

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

2021 NY Slip Op 32104(U)

November 1, 2021

Supreme Court, New York County

Docket Number: Index No. 151678/2017

Judge: Phillip Hom

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. PHILLIP HOM **PART** **02M**

Justice

-----X

D.A.M. PRODUCTIONS, INC.,

Plaintiff,

- v -

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

Defendant.

-----X
EL TORITO ENTERTAINMENT INC.,

Counterclaim-Plaintiff,

-v-

D.A.M. PRODUCTIONS, INC.,

Counterclaim-Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 007) 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 293, 294, 295, 296, 297, 298, 299

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

The following e-filed documents, listed by NYSCEF document number (Motion 009) 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310

were read on this motion to/for STRIKE PLEADINGS.

In the interest of justice and judicial economy, Motions Sequence Numbers 7 and 9 are considered together for the purpose of a decision.

Upon the foregoing documents, and after oral argument, it is ORDERED that the first branch of the Motion Seq. 7 seeking leave to serve and file their Second Amended Answer and Affirmative defenses filed on June 28, 2021 *nunc pro tunc* (NYSCEF Doc. No. 192-202) by

Defendants Nelson Torres (“Torres”) and Nelson Records Entertainment, LLC (“NRE”) is granted, without opposition

It is also ORDERED that the second branch of Torres’ and NRE’s Motion Sequence Number 7 seeking an order granting them summary judgment on their affirmative defenses and dismissing DAM’s remaining causes of action for tortious interference with a contract and for injunctive relief is denied, without prejudice and with leave to renew, after discovery is completed (CPLR §3212(f)).

It is further ORDERED that Motion Sequence Number 9 by Plaintiff D.A.M. Production Inc. (“DAM”) for an order dismissing and/or striking the Second Amended Counterclaim (“SAC”) of Defendant El Torito Entertainment, Inc. (“El Torito”) (Sequence Number 9) is denied.

Background

A complete background surrounding the facts and circumstances of this lawsuit is outlined in Hon Kathryn Freed’s (Ret.) prior Short Form Order (NYSCEF Doc. Nos 41, 46 and 184). On February 1, 2010, Hector Acosta (“Acosta”), a recording artist and Plaintiff DAM signed a recording agreement and an exclusive representation agreement (the “Agreements”) (NYSCEF Doc. Nos. 163 and 164). In or about 2016, Acosta tried to terminate the Agreements and engaged Defendant NRE as his activity coordinator and began scheduling his career independently through his solely-owned corporation Defendant El Torito.

DAM began this lawsuit in 2017 alleging three causes of action: (1) tortious interference with a contract; (2) tortious interference with prospective business relations; and (3) injunctive relief. Hon. Kathryn Freed (Ret.) dismissed DAM’s second cause of action for tortious

interference with prospective business relations for failure to state a claim (NYSCEF Doc. No. 41).

Motion Sequence Number 7

In Motion Sequence Number 7, Torres and NRE move under CPLR §3025 seeking an order granting them leave to amend the Second Amended Answer and Affirmative Defenses filed on June 28, 2021 (NYSCEF Doc. Nos 192-202) and under CPLR §3212 granting them summary judgment on their affirmative defenses and dismissing DAM's remaining causes of action for tortious interference with a contractual relationship and injunctive relief. In her Affidavit in Opposition, Yasmin Pinto, President of DAM does not oppose the first branch of the motion to amend, but reserves the right to move to dismiss and/or strike the affirmative defenses if leave to amend is granted (NYSCEF Doc. No. 271 p. 2).

Thereafter, Plaintiff/Counterclaim Defendant DAM moved under Sequence Number 8 to strike and/or dismiss the Second Amended Answer with Affirmative Defenses ("SAA") of Defendants' Torres, NRE and El Torito and El Torito's SAA. Consequently, DAM withdrew the Motion Sequence Number 8 (NYSCEF Doc. No. 280) resulting in this Court's denial of Motion Sequence Number 8 as moot (NYSCEF Doc. No. 281).

The second branch of Torres' and NRE's Motion Sequence Number 7 seeking summary judgment is denied, without prejudice to renewal after discovery is completed (CPLR §3212(f)). This Court finds that discovery is incomplete. In the Affirmation in Opposition, counsel for DAM notes that on April 3, 2019, Defendants deposed DAM's principals: Jose Beltran and Yasmin Pinto but Defendants have failed to produce any document in response to DAM's outstanding requests (NYSCEF Doc. No. 263 p. 6). Accordingly, Defendants are ORDERED to

comply with all outstanding discovery requests within 30 days after service of a copy of this Order with Notice of Entry.

Motion Sequence Number 9

Motion Sequence Number 9 seeks an order striking and/or dismissing El Torito's SAA (NYSCEF Doc. No. 235) under CPLR §§3024(b) and 3211(a)(6). In Hon Kathryn Freed's (Ret.) prior order (NYSCEF Doc. No. 184 for Motion Sequence Numbers 4, 5 and 6) the Court dismissed El Torito's prior counterclaims in its Amended Answer with Counterclaims ("AAC") for: (1) fraud; (2) voiding the Agreements because they are the product of a procedural and substantive unconscionability perpetrated by DAM; (3) breach of fiduciary duty; (4) unjust enrichment; (5) constructive trust; (6) conversion; (7) accounting; and (8) attorneys' fees. However, Hon Kathryn Freed (Ret.) stated in a footnote that: "it should be noted that Torito withdrew its counterclaim for breach of contract in the AAC, therefore, the counterclaim for fiduciary duty is dismissed, with leave to replead as a breach of contract counterclaim, if so advised" (*Id* p. 8).

On August 4, 2021, El Torito withdrew its Second Amended Answer, Defenses and breach of contract filed as NYSCEF Doc. No. 192 on July 7, 2021 due to, among other things, inadvertent errors (NYSCEF Doc. No. 234). On August 5, 2021, El Torito refiled a SAA (NYSCEF Doc. No. 235) adding a "new Counterclaim for Breach of Contract in excess of 1.8 million, as authorized by the Court in the said order at p. 8 fn. 3, without any restrictions or time limitations for filing" (NYSCEF Doc. No. 235 p. 1). The breach of contract counterclaim states in paragraph 32 that:

D.A.M. materially breached various provisions of the 2010 Agreements involving D.A.M.'s failure to either make contractually required payments to ACOSTA or

meet its timey (sic) reporting requirements, as well as the covenant of good faith and fair dealing implicit in the 2010 Agreements as in every contract. As detailed herein, all of D.A.M.'s breaches, express and implied, were so substantial and fundamental as to go to the essence of the 2010 Agreements.

Motion to Dismiss a Cause of Action under CPLR §3211(a)(1) and (7)

When a party moves to dismiss a cause of action under CPLR §3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*African Diaspora Mar. Corp. v Golden Gate Yacht Club*, 109 AD3d 204 [1st Dept 2013]). Although bare legal conclusions are not presumed to be true on a motion to dismiss under CPLR §3211(a)(7), the court must accept the facts as alleged in the pleading as true, accord the pleader the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 [2002]).

Whether a pleader can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss (*Philips S. Beach, LLC v ZC Specialty Ins. Co.*, 55 AD3d 493 [1st Dept 2008]; *African Diaspora Mar. Corp. v Golden Gate Yacht Club*, *supra* at 211). On a motion to dismiss, “the pleading is to be afforded liberal construction” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, CPLR §3211(a)(1) warrants dismissal of a cause of action where the court finds that the documentary evidence presented conclusively establishes a defense to the asserted claims as a matter of law (*150 Broadway N.Y. Assocs. L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]).

DAM's Arguments in Support of Dismissing the SAC Sequence Number 9

DAM argues that the SAA should be dismissed because El Torito's counterclaim relies upon the unsupported statement that Acosta's signature on the signed acknowledgement is a forgery (NYSCEF Doc. No. 284 p. 5). El Torito's counterclaim is premised on the theory that DAM breached the Agreements by failing to pay Acosta royalties and commissions. Nevertheless, according to the Agreements and the signed acknowledgment, DAM was permitted to apply income earned in connection with the Agreements towards Acosta's outstanding debt. Thus, DAM argues that if El Torito cannot establish that the signed acknowledgement is a forgery, then the counterclaim must fail as a matter of law (NYSCEF Doc. No. 292 pp. 4-5). DAM further argues that El Torito was not granted leave to replead forgery by Hon Kathryn Freed (Ret.) and that many of the new allegations in the SAC involve conduct which occurred after the time frame when El Torito claims that the Agreement expired. DAM opines that the new allegations cannot form the basis of a breach of contract claim as permitted by Hon Kathryn Freed's (Ret.) footnote referenced above.

El Torito's Opposition to Sequence Number 9

DAM argues that the counterclaim is outside the scope of Hon Kathryn Freed's (Ret.) limited authorization permitting a breach of contract counterclaim since it "includes claims for breach of the covenant of good faith and fair dealing, [and] alleges facts that go well beyond what El Torito was allowed to plead" (NYSCEF Doc. No. 301 p. 3). El Torito correctly points out that Hon Kathryn Freed (Ret.) did not rule on the merits of the individual claims. El Torito argues that when it filed the SAA on August 5, 2021, the answer and the two defenses asserted therein were identical to those found in the Proposed Amendment filed on June 3, 2020

(NYSCEF Doc. No. 126) and approved by Hon Kathryn Freed (Ret.) in her footnote. El Torito further emphasizes that the aforesaid order did not put a time limitation on filing the counterclaim for breach of contract or necessitate a motion to amend.

El Torito further avers that in its First Answer with Counterclaim filed on November 13, 2017 it denied “the allegations of paragraph 29 of the First Amended Complaint and states that Annex A is a recent fabrication by D.A.M. containing a forged signature of ACOSTA” (NYSCEF Doc. No. 43 ¶11). Thus, this is not the first time El Torito has mentioned the issue of forgery (NYSCEF Doc. No. 7)

As stated above, on a motion to dismiss, the court needs only to determine whether the facts as alleged fit within any cognizable legal theory (*511 W. 232nd Owners Corp v Jennifer Realty Co., supra*). The counterclaim by El Torito states cognizable causes of action for breach of contract under New York law, including allegations of failure to reimburse for recording costs, failure to provide timely reports and failure to pay earnings allegedly required under the 2010 Agreements. This is not a summary judgment motion. Moreover, the court takes judicial notice that New York law applies to this case since all the prior orders by Hon Kathryn Freed (Ret.) applied New York law.

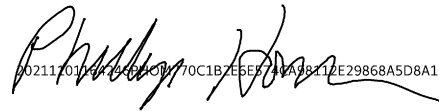
Conclusion

In accordance with the foregoing, it is ORDERED that the first branch of Torres’ and NRE’s motion (Mot. Seq. 7) seeking leave to serve and file their Second Amended Answer and Affirmative Defenses filed on June 28, 2021 (NYSCEF Doc. No. 192-202) *nunc pro tunc* is granted, without opposition.

It is further ORDERED that the second branch of Torres and El Torito’s motion for an order granting them summary judgment on their affirmative defenses and dismissing DAM’s remaining causes of action for tortious interference with a contract and for injunctive relief is denied, without prejudice to renewal after discovery is completed (CPLR §3212(f)).

It is further ORDERED that Motion Sequence Number 9 by DAM seeking an order under CPLR §3024(b) and CPLR §3211(a)(6) striking and or dismissing El Torito’s SAC is denied in its entirety.

The foregoing constitutes the Decision and Order of this Court.


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11/1/2021
DATE

PHILLIP HOM, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: