

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 08/05/16

DEPT. 34

HONORABLE MICHAEL P. LINFIELD

JUDGE

R. NAVARRO

DEPUTY CLERK

HONORABLE
#7

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

M. MEDARIS, C.A.

Deputy Sheriff

Deborah Stough, CSR# 8925 Reporter

8:31 am

BC618465

Plaintiff Randy Merritt (X)
Counsel

DEVITO ARTWORKS LLC
VS
LEGENDARY PICTURES LLC ET AL

Defendant Gregory P. Korn (X)
Counsel

170.6-E. ALLEN WHITE (DEFT)

NATURE OF PROCEEDINGS:

DEMURRER TO COMPLAINT;

The Court's tentative ruling is provided to all sides via the Court's website.

The matter is called for hearing.

The Order Appointing Court Approved Reporter as Official Reporter Pro Tempore is signed and filed this date (Deborah L. Stough, CSR # 8925).

After oral argument, the Court adopts its tentative ruling as the Order of the Court, which is incorporated herein as follows:

Case Number: BC618465 Hearing Date: August 05, 2016
Dept: 34
SUBJECT: Demurrer to complaint

Moving Party: Defendant Warner Bros. Entertainment Inc. ("Warner" or "defendant")

Resp. Party: Plaintiff DeVito Arts, LLC ("plaintiff")

Defendants' demurrer is OVERRULED.

Defendant's unopposed Request for Judicial Notice is

<p align="center">MINUTES ENTERED 08/05/16 COUNTY CLERK</p>
--

08/09/2016

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 08/05/16

DEPT. 34

HONORABLE MICHAEL P. LINFIELD

JUDGE

R. NAVARRO

DEPUTY CLERK

HONORABLE #7

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

M. MEDARIS, C.A.

Deputy Sheriff

Deborah Stough, CSR# 8925 Reporter

8:31 am

BC618465

Plaintiff

Randy Merritt (X)

Counsel

DEVITO ARTWORKS LLC

VS

Defendant

Gregory P. Korn (X)

Counsel

LEGENDARY PICTURES LLC ET AL

170.6-E. ALLEN WHITE (DEFT)

NATURE OF PROCEEDINGS:

GRANTED.

BACKGROUND:

Plaintiff commenced this action on 4/27/16 against defendants for: (1) breach of contract; (2) breach of contract; and (3) interference with contractual relations. The action pertains to the parties' negotiations and agreements regarding a television series.

ANALYSIS:

Defendant demurs against the second cause of action (the only cause of action asserted against it) on the ground that plaintiff fails to allege sufficient facts. The second cause of action is for breach of implied-in-fact contract.

Defendant argues that the second cause of action fails because there was an express agreement between the parties at the same time as the purported implied contract. The elements of a claim for breach of an implied-in-fact contract are: (1) existence of contract implied from the promisor's conduct; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) resulting damage. (Gomez v. Lincare, Inc. (2009) 173

MINUTES ENTERED
08/05/16
COUNTY CLERK

08/09/2016

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 08/05/16

DEPT. 34

HONORABLE MICHAEL P. LINFIELD

JUDGE

R. NAVARRO

DEPUTY CLERK

HONORABLE #7

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

M. MEDARIS, C.A.

Deputy Sheriff

Deborah Stough, CSR# 8925 Reporter

8:31 am

BC618465

Plaintiff Randy Merritt (X)
Counsel

DEVITO ARTWORKS LLC
VS
LEGENDARY PICTURES LLC ET AL

Defendant Gregory P. Korn (X)
Counsel

170.6-E. ALLEN WHITE (DEFT)

NATURE OF PROCEEDINGS:

Cal.App.4th 508, 525; Blaustein v. Burton (1970) 9 Cal.App.3d 161, 184. See also California Emergency Physicians Med. Group v. PacifiCare of Cal. (2003) 111 Cal.App.4th 1127, 1134 ["In order to plead a cause of action for implied contract, 'the facts from which the promise is implied must be alleged.'"].) The existence of implied-in-fact contracts normally is determined by triers of fact, except where the facts are undisputed, and support only one conclusion, in which case summary judgment may be entered. (Davis v. Consolidated Freightways (1994) 29 Cal.App.4th 354, 366.) "[A]n action based on an implied-in-fact or quasi-contract cannot lie where there exists between the parties a valid express contract covering the same subject matter." (Lance Camper Mfg. Corp. v. Republic Indem. Co. of Am. (1996) 44 Cal.App.4th 194, 203. See also Falkowski v. Imation Corp. (2005) 132 Cal.App.4th 499, 518 ["implied contract cannot override the terms of an express agreement"].)

In the second cause of action, plaintiff alleges that he prepared text and images establishing a narrative framework of a project that included a prequel and sequel to King Kong. (Compl., ¶ 76.) On 7/23/14, plaintiff's agents met with defendant's agents and presented the story for development of the project as a television series or film. (Id., ¶¶ 76, 77.) Plaintiff alleges that defendant knew that plaintiff would not have revealed its ideas as to

<p align="center">MINUTES ENTERED 08/05/16 COUNTY CLERK</p>

08/09/2016

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 08/05/16

DEPT. 34

HONORABLE MICHAEL P. LINFIELD

JUDGE

R. NAVARRO

DEPUTY CLERK

HONORABLE
#7

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

M. MEDARIS, C.A.

Deputy Sheriff

Deborah Stough, CSR# 8925 Reporter

8:31 am

BC618465

Plaintiff
Counsel

Randy Merritt (X)

DEVITO ARTWORKS LLC

VS

Defendant
Counsel

Gregory P. Korn (X)

LEGENDARY PICTURES LLC ET AL

170.6-E. ALLEN WHITE (DEFT)

NATURE OF PROCEEDINGS:

the project but for the mutual understanding that plaintiff would receive credit and financial compensation for defendant's use of the ideas. (Id., ¶ 80.) Plaintiff alleges that, by accepting the disclosure of the project, defendant's conduct implied its agreement to condition the receipt of the information on defendant's promise to provide the expected benefits to plaintiff, and that any use of the ideas would be an unauthorized use of the information and a breach of the implied-in-fact contract. (Id., ¶ 81.) After the project was passed on by ABC, CBS, and Fox, plaintiff heard nothing from defendant for several weeks. (Id., ¶¶ 82, 83.) Plaintiff later learned that defendant was no longer interested in pursuing the project. (Id., ¶ 83.) In the second half of 2014, Legendary announced that it was going to produce and release a film exploring the origin story of Skull Island, and in 2015 it was announced that Warner and Legendary would work together to produce and distribute the film. (Id., ¶¶ 84, 85.) Plaintiff alleges that defendants have used ideas presented by plaintiff's agent at the 7/23/14 meeting without compensating plaintiff for such use. (Id., ¶¶ 86, 87.)

Plaintiff also alleges that on 8/18/14, plaintiff and defendant entered into a written option purchase agreement for the production of the project as a television series. (Compl., ¶ 47.) Under the agreement, defendant acquired the exclusive right to

<p align="center">MINUTES ENTERED 08/05/16 COUNTY CLERK</p>

08/09/2016

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 08/05/16

DEPT. 34

HONORABLE MICHAEL P. LINFIELD

JUDGE

R. NAVARRO

DEPUTY CLERK

HONORABLE #7

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

M. MEDARIS, C.A.

Deputy Sheriff

Deborah Stough, CSR# 8925 Reporter

8:31 am

BC618465

Plaintiff Randy Merritt (X)
Counsel

DEVITO ARTWORKS LLC
VS
LEGENDARY PICTURES LLC ET AL

Defendant Gregory P. Korn (X)
Counsel

170.6-E. ALLEN WHITE (DEFT)

NATURE OF PROCEEDINGS:

market the series to networks. (Ibid.) Plaintiff alleges that, when reminded that the option agreement called for a guaranteed pilot, defendant negotiated a kill fee and returned the rights to the property to plaintiff in accordance with a termination agreement. (Id., ¶ 53.)

Defendant provides copies of the option agreement and termination agreement. The option agreement provided that, in consideration of the purchase price, exclusive ownership of all rights in the property for television and thereafter in any medium were provided to defendant. (See RJN, Exh. 1, ¶ 8.) The option agreement provides that if no pilot is produced or no series is ordered, the rights shall revert to the owner after a certain amount of time. (Id., ¶ 10.) The option agreement provided that plaintiff would receive certain credits for the project. (Id., ¶ 13.) The termination agreement was entered into on 12/16/14. (See RJN, Exh. 2.) The termination agreement provides that the parties agreed to terminate the option agreement. (Ibid.)

Therefore, pursuant to the allegations in the complaint, the second cause of action is based on an alleged implied contract to not use plaintiff's ideas without providing plaintiff credit and financial compensation for any such use. Pursuant to the language of the option agreement, the parties entered into an express agreement in August 2014

<p align="center">MINUTES ENTERED 08/05/16 COUNTY CLERK</p>
--

08/09/2016

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 08/05/16

DEPT. 34

HONORABLE MICHAEL P. LINFIELD

JUDGE

R. NAVARRO

DEPUTY CLERK

HONORABLE #7

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

M. MEDARIS, C.A.

Deputy Sheriff

Deborah Stough, CSR# 8925 Reporter

8:31 am

BC618465

Plaintiff Randy Merritt (X)
Counsel

DEVITO ARTWORKS LLC
VS
LEGENDARY PICTURES LLC ET AL

Defendant Gregory P. Korn (X)
Counsel

170.6-E. ALLEN WHITE (DEFT)

NATURE OF PROCEEDINGS:

regarding defendant's use of plaintiff's ideas in exchange for providing plaintiff credit and financial compensation. Therefore, it may be found that the express and implied contracts embraced the same subject matter. However, in order for the implied contract to be disregarded, the implied and express contracts must have existed at the same time. (See Wal-Noon Corp. v. Hill (1975) ["There cannot be a valid, express contract and an implied contract, each embracing the same subject matter, existing at the same time."] .) Here, the allegations in the complaint do not reveal that the express and implied contracts both existed at the time of the alleged breach. The termination agreement was entered into in December 2014. (See RJN, Exh. 2.) Plaintiff alleges that in 2014, Legendary announced that it was producing a film based on similar ideas as plaintiff's, and in 2015 Warner announced that it was joining with Legendary to produce and distribute the film. (Id., ¶¶ 84, 85.)

Based on these alleged facts, the only contract in existence at the time of the breach was the implied agreement. If plaintiff's allegations are to be believed (which they must be for the purposes of a demurrer), then defendant's argument would allow it to obtain plaintiff's ideas based on an implied contract not to use the ideas without providing compensation and credit, enter into and then terminate an agreement regarding the use of the

<p align="center">MINUTES ENTERED 08/05/16 COUNTY CLERK</p>
--

08/09/2016

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 08/05/16

DEPT. 34

HONORABLE MICHAEL P. LINFIELD

JUDGE

R. NAVARRO

DEPUTY CLERK

HONORABLE #7

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

M. MEDARIS, C.A.

Deputy Sheriff

Deborah Stough, CSR# 8925 Reporter

8:31 am

BC618465

Plaintiff Randy Merritt (X)
Counsel

DEVITO ARTWORKS LLC
VS
LEGENDARY PICTURES LLC ET AL

Defendant Gregory P. Korn (X)
Counsel

170.6-E. ALLEN WHITE (DEFT)

NATURE OF PROCEEDINGS:

ideas, and then freely use plaintiff's ideas without any repercussions. Defendant provides no authority supporting such a position or suggesting that an implied agreement cannot be enforced as to a breach occurring after the termination of the express agreement.

Defendant also argues that plaintiff's claim contradicts the terms of the termination agreement. Defendant argues that the termination agreement is an integrated agreement providing that no obligations exist between the parties. The termination agreement provides that the parties would have "no further obligations to one another." (RJN, Exh. 2, ¶ 1.) However, the language of the termination agreement suggests that it is limited only to the obligations under the option agreement. The termination agreement pertains to the parties' agreement to terminate the option agreement. (Id.) The parties agreed that the termination agreement would be effective as a satisfaction and release of every matter concerning the termination of the "obligations in connection with the [option] Agreement." (Id., ¶ 2.) The termination does not, on its face, negate the obligations created by any agreement other than the express option agreement.

Accordingly, defendants' demurrer is OVERRULED.

<p align="center">MINUTES ENTERED 08/05/16 COUNTY CLERK</p>

08/09/2016

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 08/05/16

DEPT. 34

HONORABLE MICHAEL P. LINFIELD

JUDGE

R. NAVARRO

DEPUTY CLERK

HONORABLE #7

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

M. MEDARIS, C.A.

Deputy Sheriff

Deborah Stough, CSR# 8925 Reporter

8:31 am

BC618465

Plaintiff
Counsel

Randy Merritt (X)

DEVITO ARTWORKS LLC

VS

Defendant
Counsel

Gregory P. Korn (X)

LEGENDARY PICTURES LLC ET AL

170.6-E. ALLEN WHITE (DEFT)

NATURE OF PROCEEDINGS:

Notice is waived.

08/09/2016

MINUTES ENTERED
08/05/16
COUNTY CLERK