COURT'S RULING

Depp, et al. v. Bloom Hergott Diemer Rosenthal La Viollette Feldman Schenkman & Goldman, LLP, et al.
BC680066

TYPE OF MOTION:	(1): Motion for Judgment on the Pleadings; (2): Motion to Seal.
MOVING PARTY:	(1): Cross-Defendants, John C. Depp II, Scaramanga Bros., Inc. L.R.D. Productions, Inc., and Infinitum Nihil; (2): Cross-Complainant, Bloom Hergott Diemer Rosenthal La Viollette Feldman Schenkman & Goldman, LLP.
RESPONDING PARTY:	(1): Cross-Complainant, Bloom Hergott Diemer Rosenthal La Viollette Feldman Schenkman & Goldman, LLP; (2): None (unopposed).
HEARING DATE:	Tuesday, August 28, 2018

Plaintiff Johnny Depp alleges that Defendants were placed in control of his finances, which they then mismanaged and misappropriated to their own use.

On October 17, 2017, Plaintiffs John C. Depp II (hereinafter "Depp"), Scaramanga Bros., Inc. (hereinafter "Scaramanga"), L.R.D. Productions, Inc. (hereinafter "LRD"), and Infinitum Nihil (hereinafter "Infinitum") filed their Complaint for (1) Breach of Fiduciary Duty; (2) Legal Malpractice; (3) Unjust Enrichment; (4) Violation of Cal. Bus. & Prof. Code § 6147; (5) Violation of Cal. Bus. & Prof. Code § 6148; (6) Violation of the Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 et seq.; and (7) Declaratory Judgment against Defendants Bloom Hergott Diemer Rosenthal La Viollette Feldman Schenkman & Goldman, LLP (hereinafter "Firm"); Jacob A. Bloom (hereinafter "Bloom"); and DOES 1-30. On December 11. 2017, Defendants Firm and Bloom filed their Answer.

On the same date, Defendant Firm filed its Cross-Complaint for (1) Breach of Contract; (2) Quantum Meruit; and (3) Declaratory Relief against Plaintiff/Cross-Defendants Depp, Scaramanga, LRD, Infinitum, and DOES 1-30. On January 12, 2018, Plaintiff/Cross-Defendants Depp, Scaramanga, LRD, and Infinitum filed their Answer.

Jury Trial is set for May 6, 2019.

(1) Judgment on the Pleadings

Cross-Defendants now move for judgment on the pleadings as to the first cause of action in the Cross-Complaint, on the grounds that the Cross-Complaint fails to state facts sufficient to constitute such a cause of action.

Cross-Defendants' Request for Judicial Notice ("RJN") is GRANTED *as to the existence of the documents, and the fact that certain statements were made, but not as to the truth of the contents.* Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort (2001) 91 Cal.App.4th 875, 882. The motion is GRANTED, *without leave to amend.*

> Code of Civil Procedure § 438 provides, in relevant part, the following:
>
> (c)(1) The motion provided for in this section may only be made on one of the following grounds:
> . . .
> (B) If the moving party is a defendant, that either of the following conditions exist:
> (i) The court has no jurisdiction of the subject of the cause of action alleged in the complaint.
> (ii) The complaint does not state facts sufficient to constitute a cause of action against that defendant.
> (2) The motion provided for in this section may be made as to either of the following:
> (A) The entire complaint or cross-complaint or as to any of the causes of action stated therein.
> . . .
> (d) The grounds for motion provided for in this section shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice. Where the motion is based on a matter of which the court may take judicial notice pursuant to Section 452 or 453 of the Evidence Code, the matter shall be specified in the notice of motion, or in the supporting points and authorities, except as the court may otherwise permit.
> (e) No motion may be made pursuant to this section if a pretrial conference order has been entered pursuant to Section 575, or within 30 days of the date the action is initially set for trial, whichever is later, unless the court otherwise permits.
> (f) The motion provided for in this section may be made only after one of the following conditions has occurred:
> . . .
> (2) If the moving party is a defendant, and the defendant has already filed his or her answer to the complaint and the time for the defendant to demur to the complaint has expired.
> . . .

> (h)(1) The motion provided for in this section may be granted with or without leave to file an amended complaint or answer, as the case may be.
> (2) Where a motion is granted pursuant to this section with leave to file an amended complaint or answer, as the case may be, then the court shall grant 30 days to the party against whom the motion was granted to file an amended complaint or answer, as the case may be.
> . . . .

However, "a nonstatutory motion for judgment on the pleadings apparently survives *without* such limitations: "A motion for judgment on the pleadings may be made at any time either prior to the trial or at the trial itself." [Stoops v. Abbassi (2002) 100 CA4th 644, 650, 122 CR2d 747, 752 (citing pre-CCP § 438 case of Ion Equip. Corp. v. Nelson (1980) 110 CA3d 868, 877, 168 CR 361, 365); see also Smiley v. Citibank (South Dakota) N.A. (1995) 11 C4th 138, 145, 44 CR2d 441, 445, fn. 2—"*common law motion* for judgment on the pleadings" upheld despite fact CCP § 438 had been enacted during course of proceedings; and Saltarelli & Steponovich v. Douglas (1995) 40 CA4th 1, 5, 46 CR2d 683, 686—treating defective motion for summary judgment as "*nonstatutory motion* for judgment on the pleadings"]...Case authority for the nonstatutory motion is rather thin. None of the cited cases expressly deal with this issue; they simply assume its existence. But these cases reach a practical result. A court should be able to decide there is no valid cause of action *at any time*. There is no point in forcing a case to go to trial because the motion was made too late or otherwise failed CCP § 438 requirements." Weil & Brown, et al. CAL. PRAC. GUIDE: CIV. PROC. BEFORE TRIAL (The Rutter Group 2017) ¶ 7:277 (emphasis in original).

"'A cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff.' (Careau & Co. v. Security Pacific Business Credit, Inc. (1990) 222 C.A.3d 1371, 1388)." Rutherford Holdings, LLC v. Plaza Del Rey (2014) 223 Cal.App.4th 221, 228. "Further, the complaint must indicate on its face whether the contract is written, oral, or implied by conduct. (Code Civ.Proc., § 430.10, subd. (g).)." Otworth v. Southern Pac. Transportation Co. (1985) 166 Cal.App.3d 452, 458-459 (implicitly overruled on other grounds as recognized by Miles v. Deutsche Bank National Trust Company (2015) 236 Cal.App.4th 394, 401-402).

Cross-Complainant pleads in relevant part as follows:

> "10. Beginning in 1999, Bloom Hergott or its predecessors provided entertainment-related legal services to Cross-Defendants.
> 11. Cross-Defendants orally agreed they would pay Bloom Hergott a fixed percent of their gross entertainment income, whenever received.
> 12. Bloom Hergott represented Cross-Defendants on dozens of matters and spent thousands of hours working on their behalf, and Cross-Defendants paid the fixed percent of their gross entertainment income for many years.
> 13. Cross-Defendants continued to request and receive entertainment-related legal

services from Bloom Hergott and continued to direct fee payments to Bloom Hergott under the agreement between Cross-Defendants and Bloom Hergott through July 2017.
...
15. An oral agreement existed between Bloom Hergott and Cross-Defendants under which Cross-Defendants agreed to pay a fixed percent of their gross entertainment income to Bloom Hergott whenever the income was received, in exchange for Bloom Hergott's entertainment-related legal services.
16. Cross-Defendants continued to request and accept legal services on matters from Bloom Hergott through July 2017.
17. Bloom Hergott performed all obligations to Cross-Defendants except those obligations Bloom Hergott was prevented or excused from performing.
18. Cross-Defendants ratified their agreement with Bloom Hergott by continuing to accept legal services and by continuing to pay Bloom Hergott through July 2017.
19. Cross-Defendants have breached the agreement by failing and refusing to pay Bloom Hergott." (Cross-Complaint ¶¶ 10-13, 15-19).

Cross-Defendants argue that the contract described in the Cross-Complaint is a contingency fee contract, and that contingency fee contracts must be in writing to be enforceable. Since the contract described in the Cross-Complaint is an oral contract, it is not enforceable. Cross-Complainant makes three arguments in response. First, it argues that this contract is not a contingency fee agreement. Second, it argues that Cross-Defendants ratified the agreement. Third, it argues that, even if the agreement is voidable, Cross-Complainants still have a remedy in quantum meruit. Each argument is addressed in turn.

Contingency Fee Agreement

"The term "contingency fee contract" is ordinarily understood to encompass any arrangement that ties the attorney's fee to successful performance, including those which incorporate a noncontingent fee based on a fixed rate of payment. As Witkin explains, the term refers to a contract " 'providing for a fee the size or payment of which is conditioned on some measure of the client's success.' " (1 Witkin, Cal. Proc. (5th ed. 2008) Attorneys, § 176, p. 245.) The Restatement Third of the Law Governing Lawyers, from which Witkin draws his definition, elaborates: "Examples include ... a contract that the lawyer will be paid by the hour but receive a bonus should a stated favorable result occur." (Rest.3d Law Governing Lawyers, § 35, com. a, p. 257.)." Arnall v. Superior Court (2010) 190 Cal.App.4th 360, 370.[1]

Cross-Complainant offers the following test for a identifying a contingency fee agreement: (1) whether the agreement contains clearly defined, limited goals for the representation, and (2) whether "failure is possible and success is not guaranteed." (Opposition p. 7:13-19). Though slightly redundant, this is a facially attractive mode of analysis. The only

[1] Cross-Defendants also cite to Law Office of Ball & Yorke v. Rogue (Ventura Super. Ct. May 8, 2014) 2014 WL 4099227 at *1. Trial court rulings are not precedent, and are not binding on other courts. Budrow v. Dave & Buster's of California, Inc. (2009) 171 Cal.App.4th 875, 884-885. However, they may be cited as persuasive authority if, as here, they appear in some generally recognized published collection. Santa Ana Hospital Medical Center v. Belshe (1997) 56 Cal.App.4th 819, 831. That said, Rogue contains too little in the way of substantive analysis to be helpful.

difficulty is that Cross-Complainant can cite no authority which employs or endorses such a test. The Rutter Guide for Professional Responsibility merely refers back to Arnall.[2] Franklin v. Appel (1992) 8 Cal.App.4th 875 was expressly overturned by legislative act, and failed to address the boundary line between contingency fee and other contracts.[3] In re County of Orange (C.D. Cal. 1999) 241 B.R. 212, 221 is a federal bankruptcy case which sets forth no real analysis.[4]

Cross-Complainant places heavy reliance on Estate of Stevenson (2006) 141 Cal.App.4th 1074. That was a probate case, in which the administrator of the estate hired his own law firm to represent the estate on the following terms: the firm would be paid at twice its normal hourly rates, unless the assets of the estate at the end of the case were inadequate to pay the total bill. Id. at 1080. In that case, the firm would adjust the bill to reflect only its normal hourly rates. Id. If the adjusted bill was less than the value of the estate, then the firm would be paid the full value of the estate; if the adjusted bill was *more* than the estate was worth, a surety would make up that difference. Id. The Court of Appeal held that this was not a contingency fee agreement for two reasons. Id. at 1086. First, the agreement contemplated that if all went well the firm would be paid on an hourly basis; the contingency was designed to protect the firm from *failure*, not reward it for *success*. Id. at 1084-85. Second, in the event of such a failure, the firm would take the *entire* recovery, *plus* whatever the surety paid. Id. at 1086. In no way could this contract be construed as a performance incentive.

The contract at issue in Stevenson was a uniquely good deal for the attorneys involved. The facts of this case are not at all similar to that case. Under the analysis set forth in Arnall, the contract as pled is a contingency fee contract. It is tied entirely to Cross-Defendants' success in the entertainment business. As Cross-Defendants put it, when they made money, Cross-Complainants made money; when Cross-Defendants didn't make money, Cross-Complainants didn't make money. That is the very definition of a performance-based incentive. Even if the court employed Cross-Complainant's proposed test, the success of Cross-Defendants in their business endeavors was not guaranteed. This is a contingency fee agreement. There is nothing else it can be.

Ratification

Bus. & Prof. Code § 6147 governs contingency fee contracts. It states in relevant part as follows:

> "(a) An attorney who contracts to represent a client on a contingency fee basis shall, at the time the contract is entered into, provide a duplicate copy of the contract, signed by both the attorney and the client, or the client's guardian or representative, to the plaintiff, or to the client's guardian or representative. The contract *shall be in writing* and shall

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[2] Tuft & Peck, et al., Cal. Prac. Guide: Prof. Resp. (The Rutter Group 2017) ¶¶ 5:82-5:83.2.

[3] Stand Up for California! v. State (2016) 6 Cal.App.5th 686, 703 (a case is not authority for a proposition not therein considered).

[4] The contract at issue in that case provided for a "benchmark" billing rate which the firm was empowered to adjust up or down at its own discretion based on an enumerated set of factors. County of Orange, *supra*, 241 B.R. at 215. Little imagination is necessary to understand why the opinion of the billing firm regarding the worth of its own services is not a proper "contingency" in this context.

include, but is not limited to, all of the following...
(b) Failure to comply with any provision of this section renders the agreement voidable at the option of the plaintiff, and the attorney shall thereupon be entitled to collect a reasonable fee." (Emphasis added).

According to Section 6147(b), an oral contingency fee agreement is voidable at the option of the client; if the client opts to void the agreement, the result is a recovery in quantum meruit. See also Arnall, *supra*, 190 Cal.App.4th at 368. Cross-Defendants now seek to void the agreement. Cross-Complainant argues that the agreement has been ratified and cannot now be voided.

"As a general rule, "[a] voidable contract may be ratified." (Hanley v. Murphy (1924) 70 Cal.App. 157, 165, 232 P. 767.) Civil Code section 1588 provides: "A contract which is voidable solely for want of due consent, may be ratified by a subsequent consent."" Fergus v. Songer (2007) 150 Cal.App.4th 552, 571. "Respondent...argues that a contingency fee agreement that is voidable under section 6147 cannot be ratified. Respondent also argues that, as a matter of law, the evidence is insufficient to establish a ratification. We need not determine whether the 1995 contingency fee agreement could have been ratified by respondent. Assuming that it could have been ratified, ratification would have required knowledge by respondent of his right to void the agreement." Id.

Cross-Complainant relies on Alderman v. Hamilton (1988) 205 Cal.App.3d 1033, 1038 for the proposition that a client can ratify a contingency fee contract by some general agreement to pay the money. Cross-Complainant misunderstands Alderman. In that case, the clients had consistently declined to contest one particular portion of the contract; the Court of Appeal simply acknowledged the clients' deliberate refusal, after three years of litigation, to exercise their option to void that portion of the contract. Id. at 1036. If anything, Alderman is about waiver, not ratification. Id.

There is no appellate authority on point as to whether a voidable contingency fee contract can be ratified. Fergus expressly declined to answer the question, and Alderman failed to consider it. However, the statute itself contains the kernel of an answer: the fact that it makes non-compliant contracts "voidable at the option of" the client. Bus. & Prof. Code § 6147(b) The distinction between void and voidable contracts is an established legal principle; it has always been the rule that a voidable contract may be rendered null at the option of the wronged party. See e.g. Depner v. Joseph Zukin Blouses (1936) 13 Cal.App.2d 124, 127. Section 6147(b) simply adopts that rule.

But the other side of that coin is that the wronged party may opt to *keep* a voidable contract by ratifying it. See e.g. Hanley, *supra*, 70 Cal.App. at 165. The existence of a choice to void necessarily implies the possibility of a choice to ratify. "The Legislature is presumed to know existing law when it enacts a new statute, including the existing state of the common law." Mosser Companies v. San Francisco Rent Stabilization & Arbitration Board (2015) 233 Cal.App.4th 505, 514 (quoting Arthur Andersen v. Superior Court (1998) 67 Cal.App.4th 1481, 1500-01). Presumably, therefore, when the Legislature decided to make contingency fee contracts which violate Section 6147 *voidable* rather than *void*, it knew the rule that voidable

contracts are also ratifiable. And Section 6147 contains no language forbidding such an outcome, either expressly or by implication. Therefore, contingency fee contracts which are voidable under Section 6147 can be ratified.

The next question is: how can they be ratified? Fergus has already provided a partial response: the wronged party must know of his right to void the agreement. The rest may be implied by analogy from Stroud v. Tunzi (2008) 160 Cal.App.4th 377. Stroud addressed the issue of modifications to a *compliant* contingency fee contract. Id. at 379-380. The Court of Appeal held that even a modification to a compliant contract must itself comply anew with Section 6147, because otherwise unscrupulous operators would be able to use the compliant contract as a dummy, shielding any later alterations from scrutiny. Id. at 383. This would frustrate the purpose of the statute, which is to protect clients by forcing attorneys to fix certain terms and make specified disclosures. Id. If a modification of a *compliant* agreement must independently comply with Section 6147, then a ratification of a *non-compliant* agreement must also comply with Section 6147, for the same reasons. If the purpose of the statute is frustrated when an attorney alters terms which the statute requires to be fixed, it is certainly frustrated when an attorney never fixes those terms at all.

Therefore, in order to establish ratification of a contract which is voidable under Section 6147, Cross-Complainant must (1) plead and prove the existence of a writing which complies with Section 6147, and (2) plead and prove that Cross-Defendants signed said writing with full knowledge of their option to void. Cross-Complainant has given no indication that it can do so. Its argument for ratification is based on Cross-Defendants' continued payment of the bills Cross-Complainant issued. Therefore, it does not appear probable that Cross-Complainant can amend its pleading to state a valid cause of action.

Quantum Meruit

Cross-Complainant correctly points out that Section 6147(b) does not leave it without a remedy, even though its contract is unenforceable. When a contract is voided for violation of Section 6147, the claim is converted to one for quantum meruit. But Cross-Complainant already has a claim for quantum meruit, which it has pled in the alternative to enforcement of the contract. (Cross-Complaint ¶ 22). And Cross-Defendants do not now seek judgment on that claim. There is no reason for the court to convert this cause of action to a quantum meruit claim when Cross-Complainant has already pled what would be an exact duplicate of that claim. See Palm Springs Villas II Homeowners Association, Inc. v. Parth (2016) 248 Cal.App.4th 268, 290.

Conclusion

The agreement at issue here is a contingency fee agreement because Cross-Complainant's fees are directly linked to Cross-Defendants' business success, and to nothing else. The agreement does not comply with Bus. & Prof. Code § 6147, making it voidable at the option of Cross-Defendants. Cross-Defendants have clearly exercised that option. Contracts which are voidable under Section 6147 may be ratified, but only if the ratification itself complies with the statute, and the client knows of his option to void. Cross-Complainants have not pled these facts, and it does not appear that they can. Therefore, under Section 6147(b), this breach of contract

cause of action must be converted to a quantum meruit claim. Cross-Complainants have already pled such a claim as an alternative theory. Therefore, there is no reason to retain this cause of action in the case. Cross-Defendants' motion is GRANTED, *without leave to amend.*

(2) Motion To Seal

Cross-Complainant Firm now moves to seal portions of its own Opposition papers filed in response to the above Motion for Judgment on the Pleadings. Cross-Complainant bases its request on the grounds that those papers contain privileged communications and private financial information. Cross-Complainant's motion is GRANTED.

California Rules of Court Rule 2.550 states, in pertinent part, as follows:

(a) Application
(1) Rules 2.550-2.551 apply to records sealed or proposed to be sealed by court order...
(c) Court records presumed to be open
Unless confidentiality is required by law, court records are presumed to be open.
(d) Express factual findings required to seal records
The court may order that a record be filed under seal only if it expressly finds facts that establish:
(1) There exists an overriding interest that overcomes the right of public access to the record;
(2) The overriding interest supports sealing the record;
(3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;
(4) The proposed sealing is narrowly tailored; and
(5) No less restrictive means exist to achieve the overriding interest.
(e) Content and scope of the order
(1) An order sealing the record must:
(A) Specifically state the facts that support the findings; and
(B) Direct the sealing of only those documents and pages, or, if reasonably practicable, portions of those documents and pages, that contain the material that needs to be placed under seal. All other portions of each document or page must be included in the public file...

Rule 2.551 states, in relevant part, as follows:

(a) Court approval required
A record must not be filed under seal without a court order. The court must not permit a record to be filed under seal based solely on the agreement or stipulation of the parties.
(b) Motion or application to seal a record
(1) *Motion or application required*
A party requesting that a record be filed under seal must file a motion or an application for an order sealing the record. The motion or application must be accompanied by a memorandum and a declaration containing facts sufficient to justify the sealing...
(4) *Lodging of record pending determination of motion or application*

The party requesting that a record be filed under seal must lodge it with the court under (d) when the motion or application is made, unless good cause exists for not lodging it or the record has previously been lodged under (3)(A)(i). Pending the determination of the motion or application, the lodged record will be conditionally under seal.
(5) *Redacted and unredacted versions*
If necessary to prevent disclosure, any motion or application, any opposition, and any supporting documents must be filed in a public redacted version and lodged in a complete, unredacted version conditionally under seal. The cover of the redacted version must identify it as 'Public--Redacts materials from conditionally sealed record.' The cover of the unredacted version must identify it as 'May Not Be Examined Without Court Order--Contains material from conditionally sealed record.'...

The public has an interest in observing and assessing the performance of its judicial system in *all* civil cases. McNair v. National Collegiate Athletic Association (2015) 234 Cal.App.4th 25, 31 (citing NBC Subsidiary (KNBC-TV), Inc. v. Superior Court (1999) 20 Cal.4th 1178, 1210-11 & fn.28). This public right of access is a federal First Amendment right, and therefore cannot be abrogated unless there is (1) an overriding interest in support of sealing the records, (2) a substantial probability that the interest will be prejudiced if the record is not sealed, (3) the proposed sealing order is narrowly tailored, and (4) there is no less restrictive means of satisfying the interest. McNair, *supra*, 234 Cal.App.4th at 31.

Maintenance of attorney-client privilege is one such overriding interest (NBC Subsidiary, *supra*, 20 Cal.4th at 1222 fn.46); protection of other constitutional interests (like privacy) is another. See Id. at 1222 & fn.46; see also DiLoreto v. Board of Education (1999) 74 Cal.App.4th 267, 279; Locke v. Davey (2004) 540 U.S. 712, 730 fn.2 (Scalia, J., dissenting). It is substantially probable that these interests will be prejudiced if the Opposition remains unsealed, given the prominence of Cross-Defendant Depp and the fact that the Opposition does discuss his financial dealings. The proposed order is narrowly tailored, as it requires redaction of only three relatively short paragraphs and does not render the Opposition incoherent or cripple the public's ability to understand the arguments. No less restrictive means of protecting these interests appears at this time. Therefore, Cross-Complainant's motion is GRANTED.

Dated: 8/28/18

Terry A. Green
Judge of the Superior Court