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 SPRATTLEY, MICHAEL ANDREW PASCAL, and FANTASY GAME FILMS LLC,

Defendants,

and

the D&D Production,

Nominal Defendant.
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PLAINTIFF'S REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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REPLY TO DEFENDANTS FACTUAL STATEMENT

A. Defendants Deny, Then Admit a Partnership

At the July 9, 2014 hearing on Westpaw's application for a temporary restraining order, counsel for defendants denied the existence of a partnership, instead characterizing their relationship with Westpaw as a "contractual agreement". Defendants now admit that a partnership did exist initially between Westpaw (or its principal Anthony Savini) and defendants Pascal and Sprattley. (*See* Pascal Aff. at ¶ 3: "in February 2012 . . . we transferred our ownership in the film project and the partnership to Iconoscope.") Defendants also admit that the initial agreement regarding management of the D&D Production was for decisions to be made "collaboratively, but with the understanding that a majority of the three of us could carry the vote." *Id*. However, defendants suggest that after the formation of Iconoscope in February 2012, Pascal and Sprattley ceased to be managers and instead their "actions in connection with the partnership were solely on behalf of Iconoscope . . . ." *Id.* at ¶ 4. If this were true, Iconoscope and Westpaw would have been the only two parties to make management decisions. Such an arrangement is contrary to their original and unmodified agreement to operate with three managers, and is belied by an email sent from Pascal to Savini / Westpaw on July 7, 2012, five months after Iconoscope's formation, wherein he admits that under the terms of the partnership "any and all creative and production decisions that 2 parties disagree on would be made by whatever decision the 3rd party would decide on." (Dee Reply Aff. at ¶3, Ex. 2).

Thus, even after defendants Pascal and Sprattley transferred their interest in the D&D Production to Iconoscope, they remained as managers with attendant fiduciary duties. Defendants' self-serving narrative would render impossible the parties' tripartite management

agreement as set forth in defendant Pascal's own words *after* the formation of Iconoscope. *See Id.*

B. Defendants Assertion that the Partnership Dissolved Is Undercut by Their Subsequent Threats to Dissolve.

Mr. Pascal also asserts that Iconoscope viewed the partnership terminated in May 2013 after unsuccessful mediation and expressed this to Savini. (Pascal Aff. at ¶ 9) Yet, defendants provide no evidence or even any details of such a declaration of intent. Defendants never informed Savini of their position that the partnership was over. (Savini Reply Aff. at ¶ 3). Rather, the parties continued efforts to negotiate a resolution out of their deadlock, through attorneys, in order to complete production of the film. During this time Iconoscope confirmed its position that the partnership was not dissolved through its attorney Adam Kagan, who repeatedly threatened to seek a judicial dissolution ***unless*** a settlement is reached. (Dee Reply Aff. at ¶4, Ex. 3, email from Mr. Kagan dated June 6, 2013 ("Failing either of those options, my clients have asked me to prepare a filing for a judicial dissolution . . . ."); Ex. 4, email from Mr. Kagan dated June 14, 2013 ("in the event we can't reach an agreement, my clients are willing to dissolve the partnership . . . ."); and Ex. 5, email from Mr. Kagan dated June 19, 2013 ("Failing resolution of these items my clients will again pursue a reasonable dissolution of the partnership . . . .")).

Thus, Iconoscope, through Mr. Kagan, made perfectly clear its position that the partnership was ongoing, and would not be dissolved if the parties could reach an acceptable agreement to move forward. Westpaw in turn agreed to work towards that end, acted in accordance with its fiduciary duties meanwhile, and eventually did reach a settlement with Iconoscope in December of 2013.

Thus, the allegations of Mr. Pascal and Mr. Kagan that the partnership was terminated in May 2013 are not supported by any evidence and contradict their unequivocal statements throughout June of 2013 that the partnership would not be dissolved if the parties reached an agreement.[1] Indeed, Mr. Kagan's dissolution threats were made ***after*** all of the purported "facts constituting termination of the partnership" took place. (*See* D. MOL p. 15-16) For example, Mr. Kagan submits as Exhibit B to his Affirmation a June 3, 2013 letter from Gregori Mavronicolas of the undersigned firm, which purportedly "confirmed Westpaw's view that no partnership existed at that time." (Kagan Aff. at ¶ 4) However, that letter contains no such statement, and in fact expressly states that it "is not meant to constitute a . . . statement of our clients' factual or legal position" and "is written without prejudice to any and all rights and remedies of [Westpaw] at law *or in equity*, including without limitation the right to seek injunctive relief . . . ." (*Id.* at Ex. B) Defendants also rely on un-agreed upon draft proposals, which, as mere drafts of settlement communications, did nothing to dissolve the partnership, and defendants' arguments otherwise are perplexing. (*See* D. MOL p. 15-16; Pascal Aff. at ¶ 11-12; Kagan Aff at ¶¶ 3, 5); CPLR 4547.

C. <u>The Settlement Agreement to Continue with the D&D Production.</u>

The Settlement Agreement that was finally reached in December 2013 also did not dissolve the partnership. Rather, it transferred management of creative and production aspects to Westpaw, with Iconscope assuming primary responsibility for managing the fulfillment of promises made to the partnership's Kickstarter funders. (*See* Kagan Aff. at ¶ 13; the Settlement

[1] Exhibit D to the Pascal Affidavit provides an "accounting" which shows on March 23, 2013, a payment from partnership funds to Mr. Kagan to draft a producer's agreement on behalf of the partnership. In other words, Mr. Kagan represented the partnership in March 2013, and then was retained by Iconoscope individually to negotiate against Westpaw. Yet, the Pascal Affidavit (at ¶ 11) and Kagan Affirmation (at ¶ 2) fail to mention anything about Mr. Kagan's prior representation of the partnership before engaging him to work against one of the partners.

Agreement is Ex. A to the Complaint). Pascal and Sprattley receive "Executive Producer" credits under the Settlement Agreement as well as Savini.

Iconoscope was also obligated to "use good faith efforts to deliver the remaining available goodwill and benefit associated with all expenditures to date of Kickstarter Funds to Westpaw. (Ex. A to Complaint, Settlement Agreement at §3). The parties do not dispute that the Kickstarter funds paid for all partnership costs, including costs associated with conducting interviews. (*See* Pascal Aff., Ex. D, defendants' "accounting") The researching, contacting and interviewing of D&D subjects, combined with the good will provided by Kickstarter fundraising success, allowed the partnership to developed a reputation, rapport, further good will, which provided access to more private information held by various D&D subjects, which led to other potential interviewees and their privately held information. (Savini Reply Aff. at ¶¶ 5-6) Yet, defendants do not deny that they interviewed many of the same people for the competing project, and attempt to justify such actions by asserting that the people are publicly known. (Pascal Aff. at ¶ 18) This argument misses the point: it is the information that these people were willing to reveal that is the source of value, not simply their identities. Defendants' ability to obtain these individuals' private recollections and information was generated through the partnership and with partnership funds.

Thus, even if the partnership were dissolved at some point, which is denied, the Settlement Agreement §3 still requires that the good will and benefit of partnership expenditures be transferred to Westpaw. Not only did defendants cause Iconoscope to not use good faith efforts to deliver same to Westpaw, but they actually took and continue to take adverse efforts by usurping the good will and benefits of the partnership to jumpstart, produce and market their own competing film, including interviews of the same people. The result is a dilution of value of the

D&D Production footage, loss of opportunity and good will, and diversion of public interest to the competing project. (Savini Reply Aff. at ¶ 7) Even as recently as July 17, 2014, defendants, who still have access to the D&D Production Kickstarter account, brazenly used it to garner support for their competing project. (Savini Reply Aff. at ¶ 10, Ex. D).

By producing a directly competing film, interviewing the same subjects and covering the same subject matter, defendants actively prevented Westpaw from receiving the good will and benefits associated with the partnership and continue to do so to this day and will continue to do so unless enjoined.

D. Defendants' Non-compete Argument is a Nonstarter.

In light of the fiduciary duties owned by defendants and/or Iconoscope to Westpaw, and/or the requirement in the Settlement Agreement that Iconoscope use best efforts to deliver the "good will and benefits" of the partnership to Westpaw, Westpaw did not need a non-compete clause.

Moreover, the form of the non-compete clause proposed by Westpaw was very broad and covered "*any other gaming film*", not just related to D&D. (Kagan Aff. at ¶ 6) This broad proposed non-compete clause was nothing more than an attempt to better define the parameters of the existing fiduciary obligations not to compete with the partnership, which undoubtedly precluded to direct competition with another D&D film.

E. Defendants' Accounting is Lacking

Pascal admits that the D&D Production partnership received extra funding through Paypal from donors, including funds in June 2013 as identified in the Complaint (¶¶ 63-64). (Pascal Aff. at ¶7) Pascal asserts that "all funds were properly accounted for . . . and Iconoscope provided Wetpaw with a full accounting" and attaches same as Exhibit D. *Id.* But Exhibit D to

Pascal's Affidavit does not identify any such Kickstarer funds received in June of 2013. If all the funds "were directly deposited by Paypal into the project's bank account" as alleged, the accounting does not identify such deposits. Defendant could have simply provided the bank account information, but did not, thus raising more questions about its use of partnership funds than answers.

F. Destruction of Partnership Communications

As set forth in counsel for Westpaw's letter attached as Exhibit E to Mr. Kagan's Affirmation, defendants and/or Iconoscope agreed to turn over D&D Production-related emails from the partnership email account in December of 2013, but later informed counsel for Westpaw that the entire email account had been permanently deleted, effectively admitting that they destroyed this partnership property after agreeing to turn it over. Savini confirmed as much when he was able to briefly log into the partnership email account recently. (*See* Savini Reply Aff. at ¶ 9, Ex. C) Yet, somehow defendants were able to produce two emails from 2012 despite claiming that the emails had been deleted. (*See* Pascal Aff., Ex C.)

Defendant's facts simply do not add up.

ARGUMENT

I. Plaintiff Establishes Irreparable Harm

In *David B. Findlay, Inc. v. Findlay*, 18 N.Y.2d 12, 17 (1966), the Court of Appeals affirmed the lower court's grant of injunctive relief without which "plaintiff would continue to be damaged by confusion and diversion and would suffer great and irreparable loss in his business and in his name and reputation." The Court found the plaintiff established "a valuable good will and reputation as an art dealer" . . . . "through hard work, business ability and

expenditure of large sums of money . . . ." *Id.* at 17-18. Customers, art editors and reporters were confused by a competing business, which was close in proximity, used a similar name, and offered similar art. *Id.* at 18. "It is inevitable that some would walk into [defendant's] by mistake and would have their tastes satisfied there, to [plaintiff's] great harm." *Id.* at 19.

Here, the D&D Production likewise has valuable good will and reputation in the D&D community built through work, ability and expenditure of money. *See id.* at 17-18; (Savini Aff. at ¶¶ 8,10; Savini Reply Aff. at ¶5-6; Complaint at ¶¶ 42-45) Also akin to *Findlay*, the competing D&D project of defendants has also been shown to cause great confusion among both the D&D fan base as well as those holding important information. (*See* Complaint at ¶¶ 48-55). Indeed, defendants have set up in close virtual proximity to the D&D Production by starting another Kickstarter campaign. Defendants actually go far beyond the unfair competitor in *Findlay* by actively diverting interest away from the D&D Production and directing it towards the competing project, including *as recently as July 17, 2014*. (Savini Reply Aff. at ¶ 10, Ex. D (Pascal, via the D&D Production Kickstarter page, asking an apparently important 'gamer' to spread the word about the competing project)). This diversion of the good will of the D&D Production is not remote or speculative but imminent and continuing.

Savini's Reply Affidavit also shows a long list of defendants' acknowledged "supporters" who were initially developed as contacts for the D&D Production at considerable cost and effort and has resulted in lost good will, lost opportunity and dilution of the value of various footage. (Savini Reply Aff. at ¶¶ 6-7; Complaint at ¶ 48); *and see Gundermann & Gundermann Ins. v. Brassill*, 46 A.D.3d 615, 617 (2d Dep't 2007) (such damages support finding of irreparable harm and issuance of preliminary injunction).

Plaintiff's claim to both Monetary Damages and
Irreparable Harm Does Not Warrant Denial if Preliminary Injunction.

According the Second Circuit, "[g]enerally, where we have found no irreparable harm, the alleged loss of goodwill was doubtful, and lost profits . . . could be compensated with money damages determined on the basis of past sales . . . and of current and expected future market conditions." *Tom Doherty Assocs. v. Saban Entm't, Inc*., 60 F.3d 27, 38 (2d Cir. N.Y. 1995). Here, the creative endeavor undertaken by the parties to create a documentary about Dungeons & Dragons is a unique opportunity. Injunctive relief is appropriate to avoid the unfairness of denying an injunction to a Westpaw on the ground that money damages are available, only to confront Westpaw at a trial on the merits with the rule that damages must be based on more than speculation, which defendants already allege. (D.MOL p.10, §II.D.)

Defendants misplace reliance on the holding in *Mar v. Liquid Mgt. Partners, LLC,* 62 A.D.3d 762, 763 (2d Dep't 2009) to support their argument that a preliminary injunction is unavailable to a party who also seeks monetary damages. (D.MOL p.9, §II.D.) In *Mar*, the plaintiff's complaint sought "nothing more than monetary damages." *Id.* "Accordingly, the plaintiffs ha[d] effectively acknowledged that they will be fully compensated by obtaining such damages . . . ." *Id.* The Complaint here, as acknowledged by defendants, does seek injunctive relief and asserts that plaintiff "cannot be remedied merely by the payment of money damages." (Complaint at ¶ 108).

Defendants also cite to *Cliff v. R.R.S. Inc.*, 207 A.D.2d 17, 20, 620 N.Y.S.2d 190, 193 (3d Dep't 1994) for the same proposition. However, a closer reading of *Cliff* sets forth no such unequivocal rule and in fact the very same Third Department panel of judges held otherwise in *Pyramid Centres & Co. v. Sarwill Assoc*., 186 A.D.2d 968, 969 (3d Dep't 1992) (Crew, Mikoll, Mercure, Casey,Yesawich Jr., JJ.) ("We reject defendant's contention that plaintiff is not entitled

to a preliminary injunction because it seeks only monetary damages. Although an injunction is not available in an action for money damages only, plaintiff here requests that defendant be prohibited from disconnecting it from the sewer line and therefore may have such relief.") (citations omitted)

II. Likelihood of Success the Merits

Plaintiff is likely to succeed on the merits of its claims as outlined in the moving papers and Defendants' arguments in opposition do not withstand the scrutiny hereinabove above. A few points are worth distinguishing.

Fiduciary Duties Remained Under Defendants Most Favorable Theory

Assuming, *arguendo*, that the partnership was dissolved by June 2013, as argued by defendants, the partners jointly undertook to work out the Settlement Agreement and were thus all responsible for winding up the partnership. "The partner charged with winding up the affairs of the partnership . . . retains a fiduciary duty with regard to the preservation of firm assets." *Morris v. Crawford*, 304 A.D.2d 1018, 1021 (3d Dep't 2003)(*citing Matter of Silverberg [Schwartz]*, 81 A.D.2d 640, 641 n., 438 N.Y.S.2d 143 (1981)). Under defendants most favorable theory then, the fiduciary obligations to the partnership remained to preserve the firm assets, which includes the valuable intangibles discussed above and which defendants so eagerly exploited long before any settlement was reached. In any event, the Settlement Agreement on its face requires that plaintiff, for the D&D Production, is entitled to the good will and benefits of all prior partnership expenditures, which it was actively denied by defendants.

New York Law Recognizes Derivative Claims in this Context

In *Yudell v. Gilbert*, 99 AD3d 108, 115, 949 N.Y.S.2d 380 (1st Dep't 2012), the First Department adopted the Delaware test to analyze whether the claims of a joint venturer were direct or derivative. A joint venture is akin the parties relationship here.

III. The Balance of Equities Favor Plaintiff

Even if the partnership was dissolved, the parties jointly undertook to wind up the affairs of the partnership in negotiating the Settlement Agreement, and owed a duty to preserve, and not usurp for their own benefit, the partnership opportunities. It also bears repeating that under the Settlement Agreement, Westpaw is entitled to the good will and benefits of the partnership expenditures. Defendants' misconduct created any hardships they allege.

For the same reason, any undertaking required of Westpaw should be minimal and proven by defendants. Defendants fail to establish how stopping their project now would completely destroy any future ability to complete the film should the opportunity arise (which it will not).

CONCLUSION

For the foregoing reasons, plaintiff's motion for a preliminary injunction should be gratned.

Dated: New York, New York
July 28, 2014

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