SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 43

----------X

ABKCO MUSIC, INC.,

Plaintiff,

Index No.: 656243/2016

DECISION/ORDER

-against-

CARL G. MCMAHON, as Trustee of the ANDREA MARLESS COOKE FAMILY TRUST and ANDREA M. COOKE,

Defendants.

----------X

ROBERT R. REED, J.:

In this breach of contract action, defendant Carl G. McMahon, as Trustee of the Andrea Marless Cooke Family Trust (McMahon), moves, pursuant to CPLR 3212, for summary judgment to dismiss the complaint of plaintiff ABKCO Music, Inc. (ABKCO) (motion sequence number 002). For the following reasons, this motion is denied.

BACKGROUND

Defendant Andrea M. Cooke (Marless-Cooke) is the granddaughter of renowned gospel/soul/R&B singer-songwriter Sam Cooke. During his lifetime, Sam Cooke acknowledged Marless-Cooke's now deceased mother, Denise Somerville (Somerville), as his daughter. Sam Cooke died in 1964. Somerville died in 2000.

ABKCO is a publishing company in the business of collecting payment for the use of copyrighted musical and lyrical works and disbursing royalty payments to the owners of the copyrights. *See* notice of motion, exhibit 4 (Klein affidavit), ¶ 6. On May 8, 1986, ABKCO and Somerville entered into an agreement (the royalty agreement), pursuant to which Somerville

assigned her interest in her father's copyrighted musical and/or lyrical compositions to ABKCO in return for a $10,000.00 advance payment and the right to receive future payments equal to 1/7 of the "writer's royalty" from the exploitation of the compositions for the duration of the copyrights, including all renewal registration rights. *Id.*, exhibit 2.

Of particular relevance to this litigation are the portions of the royalty agreement that provide as follows:

> "9. Indemnification. Somerville hereby agrees to indemnify, save and hold ABKCO harmless from any and all loss or damage (including reasonable attorney's fees) arising out of or connected with any claims by a third party which are inconsistent with any of the representations, warranties or agreements made by Somerville in this agreement, and Somerville agrees to reimburse ABKCO, on demand, for any payments made by ABKCO, at any time after the date hereof with respect to any liability or claim to which the foregoing indemnity applies. Pending the determination of any such claim, ABKCO may withhold payment of royalties or any other monies hereunder.
>
> "10. Modification, Waiver, Illegality, Construction. . . . This contract shall be governed by and construed under the laws and judicial decisions of the State of New York."

Id.

On June 24, 2009, Marless-Cooke formed the Andrea Marless Cooke Family Trust (the trust), and purportedly assigned her rights under the royalty agreement to the trust, with McMahon as trustee. *See* notice of motion, exhibit 4 (Klein affidavit), ¶ 14. In support of the within motion, it should be noted, McMahon has presented only an incomplete copy of the trust document. *Id.*, exhibit 3 (trust document).

In 2015, a dispute arose between Marless-Cooke and McMahon concerning, inter alia, allegedly insufficient royalty payments, the validity and administration of the trust, and the

ownership of the property controlled by the trust. *See* notice of motion, exhibit 1 (complaint), ¶ 10. As a result, Marless-Cooke shortly thereafter commenced a declaratory judgment action against McMahon in the Cuyahoga County Court of Common Pleas, Probate Division, in Cleveland Ohio, where both of those parties reside (the Ohio action). *Id.*, ¶ 11. The Ohio action is still pending.

ABKCO asserts that it and several of its affiliated corporate entities have been improperly drawn into the Ohio action despite their not being parties to the trust. *Id.*, ¶¶ 21-25. ABKCO further asserts that it has been obliged to expend considerable amounts in legal fees because of these improper actions by McMahon and Marless-Cooke. *Id.* ABKCO takes the position that it is entitled to compensation for these expenditures from both McMahon and Marless-Cooke, pursuant to the indemnity provision of the royalty agreement. *Id.*, ¶¶ 26-27

Consequently, ABKCO filed a complaint against McMahon and Marless-Cooke on January 11, 2017 setting forth causes of action for: 1) breach of contract; and 2) attorneys' fees. *See* notice of motion, exhibit 1. On February 13, 2017, McMahon filed an answer, on behalf of himself and the trust, that includes a cross claim against Marless-Cooke for contribution and indemnification. *Id.*, exhibit 5. Marless-Cooke, for her part, successfully moved pre-answer to dismiss the complaint against her on personal jurisdiction grounds (motion sequence number 001). Now before the court is McMahon's motion for summary judgment to dismiss ABKCO's complaint for lack of personal jurisdiction (motion sequence number 002).

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g.*

Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985); *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 (1st Dept 2003). Here, as was previously mentioned, ABKCO's claims sound in breach of contract. The proponent of a breach of contract claim must plead the existence and terms of a valid, binding contract, its breach, and resulting damages. *See e.g. Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 (1st Dept 1988). It is well settled that "'on a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and . . . circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where . . . the intention of the parties can be gathered from the instrument itself.'" *Maysek & Moran v Warburg & Co.*, 284 AD2d 203, 204 (1st Dept 2001), *quoting Lake Constr. & Dev. Corp. v City of New York*, 211 AD2d 514, 515 (1st Dept 1995). Here, as will be discussed, the court need not engage in any contractual interpretation at this juncture.

Rather than address the merits of ABKCO's claim, McMahon's motion instead seeks summary judgment pursuant to CPLR 3212 (c), which provides, as follows:

> "(c) Immediate trial. If it appears that the only triable issues of fact arising on a motion for summary judgment relate to the amount or extent of damages, or if the motion is based on any of the grounds enumerated in subdivision (a) or (b) of rule 3211, the court may, when appropriate for the expeditious disposition of the controversy, order an immediate trial of such issues of fact raised by the motion, before a referee, before the court, or before the court and a jury, whichever may be proper."

McMahon's motion is, indeed, "based on . . . grounds enumerated in subdivision (a) or (b) of rule 3211" -- specifically, CPLR 3211 (a) (8), which provides, in pertinent part, as follows:

> "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> * * *
>
> "8. the court has not jurisdiction of the person of the defendant . . . ."

As was previously mentioned, McMahon resides in Ohio, rather than in New York. In *LaMarca v Pak-Mor Mfg. Co.* (95 NY2d 210, 214 [2000]), the Court of Appeals held that:

> "To determine whether a non-domiciliary may be sued in New York, we first determine whether our long-arm statute (CPLR 302) confers jurisdiction over it in light of its contacts with this State. If the defendant's relationship with New York falls within the terms of CPLR 302, we determine whether the exercise of jurisdiction comports with due process."

The pertinent portion of CPLR 302 (a) provides, as follows:

> "(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:
>
> "1. transacts any business within the state or contracts anywhere to supply goods or services in the state."

In *Rushaid v Pictet & Cie* (28 NY3d 316, 323 [2016] [internal citations omitted]), the Court of Appeals observed that:

> "The CPLR 302 (a) (1) jurisdictional inquiry is twofold: under the first prong the defendant must have conducted sufficient activities to have transacted business in the state, and under the second prong, the claims must arise from the transactions. Thus, 'jurisdiction is proper even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted.'
>
> "The Court has explained that '[p]urposeful activities are those with which a

> defendant, through volitional acts, avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' Determining "purposeful availment" is an objective inquiry, [which] always requires a court to closely examine the defendant's contacts for their quality.'"

McMahon alleges that his sole contact with ABKCO was "through letter, email and telephone correspondence," and that "all of my communications with plaintiff occurred while I was located in Ohio." *See* notice of motion, McMahon aff, ¶ 14. In his motion, McMahon raises several arguments as to why this activity does not satisfy the "transacting business" prong of the foregoing test.

First, McMahon argues that ABKCO "mistakenly attempts to invoke jurisdiction . . . on the basis of [ABKCO]'s own in-state activities." *See* defendant's mem of law at 7-8. McMahon cites to the allegation in ABKCO's complaint that:

> "14. This court has jurisdiction over plaintiff's claims because, inter alia, (i) the Royalty Agreement was entered into in New York; (ii) the terms of the Royalty Agreement are to be governed by New York law; (iii) [ABKCO] performs all of its obligations under the Royalty Agreement in New York; and (iv) the damage caused by defendants' actions have been incurred by [ABKCO] in New York. Venue is proper because [ABKCO] is located in New York County."

See notice of motion, exhibit 1, ¶ 14. McMahon then focuses on allegation (iii), and asserts that ABKCO "does not and cannot make any allegation that its in-state activities are in any way imputable to" him. *See* defendant's mem of law at 7. ABKCO responds that, "it is clear that McMahon, as the trustee of the trust, conducted volitional acts that availed himself of the laws of the state of New York," because, "if the trust is the successor in interest to Ms. Somerville under the Royalty Agreement, then McMahon has the same rights and obligations that Ms. Somerville would have under the Royalty Agreement," including an "ongoing contractual relationship" with

ABKCO. *See* plaintiff's mem of law at 4-5. McMahon cites a quantity of Appellate Division, Second Department, case law to support his position that his letter, telephone and email correspondence with ABKCO from Ohio cannot constitute "purposeful activities" sufficient to invoke long-arm jurisdiction as a matter of law. *See* defendant's mem of law at 8; *see e.g. America/Intl. 1994 Venture v Mau*, 146 AD3d 40 (2d Dept 2016); *Shalik v Coleman*, 111 AD3d 816 (2d Dept 2013); *Kimco Exch. Place Corp. v Thomas Benz, Inc.*, 34 AD3d 433 (2d Dept 2006). ABKCO cites the decision of the Appellate Division, First Department, in *Liberatore v Calvino* (293 AD2d 217 [1st Dept 2002]) in countering that, when McMahon's actions are judged under a totality of the circumstances test, they can indeed be found to constitute "purposeful activities." *See* plaintiff's mem of law at 5. After reviewing the governing precedents, the court concludes that both parties' contentions either overstate or mischaracterize the governing law.

With respect to McMahon's argument, it is not true that "communication by letter, telephone and email" can *never* constitute "purposeful activity" for long-arm jurisdiction purposes as a matter of law. None of the decisions that McMahon cites apply such a blanket rule. In *Kimco*, the Second Department found that "[t]he defendants' acts of faxing the executed contracts to New York and of making a few telephone calls" were not "the transacting of business," specifically because they "were merely attempts to contact the plaintiff." 34 AD3d at 434. In *Shalik*, the Second Department made a similar finding using the "totality of the circumstances" test. 111 AD3d at 817-818. In *America/Intl. 1994 Venture*, the Second Department plainly acknowledged that "[t]elephone calls and written communications . . . generally are held not to provide a sufficient basis for personal jurisdiction under the long-arm statute *[unless they are] shown to have been used by the defendant to actively participate in*

business transactions in New York," thus, implicitly acknowledging the possibility that such actions *may* constitute "purposeful activity" in certain circumstances. 146 AD3d at 53 [emphasis added]. As will be discussed, the legal analysis does not stop with the mere *fact* of out-of-state communications; instead, it looks to the *quality and purpose* of those communications.

ABKCO's opposition argument similarly attempts to distort this rule. Initially, ABKCO refers to the First Department's holding in *Liberatore*, wherein the Court applied the "totality of the circumstances" test to determine that an out-of-state attorney's phone calls, letters and emails to New York entities *did* constitute "purposeful activity," where he made them while attempting to obtain a settlement in a personal injury case that he had commenced against those New York entities on behalf of an out-of-state plaintiff. 293 AD2d at 220-221. ABKCO then cites an unpublished decision by this court in *Bluman v Labock Tech., Inc.* (13 Misc 3d 1244(A), 2006 NY Slip Op 52335(U) [Sup Ct, NY County, 2006]), in which the judge (Ling-Cohan, J.) cited federal case law that holds that such factors as "'(1) whether the defendant has an ongoing contractual relationship with a New York corporation; (2) whether the contract was negotiated or executed in New York; (3) what the choice of law clause is in the contract; and (4) whether the contract requires notices and payments to be sent into the forum state or requires supervision by the corporation in the forum state,'" can demonstrate "purposeful activity" pursuant to CPLR 302 (a) (1). *Id.* at *2-3, *quoting Roper Starch Worldwide, Inc. v Reymer & Assoc., Inc.*, 2 F Supp 2d 470, 474 (SD NY 1998). The implication of ABKCO's argument is that simply reviewing this checklist constitutes all of the legal analysis necessary to determine whether the "totality of the circumstances" shows that the exercise of long-arm jurisdiction is proper. Again, this is not the case. The inquiry does not end with the determination of what activities a litigant engaged in,

but, rather, begins there.

The Court of Appeals holds that "[d]etermining '"purposeful availment" is an objective inquiry, [which] always requires a court to closely examine the defendant's contacts for their *quality*." *Rushaid v Pictet & Cie,* 28 NY3d at 323 [emphasis added]. In clarifying this rule, the Court of Appeals has also stated that, "although determining what facts constitute 'purposeful availment' is an objective inquiry, it always requires a court to closely examine the defendant's contacts for their *quality*." *Licci v Lebanese Can. Bank, SAL*, 20 NY3d 327, 338 (2012)[emphasis added]. Here, an "objective inquiry" into the evidence first shows the existence of the royalty agreement between ABKCO and Marless-Cooke (as successor in interest to Somerville), which contains an indemnification clause with a New York choice of law provision. *See* notice of motion, exhibit 2. It also includes McMahon's admission that he communicated with ABKCO in New York, from Ohio, via letter, telephone and email. *Id.*, McMahon aff, ¶ 14. This evidence, standing alone, is generally not sufficient proof of "purposeful activity" in New York to justify the exercise of "long-arm jurisdiction." *Shalik v Coleman*, 111 AD3d at 818. However, as was discussed, New York law requires a deeper inquiry into the "quality" and purpose of McMahon's actions. Unfortunately, it is not possible to conduct such an inquiry at this juncture, utilizing only the evidence that has been presented in connection with this motion. This is because there is no proof of what McMahon's exact duties as trustee are -- or any evidence of what actions he took to carry out those duties. Instead, the court has been presented with: 1) an incomplete copy of the trust document, consisting of just two of what would appear to be 28 pages; 2) McMahon's contradictory affidavit admitting that, as trustee, he sent communications into New York, and yet is "not aware of a single act attributable to the Trust in

connection with the Royalty Agreement that occurred within New York"; and 3) the statements, made by ABKCO's president, Jody H. Klein (Klein), on information and belief, that Marless-Cooke "transferred, as successor in interest to the rights of Ms. Somerville under the Royalty Agreement, all of her right, title and interest under the Royalty Agreement to defendant McMahon, as Trustee of the Trust," and that "McMahon contacted [ABKCO] in New York and directed [ABKCO] to account and pay, on an ongoing basis, the monies due under the Royalty Agreement to McMahon as Trustee of the Trust." *See* notice of motion, exhibits 3, McMahon aff, ¶ 12; 4, Klein aff, ¶ 14. Without reviewing the trust document, it is impossible to know for certain what McMahon's duties were. Without documentary proof, such as correspondence, invoices, payments, etc., there is no way to bear out the allegations that Klein made "on information and belief." Certainly, it is possible that a trustee, who stands in a fiduciary role to the trust and its beneficiaries, might be required to undertake strenuous affirmative actions to discharge his/her duties. It is also possible, as McMahon seems to imply, that his duties as trustee merely required him to act as a passive income receiver. However, the court is not in the business of engaging in guessing games. Only once it is known what McMahon was legally required to do, and what he actually did, can the court examine the "quality" and purpose of McMahon's activity in New York, and conclude its analysis of whether the exercise of long-arm jurisdiction, pursuant to CPLR 302 (a) (1), would be proper in this case. Because McMahon has failed to present the court with sufficient evidence to make this determination, the court finds that McMahon has failed to meet his burden of proof on this motion. Accordingly, the court finds that McMahon's motion should be denied.

McMahon has raised several other arguments in support of this motion. *See* defendant's

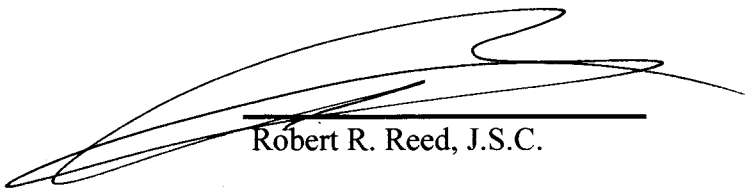
mem of law at 8-12. However, given the court's above finding, the incompleteness of the documentation supporting this motion, and the relative procedural immaturity of this action, the court need not reach those arguments at this juncture.

Accordingly, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of defendant Carl G. McMahon, as Trustee of the Andrea Marless Cooke Family Trust (motion sequence number 002), is denied.

Dated: New York, New York
December 4, 2017

ENTER:



Robert R. Reed, J.S.C.