Pai v Blue Man Group Publ. LLC
2018 NY Slip Op 30454(U)
March 15, 2018
Supreme Court, New York County
Docket Number: 650427/2016
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 61

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IAN PAI,

Plaintiff,

- v -

BLUE MAN GROUP PUBLISHING LLC, BLUE MAN GROUP PRODUCTIONS, LLC, BLUE MAN GROUP HOLDINGS, LLC, 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 PRODUCTS, LLC, ZEBRA HORSE, LLC, CHRIS WINK, PHILLIP STANTON, MATT GOLDMAN

Defendant.

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INDEX NO. 650427/2016

MOTION DATE _____

MOTION SEQ. NO. 004

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150

were read on this application to/for Summary Judgment

HON. BARRY R. OSTRAGER:

Defendants are the founding members and corporate entities associated with the Blue Man Group ("BMG"), an iconic musical group that has performed and/or managed live shows for nearly three decades in venues around the world, while generating over $1 billion in box office revenues. Plaintiff Ian Pai, an early participant in the BMG production, alleges that he played an integral role in creating the success story that is BMG, only to be improperly deprived of significant royalty payments and other entitlements without a reasonable explanation. Pai asserts claims sounding in breach of fiduciary duty, breach of contract, accounting, quantum

meruit, and unjust enrichment. Other causes of action Pai asserted have been dismissed on prior motion or on consent. Defendants Blue Man Group Publishing, LLC, Blue Man Group Productions, LLC, Blue Man Group Holdings, LLC, Blue Man Productions, LLC, Blue Man Vegas LLC, Blue Man Boston Limited Partnership, Blue Man Chicago Limited Partnership, Blue Man International, LLC, Blue Man Touring, LLC, Astor Show Productions, LLC, Zebra Horse, LLC (the "Corporate Defendants"), Chris Wink, Phillip Stanton, and Matt Goldman (the "Individual Defendants" and, collectively with the other defendants listed here, "Defendants" or "BMG") move for summary judgment, pursuant to CPLR 3212, dismissing with prejudice all claims asserted by Plaintiff Pai. For the reasons stated herein, the motion is granted in part and denied in part.

Background

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. Pai's complaint casts himself as a "gifted young and naïve artist" who, in the years between 1989 and 1991, met and began collaborating with the Individual Defendants. The Individual Defendants had been good friends for years and were actively developing and evolving their clever idea for a performance art show involving three Blue Men, who look human but who have blue skin and shaved heads and do not speak. (Complaint, ¶ 1 [NYSCEF Doc. 11]). Pai claims that he was a twenty-year-old classically trained pianist, dancer, and painter when he met the Individual Defendants who enlisted his help in bringing their dream to fruition. Pai further alleges that he co-created the iconic PVC instruments used in the BMG shows and introduced the concept of a band to back up the Blue Men, and that he assumed duties as Music Director and Conductor for BMG shows while also playing a vital role in creating the characters, costumes, sets, and props. By 1990, Pai

alleges that he was dedicated full time to creative aspects of the show while leaving the Individual Defendants to handle the financial side. *Id.* at ¶ 12.

By contrast, Defendants dispute most of these allegations and contend that Pai was one of many drummers involved in the evolving BMG concept while acknowledging that Pai, and others, in the early days of the production, made certain contributions to the production. In 1991, after years of non-remunerative Off-Off-Broadway performances, the show opened at the Astor Place Theater and became a success, with touring shows performed by artists other than the Individual Defendants, ultimately opening in cities worldwide, and generating hundreds of millions of dollars in box office receipts in more recent years. In 2017, the BMG franchise was sold to Cirque due Soleil.

In May 2014, Pai claims that he was "jolted into reality," when in response to a request for an explanation as to why his royalty checks had been cut in half, one of the Corporate Defendants' employees explained to Pai, allegedly for the first time, the methodology Defendants had been using to calculate the amount of royalties they were paying to Pai. *Id.* at ¶ 15. Pai had become very close friends with the Individual Defendants over the years and claims to have depended on their repeated assurances that he was being compensated fairly for his contributions to BMG. *Id.* Instead, Pai asserts, the Defendants had been paying him only a fraction of the fair value of his contributions, and had further failed to make good on contractual obligations to pay him royalties as a Music Director for shows in the Astor Place, Boston, and Chicago venues. As a result, Pai commenced this lawsuit. Previously, this Court held, and the Appellate Division affirmed, that the statute of limitations for all of Pai's claims limits damages Pai may recover to the period beginning six years before the filing of the complaint on January

26, 2016 and thereafter. *See Pai v. Blue Man Group Publishing, LLC, et al.*, 151 A.D.3d 456, 457 (1st Dep't 2017).

Defendants' move for summary judgment dismissing all of Pai's claims. First, Defendants contend that Pai's friendship with the Individual Defendants does not give rise to a fiduciary relationship, and that, in any event, a breach of fiduciary duty claim is time barred under the applicable six-year statute of limitations. Second, Defendants argue that discovery has revealed no evidence to support the terms of the alleged oral Music Director Agreement that Pai believes are in effect, and thus Pai's breach of contract claim must fail. Third, Defendants assert that Pai's quasi-contract claims seeking additional royalties for other artistic contributions are preempted in their entirety by the Copyright Act. Finally, Defendants argue that the Corporate Defendants, various BMG entities, should be dismissed from the case because Pai has failed to demonstrate the entities' involvement in the events underlying his claims.

Plaintiff, in opposition, first argues that the particular circumstances surrounding Pai's relationship with the Individual Defendants gave rise to a fiduciary duty that was breached in September 2014 when the Individual Defendants refused to meet with him to discuss how his royalties were being calculated. Second, Pai asserts that conflicting testimony regarding the terms, and breach thereof, of an oral Music Director Agreement precludes summary judgment on that claim. Third, Pai argues that his quasi-contract claims are not preempted by the Copyright Act because he is not asserting that Defendants' use of his creative contributions was unauthorized, but rather that Defendants failed to compensate him for the reasonable value of those contributions. Finally, Pai contends that dismissal of the Corporate Defendants would be improper as they are all BMG entities created to honor the Individual Defendants' obligations, as this Court has previously held.

Legal Standard

CPLR 3212 provides that "[a]ny party may move for summary judgment in any action" to resolve claims that do not pose genuine issues of material fact necessitating a trial. The "proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). "Once this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial." *Ostrov v. Rozbruch*, 91 A.D.3d 147, 152 (1st Dep't 2012).

Fiduciary Duty and Accounting

"A fiduciary relationship arises between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." *Roni LLC v. Arfa*, 18 N.Y.3d 846, 848 (2011) (internal quotations omitted). In other words, "a fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other." *Id.* "Such a relationship might be found to exist, in appropriate circumstances, between close friends or even where confidence is based upon prior business dealings." *Penato v. George*, 52 A.D.2d 939, 942 (2d Dep't 1976) (internal citations omitted); *see Kohan v. Nehmadi*, 130 A.D.3d 429 (1st Dep't 2015) (holding that close friendships may give rise to a fiduciary relationship under certain circumstances). "In the absence of a formal fiduciary relationship, a Plaintiff must allege special circumstances or other peculiar facts that effectively transformed the parties' relationship into a fiduciary one." *American Intern. Group, Inc. v. Greenberg*, 877 N.Y.S.2d 614, 624 (Sup. Ct. N.Y. Cnty. 2008); *see L. Magarian & Co. v.*

Timberland Co., 245 A.D.2d 69, 69-70 (1st Dep't 1997); *see also EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19-22 (2005). Special circumstances may include "control by one party of the other for the good of the other." *L. Magarian & Co.*, 245 A.D.2d at 70.

The Court finds that there was no fiduciary relationship between Pai and the Individual Defendants within the applicable six-year statute of limitations period. The essence of Pai's claim is that he and the Individual Defendants had a decades-long personal relationship and that, at all relevant times, the Individual Defendants advised Pai that they would take care of him financially. Pai's claim is thus grounded entirely in his close relationship with the Individual Defendants—starting thirty years ago when he was a naïve twenty-year-old artist—and their repeated assurances to Pai that he was being compensated fairly. The record is, indeed, replete with testimony from the BMG founders confirming the tight-knit relationship that developed between Pai and the Individual Defendants. Both Stanton and Goldman admitted in their depositions that Pai was a very close friend. (*See* Piliero Aff. Exs. 1-2 [NYSCEF Doc. 126-7]). The closeness of Pai's friendships with the Individual Defendants is further confirmed by the testimony of non-party Larry Heinemann, another early participant in the production. (Piliero Aff. Ex. 5 [NYSCEF Doc. 130]). Pai himself testified that he trusted the Individual Defendants as his friends up until 2014, when they refused to meet with him to discuss the methodology behind the royalty calculations now at issue in this litigation. (Piliero Aff. Ex. 6 [NYSCEF Doc. 131]).

This Court has little doubt as to the intimate nature of Pai's friendships with the Individual Defendants from 1989 to 2014. Indeed, it appears exceedingly likely, based upon the deposition testimony of Pai, Heinemann, and the Individual Defendants, that Pai, as an enthusiastic twenty-year-old artist trying to succeed in New York City, would have placed a

significant amount of trust in the Individual Defendants who are basically his contemporaries. However, discovery has revealed that as early as 1999, Pai ceased relying exclusively on the Individual Defendants for advice. For example, it is undisputed that Pai consulted with several attorneys in and after 1999 on a range of matters related to BMG, including, but not limited to, representation by attorney Stephanie Morris when he signed a Songwriter's Agreement, and consultation with attorney Mark Sendroff concerning royalty payments. (Butterfield Aff. Exs. G-H [NYSCEF Doc. 88-9]). In 1999, Pai, while represented by Morris, signed a Songwriter's Agreement which expressly states that Pai was encouraged to seek independent counsel in connection with the terms therein. (Butterfield Aff. Ex. P [NYSCEF Doc. 97]). In 2002, while again represented by attorney Morris, Pai signed a transfer of copyright of various musical compositions in connection with the Songwriter's Agreement. *Id.* And, in 2009, Pai and Heinemann together consulted with attorney Mark Sendroff concerning an abrupt change in their royalty payments stemming from the economic recession, and concerning "general information about" their entitlement to royalty payments. (Butterfield Aff. Ex. H [NYSCEF Doc. 89]).

The Court thus finds that although there may have been a fiduciary relationship between Pai and the Individual Defendants through much of the 1990s given Pai's age, lack of financial experience, and trust in the Individual Defendants to look out for him, that fiduciary relationship ceased to exist no later than 2009 as a result of Pai's having consulted multiple attorneys in connection with BMG matters and having negotiated arms-length agreements with the Defendants, such as the 1999 Songwriter's Agreement and the 2002 transfer of certain limited copyrights.[1] In addition, at all relevant times, Pai, now a man about fifty years old, was aware of his BMG-related income and employed accountants to file his tax returns.

[1] Pai's claim for breach of the Songwriter's Agreement was withdrawn before Defendants' pre-answer motion to dismiss was decided.

By the early 2000s, the Individual Defendants were not "in a position of dominance over the plaintiff" such that they owed any fiduciary obligations to Pai. *See L.Magarian & Co.*, 245 A.D.2d at 70. Even assuming that the Individual Defendants *were* in a position of dominance over Pai during the initial years of the BMG, such that a fiduciary relationship could be found, that relationship did not give rise to indefinite fiduciary obligations on the part of the Individual Defendants. Simply put, the "special circumstances and peculiar facts" that may have given rise to a fiduciary relationship in 1989 were no longer in existence by the early 2000s, and certainly not after Pai's 2009 meeting with attorney Mark Sendroff to discuss royalty payments. *See American Intern. Group, Inc*, 877 N.Y.S.2d at 624. By 2009, Pai was no longer a struggling twenty-year-old artist, but rather, a forty-year-old veteran of BMG who had negotiated several arms-length agreements with advice of counsel and earned more than $1 million as a result of his association with BMG. (Butterfield Aff. Ex. I [NYSCEF Doc. 90]). Any claim Pai may have had in the 1990s is time barred under the applicable six-year statute of limitations. *Pai v. Blue Man Group Publishing, LLC, et al.*, 151 A.D.3d 456, 457 (1st Dep't 2017) ("[T]he court properly limited plaintiff's recovery [for breach of fiduciary duty] to the applicable statute of limitations period, which here is six years."); *see IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 139 (2009) ("[W]here an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under CPLR 213(8)."). And any post-2010 claim Pai has asserted for breach of fiduciary duty cannot withstand Defendants' motion for summary judgment. Thus, for the reasons stated above, Defendants' motion for summary judgment is granted as to Pai's claim for breach of fiduciary duty, and the first cause of action is dismissed.

Additionally, because Pai's claim for an accounting depends upon the existence of a fiduciary duty, and the Individual Defendants owe no fiduciary duty to Pai, Pai's accounting claim must fail as a matter of law. *See Abacus Fed. Sav. Bank v. Lim*, 75 A.D.3d 472, 474 (1st Dep't 2010) ("The failure to establish the existence of such a fiduciary relationship also precludes summary judgment for an accounting."); *Akkaya v. Prime Time Transp., Inc.*, 45 A.D.3d 616, 617 (2d Dep't 2007) ("The right to an accounting rests on the existence of a trust or fiduciary relationship regarding the subject matter of the controversy at issue."). Therefore, Defendants' motion for summary judgment is granted as to Pai's claim for an accounting, and the third cause of action is dismissed.

Breach of Music Director Agreement

The Court finds that there are significant issues of fact regarding the terms of the oral Music Director Agreement (the "Agreement"), as well as significant credibility issues, that preclude summary judgment on Pai's claim for breach of that oral contract. Pai alleges in his complaint that Defendants breached an oral Agreement under which he was entitled to receive compensation as Music Director in an amount equal to 0.4% of all box office receipts for all BMG performances at the Astor Place, Boston, and Chicago venues. While not vigorously disputing that Pai performed certain services as a Music Director, Defendants dispute that any oral Agreement exists regarding specific terms of compensation, and to the extent it does exist, that the 0.4% figure was always *inclusive* of Pai's composing royalties, and not in addition to his composing royalties. (*See* Butterfield Aff. Exs. E-F [NYSCEF Docs. 86-87]).

Defendants point to documentary evidence they assert confirms that Pai was receiving an additional 0.2% royalty for his Music Director position in addition to the 0.2% Pai was already receiving for his composer royalties. (Butterfield Aff. Ex. S [NYSCEF Doc. 100]). Those two

0.2% royalty figures together equal the 0.4% of box office receipts to which Defendants assert Pai was entitled. Pai's testimony, however, shows that he believes the 0.4% Music Director compensation under the oral Agreement was *in addition* to his composing royalties. (*See* Butterfield Ex. G [NYSCEF Do. 88]). Pai thus believes that he was entitled to a 0.4% royalty for his role as Music Director, in addition to the composer royalties he was already receiving.

Pai appears to assert that because the parties never discussed how the Agreement would apply to additional venues as they later opened, industry standard dictates that the terms of the Agreement apply to *all* venues worldwide. (*See* Opp. Mem. at 24 [NYSCEF Doc. 123]). Thus, Pai claims that under the terms of the Agreement, and in accordance with industry standard, he is entitled to 0.4% of box office receipts for all venues that benefited from his Music Director role, and not just for the Astor Place, Boston, and Chicago venues, as originally alleged in the complaint.

Consequently, the Court finds that there are triable issues of fact as to the precise terms of the Agreement, as well as significant credibility issues, that preclude summary judgment on Pai's claim for breach of an oral contract. Pai's testimony regarding the terms of the Agreement is irreconcilable with that of the Individual Defendants, and the documentary evidence—mostly in the form of informal notes—does not conclusively establish the terms of the Agreement such that this claim can be decided as a matter of law. (*See* Butterfield Aff. Ex. S [NYSCEF Doc. 100]). Additionally, to the extent that Plaintiff seeks to fill missing provisions in the Agreement with terms supplied by industry standards, he will be allowed to do so at trial. *See Columbia Artists Management, LLC v. Swenson & Burnakus, Inc.*, No. 05 Civ. 7314, 2010 WL 1379737 (S.D.N.Y. Mar. 3, 2010) ("Industry custom may be used to provide a missing term when a contract is silent on the issue."). Therefore, Defendants' motion for summary judgment

dismissing Pai's claim for breach of the Music Director Agreement (the second cause of action) is denied.

Quantum Meruit and Unjust Enrichment

The Court holds that Pai's claims for quantum meruit and unjust enrichment are not preempted by the Copyright Act. Pai's quasi-contract claims stem from Defendants' alleged failure to pay Pai the reasonable value of his contributions to BMG. The claims for quantum meruit and unjust enrichment are, ultimately, catch-all claims to the extent that Pai's contributions to BMG were not covered by other agreements. Defendants argue that Pai's quasi-contract claims, insofar as they are based on contributions other than Pai's alleged service as Music Director, simply seek compensation for his intellectual property, and thus are preempted by the Copyright Act. Pai argues in opposition that he does not allege that Defendants' use of his creative contributions was unauthorized, and thus his claims should not be preempted by the Copyright Act.

"The Copyright Act exclusively governs a claim when: (1) the particular work to which the claim is being applied falls within the type of works protected by the Copyright Act under 17 U.S.C. §§ 102 and 103, and (2) the claim seeks to vindicate legal or equitable rights that are equivalent to one of the bundle of exclusive rights already protected by copyright law under 17 U.S.C. § 106." *Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 305 (2d Cir. 2004). The "type of works" covered by the Copyright Act include, *inter alia*, music, sound recordings, pictorial, graphic, dramatic, and sculptural works. *See* 17 U.S.C. § 102(a). Pai's *alleged* creative contributions, such as his choreography, costume design, and lobby installations, fall squarely within the "type of works" covered by the Copyright Act.

As respects the issue of whether the quasi-contract claims seek to vindicate legal or equitable rights already protected by the Copyright Act such that preemption applies, "[t]he Second Circuit has held that the Copyright Act preempts a state law claim for unjust enrichment unless the claim has some 'extra element' that renders it *qualitatively different* from a copyright infringement claim." *Atrium Grp. De Ediciones Y Publicaciones, S.L. v. Harry N. Abrams, Inc.*, 565 F. Supp. 2d 505, 509 (S.D.N.Y. 2008) (emphasis added) (relying on *Briarpatch Ltd., v. Phoenix Pictures, Inc.*, 373 F.3d. 296 (2d Cir. 2004)). Defendants cite several cases in which unjust enrichment and/or quantum meruit claims were preempted by the Copyright Act. *See, e.g., Briarpatch Ltd.*, 373 F.3d at 306; *Einiger v. Citigroup, Inc.*, No. 1:14-CV-4570, 2014 WL 4494139, at *7 (S.D.N.Y. Sept. 12, 2014); *Atrium*, 565 F. Supp. 2d at 509. Plaintiff argues that those cases are distinguishable because they all involve the *unauthorized* use of works, whereas here, Pai explicitly *authorized* Defendants to use his work and only seeks fair compensation for those contributions, making the claim "qualitatively different" from a copyright infringement claim. Defendants, in reply, rely on *Shepard v. European Pressphoto Agency*, for the proposition that even state-law claims based upon the *authorized* use of works may be preempted under the Copyright Act. No. 17-CV-4434, 2017 WL 6812036 (S.D.N.Y. Dec. 20, 2017). *Shepard*, however, explicitly involved the *unauthorized* use of works, and is thus inapposite. *Id.* at *7 ("[T]he Shepards claim that European Pressphoto Agency displayed, reproduced, published, distributed, and otherwise made use of the Shepards' artworks *beyond the expiration of the one day term in the license agreement*.") (emphasis added).

The Court finds that the authorized use of Pai's work renders his quasi-contract claims qualitatively different from a copyright infringement claim such that it is not preempted under the Copyright Act. "[A]n unjust enrichment claim is not preempted if it seeks relief based on the

defendant's use of a non-copyrighted work or *authorized use of a copyrighted work*, neither of which involves the violation of a copyright." *Young-Wolff v. McGraw-Hill School Educ. Holdings, LLC*, No. 13-CV-4372, 2015 WL 1399702, at *5 (S.D.N.Y. Mar. 27, 2015) (emphasis added); *see Ulloa v. Universal Music & Video Distribution Corp.*, 303 F. Supp. 2d 409, 419 (S.D.N.Y. 2004) (holding that an unjust enrichment claim based on defendant's use of a non-copyrighted work or authorized use of a copyrighted work was not preempted by the Copyright Act).

Thus, in *Levine v. Landy*, plaintiff asserted claims of unjust enrichment with respect to two groups of photographs—one group's use was authorized while the other group's use was unauthorized. 832 F. Supp. 2d 176 (N.D.N.Y. 2011). The Court held that the unjust enrichment claim with respect to the unauthorized photos was preempted by the Copyright Act. *Id.* at 188. The outcome with respect to the authorized photos, however, was different because plaintiff did not seek to "vindicate his rights to distribute, publish, and/or reproduce the photographs. Instead, he takes issue with defendants' failure to remit payment to him." *Id.*

The *Landy* Court was not the first to find that a quasi-contract claim based upon the authorized use of a work may not be preempted by the Copyright Act. *See, e.g., Northwest Home Designing Inc. v. Sound Built Homes Inc.*, 776 F. Supp. 2d 1210 (W.D. Wash. 2011) (licensors' unjust enrichment claim against licensee of architectural building plans, alleging licensee failed to pay royalties, was not preempted by the Copyright Act); *Tavormina v. Evening Star Productions, Inc.*, 10 F. Supp. 2d 729 (S.D. Tex. 1998) (homeowners' quantum meruit claim, seeking compensation for time and inconvenience in allowing film producers access to their home, was distinct from rights protected by federal copyright law and was therefore not

preempted). Here, similarly, Pai indisputably authorized the use of his creative contributions and now seeks, what he believes, is the fair compensation for such authorized use.

Defendants, of course, claim that Pai was more than fairly compensated and was, indeed, overcompensated for the authorized use of his work. There is also a factual dispute as to whether some, most, or all of the copyrighted works include contributions by Plaintiff and/or the extent of those contributions. Moreover, inasmuch as Plaintiff accepted the payments he received for such contributions as he may have made, Plaintiff's conduct is certainly relevant to the resolution of the quasi-contract claims. In any event, because Pai's quasi-contract claims, as alleged, are qualitatively different from a copyright infringement claim, Defendants' motion for summary judgment dismissing Pai's claims for quantum meruit and unjust enrichment (the fourth and fifth causes of action) is denied on the present record.

Corporate Defendants

Defendants move to dismiss the Corporate Defendants, all BMG-related entities, on the basis that Pai has failed to demonstrate that any of the entities was in involved in the events underlying his claims, or that the entities even existed at the time the alleged events occurred. This Court has previously held that "because the corporate defendants are all entities created to honor the individual defendants' obligations, the same rulings apply to all defendants." (Decision and Order, at 6 [NYSCEF Doc. 33]). Nothing revealed in the motion papers changes this straightforward fact. The record reflects that different BMG entities were the "paymasters" for BMG performances at different venues and, because Defendants are unwilling to simplify the case by stipulating that one or more BMG entities will honor any award Plaintiff obtains, Defendants' summary judgment motion dismissing all claims against the Corporate Defendants is denied.

Conclusion

For the reasons stated *supra*, Defendants' motion for summary judgment is granted in part and denied in part. The Court holds that there was no fiduciary relationship between Pai and the Individual Defendants within the applicable six-year statute of limitations, and thus, Pai's claims for breach of fiduciary duty and an accounting are dismissed. Significant issues of material fact preclude summary judgment on Pai's claim for breach of the Music Director Agreement. Further, on the present record, the Copyright Act does not preempt Pai's quasi-contract claims for unjust enrichment and quantum meruit. Finally, Pai's damages stemming from his breach of contract and quasi-contract claims are necessarily limited by the applicable six-year statute of limitations, as previously noted. (*See* Decision and Order, at 6 [NYSCEF Doc. 33]). At trial, the parties may refer to pre-2010 events only to the extent necessary to establish the necessary background such that a jury may reasonably understand the basis of Pai's post-2010 claims.

The trial of this case is scheduled for April 9, 2018. The parties are directed to select a jury on Friday, April 6 so that fifteen-minute opening statements and testimony may begin on April 9. Inasmuch as the breach of fiduciary duty claim has been dismissed and testimony related to the period between 1989 and 2010 will be significantly circumscribed, there appears to be no reason why the case cannot be concluded during the week of April 9, as there presently appears to be a limited number of witnesses who have relevant testimony with respect to the claims that have survived summary judgment.

As previously noted, because it is unclear which named defendant is potentially liable to Plaintiff, the special verdict sheet will contain the names of all seventeen defendants. Defendants

can, of course, eliminate the inevitable jury confusion by stipulating that one or more defendants will be responsible for any damages awarded by the jury.

Accordingly, it is hereby

ORDERED that Defendants' motion for summary judgment is granted as to the first and third causes of action, and the Clerk is directed to enter judgment dismissing those claims; it is further

ORDERED that Defendants' motion for summary judgment is denied as to the second, fourth, and fifth causes of action.

3/15/2018
DATE

BARRY R. OSTRAGER, J.S.C.

BARRY R. OSTRAGER JSC

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE