SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

VINCENT BALLARD,	:	**Index No. 30394/10**
Plaintiff	:	
-against-	:	**AFFIRMATION OF BETTY F. GREITZER, ESQ. IN REPLY TO DEFENDANT'S OPPOSITION TO MOTION TO DISMISS AMENDED AMENDED COMPLAINT**
ST. ALBANS CONGREGATIONAL CHURCH UCC, INC.	:	
Defendant	:	

BETTY F. GREITZER, an attorney duly admitted to practice law in the state of New York, affirms under penalties of perjury that:

1. I am of counsel to the Drakeford Firm, attorneys for Defendant St. Albans Congregational Church UCC, Inc. I submit this affirmation in reply to plaintiff's opposition to defendant's motion to dismiss the amended complaint in this matter pursuant to CPLR § 3211(a)(2), § 3211(a)(3), § 3211(a)(4), and/or § 3211(a)(7). The facts set forth in this affirmation are made on the basis of my personal knowledge, or refer to documents previously filed with the Court. Legal arguments are included for the Court's convenience and are not sworn factual statements.

2. Plaintiff appears in this action *pro se.* As a general observation his Memorandum of Law primarily consists of responding to each of defendant's legal arguments with the phrase, "I disagree," without citing a legal basis for that statement. While individuals who are parties to civil actions may represent themselves (C.P.L.R. § 321 (a)), they are nevertheless required to conform to all applicable rules and practices of the Court. *How to Try or Defend a Civil Case When You Don't Have a Lawyer*, pg. 1 (New York State Unified Courts website at

http://www.nycourts.gov/publications/GuideforProSes.pdf). Plaintiff's failure to do so renders each of these unsupported statements untenable, and his opposition to defendant's motion a failure.

3. Plaintiff maintains that "there are several open issues of fact" which prevent the Court from granting the motion (Affidavit of Opposition, ¶ 4). This statement has no bearing on the pending motion and is thus inoperative. Plaintiff's position would be an appropriate response to a motion for summary judgment, however, this is not what is before the Court at this time. Instead, defendant's motion raises affirmative defenses to the amended complaint which dispute the authority of this Court to entertain this case as a matter of law. Nevertheless, for the purposes of the present motion there are no "open issues of fact." Defendant's moving papers rely exclusively on assertions made by plaintiff himself in his amended complaint and the Affirmation of Kevin A. Drakeford, Esq. previously submitted in support of defendant's motion. Plaintiff is of course bound by statements set forth in his own pleading (*Bogoni v. Friedlander*, 197 A.D.2d 281); his failure to controvert any statement in the Drakeford Affirmation results in his admission of the facts set forth therein.

4. Plaintiff states that "St. Albans is a New York State Corporation, and respective laws grants me [sic] common law rights to file a lawsuit against any New York State Corporation for any violation of a New York State Law" (Plaintiff's Memorandum of Law, p. 1); he makes further references to "common law" throughout his papers in opposition (see Affidavit of Opposition, ¶ 2). However, his amended complaint is based not on common law but statutory law created by two legislative bodies: the United States Congress and the New York State Legislature. They and not "common law" have determined not only which individuals may avail themselves of the remedies they have created, but which courts before whom such matters must

be brought. For present purposes neither this plaintiff nor this Court can proceed as a matter of law; consequently the amended complaint must be dismissed.

5. Plaintiff states "The defendant clearly violated the NYS 'Truth in Music Advertising Law.' This gives the jurisdiction to hear this court in controversy [sic]." (Affidavit of Opposition, ¶ 2). This position is totally in error, flying as it does in the face of the intent of the New York Legislature. And it is the intent of that body which governs the interpretation and application of that law, not what plaintiff wishes the result to be. With respect to statutory interpretation, it has long been established that "…the legislative will is the all-important or controlling factor. Indeed, it is sometimes stated in effect that the intention of the legislature constitutes the law." 73 *Am. Jur.2d* § 61.

6. The source of New York's "Truth in Music Advertising Act" is a model law drafted and advanced by an organization known as the Vocal Group Hall of Fame Foundation, 82 West State Street, Sharon, Pennsylvania 16146. This organization maintains a website at http://www.vocalgroup.org/truth.htm that details the creation and passage of its model law, which has evidently been enacted in 33 states.

7. Among the materials displayed on the website is an article dated August 22, 2007, by Michael Virtanen of the Associated Press which discusses the purposes of the model law, then recently introduced in the New York Legislature by Senator John Flanagan and Assemblyman Peter Rivera. According to the bill's sponsors, the purpose of the legislation was to ensure that concertgoers "get what they pay for" when they buy tickets to hear a live performance by a particular vocal group. A copy of this article is annexed hereto as Exhibit A.

8. This view is similarly advanced by Jon "Bowzer" Bauman of the group Sha Na Na, who serves as Chairman of the Vocal Group Hall of Fame Foundation's Truth in Music

Committee, and chief spokesman with respect to the model legislation. Mr. Bauman maintains a website at http://www.bowzerparty.com/truthinmusic.htm, on which is displayed the following statement referring to the "Truth in Music Act": "We have succeeded in passing a law to help protect you, the consumer, from imposter groups that are trying to pass themselves off as the real thing in live performances." A copy of this statement is annexed hereto as Exhibit B.

9. As is evident from these statements, as well as defendant's discussion of the "Truth in Music Advertising Act" in its previously submitted Memorandum of Law, the Act is exclusively consumer-driven and for this reason enforceable only by the Attorney General in the name of the State of New York; it does not provide for a private right of action or damages (Defendant's Memorandum of Law, pp. 3-4). Should this Court decide otherwise, it must be noted that the statute in question applies only to "performing groups" that violate its provisions. Arts and Cultural Affairs Law § 34.05 (1). Defendant is not a "performing group"; it merely leased the performance space to individuals who staged the concert (Drakeford Affirmation, ¶ 6). This was not controverted by plaintiff in his opposition papers, thus this fact is deemed to be admitted. As a result, plaintiff's lack of standing to bring an action under the "Truth in Music Advertising Act," coupled with the Act's inapplicability to any parties save "performing groups," must result in a dismissal of this cause of action pursuant to C.P.L.R. § 3211(a)(2) and (a)(7).

10. Plaintiff's opposition to the argument that federal district courts have exclusive jurisdiction of trademark infringement cases consists of his "just saying 'no'" without anything further (Plaintiff's Memorandum of Law, p. 4). This position, coupled with his unsupported statement that *T.B. Harms v. Eliscu*, 339 F.2d 823, 828 (2d Cir.1964), cert. denied, 381 U.S. 915, 85 S.Ct. 1534, 14 L.Ed.2d 435, is inapplicable, is foolhardy error.

11. Plaintiff's characterization of defendant's representation to the Court that it will implead its indemnitors as third-party defendants in this matter as simply "prospective, not certain" (Plaintiff's Memorandum of Law, pp. 4-5) insults counsel's integrity and fails to acknowledge indemnification as a classic basis for a third-party complaint. Counsel has produced defendant's indemnification agreement with Richard Poindexter and Anthony Riley for the Court's review (Drakeford Affirmation, Exhibit D) and has represented that a third-party complaint will be filed against these individuals should the motion to dismiss be denied. In addition to the point that Part 1200, *Rules of Professional Conduct*, Rule 3.3(a) requires counsel as a matter of law to say what she means and mean what she says, it is basic to our civil trial procedure that a third-party action points the finger of liability at those individuals factually responsible for a wrong alleged by the plaintiff. Consequently defendant's addition of Messrs. Poindexter and Riley to the action (should it proceed), is not merely "prospective"—it is a dead certainty. To think otherwise contradicts reason.

12. Plaintiff maintains that "….the defendant can see that plaintiff has a valid course [sic] of action, and that as a remedy, defendant can file an amended complaint against the individual(s) who performed." (Plaintiff's Affidavit in Opposition, ¶ 6). Defendant made no such assertion in its moving papers, but simply acknowledged the existence of plaintiff's on-going litigation in U.S. District Court against Richard Poindexter involving the trademarked name of which he alleges ownership.

14. Plaintiff's argument runs on at length regarding the purported differences between his federal and state actions (Plaintiff's Memorandum of Law, pp. 4-6), but several determinative factors are present in both: the same trademark and the same primary actor, i.e., Richard

Poindexter. Should the Court deny the present motion, there's little doubt that this issue will be raised once again when Mr. Poindexter becomes a third-party defendant.

15. In view of the foregoing, plaintiff's statement that the within motion is "frivolous" (Affidavit of Opposition, ¶ 2) is itself frivolous, and for this reason defendant should be awarded costs pursuant to C.P.L.R. § 8106, as requested in its Notice of Motion.

16. This reply to plaintiff's opposition papers constitutes the close of written argument on the motion. C.P.L.R. § 2214 (b).

17. For the reasons set forth above and in defendant's Memorandum of Law in Support of Motion previously filed, I would urge that this action be dismissed pursuant to C.P.L.R. § 3211(a)(2), § 3211(a)(3), § 3211(a)(4) and/or § 3211(a)(7).

Dated: _____ _____
Harrison, New York BETTY F. GREITZER