SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Index Number : 600429/2007

KOCH ENTERTAINMENT LP

vs

TROMA ENTERTAINMENT

Sequence Number : 007

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 6/23/10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	E-Filed ~~46-50, 63-64~~, 58-61, 65, 79, 81-82, ~~86~~87
Answering Affidavits — Exhibits _____	
Replying Affidavits & papers on Motion Sequences 009 + 006	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

Dated: 9/27/10

JUSTICE SHIRLEY WERNER KORNREICH
J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X DECISION & ORDER

KOCH ENTERTAINMENT LP,

Plaintiff, Index No. 600429/2007

-against-

TROMA ENTERTAINMENT INC.,

Defendant.

----------X

TROMA ENTERTAINMENT INC.,

Third-Party Plaintiff, Index No. 500469/2007

-against-

KOCH ENTERTAINMENT DISTRIBUTION LLC,
KOCH ENTERTAINMENT GP LLC,
ENTERTAINMENT ONE, LP,
EARL STREET CAPITAL, LTD.,
MARWYN CAPITAL, LLP, and
MARWYN INVESTMENT MANAGEMENT, LLP,

Third-Party Defendants.

----------X

KORNREICH, SHIRLEY WERNER, J.:

Motion Sequences 005, 006 and 007 are consolidated for disposition.

In this action arising from a video and film distribution agreement (Agreement), plaintiff Koch Entertainment LP (Koch) moves for partial summary judgment dismissing the demand for the recovery of lost profits in connection with the counterclaim for breach of contract asserted by defendant Troma Entertainment Inc. (Troma) (Mot. Seq. 007). Koch had also moved to dismiss Troma's counterclaims for unjust enrichment, and declaratory judgment, but Troma's attorney

withdrew those claims at oral argument. Hence, those counterclaims are dismissed on consent. Troma opposes Koch's motion and moves for summary judgment on its counterclaim for breach of contract (Mot. Seq. 005). Koch opposes Troma's motion. Third-party defendants Earl Street Capital LTD (Earl Street) and Entertainment One, LP (Entertainment One) move for summary judgment dismissing the portion of Troma's single third-party claim that seeks damages for breach of contract (Mot. Seq. 006).

Background

On June 2, 2005, Troma, a film and video production company, and Koch Distribution Entertainment LLC (Koch Distribution), the predecessor in interest to plaintiff Koch, entered into an agreement (Agreement). Under the Agreement, Koch Distribution was given the exclusive right to distribute Troma products in the United States and Canada. Koch was obligated to make advances of funds to Troma pursuant to a schedule and to market and distribute Troma's films. The Agreement was for a three-year term, but each year Troma had the option to terminate if Koch failed to achieve gross sales in excess of $5,000,000.00. Troma could exercise the option to terminate for insufficient sales upon written notice three months prior to the end of the year. Koch had the right to terminate pursuant to §13 of the Agreement if Troma were chronically out-of-stock on all or part of its inventory of film titles. Section 9 of the Agreement stated that "each party specifically disclaims any warranty regarding the profitability success or value of any distribution services undertaken hereunder" (Disclaimer).

Toward the end of the first year, Troma wanted to terminate the contract due to insufficient sales by Koch. However, Koch wished to continue the Agreement. On March 28, 2006, Troma and the general partner of Koch, third-party defendant Koch Entertainment GP

LLC, executed an amendment to the Agreement (Amendment). The Amendment extended the Agreement to December 31, 2007 and provided that Koch would advance more money for film production than it had been required to advance under the original Agreement. Pursuant to the Amendment, Koch was required to advance $250,000.00 to Troma on August 5, 2006 (the Advance). Shortly before the Advance was due, Troma was advised by Koch that it would not make the Advance. Troma told Koch that it could not cover its obligations without the Advance. It is undisputed that Koch failed to make the Advance. However, Koch contends that it substantially performed by tendering payments aggregating $90,000 in August to September 2006 and that as of July 31, 2006, Troma owed Koch $193,142.68 (Troma's Balance).

The Agreement and Amendment provided that Koch could recoup its advances at the rate of $30,000.00 per month from the sale proceeds of Troma's films. Schedule A to the Agreement and §4 of the Amendment provided that Koch could recoup "a negative monthly payable balance due to negative sales" from Troma until all advances were fully recouped from "any and all amounts payable to Company [Troma]." Section 6 of the Agreement provided that "negative monthly payable balances due to negative sales and other amounts due Koch are due immediately and not subject to terms." The Agreement does not define "negative monthly payable balances due to negative sales." However, at his deposition, Koch's President, Mr. Rosenberg, admitted that Koch had an option to offset negative balances from any amounts payable to Troma. Advances also were refundable immediately if the Agreement terminated prior to Koch's full recoupment. Koch presents no evidence that Troma's Balance was in fact "a negative monthly payable balance due to negative sales," i.e., an amount that accrued because sales were less than $30,000.00 per month, rather than a balance due from advances that could only be recouped

according to the contractual schedule or in the event of termination.

In the event of a breach, pursuant §13 of the Agreement, the non-breaching party was required to give written notice and afford the breaching party a 30-day opportunity to cure. Koch purported to exercise its right to terminate by issuing a notice of termination dated February 20, 2007, effective March 22, 2007, based upon Troma's alleged failure to maintain sufficient inventory. Troma never exercised its right to terminate.

Koch's complaint contains causes of action for breach of contract and account stated. Troma's breach of contract claim is based upon Koch's failure to make the Advance and to use its best efforts to market and sell Troma's films. Troma's third-party complaint against Earl Street and Entertainment One asserts that they are liable in place of Koch for breach of contract, accounting, unjust enrichment, and declaratory judgment because they assumed Koch's liabilities or, alternatively, on the theory of piercing the corporate veil. As Troma has withdrawn its declaratory judgment and unjust enrichment claims against Koch, in searching the record, the portions of Troma's third-party claim against Entertainment One and Earl Street for declaratory judgment and unjust enrichment are dismissed. CPLR 3212(b).

Discussion

A motion for summary judgment is granted only if no material issues of fact exist. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The moving party must make a *prima facie* showing to that there are no material issues of fact to be tried. *Id.* at 324. Failure to make such a showing requires denial of the summary judgment motion, regardless of the sufficiency of the opposing party's evidence. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993); *see also Bray v Rosas*, 29 AD3d 422 (1st Dept 2006). However, once the movant, meets the initial burden, the

party opposing the motion must establish, through admissible evidence, that there are disputed material issues of fact to be resolved at a trial. CPLR 3212(b); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). The court examines the evidence submitted by the parties in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192 (1st Dept 1997). The court must deny the motion if it has any doubt as to the existence of a material issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Troma's Motion for Summary Judgment on its Counterclaim for Breach of Contract

Troma's motion is based upon Koch's failure to tender the Advance on August 5, 2006. Koch opposes the motion on the grounds that Troma breached before that date due to chronic lack of inventory and because Troma Balance was due on July 31, 2006. Troma disputes that it had insufficient stock and asserts that Koch was required to offset Troma's Balance from the Advance.

Even if Troma did breach the Agreement prior to August 5, 2006, which is question of fact, that would not excuse Koch's failure to pay the Advance because Koch did not give notice of termination and continued to perform. A party's performance under a contract may be excused by a material breach of the other party. *Cipriano v Glen Clove Lodge #1458, B.P.O.E.*, 1 NY3d 53, 63 (2003). However, the non-breaching party "loses an affirmative defense of excuse for breaching a contract ... where the party continues to carry out the contract 'in spite of a *known* excuse for non-performance.'" *Computer Possibilities Unlimited, Inc. v Mobil Oil Corporation*, 301 AD2d 70, 80 (1st Dept 2002). "When a party materially breaches the contract, the non-breaching party must choose between two remedies: it can elect to terminate the contract or continue it." *Awards.com v Kinko's, Inc.*, 42 AD3d 178, 188 (1st Dept 2007). When the non-

breaching party continues to perform, however, it does not waive the right to sue for the alleged breach. *Syracuse Orthopedic Specialists, P.C. v Hootnick*, 42 AD3d 890, 900 (4th Dept 2007); *Albany Medical College v Lobel*, 296 AD2d 701, 702 (3d Dept 2002).

Here, Troma is entitled to summary judgment on liability for breach of contract against Koch. Assuming that Troma breached prior to the time the Advance was due, Koch elected to continue to perform the Agreement and was not excused from its own contractual obligations. Under the Agreement, the non-breaching party was required to give written notice of breach and 30 days for the breaching party to cure. It is undisputed that Koch did not give notice of termination until 2007. It is also undisputed that Koch continued to perform by advancing $90,000.00 in 2006, after the Advance was due. As Koch did not terminate the Agreement prior to August 5, 2006, it was obligated to make the Advance, although it still had the right to sue Troma if it had breached. In sum, Troma is entitled to summary judgment on liability because even if Troma breached, Koch continued to perform with knowledge of the alleged breach and its obligation to make the Advance was not excused.

If Troma committed a material breach as well by failing to have enough stock, or failing to repay advances, Koch can recover damages for those breaches. *Arp Films, Inc. v Marvel Entertainment Group, Inc.*, 952 F2d 643 (2d Cir 1991); *Restatement of the Law2d, Contracts*, The American Law Institute, ©1981, §246.

Koch's Motion for Partial Summary Judgment

Koch's motion seeks partial summary judgment barring Troma from recovering lost profits or limiting the time period for which lost profits are recoverable. Koch contends that: 1) the language of the Disclaimer prohibits recovery of lost profits as a matter of law; 2) the

Agreement is silent on whether the parties could recover lost profits in the event of breach; 3) Troma is not entitled to lost profits because the advances were refundable; and 4) if Troma is entitled to lost profits, they are only recoverable from August 5, 2006 when Koch was to pay the Advance until March 22, 2007, when Koch terminated the Agreement.

Koch's first argument is that the Disclaimer's language prohibits the parties from recovering lost profits. Ambiguity as to the meaning of a contract provision may raise a jury question, but the threshold determination of whether the provision is ambiguous falls within the province of the court. *Innophos Inc. v Rhodia, S.A.*, 10 NY3d 25, 29 (2008). A provision is unambiguous on its face if it is reasonably susceptible of only one meaning. *White v Continental Cas. Co.*, 9 NY3d 264, 267 (2007). It is a basic principle of contract construction that a court should reject an interpretation which renders language in a contract superfluous. *Lawyer's Fund for Client Protection of the State of NY v Bank Leumi Trust Co. of NY*, 94 NY2d 398, 404 (2000).

The court rules that there is no ambiguity and the Disclaimer does not preclude recovery of lost profits. The Disclaimer states that "each party specifically disclaims any warranty regarding the profitability, success or value of any distribution services undertaken hereunder." Koch interprets this provision to mean that the parties agreed that neither party could recover lost profits in the event of a breach. Troma argues that the provision "merely disclaimed that either party was guarantying the other any specific level of profit from the joint undertaking." The Disclaimer on its face is about the level of profits that would flow if the contract were performed. The Disclaimer is silent on remedies for breach and legal consequences of the parties' *failure* to perform. Koch's interpretation must be rejected because it is unreasonable and renders

superfluous the reference to "the distribution services undertaken hereunder."

Koch's second argument is that lost profits are not recoverable because the Agreement is silent on that issue. That is an incorrect statement of the law. Damages for lost profits are denied only if the contract itself does not provide for their recovery "*and no factual issue is otherwise raised*" as to whether the parties intended that they would be able to recover damages due to lost profits. *Brody Truck Rental, Inc. v Country Wide Ins. Co.*, 277 AD2d 125, 125-126 (1st Dept 2000)[emphasis supplied]; *see Hold Bros. v Hartford Ins. Co.*, 357 FSupp2d 651, 657 (SDNY 2005) (interpreting *Brody* to hold that an express provision permitting damages for lost profits is not a prerequisite for obtaining such damages).

Damages in an action for breach of contract are intended to restore the injured party to the position he would have had if the contract had been fully performed. *Brushton-Moira Cent. School Dist. v Fred H. Thomas Associates*, P.C., 91 NY2d 256, 262 (1998). Lost profits are recoverable under this general rule but only if: 1) it is certain that the loss was caused by the breach; 2) the amount of loss is established with reasonable certainty; and 3) the particular damages were fairly within the contemplation of the parties at the time of entering the agreement. *Kenford Co., Inc. v Erie County*, 67 NY2d 257, 262 (1986). In determining the contemplation of the parties at the time of entering the agreement, the nature, purpose, and circumstances of the contract known by the parties should be considered. *Bi-Economy Market, Inc. v Harleysville Ins. Co. of NY*, 10 NY3d 187, 193 (2008).

Here, there is a question of fact as to whether lost profits were in the contemplation of the parties when the Agreement was made. Koch argues that since the advances were not Troma's to keep and were refundable if the Agreement was terminated, lost profits flowing from failure to

pay advances in the first place could not have been within the contemplation of the parties at the time they entered the Agreement. The court does not agree that the fact that advances were refundable means that the parties never contemplated that a breach would occasion a loss of profits. Given the nature, purpose and circumstances of the Agreement, at a minimum, the evidence raises a factual issue as to whether the parties contemplated that Troma would lose profits if Koch failed to make advances or sufficient sales. Although Koch was entitled to recoup advances from the sale proceeds of Troma's products and Troma had to refund advances in the event of termination, that did not relieve Koch from the obligation to make the advances in the first place or while the Agreement was still in force. Koch's sales performance depended on Troma's production of films for distribution, which depended, at least in part, on Koch's advances to finance film production in the first place. The provision giving Troma the right to terminate if Koch failed to achieve gross sales in excess of $5,000,000.00 per year also raises an issue of fact as to whether the parties contemplated that Troma would lose profits if Koch breached its obligations. Hence, Koch's motion for summary judgment dismissing Troma's counterclaim to the extent that it seeks lost profits is denied.

With respect to the period for which lost profits are recoverable, Koch contends that Troma is entitled to damages for lost profits, if at all, only for the period between the date of the alleged breach, August 5, 2006, and the date on which Koch terminated the Agreement, March 22, 2007. Koch maintains that: Troma could not have terminated the Agreement on August 5, 2006 because Koch substantially performed by tendering $90,000.00 in August to September 2006; Troma failed to terminate for Koch's failure to make the Advance and Troma accepted the $90,000.00; the Agreement continued until terminated by Koch on March 22, 2007; and Koch's

termination was justified because Troma was chronically out of stock.

As noted in connection with Troma's motion, when one party breaches, the non-breaching party may elect to perform, rather than terminate, and sue for damages later. *Awards.com v Kinko's, Inc.*, 42 AD3d 178, 188 (1st Dept 2007); *Syracuse Orthopedic Specialists, P.C. v Hootnick*, 42 AD3d 890, 900 (4th Dept 2007); *Albany Medical College v Lobel*, 296 AD2d 701, 702 (3d Dept 2002). The damages a party may recover for breach are those that ordinarily and naturally flow from the breach, are proximately caused by the breach, are certain or capable of ascertainment, and are not remote, speculative or contingent. *Fruition, Inc. v Rhoda Lee, Inc.*, 1 AD3d 124, 125 (1st Dept 2003).

Applying the law to the facts of this case, Troma's failure to terminate when Koch failed to pay the Advance did not limit its recovery of lost profits to the period before Koch's termination as a matter of law. Troma could continue to perform and sue for damages later. All of the damages that proximately flow from a breach are recoverable. The court has already ruled that Koch should have made the Advance, but that there is a question of fact as to whether Troma's failure to have sufficient stock was a breach that justified Koch's termination. If that question of fact is resolved adversely to Koch, then it had no right to terminate and Troma might be able to prove that it lost profits after March 22, 2007.

Lastly, Koch contends that Troma's lost profits are too speculative to be recovered. Damages resulting from the loss of future profits do not have to be established with mathematical certainty. *Ashland Management Inc. v Janien*, 82 NY2d 395, 403 (1993). Troma has presented the affidavit of an economist outlining a theory of damages based upon Koch's earnings experience with other distributors and with Koch that is sufficient evidence to entitle it to prove

damages for lost profits at trial. *See* Herz Aff., Exh. F.

Earl Street and Entertainment One's Motion for Summary Judgement against Troma

Third-party defendants Earl Street and Entertainment One move for summary judgment dismissing Troma's third-party claim for breach of contract. Troma's breach of contract claim against the third-party defendants is a single cause of action that imputes Koch's breach to Earl Street and Entertainment One on the theories that they assumed Koch's liabilities and/or that they are Koch's alter-ego. The third-party complaint alleges that on July 1, 2005, Entertainment One acquired the assets and liabilities of Koch and then sold them to Earl Street in February 2007.

Earl Street and Entertainment One argue that: they were not parties to the Agreement; they did not assume Koch's liabilities; and they did not dominate Koch's activities in a way that would subject them to liability under the theory of piercing the corporate veil.

Entertainment One's motion for summary judgment seeking dismissal of Troma's claim against it is denied. Entertainment One failed to make an evidentiary showing that it did not assume the liabilities of Koch on July 1, 2005. Third-party defendants submit an Annual Information Form, dated March 31, 2006, which shows the corporate structure of Entertainment One Income Fund (the Fund), not Entertainment One. Throop Aff., Exh. E. This is insufficient to demonstrate that Entertainment One did not assume Koch's liabilities.

The third-party defendants have presented evidence that Earl Street did not assume Koch's liabilities in February 2007. They submit a Business Acquisition Agreement between Earl Street and the Fund, which demonstrates that the Fund transferred to Earl Street "securities" in various entities, including a limited partnership interest in Koch. Throop Aff., Exh. A, Sec. 2.1. "A limited partner's interest, like that of a corporate shareholder, is nothing more than an . . . equity

in the partnership or corporation." *Whitley v Klauber*, 51 NY2d 555, 580 (1980). Hence, the third-party defendants have made a *prima facie* case that the Earl Street acquired only an equity interest in Koch and did not assume Koch's liabilities. As Troma has failed to come forward with admissible evidence that Earl Street assumed Koch's liabilities, the court grants summary judgment to Earl Street dismissing the portion of Troma's breach of contract claim to the extent that it alleges that Earl Street assumed Koch's liabilities.

Troma argues, however, that it can pierce Earl Street's corporate veil to hold it liable for Koch's breach. The Court found no mandatory authority applying the veil piercing theory to limited partnerships, but the purpose of the doctrine applies to limited partnerships by analogy. The doctrine allows courts to disregard the corporate form whenever necessary to prevent fraud and hold owners liable for the corporation's obligations. *Morris v State Dept. of Taxation & Fin.*, 82 NY2d 135, 140-141 (1993). "Piercing the corporate veil requires a showing that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked and (2) that such domination was used to commit a fraud against the plaintiff which resulted in plaintiff's injury." *Id.* at 141. Elaborating on the second requirement, the New York Court of Appeals explained that "the party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party." *Id.* at 142.

The third-party defendants argue that even if the doctrine applies to limited partnerships, the breach asserted by Troma against Koch, failure to make the Advance on August 5, 2006, occurred before Earl Street acquired its interest in Koch. Earl Street contracted to buy the interest on February 14, 2007 and the transaction closed on March 29, 2007. However, Troma's third-

party complaint alleges additional breaches of the Agreement that could have occurred after August 5, 2006, including Koch's failure to use its best efforts to market and sell Troma films, which could have occurred after Earl Street bought its interest in Koch. Complaint, ¶¶17-21. Hence, Earl Street has failed to make a *prima facie* case that as a matter of law it cannot be held liable for Koch's breach of the Agreement, and its motion for summary judgment dismissing the portion of Troma's claim against Earl Street based upon piercing the corporate veil is denied.

Accordingly, it is

ORDERED that Koch's motion for partial summary judgment dismissing Troma's counterclaims for unjust enrichment and declaratory judgment is granted on consent and said counterclaims are dismissed with prejudice; and it is further

ORDERED that Koch's motion for partial summary judgment dismissing Troma's breach of contract counterclaim to the extent that it seeks lost profits is denied; and it is further

ORDERED that Troma's motion for partial summary judgement on liability on its breach of contract counterclaim against Koch is granted; and it is further

ORDERED that the motion by third-party defendants, Earl Street and Entertainment One, for summary judgment dismissing Troma's third-party claim for breach of contract against Earl Street and Entertainment One is granted solely to the extent that the portion of Troma's breach of claim seeking to hold Earl Street liable on the theory that it assumed Koch's assets is dismissed, and in all other respects the motion is denied; and it is further

ORDERED that in searching the record, the court dismisses the unjust enrichment and declaratory judgment claims against Earl Street and Entertainment One in Troma's third-party complaint, and it further

ORDERED that the parties are directed to appear for a pre-trial conference on October 21, 2010, at 11 a.m., in Part 54, Room 228 of the courthouse located at 60 Centre Street, New York, NY 10007.

Dated: September 17 2010

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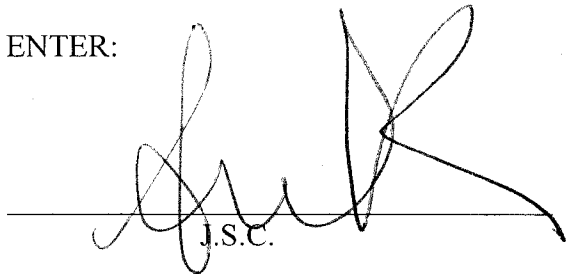

J.S.C.