United States District Court
Central District of California
Western Division

ED ASNER *et al.* ,

Plaintiffs,

v.

ACTORS' EQUITY ASSOCIATION,

Defendant.

CV 15-08169 TJH (JPRx)

Order

JS-6

The Court has considered Defendant's motion to dismiss, together with the moving and opposing papers.

This case centers on the Actors' Equity Association's ["Equity"] adoption of a rule terminating its "99-Seat Theater Plan," a program that enabled Equity members ["members"] to participate in theater productions without pay in theaters with fewer than ninety-nine seats. Equity's governing body is known as the National Council [the "Council"]. Only Equity members may serve on the Council. A certain number of the Council's members come from Equity's Western Region, which includes the greater Los Angeles area. These same Western Region members also compose the Western Regional Board, an advisory board to the Council.

Under Article X, § 1 of Equity's by-laws, Equity members are prohibited from,

inter alia, working as an actor or a stage manager in any form of theater without an Equity contract. In the 1970s, Equity began an informal waiver program, waiving Article X, § 1 for theaters with fewer than 100 seats that did not have collective bargaining agreements with Equity. In 1988, a group of members sued Equity alleging that it was attempting to modify the waiver program without following the appropriate procedures. *Salome Jens et al. v. Actors' Equity Association*, Central District of California, Case No. 88-5374-TJH ["*Jens* case"]. Thereafter, Equity adopted a new Article X, § 1 waiver program [the "99-Seat Theater Plan"], providing a waiver for theaters with 99 seats or fewer. Shortly after, the *Jens* case settled pursuant to a written settlement agreement [the "Agreement"]. The Agreement established a permanent Review Committee — composed of *Jens* plaintiffs and other Equity members — to study the "impact, implementation, problems, and operations of the 99-Seat Theater Plan." Under the Agreement, only "the Review Committee, the [Western Review Board], or any member or executive may propose"changes to the 99-Seat Theater Plan.

When changes are proposed, and the proposed changes are "substantial," Article 4 of the Agreement set forth procedures that must take place. First, the Council must "provide the Review Committee . . . details of any proposed changes[.]" This information must be provided "at least 45 days in advance of the date when the Council will act on the proposal to make those changes[.]" Next, the Council must arrange meetings with the "Review Committee for the purpose of receiving recommendations and opinions of the Review Committee about the proposed changes." These meetings must occur "[b]efore the Council acts on a proposal to make changes." Article 4 of the Agreement, also, mandates that the Council consider a request for an advisory referendum on the proposed substantial change "from a member."

In February, March, and April of 2015, a substantial change was proposed, evaluated in an advisory referendum, and adopted, respectively. On February 6, 2015, Mary McColl, the Executive Director of Equity, announced to the members that the Western Regional Board had developed — and the Council approved — a proposal for

a new 99-Seat Theater Plan. The proposed plan would effectively abolish the 99-Seat Theater Plan. The Council, then, met with the Review Committee on February 18, 20, and 21, 2015; however, the Council asserted that it "had no obligation to consider or make any changes to Equity's proposal."

On March 25, 2015, an advisory referendum was distributed by mail and posted online — providing members with the option to vote by mail or online. For three days, however, the electronic ballot omitted an endorsement statement by the Council and an opposition statement by the Review Committee. On April 21, 2015, the Council adopted the proposed changes to the 99-Seat Theater Plan.

Plaintiffs — individuals who are either a) *Jens* plaintiffs or designees of *Jens* plaintiffs or b) non-*Jens* plaintiffs who are members of Equity — [collectively referred to here as "Asner"] brought this suit. Asner alleged that by supporting, proposing, and adopting the change to the 99-Seat Theater Plan, Equity: 1) breached the Agreement; 2) breached the covenant of good faith and fair dealing; 3) breached its duty of fair representation; and 4) violated the Labor Management Reporting and Disclosure Act's ["LMRDA"] equal rights guarantee. Equity, now, seeks dismissal of the remaining four claims under Fed. R. Civ. P. 12(b)(6).

Discussion

Dismissal for failure to state a claim is proper "where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory[,]" or the complaint fails to "contain sufficient factual matter to state a facially plausible claim to relief." *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (internal citations omitted). Facts allege facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotations omitted). In considering a Rule 12(b)(6) motion, the Court must take all allegations of material fact as true and construe them in the light

most favorable to the nonmoving party, although "conclusory allegations of law and unwarranted inferences are insufficient to avoid a Rule 12(b)(6) dismissal." *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). Further, Equity is not entitled to deference for its decision to abolish the 99-Seat Theater Plan because, *inter alia*, this decision was made in an area in which Equity is not "uniquely knowledgeable." *See Garity v. APWU Nat'l Labor Org.*, 828 F.3d 848, 864 (9th Cir. 2016).

The Breach of Contract Claim

Under California law, a breach of contract claim is comprised of the following elements: (1) a contract; (2) the plaintiff's performance or excuse for non-performance; (3) the defendant's breach; and (4) resulting damages to the plaintiff. *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1367 (2010). In this case, only the third element — whether Equity breached the Agreement — is at issue.

Here, the Complaint does not sufficiently allege a breach because Equity's actions, as alleged in the Complaint, are not inconsistent with the Agreement. Article 4(a)(i) provides that "[t]he council will provide to the Review Committee . . . the details of *any proposed changes* at least 45 days in advance of the date when the Council will act on the proposal to make *those changes*." (Emphasis added). Consistent with the forty-five-day notice provision of the Agreement, the Western Regional Board proposed a change to the 99-Seat Theater Plan on February 6, 2015, more than forty-five days prior to the Council's adoption of the changes on April 21, 2015.

Next, the Council did not "act on" the proposal on February 6, 2015, for two main reasons. First, the words, "those changes," in Article 4(a)(i) unambiguously refer to the words "any proposed changes" — that is, the words "those changes" refer to a change that was proposed antecedent to when "the Council will act on the proposal to make those changes." In other words, the Agreement contemplates that the Council may "act[] on" proposed changes only after a proposal has been made. Theoretically, a proposal could have been made and adopted in the same session, and, thus, at the

same time. However, this did not happen in the instant case. Consequently, the Council did not "act on" the February 6, 2015 proposal that was adopted on April 21, 2015.

Second, interpreting the Western Regional Board's proposal to constitute "acting on" the proposal could lead to absurd results. For instance, if making a proposal constituted "acting on" the proposal, it would be difficult to find a scenario in which making a proposal would not result in a breach of the Agreement. Further, the Council complied with the requirement that, before acting on the proposal, it must meet with the "Review Committee for the purpose of receiving recommendations and opinions of the Review Committee about the proposed changes." The Council met with the Review Committee on February 18, 20, and 21 of 2015. Lastly, the Council considered a request by a member for an advisory referendum.

Accordingly, the Complaint fails to state a claim for a breach of contract.

The Breach of the Implied Covenant of Good Faith and Fair Dealing Claim

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 683 (1988). Under this doctrine, courts must protect the parties' reasonable expectations in light of the parties' intentions. *See Foley*, 47 Cal. 3d at 684. The implied covenant protects "the *express* covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purposes." *See Foley*, 47 Cal. 3d at 690 (emphasis added). "In essence, the covenant is implied as a *supplement* to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract." *Love v. Fire Ins. Exch.*, 221 Cal. App. 3d 1136, 1153 (1990) (emphasis in original).

Here, as discussed above, no express provision of the Agreement has been breached. Equity, also, did not Equity take any action that, "while not technically

transgressing the express covenants," frustrated Asner's right to receive the benefits of the Agreement. *See Love*, 221 Cal. App. 3d at 1153. Asner did not identify any facts — and the Court finds none — that demonstrate that alleged actions, such as Equity's alleged lack of neutrality throughout the proposal process, constitute a frustration of Asner's expectations under the express covenants of the Agreement. *See Foley*, 47 Cal. 3d at 690 . Thus, the Complaint does not sufficiently allege a plausible claim for breach of the covenant of good faith and fair dealing.

Equity's Motion to Dismiss the Breach of the Duty of Fair Representation Claim

"The duty of fair representation is a statutory duty implied from the grant to the union by section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a), of exclusive power to represent all employees of the collective bargaining unit." *Retana v. Apartment, Motel, Hotel & Elevator Operators Union, Local No. 14, AFL-CIO*, 453 F.2d 1018, 1021–22 (9th Cir. 1972). To survive a motion to dismiss, a complaint must plausibly allege that the union's conduct was "arbitrary, discriminatory, or in bad faith." *See Galindo v. Stoody Co.*, 793 F.2d 1502, 1513 (9th Cir. 1986).

As a preliminary matter, Equity's decision to abolish the 99-Seat Theater Plan was a judgment — as opposed to a ministerial or procedural act — because the decision involved substantial "rational attempts on the part of [Equity] to properly interpret" the Agreement. *See Wellman v. Writers Guild of Am., W., Inc.*, 146 F.3d 666, 671 (9th Cir. 1998). Further, the duty of fair representation applied to Equity's decision to abolish the 99-Seat Theater Plan because the decision "may have a substantial impact upon the external relationships of members of the unit to their employer." *Retana*, 453 F.2d at 1024. Consequently — because Asner did not allege that the abolition of the 99-Seat Theater Plan was discriminatory — this claim turns on whether the Complaint plausibly alleged that Equity's actions were in bad faith or arbitrary. *See Wellman*, 146 F.3d at 671.

To survive a motion to dismiss, a complaint alleging a breach of the duty of fair

representation under the bad-faith prong must plead facts that show "substantial evidence of fraud, deceitful action or dishonest conduct." *Beck v. United Food & Commercial Workers Union, Local 99*, 506 F.3d 874, 880 (9th Cir. 2007) (internal quotations omitted). The Complaint, here, fails to allege such facts. The majority of Equity's alleged actions — such as not remaining neutral and refusing to meet with the Review Committee between November, 2013 and February, 2015 — can be characterized as not cooperative, inconvenient, or partisan. As such, these alleged actions are not fraudulent, deceitful, or dishonest. To the extent that certain alleged statements indicating a plan to "get rid of the . . . Agreement," and that the Agreement was "a mistake," may be probative of deceit or dishonesty — and this Order does not decide whether the statements are — these facts alone cannot satisfy the requirement that the Complaint allege "substantial evidence" of bad faith. *See Beck*, 506 F.3d at 880.

Without a plausible claim under the bad faith prong, Asner's claim alleging a breach of the duty of fair representation must be dismissed. Where, as here, "the conduct involved the union's judgment, then the plaintiff may prevail only if the union's conduct was discriminatory or in bad faith." *Burkevich v. Air Line Pilots Ass'n, Int'l*, 894 F.2d 346, 349 (9th Cir. 1990) (internal quotations omitted). Because Asner did not allege that Equity's conduct was discriminatory, and cannot allege that Equity's conduct was in bad faith, the Complaint fails to sufficiently allege that Equity breached its duty of fair representation by acting arbitrarily. *See Burkevich*, 894 F.2d at 349.

Therefore, the Complaint fails to allege a plausible claim for breach of the duty of fair representation. *See Iqbal*, 556 U.S. at 678.

The LMRDA Claim

Lastly, Asner alleged that Equity violated § 101(a)(1), 29 U.S.C. § 411(a)(1) by the manner in which it conducted the advisory referendum. Section 101(a)(1),

however, does not apply to votes that are merely advisory to — as opposed to binding on — the ultimate decision-maker. *See Kahn v. Hotel & Rest. Emp. & Bartenders Int'l Union*, 469 F. Supp. 14, 18 (N.D. Cal. 1977), *aff'd sub nom. Kahn v. Hotel & Rest. Emp. & Bartenders Int'l*, 597 F.2d 1317 (9th Cir. 1979). Here, as in *Kahn*, the "[p]laintiffs' arguments . . . boil down to the contention that union members were denied an equal opportunity to vote," but "the decision" at issue "was committed solely to the discretion" of another decision-maker. *Kahn*, 469 F. Supp. at 18. Thus, "[w]hether there were irregularities in the . . . voting has no bearing on the validity" of the Council's decision to abolish the 99-Seat Theater Plan, and does not give rise to a cognizable claim under Section 101(a)(1). *Kahn*, 469 F. Supp. at 18.

Accordingly,

It is Ordered that Defendant's motion for to dismiss be, and hereby is, **Granted Without Prejudice**.

Date: December 8, 2016

Terry J. Hatter, Jr.
Senior United States District Judge