| **E3Sports, Inc. v New York City Dept. of Educ.** |
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| 2019 NY Slip Op 33334(U) |
| November 6, 2019 |
| Supreme Court, New York County |
| Docket Number: 651232/2019 |
| Judge: Arthur F. Engoron |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. ARTHUR F. ENGORON **PART** IAS MOTION 37EFM

*Justice*

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E3SPORTS, INC.,

Plaintiff,

- v -

NEW YORK CITY DEPARTMENT OF EDUCATION, THE CITY OF NEW YORK, and P.S. 135Q,

Defendants.

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**INDEX NO.** 651232/2019

**MOTION DATE** 10/22/19

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22

were read on this motion to DISMISS.

Upon the foregoing documents, it is hereby ordered that defendants' motion to dismiss plaintiff's Complaint is granted in part and denied in part.

On February 28, 2019, plaintiff, E3Sports, Inc. ("E3Sports"), commenced this action against defendants New York City Department of Education ("DOE"), The City of New York ("NYC"), and P.S. 135Q – the Bellaire School ("P.S. 135Q"). The Complaint alleges five causes of action: (1) breach of contract, (2) breach of the covenant of good faith and fair dealing, (3) unjust enrichment, (4) tortious interference with contractual relations, and (5) prima facie tort. Plaintiff seeks to recover (1) compensatory damages, (2) punitive damages, (3) injunctive relief, enjoining defendants from engaging in wrongful conduct, (4) prejudgment and post-judgment interest, and (5) costs, disbursements, and attorney's fees.

Background

On September 1, 2017, E3Sports, on behalf of defendants, entered into a Recess Enrichment Program Contract (the "Purported Agreement"), under which E3Sports provided P.S. 135Q with daily custom-designed recess period activities to offer a "constructive, physical outlet for children while instilling the confidence they need to be successful in their future endeavors." Brandon Passarelli ("Mr. Passarelli") served as one such Recess Enrichment Coach assigned by E3Sports to facilitate these services for P.S. 135Q during the 2017-2018 academic year. Pursuant to the Purported Agreement, defendants were obligated to pay $45,000.00 to retain E3Sports's services for the entire 2017-2018 academic year.

The Purported Agreement allegedly contained explicit termination and renewal provisions. It allegedly provided that termination by either party must be made upon written notice to the other party at least sixty (60) days before the end of the academic year, defined as June 22, 2018. The Purported Agreement provided that it would automatically renew at the end of the academic year

unless it was affirmatively terminated by either party. The Purported Agreement also prohibited solicitations by defendants, who agreed that P.S. 135Q would "not engage [Recess Enrichment Coaches'] services directly at any time (nor or in the future) to Coach any program at their school."

Between June and September 2018, P.S. 135Q failed to respond to E3Sports's attempts to contact P.S. 135Q regarding the Purported Agreement's renewal and the school's needs and plans for the upcoming 2018-2019 academic year. On September 20, 2018, Principal Dawn Lagnese ("Principal Lagnese") of P.S. 135Q stated verbally that P.S. 135Q no longer wished to retain E3Sports's services. In this exchange, Principal Lagnese stated that P.S. 135Q had not spoken with Mr. Passarelli. According to the Complaint, P.S. 135Q neither terminated the Purported Agreement by the April 23, 2018 deadline nor paid the $45,000.00 automatic renewal cost for the 2018-2019 academic year.

Additionally, the Complaint alleges that P.S. 135Q breached the Purported Agreement by hiring Mr. Passarelli to perform the same recess facilitation services as an "aide" that he had performed as an E3Sports employee. P.S. 135Q, and Principal Lagnese specifically, did not confirm that the school had hired Mr. Passarelli individually until an E3Sports employee spotted Mr. Passarelli at P.S. 135Q during recess. During the same visit to P.S. 135Q, this E3Sports employee saw Mr. Passarelli's timecard in the school's office. Mr. Passarelli confirmed in conversations with E3Sports that Principal Lagnese, representing P.S. 135Q, approached him about the possibility of his offering the recess facilitation services to the school in an "aide" position rather than in his capacity as an E3Sports employee. Mr. Passarelli allegedly began in this "aide" position prior to Principal Lagnese's September 20, 2018 response to E3Sports's attempts to communicate with P.S. 135Q.

On October 31, 2018, E3Sports, through counsel, demanded that P.S. 135Q pay the $45,000.00 allegedly owed for the 2018-2019 academic year renewal. In the same letter, E3Sports demanded that P.S. 135Q cease and desist from its solicitation and employment of any E3Sports recess enrichment coaches including Mr. Passarelli. On November 9, 2018, Matthew Fleming, Esq. of DOE's Office of the General Counsel denied E3Sports's $45,000.00 demand.

On or about December 7, 2018, E3Sports notified defendants of its claims and the underlying facts. At least thirty days have elapsed since the demand and claims upon which the Complaint is founded. Additionally, the comptroller has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment.

Between March 8 and 14, 2019, plaintiff served all defendants with the instant Summons and Complaint. The Complaint emphasizes that (1) defendants failed to provide the written notice of termination required by the Purported Agreement and (2) the Purported Agreement specifically required that P.S. 135Q provide a notice of termination no later than April 23, 2018 (almost exactly five months prior to Principal Lagnese's contacting E3Sports to verbally express that P.S. 135Q did not wish to retain E3Sports's services for the 2018-2019 academic year). Consequently, plaintiff claims that the termination of the Purported Agreement is ineffective. Plaintiff claims that the Purported Agreement remains in effect, along with defendants' obligations thereunder.

In a Stipulation, dated March 22, 2019, plaintiff and defendants agreed to extend defendants' time to answer from March 28, 2019 to April 26, 2019. On April 26, 2019, defendants answered with various denials and ten affirmative defenses. The Answer claimed the following: [1] the DOE agent alleged to have entered into the Purported Agreement lacked authority to bind the DOE, [2] the Purported Agreement is void for failure to comply with the DOE's Procurement Policy and Procedures DOE § 2-09(a), [3] the Purported Agreement is void for failure to comply with the DOE's Procurement Policy and Procedures DOE PPP §3-10(b)(2)(ii), [4] the alleged non-solicitation clause and/or non-competition clause are void, [5] plaintiff failed to file a timely notice of claim pursuant to N.Y. Educ. Law § 3812(1), [6] to the extent that the Complaint seeks to allege claims based on breaches of oral agreements, representations, and statements, such claims are barred by the applicable statute of frauds, [7] plaintiff failed to mitigate its damages, [8] the City of New York is not a proper party, as it is not liable for the DOE's alleged acts, [9] P.S. 135Q is not a proper party, as it is not a suable entity, and [10] defendants, their agents, and officials, acted reasonably, properly, lawfully, and in good faith, and as such are entitled to governmental immunity from liability.

On August 6, 2019, defendants moved, pursuant to CPLR 3211(a)(1) and (7), to dismiss plaintiff's Complaint. On that same day, Karen Hunter ("Ms. Hunter"), Deputy Council, DOE Commercial Unit, submitted an Affirmation, supporting defendants' Motion to Dismiss the Complaint. Ms. Hunter claimed that PPP § 4-01(a) requires the DOE to "maintain files that contain all documentation pertaining to the solicitation, award, and management of each of its contracts, purchase orders, contract changes, extensions, and renewals…" The DOE uses the digital database Financial Accounting Management Information System ("FAMIS") to keep track of the solicitation, award, and management of each of its contracts. The Chief Administrator of DOE's Division of Contracts and Purchasing's FAMIS searched and could not locate a record of the Purported Agreement (Exhibit 3). Additionally, Ms. Hunter emphasized that, when services required by a school are unavailable through an already extant contract, PPP § 1-04(b) provides that for "services [that] are anticipated to cost more than $25,000, the school Principal or Head of Office shall submit a request to the DOE Division of Contracts and Purchasing to procure the goods or services on their behalf." Although E3Sports's services cost $45,000.00, the DOE Division of Contracts and Purchasing did not contain a record of a request related to this Purported Agreement. Consequently, Ms. Hunter argued that plaintiff never submitted the Purported Agreement to the Comptroller for proper registration pursuant to PPP § 2-09(a). Ms. Hunter submitted four Exhibits with her Affirmation in Support: [1] the Complaint, dated February 28, 2019, [2] the Notice of Claim, dated December 10, 2018, [3] E3Sports "Recess Enrichment Program" Contract (School Year – 2017/2018), [4] Procurement Policy and Procedures excerpts.

On September 18, 2019, Michael R. Futterman, Esq., attorney for plaintiff, submitted an Affirmation, opposing defendants' motion to dismiss plaintiff's Complaint.

Discussion

First Cause of Action – Breach of Contract

Plaintiff's first cause of action asserts that defendants breached their obligations under their Purported Agreement with plaintiff. According to the Complaint, defendants breached this

contract by (1) allowing the Purported Agreement to renew for the 2018-2019 academic year without paying the corresponding contract price, (2) directly engaging with Mr. Passarelli to perform the same services that he provided P.S. 135Q as an E3Sports Recess Enrichment Coach, and (3) knowingly making false representations to E3Sports.

P.S. 135Q did, on the merits, breach the Purported Agreement, as Principal Lagnese failed to respond to E3Sports's communications, allegedly sent between June 2018 and September 2019, by the termination deadline. However, pursuant to NY. Educ. Law § 2590-h(36), PPP § 1-04(b), PPP § 3-10(b)(2)(ii), PPP § 3-10(c), and PPP § 2-09(a), the first cause of action for breach of contract does not survive, for the reasons discussed below.

First, pursuant to N.Y. Educ. Law § 2590-h(36), to be enforceable, a Purported Agreement with a government entity, such as the DOE, must comply with specific procurement rules. More specifically, pursuant to PPP § 1-04(b), when a school requires services that are (1) unavailable in an existing contract and (2) anticipated to cost a sum greater than $25,000.00, "the school Principal or Head of Office shall submit a request to the DOE Division of Contracts and Purchasing to procure the goods or service on their behalf." Here, although the Purported Agreement was for $45,000.00 (i.e. more than $25,000.00), the aforementioned FAMIS search by the DOE's Chief Administrator of the Division of Contracts and Purchasing indicated that the database did not contain a record of any request to the DOE Division of Contracts and Purchasing to procure services set forth in the Purported Agreement.

The absence of the Purported Agreement in the FAMIS database also violates PPP § 2-09(a), which states, in pertinent part,

> Unless otherwise provided by law or these Procedures, all contracts, franchises, revocable consents and concessions shall be presented to the Comptroller for registration. Registration of a contract by the Comptroller shall not constitute an approval of the contract nor an approval of the process by which the contract or agreement was awarded.

PPP § 2-09(c)(2), (3) also requires a "certification of legal authority by the Corporation Counsel." However, the Purported Agreement not only did not receive a certification of legal authority or procedural requisites but also did not appear before the Comptroller for its registration.

Additionally, the $45,000.00 cost of E3Sports's academic-year services established the Purported Agreement as a Simplified Procurement Purchase. Pursuant to PPP § 3-10(b)(2)(ii), a Simplified Procurement Purchase requires that the school principal, superintendent, or other DOE officer solicit written bids or offers from a minimum of three vendors, outlining (1) the contract's requirements, (2) the requested response's time, date, place, and form, (3) the basis for the award, and (4) the contact information of the procurement manager to whom inquiries may be directed. Pursuant to PPP § 3-10(c), the principal or superintendent could then award the contract or purchase order only to the lowest responsive and responsible bidder or offeror. However, the Purported Agreement was not publicly bid to any vendors.

Although P.S. 135Q received services from Mr. Passarelli, "acceptance of services performed under an unauthorized contract does not estop a municipality from asserting the invalidity of the contract." Garrison Protective Servs. v Office of Comptroller, 92 NY2d 732, 736-37 (1999). Additionally, while plaintiff submitted two purchase orders, these forms do not include a number in the section marked for "Contract #." Accordingly, the Court must dismiss the first cause of action, for breach of contract, as the Purported Agreement is illegal and unenforceable.

Second Cause of Action – Breach of The Covenant of Good Faith and Fair Dealing

Plaintiff's second cause of action asserts that defendants breached the covenant of good faith and fair dealing by engaging in unjust and unwarranted conduct that wrongfully deprived E3Sports of the benefit of its Purported Agreement with P.S. 135Q. The Complaint claims that E3Sports has incurred substantial harm as a direct and proximate result of defendants' bad faith, as defendants (1) renewed the Purported Agreement for the 2018-2019 academic year without paying its contract price, (2) directly employed Mr. Passarelli to perform the same services that he provided as an E3Sports Recess Enrichment Coach, and (3) knowingly made false representations to E3Sports.

This Court agrees that a claim for breach of the covenant of good faith and fair dealing does not state an independent cause of action, as "such covenant does not impose any obligation upon a party to the contract beyond what the explicit terms of the contract provides." Silvester v Time Warner, Inc., 763 NYS2d 912, 918 (Sup. Ct. 2003) [*aff'd*, 14 AD3d 430 (2005)].

Additionally, an implied covenant of good faith and fair dealing requires a valid and binding contract, a provision that the Purported Agreement does not satisfy, as it was not registered pursuant to PPP § 2-09(a). Schorr v Guardian Life Ins. Co., 44 AD3d 319, 319 (1st Dep't 2007). Accordingly, the Court must dismiss the second cause of action, for breach of the covenant of good faith and fair dealing.

Third Cause of Action – Unjust Enrichment

Plaintiff's third cause of action asserts that E3Sports conferred a benefit by facilitating recess programming and personnel upon defendants that now inequitably retain the benefit. However, as defendants note, "where work is done pursuant to an illegal municipal contract, no recovery may be had by the vendor, either on the contract or in quantum meruit." S. T. Grand, Inc. v New York, 32 NY2d 300, 305 (1973). Additionally, the Court of Appeals emphasized that it is "long held that acceptance of services performed under an unauthorized contract does not estop a municipality from asserting the invalidity of the contract." Garrison Protective Servs. v Office of Comptroller, 92 NY2d 732. This Court fails to see unjust enrichment, as the Purported Agreement was illegal, and defendants paid for services received from plaintiff. Accordingly, the Court must dismiss the third cause of action, for unjust enrichment.

Fourth Cause of Action – Tortious Interference with Contractual Relations

Plaintiff's fourth cause of action asserts that defendants intentionally induced Mr. Passarelli to breach his then-existing contract with E3Sports or otherwise rendered performance impossible. According to the Complaint, Mr. Passarelli breached his contract with E3Sports, inflicting substantial damages upon E3Sports as a direct and proximate result.

For a cause of action for tortious interference with contractual relations to survive, plaintiff must allege the following: (1) the existence of a valid contract between E3Sports and Mr. Passarelli, (2) defendants' knowledge of that Purported contract, (3) defendants' intentional procuring of the breach of that contract, and (4) damages. Burrowes v Combs, 25 AD3d 370, 373 (1st Dep't 2006).

Complaint ¶ 54 states that "defendants were at all times aware of the contracts between E3Sports and Passarelli." Although defendants counter that the imprecision of this statement with reference to the Purported contract's legality, dates, and obligations fails to satisfy the second requirement for a cause of action for tortious interference with contractual relations, Palmisano v Modernismo Publications holds that "because [defendant's motion was] to dismiss, rather than for summary judgment, plaintiff had no obligation to show evidentiary facts to support the allegations in [its] complaint." Palmisano v Modernismo Publications, Ltd., 98 AD2d 953, 954 (4th Dep't 1983).

Furthermore, on September 20, 2018, Principal Lagnese apparently misspoke to E3Sports when stating that P.S. 135Q and Mr. Passarelli had not been in communication. However, Mr. Passarelli has since confirmed that P.S. 135Q had hired him during the summer prior to Principal Lagnese and E3Sports's September 20, 2018 conversation. Complaint ¶ 31 states,

> Upon information and belief, while E3Sports was attempting to discuss the 2018-2019 school year, both Principal Lagnese and Mr. Passarelli falsely stated that he was no longer working at P.S. 135Q in order to hide the school's material violation of the Agreement.

By withholding this information, failing to respond to E3Sports's communications by the deadline, and refusing to pay the $45,000.00 owed pursuant to the Purported Agreement's automatic renewal clause, P.S. 135Q knowingly inflicted damages upon plaintiff. Furthermore, Connaughton v Chipotle Mexican Grill, Inc. holds that tabulated "damages need not be demonstrated at the pleading stage as long as the possibility of damages may be reasonable inferred." Connaughton v Chipotle Mexican Grill, Inc., 23 NYS3d 215, 224 (1st Dep't 2016). Accordingly, plaintiff has stated a cause of action, for tortious interference with contractual relations.

Fifth Cause of Action – Prima Facie Tort

Plaintiff's fifth cause of action asserts that defendants, motivated at all times by a disinterested malevolence, have engaged in tortious conduct and intentionally inflicted harm upon E3Sports, without any excuse or justification.

For a cause of action for a prima facie tort to survive, malevolence alone must prompt defendants' actions against plaintiff. Complaint ¶ 30, however, states that P.S. 135Q chose to employ Mr. Passarelli individually, rather than in his capacity as an E3Sports employee, to obtain "a lower rate" for the same services. Accordingly, as the Complaint itself alleges that defendants had a separate motive, the Court must dismiss the fifth cause of action for prima facie tort.

CPLR 3211(a)(7) – Motion to dismiss, as pleading fails to state a cause of action
Dismissal pursuant to 3211(a)(7) is warranted when, after accepting the alleged facts as true and according to plaintiff the benefit of every possible favorable inference, the Court determines that the allegations do not correspond to any cognizable legal theory. Leon v Martinez, supra, 85 NY2d at 87-88; see also EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005). Bleiberg v City of New York holds, "there is no basis for holding the City vicariously liable for the actions of employees of the Board of Education, 'an entity separate and distinct from the City.'" Bleiberg v City of New York, 43 AD3d 969, 971 (2nd Dep't 2007). Accordingly, pursuant to CPLR 3211(a)(7), the Court grants dismissal in favor of the City of New York.

Conclusion
Thus, for the reasons set forth herein, the defendants' motion is granted to the extent of dismissing the first, second, third, and fifth causes of action in plaintiff's Complaint. Defendants' request to dismiss the fourth cause of action for tortious interference with contractual relations is denied. The Clerk is hereby directed to enter judgment, dismissing this case as against the City of New York only.

The parties are directed to appear for the previously scheduled Compliance Conference on January 28, 2020 at 10:00 AM, 60 Centre Street, Room 418, New York, NY.

11/6/2019
DATE

ARTHUR F. ENGORON, J.S.C.

HON. ARTHUR F. ENGORON

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