

Kittie, Inc. v Sheridan Sq. Entertainment, LLC

2009 NY Slip Op 33075(U)

December 21, 2009

Supreme Court, New York County

Docket Number: 600917/2008

Judge: Emily Jane Goodman

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

DEFENDANT

EMILY JANE GOODMAN

PART 17

Justice

Index Number : 600917/2008

KITTIE, INC.,

vs.

SHERIDAN SQUARE ENTERTAINMENT, LLC

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 60091708

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 _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided as

attached

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

FILED

DEC 28 2009

NEW YORK

COUNTY CLERK'S OFFICE

EGJ

Dated: 12/21/09

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

EMILY JANE GOODMAN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----x
KITTIE, INC. and 141888 ONTARIO, INC.,

Plaintiffs,

-against-

Index No.: 600917/2008

SHERIDAN SQUARE ENTERTAINMENT, LLC
d/b/a ARTEMIS RECORDS, and
COMPENDIA MUSIC

ORDER AND DECISION

Defendants.

-----x

EMILY JANE GOODMAN, J.S.C.:

FILED
DEC 28 2009
NEW YORK
COUNTY CLERK'S OFFICE

Kittie, Inc. and 141888 Ontario, Inc. (collectively, Kittie or Plaintiffs) are Canadian entertainment companies formed in 1996 for the members of a female, heavy metal band from Ontario, Canada. Plaintiffs commenced the instant action against defendants Sheridan Square Entertainment, LLC d/b/a Artemis Records (Sheridan) and Compendia Music¹ (Compendia, and Sheridan, collectively, Defendants), which, according to Defendants, is a subsidiary of Sheridan Square Entertainment Inc.

Plaintiffs' complaint asserts various causes of action, including breach of contract and unjust enrichment; it also seeks an accounting by Defendants as to certain royalties allegedly owed to Plaintiffs, as discussed below. After the parties' attempted settlement negotiations failed, Defendants move for an

¹ According to Defendants, Kittie incorrectly named Compendia Acquisition Corp. as Compendia Music.

order to dismiss the complaint, pursuant to CPLR 3211 (a) (1) and (a) (7), or, alternatively, to quash Plaintiffs' discovery demand. Plaintiffs oppose Defendants' motion in its entirety.

For the reasons stated herein, Defendants' motion to dismiss the complaint in its entirety is denied, and their alternative request to quash Plaintiffs' discovery demand is also denied.

Background

On June 4, 1999, Kittie entered into an Exclusive Recording Artist Agreement with Sheridan (the 1999 Agreement), pursuant to which Kittie agreed to create and perform on master recordings that Sheridan would exploit for direct manufacture and other sale to the general public.² Complaint, ¶ 7. In exchange for having granted the right to exploit Kittie's master recordings, Sheridan agreed to pay Kittie royalties with respect to (1) Sheridan's manufacture or distribution of products containing such master recordings (the Artist Royalties); and (2) exploitation by licensed third parties of these recordings, such as through album compilations, television broadcasts and advertisements (the Third Party License Income). *Id.*, ¶ 8.

In 2003, Kittie commenced an action in the federal court alleging that Sheridan had breached the 1999 Agreement. In 2004, the parties settled that action by entering into a settlement

² Kittie alleges that the 1999 Agreement and other related subsequent agreements were somehow transferred or assigned by Sheridan to Compendia. The allegation is denied by Defendants.

agreement (the 2004 Settlement). As part of the 2004 Settlement, the parties also amended the 1999 Agreement (the 2004 Amendment). Complaint, ¶¶ 9-10. On July 23, 2004, Kittie signed another amendment to the 1999 Agreement (the AV Amendment), pursuant to which Sheridan would sell to the general public certain videos of Kittie's master recordings, and in exchange therefor Sheridan would pay Kittie royalties therefrom. *Id.*, ¶ 11. The 1999 Agreement, the 2004 Amendment and the AV Agreement are referred to hereinafter, collectively, as the "Kittie Agreements." Plaintiffs allege that the musical compositions that comprised the master recordings of Kittie were published by them and, thus, they are entitled to receive royalties for any use and/or sale of such recordings, as well as all "statutory or negotiated mechanical income due" (the Mechanical Royalties).³ *Id.*, ¶ 12.

The complaint commencing the instant action, which was served upon Defendants on or about April 30, 2008, asserts various causes of action, including, breach of contract, unjust enrichment and accounting. In sum, the complaint alleges that Defendants breached the Kittie Agreements by failing to account and pay for the Artist Royalties, the Third Party License Income and the advances/royalties under the AV Amendment, as well as the Mechanical Royalties, as more fully discussed below.

³ Generally speaking, mechanical royalties are derived from the sale of recorded music, such as CDs or digital downloads.

After the commencement of this action, and in response to the many requests previously made to Defendants since October 3, 2007 by Plaintiffs' counsel for various documentation (including royalty reports), on or about May 29, 2008, Defendants provided to Plaintiffs the following: (1) the Artist Royalty Statement for the period of July 2002 to December 2007; (2) the Mechanical Royalty Statement for the period of July 2004 to March 2008 for the Kittie album "Until the End"; and (3) the "final" Mechanical Royalty Statement for the period of July 2005 to March 2008 for all Kittie products except the "Until the End" album. Copies of such statements are attached, respectively, as Exhibits F, H and G to the Affidavit of Michael Olsen (Sheridan's President and CEO) in Support of Defendants' Motion to Dismiss (the Olsen Affidavit).

The Olsen Affidavit alleges, inter alia, that based on (a) the Artist Royalty Statement, there is no amount due and owing to Plaintiffs because Defendants have not recouped their costs of production and distribution, and that a negative outstanding balance is owed to the company in excess of \$565,900 (Olsen Affidavit, ¶ 25); (b) the Mechanical Royalty Statement, there is no amount due and owing to Plaintiffs because Defendants have not recouped their costs, and that a negative outstanding balance in excess of \$8,800 is owed to the company (*Id.*, ¶ 26); and (3) the "final" Mechanical Royalties Statement "shows \$8,688.10 is

currently due to plaintiff" (Id., ¶ 27).

Defendants argue that because Plaintiffs have not disputed the royalty statements provided to them, nor have they requested to perform an audit upon Defendants based on these statements - which are purportedly the procedures and remedies available to Plaintiffs under the Kittie Agreements - the causes of action asserted in the complaint should be dismissed, or, alternatively, the discovery demand made by Plaintiffs should be quashed.

Discussion

In considering a CPLR 3211 (a) (7) motion to dismiss, the court is to determine whether plaintiff's pleadings state a cause of action. "The motion must be denied if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law [internal quotation marks omitted]." *Richbell Info. Servs, Inc. v Jupiter Partners*, 309 AD2d 288, 289 (1st Dept 2003), quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-52 (2002). The pleadings are to be afforded a "liberal construction," and the court is to "accord plaintiffs the benefit of every possible favorable inference." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). On the other hand, while factual allegations in a complaint should be accorded "favorable inference," bare legal conclusions and inherently incredible facts are not entitled to preferential consideration. *Matter of Sud v Sud*, 211 AD2d 423, 424 (1st Dept

1995). Moreover, "[w]hen the moving party [seeks dismissal pursuant to CPLR (a) (1) and] offers evidentiary material, the court is required to determine whether the proponent of the [complaint] has a cause of action, not whether [he or] she has stated one". *Asgahar v Tringali Realty, Inc.*, 18 AD3d 408, 409 (2^d Dept 2005) (citations omitted).

Breach of Contract (First Cause of Action)

Under New York law, a plaintiff must plead the following elements with respect to a breach of contract cause of action: (1) existence of a valid contract; (2) plaintiff's performance of the contract; (3) defendant's material breach of the contract; and (4) resulting damages. *Noise in the Attic Prods., Inc. v London Records*, 10 AD3d 303 (1st Dept 2004); *Furia v Furia*, 116 AD2d 694 (2^d Dept 1986).

In the instant case, Defendants do not dispute the validity of the 1999 Agreement and the 2004 Amendment,⁴ nor have they alleged that Plaintiffs did not provide services pursuant to these agreements. Instead, Defendants argue that the breach of contract claim (i.e., the failure to account and pay Plaintiffs) must be dismissed based on "documentary evidence," because (1) Defendants have provided copies of the royalty statements to Plaintiffs, (2) these statements allegedly show that no amount is currently due and owing to Plaintiffs based on the purported fact

⁴ The AV Amendment will be discussed below.

that Defendants have not fully recouped their production and distribution costs, and (3) Plaintiffs have not objected to the statements in accordance with the terms of the 1999 Agreement. In sum, Defendants argue that the breach of contract claim must be dismissed "because there is no remedy to be had by plaintiff with regard to the Artist Royalties since a statement has been given as to all master uses, and there are no royalties due." Defendants' Brief, at 4. Defendants rely on *Caldwell v ABKCO Music & Records* (269 AD2d 206 [1st Dept 2000]) as support for their argument.

Defendants' arguments are without merit. Notably, under Section 8.01 of the 1999 Agreement, Defendants must provide accountings for all royalties to Plaintiffs "in no case less frequently than semi-annually, together with payment of accrued royalties, if any, earned by Grantor [Kittie] during such preceding half-year, less Advances or other recoupable and/or deductible amounts." The record in this case shows, and Defendants do not dispute, that no royalty accounting reports were provided to Plaintiffs since 2004. In fact, Defendants did not provide such reports to Plaintiffs until May 29, 2008, which was 60 days after the instant action was commenced by Plaintiffs. Moreover, the record reflects that Defendants failed to undertake reasonable diligence in responding to the many written requests made by Plaintiffs' counsel for such reports. Affirmation of

Gabin Rubin in Support of Plaintiffs' Opposition, ¶¶ 3-7, and the letters and e-mails annexed as exhibits thereto. Hence, any allegation that Plaintiffs failed to satisfy what Defendants characterized as a contractual "condition precedent" to filing this claim has no merit.⁵ Further, the determination of damages is not a "condition precedent" to filing a breach of contract claim, particularly where, as here, Plaintiffs allege that they "have been damaged in an amount unknown to be determined at trial." Complaint, ¶ 16.

Furthermore, Section 8.03 (a) of the 1999 Agreement stated that Plaintiffs have two years from the date when the royalty reports were rendered to object to such reports. Defendants do not argue that Plaintiffs' general objections to the reports are untimely, and they have not pointed to any provision in the 1999 Agreement that requires the assertion of objections to reports prior to the filing of an action against them. In any event, the reports that were belatedly provided by Defendants do not, as a matter of fact or law, conclusively establish that the royalty amounts and/or the production and distribution costs stated

⁵ Section 14.06 provided, in relevant part, that "Grantor shall not be entitled to recover damages by reason of any breach by Company ... unless Company has failed to remedy such breach within thirty (30) days following receipt of Grantor's notice thereof or, if such breach is not reasonably capable of remedy within such period, if Company does not commence to remedy such breach within such thirty (30) day period and proceed with reasonable diligence to complete such remedy."

therein are true and accurate. Unless and until a reconciliation of the figures stated in these reports has been conducted, a determination as to whether Plaintiffs are entitled to royalty payments cannot be made. In this regard, Defendants' reliance on *Caldwell* is misplaced, because the *Caldwell* court found that the record there conclusively established that no royalties were due, and "plaintiffs will not be heard to argue that defendant might breach the contract in the future." *Caldwell*, 269 AD2d at 207.

As to the AV Amendment, the record reflects that a copy of the letter agreement that was prepared on Sheridan's letterhead was signed only by a Kittie representative. The signed agreement was transmitted on July 23, 2004, via facsimile, to a Sheridan representative. The AV Amendment stated, in relevant part: "If the following accurately sets forth our agreement, please sign a copy of this letter where indicated below and return it to this office." Affidavit of Morgan Lander in Support of Plaintiffs' Opposition, Exhibit 4. Despite the foregoing, Defendants argue, *inter alia*, that: "No audio visual amendment was ever entered into, and even if it was alleged by plaintiffs, it has not been disputed by plaintiffs that a video was never produced or delivered and, as such, no royalties are or could be due for it." Affirmation of Tinamarie Franzoni in Further Support of Defendants' Motion to Dismiss (Franzoni Affirmation), ¶ 9.

Defendants cited no caselaw or other authorities in support

of the argument. Tellingly, there is none whatsoever. Indeed, "[w]hile an offer normally may be revoked at any time prior to acceptance, the moment of acceptance is the moment the contract is created." *Kowalchuk v Stroup*, 61 AD3d 118, 122 (1st Dept 2009). In this case, the AV Amendment was accepted when Kittie's representative signed and acknowledged it as "Accepted and Agreed." Also, it is undisputed that Sheridan never revoked the agreement. Thus, the AV Amendment was created at the moment it was signed and accepted by Kittie. The fact that Sheridan never counter-signed the agreement is of no moment. The *Kowalchuk* court stated that a formal document signed only by one party would be sufficient to establish the existence of the parties' agreement, because "an unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound ... unless, of course, the parties have agreed that their contract will not be binding until executed by both sides." *Id.* at 125 (internal citation omitted). Here, there is no evidence that the parties intended to be bound only when both parties signed the AV Amendment. Thus, the AV Amendment is a valid contract, and Plaintiffs have sufficiently stated a breach of contract cause of action by alleging that Defendants failed to comply with the terms therein.

Based on the foregoing, Defendants' motion to dismiss the breach of contract claim (First Cause of Action) is denied.

Accounting (Second and Fifth Causes of Action)

In their complaint, Plaintiffs seek, in the second cause of action, an accounting by Defendants with respect to the royalties due under the Kittie Agreements, namely: Artists Royalties, Third Party Income, and royalties (if any) under the AV Amendment. Separately, Plaintiffs seek, in the fifth cause of action, an accounting by Defendants with respect to Mechanical Royalties.

Defendants seek to dismiss these causes of action, arguing that "plaintiffs have failed to allege any grounds for an equitable right to an accounting." Defendants' Brief, at 5. In particular, Defendants argue that under the 1999 Agreement, Plaintiffs are entitled to receive royalties statements (which they have received), and can audit the books and records of Defendants at their own cost (which plaintiffs have not done). *Id.* at 6. Thus, Defendants argue that Plaintiffs are "relegated to an action at law," because "no facts can be alleged that would support a judgment in equity." *Id.* Defendants rely on *Poley v Sony Music Entertainment* (163 Misc 2d 127 [Sup Ct, NY County 1994], *affd* 222 AD2d 308 [1st Dept 1995]) as support.

Defendants' arguments are unavailing. Section 8.05 of the 1999 Agreement provided, in relevant part, that: "If Grantor commences suit on any controversy or claim concerning royalty accountings rendered by Company under this agreement, the scope of the proceeding will be limited to determination of the amount

of the royalties due for the accounting period concerned"

It cannot be disputed that Plaintiffs are contesting the accuracy or validity of the royalty amounts or distribution and production costs that are contained in the reports produced by Defendants. It is also undisputed that the information relating to amounts and costs are in the possession of Defendants. Hence, Plaintiffs have the contractual right to seek a court determination of such amounts and costs (i.e., an accounting), and a first step is to demand that Defendants produce books and records to reconcile the numbers stated in their reports. Defendants do not argue that Plaintiffs have no right to document production, or that this court has no authority to determine document production disputes. Because Plaintiffs are exercising their contractual right to an accounting, Defendants' opposition - characterizing such right as an "equitable right" - is without merit. In such regard, Defendants' reliance on *Poley* is misplaced, because the *Poley* court found that the plaintiff in that case "failed to allege any grounds for a contractual or equitable right to an accounting." *Poley*, 163 Misc 2d at 131.

Based on the foregoing, Defendants' motion to dismiss the accounting claim (Second and Fifth causes of action) is denied.

Unjust Enrichment (Third and Fourth Causes of Action)

The complaint asserts an unjust enrichment claim against Defendants with respect to Artist Royalties, Third Party License

Income and any royalties under the AV Amendment (third cause of action). Separately, it asserts an unjust enrichment claim with respect to Mechanical Royalties (fourth cause of action).

It is well established that the existence of a valid and enforceable written contract governing a subject matter generally precludes the pursuit of quasi-contractual remedies based upon the same subject matter. *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987). "A quasi-contractual obligation is one imposed by law where there has been no agreement or expression of assent," and the law implies it "to assure a just and equitable result." *Id.* at 388-89.

In the instant case, it cannot be disputed that the unjust enrichment causes of action are quasi-contractual in nature, and they are based on or governed by the Kittie Agreements, which, as explained above, are valid contracts between the parties. Thus, the third and fourth causes of action must be dismissed. *Clark-Fitzpatrick*, 70 NY2d at 389; *EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 23 (2005) (dismissing quasi-contract claim of unjust enrichment and holding that existence of valid contract governing subject matter precluded recovery in quasi contract); *Katz v American Mayflower Life Ins. Co. Of N.Y.*, 14 AD3d 195, 201-202 (1st Dept 2004), *affd* 5 NY3d561 (2005) (holding unjust enrichment claim could not survive and should be dismissed pursuant to *Clark-Fitzpatrick*).

Discovery Demand Disputes

On or about June 6, 2008, Plaintiffs served their first request for document production upon Defendants. Affidavit of Jay Berger in Support of Plaintiffs' Opposition, ¶ 3, Exhibit 16. Defendants argue that the discovery demand is overly broad or unnecessary burdensome, and seek an order quashing the demand. Defendants contend that Plaintiffs' only remedy is to request an audit of Defendants' books and records at their own expense, and should not be permitted to conduct a "fishing expedition" via a document production request. Franzoni Affirmation, at 7.

CPLR 3103 (a) empowers this court with wide discretion to control all manners of disclosure or discovery by "denying, limiting, conditioning or regulating the use of any disclosure device." Based on the record before this court, quashing the discovery demand of Plaintiffs is unwarranted, particularly where Defendants do not (and cannot) argue that the entirety of the information sought in the discovery is improper or irrelevant.

Notwithstanding the foregoing, this court takes judicial notice that the Defendants' assets have been foreclosed by their secured lender, and thus the continuation of any discovery device may be unfruitful in light of the circumstance. Hence, the parties shall appear for a conference to advise this court with respect to the status of this action.

Accordingly, it is hereby

ORDERED that so much of the Defendants' motion seeking dismissal of the Plaintiffs' complaint in its entirety is denied; and it is further

ORDERED that so much of the Defendants' motion for an order quashing Plaintiffs' discovery demand is denied; and it is further

ORDERED that the parties shall appear for a status conference in courtroom 422 at 60 Centre Street on Feb. 18 2010 at 10 AM PM.

This constitutes the Decision and Order of the court

Dated: 12/21/09

ENTER:



J.S.C.

EMILY JANE GOODMAN

FILED

DEC 28 2009

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