

<b>Lawson v Warner Music Group Conglomerate</b>
2020 NY Slip Op 33990(U)
November 30, 2020
Supreme Court, Kings County
Docket Number: 511050/2019
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

-----X  
Julie Lawson as representative of the  
survivors of Jerome Lawson, Jayotis  
Washington, LaZetta Duncan Moore as  
representative of the survivors of James  
"Bro" Caldon Hayes, Raymond Sanders, Zina  
Rhoad Weinberger and Paul J. Weinberger as  
representatives of the survivors of Herbert  
"Tuobo" Rhoades and Gerald Gardner Wright  
as trustee for the survivors of Jesse  
"Sweet Joe" Russell,  
  
Plaintiffs,

Decision and Order

511050/2019

-against-

Warner Music Group Conglomerate, Warner  
Music Group Inc., aka Warner Music aka WEA  
International Inc., Universal Music Group,  
Capital Records, Sony/ATV Music Publishing,  
Concord Music Group and John Doe,  
  
Defendants,

November 30, 2020

-----X  
PRESENT: HON. LEON RUCHELSMAN

The defendants have moved pursuant to CPLR §3211 seeking to  
dismiss the Amended Complaint on the grounds it fails to state  
any cause of action. The plaintiffs have opposed the motions.  
Papers were submitted by the parties and arguments held. After  
reviewing all the arguments this court now makes the following  
determination.

According to the First Amended Complaint the plaintiffs were  
and are members of a gospel soul, jazz and rock A-Capella band  
called The Persuasions. The group was formed in the early  
sixties and has been performing since, releasing many albums and  
performing live. The First Amended Complaint essentially alleges  
the plaintiffs were not paid royalties to which they were

entitled. The First Amended Complaint contains three causes of action, for fraudulent concealment, breach of contract and unjust enrichment. The defendants have moved seeking to dismiss the First Amended Complaint on the grounds it fails to allege any cause of action. The plaintiffs oppose the motions.

#### Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005], Leon v. Martinez, 84 NY2d 83, 614 NYS2d 972, [1994]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

It is well settled that to succeed upon a claim of fraud it must be demonstrated there was a material misrepresentation of fact, made with knowledge of the falsity, the intent to induce reliance, reliance upon the misrepresentation and damages (Cruciata v. O'Donnell & Mclaughlin, Esqs., 149 AD3d 1034, 53 NYS3d

328 [2d Dept., 2017])). Further, to succeed upon a claim of fraudulent concealment it must be demonstrated that in addition to the above requirements there was a fiduciary or confidential relationship which would impose a duty upon the defendant to disclose material information (Mitschele v. Schultz, 36 AD3d 249, 826 NYS2d 14 [1<sup>st</sup> Dept., 2006], Wallkill Medical Development LLC v. Catskill Orthopaedics P.C., 178 AD3d 987, 115 NYS3d 67 [2d Dept., 2019])). Moreover, even absent a fiduciary relationship a duty to disclose may arise under the 'special facts' doctrine where one party maintains superior knowledge of essential facts as to render the entire transaction inherently unfair absent the disclosure (Jana L. v. West 129<sup>th</sup> Street Realty Corp., 22 AD3d 224, 802 NYS2d 132 [1<sup>st</sup> Dept., 2005])). As with all fraud claims, these elements must each be supported by factual allegations containing details constituting the wrong alleged (see, JPMorgan Chase Bank, N.A. v. Hall, 122 AD3d 576, 996 NYS2d 309 [2d Dept., 2014])).

Concerning the fraud claim, the First Amended Complaint contains five paragraphs for each of five defendants, the Warner, Universal, Capital, Concord and SONY/ATV defendants. The allegations are identical except for the named defendant. Thus, for the Warner defendants the First Amended Complaint alleges that "defendant Warner materially misrepresented facts to Plaintiffs via actions. Defendant Warner materially

misrepresented facts to Plaintiffs via omissions. Defendant Warner willfully, contumaciously and with knowledge concealed royalties due and owing to Plaintiffs from 1971 to date. Defendants Warner were duty-bound in honesty to disclose. A duty to disclose further arose "under the special facts doctrine" where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair. Defendants intended to deceive Plaintiffs by failing to disclose royalties due and owing" (see, First Amended Complaint, ¶¶43-47). As noted the allegations are identical for the remaining defendants thus the analysis employed for one will be equally applicable for the rest. The First Amended Complaint does not specifically allege any representations or omissions at all that could constitute fraud. First, the allegations are entirely conclusory merely noting that the defendants materially misrepresented facts through actions and omissions. However, no facts whatsoever are presented detailing the misrepresentations or any omissions. The First Amended Complaint does not provide any accompanying information such as who made the material misrepresentations, when they were made, in what context they were made and how such statements were misrepresentations and how there was reliance upon them. Thus, pursuant to CPLR §3016(b) to plead fraud the complaint must "sufficiently detail the alleged conduct" and contain fact that "are sufficient to permit a reasonable

inference of the alleged conduct" (Pludeman v. Northern Leasing Systems Inc., 10 NY3d 486, 860 NYS2d 422 [2010]). In the First Amended Complaint in this case there are absolutely no facts supporting allegations of fraud. The allegations merely contain conclusions that fraud was committed without explaining, with the detail required, how such fraud occurred. Thus, a complaint that alleges fraud "absent specific and detailed allegations establishing a material misrepresentation of fact, knowledge of falsity or reckless disregard for the truth, scienter, justifiable reliance, and damages proximately caused thereby, is insufficient to state a cause of action for fraud" (Old Republic National Title Insurance Company v. Cardinal Abstract Corp., 14 AD3d 678, 790 NYS2d 143 [2d Dept., 2005]).

The First Amended Complaint does allege that "plaintiff's relied on Defendant's representations that they were faithful in their performance of their duties as Music Industry Professionals and relied on Defendant's reputation" (see, First Amended Complaint, ¶69). However, that allegation is likewise insufficient to establish fraud since there is no context when such statements were made, who made them, to whom they were made and if indeed they were misrepresentations of material fact as opposed to mere opinion.

The First Amended Complaint further alleges that Warner sold a license of a recording made by The Persuasions entitled Papa

Oom Mow Mow without authority and that SONY/ATV sold the arrangement of that same song without permission. Further, it is alleged the defendants allowed a portion of that song to appear in the movie E.T. without permission and without compensating The Persuasions. Moreover, it is alleged the defendants allowed another song 'Good Times' to appear in a commercial and to provide background music for certain video games and to be available as a ring tone for cell phones. Even if all these allegations are true they do not support a cause of action for fraud since those allegations do not contain any misrepresentations at all. They could perhaps support other claims as will be addressed presently. However, profiting from something that allegedly does not belong to the defendant is not fraud at all. Likewise, all claims The Persuasions are owed royalties for their music does not state any action in fraud. The mere fact there are allegations the defendants withheld royalties does not constitute a fraudulent omission or fraudulent concealment.

Therefore, based on the foregoing the motion seeking to dismiss the first cause of action is granted.

Concerning the second cause of action alleging breach of contract, it is well settled that to succeed upon a claim of breach of contract the plaintiff must establish the existence of a contract, the plaintiff's performance, the defendant's breach

and resulting damages (Harris v. Seward Park Housing Corp., 79 AD3d 425, 913 NYS2d 161 [1<sup>st</sup> Dept., 2010]). Further, as explained in Gianelli v. RE/MAX of New York, 144 AD3d 861, 41 NYS3d 273 [2d Dept., 2016], "a breach of contract cause of action fails as a matter of law in the absence of any showing that a specific provision of the contract was breached" (id). The First Amended Complaint alleges the contractual duty of defendants to pay royalties is not based upon any signed contract but rather the obligations are implied (see, First Amended Complaint, ¶¶194, 200, 204, 216 and 223).

An implied contract is "just as binding as an express contract arising from declared intention, since in the law there is no distinction between agreements made by words and those made by conduct" (Jemzura v. Jemzura, 36 NY2d 496, 369 NYS2d 400 [1975]). For an implied contract to be valid it must contain all the elements of a contract including mutual assent, consideration, capacity and legality of subject matter (Maas v. Cornell University, 94 NY2d 87, 699 NYS2d 716 [1999]). In Andrews v. SONY/ATV Music Publishing LLC, 2017 WL 770614 [S.D.N.Y. 2017] the court held that a claim for royalties based on an implied contract failed to establish such contract in fact existed. The court explained that "plaintiffs fail to allege any of the circumstances surrounding the purported contract's formation. Nor do they allege a course of conduct or dealing by



the parties to the contract, or any other facts from which the Court could infer the intention or assent to be bound. Other than a generalized requirement that EMI/Sony pay royalties, Plaintiffs do not allege the parties' obligations, or any other pertinent terms of the purported contract" (id). Moreover, even if an implied contract did contain all the elements necessary, the claim for royalties would still fail. In Grossberg v. Double H Licensing Corp., 86 AD2d 565, 446 NYS2d 296 [1<sup>st</sup> Dept., 1982] the court explained that an unwritten agreement to pay open-ended royalties is unenforceable because the terms of the agreement cannot be performed within one year and thus must be in writing (see, also, Sirico v. F.G.G. Productions Inc., 71 AD3d 429, 896 NYS2d 61 [1<sup>st</sup> Dept., 2010]).

The First Amended Complaint does not allege any other obligations of any party other than the obligation to pay royalties. Consequently, no implied contract exists. Even if such contract did exist it would be barred by the Statute of Frauds. Therefore, the motion of the defendants seeking to dismiss the second cause of action is granted.

The last count of the First Amended Complaint alleges unjust enrichment. It is well settled that a claim of unjust enrichment is not available when it duplicates or replaces a conventional contract or tort claim (see, Corsello v. Verizon New York Inc., 18 NY3d 777, 944 NYS2d 732 [2012]). As the court noted "unjust

enrichment is not a catchall cause of action to be used when others fail" (id).

On October 10, 1969 members of The Persuasions signed a contract with an entity called Straight Records Inc. that was later acquired by defendant Warner. That contract provides the royalties due and specifically states that The Persuasions did not own the master recordings which comprise the unjust enrichment claim. Similarly, on August 31, 1976 The Persuasions signed a contract with Elektra/Asylum Records which was also acquired by defendant Warner. That contract also stated that The Persuasions did not own the recordings and provided the basis for royalty payments to The Persuasions. Further, on April 1, 1971 Capital Records Inc., signed a contract with David Dashev Productions which stated that The Persuasions would only look to Dashev Productions for any royalties due them. On April 18, 1971, The Persuasions signed another contract with Capital Records which contained the same terms as the other contracts noted. Paragraphs 133 to 135 of the First Amended Complaint allege that "Warner's unsworn contract from 1969 was not reviewed by any manager or lawyer for the Plaintiff's herein. Warner's unsworn contract from 1969 was allegedly signed by Plaintiffs who could not all read and write. Warner's unsworn contract from 1969 was not signed by anyone for Warner or their predecessors in interest" (id). However, the plaintiff's cannot argue in the

year 2020 that contracts signed in 1969 were not signed willingly or were the result of duress or were not reviewed by other, more knowledgeable individuals. Thus, the contracts must be deemed valid and enforceable. Further, the First Amended Complaint notes that "Warners [sic] unsworn and unsigned contract from 1969 did not pertain to the entire body of the Persuasions work" (First Amended Complaint, ¶136). Even if that is true the plaintiff did not provide any basis upon which the court could evaluate the works covered by that contract and the works beyond that contract. Thus, a claim for unjust enrichment is inapplicable when there are valid claims based upon breach of contract. Indeed, it is curious the plaintiffs sought to undermine the validity of existing written contracts and to instead rely upon dubious implied contractual claims. Concerning claims the plaintiff alleges are not covered by any contracts, the allegations fail to specify the works for which no contract had been signed. This is particularly important because unjust enrichment carries a six year statute of limitations and any claims from before 2013 are time barred (Sirico, supra). Consequently, the claim for unjust enrichment is too vague since it fails to explain the specific enrichment which is unjust and fails to allege claims that are still viable. Moreover, the First Amended Complaint fails to explain why claims are not sought against Dashev Productions who contracted with the

defendants to provide royalties to The Persuasions and for many of plaintiff's claims is the true source of recovery.


Therefore, based on the foregoing the motion seeking to dismiss the claim for unjust enrichment is granted. Thus, the complaint is dismissed as to all defendants.

There is no doubt the plaintiffs maintain claims for missing royalties and the defendants concede such royalties are due them. The gap between the parties is far smaller than the lengthy First Amended Complaint would lead one to believe. However, the First Amended Complaint fails to comply with the necessary pleading requirements of the CPLR and consequently is dismissed.

So ordered.

ENTER:

DATED: November 30, 2020  
Brooklyn N.Y.

  
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Hon. Leon Ruchel  
JSC