#MeToo—Can It Be Used as an Excuse? Frustration of Purpose and Other Theories Used to Excuse Performance in Entertainment and Business Deals

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With the rise of #MeToo and other socio-political movements, the entertainment industry is wrangling with how to deal with filmmakers and talent whose reputation instantly combusts. Case in point, Woody Allen and Amazon. In 2017, Amazon agreed to a deal with the renowned auteur to release four feature films.[1] Amazon viewed this agreement as a significant part of a larger strategy to compete with Netflix and other major distributors. Although allegations of sexual abuse had dogged Allen for years, the claims did not appear to affect the negotiations at the time the two parties entered into their agreement.

As the social climate changed, however, Allen's adopted daughter, Dylan Farrow, continued to sound off on accusations of sexual abuse, and Allen made comments on Twitter about #MeToo that drew unwanted attention. Stars of the first film covered by the deal, *A Rainy Day in New York*, began to distance themselves from Allen and the film. It did not help that the film centered on a relationship between an older man played by Jude Law, forty-four at the time of production, and a young woman played by Elle Fanning, who was then nineteen. Amazon brought in a new studio head, who did a double-take and decided to try to cut losses. Allen disagreed, and filed suit for breach of contract.[2]

The case currently is pending in the Southern District of New York. Certain of Allen's claims pertaining to the four movies globally were recently tossed, but the case is proceeding as to breach of contract allegations related to the movies individually.[3] Amazon's legal team has indicated they will likely be pushing an argument for "frustration of purpose."[4] Amazon's lawyer, Robert Klieger, stated,

> Amazon's performance of the Agreement became impracticable as a result of supervening events, including renewed allegations against Mr. Allen, his own controversial comments and the increasing refusal of top talent to work with or be associated with him in any way, all of which have frustrated the purpose of the Agreement and support Amazon's decision to terminate it.[5]

Other studios have been grappling with similar issues. In February 2019, Millennium Films halted

production on *Red Sonja*, which was to be directed by Bryan Singer, who, similar to Allen, has been accused of statutory rape. Millennium's business model required guaranteed distribution in the U.S. to make essential deals with foreign distributors, and no domestic label would touch the project. Unlike Allen, Singer's deal was not "pay-or-play," and thus was easier for Millennium to walk away from.[6]

In 2015, Spanish language network Univision backed away from a five-year, $13.5 million deal to broadcast the Miss USA pageant after then-owner Donald Trump said he would be running for president and derogatorily referred to Mexican immigrants as "rapists." After Trump filed a $500 million lawsuit, Univision moved for dismissal, arguing that Trump frustrated the essential purpose of the agreement by insulting its core audience.

"Frustration of purpose" as a defense to breach of contract suits is not new, and typically finds the most success in wartime or other times of great upheaval. The theory is that while both parties to a contract technically *can* perform their duties, as a result of unforeseeable events, one party (using our initial example, Woody Allen) cannot give the other party (here, Amazon) the benefit of what induced the parties to contract in the first place. In the Allen example, the "unforeseeable" event would be the #MeToo movement.

Frustration of purpose has deep roots in legal history, but how well does it apply to modern cases presented in the context of #MeToo or other contemporary social and political movements?

When the frustration of purpose defense is raised, California courts look first to see whether the fundamental reason of both parties for entering into the contract has been frustrated by an unanticipated supervening circumstance that substantially destroys the value of the performance by the party standing on the contract.[7]

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.[8]

To prove the defense, the party asserting frustration must demonstrate that:

1. The frustration was so severe and harsh that the basic purpose of the contract was destroyed;[9]
2. The supervening circumstance or event was unforeseen and not the fault of one of the parties;[10]
3. The frustration was of the type not regarded as within the risks that were assumed under the contract;[11] and
4. The frustration was recognized by both parties to the contract (that is, both parties' purposes were frustrated).[12]

In *Nakashima*, plaintiffs FPI Development, Inc. and K.W. Hunt obtained an option to purchase and develop a golf course from Kenneth Earp, and assigned the "Earp option" to defendants Al Nakashima and George Price in exchange for a promissory note. When defendants did not pay, plaintiffs sued. Among their defenses, defendants argued that there was a failure of consideration because plaintiffs breached a promise to pursue development of the property, and because the option stated that it could not be assigned without Earp's prior consent.

The defense hinged on the argument that the option was essentially worthless because plaintiffs did not develop the property, and Earp could reject a proposed assignment. In rejecting defendants' first failure of consideration argument, the court concluded that the relevant law pertained to frustration of purpose.[13] The court stated:

> We assume for the sake of argument that defendants showed a triable issue of fact concerning the breach of the plaintiff's contract with Earp by the plaintiff and a potential defense of Earp to performance under that contract. The fact that the plaintiff was in breach of its contract with Earp does not amount to a frustration of the purpose of the agreement. This fact would be material to such a defense if it were related to a refusal by Earp to perform, a repudiation by Earp, or, perhaps, a demonstration that defendants' ability to exercise the plaintiff's option was or likely would have been prevented because of the prospect of such conduct by Earp.[14]

The court rejected the idea that the option was worthless because "the mere existence of a potential justification for Earp to refuse to perform that was not invoked would not establish a defense of frustration of purpose."[15] There was insufficient evidence that Earp would reject assignment—in fact, the available evidence suggested otherwise—and there was no showing any frustration was substantial: "It is not enough that the transaction [will] become less profitable for the affected party or even that he will sustain a loss. The frustration must be so severe that it is not fairly to be regarded as within the risks that he assumed under the contract."[16]

How can we apply this to current cases in the entertainment industry? Let us take Allen's case. *Nakashima* tells us Amazon will have a difficult time establishing prongs (1) and (3) above—frustration so severe and harsh the basic purpose of the contract was destroyed, and frustration of a type not regarded as within the risks assumed under the contract. Amazon likely will lose profits from the #MeToo fallout, but is that "so severe and harsh the basic purpose of the contract was destroyed," or is it merely "less profitable?" And was the frustration truly unforeseen? After all, allegations about Allen had followed him for years prior to the Amazon agreement. In the Trump/Univision case discussed earlier, Trump's lawyers argued that frustration of purpose should not apply because Trump was well known as a "straight talker" prior to the contract.

Other pertinent case law indicates an uphill climb for Amazon. In *Peoplesoft USA, Inc. v. Softek, Inc.*,[17] Softek licensed software from Peoplesoft. The software was intended for use by Softek's subsidiary to create program interfaces for use by Softek's customer, Policia de Puerto Rico (the Police Department of Puerto Rico) ("Policia"). By virtue of a licensing agreement, Softek was obligated to pay for the software, but, after the agreement was signed, Policia decided to use a different program to build its interface (primarliy because the Puerto Rican Treasury Department had reversed an earlier decision and decided that Policia could not use the PeopleSoft program to interface with the Treasury Department's existing software).

Since the Peoplesoft programs were not being used, Softek did not pay under the license agreement, and Peoplesoft sued. Softek tried to defend against the breach of contract by asserting the frustration of purpose doctrine. Softek argued that the supervening event was the decision by Policia to use a different program. This decision was unforeseeable and, according to Softek, frustrated the entire purpose of the licensing agreement.

Softek maintained that it was not reasonably foreseeable that Policia would fail to implement the software, nor that the Puerto Rican Treasury Department would reverse its prior position that Policia would be permitted to use the PeopleSoft program to interface with the Treasury Department's existing software. Softek noted that the contract expressly stated that the purpose of the agreement was to provide Policia with PeopleSoft's software, and it was not reasonable to interpret the language of the contract as meaning that Softek accepted the risk that Policia would decide not to implement the software.[18]

PeopleSoft contended, however, that the parties expressly contracted with the awareness that Policia might not pay for the software, and that Softek expressly assumed the risk of this eventuality by agreeing that "all payment obligations are noncancellable and nonrefundable" and by agreeing to "guarantee all payment to PeopleSoft on behalf of itself and . . . Policia."[19]

The court rejected Softek's argument and sided with PeopleSoft:

> [T]he question whether a risk was foreseeable is quite distinct from the question whether it was contemplated by the parties. . . . When a risk has been contemplated and voluntarily assumed . . . foreseeability is not an issue and the parties will be held to the bargain they made.[20]

The court found that the language of the contract clearly assigned the risk of Policia's noncooperation to Softek. Accordingly, Softek could not successfully maintain a defense of frustration of purpose.

What persuaded the court in *Softek* is illuminating for the Allen case. In *Softek*, the court recognized the frustration was not realized by both sides: the decision by Policia was not entirely unforeseeable, Peoplesoft had fully performed by delivering the software for use and, based on a reading of the agreement, the risk of non-use was built into the risks assumed under the agreement.

In the hypothctical we are considering, at the very least two of the four elements of frustration recognized by the California courts favor Allen: the resurfacing of claims against Allen was not entirely unforeseeable, and Allen had fully performed by generating the movie for release.

Frustration of purpose has a long history. In the 1948 case, *Dorn v. Goetz,*[21] plaintiffs entered into a contract to sell their home, with the ultimate conveyance of the home to defendants put off for several months due to pending construction of a new home for plaintiffs. In the interim, and before construction on the new home began, the government passed new housing regulations that protected veterans returning from World War II, but also resulted in preventing plaintiffs from obtaining permits they needed for construction on the new home. Given that the contract with defendants to convey the old home included a clause that time was of the essence, and contained language acknowledging that unforeseen difficulties in building the new home might arise, plaintiffs contended their contract with defendants to convey their old home was frustrated and they were entitled to rescind.

The court emphasized that the basic reason for entering into the contract, which is claimed to have been destroyed by the supervening event, must be recognized by both parties.[22] Further along these lines, the court stated:

> [T]he desired object or effect and purpose of the contract recognized by both parties was the purchase and sale of the old home. The construction of a new home was not the object, effect, or purpose of the contract, but had to do only with the time when the conveyance and delivery of the property sold would take place. It was merely an event by which consummation of the sale was to be timed. Delay in the construction of the new home was not a frustration of the desire to be attained.
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> Both parties anticipated a delay and contracted in contemplation of it, although the precise cause of possible delay they had in mind was the shortage of labor and building matcrials rathcr than a governmental decree. . . . As a result of the acute shortages actually contemplated by the parties, government intervention for the protection and welfare of returning veterans became necessary and we cannot, under these circumstances, say that the possibility of such regulation was not reasonably foreseeable.[23]

In sum, "not only was the action of the government reasonably foreseeable, but the building of another home was one of the desired objects of one party only."[24] Because government regulations based on post-wartime activities were reasonably foreseeable, the new home was the desire of plaintiffs and not of defendants, and plaintiffs could not demonstrate actual harm, the court upheld the trial court's decision for defendants.

Dorn is yet another example of why foreseeability will be a significant problem for Amazon in its case against Allen. In *Dorn*, the specific law that was passed was arguably not readily foreseeable, but because of the overall atmosphere of post-war events and society's desire to protect veterans, the passing of the law was not, in the court's mind, entirely unforeseeable. The specific issues with Allen and the *Rainy Day* movie were arguably not readily foreseeable, given that the allegations had surfaced years before and he had successfully made and marketed several movies since the allegations came to light. In the court's eye, however, it may not appear entirely unforeseeable that a social movement to protect abuse victims in the entertainment industry would arise and the negative reactions of the *Rainy Day* cast would result.

What other doctrines could apply? The doctrine of impossibility is closely related to the doctrine of frustration of purpose, but has one key difference: it hinges on the very *impossibility* of performance.[25] With frustration of purpose, it is not impossibility that is the issue, rather the reason for entering into contract has disappeared due to unforeseen circumstances.[26] Since Allen is able to perform his duties, impossibility of performance is inapplicable, and Amazon will find this doctrine of limited benefit.

Let's explore morals clauses. Allen's contracts with Amazon excluded such language, which is not surprising, given that the Director's Guild of America has banned morals clauses in contracts signed by its members. This prohibition goes back to the Red Scare of the 1940s and 1950s, when several directors and screenwriters had their

credits pulled from movies due to alleged associations with communism. What if Allen were not hired as a director or screenwriter, but as an actor with a morals clause included in his contract?[27] Would inclusion of a morals clause make a difference? Arguably, California courts have long upheld the legality and enforcement of morals clauses.[28] Studios and their marketing partners have an economic interest in keeping a movie's brand value high, and morals clauses ensure that talent does not compromise this value. As brand value increases, actors or actresses that become a liability to maintaining this value are eliminated. If Allen had been hired as talent instead of as a director, and without enough influence to negotiate exclusion of a morals clause, he could arguably be terminated for the studio to protect its bottom line. Considering Allen's status as a top-level director, the terms of his agreements, and the difficulty Amazon may have in demonstrating frustration of performance, Allen stands a good chance of getting the last laugh.

Endnotes

1 Gravier Prods. v. Amazon Content Servs., LLC, 2019 U.S. Dist. LEXIS 127553 (S.D. NY. 2019)

2 *Id.* at * 4.

3 *Id.* at * 17.

4 *Id.* at * 5.

5 Eriq Gardner & Tatiana Siegel, *Can Amazon Get Out of Its Woody Allen Deal? It's Complicated*, HOLLYWOOD REP. (Feb. 13, 2019), https://www.hollywoodreporter.com/thr-esq/can-amazon-get-woody-allen-deal-it-s-complicated-1186057.

6 Aaron Couch, Bryan Singer's "Red Sonja" Movie on Hold Amid Controversy, HOLLYWOOD REP (Feb. 11, 2019), https://hollywoodreporter.com/heat-vision/bryan-singers-red-sonja-movie-on-hold -amid-controversy-1185350.

7 Waegemann v. Montgomery Ward & Co., Inc., 713 F.2d 452, 454 (9th Cir. 1983).

8 RESTATEMENT (SECOND) OF CONTRACTS, § 261.

9 Dorn v. Goetz, 85 Cal. App. 2d 407, 410-11 (1948); Brown v. Oshiro, 68 Cal. App. 2d 393, 397 (1945).

10 Gold v. Salem Lutheran Home Ass'n of Bay Cities, 53 Cal. 2d 289, 291 (1959); *Dorn*, 85 Cal. App. 2d at 412-13.

11 FPI Dev., Inc. v. Nakashima, 231 Cal. App. 3d 367, 398-99 (1991).

12 *Dorn*, 85 Cal. App. 2d at 412-13.

13 *Nakashima*, 231 Cal. App. 3d at 398.

14 *Id.* at 399.

15 *Id.* at 399 n.17.

16 *Id.* at 399 (quoting RESTATEMENT (SECOND) OF CONTRACTS, § 265, com. a).

17 227 F. Supp. 2d 1116 (N.D. Cal. 2002).

18 *Id.* at 1120.

19 *Id.* at 1118-19.

20 *Id.* at 1120 (quoting Glenn R. Sewell Sheet Metal, Inc. v. Loverde, 70 Cal. 2d 666, 676 n.13 (1969)).

21 85 Cal. App. 2d 409 (1948).

22 *Id.* at 411.

23 *Id.* at 413.

24 *Id.* at 414.

25 *Softek*, 227 F. Supp. 2d at 1119.

26 *Id.*

27 Some actors and actresses have enough clout to negotiate these out of their contracts. A recent example is Kevin Spacey, who was fully paid for season six of *House of Cards* and a recent motion picture even after the now-infamous allegations about him surfaced. Many actors and actresses, however, have little choice but to accept these clauses as part of their agreements.

28 *See* Loew's, Inc. v. Cole, 185 F.2d 641 (9th Cir. 1950).