

Leeds v Harry

2015 NY Slip Op 30170(U)

February 5, 2015

Supreme Court, New York County

Docket Number: 157749/13

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

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PETER C. LEEDS,

Plaintiff,

-against-

Index No.

DEBORAH HARRY, CHRISTOPHER STEIN, JAMES
MOLLICA, CLEMENT BOZEWSKI and BMG
RIGHTS MANAGEMENT (US) LLC,

157749/13

Defendants.

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HON. ANIL C. SINGH, J. :

Plaintiff moves for summary judgment. Defendants oppose the motion.

This is a breach of contract action. Plaintiff Peter C. Leeds is a former manager of defendants Deborah Harry, Christopher Stein, James Mollica and Clement Bozewski, members of the rock group Blondie (collectively "Blondie"). These parties terminated Leeds' professional relationship with the group by agreement dated May 24, 1979 (the Termination Agreement). Over the ensuing decades, Leeds has been paid substantial sums of money under the Termination Agreement.

During the 1970s and 1980s, Blondie assigned its interest in its musical compositions to its publisher Chrysalis Music Inc. ("Chrysalis"), the predecessor of defendant BMG Rights Management (US) LLC ("BMG") pursuant to various agreements. Under the Termination Agreement, Blondie authorized Chrysalis to pay Leeds commissions on Blondie's gross earnings and to forward to him all income, royalty and earning statements related to Blondie's gross earnings.

In 2013, Blondie was entitled to exercise a valuable statutory right that allowed it to terminate the transfer of its interest in its musical compositions to its music publisher in accordance

with section 203 of Title 17 of the United States Code Annotated (hereinafter, the Copyright Act). This Act allows artists to recapture copyright interests in certain musical works beginning 35 years after the date of the original transfer to a publisher, commencing with copyrights created in 1978 and thereafter. Accordingly, the Copyright Act would extinguish BMG's share in income resulting from the distribution of Blondie's compositions and allow the group to reap the financial benefit from its musical compositions.

Blondie, however, did not exercise its recapture rights. Instead, Blondie executed an Asset Purchase Agreement with BMG, dated December 21, 2012 transferring the recapture rights to BMG for \$1.3 million. Payment was made in two installments: \$500,000 on the date of execution of this agreement, and \$800,000 on December 1, 2013.

Leeds argues that the monies Blondie received upon the execution of the Asset Purchase Agreement is subject to the Termination Agreement. He is entitled to a commission on these monies because the Termination Agreement requires Blondie to pay him commissions upon "gross earnings," which is defined as "all earnings" (Paragraphs 3 and 4 of the Termination Agreement). Leeds contends that the Asset Purchase Agreement is related to agreements in existence prior to February 9, 1985, and concerns music created by Blondie prior to February 9, 1985. Therefore, Leeds seeks a recovery in the form of commissions. In addition, Leeds seeks attorneys' fees pursuant to the Termination Agreement.

Blondie argues that the sums payable under the Asset Purchase Agreement were generated by the sale of statutory recapture rights under the Copyright Act and are not gross income as defined by the Termination Agreement. The sums are not subject to commissions, as the Termination Agreement does not provide for payment of a commission on such payments. Nor does the Termination Agreement set a commission rate for the recapture rights. Further, Leeds is

not entitled to commissions related to the Asset Purchase Agreement because the “recapture rights” did not exist until 2013, or 35 years after 1978, and this agreement was not executed until 2012.

Leeds responds that the terms of the Termination Agreement are unambiguous; that all earnings are subject to commissions unless specifically excluded; and that he is entitled to commissions arising out of the Asset Purchase Agreement. Leeds also contends that the “recapture rights” existed in 1979, because such rights had existed upon the passage of the Copyright Act in 1976, but they could not be enforced until 2012. The execution of the Asset Purchase Agreement in 2012 made those rights, already in existence, available to Blondie, who chose to surrender them to BMG for the sum of \$1.3 million.

Discussion

The Termination Agreement defines “gross earnings” to include virtually every type of payment or income to which Blondie is entitled prior to February 9, 1985. Paragraph 3 provides in relevant part as follows:

we agree to pay you a commission, based upon our gross earnings from any and all sources except as herinafter provided ... the commission shall be paid on gross earnings which result from or relate to any contract in existence as of the date of commencement of this agreement or which is executed prior to February 9, 1985 ... or (b) any of our services or talents or any product thereof, or any property created by any or all of us in whole or in part prior to February 9, 1985....”

“Gross earnings” is defined broadly in paragraph 4 to include:

... all earnings, whether in the form of salaries, bonuses, flat fees, royalties, advances, interests, percentages, shares of profits, merchandise, shares in ventures, products, properties, sales price, or any other kinds or type of income which is reasonably related to the entertainment, amusement, music, recording, television, radio, literary, theatrical and advertising fields and all similar areas whether now known or hereafter devised.

Blondie’s argument that the recapture rights are not the subject of the Termination Agreement because they came into existence in 2013 is without merit. The recapture rights were

inchoate rights with the passage of the Copyright Act in 1976. The rights could not be vested for thirty-five years. However, the income earned from sale of the recapture rights relate to music compositions that were in existence prior to February 9, 1985 pursuant to the Termination Agreement.

To determine the meaning of a contract, the court examines the parties' obligations and intentions as manifested in the entire agreement and seeks to afford the language an interpretation that is sensible, practical, fair, and reasonable (*Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 13 NY3d 398, 404 [2009]; *Abiele Contr. v New York City School Constr. Auth.*, 91 NY2d 1, 9-10 [1997]; *Brown Bros. Elec. Contr. v Beam Constr. Corp.*, 41 NY2d 397, 400 [1977]). In the construction of a contract, words and phrases used in an agreement must be given their plain and ordinary meaning so as to define the rights of the parties and to best effectuate the intention of the parties (*Innophos, Inc. v Rhodia, S.A.*, 38 A.D.3d 368 [1st Dept., 2007]).

Leeds' interpretation that the payment for recapture rights falls within the broad definition of gross earnings is reasonable. The examples given in paragraph 3 of the types of income sources are by way of example and state, "Without limiting the generality of the foregoing, it is understood that you are entitled to a commission on all of our earnings derived from records and tapes, writing and composing musical compositions, music publishing, personal appearances, television, radio commercials, merchandising and endorsements."

Furthermore, paragraph 4 defines gross earnings with more specificity as all earnings, including income "which is reasonably related to the entertainment, amusement, music, recording, television, radio, literary, theatrical and advertising fields and all similar areas whether now known or hereafter devised...." The recapture rights pertain to Blondie's musical compositions. There is no question that, had Blondie exercised its recapture rights, the royalties earned, if any, from the

exploitation of its musical compositions would have been gross earnings subject to the Termination Agreement. In short, the monies Blondie received for not exercising its recapture rights is reasonably related to music and recording.

However, the inquiry does not end here, as the court must consider the entire agreement. “Where the parties dispute the meaning of particular contract clauses, the task of the court is to determine whether such clauses are ambiguous when ‘read in the context of the entire agreement.’” *Richard Feiner & Co., Inc. v Paramount Pictures*, 95 AD3d 232, 237 (1st Dept 2012), quoting *W.W.W. Assoc.*, 77 NY2d at 163. “Accordingly, the intention of the parties to a contract must be ascertained not from one provision but from the entire instrument.” *Richard Feiner*, 95 AD3d at 237-38.

On its face, paragraph 3 of the Termination Agreement does not state a specific percentage of commission due Leeds. While paragraph 4 makes a reference to “the calculation of your commission,” it provides neither a numerical percentage nor a formula for calculating the rate of commission.

The commission rates are set forth in paragraphs 7 through 10 of the Termination Agreement. The rate varies depending on the artistic endeavor from which Blondie derives income.

Paragraph 7 sets forth specific commission rates for gross income derived from the sale of recordings. The rate varies from 10% to 15% to 7 ½% depending on the recording.

Paragraph 8 specifies specific numeric percentage rates for calculating commissions on advances related to records, song writing and music publishing.

Paragraph 9 states that Blondie agreed to pay a commission on gross income earned from song writing and music publishing at a varying rate.

Paragraph 10 states that Blondie agreed to pay a commission of 7 ½% or 3 ½% on gross income earned from personal appearances.

Finally, paragraph 11 specifies that Blondie agreed to pay a commission of 3 ½% of all gross income earned by Blondie through May 1982, which was derived from any source other than recordings, song writing, music publishing, personal appearances, theatrical performances and motion pictures.

Conspicuously absent from the Termination Agreement is a specific commission rate that would apply to the sale of statutory recapture rights. The assignment of Blondie's recapture rights is not income derived from the sale of records, advances or personal appearances, or gross income earned by defendants under the name Blondie before May 1982.

The only provision that arguably may apply to Blondie's sale of its statutory recapture rights is paragraph 9, which sets a commission rate for income payable for song writing and music publishing. Arguably, in declining to exercise its statutory recapture rights, Blondie was earning income derived from song writing and music publishing. BMG payed Blondie \$1.3 million for the continued right to exploit the compositions and generate royalties.

Leeds glosses over the issue of calculating a commission rate by imposing a blended commission rate of 12 ½% for the monies received by Blondie under the Asset Purchase Agreement. There is no support for this position in the Termination Agreement.¹ Because the court's role is limited to interpreting and enforcing the agreed terms of a contract, this Court cannot

¹Plaintiff argues that the statement by Blondie's counsel in their Memorandum in Opposition at page 4 that Leeds has earned approximately \$3 million in commissions at an average rate of 12 ½% constitutes a judicial admission. This court disagrees. A statement made by a party's attorney constitutes a judicial admission only when made with sufficient formality and conclusiveness, which the Court finds lacking here (*State ex rel. H v P.*, 90 A.D.2d 434 [1st Dept., 1982]). By no means is there an admission by Blondie that Leeds is entitled to a 12 ½% commission rate for the recapture payments. In fact, to the contrary defendants maintain that no commission is due for the sale of the recapture rights.

by construction add terms to the Agreement, nor can it vary the meaning of the agreed-upon terms (*Ashwood Capital, Inc. v OTG Management, Inc.*, 99 A.D.3d 1, 7 [1st Dept., 2012]).

The court finds that the Termination Agreement when read as a whole is ambiguous, for it fails to specify the rate of commission applicable to gross income derived from a sale of recapture rights. In light of the above, this Court finds that there is a genuine issue of material fact as to whether the sale of the statutory recapture rights is subject to a commission under the Termination Agreement.

Finally, we turn to the issue of whether plaintiff is entitled to an award of attorneys' fees pursuant to section 16 of the Termination agreement, which states as follows:

You shall have the right to audit our books and records upon reasonable notice, not more often than one (1) time every six (6) months per calendar year for every year that payments are due to you under this agreement. You agree to provide us with a copy of the audit report. In the event of any dispute arising out of any such audit, suit must be commenced within eighteen (18) months after we notify you in writing that we disagree with the results of such audit. In any such suit, if you prevail, then you shall be entitled to tax as additional costs the reasonable costs incurred in connection with said suit.

(Affirmation of Elizabeth A. Chew, Esq., exhibit A, p. 11).

Plaintiff is not entitled to an award of attorneys' fees. First, Leeds is suing for breach of contract. There is no allegation in the complaint that Leeds demanded an audit and brought suit because of a dispute arising out of an audit. Second, even if the court were to construe this lawsuit as a dispute over an audit, the agreement does not specify the payment of "attorneys' fees." There is no basis whatsoever in the record for the Court to infer that Blondie intended to waive the benefit of the American rule, under which each side bears its own attorneys' fees (Hooper Assoc. v. AGS Computers, 74 N.Y.2d 487 [1999]).

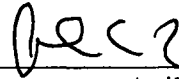
Accordingly, it is

ORDERED that the motion for summary judgment is denied and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 320,
80 Centre Street, on April 15, 2015, at 9:30 AM.

DATED: Feb 5, 2015

ENTER:



Anil C. Singh