Filed 10/12/17 Jean Technology, Inc. v. NJDY Apparel, LLC CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JEAN TECHNOLOGY, INC., Plaintiff and Appellant, v. NJDY APPAREL, LLC, Defendants and Respondents.	B271900 (Los Angeles County Super. Ct. No. BC563573)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michelle R. Rosenblatt, Judge. Affirmed.

Ilson New for Plaintiff and Appellant.

Steptoe & Johnson, Jason Levin for Defendants and Respondents.

Appellant Jean Technology, Inc. (Jean Technology) appeals from a judgment of dismissal after the trial court sustained without leave to amend a demurrer to the second amended complaint filed by respondents Steve Brink, Viviana Garcia, Ana Gonzales, Victoria Gutman, Patty Orellana, Rocio Ramirez, Cecila Reyes and Robert C. Skinner, Jr. (collectively, Respondents). Respondents worked for NYDJ Apparel, LLC (NYDJ), a manufacturer and seller of garments. From April 1, 2011, to October 20, 2014, NYDJ entered into approximately 2,300 contracts with Jean Technology to sew its garments. Jean Technology contends that after it had fully performed its obligations under each contract, Respondents improperly refused to pay Jean Technology's invoices without discount, knowing Jean Technology would suffer economic losses. Jean Technology sued Respondents for damages, alleging claims for wire fraud and extortion in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO). The trial court sustained Respondents' demurrer to the RICO claims without leave to amend, ruling, inter alia, "the second amended complaint merely show[ed] that the interaction between the parties was just part of ordinary business." We agree and affirm the judgment of dismissal.

BACKGROUND[1]

NYDJ manufactures and sells garments. Jean Technology's second amended complaint alleges that from April 1, 2011, to October 20, 2014, NYDJ, assisted by Steve Brink (Brink), Viviana Garcia (Garcia), Ana Gonzales (Gonzales), Victoria Gutman (Gutman), Patty Orellana (Orellana), Rocio Ramirez (Ramirez), Cecila Reyes (Reyes) and Robert C. Skinner, Jr.

---

1 In reviewing the trial court's decision to sustain a demurrer, we must accept as true all material allegations of fact that are well-pleaded in the complaint. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

(Skinner), engaged in a fraudulent scheme to obtain Jean Technology's money by "means of false representations, or promises."[2] During this time period, NYDJ entered into 2,300 contracts to utilize Jean Technology's services as a garment assembler to sew garments for NYDJ. Once Jean Technology had completed its duties on each contract, NYDJ "repudiated" the contract by threatening to withhold payment unless it received a discount from the price it had originally agreed to pay for the services of Jean Technology. NYDJ's requested discounts were in direct violation of California Code of Regulations, title 8, section 13569, which required the price for garment contracts to be in writing.

Brink and Skinner supervised the fraudulent scheme. Reyes "routinely represented" the purchase orders were "accurate" as to "price[,] terms and conditions," even though none of the purchase orders made any reference to price deductions. Garcia, Gutman, Orellana, Ramirez and Gonzales sent e-mails to Jean Technology after its contractual duties were completed, demanding the discounts. NYDJ's requested discounts were also "unpredictable" because "NYDJ policies and procedures for [discounts] kept changing." As a result of Respondents' actions, Jean Technology suffered damages in the amount of $210,000.

On May 12, 2015, Jean Technology filed its second amended complaint against Respondents and others[3] in the Los Angeles Superior Court, alleging

---

[2] Jean Technology also alleged that NYDJ operated "in tandem" with defendant NYDJ Production, LLC (NYDJ Production) and defendant NYDJ Retail, LLC (NYDJ Retail), which together formed a RICO "enterprise."

[3] The complaint, originally filed on December 5, 2014, and amended on December 9, 2014, also asserted claims against defendants NYDJ, NYDJ Production, NYDJ Retail (collectively, Corporate Defendants) and Mackey J. McDonald (McDonald). On January 8, 2015, the Corporate Defendants filed

causes of action for: (1) breach of contract, (2) open book account, (3) wire fraud (RICO), (4) extortion (RICO), and (5) unfair business practices (UCL).[4] Jean Technology's only claims asserted against Respondents were RICO violations.

On June 1, 2015, Respondents filed a notice of removal of the action to the United States District Court for the Central District of California based on the RICO claims. Jean Technology filed a motion to remand, which the district court granted, and the action was remanded to the superior court.

On September 28, 2015, Respondents filed their amended demurrer to the second amended complaint, arguing the RICO claims should be dismissed because: (1) "[e]ven if misrepresentation of price terms could give rise to a RICO [wire fraud] action, the [second amended complaint] fail[ed] to specify 'the time, place, and specific content' of the allegedly fraudulent contact by **each** defendant" (original emphasis); and (2) "[t]he threat to withhold payment on a contract [was] neither the use of 'force, violence, or fear'" under a RICO extortion claim.

On December 8, 2015, the trial court sustained the demurrer to the RICO claims without leave to amend. As to the wire fraud claim, the trial court ruled (a) Jean Technology "failed to plead a fraud claim with specificity"

---

a demurrer to the first amended complaint, which the trial court sustained with leave to amend. The second amended complaint did not assert any claims against defendant McDonald.

[4] The second amended complaint attached as exhibits a spreadsheet created by Jean Technology, consisting of the alleged "essential terms and conditions" of the 2,300 garment contracts and "actual replicas" of documentation in support of the spreadsheet. In evaluating the ruling on demurrer, we consider "evidentiary facts found in recitals of exhibits attached to a complaint." (*Satten v. Webb* (2002) 99 Cal.App.4th 365, 375.)

because "the alleged fraudulent misrepresentations necessarily would have been needed to occur prior to or in conjunction with each purchase order" and (b) "entirely missing" from the second amended complaint were "any facts showing what actual statements were allegedly made, when they were made, or how they were made." It also ruled that it would be "impossible" for Jean Technology to adequately allege "reasonable reliance" because it was "apparent that [Jean Technology] was aware of, or at least should have been aware of, the discounts" and therefore "its expectation that it would be paid the gross amount on each purchase order was not reasonable." As to the extortion claim, the trial court ruled Jean Technology did not "adequately allege any fraudulent conduct" because "[o]nce [it] was aware of Defendants' insistence on taking a discount on the contracts as early as April 2011, [it] cannot plausibly claim that it was being extorted every time thereafter." [5]

On December 23, 2015, Jean Technology filed a motion for reconsideration, arguing the trial court should reverse its ruling on the RICO claims because: (1) new evidence revealed that NYDJ Production was the only NYDJ party that entered into a contract with Jean Technology and therefore NYDJ had "no claim of right" to the discounts; and (2) the United States Supreme Court in *Bridge v. Phoenix Bond & Indemn. Co.* (2008) 553

---

[5] The demurrer to the second amended complaint was also filed on behalf of the Corporate Defendants, who challenged the breach of contract, open book account and UCL claims asserted against them. The trial court overruled the demurrer to the breach of contract claim against NYDJ, sustained with leave to amend the breach of contract claim against NYDJ Production and NYDJ Retail, and sustained without leave to amend the open book account and UCL claims. On February 16, 2016, Jean Technology filed a third amended complaint, asserting only a breach of contract claim against NYDJ and NYDJ Production, which has yet to be resolved. On May 20, 2016, the trial court stayed the action pending the outcome of this appeal.

U.S. 639, 648-649 (*Bridge*), held that "reasonable reliance" was not a necessary element of a RICO fraud claim.

On February 3, 2016, the trial court denied Jean Technology's motion, ruling: (1) the new evidence had no bearing on the RICO claims because Jean Technology "never alleged that the identity of the contracting party was a basis of the fraud and it is not at all clear how the change from one contracting party to another would change the analysis"; and (2) the RICO wire fraud claim still failed even if "reliance need not be shown . . . due to lack of any misrepresentation."

On April 19, 2016, the trial court entered judgment in favor of Respondents and the action against them was dismissed with prejudice. On April 28, 2016, Jean Technology filed a timely notice of appeal.[6]

---

[6] An appeal is permissible "when the case involves multiple parties and a judgment is entered which leaves no issue to be determined as to one party." (*Justus v. Atchison* (1977) 19 Cal.3d 564, 568, disapproved on other grounds in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 171.) Here, after judgment was entered in favor of Respondents, there were no issues left to be determined between Jean Technology and Respondents.

CONTENTIONS[7]

Jean Technology contends the trial court erred in granting Respondents' demurrer to its RICO claims by substituting pleading requirements that had "no support in federal law." As to the RICO wire fraud claim, Jean Technology contends the trial court ruled it failed to plead reasonable reliance; however, in *Bridge*, *supra,* 553 U.S. at pages 648-649, the United States Supreme Court held that a party "could be injured by the pattern of mail fraud . . . even if they did not rely on the misrepresentations" as long as a third party relied on the misrepresentations. Jean Technology argues it stated a valid RICO wire fraud claim because it alleged "the fraudulent representation had its intended effect: making it appear to [Jean Technology's] fellow contractors, to garment workers, to the Labor Commissioner, to investors, to tax authorities, and even to the Court that NYDJ had a legitimate claim of right regardless of absence of such a claim of right in the purchase orders."

---

[7] Although the UCL claim is only asserted against NYDJ, NYDJ Production and NYDJ Retail, the body of the complaint on that claim contains allegations against Respondents. (Respondents "engaged in unlawful, fraudulent, or unfair acts or practices . . . which acts or practices constitute unfair competition within the meaning of [UCL] . . . .") Thus, we will address the UCL cause of action. (*City of Pomona v. Superior Court* (2001) 89 Cal.App.4th 793, 800 ["The complaint must be construed liberally by drawing reasonable inferences from the facts pleaded."] Jean Technology contends if either of its RICO claims is viable, then it has a valid UCL claim. While we recognize a cause of action alleging unfair business practices may be based on a "borrowed" statute (*Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 383), because we conclude neither of the RICO claims is valid, there is no basis upon which the UCL claim can be reinstated against Respondents.

As to the RICO extortion claim, Jean Technology contends the trial court failed to consider the fact that NYDJ had no "claim of right" to the discounts because the discounts were in direct violation of California Code of Regulations, title 8, section 13569. It further argues it stated a valid RICO extortion claim because it alleged "extortionate acts amount[ed] to 'give up your claim of right on after-the-fact-of-delivery price reductions or we will ruin you by nonpayment of the entire purchase order.'"

DISCUSSION

I. Standard of Review

"The standard governing our review of an order sustaining a demurrer is well established. We review the order de novo, 'exercising our independent judgment about whether the complaint states a cause of action as a matter of law. [Citations.]'" (*Lefebvre v. Southern California Edison* (2016) 244 Cal.App.4th 143, 151.) "[W]e accept the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or conclusions of fact or law. We may also consider matters subject to judicial notice." (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924.) "In addition, we give the complaint a reasonable interpretation, and read it in context. [Citation.] If the trial court has sustained the demurer, we determine whether the complaint states facts sufficient to state a cause of action." (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

II. The Trial Court Properly Sustained Respondents' Demurrer Without Leave to Amend to Jean Technology's RICO Claims

a. RICO in General

RICO, codified at title 18 United States Code sections 1961 to 1968, "is aimed at 'racketeering activity'" and "creates a private cause of action for treble damages by providing '[a]ny person injured in his business or property

by reason of a violation of section 1962 of this chapter may sue . . . and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.' (18 U.S.C. § 1964(c).)" (*Gervase v. Superior Court* (1995) 31 Cal.App.4th 1218, 1228 (*Gervase*).)[8]

In order to state a cause of action under RICO, a plaintiff must allege: "'(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as "predicate acts") (5) causing injury to plaintiff's business or property.'" (*United Bhd. of Carpenters & Joiners of Am. v. Bldg. & Const. Trades Dep't, AFL-CIO* (9th Cir. 2014) 770 F.3d 834, 837 (*United Bhd. of Carpenters & Joiners of Am.*).) For an act or omission to qualify as racketeering activity, it must be included in the list of prohibited activities set forth in title 18 United States Code section 1961(1).[9] (*Gervase*, *supra*, 31 Cal.App.4th at p. 1232.)

The issue presented on this appeal is whether Jean Technology properly pled that Respondents engaged in racketeering activity through wire fraud (18 U.S.C. § 1343)[10] and extortion (18 U.S.C. § 1951.)[11]

---

[8] Our Supreme Court has held that state courts have concurrent jurisdiction over RICO claims. (*Cianci v. Superior Court* (1985) 40 Cal.3d 903, 908.) In exercising this jurisdiction, we interpret "federal statutory law"; "the decisions of the United States Supreme Court are binding[,] and the decisions of the lower federal courts are entitled to great weight." (*Gervase*, *supra*, 31 Cal.App.4th at p. 1228–1229.)

[9] Title 18 United States Code section 1962(c) also provides in relevant part: "It shall be unlawful for any person employed by or associated with any enterprise engaged in . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ."

[10] Title 18 United States Code section 1343 provides in relevant part: "Whoever, having devised or intending to devise any scheme or artifice to

b. RICO Wire Fraud Claim

To properly plead a violation of the wire fraud statute, a plaintiff must allege: "(1) the formation of a scheme or artifice to defraud; (2) use of the United States wires or causing a use of the United States wires in furtherance of the scheme; and (3) specific intent to deceive or defraud." (*Schreiber Distrib. Co. v. Serv-Well Furniture Co.* (9th Cir. 1986) 806 F.2d 1393, 1400 (*Schreiber*).) The term "defraud" is given its established common law meaning. (*Neder v. United States* (1999) 527 U.S. 1, 21-25.) In California, fraud must be pled with specificity, which requires "'*facts* which "show how, when, where, to whom, and by what means the representations were tendered."'"[12] (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645, original italics.) The electronic communication "need not itself be untruthful or otherwise constitute the fraud;" rather "[i]t is enough that the [electronic communication] be used as part of a 'lulling' scheme by reassuring the victim

---

defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both."

[11] Title 18 United States Code section 1951(a) provides in relevant part: "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both."

[12] "Both state and federal rules for pleading fraud require that fraud be alleged with specificity . . . ." (*Gervase,* 31 Cal.App.4th at p. 1243, fn. 16.)

that all is well and discouraging him from investigating and uncovering the fraud." (*Gervase*, 31 Cal.App.4th at p. 1246.)

Here, Jean Technology's wire fraud claim is patently deficient because the facts alleged in the second amended complaint fall short of establishing Respondents' participation in the "scheme to defraud" was fraudulent. Although Jean Technology alleged that Reyes's "represent[ions]" concerning the "price[,] terms and conditions" of the purchase orders were "untrue," it failed to plead with specificity the circumstances surrounding the alleged fraudulent act which would show the representations were in fact false when made. (*Schreiber*, *supra*, 806 F.2d at p. 1400 ["'the circumstances constituting fraud [must] . . . be stated with particularity'"].) As Respondents point out, "without the *when* allegation, it is impossible to identify the contracts to which her statement pertained." (*In re Countrywide Financial Corp. Mortg. Marketing* (S.D.Cal. 2009) 601 F.Supp.2d 1201, 1215 [dismissing RICO wire fraud claim against individual defendants because allegations did not specify the exact time and place of the misrepresentations]; *People ex rel. Sepulveda v. Highland Fed. Savings & Loan* (1993) 14 Cal.App.4th 1692, 1715 [RICO wire fraud claim "totally deficient" because "[n]o facts [were] alleged to show the nature of such conversations or the place and time thereof"].) Thus, Reyes's alleged *representations* are too vague and conclusory to constitute actionable *misrepresentations*.

The statements allegedly made by Garcia, Gutman, Orellana, Ramirez and Gonzales also fail to constitute actionable misrepresentations. Jean Technology alleged these respondents sent e-mails improperly demanding discounts after its contractual duties were completed. The second amended complaint, however, does not explain how such statements were fraudulent;

rather, it acknowledges the statements were true. ("Said [discounts] were [NYDJ's] prerequisite to any payment by [NYDJ] on [Jean Technology's invoice"].) Thus, statements made by Garcia, Gutman, Orellana, Ramirez and Gonzales are not actionable misrepresentations because there are no "facts from which an inference of fraud [can] be drawn." (*Comwest, Inc. v. American Operator Services, Inc.* (C.D.Cal. 1991) 765 F.Supp. 1467, 1471.)

Finally, Jean Technology's allegation, without more, that Brink and Skinner "supervised the scheme" is also deficient. "'It is not enough for plaintiffs to make group allegations in such a situation because collective responsibility is not self-evident. Each defendant is entitled to know what misrepresentations are attributable to them and what fraudulent conduct they are charged with.'" (*Comwest. v. American Operator Services, Inc., supra*, 765 F.Supp. at pp. 1471-1472 [dismissing RICO wire fraud claim against individual defendants because the complaint failed "to attribute any misrepresentation or act of fraud to any of the individual defendants"].) Jean Technology was required to allege "'the roles of [Brink and Skinner] in sufficient detail,'" which it failed to do. (*Ibid.*)

Because Jean Technology failed to allege, with sufficient specificity, a scheme to defraud attributable to Respondents, we need not and decline to address Jean Technology's other contentions related to this claim.

c. RICO Extortion Claim

Jean Technology alleged an extortion claim under the Hobbs Act, which defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." (18 U.S.C. § 1951(b)(2).) Jean Technology alleged it was forced to deduct discounts from its invoices due to Respondents' threats to withhold payment, which Respondents knew would

cause it to face economic losses. Although fear, under the Hobbs Act, can include "fear of economic loss," the trial court ruled that Jean Technology failed to state a valid RICO extortion claim because the "fear" it experienced "was just a part of ordinary business" and therefore did not rise to the level of "extortion." We agree.

"'[T]he fear of economic loss is a driving force of our economy that plays an important role in many legitimate business transactions.' [Citation.] Courts must therefore differentiate between legitimate use of economic fear—hard bargaining—and wrongful use of such fear—extortion." (*United Bhd. of Carpenters & Joiners of Am.*, *supra*, 770 F.3d at p. 838.) The illegitimate use of fear occurs only "where the obtaining of the property would itself be 'wrongful' because the alleged extortionist ha[d] no lawful claim to that property." (*United States v. Enmons* (1973) 410 U.S. 396, 400.)

Here, relying on *Richmark Corp. v. Timber Falling Consultants, Inc.* (D.Or. 1990) 730 F.Supp. 1525, 1530 (*Richmark*), Jean Technology contends the e-mails sent by Respondents were "extortion letters" because there was nothing in the purchase orders to support NYDJ's claim to discounts since "[a]ny so-called 'hard bargaining' was over at the time that [Jean Technology] electronically accepted the contract."

In *Richmark*, defendant corporation filed a counterclaim against plaintiff corporation, alleging, among other things, a RICO extortion claim. (730 F.Supp. at pp. 1530-1531.) Plaintiff and defendant had entered into a contract for six shipments of logs. (*Id.* at p. 1527.) After defendant financially extended itself in order to comply with the contract, plaintiff's corporate officers implied that plaintiff would not perform under the contract unless defendant made "various contract concessions," including paying a "kickback" to a personal bank account. (*Id.* at p. 1530.) The district court

ruled such allegations adequately alleged the predicate act of extortion. (*Id.* at p. 1531.)

Jean Technology's reliance on *Richmark* is misplaced. Here, Respondents did not request additional monies (i.e., kickbacks) from Jean Technology for services it never performed; rather, the e-mails sent by Respondents suggest a continuing dispute over pricing terms. NYDJ believed it was entitled to discounted services, which Jean Technology now clearly disputes. As the trial court noted, "[o]nce [Jean Technology] was aware of [NYDJ's] insistence on taking a discount on the contracts as early as April 2011, [Jean Technology] cannot plausibly claim that it was being extorted every time thereafter." Because Jean Technology "remained free to reject [NYDJ's terms] and to sue for breach of contract," Respondents' actions do not rise to level of extortion. (*Rennell v. Rowe* (7th Cir. 2011) 635 F.3d 1008, 1014 [dismissing RICO extortion claim when "[defendant] was engaged in nothing more than unpleasant hard dealing"].)

III. The Trial Court Did Not Abuse Its Discretion in Denying Leave to Amend

"'If we see a reasonable possibility that the plaintiff could cure the defect by amendment, then we conclude that the trial court abused its discretion in denying leave to amend. If we determine otherwise, then we conclude it did not.' [Citation.] '"The burden of proving such reasonable possibility is squarely on the plaintiff."' [Citation.] To satisfy this burden, '"a plaintiff 'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading"' by clearly stating not only the legal basis for the amendment, but also the factual allegations to sufficiently state a cause of action." (*Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 618.)

Jean Technology has failed to explain how, if given another opportunity, it would amend its complaint to properly assert a claim. Accordingly, there is no basis upon which to reverse the trial court's denial of leave to amend.

DISPOSITION

The judgment of dismissal is affirmed. Respondents are to recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

GOODMAN, J.*

We concur:

ASHMANN-GERST, Acting P.J.

CHAVEZ, J.

---

* Retired judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.