SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY PART IAS MOTION 48EFM

Justice

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ADVANCED ALTERNATIVE MEDIA, INC.,

Plaintiff,

- v -

JACOB KASHER HINDLIN,

Defendant.

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INDEX NO. 655916/2018

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

MASLEY, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, and 37

were read on this motion to/for DISMISS.

In motion sequence number 001, defendant Jacob Kasher Hindlin moves pursuant to CPLR 3211(a) (1) and (7) to dismiss the complaint of plaintiff Advanced Alternative Media, Inc. (AAM). Hindlin also moves pursuant to CPLR 602 to consolidate this case with another action, *Jacob Kasher Hindlin v Prescription Songs LLC., et al.*, bearing index number 651974/2018.

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) However, factual allegations "that consist of bare legal conclusions, as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence"

cannot survive a motion to dismiss. (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted]; *see also* CPLR 3211 [a] [1].)

Here, AAM states a claim for breach of contract against Hindlin. "The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." (*Flomenbaum v New York Univ.*, 71 AD3d 80, 91 [1st Dept 2009].)

AAM alleges the first element by claiming that on December 3, 2009, AAM and Hindlin entered into a Management Agreement, "the sole purpose of which was for AAM to advise and counsel Hindlin in the entertainment industry in exchange for a 15% commission of certain gross monies and other consideration earned and/or received by Hindlin." (NYSCEF Doc. No [NYSCEF] 1, Complaint ¶ 6.)

AAM alleges the second element by claiming that AAM "has performed all of its obligations in accordance with the terms of the Management Agreement." (*Id.* ¶ 33.)

AAM alleges the third element by claiming that Hindlin breached Section 3 of the Management Agreement by failing to account for and pay commissions owed to AAM. (*Id.* ¶ 32.) Specifically, AAM alleges that Hindlin owes AAM at least $227,854.45 as identified in an invoice date May 18, 2018 for Gross Monies earned and received by Hindin as a result of his activities in and throughout the entertainment industry. (*Id.* ¶ 22.) AAM also alleges that "from time to time, Hindlin requested that AAM manage Hindlin's subsidiary businesses with regard to matters other than the furnishing of Hindlin's professional services" but Hindlin failed to grant AAM 50% of the equity interest in certain of Hindlin's subsidiary businesses in violation of Section 2 of the Management Agreement. (*Id.* ¶¶ 18, 25, 32.)

The parties largely dispute whether AAM's third allegation that Hindlin owes AAM at least $3,887,500.00 for the sale of Hindlin's interests as a writer and publisher of certain musical compositions to nonparty Prescription Songs LLC on July 23, 2018 (Sale) constitutes a breach. (*Id.* ¶ 21.) Hindlin argues that the terms of the Management Agreement do not entitle AAM to recover from the Sale because consideration paid to Hindlin for the assignment of Hindlin's rights in his compositions (including his right to future royalty payments) is absent from the list of commissionable income. Hindlin further argues that this construction would grant AAM a double recovery should the Management Agreement be interpreted to reach future royalties owed to Hindlin or his assigns. AAM counters that Hindlin is attempting to limit the sweeping terms of the Management Agreement.

"[A] contract should be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose." (*Matter of Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 [2003][internal quotation marks and citation omitted].) "Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002] [citations omitted].) "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." (*Id.* [citations omitted]) The test for ambiguity is to examine the four corners of the document, not outside sources. (*W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162 [1990].) The court should review 'the entire contract and consider the relation of the parties and the circumstances under which it was executed. Particular words should be

considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance and a sensible meaning of words should be sought." (*Kass v Kass*, 91 NY2d 554, 566 [1998][internal quotation and citation omitted].) "[E]xtrinsic and parol evidence is not admissible to create ambiguity in a written agreement which is complete and clear and unambiguous upon its face." (*Intercontinental Planning v Daystrom, Inc.*, 24 NY2d 372, 379, *rearg denied*, 25 NY2d 959 [1969].)

To the extent that Hindlin sold his interests in certain musical compositions that he wrote or published to nonparty Prescription but failed to pay a percentage of the consideration he received to AAM, a breach is stated. It is undisputed that the Management Agreement is a complete contract executed by the parties. Accordingly, the four corners of the Management Agreement are dispositve and this court rejects any suggestion that it must use the Sale agreement, of which AAM is not a party, to discern the meaning of the Management Agreement. The Management Agreement as a whole and by its plain terms is unambiguous and sweeping. It states that "[t]he territory of this agreement is the universe." (NYSCEF 1, Exhibit A Management Agreement at p. 2 § 1 (a).) It plainly states that "[Hindlin] agrees to pay a 'Commission' to [AAM] in an amount equal to fifteen percent (15%) of all 'Gross Monies' (as hereinafter defined) earned and/or actually received by or on behalf of [Hindlin] or for or credited to [Hindlin's] account derived from [Hindlin's activities in the entertainment industry." (*Id.* p. 3 § (a).) Gross Monies "shall mean and include any and all 'Gross Monies or Other Consideration' (as hereinafter defined) (without any exclusion or deduction except as provided for herein) which [Hindlin] actually earns and/or receives as a result of [Hindlin's] activities in and throughout the entertainment industry whether as a writer,

composer, author, publisher of musical compositions ... and any and all gross sums resulting from the use of [Hindlin's] musical talents and or other creative talents and the results and proceeds thereof." (*Id.* p. 3 § 3 [b].) Because the term 'Gross Monies' includes the term 'Gross Monies or Other Consideration,' it encompasses more than the term 'Gross Monies or Other Consideration.' Indeed, "the word 'include' is generally a term of enlargement and not of limitation, connoting an illustrative application of a general principle." (*Empire Mut. Ins. Co. v Applies Sys. Dev. Corp.,* 121 AD2d 956, 960 [1st Dept 1986].) Nevertheless, "Gross Monies or Other Consideration" as a defined term is expansive and "shall include without limitation, salaries, earnings, fees, royalties bonuses ... earned and/or received directly or indirectly by [Hindlin] or [Hindlin's] ... assigns, or by any other person ... on [Hindlin's] behalf as a result of the exploitation of [Hindlin's] services in the entertainment industry." (NYSCEF 1, Exhibit A Management Agreement at p. 3 § 3 [c].)

Accordingly, the consideration Hindlin allegedly received for the Sale of his interests as a writer and publisher in certain musical compositions is, at the very least, within the ambit of the term "Gross Monies or Other Consideration" because it is earnings earned or received directly or indirectly by Hindlin. Even if the consideration for the Sale was not within the ambit of 'Gross Monies or Other Consideration', it is certainly within the more expansive ambit of the term 'Gross Monies' because Hindlin received this consideration as a result of his activities in and throughout the entertainment industry as a writer or publisher of the compositions at issue. Regardless, this consideration is allegedly received by Hindlin or credited to his account and derives from his activity in the entertainment industry thus triggering the 15% Commission owed to AAM.

The court rejects Hindlin's argument that this type of consideration does not constitute Gross Monies because it is not delineated in the definition of "Gross Monies' whereas other forms of consideration are. This interpretation contravenes the plain all-encompassing language used to define 'Gross Monies' evidenced by the parties repeated use of the words "include" with "and/or." (*See Schaffer v City Bank Farmers Trust Co.*, 239 AD 531, 533 [3d Dept 1933]["Both the conjunctive 'and' and the disjunctive 'or' are used and effect should be given to each of them."], [regarg deneid, 241 AD 645 [1934].) That the plain language is disadvantageous or inequitable toward Hindlin is not a reason to disregard it. "If the parties to a contract adopt a provision which contravenes no principle of public policy and is not ambiguous, the courts have no right to relieve one of them from disadvantageous terms by a process of interpretation." (*Seifert, Hirshorn & Packman v Insurance Co. of N. Am.*, 36 AD2d 506, 508 [1st Dept 1971].) As the Management Agreement states, its territory is the universe, and it is more than apparent that the parties intended for AAM to reach virtually all forms of monies made off of Hindlin in connection with his work in the industry. Hindlin's retroactive and convoluted attempt to manufacture an ambiguity is unavailing. The court has considered the balance of Hindlin's arguments and they do not yield an alternative result on this motion.

AAM also alleges the fourth element of damages by claiming the various amounts of damages resulting from Hindlin's alleged breach. (NYSCEF 1, Complaint ¶¶ 34, 21, 22.)

Hindlin's request to consolidate this action with *Jacob Kasher Hindlin v Prescription Songs LLC., et al.*, bearing index number 651974/2018 is denied. Consolidation is inappropriate where a party will be both a plaintiff and a defendant in

the consolidated action. (*Bass v France*, 70 AD2d 849, 849-850 [1st Dept 1979].) Because Hindlin is a defendant in this action, and a plaintiff in the other, he would be both a plaintiff and defendant in a consolidated action, and therefore, consolidation is inappropriate.[1]

The court has considered the balance of the parties arguments, and to the extent they are properly before the court, they do not demand an alternative result.

Accordingly, it is

ORDERED that motion sequence number 001 is denied.

8/14/2020
DATE

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

[1] Hindlin raises for the first time in reply an argument that this court alternatively order a joint trial. (NYSCEF 30, Reply Memorandum p. 7.) Raising new arguments for the first time in reply is improper. (*Hawthorne v City of New York*, 44 AD3d 544, 545 [1st Dept 2007].) Accordingly, the request is denied.