

Gonzalez v Demairo
2019 NY Slip Op 30725(U)
March 15, 2019
Supreme Court, New York County
Docket Number: 656109/2016
Judge: Anthony Cannataro
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART IAS MOTION 41EFM

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CARL GONZALEZ,	INDEX NO. <u>656109/2016</u>
Plaintiff,	MOTION
	DATE <u>11/07/2018</u>
- v -	
JOHN DEMAIRO, HENRY STREET MUSIC, INC.	MOTION
	SEQ. NO. <u>006</u>
Defendant.	
	DECISION AND ORDER
-----X	

HON. ANTHONY CANNATARO:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214

were read on this motion SUMMARY JUDGMENT (AFTER JOINDER) .

Plaintiff Carl K. Gonzalez, a musician, commenced this breach of contract case against his former music producers, defendant Henry Street Music, Inc., and its director, defendant John Demairo. In 1994 and 1995, the parties entered into licensing and distribution agreements for certain music recorded by plaintiff. Plaintiff alleges that defendants unlawfully licensed and distributed his music without compensating him, and now moves for summary judgment on the issue of liability as well as for damages in the amount of \$300,000. Defendants cross-move for partial summary

judgment dismissing plaintiff's complaint, granting them a default judgment on their counterclaims, and for other alternative relief.

On a motion for summary judgment, the movant carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Once the movant meets its initial burden, the burden shifts to the opposing party to "show facts sufficient to require a trial of any issue of fact" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The court must view the evidence in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences that can be drawn (*Benjamin v City of New York*, 55 Misc3d 1217[A], 2017 NY Slip Op 50619[U] [Sup Ct, NY County 2017]). Summary judgment "is a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues" (*Andre v Pomeroy*, 35 NY2d 361, 363 [1974]).

In 1994, plaintiff and defendants entered into a written agreement concerning the production of one music recording, with an option for a second. The agreement gave defendants ownership of the recordings to be produced and provided for payment of a portion of the income earned to plaintiff. Plaintiff released only one single subject to the agreement, and that single then earned income. Defendants later released several other of plaintiff's tracks that were not subject to a written agreement.

Plaintiff commenced this action alleging that he holds the rights to the master recording for the single, and that defendants wrongfully entered into licensing agreements with third-parties for that master recording. Plaintiff further alleges that defendants are engaging in the unauthorized release, distribution, and licensing of additional tracks to which plaintiff holds exclusive rights, and that defendants have not provided him written accounts of the income earned on any of the songs, nor paid him his rightful share of the royalties. Defendants counter that they are the rightful owners

of the master recording, that they had no obligation to provide written accounts of income to plaintiff, and that they paid plaintiff his share of the royalties.

The Court first addresses plaintiff's claim that defendants are wrongfully holding, licensing, and distributing the master recording for the single that was produced per the agreement between the parties. Section six of the agreement made between plaintiff and Northcott Productions (NCP), a company owned by defendants, provides in relevant part:

All masters recorded by PRODUCER for this agreement shall be the property of NCP worldwide free of any claims whatsoever by any person deriving any rights or interest from PRODUCER without limiting the generality of the foregoing.

(a) To manufacture, advertise, sell, lease, license, distribute or otherwise use or dispose of, in any or all fields of use by any method now or hereafter known, records embodying the masters recorded by PRODUCER during the term, all upon such terms and conditions as NCP may elect, or at its discretion to refrain therefrom;

The agreement clearly assigns the rights to the master recording, and the right to its distribution, licensing, or sale, to defendants in exchange for a percentage of royalties to be paid to plaintiff. In seeking reversion of the master recording, plaintiff is essentially asking this Court to rescind the agreement between the parties. However, rescission is an equitable remedy not available in addition to damages (*see Rudman v. Cowles Communications*, 30 NY2d 1 [1972]; *see also Lockett v Tuff City Records*, 2009 NY Slip Op 32271 (Sup Ct, NY County 2009). Although the complete failure to pay royalties might support rescission, any partial payment of royalties precludes rescission as a remedy for breach of a recording or songwriting agreement (*Id.*). In this case, there is at least an issue of fact as to whether defendants paid royalties to plaintiff on the

contract. As such, plaintiff has failed to establish entitlement to rescission of the agreement as a matter of law.

The Court next turns to plaintiff's claim for compensatory damages on the basis of defendants' alleged failure to pay royalties. Although there is no record of formal statements in which defendant accounted for royalties paid to plaintiff, defendants state that they remitted over \$300,000 in royalties to plaintiff and submit evidence of some such payments. It is impossible at this juncture to determine what if any royalties actually owed were not paid to plaintiff. Accordingly, that branch of plaintiff's motion which seeks summary judgment awarding compensatory damages must also be denied.

Similarly, with respect to plaintiff's unjust enrichment claim, plaintiff has pleaded a colorable claim for unjust enrichment as it relates to those songs produced without an agreement, but the proofs submitted on this motion are patently insufficient to award summary judgment.

The Court next turns to the branch of defendants' cross motion which seeks a default judgment on their counterclaims based on plaintiff's alleged failure to timely answer them. The counterclaims allege various improprieties by plaintiff. These allegations were contradicted by plaintiff's complaint, and were addressed throughout plaintiff's papers, including in plaintiff's original response to defendants' answer filed before the pleadings were amended. Under the circumstances, it would be unfair to grant a default judgment on defendant's counterclaims. As such, defendants' motion for a default judgment is denied.

The Court next addresses the branches of defendants' cross motion which seek to disqualify plaintiff's attorney and order that he sit for a deposition, arguing that he is a necessary witness in this case. To disqualify an attorney based on the advocate-witness rule, a party must demonstrate that the attorney's testimony is both necessary and substantially likely to be prejudicial (*Homar v American Home Mtge. Acceptance, Inc.*, 119

AD3d 901 [2014]; *Daniel Gale Associates, Inc. v George*, 8 AD3d 608 [2004]; *Iannazzo v Stanson*, 8 AD3d 113 [2004]). Defendants have failed to carry their burden of demonstrating that plaintiff's counsel's testimony regarding his sending out take down and related notices purporting to protect his client's copyrights, during the course of his representation of his client, is necessary to defendants' proving their counterclaims and thus warrant disqualification of plaintiff's attorney in this matter.

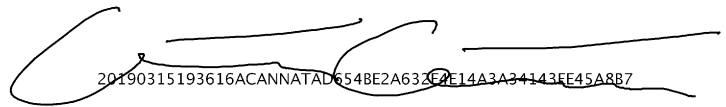
Accordingly, it is

ORDERED that defendants motion for a default judgment is denied, and it is further

ORDERED that plaintiff's motion for summary judgment and defendants' cross motion for partial summary judgment are both denied in their entirety and counsel are directed to appear for a status conference in Room 490, 111 Centre Street on March 6, 2019 at 2:15PM.

3/15/2019

DATE



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ANTHONY CANNATARO, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE