

**John F. Butz v. Orest E. Bliss, No. 84 Civ. 7030 (JMW)**

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN  
DISTRICT OF NEW YORK**

*1987 U.S. Dist. LEXIS 6343; Fed. Sec. L. Rep. (CCH) P93,385*

*OPINION AND ORDER*

WALKER, District Judge:

*INTRODUCTION*

Plaintiffs John F. Butz and Donald P. Ricklefs brought this action derivatively on behalf of U.S. Venture Capital, Inc. ("USVC") and in their own right against defendants Orest E. Bliss, Heinz Vollenweider and USVC. Bliss and Vollenweider counterclaimed against Butz and Ricklefs and added Rudolph Ernst as a third party defendant. Ernst then counterclaimed against Bliss and Vollenweider. The case was tried to the Court. Following the trial and the subsequent filing of post-trial memoranda, Butz, Ricklefs and Ernst (sometimes "claimants" or "Founders") attempted to submit "new" exhibits (Px 810-815) which the Court rejects as untimely.

Butz and Ricklefs claim that Bliss and Vollenweider violated § 10(b) of the Securities and Exchange Act of 1934, as amended, 15 U.S.C. § 78j, Rule 10(b)-5, 17 C.F.R. 240.10(b)-5, New York's Martin Act, *New York Gen. Bus. Law* § 352(c) (McKinney 1984), and principles of common law fraud, breached their fiduciary duties of care and loyalty as directors and majority shareholders of USVC and as joint venturers, and breached a contract entered into between the parties. Bliss and Vollenweider [\*2] counterclaim for common law fraud and breach of contract against Butz, Ricklefs and Ernst. Finally, Ernst counterclaims against Bliss and Vollenweider for a fraud and breach of contract as a third party beneficiary.

\* \* \* \* \*

25 Defendants have counterclaimed for breach of contract on the grounds that claimants failed to verify their expenses or develop a reasonable repayment plan. These claims are plainly frivolous. First, claimants were not required to substantiate their expenses until the time for repayment was to occur. **Second, the provision in the December 29 agreement calling for a repayment plan was expressed as an intention. It therefore was unenforceable.** See *Candid Productions, 530 F. Supp. at 1336*. And in any case, although claimants' repayment plan was of questionable legality, they honestly believed it to be reasonable and legal.

[\*92] The Court concludes that while there was neither fraud involved on either side of this contract, nor any breach of fiduciary duty, defendants have breached the December 29 agreement by failing to recapitalize and issue shares to claimants, by failing to pay Butz a one year salary and by acquiring shares of TVC other than on behalf of USVC's successor, Bridgestone. Defendants are liable for the damages resulting from these breaches.

\* \* \* \* \*

SO ORDERED.