

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

EDDIE LEVERT, WALTER WILLIAMS	:	CIVIL ACTION
d/b/a THE O'JAYS,	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
PHILADELPHIA INTERNATIONAL	:	
RECORDS, ASSORTED MUSIC, INC.,	:	
GAMBLE-HUFF PRODUCTIONS, KENNETH	:	
GAMBLE, CHUCK GAMBLE and LEON	:	
HUFF,	:	
Defendants.	:	NO. 04-1489

Norma L. Shapiro, S.J.

September 14, 2005

MEMORANDUM AND ORDER

Plaintiffs, Eddie Levert and Walter Williams (“plaintiffs”), citizens of Nevada, are singers, songwriters and original members of the “rhythm and blues” group, “The O’Jays.” Defendants Kenneth Gamble (“Gamble”) and Leon Huff (“Huff”), citizens of Pennsylvania, produced and wrote many of the songs performed by “The O’Jays.” Chuck Gamble, also a Pennsylvania citizen, is the Executive Vice President of Philadelphia International Records.

Plaintiffs allege defendant Assorted Music, Inc. (“Assorted Music”), a Nevada corporation with its principal place of business in Philadelphia, Pennsylvania, is the “alter ego” of Gamble and Huff. Amended Complaint at 2, *Levert et al, v. Philadelphia International Records* (04-1489) (June 28, 2004). Defendant Gamble-Huff Productions is the predecessor in interest to Assorted Music, d/b/a Philadelphia International Records (collectively “PIR”).

Defendants' Pretrial Memorandum Proposed Counterstatement of Facts at 21, *Levert v. Philadelphia International Records* (04-1489) (Dec. 13, 2004). Gamble is the president of Assorted Music, and Huff holds the offices of Vice-President, Secretary and Treasurer. Amended Complaint at 3, *Levert* (04-1489) (June 28, 2004).

Plaintiffs allege they are owed royalty payments on recording contracts dating as far back as 1972. Plaintiffs' amended complaint asserts six counts: two counts allege copyright infringement; three counts allege breach of contract; and a single count alleges fraud. In their second amended complaint, plaintiffs add a single count for conversion against defendant Chuck Gamble.

Before the court are two motions filed by Chuck Gamble: (1) a motion for summary judgment on all counts that have been asserted against him in the amended complaint; and (2) a motion to dismiss the claim of conversion in the second amended complaint and, in the alternative, to strike portions of the second amended complaint.

JURISDICTION

Plaintiffs originally claimed the court had two bases for jurisdiction: diversity jurisdiction pursuant to 28 U.S.C. § 1332, and federal question jurisdiction for alleged copyright violations (28 U.S.C. § 1338 grants original jurisdiction to district courts over various claims including copyright violation). Under § 1332(a)(1), a district court may exercise diversity jurisdiction only if there is "complete diversity;" "no plaintiff can have the same state citizenship as any of the defendants." *Grand Union Supermarkets of the Virgin Islands, Inc. v. H.E. Lockhart Management, Inc.*, 316 F.3d 408, 410 (3d Cir. 2003) (citations omitted). Plaintiffs now concede

there is no diversity jurisdiction because plaintiffs are citizens of Nevada and Assorted Music is a Nevada corporation.

During the final pretrial conference, the plaintiffs informed the court they were withdrawing Count I and Count II alleging copyright violation. Trans. at 7, *Levert et al, v. Philadelphia International Records* 04-1489 (Jan 5, 2005). Only state law claims remain. Under 28 U.S.C. § 1367(c), a district court may “exercise supplemental jurisdiction over a [state law claim] if the district court has dismissed all claims over which it has original jurisdiction.” A district court may decide that considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for exercising supplemental jurisdiction. *See Borough of West Mifflin v. Lancaster, et al.*, 45 F.3d 780, 788 (3d Cir. 1995).

Defendants have not filed a motion to transfer for lack of jurisdiction and plaintiffs have requested the court to retain supplemental jurisdiction over the remaining state law claims pursuant to 28 U.S.C. § 1367(c). The court has decided that its familiarity with the complex factual history of the present action and judicial economy justify exercise of supplemental jurisdiction.

DISCUSSION

Chuck Gamble moved for summary judgment on all five counts asserted against him in the amended complaint. Plaintiffs subsequently withdrew the two counts alleging copyright infringement. The three remaining counts all alleged breach of contract. Chuck Gamble has also moved to dismiss plaintiffs’ claim of conversion for failure to state a cause of action pursuant to Fed. R. Civ. P. 12(b)(6) and in the alternative to strike portions of the second amended complaint

pursuant to Fed. R. Civ. P. 12(f).

1. The Breach of Contract Claims

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Only a factual dispute that might affect the outcome under governing law precludes the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When reviewing a motion for summary judgment, a court must evaluate the facts in a light most favorable to the nonmoving party, and draw all reasonable inferences in that party's favor. *Id.* at 255.

To prove a breach of contract under Pennsylvania law, a plaintiff must show: (1) the existence of a valid and binding contract to which the plaintiff and defendant were parties; (2) the contract's essential terms; (3) plaintiff's compliance with the contract's terms; (4) a defendant's breach of a duty imposed by the contract; and (5) damages resulting from the breach. *Rho v. Vanguard OB/GYN Associates, P.C.*, No. CIV. A. 98-1673, 1999 WL 228993, *3 (E.D. Pa. 1999). No person can be sued for breach of contract if not a party to the contract either in person or by an agent. *Viso v. Werner*, 369 A.2d 1185 (Pa. 1977).

Plaintiffs concede that the three breach of contract counts allege Chuck Gamble breached contracts to which he was not and is not a party. Chuck Gamble was still in high school when the last of the disputed contracts was signed. Memorandum and Points and Authorities in Support of Defendant Chuck Gamble's Motion for Summary Judgment Pursuant to Fed. R. Civ. P. 56 and Counsel Fees Pursuant to 17 U.S.C. § 505 at 2, *Lever* (04-1489) (Nov. 5, 2004). Plaintiffs' counts alleging breach of contract asserted against Chuck Gamble will be dismissed.

2. Conversion

On consideration of a Fed. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, the court evaluates the legal sufficiency of the complaint. *Great West Life Assur. Co. v. Leviathan*, 834 F. Supp. 858, 861 (E.D. Pa. 1993). The court must accept as true all factual allegations in the complaint, draw all reasonable inferences from them, and view them in the light most favorable to the non-moving party. *Rocks v. City of Philadelphia*, 868 F. 2d 644, 645 (3d Cir. 1989). The court need not credit legal conclusions, but must determine if the plaintiff can prevail under the law. *Morse v. Lower Merion School District*, 132 F. 3d 902, 906 (3d Cir. 1997). It is “the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

The second amended complaint asserts a claim of conversion against Chuck Gamble. “Conversion is the deprivation of another’s right of property in, or use or possession of, a chattel, without the owner’s consent and without lawful justification.” *Shonberger v. Oswell*, 530 A.2d 112, 114 (Pa. Super. 1987). Plaintiffs allege Chuck Gamble, acting as PIR Executive Vice-President, “knowingly directed that royalties belonging to Plaintiffs be withheld from them and placed in a business operating account belonging to (PIR).” Plaintiffs’ Motion to Amend Pleadings at 1¹, *Lever* (04-1489) (Dec. 29, 2004).

Chuck Gamble argues plaintiffs’ claim for tort conversion must be dismissed as essentially a breach of contract claim. “The gist of the action test requires the court to determine

¹ Plaintiffs failed to paginate their motion; the quotation appears on the first page.

the essential nature of the claim alleged by distinguishing between contract and tort claims on the basis of the source of the duties allegedly breached; where the duties essentially flow from an agreement between the parties, the claim is deemed contractual in nature, whereas if the duties breached were of a type imposed on members of society as a matter of social policy, the claim is deemed essentially based in tort.” *Werner Kammann Maschinenfabrik, GmbH v. Max Levy Autograph, Inc.*, No. CIV. A. 01-1083, 2002 WL 126634, *6 (E.D. Pa. Jan. 31, 2002) (citation omitted). “Although the Pennsylvania Supreme Court has never adopted the gist of the action doctrine, the Pennsylvania Superior Court has repeatedly endorsed it.” *Owen J. Roberts School Dist. v. HTE, Inc.*, No. CIV. A. 02-7830, 2003 WL 735098, *2 (E.D. Pa. Feb. 28, 2003).

Pennsylvania courts have repeatedly held that the gist of the action doctrine prohibits claims “where the duties essentially flow from an agreement between the parties.” *Bealer v. Mutual Fire, Marine and Inland Ins. Co.*, No. CIV. A. 04-5195, 2005 WL 1819971, *4 (E.D. Pa. Aug. 1, 2005); *Wheeler v. Beard*, No. CIV. A. 03-4826, 2005 WL 1217191, *9 (E.D. Pa. May 19, 2005); *Perma-Vault Safe Company v. Keep-It-Safe, Inc.*, No. CIV. A. 02-7960, 2004 WL 603392, *6 (E.D. Pa. Mar. 25, 2004). Chuck Gamble was not a party to any contract. Just as this bars plaintiffs’ breach of contract claims it also precludes defendant Gamble’s gist of the action defense because there was “no agreement between” plaintiffs and Chuck Gamble.

At least two courts have recently held the gist of the action doctrine does not bar a plaintiff from “proceeding on both a breach of contract and [a] conversion claim.” *Berger & Montague, P.C. v. Scott & Scot*, 153 F.Supp.2d 750, 754 (E.D. Pa. 2001) (plaintiff can plead both breach of contract and tort of conversion); *see also Bernhardt, III, P.C. v. Needleman*, 705 A.2d 875 (Pa. Super. 1997) (in a dispute between lawyers over a referral fee, lawyer could proceed on

theories of breach of contract and conversion); *see also* Fed. R. Civ. P. 8(d)(2) (a party may set forth two or more statements of a claim in the alternative; if one of them independently would be sufficient, the pleading is not insufficient).

Chuck Gamble also argues that the claim for conversion should be dismissed because the royalties allegedly owed to plaintiffs constitute a debt and failure to pay a debt is not a conversion. Defendant provides no authority to support his contention that unpaid royalties constitute a debt and the court has been unable to find any Pennsylvania case law directly on point. However, in *Sheryl Records, Inc v. The Cyrkle*, 245 A.2d 454 (Pa. 1968), the Pennsylvania Supreme Court examined whether, under a Pennsylvania attachment statute, royalties owed to musicians were debt subject to attachment, or salary exempt from attachment.² The court held that the royalties owed to the musicians were essentially salary exempt from attachment. *Sheryl Records* did not address whether a plaintiff might assert a conversion claim for failure to pay royalties, but its holding that royalties payments did not constitute a “debt” contradicts defendant’s argument.

Not every payment due under a contract constitutes a “debt.” Lower Pennsylvania courts have held a defendant who owes a plaintiff money under a contractual agreement may be sued for the tort of conversion. For example, where plaintiff alleged defendant failed to remit proceeds as

²The relevant law reads: The Act of 1845 reads:

If the garnishee in his answers admit (sic) that there is in his possession or control property of the defendant liable under said act to attachment, then said magistrate may enter judgment specially, to be levied out of the effects in the hands of the garnishee, or so much of the same as may be necessary to pay the debt and costs: Provided however, That the Wages of any laborers, or the Salary of any person in Public or private employment, shall not be liable to attachment in the hands of the employer.
Act of April 15, 1845, P.L. 459, 42 P.S. § 886.

required in a consignment contract, the Superior Court, held “consignment agreements may form the basis” for an action in conversion. *Shonberger v. Oswell*, 530 A.2d 112, 114 (Pa. Super., 1987). This court does not believe the royalty payments allegedly owed to plaintiffs were a “debt;” royalty payments are more analogous to payments made under a consignment contract. Chuck Gamble’s motion to dismiss plaintiffs’ conversion claim will be denied.

3. Chuck Gamble’s Request for Attorneys’ Fees

Chuck Gamble’s Motion for Summary Judgment requests the court to award attorneys’ fees under the copyright act. *See* 17 U.S.C. § 505. Under Section 505, a district court “in its discretion may allow the recovery of full costs by or against any party . . . [and] the court may also award a reasonable attorney’s fee to the prevailing party as part of the costs.” The statutory authorization is broad, it does not require bad faith on the part of the adversaries, and it reveals an intent to rely on the sound judgment of the district court. *See Lieb v. Topstone Industries, Inc.*, 788 F.2d 151, 155 (3d Cir. 1986).

Chuck Gamble was the chief Operating Officer when PIR entered into licensing agreements with Capitol Records in 1998 and 2003. Chuck Gamble argues the evidence shows none of the compositions for which plaintiffs alleged copyright infringement were exploited during the time he has worked at PIR. Plaintiffs did not direct any questions to Chuck Gamble concerning their copyright infringement claims during his deposition. Motion for Summary Judgment at 15, *Lever* (04-1489) (November 11, 2004).

Plaintiffs argue they maintain exclusive ownership over some of The O’Jays compositions, but others are co-owned by plaintiffs and Gamble and Huff. Since PIR licensing agreements with Capitol Records were allegedly entered into without plaintiffs’ knowledge, the

plaintiffs had no way of knowing before discovery which compositions were involved in the licensing agreements. Plaintiffs' Response to Defendants' Motion for Summary Judgment at 3³, *Lever* (04-1489) (Dec. 6, 2004). As plaintiffs concede, the co-owner of a copyright can not recover for copyright infringement by another co-owner. Once plaintiffs realized all the compositions were subject to the Capitol Records licensing agreement are co-owned by defendants, plaintiffs withdrew their copyright violation allegations.

Chuck Gamble, an officer of PIR, would have been deposed in this action even if he had not been named a defendant. He is represented by the same attorneys as the other defendants. It is not clear how the defendants are dividing the cost of defending this litigation, but the added expense of defending Chuck Gamble is likely *de minimis*. The court will decline Chuck Gamble's motion for attorneys' fees.

4. Striking Portions of the Second Amended Complaint

Plaintiffs second amended complaint accuses defendants of criminal conduct and violations of rights of individuals not party to this action. For example, paragraph 186 asserts that in "directing and personally participating in the deliberate, knowing and intentional misappropriation of monies belonging to Plaintiffs, Mr. Gamble committed theft and conversion."

Plaintiffs have no standing to assert claims on the behalf of non-parties and the court finds the criminal allegations unnecessary and inappropriate. Chuck Gambles' request to strike portions of the second amended complaint will be granted.

An appropriate order follows.

³ Had plaintiff paginated their brief, the referred to statement would appear on page 3.

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GAMBLE-HUFF PRODUCTIONS, KENNETH :
GAMBLE, CHUCK GAMBLE and LEON :
HUFF :
 :
and :
 :
THE RIGHT STUFF / A DIVISION OF :
CAPITOL RECORDS : **NO. 04-1489**

ORDER

AND NOW, this 14th day of September, 2005, upon consideration of Defendant Chuck Gamble's Motion for Summary Judgment (Paper #32); Defendant Chuck Gamble's Motion to Dismiss and in the Alternative to Strike Portions of the Second Amended Complaint (Paper #56); and plaintiffs' responses thereto; for the reasons stated in the accompanying Memorandum, it is **ORDERED:**

1. Defendant Chuck Gamble's Motion for Summary Judgment on counts I through V of the Second Amended Complaint (Paper #32) is **GRANTED**.
2. Defendant Chuck Gamble's Motion to Dismiss the Conversion Claim and in the Alternative to Strike Portions of the Second Amended Complaint (Paper #56) is **DENIED** in part and **GRANTED** in part. The motion to dismiss the conversion claim is **DENIED**; the request in the alternative for the court, pursuant to Fed. R. Civ. P. 12(f), to alternatively strike those portions of the second amended complaint that allege either criminal conduct or a claim on behalf of non-parties is **GRANTED**. The second amended complaint shall read as follows in pertinent part:

Paragraph 181. Defendant Chuck Gamble deliberately and personally converted for use as operating funds of Philadelphia International Records [PIR] amounts of money that belonged to Plaintiffs.

Paragraph 184. In promoting, directing, causing and participating in the misappropriation of funds belonging to Plaintiffs, Chuck Gamble willfully failed to observe reasonable commercial standards of management and integrity.

Paragraph 185. Chuck Gamble is personally liable for his misfeasance in the misappropriation of Plaintiffs' property.

Paragraph 186. In directing and personally participating in the deliberate, knowing and intentional misappropriation of monies belonging to Plaintiffs, Mr. Gamble committed conversion.

Paragraph 193. Mr. Chuck Gamble deliberately misappropriated and directed others to misappropriate funds not belonging to him and not belonging to PIR to the detriment of Plaintiffs.

/s/ Norma L. Shapiro

Norma L. Shapiro, S.J.