Sirico v F.G.G. Prods., Inc.
2013 NY Slip Op 30365(U)
February 5, 2013
Supreme Court, New York County
Docket Number: 604403/2005
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: EILEEN BRANSTEN, Justice

PART 3

Index Number : 604403/2005
SIRICO, PHYLLIS J.
vs.
F.G.G. PRODUCTIONS, INC.
SEQUENCE NUMBER : 005
DISMISS ACTION

INDEX NO. 604403/05
MOTION DATE 8/2/12
MOTION SEQ. NO. 005

The following papers, numbered 1 to 3, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits | No(s). 1
Answering Affidavits — Exhibits | No(s). 2
Replying Affidavits | No(s). 3

Upon the foregoing papers, it is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

and the matter is directed to the Trial Support office for random re-assignment to a non-Commercial Division part of the Supreme Court, New York County as per the Court's Order on p. 12 of the memorandum decision.

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

Dated: 2-5-13

[signature], J.S.C.
EILEEN BRANSTEN

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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PHYLLIS SIRICO and PEGGY S. DAVISON,

Plaintiffs,

-against-

Index No.: 604403/05
Motion Date: 8/2/12
Mot. Seq. No.: 005

F.G.G. PRODUCTIONS, INC., UNIVERSAL MUSIC GROUP, INC., and UNIVERSAL MUSIC ENTERPRISES, INC.,

Defendants.

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BRANSTEN, J.

Defendants Universal Music Group, Inc. and Universal Music Enterprises, Inc. (collectively "Universal") move to dismiss Plaintiffs' Complaint pursuant to CPLR 3211(a)(1) and 3211(a)(7), or in the alternative, for summary judgment. Plaintiffs Phyllis Sirico ("Sirico") and Peggy S. Davison ("Davison") oppose Universal's motion in part, as it pertains to their claims for breach of contract and violation of New York Civil Rights Law § 51; however, Plaintiffs consent to the dismissal of their unjust enrichment claim. For the reasons that follow, Defendants' motion is granted as to the breach of contract and unjust enrichment claims and denied as to Davison's Section 51 claim.

I. BACKGROUND[1]

The instant action arises from allegations that Defendants failed to pay royalties to Sirico and misused Davison's image in connection with the 1963 song "My Boyfriend's Back" (the "Song").

[1] Unless otherwise noted, all facts are drawn from the First Amended and Supplemental Complaint.

On March 25, 1963, Sirico and her sister Barbara Allbut Brown ("Brown"), who is not a party to this action, entered into an exclusive recording contract (the "Recording Contract") with Sabina Records ("Sabina"). (Affirmation of Joseph J. McFadden in Support of Motion to Dismiss ("McFadden Affirm."), Ex. A (the "Am. Compl."), ¶ 10.) The Recording Contract permitted Sabina to record Sirico and Brown, who were then performing under the name "The Angels" . *Id.* at ¶ 11; *see also* McFadden Affirm., Ex. C. The Recording Contract also required Sabina to pay Sirico and Brown a percentage of royalties for the sale of records and for the licensing of The Angels' songs for use in movies and television shows. *Id.* at ¶ 12.

Defendant F.G.G. Productions, Inc. ("FGG") subsequently approached Sirico and Brown to record the song "My Boyfriend's Back" (the "Song"). *Id.* at ¶ 15. Sirico and Brown hired Davison to sing lead vocals on the recording. *Id.* at ¶ 16. Davison did not enter into a written agreement of any kind with The Angels, FGG or Sabina. *Id.* at ¶ 17.

In April of 1963, FGG purchased the Recording Contract from Sabina. *Id.* at ¶ 19; *see also* McFadden Affirm., p. 4. On April 10, 1963, Sirico and Brown sent a letter to FGG acknowledging the assignment of the Recording Contract from Sabina to FGG. *Id.* at ¶ 20.

After the Angels had recorded the Song, FGG entered into an agreement with Smash Records, Universal's predecessor-in-interest (the "Smash Contract"). *Id.* at ¶ 23. Universal contends that the Smash Contract provided that Universal would purchase the master

recording of the Song.[2] Plaintiffs allege that FGG did not simply sell the rights to the Song. Instead, Plaintiffs contend that FGG and Smash Records became joint venturers pursuant to the Smash Contract.[3] Am. Compl., ¶ 24.

Plaintiffs claim that FGG and Universal continued to produce, market and distribute recordings of the Song after FGG and Smash Records entered into the Smash Contract. *Id.* at ¶ 28-29. FGG only paid Plaintiffs royalties on record sales of the Song until June 30, 1964. *Id.* at ¶ 33-34.

Plaintiffs allege that Universal has re-released the Song many times and in multiple formats since Defendants ceased paying royalties to Plaintiffs. *Id.* at ¶¶ 30-31, 35-36. Plaintiffs further claim that Defendants continue to use Davison's likeness and voice without her consent. *Id.* at ¶ 37-38.

A. Procedural History

Brown, Sirico and Davison filed suit against FGG, Polygram Records, Mercury Records and Mason & Company in the United States District Court for the Central District of California in 1998 (the "California Action"). In that action, the plaintiffs brought claims for trademark infringement, false designation and description, unfair competition, breach of

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[2] Memorandum of Law in Support of Defendants Universal Music Group Inc. and Universal Music Enterprises, Inc.'s Motion to Dismiss Plaintiffs' First Amended Complaint, or Alternatively, for Summary Judgment ("Defs.' Memo"), p. 10.

[3] None of the parties have been able to locate a copy of the agreement between FGG and Smash Records.

contract, rescission, fraud, conversion, trespass to chattel, and for an accounting, a constructive trust and a declaratory judgment. (McFadden Affirm., Ex. D, p. 1.) The District Court dismissed Plaintiffs' causes of action for an accounting, trespass to chattel, conversion, trademark infringement, false designation and description and unfair competition for failure to state a claim. *See Id.*, Ex. E. The District Court dismissed without prejudice Plaintiffs' claims for breach of contract, fraud, rescission and for a declaratory judgment. *Id.* at p. 25.

On December 19, 2005, Sirico and Davison brought the instant action solely against FGG. The court granted FGG's motion for summary judgment dismissing Sirico and Davison's claims in a decision dated December 28, 2007 (Moskowitz, J.).[4] Plaintiffs subsequently moved to renew or reargue its opposition to FGG's motion for summary judgment. The court denied Plaintiffs' motion in a decision dated April 21, 2008 (Bransten, J.). Plaintiffs appealed the decision, and the First Department reversed the denial of Plaintiffs' motion to renew, holding that Plaintiffs' claims against FGG for breach of contract and violation of New York Civil Rights Law § 51 could potentially have merit. *See Sirico v. F.G.G. Productions, Inc.*, 71 A.D.3d 429 (1st Dep't 2010).

On December 2, 2011, Plaintiffs filed the First Amended and Supplemental Complaint, and, for the first time, raised claims against Universal for breach of contract,

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[4] The court denied the portion of FGG's motion seeking summary judgment of its counterclaims against Sirico.

violation of Section 51 of the New York Civil Rights Law and unjust enrichment. This First Amended and Supplemental Complaint is the subject of the instant motion to dismiss.

II. STANDARD OF LAW

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction." *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994). The court accepts the facts as alleged in the non-moving party's pleading as true and accords the non-moving party the benefit of every possible favorable inference. *Id.*

III. ANALYSIS

A. Res Judicata

Defendants contend that Sirico's claim for breach of contract and Davison's cause of action under Section 51 of the New York Civil Rights Law are barred by the doctrine of res judicata. Defendants argue that both claims were resolved on the merits in the California Action. Plaintiffs counter that their claims should not be dismissed under the doctrine of res judicata because the claims accrued after the California Action had been decided.

"[P]rinciples of res judicata require that 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy.'" *Xiao Yang Chen v. Fischer* 6 N.Y.3d 94, 100 (quoting *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357 (1981))

Contrary to Defendant's assertion, the California Action was not "brought to a final conclusion." *Id.* The District Court declined to consider the merits of Plaintiffs' claim for

breach of contract, and dismissed the claim without prejudice.[5] (McFadden Affirm., Ex. E, p. 25.)

"[A] dismissal 'without prejudice' lacks a necessary element of res judicata – by its terms such a judgment is not a final determination on the merits." *Landau, P.C. v. LaRossa*, 2008 NY Slip Op. 5772 at *4 (June 25, 2008). As the California District Court did not reach a final resolution in the California Action, the doctrine of res judicata does not bar Plaintiffs' claims in the instant action. Defendants' motion to dismiss Plaintiffs' claims on the grounds of res judicata is thus denied.

B. Sirico's Breach of Contract Claim

Defendants argue that Sirico's breach of contract claim should be dismissed on the merits because Universal never entered into a contract with Sirico. Sirico does not dispute Universal's contention that it never entered into a contract with Sirico or The Angels. Instead, Sirico argues in her brief that Universal and FGG "entered into a transactions for the purchase of master recordings and that [Universal] thereby assumed contractual obligations to Sirico." (Memorandum of Law in Partial Opposition to Motion to Dismiss ("Pl. Memo"), p. 8.) This argument, however, directly contradicts the allegations contained in the Amended Complaint. The Amended Complaint states that "there is no evidence that FGG sold or transferred outright its rights and obligations under the [Smash Contract]. . . . FGG's actions with respect to Plaintiffs have always been inconsistent with a sale." (Am. Compl., ¶¶ 24, 27.)

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[5] Plaintiffs did not raise a claim for violation of section 51 of the Civil Rights Law in the California Action.

The only allegation in the First Amended and Supplemental Complaint regarding Universal's obligations under the Smash Contract is that Universal and FGG entered into "a joint venture or collaboration between producer and record label whereby FGG and Smash Records became jointly and severally [liable] under the Recording Contract." (Am. Compl., ¶ 24.) Sirico did not provide any support for her "joint venture" theory in her brief or by way of affidavits. Furthermore, Sirico did not oppose Universal's argument that, even if the parties did enter into a joint venture, such venture would not obligate Universal to make royalty payments directly to Sirico. Not having either alleged the existence of a contract between Sirico and Universal or demonstrating how the alleged creation of a joint venture establishes a contractual duty, Sirico fails to state a claim for breach of contract against Universal. Universal's motion to dismiss Sirico's claim for breach of contract is, therefore, dismissed.

C. Davison's Section 51 Claim

In its March 4, 2010 decision in this case, the Appellate Division held that Davison's claim against FGG under Civil Rights Law § 51:

> may also be viable, since the statute prohibits the use of a person's name, portrait, picture or voice for advertising or trade purposes without written consent, and it is undisputed that Davidson had no written contract of any kind with FGG. . . . That claim survives only to the extent it concerns offending material published within one year of the date this action was filed."

(McFadden Affirm., Ex. G, p. 29 (internal citations and quotation marks omitted).)

Section 51 provides that "any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent . . . may . . . sue and recover damages for any injuries sustained by reason of such use." N.Y. CLS Civ. R. L. § 51. Pursuant to CPLR 215, the statute of limitations for a Section 51 claim is one year.

Defendant asserts that Davison's claims are barred by the "single publication rule." The single publication rule states that a cause of action under Section 51 "accrues on the date the offending material is first published." *Nussenzweig v. diCorcia*, 9 N.Y.3d 184, 188 (2007).

Davison alleges that Universal republished the Song many times in multiple formats within the applicable limitations period. Therefore, Davison argues, her claims fall under the republication exception to the single publication rule. "Republication, retriggering the period of limitations, occurs upon a separate aggregate publication from the original, on a different occasion, which is not merely a delayed circulation of the original edition." *Hoesten v. Best*, 34 A.D.3d 143, 150 (1st Dep't 2006). In deciding whether to apply the republication exception, the court considers whether "the subsequent publication is intended to and actually reaches a new audience . . . whether the second publication is made on an occasion distinct from the initial one, whether the republished statement has been modified in form or in content, and whether the defendant has control over the decision to republish." *Id.* at 150-51 (internal citations and quotation marks omitted).

Universal asserts that the recordings of the Song that it released during the limitations period were merely unaltered versions of the Song as it was recorded in 1963, and therefore do not fall within the republication exception.

Davison, however, alleges that Universal republished the song in altered formats, i.e., "in physical and digital formats as part of compilations" long after the Song was originally released. (Am. Compl., ¶ 35.) Accepting the facts as alleged in the First Amended and Supplemental Complaint as true, as it must on a motion to dismiss, *Leon*, 84 N.Y.2d at 88, Davison's sufficiently alleges that Universal republished the Song "on an occasion distinct from the initial one" and that Universal "modified [the Song] in form or in content." *Hoesten*, 34 A.D.3d at 150.

Universal's motion to dismiss Davison's claim under Civil Rights Law § 51 is thus denied.

D. Universal's Motion for Summary Judgment

Universal alternatively moves for summary judgment. As the court explained above, Sirico's breach of contract claim against Universal is dismissed. The court will therefore address the portion of Universal's summary judgment motion regarding Davison's Section 51 claim.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the

absence of any material issues of fact. Failure to make such a prima facie showing requires a denial of the motion." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986).

Universal sets forth no evidence whatsoever in support of its motion for summary judgment on Davison's Section 51 claims. Universal has not met its burden of demonstrating that no material issue of fact exists as to whether and in what form Universal published the Song and whether it used Davison's image without her consent during the limitations period. *Id.* Consequently, Universal's motion for summary judgment is denied.

E. Monetary Threshold for Commercial Division Cases

At oral argument on July 25, 2012, the court asked the parties to submit letters outlining the amount of damages at issue in this case.

As explained above, the statute of limitations on a Section 51 claim is one year. Therefore, Davison's calculation of damages can only be based on damages she allegedly incurred in the year before she brought the instant action. Davison asserts that her claims are worth $50,000 in damages, but Davison provides no basis for this figure. (Plaintiffs' Letter to Court dated July 26, 2012, p. 1.) Nonetheless, even if it were an accurate reflection of Davison's damages, the amount is insufficient to maintain an action in the Commercial Division. (*See* 22 NYCRR § 202.70.)

While Sirico's breach of contract claim against Universal is dismissed, her breach of contract claim against FGG remains. Sirico contends that "based on royalty statements in [their] possession," Sirico is entitled to $124,000 of royalties from January 2000-December

2009. (Plaintiffs' Letter to Court dated July 26, 2012, p. 1.) Plaintiffs estimate that Sirico should be entitled to approximately $25,000 in "additional royalties and interest" for the period of 2010 to present. *Id.* Plaintiffs do not explain how they reached these amounts, although it appears that they included interest in their calculation of damages.

FGG has calculated, based on what it says are the same royalty statements, that Sirico is due, at most, $17,441.14 in royalties for the 2000-2009 period. FGG asserts, and Sirico does not appear to contest, that the royalty contract at issue provided that Sirico and her sister, who is not a party to this action, would receive 2.7% of the royalties on the Song. (Defendant's Letter to Court dated July 27, 2012, p. 2.) Sirico's share would thus be half of this amount, or, 1.35% of total royalties. Defendants have calculated that total royalties for the Song during the relevant period were $1,291,936.20. Sirico's 1.35% of $1,291,936.20 comes to $17,441.14.

The amount of damages at issue in this case appears to be far below the threshold for assignment to the Commercial Division. (*See* 22 NYCRR § 202.70.) The court echoes the sentiment of Plaintiffs' counsel, who stated at oral argument that he was "not sure how [the action] came to the commercial division." Transcript of Oral Argument dated July 25, 2012, 16:3-5. As such, the court finds that the matter does not meet the monetary threshold for assignment to the Commercial Division in New York County. (22 NYCRR § 202.70.)

IV. CONCLUSION

For the reasons set forth above, it is hereby

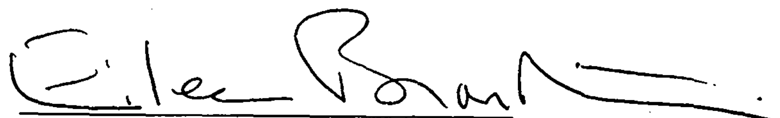
ORDERED that the Universal Music Group, Inc. and Universal Music Enterprises, Inc.'s motion to dismiss, is granted as to plaintiff Phyllis J. Sirico's claim for breach of contract and plaintiffs Sirico and Peggy S. Davison's claim for unjust enrichment, and the motion is otherwise denied; and it is further

ORDERED that Universal Music Group, Inc. and Universal Music Enterprises are directed to serve an Answer to the First Amended and Supplemental Complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that this matter is directed to the Trial Support office for random re-assignment to a non-Commercial Division part of the Supreme Court, New York County.

Dated: New York, New York
February 5, 2013

ENTER:



Hon. Eileen Bransten, J.S.C.