SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE KINGS

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CALEB DANIEL ELY,

Plaintiff,

Hon. Edgar G. Walker
Part 90

-against-

Index No. 2667/2017

PHASE ONE NETWORKS, INC.

Defendants

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The plaintiff moves for summary judgment on his complaint seeking a declaratory judgment that his contracts with the defendant are not enforceable and to strike all of the defendant's affirmative defenses.

The plaintiff is a composer and arranger of musical compositions who creates and executes background "beats" for musical compositions. The defendant is a company that produces and distributes albums. In March of 2017 the plaintiff and defendant entered into a recording agreement and a co-publishing agreement with each other.

In support of its motion the plaintiff argues that the agreements are illusory and lack mutual consideration. The plaintiff additionally contends that the agreements are unconscionable.

In opposition the defendant argues that the plaintiff failed to tender evidentiary evidence in admissible form to satisfy his *prima facie* burden and the plaintiff is not entitled to summary judgment because at a minimum there are triable issues of fact that the agreements contain mutual consideration and are not unconscionable.

The plaintiff refers to the sections of the recording and co-publishing agreements that state that the defendant reserves the right to terminate the Term of the agreements without cause

at any time in its sole discretion and that thereafter the parties will be deemed to have fulfilled all of their obligations thereunder except those obligations which survive the end of the Term (e.g. warranties, royalty obligations, etc.) in support of its contention that the agreements are illusory.

However, the plaintiff neglects to address the portions of the agreements describing the term at issue.

The recording agreement states:

> (a) The term hereof (the "Term") shall consist of an initial period commencing on the date hereof and ending ten (10) months after delivery of the album in satisfaction of the recording commitment for the First Contract Period, but not less than one (1) year from the date hereof (the "First Contract Period") plus additional "Contract Periods," if any, by which such Term may be extended by Company's exercise of one or more of the options granted to Company below (unless otherwise extended or sooner terminated as provided herein or exercised sooner by Company.)
>
> (b) You hereby irrevocably grant to Company three (3) consecutive options to extend the Term for a "Second," "Third," and "Fourth" Contract Period, respectively, such Contract Period to commence immediately after the expiration of the preceding Contract Period and ending ten (10) months after delivery of the album in satisfaction of the recording commitment for the Contract period in question, but not less than one (1) year from the start of such Contract Period. Each such option shall be deemed to be exercised by the Company unless it shall give you written notice to the contrary. [Emphasis supplied]

Similarly, the co-publishing agreement states that:

> (b) The Term of this agreement (the "Term") shall commence on the date hereof and shall continue (subject to the remaining provisions of this paragraph 1) for a first contract period (the Initial Contract Period") ending ten (10) months after delivery of the album in satisfaction of the recording commitment for the Initial Contract Period (as described in the Recording Agreement), but not less than one (1) year from the date hereof, plus the additional "Contract Period", if any, by which such Term may be extended by Publisher's exercise of one or more of the options granted to Publisher below (unless otherwise extended or sooner terminated as provided herein or in the Recording Agreement or exercised sooner by Publisher.)

> c) You hereby irrevocably grant to Publisher three (3) separate, consecutive, irrevocable options to extend the Term for a "Second," "Third," and "Fourth" Contract Period on the same terms and conditions applicable to the Initial Contract Period. Each such Option Period shall be deemed automatically exercised if Phase One exercises the option for the next succeeding Album of the Recording Commitment under the Recording Agreement, unless Publisher notifies Writer in writing that Publisher has elected not to exercise an option hereunder , which notice shall be sent any time before expiration of the prior Contract Period. If publisher exercises the option for an Option Period hereunder, the Term shall be deemed automatically extended, and such Contract Period shall commence immediately after the expiration of the preceding Contract Period and end ten (10) months after delivery of the Album in satisfaction of the recording commitment for the Contract Period in question, but not less than one (1) year from the start of such Contract Period. Notwithstanding anything contained herein, the Term of this Co-Publishing Agreement and all Contract Periods herein shall be coterminous with the Term of and Contract Periods in the Recording Agreement. [Emphasis supplied]

By its terms, the co-publishing contract must be read in conjunction with the recording contract. Although the recording contract provided that each Master Recording should be subject to the defendant's approval in its sole judgment,

> "[i]mplicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance. . . . This embraces a pledge that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*Kirke La Shelle Co. v. Armstrong Co.*, 263 NY 79, 87). Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion." Dalton v. Educational Testing Serv., 87 N.Y.2d 384, 389 (1995).

The plaintiff has not demonstrated that the contract is illusory as a matter of law since the defendant could not unreasonably withhold approval. Therefore the plaintiff has not met his *prima facie* burden. In any event, the Sereno affidavit alleges that the defendant did in fact perform under the contract and that it was the plaintiff who refused to continue his performance as required by the contract. As such, the defendant raises a question of fact with respect to

whether the contract was illusory.

According to the affidavit of Matthew Sereno, in April of 2017, after the recording and co-publishing agreements were executed, the defendant performed under the agreements to the extent it was able to in that it paid for all costs to record and produce a master recording called *Earn Ya*, which was recorded and produced at the defendant's recording studio. However, the defendant was unable to release this recording because the plaintiff stopped communicating with the defendant and did not finish the recording. This affidavit is admissible as it does not speak to the issue of contractual interpretation, but rather to the actions of the parties of which Mr. Sereno has firsthand knowledge. *See* Banos v. Rhea, 25 N.Y.3d 266, (2015).

With respect to the issue of unconscionability, "[g]enerally there must be a showing of both a lack of a meaningful choice and the presence of contractual terms which unreasonably favor one party." State v. Wolowitz, 96 A.D.2d 47 (2'd dept. 1983). Further, the traditional principles of contract law dictate that the parties to a contract are "free to make their bargain, even if the consideration exchanged is grossly unequal or of dubious value." Hollander v. Lipman, 65 A.D.3d 1086, 1087 (2'd Dept. 2009)(quoting Apfel v. Prudential-Bache Sec., 81 N.Y.2d 470, 475(1993).)

Upon examination of all submissions, the Court determines that there is at least a question of fact as to unconscionability.

The defendant concedes that its 18th and 19th affirmative defenses are not applicable because the plaintiff is not seeking attorney's fees and as such are stricken. The defendant further concedes that its 15th affirmative defense is identical to its first, and as such its 15th affirmative defense is also stricken. Additionally, since the plaintiff does not seek damages, the defendant's

8th, 10th and 12th affirmative defenses are stricken as well.

This constitutes the Decision and Order of the Court.

Dated : 5/16/2018

Hon. Edgar G. Walker, J.S.C.