SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
HALL OF JUSTICE
TENTATIVE RULINGS - March 26, 2010

EVENT DATE: 04/09/2010 EVENT TIME: 02:00:00 PM DEPT.: C-62

JUDICIAL OFFICER:Ronald L. Styn

CASE NO.: 37-2008-00090684-CU-BT-CTL

CASE TITLE: SAN DIEGOCOUNTY SCHOOLS FRINGE BENEFITS CONSORTIUM VS. ALLRED

CASE CATEGORY: Civil - Unlimited CASE TYPE: Business Tort

EVENT TYPE: Summary Judgment / Summary Adjudication (Civil)
CAUSAL DOCUMENT/DATE FILED: Notice of Motion and Supporting Declarations, 12/07/2009

The court first addresses the evidentiary objections. Cross-Defendants Plaintiff San Diego County Schools Fringe Benefits Consortium and Diane Crosier's evidentiary objections 4, 5, 28, 84, 105, are sustained; 1-3, 6-27, 29-32, 34-104, 106, 108-223, 227, 228, 230, 234-249 are overruled; objections 224-225, 229, 231 and 232 are overruled for failure to comply with California Rule of Court, Rule, 3.1354; objections 33, 107, 226 and 233 are overruled because the objected to testimony is not specified.

The court then rules as follows. Cross-Defendants Plaintiff San Diego County Schools Fringe Benefits Consortium and Diane Crosier's motion for summary judgment is denied. The Consortium/Crosier's alternate motion for summary adjudication is granted in part and denied in part.

Breach of Oral or Implied Contract (as against the Consortium)

- *Barry Allred, Christopher Dougherty, Cristinha Furtado, Lori Lin, Mary Seki and Michael Zeiger*

The Consortium/Crosier's motion for summary adjudication is **granted.** The court finds the Advisors' cross-complaint subject to the claim presentation requirements of Government Code §900 et seq. The Advisors' reliance on *Krainock v. Superior Court* (1990) 216 Cal.App.3d 1473 is misplaced. The limited exemption from the claims presentation requirement set forth in *Krainock* is applicable only to cross-complaints which "assert only defensive matter." *Krainock*, 216 Cal.App.3d at 1478. ["That is, a cross-complaint may be filed without a governmental claim as a prerequisite if it is limited to claims " . . . which, if successful, would destroy or diminish the plaintiff's recovery, but not to claims for affirmative relief." (Van Alstyne, *op. cit. supra*, at p. 451.) *Krainock*, 216 Cal.App.3d at 1478.] The cross-complaint at issue in *Krainock* sought only indemnity and declaratory relief. Conversely, the Advisors' cross-complaint asserts causes of action for breach of oral/implied contract, breach of written contract, intentional interference with prospective economic advantage and unfair competition and seeks damages and other affirmative relief [SSUMF 6].

The court finds the Advisors' Government Claim is insufficient to include Advisors Allred, Dougherty, Lin,

Seki and Zeiger's cause of action for "breach of oral or implied contract." The court finds the facts presented more analogous to those in *Fall River Joint Unified School District v. Superior Court* (1988) 206 Cal.App.3d 431 and *Donohue v. State of California* (1986) 178 Cal.App.3d 795 than those in *Stockett v. Association of California Water Agencies Joint Powers Insurance Authority* (2004) 34 Cal.4th 441. The Advisors' Government Claim as to Allred, Dougherty, Lin, Seki and Zeiger is specifically premised on "signed contracts." In contrast, the Advisors' Government Claim as to Furtado is specifically premised on "an oral or implied contract." [SSUMF 4-5] However, the Advisors cross-complaint alleges a cause of action for breach of oral or implied contract on behalf of all of the Advisors. [SSUMF 6] As summarized in *Fall River*,

Government Code section 945.4 requires, as a prerequisite to maintenance of an action against a public entity for damages arising out of an alleged tort, the timely filing of a claim, and its rejection. Section 910 provides that the claim must include a general description of the injuries and the names of the public employees who caused them. Furthermore, "If a plaintiff relies on more than one theory of recovery against the [governmental agency], each cause of action must have been reflected in a timely claim. In addition, the factual circumstances set forth in the written claim must correspond with the facts alleged in the complaint; even if the claim were timely, the complaint is vulnerable to a demurrer [or motion for judgment on the pleadings] if it alleges a factual basis for recovery which is not fairly reflected in the written claim.' [Citations omitted.]" (*Donahue* v. *State of California* (1986) 178 Cal.App.3d 795, 802-803 [224 Cal.Rptr. 57].)

Fall River, 206 Cal.App.3d at 434 citing *Donahue*, 178 Cal.App.3d at 802-803. In rejecting the plaintiff's argument for substantial compliance, *Fall River* reasons,

. . . as pointed out by the *Donahue* court, such an argument is unavailing where the plaintiff seeks to impose upon the defendant public entity the obligation to defend a lawsuit based upon a set of facts entirely different from those first noticed. Such an obvious subversion of the purposes of the claims act, which is intended to give the governmental agency an opportunity to investigate and evaluate its potential liability, is unsupportable. [Citation omitted.] Here, defendant was given no warning that it might be sued for its employee's failure to supervise plaintiff and his fellow students, and had no opportunity to consider the validity of such a claim until the filing of the amended complaint. Accordingly, insofar as his third cause of action is concerned, plaintiff did not even rise to the level of minimal, much less substantial, compliance with the claim filing prerequisites.

Fall River, 206 Cal.App.3d at 435-436 citing *Donahue*, 178 Cal.App.3d at 804.

As pled, the conduct giving rise to the breach of oral or implied contract occurred earlier than the conduct giving rise to the breach of written contract cause of action. [SSUMF 6] The breach of oral or implied contract is pled a separate and alternate cause of action. [SSUMF 6] As to Advisors Allred, Dougherty, Lin, Seki and Zeiger the breach of oral or implied contract cause of action is a new theory based on a different set of facts from those placed at issue in the Advisors' Government Claim (i.e. "signed contracts"). Therefore, Advisors Allred, Dougherty, Lin, Seki and Zeiger's cause of action for breach of oral or implied contract is barred for failure to comply with the claim presentation requirements of Government Code §900 et seq.

- *Furtado*

The Consortium/Crosier's motion for summary adjudication is **denied.** The Consortium's motion is

premised on Advisor Furtado's acceptance of the terms of the written contract. However, the Advisors submit evidence that Furtado refused to sign the written contract, despite being asked on several occasions by representatives of the Consortium to do so. [SSUMF 9-11, 13-14] "It is fundamental that every contract requires mutual assent or consent. (Civ. Code, § 1550; 1 Witkin, Summary of Cal. Law (1960) p. 39.) The determination whether it is present is made by the use of an objective test, the manifestations or expressions of assent being controlling. (*King* v. *Stanley*, 32 Cal.2d 584, 591 [197 P.2d 321].) (2) "Mutual assent is gathered from the reasonable meaning of the words and acts of the parties, and not from their unexpressed intentions or understanding." (1 Witkin, Summary of Cal. Law (1960) p. 39.)" *Russell v. Union Oil Company* (1970) 7 Cal.App.3d 110, 114. In light of evidence Furtado refused to sign the written contract, the Consortium fails to establish the absence of triable issues of material fact as to whether Furtado accepted the terms of the written contract.

Breach of Written Contract (as against the Consortium)

The Consortium/Crosier's motion for summary adjudication is **denied.** The Advisors cross-complaint alleges the Consortium breached the written contracts "when it wrongfully terminated Allred, Dougherty, Lin, Seki and Zeiger suddenly and without notice or cause." [SSUMF 91] The Consortium submits evidence that the Allred, Dougherty, Lin, Seki and Zeiger written contracts "do not contain any provision that discusses any terms of employment, e.g., salary, compensation, benefits, contract duration, or termination provisions. [SSUMF 89] In opposition, the Advisors do not dispute that the written contracts "do not contain material terms, such as compensation or termination" [Advisors' response to SSUMF 89]. Instead the Advisors argue the written contracts are ambiguous and incomplete, are not integrated and, as such, extrinsic evidence is admissible to determine whether the parties agreed the Advisors could only be terminated for cause.

Both the "Independent Contractor Agreement to Serve as Office of Supervisory Jurisdiction (OSJ)" and the Registered Representative Agreement contain integration clauses. However, the question of integration is not determined from the written document alone. *Brawthen v. H&R Block, Inc.* (1975) 52 Cal.App.3d 139 citing *Brawthen v. H&R Block, Inc.* (1972) 28 Cal.App.3d 131 and *Masterson v. Sine* (1968) 68 Cal.2d 222. Rather,

[e]xtrinsic evidence as well as the document must be considered. "The language of the writing is an important consideration, particularly where it recites that all understandings of the parties are contained therein; these are the so-called words of 'integration' [citation]. But the determination may not be made from the writing alone [citations]; the proffered collateral parol agreement itself must be considered, as well as the circumstances surrounding the transaction, and its subject matter, nature and object. [Citations.]" (*Brawthen* v. *H & R Block, Inc., supra*, at p. 137.)

Brawthen, 52 Cal.App.3d at 144.

Accordingly, rational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties. (Civ. Code, § 1647; Code Civ. Proc., § 1860; see also 9 Wigmore on Evidence, *op. cit. supra*, § 2470, fn. 11, p. 227.) Such evidence includes testimony as to the "circumstances surrounding the making of the agreement . . . including the object, nature and subject matter of the writing . . ." so that the court can "place itself in the same situation in which the parties found themselves at the time of contracting." (*Universal Sales Corp.* v. *California Press Mfg. Co., supra*, 20 Cal.2d 751, 761; *Lemm* v. *Stillwater Land & Cattle Co., supra*, 217 Cal. 474, 480-481.) If the court

decides, after considering this evidence, that the language of a contract, in the light of all the circumstances, "is fairly susceptible of either one of the two interpretations contended for . . ." (*Balfour* v. Fresno C. & I. Co. (1895) 109 Cal. 221, 225 [41 P. 876]; see also, *Hulse* v. *Juillard Fancy Foods Co., supra*, 61 Cal.2d 571, 573; *Nofziger* v. *Holman, supra*, 61 Cal.2d 526, 528; *Reid* v. *Overland Machined* Products, supra, 55 Cal.2d 203, 210; *Barham* v. *Barham* (1949) 33 Cal.2d 416, 422-423 [202 P.2d 289]; *Kenney* v. *Los Feliz Investment Co*. (1932) 121 Cal.App. 378, 386-387 [9 P.2d 225]), extrinsic evidence relevant to prove either of such meanings is admissible.
Pacific Gas and Electric Company v. G.W. Thomas Drayage & Rigging Company, Inc. (1968) 69 Cal.2d 33, 39-40.

Thus,
[p]arol or extrinsic evidence is admissible to resolve an ambiguity. (*Garcia v. Truck Ins. Exchange* (1984) 36 Cal. 3d 426, 435 [204 Cal. Rptr. 435, 682 P.2d 1100]; *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co*. (1968) 69 Cal. 2d 33, 38 [69 Cal. Rptr. 561, 442 P.2d 641, 40 A.L.R.3d 1373]; Code Civ. Proc., § 1856, subd. (g).) In such cases, the court engages in a two-step process: "First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine 'ambiguity,' i.e., whether the language is 'reasonably susceptible' to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is 'reasonably susceptible' to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step--interpreting the contract. [Citation.]" (*Winet v. Price* (1992) 4 Cal. App. 4th 1159, 1165 [6 Cal. Rptr. 2d 554].) The trial court's determination of whether an ambiguity exists is a question of law, subject to independent review on appeal. (*Ibid*.) The trial court's resolution of an ambiguity is also a question of law if no parol evidence is admitted or if the parol evidence is not in conflict. However, where the parol evidence is in conflict, the trial court's resolution of that conflict is a question of fact and must be upheld if supported by substantial evidence. (*Id*. at p. 1166.) Furthermore, "[w]hen two equally plausible interpretations of the language of a contract may be made . . . parol evidence is admissible to aid in interpreting the agreement, thereby presenting a question of fact which precludes summary judgment if the evidence is contradictory." (*Walter E. Heller Western, Inc. v. Tecrim Corp*. (1987) 196 Cal. App. 3d 149, 158 [241 Cal. Rptr. 677].)
Wyda Associates v. Merner (1996) 42 Cal.App.4th 1702, 1709-1710.

The Advisors' submit evidence that at the time Allred began working as a Registered Representative the Consortium promised Allred that if he performed according to expectations, he would not be terminated unless he did something illegal or unethical [Advisors' response to SSUMF 84] and that Allred agreed to sign the OCJ Agreement based on the Consortium's representations that it was consistent with his then-existing implied contract [Advisors' response to SSUMF 84]. The OSJ Agreement provides, in part:

- TERM AND TERMINATION

This Agreement shall commence on the date of execution by OSJ. Superintendent and the OSJ may terminate this Agreement at any time upon mutual consent with a thirty-day (30) written notice. In addition, the Superintendent may terminate this Agreement for material and/or recurring breaches by the OSJ of his/her obligations under this Agreement. The Superintendent may terminate this Agreement for cause at any time without notice.

[SSUMF 84] The OSJ Agreement also provides that the OSJ is responsible for the Registered Representatives. [SSUMF 84]

The Advisors submit evidence Advisors Dougherty, Seki, Zeiger and Lin entered into the same or similar oral or implied contracts with the Consortium (i.e. if they performed according to expectations, they would not be terminated unless they did something illegal or unethical [Advisors' response to SSUMF 3] and that they agreed to sign the Registered Representative Agreement based on the Consortium's representations that these agreements were consistent with the Advisor's then-existing contracts with the Consortium [Advisors' response to SSUMF 86]. The Registered Representative Agreement does not contain a termination provision. [SSUMF 89] At the time of his termination Allred was a Registered Representative, Seki was the OSJ; Allred did not sign a Registered Representative Agreement and Seki did not sign an OSJ Agreement. [Advisors' response to SSUMF 89, 92, 93].

On summary judgment the court draws all reasonable inferences in the light most favorable to non-moving party. *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843. The fact that, following his time as OSJ, Allred continued as a Registered Representative without signing a Registered Representative and that Seki filled the OSJ role without signing the OSJ Agreement demonstrates the parties relationship included agreements and understandings not fully reflected in the written contracts. Considering this evidence and considering evidence of the relationship between the Advisors and the Consortium prior to the written contracts, evidence of the parties pre-existing agreement regarding termination for performance or "something illegal or unethical," considering the termination for breach and for cause provisions of the OSJ Agreement, and evidence of the overall on-going relationship between the Consortium and the Advisors (including the OSJ) the court finds the written agreements reasonably susceptible to the meaning urged by the Advisors (i.e. the Advisors' could only be terminated for cause). Thus, the proffered extrinsic evidence is admissible to prove the meaning agreed to by the parties. The court finds the Consortium and the Advisors' interpretation of the written contracts equally plausible. Therefore, pursuant to the authorities cited above, the court finds triable issues of material fact as to whether the parties agreed that the Advisors could only be terminated for cause.

Intentional Interference with Prospective Economic Advantage (as against Crosier)

The Consortium/Crosier's motion for summary adjudication is **denied.** The Consortium relies on the "common interest" privilege as a defense to the Advisors' correspondence-based intentional interference cause of action. CC §47 provides, in part: "A privileged publication or broadcast is one made: . . . . (c) In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information. While the Consortium references these elements in its Points & Authorities it does not cite to its separate statement to provide evidentiary support. The Consortium fails to reference these elements in its separate statement and fails to identify the evidence establishing the applicability of the common interest privilege. Absent establishing these foundational facts, there is no basis to summarily adjudicate this privilege defense, including whether the Advisors' meet their burden of establishing malice. In light of this ruling, the correspondence-based intentional interference theory remains viable. As such, there is no basis to summarily adjudicate the merits of the CalSTRS and SagePoint based claims, or whether these theories are barred for failure to comply with the claim presentation requirements of Government Code §900 et. seq. because such adjudication will not completely dispose of "a cause of action, an affirmative defense, a claim for damages, or an issue of duty." CCP §437c(f)(1).

Unfair Competition (as against Crosier)

The Consortium/Crosier's motion for summary adjudication is **denied.** As to the Consortium's correspondence-based motion, for the reasons stated above, the Consortium fails to establish the applicability of the CC §47(c) communication privilege. The correspondence-based theory remains viable. As such, there is no basis to summarily adjudicate whether the Advisors can establish a "probability of future economic benefit" vis-à-vis CalSTRS and SagePoint and whether the CC §46 and Insurance Code §770.3 based theories are barred for failure to comply with the claim presentation requirements of Government Code §900 et. seq. because such adjudication will not completely dispose of "a cause of action, an affirmative defense, a claim for damages, or an issue of duty." CCP §437c(f)(1).