

<b>Masucci v Sonido, Inc.</b>
2007 NY Slip Op 32448(U)
August 3, 2007
Supreme Court, New York County
Docket Number: 0603594/2005
Judge: Karla Moskowitz
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08/03/2007  
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ PART 03  
Justice

-----x  
ALEX MASUCCI,

Plaintiff,

- against -

SONIDO, INC., THE ESTATE OF GERALD MASUCCI,  
MELISSA GOSNELL (INDIVIDUALLY AND AS TRUSTEE),  
CORRINE MASUCCI, VALSYN, S.A., PROTEL RECORDS,  
SHERIDAN SQUARE ENTERTAINMENT, INC., and JOSEPH  
BIANCO, V2 GROUP (INTERNATIONAL), E-MUSICA AND  
E-MUSICA ACQUISITION CORP.,

Defendants.  
-----x

INDEX NO. 603594/2005

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

MOTION SEQ. NO. 008

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying Decision and Order.

Dated: August 3, 2007

  
\_\_\_\_\_  
KARLA MOSKOWITZ J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

**FILED**  
AUG 08 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: PART 3

-----X  
 ALEX MASUCCI,

Index No. 603594/2005

Plaintiff,

-against-

SONIDO, INC., THE ESTATE OF GERALD  
 MASUCCI, MELISSA GOSNELL (INDIVIDUALLY  
 AND AS TRUSTEE), CORRINE MASUCCI, VALSYN,  
 S.A. PROTEL RECORDS, SHERIDAN SQUARE  
 ENTERTAINMENT, INC., and JOSEPH BIANCO,  
 V2 GROUP (INTERNATIONAL), E-MUSICA AND  
 E-MUSICA ACQUISITION CORP.,

**DECISION and ORDER**

Defendants.  
 -----X

**KARLA MOSKOWITZ, J.:**

This is an action for the breach of a finder's fee agreement relating to the sale of the assets of a music company, Sonido, Inc. ("Sonido"). Defendants E-Musica Acquisition Corp. ("E-Musica") and Protel Records ("Protel") move to dismiss the Third Amended Complaint for failure to state a claim (CPLR 3211[a][5] and [7]).<sup>1</sup>

**Background/The Third Amended Complaint**

The court presumes familiarity with the prior proceedings and decisions in this action. As is relevant here, the Third Amended Complaint alleges the breach of a September 29, 2004 letter agreement (the "Agreement") in which Sonido agreed to pay plaintiff Alex Masucci ("Alex") a commission of not less than 3% on the sale of certain of its assets, including the Fania

<sup>1</sup> At oral argument on the motion to dismiss the Second Amended Complaint, the parties consented on the record to the dismissal of a party identified in the pleadings as "E-Musica Inc." The stipulation was premised upon defendants' representation that no such entity existed and upon their agreement to waive objections to service upon Protel and E-Musica Acquisitions Corp. Accordingly, all claims asserted against E-Musica Inc. are deemed dismissed, notwithstanding plaintiff's references to that party in the Third Amended Complaint.

Latin music record label. The Agreement contained a non-circumvention clause by which Sonido agreed it would not consummate a transaction with any party that Alex had previously introduced without his prior written approval. The Agreement specifically identifies defendants Sheridan Square Entertainment, Inc. ("Sheridan") and its controlling shareholder, Joseph Bianco ("Bianco"), as prospective purchasers that Alex had procured, and the complaint alleges that Alex also introduced defendant V2 Group (International) ("V2") and non-party Morgan Stanley U.K. ("Morgan Stanley") to Sonido. The Agreement prohibited Sonido from engaging in transactions "with any person or entity directly or indirectly affiliated" with a party that Alex had introduced and from taking "any action which would directly or indirectly circumvent [Alex's] ability to give or withhold approval from the consummation of such a transaction."

The complaint alleges that Sonido, with the assistance of Protel, E-Musica and other defendants, breached the Agreement by engaging in a series of sham transactions intended to disguise the ultimate sale of the Fania assets to Sheridan and thus circumvent Alex's entitlement to a commission and other compensation. Specifically, plaintiff claims that, in early 2005, Bianco and Sheridan broke off direct negotiations with Sonido after Protel reasserted its longstanding interest in acquiring Fania. At the time, Bianco told Alex that Protel did not have the funds to complete the transaction and indicated he would resume negotiations after Protel dropped its bid. However, prior to withdrawing, Bianco was allegedly engaged in secret discussions with Protel to arrange for Morgan Stanley to finance Protel's acquisition of Fania. In July 2005, the complaint alleges, Sonido (1) sold Fania to Protel, that (2) transferred Fania to its subsidiary, E-Musica, that (3) sold its assets, including Fania, to defendant V2, that (4) sold its assets to defendant Sheridan. Sonido did not seek Alex's approval of the sale or compensate him under the Agreement.

The Third Amended Complaint asserts four causes of action against Protel and E-Musica. In the second cause of action, plaintiff asserts that those defendants tortiously interfered with the performance of the Agreement. In the fifth cause of action, plaintiff alleges that they aided and abetted defendants Bianco and Sheridan's breaches of fiduciary duty. Plaintiff alleges in the sixth cause of action that Protel and E-Musica aided and abetted Bianco and Sheridan's tortious interference with the Agreement. The seventh cause of action is for a mandatory injunction requiring transfer of Fania back to Sonido.

#### Discussion

The court denies the motion to dismiss. First, the complaint sufficiently pleads a cause of action for tortious interference with an existing contract. To state such a claim, "plaintiff must show the existence of its valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages." (White Plains Coat & Apron Co., Inc. v Cintas Corp., 8 NY3d 422, 426 [2007]). Here, plaintiff has alleged that he lost a commission and other benefits when the other defendants breached the non-circumvention provisions of the Agreement with the knowing participation of Protel and E-Musica in a scheme to transfer Fania to Sheridan without Alex's knowledge.

In the papers and at oral argument, one of the central issues was whether plaintiffs had adequately pled the use of wrongful means to overcome defendant's assertion of economic justification. As this court noted, the availability of that defense was problematic given some recent First Department precedent, and seemingly at odds with prior law, suggesting that it could not be raised where the tortious interference related to an existing rather than prospective contract. (See Kronish Lieb Weiner & Hellman LLP v Tahari, Ltd., 35 AD3d 317 [1st Dept 2006]). The Court of Appeals has since resolved the question, holding that "[a] defendant who is

simply plaintiff's competitor and knowingly solicits its contract customers is not economically justified in procuring the breach of contract . . . [i]n other words, mere status as plaintiff's competitor is not a legal or financial stake in the breaching party's business that permits defendant's inducement of a breach of contract." (White Plains Coat, supra at 426). Accordingly, defendants can no longer rely on an economic justification defense, notwithstanding the allegations regarding their prior business interest in purchasing Fania.

Moreover, even if an economic justification defense were legally cognizable it would not be available to Protel and E-Musica under the facts as alleged. Defendants' focus on "competitor" status misconceives the gravamen of plaintiff's complaint. Plaintiff asserts that defendant's acquisition of Fania was not a bona fide, competitive purchase, but instead part of a ruse to obfuscate the identity of the ultimate buyer, Sheridan. Defendants thus were not legitimately "competing" for ownership but merely temporarily lending their corporate identities to mask the transaction and thereby facilitate the breach of the Agreement.

Defendants' prior economic interest in Fania, however legitimate, would not excuse this later conduct. Indeed, when considered in conjunction with the allegation that defendants lacked the funds to undertake the purchase, that history cuts against their position. A reasonable inference can be drawn from those facts that the very reason Sonido selected defendants to act as strawmen was that their earlier, legitimate bids for Fania would blunt suspicion regarding their acquisition of its assets.

The nature of the underlying transaction also answers the remaining objections to the tortious interference claim. The allegations regarding defendants' knowledge of the existence of the Agreement are not conclusory, as movants contend, when the circumstances are considered in their totality. Defendants can be presumed to have had some idea of why their ownership of

the Fania assets was so transitory, of why they were facilitating the alleged back-to-back flip sales of Sonido's property. Although defendants may well have an innocent explanation for their role, plaintiff's conclusion that they were aware of the plan to circumvent the Agreement is plausible as well. Considered in the light of that alleged awareness, defendants' procurement of the sale would equate to intentional procurement of the breach.

Likewise, the alleged mechanics of the transaction support the allegation that the breach would not have occurred but for defendants' conduct. While a party who merely welcomes or witnesses a breach may escape liability for tortious interference (see Cantor Fitzgerald Associates, L.P. v Tradition North, 299 AD2d 204 [1st Dept 2002]), plaintiff accuses defendants of playing an essential role in concealing the true buyer's identity to evade the non-circumvention provisions. The argument that "but for" causation is lacking because defendants' actions did not prevent Sonido from paying a finder's fee voluntarily simply ignores the alleged reason that the defendants structured the sales as they did. Further, "[a] cognizable claim for tortious interference does not require an allegation that the defendant's conduct was the sole proximate cause of the alleged harm." (Kronish Lieb, supra at 318). As described in the complaint, defendants' active participation in the flip sale scheme satisfies the element of causation.

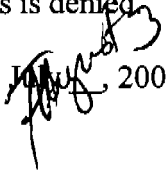
Plaintiff's aiding and abetting claims are cognizable as well. To state a claim for aiding and abetting liability, the complaint must allege (1) the underlying tortious conduct, (2) defendant's knowledge thereof, (3) the rendition of substantial assistance to the breaching party, and (4) damages. (See Global Minerals and Metals Corp. v Holme, 35 AD3d 93 [1st Dept 2006]). "Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur." (Kaufman v Cohen,

constitutes substantial assistance in effecting the breach. For the reasons discussed above, defendants' argument that plaintiff has failed to plead their knowledge of the underlying tortious conduct is without merit.

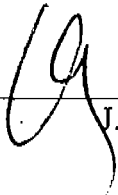
Finally, because the court sustained a cause of action for an injunction identical to the one asserted here in an order dated June 16, 2006 in connection with a motion directed at the Second Amended Complaint, the court denies the motion to dismiss the seventh cause of action.

Accordingly, it is hereby

ORDERED, that E-Musica Acquisition Corp. and Protel Records' motion to dismiss is denied.

Dated:  2007

ENTER:

  
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J.S.C.

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