

<b>Entendre Media, Inc. v Betelgeuse Productions, Inc.</b>
2005 NY Slip Op 30265(U)
April 27, 2005
Supreme Court, New York County
Docket Number:
Judge: Herman Cahn
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Cahn  
Justice

PART 49m

Entender Media, Inc.,

INDEX NO. 600864/05

- v -

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

Betelgose Productions Inc.,

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is

granted to the extent set forth in accordance with the annexed decision settle order.

Dated: 4-27-05

[Signature]

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 49

-----X

ENTENDRE MEDIA, INC., :

Index No. 600864/05

Plaintiff, :

- against - :

BETELGEUSE PRODUCTIONS, INC., :

GLOBAL MEDIA SERVICES, INC., :

NEWSPLAYER GROUP, PLC, :

JOHN SERVIDIO, RICK MURPHY and :

PAUL DUFFEN, :

Defendants. :

-----X

Herman Cahn, J.

Plaintiff moves for a preliminary injunction to restrain defendants from violating restrictive covenants contained in two contemporaneous service agreements, CPLR 6301, *et seq.*

Defendants cross-move to compel arbitration and stay litigation, *id.*, 7503.

**Facts:**

Plaintiff engages in the production of multimedia broadcast packages for television and the Internet (Complaint ¶ 1). Defendant Betelgeuse Productions, Inc., provides video editing services for the television industry. Defendants Rick Murphy and John Servidio are officers of Betelgeuse (*id.*, ¶¶ 2, 5, 6). Defendant Global Media Services, Inc., engages in Internet broadcasting, (*id.*, ¶ 3). Betelgeuse and Global are both wholly owned by defendant Newsplayer Group, plc, a British corporation of which defendant Paul Duffen is an officer (*id.*, ¶¶ 4, 7).

During 2002 and 2003, plaintiff met with members of Open Wheel Racing, LLC, to discuss the production of racing car events for the latter, as well as the development of related

\* 3 ]  
Internet services (Complaint ¶ 8). Plaintiff developed a programming plan designed to increase audience share and TV ratings, as well as recommendations for a new television production package involving improved graphics and Internet coverage (*id.*, ¶¶ 9, 10).

In connection with its foregoing efforts, plaintiff retained the broadcast production services of Betelgeuse and Global, each of which entered into a substantially identical “Non-Disclosure/Non-Circumvention Agreement” with plaintiff, dated January 14, 2004 (Complaint ¶¶ 13-18, Exs. A, B). The Agreements contain the following restrictive covenants, with regard to plaintiff’s collaboration with Betelgeuse and Global in reference to the Open Wheel Racing production plan:

It is hereby agreed to by each of the undersigned parties, acting in good faith and intending to be legally bound, not to circumvent, avoid or obviate each other, directly or indirectly, in any transaction with any corporation, partnership or individual, revealed by either party to the other, in connection with any business. Projects, strategies and individuals presented by either party are strictly proprietary and highly confidential information, whether written or oral, and the exclusive property of that party.

More specifically, Event Producer<sup>[1]</sup> and its subsidiaries, agents, or other business and/or financial partners, lenders, or investors, agrees to keep confidential any and all information received regarding Entity<sup>[2]</sup> and any of its subsidiaries; not to contact any representative of Entity, or its subsidiaries without the express written consent of Entendre; and not to seek into any agreement or engage in any business or investment activity or endeavor with Entity, and any of its subsidiaries, without the express written consent of Entendre. Accordingly, Entendre agrees not to seek into any agreement or engage in any business or investment activity or endeavor with Event Producer’s financial partners, lenders, or investors, without the express written consent of Event Producer.

Both parties further agree to keep completely confidential any literary information, strategic information, or financial and/or entertainment industry contacts, including but not limited to; musical artists, agents, managers, producers, race car drivers, race car

---

<sup>1</sup> Referring to Betelgeuse. The term “Service Provider” is used in Global’s agreement.

<sup>2</sup> Referring to Open Wheel Racing.

\* 4 ]

teams, race car series, bankers, financiers and/or financial institutions, introduced by the other party or their associates. Any such identity or information pertaining to this agreement will remain confidential during the complete term of this agreement, and neither party will disclose or otherwise reveal, to any third party, any confidential information without the express written consent of the other party.

(Complaint Ex. A; *see also, id.*, Ex. B.) The term of the Agreements is three years, i.e., until January 14, 2007 (*id.*).

The complaint alleges that plaintiff, in reliance on those protective provisions, prepared a comprehensive proposal setting forth its production plan for Open Wheel Racing, and shared it with Betelguese and Global to accommodate their collaborative duties (Complaint ¶ 23). It is alleged that three months into the Agreements' term, defendants breached the covenants by entering into agreements with Open Wheel Racing to provide TV and webcast programming, and Internet services, based on plaintiff's proposal (*id.*, ¶ 25). Lost profits of \$5,000,000.00 are alleged to have been sustained as a result of defendants' breach (*id.*, ¶ 37). The complaint asserts causes of action for breach of contract and fiduciary duty, conversion, an accounting, a constructive trust, fraudulent inducement,<sup>3</sup> interference with contract and prospective contract, unjust enrichment, and demands a permanent injunction.

Plaintiff now moves to preliminarily enjoin defendants from performing any services under their agreements with Open Wheel Racing, and for related relief.

Defendants oppose the motion, and cross-move to compel arbitration and stay this action based on the following arbitration clause contained in the Agreements:

. . . Any Claim or controversy arising out of or relating to this contract, or breach thereof, shall be settled via arbitration and shall be deemed to be within the jurisdictional

---

<sup>3</sup> Alleging that Betelguese and Global executed the Agreements with intent to obtain and use plaintiff's production plan for their own gain (Complaint ¶¶ 94-101).

authority of the county of New York, State of New York.

(Complaint Exs. A, B.)

Plaintiff does not contest the validity of the arbitration clause.

***Discussion:***

“A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it . . . .” (CPLR 7501.)

In view of the arbitration clause, defendants’ cross-motion to compel arbitration and stay this action is granted. In view of this determination, the court will treat plaintiff’s motion for a preliminary injunction as one for a provisional remedy in aid of arbitration (CPLR 7502 [c]).

A provisional remedy in aid of arbitration may be granted “upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief” (CPLR 7502 [c]). Defendants’ continued use of plaintiff’s programming plan, and defendants’ unauthorized dispensation of that plan into the stream of commerce, may cause plaintiff substantial loss in terms of profits it might have earned through its own use of its plan, and otherwise. Plaintiff has sought a permanent injunction against such use. Defendants’ continued use of the information during the pendency of this matter would render a permanent injunction in plaintiff’s favor, “ineffectual” (*id.*).

The criteria for preliminary injunctions under CPLR Article 63 are relevant to the analysis of a motion for provisional relief in aid of arbitration (CPLR 7502 [c]; *see also*, Alexander, Practice Commentaries [McKinney’s Cons Laws of NY, Book 7B, CPLR 7502,

1998, at 433]). Those criteria are: a likelihood of success on the merits; irreparable harm absent an injunction; and a balancing of the equities in movant’s favor (e.g., *Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]). Plaintiff has satisfied these factors.

Plaintiff shows a probability of success by virtue of the unequivocal language of the restrictive covenant, which defendants do not deny or challenge. Betelgeuse and Global attempt to distance themselves from the Agreements by making the assertion that the signatory of the Agreements, defendant Rick Murphy, was not authorized to sign them on the companies’ behalf (Cohen Aff. ¶¶ 17-18; Duffen Aff. ¶¶ 5-6). Yet, the Agreements plainly manifest that they are signed by Murphy as Vice President of both companies (Complaint Exs. A, B). Plaintiff’s CEO, Robert Francavillo, attests that he conducted negotiations with defendant John Servidio, Betelgeuse’s president, who designated Murphy to head up the production effort on its behalf (Francavillo Aff. ¶¶ 6-8).

In addition, defendants have acknowledged the validity of the Agreements by relying on them in their instant cross-motion to compel arbitration, which is premised on the Agreements.

Defendants say little of consequence about the keystone allegation of the complaint, that within a few months after the Agreements were entered into, they were using plaintiff’s information for their own gain, in violation of the Agreements. They claim that they were the creators of plaintiff’s plan, which plaintiff presented to Open Wheel Racing as its own (Cohen Aff. ¶ 11). However, the complaint alleges, and defendants do not deny, that they were retained by plaintiff, precisely, for their expertise in the broadcast production field. The Agreements reflect defendants’ status as “Event Producer” and “Service Provider,” respectively.

Thus, defendants' contributions to the plan are not in issue; but rather, their possible breach of the unambiguous restraint against entering into their own business arrangements with Open Wheel Racing (Complaint Exs. A, B). Defendants' preoccupation with whether they created the Entendre proposal, or whether its contents were "confidential," thus, misses the point. The Agreements prohibit defendants from making use of Entendre's relationship with Open Wheel Racing, insofar as Entendre's interests are not being promoted (*FTI Consulting, Inc. v PriceWaterhouseCoopers LLP*, 8 AD3d 145 [1<sup>st</sup> Dept 2004] ["the restrictive covenant's proscription unambiguously extends not only to BRS business, . . . but more broadly to the provision of any BRS-type services"]).

As observed, irreparable harm to plaintiff may ensue if defendants are free to cultivate a business relationship with Open Wheel Racing which may be in breach of the covenants. This is especially so if it is found that they are doing so through the use of plaintiff's proprietary plan, which they were retained to support. Defendants' ability to corner the racing market, or other markets, as a result of their present services for Open Wheel Racing, may give rise to immeasurable loss of future profit for plaintiff.

By the same token, the equities favor plaintiff in light of the possibility that a final judgment in its favor may be rendered ineffectual, and the possible harm which may flow from unrestrained business activities among defendants and Open Wheel Racing. This is only exacerbated by the uncontroverted allegation that defendants commenced dealing with Open Wheel Racing within a mere three months after execution of the Agreements.

Consequently, plaintiff's motion for a preliminary injunction is granted, in aid of arbitration.

Plaintiff's motion contains a request for an order compelling defendants to produce documents. That branch of the motion is denied in view of the stay of this action in favor of arbitration.

The parties are directed to settle an order in accordance herewith, and to appear for a preliminary conference on May 12, 2005, at 9:30 a.m., at Part 49 of the court.

Dated: April 27, 2005

ENTER:

  
\_\_\_\_\_  
J. S. C.