

**Camilla Lowther Mgt., Inc. v Sony Music
Entertainment**

2010 NY Slip Op 31903(U)

July 6, 2010

Supreme Court, New York County

Docket Number: 600123/10

Judge: Judith J. Gische

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

2
7-9-10

PRESENT: HON. JUDITH J. GISCHE
J.S.C. Justice

PART 10

Index Number : 600123/2010
CAMILLA LOWTHER MANAGEMENT, INC.
vs.
SONY MUSIC ENTERTAINMENT, INC.
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

NOTICE OF MOTION/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED
JUL 09 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

Preliminary conference scheduled for
September 2, 2010 @ 9:30 a.m.

Dated: 7/6/10

HON. JUDITH J. GISCHE J.S.C.

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 10**

-----X

CAMILLA LOWTHER MANAGEMENT, INC.
and LEE SWILLINGHAM,

Plaintiff,

-against-

SONY MUSIC ENTERTAINMENT,

Defendant.

Decision/Order

Index No.: 600123/10

Seq. No. : 001

Present:

Hon. Judith J. Gische

J.S.C.

-----X

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Def's n/m [dismiss] w/JIS affirm, exhs	1
Defs' supplemental affirm (JIS), exhs	2
Pltfs' opp and x/m w/SPI affirm, exhs	3
Defs' reply w/TM affid, exhs	4
OA transcript	5

FILED
 JUL 09 2010
 NEW YORK
 COUNTY CLERK'S OFFICE

Upon the foregoing papers, the decision and order of the court is as follows:

This action arises from a dispute involving a contract for artistic work on the recording artist, Shakira's, new album "She Wolf." Plaintiffs, Camilla Lowther Management, Inc. ("CLM") and Lee Swillingham ("Swillingham") (collectively "plaintiffs"), entered into a contract with defendant, Sony Music Entertainment ("Sony"). CLM and Swillingham are manager and artist, respectively. Plaintiffs raise various claims in contract, quasi contract, and tort, seeking compensatory damages and costs.

Defendant now moves, pre-answer, to dismiss each of the causes of action

asserted in the Complaint based upon documentary evidence and failure to state a cause of action. CPLR §§ 3211 (a)(1), (7). Plaintiffs oppose the motion to dismiss in its entirety and cross-move to amend the complaint to add a fourth cause of action for breach of contract. CPLR § 3025(b).

Since defendant's motion is directed at the sufficiency of the pleadings, the court accepts the facts as alleged by plaintiffs as true, affording them the benefit of every possible favorable inference. EBC I, Inc v Goldman, Sachs & Co., 5 N.Y.3d 11, 19 (2005); Sokoloff v Harriman Estates Development Corp., 96 N.Y.2d 409, 414 (2001); P.T. Bank Central Asia v ABN AMRO Bank NV, 301 A.D.2d 373, 375-6 (1st Dept. 2003). Furthermore, since this motion is also based upon documentary evidence (see Zanett Lombardier, Ltd. v, Maslow, 29 A.D.3d 495 [1st Dept. 2006]), such evidence must definitively dispose of plaintiffs' claims (Bronxville Knolls Inc. v. Webster Town Center Partnership, 221 A.D.2d 248 [1st Dept. 1995]).

Facts Presented and Arguments Considered

On June 29, 2009, plaintiffs and defendant executed a document identified as an "Estimate for Job Number 5361" (the "Estimate"). Pursuant to the Estimate, Swillingham was to conduct a one-day overseas photo shoot and design graphics for Shakira's album, titled "She Wolf." The Estimate provides a summary of estimated production costs; terms and conditions of work; and an estimated breakdown of artist fees and travel accommodation costs. The Estimate sets for the following costs: artist fees - \$56,500.00; travel/accommodation - \$5,600.00; and miscellaneous - \$1,000.00; for a total estimate of \$63,100.00.

The terms and conditions of the Estimate provide, in relevant part, as follows:

B. QUOTED FEES AND EXPENSES. apply to original layout and job description only. Additional compensation must be negotiated with [Swillingham] or [CLM] for any subsequent changes, additions or variations requested by [Sony], and confirmed in writing.

H. DEPOSIT. A deposit of 100% of the budgeted expenses and 50% of Stylist fees must be received prior to shooting.

The Estimate is signed by "Carter," for and on behalf of Sony, and followed by the statement that: "I have read and agreed to the above terms and conditions, I undertake to make an adv. payment as per cond. 2 above."

On October 8, 2009, Swillingham signed a second document, titled "Creative Group Artwork Purchase Order" ("APO"). Under the APO, Swillingham assigned certain rights to Sony:

Page 1 of the APO states:

If Sony Music uses the Material on merchandising intended for resale (excluding phonograph records, in any form, printed music and so-called "digital merchandise"), Sony Music will make a single additional payment to [Swillingham] in the amount of \$20,000.00 for all of the Materials (as Sony Music may elect), in consideration for all such merchandising uses.

The standard terms and conditions of the APO state, in relevant part, as follows:

4. As full payment to you hereunder and in full consideration of all rights in the Material granted herein, we will pay you, promptly after the later of (i) our receipt of the Material . . . or (ii) the execution of this agreement, (a) the Fee, plus actual Expenses, if applicable, for which you have submitted to us documentation satisfactory to us evidencing your payment or incurrance of such Expenses, if we use the Material, or (b) **one-half of the Fee, plus actual Expenses**, if applicable, for which you have submitted to us documentation satisfactory to us evidencing your payment

or inurrence of such Expenses, **if we determine that the Material is unsatisfactory because it does not comply with paragraph 3 or is not of appropriate quality for the intended use.** If we pay you under clause (b) above but later use the Material, you will be entitled to an additional payment in the amount of one-half of the Fee.

Plaintiffs argue, *inter alia*, that Sony breached the Estimate by failing to pay the entire sum agreed to. Plaintiffs' claim they also provided additional services beyond the scope of the Estimate, for which they were not paid. According to plaintiffs, they were induced into signing the APO and, therefore, it should be rescinded. Plaintiffs cross-move to amend the complaint to add a new fourth cause of action for breach of contract based on their assertion that if the APO is deemed an enforceable document, then they are entitled to additional fees under section 4 of the APO.

Defendant seeks to dismiss plaintiffs' action based on the documentary evidence, pursuant to CPLR § 3211 (a) (1) and pursuant to CPLR § 3211 (a) (7) on the ground that plaintiffs fail to state a cause of action. Defendant provides the sworn affidavit of Tyler Morgan ("Morgan"), an employee of Sony. Morgan states that on November 10, 2009, Sony wired \$9,177.30 to "the Swillingham & Spalding account" for "Shakira retouching work."

Defendant contends that the merger clause of the APO extinguished all of Sony's obligations under the Estimate and, therefore, plaintiffs' first cause of action for breach of the Estimate should be dismissed. Defendant argues further that plaintiffs' second cause of action for unjust enrichment should be dismissed because it is inconsistent with their contract claim. Defendant also contends that plaintiffs' third cause of action for

fraudulent inducement should be dismissed because, *inter alia*, it is not adequately pled and fails to show that plaintiffs' reliance on the allegedly false representation was reasonable. Although defendant acknowledges that plaintiffs' fourth cause of action for breach of contract is adequately pled and meritorious, accepting their facts as true, defendant's nonetheless claim that CLM has no standing to assert the cause of action because it is not a party to the "Sony Music Contract."

Discussion

Plaintiffs' Cross-Motion to Amend

In the absence of prejudice or surprise resulting directly from delay, leave to amend a pleading is freely given, pursuant to CPLR § 3025(b). Fahey v. County of Ontario, 44 N.Y.2d 934 (1978). Moreover, leave should be granted when the denial of the motion would create a greater prejudice than granting it. Murray v. City of New York, 43 N.Y.2d 400 (1977); Adams Drug Co. v. Knobel, 129 A.D.2d 401 (1st Dept. 1987). The party seeking leave to amend is required to show that the new claims have a colorable basis. NAB Construction Corp. v. Metropolitan Transportation Authority, 167 A.D.2d 301 (1st Dept. 1990).

Here, plaintiffs have demonstrated, and defendant does not dispute, that its fourth cause of action for breach of contract is adequately pled. Additionally, plaintiffs have set forth sufficient facts to show that its new cause of action has a colorable basis, as the plaintiffs' entire claim revolves around two obliquely worded documents containing contractual language.

Accordingly, plaintiffs' motion to amend the complaint is granted.

Defendant's Motion to Dismiss

In deciding whether the complaint must be dismissed, the court is not required to decide whether plaintiff has pled claims that it will eventually succeed on. Rather, the court has to broadly examine the complaint to see whether, from its four corners, "factual allegations are discerned which taken together manifest any cause of action cognizable at law." Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1st Dept. 1977). Consequently, unless disproved through, for example, documentary evidence [CPLR § 3211 (a)(1)], or the complaint fails to set forth a cognizable cause of action [CPLR § 3211 (a)(7)], the complaint should be preserved until issue has been joined and the claims are ready for a dispositive motion or trial.

a. Rescission/Fraud

Plaintiff's third cause of action for rescission/fraud is premised upon the alleged misstatements of material fact, to wit:

"[a]fter receiving the Plaintiffs' invoice, Sony insisted that Swillingham execute the APO— a document prepared by Sony and which it held out as a mere formality; the Defendant maintained that it would pay the invoice upon Swillingham's execution of the document . . . [i]nstead of tendering the balance due, however, Sony would now insist it did not have to pay Swillingham anything. . ."

To state a cause of action for fraudulent inducement, it is sufficient that the claim alleges a material representation, known to be false, made with the intention of inducing reliance, upon which the victim actually relies, consequentially sustaining a detriment.

Channel Master Corp. v. Aluminium Ltd. Sales, 4 N.Y.2d 403, 406-408 (1958); Megarix Furs v. Gimbel Bros., 172 A.D.2d 209, 213 (1991).

Although a fraud claim related to a breach of contract can be properly stated if the allegations in support of the claim concern representations collateral or extraneous to a contract (Morgan v. A.O. Smith Corp., 221 A.D.2d 422 [2d Dept 1995]), a fraud claim should be dismissed as redundant when it merely restates a breach of contract claim (First Bank of America v. Motor Car Funding, Inc., 257 A.D.2d 287 [1st Dept. 1999]).

Here, plaintiffs' claim for fraud merely restates its breach of contract claim, as both claims arise from circumstances constituting elements of the Estimate and APO. Plaintiffs' third cause of action for rescission of the APO based on fraud is hereby severed and dismissed as redundant of their first and fourth causes of action for breach of agreement and breach of contract.

b. Breach of Agreement, Unjust Enrichment, Breach of Contract

In order to state a cause of action for breach of contract, the pleading must allege the existence of a valid and enforceable agreement, due performance by plaintiff, and a failure of performance by defendant, resulting in damages. See Furia v. Furia, 116 A.D.2d 694, 695 (2d Dept. 1986).

Here, the documentary evidence establishes that plaintiffs have causes of action for breach of agreement and breach of contract. The court rejects defendant's argument that the APO, as a matter of law, extinguishes plaintiffs' rights under the Estimate and constitutes a novation. The two documents are identified under different job numbers and identify different photographers. Additionally, the Estimate calculates the costs for Swillingham to take the actual pictures and to conduct work overseas, whereas, the APO is

an assignment of rights. So, although defendant contends that the merger clause of the APO extinguished plaintiffs' rights under the Estimate, these documents are ambiguous. The meaning of them are ultimate issues in the case that must be decided after issue has been joined. Therefore, plaintiffs' first and fourth causes of action for breach of agreement and breach of contract remain.

Furthermore, plaintiffs' second cause of action for unjust enrichment is based in quasi contract. Plaintiffs' contention that it performed additional services beyond those contemplated by the Estimate, adequately supports this claim at the pleading stage.

c. Standing

The court accepts defendant's argument that CLM does not have standing, but only as to the APO. Swillingham directly signed the APO and, therefore, CLM is merely the agent of a fully disclosed principal and does not have standing to sue for rights under the APO. However, the Estimate is a document prepared by CLM and is not signed by Swillingham as a disclosed principal. Accordingly, the court finds that there is enough evidence to determine that CLM has standing as to the Estimate, but not as to the APO.

Plaintiffs have met their burden and alleged sufficient facts to support causes of action against defendant for breach of agreement, unjust enrichment, and breach of contract. Accordingly, the motion to dismiss is granted only as to the third cause of action for rescission/fraud, and defendant's motion to dismiss is denied as to the three remaining causes of action.

Defendant should answer the complaint in the manner provided under CPLR § 3211 (f). Plaintiffs may reply as per the CPLR.

Conclusion

In accordance herewith, it is hereby:

ORDERED that defendant, Sony Music Entertainment's motion to dismiss the complaint is granted as to plaintiffs', Camilla Lowther Management, Inc. and Lee Swillingham's third cause of action for rescission/fraud; and it is further

ORDERED that plaintiffs' third cause of action is hereby severed and dismissed; and it is further

ORDERED that defendant's motion to dismiss is granted as to CLM, only with respect to the APO for lack of standing; and it is further

ORDERED that defendant's motion is otherwise denied; and it is further

ORDERED that defendant should answer the complaint in the manner provided under CPLR § 3211 (f) and plaintiffs may reply as per the CPLR; and it is further

ORDERED that a **preliminary conference** is scheduled for **September 2, 2010** at **9:30 a.m.** in Part 10, 60 Centre Street, Room 232; and it is further

ORDERED that any relief requested but not expressly addressed herein is hereby denied; and it is further

ORDERED that this shall constitute the decision and order of the court.

Dated: New York, New York
July 6, 2010

So Ordered:

FILED
JUL 09 2010
NEW YORK
COUNTY CLERK'S OFFICE


HON. JUDITH J. GISCHE, J.S.C.