Filed 7/19/11 Ousley v. Krasnow CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MIKE OUSLEY et al., Plaintiffs and Appellants, v. STUART KRASNOW, Defendant and Respondent.	B222726 (Los Angeles County Super. Ct. No. BC398117)

APPEAL from a judgment of the Superior Court of Los Angeles County, David L. Minning, Judge. Affirmed.

Girardi & Keese, Thomas V. Girardi, Graham B. LippSmith and Joseph C. Gjonola for Plaintiffs and Appellants.

Lathrop & Gage and David Aronoff and Jeff Grant for Defendant and Respondent.

Plaintiffs, television producer Mike Ousley and his production company Mike Ousley Productions, seek reversal of the summary judgment motion on his causes of action for breach of implied contract and breach of confidence as to defendant and respondent Stuart Krasnow, an independent television executive producer. Plaintiffs alleged Ousley created the television Bingo concept, which he developed and sought to market as a television program. He "pitched" the concept to Krasnow on July 29, 2004, and believed Krasnow impliedly agreed not to divulge, use, or exploit the concept, except upon paying compensation to Ousley. More than two years later, however, defendants American Broadcasting Companies, Inc. (ABC), Game Show Network (GSN) and Andrew Glassman, and Glassman Media, Inc., produced and broadcast a television program called *National Bingo Night* that was allegedly derived from plaintiffs' television Bingo concept—but without having paid any compensation to Ousley.[1]

ABC and Krasnow moved for summary judgment on the two remaining claims against them in the first amended complaint. The trial court heard the matter on October 27, 2009, and issued a thorough and carefully reasoned written decision in which it sustained defendants' evidentiary objections to the declaration of plaintiffs' expert Dave Lerman and granted the summary judgment motion. Judgment was entered on December 29, 2009. In their timely appeal of the judgment as to Krasnow only, plaintiffs contend summary judgment was improperly granted as to both causes of action because the evidence raised genuine issues of material fact as to the existence of an implied-in-fact contract predicated on a mutual understanding of confidentiality between Ousley and Krasnow.

In the seminal decision of *Desny v. Wilder* (1956) 46 Cal.2d 715 (*Desny*), the Supreme Court explained the circumstances in which an implied-in-fact contract for

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[1] The summary judgment motion was directed solely at those two causes of action, as alleged against Krasnow and ABC. ABC is not a party to this appeal because plaintiffs did not appeal the ruling as to ABC. The other three causes of action were alleged against defendants GSN and Andrew Glassman, and Glassman Media, Inc. They are not parties to this appeal.

conveyance of an idea such as the television Bingo concept would be recognized. In its holding, the high court cautioned: "The law will not imply a promise to pay for an idea from the mere facts that the idea has been conveyed, is valuable, and has been used for profit; this is true even though the conveyance has been made with the hope or expectation that some obligation will ensue." (*Id.* at p. 739.) We agree with the trial court that the evidence presented in connection with the summary judgment motion merely supported such a "hope or expectation." That is, there was no evidence to support a reasonable inference that Ousley's disclosure of the television Bingo concept was made upon a mutual understanding with Krasnow as to the idea's confidentiality or that its disclosure was predicated on a promise to pay for any subsequent use. We therefore affirm.

STATEMENT OF FACTS

Ousley has been managing director of Mike Ousley Productions for more than 25 years, producing television shows and commercials throughout the country. In approximately 1996, he conceived the idea for a television game show involving bingo. Since that time, he engaged in extensive research efforts to develop his bingo-for-television idea. Among other things, he purchased a bingo machine and retained counsel to register a "TV Bingo play card" and the "TV Bingo" pilot episode he produced. Ousley also retained marketing and legal experts to assess the feasibility and legality of implementing his idea, especially with regard to the nationwide distribution of bingo cards that realization of his idea would require. His development efforts required expenditures of approximately $100,000 and culminated in a business plan to be used to "pitch" or sell his show.

On July 29 and 30, 2004, Ousley attended a conference sponsored by the National Association of Television Program Executives (NATPE), entitled "NAPTE Producers' Boot Camp Workshops and Pitch Pit," at the Wyndham Bel Age Hotel in West Hollywood. The conference brochure advertised: "BE SEEN—BE HEARD—BE

CAPTAIN OF YOUR TELEVISION FUTURE." Krasnow was the keynote speaker at the 12:45 to 1:45 session on July 29, entitled "Not Your *Average Joe*." The conference brochure described the session as follows: "Enjoy a soup-to-nuts study over lunch featuring Stuart Krasnow, executive producer of [the television program] *Average Joe*."

Ousley, who never had any previous contact with Krasnow, attended Krasnow's presentation along with approximately 200 others. At some point during the speech, Ousley recalled Krasnow saying, "I am always looking for projects and ideas, and once you have a show on the air, the networks are calling you." At the conclusion of the presentation, Ousley joined approximately 20 other attendees who wanted to greet Krasnow before he left the conference room. When it was Ousley's turn, he introduced himself, said he enjoyed the speech, and directly began to pitch his "TV Bingo" idea. Ousley had not previously set up an appointment to discuss his idea with Krasnow.

During this five minute "pitch," Ousley described what he considered the novel aspect of his concept for a nationwide bingo television program—that viewers at home would not merely watch, but could win prizes during the program broadcast. Ousley provided Krasnow a detailed description of how the game show would work. Krasnow said, "Very interesting." Ousley offered him the written "treatment" or business plan for the idea.[2] Krasnow took it and said he would "love to read" it. He asked for Ousley's contact information, and Ousley explained his business card was on the front of the document. Krasnow said, "I'll read this on the plane. I'm headed to Hawaii with my partner [Glassman] working on 'Average Joe Hawaii.'" They shook hands and Ousley said, "I look forward to hearing from you." Krasnow replied, "I'll be in touch."[3] Ousley

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[2] According to the written plan, "The concept of the show is simple: [¶] Each week TV Bingo will be played on television presented by a host and their sidekick. Winners call a toll free number, verifying their winning TV Bingo card. Each half hour, eight winners will win sizable prizes, right on Television."

[3] At the deposition, Ousley also testified that Krasnow asked for Ousley's contact information and said, "I'll be in touch. I'll read it on the plane," to which Ousley replied, "I look forward to hearing from you." Krasnow said, "Me too" and they shook hands.

walked out of the conference room "feeling like [he] had sold 'TV Bingo' to Stuart Krasnow." At no time did Ousley raise the subject of confidentiality or request an agreement for payment for using his idea. Ousley did not make any effort to contact Krasnow after the presentation.

At his deposition, Krasnow confirmed the NAPTE speaking engagement at the Bel Age Hotel and recalled greeting attendees afterwards, but he did not remember any conversation with Ousley or receiving any written material from him. Krasnow understood his role at the conference as helping the attendees "learn about reality TV." He testified that during the presentation, he referred to flying to Hawaii. The presentation took place within the time when he was working with Glassman on *Average Joe*. He would have taken the same flight as Glassman, and the two of them would have talked.[4] Krasnow, however, would not have shared the idea of a bingo television show with Glassman. At the time of the NAPTE conference, Krasnow was under contract with the National Broadcasting Company as an executive producer and had no authority to buy television programming ideas. Glassman and Krasnow were not close friends, but they had worked together in the past and travelled together on business. They have a "wonderful, warm respect for each other."

It was undisputed that Glassman was credited as the creator and executive producer of the game show television series *National Bingo Night*, which aired on ABC in 2007. The pilot for that series was taped in early 2007. Six episodes were aired on ABC that year. ABC did not renew the program, but a new version of the show called *Bingo America* was aired in 2008 on GSN with Glassman as creator and executive producer. Glassman and others presented evidence that he conceived the idea for those bingo programs without any knowledge or involvement of Ousley or his concept. It was undisputed that Krasnow had no involvement in the creation, development, or production

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[4] Upon review of the deposition transcript, Krasnow requested various corrections, including that he had "reviewed the broadcast schedule of *Average Joe: Hawaii* and saw that it was aired by NBC during February through March 2004; accordingly, [his] flight to Hawaii with Andrew Glassman took place in 2003, not in July 2004."

of *National Bingo Night* or *Bingo America*, nor did he receive any screen credit or compensation for those shows.

DISCUSSION

Summary judgment is appropriate "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) "The moving party bears the burden to demonstrate 'that there is no triable issue of material fact and that [it] is entitled to judgment as a matter of law.' [Citation.] If the moving party makes a prima facie showing, the burden shifts to the party opposing summary judgment 'to make [its own] prima facie showing of the existence of a triable issue of material fact.' [Citation.] 'There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.' [Citation.]" (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1246.)

We review summary judgment orders de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.) "In reviewing an order granting summary judgment, we must assume the role of the trial court and redetermine the merits of the motion. As such, we will strictly scrutinize the moving party's papers, but the declarations of the party opposing summary judgment will be liberally construed to determine the existence of triable issues of fact. All doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment. Although we must review a summary judgment motion by the same standards as the trial court, we must independently determine as a matter of law the construction and effect of the facts presented." (*Dominguez v. Washington Mutual Bank* (2008) 168 Cal.App.4th 714, 719-720; *Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 962-963.)

The trial court found no triable issues of fact as to various elements of the two causes of action, including the absence of evidence that Ousley communicated to Krasnow that disclosure of the idea for a bingo-for-television program was conditioned on the mutual understanding that it was for sale or that its disclosure was predicated on a mutual understanding as to the idea's confidentiality.

Implied-in-Fact Contract

"To establish an implied-in-fact contract, the plaintiff must show: that he or she prepared the work; that he or she disclosed the work to an offeree for sale; that under all circumstances attending disclosure it can be concluded that the offeree voluntarily accepted the disclosure knowing the conditions on which it was tendered (i.e., the offeree must have the opportunity to reject the attempted disclosure if the conditions were unacceptable); and the reasonable value of the work. ([*Desny*,] *supra*, 46 Cal.2d at p. 744; *Faris v. Enberg* (1979) 97 Cal.App.3d 309, 318 [(*Faris*)].)" (*Klekas v. EMI Films, Inc.* (1984) 150 Cal.App.3d 1102, 1114.) Plaintiffs argue the evidence below supported a reasonable inference of such an implied agreement based on "the circumstances preceding and attending disclosure, together with the conduct of the offeree acting with knowledge of the circumstances." (*Desny*, *supra*, at p. 738.)

Despite the absence of any statement by Ousley to Krasnow indicative of an offer to sell his idea, plaintiffs assert there was sufficient evidence to warrant a reasonable inference that Krasnow understood Ousley was making such an offer and expected compensation for subsequent use based on the following circumstances: (1) Ousley made his "pitch" to Krasnow in the context of the NAPTE "boot camp," which had a "pitch pit" component; (2) Krasnow effectively solicited offers for programming ideas when he stated to the audience during his presentation that he was "always looking for projects and ideas"; and (3) Krasnow told Ousely he was interested in the bingo-for-television idea, took Ousley's business plan, and said they would be in touch.

As we explain, even resolving all doubt in favor of the existence of an element of plaintiffs' cause of action, that evidence falls far short of showing communication of an offer to sell, much less of a mutual understanding to that effect or a voluntary acceptance on the implicit terms of nondisclosure and compensation for use. Again, "[t]he law will not imply a promise to pay for an idea from the mere facts that the idea has been conveyed, is valuable, and has been used for profit; this is true even though the conveyance has been made with the hope or expectation that some obligation will ensue." (*Desny, supra,* 46 Cal.2d at p. 739; *Klekas v. EMI Films, Inc., supra,* 150 Cal.App.3d at p. 1115.)

The fact that the NAPTE conference was intended to draw participants who hoped to sell their ideas does not support a reasonable inference that Krasnow, by virtue of his being a speaker, had any intention to solicit ideas. Not only did Krasnow present strong evidence to the contrary, but his address at the conference was not advertised as having anything to do with such solicitation. Further, the conference contained a "Pitch Pit" session that *was* specifically geared to offering participants the opportunity to sell their ideas, but it was scheduled for a different day and there was no evidence that Krasnow had any involvement in that session. Krasnow's reference to "looking for ideas" in the course of his own address cannot be reasonably interpreted as soliciting ideas from his audience members. Absent any indication from the circumstances and nature of Krasnow's address that the producer was inviting business offers, Krasnow's expression of general interest to Ousley in the course of greeting him and other attendees after the presentation does not support a reasonable inference that Krasnow understood he was receiving such an offer, much less that he implicitly accepted one predicated on unstated commercial terms.

We agree with Krasnow that the high court's cautionary language in *Desney* applies to Ousley: "The idea man who blurts out his idea without having first made his bargain has no one but himself to blame for the loss of his bargaining power. The law will not in any event, from demands stated subsequent to the unconditioned disclosure of an abstract idea, imply a promise to pay for the idea, for its use, or for its previous

disclosure." (*Desny, supra,* 46 Cal.2d at p. 739.) Ousley's evidence concerning his own perceptions and understandings cannot serve to create a disputed issue of material fact in the absence of evidence that such information was communicated to Krasnow. (See *id.* at p. 734 ["The person who can and does convey a valuable idea to a producer who commercially solicits the service or who voluntarily accepts it knowing that it is tendered for a price should likewise be entitled to recover."].)

Thus, in *Faris, supra,* 97 Cal.App.3d 309, the appellate court affirmed the grant of summary judgment where there was no evidence the person presenting the idea received an indication that he could expect future compensation for revealing the information. It was the "clear holding of *Desny* [that] an obligation to pay could not be inferred from the mere fact of submission on a theory that everyone knows that the idea man expects to be paid." (*Id.* at p. 319.) Moreover, "knowledge on the part of the recipient that the submitter is a writer possessing his or her unprotected literary creation could not create an obligation to pay. Plaintiff's statements that he would not have revealed the format or idea to Enberg had he known that Enberg was going to show it to anyone else were not germane since he never told this to Enberg." (*Ibid.*) Indeed, in *Faris*, the plaintiff presented evidence that the recipient of the idea—sportscaster Richard "Dick" Enberg—made greater affirmative expressions of interest than did Krasnow. Nevertheless, "[i]t would be entirely inconsistent with *Desny* to hold that an implied-in-fact contract could be created because a telephone call was returned or because a request was made for an opportunity to read the work that was unconditionally submitted." (*Ibid.*)

In contrast, decisions finding substantial evidence of an implied-in-fact contract precluding summary judgment have identified testimony of a promise to pay for use of the idea made subsequent to the initial disclosure (*Desney, supra,* 46 Cal.2d at p. 744) or repeated assurances of interest in the idea, along with representations of compensation for use, and acknowledgment that the idea for the project originated with the plaintiff (*Blaustein v. Burton* (1970) 9 Cal.App.3d 161, 171-172 (*Blaustein*)).

As plaintiffs can identify no substantial evidence to support a reasonable inference of a commercial solicitation of the bingo-for-television concept or of Krasnow's

voluntarily acceptance of the idea with knowledge that it had been tendered for a price, summary judgment was appropriate.

Breach of Confidence

Plaintiffs' challenge to the ruling on the closely related claim of breach of confidence fails for similar reasons. "The tort of breach of confidence is based upon the concept of an implied obligation or contract between the parties. [Citations.] It is '"an obligation in law where in fact the parties made no promise." [Citations.] It is not based upon apparent intentions of the involved parties; it is an obligation created by law for reasons of justice.' [Citations.] Thus, in all cases the gravamen of the tort is an understanding between the parties that an idea is offered upon a condition of confidence." (*Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co.* (1985) 168 Cal.App.3d 455, 464 (*Tele-Count Engineers*).)

It is therefore essential "that the plaintiff in a breach of confidence action must demonstrate the defendant's actual knowledge of the condition of confidentiality." (*Tele-Count Engineers, supra,* 168 Cal.App.3d at p. 464, citing *Mann v. Columbia Pictures, Inc.* (1982) 128 Cal.App.3d 628, 646; see also *Faris, supra,* 97 Cal.App.3d at p. 324 ["evidence of knowledge of confidence or from which a confidential relationship can be implied is a minimum prerequisite"].) "Actual notice of confidentiality is necessary to establish such knowledge. Mere constructive notice—or a showing that the defendant should have known of the confidential nature of the information imparted—would, in our view, improperly subject a defendant to liability without the requisite understanding or voluntary acceptance of the confidential disclosure. [Citations.] It is also settled that knowledge of the confidential nature of information must *precede* its disclosure." (*Tele-Count Engineers, supra,* at p. 465.)

As with his breach of implied contract claim, plaintiffs argue Krasnow's statements and actions in response to Ousley's statements—interpreted in light of the surrounding circumstances—during their short interaction after Krasnow's NAPTE

address all combine to support a reasonable inference of a mutual understanding that Ousley conveyed the bingo-for-television concept upon a condition of confidentiality. We disagree. There is no evidence that Ousley mentioned or implicitly referred to confidentiality at any time during his short, unsolicited "pitch" to Krasnow. As we have already explained, their discussion did not take place within the conference session that was dedicated to pitching ideas, and Krasnow's statements of interest were entirely vague as to the existence of any commercial purpose or confidentiality preconditions. Not only was Ousley's pitch made in a location and under circumstances uncongenial to commercial negotiations, but no provisions for confidentiality were requested or made.

As in *Faris*, *supra*, 97 Cal.App.3d 309 "no rational receiver of the communications from Faris could be bound to an understanding that a secret was being imparted. One could not infer from anything Enberg did or said that he was given the chance to reject disclosure in advance or that he voluntarily received the disclosure with an understanding that it was not to be given to others. To allow the disclosure which took place in this case to result in a confidential relationship, without something more, would greatly expand the creation of monopolies and bear the concomitant danger to the free communication of ideas." (*Id.* at p. 324.) Again, Ousley seeks to rely on evidence as to his own expectations concerning confidentiality. However, as in *Faris*, Ousley never communicated those thoughts to Krasnow, and nothing concerning an understanding of confidence can be inferred from Krasnow's conduct. (*Ibid.*) Nor were there any "special facts" to support an inference that Ousley and Krasnow had a business relationship. (*Ibid.*) As in *Faris*, there was no implied-in-fact agreement; they were not partners or joint adventurers; and there was no buyer/seller or principal/agent relationship. (*Ibid.*)

The *Faris* court explained how a consideration of *Blaustein*, *supra*, 9 Cal.App.3d 161 revealed "the sparcity" of the plaintiff's showing: "In *Blaustein* plaintiff and defendants used the same attorneys, plaintiff had been invited constantly by the defendants (Richard Burton and Elizabeth Taylor) to disclose his idea that they make a movie of 'The Taming of the Shrew.' He also rendered services at their request on the project." (*Faris*, *supra*, 97 Cal.App.3d at pp. 324-325.) The comparison is just as apt

with regard to plaintiffs' showing below. In sum, the evidence presented below did not raise a triable issue of fact as to the existence of an essential element of tortuous breach of confidence—an understanding between the parties that the confidential nature of the information will be maintained.[5] (*Tele-Count Engineers, supra,* 168 Cal.App.3d at p. 466; *Faris, supra,* 97 Cal.App.3d at pp. 322-323.)

DISPOSITION

The judgment is affirmed. Defendant and respondent Stuart Krasnow is to recover his costs on appeal.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.

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[5] In its written decision, the trial court found plaintiffs failed to raise any triable issue as to the independent question of the novelty of the bingo-for-TV concept. We need not reach that issue. (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 853 [a defendant may prevail on summary judgment by showing that one or more elements of a cause of action cannot be established]; *Hollywood Screentest of America, Inc. v. NBC Universal, Inc.* (2007) 151 Cal.App.4th 631, 649.)