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

PRESENT: **HON. MICHAEL D. STALLMAN** PART 7

Index Number : 602283/2007

PAYNE, CHRISETTE MICHELLE

vs

ELLISON, DOUGLAS

Sequence Number : 001

DISMISS COMPLAINT

INDEX NO. _____

MOTION DATE 10/24/07

MOTION SEQ. NO. _____

MOTION CAL. NO. 94

The following papers, numbered 1 to 5 were read on this motion to/for dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A	1-3
Answering Affidavits — Exhibits A-J	4
Replying Affidavits — Exhibits 1-9	5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion **"is determined in accordance with the annexed memorandum decision and order."**

FILED

JAN 28 2008

NEW YORK
COUNTY CLERK'S OFFICE

MICHAEL D. STALLMAN J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 1/14/08

_____ J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

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CHRISETTE MICHELE PAYNE,

Plaintiff,

Index No. **602283/07**

- against -

DOUGLAS ELLISON and FOUR KINGS PRODUCTIONS, INC.,

Decision and Order

Defendants.

----------X

HON. MICHAEL D. STALLMAN, J.:

Plaintiff, a R&B singer, claims that her manager breached their management and recording agreements by taking a greater percentage of advances she received in November 2005 and January 2006 than she believes defendants are entitled to receive. Her manager counterclaims for breach of their agreements. Plaintiff moves to dismiss her manager's affirmative defenses and counterclaims.

BACKGROUND

Plaintiff Chrisette Michele Payne, a R&B singer-songwriter, entered into an exclusive artist management agreement and an exclusive recording agreement as of January 31, 2005 with defendant Four Kings Productions, Inc. (FKP) d/b/a Four Kings Management. See Long Affirm., Exs 1, 2. Defendant Ellison is the undisputed sole shareholder and owner of FKP.

FKP allegedly procured recording and co-publishing deals for plaintiff with Island DefJam Music Group (IDJ) and EMI April Music, and an agreement with SESAC, all of which resulted in six figure advances to plaintiff from SESAC, EMI and IDJ. The parties disagree over the percentage of the advances defendants were allowed to keep, and whether defendants were entitled to recoup certain expenses before the advances were split.

On the one hand, defendants contend that they were entitled to 50% of the SESAC and EMI advances, because the recording agreement provides that plaintiff would receive only 50% of the net earnings. Plaintiff argued that defendants were entitled to keep only 20% of the SESAC advance because the management agreement states that FKP's management fee would be 20% of the artist's gross earnings, including public performances, and the SESAC agreement concerns revenue generated from public performances of the artist's work. Plaintiff argued that defendants were entitled to keep only 25% of the EMI advance, because plaintiff and defendants originally owned a 50% interest in their works, and plaintiff and defendants had transferred half of their respective interests to EMI.

Defendants claim that, in 2004, they had fronted plaintiff $21,239.48 for expenses before the parties' agreements were executed, and $82,551.34 in expenses thereafter. Defendants allegedly deducted these expenses from the advances for plaintiff.

By letter dated June 26, 2007, plaintiff's counsel informed FKP that plaintiff was terminating the management and recording agreements, due to FKP's alleged breaches of the parties' agreements. According to defendants, plaintiff then directed her booking agency to issue payments for her public appearances and performances directly to her, and not to defendants.

Plaintiff commenced this action on July 11, 2007. Plaintiff asserts 17 causes of action against defendants, sounding in breaches of the management and recording agreements, embezzlement, fraudulent inducement, breach of fiduciary duty, unjust enrichment, conversion, harassment, and negligent misrepresentation.

Defendants' answer raised six affirmative defenses and five counterclaims. While plaintiff's motion to dismiss was pending, defendants amended their answer, raising five affirmative defenses

(several defenses were combined into a single defense) and seventeen counterclaims. As indicated in the reply papers, plaintiff has elected to direct the motion to dismiss at the amended answer. See Sage Realty Corp. v Proskauer Rose L.L.P., 251 A.D.2d 35, 38 (1st Dept 1998).

ANALYSIS

"It is well settled that '[o]n a motion to dismiss a defense pursuant to CPLR 3211(b), all of defendant's allegations must be deemed to be true and defendant is entitled to all reasonable inferences to be drawn from the submitted proof.'" Capital Tel. Co. v Motorola Communications and Elecs., 208 AD2d 1150, 1150 (3d Dept 1994).

Defendants' Affirmative Defenses

Defendants asserted five affirmative defenses: failure to state a cause of action, lack of a fiduciary duty, payment in full, unclean hands, and lack of notice of breach.

1st Affirmative Defense: Failure to State a Cause of Action

The failure to state a cause of action is not an affirmative defense. Rather, it is an ordinary defense. See e.g. Bentivegna v Meenan Oil Co., 126 AD2d 506 (2d Dept 1987) (holding that the defense must be raised in a 3211 motion, not interposed in an answer). The fact that this defense was pleaded unnecessarily does not mandate its dismissal. Because the legal sufficiency of the complaint is not at issue on this motion, the Court does not address the parties' lengthy arguments and counter-arguments on the merits of plaintiff's causes of action.

2nd Affirmative Defense: Lack of Fiduciary Duty

Defendants deny that they owed plaintiff a fiduciary duty, and allege that they exercised reasonable care by forwarding all monies to plaintiff in accordance with the parties' agreements. Amended Answer ¶¶ 84-86.

As plaintiff indicates, the documentary evidence annexed to defendants' answer conclusively establishes that FKP owed plaintiff a fiduciary duty, because it acted as plaintiff's agent. See ABKO Music, Inc. v Harrisongs Music, Ltd., 722 F2d 988, 994 (2d Cir 1983). "An agency is a fiduciary relationship which results from a manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and the consent by the other to act." Meese v Miller 79 AD2d 237, 241 (4th Dept 1981).

Here, paragraph 1(a) of the management agreement between plaintiff and FKP expressly states, in pertinent part, "Artist hereby engages Manager as Artist's sole and exclusive personal representative and manager . . ." See Long Affirm., Ex 1; Amended Answer, Ex A. Paragraph 2 states, in relevant part, "Artist hereby authorizes and empowers Manager to and the Manager agrees . . . .: (a) to represent, advise and assist Artist in fixing the terms governing all manner of disposition, use, employment or exploitation of Artist's talent and the products thereof . . . ." Id. at 2. Pursuant to paragraph 14 (a), "until Artist has retained a business manager, Artists's gross earnings . . . above shall be paid directly to Manager by all persons, firms or corporations and Manager may withhold Manager's compensation therefrom and may reimburse itself therefrom for all approved expenditures . . . ." Id. at 5. It is undisputed that plaintiff nevered hired a business manager. In sum, not only did FKP represent plaintiff in the terms of her employment, but also held money for plaintiff. Thus, the terms of the management agreement created a fiduciary relationship between FKP and plaintiff, and FKP owes a fiduciary duty to plaintiff.

Defendants apparently claim that plaintiff's cause of action for breach of fiduciary duty are duplicative of plaintiff's cause of action for breach of contract. See Amended Answer ¶ 83 (v). To the extent that defendants' denial of a fiduciary duty is based on this belief, defendants' contention

is without merit. "[W]hile causes of action for breach of fiduciary duty that merely restate contract claims must be dismissed, conduct amounting to breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract which is nonetheless independent of such contract." Bullmore v Ernst & Young Cayman Islands 2007 WL 4166462, *2, 2007 NY App Div LEXIS 12075 (1st Dept 2007)(internal citation omitted).

Thus, plaintiff's motion to dismiss this affirmative defense is granted to the extent that defendants' denial of a fiduciary duty is stricken. Defendants also plead, as an affirmative defense, that their conduct was, in all aspects, proper. This raises factual questions which go beyond the scope of plaintiff's motion to dismiss.

3rd Affirmative Defense: Payment in Full

Plaintiff contends that, because defendants admitted in their answer that they took 50% of the advances, they cannot assert that plaintiff was paid in full. However, this argument begs the question of whether defendants were entitled to the percentage of the advances which they admittedly kept. This question raises issues of contract interpretation, which cannot be conclusively resolved on this motion to dismiss.

4th Affirmative Defense: Unclean Hands

Plaintiff contends that defendants have not joined necessary parties to this defense, inasmuch as defendants allege that plaintiff acted with unclean hands by allegedly hiring her mother as her manager and by negotiating directly with EMI.

The "failure to join necessary parties" may be raised as a ground for dismissing "one or more causes of action," not as a ground for dismissing an affirmative defense. Because the defense of unclean hands is addressed to plaintiff's conduct, the Court does not see how adjudication of that

defense will inequitably affect the rights of others. Given that plaintiff seeks the equitable remedy of a permanent injunction against defendants, defendants may raise unclean hands as an affirmative defense. The defense of unclean hands is not required to be pled with particularity. Therefore, plaintiff's motion is denied as to this defense.

5th Affirmative Defense: No Notice of Breach

In the fifth amended affirmative defense, defendants alleged that plaintiff failed to provide defendants with notice of their alleged breach of the management agreement, an alleged condition precedent to suit. Plaintiff has not shown that this defense must be dismissed as a matter of law. Plaintiff contends that Seldmayr and Associates, P.C. provided notice on plaintiff's behalf by a letter outlining defendants' various breaches of the management agreement. See Amended Answer, Ex E. Defendants admit receipt of the letter, but contend that notice is deficient because the letter did not purport to assert that defendant had breached agreements raised in the letter.

Having reviewed the letter, the Court agrees with plaintiff that it constitutes documentary evidence that conclusively establishes that defendants received notice of their alleged breaches contained in the letter. The letter demands FKP to immediately pay plaintiff monies that it claimed FKP improperly retained, and the letter cites the provisions of the agreements under which plaintiff claimed entitled to those monies. The letter does not use the word "breach," but the letter clearly conveys the allegation that defendants violated the agreements: "in no event does the [management agreement] grant [FKP] the right to deduct any of the [monies] . . . for services of its attorney which were incurred in connection with a music publishing agreement. . . ."; ". . . in accordance with paragraph 4 of Exhibit A thereto, [FKP] would be entitled to receive only fifty percent (50%) of the so-called Publisher's share of the performance income." See Amended Answer, Ex E.

However, defendants maintain that plaintiff waived any notice of breach by continuing to perform under the parties' agreement. Because the validity of this defense is based on waiver, and because waiver is generally a factual question, the Court denies plaintiff's motion to dismiss as to this affirmative defense.

Defendants' Counterclaims

Defendants assert 17 counterclaims. As to several counterclaims (first, seventh, eighth, twelfth, and fourteenth counterclaims), plaintiff argues that they should be dismissed because the counterclaims are based on events which allegedly occurred after plaintiff terminated the management and recording agreements. As to other counterclaims (second, fourth, fifth, sixth, and eleventh counterclaims), plaintiff argues that they should be dismissed because defendants would have to rely on inadmissible hearsay evidence to prevail. For some counterclaims, these general arguments were the only arguments that plaintiff raised for dismissal.

These general arguments are not valid grounds for dismissal of the counterclaims. The validity of plaintiff's termination of the parties' agreements is at issue, and cannot be decided as a matter of law on this motion. Whether defendants' evidence is admissible is not among the grounds for dismissal on a motion to dismiss.

Plaintiff's remaining arguments for dismissal are decided as follows:

1st counterclaim: Breach of Fiduciary Duty

Plaintiff contends that this counterclaim should be dismissed because she did not owe a fiduciary duty to defendants. However, by virtue of paragraph 14 of the management agreement, plaintiff "shall be deemed to hold in trust for Manager that portion of [plaintiff's] gross earnings which equals Managers compensation hereunder" for live performances. In reply, plaintiff states

only the duty she owed to defendants ended when the management agreement was terminated on June 26, 2007. Reply Mem. at 9. The first counterclaim does not allege when the live performances took place. Therefore, plaintiff has not demonstrated that first counterclaim is without merit as a matter of law.

2nd, 3rd, 4th, and 5th counterclaims: Breach of an oral agreement, unjust enrichment, breach of a joint venture agreement

The second, third, fourth and fifth counterclaims seek reimbursement of expenses that defendants paid on plaintiff's behalf in 2004, pursuant to an oral management agreement with plaintiff in 2003, upon the same terms as the written management agreement in January 2005. As plaintiff indicates, the Statute of Frauds bars the alleged oral agreement, because plaintiff would have agreed in 2003 to reimburse defendants for expenses that would have occurred more than a year later. General Obligations Law § 5-701 (a) (1); Sheehy v Clifford Chance Rogers & Wells LLP, 3 NY3d 554, 560 (2004). Although defendants invoke the exception of part performance, "[t]he exception . . . for part performance applies to General Obligations Law § 5-703, which deals with real estate transactions, but it has not been extended to General Obligations Law § 5-701." Stephen Pevner, Inc. v Ensler, 309 AD2d 722, 722 (1st Dept 2003). The Statute of Frauds also bars recovery under defendants' alternative theory of promissory estoppel. D'Esposito v Gusrae, Kaplan & Bruno PLLC, 44 AD3d 512, 513 (1st Dept 2007). Therefore, the second and fifth counterclaims are dismissed.

Although "the Statute of Frauds is not an automatic bar to a cause of action for unjust enrichment" (RTC Props. v Bio Resources, 295 AD2 285, 286 [1st Dept 2002]), defendants are simply recasting the allegations as a cause of action for unjust enrichment to circumvent the Statute

of Frauds. See J.E. Capital v Karp Family Assocs., 285 AD2d 361, 362 (1st Dept 2001); American-European Art Assoc. v Trend Galleries, 227 AD2d 170, 171 (1st Dept 1996). Therefore, the third counterclaim is dismissed.

As defendants indicate, "the Statute of Frauds is no bar to a joint venture agreement." Cobblah v Katende, 275 AD2d 637, 639 (1st Dept 2000). However, the alleged joint venture is based on the terms of the parties' management agreement, which does not provide that the parties were to share in losses of their alleged joint venture. Section 3 of the management agreement states, "Artist shall be solely responsible for payment of all fees and expenses incurred by Artist. . . ." See Complaint, Ex 1. Thus, defendants' attempt to characterize the alleged oral agreement with plaintiff in 2003 as a joint venture fails to escape the Statute of Frauds. Nemelka v Questor Mgt. Co., LLC 40 AD3d 505, 506 (1st Dept 2007); Andrews v Cerberus Partners, 271 AD2d 348 (1st Dept 2000). Therefore, the fourth counterclaim is dismissed.

9th counterclaim: Breach of the Management Agreement

The ninth counterclaim alleges that, in breach of paragraph 14 of the management agreement, plaintiff did not send defendants written accounting statements. Plaintiff claims that such a duty only arises when plaintiff has a business manager or accountant. However, paragraph 14 also states, "Artist shall retain an accountant or business manager, after consultation with Manager . . ." Whether plaintiff hired or did not hire an accountant or business manager, the allegations are sufficient to state a breach of paragraph 14 of the management agreement under either scenario. The motion is denied as to this counterclaim.

10th Counterclaim: Breach of the Management Agreement

The tenth counterclaim alleges that plaintiff breached paragraph 3 (g) of the management

agreement because, over the advice of her manager, she included a bonus track (i.e., an additional song) on her album.

Plaintiff argues that this counterclaim must be dismissed because the damages are speculative. Defendant argues that he suffered damages because plaintiff's decision to include an extra song damaged his reputation as a manager, in that he looked either incompetent or had no influence over plaintiff. Defendant also alleges that the extra song could have been used to fulfill recording requirements for 6 more albums, and that he will be forced to incur costs on producing another song.

It cannot be determined as a matter of law that defendants' damages are too speculative. Defendants have indicated a specific measure of damages as a result of plaintiff's decision to include a bonus track. Whether this is the appropriate measure of damages, and whether defendants can show that such damages are not speculative, cannot be determined on a motion to dismiss. Therefore, plaintiff's motion to dismiss is denied, without prejudice to raising this argument on a motion for summary judgment.

11th Counterclaim: Breach of the Management Agreement

The eleventh counterclaim alleges that plaintiff breached paragraph 7 of the management agreement by hiring her mother as her manager. Contrary to plaintiff's argument, her mother is not a necessary party to this counterclaim. Therefore, plaintiff's motion is denied as to this counterclaim.

13th Counterclaim

The thirteenth counterclaim seeks to recover the total expenses that defendants paid on plaintiff's behalf under a theory of unjust enrichment. As discussed above, the Statute of Frauds bars

recovery of $21,329.48 of those expenses, which were incurred in 2004. The management agreement governs whether defendants are entitled to reimbursement of the remaining $82,551.34 in expenses. "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 389 (1987). Therefore, plaintiff's motion is denied as to this counterclaim.

14th counterclaim: conversion

The fourteenth counterclaim alleges conversion, in that plaintiff allegedly has not paid defendants' share of the monies that plaintiff received, which were held in trust pursuant to the management agreement. Plaintiff correctly points out that "[a] conversion claim cannot be based only on the allegation that a defendant received money and failed to remit payment to the plaintiff." Interstate Adjusters v First Fidelity Bank, N.A., 251 AD2d 232, 234 (1st Dept 1998). Nevertheless,

> "Money may be the subject of conversion if it is specifically identifiable and there is an obligation to return it or treat it in a particular manner. When funds are provided for a particular purpose, the use of those funds for an unauthorized purpose constitutes conversion. Further, where possession of the property is initially lawful, conversion occurs when there is a refusal to return the property after a demand."

Hoffman v Unterberg, 9 AD3d 386, 388 (2d Dept 2004). Here, paragraph 14 of the management agreement requires plaintiff to keep defendants' management fees in trust, thus obliging plaintiff to treat the monies in a particular manner. Although plaintiff argues that recovery should be limited to transactions that occurred in 2004, or after termination of the management agreement, the transactions covered by this theory must be explored in discovery. Therefore, the motion to dismiss is denied as to this counterclaim.

16th & 17th counterclaims: specific performance

The sixteenth and seventeenth amended counterclaims seek specific performance of the management and recording agreements. Although the management agreement concerns only money, defendants contend that money damages will be too difficult to calculate. Defendants claim that plaintiff's services are unique. Plaintiffs argue that defendants are not entitled to equitable relief because defendants themselves have allegedly breached the management agreement.

"[A]n individual cannot be compelled to perform a contract for personal services, and this court cannot force [plaintiff] back to the studio to record . . ." Zomba Recording LLC v Williams, 15 Misc 3d 1118(A) (Sup Ct, NY County 2007), citing American Broadcasting Cos., Inc. v Wolf, 52 NY2d 394, 401-02 (1981). Therefore, the sixteenth and seventeenth counterclaims are dismissed.

Under certain circumstances, " where an employee refuses to render services to an employer in violation of an existing contract, and the services are unique or extraordinary, an injunction may issue to prevent the employee from furnishing those services to another person for the duration of the contract." American Broadcasting Cos., Inc., 52 NY2d at 401-02. The amended answer does not seek such injunctive relief.

Accordingly, it is hereby

ORDERED that plaintiff's motion to dismiss is granted to the extent that so much of the second affirmative defense that denies that FKP owed plaintiff a fiduciary duty is stricken, and defendants' fifth affirmative defense and defendants' second, third, fourth, fifth, thirteenth, sixteenth, and seventeenth counterclaims are dismissed; and it is further

ORDERED that plaintiff is directed to reply to the counterclaims within 10 days of service of a copy of this order with notice of entry.

Dated: 1/14/08
New York, New York

ENTER:

J.S.C.

MICHAEL D. STALLMAN
J.S.C.

FILED

JAN 28 2008

NEW YORK
COUNTY CLERK'S OFFICE