

**Midamerica Prods., Inc. v Derke**

2009 NY Slip Op 30719(U)

March 24, 2009

Supreme Court, New York County

Docket Number: 601381/08

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN  
*Justice*

PART 7

MIDAMERICA PRODUCTIONS, INC.

INDEX NO. 601381/08

Plaintiff,

- v -

MOTION DATE 11/13/08

MOTION SEQ. NO. 002

MOTION CAL. NO. 79

IRIS DERKE, Individually,  
JONATHAN GRIFFITH,  
Individually, and  
DISTINGUISHED CONCERTS  
INTERNATIONAL,  
LLC, d/b/a DISTINGUISHED  
CONCERTS  
INTERNATIONAL NEW YORK,

**FILED**

MAR 30 2009

Defendants.

**COUNTY CLERKS OFFICE  
NEW YORK**

The following papers, numbered 1 to 8 were read on this motion for dismissal

Notice of Motion— Affidavits — Exhibits 1-3

Answering Affidavits — Exhibits A-E; A-C

Replying Affidavits — Exhibits - 1-10; Exhibit 1

PAPERS NUMBERED

1 - 2

3-4

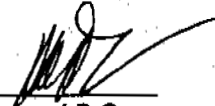
5-8

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion "is determined in accordance with the annexed memorandum decision and order."

**MICHAEL D. STALLMAN**

J.S.C.



J.S.C.

Dated: 3/24/09  
New York, New York

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 7

-----X  
MIDAMERICA PRODUCTIONS, INC.,

Plaintiff,

- against -

IRIS DERKE, Individually,  
JONATHAN GRIFFITH, Individually, and  
DISTINGUISHED CONCERTS INTERNATIONAL,  
LLC, d/b/a DISTINGUISHED CONCERTS  
INTERNATIONAL NEW YORK,

Defendants.

-----X  
HON. MICHAEL D. STALLMAN, J.:

Pursuant to CPLR 3211, plaintiff moves to dismiss all three causes of action of Derke's counterclaim, the two causes of action of Griffith's counterclaim, and DCINY's counterclaim.

Plaintiff's complaint alleges that defendants stole plaintiffs' clients and trade secrets in order to start a new business in direct competition with plaintiff.

Defendants Iris Derke, Jonathan Griffith, and Distinguished Concerts International's (DCINY) have each asserted counterclaims.

Derke's counterclaim is further divided into three causes of action, for sex discrimination in violation of New York City's Human Rights law, for violation of Labor Law §§ 191 and 193, and breach of contract. Griffith's counterclaim is further divided into two causes of action, for violations of Labor Law §§ 191 and 193 and breach of contract. DCINY's counterclaim is for false advertising in violation of the Lanham Act.

Index No.: 601381/08

DECISION AND ORDER

**FILED**  
MAR 30 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

[\* 3 ]

## BACKGROUND

Plaintiff is in the business of producing choral and instrumental concerts, and acting as a travel and tour operator for the participants in those concerts. Derke was originally employed by plaintiff as the assistant to plaintiff's founder, Peter Tiboris (Tiboris), and eventually became one of plaintiff's recruiters, earning a salary and commission. Derke resigned on December 15, 2007, and one month later DCINY was formed and Derke became a principal with that company. Derke is alleging that she was constructively discharged from plaintiff's employ because of being discriminated against by plaintiff because of her gender, in violation of the New York City Human Rights Law (first cause of action). Her allegations state that, after she became one of plaintiff's recruiters, she was forced to perform personal functions for Tiboris, which none of the male recruiters were required to perform. Such personal chores are alleged to include fixing Tiboris's personal computer and mobile phone, answering his personal mail, and making personal travel arrangements for non-employees. Derke is also alleging that plaintiff failed to pay all of the wages and commissions that she was owed, charging a breach of her employment contract (second cause of action) and a violation of the New York Labor Law (third cause of action).

Griffith is also a former employee of plaintiff who left plaintiff's employ in February of 2007, and is currently employed

with DCINY as an executive. He is also alleging that plaintiff failed to pay him all the wages and commissions he was owed, charging a breach of contract (first cause of action) and a violation of the New York Labor Law (second cause of action).

DCINY alleges that plaintiff violated the Lanham Act by advertising that it was producing a concert at Carnegie Hall on the same day and time that DCINY was producing a concert at Carnegie Hall. Plaintiff contends that the policy of Carnegie Hall was to option out the space to several producers, indicating first, second, third, and so forth, options, so that if the first option holder failed to exercise its rights, the second option holder could contract for the space. For the date in question, plaintiff asserts that it was the second option holder, DCINY being the first option holder, and that, until the option was exercised, it is industry policy to advertise the dates.

DCINY has not provided any samples of the allegedly false advertising by plaintiff, and plaintiff maintains that once DCINY exercised its option rights, it stopped advertising that date and time. It is noted that plaintiff did produce a program at Carnegie Hall on the same day, but in the afternoon, DCINY having exercised its rights for that evening.

In its papers, DCINY admits that it was able to procure artist contracts for the performance, and only states that potential artists

[\* 5 ]  
"may have relied on [plaintiff]'s false and misleading representation that it was producing a concert at Carnegie Hall on February 15, 2009 at 8:30 p.m., and these false and misleading misrepresentations may have influenced their decision as to whether they should enter into a contract with DCINY ... ."

Opposition Memo of Law, at 20-21.

It is noted that both plaintiff and DCINY conduct their businesses only by recruiting performers who are willing to guarantee the fees in case the gate falls short of covering all the expenses.

#### DISCUSSION

On a motion to dismiss pursuant to CPLR 3211, the pleading should be liberally construed, the facts alleged by the plaintiff should be accepted as true, and all inferences should be drawn in the plaintiff's favor (*Leon v Martinez*, 84 NY2d 83 [1994]); however, the court must determine whether the alleged facts "fit within any cognizable legal theory." *Id.* at 88. Further, "[a]llegations consisting of bare legal conclusions ... are not presumed to be true [or] accorded every favorable inference." *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 (1<sup>st</sup> Dept 1999), *affd* 94 NY2d 659 (2000).

Under CPLR 3211 (a) (1) a dismissal is permissible only when the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law. *Leon v Martinez*, 84 NY2d 83 (1994). As stated in *Ladenberg Thalmann & Co., Inc. v Tim's*

*Amusements, Inc.*, 275 AD2d 243, 246 (1<sup>st</sup> Dept 2000),

"The court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory (*Leon v. Martinez*, 84 NY2d 83, 87-88 (1994)). Dismissal pursuant to CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*Id.* at 88)."

To defeat a pre-answer motion to dismiss pursuant to CPLR 3211 (a) (1), the opposing party need only assert facts which fit within any cognizable legal theory. *Bonnie & Co. Fashions, Inc. v Bankers Trust Co.*, 262 AD2d 188 (1<sup>st</sup> Dept 1999).

Derke's claim of unlawful sexual discrimination  
(first cause of action of Derke's counterclaim)

Derke has alleged violations of the New York City Human Rights Law (HRL), as amended by the Local Civil Rights Restoration Act (Local Law 85 of 2005) (Restoration Act), which mandates that courts be sensitive to the more stringent analysis required under the HRL than that called for under Title VII or the state statute. See 2005 NY City Legis Ann at 528-535. Both HRL's text and legislative history "represent a desire that the city HRL meld the broadest vision of social justice with the strongest law enforcement deterrent." *Williams v New York City Hous. Auth.*, \_\_\_ AD3d \_\_\_, 872 NYS2d 27, 33 (1<sup>st</sup> Dept 2009).

In deciding whether the conduct called into question constitutes inferior terms and conditions of employment based on

gender, under the Restoration Act, the "questions of 'severity' and 'pervasiveness' are applicable to consideration of the scope of permissible damages, but not to the question of underlying liability." *Id.* at 31.

"For HRL liability, therefore, the primary issue for a trier of fact in harassment cases, as in other terms and condition cases, is whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other employees because of her gender. At the summary judgment stage, judgment should normally be denied to a defendant if there exists triable issues of fact as to whether such conduct occurred. Under the City's law, liability should be determined by the existence of unequal treatment, and questions of severity and frequency reserved for consideration of damages [internal quotation marks and citations omitted]."

*Id.* at 39.

Derke alleges that she was called upon to perform personal tasks for Tiboris that the male employees were not required to perform. Further, Derke's affidavit indicates certain statements allegedly made by Tiboris, to the effect that he would only have women perform these types of chores. Although under earlier interpretations of the unlawful discrimination laws, using decisions based on federal and state statutes, Derke would have to plead circumstances that created working conditions so intolerable, difficult or unpleasant that a reasonable person would be compelled to resign (*Polidori v Societe Generale Groupe*, 39 AD3d 404 [1<sup>st</sup> Dept 2007]; *Mascola v City University of New York*, 14 AD3d 409 [1<sup>st</sup> Dept

2005]), using the more broad standards of the HRL, particularly as interpreted by the Appellate Division in *Williams*, the Court cannot say, at this stage in the proceedings, when no discovery has taken place, that plaintiff's allegations are legally insufficient to set forth a claim. Consequently, plaintiff's motion to dismiss this cause of action is denied.

Plaintiff has also argued that Derke's allegations of discrimination are time-barred, at least as to those acts complained of which occurred prior to 2002. Allegations of gender-based employment discrimination are generally governed by a three-year statute of limitations. CPLR 214 (2); *Mascola v City University of New York*, 14 AD3d 409 (1<sup>st</sup> Dept 2005). However, taking the allegations as true, as the Court must on a CPLR 3211 motion, the acts complained of "show discriminatory conduct within the limitations period sufficiently similar to the alleged conduct without the limitations period to justify the conclusion that both were part of a single discriminatory practice, and that [Derke's] claim [therefore appears to be] timely in its entirety under the continuing violation doctrine." *Walsh v Covenant House*, 244 AD2d 214, 215 (1<sup>st</sup> Dept 1997).

Derke's and Griffith's claims for breach of contract  
(third cause of action of Derke's counterclaim;  
second cause of action of Griffith's counterclaim)

As set forth in the answer, Derke's and Griffiths' counterclaims, purporting to set forth a cause of action for breach

of contract, appear too indefinite to be enforceable, because Derke and Griffith failed to allege, in nonconclusory language, the essential terms of the parties' purported personal services contract, including those specific provisions of the contract upon which liability was predicated. *Caniglia v Chicago Tribune-New York News Syndicate, Inc.*, 204 AD2d 233 (1<sup>st</sup> Dept 1994); see generally *Leder v Spiegel*, 31 AD3d 266 (1<sup>st</sup> Dept 2006), *affd* 9 NY3d 836. However, the affidavits submitted in opposition to the instant motion, which can be considered to amplify the pleadings, provide the specific provisions of the alleged contract in sufficient detail. *Eastern Consolidated Properties, Inc. v Lucas*, 285 AD2d 421 (1<sup>st</sup> Dept 2001).

Based on the documents presented, it cannot be conclusively determined at this juncture, without the benefit of discovery, whether or not Derke and Griffith received all the compensation to which they were entitled. Consequently, plaintiff's motion to dismiss these causes of action is denied.

Violations of the Labor Law  
(third cause of action of Derke's counterclaim;  
first cause of action of Griffith's counterclaim)

Both Derke and Griffith allege violations of Labor Law §§ 191 (1) (c), 191 (3), and 198 (1-a). Plaintiff argues that Derke and Griffith, as executives earning more than \$600 per week, were not entitled to the protections of the Labor Law. However, in a recent case (*Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609 [2008]), the

New York Court of Appeals held that an executive falls within the ambit of the protections afforded to employees under the Labor Law.

Nevertheless, as plaintiff indicates, the remedies permitted under the Labor Law "are unavailable where, as here, the claim for unpaid work is a common-law contractual remuneration claim and no substantive violation of [the Labor Law] is alleged [internal quotation marks and citations omitted]." *Miles A. Kletter, D.M.D. & Andrew S. Levine, D.D.S., P.C. v Fleming*, 32 AD3d 566, 567 (3d Dept 2006). "Neither cause of action ... asserts an extra-contractual wrong, such as payment of commissions in accordance with the contract but in violation of section 191 (a) (1), (c) because made less frequently than once a month." *Fieldman v Smart Choice Communications, LLC*, 41 AD3d 343, 343-344 (1<sup>st</sup> Dept 2007); *Slotnick v RBL Agency Ltd.*, 271 AD2d 365 (1<sup>st</sup> Dept 2000). Consequently, plaintiff's motion to dismiss these causes of action is granted.

DCINY's counterclaim for violation of the Lanham Act.

DCINY claims that plaintiff engaged in misleading advertising by advertising that it was going to produce a concert at Carnegie Hall on the evening of February 15, 2009, even though DCINY had the first option on that time and space.

To state a claim under the Lanham Act for misleading advertising (see 15 USC 1125), DCINY must plead:

"(1) the [plaintiff] made a false or misleading representation regarding the nature,

characteristics or quality of the [plaintiff's or another's] services; (2) the representations were used 'in commerce'; (3) the representations were made in the context of commercial advertising or promotion; and, (4) the [plaintiff's] actions made [DCINY] believe it would be damaged by the representations"

*American Preferred Prescription, Inc. v Health Management, Inc.*, 252 AD2d 414, 420 (1st Dept 1998).

DCINY did not include a copy of the allegedly misleading advertising on plaintiff's website. Presumably, DCINY's option was for the same space and time for which plaintiff allegedly advertised a performance, because Carnegie Hall has three performance halls—Weill Hall, Zankel Hall, and Stern Auditorium. DCINY contends that potential clients may have been dissuaded from entering into a contract with DCINY for Carnegie Hall because plaintiff advertised availability that same date and time. However, the complaint alleges that DCINY contracted with a wind ensemble to perform at Carnegie Hall on February 15, 2009. Thus, the complaint fails to allege injury resulting from the allegedly misleading advertising.

Based on the foregoing, plaintiff's motion to dismiss DCINY's cause of action based on a violation of the Lanham Act is granted.

Plaintiff also argued that this cause of action should be dismissed because either Carnegie Hall is a necessary party to this cause of action, or Carnegie Hall is the proper party to assert a claim of false advertising against plaintiff. However, having

dismissed this cause of action for the reasons stated above, the Court does not need to address this contention.

#### CONCLUSION

Based on the foregoing, it is hereby

ORDERED that that portion of plaintiff's motion to dismiss the first and second cause of action of defendants' first counterclaim is denied; and it is further

ORDERED that that portion of plaintiff's motion to dismiss the first cause of action of defendants' second counterclaim is denied; and it is further

ORDERED that that portion of plaintiff's motion to dismiss the third cause of action of defendants' first counterclaim is granted; and it is further

ORDERED that that portion of plaintiff's motion to dismiss the second cause of action of defendants' second counterclaim is granted; and it is further

ORDERED that that portion of plaintiff's motion to dismiss the first cause of action of defendants' third counterclaim is granted; and it is further

ORDERED that plaintiff is directed to serve an answer to the counterclaims within 30 days after service of a copy of this order

with notice of entry.

Dated: March 24, 2009  
New York, New York

ENTER:



J.S.C.

MICHAEL D. STALLMAN  
J.S.C.

**FILED**

MAR 30 2009

COUNTY CLERK'S OFFICE  
NEW YORK