Drabek v. AAI Corporation

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Appellant Jiri Drabek (Drabek) brought this lawsuit against respondents Skoda Ostrov and AAI Corporation (AAI) to recover commissions to which he claims he is entitled. The trial court granted AAI's motion for summary judgment in part on the grounds that pursuant to the terms of the alleged contract, the project that might have given rise to Drabek's commission was abandoned for reasons unrelated to this litigation. The trial court granted Skoda Ostrov's motion for summary judgment in part because it was not a separate corporate entity at the time of the relevant events and thus could not be liable to Drabek as a matter of law. Thereafter, the trial court denied Drabek's motion for a new trial. Drabek appeals both orders granting respondents summary judgment and the order denying him a new trial. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Factual Background

a. The Parties

Drabek is a citizen of the Czech Republic. He emigrated from the country formerly known as Czechoslovakia in 1981, and in 1987, he moved to the United States. Commencing in October 1989, Drabek began doing business under the fictitious name DMS International. [1]

Defendant Skoda Concern Plzen [2] (Skoda Concern) is a foreign entity that was created under the laws of the country previously known as Czechoslovakia. [3] Skoda Concern, now known as Skoda a.s., is one of the largest industrial companies in the Czech Republic.

Defendant and respondent Skoda Ostrov also is a foreign entity created under the laws of the Czech Republic. It is in the business of manufacturing electric trolley buses. Until October 1, 1992, Skoda Ostrov was a wholly-owned division or branch of Skoda Concern.

Defendant Skodaexport Co., Ltd. [4] (Skoda Export) is a foreign entity that was created under the laws

of the country formerly known as Czechoslovakia. It is a foreign trade company that was originally formed in 1966 to be the exclusive exporter/importer of various industrial machines and systems.

Defendant and respondent AAI, a Maryland corporation, is a defense contractor engaged in electromechancial engineering and manufacturing and, during the 1990's, entered the transportation business.

Defendant Electric Transit, Inc. [5] (ETI) is an Ohio corporation that was formed to carry out a joint venture between AAI and Skoda Ostrov. In February 1994, Skoda a.s. became an ETI minority shareholder.

b. Drabek Learns of Plans for an Electric Trolley Bus System in Los Angeles and Contacts the Skoda Entities

In the spring of 1990, Drabek read an article in the Los Angeles Times about a consulting contract with the Southern California Rapid Transit District (RTD) for a planned project involving an electric trolley bus (ETB) system in Los Angeles (the Los Angeles project). Based upon his prior contact with the Skoda entities, in May 1991, Drabek sent an unsolicited letter to Skoda Concern regarding the RTD's ETB consulting contract for Los Angeles.

c. Drabek Begins Negotiations for Compensation

In the spring of 1991, Drabek and Skoda Concern exchanged drafts of a sales representation agreement; none was ever executed.

In November 1991, Drabek sent Skoda Ostrov a draft compensation agreement, pursuant to which Drabek would act as Skoda Ostrov's consultant for the Los Angeles project. Because Skoda Concern objected to the proposed compensation agreement, it was never signed.

d. The RTD Awards ETB Consulting Contract to ICF Kaiser Engineers

In February 1992, the RTD awarded the consulting contract for the ETB project to ICF Kaiser Engineers (ICF Kaiser). Because no ETB manufacturers were located in the United States at that time, ICF Kaiser turned to foreign entities, including Skoda Ostrov, for a possible deal for the sale of ETBs.

e. Drabek Coordinates Meetings Between the Skoda Entities and ICF Kaiser

While ICF Kaiser was exploring its options, Drabek approached Gary Eugene Beck (Beck), an employee of an ICF Kaiser corporation, regarding Skoda Ostrov. In February 1992, Drabek arranged for Beck and an RTD representative to tour the Skoda Ostrov facility. Apparently that tour went well

because in March 1992, Beck invited Jan Macek (Macek) of Skoda Ostrov to travel to Los Angeles to meet with the RTD for further discussions.

In late March or early April 1992, two representatives from Skoda Ostrov, Macek and Jan Hrubec (Hrubec), as well as a representative from Skoda Export, Miroslav Machalek (Machalek), accepted Beck's invitation and traveled to Los Angeles to meet with ICF Kaiser and the RTD. Drabek made all travel arrangements for Macek, Hrubec, and Machalek.

f. AAI Gets Involved in the ETB Business

At around this time, AAI sought to diversify its business and sought to enter the transportation business. James A. Talley (Talley), formerly of ICF Kaiser and now with AAI, contacted Drabek to discuss meeting with the Skoda entities to form a joint venture to manufacture and import ETBs. Because the Skoda entities would need a United States entity to function as a joint venture partner, Drabek arranged for a meeting between AAI and the Skoda entities in July 1992. The parties dispute the importance of Drabek's role in facilitating the formation of the joint venture between the two entities.

g. The Alleged Formation of Drabek's Contract With Skoda Ostrov

During the time that Macek, Machalek, and Hrubec were in Los Angeles in March 1992, Drabek alleges that they participated in a meeting in his Los Angeles apartment. According to Drabek, during this meeting, he "proposed that he receive 5% of the sales price of all trolley buses sold through any joint venture formed in the United States through his efforts in introducing the joint venture partners, and presented them with a written document to that effect." Drabek presented them with a written proposal, which they did not sign, but they "orally agreed to the[] terms . . . and promised to sign the document reflecting this agreement."

The written proposal embodying Drabek's alleged agreement with Skoda Ostrov is the Joint Venture Agency Agreement (JVAA), which Drabek drafted. The JVAA provides that Skoda Ostrov will compensate Drabek for certain information he provided to Skoda Ostrov for the implementation of ETB systems for the RTD in Los Angeles (the defined "project") because that information was necessary for Skoda Ostrov to enter into a joint venture with AAI. Pursuant to the JVAA, Skoda Ostrov would appoint Drabek its exclusive representative for negotiations of the sale of ETBs in the "territory," defined as the "project" and/or joint venture Skoda Ostrov established with the RTD, AAI, and ICF Kaiser. Moreover, according to the JVAA, Drabek is entitled to a five percent commission on the sale of all Skoda Ostrov products sold to the joint venture in the "territory" and a five percent commission on all payments Skoda Ostrov receives from the joint venture or other parties in the "territory." The JVAA specifically provides that the agreement will not take effect until signed by both parties.

h. Skoda Ostrov Instructs Drabek to Negotiate With Skoda Export

Despite Drabek's claim that the parties had entered into an enforceable agreement in March 1992, he continued to correspond with the Skoda entities regarding compensation for his efforts. On April 21, 1992, Skoda Ostrov advised Drabek to "work with Skoda Export to obtain a formal written document reflecting" the alleged March 1992 oral agreement.

On April 23, 1992, Skoda Export, as Skoda Concern's foreign trade agent, sent Drabek a two-page unsigned document, the mediation contract. The mediation contract addresses only the Los Angeles project.

Drabek did not immediately sign the mediation contract. Instead, using the mediation contract as a model, on May 3, 1992, Drabek sent a revised document, the agency agreement, to Skoda Export.

i. Further Correspondence Between Drabek and the Skoda Entities

Between June 10 and 23, 1992, Drabek sent or received correspondence to and from Skoda Ostrov, Skoda Concern, and Skoda Export regarding his alleged compensation.

Specifically, on June 10, 1992, Drabek sent a letter to Skoda Ostrov "point[ing] out that [he had] so far not received [Skoda Ostrov's] comments on the draft of the contract of 5/3 (the May 3, 1992, agency agreement), which was sent to SKODA EXPORT . . . nor [had he] received a written statement as to whether [Skoda Ostrov] would like [him] to represent [it] in connection with other projects." On June 15, 1992, Skoda Export informed Drabek that it "must . . . insist on [its] wording of the [agency agreement] as per [its] draft sent by fax." On June 23, 1992, Drabek sent Skoda Concern a letter "requesting that the oral agreement relating to his compensation for finding a joint venture partner be confirmed in writing as promised." Attached to that letter was another copy of the JVAA.

j. Drabek Signs Skoda Export's Mediation Contract

Ultimately, in late June 1992, Drabek signed the mediation contract.

k. RTD Cancels the Los Angeles ETB

In late 1993 or early 1994, for reasons unrelated to this litigation, the RTD's ETB project was canceled.

l. ETI is Awarded ETB Contracts in Dayton, Ohio and San Francisco, California

In December 1993, AAI incorporated ETI as a wholly-owned subsidiary to conduct some of its transportation business. In late February 1994, AAI sold a minority equity interest in ETI to Skoda

a.s., and in May 1995, Skoda a.s. became ETI's majority shareholder.

In December 1994, the Miami Valley Transit Authority of Ohio awarded a contract to ETI to provide ETBs for Dayton, Ohio. In June 1997, the City of San Francisco awarded a contract to ETI to provide some ETBs for San Francisco.

2. Procedural Background

a. Drabek's First Amended Complaint

After learning about the ETB contracts for Dayton and San Francisco, on July 14, 1997, Drabek initiated this lawsuit against Skoda Concern, Skoda Ostrov, Skoda Export, AAI, and ETI.

A first amended complaint (FAC), alleging 22 causes of action, was filed on June 1, 1998. The thrust of Drabek's claims is that he and Skoda Ostrov and/or Skoda Concern entered into an oral contract in March 1992 whereby Skoda Ostrov and/or Skoda Concern agreed to pay him a five percent commission on the sale of all ETBs sold in the United States, thereby giving rise to his commission from the sale of ETBs in Dayton and San Francisco. According to the FAC, Drabek's oral agreement with Skoda Ostrov and/or Skoda Concern is embodied by the JVAA, a copy of which is attached to the pleading.

Drabek asserted eight causes of action against AAI: intentional interference with contract, intentional interference with prospective economic advantage, negligent interference with contract, negligent interference with prospective economic advantage, conspiracy to defraud, unjust enrichment, violations of Business and Professions Code sections 17200 et seq., and disparagement. [6]

Drabek asserted 14 causes of action against Skoda Ostrov: breach of written contract, breach of oral contract, quantum meruit, promissory estoppel, fraud, negligent misrepresentation, conspiracy to defraud, conspiracy to interfere with contract, conspiracy to interfere with prospective economic advantage, unjust enrichment, declaratory relief, violation of Business and Professions Code sections 17200 et seq., disparagement, and accounting.

b. The Motions for Summary Judgment

On November 22, 2000, Skoda Ostrov filed a motion for summary judgment, arguing that Drabek could not maintain an action against it because it was not a separate legal entity capable of forming a contract at the time of the relevant events.

On November 29, 2000, AAI filed its motion for summary judgment, arguing, inter alia, that the parties did not have an enforceable contract and, even if they did, AAI had no knowledge of any contract and therefore did not interfere with any economic relations or advantage. AAI also asserted

that it did not engage in any acts to induce a breach of the alleged contractual relationship.

Drabek opposed both motions.

c. Judge Letteau's Tentative Ruling, the Reassignment to Judge Goodman, and Judge Goodman's Order Granting the Motions for Summary Judgment

On October 4, 2001, Judge Robert M. Letteau issued a tentative ruling denying the motions for summary judgment. Following oral argument, he "invited" the parties to "further comment/request for rulings." On October 23, 2001, AAI and Skoda Ostrov filed joint requests for review and for additional ruling. No hearing date was ever set, and Judge Letteau never entered or signed a final order denying the motions for summary judgment.

On March 12, 2002, the case was reassigned to Judge Allan J. Goodman.

At a status conference on June 4, 2002, counsel advised Judge Goodman that motions for summary judgment had been filed, but no final rulings had yet been made. Following the status conference, Judge Goodman conducted a comprehensive review of the court file and determined that the parties should argue "the points left undecided by [Judge Letteau's October 4, 2001,] tentative ruling." The trial court requested that the parties file additional documents identifying the relevant briefs in connection with the motions for summary judgment.

The parties filed the requested documents and, on September 5, 2002, the motions were heard and taken under submission. On September 10, 2002, the trial court issued its rulings, granting Skoda Ostrov's and AAI's motions for summary judgment. With respect to Skoda Ostrov, the trial court determined that it was not a separate legal entity at the time of the underlying events and therefore "could not have assumed any legal duties pursuant to such contract, or any legal theory alleged by [Drabek] in his [FAC]."

With respect to AAI, the trial court examined the JVAA, which Drabek alleged memorialized the terms of the parties' oral agreement, and found that it was limited to the Los Angeles project only. Because the Los Angeles ETB system never materialized, AAI could not be liable for interfering with the contract. The trial court also found that Drabek failed to provide any evidence of interference. With respect to the cause of action for conspiracy to defraud, the trial court granted AAI's motion on the grounds that Drabek failed to provide any opposition. Judgment was entered for AAI and Skoda Ostrov.

d. Drabek's Motion for New Trial

On October 28, 2002, Drabek filed a motion for new trial based uponnewly discovered evidence and surprise. Attached to the motion was adeclaration from Hrubec, a declaration from Jan Pravecek

(Pravecek), andan unsigned agency agreement. All three documents were in Czech.According to translation provided by All Things Czech and Jirina Fuchs,Hrubec admitted to lying in declarations previously filed in this caseand at his deposition. He stated: "The truth at the time of mydeposition and the truth now is that [Drabek] had an agreement withSkoda Ostrov and Skoda [Concern] concerning the sale of [ETBs] in theUnited States. The truth was and is that [Drabek] was to be paid bySkoda Ostrov five per cent 5% of all money paid to Skoda Ostrov or Skoda[Concern] for the sale of [ETBs] in the United States. This commissionagreement was not limited to sales of [ETBs] in Los Angeles. [Drabek]was to be paid this commission for any and all sales of [ETBs] in theUnited States." Likewise, according to the translation supplied,Pravecek confirmed that as chief executive officer of Skoda Ostrov, [7] he "approved and ratified Skoda Ostrov's agreement to pay [Drabek] fiveper cent (5%) commission on the sale of electric trolley buses (ETB's)in the United States."

On December 3, 2002, the trial court denied Drabek's motion. "The translations of the declarations and other materials submitted in a language other than the English language are not admitted as the translations are not certified under oath and there is no evidence that the interpreter is qualified." Even if the evidence were admissible, it was not material as it had nothing to do with the issues ruled upon by the trial court. As summarized by counsel: "Pravecek's testimony does nothing to rebut the fact that Skoda Ostrov was not a legal entity" and his testimony did not "support . . . Drabek's testimony that there was an agreement." The trial court denied Drabek's request to cure the alleged "technical defect of the translation."

Furthermore, the trial court questioned Drabek's late "`discovery'" of evidence given that the motions for summary judgment had been pending for a substantial period of time, providing Drabek with ample time to obtain declarations and seek their admission. Moreover, Drabek failed to show "the absence of neglect or reasonable diligence to claim surprise . . . based on the grounds of newly discovered evidence."

Thereafter, Drabek timely filed a notice of appeal challenging the trial court's orders granting respondents summary judgment as well as the order denying his motion for a new trial.

DISCUSSION

I. Motions for Summary Judgment

A. Standard of Review

Summary judgment is granted if all the submitted papers show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) The pleadings frame the issues that can be discussed, and these issues must be addressed by the moving party. (Lee v. Bank of America (1994) 27 Cal.App.4th 197, 215-216.) "`The pleadings define the issues to be considered on a motion for summary judgment.'" (Benedek v. PLC

Santa Monica (2002) 104 Cal.App.4th 1351, 1355.) "A defendant moving for summary judgment need address only the issues raised by the complaint; the plaintiff cannot bring up new, unpleaded issues in his or her opposing papers [or on appeal]." (Government Employees Ins. Co. v. Superior Court (2000) 79 Cal.App.4th 95, 98-99, fn. 4.)

A defendant seeking summary judgment has met the burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action cannot be established or that an affirmative defense to that cause of action exists. (Code Civ. Proc., § 437c, subd. (n); see Rowe v. Superior Court (1993) 15 Cal.App.4th 1711, 1724.) Once the defendant's burden is met, the burden shifts to the plaintiff to show that a triable issue of fact exists as to that cause of action. (Rowe v. Superior Court, supra, at p. 1724.) The plaintiff must set forth specific facts showing that a triable issue of material fact exists. (Code Civ. Proc., § 437c, subd. (o)(2).)

In reviewing the propriety of a summary judgment, the appellate court independently reviews the record that was before the trial court. (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843.) We must determine whether the facts as shown by the parties give rise to a triable issue of material fact. (Michael J. v. Los Angeles County Dept. of Adoptions (1988) 201 Cal.App.3d 859, 865-866.) In making this determination, the moving party's affidavits are strictly construed while those of the opposing party are liberally construed. (ML Direct, Inc. v. TIG Specialty Ins. Co. (2000) 79 Cal.App.4th 137, 141.)

B. The Trial Court Properly Granted AAI's Motion for Summary Judgment

The FAC alleges five causes of action against AAI: intentional and negligent interference with contract, intentional and negligent interference with prospective economic advantage, and conspiracy to defraud. Each cause of action properly was dismissed.

1. Intentional Interference with Contract

The elements of a cause of action for intentional interference with contract are: "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." (Pacific Gas & Electric Co. v. Bear Stearns & Co. (1990) 50 Cal.3d 1118, 1126; see also Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal.4th 26, 55.)

Here, Drabek's claim for intentional interference with contract fails as a matter of law: there was no enforceable contract. According to the FAC, Drabek entered into a contract with Skoda Concern and/or Skoda Ostrov in March 1992. The terms of that alleged contract are embodied in the unsigned JVAA. The JVAA provides, in relevant part, that the parties' agreement does not take effect until signed by both parties. It is illogical that Drabek and Skoda Concern and/or Skoda Ostrov could have entered into an enforceable contract that, as confirmed by the document admittedly memorializing

its terms, required that the agreement be in writing. As such, there was no enforceable contract with which AAI could have interfered. (See, e.g., Banner Entertainment, Inc. v. Superior Court (1998) 62 Cal.App.4th 348, 358 (Banner Entertainment) ["When it is clear, both from a provision that the proposed written contract would become operative only when signed by the parties as well as from any other evidence presented by the parties that both parties contemplated that acceptance of the contract's terms would be signified by signing it, the failure to sign the agreement means no binding contract was created"].)

Drabek claims that the JVAA does not constitute the parties' agreement, but was merely evidence of that agreement. In other words, "the words and conduct of Skoda's own representatives and [Drabek's] own actions in 1992-93 show that all parties understood that a binding contract had been formed in the meeting in Los Angeles in March 1992." Drabek has not satisfied his burden on appeal. His general reference, without citation to the lengthy appellate record, to the generic Skoda and the parties' unspecified words, conduct, and action hardly demonstrates a triable issue of fact regarding the existence of an enforceable contract. Like Banner Entertainment, other than Drabek's unfounded assertion, there is no "evidence that, despite the fact [that he] had drafted the [JVAA] and provided therein that assent to the terms would be manifested by signing [the JVAA], the parties orally agreed that assent to such terms . . . could be manifested in some other manner." (Banner Entertainment, supra, 62 Cal.App.4th at p. 360.)

Even assuming that there were a triable issue of fact as to whether Drabek and Skoda Ostrov and/or Skoda Concern entered into a valid contract in March 1992, it is undisputed that the contract was limited to the Los Angeles project. "Contract interpretation presents a question of law which this court determines independently. [Citations.] [¶] A contract must be interpreted to give effect to the mutual, expressed intention of the parties. Where the parties have reduced their agreement to writing, their mutual intention is to be determined, whenever possible, from the language of the writing alone. (Civ. Code, §§ 1636, 1639; AIU Ins. Co. v. Superior Court (1990) 51 Cal.3d 807, 821-822.) We may not `create for the parties a contract which they did not make, and . . . cannot insert in the contract language which one of the parties now wishes were there.' [Citation.]" (Ben-Zvi v. Edmar Co. (1995) 40 Cal.App.4th 468, 472-473; see also Moss Dev. Co. v. Geary (1974) 41 Cal.App.3d 1, 9 ["In construing [an agreement], it is not a court's prerogative to alter it, to rewrite its clear terms, or to make a new contract for the parties. [Citations.] Courts will not add a term to [an agreement] about which [it] is silent. [Citations.]"].)

In that regard, "[t]he words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed." (Civ. Code, § 1644.) "We interpret the intent and scope of the agreement by focusing on the usual and ordinary meaning of the language used and the circumstances under which the agreement was made." (Lloyd's Underwriters v. Craig & Rush, Inc. (1994) 26 Cal.App.4th 1194, 1197-1198.)

Moreover, an agreement must be interpreted to give effect to the mutual intention of the parties as it existed at the time of contracting. (Civ. Code, § 1636; Safeco Ins. Co. v. Robert S. (2001) 26 Cal.4th 758, 766.) In this regard, we consider the parties' expressed intent, not what one may have silently desired. "A contract cannot be varied by the undisclosed intention of one of the parties." (Schmitz v. Wetzel (1961) 188 Cal.App.2d 210, 212; see also Weddington Productions, Inc. v. Flick (1998) 60 Cal.App.4th 793, 811.)

Here, all of the allegations with respect to breach of contract, both oral and written, in the FAC are based upon the JVAA. The JVAA provides that Skoda Ostrov will compensate Drabek for his services in connection with the Los Angeles project only. Specifically, it identifies the "project" as the implementation of ETB systems for the RTD in Los Angeles and the "joint venture" as the relationship among the RTD, AAI, and ICF Kaiser. Even the "territory" is defined as the "project" and/or joint venture Skoda Ostrov established with the RTD, AAI, and ICF Kaiser. There is no mention whatsoever of any ETB systems in any region other than Los Angeles. Pursuant to the well-established rules of contract interpretation set forth above, it follows that Drabek was entitled, at most, to commissions for the Los Angeles project only. For reasons unrelated to this litigation, the Los Angeles project never came to fruition. Accordingly, AAI cannot be liable for interference with contract as a matter of law.

Pointing to paragraphs 7 and 15 of the JVAA, Drabek urges that the contract entitled him to commissions from the sale of ETBs in the entire United States. We are not persuaded.

Paragraph 7 provides: "Skoda appoints Drabek to exclusively represent Skoda to assist with all negotiations, translations and other services with the project and/or Joint Venture." As set forth above, the JVAA defines the "project" and "joint venture" as the implementation of ETB systems in Los Angeles. Quite simply, the phrase "joint venture" is not defined as broadly in the JVAA as Drabek would like.

Paragraph 15 provides: "If SKODA shall become a party to a merger, Joint venture, consolidation, sale of some or substantially all [of] its assets, partnership renamed, organized by ownership or management, or any other new business relationship, then this agreement shall remain in full force and shall transfer to the new entity which has changed or replaced SKODA." We are at a loss to understand how this paragraph broadens the scope of the parties' alleged contractual relationship beyond the Los Angeles project; it is silent regarding the previously defined "territory," "project," and "joint venture." Drabek's undisclosed "understanding was that [he] was the agent for all United States, not limited for Los Angeles" is irrelevant and immaterial. (Lloyd's Underwriters v. Craig Rush, Inc., supra, 26 Cal.App.4th at p. 1197; Winograd v. American Broadcasting Co. (1998) 68 Cal.App.4th 624, 632.)

In his opening brief and at oral argument, Drabek focused upon Pravecek's deposition testimony [8] and a line item request in November or December 1993 for his commission to support his claim that

a triable issue of fact exists regarding the existence of a contract between himself and either Skoda Ostrov or Skoda Concern. This evidence is easily dismissed as outside the terms of the contract sued upon. Pravecek's deposition testimony constitutes parol evidence, inadmissible to contradict the unambiguous terms of the JVAA. (Sunniland Fruit, Inc. v. Verni (1991) 233 Cal.App.3d 892, 898.) Likewise, the line item request cannot expand the scope of the JVAA.

Moreover, Drabek did not present any evidence of AAI's alleged interference. The opinion Beck offered at his deposition [9] was not substantiated by any act of interference. (Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co. (1996) 47 Cal.App.4th 464, 477 [bad thoughts do not equate with an act of interference].) And, the September 1, 1993 memorandum (indicating that Drabek's participation in the joint venture is illegal) was sent more than a year after Drabek concedes he was informed that he had no contractual relationship with the Skoda entities. Thus, even if the letter were wrongful, given that it was sent long after the economic relationship between Drabek and the Skoda entities terminated, Drabek cannot establish that the contract was breached as a result of AAI's conduct.

2. Negligent Interference With Contract

While there exists a cause of action for negligent interference with prospective economic advantage (J'Aire Corp. v. Gregory (1979) 24 Cal.3d 799, 806), in Fifield Manor v. Finston (1960) 54 Cal.2d 632 (Fifield Manor), the California Supreme Court rejected a cause of action for negligent interference with contract, refusing to permit a nursing home -- which had contracted to provide life-care to a man subsequently killed by a negligent driver -- to recover from the negligent driver the additional medical expenses that it incurred on the victim's behalf, even though the driver's negligence had made the contract performance more expensive. (Id. at pp. 634-637.) The court reasoned: "[W]ith the exception of an action by the master for tortious injuries to his servant, thus depriving the master of his servant's services, which traces back to medieval English law [citations], the courts have quite consistently refused to recognize a cause of action based on negligent, as opposed to intentional, conduct which interferes with the performance of a contract between third parties or renders its performance more expensive or burdensome." [10] (Id. at p. 636.) "To so hold would constitute an unwarranted extension of liability for negligence." (Id. at p. 637; see Stromer v. City of Yuba City (1964) 225 Cal.App.2d 286, 289-290; Costello v. Wells Fargo Bank (1968) 258 Cal.App.2d 90, 94-96.)

The Supreme Court has never overruled the holding of Fifield Manor. (LiMandri v. Judkins (1997) 52 Cal.App.4th 326, 349.) Therefore, Fifield Manor is binding on us. (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455.)

Because this cause of action cannot proceed as a matter of law, summary judgment properly was granted. [11]

3. Intentional and Negligent Interference with Prospective Economic Advantage

The elements of a cause of action for intentional interference with prospective economic advantage are: "`"(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." [Citations.]' [Citation.]" (Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal.4th 1134, 1153, fn. omitted.) Additionally, the plaintiff must plead that the defendant's conduct was "wrongful `by some measure beyond the fact of the interference itself.' [Citation.]" (Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal.4th 376, 392-393.)

Similarly, "[t]he tort of negligent interference with prospective economic advantage is established where a plaintiff demonstrates that (1) an economic relationship existed between the plaintiff and a third party which contained a reasonably probable future economic benefit or advantage to plaintiff; (2) the defendant knew of the existence of the relationship and was aware or should have been aware that if it did not act with due care its actions would interfere with this relationship and cause plaintiff to lose in whole or in part the probable future economic benefit or advantage of the relationship; (3) the defendant was negligent; and (4) such negligence caused damage to plaintiff in that the relationship was actually interfered with or disrupted and plaintiff lost in whole or in part the economic benefits or advantage reasonably expected from the relationship." (North American Chemical Co. v. Superior Court (1997) 59 Cal.App.4th 764, 786.) As with a claim for intentional interference, the independently wrongful requirement applies to a claim for negligent interference as well. (National Medical Transportation Network v. Deloitte & Touche (1998) 62 Cal.App.4th 412, 439-440.)

For the same reasons discussed above, AAI is not liable for interference with prospective economic advantage. To the extent Drabek's claim is based upon his alleged contract with Skoda Ostrov and/or Skoda Concern, that claim fails because either there was no contract or that contract was limited to Los Angeles alone. To the extent Drabek's alleged prospective economic advantage is based upon the sale of ETBs to Dayton and San Francisco, his claim is far too speculative to be actionable. (Youst v. Longo (1987) 43 Cal.3d 64, 71 [it must be reasonably probable that the prospective economic advantage would have been realized but for the defendant's interference]; Westside Center Associates v. Safeway Stores 23, Inc. (1996) 42 Cal.App.4th 507, 524 [the tort "protects the expectation that the relationship eventually will yield the desired benefit, not necessarily the more speculative expectation that a potentially beneficial relationship will eventually arise"].) Other than unfounded self-serving statements in the opening brief, there is no evidence whatsoever to support Drabek's claim that he is entitled to commissions arising from the sale of ETBs in the entire United States. As such, Drabek has not created a triable issue of fact that it was reasonably probable that he would have obtained an economic benefit absent AAI's alleged interference.

Moreover, as set forth above, Drabek neglected to present any evidence of interference, let alone conduct wrongful by some legal measure other than the fact of interference itself. (Della Penna v.

Toyota Motor Sales, U.S.A., Inc., supra, 11 Cal.4th at pp. 392-393.) Accordingly, Drabek cannot establish that it was reasonably probable that any economic advantage would have been realized but for AAI's act of interference. (Youst v. Longo, supra, 43 Cal.3d at p. 71.) 1.Conspiracy to Defraud

The trial court properly granted AAI's motion for summary adjudication of the fifteenth cause of action for conspiracy to defraud for the reason that Drabek did not oppose the motion. (Code Civ. Proc., § 437c, subd. (b)(3); Cravens v. State Bd. of Equalization (1997) 52 Cal.App.4th 253, 257.) Drabek does not address this issue in his opening brief, thereby abandoning and waiving this claim on appeal. (Sprague v. Equifax, Inc. (1985) 166 Cal.App.3d 1012, 1050.)

C. The Trial Court Properly Granted Skoda Ostrov's Motion for Summary Judgment

Skoda Ostrov properly was granted summary adjudication of each of the 14 causes of action alleged against it.

It is undisputed that Skoda Ostrov was not a separate legal entity at the time of the relevant events. As Drabek conceded in response to Skoda Ostrov's motion for summary judgment, until October 1992, Skoda Ostrov was a wholly-owned subsidiary of Skoda Concern, with "no ability to enter into contracts, assume obligations, or assert rights independent of" Skoda Concern. As such, it cannot be liable to Drabek. (Pinkerton's, Inc. v. Superior Court (1996) 49 Cal.App.4th 1342, 1347-1349; In re Marriage of Stephens (1984) 156 Cal.App.3d 909, 918 ["A `division' of a corporation is a unit within the corporation and has no status as a separate `person' in the eyes of the law"].)

Drabek does not challenge this legal proposition in his opening brief. Instead, he focuses on whether Skoda Ostrov ratified the alleged contract. It is true that a preincorporation agreement made by agents or promoters may be enforced against the corporation if it has been ratified. (See, e.g., Monteleone v. Southern California Vending Corp. (1968) 264 Cal.App.2d 798, 807.) But, Drabek ignores an elementary rule of civil procedure: the pleadings frame the issues to be litigated, including the issues to be considered on a motion for summary judgment. (See, e.g., Lee v. Bank of America, supra, 27 Cal.App.4th at pp. 215-216; Benedek v. PLC Santa Monica, supra, 104 Cal.App.4th at p. 1355; Government Employees Ins. Co. v. Superior Court, supra, 79 Cal.App.4th at p. 98, fn. 4.) The FAC does not allege ratification. Accordingly, we need not reach this issue.

Drabek complains that he should have been granted leave to amend the FAC to allege ratification. Counsel's oral argument notwithstanding, Drabek never sought leave from the trial court to add this new theory. It is well-established that "it is incumbent on the pleader to make some request to amend" and "[i]n the absence of such a request, the court is under no duty to inquire whether there are causes of action . . . inherent in the facts but not articulated by the pleading." (Lee v. Bank of America, supra, 27 Cal.App.4th at p. 216.) Because Drabek never requested leave to amend, we have no occasion to consider this issue.

II. Motion for New Trial

A. Standard of Review

"A motion for a new trial is appropriate following an order granting summary judgment." (Aguilar v. Atlantic Richfield Co., supra, 25 Cal.4th at p. 858.)

We review a denial of a motion for a new trial for abuse of discretion. (Sherman v. Kinetic Concepts, Inc. (1998) 67 Cal.App.4th 1152, 1160-1161; City of Los Angeles v. Decker (1977) 18 Cal.3d 860, 871-872.) As explained in Sherman v. Kinetic Concepts, Inc., supra, at page 1161, "[p]rejudice is required. `[T]he trial court is bound by the rule of California Constitution, article VI, section 13, that prejudicial error is the basis for a new trial, and there is no discretion to grant a new trial for harmless error.'"

B. The Trial Court Properly Denied Drabek's Motion

Code of Civil Procedure section 657 provides, in relevant part: "The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party: [¶] . . . [¶] 3. Accident or surprise, which ordinary prudence could not have guarded against. [¶] 4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at trial."

To succeed on a motion based upon newly discovered evidence, the proponent of the motion must establish that the evidence was (1) material, (2) newly-discovered, and (3) the proponent used reasonable diligence to discover or produce the evidence at trial. (Code Civ. Proc., § 657, subd. (4); Sherman v. Kinetic Concepts, Inc., supra, 67 Cal.App.4th at p. 1161.) Evidence is "material" if it is the type of evidence that would likely bring about a different result. (Ibid.) It is "newly-discovered" if the evidence was not known or could not have reasonably been produced at trial. (In re Marriage of Liu (1987) 197 Cal.App.3d 143, 153.) Lastly, the proponent of the motion must state particular facts or circumstances that established diligence. (Ibid.)

Likewise, to prevail on a motion for new trial based upon "surprise," the moving party must demonstrate that he was placed unexpectedly in a situation to his injury, where he is guilty of no default or negligence. (Kauffman v. De Mutiis (1948) 31 Cal.2d 429, 432.) The moving party must show that he was diligent in seeking to protect himself from being placed in such a situation. (8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court, § 30, p. 536.) The movant also must show that the surprise had a material effect on the case, making it likely a different result would be reached if a new trial were granted. (Ibid; see also City of Fresno v. Harrison (1984) 154 Cal.App.3d 296, 300-301.)

Drabek's motion for a new trial was based upon two declarations from former Skoda Ostrov representatives, Hrubec and Pravecek, and an unsigned agency agreement Drabek allegedly drafted in 1992 but which was not signed because Skoda Ostrov was told that the contract was illegal and AAI would not do business with Skoda Ostrov if it signed the draft agreement. All three documents were in Czech. Although Drabek provided an English translation of these documents, the translations were not certified under oath by a qualified interpreter, as required by California Rules of Court, rule 311(e). [12] As such, the trial court did not abuse its discretion in refusing to grant a new trial based upon these foreign documents.

Relying upon Mediterranean Construction Co. v. State Farm Fire & Casualty Co. (1998) 66 Cal.App.4th 257, 264, Drabek argues that the trial court erred in not granting him a short continuance to cure this "technical [deficiency]." We are not persuaded. Unlike Mediterranean Construction, AAI did not raise new arguments in a reply brief, catching Drabek off-guard; rather, in its opposition, filed and served 10 days before the hearing on Drabek's motion, AAI pointed out Drabek's failure to comply with the statutes governing translations. Drabek had at least those 10 days in which to obtain a proper translation. His failure to do so (or explain why he was unable to do so) does not entitle him to a continuance.

Even if the trial court erred in denying Drabek's motion, that error was harmless and not grounds for reversal. (Osborne v. Cal-Am Financial Corp. (1978) 80 Cal.App.3d 259, 265-266.) As discussed above, the terms of Drabek's alleged oral contract are set forth in the JVAA, which plainly is restricted to the Los Angeles project. Under these circumstances, we cannot consider contrary extrinsic parol evidence from Hrubec and Pravecek. (Pacific Gas & E. Co. v. G.W. Thomas Drayage Etc. Co. (1968) 69 Cal.2d 33, 37; Sunniland Fruit, Inc. v. Verni, supra, 233 Cal.App.3d at p. 898.)

Moreover, the unsigned agency agreement attached to Hrubec's declaration hardly satisfies the statutory definition of "new" or "surprise." The document was translated on November 29, 2000, well before the hearing on the motions for summary judgment. In any event, the document is irrelevant. Unlike the JVAA, it is not the alleged contract at issue and thus is immaterial to the terms of the parties' alleged agreement.

DISPOSITION

The judgment and order of the trial court are affirmed. Respondents are entitled to their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

We concur:

NOTT, Acting P. J.

Drabek v. AAI Corporation

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DOI TODD, J.

1. DMS International also is a named plaintiff and appellant. For the ease of the reader, we refer collectively to Drabek and DMS International as "Drabek."

2. The appellate record and the parties' briefs identify this entity as both Skoda Koncern and Skoda Concern. We use the spelling set forth in Drabek's first amended complaint.

3. In December 2002, the trial court dismissed Skoda Concern pursuant to Code of Civil Procedure section 583.310 (failure to bring the action to trial within five years).

4. Skoda Export is no longer a party to this action, having entered into a good faith settlement with Drabek in 1999.

5. ETI is not a party to this appeal. On March 1, 2002, the trial court granted its motion for summary judgment, and Drabek does not challenge this ruling on appeal.

6. Drabek has abandoned his claims for unjust enrichment, violations of the Business and Professions Code, and disparagement.

7. He left Skoda Ostrov's employ on April 30, 2000.

8. Pravecek testified that Drabek "was promised commissions for all deliveries to the United States."

9. Beck testified: "In the eyes of [AAI President] [Talley], Drabek had to be gotten rid of, period, with respect to our proposal."

10. The exception for an action by the master for tortious injuries to his servant is no longer the law in California. (I.J. Weinrot & Son, Inc. v. Jackson (1985) 40 Cal.3d 327, 332- 336, 339, fn. 8, superseded by statute on other grounds as stated in County of Monterey v. Mahabir (1991) 231 Cal.App.3d 1650, 1652- 1653.)

11. Regardless, for the same reasons discussed, ante, AAI cannot be liable for interference with contract because Drabek never was entitled to any commissions; ETBs never were sold for the Los Angeles project.

12. California Rules of Court, rule 311(e) provides, in relevant part: "Exhibits written in a foreign language shall be accompanied by an English translation, certified under oath by a qualified interpreter."