

Pai v Blue Man Group Publ. LLC
2018 NY Slip Op 31787(U)
April 5, 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
NEW YORK COUNTY**

PRESENT: HON. BARRY R. OSTRAGER

PART 61

Justice

-----X

PAI, IAN

Plaintiff,

INDEX NO. 650427/2016

MOTION DATE

- v -

BLUE MAN GROUP PUBLISHING LLC
Defendant.

**MOTION SEQ. NOS. 006, 007, 008,
009**

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OSTRAGER, J.:

In the interests of insuring that jury selection in this case can commence promptly on Friday, April 6 the Court resolves the four pending *in limine* motions in accordance with this order. During *voir dire* and opening statements counsel are directed not to deviate from the contents of this decision.

Preliminarily, the sole issues in this case are plaintiff's claims that defendants breached an oral agreement, that defendants were unjustly enriched at plaintiff's expense, and that plaintiff is entitled to recover sums in excess of the sums plaintiff received from defendants on the basis of *quantum meruit*. It is undisputed that plaintiff made contributions to the various aspects of the Blue Man Group production. It is also undisputed that plaintiff has received certain payments from defendants for a period of decades.

With respect to plaintiff's motion to exclude defendants' exhibits H and S (the Songwriter's Agreement), the motion is denied with respect to exhibit H and granted as to the

unsigned exhibit S, subject to defendant's ability to lay an appropriate foundation for the introduction into evidence of exhibit S. The parties have stipulated that exhibit H precludes any claim by plaintiff with respect to copyrights to music and royalties for albums and CD's. The parties have also stipulated that exhibit H does not control the rights and obligations of the parties with respect to live performances. Nevertheless, the exhibit is a fully executed contract between the parties that the jury may consider to be relevant to the plaintiff's claims.

With respect to plaintiff's motion to exclude exhibit J (the so-called Sendroff email), that motion is granted on the grounds, among others, that Mr. Heineman's transmittal to plaintiff of legal advice an attorney provided to plaintiff and Heineman, perhaps in contemplation of litigation, does not waive any claim of privilege plaintiff may have with respect to the advice plaintiff received from attorney Sendroff. Nevertheless, defendants can question plaintiff and Heineman about the circumstance under which they consulted with counsel in 2009 and the general subject about which they consulted attorney Sendroff. The document itself is inadmissible hearsay, but if questioning of Messrs. Heineman and Pai establish that the substance of the advice Sendroff provided to Heineman and Pai was not in contemplation of litigation, then, under the Court of Appeals *Ambac* decision, Heineman and Pai can be questioned about the substance of the advice they received. What testimony may or may not be elicited about the Sendroff advice is not a proper subject for *voir dire* and opening statements.

With respect to plaintiff's motion to exclude defendants' exhibits M and L and three other documents, that motion is granted without prejudice to defendants' ability to lay an appropriate foundation for the admission into evidence of these documents. The court cannot deny plaintiff's motion from a review of the documents in the absence of foundational testimony

from the witness or witnesses through whom the defendants propose to introduce these documents.

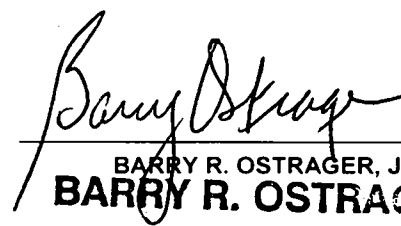
With respect to defendants' motion to preclude plaintiff's experts from testifying about various subjects, the court reserves judgment pending the state of the record as it exists at the time the experts are called as witnesses. However, none of the expert reports issued by any of the experts engaged by either party will be admitted into evidence and no expert will be allowed to testify with respect to matters for which there is no evidentiary basis in the trial record upon which the experts can render expert opinions. Of course, experts will be allowed to testify with respect to matters within their area of expertise and answer hypothetical questions. And, to the extent plaintiff wishes to elicit testimony from an expert with respect to whether elements in one Blue Man Group song are replicated in other songs, that will be allowed.

Finally, defendants' motion to exclude evidence of the sales of interests in the Blue Man Group production and/or the net worth of the defendants is granted to the extent of precluding reference to any of these issues during *voir dire* and during opening statements as it is presently unclear that evidence on these issues is part of plaintiff's *prima facie* unjust enrichment claim and, in all events, the prejudicial impact of this evidence may outweigh its productive value. The jury can evaluate all of the evidence, including evidence relating to defendants' laches and estoppel defenses and come to a reasoned decision on plaintiff's claims. Nevertheless, recognizing that this evidence is arguably relevant to plaintiff's unjust enrichment claim, the Court is prepared to revisit this issue during trial depending on the state of the trial record. But,

plaintiff may not during *voir dire* or during opening statements refer to the amount of the sale of the Blue Man Group production to Cirque du Soleil.

4/5/2018

DATE


BARRY R. OSTRAGER, J.S.C.
BARRY R. OSTRAGER
JSC

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

<input type="checkbox"/>
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CASE DISPOSED

GRANTED

SETTLE ORDER

DO NOT POST

☐

DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☒

OTHER

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REFERENCE