

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT
2083CV00052

JOSEPH M. KRAMER

vs.

VINDALOO MUSIC, INC. & others¹

**MEMORANDUM OF DECISION AND ORDER ON
PLAINTIFF'S REQUEST FOR INJUNCTIVE RELIEF**

Plaintiff Joseph Kramer, the drummer for the rock band Aerosmith, filed a complaint alleging breach of contract and violations of Chapter 93A by the closely held corporations comprising the band. For the reasons discussed below, Kramer's request for an injunction requiring the defendants to allow him to perform at the MusiCares Gala on January 24, 2020 and the Grammy Awards on January 26, 2020 is **DENIED**.

BACKGROUND

The following facts are taken from the plaintiff's verified complaint and from the affidavits and contracts filed by the parties. Kramer is a founding member of Aerosmith, has been its drummer for fifty years, and is the one-fifth owner of stock and voting rights in the closely held corporations that comprise Aerosmith. The defendant corporations employ the five members of Aerosmith and are the entities through which Aerosmith conducts its business. The other members of Aerosmith and corporate shareholders are Anthony Perry a/k/a Joe Perry, Steven Tallarico a/k/a Steven Tyler, Thomas Hamilton, and Bradley Whitford.

¹Vindaloo Music International, Inc., Rag Doll Merchandising, Inc., Queen of Denial, Inc., Aero Dynamic Music Publishing, Inc., and Swag Song Music, Inc.

The relationship among the band members is governed by a September 7, 1990 Employment Agreement with Amendments dated April 16, 2004, November 30, 2007, and August 4, 2011 (collectively, “the Agreement”). The individual band members are “Employees” under the Agreement and the defendant corporations are the “Employer.” Paragraph 14 of the Employment Agreement allows the corporations to replace a band member who is temporarily incapacitated. The band member is still entitled to his compensation after deducting the cost of his replacement. Paragraph 3 of the August 4, 2011 Amendment similarly states that a temporarily disabled band member will receive his 20% of live performance income, minus the cost of his replacement. Paragraph 11 of this Amendment states that no member of Aerosmith can be terminated “without cause,” and cause specifically excludes not being able to participate in Tour Activities due to temporary disability. Paragraph 15 states that the members will in good faith negotiate amendments to the Employment Agreement and the members’ Stockholders Agreement. Paragraph 16 then states that those agreements were not drafted as effectively as they should have been and have been the source of several controversies among the band members. Nothing in the Agreement addresses a member’s return to the band following a temporary incapacity or disability.

Since the signing of the Agreement, the band members have engaged in a course of conduct with respect to temporary absences, disabilities, or inability to perform live, including because of treatment for addiction and substance abuse. According to Kramer, the band member has been allowed to return to performing without having to audition or demonstrate fitness for the job, and without a vote of any kind. The band member simply has had to announce his desire and ability to return and has been allowed to do so.

In the Spring of 2019, Kramer was unable to perform several concerts with Aerosmith, including shows that were part of the band's residency at the MGM Resort in Las Vegas. A temporary drummer, John Douglas, has filled in for Kramer at Kramer's expense pursuant to the Agreement. In the Fall of 2019, Kramer expressed his desire to return to Aerosmith for the November and December run of the residency. However, in September, Kramer cancelled private sessions to record music with the band because he was "not mentally ready". On October 20, 2019, Kramer left a voicemail for Aerosmith's personal manager, Larry Rudolph, stating that he'd "like to wait a little bit longer before I do that" (recording with tapes) and that "I am not ready to do it yet".

In an October 26, 2019 email to Kramer, Rudolph expressed the band's excitement at Kramer's return and their desire to help him succeed, but noted that the band needed evidence that he had the stamina, physical ability, and timing to perform a one week Las Vegas cycle. Counsel for the defendants, Attorney Jeffrey Smith, stated to Kramer that the other members of the band would not allow him to return until he demonstrated that he was able to play at an appropriate level. This standard does not appear in the Agreement and had never before been invoked in the band's history.

The defendants demanded that Kramer perform a series of solo rehearsals against a "click track," a metronome used to keep time, after which the other band members would listen to the recordings and decide whether to allow Kramer's return. Kramer protested that the proposed solo rehearsals were not an effective measure of his ability to play and requested formal rehearsals with the rest of the band. However, Attorney Smith communicated the other members' refusal to rehearse. Kramer eventually agreed that Douglas could play the Las Vegas residency scheduled for November 14, 2019 through December 4, 2019, at Kramer's expense.

Aerosmith has been named the 2020 Person of the Year by MusiCares and the band is scheduled to play a career-spanning set at the MusiCares Gala on January 24, 2020. At this Gala, Aerosmith will be recognized for their philanthropic efforts over five decades and their impact on American music history and will perform with Alice Cooper and Johnny Depp. In addition, Aerosmith will be honored at the January 26, 2020 Grammy Awards by playing a career-spanning medley with guest musicians including Run-DMC. Aerosmith will not be compensated for either performance. These are "once in a career" performances that are important to the band's reputation and legacy. Aerosmith is scheduled to begin additional residencies in Las Vegas in January 2020 and May 2020 and is scheduled to begin a European tour on June 13, 2020.

Because he desires to participate in the MusiCares Gala and Grammy performances, Kramer performed recordings of himself playing the drums against "click tracks" on January 8, 10 and 12, 2020. These recordings were forwarded to the other band members for their review. In a January 13, 2020 email to Kramer's attorneys, an attorney for the defendants suggested a January 15 conference call among all five band members to discuss and vote on the following issues: whether the click track recordings show that Kramer will perform at least as well as Douglas at MusicCares and the Grammys; whether there is sufficient time to rehearse with Kramer before those events; whether the click track recordings show that Kramer will perform at least as well as Douglas during the February leg of the Las Vegas residency, and whether there is sufficient time to rehearse with Kramer before or during that leg.

During the January 15, 2020 conference call, Attorney Smith stated that Kramer was required to demonstrate that his playing was technically correct and that he could perform as well as Douglas. Attorney Smith informed the band members that their decision on whether to

allow Kramer to rejoin the band was governed by the covenant of good faith and fair dealing. The band members voted 4 (Perry, Tyler, Hamilton and Whitford) to 1 (Kramer) to prohibit Kramer from performing with Aerosmith at the MusiCares and Grammy performances and the upcoming Las Vegas residency.

Music and entertainment experts Harlan Lansky and Ian Barrett have listened to Kramer's click track recordings and opine that his performance was exceptional, suggesting no limitations on his drumming ability. Grammy award winning producer, engineer and musician Chris Lord Alge also listened to the recordings and opines that Kramer's performance is significantly deficient compared to that of Douglas playing the same set list. Alge opines that if Kramer performs at the MusiCares Gala and Grammy Awards, Aerosmith's musical success at those events will be compromised and negatively impacted.

Kramer filed this lawsuit against the defendants on January 17, 2020. Count I alleges breach of contract and breach of the implied covenant of good faith and fair dealing. Count II alleges unfair and deceptive conduct in violation of Chapter 93A. The complaint requests injunctive relief requiring the defendants to allow Kramer to perform at the MusiCares Gala on January 24, 2020 and the Grammy Awards on January 26, 2020.

Aerosmith members Whitford, Hamilton, Perry and Tyler aver that they would have to rehearse with Kramer for seven to fourteen days to successfully play together at these events and have offered to rehearse with him in early May. Rudolph avers that Kramer cannot successfully return as the band's drummer without significant rehearsals and there is no time for such rehearsals because the band has a rigorous schedule between January 20 and 27, 2020. Kramer has not played with the band since July 19, 2019, when he was unable to perform at a concert in Washington, DC because he could not move the foot used to play the peddle on the bass drum.

Kramer had so many health issues between September and December that he did not attend any practices with the band and his wife said he was not emotionally ready to do so. Kramer entered a rehabilitation facility in November and December of 2019 but left against the recommendation of his addiction counselor.

According to Kramer, for the past fifty years, Aerosmith has played charity and television events involving only a few songs by rehearsing for no more than a few hours. Kramer flew to Los Angeles hoping to participate in the band's rehearsals beginning on January 20, but was turned away by security and was not allowed to rehearse.

Aerosmith band members Whitford, Hamilton, Perry and Tyler aver that Kramer's drum performance has been deficient for several years and that Aerosmith's performance has been significantly improved by Douglas's presence as the band's drummer. When Douglas performs with Aerosmith, Kramer receives 100% of his share of the money from music licensing, record sales and streaming, and merchandising. Kramer receives 90% of his share of the money from concerts, while Douglas receives the other 10% per the Agreement. The defendants have invited Kramer to participate in all photo sessions and media events at the MusiCares Gala and Grammy Awards. Douglas will not participate in these events because he is not a member of Aerosmith.

DISCUSSION

A party seeking a preliminary injunction must demonstrate a likelihood of success on the merits of his legal claims, that irreparable harm will result from the denial of an injunction, and that in light of his likelihood of success on the merits, the risk of irreparable harm to him outweighs the potential harm to the non-moving party in granting the injunction. Garcia v. Department of Housing and Community Develop., 480 Mass. 736, 747 (2018).

Count I of Kramer's complaint alleges breach of the Agreement. Breach of contract requires a valid contract supported by consideration, that the plaintiff was ready, willing and able to perform his part of the contract, and that the defendant's breach resulted in damages. Bulwar v. Mount Auburn Hosp., 473 Mass. 672, 690 (2016). As Kramer concedes, nothing in the parties' Agreement creates specific rights or obligations with respect to the procedures to be followed when a member of the band desires to return from a temporary incapacity or disability. The Agreement simply is silent on that issue.

Kramer's claim that the defendants have deviated from the band's past course of conduct with respect to a member's return from a temporary disability does not prove a breach of contract. The parties' conduct is relevant when it is necessary for the court to resort to extrinsic evidence to determine the parties' intent with respect to an ambiguous contract term. Martino v. First Nat'l Bank of Boston, 361 Mass. 325, 332 (1972) ("there is no surer way to find out what the parties meant, than to see what they have done."). Here, however, Kramer is not relying on ambiguous language in the Agreement; rather, the Agreement is completely silent on the critical issue. Thus, Kramer has not shown a likelihood of succeeding on a claim that the defendants breached any express provision of the Agreement.

Kramer also alleges that the defendants' conduct breaches the implied covenant of good faith and fair dealing found in every contract in Massachusetts. That covenant ensures that neither party will do anything that will have the effect of destroying or injuring the other's right to receive the fruits of the contract. A.L. Prime Energy Consultant, Inc. v. Massachusetts Bay Transp. Auth., 479 Mass. 419, 434 (2018); Robert and Ardis James Foundation v. Meyers, 474 Mass. 181, 189 (2016). The covenant does not create new rights and obligations that are not otherwise present in the contractual relationship and is only as broad as the existing contract.

A.L. Prime Energy Consultant, Inc. v. Massachusetts Bay Transp. Auth., 479 Mass. at 435; Robert and Ardis James Foundation v. Meyers, 474 Mass. at 189. A breach occurs when one party violates the other party's reasonable expectations under the terms of the contract, and the court examines the manner of the defendants' performance. A.L. Prime Energy Consultant, Inc. v. Massachusetts Bay Transp. Auth., 479 Mass. at 434; Robert and Ardis James Foundation v. Meyers, 474 Mass. at 188-189. The plaintiff bears the burden of proving the defendants' lack of good faith, which may be inferred from the totality of the circumstances. A.L. Prime Energy Consultant, Inc. v. Massachusetts Bay Transp. Auth., 479 Mass. at 434; Robert and Ardis James Foundation v. Meyers, 474 Mass. at 189.

Based on the evidence presented at this stage of proceedings, Kramer has not demonstrated a likelihood of proving that the defendants' conduct breaches the covenant of good faith and fair dealing implied in the Agreement. As discussed *supra*, nothing in the Agreement sets forth the procedure to be followed when a band member wishes to return from a period of temporary incapacity or disability. Notwithstanding Kramer's assertion that the band's past practice has been to permit a member to return with no questions asked, the parties' affidavits suggest a good faith dispute whether it is in Aerosmith's best interest to allow Kramer to participate in the unique MusiCares and Grammy Awards performances, which will occur in mere days. The defendants have expressed a willingness to allow Kramer to return to the residency performances in the Spring, following an adequate opportunity for the band to rehearse. Thus, Kramer is not likely to succeed on his claim that the defendants have acted without good faith in exercising their rights under the Agreement to employ another drummer for the upcoming performances.

To the extent that Kramer's complaint fairly can be read to include a cause of action for breach of fiduciary duty, he has not shown a likelihood of success on his claim of a "freeze out." Foremost, Kramer has not named the individual band members/shareholders as defendants in this lawsuit. See Merola v. Exergen Corp., 423 Mass. 461, 463-464 & n.3 (1996) (claim for breach of fiduciary duty owed to shareholder of close corporation "is an equitable claim against individual shareholders" and fiduciary duty claim "lies only against the majority shareholder, not against the corporation."). Further, a freeze out occurs when majority shareholders oppress or disadvantage a minority shareholder by frustrating his reasonable expectations in entering into the corporate venture and depriving him of a return on his investment. Pointer v. Castellani, 455 Mass. 537, 550 (2009). As a co-equal 20% owner of Aerosmith, Kramer participated in the January 15, 2020 vote with respect to the upcoming performances. However, the majority has certain rights of selfish ownership which permit them a large measure of discretion with respect to employment by the corporation. Id. at 550-551. To establish a breach of fiduciary duty where the majority has a legitimate business purpose for its conduct, the plaintiff must prove that legitimate objective could have been achieved through a less harmful, reasonably practicable alternative mode of action. Id. at 551; Zimmerman v. Bogoff, 402 Mass. 650, 657 (1988). As discussed *supra*, the record at this stage of the proceedings reveals a good faith dispute whether it is in Aerosmith's best interest to allow Kramer to participate in the unique and imminent MusiCares Gala and Grammy Awards performances. Given that Kramer has not played with the band in six months and the dearth of available rehearsal time before the upcoming performances, Kramer has not shown a realistic alternative course of action sufficient to protect the band's business interests.

Finally, Kramer has not demonstrated a likelihood of success on his Chapter 93A claim.

A mere breach of contract, unaccompanied by extortionate or deceptive conduct, is insufficient to demonstrate a violation of Chapter 93A. Whitinsville Plaza, Inc. v. Kotseas, 378 Mass. 85, 101 (1979). Moreover, it is well established that disputes among parties to the same venture, such as those involving breach of fiduciary duty, do not fall within the scope of Chapter 93A. Selmark Assoc., Inc. v. Ehrlich, 467 Mass. 525, 548 (2014); Zimmerman v. Bogoff, 402 Mass. at 662-663.

Where, as here, the plaintiff has failed to demonstrate a likelihood of success on the merits of his claims, the court need not reach the question of the appropriate balance of irreparable harm. Garcia v. Department of Housing and Community Develop., 480 Mass. at 754.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Plaintiff's Request for Injunctive Relief be **DENIED**.

January 22, 2020



Mark C. Gildea
Justice of the Superior Court