

**Alistair Records, Inc. v Adams**

2011 NY Slip Op 31379(U)

May 20, 2011

Sup Ct, NY County

Docket Number: 603695/09

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE

*Justice*

PART 10

Alistair Records, Inc.,

Plaintiff (s).

INDEX NO. 603695/09

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 002

Glen H. Adams,

Defendant(s).

The following 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, the court's decision on this (these) motion (s) is as follows:

**FILED**

MAY 25 2011

NEW YORK  
COUNTY CLERK'S OFFICE

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

**FILED**

MAY 25 2011

NEW YORK  
COUNTY CLERK'S OFFICE

*Compliance conference scheduled for  
July 7, 2011 at 9:30am.*

Dated: 5/20/11

Hon. Judith J. Gische, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE  SETTLE/SUBMIT ORDER

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

**FILED**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10**

**MAY 25 2011**

-----X  
Alistair Records, Inc.,  
  
Plaintiff (s),  
  
-against-  
  
Glen H. Adams,  
  
Defendant (s).  
-----X

**DECISION/ORDER**  
Index No.: ~~09069500~~  
Seq. NO. COUNTY CLERK'S OFFICE

**PRESENT:**  
Hon. Judith J. Gische, J.S.C.

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

<b>Papers</b>	<b>Numbered</b>
Adams (3212, 3215) w/GA, TG affid (sep back), MMN affirm, exhs .....	1, 2
Alistair opp w/LKR affirm .....	3
Adams reply w/MMN affirm, exhs .....	4

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

This action arises out of a recording contract between plaintiff ("Alistair") and defendant Glen H. Adams, professionally known as "Chanj" ("Adams"). Presently before the court is Adams' motion for an order: 1) amending the caption to reflect that plaintiff correct name is "Alistair Records, LLC," 2) granting Adams summary judgment dismissing the complaint against him, 3) entry of a default judgment against plaintiff on his 1<sup>st</sup> and 2<sup>nd</sup> counterclaims, and 3) discovery sanctions, precluding Alistair from submitting evidence at any trial or hearing of this action of the record company's expenditures.

This motion is brought pre-note of issue but after issue was joined, therefore, summary judgment relief is available (CPLR § 3212 [a]; Myung Chun v. North

American Mortgage Co., 285 AD2d 42 [1<sup>st</sup> Dept 2001]).

### **Arguments Presented**

Adams entered into an exclusive recording agreement dated as of July 17, 2008 ("recording contract") with "Alistair Records, LLC." Pursuant to this recording contract, it was agreed that Adams would complete 5 - 10 master recordings or "demos" so Alistair could showcase his talents "in order to secure a major label recording agreement..." Adams had until September 30, 2008 to fulfill this obligation. Commencing January 1, 2009, Alistair would have 12 months in which to secure a major label agreement for him ("shopping period"). Upon completion of the shopping period, Alistair would have another 6 months in which to find a record distributor.

Pursuant to the agreement, Adams reserved the right to have his agent (attorney, CPA, or other "qualified" person) inspect the books and records of Alistair. It was also agreed that the company would consult with Adams "as to all material activities regarding the Artist, including marketing, promotion, creative decisions [etc]..." but that Alistair had the final say on all decisions regarding the artist (Recording Contract paragraph 4[c]). Alistair agreed to pay for expenses during the demo period, deeming them "advances" subject to eventual recoupment from royalties, and any other third party income.

Alistair claims that Adams undermined the company's efforts on his behalf by, among other things, engaging in rogue activities, such as uploading his performances to "You Tube" and "My Space," refusing to continue recording and refusing to make public appearances. Based upon those factual allegations, Alistair suspended its recording contract with Adams and now seeks a permanent injunction enjoining Adams

from continuing any entertainment related activity in any public or private forum including website, public performances, etc (1<sup>st</sup> cause of action). Alistair's second cause of action is for seeks damages of \$750,000 for breach of contract.

Adams denies he did anything in violation of his contract. He contends he made 30 demos for plaintiff and that he did everything he was asked to do. Despite his complete cooperation with the plaintiff, Alistair failed to obtain a major record label for him within the period prescribed in the recording contract. He also claims that he is owed money under the contract. Although he was paid \$10,000 up front, he was supposed to receive another \$10,000, as provided in section 4 [d][vi] of the recording contract. Instead, Alistair only paid him \$4,000 once he started to threaten legal action. According to Adams, Alistair's principals spent money freely which he believes is why its principals have been putting off letting him inspect the company's books and records.

Adams also claims that Alistair has not replied to his counterclaims and continues to stonewall discovery. Thus, he not only seeks an order directing a default judgment on his 1<sup>st</sup> and 2<sup>nd</sup> counterclaims (respectively for rescission and breach of contract), he argues that Alistair should be precluded from putting in evidence on their claims for damages.

### **Discussion**

Since Alistair has not opposed, let alone addressed, Adams' claim that "Alistair Records, Inc." lacks standing to bring this action, and the recording contract is between Adams and "Alistair Records, LLC," Adams' motion to amend the caption so that the name of plaintiff is "Alistair Records, LLC" instead of "Alistair Records, Inc." is granted.

Upon service of a copy of this order with notice of entry, the Clerk shall make the notation in the court's files to amend the caption.

A default in answering a pleading (here, the counterclaims) is deemed to be an admission of all factual allegations contained therein and all reasonable inferences that flow from them (Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62 [2003]). Where a party seeks to be relieved from its default, it must present excusable default and a meritorious defense (CPLR § 5015). Alistair's attorney (Lamont K. Rodgers, Esq.) acknowledges that his client did not serve a reply to the counterclaims. However, Attorney Rodgers this was because Alistair had problems with their previous attorney and the default was unintentional. Attorney Rodgers also points out that Adams served his answer late and Alistair accepted it rather than bringing a motion for entry of a default judgment. Thus, Alistair urges that because Adams has come to court with "unclean hands," he is not entitled to entry of a default judgment and the dispute should be adjudicated on the merits. Finally, Attorney Rodgers points out that neither Adams' affidavit nor that of his business manager (Terrence Gittens) complies with the requirements of CPLR § 2309[c] because they are not accompanied by certificates of conformity (PRA III, LLC v. Gonzalez, 54 AD3d 917 [2<sup>nd</sup> Dept. 2008]). Both individuals live outside the state and neither of their signatures were notarized in New York.

Addressing the last point first, Adams provided the court with properly certified affidavits in his reply. By doing so, he has remedied that defect and the affidavits are accepted by the court as if they had been timely filed in the proper form (Moccia v. Carrier Car Rental, Inc., 40 A.D.3d 504 [1<sup>st</sup> Dept 2007]).

Alistair's excuse for why it did not serve a reply to the counterclaims is not acceptable. Adams answered and asserted his counterclaims in May 2010 and the preliminary conference was held in July 2010. In August 2010, defendant's counsel "reminded" Alistair's attorney at the time that his client had yet to reply to the counterclaims. Adams did not make this motion until October 2010. Even if prior counsel erred in failing to reply to the counterclaims, Alistair's opposition to Adams' motion is not supported by an affidavit by a person with knowledge or even a proposed reply. Moreover, there is no cross motion for time to reply to the counterclaims, only an informal request.

Even were the court persuaded that Alistair's default is excusable, Alistair has not come forward with a meritorious defense as to why a default judgment should not be entered on Adams' 3<sup>rd</sup> counterclaim which is for breach of contract. Adams has established through his sworn affidavit that he completed 15 demos by September 2008, as he was required to do under the recording contract, and that plaintiff's president (Darnell Scott) "loved them." He has also established that Alistair had one year from January 1, 2009 to obtain a major record label for him which it failed to do and, pursuant to the recording contract, Adams was entitled to a \$20,000 advance which would be paid in two equal installments. Although he received \$10,000 on signing, the second installment was due "upon delivery of the recorded masters" (i.e. the demos). Since Adams complied with these obligations, Alistair should have paid Adams the second \$10,000 installment due under the recording contract. Instead, Alistair only paid Adams the lesser amount of \$4,000 at or about the time that Alistair

suspended the contract. There is no affidavit explaining why only a partial payment was made.

Regardless of any professional courtesy extended to Adams' in accepting the late answer with counterclaims, it was, nonetheless, accepted by Alistair and Alistair should have provided more than just an attorney's affirmation in opposition to this motion. Having failed to come forward with any meritorious defense, Adams' motion for entry of a default judgment on his 3<sup>rd</sup> counterclaim for breach of contract is granted. The clerk shall enter judgment in favor of defendant Glen H. Adams against plaintiff Alistair Records, LLC in the principal sum of \$6,000 with interest from May 29, 2010, the date the counterclaim was interposed.

Adams' motion for a default judgment on his counterclaim for rescission is, however, denied. A claim for rescission is inconsistent with a claim for damages arising from breach of contract (see BGW Development Corp. v. Mount Kisco Lodge No. 1552 of Beney, and Protective Order of Elks of the United States of America, 247 A.D.2d 565 [2<sup>nd</sup> Dept. 1998]). Adams cannot, on the one hand, seek enforcement of the contract by seeking damages thereunder, yet also seek to be relieved of the contract. Therefore, the 1<sup>st</sup> counterclaim is severed and dismissed.

Turning to Adams' motion for summary judgment, as the moving party, Adams has the initial burden of making a prima facie showing of entitlement to summary judgment as a matter of law, tendering sufficient evidence to eliminate any material

issues of fact from the case " [ Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]).

The complaint asserts two causes of action. The first is for a permanent injunction, enjoining Adams from performing publicly, etc.; the second is for damages in the amount of \$750,000. Adams states that Alistair has stonewalled discovery and that his requests for access to plaintiff's books and records have been rebuffed, even though under the recording contract he has that right.

In his sworn affidavit, Adams states the Alistair's principals spent massive amounts of money without his consent and despite his objections, all the while ignoring his requests for a budget and to inspect their books. Although Alistair alleges \$750,000 in damages, Adams claims these are expenses that the company would have incurred anyway and that they could only recoup them from him had they obtained a major record or distribution for him, as the recording contract provides.

In addition to his opposition based upon the missing certificates of authenticity for Adams' and Gittens affidavits (already addressed, *supra*), Alistair's attorney simply affirms that the motion is devoid of merit.

Adams has easily met his burden of making a *prima facie* showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case [ Winegrad v. New York Univ. Med. Ctr., *supra*). In opposition, however, Alistair has not submitted any evidentiary facts to controvert the allegations set forth Adams' motion thereby demonstrating the existence of a triable

issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]). Consequently, Adams' motion for summary judgment dismissing the complaint must be, and hereby is, granted and the complaint is dismissed.

Adams has not moved with respect to his 3<sup>rd</sup> through 7<sup>th</sup> counterclaims which are for other damages arising from the contract, replevin, tortious interference with advantageous business relationship, punitive damages, and an accounting. Those counterclaims shall continue.

No note of issue has been filed in this case yet and the time to do so has passed. It is unclear whether this case is ready for trial or not. The court, therefore, sets a status conference in this case for July 7, 2011 at 9:30 a.m.

## **Conclusion**

In accordance with the foregoing,

It is hereby

**ORDERED** that defendant Adam's motion for an order amending the caption to reflect the correct name of plaintiff is "Alistair Records, LLC" is granted; and it is further

**ORDERED** that the Clerk shall, upon being served with a copy of this decision and order with proof of entry, amend the caption of this case as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

-----X  
Alistair Records, LLC,

Index No.:  
603695/09

Plaintiff (s),  
-against-

Glen H. Adams,  
Defendant (s).  
-----X

; and it is further

ORDERED that defendant Adams' motion for entry of a default judgment on his 2<sup>nd</sup> counterclaim against plaintiff is granted and the Clerk shall enter judgment in favor of defendant Glen H. Adams against plaintiff Alistair Records, LLC in the principal amount of Six Thousand Dollars (\$6,000) with interest from May 29, 2010, plus the costs and disbursements of this action, as taxed by the court, and defendant shall have execution thereof; and it is further

ORDERED that Adams' motion for entry of a default judgment on his 1<sup>st</sup> counterclaim for rescission is denied and that counterclaim is severed and dismissed; and it is further

ORDERED that defendant Adams' remaining counterclaims (3<sup>rd</sup> through 7<sup>th</sup>) shall continue; and it is further

ORDERED that defendant Adams' motion for summary judgment dismissing the complaint is granted and the Clerk shall enter judgment in favor of defendant Glen H. Adams against plaintiff Alistair Records, LLC dismissing the complaint; and it is further

ORDERED that this matter is set for a compliance conference on July 7, 2011 at 9:30 a.m. No further notices will be sent, and it is further

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

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York  
May 20, 2011

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, JSC

**FILED**  
**MAY 25 2011**  
NEW YORK  
COUNTY CLERKS OFFICE