SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

- -

DRUMMOND SMITH,

Plaintiff,

Index No. 08-602664

v.

VICTORY MULTIMEDIA,

Defendant

- -

MEMORANDUM OF LAW IN SUPPORT OF VICTORY MULTIMEDIA'S MOTION TO DISMISS PLAINITFF'S COMPLAINT

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October 16, 2008

Attorneys for Defendant Victory Audio Video Services Inc. d/b/a Victory Multimedia

I. INTRODUCTION

In 1651, Mr. George Herbert wrote: "Whose house is of glass, must not throw stones at another."[1] Plaintiff Drummond Smith ("Smith") chose to file this baseless action against Defendant Victory Audio Video Services Inc. ("Victory Audio") d/b/a Victory Multimedia ("Victory"). In so choosing, Smith has thrown a rock from a proverbial glass house. For the reasons that follow, Smith's complaint should be dismissed with prejudice and this Court should award Victory Audio its costs and attorney's fees in connection with its defense against Smith's baseless suit. To the extent the Complaint is sustained, it should be stricken, as more fully set forth below.

First, Smith does not have standing. He is not a party to the Distribution Agreement ("Agreement") that gave rise to, and which is the nexus of, all of the claims in his complaint. Instead, the Agreement is between Plaintiff's company, Drummond & Smith Entertainment, Inc. ("Drummond Inc."), and Victory Audio. Therefore, only Drummond Inc. has standing to sue. Moreover, an attorney must represent Drummond Inc., per CPLR §321(a), even if this Court somehow finds that Plaintiff is indeed Drummond Inc. Upon information and belief, Smith is not an attorney. Finally, this Court lacks both subject matter jurisdiction and personal jurisdiction over Victory Audio. But the complaint fails to state a claim even assuming, *arguendo*, that Smith does have standing.

Second, the Complaint does not properly cite to the provisions of the Agreement that Victory Audio is alleged to have breached, a required by New York case law concerning pleading.

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[1] The esteemed Benjamin Franklin wrote twenty-six years later: "Don't throw stones at your neighbors, if your own windows are glass."

Third, the Complaint fails to sufficiently allege facts which would substantiate Smith's mere legal conclusion that Victory Audio breached the agreement by not paying Smith "on time" for monies received from "Hastings, NetFlix, and Fry's Electronics."

Fourth, the Complaint fails to state a claim for breach of contract against Victory Audio resulting from Smith's alleged loss of two investors. These investors supposedly agreed to invest $50,000 into Drummond Inc. but allegedly withdrew their investments upon learning of Victory Audio's alleged $11,172 breach of the Agreement. Victory Audio has no contractual relations with these investors. As a consequence, Victory Audio could not have breached any contract with them.

Fifth, even assuming that Smith lost these investors, it is "inherently incredible" that Victory Audio's purported $11,172 breach of the Agreement was either the "but for" or proximate cause of the investor's decision to withdraw their $100,000 in funding. Even if Smith properly pled such causation, which he did not, only Drummond Inc. would have standing to pursue such a claim, and even then could do so only through counsel, per CPLR §321(a).

Sixth, the Complaint fails to allege that Smith provided the required written notice of breach and opportunity to cure to Defendant Victory Audio, as required by the Agreement. Indeed, Smith even admits in his complaint that he "decided on August 15, 2008 to no longer contact Defendant about payment" and that "legal action [was] the only way to collect what is owed by defendant."

Seventh, even assuming that Victory Audio sent a notice of termination to Smith, as is alleged in Smith's Complaint, this was in and of itself not a breach of the agreement. The express terms of the Agreement allow either party to terminate the agreement "with or without cause upon third (30) days prior written notice."

Finally, certain allegations of the complaint are "flatly contradicted" by provisions of the Agreement at issue and should be stricken.

These points are addressed in seriatim in Section IV below.

II. SUMMARY OF FACTS

The facts upon which this motion is based are set forth in the accompanying Affidavit of Randall Freeman (hereinafter "Freeman Aff.").

III. STANDARD OF REVIEW

For the purposes of considering Victory Audio's motion, this Court must "presume the allegations of the Complaint to be true and accord them 'every favorable inference,' except as insofar as they 'consist of bare legal conclusions' or 'are inherently incredible or flatly contradicted by documentary evidence." *Gotham Boxing, Inc. v. Finkel*, 2008 WL 104155, *4 (N.Y. Sup. 2008) (citing *Beattie v. Brown & Wood*, 243 A.D.2d 395, 395 (1st Dep't 1997)).

In considering whether the Plaintiff has stated viable claims against Victory Audio, the Court may also take judicial notice[2] of documents in the public record and may consider documents incorporated by reference in the Plaintiff's complaint. *See NYC Medical and Neurodiagnostic, P.C. v. Republic Western Insurance Co.*, 788 N.Y.S.2d 309, 314 (2d Dep't 2004) (Pesce, P.J., dissenting) ("Courts frequently take judicial notice of matters which, at a given moment, may be personally unknown to them. In such cases, recourse may be had to 'such documents, references and other repositories of information as are worthy of belief and confidence' even in the absence of a specific request of a party . . . Moreover, it is well settled

[2] "Judicial notice has been define as 'the knowledge which a judge will officially take of a fact although no evidence to prove that fact has been introduced at trial.'" *Lorraine M. v. Linwood M.S.*, 455 N.Y.S.2d 48, 52 (N.Y. Fam. Ct. 1982) (citing Fisch on New York Evidence, 2nd Ed. §1047 ("one of the legal expedients which makes it possible to assert a fact is true without the necessity of proof.") and 9 Wigmore, Evidence §2565 (Chadbourn rev. 1981) ("matters which will be taken for true by the tribunal without the need for evidence.")).

that a court may take judicial notice of matter of public record or other 'reliable documents, the existence and accuracy of which are not disputed.") (citations omitted)).[3]

The Court may also take judicial notice of Plaintiff's informal judicial admissions located in his Complaint. *See, e.g., Arvic Realty Corp. v. RST Associates*, 2005 WL 2764265 (1st Dep't Oct. 25, 2005) (stating that "the original answer, later amended, admitted service and constitutes an informal judicial admission.") (citing *Inprimus v. Insight Venture Management*, 752 N.Y.S.2d 26, 27 – 28 (1st Dep't 2002)) (same) and *Bogoni v. Friedlander*, 610 N.Y.S.2d 511, 518 (1st Dep't 1994) (stating that "[t]he purpose of this procedural device [CPLR 3025] is to permit the plaintiff to amend his theory of recovery to comply with the facts as the unfold, not to permit the plaintiff to alter his representation of material facts to best suit his theory of recovery and thereby overcome defenses in opposition."))

In so doing, the Court may preclude the Plaintiff from making certain legal arguments that are inconsistent with his own factual allegations. *See, e.g., MJD Construction, Inc. v. Woodstock Lawn & Home Maintenance*, 749 N.Y.S.2d 895, 896 (2d Dep't 2002) ("In our previous determination, we held that Galleria was estopped from denying that it owed money to the subcontractors, including the plaintiffs, of the general contractor, the defendant David Gutierrez. Such a position conflicted with its stance in a related proceeding before the United States Bankruptcy Court of the Southern District of New York. The Supreme Court was entitled to take judicial notice of its prior decision in this matter and the record in the related bankruptcy proceeding.")

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[3] *Brass v. American Film Technologies*, 987 F.2d 142, 150 (2d Cir. 1993) ("When determining the sufficiency of plaintiffs' claim for Rule 12(b)(6) purposes, consideration is limited to the factual allegations in plaintiffs' amended complaint, which are accepted as true, to documents attached to the complaint as an exhibit or incorporated in it by reference, to matters of which judicial notice may be taken, or to documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bring suit."); *Mortgage Electronic Registration Systems, Inc. v. Schuh*, 2007 WL 4875163, *1, fn. 1 (3d Dep't Feb. 7, 2008) (taking judicial notice of party's amended complaint and exhibits filed in a separate federal action).

Finally, mere legal conclusions, without more, are insufficient to carry Plaintiff's pleading burden. *Cf. Glenesk v. Guidance Realty Corp.*, 321 N.Y.S.2d 685, 687 (2d Dep't 1971) ("Defenses which merely plead conclusions of law without supporting facts are insufficient."); *see also Petracca v. Pertracca*, 760 N.Y.S.2d 513, 514 (2d Dep't 2003), *Rich Lending Corp. v. Ballinger*, 749 N.Y.S.2d 137, 137 (1st Dep't 2002). Instead, the Plaintiff must set forth the facts which substantiate the legal conclusions that he wishes this Court to draw from those facts.

IV. ARGUMENT

A. Smith doesn't have standing.

Smith doesn't have standing to bring this suit on behalf of Drummond Inc. because, as is more fully set forth in the Freeman Affidavit, ¶¶4, 10 – 11, Smith is not a party to the Agreement. *See, e.g., Suss v. American Soc. for Prevention of Cruelty to Animals*, 823 F. Supp. 181, 190 (S.D.N.Y. 1993) ("One choosing to utilize a corporation to operate a business cannot . . . disregard the corporate veil and obtain damages personally for harm to the corporation.") (applying New York law) (citing *United States for Use of R.I.M. Plumbing v. Freedom Plumbing & Heating*, 802 F. Supp. 1013 (S.D.N.Y. 1992)); *see also* Cal. Code Civ. Proc. §367 ("Only a real party in interest has standing to prosecute an action, except as otherwise provided by statute") and *Carsten v. Psychology Examining Com.*, 27 Cal.3d 793, 796 (1980) ("A complaint filed by someone other than the real party in interest is subject to general demurrer on the ground that it fails to state a cause of action.").

Moreover, Drummond Inc. is the real party in interest and must be represented by counsel, even if the Court somehow concludes that Drummond Inc. is indeed the plaintiff. *See, e.g.,* CPLR §321(a) (providing that a "corporation or voluntary association shall appear by

attorney" except in limited circumstances, such as in the defense of a small claim action, none of which apply here). But Smith is not an attorney, upon information and belief.

Finally, this Court lacks subject matter jurisdiction over this case precisely because Smith has no standing to seek redress for purported injuries to Drummond Inc. *See, e.g., Lacks v. Lacks*, 41 N.Y.2d 71, 74 (N.Y. 1976) (stating that "questions of mootness and standing of parties may be characterized as raising questions of subject matter jurisdiction.") (*citing Sosna v. Iowa*, 419 U.S. 393, 398 (1975)). The Court also lacks personal jurisdiction over Victory Audio under CPLR §302(1) or (3). The only possible jurisdictional contact that Victory Audio arguably had with New York and upon which this Court's long arm jurisdiction could be based was the Defendant's transacting with Drummond Inc., but not with Smith. Because Drummond Inc. is not the plaintiff, this Court cannot have long-arm jurisdiction over Victory Audio.

For these reasons, the Complaint should be dismissed.

B. The Complaint fails to cite to the Agreement's provisions.

The Complaint should be dismissed for the additional reason that it fails to cite to any provision of the Agreement. *See* Freeman Aff., at Exhibit "2," *passim*.[4] In New York, a complaint fails to state a cause of action for breach of contract when the complaint fails "to allege the breach of any particular contractual provision." *See Direct, LLC*, 2006 WL 216680, ** 5 –6 (cting *Kraus v. Visa Intern. Service Ass'n*, 756 N.Y.S.2d 853, 854 (1st Dep't 2003) (dismissing breach of contract complaint for failing to cite to the provision of the contract alleged to have been breached) and *Lebow v. Kakalios*, 548 N.Y.S.2d 686, 687 (1st Dep't 1989) (same)); *see also Shields v. School of Law, Hofstra University*, 431 N.Y.S.2d 60, 62 (2d Dep't 1980) ("Where a complaint, however, sets forth a cause of action for breach of contract, the

[4] Of course, the Agreement's "validity, interpretation, and performance" are governed by California law, per ¶11.5 of the Agreement, attached as Exhibit "3" to the Freeman Aff. However, New York law still governs the pleading standards that Plaintiff must satisfy.

provisions of the contract upon which the claim is based must be alleged."), *Lupinski v. Village of Ilion*, 399 N.Y.S.2d 956, 957 (4th Dep't 1977), *Berdych v. Bell Aerospace Corp.*, 240 N.Y.S.2d 448, 448 (4th Dep't 1963) (collecting cases).

C. Smith's legal conclusions are insufficient to state a claim.

Smith fails to state a claim for breach of contract vis-à-vis the purported wholesale distributor accounts of "Hastings, NetFlix, and Fry's Electronics." Complaint, ¶8. He merely makes the legal conclusion that Defendant "has breached the contract," *id.* at ¶9, by failing "to pay on time, 90 days EOM, according to the agreement on additional purchase orders made by wholesale distributors." *Id.* at ¶8.

What Smith fails to allege, as a factual matter, is that Victory Audio received "non-refundable monies" from these distributors. Complaint, *passim*. Only then is Victory Audio obligated to pay monies to Drummond Inc. within 90 days. Agreement, ¶2.3. By failing to allege this condition precedent to payment, Smith has merely alleged legal conclusions, which are insufficient under New York law to state a claim. *Cf. Glenesk v. Guidance Realty Corp.*, 321 N.Y.S.2d 685, 687 (2d Dep't 1971) ("Defenses which merely plead conclusions of law without supporting facts are insufficient."); *see also Petracca v. Pertracca*, 760 N.Y.S.2d 513, 514 (2d Dep't 2003), *Rich Lending Corp. v. Ballinger*, 749 N.Y.S.2d 137, 137 (1st Dep't 2002).

Hence, Smith's Complaint should be dismissed to the extent it seeks alleged monies due from Defendant from refundable monies for "Hastings, NetFlix, and Fry's Electronics."

D. Victory Audio has no contractual duty to Smith's investors.

Nowhere in Smith's Complaint does he allege that Victory Audio had entered into contractual relations with Smith and Smith's two investors. *See* Freeman Aff., Exhibit "2," *passim*.

This error is fatal. In order to plead a breach of contract claim under New York law, Smith must allege facts sufficient to support the following elements of a breach of contract claim: "(1) the making of an agreement; (2) performance of the agreement by one party; (3) breach by the other party; and (4) damages." *J & L American Enterprises, Ltd. v. DSA Direct, LLC,* 2006 WL 216680, **5 – 6 (N.Y. Sup. Ct. Jan. 27, 2006) (citing *Furia v. Furia*, 498 N.Y.S.2d 12, 13 (N.Y. App. Div. 1986)). The same is true in California, incidentally. *See, e.g.,* 4 Witkin, Cal. Procedure (4th Ed. 1997), Pleading, §476, p. 570 (a cause of action for breach of contract requires four elements (1) a contract, (2) Plaintiff's performance, (3) defendant's breach, and (4) damages."). "All of the elements of the cause of action must be properly pleaded in order to avoid dismissal." *DSA Direct*, *supra*, at **5 – 6; *see also* CPLR §3013.

By failing to allege that Victory Audio had an agreement with Smith and his investors, Smith has failed to allege "the making of an agreement." *DSA Direct LLC*, 2006 WL 216680, **5 – 6; *see also* Witken, *supra*, at p. 570. Therefore, his claim for breach vis-à-vis the purported loss of investors must fail as a matter of law.

E. Victory Audio is not the factual or legal cause of Smith's investor woes.

Even assuming, *arguendo*, that it is legally irrelevant that Victory Audio had no contractual relationship with Smith's investors, it is "inherently incredible" that Victory Audio's alleged $11,172 breach was either the factual ("but for") or legal (proximate) cause of Smith's alleged investor woes. To conclude otherwise would be to make a $100,000 damage mountain out of an alleged $11,172 breach molehill.

New York law adheres to the rule a complaint should be dismissed where the plaintiff fails to sufficiently allege "specific factual allegations demonstrating" his injury was proximately

caused by defendant's breach. *See, e.g., Tortura v. Sullivan Papain Block McGrath & Cannavo, P.C.,* 803 N.Y.S.2d 571, 572 (2d Dep't 2005) (dismissing plaintiff's breach of contract and legal malpractice claims under CPLR 3211(a)(7) because the plaintiff failed to allege "specific factual allegations demonstrating" that "but for" the defendant law firm's alleged malpractice there would have been a more favorable outcome in the plaintiff's underlying medical malpractice action, in which he was represented by defendant law firm); *see also Stein v. Security Mut. Ins. Co.*, 832 N.Y.S.2d 679, 682 (3d Dep't 2007) (stating that third party defendant "was entitled to summary judgment dismissing the third party complaint" because "on either a negligence or breach of contract theory" his conduct was not "the proximate cause of defendant's damage"); *Jorgensen v. Century 21 Real Estate Corp.*, 629 N.Y.S.2d 268, 269 – 270 (2d Dep't 1995) (grating defendant's real estate broker's motion for summary judgment against plaintiff landlord's breach of contract claim because third party tenant's criminal activities were the proximate cause of plaintiff landlord's damage and stating that "proximate cause is not an element of negligence only, but is also an element of breach of contract").

Here, all Smith alleges is the following:

> [i]n addition to monies owed from the fulfillment of the stated above purchase orders, plaintiff lost two investors, who agreed to invest $50,000 each, totaling $100,000 in plaintiff. Plaintiff agreed to keep investors aware if the distributor *of plaintiff's choice* was following the dictates of the agreement specifically in terms of being paid. The non-payment by defendant damages plaintiff's investor's trust and cause monetary harm.

Complaint, ¶10, attached as Exhibit "2" to the Freeman Aff. (emphasis added).

Notably missing from Smith's allegation are "specific factual allegations demonstrating" a causal link between the alleged breach by Victory Audio and the withdrawal of funding by the unnamed investors. *Tortura,* 803 N.Y.S.2d at 572. Indeed, Smith nowhere alleges that the investors withdrew their purported $100,000 funding *because of* Victory Audio's alleged

$11,172 breach – i.e. that "but for" Victory Audio's breach, the investors and their money would have stayed put.

But even if he did make such an allegation, it could not, as a matter of law, satisfy Smith's pleading burden to show proximate cause in light of the following: (1) Victory Audio is Drummond Inc.'s *non-exclusive* distributor under ¶¶1.1, 10.1 of the Agreement, and so the effect of any alleged breach by Victory Audio could not have been the proximate cause of the investors' decision to withdraw because Drummond Inc. had many other distributors for its products; (2) Victory Audio is only alleged to have caused Drummond Inc. $11,172 in damage, per ¶7 of the Complaint, from which it would be unreasonable to conclude that investors would withdraw $100,000 in funding; and (3) Smith doesn't have standing in any event to complain of this damage since these investors were investing in Drummond Inc., and not in Smith personally, for the same reasons set forth in Section IV(A).

For these reasons, Smith has not pled sufficient facts from which this Court could conclude that Victory Audio was the "but for" or proximate cause of Smith's investor woes.

F. Smith admits he failed to provide the required notice of breach and cure.

Smith admits he failed to provide the required notice of breach and cure as required in the Agreement. He alleges in the Complaint that he "decided on August 15, 2008 to no longer contact defendant about payment" and that "legal action is the only way to collect what is owed by defendant." Complaint, ¶11, attached as Exhibit "2" to the Freeman Aff. This Court may take judicial notice of this admission. *See, e.g., Bogoni*, *supra*, 610 N.Y.S.2d at 518. Mr. Freeman's affidavit buttresses the conclusion that Smith never provided the required notice. *See* Freeman Aff., ¶12.

In so admitting, Smith has shot himself in the foot. The Agreement specifically requires that a non-breaching party provide the breaching party at least thirty (30) days written notice and opportunity to cure. Freeman Aff., ¶5 (citing ¶10.2 of the Agreement). It is well established under New York law that "the terms of a written agreement define the rights and obligations of the parties to the agreement" and "where the parties have agreed to conduct themselves in a accordance with the rights and duties expressed in a contract, a court should strive to give a fair and reasonable meaning to the language used." *Abiele Contracting, Inc. v. New York City Sch. Constr. Auth.,* 666 N.Y.S.2d 970, 973 – 974 (1997).

Where, as here, the parties have agreed to provide notice and an opportunity to cure prior to suing for performance or asserting termination rights under a contract, those covenants must be adhered to. Smith's failure to do so renders ineffective his right to pursue this case and provides an additional ground why his Complaint should be dismissed.

G. Victory Audio did not breach by terminating, even if it terminated.

Even assuming, *arguendo*, that Victory Audio terminated the Agreement, per ¶11 of the Complaint, such a termination is not a *per se* breach of the Agreement. The Agreement specifically provides each party with the right to terminate, with or without case, upon thirty (30) days written notice. Freeman Aff., ¶5 (citing ¶10.2 of the Agreement).

Smith's inaccurate interpretation of the Agreement doesn't change this conclusion. In the Complaint, Smith alleges that the "agreement carries a clause of payment due 200 days after termination date." Complaint, ¶11. Apparently, Smith is trying to give the Court the impression that Drummond Inc. was due payment from Victory Audio 200 days after termination, but this is exactly the reverse of what the Agreement provides. Victory Audio, the "Distributor" – and not Drummond Inc., the "Supplier" – has the right under the Agreement to "return to Supplier for

credit any Products in its inventory or returned to it by its customers within the succeeding two hundred (200) days under its dealer stock-balancing program." Agreement, ¶10.3.

But assume, for the purpose of argument, that Smith is correct: Drummond Inc. has a right to payment from Victory Audio within 200 days after termination under the Agreement. Then it would follow that Smith has yet to suffer damage. After all, Smith implies that Victory Audio terminated in or about August 15, 2008. Complaint, ¶11. In that case, Smith – or more accurately, the real party in interest, Drummond Inc. – would have to wait until approximately January 15, 2008, which is roughly 200 days after termination, before it could claim that it was not paid the money allegedly owed under the Agreement.

Therefore, Victory Audio's termination of the agreement, even if such termination, is not in and of itself a breach.[5] For this additional reason, Smith's complaint fails to state a claim and should be dismissed.

H. Certain allegations of the complaint should be stricken.

Because certain allegations of the complaint attempt to contradict explicit terms of the Agreement via parol evidence, they should be struck from the Complaint, assuming it is sustained.

Smith alleges in the Complaint that the purchase order he allegedly filled on February 21, 2008, was a "complete sell though transaction that is fully payable and returns are not a factor." Complaint, ¶7. Elsewhere, he alleges that "[t]he single account that the defendant sold plaintiff products directly to is Blockbuster Entertainment, whom pays fully, non refundable monies, with no returns[.]" *Id.* at ¶3. Consequently, these allegations imply that "returns are not a factor" under the Agreement with respect to the alleged February 21, 2008 transaction.

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[5] Moreover, even if, as Smith alleges, "in lieu payment due and as another stall tactic of nonpayment and deliberate damage, defendant terminated the agreement," Complaint ¶11, it still is the case that Smith was required to provide Victory Audio a written notice of breach and opportunity to cure, as more fully set forth in Section IV(F).

In so doing, these allegations contradict the plain language of the Agreement. As is more fully set forth in the Freeman Affidavit, Victory Audio has the right to deduct the value of *any* "product returns," among other items, from amounts owed to Drummond Inc. Freeman Aff., ¶8 (citing to ¶2.5(a) and (b) of the Agreement).

Under New York law, such parol evidence may not contradict the express terms and plain meaning of the Agreement. *See, e.g., Heller v. Pope,* 250 N.Y. 132, 135, 164 N.E. 881, 881 (1928) ("[P]lain meanings may not be changed by parol and the courts will not make a new contract for the parties under the guise of interpreting the writing."). Nor will a court "under the guise of interpretation, make a new contract for the parties or change the words of a written contract so as to make it express the real intention of the parties if to do so would contradict the clearly expressed language of the contract." *Rodolitz v. Neptune Paper Products, Inc.,* 292 N.Y.S.2d 878, 881 (1968).

Therefore, these allegations should be struck from the Complaint, to the extent the Complaint is sustained.

V. CONCLUSION

For the reasons stated above, the Court should dismiss the Complaint in its entirety and strike the allegations mentioned above from the Complaint, to the extent it is sustained. Defendant hereby requests an award of all costs and attorneys fees incurred in its defense of this baseless action.

Dated: New York, New York
October 16, 2008

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Pro Se Plaintiff

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MICHAEL D. STALLMAN PART 7
Justice

Drummond SMITH

- v -

VICTORY MULTIMEDIA

INDEX NO. 602664/08
MOTION DATE 11/19/08
MOTION SEQ. NO. 001
MOTION CAL. NO. 91

FILED
DEC 18 2008
COUNTY CLERK'S OFFICE
NEW YORK

The following papers, numbered 1 to 3 were read on this motion to/for dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits + memo	3

Cross-Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that this motion to dismiss is granted, without prejudice to the commencement of a new action between the proper parties in Bronx County where the action would be properly venued. This action alleges a breach of contract. The parties to the contract would be the proper parties to sue and be sued: Drummond and Smith Entertainment, Inc. and Victory Audio Video Services, Inc. d/b/a Victory Multimedia. Neither party to the contract is a party to the lawsuit. Plaintiff, an individual, lacks standing in his own name to sue as a plaintiff. Drummond Smith Entertainment, Inc., a Bronx-based corporation would be the appropriate plaintiff. Defendant is simply a "d/b/a" for a California corporation. Smith does not state any cause of action on his own behalf.

Dated: 12/14/08

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST [ ] REFERENCE