SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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ROBINSONDAY, LLC, LAURA DAY, INC. and LAURA DAY,

Plaintiffs,

-against-

THE PRINCETON REVIEW, INC., JOHN KATZMAN, ADAM ROBINSON, and RANDOM HOUSE, INC.,

Defendants.

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RANDOM HOUSE, INC.,

Interpleader Claimant,

-against-

ROBINSONDAY, LLC, LAURA DAY, INC., LAURA DAY and ADAM ROBINSON,

Interpleader Defendants.

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ADAM ROBINSON,

Plaintiff,

-against-

LAURA DAY, DAVID J. DEPINTO, ROBINSONDAY, LLC and LAURA DAY, INC., and DEPINTO NORNES & ASSOCIATES, LLP,

Defendants.

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O. PETER SHERWOOD, J.:

DECISION AND ORDER
Index No.: 650829/2011

Motion Sequence No.: 006

Index No.: 600907/2010

Motion Sequence No.: 030

Under motion sequence 006 in *RobinsonDay, LLC v TPR* (Day Case) and motion sequence 030 in *Robinson v Day* ("Robinson Case"), defendants The Princeton Review, Inc., now known as Education Holdings 1, Inc., and TPR Education, LLC (collectively, "TPR" or "defendants") move to dismiss related actions as moot on the basis that a settlement agreement entered between the parties resolved all claims against TPR parties and pursuant to CPLR 3211 (a) (1), (5) and (7). It

seeks dismissal of the Third (Conversion), Fifth (Tortious Interference), Seventh (Breach of Contract), Ninth (Specific Performance) and Eleventh (Declaratory Judgment) causes of action in the Day Case (Doc. No. 49) and the same claims in the amended third-party complaint in the Robinson Case (Doc. No. 835).[1] Because both motions are founded on the exact same facts and contain identical motion practice, this decision addresses both motions as one. The documents referenced herein may be found in the electronic record of the Day Case. They are also filed in the Robinson Case.

I. BACKGROUND

Following the end of an intimate relationship between Adam Robinson and Laura Day which included intertwined finances, Robinson filed a complaint in 2010 against Laura Day, David DePinto, RobinsonDay, LLC and Laura Day, Inc. seeking to invalidate certain agreements between the parties (Index No. 600907/2010, the Robinson Case). In 2011, Day and her businesses filed a separate action against The Princeton Review, Inc. and others that had agreed to pay royalties to Robinson, the ownership of which and attendant revenue streams were central in the Robinson Case (Index. No. 650829/2011, the Day Case). An amended complaint was filed in the Day Case adding claims against Robinson and Random House, Inc. In 2013, the Day Parties filed an amended third-party complaint in the Robinson Case against TPR Education, LLC, Education Holdings 1, LLC, and others alleging claims virtually identical to those asserted in the Day Case. These two complaints in the Day Case and Robinson Case respectively contain the following claims against TPR: (i) conversion, (ii) tortious interference, (iii) breach of contract, (iv) specific performance, and (v) declaratory judgment. There is no contractual relationship between TRP and any of the Day Parties.

In March 2012 and June 2013 respectively, now retired Justice Schweitzer stayed the Day Case and the third-party claims in the Robinson Case pending resolution of the underlying dispute between Robinson and Day in the Robinson Case. Prior to the stays and thereafter, TPR made royalty payments pursuant to court order into escrow accounts which are maintained by the New York County Clerk's Office. The court subsequently found that Robinson and the Day Parties executed a binding settlement agreement on February 7, 2018 that resolved all claims between

[1] In the amended third party complaint in the Robinson Case these claims appear as numbers First (Conversion), Third (Tortious Interference), Fifth (Breach of Contract), Sixth (Specific Performance) and Eighth (Declaratory Judgment).

Robinson and the Day Parties, included a waiver of claims and dictated the distribution of royalties going forward (the "Settlement Agreement" [Doc. No. 74]).

Although TPR and the other royalty payers are not parties to the Settlement Agreement, Robinson and the Day Parties agreed that Robinson would instruct TPR to pay pursuant to the terms of the Settlement Agreement, and that, in consideration of the royalty payers agreement in writing to pay royalties directly to recipients in accordance with the terms of the Settlement Agreement and providing a full general release to Day, Day would waive her claims against them. The Settlement Agreement is silent as to which of the parties would secure these agreements or how such agreements would be procured. Nevertheless, the parties agreed that Robinson would use his best efforts to cause the royalty payers to execute a stipulation of discontinuance (*see id.)*.

II. LEGAL STANDARD

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn,* 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR § 3211 (a)(5) states that "a party may move for judgment dismissing one or more causes of action asserted against him on the ground that the cause of action may not be maintained because of . . . release" CPLR § 3211(a)(5).

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State,* 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit

of every possible inference. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005] [citation omitted]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *Sokol v Leader,* 74 AD3d 1180 [2d Dept 2010]).

III. ARGUMENTS

A. Defendants' Memorandum in Support

TPR argues that all of the Day Parties' claims against it in both the Robinson Case and the Day Case were rendered moot by the Settlement Agreement (Def. Br. at 3–4 [NYSCEF Doc. No. 50]; *Hearst Corp. v Clyne*, 50 NY2d 707, 713 [1980]; *Boggs v New York City Health and Hospital Corporation*, 70 NY2d 972, 974 [1988]). It argues the parties waived any claims to royalties paid to the other according to the Settlement Agreement (Def. Br. at 4). TPR argues further that the Day Parties' claims against TPR for conversion, tortious interference, and breach of contract all arise out of Robinson's instruction to TPR to pay him $107,000 in October 2010 (Day Case Amended Complaint ¶¶64, 80, 100; Robinson Case Third-Party Complaint ¶¶49, 63, 80). TPR also argues Robinson and the Day Parties agreed that, "in consideration of TPR/Random House/Katzman agreement in writing to pay royalties directly to recipient . . . and in consideration of a full general release . . . [the Day Parties waive] claims against them" (Def. Br. at 5; Settlement Agreement at 1). Accordingly, TPR asserts all those claims are moot and should be dismissed (*See Boggs*, 70 NY2d at 974; *see also* NY Gen Oblig Law § 15-108(a) (McKinney) (a release against a particular defendant will waive claims against alleged joint-tortfeasor if contemplated by the settlement agreement)). TPR maintains that the Day Parties' two other claims against it for specific performance and declaratory judgment relate to TPR's forward-looking obligations to pay royalties to Robinson and/or the Day Parties and, consequently, are moot and must be dismissed because the Settlement Agreement pre-empts these claims (Def. Br. at 6; Settlement Agreement at 1). TPR argues that there is no need for the court to retain jurisdiction over it for either the Robinson or Day Case as TPR is already the subject of an Order from this court requiring it to pay all royalties to the New York County Clerk's Office (Robinson Case Docket Nos. 819, 829). Consequently, TPR asserts that dismissal of the claims against it is appropriate.

B. Plaintiffs' Memorandum in Opposition

Plaintiffs respond that the Day Parties' claims against TPR are not moot as the plain terms of the Settlement Agreement are fatal to TPR's motion (Pl. Br. at 1 [NYSCEF Doc. No. 72]). Plaintiffs direct the court to the text of the Settlement Agreement, attached as Exhibit A to the Affirmation of D. Capuder (NYSCEF Doc. No. 74), which states in relevant part: "[i]n consideration of TPR/Random House/Katzman agreement in writing to pay royalties directly to recipient in accordance with terms above and in consideration of a full general release in favor of LD [the Day Parties] from TPR/Katzman/Random House, LD waives claims against them". The Settlement Agreement further provides that "AR [Robinson] shall use best efforts to cause TPR/Katzman/Random House to execute a stipulation of discontinuance of all claims and counterclaims with prejudice and without costs" (*id.*). Plaintiffs argue that TPR has refused to deliver the necessary consideration needed to obtain a waiver of the Day Parties' claims against it. Plaintiffs further argue that TPR's claim that the parties "waive any claims to royalties paid to the other" has nothing to do with TPR as it is in a different part of the Settlement Agreement and TPR was not a party or signatory to the Settlement Agreement.

Plaintiffs argue that the Settlement Agreement does not moot the Day Parties' claims against TPR for several reasons (Pl. Br. at 5–11). First, TPR's motion proceeds exclusively under CPLR § 3211, and not pursuant to CPLR § 3212 as TPR has attached no affidavit by a person having knowledge of the facts and offers no basis or evidence for its damages (Pl. Br. at 5). Next, plaintiffs argue that TPR fails to annex its documentary evidence to the motion, which is fatal to a CPLR § 3211(a)(1) motion (*Id.* at 6; *Silverman v Minify, LLC*, 2016 NY Misc LEXIS 84, 29–30 [NY Sup Ct 2016]; *Mei Lin v Wang*, 2016 NY Misc LEXIS 6694, *3 [NY Sup Ct 2016]). Plaintiffs further argue that the Settlement Agreement's language does not moot their claims against TPR or support TPR's request for dismissal under CPLR § 3211(a)(5) (on grounds of release) because the Settlement Agreement was solely negotiated and executed by the Day Parties, Robinson, and the DePinto defendants to resolve matters pertaining to the Robinson Case. Plaintiffs argue that TPR ignores that it was not a party or signatory to the Settlement Agreement (Pl. Br. at 6). Plaintiffs argue that TPR's argument is unsupported by the plain language of the Settlement Agreement as none of the provisions of the Agreement suggest an intent to benefit TPR without satisfaction of conditions to provide a general release for the Day Parties (*see 243-249 Holding Co., LLC v Infante*, 4 AD3d 184, 185 [1st Dept 2004] ["the best evidence of the intent to bestow a benefit

upon a third party is the language of the contract itself"]). TPR cannot contest that it is a not a party to the Agreement (Pl. Br. at 7).

Plaintiffs further argue that TPR omits the Settlement Agreement's material language that would support its claim, neglecting specifically that the Agreement sets a condition to the Day Parties' waiver of claims against TPR (see Settlement Agreement at 1). Plaintiffs argue that neither required condition, specifically direct payment of royalties or a full general release in favor of the Day Parties, has occurred and, without an express waiver or release of pursuing claims against a third party, none can be implied (Pl. Br. at 8; *Broadway SKY, LLC v 53rd St. Holdings, LLC*, 2019 NY Misc LEXIS 1654, at *11–12 [Sup Ct New York County 2019] ("the clear intent of the Settlement Agreement and of paragraphs 2 and 4, read together, is not to release but to preserve [the settling party's] claims [against another party]"). Plaintiffs argue that, after two years of attempts to obtain a written agreement from TPR and other parties stating the royalties are 100% owned by Laura Day, Inc. and paying said royalties, no such agreement has been made and, consequently, TPR is not to receive the benefit of a release and its motion to dismiss under CPLR § 3211(a)(1) must fail (Pl. Br. at 9; Capuder Affirmation ¶¶3, 4 [NYSCEF Doc. No. 73]; *Silverman v Minify, LLC*, 2016 NY Misc LEXIS 84, *29–30 [NY Sup Ct 2016]). Plaintiffs further argue that TPR's citation to New York Gen. Obligation Law § 15-108 in support of discharging the Day Parties' claims against TPR as a joint-tortfeasor is meritless as it is not a correct application of the statute which provides that "it does not discharge any of the other tortfeasors from liability for the injury [] unless its terms expressly so provide" (Pl. Br. at 9; GOL § 15-108(a)). Plaintiffs argue the Settlement Agreement does not expressly discharge TPR from liability and no mutual release has been exchanged (Pl. Br. at 10; *see Johnson v Lebanese American University*, 84 AD2d 427, 428 [1st Dept 2011] [the enforceability of releases is analyzed under contract law principles, and the express reservation of claims must be enforced as written]). Plaintiffs further argue, even if GOL § 15-108 applied to the tort claims in question, it does not bar any of the Day Parties' contract claims as such claims are not in tort (*Bauman v Garfinkle*, 235 AD2d 245 [1st Dept 1997]). Plaintiffs argue that TPR's reliance on *Hearst Corp. v Clyne* and *Boggs v New York City Health & Hosp. Corp.* is misplaced as the former involved an Article 78 proceeding challenging a plea in a criminal case and the latter involved a petitioner's challenge to involuntary commitment at a Psychiatric Hospital (*Hearst Corp.*, 50 NY2d 707, 713 [1980]; *Boggs*, 70 NY2d 972, 974 [1988]).

Plaintiffs next argue that TPR's remaining arguments under CPLR § 3211 are without merit (Pl. Br. at 11). To the extent TPR seeks dismissal pursuant to CPLR § 3211(a)(7), this must fail because the Day Parties' complaints sufficiently state causes of action against TPR for conversion, tortious interference with contract, breach of contract, specific performance, and declaratory judgment (*see Leon v Martinez*, 84 NY2d 83 [1994]; Day Case Complaint ¶¶61–66, 74–82, 91–101, 109–18, 127–33; Robinson Case Third-Party Complaint ¶¶46–50, 57–64, 72–81, 82–91, 100–05). Both complaints state a claim for conversion as each alleges a possessory interest in the royalty payments, TPR's control of the funds, and TPR's refusal to pay such funds to the Day Parties (Day Case Complaint ¶¶62–66; Robinson Case Third-Party Complaint ¶¶47–50; *Fisher v Belomonte*, 2013 NY Misc LEXIS 4669 [Sup Ct New York County 2013]). Plaintiffs argue, contrary to TPR's allegation that the Day Parties only have a "mere right to payment" of the royalties, Laura Day, Inc. is the sole and 100% owner of the royalties with sole right of possession as confirmed by the Settlement Agreement (Pl. Br. at 12; Def. Br. at n5). Plaintiffs further argue that both complaints state a claim for tortious interference with contract as both allege that the 2000 Day Agreement and the 2005 Princeton Review Assignment Agreement are valid and enforceable contracts, TPR's awareness of the contracts, that TPR intentionally interfered with the contracts by entering into the 2010 Princeton Review Settlement and 2010 Amendment directing the royalty payments to Robinson, and damages to the Day Parties (Pl. Br. at 13; Day Complaint ¶¶75–85; Robinson Third-Party Complaint ¶¶58–64; *Hoag v Chancellor*, 246 AD2d 224, 228 [1st Dept 1998]). Plaintiffs argue both complaints also state a claim for breach of contract as both allege that the 2000 Princeton Review Settlement, as amended by the 2005 Amendment, is a valid and enforceable contract which provides that royalty payments be paid to the Day Parties that TPR materially breached its duties thereunder by making royalty payments to Robinson, and the Day Parties were damaged as a result (Pl. Br. at 13–14; Day Complaint ¶¶92–101; Robinson Third-Party Complaint ¶¶73–81; *Board of Mgrs. Of Water Edge Condominium v Arverne/Briarwood II, LLC*, 2017 NY Misc LEXIS 2422, at *2–3). Finally, plaintiffs argue both complaint state claims for specific performance and declaratory judgment (Pl. Br. at 14–15; *see Rovello v Orifino Realty Co.*, 40 NY2d 633, 634 [1976]). To the specific performance claim, plaintiffs argue that the complaints allege breach of contract, a claim that TPR has the ability to fulfill its ongoing obligations under the 2000 Princeton Review Settlement by paying the Day Parties royalties, and that the Day Parties have no adequate remedy at law (Day Case Complaint ¶¶92–101, 110–18;

Robinson Case Third-Party Complaint ¶¶73–81, 83–91). To the declaratory judgment claim, plaintiffs argue the complaints allege there is a real and justiciable controversy regarding defendants' liability to the Day Parties for diverted royalty payments sufficient to invoke the court's power to render a declaratory judgment (Day Case Complaint ¶¶128–31; Robinson Case Third-Party Complaint ¶¶101–05; *see, e.g., Joseffer v Lindsay Wolf, Inc.*, 2015 NY Misc LEXIS 3776, at *33–34 [Sup Ct New York County 2015]).

C. Defendants' Reply Memorandum

In reply, TPR argues that it remains contractually bound by Robinson's written instructions, a draft of which was submitted to the court on June 12, 2019 and to which the Day Parties unreasonably objected (Def. Reply at 3 [NYSCEF Doc. No. 77]). The Settlement Agreement states that the parties waive any claims to royalties paid to the other. This provision applies to TPR as well (*id.* at 3–4; Settlement Agreement at 1). TPR argues that the Day Parties unreasonably rejected the draft of transfer instructions which was submitted to the court. TPR asserts that the Day Parties are asking the court to disregard the Settlement Agreement's waiver based on "their own failure to negotiate in good faith the documents that they purport to require" (*id.* at 4).

Defendants next argue that the Day Parties failed to state a conversion claim because a mere right to payment cannot be the basis for such (*id.* at 5; *Shapsis v Kogan*, No. 38417/07, 2011 WL 61727 at *8–9 [NY Sup Ct 2011]; *Peters Griffin Woodward, Inc. v WCSC, Inc.*, 452 NYS2d 599, 883–84 [NY App Div 1982]; *Fiorenti v Central Emergency Physicians, PLLC*, 762 NYS2d 402, 455 [NY App Dic 2003]; *Selinger Enters., Inc. v Cassuto*, 860 NYS2d 533, 536 [NY App Div 2008]). Plaintiffs provide no explanation or case law to establish how an "after-the-fact" acquired right to receive payment saves the conversion claim (Def. Reply at 5–6). Defendants further argue that the Day Parties failed to state a tortious interference claim because the complaints did not allege active and intentional procurement of a breach (*id.* at 6; *First Keystone Consultants, Inc. v DDR Constr. Servs.*, 904 NYS2d 113, 117 [NY App Div 2010]; *Ulico Casualty Co. v Wilson, Elsner, Moskowitz, Edelman & Dicker*, 865 NYS2d 14, 22–23 [NY App Div 2008]; Restatement (Second) of Torts § 766 cmt. n). Plaintiffs' argument, that TPR's entry into an agreement with Robinson was enough to demonstrate collusion to tortuously interfere, is insufficient to save this claim (Def. Reply at 7).

IV. DISCUSSION

A. CPLR § 3211(a)(1): Documentary Evidence

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]).

Defendants' documentary evidence here, (the Settlement Agreement), fails to resolve the factual issues and dispose of the plaintiffs' claims. [2] The Day Parties and Robinson are the parties to the Settlement Agreement. TPR was not a party. Only a particular portion of the Settlement Agreement applies to TPR which is under the subheading "Katzman/TPR Action." It states: "[i]n consideration of TPR/Random House/Katzman agreement in writing to pay royalties directly to recipient in accordance with terms above and in consideration of a full general release in favor of LD from TPR/Katzman/Random House, LD waives claims against them" (Settlement Agreement at 1). Accordingly, the Day Parties waiver of its claims against TPR is conditioned on two pieces of consideration: (i) an agreement in writing from TPR to pay royalties directly to recipient (here, Laura Day, Inc.), and (ii) a full general release in favor of LD from TPR. As plaintiffs note, and defendants concede, neither condition has been met. As a result, no waiver exists releasing TPR in the current matter and the Day Parties' claims against TPR cannot be dismissed as moot. Defendants argue that because the Settlement Agreement contains language stating that "the parties waive any claims to royalties paid to the other," TPR does not owe any royalties to the Day Parties and, as a result, the first of the waiver's two conditions is irrelevant. This assertion fails for two reasons. First, the language defendants cite comes from a different subheading of the Agreement titled "Release." It applies to the signatories of the Agreement only and TPR is not one of the "parties." Second, a reading of a contract should not render any portion meaningless

[2] The Day Parties observation that TPR failed to annex a copy of the Settlement Agreement to its motion papers is of no moment as the court is fully familiar with that document (*see e.g.* Decision and Order in motion sequence 28 in the Robinson Case; Doc.No.77). Additionally, plaintiffs helpfully provided the Settlement Agreement as an exhibit annexed to their affirmation in opposition (see Capuder Affirmation, Exhibit A [Doc. No. 74]).

and, here, as TPR itself argues, to give effect to defendants' argument would invalidate the first of the two waiver conditions (*Broadway SKY, LLC,* 2019 NY Misc LEXIS 1654, at *11–12. Defendants' CPLR § 3211(a)(1) argument that the Settlement Agreement moots the Day Parties' claims must be rejected.

B. CPLR § 3211(a)(5): Release

CPLR § 3211 (a)(5) states that "a party may move for judgment dismissing one or more causes of action asserted against him on the ground that the cause of action may not be maintained because of . . . release" (CPLR § 3211(a)(5)). As stated above, the Day Parties' release of their claims against TPR was conditioned on two pieces of consideration, neither of which has been delivered. Consequently, no valid release of the Day Parties' claims against TPR exists and defendants' CPLR § 3211(a)(5) argument should be rejected.

C. CPLR § 3211(a)(7): Failure to State a Claim

"The tort of conversion is established when one who owns and has a right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner" (*Republic of Haiti v Duvalier*, 211 AD2d 379, 384 [1st Dept 1995]). The elements of conversion are (1) plaintiff's possessory right or interest in certain property and (2) defendant's dominion over the property or interference with it in derogation of plaintiff's rights (*see Colavitov New York Organ Donor Network, Inc.,* 8 NY3d 43 [2006]; *see also Employers' Fire Ins. Co. v Cotton,* 245 NY 102 [1927]). A plaintiff need only allege and prove that the defendant interfered with plaintiff's right to possess the property. The defendant does not have to have taken the property or benefitted from it (*see Hillcrest Homes, LLC v Albion Mobile Homes, Inc.,* 117 NYS2d 755 (4th Dept 2014). A conversion claim may not be maintained where damages are merely sought for a breach of contract (*see Sutton Park Dev. Trading Corp. v Guerin & Guerin*, 297 AD 2d 430, 432 [3d Dept 2002]).

The Day Parties' complaints allege that the Day Parties have a possessory interest in the royalty payments, that TPR was in control of these payments, and that TPR wrongfully transferred sums to Robinson (*see* Day Case Complaint ¶¶61–66; Robinson Case Third-Party Complaint ¶¶47–50). Although defendants argue that plaintiffs' possessory interest in the royalties is a "mere right to payment" insufficient to state a conversion claim, plaintiffs argue that the Settlement Agreement states that the royalties are 100% owned by Laura Day, Inc. The Day Parties never had ownership, possession or control of the $107,000 constituting the royalty payment at issue

here (*see Compl* ¶¶ 27 in the Day Case, Doc.No.1) That sum was paid out by TPR in 2010, several years prior to execution of the Settlement Agreement in 2018 on which Plaintiffs now rely (*see* Doc.No.74). The Day Parties cannot validly maintain a cause of action for conversion (*see Fiorenti v Central Emergency Physicians, PLLC*, 762 NYS2d 402, 405 [1st Dept 2003] [dismissing conversion claim relating to miscalculated bonuses on the grounds that "plaintiffs never had title, possession or control; of the funds alleged to have been converted"]; *Selinger Enters., Inc., v Cassuto*, 860 NYS2d 533, 536 [1st Dept 2003] ["The mere right to payment cannot be the basis for a cause of action alleging conversion"]).

To prove a claim for tortious interference with contract, the plaintiff must show: (1) the existence of a valid contract; (2) defendant's knowledge of the contract; (3) defendants' intentional procurement of the third-party's breach without justification; (4) actual breach of the contract; and (5) damages caused by breach of the contract (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]); *Kronos, Inc. v AVX Corp.*, 81 NY2d 90 [1993]).

Although, the Day Parties' complaints allege the existence of a valid contract, TPR's knowledge of that contract, TPR's intentional procurement of its breach without justification, actual breach, and damages (*see* Day Case Complaint ¶¶75–85; Robinson Case Third-Party Complaint ¶¶58–64), they have not made the required allegation of "[a]ctive and intentional procurement of a breach" (*First Keystone Consultants, Inc. v DDR Constr. Serv.*, 904 NYS 113, 117 [1st Dept 2010]) of Robinson's contract with Day. As aptly stated in the Restatement [Second] of Torts § 766 comment *n*, "[o]ne does not induce another to commit a breach of contract with a third person under the rule stated in this Section when he merely enters into an agreement with the other with knowledge that the other cannot perform both it and his contract with the third person." The Day Parties have alleged no more than that "[i]n executing the 2010 Princeton Review Settlement . . . and directing the October 2010 royalty payment and all future payment to Robinson, Robinson and The Princeton Review and Katzman knew and intended the breach of the 2000 Day Agreement and the 2005 Princeton Review Assignment without justification" (Day Case Amended Compl. ¶ 80). The tortious interference claims must be dismissed.

A party seeking specific performance of a contract must show that it performed its contractual obligations, that the other party was able to perform its part, and that there is no adequate remedy at law (*see EMF Gen. Contr. Corp. v Bisbee*, 6 AD3d 45, 51 [1st Dept 2004]). Money damages are regarded as an inadequate remedy at law when the money cannot provide the

benefits that the injured party expected to derive from the contract (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 415 [2001]).

As TPR notes, the claims for specific performance and declaratory judgment relate to TPR's acknowledged obligation to make future royalty payments to Robinson and/or to the Day Parties (*see* Mem. At 6, Doc. No. 836). TPR acknowledges that "the [Robinson/Day] Settlement Agreement contains an express allocation for the payment of future royalties by TPR, including a provision for written instructions to TPR to confirm that allocation" *(id.)*. TPR also acknowledges that it is "contractually bounded by Robinson's written instructions" (Reply at 3, Doc. No. 844). There are no allegations that TPR has refused to honor the Day/Robinson Settlement Agreement payment terms or that it threatens to refuse to honor those terms in the future. In fact, counsel for TPR has represented to the court that TPR will comply with the payment terms of the Settlement Agreement, subject to any order by this court and that were Robinson to give payment instructions inconsistent with the terms of the Settlement Agreement, TPR will ignore them. Accordingly, the court and the Day Parties have assurances of compliance sufficient to obviate any need for the injunctive and declaratory relief (*see BT Triple Crown Merger Co., Inc. v Citigroup Global Markets, Inc.*, No. 600899/2008, 2008 WL 1970900* 8 [NY Sup Ct May 7, 2008] [specific performance is an equitable remedy requiring showing of breach of contract]; and *Winkler v Spinnato*, 523 NYS2d 530, 541 [1st Dept 1987]["Where there is no genuine dispute between the parties, the courts are precluded, as a matter of law, from issuing a declaratory judgment"]).

The claims for specific performance and declaratory judgment shall be dismissed.

V. SUMMARY and INSTRUCTIONS

For the reasons set forth above and on the record at oral argument on February 11, 2020, the motion to dismiss on grounds of waiver is denied. The claims for conversion and tortious interference with contract shall be dismissed pursuant to CPLR 3211 (a)(7). There is no request to dismiss the breach of contract claim. Accordingly, dismissal of the breach of contract claims made at oral argument is rescinded. The equitable claims for specific performance and declaratory judgment are dismissed as moot.

The Settlement Agreement obligates Robinson to use his "best efforts to cause [the Royalty payers] to execute a stipulation of discontinuance . . ." (Doc. No. 842). The court has reviewed a draft of the instructions Robinson proposes to submit to TPR in satisfaction of the instructions clause of the Robinson/Day Settlement Agreement. The court is familiar with Robinson's

counsel's efforts to obtain a settlement with all parties and finds them sufficient to meet Robinson's best efforts obligation. Signing and delivery of said instructions to the royalty payers together with the representations of TPR's counsel as described in this Decision and Order and as stated on the record to satisfy the payment terms of the Settlement Agreement will honor Robinson's best efforts obligation.

Assuming delivery of the signed instructions, the only significant matter outstanding in this decade-old litigation is the breach of contract claim relating to the $107,000 payment. The parties shall meet and confer in an effort to resolve this issue. Failing agreement, any party may file an appropriate motion addressed to the breach of contract claim (*see* CPLR 3211 [c]).

Because none of the remaining outstanding issues are affected by the terms of the DePinto settlement and release, the court will deliver the DePinto releases five (5) business days from the date of this Decision and Order subject to a showing of good cause for further delay.

Regarding the royalty payments being held by the Office of the Clerk, any party may submit an application for release of those funds, lifting of the order directing deposit with the Clerk and proposing allocation of all funds being held. Such application shall take into account the causes, if any, for the accumulation of said deposits (*see* Decision and Order, dated March 6, 2019) and shall be made within seven (7) days of the date of this Decision and Order with responsive papers within seven (7) days thereafter.

Accordingly, it is hereby

ORDERED that the motions of TPR to dismiss the third-party complaint in the Robinson Case and the complaint in the Day Case against it is GRANTED except that the breach of contract claim shall survive; and it is further

ORDERED that the parties shall appear at a status conference to discuss all outstanding issues on Tuesday, March 24, 2020 at Noon in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

DATED: February 24, 2020

E N T E R,

O. P. Sherwood

O. PETER SHERWOOD J.S.C.