UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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JEFFREY ATKINS p/k/a JA RULE, SLAVERY MUSIC, IRVING LORENZO p/k/a IRV GOTTI, and DJ IRV PUBLISHING,

Plaintiffs,

-against-

RICH KID MUSIC, INC. and RHONDO ROBINSON,

Defendants.

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11 CIV. 3976 (AKH)
ECF Case

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS COMPLAINT

Atkins et al v. Richard Kid Music, Inc. et al Doc. 5

PRELIMINARY STATEMENT

This memorandum of points and authorities is submitted by defendants in support of their motion to dismiss the complaint in this action, upon the grounds that: (a) the claims for fraud and conversion are barred by the statute of limitations; and (b) the Court lacks subject matter jurisdiction since the amount in controvesy does not exceed $75,000.00.

STATEMENT OF FACTS

As alleged in the complaint in this action (Exhibit A to the accompanying declaration of James P. Cinque, the "Cinque Dec."), plaintiffs are songwriters who wrote

songs (the "Songs") which appeared on an album entitled "Pain Is Love" (the "Album") released by Universal Music in 2001. The complaint alleges that each of their Songs is "subject to the payment of mechanical royalties by Universal in each and every territory throughout the world where the Album is sold" (Ex. A to Cinque Dec., ¶ 12), and that "mechanical royalties generated by the commercial sale of the Album and/or the Songs are paid to the writers of each song" (Id. ¶ 13). Plaintiffs allege that defendants entered into an agreement with Universal in April 2002 "which called for the payment of mechanical royalties to be paid to the defendants in connection with the Songs" (Id. ¶ 21). Plaintiffs state that the royalty statements sent by Universal to defendants establish that defendants received the following amounts in 2002 in connection with the Songs:

> "Lost Little Girl" - $21,212.00; "Worldwide Gangsta" - $13,261.00; "Down Ass Bitch" - $13,735.00; "Shakin' and Ridin'" - $8,826.00 (see Exhibit A). (Id. ¶ 26)

Plaintiffs allege that they became aware of the fraudulent conduct in November 2010 as a result of their counsel's investigation (Id. ¶ 27). This action was commenced on June 13, 2011, and asserts two claims for relief: fraud and conversion.

Plaintiffs' counsel previously asserted claims against defendants for three other clients, similarly alleging that defendants engaged in a fraud to deprive plaintiffs of their songwriter royalties. In these actions plaintiffs alleged that they became aware of the fraudulent scheme by January 2009.

POINT I

THE CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

According to the allegations of the complaint, defendants received money from Universal Music Canada in 2002 (¶ 26 and Ex. A to the complaint) as a result of sales of an Album containing plaintiffs' Songs. As the complaint was filed eight and a half years after defendants' alleged receipt of this income, both claims are barred by the statute of limitations.

(A) The Fraud Claim is Time-Barred

Under CPLR §213(8), an action for fraud must be brought within:

> the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under who the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it.

As the alleged fraud occurred in 2002 (more than six years before the commencement of the action) plaintiffs can only prevail if they can establish that they did not and could not have discovered the fraud prior to June 13, 2011 (two years before the commencement of this action). It is plaintiffs' burden to establish this fact, as held in Sargiss v. Magarelli, 50 App.Div.3d 1117, 1118, 858 N.Y.S.2d 209, 210 (2nd Dep't 2008):

> "The burden of establishing that the fraud could not have been discovered prior to the two-year period before the commencement of the action rests on the plaintiff who seeks

> the benefit of the exception" (*Von Blomberg v. Garis,* 44 AD3d at 1034, 845 N.Y.S.2d 80; see *Siler v. Lutheran Social Servs. of Metro. N.Y.,* 10 AD3d 646, 648, 782 N.Y.S.2d 93).

As plaintiffs allege that mechanical royalties were due them on sales of the Album containing their Songs, and as the Album was openly and notoriously sold by Universal Music in Canada, plaintiffs should have known in 2002 that they did not receive the mechanical royalties which were allegedly diverted to defendants. Indeed, in other actions commenced by plaintiffs' counsel against defendants for the same types of claim plaintiffs in those actions admitted "it would not be possible for plaintiffs not to be owed mechanical royalties as they are...earned each time a song is sold" (see, e.g., Cinque Dec. Ex. C ¶ 33 and Ex. D ¶ 31). Plaintiffs cannot establish that they reasonably should not have known prior to June 2009 (two years before the commencement of this action) that they were owed royalties from Canadian sales in 2002.

In addition, plaintiffs' counsel, in his prior lawsuits against defendants for the same activity[1], admitted that he knew of the alleged fraudulent practices of defendants by January of 2009. As noted in Cohen v. Cohen, 773 F. Supp.2d 373, 386 (S.D.N.Y. 2011), awareness of other lawsuits alleging a fraudulent scheme can be deemed as notice to plaintiffs with identical claims:

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[1] Judicial notice of pleadings is authorized by Federal Rule of Evidence 201, and includes both federal (Kramer v. Time Warner, Inc., 937 F.2d 767, 774 (2nd Cir. 1991)) and state court (Blue Tree Hotels Investment (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc., 369 F.3d 212, 217 (2d Cir. 2004)) complaints.

> "[I]n this Circuit, awareness of other lawsuits ... involving a defendant puts a plaintiff on inquiry notice of the probability of fraud within another transaction involving the defendant." *Lenz v. Associated Inns and Restaurants Co. of Am.,* 833 F.Supp. 362, 375 (S.D.N.Y.1993); *see also Weiss v. La Suisse, Societe D'Assurances Sur La Vie,* 381 F.Supp.2d 334, 339 (S.D.N.Y.2005) ("It is well settled that the filing of a lawsuit by private parties puts plaintiffs with identical claims on notice of their potential claims."); *Korwek v. Hunt,* 646 F.Supp. 953, 958 (S.D.N.Y.1986) ("The filing of lawsuits by private parties has been held in this circuit to put plaintiffs on notice of their potential claims."). Indeed, courts in this Circuit have found fraud actions time-barred where a plaintiff's allegations are similar to those that have been previously made in writing either by the plaintiff herself or by others. *See, e.g., Berry Petroleum Co. v. Adams & Peck,* 518 F.2d 402, 410 (2d Cir.1975) (affirming dismissal where "[m]uch of the fraud alleged here was also alleged" in a prior fraud action against twenty of the same defendants); *Calzaturificio Rangoni S.p.A. v. United States Shoe Corp.,* 868 F.Supp. 1414, 1416, 1420–21 (S.D.N.Y.1994) (dismissing false trademark registration claim as time-barred under applicable six-year statute of limitations where, seven years before the plaintiff filed suit, plaintiff's counsel wrote a letter accusing the defendant of fraud in registering the trademark); *Weiss,* 381 F.Supp.2d at 339 (dismissing claims where other plaintiffs in the same community had filed nearly identical claims "because the filing of that lawsuit is sufficient evidence that the alleged bad acts were discoverable by the date of the filing of the first lawsuit"); *Korwek,* 646 F.Supp. at 958 (dismissing claim as time-barred where "[p]laintiffs had the opportunity to learn of the general fraudulent scheme which is at the heart of their complaint" because "there were ... several lawsuits filed ... alleging the same conspiracy against many of the same defendants as plaintiffs charge in this case").

Indeed, as noted in Cohen, the fact that the plaintiffs are represented by the same

counsel who made the prior claims against defendants makes it much easier to impute the knowledge to plaintiffs in this action:

> In *Ezra Charitable Trust v. Frontier Insurance Group,* Inc., No. 00–CV–5361, 2002 WL 87723 (S.D.N.Y. Jan. 23, 2002), the plaintiff filed a securities fraud action similar to one that had been filed in the Eastern District of New York by plaintiffs represented by the same counsel. "The complaints in both lawsuits involve[d] similar allegations that [the defendant] failed to disclose its inadequate loss reserves and did not sufficiently monitor its operations." *Id.* at *5. The court found that "the mere existence of the Eastern District litigation should have alerted plaintiffs to possible fraud." Id. Thus, where a plaintiff either alleged or should have been aware that others had alleged a fraud in a prior suit, a subsequent suit alleging the same fraud is time-barred. Id. at 386-387.

As plaintiffs' attorney admittedly had knowledge of defendants' alleged fraudulent scheme as early as December 2008, plaintiffs were on constructive notice of the alleged fraud for more than two years prior to the commencement of this action. Furthermore, as plaintiffs knew that they were owed royalties for sales of recordings in Canada, they should have known back in 2002 that they were not receiving accountings for this territory and were on notice as of that time that something was amiss. Accordingly, the fraud claim is barred by the statute of limitations.

(B) The Conversion Claim is Time-Barred

As noted in Sporn v. MCA Records, Inc., 58 N.Y.2d 482, 488-89, 462 N.Y.S.2d

413, 416 (1983), a conversion claim is subject to a three year statute of limitations:

> For the purposes of the Statute of Limitations, if the action is one for conversion, the time period will run from when that cause of action accrued – that is, when the conversion occurred.
>
> * * *
>
> Under these circumstances, we agree with the majority at the Appellate Division that since the conversion occurred in 1965, the cause of action arose at that time and, thus, this action is barred by the three-year Statute of Limitations. (CPLR 214)

Since the conversion occurred in 2002 the complaint filed eight and a half years later is untimely.

POINT II

THE COURT LACKS SUBJECT MATTER JURISDICTION

In paragraph 26 of the complaint plaintiffs allege that defendants received the following royalties:

> "Lost Little Girl" - $21,212.00; "Worldwide Gangsta" - $13,261.00; "Down Ass Bitch" - $13,735.00; "Shakin' and Ridin'" - $8,826.00 (see Exhibit A).

Exhibit A is comprised of royalty statements purportedly sent by Universal Music Canada to Rich Kid Music in 2002. As the royalties allegedly received by defendants total

$57,034.00, plaintiffs have not sustained the requisite $75,000.00 in damages required for subject matter jurisdiction under 28 U.S.C. §1332(b), and the case should be dismissed.

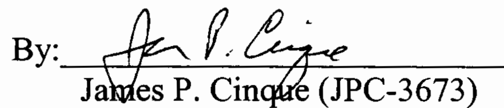
CONCLUSION

For the reasons specified above, defendants' motion to dismiss the complaint should in all respects be granted.

DATED: NEW YORK, NEW YORK
AUGUST 30, 2011

Respectfully submitted,

CINQUE & CINQUE, P. C.

By: 

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