Gottwald v Sebert
2016 NY Slip Op 32815(U)
April 6, 2016
Supreme Court, New York County
Docket Number: 653118/2014
Judge: Shirley Werner Kornreich

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

PRESENT: SHIRLEY WERNER KORNREICH **PART** 54
Justice

LUKASZ GOTTWALD et al

- v -

KESHA ROSE SEBERT

INDEX NO. 653118/2014
MOTION DATE
MOTION SEQ. NO. 019
MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	354-379, 399-403, 477-479, 483
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion
is decided in accordance with the accompanying memorandum.

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

Dated: 4/6/16

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.

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

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LUKASZ GOTTWALD p/k/a DR. LUKE, KASZ MONEY, INC., and PRESCRIPTION SONGS, LLC,

Plaintiffs,

-against-

Index No. 653118/2014

KESHA ROSE SEBERT p/k/a KESHA,

Defendants.

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KESHA ROSE SEBERT p/k/a KESHA,

Counterclaim-Plaintiff,

-against-

LUKASZ GOTTWALD p/k/a DR. LUKE, KASZ MONEY, INC., and PRESCRIPTION SONGS, LLC, KEMOSABE ENTERTAINMENT, LLC, KEMOSABE RECORDS, LLC, SONY MUSIC ENTERTAINMENT, LLC, and DOES 1-25, inclusive,

Counterclaim-Defendants.

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SHIRLEY WERNER KORNREICH, J.

Motion Sequences 019 and 020 are consolidated for disposition.

Briefly, these actions arise from contractual relationships between Kesha Rose Sebert (Kesha) and Lukasz Gottwald and his companies. The original contract to record Kesha's music was entered into in 2005. After Kesha allegedly was sexually assaulted by Gottwald, the recording contract was renegotiated to Kesha's benefit, and Kesha entered into a publishing contract with Gottwald's publishing company. In 2009, Gottwald, with Kesha's agreement, contracted with RCA/JIVE, a label of Sony Music Entertainment, to record Kesha. In 2010, Kesha met with success, and her first album and one of its singles attained platinum status. In

November of 2011, Kemosabe Records, LLC (Kemosabe), a Sony-connected entity, was formed, and Gottwald became its Chief Executive Officer (CEO). Gottwald and RCA/Jive assigned their rights to the production and copyright of Kesha's material to Kemosabe. Kesha released a second album in 2012 and stopped recording in 2013. In 2014, Gottwald commenced the instant breach of contract action in New York. Immediately thereafter, Kesha brought an action in California alleging California statutory claims for sexual assault, sexual harassment, and gender violence, for her treatment by Gottwald, all of which occurred in California. The California court stayed its action in favor of the New York action. In response, Kesha asserted claims in New York against Gottwald and his companies and also against Sony and its entities. Those claims, for the most part, are for violations of New York City and State statutes based upon gender-motivated hate crimes and gender-based employment discrimination, again, for Gottwald's California conduct. These counterclaims are at issue on these motions by Gottwald, his companies, and the Sony-related entities.

I. Counterclaims

Counterclaim-Defendants Gottwald, Kasz Money, Inc. (KMI), Prescription Songs, LLC (Prescription) and Kemosabe Entertainment, LLC (Entertainment, with Gottwald and KMI, Gottwald Parties), move (Motion Sequence 019) to dismiss the first amended counterclaim of Kesha against Prescription and Entertainment, and the 2nd through 8th causes of action in Kesha's first amended counterclaims against all of the Gottwald Parties. Kesha opposes and, alternatively, requests leave to amend.

Defendants Kemosabe, and Sony Music Entertainment, LLC (SME, with Kemosabe, Sony Parties, with Gottwald Parties, Movants) move (Motion Seq 020) to dismiss the 2nd through 7th causes of action in Kesha's first amended counterclaims against the Sony Parties.

Alternatively, the Sony Parties seek to strike portions of Kesha's first amended counterclaims, pursuant to CPLR 3024. Kesha opposes and, alternatively, requests leave to amend.

Kesha asserts eight counterclaims, numbered here as in her first amended counterclaims (each a CC, collectively, CCs): 1) declaratory judgment as to her rights under her contract with KMI and the contract between KMI and RCA/JIVE, a "Label Group" of SME,[1] to which Kesha assented in a separate document; 2) employment based gender discrimination in violation of New York Executive Law §698; 3) gender-related hate crimes under New York State Civil Rights Law §79-n; 4) employment based sexual harassment in contravention of the New York City Administrative Code §8-107((1)(a); 5) employment based sexual harassment pursuant to New York City Administrative Code §8-107(b)(1) & (2); 6) gender motived violence in violation of the New York City Administrative Code §8-904; 7) intentional infliction of emotional distress; and 8) a declaratory judgment declaring that Kesha's contracts with KMI and Prescription are void. Dkt 336.[2] Except for the 8th CC against Gottwald and KMI, the CCs are pled against all of the Movants.

II. Background

Unless otherwise noted, the facts in this background section are taken from the CCs. Kesha, whose stage name is Ke$ha, is a recording artist and songwriter, who resides in California and Tennessee. Gottwald, also known as Dr. Luke, is a songwriter and producer of musical recordings, who resides in California. KMI and Prescription are, respectively, music production and publishing companies founded and wholly-owned by Gottwald. KMI is a New

[1] The contract refers to RCA/JIVE as a Label Group of SME, but the CCs state that RCA/JIVE is a wholly-owned subsidiary of SME. CCs, ¶66.

[2] References to "Dkt" followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing System.

York corporation. Prescription is a California limited liability company doing business in New York. Entertainment is another California limited liability company doing business in New York, and is wholly-owned by Gottwald. Kemosabe is a Delaware limited liability company doing business in New York. Gottwald is Kemosabe's CEO. SME is a Delaware limited partnership doing business in New York. CCs, ¶ 13.

Kesha grew up in Nashville, Tennessee, where she was discovered by Gottwald. Kesha contends that in 2005, when she was 18, Gottwald convinced her to drop out of high school, move to Los Angeles and sign a recording contract with KMI (KMI Agreement). According to Kesha, she always has lived in either Tennessee or California, since she was 4 years old; she writes her songs in either Tennessee or California, but not New York; and she recorded music and wrote songs with Gottwald only in California. Dkt 307.

A. The Contracts & Kesha's Career

The KMI Agreement is dated September 26, 2005. Dkt 369, §2. In it, Kesha promised to record a first album during the First Contract Period,[3] which was defined as the later of 12 months after delivery of Master Recordings sufficient to constitute the First Album, or 18 months from the date of the KMI Agreement, i.e., March 26, 2007. *Id.* The First Album was to be delivered within 5 months, i.e., in 2006. *Id.* KMI was granted the right to use the First Album or "Demos" to seek a new exclusive recording agreement with a Major Label (a label or company), which was defined as including a parent or subsidiary of Sony BMG. *Id.* Kesha and KMI agreed that the Major Label Recording Agreement would be on the same terms and conditions as the KMI Agreement. *Id.* If the Major Label Recording Agreement was not obtained during the First Contract Period, then Kesha had the right to terminate the KMI

[3] Capitalized terms in this paragraph are defined terms in the KMI Agreement.

Agreement when the First Contract Period ended.[4] Kesha granted KMI the right to extend the Term beyond the First Contract Period by exercising 5 Contract Period Options and to record 5 more albums with Kesha, for a total of 6. *Id.* Kesha agreed that Gottwald would be engaged to render production services in connection with no fewer than 6 Master Recordings on each Album made under the KMI Agreement. *Id*, §6.

Kesha further agreed that the Master Recordings made by her during the Term were the property of KMI in perpetuity (during the life of their copyrights); that KMI had the exclusive right to manufacture Kesha's Master Recordings and to sell, distribute, transfer or otherwise deal with them; and that KMI had exclusive audio and video licenses to exploit Controlled Compositions on the Master Recordings. *Id*, §§ 5 & 7. KMI was to advance Recording Costs and pay Kesha Royalties after the Recording Costs were recouped. *Id*, §§ 3 & 4.

On November 26, 2008, more than three years after the KMI Agreement, Prescription, as Publisher, and Kesha, as Composer, entered into a Co-publishing and Exclusive Administration Agreement (Prescription Agreement), in which Kesha granted Prescription an exclusive percentage interest in songs (defined as Compositions) written by Kesha (or by Kesha and others) and the exclusive right to exploit them during an Initial Term and 2 Option Periods, defined as Contract Periods. Dkt 372. Kesha agreed to provide a minimum number of Compositions sufficient to meet certain financial targets in each Contract Period. The Prescription Agreement recites that, during negotiation of the contract, Kesha was represented by an attorney of her choice who was familiar with the practices of the entertainment industry. *Id*, p. 21.

[4] It is not clear from the submissions when Kesha delivered the Master Recordings sufficient to constitute her First Album, although her First Album, *Animal*, was released in 2010. CCs, ¶31.

Kesha and KMI entered into two amendments to the KMI Agreement on December 1, 2008, and May 18, 2009 (1st Amendment & 2d Amendment, respectively). Dkt 370 & 371. The 1st Amendment reduced Kesha's Recording Commitment to the First Album plus 4 KMI Contract Period Options, a total of 5, and apparently modified the Royalty provisions, which were redacted in the versions submitted to the court. Dkt 370. The 1st Amendment also stated that if a Major Recording Agreement was not secured by December 4, 2008 or 2009 (the year is not legible in the copies submitted), then either party could terminate the contract. *Id.* The 2d Amendment reflected that KMI had entered into an agreement with "RCA/JIVE a Label Group of Sony Music Entertainment," on or about January 27, 2009. Dkt 371.

On January 27, 2009, KMI and RCA/JIVE entered into an agreement (RCA/JIVE Agreement). Dkt 386. KMI agreed that during the Term of the contract, KMI would cause Kesha to render performances exclusively for RCA/JIVE to the best of Kesha's ability, on a first priority basis, for the purpose of recording Masters, which KMI would cause to be produced and delivered to RCA/JIVE. Dkt 386. It is unclear to the court what the exact relationship is between RCA/JIVE and SME. None of the submissions of the parties address the term "Label Group".

Also on January 27, 2009, Kesha and RCA/JIVE entered into an Assent, Guaranty, and Entertainment Rights Agreement (Assent), in which Kesha agreed to fully perform and discharge, to the best of her ability, all of the obligations, warranties, and undertakings contained in the RCA/JIVE Agreement, insofar as they related to her, and to refrain from entering into agreements or commitments that would interfere with KMI's and her obligations under the RCA/JIVE Agreement. Dkt 387. In the Assent, Kesha agreed that her services were "of a special, unique, intellectual, and extraordinary character which gives them peculiar value," and

agreed that if she breached, RCA/JIVE would be irreparably injured and entitled to injunctive relief. *Id.* Kesha also warranted and represented in the Assent that she had read the RCA/JIVE Agreement, and had consulted, or had the opportunity to consult, with a lawyer chosen by her, for the purpose of having the legal effect of the contract explained to her. *Id.*

Entertainment and Kemosabe were formed in 2010 and 2011, respectively. On January 13, 2010, in California, papers were filed to form Entertainment. Dkt 378. On November 8, 2011, SME formed Kemosabe, a Delaware limited liability company. Dkt 388. Since its formation, Gottwald was Kemosabe's CEO. Entertainment and SME are the members of Kemosabe. Dkt 389. Kesha alleges that SME invested $60 million in Kemosabe. CCs, §47.

On March 1, 2012, but effective November 1, 2011, RCA Records, a division of SME (RCA), entered into an assignment agreement with Kemosabe and Entertainment (Kemosabe Assignment). Dkt 389. The Kemosabe Assignment refers to an agreement, which is not in the record, between RCA and Entertainment, as successor-in-interest to KMI, dated January 27, 2009, defined as the "Dr. Luke Ke$ha Agreement" (presumably a reference to the RCA/JIVE Agreement), in which RCA assigned to Entertainment a 50% share of RCA's ownership interests in Kesha's Masters delivered to RCA under the RCA/JIVE Agreement. *Id.* Thus, it appears that Entertainment received a 50% interest in Kesha's recordings delivered pursuant to the RCA/JIVE Agreement. In the Kemosabe Assignment, Entertainment and RCA each assigned to Records their 50% interests in Kesha's Masters delivered after November 1, 2011, but kept their interests in the Masters delivered prior to that date, which are listed on an attached schedule. *Id.* As a result, Kemosabe received a 100% interest in Kesha's recordings delivered after November 1, 2011.

In 2010 (before Kemosabe was formed), *Animal*, Kesha's First Album, and her debut single, *Tik Tok*, went platinum, i.e., sold over a million copies. CCs , ¶31. Kesha gained international recognition. *Id.* Kesha's second album, *Warrior*, was released in December 2012. 12/18/15 Affidavit of Daniel B. Zucker (Zucker Aff), Dkt 408, ¶13. *Warrior* and two of its singles were successful. *Id.* SME, through Kemosabe, has invested more than $11 million in Kesha's career. *Id*, ¶10. Kesha earned millions of dollars. *Id*, ¶14.

Kesha admits that she stopped recording in 2013. Dkt 499, 2/19/16 Oral Argument Transcript (Tr), p 75. Kesha says that Gottwald failed to grant her promised increased royalties and advances for the second album, which she claims is customary for a platinum-selling artist. CCs, ¶34.

In connection with Kesha's motion for a preliminary injunction,[5] which was denied by this court, the Sony Parties averred that they were "ready, willing and able to approve a producer with whom Kesha can work other than Gottwald." Zucker Aff, ¶15. They claimed that nothing in the RCA/JIVE Agreement and Assent "obligates Kesha to hire Gottwald to produce her records." *Id.* SME and Kemosabe also swore under oath that, "Kesha has been asked, through her management, on behalf of Kemosabe to work on recording new music, but she has to date refused to do so." *Id.* Similarly, Gottwald submitted an affidavit swearing that KMI and Prescription were ready, willing and able to perform their contractual obligations and had employees, **not** Gottwald, who could work directly with Kesha. 12/11/15 Gottwald Affidavit,

[5] In her application for a preliminary injunction, Kesha asked the court "to enter an order enjoining the Counterclaim Defendants from interfering with Kesha's working with other producers and production companies and ordering Prescription Songs, LLC to issue all customary and necessary publishing licenses in connection with the release of the Kesha music, including but not limited to the mechanical and synchronization licenses required with respect to the sales, promotion, and marketing of the songs to the consumer." 9/18/15 Memorandum in Support of Kesha's Preliminary Injunction, Dkt 330, pp. 4-5.

Dkt 406. Kesha, however, insisted that she will not work with any entity related to Gottwald, including Kemosabe. 1/15/16 Kesha Reply Memorandum of Law on Motion for Preliminary Injunction (Seq 017), Dkt 486, pp 8-9. At oral argument, Kesha's attorney refused the offer to work without Gottwald on the ground that he believed that Movants would not promote Kesha's work. Tr, Dkt 499, pp 7-11. All of the Movants confirmed at oral argument that they would permit Kesha to work with no interface with Gottwald and would promote her music. *Id*, pp 32-38.[6]

B. Alleged Abuse & its Timing

This action was filed on October 14, 2014. Kesha filed an answer with counterclaims on July 7, 2015. Dkt 252. Her first amended counterclaims [the CCs] were filed on October 16, 2015. Dkt 336.

Kesha alleges that "soon after" she moved to Los Angeles in 2005, Gottwald began to make sexual advances, and forced her to take drugs and alcohol so he could take sexual advantage of her while she was intoxicated. While Kesha's CCs allege that she was sexually, physically and verbally abused by Gottwald for a decade, she describes only two specific instances of physical/sexual abuse. Kesha alleges that "one occasion" was when Gottwald "forced" her to snort an illicit drug before they boarded an airplane, after which Gottwald "continuously forced himself on" her during the flight, while she was intoxicated. CCs, ¶ 26. In the other incident, Gottwald allegedly told her to take "sober pills," which were a date rape drug (GHB), after which Kesha believed Gottwald had raped her when she was unconscious because

[6] The court did not grant the injunction, largely because Kesha was free to record without any contact with Gottwald. The court found that it is commercially unreasonable for the SONY entities, having expended more than $11 million in the U.S. and up to $20 million internationally, and willing to spend more millions, not to promote Kesha's albums.

she woke up naked, sore and sick in his hotel room, with no memory of how she got there. CCs, ¶ 27. This occurred in 2005. 8/31/15 Kesha Affidavit, Dkt. 331, ¶3. Kesha allegedly "immediately" called her mother and told her mother that she had been raped and needed to go to an emergency room. CC, ¶27.[7] Kesha does not deny that the alleged airplane and rape incidents took place in 2005 and 2008.[8] At the time, Kemosabe did not exist, Gottwald had not yet entered into the RCA/JIVE Agreement, and Kesha does not allege any business relationship between the Gottwald Parties and the Sony Parties.

Kesha expressly states that she "never dared talk about, let alone report, what Dr. Luke had done to her," except purportedly telling her mother about the rape. CCs, ¶¶ 27, 28 & 41. She conclusorily alleges that the Sony Parties knew of, should have known about, ratified and concealed Gottwald's abuse, before and after Kemosabe was formed. CCs, ¶¶ 48-56.[9] She further alleges that she kept silent about it because Dr. Luke threatened to destroy her career and

[7] In an action brought by one of Kesha's managing agents for breach of contract, she and her mother testified in 2011 depositions. Under oath, they both denied that Gottwald ever had sex with Kesha or that he had ever given her drugs.

[8] The only other specific "attack" allegedly occurred in Gottwald's Malibu house, when Gottwald screamed, threatened, thrashed his arms violently and backed her into a corner, which frightened her. CCs, ¶39. Kesha supplies no date for when this happened.

[9] Kesha alleges that unnamed SME executives "witnessed or were made aware of" Gottwald's abuse of Kesha, which was "open and obvious" but failed to take investigate or corrective action "both before the existence of Kemosabe Records and to this day." CCs, ¶¶ 48-50 & 56. She does not specify the abuse, say who knew of such "abuse", or state where or when it occurred. The Sony Parties first became involved with Kesha upon the execution of the RCA/JIVE contract with KMI in January 2009.

her family if she told anyone. CCs, ¶¶ 28 & 41.[10] She did, however, complain to SME executives about her "unconscionable" contracts. CCs, ¶ 52.

With respect to verbal abuse, Kesha alleges that Gottwald told her that she was worthless and inferior to other recording artists with whom he worked, and insulted her songwriting, vocals, clothing, weight, body and appearance. CCs, ¶¶ 32, 35 & 36. He allegedly denigrated her worth by saying that she would be nothing without him and that there were "a million girls out there like you." CCs, ¶ 35. He reportedly criticized her weight "incessantly" and instructed her to stop eating in front of others. CCs, ¶36. In January 2014, Kesha entered a rehabilitation treatment center, where she claims she was diagnosed with bulimia nervosa, severe depression, post-traumatic stress, social isolation and panic attacks, which she blames on Gottwald's alleged abuse. CCs, ¶¶ 58-59.[11]

According to Kesha's attorney, Kesha had "contact" with Gottwald after she went to the rehabilitation center in January 2014, although that was not alleged in Kesha's submissions. Dkt 499, Tr, pp 61-63 & 76. When asked what abuse occurred after January 2014, Kesha's lawyer responded that there was a "continuous tort", but gave no specifics. *Id.* The CCs allege in conclusory fashion that Gottwald's abuse continues, but, in keeping with her CCs, she supplies no dates or specifics. If Gottwald abused Kesha at any time, she does not need discovery to allege what occurred, or when and who she told. Similarly, she would know which Sony

[10] This included threats about her dog, her family's physical safety and the careers of her brother and mother. Kesha's mother is a song writer and her brother allegedly has a reality television series. CCs ¶38.

[11] No medical proof supporting her diagnoses was submitted in support of her preliminary injunction motion. For purposes of a motion to dismiss, Kesha's allegations are accepted as true.

executives witnessed any abuse, the nature of the abuse and when it occurred. She failed to make the necessary allegations, even when faced with these motions.

C. Procedural History

This action was commenced by Gottwald, KMI and Prescription on October 14, 2014. Dkt 1. The same day, Kesha filed an action in California Superior Court, Los Angeles County, Case No. BC560466 (CA Action), against the Gottwald Parties and Kemosabe (CA Defendants). Dkt 479, 6/12/15 Decision of Hon. Barbara M. Scheper, Judge (CA Decision). In the CA Action, Kesha asserted claims, under California statutes, for gender violence, civil harassment and unfair business practices, as well as tort claims for intentional infliction of emotional distress, negligent infliction of emotional distress and negligence, and sought to void contracts with the CA Defendants. *Id.* On November 17, 2014, the CA Defendants moved to dismiss or stay the CA Action, based on the forum selection clauses in the KMI, Prescription and RCA/JIVE Agreements. Dkt 158. They argued, *inter alia*, that Kesha could obtain the same relief under the New York City Human Rights Law as under similar California Laws. Dkt 479.

The CA Decision stayed, but did not dismiss, the CA Action because Kesha did not sustain her burden of providing substantial evidence that the forum selection clauses should not be enforced. *Id.* The CA Decision specifically declined to make a ruling on whether Kesha could receive the same relief under the NYC HRL as under California law.[12] *Id.*

[12] The CA Decision said, "[t]he court cannot evaluate this argument since defendant fails to cite specific provisions of the law or conduct a comparative analysis of the California statutes cited by plaintiff and the law in New York. Because the court finds that the statutes relied on by plaintiff do not contain an applicable anti-waiver provision, the court does not reach the issue of whether New York provides the same or greater rights than California on the claims at issue." *Id.* The CA Decision did not mention the New York State Human Rights Law.

On January 14, 2015, Kesha moved to dismiss this action on the grounds of improper service, lack of personal jurisdiction, forum *non conveniens* and the pending CA Action. Dkt 101 & 102. In opposition to Kesha's personal jurisdiction motion, the Gottwald Parties argued that Kesha had consented to personal jurisdiction in the forum selection clauses and that there was personal jurisdiction over Kesha, pursuant to CPLR 301 and 302(a)(1) because she was doing business and had transacted business in New York. Dkt 133. This court ruled that Kesha had waived any objection to personal jurisdiction and venue in the forum selection clauses. Dkt 251, 6/1715 Tr, pp 37-38. It did not reach the Gottwald Parties' long-arm jurisdiction arguments. *Id*, pp 37-53.[13]

III. Discussion

A. Standard of Review

On a motion to dismiss, the court must accept as true the facts alleged in the complaint, as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1st Dept 1992); *see also Cron v Hargo Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits and other evidence submitted by the plaintiff, which shall be given their most favorable intendment.

[13] The original action also had been brought against Pebe Sebert, Kesha's mother, and against Jack Rovner and his company, Kesha's manager. The court granted their motions to dismiss.

Amaro, 60 AD3d at 491; *Cron*, *supra*. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). When the motion is based on the statute of limitations, the defendant bears the initial burden of establishing, *prima facie*, that the time to sue has expired, and the court must consider the pleading and plaintiff's submissions in their most favorable light. *Benn v Benn*, 82 AD3d 548 (1st Dept 2011). Where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed only if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

B. Declaratory Judgment regarding KMI & RCA/Jive Agreements – 1st CC

Kesha's 1st CC is asserted against all of the Movants. It seeks a declaratory judgment declaring that: 1) the KMI Agreement was terminated because KMI sued her for money damages rather than specific performance; and 2) as a result, Kesha stepped into KMI's shoes under the RCA/JIVE Agreement. In the Assent, Kesha agreed to provide her recording services as promised by KMI to RCA/JIVE. Prescription and Entertainment move to dismiss on the ground that, as non-parties to the KMI and RCA/JIVE Agreements, the 1st CC does not state a claim against them.

Kesha's opposition recognizes that Prescription and Entertainment "may not have an interest" in the RCA/JIVE Agreement and Assent. 12/14/15 Memorandum of Law in Opposition (Kesha Opp Memo), Dkt 399, pp 2-4. Kesha relies on the following conclusory allegations to

save the 1st CC against Prescription and Entertainment: 1) Entertainment and Prescription are wholly-owned, operated and controlled by Gottwald; 2) each CC Defendant "was an agent and/or employee" of the others acting in concert and in the scope of its agency/employment; 3) the CC Defendants ratified each other's actions; and 4) Prescription and Entertainment were vehicles for Kesha's abuse and torture. *Id.*

CPLR 3001 provides that "[t]he supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy ...." Non-parties to a contract do not have a cognizable interest that presents a justiciable controversy suitable for declaratory relief concerning the contract. *Clarendon Place Corp. v Landmark Ins. Co.*, 182 AD2d 6, 10 (1st Dept 1992) (dismissing from declaratory judgment action victims of fire not in privity with contracting parties); *Abdalla v Yehia*, 246 AD2d 373, 374 (1st Dept 1998) (dismissal of declaratory judgment by non-party to insurance contract who had no cognizable interest in whether policy was properly cancelled); *see also*, *Lang v Hanover Ins. Co.*, 3 NY3d 350, 355 (2004).

The 1st CC is dismissed as to Prescription and Entertainment. Kesha's conclusory allegations are insufficient to state a justiciable controversy against Prescription and Entertainment concerning contracts to which they are strangers. *Lang*, *supra*; *Clarendon Place*, *supra*; *Abdalla*, *supra*.[14]

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[14] The 1st CC is against all of the Movants, and the Sony Parties' notice of motion sought to dismiss all of the CCs against them. Dkt 380. However, their memoranda of law address only the 2nd through 7th causes of action. Dkt 381 & 480. They do not address the 1st CC, which seeks a declaration that Kesha stepped into KMI's shoes in the RCA/JIVE Agreement, part of which was assigned to Kemosabe. Nor do they speak to SME's relationship to RCA/JIVE, part of its "Label Group". The section of Kesha's opposing memorandum of law concerning the 1st CC only addresses Prescription and Entertainment, not the Sony Parties. Dkt 399, pp 2-4. Hence, the court makes no ruling with respect to the 1st CC against the Sony Parties.

C. New York State & City Human Rights Law – 2nd, 4th & 5th CCs

The 2nd, 4th and 5th CCs (HRL claims) allege that all of the Movants discriminated against Kesha based on her gender in violation of the New York State and New York City Human Rights Laws (collectively HRLs), which are codified as the New York State Executive Law §290 et seq. (State HRL) and New York City Administrative Code, § 8-101 et seq. (City HRL), respectively.[15] Movants argue, *inter alia*, that this court does not have subject matter jurisdiction over the HRL claims because Kesha did not plead that the alleged discrimination had an impact in New York. Kesha responds that Movants are judicially estopped from making that argument because of the CA Decision and this court's decision on Kesha's motion to dismiss for lack of personal jurisdiction.

The doctrine of judicial estoppel prevents a party who assumes a certain position in a legal proceeding from later assuming a contrary position because his legal interests have changed. *Karasik v Bird*, 104 AD2d 758, 758-759 (1st Dept 1984). In order for the doctrine to

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[15] State HRL §296(a) provides that it is an "unlawful discriminatory practice" for an employer because of an individual's sex to "discriminate against such individual in compensation or in terms, conditions or privileges of employment." Section 298-a provides that the State HRL applies to acts committed outside the state: 1) against a resident of the state, and 2) by state residents and domestic corporations "in the same manner and to the same extent as such provisions would have applied had such act been committed within the state," except for the penal provisions. The City HRL §8-107(1) provides, *inter alia*, that it "shall be an unlawful discriminatory practice: (a) For an employer or an employee or agent thereof, because of the actual, or perceived ... gender ... of any person, ... to discriminate against such person in compensations or in terms, conditions or privileges of employment." Section 8-107(13) provides that "[a]n employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of subdivision one or two of this section" only where: "(1) the employee or agent exercised managerial or supervisory responsibility; or (2) the employer knew of the employee's or agent's discriminatory conduct, and acquiesced in such conduct or failed to take immediate and appropriate corrective action; an employer shall be deemed to have knowledge of any employee's or agent's discriminatory conduct where that conduct was known by another employee or agent who exercised managerial or supervisory responsibility."

apply, the party against whom the estoppel is sought must have prevailed in a judicial proceeding based upon the previously-asserted position. *Van Kipnis v Van Kipnis*, 8 AD3d 94 (1st Dept 2004); *Wootton USA v LeBoeuf, Lamb, Greene & MacRae*, 243 AD2d 168, 177 (1st Dept 1998) (litigant should not be permitted to lead court to find fact one way and then contend in another proceeding that same fact should be found otherwise); *Rosario v Montalvo & Son Auto Repair Ctr., Ltd.*, 76 AD3d 963, 964 (2d Dept 2010) (defendant not judicially estopped from denying plaintiff was its employee when defendant had not successfully argued that plaintiff was its employee in prior legal proceeding).

However, it is well settled that to assert claims under the State and City HRLs, a plaintiff must "plead and prove" that the alleged discrimination had an impact within those respective jurisdictions. *Hoffman v Parade Publications.*, 15 NY3d 285, 289 (2010); *Benham v eCommission Solutions, LLC*, 118 AD3d 605 (1st Dept 2014) (no subject matter jurisdiction under State and City HRLs where alleged harassment and discrimination did not occur when plaintiff was in New York); *Hardwick v Auriemma*, 116 AD3d 465, 467 (1st Dept 2014) (no jurisdiction under City and State HRL where plaintiff, a State resident, alleged discriminatory conduct that took place in London). In *Hoffman*, the Court of Appeals dismissed the Georgia plaintiff's claims under the HRLs for lack of subject matter jurisdiction because the complaint did not allege that he was a resident of, or employed in, the State or City of New York. *Hoffman, supra*. *Hoffman* also held that there is no subject matter jurisdiction for a non-resident's claim under the City HRL unless the non-resident suffers discrimination in the City of New York. In making those determinations, *Hoffman* relied on: 1) the language and purpose of the City HRL, which afforded protections only to those who inhabit or are persons in the City of New York; 2) the jurisdiction of the City government, pursuant to the Administrative Code §2-201, which

limits its jurisdiction to New York City;[16] and 3) the fact that the State HRL was enacted pursuant to the New York State Legislature's police power to protect inhabitants of New York and persons within the state, which did not afford the protections of §298-a, upon which Kesha relies, to "non-residents ... who are unable to demonstrate that the impact of the discriminatory act was felt inside the state." *Hoffman, supra.*

Here, the court does not have subject matter jurisdiction over the HRL claims since Kesha did not plead that the complained of actions occurred in New York State or City. Where the court lacks subject matter jurisdiction, it cannot be created by the conduct of the parties. *Financial Indus. Regulatory Auth., Inc.*, 10 NY3d 12, 17 (2008) (court's lack of subject matter jurisdiction not waivable). "'[A] defect in subject matter jurisdiction may be raised at any time by any party or by the court itself, and subject matter jurisdiction cannot be created through waiver, estoppel, laches or consent.'" *Strunk v New York State Bd. Of Elections*, 126 AD3d 777, 779 (2d Dept 2015); *see Matter of Rich v Bralower*, 2010 NY Slip Op 32091 (U) (Sup Ct, Nassau County, 2010) (where subject matter jurisdiction lacking, it cannot be created by judicial estoppel).

Kesha failed to plead that any of the alleged discrimination occurred in New York State or City. Thus, Movants correctly assert that the court has no jurisdiction over the HRL claims. Moreover, the CA Decision does not estop Movants because it did not determine the issue, expressly declining to resolve whether Kesha could assert a City HRL claim and did not address

[16] Administrative Code §2-201 provides that New York City has jurisdiction and power to govern in "a]ll that territory within the city being all that territory contained within the boroughs of Manhattan, The Bronx, Brooklyn, Queens and Staten Island as hereafter described, shall be known as 'The City of New York'; and the boundaries, jurisdictions and powers of the city are for all purposes of local administration and government hereby declared to be co-extensive with the territory above described."

the State HRL. Nor are Movants estopped because of the Gottwald Parties' opposition to Kesha's personal jurisdiction motion in this action. The Gottwald Parties prevailed on the motion to dismiss here because of the mandatory forum selection clauses. The 2nd, 4th and 5th CCs must be dismissed against all of the Movants because this court lacks subject matter jurisdiction over those claims.

D. Civil Rights Law §79-n & New York City Administrative Code §8-904 - 3rd & 6th CCs

New York's Civil Rights Law §79-n (2) and New York City Administrative Code (City Code) §8-904 are commonly referred to as "hate crime" laws. Civil Rights Law 79-n(2) provides a civil remedy against any person "who intentionally selects a person or property for harm or causes damage to the property of another or causes physical injury or death to another in whole or in substantial part because of a belief or perception regarding the ... gender ... of a person...." "Gender" is defined in subsection (1)(d) as " a person's actual or perceived sex and shall include a person's gender identity or expression." The legislative history of the statute indicates that it applies only to bias-related violence or intimidation. New York Bill Jacket, 2010 A.B. 529, Ch. 227.

The City Code, Title 8, Ch. 9, §8-901 et seq. is also known as the Victims of Gender-Motivated Violence Protection Act. Section 8-902 states that it was enacted because "[g]ender-motivated violence inflicts serious physical, psychological, emotional and economic harm on its victims" and because, in 2000, the United States Supreme Court invalidated the federal Violence Against Women Act. City Code 8-902. The City Council found that "victims of gender-motivated violence should have a private right of action against their perpetrators under the Administrative Code." City Code 8-902. The statute defines "crimes of violence" and "crime of violence motivated by gender" as follows:

> a. "Crime of violence" means an act or series of acts that would constitute a misdemeanor or felony against the person as defined in state or federal law or that would constitute a misdemeanor or felony against property as defined in state or federal law if the conduct presents a serious risk of physical injury to another, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction.
>
> b. "Crime of violence motivated by gender" means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender.

City Code 8-903. Section 8-904 provides a right of action for "any person claiming to be injured ***by an individual*** who commits a crime of violence motivated by gender..." [emphasis supplied]

Movants seek dismissal of both of these claims on the grounds that no facts support Kesha's conclusory allegations that the alleged violent incidents were motivated by gender; the statutes do not provide for corporate liability; §8-904 does not apply because Kesha does not allege that any gender-motivated violence took place in New York City; the claims are barred by the statute of limitations; and Kemosabe did not exist in 2005 and 2008, when the alleged violent acts occurred.

The court agrees that the 3rd and 6th CCs fail to allege gender-motivated violence. Although Gottwald's alleged actions were directed to Kesha, who is female, the CCs do not allege that Gottwald harbored animus toward women or was motivated by gender animus when he allegedly behaved violently toward Kesha. Every rape is not a gender-motivated hate crime.[17]

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[17] Kesha cited one case, in which the court upheld gender-based employment discrimination, retaliation and hostile work environment claims based on deprecatory, vulgar and offensive remarks about women, including that they were useful only for administrative services and sex. *Anderson v Edmiston & Co., Inc.*, 131 AD3d 416 (1st Dept 2015). Here, there are no facts to support Gottwald's animus toward women. Gottwald is alleged to have made offensive remarks about Kesha's weight, appearance and talent, not about women in general. *Askin v Department of Educ. of the City of NY*, 110 AD3d 621, 622 (1st Dept 2013) (no age-related animus shown where only allegations were that plaintiff 54 years old and was treated adversely or less well than others); *Bennett v Health Mgmt Sys., Inc.*, 92 AD3d 29 (1st Dept 2011) (plaintiff must

In addition, the court agrees that the Movants other than Gottwald cannot be liable under §8-904 because the statute, on its face, is limited to violence committed by "an individual."[18] In addition, Movants are correct that the §8-904 claim should be dismissed because the jurisdiction and powers of the City are limited to its geographical borders and Kesha does not allege any violent acts that occurred in New York City. City Code §2-201. Finally, were these not sufficient reasons to dismiss the 3rd and 6th CCs, the statute of limitations would require dismissal of the claim under Civil Rights Law §79-n(2).

CPLR 213-c provides for a 5-year statute of limitations for a civil claim to recover for physical, psychological or other injury or condition suffered as a result of rape in the first degree [as defined in Penal Law 130.35], criminal sexual act in the first degree [as defined in Penal Law 130.50], or aggravated sexual abuse in the first degree [as defined in Penal Law 130.70]. And, CPLR 214 (2) contains a 3-year statute of limitations for action to recover upon a liability, penalty or forfeiture created or imposed by statute, except for a claim under CPLR 213 or 215. Nonetheless, the Court of Appeals has held that when a statute merely codifies or implements an existing common-law liability, the common law statute governs, not CPLR §214(2). *Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d 201, 209 (2001). Claims akin to common-law causes that would not exist but for a statute have the 3-year, 214 (2) statute of limitations. *Id.* A cause of action for sexual assault and battery is subject to a one-year statute of limitations. CPLR

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demonstrate discriminatory motive to support City HRL claim); *Serdans v NY and Presbyterian Hospital*, 112 AD3d 449 (1st Dept 2013) (no disability-based discriminatory animus shown by remarks that plaintiff brought her situation upon herself or should take her assets elsewhere). Although Kesha, again in conclusory language, alleges that Gottwald is known to abuse other women, she does not allege discriminatory motive or violence toward others.

[18] With respect to §79-n, the term "person" is not clear because the General Construction Law defines "person" as including a corporation. General Construction Law §37. However, the court need not reach this issue because no claim is stated for other reasons.

213(3) (1-year statute of limitations for assault and battery); *Plaza v Estate of Wisser*, 211 AD2d 111, 118 (1st Dept 1995) (sexual battery); *Krioutchkova v Gaad Realty Corp.*, 28 AD3d 427, 428 (2d Dept 2006) (sexual assault and battery). Whether the statute of limitations for Civil Rights Law 79-n(2) is 5 years, 3 years or 1 year, it expired at the latest in 2013.

The court rejects Kesha's suggestion that her claim pursuant to §79-n can be predicated on all of Gottwald's alleged abusive remarks and threats during 10 years beginning in 2005. Kesha MOL, Dkt 399, p 7. It is clear that the statute requires physical violence or property damage. The only allegations in the CCs that could fall within that rubric are the 2005 and 2008 incidents, when Gottwald allegedly assaulted Kesha on an airplane and raped her in his hotel room. The claim is time-barred.

Section 8-904 has its own 7-year statute of limitations, §8-905, which can be extended by "injury or disability resulting from an act or acts giving rise to a cause of action under this chapter," until 7 years after "inability to commence the action ceases." Movants allege that §8-905 is invalid because it conflicts with the CPLR. Kesha alleges that she could not commence the action until March 2014, when she left the rehabilitation center. There is no appellate authority on the conflict between the CPLR and City Code §8-905, and the court declines to reach the issue, as there are other reasons to dismiss this claim.

E. Intentional Infliction of Emotional Distress - 7th CC

One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress. *Murphy v Am. Home Prods. Corp.*, 58 NY2d 293, 303 (1983), *citing Fischer v Maloney*, 43 NY2d 553, 557 (1978). Liability will be found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as

atrocious, and utterly intolerable in a civilized community. *Fischer* , *supra* at 557, citing Prosser, *Torts* [4th ed.], §12, p 56, & *Restatement of Torts 2d*, §46, subd 1 and Comment d. The claim should be dismissed if it does not plead allegations sufficient to meet this "strict standard." *Murphy supra*, at 303.

A claim for intentional infliction of emotional distress is subject to the one-year statute of limitations contained in CPLR 215. *Ain v Glazer*, 257 AD2d 422 (1st Dept 1999), *citing Drury v Tucker*, 210 AD2d 891 (4th Dept 1994). The one-year can be extended where the plaintiff alleges a continuing course of tortious conduct that continues into the one-year period immediately preceding commencement of the action. *Ain*, *supra*. The plaintiff can rely on events that occurred more than one year prior to instituting the lawsuit only if the "final actionable event" occurred within one year of commencing the action. *Shannon v MTA Metro-North R.R.*, 269 AD2d 218, 219 (1st Dept 2000)

Kesha's 7th CC for intentional infliction of emotional distress is dismissed against all of the Movants based on the statute of limitation, with respect to the alleged 2005 and 2008 incidents, and dismissed as to Kesha's other alleged "abuse," for failure to state a claim. Other than the 2005 and 2008 incidents, Kesha's allegations do not meet the strict pleading standard. [19] Her claims of insults about her value as an artist, her looks, and her weight are insufficient to constitute extreme, outrageous conduct intolerable in civilized society. Similarly, the "attack" involving threats and arm waving in Gottwald's Malibu home is not actionable. The final alleged actionable event occurred in 2008, more than 6 years before the action was filed, which renders the claim for intentional infliction of emotional distress time-barred.

F. Declaratory Judgment against Gottwald Parties – 8th CC

[19] Many of the claims are conclusory, deficient in alleging time, place and conduct.

The 8th CC seeks a declaratory judgment declaring that the KMI and Prescription Agreements are void, because Gottwald, KMI and Prescription sued Kesha for damages instead of specific performance. The Gottwald Parties correctly argue that claims for breach and specific performance are not mutually exclusive because both affirm the validity of the contract. *See*, *Judnick Realty Corp. v 32 West 32nd Street Corp.*, 61 NY2d 819, 823 (1984) ("There is no inconsistency between an action for specific performance and an action for breach of contract, both being in affirmance of the contract."); *Camperlino & Fatti Builders, Inc. v Dimovich Constr. Corp.*, 175 AD2d 595, 596 (4th Dept 1991) ("The doctrine of election of remedies does not apply because specific performance and damages for breach of contract are not inconsistent, both being in affirmance of the contract."); *Balleisen v Schiff*, 121 AD 285, 286 (2d Dept 1907) (action for specific performance and damages are both based on contract and, therefore, not inconsistent). Furthermore, where a contract promises several performances, an action for breach of one will not bar an action for subsequent breaches, although the injured party must sue for all breaches that have already occurred. 23 *Williston on Contracts* §63:13 (4th ed.).

Kesha relies on *Inter-Power, Inc. v Niagara Mohawk Power Corp.*, 259 AD2d 932 (3d Dept 1999), which held that the plaintiff could not sue for anticipatory breach of a contract to be performed in the future when it had waived the alleged breach by insisting that the contract was valid, after the defendant sent a letter declaring it null and void.[20] The rule, as stated in *Inter-Power*, is that when one party breaches an executory contract,[21] the non-breaching party may

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[20] The Third Department held that, faced with the defendant's anticipatory declaration that the contract was void because the plaintiff failed to comply with a condition precedent, the plaintiff elected to treat the contract as subsisting instead of suing for damages immediately, and could not later claim that the defendant's letter was a breach.

[21] A contract is executory when its obligations are not fully performed. 1 *Williston on Contracts*, §1:19 (4th ed.)

elect to treat the contract as broken and sue for breach immediately, or reject the breach, affirm the contract and continue to perform, with the right to sue for damages later. *Id.* The non-breaching party cannot treat the contract both as broken and subsisting. *Id.*

Inter-Power does not stand for the proposition that a non-breaching party cannot sue for two contract-affirming types of relief. It merely states that when faced with an anticipatory breach, defined as a breach before performance is due, the non-breaching party, at its election, may sue when the breaching party repudiates, or continue performing and sue for damages later. *Rachmani Corp. v 9 E. 96th St. Apt. Corp.*, 211 AD2d 262, 266-267 (1st Dept 1995) (once party has indicated unequivocal intent to forego performance of his obligations under contract by definite and final communication, non-breaching party may await time for performance or sue immediately); *Ga Nun v Palmer*, 202 NY 483, 492-493 (1911) (breach of contract accrues when performance is due, but aggrieved party, at his option, may sue for damages before performance is due).

In addition, KMI and Prescription could not have elected the remedy of specific performance because their contracts are for Kesha's personal services. Courts generally will not enforce a contract for personal services because slavery has been outlawed since the 19th century. *American Broadcasting Cos. v Wolf*, 52 NY2d 394, 401-402 (1981). The court dismisses the 8th CC seeking a declaration that the KMI and Prescription Agreements are void and unenforceable due to the Gottwald Parties' failure to sue for specific performance.[22]

G. Leave to Amend

[22] None of the Movants sought to dismiss the 1st CC, which alleges, in ¶72, that KMI terminated the KMI Agreement by electing to sue Kesha for damages rather than specific performance.

Kesha's request for leave to amend is denied. Leave to amend can be granted at any time, so long as there is no prejudice. *Murray v City of New York*, 43 NY2d 400 (1977) (motion to amend to conform pleading to proof may be granted at any time, even on appeal from final judgment, in absence of prejudice). Nonetheless, a motion to amend should be denied where the amendment lacks merit as a matter of law. *Perotti v Becker, Glynn, Melamed & Muffy*, LLP, 82 AD3d 495 (1st Dept 2011) (amendment cannot be palpably insufficient or clearly devoid of merit); *Crucen v Leary*, 55 AD3d 510 (1st Dept 2008) (amendment should be denied where futile). A motion for leave to amend a pleading must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment. *Cushman & Wakefield, Inc. v John David, Inc.*, 25 AD2d 133, 135 (1st Dept 1966); *Bonanni v Straight Arrow Publishers, Inc.*, 133 AD2d 585, 588 (1st Dept 1987). Moreover, proper papers on a motion to amend include a proposed amended pleading. *Bank of New York v Irwin Int'l Imports*, 197 AD2d 462 (1st Dept 1993).

Here, Kesha's request for leave to amend the CCs is denied because there is nothing in the record from which the court can determine whether the amendment would be meritorious. Kesha requests leave, but does not proffer a proposed pleading, any evidentiary proof that would be used to support it, or any specifics about what it would contain.

H. SME & Kemosabe's Alternative Motion to Strike Allegations in the CCs

The Sony Parties' alternative request to strike portions of the CCs is moot. The request was made as an alternative to dismissing the 2nd through 7th CCs against them. As the court is dismissing those CCs, the alternative request is denied as academic.

The remaining arguments of the parties were either unnecessary to reach or were considered and found to be without merit. Accordingly, it is

ORDERED that the motion (Motion Sequence 019) by Counterclaim-Defendants Lukasz Gottwald ("Gottwald"), Kasz Money, Inc. ("KMI"), Prescription Songs, LLC ("Prescription") and Kemosabe Entertainment, LLC, ("Entertainment," with Gottwald and KMI, "Gottwald Parties"), to dismiss the 1st first cause of action in the first amended counterclaim of Kesha Rose Sebert ("Kesha") against Prescription and Entertainment, and the 2nd through 8th causes of action in Kesha's first amended counterclaims against all of the Gottwald Parties, is granted; and it is further

ORDERED that the motion (Motion Sequence 020) by Counterclaim-Defendants Kemosabe Records, LLC, and Sony Music Entertainment, LLC, to dismiss the 2nd through 7th causes of action in Kesha's first amended counterclaims, is granted; and it is further

ORDERED that Kesha's request for leave to amend her first amended counterclaims is denied; and it is further

ORDERED that upon service upon him of a copy of this order with notice of entry at cc-nyef@nycourts.gov, the Clerk of the court is directed to enter judgment accordingly, and to sever the 1st cause of action, which shall continue; and it is further

ORDERED that the stay of discovery on the remaining 1st cause of action in Kesha's first amended counterclaims is lifted and the parties shall place a telephone conference call to chambers to discuss a schedule on April 13, 2016 at 4 pm.

Dated: April 6, 2016

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.