

UniLoeb Holdings LLC v Shamus
2023 NY Slip Op 30312(U)
January 30, 2023
Supreme Court, New York County
Docket Number: Index No. 651136/2022
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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UNILOEB HOLDINGS LLC,

Plaintiff,

- v -

GAREB SHAMUS, STEPHEN SHAMUS, ACE UNIVERSE,
INC.,ACE UNIVERSE LLC,ACE OPERATING LLC
(DEFENDANT AND NOMINAL DEFENDANT),
HEROMAKER STUDIOS, INC.,HEROMAKER STUDIOS,
LLC,

Defendant.

INDEX NO. 651136/2022

N/A, N/A, N/A,
N/A, N/A, N/A,

MOTION DATE N/A

001 010 012
013 014 015

MOTION SEQ. NO. 016

**DECISION + ORDER ON
MOTION**

-----X

ACE OPERATING LLC (DEFENDANT AND NOMINAL
DEFENDANT)

Plaintiff,

-against-

LOEB ENTERPRISES II LLC, KATHARINE LOEB

Defendant.

Third-Party
Index No. 595394/2022

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 48, 49, 50, 51, 52, 53, 54, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 317

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR

The following e-filed documents, listed by NYSCEF document number (Motion 010) 180, 181, 184

were read on this motion to/for SEAL

The following e-filed documents, listed by NYSCEF document number (Motion 012) 174, 175, 176, 177, 178, 179, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 306, 307, 308, 309, 310, 311, 312, 313, 314

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 013) 198, 199

were read on this motion to/for _____ SEAL _____.

The following e-filed documents, listed by NYSCEF document number (Motion 014) 211, 212, 213 were read on this motion to/for _____ SEAL _____.

The following e-filed documents, listed by NYSCEF document number (Motion 015) 251, 252, 253 were read on this motion to/for _____ SEAL _____.

The following e-filed documents, listed by NYSCEF document number (Motion 016) 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 302, 303, 304, 305 were read on this motion to/for _____ DISCOVERY _____.

UniLoeb Holdings LLC’s (**UniLoeb**) motion (Mtn. Seq. No. 001) for a preliminary injunction (i) to enjoin Gareb Shamus from participating in operations or management of HeroMaker Studios, Inc. and HeroMaker Studios, LLC (collectively, **HeroMaker**) and (ii) to enjoin Gareb Shamus and Stephen Shamus (collectively, the **Individual Defendants**) from incurring any financial liabilities on behalf of Ace Operating, LLC (the **Company**) must be granted solely to the extent that Gareb Shamus is enjoined from participating in the operations and management of HeroMaker for any purpose other than the winding down of the companies. To the extent that UniLoeb now seeks additional relief based on the “collectibles” in restricting the Shamus’ authority to being permitted to pay ordinary business expenses, such additional relief is not warranted at this time because, among other things, the definition of ordinary business expenses appears to have changed since the papers were originally filed. For the avoidance of doubt, the Shamus’ acquisition of the \$7.2 million grant and allocation of such grant may not have been known to the plaintiffs at the time the motion was filed and, as represented to the Court, (i) was done without required board approval and (ii) the defendants have now sought to inappropriately restrict the plaintiff’s access to information as to what the money specifically was spent on. This is unquestionably information that they are entitled to. Leave is granted to the plaintiff to refile their order to show cause so that the issue can be fully briefed as to the grant and any appropriate

restrictions of the defendants' activities as a result of any unauthorized applications, any misstatements in connection with such applications and any unauthorized use of the proceeds of any such grants.

The Company, Ace Universe, Inc., and Ace Universe, LLC's (collectively, the **Ace Defendants**) motion (Mtn. Seq. No. 012) to dismiss the complaint as against the Ace Defendants must be denied because as discussed below the causes of action are not moot. UniLoeb's claims for breach of the Operating Agreement include claims that the Defendants have failed to provide to UniLoeb the information to which it is entitled, and it can not be disputed that the entirety of this information has not been provided. UniLoeb's claim for an equitable accounting is also not extinguished by the report that the Ace Defendants provided to UniLoeb. As discussed, the defendants simply can not on their own provide information to an accountant who may well take their inputs as assumptions and thus be said to have met their obligations. UniLoeb's motion (Mtn. Seq. No. 016) to compel discovery and to lift the limited stay of discovery on non-parties must be granted.

The motions to seal (Mtn. Seq. Nos. 010, 013, 014, and 15) must be granted pursuant to Part 216 of the Uniform Rules for the Trial Courts because the information that the parties seek to seek contains confidential proprietary business information where the interest in protecting such proprietary information is not outweighed by the public benefit of disclosure.

- I. On a motion for a preliminary injunction, the party seeking the injunction must demonstrate a probability of success on the merits, danger of irreparable harm, and a

balance of equities in their favor (*Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY3d 839, 840 [2005]). UniLoeb seeks to enjoin Gareb Shamus from participating in the operations or management of HeroMaker and to enjoin the Individual Defendants from incurring financial liabilities on behalf of the Company outside the ordinary course of business. UniLoeb has demonstrated that it meets the standards for a preliminary injunction with respect to Gareb Shamus. Counsel for HeroMaker represented on the record (1.30.22) that HeroMaker is winding down their business and that Gareb Shamus consented to the entering of an injunction limiting his activity solely to the winding down of HeroMaker.

UniLoeb is not, however, entitled to a preliminary injunction at this time limit the defendants from incurring financial liabilities outside the ordinary course of business. This is not the irreparable harm that the plaintiffs have identified. The branch of the motion is denied without prejudice and UniLoeb may move by order to show cause for an injunction to address the irreparable harm it faces. To be clear, as discussed on the record (1.30.22), UniLoeb is entitled to information about the collectibles that the Company has purchased in order to determine how the Company's funds are being spent and what the Company's inventory is.

- II. The Ace Defendants move to dismiss the claims for breach of the Operating Agreement and for an equitable accounting, arguing that these claims are now moot. UniLoeb has made requests for information as authorized by the Operating Agreement and not all of the requested information has been provided. The attempt

to dismiss this claim as moot is nothing more than an improper attempt by the Ace Defendants to control the flow of information to UniLoeb. UniLoeb is guaranteed certain information rights pursuant to the Operating Agreement, and the Ace Defendants can not extinguish that right by claiming that they have provided sufficient information. The claim for an equitable accounting is also not properly dismissed. The report provided by the Ace Defendants to UniLoeb is not a complete accounting that UniLoeb is entitled to and the attempt the information in this manner fails. UniLoeb is entitled participate in the selection of the independent accountant given its investment and the assumptions that the accountant has in performing its analysis. The motion is therefore denied.

III. On the record before the Court, it appears that the Defendants willfully failed to comply with certain discovery orders in this case and otherwise spoliated evidence. The Defendants have failed to produce text messages as they were required to do. Among other things, more than a year after a litigation hold was in place, the Defendants exchanged their cell phones and put their text messages beyond the reach of discovery. The Defendants must produce an affidavit describing what searches were conducted and how they sought to retrieve information. Upon receipt of such affidavit, leave is granted to the Plaintiff to bring a motion for spoliation sanctions. The universe of information to which UniLoeb is entitled includes emails in Gareb Shamus' icloud email account and messages in WhatsApp, and these sources must be searched and responsive communications must be produced. UniLoeb is also given leave to move for spoliation sanctions and UniLoeb is entitled to sanctions in the

form of costs and expenses incurred in connection with having to bring this motion. A stay of discovery from non-parties was put in place to avoid potentially costly and duplicative discovery where documents could be obtained from the Defendants. The Defendants cannot use this stay and their own failure to produce to prevent UniLoeb from receiving the discovery to which it is entitled. The stay must therefore be lifted and UniLoeb can seek discovery from non-parties. For completeness, the request for additional time for the depositions of the Individual Defendants is premature at this stage and is denied without prejudice.

- IV. The motions to seal must be granted pursuant to Part 216 of the Uniform Rules for the Trial Courts because the documents sought to be sealed contain confidential and proprietary business information. NYSCEF Doc Nos. 176, 179, 186, 194-196, 201, 204-205, and 216-250 shall remain under seal.

It is hereby ORDERED that the motions are decided as set forth herein; and it is further

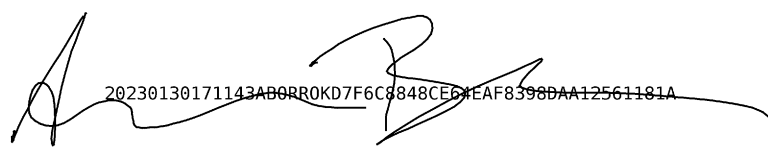
ORDERED that UniLoeb shall provide to the Defendants a proposed accounting for the costs and expenses incurred in bringing the motion to compel; and it is further

ORDERED that if the parties are not able to agree to the amount of costs and expenses owed to UniLoeb in connection with bringing the motion to compel, the parties shall promptly notify the Court (sfc-part53@nycourts.gov) and the matter shall be referred to a JHO or Special Referee; and it is further

ORDERED that the Clerk of the Court is directed, upon service on him of a copy of this order with notice of entry, to seal NYSCEF Doc Nos. 176, 179, 186, 194-196, 201, 204-205, and 216-250 and to separate these documents and to keep them separate from the balance of the file in this action; and it is further

ORDERED that thereafter, or until further order of the court, the Clerk of the Court shall deny access to the said sealed documents to anyone (other than the staff of the Clerk or the court) except for counsel of record for any party to this case and any party; and it is further

ORDERED that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website).



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1/30/2023
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
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"/>
			<input type="checkbox"/>	DENIED	<input type="checkbox"/>
					OTHER
					REFERENCE