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

PRESENT: HON. MANUEL J. MENDEZ PART 13
Justice

MITCH LEIGH AND HELLEN DARION,

Plaintiff(s),

- v -

VEGA PRODUCTIONS, INC.,

Defendant(s).

INDEX NO. 651188/13

MOTION DATE 9-11-2013

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on this motion and cross-motion to/ for Dismiss:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits _____cross motion _____	4-6
Replying Affidavits _____	

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

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant's Motion to Dismiss Plaintiffs' Complaint is granted. Plaintiffs' Cross-Motion for Summary Judgment is denied.

This is an action seeking damages and a declaration concerning the payment of royalties associated with a musical play (the "Play").

On or about November 15, 1964, Plaintiff Mitch Leigh (the "Composer"), Joseph Darion (the "Lyricist"), Dale Wasserman (the "Bookwriter", and collectively with Composer and Lyricist, the "Authors"), and Marre-Makers, Inc., executed a Minimum Basic Production Contract (the "Contract") which defined the rights and obligations related to the Play.

Paragraph Tenth of the Contract states that, "Albert Marre (hereinafter sometimes referred to as "Marre") shall be known as the "Collaborating Author."

Paragraph Tenth Z of the Contract states that, "[i]t is further understood and agreed that Marre, in consideration of the services rendered by him in connection

with the Play, shall be deemed a collaborating author in connection therewith, and shall be entitled to receive the payments hereinafter set forth. However, he shall not be entitled to receive any credit as an Author, nor shall he be entitled to exercise any of the Authors' rights of approval."

Paragraph Tenth BB of the Contract states that, "[a]ll proceeds derived by the Authors from the disposition of all subsidiary, additional, motion picture and foreign rights in and to the Play, including but not by way of limitation, all rights under Paragraphs Seventh and Eighth [of the Contract] shall be divided among all of the Authors of the Play and Marre...in the following proportion...To Marre - thirteen and one third (13 1/3%) percent thereof.

Paragraph Thirteenth of the Contract states that, "[t]his Contract shall be binding upon and inure to the benefit of the respective parties hereto and their respective successors in interest (except as herein otherwise limited)..."

Defendant is Marre's successor-in-interest as related to the Contract.

Marre died on September 4, 2012.

On or about February 10, 2013, attorneys for the Plaintiffs instructed the administrator of the copyrights related to the Play to cease making payments to Defendant.

Plaintiffs commenced this proceeding seeking a declaration that Defendant is no longer entitled to royalty payments following the death of Marre and the return of all payments made after Marre's death.

Defendant filed the instant Motion seeking to dismiss Plaintiffs' Complaint pursuant to CPLR Section 3211 (a)(1) and (a)(7).

Plaintiffs oppose Defendant's Motion and have Cross-Moved for Summary Judgment.

A motion to dismiss under CPLR Section 3211 should be granted where the documentary evidence conclusively establishes a defense as a matter of law. *See Greenapple v. Capital One, N.A.*, 92 A.D. 3d 548, 939 N.Y.S.2d 351 (N.Y.A.D. 1st Dept. 2012). *See also Leon v. Martinez*, 84 N.Y.2d 83, 638 N.E.2d 511 (1994).

Defendant relies on the language of the Contract, asserting that nothing therein limits royalty payments to the life of Marre.

Plaintiffs assert a number of arguments against dismissal and for summary judgment.

Plaintiffs first assert that the Contract was a personal services contract and therefore terminated upon the death of Marre. However, the Contract is not a personal service contract. As the cases cited by Plaintiffs note, such contracts contemplate skilled personal services, such that performance by a substituted individual would be unacceptable. *See Lacy v. Getman*, 119 N.Y. 109, 23 N.E. 452 (1890); *see also Minevitch v. Puleo*, 9 A.D.2d 285, 193 N.Y.S.2d 833 (N.Y.A.D. 1st Dept. 1959). Plaintiffs do not assert any personal service to be provided by Marre after the execution of the Contract. Royalty payments were not conditioned on any continued performance, Marre was assigned a percentage of royalty payments outright.

Plaintiffs next argue that the lack of any provision explicitly entitling Marre to post-mortem payments means that he is not entitled to such payments. Again, Plaintiffs incorrectly rely on personal service contract case law suggesting that post-mortem rights must be explicitly stated. The plain language of the Contract made an assignment of royalty payments. The Court notes that there are no provisions regarding royalty payments after the death of any of the Authors, yet those payments have continued to the successors in interest of deceased Authors, one of which is Plaintiff Hellen Darion.

Thirdly, Plaintiffs argue that because the Contract incorporated a boilerplate form contract, the parties should not be bound by its language. Plaintiffs argue that the "Contract is not drawn with care benefitting the work to which it pertains." Aside from a lack of legal support for this position, Plaintiff's argument is refuted by Plaintiffs' own admission that the portions of the Contract related to the royalty payments was not boilerplate contract language, but written by the parties expressly to modify the form contract.

Plaintiffs' fourth argument is that the duration of the Contract is vague, therefore New York law requires it not be considered to continue in perpetuity. However, the plain language of the Contract is not vague. Paragraph Tenth BB limits the Contract to "all proceeds derived by the Authors from the disposition...[of] the Play." So long as such proceeds are derived, the Contract continues. When the proceeds end, the Contract terminates.

Plaintiffs' final argument is that public policy favors their position. Plaintiffs argue that public policy favors authors' right to the value of their copyrightable material. Nothing about this case challenges public policies regarding authors' ownership rights. This case recognized that the Authors had an ownership right, but also recognizes that they transferred a percentage of those rights pursuant to a written agreement. Public policy also favors enforcing contracts according to the plain language of the agreement memorialized by the parties, rather than re-interpreting contracts decades later when most of the parties to the agreement have died. *See Marine Midland Bank-S. v. Thurlow*, 53 N.Y.2d 381, 425 N.E.2d 805 (1981); *Laskey v. Rubel Corp.*, 303 N.Y. 69, 100 N.E.2d 140 (1951).

As an aside, the Court also notes that the Contract refers to Marre as the

'Collaborating Author'. Fortunately, the Court need not attempt to quantify the import of such a designation in evaluating Plaintiffs' allegations, but it is curious nonetheless. The plain language of the assignment of royalty percentages that follows the designation obviates the need for further analysis.

On a motion to dismiss, non-moving parties are accorded the benefit of every possible favorable inference, and the court determines only whether the facts as alleged fit within any cognizable legal theory. *See Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 389 N.Y.S.2d 314, 357 N.E.2d 970 (1976).

However, no possible favorable inference can change the plain language of the Contract which assigned a percentage interest in royalty payments to Marre and his respective successors in interest. Absent fraud or mutual mistake, neither of which are alleged here, oral evidence is unacceptable to contradict the clear terms of a written agreement. *See Leumi-Fin. Corp. v. Richter*, 17 N.Y.2d 166, 216 N.E.2d 579 (1966).

Defendant has proven that the documentary evidence conclusively establishes a defense as a matter of law.

Accordingly, it is the decision and order of this Court that Defendant's Motion to Dismiss Plaintiffs' Complaint is granted and Plaintiffs' Cross-Motion for Summary Judgment is denied.

Accordingly, it is ORDERED that Defendant Vega Productions, Inc.'s Motion to Dismiss is granted and the Proceeding is dismissed, and it is further,

ORDERED that the Clerk shall enter judgment dismissing the Action, and it is further,

ORDERED that Plaintiffs' Cross-Motion for Summary Judgment is denied.

ENTER : MANUEL J. MENDEZ
J.S.C.

Dated: September 18, 2013

MANUEL J. MENDEZ
J.S.C.

Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE