

Masucci v Sonido, Inc.
2011 NY Slip Op 33892(U)
April 20, 2011
Supreme Court, New York County
Docket Number: 603594/2005
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Eileen Bransten

PART 3

Index Number : 603594/2005
MASUCCI, ALEX
 vs.
SONIDO
 SEQUENCE NUMBER : 011
 REARGUMENT/RECONSIDERATION

INDEX NO. 603 594/2005

MOTION DATE 12/12/2010

MOTION SEQ. NO. 011

MOTION CAL. NO. _____

this motion ~~is~~ for Re-Argue

PAPERS NUMBERED

1
2
3

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 IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM

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

Dated: 4-20-11

Eileen Bransten
J.S.C.

HON. EILEEN BRANSTEN

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 THREE

-----X
ALEX MASUCCI,

Plaintiff,

Index No.: 603594/2005
Motion Date: 12/17/2010
Motion Seq. No.: 011

-against-

SONIDO, INC.; THE ESTATE OF GERALD
MASUCCI; MELISSA GOSNEL, individually
and as Trustee; CORRINE MASUCCI;
VALSYN, S.A.; PROTEL RECORDS;
SHERIDAN SQUARE ENTERTAINMENT, INC;
JOSEPH BIANCO; V2 GROUP (INTERNATIONAL);
E-MUSICA; and E-MUSICA ACQUISITION CORP.;

Defendants.

-----X
PRESENT: EILEEN BRANSTEN, J.:

Plaintiff Alex Masucci moves to re-argue the denial of his summary judgment motion.

For the reasons set forth below, Plaintiff's motion is denied.

PROCEDURAL HISTORY

On December 29, 2006, Plaintiff Alex Masucci ("Plaintiff") filed a Verified Third Amended Complaint against Defendants Sonido, Inc. ("Sonido"); The Estate of Gerald Masucci ("Estate"); Melissa Gosnel, individually and as Trustee ("Gosnel"); Corrine Masucci ("C. Masucci"); Valsyn, S.A. ("Valsyn"); Protel Records ("Protel"); Sheridan Square Entertainment, Inc. ("Sheridan Square"); Joseph Bianco ("Bianco"); V2 Group

(International) (“V2”); E-Musica (“E-Musica”); and E-Musica Acquisition Corp. (“E-Musica Acquisition”) (collectively “Defendants”).

On November 3, 2009, Plaintiff moved for partial summary judgment. On August 13, 2010, the court denied Plaintiff’s summary judgment motion (“August 2010 Order”). On September 27, 2010, Plaintiff moved to re-argue the denial of his summary judgment motion. Plaintiff’s Memo of Law in Support of Motion for Re-Argument (“Plaintiff’s Memo). On October 15, 2010, Sonido opposed Plaintiff’s motion for re-argument. Sonido’s Opposition to Plaintiff’s Motion for Re-argument (“Defendant’s Opp.”). On October 21, 2010, Plaintiff replied. Plaintiff’s Reply Memorandum of Law in Support of Motion for Re-Argument (“Plaintiff’s Reply”). Oral argument was held on the matter on December 8, 2010.

FACTUAL BACKGROUND

This case is about a contract dispute.

Jerry Masucci is the founder of Fania, one of the biggest salsa record labels in the world. Complaint, ¶ 12. In 1986, Jerry Masucci formed Defendant Sonido to hold Fania’s assets. *Id.*, ¶ 6. Jerry Masucci died in 1997. *Id.*, ¶ 13. Following Jerry Masucci’s death, Defendant Estate became Sonido’s owner. *Id.*, ¶ 40.

Beginning in 2001, Plaintiff and Sonido contracted for Plaintiff to find buyers for Sonido’s Fania assets. Affidavit of Stuart Jackson, Esq. (“Sonido’s Affidavit”), ¶ 5. Sonido and Plaintiff contracted with each other three times. The first contract (the “2001 Contract”)

expired in 2002 with no sale occurring. *Id.* The second contract (the "2002 Contract") also expired without a sale taking place. *Id.*, ¶ 6. In 2004, Plaintiff and Sonido contracted for a third time (the "2004 Contract"). *Id.*, ¶ 13. During the 2004 Contract negotiations, Stuart Jackson, Esq. ("Jackson") represented Sonido. *Id.*

Plaintiff's attorney, Max Folkenflik ("Folkenflik") drafted the 2004 Contract. Affidavit of Alex Masucci ("Plaintiff's Affidavit"), Ex. A; Sonido's Affidavit, Ex. G. The 2004 Contract states that: 1) Sonido would pay Plaintiff a 3% commission on the sale of Fania's assets (the "3% commission clause"); and 2) Sonido would not transact business with a party introduced by Plaintiff without Plaintiff's approval (the "non-circumvention clause"). Plaintiff's Affidavit, Ex. A; Sonido's Affidavit, Ex. G.

Pursuant to the contracts, Plaintiff attempted to find buyers for Sonido's Fania assets. Plaintiff's Affidavit, ¶¶ 9. Potential buyers included Defendant V2 and Defendant Sheridan Square. *Id.*, ¶ 9, 11. Plaintiff introduced V2 to Sonido after the 2002 Contract expired but before the 2004 Contract was signed. *Id.* Also after the 2002 Contract expired but before the 2004 Contract was signed, Sonido allegedly began negotiations for the sale of assets to Defendants E-Musica and E-Musica Acquisition. Sonido's Affidavit, Ex. D. Plaintiff alleges that E-Musica and E-Musica Acquisition are related and that both are affiliated with Defendant Protel. Complaint, ¶ 9.

On July 21, 2005, Sonido sold its Fania assets to E-Musica Acquisition. Plaintiff's Affidavit, Ex. C. At that time, Sonido knew that Morgan Stanley funded E-Musica

Acquisition's purchase. Sonido's Affidavit, ¶ 10. Morgan Stanley had previously been the potential financier for the aborted sale of Fania's assets to V2, whom Plaintiff had introduced to Sonido. Plaintiff's Affidavit, ¶ 9. E-Musica and V2 signed a contribution agreement (the "Contribution Agreement") on the same day that Sonido sold its Fania assets to E-Musica Acquisition. Sonido's Affidavit, Ex. J; Plaintiff's Affidavit, Ex. E. As part of the Contribution Agreement, V2 acquired E-Musica stock. Sonido's Affidavit, Ex. J; Plaintiff's Affidavit, Ex. E.

STANDARD OF LAW

1. Motion to Re-argue

"A motion for leave to re-argue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." *William P. Pahl Equipment Corp v. Kassis*, 182 A.D. 2d 22, 27 (1st Dep't 1992) (citations and quotations omitted); *see also Zuckerman v. Goldstein*, 2010 N.Y. Slip. Op. 32146U, at *11 (N.Y. Supreme Court N.Y. County 2010) (quoting *William P. Pahl*, 182 A.D. 2d at 27). "Re-argument is not designed to afford the unsuccessful party successive opportunities to re-argue issues previously decided" (*William P. Pahl*, 182 A.D. 2d at 27; *Zuckerman*, 2010 N.Y. Slip. Op. 32146U, at *11).

ANALYSIS

Plaintiff's motion for re-argument is denied.

Plaintiff argues that the court misapprehended and overlooked the law and the facts on three issues: 1) on whether there was sufficient evidence linking the 3% commission clause with valid consideration; 2) on whether Plaintiff's introduction of the buyer was a condition precedent to Plaintiff's receiving the 3% commission; and 3) on whether Plaintiff introduced the buyer to Sonido. Plaintiff's Memo, pp. 2-3; Plaintiff's Reply, p. 1.

Plaintiff first argues that the court misapprehended and overlooked the law and the facts as to the evidence linking the 3% commission clause with valid consideration. Plaintiff's Memo, pp. 4-5. The court found that it was "unclear whether Plaintiff's past, present and future efforts ... are related to the 3% commission clause." August 2010 Order, p. 7. Plaintiff argues that the court's finding was "unduly narrow" and that the 2004 Contract's language, along with Plaintiff's testimony and Jackson's testimony establish that the 3% commission was supported by past consideration. Plaintiff's Memo, pp. 2-5; Plaintiff's Reply, pp. 2-4. However, the court duly considered and weighed this evidence previously, and found that the evidence was not sufficient to grant summary judgment. August 2010 Order, pp. 6-7. The language of the 2004 Contract is ambiguous, and the evidence presented is not sufficient to eliminate all issues of material fact so as to establish a connection between the 3% commission clause and valid consideration. The court did not

misapprehend or overlook the law or facts on this question. *William P. Pahl*, 182 A.D. 2d at 27.

Plaintiff next argues that the court misapprehended the law and facts as to whether Plaintiff needed to introduce the buyer to Sonido in order for Plaintiff to receive the 3% commission. The court stated that there was material issue of fact as to whether the 3% commission in the 2004 Contract represents a “finder’s fee” for Plaintiff’s introducing the ultimate buyer to Sonido. August 2010 Order, p. 7. Plaintiff argues that the only requirement for Plaintiff to earn the 3% commission is that Sonido’s Fania assets be sold, and that there is no requirement that the Fania assets be sold to a buyer introduced by Plaintiff. Plaintiff’s Memo, pp. 6-7; Plaintiff’s Reply, pp. 3-4.

Plaintiff’s argument here is unavailing. Plaintiff argues that no consideration is necessary for Plaintiff to earn the 3% commission. However, a contract is not enforceable if there is no consideration. *M.A. Garments v. Apparel Winds, Inc.*, 13 A.D.3d 111, 112 (1st Dep’t 2004). In addition, “past consideration is no consideration.” *Kastil v. Carro*, 145 A.D.2d 388, 389 (1st Dep’t 1988). The 2004 Contract’s language is ambiguous as to exactly what consideration the 3% commission is in exchange for: past, present, future or none at all. August 2010 Order, pp. 6-7. If the contract refers to past consideration, it would be unenforceable. *Kastil*, 145 A.D.2d at 389. If there is no consideration at all, the contract is also unenforceable. *M.A. Garments*, 13 A.D. 3d at 112. It is an open question as to whether

there was any valid consideration for the 3% commission, and the court did not misapprehend or overlook any facts or law on this issue. *William P. Pahl*, 182 A.D. 2d at 27.

Finally, Plaintiff argues that the court misapprehended the law and facts as to whether Plaintiff introduced Defendant Sonido to the ultimate buyer. Plaintiff argues that it introduced V2 to Sonido, and that V2 was the ultimate buyer of Sonido's Fania assets. Plaintiff's Memo, p. 7. However, E-Musica purchased Sonido's Fania Assets, not V2. Sonido's Affidavit, Ex. J; Plaintiff's Affidavit, Ex. E.

Plaintiff argues that the sale to E-Musica was effectively a sale to V2 because V2 acquired some of E-Musica's stock through a Contribution Agreement. August 2010 Order, pp. 9-10; Plaintiff's Memo, p. 7. However, upon re-examination, the court finds that Plaintiff did not tender sufficient evidence to show that the V2 was the ultimate buyer or that Sonido knew of V2's involvement sufficient to trigger the payment of commission. August 2010 Order, pp. 9-10. The documentary evidence on the issue is ambiguous and does not sufficiently state a case for summary judgment. The court did not overlook or misapprehend any facts or law on this issue either. *William P. Pahl*, 182 A.D. 2d at 27.

The court did not misapprehend or overlook and facts or law in its August 2010 order denying Plaintiff's summary judgment motion. Plaintiff's motion to re-argue is denied.

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Accordingly, it is

ORDERED that Plaintiff Alex Masucci's motion to re-argue the court's order of August 13, 2010 is DENIED.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
April 20, 2011.

ENTER

Hon. Eileen Bransten, J.S.C.