

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

PRESENT: Cahn

PART 49

Index Number : 600707/2004

NAVARONE PRODUCTIONS, N.V.

vs

HSBC GIBBS GULF INSURANCE

Sequence Number : 004

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE**

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

Dated: May 29, 2008

[Signature]

J.S.C.

Check one: FINAL DISPOSITION DO NOT POST NON FINAL DISPOSITION REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

-----X
NAVARONE PRODUCTIONS, N.V.,
Plaintiff,

-against-

Index No. 600707/04

HSBC GIBBS GULF INSURANCE CONSULTANTS
LIMITED; HSBC BANK, individually, as escrowee and
as successor in interest to ANTONY GIBBS
INTERNATIONAL INSURANCE BROKERS LIMITED,
and SONY PICTURES ENTERTAINMENT, INC.,
as successor in interest to COLUMBIA PICTURES
INDUSTRIES, INC.,

Defendants.

-----X
SONY PICTURES ENTERTAINMENT, INC.,
Interpleading Plaintiff,

-against-

(Interpleader Action)
Index No. 600707/04

NAVARONE PRODUCTIONS, N.V., NAVARONE
PRODUCTIONS, LIMITED, JANET NESCHIS as Executrix
of the ESTATE of SIDNEY E. COHN, EVE WILLIAMS-
JONES, as Executrix of the ESTATE of CARL FOREMAN,
PETER GETTINGER, VIRGINIA UNGER, as
Executrix of the ESTATE of OLIVER A. UNGER,
JACK ABBOTT, EBERHARD KUEHL, GIBBS GULF
INSURANCE CONSULTANTS LIMITED, HSBC
BANK, and JOHN DOES 1-10,

Interpleaded Defendants.

-----X
CAHN, J.:

This action relates to the proceeds received on the distribution of a movie entitled "Force Ten From Navarone," which was produced and originally released in the late 1970s and continues to be sporadically shown.

Defendants HSBC Gibbs Gulf Insurance Consultants Ltd., HSBC Bank, etc. and Sony Pictures Entertainment Inc., etc hold proceeds of the distributions which are alleged to belong to

Navarone Productions, N.V., Navarone Productions, Ltd., and the individual interpleaded defendants, or some of them.

Several of the individual interpleaded defendants argue amongst themselves as to who is entitled to receive those proceeds. Specifically, Eberhard Kuehl and Jack Abbott on one side claim all or part of the proceeds. Navarone and the other interpleaded defendants together claim that they are entitled to all of the proceeds.

The court bifurcated the issues between the interpleaded plaintiff and the interpleaded defendants, and heard the issues of which group of interpleaded defendants is entitled to the proceeds, first, so that the party, which is found to be entitled to the proceeds can then proceed against the defendants. To this end, a hearing was held before the court.

This controversy relates to monies received pursuant to a Distribution Agreement, which monies are now held by defendants Sony Pictures Entertainment Inc., as Successor in Interest to Columbia Pictures Industries, Inc., and the HSBC Defendants.

The Parties:

Navarone Productions, N.V. (“Navarone N.V.”) is a corporation formed under the laws of the Dutch Antilles and is in a state of liquidation. Stipulation of Facts, dated May 14, 2007 (“SF”), ¶ 1. Anthony Unger holds a Power of Attorney for Navarone N.V. and is empowered to act on its behalf. Trial exhibit 1 (“Tr. Ex.”).

Navarone Productions, Ltd. (“Navarone Ltd.”) is a corporation formed under the laws of the United Kingdom. SF ¶ 4. Antony Unger is a director of Navarone Ltd., having been appointed on January 5, 2007. Tr. Ex. 4, Direct Testimony of Anthony Under (“Unger Test”), ¶ 12. All of Navarone Ltd.’s rights to revenues from the proceeds of Force Ten were assigned to

Navarone N. V. Tr. Ex. 5, ¶ 9(d). This assignment was confirmed on April 11, 2007. Unger Test., ¶ 5; Tr. Ex. 6.

Kuehl is a German citizen residing in Florida. Mondo Film 76 is a German partnership owned by Kuehl. See Kuehl Trial Witness Affidavit (“KA”) ¶ 1, ¶ 9.

The Licensing Agreement

On August 6, 1976, Marwi Capital, N. V. (“Marwi”) and Mondo Film 76 (“Mondo”) entered into an agreement concerning Force Ten (“the Mondo/Marwi Agreement”). SF ¶ 17; Tr. Ex. 11. Mondo engaged Marwi to provide “all services necessary to manufacture and deliver to Mondo and Distributor(s)” a copy of Force Ten suitable for Exhibition. Tr. Ex. 11 at ¶ 3. In furtherance of providing these services, Mondo granted to Marwi a perpetual license to license, sub-license and generally traffic in Force Ten.¹ During the hearing, Kuehl admitted that the Mondo/Marwi Agreement was a perpetual licensing agreement and that it gave Navarone, N. V. the power to enter into distribution agreements for the exploitation of Force Ten. Transcript of Proceedings (“Transcr.”), 69:22-71:9.

The Mondo/Marwi Agreement provided that Mondo would provide \$7,900,000 for the production of Force Ten. Id. ¶ 5.1. A portion of this money was to come from a bank loan. Further, Mondo was to provide the sum of \$1,000,000. Id. ¶ 5.1. However, Kuehl testified that when the Mondo/Marwi Agreement was entered into, he understood that it was very unlikely that he would provide the bank loan. Witness Affidavit of Eberhard Kuehl, dated May 7, 2007 ¶ 20 (“Kuehl testimony”).

¹ The license is “in perpetuity . . . [for] the sole and exclusive rights and licenses under its copyright, throughout the world (in all gauges of film and in all media now known or hereafter known) to sublicense, or cause others to license, the distribution, exploitation, turning to account and generally deal and traffic in [Force Ten] and rights therein and to authorize, and sub-license the same to Distributors) and others.” Tr. Ex. 11, ¶ 8.

The Mondo/Marwi Agreement also provided for the repayment of Kuehl's \$1,000,000 without interest as well as a fee for Marwi in the form of a continuing 15% profit participation. Tr. Ex. 11, ¶¶ 5.6, 8.2. The Mondo/Marwi Agreement provides that the 15% fee will be paid prior to any repayment of the \$1,000,000. Id. ¶ 5.6.

While the parties contemplated a "more formal agreement," it is explicitly stated that "[p]ending the execution of such formal agreement, this Agreement shall be binding upon the parties hereto." Id. ¶ 13.

The Mondo/Marwi Agreement explicitly permitted Marwi to assign its interest therein. Tr. Ex. 11, ¶ 12. Accordingly, on October 6, 1976, Marwi informed Mondo that it intended to assign its interest to a company yet to be formed that would carry out its obligations under the Mondo/Marwi Agreements. Tr. Ex. 16. Mondo accepted this letter with its signature. Tr. Ex. 16. On March 10, 1977, Marwi informed Mondo that it had assigned its rights under the Mondo/Marwi agreement to Navarone Limited and Navarone N.V. Tr. Ex. 17. On April 8, 1977, Marwi formally executed an assignment of all of its rights in the Mondo/Marwi Agreement to Navarone N.V. Tr. Ex. 18.

The Distribution Agreement with Columbia

On November 5, 1976, High Noon entered into a letter agreement with Columbia concerning the distribution of Force Ten in territories exclusive of the United States and Canada. Tr. Ex. 20a. This letter agreement was amended on November 24, 1976 and further amended on September 9, 1977. Tr. Ex. 20b; Tr. Ex. 20c ("collectively the Distribution Agreement").² The

² As a part of the Distribution Agreement, High Noon assigned all of its rights in the Distribution Agreement to Navarone Limited, the wholly owned subsidiary of Navarone N.V., and Navarone Limited became a signatory to the Distribution Agreement. Tr. Ex. 20c. High Noon separately assigned its rights to Navarone Ltd. by an assignment dated September 14, 1977. Tr. Ex. 22. In fact, High Noon had already assigned its interest to

Distribution Agreement calls for, *inter alia*, Columbia to advance \$4 million to the production of Force Ten against future revenues from Force Ten and grants to Columbia “the sole and exclusive right in perpetuity” to distribute Force Ten in territories exclusive of the United States and Canada. Tr. Ex. 20a, ¶¶ 11, 10. After Columbia recouped \$10.1 million of gross receipts, “all further gross receipts shall be paid one-half to us [Columbia] and one-half to you [Navarone Ltd.]. Tr. Ex. 20a, ¶ 12B (hereinafter the “12.B monies”).

The Distribution Agreement

Navarone N.V. entered into a licensing agreement with the American Broadcasting Company (“ABC”) for the exhibition of Force Ten on television. Tr. Ex. 25 (the “ABC Agreement”) and a Distribution Agreement for the United States and Canada with American International Pictures (“AIP”) (the AIP Agreement). Tr. Ex. 26. Navarone N.V. also entered into a production services contract with Jadran Film (“Jadran”). Tr. Ex. 27 (the “Jadran Contract”). The Jadran Contract called for Jadran to advance at least \$2,146,620 in services consisting of personnel, sets, props, costumes, facilities and other services required for the physical production of Force Ten. Id. ¶¶ 1.16, 1.17, 2.3. Security for the re-payment of the services were set forth in the Jadran Contract and included, *inter alia*, a promissory note in the amount of \$400,000. Id.

In early 1981, an action was commenced in the U.S. District Court for the Southern District of New York in which Navarone Ltd. and Navarone N.V. were interpleaded, seeking an accounting of approximately \$1.62 million that ABC was due to pay. Kuehl engaged counsel, Juan Lothar Stroevel, to recover his \$400,000.00. He obtained a judgment against Navarone

Navarone Ltd. by assignment dated August 29, 1977. Tr. Ex. 21. In addition to the High Noon Assignments to Navarone Ltd., Mondo assigned all of its rights to Navarone Ltd. on September 15, 1977. Tr. Ex. 23

N.V. for that amount. HSBC/Gibbs placed Navarone N.V. in bankruptcy in the Netherlands and appointed a receiver over Navarone Ltd.

Eventually a settlement was arrived at between the parties that provided for a priority of payments from the monies received on account of the film's distribution, as set forth in the settlement agreements.

The settlement agreements specifically provided for the payment of seven separate sums which represented the total amount remaining due and owing to the various parties, for monies advanced to complete production of Force Ten.

One of the parties that was entitled to some payment under the settlement agreements was HSBC/Gibbs. Pursuant to the agreement HSBC/Gibbs was obligated to notify Sony/Columbia as soon as all sums due to it had been paid. Jack Abbott, the HSBC/Gibbs executive authorized by HSBC/Gibbs to administer this matter, stated that the full amount due under the settlement agreements was \$802,492.00.

Mondo and Kuehl sent letters to Columbia acknowledging and accepting the terms of the settlement agreements.

On April 9, 1981, HSBC/Gibbs, Kuehl, Mondo and Juan Lothar Stroevel entered into an "agreement in principle." The agreement in principle provided for the priority of payments amongst those parties from the revenues derived from Force Ten. HSBC/Gibbs agreed to cooperate with Mondo to realize a maximum return on its investment. Abbott produced accountings of the amounts due and of payments made under the settlement agreements. The accounting stated that, as of March 31, 1985, the settlement agreements would be paid in full with payments of \$802,492.00.

Notwithstanding this, Sony/Columbia continued to make payments annually pursuant to its agreements to HSBC/Gibbs. From 1985 to 1990, HSBC/Gibbs received \$1,017,378.00 from Sony. According to the Abbot accounting, the settlement agreements were thus paid in full in 1990, with an overage of \$214,886.00. Neither HSBC/Gibbs nor Kuehl notified Sony/Columbia that all amounts due them under the settlement agreements had been fully paid.

Abbott met with Kuehl and agreed that he would attempt to have Sony/Columbia continue to make payments to them even though such payments were no longer due, in consideration for Kuehl's paying Abbott 40% of the payments so received. In fact, the agreement between the two seems to be a conspiracy to wrongfully obtain money from Columbia - which should have been paid to the Navarone corporations.

In 1991, Kuehl stopped paying Abbott the 40%. At that time, Abbott met with Kuehl in Germany and threatened that if he did not continue to pay the 40%, he would no longer receive any payments from Sony. Kuehl thereupon executed a Power of Attorney that Abbott had drawn up. The Power of Attorney authorized Abbott "to act for Kuehl in order to obtain additional sums of monies for Mondo."

Subsequent to 1990, Sony/Columbia continued to pay to HSBC/Gibbs monies which were not due to HSBC/Gibbs and which should have been paid to Navarone Productions, et. al. The overpayment totaled \$1,620,636.00. In 2000, Sony stopped paying HSBC/Gibbs and currently owes Navarone, N.V. more than \$1 million in revenue from Force Ten under the distribution agreement. Sony refused to pay that money to the Navarone corporations on account of Kuehl's "competition clause." The hearing held before the court was to determine whether or not Navarone, N.V. or Kuehl and his companies are entitled to receive the monies held by Sony.

After hearing all of the parties, it is clear that Mondo Film 76, Kuehl, HSBC/Gibbs, and anyone claiming under their authority have no rights to the money held by Sony or the additional payments still to be paid on account of Force Ten. Gibbs, acting through its former executive, Abbot, and Mondo, acting through Kuehl and Kuehl himself, purposely kept receiving monies from Sony/Columbia to which they were not entitled. These parties entered into a scheme to defraud both Sony and Columbia into wrongfully paying them, and deprived the Navarone companies of monies and payments due to them.

As to the issue tried at the hearing - who is entitled to the monies held by Sony, and to future distribution - the answer is clear: it is the plaintiff - Navarone Productions, N.V.

DATED: May 29, 2008

ENTER:

A handwritten signature in black ink, appearing to read "J.S.C.", is written over a horizontal line.

J.S.C.