Filed 8/23/12 Leeds v. Weinstein Co. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ARTHUR LEEDS, Plaintiff and Appellant, v. THE WEINSTEIN COMPANY, LLC et al., Defendants and Respondents.	B235786 (Los Angeles County Super. Ct. No. SC106045)

APPEAL from an order of the Superior Court of Los Angeles County, Lisa Hart Cole, Judge. Affirmed.

Arthur Leeds, in pro per, for Plaintiff and Appellant.

Leopold, Petrich & Smith, Edward A. Ruttenberg and Elizabeth L. Schilken, for Defendant and Respondent The Weinstein Company.

Toberoff and Associates, Marc Toberoff and Pablo D. Arredondo for Defendants and Respondents Marc Toberoff and IP Worldwide.

Arthur Leeds appeals from the trial court's order dismissing the case without prejudice for failure to serve an indispensable party. We affirm.

BACKGROUND

1. The Piranha Agreements

Chako Van Leuuwen (Chako) was a producer of Piranha, a 1978 film (Piranha I). Sequels followed in 1982 (Piranha II) and 1995 (Piranha III). Leeds represented Chako on Piranha I as her attorney, but served in no other capacity and received no credit. In 1997, Chako, the holder of the remake and sequel rights in the Piranha films, assigned to Fox Family Films (Fox) an option to purchase the rights in the Piranha films. She provided Fox with chain-of-title documents proving her ownership of these rights.

On November 22, 2002, after the Fox option expired without exercise, Chako entered into a two-year agreement with Intellectual Properties Worldwide (IPW) through its managing member Marc Toberoff, for IPW "to arrange for the option, sale and exploitation of the" rights in the Piranha films in connection with a new Piranha project (Piranha Project).

After the 2002 agreement expired without exercise, Chako entered into another option agreement in 2005 with Piranha Pictures (PP) and Exception-Wild Bunch, S.A. (WB) on all of the terms and conditions as the Fox Family Films option except as modified by the 2005 option. On January 20, 2006, PP and WB exercised the 2005 option.

In the Fox and 2005 options, Chako warranted that she was the exclusive holder of the sequel and remake rights in the Piranha films, that there was no impairment of those rights, and that she had not granted or assigned these rights to any other party. Under the option, assignee PP's and WB's obligations were subject to "the clearance, in form and substance, to the reasonable satisfaction of Assignee's Legal Department, of the chain-of-title to the" Piranha property. The assignees assumed only "the executory obligations of [Chako] not heretofore performed pursuant to the Underlying Documents." No contract

with Leeds was among the twenty underlying documents listed in the Fox and 2005 options.

On December 14, 2005, The Weinstein Company LLC (TWC) acquired distribution rights in the Piranha Project and entered into assignment agreements on April 5, 2007 and July 31, 2007, whereby it acquired from WB, PP, and others all of their rights in the Piranha Project and its underlying materials. TWC agreed to be bound by all of TWC's assignors' executory obligations "under and pursuant to the Documents." TWC's assignors provided TWC with 28 chain-of-title documents updating the underlying documents provided in the Fox option. None of the underlying documents referenced the Leeds Contract, any other document to which Leeds was a party, or Leeds himself. Before TWC signed the July 31, 2007 assignment agreement, IPW's Toberoff made TWC generally aware that Leeds had threatened some sort of claim against Chako, but advised TWC that the claim did not appear meritorious. TWC was not aware of a contract with Leeds or its terms until Leeds served TWC with his first amended complaint (FAC) in 2010.

2. The Leeds Contract

On December 1, 2004, Leeds faxed Chako a proposed contract, drafted solely by Leeds, dated December 2, 2004, and already signed by Leeds with a signature line for Chako. Chako signed the Leeds contract the next day at Leeds's home without making any changes to it.[1]

The Leeds contract primarily concerns the disclosure of confidential information. It spends just two paragraphs discussing Leeds's role as a producer. The only consideration Leeds was to provide Chako under the contract was "helping to secure financing, distribution, and talent." In return, Leeds was to be accorded a producer credit if the Piranha Project was actually made. The contract further provides that Leeds would

---

[1] Leeds signed "Individually and for Arthur Leeds Productions, Inc." Chako signed "Individually and for Chako Film International."

be "paid a reasonable fee and contingent fee" to "be mutually agreed upon between [Leeds] and the financiers and/or distributors of Piranha."

Leeds ultimately did not secure financing, distribution, or talent for the Piranha Project. Leeds could not swear that he spent more than two hours trying to help Chako in these regards. Leeds admitted that his anticipated role in the Piranha Project was contingent on IPW's Toberoff failing to secure the project's financing. Toberoff ultimately was able to secure the project's financing.

Leeds also did not have any discussions with any person regarding the "reasonable fee and contingent fee" he was due under the Leeds contract. Leeds had no contact with TWC regarding the Piranha Project and had no business relationship with TWC regarding any matter prior to his filing of the FAC.

On February 2, 2005, Chako, through attorney Martin Barab, advised Leeds in writing that Chako was terminating the Leeds contract on the ground that she had asked Leeds to represent her as her attorney solely to help her negotiate with Toberoff and IPW, not for him to become a producer on the project.

3. Leeds's Lawsuit

On December 14, 2009, Leeds filed a complaint in pro. per., alleging causes of action against Chako, Toberoff, IPW, and Does 1-50 for (1) breach of contract; (2) intentional interference with contract; (3) unfair business practice (under Bus. & Prof. Code, § 17200 et seq.); and (4) negligent interference with contract. Leeds's four causes of action rested on his allegation that he and Chako entered into a written agreement on December 2, 2004 under which Chako agreed to provide him with compensation, including a shared producer credit and a reasonable fee and contingent fee, for Leeds's services on a "Piranha movie." Leeds claimed that all defendants named in the complaint breached the Leeds contract and engaged in related unfair and interfering activities allegedly supporting his three other causes of action.

Leeds filed his FAC on May 28, 2010, adding defendant Chako Film International (CFI) as Doe 1 and adding an aka for Chako of Toshiko Chako Van Leeuwen

(collectively, the Chako defendants). The FAC requested damages "greater than $10,000,000," treble damages, and punitive damages.

On July 26, 2010, Leeds filed a case management statement requesting that the "issuance of an order for publication of service on Defendants [CFI] and [Chako]" be considered by the court at its management conference.

On October 6, 2010, the trial court issued its case management order, advising Leeds: "The following parties necessary to the disposition of this case have not been served: [Chako and CFI]. . . . Plaintiff . . . is ordered to serve summons and complaint upon such parties within 30 days of this order." The court also set an "Order to Show Cause re: Sanctions/Dismissal for Failure to File Proof of Service" for December 6, 2010.

On November 11, 2010, Leeds filed two amendments to his FAC where he claimed to have discovered that the true name of Doe 2 was "'Dimension Films'" and that the true name of Doe 3 was TWC. Leeds served his FAC on TWC on November 18, 2010, naming it as Doe 3.

On November 30, 2010, Leeds filed a sworn declaration explaining to the court that he had not complied with its order that he serve the Chako defendants. He explained that he had been preparing to serve the Chako defendants under international law, believing "they were citizens and residents of Japan," but had been told by Toberoff that Chako resided in Los Angeles. He stated that he intended to propound discovery on Toberoff to determine Chako's most recent address and to serve her as soon as Toberoff answered. At the December 6, 2010 case management conference on the order to show cause re: sanctions/dismissal, Leeds admitted that he had not served Chako. Leeds advised the court that he was waiting for Toberoff's response to Leeds's interrogatory seeking Chako's last known contact information before serving her. The court discharged the order to show cause and set the matter for trial.

On December 22, 2010, TWC answered Leeds's FAC, denying the allegations within.

On April 20, 2011, Leeds admitted to TWC's attorney that he had still not served Chako. On May 9, 2011, TWC filed a motion to dismiss the action under Code of Civil Procedure section 389, subdivision (b)[2] on the ground that Leeds had failed to join and serve the Chako defendants, whom the court should regard as an indispensable party to the action. The motion was set for hearing on June 16, 2011.

TWC filed a notice of plaintiff's failure to file opposition papers on June 7, 2011, having received no timely papers from Leeds in opposition to the motion. Leeds filed his untimely opposition to the motion on June 10, 2011. In his accompanying declaration, Leeds admitted that he had "decided that in light of the trial date that had already been set that it was not worth the expenditure of the considerable time, money and effort to continue to try and serve [the Chako defendants] under the relevant international treaties."

On June 16, 2011, the trial court heard the motion and issued its minute order granting the motion to dismiss without prejudice. On July 8, 2011, the trial court signed and filed the formal order submitted by TWC dismissing the action without prejudice. On July 22, 2011, counsel for TWC served Leeds with notice of entry of order, which was filed with the court on July 25, 2011. Leeds timely filed his notice of appeal on September 6, 2011.

DISCUSSION

I. The dismissal without prejudice is appealable.

"As a general rule an involuntary dismissal effected by written order of the court is appealable." (*Topa Ins. Co. v. Fireman's Fund Ins. Companies* (1995) 39 Cal.App.4th 1331, 1336.) Here, the trial court granted the motion to dismiss in its minute order. The court later signed an order granting the motion to dismiss and ordering the FAC be dismissed without prejudice as to all defendants. This is an appealable order. (*Ibid*.)

---

[2] Unless otherwise indicated, all subsequent statutory references are to the Code of Civil Procedure.

II. The trial court did not abuse its discretion in ordering the case dismissed without prejudice for failure to serve an indispensable party under section 389, subdivision (b).

Contrary to Leeds's assertion that the de novo standard of review applies, we review for an abuse of discretion the trial court's determination of whether a party is necessary or indispensable under section 389. (*TG Oceanside, L.P. v. City of Oceanside* (2007) 156 Cal.App.4th 1355, 1366.) This is because "[w]hether a party is necessary and/or indispensable is a matter of trial court discretion in which the court weighs 'factors of practical realities and other considerations.' (Citation.]" (*Hayes v. State Dept. of Developmental Services* (2006) 138 Cal.App.4th 1523, 1529.)

"A party cannot be properly joined unless served with the summons and complaint." (*Ruttenberg v. Ruttenberg* (1997) 53 Cal.App.4th 801, 808.) Leeds has not served the Chako defendants; therefore, the Chako defendants have not been joined in the action.

A. The Chako defendants were indispensable parties.

Section 389, subdivision (a) provides: "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party." (§ 389, subd. (a).)

The trial court properly determined that the Chako defendants fell within this definition. The Chako defendants were subject to service of process because all of the acts alleged against Chako in Leeds's complaint occurred in Los Angeles County. Leeds does not appear to have disputed this; in his November 30, 2010 declaration, Leeds stated

that he was prepared to serve the Chako defendants. Nor would their joinder have deprived the trial court of subject matter jurisdiction.

The trial court determined that "Chako not only claims an interest relating to the subject of the action[,] her interest is the subject of the action." All Leeds's claims relate to Chako's interest—her rights in the Piranha property. Leeds' causes of action against the other defendants are entirely contingent upon his claims against the Chako defendants—namely that there was a valid contract between him and Chako encumbering Chako's rights in the Piranha films. The court recognized that the Chako defendants were the key defendants on October 6, 2010 when it advised Leeds that "[t]he following parties necessary to the disposition of the case have not been served: [Chako and CFI]."[3] The trial court also rightly determined that in Chako's absence, the Chako defendants could not "properly protect their interests if they are not parties." The court reasoned that because the "other defendants are not direct parties to the underlying contract . . . they cannot protect Chako's interest because they do not possess the facts necessary to protect those interests." Because only the Chako defendants and Leeds were parties to the underlying contract, only they had the necessary facts relating to its validity. Moreover, there is reason to believe that Chako, if joined, would contest the validity of the contract, given her attempt at rescission.

Further, an adjudication of the action in the absence of the Chako defendants might leave defendants TWC, Toberoff, and IPW "subject to substantial risk of . . . otherwise inconsistent obligations" should Leeds prevail. (§ 389, subd. (a).) To prevail in the current action, Leeds needed to prove that his contract encumbered Chako's rights in the Piranha Project and that Chako had warranted to her assignees that she held

---

[3] Leeds argues that this use of the word "necessary" shows that the court was improperly applying section 379 rather than section 389. This is without merit. The word "necessary" is preprinted on the form for an order to show cause (on which there is no preprinted option using "indispensable"), and the court's selection of this option in October 2010 is not an indication of its reasoning when it dismissed the case in July 2011.

all rights therein. Were Leeds to prove this without joining the Chako defendants, he could recover from the current defendants without binding the Chako defendants to the result. In a later suit by TWC and Toberoff against the Chako defendants for indemnity for breach of warranty, Chako could defend the suit by proving Leeds's claim meritless. This would be an inconsistent result, especially as neither TWC nor Toberoff was a party to the Leeds contract. Neither TWC nor Toberoff could adequately defend against the suit without the Chako defendants, given that they do not have the facts pertaining to the formation of the contract.

Leeds argues that the trial court abused its discretion in finding that TWC and Toberoff would be subject to substantial risk of inconsistent obligations. Leeds argues that if he were to prevail in the current action, a second jury in a subsequent indemnity suit between the appearing defendants and Chako could not reasonably accept Chako's position. Therefore, he argues, TWC has not established a substantial risk of such an outcome.

We reject this argument. Leeds ignores the fact that this inconsistent outcome may very well occur if this case continues. The appearing defendants do not have the facts necessary to defend against Leeds's suit. Only Chako and Leeds have the facts surrounding the formation of the Leeds contract. In a subsequent indemnity action, Chako could defend on the basis that the Leeds contract was invalid. In other words, without joining the Chako defendants, the appearing defendants have conflicting interests in the two actions. In the current action, they would need to argue that the Leeds contract is invalid, but do not possess the facts necessary to sustain that argument; in the subsequent indemnity action, they would need to argue that the Leeds contract is valid.

Additionally, Leeds argues that the court abused its discretion in dismissing the case because section 389, subdivision (a) "requires the court to take less drastic action than dismissal of the whole case." Leeds argues that the trial court never ordered him to serve the Chako defendants or, alternatively, never unconditionally ordered him to serve the Chako defendants. Without citing any authority, Leeds argues that the trial court thereby abused its discretion.

However, the trial court *did* order Leeds to serve the Chako defendants. In its October 6, 2010 case management order, the trial court found that the Chako defendants were necessary to the disposition of the case and had not yet been served. Further, the court scheduled an order to show cause regarding sanctions/dismissal for failure to file a proof of service for serving the Chako defendants. Leeds's declarations establish that he knew he needed to serve the Chako defendants. In his declaration dated November 30, 2010, he acknowledged that he had "not yet served defendants [Chako] and [CFI]. I was preparing to do so in compliance with international treaties." Moreover, at the hearing on the motion to dismiss, the court stated that it "has on many occasions given Mr. Leeds an opportunity to file a declaration or to serve the defendants Chako or to dismiss them. Up until today he still has not chosen to do either one of those." Contrary to Leeds' assertions, the trial court gave Leeds ample time and opportunity to serve the Chako defendants—time and opportunity that Leeds ignored.

B. The trial court did not abuse its discretion.

Section 389, subdivision (b) gives a court discretion to dismiss in its entirety an action where a person identified in section 389, subdivision (a) "cannot be made a party." (§ 389, subd. (b).) Courts have the discretion to dismiss actions not only where the indispensable party cannot be made a party, but also where the plaintiff has not made the indispensable party a party. (See, e.g., *Tracy Press, Inc. v. Superior Court* (2008) 164 Cal.App.4th 1290, 1297–1299.)

"Ordinarily where the rights involved in litigation arise upon a contract, courts refuse to adjudicate the rights of some of the parties to the contract if the others are not before it." (*Nat. Licorice Co. v. NLRB* (1940) 309 U.S. 350, 363 [60 S.Ct. 569, 84 L.Ed. 799].)

In making its decision, the court must consider four factors: "(1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff or

cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder." (§ 389, subd. (b).) No factor is determinative and no factor is more important than the others. (*City of San Diego v. San Diego City Employees' Retirement System* (2010) 186 Cal.App.4th 69, 84.) Additionally, "the court's consideration of these factors largely depends on the facts and circumstances of each case." (*Ibid.*)

All four factors weigh in favor of dismissal.

1. A judgment rendered in the Chako defendants' absence might have been prejudicial to both the absent and appearing parties.

The analysis of whether a judgment rendered in the Chako defendants' absence might be prejudicial to Chako or the appearing defendants is "essentially the same assessment that must be made under [section 389] subdivision (a) in determining whether a party's absence would impair or impede that party's ability to protect his or her interests, and determining whether proceeding to judgment would subject existing parties to inconsistent obligations." (*People ex rel. Lungren v. Community Redevelopment Agency* (1997) 56 Cal.App.4th 868, 880.) "While it is just one of the four factors listed in . . . section 389, subdivision (b), . . . in determining whether an unjoined person is an indispensable party, potential prejudice to that unjoined person is of critical importance." (*Tracy Press, Inc. v. Superior Court*, *supra*, 164 Cal.App.4th at p. 1298.)

As explained above, the trial court determined that the Chako defendants could not adequately protect their interests in the litigation because Chako was the only one with the requisite facts relating to the Leeds contract's validity. As the appearing defendants were not parties to that contract, they lacked the ability to contest its enforceability. Thus, it is clear that the trial court determined that Chako's absence might be prejudicial to both the Chako defendants and the appearing defendants.

Further, the Chako defendants' absence from the litigation could subject the appearing defendants to inconsistent obligations. If Leeds were to prevail in the current litigation, he could collect his judgment from TWC, Toberoff, and IPW. However, because neither claim nor issue preclusion would bind the Chako defendants, they could defend a subsequent indemnity suit on the grounds that Chako's contract with Leeds was

void. If the Chako defendants were to succeed in that subsequent suit, TWC, Toberoff, and IPW would be left with inconsistent obligations.

This was sufficient to justify a finding of prejudice to both the Chako defendants and the appearing defendants, TWC, Toberoff, and IPW.

2. Leeds did not offer protective provisions to mitigate prejudice.

This factor favors dismissal where the trial court found potential prejudice and the opposing party offers no possible protective provisions to eradicate prejudice to unjoined parties. (See *County of Imperial v. Superior Court* (2007) 152 Cal.App.4th 13, 37.)

Leeds suggests no method by which the court could enter an order against TWC, Toberoff, and IPW and at the same time protect the Chako defendants' interests. Because any judgment against the appearing defendants would necessarily entitle them to sue the Chako defendants in an indemnity suit for breach of warranty, it does not appear that any protective provision could adequately protect the Chako defendants' and the appearing defendants' interests.

3. A judgment rendered in the Chako defendants' absence would not be adequate.

"[A] common litigation objective is not enough to establish adequacy of representation by the named parties." (*County of Imperial v. Superior Court*, *supra*, 152 Cal.App.4th at p. 38.)

While TWC, Toberoff, and IPW have the same incentives as the Chako defendants to contest the validity of the Leeds contract as the Chako defendants, they do not possess the same means to contest the contract's validity. While Chako was a party to the contract, TWC, Toberoff, and IPW were not. Chako is the only party other than Leeds to have any knowledge of the material facts surrounding the formation and validity of the contract. In fact, while TWC was generally aware that Leeds had threatened some sort of claim against Chako, it was unaware that the Leeds contract existed prior to being served with Leeds' FAC. Any judgment rendered in the Chako defendants' absence would be based on incomplete facts and would therefore be inadequate.

4. Leeds has an adequate remedy if the action is dismissed for nonjoinder.

The court's dismissal of the action was without prejudice. Such a dismissal does not prevent Leeds from bringing a new action against the same defendants. Moreover, Leeds could bring this new action in the same court where he filed this action because there are no jurisdictional problems there: Chako's relevant acts occurred in Los Angeles County and all parties did business in Los Angeles County. Additionally, Toberoff provided Leeds with Chako's last known addresses and other contact information in discovery.

Leeds argues that if the action is dismissed for nonjoinder, he would no longer have an adequate remedy because "the additional time lag attributable to the new filing makes the statute of limitation a much more viable defense." However, Leeds provides no evidence that the statute of limitations would apply in this action. Furthermore, Leeds is responsible for his situation, as he failed to serve the Chako defendants despite ample time, more time than authorized by California Rule of Court, rule 3.110(b). "This situation, however, is of [Leeds's] own making and, therefore, does not weigh in [Leeds's] favor." (*Tracy Press, Inc. v. Superior Court*, *supra*, 164 Cal.App.4th at p. 1302.)

The trial court did not abuse its discretion.

DISPOSITION

The order is affirmed. Respondents are to recover their costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J. CHANEY, J.