

Sirico v F.G.G. Productions, Inc.

2007 NY Slip Op 34263(U)

December 28, 2007

Supreme Court, New York County

Docket Number: 0604403/2005

Judge: Karla Moskowitz

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

-----X
PHYLLIS J. SIRICO and PEGGY S. DAVIDSON,

Plaintiffs

- against -

F.G.G. PRODUCTIONS, INC.,

Defendant.
-----X

INDEX NO. 604403/2005
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____


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: December 28 2007

FILED
JAN 04 2008
NEW YORK
COUNTY CLERK'S OFFICE



KARLA MOSKOWITZ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

-----X
PHYLLIS J. SIRICO and PEGGY S. DAVIDSON,

Index No. 604403/2005

Plaintiffs

- against -

F.G.G. PRODUCTIONS, INC.,

Defendant.

DECISION and ORDER

FILED

JAN 04 2008

NEW YORK
COUNTY CLERK'S OFFICE

-----X
MOSKOWITZ, J.:

Defendant F.G.G. Productions, Inc. ("FGG") moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint of plaintiffs Phyllis J. Sirico and Peggy S. Davidson, dated May 8, 2006 ("Complaint") on the ground that no genuine triable issues of fact exist in this action for royalty payments that FGG allegedly owes to Sirico and Davidson in connection with the sale and other exploitation of recordings FGG produced and Smash Records first released in 1963. The recordings in question feature performances by a vocal group known as the Angels, best known for their song "My Boyfriend's Back," of whom plaintiffs were two of the three members. FGG additionally requests judgment in its favor on its counterclaim by virtue of plaintiffs' default.

As discussed herein, FGG's motion for summary judgment is granted to the extent that the Complaint is dismissed.

BACKGROUND

With respect to Sirico, plaintiffs allege, in relevant part, that: (a) in 1960, Sirico and two non-parties entered into an agreement with FGG with respect to their services as recording artists under the name the Angels; (b) pursuant to the terms of the agreement, FGG agreed to pay Sirico

royalties on the Angels' recordings; and (c) FGG failed to pay Sirico royalties owed pursuant to the agreement.

With respect to Davidson, plaintiffs allege that: (a) Davidson performed as a member of the Angels, but was not a party to this agreement with FGG; (b) Davidson and FGG entered into an implied contract, whose specific terms are not pleaded, for the payment of royalties; (c) FGG breached the implied contract - a promise to pay royalties - by failing to pay Davidson the royalties earned; and (d) FGG improperly used the name and likeness of Davidson in connection with the commercial exploitation of the Angels' recordings.

Plaintiffs claim that, although their recordings were released in 1963, FGG never rendered any accountings nor made any payments, notwithstanding the alleged contractual obligations (express or implied) to do so. Plaintiffs do not explain why they waited 40 years to assert these claims.

The Complaint purports to state six causes of action, as follows: (a) by Sirico - breach of contract - - that FGG breached the contract between the parties by "failing to account and to pay to Sirico her full and complete share of [royalties] due from the commercial exploitations of the Angels' master recordings" (first cause of action); (b) by Davidson - breach of implied contract - - that Davidson and FGG entered into an implied contract whereby FGG agreed to pay her royalties and license income generated from the exploitation of the Angels' master recordings, which FGG breached by failing to pay the amounts due (second cause of action); (c) unjust enrichment, by both plaintiffs (third cause of action); (d) accounting, by both plaintiffs (fourth cause of action); (e) rescission, by both plaintiffs (fifth cause of action); and (f) violation of New York Civil Rights Act § 51, by Davidson (sixth cause of action).

DISCUSSION

FGG contends that the court should grant summary judgment dismissing all of the causes of action asserted in the Complaint. FGG submits an affidavit of Richard Gottehere, an FGG principal, dated April 16, 2007, in support of the motion, together with documentary support. In opposition, plaintiffs do not submit an affidavit by Sirico or Davidson or other evidentiary support, but instead submit only an affirmation of counsel. Plaintiffs' attorney states that plaintiffs rely solely upon their Bill of Particulars and Complaint (that counsel verified).

FGG contends that: (1) the statute of limitations or laches bars Sirico's breach of contract and unjust enrichment claims; (2) Sirico has failed to plead facts showing a right to an accounting; (3) Sirico has an adequate remedy at law and thus her claim for rescission fails; (4) the statute of limitations bars Davidson's claims for breach of an implied contract and unjust enrichment; (5) the statute of frauds bars Davidson's breach of an implied contract claim; (6) Davidson has failed to plead facts showing a right to an accounting; (7) Davidson has an adequate remedy at law and thus her claim for rescission fails; and (8) use of Davidson's portrait and name is permissible pursuant to an exemption of section 51 of the New York Civil Rights Act.

FGG contends that Sirico's only claim with any semblance of substance is her claim for royalties under the agreement, but that, this claim, if valid, would, at most, be limited to royalties that accrued during the six-year period prior to the commencement of the suit. FGG submits, however, that its obligations under the agreement ended 40 years ago when Sirico breached the contract's exclusivity provision in recording for a third-party while the recording agreement was still in force. Thus, if Sirico had a cause of action challenging the validity of the contractual

provision and the cessation of royalty payments, FGG contends that the claim arose 40 years ago and is now time-barred.

With respect to Davidson, FGG's position is that there is no basis in law or in fact for her claims insofar as she was not a party to any agreement with FGG. Thus, FGG submits, Davidson has no claim to royalties in connection with any exploitation of recordings on which she participated. FGG further states that it conveyed all rights in the Angels' recordings to Smash Records in 1963, and thus, even if her Civil Rights Law § 51 claim had any merit, the proper defendant would be Smash Records or its successor-in-interest.

In order to obtain summary judgment, the moving party "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 NY2d 851, 853 [1985]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (id.). The party opposing a summary judgment motion "must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure so to do, and the submission of a hearsay affirmation by counsel alone does not satisfy this requirement" (Zuckerman v City of New York, 49 NY2d 557, 560 [1980]). "The burden upon a party opposing a motion for summary judgment is not met merely by a repetition or incorporation by reference of the allegations contained in pleadings or bills of particulars, verified or unverified" (Indig v Finkelstein, 23 NY2d 728, 729 [1968]). An attorney's affirmation that is neither based on personal knowledge nor supported by admissible evidence is insufficient to oppose a motion (Zuckerman, 49 NY2d at 563; see also Johanssen v Rudolph, 34 AD3d 338, 339 [1st Dept 2006]).

Here, in support of the motion, FGG carefully analyzed each cause of action in thorough detail, and, based on both the evidence (including an affidavit based on personal knowledge) and law, demonstrated the insufficiency of each claim that plaintiffs assert. Thus, FGG has made a “prima facie” showing of entitlement to judgment as a matter of law (Winegrad, supra). In opposition, plaintiffs submitted only an attorneys’ affirmation. Although plaintiffs’ counsel, who lacks personal knowledge about this case, vehemently argues that plaintiffs may rest upon the Complaint (verified by counsel) and the Bill of Particulars only, counsel is mistaken, and, consequently, has left defendant’s motion virtually unopposed (see Marinelli v Shifrin, 260 AD2d 227, 229 [1st Dept 1999]; see also Pautienis v Legacy Capital Corp., 36 AD3d 462 [1st Dept 2007]). Since plaintiffs did not, by admissible evidence, demonstrate the existence of a factual issue requiring a trial, FGG’s motion for summary judgment dismissing the Complaint is granted.

FGG’s motion, to the extent it seeks judgment on its counterclaim, is denied. The counterclaim seeks reimbursement of its costs and expenses from Sirico pursuant to an alleged indemnification clause, that, FGG generally alleges, upon information and belief, is contained in the agreement with Sirico. The possibly relevant paragraph of the agreement (see page 9 of Exhibit 4) is unreadable. These allegations without clear text or argument are insufficient to satisfy FGG’s burden to establish the merits of the counterclaim meriting summary judgment.

CONCLUSION

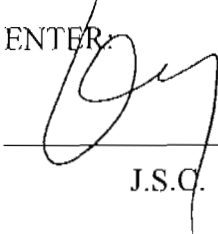
It is ORDERED that the motion by defendant F.G.G. Productions, Inc. for summary judgment, is granted to the extent that the complaint of plaintiffs Phyllis J. Sirico and

Peggy S. Davidson is dismissed and the Clerk is directed to enter judgment in favor of defendant with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the portion of defendant's motion seeking summary judgment against plaintiff Sirico with respect to its counterclaim is denied; and it is further

ORDERED that the action is severed and the counterclaim shall continue against plaintiff Sirico.

Dated: December 28, 2007

ENTER: 

J.S.C.

FILED
JAN 04 2008
NEW YORK
COUNTY CLERK'S OFFICE