

Jambetta Music, Inc. v Nugent
2006 NY Slip Op 30837(U)
July 10, 2006
Supreme Court, New York County
Docket Number: 105551/2004
Judge: Rosalyn H. Richter
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 24

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JAMBETTA MUSIC, INC.,

Plaintiff,

-against-

DECISION
Index No. 105551/2004
Motion Seq. 4

WAYNE NUGENT d/b/a Dangerous Music,
MidiMafia, Thief in Da Night, Bruce Wayne,
and P.Dubbs,

Defendant.

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RICHTER, J.:

Plaintiff Jambetta Music, Inc. moves for partial summary judgment on its claims for breach of contract and a declaratory judgment that defendant Wayne Nugent ("Nugent") remains liable for his contractual obligations under the recording agreement dated September 4, 1997. Defendant Nugent cross-moves for summary judgment to dismiss the complaint arguing that plaintiff failed to bind him to the contract.

Plaintiff brought this action seeking damages for the alleged breach of a recording agreement. On September 4, 1997, plaintiff and defendant Nugent entered into an Exclusive Recording Artist and Co-Publishing Agreement ("Agreement"). Pursuant to the agreement, defendant granted plaintiff an exclusive right to defendant's recording and publishing services for a term defined as an initial period of one year, plus seven separate consecutive options.

Section (1)(c) of the 1997 agreement states that the "First Contract Period shall commence on the date hereof and shall continue until the date twelve (12) months after the Delivery to Company of the Minimum Recording Commitment for the First Contract Period." Plaintiff alleges that defendant did not fulfill the "Minimum Recording Commitment" and

therefore is in breach of the agreement.

Plaintiff also alleges that defendant did not make a “delivery” as defined by the agreement and therefore, the First Contract Period has not terminated and defendant is still bound to the terms of the agreement. Section 12(h) defines “Delivery” as “the actual receipt by Company or Distributor of fully mixed and edited Master Recordings technically and commercially satisfactory to Company or Distributor and ready for Company’s (or Distributor’s) manufacture of Records, and all necessary licenses, consents and approvals (the form and content of which licenses, consents and approvals must be approved by Company in writing).” Plaintiff argues that defendant did not provide the requisite licenses, consents and approvals for all persons on the recordings and that defendant did not produce master recordings that were commercially satisfactory.

Plaintiff argues that defendant did not “deliver” the master recordings in accordance with the contract because he did not provide the written consent of one of his band members, Jelani Edwards. All members of the band except Edwards signed an inducement agreement which gave plaintiff written consent to use their material. Since Edwards participated on each recording, plaintiff argues that none of these songs can be “delivered” in accordance with the agreement. Also, plaintiff alleges that there are other unauthorized performances on twenty-nine of the thirty-five master recordings that defendant produced.

Section 11(a)(iv)(A) clearly states: “No Master shall be deemed Delivered hereunder until Company has received from all necessary Persons a written, legally-binding agreement, in a form satisfactory to Company and Distributor...” Defendant does not deny that it did not obtain the written consent of Edwards but instead argues that Edwards gave implied consent because he had

full knowledge of defendant's contract with plaintiff. This argument is without merit. The contract clearly requires a "written, legally-binding agreement."¹

The Court finds defendant's remaining arguments without merit. Defendant argues that even if he failed to obtain consents, he is not liable for breach of contract because plaintiff "impliedly waived its right to obtain the consents through conduct inconsistent with enforcement of that condition." Defendant states that plaintiff did not mention the consents to defendant at either of the two meetings both parties attended in 1999 and then plaintiff entered into a distribution agreement without the consents which led defendant to believe that plaintiff did not intend to enforce the "consent" provisions of the recording agreement. Failing to discuss a contractual provision does not "unequivocally establish" a waiver. *See* 22A N.Y. Jur.2d Contracts § 370.

The fact that plaintiff entered into a distribution agreement prior to receiving all of the consents is not conduct inconsistent with the consent requirement, but rather, plaintiff was fulfilling its obligations under the agreement:

Section 1(d) states "Company may exercise its rights hereunder for a Second Contract Period only if Company enters into a Distribution agreement prior to end of the First Contract Period...In the event Company has negotiated a Distribution Agreement within the period provided...but such Distribution Agreement is not fully executed...by reason of either (i) your failure to promptly fulfill obligations hereunder or (ii) your failure to execute such documents as Distributor may require...then the First Contract Period shall be extended for such reasonable time as is necessary to complete the foregoing..."

Defendant then argues that plaintiff frustrated defendant's ability to obtain consents

¹ Defendant also does not deny that he did not obtain the consent of other third parties who performed on various master recordings, but argues that even without these tracks, plaintiff has produced a sufficient number of master recordings to fulfill his commitment. There are nine recordings on which only the band performs. However, because Edwards did not sign the inducement agreement, these songs are not "delivered" either.

necessary to release his songs because plaintiff refused to pay the costs. Defendant argues that Section 5 of the agreement obligates plaintiff to pay for the costs involved with obtaining the consents. However, there is no provision in Section 5 that supports defendant's position. In fact, section 5(e) provides: "You shall be responsible for the payment of all Recording Costs or other costs in connection with making Master Recordings which costs have not been specifically approved in writing by the Company." Moreover, there is no provision elsewhere in the agreement to support defendant's argument. Section 11(a)(ii): "Company shall not be required to make any payments of any nature for, or in connection with, the acquisition, exercise or exploitation of rights by Company pursuant to this agreement, except as specifically provided in this agreement...." Defendant does not cite to any provision in this agreement which requires plaintiff to make any payments for licenses or consents.

Defendant also opposes the motion on the ground that it is an issue of fact whether defendant's songs are "commercially satisfactory." However, the Court does not need to reach this issue as it has been shown that defendant failed to obtain the required consents, which are necessary for "delivery" and fulfillment of the Minimum Recording Contract. Defendant argues that the Court must reach the issue of commercial satisfaction before it can look at whether the proper licenses and consents were obtained. There is nothing in the contract or in case law to support defendant's analysis.

Defendant's cross-motion for summary judgment is denied. Defendant argues that he is not liable under the recording agreement because the group split up in January 2000. Defendant argues that plaintiff failed to send the requisite written notice pursuant to section 24(a) and therefore, failed to bind defendant to the agreement as an individual. This section clearly states

that the Company's obligation to provide written notice of its intent to continue or terminate the agreement only begins when the Artist informs the company by written notice that he is refusing to perform or leaving the group. Defendant has not provided any evidence that he gave written notice to plaintiff that he had left the band thereby triggering plaintiff's obligation to send written notice of intent within 90 days.

Defendant further argues that "this provision explicitly indicates that the ninety day period within which Jambetta must exercise or lose its right to bind leaving band members, is also triggered by Jambetta's mere belief that a band member has left, or may leave." However, section 24(c) clearly states: "If at any time Company believes or has knowledge that a member of Artist is or may be a leaving member, then Company shall have the right (but not the obligation) to exercise Company's rights in accordance with this paragraph 24..." This provision clearly states that plaintiff is not obligated to act pursuant to section 24, but may do so if it wishes. Moreover, in support of its motion, plaintiff submits two letters from defendant. The first letter requests a date from plaintiff to deliver the first LP album and discusses several failed attempts to deliver the first LP because of plaintiff's cancellations. The second letter states that "I have not replied yet with a date as of yet because I am reviewing my schedule in hopes to find a time frame that will allow me to deliver the first LP promptly and professionally." These letters are not dated but reference dates in March 2001 and May 2001 and clearly indicate defendant's intention to deliver an album in the near future. Defendant's allegation that he left the group in January 2000 is belied by this evidence.

Therefore, plaintiff's motion for partial summary judgment is granted and plaintiff is entitled to judgment in its favor on the breach of contract and declaratory judgment claims.

Plaintiff does not establish in this motion its monetary damages, if any, on the contract claim and thus, a trial is necessary. Defendant's cross-motion for summary judgment is denied.

The parties shall appear for a pre-trial conference on August 2, 2006 at 9:30 a.m. in Part 24, Room 418, at 60 Centre Street.

Settle order on notice.

July 10, 2006



Justice Rosalyn Richter