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ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OREGON

EVERGREEN WEST BUSINESS CENTER, LLC, an Oregon limited liability company,
Plaintiff-Respondent
Cross-Appellant,
Petitioner on Review,
v.
TERRY W. EMMERT,
Defendant-Appellant
Cross-Respondent,
Respondent on Review,
and
PREMIER WEST BANK,
Impartial.
S061049 (Control)

61049

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Plaintiff-Respondent
Cross-Appellant,
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Defendant-Appellant
Cross-Respondent,
Petitioner on Review,
and
PREMIER WEST BANK,
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S061158

PETITIONER EVERGREEN WEST BUSINESS CENTER, LLC'S OPENING BRIEF ON THE MERITS

On Review from a decision of the Court of Appeals on appeal from a judgment of the Circuit Court of Clackamas County, Honorable Jeffrey S. Jones
Opinion Filed December 27, 2012

Author of Opinion: Schuman, P.J.
Concurring Judge: Armstrong
Concurring and Dissenting (on other issue): Wolheim

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July, 2013

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

Page

I. LEGAL QUESTION PRESENTED ON REVIEW

Where a defendant, breaches a fiduciary duty and wrongfully obtains property that belonged to the plaintiff, is the plaintiff barred from enforcing a constructive trust remedy because it is possible for the plaintiff also to assert a legal claim for damages?

II. PROPOSED RULE OF LAW

When a defendant, by means of a breach of a fiduciary duty, obtains property belonging to a plaintiff, the plaintiff is always entitled to seek alternative remedies, and to elect a constructive trust remedy regardless of the availability, or adequacy, of a legal remedy.

III. NATURE OF THE ACTION OR PROCEEDING

Plaintiff filed a lawsuit for breach of fiduciary duty and for damages or, in the alternative, for a constructive trust. It claimed that Defendant agreed to arrange for forbearance of a non-judicial foreclosure while a replacement loan was obtained, and that, instead, Defendant secretly purchased the note and trust deed while telling Plaintiff not to be concerned. Defendant then conducted his own non-judicial foreclosure sale. As a result he obtained Plaintiff's property forth $1,390,000 for $613,979.49, acquiring an equity of over $700,000.

IV. NATURE OF THE JUDGMENT RENDERED BY THE TRIAL COURT

The jury found that Defendant had a fiduciary duty to Plaintiff which he breached. The jury awarded punitive damages of $600,000, but found only a nominal $1.00 in actual damages. The trial court reduced the punitive damages to $4.00.

The trial court held that Plaintiff was also entitled to a constructive trust. Plaintiff elected the alternative equitable remedy of a constructive trust. The trial court ruled that Defendant was entitled to be repaid his actual cost of acquiring the note and trust deed, but was not entitled to recover any of his holding costs. Also, since Defendant had meanwhile pledged the property to his lender for a $900,000 loan, the trial court ruled that Defendant was responsible for any amount needed to repay that loan in excess of the $613,979.49 paid by Defendant for the note and trust deed.

The trial court also held that it did not have authority to award punitive damages in connection with the equitable remedy.

V. SUMMARY OF THE FACTS[1]

Carl Senour was a cabinet maker who wanted to own his own facility. He asked Brad Taggart to find a site and build him a building. Tr. 138-139. Taggart found a 4.57 acre parcel and suggested the construction of a small

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[1] This brief identifies the parties as Plaintiff and Defendant. For purpose of the Summary of Facts the parties are identified by name to conform to the transcript.

business park with Senour as an anchor tenant. Tr. 139. An additional investor with the financial strength to obtain financing was needed, and Terry W. Emmert became that investor. Tr. 140.

Evergreen West Business Center, LLC was formed to purchase and construct the business park. Ex.1. The initial members were Taggart (1/6), Hoffard (Taggart's construction partner, 1/6), Senour (1/3) and Emmert (1/3). Tr. 145-146. Later Builders, Inc. succeeded to Hoffard's interest. Tr. 146; Ex. 3. Taggart was the manager of this manager managed LLC.

The property was purchased for $846,044, of which $552,500 was borrowed from West Coast Bank. Exs. 4 and 5. The members contributed the balance of the funds. Tr. 143. The property is across the street from the Hillsboro airport, close to several high tech businesses. Tr. 147.

After the property was purchased and before buildings could be constructed there was a lot of work to be done:

A. Obtain various approvals from Hillsboro, Oregon and all of the service providers (e.g. fire marshall, etc.) of the project;
B. Bring sanitary sewer to the property;
C. Install erosion control;
D. Bring in 7,000 cubic yards of fill;
E. Prepare construction plans and specifications and have them reviewed by the City preliminary to submitting final plans for a building permit. (The City's final corrections were done on March 24, 2004, and the plans were ready to be submitted for a building permit.)

Tr. 147-153; 290.

Builders, Inc., a corporation owned by Taggart and Emmert, advanced approximately $366,000 to improve the property. Ex. 10; Tr. 157. Emmert was kept fully advised of how the property was being improved and how the money was being spent to make the property more valuable. Tr. 154-157.

West Coast Bank's acquisition loan matured. In March, 2004, West Coast Bank sent a notice that it was going to foreclose on the property. Tr. 162. Taggart began seeking a loan to pay off the acquisition loan and to pay for construction in the sum of approximately $3.4 million. Emmert's financial situation had deteriorated, and the loan was turned down. Tr. 162-166.

Taggart spoke with Emmert. They agreed to work on a two step process to obtain construction financing: first, borrow $900,000 to pay off West Coast Bank, some of the consultants and some of the money owed to Builders, Inc.; and, second, borrow construction financing. Tr. 167-168; 175.

Bob Dyer at Oregon Pacific Bank, who already did business with Emmert, was approached. He said the smaller loan would not be a problem. Then he said he would be moving to Premier West Bank, and he preferred to take the loan application with him. Tr. 167-168. Dyer returned to Premier West on August 16, 2004 and asked for a new appraisal and an explanation for how the $900,000 was to be used. Tr. 170-171.

Meanwhile, West Coast Bank's attorney wrote Taggart advising that the foreclosure sale was being postponed to September 15, 2004. Tr. 183-184; Ex. 20. West Coast Bank asked for a $50,000 interim payment to further delay the foreclosure. Tr. 172. Taggart met with Emmert and explained that West Coast Bank wanted a $50,000 payment to postpone the sale beyond September 15, 2004. Emmert told Taggart to work on obtaining the $900,000 loan from Premier West Bank, and Emmert would take care of the West Coast Bank loan. Emmert told Taggart not to worry about West Coast Bank. Tr. 173; 208.

However, commencing in early September, 2004, Emmert began secretly negotiating to buy the note and trust deed from West Coast Bank. Tr. 181; Ex. 18. Then on September 15, 2004, Emmert paid $50,000 to West Coast Bank to postpone the foreclosure sale. Tr. 180. Both West Coast Bank and its attorney had repeated contacts with Emmert and his in-house attorney, Brad Harper, concerning that loan. Tr. 191

Thereafter, West Coast Bank's attorneys sent letters only to Emmert. Tr. 579. The letter stating that the new sale date was October 15, 2004 was addressed to Emmert without copies to Taggart. Ex. 135. Only Emmert received that letter. Tr. 576.

From time to time Taggart asked Emmert about the status of the West Coast Bank foreclosure. Emmert continued to tell him that he was taking

care of it, and he had everything under control. Tr. 173. Emmert admits that he did not tell Taggart that he was buying the note and trust deed. Tr. 577-578. Emmert never disclosed that he was working only for himself, or that he was not working for Evergreen West Business Center, LLC. Tr. 173-174; 208.

Taggart had provided Dyer with all of the financial information Dyer needed prior to September 1, 2004, and Dyer did not need any more financial information. Tr. 206. Dyer wanted a written request that explained the use of the funds. Tr. 206. First Taggart sent the explanation to Emmert for his approval on September 22, 2004. Tr. 208; Ex. 7. Only after Emmert approved it, Taggart sent it to Dyer on September 27, 2004. Tr. 210; 211; Ex. 8.[2]

Even then Emmert did not tell Taggart that the foreclosure sale had been rescheduled to October 15, 2004. Tr. 210. Dyer told Taggart he would process the loan when he got back from a hunting trip. Tr. 206-207.

But Emmert told Dyer not to proceed with the Evergreen West Business Center, LLC's loan request because he had something worked out with West Coast Bank. Tr. 422. The appraisal Dyer needed, dated September 20, 2004, valued the property at $1,390,000. Ex. 15; Tr. 321-322.

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[2] The document had an erroneous date of March 25, 2004, which was corrected and resent on September 28, 2004.

On October 14, 2004, Emmert completed his negotiation to buy the note and trust deed, which were then assigned to Emmert, Ex.20. Emmert paid $563,979.49. Tr. 299; Ex. 21. The assignment of the note and trust deed was sent to Emmert on October 19, 2004, Tr. 196; Ex. 138, when the bank signed it. Emmert signed the assignment on October 21, 2004. Tr. 301. Emmert even had West Coast Bank provide him with the scripts for the foreclosure sale. Tr. 196; Ex. 138. Emmert apparently held the foreclosure sale the next day, October 22, 2004, and bought the property for himself. Ex. 23.

On October 24, 2004, Taggart again contacted Dyer to ask about the loan. Dyer said that he did not know who the borrower was to be, and he thought the borrower was to be Emmert. Dyer told Taggart that Taggart needed to talk with Emmert. Tr. 215.

Emmert agrees he was willing to sign for the $900,000 Premier West loan on behalf of Evergreen West Business Center, LLC. Tr. 307. After he bought the property at the foreclosure sale, Emmert completed the loan and borrowed the $900,000 for himself. Tr. 344

If Evergreen West Business Center, LLC had wished to stop the sale and sell the property, it could have filed for protection under the bankruptcy code and then sold the property to a third party. Tr. 201.

VI. SUMMARY OF ARGUMENT

Whenever one party breaches a fiduciary duty to the other party and thereby obtains property that belonged to the other, the remedy of a constructive trust has always been available in Oregon. The potential availability of an action at law for damages has never even been considered as a possible bar to a constructive trust. In fact the Oregon decisions have indicated that a constructive trust remedy is preferred over a legal remedy and have held that a legal remedy would be ordered only if a constructive trust were not available.

Similar cases from other jurisdictions that have considered this precise issue have appropriately concluded that an "adequate" remedy at law does not displace the right to elect the constructive trust remedy. Two policies have been cited: 1) A constructive trust is available to assure that the wrongdoer does not retain the benefit even if the victim has suffered a lesser loss; and 2) It is better that the victim be allowed to plead alternative remedies and to elect the best remedy, after the outcome of the different choices is known, than to allow the perpetrator to escape the greater of full compensation to the victim or disgorgement of any benefit from his misconduct.

These are appropriate policies for a judicial system. The differences between law and equity have been statutorily abolished. While that has

been treated as abolishing procedural differences, what remedies are available should be determined on rational grounds, and not based on any historical concepts that are irrelevant to a rational judicial system.

The right to plead in the alternative, to seek different remedies and to then elect the remedy that is preferred, is well established. It has been permitted where an equitable and a legal remedy were the alternatives.

This case illustrates why the doctrine of permitting the pleading of alternative theories and remedies, and allowing the plaintiff to elect the best available remedy, is good policy. A legal system provides for a plaintiff to allege appropriate relevant theories because one cannot know for certain what will occur at trial.

The trial court instructs the jury on all appropriate theories. Defendants often attempt to confuse the jury and obfuscate, sometimes with some degree of success. When there are multiple theories, the outcomes from different theories may vary.

The policy choice is whether the defendant can retain some of benefit of his misconduct, or the plaintiff can obtain the remedy most beneficial to him. The law with regard to breach of fiduciary duty clearly and unequivocably provides that the perpetrator should at the very least make no profit. Public policy must favor the victim who has been wronged, not

the victimizer who behaved improperly, in order to take away any incentive to misbehave.

In this case, for instance, not permitting a constructive trust recovery would leave the defendant with the spoils of his misconduct, property with a built in profit of more than $700,000. Permitting the constructive trust takes away the Defendant's incentive. It also allows Plaintiff to have control over its own destiny by being in charge of the sale of its property, thereby making the best of the circumstances caused by the wrongdoer.

VII. ARGUMENT

A constructive trust remedy is allowed for breach of fiduciary duty, as well as many other types of unjust enrichment. See, e.g. *Klinicki v. Lundgren,* 298 Or 662, 695 P2d 906 (1985); *American Timber & Trading Co. v. Neidermeyer,* 278 Or 1135, 558 P2d 1211 (1976); *Fouchek v. Janicek,* 190 Or. 251, 261, 225 P.2d 783 (1950); *Suitter v. Thompson,* 225 Or 614, 358 P2d 267 (1960) and *Tupper v. Roan,* 349 Or 211, 243 P3d 50 (2010). As explained in *Tupper v. Roan*:

> "Although our cases refer to a substantive 'doctrine' of unjust enrichment, none provide any really comprehensive exposition of that doctrine. Instead, the cases simply describe the kinds of actions and circumstances that would constitute unjust enrichment warranting imposition of a constructive trust, and then observe that the concept extends to other similar acts and circumstances. Thus, in *Suitter v. Thompson et ux.*, 225 Or. 614, 625, 358 P.2d 267 (1960), the court stated that equity may impress a constructive trust on property

> 'obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest.'

(quoting John Norton Pomeroy, 4 A Treatise on Equity Jurisprudence § 1053, 119 (5th ed 1941)) (emphasis added).

> We recognize that the foregoing precedents concern inequitable conduct of a recipient of property, and not conduct by a grantor or donor. However, other cases have added to the list of circumstances that might support a claim for unjust enrichment. In *Albino v. Albino*, 279 Or. 537, 568 P.2d 1344 (1977), for example, this court held that **a constructive trust is warranted**, even in the absence of the more active sorts of wrongful behavior identified in *Suitter*, **when a person in a fiduciary or confidential relationship acquires or retains property in violation of a duty impressed upon him by that relationship**. 279 Or. at 550, 568 P.2d 1344; see also *Pantano v. Obbiso*, 283 Or. 83, 86, 580 P.2d 1026 (1978) (to the same effect). And in *Scoggins v. State Construction*, 259 Or. 371, 376, 485 P.2d 391 (1971), we suggested that even a "mistake" might result in unjust enrichment justifying imposition of a constructive trust. Among all of those examples, however, the common thread is the acquisition or retention of property in a way that is in some sense wrongful or, as Pomeroy would have it, 'unconscientious.'"

(Bold added) Id. at 219-220

The overarching principal for breach of fiduciary duty is to remove from the perpetrator any of the benefits from the breach. In *Marnon v. Vaughan Motor Co., Inc.*, 184 Or 103, 168-69, 194 P2d 992 (1948), this Court quoted with approval Mechem on Agency as follows:

> "The law frowns upon such transactions. Concerning them it is said in 1 Mechem on Agency (2d ed.) 894. §§ 1224 and 1225:

> 'The well settled and salutary principle that a person who undertakes to act for another shall not, in the same matter act for himself, results also in the other rule, that all profits made and advantage gained by the agent in the execution of the agency belong to the principal. And it matters not whether such profit or advantage be the result of the performance or of the violation of the duty of the agent if it be the fruit of the agency. If his duty be strictly performed, the resulting profit accrues to the principal as the legitimate consequence of the relation; if profit accrues from his violation of duty while executing the agency, that likewise belongs to the principal, not only because the principal has to assume the responsibility of the transaction, but also because the agent cannot be permitted to derive advantage from his own default.
>
> 'It is only by rigid adherence to this rule that all temptation can be removed from one acting in a fiduciary capacity, to abuse his trust or seek his own advantage in the position which it affords him.
>
> 'It matters not how fair the conduct of the agent may have been in the particular case, nor that the principal would have been no better off if the agent had strictly pursued his authority, nor that the principal was not in fact injured by the intervention of the agent for his own benefit. The result is still the same.'"

Since the remedy of a constructive trust is based on the notion of unjust enrichment, a judgment for damages in some amount would almost always be available. Not only has this Court never suggested that a legal right to damages would prohibit access to constructive trust as a remedy, but the only cases found bearing on the question suggest the opposite.[3] In

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[3] The only case found that restricted access to a constructive trust remedy is *Belton v. Buesing,* 240 Or 399, 402 P2d 98 (1965). But it was not because there was an adequate legal remedy. Rather, this Court held that because an express or resulting trust existed, substantively a constructive trust was unavailable. In commenting as to the availability of a constructive trust

Albino v. Albino, 279 Or 537, 555, 568 P2d 1244 (1977) this Court held as follows:

> "If the circuit court can trace the funds into the hands of either or both defendants, it shall impose a constructive trust upon the proceeds. If the court cannot trace the funds then it shall enter a judgment for $17,900 plus interest against the defendant Catherina Albino, but not against the defendant Frank Albino."

Thus, this Court held that the equitable remedy was preferred, and a judgment for damages would only be awarded if the equitable remedy were not available.

A similar implicit understanding is found in *Tupper v. Roan*, supra. There a party breached the obligation to obtain insurance under the terms of a divorce judgment. The plaintiff was allowed to seek a constructive trust against an innocent beneficiary of a policy without regard to whether the breaching party's estate had the resources to pay the claim directly. Instead the innocent third party asked for indemnity from the estate. That roundabout resolution was approved without any suggestion that reliance on the constructive trust remedy required an inquiry as to the ability to collect from the breaching party's estate.

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remedy, this Court said that "[a] constructive trust is simply a remedial institution invented by equity to avoid unjust enrichment in situations where there is no other available *equitable* remedy." (Italics added) It did not say anything about the availability of a legal remedy.

Moreover, in *Tupper v. Roan* this Court allowed both a "money had and received" and "unjust enrichment" claim to proceed. The decision is not clear, but it may be that the former was a legal claim and the latter was an equitable claim for a constructive trust. If so, it appears that this Court allowed both a request for a legal remedy and for an equitable constructive trust remedy to be sought, the procedure used by Plaintiff in this case, allowed by the trial court and now rejected by the Court of Appeals.

Oregon has not otherwise directly addressed whether the availability of a legal remedy bars constructive trust relief. However, other jurisdictions that have been confronted with similar situations (i.e. where the defendant attempts to retain benefits by arguing that only a legal claim is available) have expressly held that the availability of a legal remedy is irrelevant and does not bar access to a constructive trust remedy.

In *Heckmann v. Ahmanson*, 168 Cal.App.3d 119, 133-134, 214 Cal.Rptr. 177, 187-188 (Cal. App. 2 Dist., 1985) the California Court of Appeals explained its rejection of any consideration of the availability of an adequate remedy at law as follows:

> "C. Entitlement to a Constructive Trust.
>
> The Steinberg Group contends even if plaintiffs ultimately prevail in this action they would not be entitled to a constructive trust because they have an adequate remedy at law in the form of money damages. The adequacy of that remedy is demonstrated by the facts the proceeds consist of an ascertainable fund of money and there is no serious question as to the solvency of any of the

defendants. (Cf. *West Coast Constr. Co. v. Oceano Sanitary Dist.* (1971) 17 Cal.App.3d 693, 700, 95 Cal.Rptr. 169.) We disagree.

In California, as in most jurisdictions, an action in equity to establish a constructive trust does not depend on the absence of an adequate legal remedy. (*Bacon v. Grosse* (1913) 165 Cal. 481, 493, 132 P. 1027.) A constructive trust is '[t]he usual theory' upon which a plaintiff recovers wrongfully acquired assets. Only where the constructive trustee has dissipated the fund that would constitute the res of the constructive trust is it proper to award a judgment for money damages. (*St. James Armenian Church of Los Angeles v. Kurkjian* (1975) 47 Cal.App.3d 547, 553, 121 Cal.Rptr. 214.) Numerous cases have recognized the plaintiff's right to a constructive trust over a fund of money regardless of the defendant's solvency. In addition to *St. James*, supra, see: *Gray v. Sutherland,* supra; *Bank of America v. Ryan* (1962) 207 Cal.App.2d 698, 709-710, 24 Cal.Rptr. 739; *Efron v. Kalmanovitz* (1967) 249 Cal.App.2d 187, 196, 57 Cal.Rptr. 248; *Shepherd v. Miles & Sons, Inc.* (1970) 10 Cal.App.3d 7, 11-14, 89 Cal.Rptr. 23; *Zumbrun v. University of Southern California* (1972) 25 Cal.App.3d 1, 14, 101 Cal.Rptr. 499; *Alexandrou v. Alexander* (1974) 37 Cal.App.3d 306, 320-321, 112 Cal.Rptr. 307; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590, 600, 124 Cal.Rptr. 297. (See also Bogert, Trusts & Trustees (2d ed. [rev.] 1978) § 472, pp. 37-40; Restatement of Restitution (1937) § 160, comment (e). While there are jurisdictions that subscribe to defendants' view, they are in the minority. (See, e.g., *Markel v. Transamerica Title Ins. Co.* (1968) 103 Ariz. 353, 442 P.2d 97, 105-106; and see 5 Scott on Trusts [3d ed. 1967] § 462.3, pp. 3418-3419.)

It must be said there is little or no discussion in these authorities on the question whether the plaintiff had an adequate remedy at law. In *Bacon v. Grosse*, supra, **the court held that where, as in the case before us, there is a pre-existing fiduciary relationship between the parties the question of an adequate remedy at law does not arise.** 'The court, as a court of equity, acquires jurisdiction of the action, not because damages at law would be inadequate, but because it is an action to enforce a trust ....' (165 Cal. at p. 493, 132 P. 1027.) There is abundant historical precedent for the court's holding. (See Note, "Must The Remedy At Law Be Inadequate Before A Constructive Trust Will Be Impressed?" 25 St. John's L.Rev. 253, 289-290, 292.) In *Bainbridge v. Stoner* (1940) 16 Cal.2d

> 423, 106 P.2d 423, also involving a pre-existing fiduciary duty, the Court suggested one whose property has been wrongfully acquired by the defendant is, as a matter of justice, entitled to greater solicitude than a mere creditor of the defendant.
>
> 'The person holding the property may have acquired it through fraud, undue influence, breach of trust, or in any other improper manner and he is usually personally liable in damages for his acts. But the one whose property has been taken from him is not relegated to a personal claim against the wrongdoer which might have to be shared with other creditors; he is given the right to a restoration of the property itself.' (Id., at pp. 428-429, 106 P.2d 423; and see 5 Scott on Trusts, supra, § 521.3, p. 3659; Note, supra, 25 St. John's L.Rev. at pp. 288-289.)
>
> Money damages are also inadequate if, by that term, it is meant plaintiff is entitled to a judgment equal to the amount of money defendant wrongfully acquired plus the legal rate of interest. The purpose of the constructive trust remedy is to prevent unjust enrichment and to prevent a person from taking advantage of his own wrong. (*Martin v. Kehl* (1983) 145 Cal.App.3d 228, 237, 193 Cal.Rptr. 312 and cases cited therein.) Thus, under a constructive trust upon money, the plaintiff is entitled to trace the fund to its ultimate product or profit. (*Brodie v. Barnes* (1942) 56 Cal.App.2d 315, 321-323, 132 P.2d 595; *Haskel Engineering & Supply Co. v. Hartford Acc. & Indem. Co.* (1978) 78 Cal.App.3d 371, 375, 144 Cal.Rptr. 189.) By the time plaintiff obtains a final judgment, the original fund may have grown far greater than the legal rate of interest would recognize. To allow the defendant to pocket the difference would reward the defendant for his wrongdoing."

(Bold added)

In *Willis v. Donnelly*, 118 S.W.3d 10 (Tex. App., 2003) the Texas Court of Appeals similarly concluded that a plaintiff is entitled to seek both legal and equitable remedies and to elect after trial:

> "However, because the constructive trust partially provides a double recovery for breach of fiduciary duty and partially secures damages for breach of contract, which we are reversing and remanding, we remand for an election of remedies pertaining to the

breach of fiduciary duty and reverse that portion of the constructive trust relating to breach of contract." Id. at 22

* * *

"B. Money Damages Available

* * * Appellants contend that the trial court erred in awarding equitable relief because Donnelly failed to establish that he lacked an adequate remedy at law. In other words, appellants claim that where money damages are available, a constructive trust may not be imposed.[19] [The footnote points out that damages of $1.7 million for breach of fiduciary duty were found by the jury.]

The thrust of appellants' argument is that (1) a constructive trust is an equitable remedy; (2) equitable remedies such as injunctions and specific performance require a lack of an adequate remedy at law; (3) thus, an inadequate remedy at law is a prerequisite to imposition of a constructive trust; (4) money damages are available to compensate any breach of fiduciary duty in this case; and (5) Donnelly is accordingly not entitled to a constructive trust. However, the forms of constructive trusts are 'practically without limit' and may be 'applied wherever necessary for the obtaining of complete justice, *although the law may also give the remedy of damages against the wrong-doer.*' Fitz-Gerald v. Hull, 150 Tex. 39, 237 S.W.2d 256, 263 (1951) (emphasis added); *Wheeler v. Blacklands Prod. Credit Ass'n.*, 627 S.W.2d 846, 849 (Tex.App.-Fort Worth 1982, no writ); *cf.* RESTATEMENT OF RESTITUTION § 160 cmt. e (1937) (constructive trust appropriate for cases involving title to land or where 'payment or transfer was procured by an abuse of a fiduciary or confidential relation.')." Id. at 37-38

Inherently, unjust enrichment always carries with it the ability to monetize the amount of the unjust enrichment and to enter a judgment for it. Some equitable remedies have been said to be available only after an inquiry as to whether there is an "adequate" remedy at law. That principle has never been applied to constructive trusts. To graft that arbitrary limit onto the

availability of a constructive trust remedy ignores a long history of case law and makes unavailability an appropriate remedy.

The judicial trend is to simplify, not arbitrarily complicate, access to justice. The procedural distinction between law and equity has been legislatively eliminated. ORCP 2. The right to plead alternative theories, legal and equitable, even when they are inconsistent, is expressly permitted. ORCP 16C.

One can seek alternative remedies and defer choosing which remedy to select up until a judgment is entered. As this court stated in *Colonial Leasing Co. v. Tracy,* 276 Or 1193, 557 P2d 639 (1976), when a party has multiple possible remedies "[o]rdinarily, an election is not made until a judicial proceeding has gone to judgment on the merits." 276 Or at 1196-1197.

The Court of Appeals' decision is inconsistent with case law and even its own analysis in a somewhat analogous circumstance. *Venture Properties,Inc. v. Jeff Parker,* 223 Or App 321, 195 P3d 470 (2008) demonstrated that one can sue for both an equitable remedy and a legal remedy at the same time. There the plaintiff sued alternatively for rescission and restitution or in the alternative for damages at law. The trial court denied the right to do so.

The Court of Appeals reversed, holding that one could seek both an equitable and a legal remedy. Id. at 325-326. Of some interest, because of the nature of the two remedies, the Court of Appeals, quoting *Sheppard v. Blitz,* 177 Or. 501, 163 P.2d 519 (1945)[4] pointed out that both remedies remained available unless events -- a clear manifestation of affirmance would make rescission unavailable; disaffirmance would not preclude damages prior to judgment or a change of position based on reliance -- made one of the remedies substantively unavailable. In this case there was no such potential incompatibility.

If the unavailability of a legal remedy were in fact a requirement for obtaining a constructive trust, anyone seeking a constructive trust would be at risk if a defendant argued at trial that the plaintiff should have asked for money instead. If that were the law, which is what the Court of Appeals' Opinion holds, a plaintiff would be in an untenable position. To protect himself, he would have to seek monetary damages, also; but the act of

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[4] In *Sheppart v. Blitz*, the case went to judgment on the theory of rescission and restitution. That result was reversed on appeal due to a defect of parties and remanded. The plaintiff then proceeded to seek the legal remedy of damages. This Court held that there was no prior election of remedies, and the plaintiff's judgment for damages was affirmed.

That case stands for the proposition that when a party is induced to enter into a contract by fraud, both a legal and an equitable remedy are available: a) Rescission of the contract and restitution, an equitable remedy; and b) Affirmation of the contract and a legal action for damages for fraud. Access to a legal remedy and to an equitable remedy coexists.

seeking monetary damages would potentially prohibit the availability of a constructive trust.

The Court of Appeals relied on its holding in *Kazlauskas v. Emmert*, 248 Or App 555, 275 P3d 171 (2012). That was a claim that pitted specific performance of a contract against an action for damages for breach of contract. In that context, the rule restricting the equitable remedy of specific performance when there is an adequate remedy at law has often been stated. See, e.g. *Alsea Veneer, Inc. v. State*, 318 Or. 33, 862 P.2d 95 (1993).

The two remedies pursued by Plaintiff were neither mutually exclusive nor even coextensive. The theoretical availability of one should not preclude the availability of the other. Very similar and analogous to *Sheppart v. Blitz* and *Venture Properties, Inc. v. Jeff Parker*, the two remedies were calculated based on two different metrics.

The measure of damages under the legal claim was the equity in the property at the time of his taking. It appears that the jury may have concluded that Defendant had not yet realized any profit since he had not sold or developed the property. So it awarded only nominal actual damages. Or the jury may have been influenced by Defendant's argument that Plaintiff would not have been able to realize the equity in any event.

The benefit from the constructive trust remedy sought by Plaintiff depends on the value of the property after it had litigated and obtained the

right to control the property, several years later. The remedies would never be coextensive. Because Defendant had caused the problem by breaching his fiduciary duty, Plaintiff should be allowed to elect the remedy that it preferred.

What the Court of Appeals held was that because Plaintiff pursued both claims to conclusion before choosing, the equitable claim was no longer available in light of the form of the final equitable judgment: the sale of the property and the distribution of the proceeds. But that resolution was the appropriate means of carrying out the constructive trust remedy in the circumstances of this case and was materially dissimilar from its damage claim.

Plaintiff had been administratively dissolved, a point that Defendant emphasized often. Winding up its affairs was all that it could do. The form of judgment proposed by Plaintiff "went to the bottom line" and advanced the appropriate means of balancing the interests of both parties: Defendant's recoupment of what he paid to satisfy Plaintiff's debt, and Plaintiff's right to whatever equity existed. That the trial court adopted that practical resolution – which would allow Plaintiff to pay its creditors and to then distribute any excess to its members -- should not make the remedy of constructive trust unavailable.

The Court of Appeals' decision undermines extensive case law concerning the availability of a constructive trust as well as ORCP 16C's express permission to state alternative legal and equitable claims and to then defer deciding what remedy to elect, prior to judgment, but after the results are known. It also left the wrongdoer with the benefit of his misconduct and left the party who was wronged without the ability to recover the equity in its property.

CONCLUSION

The Court of Appeals' decision reversing the trial court's imposition of a constructive trust should be reversed and the trial court's judgment reinstated. The case should then be remanded to the Court of Appeals to consider Plaintiff's assignment of error with regard to whether equity can award punitive damages.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2). The word count of this brief (as described in 5.05(2)(a)) is 5,481 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

Dated this July 25, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that I served two true copies of the foregoing PETITIONER EVERGREEN WEST BUSINESS CENTER, LLC'S OPENING BRIEF ON THE MERITS
on

Mr. Hollis McMilan
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Attorney for Respondent Terry W. Emmert

on July 25, 2013 by first class mail, postage prepaid at the above address.

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