

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

PRESENT: EILEEN BRANSTEN  
*Justice*

PART 3

ESTHER CREATIVE GROUP, LLC  
Plaintiff,

INDEX NO. 112902/08

MOTION DATE 5/28/09

- v -

MOTION SEQ. NO. 001

TOM GABEL, et al.

Defendants.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to dismiss.

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

Answering Affidavits — Exhibits \_\_\_\_\_

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

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, this motion



IS DECIDED IN ACCORDANCE  
WITH THE ACCOMPANYING  
MEMORANDUM DECISION AND ORDER



Dated: 10-7-09

*Eileen Bransten*  
EILEEN BRANSTEN, J.S.C.

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):

*Handwritten signature/initials*

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

-----X  
ESTHER CREATIVE GROUP, LLC

Plaintiff,

Index No.: 112902/08  
Motion Date: 5/28/09  
Motion Seq. No.: 001

-against-

TOM GABEL, JAMES BOWMAN, WARREN  
OAKES and ANDREW SEWARD a/k/a AGAINST  
ME!, AGAINST ME!, INC. and "John Doe" Corp.,

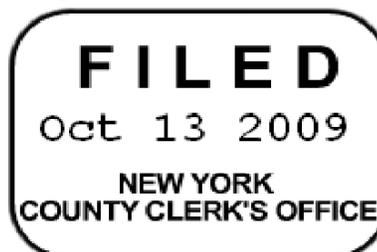
Defendants.

-----X  
EILEEN BRANSTEN, J.:

Pursuant to CPLR 3211 (a) (5) and (7), defendants Tom Gabel, James Bowman, Warren Oakes and Andrew Seward d/b/a Against Me! and Against Me! Inc. (collectively "Defendants") move to dismiss the complaint as barred by the Statute of Frauds and for failure to state a cause of action. Plaintiff Esther Creative Group, LLC ("Esther Creative") opposes the motion.

**Background**

Esther Creative manages musical talent and provides related services in the music industry (Davis Aff., Ex. A ["Complaint"], at ¶ 2). In March 2004, Defendants met with Tom Sarig, the principal of Esther Creative, and asked him to manage their band Against Me! (Complaint, at ¶¶47-49). Esther Creative then "began to organize the band's business and make efforts to generate interest with major record labels"



(Complaint, at ¶ 50). Esther Creative set up successful tours for Against Me!, introduced the band to a significant European booking agent and engaged a rock record producer and publicist. Against Me! was then featured in well-known industry magazines like Rolling Stone and Spin. After a country-wide tour, for which Sarig handled the logistics, “the band decided, with Sarig’s substantial input and guidance, to sign with Sire/Warner Brother Records” (Complaint, at ¶ 74). Esther Creative “handled and interfaced with the record label offices around the world as well as managed press, radio, sales and all the infrastructure of [an Against Me!] tour” (Complaint, at ¶ 79). Esther Creative also secured the band bookings on Late Night with David Letterman and The Conan O’Brien Show (Complaint, at ¶ 81).

According to Esther Creative, based on the parties’ agreement, it was “to be paid 15% of the band’s income,” including money derived from album sales, touring and publishing (Complaint, at ¶¶ 85-86). “The commissions included income which would be derived from contracts entered into during the course of [Esther Creative’s] management” (Complaint, at ¶ 87). The parties allegedly confirmed the terms of their agreement orally and in writing (Complaint, at ¶¶ 25, 89).

Defendants paid Esther Creative 15% of their income until 2008 and the parties’ agreement “was complied with and performed on for several years” (Complaint, at ¶ 117).

In 2008, Esther Creative commenced this action. It alleges that it arranged for tour dates throughout 2008 and that “the band has and continues to derive substantial income from these tour dates” (Complaint, at ¶ 104). Esther Creative pleads that it is entitled to commissions on income from the tour dates and income “derived as a direct result of the Warner Brothers recording contract” (Complaint, at ¶¶ 105-106). It asserts a claim for breach of the management contract and seeks recovery based on *quantum meruit* for the value of its services (Complaint, at ¶ 140). Esther Creative maintains that it is entitled to an amount not less than \$1,240,000 (Complaint, at ¶ 143).

Defendants now move to dismiss the complaint.

### Analysis

#### Statute of Frauds

Defendants maintain that because Esther Creative “seeks recovery of commissions that “cannot be fully earned within one year, [its] claims, whether cast as breach of contract or *quantum meruit*, are barred by the New York Statute of Frauds” (Memorandum of Law in Support of Defendants’ Motion to Dismiss the Complaint, at 1).

In opposition, Esther Creative asserts that its agreement with Defendants--that it was “to be paid 15% of the band’s income,” including money derived from album sales, touring and publishing “from contracts entered into during the course of [Esther Creative’s] management” (Complaint, at ¶ 87)--“was confirmed in writings many times over the course of years” and indeed, that they “exchanged thousands of emails and writings . . . confirming [the] agreement. . . . Some of these writings regarding [the] agreement and services [were] written by hand by the various parties including defendants” (Sarig Aff., at ¶¶ 22-24).

Esther Creative relies on documents allegedly prepared by defendant Tom Gabel titled “Against Me! Management Commissions” (Sarig Aff. Ex. A). These “summary statements” (*see* Sarig Aff at ¶ 26) list income and royalties that Against Me! received from various sources and a formula whereby the entire amount received was multiplied by 15% and constituted the “total owed” or “paid” (Sarig Aff., Ex. A).

Esther Creative also submits many emails between Sarig and Defendants. In one email Sarig advises Defendants about dealing with Sire/Warner Brothers. In response, along with several questions, Tom Gabel wrote “Sometimes I think you get more enjoyment out of manipulating major labels than any other aspect of managing bands” (Sarig Aff. Ex. D [emphasis added]). Gabel subsequently emailed: “I love how awesomely you handle all of this. It gives me really great confidence to have

you as part of the team and I feel really comfortable taking cues from you as to how to make our moves. If that came off any other way I apologize. I was just trying to say I think your really good at what you do” (Sarig Aff. Ex. D [emphasis added]).

Esther Creative also points out that Defendants performed under the contract for several years and their payments were evidenced by the calculations prepared by Tom Gabel (Memorandum of Law in Opposition to Defendants’ Motion to Dismiss, at 2).

New York’s Statute of Frauds is intended to prevent fraud in proving “legal transactions particularly susceptible to deception, mistake and perjury” (*Foster v Kovner*, 44 AD3d 23, 26 [1st Dept 2007] [quotation omitted]). Specifically, General Obligations Law § 5-701 (a) (1) provides that every “agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, . . . if such agreement . . . by its terms is not to be performed within one year from the making thereof . . . .” This provision “encompasses only those agreements which, by their terms, ‘have absolutely no possibility in fact and law of full performance within one year.’ It matters not that completion of performance within one year may be unlikely or improbable” (*Foster*, 44 AD3d, at 26 [citation omitted]; *see also, Zuccarini v Ziff-Davis Media, Inc.*, 306 AD2d 404, 405 [2d Dept. 2003]).

New York law establishes, however, that “a service contract of indefinite duration, in which one party agrees to procure customers or accounts or orders on behalf of the second party, is not by its terms performable within a year--and hence must be in writing . . . since performance is dependent, not upon the will of the parties to the contract, but upon that of a third party” (*Zupan v Blumberg*, 2 NY2d 547, 550 [1957] [contract providing that plaintiff would secure advertising accounts for defendants in exchange for 25% commission on any account that he brought in for so long as the account was active was within Statute of Frauds]; *see also Martocci v The Greater New York Brewery, Inc.*, 301 NY 57, 63 [1950] [agreement to pay plaintiff 5% commission on sales made by defendant to specific customer was within Statute of Frauds]; *Grossberg v Double H. Licensing Corp.*, 86 AD2d 565, 566 [1st Dept 1982] [agreement that plaintiff was to be paid 2% royalties on retail price of records sold throughout the world was within Statute of Frauds]; *Cohen v The Bartgis Brothers Co.*, 264 App Div 260, 261 [1st Dept 1942] [agreement to pay commissions “upon all orders placed [by specific customer] at any time, whether or not plaintiff was in defendant’s employ at the time of placing such orders” was within Statute of Frauds], *affd* 289 NY 846 [1943]).

Thus, to be enforceable here, there must be some “note or memorandum” evidencing the agreement requiring a 15% commission “from contracts entered into

during the course of [Esther Creative's] management" that is signed by Defendants. The summary statements, emails and checks issued by Defendants considered together in addition to other evidence that may be uncovered through discovery may well satisfy the statute's writing requirement (*see* General Obligations Law § 5-701 [b] [3] [setting forth what constitutes "sufficient evidence that a contract has been made"]; *see also, Nausch v Aon Corp.*, 2 AD3d 101, 102 [1st Dept 2003] ["memoranda need not be in one document, but may be pieced together from separate writings if they can be shown to be related to the transaction"]).

In any event, the parties' conduct over the course of years may be "unequivocally referable" to their agreement, in which case, the part performance exception to the Statute of Frauds could apply (*see Travis v Fallani and Cohn*, 292 AD2d 242, 244 [1st Dept 2002]; *see also Kantor v Watson*, 167 AD2d 297, 298 [1st Dept 1990] [dismissal appropriate on Statute of Frauds grounds where plaintiff failed to "plead any facts indicating partial performance unequivocally referable to the alleged oral agreement so as to give rise to an estoppel"]; *Carey & Assocs v Ernst*, 27 AD3d 261, 264 [1st Dept 2006] ["An oral agreement may be enforceable despite the lack of writing where a plaintiff's part performance is 'unequivocally referable' to that oral agreement"]; *Anostario v Vicinanza*, 59 NY2d 662, 664 [1983]; *Asciutto v Barco Auto Leasing Corp.*, 125 AD2d 431, 432 [2d Dept 1986] [summary judgment

dismissal appropriate as “plaintiff failed to submit any evidence of partial performance, detrimental reliance or unconscionable injury”).

Defendants correctly point out that in *Stephen Pevner, Inc. v Ensler* (309 AD2d 722, 722-723 [1st Dept 2003]), the Appellate Division stated that the part-performance exception applies in the context of real-estate transactions “but it has not been extended to General Obligations Law § 5-701.” In fact, however, the Appellate Divisions have on many occasions applied or analyzed the part-performance exception to the Statute of Frauds outside the real-property context (*see, e.g., Travis*, 292 AD2d 242 [applying part performance in the context of agreement that included provision for royalties]; *Carey & Assocs*, 27 AD3d 261 [General Obligations Law § 5-701 at issue]; *Kantor*, 167 AD2d 297 [agreement that could not be performed within a year was at issue]; *Durante Bros. Constr. Corp. v College Point Sports Assn*, 207 AD2d 379 [General Obligations Law § 5-701 (a) (1) case].

Based on New York’s broader interpretation of the impossible-to-be-performed-within-a-year Statute of Frauds provision, it is not surprising that appellate courts in this State--in the interests of preventing parties from avoiding actual agreements based on the absence of a writing--have concluded that the partial-performance exception to the statute applies.

Additionally, Esther Creative's *quantum meruit* claim survives as an alternative basis for relief in the event that there was no enforceable agreement between the parties (*Foster*, 44 AD3d at 29; *Dukes of Dixieland v Audio Fidelity, Inc.*, 19 AD2d 872 [1st Dept 1963] [contractual recovery barred by Statute of Frauds but it "is possible . . . that plaintiff is entitled to recover on a *quantum meruit* basis"]; *Karaszek v Blonsky*, 6/5/2008 NYLJ 27 [col 1] [Sup Ct Nassau County]).

#### Licensure

Defendants also argue that Esther Creative's complaint must be dismissed because "it procured a recording agreement" on their behalf and in so doing "performed the services as a theatrical employment agency" without a license. Esther Creative counters that it is not a "theatrical agent" or a booking agent; rather, it is a "full service management company" not subject to New York's licensing requirements (Sarig Aff., at n1).

General Business Law § 172 prohibits one from operating or carrying on any employment agency without a license. A "theatrical employment agency" is defined as "any person . . . who procures or attempts to procure employment or engagements for . . . radio, television, phonograph recordings. . . or other entertainments . . . or performances, but such term does not include the business of managing such

entertainments . . . or the artists or attractions constituting the same, where such business only incidentally involves the seeking of employment therefor” (General Business Law § 171 [8] [emphasis added]).

Dismissal is not warranted here as Esther Creative alleges that it was Defendants’ manager (*see, Mandel v Liebman*, 303 NY 88, 91 and 97 [1951] [dismissal inappropriate because it could not be said as a “matter of law” that agreement by an “author, writer and director” to pay plaintiff “10% of all [] earnings during the term of the contract, and thereafter on earnings from employments commenced during the term of the contract” was illegal and void based on unlicensed operation of a theatrical employment agency]; *Karaszek v Blonsky*, 6/5/2008 NYLJ 27 [col 1] [Sup Ct Nassau County]; *Gervis v Knapp*, 182 Misc 311, 313 [Sup Ct N.Y. County 1943] [contention that agreement was unenforceable was “not well taken” as contract established that plaintiff “was primarily a manager”]).

Significantly, Defendants’ own statements establish that Esther Creative may have been engaged primarily as a manager. Tom Gabel allegedly prepared documents titled “Against Me! Management Commissions” (Sarig Aff. Ex. A [emphasis added]) and acknowledged in an email that Sarig was engaged in “managing bands” (Sarig Aff. Ex. D) (*see, Pawlowski v Woodruff*, 122 Misc 695 [1st Dept 1924] [management contract upheld as defendant emphasized to plaintiff “You know you are supposed to

be my personal manager’], *affd* 212 App Div 871 [1925]). In fact, it is alleged that through Esther Creative’s efforts, Defendants employed a “very significant European booking agent” to secure employment, which was an “instrumental factor in making the band more popular (Complaint, at ¶¶ 56, 58-59) (*contrast, Pine v Laine*, 36 AD2d 924, 925 [1st Dept 1971] [defendant had a separate manager and the only service plaintiff performed was procurement of a recording contract], *affd* 31 NY2d 988 [1973]; *Allen v Brice*, 165 Misc 181 [Sup Ct N.Y. County 1937] [plaintiff failed to amplify management duties in bill of particulars; action dismissed with opportunity to re-plead]).

In the end, Defendants have not established that Esther Creative’s complaint must be dismissed at the pleading stage.

Accordingly, it is ORDERED that Defendants’ motion to dismiss is DENIED and Defendants are to answer the complaint no later than 10 days after service of notice of entry of this order (*see* CPLR 3211 [f]).

This constitutes the Decision and Order of the Court.

Dated: October 7, 2009  
New York, NY

ENTER:

  
Hon. Eileen Bransten

