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Tentative Rulings

DEPARTMENT 58 LAW AND MOTION RULINGS

Case Number: 21STCV23999 Hearing Date: May 17, 2022 Dept: 58

JUDGE BRUCE G. IWASAKI

DEPARTMENT 58

Hearing Date: May 17, 2022

Case Name: Scott Douglas Ora v. Hollywood Chamber of Commerce, et al.

Case No.: 21STCV23999

Matter: Demurrer with Motion to Strike

Calendar No: 15

Moving Party: Defendant Hollywood Chamber of Commerce

Responding Party: Plaintiff Scott Douglas Ora

Tentative Ruling: **The demurrer is sustained in its entirety, without leave to amend.**

BACKGROUND:

Plaintiff Scott Douglas Ora filed a First Amended Complaint (FAC) against the Hollywood Chamber of Commerce (Chamber), Hollywood Chamber's Board of Directors, the Hollywood Walk of Fame, and the Walk of Fame Committee alleging breach of contract and negligence. Plaintiff also seeks injunctive relief.

The lawsuit concerns the award of a posthumous star on the Hollywood Walk of Fame that was allegedly offered to Plaintiff's grandfather. The FAC alleged that in 1988, Plaintiff's grandmother and actor Bob Hope (collectively, "Sponsors") submitted a Nomination Application to the Walk of Fame Committee to sponsor Plaintiff's grandfather, Leo Robin, for a star. (FAC, ¶¶ 20, 54, 68.) On June 28, 1990, Johnny Grant, then Chairman of the Committee, sent an acceptance letter of the nomination. (*Id.* at ¶ 60.) However, two conditions had to be met at the time: (1) a fee of $4,000 must be paid and (2) the recipient must schedule the ceremony within five-years; if not, a new application must be submitted. (*Id.* at ¶¶ 15-16, 56.)

Plaintiff's grandmother died in May 1989; Bob Hope died in July 2003. (FAC, ¶¶ 57, 64.) The acceptance letter from Mr. Grant was reportedly "returned to sender." (*Id.* at ¶ 62.)

Plaintiff alleged that he discovered the award of a posthumous star for his grandfather in July 2017. (FAC, ¶ 20.) In July 2018, he mailed a check of $4,000 to pay for the star under the terms in 1990, but which was rejected as a new application had to be submitted with the updated fee. (*Id.* at ¶¶ 36-37, 41.) The FAC alleged that a contract was formed after Mr. Grant sent a letter of acceptance to Plaintiff's Grandmother and Bob Hope in June 1990. (FAC, ¶ 69.)

This Court previously sustained a demurrer by Defendant Hollywood Chamber of Commerce as to all causes of action on February 22, 2022. The FAC was filed in March.

Defendant filed another demurrer and motion to strike in April 2022, making similar contentions as in its earlier demurrer – that there was no contract between the sponsors and the Chamber, any breach of contract claim is time-barred and uncertain due to Plaintiff's standing, and the Chamber did not owe Plaintiff a duty of care.

LEGAL STANDARD

A demurrer for sufficiency tests whether the complaint states a cause of action. (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 747.) When considering demurrers, courts read the allegations liberally and in context. The defects must be apparent on the face of the pleading or via proper judicial notice. (*Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994.) A demurrer tests the pleadings alone and not the evidence or other extrinsic matters. Therefore, it lies only where the defects appear on the face of the pleading or are judicially noticed. (Code Civ. Proc., §§ 430.30, 430.70.) At the pleading stage, a plaintiff need only allege ultimate facts sufficient to apprise the defendant of the factual basis for the claim against him. (*Semole v. Sansoucie* (1972) 28 Cal. App. 3d 714, 721.) A "demurrer does not, however, admit contentions, deductions or conclusions of fact or law alleged in the pleading, or the construction of instruments pleaded, or facts impossible in law." (*S. Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 732 [internal citations omitted].)

DISCUSSION

Breach of Contract

Defendant argues that Plaintiff's grandmother's nomination "offer" was revoked upon her death, that it did not constitute an offer, that the letter from Mr. Grant was not an "acceptance," that the FAC fails to allege performance by the grandmother, there is no privity between Plaintiff and the Sponsors, and the claim is time-barred. In addition, Defendant asserts that Plaintiff lacks standing because he was not a party to any contract.

Plaintiff contends that the acceptance letter by Mr. Grant created a binding contract. He argues that the death of his grandmother did not revoke the offer because Bob Hope was still alive at that time as a co-Sponsor. Plaintiff primarily cites to law review articles for the proposition that the death of an offeror does not terminate the offer. He also argues that Defendant breached the contract by not re-sending the acceptance letter to Bob Hope.

A breach of contract requires sufficient facts to establish: (1) existence of a contract between the parties; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) damages to plaintiff from the breach. (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1178.)

"An essential element of any contract is the consent of the parties, or mutual assent. [Citations.] Mutual assent usually is manifested by an offer communicated to the offeree and an acceptance communicated to the offeror. [Citations.] ' " 'An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.' " [Citations.]' [Citation.] The determination of whether a particular communication constitutes an operative offer, rather than an inoperative step in the preliminary negotiation of a contract, depends upon all the surrounding circumstances. [Citation.] The objective manifestation of the party's assent ordinarily controls, and the pertinent inquiry is whether the individual to whom the communication was made had reason to believe that it was intended as an offer." (*Donovan v. Rrl Corp.* (2001) 26 Cal.4th 261, 270-271.)

However, " '[p]reliminary negotiations or an agreement for future negotiations are not the functional equivalent of a valid, subsisting agreement. "A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent." ' " (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1389.)

Plaintiff's entire argument relies upon the theory that the letter submitted by the Sponsors constituted an offer in the first instance. The Court disagrees with that notion. Plaintiff acknowledges that Defendant receives an average of two hundred nomination applications per year. (FAC, ¶ 13.) The decision to approve a nominee is "entirely within the Chamber's discretion." (FAC, Ex. 18.)[1] The nomination does not constitute the "manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." (*City of Moorpark v. Moorpark Unified School Dist.* (1991) 54 Cal.3d 921, 930.) This is especially true given that there are conditions precedent to receiving the star. (See Rest.2d Contracts, § 26 ["A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent."].) Plaintiff admits that there is a $40,000 fee and that a ceremony be held on an agreed upon date and time. (FAC, ¶ 56.) Thus, the Court views the nomination as a "'mere invitation to others to make offers,'" rather than constituting an offer itself. (*City of Moorpark*, *supra*, 54 Cal.3d at p. 931.)

Instead, the letter from Mr. Grant appears to be the initial offer itself because the Chamber has accepted the nomination and expressed willingness to grant the star, contingent upon the fee being paid and scheduling of the ceremony.

Since the Court finds that the acceptance letter constituted an offer to the Sponsors, the FAC fails to indicate that there was acceptance by the Sponsors. (Civ. Code § 1585.) Thus, the FAC has not sufficiently pled the existence of a contract.

Furthermore, Plaintiff has failed to address the statute of limitations issue that was previously mentioned by the Court: "Plaintiff states that because he only discovered the acceptance in 2017, California's discovery rule should delay tolling of the statute of limitations until his cause of action was discovered. However, no such rule exists delaying Plaintiff's need to perform on their obligations under the contract." Accordingly, even if there was a contract, it would be time-barred by the statute of limitations of four years. (Code Civ. Proc., § 337, subd. (a).) Plaintiff still provides no authority that would exempt him from the statute of limitations.

Plaintiff's reliance on Bob Hope being alive from 1988 through 2003 as a co-sponsor creates another flaw in his reasoning. He has no privity, standing, or any other sort of relationship with Bob Hope.

Even assuming there is a contract, Plaintiff has not sufficiently pled performance or excuse for nonperformance.

A condition precedent is an event that must be performed before some right accrues or some act must be performed. (Civ. Code, §§ 1434, 1436.) Plaintiff has the burden to show that the condition precedent has occurred. (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380; *Richman v. Hartley* (2014) 224 Cal.4th 1182, 1182 ["a party's failure to perform a condition precedent will preclude an action for breach of contract."].)

Again, even if the Court were to accept that the 1988 letter constituted an offer, the FAC concedes that there were two condition precedents that must be met before the Chamber had any obligation to install the star: payment of the fee and scheduling of the ceremony. (FAC, ¶ 56.) Plaintiff has failed to allege that he performed either of these conditions in a timely manner. He attempts to argue that he submitted the $4,000 belatedly to the Chamber in July 2018; however, as his own FAC concedes, the recipient must schedule the ceremony within two years. Otherwise, it will expire, and a new application must be submitted. (FAC, ¶ 16.)

This Court previously noted that Plaintiff himself alleged breach by the Sponsors, or, at the least, a failure to perform:

"However, the complaint further states that Defendants' purported acceptance in 1990 came with the following two conditions: 1) The recipient pay $4,000 dollars, and 2) that an award ceremony be scheduled by the recipient within five years of the award, or the application must be resubmitted. (Complaint p. 4.) Plaintiff alleges that he completed said requirement in 2018. As Plaintiff alleges that he completed his end of the bargain 13 years after the deadline of 1995 (five years after the award was granted), it was in fact Plaintiff that breached the contract per their complaint. Plaintiff's remedy is also luckily included in the terms of his complaint: resubmit an application. As Defendants correctly point out, Defendants' acceptance was conditioned on payment and scheduling of a ceremony. A lack of performance on those requirements excuses a lack of performance by Defendants."

While Plaintiff seemingly tries to argue that the Defendant first breached the agreement by "placing the acceptance letter in its files where it has since remained in the Hollywood Chamber's records ever since and made no attempt to send it," this does not constitute an excuse for nonperformance of the conditions precedent for the contract to take effect initially. In addition, this argument would suggest that the Sponsors never accepted the offer to begin with, which undermines the existence of any contract at all. In other words, there are two theories here: (1) the nomination was an offer, which was accepted by Mr. Grant, with the two conditions precedent, or (2) Mr. Grant's letter constituted an offer, to which there was no acceptance. Under the former theory, which is what the FAC asserts, Plaintiff has failed to show performance of the two conditions precedent. Under the latter theory, there is no contract at all.

The Court concludes that there is no likelihood that Plaintiff can amend the complaint once again to state a cause of action. There is no contract; the suit is late; Plaintiff lacks standing. Plaintiff's breach of contract claim has failed to allege a claim on which

the Court can grant relief, and the Demurrer is sustained without leave to amend.

Negligence

To plead a cause of action for negligence, one must allege (1) a legal duty owed to plaintiffs to use due care; (2) breach of duty; (3) causation; and (4) damage to plaintiff. (*County of Santa Clara v. Atlantic Richfield Co. (*2006) 137 Cal. App. 4th 292, 318.)

Plaintiff did not amend his complaint to address the Court's prior concerns:

> "Plaintiff further alleges that Defendants acted negligently in not attempting to re-send the letter informing Plaintiff's grandmother of the award in 1990. (Complaint p. 23-25.) Negligence claims require a special relationship between the parties in which a duty is owed to the injured party. (*Bily v. Arthur Young & Co*. (1992) 3 Cal.4th 370, 398.) Plaintiff alleges that a duty was created by the formation of the contract. (Complaint p. 23-25.) However, as discussed above, no such contract was formed, meaning that Plaintiff has alleged no duty for Defendants to violate."

Plaintiff has still not shown the existence of a contract and even if he has, there are insufficient facts to demonstrate performance of the conditions precedent. That is, there is no duty, because there was no contract. Plaintiff's declaration under Code of Civil Procedure section 377.30 that the cause of action survives his grandmother does not assist him when no contract existed between the Sponsors and the Chamber.

Plaintiff's recitation of the implied promise of good faith and fair dealing does not resolve this issue. The duty of good faith and fair dealing presupposes the existence of a contract to begin with, which Plaintiff has failed to plead here given the lack of performance.

Finally, Plaintiff appears to argue that the Chamber owed him a duty of care. (FAC, ¶ 85.) However, he again alleges this duty in the context of the contract, stating that Defendant "breached its duty of care to assist Ora several times when he attempted to engage with it regarding Robin's star." (*Id.* at ¶ 86.) Thus, because Plaintiff has not alleged that Defendant violated a duty that arose separate from the alleged contract, the cause of action for negligence has not been sufficiently pled. (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 554 ["If every negligent breach of a contract gives rise to tort damages the limitation would be meaningless, as would the statutory distinction between tort and contract remedies."].) Moreover, Plaintiff has failed to articulate how this defect can be corrected. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.)

Accordingly, the demurrer to the cause of action for negligence is sustained without leave to amend.

Motion to Strike

Because the Court has sustained Defendant's Demurrer without leave to amend in its entirety, the motion to strike is denied as moot.

CONCLUSION

The Court sustains the demurrer without leave to amend. Defendant is ordered to give notice of this ruling.

[1] Plaintiff only provides the nomination form for 2019 candidates. Presumably, the form in 1988 contained similar language.