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DiBella Entertainment, Inc.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DIBELLA ENTERTAINMENT, INC., a New York
corporation

Plaintiff,

- against -

O'SHAQUIE FOSTER,

Defendant.

CASE NO. 21-cv-2709

COMPLAINT WITH JURY DEMAND

Plaintiff DIBELLA ENTERTAINMENT, INC., a New York corporation, by and through its attorneys, as and for its Complaint against Defendant O'SHAQUIE FOSTER, states and alleges as follows:

PRELIMINARY STATEMENT

1. Professional boxers rarely achieve success on talent alone. Almost all boxers work with promoters whose job it is to deal with the tricky logistics of putting on events, paying the substantial costs of bouts, and navigating the many political trappings of the boxing industry, including lobbying the various sanctioning bodies to rate the boxer and thus make the boxer eligible to fight for a world championship. This lawsuit is a direct result of the improper and misguided efforts of an attorney for a boxer to strongarm the boxer's promoter into releasing and

foregoing its substantial investment in the boxer, after the promoter invested in excess of one hundred thousand dollars into the career of the boxer and deftly guided him to a No. 3 world rating. As a result of the promoter's efforts, the boxer is now on the cusp of finally getting a hard-fought and well-lobbied for world title shot, notwithstanding the COVID-19 pandemic, which has hit the boxing industry particularly hard, especially when considering that to date, a live professional boxing event has not taken place in the State of New York since March 2020.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332, in that it is an action between a citizen of the United States and a citizen of another state and the matter in controversy exceeds the sum of \$75,000, exclusive of interest and costs.

3. Venue lies in this District pursuant to 28 U.S.C. § 1391. Among other things, the agreement at issue in this action specifically references and incorporates an exclusive New York forum selection clause.

THE PARTIES

4. Plaintiff DIBELLA ENTERTAINMENT, INC. ("Plaintiff" or "DBE") is a New York corporation with its principal place of business in Sea Cliff, New York. DBE is a boxing promotional company that is owned by International Boxing Hall of Fame promoter, Lou DiBella ("DiBella"). For over two decades, DBE has promoted some of the biggest fights, such as, Wilder vs. Ortiz for the World Heavyweight Championship at Barclays Center, Martinez vs. Cotto for the World Middleweight Championship at Madison Square Garden, and Taylor vs. Pavlik II for the World Middleweight Championship at the MGM Grand in Las Vegas. DBE has also promoted some of the biggest names in the sport, such as, Bernard Hopkins, Jermain Taylor, Deontay Wilder, Micky Ward, Paulie Malignaggi, Andre Berto and Sergio Martinez. Prior to becoming a boxing promoter, DiBella was a long-time key executive in Home Box Office's Sports Division.

5. On information and belief, Defendant O'Shaquie Foster ("Defendant," "Fighter" or "Foster") is a citizen and resident of Texas. Foster is a world class boxer with a professional record of 18-2 (11 KO's) and is currently rated Number 3 in the world by the World Boxing Council in the Junior Lightweight division (130 lbs.).

FACTUAL ALLEGATIONS

6. On or about April 14, 2019, Foster entered into that certain Promotional Rights Agreement (the "PA") dated as of April 1, 2019 with DBE. A true and correct copy of the PA is attached hereto as Exhibit 1.

7. Section 2 of the PA provides that,

[t]his Agreement shall commence on the date of the first Bout under this Agreement ("Commencement"), and shall last for a period of three (3) years, subject to the terms and conditions contained herein ("Term"). Each consecutive one-year period of the Term beginning with Commencement or an anniversary thereof, and subject to Section 7 of this Agreement, is herein referred to as a "Contract Year".

8. Section 3.1 of the PA generally requires DBE to offer to promote Foster in a minimum of 3 Bouts per "Contract Year" for certain specified minimum purses.

9. In return, pursuant to Section 1 of the PA, Foster granted "to Promoter the exclusive, worldwide right to promote Fighter and all professional boxing contests (the "Bouts") to be engaged in by Fighter during the Term (the "Promotion Rights") of this Agreement." Moreover, Section 11 of the PA provides that "Fighter agrees that during the term hereof, Fighter shall not participate in any bouts other than Bouts promoted or co-promoted by Promoter and shall not render his services as a professional boxer, fighter, kick-boxer or paid professional combatant to any person, firm or entity other than Promoter."

10. Foster's first Bout under the PA took place on July 17, 2019. His second Bout took place on December 5, 2019.

11. Before the third Bout could take place, the COVID-19 pandemic hit and boxing as a sport ceased as did all live sporting events.

12. Section 20 of the PA provides, in part, that,

[i]f, because of an act of God or nature, . . . or other abnormal weather/natural conditions, . . . or civil commotion, act of public enemy, enactment, rule, order or act of any government or governmental instrumentality (whether federal, state, local or foreign), . . . or other cause of similar or different nature not reasonably within Promoter's control, Promoter are materially hampered and its normal business operations or the normal business operation of the premises or event sites becomes commercially impractical, then, without limiting Promoter's rights, Promoter shall have the right by giving Fighter notice to suspend the term of this agreement for the duration of any such contingency

13. On March 27, 2020, DBE sent a general e-mail to all of its fighters, including Foster, regarding the pandemic and which stated, in pertinent part, that,

every promotional agreement with DBE contains a force majeure provision, which allows DBE to toll the agreements during any unforeseen occurrence that inhibits the promotion of boxing (generally for no fewer than 60 days). **DBE will be broadly invoking the force majeure provisions across all of its active promotional agreements.** Depending on the duration of the COVID-19 outbreak's impact on sports, and other individual circumstances, the period of tolling may extend longer. As the time frame for boxing to return comes into focus, DBE will reach out to all of its athletes to discuss the implications on each individual athlete.

(emphasis supplied).

14. Furthermore, on July 14, 2020, DBE sent Foster a letter stating, in part, that,

[t]his letter shall serve as **formal notice** pursuant to your promotional contract that DBE is exercising its right under the section of the promotional contract titled Force Majeure **to suspend the Term of the contract** indefinitely: beginning with the start of widespread Covid-19 related closures and until such time that DBE's ability to put on events is not materially impacted and revenue pools are restored, including the ability to sell tickets for admission.

(emphasis supplied).

15. After receiving the above-quoted letter, Foster and his manager, Keith Mills

(“Mills”), kept in regular contact with principals from DBE and never once did they allege or complain that DBE was somehow in breach of the PA for failing to promote Foster’s third Bout by July 16, 2020.

16. On the contrary, the tolling period was defined and agreed to as part of the negotiation for Foster’s most recent Bout. On September 18, 2020, counsel for DBE, Alex Dombroff (“Dombroff”) sent an email to Mills, containing an offer for Foster to fight Miguel Roman on November 19, 2020 and further stating:

[p]ursuant to the tolling notice you were sent on July 14, the promotional right agreement between O'Shaquie and DBE shall be understood to have tolled beginning March 16, 2020, with such tolling period lasting for 6 consecutive months (until September 16, 2020). As a result, the first Contract Year of the promotional agreement will end on January 16, 2021, and the second Contract Year will commence on January 17, 2021. For clarity, the initial Term of the promotional agreement will expire on January 16, 2023, subject to further instances that may cause the Term to extend or be suspended.

17. Foster accepted the offer and the terms contained in the above-quoted email and scored the most significant win of his career in his third Bout for DBE on November 19, 2020. That third Bout took place prior to the end of the first contractual year of the PA, as extended pursuant to Section 15 of the PA to January 16, 2021, and therefore DBE fully satisfied all of its obligations to Foster under the PA, including, its obligation under Section 3.1 to offer to promote Foster in a minimum of 3 Bouts per Contract Year.

18. Section 13 of the PA provides that DBE is entitled to equitable relief in the event Foster breaches the PA. Specifically, it provides that,

Fighter acknowledges that Promoter is investing its time and financial resources in Fighter and that his services as a professional boxer are special, unique, extraordinary, irreplaceable and of peculiar value, and that in the event of Fighter's breach or threatened breach of this Agreement, Promoter would suffer irreparable damage which could not be reasonable or adequately compensated by an action at law. Accordingly, Fighter expressly

agrees that in the event of such breach or threatened breach, Promoter shall be entitled, in addition to all other rights and remedies available to it, to obtain equitable relief, including, but not limited to, an injunction against such breach in any court of competent jurisdiction, and the Fighter will not assert as a defense in any such action that Promoter has an adequate remedy at law.

19. In Section 15.2 of the PA, Foster agreed to indemnify DBE “against any and all liability, cost or expense, including reasonable attorney’s fees, Promoter or its affiliates may sustain or incur as a result of the breach of inaccuracy of any said warranties, representation and covenants.”

20. Finally, Section 27 of the PA requires a party to give the alleged breaching party notice of any alleged breach and an opportunity to cure. Specifically, it provides that,

In order to make specific and definite and/or to eliminate, if possible, any controversy which may arise between the Parties hereunder, Parties agree that if at any time Promoter or Fighter, as applicable, believe that the terms of this Agreement are not being fully and faithfully performed hereunder, Promoter or Fighter, as applicable, will so advise the other in writing by registered or certified mail, return receipt requested, or via confirmed email address, if provided in the “Notices” section below, of the specific nature of any claim, non-performance or misfeasance and the party receiving such notice shall have a period of sixty (60) calendar days after receipt thereof within which to cure such claimed breach.

21. As of December 8, 2020, Foster publicly lauded DBE for the job it had done as his promoter, tweeting “Just found out I’m ranked #4 in the world by the WBC. Thankful to My Team, @loudibella and @WBCBoxing for this opportunity.” (emphasis supplied).

22. Notwithstanding DBE’s July 14, 2020 letter suspending the PA due to the pandemic and the 6 month extension contained in DBE’s September 18, 2020 email offering the terms for Foster’s third Bout, on February 11, 2021, counsel for Foster, Rodney Drinnon, Esq. (“Drinnon”) wrote Mr. Dombroff stating that Foster is not “bound by the Promotional Rights Agreement” because DBE was in breach of the PA for failing to promote Foster in three bouts by July 16, 2020

and that DBE could not suspend the term of the PA due to the COVID-19 pandemic because “[f]orce majeure clauses, as a rule, cannot be used to extend or avoid performance relating to personal services contracts.”

23. In his letter, Mr. Drinnon also improperly tried to strongarm DBE into “release[ing] Foster after receiving this written request” by threatening that “I don’t think DBE would want to challenge this publically [sic] as a defeat would result in the wholesale departure of its remaining stable of fighters.”

24. Foster and his representatives have reaped the benefit of DBE’s hard work, expertise, and investment on Foster’s behalf which has resulted in Foster’s current world ranking and opportunity for a world title shot. Foster now wishes to sever ties with DBE based on the ridiculous argument that DBE is not permitted to suspend the term of the PA due to the shutdown of boxing that occurred worldwide as a result of the COVID-19 pandemic and notwithstanding that Foster failed to notify DBE of such alleged breach and to afford it an opportunity to cure as the PA requires.

COUNT I
BREACH OF CONTRACT

25. Plaintiff repeats and realleges Paragraphs 1 through 22 of the Complaint as though fully set forth herein and incorporates the same by this reference.

26. The PA is a valid and subsisting contract, and DBE has performed all of its obligations thereunder.

27. Foster has repudiated the PA by stating that he is not bound by it. This repudiation constitutes a material breach of the PA.

28. As a direct and proximate result of the breach of contract by Defendant as herein alleged, Plaintiff has suffered damages in an amount to be proven at trial, but believed to be in

excess of Five Hundred Thousand dollars.

COUNT II
BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

29. Plaintiff repeats and realleges Paragraphs 1 through 26 of the Complaint as though fully set forth herein and incorporates the same by this reference.

30. Implied into every contract is a covenant of good faith and fair dealing wherein and whereby the parties agree to act at all times in good faith towards each other.

31. Plaintiff reasonably expected that Defendant would deal with it fairly, equitably, and in good faith.

32. Plaintiff's expectations were brought about and intended by Defendant as a result of, *inter alia*, the language in the PA and by representations made by Defendant.

33. Defendant breached his obligation to act in good faith by repudiating the PA even though (i) he had been duly provided with notice of the suspension in accordance with Section 15 of the PA, (ii) he later agreed to the six-month suspension of the PA in connection with DBE's offer to Foster for his third Bout and (iii) he never complained to DBE that it was in breach nor did he notify DBE of such breach and provide it with an opportunity to cure, as required by Section 27 of the PA. Rather, Foster accepted and participated in an additional bout from DBE on November 19, 2020, while apparently secretly harboring, and not notifying DBE and providing it with the opportunity to cure, such alleged breach as the PA requires.

34. The acts and omissions of Defendant set forth herein were committed in bad faith, intentionally and/or with conscious and reckless disregard of Plaintiff's rights.

35. As a direct and proximate result of Defendant's breach of the implied covenant of good faith and fair dealing, Plaintiff has suffered damages in an amount to be proven at trial, but believed to be in excess of Five Hundred Thousand dollars.

COUNT III
DECLARATORY RELIEF

36. 26. Plaintiff repeats and realleges Paragraphs 1 through 33 of the Complaint as though fully set forth herein and incorporates the same by this reference.

37. Section 20 of the PA gives DBE the right to suspend the term of the PA in the event of a force majeure. DBE properly exercised its right and suspended the PA for six months due to the COVID-19 pandemic (which Foster also later agreed to) and further contends that in any event, DBE is not in breach of the PA for failing to have promoted a third Bout for Foster by July 16, 2020 because, *inter alia*, Foster never notified DBE of such breach and afforded DBE an opportunity to cure per Section 27 of the PA.

38. Foster contends that DBE did not have the right to suspend the term of the PA due to the COVID-19 pandemic and that he was not obligated to notify DBE of such alleged breach and afford it an opportunity to cure.

39. There is an actual controversy between DBE and Foster regarding DBE's rights and obligations under the PA.

40. DBE is entitled to a binding declaration of its rights and obligations under the PA.

COUNT IV
INJUNCTION

41. Plaintiff repeats and realleges Paragraphs 1 through 38 of the Complaint as though fully set forth herein and incorporates the same by this reference.

42. Section 1 of the PA expressly and unambiguously grants to DBE the exclusive right to promote Foster during the term of the PA.

43. In Section 13 of the PA, Foster acknowledged that his services as a fighter were "special, unique, extraordinary, irreplaceable and of peculiar value," and that DBE would suffer irreparable harm if Foster breached the PA and that therefore, DBE "shall be entitled . . . to obtain

equitable relief, including, but not limited to, an injunction against such breach.”

44. Foster has now repudiated the PA because, on information and belief, he intends to fight in bouts that are not promoted or arranged by DBE and are not permitted under the terms of the PA.

45. Foster’s obligation to fight exclusively for DBE under the PA is clear and unambiguous.

46. For the reasons identified above, DBE is without an adequate remedy at law absent an injunction prohibiting Foster from participating in any bouts against any fighter other than in bouts promoted or arranged by DBE under the terms of the PA.

WHEREFORE, Plaintiff prays for judgment against Foster as follows:

(a) On its First Count, Plaintiff requests that the Court award it general and special damages in accordance with proof at trial, together with interest thereon at the legal rate;

(b) On its Second Count, Plaintiff requests that the Court award it general and special damages in accordance with proof at trial, together with interest thereon at the legal rate;

(c) On its Third Count, Plaintiff requests that the Court enter a declaration having the force of a final judgment that Foster remains bound by the PA;

(d) On its Fourth Count, Plaintiff requests that the Court enter a permanent injunction, ordering that Foster is enjoined and restrained from participating in any bouts against any fighter other than in bouts promoted or arranged by DBE under the terms of the PA;

(e) For all costs of suit;

(f) For post judgment interest at the maximum legal rate;

(g) For such other and further relief as deemed just and proper;

- (h) For reasonable attorneys' fees; and
- (i) Plaintiff hereby demands a jury trial for all issues so triable.

Dated March 30, 2021

Respectfully submitted,

/s/ John S. Wirt

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