

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

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

Norma L. Shapiro, S.J.

October 25, 2005

MEMORANDUM AND ORDER

Plaintiffs Eddie Levert and Walter Williams (“plaintiffs”) are citizens of Nevada; they are singers, songwriters and original members of the “rhythm and blues” group, “The O’Jays.” Defendants Kenneth Gamble and Leon Huff are citizens of Pennsylvania; they 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 Kenneth Gamble and Leon Huff. Am. Compl. at 2. Defendant Gamble-Huff Productions is the predecessor in interest to Assorted Music, d/b/a Philadelphia International Records (“PIR”). Defs.’ Prop. Counterst. of Facts at 21. Kenneth Gamble is the president of Assorted Music and Leon Huff holds the offices of Vice-President, Secretary and Treasurer. Am. Compl. at 2

Plaintiffs have alleged defendants¹ owe them royalty payments on recording contracts dating as far back as 1972. The contracts provide that advances and production costs incurred by defendants are to be deducted from royalties earned by plaintiffs. Plaintiffs allege that defendants have assessed bogus and inflated production costs and false advances against royalties earned to overstate amounts supposedly owed by plaintiffs and to avoid payment of royalties to them.²

Plaintiffs' amended complaint asserted six counts: two counts alleged copyright infringement; three counts alleged breach of contract; and one count alleged fraud. In their second amended complaint, plaintiffs added another count for conversion against Chuck Gamble.

Before the court are four motions for summary judgment: (1) defendants Kenneth Gamble, Leon Huff and Gamble-Huff Productions' motion for summary judgment on all counts; (2) plaintiffs' motion for summary judgment on count III alleging non-payment of royalties; (3) plaintiffs' motion for summary judgment on defendants' counterclaim for abuse of process; and (4) defendants' motion for summary judgment on counts III, IV and V alleging breach of contract.

Summary judgment is appropriate if 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

¹ In this memorandum opinion, "defendants" refers to all parties named as defendants in the case caption.

² Discovery in this case was limited to the period of 1998 to present. Dec. 12, 2004 Mem. and Order at 3 (finding that plaintiffs failed to exercise the due diligence required to toll the Pennsylvania statute of limitations for a breach of contract action). This ruling applies to plaintiffs and defendants alike; plaintiffs may not seek royalty payments owed to them before 1998, and defendants may not offset any liability incurred since 1998 by deficits outstanding before 1998. Id.

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.

JURISDICTION

Plaintiffs originally claimed two bases for jurisdiction: diversity jurisdiction (28 U.S.C. § 1332), and federal question jurisdiction for alleged copyright violations (28 U.S.C. § 1338). Under 28 U.S.C. § 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 Counts I and Counts II alleging copyright violations. Jan. 5, 2005 Tr. at 7. 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 its 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. Judicial economy and the court's familiarity with the complex factual history of the present action justify the continued exercise of supplemental jurisdiction.

DISCUSSION

1. Defendants Kenneth Gamble, Leon Huff, and Gamble-Huff Productions' Motion for Summary Judgment:

Plaintiffs have asserted three breach of contract counts against defendants Kenneth Gamble, Leon Huff and Gamble-Huff Productions. These defendants seek summary judgment on each of the breach of contract counts because none of them were parties to the contracts at issue.

Plaintiffs entered into a contract with Gamble-Huff Productions, Inc. in 1972, which was amended in 1975. Plaintiffs, William Powell³ and Leon Huff signed the 1972 contract; above Leon Huff's name are the words, "Gamble-Huff Productions, Inc."⁴ Ex. I to Warshavsky Decl. at 18 and 22. Plaintiffs entered into a contract with Assorted Music, d/b/a PIR, in 1977. Plaintiffs and Kenneth Gamble signed the 1977 contract; above Kenneth Gamble's name are the words, "Assorted Music Inc. d/b/a Phila[delphia] International Records." Ex. K to Warshavsky Decl. at 18. Plaintiffs again entered into a contract with Assorted Music, d/b/a PIR, in 1979, which was amended in 1980, 1982 and 1984. Plaintiffs and Kenneth Gamble signed the 1979 contract;

³ Powell, who died in 1977, is one of the original members of The O'Jays.

⁴ Plaintiffs, Powell and James A. Bishop signed the 1975 amendment. Ex. J to Warshavsky Decl. at 2 (letter) and 5 (amendment). Above Bishop's name are the words, "Gamble-Huff Productions, Inc."; below his name appears the words, "Exec. V.P. Gen. Mg." Id.

above Kenneth Gamble's name are the words, "Assorted Music, Inc. d/b/a Philadelphia International Records."⁵ Ex. L to Warshavsky Decl. at 27. On the next and last page of the 1979 contract, there is an additional clause that states in full:

In order to induce Assorted Music, Inc., d/b/a Philadelphia International Records to enter into the foregoing agreement with Eddie Levert and Walter Williams dated March 2, 1979, the undersigned hereby assents to the execution of such agreement and agrees to be bound by the terms and conditions thereof.

Id. at 28. Below this clause is Kenneth Gamble's signature; above his signature are the words, "Gamble-Huff Productions."

For each of the contracts at issue, Defendants assert that Kenneth Gamble or Leon Huff signed as agents of PIR, not on behalf of themselves or their partnership, Gamble-Huff Productions. Therefore, defendants argue that plaintiffs cannot seek to hold Kenneth Gamble or Leon Huff, or their partnership, liable for the breach of contract counts. Plaintiffs make two arguments in response. First, plaintiffs argue liability is appropriate for Kenneth Gamble and Leon Huff, and their partnership, because Assorted Music is sham corporation that operates as the alter ego of the two men and piercing the corporate veil is appropriate. Second, plaintiffs argue Gamble-Huff Productions and its two partners assumed the obligations of the 1979 contract by signing the "inducement clause" cited above and including it as an addendum to the

⁵ Plaintiffs and Kenneth Gamble signed the 1980 amendment; above Kenneth Gamble's signature are the words, "Assorted Music, Inc. d/b/a Philadelphia International Records." Ex. M to Warshavsky Decl. at 6. Plaintiffs, Sammy Strain (the performer who replaced Powell) and another person whose signature is illegible signed the 1982 amendment; above the illegible signature are the words, "Assorted Music, Inc. d/b/a Philadelphia International Records," and below the signature are the words, "V.P. Business Affairs." Ex. N to Warshavsky Decl. at 4. Plaintiffs, Strain and Kenneth Gamble signed the 1984 amendment; above Kenneth Gamble's signature are the words, "Assorted Music, Inc. d/b/a Philadelphia International Records." Ex. O to Warshavsky Decl. at 3.

1979 contract. Defendants respond by arguing that the inducement clause was between PRI and Gamble-Huff Productions, and not between plaintiffs and Gamble-Huff Productions.

With regard to the 1979 contract, defendants argument is weak given the clear language of the inducement clause: “the undersigned [Gamble-Huff Productions and Kenneth Gamble] hereby assents to the execution of such agreement [between PRI and plaintiffs] and agrees to be bound by the terms and conditions thereof.” With regard to the other contracts, plaintiffs have set forth some evidence suggesting that Assorted Music could be the alter ego of Kenneth Gamble and Leon Huff. For example, the testimony of Earl Morgenstern, Assorted Music’s outside accountant, suggests that Assorted Music might be, among other things, an underfunded corporate structure that practices few corporate formalities. Morgenstern Dep. at 22-26.

Whether Kenneth Gamble, Leon Huff and Gamble-Huff Productions were parties to the contracts at issue are disputed issues of material fact. The court will deny defendants Kenneth Gamble, Huff and Gamble-Huff Productions’ motion for summary judgment.

2. Plaintiff’s Motion for Summary Judgment on Count III

Count III of plaintiffs’ second amended complaint alleges defendants breached the contracts by making improper royalty accounting statements and improper charges against plaintiffs’ royalty account or failing to make timely royalty accounting statements at all. Plaintiffs request summary judgment on count III because “[n]otwithstanding the reasons proffered by Defendants to explain their consistent underreporting, and non-reporting of royalties owed to Plaintiffs, Defendants, through their own testimony, admit liability for breach of contract.” Pls.’ Br. at 3.

PIR concedes in its brief it “has not always reported to Plaintiffs in a timely fashion

[and] there have been mistakes in the reporting procedures.” Defs.’ Resp. at 4. Defense counsel also admitted at oral argument that during the four years prior to the filing of the complaint “[t]here were times . . . PIR did not timely give statements at various points.”⁶ 1/5/05 Hr’g Tr. at 26. Defense counsel admitted that “PIR missed gaps” but argued PIR would attempt to remedy the problem by reconstructing missing royalty statements. Id. Notwithstanding PIR’s reconstructed royalty statements, defense counsel admitted that failing to make timely statements “was a mistake . . . [t]hat’s what happened at times and it was a mistake, it was.” Id. at 61.⁷

Despite defendants’ concessions that royalty statements were not always properly filed, defendants argue plaintiffs’ motion should be denied because: (1) plaintiffs’ failure to make timely written objections to the contested or absent royalty statements as purportedly required under the various contracts foreclosed their right to challenge the royalty accountings; and (2) plaintiffs incurred no damages as a result of defendants’ reporting errors or omissions because plaintiffs were always in a deficit position and thus not entitled to any royalty payments.

Defendants’ first argument appears to have no merit. Defendants’ second argument might have merit but genuine issues of material fact exist relating to damages.

Each of the contracts at issue remain in effect with regard to PIR’s ongoing obligation to make timely royalty payments. However, with regard to PIR’s obligation to make timely royalty

⁶ Discovery in this case was limited to the period of 1998 to present. See supra note 1.

⁷ This admission superceded defendants’ statement to the opposite effect in its pretrial memorandum. See Defs’ Pre-Trial Memo. at 100.

statements, the 1979 contract as amended is the operative contract.⁸ Although defendants argue plaintiffs foreclosed their right to challenge the royalty statements made or due under the 1972 and 1977 contracts, defendants do not argue plaintiffs' claims are barred under the 1979 contract. The applicable provision of the 1979 contract does not foreclose plaintiffs' right to challenge the statements due them. Paragraph 10 states in relevant part:

(a) We will compute royalties payable to you hereunder within ninety (90) after June 30 and after December 31 of each year during which records made

⁸ With regard to PIR's obligation to make timely royalty accounting statements, the 1977 contract supercedes the 1972 contract as amended. Paragraph 35 of the 1977 contract states: "It is agreed and understood between all of the parties hereto that the agreement of January 15, 1972 between Walter Williams, Eddie Levert and William Powell and Gamble-Huff Productions, Inc. as amended August 25, 1975 shall be deemed to have expired as though the term thereof had been completed." Ex. K to Warshavsky Decl. at 18. However, PIR's obligation to continue to make timely royalty payments for the recordings produced under the royalty provisions of the 1972 contract as amended remains intact because of the savings clause in paragraph 35: "It is agreed between all of the parties hereto that the normal obligations on each of the parties that would continue after the expiration of the term of said Agreement as amended shall remain as obligations on all of said parties." Id.

With regard to PIR's obligation to make timely royalty accounting statements, the 1979 contract supercedes the 1977 contract in the same way the 1977 contract supercedes the 1972 contract as amended. Paragraph 1(c) of the 1979 contract states: "Effective upon the execution of this agreement, the term of the agreement between you and us dated as of March 15, 1977 (the "1977 Agreement") is hereby terminated as of the date hereof and all parties shall be deemed to have fulfilled all of their obligations thereunder, except those which survive the end of the term (e.g. warranties, re-recording restrictions and royalty payments)." Ex. L to Warshavsky Decl. at 1. PIR's obligation to continue to make timely royalty payments for the recordings produced under the royalty provisions of the 1977 contract and the 1972 contract as amended remains intact because of the savings clause in paragraph 1(c) of the 1979 contract: "this subparagraph shall not be deemed to terminate our obligations to pay royalties to you in accordance with the terms and conditions of the 1977 Agreement or any other agreement between you and us with respect to sales of phonograph records derived from master recordings recorded under any such agreement, subject to recoupment of all advances chargeable against such royalties." Id. at 1-2.

Because no future contract superceded the 1979 contract as amended, PIR's obligation to continue to make timely royalty payments for the recordings produced under the royalty provisions of the 1979 contract as amended remains unchanged. However, the 1979 contract as amended is the operative contract with regards to PIR's obligation to make timely royalty accounting statements.

hereunder are sold for the preceding six (6) month period, and will render accountings for and pay such royalties, except as provided in paragraph 17 hereof [dealing with PIR's options in case of plaintiffs' failure to fulfill recording commitments], less any unrecouped advances under this and/or any other agreement between you and us within such ninety (90) days except with respect to sales of records upon which royalties are payable to us by a distributor thereof.

(e) Unless notice shall have been given to us as provided in subparagraph (c) hereof [dealing with plaintiffs' right to inspect PIR's books and records], each royalty statement rendered to you shall be final, conclusive and binding on you and shall constitute an account stated. You shall be foreclosed from maintaining any action, claim or proceeding against us in any forum or tribunal with respect to any statement or accounting due hereunder unless such action, claim or proceeding is commenced against us in a court of competent jurisdiction within three (3) years after the date on which such statement is rendered.

Ex. L. to Warshavsky Decl. at 8-9 (emphasis added).⁹ Because timely statements were not “rendered,” the specific limitations period in which to challenge royalty statements is inapplicable.¹⁰

Although defendants have conceded their failure to timely produce royalty accountings in accordance with their contractual obligations, and plaintiffs are not barred from challenging the missing royalty statements under the limitations period of the 1979 contract, plaintiffs have not yet made a showing of damages incurred as a result of defendants' failure to provide royalty statements. Genuine issues of material fact exist relating to damages. The court will deny

⁹ The 1980, 1982 and 1984 amendments do not have any effect on the terms in section (a) or (e) of paragraph 10 of the 1979 contract.

¹⁰ Pennsylvania law permits parties to agree to a limitations period shorter than the applicable statute of limitations. 42 Pa.C.S. § 5501(a) states: “An action, proceeding or appeal must be commenced within the time specified in or pursuant to this chapter [entitled “Limitations of Time”] unless, in the case of a civil action or proceeding, a different time is provided by this title or another statute or a shorter time which is not manifestly unreasonable is prescribed by written agreement.” See also Smith v. Am. Equity Ins. Co., 235 F.Supp.2d 410, 412 (E.D. Pa. 2002) (Pollak, J.) (holding one-year contractual limitations period for action not manifestly unreasonable). A three-year limitation period is not manifestly unreasonable.

plaintiffs' motion for summary judgment on count III.

3. Plaintiff's Motion for Summary Judgment on Defendants' Counterclaim for Abuse of Process

Defendants have asserted a counterclaim alleging abuse of process based on plaintiffs' attempt to secure an injunction preventing the release of the "Together We Are One" ("Together") album. The "Together" album was composed of previously recorded but unreleased songs by The O'Jays. Plaintiffs allege they sought to block the album's release because plaintiffs "believed the recordings to be inferior" since they "had been rejected for release when initially recorded." Pls. Br. at 1. Defendants assert plaintiffs had "no basis whatsoever for the preliminary injunction proceeding." Jan. 5, 2005 Tr. at 31. Injunctive relief was denied by the Honorable R. Barclay Surrick.

In assessing a claim of abuse of process under Pennsylvania law, "a court should ask whether there has been a 'perversion' of the process, or, whether a legal process has been used 'as a tactical weapon to coerce a desired result that is not the legitimate object of that process.'" Gen. Refractories Co. v. Fireman's Fund Ins. Co., 337 F.3d 297, 307 (3d. Cir. 2003); McGee v. Feege, 535 A.2d 1020, 1026 (Pa. 1987). A court must look at the legal process used and determine whether it was used primarily – not exclusively – to achieve a goal unauthorized by the procedure in question. Gen. Refractories, 337 F.3d at 305. If plaintiffs' primary purpose in seeking injunctive relief was not legitimate, defendants' abuse of process claim can survive, even if plaintiffs' secondary purpose was legitimate.

There is some evidence that plaintiffs' primary purpose for seeking injunctive relief was not legitimate. Plaintiffs had previously agreed to produce an album consisting in part of the

unreleased songs included in the “Together” album, the same songs plaintiffs later claimed were inferior when they sought to block that album’s release. April 9, 2004 Order at 2 (“Defendants offered . . . to produce a record comprised in part . . . of Unreleased Songs, which were owned by Defendants. Plaintiffs agreed to this proposal.”) Taking all inferences in favor of defendants (i.e., counterclaim plaintiffs), genuine issues of material fact remain regarding plaintiffs’ primary purpose for seeking injunctive relief. The court will deny plaintiffs’ motion for summary judgment on defendants’ counterclaim for abuse of process.

4. Defendants’ Motion for Partial Summary Judgment

Plaintiffs allege defendants owe them royalty payments for income reported to PIR by Sony Music Entertainment, Inc., (“Sony”) on statements bearing the codes 0144640059 and 01446345059. At the relevant time, Sony was the entity distributing The O’Jays recordings; it reported sales and made payments to PIR. Under the terms of the contracts between The O’Jays and PIR, a certain percentage of the royalties was due plaintiffs and a certain percentage was retained by PIR. Not surprisingly, the parties dispute how the percentages were calculated under their various contracts. Defendants contend the two disputed statement codes reported income owed to PIR and seek partial summary judgment in favor of PIR on plaintiffs’ counts III, IV and V alleging breach of contract for claims relying on income detailed in the codes 0144640059 and 01446345059.

The parties have deposed two individuals with knowledge of the disputed statements: James Harrington, the former Director of Royalty Audits and Licensing for Sony Music Entertainment, and Earl Morgenstern, a former accountant for PIR.

Defendants claim the “unequivocal testimony” of Mr. Harrington “is that Plaintiffs have

no claim to this income.” Defs.’ Br. at 2. Defendants argue that Mr. Harrington testified the two accounts report income to be paid to PIR because codes ending in numbers lower than “50” “were artist codes” (i.e., accounts reporting income that plaintiffs could claim) and that accounts ending in numbers between 50 and 99 were producer codes (i.e., accounts reporting income that defendants could claim). Defs.’ Br. at 4.

Mr. Harrington’s testimony is inconsistent. He testified one account ending in the number “80” was an artist account, and he also testified an account ending in the number “17” was a producer account. Harrington Dep. at 96:24-25; 144:24 - 145:2. There are disputed issues of material fact relating to whether the codes 0144640059 and 01446345059 were artist or producer accounts. Because of the inconsistency of Mr. Harrington’s testimony, the court need not address the testimony of Mr. Morgenstern. The court will deny defendants’ motion for partial summary judgment.

An appropriate order follows.

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EDDIE LEVERT, WALTER WILLIAMS,	:	CIVIL ACTION
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	:	
v.	:	
	:	
PHILADELPHIA INTERNATIONAL	:	
RECORDS, ASSORTED MUSIC, INC.,	:	
GAMBLE-HUFF PRODUCTIONS, KENNETH	:	
GAMBLE, CHUCK GAMBLE and LEON	:	
HUFF	:	NO. 04-1489

ORDER

AND NOW, this 25th day of October, 2005, upon consideration of defendants Kenneth Gamble, Leon Huff and Gamble-Huff Productions' motion for summary judgment on all counts (Paper #37), plaintiffs' motion for summary judgment on count III alleging non-payment of royalties (Paper #42), plaintiffs' motion for summary judgment on defendants' counterclaim for abuse of process (Paper #45), and defendants' motion for summary judgment on counts III, IV and V alleging breach of contract (Paper #64), and the responses thereto, for the reasons stated in the accompanying Memorandum, it is **ORDERED**:

1. Defendants Kenneth Gamble, Leon Huff and Gamble-Huff Productions' motion for summary judgment (Paper #37) is **DENIED**.
2. Plaintiffs' motion for partial summary judgment (Paper #42) is **DENIED**.
3. Plaintiffs' motion for partial summary judgment (Paper #45) is **DENIED**.
4. Defendants' motion for partial summary judgment (Paper #64) is **DENIED**.
5. The final pretrial conference is scheduled for **November 10, 2005 at 4:00 p.m.** This case will be placed in the jury trial pool on **November 14, 2005.**

/s/ Norma L. Shapiro
Norma L. Shapiro S.J.