

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

MICHAEL A. LOWE	:	January Term 2004
	:	
Plaintiff,	:	No. 1112
	:	
v.	:	
	:	Commerce Program
TUFF JEW PRODUCTIONS, et al.	:	
	:	Control No.: 062449, 062778
Defendants.	:	

ORDER and MEMORANDUM

AND NOW, this 6th day of March 2006, upon consideration of Defendants' Preliminary Objections, all responses in opposition, the respective memoranda and all matters of record, it hereby is **ORDERED** as follows:

1. The Preliminary Objections of Defendants Andre Young, Aftermath Entertainment, Alvin Nathaniel Joiner, Hennesy for Everyone Music, Ain't Nuthin' But Funkin' Music, Hard Working Black Folks Music, Voco Music and Loud Records pursuant to Pa.R.C.P. 1028 (a)(1) are **SUSTAINED** and all claims against these defendants are **DISMISSED** for lack of personal jurisdiction.

2. The Preliminary Objections of Defendants Scott Storch and Tuff Jew Productions pursuant to Pa.R.C.P. 1028 (a)(1) are **SUSTAINED** and all claims against these defendants are **DISMISSED** for improper service.

3. The Preliminary Objections of Defendant Sony Music Entertainment (Control No. 062278) pursuant to Pa.R.C.P. 1028 (a)(4) are **SUSTAINED** and all claims against Sony are **DISMISSED** for legal insufficiency.

BY THE COURT:

MARK I. BERNSTEIN, J.

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

MICHAEL A. LOWE

Plaintiff,

v.

TUFF JEW PRODUCTIONS, et al.

Defendants.

:
:
:
:
:
:
:
:
:
:
:

January Term 2004

No. 1112

Commerce Program

Control No.: 062449, 062778

MEMORANDUM OPINION

MARK I. BERNSTEIN, J.

Currently before the court are the separate Preliminary Objections of Defendants Scott Storch and Tuff Jew Productions (Control No. 062449) and Defendants Andre Young, Aftermath Entertainment, Alvin Nathaniel Joiner, Hennessy for Everyone Music, Ain't Nuthin' But Funkin' Music, Hard Working Black Folks Music, Voco Music, Loud Records and Sony Music Entertainment (Control No. 062278). For the reasons fully set forth below, said Preliminary Objections are sustained and Plaintiff's Amended Complaint is dismissed in its entirety.

BACKGROUND

Plaintiff Michael Lowe has brought the instant action for damages claiming that Defendants recorded, published and distributed a song he composed without permission or compensation. According to the Amended Complaint, Plaintiff brought several songs, including one titled "West Coast," to Storch, who is alleged to be the CEO and Managing Member of Defendant Tuff Jew Productions ("Tuff Jew"). Plaintiff contends that he and Storch had a "long standing agreement" pursuant to which Plaintiff was to receive producer credit as well as

monetary compensation if any of Plaintiff's musical compositions were used by Storch. Plaintiff claims that Storch brought the song "West Coast" to Defendant Andre Young (a.k.a. "Dr. Dre"), which was eventually recorded under the title "X" by Defendant Alvin Nathaniel Joiner (a.k.a. "Xzibit"), with Young as executive producer. The various other Defendants were allegedly involved in the production, distribution and promotion of the album, titled "Restless." The album was released in December 2000 and sold millions of copies.

In 2002, Plaintiff filed an action in the United States District Court for the Eastern District of Pennsylvania asserting federal copyright infringement and state common law claims in connection with the same song and actions at issue in this case (the "Federal Action"). On November 20, 2003, the Hon. Robert F. Kelly, Sr., granted summary judgment in favor of the Defendants on the copyright infringement claim. Judge Kelly found that Plaintiff's own deposition testimony and affidavit established that he had granted Storch a nonexclusive license to use "West Coast" exactly as it had been used by Young.¹ Judge Kelly also dismissed the state law claims and granted attorneys' fees and costs to Defendants. Judge Kelly's decision was affirmed by the United States Court of Appeals For the Third Circuit, with opinion, on March 23, 2005.

Thereafter, Plaintiff filed the instant action asserting the following claims against all Defendants: 1) conversion; 2) breach of contract; 3) tortious breach of contract; and 4) conspiracy. Defendants have filed Preliminary Objections to all claims; each will be addressed in turn.

¹ See Federal Action Opinions, attached to Recording Defendants' Memorandum as Exhibits 2 and 3.

DISCUSSION

A. This Court Lacks Jurisdiction over the Recording Defendants (Other Than Sony)

Defendants Andre Young, Aftermath Entertainment, Alvin Nathaniel Joiner, Hennesy for Everyone Music, Ain't Nuthin' But Funkin' Music, Hard Working Black Folks Music, Voco Music and Loud Music (the "Recording Defendants") have filed Preliminary Objections pursuant Pa.R.C.P. 1028 (a)(1) asserting lack of personal jurisdiction.² This court finds that Plaintiff has failed to demonstrate sufficient facts to establish personal jurisdiction over the Recording Defendants.

Where a party objects to a court's exercise of personal jurisdiction, the non-moving party bears the burden of demonstrating contacts with the forum state sufficient to justify the assertion of personal jurisdiction. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); Barr v. Barr, 2000 Pa. Super. 99, 749 A.2d 992 (2000). Pursuant to the Judiciary Act, 42 Pa.C.S.A. § 5301, *et seq.*, Pennsylvania courts may exercise two types of *in personam* jurisdiction over a non-resident defendant. One type of personal jurisdiction is general jurisdiction, which is founded upon a defendant's general activities within the forum as evidenced by continuous and systematic contacts with the state. The other type is specific jurisdiction, which has a more defined scope and is focused upon the particular acts of the defendant that gave rise to the underlying cause of action. Mar-Eco, Inc. v. T & R & Sons Towing & Recovery, Inc., 2003 Pa. Super. 444, 837 A.2d 512 (2003). Regardless of whether general or specific *in personam* jurisdiction is asserted, the propriety of such an exercise must be tested against the Pennsylvania Long Arm Statute, 42 Pa.C.S.A. § 5322, and the Due Process Clause of the Fourteenth Amendment.

² Defendant Sony Music Entertainment ("Sony") admits that this court has jurisdiction over it, as it has offices in Philadelphia, Pennsylvania. Sony Ans. at ¶ 15. The specific claims against Sony are discussed in further detail, *infra* at pp. 7-10.

At bar, this court finds that Plaintiff has failed to demonstrate sufficient facts to establish either general or specific jurisdiction over the Recording Defendants, despite the fact that he was given the opportunity to conduct jurisdictional discovery by the court. With respect to individuals, general jurisdiction only exists if there is a presence or domicile in Pennsylvania when process is served, or if there is consent. 42 Pa.C.S.A. § 5301 (a)(1). There is no consent here. According to the Amended Complaint, Andre Young and Alvin Nathaniel Joiner are residents of California. These Defendants have declared that they do not do business, reside, have offices or own property in Pennsylvania.³ Plaintiff has offered no evidence to the contrary and has not established personal jurisdiction over Young or Joiner.

With respect to the corporate defendants, Pennsylvania courts may exercise general personal jurisdiction where the corporation carries on “a continuous and systematic” part of its general business within Pennsylvania. 42 Pa. C.S. § 5301(a)(2)(iii). Since there is no established legal test to determine whether a corporation’s activities are sufficiently continuous and systematic to warrant the exercise of general jurisdiction, a court must engage in a factual analysis that focuses on the overall nature of the activity, rather than its quantitative character. Bizarre Foods, Inc. v. Premium Foods, Inc., 2003 U.S. Dist. LEXIS 8166 (E.D. Pa. May 16, 2003). In order to meet constitutional muster, a defendant's contacts with the forum state must be such that the defendant could “reasonably anticipate being called to defend itself in the forum.” Taylor v. Fedra Int'l, Ltd., 2003 Pa. Super 233, 828 A.2d 378 (2003). The facts must demonstrate that defendant “purposefully directed its activities to the forum and conducted itself in a manner indicating that it has availed itself to the forum's privileges and benefits such that it should also be subjected to the forum state's laws and regulations.” Id.

³ See Declarations of Defendants Andre Young, Alvin Nathaniel Joiner and Rich Isaacson, attached to Recording Defendants’ Preliminary Objections as Exhs. 4-6.

Plaintiff has likewise failed to produce specific facts to demonstrate the corporate defendants have the necessary contacts with Pennsylvania, Defendants Hennesy for Everyone Music, Ain't Nuthin' But Funkin' Music, Hard Working Black Folks Music, Voco Music and Loud Records are each described with a business address of either New York or California. These Defendants have likewise declared that they do not do business, reside, have offices or own property in Pennsylvania.⁴ Plaintiff has produced no evidence to support his claims of jurisdiction. Plaintiff's general allegations that Young and Joiner have performed concerts in Philadelphia and that records have been promoted and sold in Pennsylvania, from which each of the Recording Defendants allegedly received royalties, is insufficient to demonstrate sufficient minimum contacts. Only Sony (which does not contest jurisdiction) and Loud Records are even alleged to have actually distributed the album in Pennsylvania. Even if accepted as true, without any proof, such allegations alone are insufficient form the basis for general jurisdiction. "[T]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum state. Kachur v. Yugo Am., 534 Pa. 316, 324-325, 632 A.2d 1297 (1993)(citing Asahi Metal Industry Co., Ltd. v. Superior Court of California, 480 U.S. 102, 112 (1987)). Without specific evidence of conduct by the Defendants which demonstrates an intent or purpose to serve the market in Pennsylvania, Plaintiff has not established general jurisdiction.

Plaintiff has also failed to demonstrate specific jurisdiction, which focuses upon the particular acts giving rise to the underlying cause of action. The activity that Plaintiff alleges as the basis of his claims against the Recording Defendants – the unauthorized recording of “West

⁴ See Declarations of Defendants Andre Young, Alvin Nathaniel Joiner and Rich Isaacson on behalf of corporate defendants Hennesy for Everyone Music, Ain't Nuthin' But Funkin' Music, Hard Working Black Folks Music, Voco Music and Loud Records, attached to Recording Defendants' Preliminary Objections as Exhs. 4-6.

Coast” – is alleged to have taken place in either New York or Los Angeles, not Pennsylvania. Aside from general allegations that the album was marketed and sold in Pennsylvania, Plaintiff has identified no other specific contacts with this forum state by any of the Defendants which would establish jurisdiction. Accordingly, this court finds that Plaintiff has offered no proof that the Recording Defendants have availed themselves of the privilege of conducting activities in Pennsylvania. The minimum contacts that would justify specific jurisdiction do not exist here.

As Plaintiff has failed to demonstrate sufficient facts to establish either general or specific *in personam* jurisdiction over the Recording Defendants, all claims against these Defendants are dismissed pursuant to Pa.R.C.P. 1028 (a)(1).

B. Plaintiff’s Claims Against Storch and Tuff Jew Are Dismissed For Improper Service

Defendants Storch and Tuff Jew have filed Preliminary Objections to the Amended Complaint alleging, *inter alia*, that they were not properly served. This action was commenced on January 9, 2004 by writ of summons, which was reissued on March 17, 2004. A complaint was filed on May 24, 2004, and amended on April 28, 2005. In the Amended Complaint, Storch is alleged to reside in Florida. As per the Amended Complaint, Tuff Jew was headquartered in Philadelphia “until Storch learned of the imminent institution of this suit...”; no other address is listed for Tuff Jew in the Amended Complaint. In his response to Defendants’ Preliminary Objections, Plaintiff contends that Tuff Jew is a Pennsylvania limited liability company with a registered office address and current business address in Philadelphia, Pennsylvania.

Plaintiff made various attempts, but was unable to make personal service upon either Tuff Jew or Storch in Philadelphia. Plaintiff’s affidavits of service state that these parties “moved”.⁵

⁵ See Plaintiff’s Affidavits of Service, attached to the Memorandum of Storch and Tuff Jew as Exhs. D and E.

Plaintiff then attempted to serve both Storch and Tuff Jew by certified mail in Florida.⁶ On

March 4, 2004, an affidavit of service was filed by Plaintiff which stated:

On or about 1-23-04 attempted service by mailing a copy of plaintiff's writ of summons by registered mail RRR addressed to Defendant Scott Storch. On or about 1-30-04 mailed a copy of plaintiff's complaint by ordinary mail addressed to the defendant with the return address of the sender appearing thereon. The certified letter was returned and marked "unknown 2-24-04". Also, the regular mail was returned and marked "unable to forward file."

When the defendant is located within the Commonwealth, Pa.R.C.P. 402 provides that service may be made "at any office or usual place of business of the defendant to his agent or to the person for the time being in charge thereof." Since Storch was alleged to reside outside the Commonwealth, Pa.R.C.P. 404 permits service by mail in accordance with Pa.R.C.P. 403 which allows for such service. However, Rule 403 specifically states:

(1) If the mail is returned with notation by the postal authorities that the defendant refused to accept the mail, the plaintiff shall have the right of service by mailing a copy to the defendant at the same address by ordinary mail with the return address of the sender appearing thereon. Service by ordinary mail is complete if the mail is not returned to the sender within fifteen days after mailing.

(2) If the mail is returned with notation by the postal authorities that it was unclaimed, the plaintiff shall make service by another means pursuant to these rules.

Since the attempted service by mail was unclaimed, Plaintiff was required by the rules to "make service by another means pursuant to these Rules." Plaintiff did not. Plaintiff's affidavits of service contain no information which demonstrates that the mail was refused by Lowe. Even if Tuff Jew and Storch were attempting to avoid service, as Plaintiff contends, Plaintiff's recourse is to file a Petition for Alternative Service in accordance with Pa.R.C.P. 430. No such petition has been filed. Since Plaintiff has failed to make proper service on either Storch or Tuff

⁶ Plaintiff has even failed to demonstrate that Tuff Jew could be served in this manner. However, since service was ultimately unsuccessful, this court need not address the issue.

Jew, their said Preliminary Objections are sustained and the complaint against them dismissed.

C. The Remaining Claims Against Sony

Plaintiff's claims against Sony are as follows: 1) conversion; 2) breach of contract; 3) tortious breach of contract; 4) and conspiracy. Sony has demurred to each.

1. Plaintiff's Conversion Claim (Count I) Fails As A Matter of Law

Count I purports to state a claim for conversion. Conversion is the deprivation of another's right of property in, or use or possession of, chattel, or other interference therewith, without the owner's consent and without lawful justification." McKeeman v. Corestates Bank, N.A., 2000 Pa. Super. 117, 751 A.2d 655, 659 n. 3 (2000). Plaintiff's conversion claim fails for several reasons. First, intangible property is not chattel that may be converted, unless merged into a tangible document. Id.; Northcraft v. Edward C. Michener Assoc., Inc., 319 Pa. Super. 432, 466 A.2d 620 (1983). The subject of Plaintiff's conversion claim is the song "West Coast," which is an intangible piece of music and therefore not the proper subject of a conversion claim.

Defendants also argue that Plaintiff's claim is barred under principles of collateral estoppel, as a result of the Federal Action.⁷ Collateral estoppel, also known as issue preclusion, may be asserted by a party to bar a claim based on an issue litigated in a previous action if: 1) the issue underlying the claim is identical to the one previously litigated; 2) final judgment in the previous action was rendered on the merits of the issue; 3) the party against whom the estoppel is asserted was party to the previous action, or in privity with such a party; and 4) the party against whom the estoppel is asserted had a full and fair opportunity to litigate the issue in the previous action. City of Pittsburgh v. Zoning Board of Adjustment of Pittsburgh, 522 Pa. 44, 559 A.2d 896 (1989).

⁷ Tuff Jew was not a party to the Federal Action.

As previously stated, in the Federal Action, Judge Kelly found that Plaintiff had consented to the of “West Coast”, specifically stating:

Through his own words, Lowe acknowledges that he created “West Coast Beat,” and gave it to Storch, with the intention and desire that it be incorporated into a musical composition by Dr. Dre , which is precisely the way in which it was allegedly used...Lowe’s version of the facts directly contradicts the basis of a copyright infringement claim, that the Defendants used “West Coast Beat” without his knowledge or permission...⁸

The basis of Storch’s current conversion claim is that “West Coast” was used without his consent. However, faced with identical facts, both the District Court and the Third Circuit found that, by his own admission, Plaintiff consented to Storch’s use of “West Coast.” As previously stated, conversion is the deprivation of another’s right of property *without the owner’s consent*. Plaintiff is estopped from claiming lack of consent as a result of the Federal Court Action, so his conversion claim necessarily fails as a matter of law. Accordingly, Count I is dismissed.

2. Plaintiff’s Contractual Claims Fails As to Sony (Counts II and III)

Counts II and III purport to state claims for breach of contract⁹ against all Defendants. To set forth a valid claim for breach of contract, Plaintiff must demonstrate: 1) the existence of a contract, including its essential terms; 2) breach of a duty imposed by the contract; and 3) resultant damages. CoreStates Bank, Nat’l Assn. v. Cutillo, 1999 Pa. Super. 14, 23 A.2d 1053 (1999). Plaintiff has failed to demonstrate the existence of any contract between itself and Sony. Accordingly, Counts II and III are dismissed.

⁸ See District Court Opinion, attached to Recording Defendants’ Memorandum as Exhibits 2 at 12-13.

⁹ Count III purports to state a claim for “tortious breach of contract.” However, whether Defendant breached its alleged contract as a result of “nonfeasance” or “misfeasance” is irrelevant. Intent is not an element of a breach of contract (or even quasi-contractual claim). Pennsylvania does not recognize a separate claim for “tortious breach of contract.”

3. Plaintiff Has Failed To State A Claim For Conspiracy (Count IV)

Count IV purports to state a claim for conspiracy. To properly present a claim of conspiracy, Plaintiff must demonstrate that each Defendant entered into an unlawful agreement for the express purpose of committing either a criminal act or an intentional tort. Burnside v. Abbott Laboratories, 351 Pa. Super. 264, 278, 505 A.2d 973 (1981). Proof of malice, or an intent to injure, is an “essential part” of this cause of action. GMH Assoc. v. Prudential Realty Group, 2000 Pa. Super. 59, 752 A.2d 889 (2000). Plaintiff has failed to pled any facts against Sony. In fact, Plaintiff does not allege any direct conduct by Sony whatsoever. Bald, conclusory allegations are insufficient to support a claim for conspiracy. Count IV is dismissed.

CONCLUSION

For the above-stated reasons, Defendants’ Preliminary Objections are sustained as follows:

1. The Preliminary Objections of Defendants Andre Young, Aftermath Entertainment, Alvin Nathaniel Joiner, Hennesy for Everyone Music, Ain’t Nuthin’ But Funkin’ Music, Hard Working Black Folks Music, Voco Music and Loud Records pursuant to Pa.R.C.P. 1028 (a)(2) are sustained and all claims against these defendants are dismissed for lack of personal jurisdiction.
2. The Preliminary Objections of Defendants Scott Storch and Tuff Jew Production pursuant to Pa.R.C.P. 1028 (a)(2) are sustained and all claims against these defendants are dismissed for improper service.
3. The Preliminary Objections of Defendant Sony Music Entertainment pursuant to Pa.R.C.P. 1028 (a)(1)(4) are sustained and all claims against Sony are dismissed for legal insufficiency.

The court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT:

MARK I. BERNSTEIN, J.

