

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated term of the United States Court of Appeals for the Second Circuit, held at
2 the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York,
3 on the 14th day of December, two thousand fifteen.
4

5 PRESENT: GERARD E. LYNCH,
6 *Circuit Judge,*
7 JED S. RAKOFF,*
8 *District Judge.***
9

10
11 MARATHON STRUCTURED FINANCE
12 FUND, LP, NEWSTAR FINANCIAL,
13 INC., MUNICH RE CAPITAL MARKETS
14 NEW YORK, INC. ,
15 *Plaintiffs-Appellants,*

16 v.

No. 14-4455

17
18
19 PARAMOUNT PICTURES CORPORATION,
20 *Defendant-Appellee,****
21

* The Honorable Jed S. Rakoff, of the United States District Court for the Southern District of New York, sitting by designation.

** Judge Guido Calabresi, originally assigned to this panel, recused himself from this case. The remaining two judges issue this order in accordance with Second Circuit Internal Operating Procedure E(b).

*** The Clerk of Court is directed to amend the official caption to conform to the listing of the parties stated above.

1 **FOR APPELLANTS:**

2 WILLIAM L. CHARRON (James A. Janowitz, William
3 L. Charron, Bryan T. Mohler, Benjamin S. Akley, *on the*
4 *brief*), Pryor Cashman LLP, New York, NY.

5 **FOR APPELLEE:**

6 RICHARD B. KENDALL (Allan J. Arffa, Andrew J.
7 Ehrlich, Patrick J. Somers, Paul, Weiss, Rifkind,
8 Wharton & Garrison LLP, New York, NY, and Richard
9 B. Kendall, Philip M. Kelly, Randall L. Jackson, *on the*
10 *brief*).

11 Appeal from the United States District Court for the Southern District of New
12 York (Katherine B. Forrest, *J.*).

13 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED,**
14 **AND DECREED** that the judgment of the district court is **AFFIRMED**.

15 Plaintiffs-Appellants appeal from a judgment entered in the United States District
16 Court for the Southern District of New York in favor of Defendant-Appellee Paramount
17 Pictures Corporation (“Paramount”) on partial findings pursuant to Federal Rule of Civil
18 Procedure 52(c) following a two-week bench trial. Appellants argue that the district court
19 erred by finding that they did not establish any required element of their federal securities
20 fraud, common law fraud, or common law unjust enrichment claims. We assume the
21 parties’ familiarity with the underlying facts, the procedural history, and the issues
22 presented for review.

23 Where a district court grants judgment on partial findings pursuant to Federal Rule
24 of Civil Procedure 52(c), we review the district court’s conclusions of law de novo and
25 findings of fact for clear error. MacDraw, Inc. v. CIT Grp. Equip. Fin., Inc., 157 F.3d
26 956, 960 (2d Cir. 1998).

1 Appellants are investors in Melrose Investors LLC (“Melrose”), a special purpose
2 vehicle which invested its funds in a slate of films produced and distributed by Paramount
3 over a two-year period (“Melrose Slate”). Appellants primarily argue that the district
4 court erred in finding that Paramount’s business strategy with respect to film financing
5 and risk mitigation did not change following their investment in Melrose.

6 Appellants brought claims for federal securities fraud, common law fraud, and
7 unjust enrichment. A claim under Section 10(b) of the Securities Exchange Act of 1934
8 requires the plaintiff to prove, *inter alia*, that the defendant made a misstatement or
9 omission of material fact. In re Int’l Bus. Machines Corp. Sec. Litig., 163 F.3d 102, 106
10 (2d Cir. 1998). Common law fraud under New York state law similarly requires a
11 material misrepresentation or omission of fact. Premium Mortgage Corp. v. Equifax,
12 Inc., 583 F.3d 103, 108 (2d Cir. 2009). “The basic elements of an unjust enrichment
13 claim in New York require proof that (1) defendant was enriched, (2) at plaintiff’s
14 expense, and (3) equity and good conscience militate against permitting defendant to
15 retain what plaintiff is seeking to recover.” Briarpatch Ltd., L.P v. Phoenix Pictures, Inc.,
16 373 F.3d 296, 306 (2d Cir. 2004). While unjust enrichment does not explicitly require a
17 misstatement or omission, Appellants do not assert that Paramount committed any
18 misconduct or wrongdoing apart from the misrepresentations or omissions Paramount
19 purportedly made in the offering documents. At a minimum, therefore, Appellants must
20 establish that Paramount made a false statement or material omission in order to succeed
21 on any of their claims.

1 The gravamen of all three claims is that Paramount represented to investors that it
2 would continue its historical risk-mitigation and film financing practices,¹ but, following
3 the Melrose investment, pursued one form of co-financing – territorial sales² – at a lower
4 rate than it had in the past. The district court found that Paramount had not changed its
5 strategy with respect to co-financing, but had continued “business as usual.” S.A. 8. The
6 district court’s factual finding in this regard was not clearly erroneous. While it is true
7 that, in the aggregate, Paramount entered into fewer territorial sales on average per year
8 for the twenty-five films in the Melrose Slate as compared to the sixty-five films
9 contained in the historical data set distributed to investors, Paramount did not engage in a
10 consistent level of territorial sales in any given two-year period. Rather, the district court
11 reasonably concluded, Paramount has always relied on a mix of co-financing strategies
12 including, in addition to territorial sales, shared-pot deals and passive equity co-financing,
13 and the rate at which Paramount entered into these transactions varied widely from year
14 to year.³

¹ These practices included, *inter alia*, passive equity co-financing, shared pot deals, tax credits, split-rights deals, and foreign presales. Appellants specifically argued in this case that Paramount had dramatically decreased its use of split-rights deals (where Paramount split the costs of production and distribution rights with another studio, often retaining domestic distribution rights), and foreign presales (where, prior to release, Paramount licensed all or a substantial portion of the foreign distribution rights for a fixed fee) after they invested in Melrose.

² Appellants refer to split-rights deals and foreign presales collectively as “territorial sales.” We adopt this terminology for the purposes of this appeal without deciding whether these transactions are economically interchangeable.

³ The Melrose transaction itself, as passive equity co-financing, is a form of risk management for Paramount. By definition, every film contained in the Melrose Slate involved passive equity co-financing.

