Advanced Alternative Media, Inc. v Hindlin
2022 NY Slip Op 33118(U)
September 15, 2022
Supreme Court, New York County
Docket Number: Index No. 655916/2018
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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ADVANCED ALTERNATIVE MEDIA, INC.,

Plaintiff,

- v -

JACOB HINDLIN,

Defendant.

INDEX NO. 655916/2018

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

----------X

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 79, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 115, 116, 117, 118, 121 were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

In motion sequence number 002, plaintiff Advanced Alternative Media, Inc. (AAM) moves, pursuant to CPLR 3211(b) and 3212 (e), to dismiss defendant Jacob Hindlin's affirmative defenses and for partial summary judgment on the issue of liability, respectively.

Background

This is a breach of contract action brought by AAM, a music management company, against Hindlin, a songwriter of contemporary music, to recover commissions and other amounts allegedly due to AAM under a written management agreement (Management Agreement). Under the Management Agreement, which the parties entered into in December 2009, AAM agreed to manage Hindlin's career in the music entertainment industry and advise and counsel Hindlin on all aspects of his career.

(NYSCEF Doc. No. [NYSCEF] 61, Complaint ¶ 6; NYSCEF 54, Management Agreement at 2 [Section 2][1].) Section 2 of the Management Agreement provides that

> "should Artist request and Manager should agree that Manager will manage any subsidiary business of Artist with regard to matters other than the furnishing of Artist's professional services [e.g. any record label or publishing company owned by artist and furnishing the services of third parties], then Manager and Artist agree that Manager's services shall be rendered on an equity participation basis, such equity participation to be fifty (50%) percent to Artist and fifty (50%) percent to Manager."

(NYSCEF 54, Management Agreement at 4.) Under Section 3(a) of the Management Agreement, Hindlin agreed to pay AAM 15% of all "Gross Monies" Hindlin earned or received from his activities in the entertainment industry (Commission). (*Id.*) Both Sections 3(b) and 3(c) define the term "Gross Monies." (*Id.* at 4-5) Section 3(b) also provides for "Gross Monies" to be paid to the Manager one year after the termination of the Management Agreement under certain conditions. (*Id.* at 4.) Section 3(d)(i) provides that Hindlin will supply AAM with a monthly accounting of all compensation payable to AAM under the Agreement. (*Id.* at 5-6.) Section 9 is a cure notice provision. (*Id.* at 8.) The Management Agreement was subsequently amended in April 2015 to extend the terms of the Agreement through April 2017. (NYSCEF 55, 2015 Amendment.)

In 2010, AAM represented both Hindlin and Prescription Songs LLC (Prescription) in the negotiation of a co-publishing agreement (2010 Co-Pub Agreement). (NYSCEF 63, Answer ¶¶ 36-38; Hindlin aff ¶ 3.) Because of AAM's potential conflict, the parties entered into a Waiver, whereby Hindlin agreed to waive

[1] Pages cited refer to NYSCEF generated pagination.

any conflicts that could arise in connection to AAM's dual representation of Prescription and Hindlin in the 2010 Co-Pub Agreement (Waiver). (NYSCEF 57, Waiver.) The 2010 Co-Pub Agreement was amended by a later co-publishing agreement in 2014 (2014 Co-Pub Agreement).[2] (NYSCEF 92, 2014 Co-Pub Agreement.) AAM also represented both Hindlin and Prescription in the negotiation of the 2014 Co-Pub Agreement. (NYSCEF 63, Answer ¶¶ 39-40; NYSCEF 87, Hindlin aff ¶ 6.) The 2014 Co-Pub Agreement differed from the 2010 Co-Pub Agreement by its inclusion of the requirement that Hindlin deliver a certain amount of qualifying songs to fulfill a minimum delivery release commitment (MDRC). (*Compare* NYSCEF 89, 2010 Co-Pub Agreement, *with* NYSCEF 92, 2014 Co-Pub Agreement; *see also* NYSCEF 63, Answer ¶ 39; NYSCEF 87, Hindlin aff ¶ 6.) Hindlin alleges that his and Prescription's interests were in direct conflict under the 2014 Agreement, in that it was in Prescription's interest "to take the position that various songs did not count towards the MDRC of a given term or renewal term for one pretext or another, in order to stretch out the term or renewal term for as long as possible, thereby increasing the number of songs on which Prescription received a significant share of the royalties in perpetuity, and it was in Mr. Hindlin's interest that all songs count toward the MDRC to minimize the length of each term and renewal term." (NYSCEF 63, Answer ¶ 40.)

The 2014 Co-Pub Agreement included an initial contract term (Initial Term) with three options to renew (Option Term); once Hindlin notified Prescription that he delivered enough qualifying songs to fulfill the MDRC, the initial term would end.

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[2] The 2014 Co-Pub Agreement is also the subject of a related action before this court, *Hindlin v Prescription Songs LLC, et al.*, Index No. 651974/2018 (Prescription Action), and more specifically, the agreement's MDRC fulfillment requirements.

(NYSCEF 92, 2014 Co-Pub Agreement, Section 3.) Following the termination of the initial term, Prescription could exercise its right to extend the 2014 Co-Pub Agreement for three separate option periods, each tied to its own two-song MDRC requirement. (*Id.*)

On July 15, 2015, Mark Beaven, Hindlin's personal manager at AAM, contacted Hindlin's then-counsel Daniel K. Stuart, Esq. of King, Holmes, Paterno & Soriano, LLP (KHPS), instructing KHPS to send Prescription notice of Hindlin's MDRC fulfillment of the Initial Term. (NYSCEF 99, Beaven-Stuart Email [July 15, 2015]; NYSCEF 87, Hindlin aff ¶¶ 2, 9.) KHPS sent the MDRC fulfillment notice (2015 Notice), (NYSCEF 100) but Prescription took issue with the notice. (NYSCEF 101, Emails.) A dispute followed, which resulted in a year of back and forth between the parties. (NYSCEF 102-106, Emails.) Hindlin asserts that the failure to timely resolve the issue was caused by AAM's delays or refusal to provide certain information to Prescription. Hindlin argues that AAM's conduct stretched out the 2014 Co-Pub Agreement against Hindlin's interest.

The second relevant transaction was the eventual sale of Hindlin's songwriting catalog in July 2018. (NYSCEF 1, Complaint ¶1.) Hindlin was interested in selling his songwriting catalog and inquired with Beaven. (NYSCEF 97, Hindlin depo tr at 193:14-23.) Beaven allegedly informed Hindlin that he could not sell his catalog under the 2014 Co-Pub Agreement. (*Id.*) In November 2017, KHPS reached out to Beaven to have him solicit an offer from Prescription for Hindlin's songwriting catalog. [3] (NYSCEF 98,

[3] KHPS's request to Beaven occurred after Hindlin terminated his Agreement with AAM. The termination of the Management Agreement is discussed in more detail below.

Beaven depo tr at 233:2-9.) Accordingly, Beaven attempted to facilitate the sale of Hindlin's catalog to Prescription for $12 million. (*Id.* at 233:10-16.) The catalog ultimately sold for approximately $27 million. (*Id.* at 248:8-13.)

AAM was Hindlin's manager for seven years, until Hindlin sent notice to AAM in May 2017 to terminate their Management Agreement, effective June 9, 2017. (NYSCEF 61, Complaint ¶ 1, 9; NYSCEF 56, Termination Notice.) AAM alleges that, in 2017, Hindlin ceased to account for and pay commissions in violation of the Management Agreement. (NYSCEF 61, Complaint ¶ 21.) According to AAM, the amount of unpaid commissions owed to AAM exceeds $4 million.[4] Hindlin, through his attorney, Andrew J. Goodman, Esq., rejected the notice to cure and demand to comply. (NYSCEF 8, Goodman Letter.) Hindlin challenged whether the sale of Hindlin's Catalog falls under the definition of "Gross Monies" under the Management Agreement and also accused AAM of breaching its fiduciary duties to Hindlin through AAM's dual representation of Prescription. (*Id.*)

On April 23, 2018, Hindlin filed the Prescription Action and subsequently amended his complaint to add claims against KHPS, AAM, and Beaven. (NYSCEF 58, First Amended Complaint in Prescription Action.) In general terms, the Prescription Action challenged the termination date of the 2014 Co-Pub Agreement with Prescription. (*See id.*) In the Prescription Action, Hindlin claimed AAM and Beaven acted negligently in their handling of the 2015 MDRC Fulfillment Dispute and breached their fiduciary duties to Hindlin by prolonging the 2014 Co-Pub Agreement in favor of

[4] The unpaid commissions are calculated based on the funds received by Hindlin for the Catalog Sale ($3,887,500.00) and for Commission payments for AAM's ordinary managerial and representative matters ($227,854.45).

Prescription. (*Id.* at 22-25.) AAM and Beaven moved to dismiss Hindlin's claims against them (motion sequences numbers 003 and 004) and the court granted the dismissal, holding that Hindlin failed to state a negligence claim against AAM and Beaven because Hindlin did not plead a duty independent of the Agreement and the Waiver eliminated any alleged conflicts on which the negligence claim is based. (*See* NYSCEF 59, Decision and Order Prescription Action [mot. seq. no. 003 and 004] at 8-10.) As to the fiduciary duty claim, where there is a contract between the parties, the court held that Hindlin failed to state with particularity a duty independent of the Agreement. (*Id.* at 11.) The court's decision was unanimously affirmed by the First Department, Appellate Division. (*Hindlin v Prescription Songs LLC, et al.*,192 AD3d 480 [1st Dept 2021]; NYSCEF 60 [same decision].)

AAM brought this action against Hindlin on November 28, 2018, seeking unpaid commissions and an award granting AAM a 50% equity interest in Hindlin's subsidiary businesses. (*See* NYSCEF 61, Complaint.) Hindlin moved to dismiss AAM's complaint, primarily contending that no commissions were due to Hindlin for the Catalog Sale. (NYSCEF 62, Decision and Order [mot. seq. no. 001] at 4.) The court rejected Hindlin's argument and denied dismissal of the complaint. (*See* NYSCEF 62, Decision and Order [mot. seq. no. 001].) Following the court's denial, Hindlin filed an answer in this action and asserted nine affirmative defenses. (NYSCEF 63, Answer at 8-9.) In relevant part, Hindlin asserted:

> "FIRST AFFIRMATIVE DEFENSE
> 48. AAM, as a conflicted agent, is barred as a matter of law from recovering on the claim asserted in the verified complaint.
>
> SECOND AFFIRMATIVE DEFENSE
> 49. The Verified Complaint fails to state a cause of action.

THIRD AFFIRMATIVE DEFENSE
50. The Management Agreement is invalid as a consequence of AAM's conflicting representation of Prescription and Mr. Gottwald.

FOURTH AFFIRMATIVE DEFENSE
51. As a conflicted agent, AAM cannot carry its burden of demonstrating that it substantially performed the Management Agreement under which it is seeking to recover.

FIFTH AFFIRMATIVE DEFENSE
52. The claim asserted in the Verified Complaint is barred because AAM breached the fiduciary duty of undivided loyalty that an agent owes to its principal.

SIXTH AFFIRMATIVE DEFENSE
53. AAM's own conduct estops it from recovering on the claim asserted in the Verified Complaint.

SEVENTH AFFIRMATIVE DEFENSE
54. The claim in the Verified Complaint is barred by AAM's unclean hands to the extent that it seeks an accounting or other equitable relief.

EIGHTH AFFIRMATIVE DEFENSE
55. By its conduct, AAM has waived any claim that it may have against Defendant.

NINTH AFFIRMATIVE DEFENSE
56. Even if AAM is entitled to some recovery (which it is not), damages caused to Mr. Hindlin as a result of AAM's conflicted representation should be offset against any such recovery."

(NYSCEF 63, Answer ¶¶ 48-56.)

Discussion

"A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit. Upon a motion to dismiss a defense, the defendant is entitled to the benefit of every reasonable intendment of its pleading, which is to be liberally construed. If there is any doubt as to the availability of a defense, it should not be dismissed. The movants bear the burden of demonstrating that those defenses [a]re without merit as a matter of law."

(*Butler v Catinella*, 58 AD3d 145, 147-148 [2d Dept 2008] [internal quotation marks and citations omitted].)

AAM argues that Hindlin's nine affirmative defenses are barred by collateral estoppel, specifically that all his defenses are based upon the conflict of interest and breach of fiduciary duty claims already fully litigated and decided against him in the Prescription Action. AAM further contends that if Hindlin's defenses are dismissed based on the court's previous decision in this action (motion sequence number 001), summary judgment on the issue of liability should be granted as well.

In opposition, Hindlin argues that his defenses are not precluded by the outcome in the Prescription Action because his asserted defenses raise new issues not previously adjudicated. According to Hindlin, his answer raised a faithless servant defense, specifically relating to AAM's alleged failure to act as a faithful servant in three events—the failure to advise Hindlin regarding the MDRC fulfillment requirements under the 2014 Co-Pub Agreement, AAM's delay of the Initial Term Fulfillment, and the Catalog Sale. Further, Hindlin argues, the faithless servant defense precludes AAM's motion for partial summary judgment as the defense and associated allegations raise an issue of whether AAM performed under the Agreement.

Affirmative Defense of Faithless Servant

An answer is a pleading and is subject to the CPLR's basic pleading rules. (*See generally* CPLR 3013 [requiring that statements in a pleading give the parties and the court sufficient notice of the causes of action or defenses]; CPLR 3014 [requiring that each pleading shall consist of plain and concise statements in consecutively numbered paragraphs].) Affirmative defenses, pursuant to CPLR 3018 (b), are "all matters which if

not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading." Moreover, a party who fails to plead an affirmative defense may risk waiving the defense. (*See generally* CPLR 3211 [e].) However, courts will liberally construe an answer and disregard defects unless a substantial right of a party is not prejudiced. (*See* CPLR 3026.)

In view of the CPLR's pleading rules, the court concludes that Hindlin failed to adequately give notice of his faithless servant defense, and it is thus waived. Hindlin mentions the term faithless servant in two instances: first, in paragraph 20 of his answer and second, in paragraph 28 of his answer. (NYSCEF 63, Answer ¶¶ 20, 28.) Both paragraphs state, in relevant part, that Hindlin "ceased paying commissions to AAM because such commissions were not due and owing because AAM was a faithless, conflicted agent." (*Id.*) Nowhere in the list of affirmative defenses Hindlin asserts is the term mentioned again.[5] In fact, the second, sixth, seventh, and eight affirmative defenses state failure to state a claim, estoppel, unclean hands, and waiver, respectively. The first, third, fourth, and ninth enumerated defenses are variations of allegations that AAM was a conflicted agent. Moreover, paragraph 47 states that Hindlin "repeats and realleges paragraphs 35 through 46 above in each affirmative defense below." (*Id.* ¶ 47.) In paragraphs 35 through 46, Hindlin does not allege that AAM was a faithless servant. In those paragraphs, however, Hindlin alleges that AAM breached its duty of loyalty and opined that the Waiver did not apply. (*See id.* ¶¶ 35-47.) It cannot be said that the unmoored and discrete references to the term "faithless,

[5] Hindlin cites to paragraphs 48 through 56 of his Answer in support of his argument that he asserted a faithless servant defense. (*See* NYSCEF 112, Hindlin's Opposition Brief at 17, n 58.) This lends little support for the reasons stated.

conflicted agent" give proper notice to the parties and the court of an alleged faithless servant defense. And although a court must liberally construe the answer, "neither plaintiff nor the court ought to be required to sift through a boilerplate list of defenses or 'be compelled to wade through a mass of verbiage and superfluous matter.'" (*Scholastic Inc. v Pace Plumbing Corp.*, 129 AD3d 75, 79 [1st Dept 2015] [citation omitted].) This is especially so when other specific defenses were enumerated.

Even had Hindlin adequately asserted a defense of faithless servant, the defense is barred by collateral estoppel. The doctrine of faithless servant, asserted as a claim or defense, and a claim for breach of fiduciary share a "close relationship [and] overlap."[6] (*Yukos Capital S.A.R.L. v Fedlman*, 977 F3d 216, 242 [2d Cir 2020].) "[T]he faithless servant doctrine states that an employee or agent who is faithless in the performance of his or her duties [to the principal] is not entitled to recover salary or commission." (*Two Rivers Entities, LLC v Sandoval*, 192 AD3d 528, 529 [1st Dept 2021] [citations omitted].)

> "One who owes a duty of fidelity to a principal and who is faithless in the performance of his services is generally disentitled to recover his compensation, whether commissions or salary. Nor does it make any difference that the services were beneficial to the principal, or that the principal suffered no provable damage as a result of the breach of fidelity by the agent."

[6] The federal courts of New York, in applying state law, have collected cases depicting a split in opinions regarding what is required to show damages under a claim for faithless servant. "Unlike a traditional claim for breach of a fiduciary duty, an employer bringing a faithless-servant claim 'is not required to show that it suffered ... provable damage as a result of the breach of fidelity by the agent.'" (*Ebel v G/O Media, Inc.*, 2021 WL 2037867, *5 [SDNY, May 21, 20201] [citations omitted]; *see also Yukos Capital*, 977 F3d at 242 [2d Cir 2020] ["Our review of the caselaw suggests that, when the New York Court of Appeals does clarify those boundaries, it will hold that compensation under the faithless servant doctrine can satisfy the "damage" element of a breach of fiduciary duty claim."].) However, even if damages may be shown here, it does not change the outcome of this case.

(*Feiger v Iral Jewelry, Ltd.*, 41 N.Y.2d 928, 928-929 [1977] [citations omitted] [emphasis added].)

Two alternative standards have been applied by New York courts in determining whether an agent's conduct warrants forfeiture under the faithless servant doctrine. (*See Stanley v Skowron*, 989 F Supp 2d 356, 359 [SDNY 2013].)

> "The first standard is met with the 'misconduct and unfaithfulness . . . substantially violates the contract of service' such that it 'permeate[s] [the employee's] service in its most material and substantial part.' The second standard requires only 'misconduct [ ] that rises to the level of breach of a duty of loyalty or good faith.' In other words, it is sufficient that the employee 'acts adversely to his employer in any part of the transaction, or omits to disclose any interest which would naturally influence his conduct in dealing with the subject of the employment.'"

(*Id.*, citing *Phansalkar v Andersen Weinroth & Co., L.P.*, 344 F3d 184, 201-203 [2d Cir 2003] [brackets in original].) The law applying the faithless servant doctrine, under either approach, requires a breach of the agent's duty of loyalty. (*See id.*; *see also Dawes v J. Muller Company*, 176 AD3d 473, 474 [1st Dept 2019].)

Thus, a party asserting the faithless servant doctrine must show that the agent's misconduct "substantially violated the contract of service, such that it permeates the employee's service in its most material and substantial part," or that the agent's misconduct "rises to the level of a breach of a duty of loyalty or good faith." (*Stanley v Skowron*, 989 F Supp 2d 356, 359 [SDNY 2013].) The issue of whether AAM breached its fiduciary duty of loyalty to Hindlin has already been decided—against Hindlin— in the Prescription Action.

"The doctrine of collateral estoppel . . . precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes

of action are the same." (*Ryan v New York Telephone Co.*, 62 NY2d 494, 500 [1984] [citations omitted].) The issue in the prior action must have been material and essential to that decision, and moreover, "it must be the point actually to be determined in the section action such that 'a different judgment in the second would destroy or impair rights or interests established by the first.'" (*See id.* at 500-501 [citations omitted].) Further, "the burden rests upon the proponent of collateral estoppel to demonstrate the identicality and decisiveness of the issue, while the burden rests upon the opponent to establish the absence of a full and fair opportunity to litigate the issue in [the] prior action or proceeding." (*Id.* at 501.)

In the Prescription Action, Hindlin asserted a negligence cause of action and a breach of fiduciary duty against AAM, both causes of action with respect to AAM's role in the 2015 MDRC Fulfillment Dispute. (*See* NYSCEF 76, Decision and Order [mot. seq. nos. 003 and 004] at 7-11.) In dismissing the breach of fiduciary duty as against AAM, the court held that Hindlin failed to state a duty independent and beyond the scope of the Management Agreement. (*See id.* at 11.) In dismissing the negligence claim as against AAM, the court held that there was no independent legal duty arising from AAM's act of trying to resolve the objection to the 2015 Notice in order to maintain a tort claim. (*Id.* at 9-10.) Moreover, in dismissing the negligence claim as premised on allegations of a conflict of interest, the court found that Hindlin was aware of AAM's dual representation (evidenced by the Waiver), the Management Agreement specifically provides that AAM's services were not exclusive to Hindlin, and Hindlin nor his counsel at the time objected to AAM's handling of the Initial Term Fulfillment despite their knowledge of AAM's dual representation. (*See id.* at 10.) Here, collateral estoppel bars

Hindlin from asserting a faithless servant defense that would require relitigating the issue of whether AAM breached any fiduciary duties to Hindlin. The court held in the Prescription Action that "it cannot be said that any legal duty arising from the AAM Defendants' act of trying to resolve the objection to [2015 MDRC Fulfillment Dispute] was an independent duty springing from circumstances extraneous to, and not constituting elements of the Management Agreement." (*Id.* at 10.) The decisions were affirmed by the First Department and Hindlin did not move for leave to amend its complaint to reallege, if any, a duty independent from the Management Agreement to sustain a tort claim.

Thus, at this juncture, the determination of the faithless servant defense would necessarily require reopening the issue of whether AAM breached a fiduciary duty to Hindlin when AAM assumed responsibility over the 2015 MDRC Fulfillment Dispute.

The same reasoning applies to AAM's alleged failure to advise and consult with Hindlin regarding the inclusion of the MDRC clauses in the 2014 Co-Pub Agreement.

With regard to the Catalog Sale, Hindlin asserts that AAM/Beaven's actions constitute a separate violation of the faithless servant doctrine in spite of the Waiver. However, there must be a fiduciary relationship between Hindlin and AAM for the doctrine of faithless servant to apply, and Hindlin has failed to show that a fiduciary relationship existed between them. (*See Schulhof v Jacobs*, 157 AD3d 647, 648 [1st Dept 2018].) In fact, Hindlin admits, in a number of filings, that he terminated his agreement with AAM, effective June 9, 2017. (*See, e.g.,* NYSCEF 63, Answer ¶ 15.) The Catalog Sale occurred in June 2018. (NYSCEF 15, Asset Purchase and Sale Agreement.) Even if Hindlin demonstrated the existence of a fiduciary relationship

between him and AAM, he has failed to allege conduct in his answer that amounts to a breach of the duty of loyalty necessary to support the application of the faithless servant defense. (*See Bon Temps Agency Ltd v Greenfield*, 184 AD2d 280, 281 [1st Dept 1992] [finding that employee was disloyal and subject to disgorgement of commissions or salary when employee directly participated in competing business].) Finally, the court previously decided that "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." (NYSCEF 62, Decision and Order [mot. seq. no. 001] at 4.)

Turning now to the nine affirmative defenses affirmative defenses, specifically listed in the answer, the court finds that the doctrine of collateral estoppel also applies to first, third, fourth, fifth, and ninth affirmative defenses, which are all variations of a breach of fiduciary duty of loyalty. (*See* NYSCEF 59, Decision and Order [mot. seq. no. 003 and 004] at 8-11.) Hindlin's second affirmative defense, that AAM fails to state a claim, is also collaterally estopped. (NYSCEF 62, Decision and Order [mot. seq. no. 001] at 3 ["Here, AAM states a claim for breach of contract against Hindlin."].) The court agrees that the seventh affirmative defense, unclean hands, is moot as AAM does not seek an accounting or equitable relief. (*Fifth Line, LLC v Fitch*, 167 AD3d 847, 849 [2d Dept 2018] [citations omitted] ["Laches and unclean hands are equitable defenses not available in this action to recover damages"].)

"An estoppel defense may also be invoked where the failure to promptly assert a right has given rise to circumstances rendering it inequitable to permit the exercise of

that right." (*John Robert P. v Vito C*, 23 AD3d 659, 661 [2nd Dept 2005].) It is unclear how the defense of estoppel applies in this case as there are no allegations that AAM failed to timely bring this action. The sixth affirmative defense of estoppel is thus dismissed under CPLR 3211(b). The eighth defense, waiver, is likewise dismissed for failure to allege that AAM waived its claims against Hindlin. (*Byer v City of New York*, 50 AD2d 771, 771 [1st Dept 1975] ["A waiver is an intentional relinquishment [of a right]."].)

Partial Summary Judgment

The party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) Should the movant make a prima facie showing of entitlement to summary judgment, the burden shifts to the non-moving party to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action. (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986].) Denial of a summary judgment motion is appropriate where there is no genuine issue to be resolved at trial. (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974].) On a motion for a summary judgment, a court must view the evidence in the light most favorable to the party opposing summary judgment and draw all reasonable inferences in that party's favor. (*Flomenbaum v New York Univ.*, 71 AD3d 80, 91 [1st Dept 2009].)

All of Hindlin's arguments as to why there are issues of fact are rooted in the faithless servant defense, which for the foregoing reasons, is dismissed. Moreover, the court's prior decision held that AAM stated a claim for breach of contract against

Hindlin. (NYSCEF 41, Decision and Order [mot. seq. no. 001] at 2.) As Hindlin's faithless servant defense is dismissed, he has thus failed to raise a triable issue of fact to avoid summary judgment. (*People ex rel. Spitzer v Grasso*, 50 AD3d 535, 544 [1st Dept 2008] ["Pursuant to CPLR 3212(b) a court will grant a motion for summary judgment 'that there is no defense to the cause of action or that the cause of action or defense has no merit.'"] [citation omitted].)

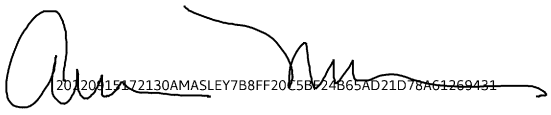
The court has considered all remaining arguments and finds them without merit.

Accordingly, it is

ORDERED that motion sequence number 002 is granted, and plaintiff is awarded judgment on liability as to its breach of contract claim; and it is further

ORDERED that plaintiff shall file a note of issue by September 30, 2022; and it is further

ORDERED that the parties shall appear for a pretrial conference on October 18 at 4 p.m.



9/15/2022
DATE

ANDREA MASLEY, J.S.C.

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