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

HON. CAROL EDMEAD

PART 35

Justice

Index Number : 103027/2009

WASHINGTON, JAMES

VS.

ESCOBAR, DAMIEN

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 103027-09

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on this motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

FILED

SEP - 2 2009

COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion of defendants Damien Escobar and Tourie Escobar, a/k/a "Nuttin But Stringz" for an order, pursuant to CPLR §3211(a)(7), dismissing the Complaint of plaintiff James Washington on the ground that plaintiff fails to state a cause of action is denied; and it is further

ORDERED that counsel for plaintiff and counsel for defendants appear for a Preliminary Conference before Justice Carol Edmead, 60 Center Street, Part 35, Rm. 438 on Tuesday, October 13, 2009 at 2:15 p.m.; and it is further

ORDERED that defendants 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.

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

Dated: 8/28/09

J.S.C.

HON. CAROL EDMEAD

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: PART 35

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JAMES WASHINGTON,

Index No. 103027/09

Plaintiff,

-against- **DECISION/ORDER**

DAMIEN ESCOBAR and TOURIE ESCOBAR,
a/k/a "Nuttin But Stringz,"

Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Anyone familiar with NY1 News is familiar with the group Nuttin But Stringz, because Nuttin But Stringz performs the cable news program's theme song. In this action, plaintiff James Washington ("plaintiff"), who in 2005 discovered the violin-playing duo Damien Escobar and Tourie Escobar, a/k/a "Nuttin But Stringz," (collectively "defendants") performing in a New York City subway station, seeks to recover at least $1 million in damages against defendants for, *inter alia*, breach of contract.

Defendants now move for an order, pursuant to CPLR §3211(a)(7), dismissing the Complaint on the ground that, in failing to plead that he possessed a valid employment license, plaintiff fails to state a cause of action.

Factual Background[1]

On July 1, 2006, plaintiff entered into a management agreement (the "Agreement") with defendants. Pursuant to the terms of the Agreement, defendants were to remain exclusively managed by plaintiff for three years concluding on July 1, 2009.

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[1]Information is taken from plaintiff's Complaint and defendants' motion.

On November 19, 2008, plaintiff received a letter from Nadia Over ("Ms. Over") informing him that plaintiff's Agreement with defendants had expired and that plaintiff's power of attorney was revoked. Approximately one month later, on December 11, 2008, plaintiff received a telephone call and a second letter from Ms. Over informing him that his services were no longer needed and that the Agreement had expired in mid-2008.

Plaintiff's Contentions[2]

In his Complaint, plaintiff alleges four causes of action: (1) breach of contract, (2) breach of an implied and express covenant of good faith and fair dealing, (3) breach of trust, and (4) breach of trust with the intent to defraud.

Plaintiff contends in the first cause of action for breach of contract that, in violation of the terms of the Agreement, defendants failed to pay plaintiff his commission for the following performances in 2008: the October 29 halftime show of the Washington Wizards basketball team in Washington, D.C.; the November 1 and 7 performances at Professional Bull Riders events in Las Vegas, Nevada; the November 6 and 11 performances in Dubai; the November 22 performance at an event for the homeless in Dallas, Texas; and a November 23 performance in New Jersey. Plaintiff further alleges that defendants failed to properly disclose to third parties that plaintiff was their manager, and canceled engagements scheduled by plaintiff, thus interfering with the obligations and responsibilities of plaintiff.

Plaintiff contends in the second cause of action that by engaging in the acts and conduct

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[2] Information is taken from plaintiff's Complaint. The Court notes that while plaintiff makes reference in his opposition ("opp.") to an Amended Complaint (as Exhibit 4), a copy of the Amended Complaint is not attached to his papers. Further, in their motion, defendants refer to and provide a copy of only the original Complaint. Notwithstanding that the Amended Complaint was served after the instant motion and defendants' counsel was aware of the Amended Complaint, defendants' counsel represents that defendants' motion rests on the submission before the Court and does not rely or rest on any Amended Complaint. The Court has rendered its decision accordingly.

described in the Complaint, defendants breached the implied and expressed covenant of good faith and fair dealing created by the Agreement. Plaintiff alleges that defendants had a duty to plaintiff not to engage any other representative or manager to render services similar those of plaintiff, and not to negotiate, accept or execute any agreement concerning their career without plaintiff's express consent, including engaging, discharging and directing booking agents, theatrical agents, firms or corporations in connection with defendants' business and financial affairs.

Plaintiff alleges that defendants also breached this duty by allowing Ms. Over to "contact booking agents such as Pyramid Entertainment Group on December 1, 2008 and Love Productions on or around December 11, 2008 to redirect payments remitted" to defendants and to discharge engagements scheduled by plaintiff and agreed to by defendants beforehand. Defendants also breached this duty by hiring a new manager to accompany them to their show in Dubai in November, in violation of the terms of the Agreement.

Plaintiff contends in the third cause of action for breach of trust that defendants conspired to willfully withhold monies earned by and owed to plaintiff, in violation of the Agreement. Defendants never remitted to plaintiff his commissions for several performances.

Plaintiff contends in the fourth cause of action for breach of trust with the intent to defraud that defendants "habitually" failed to pay plaintiff his earned commissions, pursuant to the Agreement. Plaintiff alleges that such repetitive avoidance amounts to actual intent, and such intent comprises a breach of a duty of trust with the intent to defraud. For example, defendants received the benefit of plaintiff's services through a binding and enforceable contract while calculating ways to avoid the obligation of paying plaintiff's commissions. Therefore,

defendants acted intentionally to defraud plaintiff.

As a result of defendants' breaches, plaintiff contends that he has suffered damages of at least $1 million, plus costs incurred in this action as well as attorneys' fees. Accordingly, plaintiff requests that defendants be required to account for "all gains, profits, and advantages" from their breaches and to pay plaintiff at least $1 million in damages.

Defendants' Motion

Defendants contend that plaintiff's actions, as alleged in his Complaint, clearly demonstrate that he was acting as the agent of defendants in that he not only sought commissionable income on behalf of defendants, but also obtained commissionable income and negotiated commissionable agreements for the personal appearance of defendants, without first obtaining a license pursuant to New York General Business Law ("GBL") §172. Furthermore, since plaintiff cannot produce a valid license, any effort to amend or recommence the action will be a waste of the Court's time and resources. Therefore, the Complaint should be dismissed in its entirety.

Defendants argue that GBL §172 prohibits the operation of an employment agency without a license. They further contend that any attempt to enforce an agreement by an unlicensed agency will be denied as it has been held as a matter of law that such an agreement is void.

Defendants further argue that accepting the allegations of the Complaint as true, this Court must conclude that plaintiff operated as a "theatrical employment agency" as defined under GBL §171(8). Defendants contend that a "theatrical employment agency" is one that seeks to procure the employment or engagement for, *inter alia*, legitimate theater, motion pictures or

other entertainment exhibitions or performances. Defendants argue that, in addition to engaging third parties, plaintiff affirmatively asserts in his Complaint that he was "authorized to act as [defendants'] negotiator regarding the exploitation of [defendants'] talents and to execute on behalf of [defendants] any and all agreements, documents, and contracts for [defendants] personal appearances" (Complaint, ¶ 9). Thus, plaintiff "clearly concedes" that he is a theatrical employment agency within the meaning of GBL § 171(8). Since plaintiff held himself out as such, he was required to secure a license, pursuant to GBL §172. However, plaintiff fails to allege that he is duly licensed as an employment agency. Therefore, the alleged agreement is unenforceable and the claims in tort incidental to the contract claim must fail, as well, defendants argue.

Finally, defendants argue that the allegations in the Complaint make clear that plaintiff was not engaged in "merely incidental attempts" to secure personal performance engagements on behalf of defendants. Therefore, plaintiff will not avoid dismissal by suggesting in opposition that his efforts to seek employment for defendants was merely incidental.

Plaintiff's Opposition

Plaintiff contends that at all times he exclusively participated in the business of managing clientele. On June 27, 2006, plaintiff incorporated a legal entity in the State of New York called J. Washington Management, Inc. The principal activity of his business is "Management Services" plaintiff alleges, citing a printout from New York State Division of Corporations ("Corporate Entity Information") and an Application for Employer Identification Number ("Form SS-4").

Plaintiff argues that he never claimed nor represented to anyone, including defendants,

that he was a theatrical employment agency. Plaintiff only performed duties that were consistent with a person exclusively engaged in the business of managing clientele, and defendants, at all times throughout their relationship with plaintiff, "completely understood that fact and agreed to and accepted in a written contract" plaintiff's role, plaintiff argues. Plaintiff goes on to argue that GBL §172 is not applicable, because it defines a "theatrical employment agency" as "[a]ny person who procures or attempts to procure employment or engagements for . . . other entertainments . . . but such term does not include the business of managing such entertainments, exhibitions or performances." The drafters of this section explicitly intended to exclude plaintiff from its requirements, plaintiff contends.

Plaintiff argues that the Agreement clearly states: "Artist acknowledges that Manager is not an employment agency, theatrical agent . . . has not promised to procure employment or engagements for Artist and shall not be obligated to do so" (Agreement, ¶ 3). The basis of plaintiff's obligation, pursuant to the Agreement, is found in the preamble on the first page of the Agreement, which states: "Artist and Manager have . . . discussed Artist's desire for guidance and direction in order to further develop Artist's career in all branches of the entertainment industry." Further, the Agreement states that plaintiff will "counsel and advise artist in all matters relating to Artist's professional career."

Plaintiff argues that he was not hired to procure employment for defendants. To the contrary, defendants hired a booking-agent company named Pyramid Entertainment Group to secure performances for defendants, plaintiff contends. Pursuant to the Agreement, in the event that a performance was booked by Pyramid or any other booking agent, plaintiff expected to receive his commissions pursuant to the Agreement. Plaintiff further argues that he was not

merely an agent but also an Artist Manager. Plaintiff contends that he collected fees, secured travel arrangements, deposited monies on behalf of defendants and acted as their mentor, which were "all functions of plaintiff s duties."

Plaintiff disputes defendants' allegations that he was acting as an agent because he sought commissionable income on behalf of defendants. Defendants' rational fails to convey the explicit intentions of the parties when the Agreement was drafted, plaintiff argues. Plaintiff's duties were contemplated by the parties, agreed to in writing and permitted in accordance with GBL §172. Plaintiff has the authority to review and negotiate with the booking agents and employment agents that defendants hired in connection with their business affairs, as stated in ¶ 9 of the Complaint. Plaintiff argues that such authority is consistent with plaintiff's obligations, pursuant to the Agreement, "to counsel and advise Artist in all matters relating to Artist's professional career." Plaintiff further argues that he is allowed to seek and obtain commissionable income for the purpose to "further develop Artist's career in all branches of the entertainment industry." Defendants never suggest that plaintiff promised them that he will procure employment, nor did they suggest that procuring employment was the main purpose and intention of the Agreement, plaintiff contends.

Plaintiff further argues that since he was hired to advise, guide and direct defendants, he was well within his right to negotiate and secure contracts on behalf of defendants. An artist manager "has the best interest of their client's [*sic*] at heart because if the Artist is a success likewise is the artist manager," plaintiff argues. "Being able to negotiate agreements are [*sic*] tantamount to the success of the Artist." For example, securing defendants an opportunity to perform on America's Got Talent, a nationally broadcast television series, simply was to enhance

their visibility and exposure, not to seek employment for defendants, plaintiff argues. If defendants obtained employment from the efforts of plaintiff, then it was merely incidental to the main purpose of the Agreement and consistent with the exception of GBL §171.

Therefore, defendants' motion for dismissal should be denied.

Analysis

Failure to State a Cause of Action

The standard on a motion to dismiss a pleading for failure to state a cause of action, pursuant to CPLR §3211(a)(7), is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). On a motion to dismiss made pursuant to CPLR §3211, the court must "accept the 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 into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002], *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "In deciding such a preanswer motion, the court is not authorized to assess the relative merits of the complaint's allegations against the defendant's contrary assertions or to determine whether or not plaintiff has produced evidence to support his claims" (*Salles v Chase Manhattan Bank* at 228). However, where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence," they 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]; *Kliebert v McKoan*, 228 AD2d 232 [1st Dept], *lv denied* 89 NY2d 802 [1996]), and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Leon v Martinez* at 88 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001]).

Breach of Contract

To state a cause of action for breach of an agreement, the proponent of the pleading must specify the making of an agreement, the performance by that party, breach by the other party, and resulting damages (*Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071, 2006 NY Slip Op 50497 [NY Sup 2006], *citing Furia v Furia,* 116 AD2d 694, 695 [2d Dept 1986]). "The essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated, must be alleged" (*Volt Delta Resources LLC, supra, citing Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]; *see also Caniglia v Chicago Tribune-New York News Syndicate Inc.*, 204 AD2d 233, 234 [1st Dept 1994]) by making specific reference to the relevant portions of the contract or by attaching a copy of the contract to the complaint (*Atlantic Veal & Lamb, Inc. v Silliker, Inc.*, 11 Misc 3d 1072, 816 NYS2d 693 [NY Sup 2006], *citing Chrysler Capital Corp. v Hilltop Egg Farms, Inc.*, 129 AD2d 927, 928 [3d Dept 1987]).

Here, defendant's argument that plaintiff failed to state a cause of action for failing to plead that he was a licensed agent, pursuant to GBL §172, lacks merit, at this juncture.

The Complaint

In his Complaint, plaintiff alleges that he discovered defendants in 2005, and in 2006, he entered into a "management agreement" with defendants, wherein the parties agreed that plaintiff would be defendants' exclusive manager for three years. Plaintiff was to act as defendants' "Attorney-in-Fact to engage booking agents and employment agents in connection with the business affairs of Defendants . . . [and] as Defendant's [*sic*] negotiator regarding the exploitation of Defendant's talents and to execute on behalf of Defendants any and all agreements, documents and contracts for Defendant's personal appearances" (Complaint, ¶ 9). The term of plaintiff's management agreement and the conditions and terms of payment due plaintiff thereunder were also expressly stated.

Plaintiff further alleges that he introduced defendants to Susan DelGiorno of Koch Entertainment ("Koch"), who agreed to offer defendants a recording contract with Koch (Complaint, ¶ 29). Plaintiff also secured a territory deal with Sony Music Japan, as well as a deal for defendants to appear on America's Got Talent in May 2008[3] (Complaint, ¶¶ 30-31). Thereafter, defendants performed at paid engagements throughout the country and in Dubai.

Contrary to defendants' arguments, the allegations of plaintiff's Complaint do not indicate, at this juncture, that plaintiff operated as a "theatrical employment agency" within the meaning of GBL §171(8), so as to require an allegation that plaintiff has an employment license pursuant to GBL §172.[4] The license requirement applies to a "theatrical employment agency,"

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[3] Defendants allegedly placed third among thousands of competitors.

[4] GBL §172, titled "License Required," states in relevant part that "[n]o person shall open, keep, maintain, own, operate or carry on any employment agency unless such person shall have first procured a license therefor as provided in this article."

which is defined in GBL §171(8) as follows:

> "Theatrical employment agency" means any person (as defined in subdivision seven of this section) who procures or attempts to procure employment or engagements for circus, vaudeville, the variety field, the legitimate theater, motion pictures, radio, television, phonograph recordings, transcriptions, opera, concert, ballet, modeling or other entertainments or exhibitions or performances, *but such term does not include the business of managing such entertainments, exhibitions or performances, or the artists or attractions constituting the same, where such business only incidentally involves the seeking of employment therefor.*
> (*Emphasis added*)

The Court also notes that the Complaint indicates that defendants also scheduled their own performances without informing plaintiff, including two performances in Las Vegas, Nevada, and two performances in Dubai (Complaint, ¶¶ 33-35). Therefore, accepting as true the allegations in the Complaint, as this Court must, defendants allegedly did not solely rely on plaintiff to find employment for them, which indicates that the employment secured by plaintiff for defendants was only incidental to plaintiff's management duties.

Further, that the plaintiff alleges that he acted as "a negotiator" on behalf of defendants, does not negate the allegation that he was defendants' manager. Plaintiff does not allege he was responsible for securing performances or employment for defendants (*cf., Angileri v Vivanco*, 137 NYS2d 662, 663 [1954] [holding that an agreement stating that the agents were to "use their best efforts and endeavors to obtain employment and engagements" in musical and theatrical field fell within this section which provided for the licensing of employment agencies, and services were not within exception provided in this section for situation where managing entertainments, performers, or artists or attractions only incidentally involved seeking employment therefor]). Instead, plaintiff alleges that he was authorized "to engage" employment agents on defendants' behalf (Complaint ¶9).

The Court notes that the Agreement[5], to which plaintiff's Complaint refers, also does not indicate that plaintiff was an employment agency. The first few paragraphs of the Agreement, which is titled "Management Agreement," appears to define the nature of the parties' relationship:

> WHEREAS, Artist [defendants] and Manager [plaintiff] have met and discussed Artist's desire for guidance and direction in order to further develop Artist's career in all branches of the entertainment industry;
> NOW, THEREFORE, the parties agree as follows:
> 1. APPOINTMENT: (a) *Artist hereby constitutes and appoints manager the sole and exclusive personal representative and career manager* of Artist, throughout the world for the term of this Agreement with respect to all phases of the entertainment, creative and literary industries.
> Manager hereby accepts such appointment and agrees *to serve as Artist's personal manager* subject to the terms, condition and limitations hereinafter set forth.
> (b) Regarding their musical career. Artist shall seek advice, guidance, counsel and direction from Manager exclusively. Artist shall not engage any other representative or manager, exclusive of an attorney, accountant, or business manager, to render similar services and shall not negotiate, accept or execute any agreement concerning Artist's career without Manager's express prior consent.
> (*Emphasis added*)

Under the section titled "Manager's Obligations," the Agreement states in relevant part:

> Artist [defendants] acknowledges that Manager [plaintiff] *is not an employment agency, theatrical agent, or licensed artist's manager*. In this connection, *Manager has not promised to procure employment or engagements for Artist, and shall not be obligated to do so hereunder*" (Agreement, ¶ 3) (*emphasis added*).

Under the section titled, "Manager's Authority," the Agreement states in relevant part:

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[5] The Court notes that defendants do not provide a copy of the Agreement with their moving papers; nor do they deny that they signed and executed the Agreement on July 1, 2006. Defendants only mention the Agreement in their motion to assert that plaintiff "did memorialize several of the alleged terms in the Complaint" (motion, p. 3). In *Davis v Savion Glover Productions, Inc.* (23 Misc 3d 1134 [Sup Ct NY County 2009]), where defendants likewise argued that the complaint failed to state a cause of action because the plaintiffs failed to plead that they were a licensed employment agency, the Court observed that the absence of such an agreement in that case prevented it from determining "the identity of the contract parties, and the scope of their relationship." Here, plaintiff has provided a copy of the Agreement in opposition to defendants' motion.

> With regard to his musical career, Artist hereby authorizes and appoints Manager Artist's Attorney-in-Fact . . .
> (a) To engage, discharge and direct for Artist, and in the name of Artist, theatrical agents, booking agents, employment agents, public relations firms and other persons, firms and corporations in connection with the business and financial affairs of Artist . . .
> (b) To represent Artist and act as Artist's negotiator regarding the use, employment or exploitation of Artist's talents and products and to execute for Artist, in the name of Artist and on behalf of Artist, and any all agreements, documents and contracts for Artist's personal appearance services . . . . Notwithstanding the power granted to Manager herein. Manager will, subject to Artist's availability, consult with Artist making all information regarding offers for Artist's services available to Artist. Manager shall make all reasonable efforts to contact Artist either in person or via telephone, electronic mail or facsimile transmission. Should Artist, however, be unavailable at the time or place at which Artist's approval is deemed necessary, Manager shall have the unconditional right to contract for such personal appearance engagement and Artist hereby warrants and represents that Artist will appear and perform any such engagement to the best of his ability.
> (Agreement, ¶ 4)

In the case of *Pawlowski v Woodruff* (122 Misc 695, 203 NYS 819 ([1st Dept 1924] *affd* 212 AD 871 [1925]), the First Department reviewed an agreement in which the defendant, a musician, engaged the plaintiff as an "exclusive manager" who was to receive as compensation 10% of the defendant's earnings. The Court held that the fact the plaintiff had not procured a license under GBL §171 did not prevent plaintiff's recovery for breach of contract, because the contract provided for management, *and only incidentally for seeking employment*. The Court further observed that, according to the agreement between the parties, the plaintiff's "compensation was based on defendant's earnings from employment *whether procured by plaintiff or not*" (*emphasis added*). Finally, the Court concluded that an "employment agency could not circumvent the statute by putting its contract to procure employment for an artist in the form of an agreement for management. *But that is not the case at bar*" (*id.*) (*emphasis added*).

Here, the Agreement explicitly states that it is a contract for management and that plaintiff is "not an employment agency" (Agreement, ¶ 3). The Agreement also makes clear that

plaintiff "has not promised to procure employment or engagements for Artist, and *shall not be obligated to do so*" (Agreement, ¶ 3) (*emphasis added*). Contrary to defendants' argument, the fact that the Agreement allows plaintiff to receive as compensation 12% of defendants' earnings in the first two years of the agreement and 15% in the third year (Agreement, ¶ 5) does not, in and of itself, indicate that plaintiff is an employment agency (*Pawlowski v Woodruff*; supra). Plaintiff's compensation derived from many sources of defendants' income and compensation, such as defendants' "personal appearances, theatrical engagements, nightclubs, road shows, tours, records and recordings, commercials, merchandising, writing, publishing, endorsements, tie-ins, stock and stock options, like receivables . . .."

Finally, the cases on which defendants rely are not on point. In fact, defendants rely on the same cases on which the defendants in *Davis v Savion Glover Productions, Inc.* (23 Misc 3d 1134 [Sup Ct NY County 2009]) relied: *Friedkin v Harry Walker, Inc.*, 90 Misc.2d 680 [Civ Ct NY County 1977] and *Pine v Laine*, 36 AD2d 924, 925 [1st Dept 1971] (see motion, p. 5). In *Friedkin*, the Court held that the defendant's opposition to the plaintiff's motion for summary judgment was conclusory, and, as the defendant "failed to submit evidentiary facts with any probative value specifying or describing the performance of its alleged managerial activities," the defendant failed to raise a material fact that he was not an employment agency in violation of GBL §171 (*Friedkin* at 683). In *Pine v Lane*, where the plaintiff sought to recover from a singer/defendant for procuring a recording contract for the defendant, the First Department reversed a lower court's denial of summary judgment on the ground that "[i]t is clear that the defendant had a manager, and that the only service performed by the plaintiff, although he sought to become the manager of the defendant, was this one procurement of a recording contract.

cannot come within the exception [of GBL §171(8)]" (*Pine v Laine* at 925).

However, as was the case in *Davis v Savion Glover Productions*, defendants' reliance on *Friedkin* and *Pine v Lane* is misplaced because, *inter alia*, such "cases involved motions for summary judgment which focus on the question of whether a factual issue exists . . . and have little, if anything, to do with the sufficiency of a pleading." The Court in *Davis v Savion Glover Productions* also pointed out that the question of whether plaintiff should be considered a licensed theatrical agency requires discovery as to his "business activities and employment efforts with respect to defendants" (*id.*). Here, the Court distinguishes *Friedkin* and *Pine v Lane* on the same grounds.

In accepting the facts as alleged in the Complaint as true, and according plaintiff the benefit of every possible favorable inference *(Nonnon v City of New York, supra)*, it cannot be said, at this juncture, that plaintiff was a theatrical employment agency so as to warrant dismissal of the complaint for failure to plead that he was licensed agent, pursuant to GBL §172. Therefore, plaintiff's motion to dismiss plaintiff's Complaint for failure to state a cause of action for breach of management agreement is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendants Damien Escobar and Tourie Escobar, a/k/a "Nuttin But Stringz for an order, pursuant to CPLR §3211(a)(7), dismissing the Complaint of plaintiff James Washington on the ground that plaintiff fails to state a cause of action is denied; and it is further

ORDERED that counsel for plaintiff and counsel for defendants appear for a Preliminary

Under the circumstances, plaintiff cannot come within the exception [of GBL §171(8)]" (*Pine v Laine* at 925).

However, as was the case in *Davis v Savion Glover Productions*, defendants' reliance on *Friedkin* and *Pine v Lane* is misplaced because, *inter alia*, such "cases involved motions for summary judgment which focus on the question of whether a factual issue exists . . . and have little, if anything, to do with the sufficiency of a pleading." The Court in *Davis v Savion Glover Productions* also pointed out that the question of whether plaintiff should be considered a licensed theatrical agency requires discovery as to his "business activities and employment efforts with respect to defendants" (*id.*). Here, the Court distinguishes *Friedkin* and *Pine v Lane* on the same grounds.

In accepting the facts as alleged in the Complaint as true, and according plaintiff the benefit of every possible favorable inference *(Nonnon v City of New York, supra)*, it cannot be said, at this juncture, that plaintiff was a theatrical employment agency so as to warrant dismissal of the complaint for failure to plead that he was licensed agent, pursuant to GBL §172. Therefore, plaintiff's motion to dismiss plaintiff's Complaint for failure to state a cause of action for breach of management agreement is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendants Damien Escobar and Tourie Escobar, a/k/a "Nuttin But Stringz for an order, pursuant to CPLR §3211(a)(7), dismissing the Complaint of plaintiff James Washington on the ground that plaintiff fails to state a cause of action is denied; and it is further

ORDERED that counsel for plaintiff and counsel for defendants appear for a Preliminary Conference before Justice Carol Edmead, 60 Centre Street, Part 35, Rm. 438 on Tuesday, October 13, 2009 at 2:15 p.m.; and it is further

ORDERED that defendants 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: August 28, 2009

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

HON. CAROL EDMEAD