

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK-----X
GATE FIVE, LLC,

Plaintiff,



v.

BEYONCÉ KNOWLES-CARTER and
BEYONCÉ, INC.,Defendants.
-----XIndex No. 651094/2011 (CER)
Motion Sequence: 003**STIPULATED ERRATA SHEET OF TRANSCRIPT OF PROCEEDINGS**
DATED APRIL 18, 2012

Plaintiff Gate Five, LLC ("Plaintiff"), by and through counsel, and Defendants Beyoncé Knowles-Carter and Beyoncé, Inc. (collectively "Defendants"), by and through counsel, hereby stipulate to the following Errata Sheet of the Transcript of Proceedings held in the above-titled action, dated April 18, 2012 as certified by Court Reporter Deborah Rothrock, RPR, and certify that the following corrections as identified below are required:

1. Page 2, Line 21 – change "arguments" to "argument"
2. Page 2, Line 23 – change "judgement" to judgment
3. Page 3, Line 9 – add "been" after "not"
4. Page 3, Line 18 – change "expressed" to "express"
5. Page 3, Line 23 – change "at" to "that"
6. Page 4, Line 4 – add "the" after "is"
7. Page 4, Line 24 – change "Defendant's" to "Defendants' "
8. Page 5, Line 2 – change "assigned" to "a signed"
9. Page 6, Line 5 – change "resource" to "resources"
10. Page 6, Line 14 – change "expressed" to "express"

11. Page 6, Line 16 – delete comma after “Alcon”
12. Page 6, Line 16 – add “knew” after “Alcon”
13. Page 6, Line 16 – change “they’re” to “they were”
14. Page 6, Line 19 – change “wasn’t” to “doesn’t” and “given to” to “give” and delete the comma after “me”
15. Page 6, Line 20 – delete “what”
16. Page 7, Line 15 – delete “the”
17. Page 8, Line 5 – change “reviews” to “review”
18. Page 8, Line 11 – delete “as”
19. Page 8, Line 23 – change “suppose” to “supposed”
20. Page 11, Line 5 – change “concern” to “concerned”
21. Page 11, Line 14 – delete “result”
22. Page 11, Line 23 – change “5” to “(v)”
23. Page 12, Line 6 – change “you” to “on”
24. Page 12, Line 10 – add “an” after “not”
25. Page 12, Line 10 – change “at will” to “at-will”
26. Page 12, Line 17 – change “provision” to “provisions”

Dated: <u>May 10, 2012</u>	Dated: <u>May 10, 2012</u>
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - CIVIL TERM - PART 53

-----X

GATE FIVE, LLC,

Plaintiff,

-against-

BEYONCE' KNOWLES-CARTER and BEYONCE, INC.,

Defendants.

-----X

Index # 651094/2011 Proceedings
60 Centre Street
New York, New York
April 18, 2012

B E F O R E:

HONORABLE CHARLES E. RAMOS,
Justice.

A P P E A R A N C E S:

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Official Court Reporter

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THE COURT: Okay. It is your motion.

MR. SIEV: Jordan Siev for the Defendant. Before we get started, in attempt to narrow at least the focus of our argument, we have created a small binder which is a subset of the supplements.

THE COURT: Yes, as long as counsel has one also.

MR. SIEV: Yes, there is nothing new.

(Handing.)

Your Honor, this is, as I believe you will recall, an action on breach of contract to create a video game. When we presented our motion to dismiss, your Honor said that it was a close call and you indicated at that hearing that you -- they had alleged and, therefore, you were required on that motion to accept as true that there was a completed deal, and that there were, their words from the complaint -- an execution version of agreements out for signature on the date of the termination, and that is Paragraph 64 of their complaint.

THE COURT: Yes.

MR. SIEV: You noted at the argument that it appeared they were ready to close, we pulled the plug, you would like to see this on summary judgment.

We submitted a record that we believe demonstrates that their allegation, that they were ready to close and that there were execution versions of contracts on the date

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2 of termination is absolutely false and we will certainly
3 walk you through those.

4 They now claim, despite their sworn allegation in
5 the complaint, that there was an agreement in principal on
6 all of the material terms and, therefore, we were not able
7 to terminate when we did. We'll also demonstrate that that
8 is incorrect. There were numerous issues still in dispute
9 and had not ^{been} agreed upon.

10 All of that aside, however, your Honor, in their
11 ever changing course of how they view this case, in
12 opposition to our motion the Plaintiff, itself, submitted in
13 several different places, and we'll point these out as well,
14 what it claims was an agreement to satisfy the finance
15 contingency, which is really the open question here, on
16 November 15th, 2010, they submit an agreement that they
17 claim satisfied that from late October of 2010, that
18 contains about 15 ~~expressed~~ conditions precedent, including
19 the execution of written documents. And it is undisputed in
20 the record that none of the conditions were satisfied.

21 Now, if I may say a word on discovery before I get
22 into the substance, heeding your Honor's direction at your
23 Honor's last argument th at the litigation, you said you did
24 not want to see this get protracted. We moved for summary
25 judgement, we agreed with the Plaintiff on a limited amount
26 of discovery and we have provided all valid documents. They

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2 agreed to defer deposition of the defendants until after
3 this motion was decided. They subpoenaed and received
4 extensive documents from ALCON, who is ^{the} potential financier
5 and Music World, the Defendant's former management. They
6 also got full cooperation from ALCON behind the scenes
7 without our input and submitted affidavits from ALCON and
8 their counsel. Any claim, your Honor, that they need more
9 discovery is simply looking to forestall the inevitable.

10 If your Honor would, starting at Tab 1, in the
11 binder, this is the License Agreement that started this.

12 In June of 2010, Plaintiff and the Defendants
13 entered into a License Agreement, whereby this video game
14 would be created. And some of the significant provisions,
15 if I could point you to on Page 11 of the License Agreement,
16 Paragraph 6(b)(v), it says that either party may terminate
17 this Agreement on written notice if Gate 5, the Plaintiff,
18 fails to obtain committed financing or additional capital of
19 \$5 million on or prior to August 31st.

20 This provision shows-- to highlight the importance
21 of the provision, the paragraph continues on:

22 For the avoidance of doubt, notwithstanding
23 anything else in here, there's no obligation on the
24 Defendant's part to render services until the financing
25 contingency has been satisfied.

26 Now, this Agreement also contains provisions, not

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2 surprisingly, on Page 15, Paragraph 10(g) and (h), basically
3 the Agreement can't be amended without ^{a signed} assigned writing and
4 a no waiver provision.

5 Just again --

6 THE COURT: There's no definition of the term
7 committed.

8 MR. SIEV: There's no definition. It is not a
9 definable term, your Honor, but I would say two things about
10 that.

11 First of all, in the context of 6(b)(v), what
12 satisfies the finance contingency is two things, committed
13 financing or additional capital. So, basically, the logical
14 reading of that provision is the only way this contingency
15 is satisfied is if you have additional capital, money in
16 hand, or committed financing. The only thing that squares
17 committed financing with additional capital is a commitment
18 legally enforceable to provide financing. What I said a
19 moment ago, your Honor, is significant on that point.

20 THE COURT: The problem is, if that is what you
21 meant, why didn't you put in the Agreement?

22 MR. SIEV: Well, the parties -- the Plaintiff --

23 THE COURT: Normally contracts like this require a
24 written commitment from a substantial institution. This
25 could be a commitment from me.

26 MR. SIEV: Well, the issue here is not whether --

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2 THE COURT: And I don't have \$5 million, trust me.

3 MR. SIEV: The issue here, your Honor, is not
4 whether the party attempting to provide the financing was
5 substantial enough and had the resource, but had they
6 committed to it. And the significant point we will get to,
7 as I mentioned a moment ago; in late October as the deadline
8 was approaching, they have submitted what they claim is an
9 Agreement between them and the financier --

10 THE COURT: ALCON.

11 MR. SIEV: Yes, ALCON -- --to provide the committed
12 financing so they define with ALCON how ALCON's financing
13 would be committed and it would only be committed on the
14 satisfaction of the 15 or so expressed conditions precedent,
15 if we are going to look at it.

16 THE COURT: Well, ALCON ^{KNOW} what they ^{WERE} doing when
17 they draft the contract?

18 MR. SIEV: ALCON, absolutely --

19 THE COURT: Why wasn't this contract ^{doesn't} ^{giving give} given to me
20 at least a little bit of guidance, as to what the meaning of
21 committed financing.

22 MR. SIEV: I submit, based on the language of the
23 Agreement, committed financing or additional capital, the
24 only read is one where there is a fully enforceable
25 agreement, that \$5 million is going to come into the
26 project.

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THE COURT: Do you have any authority for the proposition?

MR. SIEV: There's no legal authority, but the Agreement and the subsequent dealings between the Plaintiff and the financier, is what proves how they viewed the commitment.

THE COURT: Good. That is that excellent. That usually requires testimony from a witness.

MR. SIEV: No, but the documents have conditions precedent and the ALCON folks have put in affidavits, which I will demonstrate shows there was not committed financing.

If your Honor will flip forward to Tab 7.

THE COURT: One of the arguments that the Plaintiff makes is that they were a day away from signing and the closing the deal when your client pulled the plug.

MR. SIEV: And as I indicated, and I'm happy to walk you through that. That is absolutely false.

The first allegation they make is that execution versions of the documents were out for signature. That simply is not the case. If your Honor looks at Tab 16, Tab 16 is a draft from early in the morning on December 3rd, late in the evening December 2nd. December 3rd, by the way, was the date of the termination. This is the draft sent early in the morning on the date of the termination from ALCON's counsel, which they allege in the complaint is an

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2 execution version of the document. This draft, your Honor,
3 is anything but an execution version. This draft says from
4 ALCON's counsel, among other things, this is a revised
5 version of the LLC Agreement, it requires further review⁹
6 because the last set of changes resulted from e-mails that
7 were not comprehensive on all points. So, certainly, all
8 points had not been discussed or agreed to and ALCON
9 continues to reserve its rights on this document.

10 Now, if your Honor looks further into the document,
11 just ~~as~~ to save a little paper, we did not include the clean
12 version which is included in your exhibits, we simply
13 included the red-line version. But both the clean and
14 red-line version note on every single page in the top right
15 corner, that it is a draft as of December 2nd. This is not
16 an Agreement ready for execution where the parties are going
17 to sit down the next day and sign it and the financing is
18 going to be committed.

19 In addition, just a few things to point out your
20 Honor --

21 THE COURT: Counsel, you're asking me to make a
22 finding of fact, based upon two conflicting versions of the
23 deal that was supposed to go down on December 3rd. I
24 understand my role as a trial judge, I also have a role as a
25 motion judge. And on summary judgement motion, you've got
26 the burden to establish that there is no way the trier of

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2 fact could conclude that this deal could have gone down on
3 December 3rd.

4 MR. SIEV: Yes. And I think the evidence is clear.
5 When you look at -- this is the Agreement that they say is
6 an execution --this is one of the Agreements they say is an
7 execution version of the Agreement. It shows, for example.
8 On Page 16, in discussing one of the items that was in
9 dispute, the amount of interest that one of the members in
10 the LLC would get if that member of the LLC put more money
11 in, it indicates --

12 THE COURT: Is it really necessary from the
13 Plaintiff's point of view, that this be the execution
14 version if they were going to sign on the third as opposed
15 to fourth or fifth? I don't think that is their argument.

16 MR. SIEV: This is what they have alleged, number
17 one.

18 Number two, what I would like to do is show, that
19 at the time of this termination, there were at least half a
20 dozen material issues that had not yet been agreed upon.
21 Their argument is we had a deal in principal. All of the
22 material terms had been agreed upon and, therefore, there is
23 no issue that termination was improper.

24 What we are saying, there are material issues that
25 were in dispute as of the end of November, early December
26 between the parties. And I will show you the evidence that

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2 demonstrates that they cannot raise a fact question that all
3 material terms had been agreed upon, and that is the
4 standard. We are the Defendant saying there's no breach --

5 THE COURT: I have to place this argument that
6 you're making in the context of what was going on between
7 November 15th, was that the extension date?

8 MR. GALLAGHER: That's correct, your Honor.

9 THE COURT: December.

10 Did your client ever cause counsel to send a time
11 of the essence letter?

12 MR. SIEV: Time was of the essence.

13 THE COURT: How do we know that? The Agreement
14 does not say it.

15 MR. SIEV: Well, the Agreement --the case law
16 provides that time is of the essence where an agreement
17 provides for a specified date to accomplish something.

18 THE COURT: Look, the record is replete with the
19 evidence that your client, through counsel, was continuing
20 to negotiate with the Plaintiff right up to December 2nd.

21 MR. GALLAGHER: Your Honor, they actually agreed on
22 all points by December 2, that is what all of the witnesses
23 who have personal knowledge say in the affidavits.

24 THE COURT: At some point -- at some point you have
25 to say, okay, a week, two weeks, five days, whatever; never
26 happens.

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2 MR. SIEV: Well, there are several places in the ^{ed}
3 documents that are part of the document in the binder where
4 ALCON says, I'm sorry, but this is our final position.

5 THE COURT: I'm not concern with ALCON. Your
6 clients are trying to pull the trigger on the Plaintiff
7 saying you have not met --you have not satisfied the
8 contingency. You never send them time of the essence
9 letter. You continue to negotiate right up to until the
10 time you pull the plug. That is not going to work with me.

11 MR. SIEV: Your Honor, there are several offers
12 from our side, as well ALCON's, that indicate this is our
13 final offer, we have gone as far as we can go. And this
14 termination does not ~~result~~ ^{AM} come as a surprise. I would be
15 happy to show you a few of those.

16 THE COURT: The termination letter, as I recall,
17 relates back to the November 15th date.

18 MR. GALLAGHER: Absolutely.

19 MR. SIEV: Well, your Honor, the termination--

20 THE COURT: I thought we had a good motion for
21 summary judgement coming up, we don't, there's no way I'm
22 going to grant this.

23 MR. SIEV: Your Honor, the provision in 6(b) ^{ed},
24 which is the provision that contains the original date of
25 August 31, that was extended to November 15th, indicates
26 that any party can terminate upon written notice .

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2 immediately.

3 Now, immediately below that, there are other
4 provisions of the Agreement that require 30 days written
5 notice or additional notice.

6 THE COURT: Hang on. Hang you^{o^}_e.

7 You could not terminate before the termination
8 date, correct?

9 MR. SIEV: That's correct.

10 THE COURT: This was not ^{u^}at [^]-will contract?

11 MR. SIEV: That's correct. They had until
12 August 31 and then by written extension until November 15th.

13 The point to address your Honor's concern about
14 whether there was time of the essence, the point is, that
15 this contract didn't require anyone to provide any advance
16 notice for terminating once the financing issue was not
17 satisfied. And other provision. ^S

18 THE COURT: Hold the phone. Hold the phone.

19 You've got a date November 15th. On November 16th
20 or November 15th, at the close of business, I could
21 understand pulling the trigger. However, the record is
22 replete with the fact that you folks continued to negotiate,
23 there was a waiver of the November 15th deadline date, no
24 doubt about that. The record is replete with this.
25 Negotiations are going on with ALCON and your folks are
26 negotiating with ALCON as well, because ALCON's was going to

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2 get a big piece of the deal.

3 MR. SIEV: Correct.

4 THE COURT: Out of your client's share.

5 MR. SIEV: Correct.

6 THE COURT: It is hornbook law. Under
7 circumstances like that, you have got to say, at some point,
8 this is not going to go any further, we're going to give you
9 a reasonable time to wrap this up or we're going to invoke
10 the failure to obtain the financing clause; fair enough. I
11 enforce those all the time. But I never enforce one like
12 this. I mean, you were literally negotiating up until the
13 time you pull the plug. There is not one letter or e-mail
14 saying, time running out, nothing like that. These folks
15 were ready to sign the deal for 19 somewhat million dollars.
16 These folks were ready to sign the deal.

17 MR. SIEV: Your Honor, they were not ready to sign
18 because there were numerous open issues.

19 THE COURT: Sorry. Sorry. They were in the
20 drafting process of a substantial and serious deal and
21 someone pulled the plug.

22 This motion is denied. I am not going to go
23 further with this. I'm surprised this is so meritless.

24 Thank you very much.

25 MR. GALLAGHER: Thank you.

26 MR. SIEV: Thank you.

SO
ORDERED
[Signature]
5/16/12
CHARLES E. RAMOS