

Craig Barna & Bronsand Music, Inc. v Rigby
2015 NY Slip Op 30963(U)
June 8, 2015
Supreme Court, New York County
Docket Number: 156405/2013
Judge: Shirley Werner Kornreich
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SHIRLEY WERNER KORNREICH

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 54

-----X
 CRAIG BARNA and BRONSAND MUSIC, INC.,

Index No.: 156405/2013

Plaintiff,

DECISION & ORDER

-against-

CATHY RIGBY, TOM MCCOY, MCCOY RIGBY
 ENTERTAINMENT, and KEITH LEVINSON,

Defendants.

-----X
 SHIRLEY WERNER KORNREICH, J.:

Defendants Cathy Rigby, Tom McCoy, McCoy Rigby Entertainment (MRE), and Keith Levinson move, pursuant to CPLR 3211, to dismiss all of the claims asserted in the complaint other than breach of contract. Plaintiffs Craig Barna and Bronsand Music, Inc. (Bronsand) oppose and cross-move (1) to amend to add Peter Pan 2011 L.P. as a defendant; (2) for an order compelling defendants to place \$100,000 in escrow; (3) for injunctive relief; and (4) for an order compelling defendants to provide access to their books and records. Defendants' motion and plaintiffs' cross-motion are granted in part and denied in part for the reasons that follow.

I. Procedural History & Factual Background

As this is a motion to dismiss, the facts recited are taken from the complaint.

Barna is a "musical composer, orchestrator, arranger and conductor." He does business through his personal services corporation, Bronsand. Rigby is the star of a musical production of *Peter Pan* that tours across the world (the Play). Rigby, along with McCoy, operated the Play through MRE.

On April 22, 2004, MRE and Bronsand entered into a contract (the Agreement), whereby Barna would re-orchestrate portions of the Play's score (Barna's Music).¹ *See* Dkt. 38. The Agreement provided MRE with a license to use Barna's Music during a particular North American tour of the Play (the First Tour), for which Bronsand would be paid under a defined fee structure.² Barna did not compose, nor does he have any rights to the rest of the music used in the Play. Bronsand, however, would retain all copyrights in Barna's Music, a fact memorialized in section 2.1 of the Agreement.

Simply put, the Agreement provides that Barna would compose music for the Play, get paid for its use during the First Tour, and retain the rights in such new music after the First Tour concluded. The Agreement does not, however, set forth what compensation Barna is entitled to if defendants wished to use Barna's Music in a subsequent tour. That being said, sections 2.4 and 6 of the Agreement contemplate this possibility, and provide:

[Bronsand] hereby further grants [MRE] a non-exclusive license throughout the World to [use Barna's Music] subsequent to the conclusion of the [First] Tour, subject to the terms of a license for such use(s) to be negotiated in good faith between the parties prior to such use(s). [BRONSAND] HEREBY ACKNOWLEDGES AND AGREES THAT IN NO EVENT CAN HE DENY [MRE] A LICENSE FOR THE USE OF [BARNA'S MUSIC] IN FUTURE PRODUCTIONS OF THE PLAY OR OTHERWISE. Notwithstanding the foregoing, [MRE] shall not be permitted to use [Barna's Music] without the parties first having agreed to the terms of use.

...

[I]n the event [defendants] wish to make any use of any portion of [Barna's Music] beyond the [First Tour], [MRE] shall be required to negotiate with [Bronsand] an appropriate payment for use of [Barna's Music] or any portion thereof, prior to any such use.

¹ According to defendants, Barna's Music consisted of "audio cues and transitions of a few bars' length each." *See* Dkt. 39 at 10. Barna did not compose the Play's main score.

² The specifics of the fee structure, set forth in section 3 of the Agreement (*see* Dkt. 38 at 3), are not pertinent to this motion.

See Dkt. 38 at 2, 4 (capitalization in original).

Section 8, moreover, provides that whenever Barna's Music is used in the Play, the programs, billboards, and the like must state: "Orchestrations and Arrangements by Craig Barna." *See id.* Section 12 provides that in a lawsuit concerning the Agreement, the prevailing party may recover its attorneys' fees. *See id.* at 5. Section 15 provides that, for two years following the expiration of the Agreement, the parties must maintain books and records that they may each inspect to determine that proper payments were made under the Agreement. *See id.* at 6. Finally, section 16.2 provides that the Agreement is governed by California law. *See id.*

In March 2011, defendants contacted plaintiffs to negotiate the use of Barna's Music in another tour of the Play (the Second Tour). The parties did not reach an agreement. Between August 22, 2011 and April 28, 2013, defendants performed the Play on the Second Tour, primarily in the United States. Plaintiffs allege that the performances of the Play during the Second Tour utilized Barna's Music. Defendants contend that after they failed to reach an agreement with plaintiffs over the use of Barna's Music, they hired Levinson to compose music to replace Barna's Music. Defendants claim Levinson was expressly instructed not to use any of plaintiffs' materials and to create original, replacement music. Defendants maintain that the performance of the Play during the Second Tour did not utilize Barna's Music.

On December 8, 2011, shortly after the Second Tour began, plaintiffs filed an action against defendants in this court (Index No. 653385/2011) (the Prior Action), asserting claims that are virtually identical to those asserted in this case, which are discussed below. Claiming defendants were using Barna's Music after the conclusion of the First Tour without compensating plaintiffs, they moved by order to show cause for injunctive relief. Plaintiffs

sought an order compelling defendants to (1) deposit money into escrow; (2) credit Barna as provided for in section 8; and (3) furnish access to defendants' books and records. *See* Index No. 653385/2011, Dkt. 5. By order dated December 20, 2011, the court (Sherwood, J.) denied the motion. *See* Index No. 653385/2011, Dkt. 10. The very next day, defendants moved to dismiss. By order dated June 6, 2013, the court granted defendants' motion to dismiss, not on the merits, but on the ground that plaintiffs did not timely serve defendants pursuant to CPLR 306-b. *See* Index No. 653385/2011, Dkt. 34.

Shortly thereafter, on July 15, 2013, plaintiffs commenced the instant action by refileing their complaint under a new index number.³ Plaintiffs asserted 12 causes of action, numbered here as in the complaint: (1) breach of contract; (2) quantum meruit; (3) fraudulent misrepresentation; (4) specific performance; (5) violations of the Lanham Act; (6) conversion; (7) misappropriation; (8) violations of New York General Business Law (GBL) §§ 392-b & 396-396-t; (9 & 10) tortious interference with contract; (11) palming off; and (12) accounting.

Defendants originally moved to dismiss on December 6, 2013, but by stipulation dated April 21, 2014, the parties agreed that the motion was to be withdrawn without prejudice to allow the parties the opportunity to negotiate a settlement. *See* Dkt. 31. They did not settle. Consequently, defendants filed the instant motion to dismiss on October 31, 2014, and plaintiffs filed their cross-motion on December 2, 2014. Oral argument was held on May 7, 2015. *See* Dkt. 58 (5/7/15 Tr.).⁴

During oral argument, the court directed defendants to submit a supplemental affidavit to provide an accurate explanation of their corporate structure. Despite telling the court they would

³ Justice Sherwood declined to accept assignment of this case.

⁴ The transcript erroneously indicates that the argument was held before Justice Heitler.

do so promptly, no affidavit was submitted until May 28, 2015. *See* Dkt. 57. The affidavit, sworn to by McCoy, does, however, provide much needed clarity about defendants.

McCoy is married to Rigby. Their company, MRE, is not an incorporated entity. It is a d/b/a of Cath Co., Inc., a California corporation formed in 1973. McCoy and Rigby are its shareholders. The First Tour was operated by a production company, Peter Pan Company II, L.P., a New York limited partnership, which was dissolved after the First Tour concluded. The Second Tour was operated by another production company, Peter Pan 2011, L.P., also a New York limited partnership. Though the Second Tour concluded in 2013, Peter Pan 2011, L.P. remains active because of the pendency of this litigation.

II. Defendants' Motion to Dismiss

A. Legal Standard

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames, id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. “However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration.” *Skillgames*, 1 AD3d at 250, citing

Caniglia v Chicago Tribune-New York News Syndicate, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed only if “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 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

B. Discussion

At the outset, the court notes that plaintiffs’ opposition brief is almost entirely unresponsive to defendants’ moving brief. The arguments proffered by plaintiffs as to why their claims (aside from breach of contract)⁵ are properly pleaded fail to address the meritorious arguments set forth by defendants.

That being said, before discussing the viability of plaintiffs’ non-contractual claims, it should also be noted that such claims are, in reality, copyright infringement claims dressed up as state law causes of action. Essentially, plaintiffs are claiming that defendants used Barna’s Music during the Second Tour without plaintiffs’ authorization. This is classic copyright infringement. *See Capitol Records, LLC v ReDigi Inc.*, 934 FSupp2d 640, 652 (SDNY 2013) (“a copyright owner has the exclusive right, ‘in the case of ... musical ... works, to perform the copyrighted work publicly.’”), quoting 17 USC § 106(4); *see* 17 USC § 102(3) (copyright protection extends to “dramatic works, including any accompanying music”).

Copyright infringement claims, however, may only be asserted in federal court. *Int’l Diamond Importers, Inc. v Oriental Gemco (N.Y.), Inc.*, 2014 WL 6682622, at *5 (SDNY 2014) (28 USC § 1338 divests state courts of jurisdiction over copyright claims); *see generally*

⁵ Defendants do not move to dismiss the first (breach of contract) and fourth (specific performance) causes of action.

Editorial Photocolor Archives, Inc. v Granger Collection, 61 NY2d 517 (1984). Moreover, it is well settled that state law claims that effectively seek redress for copyright violations are preempted by the Copyright Act. See *Briarpatch Ltd., L.P. v Phoenix Pictures, Inc.*, 373 F3d 296, 305 (2d Cir 2004) (“The Copyright Act exclusively governs a claim when: (1) the particular work to which the claim is being applied falls within the type of works protected by the Copyright Act ... and (2) the claim seeks to vindicate legal or equitable rights that are equivalent to one of the bundle of exclusive rights already protected by copyright law”);⁶ see also *Phillips v Audio Active Ltd.*, 494 F3d 378, 392 (2d Cir 2007) (noting that unjust enrichment and unfair competition claims are preempted by the Copyright Act).

⁶ *Briarpatch* is the seminal Second Circuit case on state law causes of action that are preempted by the Copyright Act. In *Briarpatch*, the Second Circuit explained that:

[t]he Copyright Act exclusively governs a claim when: (1) the particular work to which the claim is being applied falls within the type of works protected by the Copyright Act under 17 U.S.C. §§ 102 and 103, and (2) **the claim seeks to vindicate legal or equitable rights that are equivalent to one of the bundle of exclusive rights already protected by copyright law** under 17 U.S.C. § 106. The first prong of this test is called the “subject matter requirement,” and the second prong is called the “general scope requirement.”

The subject matter requirement is satisfied if the claim applies to a work of authorship fixed in a tangible medium of expression and falling within the ambit of one of the categories of copyrightable works. These categories encompass literary works and motion pictures, 17 U.S.C. § 102(a), including those based on preexisting works, 17 U.S.C. §§ 101, 103. A work need not consist entirely of copyrightable material in order to meet the subject matter requirement, but instead need only fit into one of the copyrightable categories in a broad sense.

The general scope requirement is satisfied only when the state-created right may be abridged by an act that would, by itself, infringe one of the exclusive rights provided by federal copyright law. In other words, the state law claim must involve acts of reproduction, adaptation, **performance**, distribution or display.

Id. at 305 (citations omitted; emphasis added).

As discussed earlier, section 2.1 of the Agreement provides that Bronsand owns all rights in Barna's Music, and that such "rights include all copyrights and any renewals of copyright throughout the world in perpetuity, and all rights under copyright." *See* Dkt. 38 at 2. There is no question of fact that the Agreement was (1) a license agreement governing defendants' obligations to pay plaintiffs for the use of Barna's Music during the First Tour; and (2) an agreement to agree on compensation terms after the First Tour concluded. Defendants concede they had no right to use Barna's Music during the Second Tour (though they deny doing so). If defendants did indeed use Barna's Music without authorization, they would have violated plaintiffs' copyrights and would have to compensate them accordingly. Simply put, to the extent this action principally concerns the use of Barna's Music during the Second Tour, this is a copyright infringement case. Plaintiffs may not assert state law claims for damages that arise solely from defendants' violations of plaintiffs' public performance rights.

Nonetheless, besides preemption – an issue, inexplicably, not raised by defendants – plaintiffs' non-contractual claims are otherwise infirm. Yet, before addressing why this is the case, it must again be emphasized that the issue of whether defendants used Barna's Music during the Second Tour is a factual issue beyond the scope of this motion. Although a significant portion of plaintiffs' brief is devoted to this issue, the only relevant inquiry on this motion – a motion to dismiss⁷ – is whether the non-contractual causes of action are sufficiently pleaded.⁸

⁷ Plaintiffs make the erroneous argument that defendants' failure to submit fact witness affidavits to rebut the claims in the complaint is somehow a tacit admission of liability. On the contrary, a defendant is not permitted to do so. *See U.S. Fire Ins. Co. v N. Shore Risk Mgmt.*, 114 AD3d 408, 409 (1st Dept 2014).

⁸ It also should be noted that plaintiffs' brief fails to cite any case law in connection with many of their causes of action. For instance, plaintiffs do not cite to any cases setting forth the

1. *Quantum Meruit*

Plaintiffs' quantum meruit claim is not viable. Quantum meruit is a quasi-contract cause of action. *See Tannenbaum Helpern Syracuse & Hirschtritt LLP v Deheng Law Offices*, 127 AD3d 564 (1st Dept 2015). To the extent plaintiffs seek to use this claim to recover money due under the Agreement, the claim must be dismissed as duplicative of the breach of contract claim. *See Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 (1987); *see also Randall's Island Aquatic Leisure, LLC v City of New York*, 92 AD3d 463, 464 (1st Dept 2012) ("there can be no quasi-contract claim against a third-party non-signatory to a contract that covers the subject matter of the claim"). To the extent plaintiffs seek to recover for the unauthorized use of Barna's Music during the Second Tour, such a grievance is a copyright infringement claim. That claim is federally preempted. *See Phillips*, 494 F3d at 392.

2. *Fraud*

Plaintiffs' fraud claim also is defective. Fraud claims, which must be pleaded with particularity pursuant to CPLR 3016(b), have five elements: "a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009). Plaintiffs' only alleged fraudulent misrepresentation is defendants' promise that they would not use Barna's Music on the Second Tour. Plaintiffs, however, also take the position that defendants' use of Barna's Music on the Second Tour is a breach of the Agreement. This renders the fraud claim defective because lies about future intent to comply with a contract is not fraud. *See MP Innovations, Inc. v Atlantic Horizon Int'l, Inc.*, 72 AD3d 571, 573 (1st Dept

elements of their Lanham Act claims. Additionally, at the end of plaintiffs' discussion of each of their causes of action, they state: "Even to the extent that these allegations have not been fully articulated and fleshed out, Plaintiffs are entitled to do so via pre-trial disclosure as per CPLR 3211." Plaintiffs are not entitled to discovery on a claim that is insufficiently pleaded.

2010). Moreover, plaintiffs do not properly allege when the misrepresentation took place, by whom, their reliance or damages. Rather, as plaintiffs themselves plead, the parties negotiated but did not reach an agreement regarding the use of Barna's Music on the Second Tour and, as a result, Levinson was hired to compose replacement music. Plaintiffs do not state what they would have done differently had defendants not allegedly misrepresented their intention to use Barna's Music during the Second Tour. To wit, there is nothing plaintiffs could have done except attempt to negotiate a license agreement, which they tried and failed to do, or sue if Barna's Music was used absent an agreement. There are no damages for plaintiffs to recover that are not otherwise recoverable under a contract or copyright claim. Hence, the fraud claim is duplicative. *See Mosaic Caribe, Ltd. v AllSettled Group, Inc.*, 117 AD3d 421, 422-23 (1st Dept 2014).

3. *The Lanham Act, Misappropriation, and Palming Off*

The Lanham Act, 15 USC §§ 1114 & 1125, *inter alia*, creates federal law causes of action for trademark infringement, trade dress infringement, and trademark dilution. *See Time, Inc. v Petersen Pub. Co.*, 173 F3d 113, 117 (2d Cir 1999) ("The Lanham Act prohibits the use in commerce, without consent, of any 'registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods,' in a way that is likely to cause confusion."). Plaintiffs' Lanham Act claims fail because the complaint does not identify any of plaintiffs' trademarks that were infringed.

Plaintiffs, moreover, assert unfair competition claims. Plaintiffs claim, both under the Lanham Act and New York common law, that defendants' alleged use of Barna's Music during the Second Tour amounts to palming off and misappropriation. *See ITC Ltd. v Punchgini, Inc.*, 9 NY3d 467, 476 (2007) ("We have long recognized two theories of common-law unfair

competition: palming off and misappropriation.”). If anything, the claim is one for *reverse* palming off, which occurs when “A sells B’s product under A’s name.” *Societe Des Hotels Meridien v LaSalle Hotel Operating Partnership, L.P.*, 380 F3d 126, 131 (2d Cir 2004) (citation omitted). “[A] reverse palming off claim requires allegations: (1) that the [product] at issue originated with the plaintiff; (2) that [the] origin of the [product] was falsely designated by the defendant; (3) that the false designation of origin was likely to cause consumer confusion; and (4) that the plaintiff was harmed by the defendant’s false designation of origin.” *Id.* (quotation marks omitted); see *Marcy Playground, Inc. v Capitol Records, Inc.*, 6 FSupp2d 277, 281 (SDNY 1998) (“The claim is one of reverse palming off [because] ... [p]laintiffs claim ... they are being deprived of credit for their role in bringing [music] recordings into existence.”).

Plaintiffs may have a viable reverse palming off claim if Barna’s Music was used but attributed to another composer, such as Levinson. Indeed, as noted earlier, section 8 of the Agreement sets forth how Barna was supposed to be credited. Nonetheless, the existence of non-de minimis damages on this claim is highly questionable.⁹ For one thing, in this court, plaintiffs may not recover damages attributable to the unauthorized use of Barna’s Music. Such damages arise from copyright infringement and, hence, may only be recovered in federal court. To the extent plaintiffs seek to pursue a reverse palming off cause of action, they must file an amended complaint that actually pleads that cause of action.

In contrast, plaintiffs’ misappropriation claim is not viable. An unfair competition claim predicated on misappropriation “presupposes the existence of **actual goodwill.**” *ITC*, 9 NY3d at 479 (emphasis added). “If a [] plaintiff has no goodwill ... to appropriate, there can be no viable

⁹ Plaintiffs repeatedly state in their brief that they have been damaged in an amount no less than \$500,000. Plaintiffs do not explain how they arrived at such a figure, but one presumes they recited such amount to gain entry into the Commercial Division.

claim for unfair competition under a theory of misappropriation.” *Id.* “[A]t a minimum,” consumers of the good or service provided by plaintiff must primarily associate such good or service with plaintiff. *Id.* However, if customers do not do so, “no cause of action lies under New York common law for unfair competition.” *Id.* at 480. Moreover, “[i]n order to sustain a cause of action for unfair competition involving misappropriation, a plaintiff must plead **bad-faith** misappropriation of a commercial advantage.” *Carnegie Deli, Inc. v Levine*, 2015 WL 274631, at *16 (Sup Ct, NY County 2015) (emphasis added), citing *Ahead Realty LLC v India House, Inc.*, 92 AD3d 424, 425 (1st Dept 2012).

Plaintiffs do not allege that there is a market or even a commercially viable use for Barna’s Music other than its utility to the Play. The Play and the original music were not created by plaintiffs. Ergo, defendants are not competing with plaintiffs. Yet, “a court may sustain an unfair competition claim even if the parties are not ‘actual competitors.’” *Redf Organic Recovery, LLC v Rainbow Disposal Co.*, 116 AD3d 621, 622 (1st Dept 2014). Nonetheless, absent bad-faith, an unfair competition claim is not viable. See *Green Apple Cleaners, LLC v Legacy Cleaners, Inc.*, 2014 WL 7333886, at *10 (Sup Ct, NY County 2014) (collecting cases). Here, defendants are merely alleged to have used Barna’s Music without a license. Plaintiffs do not plead any non-conclusory facts suggesting this was done in bad faith. Nor do plaintiffs plead facts suggesting that audiences associate Barna’s Music with plaintiffs.¹⁰ These pleading omissions are fatal to plaintiffs’ misappropriation claim.

¹⁰ It is doubtful that plaintiffs can commercially exploit Barna’s Music on their own (especially if plaintiffs only own the copyright to the certain “transition” portions of the Play’s score). Barna did not compose the music for *Peter Pan*. Nor is there a likelihood that consumers will be tricked about the origins of Barna’s Music, at least not in the sense that the musical origins are material to audiences, since it is not likely that audiences go to see the Play to hear the portions of the score arranged by Barna. People likely care far more about watching Cathy Rigby perform and hearing the original music.

4. Conversion

“A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person’s right of possession.” *Colavito v N.Y. Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 (2006). Plaintiffs cite no case that permits the maintenance of a conversion claim when the alleged wrongdoing is the unauthorized use of music. Regardless, even if such a claim were theoretically viable, it would be preempted. *See Phillips*, 494 F3d at 392.

5. GBL Claims

Plaintiffs’ GBL claims are frivolous. Plaintiffs assert claims under GBL § 392-b and § 396 through 396-t. § 392-b prohibits the mislabeling of merchandise. § 396, titled “unlawful selling practices,” prohibits “bait and switch” advertising. Each of the sections codified at §396-a et seq. (§ 396-a through §396-z) governs specific forms of consumer deception in different industries, including “senior citizen discounts,” “blind made products,” and “sale of video game consoles.” § 396-t regulates “layaway plans”. In defendants’ moving brief, defendants explain in detail why these sections are inapplicable. In opposition, plaintiffs fail to address defendants’ accurate accusations of frivolity. Rather, plaintiffs simply state, in conclusory fashion, that they have “clearly stated” GBL claims because defendants have falsely advertised and labeled Barna’s Music as the work of defendants. No explanation for why any of the cited GBL sections apply is provided, nor do plaintiffs cite a single case.

§ 396-t has nothing to do with music or theater productions. The court, in its discretion, will not sanction plaintiffs for their assertion of patently frivolous GBL claims. However, in light of plaintiffs’ other serious pleading and briefing deficiencies, plaintiffs’ counsel is strongly cautioned that future frivolity will result in sanctions. The assertion of frivolous claims requires

defense counsel to spend more time, and, hence, more of defendants' money, on their papers and in argument. Indeed, to an attorney unfamiliar with § 396 and its approximately 40 related sections, a considerable amount of research may be necessary to ensure that such sections do not actually apply. Defendants should not have to pay for this.

6. *Tortious Interference with Contract*

Plaintiffs claim that Rigby, McCoy, and Levinson tortiously interfered with the Agreement. To state a claim for tortious interference with contract, a plaintiff must plead "the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 (1996).

The individual defendants argue that any acts they may have taken which procured a breach of the Agreement occurred within the scope of their duties as officers and employees of MRE. See *Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 108-09 (1st Dept 2002) ("the existence of a plausible claim for breach of contract does not, without more, provide a basis for the assertion of a cause of action for interference with contractual relations against those corporate officers and directors whose actions brought about the asserted breach."). "A cause of action seeking to hold corporate officials personally responsible for the corporation's breach of contract is governed by an **enhanced pleading standard**], requiring plaintiff] to plead in nonconclusory language ... that the acts complained of [were] beyond the scope of the defendant's corporate authority, were performed with malice and were calculated to impair the plaintiff's business for their personal profit." *Id.* at 109-10 (citations omitted). In other words, a tortious interference claim must be dismissed if plaintiff

“does not assert that the individual defendants acted in other than a corporate capacity.” *Id.* at 110; see *Petkanas v Kooyman*, 303 AD2d 303, 305 (1st Dept 2003) (“the pleadings must allege that the individual defendant corporate officer must have been acting for his or her own personal interests rather than for the corporate interests”).

In opposition, plaintiffs state in a conclusory manner that the individual defendants personally interfered with the Agreement. Plaintiffs, however, do not explain how or why such alleged interference was undertaken in the individual defendants’ personal capacity, as opposed to their corporate capacity. Rigby and McCoy are MRE (really, they are the shareholders of Cath Co.), and Levinson was simply hired to compose replacement music. Additionally, plaintiffs do not cite to any case law regarding when interference is considered personal or corporate when such interference is effectuated via a closely held company, a partnership or a joint venture. This court will not address this issue as plaintiffs’ brief is simply an inadequate opposition to defendants’ arguments. The tortious interference claim, therefore, is dismissed.

7. Accounting

Plaintiffs are not entitled to an accounting under section 15. Defendants argue that more than two years have elapsed since the Agreement expired and, therefore, it is too late for plaintiffs to seek an accounting under section 15. Plaintiffs do not address this argument. Plaintiffs merely argue that they are entitled to an equitable accounting, but do not provide any legal basis for why this is so. The accounting claim, consequently, is dismissed.

III. Plaintiffs’ Cross-Motion

Plaintiffs may amend the complaint (and serve an appropriate supplemental summons) to add Peter Pan 2011 L.P. as a defendant. Defendants consent to this amendment. Similarly, the

appropriate defendant is “Cath Co., Inc.”, and MRE should be referred to in the caption as a d/b/a.

The balance of plaintiffs’ cross-motion, which appears to seek the very injunctive relief denied by Justice Sherwood in 2011, is denied. Plaintiffs do not explain what additional evidence has been proffered on this motion other than the evidence Justice Sherwood deemed inadequate to justify the relief sought in 2011. In fact, there is far less urgency for an injunction now that the Second Tour has concluded. Nor do plaintiffs provide any legal basis to compel defendants to place \$100,000 into escrow. It is not clear if plaintiffs are making this request as some sort of motion for an attachment or based on some other legal theory.

In sum, plaintiffs are directed to file an amended complaint. It should only include the non-dismissed claims and should clearly delineate the nature of the damages sought. Most importantly, the amended complaint must set forth the legal basis for recovering damages. To survive dismissal, plaintiffs must allege damages that are not preempted by the Copyright Act. While plaintiffs’ may recover unpaid amounts due under the Agreement attributable to the First Tour and, possibly, damages sustained as a result of reverse palming off, plaintiffs may not recover (at least not in this court) damages sustained by virtue of unauthorized use of Barna’s Music during the Second Tour. Those are copyright damages, which are not recoverable in state court, even if the damages can be articulated as arising from a state law claim, such as unjust enrichment. Finally, it should be noted that it is unclear why Craig Barna is a named plaintiff. Barna is not a party to the Agreement and, according to the Agreement, it is Bronsand that owns the rights to Barna’s Music. If Barna is to remain a plaintiff, the amended complaint should provide a basis to do so.¹¹ Accordingly, it is

¹¹ If Bronsand is solely owned by Barna, he would effectively recovery any judgment.

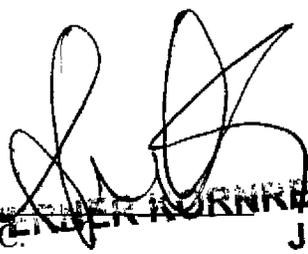
ORDERED that the motion by defendants Cathy Rigby, Tom McCoy, McCoy Rigby Entertainment (MRE), and Keith Levinson to dismiss all of the claims asserted in the complaint other than breach of contract is granted to the following extent: (1) the second (quantum meruit), third (fraudulent misrepresentation), sixth (conversion), seventh (misappropriation), eighth (GBL claims), ninth (tortious interference), tenth (tortious interference) and twelfth (accounting) causes of action are dismissed with prejudice; and (2) the fifth (Lanham Act claims) and eleventh (palming off) causes of action are dismissed without prejudice and with leave to replead to the extent set forth in this decision; and it is further

ORDERED that the cross-motion by plaintiffs Craig Barna and Bronsand Music, Inc. is granted to the extent that plaintiffs' amended complaint may name Peter Pan 2011 L.P. as a defendant and which shall refer to MRE as "Cath Co., Inc. d/b/a McCoy Rigby Entertainment", and the cross-motion is otherwise denied; and it is further

ORDERED that plaintiffs' amended complaint must be filed within 21 days of the entry of this order on the NYSCEF system.

Dated: June 8, 2015

ENTER:


SHIRLE J. SCHNEIDER
SHIRLE J. SCHNEIDER
J.S.C.