

DEPARTMENT 58 LAW AND MOTION RULINGS

Effective 2-1-16, Judge Treu is assigned to Dept. 59, Family Law.

Case Number: BC619933 **Hearing Date:** May 22, 2017 **Dept:** 58

Hearing Date: May 22, 2017
Calendar No.: 8
Case Name: Zakk v. Diesel, et al.
Case No.: BC619933
Motion: (1) Demurrers; (2) Motions to Strike; (3) Motion to Compel Further Responses
Moving Party: (1) Defendants Vin Diesel and One Race Films, Inc; Revolution Studios
(2) Defendants Vin Diesel and One Race Films, Inc; Revolution Studios
(3) Plaintiff George Zakk
Responding Party: (1) Plaintiff George Zakk
(2) Plaintiff George Zakk
(3) Defendants Revolution Studios; Vin Diesel and One Race Films, Inc

Tentative Ruling: Demurrers are sustained without leave to amend; Motions to Strike are denied as moot; Motion to Compel Further Responses is denied as moot.

On May 10, 2016, Plaintiff George Zakk filed this action against Defendants Vin Diesel, One Race Films, Inc., and Revolution Studios arising out of the alleged failure to give Plaintiff a producer credit and fee for an upcoming film, *xXx: The Return of Xander Cage*. This Court has sustained the demurrers to the Complaint, First Amended Complaint (“FAC”), and Second Amended Complaint (“SAC”). On February 6, 2017, the Court sustained the demurrers to the SAC with leave to amend, particularly allowing the addition of a claim in quantum meruit. The Court advised Plaintiff that its Third Amended Complaint (“TAC”) would likely be its final attempt to overcome the bar of the statute of frauds. The Court’s prior orders regarding the demurrers in this action are incorporated by reference herein and provided below for ease of access.

On March 17, 2017, Plaintiff filed the TAC, alleging (1) breach of oral contract, (2) breach of implied-in-fact contract, (3) intentional interference with contractual relations, (4) quantum meruit, (5) promissory estoppel, and (6) declaratory relief. Defendants demur to all causes of action in the TAC.

The factual allegations of the TAC are substantially similar to those in the SAC. However, of particular importance, the TAC no longer alleges the existence of a single oral contract executed between the parties, but rather several, separate oral or implied-in-fact agreements between Zakk, on the one hand, and Diesel and One Race Films, on the other hand. (See TAC ¶ 13; cf. FAC ¶ 12; SAC ¶ 12) Plaintiff alleges that he entered into such contracts for each film in which Diesel starred and Zakk helped develop (*Ibid.*)

Additionally, while past iterations of the Complaint alleged that Zakk was to receive an executive producer credit as well as a fee that ranged from \$250,000 to \$275,000 for each film and/or sequel in which Diesel would star, (FAC ¶ 12; SAC ¶ 12), the TAC asserts that Zakk was to receive a fee that ranged from \$200,000 to \$275,000 as well as an executive producer or producer credit. (TAC ¶ 13.)

Pursuant to each separate contract entered into between the parties, Plaintiff was also to be paid and credited for each sequel in which Diesel starred and for which Zakk performed work on in the original film. (TAC ¶ 14.) Plaintiff asserts that he entered into six such contracts between 1997 and 2006 for various films, including *xXx*. (*Id.* at ¶¶ 15-21.) With respect to the *xXx* franchise specifically, Plaintiff previously alleged

that he was to receive \$275,000 in fees and an executive producer credit for each sequel (FAC ¶ 17, SAC ¶ 17). However, Plaintiff now alleges that he was to receive at least \$200,000 in compensation and no less than 125% of his then quote, as well as an executive producer credit. (TAC ¶ 26.)

Judicial Notice

Vin Diesel and One Race Film's request and supplemental request for judicial notice are granted.

Revolution Studios' request for judicial notice is granted.

Plaintiff's request for judicial notice is granted.

Plaintiff also submits an opposition to the scope of Defendants' requests for judicial notice. Plaintiff requests that the Court decline to take judicial notice of two versions of a letter dated February 11, 2002, sent by George Davis to Daniel Ferleger. Plaintiff also contends that even were the Court to take judicial notice of the existence of the documents, it cannot properly take notice of the facts alleged therein.

However, the Court has already taken judicial notice of such documents. (See Minute Order dated May 2, 2017.) With regard to the scope of the judicial notice, the Court finds that although judicial notice of the facts alleged within such documents is ordinarily improper, the Court takes judicial notice of such facts on the grounds that Plaintiff has repeatedly and selectively quoted the documents in its TAC in order to reference a writing sufficient to satisfy the statute of frauds. Under these circumstances, justice requires that Defendants be able to present the entirety of the document to the trial court to assess the sufficiency of the writing with regard to the statute of frauds. (See *Salvaty v. Falcon Cable TV* (1985) 165 Cal.App.3d 798, 800 fn.1; see also *Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949; *Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1285, fn. 3.) In any case, as discussed below, even if the Court declined to take judicial notice of the underlying facts of said letters, Plaintiff's own allegations in the TAC undermine that such letters are a sufficient writing to satisfy the statute of frauds

Demurrers

Defendants demur to the entirety of the TAC on the grounds that (1) the TAC is a sham pleading, (2) the statute of frauds bars the action, (3) the writing asserted in the TAC does not satisfy the statute of frauds, and (4) Plaintiff's claim in quantum meruit is time-barred.

(1) Sham Pleading

Defendants contend that the demurrer should to be sustained because the TAC is a sham pleading. Specifically, Defendants assert that the TAC (1) now alleges the existence of multiple oral contracts to escape application of the statute of frauds, and (2) alleges different compensation for Plaintiff in order to comply with the terms of the February 11, 2002, letters, which are intended to take the oral contract out of the statute of frauds.

The Court agrees in part. The allegation that Plaintiff entered into several oral contracts, as opposed to one contract as previously alleged in the Complaint, FAC, and SAC, is clearly an attempt by Plaintiff to engineer the TAC to escape the reaches of a demurrer. Plaintiff consistently alleged the existence of one oral or implied-in-fact contract, but suddenly, and without reference to any reason for the change, asserts the existence of multiple contracts. Of course, this change proceeded the Court's prior rulings that the statute of frauds was applicable in that the oral contracts could not be completed within one year. (See Civil Code § 1624(a)(1).)

Indeed, a similar factual scenario emerged in *Tostevin v. Douglas* (1958) 160 Cal. App. 2d 321, 331, in which the court stated, "Plaintiff simply changed his story with regard to the terms and conditions of the oral agreement and the time of repudiation. We can only conclude that the various changes made by plaintiff in his second and third amended complaints were the result of efforts to conform to a theory of recovery rather than to the facts as they really exist, and that an obvious attempt was made to circumvent the operation of the statute of frauds and the statute of limitations."

Here, Plaintiff contends he always asserted the existence of multiple contracts, but a quick read of the Complaint, FAC, and SAC reveals that this is simply not so. (See TAC ¶ 13; cf. FAC ¶ 12; SAC ¶ 12.) Because Plaintiff's new allegations were designed, apparently, for no other reason than to avoid the reach of the statute of frauds and a demurrer without leave to amend, the Court finds that the TAC's new allegations are a sham. (See *Cantu v. Resolution Trust Corp.* (1992) 4 Cal. App. 4th 857, 877 ["A plaintiff may not avoid a demurrer by pleading facts or positions in an amended complaint that contradict the facts pleaded in the original complaint or by suppressing facts which prove the pleaded facts false."]) Accordingly, this basis standing alone is sufficient to sustain the demurrer or strike the TAC.

(2) Insufficient Writing

The writings quoted in the TAC are insufficient to take the alleged oral contract out of the statute of frauds. Notably, where a party asserts the existence of a written memorandum, it ought to either set out the material terms of the memorandum verbatim, (5 Witkin Cal.Proc. Plead § 523) or attach the memorandum to the TAC. (See *Rader Co. v. Stone* (1986) 178 Cal.App.3d 10, 25.) Here, Plaintiff has done neither. Rather, Plaintiff selectively quotes from the February 11, 2002 letters.

In addition, "[a]s to the statute of frauds, ... [t]o be sufficient, the required writing must be one which states *with reasonable certainty*, (a) each party to the contract ... and (b) the land, goods or other subject-matter to which the contract relates, and (c) the *terms and conditions of all the promises* constituting the contract and by whom and to whom the promises are made." (*Rivers v. Beadle* (1960) 183 Cal. App. 2d 691, 696.) Here, the February 11, 2002 letters demonstrate that neither Zakk nor One Race Films, Inc. were parties to the terms of the agreement presented in the letters (as alleged in the TAC). (See Diesel Parties RJN, Exhibit H.) Instead, the letters exhibit an agreement between One Race Productions, Inc.—a separate entity from One Race Films (see Diesel Parties RJN, Exhibit I, J)—and Revolution Films for the acting services of Vin Diesel, as opposed to the services of Zakk (*Id.*, Exhibit H.) Accordingly, the writings relied upon by Plaintiff neither support the TAC's allegations of the specific parties which executed the oral contract, or that Zakk was to render services in consideration for the agreement. Accordingly, the writing is insufficient to take the alleged oral contract out of the statute of frauds.

Finally, as alleged in the TAC itself by Plaintiff, the terms of the writing were simply negotiations, and, therefore, cannot constitute evidence of a contract that actually existed. (TAC ¶ 27 ["George Zakk shall be engaged as an executive producer on the sequel [i.e., the xXx Sequel] upon terms to be negotiated in good faith but in no event less than the terms contained herein and his then current precedent... Zakk shall receive executive producer credit and Zakk's guaranteed fee shall be not less than 125% of his then current quote."]; see *Louis Lesser Enterprises, Ltd. v. Roeder* (1962) 209 Cal.App.2d 401, 406 ["[T]here is no meeting of the minds of the parties while they are still negotiating terms."].)

(3) Statute of Frauds

With regard to the applicability of the statute of frauds and the exceptions thereto, the Court concludes the parties have simply reshaped the same arguments that this Court has previously ruled on. Accordingly, pursuant to the Court's prior reasoning as incorporated herein by reference, the Court finds that the statute of frauds is applicable. Therefore, the demurrer is sustained as to the first and second causes of action.

(4) Quantum Meruit

The Court finds that Plaintiff's cause of action in quantum meruit is time-barred. As Defendants point out, the statute of limitations for a quantum meruit claim--two years--begins to run when the services are rendered or at the termination of the parties' relationship. (*Maglica v. Maglica*, 66 Cal.App.4th 442, 452-454; *Cullinan v. McColgan* (1927) 87 Cal.App. 684, 692.) Because Zakk performed the services rendered for the xXx film in 2002, (TAC ¶ 17), the statute of limitations expired in 2004, long before the quantum meruit claim was added to the TAC.

(5) Promissory Estoppel

Plaintiff added its claim for promissory estoppel to the TAC without leave of the Court. Accordingly, the Court will not consider the claim. The demurrer is sustained as to the promissory estoppel cause of action.

(6) Remaining Causes of Action

Because the remaining causes of action—declaratory relief and intentional interference with contractual relations—rely on the existence of a valid contract, and because the Court sustains the demurrer to Plaintiff's first and second causes of action, the demurrer is sustained as to the declaratory relief and intentional interference with contractual relations causes of action as well.

In sum, the Court sustains the demurrer as to the entirety of the TAC.

Court Declines Leave to Amend

As the Plaintiff has unsuccessfully amended the complaint three times in this action, (Code Civ. Proc. § 430.41(e)(1)), and because the defects in the TAC do not appear to be curable, the Court declines to grant leave to amend.

Motions to Strike

As the Court sustains the demurrer as to the entirety of the TAC, the Motions to Strike are denied as moot.

Motion to Compel Further Responses

Plaintiff moves to compel further responses to its first set of requests for production of documents and to compel compliance with Revolutions' response to Plaintiff's request for production no. 37. Because the Court sustains the demurrer as to the entirety of the TAC, the Motion to Compel Further Responses is denied as moot.
