

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

JAMES D. WEATHERLY,

Plaintiff and Appellant,

v.

UNIVERSAL MUSIC PUBLISHING
GROUP,

Defendant and Respondent.

B170395

(Los Angeles County
Super. Ct. No. BC282826)

APPEAL from the judgment of the Superior Court of Los Angeles County.
Malcolm Mackey, Judge. Reversed and remanded.

Spellberg & Kornarens, Anthony Kornarens for Plaintiff and Appellant.

Mitchell Silberberg & Knupp, Russell J. Frackman, Jeffrey D. Goldman and
Nicole L. Harris for Defendant and Respondent.

In this appeal, we reject the argument that an unexercised contractual right to conduct an audit necessarily demonstrates a lack of diligence for purposes of the delayed discovery doctrine. We reverse the award of summary judgment, which the trial court based on a contractual limitations period. We also reverse an order of the trial court sustaining, without leave to amend, a demurrer to Weatherly's cause of action for breach of the implied covenant of good faith and fair dealing.

FACTUAL BACKGROUND

The Parties

Universal-PolyGram International Publishing, Inc. (UPIP) describes itself as a worldwide music publishing company. Universal Music Publishing Group (UMPG), the named defendant and respondent, describes itself as "a fictitious 'umbrella' name for a group of affiliated companies engaged in the business of music publishing, including Universal-PolyGram International Publishing, Inc."

Plaintiff and appellant, James Weatherly is a songwriter, who continues to reap the financial benefits of his songs through royalties paid by either UPIP or UMPG. The royalty checks are sent to Gurse, Schneider & Co., where Weatherly's accountant, Stanley Schneider, is employed and is responsible for depositing and handling monies received on Weatherly's behalf. As part of his responsibilities, Schneider cursorily reviewed Weatherly's royalty statements.

The Royalty Agreement

In 1974, Weatherly entered into an Exclusive Songwriter's and Composer's Agreement with KECA MUSIC, INC. (Agreement). In the Agreement, KECA MUSIC, INC. (KECA) is referred to as the Publisher and Weatherly is referred to as the Writer. UMPG or UPIP eventually acquired KECA's rights under the Agreement. The parties dispute whether UPIP or UMPG is now the Publisher. That issue was not included in the motion for summary judgment or demurrer, and therefore, we assume only for purposes of this appeal, that UMPG is the Publisher.

The provisions of the Agreement relevant to this appeal are as follows:

- (1) Writer is entitled to “[f]ifty per cent [*sic*] (50%) of any and all net sums, after deduction of foreign taxes, actually received (less any costs for collection) by Publisher from sales and uses directly related to subject musical compositions in countries outside of the United States (other than public performance royalties)”
- (2) “Writer shall have the right, upon the giving of at least ten (10) days written notice to Publisher, to inspect the books and records of Publisher, insofar as the same concerns Writer, at the expense of Writer, at reasonable times during normal business hours for the purpose of verifying the accuracy of any transaction or entry relating to the accounting of all sums to which Writer may have the right to object . . . but no more than once in any one (1) year period during the term hereof.”
- (3) “All royalty statements and other accounts rendered by Publisher shall be binding upon Writer and not subject to any objection for any reason, unless such objection is specific and is made in writing, stating the basis thereof, and delivered to Publisher within one (1) year from the date of such statement or account, and Writer shall be barred from maintaining or instituting any suit based on such objection unless such suit is commenced within one (1) year after the date on which Publisher notifies Writer that it denies the validity of the objection.”

Royalty Statements

Weatherly receives a royalty payment and statement twice a year. The royalty statements are in the same format and contain the following information followed by columns of numbers: “Typ[e],” “Catalogue Number,” “Units,” “Period,” “%Rcvd,” “Amount received,” “Your share,” and “Amount due.” Most but not all of the entries in the “%Rcvd” column contain the number “100.00.”

The meaning of the information in the “%Rcvd” column is disputed by the parties and not explained in the royalty statements or the Agreement. Weatherly interpreted the meaning of “%Rcvd” as the monies received for his songs. Based on the royalty statements he understood UMPG “reported that my share of all income (including foreign income) was being calculated at 100% of all monies received for the songs I wrote.” According to Weatherly, “I had no reason to believe there were any problems with

UMPG's accountings and never saw anything on the statements that caused me concern." Weatherly's advisors, Schneider and Ali Adawiya, interpreted the royalty statements in the same manner as Weatherly.¹

According to a statement in UMPG's appellate brief, "The '%Rcvd' column had nothing to do with the existence or amount of any subpublishing fees. Rather, it reflected UPIP's ownership percentage of each individual song, based on whether Weatherly wrote alone or with co-writers."

The Audit

In 2001, Weatherly hired Adawiya to audit UMPG's books. Adawiya previously had audited UMPG records on behalf of other clients, and he recommended the audit to Weatherly. In the process of conducting the audit, Adawiya asked Anthony Saragueta, vice-president of royalties for UMPG, "whether they were reporting to Mr. Weatherly 100 percent of the amount received by the foreign companies at the source" and Saragueta responded that it reported "75 percent." According to Adawiya, Saragueta refused to give Adawiya the source documents but told Adawiya that foreign affiliates were taking 25 percent off the top.

Adawiya wrote UMPG, criticizing its accounting practices for the following reason: "local foreign overseas offices reported 100% of the receipts to a ("UM[P]G") main office, called the "HUB," located in the United Kingdom. [*sic*] where then ("UM[P]G") main office in the UK "HUB" kept 25% of the gross income and reported

¹ Schneider stated, in his declaration, that he understood based on the royalty statements UMPG "reported that Mr. Weatherly's share of all income (including foreign income) was being calculated at 100% of all monies received for the songs he wrote." Schneider testified consistently in his deposition identifying the "% rcvd" column as showing "that Mr. Weatherly's share of all income was being calculated at 100 percent of all monies received for the songs he wrote." Adawiya also reviewed the royalty statements and concluded, "Each of the royalty statements rendered by UMPG from 1990 going forward to Mr. Weatherly are similar in form, content and information. None of them gave me any reason to believe that an off the top fee was being charged or taken on foreign collections, whether by UMPG or any affiliate of UMPG. They all indicate that Mr. Weatherly's 50% share is being calculated on 100% of foreign collections."

75% of the income to their offices in the USA. Our contention is that (“UM[P]G”) should report the income due to Mr. Weatherly based on the amount actually received by their local foreign offices as stated in the agreement”

UMPG responded to Adawiya’s letter as follows: “[s]ince KECA MUSIC, INC. was a United States corporation and since KECA MUSIC, INC. is defined as Publisher, UMPG is correct in applying a 50% royalty rate to amounts received in the United States. Therefore, there is no basis for this claim.”

PROCEDURAL BACKGROUND

Weatherly filed suit on October 4, 2002. Weatherly claims that UMPG improperly calculated his royalty payments and sued UMPG for rescission, an accounting, open book account, breach of fiduciary duty, constructive fraud, violation of Business and Professions Code section 17200 et seq., breach of contract, and breach of the implied covenant of good faith and fair dealing. The complaint alleges numerous breaches, which concern the collection of royalties, calculation of the amount of the royalties, accounting of royalties, and the failure to provide requested documentation concerning the royalties.

The trial court dismissed the cause of action for breach of the implied covenant of good faith and fair dealing following UMPG’s demurrer. The court denied Weatherly’s request for leave to amend.

The court granted summary judgment on the remaining causes of action. It found “that there are no triable issues of material fact as to the contractual limitations period set forth in Paragraph 7.2 of the agreement. Plaintiff and Defendant agreed to the shortened limitations period. Plaintiff [*sic*] had the right to audit the books at any time but chose to wait until 2001 to do so. The delayed discovery rule does not apply under these circumstances. All causes of action arise from the alleged failure by Defendant to pay royalties to Plaintiff. Thus, the 1-year contractual limitations period bars all causes of action.”

Weatherly timely appealed.

DISCUSSION

I. The Trial Court Erred in Granting Summary Judgment

We review the trial court's grant of summary judgment de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.) We must view the evidence, and all "inferences" reasonably drawn therefrom [citation], . . . in the light most favorable to the opposing party." (*Id.* at p. 843, quoting Code Civ. Proc., § 437c, subd. (c).) A defendant meets his or her burden upon a motion for summary judgment if that party has proved an element of the cause of action cannot be established or that there is an affirmative defense to that cause of action. (Code Civ. Proc., § 437c, subd. (o)(1).) UMPG argues that the statute of limitations and contractual limitations period constitute an affirmative defense to each cause of action.

UMPG's argument is based on the following claims: (1) all of Weatherly's causes of action are based on an accounting practice that dates back to 1990; (2) his lawsuit seeks to establish a "contractual right to certain sums *ab initio*"; (3) all of the alleged causes of action have either three or four-year statute of limitations; (4) the three or four-year statute of limitations expired in 1993 or 1994; (5) delayed discovery does not toll the limitations period because Weatherly cannot show an inability to make earlier discovery despite reasonable diligence; (6) Weatherly was not diligent because he had the right to audit UMPG's books but declined to exercise that right until 2001. In the alternative, UMPG argued the Agreement contained a one-year contractual limitations provision, which barred all of the causes of action alleged in Weatherly's complaint.

Based on UMPG's understanding of the facts and the law, Weatherly was required to audit its books, identify the alleged accounting improprieties, and sue for the alleged accounting practices in 1991 or forever lose that right. As discussed in detail, this understanding is predicated on an incorrect characterization of the nature of the alleged breaches, an incomplete legal argument, and a view of the evidence in the light most favorable to the moving party, UMPG.

A. Nature of the Alleged Breaches

UMPG's claim that all of Weatherly's cases of action are based on an effort "to establish a contractual right to certain sums *ab initio*" is the linchpin to its argument that either the statute of limitations or contractual limitations is a complete bar to each alleged cause of action. To this end, UMPG persuaded the trial court that "all causes of action arise from the alleged failure by Defendant to pay royalties to Plaintiff."

Citing, among other cases, *Dillon v. Board of Pension Commrs* (1941) 18 Cal.2d 427, 429-430 (*Dillon*), UMPG argues, "It is well-established that in suits such as Weatherly's, to establish a contractual right to certain sums *ab initio*, 'a cause of action accrues and the statute of limitations begins to run when a suit may be maintained,' and not at some later date when additional payments may be due." While *Dillon* involved pension benefits, UMPG's statement is consistent with *Dillon*. But it ignores the more relevant conclusion from *Dillon*: Where the amount of a periodic payment is at issue, "any time limitation upon the right to sue for each installment necessarily commences to run from the time when that instalment actually falls due." (*Id.* at p. 430.) "[W]here performance of contractual obligations is severed into intervals, as in installment contracts, the courts have found that an action attacking the performance for any particular interval must be brought within the period of limitations after the particular performance was due." (*Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.* (2004) 116 Cal.App.4th 1375, 1388.)

UMPG attempts to shoehorn this case into an entitlement case but provides no evidence in support of that characterization.² All of the evidence -- the Agreement, the parties' conduct, and the essence of the dispute -- indicate that this case involves the amount of periodic payment of royalties, not Weatherly's entitlement to royalties. The Agreement reflects each payment is divisible and the alleged breach of contract is not a

² *Mappa Music Co. v. Universal-Polygram Int'l Pub. Inc.* (C.D.Cal. Dec. 17, 2001) 62 U.S.P.Q.2d (BNA) 1582, 1588, a case heavily relied upon by UMPG, involved a plaintiff who "*never received any music publishing royalties under the agreement*" not a plaintiff who disputed the amount of royalties. (Italics added.)

single breach with continuing impact. The Agreement provides that the Publisher will pay royalties biannually. The Agreement itself suggests that the same breach may be repeated as it provides that “[n]o waiver by either party hereto of any breach of any covenants or provisions of this Agreement shall be deemed to be a waiver of any preceding or succeeding breach of the same or any other covenant or provision.” UMPG acknowledges that Weatherly “received periodic accountings” thereby, at least implicitly acknowledging that this case is not about Weatherly’s entitlement to royalties. The complaint also indicates that the crux of the dispute concerns the amount of the periodic royalties UMPG owes Weatherly.³

Therefore, at a minimum, the causes of action are not time barred with respect to the installments paid within the one-year contractual limitations period.

B. Failure To Conduct an Audit Does not Automatically Show a Lack of Diligence

UMPG’s principal legal argument is as follows: “California case law fully supports the principle that one with the right to monitor another’s performance under a contract is charged with the knowledge he would have obtained if he had done so.” According to UMPG “[t]he trial court correctly found that Weatherly’s decision not to audit precluded him from demonstrating the *blameless* ignorance that is necessary to invoke the ‘delayed discovery’ doctrine.” (Original italics.)

Weatherly argues, among other things, that the statute of limitations and contractual limitations period should be tolled because he provided evidence that

³ The complaint alleges among other things, UMPG breached its obligation in “failing to provide full and complete accountings to Plaintiff and concealing from Plaintiff relevant information regarding Defendants’ conduct concerning the Compositions and the open book royalty account; [] using the percentages and rates not agreed to by Plaintiff to calculate Plaintiff’s share of royalties; [] failing to report and/or under reporting income from foreign sources; [] failing to collect income from foreign sources; [] entering into and or implementing agreements with affiliates and/or subsidiaries and/or parents for the exploitation of the Compositions at artificially low and below market-value royalty rates and/or failing to collect and credit all monies due from affiliates . . . structuring transactions . . . so as to artificially . . . lower the actual amount of monies received in the United States”

UMPG's royalty statements were misleading in indicating that his "50% share was being calculated on 100% of all monies UPMG [*sic*] received" According to Weatherly, "[i]n addition to improperly keeping 25% to 40% of the amounts due to Weatherly on the royalties collected, UMPG refused to provide requested source documentation from foreign performing rights societies and foreign suspense reports which would show the actual amount of royalties received for the exploitation of Weatherly's work abroad."

"The discovery rule protects those who are ignorant of their cause of action through no fault of their own. It permits delayed accrual until a plaintiff knew or should have known of the wrongful conduct at issue. [Citation.]" (*April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 832 (*April Enterprises, Inc.*)). A plaintiff, prevented from discovery, should not suffer and a defendant should not "knowingly profit" from the plaintiff's ignorance. (*Id.* at p. 831.) The same policies apply in the context of a contractual limitations provision. (*Moreno v. Sanchez* (2003) 106 Cal.App.4th 1415, 1429.) "[N]o authority exists which sanctions a contractual provision permitting parties to opt out of the benefits of the discovery rule in situations where the discovery rule would otherwise apply." (*Id.* at p. 1433.)

There is some authority in support of UMPG's argument that the discovery rule does not apply to a plaintiff who had the means to discover the wrongdoing. (*McKelvey v. Boeing North American, Inc.* (1999) 74 Cal.App.4th 151, 160 fn. 11; *Atlantic Richfield Co. v. Lujan* (N.D.Okla. 1992) 811 F.Supp. 1520, 1525.) Other cases reject the conclusion that the means of inquiry is automatically tantamount to a duty of inquiry. " 'Where no duty is imposed by law to make inquiry, and where, under the circumstances, a prudent man would not be put on inquiry, the mere fact that means of knowledge are open and not availed of does not operate to give constructive notice of the facts.' " (*Baker v. Beech Aircraft Corp.* (1974) 39 Cal.App.3d 315, 322; see also *Prudential Home Mortgage Co. v. Superior Court* (1998) 66 Cal.App.4th 1236, 1248 [rejecting argument that delayed discovery did not apply because information available in public records]; *Enterprise-Laredo v. Hachar's* (Tex.Ct.App. 1992) 839 S.W.2d 822, 838

[rejecting an argument that delayed discovery did not apply because the lease in question gave the plaintiff the right to conduct an annual audit].)

In this case, Weatherly's argument goes beyond the claim that a prudent person would not have been put on inquiry notice prior to the audit; he argues that he was misled by the royalty statements, specifically the entries of 100% in the (% Rcvd) column. Applying the discovery rule in the context of a claim of a misrepresentation, the Ninth Circuit held, under California law, a defendant cannot hinder the plaintiff's discovery through misrepresentations and then fault the plaintiff for failing to investigate. (*El Pollo Loco, Inc. v. Hashim* (9th Cir. 2003) 316 F.3d 1032, 1039 (*El Pollo Loco, Inc.*) [applying California law].) “ ‘The recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he undertaken an investigation.’ ” (*Id.* at p. 1040, quoting *Storage Servs. v. Oosterbaan* (1989) 214 Cal.App.3d 498, 508.) The court found the limitations period was tolled under the discovery rule where the defendant applied for an El Pollo Loco franchise and provided fraudulent evidence indicating that he was not a franchisee of a competitor. (*Id.* at p. 1035.)

The reasoning of *El Pollo Loco, Inc.* is consistent with the purpose of the delayed discovery doctrine: a plaintiff, prevented from discovery, should not suffer and a defendant should not profit from the plaintiff's ignorance. Applied here, the right to conduct an audit is not dispositive of diligence where there is evidence that the plaintiff was “hindered” from discovering the breach by the defendant's misrepresentations. (*El Pollo Loco, Inc., supra*, 316 F.3d at p. 1040.)

C. Triable Issues of Material Fact Preclude Summary Judgment

In the context of the discovery rule, whether a plaintiff exercises diligence in learning of the injury generally is a question of fact. (*April Enterprises, Inc., supra*, 147 Cal.App.3d at p. 833.) UMPG's statement that, “[o]n summary judgment, the plaintiff has the burden of proving, not just pleading, such facts” reflects an incorrect burden. (Italics omitted.) To withstand the motion for summary judgment, Weatherly must show a triable issue of material fact with respect whether he “exercised due diligence in

discovering the [alleged] breach” (*Gryczman v. 4550 Pico Partners, Ltd.* (2003) 107 Cal.App.4th 1, 6-7.) “[S]ummary judgment may not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact.” (Code Civ. Proc., § 437c, subd. (c).)

The key “facts” UMPG relies upon in disputing Weatherly’s claim that he was misled reflect an inaccurate view of the record at this procedural stage. Specifically, UMPG states: (1) The Agreement “specifically envisioned the customary deduction of foreign subpublishing fees” (2) “The admissions of Weatherly’s professional advisors reinforce his lack of diligence and establish actual knowledge.” (3) There was no active concealment because the “ ‘%Rcvd’ column had nothing to do with the existence or amount of any subpublishing fees.” (4) Weatherly cannot show diligence because “[a]s soon as Weatherly inquired, he learned the facts.” Weatherly raises triable issues of material fact with respect to each of these statements.

1. Alleged Subpublishing Fees in the Agreement

According to UMPG, the Agreement contemplates a deduction for subpublishing fees. UMPG cites the following provision: Writer is entitled to “[f]ifty per cent [*sic*] (50%) of any and all net sums, after deduction of foreign taxes, actually received (less any costs for collection) by Publisher from sales and uses directly related to subject musical compositions in countries outside of the United States (other than public performance royalties . . .).”

The plain language of the cited provision does not mention subpublishing fees. It mentions “costs of collection.” According to Adawiya, the “25% to 40% charge by UMPG is well in excess of its actual cost . . . in collecting the royalties.” While evidence of custom and practice *may* be relevant to the interpretation of the Agreement,⁴ that

⁴ The “intention of the parties as expressed in the contract is the source of contractual rights and duties.” (*Pacific Gas & E. Co. v. G. W. Thomas Drayage Etc. Co.* (1968) 69 Cal.2d 33, 38.) “The test of admissibility of extrinsic evidence to explain the

evidence is not part of UMPG's motion for summary judgment. For purposes of summary judgment, UMPG has not shown that the Agreement provides for a subpublishing fee.

2. *Alleged Admissions by Weatherly's Advisors*

In arguing that Weatherly had actual knowledge of UMPG's accounting practices, UMPG relies on so-called admissions made by Schneider and Adawiya. UMPG states that Weatherly's "advisors did know the facts -- they simply chose not to act on them." UMPG, however, infers knowledge from testimony reflecting a lack of any knowledge. Specifically, in his deposition, Schneider testified that the royalty statements did not "indicate anywhere whether money is being deducted from foreign royalties before Mr. Weatherly's share is being calculated," that he did not advise Weatherly to inquire, and that he was not aware of any circumstances preventing him from inquiring. That testimony does not show Schneider knew UMPG was deducting monies before calculating Weatherly's share -- the *alleged* misconduct. It shows, Schneider could have investigated but chose not to.

UMPG's claim that Adawiya admitted similar knowledge also is contradicted by the evidence. Adawiya stated in his declaration, "[t]here was nothing on the face of the statements to indicate there may be a problem with the royalty accounting. That said, I knew from my prior audits that the statements UMPG had rendered to . . . other royalty recipients also failed to disclose the off the top 'fee' for foreign royalties." Adawiya continued as follows: "In my opinion, the royalty statements that UMPG renders to Mr. Weatherly are deceiving." They "give[] the impression that the monies reflected under the column 'amount received' are 100% of the amount collected in the applicable

meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible." (*Id.* at p. 37.) "Although extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract, these terms must first be determined before it can be decided whether or not extrinsic evidence is being offered for a prohibited purpose." (*Id.* at p. 39.)

territory, including foreign territories, even though, as I later learned, this amount is in fact far less.” Adawiya’s deposition testimony is not inconsistent with his declaration. Adawiya agreed that if a foreign subpublisher is hired, that foreign subpublisher typically takes a fee. Adawiya also stated that based on the royalty statements he could not determine whether UMPG was taking money off the top. That does not show, in this case, Adawiya knew that a fee was taken prior to the audit.

Because UMPG’s factual assertions are unsupported, at least at this procedural stage, we need not further consider its implicit legal claim that Schneider’s and Adawiya’s knowledge should be attributed to Weatherly.

3. Meaning of “% Rcvd”

UMPG challenges Weatherly’s claim that he was misled by the royalty statements by belittling Weatherly’s interpretation of “% Rcvd.” It argues, “Weatherly’s argument (also made to the trial court) that the notation ‘100%’ in the ‘%Rcvd’ column on his royalty statements misled him into believing that no foreign subpublishing fees were being deducted (AB at 10-13) was and is specious. The ‘%Rcvd’ column had nothing to do with the existence or amount of any subpublishing fees. Rather, it reflected UPIP’s ownership percentage of each individual song, based on whether Weatherly wrote alone or with co-writers. For example, if Weatherly co-wrote a song with one other writer, the column would read ‘50%.’ If he co-wrote it with two other writers, the column would read ‘33%.’ ” In most cases Weatherly wrote alone, so the column read “100%.”

UMPG cites no evidence for the meaning of the “% Rcvd” column. Its claim that it is based on the number of co-authors therefore is not supported by the evidence in this case. It is neither rooted in the plain meaning of the language nor identified by a legend on the royalty statements or the Agreement. UMPG’s unsupported statement is not sufficient to show as a matter of law it did not mislead Weatherly into believing that his royalties, including his foreign royalties, were calculated based on 100 percent of the monies received. Weatherly’s testimony, the testimony of his advisors, and the plain language of the royalty statements support Weatherly’s interpretation at least for purposes of this motion.

4. *Evidence of Weatherly's Ability To Investigate*

UMPG states that, "It was undisputed that as soon as Weatherly finally did inquire about his foreign royalties in 2002, UPIP immediately provided him the facts he now claims, as the linchpin of his 'delayed discovery' argument" However, according to Adawiya's declaration, UMPG "declined to show me many of its books and records concerning Mr. Weatherly that I asked to review in connection with my audit of UMPG on behalf of Mr. Weatherly. UMPG's refusal to show me these records prevented me from completing the Audit" Adawiya explained, that in general to conduct an audit one "look[s] at source documents, and . . . make[s] sure that the amount collected by Universal or a publisher is the amount exactly what's written on th[e] statement."

In claiming that Weatherly cannot show diligence for purposes of delayed discovery, UMPG simply ignores the contrary evidence provided by Weatherly. This is not the correct standard for summary judgment. Because Weatherly raised triable issues of material fact, the trial court erred in granting UMPG's motion.

II. *The Trial Court Erred in Denying Weatherly Leave To Amend His Cause of Action for Breach of the Implied Covenant of Good Faith and Fair Dealing*

We review the order sustaining, without leave to amend, UMPG's demurrer to the cause of action for breach of the implied covenant of good faith and fair dealing, to determine if Weatherly stated a cause of action and whether the trial court abused its discretion in denying Weatherly leave to amend. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.) It is "an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (*Id.* at p. 967.)

The trial court erred in dismissing Weatherly's claim for breach of the covenant of good faith and fair dealing. Such a claim may be superfluous where it is based on the exact same conduct as a breach of contract claim. (See *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 352.) But, there is no merit to UMPG's claim that the breach of the implied covenant of good faith and fair dealing and breach of contract claim are necessarily based on identical conduct.

As Weatherly explains, UMPG has breached the covenant of good faith and fair dealing by failing to negotiate at arms length for the costs of collection. Adawiya's declaration indicates that the "charge by UMPG is well in excess of its actual cost . . . in collecting the royalties. It is also in excess of what a foreign subpublisher would charge in an arms length agreement."

The trial court did not have Adawiya's declaration when it ruled on the demurrer. However, when Weatherly requested leave to amend to assert a breach of the covenant different from a breach of contract, the trial court denied him leave to amend. Because Weatherly could have so amended the complaint, the denial of leave to amend was an abuse of discretion.

DISPOSITION

The judgment is reversed. The order sustaining without leave to amend UMPG's demurrer to the cause of action for breach of the implied covenant of good faith and fair dealing is reversed. The case is remanded to the trial court. Weatherly is entitled to his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COOPER, P. J.

We concur:

FLIER, J.

BOLAND, J.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JAMES D. WEATHERLY,

Plaintiff and Appellant,

v.

UNIVERSAL MUSIC PUBLISHING
GROUP,

Defendant and Respondent,

B170395

(Super. Ct. No. BC282826)

***ORDER CERTIFYING
OPINION FOR PARTIAL PUBLICATION***

THE COURT:

The opinion in the above entitled matter filed on December 13, 2004, was not certified for publication in the Official Reports. For good cause it now appears that the following parts of the opinion should be published in the Official Reports: Introduction, Factual Background, Procedural Background, Discussion section 1B, and the Disposition. It is so ordered.

COOPER, P. J.

BOLAND, J.