

STATE OF NEW YORK
SUPREME COURT
COMMERCIAL DIVISION

COUNTY OF ALBANY

LAWRENCE A. DAVIS a/k/a Larry Davis,

Plaintiff/Petitioner,

-against-

CORNERSTONE TELEPHONE COMPANY, LLC and
CornerStone Telephone Company, LLC, as successor in
name, title and interest to CSTC, LLC, and as successor in
name, title and interest to COMBINED SOLUTIONS, INC.,
DANIEL J. YAMIN, JR., JEFFREY S. DOERR, ESQ.,
DONALD J. WALSH, JACK A. OVERTON, JR., ESQ.,
RICHARD DRAKE, STANLEY D. RUSSELL, ESQ., and
DAVID WILMING,

Defendants/Respondents.

DECISION
AND
ORDER

Index No. 6913-07
(RJ No. 01-08-092293)

(Judge Richard M. Platkin, Presiding)

APPEARANCES: LAW OFFICES OF TIMOTHY J. O'CONNOR
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LLP
Attorneys for Defendants
(Peter A. Lauricella and Benjamin F. Neidl, of counsel)
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Hon. Richard M. Platkin, A.J.S.C.

By Amended Decision and Order dated June 5, 2008, this Court granted defendants' motion to dismiss the twenty-seven (27) causes of action pled in plaintiff's Amended Complaint and denied plaintiff's cross-motion to serve a Second Amended Complaint (*Davis v CornerStone Telephone Co., LLC*, 19 Misc3d 1142 (A) [2008]). On appeal, this Order was modified to the limited extent that the dismissal, on statute of limitations grounds, of a portion of a single cause of action was reversed (*Davis v CornerStone Telephone Co., LLC*, 61 AD3d 1315, 1316 [3d Dept 2009]). In all other respects this Court's prior Order was affirmed (*see id.*).

What remains of this litigation is a claim of unjust enrichment for non-monetary benefits allegedly conferred by plaintiff upon defendants between August 28, 2001, six years prior to the date of commencement of this action, and December 31, 2001, when plaintiff ultimately severed his business relationship with defendants. Defendants have served and filed their answer to this remaining cause of action.

Plaintiff has now served discovery demands on defendants. Defendants have responded with a motion for a protective order; plaintiff counters with a cross-motion to compel disclosure.

As a threshold matter the Court must address plaintiff's procedural objection to defendants' application. Plaintiff contends that the advance notice requirements for motion practice in the Commercial Part of Supreme Court (22 NYCRR § 202.70, Rule 24) were ignored by defendants. Subdivision (b) of Rule 24, however, clearly exempts "disclosure disputes" from its ambit. Accordingly, there was no impropriety in defendants' having brought this

motion.¹

In order to delineate the appropriate bounds of discovery, it is necessary to understand the nature of the claim at issue. Plaintiff contends that he provided defendants with reduced office rent, with telephone and computer services, with payments of their office utility bills, and with what can broadly be described as consulting services for the start-up of defendants' telecommunications business. Plaintiff further alleges that defendants were unjustly enriched by these contributions, as defendants benefitted from plaintiff's contributions and yet wrongfully failed to compensate him for them.

If ultimately successful, plaintiff will be entitled to restitution for the value of his contributions to defendants, owing to "the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009], quoting *Miller v Schloss*, 218 NY 400, 407 [1916]). Critical to this analysis is the absence of an enforceable contractual relationship between the parties: equity steps in to remedy an otherwise inappropriate or unjust result (*id.*). Where there is an enforceable contract, however, the prosecution of an unjust enrichment claim ordinarily is barred (*id.*, citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]).

This distinction between unjust enrichment and contractual causes of action impacts the permissible scope of discovery in this case. Plaintiff proceeds under the mistaken belief that success in the present litigation means that he will be entitled to enjoy a measure of damages tantamount to the benefit of his bargain, which has previously been held unenforceable. This

¹ In any event, the Court did conference the issues raised by defendants' application with counsel prior to considering the parties' written submissions.

misapprehension is reflected in his discovery demands, which essentially seek to ferret out every nickel of profit connected, however tangentially, to his prior relationship with defendants.

On the contrary, the measure of recovery for a claim based on quantum meruit generally is limited to the reasonable value of the services rendered (*Carlino v. Kaplan*, 139 FSupp2d 563 [SDNY 2001]; *Collins Tuttle & Co. v. Leucadia, Inc.*, 153 AD2d 526 [1st Dept 1999]; *Giordano v. Thomson*, 564 F3d 163 [2d Cir 2009]). Plaintiff's pursuit of the "benefit of his bargain" through a claim to some portion of the equity and/or profits of CornerStone, a contention soundly rejected on the prior motion practice,² "would . . . improperly . . . establish something like [his] expectation interest under the [failed contract], not the restitution (or sometimes reliance) interest that is the proper focus of quantum meruit" (*Mem'l Drive Consultants, Inc. v. ONY, Inc.*, 29 Fed Appx 56 [2d Cir 2002]). Nor is this a case where plaintiff has demonstrated that "clear and accepted market place conventions" establish an alternative measure of valuing the services rendered to defendants (*Carlino, supra; compare Segal v. Cooper*, 49 AD3d 467 [1st Dept 2008] [real estate brokerage commission] *with Collins Tuttle, supra* [reasonable value of real estate marketing materials]).

To hold otherwise would put this Court in the position of writing a contract for the parties. As United States District Judge Hellerstein articulated in a similar case:

Importantly, courts do not write contracts, parties do. . . . Where a plaintiff provides services with the clear expectation of compensation, and the parties failed to formalize their agreement in

² Specifically, the Court rejected plaintiff's theory that defendants have been continually unjustly enriched by their receipt of profits from CornerStone that allegedly should have flowed to plaintiff.

a contract that can be recognized by the court, the law provides for compensation based on the reasonable value of services. However, here, where no convention exists to support an intervention by the court, it would be improper for a court to write a contract for the parties where none previously was written. I cannot assume the terms that the parties may, perhaps, have written into a contract. I would have no basis to impose what would be reasonable and appropriate in relation to defining . . . the nature and quantification of benefits received from consultations, the controls that might be appropriate to eliminate the influence of other market conditions, the time frame for services and compensation, or the many other factors that might be pertinent to consulting contracts. The only certain way to measure compensation is to base it on a reasonable hourly rate multiplied by the actual number of hours Plaintiff provided services to the Defendants, plus reimbursement of expenses reasonably and appropriately incurred in the delivery of the services.

(Carlino v. Kaplan, 139 FSupp2d 563, 566 [SDNY 2001] [internal citations omitted])

Inasmuch as any ultimate entitlement to damages will be limited to the value of what plaintiff contributed to defendants in the latter part of 2001, defendants' subsequent profits or losses, whether related to plaintiff's contributions or not, are irrelevant. Accordingly, plaintiff's discovery demands are overbroad.

Plaintiff is, of course, entitled to "full disclosure of all matter material and necessary in the prosecution . . . of [his] action" (CPLR 3101 [a]). This would encompass any and all information relevant to determining such things as: the value of any difference between the rent actually paid by defendants to plaintiff between August 28 and December 31, 2001 and the fair market rent for the premises in question for such period; the value of any telephone and computer services provided by plaintiff to defendants during the period; any utility bills actually paid by plaintiff on defendants' behalf during the period; and also the reasonable value of any

consulting services provided by plaintiff to defendants during the period.³

In reviewing the sixty-eight (68) different sub-categories of documents demanded by plaintiff of each of the defendants and required to be produced by the individual defendants (all of whom have been noticed for deposition), the Court determines that these demands are deemed modified so as to require production by defendants of:

1. Minutes and records of meetings of CornerStone Telephone Company, LLC, CSTC, LLC or Combined Solutions, Inc. that occurred between August 28, 2001 and December 31, 2001;

2. Minutes and records of meetings of CornerStone Telephone Company, LLC, CSTC, LLC or Combined Solutions, Inc. that make reference to any business conducted between August 28, 2001 and December 31, 2001;

3. Minutes and records of meetings of CornerStone Telephone Company, LLC, CSTC, LLC or Combined Solutions, Inc. that make reference to: rental payments for office space; payments for telephone service; payments for computer service; payments of utilities; or services of any kind performed by Lawrence A. Davis a/k/a Larry Davis for or on behalf of any defendant during the period from August 28, 2001 to December 31, 2001;

4. Any and all documents, notes, records or correspondence in the possession of any defendant that refers to any business conducted by or on behalf of CornerStone Telephone

³ In this context, the Court notes that plaintiff devotes considerable attention in the present litigation to his efforts expended toward defendants' obtaining a license from the Public Service Commission to operate a part of their business. Inasmuch as the entire application process predated August 28, 2001, (the license itself was issued on August 29, 2001), none of this is within the scope of the limited portion of the single cause of action that remains in this lawsuit.

Company, LLC, CSTC, LLC or Combined Solutions, Inc. between August 28, 2001 and December 31, 2001;

5. Any and all documents, notes, records or correspondence in the possession of any defendant that refers to any service performed for, or benefit received by, any defendant from Lawrence A. Davis a/k/a Larry Davis between August 28, 2001 and December 31, 2001;

6. Any and all tax returns prepared or filed by or for CornerStone Telephone Company, LLC, CSTC, LLC or Combined Solutions, Inc. for tax year 2001;

7. Any and all financial statements for CornerStone Telephone Company, LLC, CSTC, LLC or Combined Solutions, Inc. for 2001 or for any part of 2001 containing any date between August 28, 2001 and December 31, 2001;

8. Any and all bills, receipts, demands, notices, checks, payment vouchers or other records relating to the payment of or for office rent, telephone service, computer service, electric service, heat or other utilities consumed by CornerStone Telephone Company, LLC, CSTC, LLC or Combined Solutions, Inc. between August 28, 2001 and December 31, 2001; and

9. Any and all bills, receipts, demands, notices, checks, payment vouchers or other records relating to any payment made to or requested by Lawrence A. Davis a/k/a Larry Davis or LAD Industries, Inc. during or for the period of August 28, 2001 to December 31, 2001.

Accordingly, it is

ORDERED that defendants' motion for a protective order is granted to the limited extent that plaintiff's discovery demands are deemed amended as detailed in this Decision & Order; and it is further

ORDERED that plaintiff's cross-motion for an order compelling discovery is granted to

the limited extent that defendants are directed to comply with the provisions of this Decision & Order within forty-five (45) days of the date of its issuance.

This constitutes the Decision and Order of the Court. The original Decision and Order is being returned to defendants' counsel; all other papers are being transmitted to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220, and counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and notice of entry.

Dated: Albany, New York
September 18, 2009

RICHARD M. PLATKIN
A.J.S.C.

Papers Considered:

Notice of Motion dated June 12, 2009;
Affirmation of Peter A. Lauricella, Esq., dated June 12, 2009, with annexed Exhibits A-T;
Notice of Cross-Motion dated June 29, 2009;
Affidavit of Timothy J. O'Connor, Esq., sworn to June 29, 2009, with annexed Exhibits A-I;
Affidavit of Lawrence A. Davis, sworn to June 25, 2009, with annexed Exhibits A-I;
Reply Affirmation of Peter A. Lauricella, Esq., sworn to July 2, 2009.