

**IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY**

FALCON PICTURES GROUP, LLP,)

Plaintiff/Counter-Defendant,)

v.)

**HARPERCOLLINS CHRISTIAN
PUBLISHING, INC. d/f/a THOMAS
NELSON, INC.**)

Defendant/Counter-Plaintiff.)

Case No. 20-282-BC

JURY DEMAND

MEMORANDUM AND ORDER

The Court heard Defendant's Motion for Partial Judgment on the Pleadings and Partial Summary Judgment on July 10, 2020 pursuant to Tenn.R.Civ.Pro. 12 and 56. The Court also heard Plaintiff's Motion to Compel regarding which it will enter a separate order. The combination of these early motions requires the Court to consider what facts it needs to reach conclusions with respect to applicable statutes of limitations, and how the requested discovery will result in the identification of such facts. Defendant's motion also requires the Court to analyze Plaintiff's principal's 2011 bankruptcy and what, if any, legal conclusions it is required to reach regarding those proceedings.

The Court is prepared to rule on Defendant's dispositive motion having fully considered the parties' submissions and the relevant legal principles, as well as their oral arguments.

RELEVANT FACTS

Defendant seeks dismissal of Counts I and II pursuant to Rule 12, and III and IV pursuant to Rule 56. For the latter, it submitted four (4) pieces of correspondence between the parties and/or counsel as the only material for the Court's consideration outside the Complaint. Plaintiff, in its

response, submitted a lengthy sworn statement from its principal, Carl Amari, addressing a variety of matters including Defendant's representatives' statements to him over the years and the details of his bankruptcy case. Disputes of fact have become evident even through these limited materials extraneous to the Complaint.

What is undisputed in this case is that the parties entered into a business relationship in 2006 for Plaintiff to produce, and Defendant to market and sell, a product known as the New Testament Audio Bible ("NTAB"). The parties entered an agreement for Defendant to advance funds to Plaintiff and to pay royalties according to certain contract terms (the "NTAB 2006 Contract"). There was a second and third product, the Old Testament Audio Bible ("OTAB"), produced subject to a similar agreement in 2007 (the "OTAB 2007 Contract"), and the Kid's Audio New Testament ("KAB"), produced subject to a similar agreement also in 2007 (the "KAB 2007 Contract"). There was a 2008 agreement that altered some of the terms from the earlier agreements (the "2008 Contract") (collectively the "Contracts"). Mr. Amari signed a guarantee of Plaintiff's debt for advances as part of the 2008 Contract. At about the same time, Plaintiff began questioning whether Defendant was properly calculating and paying its royalties, and properly crediting advances against those royalties.

Mr. Amari filed for Chapter 11 bankruptcy protection in 2011, and listed as a "contingent" obligation the \$5,041,073.97 Defendant was claiming he guaranteed, on behalf of Plaintiff, for outstanding advances pursuant to the Contracts. The Chapter 11 Trustee investigated Defendant's claim and subsequently found that Mr. Amari owed \$3,963,781.87 pursuant to his guaranty. Mr. Amari's bankruptcy estate paid \$178,586.97 to satisfy his obligation pursuant to a Consent Order entered by the bankruptcy court.

While the bankruptcy pended, the parties' counsel began corresponding in August of 2013 regarding Plaintiff's questions about the accuracy of royalty statements and payments. In those communications Plaintiff demanded information to verify the payments and, in anticipation of potential litigation, that records be preserved.

Mr. Amari was successfully discharged from bankruptcy on March 16, 2017. The parties entered into a thirty (30) month tolling agreement regarding Plaintiff's claims on September 11, 2017. The lawsuit was filed prior to the conclusion of the tolling agreement term.

There are many, many factual disputes between the parties, not only related to what their contractual obligations were to each other, but whether or not those obligations were met and what, if anything, occurred between them to justify Plaintiff's delay in filing this litigation. Some of those issues touch on the appropriate scope of discovery.

LEGAL CONCLUSIONS

Rule 12 Motion to Dismiss Standard

The standards by which our courts should assess a Rule 12.02(6) motion to dismiss are well-established. *See Phillips v. Montgomery Cnty.*, 442 S.W.3d 233, 237 (Tenn. 2014); *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011). As stated by the Supreme Court in *Phillips v. Montgomery Cnty.*:

A motion to dismiss based upon Tennessee Rule of Civil Procedure 12.02(6) requires a court to determine if the pleadings state a claim upon which relief may be granted. Tenn. R. Civ. P. 12.02(6); *Cullum v. McCool*, 432 S.W.3d 829, 832 (Tenn.2013). A Rule 12.02(6) motion challenges "only the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence." *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn.2011). A defendant filing a motion to dismiss "admits the truth of all the relevant and material allegations contained in the complaint, but ... asserts that the allegations fail to establish a cause of action." *Id.* (quoting *Brown v. Tenn. Title Loans, Inc.*, 328 S.W.3d 850, 854 (Tenn.2010)) (alteration in original) (internal quotation marks omitted). The resolution of such a motion is determined by examining the pleadings alone. *Id.*

In adjudicating such motions, courts “must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences.” *Id.* (quoting *Tigg v. Pirelli Tire Corp.*, 232 S.W.3d 28, 31–32 (Tenn.2007)); *Cullum*, 432 S.W.3d at 832. A motion to dismiss should be granted only if it appears that “the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.” *Webb*, 346 S.W.3d at 426 (quoting *Crews v. Buckman Labs. Int’l, Inc.*, 78 S.W.3d 852, 857 (Tenn.2002)). Tennessee jurisprudence on this issue “reflects the principle that this stage of the proceedings is particularly ill-suited for an evaluation of the likelihood of success on the merits...” *Cullum*, 432 S.W.3d at 832 (quoting *Webb*, 346 S.W.3d at 437). We review a lower court’s decision on such a motion de novo without any presumption of correctness. *Id.*

Phillips, 442 S.W.3d at 237.

Rule 56 Motion for Summary Judgment Standard

Tenn. R. Civ. P. 56.04 sets forth the summary judgment standard, requiring that summary judgment be granted “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 judgment as a matter of law.” Tennessee law interpreting Rule 56 provides that the moving party shall prevail if the non-moving party’s evidence is insufficient to establish an essential element of her claim. Tenn. Code Ann. § 20-16-101; *Rye v. Women’s Care Center of Memphis, MPLLC*, 477 S.W.3d 235, 261-62 (Tenn. 2015). In response, the non-moving party “may not rest upon the mere allegations or denials of the adverse party’s pleading, but his or her response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” *Tolliver v. Tellico Village Property Owners Ass’n, Inc.*, 579 S.W.3d 8, 21 (Tenn. Ct. App. 2019) (citing Tenn. R. Civ. P. 56.06).

Effect of Mr. Amari’s Bankruptcy

Defendant asserts that statements Mr. Amari made in his bankruptcy petition, and subsequent court orders with the trustee representing the bankruptcy estate, entitle it to dismissal

based on the principles of judicial estoppel and res judicata. In other words, that Plaintiff should be barred from asserting these claims because Mr. Amari included Defendant's claim in his bankruptcy, and the Trustee entered a consent order for some satisfaction of them through Mr. Amari pursuant to his guaranty.

As described by the Tennessee Supreme Court in *Kershaw v. Levy*, judicial estoppel is a doctrine to “ensure the integrity of the judicial process” and is narrowly applied to situations in which “a party has attempted to contradict by oath a sworn statement previously made.” 583 S.W.3d 544, 548 (Tenn. 2019) (quoting *Cracker Barrel Old Country Store v. Epperson*, 284 S.W.3d 303, 315 (Tenn. 2009)). It is based upon the “public policy” regarding the “sanctity of an oath.” *Id.* at 549 (quoting *Sartain v. Dixie Coal & Iron Co.*, 266 S.W. 313, 317 (Tenn. 1924)). “The sworn statement is not merely evidence against the litigant, but (unless explained) precludes him from denying its truth. It is not merely an admission, but an absolute bar.” *Id.* (quoting *Sartain*, 266 S.W. at 318).

Application of judicial estoppel is within the Court's discretion, but *Kershaw* does provide some guidance. The statements must be “clearly inconsistent” and not ones that are “innocent” or an “apparent inconsistency that is actually reconcilable.” *Id.* (quoting Am. Jur. 2d *Estoppel and Waiver* § 68). Significantly, also, they must be statements of fact. *Id.* (citing *Brown v. Brown*, 281 S.W.2d 492, 502 (1955)).

Defendant asserts that listing its claim as contingent, rather than disputed, on his bankruptcy petition was an admission by Mr. Amari that monies were owed *to* Defendant and there were no offsets or royalties owed *by* Defendant. Plaintiff argues that Mr. Amari had to list the claim because otherwise he would have lost the opportunity to discharge it, and further, that it was contingent because it depended on whether the guaranty was triggered since the underlying debt

was against Plaintiff as a principal. The Court agrees that the listing of the claim cannot be construed as an admission there are not monies owed by Defendant to Plaintiff, or that the classification of it as “contingent” meant anything other than it was possible he would be held responsible for the obligation. The Court does not consider this “statement” as one clearly inconsistent or irreconcilable with Plaintiff’s claims in this case, and thus judicial estoppel is not a basis for dismissal.

Defendant also argues that the consent order regarding its claim, entered by the bankruptcy court with the approval of the trustee, in Mr. Amari’s bankruptcy case is a prior determination about the debt that is binding on this Court pursuant to res judicata. Claim preclusion or res judicata

bars a second suit between the same parties or their privies on the same claim with respect to all issues which were, or could have been, litigated in the former suit. *Creech v. Addington*, 281 S.W.3d 363, 376 (Tenn. 2009); *Richardson v. Tennessee Bd. of Dentistry*, 913 S.W.2d 446, 459 (Tenn. 1995) (quoting *Goeke v. Woods*, 777 S.W.2d 347, 349 (Tenn. 1989)). It is a “rule of rest,” *Moulton v. Ford Motor Co.*, 533 S.W.2d 295, 296 (Tenn. 1976), and it promotes finality in litigation, prevents inconsistent or contradictory judgments, conserves judicial resources, and protects litigants from the cost and vexation of multiple lawsuits. *In re Estate of Boote*, 198 S.W.3d 699, 718 (Tenn. Ct. App. 2005); *Sweatt v. Tennessee Dep’t of Corr.*, 88 S.W.3d 567, 570 (Tenn. Ct. App. 2002).

The party asserting a defense predicated on res judicata or claim preclusion must demonstrate (1) that the underlying judgment was rendered by a court of competent jurisdiction, (2) that the same parties or their privies were involved in both suits, (3) that the same claim or cause of action was asserted in both suits, and (4) that the underlying judgment was final and on the merits. *Lien v. Couch*, 993 S.W.2d 53, 56 (Tenn. Ct. App. 1998); *see also Lee v. Hall*, 790 S.W.2d 293, 294 (Tenn. Ct. App. 1990).

Jackson v. Smith, 387 S.W.3d 486, 491 (Tenn. 2012) (cited in *Parvin v. Newman*, No. E2016-00549-COA-R3-CV, 2016 WL 7183484 *6 (Tenn.Ct.App. Dec. 9, 2016)).

The Court does not view the *Trustee’s* agreement to require payment of certain monies for Mr. Amari to discharge Defendant’s claim against him as binding on Plaintiff. Once Mr. Amari

filed bankruptcy, the Trustee became responsible for identifying and claiming assets to liquidate as appropriate; identifying creditors and paying them amounts to which they were entitled as appropriate; and closing the bankruptcy estate as expeditiously as possible. *See*, 28 U.S.C. § 586. Although it could be argued that Mr. Amari is in privity to Plaintiff, this was the Trustee's action, not Mr. Amari's, and it cannot be imputed to Plaintiff. *Res judicata* therefore does not apply to bar any of Plaintiff's claims.

Count I: Breach of Contract

Defendant seeks to dismiss this cause of action based upon Tennessee's six year statute of limitations for breach of contract claims. Tenn. Code Ann. 28-3-109(a)(3). This claim regards royalties Plaintiff alleges are owed based upon the Contracts, executed between 2006 and 2008. It received royalty statements and some payments during a limited period, but asserts the statements were false, or that Defendant breached other obligations regarding cross collateralization of royalties against advances. These are all disputed material facts between the parties, also complicated by Mr. Amari's declaration in which he details his discussions with Defendant's representatives over the years. While the Court understands why Defendant filed this early dispositive motion based upon the statute of limitations, these factual disputes affect when that limitations period ran.

The Tennessee Supreme Court's 2019 decision in *Individual Healthcare Specialists, Inc. v. BlueCross BlueShield of Tenn., Inc.*, 566 S.W.3d 671 (Tenn. 2019), discusses statutes of limitation tolling in contract actions in detail. That case was initially decided by the trial court after a bench trial, and it made specific findings of fact to support its conclusions of law. The reviewing courts relied upon those findings in assessing the legal conclusions and in issuing this opinion analyzing the tolling issue. The Court addressed *Goot v. Metropolitan Gov't of Nashville*

and Davidson Cty., Case No. M2003-02013-COA-R3-CV, 2005 WL 3031638 (Tenn. Ct. App. Nov. 9, 2005), extensively, and the particulars of the inherently undiscoverable standard it established. *Id.* at *11. *Individual Healthcare Specialists, Inc.*, 566 S.W.3d at 708-712. In *Individual Healthcare*, after addressing *Goot*, the Court held “[t]he facts of [this] case do not compel [the Court] to either reject or adopt the holding in *Goot*, because the breach in [this] case does not qualify as ‘inherently undiscoverable’ under any definition.” *Id.* at 712. Absent controlling case law otherwise, the Court agrees with the federal magistrate judge in *Vanderbilt Univ. v. Scholastic, Inc.*, that “The law regarding the discovery rule in breach of contract cases in Tennessee is unsettled. Although *Individual Healthcare* casts some doubt on the viability of applying the discovery rule, *Goot* is still undisturbed precedent because the Tennessee Supreme Court declined to address its holding.” 3:18-cv-00046, docket entry no. 168, pg. 8 (M.D.Tenn. Nov. 27, 2019). The Court finds *Goot* applicable to the statute of limitations issue in this case and that it must be able to rule on the issue of inherent undiscoverability prior to defining the limitations period.

Inherent undiscoverability requires findings of fact, as were made in detail by the trial court in *Individual Healthcare*. As the Tennessee Court of Appeals found in *Osborne Enters., Inc. v. City of Chattanooga*:

The time of the accrual of the cause of action, as affecting the running of the statute of limitations, is frequently a question of fact to be determined by the jury or trier of fact under the evidence, as where the evidence is conflicting or the time is not clearly provided and is a matter of inference from the testimony. On the other hand, if the evidence is undisputed and only one conclusion can be drawn therefrom, the time of the accrual of the cause of action is a question of law to be determined by the Court.

561 S.W.2d 160, 165 (Tenn. Ct. App. 1977) (*quoting* 45 C.J.S. Limitations of Action, § 399(b), p. 550-51). The Court finds there are disputed material facts regarding this issue that prevent it from

issuing a judgment on the pleadings for this claim. Defendant's motion in regard to Plaintiff's Count I is therefore denied.

Count II: Breach of Duty of Good Faith and Fair Dealing

Defendant asserts that Tennessee law does not recognize a claim for breach of the duty of good faith and fair dealing as a cause of action in and of itself. The Court agrees based upon numerous rulings on this point in state and federal courts reviewing Tennessee law. *Cadence Bank, N.A. v. Alpha Tr.*, 473 S.W.3d 756, 773 (Tenn. Ct. App. 2015); *Lyons v. Farmers Ins. Exch.*, 26 S.W.3d 888, 894 (Tenn. Ct. App. 2000); *First Tenn. Bank Nat. Ass'n v. Republic Mortgage Ins. Co.*, 276 F.R.D. 215, 220 (W.D. Tenn. 2011); *Emergency Medical Care Facilities, P.C. v. BlueCross BlueShield of Tenn., Inc.*, 2015 WL 3581305 at * 6 (W.D. Tenn. June 5, 2015) (citing *Jones v. LeMoyne-Owen College*, 308 S.W.3d 894, 907 (Tenn. Ct. App. 2009)). The Court therefore finds that the implied covenants of good faith and fair dealing in the Contracts create duties only under the contracts themselves, not as separate causes of action and Count II of the Complaint is dismissed pursuant to Rule 12.

Counts III and IV: Promissory Fraud and Fraud Based on Concealment

Three years is the applicable statute of limitations to Counts III and IV. *Vance v. Schulder*, 547 S.W.2d 927, 933 (Tenn.1977); *American Fidelity Fire Ins. Co. v. Tucker*, 671 S.W.2d 837, 841 (Tenn.App.1983); T.C.A. § 28-3-105 (1980). Defendant has moved to dismiss these claims pursuant to Rule 56, rather than Rule 12, because it relies on correspondence between counsel commencing in August of 2013 in which Plaintiff's representative raises questions about the validity of Defendant's accounting and royalty payments. No specific claims of fraud are made in these communications, but Defendant asks the Court to find that these communications do in fact evidence Plaintiff's knowledge of its fraud claims at that time, which would bar them from

inclusion in this suit. Plaintiff argues that this motion should be denied, in part, because it is premature and that Rule 56.07 entitles it to additional discovery prior to any ruling. Plaintiff relies on an equitable estoppel tolling argument to extend the limitations period and allow these claims.

The Tennessee Supreme Court discussed the doctrine of equitable estoppel in detail in its 2012 decision in *Redwing v. Catholic Bishop for Memphis*, 363 S.W.3d 436 (Tenn. 2012). It stated as follows, in relation to a statute of limitations tolling claim:

The doctrine of equitable estoppel arises from the equitable maxim that no person may take advantage of his or her own wrong. In the context of a defense predicated on a statute of limitations, the doctrine of equitable estoppel tolls the running of the statute of limitations when the defendant has misled the plaintiff into failing to file suit within the statutory limitations period. . . .The party invoking the doctrine of equitable estoppel has the burden of proof. Thus, whenever a defendant has made out a prima facie statute of limitations defense, the plaintiff must demonstrate that the defendant induced him or her to put off filing suit by identifying specific promises, inducements, suggestions, representations, assurances, or other similar conduct by the defendant that the defendant knew, or reasonably should have known, would induce the plaintiff to delay filing suit. . . .In the context of defenses predicated on a statute of limitations, the doctrine of equitable estoppel always involves allegations that the defendant misled the plaintiff. The focus of an equitable estoppel inquiry “is on the defendant’s conduct and the reasonableness of the plaintiff’s reliance on that conduct.” . . .Determining whether to invoke the doctrine of equitable estoppel to counter a statute of limitations defense requires the courts to examine the facts and circumstances of the case to determine whether the defendant’s conduct is sufficiently unfair or misleading to outweigh the public policy favoring the enforcement of statutes of limitations.”

Id. at 460-461 (citations and footnotes omitted).

Mr. Amari, on behalf of Plaintiff, has raised a number of issues in his declaration to support Plaintiff’s position that equitable estoppel should be applied to toll the statute of limitations on these fraud claims. The Court finds that Plaintiff should be entitled to discovery on these issues before it is required to meet its burden of proving that Defendant engaged in conduct upon which it reasonably relied to delay filing this action. At the very least, Plaintiff has raised disputed

material facts that preclude a ruling on this issue at this time. Defendant's motion to dismiss Counts III and IV are denied.

CONCLUSION

Defendant is entitled to a dismissal of Count II pursuant to Rule 12 because breach of the duty of good faith and fair dealing is not an independent cause of action in Tennessee. All other requested relief, pursuant to either Rule 12 or 56 as is applicable, is denied because Plaintiff has demonstrated sufficient factual disputes to prevent a judgment, or is entitled to develop facts for the Court's consideration.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that Court II of the Complaint is DISMISSED.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that all other relief requested by Defendant is DENIED.

All other matters are reserved.

Anne C. Martin

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