Filed 7/20/12 Worldwide Subsidy Group v. Motion Picture Assn. of America CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

WORLDWIDE SUBSIDY GROUP,

Plaintiff and Appellant,

v.

MOTION PICTURE ASSOCIATION OF AMERICA, INC.,

Defendant and Respondent.

B236717

(Los Angeles County
Super. Ct. No. BC389895)

APPEAL from a judgment of the Superior Court of Los Angeles County, William F. Fahey, Judge. Affirmed.

Pick & Boydston and Brian D. Boydston for Plaintiff and Appellant.

Mitchell, Silberberg & Knupp, Gregory O. Olaniran, Karin G. Pagnanelli, Marc E. Mayer, and Lucy Holmes Plovnick for Defendant and Respondent.

FACTUAL AND PROCEDURAL SUMMARY[1]

The following facts are undisputed. The United States Copyright Office (Copyright Office), under the supervision of the Librarian of Congress (Librarian), controls the distribution of royalties for the retransmission of broadcast programming by cable and satellite. (See 17 U.S.C. §§ 111, subd. (d) & 119, subd. (b).) Appellant Independent Producers Group (IPG)[2] and respondent Motion Picture Association of America (MPAA) represent the interests of owners of media content as to such royalties.

A dispute between MPAA and IPG arose over the distribution of cable royalties collected for the 1997 calendar year. The parties appeared before the Copyright Arbitration Royalty Panel (CARP), a decision-making panel within the Library of Congress, to determine the distribution of these royalties. (See 65 Fed.Reg. 65335 (Nov. 1, 2000); see also 17 U.S.C. §§ 111, 802.) CARP's final determination was reversed and remanded by the Librarian. (66 Fed.Reg. 66433 (Dec. 26, 2001).) IPG and MPAA appealed the Librarian's determination to the United States Court of Appeals for the District of Columbia Circuit, with the Librarian named as a respondent in both cases. The appeals were consolidated.

On March 31, 2004, while the case was in mediation, IPG and MPAA entered into a purported two-part agreement.

The agreement was negotiated with MPAA by Marian Oshita, a member of IPG, and attorney Jeffrey Bogert, whom she had retained to represent IPG in the litigation regarding the royalties. While the agreement was being negotiated, IPG's other member,

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[1] This factual summary is based in part on our previous decision in *Worldwide Subsidy Group, Inc. v. Motion Picture Assoc. of America, Inc.* (Jan. 25, 2011, B224837) [nonpub. opn.] (*Worldwide Subsidy I*).

[2] Appellants are Worldwide Subsidy Group, LLC, a Texas limited liability company, doing business as Independent Producers Group (IPG), and Worldwide Subsidy Group, LLC, a California limited liability company, formerly named Artist Collections Group, LLC. Both sides refer to the two appellants in the singular and collectively as IPG. We will follow that convention.

Lisa Galaz, through her attorney, advised MPAA and the mediator that neither Oshita nor Bogert had authority to bind IPG without Galaz's authorization. Specifically, the letter advised that Oshita had only a 25 percent membership interest in IPG; any additional interest she may have had was an economic rather than membership or voting interest.

"Settlement Agreement – Part 1" (Part I) provided for MPAA to pay IPG $115,000 for its 1997 cable royalties and additional sums of 1997 satellite royalties and 1998-1999 cable and satellite royalties, upon a timely claim for payment by IPG. MPAA issued a check in this amount to Bogert's client trust account and delivered it to Bogert. In "Settlement Agreement – Part 2" (Part II), IPG agreed to withdraw its notices of intent to participate in proceedings to distribute cable and satellite royalties for years 1997-1999, and the parties agreed to dismiss their appeals.[3] Because the appeals were from a ruling of the Librarian, the Librarian signed this part of the agreement. Each part of the agreement included a choice of law provision to the effect that it would be governed by the law of the District of Columbia.

On December 4, 2004, the agreement was produced to counsel for Galaz pursuant to a subpoena in the lawsuit to determine Galaz's membership interest in IPG.

In January 2005, after a jury trial to determine Galaz's membership interest in IPG, a judgment was entered rescinding the sale of a 37.5 percent interest in IPG to Oshita. The judgment provided that "by virtue of such rescission, from the date of entry of this judgment, [Galaz] is the owner of a 75% economic and membership interest in [IPG]." (*Galaz v. Oshita* (Super. Ct. L.A. County, 2005, No. 297015).)

In 2008, IPG filed a notice of intent to participate in a proceeding to distribute cable royalties for years 1998 and 1999. MPAA raised the settlement agreement as a bar to IPG's participation. On April 29, 2008, IPG sued MPAA, seeking a declaration that the settlement agreement was void *ab initio* and seeking its rescission for uncertainty,

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[3] IPG states that Part II "addressed IPG's prospective ability to participate in future cable and satellite royalty proceedings," but provides no record citation. In fact, under Part II, IPG agreed only "to withdraw its notice(s) of intent to participate in the proceeding to distribute" the 1997-1999 cable and satellite royalties.

lack of consideration, and failure of consideration. A first amended complaint was filed on June 26, 2008.[4] MPAA demurred to the first amended complaint, claiming that the case was untimely under the District of Columbia three-year statute of limitations and that IPG had failed to join the Librarian.

On March 11, 2010, the trial court sustained the demurrer without leave to amend, ruling that the statute of limitations had run and that the issue of joinder was moot. Specifically, the court concluded that the complaint, filed in April 2008, was barred by the three-year District of Columbia statute of limitations because IPG knew or had reason to know of the settlement agreement in April 2004 and no later than December 2004. The court was not persuaded by IPG's argument that the agreement was void or that the cause of action continued to accrue. While it accepted MPAA's argument that the District of Columbia statute of limitations applied under the choice of law provision, the court was under the erroneous impression that the applicable California statute of limitations also was three years. In fact, it is four years. (Code Civ. Proc., § 564, subd. (a).)

The court denied reconsideration on May 5, 2010, but after taking the matter under submission, it clarified that "the applicable statutes of limitations (regardless of the forum selected) commenced running no later than March 31, 2004, the date the settlement agreement was entered into," a date more than four years before the commencement of the litigation.

The case was dismissed, and IPG appealed. Accepting the allegations as true, in *Worldwide Subsidy I*, we found the complaint established that the settlement agreement could be voided on the ground that Bogert, who signed the agreement on behalf of IPG,

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[4] MPAA removed the case to the United States District Court for the Central District of California, which on August 13, 2008, granted MPAA's motion to transfer the case to the United States District Court for the District of Columbia and denied as moot the motion to dismiss the case. On September 29, 2009, the United States District Court for the District of Columbia granted IPG's motion to remand the case to state court and denied without prejudice MPAA's motion to dismiss it.

lacked authority to enter the agreement. We concluded that it was premature at the demurrer stage of the litigation to enforce the choice of law provision since that provision could fall along with the remainder of the agreement. We reversed the judgment of the trial court and remanded the case for further proceedings.

On remand, both parties filed cross-motions for summary judgment and summary adjudication. The trial court granted MPAA's motion for summary judgment and denied IPG's cross-motion. It ruled: (1) IPG ratified the settlement agreement; (2) the agreement constituted an indivisible transaction; (3) the agreement's choice of law provision should be enforced; and (4) IPG's claims were barred by the District of Columbia's three-year statute of limitations. IPG filed this timely appeal.

DISCUSSION

We review the trial court's grant of summary judgment de novo, considering all the evidence set forth in the moving and opposition papers. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.)

I

IPG contends there are triable issues of material fact as to whether it ratified Part I of the settlement agreement.

A contract that is voidable because it was entered into by an agent without authority to do so "may be rendered valid and binding on the principal, as of the time the unauthorized act was done, if the principal ratifies and thus gives effect to it." (3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency, § 139, p. 184, citing Civ. Code, § 2307.) Ratification is a question of fact to be proved by the party asserting it. (*StreetScenes v. ITC Entertainment Group, Inc.* (2002) 103 Cal.App.4th 233, 242 (*StreetScenes*).) Ratification may be established by the principal's voluntary and knowing acceptance or retention of the benefits of the transaction by the principal. (Civ. Code, § 2310.) Ratification may be implied where the principal, after becoming fully informed of the unauthorized transaction, fails to repudiate it. (*StreetScenes, supra*, 103 Cal.App.4th at

p. 242.) The principal will be found to have ratified the transaction and be bound by it. (*Ibid.*)

As an initial matter, we note IPG did not challenge MPAA's contention in the trial court that IPG ratified the agreement. Issues raised for the first time on appeal are waived and will not be considered on appeal. (*Bialo v. Western Mutual Ins. Co.* (2002) 95 Cal.App.4th 68, 73.)

At the hearing on the motion, the court issued its tentative ruling concluding that IPG ratified the agreement by accepting and never returning the $115,000 royalty check and that the two parts of the agreement constituted one indivisible transaction. IPG's counsel argued "the issue does come down to . . . [whether] this [is] one contract or two. . . . Now, we didn't seek a declaratory judgment on what was resolved by Part I, because money was paid and it wasn't returned, and there is ratification on that. We haven't actually admitted ratification, but we're not challenging it."

Moreover, IPG effectively conceded ratification by not disputing that it accepted and retained the $115,000 payment by MPAA nor that it did not seek to void Part I. MPAA's motion for summary judgment asserted that IPG ratified Part I by accepting and retaining the $115,000 check tendered by MPAA. In opposition to MPAA's motion, IPG argued that it "does not seek rescission, or anything else, with regard to 'Settlement Agreement-Part I,' upon which the subject payment of $115,000 was made. Specifically, all IPG seeks from this action is to free itself from the restriction in 'Settlement Agreement-Part II.' . . . IPG may or may not have ratified [Part I], but it does not seek to declare it void."

In its separate statement of undisputed material facts, IPG did not dispute that "MPAA made a $115,000 settlement payment to IPG on April 8, 2004 pursuant to the [settlement agreement]" nor that "IPG has never returned any portion of the $115,000 settlement payment to MPAA."

In its briefing on appeal, IPG contends there is no evidence that the $115,000 check was paid to IPG since the copy of the check that appears in the record is made out to Bogert's client trust account. But IPG does not explain why it did not raise this claim in the trial court or dispute it in opposition to summary judgment. Moreover, IPG's briefs do not address MPAA's contention on appeal that IPG conceded ratification.

We find that IPG conceded its ratification of Part I by not disputing that MPAA paid and IPG retained $115,000, by not seeking rescission of Part I, and through its attorney's admission that it was "not challenging" ratification. By failing to address these concessions, IPG has provided us with no basis to reach a different conclusion.

II

Since we hold IPG ratified Part I of the agreement, we next determine whether its ratification extends to Part II. IPG contends Parts I and II are separate, divisible agreements on the ground that each addresses distinct legal interests.

"Ratification of part of an indivisible transaction is a ratification of the whole." (Civ. Code, § 2311.) Multiple writings relating to the same subject matter, between the same parties, and made as part of substantially one transaction, are considered a single contract. (Civ. Code, § 1642.) Whether multiple writings are intended to be elements of a single transaction is a question of fact. (*Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 534.) We use standard rules of contract construction to make this determination. (See *Reigelsperger v. Siller* (2007) 40 Cal.4th 574, 580).

The titles and text of the two writings expressly demonstrate that the parties intended them to constitute one contract. First, their titles are "Settlement Agreement-Part 1" and "Settlement Agreement-Part 2," which indicate they are a single agreement executed in two parts. Part I provides: "This Agreement shall take effect only upon execution by the parties of [Part II]," and Part II in turn says: "This Agreement shall not come into effect separately from [Part I]." Both writings state that they represent the parties' agreement with respect to the appeal from the Librarian's decision.

The subject matter of the two agreements indicates that the two writings are interdependent. Part I purports to settle all cable and satellite royalty claims between IPG and MPAA for the years 1997 to 1999. The parties agreed that MPAA would pay IPG

$115,000 for its share of the 1997 cable royalties. MPAA would also pay IPG its 1998-1999 cable royalties and 1997-1999 satellite royalties so long as IPG submitted a timely and documented claim to MPAA. Part II requires IPG to withdraw from proceedings held by the Copyright Office to distribute 1997-1999 cable and satellite royalties, and directs both parties to dismiss the consolidated appeal.

Part II's mandate that IPG not claim royalties for 1997-1999 makes sense only in relation to Part I's provision that MPAA pay IPG royalties for that time period. If Part I's provision allowing IPG to seek royalties from MPAA were allowed to stand without Part II's requirement that IPG refrain from claiming those royalties from the Copyright Office, IPG would effectively be permitted to receive double payment for the same royalty claims. The agreements are necessarily intertwined.

IPG contends "each agreement contains distinct, countervailing consideration, and is capable of standing on its own based on the corresponding obligations of the parties within each agreement." We disagree. As we have discussed, Part I requires MPAA to pay IPG upon its claim for royalties due from years 1997-1999, and Part II requires IPG to withdraw from proceedings to claim its royalties during those years. The consideration for MPAA's obligations in Part I is contained in Part II, and vice versa as to IPG's obligations.

IPG also argues that the parties to Parts I and II are not the same. The only difference is that the Librarian signed Part II but not Part I. The appeals filed by IPG and MPAA were from a ruling of the Librarian. Because the parties agreed to dismiss their appeals in Part II, the Librarian signed this part of the agreement. The Librarian had no legal relationship with respect to Part I's agreement that MPAA would pay IPG for its royalties. Thus, the Librarian's signing of Part II does not support an inference that the two writings were intended to be separate contracts, particularly since IPG and MPAA each signed both. (See *Varco-Pruden, Inc. v. Hampshire Constr. Co.* (1975) 50 Cal.App.3d 654, 659, fn. 2 [whether multiple instruments were signed by all or only some of the parties to the transaction is not dispositive to finding instruments constitute one contract].)

Accordingly, we construe the two writings as a single, indivisible agreement. Because IPG accepted the benefits under Part I, it is bound to its obligations contained in Part II.

III

Since we conclude IPG is bound by the entire agreement, the contract's choice of law provision to the effect that it would be governed by the law of the District of Columbia applies. District of Columbia Code 12-301, subdivision (7) provides a three-year statute of limitations for claims arising out of a contract. Because IPG's lawsuit was filed in April 2008, more than three years after December 2004, which is when it claimed to have learned of the agreements, its lawsuit is time barred.[5]

DISPOSITION

The summary judgment is affirmed. Respondent to have its costs on appeal.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.

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[5] In the conclusion of its opening brief, IPG asserts "IPG's alternative action for Rescission must stand, because the MPAA never actually paid royalties to IPG for its 1998-1999 cable claims and 1997-1999 satellite claims, even after IPG . . . withdrew [its] notices of intent to participate in [the] proceedings, yielding a failure of consideration for Settlement Agreement-Part II." IPG provides no legal citation or argument to support its contention and thus has forfeited the issue. (See California Rules of Court, rule 8.204(a)(1)(B)-(C).)