

M E M O R A N D U M

SUPREME COURT: QUEENS COUNTY
IA PART: 2

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THE NEW YORK CITY ECONOMIC
DEVELOPMENT CORPORATION,

INDEX NO. 5856/00

BY: WEISS, J.

Plaintiff,
-against-

DATED: April 17, 2006

T.C. FOODS IMPORT and EXPORT CO., INC.,
MARATHON OUTDOOR, L.L.C. and PNE
MEDIA, L.L.C.,

Defendants.

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In this action based upon a breach of a restrictive covenant and unjust enrichment, plaintiff New York City Economic Development Corporation (EDC) seeks declaratory relief, a permanent injunction and damages. The defendants counterclaimed for declaratory relief, and relied upon the provisions of RPAPL 1951.

The essential facts of this case were set forth in the decision of the Honorable Alan Levine, dated October 7, 2003, and were incorporated into this court's memorandum decision dated June 21, 2004. The action was before the court for a non-jury trial, at which time the parties stipulated, in open court, to trifurcate the trial so that the issues of liability, damages and the third-party claim could be tried separately. The parties

further stipulated that the issue of fact to be determined in the liability phase of the trial was whether, in balancing the equities, the restrictive covenant contained in the defendant T.C. Foods Import and Export Co. Inc.'s (T.C. Foods) deed is of "no actual and substantial benefit" to the plaintiff and whether the purpose of the restriction is incapable of being accomplished because of changed conditions, or for any other reason. The liability phase was tried on June 9, 10 and 14, 2004. The court determined that the defendants had erected and maintained an outdoor advertising billboard in violation of a restrictive covenant contained in the deed for the real property located at 31-69 College Point Boulevard, in Queens, New York. In the memorandum decision of June 21, 2004, and the interlocutory judgment dated July 6, 2004, the court declared that T.C. Foods was bound by the subject restrictive covenants, awarded judgment in favor of the plaintiff against the defendants for the relief demanded in the third amended complaint dated February 24, 2004, and dismissed the counterclaims of defendants Marathon Outdoor, LLC (Marathon), PNE Media, LLC (PNE) and Titan Outdoor, LLC (Titan), which sought a declaration that the restrictive covenants were unenforceable pursuant to RPAPL 1951. The defendants were ordered to remove the billboard.

The defendants appealed, and the Appellate Division in a decision and order dated June 20, 2005, affirmed the interlocutory

judgment dismissing the defendants' counterclaims based upon RPAPL 1951, stating that "[u]nder the circumstances of this case, the appellants [Marathon and PNE] failed to meet their burden [of proving that the restrictive covenants are not enforceable] and the Supreme Court properly determined, inter alia, that the restrictive covenants in question are enforceable." The Appellate Division also dismissed the Titan defendants' appeal from the decision and the interlocutory judgment, as these defendants were not aggrieved by that portion of the interlocutory judgment which dismissed the counterclaims. The billboard was dismantled by Titan, at its expense, in September 2005.

A non-jury trial on the issue of damages was held on January 5, 6, and 9, 2006. Counsel for T.C. Foods had withdrawn, with the court's approval, and the EDC made several attempts to notify this defendant of the damages phase of the trial. T.C. Foods, however, did not appear at the trial for damages either by counsel or pro se.

Plaintiff EDC, in the damages phase of the trial, asserts that it is not required to establish that it sustained any monetary damages as a result of the defendants' conduct. Plaintiff asserts that it and the public suffered harm as a result of the defendants' activities, as it undermined the urban renewal plan as expressed in the restrictive covenants and the College Point Industrial Plan Development. Plaintiff claims that its losses consist of the loss

of the ability to enforce the restrictive covenant, and that the defendants' use of the billboard denied the EDC of the benefits that accrued to it under the terms of the restrictive covenant. Plaintiff asserts that defendants were unjustly enriched by their illegal actions and, therefore, they are required to disgorge the profits they made from the billboard's advertising revenues, and turn over these revenues to the EDC.

In support of their damages claim, plaintiff called three witnesses -- Ashoka Varma, the Chief Financial Officer of PNE Media LLC, who testified, based on certain documents presented, that PNE's advertising revenue from the billboard for the period of 1999 through 2003 was \$1,145,038.31; Stephen Black, the Chief Financial Officer of Titan Outdoor, who testified, based upon certain documents presented, that Titan's advertising revenue from the billboard for the period of 2003 through 2005 was \$704,343.82; and Nick Sud, the Chief Financial Officer of Marathon Outdoor, who testified that Marathon ultimately obtained a lease from T.C. Foods to erect the billboard. Plaintiff presented no further evidence and rested its case.

Defendants', at the close of plaintiff's case, moved to dismiss the claim for damages on the grounds plaintiff had failed to establish a prima facie case for the disgorgement of revenues as an available remedy under the law. The court reserved decision on the motion, and the defendants' presented their witnesses. Nick

Sud, Stephen Black and Ashoka Varma all testified on behalf of the defendants. Mr. Sud testified that on September 30, 1998, the three shareholders of Marathon - Sud, Michael Miller and Dominic Cistrone - entered into the following agreements with PNE Media: (1) a pledge agreement; (2) three promissory notes; and (3) a limited liability company agreement. PNE, pursuant to these agreements, acquired a 51% ownership in Marathon and control of Marathon. PNE made payments totaling \$10,880,706.00 to Sud, Citrone, Miller, Johnson & Fretty Company (an industry broker) and St. John & Wayne. Cistrone, Sud and Miller each received \$3,542,914.22 from PNE. The pledge agreement included the subject billboard and allocated the sum of \$829,355.63 as the value of each side of the billboard to be constructed at the subject location, or a total of \$1,658,711.26. Mr. Varma testified that the agreements contained hypothetical liquidation provisions that could be exercised before the notes became due. Sud, Miller and Citrone exercised their option before the notes became due and were subsequently involved in litigation over the valuation of Marathon and the accrued interest on the notes. The matter was resolved in an arbitration proceeding, in which the arbitrator determined that the initial capital account of the three shareholders in Marathon was \$10,402,500.00; that the shareholders final adjusted capital account balance was \$12,198,613.00; that the note balance was \$12,283,041.00; and that the net due/owing amount for the

shareholders was negative \$84,428.00. Mr. Varma testified that from PNE's perspective the impact of the award meant that under the hypothetical liquidation, the amount owing on the note was \$12,283,041.00, which represented accrued interest, but that the value of their 49% interest was \$12,198,613.00, so that the difference of \$88,428.00 was the remaining balance owed on the note, and the rest was "credited away" (Tr.175-176). PNE and Sud, Miller and Citrone entered into a settlement agreement, which resulted in the notes not being payable after December 1, 2003. On January 10, 2003, Titan Outdoor purchased the billboard and other assets from PNE, and it continued to sell advertising on the billboard until July or August 2005. Titan removed the billboard in September 2005 in compliance with the court's order and the Appellate Division's order.

Plaintiff seeks to recover as damages the revenues defendants earned from the erection, maintenance and operation of the billboard. Although characterized as damages, plaintiff is actually seeking the "disgorgement of improper profits" a restitutionary remedy that is appropriate only where there has been a showing of unjust enrichment. The purpose of damages is to compensate a plaintiff for legally recognized losses, without permitting the recovery of any windfall. Restitution is the remedy for unjust enrichment, and is not a separate basis for liability. A plaintiff who establishes a prima facie case of unjust enrichment

is entitled to the equitable remedy of restitution. A party seeking to recover on the theory of unjust enrichment must allege and prove that (1) defendant was enriched, (2) such enrichment was at the plaintiff's expense, and (3) in equity and good conscience the defendant should be required to return the money or property to the plaintiff. The object of restitution is to restore the status quo ante--to put the parties back into the position they were in before the unjust enrichment occurred. Restitution requires that a benefit must have passed from the plaintiff to the defendant for which the plaintiff should be compensated in equity and good conscience. An injured party who has not conferred a benefit may not obtain restitution. (22A NY Jur 2d Contracts § 515.)

The unjust enrichment cases cited by plaintiff in its post-trial brief are inapposite and inapplicable to the evidence presented at trial. These cases fall into several categories: the misappropriation of a scientific discovery by the plaintiff (Saunders v Kline, 55 AD2d 887 [1977]); false misrepresentations made by the defendant to the plaintiff (Goldstein v Block, 288 AD2d 182 [2001]; breach of contract and breach of a fiduciary duty (Snepp v United States, 444 US 507 [1980] and Warren v Century Bankcorporation Inc., 741 P2d 846(Sup Ct OK 1987)); a criminal arson scheme to obtain insurance proceeds (Counihan v Allstate Insurance Co., 194 F3d 347 [1999]); the improper use of property belonging to the plaintiff that had been rented to another (John

Artukovich & Sons, Inc. v Reliance Truck Co., 126 Ariz 246 [1980]); and claimed violations of federal statutes (United States ex rel. Taylor v Gabelli, 2005 US Dist. LEXIS 26821, 16-17 [S.D.N.Y. 2005][finding no right to the disgorgement of unjust profits under the False Claims Act, 31 U.S.C.S. §§ 3729-3812 and permitting the government to pursue a common-law claim for unjust enrichment]; Maltina Corp. v Cawy Bottling Co. Inc., 613 F2d 582 [1980]; and U.S. v RX Depot, Inc., 438 F3d 1052 [2006] [violations of the federal Food, Drug and Cosmetic Act]).

Plaintiff seeks to extend a claim of unjust enrichment to a breach of a restrictive covenant. There is, however, no authority in law for such construction. A covenant is a promise to do or refrain from doing certain things with respect to real property (1A Warren's Weed, op cit, Conditions and Limitations, §§ 1.03, 2.01; 1A Warren's Weed, op. cit., Deeds, § 14.01; 4A Warren's Weed, op. cit., Restrictive Covenants, §§ 1.03, 1.05). A covenant may be enforceable in an action at law for money damages for breach or where, as here, the covenant runs with the land, in an equitable action for specific performance with the precise remedy to be fashioned to suit the competing equitable circumstances between the parties (Suffolk Business Ctr. v Applied Digital Data Sys., 78 NY2d 383, 387 [1991]). Neither the New York courts, nor any state or federal court, have enforced a restrictive covenant by the means of restitution. Plaintiff is not entitled to restitution, as it

failed to prove that it conferred a benefit upon the defendants. In fact, no benefit could have been conferred by the plaintiff, as the restrictive covenant in question prohibited the very activity that the defendants undertook. Plaintiff also failed to establish that it was deprived of any rents and profits that it would otherwise have earned, as the restrictive covenant did not permit the EDC to erect a billboard and receive any rents and profits that may have flowed from such activity. Plaintiff, thus, has failed to establish a prima facie case for unjust enrichment, and is not entitled to restitution.

The court further finds that plaintiff cannot point to any statute, regulation or provision contained in the restrictive covenant which would permit it to recover the revenues earned by the defendants from the construction and maintenance of the billboard. The court may not impose a fine or penalty where none exists, and plaintiff is not entitled to exemplary damages for defendant's breach of a restrictive covenant. The defendants' conduct is not actionable as an independent tort and did not involve "a fraud evincing a high degree of moral turpitude" or "such wanton dishonesty as to imply a criminal indifference to civil obligations" directed "at the public generally" (Rocanova v Equitable Life Assur. Socy. of U. S., 83 NY2d 603, 613 [1994], quoting Walker v Sheldon, 10 NY2d 401, 404-405[1961]; see New York Univ. v Continental Ins. Co., 87 NY2d 308 [1995]; Varveris v

Hermitage Ins. Co., 24 AD3d 537 [2005]; D'Ambrosio v Engel, 292 AD2d 564, 565 [2002]; Martin v Group Health Inc., 2 AD3d 414, 415 [2003]; Logan v Empire Blue Cross & Blue Shield, 275 AD2d 187, 194 [2000]).

Based upon the foregoing, defendants' motion to dismiss plaintiff's claim for damages is granted in its entirety. Since the plaintiff has not established a right to recover damages or restitution, the court need not make any determination regarding the defendants' calculations of their earnings or losses.

Plaintiff moved at the close of trial for a default judgment against T.C. Foods and to recover the amount of rent received by T.C. Foods from defendants PNE and Titan for the use of the property on which the billboard was constructed. The court reserved decision on this motion. Although T.C. Foods defaulted at the damages phase of the trial, plaintiff has failed to establish a prima facie case for either damages or restitution as to any of the defendants, including T.C. Foods. Therefore, plaintiff's motion is denied.

Defendants' in their post-trial brief request the dismissal of T.C. Foods' third-party complaint for indemnification on the grounds that no indemnification agreement exists, and as plaintiff is not entitled to recover damages or restitution, no basis for indemnification exists. This request is granted.

A copy of this decision has been mailed to the attorneys
for all parties and to T.C. Foods.

Settle Judgment/Order.

J.S.C.