

CSI Entertainment, Inc. v Dynasty Boxing, LLC

2017 NY Slip Op 31554(U)

June 21, 2017

Supreme Court, Richmond County

Docket Number: 150497/2015

Judge: Desmond A. Green

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

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CSI ENTERTAINMENT, INC.,

Plaintiff,

DCM PART 3

- against -

**Present:
Hon. Desmond A. Green**

**DYNASTY BOXING, LLC, DINO DUVA,
ROC NATION SPORTS, LLC and ROC NATION
SPORTS-ROC NATION BOXING, LLC,**

Defendants.

DECISION and ORDER

Index No. 150497/2015

**Motion Nos. : 221 - 002
708 - 003**

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**The following papers numbered 1 to 8 were fully submitted on the
12th day of April, 2017.**

Papers Numbered

**Notice of Motion by Defendants Roc Nation Sports, LLC,
and Roc Nation Sports - Roc Nation Boxing, LLC to Vacate
the Temporary Restraining Order entered on June 5, 2015,
and to Dismiss the Complaint, with Supporting Papers
(dated January 14, 2016)..... 1**

**Memorandum of Law by Defendants Roc Nation Sports, LLC
and Roc Nation Sports - Roc Nation Boxing, LLC in Support of
Motion to Vacate Temporary Restraining Order and to Dismiss
the Complaint
(undated)..... 2**

**Notice of Motion by Defendant Dino Duva
to Dismiss the Complaint pursuant to CPLR 3211(a)(1) and (a)(7),
with Supporting Papers
(dated February 16, 2017)..... 3**

**Plaintiff's Affirmation in Opposition to Motion by
Defendants Roc Nation Sports, LLC and Roc Nation Sports -
Roc Nation Boxing, LLC
(dated March 25, 2016)..... 4**

**Plaintiff's Memorandum of Law in Opposition to Defendants'
separate Motions to Vacate the Temporary Restraining Order
and to Dismiss the Complaint
(dated March 25, 2016)..... 5**

CSI ENTERTAINMENT, INC. vs. DYNASTY BOXING, LLC

**Reply Affidavit of David Itskowitch
(dated April 4, 2016)..... 6**

**Reply Affirmation of Casey D. Laffey, Esq.
(dated April 5, 2016)..... 7**

**Reply Memorandum of Law by Defendants Roc Nation Sports, LLC
and Roc Nation Sports - Roc Nation Boxing, LLC
(dated April 26, 2016)..... 8**

Upon the foregoing papers, the branch of the motion (Seq. No. 002) of defendants Roc Nation Sports, LLC and Roc Nation Sports - Roc Nation Boxing, LLC (hereinafter, “Roc Nation”) which is to vacate the temporary restraining order dated June 5, 2015 is granted; the balance of said motion is denied, as is the motion (Seq. No. 003) of Dino Duva (hereinafter, “Duva”) to dismiss the complaint pursuant to CPLR 3211 (a)(1) and (a)(7).

This action arises out of a certain Sports Agreement dated July 15, 2014 allegedly entered into between the plaintiff/network, CSI Entertainment, Inc. (hereinafter, “CSI”), and the defendant/promoter, Dynasty Boxing , LLC (hereinafter, “Dynasty”). The agreement (hereinafter, the “CSI-Dynasty Sports Agreement”) purports to grant exclusive media rights to CSI to broadcast, in certain defined Pan-Asian territories (excluding China), all boxing events that included the participation of the heavyweight fighter known as Zhang Zhilei (hereinafter, “Zhang”) ¹, a client of Dynasty.

¹ Zhang is alleged to be the first and only Asian heavyweight boxer to win the silver medal in the heavyweight division of the 2008 Beijing Olympics. Zhang is not a party to this

CSI ENTERTAINMENT, INC. vs. DYNASTY BOXING, LLC

By way of background, on September 26, 2013, non-party Zhang allegedly entered into an exclusive promotional agreement with Dynasty (hereinafter, the “Dynasty Promotional Agreement”) wherein the latter agreed to act as Zhang’s promoter, *e.g.*, securing and arranging boxing matches for him, and providing regular training services and compensation for each of his boxing matches, including reimbursement for his travel costs. In an affidavit in support of Roc Nation’s motion, Zhang maintains that Dynasty failed to perform these obligations after his professional debut in a boxing match on August 8, 2014. Allegedly, upon Dynasty’s failure to cure its breach of the terms of the promotional agreement, Zhang elected to exercise his right to terminate said agreement in a “Notice of Termination” dated November 19, 2014. On the same date, he entered into a promotional agreement with Roc Nation.

CSI maintains that in May of 2015, it first learned that (1) Zhang would be participating in a professional boxing event on June 6, 2015 at the Barclays Center in Brooklyn, New York, promoted by Roc Nation, (2) Dynasty was no longer Zhang’s promoter, (3) Zhang had retained Roc Nation to serve as his promoter, and (4) defendant Dino Duva had been hired by Roc Nation as a salaried employee.² According to CSI, on June 2, 2015, it first learned that Roc Nation intended to broadcast Zhang’s boxing

action.

² It is undisputed that defendant Duva was the president and fifty percent owner of defendant Dynasty upon its organization in June of 2013, until December 30, 2014, at which time Duva exercised his option, pursuant to Dynasty’s Operating Agreement, to withdraw from the LLC and resign as its president and managing partner.

CSI ENTERTAINMENT, INC. vs. DYNASTY BOXING, LLC

bout at the Barclay's Center throughout the Pan-Asian countries where CSI held "exclusive [broadcasting] rights" pursuant to its Sports Agreement with Dynasty.

This action for, *inter alia*, breach of contract and tortious interference with contract, ensued, along with an Order to Show Cause dated June 4, 2015 wherein CSI sought, *inter alia*, (1) a preliminary injunction enjoining and restraining Dynasty and Roc Nation from broadcasting in certain defined Pan-Asian countries, any and all boxing bouts in which Zhang was a participant, and (2) a temporary restraining order enjoining defendants from broadcasting any and all Zhang boxing events, including the June 6, 2015 boxing event at the Barclays Center in Brooklyn, New York. A hearing was held on June 5, 2015 wherein this Court ordered that Roc Nation (Zhang's current promoter) was to keep Zhang out of the June 6th boxing event at the Barclay's Center, and also temporarily restrained defendants from broadcasting, in the Pan-Asian countries, any and all of Zhang's future boxing events. Although a subsequent hearing for a preliminary injunction in this matter was never held, the TRO dated June 5, 2015 has been in effect to date.

In the present application, Roc Nation seeks to vacate that Order pursuant to CPLR 6314. It is argued that the continuation of plaintiff's TRO would be inequitable since (1) a restraining order with such an indefinite duration, in effect, constitutes a preliminary injunction, and (2) plaintiff has failed to established its entitlement to such drastic relief. The moving defendant further contends that, where as here, the record before the court clearly shows that the facts in this case are sharply disputed, the need

CSI ENTERTAINMENT, INC. vs. DYNASTY BOXING, LLC

for the continuation of the TRO or for preliminary injunctive relief is unjustified and inequitable.

In support of its motion, Roc Nation submits the affidavits of the individual defendant, Dino Duva (in his capacity as the former president and fifty percent owner of Dynasty, and current employee of Roc Nation), and non-party Zhang, together with pertinent correspondence and photo copies of emails between the parties concerning both the Dynasty Promotional Agreement with Zhang and the CSI-Dynasty Sports Agreement at issue. According to Roc Nation, this evidence is legally sufficient to establish that the CSI-Dynasty Sports Agreement was “incomplete” since certain pertinent terms had not been finalized. As such, Roc Nation contends that a valid contract between CSI and Dynasty never existed. In any event, it is argued that Dynasty promptly exercised its right to terminate the so-called “incomplete agreement” on August 25, 2014, prior to the alleged misconduct complained of in this action. Furthermore, Roc Nation alleges that CSI’s Sports Agreement with Dynasty was rendered invalid due to the impossibility of its performance resulting from Zhang’s termination of his Promotional Agreement with Dynasty on November 19, 2014.

Based on, *inter alia*, the foregoing, Roc Nation maintains that the TRO should be vacated due to plaintiff’s inability to establish the likelihood of success on the merits with regard to any of the four causes of action asserted in its complaint, *i.e.*, for breach of contract, intentional interference with contract, breach of implied covenant of good faith and fair dealing, and injunctive relief.

CSI ENTERTAINMENT, INC. vs. DYNASTY BOXING, LLC

It is well established that “[t]o be entitled to a preliminary injunction, a movant must establish (1) a likelihood of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant’s favor. The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual. A movant must satisfy each requirement with ‘clear and convincing evidence’” (County of Suffolk v Givens, 106 AD3d 943, 944 [internal citations omitted] [2nd Dept 2014]). Moreover, the decision to grant or deny a preliminary injunction lies within the sound discretion of the court (*see* Arcamone-Makinano v Britton Prop., Inc., 83 AD3d 623, 625 [2nd Dept 2011]). Similarly, the decision to vacate a preliminary injunction is addressed to the sound discretion of the court and may be granted either upon compelling or changed circumstances that render continuation of the injunction inequitable (CPLR 6314; *see* Lamouree v Ewart, 124 AD3d 602, 602-603 [2nd Dept 2015]; Washington Deluxe Bus, Inc. v Sharmash Bus Corp., 47 AD3d 806, 807 [2nd Dept 2008]; Thompson v 76 Corp., 54 AD3d 844, 846 [2nd Dept 2008]; Matter of Xander Corp. v Haberman, 41 AD3d 489, 490-491 [2nd Dept 2007]).

It is the Court’s opinion that CSI has not met its heavy burden of establishing that it is entitled to the continuation of this Court’s temporary restraining order dated June 5, 2015 in view of the newly presented circumstances concerning Zhang’s un rebutted assertion that he elected to terminate his promotion agreement with Dynasty, which renders such a drastic remedy unwarranted (*see* Rosenberg v Trazzera, 147 AD3d

CSI ENTERTAINMENT, INC. vs. DYNASTY BOXING, LLC

1099, 1101 [2nd Dept 2017]; Matter of Armanida Realty Corp. v Town of Oyster Bay, 126 AD3d 894, 894-895 [2nd Dept 2015]. More particularly, it is undisputed that as a result of Zhang's termination of the Dynasty Promotion Agreement, Dynasty no longer possesses the contractual ability to promote Zhang's boxing matches in the Pan-Asian countries, or anywhere else for that matter. As such, this defendant has been divested of the legal authority to perform its contract with CSI. Under these circumstances, plaintiff is unable to demonstrate that it could not be fully compensated by a monetary award (see Soundview Cinemas, Inc. v AC I Soundview, LLC, __ AD3d __, 2017 NY Slip Op 03209 [2nd Dept 2017]; American Commerce Ins. Company v Francois, 125 AD3d 903, 903 [2nd Dept 2015]; Rowland v Dushin, 82 AD3d 738,739 [2nd Dept 2011]).

"Economic loss, which is compensable by money damages, does not constitute irreparable harm" (EdCia Corp. v McCormack, 44 AD3d 991, 994 [2nd Dept 2007]; see Matter of Rice, 105 AD3d 962, 963 [2nd Dept 2013]). In other words, "[i]rreparable injury, for purposes of equity, has been held to mean any injury for which money damages are *insufficient*" (Bashian & Farber, LLP v Syms, 147 AD3d 714, 717 [emphasis added] [2nd Dept 2017]).

In the matter at bar, since plaintiff could be sufficiently compensated by money damages and, in fact, seeks monetary damages in its first, second and third causes of action, it has failed to demonstrate that it would suffer irreparable harm or that the balance of the equities favor continued injunctive relief (see Soundview Cinemas, Inc. v AC I Soundview, LLC, __ AD3d __, 2017 NY Slip Op 03209; Bashian & Farber, LLP

CSI ENTERTAINMENT, INC. vs. DYNASTY BOXING, LLC

v. Syms, 147 AD3d at 717; Matter of Armanida Realty Corp. v. Town of Oyster Bay, 126 AD3d at 895). Clearly, in view of Zhang's termination of the Dynasty Promotional Agreement, it appears that the sole relief available to plaintiff is an award of monetary damages, thereby rendering the continuation of the existing TRO inequitable.

Additionally, CSI's conclusory and speculative allegation that its reputation in the market as to having exclusive rights to broadcast Zhang's boxing events in the Pan-Asian territories has been impaired, does not constitute clear and convincing evidence that it would suffer irreparable harm in the absence of a restraining order or that the balance of the equities favor an injunction (*see* American Commerce Ins. Company v. Francois, 125 AD3d at 903; County of Suffolk v. Givens, 106 AD3d at 944; Rowland v. Dushin, 82 AD3d at 739; EdCia Corp. v. McCormack, 44 AD3d at 994). Rather, the Court is persuaded by non-party Zhang's detailed assertions in his affidavit that the continuation of the existing TRO would cause irreparable harm to his professional boxing career and future earning potential.

Turning to the motion of Dino Duva to dismiss the complaint, it is well established that in considering a motion to dismiss pursuant to CPLR 3211(a)(7), the pleadings are to be liberally construed (*see* CPLR 3026; Leon v. Martinez, 84 NY2d 83 [1994]). Accordingly, the court will accept the factual averments in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the proponent of the pleading has stated a cognizable cause of action (*see* Goldman v. Metropolitan Life Ins. Co., 5 NY3d 561, 571 [2005]); Arnav Indus., Inc.

CSI ENTERTAINMENT, INC. vs. DYNASTY BOXING, LLC

Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, 96 NY2d 300, 303 [2001]). Moreover, the criterion for dismissal becomes whether the pleader “has” a cause of action, not whether he or she has stated one (*see* Leon v Martinez, 84 NY2d at 88; Rovello v Orofino Realty Co., 40 NY2d 633, 635-636 [1976]). Further, in order to prevail on a motion to dismiss pursuant to CPLR 3211(a)(1), it is familiar law that the movant is required to demonstrate that “the documentary evidence utterly refutes plaintiff’s allegations, conclusively establishing a prima facie defense as a matter of law” (Goshen v Mutual Life Inc. Co. of N.Y., 98 NY2d 314, 326 [2002]; *see* Goldman v Metropolitan Life Ins. Co., 5 NY3d at 571). In the absence of same, the motion will be denied.

Applying the foregoing principals to the case at bar, it is the opinion of this Court that the documentary evidence proffered by the moving defendant (*e.g.*, the various contracts at issue, the affidavits of Zhang and Duva along with certain notices, correspondences and photo copies of emails between the parties) fails to resolve plaintiff’s claims against Duva for intentional interference with contract and breach of implied covenant of good faith and fair dealing. Instead, the documentary evidence submitted in support of the motion is legally insufficient to establish a defense to the asserted claims as a matter of law (*see* Goldman v Metropolitan Life Ins. Co., 5 NY3d at 571), and merely raises material questions of fact. As such, dismissal is unwarranted at this stage of the proceedings (*see* Rovello v Orofino Realty Co., 40 NY2d at 635-636).

CSI ENTERTAINMENT, INC. vs. DYNASTY BOXING, LLC

With respect to the branch of the motion which is to dismiss the complaint for failure to state a cause of action (CPLR 3211 [a][7]), the moving defendant has not convinced this Court that a material fact alleged by plaintiff “is not a fact at all” and that “no significant dispute exists regarding it” (Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]). Thus, dismissal of CSI’s claims against defendant Duva is denied (*see* Gutierrez v Government Empls. Ins. Co., 136 AD3d 975, 976-977 [2nd Dept 2016]; New York Merchants Protective Co., Inc. v Rodriguez, 41 AD3d 565, 566 [2nd Dept 2007]).

Accordingly, it is

ORDERED, that the branch of the motion of defendants Roc Nation Sports, LLC and Roc Nation Sports - Roc Nation Boxing, LLC which is to vacate the temporary restraining order dated June 5, 2015 is granted; and it is further

ORDERED, that the balance of said motion is denied, and it is further

ORDERED, that the Temporary Restraining Order dated June 5, 2015 is hereby vacated, and it is further

ORDERED, that the motion of defendant Dino Duva to dismiss the complaint pursuant to CPLR 3211 (a)(1) and (a)(7) is denied, and it is further

ORDERED, that the Clerk mark his or her records accordingly.

Dated: 6/21/17

ENTER,



J.S.C.