E1 Entertainment U.S. LP v Real Talk Entertainment, Inc.
2013 NY Slip Op 33259(U)
December 23, 2013
Supreme Court, New York County
Docket Number: 650135/09
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA JAFFE J.S.C. Justice PART 12

Index Number : 650135/2009
E1 ENTERTAINMENT U.S. LP.
vs
REAL TALK ENTERTAINMENT INC.
Sequence Number : 006
PARTIAL SUMMARY JUDGEMENT

INDEX NO. 650135/09
MOTION DATE
MOTION SEQ. NO. 006

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

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

Dated: 12/23/13

_____, J.S.C.
BARBARA JAFFE
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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E1 ENTERTAINMENT U.S. LP,

Plaintiff,

- against -

REAL TALK ENTERTAINMENT, INC., and
DERRICK JOHNSON,

Defendants.

----------x

Index No. 650135/09

Mot. seq. nos. 006, 007

DECISION AND ORDER

BARBARA JAFFE, J.:

For plaintiff:
Daniel J. Aaron, Esq.
Daniel J. Aaron, P.C.
90 Park Ave., Ste. 701
New York, NY 10016
212-684-4466

For defendants:
Michael A. Eisenberg, Esq.
Marc A. Lavaia, Esq.
Robinson Brog *et al.*
875 Third Ave., 9th Fl.
New York, NY 10022
212-603-6300

Plaintiff moves pursuant to CPLR 3212 for an order granting it partial summary judgment on its contract claim against defendant Real Talk Entertainment, Inc. (Real Talk) in the amount of $530,056.31, and for an order holding defendant Derrick Johnson personally liable for fraud. Defendants oppose. (Mot. seq. no. 006). Defendants move for summary judgment dismissing plaintiff's fraud claims, and deny that Johnson may be held personally liable. Plaintiff opposes. (Mot. seq. no. 007).

I. UNDISPUTED FACTS

Plaintiff is a national distributor of music and video products. (NYSCEF 92). Real Talk, a California corporation, is a music label, and Johnson is its principal and chief operating officer (CEO). (NYSCEF 106, 167).

On or about December 3, 2005, plaintiff's predecessor, Koch Entertainment Distribution, LLC, and Real Talk entered into a distribution agreement. Johnson signed it as the CEO of Real Talk Entertainment. Pursuant to the agreement, Real Talk agreed to provide music and video products exclusively to plaintiff for distribution and sale and to pay plaintiff immediately any negative monthly balances. (NYSCEF 93). Real Talk also agreed to appoint a new distributor to assume Real Talk's responsibilities upon termination or expiration of the agreement. (NYSCEF 93).

In April 2006, Johnson incorporated Real Talk. (NYSCEF 167). On May 4, 2006, plaintiff and Johnson, signing on behalf of Real Talk Entertainment, Inc., agreed to amend the 2005 agreement by reducing plaintiff's entitlement to distribution fees by three percent, effective retroactively. (NYSCEF 121).

By email dated June 29, 2006, Johnson asked plaintiff to adjust Real Talk's name in its records from Real Talk Entertainment to Real Talk Ent., Inc. (NYSCEF 180). Plaintiff complied and, beginning with a check dated July 1, 2006, wrote checks to that name. (NYSCEF 171).

By agreement dated December 12, 2007, plaintiff and Johnson, signing on behalf of Real Talk Entertainment, Inc., again amended their agreement by, among other things, altering the distribution fees and providing that in the event of a conflict between the terms of the 2006 and 2007 amendments, the terms of the 2007 amendment govern. (NYSCEF 121).

In or around May 2008, plaintiff deposited funds generated from certain album sales into a reserve fund to offset liabilities resulting from a copyright infringement claim concerning a Real Talk record album. (NYSCEF 146). In early July 2008, Johnson requested early payment of reserves due to him in August, along with a delay of any deductions from his upcoming check

resulting from negative sales accruing in June 2008. By email dated July 15, plaintiff declined Johnson's request. (NYSCEF 122). Later that day, Johnson surreptitiously recorded a telephone conversation between him and plaintiff's president of entertainment Michael Rosenberg, during which Johnson asked that Rosenberg reconsider his request for an early payment of the reserves. Rosenberg declined but indicated that he would liquidate the reserves after August 1 as an accommodation given Real Talk's success and his desire to maintain their relationship. (NYSCEF 123).

Rosenberg memorialized their conversation in an email to Johnson stating that the check due on August 1 would include a liquidation of reserves due in August, and that negative sales in July would not be deducted from that check. He also indicated that he would accommodate Johnson if he required an early payment of reserves due in September. (NYSCEF 124).

By email dated July 18, Rosenberg asked Johnson when he would be releasing more new albums to offset the negative sales generated by the older releases, and Johnson replied that he would do so soon, and that sales would be positive by September. He also told Rosenberg that he had a deal with one multi-platinum artist and a possible deal with another if he could pay him. Johnson thus sought additional confirmation that plaintiff would pay him early. Rosenberg confirmed based on the new deals referenced by Johnson. (NYSCEF 125).

Plaintiff issued a check dated August 1, 2008 to Real Talk Ent., Inc., in the amount of $184,404.85. (NYSCEF 126).

On September 17, 2008, Johnson withdrew $1.9 million from a Real Talk account. (NYSCEF 114). When another copyright claim arose in late September involving another one of defendants' records, Rosenberg could not reach Johnson. (NYSCEF 151).

In early October of 2008, plaintiff received an undated letter from Johnson that Real Talk was terminating its relationship with plaintiff under the distribution agreement. (NYSCEF 95). Subsequently, by email dated October 10, 2008, plaintiff demanded payment from Johnson of a negative balance of $148,176. (NYSCEF 96). By email dated October 16, Johnson sought supporting documentation. (NYSCEF 175). On October 24, plaintiff emailed Johnson supporting documentation of the balance, including income summaries and approximately 150 pages of charges. (NYSCEF 181).

On November 4, Johnson deposited $1,903,996.19 into a bank account in the name of Real Talk Ent., LLC. (NYSCEF 174). On November 20, $200,000 was withdrawn from the account, and between December 10 and 12 approximately $1.7 million was withdrawn, leaving a balance of $34.32 at the end of the year. (NYSCEF 174, 185). Defendants did not appoint a new distributor upon the termination of the agreement, and plaintiff thus continued to receive returns of defendants' products and the negative balance grew. According to plaintiff's records, defendants' negative balance incurred under the agreement is $530,056.31. (NYSCEF 97). The alleged deals with the two artists referenced by Johnson never came to fruition, and no evidence of them was ever disclosed by defendants. (NYSCEF 143).

II. PERTINENT PROCEDURAL BACKGROUND

On or about March 12, 2009, plaintiff commenced the instant action. In its amended complaint, it asserts causes of action for breach of contract against Real Talk for failing to pay the negative balance and for failing to appoint a distributor upon the termination of the agreement (count one), fraud against Real Talk for Johnson's false representations of the reasons for Real Talk's need for advance payments (count two), and fraud against Johnson for making the false

representations and using Real Talk's corporate status to perpetrate a wrong against it (counts three and four). (NYSCEF 9).

During discovery, defendants produced Real Talk's bank records which reflect that throughout 2008, funds were used for expenses relating to lawn and housekeeping services, meals, and cable bills. (NYSCEF 111-114). Approximately 26 checks dated August 28, 2008 through December 12, 2008 paid for production services, artwork, studio costs, and artist fees. (NYSCEF 127, 128).

At an examination before trial (EBT) held on May 8, 2012, Johnson testified that he sometimes signed contracts as "Derrick Johnson, AKA 'Sac', DBA Real Talk Ent. Inc.," that he used one email account for his personal and business affairs, and that he operated Real Talk in his home. He could not recall creating bylaws, appointing directors, keeping bank records, preparing balance sheets or cash flow statements, whether he responded to plaintiff's demand for payment, or if he left a forwarding address for plaintiff to contact him following termination of the agreement. Johnson also admitted taping telephone calls with plaintiff and adjusting the volume of the Rosenberg recording in the studio before producing it in discovery and does not remember where he put the original recording. He maintained that he insisted on the advance payment because he deserved it, and denied Rosenberg's assertion that he said he needed it to pay any new artists. Although he admitted that there was no deal with one of the artists, he asserted that he "may have" had an album with the other but had thrown it out. He also testified that Real Talk Entertainment, Inc. is no longer in business. (NYSCEF 105, 183).

By affidavit dated February 6, 2013, Carolyn Prudente, plaintiff's vice-president of finance for entertainment, states that when Johnson signed the 2005 agreement, he said that Real

Talk was incorporated and that during a June 2007 telephone call, demanded advance payment from plaintiff to build a bathroom in his Nevada home and satisfy several mortgage payments due on various California rental properties, which she declined to do. According to Prudente, plaintiff paid defendants $3,063,801.56 over the duration of their agreement. (NYSCEF 92).

By affidavit dated February 6, 2013, Johnson states that the funds he received in August 2008 were used for new deals with other artists. (NYSCEF 120).

By affidavit dated March 18, 2013, Rosenberg asserts that in July 2008, Johnson said that he needed the money to finance existing agreements with the two artists, and that he referenced them in the recorded conversation, which references were deleted from the recording by Johnson. Rosenberg also contends that he relied on Johnson's representations because he had previously released similar titles that had sold well. (NYSCEF 143).

By affidavit dated March 25, 2013, Johnson states that the charges to Real Talk's account that appear to fund personal expenses were actually incurred for the business, and that as a record producer, he must often meet with potential clients at restaurants, sporting events, and nightclubs. He also contends that the maintenance of his home, where he does business, is a necessary business expense and that he told plaintiff before executing the 2005 agreement that he was in the process of incorporating Real Talk and that plaintiff changed the payee on checks issued Real Talk to Real Talk Ent., Inc. as a result of the 2006 amendment. (NYSCEF 167).

By affidavit dated April 29, 2013, Rosenberg states that before executing the 2005 agreement, Johnson held himself out as Real Talk's CEO, assured him that Real Talk was incorporated, and furnished a tax identification number for it. He alleges that each amendment addresses discrete issues, denies that there was any discussion of a change in Real Talk's legal

status when the parties drafted the amendments, and that Real Talk was referenced as a corporation in the amendments at Johnson's request. According to Rosenberg, if he had been told that Real Talk was not incorporated, he would have included that fact in the agreement and would have referenced Real Talk's change in legal status in the 2006 agreement and asked for a new tax identification number. (NYSCEF 179).

By affidavit dated April 29, 2013, Johnson denies telling Prudente in June 2007 that he needed funds for personal expenses, having owned real estate in Nevada or California, and having editing his recorded conversation with Rosenberg. (NYSCEF 188).

III. PLAINTIFF'S SUMMARY JUDGMENT MOTION

A party seeking summary judgment must demonstrate, *prima facie*, that it is entitled to judgment as a matter of law, by presenting sufficient evidence to negate any material issues of fact. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must offer admissible evidence to demonstrate the existence of factual issues that require a trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant does not meet this burden, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853). Moreover, to sustain its burden, a movant may not simply reveal gaps in its opponent's case, but must "affirmatively demonstrate the merit of its claim or defense." (*Mennerich v Esposito*, 4 AD3d 399, 400 [2d Dept 2004]).

A. Contentions

Plaintiff contends that having demonstrated the existence of the distribution agreement, that it released defendants' products in accordance with the agreement, and that defendants failed

to pay its negative balance or appoint a new distributor, thereby causing it damages, it has established the elements of its breach of contract claim. (NYSCEF 115).

Defendants do not dispute that these elements have been demonstrated. Rather, they assert that Johnson should not be held personally liable and deny that plaintiff is owed $530,056.31. They request a hearing to determine the extent of the negative balance. (NYSCEF 176).

B. Plaintiff's contract claim

The elements of a claim for breach of contract are: 1) the existence of a contract between the plaintiff and the defendant, 2) the plaintiff's performance under the contract, 3) the defendant's breach of the contract, and 4) damages. (*US Bank Nat. Assn. v Lieberman*, 98 AD3d 422, 423 [1st Dept 2012]).

Here, plaintiff has demonstrated the existence of the 2005 agreement requiring Real Talk to pay negative balances immediately and to appoint a distributor upon termination or expiration of the agreement, that plaintiff distributed Real Talk's products according to the terms of the agreement, that Real Talk failed to pay the negative balances, absconded, and failed to appoint a distributor upon terminating the agreement, and that Real Talk's breach caused it to incur damages. Plaintiff has thus established its *prima facie* entitlement to summary judgment.

Although defendants offer no evidence to raise a triable issue of fact, absent any evidence substantiating the negative balances reflected in its records (NYSCEF 97), plaintiff must prove its entitlement to the $530,056.31 it claims is due. Consequently, an inquest is ordered.

C. Johnson's personal liability

1. Contentions

Plaintiff argues that Johnson is liable under the 2005 agreement as promoter for an unincorporated entity and asserts that his withdrawal of $1.9 million only weeks before terminating the agreement, thereby leaving insufficient funds to pay any negative balance, demonstrate that Real Talk was used to perpetrate a wrong against plaintiff, and that a judgment against Real Talk is not collectible. (NYSCEF 115, 186).

Defendants assert that the references to "Real Talk Entertainment, Inc." in the amendments and plaintiff's checks to "Real Talk Ent. Inc." reflect its acknowledgment that it was contracting with an incorporated entity, not Johnson, and that the amendments thus ratify Real Talk's subsequent incorporation. Defendants also argue that while Johnson may be a talented record producer, he is not a sophisticated corporate executive, and that his failure to adhere to business formalities, such as maintaining separate accounts, is not sufficient to hold him liable. (NYSCEF 176).

2. Analysis

One who enters into a contract on behalf of an unincorporated entity is known as a promoter and is personally liable on the contract unless the parties agree to the contrary. (14 NY Jur 2d, Business Relationships § 96 [2013]; *Geron v Amritraj*, 82 AD3d 404 [1st Dept 2011]; *Clinton Invs. Co., II v Watkins*, 146 AD2d 861, 862-63 [3d Dept 1989]). Such personal liability is analogous to that incurred by an agent acting on behalf of a nonexistent principal. (*Universal Indus. Corp. v Lindstrom*, 92 AD2d 150, 151 [4th Dept 1983]; *see also San Sung Korean Methodist Church of New York v Professional USA Const. Corp.*, 14 AD3d 501, 503 [2d Dept

2005]). That the corporation subsequently adopts the agreement does not relieve the promoter of liability. (*Clinton Invs. Co.,* 146 AD2d at 863).

In *Clinton Invs. Co.*, the defendant signed a lease on behalf of a tenant not identified as a corporation and thereafter entered into a rider to the lease on behalf of the incorporated tenant. The tenant thereafter occupied the premises and paid rent by corporate check until it became delinquent. (146 AD2d at 862). In granting summary judgment in favor of the plaintiff-landlord and against the defendant for breaching the lease, the court held that the tenant's adoption of the lease, while giving rise to its own liability, did not operate as a novation which would extinguish the defendant's liability. Because the defendant failed to demonstrate the existence of any agreement by which the plaintiff released him from liability, no triable issue existed. (*Id.* at 863).

A novation is an agreement that discharges an existing contractual obligation by the substitution of a new party's obligation. (*See generally* 22A NY Jur 2d, Contracts § 467 [2013]; Restatement (Second) of Contracts § 280 [1981]). The parties' intention to enter into a novation must be clear and definite, not presumed. (*Trans-Orient Marine Corp. v Star Trading & Marine, Inc.*, 736 F Supp 1281, 1284 [SD NY 1990], *affd* 925 F2d 566 [2d Cir 1991]). The party seeking to establish the existence a novation must demonstrate "(1) a previously valid obligation; (2) agreement of all parties to a new contract; (3) extinguishment of the old contract; and (4) a valid new contract." (*Healey v Healey*, 190 AD2d 965, 966 [3d Dept 1993]).

Johnson, having signed the 2005 agreement as CEO of an unincorporated entity, rendered himself personally liable as a promoter even if his verbal representations to plaintiff regarding Real Talk's status were entirely truthful. The amendments to the agreement contain nothing evidencing an intent to substitute Real Talk Entertainment in the 2005 agreement with Real Talk

Entertainment, Inc. in the amendments. Moreover, the references in the amendments to Real Talk in its corporate form, while indicative of plaintiff's intent to contract with a corporation, reflect no intention to relieve Johnson of his original personal liability. (*See Clinton Invs. Co, supra* [foreclosing validity of defense]). Defendants also fail to offer evidence of any discussion or arrangement by which plaintiff agreed that Johnson would not be held personally liable. For all of these reasons, and notwithstanding the parol evidence that Johnson told plaintiff that Real Talk was incorporated when executing the 2005 agreement, defendants have failed to raise a triable issue as to Johnson's personal liability. (*See Meyersohn v Bloom*, 259 AD2d 432, 433 [1st Dept 1999] [party alleging novation must demonstrate parties' "unequivocal intention" to extinguish liability]; *Wasserstrom v Interstate Litho Corp.*, 114 AD2d 952, 954 [2d Dept 1985] [in absence of explicit written agreement, intention to novate must be clearly demonstrated]).

Given this result, I need not address whether Johnson used Real Talk's corporate form to perpetrate a wrong or a fraud against plaintiff.

IV. DEFENDANT'S MOTION

1. Fraud claim

A. Contentions

Defendants maintain that the tape recording of Rosenberg's and Johnson's telephone conversation contain no reference to the two artists, and that Rosenberg's email asking about new releases shows that plaintiff did not advance payment in reliance on Johnson's representations concerning the artists. They also claim that Johnson's statements about the artists in his July 18 email are true. (NYSCEF 136, 191).

Plaintiff contends that the tape recording is unreliable, as Johnson admits having altered it, and that even if it is considered, Rosenberg's comments therein about Real Talk's prior

success makes it clear that he was advancing the money based on Johnson's promise to use it for the release of future albums. Plaintiff also argues that Johnson otherwise represented to Rosenberg that he had existing agreements with the two artists which it claims creates a triable issue. (NYSCEF 165).

B. Analysis

To establish, *prima facie*, a cause of action for fraud, a plaintiff must allege a material misrepresentation of fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance, and damages. (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Here, as Johnson testified to the accuracy of the recording and denies having deleted any of the conversation, I may consider it. (*See Oi Tai Chan v Socy. of Shaolin Temple, Inc.*, 30 Misc 3d 244, 252-53 [Sup Ct, New York County 2010] [upon participant's testimony that recording to conversation is not altered, allegations of inauthenticity go to weight of evidence, not admissibility]).

Even considering the recording, Rosenberg testified that Johnson had, on prior occasions, informed him that he had agreements with the two multi-platinum artists and that he relied on those representations in advancing payment. Consequently, a triable issue of fact exists as to whether Johnson may be held liable for fraud.

2. Claims to hold Johnson personally liable

Given my finding that plaintiff is entitled to summary judgment against Johnson in his capacity as the promoter of Real Talk (III.C.2), defendants' motion is denied.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment as to its first cause of action in

the amended complaint against Real Talk Entertainment, Inc. for breach of contract is granted as to liability; it is further

ORDERED, that plaintiff's motion for summary judgment as to its fourth cause of action in the amended complaint to hold Derrick Johnson personally liable on the first cause of action in the amended complaint is granted as to liability; it is further

ORDERED, that defendants' motion for summary judgment to dismiss the second, third, and fourth causes of action is denied; it is further

ORDERED, that an assessment of damages against defendant is directed; and it is further

ORDERED, that a copy of this order with notice of entry be served upon the Clerk of the Trial Support Office (Room 158), who is directed, upon the filing of a note of issue and a statement of readiness and the payment of the appropriate fees, if any, to place this action on the appropriate trial calendar for the assessment herein directed.

ENTER:

Barbara Jaffe, JSC

DATED: December 23, 2013
New York, New York