

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COLETTE ILODIGWE : CIVIL ACTION
 :
 v. :
 :
 :
 BRANDYWINE FINANCIAL, :
 DENISE DOYLE, BRUCE MOORE & :
 SHARON ALBA : NO. 98-1654

MEMORANDUM and ORDER

Norma L. Shapiro, J.

August 26, 1998

Plaintiff Colette Ilodigwe ("Ilodigwe"), alleging violations of 42 U.S.C. §§ 1981 and 1985(3), Title VII as amended by the Civil Rights Act of 1991 and the Pennsylvania Human Relations Act ("PHRA"), filed this action against defendants Brandywine Financial ("Brandywine"), Denise Doyle ("Doyle"), Bruce Moore ("Moore") and Sharon Alba ("Alba") (collectively the "defendants"). Defendants have moved to dismiss Count III of the Amended Complaint, alleging violation of 42 U.S.C. § 1985(3). For the reasons stated below, defendants' motion will be granted.

FACTS

Brandywine, formerly known as The Brandywine Group, is a corporation authorized to do business in Pennsylvania with a corporate office in Chadds Ford, Pennsylvania. (Compl. ¶ 4).¹ Doyle is Brandywine's chief administrative officer; Moore is employed as its president; and Alba is employed in an unknown capacity. (Compl. ¶¶ 8-10).

¹ References to the Complaint are to the Amended Complaint.

Ilodigwe was employed by Brandywine as an assistant investment manager from October, 1994 until her March 29, 1996 discharge; she was the only black employee of the seventeen employees in her group. (Compl. ¶¶ 11-13, 19). Brandywine officials informed Ilodigwe they were firing her because her performance was unsatisfactory and "her facial expressions were allegedly unsatisfactory to management." (Compl. ¶¶ 14-15). Ilodigwe contends that prior to her discharge, her work performance was "good to excellent" and she was never disciplined or warned of any shortcomings. (Compl. ¶¶ 16, 18).

Ilodigwe believes that white investment managers and employees were treated more favorably, in that they were given warnings and reprimands before being terminated for unsatisfactory performance. (Compl. ¶¶ 20-21). Ilodigwe also avers she was paid less than similarly situated white employees. (Compl. ¶ 22).

Ilodigwe claims that, during her employment at Brandywine, a conspiracy existed among the individual defendants and "certain unidentified state officials in order to deprive blacks of purchase opportunities in various rentals and sales which [Brandywine] handled and/or controlled." (Compl. ¶ 33). Ilodigwe was not aware of any such conspiracy while employed at Brandywine and does not plead how or where the alleged conspiracy was conducted. She claims the defendants feared she would

uncover a conspiracy and therefore fired her before she could do so. (Compl. ¶ 32).

Ilodigwe asserted four claims in her Amended Complaint under: 1) 42 U.S.C. § 1981;² 2) Title VII as amended by the Civil Rights Act of 1991; 3) 42 U.S.C. § 1985(3);³ and 4) the PHRA.⁴ Defendants move to dismiss Count III under 42 U.S.C. § 1985(3).

² 42 U.S.C. § 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

³ 42 U.S.C. § 1985(3) provides:

If two or more persons in any State or Territory conspire ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; ... in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

⁴ The parties stipulated to the withdrawal of the PHRA claim.

DISCUSSION

I. Standard of Review

In considering a motion to dismiss under Rule 12(b)(6), the court "must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 665 (3d Cir. 1988), cert. denied, 489 U.S. 1065 (1989); see Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). The court must decide whether "relief could be granted on any set of facts which could be proved." Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988). A motion to dismiss may be granted only if the court finds the plaintiff can prove no set of facts in support of her claim which would entitle her to relief. See Conley v. Gibson, 355 U.S. 41, 45 (1957).

II. 42 U.S.C. § 1985(3)

To establish a cause of action under § 1985(3), a plaintiff must show: 1) a conspiracy; 2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; 3) an act in furtherance of the conspiracy; and 4) which injures an individual in her person or property or deprives her of any right or privilege of a citizen

of the United States. See United Bhd. of Carpenters & Joiners v. Scott, 463 U.S. 825, 828-29 (1983); Lake v. Arnold, 112 F.3d 682, 685 (3d Cir. 1997).

Section 1985(3) is a "purely remedial statute, providing a civil cause of action when some otherwise defined federal right--to equal protection of the laws or equal privileges and immunities under the laws-- is breached by a conspiracy in the manner described in the statute." Great American Fed. Sav. & Loan Assoc. v. Novotny, 442 U.S. 366, 376 (1979). The conspiracy not only must have as its purpose the deprivation of "equal protection of the laws, or of equal privileges and immunities under the laws," but must also be motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Griffin v. Breckenridge, 403 U.S. 88, 102 (1971); see Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 268 (1993). Ilodigwe has alleged defendants acted based on animus toward blacks, a protected class.

Mere conclusory allegations of deprivations of constitutional rights are insufficient to state a § 1985(3) claim. See D.R. v. Middle Bucks Area Vocational Tech. Sch., 972 F.2d 1364, 1377 (3d Cir. 1992) (in banc), cert. denied, 506 U.S. 1079 (1993). "A conspiracy claim based upon § 1985(3) requires a clear showing of invidious, purposeful and intentional

discrimination between classes or individuals." Robinson v. McCorkle, 462 F.2d 111, 113 (3d Cir. 1972), cert. denied, 409 U.S. 1042 (1972); see Flagg v. Control Data, 806 F. Supp. 1218, 1224 (E.D. Pa. 1992), aff'd, 998 F.2d 1002 (3d Cir. 1993), cert. denied, 510 U.S. 1052 (1994).

A plaintiff can maintain a cause of action under § 1985(3) for a purely private conspiracy only when "the conspiracy aimed at interfering with rights that are protected against private, as well as official, encroachment." Bray, 506 U.S. at 267; see Scott, 463 U.S. at 833. A defendant must "do more than merely be aware of a deprivation of right that he causes, and more than merely accept it; he must act at least in part for the very purpose of producing it." Bray, 506 U.S. at 276. If the rights with which defendants allegedly interfered "are aimed at a right that is by definition a right only against state interference," state action is required. Scott, 463 U.S. at 833.

The Amended Complaint refers to the right to "purchase opportunities in various real estate rentals and sales," (Compl. ¶ 33), but does not allege its source. In her response to defendants' motion to dismiss, Ilodigwe argues defendants' alleged conspiracy deprived rights created by 42 U.S.C. §§ 1981 and 1982, the Fair Housing Act ("FHA"), 42 U.S.C. § 3601, et seq., and state anti-discrimination statutes.

Plaintiff appears to claim a right to recover under §

1985(3) for injuries to unknown blacks who may have been denied an opportunity to purchase mobile homes in a Haines City, Florida development by the alleged conspiracy among defendants. Ilodigwe did not allege any supporting facts in her Amended Complaint, the only pleading relevant in a motion to dismiss. In her response to defendants' motion to dismiss, she states for the first time that George Fleming ("Fleming"), an owner and partner of Brandywine, told Aimee Moulder ("Moulder") in the summer of 1996 that various Brandywine officials had told him in the fall of 1987 that Brandywine would not sell any mobile homes to blacks. Moulder then told Ilodigwe of this alleged conversation almost ten years prior to Ilodigwe's termination, after Ilodigwe had been fired. See Pltff.'s Brief at 5-7.⁵

A plaintiff must have standing to assert a claim under § 1985(3). Article III requires that the plaintiff show she "personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979). "The injury must be concrete and capable of being

⁵ Ilodigwe attached to her response to the motion to dismiss an affidavit of Moulder alleging these facts. On a motion to dismiss, the court is not permitted to look beyond the facts alleged in the Complaint and any exhibits attached thereto. To consider extraneous exhibits on a motion to dismiss, the court must convert the motion to one for summary judgment. See Fed. R. Civ. P. 12(b); Rose v. Bartle, 871 F.2d 331, 340 (3d Cir. 1989). Rather than convert the motion, the court will simply ignore Moulder's affidavit.

redressed by the court should the plaintiff prevail on the merits." Wheeler v. Travelers Ins. Co., 22 F.3d 534, 537-38 (3d Cir. 1994); see Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38-40 (1976). These requirements ensure a plaintiff has a "personal stake" or "interest" in the outcome of the proceedings, Simon, 426 U.S. at 38-39, sufficient for the exercise of the court's jurisdiction and remedial powers on plaintiff's behalf. Warth v. Seldin, 422 U.S. 490, 498-99 (1975).

"Even when a case falls within these constitutional boundaries, a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim." Gladstone, 441 U.S. at 99. These prudential considerations require that: 1) a litigant assert her own legal interests rather than those of third parties; 2) courts refrain from adjudicating abstract questions of wide public significance; and 3) a litigant demonstrate that her interests are arguably within the zone of interests intended to be protected by the statute, rule, or constitutional provision on which the claim is based. See Stehney v. Perry, 101 F.3d 925, 930 (3d Cir. 1996); Wheeler v. Travelers Ins. Co., 22 F.3d 534, 538 (3d Cir. 1994).

In a § 1985(3) suit, the plaintiff may not litigate a claim of conspiracy to deny others their rights when she was not herself a member of the class targeted by the conspirators. See Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237 (1969) (white plaintiff who was expelled from a social club because he intended to assign his share to a black person had standing because he was punished for trying to violate conspirators' intent to deny membership to blacks persons); Barrows v. Jackson, 346 U.S. 249, 257 (1952) (plaintiff must have been a member of the class targeted by the conspiracy unless she is "the only effective adversary" available).

Ilodigwe did not attempt to rent or buy a mobile home in the Florida development that was the alleged target of defendants' discriminatory conduct. Ilodigwe states that had she attempted to purchase a mobile home, "she would have most assuredly been included in the class against which defendants' conspiracy was directed." Pltff.'s Brief at 15. Ilodigwe could have tried to purchase a mobile home and thereafter might have been denied the opportunity to do so, but she did not and was not. She alleges nothing more than a hypothetical or speculative injury; it is insufficient to create standing under § 1985(3). A black person allegedly denied the right to purchase a mobile home might have filed an action in his or her own right.

The only harm that Ilodigwe herself suffered was termination

of her employment by Brandywine. Construing Ilodigwe's Complaint in the most favorable manner, she might be alleging defendants conspired to deprive her of her employment because of her race. However, "§ 1985(3) may not be invoked to redress violations of Title VII." Novotny, 442 U.S. at 378; see Emrick v. Bethlehem Steel Corp., 624 F.2d 450, 454 (3d Cir. 1980). Ilodigwe contends Novotny is not binding because it predated the Civil Rights Act of 1991 conferring the right to a jury trial and other remedies previously unavailable to Title VII plaintiffs. See Pltff.'s Brief at 11.

In Novotny, the Court stressed the need to preserve the "detailed administrative and judicial process designed to provide an opportunity for nonjudicial and nonadversary resolution of claims" established by Congress under Title VII. Novotny, 442 U.S. at 372-73. Precluding a remedy under § 1985(3) based on adverse employment action prevents a plaintiff from "completely bypass[ing] the administrative process, which plays such a crucial role in the scheme established by Congress in Title VII." Id. at 376. The additional Title VII remedies provided by the Civil Rights Act of 1991 do not abrogate the rationale of the Supreme Court holding in Novotny; plaintiff cannot recover under § 1985(3) for an alleged conspiracy to deprive her of employment.

Even if there were a § 1985(3) cause of action for a conspiracy aimed at deprivation of employment, Ilodigwe has not

alleged any form of conspiracy recognized by the statute.

Ilodigwe alleges three employees of Brandywine conspired together and with Brandywine to terminate her employment and deprive other unknown black individuals from buying mobile homes. Assuming the corporate officers could conspire with one another, see Novotny, 442 U.S. at 372 n.11 ("we assume but certainly do not decide that the directors of a single corporation can form a conspiracy within the meaning of § 1985(3)"), the corporation could not conspire with individuals acting within the scope of their employment. See Robison v. Canterbury Village, 848 F.2d 424, 431 (3d Cir. 1988).

To form a conspiracy under § 1985(3), the officers must have acted "in a personal, as opposed to official, capacity." Id.; see Johnston v. Baker, 445 F.2d 424, 427 (3d Cir. 1971) (corporation and its officers cannot conspire with one another unless the officers acted for personal reasons outside the scope of their employment); see also Novotny v. Great American Fed. Sav. & Loan Assoc., 584 F.2d 1235, 1257-58 (3d Cir. 1978) (where Complaint did not allege corporation conspired with its officers, but individual officers conspired among themselves, valid § 1985(3) conspiracy alleged), vacated on other grounds, Novotny, 422 U.S. 366.

Ilodigwe has alleged that defendants conspired together to terminate her employment and deprive unknown blacks the

opportunity to buy mobile homes as part of a concerted business effort because "there was an advantage to having no African-Americans owning property" in the development. Pltff.'s Brief at 6. The alleged conspiracy was committed in the scope of the individual defendants' employment in furtherance of a business decision on behalf of Brandywine, so there was no conspiracy cognizable under § 1985(3).

Ilodigwe attempts to broaden the alleged conspiracy beyond Brandywine's employees by superficially alleging that various, unknown state officials may have been involved in defendants' plan to keep blacks from buying mobile homes. The Florida Department of Business Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes ("Florida Division") regulates the mobile home industry. The Florida Division was involved in issuing occupancy permits for mobile homes in the development at issue, so plaintiff claims "it may be inferred that the Florida Division was aware of, chose to ignore and/or involved in the conspiracy." Id. Ilodigwe concedes she does not know "any of the potential state officials in Florida with whom defendants conspired." Pltff.'s Brief at 7.

"[M]ere conclusory allegations of deprivations of constitutional rights ... are insufficient to state a § 1985(3) claim." D.R., 972 F.2d at 1377; see Robinson v. McCorkle, 462 F.2d 111, 113 (3d Cir.), cert. denied, 409 U.S. 1042 (1972). It

is clear Ilodigwe has no foundation for her allegation that unspecified Florida state officials were involved in the alleged conspiracy to terminate her employment or deprive black persons of the ability to live in the Haines City, Florida development; plaintiff has not alleged a conspiracy among defendants and others outside the scope of Brandywine's operations.

CONCLUSION

Ilodigwe lacks standing to challenge a conspiracy to deprive unidentified black individuals from purchasing mobile homes in a Florida development because she has never attempted to purchase a home or been injured by the alleged conspiracy. Ilodigwe's only injury, her termination from employment, is not redressable under § 1985(3). Even if Ilodigwe's claims were cognizable under § 1985(3), she has not alleged any cognizable conspiracy. Defendants' motion to dismiss Count III of the Amended Complaint will be granted.

An appropriate Order follows.

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SHARON ALBA : NO. 98-1654

ORDER

AND NOW, this 27th day of August, 1998, upon consideration of defendants' motion to dismiss Count III of plaintiff's Amended Complaint, plaintiff's response, defendant's reply thereto and in accordance with the attached Memorandum, it is hereby **ORDERED** that:

Defendants' motion to dismiss Count III of the Amended Complaint (under 42 U.S.C. § 1985(3)) is **GRANTED**.

Norma L. Shapiro, J.