

New York Circus Arts v City of New York

2009 NY Slip Op 31163(U)

May 14, 2009

Supreme Court, New York County

Docket Number: 115518/08

Judge: Eileen A. Rakower

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

PRESENT: Rakower
Justice

PART 5

New York Circus

INDEX NO. 115518/08

- v -

MOTION DATE _____

City

MOTION SEQ. NO. 02

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2

3, 4

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

After oral argument on the record, the motion to dismiss is denied. See written decision attached.

FILED

MAY 18 2009


NEW YORK
COUNTY CLERK'S OFFICE

FILED

MAY 18 2009

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/12/09



HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
NEW YORK CIRCUS ARTS,

Index No. 115518/08

Plaintiff,

-against-

DECISION and ORDER

Mot. Seq. 002 & 003

CITY OF NEW YORK, CITY UNIVERSITY OF NEW
YORK, BARUCH COLLEGE, BARUCH PERFORMING
ARTS CENTER, STANLEY RAIFF, POWER
PRODUCTIONS NEW YORK, INC., STARET THE
DIRECTORS COMPANY, POLISH CULTURAL
INSTITUTE and THE INVICTUS THEATER
COMPANY,

Respondents.

-----X
HON. EILEEN A. RAKOWER:

Plaintiff brings the instant action to recover for breach of contract, unjust enrichment, tortious interference with contract, and tortious interference with business relations arising out of a license agreement entered into between Plaintiff New York Circus Arts ("Circus Arts") and Defendant Baruch Performing Arts Center to host feature-length performances by Circus Arts in the Fall of 2008 at the Nagelberg Theater. The license agreement provided for Circus Arts' use of the theater for performances from the periods of 11/4/08 through 11/26/08, and 12/16/08-1/5/09.

Immediately prior to the first series of scheduled Circus Arts performances, the theater was being used for Defendant Invictus Theater Company's play "Irena's Vow," presented by Defendant Staret the Director's Company, in association with Defendant Polish Cultural Institute ("PCI") and Defendant Power Productions New York, Inc.

The play was initially slated to run at the theater from 9/7/08 through 11/2/08. However, the play's producers sought to extend the play's run time.

Circus Arts entered into direct negotiations with Defendant Stanley Raiff (whom the complaint alleges was affiliated with all of the play's producers - including PCI - after Raiff expressed an interest in buying out Circus Arts' right to the first period of performance in 11/08. Circus Arts alleges that Raiff purported to act on behalf of the producers in the course of the negotiations. Circus Arts alleges that the producers had no intention of making any buy-out of Circus Arts' rights; and that Baruch colluded with Raiff by offering unacceptable alternative terms to Circus Arts with the intention of persuading Circus Arts to agree to unsatisfactory terms proposed by Raiff.

On 10/29/08, Baruch advised Circus Arts that it would no longer make the theater available for their November performances, and that it had agreed to extend the run of the play. Circus Arts subsequently commenced this lawsuit.

Presently before the court are two motions to dismiss pursuant to CPLR §3211. PCI moves to dismiss on the grounds that it is a "foreign state" as defined by the Foreign Sovereign Immunities Act ("FSIA"), and is thus immune from the present action under 28 U.S.C. §1604. PCI has submitted an Affidavit of Agata Grenda, Deputy Director of PCI. Ms. Grenda states that PCI is a diplomatic mission to the US which serves under the Ministry of Foreign Affairs of the Republic of Poland. The Affidavit further states that the PCI's involvement in the production of the play was solely for the purpose of promoting and advancing Polish culture. In so doing, PCI contracted with Power Productions to provide seed money to assist in the development of the play. In addition, PCI assisted Power Productions with assistance in marketing and advertising the play to the Polish and Jewish communities. The Grenda Affidavit further states that PCI was only entitled to receive credit in the off-Broadway production of the play, and that it was not entitled to reimbursement of the seed money given to Power Productions, and is not otherwise entitled to remuneration or compensation of any kind in connection with the play. The Grenda Affidavit further states that PCI had no knowledge of or dealings with Circus Arts at any time prior to the commencement of this lawsuit.

Circus Arts has submitted an Affirmation in Opposition to PCI's motion to dismiss.

The City makes a motion to dismiss for failure to state a cause of action, which Circus Arts does not oppose. Additionally, Circus Arts provides a

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stipulation of discontinuance as against Defendants City University of New York, Baruch College and Baruch Performing Arts Center.

CPLR §3211 states, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(2) the court has not jurisdiction of the subject matter matter of the cause of action; or

(7) the pleading fails to state a cause of action

28 U.S.C. §1604 provides that “a foreign state shall be immune from the jurisdiction of the courts of the united states and of the States except as provided in sections 1605 to 1607 to this chapter.” §1603(a) defines a “foreign state” to “include[] a political subdivision of a foreign state or an agency or instrumentality of a foreign state.” §1603(b) defines an “agency or instrumentality of a foreign state” as any entity

(1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States... nor created under the laws of any third country.

PCI contends that it is a diplomatic mission to the United States which serves under the Polish Ministry of Foreign Affairs, relying on the Grenda Affidavit.

When a defendant asserts sovereign immunity, the defendant has the initial burden of presenting a prima facie case that is a foreign sovereign; the plaintiff then has the burden of bringing forward evidence showing that an exception to the FSIA applies to deprive the

defendant of immunity; but the ultimate burden of persuasion remains with the alleged sovereign.

(*Swarna v. Al-Awadi*, 2009 US Dist LEXIS 30403 [S.D.N.Y. Mar. 19, 2009] (citing *Cabiri v. Gov't of the Republic of Ghana*, 165 F.3d 193, 196 [2d Cir. 1999]).

However, §1605(a)(2) provides that a foreign state is not immune from the jurisdiction of the courts in cases “in which the action is based upon a commercial activity carried on in the United States by a foreign state.” §1603(d) defines “commercial activity” as “either a regular course of commercial conduct or a particular commercial transaction or act,” and explicitly instructs that “[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.”

In *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 [1992], the U.S. Supreme Court held that a sovereign’s actions are “commercial” under FSIA “when a foreign government acts, not as regulator of a market, but in the manner of a private player within it...” Further, the Court held that, since 1603(d) instructs that the inquiry as to whether or not an activity is commercial depends upon the nature of the activity rather than the purpose,

the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in ‘trade and traffic or commerce...’

Taking the allegations of the complaint as true, even if PCI does qualify as a “foreign state” under FSIA, PCI was engaged in a “commercial activity” under §1605(a)(2). Specifically, PCI assisted in financing the play, and - allegedly through Raiff - negotiated for an extension of the play’s run time (the conduct which allegedly constituted tortious interference with Plaintiff’s contract rights and business relations). While PCI asserts that it is not receiving any remuneration or compensation for its efforts, this is immaterial to the analysis for the reasons stated

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above. The production and presentation of a play is clearly the type of action which a private party might engage in for commercial purposes. A private party can assist in the financing and promotion of a play with the aim of making a profit; conversely, it might choose to forego monetary gain for purposes of raising matters of public concern, fostering cultural awareness, cultivating good will among the community, or simply to increase its own visibility.

Accordingly, PCI's motion to dismiss must be denied.

Turning now to the City's unopposed motion, the court finds that the City is entitled to dismissal. Circus Arts has failed to plead that it has served a notice of claim upon the City pursuant to NYC Administrative Code 7-201(a). In addition, the City's assertion that Circus Arts failed to file a notice of claim stands uncontroverted. Accordingly, since "such notice is a condition of maintaining an action against the City," *Raven Elevator Corp. v. City of New York*, 291 A.D.2d 355, 356 [1st Dept. 2002], the City is entitled to dismissal.

Moreover, even if Plaintiff had filed a notice of claim against the City, CUNY is a "body corporate" which is "separate and distinct" from the City, and therefore cannot be held liable for CUNY's alleged breach of the license agreement (*Apollon v. City of New York*, 246 A.D.2d 130, 134-35 [1st Dept. 1988]).

Wherefore, it is hereby

ORDERED that Defendant PCI's motion to dismiss is denied; and it is further

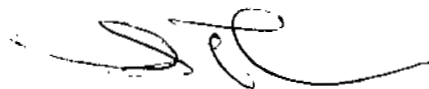
ORDERED that the City's motion to dismiss is granted without opposition, and the complaint is hereby severed and dismissed as against the City of New York, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the Clerk is directed to reassign this case and remove it from the Part 5 inventory. Plaintiff shall serve a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158. Any compliance conferences currently scheduled are hereby cancelled.

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This constitutes the decision and order of the court. All other relief requested is denied.

Dated: May 14, 2009



EILEEN A. RAKOWER, J.S.C.