UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL NO. 02-11068-RGS

EUREKA BROADBAND CORPORATION

v.

WENTWORTH LEASING CORPORATION

FINDINGS OF FACT, RULINGS OF LAW AND
ORDER FOR JUDGMENT AFTER
A JURY-WAIVED TRIAL

February 24, 2004

STEARNS, D.J.

1. There are three parties to a typical finance lease transaction: (1) the vendor, who supplies the goods; (2) the lessee, who chooses the vendor and receives the goods; and (3) the lessor, who supplies the money necessary to make the purchase. Midwest Precision Services, Inc. v. PTM Indus. Corp., 887 F.2d 1128, 1131 (1st Cir. 1989). The lessor earns its profit on the difference between what it pays for the equipment and the aggregate sum of the lease payments it collects over the life of the lease (the discounted value of which is the finance charge). The lessor takes a security interest in the leased equipment and nominally holds title, but does not take physical possession of the equipment. At the end of the lease, the lessor typically transfers title to the lessee for a nominal consideration.

2. Wentworth Leasing Corporation (Wentworth) is a Massachusetts company holding itself out as a finance lessor. Wentworth was the creation of Stanton Pearson, its President, sole employee, and sole shareholder. Wentworth operates out of Pearson's

home at 302 Boxboro Road in Stow, Massachusetts. Wentworth (Pearson) also rents Post Office Box 244 in Stow.

3. Plaintiff Eureka Broadband (Eureka) is the successor company to Gillette Global Network, Inc. Eureka is a Delaware corporation with a principal place of business in New York City, New York. Eureka installs fiber-optic systems in large office buildings and collects access fees from commercial carriers providing telecommunications services to building tenants.

4. In June of 2000, Wentworth, introduced by Pearson to Eureka-Gillette as a finance lessor, presented a lease proposal involving an $841,000 purchase of switching equipment by Eureka-Gillette from CopperCom, Inc., a Florida vendor. Under the terms of the proposed lease, Eureka-Gillette was to make forty-eight monthly lease payments to Wentworth of $22,486, totaling $1,079,328 over the life of the lease. To demonstrate its creditworthiness, Eureka-Gillette was required to furnish Wentworth with "[f]inancial statements, tax returns if statement[s] are unaudited, current interim statements and other pertinent information." The lease further required that Eureka-Gillette pay a commitment fee equivalent to one monthly payment (to be applied against the first installment on the lease). On July 24, 2000, Eureka-Gillette accepted the proposal and forwarded a check to Wentworth in the amount of $22,486.

5. On August 14, 2001, Jeffrey Buller, Eureka-Gillette's Vice President for Finance, e-mailed Pearson a package of "due diligence" materials, including copies of Eureka-Gillette's internal financial statements. On September 6, 2001, Wentworth accepted the CopperCom lease on the condition that Eureka-Gillette pay the first and last month rents as an additional deposit. The printed lease form provided that "[t]he Equipment is and shall

at all times be and remain the sole and exclusive personal property of LESSOR, and LESSEE shall have no right, title or interest therein."[1] Attached to the lease was a schedule of the CopperCom equipment that Eureka (no longer Gillette) had chosen to purchase. An addendum to the lease granted Wentworth a security interest in the equipment, and in the event of a default, an interest in Eureka's accounts receivable up to the amount of any monthly payment then owing. On that same day, Eureka provided Wentworth with a Delivery and Acceptance form acknowledging receipt of the CopperCom equipment.

6. On October 12, 2001, Buller e-mailed Pearson a list of Eureka's accounts receivable.[2] Buller also confirmed that a check for $22,486, representing the second (October) lease installment, had been mailed to Wentworth. Eureka thereafter sent Wentworth checks on a monthly basis for the November, December, and January 2002 installments, totaling $112,430.

7. On December 20, 2001, Eureka and Wentworth entered a second financing lease for the purchase of additional equipment from CopperCom and a second vendor, Marconi. The terms of the second lease were essentially identical to those of the first. The monthly rental payment was $17,057 (for a forty-eight month total of $818,736). The required first and last month deposit was $34,114. A check in the amount of $51,171 was mailed to Wentworth by Eureka on December 21, 2001, representing the deposit and the first month's payment on the lease. The parties also entered a purchase option giving Eureka the right

[1] A choice of law clause in the lease stipulated Massachusetts law as governing the rights and liabilities of the parties.

[2] An updated list of accounts receivable was sent to Pearson by Buller on January 3, 2002.

to acquire the equipment upon termination of the lease.[3] Eureka in short order provided Wentworth with an executed Delivery and Acceptance form for the Marconi equipment.

8. On December 22, 2001, CopperCom submitted an invoice to Wentworth in the amount of $839,340 for the September equipment purchase. On December 28, 2001, CopperCom sent additional invoices in the amount of $115,642.06 to Wentworth for the December purchase. The invoices were payable in full within thirty days of the delivery of the equipment. Wentworth was unable to produce evidence of an invoice from Marconi. Marconi instead billed Eureka directly. On January 10,2002, Buller e-mailed Pearson, reminding him that Marconi was complaining about not having been paid. Buller urged Pearson to contact Marconi's Director of Credit to arrange payment. Pearson never did.

9. By the end of January of 2002, Eureka had paid Wentworth a total of $163,601 on the leases. Wentworth had paid neither CopperCom nor Marconi. Moreover, Wentworth-Pearson, unbeknownst to Eureka, had neither the capacity nor the intention of doing so. Pearson made two desultory attempts to sell the leases to third party investors in late January and late February of 2002. In the meantime, both Marconi and CopperCom were demanding payment from Eureka, a continuing theme of Buller's largely ignored e-mails to Pearson. When Pearson did reply, his usual delaying tactic was to request even more "due diligence" information from Eureka.

10. By the end of February, Eureka had lost patience. On February 22, 2002, Barry Skidelsky, Eureka's General Counsel, wrote to Pearson expressing dismay that CopperCom and Marconi "are now dunning us, even though the payment obligation to them

[3]The December lease had no security interest addendum.

is yours under our lease transactions with you." Skidelsky demanded immediate assurance that the vendors would be paid. He also stated that the monthly lease payments would be withheld until Pearson provided proof that the vendors had in fact been paid.

11. On April 11, 2002, Eureka's President, Joseph Gillette, wrote to Pearson informing him that Marconi had brought suit against Eureka over the unpaid bill. Gillette stated that Eureka considered Wentworth to be in breach of the leases, and demanded the return of the $163,601 of lease payments. Pearson never responded. In September of 2002, Eureka settled with Marconi, agreeing to return the equipment and pay Marconi $180,000. Eureka also eventually returned the CopperCom equipment (which was not performing to Eureka's satisfaction) and paid a "small" fee to CopperCom.[4]

12. Pearson-Wentworth never returned the $163,601 to Eureka nor made any effort to resolve the debt issue with either CopperCom or Marconi.[5]

13. In November of 2003, after the case had been set for trial, Pearson mailed some one hundred postcards to customers on the list of accounts receivable that Eureka had provided him as part of its "due diligence." The postcards were fraudulently embossed with Eureka's corporate logo. The postcards stated that "Our [r]emittance address has changed," and directed customers to forward all future payments to the Stow post office box controlled by Wentworth-Pearson. At least one of Eureka's customers forwarded a check

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[4]No definitive evidence of the dollar amount of the fee paid by Eureka to CopperCom was offered at trial.

[5]Pearson testified at trial that he had obtained an oral agreement from CopperCom to delay payment for the equipment for six months to a year. I do not find Pearson credible on this point (as well as most others). In any event, his testimony is contradicted by evidence of CopperCom's efforts in early 2002 to collect directly from Eureka.

to the post office box as directed.

Rulings of Law

Eureka's Complaint sets out three counts. Count I alleges breach of contract and seeks damages of $163,601 (the total of the rental payments made by Eureka to Wentworth), as well as costs and attorney's fees. Count II alleges the same damages under the rubric of unjust enrichment.[6] Count III alleges intentional misrepresentation. Wentworth, by way of counterclaim, alleges that Eureka is in default on the leases and seeks an acceleration of the payments due (discounted to present value), as well as costs and attorney's fees.

As a matter of law, this case would seem very simple. A contract existed between

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[6]Unjust enrichment is an equitable claim. In this context, the court is being asked to imply a contract in the event that it finds that no enforceable agreement existed between Wentworth and Eureka and to order restitution. See Corbin on Contracts, rev. ed. § 1.20 (1993). Under the doctrine of unjust enrichment a plaintiff seeks restitution of a benefit conferred on another whose retention of the benefit at plaintiff's expense would be unconscionable. To satisfy the five elements of unjust enrichment, a plaintiff must show "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and the impoverishment, (4) the absence of justification and (5) the absence of a remedy provided by law." LaSalle Nat'l Bank v. Perelman, 82 F. Supp. 2d 279, 294-295 (D. Del. 2000), citing Jackson Nat'l Life Ins. Co. v. Kennedy, 741 A.2d 377, 393 (Del. Ch.1999). The doctrine does not require any contractual or fiduciary relationship between the parties as a prerequisite of suit. Greenwald v. Chase Manhattan Mortg. Corp., 241 F.3d 76, 78 n.1 (1st Cir. 2001). Where a contract does govern the parties' relationship, the contract provides the measure of the plaintiff's right and no action for unjust enrichment lies. McKesson HBOC, Inc. v. New York State Common Retirement Fund, Inc., 339 F.3d 1087, 1091 (9th Cir. 2003). This principle is simply an extension of the fifth element of the doctrine, that is, where a plaintiff has an adequate remedy at law, a claim of unjust enrichment is unavailable. See id., at 1093 (Delaware law); Taylor Woodrow Blitman Constr. Corp. v. Southfield Gardens Co., 534 F. Supp. 340, 347 (D. Mass. 1982) (federal common-law); Popponesset Beach Ass'n, Inc. v. Marchillo, 39 Mass. App. Ct. 586, 593 (1996) (Massachusetts law). As Eureka has remedies at law, the unjust enrichment claim is redundant.

Eureka and Wentworth whereby Eureka was obligated to make monthly payments on the leases while Wentworth was obligated to pay for the leased equipment. Eureka made the required payments until it discovered that Wentworth had not kept its end of the bargain. It is hornbook law that a material breach of a contract by one party excuses the other from further performance. Ward v. American Mut. Liab. Ins. Co., 15 Mass. App. Ct. 98, 100-101 (1983). A lease is a contract. Wentworth breached the leases by failing to pay for the equipment. Eureka was thus excused from making further payments. As the breaching party, Wentworth is liable for any damages that Eureka incurred as a direct and natural result of the breach.[7] Greany v. McCormick, 273 Mass. 250, 253 (1930).

Wentworth, both at trial and in its post-trial memorandum, agrees that no material facts are in dispute. It concedes that it received the $163,601 in payments from Eureka.

[7]Eureka argues that in addition to the lease payments, it is entitled to recover the $5,068.07 in attorney's fees that it incurred in defending and settling the suit brought by Marconi and in negotiating a settlement with CopperCom. The authority for an award of these fees is derived from Mut. Fire, Marine and Inland Ins. Co. v. Costa, 789 F.2d 83, 88-90 (1st Cir. 1986), which notes that Massachusetts recognizes an exception to the American rule "when the natural consequence of . . . a defendant's breach of contract is to cause the plaintiff to become involved in litigation with a third party . . . ." Eureka also seeks an award of $25,000 in attorney's fees expended for the litigation and trial of this case. No authority is given for this second request, although Eureka presumably has in mind Mullane v. Chambers, 333 F.3d 322 (1st Cir. 2003), and similar cases recognizing the equitable power of a court to award attorney's fees where a party "has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" Id. at 337-338, quoting Chambers v. Nasco, Inc., 501 U.S. 32, 45-46 (1991). The requested fees are attested to in a sworn Declaration submitted by Eureka's attorney. The Declaration, however, sets out only gross amounts. In this Circuit, when a lodestar method is to be applied, an attorney must particularize a fee request by explaining the tasks performed, the hours associated with each of those tasks, and a justification for his hourly billing rate. Weinberger v. Great Northern Nekoosa Corp., 925 F.2d 518, 527 (1st Cir. 1991). Because I am inclined to believe that an award of attorney's fees on both requests is merited, I will give Eureka an opportunity to conform its fee request to First Circuit requirements.

It admits that it never paid CopperCom or Eureka. And it acknowledges that it was on notice from Eureka that its failure to pay the vendors was deemed by Eureka to be a breach. Rather, Wentworth advances a progressively astonishing argument in support of its counterclaim.

The argument, which has a superficial air of plausibility, turns on a misapplication of the Uniform Commercial Code (UCC) and a misreading of the First Circuit's decision in Midwest Precision Services, supra. The argument can be summarized as follows. When CopperCom delivered the equipment to Eureka and then invoiced Wentworth without a demand for immediate payment or the retention of a security interest, under the UCC, G.L. c. 106, § 2-401(2), title to the equipment passed to Wentworth as the buyer. Therefore, when in settlement of the payment dispute with CopperCom, Eureka returned the equipment, it converted property belonging to Wentworth and is thus liable to Wentworth for the equipment's fair market value.[8] While Wentworth admits it is liable to CopperCom for the unpaid purchase price,[9] according to Wentworth that is a matter solely between itself and CopperCom. "It, therefore, follows that since Lessor was the owner of the leased equipment and the Lessee was in default on its Leases with the Lessor for failing to make the required monthly payments, it is immaterial from the standpoint of the Lessee whether or not the Lessor will pay for the equipment." Defendant's Post-Trial Memorandum, at

[8]Wentworth concedes that because it never received an invoice from Marconi, the logic of its own argument requires that it repay the $41,875 advanced by Eureka on the Marconi lease, as title on the Marconi equipment never passed to Wentworth.

[9]Pearson testified somewhat improbably at trial (and without supporting documentary evidence) that Wentworth carries the CopperCom invoices on its books as liabilities.

(unnumbered page) 8. Wentworth's breathtaking conclusion is that Eureka is liable under the acceleration clause of the CopperCom leases for the full amount of the unpaid balances due.[10]

Fortunately, the answer to all of this is straightforward. Mindful, as Judge Kass pointed out in Mechanics National Bank of Worcester v. Gaucher, 7 Mass. App. Ct. 143, 146 (1979), that the preamble to UCC § 2-401 cautions that "the rights and obligations of parties under the Code should be sorted out without traditional dependence on the concept of title," nonetheless, such a sorting resolves this case. It is useful to begin where Wentworth does with the UCC's definition of a sale: "the passing of title from the seller to a buyer for a price." UCC § 2-106(1). While it is extremely doubtful that one who acquires possession and title without the intention of paying for the goods ordered could ever invoke a buyer's remedies under the UCC,[11] the simple fact is that Wentworth never qualified as a buyer. A buyer under Article 2 of the UCC is "a person who buys or contracts to buy goods." UCC § 2-103(1)(a). Wentworth did not purchase goods from CopperCom (that is, by paying or tendering payment), nor did it contract to do so. That is the distinction with Midwest Precision Services. In Midwest, Shawmut Bank found itself caught between the vendor (Midwest) and its lessee (PTM), which had wrongfully rejected the vendor's goods.

[10] Wentworth, through Pearson's testimony at trial and in its counterclaim, advanced two additional arguments, that CopperCom had agreed to a postponement of payment on its invoices, and that Eureka had breached the leases by failing to provide sufficient financial information to demonstrate its creditworthiness. Neither argument is briefed in Wentworth's post-trial submission and I deem them waived. I note that there is no evidence supporting the first of these arguments, and overwhelming evidence to refute the second.

[11] Under the common-law, the gaining of possession and title by a cheat constituted the crime of false pretenses. See Rex v. Pear, 1 Leach 211, 168 Eng.Rep. 208 (1779).

Shawmut argued that it was not a buyer under the UCC (and hence not liable to the vendor), but was merely the financing agent for the transaction. The First Circuit, while agreeing that Shawmut's status as a finance lessor defined its rights and obligations with respect to PTM, that issue was immaterial as no claim was being pressed between the two.

> The issue, rather, is Shawmut's status vis-a-vis Midwest. That status is defined by the purchase order issued by Shawmut to Midwest, which purports to be the "complete and exclusive statement" of the agreement between Shawmut and Midwest. It has all the makings of a bilateral contract: there are promises on both sides (Shawmut's promise to pay and Midwest's promise to deliver); duties on both sides (Shawmut's duty to pay and Midwest's duty to deliver); and rights on both sides (Midwest's right to payment and Shawmut's right to delivery). See E. Farnsworth, Contracts 109-10 (1982). Nothing in the agreement expressly states that Shawmut and Midwest have no rights under the contract as against each other. All indications are to the contrary, including language stating that the supplier's express warranties in the purchase order shall be valid and enforceable directly by PTM or Shawmut.

Midwest Precision Services, 887 F.2d at 1132. As Wentworth never contracted with CopperCom by purchase order or any other method, it never became a "buyer" within the UCC's Article 2 definition and therefore never acquired title under UCC § 2-401(2).

Eureka is also entitled to recover on its intentional misrepresentation claim. "To sustain a claim of misrepresentation, a plaintiff must show a false statement of material fact made to induce the plaintiff to act, together with reliance on the false statement by the plaintiff to the plaintiff's detriment." Zimmerman v. Kent, 31 Mass. App. Ct. 72, 77 (1991). See also Acushnet Fed. Credit Union v. Roderick, 26 Mass. App. Ct. 604, 605 n.1 (1988). A deceit "may be perpetrated by an implied as well as by an express representation." Briggs v. Carol Cars, Inc., 407 Mass. 391, 396 (1990). The misrepresentation in this case consisted of Pearson's holding out Wentworth as a "finance lessor" ready and able to underwrite equipment purchases for creditworthy borrowers consistent with the rules defining finance leasing arrangements.[12] Pearson, using Wentworth as a vehicle, was in fact engaged in a scheme, the success of which depended on his ability to sell the leases that he negotiated to investors with sufficient capital to fund the equipment purchases. When the effort failed, the scheme unraveled.[13] Eureka relied on Pearson's misrepresentations to its detriment by making the stipulated lease payments and placing its reputation at risk with its vendors. A plaintiff harmed by a defendant's misrepresentation is entitled to the benefit of its bargain, that is, to be restored to the position it would have been in had the situation been as represented by the defendant. Restatement (Second) of Torts, § 549 (1977). A plaintiff is also entitled to recover any additional expenses it incurred that were foreseeable as a result of the defendant's misrepresentation.[14] See Anzalone v. Strand, 14 Mass. App. Ct. 45, 49 (1982).

ORDER

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[12]While Pearson is not named individually in the lawsuit, there is no dispute that as Wentworth's President and sole shareholder, his actions were those of Wentworth.

[13]Nondisclosure is actionable only where there is a duty to disclose. Wolf v. Prudential-Bache Securities, Inc., 41 Mass. App. Ct. 474, 476 (1996); Swinton v. Wittinsville Sav. Bank, 311 Mass. 677, 678-679 (1942). This is not, however, a case of nondisclosure. It involves half-truths giving rise to a duty of full disclosure. Golber v. BayBank Valley Trust Co., 46 Mass. App. Ct. 256, 258 (1999) ("[H]alf-truths may be as actionable as whole lies."). See also Restatement (Second) of Torts, §551 (1977). "[A] party who discloses partial information that may be misleading has a duty to reveal all the material facts he knows to avoid deceiving the other party." V.S.H. Realty, Inc. v. Texaco, Inc., 757 F.2d 411, 415 (1st Cir. 1985). I also agree with Eureka that a strong inference that Pearson entered this transaction with fraudulent intent can be drawn from his arguably criminal conduct in misusing the financial information that Eureka provided to divert payments from Eureka's customers to a post office box under his control.

[14]These damages would include Eureka's rental payments and the costs it incurred in settling the disputes with its unpaid vendors. These are the same damages that are recoverable under the contract claim. Duplicate damages, of course, are not permitted.

For the foregoing reasons, judgment will enter for Eureka in the sum of $161,301 on its contract and misrepresentation claims, with prejudgment interest awarded on the contract claim from the date of Eureka's demand letter of April 11, 2002. See Starr v. Fordham, 420 Mass. 178, 194-195 (1995). The court will also entertain an application for attorney's fees and costs as indicated in the body of its Memorandum. Eureka will have twenty-one (21) days from the date of this Order to submit such an application and a proposed form of Final Judgment conforming with the court's Memorandum and Order. On the counterclaim, Wentworth shall take nothing.

SO ORDERED.

/s/ Richard G. Stearns

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UNITED STATES DISTRICT JUDGE