SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

RICHARD FLANZER and ATLANTIC PACIFIC, ENTERTAINMENT, INC.

Index No.: 653709/2012

Plaintiffs,

-against-

Motion Seq. No. 002

PAUL ELLINGTON, individually and as Executor of the ESTATES OF EDWARD KENNEDY ("DUKE") ELLINGTON and MERCER K. ELLINGTON, and DUKE'S PLACE, LLC,

Defendants.

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action against the Estates of the late and renowned jazz musician Duke Ellington and his son, Mercer K. Ellington (the "Estates"), Duke's Place, LLC ("Duke's Place"; an entity which promotes Duke Ellington's legacy), and Paul Ellington, Duke Ellington's grandson and the sole executor of the Estates ("Ellington") (collectively, "defendants"), defendants move to dismiss the complaint pursuant to CPLR 3211 (a)(l) and (7) (or alternatively for summary judgment pursuant to CPLR 3212) in accordance with this Court's Order dated January 7, 2014.[1]

Factual Background

According to the Complaint, plaintiff, AtlanticPacific Entertainment, Inc. ("Atlantic") is a concert and tour promoter, and plaintiff Richard Flanzer ("Flanzer"), a manager and producer in the music industry, is one of Atlantic's officers.

In late 2011 to early 2012, Flanzer (on Atlantic's behalf) began to explore the commercial

---

[1] The Court's order directed the following: "defendant shall move by order to show cause by January 31, 2014 to dismiss the complaint; in the event defendant fails to so move, defendant Mr. Ellington shall appear for a deposition by February 14, 2014."

viability of producing a tribute concert/series of concerts and traveling exhibit in Duke Ellington's honor (the "Concert"). Flanzer approached Ellington, who represented himself to be the sole Executor of both Estates and the principal of Duke's Place.

As a result of negotiations, on March 12, 2012, the parties entered into two agreements pertaining to the Concert (collectively, the two agreements will hereinafter be referred to as the "Concert Agreements").

Under one agreement (the "Name and Likeness Agreement"), the Estates granted Atlantic "the non-exclusive right to use the name and likeness" of Duke Ellington for purposes related to marketing, advertising, promotion, broadcasts, live album or single releases and presentation of the Concert and provides, *inter alia*, that Atlantic "shall own all rights, without limitation, to the Copyright of the [Concert]" (¶¶ 1, 2). The Estates agreed to "use reasonable efforts to assist Atlantic wherever possible," and in exchange, Atlantic agreed to pay the Estates $5,000 in advance of any public advertising for tickets to the Concert or June 1, 2012, whichever date came first. Should Atlantic fail to make that payment, the Estates would "have the right to cancel this Agreement" upon written notice and failure to cure.

Under the other agreement (the "Charts Agreement") Duke's Place represented that "it has the rights to provide" the services of Ellington and his assistant A.C. Lichtenstein ("Ace"), "as well as its exclusive ownership of the charts" currently used by the Duke Ellington Orchestra. In exchange for filming behind the scenes footage, and conducting backstage interviews and a reasonable number of interviews with the media, Ellington was to receive $10,000 *via* a $5,000 advance (payable in two installments on or before March 23 and April 23 of 2012), and a $5,000 payment due on or before the first Concert event. Ace had to "make his best efforts to provide

any requested arrangement provided that it is in the Duke Ellington Orchestra current library." Ace was to receive $10,000 "in exchange for all charts requested" by Atlantic for use in the Concert, and was to be paid as follows: $5,000 payable upon receipt of such charts, but not later than July 1, 2012; $5,000 due prior to the first Concert event.[2]

After Atlantic began work to produce the Concert, Flanzer raised the idea of creating a "coffee-table book" (the "Book") that would present a pictorial history of Duke Ellington to generate interest in the Concert and be commercially successful in and of itself. Following further discussions, the parties entered into the other agreements at issue (also comprised of two related two-page agreements), which will hereinafter be referred to as the "Book Agreements."

The first Book Agreement (entered into on May 13, 2012), pertained to "images and photographs" to be provided by the Estates to create the book. The typed-written portion of this Agreement indicates that the Agreement was regarding the "images and photographs . . . owned by The Estate(s) . . . ." However, the word "owned" is crossed out, and adjacent thereto appears the handwritten notations "held" and initials "RF" (apparently to signify plaintiff's name). In the following paragraph, Ellington states that Flanzer planned to create the coffee table book "containing images controlled by the Estate." (No further description or specificity regarding such images is provided in the agreement). It also provides, *inter alia*, that the Estates granted Flanzer the "exclusive rights" to utilize the images Ellington provided for the specific purpose of creating the Book. However, should the book not be produced for any reason, such "ancillary rights [Ellington] granted to" Flanzer "shall revert back to the Estate." In exchange for such

---

[2] The Charts Agreement contains a provision that states that said agreement would "contain the entire agreement between Duke's Place and Atlantic" regarding the Concert.

rights, Flanzer agreed to pay the Estates 20% of net profits from all book sales, and $5,000 on or before December 31, 2012 as an advance against royalties based on book sales. This Agreement also indicated that it contained "our entire understanding."[3]

Pursuant to the second Book Agreement, entered into on May 17, 2012, Ellington became "creative director" for the book. Ellington agreed to: provide Hatay with images of Duke Ellington; write the introduction/preface; assist with possible captions for images; provide statements or comments from artists in the entertainment industry to accompany certain photographs; attend at least one press conference with Hatay to announce the Book as requested by the publisher; attend several "book signings" with Hatay; and appear for media interviews on a reasonable basis. In exchange for his services, Ellington was to receive a $2,500 advance against royalties; a $2,500 payment by September 1, 2012; another $2,500 by October 1, 2012; 20% of the net profits derived from the Book; 20% of the net profits from ancillary use of the images selected and/or enhanced by Hatay (regarding such topics as merchandising). The second Book Agreement also provides that it shall constitute the entire Agreement between us, regarding the Coffee Table Book" and that "this [the document] contains the entire Agreement."[4]

Flanzer alleges that while working on the Concert, and at Ellington's request, Ellington was advanced not only payments due under the Agreements, but additional sums paid as advances due in the future.

Eventually, development of the Concert was shelved; nevertheless, work on the Book

---

[3] Flanzer alleges that in reliance upon the first Book Agreement, he entered into a separate agreement with Nona Hatay ("Hatay"), a prominent artist, to digitally enhance and colorize the images for the book.

[4] All four agreements comprising the Concert and Book Agreements contain a provision by which the parties represent that each had the opportunity to retain separate counsel and advise them with respect to each agreement.

proceeded. Flanzer transmitted to Hatay approximately 138 photographs supplied to him by Ellington and the Estates. Hatay enhanced and/or manipulated these images using various techniques including hand colorization (the enhanced and/or modified images will hereinafter be referred to as the "Images"), thereby increasing the value of the photographs.[5] Several book publishers showed significant interest in publishing the Book, and Ellington asked Flanzer to provide him with Images to see how they had been enhanced.

Thereafter, in September 2012, Flanzer allegedly discovered that Ellington's sister, Mercedes Ellington, submitted the Images to a major publisher, Rizzoli Book Publishing ("Rizzoli"), to promote a similar coffee table book that she was writing.

Subsequently, plaintiffs notified defendants of their alleged breach of the Book Agreements. In response, defendants claimed that plaintiffs' failure to pay them under the earlier Concert Agreements voided their rights conveyed to stage the Concert.

Consequently, plaintiffs filed the instant action, and seek: (1) a declaration that the Name and Likeness Agreement and Musical Charts agreements have not been terminated, remain in effect, and have not been breached by plaintiffs based on payments they made thereunder (first cause of action); and (2) and damages for (a) breach of first Book Agreement based on Ellington's transfer of the original and enhanced photographs to his sister to promote her book (second cause of action); (b) fraudulent misrepresentations by Ellington and the Estates as to "ownership and exclusivity" in regard to the conveyance to Atlantic (*via* both Book Agreements and through conversations) the exclusive rights to use the Images (third cause of action) and (c)

---

[5] Plaintiffs allege that the photographs, so enhanced and/or manipulated, were the property of Flanzer.

conversion of the Images by transferring the Images to Ellington's sister for their own benefit.[6]

Arguments

With respect to plaintiffs' first cause of action, defendants argue that the Concert Agreements were properly terminated based on plaintiffs' undisputed failure to perform (as conceded in the Complaint), and because of plaintiffs' failure to make certain payments to keep the Agreements in place and their failure to cure. Defendants point out that according to the September 25, 2012 letter they sent to plaintiffs, plaintiffs failed to pay Ace $5,000 by May 1, 2012. Plaintiffs do not allege that they cured this breach, and in further support of the motion, Ace submits an affidavit attesting that he never received this amount. And, as to any argument by plaintiffs that such payment was not yet owed because the charts were not provided, Ace was obligated to provide charts upon request, and no request was made. Further, the payment due, while payable upon [plaintiffs'] receipt of the charts" would in any event be due "not later than May 1, 2012." Moreover, this claim is not ripe for declaratory relief because plaintiffs admit that the development of the proposed Concert had not gotten off the ground, and that they have not alleged that they were at any later time ready to move forward with Concert preparations.

Defendants also argue that the second claim for breach of contract regarding the first Book Agreement is unsupported by any evidence. Defendants point out that no documents produced by plaintiffs support their claim that defendants wrongfully provided the Images to Ellington's sister, for use to promote her own book with Rizzoli. Certain correspondence produced by plaintiffs, purporting to show a blog of an unidentified individual (who has no

---

[6] While written discovery is complete, no depositions have been conducted in the matter. To date, the proposed coffee-table book has not been created; likewise, the Concert was never produced or held. There are no allegations that either the book or Concert will be completed and/or conducted in the future

apparent relationship with defendants or the case) working on a coffee table book with defendant's sister, *predates* the first Book Agreement. In further support, Ellington submits an affidavit stating that he is, and has been, estranged from his sister during the entirety of the time at issue in the underlying matters, and has not provided anything to her, directly or indirectly, regarding the subject Images. Nor is there any evidence that any such book was ever published by Rizzoli or anyone else. In the light of the absence of any publication of any coffee table book, there could be no finding of any damages. Accordingly, because written discovery is complete, and plaintiffs have produced no evidence supporting the allegations, and defendants offer specific facts to refute the allegation (and no supporting evidence appears to exist in the world at large), the claim must be dismissed.

The third cause of action for fraud claim should be dismissed because the first Book Agreement does not state at all what the complaint asserts it states. The first Book Agreement makes no copyright representation or promise by defendants to deliver any images in which they owned a copyright. Rather, it pertains to unspecified and unidentified "images and photographs (hereinafter referred to 'images') *held* by" the Estates and that plaintiffs would have the right to use such unspecified images in a coffee table book plaintiffs might create (and for some other limited purposes) (emphasis added). Further, the word "owned," was specifically substituted with the word with "held," and initialed by Flanzer himself. Plaintiffs do not allege that they did not receive images "held" by defendants. And, to the extent plaintiffs rely on allegations outside the first Book Agreement, they are barred from doing so by the merger and integration clauses contained therein. Moreover, the complaint fails to plead fraud with adequate specificity. In addition to the absence of any representation of a material existing fact, plaintiffs, who alleged

that they are "sophisticated parties," fail to allege that they exercised reasonable diligence to support the element of justifiable reliance. Also, plaintiffs do not allege any loss caused by the Copyright status or misrepresentation of the Copyright status of any images. Instead, plaintiffs allege that the project failed because some unidentified images had been given to another party to create the contemplated book. Notwithstanding, there is no evidence ascertainable, or even alleged, that such book led to a financial gain at the expense of plaintiffs.

Plaintiffs' conversion cause of action also fails because it is duplicative of the breach of contract action. To the extent the cause of action could be read to claim that defendants have failed to return the Images paid for by plaintiffs, the cause of action fails because, *inter alia*, such Images are by their nature in the control of plaintiffs, because plaintiffs engaged the party (Hatay) who created and prepared them and may obtain what they purchased from her directly. It is thus irrelevant that defendant might retain copies of such images; but, in any event, defendants have produced all images possibly relevant throughout the course of discovery.

Defendants also seek attorneys' fees for costs associated with their motion in accordance with the Court's order, which directed such fees in the event defendants are successful movants.

In opposition, plaintiffs contend that the affidavits submitted by defendants and the alleged absence of documentary evidence, do not support dismissal based on documentary evidence pursuant to CPLR 3211(a)(1). Further, the affidavits submitted in opposition by Flanzer, his assistant Christopher Cherney ("Cherney"), and Hatay (discussed in detail, *infra*), coupled with the complaint, establish cognizable causes of action to defeat dismissal under CPLR 3211 (a)(7). And, to the extent the motion is deemed one for summary judgment, the motion is premature in light of the absence of any depositions and evidence related thereto and

defendants' failure to eliminate all issues of fact. Defendants deny that the subject Agreements were executed by sophisticated contract writers or attorneys.

Plaintiffs argue that the first cause of action adequately asserts defendants' wrongful actions and wrongful termination of the Agreements at issue. For example, there is an issue (requiring parol evidence for determination) as to whether payment was due to Ace since no charts were requested so as to constitute a breach as claimed by defendants.

As to the second through fourth causes of action, whether the proposed Book was published (or is in the stages of publication) is irrelevant. Plaintiffs argue that Ellington attests that he does not "believe" he is in possession of any original Images in order to alter his position, when further discovery would show otherwise. And, whether he is in possession currently is irrelevant. In any event, discovery through Rizzoli is necessary on this issue.

Plaintiffs contend that although the complaint was "inartfully pleaded," the requirements of breach of contract, fraud, and conversion have been met through the complaint coupled with Flanzer's affidavit.

In his affidavit Flanzer asserts that Ellington described himself as the Sole Executor with "complete control and ownership of all matters relevant to the Estates" and that the Estate "owned and controlled" over 100 rare and never published photographs which could be used regarding the Concert and Book (¶¶10, 12). However, Flanzer later discovered that "virtually all" of the photographs Ellington showed at the meeting needed licensing (¶12). At another meeting, Ellington represented that he had "all authority over the rights to the music held by the Estate" (¶14). However, Flanzer later discovered that Ellington did not have such authority (¶14). Similarly, Flanzer attests that the first Book Agreement's reference to "owned" was

changed to "held" at the request of Ellington's assistant Ace because Ace represented that it was a "technical" issue but that "the meaning and intent (as well as control of these rare photographs), remained the same" (¶24). Also, the revision, made after the agreement was executed, was not initialed by Ellington, who had left the meeting before the change was made. Flanzer states that he made multiple payments to the Estates pursuant to the Book Agreements by paying Ellington directly at his direction.

However, Ellington breached the Book Agreements, in that none of the photographs provided were rare or unique, or previously unpublished, and he failed to provide an address for payments to be sent to the Estates (as required under the first Book Agreement) or his social security/tax ID (as required under the second Book Agreement). Ellington also failed to cooperate with Hatay, notwithstanding receiving payments under these Agreements (¶¶26-27). And, the photographs provided by Ellington required licensing from other photographers. Also, in violation of the Book Agreements, Ellington refused Flanzer the right to use photographs and advertisements relative to the Concert. Ellington also refused to attend public relations firm meetings regarding the Book. [7]

Flanzer asserts that defendants breached the Concert Agreements in that although plaintiffs paid Ellington $5,000 for his behind-the-scenes footage and backstage services, he never performed; and Ellington failed to cooperate and assist in the Concert or otherwise act in

---

[7] Hatay and Cherney also provide affidavits in opposition. Hatay asserts that Ellington provided her with the subject photographs and averred that he was "in control" of same, and that they were rare and unusual. After she began work to amplify them, she discovered that only a few of the photographs were actually rare; the vast majority were taken from the internet and required licensing from each image's photographer or agency.

Cherney states that he and Flanzer met with Ellington and Ace in February or March 2012, at which time Ellington represented, *inter alia*, that he was the sole Executor of the Estates; the Estates had in their possession unique, rare and previously unseen and unpublished photographs of Duke Ellington; and that he had the authority to release said photographs regarding the Concert. Also, Cherney confirms that at no time did he request charts from Ace.

good faith in that he refused to appear at any public relations meeting with a firm which were set up to move the project forward. (¶18(d)). And, since no request for charts was ever made to Ace, no payment was due to him. Allegedly in reliance on Ellington's representations, Flanzer took numerous steps and incurred expenses to set up the Concert. The staging of the Concert allegedly fell through during a meeting with a potential investor when Ellington attempted to secure an additional $40,000 payment along with the investment.

Plaintiff also argues that given the status of discovery, plaintiffs may move for leave to amend the complaint at a subsequent date.

Further, the alleged merger and integration clause asserted by defendants is without import. Only the Charts Agreement had an integration clause, and, Flanzer attests that this Agreement was signed first. Therefore, an issue exists as to the parties' actual understanding and/or agreement regarding the merger and integration clause. Regardless, the existence of a merger clause does not prevent the court from inferring from the Agreement a covenant of good faith and fair dealing so as to not injure the other party and improperly obtain the fruits of the contract. The merger clause also does not preclude consideration of parol evidence to explain the terms of the Agreement and course of dealings.

And, despite demands, Ellington refused to return the Images plaintiffs paid Hatay to create.

Discussion

In determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the Court's role is deciding "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a

motion for dismissal will fail" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 968 NYS2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 960 NYS2d 404 [1st Dept 2013]).

The court must "accept the facts as alleged in the complaint as true, accord plaintiffs "the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, *supra; Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]). However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not" presumed to be true or accorded every favorable inference (*David v Hack,* 97 AD3d 437, 948 NYS2d 583 [1st Dept 2012]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861 [2000]), and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]).

Pursuant to CPLR 3211(a)(1), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." A motion to dismiss on the basis of a defense founded upon documentary evidence may be granted "only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law"(*see DKR Soundshore Oasis Holding Fund Ltd. v. Merrill Lynch Intern.*, 80 AD3d 448, 914 NYS2d 145 [1st Dept 2011] *citing*

Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326, 746 NYS2d 858 [2002]). "Dismissal pursuant to CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*VisionChina Media Inc. v Shareholder Representative VisionChina Media Inc. v Shareholder Representative Services, LLC*, 109 AD3d 49, 967 NYS2d 338 [1st Dept 2013]).

To be considered "documentary," evidence must be unambiguous and of undisputed authenticity (*Fontanetta v Doe*, 73 AD3d 78, 898 NYS2d 569 [2d Dept 2010] *citing* Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3211:10, at 21–22; *Raske v Next Management, LLC*, 40 Misc 3d 1240(A), Slip Copy, 2013 WL 5033149 (Table) [Sup Ct New York Cty 2013]; *Philips South Beach, LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 867 NYS2d 386 [1st Dept 2008] (documentary evidence "apparently aims at paper whose content is essentially undeniable and which assuming the verity of its contents and the validity of its execution will itself support the ground on which the motion is based")).

On their faces, the Concert Agreements and Book Agreements are unambiguous and of undisputed authenticity. Accordingly, the court considers them as "documentary" for purposes of CPLR 3211(a)(1).

Further, it is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR 3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v. BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a

matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v. Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v. Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] and *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR 3212 [b]; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v. Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Carroll v. Radoniqi*, 105 AD3d 493, 963 NYS2d 97 [1st Dept 2013]). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist," and the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists Ins. Co. v. Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1stDept 1984]; *see also, Armstrong v. Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

First Cause of Action - Declaratory Judgment

As to the first cause of action, defendants' motion to dismiss plaintiffs' request for a declaration that the Name and Likeness and Charts Agreements remain in effect (inasmuch as defendants' attempt to terminate same was improper), is denied.

As to the Name and Likeness Agreement, plaintiffs allege in their Complaint that, *inter*

alia, Atlantic agreed to pay the Estates $10,000 "triggered by the public advertising for ticket sales of the Event and the first performance of the Event, although half of this amount was due to be paid on or before June 1, 2012." (¶11). (Emphasis added).

As to the Charts Agreement, the Complaint asserts that Duke's Place agreed to supply the services of Ellington and Ace as follows: (1) Ellington was to film footage and conduct back-stage interviews and (2) Ace was to use his best efforts to provide musical arrangements requested by Atlantic to use in the Concert (Complaint, ¶12). Ellington was to be paid $10,000.00. Ace was to be paid $10,000, with half due to Ace upon receipt of the requested music charts, but that provided such charts had been requested and provided, no later than July 1, 2012, with the balance due prior to the first public performance (*id.* ¶13).

Plaintiffs allege that Ellington represented that payments due to either the Estates or Duke's Place should be made to him, and plaintiff then allegedly paid "Ellington" "all monies due" under "the above agreements" "through the summer, 2012" including additional sums as advances that were not yet due (Complaint, ¶¶21-24). Such allegations sufficiently state a claim for declaratory relief, as a dispute has arisen as to whether defendants' properly terminated such Agreements by virtue of the September 25, 2012 letter of cancellation (*Mt. McKinley Ins. Co. v. Corning Inc.*, 33 AD3d 51, 818 NYS2d 73 [1st Dept 2006] ("a declaratory judgment action requires an actual controversy between parties having a stake in the outcome")).

Further, defendants' submissions fail to conclusively establish a defense to, and fail to defeat, plaintiffs' claims as to the Name and Likeness Agreement and Charts Agreement.

The Court's review of the clear and unambiguous terms of the Name and Likeness

Agreement shows that the Estates gave Atlantic the non-exclusive right to use the name and likeness of Duke Ellington for all purposes "as they may relate to the marketing, advertising, promotion, broadcasts, live album or single releases, and presentation of" the Concert. Atlantic agreed to pay the Estate $5,000 "in advance of any public advertising for tickets to [the Concert] or June 1, 2012 whichever date comes first." (¶4). Atlantic also agreed to pay the Estate "an additional sum of $5,000.00 should this Event [Concert] and/or tour to take place in 2013, prior to the first performance." Pursuant to such Agreement, "Should Atlantic not make this payment, [the] Estate shall have the right to cancel this Agreement" (¶4).

The record presented by defendants fails to overcome plaintiffs' claims of payment to Ellington and the Estates under the Name and Likeness Agreement. Ellington's and Ace's affidavits are *silent* as to the alleged payments made to the Estates (*via* Ellington) under this Agreement. Notably, Ellington's affidavit addresses only the coffee table book claims, and Ace's affidavit asserts solely that no request for charts were made and that he "did not receive any payment." Furthermore, the mere statement in the September 25, 2012 letter that "you [Atlantic] are in breach of the contract for failing to make the agreed payment in the amount of $5,000 by June 1, 2012" is insufficient, in light of plaintiffs' complaint and Flanzer's affidavit in opposition. Notably, this letter is signed by Ace on behalf of "Duke's Place LLC," and not on behalf of the Estates. Tellingly, the submissions include a May 2, 2012 letter, with a handwritten date of May 14, 2012, in which Ellington "acknowledge[s] receipt of $2,500 as an early payment per our May 12, 2012 agreement, on behalf of the estates, as sole executor. . . ." (Exhibit "A" to plaintiffs' opposition, p. 163).

In addition, and consistent with the allegations in the Complaint, the clear and

unambiguous language of the Charts Agreement provides, in regard to Ace, that Ace:

> "shall receive the sum of Ten Thousand Dollars ($10,000.00) *in exchange for all charts requested* for use in the Event [Concert] provided directly to Atlantic, or its Musical Director . . . upon request by Atlantic. ACE will make his best efforts to provide any requested arrangement provided that it is in the Duke Ellington Orchestra current library. The sum shall be paid as follows: 50% in the amount of $5,000 payable upon receipt of charts, but not later than May 1, 2012, the balance in the amount of $5,000 to be paid prior [to] the first public performance." (Emphasis added).

Thus, contrary to defendants' contention, the obligation to pay $10,000 to Ace would arise upon *a request* by Atlantic for charts, at which time, Ace's corresponding obligation to make best efforts to provide such requested charts would be triggered. Further, Atlantic's obligation to *tender* payment of $5,000.00 "upon receipt of charts, but not later than July 1, 2012" would be triggered upon Atlantic's receipt of the charts. Therefore, defendants' contention that the Charts Agreement contemplates that Ace was to receive this payment under all circumstances, regardless of whether charts were requested or produced, lacks merit.

Furthermore, Ace unequivocally attests that the charts were never requested and that he never provided any charts. Ace's affidavit fails to establish that the September 25, 2012 letter was effective to terminate the Charts Agreement, given that (1) Ace failed to demonstrate *his* performance thereunder (so as to merit a payment by plaintiffs) and (2) plaintiff, in opposition, attests that all of the payments that were tendered to Ellington constituted payments under the Charts Agreement as well (*see* Affidavit, ¶18(a)).

As the record demonstrates that plaintiffs did not request any charts for use in the Concert and that Ace did not provide any Charts at all, defendants fail to establish that plaintiffs breached the Charts Agreement so as to validate the September 25, 2012 cancellation letter.

Essentially, defendants' argument that they properly canceled both Agreements on September 25, 2012 is unsupported by the record; the record indicates that there was no breach by the plaintiffs of the Concert Agreements. Therefore, as defendants failed to demonstrate that they effectively cancelled these Agreements or that plaintiffs otherwise breached such Agreements, the branch of defendants' motion to dismiss the first cause of action lacks merit and is denied.[8]

Second Cause of Action: Breach of the May 13, 2012 Book Agreement

The elements of such a claim include the existence of a contract, the plaintiffs' performance thereunder, the defendants' breach thereof, and resulting damages (*see Harris v. Seward Park Housing Corp.*, 79 AD3d 425, 913 NYS2d 161 [1st Dept 2010] *citing Morris v. 702 E. Fifth St. HDFC*, 46 AD3d 478, 850 NYS2d 6 [1st Dept 2007]).

Where a written agreement unambiguously contradicts the allegations of a breach of contract cause of action, the contract itself constitutes documentary evidence warranting dismissal of the complaint, pursuant to CPLR 3211(a)(1), regardless of any extrinsic evidence or self-serving allegations offered by the plaintiff (*Prichard v 164 Ludlow Corp.*, 14 Misc 3d 1202, 831 NYS2d 362 [Sup Ct New York Cty 2006] *citing 150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 784 NYS2d 63 [1st Dept 2004]; *see also* (*Igarashi v Higashi*, 289 AD2d 128, 735 NYS2d 33 [1st Dept 2001] (In view of the documentary evidence, to wit, deeds signed by plaintiff at the closings of the four properties in question indicating that both plaintiff and defendant are owners of the properties, dismissal of the first four causes of action, which essentially claimed

[8] It is noted that plaintiffs do not allege that they ever resumed development or pursuit of the Concert following the events discussed in the pleadings and moving papers.

that plaintiff was the sole owner of the property, was appropriate. While pleadings should be liberally construed on a motion to dismiss, claims "flatly contradicted by documentary evidence" must be rejected) *citing Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept 1996], *lv denied* 89 NY2d 802 [1996]).

Although agreements are to be construed in accord with the parties' intent, it is well-settled that the best evidence of what parties to a written agreement intend is what they say in their writing (*see Greenfield v. Philles Records*, 98 NY2d 562 [2002]). Thus, an agreement that is complete, clear and unambiguous on its face must be enforced according to its plain meaning (*Id.*; *see also White v. Continental Casualty Co.*, 9 NY3d 264 [2007]). And, the rule that agreements should be enforced according to their stated terms should be applied with special force when negotiated at arm's length or by sophisticated business people *(see Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P.*, 13 NY3d 398 [2009]).[9]

The "[m]ere assertion by one that the contract language means something to him, where it is otherwise clear, unequivocal and understandable when read in connection with the whole contract, is not in and of itself enough to raise an issue of fact" (*see Vesta Capital Mgmt. LLC v. Chatterjee Group*, 78 AD3d 411, 910 NYS2d 64 [1st Dept 2010]). An agreement that on its face is reasonably susceptible of only one meaning is unambiguous, and as such, the court is not free to alter the contract to reflect its personal notions of fairness and equity (*see Greenfield, supra*; *Riverside S. Planning Corp., supra*). Further, extrinsic evidence outside the four corners of the document as to what was "really intended" but was unstated or misstated is inadmissible to add to or vary the writing, where no ambiguity exists upon the face of the agreement (*see W.W.W.*

[9] Here, it is undisputed that Flanzer has held himself out to be a sophisticated member of the music industry.

Assoc. v. Giancontieri, 77 NY2d 157 [1990]). Such extrinsic proof may only be considered after the court decided as a matter of law that the agreement is ambiguous (*see Madison Ave. Leasehold, LLC v. Madison Bently Associates, LLC*, 8 NY3d 59 [2006]).

Where a contract is reduced to writing, it is presumed to embody the final and entire agreement of the parties (*see Namad v. Salomon Inc.*, 147 A.D.2d 385, 537 N.Y.S.2d 807 [1st Dept 1989] *citing Clark v. American Morgan Co.*, 268 AD 209, 212, 49 NYS2d 254 *lv. to appeal denied*, 293 NY 933 [1944]; *see also* 4 Williston, Law of Contracts § 631, at 951–52 (3d ed. 1961) (a writing that is the product of negotiations which the parties anticipated would result in a written memorialization is presumed to incorporate all previous agreements, and to be an integrated contract)).

In the Complaint, plaintiff's second cause of action alleges that the first Book Agreement required defendants to "furnish Flanzer with 'images *controlled* by the Estate' and granted "Flanzer exclusive rights to *utilize* the images for the production of a coffee table book." Ellington later allegedly asked Flanzer "to provide him with the Images" to "see how Hatay had enhanced" them (Complaint, ¶30) (emphasis added). The *sole* alleged breach occurred, according to plaintiffs, when "Ellington wrongfully gave these images, both in their original form and as enhanced . . . by Hatay . . . (the "Images"), to his sister, who in turn, has used them to promote her own book" (Complaint, ¶41). Specifically, plaintiffs allege that Ellington's "sister," "Mercedes," "submitted the Images to Rizzoli . . . in an attempt to interest" Rizzoli in publishing "a coffee table book that she was writing and that was similar in concept to that of the Book" (Complaint, ¶29) Plaintiffs allegedly discovered this breach in September 2012, and notified defendant of same by letter dated September 24, 2012 (Complaint, ¶¶29, 32).

Accepting the allegations in the Complaint as true, plaintiffs stated a claim for breach of contract.[10]

In support of dismissal, however, defendants established, by Ellington's affidavit, that Ellington "did not" provide any images to his sister "directly or indirectly," since he has "not been in touch with her at any time since May 2012, when the agreement in question was made" (Ellington Affidavit, ¶1) (*Pintor v. 122 Water Realty, LLC*, 90 AD3d 449, 933 NYS2d 679 [1st Dept 2011] (affidavit, based on personal knowledge, is sufficient to establish entitlement to summary judgment); *see also Sprotte v. Fahey*, 95 AD3d 1103, 944 NYS2d 612 [2d Dept 2012]). It is noted that defendants' submissions also establish, *via* search results on Rizzoli's website, that Rizzoli did not publish any book on Duke Ellington.

In opposition, plaintiff failed to raise an issue of fact as to whether Ellington improperly provided the subject Images to his sister. According to Flanzer's affidavit, "Leah Whisler, an editor at Rizzoli Book Publishing" informed him that "Mercedes Ellington had recently presented a coffee table book concept on her grandfather using [Flanzer's] images which [he] had described in great detail." (Affidavit, ¶33). Whisler later allegedly stated that Mercedes claimed she had never heard of Flanzer and that Mercedes offered to indemnify Rizzoli in exchange for a

[10] As to defendants' claim that there is no indication of any damages to support the second cause of action, it has been held that "In New York, 'It is a well-settled tenet of contract law that even if the breach of contract caused no loss or if the amount of the loss cannot be proven with sufficient certainty, the injured party is entitled to recover as nominal damages a small sum fixed without regard to the amount of the loss, if any'" (*Burberry Ltd. v. Euro Moda, Inc.*, Not Reported in F.Supp.2d, 2009 WL 1675080 [SDNY 2009]; *Brian E. Weiss, D.D.S., P.C. v. Miller*, 166 AD2d 283, 564 NYS2d 110 [1st Dept 1990] ("nominal damages will be awarded to a plaintiff where the law recognizes a technical invasion of his right or a breach of defendant's duty, but where the plaintiff has failed to prove actual damages or a substantial loss or injury to be compensated)).

signed contract and book advance." (*Id.*).[11] Flanzer further attests that he forwarded Whisler several emails exchanges between him and Mercedes to verify that she knew him.

Aside from the material fact that there is no evidence, in admissible form, to indicate that Ellington provided his sister with the subject Images, none of the emails or numerous other documents plaintiffs submit support their claims, or more importantly, indicate whether Ellington provided any Images to his sister. The documents do not indicate whether Mercedes presented any of the subject Images to Rizzoli. Therefore, in the absence of any additional evidentiary material, the hearsay statements in Flanzer's affidavit are insufficient to raise an issue as to whether Ellington provided the subject Images to his sister, for use to promote her book to Rizzoli (*see Rugova v. Davis*, 112 A.D.3d 404, 976 N.Y.S.2d 61 [1st Dept 2013] ("hearsay may be used to defeat summary judgment as long as it is not the only evidence submitted in opposition"); *Taylor v. One Bryant Park, LLC*, 94 AD3d 415, 941 NYS2d 142 [1st Dept 2012] ("While hearsay statements may be used to oppose a summary judgment motion, such evidence is insufficient to warrant a denial of the motion where [as here] it is the only evidence" submitted

---

[11] The settlement agreement also acknowledged that Flanzer "through Paul Ellington, supplied NH [Notay] with a number of images . . . to be enhanced . . . for possible inclusion in the Book" (defined therein as "Images"); that by her enhancements of such Images, she created 138 "Project Images" and that she hand-colored 10 test prints of Images.

Flanzer attests that leading up the settlement, he, Hatay and Ellington discussed that licensing and fees were required to utilize the Images, and that Flanzer and Hatay reached a settlement agreement to resolved her concerns of liability (attached as Exhibit A to plaintiff's opposition) dated August 30, 2012. Such settlement agreement released her from any further obligations in connection with the Book and acknowledged Flanzer's "receipt" of computer files for the "Project Images" and the 10 hand-colored images "delivered by FedEx to RF on or about August 28, 2012. . . ."

Flanzer also attests that after Hatay returned the "FedEx" package to Flanzer of "all of her work along with the images Paul [Ellington] had provided to her," Ellington "asked [him] to drop off that package" so he could "try to improve the resolution quality of the scans" and promised to return "all the images the following day," which he failed to do (Affidavit, ¶32).

Within a week of receiving the package from Hatay, Flanzer spoke to Whisler, who advised him of the aforementioned circumstances concerning Mercedes.

in opposition")).

Moreover, Flanzer's further claims of Ellington's breach of the first Book Agreement, asserted for the first time in his affidavit, are insufficient to overcome defendants' entitlement to dismissal of this breach of contract claim.

In his affidavit, Flanzer adds that defendants breached this Agreement when Ellington failed to provide him with rare, unique or otherwise previously unpublished images as Ellington had previously represented; failed to attend public relations firm meetings for the Book (as contemplated in the second Book Agreement), and failed to provide an address for payment and his social security number and/or tax identification number. And, notwithstanding the modification of "owned" to "held," Flanzer adds that defendants breached this Agreement by failing to provide him photographs "owned" by the Estates.

First, such additional claims are not indicated in the second cause of action and do not appear in the Complaint. In any event, nothing in the first Book Agreement required Ellington to produce "rare, unique or otherwise previously unpublished" images as now asserted. The sole obligations reference in the second cause of action are (1) defendants' obligations to provide Flanzer images *controlled* by the Estates and (2) defendants' obligations to give Flanzer exclusive rights to *utilize* the images. And, Flanzer's additional claim that defendants breached their obligation to provide photographs "owned" by the Estates, premised on Flanzer's assertion that Ellington did not initial the change Flanzer made to "held," is insufficient to support the second cause of action. The Agreement, on its face, required Ellington to produce unspecified images the Estates "held" and "controlled." Read in its entirety, the first Book Agreement grants plaintiffs exclusive *possessory* rights to *use* the images for purposes of creating the Book. The

first Book Agreement is unambiguous, and thus extrinsic evidence beyond the four corners of the document will not be considered at this juncture (*see W.W.W. Assoc. v. Giancontieri*, 77 NY2d 157 [1990]).

Even accepting as true Flanzer's claim that he modified or substituted the word "owned" to "held" because Ace represented that "it was a technical issue and the meaning and intent" "remained the same," plaintiffs cite no case law to support the viability of such a claim *under a breach of contract* theory.

Having failed to raise an issue of fact as to whether Ellington violated the first Book Agreement by providing his sister with plaintiffs' Images for use by Mercedes to promote her book, summary judgment dismissing the second cause of action as pleaded by plaintiffs is warranted.

Third Cause of Action: Fraud

To the degree plaintiffs allege that Ellington's "representations of ownership and exclusivity referred to in paragraph 40 above, were known by defendant Ellington to be false when made and were made with the intent to deceive and default Plaintiff Flanzer"; that plaintiff "reasonably relied upon" the representations to his detriment; and plaintiffs suffered damages "as a result of" defendants' misrepresentations, plaintiffs appears to pursue a fraud claim. In this regard, to plead a fraud claim, plaintiff must allege, *with particularity*, a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff, and damages (*see Eurycleia Partners, LC v. Seward & Kissel, LLP*, 12 NY3d 553 [2009]; *see New York University v. Continental Ins. Co.*, 87 NY2d 308, 318, 63

NYS2d 283 [1995]; *Channel Master Corp. v. Aluminum Ltd. Sales, Inc.*, 4 NY2d 403, 407, 1 76 NYS2d 259 [1958]).

Contrary to defendants' contention, the general merger clause in the first Book Agreement, that "This contains our entire understanding" does not necessarily preclude the Court from considering parol evidence to support a fraud-base claim (*see Rosenblum v. Glogoff*, 96 AD3d 514, 946 NYS2d 167 [1st Dept 2012] *citing Magi Communications, Inc. v. Jac-Lu Associates*, 65 AD2d 727, 410 NYS2d 297 [1st Dept 1978] (where the complaint states a cause of action for fraud, the parol evidence rule is not a bar to showing the fraud—either in the inducement or in the execution—despite an omnibus statement that the written instrument embodies the whole agreement, or that no representations have been made.' Here, the agreement contained a broad and general merger clause, providing: 'This Agreement contains the entire agreement of the parties hereto with respect to the subject matter herein contained and there are no representations or warranties, except as set forth herein.' Such a clause, however, is clearly ineffectual to preclude oral proof of false or fraudulent misrepresentations offered to rescind the agreement")).

Yet, a "cause of action for fraud arising out of a contractual relationship may be maintained only where the plaintiff alleges a breach of duty separate from, or in addition to, a breach of the contract" (*see Levine v American Intern. Group*, 16 AD3d 250, 792 NYS2d 35 [1st Dept 2005]). For example, if a plaintiff alleges that it was induced to enter into a transaction because a defendant misrepresented material facts, the plaintiff has stated a claim for fraud, even though the same circumstances also give rise to the plaintiff's breach of contract claim (*J.A.O. Acquisition Corp. v Stavitsky*, 192 Misc 2d 7, *supra, citing First Bank of the Americas v Motor*

Car Funding, Inc., *supra*).

However, a fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, *i.e.*, when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract (*see J.A.O. Acquisition Corp. v. Stavitsky*, 192 Misc 2d 7, 745 NYS2d 634 [Sup Ct New York Cty 2001] *citing First Bank of the Americas v Motor Car Funding, Inc.*, 257 AD2d 287, 291-92, 690 NYS2d 17 [1st Dept 1999]; *see e.g., HSH Nordbank AG v. UBS AG*, 95 AD3d 185, 941 NYS2d 59 [1st Dept 2012] (A claim for fraudulent inducement of contract can be predicated upon an insincere promise of future performance only where the alleged false promise is collateral to the contract the parties executed; if the promise concerned the performance of the contract itself, the fraud claim is subject to dismissal as duplicative of the claim for breach of contract)).

The sole fraudulent misrepresentations alleged in the third cause of action are those incorporated by reference in paragraph 40 of the Complaint, *to wit*: (1) that the Estates "controlled" the images and (2) granting plaintiffs exclusive rights to utilize the images, both of which arise out of the Book Agreement (Complaint ¶48). Since the fraud cause of action is premised on the identical factual allegations that make up the breach of contract claim and are alleged promises made in the first Book Agreement, the fraud claim must be dismissed, as plaintiffs failed to allege any promise collateral to the contract.

In support of such "inartfully pleaded" fraud claim (see Affirmation in Opposition, ¶15), plaintiffs submit affidavits to particularize this claim (*see Rovello v Orofino Realty Co.*, 40 N.Y.2d 633 [1976] (affidavits may be used freely to preserve inartfully pleaded, but potentially meritorious, claims)). Flanzer attests that after defendant signed the first Book Agreement,

Flanzer "was asked to change and initial the word 'owned' to 'held' because Ace informed him it was a technical issue and the meaning and intent" "remained the same" (Affidavit ¶24). However, there are no allegations in the Complaint concerning this event, or any claim of fraud based on this event. These unrelated claims are beyond the scope of the cause of action as pleaded, and plaintiffs failed to cite to any legal authority that these new, distinct allegations can support the third cause of action as pleaded herein. Therefore, the third cause of action must be dismissed.

Fourth Cause of Action: Conversion

A conversion occurs when a party, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession (*see Lynch v. City of New York*, 108 AD3d 94, 965 NYS2d 441 [1st Dept 2013] *citing Colavito v. New York Organ Donor Network, Inc.*, 8 N.Y.3d 43, 49–50, 827 N.Y.S.2d 96 [2006]). Two elements of conversion are (1) the plaintiff's possessory right or interest in the property and (2) the defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (*Colavito*, 8 NY3d at 49–50).

Plaintiffs sufficiently allege that defendants exercised dominion and control over the Images by delivering them to Mercedes, defendants used the Images for their own purposes and to the detriment of plaintiff Flanzer, that defendants refused to return the Images to plaintiffs despite due demand, and that defendants intended to diver property rightfully belonging to Flanzer and interfered with Flanzer's ability to commercially exploit the Images.

A conversion claim that is duplicative of a breach of contract claim must be dismissed

when no independent facts are alleged giving rise to tort liability (*see Sebastian Holdings, Inc. v. Deutsche Bank, AG.*, 108 AD3d 433, 969 NYS2d 46 [1st Dept 2013]; *Kopel v. Bandwidth Technology Corp.*, 56 AD3d 320, 868 NYS2d 16 [1st Dept 2008]).

Here, the second cause of action for breach of contract is premised on the claim that Ellington gave the subject Images to his sister, who used them to promote her own book, in violation of the first Book Agreement (¶41). Since the crux of plaintiffs' conversion claim is that Ellington gave the manipulated Images to his sister, the fourth cause of action is duplicative of the breach of contract claim, and must be dismissed.

Attorneys' Fees

On July 23, 2013, the court ordered that defendants would be awarded their attorneys' fees and costs if they successfully moved to dismiss the complaint. Because plaintiffs' complaint has not been entirely dismissed, attorneys' fees are unwarranted at this juncture.

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendants' motion to dismiss the complaint pursuant to CPLR 3211 (a)(l) and (7) (or alternatively for summary judgment pursuant to CPLR 3212) is denied as to the first cause of action; and it is further

ORDERED that defendants' motion to dismiss the complaint pursuant to CPLR 3211 (a)(l) and (7) (or alternatively for summary judgment pursuant to CPLR 3212) is granted as to the second, third and fourth causes action; and it is further

ORDERED that the second, third and fourth causes of action are hereby severed and

dismissed; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: March 27, 2014

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD