

D.A.M. Prods., Inc. v Torres

2020 NY Slip Op 33761(U)

November 12, 2020

Supreme Court, New York County

Docket Number: 151678/2017

Judge: Kathryn E. Freed

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

-----X

INDEX NO. 151678/2017

D.A.M. PRODUCTIONS, INC.,

Plaintiff,

- v -

**MOTION SEQ. NO. 004, 005, and
006**

NELSON TORRES, NELSON RECORDS
ENTERTAINMENT, LLC, and EL TORITO
ENTERTAINMENT INC.,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 124, 125, 126, 127, 128, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 175, 176

were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 151, 152, 153, 154, 171, 172, 173, 174, 177, 178, 179, 180, 181, 182, 183

were read on this motion to/for BIFURCATE.

Motion sequences 004, 005, and 006 are hereby consolidated for disposition.

In motion sequence 004, defendants Nelson Torres (Torres), Nelson Records Entertainment, LLC (NRE), and defendant/counterclaim-plaintiff El Torito Entertainment, Inc. (Torito) (collectively Defendants) move pursuant to: (1) CPLR 3124 to compel a response to interrogatories numbers 3, 5, 6, 8-10, 15 and document request number 1 in Defendants' "Combined Interrogatories and Second Notice for Discovery and Inspection of Documents,"

served April 3, 2020 (NYSCEF Doc. No. [NYSCEF] 108) (Debt Discovery),¹ and (2) CPLR 3103 (a) for a protective order denying plaintiff/counterclaim-defendant D.A.M. Productions, Inc.'s (DAM) interrogatories numbers 7 through 10² of "Plaintiff's First Set of Interrogatories," dated April 8, 2020, and document requests numbers 3 through 8 in DAM's "First Notice of Discovery and Inspection of Documents," dated April 8, 2020, which relate to revenue generated by DAM recording artist Hector Acosta (Acosta) between 2017 to the present (Revenue Discovery) (NYSCEF Doc. 109, 110).

In motion sequence 005, Defendants move pursuant CPLR 3025 to amend their answer and to interpose an amended answer with counterclaims (AAC) to include additional: (1) third-party defendants Jasmine Pinto (Pinto) and Jose Beltran (Beltran); (2) facts detailing the fraud and tort causes of action against DAM; and (3) counterclaims for unjust enrichment, constructive trust, and attorneys' fees (NYSCEF 156). DAM cross-moves pursuant to: (1) CPLR 3212 (e) for partial summary judgment dismissing Torito's claims for lack of standing or, in the alternative, dismissal of Torito's second and third counterclaims as time-barred, and (2) CPLR 3211 (a) (7) dismissing Torito's counterclaims for failure to state a claim.

In motion sequence 006, Defendants move, pursuant to CPLR 630, to bifurcate the determination of the issues of liability and damages during the discovery and trial phases with respect to DAM's first cause of action for tortious interference with contract.

¹ Defendants submit a supplemental affirmation narrowing the scope of the motion to compel (NYSCEF 141 at 4).

² Plaintiffs First Set of Interrogatories only contains nine interrogatories (NYSCEF Doc. 136 at 6).

FACTUAL AND PROCEDURAL BACKGROUND

The facts of this matter are set forth in detail in the order of this Court filed October 23, 2017 (NYSCEF Doc. 41). Briefly, this action arises out of a dispute between a recording artist, Acosta, and his booking agent and exclusive manager, DAM.

On February 1, 2010, Acosta and DAM executed a recording agreement and an exclusive representation agreement (collectively, the 2010 Agreements) (NYSCEF Docs. 163, 164). In 2016, Acosta purported to terminate the 2010 Agreements and subsequently, engaged NRE as his activity coordinator, and began managing his career himself through his solely owned corporation, Torito.

DAM commenced the captioned action in 2017, asserting causes of action for tortious interference with contract, tortious interference with prospective business relations, and injunctive relief. DAM contends that the 2010 Agreements remain operative and that Acosta was responsible for reimbursing DAM for unrecovered expenses incurred in managing him. In its prior order, this Court dismissed DAM's second cause of action for tortious interference with prospective business relations for failure to state a claim (NYSCEF Doc. 41 at 6).

Torito now moves to amend its answer and counterclaims to add parties, counterclaims, and facts. DAM cross-moves seeking summary judgment on standing and statute of limitations grounds or, in the alternative, for dismissal of the amended counterclaims for failure to state a claim.

LEGAL CONCLUSIONS

As a threshold matter, the branch of DAM's motion seeking partial summary judgment dismissing Torito's counterclaims based on standing and statute of limitations is denied. DAM's amended counterclaims are timely under the relation-back doctrine (CPLR 203 [d]) ["if the defense

or counterclaim arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint notwithstanding that it was barred at the time the claims asserted in the complaint were interposed”). Further, Torito has standing to assert the counterclaims based on the 2010 Agreements, which provide that it “will automatically subrogate to this contract all rights and obligations contained herein, as if the new entity is the one entering into this contract” (NYSCEF 164, ¶ 18).

This Court, in its discretion, grants the motion to amend because the proposed amendments are sufficiently related to the allegations in the original answer and counterclaims and would not result in prejudice or surprise (*Capstone Enters. of Port Chester v County of Westchester*, 272 AD2d 427, 427–428 [2d Dept 2000]; *Fulford v Baker Perkins, Inc.*, 100 AD2d 861, 861-862 [2d Dept 1984]). Therefore, this Court grants Torito’s motion to amend, deems the AAC served, and applies DAM’s cross motion for partial summary judgment and dismissal to the AAC.

When assessing the adequacy of a complaint on a motion to dismiss pursuant to CPLR 3211 (a) (7), a court must afford the pleadings a liberal construction, accept the allegations of the complaint as true, and provide the plaintiff “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]). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss (*id.* at 88). The motion must be denied if from the pleadings’ four corners “factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). To survive a motion to dismiss for failure to state a cause of action, “[t]he allegations of the pleading cannot be vague and conclusory . . . , but must contain sufficiently particularized

allegations from which a cognizable cause of action reasonably could be found” (*V. Groppa Pools, Inc. v Massello*, 106 AD3d 722, 723 [2d Dept 2013] [citation omitted]).

Torito’s first counterclaim, sounding in fraud, alleges that the execution of the 2010 Agreements occurred due to fraud and fraudulent concealment by Pinto and Beltran through their alter ego DAM. Torito alleges that DAM fraudulently represented to Acosta that all new provisions in the 2010 Agreements were standard industry provisions, so as to induce him to enter into the 2010 Agreements (AAC, ¶ 54).

“The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages” (*House of Spices (India), Inc. v SMJ Servs., Inc.*, 103 AD3d 848, 850 [2d Dept 2013] [internal quotation marks and citation omitted]). “All of the elements of a fraud claim must be supported by factual allegations containing the details constituting the wrong in order to satisfy the pleading requirements of CPLR 3016 (b)” (*id.* [internal quotation marks and citations omitted]). “The purpose of this pleading requirement is to inform [the adversary] of the complained-of incidents” (*id.* [internal quotation marks omitted]).

The allegations in the AAC’s first counterclaim merely recite the elements of fraud, but fail to identify any specific misrepresentations by DAM, Pinto, or Beltran; when or how the misrepresentations were made, and why Acosta was justified in his reliance on the misrepresentations when it is undisputed that Acosta was represented by counsel of his own choosing (AAC, ¶¶ 55-59). Further, Acosta contends that his attorney, Paulino Duarte (Duarte), was inadequate. However, Acosta does not deny that he selected and retained Duarte, who was also a friend and fan of Acosta. The fact that Duarte was not a licensed Florida attorney is insufficient to form the basis of a counterclaim for fraud (AAC, ¶ 55). Additionally, DAM has

submitted an email exchange from Duarte providing comments to Pinto during the negotiation of the 2010 Agreements (NYSCEF 158). Thus, the first counterclaim, for fraud, is dismissed.

The second counterclaim seeks to void the 2010 Agreements because they are a product of procedural and substantive unconscionability perpetrated by DAM, Pinto, and Beltran (AAC, ¶ 62). “In general, an unconscionable contract has been defined as one which is so grossly unreasonable as to be unenforcible [sic] because of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party” (*Simar Holding Corp. v GSC*, 87 AD3d 688, 689 [2d Dept 2011] [internal quotation marks and citation omitted]).

“This definition reveals two major elements which have been labeled by commentators, procedural and substantive unconscionability” (*id.* at 689 [internal quotation marks and citation omitted]). The procedural element focuses on the formation of the contract, and an alleged lack of meaningful choice, which may involve high pressure tactics, deceptive terms in the contract, or an imbalance in the acumen of the parties or their respective bargaining power (*id.* at 689-690 [citation omitted]). The substantive element examines the substance and content of the contract language itself for unfavorable terms, such as “inflated prices, unfair termination clauses, unfair limitations on consequential damages and improper disclaimers of warranty” (*id.* at 690 [internal quotation marks and citations omitted]). “A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made” (*id.*).

Torito’s allegations that Acosta lacked the sophistication required to negotiate the 2010 Agreements, and the fact that he was not represented by a Florida licensed attorney amounted to

procedural unconscionability, fail to establish the requisite lack of a meaningful choice generally found in unconscionability claims (AAC, ¶¶ 63, 65).

With respect to the element of substantive unconscionability, Torito merely alleges in conclusory fashion that the fees and the unrecouped expenses payable to DAM under the 2010 Agreements, including Annex A, were so “over-the market and its key provisions so thoroughly unbalanced and so grossly unreasonable in favor of DAM as to be found substantively unconscionable” without identifying any specific provision of the 2010 Agreements or providing the basis to conclude that the provisions are unbalanced (AAC, ¶ 63). The examples provided also fail to identify any specific provision of the 2010 Agreements or factual bases to support Torito’s contention that the terms of the 2010 Agreements were substantively unconscionable (*id.*).

The third counterclaim, for breach of fiduciary duty, is dismissed because Torito fails to establish that a fiduciary relationship existed between Acosta and DAM. “The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant’s misconduct” (*Litvinoff v Wright*, 150 AD3d 714, 715 [2d Dept 2017]). “A cause of action sounding in breach of fiduciary duty must be pleaded with particularity under CPLR 3016 (b)” (*id.* [internal quotation marks and citation omitted]).

Torito’s vague conclusory allegations that DAM undertook fiduciary duties and subsequently breached them by failing to identify the differences in contract terms of the 2010 Agreements and purportedly mismanaging the revenue from his performances are insufficient to sustain the counterclaim for breach of fiduciary duty (AAC, ¶¶ 72, 74). Further, Torito’s failure to establish that the alleged fiduciary duties owed by DAM to Acosta were independent of the 2010 Agreements is fatal to its counterclaim. “It is a well-established principle that a simple breach of

contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated” (*Dormitory Auth. v Samson Constr. Co.*, 30 NY3d 704, 711 [2018] [internal quotation marks and citations omitted]). “Put another way, where the damages alleged were clearly within the contemplation of the written agreement ... [m]erely charging a breach of a duty of due care, employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim” (*id.* [internal quotation marks and citations omitted]).³

Consequently, Torito’s fifth counterclaim for constructive trust and the seventh counterclaim for an accounting are dismissed as well since both are premised upon the existence of a fiduciary relationship (*AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 AD3d 6, 23 [2d Dept 2008] [“The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest” (internal quotation marks and citation omitted)]; *A.G. Homes, LLC v Gerstein*, 52 AD3d 546, 547 [2d Dept 2008] [“Generally, there are four requirements for the imposition of a constructive trust: (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment”]).

Torito’s fourth counterclaim, for unjust enrichment, is dismissed because the transactions at issue are governed by the 2010 Agreements. “Unjust enrichment [is] a quasi-contract claim and contemplates an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties” (*Georgia Malone & Co. v Rieder*, 19 NY3d 511, 516 [2012] [internal quotation marks omitted]).

³ It should be noted that Torito withdrew its counterclaim for breach of contract in the AAC, therefore, the counterclaim for breach of fiduciary is dismissed, with leave to replead as a breach of contract counterclaim, if so advised.

Torito's sixth counterclaim, for conversion, is dismissed because Torito does not specifically identify any money or account that supports a claim for conversion (*McBride v KPMG Intl.*, 135 AD3d 576, 580 [1st Dept 2016] ["the money must be specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner" (internal quotation marks and citation omitted)]).

Torito's eighth counterclaim, for attorneys' fees, fails to allege a basis for granting such relief. "It is well settled in New York that a prevailing party may not recover attorneys' fees from the losing party except where authorized by statute, agreement or court rule" (*U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 597 [2004]).

Defendants' motion seeking bifurcation of the liability and damages phases of DAM's cause of action for tortious interference is denied. Defendants fail to establish any prejudice with respect to requests for disclosure of information and documents related to Acosta from 2017 to the present, including, but not limited to the Revenue Discovery, or that such disclosure would be unduly burdensome or voluminous. The requests are not overbroad since they are restricted to the relevant time periods. To the extent Defendants are concerned with confidentiality, the confidentiality agreement sufficiently provides for methods to protect any purported sensitive information.

Similarly, the branch of Defendants' motion seeking a protective order to prevent the disclosure of Revenue Discovery is denied, since the information is clearly relevant to any damages DAM may recover on its cause of action for tortious interference, which allows for the recovery of lost profits (*Wolf St. Supermarkets, Inc. v McPartland*, 108 AD2d 25, 33 [4th Dept 1985] ["The general rule governing the recovery of lost profits in tort cases is that damages

proximately caused by the wrongful conduct of the defendant may be recovered if plaintiff proves them with reasonable certainty and without speculation”]).

Finally, Defendants’ motion seeking to compel DAM’s responses and production of documents relevant to the Debt Discovery is granted. The Debt Discovery demand seeks information and documentation related to the outstanding debt purportedly owed by Acosta to DAM, which is at the heart of the parties’ dispute over the 2010 Agreements and the basis of DAM’s contentions that the 2010 Agreements remain operative and binding against Acosta. DAM is directed to supplement its prior disclosures to remedy any deficiencies raised by Defendants.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendants NELSON TORRES, NELSON RECORDS ENTERTAINMENT, LLC and defendant/counterclaim-plaintiff EL TORITO ENTERTAINMENT, INC. to compel discovery and for a protective order is granted to the extent that D.A.M. PRODUCTIONS, INC. is directed to respond to interrogatories numbers 3, 5, 6, 8-10, 15 and document request number 1 in Defendants’ Combined Interrogatories and Second Notice for Discovery and Inspection of Documents, served April 3, 2020 (motion sequence no. 004), and it is further

ORDERED that plaintiff D.A.M. PRODUCTIONS, INC. shall supplement its prior discovery responses in conformity with this decision within thirty (30) days from service of this order with notice of entry; and it is further

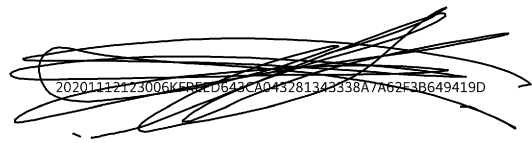
ORDERED that the cross motion by plaintiff D.A.M. PRODUCTIONS, INC. seeking partial summary judgment and to dismiss the amended answer and counterclaims is granted to the extent of granting that branch of the motion seeking dismissal of the amended answer and counterclaims (motion sequence no. 005); and it is further

ORDERED that defendant/counterclaim-plaintiff EL TORITO ENTERTAINMENT INC.'s amended counterclaims are dismissed without prejudice; and it is further

ORDERED that the motion by defendants NELSON TORRES, NELSON RECORDS ENTERTAINMENT, LLC and defendant/counterclaim-plaintiff EL TORITO ENTERTAINMENT, INC. to bifurcate the issues of liability and damages with respect to the first cause of action for tortious interference with contract during the discovery and trial phases is denied (motion sequence no. 006); and it is further

ORDERED that this constitutes the decision and order of the court.

11/12/2020
DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: