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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UNPUBLISHED OPINION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

InfoSpace Common Stock . . . in connection with the initial public offering of the InfoSpace Common Stock

The MIPA capped the total number of InfoSpace shares that could be earned at 2 million, to be distributed according to the members' pro rata ownership of YPI. All shares were held in escrow.¹

Buy-Out Agreement

On November 22, 1997, Naveen Jain, CEO of InfoSpace, offered John Richards a position as Group Manager "contingent upon eliminating any additional shares from the YPI deal." Richards negotiated with the other YPI members to agree to a settlement with InfoSpace to terminate the MIPA for a fixed number of fully vested shares. On January 2, 1998, the YPI members signed a Buy-Out Agreement terminating the MIPA in return for 170,000 shares.²

Enger v. Richards

In 2001, Richards sued Jain for breach of an oral "side deal" he alleged was a promise of stock as compensation for Richards' efforts to obtain his YPI partners' agreement to the buy-out.³ In 2002, Enger sued Jain and Richards for fraud, conspiracy, breach of fiduciary duty, conversion, and unjust enrichment. As a remedy, Enger sought an accounting and disgorgement of Richards' and Jain's profits, \$127.8 million in monetary

¹ Enger claims he is entitled to a maximum of 26,600 shares based on his ownership interest in YPI if the revenues attributable to YPI reached \$8 million.

² Enger's Buy-Out Agreement acknowledged that he had received 10,000 shares immediately as full compensation for his interest in YPI, releasing InfoSpace from any further obligation under the MIPA.

³ In a June 2001 deposition in that case, Richards testified that Jain promised him over \$100 million in options and that he believed the YPI buy-out agreement and his employment were linked. He also stated he acted as a "middle" person between Naveen and his YPI partners, while serving as the YPI managing partner, without disclosing to his partners that he was simultaneously negotiating his own employment agreement with Jain for a large stock package. Jain settled with Richards for \$800,000 for breach of this "side deal."

damages, prejudgment interest, a constructive trust in his favor for all wrongfully-obtained monetary profits, statutory litigation costs and attorney fees. Before trial, the court dismissed Enger's claims against Richards and Jain for conversion, unjust enrichment, and a claim under the Racketeer Influenced and Corrupt Organizations Act. It also dismissed Enger's claims for fraud and breach of fiduciary duty against Jain.

On January 4, 2005, the court granted Richards' motion to interpret the term "revenues" used in the MIPA as a matter of law, ruling that it was unambiguous and meant the net revenues earned during the defined revenue period.⁴ On January 18, the court granted Richards' motion to exclude speculative evidence and argument about the date on which Enger would have sold his stock. It also held the appropriate measure of damages was the benefit of the bargain determined on the alleged date of the fraud, January 2, 1998, or the date the fraud was discovered, January 10, 2002. The effect of this order was to limit Enger's potential damages to an amount no less than \$25,000 but no more than \$149,000. On the same day, the court granted Jain and Richards' motion to strike Enger's jury demand.

On January 27, the trial court granted Richards' motion on the measure of equitable damages. In its oral and written rulings, the court ruled that Enger's equitable relief could not exceed his legal damages based on the court's MIPA ruling, and that he could not force Richards to disgorge the profits received from the sale of YPI, Richards' employment compensation or his settlement with Jain because Enger had not proved the monies were benefits he conferred upon Richards. The court also excluded

⁴ Enger asserted "revenue" meant any and all monies received by InfoSpace because of Richards' efforts, not only those monies received during the distribution period. In rejecting Enger's interpretation, the court found Enger's arguments "irrelevant and inadmissible evidence" that "impermissibly contradicts the MIPA and the objective evidence of the parties' mutual intent."

evidence about the number of shares Enger could have earned, the date he could have sold any additional shares, the amount he could have made, and evidence of the highest replacement value. Finally, it denied Enger's motion for reconsideration of its ruling on speculative damages. After these rulings, Enger's only remaining claims were for fraud and breach of fiduciary duty against Richards.

On the first day of trial, Enger settled with Jain for \$2 million. On February 9, the court granted Richards' motion to dismiss Enger's remaining causes of action with prejudice on the ground that Jain's \$2 million settlement extinguished all of Richards' liabilities. Enger sought direct review in the Washington State Supreme Court which declined review and transferred the appeal to this court.

DISCUSSION

We review a trial court's order granting summary judgment de novo.⁵ A motion for summary judgment is properly granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.⁶ "The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion."⁷ We review questions of law de novo.⁸

Contract Interpretation

Enger sought to offer extrinsic evidence that the term "revenues" in the MIPA meant all revenues derived from Richards' efforts during the earn-out period, including future revenues on contracts entered into during the earn-out period that would not be

⁵ Shaffer v. McFadden, 125 Wn. App. 364, 367, 104 P.3d 742 (2005) (citing Van Noy v. State Farm Mut. Auto. Ins. Co., 142 Wn.2d 784, 790, 16 P.3d 574 (2001)).

⁶ CR 56(c); Bank of Am. v. Hubert, 153 Wn.2d 102, 111, 101 P.3d 409 (2004).

⁷ Trimble v. Wash. State Univ., 140 Wn.2d 88, 93, 993 P.2d 259 (2000) (quoting Clements v. Travelers Indem. Co., 121 Wn.2d 243, 249, 850 P.2d 1298 (1993)).

⁸ M.W. v. Dep't of Soc. & Health Servs., 149 Wn.2d 589, 595, 70 P.3d 95 (2003).

realized until after the distribution period. The trial court found the term “revenues” was unambiguous and excluded Enger’s extrinsic evidence because it contradicted the language of the MIPA.

Under the rules of contract interpretation, the trial court may only determine the objective manifestations of the parties. It may not use extrinsic evidence to “vary, contradict, or modify” the written terms or to establish a party’s unilateral or subjective intent about the meaning of a contract’s words or terms.⁹

The MIPA term “revenues” is defined as gross revenues “attributable to the business of [YPI] less (i) revenues or expenses payable to any third parties pursuant to contracts or other arrangements entered into by [YPI] and such third parties and any (ii) advertising commissions attributable to the business of [YPI]. Under the MIPA, only those revenues *received* during the “revenue period” counted toward the earn-out. The language of the MIPA is unambiguous, and the only logical interpretation of this term was as the trial court ruled:

The definition of “Revenues” under the MIPA consists of revenues attributable to the business of YPI that are “realizable” and “earned” by InfoSpace before the Distribution Date, and not the “present value” of any future possible income stream regardless of whether that income is earned or not.”^[10]

Because the term is unambiguous, the trial court properly excluded the contradictory testimony of parties who were not involved in the original negotiations between Richards and Jain.

⁹ Hollis v. Garwall Inc., 137 Wn.2d 683, 695, 974 P.2d 836 (1999).

¹⁰ Under this interpretation of the MIPA, Enger could have earned a maximum of 14,306 InfoSpace shares based on YPI’s performance.

Measure of Legal Damages

Enger argues the trial court erred by holding that his damages should be measured by the “benefit of the bargain” determined on the date of the alleged fraud or the date the fraud is discovered. He argues the RESTATEMENT (SECOND) OF TORTS highest value measure is the applicable standard because the shares he allegedly lost were sharply fluctuating assets. He concedes that no Washington appellate court has ruled on the proper measure of damages for sharply fluctuating assets gained or lost by fraud or a breach of fiduciary duty.

Richards asserts the trial court applied the correct rule and argues the highest value theory applies only to conversion cases. Richards also argues that while special damages may be available to a party with a misrepresentation claim, Enger has not asked for special damages in his complaint. We agree.

Courts generally apply the benefit of the bargain rule when plaintiffs seek recovery for general damages caused by misrepresentation or fraud.¹¹ When a plaintiff also seeks to recover damages not inherent in the benefit of bargain rule, damages for all losses proximately caused by the defendant’s fraud may also be awarded.¹² But Enger did not seek special damages in his Fourth Amended Complaint, so the court properly limited him to benefit of the bargain damages.

While Enger’s argument that the fluctuating value rule should apply to cases involving stock could be persuasive in the right case, we need not decide this issue because the court’s orders on the meaning of the MIPA and double recovery are dispositive. Under the benefit of the bargain theory, Enger could have earned between

¹¹ Turner v. Enders, 15 Wn. App. 875, 880, 552 P.2d 694 (1976) (quoting McInnis & Co. v. W. Tractor & Equip. Co., 63 Wn.2d 652, 388 P.2d 562 (1964)).

¹² Id. (citing Salter v. Heiser, 39 Wn.2d 826, 832, 239 P.2d 327 (1951)).

\$24,606 and \$148,782. Under the highest measure theory, he could have potentially earned \$746,631.60 because the stock's high point on March 2000 was \$522.12 per share. But because the court granted and we affirm Richards' motion precluding double recovery, the outcome here is the same. Enger's \$2 million settlement with Jain compensated Enger for his alleged losses regardless of the theory used to measure his legal damages.

Disgorgement

The trial court held that Enger could not require Richards to disgorge his allegedly ill-gotten profits because he failed to prove that Richards' employment compensation, the profits he received from the sale of YPI, or the settlement monies he received from Jain were benefits Richards obtained fraudulently or that they were conferred on him by Enger. Enger asserts that Richards made a total of \$12,251,456 from the sale of InfoSpace stock arising from his "side deal" with Jain, which he must disgorge. This includes Richards' \$800,000 settlement with Jain and the shares he received under the MIPA. He argues that the burden was on Richards to prove he received the compensation in good faith, and not as a result of his fraudulent acts. He also argues the trial court erred by holding he had failed to show that Richards's ill-gotten gains as a faithless fiduciary were not benefits conferred by Enger.

Richards relies upon the standards set forth in Molander v. Raugust Mathwig¹³ and Chemical Bank v. WPPS¹⁴ to argue the trial court applied the correct standard by holding that he did not have to disgorge his employment compensation from InfoSpace,

¹³ 44 Wn. App. 53, 61, 722 P.2d 103 (1986).

¹⁴ 102 Wn.2d 874, 910, 691 P.2d 524 (1984).

his settlement monies from Jain, or his compensation from the sale of YPI unless Enger could show that it was a benefit he had conferred on Richards.

Under the holdings in Molander and Chemical Bank, Enger had the burden to show that he conferred a benefit upon Richards and that benefit was unjust enrichment. Enger was only entitled to those damages directly attributable to Richards' alleged fraud or breach of fiduciary duty, and Enger was required to show the causal nexus between Richards' alleged wrongdoing and Enger's claimed harm.¹⁵ Even if Enger were to prove that Richards breached his fiduciary duty or defrauded him, he still had to prove the amount of ill-gotten gains attributable to those claims.

In the January 27 hearing, the court noted that "[i]t is undisputed that all employees at InfoSpace, including the receptionist, received stock options as an employee benefit," and "as an at-will employee, Richards had to perform work in order to receive a salary and stock options." The trial court properly ruled that Enger had not proven that Richards' employment compensation, including the stock he received as compensation, the profits received from the sale of YPI, or the \$800,000 settlement he received from Jain, was a benefit Enger conferred on Richards.

Double Recovery

Following Jain's settlement with Enger for \$2 million, Richards moved to dismiss all of Enger's remaining claims. He argued that Enger's maximum recovery for legal damages could be only \$150,000, and the settlement with Jain compensated Enger for that loss. Enger contends the trial court erred by offsetting his claim against Richards

¹⁵ See Senn v. Nw. Underwriters, Inc., 74 Wn. App. 408, 414, 875 P.2d 637 (1994); Interlake Porsche v. Blackburn, 45 Wn. App. 502, 512, 728 P.2d 597 (1986) ("once a fiduciary's self-dealing or personal benefit in one transaction has been shown, the burden does not shift to the fiduciary to prove the fairness of all transactions complained of, regardless of whether any evidence has been presented that such transactions involve self-dealing or personal benefit.").

with the settlement he received from Jain because (1) Jain's reasons for settling were based upon different risks from those facing Richards and (2) his was not an indivisible injury because Jain's exposure was far greater than Richards'. To substantiate his argument, he points to Jain's willingness to pay \$2 million to settle a \$150,000 case and contends that intentional tortfeasors should not be able to benefit from an offset rule which may not have applied had Richards and Jain been merely negligent.

Richards asserts Enger could not receive a double recovery for the same injury. He also contends Enger cannot now argue that his injury was divisible because he stipulated below that the double recovery motion could be decided "as a matter of law and without regard to the facts." Because the parties did enter into the stipulation on which Richards relies and agreed for purposes of the motion that Enger's damage claims could not exceed \$150,000, Enger may not now assert factual arguments on appeal. We therefore will not consider his arguments that Jain settled for different reasons or that his harm was divisible.

A fundamental rule of damages prohibits multiple recovery for a single injury.¹⁶ Under this principle, a non-settling defendant is entitled to a credit of the settlement amount against any judgment if the settlement and judgment represent damages for a single injury.¹⁷ We are aware of the rulings in Weyerhaeuser Co. v. Commercial Union Ins., Co.¹⁸ and Puget Sound Energy v. ALBA Gen. Ins.¹⁹ Those cases shifted the burden to the non-settling insurer in environmental cleanup litigation to prove that the

¹⁶ See Monjay v. Evergreen Sch. Dist. No. 114, 13 Wn. App. 654, 658, 537 P.2d 825 (1975).

¹⁷ See id. ("Thus, if payment received by the plaintiff from one tort-feasor constitutes the full satisfaction of the obligation, he cannot thereafter proceed against the other tort-feasors.").

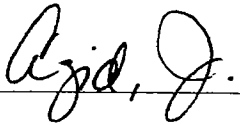
¹⁸ 142 Wn.2d 654, 15 P.3d 115 (2000).

¹⁹ 149 Wn.2d 135, 68 P.3d 1061 (2003).

insured has been made whole by its settlements with other insurers before it allowed a setoff. But Enger's case does not involve either the complexities of an environmental cleanup or insurers, and this burden shifting rule does not apply in any other kind of case. We see no reason to extend it here. As we have held, Enger's potential recovery was properly limited to \$150,000 under the trial court's rulings. Accordingly, the court did not err when it dismissed Enger's remaining claims against Richards because his potential liability was offset by the \$2 million settlement Enger received from Jain.

Because the court's interpretation of the MIPA and its decision to grant Richards' motion on double recovery are dispositive, we need not address the measure of equitable damages or Enger's jury trial demand.

We affirm.



WE CONCUR:

