

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

TRADEMARK PROPERTIES, INC., a) Civil Action No. 2:06-cv-2195-CWH
South Carolina corporation; RICHARD C.)
DAVIS, an individual,)

Plaintiffs,) ANSWER AND COUNTERCLAIMS

vs.)

A&E TELEVISION NETWORKS, a joint)
venture of the Hearst Corporation, ABC,)
Inc. and NBC Universal; DEPARTURE)
FILMS, an entity of unknown origin; and)
DOES 1-20, Inclusive,)

Defendants.)

A&E TELEVISION NETWORKS,)

Counterclaim Plaintiff,)

vs.)

TRADEMARK PROPERTIES, INC. and)
RICHARD C. DAVIS,)

Counterclaim Defendants.)

TO: FRANK M. CISA, ESQ., ATTORNEY FOR PLAINTIFFS:

Defendants A&E Television Networks (“AETN”) and Max Weissman Productions, Inc. d/b/a Departure Films (incorrectly sued, and referred to hereinafter, as “Departure

Films”) respond as follows to the Complaint of plaintiffs Trademark Properties, Inc. (“Trademark”) and Richard C. Davis:

ANSWER

1. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the Complaint.

2. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the Complaint.

3. Defendants deny the allegations contained in paragraph 3 of the Complaint, and aver that AETN is a general partnership duly organized and existing under the laws of the State of New York.

4. Defendants admit the allegations contained in paragraph 4 of the Complaint, except aver that, as noted above, the correct corporate name of Departure Films is Max Weissman Productions, Inc.

5. Paragraph 5 of the Complaint consists of legal conclusions to which no response is required. To the extent a response may be required, Defendants deny the allegations contained in paragraph 5.

6. Defendants deny the allegations contained in paragraph 6 of the Complaint, except admit that, in May 2004, Davis submitted to AETN a proposal for a television show and a rough video, of a kind referred to in the television industry as a “demo tape”; that “Flip This House” (the “Series”) is a popular television series airing on the A&E Network that focuses on buying,

renovating and selling residential properties; and that Trademark and Davis appeared in the first season of the Series.

7. Defendants deny the allegations contained in paragraph 7 of the Complaint, except admit that Plaintiffs submitted the demo tape to AETN and that a meeting took place afterwards.

8. Defendants deny the allegations contained in paragraph 8 of the Complaint, except admit that, in or around June 2004, representatives of AETN and Departure Films met with Davis and other representatives of Trademark.

9. Defendants deny the allegations contained in paragraph 9 of the Complaint.

10. Defendants deny the allegations contained in paragraph 10 of the Complaint, except admit that, as a result of Plaintiffs' refusal to honor the terms they negotiated and agreed to for a second season of the Series, Defendants are producing season two without Plaintiffs' participation.

11. Defendants deny the allegations contained in paragraph 11 of the Complaint, except admit that, on or about June 14, 2004, a meeting took place that included, among others, Charles Nordlander and Thomas Moody on behalf of AETN, Max Weissmann of Departure Films, and Davis and others on behalf of Trademark, at which no agreement was reached on the terms alleged in paragraph 11. Defendants aver that no such agreement was reached at any other time.

12. Defendants deny the allegations contained in paragraph 12 of the Complaint, except admit that, in August 2004, AETN and Departure Films signed an agreement pursuant to which Departure Films produced the Series.

13. Defendants deny the allegations contained in paragraph 13 of the Complaint.

14. Defendants deny the allegations contained in paragraph 14 of the Complaint.

15. Defendants repeat and reallege the answers set forth in the preceding paragraphs 1-14 as though fully set forth herein.

16. Defendants deny the allegations contained in paragraph 16 of the Complaint.

17. Defendants deny the allegations contained in paragraph 17 of the Complaint.

18. Defendants deny the allegations contained in paragraph 18 of the Complaint.

19. Defendants deny the allegations contained in paragraph 19 of the Complaint.

20. Defendants deny the allegations contained in paragraph 20 of the Complaint.

21. Defendants deny the allegations contained in paragraph 21 of the Complaint.

22. Defendants deny the allegations contained in paragraph 22 of the Complaint.

23. Defendants repeat and reallege the answers set forth in the preceding paragraphs 1-22 as though fully set forth herein.

24. Defendants deny the allegations contained in paragraph 24 of the Complaint.

25. Defendants deny the allegations contained in paragraph 25 of the Complaint.

26. Defendants deny the allegations contained in paragraph 26 of the Complaint.

27. Defendants repeat and reallege the answers set forth in the preceding paragraphs 1-26 as though fully set forth herein.

28. Defendants deny the allegations contained in paragraph 28 of the Complaint.

29. Defendants deny the allegations contained in paragraph 29 of the Complaint.

30. Defendants deny the allegations contained in paragraph 30 of the Complaint.

31. Defendants deny the allegations contained in paragraph 31 of the Complaint.

32. Defendants deny the allegations contained in paragraph 32 of the Complaint.

33. Defendants deny the allegations contained in paragraph 33 of the Complaint.

34. Defendants repeat and reallege the answers set forth in the preceding paragraphs 1-33 as though fully set forth herein.

35. Defendants deny the allegations contained in paragraph 35 of the Complaint.

36. Defendants deny the allegations contained in paragraph 36 of the Complaint.

37. Defendants deny the allegations contained in paragraph 37 of the Complaint.

38. Defendants deny the allegations contained in paragraph 38 of the Complaint.

39. Defendants deny the allegations contained in paragraph 39 of the Complaint.

40. Defendants repeat and reallege the answers set forth in the preceding paragraphs 1-39 as though fully set forth herein.

41. Defendants deny the allegations contained in paragraph 41 of the Complaint.

42. Defendants deny the allegations contained in paragraph 42 of the Complaint.

43. Defendants deny the allegations contained in paragraph 43 of the Complaint.

44. Defendants deny the allegations contained in paragraph 44 of the Complaint.

45. Defendants repeat and reallege the answers set forth in the preceding paragraphs 1-44 as though fully set forth herein.

46. Defendants deny the allegations contained in paragraph 46 of the Complaint.

47. Defendants deny the allegations contained in paragraph 47 of the Complaint.

48. Defendants deny the allegations contained in paragraph 48 of the Complaint.

49. Defendants deny the allegations contained in paragraph 49 of the Complaint.

50. Defendants deny the allegations contained in paragraph 50 of the Complaint.

51. Defendants deny the allegations contained in paragraph 51 of the Complaint.

52. Defendants repeat and reallege the answers set forth in the preceding paragraphs 1-51 as though fully set forth herein.

53. Defendants deny the allegations contained in paragraph 53 of the Complaint.

54. Defendants deny the allegations contained in paragraph 54 of the Complaint.

55. Defendants deny the allegations contained in paragraph 55 of the Complaint.

56. Defendants repeat and reallege the answers set forth in the preceding paragraphs 1-55 as though fully set forth herein.

57. Defendants deny the allegations contained in paragraph 57 of the Complaint.

58. Defendants deny the allegations contained in paragraph 58 of the Complaint.

59. Defendants deny the allegations contained in paragraph 59 of the Complaint.

60. Defendants repeat and reallege the answers set forth in the preceding paragraphs 1-59 as though fully set forth herein.

61. Defendants deny the allegations contained in paragraph 61 of the Complaint.

62. Defendants deny the allegations contained in paragraph 62 of the Complaint.

63. Defendants deny the allegations contained in paragraph 63 of the Complaint.

64. Defendants deny the allegations contained in paragraph 64 of the Complaint.

Response to Prayer for Relief

65. Defendants deny that Plaintiffs are entitled to any of the relief requested or to any other relief.

First Affirmative Defense

66. The Complaint fails to state a claim for which relief may be granted.

Second Affirmative Defense

67. The claims contained in the Complaint are barred under the doctrines of waiver, estoppel and laches.

Third Affirmative Defense

68. The claims contained in the Complaint are barred by the doctrine of unclean hands.

Fourth Affirmative Defense

69. Plaintiffs fail adequately to plead their cause of action for fraud with particularity.

Fifth Affirmative Defense

70. Plaintiffs have failed to mitigate any damages that allegedly exist.

Sixth Affirmative Defense

71. Plaintiffs' claim for breach of contract is barred in whole or in part by their non-performance.

Seventh Affirmative Defense

72. Plaintiffs' breach of contract claim is barred due to their consent to, and ratification of, Defendants' conduct.

Eighth Affirmative Defense

73. Plaintiffs' equitable claim for promissory estoppel is barred by the contract between AETN and Plaintiffs, as described in the Counterclaims below.

Ninth Affirmative Defense

74. Any award of punitive damages under the facts alleged in Plaintiffs' Complaint would be in violation of the constitutional safeguards provided to Defendants under the constitutions of the United States of America and the State of South Carolina.

AETN'S COUNTERCLAIMS

Summary of Counterclaims

75. These counterclaims arise out of Richard Davis's failure to honor an agreement that he reached with AETN to participate in a second season of AETN's lifestyle reality show "Flip This House." The central allegations in Davis's complaint bear no relationship to reality because AETN and Davis never made any agreement that remotely resembles the terms he alleges. It has always been understood and agreed by all parties, including Davis and Trademark, that AETN exercises final creative authority over "Flip This House," owns all legal rights in the show, and receives and controls all revenues associated with the show. AETN and Davis reached only one agreement, and Davis broke it. They agreed that Davis would appear in a second season of "Flip This House," with AETN remaining in its position of creative, economic and legal ownership and control. Davis, however, walked away from this agreement without explanation and publicly announced that he was affiliating himself with a competing network. His conduct amounts to breach of contract or, in the alternative, breach of the duty of good faith.

Facts

76. The first season of “Flip This House” was produced under an agreement between AETN and Departure Films, an independent production company, and a separate agreement between Departure Films and Davis. Neither agreement provided Davis with any rights in the show, any control of the show or any compensation. Davis initially did not seek or receive any direct compensation for his participation in the show because he viewed “Flip This House” as a powerful form of advertising for Trademark, which he hoped to expand or franchise on a national basis.

77. “Flip This House” did well in the ratings, leading to a mutual desire among the parties to do a second season. At that point, Davis requested an agreement directly with AETN. Negotiations followed, resulting in a firm agreement (the “Season Two Contract”). The Season Two Contract provided, in relevant part, that Davis would participate as on-air talent in a second season of “Flip This House”; that AETN would continue to own and control the show in every sense; and that Davis for the first time would have the opportunity to receive certain compensation.

78. Davis acknowledged, (a) via email, (b) in phone conversations and (c) through his lawyer, that he had agreed to those terms and all that remained was to prepare and sign a written form of the Season Two Contract.

79. In reliance on Davis’s actions and statements, AETN proceeded to make arrangements for Season Two and actually began taping at AETN’s expense, all in the expectation that Davis would continue to participate as agreed.

80. Davis then refused to finalize a written contract or to explain his reasons for doing so. Instead, he broke off communications with AETN and announced that he would appear instead in similar programming on a competing cable network. AETN was forced to abandon the Season Two episode that it had begun taping, locate new talent and re-start the taping of Season Two.

81. On information and belief, Trademark is Davis's alter ego and under his exclusive personal control. All of Davis's actions relevant to this matter are for all intents and purposes the actions of Trademark, and vice versa.

First Counterclaim: Breach of Contract

82. Defendants repeat and reallege the allegations of the foregoing paragraphs as if fully set forth herein.

83. The Season Two Contract was a fully enforceable legal agreement between AETN, on the one hand, and Davis and Trademark, on the other.

84. The acts of Davis and Trademark, as described above, constitute a breach of that contract.

85. The acts of Davis and Trademark, as described above, have damaged and are damaging AETN in an amount that cannot be ascertained at this time but is in excess of \$75,000.00.

86. By reason of the foregoing, AETN is entitled to recover after trial the damages resulting from the aforesaid acts of breach of contract.

Second Counterclaim: Breach of Duty of Good Faith

87. Defendants repeat and reallege the allegations of the foregoing paragraphs as if fully set forth herein.

88. In the alternative, in the unlikely event that the Season Two Contract was not a fully enforceable legal agreement, then it was a binding preliminary agreement that obligated Davis and Trademark to negotiate in good faith with AETN any remaining open issues in an attempt to reach a final agreement.

89. The acts of Davis and Trademark, as described above, constitute a breach of their duty to negotiate with AETN in good faith.

90. The acts of Davis and Trademark, as described above, have damaged and are damaging AETN in an amount that cannot be ascertained at this time but is in excess of \$75,000.00.

91. By reason of the foregoing, AETN is entitled to recover after trial the damages resulting from Davis's and Trademark's aforesaid acts of breach of duty of good faith.

Prayer for Relief

WHEREFORE, Defendants respectfully request that the Court:

1. Dismiss the Complaint in its entirety with prejudice.
2. On AETN's counterclaims, award AETN damages, in an amount to be determined at trial, arising from Davis's and Trademark's acts of breach of contract and/or breach of duty of good faith.

3. Award AETN and Departure Films their costs, including reasonable attorneys' fees, in this action.
4. Award such other and further relief as the Court deems just and proper.

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August 3, 2006

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Motions for admission *pro hac*
vice to be filed