

**Gormley v Atlantic Recording Corp.**

2009 NY Slip Op 30077(U)

January 2, 2009

Supreme Court, New York County

Docket Number: 101041/08

Judge: Emily Jane Goodman

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

EMILY JANE GOODMAN

PRESENT: \_\_\_\_\_  
Justice

PART 17

Index Number : 101041/2008

GORMLEY, MARY

vs

ATLANTIC RECORDING CORP.

Sequence Number : 001

DISMISS

INDEX NO. \_\_\_\_\_

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

MOTION SEQ. NO. \_\_\_\_\_

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

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

*decided*

*per attached*

**FILED**

JAN 16 2009

CLERK'S OFFICE  
NEW YORK

Dated: 1/20/09

*[Signature]*

EMILY JANE GOODMAN

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  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 17

-----x  
MARY GROMLEY,

Plaintiff,

Index No. 101041/08

-against-

ATLANTIC RECORDING CORP.,

Defendant.

**FILED**

JAN 16 2009

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Emily Jane Goodman, J.S.C.:

Defendant filed a partial motion to dismiss Plaintiff's discrimination claims, Equal Pay Act claim, and claims for unjust enrichment, quantum meruit and constructive trust. Plaintiff subsequently withdrew her discrimination claims and Defendant withdrew its motion to dismiss Plaintiff's Equal Pay Act claim (see letters dated August 20, 2007 [sic] and August 21, 2008). Accordingly the sole issue is whether Plaintiff's claims for unjust enrichment, quantum meruit and constructive trust should be dismissed.

In Plaintiff's seventh cause of action, she alleges that Defendant was unjustly enriched because Plaintiff generated "revenue by introducing and developing several successful artists for Atlantic" for which she was not compensated. In her eighth cause of action, she alleges that under quantum meruit, Defendant

owes her "the reasonable value of the services she performed in regard to introducing artists to Atlantic and overseeing the production of records." In her ninth cause of action for imposition of a constructive trust, Plaintiff alleges that a fiduciary relationship existed between her and Defendant and that Defendant breached that duty "by failing to render a proper accounting to [her] and to pay her the royalties to which she was entitled."

Defendant cites the well known precedent that "the existence of a valid and enforceable contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (see Clark-Fitzpatrick, Inc. v Long Island Railroad Co, 70 NY2d 382 [1987]). Because Plaintiff has also asserted a claim for breach of her employment contract as it relates to payment of royalties, Defendant maintains the seventh, eighth and ninth causes of action should be dismissed.

Plaintiff however, notes the well settled case law that where there is a dispute as to whether a contract exists or whether it applies in all circumstances, a plaintiff does not have elect his or her remedies (see Wilmoth v Sandor, 259 AD2d 252 [1st Dept 1999]). Because the employment contract does not contain a specific provision covering royalties earned for international

sales, Plaintiff argues that she is entitled to proceed on both contractual and quasi contractual claims, citing Sternberg, Inc. v Walber 36<sup>th</sup> St. Assoc., 187 Ad2d 225 [1st Dept 1993] [plaintiff's breach of contract claim was properly dismissed where the contract provided that the broker would receive \$450,000 if the building was sold for no less than \$11.5 million, but plaintiff was still entitled to seek commissions under quantum meruit, where the building was sold for \$10.6 million and the contract did not state that no commissions would be paid if the building was sold for less than \$11.5 million]). Moreover, Plaintiff notes that her contract ended on February 28, 2006. Therefore she argues that as no written contract was in place for the 13 months that she continued to work, the Clark-Fitzpatrick precedent does not apply. Plaintiff also argues that she may preceede under both contractual and quasi contract claims because Defendant breached the contract, and inexplicably cites to a case which holds that a plaintiff may elect between suing under the contract and suing under quasi contract, when an employment contract is breached.

In its reply, Defendant complains that the complaint contains no facts to support Plaintiff's arguments. Defendant also argues that Plaintiff's claims must be dismissed because the employment contract covers the subject of royalties and contains a merger

clause. Defendant also inexplicably maintains that the contract precludes the payment of royalties after it expires because it states that "[n]either the continuation of employment nor any other conduct shall be deemed to imply a continuing obligation upon the expiration of this Agreement."

### Discussion

"When determining a motion to dismiss, the court must 'accept facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within a cognizable legal theory'" (Goldman v Metropolitan Life Ins. Co., \_\_\_ NY3d \_\_\_, 2005 NY Slip Op 08846, \*7 [Nov 21, 2005] [citation omitted]).

To state a claim for quantum meruit, a plaintiff must allege (1) the performance of services in good faith, (2) the acceptance of services by the person to whom the services were rendered, (3) an expectation of compensation, and (4) the reasonable value of the services (see AHA Sales, Inc. v Creative Bath Prdts., Inc., 867 NYS2d 169 [2d Dept 2008]).

To state a claim for unjust enrichment, plaintiff must show (1) the other party was enriched, (2) at plaintiff's expense, and (3) it would be contrary to equity and good conscience to permit the other party to retain what is sought to be recovered (id; see

also Paramount Film Distribution Corp. v State, 30 NY2d 415 [1972]).

As noted above, with respect to quantum meruit and unjust enrichment, which are quasi-contractual theories, it is generally inappropriate to allege such claims when there is also a valid and enforceable contract governing the particular subject matter (see Clark-Fitzpatrick, Inc. v Long Island Railroad Co, 70 NY2d 382, supra). However, the parties' conduct after the expiration of a written contract may be sufficient to support a claim for an implied contract (see Watts v Columbia Artists Mgmt., Inc., 188 AD2d 799 [3rd Dept 1992]). It is reasonable to infer here that the parties did not expect that Plaintiff would work without expectation of payment after expiration of the contract. Accordingly, the seventh and eighth causes of action state a claim under quasi contract for payment for the period of time after expiration of the employment contract. The fact that the contract provides "[n]either the continuation of employment nor any other conduct shall be deemed to imply a continuing obligation upon the expiration of this Agreement" does not support Defendant's argument that payment of royalties after the contract's termination is barred.

However, the Court agrees that to the extent that Plaintiff

\*7]

seeks compensation under an implied contract for royalties for international sales for the period that the contract existed, such a claim is not actionable.<sup>1</sup> Assuming such agreement was not embodied in the contract (which has not yet been determined), it would be contrary to the understanding of the parties to allow the claim, in light of provision delineating all the instances where royalties would be paid, and the merger clause, which provides that the contract sets "forth the entire agreement and understanding of the parties" (see Valentino v Davis, 270 AD2d 635 [3d Dept 2000]). Sternberg, Inc. v Walber 36<sup>th</sup> St. Assoc., 187 Ad2d 225, supra, does not compel a different result, as unlike the contract in that case, the contract here sets forth the entire agreement of the parties, addressing all the instances where royalties are paid.

Finally, as to Plaintiff's ninth cause of action for imposition of a constructive trust, the motion to dismiss is denied with leave to renew (but discovery shall not be stayed if the motion is renewed). The parties have not addressed whether Defendant owes a fiduciary duty to Plaintiff under these circumstances (see e.g., Vitale v Steinberg, 307 AD2d 107 [1st Dept 2003]). Nor have the parties addressed whether this claim is

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<sup>1</sup>However, at this point, Plaintiff's claim for compensation for royalties for international sales is not dismissed pursuant to the seventh and eighth causes of action for the period after expiration of the employment contract.

redundant of the seventh and eighth causes of action to the extent it seeks payment of royalties.

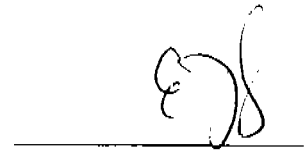
Accordingly, it is

ORDERED that Defendant's motion to dismiss the Complaint is decided in accordance with the terms of this Decision and Order.

This Constitutes the Decision and Order of the Court.

DATED: January 2, 2009

ENTER:



J. S. C.  
**EMILY JANE GOODMAN**

**FILED**

JAN 16 2009  
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MAY 11 2008