SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: Commercial Division PART 48

KENYON & KENYON, LLP,
Plaintiff,

- Against -

SIGHTSOUND TECHNOLOGIES, LLC, a Delaware Limited Liability Company; SIGHTSOUND TECHNOLOGIES HOLDINGS, LLC, a Delaware Corporation, as Successor by Merger to SIGHTSOUND TECHNOLOGIES, INC., a Delaware Corporation; DMT LICENSING, LLC, a Delaware Limited Liability Company; and GENERAL ELECTRIC COMPANY,
Defendants.

Index No.: 650795/2014

DECISION/ORDER

Motion Sequence No.: 007

MASLEY, J.S.C.:

The issue on this motion is whether a law firm's trial against its former client for unpaid litigation fees may also proceed to trial against defendants, non-client entities, where proceeds from the settlement of the litigation were paid to defendants, instead of the former client. Defendants seek dismissal arguing that the plaintiff law firm waived its priority to the settlement proceeds when it consented to the client's asset sale to defendants. For the reasons stated below, the motion is granted in part and denied in part.

In this 2014 action, plaintiff, the law firm Kenyon & Kenyon (Kenyon), seeks $9 million, including legal fees and interest, arising from its representation of defendants SightSound Technologies LLC (SST LLC) and its member SightSound Technologies, Inc. (SST Inc.) (collectively SightSound), from 1999 to 2005, which included representation in patent infringement actions known as the N2K and Napster litigations. (NYSCEF Doc. No. [NYSCEF] 2, Complaint ¶1; NYSCEF 243, Alex LePore July 19, 2018 Affidavit (LePore Aff.) ¶¶8, 17). In motion sequence number 007, defendants SST LLC,[1] DMT Licensing, LLC (DMT), and General Electric Company (GE) move for partial summary judgment dismissing the third, fifth, and sixth causes of action.

Background

In the 1980s, SightSound invented a system for selling digital video and audio recordings electronically, through the internet. (NYSCEF 243, LePore Aff. at ¶3). SightSound held the patents related to its inventions. (*Id.* at ¶4). In the mid-to-late 1990s, SightSound sold the world's first electronic music download allowing a user to purchase an individual song or album and the world's first downloadable feature film. (*Id.* at ¶¶5, 6).

Initially, SightSound paid its legal fees, but by 2001 it owed Kenyon $1,776,407. (*Id.*, ¶11). In October 2001, Kenyon entered into a Security Agreement with SightSound (the Security Agreement). (*Id.* at ¶10). The Security Agreement provides that SightSound acknowledges its debt to Kenyon and "unconditionally and irrevocably agrees in favor of [Kenyon] . . . the prompt and complete payment and performance when due of the Obligations . . ." and "the Obligations are [not] and shall not become subject to any defenses, offsets, counterclaims or rights of recoupment that the Pledgor or its affiliates may have against the Secured Parties." (NYSCEF 3, Security Agreement at ¶2). The Security Agreement also provides that Kenyon has a security interest in a wide range of property "now owned or at any time hereafter acquired by" SightSound,

[1]According to Alex LePore, CFO of SST LLC and managing member of SightSound Technologies Holdings LLC (Holdings), Holdings is a successor by merger with SST Inc. (NYSCEF 243, LePore Aff. at¶1). References in this decision to SightSound include Holdings.

including patents, patent licenses, and "to the extent not otherwise included, all Proceeds and products of any and all of the foregoing (including, without limitation, license royalties and proceeds of infringement suits)." (*Id.* at ¶3). The security interests "(a) . . . will constitute perfected security interests on the Collateral in favor of the Secured Parties, as collateral security for the Obligations and (b) are prior to all other Liens on the Collateral in existence on the date hereof." (*Id.* at ¶4.3). The Security Agreement prohibits any sale or transfer of the Collateral subject to certain exceptions. (*Id.* at ¶5.5[a]).

By 2004, iTunes was launched, and Napster had added an online music store to its business. (NYSCEF 243, LePore Aff. at ¶14). In October 2004, SightSound initiated a patent infringement action against Napster, with Kenyon as its counsel. (*Id.* at ¶17; NYSCEF 274, U.S. District Court docket). By this point, SightSound could not fund its various litigations. (NYSCEF 243, LePore Aff. at ¶11).

In 2005, a number of technology companies expressed interest in acquiring SightSound's patents. (*Id.* at ¶18). SightSound accepted GE's offer to purchase SightSound's assets, invest in the patents, and fund SightSound's infringement lawsuits through a newly created entity, DMT. (*Id.* at ¶19-22). On November 4, 2005, DMT and SightSound signed an Asset Purchase Agreement (APA) which memorialized the terms of the prospective sale. (NYSCEF 244, APA). The APA defines SightSound's assets as its patents, along with materials, propriety and licensing rights, and other items related to the patents. (*Id.* at §§ 2.1 [a] – [d]). DMT purchased any settlement agreements and "all past, present and future claims of infringement of any of the Patents." (*Id.* at § 2.1 [e] – [f]). DMT agreed to fund the ongoing infringement lawsuits, which the parties termed "patent exploitation expenses." (*Id.*, § 6.2). DMT would acquire the sole discretion to protect SightSound's patents and would fund any litigation. (*Id.*, § 6.3).

In the APA, DMT and SightSound agreed that SightSound's revenue was to be distributed as follows, and in the following order of priority:

(i) "to DMT until the aggregate amount of the Patent Exploitation Expenses incurred . . . has been paid to DMT; and thereafter
(ii) to an escrow account . . . designated by DMT (which . . . shall have an aggregate amount at all times of up to $5,000,000), . . . to fund future anticipated working capital or other expenses. . .; and thereafter
(iii) fifty percent (50%) to SightSound or its designee and fifty percent (50%) to DMT."

(*Id.* at §7.2 [c]). The APA refers to SightSound's debt to Kenyon as "Lien Release Expenses" and provides that DMT would have sole discretion to deem these as patent exploitation expenses or pay them out of SightSound's 50% share. (*Id.* at §7.2 [e]).

On November 10, 2005, Kenyon, DMT, and SightSound entered into a consent agreement (the Consent Agreement) (NYSCEF 245) by which Kenyon consented to the transfer of certain collateral to DMT "pursuant to the terms hereof" (*Id.* at §5) and agreed to forbear enforcement of its lien against SightSound. (*Id.* at §1 [a]). Section 2 (a) states that "SightSound . . . reaffirms and confirms its obligations to [Kenyon] under the Contingency Agreement and the Security Agreement," and Section 3(a) states that "DMT acknowledges that the Assets . . . remain subject to the Kenyon Encumbrances on the terms set forth in the Security Agreement." (*Id.* at §§ 2[a], 3[a].) SightSound further agreed that it would "promptly and completely pay" this amount "when due." (*Id.* at §2 [a]). Also, SightSound acknowledged Kenyon's right to elect to receive 10% of SightSound's future income. (*Id.* at §§3 [b], 8). Section 6 entitled "Waiver" provides:

> "Waiver of Certain Rights. From and after the date of this Agreement and continuing until ninety (91) days after the Final Reexamination Date, [Kenyon]

> [Kenyon] agrees to Forbear Enforcing [Kenyon] Encumbrances. No later than ninety (90) days after the Final Reexamination Date, DMT shall notify the [Kenyon] in writing as to whether DMT elects to retain any Assets or Put some or all of the Assets. In the event that DMT elects to Put all of the Assets, DMT shall notify the [Kenyon] and this Agreement shall terminate and be of no force or effect. In the event that DMT elects to retain some or all of the Assets, DMT shall provide to [Kenyon] the Initial Operating Plan and [Kenyon] agrees to extend the time during which it will Forbear Enforcing [Kenyon] Encumbrances (the "Forbearance Period") until four hundred twenty six (426) days after the Final Reexamination Date. In the event that DMT elects to retain some or all of the Assets, [Kenyon] shall, on the date that is three hundred sixty five (365) days after the Final Reexamination Date, inform SightSound and DMT in writing of [Kenyon]'s election for satisfaction of indebtedness as set forth in Paragraph 8(a) below and, in the event that payment pursuant to clause (i) of Paragraph 8(a) is selected, to send SightSound a bill (with a copy to DMT) for the amount due. In addition, [Kenyon] hereby agrees that it shall not, and [Kenyon] hereby waives irrevocably any right to, contest or take any action to contest (i) the validity of the Sale, (ii) the validity of any License Agreements (including, without limitation, any DMT Affiliate License Agreements) now or hereafter in effect, or (iii) the [Kenyon]'s obligations and agreements set forth in this Agreement. [Kenyon] acknowledges and agrees that the foregoing provisions are, and are intended to be, an inducement to DMT to consummate the transactions contemplated by the Asset Purchase Agreement and DMT shall be deemed conclusively to have relied upon such provisions in acquiring and holding, or in continuing to hold, the Assets."

(*Id.* at §6). DMT had the right to hold the assets or return them to SightSound (the Put), without any liability to Kenyon. (*Id.* at §7). The Napster action had been stayed while DMT re-examined the relevant patents (NYSCEF 243, LePore Aff. ¶34), and DMT's option was tied to the end date of this examination. (NYSCEF 245, Consent Agreement, §8[a]). In the Consent Agreement, the APA's §7.2(c) is mentioned in two whereas clauses, having nothing to do with Kenyon, and §8(a) regarding the Put and Kenyon's election to receive 10%. It provides:

> (8) Satisfaction of Indebtedness; Release of the [Kenyon] Encumbrances.
> (a) [Kenyon] hereby agrees that, in the event DMT elects to retain some or all of the Assets within ninety (90) days after the Final Reexamination Date, [Kenyon] shall, on the date that is three hundred sixty five (365) days after the Final Reexamination Date, inform SightSound and DMT in writing (in accordance with the notice provisions in Section 16.1 of the Asset Purchase Agreement) of

> [Kenyon]'s election to SightSound to have all indebtedness and obligations of SightSound to the [Kenyon] satisfied fully by (i) payment of such indebtedness by SightSound or any other Person on SightSound's behalf, or (ii) electing to receive from SightSound, in perpetuity, 10% of any Revenues otherwise allocable to SightSound (without giving effect to any Schwartz Revenues or DigaComm Revenues) pursuant to Section 7.2(c) of the Asset Purchase Agreement.

According to Brian Mudge, Esq., a partner at Kenyon during the relevant period, Kenyon's consent was conditioned upon recognition of its first priority lien and prohibiting further transfer. (NYSCEF 272 at ¶¶ 9-13). Mudge also rejects defendants' contention that DMT and GE conditioned the purchase of the patents on being paid first, before Kenyon. Kenyon argues that ¶¶2(a) and 3(a) of the Consent Agreement contradict defendants' contention. (*Id.* at ¶11). He reiterates that Kenyon was never a party to the APA. (*Id.* at ¶18).

The re-examination of the patents by DMT became final on December 20, 2010, thus triggering DMT's option. (NYSCEF 243, LePore Aff. ¶36). Accordingly, in April 2011, DMT elected to retain the patents and notified Kenyon. (*Id.* at ¶37). DMT further notified Kenyon of its intention to transfer the assets into a newly created company called SST LLC of which DMT and Holdings were the sole owners to which DMT was to contribute the patents. (NYSCEF 243, LePore Aff. at ¶40, NYSCEF 249, Assignment and License Agreement).

Section 8.2 (a)(1) of SST LLC's August 24, 2011 Operating Agreement provides that DMT was to receive 100% of SST LLC's profits until it had received the full repayment of its "Preferred Distribution." (NYSCEF 248). The "Preferred Distribution" was $13,254,664.62,[2] plus any advances DMT made in the interim, along with a return

[2]This figure allegedly equals DMT's patent exploitation expenses as defined in the 2005 APA. (NYSCEF 243, LePore Aff. ¶43; NYSCEF 244, APA § 6.2). Without explanation

of 25%, compounded monthly. (*Id.,* Article I, § 1.1 [definitions] at 5). After this, SST LLC's excess cash would be divided between DMT and Holdings pursuant to the APA. (NYSCEF 248 at §8.2 [2]).

In addition, the same parties signed a Novation Agreement, effectively modifying the APA so as to make its terms applicable to SST LLC and provides that SST LLC assumes the liabilities and obligations DMT had possessed under the APA. (NYSCEF 250).

In January 2011,[3] Mudge presented the terms of the 2005 Consent Agreement to Kenyon's management committee using PowerPoint slides. (NYSCEF 272, Brian Mudge September 7, 2018 affidavit, (Mudge Aff.)[4] ¶14). He explained the circumstances pursuant to which Kenyon's security interest would terminate; "only if it elected the 10% option (or failed to elect the fixed payment option), or upon full payment of the debt by Holdings." (*Id.*, ¶17). He presented the terms of Section 7.2 of the APA because it could become relevant if Kenyon elected the unsecured 10% option. (*Id.*, ¶18). In slide 18, he "noted that pursuant to the Consent Agreement, Kenyon had the option of, after the forbearance period was over, either (1) receiving payment in full, or (2) waiving its security interest and electing the 10% option." (*Id.*, ¶15). In slide 19, he

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of the difference, LePore states in ¶43 that "to date" (July 19, 2018, the date of the affidavit), the amount is $13 million; but in ¶63 he also states that the amount was $6.5 million as of the date of the Napster settlement in 2012. (*Id.*)

[3]Kenyon fails to explain why it was discussing the 2005 Consent Agreement in 2011 which goes to the weight of Mudge's presentation and his use of the PowerPoint slides.

[4]Mudge signed the affidavit in New Jersey where it was notarized. However, there is no certificate of conformity as to the notary as required by CPLR 2309.

also noted that the 10% option was unsecured, meaning that Kenyon would forego its security interest and only received payment via money due Holdings under the APA" and "Kenyon's security interest would terminate only if it elected the 10% option (or failed to elect the fixed payment option), or full repayment of the debt by Holdings" (*Id.* at ¶¶16, 17). In slide 21 entitled "GE Asset Purchase Agreement," with a heading "GE/Sightsound Revenue Split," he presented §7.2 of the APA "because the revenue split might have become relevant to Kenyon if it elected the unsecured "10%" option." (*Id.* at ¶18). However, Kenyon never elected the 10% option. (*Id.*)

In December 2011, the parties discussed modifying the Consent Agreement to extend the forbearance period and reflect the transfer of the Patents to SST LLC. (NYSCEF 253.)

In a December 12, 2011 email to LePore, Mudge wrote:

> "the issue re transfer of the patents is a critical one for us. Section 5.55(a) of the Security Agreement states that SightSound 'will not sell, transfer, lease or otherwise dispose of any of the collateral...' This provision is one of the 'encumbrances' on the patents that run with the patents even after the 2005 transfer. Indeed paragraph 3(a) of the 2005 Consent Agreement to transfer acknowledges that 'the Assets are and remain subject to the [Kenyon] Encumbrances on the terms set forth in the Security Agreement.'"

(NYSCEF 275). Finally, on December 13, 2011, Kenyon, SightSound, and DMT signed an amendment to the Consent Agreement. (NYSCEF 253).

On April 17, 2012, SightSound and Best Buy Inc., which had acquired Napster, settled the Napster litigation for $3.1 million. (NYSCEF 243, LePore Aff. at ¶ 57). On May 1, 2012, these proceeds were transferred to Arnold & Porter LLP (AP), counsel for SightSound at the time. (*Id.* at ¶58). AP transferred the funds to GE, where they were allegedly commingled with other funds, because GE allegedly "handled the logistics of the banking transactions" for SST LLC related to the settlement pursuant to the Banking and Derivatives Transaction Agreement. (NYSCEF 243, LePore Aff. at ¶¶59, 60; NYSCEF 252). AP was paid an "incentive fee" with the balance going to DMT. (NYSCEF 243, LePore Aff. at ¶61). On May 4, 2012, LePore notified Kenyon of the settlement and of its intent to give DMT 100% of the proceeds pursuant to the APA.[5] (NYSCEF 254, May 4, 2012 email from LePore to Kenyon).

In a letter dated June 29, 2012, Kenyon informed SightSound that it elected not to exercise the 10% option and instead sought to recoup the unpaid legal fees and interest. (NYSCEF 7). In a letter dated July 18, 2013 to SightSoung, Kenyon demanded immediate repayment. (NYSCEF 8).

In a September 9, 2013 letter to GE, Kenyon claimed that the Security Agreement gave Kenyon first priority liens in SightSounds's assets, including the Napster proceeds. (NYSCEF 9).

Procedural History

In 2014, Kenyon commenced this action asserting six causes of action: (1) specific performance against SST LLC and SST Inc.; (2) breach of contract against SST LLC and SST Inc.; (3) constructive fraudulent conveyance of the Napster settlement money against all defendants;[6] (4) GE's fraudulent transfer by piercing the corporate veil

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[5]LePore wrote: "As you know, under the terms of the Asset Purchase Agreement, revenue realized in connection with licensing or litigation settlement is first distributed to DMT until the Preferred Distribution is satisfied. Accordingly, 100% of the settlement proceeds from the Napster litigation will be distributed to DMT." (NYSCEF 254, May 4, 2012 email from LePore to Kenyon).

[6]The third cause of action was dismissed against Holdings. (NYSCEF 163).

against DMT to reach GE; (5) unjust enrichment against DMT and GE based on the Napster settlement transfer; and (6) conversion of the Napster settlement money against all defendants. (NYSCEF 2 at ¶¶ 54-90).

In motion sequence number 001, SST LLC, DMT, and GE immediately moved to dismiss the fourth, fifth, and sixth causes of action. (NYSCEF 15 at 1). In motion sequence number 002, Holdings moved to dismiss the sixth cause of action. (NYSCEF 22 at 1). On January 21, 2015, this Court (Oing, J.) decided both motions and dismissed the fourth, fifth, and sixth causes of action. (NYSCEF 35, J Oing decision, dated January 21, 2015, Tr. 46:10-13). The First Department modified the order and reinstated the conversion and unjust enrichment claims on procedural grounds. (*Kenyon & Kenyon LLP v SightSound Tech., LLC*, 151 AD3d 530 [1st Dept 2017]).

On July 28, 2016, the court denied Kenyon's motion for summary judgment (motion sequence number 005) on the third cause of action for fraudulent conveyance under Debtor and Creditor Law § 273 and granted Holding's cross motion dismissing the third cause of action against it. (NYSCEF 239). The court denied Kenyon's motion because defendants successfully argued that there were

> "disputed issues of material fact as to several elements of [the claim], including whether the payment was made to DMT or funneled back to GE, whether it was made in exchange for fair consideration and in good faith, and whether the obligor, assuming even that it is SST and not Holdings, was solvent at the time of the transfer."

(NYSCEF 239 at 12-13). Under Debtor and Creditor Law § 272, the court noted, fair consideration can be "the satisfaction of an antecedent debt," such as DMT's patent exploitation expenses. (*Id.* at 13). The court referenced Section 7.2(c) of the APA which provides that any funds received would first be paid in satisfaction of the patent exploitation expenses and Section 7.2(e) which "unambiguously gives DMT 'the sole discretion' to decide whether Kenyon's lien would be a Patent Exploitation Expense or merely deducted from any amount to be allocated to SightSound" according to the priorities of payment set forth in Section 7.2(c). (NYSCEF 239 at 14). As support for the court's conclusion that issues of fact precluded plaintiff's summary judgment motion, the court also pointed to Kenyon's own PowerPoint presentation in which Kenyon acknowledged that DMT has this authority. (*Id.*).

Further, the court rejected Kenyon's argument that neither the Consent Agreement nor its amendment subordinated Kenyon's rights as a secured creditor with first priority. Instead, the court stated, "the Consent Agreement itself explicitly refers to the terms of section [7.2] (c) of the APA and Kenyon's actions post-execution have consistently acknowledged that the terms of section [7.2] govern the allocation of revenues among the parties." (*Id.* at 15). The court rejected Kenyon's argument that the APA allocation of revenues only applied if Kenyon exercised the 10% option. (*Id.* at 15). Moreover, it stated, Kenyon did not establish bad faith as a matter of law "because there is evidence that not only did Kenyon consent to the terms of the APA, but [it] was fully and timely apprised of all relevant events relating to the settlement monies to DMT/GE." (*Id.* at 16). The court found a factual dispute as to whether the transfer of the Napster settlement money to DMT was a preferential transfer. (*Id.* at 19-20). Accordingly, the court denied plaintiff's motion for partial summary judgment on the issue of constructive fraud, and it granted Holdings' cross-motion to dismiss the fraudulent conveyance cause of action as against Holdings. (*Id.* at 21).

The First Department affirmed Justice Oing's decision denying plaintiff's motion for summary judgment on the fraudulent conveyance cause of action. (*Kenyon & Kenyon LLP v SightSound Tech., LLC*, 151 AD3d 530 [1st Dept 2017]).

In a decision dated June 21, 2018, this court resolved Kenyon's discovery motion (motion sequence number 006), seeking to compel GE to produce discovery related to the distribution of the Napster settlement funds. (NYSCEF 240). After an in camera review, this court granted the motion as to two documents which were not privileged. As to the remainder of the documents which the court found protected by the attorney client privilege, the court rejected Kenyon's argument as to the crime fraud exception. The court concluded that the documents were not relevant to the Napster settlement.

The Current Motion

Defendants move for summary judgment dismissing the third, fifth, and sixth causes of action, all of which center on defendants' handling of the Napster settlement.

As to the third cause of action for fraudulent conveyance and fifth cause of action for unjust enrichment, defendants contend that the determination of Kenyon's summary judgment motion on sequence number 005, that DMT had the right to that settlement proceeds is the law of the case, and that this court's decision on Kenyon's discovery motion on sequence number 006 adopted Justice Oing's holding.

Alternatively, defendants argue that DMT was entitled to the Napster settlement money in partial repayment of its patent exploitation expenses. Defendants rely on Section 7.2(e) of the APA which gives DMT the discretion to give these expenses priority over Kenyon's lien and Kenyon consented to the APA. Defendants insist that the APA would make no sense if the purchaser agreed to fund SightSound's litigation but pay the first $5,483,547 SightSound received to another entity.

Moreover, defendants state that the repayment of a loan is "fair consideration" under Debtor Creditor Law. Defendants contend that the unjust enrichment claim lacks merit because this claim does not lie where contracts exist. Here, defendants point to Section 7.2 of the APA. Similarly, defendants contend that a conversion claim does not exist if it is predicated on a mere breach of contract.

As the causes of action relate to GE, defendants seek dismissal because GE did not exercise ownership or control over the settlement money, but only held it briefly because it handled SST LLC's financial transactions. Therefore, they argue no financial damages are recoverable from GE.

In opposition, Kenyon disputes defendants' characterization of the various agreements and their import, offering a counter-statement of facts. Kenyon argues that by signing the Consent Agreement, Kenyon did not agree that it was bound by the APA or that its security interest in the Napster settlement money was subordinate. Rather, the few references to the APA in the Consent Agreement do not bind Kenyon to the APA.

Kenyon accuses defendants of misreading the APA. Specifically, Section 7.2 of the APA relates only to the distribution of Revenues or receipts of cash following the closing date pursuant to the License Agreements. Kenyon insists that the APA purposefully excluded revenues from patent infringement litigations from the definition of "Revenues" and, therefore, from the distribution table at Section 7.2. Kenyon argues that the capitalization of the word "Revenues" in Section 7.2 shows that the table governed only the distribution of cash received through SightSound's licensing agreements. Kenyon further states that Section 7.2 applies only to the reimbursement of expenses, and therefore it was not triggered until Kenyon or DMT incurred expenses. Moreover, Kenyon argues that because its lien existed before the execution of the APA, Kenyon should have recouped its money before defendants made any distributions under Sections 7.2(c) and 7.2(e).

Kenyon challenges defendants' reliance on Kenyon's PowerPoint presentation. Essentially, Kenyon argues that unless it exercised the 10% option, it would retain a secured lien with priority. In addition, Kenyon states that any reference to the split of profits set forth in Section 7.2 of the APA is irrelevant because (1) Kenyon was not party to or bound by the APA, and (2) Kenyon did not choose the 10% option. Kenyon emphasizes that it signed the amended consent agreement with the assurance that it would retain its security interest. (NYSCEF 275).

Further, Kenyon denies that its priority over DMT ever changed. Kenyon cites the April 26, 2012 board minutes (NYSCEF 266), during which the Napster settlement was approved and, as a subsequent item of business, Kenyon's lien and its 10% option were discussed. Kenyon insists not only that the settlement proceeds were wrongfully transferred to a GE account, but that GE retained the funds. (*See* NYSCEF 267 at interrogatory responses to 7, 9, 12; NYSCEF 269 (LePore Depo. Tr. 78:4-80:13); NYSCEF 270 (interrogatory responses to 5); NYSCEF 268 (GE May 1, 2012 email with banking instructions)). By holding the funds in its general account, Kenyon asserts, defendants transfer to GE was fraudulent. According to Kenyon, all of the above show that defendants have not eliminated all triable issues of fact.

Kenyon argues that it did not clearly subordinate its interest to DMT. It states that the Amended Consent Agreement superseded the prior Consent Agreement and clarified Kenyon's retention of its first-priority status. It notes that the Consent Agreement provides that Kenyon would be bound to the terms "hereof," referring to the Consent Agreement, and not to the terms "thereof," which would have referred to the APA. Kenyon disputes that defendants orally represented to Kenyon that DMT would obtain first priority, but states that any such representation would not have altered the written contract terms. Kenyon relies on §20.2 of the Security Agreement which prohibits any waiver by conduct or omission. Likewise, ¶23 of the Consent Agreement contains a merger clause that would bar such modification. Kenyon insists that the PowerPoint presentation does not support defendants' position, because DMT would have the discretion to choose the priority of Kenyon's lien only if Kenyon chose the 10% option.

Discussion

A motion for summary judgment will be granted where there are no triable issues of material fact. (*See Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The movant must provide sufficient evidence to demonstrate that there are no material issues of fact, and that the party is entitled to judgment as a matter of law. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant has established a *prima facie* right to summary judgment, the burden shifts to the opposing party to produce admissible evidentiary proof "sufficient to require a trial of material questions of fact." (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008]). The opposing party "must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist." (*Kornfeld v NRX Tech.*, 93 AD2d 772, 773 [1st Dept 1983]). The questions of fact raised by the opposing party must be material and must not be predicated on "mere conclusions, expressions of hope[,] or unsubstantiated allegations or assertions." (*Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]).

Defendants' first argument relating to the law of the case doctrine based on motions 05 and 06 is rejected. The doctrine of law of the case precludes parties from re-litigating issues that the court has already resolved provided that the "parties had a 'full and fair' opportunity to litigate the initial determination." (*People v Bilsky*, 95 NY2d 172, 175 [2000]). Defendants' reliance on the 005 decision, where defendants successfully argued against summary judgment based on issues of fact, is misplaced. Likewise, the court's resolution of a discovery dispute (06) following an in camera review of a few documents is not determinative of this summary judgment motion.

Here, an issue of fact exists as to what the parties agreed to in the Consent Agreement and subsequent agreements. Defendants advance numerous arguments to show that Kenyon agreed to the APA and specifically to DMT's right to determine how to distribute revenue under §7.2(c). However, none of these arguments are conclusive. For instance, defendants posit that no license deals existed at the time of the Consent Agreement, however the agreements were forward looking documents meaning license agreements could be entered in the future generating future revenues. Although defendants contend that Kenyon must have agreed to waive its lien because the economic reality was that it otherwise would never collect from SightSound, Kenyon's agreement to forebear enforcement of its lien is consideration for the Consent Agreement; complete waiver of its priority was not the only viable option, as defendants assert. Likewise, Mudge disputes the significance of his PowerPoint presentation and whether it affirms that payments to Kenyon would be made after payments to DMT making it an issue of fact. Rather, Kenyon establishes that neither the Consent Agreement nor any other document reflects Kenyon's agreement to be bound by the terms of the APA or to subordinate its security interest in the Napster settlement funds. Defendants' repeated statements otherwise do not make it so because a "unilateral expression of one party's post contractual subjective understanding of the terms of the agreement" is not probative as an aid to the interpretation of the contract. (*Murray Walter Inc v Sarkisian Brox*, 183 AD2d 140, 146 [3d Dept 1992]). Accordingly, an issue of fact exists.

Furthermore, "[i]t is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)." (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]). Yet, an issue of credibility is raised by the factual dispute between LePore and Mudge concerning whether Kenyon was informed that the Napster Settlement Funds totaled $3.1 million, or that the parties had executed a term sheet and then showed the term sheet related to the proposed settlement to Kenyon.

Kenyon additionally identifies ambiguities that cannot be resolved on summary judgment. Specifically, the use of the term "hereof" in §5 of the Consent Agreement may reference the Consent Agreement or both the Consent Agreement and the APA. Where ambiguity has been found as a matter of law, an examination of available extrinsic evidence is necessary, not optional. (*Union Carbide Corp. v Affiliated FM Ins.*, 16 NY3d 419, 425 [2011]). The court will consider "the surrounding circumstances existing when the contract was entered into, the situation of the parties and the subject matter of the instrument and parol evidence may be admissible to clear up any ambiguity in the language employed." (*Korff v Corbett*, 18 AD3d 248, 251 [1st Dept 2005] [citations omitted]). However, extrinsic evidence may not be used to alter, change or excise terms in the agreement. (*Schron v Troutman Sanders LLP*, 20 NY3d 430, 436 [2013]). The interpretation of the ambiguity cannot be "absurd, commercially unreasonable or contrary to the reasonable expectations of the parties." (*See Matter of Lipper Holdings v Trident Holdings*, 1 AD3d 170, 171 [1st Dept 2003] [internal citations omitted]). Accordingly, Kenyon's references to discussions prior to the signing of the agreements is permissible parole evidence at trial that goes to whether defendants conditioned the APA on Kenyon waiving its priority allowing defendants to be paid "patent exploitation expenses" in their entirety first. Likewise, defendants' evidence concerning Kenyon's inconsistent post execution activities is permissible parole evidence at trial.

Another issue of fact is whether the transfer to GE was fraudulent but that is contingent on whether Kenyon was entitled to the funds because of its superior priority. Both Justice Oing and the First Department indicated that issues of fact precluded Kenyon's summary judgment motion on this matter. Defendants fail to produce any evidence that would change that holding.

An issue of fact also exists as to whether the Napster settlement funds were disbursed to SST LLC. Likewise, an issue of fact arises as to the "Banking Delegation of Authority" that allegedly permitted the transfer of the Napster Settlement Funds to a GE bank account and whether the funds were transferred out of GE.

To prevail on an unjust enrichment claim, a plaintiff must demonstrate "that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered." (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks and citations omitted]). The doctrine only applies "in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff," such as where the defendant "receive[s] money to which [it] is not entitled." (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790, *reargument denied*, 19 NY3d 937 [2012]). The Consent Agreement between Kenyon, SightSound and DMT, but not GE, concerns this issue. While an issue of fact exists as to what the parties agreed to in the Consent Agreement, there is no dispute that the Consent Agreement governs the issue. Therefore, the court is compelled to dismiss the fifth cause of action against DMT, but the claim may proceed against GE.

"Conversion is the unauthorized assumption and exercise of the right of ownership over another's property to the exclusion of the owner's rights. (*Lemle v Lemle,* 92 AD3d 494, 497 [1st Dept 2012][citation omitted].) "[A]n action will lie for the conversion of money where there is a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question." (*Amity Loans v Sterling Natl. Bank & Trust Co. of N.Y.,* 177 AD2d 277, 279 [1st Dept 1991]). It is undisputed that the Napster settlement funds were dispersed into a general GE account where they were commingled. Therefore, the sixth cause of action is dismissed. (*See Bahiri v Madison Realty Cpital Advisors, LLC*, 30 Misc3d 1208(A) [Sup Ct, NY County 2010]).

The court has considered the parties' other arguments and they do not alter its conclusion.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is denied as to the third cause of action; and it is further

ORDERED that the fifth cause of action is dismissed against DMT; and it is further

ORDERED that the sixth cause of action is dismissed against all defendants; and it is further

ORDERED that the parties shall file motions *in limine* within 30 days of entry of this decision in ECF.

8/2/19
DATE

HON. ANDREA MASLEY
ANDREA MASLEY, J.S.C.

CHECK ONE:	☐ CASE DISPOSED			☒ NON-FINAL DISPOSITION		
	☐ GRANTED	☐ DENIED		☒ GRANTED IN PART		☐ OTHER
APPLICATION:	☐ SETTLE ORDER			☐ SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN			☐ FIDUCIARY APPOINTMENT		☐ REFERENCE