

Vigliano Assoc., Ltd. v Gaines

2024 NY Slip Op 32077(U)

June 12, 2024

Supreme Court, New York County

Docket Number: Index No. 654692/2022

Judge: Nancy M. Bannon

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

PRESENT: HON. NANCY M. BANNON PART 61M

Justice

-----X

VIGLIANO ASSOCIATES, LTD.,

Plaintiff,

- v -

INDEX NO. 654692/2022

MOTION DATE _____

MOTION SEQ. NO. 001 004

JOANNA GAINES, CHIP GAINES, C & J GAINES LIMITED
CO., MAGNOLIA BRANDS, LLC and UNITED TALENT
AGENCY, LLC,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 36, 38, 41, 43

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 25, 26, 27, 28, 29, 30, 31, 37, 39, 42, 44

were read on this motion to/for DISMISS.

I. INTRODUCTION

The plaintiff in this breach of contract action, a literary agency, seeks to recover commissions allegedly owed from advances and sales proceeds received by a former client and author, defendant Joanna Gaines (Joanna). The plaintiff asserts claims for breach of contract and tortious interference against Joanna, Joanna’s husband and business partner, defendant Chip Gaines (Chip), as well as against two of their companies, C&J Gaines Limited, Co. (C&J) and Magnolia Brands, LLC (Magnolia), and Joanna and Chip’s manager and agent, United Talent Agency, Inc. (UTA). The gravamen of the complaint is that the defendants improperly modified a five-book publishing agreement to eliminate one book and to substitute Chip as the author on another, and that UTA had procured the breach in order to deprive the plaintiff of commissions. Before the court are two pre-answer motions to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7) by defendants Joanna, Chip, C&J and Magnolia (Magnolia defendants) (MOT SEQ 001) and by defendant UTA (MOT SEQ 004). The plaintiff has since withdrawn the tortious interference claim as against Joanna and Chip. The plaintiff opposes dismissal of the remaining claims. Both motions are granted.

II. BACKGROUND

Defendants Joanna and Chip Gaines reside in Waco, Texas, where they own and operate real estate, retail, design and media businesses under the “Magnolia” trade name. From 2013 to 2018, the Gaineses hosted the popular “Fixer Upper” television show which ran on the HGTV network from 2013 to 2018. Joanna and Chip owned and operated their businesses under defendant C&J until they created defendant Magnolia, the successor-in-interest to C&J. UTA has been the manager and agent for defendant Magnolia since 2018. Westport Entertainment Associates, LLC was the prior management company.

In 2015 C&J entered into an agreement with non-party HarperCollins Publishers LLC (HarperCollins) for the publication of two books. HarperCollins and C&J later amended the 2015 agreement to include the publication of a third book. All three books were authored by Chip and Joanna and were highly successful. The plaintiff agency, headed by David Vigliano, was identified in that agreement as the Gaineses’ agent. The plaintiff does not take issue with the commissions it received on those books.

On September 13, 2017, C&J “f/s/o [for services of] Joanna Gaines” entered into a publishing agreement with HarperCollins which contemplated the publication of five books – two cookbooks and three other non-fiction books. The books are described on Page 1 of the contract as follows: Work #1: Magnolia Table; Work #2: Untitled Gaines Non-Fiction; Work #3: Untitled Gaines Cookbook; Work #4: Untitled Gaines Non-Fiction; Work #5: Untitled Gaines Non-Fiction. Work #1 and #3 were each to be “a (non-fiction) cookbook with photographs; Work #2, #4 and #5 were each to be a “work of non-fiction”, the “subject matter” and other details “to be mutually agreed upon by the parties.” Delivery dates for the manuscripts were November 15, 2017 (Work #1), October 1, 2018 (Work #2), October 1, 2019 (Work #3), July 1, 2020 (Work #4) and December 1, 2021 (Work #5).

The contract defines “Author” as meaning C&J and references the “Author” and “Publisher” as the parties or “both parties” throughout the agreement, without reference to the plaintiff. For example, Section 10 of Part 2 of the agreement contemplates possible amendments or modifications by providing that “[n]o waiver or modification of any provision of this agreement will be valid unless in writing and signed by *both parties*.” (emphasis supplied).

For each work, the agreement required C&J to deliver a manuscript that was “satisfactory” to HarperCollins, and HarperCollins was required to accept and publish only “satisfactory” manuscripts. Section 8 of Part 1 of the agreement gives HarperCollins the right to terminate Work #1, Work #2 or Work #5, if HarperCollins and C&J are unable to mutually agree upon the subject matter and contents of one or more of those works after making good faith efforts to do so. In turn, C&J was entitled to terminate the agreement if HarperCollins failed to publish any accepted work, failed to make payment when due, a work went out of print or HarperCollins filed for bankruptcy. The contract further provided that the plaintiff would receive a \$2.8 million advance for each of the two cookbooks and a \$2.25 million advance for each of the three non-fiction books, for a total of \$12.5 million, plus an additional \$250,000 bonus per book depending on sales and any ongoing royalties.

Section 4(k) of Part 2 of that agreement identifies David Vigliano, “in association with Westport Entertainment Associates, LLC,” as the “sole and exclusive agent” for C&J and that the agent was to receive 7.5% of all payments made to C&J “in perpetuity” and was to be paid directly by HarperCollins. C&J was to receive 80% of any payments due and the remaining 12.5% to be divided between C&J’s co-agent managers. No right to terminate or modify the agreement is granted to the plaintiff. Pursuant to the agreement, Joanna authored two books in quick succession, titled “Magnolia Table: A Collection of Recipes for Gathering” (Work #1) and “Magnolia Table, Volume 2: A Collection of Recipes for Gathering” (Work #3). The plaintiff does not dispute that these books were successful and that it was and continues to be properly paid commissions on these two books as per the 2017 agreement.

In the meantime, in 2018, as the Gaines’ various businesses expanded, Chip and Joanna wound down C&J and formed Magnolia. Magnolia terminated the plaintiff and Westport Entertainment and hired defendant UTA as both their management and talent agency.

On July 7, 2020, Magnolia and HarperCollins executed an amendment to the 2017 agreement to (1) reflect that Magnolia was the successor-in-interest to C&J, (2) name UTS as Magnolia’s manager and agent, (3) require only four books, (4) substitute Chip, who had previously authored a non-fiction book, as the author of the fourth book, and (5) reallocate the advance monies to reflect the deletion of one book. By its terms, Joanna was to author three volumes of “Magnolia Table” and Chip was to author a non-fiction book tentatively entitled

“Building a Network.” The amended agreement provided that the plaintiff was to continue to receive a 7.5% commission with respect to all payments due under the 2017 agreement.

Pursuant to the agreement, Joanne, through HarperCollins, published a third volume of Magnolia Table. In March 2021, Chip, through Harper Collins, published a book entitled “No Pain, No Gains; The Good Stuff Doesn’t Come Easy.” Like the first two, both of these books were also best sellers.

On February 28, 2022, after the final delivery date under the original contract had passed, Magnolia entered into a publishing contract with Harper Select, a division of HarperCollins, for Joanna to write another book, the manuscript being due on June 15, 2022. Later in 2022, Joanna delivered and Harper Select published this manuscript, a memoir titled “The Stories We Tell.”

The complaint, filed December 7, 2022, includes three causes of action (1) “breach of agreement – third-party beneficiary” as against the Magnolia defendants, (2) “tortious interference with the agreement” as against Joanna, Chip and UTA, and (3) “equitable accounting” as against all defendants. As stated, the essence of the plaintiff’s claims is that the Magnolia defendants breached the HarperCollins agreement by amending it to reduce the number of books and to add Chip as the author of one in place of Joanna, as these changes would lead to smaller sales and a thus smaller commission for the plaintiff. Even though Chip had previously authored a non-fiction book that was on the New York Times best-sellers list, the plaintiff, without support, opines that Joanna, not Chip, is the “driving force” of the success of the Magnolia brand and that “Chip’s “popularity and fame does not match Joanna’s.” The plaintiff maintains that UTA induced the Magnolia defendants to breach the agreement with HarperCollins for the sole purpose of depriving the plaintiff of commissions from all five books.

The instant dismissal motions ensued. At oral argument on the motions, the plaintiff withdrew the tortious interference cause of action except as against UTA.

In MOT SEQ 001, the Magnolia defendants seek dismissal of the complaint pursuant to CPLR 3211(a)(1) and (a)(7) arguing that there was no breach as the unambiguous terms of the publishing agreement (“Agreement”) plainly authorize the amendment which is the subject of the complaint. They also argue that the plaintiff lacks standing to sue since it was not a party to the

agreement nor a third-party beneficiary of the agreement but was only conditionally entitled to commissions. The Magnolia defendants further argue that the equitable accounting cause of action, which concerns damages, fails upon dismissal of the breach of contract and tortious interference claims, and because the plaintiff has an adequate remedy at law.

In MOT SEQ 004, defendant UTA seeks dismissal of the two claims asserted against it – tortious interference and equitable accounting. UTA argues that the plaintiff lacks standing to sue UTA as it is not a party to any contract and that, since the complaint fails to allege any breach by the parties to the contract, the plaintiff can allege no interference, tortious or otherwise. In any event, UTA argues, the plaintiff’s allegations that it schemed with the Magnolia defendants to avoid paying commissions to the plaintiff was speculative at best. UTA repeats the same arguments as Magnolia for dismissal of the equitable accounting claim.

III. DISCUSSION

A. Legal Standards

Dismissal under CPLR 3211(a)(1) is warranted where the documentary evidence submitted “resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.” Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431 (1st Dept. 2014). A particular paper will qualify as “documentary evidence” only if it satisfies the following criteria: (1) it is “unambiguous”; (2) it is of “undisputed authenticity”; and (3) its contents are “essentially undeniable.” See VXi Lux Holdco S.A.R.L. v SIC Holdings, LLC, 171 AD3d 189 (1st Dept. 2019). The defendants have met their burden by submitting the subject contracts.

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court’s role is “to determine whether [the] pleadings state a cause of action.” 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-52 (2002). To determine whether a cause of action is adequately stated, the court must “liberally construe” the pleading, accept the facts alleged in it as true, accord it “the benefit of every possible favorable inference, and determine only whether the facts, as alleged, fit within any cognizable legal theory. Id. at 152; see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 (2013); Simkin v Blank, 19 NY3d 46 (2012); Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994). Even liberally construing the complaint, it fails to state a cause of

action for breach of contract or tortious interference with a contract, particularly since the defendants produced the subject contracts in moving for dismissal. See McGuire v Sterling Doubleday Enterp., L.P., 19 AD3d 660 (2nd Dept. 2005) (defendant movant produced subject lease showing plaintiff to be no more than incidental beneficiary of its lease with city).

B. Breach of Contract – Third-Party Beneficiary

In an attempt to establish standing, the plaintiff premises all three causes of action on the assertion that it was either a party to or an intended beneficiary of the contract. For breach of contract, a plaintiff must sufficiently plead (1) the existence of a contract, (2) the plaintiff's performance under that contract; (3) the defendant's breach of that contract and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Hous. Corp., 79 AD3d 425, 426 (1st Dept. 2010). It cannot be seriously disputed that the plaintiff was not a party to the contract between C&J and HarperCollins, as the contract expressly identifies and defines the parties as C&J and HarperCollins, and they are the signatories on the contract. Since it was not a party, there could be no performance of the contract by the plaintiff. Nor was there a breach by the parties to the contract. Thus, there could be no damages suffered by the plaintiff. In the absence of privity, a plaintiff who claims third-party rights from a valid and enforceable contract "must plead facts sufficient, if proved, to establish that [it was an] intended beneficiar[y] of the contract." LaSalle Nat. Bank v Ernst & Young LLP, 285 AD2d 101, 108 (1st Dept. 2001). The plaintiff has failed here as well.

When evaluating whether a third-party beneficiary is incidental or intended, "courts should look at the overall purpose of the transaction." Internationale Nederlanden (U.S.) Cap. Corp. v. Bankers Tr. Co., 261 AD2d 117, 123 (1st Dept. 1999). "[A]n intention of the parties to a contract to benefit a third party, thereby conferring on the third party the right to enforce the contract, will be found (apart from situations where the third party is the only party that could recover for the breach) only 'when it is ... clear from the language of the contract that there was "an intent to permit enforcement by the third party.'" Comm. of the Dept. of Social Servs. of the City of N.Y. v New York-Presbyt. Hosp., 164 AD3d 93, 98 (1st Dept. 2018) (quoting Dormitory Auth. of the State of N.Y. v Samson Constr. Co., 30 NY3d 704, 710, [2018]) quoting Fourth Ocean Putnam Corp. v Interstate Wrecking Co., Inc. 6 NY2d 38, 45 [1985]); see Castorino v Unifast Bldg. Products Corp., 161 AD2d 421 (1st Dept. 1990)(contract between building owner and window contractor reflects no "discernible intent" to allow plaintiff, as representative of

estate of incidental beneficiary, to sue for failed window lock). A plaintiff who is merely an agent of another party is, at most, an incidental rather than an intended beneficiary of the agreement and an incidental beneficiary to a contract cannot assert a breach of contract claim. See Comm. of the Dept. of Social Servs. of the City of N.Y. v New York-Presbyt. Hosp., *supra*; LaSalle Nat. Bank v Ernst & Young LLP, *supra*; Prestige Foods, Inc. v What Sec. Co., L.P. 243 AD2d 281 (1st Dept. 1997); Mutuel Ticket Agents, Local 23293 v Roosevelt Raceway Assocs., 172 AD2d 595 (2nd Dept. 1991).

The overall purpose of the subject publishing agreement was for C&J to write and HarperCollins to publish several lifestyle books and for HarperCollins to compensate C&J from proceeds from the sale of the books. Since an business entity cannot write books and only two individuals, Chip and Joanna, comprised C&J, either one would have to author the books. The plaintiff's involvement as an agent to be paid a percentage of the proceeds generated by this writing and publishing, without any rights of enforcement under the agreement made plaintiff, at most, an incidental beneficiary. The plaintiff's arguments to the contrary are unavailing.

That plaintiff was to be paid directly HarperCollins pursuant to a contractual formula [Part 2, Section 4(k)] or that it was to receive certain notices required under the contract along with the Author's co-agents and attorney [Part 1, Section 5] did not create any rights in the plaintiff. As correctly argued by the defendants, the method of payment was merely for convenience and notifications are not contracts. As correctly observed by the defendants, nothing in the agreement even suggests that the parties intended to give the plaintiff the right to enforce the contract and the plaintiff points to none.

The plaintiff further maintains that "Chip was not a party to the agreement and cannot be added as a party without plaintiff's approval." While Chip was not a party to the agreement, C&J was a party and it, along with HarperCollins, determined that Chip, who with Joanna was a principal of both C&J, would author one of the books, and the parties, C&J and HarperCollins, amended the agreement accordingly. Indeed, on Page 1 of the contract, the parties referred to "Untitled Gaines" not "Untitled Joanna Gaines" for all but one of the works.¹ The contract on

¹ To the extent the contract also at one point identifies the parties as C&J "f/s/o Joanna Gaines", the contract subsequently and consistently identifies only C&J or "Gaines" as a party – which is Chip and/or Joanna. Moreover, it is undisputed that personal service contracts are strongly disfavored. Thus, "as a general rule equity will not enforce specific performance of contracts for personal services. Am. Broadcasting Cos., Inc. v Wolf, 6 AD2d 162, 174 (1st Dept. 1980).

which the plaintiff relies in this action expressly provides for a maximum of five books but also provides for the eventuality that less than five books would be written and published. Thus, as C&J was not guaranteed payment for five books, the plaintiff was not guaranteed any particular sum as a commission. Notably, the plaintiff seems to ignore the most obvious assertion that the parties tapped Chip to author one book so as to maximize, rather than minimize, sales and their own earnings (and thereby plaintiff's commission), as several books by one author alone in a short period of time may not produce the same result. Indeed, the plaintiff did not dispute at oral argument that it had been paid commissions on Chip's' book in addition to Joann's books.

"[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." Greenfield v Philles Records, Inc., 98 NY2d 562, 569 (2002); see Marin v Constitution Realty, LLC, 28 NY3d 666, 673 (2017); Chetrit v HPS Invest. Partners, LLC, 226 AD3d 423 (1st Dept. 2024). Further, "[a]ll parts of a contract must be read in harmony to determine its meaning." Bombay Realty Corp v. Magna Carta, Inc., 100 NY2d 124, 127 (2003). This is because it is a cardinal rule of contract construction that no provision should be ignored nor any agreement interpreted so as to render any provision meaningless. See Beal Savings Bank v Sommer, 8 NY3d 318 (2007); Tini v Alliancebernstein L.P., 108 AD3d 409 (1st Dept. 2013); Kolmar Americas, Inc. v Bioversal, Inc., 89 AD3d 493 (1st Dept. 2011). As correctly argued by the defendants, the plaintiff's interpretation of the contract to mean that amendments, modifications or termination of the agreement were barred would render meaningless the very detailed provisions in the agreement providing for amendments, modifications and termination.

Further, the plaintiff's interpretation of the contract would improperly entitle it to post-discharge commissions on agreements or modifications entered subsequent to the original, even though it had no role in negotiating those agreements or modifications, as was the case here. See Peter Lampack Agency, Inc v Grimes, 93 AD3d 430, 431 (1st Dept. 2012) (rejecting as unreasonable an interpretation of a literary agency contract that would permit the agent to recover commission on all future extensions of a book contract, even though the agent had no role in negotiating such extensions, because "[t]his would be an absurd result"); see also Roth and Assocs. East, Inc. v Kim, Sup Ct, NY County, March 28, 2022, Bannon, J., Index No. 653893/2019) (talent management agency not entitled to 15% commission on actor's earnings from television series role obtained after expiration of agent's contract term and extensions and

negotiated by newly hired talent manager). The plaintiff does not dispute that C&J was entitled to terminate their relationship at any time

C. Tortious Interference

The cause of action alleging that defendant UTA tortiously interfered with a contract is dismissed. It is well settled that “[a] claim of tortious interference requires proof of (1) the existence of a valid contract between plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procuring of the breach, and (4) damages.” Foster v Churchill, 87 NY2d 744, 749–50 (1996) (citation omitted); Macy's Inc. v Martha Stewart Living Omnimedia, Inc., 127 AD3d 48 (1st Dept. 2015); see also 330 Acquisition Co., LLC v Regency Sav. Bank, F.S.B., 293 AD2d 314, 315 (1st Dept. 2002). As previously stated, while there was a valid contract, the parties to that contract were C&J and HarperCollins, not the plaintiff. Moreover, there was no breach of that contract and thus there was no “intentional procuring of a breach” by UTA. See DashDevs LLC v Capital Markets Placement, Inc., 201 AD3d 525 (1st Dept. 2022). The allegations and inferences in the complaint regarding malicious or nefarious purposes behind Magnolia’s hiring of UTA as its manager and agent as the business expanded and their amending of the agreement are mere conjecture and self-serving speculation. Id.; Indeed, many of the allegations in the complaint are based only on “information and belief.” Id.; see also Facebook, Inc. v DLA Piper LLP (US), 134 AD3d 610 (1st Dept. 2015) *lv denied* 28 NY3d 903 (2016) [conclusory and factually insufficient allegations as to scienter require dismissal of fraud claim]; (Zelnik v Bidermann Indus. U.S.A., 242 AD2d 227, 228 [1st Dept. 1997]) [allegation based only upon information and belief, “without the slightest reference to the source of the information or the grounds for the belief” falls short of demonstrating *prima facie* breach or replevin claim]. Finally, to the extent the plaintiff is attempting in its complaint to allege a claim of tortious interference with prospective economic advantage, the court notes that it fails to allege facts describing any “conduct by the defendant [UTA] that allegedly interfered with the plaintiff’s prospects [that] either was undertaken for the sole purpose of harming the plaintiff or that such conduct was wrongful or improper independent of the interference allegedly caused thereby.” Jacobs v Continuum Health Partners, Inc., 7 AD3d 312, 313 (1st Dept. 2004); see Carvel Corp. v Noonan, 3 NY3d 182 (2004).

D. Accounting

In light of the dismissal of the first two causes of action of the complaint, the plaintiff is not entitled to any damages. Therefore, the third cause of action, seeking to compel an

accounting to assess the amount of commissions allegedly due, also fails, since “it is in fact a remedy pleaded as a cause of action.” Cambridge Capital Real Estate Invest., LLC v Archstone Enterp. LP, 137 AD3d 593, 596 (1st Dept. 2016). That is, “[t]he accounting is merely a method to determine the amount of money damages.” Cadwalader Wickersham & Taft v Spinale, 177 AD2d 315, 316 (1st Dept. 1991); see Consol. Edison Co. of New York, Inc. v East Coast Power & Gas, LLC, 224 AD3d 496 (1st Dept. 2024); Lex Tenants Corp. v Gramercy N. Assoc., 284 AD2d 278 (1st Dept. 2001). Moreover, this cause of action was improperly included in the first instance since an accounting is an equitable remedy - even if the plaintiff had sufficiently alleged and prevailed on the substantive causes of action, it would have had an adequate remedy at law. See Davis v Richmond Capital Group, LLC, 194 AD3d 516 (1st Dept. 2021); Unitel Telecard Distr. Corp. v Nunez, 90 AD3d 568 (1st Dept. 2011).

The plaintiff’s remaining contentions are unavailing.

IV. CONCLUSION

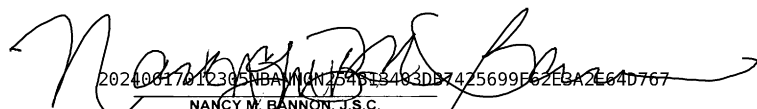
Accordingly, upon the foregoing papers and after oral argument, it is

ORDERED that the motion of defendants Joanna Gaines, Chip Gaines, C&J Gaines Limited, Co. and Magnolia Brands, LLC to dismiss the complaint as against them (MOT SEQ 001) is granted, and it is further

ORDERED that the motion of defendant United Talent Agency, Inc. to dismiss the complaint as against it (MOT SEQ 004) is granted, and it is further

ORDERED that the Clerk shall enter judgment dismissing the complaint in its entirety.

This constitutes the Decision and Order of the court.


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 NANCY M. BANNON, J.S.C.
 HON. NANCY M. BANNON

6/12/2024
 DATE

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	DENIED	<input type="checkbox"/>
			OTHER