

Binong Xu v Omnicom Group Inc.
2022 NY Slip Op 30133(U)
January 6, 2022
Supreme Court, Kings County
Docket Number: Index No.: 518453/2019
Judge: Peter P. Sweeney
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73

Index No.: 518453/2019
Motion Date: 10-25-21
Mot. Seq. No.: 1

-----X

BINONG XU,

Plaintiff,

-against-

DECISION/ORDER

OMNICOM GROUP INC.,
OMNICOM MANAGEMENT, INC.,
SIEGEL & GALE, LLC d/b/a SIEGEL+GALE,
JOHN WREN,
HOWARD BELK,
DAVID SRERE,
LORI ALMEIDA,
STEFFANIE HASSE,

Defendants.

-----X

Upon the following e-filed documents, listed by NYSCEF as item numbers 12-29, the motion is decided as follows:

The defendant, John Wren’s (“Wren”), moves for an Order pursuant to CPLR 3211(a)(1) and/or (a)(7) dismissing plaintiff’s complaint insofar as asserted against him, and for entry of a protective order barring Plaintiff Binong Xu from subjecting him to a pretrial deposition.

Background:

The plaintiff, Binong Xu, was employed as a production designer by defendant Siegel+Gale (“S+G”), a branding communications agency for approximately 12 years was terminated from her employment in 2019. In her Verified Complaint, she asserts that her supervisor (defendant Haase) and three other S+G employees, the Human Resources Director (defendant Almeida) and S+G Co-CEOs (defendants Belk and Srere) engaged in harassing and/or discriminatory conduct towards her based on her race (Chinese), national origin (China), disability (unidentified) and age (49). Plaintiff asserts that the defendants violated Sections 290-297 of the New York State Human Rights Law (“NYSHRL”) and Title 8, Chapter 1, §8-107 of the New York City Human Rights Law (“NYCHRL”). Plaintiff also seeks to impose liability against S+G and the above named individuals as well as against three other defendants: S+G’s parent corporation, Omnicom Group Inc. (“Omnicom”); Omnicom Management, Inc. (“OMI”),

an Omnicom Subsidiary that plaintiff alleges “provides various services to Defendant Omnicom, including Human Resources services” (Ver. Compl. ¶ 4), and Mr. Wren, the Chief Executive Officer of Omnicom and OMI.

The only allegations asserted against defendant Wren and is set forth in paragraph 54 where it is alleged:

On or about July 2, 2019, Plaintiff made written complaints to defendants Defendant Srere, and Defendant Almeida, and to Defendant Wren. In Plaintiff’s written complaint, she described the ongoing discrimination and abuse described in the foregoing paragraphs and reiterated that she wanted to continue working for Defendant S+G. Plaintiff wrote the complaint in hopes of being supported by her employer, Defendant S+G, where she worked for nearly 12 years, and to create a workplace free from discrimination.

In support of the motion, the movant submitted the affirmation of Maureen McLoughlin, a partner of Davis & Gilbert LLP, who has represented defendant Omnicom and Omnicom affiliates in many legal matters for decades. She averred that Omnicom is a publicly-held, Fortune 200 global marketing and communications holding company, that its corporate portfolio includes five global networks, comprised of over 1,500 companies that provide a wide range of advertising, strategic media planning and buying, digital and interactive marketing, direct and promotional marketing, public relations and other specialty communications services. She further stated that Omnicom reported revenue in 2020 of over \$13 billion and employs more than 64,000 employees worldwide.

Discussion:

“In considering a motion to dismiss pursuant to CPLR 3211(a)(7), the court is required to accept the facts as alleged in the complaint as true, accord the plaintiff[] the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Zuniga v. BAC Home Loans Servicing, L.P.*, 147 A.D.3d 882, 883, 47 N.Y.S.3d 374; *see Leon v. Martinez*, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 638 N.E.2d 511). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus” (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19, 799 N.Y.S.2d 170, 832 N.E.2d 26; *see Vermont Mut.*

Ins. Co. v. McCabe & Mack, LLP, 105 A.D.3d 837, 964 N.Y.S.2d 160). Applying these principles, the plaintiff did not state a cause of action against defendant Wren.

With respect to plaintiff's claims under the NYCHRL, the Court of Appeals recently held that "where a plaintiff's employer is a business entity, the shareholders, agents, limited partners, and employees of that entity are not employers within the meaning of the City HRL" and are not vicariously liable (*Doe v Bloomberg L.P.*, 36 NY3d 450, 459). Such individuals "may incur liability only for their own discriminatory conduct, for aiding and abetting such conduct by others, or for retaliation against protected conduct" (*Id.*), citing Administrative Code § 8-107 (1), (6) and (7). Here, there are no allegations in the Verified Complaint that Wren engaged in any discriminatory conduct, that he aided and abetted in such conduct or that he retaliated against the plaintiff for protected conduct.

The Court rejects plaintiff's contention that the Verified Complaint should be construed as alleging that Wren aided and abetted in the alleged discriminatory conduct. As defendants point out in their reply papers:

The words "aided and abetted" appear three times in the Complaint. Each time, they are mere conclusory allegations insufficient to support any claim, but regardless, each time they appear with reference only to the "Corporate Defendants." (Ver. Compl. ¶¶ 69, 75, 98.) The "Corporate Defendants" refers to S+G, Omnicom and OMI, but not Wren. (*Id.* ¶ 10.)

For the above reasons, the Verified complaint fails to state a cause of action against defendant Wren under the NYCHRL.

With respect to plaintiff's causes of action under the NYHRL, it has been held that an individual employee may be held liable as an "employer" under the NYHRL when he or she has an "ownership interest or any power to do more than carry out personnel decisions made by others" (see *Patrowich v. Chem. Bank*, 63 NY2d 541, 543-44; *Matter of New York State Div. of Human Rights v. ABS Elecs., Inc.*, 102 AD3d 967, 969; *lv denied* 24 NY3d 901 [2014]; *Kaiser v. Raoul's Rest. Corp.*, 72 AD3d 539, 540; *Priore v. New York Yankees*, 307 AD2d 67, 74 [1st Dept 2003], *lv denied* 1 NY3d 504). In light of the recent holding in *Doe v Bloomberg L.P.*, it is unlikely that these cases remain good law (see *Park v. Kurtosys Systems, Inc.*, No. 151068/2018,

2021 WL 4325689, at *13 (N.Y. Sup. Ct. Sep. 23, 2021). Regardless, the Verified Complaint does not allege that defendant Wren has an ownership interest in S+G or that he had any power to control S+G's affairs. Assuming he did, under the circumstances of this case, absent allegations that he engaged in any discriminatory conduct, or that he aided and abetted in such conduct or that he retaliated against the plaintiff for protected conduct, it would be unwise in imprudent to hold that the complaint sufficiently stated a cause of action against him. Such a holding would subject every CEO of a multi-national publicly-held holding company to suit for the discriminating actions of each and every employee in the company as well as its subsidiaries simply because of his or her status as the CEO.

For all of the above reasons, it is hereby

ORDRED that the motion to dismiss plaintiff's Verified Complaint pursuant to CPLR 3211(a)(7) against defendant Wren for failure to state a cause of actin against him is **GRANTED**; it is further

ORDERED that defendant Wren's motion for protective order barring plaintiff from subjecting him to a pretrial deposition is **GRANTED**. Plaintiff may seek an order compelling his deposition in the future if facts surface warranting such deposition.

This constitutes the decision and order of the Court.

Dated: January 6, 2022



PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020