

**Pai v Blue Man Group Publ., LLC**

2016 NY Slip Op 31797(U)

September 28, 2016

Supreme Court, New York County

Docket Number: 650427/16

Judge: Barry Ostrager

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 61

X

IAN PAI,

Plaintiff,

-against-

BLUE MAN GROUP PUBLISHING, LLC, BLUE  
MAN GROUP PRODUCTIONS, LLC, BLUE MAN  
GROUP HOLDINGS, LLC, BLUE MAN  
PRODUCTIONS, INC., BLUE MAN GROUP  
LIMITED PARTNERSHIP, BLUE MAN  
PRODUCTIONS, LLC, BLUE MAN VEGAS LLC,  
BLUE MAN BOSTON LIMITED PARTNERSHIP,  
BLUE MAN CHICAGO LIMITED PARTNERSHIP,  
BLUE MAN INTERNATIONAL, LLC, BLUE MAN  
TORONTO, LLC, BLUE MAN TOURING, LLC,  
ASTOR SHOW PRODUCTIONS, LLC, ZEBRA  
HORSE, LLC, CHRIS WINK, PHILLIP STANTON,  
and MATT GOLDMAN,

Defendants.

X

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DECISION & ORDER

MOTION SEQ. NO. 001

OSTRAGER, J:

The defendants' pre-answer motion to dismiss the complaint is granted in part and denied in part for the reasons that follow. This decision is based in large part on the well-settled principles that on a motion to dismiss all the well-pleaded allegations of the complaint must be taken as true and the pleadings must be liberally construed in favor of the non-moving party. Also, in accordance with stipulations entered into by the parties at the oral argument, plaintiff's seventh cause of action is dismissed, and the action is discontinued as against two defunct defendants: Blue Man Group Limited Partnership and Blue Man Productions, LLC.

This case arises out of the decades long relationship between the plaintiff, Ian Pai, and the individual defendants, Chris Wink, Phillip Stanton, and Matt Goldman. Plaintiff alleges in considerable detail that he was one of the principal creative forces behind the development and early promotion of the Blue Man Group, having co-authored a dozen of the iconic musical pieces that the Blue Man Group has played live at concerts and shows for more than a quarter of a century. In addition, plaintiff alleges he has labored to create the unique sets and lighting for Blue Man Group productions that now simultaneously play in multiple cities, created the PVC pipes that are an integral part of every live Blue Man Group show, and acted as Music Director of various Blue Man Group shows for more than a decade pursuant to an oral agreement that entitled him to a percentage of box office receipts for acting as the Music Director of shows. Significantly, the complaint attaches the program from the Blue Man Group's first theatrical performance in the Astor Place theater in 1991 which prominently identifies the plaintiff as one of two "Artistic and Musical Collaborators" of the show. Similar attribution was given to plaintiff in other theaters at which the Blue Man Group performed.

Plaintiff further alleges various breach of fiduciary duty, quantum meruit, unjust enrichment, and fraud claims pursuant to which plaintiff claims he is entitled to royalties for the live performance of music he allegedly participated in writing. Specifically, the plaintiff alleges that he and the individual defendants had a decades-long personal relationship equivalent to one of joint venturers and that, at all relevant times, the defendants advised the plaintiff that they would "take care of him" and that they "had his back". The plaintiff alleges, and the individual defendants do not dispute, that the individual defendants have become deca-millionaires and that the now famous Blue Man Group has generated box office revenues in excess of \$1 billion in America and around the world. The plaintiff has pled his claim for royalties exclusively as a

breach of fiduciary duty claim and not a breach of either an oral or written contract. Plaintiff seeks an accounting relating to his breach of fiduciary duty claims and his claims based on his alleged oral agreement relating to the Music Director services. The precise date when plaintiff ceased providing services to the defendants is unclear from the somewhat prolix complaint, but the plaintiff and the individual defendants apparently drifted apart some years ago.

The defendants do not dispute that there was an oral contract relating to the plaintiff's services as Music Director for certain shows, although the parties dispute the percentage of box office revenue plaintiff was entitled to receive. Defendants assert that the Music Director claim is barred by the Statute of Frauds and that the breach of fiduciary duty claim is insufficient as a matter of law to withstand a motion to dismiss. Defendants concede that the defendants have been paying plaintiff weekly royalties between \$100,000 and \$200,000 a year for more than two decades prior to the filing of the complaint. (Transcript of September 26, 2016 oral argument at 10.) Defendants ceased paying the plaintiff anything after the filing of the complaint. At oral argument, the defendants did not have a cogent explanation for precisely how the sums defendants paid to plaintiff were calculated, asserting that the plaintiff's complaint is an example of "no good deed going unpunished". (Transcript of September 26, 2016 oral argument at 13.)

The claim on the oral agreement relating to the Music Director oral contract cannot be dismissed on a pre-answer motion to dismiss as there is a writing from defendants' agents that satisfies the current version of the New York Statute of Frauds, New York General Obligations Law §5-701(b)(3). See *Eastern European Trading Corp. v. Knaust*, 128 A.D.3d 589 (2015). Thus, to the extent the second, third, fourth, and fifth causes of action relate to the Music Director claim, those causes of action cannot be dismissed on Statute of Frauds grounds on a pre-answer motion to dismiss as the plaintiff has pled sufficient facts to defeat the motion, and the

precise terms of the oral agreement and any damages plaintiff claims to have sustained will have to be determined at a subsequent stage of this case. Plaintiff, however, cannot retroactively assert contract claims to a period in time barred by the applicable statute of limitations. It is sufficient for present purposes to hold that the Music Director claims cannot be entirely dismissed at the pre-answer motion to dismiss stage of the case.

With respect to the breach of fiduciary duty claim, which is the first cause of action, plaintiff principally relies on a series of cases which held that a recording company had breached its fiduciary duties to recording artists notwithstanding the existence of a written contract among the parties. See *e.g.*, *Apple Records, Inc. v. Capitol Records, Inc.*, 137 A.D. 2d 50 (1<sup>st</sup> Dep't 1988). Defendants assert that the *Apple* cases are "outliers" and have not been followed, and that appears to be a correct interpretation of the cases. Defendants also cite numerous other cases that dismiss breach of fiduciary duty claims by composers and band members, almost all of which involve attempts to assert breach of fiduciary duty claims either in addition to or notwithstanding contractual arrangements.

These cases are inapposite to this case in which the royalty claim is framed purely as a breach of fiduciary duty/unjust enrichment/quantum meruit claim. Thus, the relevant inquiry is whether plaintiff has sufficiently pled a breach of fiduciary duty claim. The Court of Appeals has held that "[a] fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other" *Roni LLC v. Arfa*, 18 N.Y. 3d 846, 848, quoting *AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 11 N.Y.3d 146, 158 (2008) (internal quotation marks and citation omitted). Quoting *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 561 (2009), the *Roni* court also held (at p. 848) that: "Ascertaining the existence of a fiduciary relationship 'inevitably requires a fact-specific inquiry'" Applying

these standards, plaintiff has more than pleaded sufficient facts to defeat a pre-answer motion to dismiss based on the long relationship of the parties and the allegedly tireless efforts of plaintiff to advance the interests of Blue Man Group. Nevertheless, as with the Music Director claim, plaintiff cannot ignore the statutes of limitations contained in CPLR 213(1) and CPLR 214(4). Accordingly, counts one, two, three, four, and five cannot be entirely dismissed on a pre-answer motion to dismiss.

Count Six of the Complaint alleging fraud is dismissed inasmuch as the claim is subsumed by and duplicative of plaintiff's other surviving claims. In addition, plaintiff had twenty years within which to raise questions with respect to the sums he was receiving from the defendants, and he failed to exercise appropriate diligence notwithstanding his allegations that the defendants promised to "take care of him" and treat him fairly. If, as plaintiff alleges, he was entitled to significant royalties from thousands of Blue Man Group live performances, he was on notice that he was receiving less remuneration than he presently claims to be entitled. The same considerations militate against estopping defendants from relying on applicable statutes of limitations.

In addition, attached to the complaint is a fully executed assignment of copyright agreement effective 1999 (the "Songwriter's Agreement") relating to the exploitation in records and CD's of any copyrights plaintiff had to Blue Man Group compositions. Plaintiff was represented by counsel in connection with the negotiation of the Songwriter's Agreement which forms the basis of the seventh cause of action that plaintiff has agreed to dismiss. At a minimum, the existence of the Songwriter's Agreement establishes that plaintiff understood that whatever rights he had to the musical compositions written for Blue Man Group had value, and this circumstance and the totality of circumstances renders the maintenance of the fraud claim

untenable even at the pre-answer to dismiss stage of these proceedings. (The existence of the Songwriter's Agreement also suggests that the defendants believed plaintiff had a royalty interest in certain songs performed by Blue Man Group, as defendants conceded at oral argument).

(Transcript of oral argument at 10.)

Finally, because the corporate defendants are all entities created to honor the individual defendants' obligations, the same rulings apply to all defendants.

Accordingly, it is hereby ORDERED that:

The motion is granted on consent of all parties to the extent that the seventh cause of action is dismissed, as are the claims against defunct defendants Blue Man Group Limited Partnership and Blue Man Productions, LLC, and the Clerk is directed to sever those claims and enter judgment dismissing the seventh cause of action and dismissing all claims against Blue Man Group Limited Partnership and Blue Man Productions, LLC; and it is further

ORDERED that defendants' motion to dismiss the first, second, third, fourth and fifth causes of action is denied, except to the extent that the claims are barred in part by the applicable statutes of limitations; and it is further

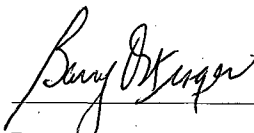
ORDERED that the sixth cause of action is dismissed, and the Clerk is directed to sever and enter judgment dismissing that cause of action; and it is further

ORDERED that defendants shall answer the portions of the complaint that have not been dismissed within thirty (30) days; and it is further

ORDERED that counsel are directed to appear for a compliance conference on November 22, 2016 at 9:30 a.m.

This constitutes the decision and order of the Court. As previously directed, defendants remain obligated to order the transcript of the oral argument that was conducted on September 26, 2016.

Dated: September 28, 2016



J.S.C.

**BARRY R. OSTRAGER**  
**JSC**