FUTURE FILMS USA, LLC, Plaintiff and Appellant,

v.

SRIRAM DAS et al., Defendants and Respondents.

No. B238222.

Court of Appeals of California, Second District, Division One.

Filed January 24, 2013.

Rufus-Isaacs Acland & Grantham and Alexander Rufus-Isaacs, for Plaintiff and Appellant.

Lapidus & Lapidus, Jim D. Bauch and Evan Pitchford, for Defendant and Respondent Sriram Das.

Dykema Gossett, Craig N. Hentschel and Tamara A. Bush for Defendant and Respondent Jonathan Bross.

Plaintiff Future Films, Inc. (Future) appeals judgment after the trial court sustained defendants' demurrers to its first amended complaint (FAC) on the basis of the sham pleading doctrine. Future asserted claims for interference with contract and declaratory relief and alleged that it owned the rights to a film by virtue of defendants' default on Future's production loan to them. After such default, Future entered into a distribution deal for the film with a third party. Plaintiff's initial complaint alleged that defendants, in an email to the third party, claimed to control distribution rights in the film and refused to provide a necessary song license and proper credits to the film, which caused the third party to breach the distribution contract. Defendant Sriram Das (Das) demurred to the complaint asserting that the lack of rights did not cause the third party to refuse to distribute the film because the lack of proper licensure and credit meant the film could not be distributed in any event. Thereafter, plaintiff filed a FAC in which it changed these key allegations to assert that plaintiff could obtain a song license and proper credits on its own, and that it was simply defendants' assertion that they owned the rights to the film that caused the third party to refuse to distribute the film. We find that the changed allegations were not material and thus the sham pleading doctrine does not provide a basis for defendants' demurrer, and reverse.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY[1]

1. Original Complaint, Filed June 7, 2011

Plaintiff Future, a limited liability company, is a film finance and production company. Defendants Das and Jonathan Bross (Bross) are film producers who acquired the rights to produce a motion picture entitled "Veronika Decides to Die" (Film). Future alleged that pursuant to a loan agreement (a copy of which was not attached the complaint), it lent over $4 million (Loan) to an entity known as VDD Productions (VDD Productions), which was controlled by defendants, to produce the Film.[2] The Loan was to be repaid by September 2009.

The Film was produced and released in certain foreign territories, but the Loan was not repaid. By letter dated October 12, 2009, Future notified defendants that the Loan was in default, and that Future would be enforcing its rights under the power of sale in the Loan. The power of sale authorized Future to lease, license, sell or otherwise dispose of the Film and related distribution rights, and to enter into those agreements it deemed appropriate. Future took over control of the Film, and attempted to minimize its losses by arranging to have the Film distributed worldwide. Defendants were aware of Future's actions.

Defendants, however, preferred the Film be released theatrically in North America because that would benefit their individual careers. Future disagreed with this course of action because it wanted the most profitable distribution deal it could get. Nevertheless, in late 2009 or early 2010, defendants advised Future that a distributor named First Look was willing to distribute the Film in North America and was offering to release the Film theatrically and through other channels (television, home entertainment).

On June 25, 2010, Future entered into a contract with Phase 4 Films, Inc. (Phase 4) to distribute the Film in North America commencing in February 2011 (Phase 4 contract). The Phase 4 contract did not provide for a theatrical release, and thus had less "vanity appeal" for defendants, but was potentially more profitable for Future because Future would receive a substantially larger percentage of receipts from the Film than it would under the First Look deal. Future believed defendants knew of the Phase 4 contract. Future also asserted that when defendants learned that Phase 4 was planning to distribute the Film, they conspired to induce Phase 4 to breach the Phase 4 contract.

On February 18, 2011, Das emailed Dan Wanamaker, an executive at Phase 4, with a copy of the email to defendant Bross, and asserted that defendants controlled the Film and they had not consented to its release (February 18 email). Das specifically stated that, "[Bross] and I are the producers, an entity controlled by us is the rightsholder of the film, and we have not consented to this proposed release." Plaintiff alleged the email was sent as part of the conspiracy to cause Phase 4 to breach the Phase 4 contract.

By letter dated March 9, 2011, Future informed defendants that their conduct constituted wrongful interference with Future's rights and relationships, and demanded that defendants inform Phase 4 their assertions in the February 18 email were a mistake.

On March 11, 2011, defendants informed Phase 4 that they had not paid for a North American license (License) for one of the songs featured in the Film's soundtrack (a song by Radiohead entitled "Everything in its Right Place" (Song)) and also informed Future that the Film's credits needed to be changed. Defendants knew that the Film could not be released without the necessary license and proper credits, and because defendants failed to obtain them, the Film could not be released in North America. Thus, defendants asserted that until the defendants purchased a license to the Song and changed the Film's credits, it could not be released in North America.[3]

However, Future asserted that defendants in fact knew that Future possessed all of the necessary copyrights in the Film which would entitle it to enter into distribution agreements for the Film, and that the film could be released in North America without the license and correct credits. As a result of defendant's February 18 email and their failure to acquire the license or to provide a print that contained the correct credits, Phase 4 declined to distribute the Film.

Plaintiff's initial complaint stated two claims for relief: intentional interference with contractual relations and declaratory relief. Future alleged that because of defendant's false claims that they controlled the Film, Phase 4 declined to distribute the Film, and defendant's conduct constituted interference with contract. Plaintiff also sought a declaration that defendants had no right to interfere with Future's right to determine how the Film was distributed by selecting a distributor in each available territory.

On July 18, 2011, defendant Das demurred to the complaint, contending that the intentional interference claim did not establish causation. Specifically, Das asserted the complaint established that in any event, in spite of Das's actions, the Film could not be distributed in North America because the Film did not have all of the necessary licenses and credits, and plaintiff failed to allege any contract with Das that he deliver those licenses and credits. Rather, Das asserted that even if he had not communicated with Phase 4, the Film could not be distributed in North America; hence, his actions caused no harm to plaintiff.

2. FAC, Filed August 30, 2011

Before the hearing on Das's demurrer, plaintiff filed a FAC alleging the same two claims for relief. Plaintiff's attorney, in a separate declaration filed in response to Das's demurrer to the FAC explained that in reviewing Das's demurrer to the original complaint, he realized that there was nothing that prevented Future from buying, on its own, a license to the Song in the Film directly from the copyright holder; therefore the allegation in the original complaint that the Film could not be released unless VDD Productions obtained a license to the Song was incorrect. Further, Future, because it now controlled the Film by virtue of its power of sale, could change the credits on the Film by instructing the film laboratory to make the necessary changes. These two actions would enable Phase 4 to release the Film in North America without risk of being sued by any producer whose credit needed to be changed.

In coming to this clarity, Future relied on the March 11, 2011 letter from VDD Productions and Das's counsel advising Future that VDD Productions and Das asserted that the Film in Future's possession was cleared for foreign distribution, while a more current version of the Film, of which Future was aware, included music cleared for exploitation in North America. Further, Phase 4 was apparently unaware of these facts regarding licensure and credits at the time it refused to distribute the Film because the specific assertions of the March 11, 2011 letter came after Phase 4 notified Future of its refusal to proceed with the Phase 4 contract.

Accordingly, counsel explained that the allegations of the FAC were the same as the original complaint, except that plaintiff omitted the allegations contained in paragraphs 4, 21, and 22, to wit: (1) defendants were personally obligated to provide a license for the music and a print of the Film that had accurate credits, (2) until defendants purchased a license for the Song and provided Future with a print of the Film that had correct credits, the Film could not be distributed in North America; and (3) Phase 4 refused to distribute the Film because defendants had not provided a license for the Song or a print of the Film with the correct credits.

The FAC at paragraph 21 and 22 contained the explanation for the changes, and alleged that:

The soundtrack of the Film contained a song by Radiohead entitled "Everything in its Right Place." Das informed Future in March 2011 that a license to use the Song in the Film in North America had not been obtained, and as therefore, Phase 4 could not have distributed the Film in any event, and defendants did not cause a breach of the Phase 4 contract.[4] At the same time, Das informed Future that the credits to the Film should be changed, but did not specify how. Future asserted that the credit issue would not have prevented Phase 4 from releasing the Film.[5]

3. Demurrers to FAC

(a) Das's Demurrer

Das demurred, asserting that pursuant to the sham pleading doctrine, Future was bound by its allegations in the original complaint that the Film could not be distributed because it did not have an appropriate song license and correct credits. Das contended that regardless of any email he sent to Phase 4, in no event could the Film be distributed in North America because of these deficiencies. Further, Das's actions were made in his capacity as principal of VDD Productions, and because he was acting in the financial interests of VDD Productions—whose interests would have been prejudiced by a distribution contract made without all licensing and credit clearances—his communications with Phase 4 were privileged. Finally, Das argued that Future attempted to "`take back'" its prior allegations that the Film could not be distributed because of the lack of licenses by arguing in paragraphs 21 and 22 that nothing prevented Future or Phase 4 from purchasing a license,

and the absence of license therefore would not have prevented Phase 4 from distributing the Film.

In opposition, Future argued that its original complaint was unverified, and the sham pleading doctrine applied to verified complaints; it was seeking to amend a legal conclusion, rather than changing the facts; and the FAC alleged that Das was acting in his individual capacity. In particular, Future asserted that its principal allegations—that Phase 4 did not distribute the Film because of the February 18 email—had not changed. Rather, what had changed was Future's allegation that it or Phase 4 could easily have bought a license for the Film and obtained correct credits, which were tasks that did not need to be performed by VDD Productions. Future's attorney submitted a declaration in which he explained the revisions in the FAC.

In reply, Das argued that the sham pleading doctrine applied to unverified pleadings; plaintiff had not adequately explained its changed allegations, and the changed allegations were facts, not legal conclusions; and the demurrer should be sustained on privilege grounds. Das also objected to Future's attorney's declaration.

At the November 17, 2011 hearing on Das's demurrer, the court sustained the demurrer without leave to amend. The court found that plaintiff had failed to adequately explain the omitted allegations because "In light of the unambiguous allegations in the original complaint that the license and film credits issue caused Phase 4 to decline to distribute the film, plaintiff must provide evidence which clearly establishes that the earlier allegations were the result of mistake or inadvertence. The Court finds that plaintiff has failed to meet that burden. Plaintiff's counsel simply states that he `reanalyzed' the situation after reading Das's first demurrer and `realized' that there was nothing to stop FUTURE from buying the license for the song or correcting the film credits. This is completely speculative and does not serve to `unring the bell.'" The court concluded that plaintiff could not show the alleged harm was proximately caused by Das's conduct, and both of plaintiff's claims failed.

(b) Bross's Demurrer

Bross also demurred arguing that the FAC alleged that he was copied on an email authored by Das, but alleged no further wrongdoing. Bross also argued that the FAC contradicted its earlier allegations, and plaintiff had failed to allege Bross engaged in a conspiracy with Das.[6]

Plaintiff filed its opposition to Bross's demurrer on November 22, 2011, after the court sustained Das's demurrer to the FAC. Future argued that it was permissible to change the facts because the FAC provided an adequate explanation; the allegations that were omitted were legal conclusions; and the FAC contained sufficient allegations against Bross to allege a conspiracy because it alleged that Bross knew about the contract and formed a conspiracy with Das to induce Phase 4 to breach the contract; the February 18 email was copied to Bross, and was clearly written on behalf of both Das and Bross; Bross knew the February 18 email misrepresented the situation to Phase 4, and would cause Phase 4 to

believe that Future did not control the rights; Bross concurred with the sending of the February 18 email; the email was sent pursuant to the conspiracy, and at no time did Bross attempt to disavow to Phase 4 any of the allegations of the February 18 email. Further, the FAC alleged that Das and Bross were acting in their individual capacities, and nowhere was VDD Productions mentioned in the February 18 email.

In support, Future submitted the declaration of its attorney that stated that Future was unaware any of the credits needed to be changed until it received the March 11, 2011 letter. Future also submitted the Declaration of Barry Meyerowitz, the president and CEO of Phase 4, which stated that in preparation for releasing the Film, Meyerowitz realized that the Film was missing licenses for all music used in the Film. Phase 4 contacted VDD Productions, Das, and Bross about the missing licenses. Upon receipt of the February 18 email in reply, Meyerowitz forwarded it to Future. Meyerowitz believed, based upon the February 18 email, a controversy over who held the rights to the Film existed, and that Phase 4 would not distribute the Film until the uncertainties were resolved. On February 25, 2011, Meyerowitz received a letter from an attorney representing Veronica Decides to Die Holdings LLC (VDDH); the letter was copied to Das and Bross. In that letter, VDDH asserted it was the exclusive owner of the rights to the Film and that VDDH would sue Phase 4 for copyright infringement if it distributed the Film. Phase 4 sent the letter to Future on February 28, 2011, and indicated that Phase 4 would not distribute the Film until the controversy was resolved. Phase 4 was unaware of any problem involving the credits of the Film before making this determination, and this issue played no part in Meyerowitz's decision.

The trial court heard Bross's demurrer on December 7, 2011. The court sustained the demurrer, finding that Phase 4 declined to distribute the Film because of the Song License and credits issues, but there was nothing to show these problems were somehow intentionally caused by defendants or that such issues prevented distribution of the Film. The court pointed to the allegations of paragraph 21 of the FAC that "there was nothing to prevent FUTURE or PHASE 4 from purchasing a license at that time. Thus, the absence of a LICENSE would not have prevented PHASE 4 from distributing the FILM, and did not cause PHASE 4 to breach the PHASE 4 CONTRACT by refusing the release the FILM." The court concluded, "In light of the unambiguous allegations of the original complaint that the license and film credits issues caused Phase 4 to decline to distribute the Film, plaintiff must provide evidence which clearly establishes that the earlier allegations were the result of mistake or inadvertence." The court found that plaintiff's lawyer's re-analysis of the facts was simply speculative and insufficient to overcome the inconsistent allegations, and because the first cause of action for intentional interference failed, the declaratory relief action failed along with it.

DISCUSSION

Plaintiff argues that the sham pleading doctrine does not bar the FAC because the Film could be released even though defendants had not obtained a song license or proper credits, and thus removal of these allegations is not fatal to its claim because Phase 4

refused to distribute the Film solely based upon the February 18 email. Specifically, that email raised an uncertainty over who owned the rights to the Film; further, plaintiff moved promptly to amend its complaint and in any event, the omitted allegations were contentions, deductions, or conclusions of fact and law to which the sham pleading doctrine does not apply. In addition, plaintiff argues that the allegations against Bross establish a cause of action for conspiracy and defendants' argument that their actions were privileged because they were made on behalf of VDD Productions has no merit.

Das contends that Future's explanation is insufficient to avoid the sham pleading doctrine because Future had sufficient time before filing its complaint to determine the correct facts, and further demonstrates Future's lack of good faith and promptness; in any event, the demurrer could have been sustained on the theory that his communications with Phase 4 were made in his capacity as principal of VDD Productions, and thus were privileged. Bross joins in Das's arguments, and also asserts that Meyerowitz's declaration, which was submitted after the court's ruling on Das's demurrer, constituted a *third* version of the facts which purported to show that Phase 4 held off due to the March 11, 2011 letter. Further, that version of the facts did not overcome plaintiff's problems with causation, and established that the dispute, if any, was contractual. In addition, Bross contends that plaintiff cannot show he engaged in any intentional acts, his passive receipt of an email copy cannot be translated into a conspiracy.

I. Standard of Review

The function of a demurrer is to test the sufficiency of a pleading as a matter of law, and we apply the de novo standard of review in an appeal following the sustaining of a demurrer without leave to amend. (*Holiday Matinee, Inc. v. Rambus, Inc.* (2004) 118 Cal.App.4th 1413, 1420.) A complaint "is sufficient if it alleges ultimate rather than evidentiary facts," but the plaintiff must set forth the essential facts of his or her case "with reasonable precision and with particularity sufficient to acquaint [the] defendant with the nature, source, and extent" of the plaintiff's claim. Legal conclusions are insufficient. (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550 & 551, fn. 5.) "We assume the truth of the allegations in the complaint, but do not assume the truth of contentions, deductions, or conclusions of law." The trial court errs in sustaining a demurrer "if the plaintiff has stated a cause of action under any possible legal theory, and it is an abuse of discretion for the court to sustain a demurrer without leave to amend if the plaintiff has shown there is a reasonable possibility a defect can be cured by amendment." (*California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 247.)

II. The Sham Pleading Doctrine Does Not Bar the FAC

Where the amended complaint omits facts alleged in a prior complaint, or pleads facts inconsistent with a prior complaint, any inconsistency must be explained, otherwise we will read into the amended complaint such omitted or inconsistent facts. (*Vallejo Development*

Co. v. Beck Development Co. (1994) 24 Cal.App.4th 929, 946; *Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 383-384 (*Owens*) [prior self-destructive allegations in an earlier pleading are read into a later pleading, and the allegations inconsistent therewith are treated as sham and disregarded].) "The purpose of the [sham pleading] doctrine is to enable the courts to prevent an abuse of process. [Citation.] The doctrine is not intended to prevent honest complainants from correcting erroneous allegations or to prevent the correction of ambiguous facts." (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 751; see also *Tognazzi v. Wilhelm* (1936) 6 Cal.2d 123, 127.) Plaintiff can avoid the affect of earlier admissions by including in the subsequent complaint an explanation why the earlier admissions are incorrect. (*Owens,* at p. 384.) Despite concerns about sham pleadings, the Supreme Court has also long since "made it clear that `a party should be allowed to correct a pleading by omitting an allegation which, it appears, was made as the result of mistake or inadvertence.'" (*Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 836; see also *Hahn,* at p. 751 [amended complaint was not a sham pleading, despite omission of alternate factual allegation contained in previous complaint].) The requirement that the explanation for inconsistency be merely "plausible" is consistent with the standard by which all pleadings are judged: that is, that courts "must assume the truth of the complaint's properly pleaded or implied factual allegations. [Citation.]" (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) Whether or not the complaint is verified does not affect the sham pleading analysis. (*Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1109.)

Illustrating the reach of these principles are *Deveny v. Entropin* (2006) 139 Cal.App.4th 408 (*Deveny*)*and Owens v. Kings Supermarket, supra,* 198 Cal.App.3d 379. In *Owens,* the plaintiff asserted a personal injury claim against defendant market, claiming the market controlled the street where the injury occurred. The market demurred, contending the street was controlled by the city, and plaintiff's amended complaint asserted that the accident occurred on the market's premises. *Owens* held that the subsequent allegation could be disregarded as a sham because plaintiff provided no explanation for the change in factual allegations. (*Id.* at p. 384.) In *Deveny,* the class plaintiffs asserted the defendant drug company failed to disclose adverse test results. In the original complaint, plaintiffs alleged that "`[d]efendants withheld scientific and clinical knowledge that Esterom was not detected in the blood or urine of patients' and that `[w]hen Plaintiffs discovered that Entropin had omitted to disclose material information concerning the absorption of Esterom, Plaintiffs contacted counsel and began an investigation.'" (*Id.* at p. 423.) After the defendant's motion for summary judgment on statute of limitations grounds based on the existence of publicly available information on its website regarding the outcome of the blood and urine tests, the plaintiffs amended their complaint, alleging that the information on the website, while accurate, "did not provide plaintiffs or other investors with any reason to believe that Esterom was not absorbed or was not effective," and was thus insufficient to trigger the statute of limitations. (*Id.* at p. 417.) The drug company asserted the sham pleading doctrine, contending the plaintiffs' change in theory of liability from "you didn't tell us about the tests," to "okay, you did tell us about the tests, but you didn't explain their significance" was an instance of sham pleading. The *Deveny* court noted that plaintiff's counsel had offered an explanation for the change, namely, that while he had initially been unaware of information that was publicly available, after speaking with experts, he realized the data

provided on defendant's website was simply insufficient to put potential investors on notice of the drug's problems. Thus, *Deveny* concluded this effort was sufficient to avoid the sham pleading doctrine, stating that "the sham pleading doctrine does not apply because [plaintiff's counsel] offered a plausible explanation for the amendment, i.e., that he had erred in relying on the failure to disclose the blood and urine data as the basis for the complaint because further discovery and consultation with experts had shown that such data was inconclusive." (*Id.* at p. 426.)

Here, the changes in plaintiff's theory of the case, and the facts supporting it, are not contradictory and are therefore not governed by the sham pleading rule. Defendants' assertion that they owned the Film's rights is different than plaintiff's assertion that defendants had failed to obtain proper license and credits, and plaintiff's initial belief that its claim was based upon this failure. Thus, at first, plaintiff asserted that defendants' alleged failure to secure a song license and correct credits prevented Phase 4 from performing the Phase 4 contract. Upon reanalyzing its case in light of Das's demurrer—which was primarily based on a causation theory—plaintiff realized that the lack of a song license or proper credits could not have caused Phase 4 to refuse to perform because plaintiff could have obtained the license and revised credits on its own. Rather, it was defendants' broad assertion in the February 18 email that defendants controlled the Film in its entirety that caused Phase 4 to balk at the Phase 4 contract. These different allegations from the original complaint to the FAC are not an attempt to change the facts, as the plaintiff did in *Owens.* Instead, plaintiff simply realized that its allegations were focused on the wrong subset of facts, and attempted to correct that. Thus, the omission of the license and credit allegations from the FAC have been satisfactorily explained and do not constitute a sham. The trial court erred in sustaining the demurrer to both of plaintiff's causes of action on the basis of the sham pleading rule.

III. Justification for Communication

Das asserts that any statements he made were made on behalf of VDD Productions and thus were privileged. We disagree that such statements were privileged as a matter of law.

An action in tort "will lie for the intentional interference by a third person with a contractual relationship either by unlawful means or by means otherwise lawful when there is a lack of sufficient justification." (*Herron v. State Farm Mutual Ins. Co.* (1961) 56 Cal.2d 202, 205.) To recover for inducing breach of contract, a plaintiff must establish (1) the existence of a valid contract; (2) the defendant had knowledge of the contract and intended to induce its breach; (3) the contract was in fact breached by the third party; (4) the breach was proximately caused by defendant's unjustified and wrongful conduct; and (5) that the foregoing resulted in damage to plaintiff. (*Abrams & Fox, Inc. v. Briney* (1974) 39 Cal.App.3d 604, 608.) Justification for the interference is an affirmative defense and not an element of plaintiff's cause of action. (*Lowell v. Mother's Cake & Cookie Co.* (1978) 79 Cal.App.3d 13, 18-19.)

Justification "is the narrow protection afforded a party where (1) he [or she] has a legally protected interest, (2) in good faith threatens to protect it, and (3) the threat is to protect it by appropriate means." (*Richardson v. La Rancherita* (1979) 98 Cal.App.3d 73, 81.) "`Where the defendant acts to further his own advantage, other distinctions have been made. If he has a present, existing economic interest to protect, such as the ownership or condition of property, or a prior contract of his own, or a financial interest in the affairs of the person persuaded, he is privileged to prevent performance of the contract of another which threatens it; and for obvious reasons of policy he is likewise privileged to assert an honest claim, or bring or threaten a suit in good faith.' [Citation.]" (*Ibid.*)

Here, VDD Productions may have had an interest in either protecting its rights to the Film, or ensuring that it was not the subject of a copyright infringement action. As Future asserts in the FAC, VDD Productions knew that such justification was not based upon any good faith belief in VDD Production's rights to the Film. Thus, assuming for the sake of demurrer that the facts of the FAC are true, VDD Productions would not be entitled to the defense of justification if, as Future alleges, "defendants knew that FUTURE possessed all of the necessary copyrights and other interests that would entitle FUTURE to enter into an agreement with whomever it wished to distribute the FILM in North America, and there was no good faith basis upon which they could assert either that `an entity controlled by us is the rightsholder of the film' or that `we have not consented to this proposed release.'"

IV. Conspiracy Claim Against Bross

Civil conspiracy is not an independent tort. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 511.) "Standing alone, a conspiracy does no harm and engenders no tort liability. It must be activated by the commission of an actual tort." (*Ibid.*) "`The major significance of a conspiracy cause of action "lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong . . . regardless of the degree of his activity. [Citation.]"' The essence of the claim is that it is merely a mechanism for imposing vicarious liability; it is not itself a substantive basis for liability. Each member of the conspiracy becomes liable for all acts done by others pursuant to the conspiracy, and for all damages caused thereby." (*Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2005) 131 Cal.App.4th 802, 823; *Applied Equipment Corp.,* at pp. 510-511 [conspiracy is "a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration"].)

"`[T]he basis of a civil conspiracy is the formation of a group of two or more persons who have agreed to a common plan or design to commit a tortious act.' [Citations.] The conspiring defendants must also have actual knowledge that a tort is planned and concur in the tortious scheme with knowledge of its unlawful purpose. [Citations.] [¶] However, actual knowledge of the planned tort, without more, is insufficient to serve as the basis for a conspiracy claim. Knowledge of the planned tort must be combined with intent to aid in its commission." (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1582.)

Knowledge and intent "`may be inferred from the nature of the acts done, the relation of the parties, the interest of the alleged conspirators, and other circumstances.'" (*Ibid.*)

Here, the FAC alleged that "the FEBRUARY 18th email was copied to BROSS, who concurred with the sending of the email which was sent with his prior knowledge and consent, and pursuant to his conspiracy with DAS to induce PHASE 4 to breach the PHASE 4 CONTRACT. At no time did BROSS contact FUTURE or PHASE 4 to disavow any of the statements made by DAS on behalf of himself and BROSS." This allegation states that Bross, as a principal of VDD Productions, who had knowledge of the email, consented to and acquiesced in its transmission and intended to aid Das as part of a plan with Das to cause Phase 4 to breach the Phase 4 contract. As such, these allegations, which we assume to be true for purposes of demurrer, are sufficient to state a claim that Bross conspired with Das to interfere with the Phase 4 contract.

DISPOSITION

The judgment is reversed. Appellant is to recover its costs on appeal.

MALLANO, P. J. CHANEY, J., concurs.

[1] In accordance with the rules of appellate review, we treat the allegations of the complaint and FAC as true for purposes of demurrer.

[2] VDD Productions was not named as a defendant in the complaint.

[3] Paragraph 20 alleged, "The soundtrack of the FILM includes a song by the rock group Radiohead, entitled *Everything in its Right Place* ("SONG"), but despite being obliged to deliver a FILM with valid music licenses, defendants informed FUTURE and PHASE 4 that they had not bought a license to use the SONG in the FILM in North America ("LICENSE"). Defendants further informed FUTURE and PHASE 4 that the credits on the FILM had to be changed, but have not provided a new print of the FILM that includes the proper credits."

[4] Paragraph 21 alleged, "However, there was nothing to prevent FUTURE or PHASE 4 from purchasing a LICENSE at that time. Thus the absence of a LICENSE would not have prevented PHASE 4 from distributing the FILM, and did not cause PHASE 4 to breach the PHASE 4 CONTRACT by refusing to release the FILM."

[5] Paragraph 22 alleged, "however, there was nothing to prevent FUTURE or PHASE 4 from changing the credits at that time if it was determined to be necessary. Thus the credit issue would not have prevented PHASE 4 from distributing the FILM, and did not cause PHASE 4 to breach the PHASE 4 contract by refusing to release the FILM."

[6] Initially, Bross, a resident of Chicago, sought to quash service of the summons and complaint. The motion was denied.