

Simmons v Rich Kid Entertainment 1
2012 NY Slip Op 33833(U)
August 1, 2012
Supreme Court, New York County
Docket Number: 105405/10
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

EA
8/26/12
K

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

**EARL SIMMONS a/k/a DMX and
BOOMER X PUBLISHING INC.,**

Plaintiffs,

- against -

INDEX NO. 105405/10

MOTION SEQ. NO. 001

**RICH KID ENTERTAINMENT 1, RICH KID
MUSIC, INC., 27 RED MUSIC and RHONDO
ROBINSON,**

Defendants.

The following papers, numbered 1 to 3 were read on the pre-answer motion by defendants to dismiss the complaint as against them pursuant to CPLR 3211(a).

RECEIVED

AUG 16 2012

**MOTION SUPPORT OFFICE
NYS SUPREME COURT
CIVIL**

FILED

Notice of Motion/ Order to Show Cause — Affidavits Exhibits
AUG 16 2012

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo)

**NEW YORK
COUNTY CLERK'S OFFICE**

PAPERS NUMBERED

1, 2, 3

4, 5, 6

7, 8

Cross-Motion: ☐ Yes ☐ No

This is an action brought by plaintiffs, Boomer X Publishing Inc. (Boomer X)¹ and Earl Simmons a/k/a DMX (Simmons), the sole shareholder and owner of Boomer X against defendants Rich Kid Entertainment 1 (RK Entertainment), Rich Kid Music, Inc. (RK Music), 27 Red Music (Red 27), and Rhondo Robinson (Robinson) alleging monetary damages for breach of contract, breach of fiduciary duty, fraud, conversion, constructive trust, unjust enrichment and an accounting. Before the Court is a motion by the defendants to dismiss plaintiff's complaint pursuant to CPLR 3211(a)(1), (3), (5) and (7). Plaintiff is in opposition to the motion.

BACKGROUND

Plaintiffs commenced this action by the filing of a summons and unverified complaint on

¹ The case caption does not identify the plaintiff Boomer X Publishing as a corporation, however, the complaint identifies it as corporation organized and existing under the laws of New York (Notice of Motion, exhibit A, Complaint ¶ 2) and Simmons as the owner since its inception in October 2000 (*id.* ¶ 11).

April 26, 2010. The complaint states that Simmons is a well-known hip-hop artist who has been in the music industry for over nineteen years and licenses many of his own musical compositions through his publishing company Boomer X, for which he receives royalties. The complaint states that defendants are "in the publishing business and act in the capacity of copyright administrators for various recording artists . . . in consideration of a fee" (Notice of Motion, exhibit A, Complaint ¶ 14). The complaint also states that:

"in or around October of 2001. . . the Defendants approached the attorney for Simmons . . . with a one (1) year publishing administration agreement with Defendants whereby Plaintiffs would be assigned a Ten (10%) Percent interest in the copyrights to all titles owned and/or controlled by Plaintiffs that were written during the year 1998, to Defendants and in return, Defendants agreed to collect foreign royalties, in specified countries, generated by those songs written during the year 1998, whether by album sales or third party licenses, and forward to plaintiffs their share of the royalties collected, to wit, Ninety (90%) Percent" (Complaint ¶ 16).

It is plaintiffs' contention that subsequent to both parties signing the publishing administration agreement (2001 Contract), the defendants "criminally, fraudulently and unilaterally began misappropriating royalties through misrepresentations to major record distributors and performing rights societies" (*id.* at ¶ 22). Defendants allegedly began collecting royalties on plaintiff's songs written during the 1998 year, pursuant to the 2001 Contract, as well as collecting royalties for songs that were not written during the 1998 year and in territories not specified in the 2001 Contract (*id.* at ¶ 23-24). In addition to exceeding the scope of the 2001 Contract, plaintiffs maintain that defendants never submitted to them any payments or written accountings, thus breaching said contract (Affirmation in Opposition ¶ 14).

Before the Court is a motion by the defendants to dismiss the complaint: 1) pursuant to CPLR 3211(a)(1), on the grounds that a defense is founded upon documentary evidence, to wit, the alleged October 2001 agreement between the parties; (2) pursuant to CPLR 3211(a)(7), on the grounds that the plaintiff fails to state a cause of action in counts two through eight; and (3)

pursuant to CPLR 3211(a)(5), on the grounds that the plaintiffs' claims are barred by the statute of limitations. Moreover, defendants move to dismiss the complaint of Boomer X, pursuant to CPLR 3211(a)(3), on the grounds that Boomer X does not have the legal capacity to sue, having been dissolved by proclamation on January 27, 2010, prior to the filing of the complaint.

In support of their motion, defendants submit, *inter alia*, a copy of the complaint; an affidavit of Rhondo Robinson, President of RK Music; an unsigned copy of the alleged 2001 Contract (Defendants' Contract Version) between RK Music and Boomer X; and a New York State Division of Corporations, State Records and UCC print-out on Boomer X, a New York corporation, which indicates it was rendered inactive and dissolved by proclamation, on January 27, 2010, for failure to file New York State Taxes with the New York State Department of Taxation and Finance.

In opposition plaintiffs submit, *inter alia*, an affirmation of plaintiffs' attorney with exhibits, including a Copyright License Agreement, dated June 19, 2001, between RK Music and Universal Music wherein RK Music warrants that it is the owner of Copyrights to certain compositions, and grants a Copyright License to Universal Music on four songs, one of which was written in part by Simmons;² an affidavit of Nakla Walker, Simmons' personal manager, in which she states that Simmons is incarcerated in Arizona, and that Simmons has engaged an accountant and is seeking to reactivate Boomer X as a New York Corporation as soon as he files back tax returns (Aff'd ¶¶ 5-11); and the affidavit of Donald Reid, Jr., a former employee/independent contractor of the defendants Robinson and RK Music, who states he drafted the contract between RK Music and Boomer X during his employment with defendants and attaches as an exhibit to his Affidavit an unsigned copy of the 2001 Contract (Plaintiffs'

² One of the songs included in this Copyright License Agreement, entitled "We In Here" lists Simmons as a writer in Schedule A to the Agreement (see Affirmation in Opposition, exhibit B). Plaintiffs aver that RK Music did not have such authority to enter into said contract.

Contract Version), which is different from the Defendants Contract Version.

DISCUSSION

CPLR 3211(a) provides:

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

1. a defense is founded on documentary evidence; . . .
3. The party asserting the cause of action has not legal capacity to sue; . .
5. the action may not be maintained because of... statute of limitations
7. the pleading fails to state a cause of action[.]

When determining a CPLR 3211(a) motion, "we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Wieder v Skala*, 80 NY2d 628 [1992]). "We also accord plaintiffs the benefit of every possible favorable inference" (*511 W. 232nd Owners Corp.*, 98 NY2d at 152; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d at 414).

CPLR 3211(a)(1):(5); and (7)

"In order to prevail on a motion to dismiss based on documentary evidence pursuant to CPLR 3211(a)(1) , the documents relied upon must definitively dispose of plaintiff's claim" (*Bronxville Knolls v Webster Town Ctr. Pshp.*, 221 AD2d 248, 248 [1st Dept 1995]; *Demas v 325 W. End Ave. Corp.*, 127 AD2d 476 [1st Dept 1986]). A CPLR 3211(a)(1) motion "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]).

In support of their motion, defendants submit their alleged version of the 2001 Contract which is not signed by either of the parties. In his affidavit Robinson states that Defendants'

Contract Version of the 2001 Contract is the agreement that he signed in his capacity as President of RK Music in October of 2001, but he is unable to locate the executed contract. Plaintiffs, in opposition, submit their version of the 2001 Contract, which is also unsigned and is a completely different agreement than Defendant's Contract Version. Plaintiffs submit the Reid Affidavit which states that Plaintiff's Contract Version is the correct contract which was signed by both parties (aff'd ¶¶ 7-11). Thus, the Court finds that defendants have failed to meet their burden under CPLR 3211(a)(1), as the documentary evidence submitted by defendants does not definitively establish defendants' defense as a matter of law. Specifically, Defendant's Contract Version is unsigned and thus does not establish the terms of the agreement or even the parties thereto, and therefore cannot "utterly refute[] plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen*, 98 NY2d at 326). Accordingly, the portion of defendant's motion seeking to dismiss the complaint, pursuant to CPLR 3211(a)(1), is denied.

Upon a 3211(a)(7) motion to dismiss for failure to state a cause of action, the "question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts 'can be fairly gathered from all the averments'" (*Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept 1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). "However imperfectly, informally or even illogically the facts may be stated, a complaint, attacked for insufficiency, is deemed to allege 'whatever can be implied from its statements by fair and reasonable intendment'" (*Foley v D'Agostino*, 21 AD2d at 65, quoting *Kain v Larkin*, 141 NY 144, 151 [1894]). "[W]e look to the substance [of the pleading] rather than to the form (*id.* at 64). A 3211(a)(7) motion to dismiss "is solely directed to the inquiry of whether or not the pleading, considered as a whole, fails to state a cause of action. Looseness and verbosity must be overlooked on such a motion if any cause of action can be spelled out from the four corners of the pleading" (*id.* at 64-65 [internal citation omitted]). In order to defeat a pre-answer motion

to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory (see *Bonnie & Co. Fashions, Inc. v. Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]).

In looking to the substance of the pleading rather than to its form (see *Foley v D'Agostino*, 21 AD2d at 64), and in viewing the complaint in the light most favorable to the plaintiff and affording the plaintiff the benefit of every possible inference (see *Leon v Martinez*, 84 NY2d at 87-88), the Court finds that the plaintiff's claims survive a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7) because the factual allegations in the complaint raise cognizable legal theories.

Defendants also move to dismiss the plaintiffs' complaint pursuant to CPLR 3211(a)(5) on the grounds that the causes of action are time-barred by the statute of limitations (def. memo. p. 8, ¶ 3). Upon a 3211(a)(5) motion to dismiss a complaint as time-barred under the applicable statute of limitations, the initial burden is on the defendant to show that the claims against him are time-barred by the applicable statute of limitations (see *Tristaino v Teitler*, 24 Misc3d 1244[A], 2009 NY Slip Op 51876[U] [Sup Ct, Suffolk County 2009]). Based upon the Court's finding that the documentary evidence and the unverified complaint does not conclusively establish whether a contract existed between the parties and if so, the terms of said contract, this portion of defendants' motion seeking to dismiss the complaint, pursuant to CPLR 3211(a)(5), is denied without prejudice.

CPLR 3211(a)(3)

Pursuant to CPLR 3211(a)(3), a defendant's motion to dismiss will be granted when the party asserting the claim lacks the legal capacity to sue. The doctrine of legal capacity "concerns a litigant's power to appear and bring its grievance before the court. Legal capacity to sue, or lack thereof, often depends purely on the litigant's status, such as that of an infant, an adjudicated incompetent, a trustee, certain governmental entities or, as in this case, a business

corporation" (*Security Pacific National Bank v Evans*, 31 AD3d 278, 279 [1st Dept 2006] [international citation omitted]).

After dissolution, a delinquent corporation retains a limited de jure existence solely for the purpose of winding up its affairs, and retains capacity to bring suit for that purpose (see Tax Law § 203-a[10]; Business Corporation Law §§ 1009, 1006). A dissolved corporation, such as Boomer X, has no existence, either de jure or de facto, except for a limited de jure existence for the sole purpose of winding up its affairs (see *Lodato v Greyhawk N. Am., LLC*, 39 AD3d 496 [2d Dept 2007]). Furthermore, a delinquent corporation lacks the capacity to commence an action absent reinstatement by payment of back taxes (see *B & O Realty Corp. v Jeng*, 201 AD2d 439 [1st Dept 1994]; *Lorisa Capital Corp. v Gallo*, 119 AD2d 99, 110 [2d Dept 1986]; 319 Smile v Forman Fifth, LLC, 2006 WL 5111101 [Sup Ct, New York County, 2006] ["Courts have held that when the corporation was dissolved as a delinquent corporation and had *not* sought reinstatement by paying back taxes, that said corporation does not have legal capacity to sue"]).

As Boomer X has not sought reinstatement,³ it has no legal capacity to commence this action and therefore, dismissal of the complaint is warranted (see *Metered Appliances v 75 Owners Corp.*, 225 AD2d 338 [1st Dept 1996]). Accordingly, the portion of defendants' motion to dismiss the complaint, pursuant to CPLR 3211(a)(3), is granted as against Boomer X only.

CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that the portion of defendants' motion to dismiss plaintiffs' complaint

³ The Court notes that Boomer X has represented that it is seeking reinstatement as a New York Corporation, because it was rendered inactive and subsequently dissolved, by the New York State Department of Taxation and Finance, for failure to file State tax returns. Plaintiff's business manager asserts in her affidavit dated February 16, 2011, that Simmons, while still incarcerated in Arizona, has hired an accountant to seek the corporation's reinstatement. However, as of July 2012, plaintiffs have not reinstated the corporate status and Boomer X remains a dissolved corporation.

pursuant to CPLR 3211(a)(1) and (7) is denied; and it is further;

ORDERED that the portion of defendants' motion to dismiss plaintiffs' complaint pursuant to CPLR 3211(a)(5) is denied without prejudice; and it is further,

ORDERED that the portion of defendants' motion to dismiss plaintiffs' complaint pursuant to CPLR 3211(a)(3) is granted as to Boomer X Publishing Inc. only, it is further, .

ORDERED that the remaining parties are directed to appear for a preliminary conference in Part 7, 60 Centre Street, Room 341 on October 3, 2012 at 11:00 A.M; and it is further,

ORDERED that the defendants shall serve a copy of this order with notice of entry upon all parties and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated:

8/1/12

FILED

AUG 16 2012

NEW YORK

COUNTY CLERK'S OFFICE

Enter:

PAUL WOOTEN J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

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