

<b>Mims v Capital Records, LLC</b>
2015 NY Slip Op 30203(U)
January 9, 2015
Supreme Court, New York County
Docket Number: 652653/2011
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART THREE

-----X  
SHAWN MIMS p/k/a "MIMS," ERIK MENDELSON,  
And COREY LLEWELYN

Plaintiffs,

- *against* -

Index No.: 652653/2011  
Motion Date: 10/06/2014  
Motion Seq. No.: 001

CAPITOL RECORDS, LLC, as successor-in-interest to  
CAPITOL RECORDS, a division of  
Capitol Records, Inc.,

Defendant.

-----X  
BRANSTEN, J.

This breach of contract action comes before the Court on a motion by Defendant Capitol Records, LLC ("Capitol") for summary judgment. Plaintiffs Shawn Mims, Erik Mendelson and Corey Llewelyn (collectively, "Plaintiffs") oppose the motion. For the reasons set forth below, the motion is denied.

**Background<sup>1</sup>**

Plaintiff Shawn Mims is a successful recording artist. In April 2006, Mims signed an agreement with non-party Urban Box Office ("UBO"), under which Mims would produce two albums and UBO would distribute the albums ("UBO Agreement").

(Affidavit of John Ray in Support of Defendant's Motion for Summary Judgment ¶ 5.)

Plaintiffs Mendelson and Llewelyn represented Mims and are entitled to receive a

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<sup>1</sup> All facts in this section are undisputed, unless otherwise noted.

percentage of Mims's earnings based upon the UBO Agreement. (Affirmation of Donald S. Zakarin in Support of Defendant's Motion for Summary Judgment ("Zakarin Affirm.") Ex. 1, at 4 (UBO Agreement).)

A. *Assignment Agreement*

In November 2006, UBO assigned its rights to distribute Mims's albums to Defendant Capitol Records, LLC ("Capitol"), under the Memorandum Assignment Agreement ("Assignment Agreement"). (Zakarin Affirm. Ex. 2.) Mims acknowledged and assented to the terms of the Assignment Agreement. (Zakarin Affirm. Ex. 3.)

Mims's assent to the Assignment Agreement was necessary because the Assignment Agreement modified some of the terms of the UBO Agreement. For example, the UBO Agreement provided for a \$6,000 advance payment to Mims, while the Assignment Agreement provided for an \$850,000 advance payment to Mims. *Compare* Zakarin Affirm. Ex. 1, at 3 *with* Zakarin Affirm. Ex. 2, at 2. The Assignment Agreement also altered the terminology used to calculate Plaintiffs' profit share. Instead of receiving 50% of the defined term "Net Income," Plaintiffs would now receive their share of "Mims Profits," calculated as "Mims Revenues" less "Mims Costs." *Compare* Zakarin Affirm. Ex. 1, at 4 *with* Zakarin Affirm. Ex. 2, at 4-5.

B. *Plaintiffs' Audit*

In 2007 and 2008, Defendant provided income statements to Plaintiffs. (Affidavit of Erik Mendelson (“Mendelson Aff.”) Exs. 1, 2.) In these statements, Defendant calculated Plaintiffs’ share of profits under the formula delineated in the Assignment Agreement. *Id.* In 2010, Plaintiffs hired an auditor to determine if Defendant had accurately calculated Plaintiffs’ profits. (Zakarin Affirm. Ex. 8.) In his report, the auditor asserted that Capitol had miscalculated Plaintiffs’ share of profits in twenty-five different ways, allegedly resulting in an underpayment of \$1.1 million (“Audit Report”). *Id.*

Plaintiffs filed the Complaint on September 28, 2011. The Complaint reflected the findings of the Audit Report and asserted a single cause of action for breach of contract, comprised of twenty-five different underpayment allegations. The parties have settled twenty-two of the twenty-five claims. (Zakarin Affirm. Ex. 7.)

C. *Remaining Claims*

Only three of the twenty-five claims remain unresolved. In both the Audit Report and the Complaint, these claims are numbered seven, sixteen and twenty-two.

In claim seven, entitled “Incorrect Distribution Fee on Download/Online Income,” Plaintiffs allege that Defendant incorrectly charged a 21% distribution fee on income from digital sales. (Compl. at 5.) Plaintiffs allege that the UBO Agreement stated that

UBO would not charge a distribution on digital sales. Plaintiffs contend that the exclusion of digital sales from the distribution fee survived into the Assignment Agreement.

In claim sixteen, entitled “SoundExchange, Other Neighboring Rights and Illegal File [S]haring Settlement Income,” Plaintiffs allege that Defendant failed to remit money that Defendant received from SoundExchange, Inc. (“SoundExchange”).<sup>2</sup> (*Id.*) Plaintiffs allege that Defendant received income from SoundExchange but did not include it as revenue for purposes of profit sharing.

Finally, claim twenty-two, entitled “Restatement Option Album Advance,” is derivative in nature and is based upon Plaintiffs’ share of profits from Mims’s first album. (*Id.*) Plaintiffs’ share of profits from the first album includes the twenty-two settled claims, as well as any amount recovered on claims seven and sixteen.

Accordingly, claim twenty-two can only be calculated once claims seven and sixteen are determined.

Defendant now moves for summary judgment. Defendant seeks dismissal of claims seven and sixteen. Defendant also seeks a grant of judgment in favor of Plaintiffs on claim twenty-two in the amount of approximately \$97,000, based upon the twenty-two claims that have already settled. Plaintiffs oppose.

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<sup>2</sup> SoundExchange is an independent non-profit organization that collects and distributes digital performance royalties. (Zakarin Affirm. ¶ 35.)

### Analysis

#### A. Summary Judgment Standard

The standards for summary judgment are well-settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action “sufficiently to warrant the court as a matter of law in directing judgment.” CPLR 3212(b); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once such proof has been offered, to defeat summary judgment “the opposing party must show facts sufficient to require a trial of any issue of fact.” CPLR 3212(b); *Zuckerman*, 49 N.Y.2d at 562. When deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-movant. *Branham v. Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931, 932 (2007).

#### B. Defendant’s Motion for Summary Judgment

The Complaint asserts one cause of action for breach of contract. In order for Plaintiffs to establish entitlement to recover for breach of contract, they must show (i) the formation of a contract between Plaintiffs and Defendant, (ii) Plaintiffs’ performance, (iii) Defendant’s failure to perform, and (iv) resulting damages. *See Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep’t 2010).

Here, all parties agree that a valid contract exists, that Plaintiffs performed under the contract, and that Plaintiffs would be better off but for Defendant's actions. The issue pertinent to the instant motion is whether Defendant breached the UBO Agreement, as it was modified by the Assignment Agreement. The parties disagree on the extent to which the Assignment Agreement modified the UBO Agreement.

1. *Claim Seven – Incorrect Distribution Fee on Download/Online Income*

As noted above, in claim seven, Plaintiffs contend that Defendant breached the parties' contract by charging a 21% distribution fee on income from digital sales. Plaintiffs argue that the UBO Agreement specifically stated that domestic revenues would not include either income from "digital downloads" or income generated by third parties who have already deducted a fee from gross revenue (*i.e.*, iTunes).<sup>3</sup> The crux of Plaintiffs' argument is that the Assignment Agreement amended the UBO Agreement without changing this definition, so the original UBO definition controls.

The UBO Agreement states that "[t]he Distribution Fee shall not apply to sales accomplished by digital downloads and electronic transmissions. Further, [UBO] shall not retain and deduct any Distribution Fee in connection with sales achieved through a third party distributor." As noted, Plaintiffs contend that this provision survived into the Assignment Agreement.

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<sup>3</sup> The Court notes that the term "digital" in the phrase "digital downloads" is redundant, but nevertheless keeps the reference to accurately reflect the contractual language.

The UBO Agreement described UBO's "marketing services fee" as 7.5% of "net sales" and UBO's "distribution fee" as 14% of "net sales." *See Zakarin Affirm. Ex. 1, at 4.* In contrast, the Assignment Agreement stated that the "Distribution/Services fee" would be 21% of "gross domestic billings." *See Zakarin Affirm. Ex. 2, at 5.* The Assignment Agreement does not mention digital downloads or third-party distributors.

Defendant argues that it properly deducted the 21% distribution fee because the UBO Agreement was superseded by the Assignment Agreement. Defendant contends that the provision in the Assignment Agreement regarding a distribution fee completely replaced the parallel provision in the UBO Agreement. Defendant supports its interpretation by arguing that the UBO Agreement expressly stated that there would be no distribution fee taken from digital downloads, but the Assignment Agreement is totally silent on the issue and does not contain any such exclusion or limitation on digital sales.

Plaintiffs contend that their interpretation is supported by Defendant's actions. Plaintiffs aver that Defendant did not deduct the 21% distribution fee from "synchronization income," a type of income derived from third parties who use Mims's music in TV or movies, "synchronized" with visual images. Plaintiffs argue that synchronization income is generated by music sales unrelated to copies of music that Defendant "actually distributed." Plaintiffs contend that synchronization income, like digital income, is passive income on which Defendant is not entitled to a distribution fee.

Defendant responds to Plaintiffs' argument that the 21% fee applies only to product "actually distributed" by stating that its failure to charge 21% against synchronization income was a simple mistake. Defendant argues that it forgot to charge 21% because synchronization income is minute (\$10,000) compared to distribution income (\$8.3 million).

Finally, Plaintiffs argue that the term "gross domestic billings" is ambiguous and should be construed against Defendant, as the drafter. Defendant responds by arguing that the undefined term "gross domestic billings," to which the 21% fee applies, actually means all "gross domestic revenue," including digital downloads. Defendant notes that Plaintiff Mendelson admitted in his deposition that "gross domestic billings" means "gross domestic revenues," and that "digital distribution" is part of "revenues." See Zakarin Affirm. Ex. 9, at 50-51, 125-27.

When dealing with issues of contract interpretation, courts must construe the agreement according to the parties' intent, and the best evidence of what parties to a written agreement intended is what was said in the writing. See, e.g., *Slatt v. Slatt*, 64 N.Y.2d 966, 966 (1985). The courts also determine, as a matter of law, whether ambiguity exists by examining the agreement as a whole. See *Kass v. Kass*, 91 N.Y.2d 554, 566 (1998); *Nappy v. Nappy*, 40 A.D.3d 825, 826 (2d Dep't 2007). An agreement is ambiguous where it is, on its face, susceptible to two or more reasonable interpretations. See *Nappy*, 40 A.D.3d at 826.

The same rules of interpretation govern a contract that has been modified. When Courts interpret a modified contract, “the [contract] and its modifications must be taken together and construed as one contract in order to carry out the parties’ intent.” *350 E. 30th Parking, Ltd. v. Bd. of Managers of 350 Condo.*, 280 A.D.2d 284, 287 (1st Dep’t 2001). “[The] modification establishes a new agreement between the parties which supplants the affected provisions of the underlying agreement while leaving the balance of its provisions unchanged.” *Benipal v. Herath*, 251 A.D.2d 933 (3d Dep’t 1998); see *Cappelli v. State Farm Mut. Auto. Ins. Co.*, 259 A.D.2d 581 (2d Dep’t 1999).

Here, Defendant has carried its initial burden to tender evidence showing its entitlement to summary judgment. The Assignment Agreement, which redefines the distribution fee, does not exclude digital downloads or third-party distributors from the distribution fee. The Assignment Agreement defines the distribution fee as simply “21% of gross domestic billings.” Digital downloads can reasonably be interpreted as part of gross domestic billings.

However, summary judgment must be denied because Plaintiffs also have carried their burden by raising a triable issue of fact regarding digital downloads. Without opining as to whether Plaintiffs’ interpretation of the Assignment Agreement is the stronger one, the Court finds that it is at least reasonable. When a contractual provision is capable of two or more reasonable interpretations, it is ambiguous and presents an issue of fact. See *Nappy v. Nappy*, 40 A.D.3d 825, 826 (2d Dep’t 2007).

Plaintiffs' interpretation of the distribution fee provision is reasonable. In the Assignment Agreement, Defendant adopted some of UBO's obligations and modified others. *See Zakarin Affirm. Ex. 1, at 4.* One of UBO's original obligations was to refrain from charging a distribution fee on digital downloads or electronic transmissions. *Id.* The reworked distribution fee provision in the Assignment Agreement simply does not mention digital downloads or electronic transmission. *See Zakarin Affirm. Ex. 2, at 5.*

Defendant's arguments do not foreclose the issue of fact raised by Plaintiffs. Use of the term "gross domestic billings," even if it does mean "revenues," does not, as a matter of law, necessarily indicate that the parties eliminated the exclusion of revenues from digital downloads and third-party distributors from the distribution fee. The UBO Agreement, which excluded the distribution fee on digital downloads, applied to "gross sales, net of returns." *See Zakarin Affirm. Ex. 1, at 4.* The Assignment Agreement changed "gross sales, net of returns," to "gross domestic billings," without referencing "digital downloads." *See Zakarin Affirm. Ex. 2, at 5.* The Court cannot say, as a matter of law, that changing the term "gross sales, net of returns" to "gross domestic billings" unambiguously evidenced an intent to include a distribution fee on digital downloads.

New York courts have held that a contractual modification "supplants the affected provisions of the underlying agreement while leaving the balance of its provisions unchanged." *Benipal, 251 A.D.2d at 933.* It is reasonable to assume that the absence of a reference to "digital downloads" in the Assignment Agreement manifested an intent to

modify the UBO Agreement's entire distribution fee provision and remove the digital exclusion. However, it is also at least reasonable to assume that the Assignment Agreement only modified the specific portion of the provision that it mentioned. Because the Assignment Agreement did not mention "digital downloads," the parties may not have intended to modify the "digital downloads" exclusion.

Accordingly, there is a question of fact as to whether the provision in the Assignment Agreement entitled "Distribution/Services fee" wholly supplanted the provision in the UBO Agreement entitled "Marketing & Distribution Fees." Both interpretations offered by the parties are at least reasonable. For the reasons stated above, Defendant's motion for summary judgment on claim seven must be denied.

*2. Claim Sixteen – SoundExchange, Other Neighboring Rights and Illegal File Sharing Settlement Income*

In claim sixteen, Plaintiffs contend that Defendant breached the parties' contract by failing to remit money that Defendant received from SoundExchange. Plaintiffs allege that Defendant received income from SoundExchange but did not include it as "Mims Revenue" for purposes of profit sharing.

Defendant argues that SoundExchange already paid Mims his share of SoundExchange income directly. Defendant contends that the "public performance" income paid by SoundExchange is not included as part of "Mims Revenue." Defendant

notes that “Mims Revenue” is defined as money Defendant receives from the “distribution, sale, use and exploitation of the Master Recordings.” Defendant contends that to be considered “Mims Revenue,” the revenue must derive from some sort of activity on the part of Defendant. Defendant contends that it did not do anything to receive SoundExchange income.

Defendant also argues that its SoundExchange revenue is a public performance fee authorized by the “statutory framework” of the federal Copyright Act. Although not explicitly identified by Defendant, Copyright Act section 114(g)(2) appears to be the “statutory framework” that Defendant relies upon. *See* 17 U.S.C. § 114 (2012). Section 114(g)(2)(A) provides that “50 percent of receipts shall be paid to the copyright owner,” and Section 114(g)(2)(D) provides that 45 percent of the receipts shall be paid . . . to the recording artist or artists featured . . .” *See* 17 U.S.C. § 114(g)(2)(A)-(D). Defendant contends that Mims already received funds from SoundExchange under § 114(g)(2)(D) and is not entitled to be paid twice for the same performance.

Finally, Defendant posits that if Mims is entitled to payment for SoundExchange income, it is limited to \$2,859.56, before deduction of the 21% distribution fee. *See* Zakarin Affirm. ¶ 37, Ex. 15. Defendant contends that it only received \$11,000 from SoundExchange, and that Mims is only contractually entitled to 25% of the \$11,000. *Id.*

Plaintiffs respond that the Assignment Agreement defines “Mims Revenues” as “all revenues received by Capitol.” According to Plaintiffs, because Defendant received

revenues from SoundExchange, those revenues are part of “Mims Revenues.” Plaintiffs also argue that the SoundExchange statement reflecting Mims’s 45% share of public performance revenue totaled \$26,000. *See Mendelson Aff. Ex. 4.* Plaintiffs contend that this means Defendant’s 50% share must be more than \$11,000.

Defendant responds that the time period covered in Plaintiffs’ SoundExchange statement is four years longer than in the time period at issue here. Defendant also contends that any request for further discovery must be denied because Plaintiffs filed the Note of Issue alleging that discovery is complete.

Defendant’s motion for summary judgment on claim sixteen must be denied because Defendant has failed to show that it is entitled to judgment as a matter of law. Defendant argues that “the statutory public performance income paid by SoundExchange is not revenue generated by Capitol’s activity in exploiting the Mims recordings.” *See Zakarin Affim. ¶ 36.* However, Defendant has not demonstrated how or why it receives SoundExchange income.

Defendant has failed to show why it is entitled to receive SoundExchange income. Defendant alleges that there is a “statutory framework,” but fails to explain why it is entitled to receive money under that “framework” other than because of the rights that Mims granted to Defendant under the Assignment Agreement.

Further, the Copyright Act cited by Defendant as laying out the “statutory framework” actually undermines Defendant’s position. Copyright Act section

114(g)(1)(A) states that “a featured recording artist who performs on a sound recording that has been licensed for a transmission shall be entitled to receive payments from the copyright owner of the sound recording in accordance with the terms of the artist’s contract.” 17 U.S.C. § 114(g)(1)(A) (2012). Mims, as a featured artist, appears to be “entitled to receive payments” from Defendant, “as the copyright owner . . . in accordance with the terms of” the Assignment Agreement. Although the parties did not brief this issue, the Court finds that the language of the statute provides additional support to deny Defendant’s motion for summary judgment.

Beyond failing to show why it is entitled to receive SoundExchange income, Defendant has also failed to show how SoundExchange income is derived, other than through conclusory averments opaquely describing a “statutory framework.” Without any description of how SoundExchange funds are earned, the Court must hold that there is an issue of fact as to whether Mims is entitled to SoundExchange revenue received by Defendant.<sup>4</sup>

Further, Defendant’s contention that Plaintiffs’ recovery should be limited to \$2,859.56 is also unavailing. To support its contention, Defendant purports to submit a schedule showing all monies it received from SoundExchange. *See Zakarin Affirm.* ¶ 35,

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<sup>4</sup> Defendant attempts to explain how SoundExchange revenues are derived in footnote 5 to its Rule 19-A Statement of Material Facts. To support its assertions, Defendant cites to page 181 of Mendelson’s deposition, submitted as Exhibit 9 to the Zakarin Affirmation. However, page 181 was not submitted to the Court. The pages submitted as Zakarin Affirmation Exhibit 9 skip from page 180 to page 199.

Ex. 15. However, the document submitted cannot serve as the basis for summary judgment. The document submitted is not clear on its face, but rather is simply a list of recipients, service descriptions, amounts, and time periods. It neither states that it relates SoundExchange nor does it contain the word "SoundExchange" anywhere in the document. *Id.* Defendant has not demonstrated, through proof in admissible form, its entitlement to judgment as a matter of law.<sup>5</sup>

Accordingly, Defendant's motion for summary judgment on claim sixteen is denied.

### 3. *Claim Twenty-Two – Restatement Option Album Advance*

Finally, in claim twenty-two, Plaintiffs seek additional payment of the second album advance. Under the Assignment Agreement, Plaintiffs are entitled to receive an advance payment of their profit share from the second album. The second album advance payment is based upon 67% of Plaintiffs' share of profits from Mims's first album, up to a maximum of \$1,200,000. *See Zakarin Affirm. Ex 2, at 4.* Plaintiffs' share of profits from the first album includes (1) all profits received so far, (2) the twenty-two settled claims, and (3) any amount recovered on claims seven and sixteen.

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<sup>5</sup> In a footnote, Defendant argues that if the money it received from SoundExchange is considered "Mims Revenues," then any money that Mims received from SoundExchange should also be considered "Mims Revenues." This argument is unavailing because the definition of Mims Revenues is defined as "all revenues received by Capitol." *See Zakarin Affirm. Ex. 2 at 4.* Revenue from SoundExchange received by Mims is not "received by Capitol."

Defendant contends that it has already paid all monies owed arising from the instant action. Therefore, based upon the \$145,740 already paid on the other claims, Defendant asks that judgment be entered against it in the amount of \$97,645.80, or 67% of \$145,740.

Defendant also contends that if Plaintiffs do recover on claims seven and sixteen, the amount recoverable on claim twenty-two is capped at \$127,000. Defendant argues Plaintiffs listed \$127,000 in the original complaint and two subsequent amendments next to claim twenty-two. Defendant further contends that Plaintiffs were already paid \$946,791 as an advance, so the cap of \$1,200,000 less \$946,791 is \$253,209. Further, under the Assignment Agreement, Plaintiffs are only entitled to 50% of \$253,209, or \$126,604 (rounded to \$127,000).<sup>6</sup> *See Zakarin Affirm. Ex. 2, at 4.*

Plaintiffs argue that this amount cannot be determined until all amounts owed are determined.

As noted above, summary judgment as to claim twenty-two must be denied because it cannot be determined until the amount of claims seven and sixteen are decided. However, Plaintiffs make no argument against setting the maximum amount recoverable on claim twenty-two as \$127,000. Finally, Plaintiffs' audit report also acknowledges the \$127,000 maximum amount. *See Zakarin Affirm. Ex. 8, at 23.* Therefore, the maximum amount recoverable on claim twenty-two is \$127,000.

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<sup>6</sup> UBO is entitled to the other 50%. *See Zakarin Affirm. Ex. 2, at 4.*

**Conclusion**

Accordingly, it is hereby

ORDERED that Defendant's motion for summary judgment is DENIED; and it is further

ORDERED that all counsel are directed to appear for a pre-trial conference on March 17, 2015, at 10:00 a.m.

This constitutes the decision and order of the court.

Dated: New York, New York

January 9, 2015

ENTER:

A handwritten signature in black ink, appearing to read "Eileen Bransten", written over a horizontal line.

Hon. Eileen Bransten, J.S.C.