SMASHING PICTURES, LLC, Plaintiff and Appellant,

v.

TWENTIETH CENTURY FOX FILM CORPORATION, Defendant and Respondent.

No. B227872.

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

Filed September 26, 2011.

Kinsella Weitzman Iser Kump & Aldisert, Dale F. Kinsella, Alan Kossoff, Amber B. Holley for Plaintiff and Appellant.

Kelley Drye & Warren, David E. Fink; Anderson General & Entertainment Law, Edward M. Anderson for Defendant and Respondent.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, J.

Plaintiff Smashing Pictures, LLC ("Smashing") appeals the judgment entered in favor of defendant Twentieth Century Fox Film Corporation ("Fox") after the trial court adopted the Report of Referee (the "Report") issued by retired Justice Edward A. Panelli (the "Referee"), which recommended that Fox's demurrer to Smashing's second amended complaint and motion for judgment on the pleadings be granted. Finding no error, we affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

We recite the factual background of this dispute as presented in the Referee's Report. "In July 2005, Smashing and Fox executed a written Co-Financing/Co-Producing & First Look Agreement (hereinafter the `Agreement'). The Agreement was a seven-year deal in which Smashing and Fox were to co-finance a slate of up to 20 teen-oriented films, four of which were existing Fox films, referred to in the Agreement as the `Inventory Pictures.' Smashing was represented by Michael Barnes during the Agreement's negotiations.

"Paragraph 2(c) of the Agreement provided that Smashing was to initially invest $15 million in the Inventory Pictures by wiring to Fox a $1 million `Option Payment' and a $14 million `Inventory Picture Payment.' The Inventory Picture Payment was to have represented Smashing's initial equity investment in the films, as set forth in Schedule 1. Upon making these payments, paragraph 5 of the Agreement provided that Smashing would have the

option to invest another $10 million in the Inventory Pictures (the `Additional Inventory Payment'), for a total investment of $25 million. The full $25 million was to be received by December 15, 2005.

"As of December, 2005, Smashing had only paid Fox a total of $8,118,151. Accordingly, on or about December 20, 2005, the parties executed Amendment No. 2 of the Agreement. Amendment No. 2 provided that Smashing would have until March 31, 2006 to pay Fox $16,881,849 — the balance remaining on the full $25 million investment contemplated in the Agreement.

"Smashing subsequently paid an additional $500,000; however, it never paid the full $25 million. Smashing ultimately requested that Fox return its $8,618,151 initial payment. Fox refused.

"On January 27, 2009, Smashing filed its Complaint against Fox. Fox demurred to the Complaint, and on March 17, 2009, Smashing filed its [First Amended Complaint]. The [First Amended Complaint] raised three claims: (1) Breach of Contract; (2) Declaratory Relief; and (3) Conversion. As with Smashing's [Second Amended Complaint's] Breach of Contract and Declaratory Relief claims, each of these claims rested on the interpretation of several key clauses in the Agreement and Amendment No. 2, including paragraph 2(c) of the Agreement, which states:

Smashing's failure to make the Inventory Picture Payment or the Option Payment as required hereunder . . . shall immediately relieve Fox of each and every obligation hereunder, and Smashing shall not share in the Gross Receipts of any Picture hereunder.

Additionally, paragraph 1 of Amendment No. 2 states that if Smashing fails to provide the additional funds by March 31, 2006, `Fox shall retain all of its rights and remedies for Smashing's failure to fully fund under the Agreement.' Amendment No. 2 also states that until Smashing delivers the full $25 million to Fox, Fox would `have the right to reallocate Smashing's investment in and among the Inventory Pictures as Fox determines, in its sole discretion.'"

On September 3, 2009, the Referee issued an "Order Re: Demurrer," in which he sustained Fox's demurrer to Smashing's breach of contract claim with leave to amend, stating that Smashing must "allege the specific contractual provisions that it believes Fox has breached" and "the legal effect of Fox's breach." The Referee overruled Fox's demurrer to the declaratory relief claim, finding that Smashing's complaint satisfied the pleading requirements by "plead[ing] the existence of two actual controversies between the parties. . .," those being the proper interpretation of Section 2(c) of the Agreement, and of Amendment No. 2. The Referee sustained the demurrer to the conversion claim.

On September 19, 2009, Smashing filed its second amended complaint, and included in the breach of contract claim the specific contractual provisions which it alleged that Fox had breached, as well as the legal effect of that breach. Specifically, Smashing alleged that "(1) Fox failed to comply with Paragraph 2(c) of the Agreement; (2) Paragraph 2(c) required the

$8,618,151 to be returned; (3) Smashing was only entitled to an interest in the films if it was able to satisfy the full $15 million payment, which it failed to do; and (4) Fox has materially breached Paragraph 2(c) of the Agreement which required it to return to Smashing any movies advanced under the Agreement on account of the fact that Smashing received no equity interest in the films."

Fox demurred to the amended complaint, and filed a Motion for Judgment on the Pleadings contending, as it had in its previous demurrer, that Smashing failed to plead facts sufficient to show its own performance or excuse from performance of the Agreement, and further failed to plead facts sufficient to show any breach of obligation by Fox.

On February 1, 2010, the Referee issued his report sustaining, without leave to amend, Fox's demurrer to both of Smashing's claims. The Referee concluded that "based on the contract language to which Smashing cites, Fox could not have committed any breach. Nothing in paragraph 2(c) can be interpreted to require Fox to return Smashing's investment if Smashing failed to fulfill the conditions precedent to the deal. Indeed, Paragraph 2(c) actually `relieved Fox of each and every obligation' under the contract if Smashing failed to make the required payments. Thus, even assuming, *arguendo,* that some contractual provision required Fox to return Smashing's money, that requirement was eliminated by Paragraph 2(c)'s unambiguous terms." Having found that, as a matter of law, Smashing could not establish Fox's breach, the Referee stated that "it follows that Fox's demurrer to Smashing's Declaratory Relief action should be sustained without leave." The Referee's Report recommended that Fox's demurrer to the breach of contract and declaratory relief causes of action both be sustained without leave to amend.

The trial court entered the Report of the Referee as its Order, without consideration of Smashing's objections, finding that under Code of Civil Procedure section 638, the statute pursuant to which the Referee was appointed, it had no discretion to change the Referee's ruling, and was required to enter that ruling as the order of the court.

Smashing appeals the judgment entered dismissing its complaint.

STANDARD OF REVIEW

On appeal from a judgment of dismissal after a demurrer is sustained without leave to amend, review is de novo. (*Linear Technology Corp. v. Applied Materials, Inc.* (2007) 152 Cal.App.4th 115, 122.) This court "treat[s] the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) In addition to the complaint's allegations, we consider matters that must or may be judicially noticed, as well as the complaint's exhibits. (*Quick v. Pearson* (2010) 186 Cal.App.4th 371, 377.) The judgment must be affirmed if any one of the grounds of demurrer is well taken. (*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 21.) However, "[a] trial court errs in sustaining a demurrer when the plaintiff has stated a cause of action under any possible legal theory, and abuses its discretion in sustaining a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any

defect identified by the defendant can be cured by amendment." (*Everett v. State Farm General Ins. Co.* (2008) 162 Cal.App.4th 649, 655, internal citations omitted.)

DISCUSSION

The legal question at issue in this lawsuit is this: What is the proper disposition of the over $8 million which Smashing gave to Fox in partial performance of its obligations under the written agreement between the parties? Smashing offers three possible answers, the first of which it promotes as a reasonable interpretation of the agreement sufficient to overcome demurrer: the money was either (a) required to be returned to Smashing, or (b) forfeited by Smashing, or (c) invested in the Inventory Pictures. Not surprisingly, the agreement does not explicitly state that in the event that Smashing provides some, but not all, of the funds promised under the agreement, the paid-in funds will be either forfeited by or returned to Smashing. However, an amendment to the agreement appears to address the very question facing the parties.

Amendment No. 2, dated December 20, 2005, was executed by the parties after Smashing had breached its obligations to make the initial payment by July 22, 2005, and to make the additional payment by December 15, 2005. Amendment No. 2 provided, in relevant part, as follows: "Smashing acknowledges that, in addition to Fox's other rights and remedies under the Agreement, Smashing's failure to provide $25,000,000 in financing by December 15, 2005 gave Fox the right not to include the Option payment as part of the funds available for investment in the Inventory Pictures. Notwithstanding the foregoing, Fox and Smashing agree that if Smashing delivers to Fox an additional $16,881,849 in funds (for a total of $25,000,000 in total funding) by March 31, 2006, then it shall be credited as part of Smashing's investment in any then-unreleased Inventory Pictures. [¶] It is understood and agreed, however, that if Smashing fails to provide $16,881,849 in additional funds by March 31, 2006 (for a total Smashing investment of $25,000,000), then the Option Payment shall not be credited to Smashing's investment in any then-unreleased Inventory Pictures, and Fox shall retain all of its rights and remedies for Smashing's failure to fully fund under the Agreement." This provision makes clear that Smashing's breach of its funding obligations under the Agreement resulted in the forfeiture of its $1 million Option Payment.

Amendment No. 2 further provided that "With the monies currently delivered to Fox, Fox shall, after deducting the Option Payment off the top, allocate the remaining funds among the Inventory Pictures (excluding "My Friend Flicka") as follows:" $3,303,000 was allocated to "Aquamarine;" $2,541,000 was allocated to "Idiocracy;" and $1,274,000 was allocated to "The Ringer." Thus, there is no question but that as of December 20, 2005, the date of this amendment, $7,118,000 was invested in the Inventory Pictures.[1] The Amendment continued, "Until such time as Smashing has delivered to Fox the full $25,000,000 in total funding, Fox shall have the right to reallocate Smashing's investment in and among the Inventory Pictures as Fox determines, in its sole discretion. In addition, Fox may also, at its

sole discretion, elect to remove up to 2 of the Inventory Pictures from the group of Inventory Pictures currently contemplated to be co-financed with Smashing."

In short, the very document which was executed after Smashing had failed to meet its funding obligations under the Agreement, and which, unlike the original Agreement, specifically contemplated that Smashing might not meet its amended funding obligations, makes no mention of returning Smashing's investment, but rather specifies precisely in which Inventory Pictures Smashing's funds are to be invested.

Smashing contends that the Referee erroneously found that "[n]othing in paragraph 2(c) can be interpreted to require Fox to return Smashing's investment if Smashing failed to fulfill the conditions precedent to the deal." Smashing explains: "Where a complaint is based on a written contract which it sets out in full, a demurrer to the complaint admits not only the contents of the instrument, but also `*any pleaded meaning to which the instrument is reasonably susceptible.*' See *Martinez v. Socoma Companies, Inc.* (1974) 11 Cal.3d 394, 400 (emphasis added)." Smashing maintains that it pleaded an interpretation of the Agreement to which it is reasonably susceptible: that is, Paragraph 2(c) specifies that, in the event Smashing fails to meet its payment obligations, Smashing is to receive no interest in the films. And if Smashing receives no interest in the films, then Fox must refund to Smashing the money it has already paid to Fox. While Smashing recognizes that the Agreement does not state that Fox must repay Smashing under these circumstances, it points out that neither does the Agreement specify that Fox may retain the funds as a forfeiture. "To the contrary, the [Second Amended Complaint] pleads that Fox is *not* entitled to keep Smashing's money. Thus, by finding that Fox is entitled to retain the money, the Referee has also made an improper factual determination on demurrer." Smashing's argument is unpersuasive.

"The rules governing the role of the court in interpreting a written instrument are well established. The interpretation of a contract is a judicial function. (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 39-40 (*Pacific Gas & Electric*).) In engaging in the function, the trial court `give[s] effect to the mutual intention of the parties as it existed' at the time the contract was executed. (Civ. Code, § 1636.) Ordinarily, the objective intent of the contracting parties is a legal question determined solely by reference to the contract's terms. (Civ. Code, § 1639 ['[w]hen a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible . . .']; Civ. Code, § 1638 [the `language of a contract is to govern its interpretation . . .'].) [¶] The court generally may not consider extrinsic evidence of any prior agreement or contemporaneous oral agreement to vary or contradict the clear and unambiguous terms of a written, integrated contract. (Code Civ. Proc., § 1856, subd. (a); *Cerritos Valley Bank v. Stirling* (2000) 81 Cal.App.4th 1108, 1115-1116; *Principal Mutual Life Ins. Co. v. Vars, Pave, McCord & Freedman* (1998) 65 Cal.App.4th 1469, 1478 [parol evidence may not be used to create a contract the parties did not intend to make or to insert language one or both parties now wish had been included].) Extrinsic evidence is admissible, however, to interpret an agreement when a material term is ambiguous. (Code Civ. Proc., § 1856, subd. (g); *Pacific Gas & Electric, supra,* 69 Cal.2d at p. 37 [if extrinsic evidence reveals that apparently clear

language in the contract is, in fact, susceptible to more than one reasonable interpretation, then extrinsic evidence may be used to determine the contracting parties' objective intent]; *Los Angeles City Employees Union v. City of El Monte* (1985) 177 Cal.App.3d 615, 622.)" (*Wolf v. Walt Disney Pictures and Television* (2008) 162 Cal.App.4th 1107, 1125-1126.)

Smashing does not point to a specific word or phrase used in the contract, the meaning of which it contends is ambiguous. Rather, it simply argues that it thought that the terms of the Agreement provided for Fox's return of Smashing's investment if Smashing did not make the payments contemplated in the Agreement. It supports this understanding by alleging that Michael Barnes, its then-attorney who drafted the Agreement on its behalf, "informed Smashing that the legal effect of Paragraph 2(c) was to require Fox to return any monies to Smashing if it did not fully fund." The second amended complaint included the allegations that Smashing "was informed by Barnes, that Paragraph 2(c) of the Agreement did not allow Fox to retain Smashing Pictures' money if Smashing Pictures did not sufficiently fund the $15 million," and that Smashing was informed by Barnes "that if it did not sufficiently fund the $15 million, the legal effect of Paragraph 2(c) was that Fox would be required to return to Smashing Pictures any monies advanced to Fox by Smashing Pictures under the Agreement on account of the fact that Smashing received no equity interest in the films."

Assuming the truth of these allegations, as we must on a demurrer, they do not state a cause of action for breach of contract. Contrary to Smashing's contention that we must accept as true its allegations regarding the legal effect of Paragraph 2(c), we reiterate that this court "treat[s] the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Blank v. Kirwan, supra,* 39 Cal.3d at p. 318.) As the Referee found, the clear, unambiguous language of the Agreement as modified by Amendment No. 2 cannot be understood to mean that Fox was obligated to refund Smashing's investment upon Smashing's default in its payment obligations. Moreover, Smashing's allegation that Fox "materially breached the Agreement by, *inter alia,* purporting to credit Smashing Pictures' money toward an equity interest in the films and a share in gross receipts of the films" is in direct contradiction to the express language of Amendment No. 2, which not only allocated Smashing's partial investment among the Inventory Pictures, but gave Fox "sole discretion" to reallocate that investment if Smashing failed to provide full funding. Smashing's complaint alleged that Fox is in breach of contract for doing something — investing the funds in the Inventory Pictures — which the parties' Agreement positively states that Fox is not only entitled but obligated to do. The complaint fails to state a cause of action for breach of contract.

Similarly, the declaratory relief cause of action is based solely and exclusively on Smashing's unreasonable "interpretation and meaning of Paragraph 2(c) of the Agreement." As the Referee explained, once Smashing identified the contractual provisions upon which its breach of contract claim rested, and the Referee determined, as a matter of law, that Smashing cannot prove a breach under those provisions, it follows that Smashing cannot state a cause of action for declaratory relief. (See *Silver v. City of Los Angeles* (1963) 217 Cal.App.2d 134, 138 ["A trial court may properly sustain a general demurrer to a declaratory

relief action without leave to amend when the controversy presented can be determined as a matter of law."].)

Finally, Smashing maintains that, even if the allegations of its second amended complaint were deficient, and the demurrer properly sustained, this court should reverse the judgment of dismissal because there exists a "reasonable possibility that the [pleading] can be cured by amendment." (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) Smashing's argument relies on extrinsic evidence — Fox's post-breach conduct which Smashing contends was inconsistent with its position that the terms of Agreement specify that Smashing's partial payment is to be invested in the Inventory Films rather than be returned to, or forfeited by, Smashing. However, as noted above, this extrinsic evidence would not support a reasonable interpretation of an ambiguous contract term, but would contradict the straightforward and unambiguous terms of the Agreement. This Smashing may not do. (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 379; *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165.)

In short, the Referee properly sustained Fox's demurrer to Smashing's second amended complaint without leave to amend.

DISPOSITION

The judgment is affirmed.

TURNER, P. J., concur.

MOSK, J., Dissenting.

I dissent.

This case comes to us after the trial court sustained a demurrer by defendant Twentieth Century Fox Film Corporation (Fox) to a second amended complaint by plaintiff Smashing Pictures, LLC (Smashing) without leave to amend and involves principles concerning demurrers and contract interpretation. The trial court based its ruling on its conclusion that notwithstanding Smashing's allegations as to the meaning of the "Co-Financing/Co-Producing & First Look Agreement" (contract), the contract was unambiguous, and thus, Smashing could not state a cause of action.

"When a complaint is based on a written contract which it sets out in full, a general demurrer to the complaint admits not only the contents of the instrument but also any pleaded meaning to which the instrument is reasonably susceptible." (*Martinez v. Socoma Companies, Inc.* (1974) 11 Cal.3d 394, 400.) "While [a] plaintiff's interpretation of the contract ultimately may prove invalid, it [is] improper to resolve the issue against [it] solely on [its] own pleading. (*Aragon-Haas v. Family Security Ins. Services, Inc.* (1991) 231 Cal.App.3d 232, 239; see *Performance Plastering v. Richmond American Homes of California, Inc.* (2007) 153 Cal.App.4th 659, 672.)

Thus, the issue is whether the contract here is reasonably susceptible to Smashing's interpretation. "`Where the meaning of the words used in a contract is disputed, the trial court must provisionally receive any proffered extrinsic evidence which is relevant to show whether the contract is reasonably susceptible of a particular meaning. (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 39-40 [69 Cal.Rptr. 561, 442 P.2d 641]; *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1140-1141 [234 Cal. Rptr. 630].) Indeed, it is reversible error for a trial court to refuse to consider such extrinsic evidence on the basis of the trial court's own conclusion that the language of the contract appears to be clear and unambiguous on its face. Even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning to which the language of the contract is yet reasonably susceptible. (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co., supra,* 69 Cal.2d at p. 40 & fn. 8; *Pacific Gas & Electric Co. v. Zuckerman, supra,* 189 Cal. App. 3d at pp. 1140-1141.)'" (*Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1350-1351.)

In the contract, an "express condition precedent" was that Smashing was to pay Fox $14 million by July 27, 2005 (¶ 2(c)) in return for which Smashing was to receive an interest in pictures (¶ 5), credit (¶ 19), and a percentage of gross receipts (Schedule 1). Smashing was also to pay Fox $1 million by July 21, 2005 for an option to make a further $10 million equity investment by December 15, 2005 in the motion pictures. If the additional investment was not paid, Smashing was to forfeit the $1 million, and neither Fox nor Smashing would have any "further obligation to each other" with respect to gross receipts and audit rights in the additional picture covered by the additional investment. (¶ 5, Schedule 1, ¶ 4, CT 619.)

Smashing was making an "equity investment" in motion pictures (¶ 5) and would be entitled to gross receipts (¶ 11), but "Fox shall be deemed the sole owner . . . of all Pictures. . . ." (¶ 15.) The contract states, "Smashing's failure to make the Inventory Picture Payment or the Option Payment as required hereunder, and/or any failure of payment under an Acceptable LC, shall immediately relieve Fox of each and every obligation hereunder, and Smashing shall not share in the Gross Receipts of any Picture hereunder." (¶ 2(c).)

Thereafter, the parties in Amendment No. 2 to the contract recognized that Smashing had only paid $8,118,151. The parties provided that Smashing was to pay an additional $16,881,849 by March 31, 2006. The amendment specified: "It is understood and agreed, however, that if Smashing fails to provide $16,881,849 in additional funds by March 31, 2006 (for a total Smashing Investment of $25,000,000), then the Option Payment shall not be credited to Smashing's investment in any then-unreleased Inventory Pictures, and Fox shall retain all of its rights and remedies for Smashing's failure to fully fund under the Agreement. [¶] (2) With the monies currently delivered to Fox, Fox shall, after deducting the Option Payment off the top, allocate the remaining funds among the Inventory Pictures (excluding `My Friend Flicka') as follows: ¶] `Aquamarine,' $3,303,000; `Idiocracy,' $2,541,000; and `The Ringer,' $1,274,000. [¶] Until such time as Smashing has delivered to Fox the full $25,000,000 in total funding, Fox shall have the right to reallocate Smashing's investment in and among the Inventory Pictures as Fox determines, in its sole discretion. In

addition, Fox may also, at its sole discretion, elected to remove up to 2 of the Inventory Pictures from the group of Inventory Pictures currently contemplated to be co-financed with Smashing." After executing Amendment No. 2, Smashing delivered an additional $500,000, for total payments of $8,618,151 and then paid nothing more.

Amendment No. 2 does not explicitly amend paragraph II (c), which provides that a failure of Smashing to make payments relieves Fox of any obligation and Smashing shall have no share in the gross receipts of any of the pictures. Moreover, that Fox retains all of its rights and remedies if Smashing does not make payments does not answer the question of whether Fox has a right to the approximately $8.6 million paid by Smashing. One could read the provision as meaning that the reallocation of the interests in the pictures based on the approximately $8 million[2] payment was made "[u]ntil such time as Smashing has delivered to Fox the full $25,000,000 in total funding." Again, that does not answer what happens if Smashing says it will not pay any more. In other words, Smashing may have no interest in any films if it ultimately pays no more than already paid.

There is no provision that expressly gives Fox the right to retain the funds Smashing had paid to it if Smashing fails to comply with the condition precedent payment provision. In view of the ambiguities, patent or latent, Smashing's interpretation of the contract that requires the refund of the approximately $8.6 million is not unreasonable. Fox's retention of that money would result in a forfeiture and possibly Fox's unjust enrichment. Our Supreme Court has said, "the policy and rule are settled, both in the interpretation of ordinary contracts and instruments transferring property, that the construction which avoids forfeiture must be made if it is at all possible." (*Ballard v. MacCullum* (1940) 15 Cal.2d 439, 444 (Gibson, J.); see *UNUM Life Ins. Co. of America v. Ward* (1999) 526 U.S. 358, 371, fn. 3 [concerning the Ballard case, "the court invoked a general presumption against forfeitures only to resolve the conflict"]; Civ. Code, § 1442; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 826, p. 915; cf. *County of San Bernardino v. Walsh* (2007) 158 Cal.App.4th 533, 550 ["avoid prospect of unjust enrichment"].)

Even if the payments are not viewed as condition precedents, but rather obligations that were breached, then Fox, arguably, would be entitled to damages, not the total amount of payments already made. (*Caplan v. Schroeder* (1961) 56 Cal.2d 515, 519 ["even a willfully defaulting vendee may recover the excess of his part payments over the damages caused by his breach. (Traynor, J.)"]; see Rest.2d Contracts, § 240, com. a, p. 229 ["forfeiture may sometimes be reduced or avoided by allowing a party whose failure has been material to have restitution in accordance with the policy favoring avoidance of unjust enrichment"; but see *Brown v. Grimes* (2011) 192 Cal.App.4th 265, 280-281 [only when total failure of consideration or repudiation of the contract is breaching party entitled restitution of money had and received].)

How one views the various promises seems to be questions of fact. (See *Brown v. Grimes, supra,* 192 Cal.App.4th at p. 279.) Notwithstanding the purported strength of Fox's position, Smashing should be entitled to submit extrinsic evidence on any ambiguity or latent

ambiguity in the written contract. I would reverse the judgment and order that the demurrer be overruled.

[1] Amendment No. 2 failed to account for an additional $151 which Fox received from Smashing under the Agreement.

[2] There was no provision specifically dealing with the allocation of the later-paid $500,000 in any motion picture.