April Enterprises, Inc. v. KTTV
147 Cal. App. 3d 805, 195 Cal. Rptr. 421 (1983)

Civ. No. 66885.
Court of Appeals of California, Second Appellate District, Division Seven.
October 5, 1983.

APRIL ENTERPRISES, INC., Plaintiff and Appellant, v. KTTV et al., Defendants and Respondents.

(Opinion by Johnson, J., with Schauer, P. J., and Thompson, J., concurring.)

COUNSEL

Hurley & Grassini, Hurley, Grassini & Wrinkle, Ronald Wrinkle and Lawrence P. Grassini for Plaintiff and Appellant.

Gibson, Dunn & Crutcher, Dean Stern and Jeffrey R. Kelleher for Defendants and Respondents.

OPINION

JOHNSON, J.

The plaintiff, April Enterprises, (April) appeals from a judgment dismissing its complaint without leave to amend. Three issues are presented on appeal: first, whether plaintiff has pleaded a cause of action for breach of the implied covenant of fair dealing in a contract; next, whether plaintiff has pleaded a cause of action for breach of fiduciary duty of a joint venturer; and, finally, whether either cause of action is barred by applicable statutes of limitations. We hold, first, appellant's complaint sufficiently alleges both causes of action; and, secondly, the statute of limitations was tolled on both causes of action until appellant reasonably could have discovered the injury at issue.

Factual and Procedural Background fn. 1

In 1965 appellant entered into a written contract with respondents, KTTV and Metromedia, Inc., (Metromedia/KTTV) for production of the "Winchell-Mahoney Time" television show (hereinafter referred to as the show.) The contract set forth the rights of the parties with respect to the show's production and syndication. Under section 4 of the agreement respondents [147 Cal.App.3d 814] owned all of the videotapes of the show. Section 17, dealing with future syndication, provided that both parties had the right to initiate syndication of the show with third parties and that each party was to receive 50 percent of the net profits from any resulting syndication. Subsection C of section 17 provided respondents could erase the videotape of each show six months after its original broadcast.

In 1968 respondents sent appellant a new contract which, if accepted, would implement the syndication clause of the 1965 contract by conferring upon respondents the exclusive right to initiate syndication for a limited period of time. Appellant signed the contract and returned it to respondents.

The new 1968 contract altered the rights of the parties in several respects. With respect to respondents, they no longer had the right to erase the videotapes of the show. They had the exclusive right to initiate syndication but that exclusivity was limited to the time in which the contract remained in effect. It follows that under the new agreement appellant could not initiate syndication at all. fn. 2 Also, appellant's compensation was changed: the 1968 contract provided that appellant would be paid 20 percent of the syndication revenue, rather than the 50 percent compensation appellant was to receive under the earlier agreement.

The 1968 contract provided for automatic termination in five years, or earlier if the shows were not broadcast for a certain period of time.

April alleges that some time in 1969 it attempted to negotiate syndication agreements with various third parties and in that connection offered to purchase the videotapes of the show from respondents. We assume these negotiations were entered even though April had no right to initiate syndication while the 1968 contract remained in effect.

Between November of 1969 and March of 1970, presumably in response to April's efforts to purchase the tapes, respondents wrote two letters to appellant offering to buy the exclusive rights to broadcast and license the show for another two years on terms different from those in the 1968 contract. In the second of the two letters, dated March 31, 1970, respondents also warned appellant the videotapes would be erased unless appellant accepted respondents' new terms. There is no record of any response by appellant to these letters.

Appellant alleges that in 1976 it discovered the video tapes had actually been erased at some unknown date. Shortly after this discovery, appellant [147 Cal.App.3d 815] filed suit. The first amended complaint set forth three causes of action: breach of contract; breach of fiduciary duty of a joint venturer; and intentional interference with prospective advantage. Appellant is no longer pursuing the third cause of action.

Respondents demurred on two grounds: (1) the complaint failed to state a cause of action for breach of fiduciary duty or for breach of contract; and (2) both causes of action were barred by the statute of limitations. The demurrer was overruled.

At trial respondents moved for a judgment on the pleadings on basically the same grounds as the demurrer. This motion initially was denied. After rejecting appellant's proposed second amended complaint, however, the court reversed itself and granted the motion as well as respondents' motion for a judgment of nonsuit after appellant's opening statement.

Discussion

We consider first the standard of appellate review applicable where motions for judgment on the pleadings and judgment of nonsuit on the opening statement have been granted. [1] It is well settled that review of a judgment on the pleadings is confined to the face of the pleading under attack and all facts alleged in the pleading must be accepted as true. (Sullivan v. County of Los Angeles (1974) 12 Cal.3d 710, 714 fn. 3 [117 Cal.Rptr. 241, 527 P.2d 865]; Baillargeon v. Department of Water and Power (1977) 69 Cal.App.3d

670, 675-676 [138 Cal.Rptr. 338].) [2] Similarly, review of a judgment of nonsuit on the opening statement accepts as proved all of the facts alleged in the opening statement and "must indulge in all favorable inferences reasonably arising from those facts." (Smith v. Roach (1975) 53 Cal.App.3d 893, 897 [126 Cal.Rptr. 29] citing Cole v. State of California (1970) 11 Cal.App.3d 671, 674 [90 Cal.Rptr. 74]; Timmsen v. Forest E. Olson, Inc. (1970) 6 Cal.App.3d 860, 867-868 [86 Cal.Rptr. 359].)

In its first amended complaint appellant alleges breach of the 1965 contract only. In counsel's opening statement, however, reference is made to both the 1965 and the 1968 agreements. fn. 3 Thus, for purposes of reviewing the order granting judgment on the pleadings we consider only the earlier agreement and accept all matters pleaded as true. (Sullivan v. County of Los Angeles, supra, 12 Cal.3d 710, 714 fn. 3.) For purposes of reviewing the judgment of nonsuit, however, we consider both agreements, accept as true all facts stated in counsel's opening statement, and draw all reasonable inferences [147 Cal.App.3d 816] in favor of appellant. (Smith v. Roach, supra, 53 Cal.App.3d 893, 897-898.)

I. Appellant Has Stated a Cause of Action for Breach of Implied Covenant of Fair Dealing

A. Judgment on the Pleadings.

[3a] Appellant contends respondents' erasure of the tapes constituted a breach of the implied covenant of fair dealing in a contract. By erasing the tapes, according to appellant, respondents interfered with appellant's right under the terms of the 1965 contract to profit from future syndication of the show. Respondents counter by pointing out the 1965 agreement contained an express clause giving them the right to erase the tapes. Accordingly, the general rule should apply that where an unambiguous contract contains an express covenant a court may not imply a covenant which would override it. (Witt v. Union Oil Co. (1979) 99 Cal.App.3d 435, 441 [160 Cal.Rptr. 285].)

[4] The traditional rule, as respondents suggest, is to the effect a covenant of fair dealing will not be implied to vary the terms of an unambiguous contract. In the case of a contradictory and ambiguous contract, however, the implied covenant may be applied to aid in construction. (Milstien v. Security Pac. Nat. Bank (1972) 27 Cal.App.3d 482, 487 [103 Cal.Rptr. 16].)

Moreover, it is implied in law that a party to a contract will not do anything which would deprive the other party of the benefits of the contract. "This implied covenant not only imposes upon each contracting party the duty to refrain from doing anything which would render performance of the contract impossible by any act of his own, but also the duty to do everything that the contract presupposes that he will do to accomplish its purpose." (Harm v. Frasher (1960) 181 Cal.App.2d 405, 417 [5 Cal.Rptr. 367]; Vale v. Union Bank (1979) 88 Cal.App.3d 330, 336 [151 Cal.Rptr. 784]; 1 Witkin, Summary of Cal. Law, (8th ed. 1973) Contracts, § 576, p. 493.)

[3b] Here, we find the terms of the 1965 contract to be inherently contradictory. Uncertainty arises when subsection (C) of the syndication clause is read together with the

preceding subsections. Taken literally, the contract would allow respondents to erase a videotape either at the same time appellant was negotiating a syndication agreement, or after such an agreement had been reached. Obviously it would be senseless for appellant to negotiate syndication if it could not be assured availability of the tapes. [147 Cal.App.3d 817]

These conflicting terms of the 1965 contract can be reconciled by construing the erasure clause to be limited by the implied covenant of fair dealing. As so qualified respondents' right to erase the tapes would be limited to the situation where future syndication was not feasible. This limitation insures that appellant is not deprived of the rights to future syndication, bargained for under the contract.

Although at trial extrinsic evidence may explain the apparent contradictions between these terms in some way which favors an absolute unqualified right to erase the tapes, at this stage of the proceedings our review is limited to the complaint and the language of the contract. Accordingly, we hold appellant has stated a cause of action for breach of implied covenant of fair dealing based on the 1965 contract, and the trial court's judgment on the pleadings was error.

B. Judgment of Nonsuit.

We turn now to the 1968 agreement, mention of which was made by appellant's counsel in his opening statement. The trial court's order of nonsuit implies it found the 1968 agreement an insufficient predicate for a cause of action. fn. 4 [5] Consequently, we address the relevance of that agreement to the issues in this case. fn. 5

[6] The 1968 syndication contract contains an integration clause, clearly indicating it implemented and superseded the provisions for syndication in [147 Cal.App.3d 818] the 1965 contract. It differs from the earlier agreement in one important respect: it does not give respondents any specific right to erase the tapes even though respondents still had exclusive ownership of them. Indeed April alleges it specifically bargained for removal of that clause. In addition, section 4 of the contract--" ... KTTV shall not have the right to enter into any licensing agreement after the termination or expiration of this agreement"--implies that respondents exhausted their rights to initiate syndication at the termination of the 1968 contract while April retained its rights to do so. Indeed, the evidence at trial may show that appellant acquired exclusive rights to syndicate the show no later than 1973 when the 1968 agreement automatically terminated.

Construing the 1968 agreement as we do, in a light most favorable to appellant, respondents' erasure of the videotapes deprived appellant of the benefit of the bargain under the agreements with Metromedia/KTTV, that is, rights to initiate future syndication of the show and receive compensation therefor. This supplies facts necessary for a breach of the implied covenant of fair dealing cause of action. (Harm v. Frasher, supra, 181 Cal.App.2d 405, 417; Vale v. Union Bank, supra, 88 Cal.App.3d 330, 336.) Indeed, if the evidence at trial establishes that Metromedia had exhausted its own syndication rights, conferred by the 1968 contract, and then deprived April of its reversionary rights by destroying the tapes, Metromedia's acts might amount to an aggravated breach of the covenant of fair dealing. Consequently, granting the motion for nonsuit was also error.

II. Appellant Has Also Stated a Cause of Action for Breach of Fiduciary Duty by a Joint Venturer.

A. Judgment on the Pleadings.

[7a] In its complaint appellant alleged that the negotiations leading to creation of the 1965 contract created a joint venture. In the opening statement counsel also referred to the 1968 contract. April's position apparently is that both the 1965 and 1968 contracts merely implemented an over-arching oral joint venture arrangement between the parties.

Respondents contend neither contract, nor any oral agreement, created a joint venture; they proffer two arguments in support of this contention. First, the clause in the 1965 contract labelling appellant as an independent contractor coupled with the contract's integration clause negates the existence of a joint venture. And, second, the contract taken as a whole details the rights and duties of the parties in such a fashion that it negates every element necessary to the creation of a joint venture. We disagree. [147 Cal.App.3d 819]

[8] "A joint venture ... is an undertaking by two or more persons jointly to carry out a single business enterprise for profit." (Nelson v. Abraham (1947) 29 Cal.2d 745, 749 [177 P.2d 931].) [9] The elements necessary for its creation are: (1) joint interest in a common business; (2) with an understanding to share profits and losses; and (3) a right to joint control. (County of Riverside v. Loma Linda University (1981) 118 Cal.App.3d 300, 313 [173 Cal.Rptr. 371]; Holtz v. United Plumbing & Heating Co. (1957) 49 Cal.2d 501, 506-507 [319 P.2d 617].) "Such a venture or undertaking may be formed by parol agreement [citations], or it may be assumed as a reasonable deduction from the acts and declarations of the parties [citations]." (Nelson v. Abraham, supra, 29 Cal.2d 745, 749-750.) Whether a joint venture actually exists depends on the intention of the parties. (County of Riverside v. Loma Linda University, supra, 118 Cal.App.3d 300, 313; Universal Sales Corp. v. California etc. Mfg. Co. (1942) 20 Cal.2d 751, 764-765 [128 Cal.Rptr. 665].)

[7b] Here, it cannot be determined as a matter of law that the complaint fails to allege facts supporting creation of a joint venture. Appellant argues that the common enterprise to seek syndication of the show after it was produced and originally telecast was a joint venture and we find that the first amended complaint sufficiently alleges such a relationship. The requisite joint interest in a common business is supplied by the allegations that the parties planned to coproduce the shows in order to exploit the market for its syndication and that each contributed its own unique talents in furtherance of this objective. The requisite joint control is supplied by the allegation that each party agreed to have equal rights to initiate syndication of the show.

We also disagree with respondents' assertion that the requirement of sharing profits and losses is not met in the instant case. The 1965 contract provides that April and Metromedia each receive 50 percent of the profit derived from any syndication of the show. April alleges in its complaint that the parties also intended to share losses in the same proportion. Since the intention to share losses may be inferred from a contract provision to share profits, (Holtz v. United Plumbing & Heating Co., supra, 49 Cal.2d

501, 507; Fitzgerald v. Provines (1951) 102 Cal.App.2d 529, 536 [227 P.2d 860]) the joint venture action is not defeated by the 1965 contract's failure to specifically provide for the unlikely eventuality that syndication of the show would be a losing proposition. Moreover, where a joint venture involves the contribution of capital by one party and services by the other, neither party is required to reimburse the other for losses sustained. In the event of loss, the party contributing capital loses his capital and the one contributing labor loses the value of his efforts. (Kovacik v. Reed (1957) 49 Cal.2d 166, 169 [315 P.2d 314]; 6 Witkin, Summary of Cal. Law (8th ed. [147 Cal.App.3d 820] 1974) Partnership, § 17, p. 4269.) Consequently, if the evidence at trial establishes that in practical effect the parties intended to share losses even though April's losses would be in the form of loss of its labor and Metromedia's would be in the form of lost capital, the difference in the type of loss sustained would not defeat a finding of joint venture.

Respondents next argument, that the contract's labelling of appellant as an independent contractor forecloses a finding of joint venture, fails since the conduct of the parties may create a joint venture despite an express declaration to the contrary. (Universal Sales Corp. v. California etc. Mfg. Co., supra, 20 Cal.2d 751, 765.)

We note that where evidence is in dispute the existence or nonexistence of a joint venture is a question of fact to be determined by the jury. (San Francisco Iron & Metal Co. v. American Milling & Industrial Co. (1931) 115 Cal.App. 238, 245-246 [1 P.2d 1008].) Consequently, whether a joint venture was actually created in the instant case is a question of fact to be decided at trial. (Nelson v. Abraham, supra, 29 Cal.2d 745, 750; Smalley v. Baker (1968) 262 Cal.App.2d 824, 837-838 [69 Cal.Rptr. 521]; County of Riverside v. Loma Linda University, supra, 118 Cal.App.3d 300, 313.) For purposes of this appeal, however, we hold the complaint alleged facts sufficient to support a cause of action for breach of fiduciary duty of a joint venturer.

B. Judgment of Nonsuit.

[10] Respondents nevertheless contend that any joint venture that may have been created by the 1965 contract was negated in 1968 because the agreement entered into that year gave Metromedia the exclusive right to license and syndicate, thereby removing the requisite control from appellant. fn. 6 It also provided that appellant would be paid on the basis of gross receipts, and, according to respondents, if the parties intended to share losses as well as profits appellant would have been paid on the basis of net receipts. We address these arguments as they relate to the order granting respondents' motion for nonsuit.

As we noted earlier, our view of the 1968 contract is that it merely implemented the earlier joint venture during the period in which it remained in effect. Moreover, the 1968 contract strengthens appellant's assertion of an oral agreement of joint venture if it is construed as representing a written [147 Cal.App.3d 821] implementation of decision to "take turns" syndicating the show, i.e., respondents had exclusive rights to syndicate until the 1968 agreement terminated, at which time exclusive rights to initiate syndication vested in April.

A joint venture continues until the purpose for which it was formed has been accomplished or it is expressly extinguished. (Elias v. Erwin (1954) 129 Cal.App.2d 313, 317 [276 P.2d 848]; San Francisco Iron & Metal Co. v. American Milling & Industrial Co. (1931) 115 Cal.App. 238, 248 [1 P.2d 1008].) And a subsequent agreement between joint venturers which merely provides for a different distribution of profits does not change the relationship unless it also expressly extinguishes the earlier agreement. (Ford & McNamara Inc. v. Wilson (1931) 119 Cal.App. 475, 480-481 [6 P.2d 996]; see also 40 Cal.Jur.3d, Joint Ventures, § 8, p. 190, fn. 53.)

There is no evidence before this court that one of the purposes of the joint venture--to exploit the market for syndication of the television show--has been accomplished. Indeed, the 1968 agreement evidences the parties intended to "take turns" initiating syndication, with April's turn coming after the 1968 contract terminated. Neither is there evidence of express extinguishment. Thus, the 1968 agreement, absent evidence that may be introduced at trial to the contrary, does not defeat the cause of action based on joint venture and granting the judgment of nonsuit was also error.

III. Appellant's Causes of Action Are Not Barred by the Statute of Limitations.

Analyzing respondents' statute of limitations defense requires three independent inquiries. First, we must decide on what date April suffered injury sufficient to begin accrual of the causes of action asserted here. Secondly, we consider whether the breach of fiduciary duty action accrued on the date of injury or whether the discovery rule applies so that accrual was delayed until April could reasonably have ascertained the injury. Finally, we examine whether the discovery rule also applies to the breach of contract action.

A. Date of Breach and Injury.

[11a] Respondents assert the statute of limitations as a defense by first characterizing the harm about which appellant complains as the deprivation of syndication rights and then asserting that appellant suffered such harm no later than March 31, 1970. On that date, in response to appellant's own efforts to purchase the tapes and syndicate the show, respondents wrote a [147 Cal.App.3d 822] letter to appellant refusing to sell the videotapes of the show to appellant and incidentally threatening to erase the tapes.

This argument fails for two independent reasons: it ignores the plain language of the 1968 contract which reveals that appellant had no present right to syndication, and thus no cause of action in 1970; and it mischaracterizes the gravamen of appellant's complaint.

Assuming the 1968 contract was still in effect, fn. 7 the relationship between the parties on March 31, 1970, was as follows. The 1965 contract governed all rights and liabilities of the parties with respect to all aspects of the "Winchell-Mahoney Time" show except those rights and liabilities relating to syndication and, by implication, respondents' former rights of erasure. The rights to initiate future syndication, vested in appellant by the 1965 contract, had been temporarily suspended by the subsequent contract, formed in 1968. That agreement gave respondents exclusive rights to syndicate the show until February 11, 1973.

In 1969, perhaps dissatisfied with respondents' failure to vigorously pursue their exclusive rights to initiate syndication under the 1968 contract, April began negotiations with various third parties relating to syndication of the show. At that time, of course, April had no legal right to initiate or consummate a syndication agreement under the terms of the contracts with respondents. Presumably April hoped that if an attractive deal could be arranged, respondents would renegotiate the provision in the 1968 contract giving them a five-year exclusive right to syndicate. By their March 31, 1970, letter, however, Metromedia/KTTV rejected April's efforts. In effect they were holding April to the terms of the contract, which on the basis of the complaint and the plain language of the two contracts, they had every right to do at that time.

This reenactment of events reveals the fallacy in respondents' argument. "'A cause of action accrues at the moment the party who owns it is entitled to bring and prosecute an action thereon.'" (Howe v. Pioneer Mfg. Co. [147 Cal.App.3d 823] (1968) 262 Cal.App.2d 330, 339-340 [68 Cal.Rptr. 617].) According to Metromedia/KTTV, appellant should have filed suit for denial of syndication rights in 1970. However, had appellant done so respondents could have pleaded the 1968 contract as a complete defense. In 1970 appellant's rights to initiate syndication were temporarily suspended; thus, appellant had no actionable claim at that time.

Should the evidence at trial establish the 1968 contract had terminated by 1970, however, Metromedia/KTTV's argument fails for another reason. They also miscast the type of harm about which appellant complains. In that connection Metromedia argues the holding in the case of Davies v. Krasna (1975) 14 Cal.3d 502 [121 Cal.Rptr. 705, 535 P.2d 1161, 79 A.L.R.3d 807] should be applied to defeat appellant's claims. That case involved the unauthorized disclosure of the plaintiff-writer's story by his producer. Our high court held the statute of limitation began to run on plaintiff's cause of action for breach of confidence when the plaintiff first learned of his producer's unauthorized disclosures because that was the moment plaintiff first suffered "appreciable harm." Consequently, his suit, brought only after the story was transformed into a successful screenplay, was time barred. The court explained: "Plaintiff's first argument, that Davies' cause of action did not arise until defendant publicly exhibited Davies' idea in 1958, confuses two different theories of action .... [The] present cause of action for breach of confidence arises upon defendant's unauthorized disclosure of the confidential idea .... The first unauthorized disclosure ... occurred before November 11, 1955; thus the statute of limitations on plaintiff's cause of action for breach of confidence began to run not later than that date." (Id, at pp. 511-512; citations and fn. omitted.)

The reasoning of the court in Davies suggests that if the contract in that case had been one in which the parties agreed to share profits from any commercial exploitation of the plaintiff's story, appreciable harm would not have been suffered until after the play had been produced and profits earned. Since the parties agreed only that plaintiff's story would not be divulged to others, however, appreciable harm was suffered and the limitations period ran from the date of first disclosure.

Respondents' argument in this case fails for the same reason the plaintiff's argument in Davies failed: they confuse two different theories of action. Appellant is not suing for respondents' failure to cooperate with efforts to syndicate the show in 1969 or 1970.

Rather, appellant's action is based on suffering harm amounting to the lost opportunity to syndicate the television show ever, under any circumstances. fn. 8 [147 Cal.App.3d 824]

April did not possess merely a right to a single syndication deal. Rather it had a continuing right to pursue a succession of syndications. Even had Metromedia "cooperated" with April's alleged tender of syndication opportunities in 1969 or 1970 those syndication deals would have been with certain stations for a certain period of time. Long before 1976 those agreements probably would have expired. The syndication clause of the 1965 contract is consistent with April possessing a right to arrange new syndications with those same stations for future periods and to pursue additional syndications with other stations which had never participated in these deals. Thus, the harm April suffered when the tapes were erased was not the loss of a single syndication deal which allegedly was tendered and rejected in 1969 or 1970. Even had that deal been consummated and April had received its benefits under that contract, April would be suffering the harm it now claims in its present cause of action --the lost opportunity to pursue other syndication deals in the future. It is one thing to deprive plaintiff of some golden eggs; it is quite another to kill the goose.

Accordingly, assuming the 1968 contract had terminated, thus resurrecting appellant's right to initiate syndication, the parties' inability to reach agreement in 1969 or 1970 on the terms for implementing appellant's syndication rights only delayed April's ability to reach syndication agreements with third parties. But respondents' erasure of the tapes did not merely delay appellant's rights to receive the benefits of the contract. Instead it foreclosed April from ever being able to implement the syndication clause and thereby reap the benefits of the bargain struck with respondents. [12, 13] [11b] Thus, the first arguably actionable event was respondents' erasure of the tapes fn. 9 since that was the moment appellant suffered appreciable harm for purposes of the causes of action asserted in this lawsuit. fn. 10 [147 Cal.App.3d 825]

* * *

[O]n the face of the pleadings and the opening statement, neither cause of action was barred by the statute of limitations.

Conclusion

This case cries out for a full development of the facts through a trial of the action. Applying the standards of review for judgment on the pleadings and nonsuit, we find the first amended complaint, the second amended complaint and the partial opening statement all state causes of action for breach of contract and breach of joint venture. The allegations of the answer and various motions and briefs filed by Metromedia may tend to undermine one or both of these causes of actions. But these allegations are not properly considered on a motion for judgment on the pleadings or a nonsuit. Similarly, applying those same standards of review, we find nothing in April's pleadings which raises a statute of limitations defense. Once again it is the allegations of Metromedia's answers, motions and briefs which suggest the possibility April's action may be barred. And once again it is not appropriate to take these allegations into consideration on a motion for judgment on the pleadings or nonsuit.

Accordingly, this judgment could have been reversed without reaching a number of the issues decided in this opinion. However, we desire to avoid a game of judicial ping pong between trial and appellate court, if at all possible. Thus, we felt it important to dispose of some particularly knotty legal problems which we anticipate may be raised by likely configurations of the facts as might emerge early in the proceedings after remand. [147 Cal.App.3d 834]

Disposition

The judgment is reversed and remanded for further proceedings consistent with the views expressed in this opinion.

Schauer, P. J., and Thompson, J., concurred.

Footnotes

FN 1. Since this appeal is based on judgments on the pleadings and of nonsuit on the opening statement, the allegations of the complaint and opening statement are assumed to be true. Consequently, many of the "facts" recited in this opinion will be subject to proof in later proceedings.

FN 2. As we explain later, however, once the 1968 contract expired April's rights to initiate syndication were reinstated.

FN 3. The 1968 agreement also is alleged in the second amended complaint tendered by the plaintiff at trial but rejected by the trial judge.

FN 4. Since we reverse the judgment, appellant will have the opportunity to amend and may choose to incorporate the 1968 agreement into the complaint.

FN 5. Respondents, without elaboration, suggest on appeal that the 1968 agreement was unexecuted since it was never signed by them. By the veiled reference to lack of execution in their brief on appeal, respondents apparently mean to raise the statute of frauds as a defense. (Civ. Code, § 1624.) Despite the parties' inability to produce a signed copy of the 1968 contract, however, on the allegations and facts properly before this court respondents' statute of frauds defense would be barred by the doctrine of equitable estoppel. "Where the defendant by his words or conduct represents that he proposes to stand by ... [his] contract, and the plaintiff, in reliance thereon, changes his position, the defendant will be estopped to set up the bar of the statute [of frauds]." (Italics in original.) (1 Witkin, Summary of Cal. Law (8th ed. 1973) Contracts, § 250, pp. 217-218.)

Here, respondents prepared the 1968 contract on their own stationery and submitted it to appellant for signature. Appellant then signed and returned it to respondents. In addition, during oral argument before this court respondents' counsel admitted the parties performed according to the terms of the 1968 contract in that when respondents and their licensees broadcast the show appellant received compensation of 20 percent of the gross receipts according to the terms of the 1968 contract rather than 50 percent of the profits appellant was to receive according to the terms of the 1965 contract. By accepting the lesser compensation appellant materially altered his position. Moreover, respondents relied upon the 1968 contract in their original answer and incorporated it by reference in that pleading. In addition, respondents' counsel admitted the contract indeed may have been executed even though neither party has been able to produce a signed copy of it. Although subsequent proceedings may adduce evidence to the contrary, on the allegations and facts presently before this court respondents would be estopped from denying execution of the 1968 contract.

FN 6. According to the terms of the 1968 contract, however, Metromedia's exclusive rights to initiate syndication were time limited. Metromedia had exclusive rights only until the 1968 contract expired. Once that happened Metromedia's exclusive syndication rights were exhausted and April was left with the remaining rights to initiate syndication of the show.

FN 7. The 1968 contract, according to its terms, terminated on February 11, 1973. During that period it was automatically renewed from one contract year to another unless Metromedia failed to broadcast a specified number of shows during the preceding contract year. In that event the agreement would expire at the beginning of the next contract year and the provisions giving Metromedia the exclusive right to syndicate the show would no longer be in effect. For purposes of this appeal, we assume the contract remained in effect until 1973 since nothing in appellant's first amended complaint or opening statement reveals the contract would have terminated earlier due to Metromedia's failure to broadcast the specified number of shows. Indeed the second amended complaint April tendered to the trial court alleged the 1968 agreement was in full force and effect at least through 1970 during the time Metromedia sought to impose a new, less favorable contract.

FN 8. Respondents also cite Brown v. Cosby (E.D.Pa. 1977) 433 F.Supp. 1331, to support their contention that April suffered appreciable harm in 1970. The federal district court in Brown held the plaintiff in that case suffered appreciable harm when the defendants first refused to pay him his fair share of the profits earned from commercial exploitation of plaintiff's cartoon characters. (Id, at p. 1342.) Accordingly, the limitations period on plaintiff's action for failure to pay him a fair share of profits began to run when defendants first used the cartoon characters without paying plaintiff his fair share. (Ibid) Brown fails to support respondents for the same reasons stated in the text that the Davies case is inapplicable. The failure to pay fair profits is not the same cause of action--nor the same harm--as would be destruction of the cartoon characters themselves.

FN 9. Neither of the parties knows exactly when the tapes were erased, although respondents apparently now believe most of them were destroyed in or about July 1972.

FN 10. Our disposition of this issue also makes it clear that we reject respondents' claim that the threats contained in the March 1970 letter constituted a repudiation of the joint venture relationship. Although a repudiation of a joint venture agreement does begin the running of the statute of limitations on an action for breach of the agreement, the acts of repudiation must be clear and unequivocal. (Wilton v. Clarke (1938) 27 Cal.App.2d 1, 4 [80 P.2d 141]; 1 Witkin, Summary of Cal. Law (8th ed. 1973) Contracts, § 631, p. 538.) Here, the alleged acts of repudiation were made while respondents were attempting to secure a new contract to telecast and license the show. A threat to erase, made during the course of such negotiations, does not amount to a clear and unequivocal repudiation of the joint venture. We construe them merely as bargaining tactics made in the context of contract negotiations.

The case of Middletown v. Newport (1936) 6 Cal.2d 57 [56 P.2d 508], cited by respondents, arose out of a joint venture agreement in which the plaintiff abandoned the bulk of his joint venture duties in 1913. From 1914 on the defendant treated the joint venture property as his own and exercised complete control over it. (Id, at pp. 59-60.) In 1918, the defendant wrote a letter to plaintiff, expressly repudiating the joint venture. (Id, at p. 61.) The court in that case concluded that plaintiff's action accrued in 1913 when plaintiff terminated the joint venture by abandoning it. (Id, at p. 61.) The court went on to state, in dictum, that if the joint venture had not been terminated by abandonment, the defendant's exercise of complete control over the joint venture property would have repudiated the joint venture. (Id, at p. 61.) Unlike the instant case, the acts of repudiation in Middletown were indeed unequivocal: the defendant had exercised sole control over the property for four years, including executing "contracts of sale in his sole name as owner and seller."

Respondents also quote a passage from Maddox v. Rainoldi (1958) 163 Cal.App.2d 384 [329 P.2d 599]which purportedly supports their argument of repudiation. (See id, at p. 386.) The quoted passage is merely a recitation of one of the allegations in the complaint. Maddox is distinguishable from the instant case in that the plaintiff was alleging, rather than disputing repudiation and the primary issue involved application of the statute of frauds. (Id, at pp. 386, 388, 391.)

If respondents intend to invoke the doctrine of anticipatory repudiation, that doctrine has no application here since it operates in some circumstances to permit a plaintiff a right of election when the defendant expressly repudiates the contract. The plaintiff may sue immediately upon such repudiation, or wait until performance is due under the contract and exercise his remedies for breach of contract at that later time. (Mayo v. Pacific Project Consultants (1969) 1 Cal.App.3d 1013, 1018 [82 Cal.Rptr. 117].) In short, the doctrine of anticipatory repudiation applies to a plaintiff's right to elect between bringing suit and has no application here. And, in any event, if the plaintiff elects to wait to sue when performance is due, the statute of limitations is tolled until the time when performance is due. (Ross v. Tabor (1921) 53 Cal.App. 605, 613 [200 P. 971].)