SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR ENGORON** **PART** **37**

Justice

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UPFRONT MEGATAINMENT, INC. FORMERLY KNOWN AS UPFRONT ENTERTAINMENT, INC., DARRICK STEPHENS,

Plaintiffs,

- v -

ALIUNE THIAM,

Defendant.

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INDEX NO. 652156/2021

MOTION DATE 05/11/2022

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 83, 84, 85, 86, 87, 88, 89, 113, 114, 115, 116, 117, 134, 135, 141, 142, 143, 144, 145, 146, 147, 148, 149, 151, 176, 177, 178

were read on this motion to DISMISS.

Upon the foregoing documents and for the reasons stated hereinbelow, defendant's motion, pursuant to CPLR 3211(a)(1) and (7), to dismiss plaintiffs' second and third causes of action is granted.

Background

On October 25, 2018, defendant, Aliaune Thiam p/k/a AKON ("Akon"), entered into a settlement agreement ("The Settlement Agreement"), to resolve a breach of contract action in the Supreme Court of New York, Index No. 652327/2017, in which he agreed to pay plaintiffs, Upfront Megatainment, Inc., f/k/a Upfront Entertainment, Inc. ("Upfront") and Darrick Stephens a/k/a Devyne Stephens a/k/a Devyne ("Stephens"), a right to receive a portion of future income from the use of specific musical compositions and sound recordings. NYSCEF Doc. No. 85.

Section 2 of The Settlement Agreement contains two separate payment "tranches" aimed at resolving plaintiffs' earlier lawsuit. NYSCEF Doc. No. 85. The first tranche, for a total of $3,250,000.00, was to be paid in four installments from October 31, 2018, through October 31, 2021. NYSCEF Doc. No. 32. The second tranche ("The Second Payment Tranche") required that Akon pay plaintiffs royalties so long as he remained signed to his then-existing "major" record label, non-party Atlantic Recording Corporation ("Atlantic"), or while under a new recording contract with another "major" record label for a term of four "album cycles." Id. If those conditions are met, then Paragraph 2(e)(iv) of The Settlement Agreement provides that Akon pay plaintiff, "twenty per cent (20%) of [the] future net income" he earns from the commercial exploitation of certain of his older musical compositions and master recordings ("Stephens Revenue Share"). Id.

On October 25, 2018, the date of The Settlement Agreement, Akon was signed to a recording contract with Atlantic. NYSCEF Doc. No. 32 ¶ 33. Pursuant thereto, Akon was obligated to produce up to three albums, to be delivered within three so-called "album cycles" consisting of one initial album cycle and two additional cycles exercisable at Atlantic's option. NYSCEF Doc. No. 114.

Also pursuant to Paragraph 2(e)(iv) of The Settlement Agreement, if Akon's relationship with Atlantic ended before four "album cycles" were completed, Akon would only owe the Stevens Revenue Share if he signed a new recording agreement with another "major" record label. NYSCEF Doc. No. 10. Even if Akon signed with another "major" record label, however, he was only required to pay royalties if he was within any of the remaining four "album cycles" with that new "major" label. Id. The Settlement Agreement further clarified:

> For the avoidance of doubt, regardless of the number of "major" record labels for which Thiam may create musical recordings after the date of this agreement, the Stephens Revenue Share shall apply only to four album cycles, inclusive of those album cycles with Atlantic.

NYSCEF Doc. No. 10. On March 11, 2019, the recording agreement between Akon and Atlantic was terminated. NYSCEF Doc. No. 32 ¶ 47. Since then, Akon has signed a contract to release his music through non-party BMG Rights Management ("BMG").

On April 1, 2021, plaintiffs sued defendant, asserting breach of contract and declaratory judgment causes of action. NYSCEF Doc. No. 1.

On July 12, 2021, defendant moved, pursuant to CPLR 3211(a)(1) and (7), to dismiss the complaint. NYSCEF Doc. No. 5.

In a Decision and Order dated September 28, 2021, this Court granted defendant's motion dismissing that portion of plaintiffs' first cause of action addressing "income for periods post-dating the termination" of Akon's agreement with Atlantic (i.e. after March 11, 2019) and their second cause of action, for a declaratory judgment, noting that The Settlement Agreement "makes clear that the revenue stream from the old body of work at issue would only continue during major record label album cycles, which did not happen here." NYSCEF Doc. No. 20.

On January 18, 2022, plaintiffs filed an Amended Complaint that, *inter alia,* retracted their prior admission that Akon's new label, BMG, is an "independent" and not a "major" label, and asserted three causes of action: (1) breach of contract as to the first payment tranche of The Settlement Agreement; (2) breach of contract as to The Second Payment Tranche; and (3) a declaratory judgment that BMG is a "major" record label, notwithstanding plaintiffs' previous admission in the initial complaint. NYSCEF Doc. No. 32.

On March 9, 2022, defendant filed the instant motion, pursuant to CPLR 3211(a)(1) and (7), to dismiss: (1) the portion of the second cause of action of the Amended Complaint seeking royalties from the Stephens Revenue Share post-dating termination of the defendant's recording

agreement with Atlantic ("Atlantic Recording Agreement") on March 11, 2019; and (2) the third cause of action seeking a declaratory judgment. NYSCEF Doc. No. 83.

Discussion

Dismissal pursuant to CPLR 3211(a)(1) is warranted where "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Leon v Martinez, 84 NY2d 83, 87-88 (1994). "Although on a motion addressed to the sufficiency of a complaint pursuant to CPLR 3211(a)(7), the facts pleaded are presumed to be true and accorded every favorable inference, nevertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration." Sud v Sud, 211 AD2d 423, 424 (1st Dept 1995).

Breach of Contract

From October 25, 2018, through and including March 11, 2019, Akon was signed to a recording agreement with a "major" record label, Atlantic, and therefore plaintiffs are entitled to royalties from that time. NYSCEF Doc. No. 32.

At issue in the second cause of action then is plaintiffs' withdrawal of their prior admission that Akon's new label, BMG, is an "independent" and not a "major" record company, and the introduction of new allegations as to why Atlantic terminated the Atlantic Recording Agreement. NYSCEF Doc. No. 32.

An "amended complaint" cannot "flatly contradict" prior "admissions of fact." 888 7th Ave. Assocs. Ltd. P'ship v AAER Sprayed Insulations, 199 AD2d 50, 51 (1st Dep't 1993). In such a case, allegations in the original pleading are treated as "informal judicial admissions, entitled to evidentiary weight but [are] not dispositive." Talking Capital LLC v Omanoff, 169 AD3d 423, 424-425 (1st Dep't 2019) (citations omitted).

Here, defendant argues that plaintiffs failed to seek leave of this Court to allow their inconsistent allegation. Plaintiffs respond that the "admission" was made by former counsel and is not dispositive as a matter of law and, therefore, should not be the basis for dismissal.

In the Decision and Order dated September 28, 2021, this Court stated that The Settlement Agreement "makes clear that the revenue stream from the old body of work at issue would only continue during major record label album cycles, *which did not happen here*." NYSCEF Doc. No. 20 (emphasis added). In doing so, this Court established that Akon did not sign with another "major" record label after Atlantic and therefore was not required by The Settlement Agreement to pay plaintiffs the Stephens Revenue Share. Further, having conceded in their own initial pleadings that BMG is *not* a "major" record label, plaintiffs' new, contradictory, claim that BMG *is* a "major" record label is unpersuasive. See Bogoni v Friedlander, 197 AD2d 281, 293 (1st Dep't 1994) (holding that statements in pleading constitutes judicial admission which remains evidence of facts admitted).

Additionally, plaintiffs argue that defendant's motion is barred by the "prevention doctrine." Under the that doctrine, "a 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."

HGCD Retail Servs., LLC v 44-45 Broadway Realty Co., 37 AD3d 43, 53 (1st Dept 2006) citing Kooleraire Serv. & Installation Corp. v Board of Educ. of City of N.Y., 28 NY2d 101, 106 (1971). The "prevention doctrine," however, does not protect a party when "the contingency was foreseeable and defendants' acts were consistent with the agreement." Ninth St. Assocs. v 20 E. Ninth Corp., 114 AD3d 518, 519 (1st Dep't 2014). Rather, the doctrine requires the breaching "party's active conduct…preventing or hindering the fulfillment of the condition." Blackrock Balanced Cap. Portfolio (FI) v U.S. Bank Nat'l Ass'n, 165 AD3d 526, 527 (1st Dep't 2018) citing Fixed Income Shares: Series M v Citibank, N.A., 157 AD3d 541, 542 (1st Dep't 2018).

Defendant argues that both parties were aware at the time of The Settlement Agreement that Akon might not remain in contract with Atlantic, or sign with another "major" record label. As such, defendant contends that the current situation was foreseeable, and that plaintiffs assumed the risk by not providing for such a contingency.

Plaintiffs allege that Akon sabotaged his relationship with Atlantic in order to terminate the contract and that the prevention doctrine should preclude Akon from undermining The Settlement Agreement and depriving plaintiffs of their royalties.

However, plaintiffs fail to allege that Akon's actions in parting ways with Atlantic were done with the specific *intention* of depriving plaintiffs of the Stephens Revenue Share. Even if Akon purposefully sought to terminate his relationship with Atlantic, plaintiffs must allege that Akon did so *specifically* to prevent plaintiffs from receiving royalty payments.

Here, Akon was free to terminate the Atlantic Recording Agreement and pursue his musical career at his own discretion. It was entirely foreseeable that Akon might end his relationship with Atlantic and not sign with another "major" record label, and plaintiffs had the opportunity to negotiate protection from that circumstance when drafting The Settlement Agreement. Plaintiffs failed to do so. As such, plaintiffs assumed foreseeable risks and cannot rely on the "prevention doctrine" to evade the terms of their own defectively worded settlement agreement.

Therefore, because this Court previously determined that Akon did not sign with another "major" label after the termination of the Atlantic Recording Agreement, and because the "prevention doctrine" does not apply absent evidence that Akon sought to terminate the Atlantic Recording Agreement with the intent of avoiding the terms of The Settlement Agreement, the motion to dismiss plaintiffs' second cause of action in its Amended Complaint is granted.

Declaratory Judgment

New York law prohibits declaratory relief where other remedies are available such as the Plaintiff's breach of contract claim. Apple Records v Capitol Records, 137 AD2d 50, 54 (1st Dep't 1988).

Plaintiffs' Amended Complaint seeks relief requiring Akon to pay the Stephens Revenue Share "through the present and beyond," and holding that "BMG Rights Management is a 'major' record label." Defendant correctly argues plaintiffs' claim is identical to those in its breach of contract claims and are therefore duplicative.

Thus, plaintiffs' third cause of action seeking a declaratory judgment against defendant is dismissed.

Conclusion

The motion of defendant Aliaune Thiam p/k/a AKON to dismiss the portion of plaintiffs' second cause of action for breach of contract seeking royalties after March 11, 2019, as well as the third cause of action for declaratory judgement is hereby granted.

6/22/2022
DATE

ARTHUR ENGORON, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE