

**Harbinger Records, Ltd. v Koch Entertainment  
Distrib., LLC**

2007 NY Slip Op 32813(U)

August 29, 2007

Supreme Court, New York County

Docket Number: 0124755/2002

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE, J.S.C.

PART 10

*Justice*

Index Number : 124755/2002  
HARBINGER RECORDS, LTD.  
vs  
KOCH ENTERTAINMENT  
Sequence Number : 001  
AMEND CAPTION/PARTIES

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

is 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

**motion (a) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

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

Dated: 8/29/07

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one:  FINAL DISPOSITION  
Check if appropriate:  DO NOT POST

NON-FINAL DISPOSITION  
 REFERENCE

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 10**

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Harbinger Records, Ltd.,

Plaintiff,

**DECISION/ORDER**

-against-

Index # 124755/02

Mot. Seq. # 001

Koch Entertainment Distribution, LLC,

Defendant.  
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Pursuant to CPLR 2219(a) the following numbered papers were considered by the Court in connection with this motion:

**PAPERS**

Notice of Motion, KB affd., proposed amended complaint.....	1
Notice of Cross-Motion, MR affd., DJA affirm., exhibits.....	2
KB affd. in Opp. To Cross-Motion and in support of Motion, exhibits.....	3

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

Gische, J.:

Upon the foregoing papers, the decision and order of the court is as follows:

Plaintiff seeks leave to serve and file an amended complaint. Defendant Koch Entertainment Distribution, LLC ("Koch") cross-moves for summary judgment dismissing the complaint. The original complaint was served in or around November 2002. It asserted one cause of action, for breach for contract, against Koch only and it sought monetary damages in the total amount of \$33,097.00. Plaintiff now seeks to interpose an amended complaint which asserts additional causes of action and adds a new defendant, DRG Records, Inc. ("DRG"). It reasserts the cause of action for breach of contract and seeks to add additional causes of action against both Koch and DRG for an accounting, unjust enrichment, fraud, conspiracy to commit fraud and conversion. Plaintiff also seeks to significantly increase its demand for damages.

### 1. Leave to Amend Pleadings

CPLR § 3025(b) permits a court to grant leave to amend a pleading at any time during an action. Leave is to be freely given upon terms that may be just. Only if the opposing party can show prejudice, then the amendment should not be granted. Where the facts on which a late motion for amendment were known to the movant from the outset, the court should carefully scrutinize whether the amendment should be denied for laches. LB Foster Co. V. Terry Contracting, Inc. 25 AD2d 721 (1<sup>st</sup> dept. 1966). Where amendment is only to change a theory, but adds no new facts to the case, it should be allowed. Rofe v. Union College, 30 AD2d 504 (3<sup>rd</sup> dept. 1968). Where merits are obviously lacking, however, amendment should not be allowed. East Asiatic Co. v. Carash, 34 AD2d 432 (1<sup>st</sup> dept 1970).

To the extent that plaintiff seeks to add DRG as a new party plaintiff the motion is denied. Although plaintiff states "on information and belief" that Koch and DRG are related entities, not a scintilla of proof is offered on this issue. In fact Koch vehemently denies this is true.

Plaintiff knew that it was Koch's position that the wrong party had been sued as early as 2003. In Koch's Bill of Particulars dated April 2, 2003 Koch expressly identified DRG as the party with whom plaintiff had a contract and not Koch. In the court's original preliminary conference order, November 15, 2003 was set as the outside date for impleader. Notwithstanding such notice, plaintiff did virtually nothing to add DRG at that time, or to ascertain the relationship (if any) between DRG and Koch. No explanation is given why plaintiff simply ignored the court's deadline for the addition of parties or the over three year delay in doing so.

Koch otherwise opposes amendment claiming that at this late stage it will be prejudiced by the addition of claims against it that utterly lack legal basis and that the new causes of action are time barred.

Plaintiff claims that because there has been no discovery in this case, there is no prejudice to Koch in allowing the amendment. This argument is rejected at the outset. This case has languished for years in the court system, without plaintiff doing anything to move its case forward. Plaintiff has neither acted to obtain discovery or fully complied with the orders requiring it to provide discovery to Koch. Plaintiff has simply failed to comply with the outstanding orders requiring it to file a Note of issue by no later October 12, 2004. The case was only re-awakened almost two years later following the court's *sua sponte* order setting it down for a status conference. While there has been little discovery in this case, the fact remains that all discovery should have been completed by now. Thus, plaintiff may not rely on its own recalcitrance in discovery as justification for this very late application for amendment of pleadings.

Moreover, the additional claims that plaintiff seeks to add against Koch for an accounting, unjust enrichment, fraud, conspiracy to commit fraud and conversion have not been shown by plaintiff to have merit.

Plaintiff's allegations concerning fraud are based upon "representations" made by Koch that also form the basis for the breach of contract action. The claimed fraud is that Koch did not intend to perform the contract. A party may not convert a breach of contract claim into one for fraud by claiming that the party did not intend to perform the contract. New York University v. Continental Insurance, 87 NY2d 308 (1995); Krantz v. Chateau Stores of Canada, Ltd., 256 AD2d 186 (1<sup>st</sup> dept. 1988).

Conspiracy does not stand as an independent tort. Thus, conspiracy to commit fraud fails where there is no underlying tort of fraud to support it. Monsanto v. Electronic Data Systems Corp., 141 AD2d 514 (2<sup>nd</sup> dept. 1988).

Here, according to plaintiff, the new proposed claim regarding the right to an accounting is based upon the obligation to account under the parties' contract. Thus, it is nothing more than a remedy asserted for a breach of contract action and it cannot stand as a separate cause of action. In order for the right to an accounting to stand apart from any right under the contract, there would need to be a need for a fiduciary obligation giving rise to that right. Hamilton v. Patrolman's Benevolent Association of City of New York, 88 N.Y.S. 2d 683 (Sup. Ct. Queens Co. 1949). No such claim is or can be made in this case.

Unjust enrichment, is also unavailable as a cause of action. Unjust enrichment is an equitable principle that a person may not be allowed to enrich his or herself at the expense of another. Where there is a contract that covers the same subject matter, this equitable remedy is not available. Curtis Properties Corp. v. Greif Companies, 236 A.D. 2d 237 (1<sup>st</sup> Dept 1997); Jandous Electric Const. Corp. v. The City of New York, 88 A.D. 2d 821 (1<sup>st</sup> Dept 1982).

Plaintiff has sworn and consistently maintained that there a contract covering the parties' relationship. While there is a viable defense of statute of frauds that precludes the enforcement of the contract (see decision *infra*), a claim of unjust enrichment may not be used to circumvent the writing requirements of the General Obligations Law ("GOL"). Roberts v. Champion International, Inc., 52 A.D.2d 773 (1<sup>st</sup> dept. 1976); see also: Davis & Mamber, Ltd. v. Adrienne Vittadini, Inc., 212 AD2d 424 (1<sup>st</sup> dept. 1995).

Nor may conversion be asserted. You cannot have conversion where the party against whom the claim is made came into possession of the property lawfully. Boston Concessions Group, Inc. v. Criterion Center Corp., 250 A.D.2d 435 (1<sup>st</sup> dept. 1998). Plaintiff admits that it gave its CD to Koch pursuant to a contractual relationship. Thus, the fact that Koch may still have possession of CDs does not support a conversion claim. Nor is the dispute about what monies are due to plaintiff under a contract a claim for conversion of the cash. Matzan v. Eastman Kodak Co., 134 A.D.2d 863 (4<sup>th</sup> dept. 1987).

Since the court finds that the proposed claims lack merit, it does not reach the claim that they would otherwise be barred by the applicable statute of limitations.<sup>1</sup>

The motion for leave to amend the pleading is therefore denied in its entirety.

## 2. Cross-Motion for Summary Judgment

Koch moves for summary judgment. Issue has been joined and the note of issue has not yet been filed. The cross-motion is, therefore, appropriately before the court for review on the merits. CPLR §3212; Brill v. City of New York, 2 N.Y.3d 648 (2004).

Koch denies that the parties have any written contract and claim that although a copy of written contract has been requested from plaintiff in discovery, none has been produced. It further claims that there is no oral contract and that, even if there was an oral contract, it is barred by the application of the statute of frauds. The statute of frauds was plead as an affirmative defense in Koch's original answer interposed in

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<sup>1</sup>The statute of limitations claims, although raised, are not clearly addressed by either side in this motion.

2003. Plaintiff does not come forward with a written contract nor does it expressly address the statute of frauds issue in opposition to the cross-motion.

Koch as the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). If Koch meets this initial burden then the burden shifts to plaintiff who must demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). A party may not defeat a motion for summary judgment with bare allegations of unsubstantiated facts. Zuckerman v. City of New York, supra at 563-64.

Koch has satisfied its burden entitling it to summary judgment. It has proven, through admissible evidence based on personal knowledge, that the parties did not have a written agreement. Plaintiff has not come forward with a writing to refute this contention. Koch also claims that there is no oral agreement between the parties. Alternatively, it claims that even if you accept plaintiff's contention that there was an oral agreement, it violates the statute of frauds. Koch's argument is based upon plaintiff's proposed verified amended complaint which alleges that the parties had an exclusive distribution agreement for a period of three years.

The statute of frauds is codified in GOL §5-701 which provides in pertinent part:

" Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:....1. By its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime..."

Plaintiff has not come forward with any opposition at all, let alone admissible evidence proving the existence of a written contract or that the oral contract it claims exists can be completed within a year. Koch is, therefore, entitled to summary judgment dismissing the complaint as a matter of law.

### Conclusion

*In accordance herewith it is hereby*

ORDERED that plaintiff's motion for leave to amend the pleadings is denied in its entirety, and it is further

ORDERED that defendant's motion for summary judgment dismissing the complaint is granted and the Clerk for the Court is directed to enter a judgment in favor of defendant and against plaintiff denying and dismissing the complaint, and it is further

ORDERED that any requested relief not otherwise expressly granted herein is denied, and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York  
August 29, 2007

So Ordered:

J.G. J.S.C.

**FILED**  
SEP 10 2007  
NEW YORK  
COUNTY CLERKS OFFICE