

<b>Playboy Enters. Intl., Inc. v Meredith Corp.</b>
2021 NY Slip Op 31205(U)
April 8, 2021
Supreme Court, New York County
Docket Number: 651903/2020
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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PLAYBOY ENTERPRISES INTERNATIONAL, INC.,

INDEX NO. 651903/2020

Plaintiff,

MOTION DATE 01/15/2021

- v -

MEREDITH CORP., PUBWORX SERVICES, LLC,  
SPECIALISTS MARKETING SERVICES INC.

MOTION SEQ. NO. 013

Defendants.

**DECISION + ORDER ON  
MOTION**

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 013) 136, 137, 138, 139, 140, 141, 153, 154, 155, 156

were read on this motion to AMEND COMPLAINT.

Upon the foregoing documents, it is

**ORDERED** that Plaintiff’s motion for leave to file an amended complaint against Meredith Corp. (“Meredith”) is **denied**.

Plaintiff’s claim against Meredith was dismissed on the merits (NYSCEF 130 at 11-15 [“When the parties’ contract terminated on December 31, 2018, so too did Meredith’s contractual obligation to indemnify Playboy. Because Playboy’s underlying claim and its indemnification demand arose only after the contract with TCS terminated, Meredith is not bound by the indemnification provision.”]). The Court directed that judgment be entered in Meredith’s favor (*id.* at 22), and the Clerk did so (NYSCEF 146). The dismissal was not, as Plaintiff suggests, “without prejudice.”

Accordingly, there is no complaint against Meredith for Plaintiff to amend (*Tanner v Stack*, 176 AD3d 429 [1st Dept 2019] [“By the time plaintiff moved for leave to amend, the original complaint had already been dismissed; hence, ‘there was no complaint left before the

court to amend”] [citation omitted]; *Panagouloupoulos v Carlos Ortiz Jr. MD, P.C.*, 143 AD3d 792, 792 [2d Dept 2016] [once the trial court granted defendants’ motion to dismiss the complaint, “there was no complaint before the court to amend”]; *Estate of Brown v Pullman Group*, 60 AD3d 481, 482 [1st Dept 2009] [“Leave to amend was properly denied since the counterclaims had already been dismissed”]; *Kazakhstan Inv. Fund Ltd. v Manolovici*, 2 AD3d 249, 250 [1st Dept 2003] [“Plaintiff’s motion to amend its complaint was properly denied since its complaint had been dismissed on a prior motion as time-barred and there was, accordingly, nothing left before the court to amend”]; *Jeffrey L. Rosenberg & Assocs., LLC v Kadem Cap. Mgmt., Inc.*, 306 AD2d 155, 156 [1st Dept 2003] [motion for leave to amend properly denied when complaint had been dismissed on summary judgment, and thus “there was no complaint left before the court to amend”]; *N. Am. Van. Lines, Inc. v Am. Int’l Companies*, 819 NYS2d 849 [Sup Ct, NY County 2006] [“The CPLR does not allow amendment of a complaint that has already been dismissed with prejudice”], *aff’d*, 38 AD3d 450 [1st Dept 2007]; *see also BGC Partners, Inc. v Avison Young (Can.), Inc.*, 140 NYS3d 404 [1st Dept 2021] [“By the time plaintiffs moved for leave to amend, we had already dismissed all the remaining claims in the amended complaint, and directed the court to enter judgment accordingly; ‘hence, there was no complaint left before the court to amend’] [citation omitted].<sup>1</sup>

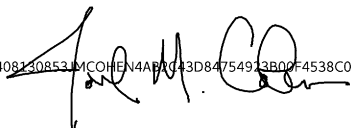
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<sup>1</sup> In its opposition to Meredith’s original motion to dismiss, Plaintiff included a footnote stating that “[i]f the Court grants Meredith’s Motion to Dismiss, Playboy requests leave to replead pursuant to CPLR 3211” (NYSCEF 89 at 5 n.3). That type of one-line generic request, which offers no indication of what the proposed amendment might be or how it would address the arguments made in support of the motion to dismiss, does not preserve the ability to amend the complaint once it is dismissed (*Densplysirona, Inc. v XXX*, 2020 NY Slip Op 30342[U], 8 [Sup Ct, NY County 2020] [Scarpulla. J.], *aff’d sub nom. Matter of Densply Sirona, Inc. Shareholders Litig.*, 2021 NY Slip Op 00522 [1st Dept 2021]).

In any event, Plaintiff's proposed amendment is "palpably insufficient" and "clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]). The proposed breach of contract claim is duplicative of (and indeed subsumed within) the indemnification claim that was asserted in the original complaint. The two claims are based on the same facts and seek the same relief, namely compensating Plaintiff for the costs of settling a lawsuit. Indeed, the indemnification claim in the original complaint was expressly predicated on the allegation that Meredith's predecessor breached the same contractual obligation – "to comply with all applicable state laws in performing its services under the TCS contract" – upon which the purportedly "new" breach of contract claim is based (compare, e.g., NYSCEF 1 ¶ 79 with NYSCEF 140 ¶ 70). Plaintiff's attempt to recast its indemnification claim into a breach of warranty claim is unavailing. If the breach of contract claim had been pleaded in the original complaint, it would have been dismissed for the same reason that the similarly duplicative breach of contract claim against Defendant SMS was dismissed (NYSCEF 130 at 11 [citing *Town of Wallkill v Rosenstein*, 40 AD3d 972, 974 [2d Dept 2007]]). Given that Plaintiff's proposed breach of contract claim could not withstand a motion to dismiss, leave to amend must be denied (*Scott v Bell Atl. Corp.*, 282 AD2d 180, 185 [1st Dept 2001], *affd as mod sub nom. Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314 [2002]; *Olam Corp. v Thayer*, 2021 N.Y. Slip Op. 30345[U] [Sup Ct, NY County 2021]).

Plaintiff's remedy at this stage is to appeal this Court's decision and judgment dismissing its indemnification claim against Meredith.

This constitutes the decision and order of the Court.

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JOEL M. COHEN, J.S.C.

4/8/2021  
DATE

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