SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 45

EDWARD ELLINGTON, GAYE ELLINGTON AND MERCEDES ELLINGTON, Plaintiffs, -against- EMI MILLS MUSIC, INC. Defendant.	Index No. 112368/10 DECISION AND ORDER Motion Sequence No. 001

MELVIN L. SCHWEITZER, J.:

This action involves a dispute over royalty payments to the grandchildren of the late Edward Kennedy Ellington, the songwriter and musician known as "Duke Ellington." The complaint asserts causes of action for breach of contract and fraudulent concealment. Defendant EMI Mills Music, Inc. (EMI) now moves to dismiss the complaint based upon documentary evidence and for failure to state a cause of action.

Factual Allegations

Plaintiffs claim that, pursuant to various agreements, Duke Ellington assigned EMI rights to his compositions, in exchange for royalty payments of 50% of the "net revenue received by [EMI] and its affiliates from worldwide exploitation of the assigned compositions." Complaint, ¶ 3. EMI submits an agreement, dated December 19, 1961, concerning renewal copyrights in Duke Ellington's work (Agreement). Ashby Aff., Ex. 1. The parties do not dispute that the Agreement contains the provisions relevant to plaintiffs' claims. The preamble of the Agreement defines Duke Ellington, Edna Ellington, Mercer Ellington, and Ruth James, as "First Parties." *Id.* at 1. The preamble defines "Mills Music, Inc., a New York corporation, American Academy

of Music, Inc., Gotham Music Services, Inc., and their predecessors in interest, and any other affiliate of Mills Music, Inc.," as "'Second Party' (which term, as hereinafter used, shall apply to all or any of them)." *Id.* Under the Agreement, the Second Party agreed to pay the First Parties, among other things, 50% "of the net revenue actually received by the Second Party from ... foreign publication or other exploitation." *Id.*, ¶ 3(a). The Agreement provides that it is binding upon the heirs and assigns of each of the contracting parties. *Id.*, ¶ 9.

Plaintiffs claim that, by an agreement dated May 10, 1989, "the royalties payable by [EMI] upon Duke Ellington Compositions since 2001 have been payable" to each of the plaintiffs and nonparty Paul Ellington, all of whom are Duke Ellington's grandchildren.[1] Complaint, ¶ 4. According to plaintiffs, instead of paying 50% of the net revenues received by EMI's foreign affiliates, EMI deducted an additional 50% of these revenues as "subpublisher commissions, as if the foreign affiliates were independent entities operating at arms length from [EMI], before applying the contractual 50% royalty rate." Complaint, ¶ 5. Plaintiffs aver that, as a result, EMI effectively reduced plaintiffs' foreign royalty rate from 50% to 25%. Plaintiffs allege that EMI breached the royalty agreement, and fraudulently concealed the additional deductions by reporting only the amounts remaining after the deductions as "'amount(s) received'" on royalty statements sent to plaintiffs. *Id.*, ¶ 6.

Legal Analysis

Central to EMI's motion to dismiss plaintiffs' breach of contract cause of action is the meaning of the term "affiliate" in the preamble of the Agreement. EMI does not dispute that it is

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[1] Paul Ellington is a plaintiff in a separate New York Supreme Court action, under Index Number 651558/10, involving the same Agreement and raising at least some of the same legal issues presented in the instant action.

currently affiliated with various foreign subpublishers. Shpetner Aff., ¶ 8 n 5, ¶¶ 10-11; Ashby Aff., ¶¶ 11-12. Instead, EMI argues that the preamble language, "any other affiliate of Mills Music, Inc.," is limited to affiliates that existed at the time the Agreement was entered into, and does not include affiliations that arose from subsequent EMI acquisitions, thereby undermining plaintiffs' claim that EMI improperly deducted affiliated foreign subpublisher commissions.

> The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent. The best evidence of what parties to a written agreement intend is what they say in their writing. Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.

Greenfield v Philles Records, 98 NY2d 562, 569 (2002) (internal quotations marks and citations omitted). The court must review the entire contract, considering particular words "not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance and a sensible meaning of words should be sought." *Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 13 NY3d 398, 404 (2009).

Here, the term "affiliate" is not defined in the Agreement. Significantly, the relevant payment term, in paragraph 3(a), makes no distinction between affiliated and unaffiliated foreign subpublishers. The court cannot read such a distinction into the Agreement. *See Evans v Famous Music Corp.*, 1 NY3d 452, 458 (2004) (court need not look further where intent of parties is discernible from plain meaning of contract language, "even if the contract is silent on the disputed issue"); *Greenfield*, 98 NY2d at 569-70; *Reiss v Fin. Performance Corp.*, 97 NY2d 195, 199 (2001) ("courts may not by construction add or excise terms, nor distort the meaning of

those used and thereby make a new contract for the parties under the guise of interpreting the writing [internal quotation marks and citation omitted]"). Certainly, it would be improper at any time, but especially now, some 50 years after the date of the Agreement's execution, to read such a distinction into it. *Greenfield*, 98 NY2d at 569-70.

Moreover, plaintiffs do not seriously dispute that the Agreement is a "net receipts" 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 for their services in exploiting and administering publication of the songs outside the United States. *Jobim v Songs of Universal, Inc.*, 732 F Supp 2d 407, 413-16 (SD NY 2010). Recently, it has become common for songwriters to enter into "at source" agreements, which provide for payment of royalties earned worldwide and are 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. *Id.*

Courts have interpreted language similar to the payment terms contained in the Agreement, concluding that such terms constitute enforceable "net receipts" agreements. *See e.g. Croce v Kurnit*, 737 F2d 229, 234-235 (2d Cir 1984); *Jobim*, 732 F Supp 2d at 417; *Berns v EMI Music Publ., Inc.*, 1999 WL 1029711, *5-6, 1999 US Dist LEXIS 17541, *17-21 (SD NY 1999); *Evans*, 1 NY3d at 458-459. Not only do the royalty payment terms of the Agreement demonstrate that it is a net receipts royalty agreement, "the parties' course of performance over an extensive period favors [the] 'net receipts' construction." *Jobim*, 732 F Supp 2d at 416; *see also Gulf Ins. Co. v Transatlantic Reinsurance Co.*, 69 AD3d 71, 85 (1st Dept 2009) ("'the

practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence'"). Having received "net receipts" royalty payments for an extensive period, under a contract that has been in operation for 50 years, "[p]laintiffs cannot now argue for an 'at source' royalty arrangement." *Jobim*, 732 F Supp 2d at 416.

The court acknowledges plaintiffs' argument that this interpretation could allow EMI to arbitrarily and unilaterally reduce royalties owed to plaintiffs by changing the agreements between EMI and its affiliated subpublishers. However, net receipts provisions were standard practice in the music publishing industry at the time that the Agreement was executed. *Jobim*, 732 F Supp 2d at 417. That such agreements may no longer be considered common industry practice is simply not a valid reason to rewrite a clear and unambiguous contract. *Croce*, 737 F 2d at 238 ("evidence 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").

Read as a whole, the plain language of the Agreement also supports the conclusion that the term "Second Party" refers only to Mills Music, Inc. affiliates that existed at the time the Agreement was entered into. The reference to "affiliate" in the preamble of the Agreement is written in the present tense, suggesting that it refers to affiliates at the time the Agreement was entered into. Plaintiffs do not claim that any EMI foreign subpublisher was affiliated with Mills Music, Inc. at the time the Agreement was entered into. While the preamble looks back in time, by referring to "predecessors in interest," it never expressly discusses future affiliates. Agreement, at 1. "Under the standard canon of contract construction expressio unius est exclusio alterius, that is, that the expression of one thing implies the exclusion of the other (Black's Law

Dictionary 602 [7th ed])" (*Matter of New York City Asbestos Litig.*, 41 AD3d 299, 302 [1st Dept 2007]), by expressly including only predecessors in interest and affiliates of Mills Music, Inc., potential future affiliates are excluded from the definition of "Second Party" in the Agreement. Absent explicit language demonstrating the parties' intent to bind future affiliates of the contracting parties, the term "affiliate" includes only those affiliates in existence at the time that the contract was executed. *VKK Corp. v National Football League*, 244 F3d 114, 130-31 (2d Cir 2001).

This interpretation is also supported by other provisions of the Agreement that refer to affiliates. For example, in the first "Whereas" clause, Duke Ellington represented that he composed and wrote the musical compositions "first published and registered for copyright during the year 1927 and in subsequent years thereto," the titles of which were listed in schedules attached to the Agreement. Agreement, at 1. This paragraph then states that "[a]ll musical compositions written ... by Duke Ellington, published by Mills Music, Inc., ... and any other affiliate of Mills Music, Inc., or assigned to them by Duke Ellington but remaining unpublished during said period, are intended to be covered thereby, whether or not actually set forth in said Schedule[s]." *Id.* Here, using the past tense, the term "affiliate" refers to entities that have previously "published" or been "assigned" Duke Ellington's music. *Id.* Thus, both the identity of the songs and the publishing entity – whether Mills Music, Inc. or an affiliate – must have existed at the time the Agreement was entered into.

In the second "Whereas" clause, Duke Ellington represented that he had not transferred "the United States renewal rights or copyrights" of his musical compositions "other than such agreements ... as Duke Ellington may have heretofore entered into with the Second Party or any

of its affiliated companies." *Id.*, at 1-2. Similarly, paragraph 5 of the Agreement provides as follows: "Duke Ellington, as author, hereby confirms the fact that *prior to the date of this agreement*, Mills Music, Inc. ... or any other affiliated companies of Mills Music, Inc., not specifically mentioned, *were and are now possessed of* and are entitled to the original copyrights of the musical compositions" identified in the attached schedules." *Id.*, at 5 (emphasis added). These provisions refer to "affiliated companies" in the past tense, dealing with publishers' rights that were previously obtained from Duke Ellington directly, without mentioning future affiliates. *Id.* at 2. If these rights were already conveyed, prior entering the Agreement, they must have been conveyed to existing affiliates, not future, unknown affiliates.

In addition, Mills Music, Inc. represented in paragraph 12 of the Agreement that it had "the authority to sign for and bind all ... affiliates of Mills Music, Inc. included in the term 'Second Party' as hereinabove used." *Id.*, at 9. A "practical interpretation" of this language supports the conclusion that it applied to then-existing affiliates, as the parties to the Agreement could not have reasonably expected Mills Music, Inc. to purport to have authority to sign for or bind any unknown, unrelated entities. *Goldman Sachs Group, Inc.*, 85 AD3d at 427 (internal quotation marks and citation omitted).

For the foregoing reasons, the Agreement "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 314, 326 (2002). Accordingly, EMI's motion to dismiss plaintiffs' breach of contract cause of action is granted.

Plaintiffs' fraudulent concealment claim is based upon their assertion that EMI concealed subpublisher deductions in the royalty statements sent to plaintiffs. According to the complaint,

EMI's royalty statements reported only the "amount received" by EMI after deducting subpublisher fees, without reporting the amounts received by those subpublishers. In support of its motion to dismiss, EMI argues that it consistently disclosed amounts paid to foreign subpublishers, and EMI submits documentary evidence of the royalty statements sent to plaintiffs and their counsel. Shpetner Aff., Exs. 1-11.

A cause of action for fraudulent concealment requires a showing of the traditional elements of fraudulent misrepresentation – a material misrepresentation of fact with intent to mislead the plaintiffs, reasonable reliance, and damages – and also "an allegation that the defendant had a duty to disclose material information and that it failed to do so." *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 (1st Dept 2003).

The royalty statements contain various column headings, including: "INCOME PERIOD," "*% RECVD*," "QUANTITY," "AMOUNT RECEIVED," "% PAYABLE," and "AMOUNT PAYABLE." Shpetner Aff., Exs. 1-11 (emphasis added). Plaintiffs claim that EMI obscured the "% RECVD" column by placing it directly under the heading "FILM PRODUCTION," which made the "% RECVD" column appear irrelevant. Greenman Aff., ¶ 3. According to plaintiffs' attorney, EMI "intended to conceal the percentages and amounts retained by [EMI's] foreign affiliates." *Id.*, ¶ 6.

As discussed above, the Agreement permits EMI to employ the very method of royalty calculation of which plaintiffs now complain. Moreover, plaintiffs do not claim that EMI failed to disclose the subpublisher fees. For these reasons alone, their fraudulent concealment claim is subject to dismissal. In any event, plaintiffs' claim is belied by the royalty statements themselves, which clearly identify a "% RECVD" column. Shpetner Aff., Exs. 1-11. The

statements also identify the name of the foreign subpublisher that paid EMI and the percentage of the deduction. *Id.* Where the statements identify a United States record company as the royalty source, the "% RECVD" column has no entry, reflecting that EMI directly received 100% of the income. *Id.* This evidence conclusively demonstrates that there was no failure to disclose material information by EMI. To the contrary, the royalty statements openly disclosed EMI's method of accounting and payment. For these reasons, plaintiffs fraudulent concealment cause of action is dismissed.

Accordingly, it is

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

Dated: October 21, 2011

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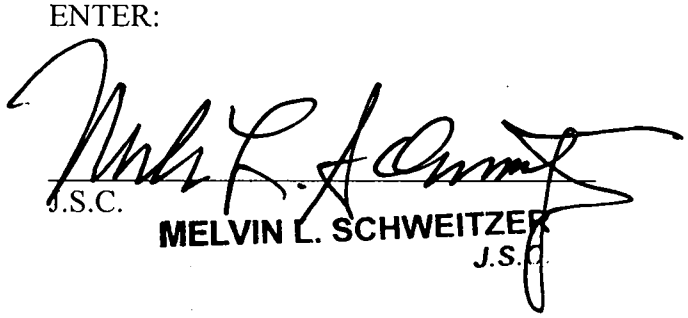

J.S.C.

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