

**Success, LLC v Stonehenge Capital Co., LLC**

2011 NY Slip Op 32862(U)

September 28, 2011

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.

PART 1

Index Number : 117138/2006

SUCCESS, LLC

INDEX NO. 117138/06

vs  
STONEHENGE CAPITAL

MOTION DATE \_\_\_\_\_

Sequence Number : 009

MOTION SEQ. NO. 009

AMEND

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 3 were read on this motion to ~~for~~ Amend Complaint

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ... 1-4

Answering Affidavits — Exhibits A-G

Replying Affidavits — Exhibits 1-4

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion:  Yes  No

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

**FILED**

SEP 29 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: September 28, 2011

**MARTIN SHULMAN** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

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

**FILED**

SEP 29 2011

Defendants.

-----X

NEW YORK  
COUNTY CLERK'S OFFICE

**MARTIN SHULMAN, J:**

Plaintiffs move to amend the complaint pursuant to CPLR 3025. Plaintiffs also ask this court to vacate what they believe was a direction by this court to separately try the breach of fiduciary duty claim asserted against defendant Alan Brown. Plaintiffs bring this action to recover damages based upon defendants' alleged false promises and misrepresentations regarding the financing of a movie, entitled *Success*, that plaintiffs sought to produce.

The plaintiffs allege that in the spring of 2005 they were seeking financing for the development and production of *Success* (the "Project") when they were informed that defendant Stonehenge Capital Company, LLC ("Stonehenge"), a private equity and fund management firm, was interested in financing the Project.

Defendants were introduced to defendant Alan Brown ("Brown") who informed plaintiffs that he would be their exclusive contact with Stonehenge. Brown sent plaintiffs a "Summary of Proposed Investment" ("SPI") dated June 8, 2005 setting forth the financial aspects of the deal with Stonehenge in return for financing. The SPI indicated that the interest rate would be the prime rate plus one and one-half percent (1½%). It also indicated that there would be an additional "Success Fee," which was defined as thirty percent of the loan amount, which would become due upon maturity. The SPI also set forth a number of "Conditions Precedent to Financing." Notable among these was that the plaintiffs were required to enter into an agreement with Brown as executive producer and that any contract plaintiffs entered into for more than \$25,000 had to be approved by Stonehenge, via Brown.

The SPI stated at the top of the first page, as follows:

These summary terms are for discussion purposes only and do not represent an offer or commitment to invest on the part of Stonehenge. Any commitment by Stonehenge to invest will be evidenced by an executed Purchase Agreement.

On June 24, 2005, Brown brought plaintiffs Ethan Goldman ("Goldman") and Aldo LaPietra ("LaPietra") to meet with defendant Stephen Keller ("Keller") at Stonehenge's offices in Manhattan. The parties met in Stonehenge's conference room. This was the first time Goldman and LaPietra had met Keller. Brown introduced Keller as the director of the New York office and head of Stonehenge's 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 Project and that there would not be any problem with financing. They both

\* 4]

agreed that Stonehenge could have the money wired into the bank within four to five weeks. Plaintiffs allege that they were told to do whatever was necessary to move forward.

Plaintiffs allege that, after this meeting, they hired their line producer on a full-time basis at a cost of \$7,500 per week against a \$75,000 fee for the entire pre-production, production and post-production time period. Thereafter, with Brown and Keller's approval and encouragement, they began hiring crew, continued casting and set up an office.

On June 28<sup>th</sup>, 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<sup>th</sup>, 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 25<sup>th</sup>, with Brown's knowledge and approval, Goldman and LaPietra hired a new casting director, at a cost of \$15,000 to cast the remaining parts in the film. The plaintiffs also obtained a short-form letter of intent to bond the film and secured a domestic distribution deal. However, as of August 2<sup>nd</sup>, the plaintiffs had still not received the funding from Stonehenge and the entire crew had been working for almost three weeks without receiving any payment.

On the morning of August 10<sup>th</sup>, 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 they might be 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. On August 11<sup>th</sup> plaintiffs learned that Keller had left Stonehenge and had formed a new film finance company called "Parkview Entertainment." Brown assured plaintiffs that this would not affect their financing.

On August 16<sup>th</sup>, Keller called Goldman and stated that the deal was not done and that Stonehenge was not going to finance the Project. He stated that there must have been some miscommunication. Keller further acknowledged that he had left Stonehenge to form Parkview Entertainment 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, LLC, 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, which was August 17<sup>th</sup>, 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. According to plaintiffs, Stonehenge's counsel later claimed that Stonehenge was not aware of the Project, was not aware of any work Keller or Brown

had done or were doing on the Project, that Brown had no relationship with Stonehenge and that Stonehenge had no interest in proceeding.

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 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.

Later, plaintiffs learned that in February 2005, Keller and Stonehenge had signed a "Separation Agreement and Release" (the "Separation Agreement") providing that Keller's employment with Stonehenge was to terminate as of August 31, 2005. Keller and Brown had decided to form Parkview Entertainment, a film financing company in which they would be partners. Plaintiffs further discovered that, although Brown had done some work with Stonehenge on another film project, Brown was not a Stonehenge employee nor did he have an exclusive relationship with it. Plaintiffs allege Keller and Brown created that fiction to prevent the plaintiffs from contacting anyone at Stonehenge other than themselves. Plaintiffs further 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.

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 as against Brown and Keller (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).

Thereafter, defendant Stonehenge moved for summary judgment dismissing the complaint as against Stonehenge, or, in the alternative, to stay the action with respect to plaintiffs Success, LLC and R & D Films, Inc. Plaintiffs cross-moved for summary judgment on the issue of liability. Defendant Stephen Keller also moved for summary judgment dismissing the complaint as to him.

By Decision and Order dated February 18, 2010, this court granted defendants' motions to the extent of dismissing plaintiffs' fifth through eleventh causes of action as to Keller, and the sixth through eleventh causes of action as to Stonehenge. The fifth cause of action for breach of fiduciary duty was dismissed as to Keller since he did not have a fiduciary relationship with the plaintiffs. As to the sixth and seventh causes of action for breach of contract, this court's decision was based on the SPI, which 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 also dismissed the eighth cause of action for breach of the implied covenant of good faith and fair dealing. The ninth cause of action for deceptive trade practices was dismissed on the ground that plaintiffs had not alleged any consumer-oriented transactions. The tenth cause of



action for “Intentional, Knowing and Malicious Destruction of Rights, Property and Future Opportunity” was dismissed because no such cause of action exists in New York. This court dismissed the eleventh cause of action for intentional infliction of emotional distress, because defendants’ conduct, as alleged by the plaintiffs, did not rise to the level of outrageous conduct required to support this cause of action. This court granted plaintiffs’ cross motion for summary judgment as to liability to the extent that defendant Stonehenge is liable for the tortious acts of its agent, defendant Keller.

Plaintiffs promptly moved to reargue the February 18, 2010 decision and order, and this court granted the motion but adhered to its original decision and order. Thereafter, upon appeal, the Appellate Division, affirmed this court’s determination (*Success, LLC v Stonehenge Capital Co., LLC*, 81 AD3d 478 [1<sup>st</sup> Dept 2011]).

Plaintiffs now move to amend the complaint. In their proposed amended complaint, which is annexed to the moving papers, plaintiffs seek to amend the fifth cause of action to reflect their claim for breach of fiduciary duty as against Brown only, to add a cause of action for aiding and abetting a breach of fiduciary obligation (proposed sixth cause of action) and promissory estoppel (proposed seventh cause of action), to reinstate the contract claims and the claim for breach of duty of good faith and fair dealing (proposed eighth, ninth and tenth causes of action, respectively) and to reinstate the cause of action for intentional knowing and malicious destruction of rights, property and future opportunity (proposed eleventh cause of action). Plaintiffs also seek to vacate an order of severance which they believe this court entered in its decision and order dated February 18, 2010.

### Discussion

“Motions for leave to amend pleadings should be freely granted (CPLR 3025 [b]), absent prejudice or surprise resulting therefrom [citation omitted] unless the proposed amendment is palpably insufficient or patently devoid of merit” (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1<sup>st</sup> Dept 2010]).

### The Contract Causes of Action

Plaintiffs move to reinstate the contract causes of action on the ground that plaintiffs entered into enforceable agreements with Keller and Brown on two separate occasions, and that Stonehenge is vicariously liable for the breach of these agreements. In the eighth and ninth causes of action of their proposed amended complaint, plaintiffs reassert their previously dismissed sixth and seventh causes of action, wherein they alleged that they entered into oral and/or implied contracts with Stonehenge through its agents: the first, wherein Stonehenge agreed to provide \$4,000,000 to plaintiffs to produce the Project; and the second, wherein Stonehenge agreed to provide \$3,000,000 to plaintiffs to produce the Project (Goldman Aff., Ex. 2 ¶¶ 93, 98). Plaintiffs also seek to reinstate their cause of action for breach of the duty of good faith and fair dealing, previously set forth as their eighth cause of action, now set forth as the tenth cause of action in their proposed amended complaint.

Plaintiffs' grounds for reasserting their contract causes of action are that: 1) the SPI was simply a “fraudulent lure” and “therefore, any disclaimer contained therein could not, by its terms, overshadow and control the question of whether Keller and Brown entered an enforceable oral and/or executory contract, or one that any of the

parties were precluded from denying by virtue of promissory estoppel" (Goldman Reply Aff., at 5); 2) the SPI did not preclude an agent of the company (presumably Keller), from entering into an enforceable contract for his own benefit, for which the principal is thereafter vicariously liable because of the principal's creation of either actual or apparent authority; and 3) even if the disclaimer existed, it could be waived.

As noted above, plaintiffs previously moved to reargue this Court's February 18, 2010 decision dismissing the contract causes of action. On the motion to reargue, plaintiffs, for the first time, argued that a contract was formed between plaintiffs and Keller, acting on his own behalf and/or on behalf of himself and co-defendant Brown, which relationship was not subject to the requirement of a signed purchase agreement. Plaintiffs claimed that the contract causes of action were valid because: 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 for having placed Keller in a position to defraud plaintiffs.

While this court denied plaintiffs' motion to reargue on the ground that plaintiffs had improperly raised new arguments on the motion to reargue, it nonetheless addressed plaintiffs' new argument, stating the following:

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.

(Decision and order, dated June 29, 2010).

Plaintiffs are under the mistaken impression that they may continue to argue the validity of the same contract causes of action again and again by merely proposing new legal theories of liability. Under the doctrine of the law of the case, parties are precluded from relitigating an issue which has been previously decided in an ongoing action (*see, e.g., Ronbet 366 LLC v Tobias*, 19 AD3d 102 [1<sup>st</sup> Dept 2005]; *Glynwill Invs., N.V. v Shearson Lehman Hutton, Inc.*, 216 AD2d 78 [1<sup>st</sup> Dept 1995]). Matters that have been previously raised and decided against a party, or which could have been raised on a prior appeal, are barred from reconsideration by the doctrine of law of the case (*Suzuki-Peters v Peters*, 37 AD3d 726 [2d Dept], *lv denied* 9 NY3d 814 [2007]; *Matter of Shondel J. v Mark D.*, 18 AD3d 551 [2d Dept 2005], *affd* 7 NY3d 320 [2006]; *see also CDR Créances S.A.S. v Cohen*, 77 AD3d 489, 490-491 [1<sup>st</sup> Dept 2010]). That portion of plaintiffs' motion to reinstate the contract causes of action, set forth as the eighth, ninth and tenth causes of action in the proposed amended pleading, is therefore denied.

### **Promissory Estoppel**

In their proposed amended pleading, plaintiffs seek to add a claim for promissory estoppel as their seventh cause of action. In support of this proposed cause of action, plaintiffs assert that defendants Keller and Brown's promise to finance and fund the Project was clear and unambiguous, that plaintiffs relied on these promises and that Stonehenge is liable for these promises and agreements by virtue of Stonehenge's conferral of actual and apparent authority upon Keller and Brown.

To succeed on a claim for promissory estoppel, a plaintiff must establish three elements: (1) "a clear and unambiguous promise;" (2) "reasonable and foreseeable reliance by the party to whom the promise is made," and (3) "an injury sustained in reliance on that promise" (*Braddock v Braddock*, 60 AD3d 84, 95 [1<sup>st</sup> Dept 2009]). Here, plaintiffs have not alleged that either Brown or Keller represented that they would personally finance their film. As to Stonehenge, a lender is not promissory or equitably estopped from refusing to proceed with the closing of a financing agreement where it has expressly stated in its lending materials that no binding agreement shall exist until final loan documents have been executed (*511 9<sup>th</sup> LLC v Credit Suisse USA, Inc.*, 69 AD3d 497 [1<sup>st</sup> Dept 2010]). The SPI specifically provides that Stonehenge shall not be bound until it has executed a Purchase Agreement. Since Stonehenge did not execute a Purchase Agreement, plaintiffs may not assert a claim for promissory or equitable estoppel. Accordingly, that portion of plaintiffs' motion to amend the seventh cause of action is denied.

#### **Aiding and Abetting Breach of Fiduciary Duty**

In their proposed amended complaint, plaintiffs seek to add a sixth cause of action for aiding and abetting a breach of fiduciary duty as against Stonehenge and Keller. To sustain a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must, in addition to establishing a breach by a fiduciary of obligations to another, demonstrate that the defendant knowingly participated and provided substantial assistance to the fiduciary's breach and that the plaintiff suffered damages thereby (*Kaufman v Cohen*, 307 AD2d 113, 125 [1<sup>st</sup> Dept 2003]; *S & K Sales Co. v Nike, Inc.*

816 F2d 843, 847-848 [2d Cir 1987]; *Kolbeck v LIT Am., Inc.*, 939 F Supp 240, 245 [SD NY 1996], *affd* 152 F3d 918 [2d Cir 1998]; *see also Fallon v Wall St. Clearing Co.*, 182 AD2d 245, 251 [1<sup>st</sup> Dept 1992]). Further, under New York law, a plaintiff is required to show that the defendant had actual, and not just constructive knowledge of the breach (*see H2O Swimwear v Lomas*, 164 AD2d 804 [1<sup>st</sup> Dept 1990], citing *A A Tube Testing Co. v Sohne*, 20 AD2d 639 [2d Dept 1964]; *Kolbeck v LIT Am., Inc.*, 939 F Supp at 245-246, *supra*). Mere inaction or a failure to investigate will not constitute substantial assistance unless defendant owed an independent fiduciary duty directly to the plaintiff (*Kolbeck v LIT Am., Inc.*, 939 F Supp at 247 ).

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. Keller and Stonehenge did not have a fiduciary relationship with the plaintiffs. Plaintiffs must, therefore, set forth facts which show that these defendants "knowingly participated" in Brown's breach of his fiduciary duty.

Plaintiffs' sixth cause of action alleges that defendants Stonehenge, Keller and Brown had previously collaborated on another film in 2004, in which they had used the same SPI. According to plaintiffs, that SPI also contained the condition that Brown be retained and under a contract which created a fiduciary duty to the producers of that film, "while in reality, Brown was to be obligated to Stonehenge and Keller, controlling and monitoring the finances of said project allegedly to be supplied in the first instance, and having the initial approval of the final cut" (Proposed amended complaint, ¶ 72).

Plaintiffs go on to allege that "Stonehenge, fully knowledgeable of the relationship between Keller and Brown in relation to film projects for which Keller was Stonehenge's agent, provided the background and facilities and apparent authority thereby aiding and abetting Brown's breach of fiduciary duty" (*id.*, ¶ 82).

Neither of the above allegations demonstrates that Stonehenge knowingly participated in Brown's breach of fiduciary duty to plaintiffs. Keller's use of Stonehenge's office space does not show "active participation." Nor does Stonehenge's interest in having Brown monitor the spending on a film demonstrate that it aided and abetted his breach of fiduciary duty.

However, as to Keller, in factual allegations supporting the complaint, the plaintiffs have sufficiently alleged that Keller actively participated with Brown in misrepresentations which damaged plaintiffs. Plaintiffs may, therefore, assert a claim against Keller for aiding and abetting Brown's breach of fiduciary duty. This court does not find the amendment to be prejudicial to Keller, since he was originally charged with breach of fiduciary duty, which served as sufficient notice of the claim for aiding and abetting. Accordingly, plaintiffs' proposed amended sixth cause of action may be asserted against Keller.

**Intentional, Knowing & Malicious Destruction of Rights, Property & Future Opportunity**

This cause of action was previously dismissed and plaintiffs have presented no reason for reinstating it. Accordingly, that part of plaintiffs' motion to amend the complaint to add the eleventh cause of action is denied.

**Severance**

CPLR 3212 (e) provides that “summary judgment may be granted as to one or more causes of action, or part thereof . . . to the extent warranted . . . The court may also direct . . . that the cause of action as to which summary judgment is granted shall be severed from any remaining cause of action . . . .” In this court’s February 18, 2010 decision and order, this court intended to sever the remaining causes of action from those that had been dismissed. There was no intention to direct a separate trial regarding the fifth cause of action.

Accordingly, based upon the foregoing it is

ORDERED that plaintiffs’ motion for leave to serve an amended complaint in the form annexed to the moving papers is granted only to the extent that plaintiffs’ proposed fifth and sixth causes of action may be asserted against defendants Brown and Keller, respectively, and is otherwise denied; and it is further

ORDERED that service of a copy of this order with notice of entry shall constitute service of the amended complaint; and it is further

ORDERED that defendant Keller shall serve his answer to the amended complaint within twenty (20) days of service thereof.

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

Dated: New York, New York  
September 28, 2011

**FILED**

SEP 29 2011

NEW YORK  
COUNTY CLERK’S OFFICE



Hon. Martin Shulman, J.S.C.