

Benzies v Take-Two Interactive Software, Inc.
2016 NY Slip Op 32504(U)
December 19, 2016
Supreme Court, New York County
Docket Number: 651920/16
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

LESLIE BENZIES,

Plaintiff,

-against-

TAKE-TWO INTERACTIVE SOFTWARE, INC.,
ROCKSTAR GAMES, INC., ROCKSTAR NORTH
LTD., DAN HOUSER and SAM HOUSER,

Defendants.

OSTRAGER, J:

INDEX NO. 651920/16

DECISION & ORDER

MOTION SEQ. NO. 002

This is a pre-answer motion by defendants to dismiss plaintiff's complaint alleging, *inter alia*, breach of a series of written agreements between the parties including plaintiff's Employment Agreement, his Sabbatical Agreement, and a Royalty Agreement, all of which related to plaintiff's involvement in the highly successful and enormously profitable "Grand Theft Auto" video game series that produced extraordinary revenue and includes more than a dozen games produced between 1996 and 2013.

This case was commenced by a filing in this court on April 11, 2016. Shortly before the initial filing in this Court, two of the five defendants in this case filed a declaratory judgment action in the United States District Court for the Southern District of New York (*Take-Two Interactive Software, Inc., and Rockstar Games, Inc. v Benzies*, 16-CV-02699). The federal declaratory judgment action is substantially narrower in scope than this action. A motion to stay that action is apparently pending before the District Court judge.

On April 12, the day after this action was commenced, defendants removed this action to the United States District Court for the Southern District of New York (NYSCEF Doc. No. 4).

On September 14, 2016, the Hon. Vernon S. Broderick of the United States District Court issued an order remanding this action back to this court (NYSCEF Doc. No. 5-7). Shortly thereafter, defendants made this motion to dismiss in lieu of answering and also moved to stay discovery pending the determination of the motion. The motion to stay discovery was denied during oral argument of the motions on December 14, 2016, consistent with the general rules of the Commercial Division.

The motion to dismiss this action in its entirety pursuant to CPLR §3211(a), subd. (1) and (7), is granted in part and denied in part for the reasons set forth below. The alternative request to dismiss or stay this action in favor of the pending federal court action based on prior action pending [CPLR §3211(a)(4)] is also denied for the reasons set forth below.

Certain facts are undisputed by reason of written agreements executed by the parties. Specifically, it is undisputed that plaintiff entered into multiple agreements with the defendants, including a 2006 Employment Agreement that was amended in 2008 and again in 2012 (Levander Aff., Exhs C, F and I), a 2009 Royalty Agreement that was amended in 2011 and again in 2012 (Exhs E and H), and a 2014 Sabbatical Agreement that granted plaintiff the right to return to his employment on terms consistent with his operative Employment Agreement (Exh J). Plaintiff essentially claims that defendants breached all the agreements that were operative before, during, and after the time he sought unsuccessfully to return to work from his sabbatical.

A particular focus of the complaint is defendants' decision to not pay plaintiff millions of dollars of royalties as a principal of defendant Rockstar Games, Inc., which, like defendant Rockstar North Ltd., is a subsidiary of defendant Take-Two Interactive Software, Inc. Plaintiff also claims, among other things, that he was constructively discharged, that he was fraudulently induced to enter into unfair agreements drafted on behalf of each of the principals of Rockstar

Games by the same law firm, that defendants were unjustly enriched at plaintiff's expense, that defendants breached their fiduciary duties, and that defendants defamed him.

During oral argument plaintiff's counsel conceded, and the Court so finds, that but for the defamation claim which is, on its face, deficient as a matter of pleading, all of plaintiff's claims are derivative of his breach of contract claims and the claims ancillary to the breach of contract claims. Consequently, since plaintiff's other claims add nothing to and/or are duplicative of the breach of contract claims, all the causes of action other than the breach of contract claims and the claims ancillary to the breach of contract claims are dismissed. Similarly, the claim for breach of the mediation agreement is dismissed, as no material breach of the agreement has been alleged.

Defendants' motion to dismiss the 71-page complaint containing 15 causes of action is largely predicated on defendants' reading of Section 2.1 of the Royalty Agreement, as amended, which provides a formula for how royalty payments are to be made. It is undisputed that, for a period of years, plaintiff and Rockstar co-founders Dan Houser and Sam Houser received equal royalty payments. At some point in time, relying on the literal text of Section 2.1, the Housers, who were the only Rockstar principals on the Allocation Committee that determined royalty allocations, decided to deny plaintiff any royalty allocation.

Although the literal text of Section 2.1 of the Royalty Agreement might potentially support defendants' motion to dismiss, plaintiff's 2012 Amended and Restated Employment Agreement specifically provides in Section 3(b) that "the Employee [plaintiff Benzies] became and remains entitled to receive certain royalties under the 2009 Royalty Plan (the '2009 Plan Royalties', and together with the 2006 Plan Royalties, the 'Royalties')." Thus, plaintiff's Employment Agreement, which is specifically referable to the Royalty Agreement, clearly contemplates that the plaintiff is entitled to receive "certain" royalties.

The Royalty Agreement also changed over time in a way that arguably impacts the powers of the Allocation Committee. Consequently, at the pleading stage, there is sufficient ambiguity relating to the proper interpretation of the various agreements that are the subject of the complaint to deny defendants dismissal of the contract claims particularly where, as here, there appears to be extrinsic evidence that may bear upon the true intent of the parties with respect to the proper interpretation and implementation of the various governing agreements.

Defendants' interpretation of Section 2.1 of the Royalty Agreement, which itself requires a bit of mental gymnastics to fully support defendants' position, is tantamount to seeking judgment at the pleading stage that the Houser defendants had the unfettered discretion to exclude plaintiff from any and all royalty payments with respect to the historical role he played in the handling and development of the Grand Theft Auto games, despite plaintiff's prior receipt of royalties. While this may be the ultimate outcome of the case, the plaintiff is entitled to attempt to prove his alternate interpretation of the various agreements as well as to support his contention that he was constructively discharged without cause in breach of his Sabbatical Agreement.

Documents submitted in opposition to the motion suggest that plaintiff worked with the Housers as a "partner" for an extended period of time. Nevertheless, all of plaintiff's claims, with the exception of the defamation and mediation claims which the Court has dismissed, rise or fall based on the various written arrangements among the parties which the Court has found to be sufficiently ambiguous as to require further factual development. Accordingly, the motion to dismiss is denied as to the fourth, fifth, seventh, eighth, tenth and eleventh causes of action. The motion is granted to the extent of severing and dismissing the thirteenth and fourteenth causes of action with prejudice. The motion is granted to the extent of severing and dismissing without

prejudice at this time the first, second, third, sixth, ninth, twelfth and fifteenth causes of action. In the unlikely event the evidence ultimately establishes that the parties never reached a meeting of the minds with respect to the many comprehensive and carefully drafted agreements they entered into, the Court will entertain a motion to reinstate the quasi-contract claims.

As to the alternative request to dismiss or stay this action based on prior action pending, there is no basis to dismiss or stay this action in favor of the pending federal action as there is not a complete identity of parties and requested relief. It is in the interests of judicial economy for all claims between the parties to be resolved in one forum, and defendants' argument that this case should be stayed in favor of the narrower federal action is unpersuasive.

Accordingly, it is hereby

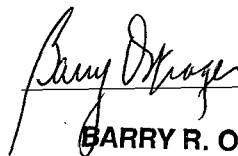
ORDERED that defendants' motion is granted to the extent of severing and dismissing with prejudice the thirteenth and fourteenth causes of action; and it is further

ORDERED that defendants' motion is granted to the extent of severing and dismissing without prejudice the first, second, third, sixth, ninth, twelfth and fifteenth causes of action; and it is further

ORDERED that defendants' motion is denied with respect to the fourth, fifth, seventh, eighth, tenth and eleventh causes of action, and those claims shall continue; and it is further

ORDERED that defendants shall serve their Answer by January 20, 2017, and all parties shall appear for a preliminary conference on Thursday, January 26, 2017 at 9:30 a.m.

Dated: December 19, 2016



J.S.C.
BARRY R. OSTRAGER