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

PRESENT: RICHARD B. LOWE III / Lowe — PART 56m

Justice

Paige, Inc.

- v -

Mr. Romel Cummings

INDEX NO. 600710/05

MOTION DATE 4/19/05

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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 THE ATTACHED MEMORANDUM DECISION.

RICHARD B. LOWE III

Dated: 9/26/2005

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

----------x

PAIGE, INC.,

Index No. 600710/05

Plaintiff,

-against-

MR. ROMEL CUMMINGS and MR. LEONARD BROOKS d/b/a CARNEGIE KINGS,

Defendants.

----------x

Richard B. Lowe, III, J.:

This action arises out of an exclusive management agreement between plaintiff management company and defendant recording artist. Plaintiff Paige, Inc., also known as Shante Paige, Inc. (Paige) brings this action, asserting breach of contract against defendant Romel Cummings, also known as Brasco (Cummings), and intentional interference of contract against defendant Leonard Brooks, also known as Carnegie Kings (Brooks). Cummings moves for an order: (1) compelling arbitration pursuant to CPLR 7503 and 7556; (2) staying the action pursuant to CPLR 7503; (3) remanding the action to the American Arbitration Association pursuant to CPLR 7501 and 7503; (4) awarding attorney's fees; and (5) disqualifying James E. McMillan, Esq. (McMillan), and his law firm, James E. McMillan, P.C., from representing Paige pursuant to the Disciplinary Rules in the Code of Professional Responsibility (DR) 5-102, 5-103, 5-108, and 7-104. In the alternative, Cummings moves, pursuant to CPLR 3211, to dismiss the action for lack of jurisdiction.

BACKGROUND

Paige, a Georgia corporation, is a management company in the entertainment industry. Cummings, a New York resident, is an aspiring recording artist and former member of a musical

group known as Rozwell or Brooklyn. Brooks, an Ohio resident, is a music executive, who conducts business in New York. Defendant Brooks os a music executive who plaintiff allegedly introduced to Defendant Cummings for purposes of assisting plaintiff in its representation of Cummings and the remainder of the group.

The Management Agreement

On February 12, 2003, Paige and Cummings executed a "Personal Management Agreement," requiring Paige to serve as the exclusive personal manager and advisor of Cummings for two years starting on the date of execution (Management Agreement). See Gabriel Levinson Affirmation in Support (Levinson Affirmation), Ex. A. The Management Agreement provides that: (1) Paige shall receive a 20% commission on all gross compensation that Cummings receives, and direct payment from any source that pays Cummings; (2) Cummings has the right to terminate the contract if Paige fails to obtain an exclusive recording agreement with a major distributor within 12 months of the contract's execution; and (3) the contract constitutes the entire agreement between the parties relating to the subject matter, and supercedes all prior agreements, whether oral or written. Section 12 of the Management Agreement contains an arbitration clause, which specifically states that "the validity, interpretation and legal effect" of the contract is governed by New York law, and that:

> In the event of any dispute under or relating to the terms of this Agreement or any breach thereof, it is agreed that the same shall be submitted to arbitration to the American Arbitration Association in New York . . . and judgment upon any award rendered may be entered in any State or Federal court located in New York and having jurisdiction thereof. In the event of litigation or arbitration arising from or out of this Agreement or the relationship of the parties created hereby, the prevailing party or parties shall be entitled to recover reasonable attorneys' fees and other costs incurred in connection therewith. This arbitration provision shall remain in full force and effect notwithstanding the nature of any claim or defense

hereunder.

Levinson Affirmation, Ex. A. During the execution of the Management Agreement, Denise Brown, Esq. represented Paige, and Reginald Osse, Esq. (Osse) represented Cummings.

2003 Recording Agreement

Paige asserts that the Management Agreement came into full force and effect when Urban Music Group, Inc. (UMG), Arista Records, Inc. (Arista) and Rozwell executed an "Exclusive Recording Agreement" on February 27, 2003 (2003 Recording Agreement). See Levinson Affirmation, Ex. I. During the execution of the 2003 Recording Agreement, McMillan represented UMG, and Osse represented Rozwell.

The June 2004 Letter

On June 10, 2004, Cummings retained a new attorney, Novalie Perry, Esq. (Nova), to represent his individual interests. According to Cummings, Nova was an associate of McMillan's law firm until March 2004. On June 11, 2004, Nova sent Paige a formal notice terminating the Management Agreement. See id., Ex. E.

Release of 2003 Recording Agreement

On November 30, 2004, Cummings, as a member of Rozwell, and UMG executed a "Release and Settlement Agreement" with regard to the 2003 Recording Agreement (Release). See Levinson Affirmation, Ex. J. During the execution of the Release, Nova represented Cummings, and McMillan represented UMG. On December 20, 2004, UMG attempted to revoke the Release. See id., Ex. L. Cummings retained a new attorney, Douglas Davis, Esq. (Davis), who wrote to McMillan on December 22, 2004, rejecting the revocation. See id., Ex. G.

The January 2005 Letter

On January 6, 2005, Paige retained McMillan as counsel. On or about January 7, 2005, Paige wrote to Interscope/Geffen Records (Geffen Records), seeking commissions owed pursuant to the Management Agreement, and signing the letter "Shante Paige o/b/o Mr. Romel Cummings p/k/a 'Brosco.'" See Levinson Affirmation, Ex. M. Cummings claims that McMillan improperly sent this letter on his behalf.

Demand for Arbitration

On January 28, 2005, McMillan, on Paige's behalf, sent Davis an immediate demand for arbitration regarding the enforceability of the Management Agreement. See id., Ex. B. The letterhead listed Nova as an associate of McMillan's firm. On February 4, 2005, McMillan wrote to Davis, stating that Paige perceived Cummings' lack of action as a waiver of the arbitration clause. See id., Ex. C. The letterhead again listed Nova as an associate of McMillan's firm.

Present Action

On February 25, 2005, Paige commenced this action, asserting breach of contract against Cummings, and intentional interference with a contract against Brooks. For its breach of contract claim, Paige alleges that Cummings improperly declared that the Management Agreement was terminated, failed to pay Paige's commission from the 2003 Recording Agreement, and attempted to circumvent the terms of the Management Agreement by completing another recording contract with Geffen Records fully intending to withhold Paige's commission. Paige seeks compensatory damages of at least $200,000.00, and punitive damages of at least $1,000,000.00. Plaintiff also alleges that in December, 2004, Brooks represented to a third party that he was now Cummings manˇagr for purposes of soliciting a new record deal.

On March 3, 2005, 4starR, Inc., a New York corporation, Cummings, and "Geffen

Records, a division of UMG Recordings, Inc" executed a recording agreement (2005 Recording Agreement). See Levinson Affirmation, Ex. K. The 2005 Recording Agreement requires Geffen to pay: (1) $50,000 to Davis for legal fees; and (2) $15,000 to UMG, $2,500 of which "shall be payable to James E. McMillan, P.C." as per the Release.

As of April 4, 2005, Cummings retained new counsel, Gabriel Levinson, Esq.

As stated above, Cummings moves: (1) to compel arbitration pursuant to CPLR 7503 and CPLR 7556; (2) to stay the action pursuant to CPLR 7503; (3) to remand the action to the American Arbitration Association pursuant to CPLR 7501 and CPLR 7503; (4) for an award of attorney's fees; and (5) to disqualify McMillan and his firm pursuant to DR 5-102, 5-103, 5-108, and 7-104. In the alternative, Cummings moves, pursuant to CPLR 3211, to dismiss the action for lack of jurisdiction.

Cummings alleges that McMillan and his firm should be disqualified, pursuant to DR 7-104, for communicating directly with him on two occasions in October 2004 and February 2005. Cummings claims that he felt threatened and coerced by these conversations, and that McMillan knew during this time that he was represented by counsel.

> In October 2004, . . . James McMillan approached me and said, "Give me something and I will make them go away." It was more than obvious that Mr. McMillan wanted me to give him some money so that the Plaintiff would not start a lawsuit against me. James McMillan then said, "Look out for me and I will make them go away." It was more than obvious that Mr. McMillan was saying that if I paid him personally, he would take care of Urban and Paige, Inc. James McMillan finally said, "Pay me and I will make them go away."

Levinson Affirmation, Ex. F, ¶ 24. Cummings alleges that he did not speak to McMillan during this incident. McMillan completely denies the alleged October 2004 encounter, and states that he had no reason to speak to Cummings because neither he nor his firm represented Paige at the

time. See James E. McMillan, Esq. Affirmation (McMillan Affirmation), ¶¶ 23-25. Cummings further alleges that, on February 3, 2005, McMillan approached him, and the following conversation took place:

> McMillan: Yo Brasco, you need to take care of this with Shante [Paige].
>
> Cummings: For what?
>
> McMillan: You gonna make it hard on LB [Leonard Brooks], you gonna make a lot of trouble.
>
> Cummings: What do you mean?
>
> McMillan: Doug [Davis] is not a litigator. Doug [Davis] doesn't know about this. I am a litigator. I did this. You should give us [me and Paige] something. You should take care of her [Paige]. You should pay Paige.

Levinson Affirmation, Ex. F, ¶ 25. McMillan then allegedly told Cummings, "You need to sign this west coast rapper. You should sign this artist." Id. Cummings provides an affidavit of Omar Vaughan, who allegedly witnessed the conversation. See id., Ex. H. McMillan admits that he talked to Cummings on February 3, 2005, but that Cummings initiated the conversation, which was as follows:

> Cummings: Hey James I just want you to know that you're still my man.
>
> McMillan: Hey! Of course, it's all good! I would hope that you wouldn't take the back and forth between me and your attorney personally. We are both doing our jobs. In fact, you and Shante should speak with each other and work out your differences. Doing this would probably save you both a lot of time and money.

McMillan Affirmation, ¶ 27. McMillan states that, at this point, he stopped Cummings from talking, and directed him to speak to Paige directly. See id., ¶ 28. McMillan submits an affidavit of Jesse Mass, who allegedly witnessed the conversation. See id., Ex. I.

DISCUSSION

Motion to Compel Arbitration, Stay, and Remand

"The threshold question of arbitrability is a matter for the courts, but the ultimate determination on the merits of the controversy is reserved for the arbitrator." Cheng v Oxford Health Plans, Inc., 15 AD3d 207, 208 (1st Dept 2005). The court finds that both Paige and Cummings properly executed the Management Agreement, and that the contract contains a legally binding arbitration clause. The arbitration clause must be enforced according to its terms (see PNE Media, LLC v Cistrone, 294 AD2d 143, 144 [1st Dept 2002]), and the breach of contract claim against Cummings clearly falls "within the ambit" of such clause (Matter of Marks v Prisant, 171 AD2d 665 [2d Dept 1991]). In addition, Paige does not object to having the breach of contract claim remanded to the American Arbitration Association. Therefore, the motion to compel arbitration, stay the instant action, and remand the instant action to the American Arbitration Association is granted to the extent of the breach of contract claim against Cummings.

The arbitration clause is not applicable to the intentional interference of contract claim against Brooks because Brooks is not a party to the Management Agreement. However, "'[a]ctions may be stayed temporarily pending arbitration proceedings where the resolution of the issues in the latter may also resolve and render academic issues in the former.'" American Tr. Ins. Co. v Associated Intl. Ins. Co., 210 AD2d 133 (1st Dept 1994), quoting Corbetta Constr. Co. v George F. Driscoll Co., 17 AD2d 176, 179 (1st Dept 1962). The intentional interference of a contract claim against Brooks requires an actual breach of the Management Agreement by Cummings. See Beecher v Feldstein, 8 AD3d 597 (2d Dept 2004). Therefore, the motion to stay

the intentional interference of contract claim pending arbitration of the breach of contract claim is granted. The request for attorneys' fees is denied as premature.

Motion to Disqualify

Cummings moves to disqualify McMillan, and his firm, pursuant to DR 5-102, 5-103, 5-108, and 7-104. Attorney disqualification rests within the sound discretion of the trial court. See Weissman v Weissman, 8 AD3d 263 (2d Dept 2004). Whether an attorney should be disqualified is an issue "'intertwined with overriding public policy considerations'" and beyond the reach of an arbitrator's discretion. Merrill Lynch, Pierce, Fenner & Smith, Inc. v Benjamin, 1 AD3d 39, 44 (1st Dept 2003) (citation omitted). A party's right to representation by an attorney of its choice "should not be abridged absent a clear showing that disqualification is warranted." Eisenstadt v Eisenstadt, 282 AD2d 570 (2d Dept 2001). "'[D]isqualification of counsel would cause severe prejudice to the client, who would have to secure new counsel to deal with somewhat complex litigation with the accompanying increased expense and loss of time.'" Macro Cash & Carry Corp. v Berkman, 81 AD2d 783 (1st Dept 1981) (citation omitted).

DR 5-102

Pursuant to DR 5-102, McMillan cannot act as an advocate on issues of fact if McMillan knows or it is obvious that McMillan ought to be called as a witness on a significant issue on behalf of its client. Cummings, as the moving party, carries the burden of showing that McMillan's testimony will be "necessary." Such a finding "'takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence.'" Eisenstadt, 282 AD2d at 570 (citation omitted); see also Unger v Unger, 15 AD3d 389, 390 (2d Dept 2005). "The mere possibility that counsel might be called to testify has been held by the

Court of Appeals to be inadequate to justify disqualification." NYK Line (North America) Inc. v Mitsubishi Bank, Ltd., 171 AD2d 486 (1st Dept 1991).

The motion to disqualify McMillan, based on DR 5-102, is denied. First, the record fails to show that McMillan ever represented Cummings. McMillan represented UMG during the negotiation and execution of the 2003 Recording Agreement, and the Release. Osse represented Cummings, as a member of Rozwell, during the execution of the 2003 Recording Agreement. Nova represented Cummings during the execution of the Release. Second, any testimony that McMillan would provide is cumulative of the documentary evidence in the record. Third, it is undisputed that McMillan never took part in drafting or negotiating the Management Agreement, the contract at the heart of this action. The motion to disqualify McMillan's law firm, based on DR 5-102, is also denied. Cummings fails to allege a sufficient basis for such disqualification. It is unclear from the record whether Nova returned to McMillan's firm after being discharged by Cummings. Cummings does not seek to disqualify Nova on these grounds, or any other grounds. Even if he did, this circumstance alone would not allow an automatic disqualification of the entire firm. See Ahn v Malvasio, 1 AD3d 216, 217 (1st Dept 2003); ICS Yarn Corp. v Incomex, Inc., 298 AD2d 232 (1st Dept 2002).

DR 5-103

DR 5-103 provides that "[a] lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he or she is conducting for a client . . . ." Cummings claims that McMillan received payments pursuant to the 2003 Recording Agreement and Release, and is set to receive $2,500.00 from the 2005 Recording Agreement.

The motion to disqualify, based on DR 5-103, is denied. All the payments that

Cummings refers to are for legal services that McMillan rendered on behalf of UMG. Irrespective of who prevails in this action, UMG is still owed certain amounts as agreed upon by the parties in the 2003 Recording Agreement, the Release, and the 2005 Recording Agreement. For his legal services to UMG, a portion of UMG's amount is allocated to McMillan. No conflict of interest exists warranting disqualification.

DR 5-108

"Under DR 5-108 (A) (1), a party seeking disqualification of its adversary's lawyer must prove: (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse." Tekni-Plex, Inc. v Meyner & Landis, 89 NY2d 123, 131 (1996). "To establish disqualification pursuant to DR 5-108 (a) (2), the party seeking disqualification must also show a 'reasonable probability' that confidential information will be disclosed during the course of litigation." Cremers v Brennan, 196 Misc 2d 262, 264 (Civ Ct, NY County 2003).

The motion to disqualify, based on DR 5-108, is denied. Cummings fails to show that he was ever a client of McMillan, or of McMillan's law firm. Cummings fails to show that any of his meetings with McMillan were confidential, since a UMG representative was always present.

DR 7-104

DR 7-104 (a) (1) provides that, while representing a client, a lawyer shall not,

> communicate . . . on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

This section protects the attorney-client relationship, and prevents "an attorney from taking advantage of a party in the absence of the party's counsel, for instance, by eliciting 'unwarranted concessions or liability-creating statements or disclosures . . . [or] protected information . . . [citation omitted].'" Tylena M. v Heartshare Human Servs., 2004 WL 1252945, at *1 (SD NY 2004).

The conversations of October 2004 and February 2005 are much disputed. The court finds that even if the unauthorized communications ran afoul of DR 7-104, Cummings fails to show that the communications taint the underlying action, and warrant the drastic remedy of disqualification. See Tylena M., 2004 WL 1252945, at *2 (denying request to disqualify pursuant to DR 7-104, and stating that the appropriate forum to raise issues of disqualification and sanctions would be court's committee on grievances). No discussion took place regarding the merits of the case. The communications did not solicit any potential admissions, privileged information, or other evidence from Cummings, which could be utilized by Paige to Cummings' detriment. The motion to disqualify, based on DR 7-104, is denied. Cummings is free to raise any purported ethical violation with the Grievance Committee of the New York State Bar Association.

Alternative Motion to Dismiss

Given the above, the alternative motion to dismiss is denied as moot. In any event, the mere existence of an arbitration clause does not authorize the dismissal of an action based on lack of jurisdiction. "Only an 'arbitration and award' would warrant such a dismissal [citation omitted; emphasis in original]." Ogoe v New York Hosp., 99 AD2d 968, 969 (1st Dept 1984).

Accordingly, it is

ORDERED that the motion for an order compelling arbitration pursuant to CPLR 7503 and 7556, staying the instant action pursuant to CPLR 7503, and remanding the instant action to the American Arbitration Association pursuant to CPLR 7501 and 7503, is granted as to the breach of contract claim against defendant Romel Cummings; and it is further

ORDERED that the motion for an order compelling arbitration pursuant to CPLR 7503 and 7556, staying the instant action pursuant to CPLR 7503, and remanding the instant action to the American Arbitration Association pursuant to CPLR 7501 and 7503 is granted as to the intentional interference of contract claim against defendant Leonard Brooks to the extent of staying further prosecution and proceedings of this claim pending the above granted arbitration, and is otherwise denied; and it is further

ORDERED that the request for attorneys' fees and costs is denied; and it is further

ORDERED that the motion to disqualify James E. McMillan, Esq., and James E. McMillan, P.C., based on the Disciplinary Rules in the Code of Professional Responsibility (DR) 5-102, 5-103, 5-108, and 7-104, is denied; and it is further

ORDERED that the alternative motion to dismiss, pursuant to CPLR 3211, is denied.

Dated: New York, New York
September 27 , 2005

ENTER:

J.S.C.

RICHARD B. LOWE III

FILED
OCT - 5 2005
COUNTY CLERK'S OFFICE