

**Navarone Productions, N.V. v HSBC Gibbs Gulf
Insurance Consultants Limited**

2008 NY Slip Op 33480(U)

December 29, 2008

Supreme Court, New York County

Docket Number: 600707/04

Judge: Herman Cahn

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

PRESENT: Cahn
Justice

PART 49m

Navarone Productions,

INDEX NO. 600-107/04

- v -

MOTION DATE _____

HSBC Gibbs et al

MOTION SEQ. NO. 007

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

DEC 31 2008

COUNTY CLERKS OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN FOOTNOTED CASES**

Dated: 12/29/08

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

-----X
NAVARONE PRODUCTIONS, N.V., :
Plaintiff, :

-against-

Index No. 600707/04

HSBC GIBBS GULF INSURANCE CONSULTANTS :
LIMITED; HSBC BANK, individually, as escrowee and :
as successor in interest to ANTONY GIBBS :
INTERNATIONAL INSURANCE BROKERS LIMITED, :
and SONY PICTURES ENTERTAINMENT, INC., :
as successor in interest to COLUMBIA PICTURES :
INDUSTRIES, INC., :
Defendants. :

-----X
SONY PICTURES ENTERTAINMENT, INC., :
Interpleading Plaintiff, :

-against-

NAVARONE PRODUCTIONS, N.V., NAVARONE :
PRODUCTIONS, LIMITED, JANET NESCHIS as :
Executrix of the ESTATE of SIDNEY E. COHN, :
EVE WILLIAMS-JONES, as Executrix of the ESTATE :
of CARL FOREMAN, PETER GETTINGER, VIRGINIA :
UNGER, as Executrix of the ESTATE of OLIVER A. :
UNGER, JACK ABBOTT, EBERHARD KUEHL, GIBBS :
GULF INSURANCE CONSULTANTS LIMITED, HSBC :
BANK, and JOHN DOES 1-10, :
Interpleaded Defendants. :

FILED
DEC 31 2008
COUNTY CLERK'S OFFICE
NEW YORK

-----X
CAHN, J.:

Motions bearing sequence numbers 005, 006 and 007 are consolidated for disposition.

In motion sequence 005, Sony Pictures Entertainment, Inc. ("Sony") seeks an order discharging it from liability, awarding it expenses and directing how the subject matter of the action is to be disposed. It further seeks summary judgement, dismissing the remaining causes of

action against it. Navarone Productions, N.V. (“Navarone”) cross-moves for summary judgment on its breach of contract claim, and further seeks dismissal of Sony’s interpleader complaint.

In motion sequence 006, Navarone moves for an order directing Sony to pay it monies determined to be due and owing to Navarone.

In motion sequence 007, Navarone moves to amend its answer, to add the affirmative defense of unclean hands.

Background:

This action relates to the proceeds received on the distribution of a movie entitled “Force Ten From Navarone” (“Force Ten”), which was produced and originally released in the late 1970s. The monies at issue (“the proceeds” or “the funds”) were subject to a Distribution Agreement, and are now held by defendant Sony, as successor in interest to Columbia Pictures Industries, Inc.¹ Sony filed an interpleader complaint, seeking a determination as to who holds the rights to the proceeds.²

Several of the interpleaded defendants contended that they were entitled to the proceeds. The Court bifurcated the action, and conducted a hearing on the issue of which of the interpleaded defendants is entitled to the proceeds, so that the entitled party or parties could proceed against the defendants. A decision was issued by the Court on May 29, 2008 (“the 5/29/08 Decision”), familiarity with which is presumed. Briefly, it was established at the hearing

¹ Certain monies are also held by the HSBC defendants. 5/29/08 Decision at 1-2, 7. Those funds are not at issue in the motions currently before the Court.

² There is a related action before the Court, in which Navarone asserted causes of action against only Sony, stemming from alleged fraudulent accounting practices and systematic under-reporting of gross revenue from Force Ten. *See, Navarone Productions v Sony Pictures Entertainment*, Index No. 601724/2006 (“the Accounting Action”).

that Sony currently owes Navarone more than \$1,000,000, which Sony has refused to release. 5/29/08 Decision at 7. It was further determined that Navarone is entitled to the sums held by Sony and any future distributions to be paid from the proceeds of Force Ten. *Id.* at 8.

Discussion:

Motion Sequence 005:

Discharge:

Sony moves to be discharged from liability, arguing that it has no claim or interest in the proceeds at issue and should be discharged so that it may release the proceeds to Navarone. It also seeks direction as to how to dispose of the proceeds and summary judgment in its favor on the remaining causes of action against it.

Sony cites to CPLR § 1006(f), which provides, in pertinent part that a stakeholder in an interpleader action “may move for an order discharging him from liability in whole or in part to any party.” It argues that, in the 5/29/08 Decision, the Court determined that it is a disinterested stakeholder and itself the victim of fraud. It further contends that, although the 5/29/08 Decision specified that the proceeds were due and owing to Navarone, the time to appeal the decision has not yet expired, and other parties may continue to assert their rights to the proceeds.

Navarone argues that it has set forth causes of action against Sony that survive the 5/29/08 Decision, are inextricably linked to the funds Sony is currently holding and, therefore, Sony is not an innocent stakeholder and discharge is unwarranted.

In this, Navarone is correct. Its claims against Sony for breach of contract and breach of fiduciary duty were not disposed of in the 5/29/08 Decision and, inasmuch as they continue, Sony cannot be considered disinterested or discharged from liability. In such a situation, discharge

would be “inappropriate and unwarranted.” *Birnbaum v Marine Midland Bank, N.A.*, 96 AD2d 776, 777 (1st Dep’t 1983). Indeed, as Sony repeats throughout its memorandum, it did not participate in the hearing. As such, Sony’s position, that the causes of action against itself were disposed of, is clearly unsupported when those causes of action were not even addressed in the hearing or the resulting decision.

It is worth noting that Sony itself acknowledges that the interpleaded defendants, who were found to have no entitlement to the proceeds, are far from the sole reason it now seeks a discharge of liability. It acknowledges that if required to pay the proceeds to Navarone, without a discharge, it would be making the payment while continuing to defend against Navarone’s claims. This is correct. Navarone is entitled to the funds that Sony is currently holding, and Sony is directed to immediately turn over 60% of such sums to Navarone, within fifteen days from the date of service of this decision on its counsel. It may retain the balance until further order of this Court, in the event that it is determined that Sony is entitled to recover any counsel or other fees. No determination has yet been made as to whether Navarone has sustained any additional damage, whether Sony is entitled to recover any counsel fees or whether Sony’s conduct, prior to and during this action, has an impact on an interest rate to be applied to the funds currently held by Sony. *See generally*, 5/29/08 Decision.

Summary Judgment:

Sony raises largely the same arguments in support of its contention that it should be granted summary judgment on the remaining claims against it. It claims that, because the Court has concluded that Sony was itself defrauded, the breach of contract and breach of fiduciary duty claims are without merit. This is incorrect. Although the Court determined that certain of the

interpleaded defendants “entered into a scheme to defraud [Sony] into wrongfully paying them, and deprived the Navarone companies of monies and payments due to them,” there was no determination regarding Sony’s own conduct. 5/29/08 Decision at 8. Indeed, the stated purpose of bifurcating the issues was to clarify which party could proceed against the defendants. *Id.* at 2. The claims against Sony have simply not yet been addressed by the Court.³

Moreover, as the courts “have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 (2008), citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Sony has not met this standard, relying solely on language of the Court that is addressing a separate and distinct issue. As “[f]ailure to make such prima facie showing requires a denial of the motion,” that portion of Sony’s motion seeking summary judgment in its favor is denied. *Id.* (emphasis in original).

³ Sony also argues that these claims are timed barred. It contends that the breach of contract and fiduciary duty claims, with a six year and three year statute of limitations respectively, stem, if at all, from breaches in 1990. As the Complaint was filed fourteen years later, it contends that the statute of limitations has run. Navarone contends that, by the beginning of 1998, Navarone provided clear evidence to Sony that it was entitled to the funds. It argues that from that time forward, each and every time Sony refused to pay the funds to Navarone, Sony breached its obligation and is liable for those breaches. Navarone “is correct that individual breaches start the Statute of Limitations running anew each time.” *Kerr v Brown*, 283 AD2d 343, 345 (1st Dep’t 2001). Thus, any evaluation of Navarone’s claims are fact specific and may involve multiple time periods. As such, the Court is not currently reaching the question on which breaches, if any, are timely but is certainly not at this time barring these causes of action on statute of limitations grounds.

For the same reason, that portion of Navarone's cross-motion that seeks summary judgment in its favor on its breach of contract claims against Sony⁴ is also denied. Although Navarone argues that the necessary consequence of the 5/29/08 Decision is the conclusion that Sony breached its obligations to Navarone, any alleged wrongful acts by Sony were not fully explored - - much less determined - - in that decision.

Costs and Expenses:

Sony also seeks to be awarded costs and expenses. It asserts that, not only are costs permitted, but attorneys' fees and expenses are routinely granted where a party has no involvement in the dispute, other than as a neutral stakeholder. Navarone opposes any such award, contending that Sony's refusal to pay it the funds at issue for more than ten years and requiring Navarone to initiate legal action to collect, is conduct that, at the very least, should result in a denial of fees and costs. It further argues that Sony pleads neutrality only now that the Court has issued the 5/29/08 Decision, recognizing Navarone's entitlement to the proceeds. Again, the Court has not made a finding that Sony is a neutral stakeholder and, as noted above, the bifurcation of issues was done to provide the clarity as to which entity was entitled to proceed against the defendants, in which group Sony remains. As such, that portion of Sony's motion that seeks costs and expenses is denied.

A further hearing on this matter is required.

¹ Navarone asserts that, if the Court grants summary judgment in its favor on the breach of contract claims, it will withdraw its claims for breach of fiduciary duty, as both claims seek the identical measure of recovery.

Disbursements:

With regard to that portion of Sony's motion that seeks direction on how the proceeds should be disbursed, the motion is granted. Sony is directed to release 60% of the monies it is holding, and any future proceeds to be paid on account of Force Ten, to Navarone.

Dismissal of the Interpleader Complaint:

Finally, Navarone also cross-moves for dismissal of the interpleader complaint. It contends that, following the 5/29/08 Decision, Sony cannot reasonably fear liability from any party other than Navarone and, as such, the interpleader complaint should be dismissed. Dismissal of the interpleader complaint is granted. Sony filed the interpleader complaint alleging, *inter alia*, that it did not know to whom the proceeds should be paid. That is precisely the issue that was determined by the Court. *See generally*, 5/29/08 Decision.

Motion Sequence 006:

Navarone moves for an order directing Sony to turn over the proceeds currently held by Sony.⁵

Sony, in opposing this motion, seeks to pay the funds to the Court. It reiterates, again, its contention that it is a neutral stakeholder that is merely seeking to be discharged from liability. It further contends that any order requiring it to pay the proceeds to Navarone, prior to determining

⁵ Interpleader defendant Eberhard Kuehl filed a cross-motion, seeking to stay the distribution of the proceeds, pending his appeal of the 5/29/08 Decision. Brody 7/30/08 Aff, ¶ 7. He also sought a stay of that decision from the First Department, which was denied. He has indicated that he will move for a stay if and when an order is issued directing Sony to pay the funds to Navarone but, in the interim, has withdrawn his cross-motion. 8/8/08 Boland Ltr at 1.

the amounts of fees and costs it is to recover, would unnecessarily complicate the transfer of the proceeds.

For the reasons addressed above, Navarone's motion is granted to the extent of requiring Sony to release 60% of the monies it is holding to Navarone.

Motion Sequence 007:

Navarone moves to amend its answer, to add the affirmative defense of unclean hands, both as a full defense and as a setoff.

CPLR §3025(b) provides that a

party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.

Navarone contends that it sought leave to amend its answer expeditiously, after learning of Sony's alleged fraud and that, therefore, no unreasonable or prejudicial delay will result.

Navarone contends it is entitled to 50% of the gross receipts from Force Ten. It argues that Sony provided written statements to Navarone that purported to reflect 100% of the gross receipts of Force Ten but that, in fact, only reported 20% and that Sony now admits its representations were false. Navarone asserts it reasonably relied upon Sony's representations, as the distributor of the film, and merely seeks to amend its answer after learning that it had relied on these representations to its detriment.

Sony opposes the motion, contending that Navarone improperly and unduly delayed in moving to amend and is, therefore, untimely. It further argues that Navarone has known of the

alleged factual basis of its proposed amendment since at least the inception of the related Accounting Action.

There is nothing in the record that would support the conclusion of “prejudice or surprise resulting directly from the delay.” *McCaskey, Davies & Assoc., Inc. v NY City*, 59 NY2d 755, 757 (1983). At bottom, Sony is alleging that the proposed defenses are in regard to the Accounting Action, not this action. Indeed, Sony concedes that it “is beyond dispute that these proposed defenses relate to Navarone []’s claims in the Accounting Action.” Opp Br at 14. This argument, however, refutes any possible prejudice or surprise that might come from Navarone amending its pleadings - - Sony simply disputes for which action against it, stemming from the same transaction and brought by the same party, these defenses are best suited.⁶

Sony also opposes Navarone’s motion to amend based on the argument that the proposed amendment is legally insufficient. It asserts that allegations that are unrelated to claims in a party’s complaint fail as affirmative defenses, and that those allegations are improper because they are merely an attempt to show unrelated wrongdoing. For the reasons addressed above, Navarone’s claims against Sony in this action remain, and Sony has not established that the proposed affirmative defense is unrelated.

As such, Navarone’s motion to amend its answer is granted.

The Court has considered the parties other arguments and find them unavailing.

⁶ The Court is not asked to address whether at this point in the litigations the two related actions should be consolidated, and takes no position as to this issue.

Accordingly, it is

ORDERED that motion sequence 005, and its cross-motion, are denied, except for: directing Sony to pay to Navarone 60% of the monies it is holding on account of Force Ten, within 15 days of entry of this order; directing Sony to release to Navarone all future proceeds from Force Ten; and dismissing the interpleader complaint; and it is further

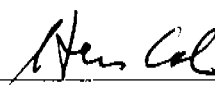
ORDERED that motion sequence 006 is granted, directing Sony to pay to Navarone 60% of the monies it is holding on account of Force Ten, within 15 days of service of a copy of this order, and directing Sony to release to Navarone all future proceeds from Force Ten; and it is further

ORDERED that motion sequence 007 is granted, and Navarone may file an amended answer, if at all, within 20 days of entry of this order; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated: December 29, 2008

ENTER :



J.S.C.

FILED
DEC 31 2008
COUNTY CLERK'S OFFICE
NEW YORK