

At a Commercial Division Part 1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of August, 2014.

P R E S E N T:

HON. CAROLYN E. DEMAREST,
Justice.

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WESTPAW FILMS INC, DIRECTLY &
DERIVATIVELY ON BEHALF OF THE D&D
PRODUCTION,

Plaintiff,

- against -

SPRATTLEY, JAMES, MICHAEL ANDREW
PASCAL AND FANTASY GAME FILMS LLC,
Defendants.

**DECISION
AND
ORDER**

Index No. 505665/14

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The following papers read on this motion:

Papers Numbered

| | |
|--|--------------|
| Notice of Motion/Order to Show Cause/Petition/ Cross Motion and Affidavits(Affirmations)Annexed | 7-9 |
| Opposing Affidavits (Affirmations) | 12-19, 20-26 |
| Reply Affidavits(Affirmations) | 28-33, 34-38 |
| Affidavits(Affirmations) | |
| Other Papers (Memoranda of Law) | 10, 27, 39 |

Plaintiff Westpaw Films, Inc. (Westpaw) moves, by Order to Show Cause, for a preliminary injunction restraining defendants James Sprattley (Sprattley), Michael Andrew Pascal (Pascal) and Fantasy Game Films LLC (Fantasy), of which Sprattley and Pascal are members, from “taking any action in furtherance of the creation, production, manufacture, marketing, distributing, releasing, soliciting funds (including crowd-funding campaigns), advertising and offering to sell of [sic] or for any documentary film about the fantasy role-playing game ‘Dungeons & Dragons,’ . . . [and] continuing to withhold D & D Production personal appearance releases and communications with third parties”.

BACKGROUND

It is undisputed that Westpaw, Sprattley and Pascal orally formed a partnership in 2011 to produce a documentary film about the fantasy game Dungeons and Dragons. Subsequently,

Sprattley and Pascal formed Iconoscope Films LLC (Iconoscope) into which they transferred their partnership interests. Thereafter, Westpaw and Iconoscope shared equally in the development of the documentary pursuant to an oral general understanding, with Westpaw and its principal, Anthony Savini (Savini), in charge of the creative aspects of production and Iconoscope handling the business aspects such as financing, marketing and distribution.¹ Although attempts were made to reduce their agreement to writing, no written contract was entered until the partnership began to unravel and a settlement agreement was signed, following extensive unsuccessful efforts at mediation of the parties' differences, on December 5, 2013, as a purported wind-up of the partnership (Settlement). Though plaintiff requested the incorporation of a non-compete clause, defendants refused and no non-compete provision appears in the Settlement. Defendants acknowledge that, during the negotiation of the Settlement, in or about August 2013, they began to develop, and raise funds for, their own documentary of Dungeons and Dragons, known as "The Great Kingdom", forming defendant Fantasy for such purpose in October 2013, and are seeking the participation of many of the same people previously interviewed by Westpaw. Defendants contend they have never seen any of the actual footage of the film created by Westpaw for the D & D Production partnership.

In August 2012, a "Kickstarter" crowd-funding campaign was launched, which generated substantial funding, as well as publicity, for the production of the partnership film. As the financial manager, Iconoscope ran the website and collected the funds. One of the primary concerns of plaintiff is defendants' continuing use of a competing website and the confusion generated, both for donors and potential donors and for participants in the films, as to the rights of the now-competing film productions. Plaintiff also complains that the e-mail account for D & D Production has been co-opted by defendants and that Savini has been unable to access it. Plaintiff has also indicated that, as recently as July 17, 2014, Pascal responded to a question posed on D & D's Kickstarter webpage from a supporter of D & D's film, D. Daniel Wagner, urging him to "spread the word", signing the communication as producer of "The Great

¹Iconoscope is not a party to the action. When this was raised by the Court at oral argument, both sides seem to agree that the real parties in interest were Sprattley and Pascal and that Iconoscope is a now-dormant shell, apparently having been succeeded by defendant Fantasy as the vehicle of Sprattley and Pascal with respect to the production of a documentary about Dungeons and Dragons. However, given the posture of this matter, plaintiff might be well-advised to amend its complaint to bring in Iconoscope as the contracting party to the Settlement.

Kingdom.” Neither film is scheduled for release in the immediate future, and from information supplied during oral argument, the Court perceives that neither film is finished and ready for distribution. Thus, defendants argue there is no evidence of immediate and irreparable harm so as to justify the granting of the requested injunctive relief. Plaintiff’s motion, however, is premised upon the chilling effect of defendants’ activities, in seeking to produce its competing film, upon plaintiff’s ability to complete the partnership film in conformity with the terms of the Settlement and upon its contentions that defendants’ activities constitute a diversion of partnership assets in violation of their fiduciary duty to plaintiff and D & D.

DISCUSSION

In order to meet the criteria for a preliminary injunction pursuant to CPLR 6301, the movant must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of the desired injunctive relief, and that the equities balance in its favor (*Nobu Next Door LLC v Fine Arts Housing, Inc.*, 4 NY3d 839, 840 [2005]; *Aetna Ins Co v Capasso*, 75 NY2d 860, 862 [1990]). The statute provides: “A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff’s rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff” (CPLR 6301). The Verified Complaint alleges, *inter alia*, both directly and derivatively, breach of fiduciary duty in self-dealing, wasting and mismanaging assets of the partnership, unfair competition by virtue of defendants’ alleged appropriation of trade secrets which has deprived D & D Production of its commercial advantage, causing it irreparable harm, and fraudulent inducement of the Settlement, and seeks a permanent injunction against defendants “from further production of the Competing Project and from the unauthorized use, disclosure, misappropriation or conversion of any part or all of plaintiffs’ [sic] Proprietary Assets or benefits improperly derived therefrom”. Thus, plaintiff’s complaint meets the statutory criteria for eligibility for a preliminary injunction if the remaining requirements are established.

While it appears to be disputed exactly when and if the partnership between plaintiff and defendants came to an end, it is undisputed that such partnership existed. It is well-established that partners owe a fiduciary duty to each other and to the partnership and, “as a general

proposition, absent an agreement to the contrary, partners [and] joint venturers . . . look solely to the appreciation of their interest in the [joint] endeavor for their financial rewards” (*Birnbaum v Birnbaum*, 73 NY2d 461, 465-66 [1989]). Moreover, “it is elemental that a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect” (*Id.*). The fiduciary duty of a partner to preserve assets of the partnership for the benefit of the partners continues during the winding up process even after termination of the partnership (*Morris v Crawford*, 304 AD2d 1018, 1021 [3d Dept 2003]).

Although it is disputed whether Savini “knew” of defendants’ intentions to embark upon a project in direct competition with D & D’s film even as they were negotiating the Settlement with plaintiff, there is no representation that plaintiff agreed that such competition was acceptable or that the assets (funding and contacts with participants in the project) that had been developed by the partnership could be employed by defendants in creating an alternative film on exactly the same subject. It is noted that, although characterized as a winding-up of the partnership, the Settlement provides for completion of the film and the continued participation of Iconoscope, as a 50% equity owner, in the Net proceeds of the project, with plaintiff assuming full responsibility for completing the project “in good faith”, rendering an accounting to Iconoscope as to the application of funds. Westpaw commits to using reasonable efforts to complete the film and “take all actions to maximize revenues”, while Iconoscope promises to “use good faith efforts to deliver the remaining available goodwill and benefit associated with all expenditures to date of Kickstarter Funds to Westpaw”, including goodwill with “third parties who are not subject to this Agreement”. Defendants Pascal and Sprattley are to receive executive producer credits in the main titles of the partnership film.² There are thus some indicia of a continuing partnership between the parties. While a determination as to the precise terms of the parties’ relationship would be inappropriate at this point (defendants have not yet served an answer to the complaint), plaintiff has demonstrated the necessary probability of success on some of its claims as a threshold to granting injunctive relief.

The equitable standards, irreparable harm and the balancing of equities in plaintiff’s favor, have also been met. Based upon the documentation submitted by both sides, including

²The Settlement provides for arbitration of “any controversy or claim arising out of or relating to this contract”, however, plaintiff’s attempt to arbitrate has apparently been rebuffed by defendants who are not signatories to the Settlement.

numerous e-mail communications evidencing some confusion among concerned third parties, some of whom are apparently participants in the D & D film, it has been demonstrated that completion of the partnership film is being undermined, and its commercial value potentially diluted, by defendants' solicitation of funding for, and advertising of, its competing film. Several e-mails and web-site comments from interested third parties annexed to plaintiff's papers express the understanding that the D & D film has morphed into defendants' "Great Kingdom", thus eclipsing the partnership's project in advance of its release. Plaintiff further explains the original reluctance of many of the D & D film participants to be interviewed which Savini, as the artistic director, managed to overcome in creating the footage for the D & D film. Savini lists the names of thirteen individuals who are listed on The Great Kingdom's Kickstarter webpage as contributors to that film who were originally contacted and "cultivated" specifically for the D & D production, often at substantial expense to the partnership. Plaintiff argues that although the identity of such contacts may be publicly known, the co-operation of these people and their actual participation in interviews constitute assets of the partnership which defendants are diverting to their own purposes. The Court is not unmindful of the first amendment issues inherent in this conflict over competing artistic endeavors (*see Rose v Levine*, 37 AD3d 691, 693 [2d Dept 2007]), however, defendants' right to self-expression cannot trump their contractual and fiduciary commitment to plaintiff and D & D Production (*cf. David B. Finlay, Inc v Findlay*, 18 NY2d 12, 17-21 [1966]).

The Court is satisfied that the economic and artistic success of the D & D Production film is being placed at risk by defendants' competing activities in marketing their own film and that such risk of damage is actual and imminent and may well be irreparable if defendants' efforts are permitted to continue unchecked. Moreover, as it is defendants who embarked upon their project in competition with the interests of their partnership with plaintiff, the equities unquestionably favor plaintiff.

Accordingly, plaintiff's motion for a preliminary injunction is granted to the following extent:

IT IS ORDERED that Defendants are hereby enjoined from having contact, for any purpose, with any of the parties or persons who were previously involved in the D & D Production film and from in any manner advertising the film The Great Kingdom or making efforts to solicit funding for such film or any other film on the subject of Dungeons and Dragons

pending further order of this Court.

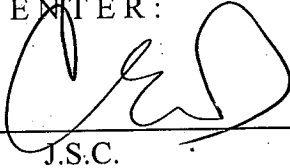
Plaintiff shall post an undertaking in the sum of \$130,000 with the Clerk of this Court on or before August 8, 2014.

As partners in the making of the D & D Production film, defendants are entitled to view the footage heretofore created by plaintiff. In the interests of full disclosure, defendants shall also afford plaintiff the opportunity to view their production footage. Both sides are therefore directed to exchange copies of the footage of the film in their respective possession by August 29, 2014. The Court shall also be supplied with the trailers for each film, in a form accessible to the Court, with a copy to the other side, no later than September 4, 2014, and a copy of all existing footage by September 19, 2014. All film submissions shall be held in confidence and are not to be submitted by e-filing.

The case is adjourned to October 1, 2014 at 2:30 PM for preliminary conference.

The foregoing constitutes the decision and order of the court.

ENTER:



J.S.C.

HON. CAROLYN E. DEMAREST