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JUDGE ROLF M. TREU
DEPARTMENT 58

FILED
LOS ANGELES SUPERIOR COURT
MAY 15 2012
John A. Clarke, Executive Officer/Clerk
BY K. Mason, DEPUTY
K. Mason

Hearing Date:	Tuesday, May 15, 2012
Calendar No:	10
Case Name:	Romero v. Eastin, et al.
Case No.:	BC463026
Motion:	Demurrers (4) to the First Amended Complaint
Moving Party:	(1) Defendants, Fox Television Studios, Inc.; TVM Productions, Inc.; Fox Television Studios Productions, Inc.; Twentieth Century Fox International Television, Inc.; Matt Loze; and David Madden (2) Defendants, Creative Artists Agency, LLC; Rob Kenneally; and Tom Young (3) Defendants, Karl R. Austen and Jackoway Tyerman Wertheimer Austen Mandelbaum Morris & Kllein, APC (4) Defendant, Jeff Eastin
Responding Party:	Plaintiff Dennis Travis Romero aka Travis Romero
Notice:	OK

Tentative Ruling:

(1) Fox Defendants' demurrer is sustained as to the 2nd - 6th, 13th and 14th COAs.

(2) CAA Defendants' demurrer is sustained as to the 2nd – 7th, 9th, 11th, 13th, and 14th COAs.

(3) Attorney Defendants' demurrer is sustained as to the 2nd – 5th COAs and is otherwise overruled.

(4) Eastin's demurrer is sustained as to the 13th and 14th COAs and the allegations pertaining to partnership, and is otherwise overruled.

Leave to amend is granted as to all COAs with the exception of the 7th and 9th COAs.

Background and Procedural History –
On 6/8/11, Plaintiff, Dennis Travis Romero aka Travis Romero filed this action against Defendant, Jeff Eastin arising out of an alleged partnership agreement for credit and compensation for the creation, development, and production of a television series, "White Collar" (Series).

On 9/20/11, Plaintiff filed a First Amended Complaint naming as Defendants: Fox Television Studios, Inc.; TVM Productions, Inc.; Fox Television Studios Productions, Inc.; Twentieth Century Fox International Television, Inc.; Matt Loze; and David Madden (collectively Fox Defendants); Creative Artists Agency, LLC; Rob Kenneally;

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and Tom Young (collectively CAA Defendants); and Karl R. Austen and Jackoway Tyerman Wertheimer Austen Mandelbaum Morris & KIlein, APC (collectively Attorney Defendants).

Plaintiff asserts causes of action for (1) accounting against Eastin only; (2) fraud: intentional misrepresentation; (3) fraud: negligent misrepresentation; (4) fraud: promise without intent to perform; (5) conspiracy to defraud; (6) unfair business practices; (7) violation of Talent Agency Act against CAA Defendants only; (8) professional malpractice against Attorney Defendants only; (9) professional malpractice against CAA Defendants only; (10) breach of fiduciary duty against Attorney Defendants only; (11) breach of fiduciary duty against CAA Defendants only; (12) breach of fiduciary duty against Eastin only; (13) intentional interference with prospective business advantage; (14) negligent interference with prospective business advantage; (15) declaratory relief against Eastin only; and (16) declaratory relief against Eastin only.

On 12/13/11, this action was removed to Federal Court. On 3/1/12, this action was remanded.

Common Factual Allegations –
In May 2008, Fox Studios and USA Network agreed to produce the Series. FAC ¶ 37. Eastin, along with other Defendants, down played Romero's involvement in the Series to a story editor position despite Romero's involvement in all aspects of the Series. FAC ¶¶ 40-44.

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Fox Defendants' Demurrer –
The Fox Defendants demur to the 2nd - 6th, 13th and 14th COAs.

1. *Factual Allegations pertaining to Fox Defendants*

Loze is the senior vice president at Fox Television Studios; David Madden is the executive vice president for Fox Television Studios and was one of the main decision makers regarding the Series. FAC ¶ 33. Loze was aware of Eastin's venture with Romero from 12/5/08. FAC ¶ 36. On 10/18/09, Eastin admitted in an interview that the idea of the Series came from Romero. FAC ¶ 61. In late October 2009, Eastin was called into a meeting with USA to discuss the interview. FAC ¶ 62. On 12/5/08, Loze sent an email to Eastin indicating that there were issues associated with Eastin giving up partial story credit and that USA is not sure Eastin would be allowed to give Romero partial story credit at this late date. FAC ¶ 86. In a series of emails from 3/19/09 through 3/25/09 between Madden and Eastin, Madden suggested that Eastin take credit for Romero's story ideas. FAC ¶ 87.

2. *Fraud COAs*

The elements of fraud must be alleged with particularity (see Hills Transportation Co. v. Southwest Forest Industries, inc. (1968) 266 Cal.App.2d 702, 707) showing "how, when, where, to whom, and by what means the representations were tendered" (Small v. Fritz Companies, Inc. (2003) 30 Cal.4th 167, 184); and against a corporation showing "the names of the persons making the allegedly fraudulent representations, their authority to

speak, to whom they spoke, what they said or wrote, and when it was said or written." (Tarmann v. State Farm Mutual Auto. Ins. Co. (1991) 2 Cal.App.4th 153, 157).

Plaintiff's fraud COAs allege that the Fox Defendants represented, or conspired to represent, to Romero that Romero would be recognized and compensated as a co-creator of the Series. However, no facts are alleged with particularity to support this allegation. Plaintiff fails to allege the details of Loze and Madden's representations to Romero, or Loze and Madden's actions in conspiring to make representations to Romero.

Additionally, the Fox Defendants consist of several entity parties, and Plaintiff's allegation that Loze and Madden are officers of "Fox Television Studios" fails to identify whether the entity is Fox Television Studios, Inc. or Fox Television Studios Productions, Inc. Plaintiff fails to allege any facts pertaining to the relationship among the Fox Defendants, and the general agency and employee allegations (FAC ¶ 102) pertain to Doe Defendants and are insufficient to allege with particularity the relationship among the Fox Defendants in light of the various Defendants named in this action.

As to the 3rd COA, the Court additionally notes that a false promise cannot form the basis of a negligent misrepresentation claim. See Tarmann, 2 Cal.App.4th at 169.

The demurrer is sustained as to the 2nd – 5th COAs.

3. Prospective Economic Advantage

Plaintiff's 13th and 14th COAs are based on business relationships and economic advantages pertaining to his work as a co-creator of the Series. However, Plaintiff fails to allege facts identifying what the business relationships and economic advantages were. Plaintiff's opposition argument that the FAC, as a whole, reasonably implies an economic relationship with Eastin concedes that the economic relationship with Eastin is not pled in the 13th and 14th COAs. Additionally, because the demurrer is sustained as to Plaintiff's fraud COAs asserted against the Fox Defendants, Plaintiff fails to allege wrongful conduct by the Fox Defendants. See Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal.4th 1134, 1158-59.

The demurrer is sustained as to the 13th and 14th COAs.

4. Unfair Business Practices

Plaintiff's 6th COA is predicated on Plaintiff's other COAs asserted against the Fox Defendants. Because those COAs are not well-pled, the 6th COA similarly fails. The demurrer is sustained as to the 6th COA.

CAA Defendants' Demurrer –

The CAA Defendants demur to the 2nd – 7th, 9th, 11th, 13th, and 14th COAs.

1. Factual Allegations pertaining to CAA Defendants

Kenneally is Eastin's agent who communicated with Eastin and Loze regarding the Series. FAC ¶¶ 33-34. Kenneally was aware of Eastin's venture with Romero. FAC ¶

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35. In mid-June 2009, the CAA Defendants had been representing Eastin in various projects. FAC ¶ 54. Romero had asked Eastin if Romero should engage a talent agent; Easting indicated that Romero could use Kenneally. FAC ¶ 56. The CAA Defendants never informed Romero of the conflict of interest in representing Eastin and Romero and never fully represented Romero's best interests in regard to the Series. FAC ¶ 58.

2. Fraud COAs

Plaintiff's fraud COAs allege that the CAA Defendants represented Romero's interests. Additionally, the CAA Defendants represented, or conspired to represent, to Romero that Romero would be recognized and compensated as a co-creator of the Series. However, no facts are alleged with particularity to support these allegations. Plaintiff fails to allege the details of the CAA Defendants' representation of Romero, their representations to Romero, or their actions in conspiring to make representations to Romero.

Additionally, Plaintiff fails to allege any facts pertaining to the relationship among the CAA Defendants, and the general agency and employee allegations (FAC ¶ 102) pertain to Doe Defendants and are insufficient to allege with particularity the relationship among the CAA Defendants in light of the various Defendants named in this action.

As to the 5th COA for conspiracy, although conspiracy is not a cause of action (see Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal.4th 503, 510-11), the Court believes that separating the conspiracy theory into a separate "cause of action" has benefits in streamlining this action in light of the various claims and Defendants (see Berg & Berg Enter., LLC v. Sherwood Partners, Inc. (2005) 131 Cal.App.4th 802, 823).

The demurrer is sustained as to the 2nd – 5th COAs.

3. Talent Agencies Act

Plaintiff's 7th COA is premised on violations of Labor Code § 1700.32. However, Labor Code § 1700.44(a) provides that the Labor Commissioner is to hear any disputes arising under the Talent Agencies Act: exhaustion of the remedies before the Labor Commissioner is mandatory and a prerequisite (see Styne v. Stevens (2001) 26 Cal.4th 42, 54). Plaintiff fails to allege compliance with the mandatory requirements. Plaintiff, in opposition, argues that this matter is moot because Plaintiff requests dismissal without prejudice as to this COA. However, no request for dismissal has been filed; additionally, the CAA Defendants were required to demur to this COA. Therefore, the Court does not find the issue moot. The demurrer is sustained as to the 7th COA.

The Court does not reach the CAA Defendants' remaining arguments as to the 7th COA.

4. "Professional Malpractice" and Breach of Fiduciary Duty

Plaintiff's 9th COA for professional malpractice invents a new malpractice claim relating to talent agents. No authority has been presented permitting a malpractice claim to be stated against talent agents. The Demurrer is sustained as to the 9th COA.

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"To establish a cause of action for breach of fiduciary duty, a plaintiff must demonstrate the existence of a fiduciary relationship, breach of that duty and damages." Charnay v. Corbert (2006) 145 Cal.App.4th 170, 182. Plaintiff's 11th COA fails to incorporate the pleading allegations concerning the CAA Defendants' representation of Plaintiff (see FAC ¶ 215 (failing to incorporate FAC ¶¶ 200-210)), to the extent that such allegations were intended to be incorporated. Additionally, Plaintiff fails to allege facts as to how the CAA Defendants failed to act in Romero's best interests in dealing with the negotiation, sale, distribution and exploitation of the Series. See FAC ¶¶ 58, 217. Lastly, no allegations pertaining to Young are present. The demurrer is sustained as to the 11th COA.

5. Prospective Economic Advantage

Plaintiff's 13th and 14th COAs are based on business relationships and economic advantages pertaining to his work as a co-creator of the Series. However, Plaintiff fails to allege facts identifying what the business relationships and economic advantages were. Plaintiff's opposition argument that the FAC, as a whole, reasonably implies an economic relationship with Eastin concedes that the economic relationship with Eastin is not pled in the 13th and 14th COAs. Additionally, because the demurrer is sustained as to Plaintiff's other COAs asserted against the CAA Defendants, Plaintiff fails to allege wrongful conduct by the CAA Defendants.

The demurrer is sustained as to the 13th and 14th COAs.

6. Unfair Business Practices

Plaintiff's 6th COA is predicated on Plaintiff's other COAs asserted against the CAA Defendants. Because those COAs are not well-pled, the 6th COA similarly fails. The demurrer is sustained as to the 6th COA.

Attorney Defendants' Demurrer –

The Attorney Defendants demur to the 2nd – 6th, 8th, 10th, 13th, and 14th COAs.

1. Factual Allegations pertaining to Attorney Defendants

In early June 2009, Austen had been Eastin's attorney for many years; Eastin recommended the legal services of Austen to Romero with regard to the Series. FAC ¶ 45. The Attorney Defendants never inquired about Romero's participation in the creation of the Series, never sought Romero's input in negotiating Romero's agreement with TVN Productions, and only provided Romero with a story editor agreement (FAC ¶¶ 47-52).

2. Request for Judicial Notice

The Attorney Defendants request judicial notice of the 2009 agreement between Romero and TVM Productions, Inc. for the Series. This agreement is referenced in the FAC. Therefore, the Court grants the RJN. See Salvaty v.Falcon Cable Television (1985) 165 Cal.App.3d 798, 800 n.1. Plaintiff's objections to the RJN are overruled.

3. Statute of Limitations

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"'A demurrer on the ground of the bar of the statute of limitations will not lie where the action may be, but is not necessarily barred.' It must appear clearly and affirmatively that, upon the face of the complaint, the right of action is necessarily barred." Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort (2001) 91 Cal.App.4th 875, 881 (citations omitted).

The Attorney Defendants demur to the non-fraud COAs on the ground that they are barred by the one-year statute of limitations in CCP § 340.6. However, this demurrer is premised on the argument that the 2009 story editor agreement placed Plaintiff on notice regarding the Attorney Defendants' wrongful conduct. The Court disagrees. As alleged, the Attorney Defendants were retained to represent Plaintiff with regards to the Series (FAC ¶¶ 189-190), not simply with regard to Plaintiff's position as a story editor. On the face of the FAC, there are no facts alleged that the story editor agreement precluded Plaintiff from also being credited and compensated as a co-creator of the Series. Therefore, at the pleading stage, the date of the execution of the story editor agreement does not necessarily reveal that the statute of limitations bars the non-fraud COAs. The demurrer on this ground is overruled.

4. Fraud COAs

Plaintiff's fraud COAs allege that the Attorney Defendants represented Romero's interests. Additionally, the Attorney Defendants represented, or conspired to represent, to Romero that Romero would be recognized and compensated as a co-creator of the Series. However, no facts are alleged with particularity to support these allegations. Plaintiff fails to allege the details of the Attorney Defendants' representation of Romero, their representations to Romero, or their actions in conspiring to make representations to Romero.

Additionally, Plaintiff fails to allege any facts pertaining to the relationship among the Attorney Defendants, and the general agency and employee allegations (FAC ¶ 102) pertain to Doe Defendants and are insufficient to allege with particularity the relationship among the Attorney Defendants in light of the various Defendants named in this action.

As to the 5th COA for conspiracy, although conspiracy is not a cause of action, the Court believes that separating the conspiracy theory has benefits in streamlining this action in light of the various claims and Defendants.

The demurrer is sustained as to the 2nd – 5th COAs.

Eastin's Demurrer –

Eastin demurs to the 1st – 6th and 12th – 16th COAs.

1. Request for Judicial Notice

Eastin requests judicial notice of excerpts of Plaintiff's responses to requests for admissions and an email exchange dated 12/21/09. Although part of the email exchange is referenced in the FAC (see FAC ¶ 68), Eastin requests judicial notice of matters beyond the email referenced in the FAC. Additionally, Eastin, in requesting judicial

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notice of Plaintiff's responses to requests for admissions, argues that Plaintiff's objections should be treated as admissions. Eastin's arguments pertaining to these documents reveal that they are not subject to judicial notice; therefore, the RJN is denied.

Plaintiff requests judicial notice of the District Court's 3/1/12 remand order. The RJN is granted.

2. Copyright Act Preemption

Eastin argues that this action arises solely from Plaintiff's work as co-author of the Series and is preempted by the Copyright Act. Because the Court denies Eastin's RJN, there is nothing on the face of the FAC that reveals that Plaintiff's claims are copyright ones because the FAC indicates that Plaintiff's claims are derived from a partnership agreement. At the pleading stage, preemption by the Copyright Act does not bar the entire action. In so ruling, the Court does not preclude Eastin from later arguing preemption as appropriate to Plaintiff's claims. Additionally, the Court rejects Plaintiff's argument that the District Court has determined that copyright preemption has no applicability (see Hansen v. Aerospace Defense Related Industry Dist. Lodge 725 (2001) 90 Cal.App.4th 977, 985) because the remand order is not a substantive decision on the merits of any issues.

3. Statute of Limitations

Eastin argues that a two year statute of limitations applies to this action rising out of an alleged oral partnership. In opposition, Plaintiff argues that the accounting claim is the primary right asserted in this action to which a four year statute of limitations applies, relying on Manok v. Fishman (1973) 31 Cal.App.3d 208, 213.

Plaintiff concedes that the right to accounting stems from partnership law. Although Manok held that an accounting claim is governed by the four year catch-all period, the Court expresses doubt that Manok is still good law. Corporations Code § 16405(c) provides: "The accrual of, and any time limitation on, a right of action for a remedy under this section is governed by other law. A right to an accounting upon a dissolution and winding up does not revive a claim barred by law."

The Court need not determine whether Manok is still good law at this time because Eastin's demurrer relies on Plaintiff's allegation that Eastin tried to push Romero out as a co-creator on 5/8/08 (FAC ¶ 44). However, repudiation of the partnership is when the statute of limitations begins to run. See, e.g., Manok, 31 Cal.App.3d at 211. Plaintiff alleges that he and Eastin continued to work on the Series (FAC ¶ 60), that Eastin attributed credit for the idea of the Series to Plaintiff on 10/18/09 (FAC ¶ 61), and that Plaintiff began to be alienated by Eastin in October and December 2009 (FAC ¶ 64). Based on these allegations, the FAC does not reveal that the statute of limitations began to run on 5/8/08 to bar this action. The demurrer is overruled on this ground.

4. Partnership

Eastin argues that Plaintiff failed to allege the exact terms of the alleged partnership agreement. Plaintiff alleges that the partnership agreement was made shortly after

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"Hawaii" ended, that Plaintiff and Eastin would share equally in everything they created and share equally in the fruits of their labor, that Plaintiff would be the "idea guy" and Eastin the "pitch guy." FAC ¶¶ 19-23. However, Plaintiff fails to allege a right t joint control, sufficient to establish a partnership. See April Enter., Inc. v. KTTV (1983) 147 Cal.App.3d 805, 819. Because Plaintiff concedes that this action is derived from the partnership agreement, the failure to allege the existence of a partnership renders the FAC vulnerable to demurrer. The demurrer is sustained on this ground.

5. Fraud COAs

Plaintiff's fraud COAs allege that Eastin represented to Romero that Romero would be recognized and compensated as a co-creator of the Series. Eastin demurs arguing that Plaintiff fails to allege facts with specificity and that the conspiracy cause of action is not a cause of action. Plaintiff correctly notes that Eastin fails to provide any discussion beyond mere citations to authorities, a violation of CRC 3.1113(b). Additionally, the Court notes that Eastin fails to consider the incorporated factual allegations of the FAC. See Eastin Demurrer p. 14:16-18. Lastly, as stated above, although conspiracy is not a cause of action, the Court believes that separating the conspiracy theory has benefits in streamlining this action in light of the various claims and Defendants.

The Court does not express a ruling as to whether the fraud allegations are sufficiently alleged against Eastin in light of the Court's ruling on the demurrers of the other Defendants. However, Eastin fails to properly present his arguments regarding the fraud COAs in this demurrer. Therefore, the demurrer is overruled as to the fraud COAs as to Eastin.

6. Unfair Business Practices

Plaintiff's 6th COA is predicated on Plaintiff's other COAs asserted against Eastin. Because some of these COAs survive, the 6th COA similarly survives. The demurrer is overruled as to the 6th COA.

7. Prospective Economic Advantage

Plaintiff's 13th and 14th COAs are based on business relationships and economic advantages pertaining to his work as a co-creator of the Series. However, Plaintiff fails to allege facts identifying what the business relationships and economic advantages were. Plaintiff's opposition argument that the FAC, as a whole, reasonably implies an economic relationship with the Fox Defendants concedes that the economic relationship with the Fox Defendants is not pled in the 13th and 14th COAs. The demurrer is sustained as to the 13th and 14th COAs.

Leave to Amend –

Plaintiff has requested leave to amend. With the exception of the 7th and 9th COAs, the Court is inclined to grant leave to amend.

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