

**D.A.M. Prods., Inc. v Torres**

2017 NY Slip Op 32225(U)

October 18, 2017

Supreme Court, New York County

Docket Number: 151678/2017

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED

PART 2

Justice

-----X

D.A.M. PRODUCTIONS, INC.,
Plaintiff,

INDEX NO. 151678/2017

MOTION DATE

- v -

NELSON TORRES, NELSON RECORDS ENTERTAINMENT,
LLC, EL TORITO ENTERTAINMENT INC.

MOTION SEQ. NO. 001 002

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 23, 24, 27, 28

were read on this application to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

were read on this application to/for DISMISSAL

Upon the foregoing documents, it is ordered that the motions are granted in part.

Motions 001 and 002 are consolidated for disposition.

In motion 001, Nelson Torres (Torres) and El Torito Entertainment Inc. (Torito) move, pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing the amended complaint based on a defense founded upon documentary evidence and failure to state a cause of action, respectively.

In motion 002, defendant Nelson Records Entertainment, LLC (Nelson Records) also moves, pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing the amended complaint on the

same grounds.<sup>1</sup> Plaintiff D.A.M. Productions, Inc. (D.A.M.) opposes the motions. After oral argument, and after a review of the parties' motion papers and the relevant statutes and case law, the motions are **granted in part**.

In the amended complaint, D.A.M. alleges as follows: defendants wrongfully interfered with DAM's contractual and prospective contractual relations with the "well-known Dominican artist Hector Acosta p/k/a/ 'El Torito'" (Acosta) (amended complaint, ¶ 1).

DA.M. is a music production and music publishing company, and a manager and booking agent (*id.*, ¶ 2). Torres incorporated Nelson Records and Torito Entertainment. Nelson Records purports to serve as Acosta's activity coordinator; and Torres is Nelson Records' principal (*id.*, ¶ 4). Torito Entertainment purports to conduct all of Acosta's artistic services (*id.*, ¶ 5).

On March 7, 2006, D.A.M. entered into written agreements with Acosta pursuant to which (1) Acosta agreed to become an exclusive recording artist for D.A.M.; (2) Acosta engaged D.A.M. to serve as his exclusive manager and booking agent throughout the world, other than in the Dominican Republic (2006 Agreements); (3) D.A.M. arranged tours and performances for Acosta between 2006 and 2009; and (4) D.A.M. produced and distributed for sale three albums recorded by Acosta, and drafted marketing plans and planned special events for promoting each of the said albums (*id.*, ¶¶ 8-10).

Between February 2010 and July 2010, D.A.M. and Acosta entered into the following written agreements: (a) an Exclusive Recording Agreement, in 2010 (Recording Agreement); (b) an Exclusive Artist Representation Agreement in 2010 (Management Agreement); and (c) Annex "A" to these two agreements (Annex A) (the Recording Agreement, the Management

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<sup>1</sup> D.A.M. Productions, Inc. filed an amended complaint after defendants made the instant motions to dismiss. Defendants state that they have elected to have their pre-answer motions to dismiss be applied to the amended complaint.

Agreement, and Annex A collectively, the 2010 Agreements) (*id.*, ¶ 11). Pursuant to the 2010 Agreements, (1) Acosta engaged D.A.M. to serve as his exclusive agent and representative through the world, except for in the Dominican Republic; (2) Acosta authorized only D.A.M. to make all arrangements for tours and other performances; (3) Acosta agreed to record three different record albums exclusively for D.A.M.; and (4) D.A.M. arranged tours and other performances for Acosta each year between 2010 and 2016 (*id.*, ¶¶ 16-19).

D.A.M. (1) produced and distributed albums recorded by Acosta, including: (a) “Obligame”; (b) “Con El Corazón Abierto”; and (c) “Merengue y Sentimiento”; (2) produced and distributed “compilation albums” including: (a) “Ultimate Bachata Collection”; (b) “Una Noche Con El Torito”; (c) “En Vivo”; (d) “Ultimate Merengue Collection”; and (e) “La Historia . . . . Mis Exitos”; and (3) (a) licensed to third parties compilation albums; (b) produced and distributed videos performed by Acosta entitled “Tu Veneno” and “Tu Primera Vez”; and (c) effectuated marketing plans and special events to promote Acosta’s artistic career (*id.*, ¶¶ 20-24).

The Recording Agreement required Acosta to deliver to D.A.M. three unpublished phonograms (albums) over the course of the agreement (*id.*, ¶ 25). Acosta delivered to D.A.M. “Obligame, “Con El Corazón Abierto, and “Merengue y Sentimiento” (*id.*, ¶¶ 26-28). At the time Acosta entered into the 2010 Agreements, he owed D.A.M. \$396,004.61 for unrecouped costs that D.A.M. had advanced pursuant to the 2006 Agreements (*id.*, ¶ 29). From 2010 through 2016, D.A.M. incurred additional unrecouped costs totaling approximately \$425,000 (*id.*, ¶ 30). Acosta has not challenged the accuracy of D.A.M.’s calculations regarding the \$820,000 in unrecouped costs (*id.*, ¶ 36).

In September and October 2016, Torres, without D.A.M.’s authorization, engaged “Roc Nation” and “TIDAL” to produce a video performed by Acosta entitled “Amorcito Enfermito.”

D.A.M. controls all rights with respect to the master recording of “Amorcito Enfermito” (*id.*, ¶ 50). In October 2016, Torres and Acosta, without D.A.M.’s authorization, entered into a plan to promote Acosta’s artistic career on television and radio stations located in the United States (*id.*, ¶ 51). In interviews in November 2016 and on other occasions, Torres asserted that he was Acosta’s representative and manager (*id.*, ¶¶ 52-53). In December 2016 and February 2017, D.A.M.’s attorney sent Torres written notice advising Torres that D.A.M. would take all actions necessary to enforce its rights under the 2010 Agreements (*id.*, ¶¶ 54-56).

On February 3, 2017, D.A.M. learned that Acosta had posted on his Twitter and Instagram social network sites statements purporting to designate Torres as Acosta’s sole representative and agent in the United States and Europe (*id.*, ¶ 57). In February 2017, D.A.M. served on Acosta a “Notice to Cure” Acosta’s violations of his obligations under the 2010 Agreements (Notice to Cure) and that it intended to recover from Torres the damages that D.A.M. incurred due to Torres’ intentional interference with the 2010 Agreements (*id.*, ¶¶ 58-59). On February 13, 2017, Acosta released a public statement via a public relations and marketing company whereby Acosta asserted that Torito Entertainment and Torres would serve as the sole managers of his artistic career (*id.*, ¶ 60).

Without D.A.M.’s authorization, Torres, Nelson Records, and Torito Entertainment arranged for Acosta to perform at the following events: on May 12, 2017 at Roxy Providence in Providence, Rhode Island; on May 13, 2017 at the United Palace Theatre in New York City; on June 16, 2017 at the Atlanta Coliseum in Atlanta, Georgia; on June 24, 2017 at the Wonderland Ballroom in Revere, Massachusetts; and on June 25, 2017 at Euphoria in Baltimore, Maryland (*id.*, ¶¶ 61-75). To date, because of the wrongful interference by Torres, Nelson Records, and

Torito Entertainment, Acosta has not cured any of the violations set forth in the Notice to Cure (*id.*, ¶ 76).

The amended complaint further alleges that defendants' wrongful interference with the 2010 Agreements has prevented D.A.M. from (1) scheduling tours, performances, or special events; (2) producing or distributing additional new Acosta albums; (3) effectuating any of its marketing plans; (4) producing or distributing any new compilation albums; and (5) marketing in 2017 any merchandise containing Acosta's image or brand (*id.*, ¶¶ 78-82). D.A.M. has not received any monies regarding the above noted events (*id.*, ¶ 83).

The amended complaint contains three causes of action. The first cause of action is for tortious interference with contract; the second is for tortious interference with prospective contractual or business relations; and the third is for injunctive relief.

Although there are two separate motions, one by Torres and Torito, and the other by Nelson Records, all three defendants set forth similar arguments in support of their motions for dismissal. Defendants argue that the amended complaint fails to contain any factual support indicating that the 2010 Agreements were still in effect at the time of the allegedly tortious conduct by defendants. They contend that a letter dated November 16, 2012 (November 2012 Letter) modified the terms of the 2010 Agreements that, prior to the modification, provided for a condition precedent for termination of the agreements. Hence, they argue, the first cause of action for intentional interference with contractual relations should be dismissed.

The second cause of action is for tortious interference with contractual relations. Defendants argue that the amended complaint fails to allege that they engaged in wrongful acts so as to sustain this cause of action.

The third cause of action seeks injunctive relief. Defendants argue that this cause of action is not viable because the other two causes of action are not validly stated or are refuted by documentary evidence.

D.A.M. argues that the “Third” paragraph of the Management Agreement extended its term, because of related third-party agreements entered into by D.A.M. It further argues that “Clause Thirteenth” of the Recording Agreement extended its term, because of unrecouped costs that Acosta owed to D.A.M. It also contends that the November 2012 letter is neither a contract nor a contractual obligation, and it did not modify any of the provisions contained in the Recording Agreement.

### DETERMINATION

Both motions are granted to the extent of dismissing the second cause of action, sounding in tortious interference with prospective contractual or business relations, based on D.A.M.’s failure to state such a cause of action.

### LEGAL CONCLUSIONS

“In the context of a CPLR 3211 motion to dismiss, the pleadings are necessarily afforded a liberal construction” and plaintiffs are accorded “the benefit of every possible favorable inference” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002] [internal quotation marks and citations omitted]). On a “CPLR 3211 (a) (1) motion to dismiss on the ground that the action is barred by documentary evidence, such motion may be appropriately granted only where

the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*id.*). Such is not the case here as to the first cause of action for tortious interference with contract.

The four elements of a cause of action for tortious interference with contract are (1) the existence of a valid contract, (2) defendants' knowledge of the contract, (3) defendants' intentional procurement of a breach of the contract, (4) and breach of the contract (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]; *RLR Realty Corp. v Duane Reade, Inc.*, 145 AD3d 444, 445 [1st Dept [2016]]).

Defendants argue that they could not have breached an expired contract, and that the contracts at issue expired three years from 2010. Defendants argue that the amended complaint does not contain any factual allegation as to whether the Management Agreement was renewed upon its expiration in February 2013. As to this assertion, "Clause Third" of the Management Agreement provides:

"THIRD: TERM.

The initial Term of this agreement shall be of three (3) years, from the date of its execution. However, the Term shall continue for all the duration of any agreement or engagement that DAM may obtain in favor of the ARTIST related to the ACTIVITIES, regardless of the validity of this contract, meaning that nevertheless this contract is valid for three (3) years, if any contract negotiated by DAM for the ARTIST (and accepted by him) is for more years, then all the conditions set forth herein and its validity will be the same as the term of said contracts, including options and renewals these are subject to under contracts only with third parties and that specifically would be longer than the term of this contract"

(Exhibit B to affirmation of Simon Schwarz, Esq. [Schwarz affirmation]).

For purposes of the motions, D.A.M. may supplement the allegations in the amended complaint with additional submissions (*see Katz v American Mayflower Life Ins. Co. of N.Y.*, 14 AD3d 195, 209 [1st Dept 2004], *affd* 5 NY3d 561 [2005]). Yasmin Pinto (Pinto), D.A.M.'s president, states that, pursuant to the provision quoted above, the Management Agreement

remains in effect, because D.A.M. has entered into agreements with third parties for Acosta's benefit, thereby extending the Management Agreement's term. Pinto provides as an example "Artist Presentation Agreements" that D.A.M. entered into with each of the venues at which D.A.M. arranged for Acosta to perform (Affidavit of Yasmín Pinto [Pinto aff], ¶ 4). Pinto also states that, in the Fall of 2015, D.A.M. informed Acosta that it would be making his album entitled "Merengue y Sentimiento" available for digital distribution and sale via the distributor "CD Baby," a company that distributes recorded music to all digital platforms. D.A.M. alleges that it previously entered into an agreement with CD Baby to distribute the single "El Calendario" from the "Merengue y Sentimiento" album (*id.*, ¶ 7).

Pinto further claims that, with Acosta's agreement, D.A.M. arranged with CD Baby to make available for digital distribution and sale the other five albums that Acosta had previously recorded with D.A.M. (*id.*, ¶ 8). D.A.M. maintains that, because it continues to maintain its contract with CD Baby for the digital sale of Acosta's albums, pursuant to Clause Third of the Management Agreement, that agreement remains in effect (*id.*, ¶ 11). The documentary evidence relied upon by defendants (the Management Agreement) does not "utterly refute" the amended complaints' allegations, supplemented by the Pinto affidavit, and thus, does not "conclusively establish[ ] a defense as a matter of law" (*DKR Soundshore Oasis Holding Fund Ltd. v Merrill Lynch Intl.*, 80 AD3d 448, 449-450 [1st Dept 2011]).

As for the Recording Agreement, paragraph "THIRTEENTH" provides:

**"THIRTEENTH - EXTENSION**

The terms and obligations of this contract will be automatically extended in the event the ARTIST owes DAM for any reason or cause. In this circumstance, the extension will be in effect until all debts by the ARTIST have been paid, understanding that such extension will automatically expire upon prompt payment by the ARTIST of said debts. In the event the ARTIST cannot pay these debts at the stipulated term of contract, then at DAM's discretion, the ARTIST will uptake, in order to terminate said extension, to (1) sign a promissory note to liquidate the

debt in a period no longer than three years and at an interest rate agreed upon based on the current market conditions for similar obligations; or (2) the recording of an additional phonogram as agreed in the Third Clause of this Contract with twelve (12) unpublished themes. DAM will have the authority to demand from the ARTIST as the debtor, total payment of the debt, or the recording of the phonogram mentioned in this paragraph.”

(Exhibit A to Schwarz affirmation).

The amended complaint alleges that, at the time Acosta entered into the 2010 Agreements, Acosta owed D.A.M. \$396,004.61 for unrecouped costs that D.A.M. had advanced pursuant to the 2006 Agreements (amended complaint, ¶ 29). From 2010 through 2016, D.A.M. allegedly incurred additional unrecouped costs totaling approximately \$425,000 (*id.*, ¶ 30). Defendants contend that D.A.M. has not provided any factual assertions regarding the alleged debt. However, paragraph 29 of the amended complaint refers to the “Second Clause” of Annex A which provides:

“SECOND – ACKNOWLEDGE[MENT] OF THE PENDING/OUTSTANDING BALANCE-

The ARTIST expressly establishes, recognizes and agrees that derived from the AGREEMENTS and from the ARTIST’s activities there is a unrecoupable pending balance not yet recovered by DAM as the result of the amounts invested in the promotion and management of the ARTIST’s career in the amount of Three Hundred Ninety Six Thousand Four Dollars and Sixty One Cents (\$396,004.61) (the “Pending Balance”), which has been invested and paid by DAM in its entirety, for the activities of the ARTIST, and in connection therewith which ARTIST at this moment expressly confirms, so that said Pending Balance shall be recouped in the terms and conditions established in the AGREEMENTS and crosscolateralized [sic] as it is understood in the record industry.”

(Exhibit C to Schwarz affirmation).

Pinto states that, in July 2016, at Acosta’s request, she sent Acosta a written report describing, among other things, all revenues that D.A.M. had received from (a) performances D.A.M. had arranged for Acosta and (b) the sales of the albums that Acosta had recorded for D.A.M. As part of that report, she sent Acosta a summary page for each album on which she indicated all revenues received and all costs incurred by D.A.M. with respect to each album.

Each of the summary pages included an entry under CD Baby for revenues received from digital sales of the album (*id.*, ¶ 9).

Defendants characterize this provision of the Recording Agreement (“THIRTEENTH”) as a condition precedent to automatic termination of the said contract. They contend that the November 2012 Letter eliminated this provision. The text of the letter is as follows:

“Respectfully, we address you to offer our warm greetings and at the same time thank you for the great work and effort you have made during the years you have been responsible for our international career as tropical artists. I sincerely feel pleased to see the honors we have achieved each year in the different international charts and the nominations and invitations we have received from the main Latin American music awards in the United States of America, as well as in places in Europe, Central and South America where we have taken our art to all those fans who have adopted us as their main artist. For all that, the affable manner and trust you have given us, in all honesty, I and the members of the HECTOR ACOSTA & ORQUESTA [HECTOR ACOSTA & ORCHESTRA] will always be grateful to you.

“At the same time, through this letter and in compliance with our agreements in the Contract for Performance and Recording of Phonograms, as well as Artist Representation, signed on the 1st of February of 2010, I give you notice that once the expiration date is reached, and if parties are interested in the renewal, at that time we would have to meet to review the stipulated conditions.

As you know, we only have one outstanding record to complete our obligation to deliver three (3) productions under these contracts, to that effect we request you indicate the date you will be in a position to receive this, taking into account that such date must be within the stipulated term in the contracts.  
Please let us know of any comments you may have.”

(Exhibit E to Schwarz affirmation).

Defendants have not established on these pre-answer motions that the November 2012 Letter modified the terms of the 2010 Agreement. Pinto denies that either D.A.M. or she (a) agreed to amend the provisions of any of D.A.M.’s contracts with Acosta pursuant to the November 2012 Letter that he delivered to her; (b) agreed to forego payment of the hundreds of thousands of dollars that Acosta allegedly owes D.A.M.; or (c) agreed to terminate either the Recording Agreement or the Management Agreement (Pinto aff, ¶ 12). Pinto states that, at

Acosta's request, she signed a copy of the November 2012 letter merely as an acknowledgment of its receipt (*id.*, ¶ 13). She states further that, by acknowledging receipt of the November 2012 Letter, she did not intend to make any modifications to the existing contracts between D.A.M. and Acosta, and that the letter itself does not make any reference to modifications to any of the provisions in these agreements (*id.*, ¶ 14).<sup>2</sup>

This Court finds that D.A.M.'s contention is correct. The letter does not state that the condition precedent is eliminated. Moreover, although Pinto signed the letter, she states that her signature was merely an acknowledgment of the receipt of the letter, not of its terms. Her assertion is not conclusively disposed of through any documentary evidence submitted with the motions. Moreover, the letter does not refer to the provisions of the Recording Agreement that it allegedly abrogates. "To the extent there may be an ambiguity, it is properly construed against the drafter" (*327 Realty, LLC v Nextel of N.Y., Inc.*, 150 AD3d 581, 582 [1st Dept 2017]).

As an example of an alleged breach of contract, D.A.M. claims that, in September and October 2016, Torres – without D.A.M.'s authorization – engaged Roc Nation and TIDAL to produce a video performed by Acosta entitled "Amorcito Enfermito." D.A.M. controls all rights with respect to the master recording of "Amorcito Enfermito" (amended complaint, ¶ 50).

The second cause of action for tortious interference with prospective contractual or business relations is not validly stated. "Tortious interference with prospective economic relations requires an allegation that plaintiff would have entered into an economic relationship but for the defendant's wrongful conduct" (*Vigoda v DCA Prods. Plus*, 293 AD2d 265, 266 [1st Dept 2002]). The amended complaint does not allege that defendants engaged in the type of "wrongful conduct" necessary to sustain this cause of action. "Wrongful means include[s]

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<sup>2</sup> Although Pinto also refers to a letter dated November 16, 2012, this appears to be a typographical error.

physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure” (*Arnon Ltd (IOM) v Beierwaltes*, 125 AD3d 453, 453 [1st Dept 2015], quoting *Carvel Corp. v Noonan*, 3 NY3d 182, 191 [2004]). Nor does D.A.M. allege that defendants engaged in “wrongful conduct motivated solely by a desire to harm” it (*Sustainable PTE Ltd. v Peak Venture Partners LLC*, 150 AD3d 554 [1st Dept 2017]).

Defendants argue that the third cause of action, for injunction relief, must be dismissed on the ground that plaintiff’s other two actions are without merit. However, as discussed above, such is not the case, and that branch of the motions seeking dismissal of plaintiff’s request for injunctive relief is denied.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendants Nelson Torres and El Torito Entertainment Inc. for an order dismissing the complaint (mot. seq. 001) is granted to the extent of dismissing the second cause of action for tortious interference with prospective contractual or business relations, and is otherwise denied; and it is further

ORDERED that the motion (002) by defendant Nelson Records Entertainment, LLC for an order dismissing the complaint (mot. seq. 002) is granted to the extent of dismissing the second cause of action for tortious interference with prospective contractual or business relations, and is otherwise denied; and it is further

ORDERED that defendants are directed to serve their answers to the amended complaint within 20 days after service of this order with a notice of entry; and it is further

ORDERED that this constitutes the decision and order of the court.

10/18/17  
DATE

  
KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	DO NOT POST	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	