Drawcard Exhibits, LLC v Victory Hill Exhibitions, LLC
2016 NY Slip Op 31738(U)
September 16, 2016
Supreme Court, New York County
Docket Number: 653261/2015
Judge: Anil C. Singh

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 45

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DRAWCARD EXHIBITS, LLC and DRAWCARD EXHIBITS PTY. LTD.,

Plaintiffs,

-against- Index No. 653261/2015

VICTORY HILL EXHIBITIONS, LLC,

Defendant.

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VICTORY HILL EXHIBITIONS, LLC,

Plaintiff,

-against- Index No. 653278/2015

DRAWCARD EXHIBITS PTY. LTD., DRAWCARD EXHIBITS, LLC, JARROD PETER CROWLEY, JOSEPH LOMBARDI, and DAVID CHARLES ROSE,

Defendants.

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SINGH, J.:

Motion sequence number 001 in *Drawcard Exhibits, LLC, et al. v Victory Hill Exhibitions, LLC* (index No. 653261/2015) (the DCE action), and motion sequence numbers 001, 002, and 003 in *Victory Hill Exhibitions, LLC v Drawcard Exhibits Pty. Ltd., et al.* (index No. 653278/2015) (the VHE action) are hereby consolidated for disposition.

These actions arise out of the failure and ultimate termination of the business and contractual relationship between Victory Hill Exhibitions, LLC (VHE) and Drawcard Exhibits Pty. Ltd (DCE AU).

In the DCE action, defendant VHE moves, pursuant to CPLR 3211 (a) (5) and (7), and CPLR 3016 (b), to dismiss the causes of action asserted against it as barred by release, for failure

to state a cause of action, and for failure to plead fraud with sufficient particularity.

In the VHE action, individual defendants David Charles Rose (Rose) (mot. seq. no. 001), Joseph Lombardi (Lombardi) (mot. seq. no. 002), and Jarrod Peter Crowley (Crowley) (mot. seq. no. 003), each move, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the causes of action asserted against them based on documentary evidence and for failure to state a cause of action.

BACKGROUND

VHE is a Florida limited liability company that operates as an "exhibition production and distribution company focused on delivering engaging, educational and interactive exhibitions for the global market" (VHE complaint, ¶¶ 4 and 13). DCE AU is an Australian proprietary limited company that possesses "expertise in the areas of licensing, franchising, brand management, merchandising, and retailing"(*id.*, ¶¶ 5 and 18). According to the DCE complaint, DCE AU is the parent company of Drawcard Exhibits LLC (DCE USA), a Delaware limited liability company headquartered in New York City (DCE complaint, ¶¶ 2 and 6).[1] Defendants Rose, Lombardi, and Crowley are each directors of DCE AU (VHE complaint, ¶¶ 7-9).

In January of 2013, VHE entered into a license agreement with nonparty Marvel Characters, B.V. (Marvel), pursuant to which VHE was granted the rights to use the Marvel name and certain Marvel intellectual property in developing, building, operating, marketing, and promoting an interactive touring exhibition entitled "Marvel's the Avengers S.T.A.T.I.O.N." (the License Agreement) (VHE complaint, ¶¶ 14-15; *see also* Garson affirmation in opposition to

[1] In their memorandum of law in opposition to VHE's motion to dismiss, the DCE plaintiffs contend that DCE USA is "loosely related to" DCE AU (*see* DCE memorandum of law in opposition to VHE's motion to dismiss at 4).

VHE's motion to dismiss the DCE complaint, exhibit C: License Agreement § 2.01). The License Agreement also granted VHE certain merchandising rights to manufacture, distribute and sell Marvel-branded merchandise at retail outlets/gift shops to be operated in conjunction with the exhibition's tour in the United States and Canada (*see* License Agreement, § 2.03).

The Avengers S.T.A.T.I.O.N. exhibition was to be a

> "first-class, primarily (at least 60%) educational science-exhibit with incidental entertainment value, specifically consisting of displays, content, diagrams and illustrations which attempt to explain, in educational terms, the science behind Super Heroes and their related powers and/or abilities ('Edutainment') which shall explore the science behind the Avengers in detail"

(*id.*, § 2.02). The planned exhibition was to be displayed inside museums, science centers, or similar venues approved by Marvel (*id.*). The first exhibition was to open at the Discovery Center in Times Square, New York (DTS), on May 23, 2014 (VHE complaint, ¶ 20).

On or about March 25, 2014, prior to the opening of the DTS exhibition, VHE entered into a merchandising agreement with DCE AU, pursuant to which VHE granted DCE AU the sole and exclusive rights to develop, manufacture, produce, distribute, and sell Marvel merchandise and operate gift shops at exhibitions operating within the United States and Canada (the Merchandising Agreement) (VHE complaint, ¶¶ 16-17; DCE complaint, ¶ 7; *see also* Michailidis affirmation in support of VHE's motion to dismiss, exhibit 2: Merchandising Agreement). The DCE plaintiffs allege that, shortly thereafter, in reliance on this Merchandising Agreement, DCE USA entered into an agreement with nonparty Pyramid Consulting Group, LLC (Pyramid), for the provision of various sales staff to work at the DTS exhibition gift shop between May and November of 2014 (DCE complaint, ¶¶ 5-6).

On May 23, 2014, VHE and DCE AU entered into a second, letter agreement (the Stan

Lee Agreement), pursuant to which VHE granted DCE AU

> "the right of first refusal (the 'ROFR') to operate all Gift Shop Outlets associated with the Avenger's Station exhibits outside of the United States and Canada, subject to the terms of this Agreement if Marvel shall grant VHE, or any individual or entity associated with VHE, rights with respect to such exhibits and VHE, or any individual or entity associated with VHE, shall determine in its sole discretion to open such exhibits outside the United States and Canada"

(*see* Michailidis affirmation in support of VHE's motion to dismiss, exhibit 3: Stan Lee Agreement at 1-2).[2]

On April 10, 2015, after various contractual disputes had arisen between VHE and DCE AU, the parties executed a third and final agreement, pursuant to which they agreed to terminate their contractual and business relationship (the Settlement Agreement) (VHE complaint, ¶¶ 26 and 28; DCE complaint, ¶ 15; *see also* Michailidis affirmation in support of VHE's motion to dismiss, exhibit 4: Settlement Agreement). According to the VHE complaint, the parties elected to terminate their contractual relationship because DCE AU was unable to pay VHE the required percentage of gross revenue, earned from the sales at the DTS gift shop, which DCE AU was obligated to pay VHE under the terms of the Merchandising Agreement (VHE complaint, ¶¶ 24-25). According to the DCE plaintiffs, DCE AU was forced into negotiating the Settlement Agreement by VHE's breaches of the Merchandising Agreement and Stan Lee Agreement, and overall failure to perform its contractual obligations, which resulted in DCE AU losing money

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[2] The ROFR was granted to DCE AU in consideration of a $75,000 interest-free loan from DCE AU to VHE, which VHE was to use to pay Stan Lee for promoting the exhibition (Stan Lee Agreement at 1-2). The Stan Lee Agreement provided that VHE was to repay the interest-free loan in a minimum of three monthly payments at a maximum rate of $25,000, by deducting these amounts from monthly settlements due to VHE from DCE AU under the terms of the Merchandising Agreement (*id.*).

and being unable to meet its own contractual obligations to pay suppliers, such as Pyramid (*see* DCE memorandum in opposition to VHE's motion to dismiss at 7, 8-10).

Under the terms of the Settlement Agreement, VHE and DCE AU agreed to terminate both the Merchandising Agreement and the Stan Lee Agreement (*see* Settlement Agreement, ¶¶ 1 and 3 [b]). The Settlement Agreement further provided that, effective as of the closing date, VHE would purchase, and DCE AU would sell free and clear of all liens and encumbrances, all of the inventory that DCE AU then held in connection with the Merchandising Agreement (*id.*, ¶ 2 [a]). The Settlement Agreement set the purchase price for the inventory at $125,000, minus 50% of the adjusted gross revenue that DCE AU owed to VHE between March 6, 2015 and the date that the Settlement Agreement was executed (*id.*, ¶ 2 [b]). The Settlement Agreement also set forth the timing and manner in which VHE was to pay DCE UA for such inventory (*id.*).

The Settlement Agreement included two guaranty provisions with respect to the value of the DCE AU inventory and the accuracy of the information that DCE AU had provided to VHE as of the closing. Specifically, paragraph 2 (c) of the Settlement Agreement provided that:

> "DCE [AU] and the guarantors set forth on the signature page of this Agreement (the 'Guarantors') in their personal capacities, hereby guarantee that the fair market value of the Inventory at the Closing Date will total at least two hundred forty two thousand dollars ($242,000). In the event that the fair market value of the Inventory does not amount to at least $242,000 as reasonably determined by VHE upon completion of a physical inventory, *to be conducted within 14 days of the closing date and which will be done either via a verifiable third party or in the presence of a DCE [AU] nominee*, DCE [AU] shall remit the difference, in the same proportion [i.e.] $242,000/$125,000, to VHE as soon as reasonably practicable. In the event that DCE [AU] is unable to remit the difference in price to VHE, the Guarantors shall pay, and shall each be jointly and severally liable for, the difference between $242,000 and the fair market value of the Inventory (in the same proportion)"

(*id.* [emphasis in original]). Paragraph 6 (b) (iii) of the Settlement Agreement provided that:

> "Accuracy of Information. DCE [AU] and the Guarantors in their personal capacity hereby represent and warrant that all information provided by DCE [AU], including the representations set forth in this Section [6] are true and correct as of the Closing Date. DCE [AU] and each Director in his or her personal capacity shall indemnify, defend and hold harmless VHE from any and all damages resulting from a violation of this Section [6] (b) (iii)"

(*id.*).

The Settlement Agreement also included a broad release, which provided that:

> "Each Party, hereby releases and discharges the other Party and each of its respective affiliates, directors, officers, employees, agents, representatives, successors and permitted assigns (collectively, the '*Releasees*') from and against any and all actions, causes of action, suits, debts, covenants, contracts, agreements, promises, damages, claims, and demands whatsoever, in law or equity, which such Party has ever had, now has, or hereafter can, shall or may have, whether known or unknown, arising out of actions, omissions, conduct, or events occurring on or before the date of this Agreement, including, without limitation, those related to the Merchandising Agreement and the Stan Lee Agreement; provided, however, that the foregoing release does not extend to, and no Party releases Releasees from, any liabilities or obligations of Releasees under this Agreement or any losses in any way relating to any breach or default by Releasees under this Agreement, including, without limitation, any breach by a Party of any of its representations and warranties set forth in Section [6]"

(*id.*, ¶ 7).

The Settlement Agreement was executed by director Lombardi, on behalf DCE AU (*id.* at 10). Directors Crowley and Lombardi also each signed the agreement underneath a signature block header that read: "GUARANTORS For the limited purposes set forth herein:" (*id.* at 10).

On or about September 1, 2015, some months after the finalization of the Settlement Agreement, Pyramid filed suit against DCE USA, seeking to recover $120,077.47 in damages, plus statutory interest, that Pyramid alleges that DCE USA owes it for the sales work that it performed at the DTS exhibition, through November 19, 2014.

The DCE Action

On September 28, 2015, DCE USA and DCE AU commenced the DCE action against VHE, asserting causes of action for breach of contract, unjust enrichment, fraud, and equitable fraud.

In the first cause of action, the DCE plaintiffs allege breaches of each of the three agreements: the Merchandising Agreement, the Stan Lee Agreement, and the Settlement Agreement. Specifically, the DCE complaint alleges that VHE breached the Merchandising Agreement (1) by failing to design a "world class" exhibit capable of accommodating a projected 500,000 visitors over a six-month period, as allegedly promised by that agreement (DCE complaint, ¶¶ 7 and 9); and (2) by poorly supervising, maintaining, and managing the exhibit that it did design (*id.*, ¶ 10). The DCE complaint alleges that VHE breached the Stan Lee Agreement by failing to provide DCE AU with a ROFR for contemplated operations in Korea, and then "fail[ing] to later disclose a deal concerning those rights, which [VHE] had signed in Korea in or about June 2014" (*id.*, ¶ 13). The complaint alleges that VHE further breached the Stan Lee Agreement (1) by including DCE AU's merchandising rights, which DCE AU had been granted under the Merchandising Agreement, as part of a transaction in which VHE was sold and acquired by Cityneon Holdings, Ltd (Cityneon), a Singapore exchange-listed entity; and (2) by thereafter concealing this information from DCE AU during the parties' settlement negotiations (*id.*, ¶ 14). The DCE complaint alleges that VHE breached the Settlement Agreement by failing to make timely payments, and by improperly calculating the payments owed to DCE AU with the intent to defraud (*id.*, ¶ 17).

In the second cause of action, the DCE complaint alleges that VHE was unjustly enriched

by (1) the sale of DCE AU's merchandising rights to Cityneon prior to the finalization of the Settlement Agreement (*id.*, ¶ 19), and (2) by VHE's acceptance of DCE AU's performance of the Merchandising Agreement and Stan Lee Agreement, while failing to uphold its own obligations under these agreements (*id.*, ¶¶ 31-34).

In the third and fourth causes of action, alleging fraud, the DCE complaint alleges that "VHE made material misrepresentations pertaining to both its competence to construct and design a 'world class' exhibit as well as the projected sales articulated within the provisions of the Merchandising Agreement," to induce DCE AU to execute that agreement (*id.*, ¶ 8). Additionally, with respect to the Settlement Agreement, the DCE complaint alleges that "Crowley, Rose, and Lombardi's acquiescence to the terms and conditions therein was the direct and proximate result of [VHE's] material misrepresentation, non-disclosure of material facts, and patent fraud . . . evidenced in VHE's concealment of the sale to Cityneon, and its breaches of both the Merchandising Agreement and Stan Lee Agreement" (*id.*, ¶ 16).

The DCE plaintiffs have assert damages, in the amount of $2,600,000, on each of their causes action, and seek attorneys' fees, costs and disbursements.

The VHE Action

On September 30, 2015, VHE commenced the VHE action against DCE AU, DCE USA, and directors Rose, Lombardi, and Crowley, asserting three causes of action for breach of the Settlement Agreement.

In the first cause of action, which is asserted solely against the corporate defendant, VHE alleges that DCE AU breached the Settlement Agreement by refusing to release and deliver all of the inventory that DCE AU held in connection with the Merchandising Agreement, despite

having received full payment (VHE complaint, ¶¶ 50-52) . As damages, the VHE complaint seeks: $77,924.61, to recover the payments it made for the inventory (*id.*, ¶¶ 32-36, 54); $1,080,067.95, to recover for lost sales, based on DCE AU's representations as to the potential sales value of the inventory (*id.*, ¶¶ 46, 55); $47,175.39, to recover the unpaid royalties on the gross revenues of the DTS gift shop, which VHE had applied toward the purchase price of the inventory (*id.*, ¶¶ 37-38, 56); and $55,000, to recover VHE's costs of retaining sales staff at the DTS gift shop, in the expectation that DCE AU would deliver the full inventory in the course of the exhibition (*id.*, ¶¶ 47, 57).

In VHE's second cause of action, which is asserted against both DCE AU and each of the Guarantors, VHE seeks to recover these same amounts, pursuant to the guaranty provision contained in paragraph 6 (b) (iii) of the Settlement Agreement.

In VHE's third cause of action, which is asserted solely against the Guarantors, VHE seeks to recover the difference between $242,000, the guaranteed fair value of the inventory, and the actual fair market value of the inventory on the closing date, pursuant to the guaranty provision contained in paragraph 2 (c) of the Settlement Agreement.

VHE also seeks attorneys' fees, costs and disbursements on each of its causes of action.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211 (a) (7), this court "must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory" (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *see also Leon v Martinez*, 84 NY2d 83 [1994]). However, "allegations consisting of

bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration" (*Tal v Malekan*, 305 AD2d 281, 281 [1st Dept], *lv denied* 100 NY2d 513 [2003] [internal citations and quotation marks omitted]).

On a motion to dismiss pursuant to CPLR 3211 (a) (1), dismissal "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

The DCE Action

VHE moves to dismiss DCE AU's causes of action for breach of contract, to the extent based on the Merchandising Agreement and Stan Lee Agreement; unjust enrichment; fraud; and equitable fraud, as barred by the broad release contained in the Settlement Agreement. Alternatively, VHE moves to dismiss DCE AU's unjust enrichment, fraud and equitable fraud claims, as duplicative of DCE AU's breach of contract claims. VHE further moves, in the alternative, to dismiss DCE AU's fraud claims for failure to plead fraud with the particularity required by CPLR 3016 (b); failure to allege the type of material misrepresentation of fact, upon which a fraud claim can be based; and failure to allege facts from which an intent to defraud can be inferred.

VHE also moves to dismiss any contract cause of action asserted against it by DCE USA, on the ground that DCE USA is neither a party to, nor a third-party beneficiary of, any of the three agreements at issue in this action.

Lastly, VHE moves to dismiss DCE AU's cause of action for breach of the Settlement Agreement, on the ground that DCE AU failed to allege the proper measure of damages on this

contract claim.

VHE's motion to dismiss DCE AU's claims for breach of the Merchandising Agreement and Stan Lee Agreement, unjust enrichment, fraud, and equitable fraud, as barred by the release contained in the Settlement Agreement, is granted.

"Generally, 'a valid release constitutes a complete bar to an action on a claim which is the subject of the release'" (*Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011], quoting *Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 98 [1st Dept 2006]). "If 'the language of a release is clear and unambiguous, the signing of a release is a "jural act" binding on the parties'" (*id.*, quoting *Booth v 3669 Delaware*, 92 NY2d 934, 935 [1998], citing *Mangini v McClurg*, 24 NY2d 556, 563 [1969]). While "[a] release 'should never be converted into a starting point for ... litigation except under circumstances and under rules which would render any other result a grave injustice[,]' [a] release may be invalidated . . . for any of 'the traditional bases for setting aside written agreements, namely, duress, illegality, fraud, or mutual mistake'" (*id.*, quoting *Mangini*, 24 NY2d at 563). "Although a defendant has the initial burden of establishing that it has been released from any claims, a signed release 'shifts the burden of going forward ... to the [plaintiff] to show that there has been fraud, duress or some other fact which will be sufficient to void the release'" (*id.*, quoting *Fleming v Ponziani*, 24 NY2d 105, 111 [1969]).

VHE has met its initial burden of establishing that the broad release contained within the Settlement Agreement bars the DCE plaintiffs' claims for breach of the Merchandising Agreement and Stan Lee Agreement, unjust enrichment, fraud, and equitable fraud. By its terms, the language of the release expressly encompasses "any and all actions [and] causes of action . . .

in law or equity, which such Party has ever had, now has, or hereafter can, shall or may have, whether known or unknown, arising out of actions, omissions, conduct, or events occurring on or before the date of this Agreement, including, without limitation, those related to the Merchandising Agreement and the Stan Lee Agreement" (Settlement Agreement, ¶ 7). Our courts have held that language in a release that references all manner of actions in conjunction with possible future and contingent actions, indicates an intent to release even unknown claims, including unknown fraud claims, at the time the release was executed (*Centro Empresarial*, 17 NY3d at 277).

Here, with the exception of DCE AU's cause of action for breach of the Settlement Agreement, all of DCE AU's causes of action, including those based on its claims of fraudulent inducement, are alleged to have arisen out of actions, omissions, conduct or events that occurred prior to the finalization and execution of the Settlement Agreement. Thus, under the broad language of the release, each of these causes of action falls squarely within the scope of the release, even if the signatories may not have known about, or known the full extent of, such claims before executing the release (*Long v O'Neill*, 126 AD3d 404, 408 [1st Dept 2015]; *see also Centro Empresarial*, 17 NY3d at 276, quoting *Mangini*, 24 NY2d at 566-567 ["[A] release may encompass unknown claims, including unknown fraud claims, if the parties so intend and the agreement is 'fairly and knowingly made'"]).

Nevertheless, DCE AU argues that the release is no bar to its causes of action, because the release itself was procured by fraud, and thus is void and unenforceable. DCE AU contends that, during the settlement negotiations, VHE "withheld material information pertaining to its prior and ongoing breaches of the Merchandising Agreement and the Stan Lee Agreement

necessary for the parties to negotiate the Settlement Agreement in good faith" (DCE plaintiffs' memorandum of law in opposition to VHE's motion to dismiss at 9). Specifically, DCE AU contends that VHE actively concealed the specific contents of its sale to Cityneon, i.e., that VHE's sale to Cityneon included the Marvel merchandising rights that VHE previously had contracted to DCE AU, which information would have alerted DCE AU to VHE's "brazen breach of contract" (*id.* at 25-26). DCE AU contends that VHE, with full knowledge of this concealment, then "willfully and knowingly drafted the release . . . with the specific aim of absolving itself of any liability for its various beaches when evidence of its foul play ultimately became available to the public" (*id.* at 10). While the DCE plaintiffs acknowledge that VHE had no fiduciary duty to disclose information about the Cityneon deal to DCE AU, plaintiffs argue that VHE had a duty to disclose this information under the "special facts" doctrine (*id.* at 24).

"A plaintiff seeking to invalidate a release due to fraudulent inducement must 'establish the basic elements of fraud, namely a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury'" (*Centro Empresarial*, 17 NY3d at 276, quoting *Global Mins.*, 35 AD3d at 98). Moreover, "a party that releases a fraud claim may later challenge that release as fraudulently induced only if it can identify a separate fraud from the subject of the release" (*Centro Empresarial*, 17 NY3d at 276). "Full disclosure is not required for a release to be effective, even with respect to fraud claims" *(Morefun Co. Ltd. v Mario Badescu Skin Care Inc.*, 2014 WL 2560608, *5, 2014 US Dist LEXIS 77710, *12 [SD NY June 6, 2014], citing *Bellefonte Ins. Co. v Argonaut Ins. Co.*, 757 F2d 523, 527 [2d Cir 1985]; *cf. Centro Empresarial*, 17 NY3d at 278 [where "sophisticated entities . . negotiated and executed

an extraordinarily broad release with their eyes wide open[, t]hey cannot now invalidate that release by claiming ignorance of the depth of their fiduciary's misconduct]).

Here, the fraud that allegedly induced DCE AU to enter into the Settlement Agreement, i.e., VHE's alleged concealment of the specifics of its sale to Cityneon during settlement negotiations, falls squarely within the scope of claims contemplated by the release.[3] As there are no allegations that a separate fraud was perpetrated by VHE to induce the signing of the release, the release cannot be invalidated. Accordingly, dismissal of DCE AU's causes of action for breach of the Merchandising Agreement and Stan Lee Agreement, unjust enrichment, fraud, and equitable fraud, is warranted.

To the extent that VHE moves to dismiss any contract claims asserted against it by DCE USA, which otherwise were not extinguished by the execution of the Settlement Agreement, the motion is granted. The DCE complaint fails to allege any facts from which to infer any contractual relationship between DCE USA and VHE.

However, VHE's motion to dismiss that portion of DCE AU's first cause of action, alleging breach of the Settlement Agreement, is denied. VHE argues that dismissal of this cause of action is warranted, because the DCE complaint fails sufficiently to allege contract damages, i.e., the value that DCE AU received under the Settlement Agreement versus the value that they bargained for under the terms of that agreement. Nevertheless, the allegations in the complaint, as supplemented by the executed Settlement Agreement, sufficiently set forth the value that DCE

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[3]DCE AU acknowledges that, at the time it executed the Settlement Agreement, it knew that VHE had not supplied it with the specifics of the Cityneon transaction, despite having requested that information and having expressed concern to VHE, in writing, that the Cityneon transaction might affect the parties' contractual relationship and settlement negotiations (DCE plaintiffs' memorandum of law in opposition to VHE's motion to dismiss at 9-10, 25).

AU bargained for under terms of the Settlement Agreement. Moreover, with respect to DCE AU's sale of inventory to VHE, the Settlement Agreement also sets forth the timing by which VHE was to make payments, and the manner in which the payments owed to DCE AU were to be calculated. The complaint's allegation that "VHE failed to make timely payments and made improper calculations of payments owed to DCE AU" (DCE complaint, ¶ 17), read in conjunction with the terms of the Settlement Agreement, is sufficient to state a cause of action for breach of that agreement.

VHE Action

Defendant Rose (motion sequence number 001) moves to dismiss the two causes of action asserted against him for breach of guaranty, on the ground that he was never a signatory on the Settlement Agreement, and, therefore, cannot be held liable for breach of the guaranty provisions in that agreement.

Defendant Crowley (motion sequence number 003) moves to dismiss the two causes of action asserted against him for breach of guaranty, on the ground that, although he is a signatory on the Settlement Agreement, VHE has not established that Crowley intended to sign and be bound personally on the Settlement Agreement as a Guarantor, rather than merely in his capacity as a director of DCE AU.

Defendants Lombardi (motion sequence number 002) and Crowley also each move to dismiss the two causes of action for breach of guaranty against them, on the ground that any liability on their part, as Guarantors, is contingent upon a breach or default of the Settlement Agreement on the part of DCE AU. Lombardi and Crowley argue that, because DCE AU's liability is not conclusively established, it is improper to assert any claims against them for

breach of guaranty at this juncture.

Additionally, all of the defendants argue that the guaranty claims asserted against them should be dismissed because, to the extent that they are personal Guarantors under the Settlement Agreement, there is "documentary evidence" that the limited personal guarantees provided in paragraph 2 (c) and paragraph 6 (b) (iii) of the Settlement Agreement, were met, if not exceeded, throughout the course of the parties' dealings. In any event, defendants argue that VHE's second cause of action must be dismissed, because the damages that VHE seeks to recover in that cause of action are not only wholly manufactured, but clearly exceed the scope of the limited guaranty contained in paragraph 6 (b) (iii) of the Settlement Agreement.

Rose's motion to dismiss the complaint for failure to state a cause of action, on the ground that he is not a signatory on the Settlement Agreement and cannot be held liable as a personal guarantor on that agreement, is granted.

Generally, an agreement to "answer for the debt, default or miscarriage of another person" must be in writing and subscribed by the party to be charged (General Obligations Law § 5–701[a][2]). VHE argues that Rose's motion should be denied because it is insufficiently clear, from the face of the Settlement Agreement, that there were only two, rather than three signatures actually present under the Guarantor signature block, and Rose has offered no other support for his contention that he was not a party to the Settlement Agreement. VHE additionally argues that, even assuming that Rose did not actually sign the Settlement Agreement, in paragraph 16 of the DCE complaint, the DCE plaintiffs allege that Crowley, Rose, and Lombardi each "acted as signatories to the Settlement Agreement on behalf of DCE AU" (DCE complaint, ¶ 16). VHE argues that, because the DCE complaint was signed by the same litigation counsel representing

Rose in the VHE action, this allegation may well be admissible as an admission against Rose. In any event, VHE argues that, because the issue of whether Rose executed the Settlement Agreement presents a factual, rather than a legal issue, it is not properly resolved on a motion to dismiss.

Contrary to VHE's contention, it is sufficiently clear from the two signature blocks at the end of the Settlement Agreement, especially when viewed in conjunction with the signatures appearing on all of the agreements executed by the parties to this action, that there are only two signatures on the Settlement Agreement, and that Rose's signature is not among them. It is true that our courts have held that "an admission in a pleading in one action [may be] admissible against the pleader in another suit, provided it is shown by the signature of the party, or otherwise, that the facts were inserted with his knowledge, or under his direction, and with his sanction" (*Matter of Union Indem. Ins. Co. of N.Y.*, 89 NY2d 94, 103 [1996] [internal citations and quotations omitted]). However, even if the allegation that was made in paragraph 16 of the DCE complaint were admissible as an admission against Rose, it could only serve as an admission that Rose was acting as a signatory "on behalf of DCE AU," and not as an admission that Rose was signing the Settlement Agreement individually, as a personal Guarantor.

Crowley's motion to dismiss the complaint, on the ground that there is insufficient evidence to establish his intent to be bound as a personal Guarantor, is denied. Crowley argues that dismissal of the breach of guaranty claims against him is warranted, because our courts have observed that an officer or director of a corporation generally "is not liable for his corporation's engagements unless he signs individually, . . . [and] where individual responsibility is demanded the nearly universal practice is that the officer signs twice -- once as an officer and again as an

individual" (*Salzman Sign Co. v Beck*, 10 NY2d 63, 67 [1961]). Crowley argues that because the record reflects that his signature appears on the Settlement Agreement just once, not twice, and because VHE otherwise has not provided any direct and explicit evidence of Crowley's actual intent to be bound as a personal Guarantor, the causes of action against him should be dismissed for failure to state a cause of action.

While it is true that Crowley signed the Settlement Agreement but once, the Settlement Agreement reflects that Crowley's signature appears in the second portion of the signature block, underneath the header "GUARANTORS," and not the first portion of the signature block, which is signed by an officer on behalf of the corporation. In any event, even if the evidence of Crowley's single signature, under the header "Guarantor," is not sufficiently direct and explicit evidence to prove Crowley's actual intent to be bound as a personal guarantor, the evidence of such signature, with the facts as alleged in the complaint, does provide a sufficient basis on which to plead a cause of action against Crowley for breach of guaranty.

The motions by Crowley and Lombardi, to dismiss the breach of guaranty claims against them on the ground that a breach or default of the Settlement Agreement by DCE AU has not been conclusively established, also is denied. While the imposition of liability on the alleged Guarantors ultimately will require a finding of breach or default of the Settlement Agreement by DCE AU, a cause of action for breach of guaranty is sufficiently stated where, as here, such breach or default has been alleged.

Finally, to the extent that each of the individual defendants moves to dismiss VHE's causes of causes action based on "documentary" evidence that the guaranties were met and exceeded; that VHE's damages are wholly manufactured and fictitious; and that VHE's damages

exceed the scope of the limited guaranties, the motions are denied.

"[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*Fontanetta v John Doe I*, 73 AD3d 78, 86 [2d Dept 2010]; citing Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 21-22). The documents offered by defendants as support for their contentions that DCE AU fulfilled its obligation to turn over all inventory held in connection with the Merchandising Agreement, and that the value of this inventory met or exceeded the guaranteed fair market value, consist of: photographs ostensibly taken of the DTS gift shop prior to its turnover to VHE (Garson affirmation in support of defendants' motions, exhibit K); an undated list of inventory (*id.*, exhibit L); and a shipping invoice, dated prior to the execution of the Settlement Agreement (*id.*, exhibit M). The document offered by defendants as support for their contention that VHE's alleged staffing costs are an "unmitigated fabrication," consists of a copy of their own staffing invoices, by way of comparison (*id.*, exhibit O). None of the documents, which defendants simply attach as exhibits to their attorneys' affirmation, are properly authenticated. Nor do these documents, by themselves, utterly refute plaintiff's factual allegations or conclusively establish a defense as a matter of law. While these documents arguably could raise an issue of fact regarding DCE AU's fulfillment of its obligations under the Settlement Agreement, if presented in admissible form, they do not qualify as documentary evidence within the meaning of CPLR 3211 (a) (1).

Accordingly, it is

ORDERED that the motion by defendant Victory Hill Exhibitions, LLC to dismiss the complaint in *Drawcard Exhibits, LLC, et al. v Victory Hill Exhibitions, LLC* (index No.

653261/2015) is granted to the extent of dismissing the first cause of action, insofar as it alleges breach of the Merchandising Agreement and Stan Lee Agreement; the second cause of action for unjust enrichment; the third cause of action for fraud; the fourth cause of action for equitable fraud; and any/all contract causes of action asserted by plaintiff Drawcard Exhibits, LLC, and the motion is otherwise denied; and it is further

ORDERED that the motion by defendant David Charles Rose (mot. seq. no. 001) to dismiss the complaint in *Victory Hill Exhibitions, LLC v Drawcard Exhibits Pty. Ltd., et al.* (index No. 653278/2015), insofar as it is asserted against him, is granted; and it is further

ORDERED that the motions by defendants Joseph Lombardi (mot. seq. no. 002) and Jarrod Peter Crowley (mot. seq. no. 003) to dismiss the complaint in *Victory Hill Exhibitions, LLC v Drawcard Exhibits Pty. Ltd., et al.* (index No. 653278/2015), insofar as it is asserted against them, is denied; and it is further

ORDERED that all other claims in *Drawcard Exhibits, LLC, et al. v Victory Hill Exhibitions, LLC* (index No. 653261/2015) and in *Victory Hill Exhibitions, LLC v Drawcard Exhibits Pty. Ltd., et al.* (index No. 653278/2015) shall continue; and it is further

ORDERED that counsel in each action are directed to appear for a [preliminary][~~status~~] conference in Room 218 on Oct 5, 2016, at 10:00 AM/~~PM.~~

Dated: Sept 16, 2016

ENTER: _____

Hon. Anil C. Singh, J.S.C.