

Darabont v AMC Network Entertainment, LLC

2021 NY Slip Op 30693(U)

March 3, 2021

Supreme Court, New York County

Docket Number: 654328/2013

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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FRANK DARABONT, FERENC, INC., DARKWOODS PRODUCTIONS, INC., CREATIVE ARTISTS AGENCY, LLC,

Plaintiff,

- v -

AMC NETWORK ENTERTAINMENT LLC, AMC FILM HOLDINGS LLC, AMC NETWORKS INC., STU SEGALL PRODUCTIONS, INC., DOES 1 THROUGH 10,

Defendant.

INDEX NO. 654328/2013

08/11/2020, 08/11/2020, 08/11/2020, 08/12/2020

MOTION DATE

MOTION SEQ. NO. 023 024 026 027

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 023) 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 876, 877, 878, 879, 880, 957

were read on this motion to PRECLUDE

The following e-filed documents, listed by NYSCEF document number (Motion 024) 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 953, 954, 955, 956, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982

were read on this motion to PRECLUDE

The following e-filed documents, listed by NYSCEF document number (Motion 026) 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 881, 882, 883, 958, 959, 960

were read on this motion to PRECLUDE

The following e-filed documents, listed by NYSCEF document number (Motion 027) 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 884, 885, 886, 887, 888, 889, 961

were read on this motion to PRECLUDE

In these motions, which are consolidated for purposes of this decision and order, the parties seek pretrial rulings with respect to the admissibility of certain testimony and other evidence. The Court will address each motion in turn.

Motion Sequence Number 23

Plaintiffs move to preclude Defendants from offering evidence to suggest that there was no “transaction” between AMC Studios (the copyright owner) and AMC Network permitting the latter to broadcast *The Walking Dead* (“TWD”). Plaintiffs assert that such evidence – suggesting that the transfer of rights was for “administrative convenience” or otherwise – should be precluded because such an informal “transfer” would be prohibited by state and federal copyright law. The import of this debate is an anticipated defense argument that the transfer of rights between related entities does not trigger the Affiliate Transaction Provision (“ATP”) in the parties’ agreements.

The motion is denied. The parties can present evidence as to the underlying facts, and any testimony thereon will be subject to cross-examination. The question whether the parties intended such an internal transfer – however characterized – to fall within the scope of the ATP does not require a determination as to copyright law requirements. To the extent either party believes that jury instructions in this regard would be helpful, the Court will consider them.

Motion Sequence Number 24

Defendants’ Motion Sequence 24 contains several different requests for exclusion of evidence, which the Court will address in turn.

Settlement Communications

First, Defendants argue that the Court should exclude evidence of the months-long negotiations between the parties’ counsel (Mr. Getman for Darabont and Mr. Janowitz for AMC) with respect to the MAGR definition and other items prior to the filing of this lawsuit. Defendants argue that these were quintessential settlement communications, and therefore are inadmissible. In support of their motion, Defendants highlight specific comments made by Mr.

Getman, testifying that his conversations with Mr. Janowitz were settlement negotiations (NYSCEF Doc. No. 780 at pgs. 56:9-57:12; NYSCEF Doc. No. 789 at pg. 487:2-25). In response, Plaintiffs argue, inter alia, that Defendants effectively waived their right to exclude evidence of settlement negotiations by relying on negotiation excerpts in their summary judgment papers (*see e.g.*, NYSCEF Doc. Nos. 422, 484, 485, 654).

CPLR § 4547 and New York case law preclude the introduction of evidence of settlement negotiations to prove the liability or merits of claims (*82 Retail LLC v Eighty Two Condo.*, 117 AD3d 587, 589 [1st Dept 2014]). Specifically, offers of “valuable consideration... or attempting to compromise a claim which is disputed” are inadmissible (CPLR § 4547; *see, e.g., PRG Brokerage Inc. v Aramarine Brokerage, Inc.*, 107 AD3d 559, 560 [1st Dept 2013]). However, communications between the parties that do not include explicit offers or suggestions of offers can be admitted (*see Nineteen Eighty-Nine, LLC v Icahn*, 96 AD3d 603, 606-07 [1st Dept 2012] [admitting communications that did not “present[] any offer or acceptance, of a compromise”] [internal citation omitted]).

Given the nature of the communications at issue, the Court cannot make an across-the-board decision on admissibility. Although litigation-avoidance was part of the backdrop, these arguably were also business negotiations envisioned in the parties’ agreements. Indeed, as Plaintiffs point out, the Defendants themselves submitted certain of the disputed evidence to the Court as part of the briefing on summary judgment motions. Decisions as to whether particular communications were admissible business negotiations or potentially inadmissible settlement communications will have to be made on a case by case basis.

Accordingly, Defendants’ motion to exclude evidence of communications between the parties’ counsel is denied, without prejudice to seeking to exclude specific evidence at trial.

AMC's Total Revenue, Profits, and AMC Executive Compensation

Second, Defendants move to exclude evidence of AMC's total revenue and AMC executives' compensation on the basis that such information is prejudicial and irrelevant. In response, Plaintiffs argue that the relative value of *TWD* to AMC's total revenue is relevant to determining whether the imputed license fee for AMC Network's distribution of *TWD* is "on monetary terms comparable to the terms on which the [AMC] Affiliated Company enters into similar transactions with third part[ies] ... for comparable programs" (NYSCEF Doc. No. 790 ["2010 Agreement"] § 13[d][iii]).

As the First Department held, "the only relevant inquiry [under the ATP] is the monetary terms of [AMC's] transactions with nonparty distributors of comparable programs" (*Darabont v AMC Network Entm't LLC*, 128 AD3d 472, 473 [1st Dept 2015] [emphasis added]). Thus, evidence as to the relative profitability of *TWD* and comparable AMC programs may be relevant to whether and to what extent the monetary terms agreed to with respect to such other programs bears upon.

That logic does not, however, extend to evidence with respect to AMC's *total* revenue. Such evidence is proffered in aid of an argument that AMC Network's "disproportionately large reliance" on revenues from *TWD* would, in an arms' length negotiation with an unrelated third party, give an unaffiliated studio leverage to extract a higher distribution fee. But that misperceives the relevant analysis. The ATP envisions a comparison with the monetary terms of prior or concurrent *AMC transactions* for specific, comparable programs. It does not, by its terms, entitle Plaintiff to the benefit of an expert witness's reckoning of the "fair market value" of *TWD* on a stand-alone basis, based on the leverage AMC Network would or would not have in a hypothetical arms-length negotiation with an unaffiliated studio. The parties could have

negotiated for such a standard, but they opted instead for a more targeted standard based on AMC's own previous transactions. Accordingly, the proffered evidence of AMC's total revenue is irrelevant and therefore inadmissible.

Moreover, there are legitimate concerns that if "evidence of [Defendants'] net worth" is presented, the jury "will use [its] verdicts to express biases against big business" (*State Farm Mut. Auto. Ins. Co. v Campbell*, 538 US 408, 417 [2003]). The risk of prejudice provides an additional ground for excluding such evidence here.

For similar reasons, the evidence as to the total compensation or net worth of AMC executives is inadmissible. Such evidence is irrelevant and unduly prejudicial. However, Plaintiffs may probe as to financial incentives the executive has in connection with the outcome of this litigation. That may include some description of compensation incentives based on AMC revenues. Rulings as to specific testimony will be made at trial, balancing relevance and undue prejudice.

Whether AMC Breached a Duty to Negotiate its MAGR Definition in Good Faith

Defendants seek to exclude evidence that AMC negotiated its MAGR definition in bad faith, in violation of the Season 2 Amendment. In connection with the briefing on Defendants' motion to reargue the Court's summary judgment decision in the 2018 Action (650251/2018), it became clear that "(i) Plaintiffs do not (or no longer) dispute that AMC's MAGR definition is binding and enforceable, without regard to subsequent negotiation, subject to express limitations contained in the agreements (Pl. Op. at 3, 4, 14, 18); (ii) Plaintiffs are not pursuing a claim based on any failure by Defendants to negotiate in good faith the terms of AMC's proffered MAGR definition (Tr. at 36-37)" (*Darabont v AMC Network Entertainment LLC*, 2020 N.Y. Slip Op. 34341[U], 4 [NY Sup Ct, NY Cnty 2020]). Accordingly, it appears this motion is moot.

To the extent Plaintiff nevertheless seeks to admit such evidence at trial, the Court will address objections at that time.

Comic-Con and Deduction of Profit Participation Payments

Defendants move to exclude evidence pertaining to two audit-related claims that Plaintiffs allegedly raised for the first time in their expert reports and opposition to summary judgment: an allegation that Defendants improperly included in the MAGR pool certain expenses associated with Comic-Con, and an allegation that AMC improperly deducted from the MAGR pool profit participation payments made to other profit participants on *TWD*. Defendants argue that the evidence pertaining to these two new allegations should be excluded, because AMC was deprived of the opportunity to take earlier fact discovery (*Gurweitz v City of New York*, 175 AD3d 655, 657-58 [2d Dept 2019]).

As set forth in the Court's recent summary judgment decision in the 2018 Action, Plaintiffs' proposed claims with respect to Comic-Con are either moot (having been corrected) or were outside the scope of the complaint and improperly raised for the first time on summary judgment (*Frank Darabont et al v AMC Network Entertainment LLC, et al*, Index No. 650251/2018, NYSCEF Doc. No. 701 ["S.J. Op."] at 25). Accordingly, evidence with respect to such claims is excluded.

In its revised summary judgment decision, the Court held that "if the 2015 MAGR Definition is the controlling definition of MAGR, Plaintiffs' claim [based on allegedly improper deduction of advances paid to other MAGR participants] cannot be sustained" (*Id.* at 23). Because the question of whether the 2015 MAGR definition is controlling has been reserved for trial, the evidence may be admissible (subject to specific objections raised at trial), even if its

ultimate relevance to the verdict is conditioned upon the jury's finding with respect to the breadth of the MAGR definition.¹

Accordingly, Defendants' motion to exclude evidence pertaining to Comic-Con is granted. Defendants' motion to exclude evidence concerning Plaintiffs' claim with respect to alleged improper deduction of profit participation payments is denied.

Motion Sequence Number 026

Plaintiffs move to preclude Defendants from offering into evidence emails authored by Mr. Darabont while he was working with Defendants on *TWD*. In addition, Plaintiffs move to exclude evidence of CAA's litigation with the Writers Guild of America.

First, Plaintiffs' motion with regards to the Writers Guild of America litigation is moot, since Defendants represented that they will not seek to introduce the WGA lawsuit at trial (NYSCEF Doc. No. 881 ["Defendants' Memo of Law in Opposition"] at 11).

Second, Mr. Darabont's emails are "evidence of unrelated bad acts, the type of propensity evidence that lacks probative value concerning any material factual issue, and has the potential to induce the jury to decide the case based on evidence of [Darabont's] character" (*Mazella v Beals*, 27 NY3d 694, 710 [2016]). The Court is not swayed by Defendants' argument that, absent Mr. Darabont's emails, jurors could speculate as to why Mr. Darabont got fired and infer that AMC fired Mr. Darabont to limit his compensation. The motion to preclude such evidence is granted.

¹ The First Amended Complaint alleges that Defendants improperly diminished the pool of MAGR by deducting profit payments received by Plaintiff Ferenc, Inc. (NYSCEF Doc. No. 792 ["First Amended Complaint"] at ¶ 26[k]), and also alleges that Defendants improperly diminished the pool of MAGR by deducting advances paid to other participants (*id.* at ¶ 26[l]). Therefore, Defendants were given adequate notice per CPLR § 3013 of the "transactions, occurrences, or series of transactions or occurrences, intended to be proved..." (*Cole v Mandell Food Stores, Inc.*, 93 NY2d 34, 40 [1999]).

However, if Plaintiffs were to expressly put at issue AMC's motive for terminating Mr. Darabont, for example by alleging that AMC terminated Mr. Darabont as part of a scheme to deprive him of additional compensation, then the door may be open to such evidence. That determination will be made at trial.

Motion Sequence Number 027

Finally, Plaintiffs move to preclude Defendants from offering or referring to evidence of agreements with other "talent," including AMC Network's contract with Amblin Films for *Crystal Pines*. Plaintiffs argue that these agreements are irrelevant, and that the jury should focus on comparing the monetary terms of AMC's transactions with unaffiliated third-party studios for comparable programs. Defendants contend that they will only introduce the talent agreements to defend against Plaintiffs' implied covenant claims. AMC argues that the talent agreements are proof of AMC's subjective beliefs, and what is thought was standard practice.

Defendants rely heavily on Justice Bransten's comments during oral argument earlier in the case stating that "what AMC thought was standard" is relevant to Plaintiffs' claims that AMC acted in bad faith because those claims "require[] proof of AMC's subjective belief" (NYSCEF Doc. No. 857 ["August 12, 2014 Hearing Transcript"] at 6:20-23). However, by trying to insert these talent agreements into evidence, Defendants are running up against the very argument they present in Motion Sequence Number 025 (*see* NYSCEF Doc. No. 801 ["Defendants' Memo of Law"]).

As the Defendants reminded the Court several times during oral argument, the only relevant inquiry at trial is AMC Network's previous deals with unaffiliated third-party studios (*see also Darabont*, 128 AD3d at 473). The Court does not see a meaningful distinction between the information AMC sought to exclude in Motion Sequence Number 025, and the talent

agreements here. Regardless of whether AMC thought the terms in the talent agreements were “standard,” this case does not require an evaluation of standard industry practices. Plaintiffs’ motion to preclude evidence of Defendants’ talent agreements is granted.²

* * * *

Accordingly, it is

ORDERED that Plaintiffs’ motion to preclude (Mot. Seq. No. 23) is denied; it is further

ORDERED that Defendants’ motion to preclude (Mot. Seq. No. 24) is granted in part; it is further

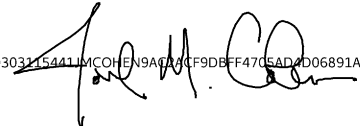
ORDERED that Plaintiffs’ motion to preclude (Mot. Seq. No. 26) is granted; and it is

further

ORDERED that Plaintiffs’ motion to preclude (Mot. Seq. No. 27) is granted.

This constitutes the decision and order of the Court.

3/3/2021
DATE

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JOEL M. COHEN, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE

² The Court will consider at trial whether evidence submitted by Plaintiffs in support of their claim based on the implied covenant of good faith and fair dealing will open the door to evidence – perhaps including the evidence at issue in this motion – as to whether AMC’s MAGR definition was irrational, arbitrary, or developed in bad faith.