Raven Capital Mgt. LLC v Georgia Film Fund 72
2021 NY Slip Op 30393(U)
February 8, 2021
Supreme Court, New York County
Docket Number: 652463/2020
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: **HON. O. PETER SHERWOOD** **PART** **IAS MOTION 49EFM**

Justice

---X

RAVEN CAPITAL MANAGEMENT LLC, and RIVE BL, LLC,

Plaintiffs,

-against-

GEORGIA FILM FUND 72, LLC,

Defendant.

---X

INDEX No.: 652463/2020

MOT. DATE: 8/24/2020

MOT. SEQ. No.: 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 16, 17, 18, 19, 20, 21, 35, 36, 39, 40, 41
were read on this motion to/for DISMISSAL

In motion sequence 005, defendant Georgia Film Fund 72, LLC ("GFF") moves to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7) with prejudice and without leave to amend, to limit the request for expectation damages or lost profits for breach of contract and for sanctions. For the following reasons, the motion shall be granted in part.

I. BACKGROUND

As this is a motion to dismiss, the facts are taken from the complaint. Plaintiff Raven Capital Management LLC ("Raven") is a New York based private equity fund manager and Registered Investment Advisor (Compl. ¶¶ 2, 9 [Doc. No. 2]). Plaintiff RIVE is a Delaware company that is a wholly-owned subsidiary of investment funds managed by Raven (*id.* ¶ 10). Defendant GFF is a film production company based in Delaware (*id.* ¶ 1). On March 12, 2020, Raven and GFF entered into a Term Sheet through which GFF extended to plaintiffs an offer to acquire exclusive distribution rights within the United States and its territories to a motion picture titled *Boss Level* (the "Film"). Plaintiff RIVE would be the distributor (*id.* ¶¶ 1, 6, 14). The Term Sheet required the parties to use commercially reasonable efforts to negotiate and enter into a definitive distribution agreement (the "Distribution Agreement"), and provided that certain specified terms were binding and would survive termination of the Term Sheet (*id.* ¶¶ 16-17).

The Term Sheet established an initial 21-day Exclusivity Period, automatically renewable for successive 14-day periods, during which time GFF would be prohibited from soliciting offers for, or entering into, any transaction granting rights that would compete with the offer (the "Exclusivity Provision") (*id.* ¶¶ 18-19). The Exclusivity Period would continue until a party gives written notice of termination of discussions at least 48 hours prior to the end of the current period (*id.*). The Provision obligated GFF to terminate consideration of any Competing Transaction it may have been contemplating and to immediately inform Raven of any competing proposals received (*id.* ¶ 20). The Exclusivity Provision further obligates GFF to pay Raven $250,000 in the event GFF enters into a Competing Transaction or agrees in writing to accept an alternative distributor (*id.* ¶ 22). The Term Sheet includes a Confidentiality Provision that survives termination, shielding the terms of the contemplated Distribution Agreement from disclosure to any third-party without the other parties' consent (*id.* ¶ 24).

Thereafter, Raven formed RIVE for the purpose of acquiring and using the distribution rights (*id.* ¶ 27). Throughout the Exclusivity Period, plaintiffs prepared and negotiated terms of a Distribution Agreement as outlined in the Term Sheet. A first draft was sent to GFF on March 16, 2020 (*id.* ¶¶ 28-29). Between March 16, 2020 and June 1, 2020, the parties exchanged correspondence regarding the drafts, resulting in at least five automatic extensions of the Exclusivity Period (*id.* ¶ 29). By the end of March, the parties had agreed on all material business terms. The terms were papered in a draft Distribution Agreement in late April, and Raven provided all outstanding deliverables to "consummate" the transaction by early May (*id.* ¶ 30). However, on June 1, 2020, a representative for GFF informed plaintiffs that GFF had been negotiating a Competing Transaction for direct-to-consumer distribution which GFF would be executing instead (*id.* ¶¶ 29, 34–36). During this period, plaintiffs learned that GFF had previously granted certain distribution rights in the Film to a third-party, Entertainment Studios ("ES"), but that it was working to finalize termination of that deal (*id.* ¶ 37). GFF later informed plaintiffs that the termination did not place (*id.*). On June 1, 2020, plaintiffs sent GFF a cease-and-desist letter (*id.* ¶ 39). Shortly thereafter, GFF wrote to Raven allegedly terminating negotiations only one day before expiration of the then current extension of the Exclusivity Period (*id.* ¶ 40). Plaintiffs allege five causes of action against GFF: (i) breach of the Term Sheet, (ii) Declaratory Judgment finding that a valid oral Distribution Agreement exists, (iii) breach of the oral Distribution Agreement, (iv) fraud, and (v) breach of the implied covenant of good faith and fair dealing.

II. ARGUMENTS

A. Defendant's Memorandum in Support

1. Liquidated Damages

Defendant argues that Raven cannot recover more than $250,000 in damages for breach of the Term Sheet as the $250,000 Break-Up Fee provision is a liquidated damages clause which bars additional damages (Def. Br. at 13 [Doc. No. 41]); *see FCS Advisors, Inc. v Fair Fin. Co.*, No. 07 CIV 6456 (DC), 2009 WL 1403869, at *10 [SD NY 2009] ["A break-up fee is a form of liquidated damages"]). The Term Sheet states that "if at any time during the Exclusivity period, [GFF] . . . (i) enters into any Competing Transaction . . . (ii) agrees in writing to accept a Competing Transaction . . . then in such case, [GFF] shall be liable for and immediately pay $250,000 to [Raven] (Def. Br., Ex. 2 at 10 [Doc. No. 12]). Liquidated damages limit liability for breach and preclude recovery of actual damages (Def. Br. at 14; *Chappo & Co. v Ion Geophysical Corp.*, 83 AD3d 499, 500 [1st Dept 2011]). Because "the purpose of a liquidated damages clause is to prevent, in the event of a breach, any question as to the amount of damages that may be recovered, a clause which is reasonable precludes any recovery of actual damages" (*Fed. Realty Ltd. P'Ship v Choices Women's Med. Ctr., Inc.*, 289 AD2d 439, 441 [2d Dept 2001]). Liquidated damages preclude actual damages, even where the clause does not explicitly limit the parties' liability or make reference to it as the "exclusive remedy" for breach, because such clauses control the rights of the parties in the event of a breach (*see X.L.O. Concrete Corp. v Brady & Co.*, 104 AD2d 181, 183-184 [1st Dept 1984]; *Fed. Realty*, 289 AD2d at 440). Raven cannot elect to pursue actual damages in lieu of the Break-up Fee because the liquidated damages clause here "fixes the amount recoverable at the sum stipulated, irrespective of actual damages" (Def. Br. at 14; *X.L.O.*, 104 AD2d at 186). Plaintiffs cannot allege the Break-up Fee is insufficient as Raven proposed and drafted the provision (Def. Br. at 14-15; Ex. 4 at 1-2 [Doc. No. 14]; *X.L.O.*, 104 AD2d at 184; *see also J.R. Stevenson Corp. v County of Westchester*, 113 AD2d 918, 921 [2d Dept 1985]).

Defendant also argues that New York law prohibits recovery of lost profits for breach of a Term Sheet (Def. Br. at 15; Compl. ¶ 47). The Court of Appeals has held that plaintiffs may not recover consequential damages for breach of an exclusive negotiating contract (Def. Br. at

15-16; *Goodstein Constr. Corp. v City of New York*, 80 NY2d 366, 372-375 [1992] ["*Goodstein II*"] ["To allow the profits that plaintiff might have made under the prospective [agreement] as the damages for breach of the exclusive negotiating agreements . . . . would, in effect, be transforming an agreement to negotiate for a contract into the contract itself."]; *see also MG W. 100 LLC v St. Michael's Protestant Episcopal Church*, 127 AD3d 624, 626 [1st Dept 2015]). Defendant argues Raven's request contradicts settled law barring Raven from recovering lost profits or other expectation damages for alleged breach of the Term Sheet (Def. Br. at 16). While Raven has asserted that this issue cannot be decided on a motion to dismiss, GFF maintains that New York courts often grant motions to dismiss claims precluding certain damages, including lost profits (*id.*; *see e.g. Howard S. v Lillian S.*, 14 NY3d 431, 435 [2010]; *Calip Dairies, Inc. v Penn Station News Corp.*, 262 AD2d 193, 194 [1st Dept 1999]; *ERC 16W Ltd. P'ship v Xanadu Mezz Holdings LLC*, 133 AD3d 444, 444 [1st Dept 2015]; *see also Vector Capital Corp. v Ness Techs., Inc.*, No. 11 CIV. 6259 [PKC], 2012 WL 1948822, at *6 [SD NY 2012] ["The insufficiency of a lost profits claim based on negotiating agreements that are silent or substantially vague as to a final agreement is a matter of law, and a claim that relies on such a theory is equally deficient at all stages of a proceeding."]). Defendant argues that courts applying *Goodstein II* have granted motions to dismiss lost profits claims where, as here, it is clear that lost profits are not available as a matter of law (Def. Br. at 16-17; *see e.g. 180 Water St. Assocs., L.P. v Lehman Bros. Holdings, Inc.*, 776 NYS2d 278, 279 [1st Dept 2004]; *Rao v Verde*, 222 AD2d 569, 570 [2d Dept 1995]; *ICBC (London) PLC v Blacksands Pac. Grp., Inc.*, No. 15 CIV. 0070 (LAK), 2015 WL 5710947, at *9 n94 [SD NY 2015]). Defendant further argues that Raven's request for specific performance in the alternative is meritless as GFF was always free to negotiate with others provided it paid the Break-up Fee (Def. Br. at 17; *ROI, Inc. v Hidden Valley Realty Corp.*, 45 AD3d 1010, 1011 [3d Dept 2007] [no specific performance of terms contrary to the agreement's terms]).

2. Oral Agreement

Regarding plaintiffs' second and third claims, defendant argues that no Distribution Agreement, oral or otherwise, exists (Def. Br. at 17). First, the parties expressly agreed that no distribution rights would be granted until a final signed agreement was reached. The Term Sheet states:

- The "Term Sheet . . . does not constitute a binding obligation of either party . . . . This is not a commitment to engage in the transaction . . ."
- "Any obligations in respect of the transaction contemplated by this Term Sheet shall be conditional upon the parties actually entering into the Distribution Agreement."
- "Closing of the Distribution Agreement shall be subject to customary conditions precedent for a transaction of this type," including "execution and delivery by [GFF] of the Distribution Agreement in forms satisfactory to [Raven]."

(Ex. 2, at 1, 7-8). Raven cannot avoid these provisions by alleging the parties orally agreed to the material terms as "it is well settled that, if the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed" (Def. Br. at 18; *Scheck v Francis*, 26 NY2d 466, 469-470 [1970]). Even accepting the complaint as true, Raven's claim that the parties agreed to material terms is insufficient because the parties agreed to be bound only upon executing the distribution agreement (*see Jordan Panel Sys., Corp. v Turner Constr. Co.*, 45 AD3d 165, 170-171 [1st Dept 2007]; *Naturopathic Labs. Int'l, Inc. v SSL Ams., Inc.*, 18 AD3d 404, 405 [1st Dept 2005]). No meeting of the minds could have occurred as the parties previously agreed that any commitment was non-binding until a final agreement was executed (Def. Br. at 19).

Second, GFF asserts the parties never discussed a non-exclusive distribution agreement and, consequently, they could not have reached an oral agreement (*id.*). The complaint, Term Sheet, draft distribution agreement, and the parties' correspondence all make clear that the parties' negotiations concerned an exclusive distribution agreement (*id.*; Ex. 1 ¶ 15 [Doc. No. 18]; Ex. 2 at 2 [Doc. No. 12]; Ex. 4 at 4 [Doc. No. 14]). Exclusive and non-exclusive distribution agreements are often very different, with entirely different terms. GFF argues the value of a movie distribution agreement, is the exclusivity (Def. Br. at 19; *Davis v Blige*, 505 F3d 90, 101 [2d Cir 2007]; *see also PlayMedia Sys., Inc. v Am. Online, Inc.*, 171 F Supp 2d 1094, 1099 [CD Cal 2001]). Here, nothing exchanged between the parties addressed the terms of a non-exclusive distribution agreement and, consequently, the alleged oral agreement could not have been reached (Def. Br. at 20; *Express Indus. & Terminal Corp. v N.Y. State Dep't of Transp.*, 93 NY2d 584, 589 [1999]; *Baker v Robert I. Lappin Charitable Found.*, 415 F Supp 2d 473, 484 [SD NY 2006]).

Third, defendant maintains that the failed negotiation of an exclusive copyright distribution agreement does not create an implied non-exclusive license except under rare equitable circumstances which would not be implicated here (Def. Br. at 20). An exclusive agreement must be in writing signed by the owner of the rights conveyed under the Copyright Act (*id.*; 17 USC § 204(a)); *Weinstein Co. v Smokewood Entm't Grp., LLC*, 664 F Supp 2d 332, 340 [SD NY 2009]). The parties were indisputably negotiating an exclusive distribution agreement, which required a signed writing (Def. Br. at 20-21). Raven now has an implied non-exclusive copyright license because it cannot satisfy the signed writing requirement. Raven bears the burden to show the license exists (*id.*; *see Bourne v Walt Disney Co.*, 68 F3d 621, 631 [2d Cir 1995]). Courts have uniformly rejected the idea that failed negotiations for exclusive copyright rights result in an implied non-exclusive license (*Weinstein Co.*, 664 F Supp at 336-337, 344-345 [rejecting the argument that a failed attempt to acquire an exclusive license can result in an implied nonexclusive license]; *Bangkok Broad. & T.V. Co. v IPTV Corp.*, 742 F Supp 2d 1101, 1113 [CD Cal 2010] [copyright holder could not have granted binding oral license agreement in phone call during negotiations for exclusive license]; *Ulloa v Universal Music & Video Distribution Corp.*, 303 F Supp 2d 409, 416-417 [SD NY 2004]). Here, it is undisputed that GFF did not create the Film at Raven's request or for Raven to copy and distribute. GFF developed the Film before Raven entered the picture (Def. Br. at 22; Ex. 1 ¶¶ 4-5; *Weinstein Co.*, 664 F Supp 2d at 344; *Bangkok Broad.*, 742 F Supp 2d at 1113). If Raven's non-exclusive license theory was accepted, copyright owners' statutory rights would be undermined by turning every failed negotiation into a potential claim for a non-exclusive license (*Bangkok Broad.*, 742 F Supp 2d at 1112).

3. <u>Fraud</u>

Defendant next argues Raven cannot sustain its fraud claim because the claim arises from the same facts as the accompanying breach of contract claim, seeks identical damages, and does not allege breach of any duty collateral to or independent of the parties' agreements (Def. Br. at 23; *Cronos Grp. Ltd. v XComIP, LLC*, 156 AD3d 54, 62-63 [1st Dept 2017]). To recover damages for tort in a contract matter, plaintiff must plead and prove breach of a duty distinct from, or in addition to, the breach of contract (*Non-Liner Trading Co. v Braddis Assocs., Inc.*, 243 AD2d 108, 118 [1st Dept 1998]). Defendant argues that each of Raven's fraud allegations merely duplicates its claim for breach of the Term Sheet (Def. Br. at 23-24). Raven's contention that GFF concealed its pursuit of a potential Competing Transaction, is identical to Raven's claim that GFF breached its obligation under the Term Sheet to inform Raven of any potential Competing Transaction and to refrain from entering into such a transaction (Compl. ¶¶ 45, 63-65; *see 180 Water St. Assoc. v Lehman Bros. Holdings*, 7 AD3d 316, 317 [1st Dept 2004]). Raven's allegation, that GFF failed to disclose that it would not honor its alleged promise to deliver distribution rights to Raven, is nothing more than an allegation that GFF failed to perform as promised under the Term Sheet (Compl. ¶¶ 67-69; *see Cronos*, 156 AD2d at 64-65 [fraud claim dismissed where the alleged false promise was a promise to perform under the contract]).

4. Breach of Implied Covenant

Defendant next argues that Raven's fifth claim for breach of the implied covenant of good faith and fair dealing must also fail as it replicates Raven's breach of contract claim. Moreover, New York law does not recognize a separate claim for breach of the implied covenant when a breach of contract, based on the same facts, is also pleaded (Def. Br. at 25; Compl. ¶¶ 44-46, 48, 75; *Harris v Provident Life & Accident Ins. Co.*, 310 F3d 73, 81 [2d Cir 2002]; *Havell Capital Enhanced Mun. Income Fund, L.P. v Citibank, N.A.*, 84 AD3d 588, 588 [1st Dept 2011]; *see Quail Ridge Assocs. v Chem. Bank*, 162 AD2d 917, 919 [3d Dept 1990] ["bad faith does not provide an independent basis for recovery"]).

5. Sanctions

Finally, defendant asserts that Raven should be sanctioned for baseless and frivolous claims. It asks to be awarded costs and attorneys' fees (Def. Br. at 25-27). A party's conduct is frivolous if: (i) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (ii) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (iii) it asserts material factual statements that are false" (NYCRR § 130-1.1(c)(1)-(3)). Raven's complaint advances numerous frivolous claims that lack merit in law, including: (i) seeking lost profits in addition to the Break-up Fee despite the Break-up Fee barring any recovery of actual damages and New York law prohibiting recovery of lost profits for breach of an exclusive negotiating agreement (*X.L.O.*, 104 AD2d at 184; *Goodstein II*, 80 NY2d at 372-375); (ii) seeking to enforce a non-exclusive license in contravention of U.S. copyright law (*see e.g. Weinstein Co.*, 664 F Supp 2d at 344; *Bangkok Broad.*, 742 F Supp 2d at 1113); and (iii) fraud and implied covenant claims which duplicate the breach of contract claim (*see Cronos*, 156

AD3d at 62; *Harris*, 310 F3d at 81). Defendant further argues that Raven's complaint is frivolous as the allegation that an oral contract exists contradicts the Term Sheet (Def. Br. at 27). This suit was brought not to enforce Raven's rights but to harass GFF as Raven's counsel went as far as to send the complaint to Hulu as a warning to stop dealing with GFF before serving GFF (*id.*; Ex. 5 [Doc. No. 19]).

B. Plaintiffs' Opposition Memorandum

1. <u>Liquidated Damages</u>

Plaintiffs respond that the Term Sheet is an enforceable "Type II" preliminary agreement obligating GFF to negotiate with Raven in good faith (Pl. Br. at 8 [Doc. No. 36]; Compl. ¶¶ 7, 34-35). New York recognizes two types of preliminary agreements, with Type II constituting agreements which are "binding only to a certain degree" because "the parties agree on certain major terms, but leave other terms open for further negotiation" (Pl. Br. at 8; *see Vacold LLC v Cerami*, 545 F3d 114, 124 [2d Cir 2008]; *Adjustrite Sys., Inc. v GAB Business Servs., Inc.*, 145 F3d 543, 548 [2d Cir 1998]). Such agreements do not commit the parties to the ultimate contractual objective, instead binding the parties to the obligation to negotiate the open issues in good faith to reach their objective (*Adjustrite*, 145 F3d at 548). The Term Sheet is a Type II preliminary agreement which bound GFF to negotiate in good faith and to not insist on conditions that do not conform to the Term Sheet (Pl. Br at 9; *Brown v Cara*, 420 F3d 148, 157 [2d Cir 2005]). Consequently, GFF cannot assert that it was "always free to negotiate with others" (Pl. Br. at 9).

Plaintiffs next argue that the Break-Up Fee does not apply as, according to the Term Sheet, the Fee would only be triggered if, during the Exclusivity Period, GFF entered into a Competing Transaction which may be an alternative to the Term Sheet or agreed in writing to accept an alternative distribution or release proposal which constitutes a Competing Transaction (Pl. Br. at 9; Ex. 2, at 10 [Doc. No. 12]). Plaintiffs argue that GFF fails to argue that it entered into a Competing Transaction during the Exclusivity Period (Pl. Br. at 9-10). The issue of whether the Break-Up Fee applies cannot be resolved on the pleadings (*id.* at 10; *see Greenbaum v Gross*, 273 AD 912 [2d Dept 1948]). Further, GFF has not paid or offered to pay the Break-Up Fee, distinguishing this case from *Chappo & Co.*, a case cited by GFF, where the court ruled "plaintiff's damages were limited to the $50,000 breakage fee, of which plaintiff is already in possession" (83 AD3d at 500). GFF cannot rely on the extrinsic evidence of a draft Term Sheet and negotiation correspondence to support its limited liability argument (Pl. Br. at 10). These exhibits are not "documentary evidence" properly considered under CPLR 3211(a)(1) and do not "utterly refuse" or contradict Raven's claim to recover actual damages for the Term Sheet's breach (Pl. Br. at 10; *see Goshen*, 98 NY2d at 326; *Chambers*, 44 Misc3d at *9). The exhibits do not establish whether conditions attached to the Break-Up Fee occurred.

Plaintiffs next argue that Raven may recover actual damages for breach of the Term Sheet if the Break-Up Fee does not apply (Pl. Br. at 11). Notwithstanding *Goodstein II*, "whether lost profits may never be recovered for a party's failure to negotiate in good faith is unclear" under New York law (*id.*; *Worldwide Servs., Ltd. v Bombardier Aerospace Corp.*, 2015 WL 5671724, at *20-21 [SD NY 2015]; *see Fairbrook Leasing, Inc. v Mesaba Aviation, Inc.*, 519 F3d 421, 429 [8th Cir 2008]). Courts have routinely declined to resolve the question of available remedies for breach at the pleading stage, including in *Goodstein II* where the court upheld the trial court's determination on summary judgment that lost profits were unavailable for breach of the duty to negotiate in good faith (Pl. Br. at 11; *Goodstein Const. Corp. v City of New York*, 111 AD2d 49, 52 [1st Dept 1985]). A decision regarding Raven's available remedies should be reserved for a later stage of this matter (Pl. Br. at 12; *see Wordwide Servs.*, 2015 WL 5671724, at *21).[1]

Plaintiffs maintain the Break-Up Fee is not Raven's exclusive remedy (Pl. Br. at 12). Even if lost profits are unavailable for breach of the Term Sheet, Raven may recover other forms of monetary damages such as out-of-pocket expenses associated with the transaction (*Learning Annex Holdings, LLC v Whitney Educ. Grp., Inc.*, 765 F Supp 2d 403, 417 [SD NY 2011]). Raven is not precluded from recovering actual damages for other Term Sheet violations, such as violation of the Confidentiality Provision or the duty to negotiate in good faith, so long as the Break-Up Fee is not "essentially subsumed in the actual damages" Raven suffers (*Wechsler v Hunt Health Sys., Ltd.*, 330 F Supp 2d 383, 426 [SD NY 2004]; *see J.E. Hathaway & Co. v United States*, 249 US 460, 464 [1919]). Even if the Break-Up Fee applies as liquidated damages, Raven can still seek equitable remedies like specific performance or injunctive relief

[1] In its reply brief, GFF notes that lost profits are not available for a breach of a Type II agreement (Def. Reply at 2 [Doc. No. 39]; *Goodstein Constr. Corp.*, 80 NY2d at 372-375; *ICBC (London) PLC.*, 2015 WL 5710947, at *9 n 94) and that Raven mischaracterizes *Goodstein I* because the court there did not hold expressly that plaintiff's lost profits were sufficient to survive dismissal, instead expressing doubt as to whether plaintiff could establish a right to recover (Def. Reply at 2-3; *Vector Cap. Corp. v Ness Techs., Inc.*, 2012 WL 1948822, at *6 [SD NY 2012]).

(Pl. Br. at 13). Absent contractual language explicitly barring equitable relief, the Break-Up Fee does not preclude Raven from seeking specific performance or create a "unilateral option" that excuses GFF from good faith negotiation (Pl. Br. at 13; *see Rubinstein v Rubinstein*, 23 NY2d 293, 298 [1968]; *Vacold*, 545 F3d at 130-131; *ParaGino's of Am., Inc. v Plaza at Latham Assocs.*, 135 AD2d 74, 76 [3d Dept 1988]).

2. Oral Agreement

Plaintiffs next assert that they can legitimately allege formation of a non-written Distribution Agreement, and whether or not there is an oral agreement cannot be resolved at this stage merely because the Term Sheet contemplates a written agreement (Pl. Br. at 14; *Oster v Castel*, 2016 WL 3773631, at *4 [NY Sup Ct 2016]). The Term Sheet is just one factor to be considered and it is not dispositive on its own (*Elizabeth St. Inc. v 217 Elizabeth St. Corp.*, 276 AD2d 295, 296 [1st Dept 2000]; *Learning Annex Holdings, LLC v Rich Glob., LLC*, 860 F Supp 2d 237, 243 [SD NY 2012]). In determining the existence of an oral contract, New York courts consider whether: (i) there has been an express reservation of the right not to be bound absent a writing; (ii) there has been partial performance of the contract; (iii) all of the contract's terms were agreed upon; and (iv) the agreement at issue is the type of contract typically committed to writing (Pl. Br. at 15; *Elizabeth St. Inc.*, 276 AD2d at 296). Plaintiffs argue factors two and three favor finding an oral Distribution Agreement existed and, consequently, dismissal is not warranted (*see Dickerson v Kaplan*, 763 F Supp 694, 700 [ED NY 1990]; *Spencer Trask Software & Info. Servs. LLC v RPost Int'l LTd.*, 383 F Supp 2d 428, 447-448 [SD NY 2003]).

Plaintiffs also argue GFF's reliance on *Scheck v Francis* is inapposite as the rule from that case yields "when the parties have agreed on all contractual terms and have only to commit them to writing" (Pl. Br. at 15-16; *Mun. Consultants & Publishers, Inc. v Town of Ramapo*, 47 NY2d 144, 148-149 [1979]). Plaintiffs also assert their complaint alleges the parties agreed on all contractual terms of the Distribution Agreement (Compl. ¶¶ 6, 27-33). Plaintiffs seek to distinguish *Jordan Panel Sys. Corp.*, which requires dismissal of plaintiffs' claim absent a signed writing because as the First Department held in *PMJ Capital Corp.*, it is necessary to look to the objective manifestations of the parties' intent as expressed by their words and deed when "determining whether the parties entered into a contractual agreement" (Pl. Br. at 16; *PMJ*

Capital Corp., 98 AD3d 429 [1st Dept 2012]).[2] Similar to the allegations in the complaint, the parties in *PMJ Capital Corp.* negotiated the terms of the agreement to the point where all terms were agreed upon (Compl. ¶¶ 6, 27-33; *id.*, at 430-431). Plaintiffs also seek to distinguish GFF's reliance on *Weinstein Co.*, arguing that courts have found an implied non-exclusive copyright license using a holistic approach which aligns with New York's "totality of the circumstances" approach (Pl. Br. at 16; *Weinsterin Co.*, 664 F Supp 2d at n 5; *Baisden v I'm Ready Productions, Inc.*; *Baisden*, 693 F3d 491, 501 [5th Cir 2012] ["we have never held that implied license could not arise in other circumstances where the totality of the parties' conduct supported such an outcome"]; *Malibu Media, LLC v Doe*, 2014 WL 2581168, at *5 [ND Ill 2014] ["It does not appear to the Court that the [above] three-part test . . . describes the only way to establish an implied license . . . . At this stage of the proceedings, the Court is unprepared to rule out the possibility that Doe can establish an implied license"]). Plaintiffs further argue that courts have rejected GFF's contention that a non-exclusive oral or implied license cannot be found where the parties contemplated an exclusive license (PL. Br. at 17-18; *see Baisden*, 693 F3d at 502; *Jacob Maxwell, Inc. v Veeck*, 110 F3d 749, 752-753 [11th Cir 1997]). This rationale is guided by the underlying state law principle that courts will sever illegal portions of agreements and enforce remainders if the parties would have entered the agreement absent an illegal portion (Pl. Br. at 18; *Lulirama Ltd., Inc. v Axcess Broad. Servs., Inc.*, 128 F3d 872, 879-880 [5th Cir 1997]; *Artache v Goldin*, 133 AD2d 596, 599 [2d Dept 1987] [a New York court recognizing this principle]).

3. Fraud

Plaintiffs next argue that their fraud claim is not duplicative because the complaint alleges that GFF made misstatements of present facts collateral to the contract, not contractual promises regarding prospective performance (Pl. Br. at 18; *see First Bank of Americas v Motor Car Funding, Inc.*, 257 AD2d 287, 292 [1st Dept 1999]; *GoSmile, Inc. v Levine*, 81 AD3d 77, 81

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[2] In its reply brief, GFF notes that under New York law, if either party communicates an intent not to be bound until they achieve a fully executed document, no amount of negotiation or oral agreement to specific terms will result in the formation of a binding contract (*Winston v Mediafare Entm't Corp.*, 777 F2d 78, 80 [2d Cir 1985]). Courts distinguish between a statement that merely contemplates a future written agreement and one that expressly conditions any further commitment on an executed agreement. The former refers to the expectation that a writing will be prepared to memorialize an agreement without conditioning the agreement's binding effect on the completion and signing of such a writing, whereas the latter is a clear statement of party's intent not to be bound until it signs a written agreement (*Jordan Panel Sys., Corp.*, 45 AD3d at 174-175).

[1st Dept 2010]; *CCM Rochester, Inc. v Federated Inv'rs, Inc.*, 2014 WL 6674480, at *4 [SD NY 2014]). Plaintiffs have alleged GFF's agents willfully misrepresented present facts concerning plaintiff's exclusive rights and status leading up to and at the time of entering the Term Sheet and Distribution Agreement (Compl. ¶¶ 36-37, 64-66). Plaintiffs maintain GFF knew these representations were false because, "upon information and belief", GFF was already in discussions with another third-party licensee (*id.* ¶¶ 34-35, 64). These misrepresentations induced plaintiffs to contract with GFF for the distribution rights (Pl. Br. at 19; *First Bank*, 257 AD2d at 291-292). Plaintiffs also alleges that GFF misrepresented availability of the distribution rights by misrepresenting the scope of third-party ES's rights in the Film (Pl. Br. at 19; Compl. ¶¶ 37, 66; *see Merrill Lynch & Co. Inc. v Allegheny Energy, Inc.*, 500 F3d 171, 184 [2d Cir 2007]). These misrepresentations are separate from the breach of contract claim (Pl. Br. at 19). In the alternative, plaintiffs request leave to amend the complaint to assert additional, non-duplicative facts (*id.* at 20).

4. Breach of Implied Covenant

Plaintiffs next argue the breach of the covenant of good faith and fair claim is not duplicative as the complaint alleges that GFF engaged in "conduct that subvert[ed] the contract's purpose without violating its express terms," including: (i) intentionally stringing plaintiffs along in negotiating the Distribution Agreement, (ii) causing plaintiffs to expend enormous time and resources in negotiating and partially performing under the Distribution Agreement, and (iii) abruptly terminating discussions (*id.*; *JPMorgan Chase Bank, N.A. v The IDW Grp., LLC*, 2009 WL 321222, at *5 [SD NY 2009]; *Verzani v Costco Wholesale Corp.*, 641 F Supp 2d 291, 300 [SD NY 2009]; *see also Hard Rock Café Int'l, (USA), Inc. v Hard Rock Hotel Holdings, LLC*, 808 F Supp 2d 552, 568 [SD NY 2011]). Because GFF disputes the existence of the Distribution Agreement, plaintiffs may assert a breach of the covenant in the alternative (Pl. Br. at 20-21; *Fantozzi v Axsys Techs., Inc.*, No. 07 Civ 2667(LMM), 2008 WL 4866054, at *7 [SD NY 2008]; *see Hard Rock Café Int'l*, 808 F Supp 2d at 568). Plaintiffs request, in the alternative, leave to replead this claim (Pl. Br. at 21).

5. Sanctions

Finally, plaintiffs argue that the sanctions motion is meritless and procedurally defective because it fails to set out the amount of costs and sanctions requested, and further fails to explain why such relief is appropriate (*id.*; NYCRR § 130-1.2; *see Chupack v Gomez*, 160 AD3d 491

[1st Dept 2018]). Even if some of plaintiffs' claims are dismissed, asserting a dismissed claim is not equivalent to frivolousness, and plaintiffs have indisputably alleged a viable breach of contract claim (Pl. Br. at 21; *see Poley v Sony Music Entm't, Inc.*, 163 Misc2d 127, 138 [NY Sup Ct 1994]; *Kotlyar v Khlebopros*, 44 Misc3d 1219(A), *5 [NY Sup Ct 2014]). Plaintiffs add that sanctions are unwarranted as the parties simply disagree on the law (Pl. Br. at 21-22; *Jara v Strong Steel Doors, Inc.*, 16 Misc3d 1139(A) [NY Sup Ct 2007]). Plaintiffs did not forward the complaint to Hulu to harass GFF and defendant's exhibits show a "lack of malicious intent" (Pl. Br. at 22).

III. DISCUSSION

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn*, 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR § 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2nd Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' " (*id.* at 84-85). Here, the documentary evidence is Term Sheet at issue in this matter (Doc. No. 12).

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

Defendant successfully argues that plaintiffs cannot recover more than the $250,000 Break-Up Fee as damages for breach of the Term Sheet. A break-up fee provision is a liquidated damages clause, providing an estimate the parties made regarding damage if one party breached (*FCS Advisors, Inc. v Fair Fin. Co.*, No. 07 CIV 6456 (DC), 2009 WL 1403869, at *10 [SD NY 2009]). Determining whether a liquidated damages provision is enforceable is a question of law which requires the court to look to whether: (i) actual damages would be difficult to determine; and (ii) the sum stipulated is "plainly disproportionate" to the possible loss (*id.*; *Walter E. Heller & Co. v Am. Flyers Airline Corp.*, 459 F2d 896, 899 [2d Cir 1972]). "Courts should invalidate a liquidated damages clause only in 'rare cases'" (*FCS Advisors*, 2009 WL 1403869, at *11; *Seven Corners Shopping Ctr. Falls Church, Va. Ltd. P'ship v Chesapeake Enters. U.S. LLC*, No. 07 CIV 6332(MAT)). Here, as the Term Sheet was merely a contract setting out terms for the parties to negotiate a subsequent Distribution Agreement, a calculation of actual damages may not be permitted as courts have held that plaintiffs may not recover consequential damages for breach of an exclusive negotiating contract (*Goodstein Constr. Corp. v City of New York*, 80 NY2d 366, 372-375 [1992]). Plaintiffs fail to rebut this presumption, first arguing that the Break-Up Fee does not necessarily apply as the complaint alleges only GFF's breach of the Exclusivity Period, but not triggering of the Break-Up Fee which required GFF to either "enter[] into any Competing Transaction which may be an alternative to the Term Sheet" or "agree[] in writing to accept an alternative distribution" (Ex. B. at 10). This argument, however, fails as plaintiffs' complaint specifically alleges that GFF breached the Exclusivity Provision of the Term Sheet by "entering into a Competing Transaction with another third-party distributor" (Compl. ¶ 45). Plaintiffs' argument, that even if the Break-Up Fee applies, plaintiffs may still recover for other actual damages, is similarly unavailing because, as stated above, consequential damages are not available for breach of exclusive negotiating contracts (*Goodstein Constr. Corp. v City of New York*, 80 NY2d at 372-375). Plaintiffs, however, may avoid dismissal of their claim for equitable relief as the Term Sheet does not explicitly bar such remedies (*Rubinstein v Rubinstein*, 23 NY2d 293, 298 [1968]; *Papa Gino's of Am., Inc. v Plaza at Latham Assocs.*, 135 AD2d 74, 76 [3d Dept 1988]). Consequently, defendant's argument limiting plaintiffs' monetary recovery must be sustained.

Defendant's motion to dismiss the second and third causes of action shall be granted. The Term Sheet provides that there is no binding agreement for distribution rights to be granted prior to execution of the Distribution Agreement. In such a circumstance, no amount of oral agreement to specific terms will result in a binding agreement (*see Jordan Panel Sys. Corp.*, 45 AD3d at 174-175; *Winston*, 777 F2d at 80).

Defendant's motion shall be granted as to the fourth cause of action for fraud. "To state a cause of action for fraud, a plaintiff must allege a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury" (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003] citing *Monaco v New York Univ. Med. Ctr.*, 213 AD2d 167, 169 [1st Dept 1995], lv. denied 86 NY2d 882 [1995]; *Callas v Eisenberg*, 192 AD2d 349, 350 [1st Dept 1993]). A fraud claim should be dismissed where it "arises from the same facts as an accompanying contract claim, seeks identical damages, and does not allege a breach of any duty collateral to or independent of the parties' agreements" (*Cronos Grp. Ltd. v XComIP, LLC*, 156 AD3d 54, 62-63 [1st Dept 2017]). Here, defendant has successfully demonstrated that each of plaintiffs' fraud allegations duplicates the breach of Term Sheet allegations. Plaintiffs' fraud claim essentially alleges that GFF misrepresented and concealed material facts it was contractually obligated to disclose such as misrepresenting it had agreed to terminate the distribution rights of third-party ES and concealing that it "had no intention of honoring . . . its promise to deliver distribution rights in the Film to plaintiffs" (Compl. ¶¶ 63, 66-67). As to the misrepresentation that GFF had terminated its distribution rights of ES, the complaint alleges the same, stating that GFF breached the Term Sheet by "failing to terminate its consideration and negotiation of a Competing Transaction" (*id.* ¶ 45). As to the allegation that GFF concealed that it had "no intention of honoring" the "promise to deliver distribution rights," defendant correctly notes this is merely an allegation that GFF failed to perform under the Term Sheet, i.e. a breach of contract (*Gerbeg v Empire Scale*, 147 AD3d 1434, 1435 [4th Dept 2017] ["fraud is not sufficiently stated where it alleges that a defendant did not intend to perform a contract with a plaintiff when he made it"]).

Similarly, defendant's motion shall be granted as to the fifth cause of action for breach of the implied covenant of good faith and fair dealing. The covenant is breached when a party acts in a manner that, although not expressly forbidden by the contract, would deprive the other party of the benefits of the agreement (*see 511 W. 232nd Owners Corp.*, 98 NY2d at 153; *Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 267 [1st Dept 2008]). However, New York law does not recognize a separate claim for breach of the implied covenant when a breach of contract based on the same facts is also pleaded (*Harris v Provident Life & Accident Ins. Co.*, 310 F3d 73, 81 [2d Cir 2002]; *Havell Capital Enhanced Mun. Income Fund, L.P. v Citibank, N.A.*, 84 AD3d 588, 588 [1st Dept 2011]). Like the fraud claim, the allegations supporting the breach of implied covenant do not allege any new acts on defendant's part, but instead reallege that GFF has acted in bad faith by terminating negotiations over the Distribution Agreement (Compl. ¶¶ 48, 75).

Defendants' argument that plaintiffs should be sanctioned for baseless and frivolous claims must be denied. The Administrative Rules of the Unified Court System provide that "[t]he court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part" (22 N.Y.C.R.R. 130-1.1(a)). Frivolous conduct is defined as follows:

> "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false."

(*Id.* at 130-1.1[c]). Here, plaintiffs have not taken any position that is frivolus. Further, dismissal of that some of plaintiffs' claims is not tantamount to a finding frivolousness (*Poley v Sony Music Entm't, Inc.*, 163 Misc2d 127, 138 [Sup Ct New York County 1994]).

Accordingly, it is hereby

ORDERED that the defendant's motion is granted as to limitation of monetary damages on the first cause of action, and as to the second (breach of oral Distribution Agreement), third (breach of oral Distribution Agreement), fourth (fraud) and fifth (breach of covenant of good faith) causes of action; and it is further

ORDERED that the request for sanctions is DENIED.

2/8/2021
DATE

O. PETER SHERWOOD, J.S.C.

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