UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DANIEL DYMTROW,	:	
		No. 07 Civ. 11277 (RJS)
Plaintiff,	:	
v.	:	
TAYLOR SWIFT, SCOTT SWIFT, SCOTT BORCHETTA, BIG MACHINE RECORDS, LLC, and ANDREA SWIFT,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS THE AMENDED COMPLAINT AGAINST DEFENDANTS SCOTT BORCHETTA AND BIG MACHINE RECORDS, LLC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

Preliminary Statement

This memorandum of law is respectfully submitted on behalf of Defendants Scott Borchetta and Big Machine Records, LLC ("BMR") in support of their motion, pursuant to Rule 12(b)(6), Fed. R. Civ. P., for an order dismissing the Amended Complaint, dated December 22, 2008 (the "Amended Complaint"), for failure to state a claim upon which relief can be granted.

Plaintiff has amended his complaint to sue Mr. Borchetta and BMR on claims alleging that they tortiously interfered with an exclusive personal management agreement (the "Management Agreement"), effective as of March 25, 2003, and business opportunities, between Plaintiff and Taylor Swift, a minor, and her parents' guarantee of her performance of the Management Agreement.

Because Ms. Swift had the absolute and unrestricted statutory right to disaffirm the Management Agreement, her disavowal of that contract is not a breach of contract. Without a breach, there can be no claim of tortious interference with contract. The Management Agreement was never judicially approved, thus, it was properly disaffirmed by Ms. Swift. In addition, the parents' guarantee of the Management Agreement was void and unenforceable as a matter of statute and public policy. Accordingly, there can be no tortious interference with an agreement that is void.

Furthermore, Plaintiff has failed to allege that Mr. Borchetta and BMR acted *solely* with intent to harm Plaintiff or employed "wrongful means" to interfere with a voidable contract or any business opportunities. The Amended Complaint does not allege that Plaintiff performed any services for Mr. Borchetta or BMR that would support a claim for unjust enrichment.

As more fully set forth below, the Amended Complaint must be dismissed with prejudice.

BACKGROUND FACTS

The Amended Complaint

The Amended Complaint alleges that Plaintiff agreed to act as recording artist Taylor Swift's exclusive personal manager in 2003, when the aspiring singer was thirteen years old. Declaration of Jonathan D. Davis, Esq., dated March 17, 2009 ("Davis Decl."), Exhibit A at ¶2. The pleading alleges that Plaintiff entered into the Management Agreement with Ms. Swift, which was personally guaranteed in a written agreement by her parents, Scott and Andrea Swift (the "Parents' Guarantee"). The Management Agreement and the Parents' Guarantee were both dated as of Match 25, 2003, and executed on April 5, 2004, and are attached to the Amended Complaint as Exhibits A and B.

The Management Agreement was for an open-ended term from its commencement to the expiration of a "Second Album Cycle", defined as the later of sixty (60) days after the completion of all personal appearances and concerts by Ms. Swift in connection with her second album and the date she commences pre-production activities for her next succeeding album. Under the terms of the Management Agreement, Plaintiff's participation in Ms. Swift's "Gross Income" would continue for four (4) years after the expiration or termination of this open-ended term.

The Management Agreement at ¶12(c) expressly recognized Ms. Swift's minority status and the need for judicial approval of a contract with a minor:

> Notwithstanding anything contained herein to the contrary, Artist has advised Manager that Artist is under eighteen

> (18) years of age. Artist shall cooperate with reasonable requests by Manager in connection with any proceeding Manager may institute to obtain judicial approval of this Agreement. . . .

The Amended Complaint is bereft of any allegation that Plaintiff ever sought or obtained judicial approval of the Management Agreement. Rather, it alleges that Ms. Swift formally disaffirmed the Management Agreement on August 1, 2005, when she was fifteen years of age. Davis Decl., Exhibit A, at ¶70.

The Amended Complaint details efforts allegedly undertaken by Plaintiff to advance her career. While recognizing Ms. Swift's right to disaffirm the Management Agreement, Davis Decl. at ¶¶90, 147, the Amended Complaint seeks to recover damages on the basis of breach of contract, quasi-contract, estoppel and tortious interference theories.

Three of the seven claims in the Amended Complaint are alleged against Mr. Borchetta, and two of these same claims are also asserted against BMR. The Fourth Cause of Action alleges that Mr. Borchetta and Ms. Swift's parents intentionally procured Ms. Swift's breach of the Management Agreement by encouraging her to terminate or breach the contract. Davis Decl., Exhibit A, at ¶124. This claim alleges that Defendants actions "have wrongfully interfered and continue to interfere with Mr. Dymtrow's business relationships and opportunities related to Taylor." *Id.* at 122.

Because Ms. Swift had the absolute statutory right to disaffirm the Management Agreement, her disaffirmance of that agreement is not a breach or conduct that is actionable. As discussed below, without a breach, there can be no tortious interference of contract claim. Moreover, the Amended Complaint does not allege any

"wrongful means", a necessary element of the claim, which would support a claim for tortious interference with a voidable contract or business opportunities.

Plaintiff's Fifth Cause of Action alleged against Mr. Borchetta and BMR makes similar allegations with respect to these Defendants' purported tortious interference with the Parents' Guarantee of Ms. Swift's performance. Because Ms. Swift's parents had a separate statutory right to encourage their daughter to disaffirm the contract without the parents' risking liability, a contract seeking to hold the parents liable when the minor disaffirms the contract is void and against public policy. Accordingly, there can be no claim for tortious interference with a void contract.

Finally, Plaintiff's Sixth Cause of Action against Mr. Borchetta and BMR alleges that they have been unjustly enriched as a result of Plaintiff's labors. Plaintiff fails to allege that he performed any services on behalf of the Defendants which are the subject of this particular claim, thus an unjust enrichment claim has not been stated against them.

ARGUMENT

THE AMENDED COMPLAINT SHOULD BE DISMISSED

A. Governing Standards

In ruling on a motion to dismiss under Rule 12(b)(6), a district court is required to accept the material facts alleged in the complaint as true. *Frasier v. General Elec. Co.*, 930 F.2d 1004 (2d Cir. 1991); *Pacific Health Advantage v. Cap Gemini Ernst & Young*, 2007 WL 2619052 (S.D.N.Y. Sept. 6, 2007) at *2. The complaint must also be read generously, drawing all reasonable inferences in favor of the plaintiff. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 515, 92 S. Ct. 609, 614 (1972).

However, while a complaint need not contain detailed factual allegations, the plaintiff's "obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1964-65 (2007); *Pacific Health Advantage, supra. See also Aspex Eyewear, Inc. v. Clariti Eyewear, Inc.*, 2008 WL 219765 (S.D.N.Y. Jan. 24, 2008) at *1 ("bald contentions, unsupported characterizations, and legal conclusions are not well-pleaded allegations" sufficient to defeat the motion); *Gavish v. Revlon, Inc.*, 2004 WL 2210269 (S.D.N.Y. Sept. 30, 2004) at *10 (same). Rather, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic* at 1974. *See also Patane v. Clark*, 508 F.3d 106, 113 (2d Cir. 2007); *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007) ("'plausibility standard'...obligates a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*").

The Management Agreement is governed by New York law. It provides that it was entered into in the State of New York "and the validity, interpretation and legal effect of this agreement shall be governed by the laws of the State of New York applicable to contracts entered into and performed entirely within the State of New York."

B. <u>There Can Be No Tortious Interference With Voidable Or Void Contracts</u>

Under New York law, to state a claim for tortious interference with contract, a plaintiff must plead four elements: (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party's breach without justification; and (4) damages. *See Finley v. Giacobbe*, 79 F.3d 1285, 1294 (2d Cir. 1996); *Carruthers v. Flynn*, 365 F. Supp.2d 448, 462 (S.D.N.Y.

2005); *Lama Holding Co. v. Smith Barney, Inc.*, 88 N.Y.2d 413, 646 N.Y.S.2d 76 (1996); *Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 120, 151 N.Y.S.2d 1 (1956); *Burrowes v. Combs*, 25 A.D.2d 370, 373, 808 N.Y.S.2d 50, 53 (1st Dep't 2006); *Kaminski v. United Parcel Serv.*, 120 A.D. 2d 409, 412, 501 N.Y.S.2d 871, 873 (1st Dep't 1986).

Plaintiff claims in the Fourth Cause of Action that Mr. Borchetta, along with Defendants Scott and Andrea Swift, intentionally procured Ms. Swift's breach of the Management Agreement, and he alleges in the Fifth Cause of Action that Mr. Borchetta and BMR intentionally procured her parents' breach of the Parents' Guarantee. Because Ms. Swift and her parents acted under the protections of New York law and its public policy in disaffirming a contract for the personal services of a minor, their actions cannot constitute a breach of the Management Agreement or the Parents' Guarantee. A third party cannot be liable for tortious interference with a contract where there has been no breach.

Section 35.03 of the New York Arts and Cultural Affairs Law protects minors in connection with contracting services in the entertainment field. A minor forfeits the right to disaffirm a personal service contract where the contract is judicially approved. In securing judicial approval, there must be a showing that "the contract is reasonable and provident and for the best interests of the infant." *Id.* at §35.03(5)(k). The statute also imposes restrictions on the duration of the contract. It provides that no contract shall be approved if it binds the infant for a period of more than three years or seven years if the infant had experienced independent entertainment counsel. If the contract contains any other condition that extends beyond these time frames, it may be approved only if found reasonable by a court. *Id.* at §35.03(2)(d).

The Amended Complaint tacitly admits that judicial approval of the minor's contract was neither sought nor obtained. Davis Decl., Exhibit A, at ¶¶ 90, 147. Moreover, the open-ended term of the Management Agreement violated the statute and could not receive judicial approval. New York Arts and Cultural Affairs Law §35.03(2)(d). Because the Management Agreement was not judicially approved, Ms. Swift did not relinquish her right to disaffirm the contract.

New York law also provides statutory protection for infants by providing that if a contract for the services of a minor requiring judicial approval is not approved, the parent or guardian may not be liable as a party or guarantor of the contract. 23A New York General Obligations Law §3-107.

Neither Mr. Borchetta nor BMR may be liable for allegedly inducing Ms. Swift or her parents to exercise their statutory rights. *Cohen v. Brunswick Record Corp.*, 31 Misc. 2d 525, 527, 221 N.Y.S.2d 893 (Sup. Ct. N.Y. Co. 1961), which involved the dismissal of a claim for tortious interference with an infant's recording contract, is directly on point. The court stated that the infant's exercise of her legal right to disaffirm the recording contract precluded any claim based on tortious interference with the alleged breach of that contract. The court ruled that:

> Since the contract is voidable and unenforceable, it could not be the basis of an action against defendants for inducing a termination of such agreement . . . . The exercise of a legal right to terminate an agreement by a contracting party cannot be the subject of an action against a third party for procuring such alleged breach (citations omitted). At best, plaintiff's rights in the agreements in question were enforceable merely at the will of the infant and no action can arise for inducing the legal termination thereof.

See also NYC Management Group, Inc. v. Brown-Miller, 2004 WL 1087784 (S.D.N.Y. May 14, 2004) at *6 (disaffirmance of voidable contract by minor "does not literally constitute a breach, and, therefore, an essential element of a claim for tortious interference with contract would appear to be missing"); *Bradford v. Sonet*, 64 NY.S.2d 876 (Sup. Ct. N.Y. Co. 1946); *E.R. Squibb & Sons v. Ira J. Shapiro, Inc.*, 64 N.Y.S.2d 368 (Sup. Ct. N.Y. Co. 1945) (persuading a party to exercise lawful right of termination is not a breach of contract and no cause of action for tortious interference stated regardless of defendants' motive).

As *Cohen, supra*, holds, a contract with a minor is subject to disaffirmance and is terminable at the will of the minor. A tortious interference claim cannot be predicated on an at-will contract. As explained in *Aim International Trading, L.L.C. v. Valcucine, S.P.A., IBI, L.L.C.*, 2003 WL 21203503 (S.D.N.Y. May 22, 2003) at *5:

> A contract terminable at will cannot be the basis for a tortious interference with contract claim. [Citations omitted]. The reason for this principle is intuitive: there can be no breach of contract, a necessary element for tortious interference with contract, when the contract may be terminated at will. *See Guard-Life*, 428 N.Y.S.2d 628, 406 N.E.2d at 50.

See also Discover Group, Inc. v. Lexmark Intern., Inc., 333 F. Supp.2d 78, 83-84 (E.D.N.Y. 2004); *Miller v. Mount Sinai Medical Center*, 288 A.D.2d 72, 733 N.Y.S.2d 26 (1st Dep't 2001); *Kaminski v. United Parcel Service, supra.*

The Parents' Guarantee is not merely voidable under New York law, but void and unenforceable when, as here, the infant's contract has not been judicially approved. *See Metropolitan Model Agency USA, Inc. v. Rayder*, 168 Misc. 2d 324, 643 N.Y.S.2d 923 (Sup. Ct. N. Y. Co. 1996) (parents not liable for breach of guarantee of minor's modeling

contract where contract and guarantee did not comply with statute and were void). It is well established that a contract that is void and unenforceable cannot be the subject of a claim for tortious interference. *Carruthers v. Flynn*, *supra*; *Harris v. Economic Opportunity Comm'n of Nassau County, Inc.*, 171 A.D.2d 223, 229, 575 N.Y.S.2d 672, 676 (2d Dep't 1991).

For the foregoing reasons, Plaintiff cannot plead a sustainable tortious interference claim against Mr. Borchetta or BMR with respect to inducing either a breach of the Management Agreement or the Parents' Guarantee.

C. Plaintiff Has Not Met His Burden Of Alleging "Wrongful Means"

The Amended Complaint is also deficient because Plaintiff has failed to allege that Mr. Borchetta or BMR employed "wrongful means" or acted "solely" to harm Plaintiff. Such allegations are required when alleging a tortious interference claim concerning voidable at will contracts, such as the Management Agreement, and to claims based on business relations and opportunities, as alleged in the Fourth and Fifth Causes of Action. *NYC Management Group*, *supra*; *Darby Trading Inc. v. Shell Intern. Trading and Shipping Co. Ltd.*, 568 F. Supp.2d 329, 342-48 (S.D.N.Y. 2008); *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 428 N.Y.S.2d 628 (1980).

With respect to claims based on voidable contracts or business relations and opportunities, a plaintiff must allege that defendant employed "wrongful means," such as "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degree of economic pressure." *Guard-Life Corp.*, *supra*, 50 N.Y.2d at 191, 428 N.Y.S.2d at 632. "Wrongful means" requires that Plaintiff allege that defendants "engaged in conduct that: (1) amounts to a crime or independent tort; (2) was done for the sole purpose of injuring Plaintiff; or (3) constitutes 'extreme,' 'unfair,' and 'egregious'

behavior." *Darby Trading Inc., supra*, 568 F. Supp.2d at 343, 348; *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 189, 785 N.Y.S.2d 359 (2004); *Phoenix Capital Investments LLC v. Ellington Management Group*, 51 A.D.3d 549, 551, 859 N.Y.S.2d 46, 48-49 (1st Dep't 2008).

This pleading requirement imposes a "high burden" on Plaintiff to allege "wrongful means." *See, e.g., Lockheed Martin Corp. v. Aatlas Commerce, Inc.*, 283 A.D.2d 801, 803, 725 N.Y.S.2d 722 (3d Dep't 2001); *Barcellos v. Deutsche Bank*, 12 Misc. 3d 1181 (A), 2006 WL 1915097 (Sup. Ct. Richmond Co. 2006). *See also Martian Entertainment, LLC v. Harris*, 12 Misc. 3d 1190 (A), 2006 WL 2167178 (Sup. Ct. N.Y. Co. July 5, 2006).

Plaintiff was not only required to allege "wrongful means," but to do so through factually specific allegations. Plaintiff's factually barren and conclusory allegations that Defendants acted "intentionally, willfully, and/or with malice or through the use of dishonest, unfair or improper means," Davis Decl., Exhibit A, at ¶¶122, 131, are insufficient as a matter of law. *See Phoenix Capital Investments LLC, supra*, (Plaintiff's claim fails as entirely conclusory); *LoPresti v. Massachusetts Mut. Life Ins. Co.*, 30 A.D.3d 474, 476, 820 N.Y.S.2d 275 (2d Dep't 2006) ("the agreements were terminable at will [citations omitted], and the allegation that respondents' actions were wrongful or unlawful were conclusory and without support"). Indeed, the courts of this State have routinely dismissed tortious interference claims that were conclusory and unsupported by factual allegations. *See, e.g., Tsadik v. Beth Israel Medical Center*, 13 Misc. 3d 359, 365, 822 N.Y.S.2d 395 (Sup. Ct. N.Y. Co. 2006) ("Mere conclusions that third parties cancelled contracts because of defendants' action will not withstand a motion to

dismiss."); *M. J. & K. Co., Inc. v. Matthew Bender and Company, Inc.*, 220 A.D.2d 488, 631 N.Y.S.2d 938 (2d Dep't 1995).

The rationale for this heightened pleading requirement is explained in *Guard-Life, supra.* Relying on the *Restatement of Torts (Second)* §768, the Court of Appeals explained that a "party seeking to impose liability [based on an at-will contract] enjoys no legally enforceable right to performance; his interest is a mere expectancy – a hope of future contractual relations." 50 N.Y.2d at 193, 428 N.Y.S.2d at 634. The Court approvingly quoted *comment i* to the *Restatement of Torts (Second)* as follows:

> If the third person is free to terminate his contractual relation with the plaintiff when he chooses, there is still a subsisting contract relation; but any interference with it that induces its termination is primarily an interference with the future relation between the parties, and the plaintiff has no legal assurance of them. As for the future hopes he has no legal right but only an expectancy; and when the contract is terminated by the choice of the third person there is no breach of it. The competitor is therefore free, for his own competitive advantage, to obtain the future benefits for himself by causing the termination. Thus he may offer better contract terms, as by offering an employee more money to work for him or by offering a seller higher prices for goods, and he may make use of persuasion or other suitable means, all without liability.

50 N.Y.2d at 192 n.4, 428 N.Y.S.2d at 633 n.4. *See also Snyder v. Sony Music Entertainment, Inc.*, 252 A.D.2d 294, 299, 684 N.Y.S.2d 235, 239 (1st Dep't 1999) ("the case law is clear that '[a]greements that are terminable at will are classified as only prospective contractual relations, and thus cannot support a claim for tortious interference with existing contracts'").

Here, as in *Darby Trading, supra*, Plaintiff has not made any allegation whatsoever that Defendants' conduct amounted to a crime or an independent tort or was

done for the sole purpose of harming Plaintiff. Rather, the Amended Complaint alleges that Mr. Borchetta acted to advance BMR's economic advantage. Davis Decl., Exhibit A, at ¶78. *See also NBT Bancorp Inc. v. Fleet/Norstar Financial Group, Inc.*, 87 N.Y.2d 614, 625, 641 N.Y.S.2d 581, 587 (1996) ("letter was written to secure an economic advantage, not to injure plaintiffs, and it therefore constituted persuasion alone, not a malevolent act"); *Lobel v. Maimonides Medical Center*, 39 A.D.3d 275, 835 N.Y.S.2d 28 (1st Dep't 2007) (dismissing claim for tortious interference with at-will contract "since it is clear that any motivation on defendant Grazi's part was based on economic self-interest and not for the sole purpose of harming plaintiff"); *Lawrence v. Union of Orthodox Jewish Congregations of America*, 32 A.D.3d 304, 305, 820 N.Y.S.2d 60 (1st Dep't 2006) ("the record provides no ground to infer that Kehilah was not motivated by legitimate economic self-interest when it sent the memo" urging plaintiff's termination); *Hoesten v. Best*, 34 A.D.3d 143, 159, 821 N.Y.S.2d 40 (1st Dep't 2006) (trial court erred in not dismissing claim for tortious interference with at-will contract where there was no evidence defendant acted solely for the purpose of harming plaintiff or utilized fraud, threats or other wrongful means); *Cerberus Capital Management, L.P. v. Snelling & Snelling, Inc.*, 12 Misc. 3d 1187 (A), 2005 WL 4441899 (Sup. Ct. N.Y. Co. Dec. 19, 2005) at * 7 (dismissing tortious interference claim where the complaint contained nothing indicating defendants acted beyond their self-interest or other economic considerations).

Having failed to plead the necessary elements of a tortious interference with contract or with business relations or opportunities, Plaintiffs' claim must be dismissed.

D. Plaintiff Has Failed To State A Claim For Unjust Enrichment

In his Sixth Cause of Action, Plaintiff claims that Mr. Borchetta and BMR were unjustly enriched by Plaintiff's efforts to further Ms. Swift's career. Davis Decl., Exhibit A, at ¶¶145-46. The Amended Complaint makes no reference to any services performed by Plaintiff on behalf of Mr. Borchetta or BMR that could support a claim for unjust enrichment.

The criteria for a claim for unjust enrichment are as follows: "(1) the performance of the services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services." *Joan Hansen & Co., Inc. v. Everlast World's Boxing Headquarters Corp.*, 296 A.D.2d 103, 108, 744 N.Y.S.2d 384, 389 (1st Dep't 2002), *quoting Moors v. Hall*, 143 A.D.2d 336, 337-38, 532 N.Y.S.2d 412 (2d Dep't 1988).

As explained in *Kagan v. K-Tel Entertainment, Inc.*, 172 A.D.2d 375, 376, 568 N.Y.S.2d 756 (1st Dep't 1991), a plaintiff seeking to recover on an unjust enrichment theory must allege that he performed services for that defendant for which the plaintiff should be compensated:

> A plaintiff must demonstrate that services were performed *for the defendant* resulting in its unjust enrichment (*Kapral's Tire Svc. v. Aztec Tread Corp.*, 124 A.D.2d 1011, 1013, 508 N.Y.S.2d 777). It is not enough that the defendant received a benefit from the activities of the plaintiff (*Armstrong v. I.T.T.S. Corp.*, 10 A.D.2d 711, 198 N.Y.S.2d 641); if services were performed at the behest of someone other than the defendant, the plaintiff must look to that person for recovery (*Citrin v. Columbia Broadcasting*; 29 A.D.2d 740, 286 N.Y.S.2d 706) (emphasis in original).

See also Joan Hansen & Co., Inc., supra; *Sivin-Tobin Associates, LLC v. Akin Gump Strauss Hauer & Feld, LLP*, 19 Misc. 3d 1116 (A), 862 N.Y.S.2d 818, 2008 WL 958015 (Sup. Ct. N.Y. Co. Mar. 28, 2008) at *4.

The Amended Complaint does not allege that Plaintiff performed services for Mr. Borchetta or BMR, whether at their behest or otherwise. Rather, the Amended Complaint refers to services he rendered solely on behalf of Ms. Swift. Plaintiff's unjust enrichment claim against Mr. Borchetta and BMR must therefore be dismissed.

CONCLUSION

For all the foregoing reasons, Defendants Borchetta and BMR respectfully request that the Court dismiss the Amended Complaint for failure to state a claim, together with such other and further relief as the Court deems just and proper.

Dated: March 17, 2009
New York, New York

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