

Michalak v Merchant Ivory Prods. (USA) Inc.

2009 NY Slip Op 32258(U)

September 29, 2009

Supreme Court, New York County

Docket Number: 115076/07

Judge: Richard B. Lowe

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENTED BY HON. RICHARD B. LOWE, III
Justice

PART 56m

Susan Mechalatt et al

INDEX NO. 115076/07

MOTION DATE 8/27/09

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

- v -

Merchant Ivory et al

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
OCT 01 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.

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

Dated: SEP 29 2009

HON. RICHARD B. LOWE, III
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

-----X
SUSAN MICHALAK a/k/a SUSAN MALICK,

Plaintiff,

Index No. 115076/07

-against-

MERCHANT IVORY PRODUCTIONS (USA) INC.,
JAMES and CITY PRODUCTIONS, INC.,

Defendants.

-----X
RICHARD HAWLEY,

Plaintiff,

Index No. 115077/07

-against-

MERCHANT IVORY PRODUCTIONS (USA) INC.,
JAMES IVORY and CITY PRODUCTIONS INC.,

Defendants.

-----X
Hon. Richard B. Lowe, III:

FILED
OCT 01 2009
COUNTY CLERK'S OFFICE
NEW YORK

Plaintiff Richard Hawley ("Hawley") moves for an order allowing him to amend the complaint and granting an extension of the note of issue set in this matter.

The background of this matter is discussed in this court's prior decision of June 15, 2009, and familiarity with which is presumed. Generally, plaintiff was employed by Merchant Ivory Productions (USA) Inc. ("MIP"). He alleges he was not paid monies he was entitled to as part of his salary. Furthermore, in November 2006, Hawley entered into a producer's agreement with Defendant City Productions ("CP") to produce a film. He was to receive a fee for its production as well as profits from its distribution. Hawley claims he was prevented from performing under the agreement and was not paid any compensation. In its June 15, 2009 decision, this court

3]
dismissed the causes of action brought against defendant James Ivory, the shareholder and officer of MIP and CP, in his individual capacity.

Plaintiff now seeks to amend the complaint arguing that he has recently discovered that the defendants have transferred all of the intellectual rights associated with the film "The City of Your Final Destination" (the "Film") which was CP's sole asset, to a separate entity, St. Pancras, Inc. ("SPI"), to avoid any judgments which Hawley may obtain (Drohan Aff ¶ 1). This was discovered after Hawley issued certain subpoenas on various banks in April of 2009. SPI is believed to be owned by a former employee of MIP. Hawley alleges this was done under false pretenses in order to obtain financing from entities known as Film Finances and First California bank, in order to complete the Film. Furthermore, he alleges it was fraudulently done so he would not be able to collect on any judgment rendered.

Hawley alleges that Ivory made false statements to the financing companies in order to obtain a necessary completion bond to finish the Film. He alleges that defendants transferred the rights to the Film to Pancras. He also alleges that defendants misrepresented to the financing companies that Hawley had waived any of the fees he was entitled to from the Film and that he was not owed any monies. Furthermore, according to the amended complaint, the defendant's sent a fraudulent producer's contract to third parties which misrepresented the amount of fees owed to Hawley. Specifically, the amended complaint alleges that the financing companies were shown a contract which showed a fee of \$50,000 owed to plaintiff instead of \$375,000. Because of these fraudulent misrepresentations, Hawley alleges the third parties were induced to provide a completion bond for the film.

Plaintiff seeks to add causes of action against James Ivory ("Ivory"), in his capacity as

shareholder officer and director of MPI and CP, for fraudulently allowing the transfer to SPI to occur. It also adds a cause of action against Ivory seeking the salary owed to Hawley. The amended complaint also alleges causes of action against SPI for breach of contract as well as various causes of action against the corporate defendants.

Discussion

CPLR 3025(b) provides that leave to amend a pleading shall be freely given. However “an examination of the underlying merits of the proposed causes of action is warranted” (*Megarix Furs v Gimbel Bros.* 172 AD2d 209 [1st Dept 1991]). “[L]eave to amend will be denied where the proposed pleading fails to state a cause of action” (*See Megarix Furs v Gimbel Bros* 172 AD2d 209 [1st Dept 1991]). Such consideration by the court is designed to conserve judicial resources by avoiding a subsequent, duplicative motion on the merits (*see Non-Linear Trading Co. Inc. v Brassis Assoc. Inc.* 243 AD2d 107, 116 [1st Dept 1998]).

Causes of action against Ivory

As to the cause of action seeking liability against Ivory for monies owed for Hawley’s salary, the amended complaint provides no grounds for such liability against Ivory as a shareholder of MIP. Defendant suggests that the only plausible grounds for such liability would be under BCL § 630. However, this section is inapplicable because it requires that first there has been a return of an execution unsatisfied against the corporation upon a judgment recovered against it for the employee’s services (*See Powers v Adcraft Typographerhs, Inc.*, 86 AD2d 566 [1st Dept 1982]).

As to the fraud cause of action against Hawley, plaintiff fails to plead the cause of action with any specificity as required by CPLR § 3016(b). “[T]he circumstances constituting the fraud

shall be stated in detail” (CPLR § 3016[b]). To sustain a cause of action for fraud, the plaintiff must allege (1) a material misrepresentation or a material omission of fact; (2) that it was false and known to be false by the defendant; (3) made for the purpose of inducing plaintiff’s reliance; (5) reliance by the plaintiff; and (6) damages (*See Lama Holdings Co. v Smith Barney Inc.* 88 NY2d 413 [1996]).

Plaintiff makes no allegations of statements or actions specifically made by Ivory to Hawley which induced and permitted the purported fraudulent scheme. All of the alleged false statements which induced reliance, as plead in the complaint, were made to third parties to induce them to provide completion financing for the film. Therefore, while leave to amend should be freely given, the proposed amended complaint fails to allege statements made by Ivory to Hawley which were relied upon.

Hawley also seeks money damages against Ivory for fraudulent conveyance by causing the rights to the Film to be transferred to SPI. However, money damages are not a remedy available for a claim of fraudulent conveyance. “[A] creditor’s remedy for the transfer of its debtor’s assets, where undertaken prior to a judgment on the debt, is [] to obtain a nullification of the conveyance” (*Blakeslee v Rabinor* 182 AD2d 390, 392 [1st Dept 1992])(citing *Federal Deposit Ins. Corp. v Porco*, 75 NY2d 840, 842 [1990]). Therefore, leave to add a cause of action seeking money damages for fraudulent conveyance is denied.

Cause of action against SPI

Hawley seeks to amend the complaint to add a cause of action against SPI for breach of contract. To sustain this cause of action, the amended complaint must allege (1) the formation of a contract between Plaintiff and SPI; (2) Plaintiff’s performance under the contract; (3) a

failure by SPI to perform under the contract; and (4) damages (*See Noise in the Attic Prods, Inc. v London Records*, 10 AD3d 303, 306-307 [1 st Dept 2004]). The proposed amended complaint alleges no contract between SPI and Hawley. Rather the only contract at issue is between CPI and Plaintiff. Therefore, there can be no cause of action for breach of contract.

Hawley also seeks liability against SPI as a successor corporation. Such liability is premised upon the alleged facts that Ivory is the sole shareholder of MIP which controls SPI. Further Ivory is a shareholder of CP which controls SPI and Ivory is a director of SPI. Furthermore, according to the amended complaint, according to an Assignment Agreement, SPI agreed to assume all rights and obligations of CP.

First, Ivory is not a shareholder of SPI which is the wholly owned subsidiary of CP, which is in turn wholly owned by MIP (See *Nakamura Aff Ex C*). Merely being a subsidiary of CP does not make SPI a “successor corporation” for liability purposes (*See BT Americas Inc. v Porntocom marketing Inc.*, 18 Misc. 3d 1141(A)[(Sup Ct NY 2009)].

Furthermore, the Assignment and Assumption Agreement states “Assignee shall assume all of assignor’s executory obligations under the Underlying Property Agreements *accruing on or after the date of the complete execution of this Agreement*” (See *Drohan Aff. Ex D*)(emphasis added). According to the amended complaint, any obligation owed to him with respect to his Producer’s Agreement accrued prior to the execution of the Assignment and Assumption Agreeemnt which was signed on April 28, 2008.

Motion to Amend the Complaint as to Corporate Defendants

With respect to the breach of contract claim, the claim cannot stand as to MIP because it is not a party to the producer’s agreement (*Drohan Aff Ex C and I*). Therefore, the claim cannot

[* 7]

stand as to MIP because it lacks contractual privity.

With respect to the quantum meruit claim, it may be amended though it is nearly identical to the existing quantum meruit claim. Defendants argue that the claims for reimbursable business expenses should not be allowed because it is lacking in detail and because during discovery Hawley did not identify his alleged expenses or damages. However, Hawley need not prove his claim at this stage, and specificity is not required in order to amend so long as there is a cause of action plead within the four corners of the pleading.

With respect to the alleged theory of unjust enrichment, Hawley's claims under the producers agreement is covered by the existing breach of contract claim and his claim for services as an employee is covered by his quantum meruit claim. Therefore, leave to amend to add a cause of action for unjust enrichment is denied.

The court declines to add a cause of action for breach of an oral agreement seeking salary owed by MIP. General Obligations Law § 5-701 voids such agreements where they cannot be performed within one years time. Furthermore, plaintiff can recover under his theory of quantum meruit.

That part of the amended complaint seeking to add a cause of action for defamation is denied. CPLR 3016(b) requires the pleading of factual particulars for a cause of action sounding in defamation. Specifically, "the particular words complained of shall be set forth in the complaint". Here, the amended complaint makes reference to only "strong impressions" given to plaintiff that he was being accused of stealing money (Notice of Motion Ex J ¶ 79). There is no indication of particular defamatory statements which were made.

Request to Extend the Note of Issue

The note of issue in this matter was originally set for August 28, 2009. Because amendment allowing causes of action which would require additional discovery has been denied, a significant extension of the note of issue is not necessary. Therefore, plaintiff shall file a note of issue forthwith.

Conclusion

Therefore, based on the foregoing, it is hereby

ORDERED that part of the motion seeking to amend the complaint is granted to the extent of allowing the claim for reimbursable expenses and otherwise denied and it is further

ORDERED that part of the motion seeking to extend the note of issue is denied and the plaintiff is directed to file a note of issue in this matter on or before October 19, 2009.

This shall constitute the Order and Decision of the Court.

Dated: September 29, 2009

ENTER:

FILED
OCT 01 2009
COUNTY CLERK'S OFFICE
NEW YORK

J.S.C.
HON. RICHARD B. LOWE, III