Thomas v Massenburg
2015 NY Slip Op 30502(U)
April 1, 2015
Sup Ct, New York County
Docket Number: 652898/14
Judge: Cynthia S. Kern

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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JOE LEWIS THOMAS and 563 ENTERTAINMENT, LLC,

Plaintiffs,

Index No. 652898/14

-against-

DECISION/ORDER

KEDAR MASSENBURG, individually and d/b/a KEDAR ENTERTAINMENT, KEDAR ENTERTAINMENT, LLC, MASSENBURG MANAGEMENT, LLC and MASSENBURG MEDIA, LLC,

Defendants.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiffs Joe Lewis Thomas and 563 Entertainment, LLC ("563") commenced the instant action against defendants Kedar Massenburg, individually and d/b/a Kedar Entertainment, Kedar Entertainment, LLC, Massenburg Management, LLC and Massenburg Media, LLC to recover damages stemming from defendants' alleged breach of two oral agreements entered into between plaintiffs and defendants. Defendants now move for an Order pursuant to CPLR §§ 3211 (a)(5) and (7) to dismiss plaintiffs' complaint. For the reasons set forth below, defendants' motion is granted in part and denied in part.

The relevant facts according to the complaint are as follows. Plaintiff Thomas is a rhythm

and blues recording artist, songwriter and singer who has enjoyed substantial success and recognition in the music industry for over two decades and has received seven Grammy Award nominations for his vocal performances and musical works. Plaintiff 563 is the company used by Thomas as his record label and as the vehicle for his professional activities in the recording industry. Defendant Kedar Massenburg is a record producer and record label executive, who was the president of Motown Records from 1997 through 2004 and since 2005, under the name "Kedar Entertainment," has acted as a personal manager, promoting recording artists, serving as an executive producer for their albums and releasing said albums of such recording artists.

In or around 1998, Thomas entered into an oral agreement with Massenburg whereby Massenburg was to act as Thomas' personal manager ("Personal Management Agreement"). Specifically, Thomas alleges that pursuant to the Personal Management Agreement, Massenburg was to assist Thomas with major business and creative decisions, to oversee and take steps to promote and advance Thomas' career as a recording artist and live performer and to coordinate concert tours and bookings for live performances. Additionally, pursuant to the Personal Management Agreement, Massenburg was to retain as his management fee twenty percent of net revenues received from Thomas' activities, including, *inter alia*, income derived from live performances and touring.

In or around 2008, 563, on behalf of Thomas, entered into an oral agreement with Massenburg under the name Kedar Entertainment purporting to create a joint venture to produce, release, market and distribute sound recordings, including albums embodying the sound recordings, featuring Thomas as a musical artist (the "Joint Venture Agreement"). Specifically, pursuant to the Joint Venture Agreement, 563 was to oversee and produce sound recordings featuring Thomas' performances as a recording artist and Thomas was to write, co-write and/or

select the musical compositions to be embodied upon the sound recordings, select, oversee and arrange the musicians involved and oversee the musical performances and the recording, mixing and mastering of the sound recordings for ultimate delivery to Massenburg as completed albums. Additionally, pursuant to the Agreement, Massenburg was to promote, market and arrange for the distribution and sale of the albums and the individual songs embodied on the albums and deal with the business relating to the collecting of all moneys derived from the sale of the albums and to pay any costs associated with the production and promotion of the albums. Finally, pursuant to the Agreement, any advances received and all profits derived from the sale of the albums were to be divided equally between Massenburg and 563.

The complaint alleges that plaintiffs performed pursuant to both agreements but that they have not received the funds promised to them by defendants. Defendants now move for an Order pursuant to CPLR §§ 3211 dismissing the complaint in its entirety.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept. 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to 'whether it states in some recognizable form any cause of action known to our law.'" *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977) (*citing Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956).

As an initial matter, defendants' motion to dismiss the complaint's third cause of action for the breach of the Personal Management Agreement, fourth cause of action for an accounting based on the breach of the Personal Management Agreement and fifth cause of action for the

imposition of a constructive trust based on the breach of the Personal Management Agreement on the ground that they are time-barred is denied. "A defendant who seeks dismissal of a complaint pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations bears the initial burden of proving, prima facie, that the time in which to commence an action has expired." *Texeria v. BAB Nuclear Radiology, P.C.*, 43 A.D.3d 403, 405 (2d Dept 2007). A party has six years to commence an action for breach of contract. *See* CPLR § 213(2). "In New York, a breach of contract cause of action accrues at the time of the breach." *Ely-Cruikshank Co. v. Bank of* Montreal, 81 N.Y.2d 399, 402 (1993). Further, a "cause of action for an accounting is governed by the six-year Statute of Limitations (CPLR 213) and accrues only when the duty to pay arises." *Bernstein v. La Rue*, 120 A.D.2d 476, 477 (2d Dept 1986). "However, the time such a duty arises is dependent upon the time for the defendants' performance under the parties' contract." *Id.* Additionally, "[a] cause of action to impose a constructive trust is governed by a six-year statute of limitations and begins to accrue 'upon the occurrence of the wrongful act giving rise to a duty of restitution and not from the time the facts constituting the fraud are discovered.'" *Reiner v. Jaeger*, 50 A.D.3d 761 (2d Dept 2008)(citing *Soscia v. Soscia*, 35 A.D.3d 841, 843 (2d Dept 2006)).

In the instant action, defendants' motion to dismiss the third cause of action for breach of the Personal Management Agreement, the fourth cause of action for an accounting based on the breach of the Personal Management Agreement and the fifth cause of action for the imposition of a constructive trust based on the breach of the Personal Management Agreement on the ground that they are time-barred is denied as defendants have not established that plaintiffs' time in which to commence these causes of action has expired. Indeed, defendants have not put forth any evidence of when the breach of the Personal Management Agreement might have occurred, when

the duty to pay plaintiff arose under the Personal Management Agreement or any details about the time for defendants' performance under the Personal Management Agreement. The mere fact that the complaint alleges that the parties entered into the Personal Management Agreement in 1998 is insufficient to establish that the claims made pursuant to the Personal Management Agreement are time-barred as the complaint does not specify a date by which payment to Thomas was required.

Defendants' motion to dismiss the complaint's second cause of action for fraud is granted. A fraud-based cause of action can only lie "where the plaintiff pleads a breach of a duty separate from a breach of the contract." *Manas v. VMS Assocs., LLC*, 53 A.D.3d 451, 453 (1st Dept 2008); *see also Krantz v. Chateau Stores of Canada, Ltd.*, 256 A.D.2d 186, 187 (1st Dept 1998)(citing *Wegman v. Dairylea Coop.*, 50 A.D.2d 108, 113 (4th Dept 1975)("To plead a viable cause of action for fraud arising out of a contractual relationship, the plaintiff must allege a breach of duty which is collateral or extraneous to the contract between the parties.")) "A failure to perform promises of future acts is merely a breach of contract to be enforced by an action on the contract. A cause of action for fraud does not arise when the only fraud charged relates to a breach of contract." *Tesoro Petroleum Corp. v. Holborn Oil Co.*, 108 A.D.2d 607 (1st Dept 1985).

In the instant action, defendants' motion to dismiss the complaint's second cause of action for fraud is granted on the ground that the complaint fails to plead a breach of a duty separate from a breach of the Joint Venture Agreement. The second cause of action alleges that defendant Massenburg represented to Thomas on numerous occasions that no profits had been generated under the Joint Venture Agreement due to substantial expenses incurred by Massenburg. The second cause of action further alleges that such representations were material and false, that they were known to be false by Massenburg when they were made and that Massenburg made the

representations with the intent to induce Thomas' reliance upon them. Additionally, the second cause of action alleges that Thomas justifiably relied upon Massenburg's misrepresentations and that as a result of such reliance, Thomas failed to seek and obtain the profits he is allegedly owed. However, the second cause of action fails to allege any fraud which is collateral or extraneous to the Joint Venture Agreement, pursuant to which Massenburg was obligated to pay fifty percent of the profits to Thomas. Thus, the second cause of action for fraud must be dismissed.

The court next turns to defendants' motion to dismiss plaintiffs' first cause of action for breach of the Joint Venture Agreement and third cause of action for breach of the Personal Management Agreement on the ground that they are barred by the Statute of Frauds. As an initial matter, defendants' motion to dismiss the third cause of action for breach of the Personal Management Agreement on the ground that it violates General Obligations Law ("GOL") § 5-701(a)(1) is denied. Pursuant to GOL § 5-701(a)(1),

> a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:
>
> 1. By its terms is not to be performed within one year from the making thereof....

"The statute encompasses only those agreements which, by their terms, 'have absolutely no possibility in fact and law of full performance within one year.' It matters not that completion of performance within one year may be unlikely or improbable." *Foster v. Kovner*, 44 A.D.3d 23, 26 (1st Dept 2007) (citing *D & N Boening v. Kirsch*, 63 N.Y.2d 449 (1984)).

In the instant action, defendants' motion to dismiss the complaint's third cause of action for breach of the Personal Management Agreement on the ground that it violates GOL § 5-

701(a)(1) is denied as the Personal Management Agreement, the terms of which are alleged in the complaint, could have been performed within one year. Pursuant to the allegations in the complaint, plaintiff Thomas entered into the Personal Management Agreement with Massenburg in 1998 pursuant to which Massenburg was to act as Thomas' personal manager. Specifically, Massenburg was to assist Thomas with major business and creative decisions and to oversee and take steps to promote and advance Thomas' career as a recording artist and live performer, including, coordinating concert tours and booking Thomas for live performances. Additionally, pursuant to the Personal Management Agreement, Massenburg was to retain a twenty percent management fee to be paid out of the net revenues received from Thomas' activities, including the live performances and touring and Thomas was to receive the remaining eighty percent. While it is unlikely that such agreement could be performed within one year, it matters not that it is unlikely or improbable but only whether, pursuant to the terms of the agreement, it is impossible. *See Foster*, 44 A.D.3d at 26. Pursuant to the terms of the Personal Management Agreement, it is not impossible for it to be completed within one year.

Additionally, defendants' motion to dismiss the complaint's first cause of action for breach of the Joint Venture Agreement on the ground that it violates GOL § 5-701(a)(1) is denied. "[T]he statute of frauds is generally inapplicable to an agreement to create a joint venture or partnership." *Foster v. Kovner*, 44 A.D.3d 23, 27 (1st Dept 2007)(internal citations omitted). "This is because, absent any definite term of duration, an oral agreement to form a partnership or joint venture for an indefinite period creates a partnership or joint venture at will." *Id. See also Murphy v. CNY Fire Emergency Services, Inc.*, 225 A.D.2d 1034, 1035 (4th Dept 1996)("An oral agreement that is terminable at will is capable of performance within one year and, therefore, does

not come within the Statute of Frauds.") Here, the Joint Venture Agreement, as alleged in the complaint, is not for a definite term of duration and thus, is an agreement that is terminable at will. Therefore, GOL § 5-701(a)(1) is inapplicable here.

Further, defendants' motion to dismiss the first cause of action for breach of the Joint Venture Agreement on the ground that it violates GOL § 5-701(a)(10) is denied. Pursuant to GOL § 5-701(a)(10),

> a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:
>
> 10. Is a contract to pay compensation for services rendered in negotiating...of a business opportunity, business, its good will, inventory, fixtures or an interest therein.... "Negotiating" includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction. This provision shall apply to a contract implied in fact or in law to pay reasonable compensation but shall not apply to a contract to pay compensation to an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman.

It is well-settled that "[t]he statute,...applies to various kinds of intermediaries who perform limited services in the consummation of certain kinds of commercial transactions." *Freedman v. Chemical Construction Corp.*, 372 N.Y.2d 260, 266 (1977). Indeed, "the statute was aimed at the protection of principals or employers against claims for brokers' or finders' fees and, indirectly, at protecting brokers and finders in their dealings with principals...." *Dura v. Walker, Hart & Co.*, 27 N.Y.2d 346, 350 (1971). Moreover, it is well-settled in New York that GOL § 5-701(a)(10) is inapplicable where the agreement involves the split of profits from a business enterprise "closely akin to a joint venture." *Dura*, 27 N.Y.2d at 350; *see also Haskins v. Loeb Rhoades & Co.*, 52

N.Y.2d 523, 535 (1981)(agreement to share in the profits of a joint enterprise need not be in writing). *See also Richman v. Federated Adjustment Co.*, 95 A.D.2d 850 (2d Dept 1983)("this 'free-splitting' agreement envisions a relationship more closely akin to that of a joint venture, where individuals pool their respective efforts to effect a result and share in the benefits. Such an agreement need not be reduced to writing.") Here, as plaintiff has alleged the existence of a Joint Venture Agreement pursuant to which the profits were to be shared, GOL § 5-701(a)(10) does not apply to bar recovery upon said agreement.

Additionally, defendants' motion to dismiss the third cause of action for breach of the Personal Management Agreement on the ground that it violates GOL § 5-701(a)(10) is denied as pursuant to the allegations in the complaint, defendant was not hired as a "finder" or "broker" to negotiate a business opportunity but rather as a manager to advance and promote plaintiff Thomas' career, which does not fall within the ambit of § 5-701(a)(10). In *Streit v. Bushnell*, 424 F.Supp.2d 633 (S.D.N.Y. 2006), a case similar to the instant action, an agreement akin to the Personal Management Agreement was found not to be barred by § 5-701(a)(10). Specifically, in *Streit*, the plaintiff alleged that he was hired as a professional manager by the defendant pursuant to an oral agreement and referred to said agreement in the complaint as a "Management Agreement." Streit alleged that pursuant to said agreement, he undertook to sell and promote the defendant's work and career, including the production of defendant's book as a television series, in exchange for ten percent of all income defendant derived from that production. In denying defendant's motion to dismiss the action on the ground that it violated § 5-701(a)(10), the court explained as follows:

> Streit's pleadings describe services that are neither those of an

> intermediary, nor limited to one business transaction. Rather, the complaint suggests that the parties had maintained an employment relationship that began in 1995 under what in form and substance may be properly deemed an employment contract that New York courts have held are not subject to [GOL § 5-701(a)(10)].

Here, according to the allegations in the complaint, plaintiff has alleged what can only be deemed an employment contract pursuant to which Massenburg was to be plaintiff's manager and promote and advance plaintiff's career, including booking concert tours and live performances, in exchange for a twenty percent management fee. Such agreement does not fall within the ambit of GOL § 5-701(a)(10).

Defendants' motion to dismiss the complaint's sixth cause of action seeking to recover in quantum meruit on the ground that it is also barred by the Statute of Frauds is denied. As defendants' only argument for dismissal of the sixth cause of action is based on dismissal of the two breach of contract causes of action on the ground that the agreements violate the Statute of Frauds, their motion is denied as this court has not dismissed those causes of action.

The court next turns to defendants' motion to dismiss the complaint's fourth cause of action for an accounting and fifth cause of action for the imposition of a constructive trust on the ground that the allegations in the complaint do not support a finding of a fiduciary relationship. "The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest." *Palazzo v. Palazzo*, 121 A.D.2d 261, 265 (2d Dept 1986). Further, "[i]n order to impose a constructive trust..., a plaintiff must prove: (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment." *Eickler v. Pecora*, 12 A.D.3d 635, 636 (2d Dept 2004).

As an initial matter, defendants' motion to dismiss the fourth cause of action for an accounting and fifth cause of action for the imposition of a constructive trust is granted only to the extent that the fourth and fifth causes of action based on a breach of the Personal Management Agreement are dismissed as plaintiffs have failed to establish their entitlement to an accounting or the imposition of a constructive trust based on said agreement. Indeed, plaintiffs have not alleged that a confidential or fiduciary relationship arises out of the Personal Management Agreement, which would entitle them to an accounting or the imposition of a constructive trust.

However, defendants' motion to dismiss the fourth cause of action for an accounting and fifth cause of action for the imposition of a constructive trust based on a breach of the Joint Venture Agreement is denied. It is well-settled that a fiduciary relationship arises out of the existence of a joint venture. *See Plumitallo v. Hudson Atlantic Land Co., LLC*, 74 A.D.3d 1038 (2d Dept 2010). *See also Birnbaum v. Birnbaum*, 73 N.Y.2d 461 (1989)(The right to an accounting arises from the well-established tenet that joint venturers, like partners, are fiduciaries owing a duty of undivided and undiluted loyalty to those whose interests the fiduciaries are to protect.) Further, "profits wrongfully diverted or kept from a joint venture are subject to a constructive trust and a faithless fiduciary must account to his associates in the enterprise...." *See Mariani v. Summers*, 3 Misc.2d 534, 539 (Sup. Ct. N.Y. County 1944), *aff'd*, 269 A.D. 840 (1st Dept 1945). See *also Plumitallo*, 74 A.D.3d at 1039 ("The plaintiff's status as an alleged partner in a joint venture gives rise to a fiduciary relationship which allows the imposition of a constructive trust.")

In the instant action, plaintiffs have sufficiently alleged a cause of action for an accounting and the imposition of a constructive trust based on the alleged breach of the Joint Venture

Agreement as the complaint alleges the existence of a joint venture agreement with defendants, out of which arises a fiduciary duty and entitles the plaintiff to an accounting and the imposition of a constructive trust. Thus, defendants' motion to dismiss the fourth and fifth causes of action for an accounting and the imposition of a constructive trust based on a breach of the Joint Venture Agreement is denied.

Finally, defendants' motion to dismiss all causes of action asserted against Mr. Massenburg individually on the ground that the complaint fails to state a claim for piercing the corporate veil is granted only as to those causes of action based upon an alleged breach of the Joint Venture Agreement. "[P]iercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." *Morris v. New York State Dept. of Taxation and Finance*, 82 N.Y.2d 135, 141 (1993). "[C]omplete domination of the corporation is the key to piercing the corporate veil, especially when the owners use the corporation as a mere device to further their personal rather than the corporate business...." *Id.*

Here, plaintiffs' complaint fails to sufficiently state a claim for piercing the corporate veil. The complaint alleges that "Massenburg has abused the privilege of doing business in the corporate form by failing to adhere to corporate formalities, because of the inadequate capitalization of each of the companies, the commingling of the companies' assets with his personal assets, and the use of the companies' funds to pay Massenburg's personal expenses." However, nowhere in the complaint do the plaintiffs allege that Massenburg maintained complete domination and control over the corporation and that such domination and control was used to

commit a fraud or wrong against plaintiffs. Thus, all causes of action asserted against Mr. Massenburg individually based on an alleged breach of the Joint Venture Agreement are dismissed. However, those causes of action asserted against Mr. Massenburg individually based on an alleged breach of the Personal Management Agreement may not be dismissed as plaintiffs have alleged that the Personal Management Agreement was entered into with Massenburg individually.

Accordingly, defendants' motion to dismiss the complaint is resolved to the extent described herein. This constitutes the decision and order of the court.

Dated: 4/1/15

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.