

**MPL Music Publ., Inc. v ABKCO Music & Records,
Inc.**

2013 NY Slip Op 33659(U)

June 19, 2013

Sup Ct, New York County

Docket Number: 650794/09

Judge: Milton A. Tingling

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MILTON A. TROTTING J.S.C. Justice

PART 44

MPL Music Publishing, Inc.

INDEX NO. 650794/2009

MOTION DATE 4/22/13

MOTION SEQ. NO. 002

ABKCO Music and Records, Inc.

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

This motion is decided in accordance with the annexed decision. Conference on August 5, 2013. Note of Issue to be filed by 11/30/13.

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

Dated: 06/28/2013

[Signature] J.S.C.

- 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

-----X
MPL MUSIC PUBLISHING, INC.,

Plaintiff,

-against-

ABKCO MUSIC & RECORDS, INC.,

Defendants.
-----X

Index No. 650749/09

The defendant ABKCO Music & Records, Inc. ("ABKCO") moves for partial summary judgment declaring that ABKCO's royalty obligation to the plaintiff, MPL Music Publishing, Inc. ("MPL"), in the United States is limited to sales of 78 rpm and 45 rpm single records. ABKCO also seeks summary judgment on its first counterclaim for attorney's fees. MPL opposes the motion and has filed a cross-motion seeking an order dismissing ABKCO's counterclaims and granting summary judgment in MPL's favor for breach of contract.

FACTS

This dispute arises out of a purchase agreement between MPL and ABKCO regarding two recordings performed by The Rays. The Rays are a recording group that was formed in the 1950s. The group originally had a recording agreement with Magda Record Company ("Magda") whereby Magda was obligated to tender royalty payments to The Rays.

Pursuant to the Purchase Agreement, dated September 16, 1957, Magda sold the Master Recordings of the songs "Silhouettes" and "Daddy Cool" performed by The Rays to Bernard Lowe Enterprises, Inc. ("BLE"). Pursuant to the Agreement, BLE agreed to pay royalties to Magda for the use of the Master Recordings. MPL subsequently succeeded to the rights and obligations of Magda and ABKCO subsequently succeeded to the rights and obligations of BLE.

In 2009, representatives of The Rays contacted ABKCO claiming that ABKCO had not paid any royalties to The Rays. ABKCO's counsel responded by citing a part of the Purchase Agreement which

provided that MPL had the sole obligation to pay the artist royalty and that MPL indemnified ABKCO from any failure on their part to do so. Afterward, MPL assigned its right to receive royalties and other income from the exploitation of the two master recordings to the Artists Rights Enforcement Corp. ("AREC").

Subsequently, MPL commenced the instant action asserting claims for breach of contract, an accounting and unjust enrichment. ABKCO then filed an answer denying that it had breached the contract and asserting counterclaims for attorney's fees and punitive damages for frivolous conduct.

DECISION

In the instant case, ABKCO is moving for a partial summary judgment on the grounds that the terms of the Agreement are unambiguous. The proponent of a summary judgment motion carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as matter of law. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986). If there's a failure to meet this initial burden, the motion must be denied. Id.

When deciding a motion for summary judgment based upon a written contract, the construction of an unambiguous written contract must be enforced according to the plain meaning of its terms. W.W.W. Assocs. v. Giancontieri, 77 N.Y.2d 157, 162 (1990). Whether a contract is ambiguous is a question of law to be resolved by the Court and extrinsic evidence is not to be considered unless the writing itself is ambiguous. Bailey v. Fish & Neave, 8 N.Y.3d 523, 528 (2007).

In the instant case, the contract is unambiguous. The Agreement broadly defines the term "record" to include all future forms of exploitation of sound recordings without regard to "size or dimension and/or speed." Affidavit of Jay L. Berger, ¶ 8, Ex. 3. Furthermore, with regard to royalty payments the Agreement clearly states that MPL is entitled to five cents for each record sold and paid for in the continental United States. As such, given the language used in the Agreement, ABKCO's royalty

obligation cannot be limited to 78rpm and 45 rpm single records. Thus, this part of ABKCO's motion is denied.

ABKCO is also seeking summary judgment on its counterclaim for attorney's fees. The Agreement provides that MPL would be solely responsible for all artists' royalties and would indemnify ABKCO from any loss, damage or cost, including attorneys' fees arising out of claims by the artist. However, ABKCO has failed to allege sufficient facts showing that MPL has brought this action on behalf of the artist, "The Rays". Rather, MPL's assignment of its rights to AREC raises a question of fact as to whether MPL or AREC is controlling this claim. As such, this part of ABKCO's motion is denied.

Alternatively, MPL has filed a cross motion opposing ABKCO's counterclaims and seeking summary judgment on the ground that ABKCO has materially breached the Agreement. The proponent of a summary judgment motion carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as matter of law. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986). If there's a failure to meet this initial burden, the motion must be denied. Id.

MPL alleges a breach of contract on the grounds that ABKCO was required to pay a royalty for any formatted exploitation and has failed to do so. As previously stated, the Agreement defined the term "record" to include all future forms of exploitation of sound recordings. Furthermore, the Agreement required ABKCO to pay a royalty of five cents for each record sold in the United States. As such, there would be a breach of contract if ABKCO failed to apply this royalty rate to the sale of CD's and digital formats which are forms of exploitation. Based on the sample royalty reports, ABKCO has not applied the proper rate and is in breach of the contract. Thus, this part of the cross-motion is granted.

With regard to the dismissal of ABKCO's counterclaim for attorney's fees, as stated above there exists a question of fact as to whether AREC or MPL is controlling the claim. As such, this part of the cross-motion is denied.

With regard to the dismissal of ABKCO's counterclaim for punitive damages, a party claiming punitive damages must "allege facts demonstrating that the defendant's conduct was so outrageous as to evince a high degree of moral turpitude." Zarin v. Reid & Priest, 184 A.D.2d 385, 388 (1st Dep't 1992). Here, ABKCO has not shown that MPL has engaged in such conduct. As such, this part of the cross-motion is granted.

Accordingly, the Defendant's motion is denied. The branch of the Plaintiff's motion asking for summary judgment for breach contract and dismissal of the counterclaim for punitive damages is granted. The branch of the Plaintiff's motion asking for dismissal of the counterclaim for attorney's fees is denied.

Dated: June 19, 2013



HON. MILTON A. TINGLING

J.S.C