

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

	x	Index
LINDA PUGACH, et al.		Number <u>17741</u> 2008
- against -		Motion
HBO PICTURES, INC., et al.		Date <u>October 22,</u> 2008
	x	Motion
		Cal. Numbers <u>48, 50, 51</u>
		Motion Seq. Nos. <u>1, 3, 4</u>

The following papers numbered 1 to 26 read on these separate motions by defendants Dan Klores and Shoot the Moon Productions, Inc. (Shoot the Moon), defendant HBO Pictures, Inc. (HBO) and defendant Franklin, Weinrib, Rudell & Vassallo, P.C. (FWRV), to dismiss the amended complaint pursuant to CPLR 3211(a)(1) and (a)(7), and for sanctions.

	<u>Papers Numbered</u>
Notices of Motion - Affidavits - Exhibits.....	1-15
Answering Affidavits - Exhibits.....	16-22
Reply Affidavits.....	23-26

Upon the foregoing papers it is ordered that the motions are consolidated for the purpose of disposition and are determined as follows:

This action arises out of an agreement between plaintiffs and defendant Shoot the Moon, dated May 11, 2004, whereby, in consideration of the payment of the sum of \$2,000, plaintiffs granted Shoot the Moon an option to purchase all rights to their life stories, including any and all motion picture, television, and radio rights, with plaintiffs reserving to themselves print publication rights. The agreement also allowed for an 18-month extension of the original 24-month option period for an additional payment, and included terms governing the exercise of the option, defining the rights granted by such exercise and fixing the compensation due for exercising the option and for various

productions. Shoot the Moon thereafter produced a documentary film, entitled "Crazy Love," based upon plaintiffs' life stories. The documentary was directed by defendant Dan Klores, the president of Shoot the Moon. Subsequently, in 2007, Shoot the Moon entered into an agreement with defendant HBO for the production of a television film.

Although the motion by defendants Shoot the Moon and Klores initially addressed the original complaint herein, plaintiffs subsequently served and filed an amended complaint. Inasmuch as defendants had not yet answered, and their time to do so was extended by moving to dismiss, plaintiffs were entitled to amend the complaint as of right. (CPLR 3025[a]; see, Johnson v Spence, 286 AD2d 481 [2001]; STS Mgt. Dev. v New York State Dept. of Taxation & Fin., 254 AD2d 409 [1998]; Miller v General Motors Corp., 99 AD2d 454 [1984], affd 64 NY2d 1081 [1985].) Defendants Shoot the Moon and Klores have submitted further papers requesting that their motion to dismiss be treated as being directed to the amended complaint, and it will be so considered. (See, Sage Realty Corp. v Proskauer Rose LLP, 251 AD2d 35, 38 [1998].) Plaintiffs have fully argued the issues with regard to the amended complaint.

On a motion to dismiss the complaint for failure to state a cause of action (CPLR 3211[a][7]), the focus is on whether a plaintiff has a cause of action. (See, Cron v Hargro Fabrics, 91 NY2d 362, 366 [1998]; Leon v Martinez, 84 NY2d 83, 87-88 [1994]; Guggenheimer v Ginzburg, 43 NY2d 268 [1977].) The court must liberally construe the pleading and determine whether it states any legally cognizable cause of action. (Id.) Neither bare legal conclusions nor factual claims which are flatly contradicted by documentary evidence, however, will be given the benefit of the presumption of truth or the favorable inferences otherwise accorded the factual allegations of a complaint on a CPLR 3211(a)(7) motion. (See, Smith v Meridian Tech., Inc., 52 AD3d 685 [2008]; Peter F. Gaito Architecture, LLC v Simone Dev. Corp., 46 AD3d 530 [2007].) Where evidentiary material is submitted in support of a motion to dismiss for failure to state a cause of action, dismissal is warranted where the evidence conclusively establishes that a material fact alleged by a plaintiff is not a fact at all and that the plaintiff has no cause of action. (See, Guggenheimer, 43 NY2d at 275; Kelly v Schwend, 15 AD3d 450 [2005]; Allstate Ins. Co. v Raguzin, 12 AD3d 468 [2004].) Similarly, a motion to dismiss pursuant to CPLR 3211(a)(1) on the ground that a defense is founded upon documentary evidence will succeed when the documentary evidence upon which the motion is predicated refutes all factual allegations and definitively disposes of a plaintiff's claim as a matter of law. (See, Goshen v Mutual Life Ins. Co. of New York, 98 NY2d 314, 326 [2002]; Montes Corp. v Charles Freihofer Baking

Co., 17 AD3d 330 [2005]; see also, Allstate Ins. Co., 12 AD3d at 469.)

Contrary to the premise of the first cause of action for a declaration regarding the ownership rights of the feature film and movie rights to Crazy Love, the documentary evidence and plaintiffs' own admissions establish that defendant Shoot the Moon exercised its option to purchase plaintiffs' life stories under the agreement and paid the compensation required by the agreement for the exercise of the option. While providing that the option be exercised by notice given during the option period, the agreement further provided that the option would "be deemed exercised upon commencement of principal photography of any motion picture version" of the life stories during that option period. Not only was principal photography commenced but the documentary film produced by Shoot the Moon was completed before the end of the option period. In addition, the compensation payable under the agreement for the exercise of the option and "as full and complete consideration for all rights granted" to Shoot the Moon thereunder was \$50,000 less the payment for the option. Plaintiffs admittedly received such a payment from Shoot the Moon. Though additional payments were contemplated if the production was produced "for initial exhibition by means of a general theatrical release (other than as a documentary production...)," the agreement specifically stated "for the avoidance of doubt" that plaintiffs would not be entitled to any other payments for the initial production if it was a documentary production.

To the extent plaintiffs may be asserting that Shoot the Moon had to separately exercise its option, and tender a separate payment therefor, to obtain the rights to produce a feature film or movie subsequent to the documentary, such an argument is refuted by the unambiguous terms of the agreement. A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. (Van Kipnis v Van Kipnis, ___ NY3d ___, 2008 NY Slip Op 9862, *4 [2008]; Greenfield v Philles Records, 98 NY2d 562 [2002].) Having exercised its option under the agreement, Shoot the Moon also had the right under paragraph 18 of the agreement to assign the agreement and all or any part of its rights thereunder to HBO. Although plaintiffs may be entitled to further compensation under paragraph 8(c) of the agreement if Shoot the Moon or HBO "produces a theatrical remake or sequel" to the documentary based on plaintiffs' life story, such compensation would not be payable until 15 days following completion of principal photography of the remake or sequel, and this provision does not affect the claims in the complaint. Thus, the allegations of the first cause of action are conclusively refuted and the first cause of action is dismissed. It is declared

that Shoot the Moon acquired the rights set forth in the agreement to plaintiffs' life stories, and that any assignment of those rights to HBO was permitted under the agreement.

The second cause of action alleges that plaintiffs were fraudulently induced to enter into the agreement by representations by defendant Klores that he intended to produce a feature film when, in fact, he intended to produce a documentary film. It is also alleged that defendant FWRV aided and abetted defendant Klores by not furnishing plaintiffs with notice of his fraud and not making certain that the agreement was read to plaintiff Linda Pugach, who is blind. Plaintiffs have not alleged that plaintiff Burt Pugach did not read the agreement or that the agreement was not read to or summarized for plaintiff Linda Pugach. Nor do plaintiffs claim that they were not aware of the terms of the agreement or that they did not know the agreement granted Shoot the Moon, if it exercised the option, "any and all rights" to their stories including "any and all motion picture, television [and] radio" rights.

An essential element of a cause of action for fraud is the justifiable reliance of one party on the misrepresentation of another party. (See, Lama Holding Co. v Smith Barney Inc., 88 NY2d 413, 421 [1996]; Shovak v Long Is. Commercial Bank, 50 AD3d 1118, 1120 [2008].) Here, plaintiffs allege that they relied on an oral representation by Klores that he would make a feature film, but the provisions of the contract clearly allow Shoot the Moon to make a documentary or any other form of motion picture or television production. Due to this meaningful conflict between the alleged oral misrepresentation and the particular provisions of the written agreement, plaintiffs could not, as a matter of law, reasonably rely on the alleged misrepresentation. (See, Old Clinton Corp. v 502 Old Country Rd., LLC, 5 AD3d 363 [2004]; Sulaiman Corp. v Asian Am. Food Corp., 285 AD2d 499 [2001]; Stone v Schulz, 231 AD2d 707, 708 [1996]; A-Pix, Inc. v SGE Entertainment Corp., 222 AD2d 387, 389-390 [1995]; Bango v Naughton, 184 AD2d 961 [1992]; see also, Champion Mtg. Co. v Elmore, 5 AD3d 140 [2004].) Absent the elements of a cause of action for fraud against defendants Klores and Shoot the Moon, it follows that there can be no claim against defendant FWRV for aiding and abetting them in committing a fraud. (See, Cash v Titan Fin. Servs., Inc., ___ AD3d ___, 2009 NY Slip Op 493, *2 [2d Dept 2009]; National Westminster Bank USA v Weksel, 124 AD2d 144, 149 [1987].)

The allegations by plaintiffs concerning the inability of plaintiff Linda Pugach to read the agreement due to her blindness do not change the result. As stated previously, it is alleged only

that defendants did not ensure that the agreement was read to Linda Pugach, not that she did not have it read to her, and it is not asserted that Linda Pugach did not have knowledge of the terms of the agreement. In any event, it has long been established that where a party to a contract can read the document, not to have read it was gross negligence, and if the party could not read it, "not to procure it to be read was equally negligent." (Pimpinello v Swift & Co., 253 NY 159, 162-163 [1930]; see, Freda v McNamara, 254 AD2d 251, 253 [1998]; Sofio v Hughes, 162 AD2d 518, 520 [1990].) This is not an instance where it is claimed that defendants or a third party misread or misrepresented the contents of a writing to a plaintiff who was unable to read the document. (See, Cash, 2009 NY Slip Op at *3; Sofio, 162 AD2d at 521; Albany Med. Ctr. Hosp. v Armlin, 146 AD2d 866 [1989]; cf., Pimpinello, 253 NY at 164; Fuentes v Aluskewicz, 25 AD3d 727 [2006].) In fact, plaintiffs specifically state that defendants did not read the agreement to Linda Pugach but merely mailed it to plaintiffs for execution. The alleged misrepresentation did not involve the contents or true nature of the document but the intent of defendant Klores. Even if it were alleged that Linda Pugach was unaware of the terms of the agreement, since defendants did not prevent her from having the agreement read to her and did not misrepresent the contents thereof, any misapprehension by Linda Pugach would be due to her own gross negligence in failing to make a reasonable effort to have the document read to her. (See, Gillman v Chase Manhattan Bank, N.A., 73 NY2d 1, 11 [1988]; Pimpinello, 253 NY at 162-163; Freda, 254 AD2d at 253.) Accordingly, the second cause of action is dismissed.

The third cause of action against defendant FWRV is insufficient as a matter of law and is dismissed. It is undisputed that defendant FWRV represented defendants Klores and Shoot the Moon in the preparation and drafting of the subject agreement with plaintiffs. Absent an attorney-client relationship between plaintiffs and FWRV, plaintiffs' claim of legal malpractice against FWRV cannot be sustained. (See, Tawil v Wasser, 21 AD3d 948 [2005]; Andino v Samenga, 287 AD2d 425 [2001]; DeFalco v Cutaia, 236 AD2d 358 [1997]; see also, Overgard v Hobbs, 41 AD3d 680 [2007].) As counsel for Klores and Shoot the Moon, FWRV owed no separate duty to ensure that the agreement was read to Linda Pagach. (See, Pimpinello, 253 NY at 162-163; Freda, 254 AD2d at 253; Sofio, 162 AD2d at 520.) Nor, as determined above, is there any basis for a claim that FWRV participated in any fraudulent acts for which the firm could be held liable to plaintiffs. (See generally, Harder v McGinn, 58 NY2d 663 [1982], affg 89 AD2d 732 [1982]; Tawil, 21 AD3d at 948.) Moreover, a claim predicated on Judiciary Law § 487 will not lie when the alleged wrongful acts occurred as part of contract drafting and execution; the statute

applies only to conduct by an attorney during an action pending in court. (See, Tawil, 21 AD3d at 949; Henry v Brenner, 271 AD2d 647 [2000]; Gelmin v Quicke, 224 AD2d 481 [1996].) In addition, an alleged violation of a disciplinary rule does not, in itself, give rise to a cause of action. (See, Schwartz v Olshan Grundman Frome & Rosenzweig, 302 AD2d 193, 199 [2003]; Swift v Ki Young Choe, 242 AD2d 188, 192 [1998]; Cronin v Scott, 78 AD2d 745, 746 [1980].)

For the reasons stated above in dismissing the first and second causes of action, the fourth and fifth causes of action, which are based on the theory that Shoot the Moon did not exercise the option and obtain the film rights it allegedly assigned to HBO, must also be dismissed.

Although the complaint contains no allegations or claims involving the provisions of Executive Law § 632-a that govern the disbursement to crime victims of funds representing profits from a crime, plaintiffs, whose life stories center on the crime which Burt Pugach was convicted of perpetrating against Linda Pugach, have raised the statute in their opposition papers. However, the obligations imposed by, and the procedures and remedies provided for, in section 632-a are not relevant to the issues herein. The court also notes that plaintiffs and defendants have included in their papers assertions and materials which are extraneous to the motions before the court. All requests for sanctions are denied.

Dated: February 19, 2009

J.S.C.