

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

PRESENT: SCARPULLA, SALIANN Justice

PART 39

CRESPO, IGOR

INDEX NO. 651616/2014

MOTION DATE 03/05/2015

- v -

BIYOMBO, BISMACK

MOTION SEQ. NO. 001

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

Notice of Motion/ Petition/ OSC - Affidavits - Exhibits No(s)

Answering Affidavits - Exhibits No(s)

Replying No(s)

Upon the foregoing papers, it is

ORDERED that the motion is decided in accordance with the accompanying memorandum decision.

DATE: 9/4/15

Signature of Scarpulla, Saliann, JSC

- 1. CHECK ONE : [] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. APPLICATION : [] GRANTED [] DENIED [] GRANTED IN PART [X] OTHER
3. CHECK IF APPROPRIATE : [] SETTLE ORDER [] SUBMIT ORDER
[] DO NOT POST [] FIDUCIARY APPOINTMENT [] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

-----X
IGOR CRESPO and IGOR CRESPO D/B/A PROTALENT
SPORTS MANAGMENT,

Plaintiffs,

-against-

BISMACK BIYOMBO and WASSERMAN MEDIA GROUP,
LLC

Defendants.

-----X

HON. SALIANN SCARPULLA, J.:

Plaintiff Igor Crespo (“Crespo”) commenced this action to recover damages for breach of a “development agreement” that he allegedly entered into with professional basketball player Bismack Biyombo (“Biyombo”). Biyombo moves to dismiss plaintiffs’ complaint pursuant to CPLR §§ 3211(a)(1) and (a)(7), or alternatively, to compel plaintiffs to arbitrate their claims before the National Basketball Players Association (“NBPA”).

Crespo is a sports manager based in Vitoria, Spain. At times, Crespo does business as Protalent Sports Management (“Protalent”). Crespo alleges that he first met Biyombo in 2009, while Biyombo was pursuing professional basketball in Yemen. After meeting with Biyombo and observing his potential talent and drive to succeed, Crespo agreed to offer his “expertise in developing Biyombo into a professional caliber athlete.”

DECISION/ORDER

Index No. 651616/2014
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On June 12, 2009, Biyombo and Protalent entered into a contract, under which Biyombo agreed: (1) “to be exclusively assisted” by Protalent in the negotiations of all contracts for “sports performances in Europe and the NBA”; and (2) “to be exclusively represented” by Protalent in the negotiation of any sponsorship contracts (“the Agreement”).

In exchange for Protalent’s representation and assistance, Biyombo agreed to pay Protalent: (a) 10% of his earnings from any sports contract made within Europe or the NBA, and (b) 20% of his earnings from any sponsorship contracts. The parties agreed to a one-year term for the Agreement, which would thereafter be “automatically renewed by year in the absence of written notice sent by registered post at least 90 (ninety) days before its expiry.”

Crespo submits an affidavit in support of the complaint. Crespo states that after entering into the Agreement, he successfully assisted Biyombo in obtaining several professional basketball contracts with teams in Spain, such as Fuenlabrada-Getafe Madrid, CB Illescas, and Baloncesto Fuenlabrada. Crespo claims that Biyombo paid 10% of his earnings from these contracts to Crespo, as required under the Agreement. In addition, Crespo alleges that he negotiated a sponsorship contract with Nike on Biyombo’s behalf (“the Nike contract”).

According to Crespo, Biyombo was highly motivated to leave the European basketball leagues and join the NBA. To advance Biyombo’s career toward that end, Crespo secured an invitation for Biyombo to participate in the 2011 Nike Hoops Summit, the “premiere vehicle” for showcasing international basketball players to NBA scouts.

Crespo allegedly invested a substantial amount of time and money to secure an invitation for Biyombo to attend this event. At the Nike Hoops Summit, Biyombo performed well, scoring the first ever “triple double” in the event’s history.

Following the Nike Hoops Summit, Crespo alleges that NBA officer Ned Cohen informed him that Biyombo had been selected to participate in the 2011 NBA draft. In anticipation of the draft, Crespo introduced Biyombo to several agents that were certified with the NBPA and could negotiate an NBA contract for Biyombo. Crespo ultimately recommended that Biyombo hire Leon Rose (“Rose”) from Creative Artists Agency as his certified agent. Crespo alleges that he and Rose informally agreed to share any agent fee earned from Biyombo’s NBA contract on a 50/50 basis, and that he advised Biyombo that he would limit his compensation accordingly.

Despite Crespo’s recommendation to hire Rose, Crespo later learned that Biyombo hired another certified agent, Joel Bell, to negotiate his NBA contract. On September 27, 2011, Biyombo allegedly advised Crespo by letter that he was terminating the Agreement. Shortly thereafter, Biyombo signed an NBA contract with the Charlotte Bobcats on December 19, 2011 (“the NBA contract”).¹

On May 27, 2014, Plaintiffs commenced this action to recover \$2 million in damages under three causes of action: (1) breach of contract against Biyombo; (2) unjust

¹ The parties to the NBA contract are Bismack Biyombo and Bobcats Basketball, LLC. According to the complaint, Bobcats Basketball, LLC now engages in competition under the name, Charlotte Hornets.

enrichment against Biyombo; and (3) a tortious interference with contract against Wasserman Media Group, LLC.²

In the first cause of action for breach of contract, Plaintiffs assert that Biyombo breached the Agreement by failing to pay them 10% of his earnings on the NBA contract, and 20% of his earnings from any sponsorship contracts, including the Nike contract.³ In the second cause of action for unjust enrichment, Plaintiffs assert that Biyombo has unjustly retained the benefit of the funds that they invested in his development as a professional athlete.

In the current motion, Biyombo first moves to dismiss the breach of contract claim. Biyombo argues that the Agreement is invalid because it violates Section 9(a) of the National Labor Relations Act (“NLRA”) by designating Crespo as his agent, even though Crespo is not certified by the NBPA. Biyombo further claims that, even if the Agreement is valid, Plaintiffs cannot recover under this contract because it fails to comply with regulations established by the NBPA. In the alternative, Biyombo seeks to compel arbitration of the contract claim pursuant to NBPA regulations.

Biyombo also moves to dismiss the unjust enrichment claim on the grounds that it is duplicative of the breach of contract claim and based on services that Plaintiffs provided in violation of Section 9(a) of the National Labor Relations Act.

² Plaintiffs allege that Wasserman Media Group, LLC is Biyombo’s current agent. Wasserman Media Group, LLC has not yet appeared in this action.

³ At oral argument, the parties appeared to agree that Protalent was properly compensated for its work related to Biyombo’s professional basketball contracts in Spain.

In opposition, Plaintiffs argue that their breach of contract claim should not be dismissed because the Agreement is a valid development agreement, not a player/agent agreement governed by NBPA regulations. Plaintiffs further contend that Crespo has an exclusive contractual right to approve Biyombo's contracts, and that Biyombo breached the Agreement by not allowing Crespo to decide whether to approve the NBA contract.

In the alternative, Plaintiffs assert that they state a breach of contract claim with respect to Biyombo's sponsorship contracts, which are not governed by NBPA regulations. Lastly, Plaintiffs contend that they sufficiently state a claim for unjust enrichment, and they oppose arbitration because the parties do not have an arbitration agreement.

Discussion

I. Breach of Contract

A. Biyombo's alleged breach relating to a failure to pay 10% of his earnings from the NBA Contract

Biyombo argues that Plaintiffs' claim for 10% of his earnings from the NBA contract should be dismissed because the Agreement is an invalid contract that requires payment of an excessive agent's fee to Crespo, an uncertified agent, in violation of Section 9(a) of the NLRA and the NBPA Regulations.

Section 9(a) of the National Labor Relations Act provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit . . . shall be the exclusive representatives of all the employees in such

unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.” 29 U.S.C. § 159(a).

Pursuant to the authority granted by Section 9(a), the National Basketball Players Association has been designated the “exclusive bargaining representative of NBA players.” NBPA Regulations Governing Players Agents (“NBPA Regulations”), Section 1. To regulate contracts between NBA players and their agents, the NBPA has established a set of regulations governing certain contractual aspects such as who may serve as an agent, the maximum fees that an agent may charge, and the type of contract form that must be used.⁴

The NBPA Regulations were adopted based on the “increasing recognition among NBA players of the need: (1) to insure that agents representing players . . . in individual contract negotiations with NBA teams provide services of a high quality at fee levels that are fair and equitable; and (2) to establish a program for assisting players and rookies in selecting individual agents.” NBPA Regulations, p. 1.

Here, the Agreement provided that Protalent would exclusively assist Biyombo in negotiating a professional contract with an NBA team, in exchange for a 10% fee. Because this portion of the Agreement was in essence a contract between an NBA player (Biyombo) and an agent seeking to negotiate an NBA contract on his behalf (Protalent),

⁴ For example, the NBPA Regulations provide that the maximum fee that an agent may charge is “four percent (4%) of the compensation negotiated for the player for each playing season” for contracts in which the individual player receives compensation in excess of the minimum compensation provided for under the NBA-NBPA Collective Bargaining Agreement. NBPA Regulations, Section 4.

the Agreement is subject to and governed by NBPA regulations. *Walters v. Harmon*, 135 Misc.2d 905, 907-08 (Sup. Ct. New York County 1987) (finding that plaintiffs' agency contract with defendant was subject to NFL regulations because defendant is a member of the NFL).

Pursuant to NBPA Regulations, the parties' agreement that Biyombo would pay a 10% fee to Protalent for the negotiation of an NBA contract is void. NBPA Regulations provide that "[n]o person . . . shall be permitted to conduct individual contract negotiations on behalf of a player (including a rookie) and/or assist in or advise with respect to such negotiations with NBA clubs . . . unless he is (1) currently certified as a player agent pursuant to these Regulations, and (2) signs the standard form fee agreement with the player." Neither Protalent nor Crespo are certified agents that have signed a standard form agreement with Biyombo. Based on Protalent and Crespo's failure to comply with NBPA regulations, they cannot recover any fees associated with the NBA contract, and the portion of the Agreement providing for such fees is void. *See* Regulations, Section 4(A) (stating that "[a]ny agreement between a player agent and a player . . . which does not meet the requirements of these Regulations shall be of no force and effect"); *Scotto v. Mei*, 219 A.D.2d 181, 183 (1st Dep't 1996).

Crespo argues that he is still entitled to receive 10% of the NBA contract because he did not act as Biyombo's agent, but merely provided assistance in negotiating the NBA contract. However, under NBPA Regulations, any person that assists in or advises "with respect to such negotiations with NBA clubs" is also prohibited from earning any

fee, unless that person is certified as a player agent and signs the standard form fee agreement. NBPA Regulations, p. 3.

For the above stated reasons, I dismiss Plaintiffs' breach of contract claim to recover 10% of Biyombo's earnings from the NBA contract.⁵

**B. Biyombo's alleged breach relating to a failure to pay
2% of his earnings from the NBA Contract under the Rose Agreement**

Crespo alleges the existence of a separate agreement that he entered into with Leon Rose (an NBPA certified agent), under which Rose agreed to split the 4% agent fee that he expected to earn from Biyombo's NBA contract, with Crespo ("Rose Agreement"). Crespo submits a copy of the proposed agreement with Rose, which he claims was never formalized.

To the extent that Plaintiffs seek to allege a breach of contract claim against Biyombo for failure to pay 2% of his earnings from the NBA contract as contemplated by the Rose Agreement, I dismiss this claim. The alleged Rose Agreement was never executed by Rose. Moreover, Plaintiffs are not entitled to any agent's fee under the alleged Rose Agreement because neither Crespo nor Rose acted as Biyombo's agent in negotiating the NBA contract. I therefore dismiss Plaintiffs' breach of contract claim to recover any fees due under the Rose Agreement.⁶

⁵ I further note that the Agreement does not comply with NBPA Regulations because it provides for a fee in excess of the maximum fees permitted under the Regulations.

⁶ Plaintiffs further claim that Biyombo breached "the exclusivity provision" in the Agreement, which purportedly granted Crespo the right to approve Biyombo's contracts. While the Agreement stated that Biyombo could not negotiate any professional contracts

C. Biyombo's alleged breach relating to a failure to pay 20% of his earnings from sponsorship contracts

Biyombo next moves to dismiss Plaintiffs' breach of contract claim with respect to the sponsorship contracts pursuant to CPLR § 325(d). Biyombo argues that this claim should be dismissed because it fails to meet the Commercial Division monetary threshold. Here, I exercise my discretion to retain jurisdiction over this claim, and I deny Biyombo's motion to dismiss the breach of contract claim with respect to sponsorship contracts. Biyombo does not dispute that Plaintiffs sufficiently state a breach of contract claim to recover 20% of his earnings from sponsorship contracts covered by the Agreement.

II. Unjust Enrichment

A cause of action for unjust enrichment requires a showing that: (1) the defendant was enriched, (2) at the expense of the plaintiff, and (3) that it would be inequitable to permit the defendant to retain that which is claimed by the plaintiff. *Georgia Malone & Co. Inc. v. Ralph Rieder*, 86 A.D.3d 406, 408 (1st Dep't 2011); *Clifford R. Gray, Inc. v. LeChase Constr. Servs., LLC*, 31 A.D.3d 983, 987-88 (3d Dep't 2006).

In the complaint, Crespo alleges that he invested substantial funds in Biyombo's development as a professional athlete; that Biyombo benefited from Crespo's investment; and that Biyombo has been unjustly enriched by retaining the benefit of the funds that he invested. In moving to dismiss the unjust enrichment claim, Biyombo argues that it is

“directly nor through a third party,” this provision did not grant Crespo the exclusive right to approve whether Biyombo entered into a contract with the NBA.

duplicative of the breach of contract claim, and any funds expended by Crespo were enmeshed with his performance of the Agreement.

At the outset, I agree with Biyombo that Plaintiffs fail to state an unjust enrichment claim to the extent that they seek to be compensated for any services they provided in negotiating or assisting with the NBA contract. As stated above, Plaintiffs may not recover any fees related to the NBA contract because they are not certified agents with the NBPA. *Benham v. eCommission Solutions, LLC*, 118 A.D.3d 605, 607 (1st Dep't 2014) (finding that an unjust enrichment claim that "seeks precisely the same damages as . . . [a] claim for breach of contract" must be dismissed as duplicative).

However, Plaintiffs adequately state an unjust enrichment claim with respect to any benefits that Biyombo unjustly retained from their investment in him as a professional athlete. In his affidavit, Crespo states that he expended at least \$164,000 on Biyombo's professional development in expectation that he would be compensated by the Agreement. Crespo further alleges that after Biyombo terminated the Agreement, Biyombo acknowledged that he had been unjustly enriched and separately agreed to repay the funds that Crespo expended on him. To support his claim, Crespo submits an email that Biyombo purportedly wrote to his colleague Richard Gonzalez, in which Biyombo appears to reflect on his termination of the Agreement and states: "[i]t has been hard to make that decision, but I hope you understand it. Although you do not have your money today, you will have it tomorrow."⁷

⁷ Crespo submits an English translation of the email, which was originally written in Spanish.

Here, the allegations in the complaint and Crespo's affidavit are sufficient to state a claim for unjust enrichment. The "basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in 'equity and good conscience' should be paid to the plaintiff." *Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 790 (2012) (internal citation omitted). A claim for unjust enrichment may exist in such cases where "though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff." *Id.* I find that the specific circumstances alleged here may have created an equitable obligation for Biyombo to compensate Plaintiffs for the benefits that he received from their investment in his development as a professional basketball player.

Accordingly, Biyombo's motion to dismiss the unjust enrichment claim is granted to the extent that it seeks to recover compensation for negotiating or assisting with the NBA contract, but denied with respect to any benefits that Biyombo unjustly retained from Plaintiffs' investment in his development as a professional athlete.

In accordance with the foregoing, it is

ORDERED that defendant Bismack Biyombo's motion to dismiss plaintiffs' complaint pursuant to CPLR §§ 3211(a)(1) and (a)(7) is granted to the extent that the first cause of action for breach of contract to recover any fees from the NBA contract, and the second cause of action for unjust enrichment to recover any compensation for negotiating or assisting with the NBA contract are dismissed, and otherwise denied; and it is further

ORDERED that counsel are directed to appear for a preliminary conference at 60 Centre Street, Room 208 on October 28, 2015 at 2:15pm; and it is further

ORDERED that the parties are directed to participate in the Commercial Division's Alternative Dispute Resolution Program.⁸

This constitutes the decision and order of the Court.

DATE: 9/4/15


SCARPULLA, SALIANN, JSC

⁸ I grant Plaintiffs' request for an order to participate in the Commercial Division's Alternative Dispute Resolution Program.