SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 60

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PAUL ELLINGTON,

Plaintiff,

-against-

Index No.
651558/2010

EMI MUSIC, INC., EMI MUSIC PUBLISHING,
EMI MUSIC PUBLISHING NORTH AMERICA and
EMI MILLS MUSIC, INC.,

Defendants.

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APPEARANCES:

For Plaintiff:

Scarola Malone & Zubatov LLP
888 Seventh Avenue
New York, NY 10106
(Alexander Zubatov, Esq.)

For Defendants:

Pryor Cashman LLP
7 Times Square
New York, NY 10036
(Donald S. Zakarin, Esq.)

FRIED, J.:

In this action for breach of a songwriter royalty agreement, fraud, and a declaratory judgment, defendant EMI Mills Music, Inc. moves, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the amended complaint in its entirety.

Plaintiff Paul M. Ellington, the heir and grandson of the legendary jazz composer and performer Edward Kennedy "Duke" Ellington, seeks to recover foreign music publication royalties allegedly owed to him by defendants pursuant to contract dated December 17, 1961 (the 1961 contract). Ellington also seeks to commence a class action against defendants on behalf of a putative class consisting of all persons to whom defendants have failed to pay

their full contractual share of foreign publication royalties.

The 1961 contract was executed by Duke Ellington, his wife, son, and sister, designated in the contract as "First Parties," and Mills Music, Inc., the American Academy of Music, Inc., Gotham Music Service, Inc., and their predecessors and affiliates, designated as "Second Party" (*see* 1961 Contract, First Paragraph). The 1961 contract is expressly binding on the heirs and assigns of each of the contracting parties (*see id.*, ¶ 9).

EMI Mills represents that, over the years, a series of acquisitions and a restructuring involving Mills Music took place that resulted in EMI Mills becoming the sole corporation presently bound by the 1961 contract to pay Duke Ellington music publishing royalties to the First Parties, including Ellington. EMI Mills represents that Mills Music's assets were acquired by EMI Mills' owner in 1990.

Pursuant to the 1961 contract, the First Parties transferred to the Second Party the copyrights to numerous identified musical compositions written by Duke Ellington between 1927 and the contract date, in exchange for, inter alia, payments of cash and royalties, calculated as a percentage of various sources of income, including income generated from sales outside the United States. The 1961 contract superceded a series of similar agreements between Duke Ellington and Mills Music or certain of its affiliates.

In the amended complaint, Ellington alleges that he is suing on his own behalf and on behalf of all persons similarly situated, and seeks an order certifying this action as a class action, and appointing himself as class representative and his counsel as class counsel. In the first cause of action, Ellington seeks a judgment declaring that, by funneling foreign royalties through affiliated subpublishers and allowing such affiliates to retain a percentage

of the foreign publishing royalties before remitting only the contractual percentage of the lesser amount remaining to him, and the members of the putative class, defendants breached the relevant agreements, including the 1961 contract. In the second cause of action, he seeks an order enjoining defendants from continuing to calculate royalties in this way, and directing defendants to pay Ellington and the class members the entire contractual percentage of total revenue actually received from foreign publishing royalties, without diverting any portion of such revenue to its own foreign affiliates. In the third and fourth cause of actions, Ellington, on behalf of himself and the putative class, alleges that defendants breached the relevant songwriter royalty agreements, and fraudulently concealed from Ellington and the putative class members the actual foreign publishing royalty revenues earned. Ellington seeks an order directing defendants to pay himself and the putative class members damages to be proven at trial, together with interest.

EMI Mills now seeks an order dismissing the amended complaint in its entirety primarily on the ground that the 1961 contract terms and the underlying facts as alleged by Ellington demonstrate that Ellington has failed to state a legally viable cause of action either individually or on behalf of the putative class.

In opposition, Ellington contends that the motion is premature on the grounds that the relevant provisions of the 1961 contract are ambiguous and because no CPLR 902 class certification motion has yet been made. Ellington further contends that discovery is necessary regarding the parties' course of conduct under the subject contract and the music industry's custom and practice under similar contracts, and regarding the grounds for certification of the putative class.

On a motion addressed to the pleadings, the court may grant the motion and dismiss the complaint where no legally cognizable cause of action has been stated within the four corners of the complaint (*Scott v Bell Atl. Corp.*, 282 AD2d 180, 183 [1st Dept 2001], *affd as mod sub nom. Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 [2002]; *see* CPLR 3211 [a] [7]). A motion to dismiss based upon documentary evidence may be granted "where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d at 326; *see* CPLR 3211 [a] [1]).

There is no real dispute that the 1961 contract is a "net receipts" songwriter royalty agreement. A "net receipts" agreement, common in the music industry prior to the early 1980s, provides for the payment of royalties to the songwriter on a net receipts basis, or, payment based on the net income received by the United States publisher from foreign subpublishers, who retain a percentage of the foreign income as a fee in payment for their services in exploiting and administering publication of the songs outside the United States (*see Jobim v Songs of Universal, Inc.*, 732 F Supp 2d 407, 415-416 [SD NY 2010]).

Recently, it has become more common for songwriters to enter into an "at source" agreement. An at source agreement provides for payment of royalties earned worldwide calculated on the amount of income earned in the foreign territories at their source, rather than on the portion of that income received by the United States publisher (*see id.*).

Here, Ellington contends that the 1961 contract requires defendants to pay him his contractual share of the foreign publishing royalties based on 100% of the foreign income earned by foreign territorial subpublishers, whether the subpublisher is affiliated with EMI

Mills or is owned by EMI Group, Ltd., the company that owns EMI Mills. Ellington further alleges that, in practice, defendants have paid him his share of the foreign publishing royalties based on 50%, rather than 100%, of the foreign income generated by the foreign territorial subpublishers to EMI Mills. Ellington alleges that, where the foreign subpublisher is presently owned by, or affiliated with, EMI Group, Ltd., defendants are "double dipping," or, twice realizing income from the foreign publication of the Duke Ellington catalog of songs, while reducing Ellington's share of such royalties. Ellington further contends that the 1961 contract terms are a "scam," that defendants' implementation of those terms is in breach of the contract, and that defendants fraudulently concealed their breach from Ellington through the intentional use of misleading royalty account statements.

EMI Mills contends that Ellington has misconstrued the 1961 contract, and that the contract requires EMI Mills to pay such royalties based solely on what is actually received by the United States publisher, now EMI Mills, after deduction of the fees, calculated pursuant to contract as 50% of the foreign publishing income, paid to the foreign territorial subpublishers, without reference to the identity of the owner of the subpublisher.

With regard to the payment of royalties, the 1961 contract provides that:

> The Second Party agrees to pay or cause to be paid to the First Parties the following royalties:
>
> (a) On all copies published, sold and paid for to the Second Party in the United States of America and Canada of the musical compositions covered by this agreement during the term of the respective copyright in the United States, a royalty of four (4¢) cents for each pianoforte copy sold in the United States and Canada and paid for, and ten (10%) percent of the wholesale selling price after trade discounts for each orchestra arrangement sold in the United States and Canada and paid

> for, **and a sum equal to fifty (50%) percent of the net revenue actually received by the Second Party** from synchronization, background, electrical transcription, **foreign publication** or other exploitation, the use of said compositions by mechanical instruments, such as phonographs, music rolls, the use of the titles, dramatization and literary uses

(1961 Contract, ¶ 3 [a] [emphasis added]). The 1961 contract also provides for payment to the First Parties of a reduced share of the net revenue actually received by the Second Party where Duke Ellington is not the sole author of the musical composition (*see id.*, ¶ 3).

The royalty payment provision is clear and unambiguous. "A contract is unambiguous when the contractual language has a definite and precise meaning, unattended by danger of misconception in the purport of the [contract] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Jobim v Songs of Universal, Inc.*, 732 F Supp 2d at 414-415 [internal quotation marks and citation omitted]). Therefore, resort to evidence extrinsic to the contract is not necessary (*see American Express Bank Ltd. v Uniroyal, Inc.*, 164 AD2d 275, 277 [1st Dept 1990], *lv denied* 77 NY2d 807 [1991]).

The royalty payment provision terms demonstrate that the 1961 contract is a net receipts royalty agreement that requires Mills Music, now EMI Mills, to pay Duke Ellington, now Ellington, one half of the "net revenue actually received by the Second Party" from the "foreign publication" of the songs falling within the scope of the contract. "[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" because such terms constitute the "best evidence of what parties to a written agreement intend" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). This is true, even where the agreement is silent on the disputed issue (*Evans v*

Famous Music Corp., 1 NY3d 452, 458 [2004]).

Here, the contracting parties made no distinction in the royalty payment terms based on whether the foreign subpublishers are affiliated or unaffiliated with the United States publisher. Certainly, it would be improper at any time, but especially now, some 50 years after the date of the contract's execution, to read such a distinction into the contract (*see American Express Bank Ltd. v Uniroyal, Inc.*, 164 AD2d at 277).

Net receipts agreements have been enforced by the courts (*see e.g. Croce v Kurnit*, 737 F 2d 229, 234-235 [2d Cir 1984] [the court upheld the jury's finding that the relevant extrinsic evidence, including the parties' course of conduct and the defendants' deposition testimony, overwhelmingly demonstrated that the "net revenue actually received" contract language must be construed to include both sums directly physically received by the U.S. publisher and those indirectly received through the payment of a debt owed by the U.S. publisher]; *Jobim v Songs of Universal, Inc.*, 732 F Supp 2d at 417 ["(I)n addition to the overall language of the Subpublishing Agreements (executed between 1962 and 1973) and the parties' decades-long course of performance-the custom in the music industry at the time the parties executed the Subpublishing Agreements favors the 'net receipts' interpretation"]; *Berns v EMI Music Publ., Inc.*, 1999 WL 1029711, *1, 5-6, 1999 US Dist LEXIS 17541 [SD NY 1999] [holding that contract provision entitling plaintiff songwriter to "all net earned sums received and actually retained" by defendant Screen Gems-EMI Music, Inc. was straightforward, unambiguous, and enforceable, while recognizing that defendant had "entered into . . . foreign subpublishing agreements with both affiliated and unaffiliated companies"]; *Evans v Famous Music Corp.*, 1 NY3d at 458-459 [holding that contract

provision stating that plaintiff songwriters were entitled to a percentage of "all net sums actually received" by defendant music publishing company, after deduction of certain taxes and expenses, did not obligate defendant "to make payments to the songwriters in the event that [a] foreign tax credit proved beneficial" to defendant]).

Ellington contends that the parties must have intended the 1961 contract to require payment of a percentage of the royalties earned at source because a straight net receipts provision was never intended to permit a publisher to unilaterally reduce the negotiated contractual royalty rate by inserting affiliated intermediaries into the relationship between itself and the songwriter, that no reasonable person would agree to a net receipts agreement, and that such agreements are now recognized as scams. However, as Ellington concedes, net receipts provisions were standard practice in the music publishing industry at the time that the 1961 contract was executed. The mere fact that such agreements are no longer common is simply not a valid reason to rewrite a clear and unambiguous contract. "[E]vidence of industry practice may not be used to vary the terms of a contract that clearly sets forth the rights and obligations of the parties" (*Croce v Kurnit*, 737 F 2d at 238).

Ellington further argues that the term "Second Party," as defined by the 1961 contract, was intended to refer to, and may be interpreted as referring to, the present-day U.S. publisher's foreign affiliates on the date that the foreign publishing royalty was earned. The 1961 contract defines the "Second Party" as "MILLS MUSIC, INC., a New York corporation, AMERICAN ACADEMY OF MUSIC, INC., GOTHAM MUSIC SERVICE, INC., and their predecessors in interest, and any other affiliate of Mills Music, Inc., hereinafter designated as 'Second Party' (which term, as hereinafter used, shall apply to all or any of them)" (1961

Contract, Preamble).

As written, the term "Second Party" can only refer to Mills Music affiliates in existence on December 17, 1961, the date of the execution of the 1961 contract. As used in other provisions in the 1961 contract, the term clearly demonstrates the parties' intent that the term mean Mills Music's affiliates in 1961. For example, at paragraph 12, the 1961 contract provides that "Mills Music, Inc., American Academy Music, Inc. and Gotham Music Service, Inc. hereby jointly and severally represent and warrant that they have the authority to sign for and bind all of the predecessors in interest and other affiliates of Mills Music, Inc. included in the term 'Second Party' as hereinabove used" (1961 Contract, ¶ 12). They could not represent that they had the authority to bind entities that did not yet exist or were not yet affiliated with the United States publisher. Absent explicit language demonstrating the parties' intent to bind future affiliates of the contracting parties, the term "affiliates" includes only those affiliates in existence at the time that the contract was executed (*VKK Corp. v National Football League*, 244 F 3d 114, 130-131 [2d Cir 2001]).

For the foregoing reasons, the branches of the motion to dismiss the portions of the first and second causes of action in which Ellington seeks relief on his own behalf are granted and the claims are dismissed.

EMI Mills next seek to dismiss the portions of the third and fourth causes of action in which Ellington alleges that defendants fraudulently concealed its double-dipping in royalty streams from Ellington. As discussed above, the 1961 contract permits defendants to employ the very method of royalty calculation of which Ellington now complains. Thus, the third and fourth causes of action must be dismissed.

Finally, the branches of the motion to dismiss the class action claims are granted on the ground that the same claims asserted by Ellington individually are not legally viable and have been dismissed.

Last, to the extent that EMI Mills seeks to dismiss the claims asserted against defendants EMI Music Inc., EMI Music Publishing, and EMI Music Publishing of North America, those claims are dismissed on the ground that, even if these defendants are found to have legal capacity to be sued, they cannot be found liable to Ellington for failure to pay royalties in accordance with the 1961 contract. There is no dispute that none of these defendants existed in 1961, and, therefore, none can be bound by the 1961 contract.

I note that Ellington has agreed to voluntarily discontinue all claims asserted against EMI Music Inc., a record company, and has not attempted service on that defendant (*see* Alexander Zubatov, Esq. Apr. 6, 2011 Aff., ns 1, 3).

Accordingly, it is

ORDERED that the motion to dismiss is granted and the amended complaint is dismissed in its entirety and against all defendants, with costs and disbursements to defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendants.

DATED: October 5, 2011

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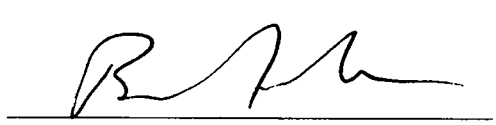

J.S.C.

HON. BERNARD J. FRIED