SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48
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PATRICK MOSES, KEVIN KAUFMAN, and VENTANA VENTURES LLC,

Plaintiffs,

-against-

SCOTT DUNLOP, DUNLOP GROUP, VENTANA VENTURES INC., BRAVO MEDIA LLC (F/K/A BRAVO COMPANY), and REALAND PRODUCTIONS LLC,

Defendants.

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Index No.: 653412/2014

Mtn Seq. No. 002

DECISION AND ORDER

JEFFREY K. OING, J.:

Background

Plaintiffs, Patrick Moses ("Moses"), Kevin Kaufman ("Kaufman"), and Ventana Ventures LLC ("Ventana", with Moses and Kaufman, collectively, "plaintiffs"), move, pursuant to CPLR 2221(e), for leave to renew that branch of this Court's prior decision and order that dismissed plaintiffs' first cause of action for breach of fiduciary duty against defendant Scott Dunlop ("Dunlop"), second cause of action for fraud against Dunlop, the fifth cause of action for aiding and abetting a breach of fiduciary duty against defendant Bravo Media LLC f/k/a Bravo Company ("Bravo"), and the sixth cause of action for fraud against Bravo, and, upon renewal, reinstating those claims. The underlying facts are set forth in the July 8, 2015 transcript (Transcript ["Tr."], NYSCEF Doc. No. 45, at 3-6), and familiarity is presumed.

In the prior decision, I dismissed the entire complaint based on the finding that plaintiffs' claims were time barred by the applicable statute of limitations. For the purposes of this renewal motion, the operative dates and agreements are the Dunlop Agreement, entered into in August 2006, and the Termination Agreement, entered into in June 2009. Both the Dunlop and the Termination Agreements were between Dunlop and Bravo. Plaintiffs commenced this action on November 5, 2014.

New York's statute of limitations for fraud is six years "from the date the cause of action accrued or two years from the time the plaintiff ... discovered the fraud, or could with reasonable diligence have discovered it" (CPLR 213[8]). The statute of limitations for a breach of fiduciary duty claim is three years, or six years where "an allegation of fraud is essential" to the claim (IDT v Morgan Stanley Dean Witter & Co., 12 NY3d 132 [2009]).

The first cause of action for breach of fiduciary duty against Dunlop was dismissed upon a finding that, to the extent the claim was based on the Termination Agreement, it is subject to the three year statute of limitations and is time barred (Tr. at 17-18). In that regard, I found that the Termination Agreement cannot be the basis for plaintiffs' fraud-based claims because that agreement was between Dunlop and Bravo, and any alleged misrepresentations made by Dunlop were made to Bravo, and

not to plaintiffs. Thus, plaintiffs could not avail themselves of the six year statute of limitations for a breach of fiduciary duty claim based on the Termination Agreement.

I also found that the Dunlop Agreement cannot be the basis for the breach of fiduciary duty claim based on fraud. In that regard, I rejected plaintiffs' reliance on the two year discovery rule, from the time they first discovered the alleged fraud in October 2013. Specifically, I found unpersuasive the argument that during the period from August 2006, when Dunlop and Bravo entered into the Dunlop Agreement, to October 2013, "when a mutual acquaintance informed Moses that Dunlop was being paid a substantial royalty on all episodes of The Real Housewives series and spinoffs" plaintiffs were not on inquiry notice of the fraud they allege (NYSCEF Doc No. 1, Complaint, ¶ 80). The principle is well settled that:

> [w]here the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him.

(Aozora Bank Ltd. v Deutsche Bank Securities Inc., 137 AD3d 685 [1st Dept 2016] [internal quotation marks omitted]). The record on the motion to dismiss demonstrated that there was ample information in the public domain between 2006 and 2013 to put plaintiffs on inquiry notice that Dunlop was benefitting more

from The Real Housewives series than he had originally indicated in 2006 (see Margolis Affirm., 1/9/15, Exs. C-K and M-T). Plaintiffs failed to explain why they could not have discovered the alleged fraud until October 2013. As such, I found plaintiffs' claim that they only discovered the fraud in 2013 to be unreasonable and declined to apply the two-year limitations applicable to the discovery rule to plaintiffs' claim. Thus, plaintiffs' breach of fiduciary duty claim based on fraud was dismissed, as was plaintiffs' second cause of action for fraud against Dunlop based on the Dunlop and Termination Agreements and the sixth cause of action for fraud against Bravo. The fifth cause of action against Bravo for aiding and abetting Dunlop's breach of fiduciary duty was dismissed because it was predicated on the first cause of action, which was dismissed.

Renewal Motion

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination ... and shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e]). Plaintiffs claim that they submit new facts that would change this Court's prior determination by proffering four additional affidavits and an attorney affirmation from the following individuals: (1) plaintiff Kaufman, (2) Amanda Seward, an attorney who represented Ventana in connection with production

of the first season of The Real Housewives series, (3) Josh Levenbrown, vice president of a California-based talent agency, (4) Michael Wise, a Los Angeles based talent agent, and (5) John M. Magliery, plaintiffs' counsel in this action.

To begin, contrary to plaintiffs' argument, I did not base my prior decision to grant defendants' motion to dismiss on my statements, which plaintiffs quote from the transcript, i.e., that television is "a cottage industry" where "everybody knows what everybody else is doing" (Tr. at 47). Rather, I found that based on all the information in the public domain from 2006 onwards plaintiffs were on inquiry notice of the fraud they allege in the complaint, and cannot rely on the benefit of the discovery rule to extend the statute of limitations.

A review of the additional affidavits and affirmation plaintiffs provide in this renewal motion do not compel a different outcome. There are no facts alleged in the affidavits that demonstrate that in the face of all the information in the public domain plaintiffs exercised reasonable diligence in discovering the fraud and were thwarted in their efforts. Indeed, the affidavits of Seward, Levenbrown, and Wise do not contain new facts explaining what efforts plaintiffs took from 2006 to 2013 to discover the fraud they allege.

As for Kaufman's affidavit, plaintiffs do not provide a reasonable explanation for why plaintiff Kaufman did not submit

an affidavit in the original motion. In any event, there are inconsistencies between Kaufman's affidavit and the affidavit Moses provided with the original motion. While both plaintiffs claim that Dunlop told them Bravo wanted to keep "him in a modest role of 'local fixer' -- the person who corrals the cast and solves other local problems for the production -- and that he would be paid a very modest sum for this service" (Moses Aff., 2/20/15, ¶ 9), Moses' affidavit jumps from 2006, when the Dunlop Agreement was allegedly entered into between Dunlop and Bravo, to 2013 when Levenbrown happened to mention during the course of a lunch conversation that Dunlop was "enjoying a 'nice royalty'" (Moses Aff., 2/20/15, ¶ 12). Moses also claimed that he only learned that Dunlop received the executive producer credit in 2013, after he retained counsel and confronted Dunlop and Bravo with the information he learned from Levenbrown (Moses Aff., 2/20/15, ¶¶ 13-14).

Plaintiff Kaufman, on the other hand, claims the following:

> In or around 2007, I learned that Dunlop had received an executive producer credit in connection with the Program.
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> In late 2007 or early 2008, however, I learned that Bravo was filming a spin-off of the Program called The Real Housewives of Atlanta; I also learned around that time that Dunlop would be receiving an executive producer credit with respect to that spinoff.
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> I was not sure, upon learning this news, what significance the executive producer credit had, and

> particularly, whether that credit was something that should indicate to me that Dunlop was actually playing a larger role in connection with the Program (and in connection with its sequels and spin-offs)than he had represented to Moses and me. On the one hand, an executive producer credit can sometimes mean that a person is involved in the actual production work for a program, which can -- as it had been in Ventana's case -- be associated with substantial fees. On the other hand, my experience in the industry over many years has made me understand that it is very common for the title of "executive producer" to be given to people as a "vanity credit," in which the credit is not accompanies by an significant compensation - or any meaningful work -- at all.

(Kaufman Aff., ¶¶ 9-11).

Thus, while Moses claims he only learned of the executive producer credit after he retained counsel in 2013, Kaufman claims that he learned in late 2007 or early 2008 that Dunlop had received an executive producer credit for The Real Housewives series. If Kaufman learned in late 2007 or early 2008 that Dunlop was receiving an executive producer credit for the spin-off The Real Housewives of Atlanta, and based on the information that was already in the public domain at that time regarding Dunlop's role, it begs the question of why plaintiffs assumed the compensation was a vanity credit and conducted no further investigation into the issue.

Furthermore, the two chance conversations Kaufman describes in his affidavit with Lance Klein and Steven Weinstock do not demonstrate diligent efforts to investigate the fraud. First, Klein had no knowledge on the subject of Dunlop's arrangement

with Bravo. As for Kaufman's inquiry to Weinstock, the president and founder of the production company for The Real Housewives of Atlanta, the conversation was also based on a chance encounter when Kaufman attended the same social function as Weinstock "shortly after the Atlanta-series of the Program began filming in late 2007 or early 2008" (Id., ¶¶ 10 and 12). Kaufman asked Weinstock:

> whether he knew Dunlop and whether he had any understanding of Dunlop's actual role in connection with the show. He told me that he did know of Dunlop receiving that executive producer credit, but that in reality, Dunlop had no involvement at all with the production of the Atlanta show. He also said that he did not have any reason to believe Dunlop was making any money in connection with the Atlanta show and that he shared my belief, given Dunlop's lack of involvement in the actual production work, that Dunlop was still receiving the executive producer title solely as a vanity credit.

(Kaufman Aff., ¶ 12). In light of the publicity The Real Housewives series and spin-offs were receiving, and the fact that Dunlop was given the executive producer credit year after year for the series and spin-offs, plaintiffs' reliance on Kaufman's chance encounter with Weinstock to inform them of Dunlop's financial arrangement with Bravo and conduct no further inquiry into the matter was not reasonable. Moreover, this encounter allegedly took place in early 2008, shortly after the Atlanta series of the Program began filming (see Kaufman Aff., ¶¶ 10 and 12). According to the record, plaintiffs made no further inquiries despite Dunlop's name being associated with the series

and spin-offs after 2008. Plaintiffs were clearly on inquiry notice and fail to show that "even if [they] had exercised reasonable diligence, [they] could not have discovered the basis for [their] claims before" October 2012, six years from formation of the Dunlop Agreement (see Aozora Bank, Ltd. v Deutsche Bank Securities Inc., 137 AD3d 685).

Accordingly, it is hereby

ORDERED that plaintiffs' motion for leave to renew is denied.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 12/14/16

HON. JEFFREY K. OING, J.S.C.

JEFFREY K. OING
J.S.C.