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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JOYCE FAYE ALLEN et al., Plaintiffs, Cross-Defendants, and Appellants, v. GAMES PRODUCTIONS, INC., Defendant and Respondent, NEW GAMES PRODUCTIONS, INC., Defendant, Cross-Complainant, and Respondent.	B265476 (Los Angeles County Super. Ct. No. BC531979)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth R. Feffer, Judge. Affirmed.

Law Office of Daniel Friedlander and Daniel A. Friedlander for Appellants.

Kendall Brill & Kelly, Philip M. Kelly, Nicholas F. Daum, and Meaghan Lert for Respondents.

Joyce Faye Allen, individually and as trustee of The Varnette Patricia Honeywood Revocable Living Trust, and Honeywood's two other heirs, Jennell Allen and Carolyn Allen Roper, appeal from a summary judgment in favor of respondents Games Productions Inc. (GPI) and New Games Productions, Inc. (NGPI). The only issue on appeal is whether Honeywood's agreement with GPI entitles appellants to a royalty payment of $500 for each broadcast of the animated series *Little Bill*. We find as a matter of law that it does not, and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

Honeywood was a visual artist. In 1998, she and GPI entered into a letter agreement, under which Honeywood would be paid a one-time fee of $15,000 for providing consulting services for the first cycle of the *Little Bill* cartoon series, based on books written by actor Bill Cosby. In addition, the agreement entitled Honeywood to a "per episode consultant fee" of $1,000 "for each episode of the Series in which Ms. Honeywood renders and completes all services reasonably required by Producer" (including any episode for which "Producer does not require Ms. Honeywood's consulting services") and "$500 per episode royalty in perpetuity." The agreement provided that "[a]ll per episode fees and royalty payments" would be paid in two installments: one-half within 10 business days after completing voice recording for the applicable episode and one-half within 10 business days after final delivery of the episode. Under paragraph 5 of the agreement, Honeywood's right to the "$500 per episode royalty" was to inure to the benefit of her successors and legatees. Separately, the agreement provided for backend participation of a certain percentage to be computed as described in an attachment to the agreement.

In 2009, Honeywood and NGPI, the successor in interest to GPI, amended paragraph 5 of the agreement to provide that Honeywood's right to receive backend participation and the royalty payment of $500 "per episode" would inure to the benefit of her successors, legatees, and the revocable living trust she had set up in 2007. Honeywood died the following year.

A total of 52 episodes of the series were produced, and the original episodes were broadcast on the Nickelodeon television networks between 1999 and 2004. Reruns continued to be broadcast by Nickelodeon and various licensees. Viacom Media Networks (formerly known as MTV Networks) issued participation statements on behalf of respondents. Honeywood was never paid royalties per broadcast, nor did she ever claim she had right to such payment under the agreement.

In 2013, three years after Honeywood's death, appellants sued respondents, as well as various other Viacom-related entities. Appellants asserted breach of contract and related claims on the theory that the agreement required a royalty payment for each broadcast of an episode, and on the allegation that the accounting for revenues relevant to backend participation payments was incomplete. NGPI filed a cross-complaint, seeking a declaration that the agreement provided for a $500 royalty per episode, not per broadcast.

The trial court dismissed the claims against all entities other than respondents for lack of contractual privity. It granted summary judgment to respondents on the remaining claims, finding that the agreement unambiguously provided for a per episode payment of royalties. The court ruled the expert declarations offered by appellants on that issue were inadmissible under Evidence Code section 801, and sustained objections to them because they offered improper legal conclusions about the meaning of the agreement.

This appeal followed.

DISCUSSION

The interpretation of a contract is governed by its terms "if the language is clear and explicit and does not involve an absurdity. (Civ. Code, §§ 1638, 1639.) The whole contract must be considered together in order to 'give effect to every part, if reasonably practicable, each clause helping to interpret the other.' (§ 1641.) 'The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.' (§ 1644.)

‘Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense.’ (§ 1645.)” (*Supervalu, Inc. v. Wexford Underwriting Managers, Inc.* (2009) 175 Cal.App.4th 64, 72–73 (*Supervalu*), fn. omitted.)

“‘When a dispute arises over the meaning of contract language, the first question to be decided is whether the language is “reasonably susceptible” to the interpretation urged by the party. If it is not, the case is over. [Citation.]’ . . . Whether the contract is reasonably susceptible to a party’s interpretation can be determined from the language of the contract itself or from extrinsic evidence of the parties’ intent. [Citation.] Extrinsic evidence can include the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties. [Citations.]” (*Cedars-Sinai Medical Center v. Shewry* (2006) 137 Cal.App.4th 964, 979–980.)

Consideration of extrinsic or parol evidence requires 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 the 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 the second step—interpreting the contract.”’ [Citation.]” (*Supervalu*, *supra*, 175 Cal.App.4th at p. 73.)

The trial court’s determination of whether an ambiguity exists is a question of law, subject to independent review on appeal. (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165.) Similarly, whether a moving party is entitled to summary judgment as a matter of law is reviewed de novo. (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 253.)

Appellants argue the agreement is ambiguous on its face because it does not make clear whether the $500 royalty is to be paid each time an episode is created or each time it is run. This argument is not persuasive because the agreement expressly provides that the royalty is to be paid in two installments: one-half within 10 days of completion of the voice recording for the applicable episode, and one-half within 10 days of delivery of the episode. The timing of these installment payments is clearly tied to episode production, not broadcasting.

Alternatively, appellants argue that interpreting the agreement as tying royalty payments to episode production would be unreasonable since the $500 royalty would then be indistinguishable from the $1,000 consultant fee, and that, in effect, would read the words "royalty" and "in perpetuity" out of the contract. Not so. The consultant fee clause requires that Honeywood either provide consulting services, or (by implication) be available to provide such services, even though the producer might choose not to use them for all episodes. In contrast, the right to royalty payments is not tied to Honeywood's availability. It is indefinite, and under paragraph 5 of the 1998 agreement survives her death. Nevertheless, the agreement treats the $500 royalty and the $1,000 consultant fee similarly in one important respect: each is to be paid "per episode" in the same two installments—after completion of voice recording and delivery of the episode. Thus, the right to royalty payments hinges on the production of episodes: Honeywood, or her heirs, are entitled to royalty payments so long as episodes are produced, regardless of Honeywood's availability to provide consulting services.

Appellants contend that it would have been illogical to provide for "perpetual royalty payment" in the 2009 amendment of the agreement if that payment hinged on the production of new episodes because no new episodes had been produced since 2004. The right to royalty payments in perpetuity and their inurement to Honeywood's successors are the product of the original 1998 agreement, not the 2009 amendment. Appellants have offered no evidence that the parties' intent in negotiating the amendment differed from their original intent, and the fact that production of new episodes had stopped before the 2009 amendment does not mean that it could never resume.

In opposition to the motion for summary judgment, appellants sought to create ambiguity by relying on declarations by an entertainment lawyer and a certified public accountant, with experience in either negotiating, litigating or auditing compliance with royalty agreements. The first opined that the term "royalty," as used in the entertainment business, is synonymous to the term "residual" and means payment for each reuse or rebroadcast of an original show. The second opined that royalty is "almost always a 'per use' fee that is to be paid each time that an item is sold or used." Appellants argue that the court erred in refusing to consider this evidence of trade usage to determine the meaning of the contract. That is incorrect. The court did provisionally consider the declarations and found that they did not meet the requirements for expert declarations on custom and usage because, for the most part, they repeated appellants' interpretation of the agreement, and conflated "royalty" and "residual" payments. We find no error.

While "[e]xpert testimony is admissible to prove custom and usage in an industry," it is "subject to foundational challenges." (*Howard Entertainment, Inc. v. Kudrow* (2012) 208 Cal.App.4th 1102, 1114.) Such preliminary challenges may be to the expert's qualifications, or to the logic of his or her conclusions. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 772 [court must determine whether matter relied on can provide reasonable basis for expert opinion or whether opinion is based on leap of logic or conjecture].) Expert opinion on legal issues, such as the interpretation of the contract in question, is inadmissible. (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1180.) In addition, parol evidence, including expert evidence of custom and usage, is not admissible "'to flatly contradict the express terms'" of an agreement. (*Supervalu*, *supra*, 175 Cal.App.4th at p. 75, citing *Winet v. Price*, *supra*, 4 Cal.App.4th 1159, 1167.)

Appellants take issue with the court's conclusion that the declarants were not qualified to give an expert opinion on royalty payments, but that was not respondents' only challenge. Respondents challenged the experts' qualifications to opine about a creative consultant's compensation on an animated series, the lack of foundation for the conclusion that royalty payments are the same as residual payments, the relevance of both experts' legal interpretation of the agreement itself, and the admissibility of their interpretation to contradict the express terms of the agreement. The court sustained all these challenges. Even assuming the experts were qualified to render an opinion on industry custom and usage regarding royalty payments, the declarants provide little to no foundation for their conclusions regarding custom and usage in the entertainment industry. Instead, for the most part, they opine about the interpretation of the particular agreement at issue in this case. The court was rightfully skeptical of the unsupported conclusion that royalty payments are generally the same as residual payments. And even assuming that conclusion to be correct, the court did not err in rejecting appellants' attempt to use industry custom and usage to "contradict the express terms" of the agreement, which clearly provide when royalty payments should be made. (*Supervalu*, *supra*, 175 Cal.App.4th at p. 75.)

The language of the agreement is neither ambiguous, nor does respondents' long-standing interpretation of it, which Honeywood never contested in the decade before she died, involve an absurdity. Respondents are entitled to judgment as a matter of law.

DISPOSITION

The judgment is affirmed. Respondents are to have their costs on appeal.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.