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SUPREME COURT OF NEW YORK, NEW YORK COUNTY

FRANK FIDILIO, Plaintiff, - against — HOOSICK FALLS PRODUCTIONS, INC., 38th FLOOR PRODUCTIONS, INC. and VIACOM INTERNATIONAL INC., Defendants.

Index No. 654066/2016

March 22, 2017, Decided
NOT APPROVED BY REPORTER OF DECISIONS FOR REPORTING IN STATE REPORTS.

PRESENT: EILEEN BRANSTEN, JSC.

EILEEN BRANSTEN

Upon the foregoing papers, it is

ORDERED Defendants New 38th Floor Productions, Inc. and Viacom International Inc.'s motion to dismiss is GRANTED as stated on the March 9, 2017 (Terry-Ann Volberg, C.S.R.) record and transcript at 10:1-18:10.

DATE: 3/27/2017

/s/ Eileen Bransten

BRANSTEN, EILEEN, JSC

Proceedings

THE COURT: For the plaintiff Frank Fidilio, I have from the Kerr LLP firm, William Kerr.

MR. KERR: Yes.

THE COURT: Good morning.

For Hoosick Falls Production, Inc., from Gibson Dunn & Crutcher LLP, I have Mitchell Karlan.

MR. KARLAN: Yes, your Honor.

THE COURT: And also Donate Marcantonio.

MR. MARCANTONIO: That's right, your Honor.

THE COURT: How are you?

For New 38th Floor Productions, Inc. and Viacom International, Inc., from Friedman Kaplan Seiler & Adelman, LLP, I have Jeffrey Wang.

MR. WANG: Good morning.

THE COURT: And David Ranzenhofer.

MR. RANZENHOFER: Good morning, your Honor.

THE COURT: So we have two motions. Motion number one is a motion to dismiss and compel arbitration, that is brought by Hoosick Falls Production, Inc., and motion number two, the motion to dismiss, is brought by the New 38th Floor Productions, Inc. and Viacom International. They are two separate entities.

We will go through and do number one first, all right.

Here's some background, and this goes for both motions. Plaintiff, Frank Fidilio, is a creator and producer of Scrappers, a reality TV show which featured scrap metal crews driving around New York City collecting scrap metal which aired during the summer and fall of 2020 on Spike TV, MTV2, and other cable channels owned by defendant Viacom International, otherwise known as Viacom.

Defendant, Hoosick Falls, otherwise known as Hoosick, was hired by Viacom to produce the show, and defendant, New 38th Floor, otherwise known as New 38th, distributed the show on behalf of Viacom.

On April 1, 2009 Hoosick and New 38th entered into a production services agreement whereby Hoosick was engaged to produce the show.

On August 3, 2009, Fidilio entered into three agreements with Hoosick, a producer agreement, a participant agreement and a trademark and merchandising agreement.

The producer agreement sets forth certain compensation to be paid to Fidilio entitled "contingent compensation" which amounts to 14.78125 percent of certain compensation payable to Hoosick pursuant to Hoosick's production services agreement with New 38th.

Plaintiff alleges that New 38th and Viacom have received significant revenue from Scrappers that have not been disclosed to plaintiff in order to deny him his "contingent compensation" and other equitable compensation for the creation and production for the show.

Plaintiff alleges Hoosick accepted payments from New 38th -- plaintiff alleges that when Hoosick accepted payments from New 38th that they **[*2]** did not classify as -- sorry -- accepted payments from New 38th which qualified as "contingent compensation" and otherwise failed to pay and/or severely underpaid Fidilio.

On May 15, 2014 plaintiff demanded an accounting of Hoosick pursuant to the production agreement. Hoosick provided a response which included four summary participation statements.

As such, plaintiff brings this instant lawsuit seeking breach of express and Implied contract, unjust enrichment, and demands for an accounting against the defendants.

All the defendants moved to dismiss.

Motion sequence number one: Defendant Hoosick's seeks an order dismissing the plaintiff's complaint and compelling mediation and arbitration pursuant to CPLR 7503(a) .

The standard: CPLR 7503(a) states, application to compel arbitration, stay of action. A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement has been made or complied with, the claim sought to be arbitrated is not barred by limitation under subdivision B of Section 7502, the court shall direct the parties to arbitrate. Where any such question is raised, it shall be tried forthwith in said court. If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that court. If the application is granted, the order shall operate to stay a pending or subsequent action or so much of it as is referable to arbitration.

Defendant Hoosick argues, despite the fact that plaintiff and Hoosick executed three separate agreements concerning Scrappers, they were all signed on the same day and combined to make one agreement and contract. That cites to the Verschoor Memo at page two.

By the way, I didn't see in favor of Fidilio, I didn't see a memorandum of law. Did you write one?

MR. KERR: Yes, and a memo in opp. for both.

THE COURT: You have to stand up.

MR. KERR: Docket number 34 is an opposition memo.

THE COURT: It is.

MR. KERR: Then I filed it twice because it's a joint opposition.

Would you like a copy?

THE COURT: Okay.

MR. KERR: It was also filed, I think, as 35, motion sequence number two.

THE COURT: Okay.

Separate contracts relating -- do me a favor, print that for me -- separate contracts relating to the same subject matter and executed simultaneously by the parties may be construed as one agreement. In the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction shall be read and interpreted together it being said that they are in the eyes of the law one instrument. Citing to Astoria Equities 200 LLC v. Halletts A Development Company, LLC, 47 Misc.3d 171 at page 181, N.Y. Sup 2014. That is Justice Martin Ritholtz' decision.

Defendant argues that page 27 of the participation agreement contains a binding arbitration clause which states "all claims, controversies or disputes arising out

of, in connection with, or relating to this agreement, **[*3]** the performance or breach thereof or default hereunder, whether based on contract tort or statute including without limitation any claim that this agreement was induced by fraud otherwise known as the covered claims shall be resolved by mediation, and, if necessary, by binding arbitration in New York, New York."

The defendant further argues that the participation agreement is specifically referenced in the producers agreement such that the intent of the agreements are to be read together.

The producer agreement states "for the pilot and each series episode upon which Fidilio provides his services pursuant to the participant agreement, artist shall also provide his services as a non-writing producer."

Defendant argues that by referencing the participant agreement, the producer agreement makes clear it is not distinct from the participant agreement.

In response, plaintiff argues that his claim arises out of the producer agreement and not the participant agreement treating the dockets separately.

He further argues that the arbitration clause in the participant agreement is "self limiting" inasmuch as its text states it's limited to those rights under "this agreement." As such, plaintiff argues his claims are not subject to mediation or arbitration.

This court is not convinced that from the plain reading of the agreements entered into between plaintiff and Hoosick that the arguments advanced by plaintiff, that the producer agreement and the participant agreement were not meant to be read together.

They were executed at the same time, by the same parties, and governing the same topic, Scrappers, and are referenced within each other's documents. Participant agreement referenced in the producer agreement.

Plaintiff has failed to advance any case law which convinces this court that these agreements should not be viewed together. As such, this court finds the arbitration language contained within the participant agreement governs both agreements, and, therefore, is binding upon plaintiff.

As for whether dismissal will be entertained, the language of the arbitration clause states that the present parties shall present to mediation and, if necessary, binding arbitration. Therefore, the court cannot envision a scenario in which the parties would need to return back to court to mete out, to confront such issues as a remedy for the resolution has been laid out and agreed upon among the parties.

While ordinarily plaintiff would prevail on the request for a stay in lieu of a dismissal, courts hold that where arbitration would dispose of all claims asserted, dismissal with prejudice is appropriate. Citing to Republic Mortgage Insurance Company v. Countrywide Financial Corp., 28 Misc.3d, 1214(A) *3, N.Y.S. 2010, affirmed at 87 A.D.3d 457 , a First Department 2011 case.

Therefore, the court grants defendant Hoosick's motion to dismiss and compels plaintiff and Hoosick to comply with the mediation and arbitration provision of their agreement.

The court need not consider plaintiff's additional arguments.

So that **[*4]** takes care of motion sequence number one. Again, the parties are ordered to first mediate and then to go to binding arbitration, if necessary.

Now we get to motion sequence number two, defendants New 38th floor and Viacom's motion to dismiss. They are seeking to dismiss the second, third and fourth causes of action in plaintiff's complaint pursuant to CPLR 3211(a)(1) , also (a)(3), and (a)(7).

The standard: 3211(a)(1) reads, a party may move for judgment dismissing one or more causes of action asserted against him on the ground that, subdivision one, a defense is founded upon documentary evidence.

CPLR 3211(a)(3) cites that a party may move for judgment dismissing one or more causes of action asserted against him on the ground that, subdivision three, the party asserting the cause of action has no legal capacity to sue.

CPLR 3211(a)(7) , cites that a party may move for judgment dismissing one or more causes of action

asserted again him on the ground that, subdivision seven, the pleading fails to state a cause of action.

Analysis: Defendants argue dismissal of the complaint as against them on three separate grounds: One, plaintiff was not a party to the contract in which he sues. To the extent that plaintiff alleges he was an intended third-party beneficiary, defendants argue a plain reading of the contract confirms plaintiff was not a third-party beneficiary. Even if he was, plaintiff does not argue breach of the contract to which defendants are a party or breach of either the New 38th or Viacom contract.

Two, plaintiff's claim for unjust enrichment is precluded inasmuch as the subject matter is governed by an express contract.

And, three, plaintiff has no contractual right to an accounting against the defendants.

As to plaintiff's second cause of action, breach of implied contract, defendant seeks dismissal of plaintiff's second cause of action for breach of implied contract.

Defendants argue, plaintiff has failed to demonstrate he is "an intended third-party beneficiary" such that he would have standing to sue under a contract to which he is not a party, that is, the production services agreement entered into between Hoosick and New 38th.

Relying on language specifically in the production services agreement, defendants argue that New 38th has no obligation to the plaintiff. Defendants argue that the parties intent was clear, and there is no language within the agreement which states that plaintiff is considered a third-party beneficiary.

The production services agreement states that New 38th would incur no obligation to parties with which Hoosick contracted. That's at paragraph 16.

The agreement also states that Hoosick shall be "solely and entirely responsible" for payment to plaintiff of his share of any contingent compensation which is the subject matter of this lawsuit. That's at paragraph seven, subdivision romanette one.

In response plaintiff points to various provisions in the agreement (many that do not deal with contingent compensation) in an effort to save this claim. Notably, the paragraphs referenced by plaintiff in opposition to this motion purportedly **[*5]** include "in a class of persons for which some other beneficial rights are conferred." Kerr Memorandum of Law, page 15 through 18. The cited provisions, however, are not allege to have been breached.

As the First Department held in Alicea v. City of New York, 145 A.D.2d 315 , a First Department 1988 case, "the contract must evince a discernible intent to allow recovery for the specific damages to the third-party that results from a breach thereof before a cause of action is stated." That, again, is to Alicea at page 317. None of the quoted paragraphs confer a right on plaintiff that he can sue New 38th or Viacom for contingent compensation -- the subject matter of this dispute.

Further, defendants argue plaintiff has failed to directly respond to the argument that Hoosick is directly responsible for the payment, for paying plaintiff contingent compensation according to the agreement, and New 38th. Plaintiff attempts to skirt this issue by arguing that defendants made payments to Hoosick "outside" of the contingent compensation purely to cut plaintiff out of monies. However, defendant argues that even if that were the case, plaintiff still has no claims to the monies as against New 38th. The producer agreement, entered into between Hoosick and the plaintiff, states that Hoosick shall pay to plaintiff 14.78125 percent of each amount that producer, otherwise known as Hoosick, receives as contingent compensation from production services agreement...whether pursuant to section seven of the production services agreement or otherwise. That sentence is emphasized. That's with emphasis added, and that's at paragraph five.

As such, regardless of the classification of payments paid to Hoosick, plaintiff arguably has a claim against Hoosick for such sums and not against New 38th or Viacom.

Defendants correctly argue a plain reading of the participant agreement confirms the parties were well aware of how to incorporate parties into the agreement such as they would be deemed third-party beneficiaries, i.e., see New 38th and Viacom, and elected not to do that for plaintiff in the production services agreement. See Ambac Assurance Company

v. EMC Mortgage, LLC, 121 A.D.3d 514 at page 518, a First Department 2014 case. ("Indeed, a reasonable reading of section seven shows that the contracting parties knew how to limit certain remedies to that section.")

Finally, plaintiff concedes Viacom was not a party to the production service agreement and has failed to identify any other agreement to which they are a party which concern payment of contingent compensation. Kerr Memorandum of Law page 21.

As such, under 3211(a)(1) and (a)(7) the court finds plaintiff's second cause of action shall be properly dismissed as against defendants New 38th and Viacom.

Plaintiff's third cause of action: Unjust enrichment.

Defendants seek dismissal of plaintiff's third cause of action for unjust enrichment.

In the claim plaintiff alleges defendants received revenues from Scrappers to which plaintiff claims he's entitled, i.e., contingent compensation.

Defendants argue that "contingent **[*6]** compensation" is wholly addressed by the three existing contracts, the production services agreement, the producer agreement and the participant agreement, such that plaintiff's cause of action for unjust enrichment must be dismissed.

Where, as here, express contracts govern the subject matter at issue, a plaintiff cannot recover under a theory of unjust enrichment because "the theory of unjust enrichment lies as a quasi-contract claim. It is an obligation the law creates in the absence of any agreement." Citing to Goldman v. Metro life Insurance Company, 5 N.Y.3d 561 at page 572, a 2005 case.

In response, plaintiff fails to address defendants argument either by case law or argument that the subject matter is addressed in contracts thereby precluding his claim for unjust enrichment.

Moreover, defendants correctly contend that even if plaintiff could demonstrate this subject matter is not otherwise addressed in the contracts, plaintiff fails to show how defendants, New 38th and Viacom, were enriched at plaintiff's expense when plaintiff concedes that New 38th paid Hoosick contingent compensation from which Hoosick was supposed to pay plaintiff. Amended Complaint at paragraphs 28 to 30 and 56.

Plaintiff has failed to demonstrate defendant Viacom assumed any obligations to either Hoosick or plaintiff. As such, plaintiff's claim for unjust enrichment as against both the defendants, New 38th and Viacom, is dismissed with prejudice pursuant to CPLR 3211(a)(1) and (7).

Plaintiff's fourth causes of action. Plaintiff's fourth cause of action seeks an accounting from all defendants including Hoosick.

"In order for the court to order an accounting, plaintiff must show a fiduciary relationship with defendants involving the entrustment of money or property, that no other remedy exists, and that plaintiff demanded and was refused an accounting." Citing to Arbeeny v. Kennedy Executive Search, Inc., 31 Misc.3d 494 at page 503, Supreme Court New York County, 2011.

Defendants argue that plaintiff fails to satisfy those elements by failing to, one, allege a fiduciary relationship with New 38th and Viacom to which defendants state was not surprising because one does not exist, and, two, the contract to which Hoosick and New 38th are parties to specifically disclaimed any agency or relationship of trust between the two and confirms that Hoosick is to perform its obligation as an independent contractor without the ability to bind New 38th in any way.

Furthermore, defendant claims that plaintiff failed to allege that he lacks a remedy.

Remedy for alleged lost compensation already exists and is spelled out in the producer agreement entered into with Hoosick, albeit, arguably limited to mediation and/or arbitration.

And, finally, the defendant alleges that plaintiff failed to make a demand for an accounting to New 38th and Viacom, and that such demand was refused. Rather, he alleges that he made a demand pursuant to the producer agreement, i.e. he made a demand to Hoosick.

Plaintiff does not submit any satisfactory arguments in response **[*7]** nor, importantly, does he refute he did

not make a showing of the requisite elements of a cause of action for accounting, and, therefore, he has failed to make out the elements, the requisite elements for a cause of action for accounting.

As such, the court finds plaintiff failed to state a cause of action for an accounting against defendants New 38th and Viacom, and the fourth cause of action is thereby dismissed.

In sum, defendants', New 38th and Viacom's, motion to dismiss the second, third and fourth causes of action are granted, and they are done so with prejudice. The court, therefore, needs not address defendants' request to stay as it is academic.

That constitutes the decision and order of the court.

I will ask to you make sure to get me a copy of the minutes, and thereafter I will give you the appropriate gray sheet that will be the appealable event.

Okay.

MR. WANG: Thank you, your Honor.

MR. KARLAN: Thank you, your Honor.

THE COURT: Have a good day.

General Information

Judge(s)	Eileen Bransten
Topic(s)	Contracts; Alternative Dispute Resolution; Civil Procedure
Industries	Entertainment, Media & Publishing; Broadcast Television
Date Filed	2017-03-22 00:00:00
Court	New York Supreme Court
Parties	FRANK FIDILIO, Plaintiff, - against — HOOSICK FALLS PRODUCTIONS, INC., 38th FLOOR PRODUCTIONS, INC. and VIACOM INTERNATIONAL INC., Defendants.