GIOVANNI GAMBINO, Plaintiff and Appellant,

v.

WARNER BROS. PICTURES, et al., Defendants and Respondents.

No. B294086.

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

Filed January 29, 2020.

APPEAL from a judgment of the Superior Court of Los Angeles County, Super.Ct. No. SC126527, Gerald Rosenberg, Judge (Ret.). Affirmed.

Giovanni Gambino, in pro. per., for Plaintiff and Appellant.

Boies Schiller Flexner, Andrew Esbenshade and Joshua M. Stein for Warner Bros. Pictures.

INTRODUCTION

Plaintiff and appellant Giovanni Gambino appeals from the trial court's grant of summary judgment in favor of Warner Bros. Pictures (Warner Bros.) on his action for breach of implied contract and breach of confidence.

Gambino's complaint alleged his two-page film treatment, a synopsis of his proposed motion picture titled *Father and Son* (the "Treatment"), was used as the basis for the 2014 Warner Bros. film, *The Judge.* Gambino alleged he emailed a draft of the Treatment to a friend, who then emailed it to another friend who allegedly worked for Warner Bros., and that friend in turn gave it to a person who worked as a line producer on various Warner Bros. films. Warner Bros. moved for summary judgment, supporting its motion with uncontroverted evidence negating key elements of Gambino's claims. For example, Warner Bros. submitted undisputed evidence it did not receive, agree to compensate Gambino for, or use, Gambino's Treatment in creating *The Judge.* Indeed, its evidence demonstrated that scripts for *The Judge* — containing all the elements Gambino claims were taken from his Treatment — existed well before the time he alleges Warner Bros. received the Treatment. The trial court sustained Warner Bros.' six evidentiary objections to Gambino's declaration (submitted in opposition to the motion), and granted summary judgment. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Gambino saw a television advertisement for *The Judge* in approximately October 2014. On October 7, 2016, Gambino filed a complaint against Warner Bros., Big Kid Pictures, Team Downey, LLC, Village Roadshow Pictures Entertainment, Inc., and Charbel Youssef for

breach of implied contract and breach of confidence. The complaint alleged on or about June 19, 2010, Gambino sent his Treatment to a friend, Lance Lane, who said he would submit it to one of his contacts at Warner Bros., Charbel Youssef. The complaint further alleged on or about July 2, 2010, Lane submitted the Treatment to Youssef, and Youssef told Gambino he shared it with Warner Bros. and Tadross Media Group. Warner Bros., according to the allegations in the complaint, used Gambino's Treatment to create *The Judge* without compensating Gambino for his ideas.

Warner Bros. moved for summary judgment, asserting it did not receive, agree to compensate Gambino for, or use, Gambino's Treatment in creating *The Judge.* Gambino failed to file his opposition with the court, but a service copy was provided to the court by Warner Bros.' counsel. It was not accompanied by a separate statement.[1] Gambino submitted a declaration in support of his opposition stating, contrary to the allegations in his complaint, that he pitched the Treatment to Youssef directly in January 2009. He also declared that Youssef "proclaims and states that [Youssef] holds this position of Production Supervisor with [Warner Bros.] and has since `Jan 2009-Present' in [Youssef's] online resume, curriculum vitae, and social media content. . . ." Gambino attached a document to his declaration purporting to be Youssef's LinkedIn profile.

The court granted summary judgment, holding Warner Bros. "negate[d] the element that they used [Gambino's] treatment." The court further found: (1) Warner Bros. demonstrated it never received the Treatment for review; (2) *The Judge* was independently created even though there are some similarities with the Treatment (noting the draft of the screenplay for *The Judge* was received from its creators in May 2009 and the ideas were first conceived in 2008, but Gambino alleges he sent his Treatment to Youssef in 2010); and (3) even though there are similarities between the Treatment and *The Judge,* there are substantial differences. The trial court also sustained Warner Bros.' six evidentiary objections to Gambino's declaration, including Warner Bros.' objection to the document purporting to be Youssef's LinkedIn profile. The court entered judgment in favor of Warner Bros. Gambino appeals from the judgment.

DISCUSSION

I. Standard of Review

"A party is entitled to summary judgment only if there is no triable issue of material fact and the party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment must show that one or more elements of the plaintiff's cause of action cannot be established or that there is a complete defense. (*Id.*, subd. (p)(2).) If the defendant meets this burden, the burden shifts to the plaintiff to present evidence creating a triable issue of material fact. (*Ibid.*) A triable issue of fact exists if the evidence would allow a reasonable trier of fact to find the fact in favor of the party opposing summary judgment. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 [citation.])

"We review the trial court's ruling on a summary judgment motion de novo, liberally construe the evidence in favor of the party opposing the motion, and resolve all doubts concerning the evidence in favor of the opponent. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460 [citation.]) We must affirm a summary judgment if it is correct on any of the grounds asserted in the trial court, regardless of the trial court's stated reasons. [Citation.]" (*Grebing v. 24 Hour Fitness USA, Inc.* (2015) 234 Cal.App.4th 631, 636-637.)

II. Gambino's Implied Contract Claim Fails As a Matter of Law

To prevail on a cause of action for breach of implied contract, Gambino must show: (1) he submitted the Treatment to Warner Bros. on the condition Warner Bros. pay for its use; (2) Warner Bros. knew of this condition, and voluntarily accepted the submission; and (3) Warner Bros. actually used the Treatment. (*Spinner v. American Broadcasting Companies, Inc.* (2013) 215 Cal.App.4th 172, 184 (*Spinner*).)

Here, Warner Bros. demonstrated Gambino did not submit his Treatment to Warner Bros. on the condition Warner Bros. pay for its use. Warner Bros.' records established the idea for *The Judge* was first conveyed to Warner Bros. in 2008 by its creators, David Dobkin and Nick Schenk. According to Warner Bros.' computerized database, Dobkin and Schenk then delivered their first draft of the screenplay for *The Judge* to Warner Bros. in May 2009. Warner Bros. maintains a computerized database of every treatment and script it receives, but has no record of ever receiving a treatment authored by Gambino.[2] Moreover, Gambino neither alleged in his complaint nor testified in his deposition that he conditioned his submission of the Treatment on being compensated (only that he told Youssef he wanted writer's credit *after* Youssef already purportedly gave the Treatment to Tadross). Because Warner Bros. satisfied its burden to demonstrate the elements of Gambino's claim for breach of implied contract cannot be established, the burden shifted to Gambino to show a triable issue of material fact exists. (Code Civ. Proc., § 437c, subd. (p)(2).) He has not done so.

As noted above, Gambino alleged in his complaint that on or about June 19, 2010 — more than a year after Dobkin and Schenk delivered their first draft of the screenplay for *The Judge* to Warner Bros. — he sent the Treatment to Lane, who said he would submit it to one of his contacts at Warner Bros., Youssef. He further alleged on or about July 2, 2010, Lane submitted the Treatment to Youssef, and Youssef told Gambino he shared it with Warner Bros. and Tadross Media Group. Contrary to the allegations in his complaint, Gambino's declaration in support of his opposition states he disclosed his ideas for the Treatment directly to Youssef beginning in January 2009, and that although Youssef said he would present the Treatment to Tadross, it was also Gambino's expectation that he was "conveying and disclosing [his] concepts to an agent/employee of [Warner Bros.]." But a plaintiff opposing summary judgment may not raise facts or legal theories not encompassed by his complaint to defeat a summary judgment motion. (See *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258 & fn. 7 ["The complaint limits the issues to be

addressed at the motion for summary judgment. The rationale is clear: It is the allegations in the complaint to which the summary judgment motion must respond."]; *Sweat v. Hollister* (1995) 37 Cal.App.4th 603, 607, disapproved on other grounds in *Santisas v. Goodin* (1998) 17 Cal.4th 599, 609, fn. 5 ["The issues at summary judgment cannot be expanded by affidavit; if the plaintiff's claim is to be extended it must be done by amendment."].)

In any event, Gambino relies on inadmissible evidence to support his contention that Youssef was an agent/employee of Warner Bros. Gambino contends the court erred in sustaining Warner Bros.' objection to Exhibit A to his declaration: Youssef's putative LinkedIn profile. Our Supreme Court has not resolved the standard of review for summary judgment evidentiary rulings (see *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535), but "[a]ccording to the weight of authority, appellate courts `review the trial court's evidentiary rulings on summary judgment for abuse of discretion.'" (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 852.) We discern no error under either a de novo or abuse of discretion standard.

Gambino acknowledges that Youssef's purported LinkedIn profile is hearsay, presented to prove the truth of the statement in the profile that Youssef was a production supervisor at Warner Bros. He contends, however, that three exceptions to the hearsay rule apply: (1) admission against interest; (2) prior inconsistent statement; and (3) the business record exception. We are unpersuaded.

First, Youssef's LinkedIn profile is not a statement against his interest. Moreover, Gambino has not demonstrated Youssef was "unavailable" as a witness. Gambino never attempted to depose Youssef. (Evid. Code, § 1230 ["Evidence of a statement by a declarant . . . is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness. . . ."].) Second, Gambino argues the LinkedIn profile is admissible because it is inconsistent with Youssef's declaration, which states he was never employed by Warner Bros. But Gambino failed to authenticate the LinkedIn page; thus, he cannot argue Youssef (as opposed to someone else) made the allegedly inconsistent statement. Third, the LinkedIn page is not Youssef's business record. It was not made in the regular course of Youssef's business. (Evid. Code, § 1271 ["Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule . . . if: [¶] (a) The writing was made in the regular course of a business . . ."].)[3]

Accordingly, we conclude Gambino did not meet his burden to show the evidence would allow "a reasonable trier of fact to find the underlying fact in favor of the party opposing [summary judgment]." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) He failed to submit admissible evidence that he ever submitted the Treatment to Warner Bros, or that any submission was conditioned on Warner Bros.' agreement to compensate Gambino for its use. Further, as discussed above, Warner Bros. proved it had an original source for *The Judge* before Gambino claims he submitted the Treatment; therefore, Warner Bros. did not use the Treatment in creating *The Judge.* (*Spinner, supra,* 215 Cal.App.4th at p. 184.) Thus, Gambino's claim for breach of implied contract fails as a matter of law.

III. Gambino's Breach of Confidence Claim Fails As a Matter of Law

"An actionable breach of confidence will arise when an idea, whether or not protectable, is offered to another in confidence, and is voluntarily received by the offeree in confidence with the understanding that it is not to be disclosed to others, and it is not to be used by the offeree for purposes beyond the limits of the confidence without the offeror's permission." (*Faris v. Enberg* (1979) 97 Cal.App.3d 309, 323.) As discussed above, Warner Bros. demonstrated it did not receive the Treatment from Gambino (or anyone else). Moreover, as also discussed above, Warner Bros. proved it received a first draft of the screenplay for *The Judge* from a different source, containing all the elements Gambino claims were taken from the Treatment, before Gambino claims he submitted the Treatment to Warner Bros. We therefore conclude Gambino's breach of confidence claim fails for the same reasons his breach of implied contract claim fails.

DISPOSITION

The judgment is affirmed. Warner Bros. is awarded its costs on appeal.

WILLHITE, Acting P. J. and COLLINS, J., concurs.

[1] Gambino's failure to submit a separate statement was a sufficient reason alone to grant Warner Bros.' motion. (Code Civ. Proc., § 437c, subd. (b)(3).)

[2] At his deposition, Gambino testified Youssef told him that Michael Tadross, Sr. — a line producer on various Warner Bros. films — received the Treatment. Tadross denies that he ever received the Treatment. For at least the past 25 years, Tadross had a strict policy against accepting unsolicited material, and did not have the authority to accept any material on behalf of Warner Bros. He further declared he had no involvement with the *The Judge* and never heard of its creators. Gambino provided no admissible evidence to contradict these facts. (See *Dollinger DeAnza Associates v. Chicago Title Ins. Co.* (2011) 199 Cal.App.4th 1132, 1144-1145 [a party "cannot avoid summary judgment by asserting facts based on mere speculation and conjecture, but instead must produce admissible evidence raising a triable issue of fact."].)

[3] Gambino does not challenge the remaining five evidentiary objections on appeal.