

Payne v Ellison

2009 NY Slip Op 30807(U)

April 5, 2009

Supreme Court, New York County

Docket Number: 602283/07

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 7

CHRISSETTE MICHELE PAYNE,
Plaintiff,

- v -

DOUGLAS ELLISON and FOUR KINGS PRODUCTIONS, INC.,
Defendants.

INDEX NO. 602283/2007

MOTION DATE 11/19/08

MOTION SEQ. NO. 005

MOTION CAL. NO. 74

The following papers, numbered 1 to 3 were read on this motion to dismiss

- Notice of Motion— Affirmation —
Exhibit A [Exs 1-7], Exhibits B-E
- Answering Affirmation — Exhibits 1-21
- Reply Memo

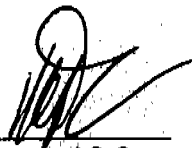
PAPERS NUMBERED
1-2
3
 APR 10 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

HON. MICHAEL D. STALLMAN

Dated: 4/5/09
New York, New York



J.S.C.

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 CITY OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 7**

-----X
CHRISSETTE MICHELLE PAYNE,

Plaintiff,

- against -

DOUGLAS ELLISON and FOUR KINGS
PRODUCTIONS, INC.,

Defendants.

-----X
HON. MICHAEL D. STALLMAN, J.:

Index No.: 602283/07

Decision and Order

FILED
APR 10 2009
COUNTY CLERK'S OFFICE
NEW YORK

Pursuant to CPLR 3211 (a) (7), defendants, an artists' management company and its owner, move to dismiss plaintiff singer-songwriter's complaint.

BACKGROUND

The background of this case was discussed in an earlier decision, dated January 14, 2008, and need not be reiterated here at length. Plaintiff Chrisette Michelle Payne, a R&B singer-songwriter, entered into an exclusive artist management agreement and an exclusive recording agreement as of January 31, 2005 with defendant Four Kings Productions, Inc. (FKP) d/b/a Four Kings Management. Defendant Ellison is the undisputed sole shareholder and owner of FKP. FKP allegedly procured recording and co-publishing deals for plaintiff with Island DefJam Music Group (IDJ) and EMI April Music, and an agreement with SESAC, all of which resulted in six figure advances to plaintiff from SESAC, EMI and IDJ. The parties disagree over the percentage of the advances defendants were allowed to keep, and whether defendants were entitled to recoup certain expenses before the advances were split. For the purpose of deciding the instant motion, only certain provisions of four contracts—the Exclusive Artist Management Agreement, the Exclusive Recording Agreement, the Co-Publishing Agreement, and a Merchandise Agreement—are pertinent. Each of the aforementioned

agreements affirmatively states that each party has separately consulted with counsel before entering into the agreement.

Plaintiff has asserted 17 causes of action against FKP. The first three causes of action allege breaches of a management contract, arguing that FKP took a greater percentage of advances than that to which it was entitled, plus keeping funds for expenses that were not authorized. The ninth, tenth, and eleventh causes of action allege a breach of the recording and publishing contract, once again asserting that FKP took a greater percentage of royalties than that to which it was entitled, plus the same amount as that alleged in the third cause of action for unauthorized expenses. The fifth through eighth causes of action are based on the management agreement, asserting fraudulent inducement, unjust enrichment, breach of fiduciary duty and conversion. The twelfth through fifteenth causes of action are based on the recording and publishing contract, alleging fraudulent inducement, unjust enrichment, breach of fiduciary duty, and conversion. The seventeenth cause of action is for negligent misrepresentation. The fourth cause of action is for embezzlement, and the sixteenth cause of action is for harassment.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211, the pleading should be liberally construed, the facts alleged by the plaintiff should be accepted as true, and all inferences should be drawn in the plaintiff's favor. *Leon v Martinez*, 84 NY2d 83 (1994); however, the court must determine whether the alleged facts "fit within any cognizable legal theory." *Id.* at 88. Further, "[a]llegations consisting of bare legal conclusions ... are not presumed to be true [or] accorded every favorable inference." *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 (1st Dept 1999), *affd* 94 NY2d 659 (2000).

First, Second, Third Causes of Action: Breach of the Management Agreement

The first three causes of action are based on alleged violations of the "Exclusive Artist Management Agreement," which obliges FKP to manage plaintiff's career, in consideration for which FKP is to receive 20% of plaintiff's gross earnings. See Exhibit 1 to Defendants' Ex A [Exclusive Artist Management Agreement], § 11 (a). Also, pursuant to section 14 of this contract, plaintiff is required to retain an accountant or business manager to collect and receive all earnings on plaintiff's behalf, who would also make the appropriate payments to FKP. Furthermore, FKP is entitled to be reimbursed for all authorized expenses it expends on plaintiff's behalf. The contract does not specify who authorizes such expenses. Further, until plaintiff retains an accountant or business manager, all of plaintiff's gross earnings are to be paid to FKP, who has the right to withhold its percentage of compensation, and to reimburse itself for all approved expenditures made on plaintiff's behalf.

Plaintiff asserts that FKP defalcated \$37,500.00 of monies that should have gone to plaintiff, based on FKP taking 50% of the earnings, as well as taking 50% of plaintiff's living advance, despite the fact that the "Exclusive Artist Management Agreement" provides that FKP's compensation is limited to 20% of plaintiff's gross earnings. The third cause of action argues that FKP retained \$103,880.82 as expenses, but that plaintiff never authorized such expenses. Simply stated, the two issues pertaining to the breach of contract causes of action are: one, whether, according to the terms of the agreements, FKP is entitled to 20% or 50% of the advances earned by plaintiff; and two, whether the expenses claimed by FKP for reimbursement were authorized.

It is well-settled that whether a contract is unambiguous is a question of law that may be decided by the court. *Bailey v Fish & Neave*, 8 NY3d 523 (2007); *W.W.W. Assoc., Inc. v*

Giancontieri, 77 NY2d 157 (1990). Paragraph 19 of the complaint specifies that the source of the funds in question for the first cause of action is a “writer’s advance” from SESAC, a performing rights organization, and paragraph 20 of the complaint specifies that the source of the funds in question for the second cause of action is from a “monthly living advance” from Def Jam, a recording company. As previously stated, the agreements between the parties specify that FKP is entitled to 50% of all “advances” paid to plaintiff, separate and distinct from the compensation to be paid to FKP for its management services.

Pursuant to the “Exclusive Recording Agreement, the “Co-Publishing Agreement,” and the “Merchandise Agreement,” plaintiff transferred one-half of all of her copyrights to FKP. Therefore, the controlling contract for these funds is not the “Exclusive Artist Management Agreement,” but the agreements indicated above, pursuant to which terms FKP is entitled to 50% of plaintiff’s earnings, as a 50% owner of her copyrights. These funds are not derived from FKP’s management services, but rather, from plaintiff’s copyrighted works.

In support of this contention, plaintiff relies heavily on *Fox Film Corp. v Springer*, 273 NY 434 (1937), in which the court found that, with technical contracts utilizing terms and phrases that have specific industry meanings that persons outside of that industry would not readily comprehend, it was error for the trial court to determine the action without evidence as to the meaning the terms had for the industry signatories. However, plaintiff misconstrues the nature of the contract terms involved in the instant controversy.

Plaintiff’s assertion that the contracts involve “special or technical” music industry terms, which require expert clarification, is unavailing. Although plaintiff discusses several technical terms used in the agreements, none of those terms are pertinent to the issues at hand. The source and

amount of the funds are not disputed, only the percentage of those funds to which FKP is entitled. The Court does not need any technical expertise to ascertain the percentages specified in a contract, or to determine whether expenses were authorized.

“Despite the technological innovations that continue to revolutionize the recording industry, long-settled common-law contract rules still govern the interpretation of agreements between artists and their record producers. The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties’ intent. The best evidence of what parties to a written agreement intend is what they say in their writing. Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms [internal quotation marks and citations omitted].”

Greenfield v Philles Records, Inc., 98 NY2d 562, 569 (2002).

Despite plaintiff’s attempt to argue that there is an ambiguity in the contracts, either express or latent, because of allegedly technical industry terms, the contracts are clear on their faces. As stated in *JP Morgan Chase Bank, N.A. v Cellpoint* (54 AD3d 366, 367 [2d Dept 2008]), “extrinsic evidence may be used to clarify ambiguities in an agreement, but not to create them.”

Thus, plaintiff’s first two causes of action are dismissed.

Plaintiff’s third cause of action, for unauthorized expenses, has partially been dealt with in the Court’s earlier decision of January 14, 2008, in which it was determined that the Statute of Frauds barred recovery of \$21,329.48 of these alleged expenses. However, a material question of fact exists as to whether FKP had the right to authorize the expenses in the absence of plaintiff having an accountant or business manager, because it is undisputed that plaintiff failed to retain the services of such professionals. Consequently, FKP’s motion to dismiss plaintiff’s third cause of action is denied.

Ninth and Tenth Causes of Action: Breach of the Recording Agreement

Plaintiff's ninth and tenth causes of action are for breach of the "Exclusive Recording Agreement." Plaintiff asserts that FKP retained 50% of the royalties it received on behalf of plaintiff from a recording contract with EMI. However, plaintiff has misconstrued the plain language of the agreement.

Section 4 of the "Exclusive Recording Agreement" grants to FKP 50% of all of the net royalties payable to plaintiff in respect of any exploitation of plaintiff's records. See Exhibit 2 to Defendants' Exhibit A. Section 3 (a) defines "advances" as all monies paid to plaintiff, including royalties, for which FKP is entitled to 50% on the first seven LPs. Section 4 also specifically includes plaintiff's "writer share" of performances as part of her total royalties. Further, pursuant to section 8 of this agreement, plaintiff assigned to FKP 50% of all of her copyrights in compositions written by plaintiff, and incorporates by reference, attached as Exhibit A to this agreement, a "Publishing Agreement."

According to the EMI contract, of the 100% of the money EMI made, it retained 50%, and remitted 25% to plaintiff and 25% to FKP. These funds represented monies derived from EMI's exploitation of plaintiff's copyrighted works. As noted above, plaintiff assigned 50% of her copyrights to FKP. Therefore, from the 100% that was remitted collectively to plaintiff and FKP (50% of the total earned by EMI), each kept one-half, which was their contract right. Plaintiff's assertions are based on the percentage designated by EMI, which only concerns the numerical distribution of its earnings according to its agreement with FKP, and does not reflect the contract between FKP and plaintiff. Hence, this cause of action is dismissed.

Eleventh Cause of Action: Breach of the Recording Agreement

Plaintiff's eleventh cause of action asserts a claim for breach of the "Exclusive Recording Agreement" with respect to unsubstantiated expenses, but asserts this cause of action in relation to the third cause of action discussed above. Because this cause of action, as presented, does not differ from the third cause of action, in which these funds are indicated to be violative of the "Exclusive Artist Management Agreement," and plaintiff does not assert that these funds were specifically spent with respect to the "Exclusive Recording Agreement," this cause of action is dismissed as redundant.

Fifth and Twelfth Causes of Action: Fraudulent Inducement

CPLR 3016 (b) requires that the complaint set forth the misconduct complained of in sufficient detail to clearly inform each defendant of what their respective roles were in the alleged deception. The mere assertion that the contracting parties did not intend to meet their contractual obligations does not convert a cause of action for breach of contract into one for fraud. *767 Third Avenue LLC v Greble & Finger, LLP*, 8 AD3d 75, (1st Dept 2004); *Modell's N.Y. Inc. v Noodle Kidoodle, Inc.*, 242 AD2d 248 (1st Dept 1997)

As stated by the Court in *Friedman v Anderson* (23 AD3d 163, 166 [1st Dept 2005]),

"[a] mere recitation of the elements of fraud is insufficient to state a cause of action" (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Christopher Assoc.*, 257 AD2d 1, 9 [1st Dept 199]) Furthermore, a plaintiff seeking to recover for fraud and misrepresentation is required "to set forth specific and detailed factual allegations that the defendant personally participated in, or had knowledge of any alleged fraud" (*Handel v Bruder*, 209 AD2d 282, 282-283 [1st Dept 1994])."

In the instant matter, plaintiff's allegations of fraud are conclusory and lack sufficient particularity to satisfy the requirements of CPLR 3016 (b). Plaintiff alleges that Ellison knowingly misrepresented to plaintiff that he would represent her best interests in order to induce her into

signing the Management Agreement and the Exclusive Recording Agreement. Defendants' Ex A [Complaint ¶¶ 46, 68]. Therefore plaintiff's fifth and twelfth causes of action, for fraudulent inducement, are dismissed.

Sixth and Thirteenth Causes of Action: Unjust Enrichment

Plaintiff's sixth and thirteenth causes of action, for unjust enrichment, are also dismissed. Plaintiff alleges that Ellison, acting through FKP, has been unjustly enriched by the alleged unlawful takings of proceeds which plaintiff claims rightfully belong to her. However, the existence of a valid contract bars a cause of action in quantum meruit. *The Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320 (1st Dept 2004); *see also Sheiffer v Shenkman Capital Mgt., Inc.*, 291 AD2d 295 (1st Dept 2002). As defendants indicate, the unjust enrichment claims seek recovery of the same amounts of money for which plaintiff seeks recovery under the breach of contract theories. There is no dispute as to the validity of the contracts at issue. Contrary to plaintiff's argument, ambiguity in the parties' agreements, which the Court does not find, would not render the contracts invalid.

Seventh and Fourteenth Causes of Action: Breach of Fiduciary Duty

As stated in the Court's earlier decision in this case, the "Exclusive Artist Management Agreement" creates certain fiduciary obligations between the parties. Defendants now argue that the seventh and fourteenth cause of action should be dismissed as duplicative of plaintiff's causes of action for breach of contract.

"[W]hile causes of action for breach of fiduciary duty that merely restate contract claims must be dismissed [citation omitted], conduct amounting to breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract which is nonetheless independent of such contract."

Bullmore v Ernst & Young Cayman Is., 45 AD3d 461, 463 (1st Dept 2007). As indicated in the

Court's prior decision, paragraph 1(a) of the management agreement between plaintiff and FKP expressly states, in pertinent part, "Artist hereby engages Manager as Artist's sole and exclusive personal representative and manager . . ." Paragraph 2 states, in relevant part, "Artist hereby authorizes and empowers Manager to and the Manager agrees . . . : (a) to represent, advise and assist Artist in fixing the terms governing all manner of disposition, use, employment or exploitation of Artist's talent and the products thereof . . ." Pursuant to paragraph 14 (a), "until Artist has retained a business manager, Artists's gross earnings . . . above shall be paid directly to Manager by all persons, firms or corporations and Manager may withhold Manager's compensation therefrom and may reimburse itself therefrom for all approved expenditures . . ." The Management Agreement created a fiduciary relationship by virtue of the requirement that the Manager would advise plaintiff and would hold money on plaintiff's behalf. These duties are independent of the Management Agreement.

Unlike the Management Agreement, the Recording Agreement does not contain any provisions that create a relationship where defendants assumed a role of trust and confidence as advisor to plaintiff. Plaintiff's opposition papers discuss only the Management Agreement, not the Recording Agreement.

Therefore, defendants' motion to dismiss is denied as to the seventh cause of action, but granted as to the fourteenth cause of action.

Eighth and Fifteenth Causes of Action: Conversion

The complaint alleges that Ellison, through FKP, unlawfully converted and continues to convert plaintiff's property "[b]y the acts, practices and omissions" regarding the Management Agreement and the Recording Agreement. Complaint ¶¶ 55, 78. However, "[a] conversion claim

cannot be based only on the allegation that a defendant received money and failed to remit payment to the plaintiff.” *Interstate Adjusters, Inc. v First Fidelity Bank, N.A.*, 251 AD2d 232, 234 (1st Dept 1998). Neither can it be predicated on a mere breach of contract claim with no independent facts to give rise to tort liability. *Fesseha v TD Waterhouse Investors Services, Inc.*, 305 AD2d 268 (1st Dept 2003); *Yeterian v Heather Mills N.V. Inc.*, 183 AD2d 493, 494 (1st Dept 1992).

Therefore, these causes of action are dismissed.

Sixteenth Cause of Action: Harassment

“New York does not recognize a cause of action to recover damages for harassment.” *Goldstein v Tabb*, 177 AD2d 470, 471 (2d Dept 1991); *Board of Managers of Executive Plaza Condominium v Jones*, 251 AD2d 89, 90 (1st Dept 1998). To the extent that the allegations of harassment can be viewed as alleging intentional infliction of emotional distress (*see generally Cavallaro v Pozzi*, 28 AD3d 1075 [4th Dept 2006]; *Bunker v Testa*, 234 AD2d 1004 [4th Dept 1996]), the allegations are not extreme or outrageous to support this theory of liability. *Leonard v Reinhardt*, 20 AD3d 510, 510 (2d Dept 2005).

Seventeenth Cause of Action: Negligent Misrepresentation

Plaintiff’s assertions, that Douglas Ellison, acting on behalf of FKP, said that “he would take care of her,” and that “he would make [her] into a big star,” do not rise to the level of negligent misrepresentation. Statements that “are conclusory and/or constitute mere puffery, opinions of value or future expectations” (*Sheth v New York Life Insurance Company*, 273 AD2d 72, 74 [1st Dept 2000]), are insufficient to form the basis of a claim of negligent misrepresentation, and so this cause of action is dismissed. Furthermore, in her complaint, plaintiff describes herself as “a world-renown singer and songwriter,” who, prior to the subject agreements, was “20 years old and a student at Five

Towns College in Long Island.”

Fourth Cause of Action (Embezzlement)

Defendants did not specifically address this cause of action in their moving papers. Accordingly, defendants did not meet their burden on this motion to dismiss as to this cause of action.

Finally, the request in plaintiff’s opposition papers (which plaintiff incorrectly refers to in the papers as a “cross motion”) to lift the automatic stay of discovery pending determination, triggered by this motion, was denied by the Court’s interim decision and order dated December 5, 2008. Now that this motion is decided the stay of discovery has dissolved by operation of law.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that defendants’ motion to dismiss is granted to the extent of dismissing plaintiffs first, second, fifth, sixth, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth and seventeenth causes of action; and it is further

ORDERED that plaintiff’s third case of action is limited to damages of \$ 82,551.34; and it is further

ORDERED that the remainder of this action shall continue.

Dated: April 5, 2009
New York, New York

ENTER:



J.S.C.

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NORMAN S. STALLMAN