (2) scheduling an inquest on damages and attorneys' fees, and (3) such other relief as just and proper (motion sequence number 007, filed November 28, 2023).

On January 02, 2023, defendants RKC filed opposition and a cross motion, dated January 02, 2024, seeking an order, pursuant

to CPLR § 3212, granting it summary judgment, dismissing the complaint on plaintiff's first and fourth affirmative defenses. The first affirmative defense urges that, pursuant to New York City's Freelance Isn't Free Act ("FIFA"), plaintiffs are not "freelance workers" and that RKC is not a "hiring party" as defined therein. As for the fourth affirmative defense, RKC states the complaint is barred by documentary evidence.

ANALYSIS

Timeliness

The deadline for summary judgment applicable to this case was "sixty (60) days after the filing of the note of issue . . . , absent a demonstration, in the same motion, of a good cause for delay" (Part 42 Rules of the Honorable N. Bannon, J.S.C.; see also CPLR 3212 [a]). J. Chen, Inc., and Dina Kozlovska filed a timely summary judgment motion and, while not timely if filed independently, RKC filed a summary judgment motion as a cross motion returnable on the same date as plaintiffs' motion for summary judgment. Therefore, the Court will consider the cross motion, noting that -- if RKC had filed an independent motion for summary judgment -- the Court would have declined to entertain it as untimely.

CPLR 3212 (b) provides the Court with authority to search the record and grant summary judgment to any party where, as here, another party has filed a timely summary judgment motion⁴ and the cross motion raises issues that are subject of the timely motion (see generally Kershaw v Hospital for Special Surgery 114 AD3d 75, 87 [1st Dept 2013], citing Filannino v Triborough Bridge & Tunnel Auth., 34 AD3d 280, 281 [1st Dept 2006]; Dunham v Hilco Constr. Co., 89 N.Y.2d 425, 429-430 [1996] [discussing with approval that our Appellate Division uniformly have held that "a court may search the record and grant summary judgment in favor of a nonmoving party only with respect to a cause of action or issue that is the subject of the motions before the court"]).

⁴ CPLR 3212 (b), governing "[s]upporting proof; grounds; relief to either party" on a motion for summary judgment, provides: "A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. Where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion" (emphasis added).

MOTION FOR SUMMARY JUDGMENT

"On a motion for summary judgment, the moving party must 'make prima facie showing of entitlement to judgment as a matter of law, tendering [evidentiary proof in admissible form] to demonstrate the absence of any material issues of fact'" (Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP, 26 NY3d 40, 49 [2015], citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; CPLR 3212[b]; Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065, 1066, [1979] [providing movant must support the subject application with "'evidentiary proof in admissible form'"]).

Where the movant produces such evidence, the non-moving party then has the burden "'to establish the existence of [factual issues] which require a trial of the action'" (id., citing Vega v Restani Constr. Corp., 18 NY3d 499, 503 [2012], quoting Alvarez, 68 NY2d at 324).

The court must view the facts in the light most favorable to the non-movant, giving it the benefit of all reasonable inferences (De Lourdes Torres v Jones, 26 NY3d 742 [2016]).

Joseph Chen, Inc. (J. Chen, Inc.)

Here, plaintiff J. Chen, Inc., asks the Court to grant it summary judgment on liability only, pursuant to the Freelance Isn't Free Act (FIFA) (See Administrative Code of the City of New York, title 20, ch 10). It is undisputed that, prior to commencing this action, J. Chen, Inc., utilized FIFA's administrative complaint procedure, alleging that it is a freelancer and that Romona Keveza Collection, as a hiring party, failed to pay it, pursuant to their written contracts (see Admin Code § 20-931 [a] [setting forth the FIFA complaint procedure and jurisdiction of the Commissioner of New York City Consumer Affairs])). It is also undisputed that RKC did not respond to the notice of the complaint.

"This failure [of RKC] to formally respond created a rebuttable presumption that [RKC], as the hiring party, committed violations alleged in the complaint" against plaintiffs as freelancers (see Van Den Berg v Clinton Hall Holdings, LLC, 2019 NY Slip OP 32036 [U], ** 8 [Sup Ct New York County] [Gerald Lebovitz, J.S.C.]; see also Admin. Code § 20-931 [d])).⁵

⁵ NYC Administrative Code 20-931 [d] explicitly provides: "Within 20 days of receiving a complaint alleging a violation of this chapter, the commissioner shall send the hiring party named in the complaint a written notice of complaint. Such notice shall inform the hiring party that a complaint has been filed alleging violations of this chapter, detail the remedies available to a freelance worker for violations of this chapter by a hiring party and include a copy of the complaint and notice that failure

Given the applicable presumption, the burden shifts to RKC to show an issue of fact exists as to liability pursuant to FIFA. In this effort, RKC focuses on FIFA's definition of a "freelance worker."

As defined in FIFA, a "freelance worker" is:

"any natural person or any organization composed of no more than one natural person, whether or not incorporated or employing a trade name, that is hired or retained as an independent contractor by a hiring party to provide services in exchange for compensation"

(NYC Administrative Code § 20-927).

Because RKC hired J. Chen, Inc., to perform a job as a "group of two or more," RKC contends the corporation falls outside the above meaning. RKC also argues that J. Chen, Inc., cannot be a freelance worker as the corporation allegedly performed the subject job with a staff of four individuals.

RKC made essentially these same arguments against Joseph Chen, individually, before the Court (N. Bannon, J.S.C.), and raised them against J. Chen, Inc. for the first time on appeal. While not determining the merits of RKC's unpreserved argument as to J. Chen, Inc., the Appellate Division, First Department noted that RKC "improperly and unconvincingly transposed" onto

to respond to the complaint creates a rebuttable presumption in any civil action commenced pursuant to this chapter that the hiring party committed the violations alleged in the complaint. The commissioner shall send such notice by certified mail and shall bear the cost of sending such notice" (emphasis).

J. Chen, Inc., the contention that a freelancer does not include a complainant who performs as a group of two or more was" (see Chen v. Romona Keveza Collection LLC, 208 AD3d 152, 158 [1st Dept 2022])). In any event, the Appellate Division determined on this issue as raised against Dina Kozlovskaya that the presumption of being a "freelancer" is not overcome merely because a FIFA complainant states they were hired to perform work as a "[g]roup of two or more" (id. at 159).⁶

Therefore, it appears that working in a group does not, without more, preclude "any natural person or any organization [from being] composed of no more than one natural person" (see NYC Administrative Code § 20-927 [defining "freelance worker"]).

RKC next contends that J. Chen, Inc. did not just work in a group, but that J. Chen, Inc. is a corporation with employees. In support of this contention, RKC provides "screenshots" of four different "LinkedIn" profiles. Counsel for RKC affirms that they took the screenshots and that the screenshots are an accurate representation of things depicted. These profiles

⁶Regarding, among other things, RKC's argument of that claimant's designated as working in a "[g]roup of two or more" cannot be "freelancers," the Appellate Division provided:

"RKC notes that Kozlovskaya indicated on her OLPS complaint form that she was hired as part of a group of two or more and that the "[h]iring agreement was made through third party, my modeling agency." While it is unclear what OLPS's internal procedure is once it receives a complaint, OLPS continued to process the complaint and issued a rebuttable presumption in Kozlovskaya's favor despite these statements. . . The fact that OLPS issued a rebuttable presumption in Kozlovskaya's favor suggests that these statements were not fatal to her FIFA claim."

include persons listing as their professional experience having worked for J. Chen, Inc., as either "Intern," "Assistant," "Photo Retoucher," "Producer," "Head Photographer," and/or "Production Assistant" (affirmation in further support, dated January 26, 2024, exhibits A - E).

Such proof does not overcome the presumption of "freelance worker" dispositively, as RKC suggests. However, given the requisite benefit to the nonmoving party on a motion for summary judgment, the record overall contains inconclusive proof of the working relationship between J. Chen, Inc., and the persons it staffs for work projects. This presents a material factual issue precluding summary judgment for either side of this conflict.

"Summary judgment is inappropriate in any case where there are material issues of fact in dispute or where more than one conclusion may be drawn from the established facts" (Friends of Thayer Lake LLC v Brown, 27 NY3d 1029, 1043 [2016], citing Kriz v Schum, 75 NY2d 25, 33-34 [1989]; see also Ortiz v Varsity Holdings, LLC, 18 NY3d 335, 339 [2011]). "[C]ompeting evidence must be weighed and [a factfinder must assess] the credibility of the witnesses" (Friends of Thayer Lake LLC at 1044, citing Adirondack League Club v Sierra Club, 92 NY2d 591, 600 [1998]).

Dina Kozlovsk

Plaintiff Dina Kozlovska asks the Court to grant her summary judgment on liability only, pursuant to the Freelance Isn't Free Act (FIFA) (See Administrative Code of the City of New York, title 20, ch 10). It is undisputed that, prior to commencing this action, Dina Kozlovska utilized FIFA's administrative complaint procedure, alleging that she is a freelance worker and that Romona Keveza Collection, as a hiring party, failed to pay her, pursuant to their written contract (see Admin Code § 20-931 [a] [setting forth the FIFA complaint procedure and jurisdiction of the Commissioner of New York City Consumer Affairs]). It is also undisputed that RKC did not respond to the notice of the complaint.

"This failure [of RKC] to formally respond created a rebuttable presumption that [RKC], as the hiring party, committed violations alleged in the complaint" against plaintiffs as freelancers (see Van Den Berg v Clinton Hall Holdings, LLC, 2019 NY Slip OP 32036 [U], ** 8 [Sup Ct New York County] [Gerald Lebovitz, J.S.C.]; see also Admin. Code § 20-931 [d]).⁷ Indeed, in this very case, the governing First Department

⁷ NYC Administrative Code 20-931 [d] explicitly provides: "Within 20 days of receiving a complaint alleging a violation of this chapter, the commissioner shall send the hiring party named in the complaint a written notice of complaint. Such notice shall inform the hiring party that a complaint has been filed alleging violations of this chapter, detail the remedies available to a freelance worker for violations of this chapter by a hiring party and include a copy of the complaint and notice that failure to respond to the complaint creates a rebuttable presumption in any civil action commenced pursuant to this chapter that the hiring party committed the violations

determined that the presumption of being a "freelancer" is not overcome as to Dina Kozlovska merely because her complaint states that RKC hired her to perform work as a "[g]roup of two or more" and that her hiring agreement was made through her modeling agency (see Chen v. Romona Keveza Collection LLC, 208 AD3d 152, 159 [1st Dept 2022]). "[P]ersons who are represented by an agent [as Dina Kozlovska] are not included in [FIFA's] finite list" of individual worker who "are not freelancers under the Act" (id., citing Administrative Code § 20-927 [defining "freelance worker"]).

As the presumption of liability stands, the burden shifts to RKC to establish an issue of fact in this regard. To do so, RKC presents, among other things, the affidavit of the president of Dina Kozlovska's nonparty modeling agency. Therein, the agency president attests that "all models" it represents enter contracts agreeing to provide modeling services on behalf of VNY Model Agency, not to model in their individual capacities. Attached to said affidavit is a blank VNY Models "Model Management Agreement." Neither party provides any executed management agreement between the parties.

Review of the record reveals that a material issue of fact exists as to the nature of the relationship with nonparty VNY

alleged in the complaint. The commissioner shall send such notice by certified mail and shall bear the cost of sending such notice" (emphasis).

Model Agency and Dina Kozlovska. The unclear level of control, if any, appears key to whether a complainant can qualify as a "freelance worker." FIFA clearly states that, along with being a single individual, a freelancer must be an "independent contractor" (Admin Code § 20-927).

"Independent contractor" is not defined in FIFA. Therefore, the Court must construe this term with its "usual and commonly understood meaning" (Yaniveth R. v LTD Realty Co., 27 NY3d 186, 192 [2016] [internal quotation marks and citation omitted]; accord Matter of Level 3 Communications, LLC v Clinton County, 144 AD3d 115, 118 [3d Dept 2016]; see also McKinney's Cons Laws of NY, Book 1, Statutes § 232 at 392-393). An "independent contractor" is plainly defined as "a person hired to do work who controls how the work is done" (see "Independent contractor." Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriamwebster.com/dictionary/independent%20contractor>. Accessed 3 May. 2024; see generally Ronkese v Tilcon N.Y., Inc., 153 AD3d 259, 262 [3d Dept 2017] [providing dictionary definitions are useful in analysis of plain meaning]; Yaniveth R., 27 NY3d at 192; see also McKinney's Cons Laws of NY, Book 1, Statutes § 232 at 392-393).

In sum, in this action, the factual determinations and their relative weight are for the trier of fact and preclude the issuance of summary judgment (see generally Friends of Thayer

Lake LLC v Brown, 27 NY3d 1039, 1044 [2016], citing Adirondack League Club v Sierra Club, 92 NY2d 591, 600 [1998]).

Accordingly, it is

ORDERED that plaintiffs' motion for an order granting them summary judgment as to liability and granting them an inquest on damages is DENIED in its entirety; it is further

ORDERED that defendants' cross-motion for an order granting them summary judgment dismissing the complaint is DENIED; and it is further

ORDERED that as Josphe Chen, individually, is no longer a party to this action, the caption shall be amended to read as follows:

JOSEPH CHEN, INC., and DINA KOZLOVSKA,

Plaintiffs,

-against-

ROMONA KEVEZA COLLECTION LLC,
ROMANA KEVEZA ONE ROCK, LLC,
ROMONA KEVEZA 1 ROCK, LLC,
and ROMONA KEVEZA,

Defendants.

It is further

ORDERED that the parties shall appear in Part 42, at 111 Centre Street, Room 457, on August 14, 2024, at 10:00 AM for a settlement conference.

This Constitutes the Decision and Order of the Court.

DATE: May 06, 2024