Michael Pick International vs ICM

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Plaintiff Michael Pick International, Inc. (MPI), sued a competing talent agency and one of its employees, defendants International Creative Management (ICM) and Steve Levine, for interference with contractual relations, intentional and negligent interference with prospective economic advantage, and trade libel. MPI appeals following summary judgment in favor of ICM and Levine. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

MPI, a small talent agency, complains that Levine and ICM, a large and well-known talent agency, interfered with an exclusive agency agreement between MPI and its client Capitol Events. Capitol Events, owned by David King, created and produced a popular live stage show of Irish music and dance known as "Spirit of the Dance" (Spirit). Between 1997 and 2000, Spirit had been booked by Big League Theatrical, Inc., with great success but almost exclusively at performing arts centers. King was anxious to get Spirit booked extensively at other more lucrative venues, such as casinos and state fairs.

In August of 2000, MPI and Capitol Events signed a written contract that provided, in pertinent part, that MPI was the sole and exclusive agent for Spirit in North America in venues such as casinos, fairs, festivals, corporate events, and special events. But the terms of the contract did not include bookings at performing arts centers. The contract was for a one-year period, with an automatic extension to a second one-year period unless Capitol Events gave written notice that it did not want to extend the agreement.

The contract further provided that if MPI failed "to obtain employment or a bona fide offer of employment from a responsible employer in the field of concert performances and appearances" during a period of more than four months, such failure shall be deemed cause for either party to terminate the contract. In an addendum to the contract, the parties also agreed that if Capitol Events decided to leave Big League Theatricals, MPI would obtain the right to the exclusive representation of Capitol Events' theatrical presentation at performing arts centers.

In February of 2001, Levine at ICM proposed to King at Capitol Events that another promoter, Jerry Hamza, could work with ICM and replace both MPI and Big League Theatricals in booking Spirit in all venues in North America. The time period initially contemplated by Levine for an agency agreement between Hamza and Capitol Events was September 1 through January 1, 2002, with an option to extend the period from January 1 through May 30, 2002. At the time Levine made this proposal to King, he had received a fax from King (dated August 9, 2000) noting that Capitol Events had selected MPI as its exclusive representative for all venues, except performing arts centers, which were handled by Big League Theatricals. Levine, however, was unaware of the duration or other details of the arrangement between Capitol Events and MPI. And, according to Levine, exclusive agency relationships of this type in the entertainment industry are commonly terminable at will by either party.

Meanwhile, from the end of 2000 and into 2001, Capitol Events continued to use the agency services of ICM and Big League Theatricals. ICM continued to obtain bookings for Spirit in international venues, which were outside the scope of the agreement between MPI and Capitol Events.

In March of 2000, pursuant to a specific request by King, Levine spoke with a representative of Resorts International, which operates a hotel and casino in Atlantic City, and suggested that the casino representative see a performance of Spirit. The casino representative saw a performance and then passed a positive recommendation on to the management. Resorts International then made an offer, which it mailed to Levine because he was the source who had recommended Spirit. On April 13, 2001, Levine relayed the offer to King at Capitol Events, who rejected it because the price offered for the show was too low.

Unbeknownst to Levine, approximately six months earlier, in October of 2000, MPI had sent promotional materials for Spirit to Resorts International and then had spoken with their representative (someone other than the person to whom Levine had spoken). Levine also asserted that King did not advise him--and he was unaware--that any exclusive agency agreement relationship between MPI and Capitol Events was still in effect.

On April 12, 2001--before Capitol had terminated its exclusive agency with MPI--two companies controlled by King and Hamza entered into a written agreement whereby King gave Hamza the right to book performances by Spirit. The agreement provided that any venues Hamza wanted to book had to be pre-approved by King in writing. King thus arguably retained the right to prevent Hamza from promoting Spirit at any venue encompassed by the MPI agreement. And Hamza later asserted he was not attempting to book Spirit at any casinos, fairs or special events, but only at theaters, such as the Universal Amphitheater and the Wiltern Theater. However, the tour of theaters Hamza promoted was cancelled due to poor attendance after September 11, 2001.

Meanwhile, on April 25, 2001, more than six months after Pick last generated a booking or employment offer for Spirit, Capitol Events terminated its exclusive agency agreement

with MPI. From August 2000 through April 2001, MPI had obtained only two bookings for Spirit, one at the Foxwoods Casino and another at the Arizona State Fair. As King stated in the termination letter to Pick, "I am quite obviously disappointed that no further work has come from your office since the original bookings last September, and . . . in accordance with Clause 6 of the contract we signed, I have decided to give you notice to terminate the exclusive agency agreement [though I am] willing to work with you on a non-exclusive agency basis and you are welcome to continue offering the show if you wish to do so, but on a non-exclusive basis."

Thereafter, MPI filed the complaint in the present action. The complaint focused on the events relating to the Resorts International offer. Specifically, MPI claimed that "ICM misled Resorts International into believing ICM still represented Spirit of the Dance, falsely represented to Capitol [Events] that ICM had generated interest by Resorts International, and disparaged MPI to Capitol [Events]," and by such actions ICM and Levine intended to prevent MPI from generating the Resorts International offer. As a result, MPI alleged that it lost a commission on the "contract" with Resorts International, lost future revenue from other deals with Resorts International, and that ICM and Levine induced Capitol Events to cancel the MPI agreement. The complaint was silent regarding the Hamza agreement or the role of ICM and Levine in regards to that deal.

During discovery, when confronted with questions about MPI's claim that ICM and Levine disparaged MPI, Pick admitted that he was not aware of any disparaging or negative comment made by Levine to King or Resorts International. MPI alleged in its complaint only that Levine somehow "misled" Capitol Events into believing that Levine generated the Resorts International offer. And during discovery, Pick was unable to specify any "untrue" or "inaccurate" statements by Levine or anyone at ICM about Pick or MPI.

The trial court granted summary judgment in favor of ICM and Levine, ruling that MPI had "not shown clear, relevant evidence that tends to contradict defendants' separate statement." Regarding MPI's argument that ICM's dealings with Hamza supported its claim for interference with contract, the court found that because the Hamza deal was "not even mentioned in the complaint . . . any approach to Hamza is irrelevant to the issues in the lawsuit." The court further ruled that MPI had not shown any evidence to contradict ICM's undisputed material fact that "[a]t the time defendants presented the Resorts [International] offer to Capitol [Events], [d]efendants did not know that plaintiff had promoted Spirit to Resorts [International]."

Approximately two weeks after the trial court's ruling on the summary judgment motion, MPI moved for (1) reconsideration of the summary judgment ruling, (2) leave to file a first amended complaint, and (3) relief from the judgment. The belated motion to file a post-summary judgment first amended complaint was the first time MPI had sought to amend the complaint to include allegations relating to the Hamza deal. Counsel for MPI acknowledged that they had received documents from ICM revealing negotiations with Hamza as early as

November of 2001, almost 11 months prior to the ruling on the summary judgment. At the hearing on the motion for reconsideration, the trial court confirmed that in ruling on the motion for summary judgment, it had in fact considered evidence relating to the Hamza agreement, but found it was unrelated to the pleadings.

DISCUSSION

I. The standard of review

Summary judgment is granted when a moving party establishes the right to the entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) [1] In reviewing an order granting summary judgment, we must assume the role of the trial court and redetermine the merits of the motion. In doing so, we strictly scrutinize the moving party's papers. (Chevron U.S.A., Inc. v. Superior Court (1992) 4 Cal.App.4th 544, 549.) The declarations of the party opposing summary judgment, however, are liberally construed to determine the existence of triable issues of fact. (Sosinsky v. Grant (1992) 6 Cal.App.4th 1548, 1556.) All doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment. (Ibid.)

A defendant moving for summary judgment meets its burden of proof of showing that a cause of action has no merit by establishing that one or more elements of the cause of action cannot be established, or that there is a complete defense to the action. (§ 437c, subd. (o)(2).) This may be done, inter alia, by the defendant's "showing that the plaintiff does not possess, and cannot reasonably obtain, needed evidence." (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 854.) Once the defendant has done so, the burden shifts back to the plaintiff to show, not merely by allegations or denials, but by competent evidence that a triable issue of one or more material facts exists as to the cause of action or defense in question. (§ 437c, subd. (o)(2).)

The party opposing the summary judgment must make an independent showing by a proper declaration or by reference to a deposition or another discovery product that there is sufficient proof of the matters alleged to raise a triable question of fact if the moving party's evidence, standing alone, is sufficient to entitle the party to judgment. (Sebastian International, Inc. v. Peck (1987) 195 Cal.App.3d 803, 807; Hoffman v. Sports Car Club of America (1986) 180 Cal.App.3d 119, 126.) To avoid summary judgment, admissible evidence presented to the trial court, not merely claims or theories, must reveal a triable, material factual issue. (Torres v. Reardon (1992) 3 Cal.App.4th 831, 836.) Moreover, the opposition to summary judgment will be deemed insufficient when it is essentially conclusionary, argumentative or based on conjecture and speculation. (Joseph E. Di Loreto, Inc. v. O'Neill (1991) 1 Cal.App.4th 149, 161; Baron v. Mare (1975) 47 Cal.App.3d 304, 309, 311.)

Exercising our independent judgment to determine as a matter of law the construction and effect of the facts presented (Spitler v. Children's Institute International (1992) 11 Cal.App.4th 432, 439; Saldana v. Globe-Weis Systems Co. (1991) 233 Cal.App.3d 1505, 1510-1511, 1513-

1515) and acknowledging the obligation to affirm on any ground supported by the record (Becerra v. County of Santa Cruz (1998) 68 Cal.App.4th 1450, 1457), we find summary judgment was properly granted. II. Undisputed evidence reveals that MPI cannot establish the elements of the cause of action for intentional interference with contract, as pled.

A plaintiff asserting a cause of action for intentional interference with the performance of a contract must establish the following: "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional acts designed to induce breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." (See Pacific Gas & Electric Co. v. Stearns & Co. (1990) 50 Cal.3d 1118, 1126.) In the present case, MPI has failed to establish several of the requisite elements of that cause of action.

As alleged in the complaint, MPI's cause of action for intentional interference with contract is premised on the assertion that Capitol Events terminated its agreement with MPI because ICM intentionally prevented MPI from generating the Resorts International offer. As a result, according to MPI, it lost future commission income under the MPI agreement, including commissions from the Resorts International deal.

A. There is no evidence that defendants knew of the scope and duration of the contract.

The first problem with MPI's claim is that if, as here, the defendant had no knowledge of the existence of the contract, he cannot be held liable for interfering with it, even if an actual breach results from his lawful and proper acts. (Kasparian v. County of Los Angeles (1995) 38 Cal.App.4th 242, 261.) In the present case, the undisputed evidence reveals that although on August 9, 2000, Levine knew an agency relationship existed at that time between Capitol Events and MPI, Levine was unaware of the details of the contract and its duration. It was also uncontradicted that Levine's procurement of an offer from Resorts International was pursuant to a specific request by Capitol Events, in March of 2000, that Levine attempt to obtain bookings for Spirit in Atlantic City. Indeed, based on the fact that Capitol Events requested such a booking from Levine, it was certainly reasonable for Levine to believe that Capitol Events no longer had an exclusive agency contract with MPI, and thus that ICM was not interfering with any relationship between Capitol Events and another agent.

MPI's claim that ICM knew about the existence of a contract between Capitol Events and MPI at the time of its alleged interference is thus a conclusory and unsupported assertion. In fact, evidence submitted by MPI actually defeats its claim. On March 8, 2001, approximately a year after Levine's solicitation of the Resorts International deal, King sent Levine an e-mail regarding another deal (the Hamza contract), and advised Levine, "There is one more area of exclusion that I need in the contract. We use an agent called Mike Pick, who find[s] us Casinos and Fairs. I do not want to dispense with his services just yet. . . ." The e-mail then discussed possible ways in which Pick of MPI and Hamza could work together. It thus appears from this e-

mail that King believed Levine did not know Capitol Events was at that time using MPI as its agent and, most significantly, that King and Levine had not previously discussed the details of the agency contract between Capitol Events and MPI.

Accordingly, since there was no evidence that Levine of ICM had any knowledge of the scope and duration of the terms of the agency contract between Capitol Events and MPI at the time Levine approached Resorts International, and thus no knowledge of whether the contract was then in existence, defendants cannot be liable for interfering with the contract. (See Kasparian v. County of Los Angeles, supra, 38 Cal.App.4th at p. 261.)

B. Defendants did not intentionally act to induce a breach or disruption of the contract.

Lack of knowledge of whether the contract was in existence also undermines a second and related element of the cause of action; i.e., that defendants intentionally act to induce a breach or disruption of the contract. (Kasparian v. County of Los Angeles, supra, 38 Cal.App.4th at p. 261.) A party cannot intentionally act to induce the breach or disruption of a contract if the party is unaware the contract exists at the time of its actions.

C. There was no actual breach or disruption of the contract.

Nor can MPI establish a requisite third element of the cause of action; i.e. the actual breach or disruption of the contract caused by defendant. Even assuming arguendo that ICM had been aware of the contract and intentionally attempted to breach or disrupt the contract, the evidence unequivocally established that the agreement between Capitol Events and MPI was terminated by Capitol Events for reasons completely unrelated to ICM's role in the Resorts International offer. The agreement was terminated solely because MPI had failed to obtain a single booking or a bona fide offer of employment for more than four consecutive months, thus triggering the cancellation clause in the agreement. Since ICM's actions regarding the Resorts International offer (an offer which Capitol Events declined to accept) did not interfere with the agency agreement between Capitol Events and MPI, a third necessary element of the cause of action is also lacking.

Therefore, even apart from other issues, such as whether MPI suffered any damages as a result of ICM's conduct, the trial court properly concluded that MPI could not establish a cause of action for intentional interference with contract. Summary judgment was properly granted as to that cause of action.

III. The trial court did not err in denying leave to amend the pleadings, since the belated request to amend was filed after the summary judgment ruling.

According to MPI, it did not know the full extent of defendants' purported interference at the time the complaint was filed and particularly was unaware of any of the dealings with Hamza. Only after discovery did MPI learn of the transaction with Hamza, which MPI asserts is sufficient to establish a cause of action for intentional interference with contract.

MPI urges that "`"[i]f either party finds, on the hearing of [a motion for summary judgment], that his pleading is not adequate, either by way of allegation or denial, the court may and should permit him to amend."'" (Dorado v. Knudsen Corp. (1980) 103 Cal.App.3d 605, 611; see Bostrom v. County of San Bernardino (1995) 35 Cal.App.4th 1654, 1663-1664.) However, in the present case, MPI did not discover on the hearing of the summary judgment motion the information or legal theory it alleges was supportive of its motion to amend the complaint. Rather, it discovered the relevant evidence approximately a year before the summary judgment motion was filed.

Specifically, as acknowledged by counsel for MPI, the documents evidencing negotiations between ICM and Hamza (a press release publicizing the relationship) were produced during discovery by ICM in November and December of 2001--a year before the motion for summary judgment was filed on November 14, 2002. Yet, even after Hamza was deposed in April of 2002, MPI made no effort to amend the complaint to alter its theory of recovery based on such "newly" discovered facts until two weeks after summary judgment had been granted in favor of ICM.

To properly place its new theory before the trial court MPI should have moved to amend the complaint prior to the hearing on the motion for summary judgment. MPI did not apply for an order shortening the time to have a motion to amend heard before or at the same time as the summary judgment motion. Nor did MPI request a continuance of the summary judgment hearing so the motion for leave to amend the complaint could be timely heard.

MPI's belated motion for leave to amend was properly denied. A party cannot resist a summary judgment motion on a theory not pleaded in the complaint. (Roth v. Rhodes (1994) 25 Cal.App.4th 530, 541.) "To create a triable issue of material fact, the opposition evidence must be directed to issues raised by the pleadings. [Citation.] If the opposing party's evidence would show some factual assertion, legal theory, defense or claim not yet pleaded, that party should seek leave to amend the pleadings before the hearing on the summary judgment motion." (Distefano v. Forester (2001) 85 Cal.App.4th 1249, 1264-1265, italics added.) MPI failed to do so and offered no excuse for its extremely belated motion for leave to amend.

ICM also alleges that the deal with Hamza did not breach the agreement between Capitol Events and MPI because the venues involved were not necessarily the same, that ICM did not intend to cause termination of the MPI agreement, and that MPI did not suffer any damages--and thus that the evidence does not support the necessary elements for a cause of action for intentional interference with contract. However, it is unnecessary to discuss these other issues, as the trial court properly denied MPI's inexplicably belated motion for leave to amend the complaint.

IV. Undisputed evidence reveals that MPI cannot establish the elements of the causes of action for intentional or negligent interference with prospective economic advantage.

The elements of a cause of action for intentional interference with economic advantage are: (1) plaintiff had an economic relationship with a third party containing the probability of a future economic benefit to plaintiff; (2) defendant had knowledge of this relationship; (3) defendant committed intentional and wrongful acts designed to disrupt the relationship; (4) actual disruption of the relationship occurred; and (5) economic harm to plaintiff was proximately caused by defendant's conduct. (Della Penna v. Toyota Motor Sales, USA, Inc. (1995) 11 Cal.4th 376, 389 (Della Penna).) The elements of a cause of action for negligent interference with economic advantage are the same as above, except that plaintiff need only demonstrate that defendant was negligent. (See J'Aire Corp. v. Gregory (1979) 24 Cal.3d 799, 803-804.)

However, in contrast to interfering with an existing contract, which "is `a wrong in and of itself'" (Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal.4th 1134, 1158 (Korea Supply)), a plaintiff asserting interference with a prospective economic advantage must establish the alleged wrongful conduct was wrongful by some legal measure other than the fact of the interference itself. (Della Penna, supra, 11 Cal.4th at pp. 389-393.) Wrongful conduct is insufficient if it is merely unfair or immoral or the product of an improper but lawful purpose. Rather, "an act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." (Korea Supply, supra, 29 Cal.4th at p. 1159.)

MPI mistakenly relies on case law prior to Korea Supply, and focuses on conduct that is purportedly "`unfair or immoral according to the common understanding of society.'" MPI thus erroneously contends that the wrongfulness requirement was satisfied because defendants "sought out and led Resorts [International] to believe they were authorized agents for Spirit." According to MPI, for example, after ICM and Levine received the offer from Resorts International, they did not turn it over to MPI but rather delivered the offer to King, took credit for the offer and purportedly falsely represented to King that MPI had not done anything to generate the offer. MPI asserts that but for such actions, King might not have lost faith in MPI and might not have subsequently terminated their relationship.

Even assuming such facts and implications as alleged by MPI, there is no evidence supporting the requisite "independently wrongful" conduct that is "unlawful," meaning conduct that is "proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." (Korea Supply, supra, 29 Cal.4th at p. 1159.) In essence, Levine and ICM merely acted upon the instructions of their client and accurately reported the circumstances of the Resorts International offer to Capitol Events. Their conduct did not rise to the level of an independent wrong as required by Korea Supply.

Moreover, regarding the cause of action for negligent (as distinguished from intentional) interference with prospective economic advantage, the defendants owed no "duty of care" to MPI, which is a necessary prerequisite. (LiMandri v. Judkins (1997) 52 Cal.App.4th 326, 348.) As between business competitors, California courts have consistently refused to recognize a

duty of care. (See, e.g., Stolz v. Wong Communications Limited Partnership (1994) 25 Cal.App.4th 1811, 1825; Settimo Associates v. Environ Systems, Inc. (1993) 14 Cal.App.4th 842, 845.) The California Supreme Court has specifically "decline[d] to recognize a duty to avoid business decisions that may affect the financial interests of third parties, or to use due care in deciding whether to enter into contractual relations with another." (Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal.4th 26, 58.) Defendants thus owed no duty of care to MPI which could give rise to this cause of action.

In view of the above discussion, it is unnecessary to address defendants' other attacks on the cause of action for interference with prospective business advantage. We thus need not discuss the alleged absence of any damages. Nor need we resolve whether, in fact, ICM caused no disruption of the relationship between MPI and Capitol Events. As asserted by ICM, since after King terminated the contract with MPI for failure to procure sufficient business, MPI declined King's invitation to continue to represent Spirit on a nonexclusive basis, and thus ICM itself "disrupted" its relation with Capitol Events.

Accordingly, the trial court properly granted summary judgment as to the causes of action for alleged intentional and negligent interference with prospective economic advantage.

V. The evidence reveals that MPI cannot establish the requisite elements for its claim of trade libel.

Trade libel is the intentional disparagement of the quality of property that results in pecuniary damage to the plaintiff. (Leonardini v. Shell Oil Co. (1989) 216 Cal.App.3d 547, 572.) There is simply no evidence in the record that Levine or anyone else at ICM ever made any disparaging statements about MPI to Capitol Events or any to other third parties. When asked to state all facts in support of the trade libel allegation, MPI made the conclusory assertion in its interrogatory responses that "ICM disparaged MPI to Capitol [Events] in order to try and obtain the Resorts International booking and to try and get Capitol [Events] to terminate its Agreement with MPI. . . ." Yet, Pick in his deposition offered no specific facts to support this assertion and admitted he was "not aware" of any instance in which ICM or Levine disparaged MPI or Pick to King.

MPI alleges on appeal a purported conversation during which Levine told King that Pick was a liar, and King concluded from what Levine had said that Pick was dishonest and incompetent. However, the cited portions of the record of Levine's deposition do not support that characterization. The cited portions of the record do not even mention a conversation between King and Levine, and there is no direct evidence or reasonable inferences from evidence to conclude that Levine told King that Pick was a liar. Moreover, MPI never deposed King to attempt to establish this.

Accordingly, there was no evidence to support the cause of action for trade libel. The trial court properly granted summary judgment.

DISPOSITION

The judgment is affirmed.

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We concur:

NOTT, J.

ASHMANN-GERST, J.

1. Unless otherwise indicated, all statutory references are to the Code of Civil Procedure.