



5281. Upon information and belief, Defendant BMI had a duty and failed to meet its duty to act as a reasonable and prudent licensing agency would act upon notice of a dispute over monies generated from a musical composition copyright licensed by it, which duty is set forth previously in this Complaint and incorporated herein. Defendant BMI, in fact, took no action after receiving notice from plaintiffs regarding disputes over the musical composition copyrights made the basis of this lawsuit.

5282. As a direct and proximate result of BMI's failure to perform the duties of a reasonable and prudent licensing agency, plaintiffs has [sic] been harmed and has suffered damages, including but not limited to, loss of profits, loss of opportunities, loss of good will, loss of publicity, attorney's fees, and interest, the amount of which to be determined at trial.

(Complaint, Docket No. 1, pp. 896-897).

A motion to dismiss for failure to state a claim on which relief can be granted must be viewed in the light most favorable to the party opposing the motion. State of Ohio ex rel. Fisher v. Louis Trauth Dairy, Inc., 856 F.Supp. 1229, 1232 (S.D. Ohio 1994). The purpose of a motion to dismiss for failure to state a claim is to allow the defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true. Mayer v. Mylod, 988 F.2d 635, 638 (6th Cir. 1993).

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Williams v. Mehra, 186 F.3d 685, 689 (6<sup>th</sup> Cir. 1999). The Court must view the factual evidence and draw all reasonable inferences in favor of the non-moving party. Id. To prevail, the non-movant must show sufficient evidence to create a genuine issue of material fact. A mere scintilla of evidence is insufficient; there must be evidence on

which the jury could reasonably find for the non-movant. Anderson v. Liberty Lobby, Inc., 447 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

BMI initially argues that it had no prelitigation duty to escrow disputed royalties for the benefit of Plaintiffs. BMI contends that Bridgeport is a BMI affiliate and that all duties owed by BMI to Bridgeport arise from that contractual relationship. Pursuant to its rules, BMI withholds royalties on musical compositions when litigation has been commenced. BMI does not withhold royalties merely at the request of an affiliate or upon learning of a dispute over licensing royalties or ownership of copyrights generating those royalties. BMI asserts that there is no basis for this case to proceed under a tort theory. Alternatively, BMI argues that the Federal Arbitration Act (“FAA”) governs the arbitrability of this dispute. BMI contends that the FAA mandates dismissal of Plaintiffs’ claims due to an arbitration provision contained in the contract between Bridgeport and BMI.

Plaintiffs, Bridgeport Music, Inc. and Southfield Music, Inc., have filed a Response (Docket No. 314) in opposition. Plaintiffs contend that the negligence claims asserted against BMI are proper and should not be dismissed because BMI owes Plaintiffs a duty of care to escrow funds in copyright disputes and to notify third parties of such disputes. Plaintiffs allege that BMI’s duty of care to escrow performance royalties arises when it is put on notice of a copyright ownership dispute regarding a musical composition, whether or not litigation has commenced. Plaintiffs generally cite the Tennessee law of negligence as the source of the alleged duty by BMI to escrow performance royalties upon knowledge of a dispute. Staples v. CBL Assoc., Inc., 15 S.W.3d 85, 89 (Tenn. 2000); Aetna Cas. & Surety Co. v. Gilreath, 625 S.W.2d 269 (Tenn. 1981). Plaintiffs further contend that the harm to them was foreseeable and that BMI

loses nothing by placing the funds in escrow upon notice rather than upon commencement of litigation.

Alternatively, Plaintiffs argue that the claims asserted against BMI are not arbitrable. Bridgeport asserts that its claims against BMI do not arise out of the contract between Bridgeport and BMI and, therefore, are not subject to the contractual arbitration clause contained therein. Southfield, in addition, asserts that it has no contract with BMI and, therefore, is not subject to any contractual arbitration provision.

The Court finds that BMI's Motion is well taken and should be GRANTED.

Plaintiffs have cited no case wherein any court has held that BMI, or any performance rights organization, has a common law duty in tort to escrow funds in copyright disputes, and/or to notify third parties of such disputes, upon merely learning of such disputes. Plaintiffs cite no specific authority that imposes such a duty on BMI pursuant to the common law of negligence or otherwise. In the absence of any such authority, this Court declines the Plaintiffs' invitation to expand the common law of negligence to create such a duty. Alternatively, the Court declines supplemental jurisdiction over Count 485. 28 U.S.C. § 1367(c)(1). Count 485, at a minimum, "raises a novel ... issue of State law." *Id.*

The Clerk is directed to serve this Order on BMI and Plaintiffs, and as directed in the Order (Docket No. 2) entered on May 8, 2001. The Clerk shall also post this Order on the Court's website (<http://www.tnmd.uscourts.gov/>).

IT IS SO ORDERED.

  
TODD J. CAMPBELL  
UNITED STATES DISTRICT JUDGE