

ORIGINAL FILED  
AUG 17 2009  
LOS ANGELES  
SUPERIOR COURT

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

BLIX STREET RECORDS, INC.,  
Plaintiff,  
vs.  
ALLEN GELBARD, HUGH CASSIDY  
and BARBARA CASSIDY, parents and  
sole heirs of the Estate of Eva Cassidy,  
EVA CASSIDY PARTNERS, LLC, and  
DOES 1 through 50, inclusive,  
Defendants.  
\_\_\_\_\_  
HUGH CASSIDY and BARBARA  
CASSIDY and DANIEL CASSIDY,  
Cross-Complainants,  
vs.  
WILLIAM R. STRAW, BLIX STREET  
RECORDS, INC., a Washington  
Corporation, and ROES 1 through 10,  
inclusive,  
Cross-Defendants.  
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Case No. BC 312118  
  
STATEMENT OF  
DECISION, PHASE I

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1 RULING:

2 The court rules in favor of defendants and cross-complainants (Cassidy parties) and  
3 against plaintiffs and cross-defendants (Blix Street parties) and finds that plaintiffs and  
4 cross-defendants are estopped from claiming that the Settlement Agreement is  
5 unenforceable.

6  
7 INTRODUCTION:

8 This is a dispute between the parents of the late singer Eva Cassidy and the record  
9 label that owns the rights to her songs, Blix Street Records and its principal William R.  
10 Straw. The suit was initiated by Blix arising primarily out of a claim that the Cassidy's had  
11 entered into a movie deal for the life of Eva Cassidy which Blix did not agree with, which  
12 then precipitated a cross-complaint against Blix and Straw over royalty accounting and  
13 other related issues. After mini-opening statements and the selection of the jury, there was  
14 a week long recess during which time the parties engaged in a mediation. Out of that  
15 mediation arose a settlement agreement which the Cassidy's maintain was enforceable  
16 under CCP 664.6. The parties represented to the trial judge Hon. Lee Edmon that the case  
17 had settled and the court released the jury. Within seven days after those representations  
18 to the court, Blix and Straw, through two new sets of attorneys, wrote to the Cassidys  
19 attorneys taking the position that the Settlement Agreement was not enforceable.

20  
21 After some further attempts to negotiate a so-called long form agreement which was  
22 referenced in the Settlement Agreement as a "more formal agreement," the Cassidys  
23 sought to enforce the Settlement Agreement under CCP 664.6 in the trial court (Hon. Mark  
24 Mooney had taken over the case after Judge Edmon assumed an administrative position  
25 with the court). Judge Mooney enforced the Settlement Agreement under CCP 664.6 and  
26 the matter went up on appeal. The Court of Appeals, in a 2 to 1 unreported opinion,  
27 refused to enforce the Agreement, finding that not all of the parties to the Agreement had  
28 signed and thus the CCP 664.6 mechanism could not be used to enforce the settlement.

1 *Blix Street Records, Inc. v. Allen Gelbard, et al.*, (2008 WL 331384). The dissent argued  
2 that the doctrines of waiver and estoppel should be applied and would have enforced the  
3 Agreement. The majority expressed no opinion on "whether the Settlement Agreement is  
4 enforceable by other means, such as by a summary judgment, separate suit in equity, or  
5 an amendment to the pleadings," citing the leading California Supreme Court case in this  
6 area, *Levy v. Superior Court*, (1995) 10 Cal.4th 578, 586, fn. 5. In fact, the Cassidy's did  
7 amend their complaint to add a cause of action for breach of the Settlement Agreement and  
8 for specific performance thereof, and this cause of action was bifurcated and tried to the  
9 court without a jury. The remaining causes of action are set for later trial in the event the  
10 Cassidy's do not prevail in this bifurcated trial.

11

12 THE SETTLEMENT AGREEMENT:

13 The Settlement Agreement itself (Ex. 3 handwritten, Ex. 4 typewritten) was signed  
14 by Blix Street Records by William Straw and William Straw, Hugh T. and Barbara Cassidy,  
15 and Daniel Cassidy through his attorney Brian Sun. The Agreement was also signed under  
16 an approval as to form by Bert Deixler of Proskauer Rose, counsel for Blix and Straw, and  
17 by Brian Sun of Jones Day, counsel for the Cassidy's. It was executed on Friday, March  
18 24, 2006 at the mediation in San Francisco. Paragraph 1 of the Agreement states that  
19 "Although subject to more formal documentation, including the preparation and filing of a  
20 dismissal of the entire action with prejudice, this is a final binding agreement subject to  
21 judicial enforcement pursuant to CCP 664.6." Paragraph 1(A.), a key section as it relates  
22 to the current dispute, reads: "The parties hereby release all claims or any type or nature  
23 from inception through today, including rights as to Gelbard, Engel and Eva Cassidy  
24 Partners, LLC (Gelbard and ECP to be releasers under the more formal agreement  
25 documents) and including Elana Byrd." At the time Mr. Gelbard was in bankruptcy and  
26 could act only through the trustee in bankruptcy.

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1 THE ISSUES:

2 It is the Cassidy's position that neither Gelbard nor ECP are "parties to the  
3 Agreement" since they are only listed as "releasers under the more formal agreement" and  
4 there is no place for their signatures on the Agreement. They also point to other aspects  
5 of the language, e.g. that the parties to the Settlement Agreement are to be bound by the  
6 November 1, 1997 Licensing Agreement, as evidence that Gelbard and ECP could not  
7 have been parties to the Settlement Agreement because it would make no sense for them  
8 to be bound to the Licensing Agreement to which they were never parties. Since they were  
9 not parties to the Agreement, the absence of their signatures does not make the  
10 Agreement unenforceable. The Cassidy's also point to the language of the Agreement  
11 itself that it is a "final binding agreement," and that Mr. Straw himself believed that he was  
12 bound by it.

13  
14 Blix and Straw on the other hand contend that Gelbard and ECP were indeed parties  
15 to the Agreement, and since they had not signed there is no enforceable Agreement, either  
16 because Straw and Blix's signatures only constituted offers, which were thereafter  
17 withdrawn before Gelbard and CCP signed, or because Gelbard had repudiated the  
18 Agreement by demanding that he be paid for his release, and threatening to sue for  
19 malicious prosecution. They also contend that the Agreement was lacking in material terms  
20 as a further ground that the Agreement is not enforceable, and that even if there was an  
21 Agreement it cannot be specifically enforced because of actions taken by the Cassidy's  
22 after the Settlement Agreement in entering into a new contract with a new producer for an  
23 Eva Cassidy film.

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25 And finally, the Cassidys contend that even if Gelbard and ECP were parties,  
26 plaintiffs are estopped from denying the Settlement Agreement because of their  
27 representations to the trial court that the case was settled, resulting in the discharge of the  
28 jury and the loss of the trial date by the Cassidy's.

1           After hearing all the testimony, and carefully analyzing the Court of Appeals opinion,  
2 the court finds that Gelbard and ECP were in fact parties to the Settlement Agreement, but  
3 that defendants are estopped from claiming that the Settlement Agreement is  
4 unenforceable.

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6 COURT OF APPEALS OPINION:

7           The Court of Appeals refused to enforce the Settlement Agreement under CCP  
8 664.6 because not all the parties to the Agreement had signed. Daniel Cassidy had not  
9 signed himself, but his attorney signed for him, claiming that he had his proxy to do so. Mr.  
10 Gelbard did not sign and ECP did not sign, and in fact there were no places indicated for  
11 them to sign on the handwritten Settlement Agreement. It is apparent from the opinion that  
12 Justice Mosk, writing for the majority, found that Dan Cassidy, Mr. Gelbard and ECP were  
13 parties to the Agreement. In reaching its decision based on the fact that not all parties to  
14 the Agreement had signed, the court stated: "In the instant case, Gelbard, ECP and Daniel  
15 Cassidy, *all parties*, did not originally sign the Settlement Agreement, and at no time did  
16 they orally affirm the Agreement before the court." (Emphasis added) The court went on  
17 to state that the fact that Mr. Gelbard had qualms about the Settlement Agreement is the  
18 "very reason for requiring signatures." Moreover, the pleadings filed by counsel for the  
19 Cassidys in the bankruptcy court reflect that they considered Gelbard and ECP to be  
20 parties. (Ex. 13, p.1, l. 6-9; Ex. 14, p. 11, l. 10-13) There is also correspondence between  
21 counsel regarding whether Gelbard had or had not signed the Agreement. The Cassidy's  
22 rely on the language that says that Gelbard and ECP would be releasers in the Long Form  
23 agreement, but absent their signatures on a Long Form Agreement or the Settlement  
24 Agreement itself, there would be no way to enforce that release which was apparently  
25 reciprocal to the releases given by the Cassidy parties in the body of the Settlement  
26 Agreement itself.

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28           The court agrees with the analysis of Justice Mosk regarding the parties to the

1 Agreement, and also considers itself bound by the law of the case. Thus, the court finds  
2 that the signatures of Blix and Straw under the circumstances only constituted offers which  
3 were withdrawn by attorney letters before Gelbard and ECP signed the Agreement.  
4 *Petrikis v. Hanges*, (1952) 111 Cal.App.2d 734. However, because Blix and Straw  
5 remained silent in court, and had their attorney represent to the judge that the case had  
6 settled (e.g. that the Settlement Agreement was enforceable), at a time when they were  
7 fully aware of all the facts on which they later relied in claiming that the Agreement was  
8 unenforceable, they are estopped from denying the Agreement is enforceable.

9

10 ESTOPPEL:

11 In a strongly worded dissent Justice Armstrong found that the doctrine of estoppel  
12 and waiver applied. The court agrees with Justice Armstrong's analysis and finds under  
13 the reasoning of the dissenting opinion, now augmented by a complete factual record from  
14 the trial, that those doctrines apply in this case. Within seven days after Blix, Straw and  
15 their counsel represented to the court that the case had settled, thus inducing the judge to  
16 discharge the jury and vacate the trial date, Blix and Straw hired new attorneys and had  
17 them send letters to the Cassidy's asserting that the Settlement Agreement was  
18 unenforceable. The grounds for this claim were that Mr. Gelbard had not signed the  
19 Settlement Agreement and that material terms were missing from the Agreement. These  
20 letters did not assign as grounds the fact that no long form agreement had been signed,  
21 or that they had been unable to complete the bankruptcy matters involving Mr. Gelbard, the  
22 two matters mentioned to the judge by counsel for Blix and Straw and put on the record as  
23 requiring some further activity. (Ex. 6, 7) The court finds that all of the facts upon which  
24 these new counsel relied in attempting to withdraw from the Agreement were known by Blix  
25 and Straw at the time the settlement was put on the record, that Blix and Straw had a duty  
26 to disclose to the court, and that plaintiffs have met their burden of proof for invoking the  
27 doctrine of judicial estoppel. The following evidence and testimony, including some that  
28 was not before the Court of Appeals, supports a finding of estoppel.

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- : 1. At all relevant times Straw was a highly experienced attorney and negotiator in the music business, having been in the business for over forty years and personally negotiated hundreds of similar agreements.
2. Straw was represented by able and experienced counsel during the litigation, including at the mediation and in court when the settlement was put on the record and during the in-chambers conference with the judge just prior thereto.
3. Right after mediation on 3/24/06 at which time he signed the Settlement Agreement, Straw testified that he was satisfied with the Agreement and expected to be bound by it. He did not think there were any more issues that needed to be negotiated.
4. The evening of the mediation on 3/24/06 Straw had dinner with his long-time attorney Engel and his biggest stress developed at that time. The clear implication from the testimony, and from the observation of the witness while testifying, was that Engel had seriously questioned the deal he had signed.
5. The next morning 3/25/06 Straw woke up and was very depressed and upset about the deal.
6. The day after next, Monday 3/26/06 Straw had his partner type up the handwritten agreement and after he read it in this form he declared that it was the worst agreement he had ever seen; that it would put his whole business in jeopardy and that it was totally one sided for the Cassidy's. He also said there were material terms missing. Exactly what those terms are is not so important as the fact that Mr. Straw thought there were material terms that he should have added to the Settlement Agreement at the mediation. Whether they were or were not material is based on Mr. Straw's belated view of what he wished he had done in the mediation when the parties signed the Agreement. When the document was signed at the mediation all parties acknowledged that the agreement contained terms

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necessary for it to be signed. Whether material terms were omitted is purely a function of Mr. Straw's subjective opinion as to the scope of the agreement and what he believes it should have covered.

Therefore, within three days after signing the Agreement he was aware of all the problems with the Agreement, e.g. lack of material terms and no signature by Mr. Gelbard and ECP, and resolved at that time to do everything in his power to get out of it.

7. On 3/26/06, after the mediation, counsel for Blix and Straw drafted an e-mail to the judge stating that the case had settled and it was sent under the signatures of counsel for all parties. (Ex. 103)
8. Straw was present with his attorney in the unreported in-chambers conference with the judge just before the settlement was put on the record. In addition to Mr. Straw, Judge Lee Edmon, Bert Daichsler, Esq. Counsel for Straw and Blix and Brian Sun, Esq. and Fred Friedman, Esq. both counsel for the Cassidys. He testified that Brian Sun, counsel for the Cassidy's, said that Gelbard was threatening not to sign the Agreement and release, he wanted money to sign it, and that he might sue Blix and Mr. Straw for malicious prosecution. He testified that he was "stunned" but, even though he was an experienced music business lawyer and negotiator, he did not focus on his legal rights.
9. Straw testified that in the in-chambers conference he believed that the Settlement Agreement was not enforceable but that he said nothing. He testified that "even before we were in the courtroom, I considered having my attorney say something." but decided not to do so.
10. After the in-chambers conference Mr. Straw appeared in court before the judge with his attorneys and was present when the judge announced to the jury that the case had settled. Blix Street's counsel Bert Daichsler, Esq.

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stated "the matter, subject to having the Long Form Agreement being prepared and obtaining the approval of the Bankruptcy Court with regard to the Gelbard piece and the Eva Cassidy's partner's piece, the case is settled, subject to those provisos which we expect will be resolved in the next 30 days."

As noted earlier, it was on the basis of neither of these provisos that Straw and Blix Street asserted that the Settlement Agreement was unenforceable.

Neither he nor his attorney said anything to the judge about the facts Mr. Straw says he heard in chambers that caused him to become stunned. He was present when the jury was actually discharged by the judge, and left the courtroom at the same time as the jury.

11. Thereafter the attorneys had further discussions with the court and indicated on the record that case was settled. Mr. Dietrich, counsel for Mr. Gelbard was present and stated that he agreed. Mr. Gelbard himself was in court at that time. At trial, Mr. Dietrich testified that neither Gelbard nor ECP were now objecting to the Settlement Agreement and were willing to sign it, and Gelbard told the bankruptcy judge in open court that he agreed with the settlement and had signed the Agreement. (Ex. 16, p. 13, l. 7-16; See also, Ex. 8) While Mr. Straw's attorneys told the trial judge that a long form was to be prepared and that bankruptcy approval would be required regarding Mr. Gelbard, he said nothing about the facts that Mr. Straw said he heard in chambers that caused him to be stunned and to believe that the Agreement was not enforceable.

12. On cross-examination, the first question directed to Mr. Straw was: "Didn't you think that the judge was entitled to know that you thought the Agreement was not enforceable?" There was a long pause, and a halting answer which was never directly responsive to the question. It was apparent to the court

1 from this testimony that he recognized the implications of not saying anything  
2 to the court, but did not know how to justify or rationalize that decision he had  
3 made to remain silent. He testified at other times that he didn't want to say  
4 anything to disrupt the process because he thought and that these issues  
5 could be worked out in negotiations on the long form agreement. (Of course,  
6 those negotiations would always remain subject to his unilateral fall-back  
7 position that the Agreement was not enforceable if it developed that the  
8 parties were not able to finalize a long form.)  
9

10 In having his attorneys represent to the judge that there was a settlement and that  
11 the parties believed that it was enforceable under CCP 664.6, Blix and Straw represented  
12 that the Agreement was enforceable. This is directly inconsistent with the position taken  
13 by his new attorneys for the first time seven days after the jury was excused. The reasons  
14 given in the attorney letters were the very problems recognized by Straw on the Monday  
15 after the mediation. Defendants argue that the information about Mr. Gelbard's intention  
16 to sue and demand money for a release did not come up until after the court appearance,  
17 because the Cassidy's attorneys Mr. Sun and Mr. Friedman did not recall specifically what  
18 was said in chambers about Mr. Gelbard. Mr. Sun did recall, however, that he thought Mr.  
19 Gelbard was being an irritant, and Mr. Straw was very clear and detailed in his testimony  
20 that he heard those things about Mr. Gelbard in the judge's chambers, right before putting  
21 the settlement on the record.  
22

23 These representations to the court and the Cassidy's are sufficient to raise a judicial  
24 estoppel. In direct reliance on the statement that the case was settled, which meant that  
25 the Agreement was enforceable, the court discharged the jury which had been selected  
26 after two days of jury selection and mini-opening statements by the lawyers, and vacated  
27 the trial date. (1997) *Jackson v. County of Los Angeles*, 60 Cal.App.4th 171, 183 (same  
28 party has taken two positions in a judicial proceeding; the court adopted the position or

1 accepted it as true; the two positions were totally inconsistent; and the first position was not  
2 taken as the result of ignorance, fraud or mistake) The court finds that the first position  
3 taken in court was not the result of ignorance, fraud or mistake.  
4

5 Although the Court of Appeals in its majority opinion does not comment on the  
6 dissenting opinion which would have applied the doctrines of waiver and estoppel, this  
7 court is of the view that the majority may well have believed that the legislative policy  
8 supporting the enforcement of agreements through the summary method of CCP 664.6  
9 requires strict application with no exceptions, even under equitable principles. This court  
10 does not believe, however, that those same legislative policy considerations would apply  
11 to application of the equitable doctrines of waiver and estoppel in the context of common  
12 law contracts, and even the majority opinion suggested there may be other means available  
13 to seek enforcement such as amending the complaint or summary judgment.  
14

15 Defendants claim that estoppel is not appropriate here since the court cannot order  
16 specific performance for three separate reasons.

17 1. The Repudiation by Gelbard and ECP Constituted a Breach that Excused  
18 Blix Street's Performance:

19 It is clear from Mr. Straw's testimony that if there was any threatened  
20 repudiation by Mr. Gelbard, he knew about it at the in-chambers conference  
21 before the judge and before his attorneys' representations to the court that  
22 the matter was settled. Apparently Plaintiffs contend that Gelbard had  
23 already repudiated the agreement by the time of the in chambers conference  
24 and this repudiation excused Blix's performance under the contract. And yet  
25 Blix and its attorneys remained silent and took no action to act on this  
26 purported repudiation. Contrary to what defendants say in their Estoppel  
27 brief, after Mr. Straw and Blix Street learned in chambers of Gelbard's  
28 comments they did not "unequivocally rescind(ed) the contract." Instead,

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they misled the court into dismissing the jury and vacating the trial date.  
This court is not making a finding that at the time of the chambers conference Mr. Gelbard had already repudiated the Agreement. The evidence does not support such a finding.

2. The Cassidy's Breached the Cooperation Clause of the "Settlement Agreement":

Even assuming that the alleged breach by Gelbard and ECP did not excuse Blix's performance under the Agreement, defendants claim that the Cassidy's also materially breached the Settlement Agreement and therefore cannot enforce it. This alleged breach concerns Attachment C to the Agreement which provides "The parties shall agree upon a Neutral Referee who shall decide disputes arising under this Agreement or under the Licensing Agreement." Defendants contend that this provision includes disputes regarding the selection of a production team for the movie and that the Cassidy's did not abide by this provision when they entered into a deal with the Redford team. The court does not find any breach here. From the testimony of Mr. Niel Fischer, it is apparent that Mr. Straw was kept apprised all along of the various production teams being contacted, and he in fact had met with members of the Redford team. Mr. Fischer also testified that he told Mr. Straw in the Spring of 2007 that the Redford team had been selected. The actual deal was not consummated until the fall of 2007. He also testified that Mr. Straw never told him to stop the Redford negotiations and that the Cassidys never gave Straw veto power over selection of the production team and in fact Straw did not have the right to participate in the selection of the team. (See Exhibit 31, April 5, 2007 letter from Fischer to Straw regarding Straw's claimed surprise at learning of the Redford deal.; Exhibit 17, Draft Long Form Agreement Paragraph E, page 8 which confirms that in the attempted negotiations of the Long Form the Cassidys had the final say).

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Although Straw at one time expressed reservations in a letter regarding the ability of that team to raise funds, there was never an open and directly engaged dispute over the hiring of that producer which either party needed to refer to a Referee. Mr. Straw had no rights at all regarding the movie before the Agreement, and those that he did have were limited by this clause. Neil Fischer testified that the Cassidys always had the film rights and Mr. Straw testified that Fischer had told him the Cassidys had the sole right to the film. (See also, Exhibit 27, letter from Fischer to Straw, August 16, 2006). Mr. Straw himself testified on cross examination that absent the Settlement Agreement he had no rights in the movie. On re-direct, he changed his testimony to say that anyone could have made a movie, including himself. The court finds that the testimony of Niel Fischer was both credible and persuasive, and the court finds further that the Cassidy's did cooperate during this period of finding another producer and that Mr. Straw was kept advised and was involved throughout the various contacts as noted above. (See also, Ex. 30)

3. The Cassidy's Cannot Obtain Specific Performance of the "Settlement Agreement" Because They Are Unable to Perform their Own Obligations": Defendants argue that the Cassidy's are no longer able to comply with 1) the obligation to cooperate with Blix Street in the making of a motion picture, and 2) the obligation to submit disputes about the motion picture to a neutral referee. The court disagrees. As noted above, the court finds that the Cassidy's did cooperate in the selection of a production team and did not otherwise breach that provision of the Agreement. As for the future, both parties are obligated to comply with the terms of the Agreement.

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1 Defendants are to prepare a Judgment consistent with this Statement of Decision  
2 within 10 days.

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4 Dated: AUG 17 2009

James R. Dunn  
JAMES R. DUNN  
Judge of the Superior Court

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