Roy's Boys, L.L.C. v Hologram USA Entertainment, Inc.
2018 NY Slip Op 31653(U)
March 6, 2018
Supreme Court, New York County
Docket Number: 657037/2017
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 61

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ROY'S BOYS, L.L.C.

Plaintiff,

- v -

HOLOGRAM USA ENTERTAINMENT, INC.,

Defendant.

---X

INDEX NO. 657037/2017

MOTION DATE

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this application to/for Dismiss

HON. BARRY R. OSTRAGER:

Defendant Hologram USA Entertainment, Inc. ("Hologram") moves for an order dismissing the complaint of Plaintiff Roy's Boys, L.L.C. ("RB") pursuant to CPLR 3211(a)(1) and (a)(7). The motion to dismiss is denied for the reasons stated herein.

Background

Plaintiff RB is a Nashville-based company founded by the sons of Roy Orbison, a famous American singer-songwriter, to administer their late father's music catalog and otherwise safeguard his legacy. Defendant Hologram is a media company specializing in the creation of holograms of celebrity entertainers, among others. On February 24, 2015, the parties entered into a written contract (the "Agreement") granting Hologram an exclusive license for the creation of a

Roy Orbison hologram and "live" performance featuring the Orbison hologram. (Rothman Aff. Ex. 1 [NYSCEF Doc. 14]).

The Agreement also sets forth various deadlines for the creation of the hologram and production of the show. Schedule 2 of the Agreement provides, *inter alia*, that:

> Notwithstanding the foregoing, Hologram must: (i) provide a "Roy Orbison" hologram prototype for [RB] review within nine (9) months following the Effective Date ("Prototype Deadline"); (ii) provide a detailed binding letter of intent, including budget and business partners for distribution of the Production within nine (9) months for the Prototype Deadline ("LOI Deadline"); and (iii) stage the first performance of the Production within nine (9) months following the LOI Deadline. **In the event that any of the aforementioned deadlines are not met, unless any such periods are extended by mutual written Agreement, [RB] shall have the right to terminate the Initial Term and retain all advances previously paid**. (Rothman Aff. Ex. 1 [NYSCEF Doc. 14]) (emphasis added).

On October 22, 2015, RB agreed in writing to extend Hologram's nine-month deadline to provide an Orbison hologram prototype to May 16, 2016. (Complaint ¶ 7 [NYSCEF Doc. 2]). Hologram did not provide an Orbison hologram prototype by May 16, 2016. *Id.* ¶ 8. Neither the deadline extension nor Hologram's failure to perform by that deadline is in dispute.

On October 11, 2016, roughly five months after the extended deadline for Hologram to provide an Orbison prototype, RB purportedly advised Hologram that it was exercising its right to terminate the Agreement based on Hologram's failure to timely provide the prototype. Hologram did not respond to RB and never provided a prototype. Rather, about five months later in March 2017, RB entered into a contract with non-party BASE Holograms, LLC ("BASE") to produce a Roy Orbison hologram and live show. In October 2017, BASE announced the "Orbison Tour" in the United Kingdom and Australia, for which tickets are now on sale. *Id.* ¶ 13. It is further alleged that on November 15, 2017, Hologram threatened to commence legal action against BASE pursuant to Hologram's exclusive license to produce an Orbison hologram and

performance. *Id.* ¶¶ 14-16. RB commenced this lawsuit seeking a declaratory judgment that the Agreement with Hologram was terminated, and an injunction enjoining Hologram from exploiting Roy Orbison intellectual property.

Analysis

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction .... Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). "A contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion." *Greenfield v. Phillies Records, Inc.* 98 N.Y.2d 562, 569 (2002) (internal citations and quotations omitted). "If the court concludes that a contract is ambiguous, it cannot be construed as a matter of law, and dismissal under CPLR 3211(a)(7) is not appropriate." *Telerep, LLC v. U.S. Intern. Media, LLC*, 74 A.D.3d 401, 402 (1st Dep't 2010).

Defendant moves to dismiss based on plaintiff's alleged failure to provide the notice to cure required by Section 9.1 of the Agreement as a prerequisite to termination. Section 9.1 of the Agreement states as follows:

> Either party may by written notice terminate this Agreement immediately if the other commits any material breach of its obligations under this Agreement which is incapable of remedy, or if capable of remedy, is not remedied within 21 days of the other party giving written notice requiring the breach to be remedied.
> (Rothman Aff. Ex. 1 [NYSCEF Doc. 14]).

Nothing in the complaint indicates that Hologram's failure to meet the interim deadline to produce a prototype for review was incurable, or that RB provided Hologram a twenty-one day opportunity to remedy the breach pursuant to Section 9.1. Hologram argues that any termination

of the Agreement is subject to the notice to cure provision of Section 9.1 and that RB failed to provide such notice before purportedly terminating the Agreement on October 11, 2016.

RB, in opposition, argues that the Section 9.1 notice requirement is not applicable here, and that Schedule 2 of the Agreement is instead controlling. Schedule 2 contains various interim deadlines for the creation of the hologram prototype and production of the show. That schedule provides that "[n]otwithstanding the foregoing ... [i]n the event that any of the aforementioned deadlines are not met, unless any such periods are extended by mutual written Agreement, [RB] shall have the right to terminate the Initial Term and retain all advances previously paid." (Rothman Aff. Ex. 1 [NYSCEF Doc. 14]). Essentially, RB argues that Schedule 2 provides an independent right to terminate the Agreement that is separate and apart from the cure procedures set forth in Section 9.1. Thus, under Schedule 2, RB was not obligated to provide a notice to cure because Hologram failed to meet the deadline to provide a prototype, and Schedule 2 provides no such notice to cure requirement for this type of a breach.

In reply, Hologram asserts that even if Schedule 2 provides the applicable termination procedure, which they do not concede, then RB waived its right to terminate when it waited five months after the purported breach to enforce such right. Hologram argues that although Section 11[1] indisputably allows RB to exercise its rights and remedies under the termination provision of the Agreement at any time, it does not allow termination for an earlier purported breach that was already excused.

This Court, however, need not reach Hologram's waiver argument to determine the instant motion. The threshold issue in this action is whether the termination right provided in Schedule 2 trumps the notice to cure provision of Section 9.1. If Section 9.1 takes precedence,

[1] Section 11 provides: "No failure or delay by either party to exercise any right or remedy available to it under or in connection with this Agreement shall prevent the later exercise of any such right or remedy."

then RB would have had to provide a notice to cure before terminating the Agreement. If Schedule 2 takes precedence, then no such notice would have been required, and only then would Hologram's waiver defense come into play.

Here, there is sufficient ambiguity in the termination provisions of the Agreement such that dismissal on a pre-answer motion is unwarranted. While ostensibly Section 9, which is entitled "Termination", and the provisions thereunder, would provide the Agreement's termination procedure, such cannot be determined given the ambiguity that arises out of Schedule 2's termination language. The two purported termination provisions, when read together, provide a "reasonable basis for a difference of opinion," [*Greenfield*, 98 N.Y.2d at 569] such that dismissal pursuant to CPLR 3211(a)(1) and (a)(7) must be denied without prejudice to renew as a summary judgment motion following discovery regarding the parties' contractual intent.

Accordingly, it is hereby

ORDERED that Defendant's motion to dismiss is denied; it is further

ORDERED that Defendant shall file an Answer within twenty days of the filing of this decision and order.

3/6/2018
DATE

BARRY R. OSTRAGER, J.S.C.
BARRY R. OSTRAGER
JSC

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION	
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