

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

MCCALL STAFFING ASSOCIATES, LTD.,

Plaintiff,

v.

DECISION AND ORDER

Index #2006/01354

TERRY L. CAMPBELL and
BAILEY PERSONNEL CONSULTANTS, INC.,

Defendant.

The cases of Town & Country House & Home Service v. Newbery, 3 N.Y.2d 554 (1958) (where "customers of plaintiff were not and could not be obtained merely by looking up their names in the telephone or city directory or going to any advertised locations, but had to be screened" from among many others, defendant was enjoined from soliciting those customers) and Fisher Organization, Inc. v. Ryan, 122 Misc.2d 305 (N.Y. Cty. Civil Ct. 1983), cited by plaintiff, are applicable here. See also, Hecht Foods, Inc. v. Sherman, 43 A.D.2d 850 (2d Dept. 1974). Screening candidates for suitability, both prospective employers willing to hire and employee-candidates in need of work, and compiling these lists in a manner calculated to determine likely matches, is (esp. in the compilation achieved by Campbell during her employment with McCall) not something readily known in the trade or available from easily accessible sources, and it qualifies for

trade secret protection. McCall's client and candidate data was not a listing of every potential employer or employee in Monroe County. It was a listing of carefully cultivated clients, prospects and candidates developed by McCall and screened for suitability to their clients, demonstrating their preferences, history of placement, contacts and other such information. "Such customer lists, the result of effort and expense on the plaintiff's part, and containing information which the defendants would not have obtained absent their former employment with the plaintiff, are deserving of protection." McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co., Inc., 114 A.D.2d 165, 173 (2d Dept. 1986). As well stated in Harry R. Defler Corp. v. Kleeman, 19 A.D.2d 396 (2d Dept. 1986), affd. on op. below, 19 N.Y.2d 694 (1986):

The customers and suppliers of plaintiff, though perhaps well-known in industrial fields, were not readily apparent as customers and suppliers for plaintiff's particular type of business. As we have observed, the information as to the availability of materials and the peculiar needs of plaintiff's customers was derived from the intimate knowledge acquired through years of experience by Defler. Therefore, the defendants by exploiting this information obtained an advantage not available to a stranger seeking to set himself up in fair competition with plaintiff. The actions of the defendants in this case amounted to a theft not only of customers which the plaintiff had discovered and developed but of the essential tools for serving such customers.

The conclusion is inescapable that the type of business piracy practiced by the defendants amounted to misconduct which the courts have not hesitated to restrain.

Id. 19 A.D.2d at 400-01. See Giffords Oil Co., Inc. v. Wild, 106 A.D.2d 610 (2d Dept. 1984) (granting injunction).

Defendants claim that the restrictive covenant is overbroad because it prevents Campbell from soliciting any McCall clients, not just those with whom she worked in the medical division. But McCall has shown that Campbell had access to information about other divisions; indeed, that she stole information about other divisions, including the liquidation formula, client list, candidate resumes and other information. Thus, limiting the injunction to the medical division would not adequately protect McCall's legitimate needs, since Campbell would be able to compete unfairly in other divisions, by misappropriating McCall information and sabotaging McCall's computer data. Chernoff Diamond & Co. v. Fitzmaurice, Inc., 234 A.D.2d 200, 202 (1st Dept. 1996) (granting an injunction to enforce a restrictive covenant prohibiting the defendant from soliciting any client of the former employer for two years - "the only restriction imposed upon him is that he is not permitted to deal with plaintiff's clients. There is no reason to suppose that this limitation will prevent defendant from pursuing his livelihood").

Campbell's effort to show that some of the material she took with her shortly before and while departing from McCall is largely unavailing, and does not warrant a hearing. The only persuasive showing she makes in this regard concern the templates

she insists she created herself before becoming a McCall employee. But she does not establish that the templates, in the form she took them off plaintiff's computer do not contain the same type and kind of confidential data she otherwise took. In addition, the fact that the resumes may not contain contact information does not diminish the finding that, in all respects, they are, especially in compilation, the property and trade secrets of McCall. The fact Campbell brought them home to work on them while still employed by McCall in no way detracts from the fact that they are McCall's material. Campbell offers no colorable argument that she has a right to maintain possession of them. The same analysis applies to the placement records and client addresses Campbell vainly tries to establish are hers to the exclusion of McCall. BDO Seidman is not authority for the appropriateness of the pervasive theft of McCall material Campbell engineered here. If it was, no business would have any protection from the acts of departing employees calculated to sabotage the former employer and to enable the employee to compete unfairly (and I mean "unfairly" in the BDO Seidman sense of the concept of unfair competition).

A useful contrast may be drawn from the case of H. Meer Dental Supply Co. v. Commisso, 269 A.D.2d 662 (3d Dept. 2000).

There the court held:

We note that customer lists are generally not considered confidential information (see, Arnold K.

Davis & Co. v. Ludemann, 160 A.D.2d 614, 615, 559 N.Y.S.2d 240; Cool Insuring Agency v. Rogers, 125 A.D.2d 758, 759, 509 N.Y.S.2d 180, appeal dismissed 69 N.Y.2d 1037, 517 N.Y.S.2d 1030, 511 N.E.2d 89). We also note that "[i]n order to establish * * * confidential customer information status, it [is] incumbent upon plaintiff to demonstrate that its customers are not known in the trade and are discoverable only by extraordinary efforts" (Empire Farm Credit v. Bailey, 239 A.D.2d 855, 856, 657 N.Y.S.2d 211). Plaintiff has failed to prove that such information is not readily discoverable through public sources. As to the remaining information, plaintiff has not put forth sufficient evidentiary proof to show what specific data the individual defendants misappropriated or used in their employ with Patterson. Although plaintiff submitted computer records revealing that Musto downloaded some information around the time he resigned from plaintiff, the records do not disclose the nature of the information. Under the circumstances, we conclude that a preliminary injunction should not have been issued and, therefore, must be vacated (see, Business Networks of N.Y. v. Complete Network Solutions, 265 A.D.2d 194, 696 N.Y.S.2d 433; Arnold K. Davis & Co. v. Ludemann, supra; Cool Insuring Agency v. Rogers, supra).

Id. 269 A.D.2d at 664. In every respect found wanting in Comisso, plaintiff's showing on this motion succeeds. The same contrast between the former employer's showing found insufficient in Briskin v. All Seasons Services, Inc., 206 A.D.2d 906 (4th Dept. 1994) can be seen in plaintiff's very detailed and non-conclusory showing here. Even if what Campbell took would not qualify as a trade secret, and I hold on this record that it did, an injunction would nevertheless be proper. "[A] physical taking or studied copying of the employer's client information may result in a court enjoining solicitation based not on a trade secret violation but as an egregious breach of trust and

confidence (see Silfen, Inc. v. Cream, 29 N.Y.2d 387, 391-392 [1972])." Battenkill Veterinary Equine P.C. v. Cangelosi, 1 A.D.3d 856 (3d Dept. 2003). Such an egregious breach of trust and confidence is established here, at least to the extent required to grant a preliminary injunction.

McCall has shown that it would suffer irreparable injury in the absence of injunctive relief, in three respects. First, it has shown that customer relationships had been built up through years of effort and that customers lost to a competing former employee would not necessarily return to it. Second, plaintiff has shown that Campbell actually stole its information while in plaintiff's employ, and has used it to solicit clients. Third, plaintiff has shown that Campbell has already engaged in open, competitive advertising and other solicitation.

An injunction will be granted where the failure to grant it would have the effect of allowing a former employee to take information into the camp of a competitor "engaged in systematic effort to acquire to itself precisely that benefit" of the special training and confidential knowledge. Eastman Kodak Co. v. Powers Film Products, 189 App. Div. 556, 562 (4th Dept. 1919). See Victor Temporary Services, a Division of Victor United, Inc., a Subsidiary of Walter Kidde, Inc. v. Slattery, 105 A.D.2d 1115, 1116 (4th Dept 1984); Service Systems Corp. v. Harris, 41 A.D.2d 20, 23-24 (4th Dept. 1973).

The motion for a preliminary injunction directed to Bailey is denied. The showing made by plaintiff concerning Bailey is far too slender a reed upon which to base preliminary relief. In any event, the injunctions directed to the new employer in the cases cited by plaintiff all seem too involve new companies established by the departing employees upon their departure from the former employer, not previously established companies. Of course, this is without prejudice to a re-application upon discovery of sufficient grounds to warrant preliminary relief. The motions to dismiss are denied.

Settle order accordingly.

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: February 21, 2006
Rochester, New York

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

HENRIETTA PIPING, INC. and
MICHAEL D'AMICO, as sole member of
Camelot Development, LLC, a dissolved
Limited Liability Company,

Plaintiff,

v.

ANDETOMASO & MICCA GROUP, LLC,
Defendant.

DECISION AND ORDER

Index #2005-12042

Defendant, Antetomaso & Micca Group, LLC
("Antetomaso"), has moved for an order pursuant to CPLR §
6514 canceling the Notice of Pendency, or in the
alternative, setting an amount for an undertaking at
\$100,000 for the cancellation of the Notice of Pendency
pursuant to CPLR § 6515. Plaintiff opposes the cancellation
of the Notice of Pendency, or in the alternative, seeks an
undertaking in the amount of \$334,000.

This dispute stems from a contract for the purchase and
sale of the Mayer Farms subdivision in the Town of Penfield.
By contract dated January 25, 2001, defendant offered to
purchase from Camelot Development, LLC ("Camelot") a tract
containing 47 residential building lots, and in addition an
option to purchase an additional 114 residential building
lots, for a purchase price of \$1,670,000. Defendant admits

in its answer that John Micca signed the offer as Agent for an entity to be formed (the entity subsequently formed was defendant Antetomaso & Micca Group, LLC, as admitted by defendant in its answer). Camelot accepted defendant's offer by way of a written acceptance dated January 30, 2001, signed by Michael D'Amico ("D'Amico") as President of Camelot Development, LLC. In addition, an "Addendum to Land Contract" was executed on the same day, January 30, 2001, by John Micca as Agent for the entity to be formed and by D'Amico as President of Henrietta Piping, Inc. ("Henrietta Piping"). In other words, the seller of the property, Camelot, was not a party to the Addendum. D'Amico, however, was the sole member of Camelot Development, LLC, which was dissolved two years later, in September 2003, by the filing of articles of dissolution with the New York State Department of State. D'Amico also is the sole shareholder and president of Henrietta Piping, Inc. The Addendum provided that Henrietta Piping would perform future site development at all sections of the Mayer Farm property and it set forth two different methods of calculating the price of future site development. Plaintiffs also allege that, prior to January 25, 2001, Henrietta Piping performed site development work on a portion of the building lots, which

involved earthmoving and the stripping and stockpiling of dirt, at the cost of approximately \$40,000.

The purchase of the premises from Camelot was to be financed by a bank loan (admitted by defendant in answer). Plaintiffs allege that Camelot's asking price for the premises was originally intended to include the \$40,000 owed for past site work, but that it exceeded the bank's allowable lot cost to obtain financing. To consummate the transaction, defendant had to reduce the total amount of money paid to Camelot for the premises in order to obtain financing. To accomplish this, plaintiffs allege that defendant orally promised Camelot that, after closing, defendant would pay Henrietta Piping the \$40,000 it was owed for the site development it had already performed. In addition, plaintiffs allege that Camelot agreed to further reduce the purchase price for the premises in consideration of defendant's written agreement to hire Henrietta Piping to perform all future site development work.

The premises were conveyed by a warranty deed dated May 4, 2001, between Camelot as grantor and Antetomaso as grantee, which was duly recorded at the Monroe County Clerk's office on May 8, 2001, and was later corrected by a Correction Warranty Deed executed by the same parties dated

November 15, 2001, and recorded December 26, 2001. The purchase price for the premises was \$1,670,000 (admitted by defendant in answer). There is no indication that any of the above described arrangements between the parties, oral and written, were set forth in the deed, either by way of condition subsequent or otherwise. At closing, Camelot was paid in full for the property. Defendant has since made substantial improvements on the property, has built and sold numerous homes on the tract, and currently has a number of contracts to build homes on the property. Henrietta Piping was hired by defendant in connection with the improvements constructed during the first phase, in 2001, but disagreements arose concerning the completeness and quality of its work, as revealed in the counterclaims, and it was not hired for the upcoming phase of the overall development.

Plaintiffs allege generally that defendant breached that portion of it's overall agreement which provided for Henrietta Piping to furnish all future site development work. Plaintiffs assert four causes of action against defendant: (1) fraud in the inducement, seeking \$40,000 for the work performed pre-closing, (2) breach of the Addendum contract seeking \$60,000 relating to work done post-conveyance during the summer of 2001, (3) rescission of the

entire transaction, and (4) quantum meruit. Defendant counterclaims for damages as a result of plaintiff's incomplete and faulty work at the premises during the first phase of the development in 2001.

In its first cause of action, plaintiffs allege that defendant fraudulently induced Camelot to enter into the purchase and sale contract when defendant orally promised to Camelot that it would pay Henrietta Piping the \$40,000 for the site development work already performed. In its second cause of action, plaintiffs allege that defendant breached the purchase and sale contract, and that Henrietta Piping has been damaged. In its third cause of action, plaintiffs allege that defendant's breach of the purchase and sale agreement was "material and willful, or so substantial and fundamental as to strongly tend to defeat the object of the parties in making the agreement," and that "Camelot does not have an adequate remedy at law because the object of the parties was defeated when defendant breached the Purchase and Sale Agreement." Amended Verified Complaint, ¶¶ 48, 49. Finally, in its fourth cause of action, plaintiffs seek recovery based on quantum meruit and allege that defendant has been unjustly enriched by its receipt of the improved property without paying Henrietta Piping the fair and

reasonable value of the site work performed by Henrietta at a cost of \$40,000.

DISCUSSION

CPLR § 6501 states in pertinent part: “[a] notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property . . .” The notice of pendency is “considered an extraordinary privilege, and the litigant must strictly comply with the statutory requirements.” Rose v. Montt Assets, Inc., 250 A.D.2d 451, 452 (1st Dept. 1998), citing 5303 Realty Corp. v. O & Y Equity Corp., 64 N.Y.2d 313, 320 (1984). Section 6514 provides for mandatory and discretionary cancellation of a Notice of Pendency upon motion by an aggrieved party. See CPLR § 6514(a) and (b).

In addition, “[c]ancellation of a notice of pendency can be granted in the exercise of the inherent power of the court where its filing fails to comply with CPLR 6501.” Nastasi v. Nastasi, ___ A.D.3d ___, 805 N.Y.S.2d 585, 588-89 (2d Dept. 2005), citing 5303 Realty Corp. v. O & Y Equity Corp., 64 N.Y.2d 313, 320-21 (1984). See Rose v. Montt Assets, Inc., 250 A.D.2d 451 (1st Dept. 1998). When the court exercises its inherent power to determine if the

pleading complies with CPLR 6501 on a motion to cancel a Notice of Pendency, the court does not assess the likelihood of success on the merits nor does it consider material beyond the pleading itself; "the court's analysis is to be limited to the pleading's face." Nastasi v. Nastasi, ___ A.D.3d at ___, 805 N.Y.S.2d at 589, quoting 5303 Realty Corp. v. O & Y Equity Corp., 64 N.Y.2d at 321. See Matter of Sakow, 97 N.Y.2d 436, 441 (2002). On the other hand, the demands made in the prayers for relief are not, alone, determinative. 5303 Realty Corp. v. O & Y Equity Corp., 64 N.Y.2d at 323 ("Although the prayer for relief seeks a transfer of title, the court must examine the complaint in its entirety.") As well stated in Richards v. Chuba, 195 Misc. 732 (Sup. Ct. Rensselaer Co. 1949):

An examination of the allegations of the complaint herein fails to show that the action is one to recover a judgment affecting the title to, or the possession, use or enjoyment of real property. It sets forth a cause of action at law for money damages and for fraud arising out of a breach of contract. It is true the prayer for relief as prayed for in the defendants' cross-motion demands relief by the impression of an equitable lien and foreclosure. But it has been held that 'It is not the title of the action nor the prayer for judgment, but the facts set out in the complaint, which determine the kind and character of action. The action cannot be made an equitable one by the demand for relief if no facts are stated in the complaint which would justify equitable relief.' Sayer v. Wilstrop, 200 App.Div. 364, 371, 193

N.Y.S. 4, 9; Brox v. Riker, 56 App.Div. 388, 67 N.Y.S. 772; Behrens v. Sturges, 121 App.Div. 746, 106 N.Y.S. 501.

Id. 195 Misc. at 735. Accordingly, it must be determined whether the amended verified complaint states a cause of action that complies with CPLR 6501, namely, whether the cause of action "affect[s]" real property.

Here, plaintiff asserts it is entitled to rescission of the purchase agreement, and restitution in specie of the property conveyed, based upon fraud and defendant's breaches of a contemporaneous oral contract and an attached written addendum. Insofar as the claims concern alleged fraud after execution of the purchase agreement and conveyance, they do not state claims within CPLR 6501. As in Tsilogiannis v. 53-11 90th Street Associates, Inc., 293 A.D.2d 468 (2d Dept. 2002) such a claim quickly is dispatched:

The only claim of the plaintiff for which "the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property" (see CPLR 6501) is that of fraud in the inducement to enter the contract, found in the third cause of action of the complaint. That cause of action, however, is insufficient on its face because the alleged fraud is premised upon the breach of a duty arising under a contract. "A cause of action alleging fraud does not lie where the only fraud claim relates to a breach of contract" (WIT Holding Corp. v. Klein, 282 A.D.2d 527, 528, 724 N.Y.S.2d 66; see Rubinberg v. Correia Designs, 262 A.D.2d 474, 692 N.Y.S.2d 172; Non-Linear Trading Co. v. Braddis Assocs., 243

A.D.2d 107, 675 N.Y.S.2d 5). The plaintiff did not plead facts or circumstances showing that the defendants breached a duty independent of the duty imposed upon them by the parties' contract, and therefore, the claim lies in breach of contract rather than fraud (see Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co., 70 N.Y.2d 382, 521 N.Y.S.2d 653, 516 N.E.2d 190; Rubinberg v. Correia Designs, supra).

Id. 293 A.D.2d at 468-69. Here, the only fraud alleged relates to defendant's alleged breach of the oral contract to pay for the pre-closing site work, and its alleged breach of the Addendum contract relating to post-closing site work. Accordingly, the only cause of action in the complaint which might support rescission of the property sale, the fraud in the inducement claim, is insufficient on its face.

The analysis is more complicated if the complaint is read to encompass pre-conveyance fraud. Crediting as I must the allegation that defendant had no intention to fulfill either contract at the time it made the contracts, and only made the contracts to induce the seller to execute the deed, and that therefore rescission of the transaction might in the ordinary case be properly ordered, Michel v. Halheimer, 56 Hun 416, 10 N.Y.S. 489 (2d Dept. 1890); 5 Arthur Corbin, Contracts § 1120 (1964), this is not a case in which specific restitution of the property may be ordered upon rescission. At this late date, over five years after the

conveyance, when portions of the property have been developed and sold to third parties (with plaintiff's assistance pursuant to the Addendum), other portions are in the process of being developed and sold, with moneys lent to aid the process, and where it is undisputed that contracts are in place for still other portions of the tract to be developed and sold, the parties cannot be restored to their original positions, whether by a combination of partition and restitution damages or otherwise (plaintiff's counsel consented at oral argument to partitioning the already completed development, leaving it untouched by the litigation). Merry Realty Co. v. Shamokin & Hollis Real Estate Co., 230 N.Y. 316, 323 (1921) ("If rescission is the remedy selected, it must be in whole, and not in part.") This conclusion is only reinforced when one considers, as the court must, that plaintiff was hired to perform services in accordance with the addendum for the first phases of the development, and undertook to work at the site notwithstanding not having been paid the \$40,000 for the pre-closing work. See Hammond v. Pennock, 16 Sickels 145, 61 N.Y. 145 (1874).¹

¹ Wherein it was stated:

No one, perhaps, has stated this qualification more

In Merry Realty, the court stated that, upon successful proof of its fraud claim, "defendant may have full rescission and get its lots back, or, if this is impossible owing to changed circumstances or is inequitable for any reason, then it may have full and complete damages." Id. 230 N.Y. at 235 (emphasis supplied). Stated another way, changed "circumstances do not bar the equitable remedy of rescission for wrong done. The terms upon which rescission may be granted where complete restoration of the parties to their former position is impossible rests in the sound discretion of the courts." Buffalo Builders Supply Co. v. Reeb, 247 N.Y. 170, 176 (1928). But sound discretion does not permit in these circumstances a reconveyance back to plaintiff of the property. This much is established by the celebrated case of Chicago T. & M. C. Ry. Co. V. Titterington, 84 Tex. 218, 222-23, 19 S.W. 472 (1892), discussed at length in G. Palmer, The Law of Restitution §

satisfactorily than the late Judge BEARDSLEY, in Masson v. Bovet (1 Denio, 69); he there said: "If a party defrauded would disaffirm the contract, he must do so at the earliest practicable moment after the discovery of the cheat. That is the time to make his election, and it must be done promptly and unreservedly. He must not hesitate; *nor can he be allowed to deal with the subject-matter of the contract and afterward rescind it.*" Hammond v. Pennock, supra (emphasis supplied).

4.19, at 530 ("promise to maintain the train station was without time limit, and it would be unwise for a court to hold that the grantee held a title which was subject to forfeiture should it fail to maintain the station at any time in the future"), 533-35 ("in the Titterington case discussed above, where land was deeded to a railroad in return for its promise to build and maintain a station, there would be undeniable difficulty in proving damages for breach, yet this does not justify leaving the grantee with an uncertain title for an indefinite period of time") (1978).

"Another factor argu[ing] against cancellation of the deed in the Titterington case . . . [is that, where the grantee has taken possession and operated at the site for years], a decree ordering cancellation would provide the grantor with an instrument of coercion, much as does the issuance of an injunction in cases in which the decree leaves the defendant little choice except to pay the plaintiff for his interest at a price that may be exorbitant." G. Palmer, The Law of Restitution § 4.19, at 534 n.25. The disparity in price alone between plaintiff's bid and the Monroe Roadways bid might be seen to prove the point, but of course I am disabled on a motion such as this from examining the underlying transaction. The point is

that, in cases of this sort, and Titterington proceeded on the assumption that fraud induced the conveyance, "most courts have refused specific restitution in favor of the vendor, regardless of the seriousness of the breach," because "such relief would interfere unduly with the certainty of titles to land." Id. at 528-29 (collecting cases). Accord A.L.I., Restatement (Second) of Contracts § 372(1)(a), & comment *b* ("a court may refuse specific restitution if it would unduly interfere with the certainty of title to land. . . [or] if it would otherwise cause injustice as where, for example, it would result in a preference over other creditors in bankruptcy"); A.L.I., Restatement (Third) of Restitution (Tentative Draft No. 3) § 37(2)(c), and comment *f* ("[r]escission is uniformly denied" in such cases), and illus. 15 (based on Titterington). It is true that, without the factors of transfers to third parties, post-conveyance interposition of creditor rights, passage of time, and the necessity of partition, specific restitution would be available, even if legal remedies might be adequate, that is if this case were to be decided under the formula of the Restatement (Second) of Contracts. A.L.I., Restatement (Second) of Contracts § 372 & comment *a* ("right to specific restitution may, however, be subject to

rights of third parties"), § 376. The cited sections of the Second Restatement were designed to avoid the inadequacy criterion of the First Restatement (§ 354), which were said not to be consonant with case law. G. Palmer, Law of Restitution § 4.7, at 429. But they do not create a new right to specific restitution in the circumstances of this case; the Second Restatement still remains faithful to the Pitterington rule, Restatement (Second) of Contracts § 372 illus. 2 and 3, & Reporter's Note (citing G. Palmer, supra § 4.19), and thus this action does not affect real property within the meaning of CPLR 6501, even under the revised formula of the Second Restatement.

But it is not clear that the New York Court of Appeals fully embraces the Second Restatement's abrogation of the inadequacy requirement in this context. The equitable remedy of rescission is often said in the New York cases to be available only where a party lacks a "complete and adequate remedy at law and where the status quo may be substantially restored." Alper v. Seavy, 9 A.D.3d 263 (1st Dept. 2004), quoting Rudman v. Cowles Communications, 30 N.Y.2d 1, 13-14 (1972). On the other hand, "[t]he rule that rescission is unavailable where a party cannot be returned to the status quo ante will not be strictly enforced where

the party against whom rescission is sought is a wrongdoer who is exploiting its change of position to shield its wrongdoing (Butler v. Prentiss, 158 N.Y. 49).” Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher, 299 A.D.2d 64, 72 (1st Dept. 2002). This rule is traced back to the case of Hammond v. Pennock, 16 Sickels 145, 61 N.Y. 145 (1874), discussed at fn 1, above

Whether plaintiff may bring itself within the application of the latter rule is a question that must, on these facts, be answered in the negative. It was not defendant alone that created the changed circumstances; indeed defendant performed for a time and plaintiff was hired during the first phase of the project with full knowledge that it had not been paid the sums which are the subject of the first cause of action sounding in fraud. Hammond v. Pennock, supra, discussed at fn 1, above. But the transfer to third parties, the necessity of partition, the effect rescission would have on creditor and title rights, and the long passage of time since the conveyance, plaintiff’s part performance of the Addendum in the prior post-conveyance phase of the development (see fn 1, above), all militate against the operation of the Butler v. Prentiss rule in this case. Thus, to the extent New York law varies

from the formula of the Second Restatement, this favors defendant on this motion; an adequate remedy at law is assuredly available in these circumstances, especially if plaintiff is awarded "restitution of the value of the land," G. Palmer, supra § 4.6A (1992 Supp. at 125-26), § 4.19 (main text), at 534-35, 536-37, less any appropriate adjustments and credits.

CONCLUSION

Defendant's motion to cancel the Notice of Pendency is granted. This renders academic the question of an undertaking or bond.

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: February 21, 2006
Rochester, New York