

Woodstock 50, LLC v Dentsu Inc.

2019 NY Slip Op 31469(U)

May 15, 2019

Supreme Court, New York County

Docket Number: 652772/2019

Judge: Barry Ostrager

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 53EFM

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WOODSTOCK 50, LLC,

Petitioner,

- v -

DENTSU INC., DENTSU AEGIS NETWORK, and AMPLIFI LIVE,
LLC

Respondents.

INDEX NO. 652772/2019

MOTION DATE May 14, 2019

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for INJUNCTION/RESTRAINING ORDER

HON. BARRY R. OSTRAGER:

The Court held a two-day evidentiary hearing on the narrow issues presented by Petitioner’s—Woodstock 50, LLC (“W50”)—request for a preliminary injunction in aid of arbitration pursuant to CPLR § 7502(c). For the reasons discussed *infra*, the relief Petitioner seeks is granted in part and denied in part.

The Financing and Production Agreement

Petitioner W50 controls the exclusive licensing rights to certain “Woodstock” trademarks related to the iconic Woodstock Music and Art Fair held in August 1969 at a farm in Bethel, New York. Respondent Dentsu Inc. (“Dentsu”) is one of the world’s largest advertising agencies, Respondent Dentsu Aegis Network (“DAN”) is a wholly owned Dentsu subsidiary, and Respondent Amplifi Live, LLC (“Amplifi”) is the investment arm of Dentsu Aegis Network.

In Spring 2018, W50 sought funding from Dentsu as part of a contemplated joint effort to produce a three-day music festival in August 2019 (the “Festival”) in Upstate New York to commemorate the fiftieth anniversary of the original Woodstock.

On November 2, 2018, W50 and Amplifi entered into a Financing and Production Agreement (the “FPA”). The FPA specified that the Festival would take place on August 16, 17, and 18, 2019 at Watkins Glen International in Watkins Glen, New York (the “Festival Grounds”). (See FPA, Exhibit A [NYSCEF Doc. No. 15]). The Festival was to have “no less than twenty-four (24) musical acts per day” and “[a]t least 150,000 tickets shall be made available for sale for the entire Festival.” *Id.* The FPA jointly obligated the parties to obtain written commitments from at least two “first tier” artists such as Drake or Bruce Springsteen, or comparable artists based on recent ticket sales. (See FPA, Exhibit E [NYSCEF Doc. No. 15]). The FPA required the parties to secure similar written commitments from various “tiers” of talent.

The FPA required Amplifi to provide \$49,141,000 in funding to cover the production costs of the Festival. (FPA § 4(a)). Amplifi was required to transfer such funds to a dedicated bank account held by Amplifi for the purposes of funding Festival related costs (the “Festival Bank Account”). Proceeds from the Festival would first be paid to Amplifi until Amplifi recouped its \$49+ million and any additional amounts it funded under the FPA. All additional proceeds would be split between the parties: 64% to W50 and 36% to Amplifi. (FPA § 10(c)).

The FPA, read as a whole, makes clear that both Amplifi and W50 were jointly responsible for the vast majority of the work associated with producing the Festival. Section 2(a) provides:

The Parties hereby agree to cooperate to produce the Festival in a good and workmanlike manner in accordance with highest industry practices and standards. The

Parties shall be jointly responsible for the day to day operations for the development, production and marketing of the Festival (with a right to delegate services to third parties), including, without limitation, (i) booking and coordination of all artists; (ii) booking/leasing of the Festival location; (iii) managing the box office and ticket sales; (iv) production of the Festival, including coordination of the stage, sound, lights, video, volunteers, and stagehands; (v) supervision and coordination of the vendor sales including food, bar, art, and apparel; (vi) contracting with all vendors and suppliers, including tents, fence, port-a-cans, clean-up, electrical supplies, catering, etc., with such primary vendors; (vii) providing private security in coordination with existing state and local police; (viii) filming or otherwise recording the Festival, on its own behalf or through third party vendors.

Section 2 further provides that: the parties consult with each other regularly on all matters related to the Festival; jointly agree on any material deviation from the Festival's specifications regarding tickets and talent; jointly enter into agreements with major vendors; and jointly work with state and local authorities to ensure compliance with applicable laws and regulations (*See* FPA §§ 2(b)-(f)).

While most of the production-related work under the FPA was to be shouldered jointly by W50 and Amplifi, Section 6(b) provides:

Amplifi shall control all payments from the Festival Bank Account. Amplifi agrees to timely make all payments from the Festival Bank Account that are incurred in accordance with the Approved Budget and the terms of this Agreement and that are supported by valid invoices from the applicable vendor. *W50 shall be granted read-only access to the Festival Bank Account.* (emphasis added).

Thus, while the parties agreed to cooperate in good faith to produce all aspects of the Festival, Amplifi retained control over the purse strings with respect to payments for Festival related costs.

Importantly, the FPA contains termination provisions providing each party with the right to terminate the contract upon a ten-day notice of a breach and failure to cure. For example, Section 12(a)(ii) provides that the FPA may be terminated "by Amplifi, upon ten (10) days written notice to W50 of W50's repeated or serial breach of this Agreement with respect to a

failure to obtain Amplifi's approval for the matters specifically requiring Amplifi's approval or joint approval of the Parties hereunder, and such repeated or serial breach is not cured during such notice period."

Section 12(d) further provides that Amplifi—if it has the right to terminate the FPA under Section 12(a)(ii)—may “take full control of the operation and production of the Festival by a notice in writing to W50 and cause W50 and its officers and employees to cease all Festival-related activity,” or, alternatively, terminate the FPA. Thus, upon a breach by W50 that would give Amplifi the right to terminate the FPA, Amplifi could, and, as set forth *infra*, purportedly did, exercise a “Control Option” whereby Amplifi would take full control of the Festival without terminating the FPA.

Section 12(d) provides:

If Amplifi chooses to exercise its Control Option, W50 shall (i) maintain in full force and effect the License Agreement, (ii) either assign to Amplifi or continue to perform under any Festival-related agreement to which W50 is a party, as reasonably directed by Amplifi, and (iii) take such other actions or omit to take such actions as Amplifi shall reasonably direct that are required to successfully produce the Festival. Provided that W50 performs its obligations set forth in this Section 12(d), in the event Amplifi exercises its Control Option, W50 shall remain entitled to its share of the Festival Net Proceeds, less any losses, damages, liabilities or expenses suffered or incurred by Amplifi as a result of the events giving rise to Amplifi's right to exercise its Control Option, as set forth in this Agreement.

Thus, Section 12(d) empowers Amplifi to take control of production as an alternative to terminating the FPA because of W50's alleged breaches. The Control Option seemingly contemplates that the FPA would stay in effect, Amplifi would control production of the Festival, and the parties would still ultimately split proceeds on the basis provided in the FPA.

The Control Option does not make provision for the unilateral cancellation of the Festival. Indeed, Section 12(e) explicitly states, in a stand-alone provision: “Any decision to cancel the Festival shall be jointly made in writing by the Parties.”

On April 17, 2019, Amplifi provided W50 with written notice of W50's alleged repeated breaches of the FPA. (Trial Exhibit 4 [NYSCEF Doc. No. 57]). The letter asserts that Amplifi may terminate the FPA under Section 12(a)(ii) or, alternatively, exercise its Control Option under Section 12(d), and that W50's breaches are not curable. The letter lists several purported breaches by W50, such as: failing to obtain Amplifi's consent to lower ticket sales from 150,000 to 60,000; failing to consult with Amplifi regarding the booking of talent; failing to decrease the approved budget after failing to sign any talent by a December 31, 2018 deadline; and making certain payments for rent and other business expenses without Amplifi's prior approval. *See id.* The letter otherwise sought W50's confirmation that the breaches could not be cured and that Amplifi would immediately assume full control of production pursuant to the FPA's Control Option at the end of the ten-day cure period. *See id.*

On April 29, 2019, Amplifi sent notice to W50 of Amplifi's purported exercise of its Control Option. (Trial Exhibit 5 [NYSCEF Doc. No. 67]). In a subsequent letter sent on the same day, Amplifi notified W50 that it was cancelling the Festival because of "the significant cost overruns, revenue shortfalls, and lack of financing facing the Festival, all insurmountable obstacles that cannot be cured." (Trial Exhibit 6 [NYSCEF Doc. No. 68]). The Festival's apparent cancellation was widely publicized by major media outlets almost immediately.¹

In or around April 29, 2019, Amplifi also allegedly removed the roughly \$17.8 million remaining in the Festival Bank Account and transferred such funds to a different Amplifi controlled account.

On May 9, 2019, W50 commenced this special proceeding seeking a temporary restraining order and a preliminary injunction in aid of arbitration. To be clear, no arbitration has

¹ *See, e.g.,* Daniel Kreps, *Woodstock 50 Canceled*, Rolling Stone (Apr. 29, 2019), <https://www.rollingstone.com/music/music-news/woodstock-50-canceled-828606/>.
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yet been commenced, however, Section 18(f) of the FPA provides that all disputes arising under the FPA be submitted first to non-binding mediation—and if such disputes are not resolved through mediation—then to binding arbitration. W50’s petition contemplates arbitrable claims sounding in breach of the FPA, defamation, and tortious interference with W50’s contracts with performers and vendors.

The Court granted Petitioner’s request for a temporary restraining order to the extent of restraining Respondents from communicating about the Festival with, *inter alia*, the media, stakeholders, vendors, performers, and local officials. The Court denied Petitioner’s request, pending a full evidentiary hearing, for a mandatory injunction directing Respondents to return the \$17.8 million to the Festival Bank Account and provide Petitioner access to the funds in the Festival Bank Account. The Court also denied Petitioner’s request for certain pre-arbitration discovery. (*See* Order to Show Cause [NYSCEF Doc. No. 8]).

On May 14-15, 2019, the Court held a full evidentiary hearing regarding Petitioner’s requested injunctive relief in aid of arbitration.

Discussion

The Court “may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration that is pending or that is to be commenced ... but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief.” CPLR § 7502(c). A preliminary injunction is “an extraordinary provisional remedy which will only issue where the proponent demonstrates (1) a likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, and (3) a balance of equities tipping in its favor.” *Harris v. Patients Med., P.C.*, 169 A.D.3d 433, 434 (1st Dep’t 2019). A party, like W50, seeking a mandate of specific conduct, must meet a

“heightened standard.” *Roberts v. Paterson*, 84 A.D.3d 655, 655 (1st Dep’t 2011). A mandatory preliminary injunction “is an extraordinary and drastic remedy which is rarely granted and then only under unusual circumstances where such relief is essential to maintain the status quo pending trial of the action.” *Zoller v. HSBC Mtge. Corp. (USA)*, 135 A.D.3d 932, 933 (2d Dep’t 2016) (internal quotations and citations omitted).

Petitioner W50 seeks a preliminary injunction enjoining Respondents from all communications relating to the Festival, and, additionally, a mandatory injunction ordering Respondents to return the \$17.8 million to the Festival Bank Account, to cooperate with W50 in the continued planning of the Festival, and to produce records related to the removal of funds from the Festival Bank Account and communications regarding the production of the Festival from April 1, 2019 to date.

First, Petitioner W50 argues that Amplifi had no right, regardless of any of W50’s purported breaches, to unilaterally cancel the Festival without written approval from W50. Amplifi, in opposition, argues that once it exercised its Control Option under the FPA it was authorized to take “full control” of the Festival which, necessarily, includes the ability to cancel the Festival if Amplifi determines that is the appropriate course of action. Amplifi argues that without the ability to cancel the Festival, Amplifi would be forced to produce a Festival despite any public safety risks and despite the clear economic losses it believes it would incur.

Petitioner, however, is correct that the FPA expressly provides that the Festival can only be cancelled by a writing signed by both parties. Section 12(e), a stand-alone provision, clearly provides: “Any decision to cancel the Festival shall be jointly made in writing by the Parties.” Respondents’ witness testified, and it is beyond dispute, that the FPA was never terminated and thus remains in effect.

Here, Amplifi unilaterally cancelled the Festival, without consulting W50, by exercising its Control Option which, Amplifi asserts, necessarily enables Amplifi to cancel the Festival. However, the Control Option in Section 12(d) does not provide Amplifi with the right to unilaterally cancel the Festival in the face of Section 12(e)'s explicit requirement that any cancellation be mutually agreed upon.

In sum, nothing in the FPA indicates that Amplifi's exercise of the Control Option overrides the contract's explicit requirement that any cancellation of the Festival be mutually agreed upon in writing. Passing the issue of whether, as it appears, it is no longer feasible to conduct the Festival—a circumstance that is not explicitly addressed in the FPA²—Amplifi does not have the right to unilaterally cancel the Festival, although the inevitable arbitration may confirm Amplifi's right to exercise the Control Option. If the Festival does proceed, the arbitration will presumably determine how to allocate the costs and expenses associated with the Festival.

Ultimately, Petitioner has established (1) a likelihood of success on the merits of a claim for breach of, at a minimum, Section 12(e) by virtue of Amplifi's unilateral cancellation of the Festival, (2) irreparable harm given the unique nature of the event, and (3) a balance of the equities in its favor.

Petitioner, however, falls woefully short of making the heightened showing necessary to warrant a mandatory injunction ordering Amplifi to return \$17.8 million to the Festival Bank Account and to "provide W50 with access to the funds in the Account." (*See Order to Show*

² The only provision that seemingly contemplates a scenario in which the Festival becomes impossible to produce provides that either party may terminate the FPA "in the event that the Festival does not occur by August 31, 2019 or is mutually cancelled prior to such date pursuant to Section 12(e)." FPA § 12(a)(v). However, the termination rights under this provision are limited to a scenario in which the scheduled mid-August Festival dates have come and gone without a Festival or when the parties have mutually agreed to cancel the Festival. The FSA, confoundingly, does not explicitly state the parties' obligations if it becomes evident to Amplifi (the financier of the Festival), but not to W50, that the Festival cannot, as a practical matter, go forward.

Cause [NYSCEF Doc. No. 8]). Again, passing the issue of whether it is feasible for the Festival to proceed as scheduled, Respondents cite multiple breaches of the FPA, and granting Petitioner access to the funds in the Festival Bank Account would give Petitioner more rights than it has under the FPA, as the contract gives Amplifi the right to approve all expenditures. (See FPA § 6(b)). In the latter connection, Amplifi asserted by convincing testimony adduced at the hearing that it intended to mitigate its damages from a music festival that could not be successfully produced by mid-August because, among other reasons, multiple permits necessary to conduct the Festival were not in place, tickets had not yet been sold, no budget had been agreed upon, necessary and expensive structural improvements to the Festival site and related areas had not yet started, and the production company essential to produce the Festival had withdrawn. Thus, Petitioner has not met the high burden entitling it to a mandatory injunction forcing Amplifi to provide W50 with access to the \$17.8 million W50 is not contractually entitled to control under the FPA.

Whether Respondents' conduct is actionable is an issue for the arbitration and not for resolution in a special proceeding for injunctive relief in aid of arbitration. Similarly, the Court declines to grant pre-arbitration discovery, as the parties did not argue the issue in their briefing or during the two-day evidentiary hearing.

Finally, Petitioner has established that all three Respondent entities have been acting interchangeably in connection with the Festival and were acting as agents of one another. Thus, the interim relief granted herein is applicable to all Respondents and not just Amplifi as signatory to the FPA.

Accordingly, it is hereby

ORDERED that Respondents, their agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of Respondents are enjoined and restrained, pending the determination of the anticipated arbitration, from:

- a. Cancelling the Festival or communicating to the media and/or Festival stakeholders, including state and county officials, venue operators, local vendors, community representatives, insurers, producers, and talent agencies, and performers that the Festival has been cancelled; and it is further

ORDERED AND ADJUDGED that the petition is otherwise denied subject to the provisions of CPLR § 7502(c).

5/15/2019
DATE

Barry R. Ostrager
BARRY R. OSTRAGER
 JSC

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE