

Lockett v Tuff City Records

2009 NY Slip Op 32271(U)

September 21, 2009

Supreme Court, New York County

Docket Number: 602900/08

Judge: Carol R. Edmead

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

PRESENT: **HON. CAROL EDMEAD**

PART 35

Index Number : 602900/2008
LOCKETT, ERIC
vs.
TUFF CITY RECORDS
SEQUENCE NUMBER : 002
COMPEL OR STAY ARBITRATION

INDEX NO. _____

MOTION DATE 8/03/09

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 _____

FILED
SEP 22 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 branch of plaintiff's motion to permanently stay an arbitration, pursuant to CPLR §7503(c), is granted; and it is further

ORDERED that the branch of plaintiff's motion for attorneys' fees, costs and disbursements, pursuant to 22 NYCRR §130-1.1, is denied; and it is further

ORDERED that the branch of defendants' cross-motion to dismiss the Complaint, pursuant to CPLR §1002(a), for improper joinder of plaintiffs and to stay the action until the Court decides this motion, is denied as moot. However, the claims by (1) Brown and Mandes, individually and as the recording artist professionally known as the Cold Crush Brothers, and (2) Livingstone, Diggs, Ferguson, Mason, Whipper or Garcia, individually and as the recording artist professionally known as The Fantastic Five, are hereby severed from this action. Brown and Mandes, individually and as the recording artist professionally known as the Cold Crush Brothers shall obtain a no-fee index number and serve their Complaint within 30 days. Livingstone, Diggs, Ferguson, Mason, Whipper or Garcia, individually and as the recording artist professionally known as The Fantastic Five shall also obtain a no-fee index number and serve their Complaint within 30 days; and it is further

Page 1 of 2

Dated: _____

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):

ORDERED that the branch of defendants' cross-motion to sever and remove plaintiffs' causes of action to the Small Claims Part of the New York City Civil Court, pursuant to CPLR §§1002(a) and 325(a), is denied; and it is further

ORDERED that the branch of defendants' cross-motion to stay the proceedings until the Court rules on removal, pursuant to CPLR §326(a), is denied, as moot; and it is further

ORDERED that the branch of defendants' cross-motion for an award of costs, attorneys fees and sanctions is denied, at this juncture; and it is further

ORDERED that Lockett's counsel shall return to defendants' counsel any privileged documents inadvertently given to Lockett's counsel within five (5) days of entry of this order. The failure of Lockett's counsel to provide such documents shall result in sanctions; and it is further

ORDERED that plaintiff shall file 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.

FILED
SEP 22 2009
COUNTY CLERK'S OFFICE
NEW YORK

Page 2 of 2

Dated 9/21/09

ENTER: [Signature] J.S.C.
HON. CAROL EDMEAD

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

DO NOT POST REFERENCE

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

-----X

ERIC LOCKETT, p/k/a Funkmaster Wizard Wiz;
CURTIS BROWN p/k/a Grandmaster Caz; CARLOS
MANDES p/k/a DJ Charlie Chase, individually and as
The recording artist p/k/a THE COLD CRUSH
BROTHERS; THEODORES LIVINGSTONE p/k/a
Grand Wizard Theodore; ROBIN DIGGS, p/k/a Master
Rob; KEVIN FERGUSON p/k/a Waterbed Kev;
DARRYL MASON p/k/a Dot-A-Rock; JAMES
WHIPPER p/k/a Prince Whipper Whip; and RUBIN
GARCIA p/k/a Ruby Dee, individually and as the
recording artist p/k/a THE FANTASTIC FIVE,

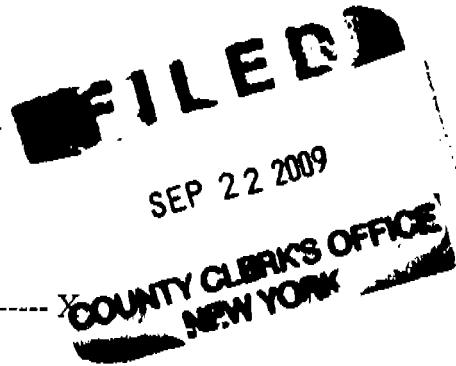
Index No. 602900/08

Plaintiffs,

-against-

TUFF CITY RECORDS; TUFAMERICA, INC.; OL'
SCHOOL FLAVA, a division of TufAmerica, Inc.;
STREET TUFF TUNES; and AARON FUCHS,

Defendants.



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HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION¹

Plaintiff, Eric Lockett, professionally known as “Funkmaster Wizard Wiz” (“Lockett”),
moves to permanently stay an arbitration, pursuant to CPLR §7503(c), and for attorneys’ fees,
costs and disbursements, pursuant to 22 NYCRR §130-1.1.

In response, defendants Tuff City Records, TufAmerica, Inc. (“TAI”), Ol’ School Flava, a
Division of TufAmerica, Inc. (“Ol’ School Flava”), Street Tuff Tunes, and Aaron Fuchs
 (“Fuchs”) (“defendants”) cross move to dismiss the Complaint, pursuant to CPLR §1002(a), for
improper joinder of plaintiffs, to stay the action until the Court decides this motion, or

¹ The Court welcomes Annie Nazarian, New York University School of Law, Class of 2010, and Hon. Betty Weinberg Ellerin Fellow of the New York Women’s Bar Association, and thanks her for her significant contribution to this decision.

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alternatively, to sever and remove plaintiffs' causes of action to the Small Claims Part of the New York City Civil Court, pursuant to CPLR §§1002(a) and 325(a), and to stay the proceedings until the Court rules on removal, pursuant to CPLR §326(a), and for costs, attorneys' fees and sanctions.

Factual Background

This is an action to recover monies allegedly owed for royalties and fees in connection with songs and recordings made by plaintiffs. During the course of this litigation, on June 22, 2009, defendants served plaintiff with a Demand for Arbitration ("Demand"), which referenced a November 16, 1986 contract (the "1986 Contract") entered into between Lockett and Frost Belt International ("Frost Belt"). Lockett is the only plaintiff that is subject to the Demand. The Demand states that the 1986 Contract, which contains an "explicit requirement that all disputes go to arbitration rather than to litigation," is central to the instant litigation.

Plaintiffs' Motion²

Lockett contends that defendants waived their right to arbitration based on their active participation in this lawsuit and affirmative acceptance of the judicial forum. Since October of 2008, defendants have engaged in discovery, created unreasonable delay, purposefully filed counterclaims or affirmative defenses, and contested the merits through the judicial process.

² Lockett initially argued that he was not precluded from moving to stay arbitration after the prescribed 20 day limitations period because the Demand required a response within 10 business days in violation of CPLR §7503 (c). However, after Lockett's motion was filed, defendants served another Demand for Arbitration on July 14, 2009, amending the first Demand by stating that "Unless the party served with this notice applies to stay the arbitration within twenty (20) days after service of demand of the demand or notice, the party served shall thereafter be precluded (a) from objecting that a valid agreement was not made or has not been complied with, and (b) from asserting the statute of limitations in court." Therefore, this issue is rendered moot, and the references in this decision to "Demand" shall include the one served most recently.

First, defendants filed their Answer without asserting any affirmative defenses raising the issue of arbitration, and instead simply averred that "the Lockett Recording Contract requires Lockett to address all claims through arbitration." Lockett argue that such averment was not the proper procedure to raise a right to arbitration. Although a denial may raise an issue of fact alleged by plaintiff, Lockett never alleged any agreement that included an arbitration clause. Nor do any of the seven affirmative defenses assert a right to arbitration. Second, defendants filed a counterclaim against Lockett for tortious interference with the contract, *i.e.*, the 1986 Contract, the very contract defendants assert is the basis for their right to arbitration (a counterclaim this Court later dismissed). Third, defendants moved to dismiss the Complaint as against Fuchs, pursuant to CPLR §3211(a)(1) and (7), without mentioning arbitration.³ Fourth, since January 2009, defendants participated in discovery; yet at no time prior to serving 288 discovery requests and 77 interrogatories did defendants serve the Demand or file a motion to compel arbitration. Fifth, defendants have requested (and received) numerous extensions of time to respond to the Complaint and discovery, thereby unreasonably delaying these proceedings. Finally, defendants waited more than eight months into this litigation to formally raise the issue of arbitration.

Plaintiffs further argue that the purported 1986 Contract between plaintiff and Frost Belt, a defunct entity not named or involved in this dispute, is irrelevant to Lockett's dispute.⁴ The

³ It is argued that neither defendants' motion nor any of the supporting papers asserted the existence of an arbitration clause in any agreement. In response to Fuchs' motion, plaintiffs cross moved to dismiss defendants' counterclaim for interference with contractual relations pursuant to CPLR §3211(a)(7). By order dated May 20, 2009, the Court denied defendants' motion to dismiss the complaint as against Fuchs and dismissed the counterclaim in its entirety.

⁴ According to plaintiff, a search conducted on the New York State Department of State, Division of Corporations website reveals that Frost Belt was formed June 16, 1982 and was dissolved by proclamation on June 26, 1991. Fuchs signed the 1986 Contract on behalf of Frost Belt.

Demand failed to state who is asserting Frost Belt's alleged arbitration rights or Frost Belt's relation to the defendants. Nor do defendants allege a single master recording created under the alleged 1986 Contract that is relevant to this action. Lockett's claim against defendants is based upon the defendants' failure to account and to pay royalties for their exploitations of his master recordings, a majority of which were recorded and/or created before the 1986 Contract. Lockett attests that he does not recall signing any contract with Fuchs in 1986, but that he signed an agreement with a record company related to Fuchs in 1981, while he was a minor. Pursuant to that 1981 agreement, Lockett recorded the master recordings⁵ which would be included in the album entitled "Bellevue Patient." These master recordings were completed in 1985. Thus, any master recording created before the 1986 Contract would not be subject to arbitration.

In support of his application for attorneys' fees, plaintiff contends that defendants have engaged in frivolous conduct in order to delay this proceeding. Defendants received extensions to respond to the Summons with Notice and the Complaint, waited eight months to serve their Demand, actively engaged in this litigation, and in direct contravention to the Demand, filed a counterclaim against Lockett. Defendants failed to properly assert arbitration and/or serve the Demand (1) upon receipt of the Summons With Notice; (2) upon receipt of the Complaint; (3) in conjunction with and as an affirmative defense; and/or (4) failed to move to compel arbitration along with its dismissal motion. Thus, serving the Demand at this time only serves to delay the proceedings, thus warranting reasonable attorneys' fees and costs in the amount of \$2,445.00 in Lockett's favor.

⁵ Lockett asserts that the master recordings include, among others, the following songs: (a) Bellevue Patient; (b) Stop It Wiz; (c) I Ain't Wit Dat; and (d) Grand Concourse and 183rd.

Defendants' Cross-Motion

In support of dismissal of the Complaint, defendants argue plaintiffs have no common questions of law or fact that give rise to permissive joinder of their claims under CPLR §1002(a). The common "thread" that defendant did not pay plaintiffs is insufficient. This action does not concern only two hip hop groups, but concerns the following groups of unrelated performers: 1) Lockett (Funkmaster Wizard Wiz and Optimist Prime), 2) Brown and Mandes (The Cold Crush Brothers) and Mendez performing solo (as Caz), and 3) Grand Wizard Theodore and the Fantastic Five (Livingstone, and Diggs, Mason, Ferguson, Whipper and Garcia), each of which have different recording agreements that give rise to and define their relationship, if any, with defendants.

Regarding plaintiffs Livingstone, Diggs, Mason, Ferguson, Whipper and Garcia, defendants' defenses are uniquely based on a licensing agreement with their record label Soul Wax. Any claims that they may have for royalties should be directed to Soul Wax.

As for the remaining plaintiffs that negotiated agreements with TAI (or its predecessors), these agreements were negotiated at different times and with different people, under different circumstances for recordings that are unrelated to each other in any way.

Likewise, the facts concerning the performance and breach by the parties to those agreements vary greatly from one to another. Lockett's claim that he was a "minor" in 1981 when he signed an agreement with a label affiliated with Fuchs requires discovery and legal analysis unique to his contracts and claims. Lockett is also currently litigating the issue of whether his claims are subject to arbitration. Defendants also have certain defenses and other set-offs they can assert for Lockett's inability to perform under the agreement for several years.

Brown's individual contract uniquely provides he will not sue defendants as part of a suit by the Cold Crush Brothers. Defendants also have certain defenses and other set-offs they can assert in connection with their suspension of Brown's contract for failure to perform.

Also, that the discovery exchanged needs to kept confidential from one plaintiff or set of plaintiffs indicates that their actions are wholly unrelated. The sharing of each plaintiff's information among the other will cause problems between these artists and defendants. Coordinating and sequestering the information will waste judicial resources, and the parties' time and money, warranting dismissal.

Plaintiffs may argue that they are also connected because defendants refused to provide copies of their recording agreements when they originally signed them, or because their veil-piercing theory somehow unites them. First, six of the plaintiffs never signed any agreements with defendants. Moreover, Lockett does not allege that defendants refused to give him copies of the various agreements he had signed. Brown attested that he never received a copy of any of his many contracts, even though all of Brown's agreements were provided to him at signing. Moreover, these plaintiffs all signed successive agreements, continued to make recordings, and collect advances and royalty payments. Defendants' failure to provide plaintiffs with replacement copies more recently was not intentional, but circumstantial.

Second, plaintiffs' claims are not multi-million dollar claims for royalties that require veil piercing to satisfy a potential damage award. Lockett's claims do not exceed \$213. Brown's individual claims do not exceed \$1,103, and Brown's and Mandes's claims as the Cold Crush Brothers do not exceed \$152 and \$128, respectively, not including any of defendants' defenses or counterclaims. None of the recording agreements provide for royalties for any third party

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licensing (television, film, commercials, samples). The clear statements in the agreements indicate that the artists do not own the masters and that TAI owns part of all the compositions. Thus, no veil piercing theory needs to be advanced by the plaintiffs.

In support of their own claim for costs, attorneys' fees and sanctions, defendants argue that prior to starting this action, plaintiffs' counsel repeatedly threatened litigation and made extortion demands for "royalty advances" – without their clients making any recordings in exchange. Also, plaintiffs' counsel admitted to Fuchs that he knew the claims for Lockett were "relatively small," but filed this action naming Fuchs individually despite knowing that there was no need to pierce the corporate veil and that the corporate defendants had sufficient assets to pay plaintiffs' contract claims. Plaintiffs' naming of Fuchs necessitated a motion to dismiss him from the action, which burdened the Court and cost defendants time and money. TAI is falling way behind in running its business due to the discovery demands. Now, plaintiffs' counsel threatens to move to compel the production of Fuch's personal income tax returns, and demands that Fuchs attend a deposition, even prior to the preliminary conference. Such documents are not relevant to this case and are being sought solely to embarrass Fuchs. Although defendants also offered to settle this matter with Brown, plaintiffs' attorneys were not interested in discussing or settling the matter. The result of plaintiffs' frivolous, bad faith and harassing conduct is that defendants have incurred tremendous legal expense and have also been forced to use their staff to work on this case rather than run the business.

In addition the Court should impose sanctions upon plaintiffs' counsel. Defendants were forced to engage in unnecessary and burdensome discovery, much of which is highly sensitive financial and competitive information. Such information is wrongfully in the hands of plaintiffs'

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counsel – a self-proclaimed "Enforcement Corporation" for "Artist's Rights" ("AREC") that will certainly try and use it again on defendants.

Defendants also argue that the Court should compel arbitration. Defendants contend that Lockett, originally signed with Frost Belt as part of a trio called The Undefeated Three in 1981. Only the signature page of that 1981 agreement, and an additional agreement with an amendment that he signed in 1983 have been located. The 1986 Contract signed between Lockett and Frost Belt sets out Lockett's advances and royalty rates for record sales, and Frost Belt (now TAI) now owns the recordings pursuant to paragraph H therein. The copyrights to the compositions are jointly owned by TAI and Lockett, each receiving 50% of all publishing income; and paragraph P contains a mandatory arbitration provision. There are no royalty provisions for third party licensing (*e.g.*, television, commercials, films, samples). TAI is the successor in interest to Frost Belt and assumed all the assets, liabilities, rights and obligations of Frost Belt in or around September 6, 1991 in a purchase and sale agreement.⁶

Further, a defendant is deemed to have waived its right to arbitrate when at least one year has passed and the initial discovery period has expired, and here, only eight months have passed and the discovery period has yet to expire. Thus, defendants have not forfeited their right to compel arbitration. Also, the act of making a motion to dismiss does not serve as a waiver either. Defendants never expressed an outright rejection or abandonment of their right to arbitrate. And, that the right of arbitrate was not posited as an affirmative defense is harmless error, in light of its mention in the Amended Answer. Arbitration would benefit all parties involved, in light of

⁶ Defendants asserts that TAI currently sells Lockett's recording called "Bellevue Patient" which was released in 1985 on Old School Flava and "I Ain't Wit That," (1988).

the high costs of litigation and the monetary award involved.

Any discovery delays by defendants were due to the office move of TAI in April 2009, causing it difficulties in locating documents. There are 20,000 masters and compositions that TAI administers, so it is not unreasonable for some documents to go missing. This lawsuit sought accountings for two solo artists and a group. TAI went back six years for each in order to give a fuller picture for each artist, and any delay was unintentional. No false statements have been made in the pleadings by defendants, and all allegations are based on defendants' personal knowledge of events. The counterclaims were stated upon advice of counsel, all of whom are no longer working on this case. TAI's prior counsel's pleading errors should not continue to color the Court's impression of TAI.

Further, only one agreement is the subject of this litigation with respect to Lockett, and the 1986 Contract is the only agreement that applies to Lockett as an individual artist.

Plaintiffs' Opposition to Cross-Motion

Plaintiffs' claims, with the exception of the members of the Fantastic Five, are virtually identical, in that the defendants have exploited their master recordings and musical compositions without rendering payment to them for the same. Since 2003, plaintiffs have been requesting of the defendants all relevant information and documentation concerning contracts, royalties, and payments, which have not been provided, thus necessitating this litigation. With the exception of Lockett and the members of the Fantastic Five, the remaining plaintiffs also seek rescission of their various agreements with the Tuff City Records. Thus, this matter involves a more than the mere request for past due royalties.

CPLR §1003 reveals that dismissal is not a remedy for misjoinder of parties. Defendants

have the right to exploit the plaintiffs' relevant compositions and master recordings, and in this regard are identical for all of the plaintiffs. Second, defendants have a systemic business practice of failing to properly account to each plaintiff for their royalties and other license fees for the use of their musical compositions and master recordings. Moreover, severing this action and forcing the parties to litigate five separate matters in this courthouse to coincide with the five separate plaintiffs (three (3) solo artists and two (2) groups, several of whom are intertwined), would be an enormous burden on both parties and this court, and a waste of judicial resources. Severance will also necessarily involve the relitigation of the exact same issues of fact and law in several separate trials, which could render different results. Where issues are intertwined, it would be better not to fragment trials, but to facilitate one complete and comprehensive trial and determine all the issues involved between the parties simultaneously.

Further, no "mistake" as to plaintiffs' choice of court has been alleged so as to permit the removal of plaintiffs' causes of action pursuant to CPLR §325(a). Further the Supreme Court, which has original jurisdiction over this matter, has no threshold minimum monetary amount. Moreover, defendants have not established, with relevant and admissible evidence, that the amount of damages owed to plaintiffs is less than \$25,000. Defendants have not provided any document evidencing their own sales to their distributors and/or licensees, or the recording agreements for each of the plaintiffs to calculate royalties. Further, Lockett's solo compositions and master recordings were created prior to the 1986 Contract, and as such, 100% of any income generated by the same should have been remitted entirely to him. This alone encompasses in excess of \$50,000.00 in royalties due Lockett, *i.e.*, the amount wrongfully retained by defendants. The same argument applies to any composition and master recording created by any one of the

plaintiffs for which defendants cannot produce a recording agreement. Nor is there any admissible evidence attesting to how the royalties were calculated or paid. And, Fuchs' statement concerning payments made to Lockett are inaccurate. Further, the 1986 Contract states that Lockett is entitled to \$500 semi-annually; thus, since defendants have only provided royalty reports on four occasions from December 2006 and June 2008, Lockett is entitled to the remainder semi-annual payments for the period of June 2002 through December 2008, which does not include other royalties and license fees due to him. With respect to Lockett, defendants admit that there is no agreement covering the pre-1986 recordings, the 1983 Cold Crush Brothers agreement includes a provision entitling those plaintiffs to royalties on third party licensing, the 1985 solo recording agreement for Brown specifically adopts all of the terms of the 1983 Cold Crush Brothers agreement, and defendants' prior payments effectively amended any contracts that might have previously limited plaintiffs' rights to receive such royalties.

Plaintiffs also dispute defendants' claim for sanctions and attorneys' fees, arguing that they have not failed to account and pay, or expressed disinterest in discussing settlement.

Plaintiffs' Reply

Plaintiffs add that defendants have not proffered any agreement concerning the creation of master recordings prior to 1986 that includes an arbitration clause, or any contract that concerns master recordings recorded by Lockett prior to 1986. Furthermore, absent from the 1986 Contract is any language that refers to, relates to, or incorporates any previous agreement or contract between Lockett and the defendants, or any earlier master recordings. The 1986 Contract states that the same "commences on the date of the release of the first master," which was scheduled for February 28, 1987.

Even if the 1986 Contract concerns the master recordings at issue, defendants waived any alleged right to arbitration.

Plaintiffs also reiterate their request for sanctions, arguing that defendants failed to justify their belated and defective Demand, and for misrepresenting the procedural history of the case. Lockett contends that the two Demands were sent as a means to have Lockett incur additional costs in filing this Motion, or preclude Lockett from asserting certain claims.

Defendants' Reply to Cross-Motion

Plaintiffs' counsel's argument that the only difference between the plaintiffs' claims herein are the royalty calculations, lack merit; the royalty calculations are mere incidents to the contract, and are not relevant to the issues of law and fact in these various actions. Plaintiffs' claims concern whether defendants breached the various agreements, what terms were allegedly breached and what defenses they might assert. Establishing these facts for one plaintiff or set of plaintiffs will not establish them for any other plaintiffs in this action. Further, there is no support for the allegation that defendants have a "uniform practice" of failing and refusing to account to their artists. Plaintiffs admit Lockett is currently receiving royalty statements and they have not made a single allegation concerning an outstanding license that has not been paid. Brown and Mandes have received and accepted without protest numerous royalty statements, advances and royalty payments. Defendants have various defenses and set-offs they can raise in connection with the plaintiffs' claims, which are uniquely and wholly dependant on the artist, the particular recording and the agreements. Defendants do not have recording contracts with Livingstone, Diggs, Ferguson, Mason, Whipper or Garcia, and thus, did not provide royalty statements. In sum, defendants' alleged failures to provide royalty statements to the various

plaintiffs are not a common fact, as they arise from different transactions or series of transactions.

Several of the plaintiffs seek rescission of their various recording agreements and reversion of ownership of the master recordings and compositions. However, rescission is an equitable remedy for breach of contract, it is not a cause of action and it is not a remedy available in addition to damages. Although the complete failure to pay royalties will support rescission, it is well-settled that any partial payment of royalties, such as those accepted by Brown and Mandes, defeats this as a remedy for breach of a recording or songwriting agreement. Defendants have no agreements with the other plaintiffs that are asking for rescission. The money owed to Brown and Mandes without even considering defendants' affirmative defenses or counterclaims are numbers that should be in the Small Claims Part, not in this Court. The addition of approximately \$1,164 in additional license fees from 2005 does not change this analysis. Further, since Livingstone, Diggs, Ferguson, Mason, Whipper and Garcia have no agreements with defendants, their claims should be dismissed, pursuant to CPLR §1003. Livingstone is not a solo artist in the context of this case, and never signed a recording agreement with any of the defendants as alleged. There is no evidence that Diggs, Ferguson, Mason, Whipper and Garcia performed as a group without Livingstone. Although the Complaint alleges that defendants bought and assumed a recording agreement that these plaintiffs purportedly signed with another record company, no copy of that recording agreement or affidavit concerning same is submitted.

Plaintiffs provide no legal support for the assertion that Lockett is the sole copyright owner of the master recordings and the compositions of the songs from the album "Bellevue

Patient.” Such claim is not pleaded in the Complaint, and directly conflicts with the assertion that none of the plaintiffs is making ownership claims to the master recordings. This claim also conflicts with the assertion that Lockett's damages are *de minimus*. In any event, such claim must be brought in the Southern District of New York because it involves claims of copyright ownership of the master and composition. Further, the minimum payments are to be made while Lockett is making the records he is contracted to make under the recording agreement, and it is undisputed that Lockett stopped recording as Funkmaster Wizard Wiz in the early 1990s. Even if this provision could be read in a vacuum now, Lockett knew what this provision meant when he signed it in 1986, as evidenced by his acceptance of royalty payments without protest for 23 years. Plaintiffs' counsel can seek these damages and a declaration that this is how the contract should be read in arbitration, because the agreement contains an arbitration provision to which Lockett agreed to in writing.

Nor did defendants waive their right to arbitration; plaintiffs threatened defendants with sanctions and attorneys' fees motions if they did not comply with discovery demands. Thus, plaintiffs cannot now argue that defendants' risk avoidance was a waiver of their right to arbitrate. Finally, plaintiffs' counsel cannot submit a claim for future fees.

The court should award costs and impose financial sanctions on plaintiffs' counsel for frivolous conduct. Plaintiffs' counsel brought these actions for several reasons that have nothing to do with advancing the claims of her clients. Plaintiffs' counsel seeks to take advantage of the CPLR discovery rules to get information about the defendants and Fuchs that they would not have in connection with these small claims in order to help her bring future actions against defendants.

Further, defendant's counsel (Ms. Stark) never received the privileged documents inadvertently exchanged by prior counsel, which plaintiff's counsel agreed to return. That plaintiffs' counsel is retaining and using these attorney-client/work product-privileged communications with impunity, is reason alone to award plaintiffs the sanctions that they seek. Plaintiffs' counsel has absolutely no legal basis on which to retain these documents. The only possible reason for their continuing retention of this material is to gain an unfair advantage in this litigation. This must be sanctioned.

Plaintiffs also exaggerate the extent of their efforts to collect information prior to suing defendants. Most of the communications AREC had with defendants concerned Lockett, which began in late 2004. The documents indicate that Lockett misplaced his own copies of his agreements when he sought replacement copies from defendants, directly contradicting the allegations in the unverified Complaint that Fuchs refused to give Lockett copies of his various agreements with the defendants after he signed them. Concerning plaintiffs Brown, Mandes or Livingstone, the first written communication with defendants was not until March 2007, years after the supposed 2003 date on which this dispute began. The next communication regarding these three plaintiffs is dated September 2008, a month before plaintiffs filed this lawsuit. Information for the Fantastic Five was not requested until one month before filing this lawsuit. Plaintiffs' counsel also waived the reporting and payments for Brown as of 2007 based on Brown's own breaches of the recording agreement. The statements about Lockett not receiving payments in 2004 and 2005, and about Brown and Mandes not receiving payments in 2003 are also false. Lockett, a solo artist, has no relation to any other artists involved in this action. Brown is a solo artist and also part of the Cold Crush Brothers along with Mandes. Together and

apart, Brown and Mandes are unrelated to any of the other plaintiffs in this action. Nor is there one conciliatory letter or written request to meet to try to settle these matters.

There is no evidence that the claims by Grand Wizard Theodore and the Fantastic Five are valid; the complaint is unverified and there is no affidavit from any of these six plaintiffs. These plaintiffs are nominally involved in this litigation and plaintiffs' should be sanctioned for keeping them in because the only reason they have remained is to harass and injure the defendants. When it became clear that Lockett's claims amounted to a few hundred dollars Lockett's counsel should have immediately tried to settle his action; instead she shifted her theories to further burden defendants, and force them to spend more attorneys' fees.

Analysis

I. Plaintiff's Motion

A. Stay of Arbitration Based on Irrelevance of 1996 Contract

Defendants failed to establish that Lockett's claims are subject to the arbitration clause in the 1986 Contract.

The proponent of arbitration has the burden of demonstrating that the parties agreed to arbitrate the dispute at issue (*Gerling Global Reinsurance Corp. v Home Ins. Co.*, 302 AD2d 118, 123, 752 NYS2d 611 [2002], *lv. denied* 99 NY2d 511, 760 NYS2d 102 [2003]). Thus, a “party cannot be compelled to submit to arbitration unless the agreement to arbitrate expressly and unequivocally encompasses the subject matter of the particular dispute” (*Gerling Global Reinsurance Corp.*, citing *Matter of American Centennial Ins. Co. v Williams*, 233 AD2d 320, 649 NYS2d 190). Moreover, “a court will not order a party to submit to arbitration absent evidence of that party's unequivocal intent to arbitrate the relevant dispute and unless the dispute

falls clearly within that class of claims which the parties agreed to refer to arbitration”
(*Primavera Labs. v Avon Prods.*, 297 AD2d 505, 505, 747 NYS2d 16 [2002] [citations and internal quotation marks omitted]). Thus, the burden is upon defendants, the parties seeking arbitration herein, to demonstrate a “clear and unequivocal” agreement to arbitrate Lockett’s claim.

The 1986 Contract contains an arbitration clause that requires that in the event of any claim “under or relating to the terms of this agreement, or the breach . . . thereof, it is agreed that the same shall be submitted to arbitration to the American Arbitration Association.” Under the 1986 Contract, Frost Belt agreed to “release [the] first single by February 28, 1997” and the “second single by October 28, 1987,” and the “album by September 28, 1987.”

Lockett’s claim against defendants is based upon the defendants’ alleged failure to account and to pay royalties on his master recordings, i.e, the Bellevue Patient recordings, a majority of which were recorded *before* the 1986 Contract. Lockett attests that he recorded the master recordings that would be included in the album titled “Bellevue Patient” pursuant to a 1981 agreement, *before the 1986 Contract*. Consistent with Lockett’s position that he signed an agreement with a record company related to Fuchs in 1981, defendants stated that Lockett signed with Frost Belt (TAI’s predecessor) in 1981. Tuff City Record’s website indicates that Bellevue Patient had been released by 1985, *before* the 1986 Contract containing the arbitration clause. Defendants acknowledge that only the signature page of that 1981 agreement, and an additional agreement with an amendment that he signed in 1983 have been located; neither have been produced to the Court. Yet, the only arbitration clause upon which defendants rely is the clause found in the 1986 Contract. Therefore, that the 1986 Contract contains an arbitration clause does

not establish that plaintiff's claims herein fall within the scope of such arbitration clause. Since the record indicates that plaintiff's claim arises from recordings completed prior to the 1986 Contract, defendants failed to demonstrate a "clear and unequivocal" agreement to arbitrate Lockett's claims herein.

Therefore, the branch of Lockett's motion to permanently stay the arbitration is granted.

B. Stay of Arbitration Based on Defendants' Waiver

Additionally, defendants' participation in this judicial forum constitutes a waiver of arbitration. The Court of Appeals has consistently recognized New York's "long and strong public policy favoring arbitration" (*Stark v Molod Spitz De-Santis & Stark, P.C.*, 9 NY3d 59, 66 [2007] quoting *Matter of Smith Barney Shearson v Sacharaow*, 91 NY2d 39, 49 [1997]). Indeed "this State favors and encourages arbitration as a means of conserving the time and resource of the courts and the contracting parties. Therefore, New York courts interfere as little as possible with the freedom of consenting parties to submit disputes to arbitration." (*Id.* [citations and internal quotation marks omitted]). However, "[l]ike contract rights generally, a right to arbitration may be modified, waived or abandoned" (*Sherrill v Grayco Bldrs.*, 64 NY2d 261, 486 NYS2d 159 [1985]). Affirmative use of the judicial process is a waiver of the right to go to arbitration (*De Sapio v Kohlmeyer*, 35 NY2d 402, 362 NYS2d 843 [1974]).

The Court of Appeals has explained that, "[t]he crucial question ... is what degree of participation by the defendant in the action will create a waiver of a right to stay the action. In the absence of unreasonable delay, so long as the defendant's actions are consistent with an assertion of the right to arbitrate, there is no waiver. However, where the defendant's participation in the lawsuit manifests an affirmative acceptance of the judicial forum, with

whatever advantages it may offer in the particular case, his actions are then inconsistent with a later claim that only the arbitral forum is satisfactory” (*Stark* at 66-67, quoting *De Sapio* at 405).

Also, “not every foray into the courthouse effects a waiver of the right to arbitrate Where urgent need to preserve the *status quo* requires some immediate action which cannot await the appointment of arbitrators, waiver will not occur” (*Sherrill* at 273). For example, moving to dismiss a case for lack of jurisdiction or failure to state of action does not waive arbitration rights (*see, Allied Bldg. Inspectors Intern. Union of Operating Engineers, Local Union No. III, AFL-CIO, Office of Labor Relations of City of New York*, 45 NY2d 735, 408 NYS2d 476 [1978] [holding that the petition for removal and the motion to dismiss filed by defendants were directed and the subject matter jurisdiction of the courts and were not inconsistent with an intention to rely on arbitration]; *Haupt v Rose*, 265 NY 108 [1934]). Arbitration is not waived when defendants do not engage in discovery and do not file purposeful counterclaims or affirmative defenses (*Two Central Tower Food, Inc. v Sergio Pelligrino*, 212 AD2d 441, 622 NYS2d 701 [1st Dept 1995] [holding that defendants did not actively participate and accept litigation when their answer did not state any affirmative defenses, did not file any counterclaims and did not participate in discovery]). Arbitration does not necessarily need to be pleaded as an affirmative defense (*see Island Cash Register, Inc. v Data Terminal Sys., Inc.*, 244 AD2d 117, 676 NYS2d 146 [1st Dept 1998] [finding no merit to plaintiff’s argument that defendant “waived the right to . . . bar [plaintiff’s] claims, since it failed to plead arbitration as an affirmative defense in its answer.”]; *Nagy v Arcas Brass & Iron Co.*, 242 NY 97 [1926] [noting that while the agreement to arbitrate is not itself properly pleaded either as a defense or a counterclaim, when pleaded it is no less an assertion that the defendant does not intend to

abandon his rights, and so rebuts any inference that would otherwise be drawn from the mere service of the answer]).

However, where defendants have taken advantage of the judicial forum to an extent that exceeds the limits of the arbitral forum, they have deemed to waive their rights to arbitration (*see e.g., Nishio v E.F. Hutton & Co., Inc.*, 168 AD2d 224, 562 NYS2d 112 [1st Dept 1990]; *De Sapio v Kohlmeyer, supra*; *Sherrill v Grayco Builders, Inc.*, 64 NY2d 261, 486 NYS2d 159 [1985]).

“The availability of disclosure devices is a significant differentiating factor between judicial and arbitral proceedings. ‘It is contemplated that disclosure devices will be sparingly used in arbitration proceedings’” (*De Sapio*, at 406). “Under the CPLR, arbiters do not have the power to direct the parties to engage in disclosure proceedings” (*De Sapio*, at 406 citing Par. 7505.06.).

The Court notes that defendants mentioned that potential right to arbitration in their Amended Answer. However, defendants have sought numerous extensions to respond to discovery due to changes in counsel over the last eight months and later provided numerous documents to plaintiffs. Defendants participated in discovery by utilizing disclosure devices afforded under the CPLR, such as demanding numerous documents (288 document requests and 77 interrogatories). Most importantly, defendants also filed a counterclaim for tortious interference against the plaintiff, and then continued to pursue their counterclaim when plaintiffs’ sought dismissal of same (*see e.g., Nishio v E.F. Hutton & Co., Inc.*, 168 AD2d 224, 562 NYS2d 112 [1st Dept 1990] [where defendants obtained numerous extensions to file an answer, filed counterclaims, sought discovery of documents and waited more than a year to seek a stay of judicial proceedings, the right to arbitration was waived]; *De Sapio v Kohlmeyer, supra* [where defendants filed a cross claim and had taken depositions of plaintiff’s witnesses, *each* were found

sufficient to constitute a waiver of arbitration]; *Sherrill v Grayco Builders, Inc., supra* [where the court held that the totality of participating in litigation for over three years, taking depositions, filing counterclaims and exchanging over 100,000 documents in discovery deemed a waiver of arbitration]).

Therefore, the totality of the circumstances demonstrate that defendants waived their alleged right to arbitration.

C. Sanctions Against Defendants

Part 130 of the Uniform Rules of the Chief Administrator (22 NYCRR 130-1.1 *et seq.*), permits the court to impose sanctions, including reasonable attorney's fees, for conduct if it is found to be "frivolous," *i.e.*, if (1) it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false (130-1.1[c]; *Solow v Bethlehem Steel Corp.*, 204 AD2d 227, 612 NYS2d 402 [1st Dept 1994]).

Defendants' delay in filing the Demand, obtaining extensions to respond to pleadings, taking the inconsistent position of asserting a counterclaim against Lockett and filing for arbitration, do not rise to the level of sanctionable or frivolous conduct to warrant the sanctions, attorneys' fees and costs sought. Therefore, Lockett's motion for sanctions, attorneys' fees, and costs is denied.

II. Defendants' Cross-Motion

A. Improper Joinder of Parties

CPLR §1002 (a) provides

Persons who assert any right to relief jointly, severally, or in the alternative arising out of the same transaction, occurrence, or series of transactions or occurrences, may join in one action as plaintiffs if any common question of law or fact would arise.

CPLR §1002(a) permits the combination of parties as plaintiffs provided that (1) the claims arise from “the same transaction, occurrence, or series of transactions or occurrences,” and (2) a common question of law or fact is presented (*Autoone Ins. Co. v Manhattan Heights Medical, P.C.*, 2009 WL 2357003 [Sup Ct Queens County 2009] citing *Stewart Tenants Corp. Square Indus., Inc.*, 269 AD2d 246, 703 NYS2d 453 [1st Dept 2000]). “Transaction” is a word of flexible meaning; it may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship (*Harris v Vingeorge Fashions*, 194 Misc 876, 88 NYS2d 208 [NY City Ct 1949]).

In *Tankoos v Levine* (135 NYS2d 195 [1954]), two individual plaintiffs and a corporate plaintiff, who were real estate brokers, sought to recover commissions from the defendant arising out of a transaction whereby defendant was to purchase the corporate stock of the owner of a building in Manhattan. The individual plaintiffs alleged a separate cause of action claiming that they were hired by defendant, that they performed and that defendant defaulted; the corporate plaintiff alleges a hiring by defendant who was to pay the agreed brokerage upon purchase of the same stock procuring the owners thereof to sell, and defendant's default. The agreements on which they relied were separate, and plaintiffs sought damages from the same defendant on different theories arising out of defendant's breach of the agreements. The Court found that

although the common features of the agreements are the subject property and the price, such factors “did not present common questions of law or fact. The property involved and price thereof are incidents to the contract. The main issues of law and of fact are whether or not agreements were made, plaintiffs performed and defendant breached. Establishment of these component parts of one cause will not establish them in the other.” Thus, each plaintiff was required to serve a separate complaint (*see also, Bauer v Leider*, 17 Misc 2d 308, 182 NYS2d 972 [1958] [where complaint indicated that negotiations were carried on by one or the other of defendants with several plaintiffs at different times over a two-year period, that all contracts were not similar and that varying defenses might be asserted against respective plaintiffs, motion for order requiring plaintiffs to separately state and number their respective causes of action would be granted]).

Here, although each of plaintiffs allege that defendants breached their agreement with plaintiff to pay and account for royalties, Brown and Mandes also assert an *additional claim* for rescission of their contract. The record demonstrates that each of the plaintiffs have separate and varying obligations to perform under their respective agreements, which were all negotiated and entered into in different years. The terms of performance by each plaintiff, and defendants’ payment obligations vary from artist to artist. There is no logical relationship among the agreement of *all* of the plaintiffs. Further, defendants have also alleged various defenses and set-offs they have to plaintiffs’ various claims of breach, which depend upon the particular artist, the artist’s particular recording, and the particular agreement under which the recording and alleged breach occurred. It is also claimed that Livingstone, Diggs, Ferguson, Mason, Whipper and Garcia do not even have recording contracts with defendants. Therefore, it cannot be said

that plaintiffs' claims arise from "the same transaction, occurrence, *or* series of transactions or occurrences," and that a common question of law or fact is presented (*see Mount Sinai Hosp. v Motor Vehicle Accident Indemn. Corp.*, 291 AD2d 536, 738 NYS2d 247 [2d Dept 2002] [holding as proper the Supreme Court's severance of remaining five causes of action, asserting claims on behalf of five unrelated assignees, involved in accidents on five different dates, with no common contract of insurance and no relation or similarity to each other, other than the fact that the no-fault benefits were not paid (*cf.*, *Hempstead General Hosp. v Liberty Mut. Ins. Co.*, 134 AD2d 569, 521 NYS2d 469 [2d Dept 1987] [where assigned claims related to separate accidents and individuals, joinder of claims was proper since the claims arise out of a *uniform* contract of insurance and involve the interpretation of the same no-fault provisions of the Insurance Law"])).

However, CPLR §1003 states, in part, that: "Misjoinder of parties is not a ground for dismissal of an action." Therefore, the branch of defendants' cross-motion to dismiss this action for misjoinder of parties and to stay the action until the Court decides this motion, is denied. However, the claims by (1) Brown and Mandes, individually and as the recording artist professionally known as the Cold Crush Brothers, and (2) Livingstone, Diggs, Ferguson, Mason, Whipper or Garcia, individually and as the recording artist professionally known as The Fantastic Five, are hereby severed from this action. Brown and Mandes, individually and as the recording artist professionally known as the Cold Crush Brothers shall obtain a no-fee index number and serve their Complaint within 30 days. Livingstone, Diggs, Ferguson, Mason, Whipper or Garcia, individually and as the recording artist professionally known as The Fantastic Five shall also obtain a no-fee index number and serve their Complaint within 30 days.

Removal to Small Claims Court

Although defendants mainly argue that removal to Small Claims Court is warranted due to the nominal amount of damages allegedly suffered by plaintiffs, defendants do not cite CPLR §325(d) (Removal without consent to court of limited jurisdiction), but 325(a) which provides:

Where a mistake was made in the choice of the court in which an action is commenced, the supreme court, upon motion, may remove the action to the proper court, upon such terms as may be just.

When the case is brought beyond the monetary jurisdiction of a court, the plaintiff may move for removal and transfer pursuant to CPLR §325(a), or to start anew (*Lemard v Star Auto Sales Inc.*, 2002 WL 1275100 [NY Dist Ct]).

Further, CPLR §325(d) “authorizes the adoption of court rules that empower a court to transfer a pending action, without the parties' consent, to a lower court that has jurisdiction except for the amount demanded” (*Spinnell v Doris L. Sassower, P.C.*, 155 Misc 2d 147, 589 NYS2d 230 [NY City Civ Ct 1992]). Under this section, the Supreme Court can transfer case, *sua sponte* to any other court within same department for any reason (*Brooks v Board of Higher Ed. and Dormitory Auth. of State of N. Y.*, 113 Misc 2d 494, 449 NYS2d 425 [1982]). Under this section, removal to a court of limited jurisdiction may be ordered only where it appears that damages sustained may be less than demanded and where a lower court would have jurisdiction but for the amount demanded (*Niagara Mohawk Power Corp. v Bloomfield Bldg. Wreckers, Inc.*, 94 Misc 2d 748, 405 NYS2d 168 [1978]).

Defendants have not established that plaintiffs' causes of action were brought in this Court by mistake, and the record does not establish that their damages fall within the jurisdictional limits of Small Claims Court, or any other court. Lockett's claims fall under an

agreement he allegedly signed in 1981, entitling to him royalties and payments never received, and the remaining plaintiffs' claims fall under various written agreements (including those not provided), which possibly entitle them to royalties on third-party licensing. Notably, several plaintiffs have claims for rescission as well.

Therefore, the branch of defendants' cross-motion to sever and remove plaintiffs' causes of action to the Small Claims Part of the New York City Civil Court pursuant to CPLR §1002(a) and 325(a) and to stay the proceedings until the Court rules on removal pursuant to CPLR §326(a) is denied.

B. Sanctions

Based on the caselaw noted above, the branch of defendants' cross-motion for sanctions against plaintiffs are unwarranted, at this juncture. Plaintiffs' threat of a lawsuit, demand for royalty payments, commencement of the action against Fuchs individually, service of voluminous discovery and demand for Fuch's deposition do not warrant the relief requested. Further, the alleged inconsistent statements made by Lockett's counsel do not constitute "material" misstatements of fact so as to warrant the sanctions sought. Therefore, the branch of defendants' cross-motion for sanctions, costs and attorneys' fees is denied. However, Lockett's counsel shall return to defendants' counsel any privileged documents inadvertently given to Lockett's counsel within five (5) days of entry of this order. The failure of Lockett's counsel to provide such documents shall result in sanctions.

III. Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of plaintiff's motion to permanently stay an arbitration,

pursuant to CPLR §7503(c), is granted; and it is further

ORDERED that the branch of plaintiff's motion for attorneys' fees, costs and disbursements, pursuant to 22 NYCRR §130-1.1, is denied; and it is further

ORDERED that the branch of defendants' cross-motion to dismiss the Complaint, pursuant to CPLR §1002(a), for improper joinder of plaintiffs and to stay the action until the Court decides this motion, is denied as moot. However, the claims by (1) Brown and Mandes, individually and as the recording artist professionally known as the Cold Crush Brothers, and (2) Livingstone, Diggs, Ferguson, Mason, Whipper or Garcia, individually and as the recording artist professionally known as The Fantastic Five, are hereby severed from this action. Brown and Mandes, individually and as the recording artist professionally known as the Cold Crush Brothers shall obtain a no-fee index number and serve their Complaint within 30 days. Livingstone, Diggs, Ferguson, Mason, Whipper or Garcia, individually and as the recording artist professionally known as The Fantastic Five shall also obtain a no-fee index number and serve their Complaint within 30 days; and it is further

ORDERED that the branch of defendants' cross-motion to sever and remove plaintiffs' causes of action to the Small Claims Part of the New York City Civil Court, pursuant to CPLR §§1002(a) and 325(a), is denied; and it is further

ORDERED that the branch of defendants' cross-motion to stay the proceedings until the Court rules on removal, pursuant to CPLR §326(a), is denied, as moot; and it is further

ORDERED that the branch of defendants' cross-motion for an award of costs, attorneys fees and sanctions is denied, at this juncture; and it is further

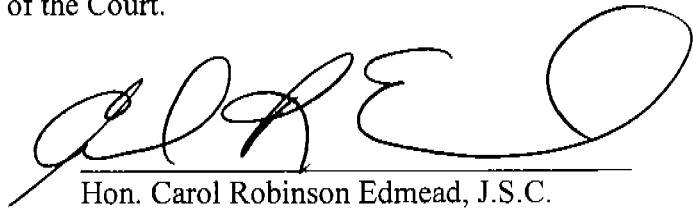
ORDERED that Lockett's counsel shall return to defendants' counsel any privileged

documents inadvertently given to Lockett's counsel within five (5) days of entry of this order. The failure of Lockett's counsel to provide such documents shall result in sanctions; and it is further

ORDERED that plaintiff shall file 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: September 21, 2009



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

HON. CAROL EDMEAD

FILED

SEP 22 2009

**COUNTY CLERK'S OFFICE
NEW YORK**