

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL**

MINUTE ORDER

DATE: 08/22/2017

TIME: 08:29:00 AM

DEPT: C-68

JUDICIAL OFFICER PRESIDING: Judith F. Hayes

CLERK: Richard Cersosimo

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT:

CASE NO: **37-2017-00016311-CU-BC-CTL** CASE INIT.DATE: 05/04/2017

CASE TITLE: **Proper Media LLC vs Bardav Inc [Imaged]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Breach of Contract/Warranty

APPEARANCES

The Court, having taken the above-entitled matter under submission on 08/04/2017 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

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(1) The Demurrer of Defendant/Cross-Complainant Bardav Inc. to the First, Seventh, Eighth, and Ninth Causes of Action is SUSTAINED, with leave to amend.

The first amended complaint ("FAC") does not attach the alleged contract, the General Services Agreement ("GSA"), but alleges the legal effect. "In order to plead a contract by its legal effect, plaintiff must "allege the substance of its relevant terms. [Citation omitted]" (*McKell v. Washington Mut., Inc.* (2006) 142 Cal.App.4th 1457, 1489.) The FAC does not allege all of what Bardav's obligations were under the GSA. However, all of Bardav's obligations under the GSA are not relevant for purposes of determining if there was a breach. Each party to a contract has a duty to do what the contract presupposes he will do to accomplish its purpose and a party may not avoid liability by preventing the fulfillment of the other party's obligation. (*San Bernardino Val. Water Development Co. v. San Bernardino Val. Municipal Water Dist.* (1965) 236 Cal.App.2d 238, 265.) Proper Media has properly alleged that Mikkelson prevented it from performing its obligations under the GSA.

The demurrer as to the first cause of action is OVERRULED.

Corporations Code section 1800(e) states, in part, "[f]or the purposes of this section, "shareholder" includes a beneficial owner of shares who has entered into an agreement under Section 300 or 706." (Corp. Code, § 1800.) The FAC explicitly acknowledges Proper Media is not a shareholder; however, it does allege that Proper Media is a beneficial owner of shares. Notwithstanding, the FAC does not allege Proper Media entered into "an agreement under Section 300 or 706," nor does the FAC allege some other way Proper Media could be considered a shareholder. The FAC has not properly alleged Proper

Media's standing. However, Plaintiffs' FAC pleads, in the alternative, that "Schoentrup and Richmond bring this claim as owners of 40% of the equity in Bardav." Schoentrup and Richmond have standing.

California Code of Civil Procedure § 389(a) lists three factors to consider when determining whether a party is an indispensable party. (CCP § 389(a).) The first clause focuses on whether the parties named in the action can be accorded complete relief. (*Deltakeeper v. Oakdale Irrigation Dist.* (2001) 94 Cal.App.4th 1092, 1101.) The second is if the party claims an interest in the subject of the action and the disposition of the action in his absence may 1) impede or impair his ability to protect that interest or 2) cause existing parties to incur a substantial risk of double, multiple, or inconsistent obligations. (CCP § 389(a).) In an action for dissolution of a partnership "all of the partners are considered indispensable parties to the litigation." (*Kraus v. Willow Park Public Golf Course* (1977) 73 Cal.App.3d 354, 369.) Persons having an undetermined interest "in a trust fund and one of them, *acting adversely to the others, seeks to recover the whole, to fix his share, or recover a portion claimed by him*, the other persons are indispensable parties." (*Patrick v. Alacer Corp.* (2008) 167 Cal.App.4th 995, 1015.)

According to the FAC, Ryan Miller, Vincent Green, and Tyler Dunn are shareholders of Bardav. Shareholders' ability to protect their interests, i.e. the right to vote regarding dissolution, could be impeded if they are not included as parties to this action. The shareholder's right to vote regarding dissolution is partly analogous to a property right in a trust or the rights associated with being a partner. A shareholder's property rights in the corporation are greatly impacted by a vote to dissolve. The Court finds Ryan Miller, Vincent Green, and Tyler Dunn are indispensable parties. The demurrer is SUSTAINED, with leave to amend, as to the seventh cause of action for dissolution.

Bardav concedes that the FAC alleges, in the alternative, that its eighth cause of action is brought by Schoentrup and Richmond as owners of 40% of the equity in Bardav. As discussed above, however, Proper Media has not properly alleged standing. The demurrer as to the eighth cause of action for removal of director as to Proper Media is SUSTAINED, with leave to amend.

As Ryan Miller, Vincent Green, and Tyler Dunn are indispensable parties, the demurrer as to the ninth cause of action for declaratory relief is SUSTAINED, with leave to amend.

(2) The Motion of Plaintiffs for Preliminary Injunction is DENIED.

"[T]he question whether a preliminary injunction should be granted involves two interrelated factors; (1) the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief." (*White v. Davis* (2003) 30 Cal.4th 528, 554; *County of Kern v. T.C.E.F., Inc.* (2016) 246 Cal.App.4th 301, 315.)

Plaintiffs' eighth cause of action for removal of director is by Proper Media, which the parties do not dispute is not a shareholder. Proper Media's board members are shareholders. Under Corporations Code section 304, "at the suit of shareholders holding at least 10 percent of the number of outstanding shares of any class," a court can remove from office a director "in case of fraudulent or dishonest acts or gross abuse of authority or discretion..." (Corp. Code, § 304.) Proper Media does not have standing to seek removal of Mikkelson. However, Plaintiffs' eighth cause of action for removal of director pleads, in the alternative, that "Schoentrup and Richmond bring this claim as owners of 40% of the equity in Bardav." Schoentrup and Richmond have standing.

Plaintiffs have not presented sufficient evidence to prove fraudulent acts. Schoentrup signed off on the compensation agreement under which Mikkelson was paid and only raised an issue with it once the

GSA was terminated by Bardav. Similarly, Plaintiffs have not identified any particular financial transaction conducted by Mikkelson that would constitute waste or abuse of control.

Plaintiffs does not contest that Mikkelson is the president and CEO of Bardav and that his actions to terminate the General Services Agreement ("GSA") were done as such, not as a director. Plaintiffs do not address the fact that the GSA was entered into by Mikkelson as the president and CEO of Bardav.

The effective date of the GSA was August 11, 2015, and the GSA was to remain in effect for one year at which point it would be renewed each month unless terminated by either party upon "written notice of termination, with or without cause, at least sixty (60) days prior to renewal." By the time Bardav sent notice of termination of the GSA, the one-year period had long since expired, such that Bardav was within its rights to terminate the GSA upon 60-days' notice, with or without cause.

While Plaintiffs assert that the contract was material, such that approval by the board of directors was necessary before it could be terminated, Plaintiffs have not shown that Mikkelson was not the sole board member. Plaintiffs have not shown that Schoentrup was a board member. In Plaintiffs' reply they cite to Schoentrup's declaration and a "Shareholder and Board Resolution Approving Amendment of Bylaws." Schoentrup's declaration states he executed this document "as a member of the Board of Directors of Bardav;" however, Plaintiffs state in their first amended complaint's ("FAC") that they "recently discovered those bylaws do not exist." (FAC, ¶40.) Plaintiffs acknowledge the "Shareholder and Board Resolution Approving Amendment of Bylaws" had no legal effect. Stating that a document with no legal effect was signed as if Schoentrup was a director is not direct evidence that he was a director.

Corporations Code section 212(a) states Bylaws show provide that the "minimum number of directors shall not be less than three; provided, however, that (1) before shares are issued, the number may be one, (2) before shares are issued, the number may be two..." (Corp. Code, § 212.) This does not transform any shareholder into a director by default. Corporations Code section 212(a) simply indicates that Bardav's bylaws should have included a minimum number of directors. Corporations Code section 212(a) does not provide evidence that Schoentrup or anyone else besides Mikkelson was a board member.

Further, Mikkelson's declaration states the Stock Purchase Agreement "was not accompanied by any corporate resolution appointing Mr. Schoentrup or any of the other purchasers to Bardav's board of directors... I have never appointed Mr. Schoentrup to be a director of Bardav and there has not been a shareholders meeting at which Mr. Schoentrup was elected as a director of Bardav." (Decl. Mikkelson, ¶11.) We have two completing declarations. Mikkelson's declaration is much more direct and Mikkelson is in a position to know the bylaws, if they exist, which would dictate the appointing of directors.

Notwithstanding, a response to a request for inspection of documents which would include Bylaws, if they exist, could help determine whether Schoentrup could have been a director.

Corporations Code section 1602 states, in part: "Every director shall have the absolute right at any reasonable time to inspect and copy all books, records and documents of every kind and to inspect the physical properties of the corporation" (2a) Courts have recognized that "[d]irectors occupy a fiduciary relationship to the corporation and its stockholders [citation], and the unqualified right of inspection accorded them by the statute here invoked is manifestly in aid of such principle." (*Hartman v. Hollingsworth* (1967) 255 Cal.App.2d 579, 581-582 [63 Cal.Rptr. 563].)

(*Saline v. Superior Court* (2002) 100 Cal.App.4th 909, 913-14.) The absolute right applies only to

disinterested directors. (*Wolf v. CDS Devco* (2010) 185 Cal.App.4th 903, 916.)

Schoentrup is not a disinterested director. A director is independent when he is in a position to base his decision on the merits of the issue rather than being governed by extraneous considerations or influences. (*Wolf, supra*, 185 Cal.App.4th 903, 916.) As discussed above, Plaintiffs have presented no persuasive evidence that Schoentrup is a director. Further, Schoentrup, as a director of Proper Media who had its contract terminated, is not independent. Schoentrup has an extraneous interest in ensuring the GSA remain in force for Proper Media. Finally, Proper Media is not a shareholder of Bardav and does not have standing to make a demand for inspection. The documents demanded in the demand for inspection can be obtained through discovery.

For the above reasons, Plaintiffs have failed to establish that they are likely to prevail on the merits. The balance of harms weighs in Bardav's favor. Plaintiffs assert a damage to goodwill and creditworthiness. The shares in Bardav are still owed by the directors of Proper Media. Plaintiffs have not shown that the failure to remove Mikkelson as a director would invariably lead to a loss of goodwill. Mikkelson's removal could have the undesired effect of causing Snopes to lose goodwill. On the other hand, the injunction could cause Snopes to shut down. The shuttering of a business with import to the public is weightier than an undefined loss of goodwill and a bad mark on the creditworthiness of a company.

(3) The Motion of Defendant/Cross-Complainant Bardav Inc. for Preliminary Injunction is GRANTED, in part.

Bardav is likely to prevail on its contract claim. Plaintiffs do not dispute that under the GSA Proper Media was obligated to provide Bardav with the advertising revenue, but Proper Media asserts, pursuant to the GSA, it is not liable for payments as a result of the breach it claims Bardav committed. As discussed above, Bardav is likely to prevail on that claim.

While the Court has the power to issue a preliminary injunction that changes the status quo, it is only in "extreme cases where the right thereto is clearly established." (*Integrated Dynamic Solutions, Inc. v. VitaVet Labs, Inc.* (2016) 6 Cal.App.5th 1178, 1184.) Plaintiffs assert this is not an extreme case like *Integrated Dynamic*. The status quo would change in this case if the injunction were granted – it would force Proper Media to release advertising funds and source code to templates and themes for the Snopes website to Bardav. This is an extreme case like *Integrated Dynamic* because Bardav has clearly established a breach of the GSA as to the advertising revenue.

The issue of the source code is less clear. At section 2.2 of the GSA, it explicitly states "Publisher will retain control over the final theme and templates to be used on the live version of the Website." (Schoentrup Decl., Exhibit A.) Bardav is the Publisher. This language is somewhat similar to that in *Integrated Dynamic* where it was agreed all software codes, *inter alia*, were "VitaVet's sole and exclusive property" and were assigned to VitaVet. (*Id.* at 875.) However, the GSA does not explicitly say "source code" or say inventions, such as software, created by Proper Media were assigned to the Publisher. Other portions of the GSA discuss Proper Media's responsibilities to, *inter alia*, maintain the servers and to merge all domains associated with the Snopes.com website, but the GSA does not say that Proper Media was to retain any invention, source code or otherwise.

Proper Media also distinguishes this case from *Integrated Dynamic* by citing to the declaration of Richmond which indicates that some of the source code for Snopes, "Proper Press," was intended to be used on websites besides Snopes. Proper Media is correct that if the injunction is granted and if the Proper Press source code is proprietary, it could lose control over of it and its proprietary nature. In

Integrated Dynamic the source code was of no use to the party opposing the injunction, such that it would suffer no harm whatsoever. Thus, the balancing of harms in this case differs from *Integrated Dynamic*. It is not disputed that Snopes can continue to run without the specific source code. The irreparable harm to Bardav would be the difference in performance between the website being run with the code and without it for the period of the litigation. Bardav has not shown that the difference would be such that it would outweigh the harm of the source code losing its proprietary nature.

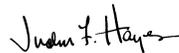
The balancing of the harm as to the advertising revenue weighs in favor of Bardav. Proper Media has acknowledged that the advertisement revenue is Snopes's only source of income, which it has cut off. Bardav has presented evidence that their fixed costs are about \$165,000 per month. Even if Snopes had large reserved, it cannot continue to run for years during litigation without any source of revenue. On the other hand, Proper Media, who received notice of the termination of the GSA months ago, is free to work for other websites to earn money to pay its loan. Proper Media does not even discuss harm to itself as to the advertising revenue.

Therefore, the Court grants the preliminary injunction as to the advertising revenue and themes, templates, and content, but not as to the source code known as "Proper Press." Based on declarations on behalf of Bardav and representations made in court, Bardav has not been provided the functional themes and templates. Proper is ordered to provide functional "final theme and templates to be used on the live version of the Website." To the extent any of the source code known as "Proper Press" is required for the final theme and templates to be fully functional, the "Proper Press" source code must be turned over to Bardav. In such a case, Bardav is to maintain the "Proper Press" source code confidential and refrain from distributing such source code for any purpose other than to continue the running of the Snopes.com website.

Proper is to continue maintaining all hosting of the Snopes.com website in its current form, without alteration or disruption, for a period of sixty (60) days to facilitate the transfer of hosting activities to Bardav without a disruption in service. Bardav must pay Proper for hard costs incurred during this sixty (60) day period. Bardav is entitled to an accounting of costs incurred during this sixty (60) day period.

Pursuant to CCP section 529, the Court orders Bardav to post an undertaking in the amount of \$50,000 within ten (10) days of entry of the signed order.

Bardav is ordered to prepare a proposed order.



Judge Judith F. Hayes