

Baker Marquart and Quinn Emanuel Win Jury Verdict in Last Samurai Case

Law360, New York (May 24, 2012, 11:30 AM ET) -- With the reputations of “The Last Samurai” director Edward Zwick and his longtime collaborator Marshall Herskovitz on the line, Gary Gans of Quinn Emanuel Urquhart & Sullivan LLP fought back against allegations of screenplay theft with a multipronged strategy that used the film itself as its own defense.

The case centered on two screenwriting brothers, Aaron and Matthew Benay, who in 2005 claimed Zwick and Herskovitz, along with Bedford Falls Productions, had stolen the idea for the 2003 Tom Cruise film from a screenplay the Benay brothers had allegedly submitted to Bedford Falls.

Zwick and Herskovitz, longtime collaborators behind films like “Traffic” and “Blood Diamond” and television shows like “Thirtysomething” and “My So-Called Life,” denied using the Benays’ screenplay in writing and producing their film. They asserted that the evidence showed their project was the product of an intense collaboration with “Gladiator” writer John Logan.

While the claims of copyright infringement and breach of implied contract were tossed in 2008, two years later, the Ninth Circuit reversed the dismissal of the breach-of-implied-contract claim while affirming the dismissal of the copyright claim.

Gans came to the conclusion that the central theme of the movie — honor — was one of the pathways to his clients’ vindication.

“The key to this case from my viewpoint was that the movie was largely about honor,” Gans told Law360. “We tried to channel that theme and the emotion of the movie so that they would be associated not only with the movie, but also with our clients in the courtroom as honorable people — which they are — and to show that they had no need or desire to steal someone else’s ideas.”

What was fundamental to that line of reasoning was to avoid falling into the trap of being labeled the Hollywood establishment types against the young and aspiring writers.

“On the one hand, we were trying to build up our clients as honorable and successful people; on the other hand, you have to attack the plaintiffs,” Gans said.

Gans, along with Jaime Marquart of Baker Marquart LLP, settled on a three-part message to take to the jury: His clients never saw the Benay brothers’ screenplay, the script for “The Last Samurai” was being independently developed for some time, and any similarities between the movie and the screenplay were not substantial other than the historical context of being set in the Satsuma Rebellion in 19th century Japan.

While much of the case involved the differences and similarities between “The Last Samurai” and the Benay brothers’ screenplay about an American Civil war veteran in Japan, in the midst of the trial, Gans saw a golden opportunity to hammer home one of his central arguments: Zwick and Herskovitz never even saw the Benay brothers’ script.

The Benay brothers’ agent, Dave Phillips, claimed he had sent the screenplay to Rick Solomon, now the former president of Bedford Falls, and had met with Solomon numerous times.

“It occurred to me: What if the agent couldn’t pick Solomon out of a lineup?” Gans said.

Gans obtained a photo of Solomon along with photos of seven other men of a similar age. On cross-examination, after showing Phillips 8 different photos, Gans says the agent was unable to identify Solomon, the man he claimed to have met with up to 10 different times.

“After the photograph lineup, the agent had very little credibility,” Gans said. “The cross is largely about setting up the pins, knocking them down is a lot easier than setting them up.”

With the agent sidelined, Gans turned his attention to attacking the Benay brothers’ position on the alleged similarities between the screenplay and the movie.

While he couldn’t dispute both the film and the Benay brothers’ screenplay shared the same historical context, Gans said the differences between the two stories were rather stark.

In the screenplay, Gans said the protagonist was a respected, married West Point professor enlisted by the U.S. president to help train the Japanese army in advanced military tactics, while in the movie, Tom Cruise's character is an entirely different sort of man.

"He's a loner; he's a drunk. He goes to Japan as a mercenary," Gans said. "You contrast these two scenes, and you set up the plaintiffs who are saying they're identical."

Additionally, in the film, the character of the last samurai is considered a good and honorable man who befriends Cruise's character, while in the screenplay, the last samurai is evil, and is eventually killed by the protagonist, according to Gans.

Despite the differences, Gans said the Benay brothers maintained the two stories were identical.

"I think they lost a lot of credibility in that respect," Gans said. "They could not bring themselves to concede that there were differences."

After a two-week trial, the seven-member jury of five women and two men took five hours to come back with a unanimous verdict finding there was no implied agreement to pay the Benay brothers for the use of their script.

Gans said the if the jury had gone the other way, it could have had a chilling effect on the ability of young writers to get their material read by studios and production companies due to fear of similar lawsuits.

"There are a lot of similar ideas," Gans said. "The significance is it really allows studios and production companies to read people's scripts and allows young writers to keep that avenue open. "

The Benays are represented by John A. Marder of Marder Zink & Karlzen LLP.

The defendants are represented by Gary Gans of Quinn Emanuel Urquhart & Sullivan LLP and Jaime Marquart of Baker Marquart LLP.

The case is Aaron Benay et al. v. Warner Bros. Entertainment Inc. et al., case number 2:05-cv-08508, in the U.S. District Court for the Central District of California.

--Editing by Elizabeth Bowen.