

**Duncan-Watt v Rockefeller**

2018 NY Slip Op 30678(U)

April 13, 2018

Supreme Court, New York County

Docket Number: 655538/2016

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL PART 48

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THOMAS DUNCAN-WATT, NEIL GOODING  
PRODUCTIONS PTY LTD., and MATTHEW  
HENDERSON TRADING AS MATTHEW  
MANAGEMENT,

Index No: 655538/2016

Plaintiff,

-against-

JONATHAN ROCKEFELLER f/k/a JONATHAN  
WORSLEY, JWR PRODUCTIONS LLC d/b/a  
JW ROCKEFELLER PRODUCTIONS LLC d/b/a  
ROCKEFELLER PRODUCTIONS, JOEY CREATIVE  
MANAGEMENT PTY LTD., and SHADY  
PINES ENTERTAINMENT LLC,

Defendants.  
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**Masley, J. :**

In motion sequence number 001, defendants move, pursuant to CPLR 327(a) and CPLR 3211(a)(1) and (7), to dismiss the complaint in its entirety. For this motion, the court accepts the facts alleged in the complaint as true.

**Background**

In 2012, plaintiff Thomas Duncan-Watt and defendant Jonathan Rockefeller started discussing the creation of a puppet parody show; Duncan-Watt suggested a parody of the television show "The Golden Girls (Complaint ¶ 38). Rockefeller thought the idea was genius, and after further discussions, Duncan-Watt wrote a show called, "Thank You For Being A Friend" (TYFBAF) (Complaint ¶¶ 38; 40).

In February 2013, TYFBAF debuted in Australia to welcomed praise (Complaint ¶ 43). TYFBAF's success convinced Rockefeller to explore licensing opportunities so he approached Matthew Henderson, principal of plaintiff Matthew Henderson Trading, and

Neil Gooding, principal of plaintiff Neil Gooding Productions Pty Ltd. (collectively, the Producers) about becoming involved in the show's production (Complaint ¶¶ 44-45).

Duncan-Watt and Rockefeller, as licensors, issued a worldwide license for TYFBAF to the Producers, as licensees (the License Agreement) (Complaint ¶ 47).<sup>1</sup> The Agreement allowed the Producers to produce TYFBAF anywhere in the world for a term of five years (Complaint ¶ 48).

The Producers decided to bring TYFBAF to Canada, and the show was a great success (Complaint ¶ 51). After seeing the success of the Canadian production, in 2014, Rockefeller told Duncan-Watt that he regretted issuing a worldwide license to the Producers, because now that he was a Rockefeller, he had the resources to produce TYFBAF without them (Complaint ¶ 55).

In early 2015, Rockefeller informed Duncan-Watt that "his lawyers had identified numerous breaches by the Producers of the License Agreement" (Complaint ¶ 56). Rockefeller suggested that he and Duncan-Watt be prepared with an "improved Golden Girls puppet parody show once the License Agreement was no longer in effect" (Complaint ¶ 56). It is alleged that Duncan-Watt did not question whether the breaches were true and believed what Rockefeller told him (Complaint ¶ 57).

Meanwhile, the Producers prepared to expand TYFBAF to the United States' market, specifically New York, for a 2015 show. The Producers coordinated with Matt Chinn, a booking agent from East Bank Entertainment, regarding the New York production (Complaint ¶ 96). However, on March 4, 2015, the Producers received an

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<sup>1</sup> Although plaintiffs allege that Duncan-Watt and Rockefeller are the licensors, the License Agreement, submitted as documentary evidence here, was entered into by defendant Joey Creative Management Pty Ltd. (Joey Creative) as licensor.

email from an attorney named E.W. Jones, stating that the use of Chinn as an agent was unacceptable (Complaint ¶ 97). Duncan-Watt and the Producers allege that the email, sent from the address [legal@rockefellerproductions.com](mailto:legal@rockefellerproductions.com), was from Rockefeller posing as a fictitious attorney (Complaint ¶¶ 97; 101). Because the License Agreement required that Rockefeller agree to the booking agent, the Producers could not move forward with their plans to bring TYFBAF to the United States without his consent. While the Producers tried to resolve Rockefeller's objection to the booking agent, Duncan-Watt and Rockefeller planned their next script. They decided on another puppet parody of the Golden Girls show called "Goldenish Girls: A Puppet Parody" (GG) (Complaint ¶ 58).

On May 11, 2015, Duncan-Watt and Rockefeller, through his entity JWR d/b/a JW Rockefeller Productions LLC d/b/a Rockefeller Productions, LLC (JWR), entered into a Scriptwriter Agreement (SWA) for the production of GG (*id.*). Under the SWA, JWR employed Duncan-Watt as the scriptwriter for the creation of a 90-minute stage show and ten 3-5 minute webisodes. In return, Duncan-Watt was to receive ten thousand Australian dollars and four percent of Gross Box Office Receipts (Complaint ¶ 59). Pursuant to the SWA, Duncan-Watt was to be credited as a creator and writer of GG on all playbills and on the GG's website (Complaint ¶ 59). JWR reserved its right to terminate the SWA if Duncan-Watt defaulted on any material obligation, provided that JWR give notice of the grounds; Duncan-Watt would then have seven days to cure the default. On June 25, 2015, Duncan-Watt provided Rockefeller with his first draft of the GG script (Complaint ¶ 63).

In January 2016, a Canadian producer, Joseph Patrick, asked the Producers

about bringing TYFBAF to Toronto, Canada (Complaint ¶ 70). Because the Producers were planning a 2015 show in the United States, they exercised their right of first refusal and "handed the licensing rights back to Rockefeller and Duncan-Watt solely in connection with the Toronto production of TYFBAF" (Complaint ¶ 71).

With consent of Duncan-Watt and the Producers, Rockefeller entered into a licensing deal with Patrick for a one-time production of TYFBAF in Toronto (Complaint ¶ 72). Duncan-Watt and Rockefeller agreed to split ten percent of the royalties and profits (*id*). The Producers also authorized Rockefeller to enter into a one-time production of the show in Toronto while splitting two percent of any royalties or profits as required under the Licensing Agreement (Complaint ¶ 73).

On February 1, 2016, JWR entered into a licensing agreement with Patrick for the Toronto Production (Canadian Licensing Agreement) (Complaint ¶ 89). The actual terms of the Canadian licensing deal were unbeknownst to Duncan-Watt and the Producers. Duncan-Watt asked Rockefeller for a copy of the Canadian Licensing Agreement, but encountered resistance with each request (Complaint ¶ 74). After no cooperation from Rockefeller, Duncan-Watt sought help from the Australian Writers' Guild (AWG), who contacted Patrick requesting a copy (Complaint ¶ 75). News of the AWG's request traveled to Rockefeller, prompting an email to Bryant Apolonio, an Industrial Officer of AWG, and the Producers, claiming that Duncan-Watt refused to return his property; that Duncan-Watt is "fraudulently misrepresenting himself, and his business arrangement and license for [TYFBAF]"; that Duncan-Watt misrepresented himself for personal and economic gain; and that Duncan-Watt failed to satisfy an existing debt to Rockefeller or his entities (Complaint ¶ 76).

Duncan-Watt eventually received a copy of the Canadian License Agreement and discovered that the Agreement named JWR as the "Licensor," leaving Duncan-Watt and the Producers with no rights as a licensor (Complaint ¶ 89). Also, the Canadian Licensing Agreement granted Patrick a licensing right for all of Canada, and not just Toronto, and carried a term of three years as opposed to a one-time production (Complaint ¶ 90). Lastly, the Canadian Licensing Agreement left Duncan-Watt and the Producers with no rights to compensation. Instead, the Canadian Licensing Agreement directed all payments and royalties be paid to JWR's account held at The Bank of New York Mellon, N.A (Complaint ¶ 91). It is alleged that, to date, neither Duncan-Watt nor the Producers have received compensation from the Canadian production (Complaint ¶ 93).

In March 2016, after a telephone conference with the Producers, Rockefeller agreed to meet with Chinn in New York to discuss the Producers' plans to produce TYFBAF in New York (Complaint ¶ 103-105). It is alleged that Rockefeller met with Chinn only for an appearance of good faith because Rockefeller was secretly planning to open his own show in New York, "That Golden Girls Show" (TGGS), and wanted to slow down the debut of TYFBAF in order to allow TGGS to enter the New York market first (Complaint ¶ 106).

On June 10, 2016, Rockefeller informed Duncan-Watt that his failure to return property relating to a separate project, involving a book collaboration, constituted grounds for withholding additional updates "despite current, development and imminent plans of 'The Golden-ish Girls'" (Complaint ¶ 66). On June 27, 2016, Rockefeller sent a formal termination notice to Duncan-Watt discharging "all further duties and obligation of

all parties" under the SWA (Complaint ¶67). Rockefeller claimed that he was terminating the SWA because of Duncan-Watt's "failure to deliver work product and other materials specified in the Agreement" (*id*).

In August 2016, a casting call was issued for TGGs, which was slated for a September 19, 2016 to December 11, 2016 run at the DR2 Theatre in New York (Complaint ¶ 106). After its premier, Duncan-Watt and the Producers realized that TGGs's script was "virtually identical to the GG script that was written by Duncan-Watt," including similar plot lines and jokes (Complaint ¶ 112), and similar puppets, scenarios, themes, and plot (Complaint ¶ 113). Duncan-Watt and the Producers learned that TGGs was produced by defendant Shady Pines Entertainment LLC (Shady Pines), a company owned by Rockefeller (Complaint ¶ 35).

Duncan-Watt and the Producers demanded a script of TGGs for comparison. Rockefeller insisted that TGGs and TYFBAF "are 100% different" and that Rockefeller "assiduously differentiated the Australian show from the New York show" (Complaint ¶ 110). Duncan-Watt and the Producers allege that Rockefeller intentionally confused the New York market by selling TGGs tickets on its website while using TYFBAF puppets for promotion and the reviews of TYFBAF from Time Out and other media reviews (Complaint ¶ 25).

Duncan-Watt and the Producers filed this action on October 19, 2016 alleging, thirteen causes of actions.<sup>2</sup> Specifically, they allege: (1) defamation (Duncan-Watt) against all defendants; (2) fraud against JWR, Rockefeller, and Shady Pines; (3) breach of the SWA (Duncan-Watt) against JWR; (4) breach of the covenant of good faith and

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<sup>2</sup> Rockefeller's various companies are co-defendants in the action because they are signatories to the various agreements at issue or were allegedly involved in the production of TGGs.

fair dealing (Duncan-Watt) by JWR; (5) breach of the License Agreement (Duncan-Watt) by Joey Creative and Rockefeller; (6) breach of the covenant of good faith and fair dealing (Duncan-Watt) by Joey Creative and Rockefeller; (7) breach of the License Agreement (Producers) by Joey Creative; (8) breach of the covenant of good faith and fair dealing (Producers) by Joey Creative and Rockefeller; (9) unjust enrichment against JWR, Rockefeller and Shady Pines; and (10) tortious interference with contract against JWR, Rockefeller and Shady Pines. They seek an accounting and a preliminary and/or permanent injunction against all defendants.

Defendants now move to dismiss the complaint.

## DISCUSSION

### FORUM SELECTION CLAUSE/ CHOICE OF LAW

At the outset, defendants seek to dismiss the case based on a forum selection clause in the License Agreement that, in their view, mandates that the case be heard in New South Wales, Australia.

Forum selection clauses are *prima facie* valid because of their “certainty and predictability in the resolution of disputes, particularly those involving international business agreements” (*Brooke Group v JCH Syndicate 488*, 87 NY2d 530, 534 [1996] [citations omitted]). To constitute a mandatory forum selection clause, New York courts require language “binding the parties to a particular forum” (*id.* [holding that the clause there “contain[ed] no such mandatory language binding the parties to a particular forum, but provide[d] only that the underwriters will submit to the jurisdiction of a United States court”]).

The License Agreement’s forum selection clause is permissive, not mandatory.

The License Agreement reads: “[t]he Laws of the State of New South Wales, Australia, apply to this License Agreement. Should a dispute arise out of this Agreement, both parties submit to the jurisdiction of the Courts of New South Wales, Australia.” This forum selection clause does not exclude litigation in other jurisdictions, but instead, provides that the parties consent to the jurisdiction of courts in New South Wales. As in *Brooke Group*, the second sentence of this clause requires both parties to “submit” – or consent – to the jurisdiction of New South Wales, merely permitting litigation in New South Wales. A clause that merely provides that the parties are to “submit” to the jurisdiction of a specific court does not bind the parties to litigate in that jurisdiction; it only requires submission to the authority of that forum if served with process to appear there (*Brooke Group*, 87 NY2d at 534).

The parties also dispute whether, by relying on New York law for this motion, defendants waived their right to enforce the Australian choice-of-law provision contained in the License Agreement. Choice of law clauses are enforced absent a strong showing that the clause is a product of fraud or overreaching, or that enforcement would contravene strong public policy of the forum (*MBIA Ins. Corp. v Royal Bank of Can.*, 28 Misc. 3d 1225[A], 2010 NY Slip Op 51490[U], \*25 [Sup Ct, Westchester County 2010]). The parties may, however, by conduct or consent, waive their choice of law provision by reliance on the law of another state (*Farmers Deposit Bank v Fox*, 2009 NY Slip Op 32470 [U], \*2-3 [Sup Ct, NY County 2009]).

For this motion only, both parties have waived the choice of law provision in the Licensing Agreement by relying solely on New York law in their memoranda of law. Defendants’ footnote, that they are not waiving the choice of law provision by citing New

York law, does not require a contrary finding. The parties have failed to make any effort to explain the law of the New South Wales, as it applies to the claims arising from the Licensing Agreement, or cite any law from that jurisdiction. Thus, the court applies New York law to these claims in reviewing this motion to dismiss (*see Farmers Deposit Bank*, 2009 NY Slip Op 32470 [U] [applying New York law where defendant relies solely on New York law and neither cites nor shows how Kentucky law is applicable despite the contract's choice of law provision]),<sup>3</sup>

### FORUM NON CONVENIENS

Defendants also move to dismiss under CPLR 327(a), *forum non conveniens*, arguing that the parties are residents and citizens of Australia; that the TYFBFAF was conceived of and produced in Australia; and that the License Agreement is governed by Australian law.

CPLR 327(a) permits a court to stay or dismiss an action in whole or in part where "in the interest of substantial justice, the action should be heard in another forum." Dismissal on grounds of *forum non conveniens* is subject to the court's discretion (*Shin-Etsu Chem. Co. v ICICI Bank Ltd.*, 9 AD3d 171, 175 [1st Dept 2004]). Nonetheless, courts must consider: (1) "the burden on the New York courts"; (2) "the potential hardship to the defendant"; (3) "unavailability of an alternative forum in which plaintiff may bring suit"; and (4) that the transaction bear a substantial nexus with New York (*id.* at 176 [internal quotation marks and citations omitted]). The party challenging the forum must show that the litigation would best be adjudicated elsewhere (*see*

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<sup>3</sup> Going forward, however, the law of New South Wales applies to all claims arising from the Licensing Agreement and the parties are required to cite to and explain these laws in any further papers submitted to this court.

*Grizzle v Hertz Corp.*, 305 AD2d 311, 312 [1st Dept 2003]).

Here, defendants have failed to meet their burden. First, defendants have not shown that maintaining the action in New York would be a burden to the New York courts. This court and, in particular, this commercial part, routinely adjudicates complex commercial cases involving domestic and international parties. This court is qualified, by experience and expertise, to adjudicate international legal controversies involving the laws of foreign nations.

Second, defendants have not established a potential hardship for maintaining the action in New York. Rockefeller and Shady Pines, which produced TGGs, are both New York residents and no undue hardship would befall either defendant to defend this suit in their resident state. The same is true with respect to the other defendant entities as each are allegedly controlled by Rockefeller.

Third, defendants must establish that New York possesses no substantial nexus to the challenged transaction and that litigation is best adjudicated elsewhere, and this they cannot do. The alleged breach of the License Agreement and SWA occurred in New York and is caused by defendants' production of TGGs in New York. The SWA, governing various breach of contract claims between Duncan-Watt and Rockefeller, requires that the case be litigated in New York (SWA ¶12 ["Both Scriptwriter and Company agree that the venue for any litigation regarding this Agreement shall be in New York"]); (see *Continental Ins. Co. v Garlock Sealing Tech., LLC*, 23 AD3d 287 [1st Dept 2005] [finding that there is a substantial nexus between the action and New York because the challenged insurance policies there were breached in New York]). The factual issues forming the basis of the alleged breaches are deeply interwoven under

both Agreements and maintaining separate lawsuits on opposite ends of the globe would increase the unnecessary risk of inconsistent judicial rulings.

Finally, although an alternative forum for plaintiffs may exist, this is just one factor to consider, and the substantial nexus to New York, as well as the other factors favoring New York as the appropriate forum, greatly outweigh the fact that plaintiffs could have brought this suit in Australia.

Defendants' motion to dismiss pursuant to CPLR 327(a) is denied.

Motion to Dismiss Standard

On a motion to dismiss under CPLR 3211, "the pleading is afforded a liberal construction. [The court] accept[s] the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). Dismissal, under CPLR 3211(a)(1), is appropriate "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*id.* at 88 [citations omitted]).

Defamation

Duncan-Watt alleges that Rockefeller defamed him by: (1) failing to publicly credit Duncan-Watt as creator and author of TYFBAF during its United States production<sup>4</sup>; (2) claiming to be a creator and author of TYFBAF; and (3) publishing defamatory statements in the public domain. Duncan-Watt also alleges that Rockefeller defamed him in the July 8, 2016 email to AWG by stating that (1) Duncan-Watt "is fraudulently misrepresenting himself, and his business arrangement and license for"

<sup>4</sup> Duncan-Watt is actually referring to TGGS, the alleged counterfeit of TYFBAF.

TYFBAF; and (2) Duncan-Watt's motive is "personal and economic gain to which he is not justly entitled, and which constitutes an abuse of the Guild and its principles" (Complaint ¶130).

To prove defamation, a party must establish "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, ... caus[ing] special harm or constitut[ing] defamation per se" (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999] [citations omitted]). Accordingly, "CPLR 3016(a) requires that 'the particular words complained of...be set forth in the complaint'" (*id.* [citation omitted]).

In claims for defamation, courts analyze whether "the full context of the communication signal[s] . . . of what is being read or heard is likely to be opinion, not fact" (*Gross v New York Times Co.*, 82 NY2d 146, 154 [1993] [internal quotation marks and citation omitted]). To distinguish between fact and opinion, courts consider: "(1) whether the specific language has a precise meaning that is readily understood, (2) whether the statements are capable of being proven true or false, and (3) whether the context in which the statement appears signals to readers that the statement is likely to be opinion, not fact" (*Silverman v Daily News, L.P.*, 129 AD3d 1054, 1055 [2d Dept 2015]). A statement can be treated as an opinion or rhetorical hyperbole "where it is accompanied by other statements that, taken in context, convey to the reasonable reader that something other than an objective fact is being asserted" (*Gross*, 82 NY2d at 155 [internal quotation marks and citations omitted]). For example, in certain contexts, allegations of "blackmail," "fraud," "bribery" and "corruption" can be non-actionable rhetorical hyperbole (*id.*)

Rockefeller's statements do not give rise to a claim for defamation. The dispositive inquiry is "whether a reasonable [reader] could have concluded that [the statements were] conveying facts about the plaintiff" (see *Gross*, 82 NY2d at 152). An objective reader, in view of the full July 8, 2016 e-mail to AWG, would consider Rockefeller's statements as opinion and not fact under *Gross*.

In the email, Rockefeller wrote: "Mr. Duncan-Watt is fraudulently misrepresenting himself, and his business arrangement and license for 'Thank You For Being a Friend' (Canada) to you." Rockefeller further wrote: "I am certain that if the above issues are resolved it would lead to a satisfactory conclusion to your member's (Thomas Duncan-Watt) demands, but unfortunately your member has misrepresented himself, his legal standing and his actions to you and the Writer's Guild for personal and economic gain to which he is not justly entitled, and which constitutes an abuse of the Guild and its principles – not to mention considerable damage to his aspirations and reputation internationally."

This language can be readily understood as a communication of Rockefeller's opinion. Rockefeller's statements reflect his belief that Duncan-Watt is incorrect in his view of the terms of the Canadian Licensing Agreement. Rockefeller bases his statements on his reading of the Agreement and the circumstances that led to its terms. A reasonable recipient in Apolonio's role, enlisted to pressure Rockefeller into providing a copy of the Canadian Licensing Agreement, would view Rockefeller's statement as opinion, and not fact, given the parties' fundamental disagreement on the operative terms of that Agreement. This is also true of the Producers, the other recipients of the

email, as they were well aware of the disagreement between Duncan-Watt and Rockefeller.

In regard to Duncan-Watt's claim that Rockefeller did not publicly credit him, Duncan-Watt fails to identify any false statement attributable to Rockefeller that might satisfy the particularity requirement of CPLR 3016. Accordingly, the claim is dismissed against Rockefeller. Further, Duncan-Watt fails to identify any false statement attributable to defendants JWR, Joey Creative, and Shady Pines, and thus, the claim for defamation is dismissed against those defendants as well.

Fraud

Generally, fraud requires proof of (1) "a material representation of fact"; (2) "knowledge of its falsity"; (3) "an intent to induce reliance"; (4) "justifiable reliance by the plaintiff"; and (5) "damages" as a result of such reliance (*Carlson v American Intl. Group, Inc.*, 30 NY3d 288, 310 [2017] [internal quotation marks and citations omitted]). A party seeking to survive a motion to dismiss under CPLR 3016 (b) must ensure that the circumstances constituting the wrong be stated with sufficient detail (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]).

*Producers*

The Producers claim that Rockefeller, in a bad faith effort to stall the Producers' New York City production and to intimidate, sent them an email from a fictitious attorney objecting to the hiring of Chinn. The Producers further allege that, "by email correspondence on March 23, 2016, all parties to the License Agreement (including, and specifically, Rockefeller) agreed that [the Producers] were 'now in position to power on with the development and planning for the US market' and intended on travelling to

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New York for the specific purpose of attempting to produce TYFBAF in New York City”  
(Complaint ¶ 107).

The Producers have failed to sufficiently plead a cause of action for fraud. First, the Producers fail to state, in sufficient detail, the misrepresentation made in the email from Rockefeller allegedly posing as Jones, their justifiable reliance on any misstatement made in the email, and their damages as a result. The Licensing Agreement required Rockefeller to agree to the booking agent, and this email, whether or not from Rockefeller posing as a fictitious attorney, informed the Producers that Rockefeller did not agree to their selection of Chinn. If the misrepresentation is the allegation that the sender of the email was Rockefeller, and not Jones, the Producers still have not sufficiently pled how they relied on this misrepresentation and their damages, especially when Rockefeller did ultimately meet with Chinn after this initial rejection.

Further, the statements made in the March 23, 2016 email, stating that the parties agreed that they “were now in position to power on with the development and planning for the US market” and that Rockefeller “intended on travelling to New York for the specific purpose of attempting to produce TYFBAF in New York City” also do not give rise to a fraud claim as these quoted statement were not made by Rockefeller, but rather made by Matthew Henderson, who in that email stated, “[b]oth Neil and I will now be in position to power on with the development and planning for the US market” and that he and Duncan-Watt would be in New York if Rockefeller wanted to meet up (see Complaint, exhibit C).

As to Duncan-Watt's claim of fraud, the complaint does not provide any "material representation of fact" by Rockefeller to him. Duncan-Watt alleges nothing beyond conclusory allegations of fraud based on Rockefeller's general conduct. Duncan-Watt merely recites the descriptive elements of fraud into a narrative that reframes every interaction with Rockefeller as necessarily rooted in fraud. This neither satisfies the pleading requirement for fraud nor the specificity requirement of CPLR 3016 (b).

Further, there are no allegations of material representations of fact made by defendants JWR and Shady Pines.

The fraud claims against these defendants are dismissed.

#### Breach of the SWA

Duncan-Watt contends that JWR breached the SWA by: (1) failing to pay Duncan-Watt his commissions under TGGS and TYFBAF; (2) failing to credit Duncan-Watt as a creator and writer of TGGS and TYFBAF; (3) producing and running TGGS without proper notice and compensation; (4) improper termination of the SWA; and (5) failing to provide Duncan-Watt with proper notice of termination and an opportunity to cure.

JWR advances two grounds for dismissal. First, JWR contends that Duncan-Watt failed to specify which contractual provisions were breached. The court rejects this argument as there is no requirement that a plaintiff specify in his or her pleadings the contractual provisions that were breached. Nevertheless, here, plaintiffs do specify the various breaches under the SWA in their complaint (Complaint ¶ 143).

Second, based on documentary evidence, JWR argues that the SWA was properly terminated, precluding any basis for Duncan-Watt's breach of contract claim.

Specifically, JWR relies on an email, dated May 16, 2016, between Rockefeller and Duncan-Watt, and the formal termination letter, dated June 27, 2016.

Under CPLR 3211(a) (1), dismissal is required “only if the documentary evidence submitted utterly refutes plaintiff’s factual allegations and conclusively establishes a defense to the asserted claims as a matter of law” (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 433 [1st Dept 2014] [internal quotation marks and citations omitted]). To prevail on documentary evidence, the proof must “definitely dispose of [the] plaintiff’s claim” (*Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [internal quotation marks and citation omitted]). As the Appellate Division, First Department held, an e-mail can suffice as documentary evidence when it is “essentially undeniable and ... will itself support the ground on which the motion is based” (*Amsterdam Hospitality Group, LLC*, 120 AD3d at 432 [internal quotation marks and citations omitted]).

Neither the May 16<sup>th</sup> email nor the June 27<sup>th</sup> termination letter disposes of Duncan-Watt’s claim. Section 8 of the SWA, titled “Scriptwriter Default”, requires two conditions for proper termination: (1) notice of grounds for default; and (2) seven days to cure. Failure or refusal to “comply with any material terms” of the SWA grants JWR the right to terminate it.

Duncan-Watt’s July 1, 2016 response to the June 27<sup>th</sup> termination letter precludes dismissal. In his response, Duncan-Watt states that he has “been unable to find reference to any legitimate breach of our contract.” Duncan-Watts explains that the June 27<sup>th</sup> termination letter was the first time he was notified of a specific default. Rockefeller’s May 16<sup>th</sup> email does little to refute Duncan-Watt’s assertion. The e-mail

states "I reiterate this is a final warning to cure under your The Golden-ish Girls contract prior to termination," and references an alleged earlier conversation where JWR advised of the default. But JWR attaches no evidence pre-dating the May 16<sup>th</sup> conversation where JWR allegedly first advised of the default. These conflicting documents raise unresolved factual issues that hardly amounts to irrefutable proof. Thus, the documentary evidence fails to "negate[] beyond substantial question" Duncan-Watt's allegation that termination was improper and that the SWA was breached as a result (see *Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 433-434 [1<sup>st</sup> 2014] [the documentary evidence "raise[s] factual issues concerning the circumstances and communications underlying plaintiff's [cause of action]").

Defendants' motion to dismiss this claim is denied.

Breach of Covenant of Good Faith and Fair Dealing<sup>5</sup>

In his fourth and sixth causes of action, Duncan-Watt alleges that JWR, Joey Creative, and Rockefeller breached the covenant of good faith and fair dealing under the SWA and the Licensing Agreement by (1) attempting to terminate the SWA in bad faith; and (2) intentionally stalling and hindering Duncan-Watt's ability to produce TYFBAF in New York so Rockefeller could produce TGGs, causing confusion in the marketplace. In the eighth cause of action, the Producers allege a breach of the covenant of good faith and fair dealing arising from the License Agreement against Joey Creative and Rockefeller. The Producers allege that TGGs destroyed their right to produce TYFBAF in New York.

<sup>5</sup> Because plaintiffs' fourth, sixth, and eighth cause of actions share the same legal theory and are alleged against the same defendants, the court will address the arguments together.

In New York, a covenant of good-faith and fair dealing is implicit in the performance of all contracts (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). The covenant ensures that “neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract” (*id.* at 153 [internal quotation marks and citation omitted]). An implied covenant claim is duplicative of a breach of contract claim where the implied covenant claim arises from the same facts and seeks the same damages as the contract claim (*Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [1st Dept 2010]).

Here, the complaint makes plain that plaintiffs' breach of covenant claims are duplicative of the their breach of contract claims, as they arise from the same facts. In their breach of contract claim, the Producers allege that Joey Creative failed to give the Producers their right of first refusal to produce TYFBAF and that Joey Creative breached their Licensing Agreement by producing TGGS in New York “which has the effect of rendering the rights granted” under their agreement “meaningless” (Complaint ¶ 170). The Producers seek “an amount to be determined at trial, but believed to be in excess of \$1,000,000, exclusive of interest” (Complaint ¶ 171). The Producers' breach of covenant claim is no different (*see* Complaint ¶ 177 [stating Rockefeller's conduct had the effect of destroying and injuring the Producers' rights under the License Agreement]); (*see also* Complaint ¶ 178 [seeking money damages in “an amount to be determined at trial, but believed to be in excess of \$1,000,000, exclusive of interest”).

Duncan-Watt alleges that JWR breached the SWA by failing to pay Duncan-Watt his due commissions, improperly terminating their SWA, and producing TGGS in New

York (see Complaint ¶ 143). Duncan-Watt seeks compensation “believed to be in excess of \$1,000,000, exclusive of interest” (Complaint ¶ 146). The breach of covenant claim is essentially a mirror image of his contract claim (see Complaint ¶ 148 [alleging failure to provide “commissions due Duncan-Watt by fraudulently and illegally seeking to terminate said Agreement, and fraudulently and surreptitiously producing TYFBAF in New York” using a virtually identical Golden Girls puppet parody show]). Further, like the contract claim, the breach of covenant claim seeks compensation “believed to be in excess of \$1,000,000, exclusive of interest” (Complaint ¶ 152). As duplicative, these must fail.

The plaintiff claims also fail against Rockefeller because he is not a party to the SWA or the Licensing Agreement.

Breach of License Agreement as to Duncan-Watt

Duncan-Watt alleges that Joey Creative and Rockefeller breached the License Agreement by (i) failing to pay him royalties for TGGS and the Canadian production of TYFBAF; (ii) failing to credit him as a co-author of TGGS, (iii) producing a virtually identical to TYFBAF and TGGS which rendered Duncan-Watt’s rights in the License Agreement effectively meaningless.

Duncan-Watt has sufficiently alleged the elements for breach of contract as to Joey Creative. However, defendants argue that these claims should be dismissed because Duncan-Watt failed to specify the breached provision<sup>6</sup> and that the License Agreement conclusively disposes of the claim. By Joey Creative’s account, the Agreement explicitly allows Joey Creative, as the sole Licensor, to (1) produce

<sup>6</sup> This line of argument was rejected earlier as without merit.

competing Golden Girls parodies because the Agreement "grants a non-exclusive, narrow license to produce 'the originating production of TYFBAF'" anywhere in the world and (2) the Agreement authorizes Joey Creative to "use and exercise and to permit others to use and exercise [its] reserved rights at any time, *free from any claim or interference by the Originating Producers.*"

The parties dispute whether Duncan-Watt is a "licensor" under the Licensing Agreement. The documentary evidence presented by the parties includes two versions of the Licensing Agreement, one signed on July 12, 2013 by Joey Creative only, identifying Joey Creative as the sole licensor, and the other signed by Joey Creative, the Producers, and Duncan-Watt on November 25, 2013, identifying Joey Creative and Duncan-Watt as the licensors. If anything, this proof supports Duncan-Watt's allegations that he is a licensor under the Licensing Agreement.

Defendants also contend that Duncan-Watt is not a licensor under the Licensing Agreement because Duncan-Watt assigned all his rights in TYFBAF to Joey Creative under a Writer's Assignment Agreement in July 9, 2013 (see NYCEF Doc. No. 19, Exhibit C to Affidavit of Jonathan Rockefeller). However, the Licensing Agreement fully executed on November 25, 2013, after the Writer's Assignment Agreement, identifies Duncan-Watt as a licensor. Further, the Writer's Assignment Agreement defendants rely on is not fully executed. Thus, there is no conclusive proof that Duncan-Watt's rights are assigned to Joey Creative.

Defendants' evidence submitted to dispose of the royalty and credit claims are likewise unavailing. As to royalties, Duncan-Watt is entitled to royalties amounting to five percent of gross weekly box office receipts for the TYFBAF production. The

defendants' documentary evidence must establish that the amount paid constitutes the agreed 5% owed under the Licensing Agreement. Their proof fails to do so as the receipts and checks submitted provide no description for their purpose or context. And crucially, defendants have provided no additional evidence from which the court can confirm that the paid amount reflects the entire 5% owed under the Agreement. Defendants' motion to dismiss this claim is denied.

As to Rockefeller, this cause of action is dismissed. The Licensing Agreement<sup>7</sup> is between Joey Creative and the plaintiffs. While Rockefeller signed on behalf of his entity Joey Creative, he is not a party to the Agreement.

"A cause of action seeking to hold corporate officials personally responsible for the corporation's breach of contract is governed by an enhanced pleading standard. As stated by this Court, Failure to plead in nonconclusory language facts establishing all the elements of a wrongful and intentional interference in the contractual relationship requires dismissal of the action It has been observed that, where the pleading has been sustained ... the complaint has contained allegations that the acts of the corporate officers were done with the motive for personal gain as distinguished from gain to their corporations. The general rule, as we have stated, is that an officer or director is liable when he acts for his personal, rather than the corporate interests. Thus, a pleading must allege that the acts complained of, whether or not beyond the scope of the defendant's corporate authority, were performed with malice and were calculated to impair the plaintiff's business for the personal profit of the defendant.

*(Joan Hansen & Co., Inc. v Everlast World's Boxing Headquarters Corp., 296 AD2d 103, 109–10 [1<sup>st</sup> Dept 2002] [internal quotation marks and citations omitted]).* Duncan-Watt has not met this enhanced pleading standard.

#### Breach of License Agreement as to Producers

The Producers allege that Joey Creative breached the License Agreement by (i) failing to give the Producers the right of first refusal to produce or invest in TYFBAF in

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<sup>7</sup> Both versions of the Licensing Agreement submitted to the court identify Joey Creative as the contracting party, and not Rockefeller as an individual.

New York City; and (ii) failing to give them the right of first refusal to produce or invest in TYFBAF in any geographic location in Canada other than in Toronto.<sup>8</sup> They further alleged that Joey Creative breached the License Agreement by failing to provide the Producers with royalties from TGGS and from the Canadian production of TYFBAF and for producing a TGGS, a virtually identical show to what they were going to produce, rendering the Producers' rights granted by the License Agreement meaningless.

Joey Creative argues that the Producers were not denied of their right of first refusal because the Licensing Agreement grants a non-exclusive narrow license permitting Joey Creative to produce a competing puppet parody of the Golden Girls show. Joey Creative relies on the Licensing Agreement, which it interprets to permit such a production for reasons independent of Producers' right of first refusal. Additionally, Joey Creative proffers documentary evidence in the form of an email purportedly written and sent by Duncan-Watt authorizing Joey Creative to independently produce TYFBAF "in the Territory of Canada," as opposed to just in Toronto.

Whether the alleged breach of the right of first refusal exists depends on whether production of competing parodies is permissible under the Agreement. If so, then Joey Creative is authorized to produce a competing Golden Girls parody without needing to honor the right of first refusal.

Under Section 13 of the Agreement, titled "Reservation of Rights," Joey Creative shall reserve for its use certain rights "other than the rights specifically licensed to Originating Producers." The next sentence then states that Joey Creative's rights

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<sup>8</sup> The court rejects Joey Creative's argument that dismissal is warranted because of plaintiffs' alleged failure to specify the breached provision. As previously stated, there is no requirement that plaintiffs must specify the breached provisions. Further, the allegations contained in the complaint do specify the alleged breaches (Complaint ¶¶ 168-170).

include even "rights [that] are of a competing nature with the rights licensed hereunder." A natural reading of this provision supports one interpretation – Joey Creative's reserved rights do not include "rights specifically licensed to Originating Producers" and the Producers possesses exclusive production rights to TYFBAF. But another interpretation is also plausible, one favored by Joey Creative: the rights include those that compete with the Producers' licensing rights.

The Agreement also bestows creative control on Joey Creative. Section 4 of the Agreement, titled "Preservation of Work's Integrity," endows creative authority on Joey Creative to control and approve of, any proposed changes by Producers to the script for production. The parties dispute whether this creative control includes "first-quality stage" rights. Where questions of fact exist as to the meaning and intent of a document, dismissal is precluded.

The same is true for Joey Creative's attached copies of checks submitted as proof that royalties were paid. The attached checks are deficient for the same reason that the payment to Duncan-Watt failed: neither piece of evidence establishes that the payments constitute the *full* amount due. Accordingly, this cause of action survives the motion to dismiss.

#### Unjust Enrichment

In their ninth cause of action, plaintiffs allege unjust enrichment against JWR, Shady Pines, and Rockefeller. Defendants move to dismiss for failure to state a claim on the basis that the License Agreement governs the dispute.

Unjust enrichment is a quasi-contract claim created in law in the absence of any agreement (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142

[2009]]. The theory of unjust enrichment is “not a catchall cause of action” and will not support claims duplicative of a “conventional contract or tort claim” (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012] [citations omitted]). Here, the unjust enrichment claim against JWR is duplicative of the breach of contract claims against it, and accordingly, is dismissed as to that defendant.

Defendants Rockefeller and Shade Pines are not parties to the License Agreement, and thus, the unjust enrichment claim against them cannot be dismissed as duplicative as defendants assert.

#### Tortious Interference with Contract

Plaintiffs' tenth cause of action is for tortious interference with a contract, against JWR, Shady Pines, and Rockefeller. Specifically, plaintiffs allege that defendants knew TGGS was improperly using the puppets, artwork and reviews of TYFBAF to advertise for TGGS and that defendants induced Joey Creative to materially breach the License Agreement. It is also alleged that JWR, Shady Pines, and Rockefeller knew that TGGS was based entirely on the breached SWA.

Defendants argue that plaintiffs' claim should be dismissed because plaintiffs failed to specify which contractual provisions the defendants allegedly interfered. For reasons previously stated, this argument is without merit.

#### Accounting

Plaintiffs seek an accounting of all royalties and payments earned by the Canadian production of TYFBAF. Defendants move to dismiss for failure to state a claim arguing that the parties did not have a special fiduciary relationship.

The right to an accounting is based on (1) the existence of a confidential or

fiduciary relationship; (2) a breach of the duty imposed by that relationship; (3) regarding property in which the party seeking the accounting has an interest (see *Palazzo v Palazzo*, 121 AD2d 261, 264 [1st Dept 1986]). The claimant must show that there is no adequate remedy at law (see *Unitel Telecard Distrib. Corp. v Nunez*, 90 AD3d 568, 569 [1st Dept 2011]).

Plaintiffs claim for an accounting fails. The Licensing Agreement did not create a special relationship between the parties – fiduciary or otherwise. Conventional licensing agreements recording “routine licensing and royalt[y] rights and obligations” do not create a fiduciary relationship between contracting parties (see *Surge Licensing, Inc. v Copyright Promotions, Ltd.*, 258 AD2d 257, 258 [1st Dept 1999]).

#### Injunctive Relief

Plaintiffs' seek a preliminary and/or permanent injunction for essentially two categories of conduct: (1) prominently displaying notices crediting Duncan-Watt, and disclaiming Rockefeller, as the creator and author of TYFBAF and TGGS in all current and future playbills and promotions; and (2) enjoining defendants from producing TYFBAF or TGGS and any of their derivative iterations anywhere in the United States and the world. Where an adequate remedy at law, namely monetary damages, exists, a permanent injunction will be denied (see *Mini Mint Inc. v Citigroup, Inc.*, 83 AD3d 596, 597 [1st Dept 2011]). Here, the plaintiffs have an adequate remedy at law under the Licensing Agreement. Further, the Scriptwriter Agreement specifically prevents Duncan-Watt from enjoining or restraining in any manner the exhibition or other usage of the show in any manner (see *Scriptwriter Agreement*, §10 [b]).

Declaratory Judgment

Lastly, Duncan-Watt seeks an order declaring that "Duncan-Watt is and always will be the creator and writer of TGGS, TYFBAF, and any derivative or iteration thereof". Defendants move to dismiss because declaratory judgments may only determine questions of law.

CPLR 3001 provides that the court "may render a declaratory judgment having the effect of a final judgment, as to the rights and other legal relations of the parties as to a justiciable controversy whether or not further relief is or could be claimed." The general purpose of a declaratory judgment is to "declare the respective legal rights of the parties based on a given set of facts, not to declare findings of fact" (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 99-100 [1st Dept 2009]).

Here, Duncan-Watt seeks to a declaratory judgment in direct contravention of its general purpose. Duncan-Watt plainly seeks to declare a finding of fact: his authorship of both TYFBAF and TGGS (*see Thome*, 70 AD3d at 100 [explaining that a finding of fact includes an impermissible declaration that an art piece is the authentic work of a particular artist]). Accordingly, defendants' motion to dismiss is granted.

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted and the first, second, fourth, fifth against defendant Jonathan Rockefeller only, sixth, eighth, ninth against defendant JWR Productions LLC only, eleventh, and twelfth causes of action of the complaint are dismissed; and it further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

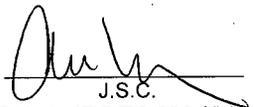
NYSCEF DOC. NO. 64

RECEIVED NYSCEF: 04/16/2018  
Duncan-Watt v Rockefeller, Index No: 655538/2016  
Mot. Seq. No.: 001

ORDERED that counsel are directed to appear for a preliminary conference in  
Room 242, 60 Centre Street, on April 26, 2018 at 10 AM.

Dated: 4/13/18

ENTER:



J.S.C.

**HON. ANDREA MASLEY**