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

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

DAS COMMUNICATIONS, LTD.

- v -

SEBERT, KESHA ROSE and GOTTWALD, LUKASZ

INDEX NO. 650457/2010

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

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, it is ordered that this motion by plaintiff DAS to dismiss defendant and counterclaim plaintiff's LUKASZ GOTTWALD's counterclaims is GRANTED; and

Defendant LUKASZ gottwald is granted leave to amend his answer pursuant to CPLR 203(d) to assert a recoupment counterclaim, all as per the attached Decision and Order.

Dated: June 28, 2011

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

| | |
|---|---|
| DAS COMMUNICATIONS, LTD., Plaintiff, -against- KESHA ROSE SEBERT p/k/a/ KESHA, an individual, LUKASZ GOTTWALD p/k/a DR. LUKE, an individual, Defendants. | Index No. 650457/10 DECISION AND ORDER Sequence No. 003 |
| KESHA ROSE SEBERT p/k/a/ KESHA, Counterclaim Plaintiff, -against- DAS COMMUNICATIONS, LTD., Counterclaim Defendant. | |

**MELVIN L. SCHWEITZER, J.:**

This case involves claims by two performing artist management agents, each of whom alleges that their respective contracts to represent a vocal recording artist was interfered with by the other agent. Today the recording artist, Kesha Rose Sebert (Ms. Sebert), is a prominent performer, but at the time of the events which gave rise to this lawsuit, she was little known and starting out.

**Background**

Defendant and counterclaim plaintiff Lukaz Gottwald (Mr. Gottwald) is a successful songwriter/producer who, in March 2005, agreed to work with Ms. Sebert. She signed an exclusive recording agreement with Mr. Gottwald's Company, Kasz Money, Inc (KMI), on

September 26, 2005 (Gottwald Agreement). Mr. Gottwald was an expressly intended third party beneficiary of the Gottwald Agreement. The Gottwald Agreement provided in relevant part:

1. [Ms. Sebert] shall Deliver the first Album of the Recording Commitment to [Mr. Gottwald's company] within the first five (5) months after the commencement of [the] Contract Period. ¶2 (g)(i);

2. [Mr. Gottwald's Company] shall have the right during the First Contract Period to use the First Album and/or demonstration recordings embodying [Ms. Sebert's] performance . . . to seek a new exclusive recording agreement with a Major Label" ¶2 (b);

3. [Mr. Gottwald's Company] . . . shall have the perpetual right on an exclusive basis during the Term . . .to use and to authorize other Persons to use [Ms. Sebert's] name[], approved likeness[] and approved biographical material of or relating to [Ms. Sebert] . . . for purposes of advertising, promotion and trade and in exclusive right . . . to create, maintain and host [Ms. Sebert's official website and to own "ke$hasebert.com" . . . in perpetuity . . .] ¶8 (a);

4. [Ms. Sebert] hereby grants to [Mr. Gottwald's Company] . . . the exclusive right [to use Ms. Sebert's name and likeness] . . . in connection with the sale, lease, license or other disposition of any merchandising, tie-ins, retail and concert tour merchandising, . . . whether or not in connection with Master Recordings hereunder . . . ¶8 (b)(2);

5. During the term: (1) [Ms. Sebert] shall not enter into any agreement which would interfere with the full and prompt performance of [her] obligations [under the Gottwald Agreement]. ¶9 (a)(vi)(1)(2).

It is clear that when Ms. Sebert signed with Mr. Gottwald and KMI, she gave them exclusive control over her career, the exclusive right to find her a recording agreement with a major record label, and the exclusive right to her name and likeness in connection with the sale of any musical or artistic merchandise. It is also clear that Ms. Sebert assumed the obligation to deliver her first album to Mr. Gottwald within five months after the effective date of agreement.

In late 2005, however, Ms. Sebert also decided to pursue discussions with DAS Communications (DAS) about working together. According to Mr. Gottwald, DAS then induced

Ms. Sebert to breach her agreement with him, and also led her to believe that the Gottwald Agreement was invalid and unenforceable. On behalf of Ms. Sebert, attorney Fred Goldring wrote Mr. Gottwald's counsel on December 6, 2005 that Ms. Sebert was repudiating the Gottwald Agreement. One week later, on December 13, 2005, Mr. Goldring wrote a second letter emphasizing that his client had no intention of proceeding further with Mr. Gottwald. Days later, Mr. Gottwald's counsel replied to Mr. Goldring and clearly asserted that if Ms. Sebert attempted to unilaterally void the contract, she would be in breach.

Four months after the effective date of the Gottwald Agreement, on January 27, 2006, Ms. Sebert signed a management contract with DAS. In signing the DAS management agreement, Ms. Sebert agreed in part that DAS would be "authorized and empowered . . . on [Ms. Sebert's] behalf . . . to . . . approve and permit any and all publicity and advertising; approve and permit the use of [Ms. Sebert's] name, photograph, likeness . . . artistic and musical materials for purposes of advertising and publicity and in the promotion and advertising of any and all products and services; [and] negotiate for [Ms. Sebert] on [her] behalf any and all agreements, documents and contracts for [her] services, talents and/or artistic, literary and musical materials." This provision is in direct conflict with paragraph 8a of the Gottwald Agreement referred to above.

The DAS agreement had a term of five years but was terminable by Ms. Sebert within one year if a recording agreement with a major record label had not been entered into within that period. In the event a recording agreement was entered into, the term of the agreement would extend to the earlier of five years or the completion of her second album.

On February 7, 2006, on behalf of his client, Mr. Gottwald's attorney Gillian Bar sent a letter to Ms. Sebert's attorney, Mr. Goldring, notifying him that Ms. Sebert was in breach of the

Gottwald Agreement. The letter specifically detailed that: "by not delivering recordings sufficient to comprise one (1) album" and by "rendering services [to DAS] as a recording artist for the purpose of making recordings during the Term of the [Gottwald] Agreement," Ms. Sebert was "in breach of the [Gottwald] Agreement." The letter also said that any third party agreement for Ms. Sebert's services as a recording artist (i.e., her January 2006 contract with DAS) would be an act of "tortious interference with [Gottwald's] contractual rights."

In May 2006, settlement talks between Ms. Sebert and Mr. Gottwald occurred by email, but soon ceased. Two years later, on May 25, 2008, DAS sent Ms. Sebert and her mother Pebe an email using explicit language with respect to Mr. Gottwald and advising the two to "say good riddance to dr. luke and don't look back."

The one-year contractual period between DAS and Ms. Sebert referred to above had lapsed on January 27, 2007, without a recording agreement having been entered into. Ms. Sebert, however, continued to be represented by DAS, who then allegedly executed a recording agreement on her behalf with Arthouse/WMG (Warner Agreement). At this point, Mr. Gottwald reappeared and allegedly induced Ms. Sebert to breach the Warner Agreement. On September 11, 2008, Ms. Sebert's counsel sent DAS a letter purporting to terminate her agreement with DAS, retroactive to January 27, 2007. DAS rejected the termination letter and continued to offer its services to Ms. Sebert. She then entered into a recording agreement with Jive Records. In January 2010, Jive Records released Ms. Sebert's first album.

DAS brought this action seeking damages against Mr. Gottwald, for Mr. Gottwald's alleged intentional interference with the DAS/Ms. Sebert contract. Mr. Gottwald filed an answer and two counterclaims against DAS.

The first counterclaim, tortious interference with contract, alleges that DAS intentionally caused and induced Ms. Sebert to breach the Gottwald Agreement and prevented Ms. Sebert from performing under it. The second counterclaim, tortious interference with prospective economic advantage, alleges that the Gottwald/Sebert relationship would have resulted in future contracts for the writing and production of songs during the term of the DAS management agreement, if not for DAS' tortious interference. DAS then filed a motion to dismiss Mr. Gottwald's counterclaims pursuant to CPLR 3211 (a) (5), claiming that the statute of limitations on both claims had expired, and pursuant to CPLR 3211 (a) (7), claiming the respective counterclaims each failed to state a cause of action, and that the motions to dismiss should be treated as summary judgment motions pursuant to CPLR 3211 (c), in that neither counterclaim presented a triable issue of fact without a showing of intent.

**Discussion**

On a motion to dismiss pursuant to CPLR 3211(a), the pleading is to be afforded a liberal construction and the court will afford the non-movant the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. *Arnav Industries, Inc. Retirement Trust v Brown Raysman,* 96 NY2d 300 (2001). In opposing a 3211 (a) motion, the non-movant is entitled to supplement the allegations in the pleading by submitting evidence in affidavit form. *Sargiss v Magrelli,* 12 NY3d 527, 530-31 (2009).

In asserting a motion to dismiss on the ground of the statute of limitations pursuant to CPLR 3211 (a) (5), the movant bears the burden to offer "*prima facie* proof that the time in which to sue has expired." *Island ADC, Inc. v Baldassano Architectural Group, P.C.*, 49 AD3d 815, 816 (2008).

The parties agree that the three-year statute of limitations in CPLR 214 (4) for injury to property applies to both counterclaims. DAS has provided various documents in support of its motion to dismiss Mr. Gottwald's counterclaims. These documents include faxes from Ms. Sebert's attorneys to Mr. Gottwald's attorneys which declared Ms. Sebert's repudiation, as well as Ms. Sebert's signed contract with DAS, dated January 2006. Mr. Gottwald has submitted additional documents in his various responses and subsequent submissions. These documents include a copy of the exclusive Gottwald Agreement, as well as the email from DAS to Ms. Sebert on May 25, 2008.

In tort, no cause of action accrues and, therefore, the statute of limitations does not start to run until damage has been incurred. The sole question presented here regarding the statute of limitations issue is whether damage was incurred when the Gottwald Agreement was breached in 2006, as DAS contends, or in 2008, when Mr. Gottwald alleges he would have first suffered a pecuniary loss of Ms. Sebert's potential recording sales. It is the absence of such sales which is alleged to manifest DAS' alleged tortious conduct.

Tortious Interference with Contract

A claim for tortious interference with contract must prove four elements: "(1) the existence of a contract between the plaintiff and a third party; (2) the defendant's knowledge of the contract; (3) the defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to the plaintiff." *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 (1993). Injury, in damages, is essential to the tort claim. *Id.* Inducing another to break a contract does not become a legal wrong upon which an action may be based *until* damage is suffered as a result. *Fury Imports, Inc. v Shakespeare Co.*, 625 F2d 585, 588 (5th Cir 1980) (citing *Israel v Wood Dolson Co.*, 1 NY2d 116, 120, (1956)).

Mr. Gottwald contends that the cause of action for tortious interference with contract does not accrue until pecuniary damages are sustained. To support this proposition, he cites the *Kronos* decision (81 NY2d 90), which held the statute of limitations on a contract claim did not begin to run until four years after the subject contract had been breached. The reason for the four-year delay in accrual in *Kronos*, however, was due to the nature of the contract there. That contract was a *nonexclusive* license which only granted the plaintiff licensee a "most favored licensee" status. In entering into a license agreement with a third party without giving preference to the plaintiff, the defendant "could have chosen not to follow through on the second contract," or "decided to abide by [the license in favor of the plaintiff], thereby protecting whatever interest plaintiff had (citations omitted). . ." *Id.* at 97. In fact, defendant there did continue to honor the financial terms of his *nonexclusive* agreement with the plaintiff through 1987. *Id.* Only in 1988, when defendant specifically informed plaintiff he would not continue payments on plaintiff's license, was the contractual relationship between plaintiff and defendant completely severed. *Id.* at 93. Damages thus were sustained in 1988. *Id.* at 97.

In *Kronos*, injury did not occur at the moment the defendant merely *promised* to a third party to act in a manner counter to plaintiff's interests, because the license at issue was non-exclusive. The case here, however, is distinguishable from *Kronos*. As DAS contends here, when Ms. Sebert repudiated her agreement with Mr. Gottwald (within two months of its execution), Mr. Gottwald was on notice that Ms. Sebert had completely renounced her obligations to produce songs within the five-month period referred to in their agreement. Further, the Gottwald Agreement was *exclusive*; the moment Ms. Sebert signed with a third party, she breached the Gottwald Agreement again. She was not only promising to act in a

manner counter to Mr. Gottwald's interests when she signed with DAS – she was *acting* counter to Mr. Gottwald's interests.

The other cases cited by Mr. Gottwald are inapposite, as their facts are not aligned with the case here. Rather, this case is most like *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132 (2009). There, in 1999, IDT and Telefonica entered into a memo of understanding (MOU) whereby IDT was promised a 10% share in a company to be established by Telefonica (Newco). In June 2000, Telefonica breached the MOU on the advice of Morgan Stanley. On November 5, 2004, IDT sued Morgan Stanley for intentional interference with their contract with Telefonica. The court determined that the requisite damage to sustain the tort claim were satisfied from the *moment* Telefonica breached the original MOU, in June 2000. *Id.* at 141. Similarly, here, there were two breaches: one, the letters written by Ms. Sebert's counsel in December 2005, and the second, when she signed with DAS in January 2006. Each resulted in immediate damage to Mr. Gottwald.

Under the Gottwald Agreement, Mr. Gottwald was given total control over Ms. Sebert's career. She was obligated to deliver her first album to Mr. Gottwald in February 2006 (five months after she signed with him). Mr. Gottwald was planning to use this album to find Ms. Sebert a major label recording agreement. Ms. Sebert's disavowal of the Gottwald Agreement in December 2005 was the date of her first breach. At that time, Mr. Gottwald was on notice that he would neither receive the initial recordings within five months nor have control over obtaining a major label recording deal for Ms. Sebert.

It is Mr. Gottwald's contention that Ms. Sebert breached the Gottwald Agreement at some point in 2008, when his work with Ms. Sebert quite possibly would have resulted in a hit album for her and an earned profit for him. However, Mr. Gottwald clearly acknowledges in his

answer that Ms. Sebert had entered into a contract with DAS on January 27, 2006. At this time, then, Mr. Gottwald was on notice that Ms. Sebert had officially severed her exclusive relationship with him and with KMI, and he would no longer have control over her career. This conduct surely constitutes a breach of the Gottwald Agreement. Whether the first date of a breach was the date of Ms. Sebert's repudiation letter or the date Ms. Sebert entered in the agreement with DAS, it is clear that the claim accrued over three years ago, and the statute of limitations period has expired.

Accordingly, Mr. Gottwald's counterclaim for tortious interference with contract is dismissed.

Tortious Interference with Prospective Economic Advantage

A claim for tortious interference with prospective business advantage must allege that: (a) the plaintiff had business relations with a third party; (b) the defendant interfered with those business relations; (c) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; and (d) there was resulting injury to the business relationship. *Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 108 (1st Dept 2009), *lv to appeal denied*, 15 NY3d 703 (2010).

A claim for tortious interference with prospective economic advantage is ripe from the moment damages are incurred. In tort, damages result from injury. As noted above, it was on December 6, 2005 that Ms. Sebert's attorneys notified Mr. Gottwald's attorneys by mail that Ms. Sebert was repudiating the Gottwald Agreement. DAS argues this repudiation was Ms. Sebert's breach. It points out that Mr. Gottwald's claim even alleges that DAS "went so far as to instruct and otherwise cause [Ms. Sebert] to repudiate (and thereby breach) the Gottwald . . . Agreement." On January 27, 2006, Ms. Sebert signed with DAS. On February 7, 2006,

Mr. Gottwald's attorneys wrote to Ms. Sebert's attorneys expressly asserting that, in rendering services to DAS, Ms. Sebert was in breach. In fact, Mr. Gottwald never alleged any further breaches by Ms. Sebert.

In his complaint, however, Mr. Gottwald alleges further injury: that the interference of DAS reached its "apex" in 2008 when DAS negotiated for Ms. Sebert to enter into an exclusive recording contract with Warner Music, in "express contravention" of the contractual rights of KMI and Mr. Gottwald. At that point in time, however, the Gottwald Agreement already had been repudiated and completely breached. Damages from the breach (loss of Ms. Sebert's exclusive services) previously had been incurred. The statute of limitations on his tort claims already had commenced running.

Mr. Gottwald mistakenly contends that the statute of limitations is reset with every new act by the alleged tortfeasor, DAS. Rather, the statute of limitations for tortious interference with prospective economic advantage is only reset with a new, independent breach. Mr. Gottwald improperly cites *Omni Food Sales v Boan*, No. 06 Civ. 119, 2007 WL 2435163 (S.D.N.Y., Aug. 24, 2007), where the plaintiff initiated action against its former president, alleging he made "secret payments" to a co-defendant, in furtherance of a conspiracy that resulted in the termination of a contract between plaintiff and a third party. The court there explained that each "secret payment" could constitute an "individual breach" necessary to restart the statute of limitations. However, merely alleging additional wrongful acts by the tortfeasors [DAS], without an additional, independent breach, does not start the statute of limitations running anew.

This reasoning is reinforced in *Thome v The Alexander & Louisa Calder Foundation*, 70 AD3d 88 (1st Dept. 2009). The plaintiff there submitted two pieces by the late artist

Alexander Calder for authentication and publication by the Calder Foundation, a private organization, in 1997. Over the years, plaintiff was unable to sell the works because the Foundation never published the works. In 2005, one potential buyer resubmitted the materials for publication, and was told catalogue numbers would not be issued. Plaintiff alleged that the statute of limitations for tortious interference with economic advantage had been reset with each contract lost as a result of the Foundation's continued inaction.

The court found no tortious interference. Citing *Kronos*, the court determined nonetheless that any potential cause of action would have accrued at the time the Foundation *first* failed to issue the numbers for the catalogue, thus "injuring" plaintiff. *Id.* at 108. (citing *Kronos,* 81 NY2d at 94). The court added that even when a "claim is based entirely on the assertion that the defendants' action (or inaction) had a negative effect on contractual relationships that plaintiff might later have had, the subsequent injuries alleged do not affect the timeliness issue." *Id.* (citing *Johnson v Nyack Hospital*, 891 F Supp 155, 166 (SDNY 1995)).

Mr. Gottwald argues that DAS' continued "acts of interference" reset the statute of limitations on Mr. Gottwald's cause of action for tortious interference with prospective economic advantage. According to Mr. Gottwald, these "acts of interference" include repeatedly instructing Ms. Sebert to refrain from working with or even speaking to Mr. Gottwald, not delivering her recordings to Mr. Gottwald, and, on May 25, 2008, sending a profanity-laced email advising Ms. Sebert to ". . . say good riddance to dr. luke and don't look back . . ." The email certainly was unprofessional and harsh. However, at that point, Ms. Sebert already had breached the contract with KMI and Mr. Gottwald, and moved forward solely with DAS. Subsequent actions did not reset the statute of limitations on the tort claim. No matter how

inappropriate, the May 25 e-mail was sent two years after the last breach alleged in Mr. Gottwald's complaint.

Accordingly, Mr. Gottwald's counterclaim for tortious interference with prospective economic advantage is dismissed.

Recoupment

CPLR 203(d) allows a defendant to assert an otherwise untimely counterclaim that arose out of the same transactions alleged in the complaint, even though an independent action by defendant would be barred at the time the action was commenced. *Bloomfield v Bloomfield,* 97 NY2d 188, 193 (2001). Under this provision, however, an untimely counterclaim can act only as a "shield" for "recoupment purposes," and does not permit the defendant to obtain affirmative relief. *DeMille v DeMille,* 5 AD3d 428, 429 (2d Dept 2004) (citing *Bloomfield*, 97 NY2d 188 (2001)).

Here, both parties agree that Mr. Gottwald's counterclaims arise out of the same transactions giving rise to the complaint. In such case, CPLR 203(d) and the case law thereunder indicate that an untimely counterclaim should not be barred to the extent of the demand in the complaint. *Coppola v Coppola*, 260 AD2d 774, 776 (3d Dept 1999) (citing *Enrico & Sons Contr. v Bridgemarket Assocs.*, 252 AD2d 429 (1st Dept 1998)). Accordingly, Mr. Gottwald is granted leave to limit the remedies sought to the amount demanded by plaintiff in his complaint. *U.S. Fid. and Guar. Co. v Delmar Dev. Partners, LLC*, 22 AD3d 1017, 1020 (3d Dept 2005).

ORDERED that plaintiff's motion to dismiss defendant Lukasz Gottwald's counterclaims is granted; and it is further

ORDERED that defendant and counterclaim plaintiff Lukasz Gottwald is granted leave to amend his answer pursuant to CPLR 203 (d) to assert a recoupment counterclaim as provided in the court's decision herein.

Dated: June 28, 2011

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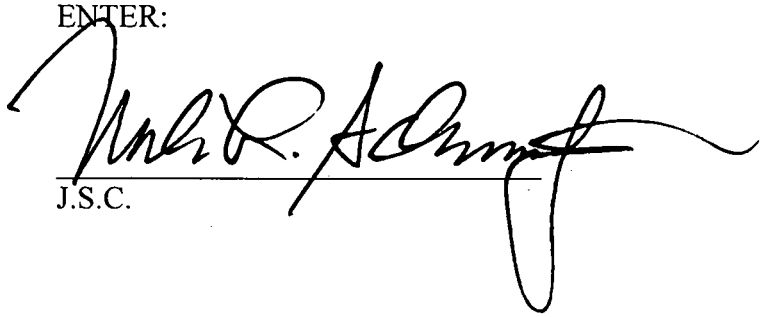

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