SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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FINE CREATIVE MEDIA, INC.

Plaintiff,

- v -

BARNES & NOBLE, INC.,

Defendant.

INDEX NO. 651141/2023

MOTION DATE 03/04/2024

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 40, 41, 42, 43, 44, 45, 46, 52, 53, 54, 55, 57, 59, 60, 61, 62

were read on this motion to DISMISS AMENDED COMPLAINT.

This is, at its core, a breach of contract case. Defendant, Barnes & Noble ("B&N"), and the Plaintiff, Fine Creative Media ("FCM") entered into an agreement under which the parties developed and published an in-house line of certain public domain titles as the "Barnes & Noble Classics" series (the "Production Agreement"). FCM alleges that after Elliott Advisors (UK) Limited acquired B&N in August 2019, B&N ceased making purchases under the Production Agreement, forcing FCM to close its office, lay off employees, and shut down its operations. In its Amended Complaint, FCM seeks over $30 million in damages against B&N.

For the reasons set forth below, B&N's Motion to Dismiss FCM's Amended Complaint is granted in part and denied in part.

BACKGROUND

The Court granted in part and denied in part B&N's prior motion to dismiss FCM's

original Complaint (NYSCEF 1).[1] Specifically, the Court dismissed FCM's breach of fiduciary duty claim, which was premised on a joint venture theory, because among other things FCM failed to allege an agreement to share in the losses of the purported venture (NYSCEF 23 at 7). The Court dismissed FCM's claim for breach of the implied covenant of good faith and fair dealing as duplicative, and dismissed the claims for an accounting (premised on the existence of a fiduciary duty), unjust enrichment, and violations of GOL §§349 and 350 for failure to state legally viable claims. The Court also dismissed FCM's breach of contract claim concerning Section 11 of the Production Agreement because FCM did not allege that B&N terminated the Agreement for cause, which was an express precursor to B&N's royalty obligations under that contractual provision. However, the Court sustained FCM's breach of contract claim concerning Section 8 of the Production Agreement regarding royalties on sales of the B&N Competing Classics because "the language of the agreement does not utterly refute FCM's claims so as to warrant summary dismissal at this stage" (*id.* at 8). Finally, the Court sustained FCM's forward-looking claim for declaratory judgment.

In the Amended Complaint (NYSCEF 31 ["Am. Compl."), FCM essentially has re-pleaded several of the dismissed claims. It repleads the breach of fiduciary duty claim alleging, again, that B&N breached a purported fiduciary duty it owed to FCM as a joint venture partner. FCM has added allegations aimed at strengthening its argument that FCM agreed to share in the losses of a "joint venture" because (1) FCM shared the losses arising from lower prices charged to consumers via promotional discounts, (2) FCM was responsible for all costs of developing and producing the B&N Classics, (3) the parties limited production of certain books by engaging

[1] The Court summarized the underlying facts in its Decision and Order on Mot. Seq. 001 (NYSCEF 22) and assumes the parties' familiarity with those facts.

in regular and frequent discussions, thereby reducing the costs to B&N for unsold books, and (4) the agreement afforded B&N, as opposed to FCM, usually large discounts resulting in a high profit margin on the B&N Classics—such that even if there were some unsold books, B&N would still make a profit on each print run ordered (Am. Compl. ¶¶17-19)

FCM also repleads its breach of contract claim under Section 11 of the contract, alleging that statements made by B&N's counsel suggest that B&N terminated the Agreement for cause based on "quality concerns." FCM reasserts its breach of the implied covenant claim, claiming that while the Agreement affords B&N discretion as to the placement of purchase orders, the B&N acted in bad faith in the exercise of that discretion by contracting with third parties to produce titles included within the "Barnes & Noble Classics" thereby depriving FCM of the fruits of the Agreement. FCM also re-asserts its claims for an accounting.[2] B&N now moves, again, to dismiss all claims.

DISCUSSION

"On a motion to dismiss pursuant to CPLR 3211(a)(1), the defendant has the burden of demonstrating that the documentary evidence conclusively resolves all factual issues and that plaintiff's claims fail as a matter of law" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]). "While a complaint is to be liberally construed in favor of plaintiff on a [CPLR] 3211 motion to dismiss, the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts" (*id*).

In assessing a motion to dismiss under CPLR 3211(a)(7), the Court must give the

[2] FCM's declaratory judgment claim remains unchanged from the original Complaint.

complaint a liberal construction, accept its factual allegations as true, and provide the plaintiff with the benefit of every favorable inference (*Nomura Home Equity Loan, Inc. v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 582 [2017]). But "allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration" (*Kliebert v McKoan*, 228 AD2d 232, 232 [1st Dept 1996]).

A. Fiduciary Duty and Accounting Claims (First and Fourth Causes of Action)

As with the original complaint, FCM's fiduciary duty claim hinges on its assertion that the parties' agreement constitutes a joint venture. Despite its attempt to bolster that claim to address the defects that led to dismissal of the original claim, FCM's claim still fails not because of inartful pleading but because the contract itself simply does not support a viable claim.

A party asserting a joint venture relationship must allege an arrangement involving mutual contribution to the joint undertaking through a combination of property, financial resources, effort, skill or knowledge, a measure of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses (*Slabakis v Schik*, 164 AD3d 454, 455 [1st Dept 2018] [citation omitted]). Although "[a] Joint Venture does not require an *equal* sharing of profits or losses" (*Dundes v Fuersich*, 6 Misc.3d 882, 885 [Sup Ct, NY County 2004]), the obligation to share in some respect must be part of the arrangement.

FCM's citation to older decisions suggesting that the absence of loss-sharing may not in all cases be fatal to a joint venture claim (*P.F.G. Indus., Inc. v Tel-Glass, Inc.*, 49 AD2d 112, 114 [1st Dept 1975]; *Eagle Comtronics, Inc. v Pico, Inc.*, 89 AD2d 803, 804 [4th Dept 1982]; *Penato v George*, 52 AD2d 939, 942 [2d Dept 1976]; *Lab Crafters, Inc. v Flow Safe, Inc.*, No. CV034025SJFETB, 2008 WL 11449206, at *28 [ED NY July 2, 2008]), is unavailing. The First

Department has made clear that the loss sharing requirement may be disregarded only "where the record in a particular case establishes that there was no reasonable expectation of losses" (*Lebedev v Blavatnik*, 193 AD3d 175, 185 [1st Dept 2021]). In reaching that conclusion, the First Department relied upon the Court of Appeals' earlier direction that "[a]n indispensable essential of a contract of partnership or joint venture, both under common law and statutory law, is a mutual promise or undertaking of the parties to share in the profits of the business and submit to the burden of making good the losses" (*id*. at 185–85 [quoting *Matter of Steinbeck v Gerosa*, 4 NY2d 302, 317 [1958]).

As was the case with the original Complaint, this narrow exception does not apply here. B&N and FCM put up capital to begin their business. There was undoubtedly the possibility that the business would fail, and that the initial investments would never be recouped. FCM admits as much in their Amended Complaint, stating that "while B&N agreed to advance to FCM certain monies for initial production costs, these advances were credited against purchase orders and only covered a portion of the expenses incurred by FCM… thus, while B&N bore the risk that it might not recover these advance payments, FCM bore substantial risk that it would not recover significant development and production expenses" (Am. Compl. ¶ 18 [emphasis added]).

FCM alternatively argues, again, that the parties did agree to share losses, which is similarly unavailing. First, FCM alleges that Section 8(e) of the Agreement provides that if certain promotional discounts are offered by B&N to consumers, FCM is required to pay B&N a promotional adjustment. Agreement § 8(e). Citing this provision, FCM alleges it has absorbed hundreds of thousands of dollars in promotional adjustments over the years (Am. Compl. ¶ 19). Second, FCM cite the parties' "agreement to give free promotional copies to B&N of every B&N Classics title printed to help B&N subsidize the cost [of] supplying copies of those B&N

Classics to schools and faculty throughout the country," in order to facilitate and encourage course adoptions (*id.*). Third, FCM alleges that it invested substantial time and resources into developing the B&N Classics and FCM's infrastructure to service the venture long-term, such as FCM leasing more than 5,000 square feet of office space (a third of which was subsidized by B&N), and then hiring a team of full-time employees (Am. Compl. ¶ 12). Fourth, FCM alleges that B&N, with FCM's assistance, was able to limit or, in most instances, eliminate the risk of unsold books, by engaging in regular and frequent discussions with FCM concerning the timing and amounts of purchase orders, as well as proposed production estimates so FCM could meet those orders (*id.* at ¶ 19). Finally, FCM alleges that FCM provided B&N with deep discounts allowing for an extraordinarily high profit margin on the B&N Classics such that even if there were some unsold books, B&N would still make a profit on each print run ordered (*id.*).

However, the fact that certain promotional discounts from B&N to consumers may trigger a requirement by FCM to pay a promotional adjustment is simply a change to the purchase price, not an agreement to share losses. Nor does the fact that FCM bears its own costs of the development and production of the B&N Classics convert this normal supply agreement into a joint venture. The fact that a party bears its own expenses is hardly uncommon in commercial arrangements. It is only when each party bears some responsibility (even if not an equal share) for the venture's *combined* losses that the ingredients for a joint venture may exist. Nor does the fact that the parties discussed the timing and amount of purchases to minimize B&N's risk of loss satisfy the requirement of loss-sharing. Indeed, that simply confirms the point that the risk of loss remained always with B&N, which was unable to return unsold books to FCM. Nor does the fact that FCM offered discounts to B&N demonstrate any sort of cost-sharing between the parties. Accordingly, FMC's amended fiduciary duty claim fails to state a

viable cause of action.

In the absence of a joint venture, there is no fiduciary duty (only a contractual one). Accordingly, FCM's accounting claim, which is premised on the existence of a fiduciary relationship, is also dismissed (*see Adam v Cutner & Rathkopf* 238 AD2d 234, 242 [1st Dept 1997] ["To demonstrate entitlement to equitable accounting, a plaintiff must establish (i) the existence of a confidential or fiduciary relationship between the plaintiff and the defendant and (ii) the defendant's breach of the duty imposed by that relationship with respect to money or property in which the plaintiff has an interest."]).

B. Breach of Contract (Second Cause of Action)[3]

FCM's revised attempt to state a viable claim for breach of Section 11 of the Production Agreement fails. The royalties FCM seeks pursuant to section 11 are only triggered "in the event B&N elects to terminate this Agreement pursuant to Section 11(a)" (Agreement § 11(c)). Section 11(a) provides for termination "[i]f FCM consistently and materially fails to deliver titles hereunder (i) on a timely basis and/or (ii) which meet the Quality Standards set forth in Section 2(b)" (*id.* § 11(a)). FCM again argues that B&N "effectively terminated" the contract by not continuing to make orders for new titles, an argument the Court previously rejected (NYSCEF 22 at 18).

FCM attempts to bolster the allegation of an effective termination for cause by relying on B&N's counsel's statement at oral argument on the motion to dismiss the initial complaint that "[r]ecently Barnes & Noble became displeased and stopped placing new orders for additional

[3] The Court sustained FCM's original claim for breach of Section 8 of the Production Agreement (NYSCEF 23 at 7-8), which is not substantively changed in the Amended Complaint. Defendants do not assert grounds for revisiting the Court's decision. Accordingly, the motion to dismiss that branch of FCM's breach of contract cause of action is denied.

copies of these books," (NYSCEF 21 [Tr Oct. 25, 2023] at 3:4-6). However, that statement does not indicate that B&N terminated the Production Agreement for cause—"effectively" or otherwise.

Moreover, Section 11(a) lays out very specific steps that must occur in order for Termination pursuant to Section 11(a) to have occurred, such as B&N providing FCM written notice detailing a deficiency and then written notice of termination if FCM does not cure (Agreement § 11(a)). Because these steps have not occurred, no termination pursuant to Section 11(a) has occurred. Therefore, the contingent royalty provisions contained in Section 11(c) are inapplicable. Accordingly, the motion to dismiss the branch of the breach of contract claim relating to Section 11 of the Production Agreement is granted.

C. Breach of the Implied Covenant (Third Cause of Action)

FCM's proposed claim for breach of the implied covenant of good faith and fair dealing fails. The Court previously dismissed this claim as duplicative of the breach of contract claims. Here, FCM attempts to differentiate this claim from its breach of contract claim by stating that B&N's improper exercise of discretion "deprive[d] [FCM] of the fruit of its bargain" (*Anexia, Inc. v Horizon Data Sols. Ctr., LLC*, No. 657444/2019, 2022 WL 1195436, at *3 [Sup Ct, NY County 2022]). Specifically, FCM alleges that B&N acted in bad faith and in breach of the covenant by causing third parties to manufacture the B&N Competing Classics titles, instead of placing orders with FCM. FCM goes on to allege that B&N's actions were based on the improper motive of attempting to eliminate FCM.

FCM's assertion that the Agreement affords B&N "discretion" as to the placement of purchase orders does not suffice to impose upon B&N an obligation to continue making orders indefinitely. The Agreement contained a minimum purchase requirement, which was satisfied.

(Agreement § 2(a)). To imply an obligation to continue placing orders beyond the minimum purchase requirement would be to rewrite the parties' contract. As the Court of Appeals has held, "a party who asserts the existence of an implied-in-fact covenant bears a heavy burden, for it is not the function of the courts to remake the contract agreed to by the parties, but rather to enforce it as it exists" (*Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 69 [1978]). Likewise, "the covenant of good faith and fair dealing cannot be construed so broadly as to effectively nullify other express terms of the contract, or to create independent contractual rights." (*Nat'l Union Fire Ins. Co. of Pittsburgh, PA v Xerox Corp.*, 25 AD3d 309, 310 [1st Dept 2006]).

Nor has FCM alleged any facts to suggest that B&N acted in bad faith. At most, FCM alleges that B&N saw an opportunity to pursue a more lucrative opportunity to publish classic books. In the absence of contractual exclusivity, which the parties *could* have included in the contract if that had been their intent, B&N was free to seek out a more lucrative arrangement without running afoul of the implied covenant of good faith and fair dealing.

D. **Declaratory Judgment (Fifth Cause of Action)**

In its motion to dismiss, B&N again argues that FCM's claim for Declaratory Judgment is duplicative of its claim for Breach of Contract. However, as this Court stated in its previous decision sustaining FCM's original claim for Declaratory Judgment, FCM's declaratory judgment claim seeks to define the scope of B&N's obligations going forward. It is thus not impermissibly duplicative of the breach of contract claims (*see Chiykowski v Goldner*, 2020 WL 2834225, at *4 [SDNY 2020] [finding breach of contract and declaratory judgment not duplicative]).

However, Declaratory Judgment claim must be dismissed to the extent it seeks a declaration that "the Agreement requires B&N to pay FCM royalties pursuant to Section 11(c)"

in the future, as the Court has dismissed that claim on the merits. Therefore, the declaratory judgment claim is limited to B&N's alleged breach of Section 8 of the Production Agreement.

Accordingly, it is:

ORDERED that the Defendant's Motion to Dismiss the Amended Complaint is **GRANTED IN PART** as follows: Plaintiff first cause of action for breach of fiduciary duty, third cause of action for breach of implied covenant of good faith and fair dealing, fourth cause of action seeking an accounting, and the branch of the second cause of action for breach of contract and fifth cause of action for declaratory judgment relating to Section 11 of the Production Agreement are **dismissed with prejudice**; the motion is **denied** as to the branch of the breach of contract claim and declaratory judgment claim relating to Section 8 of the Production Agreement; and it is further

ORDERED that Defendant file an Answer within twenty-one (21) days of the date of this Order.

This constitutes the Decision and Order of the Court.

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8/1/2024
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE