

Spinosa v Interpublick Group of Cos., Inc.
2019 NY Slip Op 32406(U)
August 12, 2019
Supreme Court, New York County
Docket Number: 150110/2019
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOEL M. COHEN PART IAS MOTION 3EFM

Justice

ANN SPINOSA, INDEX NO. 150110/2019
MOTION DATE N/A
MOTION SEQ. NO. 001

- v -

THE INTERPUBLIC GROUP OF COMPANIES, INC., MCCANN-ERICKSON USA, INC.,

DECISION + ORDER ON MOTION

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 26

were read on this motion to DISMISS

Upon the foregoing documents:

Plaintiff Ann J. Spinosa is the owner and Chief Executive Officer of Spin Marketing Inc. ("Spin"). Spinosa alleges that Defendants The Interpublic Group of Companies, Inc. ("IPG") and McCann-Erickson ("McCann") (collectively, the "Defendants") violated Article 15 of the New York Human Rights Law. In addition, Spinosa alleges that McCann breached its contract with Spin and violated the covenant of good faith and fair dealing implicit in the contract. Spinosa further claims that as a result of McCann's breach, Spin has suffered substantial economic damages. Notably, Spinosa brings these claims in her own name, not on behalf of Spin.

Defendants move to dismiss the Complaint on the ground that the claims asserted by Spinosa belong (if to anyone) to Spin, which cannot proceed as a party (even if it had been named as a plaintiff, which it has not) without being represented by

counsel. Moreover, Defendants contend that Spinosa's breach of contract claims (again, effectively on behalf of Spin) fail as a matter of law. This motion is unopposed.

For the reasons set forth below, the motion is granted.

Factual Background

The following facts are drawn from the allegations contained in Spinosa's complaint, which are assumed to be true for the purposes of this motion.

In May 2014, the New York State Gaming Commission, Division of Lottery (the "Gaming Commission"), solicited proposals from firms to provide it marketing services. In June 2014, the Gaming Commission accepted McCann's proposal, and the two parties entered into an agreement. Under the agreement, McCann was obligated to partner with certain minority and women-owned businesses (MWBE) to provide "Creative & Marketing Communications Services" and "Media Planning & Buying Services" to the Gaming Commission.

In June 2015, McCann notified Spin and other certified MWBE throughout New York State about potential partnerships through Momentum, a subsidiary of IPG. Spinosa alleges that Momentum acted as McCann's agent and/or representative for the purposes of satisfying McCann's obligations under the State Contract and Agreement.

Around December 2016, Spin and McCann entered into the Vendor Agreement, under which Spin would provide procurement services (the "Procurement Services") to the New York Lottery. Spin and McCann were the only parties to the agreement. The Vendor Agreement stipulated that McCann could terminate the contract at will.

In the Spring of 2017, McCann provided Spin with a merchandise order that listed different promotional items that McCann needed to provide to the New York

Lottery under the State contract. Spinosa alleges that McCann and momentum had identified and preselected vendors to solicit bids from when providing its procurement services.

Spin repeatedly expressed concern to Momentum, highlighting that based on its understanding of the agreement, McCann retained Spin to act independently to procure state contracts. Spinosa alleges that each time Spin expressed concern to McCann, the latter threatened to terminate the Vendor Agreement if Spin did not comply with McCann's selection of vendors. Spinosa also alleges that McCann prevented Spin from soliciting bids from vendors listed in the MWBE directory.

On May 12, Momentum terminated the Agreement on behalf of McCann.

Legal Analysis

Under CPLR 3211 (a)(7), “[d]ismissal of [a] complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery.”

Connaughton v. Chipotle Mexican Grill, Inc., 29 N.Y.3d 137, 142 (2017). “The motion must be denied if from the pleadings' four corners ‘factual allegations are discerned which taken together manifest any cause of action cognizable at law.’” *511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002). Alternatively, under CPLR 3211(a)(1), a claim may be dismissed if “the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994).

Here, it is undisputed that Spin and McCann are the parties to the Vendor Agreement. Spinosa is not. “It is well settled that in order to have standing to challenge

a contract, a non-party to the contract must either suffer direct harm flowing from the contract or be a third party beneficiary thereof.” *Decolator, Cohen & DiPrisco, LLP v. Lysaght, Lysaght & Kramer, P.C.*, 304 A.D.2d 86, 90 (1st Dep’t 2003).

As a non-party to the agreement, Spinosa can maintain a claim only if her allegations, if true, show that she is a third-party beneficiary of the agreement.

Dormitory Authority v. Samson Construction Co., 30 N.Y.3d 704, 710 (2018). “[A] third party may sue as a beneficiary on a contract made for [its] benefit. However, an intent to benefit the third party must be shown, and, absent such intent, the third party is merely an incidental beneficiary with no right to enforce the particular contracts.” *Id.* at 710; see also *Internationale Nederlanden (U.S.) Capital Corp. v. Bankers Tr. Co.*, 261 A.D.2d 117, 123 (1999) (holding that a third party seeking to recover on a contract must establish that the benefit to him was direct rather than incidental).

To allege a viable claim as a third party beneficiary, Spinosa would have to show: “(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [her] benefit, and (3) that the benefit to [her] is sufficiently immediate ... to indicate the assumption by the contracting parties of a duty to compensate [it] if the benefit is lost. *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011). She has made no such showing.

In short, there is no indication that Spin’s agreement with McCann was created for Spinosa’s individual benefit. The Complaint asserts that *Spin* suffered “substantial economic damages as well as future losses and irreparable harm to its business and reputation.” (NYSCEF 2, ¶ 242). In her second cause of action, Spinosa claims that McCann “breached Section 2 of the Agreement by failing to compensate Spin for its

actual hours providing the Procurement Services and out-of-pocket expenses,” and that, as a result, Spinosa herself is entitled to recover economic damages. (NYSCEF 2, ¶253). Throughout her complaint, Spinosa alleges wrongs committed against Spin, not against herself directly. The complaint fails to allege how Spinosa was damaged by McCann’s alleged acts, other than perhaps indirectly through her ownership interest in Spin. Such a claim belongs to the Company (Spin), not to the shareholder (Spinosa).

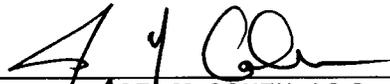
Similarly, Spinosa lacks standing to allege that IPG violated the New York Human Rights Law. A plaintiff that alleges discrimination in employment “has the initial burden to establish a prima facie case of discrimination.” *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305 (2004). To have standing, plaintiffs must have more than an interest in whether parties are being discriminated against; they must have also alleged injuries as a result of the discriminatory conduct. *See Village of Chestnut Ridge v. Town of Ramapo*, 45 A.D.3d 74, 89 (2d Dep’t 2007). As with her claim for breach of contract, Spinosa alleges harm to *Spin*, not to herself (other than as a shareholder of Spin). Accordingly, she cannot bring this claim in her individual capacity.

Therefore, it is:

ORDERED that Defendants’ motion to dismiss is GRANTED.

This constitutes the Decision and Order of the Court.

8/12/2019
DATE


JOEL M. COHEN, J.S.C.

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