

Success, LLC v Stonehenge Capital Co., LLC

2012 NY Slip Op 31848(U)

July 12, 2012

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 : 011
SUMMARY JUDGMENT

INDEX NO. 117138/06
MOTION DATE _____
MOTION SEQ. NO. 011

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

Notice of Motion/~~Order to Show Cause~~ — Affidavits — Exhibits _____ **No(s)** 1, 2

Answering Affidavits — Exhibits _____ **No(s)** 3, 4

Replying Affidavits Exhibit A _____ **No(s)** 5

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):

FILED
JUL 16 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 12, 2012

MARTIN SHULMAN
J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

FILED

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

JUL 16 2012

Plaintiffs,

NEW YORK
COUNTY CLERK'S OFFICE

-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 ALLAN 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

JUL 16 2012

Defendants.

NEW YORK
COUNTY CLERK'S OFFICE

-----X

MARTIN SHULMAN, J:

Defendant W. Stephen Keller (Keller) moves pursuant to CPLR 3212 for summary judgment dismissing the amended complaint's sixth cause of action for aiding and abetting a breach of fiduciary duty.

Plaintiffs bring this action to recover damages based upon defendants' false promises and misrepresentations regarding the financing of a movie entitled "Success," which plaintiffs sought to produce. Plaintiffs allege that, commencing in the spring of 2005 and continuing through August of that year, defendants Allan Brown (Brown) and Keller misrepresented their status as representatives of Stonehenge Capital Company, LLC (Stonehenge), a private equity and fund management firm, as well as Stonehenge's interest in financing the film. As a result of these misrepresentations,

plaintiffs allege they expended considerable sums of their own money and missed other financing opportunities in anticipation of Stonehenge's financing.

Plaintiffs allege that, in the spring of 2005, they were seeking financing for the production of "Success" (the Project). In late May, an independent film packaging agent, Roeg Sutherland (Sutherland), called plaintiffs to inform them that Stonehenge was interested in financing the Project. Sutherland told them that there would be two people they would be dealing with at Stonehenge, to wit, defendants Brown and Keller.

On June 7, 2005, Sutherland arranged a telephone call in which he introduced plaintiffs Ethan Goldman (Goldman) and Aldo LaPietra (LaPietra) to Brown. Sutherland indicated that Brown "was Stonehenge." During that phone conversation, Brown stated that Stonehenge would finance the project and that the turnaround time to close and receive the funds would be four to five weeks. During that conversation, Brown also stated that he had an exclusive relationship with Stonehenge, pursuant to which all potential film financing opportunities had to be brokered by and through him and that, for the purposes of the proposed financing transaction, Brown would be plaintiffs' contact with Stonehenge.

The next day, Brown sent Goldman and LaPietra a contract which included a provision making Brown the Executive Producer of the film, along with a "Summary of Proposed Investment" (SPI) setting forth the financial aspects of the deal with Stonehenge in return for financing.

By June 14, Brown informed Goldman that closing on the deal was set for July 11. On June 24, Brown brought Goldman and LaPietra to meet with defendant Keller at the Stonehenge's offices at 152 West 57th Street, in Manhattan. The parties met in the

Stonehenge conference room. This was the first time that Goldman and LaPietra had met Keller, and Brown introduced Keller as the Director of the New York office and head of the film financing unit. Keller gave Goldman his card, which set forth his title as "Director" of Stonehenge.

According to plaintiffs, Keller and Brown both told them how excited they were about the script and that there would not be any problem with financing the Project for \$4 million. They both agreed that they could have the money wired into the bank within four to five weeks, which plaintiffs had said was important if they were to have Sarah Michelle Gellar for one of the lead roles. Plaintiffs state that they were told to do whatever they had to do to move forward.

Goldman alleges that he told Keller and Brown that, in order to move forward, and to be able to begin getting the necessary documentation together for the completion bond company, the plaintiffs would need to officially hire their line producer on a full-time basis for the film. Plaintiffs allege that they left the meeting with the clear understanding that, with Brown and Keller's approval and encouragement, they were to go out and begin hiring crew, continue casting, set up an office and do all the things they needed to do to make the movie.

On June 28, Brown requested that plaintiffs wire him \$1,500 for expenses so that he could perform the necessary background checks for the purpose of Stonehenge's due diligence. Thereafter, on July 12, LaPietra spoke to Brown several times about how long it would take to actually close the financing. Brown responded that it would take from 48 to 96 hours. LaPietra also asked Brown if plaintiffs had satisfied all the conditions and Brown said "Yes, you guys are done!"

On July 29, Sutherland informed the plaintiffs that he had just received an e-mail from Keller stating that Stonehenge would now only extend financing for \$3 million. Moreover, Stonehenge would only finance the Project if plaintiffs were able to obtain a domestic distribution deal and sign foreign pre-sale commitments, not just projections and/or estimates, which had been referenced in the original SPI. On August 1, Sutherland secured a domestic distribution deal and sent the deal memo to Keller and Brown.

LaPietra spoke to Brown four times on August 2 to impress upon him that plaintiffs were in a serious and critical situation. Brown allegedly continued to say that things were fine and that he was working hard on getting everything done and that it was okay for plaintiffs to continue spending their own money to keep the Project going since the money from Stonehenge was going to come any day now. Plaintiffs continued to spend their own funds on the Project. On August 8, Film Finances, the bond completion company, issued a signed, long-form letter of intent to both Brown and Success.

On the morning of August 10, Brown called LaPietra and told him that he was, at that moment, in a meeting with Keller and Stonehenge, that they were going over everything and that there might be a closing later that day. Several hours later, Brown called and said that they would know in an hour or so if Stonehenge had approved all the paperwork.

Later that night plaintiffs learned that Keller was no longer listed on the Stonehenge website. The next day, on August 11, plaintiffs learned that Keller had left Stonehenge. Brown assured plaintiffs that this would not affect their financing.

On August 16, Keller called Goldman and stated that the deal was not done and that Stonehenge was not going to finance the film. He stated that there must have been some "mis- communication." Keller then informed Goldman that he had left Stonehenge to form Parkview Entertainment, a film financing company, and that Stonehenge would still finance some of his projects. Keller then stated that there were three new conditions for financing and that they had not been met. These included signed foreign commitments.

Later, Goldman forwarded several e-mails to Keller, some of which were e-mails sent from Brown to Success, in which Brown stated that plaintiffs had met all of Stonehenge's conditions. That night Keller called LaPietra and assured him that he and Stonehenge were working on the deal, and that he didn't want to make any promises, but that he thought he would have the money for the Project within two days.

The next morning, August 17, Keller informed LaPietra that, because of the e-mails that Goldman had sent the day before, he would have to have the matter reviewed by Stonehenge's legal counsel and that he would contact plaintiffs when that was completed. Thereafter counsel for Stonehenge stated that if plaintiffs wanted to hold any discussions with Stonehenge regarding financing, any such conversations had to be preceded by a full release of any claims against Stonehenge, Keller and Brown. Plaintiffs refused and the Project collapsed.

Plaintiffs later learned that, in February 2005, Stonehenge had terminated Keller's employment as of August 31, 2005. Keller and Stonehenge had entered into a "Separation Agreement and Release" dated February 28, 2005 (the Separation Agreement). That Separation Agreement contained a "Failure Fee," providing that if

Keller presented a qualifying film investment opportunity to Stonehenge and Stonehenge passed on the project, Stonehenge would nevertheless pay Keller \$75,000 (O'Brien Aff., Ex. 21 ¶ 4). Plaintiffs further discovered that, although Brown had done some work with Stonehenge on another film project, Brown was not an employee of Stonehenge, nor did he have an exclusive relationship with it. Plaintiffs allege that Keller and Brown created that fiction in order to prevent the plaintiffs from contacting anyone at Stonehenge other than themselves.

Plaintiffs allege that, as a result of defendants' misrepresentations and failure to proceed with the financing, they not only lost the money that they had invested, but their careers in the film industry were ruined. Plaintiffs also allege that Keller wanted to deliver the Project to Stonehenge through Parkview Entertainment, and wanted Brown as the Executive Producer of the Project so that he and Brown could collect additional compensation from the plaintiffs.

Stonehenge's President, Thomas Adamek, contends that he did not hear of the Project until July 31, 2005 (O'Brien Aff., Ex. 10, ¶ 20). Thus, according to plaintiffs, throughout June and July, while Brown and Keller were assuring plaintiffs that they had a deal and that financing was forthcoming, Brown and Keller had not even presented the Project to Stonehenge.

In November 2006, plaintiffs commenced the within action against Stonehenge, Keller, Brown and their respective companies alleging causes of action for fraud and misrepresentation (first cause of action), conspiracy and acting in concert to defraud (second cause of action), fraud by concealment (third and fourth causes of action), breach of fiduciary duty (fifth cause of action), breach of contract (sixth and seventh

causes of action), breach of the duty of good faith and fair dealing (eighth cause of action), deceptive trade practices (ninth cause of action), intentional destruction of rights (tenth cause of action) and intentional infliction of emotional distress (eleventh cause of action).

This court dismissed the fifth through eleventh causes of action as to Keller and the sixth through eleventh causes of action as to Stonehenge (Order dated 2/18/10). Thereafter, this court granted plaintiffs' motion for leave to amend their complaint to, inter alia, add a sixth cause of action for aiding and abetting a breach of fiduciary duty as against Keller.

Keller now moves for summary judgment dismissing the sixth cause of action against him on the grounds that: (1) Brown did not owe a fiduciary duty to any of the plaintiffs; (2) Keller did not have actual knowledge of any alleged breach by Brown of a duty owed to plaintiffs; and (3) Keller did not provide substantial assistance in breaching any alleged duty Brown owed to plaintiffs.

Keller's first argument, that Brown did not owe a fiduciary duty to the plaintiffs, is based upon Keller's assertion that the only agreement alleged by plaintiffs to have been entered into with Brown was executed on July 26, 2005 by Success Productions, LLC, which is not a party to this action. As an initial matter, this court has already determined by decision and order dated September 28, 2011 that "Brown, as plaintiffs' agent, owed plaintiffs a fiduciary duty, which he breached by inter alia, misrepresenting his status as an exclusive broker for Stonehenge and misrepresenting the status of the plaintiffs' deal with Stonehenge."

Parties are precluded from re-litigating an issue in an ongoing action when there previously was a full and fair opportunity to address the issue (*Carmona v Mathisson*, 92 AD3d 492 [1st Dept 2012]). In any event, “[a] fiduciary relationship ‘exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation’” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005], quoting Restatement [Second] of Torts § 874, Comment a). “[I]t is fundamental that fiduciary ‘liability is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation’” (*id.*, at 20, quoting Restatement [Second] of Torts § 874, Comment b).

Keller next argues that he had no knowledge of any breach of duty by Brown to the plaintiffs and did not assist in any such breach. However, Keller has acknowledged that he drafted the SPI, which set forth the proposed terms of financing by Stonehenge and provided that Brown was to be the executive producer. Thereafter, Keller met with Brown and plaintiffs in the Stonehenge offices. At that meeting, Keller was introduced as Stonehenge’s “Director” and the head of its film financing unit. According to plaintiffs, Keller and Brown both told them how excited they were about the script and that there would not be any problem with financing the Project for \$4 million. They both agreed that they could have the money wired into the bank within four to five weeks. Keller was, therefore, aware of Brown’s misrepresentations regarding Stonehenge’s commitment to financing and encouraged plaintiffs to believe those misrepresentations. Nonetheless, it appears that Keller did not inform Stonehenge about the Project until

July 31, 2005, when he wrote in an e-mail to Thomas J. Adamek, President of Stonehenge the following:

Tom,
We've got a project that's been brewing for awhile but the casting has now been completed and is ready to go. I've put together the attached description. If you have any thoughts on how to get this done or would like more info let me know.
Best,
wsk

(O'Brien Aff., Ex. 14).

Further, despite Keller's claim that he did not know of any breach of fiduciary duty by Brown to the plaintiffs, Brown has stated, in deposition testimony, that he kept Keller informed of his dealings with the plaintiffs (O'Brien Aff., Ex. 4 at 138:13-24). Plaintiffs allege that, during this time, Brown repeatedly misrepresented to them that they had completed all the pre-conditions to financing and that a closing was imminent.

Plaintiffs allege that, while Keller may have made a minimal attempt to inform Stonehenge about the Project, he was, in fact, involved with Brown in forming Parkview Entertainment and preparing to package the financing through that entity, as evidenced by the "Parkview Entertainment 'Success' Film Financing Package" proposal, which Keller authored (O'Brien Aff., Ex. 25). These factors are sufficient to raise an issue of fact as to Keller's knowledge and active involvement in Brown's breach of duty to the plaintiffs.

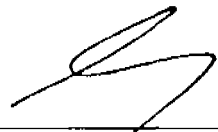
Accordingly, based on the foregoing, it is

ORDERED that defendant W. Stephen Keller's motion for summary judgment dismissing the plaintiffs' sixth cause of action against him is denied; and it is further

ORDERED that the case be remanded back to the Administrative Coordinating Part (Part 40) to be calendared for trial.

The foregoing is this court's decision and order. Courtesy copies of this decision and order have been provided to the parties' counsel.

Dated: New York, New York
July 12, 2012



Hon. Martin Shulman, J.S.C.

FILED

JUL 16 2012

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