Artists Rights Enforcement Corp. v Haskins

2008 NY Slip Op 33357(U)

December 16, 2008

Supreme Court, New York County

Docket Number: 105227/04

Judge: Carol R. Edmead

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SCANNED ON 12/16/2008

[* 1]

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

PRESENT: CAROL EDMEAD J.S.C. Justice — PART 35

Artists Rights Enforcement

- v -

Haskins, Barbara Jean

INDEX NO. 105227/04
MOTION DATE 11/12/08
MOTION SEQ. NO. 002
MOTION CAL. NO.

The following papers, numbered 1 to ______ were read on this motion to/for Summary Judgment

	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

FILED
DEC 16 2008
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion pursuant to CPLR 3212 for an order granting summary judgment against defendant on its causes of action is denied; and it is further

ORDERED that defendant's application for dismissal of the complaint is denied; and it is further

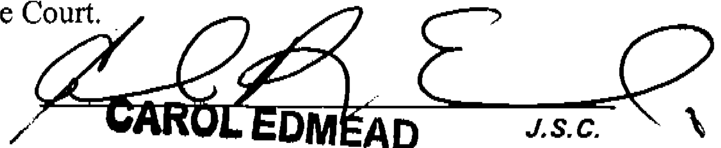
ORDERED that plaintiff is directed to amend the caption to join the estate of John Kendricks as a party defendant within 30 days of the date of this order; and it is further

ORDERED that the plaintiff file the note of issue by January 31, 2009; and it is further

ORDERED that plaintiff 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: 12/16/08



CAROL EDMEAD J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

---x

ARTISTS RIGHTS ENFORCEMENT CORP.,

Plaintiff,

Index No. 105227/04

-against-

BARBARA JEAN HASKINS,

Defendant.

---x

CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

John Kendricks p/k/a Hank Ballard, singer ("Finger Poppin' Time" and "Let's Go, Let's Go, Let's Go"), and composer ("The Twist"), like many early R & B and Doo Wop luminaries, failed to profit in his heyday from his work.[1] Enter Artists Rights Enforcement Corp. ("AREC"). For more than twenty-five years, AREC has specialized in assisting artists, songwriters and music publishers with the recovery of royalties and other fees due them from their artistic material and/or performances. But, the motives of AREC are not purely selfless.

In this action, AREC asserts causes of action for breach of contract, tortious interference with contractual relations, and tortious interference with prospective economic advantage against one of Mr. Kendricks' heirs, Barbara Jean Haskins ("Haskins"). AREC now moves pursuant to CPLR 3212 for an order granting summary judgment on its causes of action. Haskins opposes the motion, and seeks dismissal of the complaint.

FILED
DEC 16 2008
NEW YORK
COUNTY CLERK'S OFFICE

[1] See LaFraniere, *In the Jungle, the Unjust Jungle, a Small Victory*, The New York Times, March 22, 2006, at 1 and 6, cols 4 and 1, respectively.

[* 3]

Background: AREC

For many years up until the mid-1980's, Mr. Kendricks was receiving none of his royalties from Broadcast Music, Inc. ("BMI") and King Records. In an effort to remedy this situation, on or about March 2, 1984, AREC and Mr. Kendricks entered into a written letter agreement (the "1984 Agreement"), whereby AREC agreed to use its best efforts to obtain for Mr. Kendricks any and all royalties and other fees due him from various record companies, music publishers and performing rights societies. Berger Affidavit, ¶4. Pursuant to the terms of the 1984 Agreement, AREC is entitled to fifty percent (50%) "of all sums and/or assets which may come into" its hands as a "proximate result" of its activities on behalf of Mr. Kendricks. *Id.* After the 1984 Agreement was executed, AREC was successful in obtaining for Mr. Kendricks: (1) songwriter performance royalties from BMI; (2) publisher income from BMI and Warner Chappell Music; and (3) artist royalties from various record companies including, but not limited to, King Records, GML Records, and Catalogue Music. Berger Affidavit, ¶5. Moreover, AREC negotiated the sale of Mr. Kendricks' BMI songwriter performance royalties to "The Twist" to DreamWorks Music Publishing, LLC ("DreamWorks"). *Id.*.

Although not required under the 1984 Agreement, from 1984 to 2002, AREC continually advanced funds to Mr. Kendricks to pay and/or satisfy judgment and tax liens recorded against him, his medical and auto repair bills, and his monthly living expenses. Berger Affidavit, ¶6. Accordingly, when Mr. Kendricks' sale to DreamWorks was consummated, all of the advances AREC had provided to Mr. Kendricks were recouped – without any charge for interest. *Id.* On or about March 2, 2003, Mr. Kendricks died and all of his heirs, including Haskins, reaffirmed and agreed in writing to continue and maintain the 1984 Agreement by and between

AREC and Mr. Kendricks. Berger Affidavit, ¶¶7, 8.

Although the final settlement was consummated after Mr. Kendricks' death, prior to his passing, AREC commenced and virtually completed negotiations for a settlement of Mr. Kendricks' artist royalty claims with various record companies that were filed in the United States District Court in Nashville, Tennessee. Berger Affidavit, ¶9. Haskins approved the settlement and executed a written settlement agreement memorializing the terms. *Id.*

Following the settlement, AREC continued to administer Mr. Kendricks' royalty income by collecting, accounting to, and paying all royalties it received to Mr. Kendricks' heirs, including Haskins. Berger Affidavit, ¶10. AREC regularly provided Haskins with royalty accountings and payments from various record companies and music publishers, and negotiated the same. *Id.* AREC, on behalf of Mr. Kendricks' heirs, including Haskins, also contacted BMI to ensure that the heirs would independently receive their share of Mr. Kendricks' writer performance income, and that all income payable by BMI would continue to be sent to AREC pursuant to the terms of the 1984 Agreement. Berger Affidavit, ¶11. All of the heirs, with the exception of Haskins, executed the necessary documentation to effectuate the continuation of the BMI payments to AREC. *Id.* Accordingly, as was the case prior to the death of Mr. Kendricks, BMI continued to pay AREC all of the heirs' performance royalties, with the exception of Haskins' portion. *Id.* Hence, AREC was not receiving its fee under the 1984 Agreement from Haskins' portion of the BMI performance income. *Id.*

AREC believes that Haskins has contacted the remaining heirs in an attempt to convince them to breach their respective agreements with AREC.

In March of 2004, the Los Angeles County Superior Court appointed Haskins as the

temporary "Special Administrator" of Mr. Kendricks' estate. Berger Affidavit ¶12. As a result of this appointment, Haskins' counsel contacted BMI to have them cease payment of any performance monies to AREC. Berger Affidavit ¶13. In turn, BMI has since withheld payment to AREC and all of the heirs of Mr. Kendricks, including Haskins. *Id.* BMI is currently holding all of Mr. Kendricks' performance income royalties. *Id.*

Although Haskins was initially the sole "Special Administrator" of the estate, she currently acts as co-administrator over the estate resulting from the opposition of her role as the sole administrator by a fellow heir to the estate, Bonnie Thomas, another daughter. Berger Affidavit ¶14. Following a mediation, Haskins agreed to share the appointment with Ms. Thomas.

Background: Haskins

Haskins is the biological first-born daughter of Mr. Kendricks. Haskins Exhibit 1. As the "Special Administrator" of Mr. Kendricks' estate, Haskins had a fiduciary duty to both the probate division of the Los Angeles Superior Court and to the four remaining heirs to the estate. In a letter dated April 5, 2004, AREC was notified and advised of the appointment through Haskins' California counsel. (Haskins Exhibit 3). Additionally, following four prior distributions from AREC to Haskins, Haskins' fifth and final distribution from AREC occurred on March 9, 2004, for a grand total of $932.87 from AREC to Haskins. (Haskins Exhibit 7).

AREC's Contentions

AREC generally contends that the present action contains no triable issues of fact concerning the binding effect of the 1984 Agreement on Haskins. AREC asserts that it is entitled to its share of the royalty income its efforts produced for Mr. Kendricks. More specifically,

AREC contends that a contract lacking a requirement that one of the parties perform personal services in the future will remain binding after the death of one of the parties. If this were not the law, no purpose would have been served by having royalty monies paid to AREC, and AREC would not have agreed to perform the services it provided.

AREC further contends that while Haskins may terminate the 1984 Agreement, Haskins may not terminate AREC's rights that accrued up to the point of termination. Haskins' termination of the 1984 Agreement only affected new sources of revenue that AREC had not yet tapped. AREC asserts that once a royalty stream has begun to flow as the result of a contracting party's efforts, this contracting party is entitled to continue receiving its share of the royalty stream going forward, even following the contract's termination. AREC argues that any other rule of law would be "nonsensical."

Moreover, AREC contends that the 1984 Agreement is not unconscionable. First, AREC represents more than 400 artists under essentially the same form of agreement, and of the few who have challenged the agreement's terms, none have been successful. Also, AREC states that the contract is not so grossly unreasonable in light of the mores and business practices of the time and place as to be unenforceable according to its literal terms. AREC argues that there is no basis for finding the 1984 Agreement in any way unreasonable, considering that Mr. Kendricks received royalties he might not have otherwise obtained, and that he lived with the contract without protest for eighteen years until his death.

AREC additionally contends that there exists no triable issue of fact as to its claim for tortious interference with the 1984 Agreement. AREC contends that the 1984 Agreement existed between AREC and Mr. Kendricks; Haskins admitted in her Answer that she was specifically

aware of the 1984 Agreement; Haskins admitted in her Answer that she "intentionally" caused the contract to be breached and/or interfered with by refusing to sign the BMI contract, creating an estate to stop AREC from receiving funds from BMI, and demanding that BMI not pay any performance income royalties to AREC; and AREC has been damaged since it has not received its contractual fee due to Haskins' conduct.

Finally, AREC contends that no triable issue of fact exists as to its claim for tortious interference with prospective economic advantage. AREC asserts that Haskins' conduct involved the "wrongful means" required for this tort because, by her own admission, the sole purpose for her conduct was to deprive AREC of any monies due to any of the heirs. AREC submits that the other elements of the claim are met under the same evidence used to show the validity of its claim for tortious interference with the 1984 Agreement.

Haskins' Contentions

While this case has been pending, Kendricks' estate has been administered under the auspices of the California Probate Court, which will decide rights to, and proper distribution of Kendricks' property.[2] The co-administrators, Haskins and Bonnie Thomas, have filed a petition with the California Probate Court specifically questioning the validity of the 1984 Agreement and requesting that all royalty payments be paid into Kendricks' estate. AREC removed that petition to the United States District Court for the Central District of California, and the co-administrators have moved for a remand to state court. All parties are awaiting decisions

[2] In the California Probate Action, Ms. Haskins and Bonnie Thomas allege that the 1984 Agreement is unenforceable, and has been terminated by the co-administrators. Ms. Haskin and Thomas request that the California Probate Court order that title to Mr. Kendricks' performance and publishing rights and royalties are rightfully in petitioners as co-administrators, and that AREC and any other entity convey any accrued royalties to the co-administrators.

from these California courts.

Ms. Haskins argues that this Court lacks subject matter jurisdiction, due to the failure to join an indispensable party, namely, the Bonnie Thomas. Further, AREC has an effective remedy in California, Bonnie Thomas who is 3000 miles away and not subject to the jurisdiction, would be severely prejudiced by the disposition of this case, any judgment would effect the estate, which is not properly before the Court, and Bonnie Thomas will challenge any judgment collaterally. It was AREC that engineered the appointment of Bonnie Thomas in California. As a matter of comity and federal constitutional law, the Court must defer to the California Probate Court on issues relating to the estate's rights to assets. The only assets in the estate that have been liquidated are Kendricks' bank accounts, which are in California. The remainder are in the hands of third parties not before this Court. Thus, this Court should not exercise control over assets not in its control. Further, Bonnie Thomas is not before the Court.

Haskins argues that there are triable issues of fact concerning the non-binding nature of the 1984 Agreement. Haskins asserts that AREC is not entitled to Mr. Kendricks' royalty income meant for his heirs. Also, Haskins argues that the Los Angeles Superior Court has jurisdiction over Mr. Kendricks' royalties, Mr. Kendricks' died intestate, and that the "probate law takes precedent." More specifically, Haskins contends that there is no "survivorship" provision or "perpetuity clause" in the 1984 Agreement, and therefore AREC's rights in the contract do not carry beyond Mr. Kendricks' death. Also, Haskins asserts that according to the Uniform Commercial Code, the 1984 Agreement was terminated upon the death of Mr. Kendricks. Ms. Haskins also argues that as there is no choice of law clause in the 1984 Agreement, there is no reason that New York law governs its enforcement. Mr. Kendricks signed the 1984 Agreement

in Texas, and under Texas law, a services contract without a fixed expiration date is terminable upon the death of the individual. Moreover, Haskins argues that contracts between AREC and "living" individuals and contracts between AREC and individuals who die intestate cannot be compared.

Furthermore, AREC failed to set forth any efforts it has made to perform under the alleged 1984 Agreement. Without knowing what AREC did, Haskins is unable to address whether payment or promise of royalties was the "proximate result" of AREC's actions. Except for AREC's involvement with the lawsuit on behalf of Kendricks, the correspondence and incomplete royalty statements and interrogatories produced by AREC do not tell anything about the efforts AREC allegedly made on Kendricks' behalf.

Even if AREC could prove that it had something to do with the redirection of royalties in the 1980's, it failed to prove that royalties in 2008 are the "proximate" result of that effort. For example, there are online resources which describe more recent exploitation of "The Twist" in films and pop culture. Arguably, superseding causes such as films and recordings generated additional interest in ways that AREC could not have possibly affected or influenced. "But for" cause is not "proximate cause" and a jury might conclude that there is no close causal connection between an alleged redirection of some royalties in 1984 and new royalties now being earned 24 years later.

Haskins also contends that the 1984 Agreement is unconscionable. Haskins asserts that AREC continually causes unnecessary waste to the estate and depletes the estate of revenue. Also, AREC is ignoring the lawful jurisdiction of the Los Angeles probate court. Moreover, Mr. Kendricks' heirs are allegedly losing fifty percent of their inheritance to AREC due to the

deceptive practices AREC used in executing new contracts for Mr. Kendricks' heirs with BMI. Haskins also contends that AREC's representative, Charles Rubin ("Rubin"), during Mr. Kendricks' funeral, promised the heirs large royalties, thereby "coercing" the heirs' confidence in him to "do the right thing concerning the decedent's estate." Haskins further asserts that "unconscionability, coercion, deceptive language and absurdity are not indications that Kendricks' royalty incomes, administered by AREC, benefitted Kendricks to Kendricks' advantage in the past and currently for Kendricks' lawful heirs."

As to the tortious interference with contractual relations claim, Haskins argues that the Berger Affidavit only shows that a contract "possibly existed" between AREC and Mr. Kendricks. Second, Haskins did not admit in her Answer that she knew of the 1984 Agreement, but was only made aware of the contract more than a year after Mr. Kendricks' death. Third, she asserts that it was her lawful right to refuse having a third party administer the estate. Finally, Haskins contends that "by virtue of the failure of BMI to pay any monies to AREC, by probate law, AREC is not entitled to receive a contractual fee – hence AREC has not been damaged by Haskins' 'conduct.'"

As to the claim for tortious interference with prospective economic advantage, Haskins asserts that she knew of the contracts between BMI and the other heirs, but believed the inclusion in those contracts of the fifty percent fee to AREC is unfair and burdensome to Mr. Kendricks' estate. Also, Haskins states that she did not act intentionally to interfere with AREC's prospective contractual relationships. Moreover, Haskins argues that her conduct involved lawful means "significantly necessary for protection against fraud." In addition, "[s]uch lawful conduct has been appropriate without the possibility of damaging [AREC]." Haskins contends

that she was required to act as she did under her fiduciary duties to the Los Angeles Superior Court and to the four remaining heirs "for the sole purpose of protecting the estate ..., whereby the lawful heirs will receive their inheritance without the interference of ... AREC." There is no evidence that Ms. Haskins seeks any result other than the recovery of property rightfully belonging to the estate, and she hired California counsel to advance that cause.

Further, Haskins asserts that AREC's motion lacks "an explanation of percentages and formulas used in calculating the claimed damages to AREC," supporting evidence as to AREC's damages, or financial statements to justify the motion.

AREC's Reply

The validity of the 1984 Agreement is not a matter subject to exclusive jurisdiction of any probate court, and this Court has jurisdiction over this matter. Nor does this action concern assets of an estate; the only issues are whether the 1984 Agreement is binding and the size of the distribution to either the estate or its individual members. Further, Bonnie Thomas, who was not a co-administrator of the estate at the time this action was filed, is not an indispensable party. All of the evidence related to this action is in New York, and Ms. Haskins and Bonnie Thomas share the same defenses to this action. Neither Bonnie Thomas nor Ms. Haskins live in California and AREC is not subject to jurisdiction in California. Bonnie Thomas has done nothing in California related to this matter and is not a signatory to the 1984 Agreement. Thus, dismissal of this action will severely prejudice AREC, and maintaining this action in New York results in no prejudice to either Ms. Haskins or Bonnie Thomas. And, since this action was filed four years prior to the filing of Ms. Haskins' California petition, comity requires that this action proceed. Ms. Haskins and the remaining heirs accepted the benefits of the 1984 Agreement, which is not a personal

service contract that expires upon the death of one of the parties. The 1984 Agreement does not require services to be performed by Mr. Kendricks to recover any royalty.

Nor is this Court required to defer the issue of the validity of the 1984 Agreement to the California Probate Court. AREC's services under the 1984 Agreement were performed in New York, from where royalty statements were routinely sent and disbursements of royalty funds were made. The California Probate Court has not exercised jurisdiction over AREC.

Not only has Ms. Haskins failed to move for dismissal of this action, but Ms. Haskins did not file the California Petition against AREC until after AREC filed this action, and Ms. Haskins does not seek a determination of the validity of the 1984 Agreement in the California action. AREC produced thousands of pages of discovery, and Ms. Haskins fails to demonstrate that any additional discovery is needed to oppose summary judgment. AREC does not collect income from sources which did not involve AREC, and Ms. Haskins cannot dispute that Mr. Kendricks would not have received a single cent of future income if AFEC had not acted on his behalf. Finally, Ms. Haskins' claim that AREC is not an heir and thus not entitled to 50% of the heirs' inheritance demonstrates her true motives, and supports AREC's tortiuous interference claims.

Analysis

The Court first determines whether it has subject matter jurisdiction over AREC's claims due to AREC's failure to join the estate, through its co-administrator Bonnie Thomas, as a necessary party. Pursuant to CPLR § 1001 (a), "Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants. . . ."

While AREC argues that it is undisputed that the monies collected under the 1984

Agreement will go to either the estate or its individual members, the size of the distribution is not the only question before the Court. The critical issue is whether the royalties payable by BMI for Mr. Kendricks' works are the "proximate result" of AREC's activities, and thus payable directly to AREC for disbursement, or if not, payable directly to the estate as an asset of the estate (see *e.g., Sawhill Tubular Div. Cyclops Corp. v Lincoln First Bank, N.A., NBW Div.*, 97 AD2d 540, 468 NYS2d 165 [2d Dept 1983] *citing* McKinney's CPLR 1001(a) [in an action by deceased attorney's client against bank to recover proceeds of settlement check deposited by said attorney prior to his death, the attorney's estate was a necessary party insofar as the proceeds were potentially subject to claim by attorney's estate as part of contingent fee]). Although Ms. Haskins did not commence the California action until after AREC's instant action was filed, her California action seeks a determination as to the rights of the estate to receive royalties *apart from* the 1984 Agreement, and such royalties are now subject to a claim by the estate. As the rights of the estate are at stake, the estate might be inequitably affected by a judgment in this action, and joinder of the estate is necessary in order to accord complete relief between Ms. Haskins, as administrator of the estate, and AREC.

However, dismissal is not required, as AREC may be directed to join the estate as a necessary party herein (*Sawhill Tubular Div. Cyclops Corp., supra*). And, Bonnie Thomas need not be joined as co-administrator of the estate, as her interests in this action concern the rights of the estate and are sufficiently similar to those of Ms. Haskins. Thus, Ms. Thomas' rights as co-administrator are protected by virtue of Ms. Haskins' participation in this action.

Further, the Court is not required to defer this action to the California Probate Court. New York courts generally follow the first-in-time rule, which instructs that "the court which has first taken

jurisdiction is the one in which the matter should be determined and it is a violation of the rules of comity to interfere" (*L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 841 NYS2d 82 [1st Dept 2007, *citing City Trade & Indus., Ltd. v. New Cent. Jute Mills Co.*, 25 NY2d 49, 58, 302 NYS2d 557 [1969]). However, it is also clear that determining the priority of pending actions by dates of filing is a general rule that should not be applied in a "mechanical" way, and that special circumstances may warrant deviation from this rule where "the action sought to be restrained is vexatious, oppressive or instituted to obtain some unjust or inequitable advantage" (*L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, *citing White Light Prods., Inc. v On The Scene Prods., Inc.*, 231 AD2d 90, 96-97, 660 NYS2d 568 [1997] [internal quotations marks and citation omitted]; *see also Certain Underwriters at Lloyd's, London v Hartford Acc. & Indem. Co.*, 16 AD3d 167, 168, 791 NYS2d 90 [2005]).

Courts have often deviated from the first-in-time rule where one party files the first action preemptively, after learning of the opposing party's intent to commence litigation *(L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1 *citing White Light Prods.*, 231 AD2d at 100, 660 NYS2d 568 ["[d]efendants should not be rewarded for their precipitous filing, approximately a week after learning of plaintiffs' intention to bring an action"]; *see also Certain Underwriters at Lloyd's, London*, 16 AD3d at 168, 791 NYS2d 90; *Matter of Topps Co. Shareholder Litig.*, N.Y.L.J., June 19, 2007, at 22, col. 1). Federal and state court decisions in New York have consistently rejected the application of the first-in-time rule in such circumstances on the ground that such a race to the courthouse would create disincentives to responsible litigation, by discouraging settlements due to fear of a preemptive strike and by providing a tactical advantage to defendants seeking a more favorable forum for litigation (*White Light*, at 99, 660 NYS2d 568;

see also Elbex Video, Ltd. v Tecton, Ltd., 2000 WL 1708189, *2, 2000 U.S. Dist. LEXIS 16531, *5 [SDNY Nov. 15, 2000] [circumstances justifying exception to first-filed rule include where first suit constitutes an improper anticipatory filing or was motivated solely by forum shopping]). AREC, a New York based company, commenced this action against Ms. Haskins in April 2004, after she refused to sign documentation with BMI permitting BMI to send royalty payments to AREC and after she was appointed Special Administrator. There is no indication that Ms. Haskins intended to pursue litigation over the estate's right to directly receive royalties from BMI prior to the institution of this action. It was not until April 2008, four years later, that Ms. Haskins and Bonnie Thomas commenced the California Probate Action alleging that Mr. Kendricks died with the right to receive publishing and performance royalties on his recorded music through his company, "On the Money Publishing." Therefore, based on the rules of comity noted above, dismissal of this action on the ground that there is another action pending in California is unwarranted.

Turning to the merits of AREC's motion for summary judgment, to obtain such relief, AREC must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (see CPLR § 3212 [b]). This standard requires that AREC make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*see Winegrad v New York Univ Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge

of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212 [b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York*, supra, 49 NY2d at 560, 562; Forrest v Jewish Guild for the Blind, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). To prevail on its cause of action for breach of contract, AREC must demonstrate (1) the making of an agreement, (2) its performance under the contract, (3) breach by the other party, and (4) resulting damages (*Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071, 816 NYS2d 702 [Supreme Court New York County 2006], *citing Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]).

The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent (*see Slatt v Slatt*, 64 NY2d 966, 967, 488 NYS2d 645, *rearg denied* 65 NY2d 785, 492 NYS2d 1026 [1985]). "The best evidence of what parties to a written agreement intend is what they say in their writing" (*Slamow v Del Col*, 79 NY2d 1016, 1018, 584 NYS2d 424 [1992]). Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms *(see e.g.*

R/S Assoc. v New York Job Dev Auth., 98 NY2d 29, 32, 744 NYS2d 358, *rearg denied* 98 NY2d 693, 747 NYS2d 411 [2002]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162, 565 NYS2d 440 [1990]). A contract is unambiguous if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355, 413 NYS2d 352 [1978], rearg denied 46 NY2d 940, 415 NYS2d 1027 [1979]). Thus, if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity *(see e.g. Teichman v Community Hosp. of W. Suffolk*, 87 NY2d 514, 520, 640 NYS2d 472 [1996]; *First Natl. Stores v Yellowstone Shopping Ctr.*, 21 NY2d 630, 638, 290 NYS2d 721, *rearg denied* 22 NY2d 827, 292 NYS2d 1031 [1968]).

It is undisputed that Mr. Kendricks signed the 1984 Agreement, pursuant to which AREC is entitled to receive 50% of all amounts realized as a "proximate result" from AREC's activities in recovering royalties due to Mr. Kendricks.

Research by this Court uncovered one case involving the very same language employed in the 1984 Agreement involving AREC: *Holmes v Artists Rights Enforcement Corp.*, 148 Fed.Appx. 252 [C.A.6 (Mich.) 2005]).

In *Holmes*, Rosalind Holmes and Annette Beard Sterling, the original members of the Motown Records group Martha and the Vandellas, had difficulty obtaining royalty payments allegedly owed them by Motown Records. In 1984, Holmes and Sterling (collectively, the "Vandellas") entered into two separate contracts with AREC to collect the Vandellas' royalties. AREC recommended that the Vandellas engage Summit Rovins to pursue a case against

Motown. Pursuant to the Vandellas' retainer agreement, Summit Rovins was "entitled to receive 33-1/3% of all monies payable to or received by [the Vandellas] on account of sums found due to the date of judgment and, in addition, 25% of all monies due to or received by [the Vandellas] from Motown thereafter . . . . The ensuing case against Motown eventually settled in 1989. Summit Rovins later assigned the benefit of the Vandellas' retainer agreement to Edwards & Angell. In 1994, Edwards & Angell commenced a new action against Motown in California. That lawsuit also settled.

As a result of the lawsuits, the Vandellas began receiving royalties from Motown and its successor in interest, UMG Recordings, Inc. ("UMG"). When UMG made payments to AREC, AREC, in turn, retained its share and paid the remainder to Edwards & Angell. In 2003, the Vandellas attempted to terminate their contracts with AREC on the ground that AREC had not done any new work and should not be entitled to continuing payments. The Vandellas corresponded with UMG, asking it to make royalty payments to them only. On March 31, 2003, the Vandellas sued AREC, Chuck Rubin, Summit Rovins, and Mr. Greenberg alleging that the contracts with AREC, as "forever contracts," were terminable at will, that the defendants had been overpaid, and that the contracts were unconscionable. When the parties cross moved for summary relief, the District Court granted defendants' motions for summary judgment.

On appeal, the Circuit Court affirmed dismissal of the complaint. The Vandellas urged the Court to adopt the dictionary definitions of "proximate" as "next, nearest, immediately before or after in order, place or occurrence, close or very near" and "result" as "to spring from, arise or proceeds as a consequence from the actions, circumstances or premises." According to the Vandellas, under such terms, defendants were only entitled to 50% of the royalties "collected

close or very soon after their royalty collection based activities."

The Circuit Court rejected this interpretation, and agreed with the District Court's application of the "proximate cause" standard in tort claims to Vandellas' contracts. According to the Circuit Court, "the term 'proximate result' means that there must be a causal link between the efforts of AREC and the receipt of royalties by the Vandellas, unbroken by any other cause, in order for AREC to be entitled to remuneration." Since the Vandellas were currently receiving payments from UMG "for only one reason-the efforts of AREC," AREC's efforts were found to be the "proximate result" of the Vandellas' current receipt of royalties. Since the causal chain remains unbroken, the passage of time is irrelevant.

As in the case above, "proximate result" is not defined in the 1984 Agreement. According to the Compact Oxford English Dictionary, Second Edition, "proximate" is defined as closely neighboring, immediately adjacent, next, nearest; coming next (before or after) in a chain of causation; immediate: opposed to remote or ultimate. However, the 1984 Agreement involves the recovery of royalties due Mr. Kendricks, which by their nature, constitute an ongoing, continuing income stream of revenue for as long as he holds these rights. Therefore, the passage of time is inconsequential to AREC's rights under the 1984 Agreement. AREC's compensation in the 1984 Agreement, instead, is more closely tied to whether the royalties realized by Mr. Kendricks was the "proximate cause" of AREC's activities. Black's Law Dictionary (8th ed. 2004) defines "proximate consequence" as a "[a] result following an unbroken sequence from some (esp. negligent) event. Thus, when given its proper legal meaning, the term "proximate result" means that there must be a causal link between the efforts of AREC and the receipt of royalties by Mr. Kendricks, unbroken by any other cause *(see Eardley v Board of Educ.*

Retirement System of City of New York, 186 AD2d 565, 588 NYS2d 370 [2d Dept 1992] [Board entitled to conclude that petitioner's back condition "was not a proximate result" of the 1983 accident, and find "that there was a lack of causal relationship" between the petitioner's condition and the 1983 accident]; *Perez v John W. Ryan Const. Co.*, 122 NYS2d 42 [N.Y. Sup. 1953] [finding that the injury to the plaintiffs was not the proximate result of any negligence on the defendant's part and that defendant was not guilty of any negligence proximately causing this accident]).

AREC's breach of contract claim essentially rests on the theory that AREC has a continued right to collect Mr. Kendricks' performance income from BMI (Complaint ¶17). Various documents, including affidavits, submitted in support of AREC's motion indicate that payments from BMI's collection services were the proximate result of the activities AREC undertook in connection with the 1984 Agreement.

According to the affidavits of Rubin and counsel he retained to pursue the rights of Mr. Kendricks, Alexander Peltz ("Peltz"), after Mr. Kendricks signed the 1984 Agreement, AREC retained Peltz to pursue litigation against BMI and/or the Adam R. Levy & Father Enterprises, Inc. ("Levy Inc."). Levy allegedly purchased from Mr. Kendricks his right to BMI performance income for "The Twist" and other songs Mr. Kendricks authored (the "Other Songs") (collectively, the "Twist Songs"). With the assistance of AREC, Peltz filed an arbitration, which was followed by an action by Levy (the "Levy action") for a judicial determination that Levy Inc. owned the rights to Mr. Kendricks' performance income for The Twist Songs. During the litigation, AREC received from BMI a "songwriter reaffiliation agreement" and prepared it for Mr. Kendricks' signature. After Mr. Kendricks signed the reaffiliation agreement, AREC

received royalty reports and payments from BMI for the Other Songs. AREC later received a schedule of domestic royalties for the Twist Song that were the subject of Levy's action. In 1990, Rubin negotiated a settlement with Mr. Levy, which they failed to finalize before Mr. Levy's death in May, 1990. Rubin then met with Mr. Levy's son to consummate the settlement of the Levy action. After this settlement, Levy Inc. waived all rights to Mr. Kendricks' BMI writer performance income for the Twist Songs, and AREC began receiving all of Mr. Kendricks' BMI writer performance royalty reports and payments. AREC submitted the BMI writer application and songwriter reaffiliation agreement,[3] both signed by Mr. Kendricks on or about January 12, 1990, and various letters and checks from BMI and Levy Inc. representing payments pursuant to Kendricks' settlement with Levy Inc.

By establishing and securing Mr. Kendricks' right to receive royalty payments from BMI as to the Twist Songs, any payments payable to Mr. Kendricks by BMI, which are sent to AREC pursuant to AREC's agreement with BMI entitle AREC to continued fees under the 1984 Agreement.

Contrary to Haskins' contentions, the 1984 Agreement is not unconscionable and is enforceable. A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made, i.e., "some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party" (*Wachovia Securities, LLC v Joseph*, __ AD3d ___; 866 NYS2d 651 [1st Dept 2008]). That Mr. Kendricks had established On the Money

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[3] The songwriter affiliation agreement is addressed to Mr. Kendricks, "C/O Artists Rights Enforcement Corporation."

Publishing and executed an agreement with BMI in 1979 belies any claim that Mr. Kendricks lacked business acumen and experience to enter into the 1984 Agreement. Upon signing the 1984 Agreement, AREC assumed a risk of being unable to collect any royalty payments for Mr. Kendricks' benefit, thereby subjecting itself to loss of time and costs in investigating the source of any payments due to Mr. Kendricks. At time of contracting, the success and failure of AREC's services were unknown, and Mr. Kendricks had not been receiving any of the fruits of his labor. Mr. Kendricks continued to receive and accept payments for many years after the execution of the 1984 Agreement from BMI, among others, as a result of the efforts undertaken by AREC. Under these circumstances, it cannot be said that the 1984 Agreement is unconscionable.

Haskins' claim that the 1984 Agreement terminated upon the death of Mr. Kendricks does not defeat AREC's entitlement to payments owed to it thereunder. The death of Mr. Kendricks would not have terminated AREC's right to receive payments under the 1984 Agreement since by the time of Mr. Kendricks' death, AREC had performed all the services for which its fee has been earned or on which they will accrue *(see e.g., Segar v King Features Syndicate*, 262 AD 221, 28 NYS2d 542 [1st Dept 1941]). Furthermore, even if Haskins effectively terminated the 1984 Agreement, her termination would not obviate AREC's right to receive payments based on the royalty stream it secured through BMI.

The Court notes that AREC also submitted a letter from AREC to Ms. Haskins, dated February 2, 2004, addressing her failure to execute a BMI membership agreement permitting "AREC to receive all of the BMI income." Notably, AREC contends that all of the heirs, with the exception of Ms. Haskins, executed contracts with BMI to effectuate the *continuation* of the BMI payments to AREC. And, said BMI contract contains a clause wherein the heirs represent

that they

> (e) . . . each own and control, and will during the term of the basic agreements, own and control all of the rights granted to BMI pursuant to the basic agreements with respect to all works which are embraced by the respective agreement; and
>
> (f) . . . each direct BMI to pay any royalties which might be due to you or become due to you under the terms of the basic agreements to [AREC] until such time as BMI is notified otherwise by you in writing . . . .

Accordingly, the heirs, including Haskins, still own and control "all of the rights granted to BMI" with respect to the subject works of Mr. Kendricks. Although Haskins has refused to execute documents granting BMI a continued right to collect royalties for the Twist Songs, it does not appear that she is so required; otherwise, her consent (as well as the consent of the other remaining heirs) would not have been sought. Notably, the 1990 reaffiliation agreement between Mr. Kendricks and BMI indicates that the "period" and term of such agreement was January 1, 1986 to December 31, 1991, and continuing thereafter for additional two years each unless terminated by either party at the end of said initial term or any additional term, upon notice by registered or certified not more than six months or less than sixty (60) day s prior to the end of any such term." While Haskins' execution of such documents to facilitate her receipt of continued payments of Mr. Kendricks' performance royalties from BMI would be prudent, it cannot be said that her failure to do so merits a finding of breach of contract or tortious interference with the 1984 Agreement, based on her failure to sign such BMI documents. In other words, there is no indication in the 1984 Agreement, or any other agreement, that Mr. Kendricks or Haskins agreed to grant BMI an irrevocable right to collect royalty payments due to Mr. Kendricks.

Thus, to the extent the association responsible for collecting royalty fees for Mr.

Kendricks' Twist Songs remains as BMI, which this Court finds was the proximate result of the efforts of AREC, AREC is entitled to its fee in accordance with the 1984 Agreement. AREC established that it used its best efforts to obtain royalties and fees due Mr. Kendricks from "performing rights societies" and established Kendricks' rights to receive such payments from BMI regarding the Twist Songs. Until BMI's right to collect Mr. Kendricks' royalties is terminated, AREC is entitled to receive its fees under the 1984 Agreement. However, the BMI contract also states, in part, that

> (3) The basic agreements, as of their effective date, shall cancel and supersede the agreement between the decedent and BMI dated May 10, 2002, and between the decedent doing business as On The Money Publishing and BMI dated April 10, 1979, and any and all modifications thereof of each Agreement. . . .
> (emphasis added).

It appears that Mr. Kendricks subsequently executed an agreement with BMI dated *May 10, 2002* and it cannot be determined, at this juncture, the effect such May 10, 2002 agreement bears on the amounts claimed in this action. The May 10, 2002 agreement is absent from the record. Therefore, at this juncture, AREC's entitlement to continued fees under the 1984 Agreement is limited to any royalties solely collected by BMI arising out Mr. Kendricks' Writer Application (agreement) dated January 12, 1990.

As to whether Haskins' direction to BMI to withhold payments due to AREC constitute a breach of the 1984 Agreement, Haskins is not a party to such agreement and an issue of fact remains as to whether she affirmed such agreement. In support of AREC's claim that Haskins "reaffirmed and agreed in writing to continue and maintain the 1984 Agreement," AREC submits a letter Haskins wrote to "Chuck" Rubin after Mr. Kendricks' funeral. In her letter, Haskins thanks Rubin for his "administrative skills, expertise, experience, and loving kindness during

such a sensitive occasion . . . . It is my desire to have you continue administering Dad's business. When your time permits, I *will need your explanation of the whole picture* surrounding Dad's music trust, the Steven Spielberg signed and notarized contractual lease for loan deal, BMI, IRA, and the Lawsuit #2 and #3." (Emphasis added). In her Answer, Haskins states that her letter never referenced the "unknown" 1984 Agreement, but was based on the "3/06/03 promises" and that her letter was not a contract between her and AREC. Further, Haskin expressly denies any reaffirmation of the 1984 Agreement. As Haskins' letter, coupled with her Answer, raises an issue of fact as to whether she affirmed the 1984 Agreement, it cannot be said that she breached the 1984 Agreement.

As to AREC''s tortious interference with contract claim, AREC must establish the existence of a valid contract, the tortfeasor's knowledge of the contract and intentional interference with it, the resulting breach and damages (*see Hoag v Chancellor, Inc.*, 246 AD2d 224, 228 [1st Dept 1998]; *Joan Hansen & Co., Inc. v Everlast World's Boxing Headquarters Corp.*, citing 296 AD2d 103, 744 NYS2d 384 [1st Dept 2002]; *Israel v Wood Dolson Co.*, 1 NY2d 116, 120, 151 NYS2d 1]).

AREC asserts two contracts as the subject of this claim: the 1984 Agreement (" . . . at all times mentioned herein, there existed a contract by and between Mr. Kendricks and AREC" Memorandum of Law page 9) and the contracts between Haskins' siblings and AREC ("I am personally aware that Haskins has contacted the remaining heirs in an attempt to convince them to breach their respective agreements with AREC" Berger Affidavit ¶12). Haskins was also aware of such agreements at the time she caused BMI to cease payments to AREC. Further, AREC's submissions indicate that BMI collected royalty payments related to the Twist Songs in

accordance with the BMI agreement signed by Mr. Kendricks on or about January 12, 1990 and that this agreement was the direct result of AREC's efforts pursuant to AREC's 1984 Agreement with Kendricks. There is no indication that BMI's agreement to collect fees for the Twist Songs was terminated at the time Haskins caused the interruption of BMI's payments to AREC, authorized by Haskins' siblings. Therefore, arguably, Haskins did not have a right to interfere with the delivery of payment due and owing under such agreements, which were in effect and enforceable at the time such payments were due to be paid. As long as BMI completed it service in collecting royalty payments for the Twist Songs, payment is due to AREC.

However, the claim of tortious interference with contractual relations requires that the interference be unjustified (*see Falk v Anesthesia Associates of Jamaica*, 228 AD2d 326, 644 NYS2d 237 [1st Dept 1996] ["The essential elements of such a cause of action are the existence of an agreement, the alleged tortfeasor's knowledge of the agreement, the intentional *and unjustifiable* interference with the agreement and resulting damages"] [emphasis added]; *see also Havana Central NY2 LLC v Lunney's Pub, Inc.*, 49 AD3d 70, 852 NYS2d 32 [1st Dept 2007] *citing Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413 [1996] [tortious interference with contract "requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract *without justification*, actual breach of the contract, and damages resulting therefrom] [emphasis added]; *Alvord and Swift v Stewart M. Muller Const. Co., Inc.*, 46 NY2d 276 [1978] [plaintiff must produce evidence that the tortfeasor "intentionally and *unjustifiably* interfered"] [emphasis added]). It has also been held that a person is generally privileged to interfere with a contract interest where such interference is made in protection of an equal or superior right (*Rudoff v Huntington Symphony Orchestra Inc.*, 91 Misc 2d 264, 397 NYS2d 863

[App. Term 1977] *citing Cornell v T. V. Development Corp.*, 41 Misc 2d 628, 245 NYS2d 918). "The affirmative defense of justification in an action for interference may be more appropriately stated to be a matter of privilege; that is, it may be shown that interference, although it occurred, is privileged by reason of the interests furthered by the conduct (*id. citing* 45 Am.Jur.2d, Interference s 27).

Upon her appointment as a "personal representative of the estate" Haskins received a form explaining her "duties and liabilities" in managing the estate's assets and taking an inventory of the estate property. In taking the inventory of the estate, Haskins is required to "locate and take possession of all the decedent's property to be administered in the estate." In her Answer, Haskins alleges that her "California attorney" "is right in causing BMI and the other income producing companies for Kendricks to withhold payments to AREC and all the heirs of the Estate of Kendricks." AREC acknowledges that "[a]s a result of [Haskins'] appointment . . . [it] was personally informed by representatives of BMI that Haskins' counsel contacted BMI to have them cease payment of any performance monies to AREC,'"' thereby forcing AREC "to file the instant action against Ms. Haskins." Although AREC contests that Haskins has not explained what steps she undertook as an administrator of the estate to warrant an interference with AREC's rights under the 1984 Agreement, it is uncontested that she is an administrator of the estate of Mr. Kendricks, that she is represented by counsel in connection with her role as administrator, and that her pursuit of Mr. Kendricks' property rights falls arguably falls within her role as administrator of said estate. Thus, it cannot be said, as a matter of law at this juncture, that the actions undertaken by Haskins in causing BMI to cease further payments to AREC were not privileged or unjustified so as to warrant summary judgment in favor of AREC

Likewise, summary judgment in favor of AREC on its tortious interference with

economic advantage claim is denied. "In order to establish a claim for tortious interference with prospective business relations or economic advantage, a plaintiff must demonstrate either that the defendant acted for the sole purpose of harming the plaintiff, or that the defendant's interference was accomplished by 'wrongful means'" (*Odrich v Trustees Of Columbia University In City Of New York*, 9 Misc 3d 1130 [NY Sup 2005] *citing Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294, 299-300, 684 NYS2d 235 [1st Dept 1999]). For the reasons noted above, the record does not support a finding, at this juncture, that Haskins tortiously interfered with an economic advantage belonging to AREC.

In light of the above, Haskins' application to dismiss the complaint lacks merit.

Conclusion

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion pursuant to CPLR 3212 for an order granting summary judgment against defendant on its causes of action is denied; and it is further

ORDERED that defendant's application for dismissal of the complaint is denied; and it is further

ORDERED that plaintiff is directed to amend the caption to join the estate of John Kendricks as a party defendant within 30 days of the date of this order; and it is further

ORDERED that the plaintiff file the note of issue by January 31, 2009; and it is further

ORDERED that plaintiff 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: December 16, 2008

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

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