

NAVARONE PRODUCTIONS, N.V., Plaintiff,

v.

SONY PICTURES ENTERTAINMENT, INC., as successor in interest to
COLUMBIA PICTURES, INC., Defendant.

601724/2006.

Supreme Court, New York County.

April 28, 2010.

DECISION & ORDER

SHIRLEY WERNER KORNREICH, Judge:

William Rambaum, as executor of the Estate of Eberhard Kuehl (Kuehl), moves for an order confirming, *nunc pro tunc*, that there have been no claims pending by or against Kuehl in this court since September 1, 2009. Kuehl seeks a final order because the Court of Appeals denied his motion for leave to appeal an order of the Appellate Division, dated September 1, 2009 (AD Order), on the ground that it was non-final. The AD Order affirmed two orders not entered in this action. The two orders were issued on May 29 and December 29, 2008 (Cahn, J.) in a related action entitled *Sony Pictures Entertainment, Inc. v Navarone Productions, NV, et al.*, Supreme Court, New York County Index No. 600707/04. Kuehl also moves to sanction plaintiff, Navarone Productions, NV (Navarone) and its counsel for statements they made in response to an inquiry by the Clerk of the Court of Appeals concerning the finality of the AD Order.

Procedural History

In March 2004, Navarone brought an action against, *inter alia*, HSBC Gibbs Insurance Consultants, Ltd., (HSBC) and Sony Pictures Entertainment, Inc., (Sony), under Supreme Court, New York County Index No. 600707/04 (NAV I). The complaint contained causes of action against Sony and/or HSBC arising out of Navarone's claims to royalties for the distribution of the film *Force Ten From Navarone* (Film). Kuehl was never a party to NAV I.

In October 2004, Sony, using the NAV I Index Number, brought an interpleader complaint against, *inter alia*, HSBC, Navarone and Kuehl (Interpleader). The Interpleader complaint alleged that Sony was a disinterested stakeholder of monies (Fund) relating to the Film, to which the defendants had competing claims. The Interpleader complaint sought discharge

of Sony after its payment into court of the Fund, as well as Sony's costs and attorneys' fees. Kuehl's answer in the Interpleader asserted cross-claims and counter-claims for the monies in the Fund. Kuehl also asserted claims for breach of contract and breach of fiduciary duty against HSBC.

In 2006, Navarone brought the action in which this motion was made (NAV H) against Sony. NAV II was assigned Supreme Court, New York County Index Number 601724/06. Kuehl's papers admit that he was never a party to this action, in which he has inexplicably moved.

Justice Cahn held a hearing on the Interpleader and by decision dated May 29, 2008 (Interpleader Hearing Decision), determined that Navarone was entitled to the Fund. Justice Cahn found that Kuehl, entities that he controlled and others had entered into a scheme to obtain monies owed to Navarone by defrauding Sony and its predecessor, Columbia Pictures, Inc.

Subsequently, on December 29, 2008, Justice Cahn issued a decision (Post-Hearing Decision) on various motions and cross-motions. The Post-Hearing Decision dismissed the Interpleader complaint, refused to discharge Sony and directed Sony to pay 60% of the Fund to Navarone and to retain 40% "until further order of this Court, in the event that it is determined that Sony is entitled to recover any counsel or other fees." The Post-Hearing Decision made clear that a further hearing would be required to determine whether, under the circumstances, Sony, as a stakeholder, was entitled to counsel fees, costs and expenses.

On September 1, 2009, the Interpleader Hearing Decision and the Post-Hearing Decision were affirmed by the AD Order. Kuehl moved for leave to appeal to the Court of Appeals. On November 25, 2009, the Clerk of that Court wrote to Kuehl's counsel, with copy to other parties' counsel, inquiring whether the AD Order finally determined the action, citing CPLR 5602.^[1] The letter invited all parties to comment on the issue of finality. Navarone's counsel responded with a letter, dated December 4, 2009 (Navarone Letter). The Navarone Letter stated that the AD Order was not final because the issue of fees owed to Sony was outstanding and Kuehl could share liability for them. On January 14, 2010, the Court of Appeals dismissed Kuehl's appeal on the ground that the AD Order did not finally determine the action. Kuehl's motion for sanctions is based upon the theory that the Navarone Letter misled the Court of Appeals.

On February 11, 2010, this motion came on for oral argument. As the Interpleader had never been assigned to this court, Sony was directed to purchase an index number and file a Request for Judicial Intervention, and the parties in the Interpleader with the new index number were referred to a Special Referee for determination of whether attorneys' fees were due to Sony. The Interpleader Index Number is now 600430/10.

Subsequently, Sony and Navarone settled their disputes. They have submitted a stipulation of discontinuance of NAV II, dated April 5, 2010.

Discussion

Kuehl's motion must be denied because he has moved in an action that is now over in which he was never a party. Kuehl is not and never was a party to NAV II, which now has been discontinued. Further, he seeks an order of finality so that he can appeal orders entered in the Interpleader, not this action.

Moreover, Navarone is correct that the Interpleader is not final because the issue of attorneys' fees and costs is outstanding. *Jiggetts v Dowling*, 21 AD3d 178, 180 (1st Dept 2005)(outstanding attorneys' fee issue rendered judgment non-final for purposes of Court of Appeals jurisdiction). Further, the Special Referee may order Kuehl to pay attorneys' fees and costs based upon Justice Cahn's finding that he engaged in a fraudulent scheme. In an interpleader, a court has discretion to award expenses as may be just, which includes their payment by a claimant, rather than out of the fund. *Fischbein, Badillo, Wagner v Tova Realty Co.*, 193 AD2d 442, 444-445 (1st Dept 1993), citing CPLR 1006(f)(court shall impose such terms relating to payment of expenses, costs and disbursements as may be just and which *may* be charged against subject of action) [emphasis supplied]. In *Fischbein*, the claimants, neither of whom were held to be entitled to an escrow fund, were ordered to pay the stakeholder's fees and expenses. *See also, Republic Nat'l Bank v Lupo*, 215 AD2d 453 (2d Dept 1995) and *Lupo v Republic Nat'l Bank*, 215 AD2d 452 (2d Dept 1995)(successful and unsuccessful claimant to bank account to share payment of stakeholder bank's attorneys' fees and costs).

Finally, in light of this court's agreement with the positions set forth in the Navarone Letter, the motion for sanctions is denied. Accordingly, it is

ORDERED that the motion of William Rambaum, as executor of the Estate of Eberhard Kuehl, for an order confirming, *nunc pro tunc*, that there have been no claims pending by or against Kuehl in this court since September 1,2009 and for sanctions, is denied in all respects,

[1] CPLR 5602 provides that an appeal may be taken to the Court of Appeals with its permission "from an order of the appellate division which finally determines the action and which is not appealable as of right."