

A Valuable Exception to the Statute of Frauds

The California Statute of Frauds (Civil Code § 1624) can be a conclusive defense to a breach of oral contract claim because it can bar the claim regardless of its validity and support by evidence. If the subject contract fails within the Statute, the agreement must be in writing and executed by the party to be charged or it is invalid, unless there is an exception.

In the recent decision of *Zakk v. Vin Diesel*, the actor's argument that the Statute barred the claim by producer George Zakk was rejected by the Appellate Court, in a decision that clarifies the application of the Statute to an agreement that by its terms is not to be performed within a year from the making thereof.

Zakk claimed he was entitled to be paid \$275,000 as an executive producing fee, and receive an executive producer credit, for the sequel to the film entitled *xXx*, a film Zakk had worked on and developed. Zakk sued Diesel, and his production company, for breach of an oral contract, and quantum meruit, among other causes of action.

The trial court found that Zakk's claim for breach of an oral contract (and its derivative claims) was barred by the Statute, and the quantum meruit claim was barred by the statute of limitations.

Zakk ran Diesel's production company, One Race Films, from its inception, and he was responsible for developing projects and managing them to conclusion. Zakk did not receive a salary, reimbursement for expenses, or any other compensation for his daily work.

Instead, he claimed he had an oral and/or implied-in-fact agreement with Diesel and One Race Films which provided that for each motion picture in which (a) Diesel would star in and act in the capacity as producer in, and (b) Zakk helped develop and/or worked on while running the operations of One Race Films, including sequels based thereon, Zakk would, unless otherwise agreed, receive a fee that ranged from \$250,000 to \$275,000, and an executive producer or producer credit on screen and in promotional materials on a Most Favored Nation (MFN) basis with other executive producers or producers.

Zakk's complaint alleged there was a considerable amount of precedent that evidences the oral and/or implied-in-fact agreement, and he listed six original films and one sequel for which he was paid and given executive producer or co-producer credit.

The first film, *Strays*, was produced in 1997; the last original film listed, *Find Me Guilty*, was produced in 2006. The one sequel listed, *Riddick* (which was a sequel to the 2004 original film, *The Chronicles of Riddick*) was produced in 2013, and Zakk received an executive producer fee and credit for the sequel even though his relationship with Diesel and One Race had terminated in 2007.

With regard to the film *xXx*, which was produced in 2002, the complaint alleged Zakk worked on and helped develop *xXx*. Accordingly, with respect to *xXx* and any sequel of *xXx* that would be starring and produced by Diesel, Zakkk alleged that One Race Films, and/or Revolution Studios (the production company) agreed to provide Zakk with an Executive Producer credit and \$275,000 executive producing fee in exchange for his services.

Zakk alleged that by virtue of the services that Zakk provided in connection with *xXx* (i.e., working on the picture and helping to develop it), Zakk fully performed all of his obligations under the oral or implied-in-fact agreement that Zakk had with Diesel and One Race Films, thereby entitling Zakk to an Executive Producer credit and \$275,000 producing fee.

Zakk alleged a cause of action for quantum meruit contending that defendants requested that Zakk perform services for their benefit in connection with the *xXx* film franchise and promised to pay Zakk the reasonable value of those services (which is alleged to be no less than \$2 million), and that Zakk performed those services.

Oral contracts that by their terms are not to be performed within one year fall within the Statute, but the promisee's (in this case Zakk) full performance of all of his obligations under the contract takes the contract out of the Statute, and no further showing of estoppel is required. In other words, Zakk's allegation that he fully performed his obligations under the alleged oral contract was enough to avoid the Statute.

To the extent cases hold that avoidance of the Statute requires the promisee to satisfy the elements of estoppel (i.e., showing extraordinary services by the promisee or unjust enrichment by the promisor), they do not apply to the category of contracts not to be performed within a year.

Where the contract is bilateral but has been fully performed by one party, the remaining promise is taken out of the Statute, and the party who performed may enforce it against the other.

Some cases required that the plaintiff must show more than full performance in order to avoid the Statute, and they involved oral contracts to make a will (or to devise property in a will) or contracts not to be performed during the lifetime of the promisor. Where an oral agreement to make or not to revoke a will is alleged after promisor is deceased and unable to testify, there is an opportunity for the fabrication of testimony concerning the existence of the agreement. Sound policy requires some form of written evidence that such an agreement actually exists. The concern about fabrication of testimony is significantly lessened where all parties to the alleged contract are able to testify as to its existence or nonexistence, such as in the *Zakk v. Diesel* case.

The statute of limitations on a cause of action for quantum meruit for personal services usually begins to run when those services or the relationship between the parties terminate, but that is not always the case. Where services are provided with the

understanding that payment for those services will be made at some time after the termination of those services or upon some contingency, the statute of limitations does not begin to run until that time arrives or contingency occurs. The statute of limitations does not begin to run against a claim until it matured and could be enforced, regardless of whether the time fixed was reasonable or unreasonable.

Zakk alleged that defendants agreed to pay him the reasonable value of the services he performed “when the *xXx Sequel* was released.” He also alleged that the sequel was released “on or about January 20, 2017.” Therefore, the two-year statute of limitations on his quantum meruit cause of action did not begin to run until January 20, 2017, and the trial court erred in finding that his claim, filed on March 17, 2017, was time-barred.

LESSONS:

1. Always get a contract in writing, and if you can't, keep detailed records of performance of the agreement.
2. The statute of frauds is a powerful defense, but the promisee's performance of an oral agreement may be sufficient to avoid the bar of the statute of frauds, depending on the nature of the oral agreement and the evidence.
3. The prior conduct of the parties may be treated as precedents, and can be valuable evidence supporting or defeating an oral contract claim.
4. Where money is concerned, reliance on the promisor's good faith may be misplaced.