

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

PRESENT: BERNARD J. FRIED  
*Justice*

PART 60

**E-FILE**

Sony Music Entertainment, Inc.,

INDEX NO. #601441--2009

PLAINTIFF

MOTION DATE

- v -

MOTION SEQ. NO. #001

Ronn Werre, et. al.,

MOTION CAL. NO.                     

DEFENDANTS

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits                     

Replying Affidavits                     

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the attached memorandum decision.

SO ORDERED

**RECEIVED**

MAR 18 2010

MOTION SUPPORT OFFICE  
NYS SUPREME COURT - CIVIL

*Handwritten signature/initials*

Dated: 3/17/2010

*Handwritten signature*  
J.S.C.

**HON. BERNARD J. FRIED**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 60

-----X  
SONY MUSIC ENTERTAINMENT, INC.,

Plaintiff,

Index No.  
601441/09

-against-

RONN WERRE and EMI MUSIC NORTH AMERICA,

Defendants.  
-----X

**APPEARANCES:**

For Plaintiff:

Dechert LLP  
1095 Avenue of the Americas  
New York, New York 10036  
(Benjamin E. Rosenberg,  
Robert W. Topp)

For Defendant EMI Music North  
America:

Sidley Austin LLP  
787 Seventh Avenue  
New York, New York 10019  
(John G. Hutchinson, Martin B. Jackson)

For Defendant Ronn Werre:  
Herrick, Feinstein LLP  
2 Park Avenue  
New York, New York 10016  
(Mara B. Levin, David Feuerstein)

**FRIED, J.:**

In motion sequences 001 and 002, respectively, defendant EMI Music North America (EMI) and defendant Ronn Werre (Werre) move to dismiss the complaint as against them, pursuant to CPLR 3211 (a) (1) and (a) (7).

Werre has been a high-level executive employee of EMI since 1998. In early 2009, Werre entered into negotiations with Sony about his joining Sony after his contract with EMI ended. Sony states that, during the negotiations, Werre informed Sony that he

had a written employment agreement with EMI that expired on March 31, 2010 and that did not contain a non-compete clause or any other restrictive covenant that would prevent him from working for Sony upon the conclusion of his contract term at EMI. Cmplt, ¶ 5. On February 12, 2009, Werre and Sony signed a letter agreement entitled "Employment Agreement As of April 1, 2010" (the Letter Agreement).

A few months after signing the Letter Agreement, Werre re-signed an employment contract with EMI, thereby extending the term of his employment with EMI through April 1, 2010 and beyond. Sony then commenced the instant lawsuit. The complaint contains four causes of action. The first three causes of action, sounding in breach of contract, fraud and breach of the duty of good faith and fair dealing, are brought as against Werre. The fourth cause of action, brought as against EMI, alleges tortious interference with contract.

Paragraph 2 of the Letter Agreement states, in part:

Provided that prior to the commencement of the Term hereof (as defined in Paragraph 4 herein) you will not be under any written or oral agreement, nor will you have at any time entered into an agreement, non-competition covenant, or any similar agreement, covenant, understanding, or restriction, with any other person, firm, company or corporation, which would in any manner preclude or prevent you from giving freely, and [Sony] receiving, the exclusive benefits of your services as outlined in Paragraph 3 herein, [Sony] hereby offers you employment as President, Commercial Music Group, [Sony], and you accept such employment, subject to the terms and conditions of this Agreement.

The "Term" of the Letter Agreement is set forth in paragraph 4 to be "three (3) years, and shall commence April 1, 2010 provided that the conditions set forth in Paragraph 2 above have been satisfied, and end on March 31, 2013," with Sony permitted to terminate before the end of the Term under certain conditions.

Paragraph 25 of the Letter Agreement states:

Representation: This Agreement has been offered to you based on your representation that as of the commencement of your employment with [Sony] and throughout the Term, you will not be under any written or oral agreement, nor will you have at any time entered into an agreement, noncompetition covenant, nondisclosure agreement, or any similar agreement, covenant, understanding, or restriction, with any other person, firm, or corporation, which would or could in any manner preclude or prevent you from giving freely, and [Sony] receiving, the exclusive benefits of your services.

Defendants assert that the Letter Agreement is a contingent offer, subject to the condition that Werre is available for employment on April 1, 2010. They argue that, because the contingency did not occur, there is no binding contract between Werre and Sony, and the Letter Agreement is therefore not enforceable.

EMI argues that it could not have tortiously interfered with the Letter Agreement because it is not a binding contract. EMI further contends that it had the exclusive right to enter into an employment agreement with Werre during the term of his employment with EMI, because he could not enter into a binding agreement with any other employer while he was employed by EMI.

EMI contends that Werre's employment agreement with EMI prohibited him from directly or indirectly accepting employment from any other party while he was employed at EMI, and from being connected with any other entity in the business of music publishing, record production or artist management. Thus, according to EMI, any binding agreement between Werre and Sony entered into prior to April 1, 2010 would be unenforceable, because it would violate the restrictions in Werre's pre-existing employment contract with EMI.

Werre argues that Sony was aware of the restrictions in his prior employment agreement with EMI and knew that he could not, as of February 2009, commit himself to work for Sony as of April 1, 2010. According to Werre, he therefore negotiated with Sony in good faith that, if he did not re-sign with EMI, and he was available on April 1, 2010, he would commence employment with Sony as of that date. Defendants argue that the Letter Agreement did not restrict Werre or EMI from extending the pre-existing employment relationship between them.

Sony argues that the prevention doctrine applies, under which, a party to a contract cannot undermine a condition precedent set forth within the contract. According to Sony, the Letter Agreement is a binding contract between Sony and Werre, in that there is an offer and an acceptance, which are not contingent. Sony argues that the performance under the contract is contingent, but that that is true for all contracts for future performance.

Sony further asserts that paragraph 25 of the Letter Agreement expressly states that Werre would not enter into a contract that would restrict his ability to perform under the Letter Agreement. Sony argues that paragraph 25 of the Letter Agreement makes it clear that Werre was not to enter into another employment agreement that would eviscerate his contract with Sony.

Defendants assert that paragraph 25 of the Letter Agreement only comes into existence as a binding commitment if Werre commences employment with Sony, and is only applicable during the term of any employment with Sony. According to defendants, it does not apply if Werre never commences employment with Sony.

Defendants contend that Sony could have made paragraph 25 effective on the date the Letter Agreement was signed, or even as of April 1, 2010. Instead, it becomes operative only “as of the commencement of [Werre’s] employment with [Sony].” Defendants argue that this precludes any claim that Werre breached the Letter Agreement by accepting continued employment from EMI before April 1, 2010.

Werre argues that Sony’s breach of contract claim against him is insufficient and contrary to the terms of the contingent offer set forth in the Letter Agreement. According to Werre, the contingent offer is no longer in effect because Werre is now under an employment agreement with EMI that extends beyond April 1, 2010. Werre asserts that, because the contingency of his availability on April 1, 2010 did not occur, there is no agreement with Sony and nothing to breach.

Werre maintains that Sony’s fraud claim also fails because it is based solely on the allegation that Werre did not intend to perform under the agreement at the time the parties agreed to the terms of the offer, and because it contradicts the express terms of the Letter Agreement. Werre asserts that the claim for breach of good faith and fair dealing fails because it improperly seeks to alter the express terms of the Sony offer, and because it is based upon the same flawed factual premise underlying Sony’s breach of contract claim.

In assessing the adequacy of a complaint on a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must construe the allegations therein liberally, giving plaintiff the benefit of all favorable inferences. *Leon v Martinez*, 84 NY2d 83 (1994). Allegations that consist of bare legal conclusions, and claims that are contradicted by documentary evidence, however, are not entitled to such a presumption. *Caniglia v*

*Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 233-34 (1<sup>st</sup> Dept 1994). On a motion to dismiss pursuant to CPLR 3211 (a) (1), dismissal is granted “only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” *Leon v Martinez*, 84 NY2d at 88.

Werre’s motion to dismiss is granted. The Letter Agreement is not a binding, enforceable contract because the contingency set forth in paragraph 2 therein, namely Werre’s availability for employment on April 1, 2010, did not occur. Thus, the terms of the Letter Agreement did not and will not become binding. Sony’s argument that Werre breached paragraph 25 is unpersuasive. The terms of that provision indicate that it does not come into effect until “the commencement of [Werre’s] employment.” Such commencement of employment never took place, so Werre could not have breached paragraph 25.

The prevention doctrine does not apply. “At bottom, the application of this doctrine rests on an implied obligation under the contract not to frustrate or prevent the performance of the condition precedent.” *HGCD Retail Servs., LLC v 44-45 Broadway Realty Co.*, 37 AD3d 43, 53 (1<sup>st</sup> Dept 2006). That general rule, however, applies when there is a binding contract in effect that contains the condition precedent in question, which is not the situation here.

In the instant case, by contrast, the contract is not binding on the parties until the condition precedent occurs, such that the prevention doctrine does not apply.

Most conditions precedent describe acts or events which must occur before a party is obliged to perform a promise made pursuant to an existing contract, a situation to be distinguished conceptually from a condition precedent to the formation or existence of the contract itself. In the latter situation, no contract arises unless and until the condition occurs.

*Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690 (1995) (internal citations and quotation marks omitted).

The fraud claim is based on the allegation that Werre never intended to be bound by the Letter Agreement, but rather sought to use the Letter Agreement as leverage with EMI, so that he could enter into a more generous contract with EMI than he otherwise would have received. Cmpl't, ¶ 19. The complaint further alleges that Werre misrepresented to Sony that he was interested in employment with Sony and that he intended to perform under the Letter Agreement. *Id.*, ¶ 20.

The fraud claim is dismissed. “A fraud claim that only restates a breach of contract claim may not be maintained.” *Orix Credit Alliance v Hable Co.*, 256 AD2d 114, 115 (1<sup>st</sup> Dept 1998). “Allegations that a party entered into a contract without intent to perform do not state a cause of action for fraud.” *Id.*

The third cause of action, sounding in breach of the covenant of good faith and fair dealing, is also dismissed, as it is duplicative of the breach of contract claim, in that they both arise from the same facts. *See Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 (1<sup>st</sup> Dept 2009).

EMI's motion to dismiss is also granted. The elements of a claim for tortious interference with a contract are: (1) a valid contract between plaintiff and a third party, (2) defendant's knowledge of the contract, (3) defendant's unjustified, deliberate inducement of the third party's breach of the contract, (4) actual breach of the contract, and (5) damages resulting from the breach. *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 (1996). The Letter Agreement is not a valid, enforceable contract, due to the

non-occurrence of the contingency contained therein. Thus, the first element of a tortious interference claim is not satisfied, and the fourth cause of action is dismissed.

Accordingly, it is

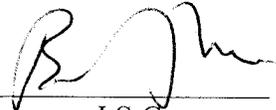
ORDERED that defendant EMI Music North America's motion to dismiss, motion sequence 001, is granted and the complaint is dismissed as against said defendant with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that defendant Ronn Werre's motion to dismiss, motion sequence 002, is granted and the complaint is dismissed as against said defendant with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 3/17/2010

ENTER:

  
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J.S.C.

**HON. BERNARD J. FRIED**