Wallert v Ballance
2011 NY Slip Op 34002(U)
October 26, 2011
Sup Ct, New York County
Docket Number: 102834/2010
Judge: Shirley Werner Kornreich

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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Wallert, Charles

-v-

Ballance, Dr. William

INDEX NO. 102834/10
MOTION DATE 3/14/11
MOTION SEQ. NO. 001
MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	E-Filed 1-6, 11-15 & papers on Mot Seq 5, 002 & 003 & Trs. dated 2/24 & 3/24/11
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

Dated: 10/26/11

JUSTICE SHIRLEY WERNER KORNREICH J.S.C.

Check one: ☒ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

CHARLES WALLERT,

Plaintiff,

DECISION & ORDER

-against-

Index No.: 102834/2010

DR. WILLIAM BALLANCE, JR., BLUEWATER RECORDINGS, INC., and BOBBY TOMLINSON, d/b/a THE EMBERS,

Defendants.

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SHIRLEY WERNER KORNREICH, J.

Motion Sequences 001, 002 and 003 are consolidated for disposition.

Defendant Dr. William Ballance, Jr. (Ballance), moves to dismiss the amended complaint for lack of personal jurisdiction, CPLR 3211(a)(8) (Mot. Seq 001). Defendants Bluewater Recordings, Inc. (Bluewater) and Ballance move (Motion Seq 002) to dismiss the amended complaint, dated June 28, 2010 (AC),[1] based on documentary evidence, the statute of frauds and for failure to state a cause of action. CPLR 3211(a)(1), (5) and (7). Defendant Bobby Tomlinson (Tomlinson, and together with Ballance, Individual Defendants) moves (Mot. Seq. 003) to dismiss the AC on the same grounds asserted by Ballance in Motion Sequence 002. None of the defendants has served an answer. Plaintiff opposes all three motions and asks for jurisdictional and other disclosure.

In response to Motion Seq. 003, plaintiff cross-moved to have the three motions heard

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[1]The complaint was filed on March 4, 2010. On April 5, 2010, defendants removed the action to the United States District Court for the Southern District of New York (SDNY). The amended complaint was filed in the SDNY on June 28, 2010. The SDNY remanded the case to this court on October 28, 2010.

together. Attached to the notice of cross-motion as Exhibit A was an undated document entitled "Verified Amended Complaint," filed on March 18, 2011 (2nd AC, Doc. 34).[2] Plaintiff properly served this 2nd AC as of right, as the defendants' time to answer the AC had not expired. CPLR 3025(a) [amendment as of right prior to service of responsive pleading; 3211(f)(pre-answer motion under CPLR 3211(a) extends time to answer until 10 days after service with notice of entry of order on motion]. The 2nd AC added two derivative causes of action. As defendants' motions were directed to the AC, the court permitted the defendants to submit opposition to the cross-motion. The court grants the cross-motion. In addition, as there has been an opportunity to respond to the cross-motion, the court will consider the two newly added derivative causes of action for corporate looting and waste of corporate assets.

The court grants, on consent, the Individual Defendants' motions to dismiss plaintiff's claim against them for fraudulent inducement.[3] Moreover, plaintiff's demand for punitive damages is stricken because fraudulent inducement is the only cause of action for which plaintiff seeks punitive damages.

The remaining causes of action in the 2nd AC and their corresponding numbers are as follows: 1) breach of an alleged compensation contract against Bluewater; 2) recovery of compensation against Tomlinson and Ballance based upon alleged personal guaranties; 3) unjust enrichment against the Individual Defendants; 4) breach of an alleged agreement by Bluewater to pay royalties for proceeds received or receivable by Tomlinson doing business as the Embers,

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[2]"Doc." refers to the New York Courts Electronic Filing System (NYCEFS) document number.

[3]Tr. of Oral Argument (Tr.), 3/24/11, p. 6.

asserted against Bluewater; 5) recovery of said royalties against Tomlinson and Ballance, based upon alleged personal guaranties of the alleged Bluewater royalty contract; 6) failure to promote two albums, asserted against Tomlinson and Ballance; 8) a derivative claim against Tomlinson for corporate waste and looting; and 9) a derivative claim against Ballance for corporate waste.

Background[4]

Plaintiff, Charles Wallert (plaintiff or Wallert), is an internationally-known songwriter and record producer. He is a 30% shareholder, director and president of defendant Bluewater. He also is its chief operating officer. Wallert resides in New York State. Tomlinson also is a 30% shareholder, officer and director of Bluewater. Tomlinson is the owner of and does business as "The Embers," an internationally recognized singing group, whose recordings Bluewater produced. Ballance and another director, non-party, Wayland H. Cato, Jr., III (Cato), invested money in Bluewater. Tr. 2/24/11, pp 26-27. Tomlinson directed The Embers band. *Id.* Wallert's contribution was "sweat equity." *Id.*

Bluewater is incorporated in North Carolina. Tr. 3/24/11, p. 12. Ballance says that since 1989, he has resided in North Carolina, where he was served with process. Ballance Aff & Supp Aff, 11/11/10 & 1/19/11, Docs. 5 & 15-1. Ballance says that he has been a North Carolina resident since 1989, owns no New York property and has no bank accounts in New York. *Id.* He avers that he never did business in New York and did not transact business in New York relating to the allegations in suit. *Id.*

Bluewater was authorized to and did business in New York State. Wallert conducted

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[4]As this is a motion to dismiss, the facts are drawn from the AC, the 2nd AC, and Wallert's affidavits which verified them, unless otherwise indicated.

Bluewater's activities in a New York office, located at 501 Fifth Avenue, New York, NY (NY Office), beginning in 2004 until a date that he does not specify, although he states that Bluewater renewed the lease in 2007 for a term ending in 2012. The NY Office was Bluewater's only corporate headquarters, and Wallert conducted its day to day operations in New York, where he engaged in "contract negotiations with all contributing artists," "record[ed] with the Embers," and "personally produced each album."

On April 28, 2003, there was a Bluewater special shareholders' meeting. Wu Aff, Ex D, Doc 9-3. The minutes reflect that the shareholders who attended were Wallert, Tomlinson and Cato. *Id.* Wallert and Tomlinson, described in the minutes as "co-founders" were elected president and executive vice-president/treasurer, respectively, and a resolution was passed stating that they would be "solely responsible for the day to day operations of the corporation and all management functions." *Id.* Cato, who is not described in the minutes as a co-founder, was elected secretary. *Id.* It was resolved that the "founding officers would serve on the board of directors" and that the board would not exceed five members. *Id.* Thus, the minutes are unclear as to whether Cato was on the board on April 28, 2003. However, other documents submitted by defendants suggest that Cato was a director as of April 17, 2004. *Id.* Wallert invited Ballance to become a director in August 2005 and Ballance became a director on December 6, 2005. *Id.*; Wallert Aff 11/11/10, ¶4, Doc. 5.

The minutes of the April 23, 2003 shareholders' meeting also contain the following resolution (1st Resolution) regarding the compensation of Wallert and Tomlinson, and royalties for Wallert, which provides in pertinent part:

IT WAS RESOLVED that Compensation for each officer will be

[* 6]

> $3,750...commencing 2 months after recorded completion of the "Super Collaboration Album". Fees will be payable at the beginning of each month for the preceding month. Charles Wallert will also receive a production royalty advance of $3,750...commencing one month after recorded completion of the "Super Collaboration Album", payable at the beginning of each month for the preceding month. It is understood that the founding officers will use their discretion in distributing or accruing funds depending on the financial condition of the COMPANY and the participation and fair distribution of individual officer's [sic] needs and requirements due to compensation from other sources....Any fees accrued or owed to the President and Executive Vice-President will be in second position behind any collateralized or secured loans in case of liquidation of the corporation.

Wallert's compensation claim is in the amount of $472,650 plus interest. It is based upon a "resolution" dated January 7, 2004 (2nd Resolution), executed by Wallert and Tomlinson. It reads, in full, as follows:

> Blue Water Recordings, Inc.
> 4423 Rye Gate Dr.
> Raleigh, N.C. 27604
>
> January 7, 2004
>
> This will serve as a resolution regarding compensation to the Bluewater Recordings Inc. (COMPANY) founding officers, Bobby Tomlinson and Charles Wallert.
>
> As prescribed by the Board of Directors' Resolution of April 28, 2003, compensation for each officer will be $3,750...retroactive commencing on January 1, 2004, payable at the beginning of each month for the preceding month.
>
> It is understood that the founding officers will use their discretion in distributing or accruing funds depending on the financial condition of the COMPANY and the participation and fair distribution of individual officer's [sic] needs and requirements due to compensation from other sources.
>
> Charles Wallert will also receive a production royalty advance of $3,750...retroactive commencing on January 1, 2004, payable at the beginning of each month for the preceding month.
>
> The co-founders may assign their compensation to a third party corporate or

company entity.

Agreed to s/_____
Bobby Tomlinson

Agreed to s/_____
Charles Wallert

Wallert describes the 2nd Resolution as a board resolution, although the document itself does not say what sort of meeting it memorialized.

Wallert claims that Ballance and Tomlinson personally guaranteed the obligation in the 2nd Resolution. Ballance denies it. Tomlinson did not submit an affidavit.

The second cause of action in the 2nd AC alleges:

> 15. At all times herein, by various emails, the Defendants Dr. William Ballance, Jr. and Bobby Tomlinson personally guaranteed all payments due and owing to Plaintiff Charles Wallert.
>
> 16. On various occasions, the Defendant Dr. William Ballance, Jr. paid with his personal funds amounts due and owing to Plaintiff Charles Wallert and the Defendant Bobby Tomlinson.
>
> 17. As such, the Plaintiff Charles Wallert is entitled to $472,650 with statutory interest ... commencing March 1, 2006 from the Defendants Dr. William Ballance, Jr. and Bobby Tomlinson personally, who are jointly and severally liable to Plaintiff Wallert.

Wallert avers by affidavit that:

> Ballance gave me a guarantee that was referred to in emails that he would pay all monies due and owing from Defendant Bluewater. These emails and the guarantee were all to our New York Office. Defendant Ballance had a history of paying for Bluewater's debts from his personal funds and he did so on the following occasions...5) Ballance repeatedly paid me for Bluewater's debts to me that were owed to me.

> Ballance was in frequent phone and email contact with me during the entire term of the lease in New York. Defendant Ballance also paid out of his personal funds...as part of his personal guarantee on the Bluewater contract...at least four times for monies that were past due on my contract with Bluewater.

While it is not clear from plaintiff's allegations what debts or monies Ballance allegedly paid, giving plaintiff the benefit of every favorable inference, the debts were the compensation and/or royalties mentioned in the 2nd Resolution for which he is suing.

Wallert says the emails constituting Ballance's guarantee are not in the record because "My computer crashed and much of my records were lost after the Landlord at Bluewater's New York Office took possession following an eviction." Wallert says he needs discovery to establish Ballance's guarantee.

Ballance avers that he did not engage in facsimile, telephone, email or other negotiations concerning the alleged guaranty. Ballance Aff & Supp Aff, 11/11/10 & 1/19/11, Docs. 5 & 15-1. He denies that he repeatedly paid Wallert for Bluewater's debts, that he made any payments to Wallert pursuant to a guaranty, or that he agreed to share primary liability with Bluewater for any of its debts. *Id.* He says he has attended Bluewater board meetings in North Carolina, that as a director he was "not generally involved in its day-to-day operations...," and all of his investments in Bluewater were made by deposits in its North Carolina corporate checking account. *Id.*

Discussion

On a motion to dismiss, the plaintiff's allegations must be accepted as true, and given the benefit of every favorable inference [*Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 (1976)], unless they are utterly contradicted by documentary evidence that establishes a defense as a matter of law [*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002); *Leon v*

Martinez, 84 NY2d 83, 88 (1994)]. Affidavits may be considered freely to support inartfully pleaded, but meritorious, cause of action; the inquiry focuses on whether the plaintiff has a cause of action, not whether he has stated one. *Rovello*, 635-636. When a defendant makes an evidentiary showing that refutes the pleaded cause of action, the plaintiff may stand on his pleading and will not be penalized for failure to make an evidentiary showing in support of the complaint, unless the court notifies the parties that it is converting the motion to one for summary judgment. *Id.*

The court will consider Ballance's motions solely on the ground of personal jurisdiction and failure to state a cause of action. CPLR 3211(e) permits a single motion to dismiss on the grounds set forth in subdivision (a), except for motions made pursuant to subdivisions (a) (2), (7) or (10). Here, Ballance made two motions: to dismiss for lack of personal jurisdiction, subdivision (a)(8), and a second motion to dismiss both for failure to state a claim and based upon documentary evidence, respectively subdivisions (a)(7) and (a)(1). His second motion also addressed the statute of frauds (a)(5). Hence, his second motion violates the single motion rule, except insofar as it is based upon failure to state a cause of action.

I. Personal Jurisdiction over Ballance

Plaintiff asserts that Ballance is subject to personal jurisdiction, pursuant to CPLR 302(a)(1), because he transacted business in New York by sending emails to New York in which he allegedly guaranteed Wallert's compensation; making payments of Bluewater's expenses with his personal funds; talking to Wallert in the NY Office by telephone; and paying money Bluewater owed to Wallert with his personal funds, including the disputed compensation that Ballance allegedly guaranteed.

Ballance opposes on the grounds that he has insufficient minimum contacts with New York to justify the assertion of jurisdiction over him. Further, he argues that he did not personally do business in New York within in the meaning of CPLR 301; that Bluewater's New York contacts are not attributable to Ballance personally; that plaintiff does not allege that Ballance transacted business in New York pursuant to CPLR 302(a)(1); that Ballance did not execute a guarantee and there is no proof of this; and that there is no nexus between the alleged guaranty and the alleged acts of Ballance in New York.[5]

CPLR 302(a)(1) provides that a New York State court has long-arm jurisdiction over a non-domiciliary who "in person or through an agent transacts any business within the state or contracts anywhere to supply goods or services in the state." The Court of Appeals has upheld personal jurisdiction over a non-resident president of a foreign corporation doing business in New York who guaranteed a corporate obligation. *Hi-Fashion Wigs v Peter Hammond Advertising, Inc.*, 32 NY2d 583 (1973). The language of the *Hi-Fashion* Court is instructive:

> We reach the same conclusion even if we were to assume that the contract of guarantee was not made in New York....In point of fact, apart from the circumstance that the guarantee had been drafted in Oklahoma and that Schuminsky [president of the Oklahoma corporation] lived there, every incident pertaining to it was New York connected. Thus, in addition to the fact that the guarantee was personally delivered by Schuminsky in New York City, the ... corporation of which Schuminisky was president and half owner, did business in New York, the contract [guaranteed] ...involved advertising services to be performed entirely in this State, and payment not only for such work, but also on the guarantee ... was to be made here.

Id. at 587. In addition, it does not offend due process notions of fair play and substantial justice

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[5]Ballance's additional argument concerning CPLR 302(a)(2), jurisdiction based upon a tort committed in New York, is moot because it was based upon the dismissed fraudulent inducement claim.

for a corporate officer or director to be subjected to personal jurisdiction in New York, if he will also be called as a witness in his corporate capacity. *Kreutter v McFadden Oil Corp.*, 71 NY2d 460 (1988).

Here, it is undisputed that Bluewater did business in New York and that the services performed by Wallert in return for compensation were to be performed in Bluewater's NY Office. The alleged guarantee, if it exists, was connected to Bluewater's continuous, purposeful activities in New York, in that it allegedly was made for the purpose of obtaining plaintiff's continued services to the corporation. Plaintiff alleges that Ballance's emails containing the guarantee were sent to New York and that four times, pursuant to his guarantee, Ballance paid sums due to Wallert. It does not offend notions of fair play and substantial justice for Ballance to defend the suit here, if in fact he did execute a guarantee to facilitate corporate operations in New York. Moreover, he will certainly be called as a corporate witness with respect to causes of action upheld in this decision.

However, the existence of the alleged guarantee is a disputed factual issue. Plaintiff says that he needs discovery to obtain proof that Ballance guaranteed the 2nd Resolution. In opposing dismissal, plaintiffs need not make a *prima facie* showing of personal jurisdiction, but need only demonstrate that their position is not frivolous, that facts may exist in their favor and that discovery is necessary. *Peterson v Spartan Indus., Inc.*, 33 NY2d 463, 467 (1974); *Castillo v Star Leasing Co.*, 69 AD3d 551, 552 (2d Dept 2010); *Copp v Ramirez*, 62 AD3d 23, 31 (1st Dept 2009); *Federal Ins. Co. v Chevalier Mach, Inc.*, 258 AD2d 904, 905 (4th Dept 1999). Jurisdictional discovery is permitted where jurisdiction may exist and the essential jurisdictional facts are in the exclusive control of the moving party. CPLR 3211 (d); *Peterson v Spartan*

Industries, Inc., *supra* at 467.

Ballance asserts that plaintiff had an opportunity for discovery in federal court[6] and to recover the alleged emails from his "crashed" computer. Plaintiff's affidavit does not state that he is unable to retrieve the emails from his crashed computer or that he has attempted to do so. The court also notes that Wallert was the one in charge of the NY Office when Bluewater was evicted and its computers allegedly were disposed of by the landlord. Wallert does not say why he chose not preserve them to prove his claims. Nonetheless, as Ballance may have copies of emails concerning payments by him to Wallert, the court will permit limited expedited jurisdictional discovery solely for the purpose of obtaining such emails. The cost of retrieving emails that cannot be printed or copied from live databases shall be borne by plaintiff and paid in advance to Ballance.

II. Failure to State a Cause of Action

A. Breach of Contract against Bluewater- First Cause of Action

1. The Validity of the 2nd Resolution

Defendants move to dismiss the first cause of action for breach of contract on the ground that the 2nd Resolution is invalid, under North Carolina Statutes §55-8-31(a)(1), because it was approved only by interested directors. As a threshold matter, plaintiff contends that New York law applies. The court disagrees. "[T]he law of the state in which an entity was incorporated ... is controlling as to matters relating to its internal affairs." *Venturetek, L.P. v Rand Publ. Co., Inc.*, 39 AD3d 317 (1st Dept 2007), *app. den.*, 10 NY3d 703 (2008), citing *Carroll v Weill*, 2

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[6]The federal court remanded the case here for lack of diversity jurisdiction and did not consider personal jurisdiction in New York or the merits of the case.

AD3d 152, 153 (1st Dept 2003), lv den 2 NY3d 704 (2004). Bluewater was incorporated in North Carolina and its law applies.

This is a motion based upon documentary evidence and, therefore, only Tomlinson's motion will be considered. The fact that the 2nd Resolution was approved by interested directors does not invalidate it as a matter of law. Under the cited North Carolina statute, a contract with an interested director may be sustained without ratification or approval by the disinterested directors, if it is fair to the corporation. N.C. Gen. Statutes §55-8-31(a)(3) & Official Comments 2 (if votes are not obtained, the transaction is tested under the fairness test of subdivision [a][3]) & Comment 4 (fairness should be evaluated on basis of facts and circumstances known or that should have been known at time of transaction); *see also*, *In re Brokers, Inc., Debtor, Carlton Eugene Anderson and Nelson Kirby Hodge*, 363 BR 458, 472-473 (Bankr. Ct. Middle Distr. NC 2007). A question exists here as to the fairness of the 2nd Resolution.

2. Compensation Was Solely Discretionary

This is a defense based upon documentary evidence that can only be raised by Tomlinson. On the state of the record, the court cannot rule as a matter of law that the founding officers exercised their discretion to accrue, rather than pay, Wallert's salary. Tomlinson argues that Wallert had no right to compensation under the 2nd Resolution because payment was subject to discretion, which cannot be reviewed as a matter of law. The 2nd Resolution provides that the "founding officers will use their discretion in distributing or accruing funds depending on the financial condition of the COMPANY and the participation and fair distribution of [sic] individual officer's needs and requirements due to compensation from other sources." As previously noted, the founding officers were Wallert and Tomlinson. Tomlinson has not

submitted an affidavit stating that discretion was exercised to accrue the funds instead of paying plaintiff. Wallert says that he is entitled to the compensation. He also alleges that funds available to pay his salary were diverted by Tomlinson and Ballance to non-corporate purposes. There is no statement by Tomlinson that he exercised his discretion after consideration of Bluewater's financial condition and Wallert's "needs and requirements due to compensation from other sources." For purposes of this motion, the court must accept as true plaintiff's uncontradicted statement that he is owed compensation and that there were funds available to pay it that were diverted. Hence, the court cannot rule as a matter of law that plaintiff is not entitled to compensation because the founding officers exercised discretion not to pay him.

B. The Guarantees of the Compensation

The second cause of action alleges that the Individual Defendants guaranteed plaintiff's compensation due under the 2nd Resolution. The Individual Defendants argue that the second cause of action should be dismissed because 1) there is no enforceable contract to guaranty, 2) enforcement is barred by the statute of frauds, and 3) there was no consideration for the guarantees. The first two grounds can only be asserted by Tomlinson because of the single motion rule.

The first argument fails because the court has ruled that plaintiff has stated a cause of action for breach of contract. The third point, lack of consideration, fails because plaintiff's performance of services was consideration for the guarantee. *Dunkin' Donuts of America, Inc. v Liberatore*, 138 AD2d 559, 561 (2d Dept 1988)("'where one party agrees with another party that, if such party for a consideration performs a certain act [for] a third person, he will guarantee payment of the consideration by such person, the act specified is impliedly requested by the

guarantor to be performed and, when performed, constitutes a consideration for the guarantee'").

Turning to the statute of frauds, General Obligations Law, §5-701(a)(2) provides that every promise to answer for the debt of another person is void unless it is memorialized in writing and subscribed by the party to be charged. Similarly, North Carolina General Statutes § 22-1 provides, in pertinent part, that: "No action shall be brought .. to charge any defendant upon a special promise to answer the debt ... of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith ...."

With respect to Ballance, as noted above, he cannot raise the statute of frauds because of the single motion rule. In addition, the court has already ruled that there is a factual issue requiring discovery as to whether he in fact signed a memorandum constituting a guarantee. With respect to Tomlinson, plaintiff alleges that he guaranteed Bluewater's obligation to pay the compensation. 2nd AC, ¶15. Although Tomlinson is correct in arguing that plaintiff did not say that Tomlinson's guarantee was written, the court must accept as true plaintiff's allegation that Tomlinson guaranteed the compensation. *Rovello, supra.* Tomlinson failed to deny it.

C. Unjust Enrichment - 3rd Cause of Action

Plaintiff alleges that the Individual Defendants were unjustly enriched by Bluewater's failure to pay Wallert's compensation. Defendants argue that plaintiff has failed to state an unjust enrichment claim because: 1) the benefit of plaintiff's services was conferred on Bluewater, not the Individual Defendants; and 2) the breach of contract claim fails as a matter of law. The court has already ruled that the breach of contract claim states a cause of action.

Nevertheless, the Individual Defendants cannot be held liable for unjust enrichment, and

the third cause of action must be dismissed. Unjust enrichment is a quasi-contractual claim that is precluded where the parties have executed an enforceable written contract governing the same subject matter. *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 (2009); *Progressive Am. Ins. Co. v State Farm Mut. Auto. Ins. Co.*, 184 NC App. 688, 695 (NC Ct. App. 2007)("When one [party] confers a benefit upon another which is not required by a contract either express or implied or a legal duty, the recipient thereof is often unjustly enriched and will be required to make restitution therefor."). Here, the benefit was conferred on Bluewater and the Individual Defendants could only benefit from unpaid compensation if they guaranteed it in writing, as required by the statute of frauds. If there are guarantees, then they would be written contracts governing the same subject matter and unjust enrichment does not lie. *Id.* Consequently, the motions to dismiss the unjust enrichment claim are granted.

D. Accounting for Royalties (4th Cause of Action), Guarantees of Royalties (5th Cause of Action) & Failure to Promote Two Albums (6th Cause of Action)

1. Accounting for Royalties

The fourth cause of action alleges that "pursuant to an agreement for royalties...[Bluewater] agreed to pay a royalty in the amount of "5% of the gross proceeds received or to be received from... [Tomlinson] doing business as The Embers." 2nd AC, ¶21. Plaintiff states that he has been paid no royalties and that Bluewater have [sic] refused an accounting which is hereby demanded." 2nd AC, ¶22. This is sufficient to state a cause of action for breach of an agreement to pay royalties to plaintiff, although it is not referable to the 2nd Resolution, which does not speak of five percent.

Bluewater moves to dismiss the royalty accounting claim on the following grounds:

plaintiff is not entitled to an accounting because he has failed to plead 1) a fiduciary relationship; 2) that he entrusted money or property to Bluewater; 3) that he made a demand for an accounting that Bluewater refused; and 4) that he has no other remedy.

Under North Carolina law, directors of a corporation have a fiduciary duty to the corporation, and majority shareholders in a closely held corporation have a fiduciary duty to the minority shareholders. *Consoli v. Global Supply & Logistics, Inc.*, 2011 N.C. App. LEXIS 1787, 30-33 (N.C. Ct. App. Aug. 16, 2011) (nor); *Norman v Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390 (Ct. App. N.C. 2000). A shareholder may bring a claim against a corporation to recover any amount owed to him individually from the corporation and need not bring a derivative claim. *Norman*, 397. Therefore, it is not necessary for plaintiff to claim that the allegedly owed royalties were entrusted to Bluewater. Plaintiff alleges that he has received no royalties and Bluewater has "refused an accounting, which is hereby demanded." Giving plaintiff the benefit of every favorable inference, his use of the past tense indicates that a demand was made before the lawsuit and the one made in the pleading is in the nature of a wherefore clause. The exclusive remedy requirement appears in case law cited by defendants involving trusts, not corporations. An accounting is a recognized remedy in the corporate context, and the remedy need not be exclusive. *Norman*, at 398-401 and cases cited therein.

2. Guarantees of Royalties

The fifth cause of action alleges that the Individual Defendants guaranteed royalties allegedly owed to Wallert pursuant to the 2nd Resolution (referred to in the pleading as The Contract) which provides that plaintiff:

will ... receive a production royalty advance of $3,750...retroactive commencing on

January 1, 2004, payable at the beginning of each month for the preceding month. The alleged guarantees of the royalties require discovery and cannot be dismissed as a matter of law. *See*, Part II(B), *supra*, regarding guarantees.

3. Failure to Promote Two Albums

The motion to dismiss the sixth cause of action for failure to promote is based upon the 2nd Resolution, which is documentary evidence. The 2nd AC alleges that "pursuant to The Contract," Ballance and Tomlinson failed to promote two albums plaintiff produced. As there is no mention in the 2nd Resolution of an obligation to promote two albums, the sixth cause of action is dismissed as against Tomlinson. It survives against Ballance because of the single motion rule.

E. Corporate Waste & Looting - 8th & 9th Causes of Action in 2d AC

The eighth cause of action says that Tomlinson, as an officer and director, engaged in corporate waste and looting by taking $6,000 from the recording budget of "The Show Must Go On" and by paying an Embers band member $23,000. Plaintiff alleges that Bluewater owed neither amount. The ninth cause of action alleges that Ballance, as officer and director, committed corporate waste by paying $250,000 out of Bluewater's assets to two Embers partners to whom Bluewater did not owe money. In the eighth cause of action, plaintiff alleges that "All legal prerequisites to the commencement of this derivative action, including appropriate notice requirements, have been met." The ninth cause of action begins with "All prior allegations are repeated."

Defendants Ballance and Bluewater move to dismiss these claims on the grounds that the amendment was untimely; Wallert cannot bring a shareholder derivative action and individual claims against Bluewater at the same time due to conflict of interest; a demand on Bluewater is a condition precedent to bringing a derivative action; and North Carolina does not recognize an independent tort

of corporate waste. As previously noted, the 2nd AC was timely served as of right.

North Carolina law holds that a minority shareholder of a close corporation may maintain simultaneously a derivative action and an action against the majority shareholders for a breach of fiduciary duty that deprives the minority of the benefit of their investment. *Consoli, Norman*, at 405. While there is some contrary authority, also from the North Carolina Court of Appeals, *Gaskin v The J.S. Proctor Company, LLC*, 196 N.C. App. 447 (N.C. Ct. App. 2009), *Gaskin* was a suit by 90% of the shareholders and therefore its holding was *dicta*. The North Carolina Supreme Court has not ruled on the issue.

The demand which is a condition precedent to a derivative action,[7] may be pleaded generally without specifying the notice given to the corporation. *Norman*, at 411-412 (upholding complaint alleging that "all conditions precedent to the filing of this action by Plaintiffs have been complied with"), *cf, Garlock v Hillard*, 2000 NCBC 11 (N.C. Superior Ct., Mecklenberg Co 2000). The North Carolina Business Court, a specialized trial level court, and the North Carolina Court of Appeals have opposing views on this issue. 1-17 *Robinson on North Carolina Corporation Law*, Ch. 3, §17.03. Under principles of *stare decisis*, this court should follow the appellate rather than the trial court rule. Hence, plaintiff has adequately pleaded the demand on Bluewater.

It is unnecessary to address Tomlinson's corporate waste argument, as the eighth cause of action is upheld on the basis that the substance of the claim is that Tomlinson diverted corporate assets for a non-corporate purpose, which would be a breach of fiduciary duty if established. Accordingly, it is

ORDERED that the motion by Ballance to dismiss the amended complaint and second

[7] N.C. Gen. Stat. § 55-7-42.

amended complaint on the basis of personal jurisdiction is denied with leave to renew after completion of the limited jurisdictional disclosure ordered herein; and it is further

ORDERED that plaintiff's cross-motion to Motion Sequence 003 to consider all of his submissions in opposition to both motions and as against the second amended complaint annexed as Exhibit A to the cross-motion is granted, and the second amended complaint is deemed served as of the date that it was e-filed; and it is further

ORDERED that the motions by defendant Tomlinson (Mot. Seq. 002) and defendants Ballance and Bluewater (Mot. Seq. 003) to dismiss the amended complaint for failure to state a claim and based upon documentary evidence, which the court has considered as against the second amended complaint served as of right, are granted solely to the extent of: 1) dismissing the seventh cause of action for fraudulent inducement on consent of the parties; 2) dismissing the third cause of action for unjust enrichment as against Dr. William Ballance, Jr. and Bobby Tomlinson d/b/a the Embers, 3) dismissing the sixth cause of action for failure to promote against Bobby Tomlinson d/b/a the Embers, 4) striking plaintiff's demand for punitive damages, and in all other respects the motions are denied; and it is further

ORDERED that within thirty days of service upon Ballance of a copy of this order with notice of entry, he shall provide plaintiff with copies of all emails, that can be copied or printed from live databases in his possession, custody or control, that he sent to Charles Wallert between August 1, 2005 and November 11, 2010 and that concern payments by Ballance to Charles Wallert, and in the event that such emails exist in a form easily retrievable and, thus, cannot be copied or printed from live databases, Ballance shall provide them to plaintiff after plaintiff pays the cost of retrieving them; and it is further

ORDERED that Charles Wallert shall, within thirty days of his attorneys' receipt of confirmation of entry of this order in the NYCEFS, provide Ballance and Tomlinson with copies of all documents in which Ballance or Tomlinson guaranteed royalties or compensation allegedly owed to plaintiff, or an affidavit stating that he has no such documents in his possession, custody or control and detailing the steps he took to retrieve and obtain such documents.

Dated: October 26, 2011

ENTER:

J.S.C.