

**McMillan Firm v Klarberg**

2007 NY Slip Op 31144(U)

May 2, 2007

Supreme Court, New York County

Docket Number: 0104125/2006

Judge: Martin Shulman

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

**MARTIN SHULMAN**

PART 1

Index Number : 104125/2006 **J.S.C.**

MCMILLAN FIRM

vs

KLARBERG, BARRY

Sequence Number : 002

DISMISS

INDEX NO. 104125/06

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

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

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

PAPERS NUMBERED

1  
2  
3

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

**FILED**  
MAY 10 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: May 2, 2007

**MARTIN SHULMAN** 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):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 1

-----X  
THE MCMILLAN FIRM, f/k/a L. LONDELL  
MCMILLAN, P.C., a professional corporation,

Index No. 104125/06

Plaintiff,

-against-

BARRY KLARBERG, ASSANTE BUSINESS  
MANAGEMENT, LORING WARD (NY) INC.,  
THE ELLERBEE GROUP, INC., DOUBLE  
XXPOSURE, SIMONE MINOTT, and ANGELO  
ELLERBEE,

Defendants.  
-----X

**DECISION/ORDER**  
**FILED**  
MAY 10 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

HON. MARTIN SHULMAN, J.S.C.:

Plaintiff, The McMillan Firm, formerly known as L. Londell McMillan P.C. ("Plaintiff" or "McMillan"), brings this action *pro se* against defendants Barry Klarberg ("Klarberg"), Assante Business Management ("Assante"), Loring Ward (NY) Inc. ("Loring"), Simone Minott ("Minott"), The Ellerbee Group, Inc., Double XXposure and Angelo Ellerbee for various alleged acts of wrongful conduct, including tortious interference with contract, tortious interference with prospective economic advantage and fraud in the inducement (the "Complaint"). Klarberg, Assante, Loring and Minott (collectively referred to as the "Movants") move for an order pursuant to CPLR §§ 1001, 1003 and 3211(a)(10) dismissing the Complaint because of McMillan's alleged failure to join all necessary parties to this action (the "Motion"). Plaintiff opposes the Motion, *inter alia*, claiming that Movants' contention is meritless.

The first cause of action seeks recovery for alleged tortious interference with contract. McMillan claims that the defendants, with knowledge of the existence of

certain agreements between Plaintiff and Earl Simmons (who is professionally known as “DMX” [the “Artist”]), intentionally, wrongfully and improperly interfered with such agreements and/or contractual relationship(s) by prohibiting the payment of fees; misusing their positions; intentionally and wrongfully providing false, misleading and other negative information to the Artist and/or his representatives and agents about Plaintiff, thereby causing the Artist and/or his representatives and agents to breach their obligations under certain agreements with Plaintiff.

The second cause of action seeks recovery for alleged tortious interference with prospective economic advantage. McMillan maintains that defendants, with knowledge of certain existing and potential future contracts between the Artist and Plaintiff, “attempted to inhibit McMillan’s business relationship with the Artist by providing false and misleading information [e.g. McMillan was ‘double billing’ and had already been paid for services performed] to the Artist regarding McMillan’s fees and services; prohibiting contact with the Artist; improperly advising the Artist; and interfering with McMillan’s professional relationship with the Artist” and that “but for” defendants’ aforesaid wrongful conduct certain proposed future contracts between Artist and Plaintiff would have been entered into. See Complaint at ¶¶ 75-77, at Ex. A to Motion. McMillan further alleges that as a result of defendants’ contumacious “acts and statements Plaintiff’s relationship with the Artist was severed, to the damage and detriment of Plaintiff”. *Id.* at ¶78.

The third cause of action seeks recovery against defendants for fraud in the inducement claiming that Minott, individually and as a principal/agent/employee/

representative of Assante and on behalf of the Artist, proposed to pay McMillan a retainer fee of five thousand (\$5,000.00) dollars per month, which McMillan accepted and agreed to and that the Artist and all of the named defendants were intended, implied and/or actual beneficiaries of the work McMillan performed. Plaintiff further claims that defendants' repeated promises to make payment were false and that such offers and promises were intentionally made to induce Plaintiff to rely upon them and continue working on behalf of the Artist and the various defendants.

Succinctly stated, Movants argue that the genesis of each of McMillan's three tort causes of action stems from certain contracts and/or agreements between McMillan and the Artist and/or the law firm of Thelen Reid & Priest ("Thelen Reid"). However, Thelen Reid and/or the Artist are not parties to this action. Therefore, Movants seek dismissal of the action claiming that Thelen Reid and/or the Artist are necessary parties who may be inequitably affected by a judgment in this action.

In opposition to the Motion, Plaintiff argues that Movants misconstrue the gravamen of the Complaint because "the enumerated causes of action against the named defendants are for torts committed against the plaintiff". Whitaker Opp. Aff. at ¶16 (emphasis in original). McMillan further espouses the notion that references in the Complaint to certain contracts and non-parties (Thelen Reid and the Artist ) were simply to supply background information and that granting the Motion would prejudice McMillan because if granted, the statute of limitations for tort claims against the existing

defendants, as well as any tort claims against the Artist and Thelen Reid, would have expired.<sup>1</sup>

### Analysis

Pursuant to CPLR §1001(a) two situations mandate joinder of a party: (1) where that party is necessary if complete relief is to be accorded between the persons who are parties to the action; or (2) **where the unnamed party might be inequitably affected by a judgment in the action.** Moreover, failure to join such a party is grounds for dismissal of an action. See CPLR §1003 and CPLR R. 3211(a)(10); *see also, City of New York v. Long Island Airports Limousine Service Corp.*, 48 N.Y.2d 469, 423 N.Y.S.2d 651 (1979) (“The rule serves judicial economy by preventing a multiplicity of suits. It also insures fairness to third parties who ought not to be prejudiced or ‘embarrassed by judgments purporting to bind their rights or interest where they have had no opportunity to be heard’ [citations omitted]”).

It is readily apparent that the Artist is the “common thread” which runs through the Complaint’s three causes of action.<sup>2</sup> To prevail on a claim for tortious interference

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<sup>1</sup> Movants’ supporting papers implicitly suggest that Plaintiff’s failure to name Thelen Reid and/or the Artist was not inadvertent but rather an intentional omission. Moreover, Movants seemingly avow that any potential expiration of the statute of limitations as against the named defendants, Thelen Reid or the Artist was a known consequence of Plaintiff’s intentional omission of the Artist and/or Thelen Reid from the action.

<sup>2</sup> Parenthetically, Plaintiff alleges that some, if not all, of the defendants maintained confidential relationships with the Artist and made some of the financial decisions, both personal and professional, on behalf of the Artist (Complaint ¶¶ 20-37). Plaintiff also claims that “the Artist and all of the named defendants were intended, implied and/or actual beneficiaries of the work performed by McMillan...” (Complaint at ¶60).

with contract McMillan must establish: (1) the existence of a valid contract between the plaintiff and a third party; (2) defendant's knowledge of that contract; (3) defendant's intentional procurement of the third-party's breach of the contract without justification; (4) actual breach of the contract; and (5) damages resulting therefrom. See *Lama Holding Co. v. Smith Barney, Inc.*, 88 N.Y.2d 413, 424, 646 N.Y.S.2d 76 (1996). With respect to the fourth element of such a claim, actual breach of the contract, Plaintiff must necessarily implicate the Artist and/or Thelen Reid and demonstrate that the Artist and/or Thelen Reid in fact breached a contract. Therefore, in order for McMillan to prove his first cause of action for tortious interference with contract, the court must determine that the Artist and/or Thelen Reid breached a contract with McMillan. Such a finding would potentially "inequitably affect" the Artist and/or Thelen Reid. Thus, as to the first cause of action the Artist and/or Thelen Reid are parties who should have been joined, and such cause of action could not be prosecuted in their absence. See CPLR §1001; see also, *First Nat. Bank of Amsterdam v. Shuler*, 153 N.Y. 163, 170, 47 N.E. 262, 264 (1897).

With respect to the second cause of action for tortious interference with prospective economic advantage, Plaintiff contends that it had a long-standing business and professional relationship with the Artist and because of their many prior business dealings such relationship was one of respect and confidence. McMillan further contends that because of its relationship with the Artist, McMillan and the Artist would have entered into future contracts and that the defendants knew of the existing and potential future contracts between McMillan and the Artist. Despite the foregoing, Plaintiff alleges that defendants "attempted to inhibit McMillan's business relationship

with the Artist by providing false and misleading information to the Artist regarding McMillan's fees and services; prohibiting contact with the Artist; improperly advising the Artist; and interfering with McMillan's professional relationship with the Artist" (the "Alleged Wrongful Conduct"). In support of this cause of action Plaintiff also maintains that, but for such Alleged Wrongful Conduct, Plaintiff's relationship with the Artist would not have been severed and future contracts between the Artist and Plaintiff would have been entered into.

In order to prevail on its tortious interference with prospective economic advantage claim, McMillan must show that defendants' interference with its prospective business relations with the Artist was accomplished by wrongful means<sup>3</sup> or that defendants acted for the sole purpose of harming McMillan. See, *Snyder v. Sony Music Entertainment Inc.*, 252 A.D.2d 294, 684 N.Y.S.2d 235 (1<sup>st</sup> Dept., 1999); see also, *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 428 N.Y.S.2d 628 (1980). In addition, Plaintiff must also establish such acts were the proximate cause of the cessation of the Plaintiff's projected contractual relations with the Artist. See, *NBT Bancorp, Inc. v. Fleet/Norstar Fin. Group, Inc.*, 215 A.D.2d 990, 628 N.Y.S.2d 408 (3<sup>rd</sup> Dept., 1995), *aff'd* 87 N.Y.2d 614, 641 N.Y.S.2d 581 (1996).

Simply stated, it appears from the pleaded allegations that the defendants, particularly Minott, acted as the Artist's confidant, alter ego and/or middleman between the Artist and various third parties with respect to various personal and professional

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<sup>3</sup> "Wrongful means" includes physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract. See *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, *supra*.

matters. McMillan's Complaint painstakingly recounts the alleged contractual and/or personal relationships between the Artist and the various defendants as being one of confidence. Plaintiff further asserts, albeit upon information and belief, that defendants made personal and professional decisions on the Artist's behalf allegedly without the Artist's knowledge. Therefore, it necessarily follows that any finding of tortious interference with a prospective economic advantage here may very well implicate the contractual relationships between the Artist and defendants or other third parties,<sup>4</sup> the result of which would inequitably affect the Artist if this action were to proceed in the Artist's absence.

Plaintiff's fraudulent inducement claim (the third cause of action) is based upon the theory that defendants' alleged "offers and promises" to pay Plaintiff a \$5,000.00 per month retainer were false or "recklessly made" for the purpose of inducing Plaintiff to rely on such "offers and promises", and in justifiable reliance thereon Plaintiff continued to perform work for the benefit of the Artist and the various defendants, to Plaintiff's detriment. To establish a *prima facie* claim of fraudulent inducement, a plaintiff must establish that a material representation, known to be false, has been made with the intention of inducing reliance on the misstatement, and as a result of its reliance plaintiff sustained damages. *First Nationwide Bank v. 965 Amsterdam, Inc.*, 212 A.D.2d 469, 470-471, 623 N.Y.S.2d 200, 201 (1<sup>st</sup> Dept., 1995); see also, Restatement (Second) of Torts §§ 525.

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<sup>4</sup> The propriety of defendants' acts on the Artist's behalf may also be implicated.

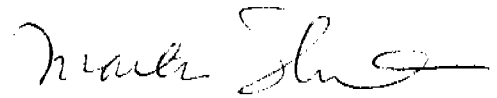
Logic dictates that as a corollary to McMillan's establishment of its pleaded claim of fraudulent inducement, the likely result is that the Artist would be inequitably affected. This is particularly so where Plaintiff contends that the absent Artist, with whom Plaintiff claims to have had a contractual relationship, benefitted from the alleged fraud.

Accordingly, it is hereby

ORDERED that the Motion is granted and the action is dismissed.

The foregoing constitutes the decision and order of this court. Copies of this decision and order have been sent to counsel for all parties.

Dated: New York, New York  
May 2, 2007



Hon. Martin Shulman, J.S.C.

**FILED**  
MAY 10 2007  
NEW YORK  
COUNTY CLERK'S OFFICE