

**Jambetta Music Inc. v Nugent**

2004 NY Slip Op 30388(U)

August 25, 2004

Supreme Court, New York County

Docket Number: 105551/2004

Judge: Rosalyn H. Richter

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 24

Jambetta Music Inc.,

Plaintiff,

-against-

Index No. 105551/2004

Wayne Nugent d/b/a/  
Dangerous Music, Midimafia,  
Theif In Da Nite, Bruce Wayne and  
P.Dubbs,

Defendant.

**FILED**  
AUG 27 2004  
NEW YORK  
COUNTY CLERK'S OFFICE

**Richter, J:**

Plaintiff, a music production company, moves for a preliminary injunction containing an order restraining defendant from recording, producing and /or publishing music for any person or entity other than plaintiff; and directing defendant to deposit into the court all monies, royalties, commissions and/or payments earned and/or paid for recording, production and/or publishing services for any other person or entity other than plaintiff. Defendant is a musical artist and member of various groups or bands. An "exclusive recording artist and co-publishing agreement" was executed by plaintiff and defendant on September 4, 1997 which provided, in part, for plaintiff's production of an album of songs to be created by defendant's band. The contract was to remain in effect until one year after the "minimum recording commitment" was fulfilled. Plaintiff alleges that defendant breached the agreement by failing to provide sufficient songs, in the manner anticipated by the contract, to constitute an album and by performing with another band on what was an allegedly commercially successful album, in violation of the contract's exclusivity provision.

A preliminary injunction may be granted where it appears that the defendant threatens to or is about to commit an act in violation of the plaintiff's rights with respect to the subject of the action and tending to render the judgment ineffectual. CPLR 6301. It is the moveant's burden to establish: (1) a likelihood of success on the merits; (2) that irreparable injury will result absent the grant of a preliminary injunction; and (3) that a balance of the equities favors its position. *Koultukis v. Phillips*, 285 A.D.2d 433 (1st Dept. 2001). "Preliminary relief is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and the undisputed facts on the moving papers." *Id.*

The Court finds that plaintiff has not meet its burden for several reasons. First, although the mere existence of a disputed fact alone is insufficient to defeat a request for a preliminary injunction, CPLR 6312(c), the factual record presented to this Court by the parties contains largely differing versions of the facts. The material facts in dispute which cannot be resolved without a trial include whether the contract was in force and effect at the time of defendant's alleged breaches; how many songs and disks were delivered by defendant to plaintiff, if any; whether an album was released pursuant to the contract; and whether, as defendant alleges, plaintiff breached the agreement first by failing to arrange a distribution agreement. The affidavits and documentary evidence submitted in support of the parties' claims directly conflict on these points. Thus, it is not clear from the moving papers that plaintiff is likely to succeed on the merits, and a preliminary injunction at this point would not be appropriate. *See, e.g., Winkler v. Kingston Housing Auth.*, 238 A.D.2d 711 (3d Dept. 1997) (no preliminary injunction where key facts were in dispute); *SportsChannel American Assoc. v. National Hockey League*, 186 A.D.2d 417 (1st Dept. 1992) (injunctive relief inappropriate where contractual language required

interpretation); *Business Networks of New York, Inc. v. Complete Network Solutions, Inc.*, 1999 WL 126088, at \*1 (Sup. Ct. N.Y. Co. 1999) (finding injunctive relief to be extreme and unavailable where “the dispute is rife with questions of fact . . .”).

Second, the Court is not persuaded that plaintiff will be irreparably injured absent the grant of a preliminary injunction and temporary restraining order. All of the defendant’s complained-of behavior is in the past and plaintiff does not allege any on-going or future breaches of the contract, except for the implication that defendant may continue to receive payments for his past performances allegedly in violation of the contract. Moreover, New York courts cannot compel the specific performance of a contract for services, *American Broadcasting Cos., Inc. v. Wolf*, 52 N.Y.2d 394 (1981), and there is a strong public policy against preventing a party from practicing its livelihood. *See Marietta Corp. v. Fairhurst*, 301 A.D.2d 734 (3d Dept. 2003). Also, plaintiff could be fully compensated with monetary damages, should it prevail on the merits. “Monetary damages simply are not irreparable and are an insufficient harm to support the issuing of an injunction.” *Winkler v. Kingston Housing Auth.*, 238 A.D.2d 711 (3d Dept. 1997).

Third, plaintiff has not articulated any immediate need for relief, nor is there any indication here that without the issuance of a preliminary injunction, the subject matter of the lawsuit will be so damaged as to render an ultimate decision in plaintiff’s favor ineffectual. CPLR 6301 & 6312(a). For example, there has been no showing that defendant is insolvent or would otherwise be unable to pay any money judgment that might be obtained against it.

For the foregoing reasons, plaintiff’s motion for a preliminary injunction and temporary restraining order is denied.

This constitutes the decision and order of the Court.

August 25, 2004

*Rosalyn Richter*  
Justice Rosalyn Richter

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