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STEPHENS PLLC

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JOHN W. ENGER,)
)
 Appellant/)
 Cross-Respondent,)

No. 57599-6-1

DIVISION ONE

v.)

JOHN E. RICHARDS and SUSAN L.)
 RICHARDS, husband and wife,)
 and their marital community,)

UNPUBLISHED OPINION

Respondents/)
 Cross-Appellants.)

FILED: September 18, 2006

and)

NAVEEN JAIN and JANE DOE JAIN,)
 husband and wife, and their marital)
 community,)

Defendants.)

NAVEEN JAIN and ANURADHA)
 JAIN, husband and wife and their)
 marital community,)

Third Party)
 Plaintiffs,)

v.)

ALEXANDER HUTTON CAPITAL,)
 LLC, a Washington limited liability)
 company; ALEXANDER HUTTON)

CAPITAL, INC., a Washington)
corporation; and MICHAEL SHERRY,)
)
Third Party)
Defendants.)
_____)

AGID, J -- Enger sued Richards and Jain alleging multiple claims arising out of InfoSpace's purchase of Enger's start-up company Yellow Pages on the Internet. The trial court entered six pretrial orders which Enger challenges on appeal. (1) He asserts the court misinterpreted the term "revenues" as defined by the parties Membership Interest Purchase Agreement and assigns error to the court's ruling excluding extrinsic evidence to prove the intent of the parties. (2) He argues the court erred in measuring his legal damages under the benefit of the bargain theory rather than the highest value formula. (3) He assigns error to the court's ruling that he could not require Richards to disgorge his ill-gotten gains unless Enger showed that he conferred the benefit on Richards. (4) He challenges the court's order striking his jury trial demand. (5) He asserts the court erred by limiting his equitable damages to an amount that could not exceed his legal damages. (6) Finally, Enger argues the trial court erred in dismissing his breach of fiduciary duty and fraud claims against Richards because it should not have offset Richards' liability with the amount he received in a settlement with Jain.

The court did not err when it ruled that the term "revenues" was unambiguous and thus excluded Enger's extrinsic evidence because he could not use the evidence to "vary, contradict, or modify" the written terms of an unambiguous contract term. Its substantive ruling on the meaning of the term was also correct. The court properly applied the benefit of the bargain theory to Enger's measure of legal damages because

Washington courts have never applied the highest value measure to fraud cases. The court was also correct in ruling that Enger was not entitled to disgorgement from Richards. The burden was on Enger to prove that Richards' earnings were attributable to the alleged fraud, and he failed to meet it. The trial court properly ruled that Enger could not shift the burden to Richards to show that Richards' gain was in good faith. Nor did the court err by dismissing Enger's breach of fiduciary duty and fraud claims against Richards because his settlement with Jain compensated him in full. He was not entitled to a double recovery for a single harm. Because these issues are dispositive, we need not address Enger's arguments about his equitable damages and jury trial demand. We affirm.

FACTS

Membership Interest Purchase Agreement

In 1996, John Enger, John Richards, Peter Richards, and Alexander Hutton Capital, LLC., formed a company, Yellow Pages on the Internet (YPI). Enger owned 13.28 percent and John Richards, the YPI managing partner, owned 50.1 percent of YPI. On May 1, 1997, InfoSpace purchased YPI with common stock, and the parties signed a Membership Interest Purchase Agreement (MIPA). The earn-out formula in the MIPA provided YPI members with one share of InfoSpace common stock for every \$4 in revenues derived from the business of YPI during the defined revenue period. The MIPA defined the revenue period as March 1, 1997, through a distribution date, which was defined as:

the earlier of (i) February 28, 1999; (ii) the execution of a definitive agreement for the Acquisition (as hereinafter defined) of Purchaser by a third party; (iii) the filing of a registration statement for a public offering of

