

Hindlin v Prescription Songs LLC
2019 NY Slip Op 32018(U)
July 5, 2019
Supreme Court, New York County
Docket Number: 651974/2018
Judge: Andrea Masley
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREA MASLEY

PART

IAS MOTION 48EFM

Justice

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INDEX NO. 651974/2018

JACOB HINDLIN,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 002

- v -

PRESCRIPTION SONGS LLC, KASZ MONEY, INC., ADVANCED
ALTERNATIVE MEDIA, INC., MARK BEAVEN, KING, HOLMES,
PATERNO & SORIANO, LLP, PETER PATERNO

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 96

were read on this motion to/for

DISMISS

In motion sequence number 002, defendants Prescription Songs LLC (Prescription) and Kasz Money, Inc. (KMI) (collectively, Movant Defendants) move pursuant to CPLR 3211 (a) (1) and (7) to dismiss the complaint in its entirety.

Procedural History

On April 24, 2018, plaintiff filed a summons and complaint seeking a declaratory judgment declaring that the term of the 2010 Production Agreement ends on April 26, 2018 (first cause of action), a declaratory judgment declaring that the term of the 2014 Co-Pub Agreement ended January 26, 2018 (second cause of action), and in the alternative, a declaratory judgment declaring that the parties are in the third option term of the 2014 Co-Pub Agreement (third cause of action). On September 7, 2018, plaintiff filed an amended summons and complaint (amended complaint), adding Advanced Alternative Media, Inc., Mark Beaven, King, Holmes, Paterno & Soriano, LLP, and Peter T. Paterno as defendants. In the amended complaint, plaintiff added causes of action

for an accounting (against Prescription), legal malpractice (against King, Holmes, Paterno & Soriano, LLP and Paterno), negligence (in the alternative against Advanced Alternative Media, Inc. and Beaven), and breach of fiduciary duty (in the alternative against Advanced Alternative Media, Inc. and Beaven). Omitted from the amended complaint is plaintiff's original first cause of action for a declaratory judgment involving the 2010 Production Agreement; plaintiff's counsel confirmed at argument that plaintiff withdrew this claim (NYSCEF Doc. 96, tr. at 2:17-19).

At oral argument, plaintiff's counsel informed the court that plaintiff filed the amended complaint as of right, since there was no answer to the original complaint (*id.* at 20:10-11, 21:6-11). While the court will not look at the amended complaint as to the new defendants and claims (*id.* at 21:15-16), the Movant Defendants did not withdraw this motion despite the filing of the amended complaint, and implicitly consented to apply this existing motion to dismiss the original complaint to the amended complaint (*id.* at 38:16-22). Thus, the court will apply this motion to the amended complaint (see *Sage Realty Corp. v Proskauer Rose L.L.P.*, 251 AD2d 35, 38 [1st Dept 1998]).

The following facts are alleged in the amended complaint and for the purposes of this motion are accepted as true.

Plaintiff Jacob Hindlin is a writer and producer of contemporary popular music (NYSCEF Doc. No. [NYSCEF Doc.] 69 at ¶ 4). Defendant Prescription is a music publishing company (*id.* at ¶ 5). Defendant KMI is engaged in the business of music production (*id.* at ¶ 6). Prescription and KMI are controlled by nonparty Lukasz Gottwald (*id.* at ¶ 7).

On November 23, 2010, plaintiff entered into a Co-Publishing Agreement with Prescription (2010 Co-Pub Agreement), whereby plaintiff agreed to “sell, assign, transfer, and deliver to Prescription an undivided forty percent (40%) interest in and to all of [plaintiff’s] interest in all Compositions¹ in perpetuity” (NYSCEF Doc. 52 at ¶ 1 [a]). Contemporaneously, plaintiff entered into a Production Agreement with KMI (2010 Production Agreement), whereby plaintiff agreed to provide KMI with his exclusive personal services as a producer, co-producer, mixer, remixer, arranger, musician, and programmer during the term set forth in the 2010 Co-Pub Agreement (*id.* at p. 4, ¶ 1).

On June 30, 2014, plaintiff and Prescription entered into a Co-Publishing and Exclusive Administration Agreement (2014 Co-Pub Agreement), whereby plaintiff agreed to sell, assign, convey, grant and transfer an undivided 50% in plaintiff’s interest in the “Subject Compositions” irrevocably and exclusively to Prescription (NYSCEF Doc. 54 at ¶ 1). The Paragraph 3 of 2014 Co-Pub Agreement provides,

“(a) The term of this agreement (the ‘Term’) will commence on the date upon which the term of the Prior BAMF Agreement (as defined below)² expires (such expiration which shall be confirmed by written confirmation that is acceptable to [Prescription] in its sole discretion, including without limitation, by way of written confirmation from BAMF (as defined below), it being understood that until the termination of the Prior BAMF Agreement is confirmed, [plaintiff] shall use continued best efforts to convince and encourage BAMF to confirm termination of the term of the Prior BAMF Agreement with substantiation to be provided to [Prescription] and continue, unless extended or suspended as provided herein,

¹ Compositions are defined as “all compositions written, owned, controlled and/or acquired, in whole or in part, by [plaintiff] prior to (solely with respect to any compositions co-written with any writer affiliated with Prescription and/or Lukasz Gottwald) and during the Term” (NYSCEF Doc. 52 at ¶ 2).

² The 2010 Co-Pub Agreement acknowledged that plaintiff had entered into an agreement with nonparty B.A.M.F. Entertainment, Inc. (BAMF) on March 6, 2009, prior to the execution of the 2010 Co-Pub Agreement (Prior BAMF Agreement) (NYSCEF Doc. 52 at ¶ 3 [a]). While BAMF waived its exclusive rights to the Compositions so plaintiff and Prescription could enter into the 2010 Co-Pub Agreement, BAMF continued to own an undivided 50% interest in plaintiff’s interest in all Compositions; thus, plaintiff retained a 10% interest in the Compositions (*id.*).

for a first Contract Period (sometimes referred to as the 'Initial Period') and the additional Contract Periods provided for herein below. The Initial Period shall commence on the date hereof and shall continue until the date thirty (30) days after the later of the date when [plaintiff] (i) sends notice to [Prescription] of the fulfillment of the MDRC (defined below)³ for the Initial Period and (ii) twelve (12) months after the date hereof (the 'Option Trigger Date').

(b) Additionally, [plaintiff] hereby grants [Prescription] three (3) separate options to extend the Term for additional Contract Periods (each individually referred to herein as an 'Option Period' and collectively referred to as the 'Option Periods') on the same terms and conditions applicable to the Initial Period except as otherwise provided herein. Notwithstanding anything to the contrary contained in paragraph 3(a) above, a particular Contract Period shall not end unless and until [plaintiff] deliver[s] to [Prescription] a notice expressly referring to this paragraph and indicating that [Prescription] has theretofore failed during the then-current Contract Period to exercise [Prescription's] option to extend the Term for an Option Period. If [Prescription] fails to exercise [its] option for the applicable Option Period on or before the date fifteen (15) days after [Prescription] receives that written notice from [plaintiff], then the Term shall end on its otherwise natural expiration date, as if that date was the original expiration date of the Term, without any liability or additional obligations to [plaintiff] in connection therewith except those obligations of [Prescription] which survive the expiration of the Term.

(c) If [Prescription] exercises its first option, the First Option Period will begin immediately after the expiration of the Initial Period and continue until the later of date thirty (30) days after the date when [plaintiff] (i) sends notice to [Prescription] of fulfillment of the MDRC for the First Option Period and (ii) twelve (12) months after the commencement of the First Option Period. If [Prescription] exercises its second option, the Second Option Period will begin immediately after the expiration of the First Option Period and continue until the later of the date thirty (30) days after the date when [plaintiff]: (i) sends notice to [Prescription] of fulfillment of the MDRC for the Second Option Period and (ii) twelve (12) months after the commencement of the Second Option Period. If [Prescription] exercises its third option, the Third Option Period will begin immediately after the expiration

³ Paragraph 4 (b) (iv) provides, "[i]n each Contract Period, there shall be a Major Release on Phonograph Records of the Album(s) embodying all of the Qualifying New Compositions Delivered in satisfaction of the [Minimum Delivery Commitment] for the Contract Period concerned pursuant to paragraph 4(b)(i) ('MDRC'). The MDRC shall not be deemed fulfilled until [Prescription] receives (a) [plaintiff's] written notice accurately confirming that there has been a Major Release of the Album(s), (b) confirmation from the Record Company that released the Album(s) concerned regarding the U.S. mechanical royalty payable to [Prescription] in respect of each Qualifying New Composition as embodied in such Album, (c) written notice accurately documenting your ownership interest in the applicable Qualifying New Compositions, and (d) a digital copy of such Album (inclusive of the album packaging and inserts) (collectively, the 'Release Notice') (NYSCEF Doc. 54).

of the Second Option Period and continue until the later of the date thirty (30) days after the date when [plaintiff]: (i) sends notice to [Prescription] of fulfillment of the MDRC for the Third Option Period and (ii) twelve (12) months after the commencement of the Third Option Period. (The Option Periods are sometimes consecutively referred to herein as the 'First Option Period', the 'Second Option Period', etc.)"

(*id.* at ¶ 3).

Also, on June 30, 2014, the parties entered into an amendment to the 2010 Co-Pub Agreement and 2010 Production Agreement (Amendment) (NYSCEF Doc. 53). The Amendment provided that the 2010 Co-Pub Agreement would not apply to compositions written, composed, acquired, or created by plaintiff from June 30, 2014 onward; the 2014 Co-Pub Agreement would apply (*id.*). The Amendment deleted paragraph 3 of the 2010 Production Agreement governing annual producer advances and provided for certain producer royalties (*id.* at ¶¶ 3, 4). It also provided that the "Term of the Agreement shall be extended, so that the Term shall be coterminous with the term of the [2014 Co-Pub Agreement]" (*id.* at ¶ 2). The Amendment defines "Agreement" as the co-publishing agreement and production agreement dated November 23, 2010.

On July 20, 2015, plaintiff sent Prescription notice that plaintiff has "satisfied the MDRC for the Initial Period of the [2014 Co-Pub] Agreement (NYSCEF Doc. 55). The Notice requests confirmation of Prescription's exercise of the its option to extend the Term of the 2014 Co-Pub Agreement into the first Option Period by sending plaintiff the first half of the Advance for the First Option Period within 30 days (*id.*). On August 12, 2016, Prescription's counsel sent plaintiff's counsel a letter informing plaintiff that Prescription was exercising its option for the First Option Period, effective retroactively on July 20, 2016 (NYSCEF Doc. 56 at p. 5; NYSCEF Doc. 69 at ¶ 48).

On November 29, 2017, plaintiff's counsel informed Prescription that plaintiff had fulfilled the MDRC for the current option period (NYSCEF Doc. 57). On January 5, 2018, plaintiff's counsel sent notice to Prescription's counsel that Prescription failed to exercise its "option to extend the Term for an Option Period" (NYSCEF Doc. 59). On January 31, 2018, Prescription's counsel responded that plaintiff was in his first option period and that MDRC fulfillment had not occurred (NYSCEF Doc. 56). On February 14, 2018, counsel for Prescription informed plaintiff's counsel that Prescription received confirmation from nonparty Interscope Records of plaintiff's mechanical royalty rate and all of the songs plaintiff is on and that Prescription was now exercising its option for the second option period (NYSCEF Doc. 58). On April 23, 2018, plaintiff's counsel informed Prescription that plaintiff would no longer perform services under the 2014 Co-Pub Agreement as of April 26, 2018.

Analysis

CPLR 3211 (a) (7) provides that a "party may move for judgment dismissing one or more causes of action asserted against him on the ground that the pleading fails to state a cause of action." The court is to give the pleadings a liberal construction and accept the facts alleged as true (*Leon v Martinez*, 84 N.Y.2d 83, 87 [1994]). While the court's analysis of plaintiff's claims is "limited to the four corners of the pleading" (*Johnson v Proskauer Rose LLP*, 129 AD3d 59, 67 [1st Dept 2015]), in "circumstances where legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference," and "the criteria becomes whether the proponent of the pleading has a cause of action, not whether she has stated one" (*Ark Bryant Park Corp. v Bryant Park Restoration Corp.*,

285 AD2d 143, 150 [1st Dept 2001] [internal quotation marks and citations omitted).

"The documents submitted must be explicit and unambiguous" (*Dixon v 105 West 75th St. LLC*, 148 AD3d 623 [1st Dept 2017] [citation omitted]).

The Movant Defendants argue that plaintiff's causes of action for a declaratory judgment declaring the 2014 Co-Pub Agreement terminated on January 26, 2018, or in the alternative, that the parties are in their third option term, must be dismissed because neither of these declarations comport with the unambiguous terms of the 2014 Co-Pub Agreement and the documentary evidence presented, including documents attached to the amended complaint. The Movant Defendants assert that the 2014 Co-Pub Agreement provides that, for a contract period to end, there must be fulfillment of the MDRC and proper notice of fulfillment, and these requirements were not met. Specifically, the Movant Defendants assert that confirmation from the record company regarding the U.S. mechanical royalty rate payable to Prescription is required for fulfillment of MDRC, and since Prescription did not receive this confirmation until February 14, 2018, it could not exercise its option until that time, as the previous contract term had not ended.

Paragraph 4 (b) (iv) provides, in relevant part, "[t]he MDRC shall not be deemed fulfilled until [Prescription] receives (a) [plaintiff's] written notice accurately confirming that there has been a Major Release of the Album(s), (b) confirmation from the Record Company that released the Album(s) concerned regarding the U.S. mechanical royalty payable to [Prescription] in respect of each Qualifying New Composition as embodied in such Album, (c) written notice accurately documenting your ownership interest in the

applicable Qualifying New Compositions, and (d) a digital copy of such Album (inclusive of the album packaging and inserts)."

This provision is clear that there are four requirements that must be met for there to be fulfillment of the MDRC, and one of those requirements is that Prescription must receive confirmation from the record company regarding the U.S. mechanical royalty payable to Prescription. There is also another confirmation that is allegedly required in order to satisfy the mechanical royalty requirement that is not explicitly defined in the Agreement, in that the mechanical royalty requirement cannot be met until Prescription receives confirmation of the split of ownership percentages between the writers of a particular song. The Movant Defendants refer the court to, what is now, exhibit H to the amended complaint - an email exchange between Prescription's counsel and Steve Weil at Universal Music Group, commencing January 9, 2018 and concluding February 14, 2018 (NYSCEF 77). However, the court cannot rely solely on this email to determine whether plaintiff satisfied his requirements under the 2014 Co-Pub Agreement.

First, at argument, both counsels repeatedly refer to industry standards, customs, and practice which is clearly needed to read the Agreement, i.e., the implicit requirement of confirmation of split agreements. This alone demonstrates that this CPLR 3211 motion should not be granted.

Second, the email chain does not conclusively refute the allegations of the complaint that plaintiff met his obligations, because the Agreement is ambiguous. A motion to dismiss pursuant to CPLR 3211(a)(1) may be granted only where the documentary evidence "utterly refutes plaintiff's factual allegations, conclusively

establishing a defense as a matter of law.” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Where the documentary evidence, such as a contract, does not clearly refute the allegations in the complaint, the action will not be dismissed. (See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 154 [2002]. The contract must not be ambiguous, otherwise a defense is not conclusively established as a matter of law. (*Weston v Cornell Univ.*, 56 AD3d 1074, 1074 [3d Dept 2008]). A contract is ambiguous if its provisions “lack a definite and precise meaning and provide a reasonable basis for a difference of opinion.” (*Id.* [citations omitted]).

While the mechanical royalty requirement is clear, it is not clear from the Agreement, who is charged with satisfying this requirement. This is particularly so when you look at Paragraph 4 (b) (iii), which specifically puts the onus on plaintiff to deliver notice confirming certain requirement for “minimum delivery commitment.” For the MDRC, the Agreement does not make clear who is responsible for requirements (b), (c) and (d). Requirement (a) is the only requirement in Paragraph 4 (b) (iv) that clearly puts the onus on plaintiff (“your written notice accurately confirming that there has been a Major Release of the Album[s]”).

Accordingly, it is

ORDERED that defendants Prescription Songs LLC and Kasz Money, Inc.'s motion to dismiss is denied; and it further

ORDERED that the parties are to appear for a status conference on September 4, 2019 at 10:30 am.

7/5/2019

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

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DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐

OTHER

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REFERENCE

HON. ANDREA MASLEY

ANDREA MASLEY, J.S.C.