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

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LUKASZ GOTTWALD, KASZ MONEY, INC., PRESCRIPTION SONGS, LLC,

Plaintiffs,

-against-

KESHA SEBERT p/k/a, Kesha,

Defendant.

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KESHA ROSE SEBERT p/k/a KESHA,

Counterclaim-Plaintiff,

-against-

LUKASZ GOTTWALD p/k/a DR. LUKE; KASZ MONEY, INC.; PRESCRIPTION SONGS, LLC; KEMOSABE ENTERTAINMENT, LLC; KEMOSABE RECORDS, LLC; and SONY MUSIC ENTERTAINMENT,

Counterclaim-Defendants.

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DECISION & ORDER
Index No. 653118/2014

HON. SHIRLEY WERNER KORNREICH, JSC:

Defendant Kesha Sebert, whose stage name is Kesha, moves for leave to assert second amended counterclaims (each a CC, collectively, 2nd CCs). Motion Sequence 027. Plaintiffs Lukasz Gottwald, also known as Dr. Luke (Gottwald), Kasz Money, Inc. (KMI) and Prescription Songs, LLC (Prescription, collectively with Gottwald and KMI, Plaintiffs), oppose.

Kesha's proposed 2nd CCs, numbered here as in her proposed pleading, are as follows: 1) breach by all Plaintiffs of the implied covenant of good faith and fair dealing in her contracts with KMI and Prescription; 2) breach of contract against Prescription; 3) breach of contract against KMI; 4) a declaratory judgment declaring that, after the release of Kesha's third album, her contracts with Prescription and KMI are terminated due to impracticality or impossibility; and 5) a declaratory judgment declaring that, after the

release of Kesha's third album, her contracts with Prescription and KMI are terminated pursuant to California Labor Code §2855. Dkt 629.[1] For the reasons which follow, the motion is denied.

I. Background

The facts relating to this action are more fully set forth in the court's decision and order, dated April 6, 2016 [Dkt 504], with which the reader's familiarity is assumed.

Kesha is a recording artist and songwriter. Gottwald is a songwriter and producer of musical recordings. KMI and Prescription are, respectively, production and publishing companies owned by Gottwald. In 2005, Kesha entered into an exclusive recording contract with KMI for six albums, upon which Gottwald was to produce at least six recordings and for which he was entitled to a specified percentage of the sales. Dkt 643. Kesha's second album, *Warrior*, was released in 2012. Dkt 629, 2nd CCs, ¶28. On November 26, 2008, Kesha entered into a Co-Publishing and Exclusive Administration Agreement with Prescription (Prescription Agreement, with KMI Agreement, Gottwald Agreements). Dkt 646.

The KMI agreement was amended twice in December 2008 and May 2009 (each an Amendment, collectively, Amendments, collectively with KMI agreement, KMI Agreement). Dkt 644 & 645. The 2008 Amendment reduced Kesha's recording commitment from six to five albums. Dkt 644. The 2008 Amendment also stated that if a Major Recording Agreement was not secured by December 4, 2008 or 2009 (the year is not legible), then either party could terminate the contract. *Id.* The 2009 Amendment reflected that, on or about January 27, 2009, KMI entered into an agreement with RCA/JIVE (RCA) a label group of Sony Music Entertainment (Sony). Dkt 645.

On January 27, 2009, KMI and RCA, entered into an agreement (RCA/JIVE Agreement). Dkt 647; Dkt 629, 2nd CCs, ¶39. KMI agreed that during the term of the contract, KMI would cause Kesha to render performances exclusively for RCA 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. Dkt 647. RCA also

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

agreed that Gottwald could produce six songs per album, provided he was in compliance with his material obligations under the contract, and subject to Kesha's approval. *Id*, §4.01(b). Also on January 27, 2009, Kesha and RCA/JIVE entered into an Artist's Assent and Guaranty (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. *Id.*

Keshas released her first album in 2010 and her second in 2012. Both were successful.

On March 1, 2012, RCA, assigned its rights and obligations under the RCA/JIVE Agreement to Kemosabe Records, LLC (Kemosabe), another Sony related entity, of which Gottwald is CEO. Dkt 629, 2nd CCs, ¶39. The 2nd CCs allege that Sony's involvement with Gottwald purportedly ends in March 2017. *Id*, ¶87.

II. Discussion

A. Standard of Review

A motion to amend may be freely granted at any time, so long as there is no prejudice. CPLR 3025; *Murray v City of New York*, 43 NY2d 400 (1977). Nonetheless, a motion to amend should be denied where it lacks merit as a matter of law. *Perotti v Becker, Glynn, Melamed & Muffy, LLP*, 82 AD3d 495 (1st Dept 2011); *Crucen v Leary*, 55 AD3d 510 (1st Dept 2008); *McGhee v Odell*, 96 AD3d 449, 450 (1st Dept 2012) (leave to amend pleadings should be denied where proposed pleading palpably improper or insufficient as a matter of law). The party opposing a motion to amend must overcome a heavy presumption of validity in favor of permitting amendments. *McGhee v Odell, id.*

B. Breach of the KMI Agreement for Failure to Account and Pay for Royalties

The elements of a breach of contract claim are the existence of valid contract, plaintiff's performance of his/her obligations thereunder, the defendant's breach, and resulting damages. *Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478 (1st Dept 2007). A breach of contract claim should be dismissed where documentary

evidence shows that the plaintiff failed to perform his obligations under the contract. *Chappo & Co., Inc. v Ion Geophysical Corp.*, 83 AD3d 499, 500 (1st Dept 2011).

The alleged breaches of the KMI Agreement (3rd CC) are the failure to accurately account for and pay royalties. *Id*, ¶83. According to the affidavit of Lawrence Spielman, a partner of the firm that acts as Plaintiffs' accountant and business manager, Kesha last paid royalties to KMI in April 2012. Affidavit of Lawrence Spielman, Dkt 666 (Spielman Aff), ¶3. Plaintiffs also submitted the affidavit of KMI's royalty auditor, Gary Cohen, who is a CPA. He avers that in 2012, he determined that Kesha owed royalties in the amount of approximately $138,000 to KMI for the period ending December 31, 2011, which have not been paid. Gary Cohen Affidavit, Dkt 664, ¶2. Cohen further swears that from his examination in 2012 until January 2017, Kesha provided no royalty statements to KMI. *Id*, ¶3. Cohen attaches statements from Kesha's accountant, Tribeca, that calculated royalties owed by Kesha to KMI in the sum of approximately 1.3 million dollars for 2012 through December 31, 2016. *Id* & Dkt 665. Kesha did not rebut the accountants' affidavits in her reply papers.

Plaintiffs argue that Kesha has not stated a claim for breach of the KMI Agreement because, *inter alia*, she failed to perform by not paying royalties owed since 2012, a fact admitted on her accountant's statement. While Kesha alleges in conclusory fashion that she has fully performed [2nd CC, ¶82], the unrefuted proof shows otherwise [Dkt 664 & 665]. As a result, Kesha cannot establish that she performed her obligations under the contract, an element of her proposed breach of contract claim. Her claim for breach of the KMI Agreement, therefore, is palpably without merit. *Perotti v Becker, Glynn, Melamed & Muffy, LLP*, *supra*; *Crucen v Leary*; *supra*; *McGee v Odell*, *supra*; *Chappo & Co., Inc. v Ion Geophysical Corp.*, *supra*.

C. Breach of Prescription Agreement by Failing to Pay Royalties

The alleged breaches of the Prescription Agreement (2nd CC) are failure to send semiannual accounting statements and pay royalties between the first quarter of 2014 through December 2016. 2d CCs, Dkt 629, ¶77. Plaintiffs urge that Kesha cannot assert a claim for non-payment of royalties under the

Prescription Agreement because she failed to give notice, which was a contractual condition precedent for a claim of breach. The court agrees.

> Section 16 and 17 of the Prescription Agreement provide, in pertinent part:
>
> 16. ... The failure by Publisher [Prescription] or Owner to perform any of their respective obligations hereunder shall not be deemed a breach of this agreement unless the nonbreaching party gives the breaching party prompt written notice of such failure to perform specifically stating the nature of any such failure and the provision that governs or relates to such failure hereunder and such failure is not corrected within thirty (30) days from and after the breaching party's actual receipt of such notice ....
> 17. ... All notices to be given to Publisher [Prescription] hereunder shall be addressed to Publisher at the address first set forth above or at such other address as Publisher shall designate in writing from time to time with copies to Advanced Alternative Media, 7 West 22nd St, 4th FL, New York, NY 10010, Attention: Andy Kipnes. All notices shall be in writing and, except for royalty statements, shall be served by certified or registered mail return receipt requested, or telegraph, all charges prepaid....

Dkt 646.

The notice provision created a condition precedent to bringing a claim for breach. *U.S. Bank N.A. v GreenPoint Mtge. Funding, Inc.*, 45 NYS3d 11, 16; 2016 NY App Div LEXIS 8817, 2016 NY Slip Op 08968 (1st Dept 2016) (nor) (breach notices were conditions precedent to bringing action in order to permit allotted time to cure); *Putman High Yield Trust v Bank of NY*, 7 AD3d 439 (1st Dept 2004) (breach not actionable without written notice required by contract); *Environmental Safety & Control Corp. v Board of Educ. of Camden Cent. School Dist.*, 179 AD2d 1012 (4th Dept 1992) (counterclaims for breach of contract should have been dismissed for lack of contractually required written notice); 8-37 *Corbin on Contracts* §37.14, Matthew Bender & Company, Inc., a member of the LexisNexis Group, © Fall 2016) (use of appropriate words may make notice condition of action for damages for breach).

Kesha conceded that she failed to provide notice and a thirty-day cure period, as required by the Prescription Agreement.[2] Kesha's reply papers argued only that under New York law, strict compliance with notice provisions is not required. Kesha's Reply Memorandum, Dkt 694, p 14. This is incorrect. *U.S.*

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[2] In her reply papers, Kesha offered emails from her lawyer, Bo Pearl, which were sent in May 2016, to other lawyers in this action, and which did not mention the provision breached. They were not sufficient to satisfy the contractual notice requirement and cure period.

Bank N.A. v GreenPoint Mtge. Funding, Inc., supra; *Putman High Yield Trust v Bank of NY*, *supra*; *Environmental Safety & Control Corp. v Board of Educ. of Camden Cent. School Dist. supra*; *Corbin on Contracts*, *supra*. The cases Kesha cited are not on point. They involved situations where complying with a condition would be futile, or the other party prevented the performance of the condition.[3] Here, Kesha made no showing that it would have been futile to send an appropriate notice or that she was prevented from doing so. Thus, Kesha may not assert a counterclaim for breach of the Prescription Agreement. *Perotti v Becker, Glynn, Melamed & Muffy, LLP*, *supra*; *Crucen v Leary*; *supra*; *McGee v Odell*, *supra*.

D. Breach of the Covenant of Good Faith & Fair Dealing

Kesha's proposed first CC for breach of the covenant of good faith and fair dealing alleges abusive behavior by Gottwald "throughout their decade-long relationship," which began in 2005 [Dkt 629, 2d CCs, ¶¶ 21 & 47-49], as well as a failure, since February 24, 2016, to facilitate, as soon as practicable, the production and promotion of Kesha's third album [*Id*, ¶68]. Kesha alleges, in conclusory fashion, that she has performed and is currently performing under the KMI and Prescription Contracts. *Id*, ¶69. She claims that as a result of plaintiffs' breaches, she has sustained damages, including all sums lost because of her inability to timely complete additional albums and other remunerative opportunities. *Id*, ¶¶ 60 & 71.

Kesha may not assert her proposed counterclaim for breach of the covenant of good faith and fair dealing implied in the Gottwald Agreements. A cause of action for breach of an implied covenant of good faith and fair dealing is a contract claim based upon breach of an implied promise to exercise good faith in performing obligations that a reasonable person would be justified in understanding were included in the contract. *Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 (1995). However, as noted above, the court has determined that Kesha cannot assert claims for breach of the Gottwald Agreements because she did not perform under the KMI Agreement and failed to give notice under the Prescription Agreement. Thus, she

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[3] *Special Situations Fund III, L.P. v Versus Tech.*, 227 AD2d 321 (1st Dept 1996) (plaintiff's failure to tender payment for warrants excused as futile because defendant had sold to someone else); *Sunshine Steak, Salad & Seafood, Inc. v W. I. M. Realty, Inc.*, 135 AD2d 891, 892 (NY App. Div 3d Dept 1987) (party to a contract cannot rely on the failure of another to perform a condition precedent where he has frustrated or prevented the occurrence of the condition).

cannot maintain a breach of contract claim based on the implied covenant in the Gottwald Agreements. See Discussion in Parts II. B & C, *supra.*

E. Declaratory Judgment Terminating the Gottwald Agreements for Impracticality/Impossibility

Kesha seeks a declaratory judgment declaring that, after her third album is released, it will be impractical or impossible to perform the Gottwald Agreements without court supervision or Sony's assistance, because of Gottwald's alleged abuse and his inability to exercise good faith, due to their acrimonious relationship. Dkt 629, 2d CCs, ¶¶ 87-88. Kesha alleges that Sony's, contract "purportedly ends" in March 2017. *Id.* Kesha pled that Gottwald's verbal abuse and physical threats were not foreseeable when she signed the KMI and Prescription Agreements. *Id*, ¶89. However, the Prescription Agreement was signed on November 26, 2008, and Kesha admitted in pleadings and swore in an affidavit that the abuse began in 2005. 2d CCs, Dkt 629, ¶¶ 21 & 47; First Amended Counterclaims, Dkt 336, ¶¶ 26 & 27; 8/31/15 Kesha Affidavit, Dkt. 331, ¶3.

CPLR 3001 authorizes the Supreme Court to render a declaratory judgment "as to the rights and other legal relations of the parties to a justiciable controversy." In order to be justiciable, a controversy must "involve present, rather than hypothetical, contingent or remote, prejudice" to a plaintiff. *American Ins. Assn. v Chu*, 64 NY2d 379, 383, *cert denied* 474 US 803 (1985). "The dispute must be real, definite, substantial, and sufficiently matured so as to be ripe for judicial determination." *Waterways Dev Corp. v Lavalle*, 28 AD3d 539, 540 (2d Dept 2006). "[C]ourts are not empowered to render advisory opinions, or determine abstract, ... hypothetical, remote or academic questions". *Matter of Ideal Mut. Ins. Co.*, 174 AD2d 420, 421 (1st Dept 1991).

The defense of impossibility or impracticability of performance is applied narrowly and excuses contractual performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible due to an unanticipated event that could not have been foreseen or guarded against in the contract. *Matter of Reed Found., Inc. v Franklin D. Roosevelt Four Freedoms Park, LLC*, 108 AD3d 1, 7 (1st Dept 2013), citing *Kel Kim Corp. v Central Mkts.*, 70 NY2d 900, 902 (1987).

Kesha's amendment to plead this declaratory claim is denied. Kesha pleaded that it will be impractical or impossible for her to perform without court supervision or the assistance of Sony, whose contract with Gottwald "purportedly" ends in March 2017. It is speculative, not justiciable, whether Sony's contract is ending and whether it will be able to assist after this month. Furthermore, KMI may not choose to exercise its options for future albums after the third is released. Finally, with respect to the Prescription Agreement, signed in November 2008, Gottwald's allegedly abusive behavior was foreseeable. Kesha has admitted that Gottwald's alleged abuse began at the outset of their relationship in 2005. Dkt 629, 2d CCs, ¶¶ 21 & 47; 1st Amended Counterclaims, Dkt 336, ¶¶ 26 & 27; 8/31/15 Kesha Affidavit, Dkt 331, ¶3.

F. Counterclaim Under California Labor Code §2855

Kesha's fifth CC seeks a declaration that the Gottwald Agreements are unenforceable pursuant to California Labor Code §2855(a). 2nd CCs, ¶95. Section 2855 provides that "a contract to render personal service, … may not be enforced against the employee beyond seven years from the commencement of service under it."

Kesha may not assert her proposed declaratory judgment counterclaim based on California Labor Code §2855 because it is barred by the choice of law provisions in the Gottwald Agreements, which have virtually identical provisions. The KMI Agreement choice of law provision provides:

> THE VALIDITY, INTERPRETATION AND LEGAL EFFECT OF THIS AGREEMENT SHALL BE GOVERNED BY THE LAWS OF THE STATE OF NEW YORK APPLICABLE TO CONTRACTS ENTERED INTO AND PERFORMED ENTIRELY WITHIN THE STATE OF NEW YORK (WITHOUT GIVING EFFECT TO ANY CONFLICT OF LAW PRINCIPLES UNDER NEW YORK LAW)

Dkt 643, §10(f). The Prescription Agreement choice of law provision is identical, except it omits the words "without giving effect to any conflict of law principles under New York law." Dkt 646, §21(a). The omission of the clause is of no moment because "parties are not required to expressly exclude New York conflict-of-laws principles in their choice-of-law provision in order to avail themselves of New York substantive law. *IRB-Brasil Resseguros, S.A. v Inepar Invs., S.A.*, 20 NY3d 310, 316 (2012).

The choice of law provisions in the Gottwald Agreements preclude the application of §2855. Courts will generally enforce choice-of-law clauses and a choice-of-law provision in a contract may be read as a substitute for conflict of law analysis. *Ministers & Missionaries Benefit Bd. v Snow*, 26 NY3d 466, 470 (2015). When parties include a choice-of-law provision in a contract, they intend that the law of the chosen state, and no other state, including its statutes, will be applied. *Id*, at 476 (rejecting application of Colorado statute as contrary to New York choice of law provision). "The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue." *Restatement 2d of Conflict of Laws*, §187 (1988). Where the particular issue could not have been resolved by an explicit provision, the chosen state's law will be enforced, unless it "would be contrary to a fundamental policy of a state which has a materially greater interest." *Id.* The parties' choice of New York law should be enforced, unless the public policy of another jurisdiction has an overriding concern so strong that it trumps New York's strong public policy in maintaining and fostering its undisputed status as the preeminent commercial and financial nerve center of the world. *Marine Midland Bank, N.A. v United Mo. Bank, N.A.*, 223 AD2d 119, 123-124 (1st Dept 1996).

Turning to the case at bar, the parties to the Gottwald Agreements could have provided that they would terminate in seven years. The parties, represented by sophisticated counsel, chose not to put such an explicit provision into the agreements. Thus, their choice of law should be enforced. *Ministers & Missionaries Benefit Bd. v Snow*, *supra*; *Restatement 2d*, *supra*. Moreover, the single 1944 case cited by Kesha that mentions California's public policy in enacting §2855 does not demonstrate an overriding public interest that is materially greater than New York's interest in enforcing the parties' choice of New York law. The California court held that:

> Legislation which is enacted with the object of promoting the welfare of large classes of workers whose personal services constitute their means of livelihood and which is calculated to confer direct or indirect benefits upon the people as a whole must be presumed to have been enacted for a public reason and as an expression of public policy.

De Haviland v Warner Bros. Pictures, Inc., 67 Cal App2d 225, 235 (1944). The fact that a statute is a policy choice is not evidence of an interest materially greater than New York's. *Marine Midland Bank, N.A. v United Mo. Bank, N.A.*, *supra*. In sum, Kesha may not assert a counterclaim under §2855. Accordingly, it is

ORDERED that Kesha Sebert's motion for leave to assert second amended counterclaims (Sequence 027) is denied.

DATED: 3/20/2017

KORNREICH, SHIRLEY WERNER, JSC

SHIRLEY WERNER KORNREICH
J.S.C