Hindlin v Prescription Songs LLC
2022 NY Slip Op 31166(U)
April 8, 2022
Supreme Court, New York County
Docket Number: Index No. 651974/2018
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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JACOB HINDLIN,

Plaintiff,

- v -

PRESCRIPTION SONGS LLC, KASZ MONEY, INC., ADVANCED ALTERNATIVE MEDIA, INC., KING, HOLMES, PATERNO & SORIANO, LLP, MARK BEAVEN, PETER PATERNO, NONSTOP MANAGEMENT, LLC, and LUCILLE SONGS, INC.,

Defendants.

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INDEX NO. 651974/2018

MOTION DATE

MOTION SEQ. NO. 012 023

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 012) 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 447, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 536, 537, 538, 539, 540, 778

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 023) 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 777, 779, 807, 808, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In motion sequence number 012, plaintiff Jacob Hindlin moves for summary judgment, pursuant to CPLR 3212, on his first (declaratory judgment) and second (accounting) causes of action in the first amended complaint (FAC) on the basis that the agreements between him and defendants Prescription Songs LLC (Prescription) and Kasz Money, Inc. (KMI) terminated on January 26, 2018. Plaintiff also moves to dismiss defendants' counterclaims arising after January 26, 2018.

In motion sequence number 023, Prescription and KMI move, pursuant to CPLR 3212, for summary judgment on their counterclaims and dismissal of plaintiff's first cause of action.

Background

This dispute concerns the termination date of agreements made between plaintiff, who is a writer and producer of contemporary music, and Prescription and KMI, a music publishing corporation and music production corporation, respectively. (NYSCEF Doc. No. [NYSCEF] 69, FAC ¶¶ 4-6.) Central to this dispute are the provisions governing contract periods and renewal options. The facts and events of this case are set forth in this court's July 5, 2019 and November 25, 2019 decisions[1] and will only be repeated here as necessary.

In November 2010, plaintiff entered into a Co-Publishing Agreement with Prescription (2010 Co-Pub Agreement) and simultaneously entered into a Production Agreement with KMI (2010 Production Agreement) (collectively, 2010 Agreements). (NYSCEF 434, 2010 Co-Pub and Production Agreements.) On June 30, 2014, plaintiff and Prescription entered into a Co-Publishing and Exclusive Administration Agreement (2014 Co-Pub Agreement), whereby plaintiff agreed to sell, assign, convey, grant and transfer an undivided 50% in plaintiff's interest in the "Subject Compositions" irrevocably and exclusively to Prescription. (NYSCEF 435, 2014 Co-Pub Agreement.) Also, on June 30 2014, the parties amended the 2010 Co-Pub and Production Agreements. (NYSCEF 436, 2014 Letter Amending 2010 Agreements [2014 Letter Amendment]).

[1] (NYSCEF 136, Decision and Order [motion seq. no. 002]; NYSCEF 165, Decision and Order [motion seq. no. 005].)

Pursuant to the 2014 Letter Amendment, the parties agreed that the 2010 Co-Pub Agreement would not apply to compositions written, composed, acquired, or created by plaintiff from June 30, 2014 onward; the 2014 Co-Pub Agreement would apply. (*Id.* at 2[2]). The 2014 Letter Amendment extended the term of the 2010 Agreements so that it was "coterminous with the term of the [2014 Co-Pub Agreement]." (*Id.*)

Paragraph 3 of the 2014 Co-Pub Agreement states that

> "(a) The term of this agreement (the 'Term') will commence on the date upon which the term of the Prior BAMF Agreement (as defined below) expires (such expiration which shall be confirmed by written confirmation that is acceptable to [Prescription] in its sole discretion, including without limitation, by way of written confirmation from BAMF (as defined below), it being understood that until the termination of the Prior BAMF Agreement is confirmed, [plaintiff] shall use continued best efforts to convince and encourage BAMF to confirm termination of the term of the Prior BAMF Agreement with substantiation to be provided to [Prescription]) and continue, unless extended or suspended as provided herein, for a first Contract Period (sometimes referred to as the 'Initial Period') and the additional Contract Periods provided for herein below. The Initial Period shall commence on the date hereof and shall continue until the date thirty (30) days after the later of the date when [plaintiff] (i) sends notice to [Prescription] of the fulfillment of the MDRC (defined below) for the Initial Period and (ii) twelve (12) months after the date hereof (the 'Option Trigger Date')." (Contract Period Provision)
>
> "(b) Additionally, [plaintiff] hereby grants [Prescription] three (3) separate options to extend the Term for additional Contract Periods (each individually referred to herein as an 'Option Period' and collectively referred to as the 'Option Periods') on the same terms and conditions applicable to the Initial Period except as otherwise provided herein. Notwithstanding anything to the contrary contained in paragraph 3(a) above, a particular Contract Period shall not end unless and until [plaintiff] deliver[s] to [Prescription] a notice expressly referring to this paragraph and indicating that [Prescription] has theretofore failed during the then-current Contract Period to exercise [Prescription's] option to extend the Term for an Option Period. If [Prescription] fails to exercise [its] option for the applicable Option Period on or before the date fifteen (15) days after [Prescription] receives that written notice from [plaintiff], then the Term shall end on its otherwise natural expiration date, as if that date was the original expiration date of the Term, without any liability or additional obligations to [plaintiff] in connection therewith

[2] NYSCEF Pagination.

except those obligations of [Prescription] which survive the expiration of the Term." (15-Day Option Renewal Provision)

"(c) If [Prescription] exercises its first option, the First Option Period will begin immediately after the expiration of the Initial Period and continue until the later of date thirty (30) days after the date when [plaintiff] (i) sends notice to [Prescription] of fulfillment of the MDRC for the First Option Period and (ii) twelve (12) months after the commencement of the First Option Period. If [Prescription] exercises its second option, the Second Option Period will begin immediately after the expiration of the First Option Period and continue until the later of the date thirty (30) days after the date when [plaintiff]: (i) sends notice to [Prescription] of fulfillment of the MDRC for the Second Option Period and (ii) twelve (12) months after the commencement of the Second Option Period. If [Prescription] exercises its third option, the Third Option Period will begin immediately after the expiration of the Second Option Period and continue until the later of the date thirty (30) days after the date when [plaintiff]: (i) sends notice to [Prescription] of fulfillment of the MDRC for the Third Option Period and (ii) twelve (12) months after the commencement of the Third Option Period. (The Option Periods are sometimes consecutively referred to herein as the 'First Option Period', the 'Second Option Period', etc.)"

(NYSCEF 435, 2014 Co-Pub Agreement at 4.)

Paragraph 4(b) of the 2014 Co-Pub Agreement provides, in relevant part, that

"(iii) In respect of each Contract Period, you shall deliver to Publisher a written notice from you or the record company entitled to release such Album confirming (a) the titles of the Qualifying New Compositions embodied thereon, (b) that record company's acceptance of such album for major release, (iii) the scheduled date of Major Release of that Album, (c) your ownership interest in the Qualifying New Compositions embodied on the Album; and (d) the per Composition mechanical royalty which is payable in respect of each New Composition embodied in the Album concerned (collectively, the "Delivery Notice"). The requirements set forth in this paragraph shall be referred to hereinafter as the 'Minimum Delivery Commitment,' and sometimes the 'MDC.'

(iv) In each Contract Period, there shall be a Major Release on Phonograph Records of the Album(s) embodying all of the Qualifying New Compositions Delivered in satisfaction of the [Minimum Delivery Commitment] for the Contract Period concerned pursuant to paragraph 4(b)(i) ('MDRC'). The MDRC shall not be deemed fulfilled until [Prescription] receives (a) [plaintiff's] written notice accurately confirming that there has been a Major Release of the Album(s), (b) confirmation from the Record Company that released the Album(s) concerned regarding the U.S. mechanical royalty payable to [Prescription] in respect of each Qualifying New Composition as embodied in such Album, (c) written notice accurately documenting your ownership interest in the applicable Qualifying New

> Compositions, and (d) a digital copy of such Album (inclusive of the album packaging and inserts) (collectively, the 'Release Notice')." (MDRC Requirements Provision).

(*Id.* at 5-6.)

On November 29, 2017, plaintiff, by his then-attorney Daniel K. Stuart, Esq., informed Prescription that he had fulfilled the MDRC, defined in Paragraph 4(b)(iv), for the then current option period. (NYSCEF 437, MDRC Fulfillment Notice.) Upon receipt of the November 29, 2017 MDRC Fulfillment Notice, Renee Karalian, Esq., Prescription's outside counsel, "reached out to [nonparty] Kobalt[3] to see if the royalty splits had been confirmed for the [plaintiff's] compositions." (NYSCEF 700, Karalian aff [Dec. 4, 2020] ¶ 34.) Karalian "repeatedly followed up with Kobalt" to determine whether Kobalt had "heard[d] back from some of the labels." (*Id.*; NYSCEF 705, Karalian-Kobalt Emails.)

On January 5, 2018, plaintiff informed Prescription, by letter, that it failed to, "during the then current Contract Period", "exercise its option to extend the Term for an Option Period" and that the letter constituted notice under Paragraph 3(b) of the 2014-Co-Pub Agreement. (NYSCEF 438, Plaintiff's 15-Day Option Renewal Notice [Jan. 5, 2018] at 2.) Upon receipt of that letter, Karalian "reached out to all of the record labels for the compositions that Mr. Stuart had listed in his November 29, 2017 letter." (NYSCEF 700, Karalian aff [Dec. 4, 2020] ¶ 36; *see* NYSCEF 707-709, Karalian Emails to Capitol Records, Sony Music, and Interscope Records.) In short, Karalian did not obtain confirmation from the record labels and informed Stuart of her findings via

[3] Kobalt Music Publishing is Prescription's music publishing administrator. (NYSCEF 700, Karalian aff ¶ 4.)

telephone on January 9, 2018. (NYSCEF 700, Karalian aff [Dec. 4, 2020] ¶ 38.) During this conversation, Karalian also informed Stuart that plaintiff's MDRC was not fulfilled without the mechanical royalty rates confirmation. (*Id.*) Karalian sent Stuart a letter on January 15, 2018, reiterating what she had told him over the phone. (NYSCEF 710, Karalian Letter to Stuart [Jan. 12, 2018].)

Ultimately, on February 14, 2018, Prescription informed plaintiff that it received confirmation from Steve Weil, a representative of nonparty Interscope Records, of plaintiff's mechanical royalty rate and all of the songs he is on. (NYSCEF 709, Karalian-Weil Emails.) Karalian "notified []Stuart that Prescription was exercising its option for the Second Option Period as of that date: February 14, 2018." (NYSCEF 700, Karalian aff ¶ 55.) Two days later, on February 16, 2018, Prescription issued a $200,000 check for "50% of advance on 2nd option." (NYSCEF 718, Check.) Plaintiff deposited the check on April 6, 2018. (NYSCEF 719, Deposit Slip.)

Procedural Background

On May 11, 2018, the court ordered the parties to continue complying with the terms of the 2014 Co-Pub Agreement until a final resolution of the parties' agreements was reached. (NYSCEF 68, So-Ordered Transcript at 38:8-14 [mot. seq. no. 001].)

In motion sequence number 002, defendants moved pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint in its entirety, arguing that the 2014 Co-Pub Agreement contract period ends when they receive proper notice by plaintiff of his valid fulfillment of the MDRC (pursuant to paragraph 3(a) of the 2014 Co-Pub Agreement). (NYSCEF 136, Decision and Order at 7.) The court denied defendants' motion (*id.* at 9-10), stating

> "[f]irst, at argument, both counsels repeatedly refer to industry standards, customs, and practice which is clearly needed to read the [2014- Co-Pub] Agreement, i.e., the implicit requirement of confirmation of split agreements. This alone demonstrates that this CPLR 3211 motion should not be granted. . . .
>
> While the mechanical royalty requirement is clear, it is not clear from the [2014-Co-Pub] Agreement, who is charged with satisfying this requirement. This is particularly so when you look at Paragraph 4 (b) (iii), which specifically puts the onus on plaintiff to deliver notice confirming certain requirement for "minimum delivery commitment." For the MDRC, the Agreement does not make clear who is responsible for requirements (b), (c) and (d). Requirement (a) is the only requirement in Paragraph 4 (b) (iv) that clearly puts the onus on plaintiff ('your written notice accurately confirming that there has been a Major Release of the Album[s])'."

(NYSCEF 136, Decision and Order [mot. seq. no. 002].)

Defendants appealed, and on August 2, 2020, the Appellate Division, First Department unanimously affirmed this court's decision. (*Hindlin v Prescription Songs, LLC*, 182 AD3d 434 [1st Dept 2020].) On appeal, the First Department examined the 2014 Co-Pub Agreement and the emails between nonparty Interscope Records (the record company) and Prescription and held that "[t]he documentary evidence defendants offer in support of their motion does not utterly refute plaintiff's factual allegations or conclusively establish a defense as a matter of law." (*Id.* at 435.) The First Department also agreed with this court's finding of the ambiguity: The panel noted that the contract was silent on which party was responsible for obtaining the confirmation of mechanical royalty rates from the record company for purposes of MDRC fulfillment under paragraph 4(iv)(b) to determine the termination date of a Contract Period set out under paragraph 3(a). (*Id.*) The First Department pointed to paragraph 4(b)(iii) of the 2014-Co Pub Agreement that charged plaintiff with specific duties. (*Id.*) In contrast however, paragraph 4(b)(iv), which set out the four conditions to satisfying the MDCR, did not charge plaintiff (or Prescription) with obtaining

confirmation of mechanical royalty rates. (*Id.*) Thus, the First Department "decline[d] to read into the agreement an implied obligation on plaintiff's part to assume the responsibility to ensure that a third party beyond his control, i.e., a record company, would furnish the information and, moreover do so by a particular time." (*Id.* at 435-436 [citation omitted].) Lastly, the First Department stated that "additional ambiguity surrounds the question of what was supposed to happen if the record company's confirmation post-dated the deadline triggered upon plaintiff's 15-day notice." (*Id.*)

Discussion

Motion Seq. No. 012 – Plaintiff's Motion for Summary Judgment

Plaintiff makes two arguments in support of his motion for summary judgment.

First, plaintiff argues that the First Department determined that a failure to receive confirmation from the record company did not extend defendants' exercise period beyond the 15-day deadline after defendants' receipt of the Non-Exercise Option to exercise as provided for in the 2014 Co-Pub Agreement. Plaintiff argues that the First Department also determined that the 2014 Co-Pub Agreement did not impose the obligation to obtain that confirmation on him. Plaintiff contends that, since the First Department ruled that it was not his obligation to obtain record company confirmation, he had discharged his obligations under § 3(a) of the 2014 Co-Pub Agreement as of November 29, 2017, when he sent his MDRC Fulfillment Notice to defendants.

Plaintiff asserts that the Contract Period Provision is unrelated and separate from the notice provisions set out under the 15-Day Option Renewal Provision. He contends that his January 5, 2018 notice sent pursuant to the 15-Day Option Renewal Provision, for which Prescription received on or about January 11, 2018, triggered Prescription's

time (fifteen days) to exercise its option to renew for the next period by January 26, 2018. Thus, Prescription's exercise of its option to renew on February 14, 2018 was untimely and their agreements terminated on January 26, 2018.

Alternatively, should the court find that the parties' contractual relationship was not terminated on January 5, 2018, plaintiff contends that the agreement terminated on February 14, 2018—the date Prescription received record company confirmation from nonparty Interscope Records.[4]

Defendants argue that a valid notice under the Contract Period Provision must be satisfied before plaintiff can send notice under the 15-Day Option Renewal Notice. The notice under the 15-Day Option Renewal Provision merely extends Prescription's option to exercise 15 days beyond the 30 days following Contract Period Termination Provision notice.[5] Further, implicit in defendants' argument is their disagreement with the First Department's decision—i.e., that while it is not plaintiff's obligation to obtain record

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[4] Plaintiff further argues that, under *Jade Realty LLC v. Citigroup Commercial Mortgage Trust 2005-EMG*, courts are not empowered to add terms to agreements when the application of the contract's literal language does not render the contract an absurdity or an unenforceable. (83 AD3d 567 [1st Dept 2011], aff'd, 20 NY3d 881 [2012].) Thus, terms should not be added because the literal language of the 2014 Co-Pub Agreement does not result in an absurdity or an unenforceable contract. Without a showing of absurdity or unenforceability (which, plaintiff argues that defendants cannot do), the literal language of the agreement should be enforced. The court's understanding of the First Department's citation to *Jade Realty* is confined to the 15-Day Option Renewal Provision, not to the entire agreement, as the citation followed a discussion of the First Department's refusal to "read into the agreement an implied obligation on plaintiff's part to assume the responsibility to ensure that a third party beyond his control, i.e., a record company, would furnish the information and, moreover, do so by a particular time." (*Hindlin*, 182 AD3d at 435-436.)

[5] The fifteen-day notice, as defendants argue, is akin to a "notice to cure" for failure to exercise their renewal option after valid MDRC notice has been given.

company confirmation, the First Department did not hold that it was defendants' obligation to obtain record company confirmation.

On the other hand, defendants argue that summary judgment should be granted in their favor because plaintiff cannot raise a triable issue of fact that his November 29, 2017 and January 5, 2018 Notices were validly given. In essence, therefore, defendants do not read paragraph 3(a) and paragraph 3(b) separately from each other. Rather, these provisions work in sequence to determine how the parties' relationship would be renewed or terminated. Specifically, that a valid MDRC fulfillment notice is a condition precedent to 15-Day Notice. Defendants also argue that evidence of the parties' course of dealing and plaintiff's counsel's statements make clear that the Option Warning Notice could only be sent thirty days after a valid Fulfillment Notice.

In support, defendants offer the testimonies of (i) Michael Perlstein, plaintiff's expert; (ii) Weil; and (iii) their expert, Bruce Scavuzzo, positing that the 2014 Co-Pub Agreement does not require them, as the publisher and producer, to obtain MDRC fulfillment confirmation. And, as discussed above, defendants argue that without a valid notice sent under the Contract Period Termination Provision, which is a prerequisite to trigger Prescription's obligation to exercise its option to renew, defendants timely exercise its rights under the 2014 Co-Pub Agreement. Essentially, defendants' asks the court to reach the conclusion that the Contract Period Provision is a condition precedent to triggering notice under the 15-Day Option Renewal Provision. In opposition, plaintiff

take a variety of positions, including identifying additional questions of fact to defeat defendants' summary judgment motion.[6]

Defendants also argue that plaintiff waived each of his claims when he deposited the $200,000 check prior to the commencement of litigation, on April 6, 2018. Plaintiff strongly refutes defendants' argument, arguing instead that the check was for "earned royalties," and not an advance. (*See* NYSCEF 839, Hindlin-Spielman Emails.) Plaintiff argues that he accepted the check only after confirming with Spielman that the check was for owed royalty payments, and not as an advance.

Neither Party is Entitled to Summary Judgment

Both parties have failed to meet their burden to show that their interpretation of the 2014 Co-Pub Agreement is the only reasonable interpretation.

The 2014 Co-Pub Agreement, on its face, does not provide that notice under § 3(a) and (b) must be provided consecutively. Plaintiff argues that this makes sense for planning purposes to learn whether defendants intend to pick up the next option period. However, in defendants' view, only after receiving the required MDRC information can defendants decide whether to continue their relationship with plaintiff. In the court's view, this factual issue is determinative of the Contract Periods. The lack of clarity over

[6] One issue of fact identified by plaintiff is whether there was a valid fulfillment of the requirements under the Contract Period Provision on November 29, 2017. Another issue of fact conceded by plaintiff is "how § 3(a) relates to § 4(b)(iv), particularly as to timing of the termination of the extant Option Period." In addition, plaintiff states " "At minimum, therefore, questions of fact exist regarding whether Plaintiff's January 5, 2018 Non-Renewal Notice required Prescription to exercise its option, regardless of whether Prescription had received record company confirmation at the conclusion of the 15 day period or whether the MDRC was 'deemed' fulfilled by that date" (NYSCEF 881, Plaintiff's MOL at 18) which contradicts plaintiff's position that there are no issues of fact concerning the interrelation of paragraphs 3(a) and (b).

which provision controls the termination of the parties' agreement or whether a condition precedent applies makes the 2014 Co-Pub Agreement susceptible to more than one reasonable construction of the agreement. This is clearly demonstrated by the diverging reasonable interpretations of the parties, and as discussed more below, the parties' extrinsic evidence does not favor one interpretation over another. In fact, the extrinsic evidence highlights additional issues of fact. Therefore, the 2014 Co-Pub Agreement is ambiguous and neither party is entitled to summary judgment.

Plaintiff relies heavily on the First Department's decision on appeal from the court's denial of defendants' motion to dismiss. Accepting plaintiff's interpretation of the First Department's decision for argument's sake[7], plaintiff still has not met his burden in demonstrating that his interpretation of the 2014 Co-Pub Agreement, namely that Prescription had fifteen days following its notice under § 3(b) to exercise its right to renew the agreement for another term, is the only reasonable interpretation. So, while the First Department may have conclusively ruled that (i) plaintiff had no affirmative obligation to seek record company confirmation for MDRC Fulfillment purposes and (ii) there was no extension beyond the prescribed fifteen days under § 3(b) notice purposes, this fails to definitively show that § 3(a) and § 3(b) operated separately from each other. This makes sense. The First Department did not have the opportunity to consider the argument plaintiff now makes in his summary judgment motion—that the notice provisions are separate and distinct from each other. In part, the disposition of

[7] Even on this point, plaintiffs concede there may be an issue of fact, i.e., whether an invalid fulfillment of the requirements under § 4(b)(iv) would trigger a right to send notice under § 3(b) even if not deemed effective for MDRC fulfillment under § 4(b)(iv). (NYSCEF 881, Plaintiff's Opp Brief at 16, n 7.)

both parties' motions requires the court to accept one party's argument to the exclusion of the other.

Plaintiff's arguments are also contradictory. First, plaintiff argues that "a term could not end unless a [15-Day Option Renewal Notice] had been sent at sometime within the term." However, plaintiff also posits that February 14, 2018 is the "natural termination date" under paragraph 3(b) as that is when defendants received actual MDRC Fulfillment Notice confirmation from the record company. The two cannot can co-exist.

In addition, the language of § 3(b) suggests it was drafted in view of the preceding paragraph. Paragraph 3(b) begins with "Notwithstanding anything to the contrary contained in § 3(a) above" in explaining the fifteen-day renewal option notice. Thus, it is reasonable to interpret the contract the way defendants posit it—that paragraph 3(b) clarifies the Contract Period termination date that are more specifically set out in paragraph 3(a). At the very least, paragraph 3(b), by its inclusion of the notwithstanding clause, demonstrates that it is reasonable to construe both § 3(a) and (b) together. (*See Warberg Opportunistic Trading Fund, L.P v GeoResources, Inc.*, 112 AD3d 78, 83 [1st Dept 2013] [citation omitted] [noting that the use of a notwithstanding clause indicates the drafter's intention that the provisions of the notwithstanding section override conflicting provisions of any other sections].)

Here, both parties' interpretations find some support in the contract, but neither party can clearly and unambiguously demonstrate that § 3(a) and § 3(b) are or are not separate and distinct from each other.

"Faced with ambiguity, [the court] turn[s] to extrinsic evidence for guidance as to which interpretation should prevail." (*Evans v Famous Music Corp.*, 1 NY3d 452, 459 [2004].) The extrinsic evidence proffered by both parties to support their respective positions does not resolve the ambiguity presented by the agreement, nor does the evidence conclusively show that there can only be one reasonable interpretation. (*See id.* at 459-460 [finding that, "in light of the extrinsic evidence," "[t]he evidence strongly favors Famous" warranting summary judgment in its favor.].)

For example, defendants direct the court to the draft report of Perlstein in support of their argument that the completion of all requirements stated in the Contract Period Provision is a condition precedent to exercising notice under the 15-Day Option Renewal Provision. (NYSCEF 725, Perlstein Expert Opinion Draft ¶ 10 ["That is the reason why a notice from a record company to a publisher confirming the mechanical royalty splits is important. The publisher needs to know the amount of mechanical royalties the record company will pay per composition embodied on an album."].) This line was omitted from Perlstein's final report. (*Compare id.*, *with* NYSCEF 864, Perlstein Expert Opinion Declaration [Dec. 20, 2020] ¶ 10.) What made it into Perlstein's final report is his opinion that "under standard industry custom and practice, pursuant to the terms of a co-ownership/exclusive administration agreement, and the natural division of labor between a writer and a publisher, the publisher not only bears the responsibility of obtaining confirmation from a record company for mechanical royalty rates but has the implied good faith contractual obligation to do so because the publisher exclusively controls the mechanical licensing process." (*Id.* ¶ 19.)

Scavuzzo, defendants' expert, opined to the contrary, that the 2014-Co Pub Agreement, consistent with industry custom and practice, required plaintiff to provide the record company confirmation to Prescription with respect to any musical compositions which he intended to apply toward the MDRC. (NYSCEF 759, Scavuzzo Expert Report ¶¶ 45-46.) As plaintiff correctly states, a battle of the experts regarding the custom and practice in the music publishing industry creates an issue of fact, defeating summary judgment for any party. (*Scholastic Inc. v Pace Plumbing Corp.*, 129 AD3d 75, 87 [1st Dept 2015].)

Defendants' other arguments and evidence do not favor granting summary judgment in their favor. Defendants also attempt to support their argument with evidence of the parties' course of dealing[8], Weil's testimony, (NYSCEF 761, Weil aff), and plaintiff's counsel's statements at oral argument, (NYSCEF 730, Oral Argument tr [mot. seq. 005]). First, "in order to constitute a judicial admission, the statement must be one of fact", legal arguments made by counsel do not constitute judicial admissions. (*Naughton v City of New York*, 94 AD3d 1, 12 [1st Dept 2012].) Plaintiff's counsel's statements were made in the context of his legal argument, that there was more than one reasonable interpretation of the 2014-Co Pub Agreement. (NYSCEF 730, Oral Argument tr at 16:16-17:13.) The court also finds defendants' reliance on Weil's affirmation unavailing; upon closer inspection, Weil merely affirmed the events that led to him providing the mechanical royalty splits and rate information. (NYSCEF 761, Weil aff ¶ 8.)

[8] Defendants merely argue, in one passing line, that plaintiff's experienced attorneys did not send any notices under the Option Renewal Provision prior to any notice under the Contract Period Provision.

Plaintiff, too, has come forward with limited support for its opposing position as well. According to plaintiff, Gottwald admitted in his testimony that it was Prescription's regular practice and procedure to have Karalian check with the record label to confirm royalty rates and splits.[9] (*See* NYSCEF 887, Gottwald depo tr at 103:12-23.) However, earlier Gottwald qualified his answer stating: "Again, I'd say I'm not an attorney, but from what I understand, in order for it to count toward the MDRC, right, it needs to be confirmed by third party, the record label." (*Id.* at 101:2-6,104:9-13.) Karalian, however, has affirmed that she was under no obligation to obtain record company confirmation. (NYSCEF 700, Karalian aff [Dec. 4, 2020].) This regular practice is also apparently supported by one 2015 email correspondence showing Karalian reaching out to a third-party to obtain record company confirmation for plaintiff's mechanical royalty splits. (*See* NYSCEF 888, Karalian Email [July 6, 2015].)

As to defendants' waiver argument, summary judgment is also denied. "A waiver, by definition, is the intentional relinquishment of a known right—it must be clear, unequivocal and deliberate." (*Silverman v Silverman*, 304 AD2d 41, 46 [1st Dept 2003] [internal quotations and citations omitted].) Plaintiff argues he did not waive any claims by depositing the check as the check was in payment for royalties then-owed to him. (NYSCEF 839, Spielman-Hindlin Emails [Apr. 3, 2018].) Prior to depositing the $200,000 check, plaintiff spoke and confirmed with Prescription's agent, Lawrence Spielman, that accepting the check would not be deemed an acceptance of an advance.

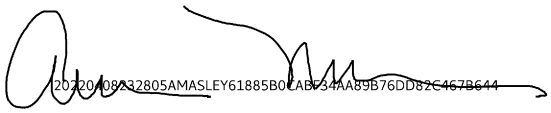
[9] Defendants made clarification changes to Gottwald's testimony, as evidenced by the May 1, 2021 errata sheet. (NYSCEF 887, tr of Gottwald deposition at 7.)

(*Id.* at 2.) The emails do not show that plaintiff clearly and unequivocally waived his right to assert claims against defendants.

The court has considered the parties' remaining arguments and finds them unavailing.

Accordingly, it is

ORDERED that plaintiff's and defendants' motions for summary judgment are denied.



4/8/2022
DATE

ANDREA MASLEY, J.S.C.

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