

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

PRESENT: Cahn  
*Justice*

PART 4am

Zomba Recording LLC et al  
INDEX NO.

600639/06

MOTION DATE

1/25/07

MOTION SEQ. NO.

004

MOTION CAL. NO.

Anthony C. Williams II et al

- v -

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION IN MOTION SEQUENCE.....

**FILED**  
MAR 01 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 2/7/07

A. Cahn

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMM. DIV. PART 49

-----X  
ZOMBA RECORDING LLC,

Plaintiff,

-against-

Index No.: 600639/06

ANTHONY C. WILLIAMS, II. and MO' SOULE  
STEPPYN RECORDS, INC.,

Defendants.  
-----X

HERMAN CAHN, J.:

This is an action concerning the rights to the work of recording ~~rights~~ and defendant  
Anthony C. Williams, II.

Prior to May 2004, defendant Williams performed under the name "Tonéx" for Verity  
Records, the label for plaintiff Zomba Recording LLC (Zomba). His services are provided  
through defendant Mo' Soule Steppyn Records, Inc. (MSSR), Williams' wholly-owned  
company. The parties dispute whether an agreement, dated as of November 1, 2000, between  
Zomba's predecessor, Zomba Recording Corporation, defendant Williams, MSSR and Tommy  
Boy Music (the Zomba contract), which reserves Williams' exclusive recording services to  
plaintiff, is governed by New York or California law and whether it is still enforceable.

Plaintiff Zomba moves for partial summary judgment, a preliminary injunction and leave  
to amend its complaint. Specifically, plaintiff seeks partial summary judgment, pursuant to  
CPLR 3212 and 3001, declaring that the Zomba contract is governed by New York law as  
provided in paragraph 6.4 thereof. Plaintiff also moves, pursuant to CPLR 6311 and 6313, for a  
preliminary injunction enjoining and restraining defendants from producing, manufacturing,  
distributing, releasing, marketing, advertising and offering to sell any sound recordings

**FILED**  
MAR 01 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

embodying Tonéx' vocal or musical performances. Finally, plaintiff seeks leave to amend the complaint, pursuant to CPLR 3025(b), to add a cause of action for injunctive relief against defendants and to add Nureau, LLC as a party defendant.

In support of the instant motion, plaintiff alleges that defendants have entered into a competing recording agreement with non-party Nureau Ink, LLC, in derogation of plaintiff's exclusive rights, and are now unlawfully advertising, promoting, offering for sale and selling via the Internet and elsewhere the albums entitled *OaK ParK 921'06*, *London Letter and Tonéx Presents: AJB & AP -- Happy Holidays*. In addition, plaintiff alleges that Williams is engaged in a purposeful campaign to injure Zomba's good will and credibility in the music industry and elsewhere by advertising and selling t-shirts with the banner "Where's Tonéx?" to symbolize his self-described struggle with Zomba over the rights to his recording services.

Defendants Williams and MSSR oppose the motion, arguing that the Zomba contract terminated when plaintiff failed to timely exercise an option to extend it for another term. Alternatively, defendants maintain that the Zomba contract is subject to a California law, specifically section 2855 of California's Labor Code, which provides that personal service contracts cannot be enforced beyond seven years, which time defendants allege has expired. Defendants also contend that plaintiff is not entitled to a preliminary injunction on the ground that it has materially breached the Zomba contract by failing to properly and timely account to MSSR and Williams for years, Zomba waited over a year before seeking injunctive relief, and because the injunction will cause more harm to defendants by its issuance than benefit Zomba.

#### **FACTUAL BACKGROUND**

On February 4, 1997, defendant Williams entered into a recording agreement with Rescue

Records, Inc. (Rescue) of Chula Vista, California, wherein he agreed to perform services and record for Rescue as its exclusive worldwide recording and video artist. The term of the agreement was two years with four options by Rescue to renew for consecutive one-year periods. The Rescue recording agreement contained a Tennessee choice of law provision. Williams released his first album, entitled *Pronounced Toe-nay*, while under contract with Rescue.

On July 27, 1998, with the permission of Rescue, MSSR entered into an exclusive recording contract with Tommy Boy Music, a New York company, for a one-year term, plus five successive options by Tommy Boy to extend the contract for two years, for a possible maximum term of eleven years (the Tommy Boy recording agreement). Section (C)(3)(b) of the Tommy Boy recording agreement provides that it has been entered into in the State of New York, and its validity, construction, interpretation and legal effect shall be governed by New York law. In a three-page letter agreement, also dated July 27, 1998, that Williams signed, he agreed to the execution of the recording agreement between MSSR and Tommy Boy and guaranteed performance thereunder. In paragraph 8 of the letter, Williams agreed that it would be “construed under the internal laws of the State of New York applicable to agreements to be performed wholly therein.”

On December 10, 1998, the Rescue recording agreement was assigned to Zomba, and sometime in 2000, the Tommy Boy recording agreement was also assigned to Zomba.

In the November 1, 2000 Zomba contract, MSSR and Williams agreed that the Rescue recording agreement was valid, in full force and effect, validly assigned to Zomba and that they irrevocably consented to such assignment. Paragraph 2.1 states that the Tommy Boy recording agreement “shall be deemed valid, binding, in full force and effect, and enforceable in all

respects [as amended] effective retroactively to July 1, 2000.” Paragraph 2 amends the term of the Tommy Boy recording agreement, changing it to an initial contract period and five successive irrevocable options by Zomba to renew based, not on time, but on Williams’ delivery of a certain minimum number of albums. Paragraph 2.3.1(d) of the Zomba contract requires written notice by Zomba to MSSR to exercise the options.

Zomba contends that Williams delivered two albums under the Zomba Contract, providing plaintiff with the right to four additional albums, plus additional masters. Williams’ first Zomba album, *Tonéx O2*, was released in 2002, and sold over 110,000 copies. On May 18, 2004, Zomba released his second album entitled *Out The Box*, which has sold over 150,000 copies, was critically acclaimed and nominated for a 2004 Grammy Award for “Best Contemporary Soul Gospel Album.”

In January 2005, defendants hired a new attorney, Courtney M. Coates, Esq. Williams avers that he hired Coates to determine his and MSSR’s rights as to the Rescue and Tommy Boy recording agreements, because Zomba had failed to provide accountings, failed to adequately compensate him for his services, and did not respond to his complaints over several years that he was not being paid, treated fairly and was very unhappy. Coates contacted Zomba and requested copies of all accountings and transaction documents relating to his clients’ agreements with Zomba. By e-mail dated January 19, 2005, Zomba sent Coates a copy of a letter dated November 29, 2004 letter purporting to exercise the second option as well as a copy of the Tommy Boy recording agreement.

During 2005, Coates was in ongoing negotiations with Zomba over its alleged failure to provide accountings and pay monies to defendants, and Zomba’s alleged refusal to recognize the

overall need to update and revisit terms of what he terms defendants' "outdated" recording agreement. The negotiations were not successful. On or about December 20, 2005, Williams digitally released an album entitled *OaK ParK: 921'o5* on the Internet without Zomba's prior consent or knowledge. There is no dispute that Roger Skelton of Verity Records telephoned Coates in early January 2006 and verbally objected to its release.

On January 5, 2006, Coates wrote to Skelton. In the letter, Coates contended that the Tommy Boy recording agreement had "expired long ago," and that "[a]lthough there are many other legal reasons why the Recording Agreement is no longer binding on Tonéx, the main reason is that the contract expired when Tommy Boy Music (and Zomba) failed to timely exercise its options to extend the term of the contract." Defendants' counsel further claimed that the relationship between Williams and Zomba was governed by section 2855(a) of the California Labor Code, thus limiting the binding terms of the Recording Agreement to a maximum of seven years, which time had also already passed. Finally, he concluded by stating that defendant Williams would "no longer perform any additional actions on behalf of or render any additional services to Verity or Zomba, effective January 10, 2006."

Skelton responded by letter dated January 11, 2006, in which he stated that Zomba disputed all of the claims made in Coates' January 5th letter, and that "[t]o be clear, the recording agreement granting your client's recording services to Zomba on an exclusive basis continues to be in full force and effect" (emphasis in original).

Coates e-mailed Eric M. Levine, Zomba's "Vice President - Business Affairs," on February 12, 2006 requesting a written response to his January 5, 2006 letter, as well as a copy of the signed certificate of receipt for the November 29, 2004 letter. In an e-mail response of the

same date, Levine pointed out that even if defendants were to take the position Zomba had failed to exercise the second option in a timely fashion, MSSR would be required to send Zomba written notice thereof and Zomba would have twenty business days to exercise the option. "Your invoking that paragraph now will simply lead us to "re-exercise" the option and we'd be at precisely the same place we are at now." Coates responded by e-mail on February 14th, stating that "Zomba received written notice that it failed to timely exercise the option at issue -- more than 20 business days ago."

Another letter, described as the "formal response " to Coates January 5th letter was sent on February 23, 2006 by Levine. This letter disputes that California law applies, and asserts that even if the November 29, 2004 letter was untimely, defendants had failed to send the requisite notice commencing Zomba's twenty-day grace period to exercise the option. Levine concluded by stating that the Tommy Boy recording agreement, as amended by the Zomba contract, remains in full force and effect.

This action was commenced on February 26, 2006. The day before the defendants were served with process, Williams filed an action against Zomba in the United States District Court for the Southern District of California. Nureau Ink LLC, et al. v Zomba Recording, LLC, et al., 2006 US Dist. LEXIS 87240 (SDCA Nov 29, 2006). By order and decision dated November 29, 2006, the district court dismissed the California action for improper venue based, inter alia, on the New York forum-selection clause in the Zomba contract.

On October 4, 2006, Zomba's attorney wrote to Coates, advising that Williams was blatantly violating the terms of his exclusive recording agreement with Zomba "and" that he is engaging in or about to engage in the unauthorized manufacture, distribution and sale of "master

recordings that are exclusively owned and controlled by Zomba.” Specifically, Zomba objected to the release of a new album entitled *Oak Park 921'06* which Zomba contended was being advertised on Williams’ website at [www.myspace.com](http://www.myspace.com) and elsewhere. Zomba demanded that he cease releasing this new album and provide an accounting of any existing sales. Coates responded on October 6, 2006, claiming that Williams was not re-releasing any master recordings owned by Zomba, and indicating that the parties’ rights would be determined by the courts.

On October 27, 2006, Zomba’s counsel once again wrote to Coates, contending that he was dodging the issue of whether Williams intended to violate the exclusive recording provisions of his recording agreement with Zomba by releasing, in some form or other, the album entitled *Oak Park 921'06* on the Nureau Ink imprint. Coates responded on November 15, 2006, stating:

Mr. Williams finds it hard to believe that Zomba continues to interfere with his ability to record and earn a living, given Zomba’s ongoing breaches of contract. Zomba interferes at its own peril. Mr. Williams is willing to enter a mutually acceptable agreement concerning his release of future recordings through another record label, other than Verity Records. If that is not acceptable, Mr. Williams has no alternative but to earn a living and to let a court vindicate his rights.

This motion was filed on December 22, 2006.

## **DISCUSSION**

### **Amendment of the Complaint**

Plaintiff seeks leave to amend the complaint, pursuant to CPLR 3025(b), to add a cause of action for injunctive relief against defendants and to add Nureau Ink, LLC as a party defendant.

Since leave to amend is freely given absent prejudice or surprise to the opposing party (CPLR 3025[b]; Zaid Theatre Corp. v Sona Realty Co., 18 AD3d 352, 354-55 (1st Dept 2005), and defendants do not oppose this relief, this portion of plaintiff's motion is granted. Since there is no dispute that the newly-added defendant, Nureau Ink, LLC is a wholly-owned company of defendant Williams, the amended complaint is deemed served as of December 22, 2006, the date of service of the order to show cause on defendants' counsel. Defendants shall have twenty (20) from service of a copy of this order with notice of entry, on their attorney, to serve and file an answer to the amended complaint.

### **Choice of Law**

The Zomba contract provides in paragraph 6.4:

This Agreement shall be construed in accordance with the internal laws of the State of New York (exclusive of conflict of law principles) governing agreements entered into and wholly performed therein.

Defendants argue that the application of New York law to this dispute violates "fundamental protections" afforded to California recording artists under contracts for personal services.

New York recognizes the validity and enforceability of contractual choice-of-law provisions. Boss v American Express Fin. Advisors, Inc., 15 AD3d 306, 307 (1st Dept 2005), affd on other grounds 6 NY3d 242 (2006); Marine Midland Bank, N.A. v United Missouri Bank, N.A., 223 AD2d 119, 122-23 (1st Dept), lv dismissed 88 NY2d 1017 (1996). "A basic precept of contract interpretation is that agreements should be construed to effectuate the parties' intent." Welsbach Electric Corp. v MasTec North America, Inc., 7 NY3d 624, 629 (2006). However, the freedom to contract is not absolute, and courts will not enforce a choice of law provision if the

chosen law bear no reasonable relationship to the parties or the transaction. Id. In addition, New York, following section 187(2) of the Restatement (Second) of Conflicts,<sup>1</sup> will not apply a law that violates a fundamental public policy of another state which has a materially greater interest than the chosen state in the determination of the particular issue, and which would be the state of the applicable law in the absence of an effective choice of law by the parties. Marine Midland Bank, N.A., 223 AD2d at 123-24; see also Beatje and Osborn LLP v Patriot Scientific Corp., 431 F Supp 2d 367, 378 (SDNY 2006); Radioactive, J.V. v Manson, 153 F Supp 2d 462, 469 (SDNY 2001).

Case law construing the validity of foreign choice of law provisions provide, in accordance with the Restatement (Second) of Conflicts § 187(2), that the chosen law must not violate some fundamental public policy of New York. See, e.g., Hugh O’Kane Elec. Co., LLC v Mastec North America, Inc., 19 AD3d 126,127 (1st Dept 2005) (Florida choice of law provision); Finucane v Interior Constr. Corp., 264 AD2d 618, 620 (1st Dept 1999) (Oklahoma choice of law provision); Andin Intl. Inc. v Matrix Funding Corp., 194 Misc 2d 719, 722 (Sup

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<sup>1</sup> Restatement (Second) of Conflicts § 187(2) states:

The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either --

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Ct, NY County 2003) (Utah choice of law provision). However, as defendants correctly point out, the analysis in this case turns on whether the application of New York law would violate a fundamental public policy of another jurisdiction with materially greater interests in the dispute.

New York, chosen by the parties to govern their contract, has a reasonable relationship to the parties and this dispute, because Zomba's principal place of business is in New York City. Finucane, 264 AD2d at 620, citing Zerman v Ball, 735 F2d 15, 20 (2d Cir 1984); Beatie and Osborn LLP, 431 F Supp 2d at 378. In addition, in the California federal court action, Williams conceded that the New York choice-of-law clause has a reasonable connection to New York.

It is not necessarily true, as defendants maintain, that California law would apply to this dispute in the absence of the choice-of-law provision. New York applies a "grouping of contacts" or "center of gravity" approach to choice of law questions in contract cases. Zurich Ins. Co. v Shearson Lehman Hutton, Inc., 84 NY2d 309, 317 (1994); Matter of Allstate Ins. Co. v Stolarz, 81 NY2d 219, 226 (1993). Under this approach, the court may consider all the significant contacts with the two states, including the place of contracting, the places of negotiation and performance, the location of the subject matter, and the domicile or place of business of the contracting parties. Matter of Allstate Ins. Co., 81 NY2d at 227; Ackerman v Price Waterhouse, 252 AD2d 179, 192 (1st Dept 1998); Restatement (Second) of Conflict of Laws § 188(2).

The only connections between California and the Zomba contract is the fact that Williams is a native of San Diego, that he wrote, arranged, recorded and produced "almost" all of his music from his home studio in San Diego, and that MSSR is a California S-corporation. See Williams Aff., ¶ 1, 2, 10. However, as explained in the reply affidavit of Daniel B. Zucker, the

creation of the actual sound recording, although highly important and necessary, is merely the beginning step of the process of producing a successful album. Zucker avers that Zomba has invested more than \$1,500,000 in Williams' recording career. Zucker contends that the specific activities conducted by Zomba to advance Williams' career include national advertisements, press releases, radio and video promotion, as well as manufacturing, distributing and selling records; and that each of these activities was initiated, formulated and implemented by Zomba's employees working in New York City.

Other contacts with New York include the fact that two of the contracting parties -- Zomba and Tommy Boy -- are located in New York, and negotiated the Zomba contract by telephone and fax communications from New York. In addition, the Zomba contract amends a prior recording agreement, voluntarily entered into by defendants with another New York company, Tommy Boy, which also provides for the application of New York law. Finally, the parties agreed to the exclusive jurisdiction of New York courts for any disputes arising under the Zomba contract. Thus, even absent the choice-of-law provision, a grouping of contacts analysis would recommend application of New York law.

Accordingly, the court need not determine whether enforcement of the Zomba contract beyond seven years would violate a fundamental public policy of the state of California. However, even if the California law applied, which it does not, by its terms, the Zomba contract is enforceable until July 1, 2007.

Defendants contend that in the Tommy Boy recording agreement, the parties expressly agreed to submit to California law in order to secure injunctive relief against Williams. However, the contract provisions that defendants rely on appear in paragraph 5 of the inducement

letter that Williams signed. This paragraph states only that Williams:

is guaranteed compensation by [MSSR] at the minimum required . . . specified in Section 3423(e)(2)(A)(I) of the California Civil Code and Section 526(b)(5)(B)(i)(I) of the California Code of Civil Procedure. . . . [Williams] further acknowledge and agree that the aforesaid is intended to be construed so as to comply with the [aforesaid provisions of California law] concerning the availability of injunctive relief to prevent the breach of an agreement in writing for the rendition of personal services. It is acknowledged that this Paragraph 5 is included herein to avoid compromise of Tommy Boy's rights by reason of a finding of the applicability of California law, but shall not affect the agreement of the parties hereto as to the applicability of New York law.

(Emphasis added). Zomba contends that this provision is routinely included in recording contracts as a prophylactic measure. Regardless of its purpose, the clear intent of the final sentence is that it cannot be read as usurping the parties' choice of New York law to govern their contractual relationship.

Accordingly, plaintiff is entitled to partial summary judgment on the first cause of action, pursuant to CPLR 3212 and 3001, declaring that the Zomba contract is governed by New York law as provided in paragraph 6.4 thereof, and thus not subject to the California Labor Code.

### **Preliminary Injunction**

Zomba maintains that defendants have anticipatorily repudiated the Zomba contract by refusing to perform thereunder, and they are pursuing the manufacture, production, sale and exploitation of two unauthorized albums. Zomba seeks asks this court to enjoin and restrain defendants from producing, manufacturing, distributing, releasing, marketing, advertising and offering to sell any sound recordings embodying Williams' vocal or musical performances.

In order to be entitled to a preliminary injunction, plaintiff must show a probability of

success on the merits, a danger of irreparable injury in the absence of an injunction and a balance of the equities in its favor. Aetna Ins. Co. v Capasso, 75 NY2d 860, 862 (1990); W.T. Grant Co. v Srogi, 52 NY2d 496, 517 (1981); 35 New York City Police Officers v City of New York, 34 AD3d 392 (1st Dept 2006).

On the merits, there is no doubt that defendants are in breach of the Zomba contract due to their admitted violation of its exclusivity provisions. Defendants argue, however, that Zomba cannot show a likelihood of success on the merits because the Zomba contract has expired and Zomba itself in substantial breach due to its failure to properly and timely account to defendants for years.

Turning first to the question of whether there is an enforceable agreement between the parties, defendants contend that Zomba failed to timely exercise the second option to extend the Zomba contract. The parties do not dispute that Zomba had until November 30, 2004 -- the date six months after the last day of the month in which *Out The Box* was released -- to exercise its second option to extend the Tommy Boy recording agreement, as amended by the Zomba contract.<sup>2</sup> Zomba claims it mailed a notice purporting to exercise the second option on November 29, 2004 from New York to MSSR care of Williams at his 2307 Fenton Parkway, San Diego, CA 92108 address, by certified mail, return receipt requested. Williams denies receiving the notice. According to the United States Postal Service, Zomba's letter was delivered to the

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<sup>2</sup> The parties' motion papers are devoid of any discussion as to how, when, and whether the first option was properly exercised by Zomba. Although counsel for the defendants argued in the pre-litigation letter dated January 5, 2006, that his client had no recollection of receiving notice of the exercise of the first option, defendants do not raise this argument in opposition to plaintiff's motion in this action. Thus, the court assumes that the first option was properly and timely exercised.

correct zip code, 92108, although neither party presents the signed green return receipt card.

Defendants argue that this notice is defective since, under paragraph 6.2 of the Zomba contract, notices are deemed given when received and even if this notice was sent, it arrived three days too late and was not sent to the designated address for notices to MSSR listed in paragraph 6.2 the Zomba contract, namely MSSR's attorney, Stephen Barnes, Esq.

On the issue of MSSR's proper address for notices, Zomba contends that, as early as January 2002, Stephen Barnes had stopped representing the defendants, and therefore Zomba was sending documents directly to Williams without objection. Nevertheless, under a strict interpretation of the Zomba contract, the November 29, 2004 notice is still problematic as it apparently did not reach San Diego until three days after the deadline.

Despite the untimeliness of the November 29, 2006 letter, the inquiry is not ended since the Zomba contract contains the following additional provision regarding Zomba's right to exercise its options:

(e) Notwithstanding anything to the contrary contained in this Article 2, if Tommy boy does not give Company notice of its election to exercise (or not to exercise) an option within the time limits set forth in paragraphs 2(b), (c) or (d), Company will give Tommy Boy notice of its failure to make such election and Tommy Boy will have twenty (20) business days after its receipt of such notice from Company (the "Grace Period") to exercise the option concerned.

The clear purpose and intent of this provision is to ensure the option did not lapse by mere inadvertence or passage of time. Contrary to defendants' contention, their counsel's January 5, 2006 letter does not give the requisite notice if the court, as defendants contend, applies a strict interpretation of the Zomba contract. First, Coates is referring to outdated provisions of the underlying Tommy Boy recording agreement when he declares the parties' agreement has

expired. Second, the letter does not mention that Zomba was entitled to cure its alleged failure to exercise the second option within twenty business days; rather it declares that Williams will no longer perform any additional services to Verity Records or Zomba in five business days. Third, Coates' January 5th letter was not sent by "overnight carrier," but by facsimile and regular mail. Fourth, it does not appear that the letter was sent to the proper recipients as paragraph 6.2 of the Zomba contract requires notices to be sent to Zomba's "Senior Vice President of Business Affairs," with a courtesy copy to Zomba's attorneys. The January 5th letter was sent to Roger Skelton. He claims that he is merely a consultant in Zomba's Department of Business Affairs, and Daniel B. Zucker, Esq. holds the title of "Senior Vice President, Business & Legal Affairs." Finally, there is no doubt that Zomba had no intention of releasing Williams from the contract and, as Levine's February 13, 2006 e-mail points out, even if MSSR had given Zomba notice of the grace period, Zomba simply would have re-exercised the option.

Defendants' second argument concerning the merits of this dispute is that Zomba's own contractual breaches bar the injunctive relief sought. "When a party benefitting from a restrictive covenant in a contract breaches that contract, the covenant is not valid and enforceable against the other party because the benefitting party was responsible for the breach." DeCapua v Dine-A-Mate Inc., 292 AD2d 489, 492 (2d Dept 2002); see also Michael I. Weintraub, M.D., P.C. v. Schwartz, 131 AD2d 663, 665-66 (2d Dept 1987). Williams avers that although he received some moderate advances prior to 2005, for years Zomba failed to pay him or provide him with the semi-annual royalty statements to account for royalties generated which would be offset against his negative royalty account that is required by Section 4(d) of the Tommy Boy recording agreement. His attorney, Courtney Coates, avers that he concluded from the lack of

documentation forthcoming from Zomba that it had failed to provide any accountings from November 2000 to February 6, 2006, and that the accountings that were then forthcoming were incomplete and omitted albums and videos covered under the Zomba contract.

In response, Daniel Zucker, Zomba's Senior Vice President, maintains that Williams' royalty account remains unrecouped and thus he is not presently owed any royalties and that "[t]o the best of my knowledge, Zomba has accounted and paid Defendant Williams all monies due and owing to him." Zucker Reply Aff. ¶ 5. The basis for Zucker's knowledge of the issuance of the required semi-annual accountings is unclear, and Zomba fails to provide copies of any accountings rendered to MSSR or Williams before Coates was retained. Nevertheless, the documentary evidence establishes that some accountings and payments have since been forthcoming. Whether the accountings are sufficient or whether defendants are owed additional royalties or amounts for profit sharing is a question of fact that cannot be resolved on this record. Thus, defendants have raised an issue of fact as to whether Zomba was in material breach of the Zomba contract as of January 5, 2006 when defendants announced their intent not to perform thereunder, and whether Zomba promptly and adequately cured any such breach.

On the issue of irreparable harm, as an initial consideration, the court notes that the original complaint does not contain any request for injunctive relief, but seeks only a declaratory judgment that New York governs the enforceability of the Zomba contract (first cause of action); damages for its breach (second cause of action), and damages for defendants' breach of the duty of good faith and fair dealing (third cause of action). "A preliminary injunction is still unavailable in an action for a sum of money only." Daley v The Related Companies, Inc., 179 AD2d 55, 60-61 (1st Dept 1992) (quoting McLaughlin, Practice Commentaries, McKinney's

Cons Laws of NY, Book 7B, CPLR C6301:1). However, as part of this motion, Zomba seeks leave to serve an amended complaint to add a claim for permanent injunctive relief, which has been granted. Thus, whether Zomba is entitled to injunctive relief against defendants, turns mainly on the question of irreparable harm.

The existence of an adequate legal remedy, i.e., money damages capable of calculation, will bar the issuance of a preliminary injunction. Credit Index, LLC v Riskwise Intl., L.L.C., 282 AD2d 246, 247 (1st Dept 2001); SportsChannel Am. Assocs. v National Hockey League, 186 AD2d 417, 418 (1st Dept 1982). Indeed, an individual cannot be compelled to perform a contract for personal services, and this court cannot force defendant Williams back to the studio to record for plaintiff. American Broadcasting Cos., Inc. v Wolf, 52 NY2d 394, 401-02 (1981). However, other remedies for failure to perform a contract for personal services do exist. Id. at 402. “Thus, where an employee refuses to render services to an employer in violation of an existing contract, and the services are unique or extraordinary, an injunction may issue to prevent the employee from furnishing those services to another person for the duration of the contract.” Id. at 402.

There is no dispute that Williams is a recording artist whose musical talents are special, unique and extraordinary. Indeed, defendants expressly acknowledged and agreed in the Tommy Boy recording agreement, at paragraph 23(a), that Williams’ services “are of special, unique, unusual, extraordinary and intellectual character involving skill of the highest order which gives them a peculiar value, the loss of which cannot be reasonably or adequately compensated for by damages in an action at law.” Coates Aff., Exh. B. Williams’ Grammy Award nomination in 2004 substantiates this characterization. Thus, the court finds that irreparable harm may befall

Zomba should Williams be permitted to record and sell albums for himself or a competitor in violation of Zomba's exclusive rights, particularly in violation of Zomba's creative rights with respect to the production, sale, marketing and promotion of Williams' music.

A preliminary injunction may be also be granted to protect a company's goodwill and credibility in its industry. Four Times Square Assocs., L.L.C. v Cigna Investments, Inc., 306 AD2d 4, 6 (1st Dept 2003); Brintec Corp. v Akzo, N.V., 129 AD2d 447, 448 (1st Dept 1987). Here, when an album is released by a Zomba recording artist, the release bears Zomba's name, and the brand identification of a talented artist with the label enhances Zomba's goodwill in the music industry. This enhancement is not capable of monetary calculation.

Finally, a court must weigh the harm each side will suffer in granting or denying injunctive relief. Somers Associates, Inc. v Corvino, 156 AD2d 218, 220-21 (1st Dept 1989). However, a defendant cannot complaint of hardship resulting from a situation that he is largely responsible for creating. If it turns out that Zomba fully performed its contractual obligations with respect to royalties, profit sharing and the requisite semi-annual accountings, then defendants will not be heard to complain of any hardship from an injunction against the sale of unauthorized albums. Nor does it appear that Zomba unduly delayed in seeking to enforce its contractual rights and/or acted in such a manner as to lead defendants to believe they were free to record and sell music under a different label.

Therefore, the court finds that, but for the disputed factual issue regarding Zomba's own alleged material breach of the Zomba contract, the plaintiff is entitled to a preliminary injunction. Pursuant to CPLR 6301(c), the issue of whether Zomba was in material breach of the Zomba contract as of January 5, 2006 when defendants announced their intent not to perform thereunder

and if there was a breach, whether Zomba promptly and adequately cured such breach, is referred, on an expedited basis, to a Special Referee to hear and report. The temporary restraining order heretofore entered by this court shall be continued, but only upon proof that plaintiff has filed a surety bond in the amount of \$100,000.00 (or deposited cash in the equivalent amount) with the clerk of the court as previously ordered by this court on January 25, 2007, see CPLR 2505, within one week from the date hereof.<sup>3</sup>

### CONCLUSION AND ORDER

For the foregoing reasons, it is

ORDERED that that branch of the motion for leave to amend the complaint, pursuant to CPLR 3025(b), to add Nureau, LLC as a party defendant and to add a cause of action for injunctive relief against defendants is granted, and defendants may serve and file an answer to the amended complaint within twenty (20) of service of a copy of this order with notice of entry; and it is further

ORDERED and ADJUDGED that plaintiff Zomba Recoding LLC is entitled to partial summary judgment, pursuant to CPLR 3212 and 3001, on its first cause of action declaring that the Zomba contract is governed by New York law as provided in paragraph 6.4 thereof, and thus not subject to the California Labor Code, and the remaining causes of action are hereby severed and continued; and it is further

ORDERED that the issue of whether plaintiff was in material breach of the Zomba contract as of January 5, 2006 when defendants announced their intent not to perform thereunder

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<sup>3</sup> To date, there is no indication from the County Clerk's file that plaintiff has posted the requisite bond.

and if so, whether Zomba promptly and adequately cured any breach thereof, is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee shall determine the aforesaid issue; and it is further

ORDERED that that portion of plaintiff's motion seeking a preliminary injunction is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for plaintiff shall, within five (5) days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of Part 50R on as expedited basis as the calendar may allow; and it is further

ORDERED that the temporary restraining order entered by the Court on January 25, 2007 shall be continued upon proof plaintiff has filed a surety bond in the amount of \$100,000.00 or deposited the equivalent sum with the clerk of the court, within one week from the date hereof.

<sup>18</sup>  
Dated: February ~~20~~, 2007

ENTER:



J.S.C.

**FILED**  
MAR 01 2007  
CLERK'S OFFICE