UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION
CIVIL MINUTES - GENERAL

Send

Case No. CV 07-1912 GPS(JCx) Date: December 12, 2007

Title: *Trustees of the Screen Actors Guild-Producers Pension Plan, et al. v. NYCA, Inc., et al.*

PRESENT: THE **HONORABLE GEORGE P. SCHIAVELLI**, JUDGE

Jake Yerke
Courtroom Clerk

Not Present
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS: Not Present

ATTORNEYS PRESENT DEFENDANTS: Not Present

PROCEEDINGS: Defendants' Motion to Dismiss (In Chambers)

On October 29, 2007, this Court held a hearing on Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint ("SAC") and submitted the matter. After consideration of the parties' positions, submissions and arguments, the Court **GRANTS** Defendants' Motion to Dismiss and **DISMISSES** Plaintiffs' SAC with leave to amend.

I. BACKGROUND

Plaintiffs Trustees of the Screen Actors Guild-Producers Pension Plan and Trustees of the Screen Actors Guild-Producers Health Plan ("Plans" or "Plaintiffs") are employee welfare benefit plans. (SAC at ¶ 4.) The Plans were created pursuant to written declarations of trust between the Screen Actors Guild ("SAG"), and motion picture, television and commercial producer employees ("Performers"). (*Id.*) The purpose of the Plans is to provide Performers with medical and retirement benefits. (*Id.*)

Plaintiffs allege that the Defendants failed to provide funds to the Plans when they hired golfer Fred Couples ("Couples") to appear in television advertisements.

A. The Commercials Contract

The primary contract at issue is the Commercials Contract. The Commercials Contract is an agreement between Plaintiffs and the Association of National Advertisers, Inc. - American Association of Advertising Agencies ("ANA-AAAA"). (*Id.* at ¶¶ 7, 12.) Under this agreement, ANA-AAAA members (*i.e.* "Producers") are required to contribute to the Plans based on a

percentage of gross compensation paid to Performers for acting in commercials (*i.e.* "Covered Services"). (*Id.* at ¶ 11.) Covered Services include, but are not limited to, acting and related services, as well as the exclusive right to use an actor for endorsement of a product on television advertising regardless if acting services are actually rendered. (*Id.*)

Defendant NYCA, Inc. ("NYCA") is a California advertising agency, which is a member of ANA-AAAA, a signatory to the Commercials Contract, and therefore NYCA is required to make pension and health contributions on behalf of Performers who provide Covered Services to it. (SAC at ¶ 14.)

B. The TaylorMade Agreements

Plaintiffs allege that Defendant NYCA and Defendant TaylorMade-Adidas Golf Company, Inc. ("TaylorMade"), a Delaware corporation, entered into an agreement ("TaylorMade-NYCA Contract") under which NYCA would produce commercials for TaylorMade's products. (*Id.* at ¶¶ 8, 25.) The Plans allege that NYCA and TaylorMade, pursuant to this agreement, hired professional golfer Fred Couples ("Couples") to appear in the commercials. (*Id.*) The Plans also allege that NYCA and TaylorMade maintained substantial control over the terms and conditions of Couples' employment, including but not limited to, the working hours, work load, hiring and firing, wages, and supervision. (*Id.*) Accordingly, the Plans allege that NYCA and TaylorMade exercised sufficient control over Couples such that NYCA and TaylorMade were Couples' "joint employers" for purposes of federal labor law. (*Id.*)

Because Couples was considered a Performer under the Commercials Contract, NYCA was obligated to contribute to the Plans based on any Covered Services he provided. Plaintiffs contend NYCA's own reports show that NYCA paid Couples $102,181.50 for Covered Services between January 1, 2002 and December 31, 2004. In addition, these reports show that NYCA made contributions to the Plans based on this reported amount of gross compensation. (*Id.*)

Prior to the TaylorMade-NYCA Contract, TaylorMade and Couples had already established a relationship. Before the agreement with NYCA, TaylorMade had assumed an endorsement agreement ("Endorsement Agreement") with Couples from TaylorMade's predecessor in interest Defendant Dunlop Slazenger Group Americas ("Dunlop"), which Plaintiffs incorrectly named in the lawsuit as "Slazenger Group America, Inc." Plaintiffs contend that the Endorsement Agreement specified that 30% of Couples' gross compensation was to be for Covered Services.

C. Plaintiffs' Claims

The basic premise of Plaintiffs' lawsuit is that NYCA and Taylor-Made underpaid the Plans by $185,909.86 by artificially limiting the amount of Covered Services provided by Couples. Accordingly, Plaintiffs allege that: (1) NYCA breached the Commercials Contract and Trust Agreements; (2) NYCA and

Taylor-Made as "joint employers", violated ERISA and the Commercials Contract by underpaying the Plans; (3) NYCA and Taylor-Made violated the TaylorMade-NYCA Contract by failing to undertake their obligations to the Plans, which were third-party beneficiaries of this contract; and (4) TaylorMade violated the Endorsement Agreement by failing to undertake its obligation to the Plans, which were third-party beneficiaries of this agreement.

II. DISCUSSION

As discussed in the background section, the contractual relationships between the parties are somewhat complex. NYCA is obligated under the Commercials Contract to contribute to the Plans. TaylorMade, on the other hand, is not a signatory to the Commercials Contract, but does have agreements with Couples to pay him for both covered and non-covered services (Endorsement Agreement) and NYCA, to produce commercials starring Couples (NYCA-TaylorMade Contract). Plaintiffs' apparent theory is that: (1) TaylorMade is bound to contribute to the Plans for all Covered Services discussed in the Endorsement Agreement, and (2) that NYCA is liable because it did not ensure that Couples was paid his "customary fee" for the TaylorMade commercials and thereby did not contribute the correct amount to the Plans. As demonstrated below, Plaintiff failed to assert a sufficient factual allegations to form a "plausible" basis for its action.

A. Plaintiffs Failed to Demonstrate that TaylorMade Is Obligated to Contribute to the Plans

Although Plaintiffs allege four claims for relief, all of these claims stem from Defendants' alleged failure to contribute to the Plans. The obligation to contribute to the Plans is set forth in the Commercials Contract. Defendant TaylorMade claims it cannot be liable because it did not sign or assume the obligations of the Commercials Contract. As shown below, TaylorMade is correct, it cannot be held liable for failing to contribute to the Plans. The present analysis focuses on Count II of the SAC.

i. The "Joint Employer" Doctrine

Plaintiffs' primary theory for holding TaylorMade liable under the Commercials Contract is that TaylorMade and NYCA were "joint employers" of Couples and, therefore, TaylorMade was obligated under the Commercials Contract to the same degree as NYCA. This argument is untenable.

Contrary to Plaintiffs apparent belief, the "joint employer" doctrine does not make TaylorMade liable under the Commercials Contract. There are only two situations where a nonsignatory can be liable for contributions under ERISA: (1) if the nonsignatory is the alter-ego of the signatory, or(2) if the signatory and nonsignatory are engaged in a fraudulent scheme to deprive the plans of contributions. Although suggesting Defendants may have

acted fraudulently, Plaintiffs' allegations focus on the "joint employer" doctrine and, in any event, do not allege fraud with the specificity required by Rule 9(b).

The only analogous action that Plaintiffs' cite for its "joint employer" argument, *Trustees of the SAG Pension Plans, et al. v. Sirius Satellite Radio*, CV 07-4495 PA (FMOx) (Sept. 17, 2007) ("*Sirius*"). The holding there is based on an understandable misapplication of language in a Ninth Circuit case.[1]

In *Sirius*, Plaintiffs defeated a motion to dismiss using the same "joint employer" theory alleged here. In denying a Rule 12(b)(6) motion to dismiss, the court held that the Ninth Circuit had previously found "joint employers status could serve as a basis for nonsignatory liability under ERISA." *Sirius*, at *2 (*citing Hotel Employees & Rest. Employees Int'l Union Welfare Fund v. Genter*, 50 F.3d 719, 722 (9th Cir. 1995)). However, the *Genter* case does not support this position.

To the contrary, the *Genter* court affirmed the dismissal of an ERISA action against an attorney because there was no professional or contractual relationship between the attorney and the ERISA plan. *Id.* at 722. In so holding, the *Genter* court discussed a number of cases permitting nonsignatories to be liable under ERISA. *Id.* These cases were limited, however, to situations where "the interests of the nonsignatory and signatory parties are materially inseparable." *Id.* (citations omitted). The *Genter* court found the attorney-client relationship at issue was "distinguishable from these 'alter ego' relationships" and affirmed the dismissal of the claim. *Id.*

It appears that the *Sirius* decision was based on a misleading parenthetical citation in *Genter*. In discussing the alter ego cases, the *Genter* court cited a Fifth Circuit opinion as follows: "*Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 526 (5th Cir. 1982) (stating a nonsignatory company can be held liable if it is a joint employer with the signing company), cert. denied, 464 U.S. 932 . . . (1982)." *Genter*, 50 F.3d at 722 (parallel citations omitted.) This reference to the "joint employer" doctrine was an error because the *Pratt-Farnswoth* case only considered the "single employer" and "alter ego" doctrines, and never

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[1] On November 15, 2007, Plaintiff filed a Request for Judicial Notice ("RJN"), which asked the Court to consider a recent decision by Judge Cooper in *Trustees of the Screen Actors Guild-Producers Plan, et al. v. Accenture, Inc. et al.*, CV 07-3249 FMC (RZx) (Nov. 14, 2007). This RJN is **GRANTED**, but does not affect the Court's analysis because the Court there appears to have committed the same understandable error as the Court in *Sirius*. *See id.* at *6 (citing the same misleading parenthetical citation in *Hotel Employees & Rest. Employees Int'l Union Welfare Fund v. Genter*, 50 F.3d 719, 722 (9th Cir. 1995).)

considered or even used the term "joint employer." 690 F.2d at 504-09.

Thus, Plaintiffs' attempt to use the "joint employer" doctrine to bind TaylorMade to the Commercials Contract fails. As Defendants correctly point out, every published decision to consider this issue has rejected "joint employer" status as a basis for finding a nonsignatory bound under ERISA. (*See* Reply at 6, citing cases); *see also Trustees of the SAG Pension Plans, et al. v. J. Walter Thompson Co., et al.*, CV 06-174 RGK (PLAx) (April 14, 2006) at **4-5 (dismissing ERISA claims against a nonsignatory despite Plaintiffs' claims of "joint employer" liability).

ii. Provisions Of TaylorMade's Other Contracts

Plaintiffs' other theory for asserting TaylorMade is liable for failing to make ERISA contributions is that its related contracts guaranteed these contributions. TaylorMade's other two agreements, the Endorsement Agreement and the TaylorMade-NYCA Contract, both provide that TaylorMade will ensure the Plans receive their payment.

TaylorMade contends that these are merely indemnity/reimbursement provisions that do not create any contractual or other relationship between TaylorMade and Plaintiffs. (Mot. at 8-10). To support this point, TaylorMade points to numerous authorities that found similar contractual provisions did not create an obligation for the guarantor to contribute to the union plans in the first instance. (*Id.* at 8-9.) Indeed, a court in this District came to the same conclusion in circumstances almost identical to those presented in this case. *See J. Walter Thompson*, CV 06-174 RGK (PLAx) (April 14, 2006) at **4-5.)

In *J. Walter Thompson*, Salton, a maker of household products, engaged JWT to produce commercials, which used SAG member George Foreman. *Id.* at *2. The commercials were made by JWT pursuant to the terms of its collective bargaining agreement with SAG. *Id.* The Trustees of the SAG Plans (the same Plaintiffs as in the present case) sued Salton, alleging it violated ERISA by failing to adequately contribute to the Plans. *Id.* Salton moved to dismiss under Rules 12(b)(1) and 12(b)(6). *Id.* The Plans argued that JWT was merely a conduit through which Salton was to make the contributions and therefore Salton had assumed the contractual obligations of the collective bargaining agreement. *Id.* at **4-5. The court rejected this position and noted that provisions guarantying benefit contributions were standard in the industry and did not create a contractual obligation binding Salton. *Id.* at *5. Accordingly, dismissed the Plans' claims against Salton were dismissed.

The reasoning in *J. Walter Thompson* is persuasive here.

iii. Conclusion

In light of the above, Plaintiffs have failed to provide any plausible

bases for binding TaylorMade to the Commercials Contract. Accordingly, Count II against TaylorMade is **DISMISSED** for failure to state a claim.

B. NYCA Is Not Obligated to Contribute to the Plans Based on the Endorsement Agreement Between Couples and TaylorMade

Counts I and II against NYCA in the SAC are virtually identical to the claims Plaintiffs made against NYCA in the First Amended Complaint ("FAC"). Accordingly, these claims fail for the same reasons.

In the SAC, Plaintiffs appear to contend that NYCA is obligated to contribute to the Plans based on the compensation Couples was to receive under the Endorsement Agreement. Again, Plaintiffs base their claims against NYCA on a theory of "joint employer" liability. Under this theory, Plaintiffs allege that NYCA and TaylorMade are "joint employers" of Fred Couples and, therefore, NYCA is liable under the Endorsement Agreement, which allegedly allots 30% of Couples compensation to Covered Services. Thus, Plaintiffs contend NYCA should have paid contributions based on the 30% in the Endorsement Agreement, rather than the $102,181.50 in Covered Services NYCA actually paid to Couples. Again, the "joint employer" doctrine does not make a nonsignatory like NYCA liable for contracts that it neither signed nor assumed. *See United States Football League Players Assoc., AFL-CIO v. United States Football League*, 650 F. Supp. 12, 13-16 (D. Or. 1986).

Thus, because Plaintiffs failed to provide any plausible bases for binding NYCA to TaylorMade's contractual obligations, Counts I and II against NYCA are **DISMISSED** for failure to state a claim.

C. Plaintiffs' Third-Party Beneficiary Claims Fail to State a Valid Claim

Counts III and IV of the SAC allege that Plaintiffs are third-party beneficiaries of the TaylorMade-NYCA Contract and the Endorsement Agreement between Couples and TaylorMade. These claims too lack merit.

In Count III of the SAC, Plaintiffs contend the TaylorMade-NYCA Contract was for the benefit of the Plans and required both TaylorMade and NYCA to ensure the proper contributions were made to the Plans pursuant to the Commercials Contract. (SAC at ¶ 25.) Similarly, in Count IV of the SAC, Plaintiffs contend that the Endorsement Agreement between Couples was for the benefit of the Plans to ensure the proper contributions were made pursuant to the Commercials Contract. (*Id.* at ¶¶ 30-31.) In opposing the present Motion to Dismiss, Plaintiffs more specifically allege the bases of these claims.

Plaintiffs allege that the TaylorMade-NYCA Contract and Endorsement Agreement are clearly "for the benefit" of the Plans because each includes language guarantying the contributions would be paid to the Plans. (Opp. at 13-18.) Plaintiffs contend that, because these agreements provide a promise of pecuniary gain for the Plans, the Plans are intended beneficiaries and,

therefore, have standing to sue as third-party beneficiaries. (Opp. at 15-18.) Again, Plaintiffs' position is unavailing.

First, as previously discussed, the indemnity/reimbursement provisions are insufficient as a matter of law to bind TaylorMade to the Commercials Contract. Thus, TaylorMade is no more liable for failing to contribute to the Plans under a third-party beneficiary claim than it is under the direct claim (*i.e.* Count II). *See J. Walter Thompson*, CV 06-174 RGK (PLAx) at **5-6 (holding that the third-party beneficiary claims against the advertiser Salton in a parallel case failed as a matter of law).

Second, the third-party beneficiary claims against both Defendants fail for lack of jurisdiction because the TaylorMade-NYCA Contract and Endorsement Agreement are not an agreements between employers and labor organizations. *J. Walter Thompson*, at CV 06-174 at *6 (finding a lack of jurisdiction over third-party beneficiary claims where the agreement at issue was not between an "employer" as defined in ERISA and a labor organization).

Third, the indemnity/reimbursement provisions of the TaylorMade-NYCA Contract were not for the benefit of the Plans, but rather for the benefit of NYCA. These provisions ensure NYCA is reimbursed for any contributions it makes when SAG members endorse TaylorMade products.

Finally, Defendants state that the third-party beneficiary claims against TaylorMade would be viable if Plaintiffs contended NYCA did not fulfill its obligations to contribute to the Plans in accordance with the TaylorMade-NYCA Contract and TaylorMade therefore had to reimburse the Plans. Of course, this is not Plaintiffs' claim. Instead, Plaintiffs state that NYCA literally complied with its agreement, but failed to contribute to the Plans in accordance with the amount of Covered Service compensation Couples was to be paid under the Endorsement Agreement.

In light of the above, even the most liberal reading of Plaintiffs SAC does not demonstrate factual bases for their third-party beneficiary claims. Accordingly, Counts III and IV are **DISMISSED** for failure to state a claim.

III. CONCLUSION

In light of the above, Defendant's Motion to Dismiss is GRANTED and Plaintiffs claims are **DISMISSED WITHOUT PREJUDICE**. Unless Plaintiffs can demonstrate either that Defendants acted as a single employer or that Defendants engaged in fraud to deprive the Plans of contributions, Plaintiffs claims cannot survive under Rule 12(b)(6). Plaintiffs have **fifteen (15) days** from the date of this order to file an amended complaint.

Additionally, because none of the claims in the SAC were alleged against Defendant Dunlop Slazenger Group Americas, which Plaintiffs incorrectly named in the lawsuit as "Slazenger Group America, Inc.", this Defendant is **DISMISSED** from this action.