Superior Court of California

County of Los Angeles

Department 50

ANDREW CONWAY, et al. Plaintiff, vs. SAM LICATA, et al. Defendants.	Case No.: BC 573980 Hearing Date: June 16, 2016 Hearing Time: 8:30 a.m. **~~[TENTATIVE]~~ ORDER RE:** DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Background

Plaintiffs Andrew Conway and Liana Conway (jointly, "Plaintiffs") filed this action on February 27, 2015 against Defendants Sam Licata, Sybil Hall, Stonehall Entertainment, LLC, and Stonehall Records, LLC (collectively "Defendants"). The Complaint asserts one cause of action for violation of Cal. Labor Code ¶1701, *et seq.* The Complaint alleges that Liana Conway, Andrew Conway's daughter, was an aspiring professional musician. (Complaint ¶13.) The Complaint alleges that from May 2010 through September 2012, Defendants performed numerous services for Plaintiffs including managing and directing Ms. Conway's career, providing advice and guidance on Ms. Conway's career, and providing lessons, coaching, and training to Ms. Conway. (Complaint ¶¶16-20.) The Complaint also alleges that Defendants produced Ms. Conway's music, marketed her music, maintained social media for her, managed her website, arranged for photo and video shoots; attempted to place her music in movies, and organized performance tours for her. (Complaint ¶¶21-27.) Plaintiffs allege that Defendants were

acting as an "advance-fee talent representation service" and were taking illegal fees in violation of Cal. Labor Code §1704. (Complaint ¶¶ 29, 32.)

Defendants now move for summary judgment on the ground that this action is barred by the doctrine of res judicata based on a judgment entered after trial in a case between the same parties in the United States District Court for the District of Massachusetts.

A hearing on this motion was initially held on March 29, 2016. At the hearing, the Court requested further briefing from the parties and continued the matter to May 19, 2016. At the May 19, 2016 hearing, the Court again requested further briefing and continued the matter to June 16, 2016. The below discussion incorporates the original and supplemental briefing of the parties.

Evidence

The parties' requests for judicial notice are granted. (Ev. Code §§ 452(c) and 452(d).)

The Prior Action

The following facts are undisputed. On September 4, 2013, Plaintiffs filed an action against Defendants in the United States District Court for the District of Massachusetts, Case No. 1:13-cv-12193-LTS. (Plaintiffs' Separate Statement ("SS") at 1:10-17.)[1] The federal complaint asserted nineteen causes of action: (1) fraud and negligent misrepresentation; (2) breach of contract and the covenant of good faith and fair dealing; (3) quantum meruit; (4) money had and received; (5) unjust enrichment; (6) conversion; (7) copyright infringement; (8) defamation; (9) breach of fiduciary duty; (10) concert of action; (11) aiding and abetting against the entities; (12) piercing the corporate veil; (13) violation of Massachusetts General Laws chapter 93A, §§2; (14) violation of Massachusetts General Laws chapter 214, §3A; (15) declaratory judgment; (16) equitable accounting; (17) replevin; (18) injunctive relief; and (19) violation of the Racketeer Influenced and Corrupt Organizations Act. (SS at 3:16-4:9.) The complaint sought several forms of relief, including "[a]n order requiring the Defendants to account for and disgorge all funds wrongfully obtained by the Defendants from the Plaintiffs, any benefits obtained as a result of

[1] The facts in the separate statement are not separately numbered; thus, the Court cites to the page and line numbers.

the payment of monies associated with the career of Ms. Conway and profits received as a result of their association with the Plaintiffs and the conversion of their funds." (SS at 2:24-3:6.) On February 10, 2015, Plaintiffs filed a motion to amend the federal complaint to add a cause of action under the Talent Scam Prevention Act. (SS at 5:8-14.) On February 23, 2015, the Federal Court denied Plaintiffs' motion to amend the complaint. (SS at 7:3-8.) On May 27, 2015, a 10-day trial commenced in the federal action which concluded on June 8, 2015. (SS at 9:10-17.) The Federal Court entered judgment, dated August 31, 2015, and filed on September 1, 2015. (SS at 13:8-28.) The Federal Court entered an amended judgment dated September 1, 2015, which added prejudgment interest and taxable costs. (SS at 14:1-11.)

Legal Standard

A defendant moving for summary judgment must show either: "that one or more elements of the cause of action … cannot be established"; or "that there is a complete defense to that cause of action." (CCP § 437c(p)(2).) "The defense of res judicata not only is properly raised by a motion for summary judgment, but also is a proper ground upon which to grant a summary judgment. Moreover, such a plea presents a question of law for the determination of the trial court." (Rohrbasser v. Lederer (1986) 179 Cal.App.3d 290, 296 (internal citations omitted).)

Discussion

Res Judicata bars a second suit between the same parties on the same cause of action that was adjudicated on the merits in an earlier suit, even if the later suit is prosecuted on a different legal theory. (Weikel v. TCW Realty Fund II Holding Co. (1997) 55 Cal.App.4th 1234, 1245; Lucas v. County of Los Angeles (1996) 47 Cal.App.4th 277, 285.) Res judicata "rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent." (Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Ass'n (1998) 60 Cal.App.4th 1053, 1065.) The doctrine applies "if (1) the decision in the prior proceeding is final and on the merits; (2) the present proceeding is on the same cause of action as the prior

proceeding; and (3) the parties in the present proceeding or parties in privity with them were parties to the prior proceeding." (Federation of Hillside & Canyon Associations v. City of Los Angeles (2004) 126 Cal.App.4th 1180, 1202.)

Here, Plaintiffs do not dispute that the decision in the prior proceeding is final and on the merits or that the parties in the present proceeding are the same as the parties to the prior proceeding. (Opposition at p.6 fn.1.) The only issue is whether this action asserts the same "cause of action" that was adjudicated in the prior proceeding.

Applicable Law

The parties dispute which law applies in determining the identity of the causes of action. Case law seemingly provides that California law controls on this issue: "Where, as here, an action is filed in a California state court and the defendant claims the suit is barred by a final federal judgment, California law will determine the res judicata effect of the prior federal court judgment on the basis of whether the federal and state actions involve the same primary right." (Gamble v. Gen. Foods Corp. (1991) 229 Cal.App.3d 893, 898; see also Acuna v. Regents of University of California (1997) 56 Cal.App.4th 639, 648.)

Defendants argue that Gamble and Acuna are not controlling. Defendants contend that Semtek Int'l Inc. v. Lockheed Martin Corp. (2001) 531 U.S. 497, mandates that either federal or Massachusetts law governs. In Semtek, the United States Supreme Court held that the claim-preclusive effect of a federal diversity judgment is governed by federal common law, which looks to the law of the state where the district court is located. (Id. at 508.) With respect to federal-question cases, the Court noted that: "States cannot give those judgments merely whatever effect they would give their own judgments, but must accord them the effect that this Court prescribes." (Id. at 507.)

Significantly, the identity of causes of action was not at issue in Semtek and the Court did not specifically address the law that applies to the identity analysis. Indeed, in Gamble, the Court was faced with similar precedent holding that "a federal court judgment has the same effect in California courts as it would in a federal court." (Gamble, supra, 229 Cal.App.3d at 899.)

However, the Court noted that this precedent "[does] not hold that California courts must employ the transactional approach for the purposes of a res judicata analysis when a prior judgment has been rendered in federal court." (Id.) The Gamble Court appears to have distinguished the question of finality and enforceability, from the question of identity of causes of action. (See, e.g., Martin v. Martin (1970) 2 Cal.3d 752, 761 ("On this question of finality federal law is controlling.").)

Defendants emphasize that Gamble and Acuna were decided before the Supreme Court decided Semtek. However, at least one California Court of Appeal opinion decided after Semtek still relied on Gamble and Acuna in applying a primary rights theory to determine whether a cause of action in a prior federal action was the "same" as a cause of action asserted in a subsequent state action. (City of Simi Valley v. Superior Court (2003) 111 Cal.App.4th 1077, 1082-1083.)

Defendants also argue that Gamble and Acuna follow the Semtek rule because they both apply the res judicata law of the state where the federal diversity court sat, which in both cases was California. But this appears to be nothing more than a coincidence. There is no indication that the identity of the state where the federal court was located factored into the Gamble and Acuna decisions in any manner.

Finally, the Court notes that Defendants fail to cite to a single California case that applies foreign or federal law to determine whether a federal judgment involved the same cause of action as a California state court action.

Accordingly, the Court finds that Gamble and Acuna are controlling and require the application of California's primary rights theory in determining the identity of Plaintiffs' causes of action.

Primary Rights Theory Analysis

"[F]or purposes of applying the doctrine of res judicata, the phrase 'cause of action' ... is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced." (Boeken v. Philip Morris USA, Inc. (2010)

48 Cal.4th 788, 798.) "[U]nder the primary rights theory, the determinative factor is the harm suffered. When two actions involving the same parties seek compensation for the same harm, they generally involve the same primary right." (Id.) Thus, "if two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery." (Eichman v. Fotomat Corp. (1983) 147 Cal.App.3d 1170, 1174.)

In the instant action, Plaintiffs bring a single cause of action under Labor Code §1701, *et seq.*, known as the "Talent Scam Prevention Act" (hereafter, the "Act"). The Act states that: "No person shall own, operate, or act in the capacity of an advance-fee talent representation service or advertise, solicit for, or knowingly refer a person to, an advance-fee talent representation service." (Lab. Code §1702.)

The Act defines "advance-fee talent representation service" as follows:

> (a) "Advance-fee talent representation service" means a person who provides or offers to provide, or advertises or represents itself as providing, an artist, directly or by referral to another person, with one or more of the following services described below, provided that the person charges or receives a fee from or on behalf of an artist for photographs, Internet Web sites, or other reproductions or other promotional materials as an artist; lessons, coaching, seminars, workshops, or similar training for an artist; or for one or more of the following services:
>
> (1) Procuring or attempting to procure an employment opportunity or an engagement as an artist.
> (2) Procuring or attempting to procure an audition for an artist.
> (3) Managing or directing the development of an artist's career.
> (4) Procuring or attempting to procure a talent agent or talent manager, including an associate, representative, or designee of a talent agent or talent manager.

(Labor Code §1702.1.)

A civil remedy for violation of the Act is provided for in §1704.2. That section provides: "A person who is injured by a violation of this chapter or by the breach of a contract subject to this chapter may bring an action for recovery of damages or to restrain and enjoin a violation, or both. … The amount awarded for damages for a violation of this chapter shall be not less than

three times the amount paid by the artist, or on behalf of the artist, to the talent service or the advance-fee talent representation service."

The purpose of the Act is stated in Assembly Bill 1319: "The Legislature declares that the purpose of this act is to safeguard the public against fraud, deceit, imposition, and financial hardship, and to foster and encourage competition, fair dealing, and prosperity in the field of talent services by prohibiting or restricting false or misleading advertising and other unfair, dishonest, deceptive, destructive, unscrupulous, and fraudulent business practices by which the public has been injured in connection with talent services." (2009 Cal. Legis. Serv. Ch. 286 (A.B. 1319); Plaintiff's Evidence, Ex. E at p.1.)

Based on the language of the statute and the assembly bill, it is clear that Plaintiffs' cause of action under the Act involves the same primary right as the claims asserted in the prior federal action. Plaintiffs are seeking redress for the same harm—the loss of monies advanced to Defendants, allegedly through fraudulent and deceptive means.

Plaintiffs argue that the Act uniquely protects against the operation of an advance-fee talent representation service and that this wrong is separate from any of the wrongs adjudicated in the federal action. However, the reason the Legislature prohibited the operation of advance-fee talent representation services was to safeguard against "unfair, dishonest, deceptive, destructive, unscrupulous, and fraudulent business practices." (2009 Cal. Legis. Serv. Ch. 286 (A.B. 1319); Plaintiff's Evidence, Ex. E at p.1.) These are the same wrongs that Plaintiffs' federal action sought redress for. For example, the federal complaint (Goldman Decl. ¶2, Ex. 1) alleges the following:

- "Defendants misrepresented to the Plaintiffs that they had the experience, connections, and influence in the industry that would allow them to cultivate Ms. Conway's music career." (Fed. Comp. ¶38.)
- "Defendants made numerous misrepresentations about their knowledge of the music industry, their contacts in the industry, and their experience." (Fed. Comp. ¶39.)

- "Defendants used the relationship and position of trust that they cultivated to induce Mr. Conway to advance funds ostensibly for Ms. Conway's career." (Fed. Comp. at p.7, subheading C.)
- "Defendants misused the funds that Mr. Conway wired to them for their own benefit." (Fed. Comp. ¶119.)
- "Defendants did not pay all of the advanced funds to third-party vendors and instead converted and retained funds for their own benefit." (Fed. Comp. ¶151.)
- "Defendants breached their fiduciary duties by making numerous, material misstatements and omissions to the Plaintiffs." (Fed. Comp. ¶204.)
- "Defendants breached their fiduciary duties by misusing the funds that Mr. Conway wired to them for their own benefit and not that of Ms. Conway." (Fed. Comp. ¶206.)
- "Defendants engaged in unfair and deceptive acts and practices against the Plaintiffs in the course of its trade or commerce…" (Fed. Comp. ¶232.)

Further, the federal complaint indicates that Plaintiffs transferred funds totaling nearly $1.7 million to Defendants (Fed. Comp. ¶66); and Plaintiffs' prayer for relief seeks "[a]n order requiring the Defendants to account for and disgorge all funds wrongfully obtained by the Defendants from the Plaintiffs…" (Fed. Comp., Prayer at ¶13.) Similarly, the Complaint in the instant action alleges that Plaintiff paid fees to Defendants in the amount of $1,737,948 (Complaint ¶30, Ex. A); and Plaintiffs seek a statutory award of "three times the amount paid by the artist, or on behalf of the artist, to Defendants." (Complaint, Prayer at ¶2.) These allegations establish that the harm suffered by Plaintiffs in both actions was the loss of money advanced to Defendants.

Plaintiffs also argue that the harm that the Act seeks to prevent is primarily emotional. In making this argument, Plaintiffs rely on the "Arguments in Support" section of the Assembly Committee on Labor and Employment's analysis of the proposed Act. (Plaintiffs' Evidence, Ex. F.) This analysis states: "Aside from causing substantial monetary loss … talent scams cause

severe emotional harm to victims..." (Id. at 9.) This does not establish that the Act primarily concerns emotional harm. At best, it establishes that emotional harm is a secondary concern. In fact, the preceding paragraph of the committee's analysis states: "Since the amount of loss to an individual victim frequently amounts to $1,000 or more, this is a crime that results in millions of dollars in loss." (Id.) It is apparent that the primary harm the Act seeks to remedy is the monetary loss suffered by victims of talent scams. This is why the Act allows for the recovery of damages corresponding to the amount paid by the artist to the talent service. The statutory language makes no reference to emotional harm or damages. Moreover, Plaintiff's Complaint in this action does not mention emotional harm or damages. The Complaint merely seeks recovery of the fees paid to Defendants. Accordingly, the Court is not persuaded that the instant action seeks redress for emotional harm.

In their supplemental briefing, Plaintiffs argue that the primary right at stake in this action is the right to be free from advance-fee-talent representation services. This characterization of the primary right overlooks the harm suffered—the loss of money advanced to Defendants. Plaintiffs already sought redress for this harm.

Plaintiffs also emphasize that they are asserting a statutory violation in this action, whereas the prior action asserted common law claims. However, the California Supreme Court specifically rejected the significance of this distinction. (Boeken, supra, 48 Cal.4th at 798 ("The cause of action is the right to obtain redress for a harm suffered, *regardless of the specific remedy sought or the legal theory (common law or statutory) advanced.*") (emphasis added).) Moreover, all of the cases cited by Plaintiffs in which a statutory claim was held to constitute a different primary right than a common law claim are distinguishable because they each involved distinct harms. (See Defendants' Supp. Reply 9:4-18.)

Plaintiffs also argue that application of res judicata would result in injustice and violate California's public interest. (See City of Sacramento v. State of California (1990) 50 Cal.3d 51, 64 ("when the issue is a question of law rather than of fact, the prior determination is not conclusive either if injustice would result or if the public interest requires that relitigation not be

foreclosed.").) However, the public interest exception to res judicata is "extremely narrow." (Acuna, supra, 56 Cal.App.4th at 652.) "It only applies if there is a clear and convincing need to relitigate the issue because the federal judgment creates a potential adverse impact on the public or persons not parties to the federal action." (Id.) Here, there is no potential adverse impact on the public. The Act was not litigated in the prior action.

Finally, the Court is not persuaded by Plaintiffs' judicial estoppel argument. Judicial estoppel applies when "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." (Jackson v. Cty. of Los Angeles (1997) 60 Cal.App.4th 171, 183.) "Judicial estoppel is an extraordinary remedy that should be applied with caution." (Mercury Interactive Corp. v. Klein (2007) 158 Cal.App.4th 60, 85-86.) Even where all elements are present, its application is discretionary. (MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co. (2005) 36 Cal.4th 412, 422.)

Here, Defendants did not take "totally inconsistent" positions in the prior action and the instant action. Plaintiffs argue that Defendants took the position in the prior action that additional discovery would be needed, and now are arguing that no additional discovery is necessary. However, Plaintiffs have taken ~~Defendants' statements out of~~ not fully into account the context. In opposing Plaintiffs' motion for leave to amend in the prior action, Defendants asserted that, "it is impossible to know whether Plaintiffs' new claim under the Act will add additional factual allegations that would require more fact discovery…" (Baker Decl. ¶2, Ex. A at p.9.) Now, in their moving papers related to this motion, Defendants state that, "[Plaintiffs] admitted that the Instant Action would require no 'additional discovery'…" (Motion at p.13.) There is no inconsistency. Moreover, Defendants opposed Plaintiffs' motion for leave to amend in the prior action on other grounds including that the motion was untimely, that amendment would cause Defendants prejudice, and that amendment would be futile. Accordingly, the Court finds that plaintiff is not judicially

estopped from arguing the preclusive effect of the prior judgment.

Injunctive Relief

The second round of supplemental briefing is concerned with Plaintiffs' entitlement to injunctive relief. Specifically, the Court asked the parties to brief: (1) whether Plaintiffs have standing to seek an injunction under the Act; (2) whether Plaintiffs are entitled to an injunction in this case even though there is no specific prayer for injunctive relief; and (3) if Plaintiffs are entitled to an injunction, whether that means their cause of action under the Act asserts a separate primary right than that at issue in the prior federal action.

A complaint must contain "[a] demand for judgment for the relief to which the pleader claims to be entitled." (CCP §425.10.) However, "[f]ailure to pray for the proper form of relief is not fatal to a complaint." (Valdez v. Himmelfarb (2006) 144 Cal.App.4th 1261, 1276 (citing CCP §580).) CCP §580 provides in part: "the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue." (CCP §580(a).) Thus, in Valdez, the Court of Appeal held that plaintiff's failure to pray for injunctive relief was not fatal to the complaint where defendants did not contend that the complaint failed to state facts sufficient to support injunctive relief. (144 Cal.App.4th at 1276, fn 51.)

Here, not only have Plaintiffs failed to specifically request injunctive relief in the Complaint, but the Complaint's allegations do not support a request for injunctive relief. Plaintiffs concede that they are no longer suffering harm as a result of Defendants' operation of an advance-fee talent representation service. Thus, in their supplemental briefing, Plaintiffs emphasize that they seek to vindicate the rights of the people of California who are continuing to be injured by Defendants' operation of an advance-fee talent representation service. But the Complaint only refers to harm suffered by Plaintiffs. There is no reference to any continuing harm suffered by others. It is clear that the Complaint did not contemplate the injunctive relief that Plaintiffs are now requesting.

Plaintiffs argue that they are entitled to injunctive relief because of the Complaint's prayer seeking: "Any other relief that this Court deems just, proper and equitable." Plaintiffs rely

on Ostrofsky v. Sauer (E.D. Cal.) 2010 WL 891263. However, Ostrofsky is a decision from a federal district court that was applying federal pleading standards. Additionally, the court in Ostrofsky was dealing with a pro se complaint and the court noted that the rules require liberal construction of pleadings in such circumstances. Plaintiffs also cite to Coons v. Henry (1960) 186 Cal.App.2d 512. However, Coons merely held that "under a prayer for general relief the court may grant any relief conformable to the case made by the pleadings and the evidence." (Id. at 519.) This is consistent with the principle cited above that the court may grant any relief consistent with the case made by the complaint and embraced within the issue.

Finally, the Court notes that "the pleadings determine the scope of relevant issues on a summary judgment motion." (Nieto v. Blue Shield of California Life & Health Ins. Co. (2010) 181 Cal.App.4th 60, 74.) Therefore, "a plaintiff wishing 'to rely upon unpleaded theories to defeat summary judgment' must move to amend the complaint before the hearing." (Laabs v. City of Victorville (2008) 163 Cal.App.4th 1242, 1254.)

Here, Plaintiffs' argument that they are entitled to seek injunctive relief to vindicate the rights of others is an unpleaded theory that is outside the scope of relevant issues established by the Complaint. Accordingly, Plaintiffs may not defeat Defendants' res judicata argument by relying on an unpleaded claim for injunctive relief.

Even if Plaintiffs were entitled to seek injunctive relief, it is not clear that this would give rise to a distinct primary right. The law provides that the remedy sought is not determinative in a primary rights analysis. (Weikel v. Tcw Realty Fund II Holding Co. (1997) 55 Cal.App.4th 1234, 1247 ("The 'cause of action' is to be distinguished from the 'remedy' and the 'relief' sought, for a plaintiff may frequently be entitled to several species of remedy for the enforcement of a single right.").) Plaintiffs acknowledge in their reply brief that they "are not arguing that their entitlement to injunctive relief alone creates a different primary right, it merely underscores that Plaintiffs' claim under the Act vindicates a distinct primary right on behalf of themselves and the people of California. . . . " (Reply, p.7, ll. 5-8.) In any event, the Court need not address the remaining issues addressed in the parties' supplemental briefing.

Federal Transactional Approach

As discussed above, the transactional approach to determining the identity of causes of action does not apply. In any event, the Court notes that Plaintiffs' instant action would be barred even if this were the controlling standard.

Both federal law and Massachusetts law apply a transactional approach, meaning that all claims arising out of the same transaction or series of transactions will be barred in a subsequent case. (W. Sys., Inc. v. Ulloa (9th Cir. 1992) 958 F.2d 864, 871; TLT Const. Corp. v. A. Anthony Tappe & Associates, Inc. (1999) 48 Mass.App.Ct. 1, 8.) "Whether two suits arise out of the same transactional nucleus depends upon whether they are related to the same set of facts and whether they could conveniently be tried together. In most cases, the inquiry into the 'same transactional nucleus of facts' is essentially the same as whether the claim could have been brought in the first action." (Turtle Island Restoration Network v. U.S. Dep't of State (9th Cir. 2012) 673 F.3d 914, 918 (internal citations and quotations omitted).)

Here, the instant action and the prior action involve the same underlying facts—namely, Plaintiffs advanced approximately $1.7 million to Defendants in furtherance of Ms. Conway's career, and Defendants allegedly misused those funds for their own benefit. Plaintiffs' claim under the Act could have been brought in the first action. Thus, Plaintiffs' cause of action under the Act is barred under the transactional approach as well.

Conclusion

Based on the foregoing, the Court finds that this action, and Plaintiffs' prior federal action, involve the same "cause of action" which was fully adjudicated on the merits between the same parties. Therefore, res judicata bars Plaintiffs from maintaining this action. Defendants' motion for summary judgment is GRANTED.

~~Defendants are ordered to give~~ Parties waive notice.

DATED: June 16, 2016

Teresa A. Beaudet

Hon. Teresa A. Beaudet
Judge, Los Angeles Superior Court