

**IMG Universe, LLC v Invisi Smart Global, LLC**

2023 NY Slip Op 31616(U)

May 11, 2023

Supreme Court, New York County

Docket Number: Index No. 655604/2021

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. LOUIS L. NOCK PART 38M**

*Justice*

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IMG UNIVERSE, LLC,

Plaintiff,

- v -

INVISI SMART GLOBAL, LLC, INVISI SMART MASKS USA  
LLC, INVISI SMART STRATEGIES LLC, INVISI SMART  
TECHNOLOGIES UK LTD., SABA YUSSOUF, and LEON  
SIKES,

Defendants.

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INDEX NO. 655604/2021

MOTION DATE 12/15/2021

MOTION SEQ. NO. 001

**SUPPLEMENTAL DECISION +  
ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 11, 12, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 49, 50, 51, 52, 57, 58, 60, 61, 62, 63, and 64

were read on this motion to DISMISS.

LOUIS L. NOCK, J.

In this breach of contract action, defendants initially moved to dismiss the complaint based on documentary evidence pursuant to CPLR 3211(a)(1); for failure to state a cause of action pursuant to CPLR 3211(a)(7); and for lack of personal jurisdiction pursuant to CPLR 3211(a)(8). The court, by decision and order dated February 6, 2023, denied the motion without prejudice to renewal, and ordered jurisdictional discovery pursuant to CPLR 3211(d) (decision and order, NYSCEF Doc. No. 57). By letter to the court dated April 25, 2023, defendants withdrew “the motion to dismiss to the extent it seeks to dismiss the case on jurisdictional grounds, and respectfully request[ed] that the Court renew the motion to dismiss on the basis of the other grounds stated therein” (letter to the court from defendants’ counsel, dated April 25, 2023, NYSCEF Doc. No. 60). Accordingly, the court now turns to the remainder of defendants’

motion as previously briefed. The court assumes familiarity with the facts of this action as set forth in its original decision on the motion.

Plaintiff alleges three causes of action: breach of contract; fraudulent inducement to contract; and unfair competition, both at common law and in violation of General Business Law § 349. Defendants first argue that the allegations of the complaint constitute an impermissible group pleading, asserting that it is not clearly alleged what wrongdoing was committed by each individual defendant (*e.g.*, *Principia Partners LLC v Swap Fin. Group, LLC*, 194 AD3d 584, 584 [1<sup>st</sup> Dept 2021]). Plaintiff, however, *does* allege specific and separate conduct by each defendant.

Defendant Invisi Smart Global, LLC (“Global”), is the signatory to the contract with plaintiff (contract, NYSCEF Doc. No. 16). Plaintiff alleges that defendant Invisi Smart Technologies UK Ltd. (“UK Parent”) did significant work promoting the competition at which its products were featured and continues to promote its association with plaintiff’s Miss Universe pageant on its social media accounts (complaint, NYSCEF Doc. No. 1, ¶¶ 41-43). Plaintiff alleges that defendant Saba Yussouf (“Yussouf”), UK Parent’s Chief Executive Officer (“CEO”), appeared during the Miss Universe pageant’s worldwide broadcast and presented an award; personally owns the “Invisi Smart Technologies” trademark in the United States; continues to associate herself personally with Miss Universe on social media; and uses both UK Parent and Global as alter egos for her own increased notoriety (*id.*, ¶¶ 45-58). Moreover, and as noted by the court in its original decision, the complaint alleges that Invisi Smart Masks USA LLC, Invisi Smart Strategies LLC, and Global all share the same business address (complaint, NYSCEF Doc. No. 1, ¶¶ 21, 26-27), which UK Parent lists on its website as its U.S. office (*compare* contract, NYSCEF Doc. No. 16 at 1, *with* the “Contact Us” page from

invisismart.com, NYSCEF Doc. No. 41). At the motion to dismiss stage, these allegations are sufficient to assert specific conduct by each defendant, or potential alter ego liability, given the alleged interconnected nature of the various Invisi Smart entities and defendant Yussouf. For the same reason, the breach of contract claim is properly pled against all defendants at this stage, as alleged alter egos of Global (*e.g.*, *Perez v Long Island Concrete Inc.*, 203 AD3d 552 [1<sup>st</sup> Dept 2022]).

Turning to the cause of action for fraudulent inducement, plaintiff alleges that in April 2021, Global represented that it had developed “a unique, proprietary, ‘Invisi Smart’ technology to protect against SARS-CoV-2” (complaint, NYSCEF Doc. No. 1, ¶ 36; contract, NYSCEF Doc. No. 16 at 1). Based on this representation, plaintiff alleges that it believed that Global was a reliable deal partner and would not have entered into the contract if it had known that Global was effectively a shell company that had no operations or rights to the technology it was purporting to offer (Complaint ¶¶ 37-39). In addition, deceased defendant Leon Sikes,<sup>1</sup> a former member of Global, is alleged to have made several representations regarding payment of the outstanding sponsorship fee prior to the Miss Universe pageant that plaintiff asserts induced it to continue to allow defendants to be featured in the program despite defendants not performing as required by the contract (*id.*, ¶¶ 66-75). Defendants argue that this claim should be dismissed on three grounds: first, that it is duplicative of the breach of contract claim; second, that it is not pled with the requisite particularity; and third, that plaintiff fails to allege a material misrepresentation.

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<sup>1</sup> Sikes passed away on August 28, 2021 (death certificate, NYSCEF Doc. No. 40), and while still named in the caption, is not presently a defendant as he died prior to commencement of the action (*Batista v Rivera*, 5 AD3d 308, 309 [1<sup>st</sup> Dept 2004] [“Because Aponte had died before the action was commenced, he was at no time a party to this action, and the presence of his name in the caption is of no legal consequence”]).

“General allegations that [a party] entered into a contract while lacking the intent to perform it are insufficient to support the claim” (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]). “[I]f the promise concerned the performance of the contract itself, the fraud claim is subject to dismissal as duplicative of the claim for breach of contract” (*Fairway Prime Estate Mgt., LLC v First American Intl. Bank*, 99 AD3d 554, 557 [1<sup>st</sup> Dept 2012]). However, a claim for fraudulent *inducement* to contract may be successfully pleaded alongside a claim for *breach* of contract where the alleged misrepresentation is one of then-present fact, without which plaintiff claims it would not have entered into the contract (*GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [1<sup>st</sup> Dept 2010], *appeal dismissed* 17 NY3d 782 [2011] [“a misrepresentation of present facts, unlike a misrepresentation of future intent to perform under the contract, is collateral to the contract, even though it may have induced the plaintiff to sign it, and therefore involves a separate breach of duty”]).

Here, the representations allegedly made by Sikes involve a debt already incurred pursuant to the contract, and thus, they are duplicative of the claim for breach of contract (*Cronos Group Ltd. v XComIP, LLC*, 156 AD3d 54, 62-63 [1<sup>st</sup> Dept 2017]). However, plaintiff adequately alleges a misrepresentation collateral to the contract, in that Global allegedly represented that it had a proprietary technology that it was offering in exchange for being a sponsor of the Miss Universe pageant, when in fact, Global was allegedly a shell company with no operations or rights to the anti-coronavirus technology it was offering. This alleged misrepresentation relates to Global’s assets and strength as a deal partner; not to whether defendants had an undisclosed intent not to perform the contract, and is, therefore, sufficient to maintain the cause of action for fraudulent inducement to contract (*GoSmile, Inc.*, 81 AD3d at 81). Defendants cite no authority for the proposition that this alleged misrepresentation was not

material. Moreover, plaintiff pleads with particularity the alleged misrepresentation made by Global by pleading what was said, when it was said, and who it was said to (*EI Entertainment U.S. LP v Real Talk Entertainment, Inc.*, 85 AD3d 561, 562 [1<sup>st</sup> Dept 2011]). As to the other defendants, “[i]t is sufficient at the pleading stage that the alleged facts and the inferences drawn from them establish the basic elements of the doctrine of piercing the corporate veil” (*Cortlandt Street Recovery Corp. v Bonderman*, 31 NY3d 30, 49 [2018]), which plaintiff has done, as set forth above.

Accordingly, it is

ORDERED that the defendants’ motion to dismiss the complaint is denied; and it is further

ORDERED that the defendants are directed to serve an answer to the complaint within 20 days after the date of filing hereof; and it is further

ORDERED that counsel for the parties are directed to appear before this court for the previously scheduled conference via Microsoft Teams on May 17, 2023, at 2:30 PM.

This will constitute the decision and order of the court, supplemental to its prior decision and order of the court herein (NYSCEF Doc. No. 57).

ENTER:



<u>5/11/2023</u>			<u>LOUIS L. NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED		<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