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| Aspire Music Group, LLC v Cash Money Records, Inc. |
| 2018 NY Slip Op 31444(U) |
| July 2, 2018 |
| Supreme Court, New York County |
| Docket Number: 652029/2017 |
| Judge: Barry Ostrager |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 61

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ASPIRE MUSIC GROUP, LLC,

Plaintiff,

- v -

CASH MONEY RECORDS, INC., BRYAN BABY WILLIAMS,
RONALD SLIM WILLIAMS, YOUNG MONEY ENTERTAINMENT
LLC, UMG RECORDINGS, INC., REPUBLIC RECORDS INC.

Defendant.

INDEX NO. 652029/2017

MOTION DATE _____

MOTION SEQ. NO. 004 & 005

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 60, 61, 62, 63, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 105, 106, 107, 108, 109, 110, 112

were read on this application to/for _____ Dismiss _____.

HON. BARRY R. OSTRAGER:

Plaintiff Aspire Music Group, LLC (“Aspire”) is a record label primarily known for having signed the then-rising musician Aubrey Drake Graham (“Drake”). In 2008, Aspire and Drake entered into an Exclusive Recording Artist Agreement which gave Aspire the exclusive right to Drake’s services as a recording artist for his first six solo albums. In 2009, Aspire furnished Drake’s services to the Young Money Entertainment Joint Venture,¹ a purported

¹ The agreement between Aspire and the Young Money Entertainment Joint Venture will hereinafter be referred to as the “Aspire/YME Agreement.” Additionally, it should be noted, that the Aspire/YME Agreement purports to be between Young Money Entertainment, LLC (a named Defendant in this action) and Aspire. As clarified during oral argument on these motions, the Aspire/YME Agreement is, in reality, between Aspire and a joint venture partnership between Dwayne Carter and Cash Money, that merely referred to itself as Young Money Entertainment, LLC. Apparently, Dwayne Carter later assigned his interest in the joint venture to an entity also called Young Money Entertainment, LLC, which now stands in the shoes of Carter as a partner in the joint venture. Presently, it appears that the joint venture is a partnership between Cash Money and Young Money Entertainment, LLC. The amended complaint does not clearly reflect these distinctions. The parties have been directed to revise the pleadings to reflect the proper Defendants to this action.

partnership between Defendant Cash Money Records, Inc. (“Cash Money”) and non-party Dwayne Carter. Carter subsequently assigned his interest in the Young Money Entertainment Joint Venture to Defendant Young Money Entertainment, LLC (“YME”). Under the Aspire/YME Agreement, Cash Money (together, and with Defendants Bryan Williams and Ronald Williams,² the “Money Defendants”) and YME agreed to give Aspire one-third of the Net Profits from the exploitation of the applicable Drake albums, and one-third of the copyright in and to the applicable master recordings for these albums. Additionally, the Money Defendants and YME agreed to prepare monthly accounting statements of the Net Profits and to remit such statements and any related payments due to Aspire on a monthly basis.

Drake has since become one of the most successful recording artists in the world. He has produced multiple platinum albums and regularly sells out large concert venues on multiple continents. Aspire alleges that Defendants have profited significantly from the exploitation of Drake’s music since 2009 and that they have breached their obligation to provide detailed monthly accounting statements and, additionally, provided statements that reflected that no monies were due to Aspire despite Drake’s commercial success.

Aspire further alleges that, in January 2013, the Money Defendants induced Drake to break his Exclusive Artist Agreement with Aspire and sign a competing recording agreement with the Money Defendants, purporting to divest Aspire of its rights under the Aspire/YME Agreement. Additionally, Aspire alleges that Defendants allowed copyrights in Drake’s master recordings to be falsely registered with the U.S. Copyright Office without acknowledging Aspire’s partial ownership of those copyrights. As a result, Aspire asserts that Defendants have

² Defendants Bryan Williams and Ronald Williams (the “Williams Brothers”) are the founders of Cash Money Records.

interfered with Aspire's right to receive a one-third share of revenue from various royalty administrators.

Aspire brings this action against Cash Money and YME for, *inter alia*, breach of the Aspire/YME Agreement. Aspire also asserts the same claims against the Williams Brothers—the two founding members of Cash Money—by alleging that they exerted complete control and domination over Cash Money during the first few years following execution of the Aspire/YME Agreement.

Aspire also asserts claims against Defendant UMG Recordings, Inc. ("Universal"). Universal, apparently, had for several years, acted as the distributor of Drake's albums. Aspire's amended complaint alleges that Cash Money—under the control of the Williams Brothers—entered into a variety of agreements with Universal to relieve Cash Money of millions of dollars in liabilities in return for transferring control of Cash Money to Universal. This control purportedly allowed Universal to "renegotiate" Universal's distribution agreements with Cash Money in order to provide Universal with higher distribution fees than what Cash Money had initially agreed Universal could charge. Because the distribution fees are deducted from Net Profits under the Aspire/YME Agreement, Aspire asserts that it has lost significant revenue as a result of Universal's influence over Cash Money.

Aspire alleges that Cash Money is completely controlled by Universal, that Universal disregards Cash Money's corporate form and structure, that the business affairs of Universal and Cash Money are entirely intermingled, and that Cash Money's finances are completely dependent on payments from Universal. Aspire thus alleges that Universal is the alter ego of Cash Money, and that therefore, Universal should be liable for Cash Money's obligations under the Aspire/YME Agreement, under which Cash Money is a partner to a contracting party.

Presently before the Court are two separate motions to dismiss the amended complaint—one from Universal and one from the Money Defendants. Universal’s motion to dismiss is denied and the Money Defendants’ motion to dismiss is granted in part for the reasons stated *infra*.

Legal Standard

“In considering a motion to dismiss pursuant to CPLR 3211(a)(7), a court is required to accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Weinstein v Cohn Reznick, LLP*, 144 A.D.3d 1140, 1140 (1st Dep’t 2016). “Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994).

The Money Defendants’ Motion to Dismiss

The Money Defendants submit three arguments in support of their motion to dismiss Aspire’s amended complaint.

First, the Money Defendants assert that Aspire failed to plead that Aspire complied with various contractually mandated conditions under the Aspire/YME Agreement; in particular, that Aspire failed to send timely, specific written objections to accounting statements, that Aspire failed to complete an audit of said accounting statements, and that Aspire failed to commence a suit within two years of commencing said audit. In essence, the Money Defendants believe that Aspire’s claims are time barred by the incontestability provisions of the Aspire/YME Agreement.

Second, the Money Defendants argue that Aspire's claims are independently time barred under New York's six-year statute of limitations period to the extent Aspire's claims are based on sums due and owing before March 2, 2010.

Third, the Money Defendants argue that Aspire's cause of action for breach of the implied covenant of good faith and fair dealing should be dismissed as duplicative of Aspire's breach of contract claim.

In opposition, Aspire first asserts that the amended complaint alleges that Aspire performed all of its obligations under the Aspire/YME Agreement and that the Money Defendants fail to submit documentary proof to the contrary. To the extent Aspire failed to perform any obligation under the Aspire/YME Agreement—such as providing objections to accounting statements and conducting audits of such statements—Aspire alleges that its attempts to comply with its contractual obligations were frustrated by the Money Defendants, who prevented Aspire from obtaining the information needed to prepare specific objections to accounting statements and who ignored Aspire's requests to conduct an audit. Therefore, Aspire argues, the Money Defendants cannot now argue that Aspire is time barred from bringing suit with respect to any such accounting statement under the Aspire/YME Agreement.

Second, Aspire argues its claims are not barred by the six-year statute of limitations period. In March 2016, the parties executed the Cash Money Tolling Agreement, whereby Cash Money agreed that the statute of limitations would be suspended for two years as to any cause of action relating to the Aspire/YME Agreement. The initial complaint was filed in April 2017, well within the tolling period. Thus, Aspire argues that the six-year limitations period presents no bar to claims accruing at least as far back as March 2010.

As for those claims potentially accruing before March 2010, Aspire argues that issues of fact regarding Aspire's attempts to audit, as well as the intent of the parties regarding the incontestability provisions, preclude dismissal of those causes of action as barred by the statute of limitations.

Third, Aspire opposes dismissal of its cause of action for breach of the implied covenant of good faith and fair dealing because, *inter alia*, the Money Defendants contracted with Universal in a manner that prevented Aspire from receiving its proper share of Net Profits. Aspire thus argues that the Money Defendants' contractual relationship with Universal, while not explicitly in breach of the Aspire/YME Agreement, prevented Aspire from receiving the full fruits of the Aspire/YME Agreement. For that reason, Aspire argues, the cause of action for breach of the implied covenant is not duplicative the cause of action for breach of the Aspire/YME Agreement, and cannot be dismissed as such. The Court considers each of these three arguments in turn.

Incontestability Provisions

The Court finds that Aspire's claims cannot be dismissed on a pre-answer motion based solely on the incontestability provisions in the Aspire/YME Agreement. "It is now well settled in New York that an incontestability clause is in the nature of, and serves a similar purpose as a Statute of Limitations." *Berkshire Life Ins. Co. v. Fernandez*, 124, A.D.2d 120, 124 (2d Dep't 1987). The Aspire/YME Agreement contains such an incontestability clause. Section 8.05 of the Aspire/YME Agreement provides:

All accounting statements rendered by YME pursuant to this Article 8 will be conclusively binding upon you and not subject to any objection by you for any reason unless specific objection in writing, stating the basis thereof, is given to YME within two (2) years from the date such statement is rendered and an audit pursuant to paragraph 8.06 below for that statement is completed within said two (2) year period. Failure to make such written objection or conduct the audit within said

time periods will be deemed to be your approval of such statement, your waiver of such audit rights, and your waiver of the right to sue YME for additional royalties or Net Profits in connection with the applicable accounting period. Each statement will be deemed rendered when due unless you notify YME that the applicable statement was not received by you and such notice is given within sixty (60) days after the applicable due date specified in paragraph 8.01 above, in which event the statement will be deemed rendered on the date actually sent by YME. **You will not have the right to sue YME in connection with any royalty or Net Profit accounting, or to sue YME for recovery of sums owed for a particular accounting period, whether from the sale of Records or otherwise, unless you commence the suit within two (2) years after commencement of your audit for the applicable period.** (emphasis added).

By the clear terms of the Aspire/YME Agreement, the YME joint venture, and, by virtue of the partnership that formed that joint venture, Cash Money, was to provide monthly accounting statements which would be binding upon Aspire unless Aspire met certain conditions. Namely, Aspire was obligated to provide specific, written objections and conduct an audit of any contested statement within two years of receiving said statement. Furthermore, Aspire was required to commence a lawsuit to recover sums owed for a particular accounting period within two years after commencement of an audit for the applicable accounting period.

The Money Defendants' purported frustration of Aspire's ability to perform any of these apparent conditions precedent necessitates denial of the Money Defendants' motion to dismiss on the grounds that Aspire's claims are time barred under the incontestability provisions of the Aspire/YME Agreement. "[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." *Kooleraire Serv. & Installation Corp. v. Board of Educ. Of City of N.Y.*, 28 N.Y.2d 101, 106 (1971). Here, Aspire alleges the Money Defendants provided deceptive statements reflecting no monies due to Aspire and eventually ceased providing Aspire with any accounting statements. Aspire has provided documentary evidence of at least one request to conduct an audit of Cash Money and Cash Money's purported failure to adequately respond. (See Siegel Aff. Ex.

B [NYSCEF Doc. 85]). Granting every possible inference in favor of Aspire, there are issues of fact as to whether, and to what degree, Cash Money frustrated Aspire's attempts to conduct audits and render objections to accounting statements, let alone whether Cash Money even provided such accounting statements for all applicable periods in accordance with the Aspire/YME Agreement. For these reasons, the Court finds that the incontestability provisions do not provide a bar to Aspire's claims on a pre-answer motion to dismiss.

Statute of Limitations

New York applies a six-year statute of limitations to breach of contract claims, including claims based on a breach of the implied covenant of good faith and fair dealing. *See* CPLR § 213(2). Aspire alleges that it entered into a tolling agreement with Cash Money, effective March 2, 2016, whereby Cash Money agreed that the statute of limitations would be suspended for two years as to any claim relating to the Aspire/YME Agreement. The original complaint was filed on April 17, 2017, well within the two-year tolling period. Thus, Aspire's claims accruing on or after March 2, 2010 are not time barred by the statute of limitations.

As to those claims that accrued on or before March 1, 2010, however, they are barred under the statute of limitations. Aspire failed to commence suit on potential claims accruing during this period in a timely fashion regardless of whether Cash Money provided monthly accounting statements to Aspire that Aspire properly objected to, or whether Cash Money failed entirely to provide such accounting statements. Therefore, the Court dismisses those claims that arise out of accounting statements that were provided on or before March 1, 2010.

Breach of the Implied Covenant

The Money Defendants motion to dismiss Aspire's cause of action for breach of the implied covenant of good faith and fair dealing is denied. The cause of action for breach of the

implied covenant is not, in this case, duplicative of the cause of action for breach of the Aspire/YME Agreement. “[A] claim of breach of the implied covenant of good faith and fair dealing is not duplicative of the breach of contract claim, [if] it arises out of different facts.” *Hong Leong Fin. Ltd. (Singapore) v. Morgan Stanley*, 131 A.D.3d 418, 419 (1st Dep’t 2015). Aspire’s implied covenant claim alleges that Cash Money contracted with Universal in a manner that prevented Aspire from receiving its proper share of Net Profits, that Cash Money failed to ensure that Aspire’s copyright interests were preserved by registering the copyrights with the proper names, and that Cash Money, in bad faith, restructured the accounting statements issued by Universal. These allegations arise out of facts largely separate from Aspire’s claim that the Defendants breached the Aspire/YME Agreement by failing to provide accurate, timely account statements to Aspire.

It is true that the “implied covenant does not extend so far as to undermine a party’s general right to act on its own interests in a way that may incidentally lessen the other party’s anticipated fruits from the contract.” *Thyroff v. Nationwide Mut. Ins. Co.*, 460 F.3d 400, 408 (2d Cir. 2006) (internal quotations and citations omitted). However, Aspire’s allegations go beyond its assertion that it failed to reap the full fruits of the Aspire/YME Agreement because of Cash Money’s contractual relationship with Universal. For instance, and as described above, Aspire alleges that the Money Defendants failed to ensure that Aspire’s one-third copyright interest would be registered and preserved—an obligation not explicit in the Aspire/YME Agreement but, perhaps, reasonably implied in law. Therefore, taking the allegations liberally construed, the Money Defendants’ motion to dismiss Aspire’s cause of action for breach of the implied covenant of good faith and fair dealing is denied.

For the reasons stated *supra*, the Money Defendants' motion to dismiss is denied, except to the extent that claims accruing on or before March 1, 2010 are barred by the applicable statute of limitations.

Universal's Motion to Dismiss

As detailed above, Aspire's amended complaint alleges that Universal is the alter ego of Cash Money, and thus, that Universal is liable for Cash Money's obligations under the Aspire/YME Agreement. Universal argues, *inter alia*, that Aspire cannot plead alter ego liability because Aspire's allegations of domination and control over Cash Money arise solely out of the exercise of lawful contract rights that were freely agreed upon by Universal and Cash Money. Therefore, Universal argues, because Universal does not hold any ownership interest, director or officer position in Cash Money, Aspire's alter ego theory of liability is barred under either Louisiana or New York law.

Choice of Law

A threshold issue is whether New York or Louisiana law should apply for purposes of analyzing the viability of Aspire's alter ego theory of liability. Under New York choice of law principles, generally "[t]he law of the state of incorporation determines when the corporate form will be disregarded and liability will be imposed on shareholders." *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1456 (2d Cir. 1995). However, "New York courts will disregard the state of incorporation" where "the Defendant's contacts and the events at issue in the case substantially implicate New York." *Hayden Capital USA, LLC v. Northstar Agri Indus., LLC*, No. 11-594, 2012 WL 1449257, at *6 (S.D.N.Y. Apr. 23, 2012). Here, Cash Money is alleged to be a Louisiana corporation. However, the Aspire/YME Agreement, which is at the heart of this action, was

executed in New York and is governed by New York law by way of a New York choice-of-law provision. The Court thus finds that New York law is controlling.

Alter Ego Theory

Aspire has adequately alleged that Universal is the equitable owner of Cash Money such as to survive Universal's pre-answer motion to dismiss. The issue turns on whether, under New York law, Aspire has sufficiently alleged that Universal is the alter ego of Cash Money despite the fact that it is undisputed that Universal is a non-owner, non-director, and non-officer of Cash Money. The Court of Appeals "found no definitive authority on the issue of whether a nonshareholder could be personally liable under a theory of piercing the corporate veil." *Matter of Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y.2d 135, 142 (1993). Other New York courts have generally declined to extend alter ego liability to a non-owner defendant. *See Lantau Holdings, Ltd. v. Orient Equal Intern. Group*, 2017 N.Y. Slip Op. 30464(U), 2017 WL 914636, at *18 (N.Y. Sup. Ct. Mar. 8, 2017) (Singh, J.) ("Here it is undisputed that Haitong is not the owner of the Defendant Borrowers who signed the loan documents. Therefore, plaintiff has not adequately pled a jurisdictional basis for alter ego liability."); *see also Old Republic Nat. Title Ins. Co. v. Moskowitz*, 297 A.D.2d 724, 726 (2d Dep't 2002) ("There is no basis to pierce the corporate veil as against her since she was neither an owner, director, nor a shareholder in Metro Land."). However, "New York courts have recognized for veil-piercing purposes the doctrine of equitable ownership, under which an individual who exercises sufficient control over the corporation may be deemed an 'equitable owner', notwithstanding the fact that the individual is not a shareholder of the corporation." *Freeman v. Complex Computing Co.*, 119 F.3d 1044, 1051 (2d Cir. 1997). "Equitable ownership is determined by considering whether [the defendant] 'exercised considerable authority' over the corporation and acted as though the 'assets were his

alone to manage and distribute.’’ *United Mizrahi Bank Ltd. v. Sullivan*, No. 97-9282, 2000 WL 1678040, at *3 (S.D.N.Y. Nov. 6, 2000) (quoting *Freeman*, 119 F.3d at 1051).

Here, Aspire alleges that Universal took advantage of Cash Money’s cashflow problems by satisfying millions of dollars of Cash Money’s debts in exchange for control over Cash Money’s finances and agreements, including the Aspire/YME Agreement. Aspire alleges that Cash Money is a mere corporate instrument of Universal, that Universal shares offices with Cash Money, that Universal operates Cash Money’s website, that the business affairs of the two entities are intermingled, that Cash Money itself remains undercapitalized in relation to its needs, and that Cash Money is entirely dependent on advances and direct payments from Universal. Allegations of this sort have been held sufficient on a pre-answer motion to dismiss. *See Trans Intern. Corp. v. Clear View Technologies, Ltd.*, 278 A.D.2d 1, 2 (1st Dep’t 2000) (upholding denial of motion to dismiss where “plaintiff alleged that individual defendants are Clear View’s equitable owners, that Clear View was their alter ego, that they exercised complete dominion and control over Clear View and that equity requires that they be held liable for Clear View’s obligations to plaintiff”).

Aspire’s allegations are not wholly conclusory such that dismissal on a pre-answer motion is warranted. *Contra Ferro Fabricators, Inc. v. 1807-1811 Park Ave. Dev. Corp.*, 127 A.D.3d 479, 480 (1st Dep’t 2015) (affirming grant of motion to dismiss because “the first cause of action alleging alter-ego liability is too conclusory, since it fails to plead any particularized facts”). As discussed above, Aspire’s amended complaint contains particularized examples of Cash Money ceding much of its business operation to Universal. Regardless of whether Cash Money’s purported relinquishment of its business to Universal is partially the result of freely executed contracts between the parties, the inquiry into whether, and to what extent, the

contractual relationship between the two parties transformed over time into that resembling an alter ego relationship is necessarily fact intensive and requires discovery. Therefore, Aspire has sufficiently alleged that Universal is the equitable owner of Cash Money for purposes of this pre-answer motion to dismiss.

The Court finds Universal's additional arguments equally unavailing.

First, Universal argues that Aspire never actually alleges that Universal is the alter ego of YME, thereby foreclosing any claim that Universal is liable for YME's duties under the Aspire/YME Agreement. However, as the motion papers and oral argument on the motion have made clear, Cash Money and YME are partners for purposes of the Young Money Entertainment Joint Venture—the joint venture that entered into the Aspire/YME Agreement with Aspire. Aspire alleges that Universal is the alter ego of Cash Money, a party to the joint venture. A joint venture “is in a sense a partnership for a limited purpose, and it has long been recognized that the legal consequences of a joint venture are equivalent to those of a partnership.” *Gramercy Equities Corp. v. Dumont*, 72 N.Y.2d 560, 565 (1988). Thus, Cash Money and YME are partners to the joint venture that entered into the Aspire/YME Agreement and may be held jointly and severally liable under the Aspire/YME Agreement. Therefore, Aspire adequately alleges that Universal is the alter ego of Cash Money—a partner to a party to the Aspire/YME Agreement—and thus, that Universal may also be held liable under the Aspire/YME Agreement.

Second, Universal argues that Aspire's alter ego claim against Universal is precluded by the Aspire/YME Agreement because New York courts reject alter ego liability where a sophisticated party, like Aspire, knowingly contracts with its counterparty and then seeks to impose liability on some third party for breach of that contract. However, Aspire's amended complaint makes clear that it was not aware of Universal's purported dominion over Cash

Money at the time of contracting. Aspire does not even allege that Universal was Cash Money's alter ego at the time the Aspire/YME Agreement was executed. Rather, Aspire alleges that Universal subsequently gained complete control over Cash Money in or after 2015. Therefore, Aspire's alter ego claim, on this pre-answer motion to dismiss, is not precluded by the Aspire/YME Agreement.

Finally, Universal argues that Aspire failed to adequately plead the fraud element of alter ego liability. However, Aspire has adequately alleged that Universal "engaged in acts amounting to an abuse or perversion of the corporate form" of Cash Money, which caused harm to Aspire. *East Hampton Union Free Sch. Dist. v. Sandpebble Builders, Inc.*, 16 N.Y.3d 775, 776 (2011). Such allegations are sufficient to state a claim under an alter ego theory of liability.

For the reasons stated above, Universal's motion to dismiss is denied.

Accordingly, it is hereby

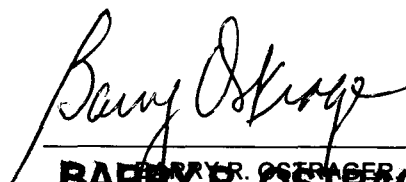
ORDERED that the Money Defendants' motion to dismiss is denied, except to the extent Aspire's claims accruing on or before March 1, 2010 are time barred by the applicable statute of limitations; and it is further

ORDERED that Universal's motion to dismiss is denied; and it is further

ORDERED that the Money Defendants and Universal answer the amended complaint within twenty days of this Decision and Order.

7/2/2018

DATE


BARRY H. OSTRAGER
 JSC

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REFERENCE