



McMahon v. Cooke

2024-Ohio-2170 (2024) | Cited 0 times | Ohio Court of Appeals | June 6, 2024

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT COUNTY OF CUYAHOGA

CARL G. MCMAHON, :

Defendant, : No. 113190 v. :

ANDREA M. COOKE, ET AL., :

Plaintiffs-Appellees, :

[Appeal by ABKCO Music, Inc., :

Defendant-Appellant.] :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED IN PART, VACATED IN PART RELEASED AND JOURNALIZED: June 6, 2024

Civil Appeal from the Cuyahoga County Court of Common Pleas Probate Division Case No. 2015ADV211062

Appearances:

Reminger Co., L.P.A., Clifford C. Masch, and Adam M. Fried, for appellant.

Thompson Hine LLP, Thomas L. Feher, John C. Allerding, and Ashley M. Bailes, for appellee.
FRANK DANIEL CELEBREZZE, III, J.:

Appellant ABKCO Music C the instant appeal

from the probate on February 9, 2023, awarding appellee Andrea



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M. Cooke 1 attorney fees and costs. After a thorough review of the record and law, this court affirms in part and vacates in part.

I. Factual and Procedural History

On October 9, 2015, McMahon filed a complaint against

Cooke and her minor children: S.C. (d.o.b. 8/9/2003), Al.C. (d.o.b. 3/29/2007),

M.C. (d.o.b. 6/15/2012) children of Andrea M. Cooke and the issue of such children. The complaint alleged

that Cooke was the settlor and the children were the sole beneficiaries of the Andrea Marless Cooke Family Trust . While ABKCO was not joined as a defendant until later, the substantial history of the litigation necessitates a thorough recitation of the facts.

Cooke is the granddaughter of legendary musician Sam Cooke, who was murdered on December 11, 1964, at 31 years old. , Denise Arnett

Cooke, also referred to within the record as Denise Somerville Cooke Denise , was

1 Cooke has commenced her own appeal that we have assigned as a companion to the instant appeal. McMahon v. Cooke, 8th Dist. Cuyahoga No. 113186. . Denise passed away in May 2000, and Cooke, as her

only child, was the sole beneficiary of the estate.

In 1986, Denise contracted with ABKCO, releasing her (and her rights to Sam to ABKCO in exchange for

periodic royalty checks . Until her death, Denise regularly

received royalties from ABKCO. attorney, McMahon, notified ABKCO that Denise had passed and requested that all



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future royalty payments be paid to Cooke. ,

Cooke, , organized the Trust to receive the royalty

payments and appointed McMahon as trustee. A contract dated April 13, 2010,

estate interest in the Royalty Agreement to the Trust. From this

point forward, all royalties were deposited into the Trust and McMahon distributed

them to Andrea as requested.

On August 28, 2015, Cooke filed a complaint in the probate court

against McMahon and the alternate trustee provided for in the trust instrument,

Joseph Silvaggio , and was assigned Cuyahoga P.C. No.

2015ADV209988. The complaint alleged that McMahon and Silvaggio had

breached their fiduciary duties to Cooke and demanded an accounting, alleging that

her prior attempts to audit the financial activity of the Trust had been stonewalled

by McMahon and Silvaggio. McMahon filed a pre-answer motion to dismiss,

alleging that Cooke did not have standing to bring the complaint because she was

not a beneficiary of the trust, only the settlor of the trust. In September 2015,

in Cuyahoga P.C. No. 2015ADV209988, McMahon filed a separate complaint in the

probate court, from which this appeal stems, seeking (1) declaratory judgment

accounting with respect to the Trust, and (3) approval for McMahon to resign as

trustee.

The complaint requested that the court clarify the rights and

relationships under the Trust instrument. McMahon alleged that custody of the children had been



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terminated in September 2015, and that the

children had been placed in the custody of the Cuyahoga County Division of Child

. Pursuant to Paragraph 3(a) 2 of the Trust, only

beneficiaries to the trust were The complaint

alleged that since Cooke was not a beneficiary, she did not possess withdrawal rights

under the trust instrument, and since she lost custody of her children, was no longer

permitted to receive distributions from the Trust for their benefit.

2 3(a) provides, in its entirety:

The class of beneficiaries who are entitled to exercise the withdrawal rights provided in this paragraph 3 consists of all of my issue (including the issue of a child of mine) who are living at the time that a contribution is made to the trust. The withdrawal right of such person in that class shall be as specified by the person making the transfer. If there is no direction by such person as to the withdrawal rights of each member of the class, then the withdrawal rights of each class member shall be determined as follows: equally among each of my children, the then living issue of a child of mine who is then deceased to have Prior to losing custody of her children, Cooke had been receiving

terminated, Cooke continued to demand distributions from McMahon, insisting

that she was a beneficiary of the Trust, and McMahon obliged. Attached as exhibits

to the complaint were copies of numerous checks written from the Trust to Cooke

displaying McMahon argued that pursuant to Paragraph 6(o) 3

of the Trust, Cooke

since her legal

custody had been terminated.

Shortly after McMahon filed the complaint, the probate court issued a

temporary restraining order, ordering McMahon to continue making distributions



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to Cooke from the Trust in the amount of \$250 weekly, as well as her rent and utilities to maintain the status quo during the pendency of the litigation.

3 6(o) provides, in its entirety:

To make payments or distributions to an incapacitated or incompetent beneficiary, either directly to such one or to a parent, spouse, or guardian of such one or to any person or organization having charge of or the responsibility for the care of such beneficiary, to be applied for the sole use and benefit of such one. In making any distribution hereunder to a minor beneficiary, the Trustee may make such distribution to any person, bank, or trust company as custodian for such one under the Ohio Transfers to Minors Act. In making any such payment or distribution, the receipt of such recipient shall be a full release to the Trustee and the Trustee shall have no duty to see to the application of any such payment or distribution. , Counterclaim, and Cross-claim

The children answered, counterclaimed, and cross-claimed through

. The counterclaim

alleged that McMahon had breached his duties as trustee by making distributions to Cooke, who was not a beneficiary of the Trust, and alleged that McMahon paid in violation of Section 7 of the Trust. The cross-claim asked the probate court to hold McMahon and Cooke personally liable for any liabilities incurred on behalf of the Trust.

On November 20, 2015, McMahon filed his first amended complaint, removing Jane/John Doe Cooke and adding An.C. (d.o.b. 1/2014) and CCDCFS as defendants.

-claim

Cooke filed an answer, counterclaim, and cross-claim on December 21, 2015, incorporating all factual allegations from 2015ADV209988. Cooke alleged



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that at the time she organized the Trust, she was unemployed, had not obtained a high school diploma, and thus believed that the royalties would be her main source of income for the duration of her life. Cooke alleged that at the time she organized the trust, she intended to be a beneficiary of the trust and for her children to be secondary beneficiaries.

The counterclaim alleged tha

Cooke had full rights to the royalties. She alleged that the contract assigning her rights to the royalties to the Trust was signed by McMahon without her

authorization. that McMahon had been making

distributions to her when asked and had never informed her that she was not a beneficiary under the Trust.

and a reformation of the terms of the Trust to reflect her true intentions. In the

alternative, Cooke requested a declaratory judgment declaring that she is entitled to

the royalties and that all assets in the Trust to be turned over to her. In the

alternative, Cooke requested a judgment declaring that the Trust is void; a judgment

for compensatory damages against McMahon and indemnification should Cooke be

found liable to a third-party because of her personal use of funds from the Trust; an

order that McMahon provide a full accounting of the Trust since its inception

through the date of the order; and costs and fees.

ABKC CO Parties

AM first became involved when



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Cooke subpoenaed AMR directly because Cooke was convinced that McMahon was not properly maintaining records relating to the royalties and desired to obtain the records directly from AMR. Though the issue is not germane at this point in the litigation, ABKCO and AMR are two separate and distinct entities.

On August 19, 2016, ABKCO (not AMR), sent McMahon a letter

pertinently advising that [a]s a result of the pending proceeding, entitled Carl G. McMahon v. Andrea M. Cooke, et al. claims as to the right to receive the songwriter royalty from [ABKCO],

[ABKCO] will hold all such royalties until such time that there is an adjudication as to the proper recipient of such royalties.

The letter also pertinently provided:

As a result of the dispute between [Cooke] and the Trust[,], ABKCO, who has no interest in the outcome in the resolution of the dispute has Consequently, [ABKCO] reserves any and all rights and remedies it may have in respect of such attorneys fees and costs including [ABKCO fees and costs against future royalties payable to the Trust or such other individual or entity as a court may hereafter determine.

Upon receipt of this letter, McMahon filed a motion asking the probate

. Because ABKCO elected to

withhold royalty payments and reserved the right to recover fees from the withheld

royalties, McMahon desired to preserve the approximate \$35,000 in the Trust for

such purposes, as well as his trustee fees. allowance should be terminated.

AMR and ABKCO Become Parties

On October 26, 2016, Cooke filed a motion requesting a temporary

and preliminary injunction, barring AMR from withholding the royalty payments.

The motion alleged that [AMR] decision to cease paying [r]oyalties is a



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culmination of a year-long dispute between the company and [Cooke] regarding

access to [AMR] records that are critical to this action. real intention in

refusing to continue making payments is to subject [Cooke] to economic duress with In a separate motion, Cooke sought leave to join AMR as a party to

the case and amend the complaint. Both filings specifically and exclusively delineate

It is, however, undisputed that the Royalty Agreement

provided that ABKCO was the only party to the agreement. Attached to the motion

were several letters exchanged between , exhibiting that AMR, through

Kramer, had been uncooperative in responding to subpoena requests.

The trial court AMR and accepted the

amended answer, counterclaim, and cross-claim. The court also motion for a temporary injunction, enjoining AMR from ceasing to make payments

in accordance with the Royalty Agreement to the Trust and set a hearing on

application for a preliminary injunction. the parties to the case were embroiled in numerous, voluminous discovery disputes

pertaining to document requests and deposition scheduling.

Once AMR was joined as a cross-claim defendant, it filed a motion to

dismiss. The first motion to dismiss argued, for the first time involvement, that AMR is not a party to and has no obligations under the Royalty

Agreement, which had been signed by ABKCO, not AMR. The motion alleged that

. She sued AMR for breach of contract, declaratory

judgment, and accounting under a Royalty Agreement she claimed AMR breached.

But AMR was not a party to the Royalty A Cooke opposed the motion to



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dismiss, arguing that when Kramer initially responded to the subpoena requests 4

Cooke

further alleged that AMR is the parent company of ABKCO, so AMR would have an interest in the litigation despite not being a party to the Royalty Agreement. Cooke filed a motion for leave to amend her answer again, this time desiring to add ABKCO to the cross-claim and add claims against both ABKCO and AMR for the allegedly improper actions of both entities. The court granted leave and allowed the amendments.

In January 2017, ABKCO filed a complaint in the New York County

Supreme Court against McMahon and Cooke setting forth causes of action for 1)

breach of contract, and 2) attorney fees, both related to the question of whether

ABKCO had a right to set off the withheld royalty payments based on costs and fees

incurred in producing documents in furtherance of ABKCO Music, Inc. v. McMahon, 57 Misc.3d 1223(A), 2017 NY Slip Op 51653(U),

72 N.Y.S.3d 516 (Sup.Ct.).

4 Despite this allegation, the record demonstrates the contrary. Exhibit B to this filing is a letter from Kramer, dated October 28, 2015, that advises:

Let me begin by stating that AMR, has no contractual obligations to your client whatsoever, and takes no position one way or the other with respect to the Litigation. AMR shall comply with any appropriate order of the court regarding to whom future accountings and payments should be made. However, as you are certainly aware AMR is not subject to the jurisdiction of an Ohio probate court or its subpoena power and any attempt by you to bring AMR into the Litigation would constitute an abuse of process subjecting your firm to appropriate proceedings, both civil and disciplinary. Shortly thereafter, ABKCO filed a pre-answer motion to dismiss the

second amended cross-claim, arguing that a New York court had first obtained



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jurisdiction over the proper parties to the exclusion of the probate court.

Resolution of Trust-Related Claims

On March 2, 2017, McMahon filed a motion advising that all parties except for ABKCO and AMR had reached an agreement that included reformation of the Trust actions. McMahon once again sought permission to resign as trustee.

While the aforementioned motions were pending, on April 7, 2017,

Cooke filed a notice of partial dismissal, dismissing (1) her cross-claims against AMR without prejudice and (2) her cross-claims for misrepresentation/fraud, negligent misrepresentation, conversion, and accounting against ABKCO.

On December 13, 2017, McMahon, Cooke, the children, and CCDCFS

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With these motions and notices pending before it, the trial court set a

hearing for January 2018, noting that

[d]efendant Cooke has entered in an agreement to Reform the Andrea Marless Cooke Family Trust which may or may not affect her standing to maintain her cross[-]claims. The Court further finds that there is a question of fact and law as to whether the New York Court or the Cuyahoga County Probate Court has jurisdiction over the cross[-]claims. Following the hearing in January 2018, ABKCO filed a supplemental

brief to its representations The

substance of the brief argued that (1) Cooke did not have standing to bring the

breach-of-contract and declaratory-judgment claims, (2) the probate court lacked

subject- -of-contract and declaratory-

judgment claims based on the pending New York case, and (3) any purported



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assignment of rights under the Royalty Agreement required ABKCO writing prior to the assignment, which had not happened interest was assigned to the Trust.

In April 2018, the court ruled on the motion to dismiss, finding that

(1) Cooke had standing to pursue her claims against ABKCO, (2) the court had

subject-matter jurisdiction because the New York matter

involved different allegations, and (3) Cooke complied with all conditions precedent

for bringing an action against ABKCO. As such, the court denied ABKCO to dismiss and ABKCO timely filed an answer and counterclaim amended cross-claim.

Summary Judgment: Cooke and ABKCO

Following a pretrial held on May 15, 2018, another discovery dispute

ensued over ABKCO indemnification pursuant to Section 9 of the Royalty

Agreement. Despite the fact that the settlement between the other parties made

clear that ABKCO was to release the funds to the reformed Trust, ABKCO refused to release the withheld royalties until it subtracted the indemnification that it was

allegedly entitled to, which had not yet been determined. As a result, the trial court

ordered ABKCO to provide Cooke/the Trust [ABKCO] is

holding and (2) the amount [of] fees which [ABKCO] claims a right to offset against

On July 26, 2018, Cooke filed a motion for partial summary judgment

as to her breach-of-contract claim against ABKCO, her declaratory-judgment claim

against ABKCO, and ABKCO -claim against her. The motion argued that

ABKCO was not entitled to indemnification pursuant to the Royalty Agreement and

that ABKCO did not have the right to withhold any of the royalties at this point in



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time.

ABKCO responded with a Civ.R. 56(F) motion, alleging that factual discovery was incomplete. The court agreed and set a discovery schedule. Several more discovery disputes arose, prompting the probate court to set a hard deadline requiring that all discovery be completed by July 19, 2019. ABKCO was allowed until August 19, 2019, judgment, and its own motion for summary judgment. Immediately thereafter, ABKCO filed a motion asking for a discovery extension, and significant briefing once again ensued. The trial court denied the motion.

On August 19, 2019, ABKCO filed its brief in opposition to motion for summary judgment and its own motion for summary judgment, urging -of-contract and declaratory-judgment claims. ABKCO argued that it was entitled to summary judgment, raising the argument that Cooke did not fulfill the conditions precedent for a breach-of-contract claim under the Royalty Agreement, which required Cooke to provide notice and allow ABKCO the opportunity to cure the purported breach.

Around this time, the New York matter was resolved; the Supreme Court of New York, Appellate Division, First Department, found that ABKCO did not present sufficient facts to prove that the New York court had personal jurisdiction over the matter. *ABKCO Music, Inc. v. McMahon*, 175 A.D.3d 1201, 2019 NY Slip Op 06721, 109 N.Y.S.3d 264.

On November 20, 2019, the trial court denied summary judgment on the breach-of-contract and declaratory-judgment claims,



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finding that summary judgment should be granted in favor of ABKCO as it pertains -of-contract and declaratory-judgment claims, and allowed ABKCO to seek indemnification pursuant to Section 9 of the Royalty Agreement. Cooke timely appealed to this court, which was dismissed for want of a final, appealable order since the judgment did not determine the amount that ABKCO was entitled to under Section 9 of the Royalty Agreement. See McMahon v. Cooke, 8th Dist. Cuyahoga No. 109316 (Motion No. 536315).

The Attorney Fees Dispute

Cooke returned to the probate court and filed a motion asking the court to set a prehearing schedule and hearing dates to resolve the outstanding indemnity dispute, which the court complied with. In the respective trial briefs, ABKCO indicated that it was seeking \$414,527.25 in indemnification; Cooke argued that based on her calculations, only \$14,250 of the amount sought was reasonable. Thereafter, ABKCO amended its indemnification request twice, seeking a final amount of \$476,155.75.

On June 21, July 7, and July 12, 2021, the probate court conducted hearings on the indemnity dispute. On September 9, 2021, the probate court issued a journal entry detailing findings of fact and conclusions of law based on the trial briefs and the hearings.

Pertinent to this appeal, the judgment entry ordered (1) all fees incurred on behalf of AMR are disallowed, and that since Kramer only represented



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AMR, all of his fees were disallowed; (2) all billing by Reminger & Co. LPA (ABKCO counsel) until February 3, 2017, was on AMR and therefore disallowed;

(3) any billed communications between Reminger & Co. LPA and Kramer were disallowed; (4) the New York case filed by ABKCO for breach of contract was not covered by the Royalty Agreement, and any fees stemming therefrom were disallowed; (5) that ABKCO is entitled to \$111,182.25, to be taken from the withheld royalties before distribution to the Trust. Notably, the September 9, 2021 entry ordered ABKCO to release all royalties being held, after subtracting the \$111,182.25 that it was entitled to under Section 9 of the Royalty Agreement.

ABKCO attempted to appeal, but the appeal was dismissed for failure to comply with App.R. 3(A). See McMahon v. Cooke, 8th Dist. Cuyahoga No. 110896 (Nov. 2, 2021), motion No. 550283. About two months after the September 9, 2021 judgment was entered,

Cooke filed a motion for order of contempt and sanctions against ABKCO, alleging that ABKCO had not complied to subtract the amount that it

was entitled to and distribute the remainder of the withheld royalties. ABKCO disputed that Cooke had standing to bring the motion, claiming the royalties are payable to the reformed Trust. Nonetheless, without any decision or order of the court, ABKCO willingly released the withheld royalties on December 8, 2021.

in the amount of \$473,918.37 and postjudgment interest in the amount of \$55,857.68, as well as reasonable attorney fees. ABKCO opposed and a hearing was set.



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The hearing commenced on November 29, 2021, and the probate court found ABKCO in contempt, but found that contempt finding was abated because ABKCO voluntarily released the withheld royalties on December 8, 2021. The court also found that ABKCO owed the Trust the requested prejudgment and postjudgment interest for failing to make the royalty payments since 2016 and for delaying the payment of withheld royalties following the order. The court requested that Cooke submit applications for reasonable attorney fees.

ultimately requested \$445,516.81 in legal fees from involvement. ABKCO opposed. On January 23, 2023, the court held a hearing and determined that Cooke was entitled to attorney fees in the amount of \$440,647.50, as well as costs totaling \$6,779.31. In so reasoning, the probate court found:

Indeed, as demonstrated again at the hearing, the entirety of this) is a product of [ABKCO] falsely claiming to have incurred fees and improperly ceasing royalty payments in August 2016. See, 9.9.21 judgment entry at 84. [ABKCO] mislead this Court early on as to its involvement in this fees due to the Trust and Ms. Cooke. The actions of [ABKCO] justify an award of attorney fees for all work incurred on behalf of Ms. Cooke in enforcing payment of royalty fees and obtaining royalty statements pursuant to Section 9 of the Royalty Agreement.

Both Cooke and ABKCO initiated appeals. In the instant appeal, we address ABKCO two 5 assignments of error:

1. The trial court erred in awarding attorney fees and expenses to Appellee pursuant to the terms of the indemnification provision contained in the Royalty Agreement.
2. as rendering judgment in favor of Cooke, the court should not have awarded any attorney fees or expenses incurred prior to the 9/9/21 Judgment Entry.



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II. Law and Analysis

ABKCO award of attorney fees and expenses to Cooke and challenges the validity of the

5 ABKCO its assignments of error as required by App.R. 16(A)(3). Nonetheless, we presume that the two subsection headings indicate ABKCO award in its entirety. The second assignment of error challenges the amount of fees

should this court find that the award was valid under the Royalty Agreement.

We begin with the few arguments that are undisputed. Both parties

agree that Section 5 (Accounting) of the Royalty Agreement controls the award of

fees and expenses relevant to this appeal, which reads:

Should suit be instituted by [Denise] against ABKCO with respect to enforcement of the terms of this Agreement or payments thereunder, it is understood and agreed that any judgment which would be rendered in favor of [Denise] fees incurred by [Denise].

Both parties agree that interest in the Royalty Agreement

has since been assigned to the reformed Trust, of which Cooke is a beneficiary.

request attorney

fees on behalf of the Trust or the reformed Trust. As such, for ease of reading, we

fees under Royalty Agreement. Both parties also agree that pursuant to Section 10

of the Royalty Agreement, interpretation of the Royalty Agreement is governed by

and construed under the laws and judicial decisions of the state of New York.

Finally, it is undisputed that Cooke has not personally incurred legal fees in this

matter because her counsel represented her pro bono.

A to award attorney fees is typically reviewed for an

abuse of discretion. *Motorists Mut. Ins. Co. v. Brandenburg*, 75 Ohio St.3d 157, 160,



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648 N.E.2d 488 (1995). interpretation of a contractual agreement, the decision is subject to de novo review. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978),

paragraph one of the syllabus (stating that the interpretation of a written contract is a question of law). Since both parties agree that fees in this matter are governed by Section 5 of the Royalty Agreement, we review th de novo, applying New York law.

In its first assignment of error, ABKCO argues that the probate court misinterpreted the terms of Section 5 of the Royalty Agreement. ABKCO notes that the Royalty Agreement provides that reasonable attorney fees are warranted from [the reformed Trust]. ABKCO

argues that ; she lost on summary

judgment and fees were awarded to ABKCO, albeit less fees than those requested.

as

evidenced even though

summary judgment was rendered in favor of ABKCO. She also argues that she

only ordered that ABKCO could recoup a small

fraction of their requested fees before distributing the withheld royalties to the

reformed Trust rather, it states

New York follows the general rule that attorney fees are incidents of

litigation and may not be collected unless the award is authorized by an agreement

between the parties. *Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491, 549 N.Y.S.2d 365, 548 N.E.2d 903 (1989). This rule exists to avoid placing



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barriers in the way of those desiring judicial redress and providing open access to courts. *A. G. Ship Maintenance Corp. v. Lezak*, 69 N.Y.2d 1, 5, 511 N.Y.S.2d 216, vexatious litigation [should be achieved through] separate, plenary actions after the *Id.* at 618, citing *Curiano v. Suozzi*, 63 N.Y.2d 113, 480 N.Y.S.2d 466, 469 N.E.2d 1324 (1984).

Hooper at 492. We must therefore look to rules of contract interpretation in reviewing Section 5 of the Royalty Agreement.

New York State law governing contractual interpretation is generally harmonious with Ohio law. Contract interpretation requires a determination from the perspective of the parties in order to conform to the terms of their agreement. *Tomhannock, LLC v. Roustabout Resources, LLC*, 33 N.Y.3d 1080, 2019 NY Slip Op 05058, 104 N.Y.S.3d 596, 128 N.E.3d 674. What parties to a written agreement intend is what the *Id.*

Where the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical construction. *Id.*

The words and phrases used by the parties must, as in all cases involving contract interpretation, be construed by their plain meaning. *Ellington v. EMI Music, Inc.*, 24 N.Y.3d 239, 245, 2014 NY Slip Op 07197, 997 N.Y.S.2d 339, 21 N.E.3d 1000.

In its order granting the probate court's decision, the Reformed Andrea Marless Cooke Family Trust did in fact prevail.



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when the September 9 Judgment ordered ABKCO to pay the Reformed Trust \$263,957.25 of Royalties owed to the Reformed Trust [] pursuant to the Royalty Agreement. (¶ 33, 8/24/2022 Judgment entry).

The probate court interpreted Section 5 as follows:

its claim, so long as the award was made in an action where enforcement was sought. And in any event, the Reformed Trust is deemed to have prevailed pursuant to the September 9 order, where the Court has denied [ABKCO] recovery of the vast majority of the fees it sought, determined that [ABKCO] withheld royalties before it ever incurred fees subject to indemnification, and determined that the amount of royalties withheld were far in excess of [ABKCO] reasonable fees.

(¶ 40, 8/24/2022 Judgment entry).

We agree with ABKCO does not interpret . The plain

text of Section 5 clearly provides that attorney fees are available if the following conditions [the reformed Trust]

against ABKCO ; (2) ; and (3) any judgment results that [the reformed Trust]. Section 5 does not use the

instead requires that any judgment be rendered in the reformed Trust.

ABKCO points this court to Graybill v. Van Dyne, 67 Misc.2d 228,

324 N.Y.S.2d 291 (Sup.Ct.1971), where

is entered, located in a statutory provision was interpreted. The Graybill Court cited German-American Button Co. v. A. Heymsfeld, Inc., 170 A.D. 416, 156 N.Y.S. 223 (1915), and Kriser v. Rodgers, 195 A.D. 394, 186 N.Y.S. 316 (1921), for the



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proposition that Graybill at 232.

After examining the statutory provision in Graybill versus the

language in Section 5 of the Royalty Agreement, we conclude that there is a key

distinction between the language used in the Graybill statute versus the Royalty

Agreement. This distinction hinges on the Royalty Agreement using the term , implying that there may be numerous judgments

throughout a case, as was the case here where Cooke (and/or the reformed Trust)

was not successful on summary judgment, but was successful and did receive a

judgment in her favor relating to her postjudgment motion for contempt

complaining that ABKCO had not released the withheld royalties. Additionally, the

Graybill The plain text of the Royalty

Trust to receive any The New York State Civil Practice Law and Rules

and may be either interlocutory or final. A judgment shall refer to, and state the

result of, the verdict or decision, or recite the default upon which N.Y.C.P.L.R. Law 5011. See also N.Y.C.P.L.R. a final or interlocutory judgment ; Burke v. Crosson, 85 N.Y.2d 10, 15, 623 N.Y.S.2d

524, 647 N.E.2d 736 (1995) (discussing the distinction between final and nonfinal

judgments in a case).

In the instant matter, the trial court entered judgment in favor of

ABKCO on summary judgment, and in favor of ABKCO in awarding fees pursuant

to Section 9, even though the fees were not as much as requested. There is no way

. In fact, the trial court explicitly

. ABKCO was awarded fees pursuant to



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Section 9 of the Royalty Agreement, and even though the court did not award ABKCO the total requested amount of fees, that does not undermine or somehow indicate that ABKCO did not receive a judgment in its favor.

After the trial court determined that ABKCO was entitled to fees to be taken from the withheld royalties, it ordered ABKCO to subtract the fees and release the royalties on September 9, 2021. ABKCO, however, did not immediately comply and it became necessary for Cooke 6 September 9, 2021 judgment.

The postjudgment motion for contempt arose (1) out of a suit instituted by Denise/Cooke/the reformed Trust, (2) related to payments under the Royalty Agreement, and (3) resulted in a judgment in her favor. ABKCO was found ber 9, 2021 order, but at the time this judgment was rendered, had already voluntarily released the withheld royalties on December 8, 2021. Cooke is thus entitled to all fees stemming from the efforts necessary to obtain the royalty payments to which she was entitled after the September 9, 2021 judgment was entered by the probate court, until December 8, 2021, when the withheld royalties were released.

Based on the documentation submitted partners billed 41.8 hours and associates billed 12.3 hours in preparing the postjudgment motion for contempt, for total fees of \$27,417.50

New York law does not permit a party to collect fees incurred by the



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fees. Rodriguez v. First Elite

Mgt. Corp., Sup.Ct. No. 652082/2017, 2022 N.Y. Misc. LEXIS 24996, 2 (Dec. 19,

6 In the probate court, ABKCO argued that Cooke did not have standing to seek enforcement of the judgment because the interested party is actually the Trust, not Cooke. ABKCO has abandoned this argument on appeal, and we deem it waived for purposes of appeal. 2022). Unless fee- Id., citing 546-552 W. 146th St. LLC

v. Arfa, 99 A.D.3d 117, 2012 NY Slip Op 5895, 950 N.Y.S.2d 24, ¶ 4; Valentini v. 326

E. 30th St. Owners, Inc., 76 Misc.3d 1207(A), 2022 NY Slip Op 50840(U), 173

N.Y.S.3d 479, ¶ 2 (Sup.Ct.). S

As a final point, we note that ABKCO does not dispute the pre- and

postjudgment interests or the costs only attorney fees awarded pursuant to

Section 5. As such, we do not address those amounts and conclude that since

ABKCO did not pursue them, they are owed as determined by the trial court.

ABKCO sustained in part and overruled

obtain the royalties that ABKCO withheld. She is therefore entitled to \$27,417.50 in

fees. ABKCO sustained.

III. Conclusion

Judgment affirmed in part and vacated

of attorney fees to Cooke s counsel in the amount of \$440,647.50 is vacated except

for \$27,417.50 that we affirm, stemming from her

efforts to enforce the September 9, 2021 judgment.

It is ordered that appellant and appellee share the costs herein taxed.



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The court finds there were reasonable grounds for this appeal. It is ordered that a special mandate be sent to said court to carry this judgment

into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27

of the Rules of Appellate Procedure.

_____ FRANK DANIEL CELEBREZZE, III, JUDGE

KATHLEEN ANN KEOUGH, A.J., CONCURS; MARY EILEEN KILBANE, J., DISSENTS (WITH SEPARATE OPINION)

MARY EILEEN KILBANE, J., DISSENTING:

I respectfully dissent from the majority opinion. I would affirm the
presided over this case for the entirety of its lengthy and convoluted history, and as
such, was in the best position to determine an appropriate award of attorney fees.

While I concur with the majority opinion that fees in this matter are governed by
no judgments were rendered in favor of the reformed Trust because the probate
court ordered ABKCO to pay the reformed trust \$263,957.25 of royalties.

attorney fees, save the \$27,417.50 that the majority opinion leaves intact. Based on
believe that Cooke

For these reasons, I respectfully dissent.

