

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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WESTPAW FILMS INC., directly and derivatively
on behalf of the D&D Production,

Plaintiff,

Index No.: 505665/2014

-against-

JAMES SPRATTLE, MICHAEL ANDREW
PASCAL, and FANTASY GAME FILMS LLC,

Defendants,

and

the D&D Production,

Nominal Defendant.

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**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ORDER TO SHOW
CAUSE AND APPLICATION FOR TEMPORARY RESTRAINING ORDER**

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INTRODUCTION

This Memorandum of Law is submitted on behalf of Plaintiff, Westpaw Films Inc., directly and derivatively on behalf of the D&D Production (“Westpaw”), pursuant CPLR §§6301, 6311 and 6313, in support of its instant application, by Order to Show Cause, seeking a preliminary injunction and temporary restraining order which enjoins and restrains the Defendants James Sprattley (“Sprattley”), Michael Andrew Pascal (“Pascal”), and Fantasy Game Films LLC (“FGF”), including their employees, agents, servants, attorneys, representatives and other persons acting on their behalf or in concert with them in any manner or by any means, (i) from taking any action in furtherance of the creation, production, manufacture, marketing, distributing, releasing, soliciting funds, advertising, and offering to sell of or for any documentary film about the fantasy role-playing game “Dungeons & Dragons,” including from the unauthorized use, disclosure, and exploitation of the network of contacts, trade secrets, concepts, goodwill, reputation and/or other proprietary information belonging to the D&D Production or derived therefrom, (ii) from continuing to withhold D&D Production personal appearance releases and communications with third parties, including to and from the email account dungeonsdoc@gmail.com, and (iii) such other and further relief as the Court deems proper.

For the reasons set forth herein, in the Verified Complaint and exhibits thereto (the “Complaint”), the Affidavit of Anthony Savini, and the affirmation of Peter Dee, Esq., Westpaw’s application should be granted in its entirety.

STATEMENT OF FACTS

For the sake of brevity, the Court is respectfully referred to the Verified Complaint and exhibits thereto (the “Complaint”), the Affidavit of Anthony Savini, and the affirmation of Peter Dee, Esq. for a full recitation of the relevant facts and circumstances in this action.

ARGUMENT

Under New York law, a party is entitled to a preliminary injunction upon demonstrating a probability of success on the merits, danger of irreparable injury in the absence of a preliminary injunction, and a balance of the equities in its favor. *Aetna Insurance Co. v Capasso*, 75 NY2d 860, 862 (1990). “A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.” CPLR §6301.

As detailed below, Westpaw can establish each of the elements required for entitlement to a preliminary injunction and temporary restraining order.

A. Westpaw Presents Evidence Showing Probability Of Success on the Merits of Its Claims

Westpaw’s claims against Defendants, which are asserted directly by Westpaw and/or derivatively on behalf of the D&D Production against some or all of the Defendants, are viable, documented, and substantial, and include breach of fiduciary duties, aiding and abetting breaches of fiduciary duties, accounting and fraudulent conveyance, conversion, fraudulent inducement, unfair competition, unjust enrichment, constructive trust, and alter ego.

Existence of the D&D Production Partnership and Breaches of Fiduciary Duties

First, the Complaint establishes that a partnership exists. As the court stated in *Czernicki v Lawniczak*, 74 AD3d 1121, 1124 (2d Dept. 2010): “When there is no written partnership agreement between the parties, the court must determine whether a partnership in fact existed

from the conduct, intention, and relationship between the parties ... Factors to be considered in determining the existence of a partnership include (1) sharing of profits, (2) sharing of losses, (3) ownership of partnership assets, (4) joint management and control, (5) joint liability to creditors, (6) intention of the parties, (7) compensation, (8) contribution of capital, and (9) loans to the organization.” (internal citations omitted).

Here, the Verified Complaint alleges in detail the facts and circumstances upon which the D&D Production partnership or joint venture¹ was formed and exists between Westpaw, Sprattley and Pascal (and subsequently non-party Iconoscope Films LLC (“Iconoscope”)), including sharing of profits and losses and ownership of assets (Complaint at ¶ 18), joint management and control (*id.* at ¶ 16), joint liability to creditors was obviated insofar as the D&D Production raised funds through a Kickstarter crowd-funding campaign whereby it solicited donations in exchange for various “rewards” (the fulfillment of which were a joint responsibility of the partners as joint managers), and loans to the partnership (*id.* at ¶ 20). Most importantly, the intent of Westpaw, Sprattley and Pascal is clearly established from the cumulative facts alleged in the Complaint.

To state a claim for breach of fiduciary duty, the plaintiff must allege the existence of a fiduciary relationship, defendant's misconduct and damages directly resulting from such misconduct. *Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 807 (2d Dept 2011). As partners in and joint managers of the D&D Production, Sprattley and Pascal had a fiduciary obligation to Westpaw and the D&D Production. *See Appell v. LAG Corp.*, 41 A.D.3d 277, 278 (1st Dept. 2007). Such a relationship is grounded in a higher level of trust than

¹ The essential elements of a joint venture are an agreement manifesting the intent of the parties to be associated as joint venturers, a contribution by the joint venturers to the undertaking, some degree of joint proprietorship and control over the enterprise, and an understanding with regard to the sharing of profits and losses. *See Kaufman v. Torkan*, 51 AD3d 977, 979 (2d Dept. 2008).

normally present in the marketplace between those involved in arm's length business transactions. *See Northeast Gen. Corp. v Wellington Adv.*, 82 NY2d 158, 162 (1998).

A cause of action to recover damages for aiding and abetting breach of fiduciary duty requires a prima facie showing of a fiduciary duty owed to plaintiff a breach of that duty, and defendant's substantial assistance in effecting the breach, together with resulting damages. *First Keystone Consultants, Inc. v DDR Constr. Servs.*, 74 A.D.3d 1135, 1137 (2d Dept. 2010)

Here, the evidence of the Complaint and exhibits thereto, the Savini Affidavit, and the Dee Affirmation establish the existence of a fiduciary relationship among the partners in the D&D Production, the misconduct of Sprattley and Pascal as partners and/or co-managers thereof, and resulting damages. (Complaint at ¶¶72-76) Moreover, even if the Court were to find that the fiduciary duty exists between only Iconoscope (as successor in interest to Sprattley and Pascal in the D&D Production, (see Complaint at ¶ 24)) and Westpaw, the Defendants, through their well- documented and public actions in connection with the Competing Project, including wrongful competition, usurping of corporate opportunities, and bad faith negotiation of the Settlement Agreement, effected the breach of Iconoscope's fiduciary duties to plaintiff and resulting damages. (Complaint at ¶¶ 77-81)

Thus, the Defendants breached or caused the breach of the fiduciary duties owed to Westpaw and the D&D Production in committing improper acts, which are also actionable under the various other asserted causes of action.

Likelihood of Success as to Other Causes of Action

(i) Accounting (Third Cause of Action). To exercise any right to an accounting requires the existence of a confidential or fiduciary relationship coupled with a breach of the duty that relationship imposes viz-a-viz the property in which the party seeking the accounting has an

interest. *Dee v. Rakower*, 112 AD3d 204, 214 (2d Dept 2013). As set forth above, the elements for an accounting are satisfied.

(ii) Conversion (Fourth Cause of Action). Conversion is the unauthorized assumption and exercise of the right of ownership over another's property to the exclusion of the owner's rights. *See Thyroff v. Nationwide Mut. Ins. Co.*, 8 N.Y.3d 283 (2007). Defendants' use of assets, including proprietary assets, belonging to and to the exclusion of the D&D Production, was unauthorized. (Complaint at ¶¶ 89-93) As such, Westpaw is likely to succeed on the merits of its conversion claim.

(iii) Fraudulent Inducement (Fifth Cause of Action). A plaintiff, to prevail on a claim of fraud, must prove (1) a material misrepresentation or omission of fact, (2) made with knowledge of its falsity, (3) with an intent to defraud, and (4) reasonable reliance on the part of the plaintiff, (5) that causes damage to the plaintiff. *See Aguirre v. Best Care Agency, Inc.*, 961 F. Supp. 2d 427, 447 (E.D.N.Y. 2013). "A corporate officer is individually liable for fraudulent acts or false representations of his own, or in which he participates, even though his actions in such respect may be in furtherance of the corporate business" *A-1 Check Cashing Service, Inc. v. Goodman*, 148 A.D.2d 482, 482, 538 N.Y.S.2d 830, 831 (2d Dep't 1989). Here, Pascal and Sprattley, as corporate representatives of Iconoscope LLC, misrepresented in the Settlement Agreement between Iconoscope and Westpaw (*see* Complaint at ¶¶ 37-39 and exhibit A thereto) that the Settlement Agreement had been negotiated in good faith, despite knowing that that they had abused the corporate form of Iconoscope to breach fiduciary duties in usurping the D&D Production opportunities and convert its assets during the negotiation of the Settlement Agreement. Pascal and Sprattley did so with the intent to defraud Westpaw and induce it into giving up certain of its rights in the D&D Production and claims by executing the Settlement

Agreement, and in fact Westpaw reasonably relied on that promise in signing the Settlement Agreement. (See Complaint at ¶¶ 95-104).

(iv) Such improper actions undertaken by Defendants likewise entitles Westpaw to relief on its remaining claims for:

(a) Unfair competition (Sixth Cause of Action), due to Defendants bad faith misappropriation of the commercial advantage belonging to the D&D Production and Westpaw “by exploitation of proprietary information or trade secrets” (see *Out of Box Promotions, LLC v Koschitzki*, 55 AD3d 575, (2d Dept. 2008)) (Complaint at ¶¶ 105-112);

(b) Unjust enrichment (Seventh Cause of Action) and Constructive trust (Eighth Cause of Action), due Defendants enrichment at the expense of the D&D Production, as permitting the Defendants to retain the benefits of their wrongdoing would be against equity and good conscience (see *Sharp v Kosmalski*, 40 NY2d 119, 121 (1976)) (Complaint at ¶¶ 113-120); and

(c) Alter ego liability (Ninth Cause of Action) as Westpaw’s allegations and evidence “establish the principal elements of a veil-piercing theory; namely, commingling of corporate assets with the [Defendants’] own assets [and] application of corporate assets for the owner's personal use (*Kleinman v Blue Ridge Foods, LLC*, 32 Misc. 3d 1219(A), 1219A (N.Y. Sup. Ct. 2011)) (Complaint at ¶¶ 121-126).

Westpaw’s likelihood of success on all causes of action is established with all but complete certainty.

B. Defendants’ Continued Competition with the D&D Production During the Pendency of this Action Produces Immediate and Irreparable Injury to Westpaw

Lost goodwill and lost opportunity are damages which are difficult if not impossible to quantify and support the finding that plaintiff will suffer irreparable harm absent the issuance of a preliminary injunction. *Gundermann & Gundermann Ins. v. Brassill*, 46 A.D.3d 615, 617 (2d Dept. 2007).

In the Complaint, Westpaw demands a judgment restraining the Defendants from the commission or continuance of the acts that it seeks herein to enjoin and which will result in lost goodwill and opportunities with no adequate legal remedy and therefore irreparable harm. (*Id.*) (Complaint at ¶¶ 102, 111, and request for relief at p.23 at ¶ 2) (Dee Aff. at ¶¶ 11-15, 20 and the citations therein).

If these actions are allowed to be committed or continued during the pendency of the action, including before a hearing on this application, they will result in further immediate and irreparable injuries to Westpaw and the D&D Production. (*Id.*)

C. The Balance of the Equities Weighs Entirely in Westpaw's Favor

As any hardship that could be claimed by the Defendants is a result of the situation that they have wrongfully created, the balance of the equities weighs entirely in Westpaw's favor. *See Zomba Rec. LLC v. Williams*, 15 Misc. 3d 1118(A), 1118A (N.Y. Sup. Ct. 2007). Furthermore, to not grant this remedy against Defendants would result in a gross injustice. Westpaw and the D&D Production will continue to suffer damage to its reputation, be hindered in its ability to produce the documentary film that is intended, and will be hindered in its ability to raise funds. (Savini Aff. at ¶¶ 22-23)

CONCLUSION

Westpaw has shown by the evidence submitted herewith together with the Verified Complaint, that it is entitled to a preliminary injunction and temporary restraining order which enjoins and restrains the Defendants James Sprattley, Michael Andrew Pascal, and Fantasy Game Films LLC, including their employees, agents, servants, attorneys, representatives and other persons acting on their behalf or in concert with them in any manner or by any means, (i) from taking any action in furtherance of the creation, production, manufacture, marketing, distributing, releasing, soliciting funds, advertising, and offering to sell of or for any documentary film about the fantasy role-playing game “Dungeons & Dragons,” including from the unauthorized use, disclosure, and exploitation of the network of contacts, trade secrets, concepts, goodwill, reputation and/or other proprietary information belonging to the D&D Production or derived therefrom, (ii) from continuing to withhold D&D Production personal appearance releases and communications with third parties, including to and from the email account dungeonsdoc@gmail.com, and (iii) such other and further relief as the Court deems proper.

Dated: New York, New York
July 9, 2014

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