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CASES OF INTEREST

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IP/Entertainment Law Weekly Case Update for Motion Picture Studios and Television Networks

February 23, 2012

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Benay v. Warner Bros. Entertainment, Inc., USDC Central District of California, February 14, 2012

 [Click here for a copy of the full decision.](#)

- District court grants summary judgment in favor of defendants on implied-in-fact contract, finding lack of privity between plaintiffs and defendants.

In this long-running litigation, plaintiffs, authors of a copyrighted screenplay titled *The Last Samurai*, pitched their screenplay to defendant Bedford Falls, a production company, in 2001. Bedford Falls rejected plaintiffs' submission, citing a similar film project already in development, which was released in 2003 and also called *The Last Samurai*. Plaintiffs sued Bedford Falls, as well as defendants involved in the writing, production, marketing and distribution of *The Last Samurai* film, for copyright and breach of an implied contract. The Ninth Circuit affirmed the district court's grant of summary judgment in favor of defendants on the copyright claims, holding that the works were not sufficiently similar to support a finding of copyright infringement, but reversed the district court's dismissal of the contract claim, finding that the works could be similar enough to support a finding that defendants used the plaintiffs' script in breach of what plaintiffs claimed was an implied contract.

On remand, all of the defendants except Bedford Falls moved for summary judgment on plaintiffs' breach of implied-in-fact contract claim, arguing they lacked privity with plaintiffs, and could not be liable for breach of contract. All defendants also moved for summary judgment on statute of limitations grounds, as well as for termination of the case as a sanction for what they alleged was plaintiffs' falsification of evidence.

The court granted summary judgment in favor of defendants Warner Bros. and John Logan, who co-wrote the screenplay for the film, holding that plaintiffs lacked privity with these defendants. Noting that privity between an author and producer or director – or someone acting as their agent – was a necessary element for an implied-in-fact contract, a contract that arises as a result of a personal relationship or understanding between the parties, the court held that plaintiffs failed to adduce sufficient facts to support a finding of privity with Warner Bros. The court rejected plaintiffs' asserted theories in support of their privity argument at the summary judgment stage, since they had not been previously articulated either in plaintiffs' complaint or during discovery. The court also dismissed the contract claim against defendant Logan, finding that plaintiffs had not shown how they could have been in privity with him. Plaintiffs' assertions – that Bedford Falls, with which plaintiffs had an alleged understanding that if their idea was used, they would be compensated, had hired Logan to write the *Last Samurai* script and the circumstances of Logan's employment indicated that he knew of the agreement between plaintiffs and



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Bedford Falls – were insufficient under established precedent to find privity between plaintiffs’ and defendant Logan.

The court denied summary judgment to defendants Edward Zwick (director of *The Last Samurai*) and Marshall Herskovitz (a co-author of the film’s screenplay), holding that triable issues of fact existed as to whether Richard Solomon, the former president of Bedford Falls to whom plaintiffs had pitched their screenplay, was also acting as an agent for defendants Zwick and Herskovitz in their individual capacities. Sufficient evidence existed – including the deposition testimony of Solomon that, in his employment with Bedford Falls, he looked at submissions not only to see if they were appropriate for the company but also to determine whether Zwick or Herskovitz might be interested in their capacities as producers, writers or directors – to support a jury finding that Solomon, in addition to acting as an agent for Bedford Falls, was also an agent for Zwick and Herskovitz in their individual capacities. Because privity could be established based on agency theories in which Solomon acted as agent for Zwick and Herskovitz, the court denied defendants summary judgment.

The court rejected defendants’ statute of limitations argument, which required a finding that the breach of contract claim began to run prior to the film’s release. In a typical idea submission case, plaintiffs’ claim would only begin to run upon disclosure of their idea to a “substantial segment of the public” that would trigger the obligation to pay the authors for use of their work. Defendants had not established any “actionable use” other than the release of the film that would trigger an earlier date for the running of the statute of limitations, and therefore defendants were not entitled to summary judgment.

The court also rejected the defendants’ motion for terminating sanctions, in which defendants alleged that the plaintiffs fabricated e-mails that purported to be written by defendants. The e-mails were attached to an anonymous letter transmitted to all parties several days before a scheduling conference was to take place following the Ninth Circuit’s remand to the district court. While finding that the “circumstances, content and timing of the anonymous mailing are suspicious and [d]efendants have made a strong showing regarding their falsity,” the court concluded that insufficient evidence existed to show that the plaintiffs, or their counsel, were responsible for the letter or the e-mails, or knew of their falsity when they used them to reopen discovery for the limited purpose of determining the provenance, authenticity and relevance of the e-mails.

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