

Success, LLC v Stonehenge Capital Co., LLC

2010 NY Slip Op 31678(U)

June 29, 2010

Supreme Court, New York County

Docket Number: 117138/06

Judge: Martin Shulman

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

PRESENT: MARTIN SHULMAN
J.S.C. Justice

PART 1

Index Number : 117138/2006
SUCCESS, LLC
VS.
STONEHENGE CAPITAL
SEQUENCE NUMBER : 007
REARGUMENT/RECONSIDERATION

INDEX NO. 117138/06
MOTION DATE _____
MOTION SEQ. NO. 007
MOTION CAL. NO. _____

FILED
in this motion to/for
JUL 01 2010
COUNTY CLERK'S OFFICE
NEW YORK

PAPERS NUMBERED
1
2, 3, 4
5, 6

Notice of Motion _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the attached decision and order.

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

Dated: JUN 29 2010

MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 1

-----X
SUCCESS, LLC, R&D FILMS, INC., BAD COMPANY
FILMS, ETHAN GOLDMAN and ALDO LaPIETRA,

Plaintiffs,

-against-

Index No. 117138/06

STONEHENGE CAPITAL COMPANY, LLC,
W. STEPHEN KELLER, ALAN BROWN and A.R.
BROWN & ASSOCIATES, JOHN DOE, INC. a/k/a
PARKVIEW ENTERTAINMENT a/k/a THE
ENTERPRISE FORMED BETWEEN W. STEPHEN
KELLER and ALAN BROWN and RICHARD DOE,
INC. a/k/a an ENTERPRISE FORMED, inter alia,
BETWEEN W. STEPHEN KELLER and
STONEHENGE CAPITAL COMPANY, LLC,

DECISION AND ORDER

FILED
JUL 01 2010
COUNTY CLERK'S OFFICE
NEW YORK

Defendants.

-----X

MARTIN SHULMAN, J:

Plaintiffs move to reargue this court's February 18, 2010 decision and order (the "prior order") to the extent of reinstating the sixth, seventh and eighth causes of action¹ and to conform the pleadings to the proof, if required. Defendants Stonehenge Capital Company, LLC ("Stonehenge") and W. Stephen Keller ("Keller") oppose the motion,² which is granted and upon granting same, the court adheres to its prior decision and order.

This court's prior order *inter alia* granted Stonehenge's and Keller's motions for summary judgment dismissing the complaint against them to the extent of dismissing

¹ These causes of action alleged breach of contract (6th and 7th causes of action) and breach of the implied covenant of good faith and fair dealing (8th cause of action).

² As he did in response to the underlying motion, co-defendant Alan Brown ("Brown") submits an affidavit joining in his co-defendants' arguments in opposition.

the sixth through eleventh causes of action and granted plaintiffs' cross-motion solely to the extent of granting summary judgment on the issue of Stonehenge's liability for any misrepresentations Keller may have made to plaintiffs.³

The relevant facts and issues in this action are summarized in the prior order and are not repeated herein. This court dismissed the sixth through eighth causes of action because the parties' Summary of Proposed Investment ("SPI") provided that "[a]ny commitment by Stonehenge to invest will be evidenced by an executed Purchase Agreement." No such purchase agreement was ever executed. Since the contract causes of action were not viable, this court dismissed the eighth cause of action for breach of the implied covenant of good faith and fair dealing.

Motion to Reargue

On reargument, plaintiffs claim the court overlooked their argument that "there was a separate and divisible agreement made with the Plaintiffs, one of which was the agreement made when Keller was pursuing his own (and Brown's) interests, and which Stonehenge professes to have known nothing about [footnote omitted], but for which Stonehenge remains liable nonetheless, and (2) the agreement to which they are a party according to the terms that was [sic] negotiated by their agent." R. Goldman Aff. in Supp. at ¶11. Despite asserting the existence of more than one agreement, in reply, plaintiffs contradict the foregoing by stating: "there are not two separate and distinct contracts. There is but a single complete and enforceable contract, but with several

³ Only the first through fourth causes of action sounding in fraud remain against all defendants and the fifth cause of action for breach of fiduciary duty remains as to defendant Brown.

separate and distinct theories of liability . . .”⁴ (Goldman Reply Aff. in Response to Keller at ¶12), which plaintiffs contend the court’s prior order did not address.⁵

Plaintiffs’ present position and their position below are difficult to summarize as they are neither clearly explained nor, as demonstrated above, are they entirely consistent. As the court understands it, plaintiffs essentially contend that a contractual relationship was formed between plaintiffs and Keller, acting on his own behalf and/or on behalf of himself and co-defendant Brown, his partner,⁶ which relationship was not subject to the requirement of a signed purchase agreement.

Not surprisingly, co-defendants Keller and Stonehenge vehemently object to plaintiffs’ continually evolving theory of this case. Stonehenge reiterates that the court correctly dismissed the contract causes of action due to lack of a signed purchase

⁴ As set forth in their reply to Keller’s opposition to this motion, plaintiffs’ theories of liability are: 1) Keller is personally liable for breach of contract; 2) Stonehenge is liable for breach of the contract its agent entered into; and 3) Stonehenge is vicariously liable having placed Keller in a position to defraud plaintiffs. *Id.* In opposition to the underlying motions for summary judgment, plaintiffs argue a contract is established in one or all of the following ways: 1) a “fully formed, comprehensive and executed oral contract”; 2) a “fully formed and executed executory contract”; and/or 3) a “fully formed agreement and executed agreement as a result of ‘promissory estoppel’”.

⁵ The complaint itself, which was never amended, alleged two separate causes of action based upon Stonehenge’s alleged breaches of two purported contracts. Specifically, the sixth cause of action is predicated upon Stonehenge’s alleged July 29, 2005 breach of an oral and/or implied contract to provide plaintiffs \$4,000,000 in connection with the Project. The seventh cause of action is predicated upon Stonehenge’s alleged breach of a second agreement to finance \$3,000,000. This so-called second agreement was entered into after July 29, 2005 and was allegedly breach in mid-August 2005.

⁶ Through discovery plaintiffs learned that while Keller was employed by Stonehenge and negotiating with plaintiffs on Stonehenge’s behalf, he was also in the process of forming a new entity, Parkview Entertainment (“Parkview”), with co-defendant Brown, and had considered bringing the Project to Parkview.

agreement. Keller, now faced with potential personal liability, contends: 1) plaintiffs improperly claim for the first time on reargument that Keller entered into a contract with plaintiffs; 2) plaintiffs reassert the same arguments the court previously rejected concerning an alleged contract not requiring a signed purchase order; 3) plaintiffs only now attempt to assert a breach of contract claim against Keller because their breach of contract claims against Stonehenge were dismissed; 4) plaintiffs never opposed Keller's request for summary judgment on the contract-based sixth through eighth causes of action; and 5) plaintiffs' breach of contract claim against Keller is deficient because they have never articulated what the terms of the alleged contract with Keller were, when it was made and what provisions were allegedly breached.

A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. *Foley v. Roche*, 68 A.D.2d 558 (1st Dept. 1979); CPLR 2221(d). Motions for leave to reargue are not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented. *Pro Brokerage, Inc. v. Home Ins. Co.*, 99 A.D.2d 971 (1st Dept. 1984); *William P. Pahl Equipment Corp. v. Kassis*, 182 A.D.2d 22 (1st Dept. 1992).

Here, the court agrees that plaintiffs' motion to reargue presents new arguments not previously raised. As evidenced by plaintiffs' counsel's affirmation below (Exh. A to Goldman Aff. in Supp.), in opposing defendants' motions for summary judgment plaintiffs focused primarily upon Keller's role as Stonehenge's agent/employee. In support of this reargument motion, plaintiffs extract isolated paragraphs and statements

from their opposition below. However, despite plaintiffs' counsel's verbose submissions, the theories of liability now proffered were not fully expounded upon and cannot now be asserted on reargument.

In any event, even if plaintiffs had raised their arguments regarding Keller, there is no basis in the record below for contractual liability against him either personally or as an agent of his newly formed venture Parkview. At all times the parties' interactions in June through August 2005 which are at the heart of this action centered around plaintiffs obtaining financing for the Project from Stonehenge. That Keller may have contemplated Parkview's possible involvement in the Project at some point does not create a contractual relationship with plaintiffs. Thus, plaintiffs' proposed theory of liability lacks merit. Indeed, the court cannot discern the existence of even the most basic contractual elements of an offer by Keller individually or on behalf of Parkview and plaintiffs' acceptance of any such offer.

Motion to Conform Pleadings to the Proof

As counsel for Stonehenge and Keller incredulously note, the portion of plaintiffs' motion seeking to conform the pleadings to the proof is contained in a footnote in plaintiffs' counsel's supporting affirmation. No supporting authority is cited for the requested relief and plaintiffs suggest that they have merely failed to label a specific cause of action "fraudulent inducement of the contract." Goldman Aff. in Supp. at fn. 12. In his reply to Keller's opposition, plaintiffs' counsel expands the request to also allege promissory estoppel.

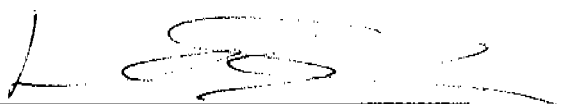
The court agrees with defendants that plaintiffs essentially seek to amend the complaint to allege new causes of action. However, no proposed amended pleading is submitted and, at this late juncture, the court is disinclined to grant such relief. The note of issue has been filed and the action must proceed to mediation and trial forthwith.

The court has considered the parties' remaining arguments and finds them lacking in merit. Accordingly, based upon the foregoing, it is

ORDERED that the portion of plaintiffs' motion to reargue is granted and upon granting reargument, this court adheres to the decision and order dated February 18, 2010, and the motion is otherwise denied.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been sent to counsel for the parties.

Dated: June 29, 2010



Martin Shulman, J.S.C.

FILED
JUL 01 2010
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