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United States District Court,
E.D. California.

CLEARSTREAM COMMUNICATIONS, INC., a Delaware corporation; Wellhead Electric Company, Inc., a California corporation; Paradigm Power Company, LLC, a Nevada limited company; and Harold E. Dittmer, an individual, Plaintiffs,
v.
Kenneth A. MURRAY, Jr. an individual, and Does 1 through 10, inclusive, Defendants.

No. CV S-02-1598 GEB JFM.
|
Jan. 15, 2003.

Attorneys and Law Firms

Patrick Martin Ryan, Chad Eric Deveaux, Thelen, Reid and Priest LLP, San Francisco, CA, for Plaintiffs.

Jennifer Elizabeth Costa, Epport and Richman LLP, Los Angeles, CA, for Defendants.

ORDER [*]

BURRELL, J.

***1** AND RELATED COUNTERCLAIM. Four separate motions are decided in this Order. First, Plaintiffs ClearStream Communications ("ClearStream"), Wellhead Electric Company ("Wellhead"), Paradigm Power Company ("Paradigm") and Harold Dittmer (collectively "Plaintiffs") move for summary judgment of their breach of fiduciary duty, legal malpractice, breach of implied contract, and fraud claims against Defendant Kenneth Murray. Second, Plaintiffs move for summary judgment of Defendant's entire counterclaim. Defendant opposes the motions and moves for additional time to conduct discovery under Federal Rule of Civil Procedure 56(f). [1] Third, Plaintiffs move to dismiss Defendant's counterclaim under Rule 12(b)(6). Defendant opposes the motion. Fourth, Counter-defendants Henning Ottsen, John Hynds, John Tigert, and Frank Petro move to dismiss Defendant's claims against them under Rule 12(b)(6). Defendant failed to respond to this motion.

Background

From February 1999 through July 2002, Dittmer was the sole owner of Wellhead, an electric power plant development company, and the Principal of Paradigm. (Dittmer Decl. ¶¶ 4,5,6; Pls.' Separate Statement of Undisputed Facts ("Undisputed Facts") ¶¶ 1,2.) In late 1998, a business contact sought Dittmer's investment in Global Photon Holdings, Inc. ("Global"), which was in the business of developing and deploying a coastal underwater fiber-optic telecommunications network. (Dittmer Decl. ¶ 11.) Dittmer placed an advertisement in the Davis Enterprise to obtain legal advice on an investment in Global and other issues. (*Id.* ¶ 14.) Defendant, a member of the California State Bar, responded to the advertisement and met with Dittmer

to discuss the investment in Global. (*Id.* ¶ 16; Def. Decl. ¶ 3.) On or about March 10, 1999, Defendant became Dittmer's attorney. (Undisputed Facts ¶ 4.) Plaintiffs claim that Defendant entered into an attorney-client relationship with Wellhead and Paradigm at this time as well; however, Defendant disputes this assertion. (Undisputed Facts ¶¶ 5, 6; Def.'s Separate Statement of Undisputed Facts ("Def.'s Undisputed Facts") ¶¶ 5,6.)

After conducting legal research on the Global investment, Dittmer asked Defendant to propose other potential telecommunications projects for business development. (Undisputed Facts ¶ 18; Def.'s Decl. ¶ 7.) Defendant conceived of and proposed to Dittmer a project for deploying fiber optic cables in inland waterways, including rivers, canals and intercoastal waterways. (Def.'s Decl. ¶ ¶ 8-10.) Throughout April and May of 1999, at Dittmer's direction, Defendant conducted due diligence to insure that the idea was reasonably feasible. (Dittmer Decl. ¶ 19; Supplemental Decl. of Kenneth Murray in Opp'n to Application for T.R.O. ¶ 10.)

In late May of 1999, Dittmer and Defendant began discussing a joint venture, independent of Global, in which they would exploit the inland fiber optic cable concept in the United States. (Dittmer Decl. ¶ 22; Def.'s Decl. ¶ 10.) Defendant drafted an agreement using his standard legal services agreement, but Dittmer rejected it. (Def.Decl.¶ 11.) Defendant sent Dittmer a revised consultant and legal services agreement, however Dittmer did not approve or sign this revised agreement. (*Id.*) On or about May 1999, Dittmer and Defendant orally agreed that Defendant would bill Dittmer $100.00 an hour for his work with the anticipated company with $85.00 of Defendant's $185.00 hourly fee being deferred as Defendant's "investment" in the anticipated company. (Undisputed Facts ¶ 12.) Defendant alleges that over the next three years he earned approximately $600,000 in deferred payments that were never paid. (Def.Decl.¶ 15.) In at least partial payment for Defendant's services and related expenses, Paradigm paid Defendant $28,332.50, Wellhead paid Defendant $271,262.18, and ClearStream paid Defendant $255,730.08. (Undisputed Facts ¶¶ 80, 81, 82; Def.'s Undisputed Facts ¶¶ 80, 81, 82.)

***2** ClearStream, incorporated on July 27, 2000, ultimately became the company in which Defendant was to obtain an ownership interest. (Undisputed Facts ¶¶ 9, 13; Def.'s Decl. ¶ 21.) Prior to August 2000, Defendant did not specifically advise the Plaintiffs in writing to seek the advice of an attorney regarding his entry into a business deal with Dittmer whereby Defendant would acquire an ownership interest in the company that developed the technology at issue in this case. (Def.'s Undisputed Facts ¶ 25.) ClearStream is engaged in the business of designing, developing and deploying fiberoptic telecommunications cable and systems. (Undisputed Facts ¶ 16.) The intellectual property related to designing, developing and deploying fiber optic telecommunications cable and systems ("disputed intellectual property") is presently at issue in this case. Prior to January 1, 2000, Defendant believed himself to be the owner of some of the disputed intellectual property. (Def.'s Undisputed Facts ¶ 31.) Prior

to August 1, 2000, Defendant did not advise Dittmer, Wellhead, or ClearStream in writing to seek the advice of an independent attorney regarding Defendant's purported ownership of the disputed intellectual property. (Undisputed Facts ¶¶ 41, 42, 43.)

From July 2000 through July 2002, Dittmer was the Principal of ClearStream. (Undisputed Facts ¶ 10.) On or about July 2000, Defendant was given the title Vice President and General Counsel of ClearStream. (Def.'s Decl. ¶¶ 25, 26; Def.'s Undisputed Facts ¶ 11.) Defendant widely distributed business cards identifying himself as ClearStream's "Vice President and General Counsel." (Undisputed Facts ¶ 56.) In March of 2002, Defendant ceased working for Dittmer and ClearStream. (Dittmer Decl. ¶ 42; Def.'s Decl. ¶ 45.)

In the summer of 2002, Defendant prepared provisional patent applications concerning the disputed intellectual property. (Dittmer Decl. ¶ 52.) Defendant did not inform Plaintiffs in writing that he intended to file provisional patent applications regarding the disputed intellectual property in his own name, nor did Defendant obtain Plaintiffs' written consent to file such applications. (Undisputed Facts ¶¶ 47, 49.) On August 20, 2002, Defendant filed three provisional patent applications covering the disputed intellectual property, in which he listed himself as the inventor and did not ascribe any ownership interest to ClearStream. (Undisputed Facts ¶¶ 84, 85.)

Discussion

A. Summary Judgment[2]

Plaintiffs' motion for summary judgment turns on whether an attorney-client relationship existed between Plaintiffs and Defendant. An attorney-client relationship generally forms as the result of an express contract between the attorney and client, however it may also arise by implication. *Streit v. Covington & Crowe,* 82 Cal.App.4th 441, 444, 98 Cal.Rptr.2d 193 (2000). What is critical to determining whether an attorney-client relationship has formed is the intent and conduct of the parties. *Hecht v. Superior Court,* 192 Cal.App.3d 560, 565, 237 Cal.Rptr. 528 (1987). "The question of whether an attorney-client relationship exists is one of law.... However, when the evidence is conflicting, the factual basis for the determination must be determined before the legal question is addressed." *Strasbourger Pearson Tulcin Wolff Inc. v. Wiz Tech., Inc.,* 69 Cal.App.4th 1399, 1404, 82 Cal.Rptr.2d 326 (1999).

***3** It is undisputed that Defendant and Dittmer entered into an attorney-client relationship in March, 1999 when Defendant agreed to conduct legal research for Dittmer regarding an investment in Global. (Undisputed Facts ¶ 4.)

Defendant claims that he never acted as an attorney for Wellhead. However, Defendant acknowledges that he responded to "an ad in the David (sic) Enterprise newspaper seeking contract help for a company called Wellhead." (Def.'s Decl. ¶ 2.) Defendant states that as a result of responding to the ad and meeting with Dittmer he conducted a legal review of documents relating to an investment in Global. (*Id.* ¶¶ 4, 5, 82 Cal.Rptr.2d 326.) On May 25, 1999, during the period in which Defendant and Dittmer

were discussing a joint venture aimed at exploiting the idea of developing and deploying inland fiber optic cable and systems in the United States, Defendant sent Dittmer a letter outlining the terms of their relationship. (Pls.' Ex. 15) In this letter, Defendant states, "I will provide legal representation for you in connection with various matters involving the telecommunications industry, a company known as Global Photo Holdings, Inc. in which you have made a substantial investment, and any other projects which you may identify from time to time." (Pls.' Ex. 15 at 703.) The letter was also accompanied by a document setting forth "the terms of my engagement as your lawyer." (Pls.' Ex. 14 at 705.) This document, signed by Defendant, lists Defendant and Wellhead Electric Company as the parties to the agreement. (*Id.* at 714, 82 Cal.Rptr.2d 326.) Defendant sent Dittmer a revised agreement on May 28, 1999, titled "Consulting and Legal Services Agreement" in which the parties to the agreement are identified as Defendant, "Wellhead Electric Company, Inc., or Wellco Services, Inc., or any of its affiliates collectively referred to as the ('Company')." (Pls.' Ex. 21 at 723.) Exhibit A to this revised agreement, titled "Scope of Work", indicates Defendant will "[p]rovide legal, technical, operational and economic review, assessment, guidance and counseling for those Projects identified in Exhibit C, and for general in-house corporate matters." (Pls.' Ex. 21 at 729.)

Furthermore, Defendant sent billing statements to Dittmer as President of Wellhead for various services performed. (Pls.' Ex. 9 (sealed) at 291, 300, 309.) One such statement, dated July 1, 1999, includes billing for "[r]eviewing research results re: indefeasible right of use (IRU) in telecom contracts," "[r]esearch IRU's and telecom contracts," and "[r]eview California code re: fraud/misrepresentation re: stock purchase agreement." (Pls.' Ex. 9 at 310, 313.) It is undisputed that Wellhead paid Defendant $271,262.18 for his services and related expenses. (Undisputed Facts ¶ 81.) Although Defendant contends that he did not act as an attorney to Wellhead, the undisputed facts, along with the intent and conduct of the parties, demonstrate that Defendant and Wellhead entered into an attorney-client relationship.

***4** Defendant also denies ever acting as an attorney for Paradigm. (Def.'s Opp'n to Pls.' Mot. for Partial Summ. J. at 7.) However, the legal work performed by Defendant as a result of responding to the March 1999 ad in the Davis Enterprise directly related to Paradigm. In an email sent by Dittmer to Defendant on March 12, 1999, Dittmer requested Defendant to analyze what ramifications the Global investment would have on Paradigm. (Pls.' Ex. 7.) In response to Dittmer's email, Defendant addressed the legal effect of the stock purchase agreement and the shareholder's agreement with respect to Paradigm's ability to engage in other related businesses. (Pls.' Ex. 8.) Defendant's billing statements also indicate he performed work on behalf of Paradigm. In letters dated May 7, 1999 and May 28, 1999, Defendant characterized the statement of account for services rendered as relating to "Global Photonics and Paradigm Power, Research and Analysis." (Pls.' Ex. 9 at 294, 300.) Furthermore, it is undisputed that Paradigm paid Defendant $28,332.50 for Defendant's services and related expenses.

(Undisputed Facts ¶ 80.) Based on the conduct and intent of the parties, an attorney-client relationship formed between Defendant and Paradigm.

Defendant now contends he was never ClearStream's attorney, but instead acted as a project developer. It is undisputed that Defendant held the title "Vice President and General Counsel" while he was employed by ClearStream and that he handed out business cards to third parties indicating he held such positions within the company. (Undisputed Facts ¶¶ 11, 56; Def.'s Undisputed Facts ¶ 11.) In addition, the billing statements submitted to ClearStream by Defendant indicate that Defendant performed various legal services on behalf of ClearStream. For example, the billing statements contain the following entries, "[r]esearch CSC [ClearStream] business structure re: taxes" (Pls. Ex. 9 at 506), "[s]tudy new business binder for CSC; review business capitalization and protection" (*Id.* at 530, 82 Cal.Rptr.2d 326), "patent search on plow technology re: vibratory capabilities ..." (*Id.* at 588, 82 Cal.Rptr.2d 326), "work on additional drawings for patent submittal...." (*Id.* at 599-600, 82 Cal.Rptr.2d 326). ClearStream paid Defendant $255,730.08 for his services and related expenses. (Undisputed Facts ¶ 82.) Based on the undisputed facts, it is evident that an attorney-client relationship was established between Defendant and ClearStream.

Defendant's motion to continue or deny Plaintiffs' motion for partial summary judgment under Rule 56(f) is denied. To obtain a continuance of Plaintiffs' motion, "Defendant[ ] must show (1) that [he][has] set forth in affidavit form the specific facts that [he] hope[s] to elicit from further discovery, (2) that the facts sought exist, and (3) that these sought-after facts are 'essential' to resist the summary judgment motion." *California ex rel. California Dep't of Toxic Substances Control v. Campbell,* 138 F.3d 772, 779 (9th Cir.1998). None of the facts sought by Defendant are relevant to determining whether Defendant complied with the Rules of Professional Conduct nor are they "essential" to resisting summary judgment.

1. Breach of Fiduciary Duty

***5** An attorney's duties to his client are governed by the California Rules of Professional Conduct. *Mirabito v. Liccardo,* 4 Cal.App.4th 41, 45, 5 Cal.Rptr.2d 571 (1992). "Those rules, together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which an attorney owes to his client." *Id.* Plaintiffs claim Defendant breached his fiduciary duty to them as their attorney by not complying with Rule 3-300 of the California Rules of Professional Conduct. Rule 3-300 provides:

> A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:
>
> (A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which

should reasonably have been understood by the client; and

(B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and

(C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition.

This rule was designed to "regulate two types of activity: business transactions between attorneys and clients and the acquisition by attorneys of pecuniary interests adverse to clients." *Santa Clara County Counsel Attorneys Ass'n v. Woodside,* 7 Cal.4th 525, 545, 28 Cal.Rptr.2d 617, 869 P.2d 1142 (1994).

According to Defendant, after completing the initial legal assignment for Dittmer regarding his investment in Global, his relationship with Dittmer changed. Defendant maintains that he conceived of and proposed to Dittmer a project involving the deployment of telecommunications cables within inland waterways. (Def.'s Decl. ¶¶ 9, 10.) In May 1999, Dittmer and Defendant began discussing a joint venture which would exploit the idea. Defendant characterizes his role as that of a "consultant and project developer." (Def.'s Decl. ¶ 16.) Defendant and Dittmer agreed that Defendant would bill $100.00 an hour for his work with the anticipated company with $85.00 of his $185.00 hourly fee being deferred as Defendant's "investment" in the anticipated company. (Undisputed Facts ¶ 12.) Defendant avers that the deferred payment would be paid to him "in the form of 1) recognition as a founder of the company through which [his] intellectual property would be marketed and implemented, and 2) reasonable equity in any company formed and based upon [his] concepts and work." (Def.'s decl. ¶ 11.) Based upon Defendant's statements, it is clear that Defendant entered into a business relationship with Dittmer.

Defendant contends that at the time he entered into a business relationship with Dittmer he was not Dittmer's attorney; therefore, he was not required to comply with Rule 3-300. Relying on *Hunniecutt v. State Bar,* 44 Cal.3d 362, 243 Cal.Rptr. 699, 748 P.2d 1161 (1988), Plaintiffs argue that the Rules of Professional Conduct apply to transactions with former clients. When the California Supreme Court analyzed Rule 5-101, the predecessor to Rule 3-300, it held "if there is evidence that the client placed his trust in the attorney because of the [prior legal] representation, an attorney-client relationship exists for the purposes of rule 5-101 even if the representation has otherwise ended." *Hunniecutt,* 44 Cal.3d at 370-71, 243 Cal.Rptr. 699, 748 P.2d 1161. Dittmer avers that he had no notice of Defendant's withdrawal as his attorney until Defendant's resignation in March of 2002. (Dittmer Decl. ¶ 42.) Because Dittmer believed Defendant to be his attorney, there is sufficient evidence that Dittmer placed his trust in Defendant as an attorney; therefore, Defendant was required to comply with Rule 3-300.

***6** It is undisputed that prior to August 2000, Defendant did not advise Dittmer in writing to seek the advice of an independent attorney regarding the business transaction with Dittmer in which Defendant was to

acquire an ownership interest in the company that developed the technology at issue in this case. (Def.'s Undisputed Facts ¶ 25.) This alone establishes Defendant's failure to comply with Rule 3-300 and Defendant's breach of his fiduciary duty to Dittmer. "California courts have often held that when the ethical violation in question is a conflict of interest between the attorney and the client (or between the attorney and a former client), the appropriate fee for the attorney is zero" "when the violation is one that pervades the whole relationship." *United States ex rel. Virani v. Jerry M. Lewis Truck Parts & Equip., Inc.*, 89 F.3d 574, 579 (9th Cir.1996). Dittmer has established that he has been damaged based on his payment for legal services to Defendant which did not have to be paid because of Defendant's breach of fiduciary duty to him. Therefore Dittmer's motion for summary judgment on the breach of fiduciary duty claim against Defendant is granted.

While serving as Vice President and General Counsel of ClearStream, it is clear that Defendant was involved in a business transaction with ClearStream. Defendant claims that he was the inventor of the disputed intellectual property and a project developer while Dittmer provided financial investment. (Def.'s Decl. ¶¶ 7,10,11,20.) As ClearStream's attorney, Defendant was obligated to comply with Rule 3-300. Because it is undisputed that Defendant did not specifically advise Dittmer, ClearStream's President, in writing to seek the advice of an attorney regarding his entry into a business deal with Dittmer whereby Defendant would acquire an ownership interest in ClearStream, Defendant breached his fiduciary duty to ClearStream by failing to comply with Rule 3-300. (Def.'s Undisputed Facts ¶ 26.) ClearStream's damages arise out of its payment to Defendant for legal services which it did not have to pay because of Defendant's breach of fiduciary duty. Therefore, ClearStream's motion is granted.

Wellhead and Paradigm have failed to show that Defendant went into business with either company or that he acquired an adverse interest to them. Accordingly, neither Wellhead nor Paradigm prevail on the breach of fiduciary duty claim against Defendant on summary judgment. Because these Plaintiffs' remaining motions depend on establishing Defendant's violation of the California Rules of Professional Conduct, Wellhead and Paradigm's motions for summary judgment of the legal malpractice, breach of implied contract, and fraud claims against Defendant are also denied.

2. Legal Malpractice

Dittmer and ClearStream argue that Defendant's violation of the Rules of Professional Conduct conclusively establish his liability for legal malpractice. (Pls.' Memo. of P. & A. in Support of Mot. for Summ. J. at 26.) The elements of a legal malpractice action are "(1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her professional commonly possess and exercise; (2) breach of that duty; (3) proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence." *Lynch v. Warwick*, 95 Cal.App.4th 267, 270, 115 Cal.Rptr.2d 391 (2002) (quotations and citations omitted). Dittmer and ClearStream have established that Defendant breached his

duty to them by not complying with Rule 3-300 which was the proximate cause of the injuries they suffered. Therefore, the motion is granted.

3. Breach of Implied Contract

***7** Dittmer and ClearStream argue that by undertaking the representation of ClearStream and Wellhead, Defendant entered into an implied contract for legal services, which was governed by the Rules of Professional Conduct. (Pls.' Memo. of P. & A. in Support of Mot. for Summ. J. at 26.) By violating the Rules, Defendant is liable for breach of implied contract. Dittmer and ClearStream have failed to cite any authority supporting the contention that an attorney's breach of the Rules of Professional Conduct by itself establishes the attorney's breach of implied contract. Therefore, the motion is denied.

4. Fraud

Dittmer and ClearStream also seek summary judgment on their respective fraud claims. "The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." *Lazar v. Superior Court,* 12 Cal.4th 631, 638, 49 Cal.Rptr.2d 377, 909 P.2d 981 (1996) (quotations and citations omitted). When an attorney-client relationship exists, "the rebuttable presumption of fraud or undue influence arises where the attorney profits from his dealing with the client." *Hicks v. Clayton,* 67 Cal.App.3d 251, 262, 136 Cal.Rptr. 512 (1977). These Plaintiffs contend that because Defendant breached his professional duty as an attorney with respect to business dealings with them, the rebuttable presumption cannot be rebutted.

Defendant counters that Dittmer and ClearStream were fully informed of all matters relating to all of his transactions and that the transactions were fair and equitable. Since disputed factual issues exist, the motion is denied.

B. Plaintiffs' Motion for Summary Judgment of Defendant's Entire Counterclaim [3]

Plaintiffs argue that the cause of action in Defendant's counterclaim alleging breach of contract fails as a matter of law by virtue of his breach of fiduciary duty to them. (Pls.' Memo. of P. & A. in Supp. of Mot. for Summ. J. at 28.) If a contractual promise is obtained by an attorney in violation of his ethical duty as a lawyer to his client, that promise cannot be enforced by the attorney against the client. *See* *Passante v. McWilliam,* 53 Cal.App.4th 1240, 1242-43, 1247-48, 62 Cal.Rptr.2d 298 (1997). Because Defendant failed to comply with Rule 3-300 of the California Rules of Professional Conduct, Defendant cannot enforce the alleged contract with Dittmer and ClearStream. Therefore, Plaintiffs' motion for summary judgment of Defendant's breach of contract claim is granted.

Plaintiffs also argue their entitlement to summary judgment on the remaining causes of action in the Counterclaim because of Defendant's breach of fiduciary duty to them. These claims are embroiled in factual disputes. Defendant asserts he conceived of

the disputed intellectual property prior to becoming Plaintiffs' attorney. Plaintiffs counter that even if this is true, he owed a fiduciary duty to assign all ownership rights of this property to his clients because the technology related to ClearStream's line-of-business. (Pls.' Memo. of P. & A. in Supp. of Summ. J. at 31.) Plaintiffs principally rely on *Great Lakes Press Corp. v. Froom,* 695 F.Supp. 1440, 1445 (W.D.N.Y.1987). That case involved whether an employee or fiduciary has a legal duty to assign a patent to an employer, stating that this question is governed by state law. That case however does not aid Plaintiffs' position that as a matter of law Defendant is required to assign all ownership interest in the disputed intellectual property to them regardless of when he conceived of the technology. Therefore, the motion is denied.

C. Plaintiffs' Motion to Dismiss Counterclaim

***8** Plaintiffs move to dismiss Defendant's counterclaim on the basis that Defendant has failed to plead compliance with Rule 3-300 of the California Rules of Professional Conduct. Although an attorney bears the burden of demonstrating compliance with Rule 3-300, Plaintiffs have failed to provide authority demonstrating that such compliance must be pled in the attorney's complaint against a former client. *See* *Mayhew v. Benninghoff,* 53 Cal.App.4th 1365, 1369-70, 62 Cal.Rptr.2d 27 (1997)(revealing that attorney bears the burden of refuting the presumption of voidability in transactions between an attorney and a client). Therefore, Plaintiffs' motion to dismiss is denied.

D. Counter-Defendants' Motion to Dismiss Counterclaim

Counter-defendants Ottsen, Hynds, Tigert, and Petro move to dismiss Defendant's counterclaim on the basis that it fails to plead compliance with Rule 3-300; however this argument fails for the reasons stated above.

Further, Counter-defendants argue Murray's claim for declaratory relief fails because he has no standing to sue co-workers. In his declaratory relief claim, Murray alleges that ClearStream, Dittmer, Ottsen, Hynds and Tigert claim to own and to have conceived of the disputed intellectual property; thus, he seeks "a ... declaration of his rights and duties" related to the disputed intellectual property. (Def.'s Answer & Countercl. at 25.) To support their motion, Counter-defendants rely entirely on *Oppenheimer v. Gen. Cable Corp.,* 143 Cal.App.2d 293, 297, 300 P.2d 151 (1956), which held the plaintiff could not maintain an action for declaratory relief against employees of his former employer for a declaration of his rights under a contract to which such employees were not parties and were not alleged to have any rights or duties. Murray's declaratory relief claim is not alleging breach of an employment contract; instead, he alleges that Counter-defendants are asserting ownership over the disputed intellectual property. Since Murray has sufficiently alleged a claim, this aspect of Counter-defendants' motion is denied.

Counter-defendants also argue Murray's claims for interference with prospective economic advantage fail because Counter-defendants are not "interlopers." "It has long been held that a

stranger to a contract may be liable in tort for intentionally interfering with the performance of the contract." *Pac. Gas and Elec. Co. v. Bear Stearns & Co.,* 50 Cal.3d 1118, 1126, 270 Cal.Rptr. 1, 791 P.2d 587 (1990). "The tort of interference with prospective economic advantage[4] protects the same interest in stable economic relationships as does the tort of interference with contract, though interference with prospective advantage does not require proof of a legally binding contract." *Id.*

Counter-defendants argue that as agents of ClearStream, they were not "strangers" to the alleged contract between Murray and ClearStream, therefore they cannot be liable for interfering with that contract. However, Murray's counterclaim does not specifically allege that Counter-defendants interfered with a contract between Murray and ClearStream. Instead, Murray alleges, "[Counter]-defendants intended and intend to harm [Murray] by interfering with his business operations and his ability to exploit and market his intellectual property." (Def.'s Answer & Countercl. at 28.) Because all material allegations in the complaint must be accepted as true and construed in the light most favorable to the nonmovant when considering a Rule 12(b) motion, it may be inferred that Murray's claim concerns potential business relationships with individuals and entities other than ClearStream. *Cahill v. Liberty Mutual Ins. Co.,* 80 F.3d 336, 337-38 (9th Cir.1996). To the extent the claim alleges that Counter-defendants interfered with Murray's relationship with ClearStream, the motion is granted because they are not "strangers" to that relationship. But the motion is denied with respect to Murray's allegation that Counter-defendants interfered with his relationships with individuals or entities other than ClearStream.

***9** Lastly, Counter-defendants argue Murray's claims for punitive damages under California's Unfair Competition Act fail because the applicable statute limits relief for private parties to injunctive relief. "California law is clear that [the Unfair Competition Act does] not authorize a suit by a private party for damages." *Cacique, Inc. v. Robert Reiser & Co., Inc.,* 169 F.3d 619, 624 (9th Cir.1999); *Bank of the West v. Superior Court,* 2 Cal.4th 1254, 1272, 10 Cal.Rptr.2d 538, 833 P.2d 545 (1992). "Private remedies are limited to equitable relief, and civil penalties are recoverable only by specified public officers." *Brown v. Allstate Ins. Co.,* 17 F.Supp.2d 1134, 1140 (C.D.Cal.1998); *see Kasky v. Nike, Inc.,* 27 Cal.4th 939, 950, 119 Cal.Rptr.2d 296, 45 P.3d 243 (2002) (revealing that "in a suit under [California's Unfair Competition Act], a public prosecutor may collect civil penalties, but a private plaintiff's remedies are 'generally limited to injunctive relief and restitution.' "). Murray is not entitled to punitive damages on his unfair competition cause of action, therefore this aspect of Counter-defendants' motion is granted.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2003 WL 24309646

Footnotes

* This matter was determined to be suitable for decision without oral argument. L.R. 78-230(h). This Order is not selected for publication.

1 All references to Rules are to the Federal Rules of Civil Procedure unless otherwise noted.

2 Summary adjudication standards are well-known and will not be repeated unless relevant to a point decided.

3 Because Wellhead and Paradigm are not named as Counter-defendants in Defendant's counterclaim, their motions against Defendant's counterclaim are nonsensical and need not be reached. Therefore, “Plaintiffs” within this section and the following section refers to Dittmer and ClearStream only.

4 The elements of the tort of interference with prospective economic advantage are: (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of defendant designed to disrupt the relationship; (4) actual disruption of the relationship; (5) economic harm to the plaintiff proximately caused by the acts of the defendant. *Bear Stearns & Co.,* 50 Cal.3d at 1126 n. 2, 270 Cal.Rptr. 1, 791 P.2d 587.

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