

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SAN DIEGO

HALL OF JUSTICE

TENTATIVE RULINGS - August 29, 2019

EVENT DATE: 08/30/2019

EVENT TIME: 10:30:00 AM

DEPT.: C-68

JUDICIAL OFFICER: Richard S. Whitney

CASE NO.: 37-2017-00016311-CU-BC-CTL

CASE TITLE: PROPER MEDIA LLC VS BARDAV INC [E-FILE]

CASE CATEGORY: Civil - Unlimited

CASE TYPE: Breach of Contract/Warranty

EVENT TYPE: Demurrer / Motion to Strike

CAUSAL DOCUMENT/DATE FILED:

TENTATIVE RULING:

(1) Defendant/Cross-Complainant Snopes Media Group, Inc.'s Demurrer to Plaintiffs' Third Amended Complaint is SUSTAINED.

The demurrer is moot as to the fifteenth and seventeenth causes of action because this Court's amended submitted ruling on Snopes' anti-SLAPP motion strikes such causes of action. Snopes also demurrers as to the fifth and seventh causes of action for corporate waste and breach of fiduciary duty brought derivatively by Plaintiffs Schoentrup and Richmond.

Plaintiffs acknowledge they have not made a demand on Snopes' board. Plaintiffs allege demand futility. "The test for proving demand futility is whether the facts show a reasonable doubt that (1) the directors are disinterested and independent, and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment." (*Oakland Raiders v. National Football League* (2001) 93 Cal.App.4th 572, 587.) "[I]n order to evaluate the demand futility claim, the court must be apprised of facts specific to each director from which it can conclude that that particular director could or could not be expected to fairly evaluate the claims of the shareholder plaintiff." (*Shields v. Singleton* (1993) 15 Cal.App.4th 1611, 1622.) "A director will be deemed not to be disinterested if the facts alleged 'demonstrate[] a potential personal benefit or detriment to the director as a result of the decision.'" (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 792 [Citation omitted].) It is undisputed that at the relevant time of filing the third amended complaint ("TAC"), Snopes' board consisted of Westbrook, who is disinterested and independent, Mikkelson, and Richmond. Plaintiffs also concede that determining demand futility is based on a majority of the board, not a quorum.

It is clear from the TAC that Mikkelson is interested as he is directly being accused of wrongdoing, including that he used corporate assets "to pay for personal expenses." (TAC, ¶ 206.) Plaintiffs have alleged facts supporting the conclusion there is a reasonable doubt that Richmond is a disinterested and independent director given that he is "both a Plaintiff and Defendant in this lawsuit and has asserted both derivative and direct claims against Mikkelson." (TAC, ¶ 240.) While Richmond would likely vote to allow the lawsuit, it is reasonable to conclude that Richmond would not reach that decision based solely on a fair, evenhanded consideration of the demand. As both Richmond and Mikkelson are apparently not disinterested or independent, there could be no majority to approve the demand.

While Snopes points out that the above allegations are not included in the fifth cause of action, the Court considers the complaint as a whole in determining whether a cause of action has been properly stated.

Plaintiffs have sufficiently alleged demand futility.

Notwithstanding the above, the claims fail. Snopes asserts Schoentrup and Richmond are disqualified from bringing derivative claims because they are overtly hostile to Snopes. This Court acknowledged, in ruling on Plaintiffs' motion for leave to amend, that *Zarowitz v. BankAmerica Corp.* (9th Cir. 1989) 866 F.2d 1164 did not establish a per se rule barring any shareholder who has a conflict of interest as serving as a representative. However, the Court finds that Schoentrup and Richmond have hostile interests that disqualify them as adequate representatives of Snopes. While Schoentrup and Richmond assert there is no other shareholder who could bring the claims, Plaintiffs have not demonstrated Tyler Dunn will not pursue the claims. While this Court stated "[t]here is no indication [Mr.] Dunn would pursue the claims as such a small shareholder," the Court did so in light of the extremely low threshold in determining whether leave to amend could be granted. Plaintiffs have not alleged Tyler Dunn could not pursue the claims when judicially noticeable information before the Court demonstrates Schoentrup and Richmond have conflicting interests with Snopes. Finally, the Court finds Schoentrup's representation of Plaintiffs exacerbates the conflicts of interest. Schoentrup and Richmond are not qualified to represent Snopes.

The demurrer is sustained as to the fifth and seventh causes of action. "Unless the complaint shows on its face that it is incapable of amendment, denial of leave to amend constitutes an abuse of discretion [...] Liberality in permitting amendment is the rule...." (*McDonald v. Superior Court* (1986) 180 Cal.App.3d 297, 303-04.) However, Plaintiffs have the burden of proving a reasonable possibility of amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Plaintiffs have not demonstrated they could amend to show they are proper representatives for Snopes.

Snopes' requests for judicial notice are granted.

(2) Defendant and Cross-Complainant David Mikkelson's Demurrer to Plaintiffs' Third Amended Complaint is SUSTAINED.

The demurrer is moot as to the fourteenth through eighteenth causes of action because this Court's ruling on Mikkelson's anti-SLAPP motion strikes such causes of action. Mikkelson also demurrers to the fifth, seventh, twelfth, and thirteenth causes of action.

For the same reasons discussed above as to Snopes' demurrer, the demurrer is sustained as to the fifth and seventh causes of action as Schoentrup and Richmond are not qualified to represent Snopes.

Plaintiffs' twelfth cause of action is for breach of contract. Mikkelson asserts the terms of the purported contract are too uncertain and that no agreement existed among all Plaintiffs, Mikkelson and Snopes. "To be enforceable, a promise must be definite enough that a court can determine the scope of the duty and the limits of performance must be sufficiently defined to provide a rational basis for the assessment of damages." (*Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 770.)

Plaintiffs allege:

Mikkelson (on behalf of himself and Snopes Media Group) offered that if Plaintiffs would enter into a settlement agreement with Barbara in their own names, and exclude Mikkelson and Snopes Media Group from the settlement agreement, that Snopes Media Group would thereafter reimburse Plaintiffs for all payments made pursuant to the settlement agreement by allowing them to deduct all settlement payment amounts directly from the advertising revenue that Proper Media was collecting on behalf of Snopes Media Group. Plaintiffs accepted Mikkelson's and Snopes Media Group's offer, and, on the basis of that agreement, subsequently entered into the Barbara Settlement Agreement on or about October 21, 2016.

(TAC, ¶ 278.) Exhibits C and D to the TAC are communications between Mikkelson and Schoentrup wherein Mikkelson states conditions on which he is willing to have a settlement with Barbara Mikkelson,

who had threatened to "go public with dirt on [Mikkelson] and the business" in relation to a salary/director fee dispute. Mikkelson tells Schoentrup "I will cover you by kicking back the extra payment amount to Proper Media each month." Later, Mikkelson discussed making edits to a draft settlement agreement. Mikkelson states "[w]hat I was thinking was that you're making the settlement, and if it means that you end up paying her an additional \$X per month on the promissory note payments, then we'll increase the amount of Bardav revenue that Proper keeps by \$X per month."

While not clearly spelled out in these conversations, it appears Schoentrup recognized Barbara Mikkelson had a legitimate claim to money from Snopes. As the TAC alleges, Proper Media purchased Barbara Mikkelson's share by July 1, 2016. (TAC, ¶ 49.) Exhibits C and D show the conversations between Schoentrup and Mikkelson occurred on September 14, 2016, and September 29, 2016, after Proper Media purchased Barbara Mikkelson's share. It appears both Schoentrup and Mikkelson were discussing how to handle a threat to Snopes, and to Mikkelson personally – disclosure of unknown "dirt." Although it appears Mikkelson personally benefitted from the settlement, which was to include a non-disclosure agreement, the discussion does not definitely define Mikkelson as having a personal obligation to make the payments. The parties agreed the money would come generally from Snopes' revenue.

The demurrer is sustained as to the twelfth cause of action for breach of contract.

Plaintiffs' thirteenth cause of action is for promissory estoppel/specific performance. "The elements of a promissory estoppel claim are '(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance.'" (*Jones v. Wachovia Bank* (2014) 230 Cal.App.4th 935, 944 [Citation omitted].) Plaintiffs' allegations suffer from the same problem discussed above – there is no clear promise by Mikkelson to personally pay for Proper Media's settlement with Barbara Mikkelson. It appears the settlement primarily benefitted Snopes. If Plaintiffs received payment from Mikkelson personally, then their share of the benefit of resolving the dispute with Barbara Mikkelson would have come at no cost to them.

The demurrer is sustained as to the thirteenth cause of action for promissory estoppel/specific performance.

(3) Defendant and Cross-Complainant David Mikkelson's Motion to Strike Portions of Plaintiffs' Third Amended Complaint is GRANTED, in part.

Pursuant to CCP section 436, the court has discretion at any time to strike portions of pleadings, including irrelevant, immaterial, and improper allegations. (Code Civ. Proc., § 436.) A claim for punitive damages must be specifically pled and show facts that, if proved, demonstrates the requisite degree of culpability necessary for imposing exemplary damages under Civil Code Section 3294. (*Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 166-167.) Plaintiffs' allegations are sufficient if the complaint alleges despicable conduct carried on by Defendant with a willful and conscious disregard of the rights or safety of others. (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 713.) Jury Instructions for punitive damages define "Despicable conduct" as "conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people." (CACI 3940.)

Mikkelson seeks to eliminate punitive damages from the TAC. Plaintiffs allege, "[o]n information and belief," that "Mikkelson has engaged in a pattern and practice of padding his salary through the submission of astronomical personal expenses for reimbursement by Snopes." (TAC, ¶ 61.) Plaintiffs may not rely on allegation based "on information and belief" without alleging the facts that lead to the belief the allegations are true. (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1158–1159.) Plaintiffs allege various wrongs by Mikkelson based "on information and belief," such as Mikkelson expensing personal legal fees to Snopes and expensing personal travel expenses (honeymoon) to Snopes. Plaintiffs do not explain why they believe these alleged facts. (See TAC, ¶¶ 61-65.) However, Plaintiffs do provide facts to believe that "Mikkelson never intended to honor his promise to Plaintiffs that he would enter into a reasonable agreement governing compensation for all

shareholders in 2017." (TAC, ¶ 70.) Mikkelson was unhappy with his \$260,000 salary. (TAC, ¶ 63.) Mikkelson did not sign the 2016 Compensation Agreement after promising that he "would enter into a compensation agreement for 2017 that would (1) keep his salary and business expenses moderate and predictable, and (2) allow for compensation and/or distributions to all shareholders." (TAC, ¶¶ 67-69.) Plaintiffs also allege Mikkelson believed "his salary should be on par with that of other founders." (TAC, ¶ 63.)

Plaintiffs go on to allege a conspiracy among Mikkelson, Green, and Miller to obtain control of Snopes. (TAC, ¶¶ 70-93.) While Plaintiffs repeatedly allege facts based "[o]n information and belief" to support the alleged conspiracy, there are alleged facts that would lead Plaintiffs to believe they are true. Mikkelson and Schoentrup and Richmond were not happy with each other. Mikkelson had a motive to obtain control of Snopes. Mikkelson could do so by convincing minority shareholders Green and Miller to work for Snopes directly on the website, rather than for Proper Media which performed work for the website under a General Services Agreement. Both Green and Miller went to work for Mikkelson. If Green and Miller aligned with Mikkelson, Mikkelson could control Snopes. Plaintiffs allege Mikkelson directed Green to remove data from Proper Media, which prevented Proper Media from fulfilling its obligations under the General Services Agreement, and terminated the General Services Agreement as part of the conspiracy. Conspiring to prevent performance of a contract and to interfere with employment relationships as part of an intentional scheme to gain control of a corporation, to the detriment of minority shareholders, is despicable, intentional conduct, especially in light of the fact Mikkelson owed a fiduciary duty to Schoentrup and Richmond.

The Court denies the motion as to punitive damages.

Mikkelson also moves to strike Plaintiffs' requested relief for attorney's fees based on the lack of any contractual terms or statute that provides for the recovery of attorney's fees. In opposition, Plaintiffs point to Corporations Code section 800. Corporations Code section 800 applies to derivative actions. As the anti-SLAPP motions and demurrers have eliminated the derivative causes of action, Corporations Code section 800 is inapplicable. Plaintiffs do not cite any other statute or contractual provision that would permit the recovery of attorney's fees. As such, the request for attorney's fees is stricken.

Finally, Mikkelson seeks to strike out allegations of disgorgement. As Plaintiffs acknowledge, their disgorgement request stems from the fifteenth and sixteenth claims for relief, which have been eliminated. Thus, the issue is moot. In any event, the California Supreme Court in *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134 found "nonrestitutionary disgorgement" is not recoverable under the UCL. Plaintiffs have not explained how they could properly allege restitutionary disgorgement.