

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

PETER BRENNAN, an individual, and
PETER BRENNAN PRODUCTIONS, INC., a
New York corporation,

Plaintiffs,

vs.

BIG TICKET PICTURES, INC., a Delaware
corporation, VIACOM, INC., a Delaware
corporation, PARAMOUNT TELEVISION
GROUP, an entity of unknown form,
SPELLING ENTERTAINMENT GROUP,
INC., a New York corporation, and DOES 1-
50, inclusive,

Defendants.

CASE NO. BC 240430

[Honorable Richard Montes]

**ORDER re: PLAINTIFF'S MOTION
FOR SUMMARY ADJUDICATION and
DEFENDANT BIG TICKET PICTURES,
INC.'S MOTION FOR SUMMARY
JUDGMENT OR IN THE
ALTERNATIVE SUMMARY
ADJUDICATION**

Date: September 20, 2002
Time: 1:30 p.m.
Dept: 34

The motion of defendant Big Ticket Pictures Inc. ("Defendant") for summary judgment against plaintiffs Peter Brennan ("Brennan") and Peter Brennan Productions, Inc. ("PBP") (collectively, "Plaintiffs") and Plaintiffs' Motion for Summary Adjudication came on regularly for hearing before this Court in Department No. 34. Richard B. Kendall and Michael H. Strub, Jr., of Irell & Manella LLP appeared as attorneys for Defendant, and Michael J. Plonsker, David S. Gubman, and Stacy W. Harrison of Alschuler Grossman Stein & Kahan LLP appeared as attorneys for Plaintiffs.

After full consideration of the evidence and points and authorities and the separate statement submitted by both parties, and oral arguments of counsel, it appears and the Court finds that the following facts are not in dispute:

Plaintiff Peter Brennan Productions, Inc. f/s/o Peter Brennan [hereinafter called "Brennan"] entered into a contract with Big Ticket Pictures, Inc., a subsidiary of Spelling

Entertainment Group, Inc. on October 11, 1995, with respect to the show "Her Honor" (later called "Judge Judy"). [Exhibit 8 to Declaration of Michael Strub, Jr. in Support of Big Ticket's Motion for Summary Judgment.] A few weeks later, Judge Judith Sheindlin signed her contract with Big Ticket for the same show. [Exhibit 1 to Declaration of Michael Strub, Jr.]

Under Brennan's contract, plaintiff was to receive compensation based on a series sales bonus for year 1 and year 2; a fee on the series (per week payment) and profits participation. Paragraph 8 of the contract, the provision in dispute, states:

12 1/2 % of 100% of defined proceeds (BTP's standard definition to be negotiated in good faith on a favored nations basis except with respect to the merchandising provision of Judge Judith Sheindlin) in perpetuity for all shows that Artists renders services on. In the even that Artists' option is not picked up. Artist will receive 1/2 of his proportionate amount of defined proceeds for the life of the series.

In the event Artist is rendering executive producer services in Year 2 and other profit participants are not rendering services, we will discuss additional profits to Artist in good faith.

Judge Judith Sheindlin in 1995 also received fixed compensation, merchandising and profit participation. Under this agreement, BTP agreed to pay her 15% of BTP's "standard definition" labeled "Defined Proceeds" (See Exh. P to Plonsker Motion Decl.):

Artist shall also be paid Contingent Compensation in the amount equal to 15% of one hundred percent (100%) of the "Defined Proceeds," if any, derived from the Programs of the Series in which Artist is host. "Defined Proceeds" shall be defined, computed or otherwise accounted pursuant to Exhibit I

Plaintiffs Brennan acknowledged during argument that BTP's standard definition of defined proceeds is contained in Exhibit I to Sheindlin's 1995 contract. Plaintiff Brennan also acknowledged receiving a copy of Exhibit I. (Weiner Declaration).

Plaintiffs Brennan states that disparity between their 12 1/2 % defined proceeds compensation and Judge Sheindlin's 15% defined proceeds compensation is not the object of this suit. Rather, it is the violation of the favored nations provision contained in paragraph 8 of the contract, when defendants renegotiated and improved Judge Sheindlin's formula for compensation without giving plaintiff compensation based upon the same formulation and not negotiated with plaintiff regarding said compensation.¹

¹ The "favored nations" clause of paragraph 8 would seem to compel this conclusion since the reference to Judge Sheindlin indicates that the parties contemplated the Sheindlin contract to be the benchmark for the definition in question.

In 1999, Big Ticket and Judge Sheindlin renegotiated her contract (Exhibit 2 to Straub Declaration). The Sheindlin Agreement was modified to improve Sheindlin's profit definition by giving Sheindlin the benefit of the greater of two calculations: (a) 7 1/2% of an improved calculation labeled "Adjusted Gross Receipts" as an advance against (b) 15% of an improved calculation that BTP continued to label "Defined Proceeds" (See Exh. Q to Plonsker Motion Decl.) Judge Sheindlin's renegotiated definition of defined proceeds is the most favorable definition of defined proceeds, from the standpoint of the profit participant, that anyone on the Judge Judy show receives

Judge Sheindlin's 1999 renegotiated contract also has two attachments, Exhibits I ("Defined Proceeds") and Exhibit II ("Adjusted Gross Receipts").

Exhibit I has the following definitions:

- (A) "Defined Proceeds" means excess, if any, of "Gross Receipts" over the total of the "Distribution Fees," the "Distribution Expenses" and the "Cost of Production" in such order.
- (B) "Gross Receipts" means the aggregate of all monies actually received by a "Producer Company" or a "Sub distribution" including, without limitation, any non-refundable advances, as consideration for the right to exploit the Series, and all rights therein, including, without limitation, the "Subsidiary Rights," in any and all media known and hereafter acquired throughout the world in perpetuity, subject to the provisions of subparagraphs (B)1 through (B)6 below, but excluding any monies received with respect to Merchandise which shall be separately accounted for pursuant to paragraph 11.6 of the Amended Agreement.

Exhibit II contains the same definition for "Gross Receipts" and has the following definition for "Adjusted Gross Receipts:"

"Adjusted Gross Receipts" means an amount equal to the balance of "Gross Receipts remaining, if any, after the deduction of the "Distribution Expenses," the "Cost of Production" and "Overhead" in such Order.

Exhibit II defines "Overhead" as "an amount equal to ten percent (10%) of the total Cost of Production. Other than the foregoing, neither Distribution Expenses nor Cost of Production shall include any charge of any item which constitutes overhead." Exhibit II specifically states that "Distribution Fees" are intentionally omitted.

From the review of Exhibit I and Exhibit II, the difference between the "defined proceeds" and "adjusted gross receipts" is what is deducted from the gross receipts. With "defined proceeds," the distribution fees, distribution expenses and cost of production are

deducted from the gross receipts. With "adjusted gross receipts," the distribution expenses, cost of production and overhead are deducted from the gross receipts.

The definition of "Distribution Fees" as stated by Exhibit I to the 1999 contract shows that substantial amounts of money that would have been deducted were eliminated in the definition of "Adjusted Gross Receipts."² There is a difference in the definition of cost of production between Exhibits I and II.

The instant action is a dispute between the parties regarding the interpretation of paragraph 8 contained in Plaintiffs' contract with defendant Big Ticket in light of the modification of Judge Sheindlin's contract in 1999. Plaintiffs have asserted against Big Ticket Pictures causes of action for breach of contract (first cause of action), breach of the implied covenant of good faith and fair dealing (second cause of action); breach of fiduciary duty (third cause of action); declaratory relief (fifth cause of action); accounting (sixth cause of action); and fraud (seventh cause of action).

Based on the foregoing undisputed facts, the Court makes the following legal conclusions:

A motion for summary judgment or summary adjudication "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Cal. Civ. Proc. Code § 437c; see Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 850. The interpretation of a written contract is solely a judicial function. Parsons v. Bristol Development Co. (1965) 62 Cal. 2d 861, 865. On

² Exhibit I states that "Distribution Fees" means the following percentages of Gross Receipts:

1. Ten percent (10%) for license to the ABC, CBS, NBS, FBC or WB television network authorizing the initial, over-the-air, broadcast of the Episodes, including repeats firmly ordered in connection with such initial broadcast, in prime time;
2. Twenty percent (20%) for licenses to the ABC, CBS, NBS, FBC or WB television network authorizing over-the-air broadcasts other than those referred to in subparagraph 1 above, including, but not limited to, any non-primetime stripping of the Episodes;
3. Thirty-five percent (35%) for all television licenses for exhibition of the Episodes in the United States, other than those referred to in subparagraphs 1 and 2 above;
4. Thirty percent (30%) for all licenses to telecast Episodes on the entire CRC or CTV networks in Canada.
5. Forty-five percent (45%) for all licenses to telecast the Episodes outside of the United States, other than those referred to in subparagraph 4 above;
6. Twenty-five percent (25%) from exploitation of videocassettes;
7. No Distribution Fees shall be charged against the monies payable in Gross Receipts pursuant to (B)1 and (B)3 above.
8. Fifty percent (50%) for all other uses of the Episodes or the elements thereof, whether in the United States or elsewhere.

the other hand, if the contract is ambiguous or uncertain and contradictory extrinsic evidence has been received to explain away the ambiguity or uncertainty, the jury's function is to interpret the contract or the ambiguous portion of the contract. Schmidt v. Macco Construction Co. (1953) 119 Cal.App.2d 717, 733.


Although both parties assert that there is no ambiguity to the contract, the contract is uncertain. The parties have presented contradictory evidence to explain these ambiguity. Therefore, the following triable issues of fact exist with respect to the causes of action for breach of contract (first cause of action), breach of the implied covenant of good faith and fair dealing (second cause of action); breach of fiduciary duty (third cause of action); declaratory relief (fifth cause of action); and accounting (sixth cause of action):

1. Whether the modification of Judge Sheindlin's contingent compensation, which includes adjusted gross receipts, is in fact merely a variation of the defined proceeds scheme of compensation which would invoke the duty to negotiate with the plaintiff under the favored nations clause of plaintiff's contract.
2. Whether the 10% of overhead that was deductible from the gross receipts to achieve adjusted gross receipts in the Sheindlin contract is, in fact, equivalent to the compensation under the scheme of defined proceeds;
3. If the adjusted gross receipt is merely a modification of the definition of defined proceeds, whether defendants failed to negotiate with plaintiff Brennan in good faith on a favored nations basis.
4. Whether paragraph 8 creates a duty on the part of Big Ticket to notify plaintiff of any modification or re-formulation of profit participation compensation of the Sheindlin contract and whether defendant failed to negotiate in good faith concerning said modification.

However, the court finds that no triable issues of fact exist with respect to the seventh cause of action for fraud. To state a claim for fraud, there must be (1) a false representation or concealment of a material fact; (2) made with knowledge of its falsity or without sufficient knowledge on the subject to warrant a representation, (3) with the intent to induce the person to whom it is made to act upon it; and such person must (4) act in reliance upon the representation (5) to his damage. Stevenson v. Baum (1998) 65 Cal.App.4th 159, 164. Here, there is no evidence showing that plaintiff detrimentally relied on any representations by defendant Big Ticket Pictures. Further, the fraud claim is not independent of the breach of contract claim. Alling v. Universal Mfg. Corp. (1992) 5 Ca.App.4th 1412. Plaintiffs' evidence shows nothing more than the possibility of Big Ticket's breach of contract. There is no tort for maliciously breaching a contract. Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal.4th 503.

IT IS THEREFORE ORDERED that Plaintiffs' motion for summary adjudication and Defendant Big Ticket's motion for summary judgment, are hereby both, DENIED. Defendant Big Ticket's motion for summary adjudication of the seventh cause of action for fraud is GRANTED.

Dated: September 30, 2002



Hon. Richard Montes
Judge of the Superior Court