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Kesha, Freedom, And ‘Efficient Breach’



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What do pop singer Kesha, hotel owners and countless other parties to commercial contracts have in common? All have recognized that this is a free country, and that parties to a contract may freely choose to cease performing subject to mutual damages claims for breach of contract.

The case between Kesha and record producer Dr. Luke, pending in New York County’s Commercial Division, continues to garner significant media attention at every turn. Most recently, the court denied Kesha’s request for a preliminary injunction blocking Dr. Luke and his related companies, along with Sony Music Entertainment, from enforcing exclusive recording and publishing agreements entered into by Kesha with a number of Dr. Luke entities.

On March 19, Kesha appealed the court’s ruling, stating in her pre-argument statement that “[a]lthough

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AP / MARY ALTMER

POP STAR **Kesha** leaves Manhattan Supreme on Feb. 19 after Justice Shirley Werner Kornreich denied her request for a preliminary injunction.

it recognized that ‘slavery was done away with a long time ago’ and that ‘[y]ou can’t force someone to work... in a situation in which they don’t want to work,’ the court’s ruling requiring Kesha to work for [Dr. Luke’s] companies, purportedly without his involvement, does just that.”

While the serious allegations of abuse contained in Kesha’s counterclaims—which are the subject of a related proceeding pending

in California state court—continue to dominate the headlines, and have led to significant public outcry after the denial of Kesha’s request for a preliminary injunction, this case once again invokes the legal principles of “efficient breach” and the inability of a party to compel the specific performance of a personal services contract. This article explores these legal concepts in the context of recent New York cases.

Doctrine of Efficient Breach

Parties are permitted to pay damages for the ability to breach contracts when they determine that it is in their best interests to do so. This principle is part of the fabric of contracts law going back to English common law, and has been part of commercial New York law for over 100 years. As Oliver Wendell Holmes, Jr. famously wrote: “The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and *nothing else*.”¹ The law does not impose punitive damages or “punish” parties for deliberately breaching contracts, or try to deter future parties from “efficiently” breaching contracts when breaching is a party’s best business option.²

Personal Service Contracts

Moreover, in contracts for personal services, such as Kesha’s recording agreement, the rule against specific performance following a breach is strict. This is because the compulsion of involuntary service is deemed too close to this country’s proscription against involuntary servitude, as dictated by the Thirteenth Amendment to the U.S. Constitution.³ The Thirteenth Amendment “declares that involuntary servitude shall not exist within the United States and gives Congress power to enforce the article by appropriate legislation.”⁴ Specifically, the Thirteenth Amendment provides that “[n]either slavery nor involuntary servitude, except as

a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”⁵

As the Supreme Court explained in *Bailey v. State of Alabama*, the “words involuntary servitude have a ‘larger meaning than slavery,’” and the purpose of including those words in the Thirteenth Amendment was to “make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another’s benefit which is the essence of involuntary servitude.”⁶ Thus, “the term ‘involuntary

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servitude’ necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process.”⁷ Likewise, under the same legal rubric it is well established that specific performance of services by another cannot be forced involuntarily upon a resistant party.⁸

Accordingly, a party to a contract for personal services is free to breach when it determines that it is in their best interests to do so, and the other party to the contract’s only remedy is a claim for money damages for breach of contract. Frequently, the

parties exchange mutual breach of contract claims.

In the hospitality industry, these legal doctrines have been challenged by hotel management companies seeking judicial enforcement of long-term management contracts with hotel owners. In *Woolley v. Embassy Suites*, a California appellate court reversed a preliminary injunction that purported to compel a hotel owner to accept the services of its property manager pending an arbitration, because the injunction impermissibly compelled specific performance of a services contract.⁹ As that court explained: “Courts wish to avoid the friction and social costs which result when the parties are reunited in a relationship that has already failed, especially where the services involve mutual confidence and the exercise of discretionary authority.”¹⁰

More recently, in *FHR TB v. TB Isle Resort*,¹¹ the owner of a hotel in Florida attempted to reclaim management of its hotel from its sitting manager. Notwithstanding the manager’s emotional arguments that the owner was engaged in an act of surprise self-help, the court nonetheless denied the manager’s motion for temporary and preliminary injunctive relief, finding that, under New York law, such an injunction would “clash head on with the well-established rule that personal service contracts are not specifically enforceable.”¹²

In *Marriott International v. Eden Roc*,¹³ Marriott challenged the continuing viability and scope of these legal doctrines. Marriott argued that its management agreement with Eden Roc could not be terminated

by Eden Roc during the full term of that agreement. In so arguing, Marriott advocated for a narrowing of the definition of personal services contracts to only those involving “actors, singers, and artists.” Marriott also argued that personal services require the existence of a “key-man provision” identifying a specific person to perform the services contemplated.

Although Marriott obtained an injunction from the lower court securing its place as Eden Roc’s manager against Eden Roc’s wishes on the basis that commercial contracts between sophisticated parties should not be treated as personal services contracts under the law, a unanimous panel of the First Department reversed, holding that the parties’ hotel management contract “is a classic example of a personal services contract that may not be enforced by injunction.”¹⁴ (The authors’ firm, Pryor Cashman, represented Eden Roc in its First Department appeal.)

The Kesha Case

In the wake of these recent decisions, both Dr. Luke and Sony have conceded that these legal principles apply and have made no effort to compel Kesha to specifically perform under her exclusive recording agreement or to obtain an order preventing Kesha from breaching that agreement. Instead, Dr. Luke has acknowledged that even though, under Kesha’s exclusive recording agreement, he is contractually entitled to produce six tracks on each of Kesha’s albums and to receive a corresponding royalty,

Kesha is free to record without Dr. Luke’s involvement subject to a claim for money damages for breach of contract.

However, Dr. Luke (and by proxy, Sony) has maintained that their contractual rights, including to promote and release Kesha’s recordings, remain in force and that Kesha cannot merely walk away from those contractual obligations and work with a competitor. The crux of Dr. Luke’s argument is that because Kesha assigned her copyrights in future recordings to a Dr. Luke entity in the exclusive recording agreement, to award her freedom to work with a competing record label would improperly infringe upon Dr. Luke’s copyright interests.

On appeal, it appears Kesha intends to argue that to enforce the exclusive recording agreement and publishing agreements in any manner, including the purported assignments of copyright interests in future recordings, infringes upon her Thirteenth Amendment rights. It remains to be seen how this will play out.

Conclusion

While the Kesha case will surely continue to command significant media attention, what already is clear is that the legal precepts of “efficient breach” and the inability of a party to compel the specific performance of a personal services contract remain enforceable and essential protections for commercial actors. Contracting parties should remain confident that they may freely choose to cease performing subject

to mutual damages claims for breach of contract.



1. Oliver Wendell Holmes, Jr., “The Path of Law,” 10 Harv. L. Rev. 457, 462 (1897) (emphasis supplied).

2. E.g., *Bronk v. Riley*, 3 N.Y.S. 446, 448 (3d Dept. 1888); *Metropolitan Life Ins. Co. v. Noble Lowndes Int’l*, 84 N.Y.2d 430, 435 (1994) (“Generally in the law of contract damages, as contrasted with damages in tort, whether the breaching party deliberately rather than inadvertently failed to perform contractual obligations should not affect the measure of damages.”) (citations omitted); 3 E. Allen Farnsworth, *Contracts* §12.8, at 198-99 (2d ed. 1990) (“Most courts have not infringed on the freedom to keep or break a contract traditionally afforded a party by the common law and endorsed by the notion of efficient breach.”) (citations omitted).

3. E.g., *People v. Lavender*, 48 N.Y.2d 334, 338 (1979) (finding that an administrative rule that purported to prohibit the abandonment or failure to perform a home improvement contract was unconstitutional because it violated the Thirteenth Amendment’s proscription against involuntary servitude); *Woolley v. Embassy Suites*, 278 Cal. Rptr. 719, 727 (Ct. App. 1991) (injunctions compelling specific performance of services contracts, such as a hotel management contract, “run contrary to the Thirteenth Amendment’s prohibition against involuntary servitude.”) (citation omitted); accord *Lark v. Post-Newsweek Stations, Conn., Inc.*, No. CV 94 070 53 26, 1994 Conn. Super. LEXIS 3055, at *18 (Conn. Super. Ct. Nov. 28, 1994); *Bloch v. Hillel Torah N. Suburban Day Sch.*, 426 N.E.2d 976, 977 (Ill. Ct. App. 1981).

4. *Pollock v. Williams*, 322 U.S. 4, 7-8 (1944).

5. U.S. Const. amend. XIII.

6. 219 U.S. 219, 241 (1911).

7. *United States v. Kozminski*, 487 U.S. 931, 952 (1988).

8. *Bronk*, 3 N.Y.S. at 448; *Woolley*, 278 Cal. Rptr. at 727 (“[S]pecific performance cannot be decreed to enforce a contract for personal services, regardless of which party seeks enforcement.”) (citations omitted); *FHR TB, LLC v. TB Isle Resort, LP*, Case No. 11-23115-CIV-Graham/Goodman, 2011 U.S. Dist. LEXIS 155742, at *50 (S.D. Fla. Sept. 26, 2011), *aff’d*, 2011 U.S. Dist. LEXIS 155752 (S.D. Fla. Oct. 13, 2011) (applying New York law and denying hotel manager’s motion for temporary and preliminary injunctive relief to reinstate position against hotel owner’s wishes); *Felch v. Findlay College*, 200 N.E.2d 353, 355 (Ohio Ct. App. 1963) (“[A]lthough [the plaintiff’s] services might once have had a unique and peculiar value they no longer have any value as far as the defendant is concerned.”).

9. 278 Cal. Rptr. 719, 727 (Ct. App. 1991).

10. *Id.*

11. Case No. 11-23115-CIV-Graham/Goodman, 2011 U.S. Dist. LEXIS 155742, at *50 (S.D. Fla. Sept. 26, 2011), *aff’d*, 2011 U.S. Dist. LEXIS 155752 (S.D. Fla. Oct. 13, 2011).

12. 2011 U.S. Dist. LEXIS 155742, at *84.

13. 104 A.D.3d 583 (2013).

14. *Id.*