SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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SEBASTIAN SHAPIRO and DAVID DIXON,

Plaintiffs,

-against-

NINAH CONSULTING, INC. and PUBLICIS MEDIA, INC.,

Defendants.

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Index No.: 654333/2018

DECISION & ORDER

JENNIFER G. SCHECTER, J.:

Pursuant to CPLR 3211, defendant Publicis Media, Inc. (Publicis) moves for dismissal of the complaint as against it. Plaintiffs Sebastian Shapiro and David Dixon oppose the motion. Publicis' motion is granted.

Factual Background & Procedural History

Plaintiffs are former employees of defendant Ninah Consulting, Inc. (Ninah). Ninah, a Delaware corporation, is a research and marketing analytics firm. It is wholly owned by non-party Zenith Optimedia, North America (Zenith) which, in turn, is wholly owned by Publicis. Publicis is incorporated in Illinois.

Shapiro's employment was governed by a written agreement dated November 21, 2008 (Dkt. 15 [the Shapiro Agreement]). It provides that it is an agreement between him and Ninah, that he has the title of "CO-Managing Director of Ninah Consulting USA" and that he reports to the CEO of Zenith (*see id.* at 1). The Shapiro Agreement is signed

by Shapiro and Zenith's CEO (*id.* at 3). Publicis is not a party to the Shapiro Agreement and did not execute it.

Dixon's employment was governed by a written agreement dated October 7, 2010 (Dkt. 16 [the Dixon Agreement; collectively with the Shapiro Agreement, the Agreements]). Like the Shapiro Agreement, it provides that it is an agreement between Dixon and Ninah, that Dixon has the title of "Managing Director of Nina Consulting USA" and that he reports to the CEO of Zenith (*see id.* at 1). The Dixon Agreement is signed by Dixon and Zenith's CEO (*id.* at 5). Publicis is not a party to the Dixon Agreement and did not execute it.

In March 2016, Publicis announced a corporate reorganization that curtailed the importance of Ninah's work. The complaint alleges that Publicis determined that demand for Ninah's core products was 'dead'" (Complaint ¶ 29). Over the next year, the situation at Ninah deteriorated further. On August 8, 2017, at a meeting with Zenith's CEO and Ninah's CFO, plaintiffs were informed that their employment was being terminated for "Cause." The Agreements provide that upon a termination for "Cause"–a term defined in Ninah's Employee Handbook (Dkt. 28 [the Handbook])–Ninah was obligated to provide them with six months of "Salary Bridging," which is also defined in the Handbook (Dkt. 15 at 3; Dkt. 16 at 4; *see* Dkt. 28 at 52 [governing involuntary termination and Salary Bridging]).

Plaintiffs commenced this breach-of-contract action against Ninah and Publicis, claiming that they were improperly terminated for Cause and were not paid their six

months of Salary Bridging. Ninah answered (Dkt. 11) and Publicis made this motion to dismiss, urging that as a non-party to the Agreements it cannot be responsible for breaching them. Plaintiffs disagree with Publicis and maintain that its corporate veil can be pierced.

Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint and all reasonable inferences that may be gleaned from those facts (*Amaro v Gani Realty Corp.*, 60 AD3d 491 [1st Dept 2009]). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003], citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). If the defendant seeks dismissal of the complaint based upon documentary evidence, the motion will succeed only if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]).

It is axiomatic that only parties to a contract can be sued for breach (*Leonard v Gateway II, LLC*, 68 AD3d 408 [1st Dept 2009]). Because Publicis is not a party to the Agreements, it cannot be sued for breaching them. Plaintiffs' contention that Publicis is a party simply because it is mentioned in the Agreements is baseless. Plaintiffs cite no

authority for the proposition that an employment agreement that merely references the fact that an employee may be eligible to receive certain benefits from the parent company of the employer makes the parent company a party to the agreement.[1] The Agreements clearly indicate that they are only between plaintiffs and Ninah; Publicis did not sign them.

That Publicis wholly owns Ninah is unavailing. Parent companies are distinct from their subsidiaries (*see Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 140 [1993] [veil piercing "is a limitation on the accepted principles that a corporation exists independently of its owners, as a separate legal entity, that the owners are normally not liable for the debts of the corporation, and that it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners"]). Thus, to hold a parent liable for the contractual liabilities of its subsidiary, there must be grounds for veil piercing (*id.* at 140-41). "In order to pierce the corporate veil, a plaintiff must show that the dominant corporation exercised complete domination and control with respect to the transaction attacked, **and** that such domination was used to commit a fraud or wrong causing injury to the plaintiff" (*Fantazia Intl. Corp. v CPL Furs New York, Inc.*, 67 AD3d 511, 512 [1st Dept 2009] [emphasis added]). Domination alone, without the added allegation of wrongdoing, does not permit piercing the corporate veil (*TNS*

[1] The provisions mentioning Publicis are not alleged to have been breached. Plaintiffs do not allege facts or raise arguments related to whether Publicis is a third-party beneficiary of the Agreements or whether it tortiously interfered with them.

Holdings, Inc. v MKI Sec. Corp., 92 NY2d 335, 339 [1998]; *see Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 40 [1st Dept 2012]; *Damianos Realty Group, LLC v Fracchia*, 35 AD3d 344 [1st Dept 2006] ["The mere claim that the corporation was completely dominated by the defendants, or conclusory assertions that the corporation acted as their 'alter ego,' without more, will not suffice to support the equitable relief of piercing the corporate veil"]). Notably, the allegation that the parent caused the subsidiary to breach a contract is insufficient to show the requisite wrongdoing (*Skanska USA Bldg. Inc. v Atlantic Yards B2 Owner, LLC*, 146 AD3d 1, 12 [1st Dept 2016] ["a simple breach of contract, without more, does not constitute a fraud or wrong warranting the piercing of the corporate veil"]).

Plaintiffs' allegation that Publicis caused Ninah to breach the Agreements is insufficient to plead the requisite wrongdoing; thus, veil piercing is not a basis to hold Publicis liable.[2]

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[2] New York law is applied because plaintiffs rely on it in opposing the motion (*see* Dkt. 25 at 7). Neither of the defendants, however, is incorporated in New York. Ninah is a Delaware corporation and Publicis is incorporated in Illinois. The result would be no different under those states' laws (*see TBA Global, LLC v Proscenium Events, LLC*, 114 AD3d 571, 572 [1st Dept 2014]). Delaware is notoriously strict about veil piercing (*Midland Interiors, Inc. v Burleigh*, 2006 WL 4782237, at *3 [Del Ch 2003]) as is Illinois (*see* Dkt. 33 at 8-9). Publicis is not alleged to have abused its corporate form such that Ninah was rendered a sham; thus, there is no basis for veil piercing (*see Crosse v BCBSD, Inc.*, 836 A2d 492, 497 [Del 2003]). A parent's strategic corporate reorganization decisions that have an adverse effect on a subsidiary do not alone constitute an abuse of the corporate form. Rather, the decisions are an exercise of business judgment that do not nullify the protection of the corporate veil. Plaintiffs' concern that Ninah may not be able to satisfy a judgment is not a basis for veil piercing. Because New York's arguably laxer veil piecing standard has not been satisfied, it is academic whether veil piercing would be appropriate under more stringent standards. Veil piercing, moreover, would, at the outset, require piercing Zenith's corporate veil, which neither party meaningfully addresses.

Accordingly, it is ORDERED that Publicis' motion to dismiss the claims asserted in the complaint against it is granted, the Clerk is directed to enter judgment accordingly and plaintiffs' claims against Ninah are hereby severed and shall continue.

Dated: August 16, 2019

ENTER:

Jennifer G. Schecter, J.S.C.