UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MAYIMBA MUSIC, INC., Plaintiff, -against- SONY CORPORATION OF AMERICA, SONY MUSIC ENTERTAINMENT, SONY/ATV LATIN MUSIC PUBLISHING LLC, SONY/ATV DISCOS MUSIC PUBLISHING LLC, and SONY/ATV TUNES LLC, Defendants.	**ORDER FOR EVIDENTIARY HEARING** 12 Civ. 1094 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

On August 19, 2014, I issued findings of fact and conclusions of law (the "Opinion") after a bench trial of liability issues, finding in favor of Plaintiff. *See* Findings of Fact and Conclusions of Law After Trial of Liability Issues, *Mayimba Music, Inc. v. Sony Corp. Am.*, No. 12 Civ. 1094 (S.D.N.Y. Aug. 19, 2014) (Dkt. No. 104). In the Opinion, I found that Plaintiff had a valid copyright, and that defendants Sony/ATV Latin and Sony/ATV Discos (collectively, "Defendants")[1] infringed on that copyright. *Id.* Liability and damages were to be determined in a separate phase, and I denied Plaintiff's motion for a permanent injunction as premature at that time. *Id.* I did not enter final judgment. *See id.*

On December 17, 2014, Defendants moved to partially vacate the Opinion pursuant to Fed. Rs. Civ. P. 59(a) and 60(b), based on newly discovered evidence, and for

[1] I dismissed defendants Sony Corporation of America, Sony Music Entertainment, and Sony/ATV Tunes LLC from the case. No evidence was presented showing that they were involved in the distribution of the infringing songs.

summary judgment pursuant to Fed. R. Civ. P. 56. (Dkt. No. 113.) For the reasons set forth below, I suspend the judgment of liability against Defendants until after an evidentiary hearing, to be scheduled pursuant to the last paragraph of this Order.

BACKGROUND

As the parties are familiar with the facts of the case, I do not recite all of them herein. In the Opinion, I found that Ramon Arias Vasquez ("Arias") had a valid copyright in the song Loca con su Tiguere (the "Song"). (Dkt. No. 104 at ¶ 46.) At trial, I found his testimony credible that he authored the Song between 1996 and 1998 (*id.*), that it was an original song (*id.*), that the song was recorded onto a cassette tape in 1998 (the "Tape") (*id.* at ¶¶ 11-12, and Trial Ex. No. 101), and that a copy of the Song on the Tape was registered at the Copyright Office in November 2011 (Dkt. No. 404 at ¶ 20). The testimony of Juan Pablo West Smith ("Smith") confirmed Arias's testimony that Arias wrote the song in 1998. (*Id.* at ¶¶ 12, 36.)

After trial, the parties engaged in extensive discovery of damages in preparation for the second phase of trial. On December 17, 2014, four months after the Opinion was issued, Defendants filed the instant motion, contending that newly-discovered evidence demonstrated that the Tape was fabricated in 2011, not created in 1998, and that Arias had lied under oath when he testified that the Tape had been created in 1998. (Dkt. No. 113.)

Defendants submit with their motion an affidavit from Eduard Bello Pou ("Bello"), who appeared in this court and testified during the bench trial. (Dkt. No. 116.) Bello states under oath that, while on cross-examination, counsel for Mayimba asked him if he knew an individual named DJ Japones. (*Id.* at 1.) Bello did not know him, and so testified, but searched for him when he returned from the trial, and located him. (*Id.*) Bello met with DJ Japones in September 2014, showed him a copy of the cassette tape (Trial Ex. No. 101), and

played the Song for him as recorded on the Tape. (*Id.*) When DJ Japones heard the Song, he told Bello that he recognized the underlying music to the song, and that he had created that music in 2009 for a song named "Tu Foto en el Display" for his music group, The New Collection. (*Id.*) DJ Japones stated that the other tracks on the Tape were other songs created by the musicians of The New Collection in 2008 and 2009. (*Id.* at 2.) Japones told Bello that Arias has socialized with The New Collection in 2011 and 2012, but that Arias had not created any of their music. (*Id.*) Finally, upon seeing the Tape, DJ Japones recognized the man depicted on the cover as Jhoan Gabriel Gonzalez Gomez ("Jhoan"), and said the tape could not have been made in 1998, for Jhoan, now 25 years old, was only nine years old in 1998. (*Id.*)

Defendants also submitted an affidavit from Wilson Rood ("Rood"), a private investigator whom they retained in October 2014 to investigate the authenticity of the Tape. (Dkt. No. 117.) Rood states under oath that he located Jhoan in October 2014, and confirmed Jhoan's likeness as that in the image on the Tape, and Jhoan's birth date of January 15, 1989. (*Id.* at 1-2.)

Defendants also submit an affidavit from Oscar Marine Santos Cabrera ("Santos") stating that he was a member, beginning in 2008, of The New Collection. (Dkt. No. 119 at 1.) Santos states that four of the songs listed on the Tape, and three of the songs recorded on the Tape, were created by members of The New Collection in 2008 and 2009, and that he created one of those songs—Pica Pollo—in 2008. (*Id.*) Santos further states that Arias heard The New Collection's music on a frequent basis in 2011 and 2012. (*Id.*)

Defendants also submitted an affidavit from Jhoan. (Dkt. No. 120.) Jhoan states that he is the person whose photo appears on the Tape, and that Arias took the photo of him in 2011. (*Id.* at 1.) Jhoan confirms that he was born on January 15, 1989, and attaches a copy of

his identity card to his affidavit. Thus, the Tape, since it bore his likeness as an adult, could not have been made in 1998 as Arias testified. Jhoan states that in 2011 or 2012, Arias, his brother Carlos Arias Vazquez ("Carlos Arias"), Alejandro Martinez ("Martinez"), an executive of SGACEDOM (la Sociedad General de Autores, Compositores Y Editores Dominicanos de Música), and Nelson Estevez ("Estevez"), of J&N Music (Arias's publishing company) told him they were going to sue Bello and Sony, and told him that he had formed part of "Joan el Rabioso Y Collection", even though that was not true. (*Id.*) Jhoan now states in his current affidavit that he was never a member of "Joan el Rabioso y Collection", that in 2011 or 2012, Arias, Carlos Arias, Martinez, and Estevez promised to pay Jhoan $18,000.00 if they won the case against Bello and Sony, and that he opened an account in anticipation of that money. (*Id.*) Jhoan states that was not paid, that he complained, and that he was then promised to be paid $10,000.00 instead of the $18,000.00, but that too was not paid. (*Id.*) He complained again, and this time he was promised to be paid $8,000.00, but was not paid that payment either. (*Id.* at 2.)

Jhoan had previously signed a sworn statement on April 5, 2012, and it was submitted with Plaintiff's opposition to Defendants' motion for summary judgment. (Dkt. No. 21-17.) In that affidavit, Jhoan stated that the photo on the Tape was taken in 1998, that he was a dancer and choreographer in "Joan el Rabioso Y Collection", that he was involved in the creation of the Song, that Arias gave the Tape to the group, and that Jhoan was 17 years old at the time in 1998. (*Id.*) Jhoan's current affidavit recants his previous affidavit, and Jhoan now states that all of the statements he made in the previous affidavit were false. (Dkt. No. 120.)

At trial, Smith testified that he added musical elements to Arias' vocal track in mid-1997, using a computer program named "Frooty Loops". (Trial Tr. 123-126.) However, Frank van Biesen ("van Biesen") states in an affidavit submitted by Defendants that he is the co-

founder and Managing Director of Image-Line Software BVBA ("Image-Line"), which produces and distributes Fruityloops, now known as FL Studio. (Dkt. No. 123 at 1.) Van Biesen states that "Fruity Loops" software did not exist in 1997, that an initial version was not completed until December 18, 1997, that its first version was not released or otherwise available to the public until March 21, 1998, and that no one in the Dominican Republic purchased it at any time in 1998. (Dkt. No. 123 at 1-2.) He states that it was not available to download from the Internet at any point in 1997. (*Id.*) Smith's trial testimony was used to corroborate Arias' claim of a 1998 creation of the Tape; van Biesen's affidavit now impeaches that testimony.

In opposition, Plaintiff submits, amidst numerous other exhibits of marginal relevance, affidavits from Arias, Martinez, Estevez, and Rafael Matos. (Dkt. Nos. 125-7, 125-8, 125-9 & 125-10.) These affidavits attack the credibility of Defendants' witnesses' affidavits, but do not address the core issues – when the tape was created, and whether witnesses lied on the stand with respect to its creation. (*See id.*)

With their reply, Defendants also submit a declaration of Juan Carlos Arias Vasquez ("Carlos Arias"), Arias's brother. (Dkt. No. 135.) In the declaration, Carlos Arias states that in 2010, he had the idea to record the song on a cassette and make it "appear as though it had been created in the [1990s]". (*Id.* at 2.) Carlos Arias states that he created the tape using music from DJ Japones and a vocal track by Arias, and then took a picture of Jhoan for the cover. (*Id.*) Carlos Arias further states that he took the tape to Estevez, and then told Estevez in August 2012 that the tape had been created in 2010. (*Id.*) In preparation for the trial, Carlos Arias states that when Smith was asked to travel to New York to testify, in June 2014, Carlos Arias told him exactly what to say about the creation of the tape. (*Id.* at 3.)

LEGAL STANDARD

Federal Rule of Civil Procedure 59(a)(2) provides that "After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or made new ones, and direct the entry of a new judgment." Under Fed. R. Civ. P. 59(b), "[a] motion for a new trial must be filed no later than 28 days after the entry of judgment". However, the circuit courts that have addressed this issue in recent years have held that the 28-day deadline is a claim-processing rule, not a jurisdictional limit, and therefore the trial court may hear a motion made after the time set out by Fed. R. Civ. P. 59(b) if there is no proper objection to the timeliness. *See, e.g., Lizardo v. U.S.,* 619 F.3d 273, 277–78 (3d Cir. 2010), cert. denied, 131 S. Ct. 2444, (2011); *National Ecological Foundation v. Alexander,* 496 F.3d 466, 474–476 (6th Cir. 2007); *Blue v. International Broth. of Elec. Workers Local Union*, 159, 676 F.3d 579, 584–85, (7th Cir. 2012); *Advanced Bodycare Solutions, LLC v. Thione Intern., Inc.,* 615 F.3d 1352, 1359 n.15 (11th Cir. 2010).

Under Federal Rule of Civil Procedure 60(b), "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order or proceeding for the following reasons: … (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party". Under Fed. R. Civ. P. 60(c), "[a] motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding".

"Newly discovered evidence" is "evidence of facts in existence at the time of trial of which the party seeking a new trial was justifiably ignorant". *Campbell v. American Foreign*

S.S. Corp., 116 F.2d 926, 928 (2d Cir.), *cert. denied*, 313 U.S. 573, 61 S.Ct. 959, 85 L.Ed. 1530 (1941). If such evidence was available or by the use of reasonable diligence could have been available at trial to the party seeking a new trial, that evidence cannot support an order for a new trial. *Mayer v. Higgins*, 208 F.2d 781, 783 (2d Cir. 1953). An exception exists in the case law on the basis of newly discovered evidence even in the absence of a showing of due diligence "in order to prevent a miscarriage of justice, namely the commission of fraud on this court". *Ope Shipping, Ltd. v. Underwriters at Lloyds*, 100 F.R.D. 428, 434 (S.D.N.Y. 1983), *see also Ferrel v. Trailmobile, Inc.*, 223 F.2d 697, 698 (5th Cir. 1955); *Samuels v. Health and Hospitals Corp.*, 591 F.2d 195, 199 (2d Cir. 1979).

DISCUSSION

This motion reaches me in an interesting procedural posture. I found liability on August 19, 2014, but did not enter final judgment. (*See* Dkt. No. 104.) Damaages and an appropriate equitable remedy were to be determined in a separate proceeding. (*See id.*) The parties took up the time since my finding of liability in discovery of damages issues. (*See, e.g.*, Dkt. Nos. 105, 106, 109, 110.) Defendants' current motion was made after the 28 days provided for in Fed. R. Civ. P. 59, which governs motions for new trial, but before the year provided for in Fed. R. Civ. P. 60, which governs relief from a final judgment.

Construing the Federal Rules of Civil Procedure in accordance with Fed. R. Civ. P. 1, which states they "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding", I hold that I am able to hear the instant motion. Plaintiff did not make a proper timeliness objection to the motion under Fed. R. Civ. P. 59(b), and the circuit courts which have considered the issue have held that this deadline is a claim-processing rule, not a jurisdictional limit. *See, e.g., Lizardo v. U.S.*, 619 F.3d 273,

277–78 (3d Cir. 2010), cert. denied, 131 S. Ct. 2444, (2011); *National Ecological Foundation v. Alexander,* 496 F.3d 466, 474–476 (6th Cir. 2007); *Blue v. International Brotherh. of Elec. Workers Local Union*, 159, 676 F.3d 579, 584–85, (7th Cir. 2012); *Advanced Bodycare Solutions, LLC v. Thione Intern., Inc.*, 615 F.3d 1352, 1359 n.15 (11th Cir. 2010).

Secondly, I find that this is newly discovered evidence which could not have been found with reasonable diligence before trial. It was not until Defendants heard the mention of DJ Japones, or the Fruityloops program, at trial, that they became aware of their potential involvement in the creation of the tape. Furthermore, the evidence now put forth, if credited, clearly establishes that Plaintiff attempted to commit a fraud upon this court, going so far as to fabricate evidence and to commit perjury.

CONCLUSION

I hereby suspend the finding of liability against Defendants until further clarification can be found on these very serious issues. A sufficient showing has been made to cause me to lose trust in the integrity of the trial testimony. As credibility is very much an issue, an evidentiary hearing is necessary. The parties shall meet with me on May 21, 2015, at 4:00 p.m., to plan the content and timing of the evidentiary hearing.

The clerk shall mark the motion (Dkt. No. 113) terminated.

SO ORDERED.

Dated: New York, New York
April 30, 2015

ALVIN K. HELLERSTEIN
United States District Judge