

**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 DIEGO COUNTY 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 issues. Cross-Defendants Barry Allred, Christopher Dougherty and B&C Investments, Inc.'s evidentiary objections to the Declaration of Daniel Puplava 5, 8 and 10 are sustained; objections 4, 5, 6, 7, 9, 11 and 12 are overruled; objections 1, 2, 3, 4, are overruled because the objected to testimony is not specified. *Fibreboard Paper Products Corporation v. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO, et al.* (1964) 227 Cal.App.2d 675, 712. Cross-Defendants' evidentiary objections to the Declaration of Randall J. Thill 1 and 2 are sustained; objection 4 is overruled; objection 3 is overruled because the objected to testimony is not specified. *Fibreboard*, 227 Cal.App.2d at 712.

The court then rules as follows. Cross-Defendants Barry Allred, Christopher Dougherty and B&C Investments, Inc.'s motion for summary judgment is denied. Cross-Defendants' alternate motion for summary adjudication is denied.

Violation of Right to Privacy – Intrusion into Private Financial Affairs
Violation of Constitutional Right to Privacy

As pled, this cause of action arises out of Cross-Defendants' alleged dissemination of Puplava's commission statements. [FAXC ¶ 23] Puplava submits evidence Allred distributed a commission statement including both the Advisors' DCP commissions and Puplava's commissions for "ancillary" business to individuals outside of B&C. [Puplava Additional Undisputed Material Facts 8, 9] With respect to the commission statement distributed by Allred during the 2006 meeting, Mary Seki testified that Allred reminded them the commission statement included "FBC trails." Drawing all reasonable inferences in the light most favorable to non-moving party, [*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843] it is reasonable to infer that, since Puplava engaged in "ancillary" business [SSUMF 26], and since B&C was responsible for financial documentation of both Puplava's DCP commissions (received on behalf of the Advisors) and Puplava's ancillary business [Puplava response to SSUMF 31], and since B&C issued the commission statement distributed at the 2006 meeting [Puplava response to SSUMF 34] it is reasonable to infer that the commission statement issued by B&C distributed at the 2006 meeting included both DCP commissions and commissions for Puplava's "ancillary" business. Financial information regarding Puplava's "ancillary" business is protected by Puplava's right to privacy.

See, *Carmel-by-the-Sea v. Young* (1970) 2 Cal.3d 259. Cross-Defendants' fail to establish Puplava has a reduced expectation of privacy as to commissions earned from his "ancillary" business.

It is undisputed Puplava entered into an agreement with Allred and Dougherty to join B&C. [SSUMF 29] Puplava submits evidence the Shareholder Agreement contains a confidentiality provision. [Puplava AUMF 4] Puplava also submits evidence Allred distributed a commission statement including both Puplava's DCP commissions and commissions for "ancillary" business. The court finds triable issues of material fact as to whether distribution of a commission statement including commissions for Puplava's "ancillary" business is in breach of the confidentiality provision of the B&C Shareholder Agreement.

Puplava submits evidence that after the commission statement was distributed, anonymous letters were written to the County of Office of Education employees and others asserting that Puplava had earned \$395,000.00 in commissions, even though this figure was the amount of commissions Puplava received on behalf of all of the Advisors [Puplava's response to SSUMF 40] and that following these letters FINRA opened an investigation of Puplava [Puplava's response to SSUMF 41] and the County opened an investigation [Puplava's response to SSUMF 42] the result of which was an Amended Memorandum of Understanding under which Puplava agreed to only service existing "ancillary" business clients and under which Puplava could not obtain any additional new clients. [Puplava response to SSUMF 42] The court finds this evidence sufficient to create triable issues of fact as to whether Allred's distribution of the 2006 commission statement caused Puplava damage. The court is not persuaded by Cross-Defendants reliance on the deposition testimony of Kris Kertzman denying taking Puplava's commission statement and denying authoring the anonymous letters. [SSUMF 44] Puplava submits evidence Kris Kertzman (a former Advisor) obtained the commission statement from Allred and that Kertzman told Randy Thill he would use the commission statement against Puplava. [Puplava response to SSUMF 44-45] Under *Aguilar*, such evidence is sufficient to withstand summary judgment.

Nor is the court persuaded the anonymous letters and/or the subsequent investigations are a superseding cause of Puplava's alleged damages. As stated in *Brewer v. Teano* (1995) 40 Cal.App.4th 1024,

The application of intervening and superseding cause principles has been the subject of a substantial number of appellate decisions, and, in Justice Kaus' phrasing, "[i]t would be idle to pretend that all [of these] cases are easily reconcilable." (*Ewart v. Southern Cal. Gas. Co.* (1965) 237 Cal. App. 2d 163, 170 [46 Cal. Rptr. 631]; see *Pappert v. San Diego Gas & Electric Co.* (1982) 137 Cal. App. 3d 205, 210 [186 Cal. Rptr. 847] [cases collected as of date of decision].)

Brewer, 40 Cal.App.4th at 1032-1033.

In an often quoted passage, Witkin has distilled the following rule: "Where, subsequent to the defendant's negligent act, an independent intervening force actively operates to produce the injury, the chain of causation may be broken. It is usually said that if the risk of injury might have been reasonably foreseen, the defendant is liable, but that if the independent intervening act is highly unusual or extraordinary, not reasonably likely to happen and hence not foreseeable, it is a *superseding* cause, and the defendant is not liable." (6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 975, p. 366; *Akins v. County of Sonoma* (1967) 67 Cal. 2d 185, 199 [60 Cal. Rptr. 499, 430 P.2d 57].)

Brewer, 40 Cal.App.4th at 1032.

In many cases, the issue whether an intervening force is superseding or not is a question of fact for the jury to decide. But, like proximate cause generally, it is a matter of law where only one reasonable conclusion may be reached. (See *Weaver v. Bank of America* (1963) 59 Cal. 2d 428, 434 [30 Cal. Rptr. 4, 380 P.2d 644]; *Schrimsher v. Bryson, supra*, 58 Cal. App. 3d at p. 664; *Pool v. City of Oakland, supra*, 42 Cal. 3d at pp. 1063, 1065.) "Whether a defendant's conduct is an actual cause of a plaintiff's harm is a question of fact, but the existence and extent of a defendant's liability is a question of law and social policy." (*Maupin v. Widling, supra*, 192 Cal. App. 3d at p. 573.)

Brewer, 40 Cal.App.4th at 1035.

None of the cases cited by the parties involve facts sufficiently similar to those presented in this case so as to be of significant assistance on this issue in this case. The court finds that, given Pupilava's position as Deferred Compensation Manager, employed by a public entity, there are triable issues of material fact as to whether it is foreseeable an individual with information allegedly demonstrating Pupilava, a public servant, was engaging in improper practices would be reported (anonymously or otherwise) to other authorities. The court finds that, given the significant regulation of the financial industry, there are triable issues of fact as to whether the investigation by FINRA and the County following the anonymous letter would have been "highly unusual or extraordinary" so as to be a superseding cause.

Breach of Fiduciary Duty
Negligence

The terms of the Shareholder Agreement create a fiduciary duty owed from Cross-Defendants to Pupilava. [SSUMF 98; Pupilava AUMF 6] See, *Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1160-1161. Pupilava submits evidence Allred distributed a commission statement including both the Advisors' DCP commissions and Pupilava's commissions for "ancillary" business to individuals outside of B&C. [Pupilava Additional Undisputed Material Facts 8, 9] The court finds this evidence sufficient to create triable issues of material fact as to whether Cross-Defendants breached their duties to Pupilava. The court is not persuaded by Cross-Defendants argument that Pupilava's DCP commissions were not confidential as to the Advisors because there is evidence the commission statement also included information regarding Pupilava's commissions for his "ancillary" business – information protected by the confidentiality provision of the Shareholder Agreement. Nor is the court persuaded by Cross-Defendants reliance on Pupilava allowing Lincoln Financial access to the database because Pupilava submits evidence Lincoln never accessed any financial information. [Pupilava response to SSUMF 102]

For the reasons stated above, the court finds this evidence sufficient to create triable issues of fact as to whether Cross-Defendants' breach of its duties to Pupilava (i.e., distribution of the 2006 commission statement) caused Pupilava damage.

Breach of Contract

Cross-Defendants rely on the same arguments set forth as to the privacy, breach of fiduciary duty and negligence causes of action to support their motion as to the breach of contract cause of action. For the reasons stated above, the court finds triable issues of material fact as to this cause of action.

Laches

As Puplava correctly states the defense of laches is unavailable in an action at law for damages. *Wells Fargo Bank N.A. v. Bank of America NT&SA* (1995) 32 Cal.App.4th 424, 439. Each of the causes of action pled seek money damages. Cross-Defendants apparently concede their laches defense by failing to address this issue in reply.

Release

Cross-Defendants raise the issue of a release on their reply Points & Authorities and in the issue statements set forth in their amended notice of motion and amended separate statement. Cross-Defendants fail to include any undisputed material facts as to a release in their separate statement and fail to submit evidence of such a release. In their reply, Cross-Defendants refer to the release as being having been submitted by the Advisors in opposition to Puplava's motion for summary adjudication. As Cross-Defendants do not raise this issue until reply, Puplava has been deprived of his opportunity to respond. Accordingly, because Cross-Defendants raise this issue for the first time in reply, and because Cross-Defendants fail to comply with the separate statement requirements *as to this* motion, the court finds summary judgment or summary adjudication based on the release is improper.