Ellington v Sony/ATV Music Publ. LLC
2010 NY Slip Op 33887(U)
July 7, 2010
Supreme Court, New York County
Docket Number: 650233/09
Judge: Barbara R. Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK PART 39

Index Number : 650233/2009
ELLINGTON, PAUL M.
vs
SONY/ATV MUSIC PUBLISHING
Sequence Number : 001
DISMISS ACTION

INDEX NO. 650233/09
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO.

...ing papers, numbered 1 to ____ 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

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

RECEIVED
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MOTION SUPPORT OFFICE
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Dated: 7/7/10

BARBARA R. KAPNICK 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: IA PART 39

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PAUL M. ELLINGTON,

Plaintiff,

-against-

SONY/ATV MUSIC PUBLISHING LLC,
FAMOUS MUSIC CORPORATION and
FAMOUS MUSIC, LLC,

Defendants.

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DECISION/ORDER
Index No. 650233/09
Motion Seq. No. 001

BARBARA R. KAPNICK, J.:

This action arises out of an agreement (the "Agreement") entered into on or about May 10, 1989, by defendant Famous Music Corporation,[1] and plaintiff Paul M. Ellington ("Mr. Ellington"), the grandson of Edward Kennedy "Duke" Ellington ("Duke Ellington"), along with other members of the Ellington family (the "Ellington Siblings"). Under the Agreement, Famous Music, then a division of Viacom, came to control rights in copyrights to certain musical compositions created by Duke Ellington and to use the name and likeness of Duke Ellington in conjunction with those compositions (the "Agreement").

As part of Famous Music's duties under the Agreement, Famous Music had, *inter alia,* the obligation to administer the Duke Ellington compositions, maximize the royalties to be earned in connection with them, maintain true and correct royalty accounts

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[1] Famous Music Corporation changed its corporate structure in December 2006, becoming Famous Music, LLC. (Famous Music Corporation and Famous Music, LLC shall be collectively referred to herein as "Famous Music").

and pay over the designated songwriter's share of royalties to the Ellington Siblings.

Plaintiff claims that in or about August 2007, defendant Sony/ATV Music Publishing LLC ("Sony/ATV") acquired Famous Music from Viacom, without his consent or knowledge. Plaintiff further claims that he learned about the acquisition for the first time in a royalty statement in March 2008, which was issued by Sony/ATV and appeared on Sony/ATV letterhead.

Mr. Ellington, through his counsel, thereafter attempted to determine the precise nature of the relationship between Sony/ATV and Famous Music and whether Famous Music still existed. However, plaintiff claims that he was unable to reach the individuals at Famous Music, many of whom had been employed in their capacities for long periods of time and with whom Mr. Ellington and his attorneys had had longstanding relationships, because they were no longer employed by Famous Music or Sony/ATV in their former capacities.

By letter dated August 15, 2008, Dale D. Esworthy, Sony/ATV's Senior Vice President, Administration, responded to plaintiff's counsel's inquiries as follows:

> Regarding your questions about the relationship between Sony/ATV Music Publishing LLC and Famous Music LLC, Sony/ATV purchased Famous from Viacom in August 2007. As part of that transaction Sony/ATV acquired Famous' interest in the Ellington Compositions. While Famous still technically exists as a corporate entity, it is

[* 4]

> wholly owned by Sony/ATV. Sony/ATV has no continuing obligations to Viacom with respect to the Ellington Compositions.

By letter dated August 27, 2008, Mr. Ellington, through his counsel, informed Sony/ATV that he had

> never been previously informed of, consulted about or asked to consent to any such action on Famous' part, and that he does not consent to them. As such, please be advised that we are entitled to treat Famous's actions as a repudiation of the Agreement and proceed accordingly.

In the first cause of action of the Amended Complaint, plaintiff seeks a declaration that Famous Music has repudiated the Agreement, that the Agreement has been terminated and that Mr. Ellington is now relieved of any obligations under the Agreement, with his rights pertaining to the Duke Ellington compositions as otherwise provided for in the Agreement reverting to him.

In the alternative, plaintiff claims that to the extent that the transfer is not void as to Mr. Ellington's rights, the intervention of Sony/ATV into the relationship between Famous Music and Mr. Ellington has caused Mr. Ellington to incur significant inconvenience, substantial expense and lost earnings.

Specifically, Sony/ATV sought in a letter dated April 25, 2008 to withhold $212,444.62 in "negative adjustments" from royalties due to the Ellington Siblings under the Agreement to account for

[* 5]

alleged mistakes Famous Music had made in calculating such royalties in prior periods going back to 2000.

Plaintiff claims that these negative adjustments were wrongfully applied because: (i) all or virtually all the adjustments concerned mechanical royalties for which Famous Music was a mere conduit between *other* publishers and the Ellington Siblings, i.e., neither Famous Music nor Sony/ATV ever had any rights to such royalties; (ii) $168,229.60 of the "negative adjustments" concerned allegedly mistaken payments that were due and made by Famous Music before March 3, 2002, putting such payments outside the six-year statute of limitations set forth in CPLR § 213; (iii) pursuant to paragraph 2(a) of the Agreement, Famous Music had an obligation to maintain "true and accurate accounts," and plaintiff was entitled to and did rely on those calculations; (iv) pursuant to paragraph 2(c)(vi) of the Agreement, statements that Famous Music issued were also "deemed binding" upon Mr. Ellington and, thus, could not be retroactively revised by Famous Music or its purported successor; and (v) the recovery of payments that were made voluntarily by Famous Music is barred by the voluntary payment doctrine.

By letter dated December 3, 2008, Sony/ATV acknowledged that

> a debit to the Ellington Parties' royalty account in the amount of $212,444.362 has been adjusted to reflect the correct debit in the amount of $41,401.49. Therefore, the difference now due the Ellington Parties is $171,043.13 (the "Ellington Payment"), of which $68,417.25 (40% of

[* 6]

$171,043.13) (the "Debit Payment"), equals your client's share.[2]

Plaintiff further claims that Sony/ATV made a royalty payment to an incorrect third party and refused to forward payment to the Ellington Siblings. Sony/ATV, which was eventually repaid the funds, has demanded a release of any claims to the remaining royalties, as well as a release as to any of the other claims the Ellington Siblings had against Sony/ATV prior to its payment of these funds, but the Ellington Siblings have refused to grant any such release.

In the second cause of action, plaintiff seeks a jugment declaring that: (i) by assigning away obligations under the Agreement, failing to pay royalties due under the Agreement on the dates specified therein and refusing to pay royalties due despite acknowledging plaintiff's entitlement to such royalties, defendants have breached the Agreement; (ii) the Agreement has, therefore, been terminated; and (iii) Mr. Ellington is entitled to rescission of the Agreement and is thus relieved of any obligations under the Agreement, with his rights pertaining to the Duke Ellington compositions reverting to him.

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[2] There is no dispute that a payment in the amount of $68,417.25 was made in June 2009, after this action was commenced.

[* 7]

The Amended Complaint also seeks to recover:

(a) damages in the amount of $68,417.25, plus interest, for breach of contract based on Sony/ATV's withholding the "negative adjustments" which Sony/ATV acknowledged were improperly made (third cause of action) and for damages in said amount, as well as punitive damages, for conversion (fourth cause of action);

(b) damages for breach of contract for the remaining "negative adjustments" (fifth cause of action);

(c) damages for breach of fiduciary duty based on Paragraph 9(a) of the Agreement which provides that "no fiduciary relationship is created hereby (except [emphasis supplied] as to the payment of monies ...)"; plaintiff claims that Sony/ATV breached their fiduciary duties to plaintiff (i) by making negative adjustments to plaintiff's account, withholding royalty payments on that basis and then failing to repay the withheld monies due despite acknowledging that such monies were owed; (ii) by failing to make timely payment of royalties for the semi-annual period concluding on December 31, 2008; and (iii) by making payment of royalties due to plaintiff to an unauthorized account four years out of date (sixth cause of action);

(d) damages for breach of contract, based on Sony/ATV's failure to make the royalty payment for the semi-annual period concluding on December 31, 2008 within 60 days of that date and announcing their intention not to make payment of such royalties until March 31, 2009, in violation of paragraph 2(a) of the Agreement (seventh cause of action); and

(e) damages for unjust enrichment, based on Sony/ATV's retention of amounts illegitimately claimed as "negative adjustments" and based on its unilateral postponement of the date on which they were obligated to make the royalty payment to plaintiff reflecting the semi-annual period concluding on December 31, 2008 (eighth cause of action).

Defendants now move for an order pursuant to CPLR § 3211(a)(1) and (7) dismissing the first, second, sixth and eighth causes of action with prejudice.[3]

First cause of action

Defendants argue that the first cause of action for a declaration that the Agreement has been repudiated based on the assignment from Famous Music to Sony/ATV must be dismissed because there is nothing in the Agreement that prohibits assignments. *See, Matter of Stralem*, 303 AD2d 120, 122 (2nd Dep't 2003), which held that "[u]nder New York law, contracts are freely assignable absent language which expressly prohibits assignment (citations omitted)."[4]

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[3] Defendants concede that plaintiff's remaining claims involve factual issues that cannot be disposed of on a motion to dismiss.

[4] In fact, the Agreement defines the Buyer as Famous Music Corporation "(or its designated affiliated entity, it being agreed no such designation shall relieve Famous of any liability hereunder)".

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Plaintiff, however, contends that the subject Agreement constitutes a contract for personal services, which may not be assigned. See, *In re Compass Van & Storage Corp.*, 65 BR 1007 (U.S. Bankr. Ct., EDNY 1986).

However, defendants argue that there is no basis to find that the Agreement is a personal services contract, since it involves the sale of assets, i.e., the ownership and administration rights in the catalogue of completed songs, and does not provide for the rendering of any personal services.

Alternatively, plaintiff argues that

> it has long been the law that a party repudiates a contract "where [that] party, before the time of performance arrives, puts it out of his power to keep his contract" (citations omitted). Stated otherwise, a party repudiates a contract when it "voluntar[il]y disable[s] itself from complying" with its contractual obligations (citation omitted).

Computer Possibilities Unlimited v Mobil Oil Corp., 301 AD2d 70, 77 (1st Dep't 2002), lv to app denied, 100 NY2d 504 (2003).

Plaintiff contends that by transferring its performance obligations under the Agreement to Sony/ATV, Famous Music likewise voluntarily disabled itself from complying with its contractual

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obligation. Thus, plaintiff argues that Famous Music repudiated the Agreement.

Defendants, however, contend that *Computer Possibilities Unlimited v Mobil Oil Corp., supra* is distinguishable from the instant case because Famous Music did not divest itself of the ability to assure that plaintiff receive the benefit of the Agreement. Moreover, unlike the situation presented in *Computer Possibilities Unlimited, Inc. v Mobil Oil Corp., supra*, Famous Music did enter into a conflicting agreement.

Defendants further argue that plaintiff's contractual right to receive royalties has not been affected, and that Famous Music has continued since 2007 to perform under the Agreement under Famous Music's new owner, i.e., Sony/ATV.[5]

Based on the papers submitted and the oral argument held on the record on February 18, 2010, this Court finds that plaintiff has failed to state a claim for repudiation of the Agreement. Accordingly, that portion of defendants' motion seeking to dismiss the first cause of action is granted.

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[5] In fact, defendants contend that there was never even an "assignment" of the Agreement, since Sony/ATV simply purchased Famous Music from Viacom.

Second cause of action

Defendants next move to dismiss plaintiff's second cause of action which seeks, *inter alia*, rescission of the Agreement.

It is well settled that

> [i]n order to justify the intervention of equity to rescind a contract, a party must allege fraud in the inducement of the contract; failure of consideration; an inability to perform the contract after it is made; or a breach in the contract which substantially defeats the purpose thereof (citation omitted). If rescission is based upon a breach of the contract, the breach must be "material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract" (citations omitted).

Babylon Associates v Suffolk Co., 101 AD2d 207, 215 (2nd Dep't 1984). *See also, Jacobs Private Equity, LLC v 450 Park LLC*, 22 AD3d 347 (1st Dep't 2005).

Defendants argue that plaintiff has failed to allege a breach so substantial and material as to defeat the purpose of the contract.[6]

Plaintiff argues in opposition that the Complaint alleges that the defendants' acts were 'material and willful'.

[6] Defendants further contend that plaintiff is attempting to convert his minimal claim for $16,560.00 in unpaid royalties into a claim to rescind a contract under which the Ellington Siblings have received millions of dollars in advances and royalties over the past twenty years.

[* 12]

However, even were there a sufficient basis for this Court to determine that the alleged breaches are so substantial and fundamental as to strongly tend to defeat the objective of the Agreement, rescission should not be granted where, as here, there is an adequate remedy at law. *See*, *Brooks v Key Trust Co. Nat'l Assn.*, 26 AD3d 628 (3rd Dep't 2006), *lv to app. dism'd*, 6 NY3d 891 (2006); *Bristol Oaks, L.P., v Citibank, N.A.*, 272 AD2d 258 (1st Dep't 2000).

Accordingly, that portion of defendants' motion seeking to dismiss the second cause of action is granted.

Sixth cause of action

Defendants next argue that the sixth cause of action for breach of fiduciary duty must be dismissed on the grounds that absent special circumstances, the relationship between a music publisher and a writer (or, in this case, his successors) does not give rise to fiduciary obligations.

Plaintiff argues in opposition that the existence of a fiduciary relationship is established by the plain language of Paragraph 9(a) of the Agreement since the dispute involves "the payment of monies," which constitutes an exception to the prior statement in Paragraph 9(a) which provides that "no fiduciary relationship is created hereby".

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Defendants alternatively argue that the sixth cause of action must be dismissed as duplicative of plaintiff's claim for breach of contract.

It is well settled that "[a] cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand (citation omitted)." *William Kaufman Org. v Graham & James*, 269 AD2d 171, 173 (1st Dep't 2000).

Here, plaintiff's claim for breach of fiduciary duty seeks the identical relief sought in plaintiff's breach of contract claims.

Therefore, that portion of defendants' motion seeking to dismiss the sixth cause of action is granted.

Eighth cause of action

Finally, defendants argue that the eighth cause of action for unjust enrichment must be dismissed on the ground that said claim is barred by the existence of a valid contract.

Plaintiff argues that this portion of the motion must be denied as premature since plaintiff is permitted to plead such a claim in the alternative.

However, defendants have not disputed the existence or validity of the Agreement. Accordingly, that portion of defendants' motion seeking to dismiss the eighth cause of action is granted.

Defendants shall serve an Answer to the third, fourth, fifth and seventh causes of action within 30 days.

A conference shall be held in IA Part 39, 60 Centre Street, Room 208 on September 15, 2010 at 10:00 a.m. to schedule all outstanding discovery.

This constitutes the decision and order of this Court.

Dated: July 7 , 2010

BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.