

Fay v Yost

2006 NY Slip Op 30215(U)

November 8, 2006

Supreme Court, New York County

Docket Number: 0102782/2007

Judge: Marylin G. Diamond

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

PRESENT: HON. MARYLIN G. DIAMOND

PART 48

Justice

ALLEN FAY and ARNOLD LAZARUS,

Plaintiffs,

INDEX NO. 102782/07

-against-

MARY YOST and MARY YOST ASSOCIATES, INC.,

Defendants.

MOTION SEQ. NO. 001

FILED NOV 09 2007 COUNTY CLERK'S OFFICE NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that: This is an action by two writers against their former literary agent seeking royalty payments for the sales of their books overseas. The plaintiffs are co-authors of a book entitled I Can If I Want To. In addition, plaintiff Allen Fay is the author of a book entitled In the Mind's Eye. The defendants are Mary Yost Associates, Inc., their literary agent, and Mary Yost, the president of the agency. Plaintiffs claim that, in agreeing to act as their literary agent, the defendant agreed to collect and distribute royalties from the sale of these books in foreign countries. According to the complaint, although the defendants collected royalties over a number of years, they failed to remit all of the payments to the defendants and commingled the payments with other monies. The plaintiffs also claim that the defendants have failed to provide account statements in a timely manner. The plaintiffs allege that the amount of royalty payments due exceeds \$60,000. The complaint asserts five causes of action. The first cause of action is for breach of contract. The second cause of action is for breach of a fiduciary duty. The third seeks an accounting. The fourth cause of action is for fraud and the fifth is for negligence.

The defendants now move to dismiss the complaint, pursuant to CPLR 3211(a)(1), (5) and (7). They contend that documentary evidence conclusively establishes a defense to the plaintiffs' claims for unpaid royalties and that the claims are barred by the statute of limitations and/or the statute of frauds. The defendants also move to dismiss the fraud and negligence claims as duplicative of the breach of contract claim. Defendant Mary Yost moves to dismiss the complaint as against her on the ground that she is not a proper party to this action since she transacted business with the plaintiffs solely as an officer of the corporate defendant.

Discussion

1. Documentary Evidence - In support of their motion to dismiss, the defendants have submitted an affidavit from Mary Yost along with a number of exhibits which, they assert, conclusively demonstrate that the plaintiffs have been paid all of the royalties to which they were entitled. The exhibits include account statements showing royalties received by Ms. Yost between the years 1976-2004 for sales in Germany of the two books, as well as copies of canceled checks reflecting payments by Ms. Yost of the royalties to the plaintiffs.

Under CPLR 3211(a)(1), a dismissal based upon documentary evidence is warranted only where such evidence "resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim." Trade Source v. Westchester Wood Works, 290 AD2d 437 (2nd Dept. 2002). See also 511 W.32nd Owners Corp. v. Jennifer Realty Co., 98 NY2d 144, 152 (2002). The submissions by the defendants fail to satisfy this standard. The account statements which they have submitted do not cover the entire period in question

and are limited to sales in Germany even though Ms. Yost has acknowledged that the books were sold in other countries. Nor have the defendants provided any bank statements or other documents which would show when the royalties were actually received from the German publisher or agent. Notably, Ms. Yost has admitted that these documents may be incomplete or missing because of a flood which destroyed some of her banking records. Finally, it appears that, at the very least, there was a substantial delay between the defendants' receipt of the royalty payments and their payments to the plaintiffs. The defendants have not provided any reasonable explanation as to why they waited so long and have not refuted plaintiffs' claim that the delay in remitting payments entitles them to interest.

2. Breach of Contract - The first cause of action, which is for breach of contract, is based on an oral contract between the plaintiffs and Ms. Yost. On their motion to dismiss, the defendants argue that this claim is barred by New York's statute of frauds because the contract was incapable of being performed within one year. The statute of frauds provides, in pertinent part, that "[c]very agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing...if such agreement, promise or undertaking... [b]y its terms is not to be performed within one year from the making thereof." General Obligations Law §5-701(a)(1). It is well settled that this provision is to be interpreted narrowly and should encompass only those contracts which, by their terms, "have absolutely no possibility in fact and law of full performance within one year." *D&N Boeing v. Kirsch Beverages*, 63 NY2d 449, 454-55 (1984). *See also Cron v. Hargo Fabrics*, 91 NY2d 362, 366 (1998); *Foster v. Kovner*, 44 AD3d 23, 26 (1st Dept. 2007). Here, none of the parties has contended that the alleged oral agreement between them contained any provision regulating the time of performance or requiring that the contract be in effect for more than one year. The statute of frauds does not therefore bar enforcement of the parties' oral agreement.

As to the statute of limitations, the applicable period for breach of contract is six years from the time of the breach, even if the breach is not discovered by the plaintiff until later. *See Ely-Cruikshank Co. v. Bank of Montreal*, 81 NY2d 399, 402-03 (1993). As such, the defendants cannot be held liable for breach of contract with respect to any royalty payments or accountings which they failed to remit to the plaintiffs prior to February 28, 2001, six years before the commencement of the action. Thus, the first cause of action is dismissed as to any alleged breach which occurred prior to February 28, 2001.

3. Breach of Fiduciary Duty and Accounting - The defendants argue the plaintiffs' second cause of action for breach of fiduciary duty and third cause of action for an accounting are barred by the applicable statute of limitations. According to the defendants, these claims accrued in 1976 since the agency relationship between the parties dates back to that year and it was at that time that plaintiffs first became entitled to demand an accounting from the defendants concerning their overseas royalty payments. The defendants argue that since there is a three-year statute of limitations for breach of fiduciary duty and an accounting, *see* CPLR 214, these claims should have been asserted by 1979.

In opposing the motion to dismiss, plaintiffs rely on CPLR 206(a)(1), which provides that "where a right grows out of the receipt or detention of money or property by a trustee, agent, attorney or other person acting in a fiduciary capacity, the time within which the action must be commenced shall be computed from the time when the person having the right to make the demand discovered the facts upon which the right depends." Plaintiffs argue that, under this statute, their claims for breach of fiduciary duty and an accounting did not accrue until they first discovered, in May, 2005, that their books had substantial overseas sales and they then demanded a full accounting and payment of the royalties from the defendants. The court agrees. Although defendants argue that May, 2005 was not the earliest date when the plaintiffs had knowledge of the facts entitling them to make a demand, they have failed to provide any evidence to support this argument. To the extent the defendants suggest that they should not be penalized for plaintiffs' prolonged delay in even

inquiring about whether their literary agent had received any royalty payments, such an argument sounds in laches and, at best, creates an issue of fact which cannot be resolved on a motion to dismiss. The defendants' motion to dismiss the second and third causes of action must therefore be denied.

4. Fraud & Negligence - The defendants argue that the fourth cause of action for fraud and the fifth cause of action should be dismissed as duplicative of plaintiffs' cause of action for breach of contract. The court agrees.

As to fraud, a contract action may not be converted into one for fraud by the mere additional allegation that the contracting party did not intend to satisfy its contractual obligation. *Comtomark, Inc. v. Satellite Communications Network, Inc.*, 116 AD2d 499, 500 (1st Dept. 1986). To be sure, New York permits a cause of action for fraudulent inducement to contract upon a showing that factual misrepresentations, separate from a false promise to perform under the contract, were made and justifiably relied upon by a contracting party to its detriment. See *Deerfield Communications Corp. v. Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 (1986); *Channel Master Corp. v. Aluminum Limited Sales, Inc.*, 4 NY2d 403408 (1958). Here, however, the fourth cause of action does not allege any factual misrepresentations. To the extent that the complaint suggests a false promise to perform under the contract, "the wrongful act alleged in support of the fraud claim does not differ from the purely contract-related allegation that defendant did not intend to perform at the time it entered into the agreement, and therefore fails to state a cause of action...." (*Tannehill v. Stuart*, 226 AD2d 117, 118 [1st Dept 1996]). The fourth cause of action must therefore be dismissed.

As to negligence, even if the defendants' failure to turn over the royalty payments at issue was attributable to their lack of diligence, as plaintiffs have suggested as an alternative theory, the plaintiffs' allegation of negligence is still based on the defendants' failure to comply with their contractual obligations. As such, it is duplicative of their breach of contract claim and must therefore be dismissed. See *Gordon v. Teramo & Co., Inc.*, 308 AD2d 432 (2nd Dept 2003); *Merritt v. Hooshang Construction, Inc.*, 216 AD2d 542 (2nd Dept 1995); *Westminster Construction Co., Inc. v. Sherman*, 160 AD2d 867 (2nd Dept 1990).

5. Dismissal of Claims Against Mary Yost Individually - The defendants argue that the plaintiffs' claims should be dismissed as against Mary Yost individually because she never transacted business with the plaintiffs in a personal capacity or as a sole proprietorship. Rather, the defendants claim that Ms. Yost was merely acting as a corporate officer of Yost Associates, Inc., and is therefore not amenable to suit as an individual defendant. Under New York law, the corporate veil may be pierced so as to make an owner personally liable where there is a showing that (1) the owner exercised complete domination of the corporation with respect to the transaction at issue and (2) such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury. See *Matter of Morris v. New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 (1993). Here, the complaint alleges that Ms. Yost is the controlling shareholder and director of Mary Yost Associates Inc., and that she used that status to wrongfully withhold royalty payments from the plaintiffs. At this stage of the proceeding, before any discovery has been conducted, plaintiffs' allegations are sufficient to state a claim for piercing the corporate veil and holding Ms. Yost individually liable. The defendants' motion to dismiss the complaint as against her must therefore be denied.

Accordingly, the defendants' motion to dismiss is granted to the extent that the first cause of action for breach of contract is dismissed as to any alleged breaches occurring prior to February 28, 2001 and the fourth and fifth causes of action are dismissed in their entirety. The motion is otherwise denied. Defendants shall serve an answer to the complaint within 20 days of service upon them of a copy of this order with

notice of entry.

The parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on December 11, 2007 at 10 a.m. for a preliminary conference.

ENTER ORDER

Dated: 11-8-06

MGD

MARYLIN G. DIAMOND, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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