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Court of Appeal, Second District, Division 1, California.
Rex REGINALD, Plaintiff and Appellant,
v.
NEW LINE CINEMA CORPORATION et al., Defendants and Respondents.
No. B190025.
(Los Angeles County Super. Ct. No. SC082446).

April 2, 2008.

ORDER MODIFYING OPINION AND DENYING REHEARING

THE COURT:

*1 It is ordered that the opinion filed herein on March 5, 2008, be modified as follows:

1. On page 9, second full paragraph of footnote 5, beginning “Contrary to plaintiff’s contention” is deleted and the following paragraph is inserted in its place:

We note that in establishing an implied-in-fact contract or plagiarism, a threshold issue is whether, as a matter of law, there is substantial similarity between the two literary works at issue. The *Klekas* court indicated that, just as for the tort of plagiarism, in order to prevail on a cause of action for an implied-in-law contract, “there must be some substantial similarity between the screenplay and the *protectable* portions of plaintiff’s work.”(*Klekas v. EMI Films, Inc., supra*, 150 Cal.App.3d at p. 111, italics added.) For an implied-in-fact contract, substantial similarity is also a threshold issue, but there is no requirement that the substantially similar portion of plaintiff’s work be, by law, protectable. (*Weitzenkorn, supra*, 40 Cal.2d at pp. 791-792.) Because of their common element of substantial similarity, we can look to opinions regarding plagiarism and implied-in-law contract to glean criteria for determining substantial similarity in this case.

2. On page 14, last sentence of footnote 7, beginning “As we noted” and ending “copyright law” is modified to read as follows:

As we noted previously, the analysis of substantial similarity is essentially the same in the context of breach of an implied-in-fact contract, as is the issue in the instant action, but the assessment of similarity is not limited to only material which is legally protectable under copyright law.

There is no change in the judgment. Appellant's petition for rehearing is denied.

JACKSON, J.^{FN*} VOGEL, Acting P.J. ROTHSCHILD, J.

FN* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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