

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

PRESENT: Hon. MICHAEL D. STALLMAN

PART 7

Justice

LLOYD STRAYHORN,

Plaintiff,

- v -

SIRIUS SATELLITE RADIO, INC.,

Defendant.

INDEX NO.

602277/06

MOTION DATE

11/16/06

MOTION SEQ. NO.

001

MOTION CAL. NO.

109

The following papers, numbered 1 to 7 were read on this motion to dismiss and cross motion for leave to amend the complaint

Notice of Motion— Affidavits — Exhibits 1

Notice of Cross Motion— Answering Affidavits — Exhibits A

Letter Briefs

FILED
 APR 06 2007
 NEW YORK
 COUNTY CLERK'S OFFICE

PAPERS NUMBERED	
1-2	
3-5	
6-7	

Cross-Motion: X Yes No

In this action, plaintiff alleges that he entered into a letter agreement with defendant to write, voice, and record a series of one minute vignettes, and that defendant would split equally with plaintiff the net advertising revenue from the sale of commercial advertising time with respect to the vignettes. However, plaintiff alleges that defendant failed and refused to make any commercially reasonable efforts to sell, or arrange the sale of, commercial advertising. Plaintiff also claims that he actually wrote and recorded two minute vignettes, instead of one minute vignettes. The complaint sets forth causes of action for breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment, quantum meruit, and fraud.

As defendant indicates, the second cause of action, for breach of the covenant of good faith and fair dealing, is dismissed as duplicative of the first cause of action. See e.g. Pier 59 Studios L.P. v. Chelsea Piers L.P., 27 AD3d 217 (1st Dept 2006). The second and third causes of action, for unjust enrichment and quantum meruit, are dismissed. "[T]he existence of a valid contract governing the subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter." EBCI, Inc v Goldman, Sachs & Co., 5 NY3d 11, 23 (2005); Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 388 (1987).

Plaintiff's arguments are unavailing. There is no bona fide dispute as to the enforceability of the letter agreement, such that plaintiff may be permitted to plead in the alternative. Plaintiff does not seek to void the letter agreement. Plaintiff is not entitled to seek recovery, under a quasi contract theory, for the additional minute of the vignettes that he recorded, because plaintiff's agreement with defendant was to produce one minute vignettes. Otherwise, under the guise of conferring a benefit, plaintiff would be allowed to recover for breach of the agreement. Plaintiff has not shown that the cases allowing quantum meruit recovery based on extra work are applicable here. See Avly Construction v Antiquarium, Ltd., 269 AD2d 445 (1st Dept 1999); Harder v Reedy, 217 AD2d 833 (3d Dept 1995). The work product that plaintiff produced is not like construction work. Nothing in the

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE DATED: J.S.C.

(Continued . . .)

Complaint indicates that the extra minute of the vignettes is something that is capable of being separated from the first minute, such that the extra minute might be considered as extra work.

Finally, the fifth cause of action, for fraud, is dismissed. "A fraud claim is not sufficiently stated where it alleges that a defendant did not intend to perform a contract with a plaintiff when he made it..." Gordon v Dino De Laurentis Corp., 141 AD2d 435, 436 (1st Dept 1988). The alleged fraudulent statements of Elana Sokco are not collateral or extraneous to the contract. Coppola v Applied Elec. Corp., 288 AD2d 41, 42 (1st Dept 2001). Thus, this case is distinguishable from Graubard Mollen Dannett & Horowitz v Moskovitz, 86 NY2d 112 (1995).

Plaintiff's cross motion for leave to amend the complaint is denied. The additional allegations of the proposed amended complaint do not remedy the legal insufficiency or duplicative nature of the dismissed causes of action.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is granted, and the second through fifth causes of action of the complaint are dismissed; and it is further

ORDERED that plaintiff's cross motion to amend the complaint is denied. The parties are directed to appear at a preliminary conference in IAS Part 7, 111 Centre St Rm 949, on May 10, 2007, at 10:30 am. Copies to counsel.

Dated: 3/29/07



J.S.C.

HON. MICHAEL D. STALLMAN

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Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE