

Specialists Entertainment, Inc. v Moore

2013 NY Slip Op 32234(U)

September 19, 2013

Sup Ct, New York County

Docket Number: 158017/12

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Saliann Scarpulla
Justice

PART 19

Index Number : 158017/2012
SPECIALISTS ENTERTAINMENT,
vs.
MOORE PKA PINK, ALECIA
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the accompanying decision/order.

This constitutes the decision and order of the Court.

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

Dated: 9/19/13

(SA), J.S.C.
SALIANN SCARPULLA

- 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: CIVIL TERM: PART 19

-----X
SPECIALISTS ENTERTAINMENT, INC.,

Plaintiff,
-against-

Index No.: 158017/12
Submission Date: 5/1/13

ALECIA MOORE P/K/A PINK AND SONY MUSIC
HOLDINGS, INC.,

DECISION AND ORDER

Defendant,

-----X

For Plaintiff:
Anthony Motta
50 Broadway, Suite 2202
New York, NY 10004

For Defendants:
Dechert LLP
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New York, NY 10036

Papers considered in review of the motion to dismiss and cross motion to amend:

- Notice of Motion1
- Notice of Cross Motion2
- Memo in Opposition 3
- Memo in Reply 4

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for breach of contract and unilateral mistake, defendants Alecia Moore p/k/a Pink (“Moore”) and Sony Music Holdings, Inc. (“Sony”) move to dismiss the complaint, and plaintiff Specialists Entertainment, Inc. (“Specialists”) cross moves for leave to serve and file an amended complaint pursuant to CPLR §3025(b).

In September 1999, Moore entered into a Producers Agreement with Specialists and non-party Thunderstone Productions, Inc. f/s/o Steve Clarke (“Thunderstone”) to produce sound recordings of two musical compositions for Moore’s album “Can’t Take

Me Home.” After production of the recordings, Moore would deliver the recordings to record label LaFace Records (Sony is the successor in interest to LaFace Records).

According to the terms of the Producers Agreement, Thunderstone and Specialists were paid an advance against royalties in the amount of \$35,000. Moore agreed to pay royalties to Thunderstone and Specialists, with each party entitled to 50% of those royalties.

In January 2000, Moore executed a Letter of Direction, in which she authorized LaFace Records to pay producer royalties in equal shares to Specialists and Thunderstone, stating “although the [Producers] Agreement requires me to pay for the services of the producer, I hereby request and irrevocably authorize you to make payments for his services on my behalf.” The Letter of Direction further provided, “your compliance with this authorization will constitute an accommodation to me alone; producer is not a beneficiary of it. All payments to producer under this authorization will constitute payment to me, and you will have no liability by reason of any erroneous payment you make or failure to comply with this authorization. I will indemnify and hold you harmless against any claims asserted against you and any damages, losses or expenses incurred by you by reason of any such payment otherwise in connection herewith.”

In early 2012, Specialists contacted Sony, informing Sony that it had not received any royalties. Sony responded by email dated September 12, 2012 and by letters to Thunderstone dated May 9, 2012 and September 26, 2012 (the “2012 correspondence”).

Sony explained that as of 2004, “earnings in excess of advances charged totaled \$72,743.08,” 50% of which was paid to Thunderstone. The remaining 50% of royalties earned from 2000-2004 was put on hold because Sony did not have a valid address for Specialists’ representative. However, in 2004, due to an administrative error, Sony erroneously released 100% of the monies to Thunderstone and from that point forward, 100% of the royalties were paid to Thunderstone.

Sony further explained that cumulative post-2004 earnings totaled \$9,434.18. Sony indicated that it would charge the amount of the post-2004 overpayment, which was \$4,717.09, as an advance against Thunderstone’s royalty account and send Specialists a check for \$4,874.81, which represented 50% of post-2004 earnings and 100% of producer royalties payable on October 1, 2012 for earnings for the June 30, 2012 accounting. Sony informed Specialists that “due to statute of limitations reasons getting restitution from [Thunderstone] of the mistaken payments made prior to 2006 will prove difficult if not impossible. Nevertheless, [Sony] has agreed to pay [Specialists] the share of Post 2004 Earnings [it] would have received and from this point forward we will pay your client 100% of the earnings of the producer account until your client reaches parity with the sums paid to [Thunderstone] at which point (which is unlikely to occur in the foreseeable future) we will revert to paying 50% to each.”

Specialists then commenced this action, asserting causes of action for breach of contract against Moore and Sony and unilateral mistake against Sony, and sought to recover \$36,213.31 in unpaid producer royalties for 2000-2004.

Moore and Sony now move to dismiss the complaint. They first argue that the claims are barred by the statute of limitations because the alleged breach occurred in 2004, and the action was commenced in 2012. Moore and Sony contend that the 2012 correspondence did not revive the breach of contract claims pursuant to General Obligations Law §17-101 because (1) Moore was not a party to the 2012 correspondence; (2) Sony was not acting as Moore's agent in the correspondence; and (3) the correspondence did not amount to an acknowledgment of a debt by either Moore or Sony sufficient to trigger General Obligations Law §17-101.

They further argue that, in any event, the complaint fails to state a breach of contract cause of action against Sony because neither Sony, nor its predecessor, was a party to the Producer Agreement, and any breach of contract claim premised on the Letter of Direction must also fail because Specialists was not an intended third-party beneficiary of that Letter.

Sony and Moore also argue that the claim for unilateral mistake must be dismissed because there was no contract between Sony and Specialists, and this claim can only be made if a party is seeking reformation or rescission of a contract, which is not the case here.

Specialists cross moves for leave to serve and file an amended complaint pursuant to CPLR §3025(b). Specialists' proposed amended complaint includes (1) a breach of contract claim against Moore, (2) a unilateral mistake claim against Sony, and (3) a third-party beneficiary claim against Sony.

In support of its cross motion and in opposition to Moore and Sony's motion, Specialists argues that the 2012 correspondence constituted an acknowledgment of the debt by Sony as Moore's agent, and therefore, the claims are not barred by the statute of limitations. Specialists next argues that it is entitled to assert a claim against Sony as a third-party beneficiary of the Letter of Direction, despite the limiting language set forth in the letter, because it was clearly intended for Specialists' benefit and the commitment to undertake the obligation by Sony was immediate.

Discussion

In determining whether to grant a motion to dismiss pursuant to CPLR §3211, the court should accept as true the facts alleged in the pleading, accord the drafter the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

Pursuant to CPLR §213, a claim for breach of contract is governed by a six-year statute of limitations. The statute of limitations begins to run when a cause of action accrues, that is, "when all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court." *Aetna Life & Casualty Co. v.*

Nelson, 67 N.Y.2d 169, 175 (1986). Here, the Producers Agreement was executed by Moore, Specialists and Thunderstone in 1999. In 2000, by Letter of Direction, Moore authorized LaFace Records to begin paying producers royalties to Specialists and Thunderstone, with each receiving a 50% share. Due to an administrative error, in 2004, Sony released 100% of royalties earned from 2000-2004 to Thunderstone, instead of apportioning 50% to Thunderstone and 50% to Specialists. Specialists commenced this action in 2012, alleging breach of contract. Given that Specialists commenced the action approximately eight years after the breach occurred, the statute of limitations has expired.

The court first notes that Specialists can not state a claim against Sony for breach of the Producer Agreement because Sony was not a party to that agreement.

Specialists' argument centers around its claim that it was an intended third-party beneficiary of the Letter of Direction. It claims that as a third-party beneficiary, it is entitled to recover for breach of the Letter even though the statute of limitations has expired because Sony revived the claim on its behalf, and on Moore's behalf, through the 2012 correspondence. Specialists also argues that through the 2012 correspondence, Sony, on Moore's behalf, revived a claim for Moore's breach of the Producers Agreement.

Specialists claims that in the 2012 correspondence, Sony acknowledged the existence of the debt on its behalf, and on behalf of Moore, and expressed an intent to pay the owed royalties, thereby invoking General Obligations Law §17-101, which allows a

time-barred claim to be revived. Section 17-101 provides, “an acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions under the civil practice law and rules other than an action for the recovery of real property.” To constitute an acknowledgment, the writing must be signed by the party to be charged and must recognize an existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it. *Hon Fui Hui v. East Broadway Mall, Inc.*, 4 N.Y.3d 790, 791 (2005); *Lew Morris Demolition Co. v. Board of Education*, 40 N.Y.2d 516, 521 (1976).

The court first finds that Moore was not a party to the 2012 correspondence and thus any claim for breach of the Producers Agreement or Letter of Direction asserted against her remains barred by the statute of limitations. Specialists’ claim that Sony was acting as Moore’s implied agent in the 2012 correspondence is unavailing. Apparent agency may arise from words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. *1230 Park Assoc., LLC v. Northern Source, LLC*, 48 A.D.3d 355 (1st Dept. 2008). The 2012 correspondence makes no mention of Moore, and Specialists submits no evidence that Sony had actual or implied authority to act on Moore’s behalf in any matters related to the 2012 correspondence.

The court finds, however, that Specialists can state a claim for breach of contract as a third-party beneficiary of the Letter of Direction against Sony. A party may recover as a third-party beneficiary of a contract by establishing (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit, and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost. *Alicea v. New York*, 145 A.D.2d 315 (1st Dept. 1988). When performance is to be made directly to a third party, that party is generally deemed an intended beneficiary of the contract and is entitled to enforce it or there is, at least, a presumption that the contract was for the benefit of the third party. *Nepco Forged Products, Inc. v. Consolidated Edison Co.*, 99 A.D.2d 508 (2nd Dept. 1984).

The best evidence of the intent to bestow a benefit upon a third party is the language of the contract itself. *767 Third Ave. LLC v. Orix Capital Mkts., LLC*, 26 A.D.3d 216, 218 (1st Dept. 2006). Here, the Letter of Direction provides that “your compliance with this authorization will constitute an accommodation to me alone; producer is not a beneficiary of it.”¹ However, the language of the Letter of Direction

¹ Sony argues that Specialists can not state a claim as a third-party beneficiary because of precedent that states that a provision in a contract that expressly negates enforcement by a third party is controlling (see e.g. *Mendel v. Henry Phipps W., Inc.*, 6 n.Y.3d 783 [2006]; *Edward B. Fitzpatrick, Jr. Constr. Corp. v. County of Suffolk*, 138 A.D.2d 446 [2nd Dept. 1988]). Sony’s argument is without merit because here, in the Letter of Direction, there is no provision expressly negate enforcement by third parties.

also confers an immediate benefit upon Specialists, through Moore's directive to Sony to pay Specialists its royalties. Therefore, the content of the Letter of Direction, taken as a whole, could demonstrate that the intention of the parties was for Specialists to be the beneficiary of the agreement, as performance of the agreement was to be made directly to Specialists.

Further, in the September 12, 2012 email, Sony clearly acknowledged the debt and took responsibility for its repayment. Specifically, it provided, "nevertheless, [Sony] has agreed to pay [Specialists] the share of Post 2004 Earnings [it] would have received and from this point forward we will pay your client 100% of the earnings of the producer account until your client reaches parity with the sums paid to [Thunderstone] at which point (which is unlikely to occur in the foreseeable future) we will revert to paying 50% to each." In other words, Sony acknowledged that a debt was owed and expressed its intention to repay it by agreeing to pay Specialists 100% of any earnings going forward, albeit admitting that they would likely be insufficient to achieve recovery of the entire amount owed, until the full overpayment to Thunderstone was recovered. In doing so, Sony revived the breach of contract claim pursuant to General Obligations Law §17-101.

However, the claim for unilateral mistake asserted against Sony must be dismissed. An agreement can be rescinded upon a showing of one party's unilateral mistake resulting in the unjust enrichment of the other party. *See Cox v. Lehman Bros.*, 15 A.D.3d 239 (1st Dept. 2005). Alternatively, an agreement can be reformed upon a showing of

fraudulently induced unilateral mistake. *Greater N. Y. Mut. Ins. Co. v. United States Underwriters Ins. Co.*, 36 A.D.3d 441 (1st Dept. 2007). Specialists inappropriately asserts this claim as it is not relevant to the facts at issue in this case. Specialists is not seeking rescission or reformation of a contract.

The court grants Specialists' cross motion to amend its complaint only to the extent that it can add a claim for breach of contract as a third-party beneficiary of the Letter of Direction against Sony.

In accordance with the foregoing, it is hereby

ORDERED that defendants Alecia Moore p/k/a Pink and Sony Music Holdings, Inc.'s motion to dismiss the complaint and plaintiff Specialists Entertainment, Inc.'s cross motion for leave to serve and file an amended complaint pursuant to CPLR §3025(b) are resolved as follows: plaintiff Specialists Entertainment, Inc. is directed serve an amended complaint within 30 days of the date of this order, asserting a claim for breach of contract as a third-party beneficiary of the Letter of Direction against Sony Music Holdings, Inc.,

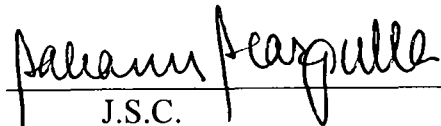
and all claims asserted against Alecia Moore p/k/a Pink and Sony Music Holdings, Inc. in the original complaint are dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: New York, New York
September 19, 2013

ENTER:



J.S.C.
SALIANN SCARPULLA