

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 18 NASSAU COUNTY

PRESENT:

HONORABLE LEONARD B. AUSTIN

Justice

Motion R/D: Mot. # 1; 8-22-05

Mot. # 2; 8-26-05

Submission Date: 10-7-05

Motion Sequence No.: 001,002/MOT D

**SCOTT BRETTSCHEIDER and
WILLIAM FAGAN,**

Plaintiffs,

- against -

COUNSEL FOR PLAINTIFF

Patrick Michael Megaro, Esq.

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West Tower - 6th Floor

Uniondale, New York 11556

**ONEIL BELL, GLENN TOBY, HARD
ROCK CAFÉ INTERNATIONAL, INC.,
INTERNATIONAL BOXING
FEDERATION, INC., WARRIORS
BOXING PROMOTIONS, INC.,**

Defendants,

COUNSEL FOR DEFENDANT

ORDER

The following papers were read on Plaintiffs' motions for preliminary injunctions:

Motion Sequence No. 1

Order to Show Cause dated August 15, 2005;

Affirmation of Patrick Michael Megaro, Esq. dated August 9, 2005;

Affidavit of Scott Brettschneider sworn to on August 9, 2005;

Affidavit of William Fagan sworn to on August 9, 2005;

Motion Sequence No. 2

Order to Show Cause dated August 26, 2005;

Affirmation of Patrick Michael Megaro, Esq. dated August 22, 2005;

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Affidavit of Scott Brettschneider sworn to on August 9, 2005;
Affidavit of Scott Brettschneider sworn to on August 22, 2005;
Affidavit of William Fagan sworn to on August 9, 2005;

Letter of Jay A. Wolszczak dated August 25, 2005;
Agreement executed by Oneil Bell and Leon R. Margules, Esq. dated August 25, 2005.

Plaintiffs move for a preliminary injunction. In Motion Sequence No. 1, Plaintiffs move to enjoin the Defendant Oneil Bell ("Bell") from competing as a professional boxer or prizefighter pending the final determination of this action.

After serving the Order to Show Cause and Summons and Complaint, Plaintiffs filed a supplemental summons and amended complaint adding Glenn Toby ("Toby"), Hard Rock Cafe' International, Inc. ("Hard Rock"), International Boxing Federation, Inc. ("IBF") and Warriors Boxing Promotions, Inc. ("Warriors") as defendants . Plaintiffs also filed a second Order to Show Cause (Motion Sequence No. 2). In the second motion, Plaintiffs seek to enjoin (1) Bell from competing as a professional boxer or prizefighter; (2)Toby from acting as Bell's business manager; (3) Hard Rock and IBF from hosting, sanctioning and permitting Bell to compete as a professional boxer or prizefighter; and (4) Warriors from disbursing any prize money to Bell for competing as a professional boxer or prizefighter pending the final determination of this action.

Pursuant to a written agreement dated August 25, 2005, Bell agreed to deposit the sum of \$25,000, with Florida attorney Leon R. Margules, Esq., from the purse he was to earn from his August 26, 2005 fight with Sebastian Rothmann. As a result, Bell participated in the fight. This rendered the portion of Motion Sequence No. 2 which

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sought a preliminary injunction enjoining Hard Rock and IBF from hosting, sanctioning and permitting Bell to participate in the Rothmann fight and Warriors from distributing the prize money, academic.

BACKGROUND

Bell is a professional boxer in the cruiserweight class. He is presently the IBF cruiserweight world champion. The cruiserweight class includes boxers who weigh more than 175 pounds but less than 200 pounds.

By a Management Agreement (“Agreement”) dated June 7, 2004, Bell retained Plaintiffs Scott Brettschneider (“Brettschneider”) and William Fagan (“Fagan”) to act as his co-managers for a period of three years commencing on June 7, 2004. Under the Agreement, Brettschneider and Fagan were to exclusively represent Bell in connection with the “...disposition, use, employment and exploitation” of Bell’s services, negotiate the terms of contracts for prize fights and market Bell. Bell also granted Brettschneider and Fagan the authority to sign contracts and other agreements on behalf of Bell during the term of the Agreement.

Bell further agreed that he would not participate in any prize fights, boxing matches or exhibitions, make any personal appearances or commercial endorsements without first obtaining the written approval of his co-managers.

As compensation for their services, Brettschneider and Fagan were to receive one-third of all sums received by Bell as purses from his fights, endorsements, etc.

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Plaintiffs' fees were subject only to payment of money to trainers and third parties, as actually incurred, for training expenses.

If Bell negotiated his own endorsement deal, he would be able to retain 90% of the proceeds and his co-managers would receive 10%.

Almost immediately after signing the Agreement, Bell advised his managers that he needed \$10,000 or he would be unable to train. Brettschneider loaned Bell this sum which is evidenced by a promissory note executed by Bell.

Plaintiffs arranged a fight for Bell in Las Vegas, Nevada on September 4, 2004 for which Bell received a purse of \$30,000. The check for this purse was payable to Bell who cashed the check at a casino in Las Vegas. Bell paid his co-managers \$7,000. He promised to pay the additional \$3,000 due from the purse at a later date. He has never paid this sum.

Bell was also obligated to pay Warriors \$9,000 from the purse for fees incurred in promoting the fight. Bell is alleged to have told Warriors that, the \$9,000 he owed them, was taken by the casino and paid to another promoter.

After the September 4, 2004 fight, Bell advised Brettschneider and Fagan that he no longer wanted them to act as his managers. Despite this, Plaintiffs started to negotiate for a fight between Bell and Kelvin Davis, who was then the IBF Cruiserweight World Champion.

Plaintiffs were successful in securing this fight for Bell which was to take place in St. Louis, Missouri on February 5, 2005.

This fight was cancelled because, shortly before it was to take place, Davis declared personal bankruptcy. The bankruptcy court stayed all financial matters involving Davis, including the fight. As a result, on February 9, 2005, the IBF stripped Davis of his IBF Cruiserweight title.

In March 2005, Brettschneider and Fagan then secured a written agreement whereby Bell would fight for the vacant IBF cruiserweight title. Bell won the fight and was awarded the IBF Cruiserweight World Championship.

Bell's purse for that fight was \$50,000. Bell advised Brettschneider and Fagan that he received only \$45,000 for this fight and paid them \$15,000. Thereupon, Brettschneider demanded payment of all sums due Fagan and him, including the amount due under the promissory note. These sums have not been paid.

At or about the time of the February, 2005 fight, Bell announced to several boxing promoters that Brettschneider and Fagan were no longer his managers. Bell announced that he was then being managed by Toby.

On June 4, 2005, Bell issued a press release indicating that Toby was his new manager. By letter dated June 7, 2005, Bell advised Warriors that Brettschneider and Fagan were no longer his managers and Toby was his new manager. Bell also sent a letter dated June 7, 2005 to Brettschneider and Fagan advising them that he was no longer bound by the terms of the Agreement.

In late July 2005, Brettschneider and Fagan learned that Bell was scheduled to fight in late August, 2005 at the Hard Rock Café in Florida. Brettschneider and Fagan

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were not involved in scheduling the fight or negotiating the terms of the contract for the fight.

Upon learning of this fight, Brettschneider and Fagan moved to enjoin Bell from participating in this fight. Brettschneider and Fagan then supplemented the summons and amended the complaint to add IBF, Hard Rock and Warriors as defendants and sought to enjoin them from promoting, sanctioning and holding the fight. They also added Toby as a defendant and sought to enjoin him from acting as Bell's manager.

The application to stop the fight was resolved when the parties agreed to pay Brettschneider and Fagan's share of the purse into escrow.

Brettschneider and Fagan now seek a preliminary injunction enjoining Bell from fighting and enjoining Toby from acting as Bell's manager.

DISCUSSION

The party seeking a preliminary injunction must establish (1) a likelihood of success on the merits; (2) the Plaintiff will suffer irreparable harm in the absence of an injunction; and (3) a balancing of the equities favors the granting of an injunction. Aetna Ins. Co. v. Capasso, 75 N.Y.2d 860 (1990); Doe v. Axelrod, 73 N.Y.2d 748 (1988); and Olabi v. Mayfield, 8 A.D.3d 459 (2nd Dept. 2004).

A preliminary injunction may be issued to preserve the status quo pending a full hearing on the merits of the action. Olympic Tower Condominium v. Coccoziello, 306 A.D.2d 159 (1st Dept. 2003); and Livas v. Mitzner, 303 A.D.2d 381 (2nd Dept. 2003).

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A preliminary injunction will be granted only if there is a clear right to the relief upon the law and the undisputed facts. Peterson v. Corbin, 275 A.D.2d 35 (2nd Dept. 2000); Carman v. Congregation De Mita of New York, Inc., 269 A.D.2d 416 (2nd Dept. 2000); and Anastasi v. Majopon Realty Corp., 181 A.D.2d 706 (2nd Dept. 1992).

In this case, Plaintiff has clearly made a showing of likelihood of success on the merits against Bell. Bell entered into a written agreement whereby Brettschneider and Fagan were to manage Bell's boxing career for a period of three (3) years commencing on June 7, 2004. The agreement provided that during the term of the agreement Bresttschneider and Fagan would negotiate the terms and contract with promoters for all of Bell's fights. Brettschneider and Fagan would received one-third of the purse less actual training expenses as compensation for their services. Bell breached the agreement by failing to pay to Brettschneider and Fagan their contractual share of the purse on his September 4, 2004 and May 20, 2005 fights and by entering into an agreement to fight on August 26, 2005 which had not been negotiated by Brettschneider and Fagan. Bell has also issued press releases indicating that Toby is now his manager, even though his contract with Brettschneider and Fagan is still in full force and effect.

Plaintiffs seek to enjoin Toby from acting as Bell's manager during the pendency of this action. They assert that Toby tortiously interfered with their contract with Bell. While the papers clearly establish that Toby is currently acting as Bell's manager, there are no factual allegations establishing that Toby knew of the existence of the contract

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between Bell and the Plaintiffs or that Toby took any action to induce Bell to breach the contract. See, Kronos, Inc. v. AVX Corp., 81 N.Y.2d 90 (1993); and Bernberg v. Health Management Systems, Inc., 303 A.D.2d 348 (2nd Dept. 2003). Thus, Plaintiffs have failed to establish a likelihood of success on the merits on their claim against Toby.

Ordinarily, the plaintiff will not sustain irreparable harm, and a preliminary injunction will not issue, if the plaintiff can be compensated by money damages. Credit Agricole Indosuez v. Rossiyskiy Kredit Bank, 94 N.Y.2d 541 (2000); and 1659 Ralph Ave. Laundromat Corp. v. Ben David Enterprises, LLC, 307 A.D.2d 288 (2nd Dept. 2003). However, the court may grant equitable relief to enforce contractual rights and obligations. See, Country Kennel, Inc. v. Booth, 150 A.D.2d 418 (2nd Dept. 1989). Where the rights of the parties are clear, the court can intervene to prevent those rights from being violated and then relegating the party to a remedy at law which may be uncertain. See, Board of Higher Education of the City of New York v. Marcus, 63 Misc.2d 268 (Sup.Ct. Kings Co., 1970). This is especially true when injunctive relief is sought to prevent the defendant from converting identifiable proceeds sought in the underlying action (Solow v. Liebman, 175 A.D.2d 120 [2nd Dept. 1991]) or the defendant may dissipate such proceeds so as to render the ultimate money judgment ineffectual. (Zonghetti v. Jeromack, 150 A.D.2d 561 [2nd Dept. 1989]).

In view of this, Plaintiff has demonstrated irreparable harm as against Bell. Bell has repeatedly chosen to breach his contractual obligations. He breached an agreement with a prior manager which resulted in litigation which was settled with Bell

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paying money to his prior manager. Bell violated the terms of the Agreement when he received the check for the purse for the September 4, 2004 fights, cashed the check and failed to pay Plaintiffs their agreed share of the purse. Plaintiffs also claim that Bell failed to pay promotional expenses due to Warriors in connection with this fight.

By letter dated June 7, 2005, Bell claims to have unilaterally terminated the Agreement. In his termination letter, Bell accuses the Plaintiffs of breaching the contract, in using undue influence and fraud in inducing him to sign the contract and in violating their fiduciary duties to him. The letter does not contain any factual recitations supporting these allegations. Additionally, the Agreement contains a provision which gives a party who is in default under its terms the right to written notice of the breach. The party receiving the default letter is then given thirty (30) days to commence reasonable efforts to cure the breach. The Agreement specifically provides that it remains in effect for the thirty (30) days after the notice of default and any period thereafter during which the defaulting party is engaged in reasonable efforts to cure or remedy the breach.

Bell did not even properly exercise his right to terminate the Agreement. Bell should not be permitted to ignore his contractual obligations with impunity. If Bell believed that Brettschneider and Fagan had breached the Agreement, then he should have properly exercised his right to terminate.

The balancing of the equities also favors the issuance of preliminary injunction against Bell.

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Plaintiffs seek to enjoin Bell from participating in any prize fights or receiving any remuneration for boxing during the pendency of this action. New York has a strong public policy against enjoining a person from engaging in one's chosen profession. See, Columbia Ribbon & Carbon Mfg. Co. v. A-1-A Corp., 42 N.Y.2d 496 (1977); and Reed Roberts Assocs. v. Strauman, 40 N.Y.2d 303 (1976). Prohibiting Bell from engaging in prizefighting during the pendency of this action may well violate that policy. But see, American Broadcasting Companies, Inc. v. Wolf, 52 N.Y. 2d 394 (1981). Plaintiffs' remuneration is contingent upon Bell fighting since Plaintiffs receive one-third of the purse. Plaintiffs are also entitled to receive a share of Bell's endorsement money. There is no proof in the record that Plaintiffs ever obtained any endorsement deals for Bell. This Court is certain that Bell's ability to obtain, and the value of, any endorsements is dependent upon his success in the ring.

Under the terms of the Agreement, Plaintiffs are entitled to one-third of the purse for any prize fight and one-third of any money received by Bell for any endorsements. Thus, equity requires that sums sufficient to pay Plaintiffs' claims be held in escrow pending the resolution of this action. Such relief will assure that Bell will be able to fight and receive compensation during the pendency of this action while assuring that Plaintiffs are compensated should they ultimately prevail. Therefore, all promoters or any person or entity paying a purse for any fight in which Bell participates during the pendency of this action are directed to pay over to the Nassau County Treasurer one-third of the purse for any prizefight in which Bell participates during the pendency of this

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action such funds to be distributed in accordance with further order of this Court.

Additionally, any person, corporation or other entity which shall become obligated to pay over money to or on behalf of Bell for any endorsement deals or for the use of Bell's name, likeness, voice and/or image shall pay over to the Nassau County Treasurer one-third of such sums during the pendency of this action such sums to be distributed in accordance with further order of this Court.

CPLR 6312(b) requires the Court to fix an undertaking in an amount sufficient to compensate Defendants for damages sustained should it be determined that the preliminary injunction was improvidently granted. See, Magolies v. Encounter, Inc., 42 N.Y.2d 475 (1977); and Schwartz v. Gruber, 216 A.D.2d 526 (2nd Dept. 1999).

In view of the fact that all money will be held by the Nassau County Treasurer during the pendency of the action, should Bell ultimately prevail, he will receive all of the money less the County Treasurer's fee. Therefore, the Plaintiffs should post an undertaking of \$2,500. See, Clover Street Assocs. v. Nilsson, 244 A.D.2d 312 (2nd Dept. 1997).

Accordingly, it is,

ORDERED, that Plaintiffs' motion for a preliminary injunction is **granted** to the extent that all promoters who promote fights and/or managers, including Defendant Glenn Toby, who contract for fights in which Oneil Bell participates and anyone else who is obligated to pay money to Oneil Bell for participation in prize fights, boxing contests or exhibitions and all persons or entities which shall now be or in the future which shall

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become obligated to pay Oneil Bell money for use of his name, likeness, voice and/or image shall pay one-third of such sums to the Nassau County Treasurer during the pendency of this action, subject to further order of this Court and is, in all other respects **denied**; and it is further,

ORDERED, that, pursuant to CPLR 6312(b), Plaintiffs shall post an undertaking in the sum of \$2,500 within ten (10) days of the date of this order. Such undertaking shall be in the form of surety deposit with the Nassau County Treasurer. In the event Plaintiffs fail to post such undertaking, the motion is **denied** in all respects; and it is further,

ORDERED, that counsel for the parties and if the Defendants Bell and Toby have not appeared in this action by counsel, then Defendants *pro se*, shall appear for a Preliminary Conference on January 24, 2006 at 9:30 a.m.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
December 19, 2005

Hon. LEONARD B. AUSTIN, J.S.C.