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SUPERIOR COURT OF NEW JERSEY
MORRIS COUNTY
LAW DIVISION, CIVIL PART
DOCKET NO. L-734-13

MUSASHI, L.L.C. AND W.R. HUFF
ASSET MANAGEMENT CO., L.L.C.,

Plaintiffs,

V.

VIRGIN MEDIA, INC.,

Defendant.

Decided: September 22, 2017

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FRANK J. DeANGELIS, J.S.C.

The current matter arises out of allegations of breach of contract, breach of covenant of good faith and fair dealing, breach of accounts stated, quantum meruit, unjust enrichment. Defendant Virgin Media, Inc. ("Defendant") is seeking to assert affirmative defenses of laches, unclean hands and equitable

estoppel. Plaintiffs Musashi LLC and W.R. Huff Asset Management Co. LLC ("Plaintiffs") contend that the affirmative defenses should be precluded because Defendant cannot assert equitable defenses where only money damages are sought. Defendant contends that if its affirmative defenses are allowed, they must be decided by the Court and not the jury because only money damages are sought.

ANALYSIS

A. Laches

Laches is an equitable defense that may be asserted in the absence of the statute of limitations and has been defined as an inexcusable delay in asserting a right that is prejudicial to the other party. Nw. Covenant Med. Ctr. v. Fishman, 167 N.J. 123, 140 (2001).

Plaintiffs argue that an affirmative defense of laches is impermissible in the current matter because laches cannot be used to bar an action at law commenced within the statute of limitations. Fox v. Millman, 210 N.J. 401 (2012). All of Plaintiff's claims, including claims sounding in restitution/unjust enrichment and quantum meruit are governed by a statute of limitations. See Fox, 210 N.J. 401 and Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 473 (applying N.J.S.A. §2A:14-1 six-year statute of limitation to unjust enrichment and quantum meruit claims). Defendant does not dispute the

preclusion of laches in its brief. Thus, Defendant's affirmative defense of laches is barred.

B. Unclean Hands

The doctrine of unclean hands, "gives expression to the equitable principle that a court should not grant relief to one who is a wrongdoer with respect to the subject matter in suit." Faustin v. Lewis, 85 N.J. 507, 511 (1981). While it is true that "general iniquitous conduct" will not operate to bar a party from receiving equitable relief from a court of equity, United Bd. & Carton Corp. v. Britting, 61 N.J. Super. 340, 344 (App. Div.), certif. denied, 33 N.J. 326 (1960), when such "iniquitous conduct" relates to the very matter or transaction on which judicial protection is sought, the wrongdoer will be denied relief. Ibid.

Defendant pled unclean hands as its affirmative defense. O'Donnell Cert., Ex. 1 at 31. Defendant contends that its unclean hands defense applies to Plaintiffs' quantum meruit claim because it is an equitable remedy. Def. Br. at 3. Plaintiffs cite Sprenger v. Trout, 375 N.J. Super. 120 (App. Div. 2005) and Zhu Inv. Trade Corp. v. Natural Food Imp. USA, Inc., 2012 N.J. Super. Unpub. LEXIS 1672 (App. Div. July 12, 2012) for the proposition that the doctrine of unclean hands does not apply to a claim for quantum meruit because Plaintiffs only seek money damages. Quantum meruit is a form of quasi-

contractual recovery resting on the equitable principle that one should not be permitted to unjustly enrich himself at the expense of another. Goldberger, Seligsohn & Shinrod, P.A. v. Baumgarten, 378 N.J. Super. 244, 252 (App. Div. 2005) (citing Weichert Co. Realtors v. Ryan, 128 N.J. 427, 437 (1992)). Unlike Plaintiffs in the current matter, plaintiffs in Zhu Inv. Trade Corp and Sprenger seek only *legal remedies* and do not assert a claim for quantum meruit. However, because quantum meruit is an equitable remedy asserted by the Plaintiffs here, the defense of unclean hands can be asserted as to the quantum meruit claim.¹

Defendant further asserts that it should be able prove its unclean hands defense through a showing of illegality. The doctrine of unclean hands encompasses the idea that he who seeks equity must do equity. Borough of Princeton v. Bd. of Chosen Freeholders of Mercer, 169 N.J. 135, (2001). This doctrine has long been concerned with wrongful and illegal conduct. As New Jersey Courts have explained:

¹ It should also be noted that New Jersey courts have previously applied the doctrine of unclean hands to a quantum meruit claim. See Hovbilt, Inc. v. Lair, 2010 N.J. Super. Unpub. LEXIS 383, 2010 WL 668757 (App. Div., Feb. 25, 2010) certif. denied 202 N.J. 43 (2010); Serrins & Assocs., LLC v. Hanover Direct, Inc., 2014 N.J. Super. Unpub. LEXIS 2012, 2014 WL 3928523 (App. Div., Feb. 25, 2010). However, unpublished cases are not binding on this Court and although the Court reaches the same conclusion here, these cases do not serve as the basis for this opinion.

It is a maxim of equity that a court of conscience will not even listen to a suitor who comes into that tribunal with unclean hands, and this doctrine is applicable whenever it appears that the litigant seeks to be relieved of the consequences of a fraud in which he has been an active participant. The courts of this state have steadfastly refused to lend their aid to a wrongdoer either by the enforcement of an illegal contract or by relieving the wrongdoer from the obligations thereof; and this they do, not out of regard for the defendant in the action, but because of their unwillingness to use the powers which were granted to them for the furtherance of lawful ends in aiding schemes which are in their nature venal, or for the purpose of relieving parties from the liabilities which such schemes create.

Ryan v. Motor Credit Co., 130 N.J. Eq. 531, 560, (Ch. Div. 1941) aff'd 132 N.J. Eq. 398 (1942) (quoting Prindiville v. Johnson & Higgins, 93 N.J. Eq. 425 (E. & A. 1922)). See also, Taylor v. Mitchell, 90 N.J. Super. 312, 320 (Ch. Div. 1966) (holding that plaintiff was charged with unclean hands when the mortgage in the case was a product of illegality).

The doctrine of unclean hands, however, has limitations. It is only applicable to those who do not themselves act inequitably. See Ryan v. Motor Credit Co., 132 N.J. Eq. 398 (E. & A. 1922) (holding that where both parties were guilty of illegal transactions neither was entitled to equitable relief because both parties' hands were unclean.) Therefore, Defendant may point to the other party's illegal conduct in asserting its

defense of unclean hands to the claim of quantum meruit if it did not also engage in illegality and the jury charge will take the illegality issue into consideration.

C. Equitable Estoppel

Equitable estoppel applies to "conduct, either express or implied, which reasonably misleads another to his prejudice so that a repudiation of such conduct would be unjust in the eyes of the law." D'Agostino v. Maldonado, 216 N.J. 168, 200 (2013) (quoting Dambro v. Union Cnty. Park Comm'n, 130 N.J. Super. 450, 457 (Law Div. 1974)). To prove equitable estoppel, there must be a "knowing and intentional misrepresentation" that results in the party seeking estoppel to rely on the misrepresentation to his or her detriment. Id. (quoting O'Malley v. Dep't of Energy, 109 N.J. 309, 317 (1987)). "Equitable estoppel is based on the principles of fairness and justice." Id. (citing Knorr v. Smeal, 178 N.J. 169, 180 (2003)).

Defendant's Answer states as its affirmative defense:

Second Separate Defense: Waiver/Estoppel

Plaintiff's claims are barred, in whole or in part, by principles of waiver and/or estoppel because they unreasonably waited too long to bring their claims.

O'Donnell Cert., Ex. 1 at 30.

Defendant's affirmative defense of estoppel sounds in the principle of laches. Although Defendant was not required to, it

specified that its defense of waiver/estoppel rests in timeliness and not misrepresentation. Nonetheless, Defendant reserved the right to assert any applicable defenses during the pendency of the action. Id. at 32. Generally, waiver of an affirmative defense depends on principles of equity and public policy. See Rivera v. Gerner, 89 N.J. 526, 536 (1982). While R. 1:4-8 and 4:5-8 require a specific representation regarding the factual or legal basis for an asserted defense, the failure to do so does not in and of itself constitute a waiver of an asserted affirmative defense. Id. at 535.

Here, Defendant did not just now assert the equitable estoppel defense. Defendant had been developing its defense throughout the discovery period by asking for Plaintiffs' "representations in Director's Questionnaires that they had no monetary claims against Defendant, (2) their failure to seek approval for their services as a 'related party transaction'; their failure, [...], to raise their supposed entitlement to billions of dollars in payment; and (4) the Company's SEC filings which were made in reliance on the foregoing, disclosed no liability owed to Plaintiffs..." Def. Br. at 6 (emphasis omitted). In addition, Plaintiffs have been on notice of Defendant's equitable estoppel defense since at least July 2016 when Defendant provided the factual basis for its defense in the motion for summary judgment. O'Donnell Cert., Ex. 2. The purpose

for the requirement that affirmative defenses be pled in the pleadings with specificity is to avoid surprise and prejudice to the plaintiff. Bacon v. American Ins. Co., 131 N.J. Super. 450, 454-455 (Law Div. 1974). In the current matter, Defendant reserved the right to assert additional defenses. Defendant then conducted discovery on the issue of equitable estoppel and asserted the defense in their motion for summary judgment. Thus, Plaintiff had adequate notice of Defendant's equitable estoppel defense and is not surprised nor prejudiced by the assertion of the defense at trial.

Furthermore, Plaintiffs contend that if Defendant is allowed to assert a defense of equitable estoppel, the jury will be confused by Defendant's defenses against its quantum meruit claim and its affirmative defense of equitable estoppel. Overlapping evidence for claims and defenses, however, does not necessarily lead to confusion or inconsistency. As Plaintiffs correctly state a "claim for quantum meruit requires the jury to decide whether the parties had a reasonable expectation that Huff would be paid for its services." Pl. Br. at 7 (citing Weichert Co. Realtors v. Ryan, 128 N.J. 427, 437-38 (1992)). Defendant, thus, can defeat a claim for quantum meruit if the weight of the evidence establishes that no such expectation existed. Equitable estoppel, on the other hand, requires a "knowing and intentional misrepresentation" which results in the

party seeking estoppel to rely on that misrepresentation to his or her detriment. O'Malley v. Dep't of Energy, 109 N.J. 309, 317 (1987). Therefore, unlike disproving quantum meruit, defendant asserting equitable estoppel has the burden of proof that the plaintiff made a knowing and intentional misrepresentation, that defendant in fact relied on that misrepresentation and that its reliance was detrimental to the defendant. The Court deems the difference between the defense for quantum meruit and the affirmative defense of equitable estoppel facially evident and unlikely to confuse the Court or the jury.

D. Disgorgement

Plaintiffs claim that they are entitled to argue disgorgement based on their unjust enrichment claim. Unjust enrichment requires a plaintiff to show that he expected to receive remuneration at the time of performing or conferring a benefit and that the failure to receive that remuneration enriched the defendant beyond his contractual rights. Associates Commercial Corp. v. Wallia, 211 N.J. Super. 231, 243 (App. Div. 1986). "The intent of an unjust enrichment cause of action is to receive a 'disgorgement' of the profits retained by the defendant." Kleinman v. Merck & Co., 417 N.J. Super. 166, 186 (Law Div. 2009). "Disgorgement of profits is a punitive, not a compensatory, form of damages. There is no law in New Jersey that allows such a recovery in this type of claim." Id. To the

extent that disgorgement is permitted in a punitive sense, those matters relate to public corruption involving either a public entity or a public official. See County of Essex v. First Union Nat. Bank, 186 N.J. 46 (2006) and Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433 (1952).

Based upon the foregoing, there is no evidence or legal basis for this Court to extend disgorgement to Plaintiffs' claims. Thus, Plaintiffs are not entitled to argue for disgorgement.

E. Determination of Equitable Defenses

Defendant further contends that its equitable defenses should be decided by the Court, not the jury. As mentioned above, Defendant has two viable equitable defenses: unclean hands and equitable estoppel. The determination of all equitable claims and defenses is to be decided by the court while the legal issues are to be decided by the jury. Sun Coast Merchandise Corp. v. Myron Corp., 393 N.J. Super. 55 (App. Div. 2007). The Court may, however, elect to try these defenses with an advisory jury. R. 4:35-2 ("The court on motion or its own initiative may try with an advisory jury any issue not triable of right by a jury, or it may, with the consent of all parties appearing at the trial, order a trial of any such issue with a jury whose verdict has the same effect as if trial by jury had been a matter of right.") Although, New Jersey Courts are

reticent in elevating an advisory jury verdict to a binding verdict due to possible procedural issues that may impact attorneys and their choices in trial strategies based on who is the fact finder, Chancery courts have previously empaneled advisory juries at their discretion. Mercedes-Benz Credit Corp. v. Lotito, 328 N.J. Super. 491, 497 (App. Div. 2000). "An examination of the history of [R. 4:35-2] indicates that it was intended to preserve and adapt the former Chancery practice by empowering the court, in its discretion, to utilize such a jury." Hyland v. Simmons, 152 N.J. Super. 569, 578 (Ch. Div. 1977) citing Pressler, Current N.J. Court Rules, Comment to R. 4:35-2; 2 Schnitzer and Wildstein, New Jersey Rules Service, R. 4:40-1 at 1312; Trenton Banking Co. v. Woodruff, 2 N.J. Eq. 117, 132 (Ch. 1838); Black v. Shreve, 13 N.J. Eq. 455, 467 (E. & A. 1860). See also Chance v. McCann, 405 N.J. Super. 547, 570 f.n. 9 (App. Div. 2009) (noting that the determination of an equitable claim of laches "must be made by the trial judge, although that judge could seek the guidance of the jury trying the substantive issues as an advisory jury."); Mala v. Crown Bay Marina, Inc., 704 F.3d 239 (3rd Cir. 2013) (holding that the trial court did not err by empaneling an advisory jury or by rejecting its verdict because District courts are free to use advisory jury even absent the parties consent and free to reject their verdicts); Mercantile & General Reinsurance Co., PLC v. Colonial

Assurance Co., 82 N.Y.2d 248 (N.Y. 1993) (when a legal claim was met with an equitable defense an advisory jury may be empaneled, but its decision is not binding on the court).

The circumstances of the present case warrant the Court to empanel an advisory jury. Plaintiffs assert five causes of action against Defendant. The parties had over four years to gather evidence through discovery and have substantial factual disputes. Defendant reserved the right to introduce over 300 trial exhibits in its case. The trial is expected to last for approximately four weeks. Both parties stated in their briefs that evidence on the quantum meruit claim and Defendant's equitable affirmative defenses considerably overlaps. The evidence of the parties' assurances and reliances during their agreements may also be relevant to other claims and defenses at issue. All of the Plaintiffs' claims including quantum meruit, to which the equitable defenses apply, involve a determination of a legal right which must go to a jury. Though these claims and defenses are legally distinct, they are evidentiary non-divisible unless the Court chooses to conduct separate trials, hearing the same evidence that will inevitably be presented to the jury. Such an outcome is wasteful and unnecessary. Thus, there is no need to sequester the jury for the issues of unclean hands and equitable estoppel. The jury will serve solely as an advisory jury with the purpose of providing insight into the

facts that overlap with the parties' equitable and legal claims. The Court pursuant to its equitable powers, however, maintains the ultimate responsibility to resolve equitable defenses.