SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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NICHE MUSIC GROUP, LLC,

Plaintiff,

-against-

THE ORCHARD ENTERPRISES, INC. and SONY MUSIC ENTERTAINMENT, INC.,

Defendants.

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DECISION AND ORDER
Index No.: 650100/2018

Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

I. FACTS

As this is a motion for summary judgment, these are the undisputed facts taken from the parties' 19-a Statements of Undisputed Material Facts (SUMF, NYSCEF Docs. No. 25, 28). Disputed facts are noted.

The Independent Online Distribution Alliance (IODA) provided digital distribution solutions to the independent music community. IODA also licensed music catalogs for digital distribution. Joker's Wild Productions (JWP), which held rights to a catalog of recorded music, entered into a Digital Distribution Representation Agreement (the Agreement) with IODA on January 7, 2004. Plaintiff Niche Music Group LLC f/k/a Naked Voice Records (Niche) is the successor-in-interest to JWP's rights and obligations under the Agreement. Defendant The Orchard Enterprises, Inc. (The Orchard) is the successor-in-interest to IODA's rights and obligations under the Agreement. The Agreement is valid and enforceable. The Orchard is wholly-owned by defendant Sony Music Entertainment, Inc (Sony).

The Agreement "covers the entire catalog of [JWB's] music . . . that [it] has the right to license" (SUMF, ¶ 13, quoting Agreement, attached as Exhibit A to McCrady Aff, § 1). Pursuant thereto, JWB "grants to IODA a worldwide right . . . to . . . licens[e] the Catalog . . . to third party digital music services . . . and . . . collect, administer, and distribute royalties from such digital music services" (*id.* ¶ 14, quoting Agreement § 2). IODA was to provide various distribution services and reports to JWB and was entitled to a percentage of royalties IODA received on JWB's behalf. The agreement also contains a limitation of damages provision and entitles the prevailing party to attorneys' fees and costs. The agreement continues until terminated by either party.

Under the Agreement, The Orchard, for Niche, distributed the music of nonparty the Society for the Preservation of Encouragement of Barber Shop Quartet Singing in America, Incorporated, also known as the Barbershop Harmony Society (BHS). Niche (by its predecessor Naked Voice Records) obtained the rights to distribute this music by an agreement with BHS dated March 22, 2007 (First BHS Agreement) (SUMF, ¶ 26). There was also a 2011 agreement for the distribution of sheet music (the Second BHS Agreement). BHS is not a party to the Agreement.

On September 30, 2014, BHS sent Niche a letter terminating an agreement as of December 31, 2014. The parties dispute whether the intention was to terminate the First BHS Agreement or the Second BHS Agreement (SUMF, ¶ 27-28). The September 30 letter refers to the Second BHS Agreement. However, it is undisputed that on December 3, 2014, BHS's entered into a Digital Distribution Agreement directly with The Orchard (O/BHS Agreement) for distribution of BHS recorded music catalog and that on January 2, 2015, Niche's general counsel sent an email to The Orchard advising that nonparty BHS had "elected to take their catalog elsewhere for digital distribution and they have just terminated their contract with us" (*id.* ¶ 29). He also requested The Orchard to instruct all vendors to take BHS's audio recordings down from their services. He noted he expected a lag in the removal of the recordings and provided The Orchard with payments and royalty statements through May 15, 2015 (*id.*, ¶ 30).

The Orchard claims it did not collect any royalties for BHS music under the O/BHS Agreement before January 2015 (*id.*, ¶ 32). The Orchard claims BHS earned about $23,000 in royalties between January 2015 and December 2018, which (had it been earned pursuant to the Agreement) would have resulted in $19,550 paid to Niche, with 60% going to BHS (*id.*, ¶ 33).

The parties agree that Janice Bane of BHS and Jason Pascal of The Orchard were introduced via email on August 29, 2014 (*id.*, ¶ 41). The parties dispute the significance of their subsequent conversations, but The Orchard states BHS terminated its relationship with Niche on September 30, 2014, to be effective December 31, 2014. Niche argues BHS only terminated the Second BHS Agreement, which covered sheet music licensing.

In the First Amended Complaint (Complaint, NYSCEF Doc. No. 003), plaintiff asserts claims for:

1) Breach of Contract for breach of the Agreement;
2) Breach of the Covenant of Good Faith and Fair Dealing by attempting to induce BHS and others to breach their contracts with Niche and contract directly with The Orchard; and

3) Tortious Interference with Contractual Relations for inducing BHS and others to breach their contracts with Niche and contract directly with The Orchard.

II. DISCUSSION

a. Standard for Summary Judgment

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez v Prospect Hosp., supra*; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver*, 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop*, 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, v Ceppos*, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "[a] shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *see Zuckerman v City of New York, supra*; *Ehrlich v American Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255, 259 [1970]).

Lastly, "[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin*, 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]).

b. Claims against Sony

Plaintiff Niche admits the breach of contract claim and the claim for breach of the implied covenant of good faith and fair dealing fail as against Sony (Opp at 10). Niche has not presented any arguments against Sony as to the Third Cause of Action. Accordingly, the Third Cause of Action as against Sony shall be dismissed as abandoned. The entire complaint shall be dismissed as against Sony.

c. Breach of Contract Claim against The Orchard

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

It is undisputed that the Agreement is valid and enforceable as between Niche and The Orchard, and that plaintiff has performed. The alleged breaches are as set forth below.

Representation with SoundExchange. The Orchard is alleged to have improperly represented Niche's content with SoundExchange and withheld royalties owned Niche for that content. However, plaintiff acknowledges funds were released (Iannacchione aff, NYSCEF Doc. No. 30, ¶ 18 [reporting he was informed that, after some delay, all Niche tracks at SoundExchange were released by The Orchard and that amounts deducted by The Orchard had been credited]). Plaintiff has not pled or shown evidence of any damages from this alleged breach. Accordingly, this claim fails.

Failure to Deliver Content for the BHS 75th Anniversary Release. The Agreement obligates The Orchard to coordinate promotional opportunities with Niche (Opp at 14, citing Agreement, §1, but likely meaning § 3 [d] ["At Licensor's request, [The Orchard] will assist [Niche] in the

promotion of the Catalog within the various licensed digital music services through active and passive methods, and will use commercially reasonable efforts to coordinate promotional opportunities with [Niche] by way of traditional offline media advertising means"]). No admissible evidence has been provided (nor are there any specific statements in the Rule 19-a Statement) supporting the conclusory assertion that defendants failed to timely provide such content, or the tacit assumption that Niche requested content related to the BHS 75th Anniversary, in the first place (*see* Complaint, ¶ 26, Opp at 14-15, SUMF ¶ 61). As far as plaintiff requests discovery on this issue, evidence of their request and defendant's alleged failure would be within plaintiff's control. This portion of the claim is rejected.

Failure to use Commercially Reasonable Efforts to Coordinate Promotional Opportunities Regarding Opt-Outs. Niche claims The Orchard's decision not to provide Niche with the financial terms it negotiated with digital distributors constitutes a breach of the Agreement by failing to use commercially reasonable efforts to coordinate promotional opportunities (Opp at 15). Plaintiff cites Section 1 of the Agreement, but presumably means section 3(d), quoted above. This section of the Agreement does not apply here, as the conduct complained of has nothing to do with "coordinat[ing] promotional opportunities with [Niche] by way of traditional offline media advertising means." No breach of the contract (of either section 1 or section 3) has been shown here.

Inducing BHS to Breach the First BHS Contract. Plaintiff claims stealing BHS as a client is a breach of section 3(d) of the Agreement, because plaintiff cannot promote Niche's catalog while taking its client. The Agreement does not contain a non-compete provision. Had the parties intended such a provision, they could have included one. Further, under California law, "covenants not to compete in contracts other than for sale of goodwill or dissolution of partnership are void" (*Kolani v Gluska*, 64 Cal App 4th 402, 406 [Cal Ct App 1998]). This portion of the claim fails.

Failure to Promote the Niche Catalog. Niche claims The Orchard failed to promote the catalog, as required by section 3(d) of the Agreement, by inducing a breach of the First BHS Agreement. This is merely another attempt to read in a non-compete agreement. It, too, fails.

Failing to Encourage Product Features. Niche makes no specific arguments about this claim, but asserts it needs discovery. CPLR 3212(f) provides that "[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist

but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had. . . . " No such showing has been made, or even alleged as to what precisely Niche maintains The Orchard failed to do. This claim must be dismissed.

d. Breach of Covenant of Good Faith and Fair Dealing

It is well settled that within every contract is an implied covenant of good faith and fair dealings (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]; *Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 [1995]). The implied covenant "embraces a pledge that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*511 W. 232nd Owners Corp.*, 98 NY2d at 153 [internal quotation marks omitted]; *see also 6243 Jericho Realty Corp. v AutoZone, Inc.*, 71 AD3d 983, 984 [2d Dept 2010]; *Moran v Erk*, 11 NY3d 452, 457 [2008]). A breach of the covenant is a breach of the contract itself (*see Boscoral Operating, LLC v Nautica Apparel, Inc.*, 298 AD2d 330, 331 [1st Dept 2002]). The covenant of good faith and fair dealing is breached when a party acts in a manner that, although not expressly forbidden by the contractual provision, would deprive the other party of the benefits of the agreement (*see 511 W. 232nd Owners Corp.*, 98 NY2d at 153; *Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 267 [1st Dept 2008]).

The covenant encompasses any promises that a reasonable person in the position of the promisee would be justified in understanding were included (*see 511 W. 232nd Owners Corp.*, 98 NY2d at 153; *Ochal v Tel. Tech. Corp.*, 26 AD3d 575, 576 [3d Dept 2006]). However, the obligations imposed by an implied covenant of good faith and fair dealing are limited to obligations in aid and furtherance of the explicit terms of the parties' agreement (*see Trump on Ocean, LLC v State*, 79 AD3d 1325, 1326 [3d Dept 2010]). The covenant cannot be construed so broadly as to nullify the express terms of a contract, or to create independent contractual rights (*see Phoenix Capital Invs. LLC v Ellington Mgt. Group, L.L.C.*, 51 AD3d 549, 550 [1st Dept 2008]; *767 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75, [1st Dept 2004]; *SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352, 355 [1st Dept 2004]; Fesseha v TD Waterhouse Inv. Servs., Inc., 305 AD2d 268, [1st Dept 2003]). To establish a breach of the implied covenant, the plaintiff must allege facts that tend to show that the Defendants sought to prevent performance of the contract or to withhold its benefits from the plaintiff (*see Aventine Inv. Mgmt., Inc. v Can. Imperial Bank of Communications Inc.*, 265 AD2d 513, 514 [2d Dept 1999]).

Niche argues The Orchard breached the covenant of good faith and fair dealing by competing for business with Niche (Opp at 14). This is yet another attempt to read a non-existent but, in any event, prohibited non-competition clause into the Agreement. Niche has not shown that the The Orchard sought to prevent performance of the contract or withheld its benefits from the plaintiff. This claim also fails.

e. Tortious Interference

To prove a claim for tortious interference with contract, the plaintiff must show: (1) the existence of a valid contract; (2) defendant's knowledge of the contract; (3) defendants' intentional procurement of the third-party's breach without justification; (4) actual breach of the contract; and (5) damages caused by breach of the contract (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]); *Kronos, Inc. v AVX Corp.*, 81 NY2d 90 [1993]). The contract alleged to be interfered with is the First BHS Agreement. It is undisputed it was a valid and enforceable contract before BHS sent the termination letter. It is also undisputed The Orchard knew about the First BHS Agreement. It is disputed whether the termination letter was effective in terminating that agreement. Niche argues that signing BHS while knowing that Niche was the only other distribution channel available was improper (Opp. Br. At p. 19, NYSCEF Doc. No. 27). It cites no law in support. As noted above, non-competition agreements are unenforceable.

The termination letter, dated September 30, 2014 (attached as Exhibit C to McCrady aff, NYSCEF Doc. No. 21), states:

> "As provided in Section 7 of the *Printed Music Distribution Agreement* dated January 1, 2011 . . . [BHS] hereby terminates the term of the Agreement effective at the end of the current Agreement term on December 31, 2014."

(emphasis added). The letter was attached to an e-mail, which stated:

> "Attached you will find a letter terminating our agreement . . . . Given our pending amendment and automatic renewal upon us, we feel this is the best way to move forward with our relationship as we continue to evaluate our next steps with [Niche] and any other potential business partner."

(*see* NYSCEF Doc. No. 24)[1] In December 2014, The Orchard and BHS signed a distribution agreement (*see* O/BHS Agreement, attached as Exhibit B to McCrady aff, NYSCEF Doc. No. 21). Subsequently, on January 2, 2015, Jonathan Clunies, general counsel of Niche acknowledged that:

[1] Although not necessary to the court's decision, it appears that BHS made the change because it was dissatisfied with the service Niche was providing (*see* NYSCEF Doc. No. 24, Ex. J).

> "One of our major artists with a significant number of releases [BHS] has elected to take their catalog elsewhere for digital distribution and they have just terminated their contract with us"

He instructed The Orchard to have the BHS recorded music removed from the various online services (attached as Exhibit D to McCrady aff, NYSCEF Doc. No. 21).

On a motion for summary judgment, the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and give that party the benefit of every favorable inference. Summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact.

Here, the September 20, 2015 letter, read in isolation, provides for termination of the sheet music agreement only. However, emails provided by nonparty BHS reveals it was dissatisfied with Niche and wanted to sever its ties (*see* NYSCEF Doc. No. 24). The conduct of BHS and Niche shows conclusively that the parties understood that BHS intended to terminate the agreement governing the digital catalog of its music. Specifically, along with the termination notice, BHS attached an email a expressing its plan to "evaluate our next steps with [Niche] and any other potential business on December 3, 2014. BHS took that "next step" when it entered into an agreement with The Orchard for distribution of music in its digital catalog. Understanding the intentions of BHS, on January 2, 2015, the general counsel of Niche confirmed to The Orchard that BHS had "elected to take their catalog elsewhere for digital distribution and have just terminated their contract with [Niche]") (SUMF ¶ 29).[2]

Niche has not sufficiently alleged, let alone provided admissible evidence, that The Orchard intentionally procured BHS's breach of the First BHS Agreement without justification.

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[2] There is other evidence to demonstrate that The Orchard did not procure any alleged breach by BHS, much less procure it by improper means (*see AREP Fifty-Seventh, LLC v PMGP Assoc., LP*, 115 AD 3d 402 [1st Dept 2014]). In response to an interrogatory that Niche "[I]dentify all persons with knowledge of any person who allegedly induced the breach of the BHS Agreement" Niche conceded that "Niche does not allege that anyone induced the breach of the BHS agreement. Accordingly, Niche is not aware of any person with knowledge of any person who induced the breach of the BHS Agreement" (NYSCEF Doc. No. 24, Ex. C, Plaintiff's Objections and Responses to Defendants' First Set of Interrogations, Interrogatory No. 7). The "BHS Agreement", a defined term, is the BHS audio agreement dated March 22, 2007, referred to in this Decision and Order as "First BHS Agreement" (*see id.*, at Interrogatory No. 1). In a Supplemental Response, Niche clarified that it never received "proper notice for the termination of the First BHS [Agreement]. Accordingly, the First BHS [Agreement] remains in force . . . [It] was breached in early 2015 when [BHS] switched companies to the The Orchard for the publication of digital music" (see id., Ex. E, at Supplemental Response to Interrogatory 7). It adds that "Niche believes that The Orchard induced this breach and it is this breach that is central to Niche's claim against defendants" (*id.*). Notably, Niche has not identified any facts tending to show that The Orchard induced BHS to commit the error that resulted in failure of BHS to provide "proper notice".

While the Court of Appeals has noted that "mere status as plaintiff's competitor is not a legal or financial stake in the breaching party's business that permits defendant's inducement of a breach of contract[. . . .] existing contractual relationships do[] not negate a competitor's right to solicit business, where liability is limited to *improper* inducement of a third party to breach its contract" (*White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426-27 [2007]). While plaintiff makes vague, conclusory allegations of The Orchard having used Niche's proprietary information to obtain BHS's business, it alleges nothing specific and fails to provide any admissible evidence on this point.

Nothing in Niche's Agreement with The Orchard restrains BHS from "tak[ing] its catalog elsewhere". The motion for summary judgment seeking dismissal of the First, Second and Third causes of action shall be granted and the breach of contract, breach of the coveant of good faith and fair dealing and tortious interference with contract claims shall be dismissed. It is hereby

ORDERED that the motion for summary judgment of defendants The The Orchard Enterprises, Inc., (Motion Sequence Number 001) is GRANTED; and it is further

ORDERED that the complaint against defendant Sony Music Entertainment, Inc., is DISMISSED for the reasons stated above; and it is further

ORDERED that the complaint of plaintiff Niche Music Group, LLC is hereby DISMISSED in its entirety and the Clerk of the Court is directed to enter judgment against plaintiff Niche Music Group, LLC and in favor of defendants Sony Music Entertainment, Inc., and The Orchard Enterprises, Inc., together with costs and disbursements to be taxed in an amount calculated by the Clerk upon presentation of a proper bill of costs.

This constitutes the decision and order of the court.

DATED: June 19, 2019

ENTER,

O. PETER SHERWOOD J.S.C.