

Herbert v Bregman

2016 NY Slip Op 30710(U)

April 14, 2016

Supreme Court, New York County

Docket Number: 653259/2013

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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LAWRENCE HERBERT and
GEORGE S. KAUFMAN,

Plaintiffs,

Index No.
653259/2013

**DECISION and
ORDER**

- against -

Mot. Seq. #006

MARTIN BREGMAN and
BREGMAN PRODUCTIONS, INC.,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

This action arises out of two investments totaling \$3 million that plaintiffs Lawrence Herbert (“Herbert”) and George S. Kaufman (“Kaufman”) (collectively, “Plaintiffs”) made under two separate agreements to purportedly fund the pre-production expenses for a film entitled The Gold Coast (the “Film”) that defendant Martin Bregman (“Mr. Bregman”) claimed that he and his production company, defendant Bregman Productions, Inc. (“Bregman Productions”), were producing. Plaintiffs’ Complaint alleges fraud, breach of contract and other causes of action based upon their investment in The Film to be produced by Mr. Bregman and Bregman Productions (collectively, “Defendants”).

By Order dated August 18, 2015, the Court granted the motion Defendants’ former attorney Lawrence H. Silverman’s motion to be relieved as counsel for Defendants. The action was stayed for 30 days within which time Bregman Productions was directed to appoint a substitute attorney and Mr. Bregman was directed to appoint a substitute attorney or opt to proceed pro se. All parties were directed to appear for a compliance conference on October 27, 2015.

Plaintiffs previously moved by way of Order to Show Cause to strike Bregman Productions' Answer based on Bregman Productions' failure to appear by counsel in violation of CPLR 321(a) and the Court's August 18, 2015 Order. By Order dated October 28, 2015 without opposition, granted Plaintiffs' motion, and struck Bregman Production's Answer based on its failure to appear by counsel in violation of CPLR 321(a) and the Court's August 18, 2015 Order, and its failure to appear at the scheduled compliance conference on October 27, 2015.

Plaintiffs move by way of Order to Show Cause for an Order pursuant to CPLR 3215, directing entry of default judgment against defendant Bregman Productions, Inc. on Plaintiffs' First Cause of Action for fraud; and pursuant to CPLR 3212, granting summary judgment against Mr. Bregman on Kaufman's Second Cause of Action for breach of a note and directing entry of judgment accordingly; and severing the remaining claims against Mr. Bregman for separate trial. Plaintiffs submit the attorney affirmation of Peter M. Satorius; the pleadings; and previous Court Orders.

Plaintiffs submit the affidavit of Herbert; an investment agreement dated February 6, 2009 entered between Herbert and Bregman Productions for the production of the Film; and proof of payment of \$1,000,000.00 by Herbert to Bregman Productions. Plaintiffs also submit the affidavit of George S. Kaufman; an investment agreement dated April 23, 2009 entered between Kaufman and Bregman Productions for the production of the Film; proof of payment of \$2,000,000.00 by Kaufman to Bregman Productions representing Kaufman's investment in the production of the Film; and a promissory note dated May 2012, executed between Mr. Kaufman, as "Note Holder," and Mr. Bregman memorializing a loan of \$100,000.00. No opposition is submitted.

The Court turns first to Plaintiffs' motion for default judgment against Bregman Productions on Plaintiffs' first cause of action for fraud. Both Herbert and Kaufman, who made investments in the Film, aver that Mr. Bregman made certain representations to them regarding the Film's production schedule, budget, cast, crew, rights and Bregman Productions' intended use of Plaintiffs' investment funds; Plaintiffs relied on Mr. Bregman's false representations in deciding to invest in the Film and would not have invested in the Film but for Mr. Bregman's false representations; Mr. Bregman and Bregman Productions intended to and did deceive

Plaintiffs' through these false representations; and Plaintiffs have been suffered resulting damages. Plaintiffs allege that while Mr. Bregman made the misrepresentations, the misrepresentations are to be imputed to Bregman Productions, which Mr. Bregman solely owns, controls, and is the entity through which Mr. Bregman expressly sought and obtained Plaintiffs' investments. Bregman Productions does not oppose Plaintiffs' motion for default judgment. Herbert and Bregman have demonstrated entitlement to default judgment against Bregman Productions on Plaintiffs' first cause of action for fraud.

Turning to the portion of Kaufman's motion which seeks summary judgment against Mr. Bregman on Plaintiffs' second cause of action, in an action to recover on a promissory note, a plaintiff establishes a prima facie case by submitting proof of the note and of the defendants' default. (*Bank of NY v. Sterlington Common Assocs.*, 235 A.D. 2d 448, 448 [1st Dept 1997]). It is then incumbent on defendants to come forward with proof of evidentiary facts showing the existence of a triable issue of fact with respect to a bona fide defense. (*Colonial Commercial Corp. v. Breskel Assocs.*, 238 A.D. 2d 539, 539 [1st Dept 1997]).

Here, Kaufman has made a prima facie showing of entitlement to summary judgment on his claim for breach of a promissory note by submitting proof of the May 2012 note executed between Kaufman and Mr. Bregman, and Mr. Bregman's default. Mr. Bregman does not oppose, and as such, fails to raise a triable issue of fact. Where the movants have established a prima facie showing of entitlement to summary judgment, the motion, unopposed on the merits, shall be granted. (*See generally Access Capital v. DeCicco*, 302 A.D. 2d 48, 53-54 [1st Dept. 2002]).

Wherefore, it is hereby

ORDERED that Plaintiffs' motion for a default judgment against defendant, Bregman Productions, Inc., on Plaintiffs' First Cause of Action for fraud is granted without opposition; and it is further

ORDERED that the Clerk enter judgment in favor of Plaintiff Lawrence Herbert against defendant, Bregman Productions, Inc., in the amount of \$1,000,000.00 together with interest as prayed for allowable by law (at the rate of 9% per annum from January 31, 2016) until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and

disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk enter judgment in favor of Plaintiff George S. Kaufman against defendant, Martin Bregman, in the amount of \$2,000,000.00 together with interest as prayed for allowable by law (at the rate of 9% per annum from January 31, 2016) until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff George S. Kaufman's motion for summary judgment against defendant Bregman Productions, Inc., on plaintiff's second cause of action for breach of a promissory note is granted without opposition; and it is further

ORDERED that the Clerk enter judgment in favor of plaintiff George S. Kaufman against defendant, Bregman Productions, Inc. on Plaintiffs' Second Cause of Action, in the amount of \$100,000.00 together with interest as prayed for allowable by law (at the rate of 9% per annum from January 31, 2016) until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED the remaining claims against defendant Martin Bregman are severed for separate trial.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: APRIL 14, 2016

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Eileen A. Rakower, J.S.C.