

**Schlacter v Levy**

2006 NY Slip Op 30858(U)

March 28, 2006

Supreme Court, New York County

Docket Number: 111189-2004

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

-----X  
SCOTT SCHLACTER,

Plaintiff,

-against-

ADAM LEVY, RED DISTRIBUTION (a division of SONY),  
SANYO LASER PRODUCTS, INC. WARLOCK  
RECORDS, INC., TPZ DISTRIBUTION, INC., MOIST  
MUSIC, INC. and JOHN DOE(S), INC.,

Defendants.

-----X  
HON. CAROL EDMEAD, J.S.C.

Index No. 111189-2004

**DECISION/ORDER**

**FILED**

APR 04 2006

NEW YORK  
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

Plaintiff Scott Schlacter commenced this action under theories of, *inter alia*, fraud, conspiracy, and breach of fiduciary duty, against defendants Adam Levy, RED Distribution (A Division of Sony) ("RED"), Sanyo Laser Products, Inc. Warlock Records, Inc., ("Warlock"), TPZ Distribution, Inc. ("TPZ"), and Moist Music, Inc. ("Moist Music") for, *inter alia*, an accounting and to recover lost profits resulting from the distribution of certain recording products. Defendant RED moves for dismissal of the amended complaint for failure to state a cause of action against it (CPLR 3211 (a)(7)).

Background

In March 1998, RED and Warlock entered into a distribution agreement wherein Warlock gave RED the exclusive right to distribute all of the records owned by the "Owner," which was defined to include Warlock, Adam Levy, and any other entity "owned or controlled or affiliated"

with Warlock and Levy<sup>1</sup> (the “Warlock Agreement”). Levy is the sole owner of Warlock. RED also had the right to determine how many records it will order, distribution of same, invoicing, and inventory control.

On June 1, 1999, plaintiff and Levy, *inter alia*, entered into an agreement (the “TOPAZ Agreement”) to form a corporation, RK Entertainment, with a registered trade name of Topaz Records (“TOPAZ”). Levy and Schlacter were the directors, who held 37 ½ shares and 25 shares, respectively.

The Warlock Agreement was amended on May 15, 2000 and December 23, 2002 to, *inter alia*, extend the agreement and to increase the “Owner’s Unrecouped Balance.”

On May 13, 2003, plaintiff and Levy entered into a shareholders agreement (the “TPZ/Shareholder’s Agreement”), whereby plaintiff as the CEO, was granted the responsibility for the day-to-day operations of the corporation TPZ. Plaintiff and Levy each owned 50 shares of Common Stock of TPZ.

The Warlock Agreement was amended again on July 23, 2003 regarding the “unrecouped Advance balance,” and to extend the agreement.

Plaintiff essentially claims that defendant Levy engaged in self-dealing and fraud, breached his fiduciary duties, and misappropriated TOPAZ/TPZ records for distribution and sale by companies owned by Levy, including Warlock, in order to benefit himself and his independent interests.

As relevant to the instant motion, plaintiff alleges in his second cause of action of the

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<sup>1</sup> RED was also given the exclusive right to distribution over records owned by Joel Bonner, who is not party to this litigation.

amended complaint, that plaintiff specifically instructed RED to cease from distributing the various recordings, the rights to which belongs to TOPAZ and TPZ unless the proceeds were placed in escrow for the benefit of TOPAZ and TPZ. Plaintiff also gave RED copies of the TOPAZ and TPZ Agreements, and RED should have known that plaintiff had equal control of TOPAZ and sole authority to act on behalf of TPZ. It is also alleged that despite being advised to the contrary to refrain from distributing TOPAZ's records, RED, Sanyo and Levy conspired to distribute the recordings to which TOPAZ and TPZ owned the rights, thereby depriving plaintiff of income necessary to pay for the distribution of labels. RED, Warlock, and Moist also conspired to divert assets belonging to TOPAZ for the sole benefit of Levy, RED, Warlock, Moist and Sanyo. Plaintiff also seeks an order directing RED to make payments to the account of TOPAZ (sixth cause of action).

In support of its motion for dismissal of the complaint, RED argues that the failure of plaintiff to allege any agreement between the defendants to commit a tort or fraudulent scheme defeats plaintiff's conspiracy claim against RED. Further, in light of the Warlock Agreement, no such claim for conspiracy can be maintained. RED contends that RED and Warlock distribute and continue to distribute TOPAZ/TPZ records pursuant to the Warlock Agreement. Under this Agreement, RED was obligated to perform certain services for Warlock, including the distribution of "Owner's Record(s)," and "Owner" includes Warlock, Levy and all entities owned and controlled by, or affiliated with Warlock and Levy. Under the Shareholder Agreement, Levy holds a 50% interest in TOPAZ and a 37.5% in TPZ. Thus RED has an obligation to distribute TOPAZ/TPZ records provided to it by Levy for distribution. RED was under no obligation to follow plaintiff's instructions otherwise.

In opposition, plaintiff claims that RED's Warlock Agreement effectively eviscerates plaintiff's rights to manage TOPAZ and TPZ, rights specifically granted in the TOPAZ and TPZ Agreements. Plaintiff argues that RED acted with Levy to deprive plaintiff of his authority granted under the TOPAZ and TPZ Agreements, by refusing to allow plaintiff to exercise control over the inventories of said corporations. Plaintiff claims that RED was given copies of the two subsequent agreements, *to wit*: the TOPAZ Agreement and TPZ Agreement, and should have known that its Warlock Agreement was in direct contravention of plaintiff's rights. Plaintiff also claims that RED acted with Levy by selling TPZ's records through third party companies solely owned by Levy, which were formed for the sole purpose of depriving plaintiff of his legitimate share of profits that belongs to TOPAZ and TPZ. Specifically, plaintiff alleges that RED first sold and distributed records of "DJ Irene" under the label of TOPAZ, but then subsequently issued and distributed "DJ Irene's" records under Moist Music, which was owned all or in part by Levy. RED's distribution of DJ Irene's records under the Moist Music label deprived TOPAZ of the profits made from DJ Irene's records and value of DJ Irene's name and services in signing other artists as a result of DJ Irene's success. Plaintiff also claims that RED's motion is actually one for summary judgment, improperly brought in the absence of joinder of issue or discovery.

In reply, RED points out that even if agreeing to distribute records could constitute a conspiracy to commit a tort, it could not do so here because RED had a contract with Warlock that required it to distribute records that Warlock provided to it. Moreover, the gravamen of plaintiff's complaint is that Levy, with the help of others, diverted assets and opportunities from TOPAZ or TPZ, and Levy failed to sue in the name of or on behalf of either entity. Further, plaintiff's purported need for discovery does not cure the amended complaint.

### Analysis

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint, liberally construed, states a cause of action (*see*, CPLR §3026; *Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). On a motion to dismiss made pursuant to CPLR § 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]). However, in those circumstances where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence," they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *aff'd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv. denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996], and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511

[1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1<sup>st</sup> Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804, 616 NE2d 159 [1993]).

Where the parties have submitted evidentiary material, including affidavits, the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (see *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS2d 532 [1st Dept 1989]).

Plaintiff's claim that RED acted with Levy to deprive plaintiff of his authority granted under the TOPAZ and TPZ Agreements, by refusing to allow plaintiff to exercise control over the inventories of said corporations is flatly refuted by the documentary evidence.

Plaintiff concedes that RED's Warlock Agreement gave RED the exclusive right to distribute Warlock's records, as well as records owned by entities with which Levy was affiliated. More importantly, it is uncontested that RED's Warlock Agreement preceded the TOPAZ and TPZ Agreements. Plaintiff fails to allege how RED was in any way connected with or involved in the formation of any third party companies which allegedly deprived plaintiff of its rights under plaintiffs' two subsequent agreements.

The rights of the plaintiff, if any, under the TOPAZ Agreement or TPZ Shareholder Agreement to control the distribution of Topaz and TOPAZ's records, did not arise until the time such Agreements were entered into, *after* the Warlock Agreement was entered into between RED and Warlock. Thus, RED owed no duty or obligation to plaintiff at the time the Warlock Agreement was entered into in 1998. Any damages resulting from the existence of the Warlock Agreement does not necessarily impute liability upon RED, where the alleged acts causing

plaintiff's damages occurred subsequent to the Warlock Agreement.

Plaintiff has alleged no specific actions performed by RED, except that RED's agreement with Warlock eventually operated to deprive plaintiff from his right to control the day-to-day operations of the two subsequent corporations, TOPAZ Entertainment and TPZ Agreement. Nor has plaintiff alleged with any degree of particularity how the amendments to the Warlock Agreement made after plaintiff's agreements with Levy, constitute a fraud or conspiracy to commit a fraud. Plaintiff maintains that RED cannot rely on its Warlock Agreement, of which plaintiff was not informed. However, the complaint and supporting documents show no basis for RED to disregard its agreement with Warlock, on account of Levy's subsequent actions with plaintiff, for which RED had no control or involvement. Furthermore, RED was under no obligation to inform plaintiff of the Warlock Agreement when plaintiff entered into the TOPAZ or TPZ Agreements, to which RED was not a party.

Further, plaintiff's counsel's letter to RED, noting that RED reviewed the TPZ Shareholder Agreement and acknowledged that only plaintiff has the power and authority to direct how the TPZ records will be distributed does not amount to fraud, or give rise to an inference that RED intended to deceive plaintiff. That RED allegedly "acknowledged in the past" that plaintiff "has the power and authority to direct how the TPZ product will be distributed" and that RED allegedly continued to make payments for the records to WARLOCK instead of TOPAZ and TPZ does not rise to the level of a sufficient allegation for conspiracy. Again, RED, as acknowledged by plaintiff, relied solely on the Warlock Agreement to which RED was bound, and which preceded the two agreements between plaintiff and Levy.

Based on the foregoing, it is hereby

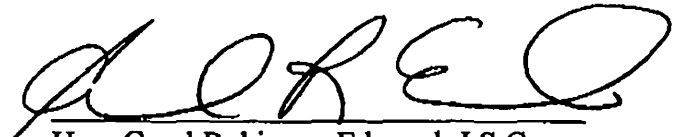
ORDERED that the motion by defendant RED Distribution (A Division of Sony) to dismiss the complaint for failure to state a cause of action against it (CPLR 3211 (a)(7)), is granted; and it is further

ORDERED that notwithstanding that RED is no longer a party to this action, RED agrees to comply with the remaining parties' request for documents and deposition requests, reserving all general objections.

ORDERED that RED Distribution (A Division of Sony) shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: March 28, 2006

  
Hon. Carol Robinson Edmead, J.S.C.

**FILED**  
APR 04 2006  
NEW YORK  
COUNTY CLERK'S OFFICE