

**Herbert v Bregman**

2014 NY Slip Op 30926(U)

April 7, 2014

Supreme Court, New York County

Docket Number: 653259/2013

Judge: Eileen A. Rakower

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

PRESENT: Hon. EILEEN A. RAKOWER  
Justice

PART 15

LAWRENCE HERBERT AND GEORGE S. KAUFMAN,

Plaintiffs,

- v -

MARTIN BREGMAN and BERGMAN PRODUCTIONS,

Defendants.

INDEX NO. 653259/2013

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

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

PAPERS NUMBERED

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

1-2

Answer — Affidavits — Exhibits \_\_\_\_\_

3

Replying Affidavits \_\_\_\_\_

4

Cross-Motion: Yes X No

Plaintiffs' Complaint alleges fraud, breach of contract and other causes of action based upon their investment in motion pictures to be produced by the Defendants.

Defendants move for an Order pursuant (1) pursuant to CPLR §3016 (b) dismissing each and every cause of action for fraud for failure to plead same with particularity; (2) pursuant to CPLR §3024(a) for failure to separately state and number the allegations in the Complaint; (3) and pursuant to CPLR §3024 (b) to strike scandalous and prejudicial matter. Plaintiffs oppose.

“The elements of a cause of action sounding in fraud are material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation and damages.” (*Orchid Constr. Corp., v. Gottbetter*, 89 AD3d 708, 932 NYS2d 1000 [2d Dep’t 2011]).

CPLR §3016 requires particularity in the pleading of a fraud cause of action.

Here, Plaintiffs' Complaint alleges that Defendants knowingly made false representations concerning the film's production schedule, budget, crew, rights and intended use of funds in order to induce Plaintiffs to rely upon said representations, and that Plaintiffs justifiably relied on these representations in deciding to make their investment, and were damaged as a result. More specifically, among other allegations, the Complaint alleges:

- In late 2008, Defendant Bregman separately approached each Plaintiff about investing in a film that he was allegedly then producing called Gold Coast. Mr. Bregman claimed that Gold Coast would be a film adaptation of Nelson DeMille's bestseller of the same name, a novel about the relationship between a high-powered Wall Street attorney and his client, a mafia don. In contrast to previous rejected investment opportunities, Mr. Bregman separately told each Plaintiff that Bregman Productions owned the rights to Gold Coast and that filming was going to begin within the next year. To further entice Plaintiffs, Bregman offered an alleged script for the Film. According to Bregman, the Film had been "green lighted" by a major studio with a budget of approximately \$17 million; Kevin Reynolds was the director of the film; and acclaimed actor, Richard Gere, was attached to star in the Film's lead role. Unbeknownst to Plaintiffs, Bregman's assurances were a fabrication. He had neither stars, nor budget, nor studio approval, and no intent to use any funds to pay for anything but his personal expenses. (Complaint ¶ 9)
- Relying on Bregman's false promises, on or about February 6, 2009, Mr. Herbert entered into a Memorandum of Understanding with Bregman Productions ("Herbert Agreement"). A true and correct copy of the Herbert Agreement is annexed as Exhibit A. Mr. Herbert committed to invest \$1 million to the "pre-production" expenses on the Film. Pre-production refers to the period of time after a studio "green lights" or approves a project. In return for Plaintiff Herbert's \$1 million investment in the Film, Mr. Herbert would purportedly receive a share, proportionate to his investment, in the North American rights of the Film, based on a formula outlined in the Herbert Agreement. (Complaint ¶ 10)
- Whenever Mr. Herbert made an additional payment, he inquired about the status of the Film. Mr. Bregman consistently reassured Mr.

Herbert that the project was proceeding. He told Mr. Herbert, for example, that the script for the Film was finalized, but scheduling conflicts with the actors and directors prevented the director from beginning to film. Mr. Herbert accepted Mr. Bregman's explanations each time. These reassurances were likewise false. (Id. ¶ 12)

- On or about November 7, 2008, relying on Bregman's false statements, Mr. Kaufman wrote Bregman Productions a check for \$200,000 and enclosed a note stating that the purpose of the check was to "move [their] production business forward." The note further affirmed Mr. Kaufman's trust in Defendant Bregman; Mr. Kaufman stated that "with [Bregman] at the helm good things will happen." (Id. ¶ 15).
- In entering into the Kaufman Agreement, Mr. Kaufman relied on Bregman's assurances that his investment was going to fund the "pre-production" costs of Gold Coast and that Defendant Bregman Productions owned the rights and had studio approval to make the Film. Indeed, the Kaufman Agreement states that the budget for the Film was approximately \$15 million; Kevin Reynolds was the director of the film; and acclaimed actor, Richard Gere, was expected to star in the Film's lead role. None of these assertions, as Bregman well knew, had any basis in reality. (Id. ¶ 18)
- Similar to Mr. Herbert, Mr. Kaufman frequently asked Bregman about the status of the Film before remitting payments to him. As with Mr. Herbert, Bregman consistently reassured Mr. Kaufman and told him that the script for the Film was finished, but scheduling conflicts with the actors and directors prevented the director to beginning to film. (Id. ¶ 22)
- Plaintiffs later learned that Bregman's assurances regarding Gold Coast were knowing deceptions. He had no rights to the title; their funds did not go to "pre-production expenses;" there was no studio approval; there was no production budget, and no directors or stars had committed to work on the project. Later investigations revealed that Mr. Bregman had a history of scamming investors with Gold Coast and other bogus film projects. On two occasions, investors had sued him for fraud. (Id. ¶ 29)

- By virtue of the foregoing, Plaintiffs have been damaged in an amount to be determined at trial, but believed to be in excess of \$3 million, together with punitive damages in excess of \$10 million. (Id. ¶ 39)

Accordingly, the allegations contained in the four corners of Plaintiffs' complaint plead with particularity facts sufficient to support a cause of action for fraud.

CPLR §3024(a) provides,

Vague or ambiguous pleadings. If a pleading is so vague or ambiguous that a party cannot reasonably be required to frame a response may move for a more definitive statement.

Defendants contend that portions of Plaintiff's Complaint entitled "Background", "Agreement with plaintiff Lawrence Herbert", "Agreement with Plaintiff George Kaufman", "Additional Offers to Invest and Current Status of Gold Coast" and "Personal Loan from George Kaufman to Defendant Bregman" contain paragraphs with various allegations in each. Defendants therefore request that Plaintiffs separate and number the allegations in order to permit Defendants to respond specifically to each. Defendants' request is granted.

CPLR §3024 (b) provides,

Scandalous or prejudicial material. A party may move to strike any scandalous or prejudicial matter unnecessarily inserted into a pleading.

The showing required under CPLR §3024(b) is not merely that the matter objected to is "scandalous" or "prejudicial" but that it is "unnecessarily" inserted in the pleadings.

In reviewing a motion pursuant to CPLR §3024(b), the Court assesses "whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action." *New York City Health and Hosps. Corp. v. St. Barnabas Comly. Health Plan*, 22 A.D.3d 391, 391 [1st Dep't 2005].

Defendants specifically seek to strike the following allegations: (1) Plaintiffs' allegations that one of Mr. Bregman's motion pictures was "an abysmal

failure” and that Defendant “decided to use his past success to obtain money through deceit” (paragraph 4 of Complaint); (2) Plaintiffs’ claim that Mr. Bregman used his production company as a “vehicle for his scams” (paragraph 5 of Complaint); and (3) Plaintiffs allegation that Mr. Bregman had “a history of scamming investors with Gold Coast and other bogus film projects” (paragraph 29 of Complaint).

Here, as the referenced allegations that Defendants seek to strike are made in connection and are relevant to Plaintiffs’ fraud claims, Defendants’ motion pursuant to CPLR §3024(b) is denied.

Wherefore, it is hereby,

ORDERED that Defendants’ motion is granted only to the extent that Plaintiffs are directed to separate and number the allegations in order to permit Defendants to respond specifically to each allegation within ten (10) days of notice of entry of this Order.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: APRIL 7, 2014



HON. EILEEN A. RAKOWER

Check one:      FINAL DISPOSITION      X      NON-FINAL DISPOSITION

Check if appropriate:       DO NOT POST       REFERENCE