Is a Personal Manager the Artist's Fiduciary?

By Judah S. Shapiro

In almost every litigation involving an artist and a former personal manager, there is invariably a claim for breach of fiduciary duty. A split can be a messy divorce between former pals—the artist and his or her personal manager, who has been a day-to-day confidante, career advisor, fixer, co-party-er and sometimes the artist's lawyer. Whether the artist is unsatisfied with lack of career progress, wants to move on to a new handler (Broadway Danny Rose style), or suspects self dealing, the manager's course of conduct and business dealing comes under significant scrutiny.

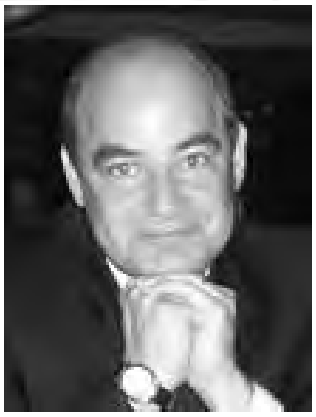
Though a common type of litigation, there are not many reported cases that directly address whether a personal manager has a fiduciary duty to his or her artist/client. After much research and hours of serious thought and analysis, I have come to agree with my initial opinion reached jointly with my esteemed colleague Marc Jacobson, who pithily stated: "It depends."[1]

Perhaps the strongest case in New York supporting a fiduciary duty is *Gershonoff v. Panov*.[2] In *Gershonoff*, prominent ballet dancers who defected from the Soviet Union entered into a contract with Maxim Gershonoff as an "impresario manager." Valery and Galina Panov were described by the court as being "hot properties" and "untaught babes in a world where freedom exists." The court described circumstances indicating that the Panovs were wholly dependent upon their Russian speaking "impresario manager."[3]

The appellate court specifically held that Gershonoff had a fiduciary duty and stated that his conduct was "entirely incompatible with the duty owed by manager Gershonoff to his principals." However, the court then cited only two very old cases (one from the 19th century) addressing agency generally.[4]

While the court's decision could (and probably should) be read to mean that the relationship of a talent/personal manager is a fiduciary one, it may be a function of the extreme "double dealing" of the manager and total dependence of the artists, in this particular case.[5]

The First Department also touched upon the fiduciary issue in *Vogotta v. DCA Productions Plus, Inc.*,[6] where a rock band brought an action against its former personal manager after the ex-manager allegedly caused a cancellation of the band's concert appearance. The court held that there was no reason to impose a fiduciary duty on a discharged agent. However, by referring to the personal manager as an agent, there seems to be an implication that the manager was an agent with a fiduciary duty while engaged by the band.[7]



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Tyson v. Cayton[8] is also a mixed bag. The case pertains to a series of boxer-manager contracts involving the former heavyweight champion Mike Tyson. The court seemed to hold that the defendant boxing manager was by definition a fiduciary and there were questions of fact whether the defendant manager violated his fiduciary duties in connection with their fourth and fifth management contracts. However, the court also found that there were questions of fact whether the defendant was a fiduciary when the parties signed their first personal management contract. In a virtual 15 rounder, I would give it a split decision 9-6 in favor of managers generally being fiduciaries.

Another federal court case seems to cut the other way. In a suit brought by Jim Croce's widow against former managers, publishers, and lawyer, the court found that the lawyer was liable for breach of fiduciary because he did not advise Croce to obtain independent counsel. However, the non-lawyer managers were not found to have fiduciary duties.[9]

Despite the court specifically acknowledging that the contracts were hard bargains favoring defendants and that Croce had little bargaining power, Judge Sweet, noting the risks in the music business, found them not to be unconscionable and found that no fiduciary duty was owed to Croce. This is a good illustration of where such an imbalance is passable for a breach of contract claim, but not consistent with fiduciary duties.

Additionally, somewhere in the long and winding road of George Harrison's "My Sweet Lord"/ "He's So Fine" travails, the Second Circuit found that George's ex business manager breached fiduciary duties but refused

to apply a strict standard of scrutiny to the artist-personal manager relationship for fear that it would "not suit the realities of the business world."[10] In other jurisdictions, a personal manager was assumed to be a fiduciary.[11] However, it is less definitive in New York.

- In *Malmsteen v. Berdon LLP*,[12] the court held that where a personal manager and business manager were accused of embezzlement, it was a question of fact for the jury to determine whether the respective manager took on a fiduciary duty to monitor a musician's income.
- In *Thomas v. 563 Entertainment*,[13] the court ruled on a motion to dismiss various claims brought by a musician against his personal manager. The court, interestingly, denied a motion to dismiss a constructive trust claim based upon alleged fiduciary duties created by a pleaded joint venture. However, it contemporaneously dismissed a similar claim, stating that no fiduciary duty was alleged, in connection with a Personal Management Contract. This seems very odd (and probably incorrect) and certainly argues against a finding that managers are fiduciaries per se.[14]

One would think on a motion to dismiss that the artist would be given leave to replead, especially since the court seemed to be aware of the alleged nature of the artist-manager relationship. The court stated the core essentials of personal management duties as: "specifically Massenburg was to assist Thomas with major business and creative decisions and to oversee and take steps to promote and advance Thomas' career as a recording artist and live performer, including, coordinating concert tours and booking Thomas for live performances."[15]

"Moreover, the burden of proof in establishing an agency relationship generally falls upon the party asserting such relationship."

Judge Kern's description of a personal manager's job function is essentially accurate. While phrased in various ways, "guidance, counsel, and advice," is the key language most often associated with the personal manager's primary job functions. "The personal manager is expected to advise an artist in all facets of the artist's career and primarily advise, counsel, direct, and coordinate the development of the artist's career. The manager advises in both business and personal matters, frequently lending money to young artists, and serves as spokesperson for his or her artists."[16]

The personal manager's deep involvement in advising and acting for the artist by aiding his or her day-to-day business and personal decisions would seem to in and of itself evidence the indicia of a fiduciary relationship. An artist's lawyer could make the good argument for establishing such a duty.

What's the counter argument / protective action for manager's counsel? It would be to set it up in the language of the personal management contracts. A contract could read something like:

> You [manager] will use your best efforts to counsel and advise me in all matters pertaining to my professional career, engagements and business interests, the exploitation of my name and talents, the choice of booking agent's services, the negotiation of contracts for my services and generally in all matters relating to my interest and welfare. You are not required to secure offers of employment for me.[17]

Specifically defining the extent of the relationship to "best efforts" significantly (not wholly) militates against the establishment a fiduciary relationship, especially if the artist is represented by competent independent counsel. Yet, on the other hand, "best efforts," though raising the bar from a pure arm's length contractual "good faith" standard, can also be viewed as a limiting provision.

In New York, where parties have entered into a contract, courts look to that agreement "to discover . . . the nexus of [the parties'] relationship and the particular contractual expression establishing the parties' interdependency."[18] "If the parties do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them."[19] Further, when parties deal at arm's length in a commercial transaction, no relation of confidence or trust sufficient to find the existence of a fiduciary relationship will arise absent extraordinary circumstances.[20] Moreover, the burden of proof in establishing an agency relationship generally falls upon the party asserting such relationship.[21]

Although this is a good counter-argument, while the limiting provision is relevant it is not dispositive. In addition to the contract language, the course of conduct of the parties may define the scope of the manager's responsibilities (fiduciary or otherwise) and how dependent the artists became upon the manager's guidance and activities. "It is fundamental that fiduciary liability is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation."[22]

The courts have also opined that the parties' course of performance of a contract necessarily is manifested after execution of the contract, but their performance is highly probative of their states of mind at the time the contract was signed."[23] Additionally, generally a finding of a fiduciary duty is a "mixed question of law and fact."[24] Such a relationship, necessarily fact-specific, is grounded in a

higher level of trust than normally present in the marketplace between those involved in arm's length business transactions.[25] Why does this all matter?

Imposing a fiduciary can have a significant impact on a litigation as well the daily business practices of a personal manager. A fiduciary relationship or agency generally raises the level of communication expected by the principal who is entitled to all material information the fiduciary receives.[26] What constitutes "material" is rife with problems and questions of fact.

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A fiduciary duty can supply the "special relationship" element of a negligent misrepresentation claim.[27] When one considers that an omission of a material fact can be a constituent, an element of negligence, this opens a whole set of headaches for a manager entrusted with daily responsibilities and who handles thousands of communications. The manager is then subject to potential liability for non-willful acts or lack of due diligence.

A personal manager frequently, if not typically, is not exclusive to a particular artist. A fiduciary has a heightened duty to act in the beneficiary's behalf and avoid conflicts of interests—in the framework of Justice Cardozo's famous "punctilio of honor"[28] standard resulting in greater exposure to any hint of self-dealing. For example, a client can sue a manager, alleging that the manager spent too much time promoting another client in a similar genre.

For the litigator, all of this makes motion practice (such as summary judgment) and discovery a wide-open consequential battlefield rife with questions of fact. Moreover, a breach of fiduciary duty can make it easier for the artist to claim and prove damages.[29] The increased exposure to damages beyond mere breach of contract obviously impacts motion practice, final judgment and of course the 90% of cases that settle.

While a fiduciary finding greatly advantages the artist, theoretically there may be a countervailing modest consideration. There have been a number of cases where a personal manager has been denied fees because of an artist's claim that the manager acted as an unlicensed booking agent, which is highly regulated by statute in California and New York.[30] It is a common affirmative defense. In sum, a personal manager should be okay if his or her bookings are limited and "incidental" to other job duties. If a manger acts as a fiduciary with the artist's imprimatur, this militates in favor of a broader role, and bookings being properly characterized as incidental. This would be particularly so in California, which seems more pro-artist in those matters compared to New York, which does not allow for a private right of action.[31] Given the broad involvement of a personal manager in an artist's career, it is likely that he or she would properly be found to be a fiduciary, but not necessarily and not without factual inquiry.

The New York Court of Appeals has held that "[a] fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other."[32] Accordingly, a proper inquiry would be: (1) to what extent the artist reposed trust in the manger and (2) the degree of superiority and influence the manager yields.

A new, inexperienced artist probably would be able to prove a fiduciary relationship with his or her manager, whereas a more established musician, such as Sir Paul McCartney, who possesses bargaining power and an army of informed professionals, such as the lawyers reading this article, would likely need a little luck.

Endnotes

1. As this is EASL's 30th anniversary, it is an appropriate time to thank and give a "shout out" to Marc Jacobson, the founding Chairman of the Section.
2. 77 A.D.2d 511, 430 N.Y.S.2d 299 (1st Dept. 1980), appeal dismissed, 51 N.Y.2d 875, 433 N.Y.S.2d. 1020
3. *Id.* at 513.
4. *See Lamdin v. Broadway Surface Advertising Corp.*, 272 N.Y. 133, 138-39; *Murray v. Beard*, 102 N.Y. 505, 508-9 (1886).
5. Among other things, the manager acted as self-dealing "impresario," producing shows where he made many rubles while failing to disclose other better offers. Gershonoff did this while simultaneously collecting management fees from the artists.
6. 293 A.D.2d 265, 741 N.Y.S.2d 20 (1st Dept. 2002).
7. [7] *Id.* at 267. The decisions of the Appellate Division, First Department hold particular import since New York County is a Mecca for the music industry. Citation—*In re Francis A. Sinatra "New York, New York"* ('If I can make it there, I'll make it anywhere . . .").
8. 784 F. Supp. 69 (S.D.N.Y. 1992).
9. *Croce v. Kurnit*, 565 F. Supp. 884, 893 (S.D.N.Y. 1982).
10. *See ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, F. Supp. 988, 995 (2d Cir. 1983). Although not an illuminating "here comes the sun" revelation, perhaps it is something.
11. *Porter*, 498 B.R.609 (E.D. La 2013) Louisiana court reviewing a case with Massachusetts law thus really impacting Rockin in Boston and down in New Orleans. Also watch out Nashville Katz and other music professions in Tennessee. *See Int'l House of Talent v. Alabama*, 712 S.W.2d 78 (S. Ct. Tennessee, Nashville).
12. 595 F. Supp. 2d 299 (S.D.N.Y. 2012).
13. Lexis Index No. 652898/14 (N.Y. Supreme Court 2015). Note, *Thomas* is relatively recent and lacks any substantial citations to cases defining the manager fiduciary duty, evidencing that it still an open issue.
14. *Id.* at 7. It should also be noted that a breach of fiduciary duty cause of action must be pleaded with particularity. *Parekh v. Cain*, 96 A.D.3d 81 (2d Dept. 2012); CPLR 3016(b). Perhaps this implicitly influenced the court's decision.
15. *Id.* p. 7.

16. *Marathon Entertainment, Inc. v. Blasi*, 42 Cal. 4th 974 (2008), citing/quoting *Park v. Deftones*, 71 Cal. App. 4th 1465, 1469-70, 84 Cal. Rptr. 2d 616; see also Siegel on Entertainment Law for a good readable description of a personal manager's duties and responsibilities; this section is authored by Mr. Siegel himself. *See* Siegel Section 10, Personal Managers.
17. *See* sample Exclusive Personal Management Contract, Siegel, Section 10, Appendix A.
18. *Northeast Gen. Corp v. Wellington Adv.*, 82 N.Y.S.2d 158, 160 (1993).
19. *EBC I, Inc. v. Goldman Sachs*, 5 N.Y.3d 11, 20-21 (2005); *Northeast Gen. Corp, supra*, note 18, at 162.
20. *Velron Holding, B.V. v. Morgan Stanley*, 117 F. Supp. 3d 404 (S.D.N.Y. 2015); *Northern Shipping Funds I, LLC v. Icon Capital Corp.*, 921 F. Supp. 2d 94 (S.D.N.Y. 2013).
21. *Nippon Yusen Kaisha v. FIL Lines USA, Inc.*, 977 F. Supp. 2d 343, 350 (S.D.N.Y. 2013).
22. *EBC I, Inc. v. Goldman Sachs*, 5 N.Y.3d 11, 20-21 (2005) (quoting Restatement [Second] of Torts § 874, Comment b).
23. Restatement (Second) of Contracts § 202 comment. *Gulf Ins. Co. v. Transatlantic Reinsurance*, 886 N.Y.S.2d 133 (1st Dept. 2009).
24. *Commercial Union Ins. Co. v. Alitalia Airlines, S.p.A.*, 347 F.3d 448, 462 (2d Cir. 2003); *Artists Rights Enforcement Corp. v. Estate of King*, 224 F. Supp. 3d 231 (2016).
25. *Eurycleia Partners, LP v. Seward & Enzo Kissel*, LLP, 12 N.Y.3d 553, 561 (2009).
26. *Marine Midland Bank v. John E. Russo Produce Co.*, 50 N.Y.2d 31 (1980).
27. *J.A.O. Acquisition Corp. v. Stavitsky*, 8 N.Y.3d 144 (2007); *Korea First Bank of N.Y. v. Noah Enterprises Ltd.*, 787 N.Y.S.2d 2, 12 A.D.3d 321 (1st Dept. 2004), *leave to appeal denied,* 797 N.Y.S.2d 816, 4 N.Y.3d 710 (2004).
28. *Manhard v. Salmon*, 249 N.Y. 458 (1928).
29. *105 East Second Street Associates v. Bobrow*, 175 A.D.2d 746, 747, 573 N.Y.S.2d 503 (1st Dept. 1991); *Brigham v. McCabe*, 27 A.D.2d 100, 105 (3d Dept. 1966).
30. N.Y. General Business Law § 190 (GBL); Cal. Labor Code § 1700.44(b). A significant portion of Sigel's Personal Managers section addresses this fluid unlicensing issue. Moreover, it is hard not to notice that the standard personal management agreement has an agency disclaimer in BIG BOLD LETTERS. *See* Appendix A.
31. *Marathon Entertainment, Inc. v. Blasi*, 42 Cal. 4th 974 (2008); Rhodes v. Herz, 84 A.D.3d 1 (1st Dept. 2011).
32. *AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 11 N.Y.3d 146, 158 (2008); Roni LLC v. Arfa, 938 N.Y.S.2d 746 (2011).

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