

War Rd. Music, Inc v Ditto Ltd
2021 NY Slip Op 32632(U)
December 9, 2021
Supreme Court, Kings County
Docket Number: Index No. 517590/2020
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8
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WAR ROAD MUSIC, INC and
DRIVE-THRU RECORDS, LLC,

Plaintiffs,

Decision and Order
Index Number
517590/2020

-against-

DITTO LTD and CHRISTOPHER MOONEY,
Defendants,

December 9, 2021

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PRESENT: HON. LEON RUCHELSMAN

The plaintiffs have moved pursuant to CPLR §3212 seeking summary judgement on the grounds there are no questions of fact and they are entitled to judgement. The defendants oppose the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

According to the Complaint the plaintiff War Road is an artist management company and plaintiff Drive Thru is a record label company. The defendant Ditto is a digital distributor of music and defendant Christopher Mooney is the United States head of operations of Ditto. All of the corporate parties maintain their principal places of business in other places and not New York State. On July 17, 2019 Ditto entered into agreements with both Drive Thru and War Road whereby Ditto agreed to market and promote digital musical content of the plaintiffs and required the defendant Ditto to pay for some expenses as detailed in the agreements. The complaint alleges four causes of action, breach

of contract against both Drive Thru and War Room, fraudulent misrepresentation by Mooney and for an injunction. The parties have not engaged in any discovery at all and now the plaintiffs move seeking summary judgement arguing there are no questions of fact the plaintiffs are entitled to judgement on each cause of action.

Conclusions of Law

Where the material facts at issue in a case are in dispute summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury (Aronson v. Horace Mann-Barnard School, 224 AD2d 249, 637 NYS2d 410 [1st Dept., 1996]). However, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Derdiarian v. Felix Contracting Inc., 51 NY2d 308, 434 NYS2d 166 [1980]).

Thus, to succeed on a motion for summary judgement it is necessary for the movant to make a prima facie showing of an entitlement as a matter of law by offering evidence demonstrating the absence of any material issue of fact (Winegrad v. New York University Medical Center, 64 NY2d 851, 487 NYS2d 316 [1985]). Moreover, a movant cannot succeed upon a motion for summary judgement by pointing to gaps in the opponents case because the moving party must affirmatively present evidence demonstrating

the lack of any questions of fact (Velasquez v. Gomez, 44 AD3d 649, 843 NYS2d 368 [2d Dept., 2007]).

It is well settled that to succeed upon a claim of breach of contract the plaintiff must establish the existence of a contract, the plaintiff's performance, the defendant's breach and resulting damages (Harris v. Seward Park Housing Corp., 79 AD3d 425, 913 NYS2d 161 [1st Dept., 2010]). Further, as explained in Gianelli v. RE/MAX of New York, 144 AD3d 861, 41 NYS3d 273 [2d Dept., 2016], "a breach of contract cause of action fails as a matter of law in the absence of any showing that a specific provision of the contract was breached" (*id.*). The plaintiffs do not provide any evidence, other than simple conclusory assertions that any breach of contract took place. Surely, the plaintiffs have not provided any of the provisions of the agreement they assert were breached. The complaint states in identical language for each contract that "DITTO breached the agreement by failing to provide the agreed upon funds, failing to provide the promised services and terminating the agreement prior to the end of the term" (*see*, Complaint, ¶ 54, ¶ 58). Similarly, the motion in support simply states "DITTO breached agreements" (*see*, Memorandum of Law in Support, ¶ 2). The affidavit in support of the motion submitted by Richard Reines the co-owner of both War Road and Drive Thru does state that "since January of 2020, DITTO has repeatedly breached its obligations and has failed to pay

amounts due under the agreements" (see, Affirmation of Richard Reines, ¶ 2). However, that allegation is also conclusory. Indeed, all the evidence submitted boils down to a simple assertion, namely that Ditto breached the contracts. There is no explanation how the contracts were breached, the nature of the breaches and the damages incurred. This is particularly important because an examination of the contracts reveals it contains two broad duties that must be fulfilled by the defendant, namely promotion and marketing and advances. The promotion and marketing requires the mutual agreement of the plaintiffs while the advances are further divided into a labeling advance, label marketing fund, an artist signing fund, and an artist marketing fund. The motion seeking breaches of the agreements do not specify the precise breaches that took place at all. In addition, the basis for the defendant's termination has not been explored.

Thus, there are significant questions of fact which foreclose a summary determination at this time.

Further, the request seeking an injunction is difficult to comprehend. The motion states that an injunction is necessary "to prevent DITTO from continuously interfering with the plaintiff's rights in the sound recordings they own" (see, Memorandum of Law in Support, ¶ 5). However, there is absolutely no evidence that Ditto is interfering with any recordings owned

by the plaintiff. Surely, there can be no conclusion there are no questions of fact in this regard.

Therefore, based on the foregoing, the motion seeking summary judgment is denied in all respects.

So ordered.

ENTER:

DATED: December 9, 2021
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC