
In the
Supreme Court
of the
State of California

S139237

CITY OF STOCKTON et al.,

Petitioners,

v.

THE SUPERIOR COURT OF SACRAMENTO COUNTY,

Respondent,

CIVIC PARTNERS STOCKTON, LLC,

Real Party in Interest.

CALIFORNIA COURT OF APPEAL · THIRD APPELLATE DISTRICT · NO. C048162
SUPERIOR COURT OF SACRAMENTO · HON. JEFFREY GUNTHER · 03AS00193

REPLY BRIEF ON THE MERITS

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I. The city's answer brief substantially contradicts the second amended complaint.

The answer brief widely misstates and discards facts in the second amended complaint and argues allegations that contradict it. The city concedes that it is bound by the complaint,¹ but rejects it.

The effort here is to undermine Civic's claim that the agency was unjustly enriched when it persuaded Civic to yield its plans, its tax-credit partnership, and its other assets to the agency for the use of Mr. Youssefi, but later refused to return them to Civic when the agency refused to ratify the settlement. The agency argues that it was Civic, not the agency or the city, that breached Civic's hotel development agreement and the lease.² It claims Civic demanded improper payments from the agency.³

¹ Answer brief, 6.

² Answer brief, 6.

³ *Ibid.*

The second amended complaint alleges exactly otherwise.

The city repudiated the hotel lease in August 2001.⁴ With the agency's consent, Civic survived this loss by substituting senior housing for the city's lease, to be financed by state and federal tax credits.⁵ Civic spent many months in 2001 and several hundred thousand dollars preparing housing plans and the tax-credit application due in March 2002. Civic invested \$800,000 with Paramount Financial in a partnership to market the tax credits.⁶

Civic was ready to make the tax-credit application when Mr. Pinkerton and Mr. Youssefi first approached

⁴ Second amended complaint, ¶¶ 4, 6.

⁵ Second amended complaint, ¶¶ 13-15.

⁶ *Ibid.*

Civic.⁷ Mr. Pinkerton called Civic to say that the agency wanted to substitute Youssefi for Civic in the upper floors of the hotel—to take over Civic’s housing application.⁸

Civic was dumbfounded.⁹ Pinkerton reassured Civic that its hotel agreement was not in default and that the agency recognized that it needed Civic’s consent to the transfer to Youssefi.¹⁰ The agency was prepared to restore Civic’s investment in the hotel.¹¹ Pinkerton, Youssefi, and Youssefi’s lawyer reiterated this offer in a visit to Civic’s offices.¹² Pinkerton repeated in his January email that he was authorized to negotiate restoring Civic’s

⁷ Civic offer of proof, ¶ 2.

⁸ Civic offer of proof, ¶¶ 1-4.

⁹ Second amended complaint, ¶ 17; Civic offer of proof, ¶ 3.

¹⁰ Civic offer of proof, ¶ 4 and figure 1, ¶ 8.

¹¹ Civic offer of proof, ¶ 4.

¹² Civic offer of proof, ¶¶ 6-7.

investment in the hotel¹³—an offer wholly at odds with a claim that Civic was in breach.¹⁴ Pinkerton approved the payments the agency agreed to make, which he would certainly not have done if Civic was in default.¹⁵

The agency did not declare Civic’s hotel agreement in default when the agency granted Mr. Youssefi a duplicate hotel agreement in March 2002, which clouded Civic’s right of possession¹⁶—two developers could not hold simultaneous possession of the same space. The agency would have ejected Civic if it believed Civic was in default, as it later claimed.

The agency asserts for the first time that Mr. Youssefi was working “on a different senior housing alternative

¹³ January 29 email, Civic offer of proof, figure 1.

¹⁴ January 29 email, ¶ 6,

¹⁵ March 15 memo, Civic offer of proof, figure 3.

¹⁶ Second amended complaint, ¶ 28.

for the Hotel,”¹⁷ suggesting that Youssefi and the agency thus did not convert Civic’s architectural plans and other investments. Mr. Youssefi and the agency in fact took over Civic’s tax-credit application¹⁸ and converted Civic’s architectural plans.¹⁹ They took as their own Civic’s tax-credit partnership interest with Paramount Financial and Civic’s right to possession of the hotel.²⁰

The agency claims that Civic *demand*ed repayment of its hotel investment, inferring that the negotiation to restore it originated not with the agency, but with Civic.²¹ This is pure invention. Mr. Pinkerton and soon Youssefi and Youssefi’s lawyer approached Civic with the offer to repay Civic’s investment in return for Civic’s blessing on

¹⁷ Answer brief, 6.

¹⁸ Second amended complaint, ¶¶ 36-37.

¹⁹ Second amended complaint, ¶ 30; Civic offer of proof, ¶ 18.

²⁰ *Ibid.*

²¹ Answer brief, 6.

Mr. Youssefi.²² The offer was made before Civic said a word. Civic was surprised to be confronted with Youssefi, who came from nowhere.²³ Mr. Pinkerton repeated his offer in his January email, then in March agreed to the final payments, transfers, and set-asides to Civic²⁴—all of them at war with the notion that Civic was in breach.

The agency’s most egregious misstatement claims that paragraph 9.7 of Civic’s hotel agreement gave the agency the right to seize Civic’s plans without paying for them.²⁵ Here is paragraph 9.7:

Plans, Data, and Approvals. If this Agreement is terminated pursuant to Section 9.2 or 9.4, then the Developer shall promptly assign and deliver to the Agency copies of all plans, studies, reports, data, and specifications for the Project . . . (collectively, the “Planning Documents”) *upon receipt of payment from the Agency for the Planning Documents.* . . .²⁶

²² Civic offer of proof, ¶¶ 6-7.

²³ *Id.* at ¶ 4.

²⁴ Memo of March 15, Civic offer of proof, figure 3.

²⁵ Answer brief, 7.

²⁶ Hotel development agreement ¶ 9.7 [emphasis added]

The agency seized the plans from Civic’s architect with no word to Civic that the agency invoked paragraph 9.7²⁷ and after the agency reassured Civic and Civic’s bankers that the agency and Civic had settled, that the agency was raising the funds to meet its settlement commitments, and that the agency would repay Civic’s investment.²⁸ Only with Civic’s assets in its grasp did the agency reverse itself to claim that Civic was in breach when Mr. Youssefi took over²⁹—a claim at odds with the agency’s earlier deference to Civic. Never had the agency said Civic was in breach, which it surely would have said if it were true. Nowhere in Civic’s hotel agreement was there authority to seize Civic’s investment, even when the agency later claimed Civic was in breach and sought to disown it.

²⁷ Second amended complaint, ¶¶ 31-34.

²⁸ Civic offer of proof, ¶¶ 21, 14-21.

²⁹ Second amended complaint, ¶ 38; Civic offer of proof, ¶ 22.

II. Despite Civic’s careful and repeated explanation of its restitution claim, the agency mischaracterizes it as “implied contract.”

The agency repeatedly labels Civic’s restitution claim as “implied contact,” which it claims is within the claims act.³⁰ Restitution is not contract.

The implied in law contract is often called a quasi contract. The most important thing about this implied contract or quasi contract is that it is not a contract in any sense. It is a rule of law that requires restitution to the plaintiff of something that came into the defendant’s hands but in justice belongs to the plaintiff.³¹

Perillo makes the same point.

When the parties manifest their agreement by words, the contract is said to be express. When it is manifested by conduct it is said to be implied in fact. . . . [B]oth are true contracts formed by mutual manifestation of assent. . . . A contract implied in law is not a contract at all but an obligation imposed by law to do justice even when it is clear that no promise was ever made or intended.³²

³⁰ Answer brief, 2-3, 4-5, 13; Agency motion for judicial notice, 3.

³¹ D. Dobbs, *THE LAW OF REMEDIES; Equity, Damages, Restitution* § 4.3(3) at 385 (2d ed. 1993).

³² J. Calamari & J. Perillo, *THE LAW OF CONTRACTS* § 1.11 (4th ed. 1998).

*Minsky*³³ and *Holt*³⁴ explicitly coincide, but the agency talks around them. *Minsky* and *Holt* hold that restitution is not damages, even when the defendant dissipates the plaintiff's assets and the plaintiff must sue for money to recover from the defendant its unjust enrichment.³⁵

Restitution is not “money or damages.”

Relation of Restitution to Equity. The substantive basis of restitution is related to substantive equity. That is, courts applying substantive equity and courts applying the law of unjust enrichment are both applying the law of “good conscience.” Remedially and historically speaking, however, restitution may be either a purely legal claim or a purely equitable claim. . . . [I]f the defendant fraudulently obtained title to Blackacre from the plaintiff, the plaintiff might ask the court to declare a “constructive trust,” the upshot of which would be to order the defendant to reconvey Blackacre to the plaintiff. Such a claim is restitutionary and also historically regarded as equitable. . . . As we have seen, *restitution* is not *damages*; restitution is a restoration required to prevent unjust enrichment.³⁶

³³ *Minsky v. City of Los Angeles*, 11 Cal.3d 113, 121 (1974).

³⁴ *Holt v. Kelly*, 20 Cal.3d 560, 565 (1978).

³⁵ *Minsky*, at 120-121; *Holt*, at 565.

³⁶ D. Dobbs, THE LAW OF REMEDIES, note 1, at 370.

To this the agency responds that when Civic claims the illicit profit made with Civic’s assets, its claim is not restitution, but “‘money or damages’ under the tort claims act.”³⁷ This is error. Restitution recovers the defendant’s illicit profit from the plaintiff’s assets.

[R]estitution claims are bound by this major unifying thread. Their purpose is to prevent the defendant’s unjust enrichment by recapturing the gains that the defendant has secured in the transaction. . . . One whose money or property is taken by fraud or embezzlement or by conversion is entitled to restitution measured by the defendant’s gain if the victim prefers that remedy to the damage remedy.³⁸

California and the Restatement of Restitution agree.³⁹

³⁷ Answer brief, 4.

³⁸ D. Dobbs, *THE LAW OF REMEDIES: Damages, Equity, Restitution* 365-367, 370 (2d ed. 1993).

³⁹ *Brazil v. Silva*, 181 Cal. 490, 494 (1919); *Rankin v. Satir*, 75 Cal.App.2d 691, 695 (1946); *Haskel Engineering & Supply Co. v. Hartford Acc. and Indem. Co.*, 78 Cal.App.3d 371, 375-376 (1978); *Gladstone v. Hillel*, 203 Cal.App.3d 977, 989 (1988).

RESTATEMENT OF RESTITUTION § 160, comment *d* at 644 (ALI 1937) provides:

[W]here the defendant makes a profit through the consciously wrongful disposition of the plaintiff’s property, he can be compelled to surrender the profit to the

The agency claims that the failure of the agency to adopt the Pinkerton settlement is fatal to restitution. This is precisely backwards. Where the parties negotiate for a contract, and the plaintiff transfers assets to the defendant on the faith that the agreement will be made, it is conversion for the defendant to retain the assets but refuse to make the settlement. If the agency had returned Civic's assets, the refusal to settle might have been

plaintiff and not merely to restore to the plaintiff his property or its value. . . .

Section 202, comment c, states:

If the property [acquired by conversion] is or becomes more valuable than the property used in acquiring it, the profit thus made by the wrongdoer cannot be retained by him; the person whose property was used in making the profit is entitled to it. The result is, it is true, that the claimant obtains more than the amount of which he was deprived, more than restitution for his loss; he is put in a better position than that in which he would have been if no wrong had been done to him. Nevertheless, since the profit is made from his property, it is just that he should have the profit rather than that the wrongdoer should keep it.

legitimate. Seizing its assets crossed the border to conversion, the point of restatement section 56(1).

Civic negotiated for a contract it believed the agency genuinely wanted, parting with assets believing from what it was told that they would be properly credited to Civic. The agency could not at one and the same time refuse to sign Pinkerton's settlement and retain Civic's property, especially when Civic had made it clear in the February 19 letter countersigned by the agency that the transfer of assets was in trust based on their final settlement.

This is Restatement of Restitution § 56:⁴⁰

(1) A person who transfers property to, or to the account of, another, manifesting that he is doing this as the offer of a contract or for a specified purpose, is entitled to regain the subject matter if the offer is not accepted or if the purpose is not carried out and if the other has possession or control of the subject matter.

(2) A person who confers upon another a benefit which cannot be restored in specie, manifesting that he does so as the offer of a contract with the other or for a specified purpose, is not entitled to restitution

⁴⁰ RESTATEMENT OF RESTITUTION § 56(1) (ALI 1937).

if the other does not accept the offer or if the purpose is not carried out.

Subsection 1 applies while the defendant remains in possession of the plaintiff's property. Disposing of the property usually constitutes acceptance of the offer.⁴¹ If not, the defendant must restore their value and their proceeds.⁴² Subsection 2 applies only when one person transfers a benefit to another without the other's request.⁴³ A defendant who converts plaintiff's assets must make restitution.⁴⁴ When property is obtained by fraud, the plaintiff may sue for deceit or waive the tort and sue for restitution.⁴⁵ Knowing that Civic would not give up its

⁴¹ It may not be acceptance of the offer here, because of the policy in cases like *Zottman*, which protect the statutory mode of contracting for cities.

⁴² RESTATEMENT § 56, comment on subsection 1, page 220.

⁴³ RESTATEMENT § 56, comment on subsection 2, page 222.

⁴⁴ RESTATEMENT OF RESTITUTION § 128 (ALI 1937).

⁴⁵ RESTATEMENT § 128, comment *d*, § 130.

plans or other assets without the restoration the agency promised, the agency cannot defend on the statute of frauds—arguing that its board did not sign the settlement—while enriching itself with the assets it winkled out of Civic on the commitment that it would settle.

When the contract itself is unenforceable, restitution is usually the only remedy available for benefits the plaintiff has conferred upon the defendant by part performance. For instance, if the plaintiff partly performs an agreement that is unenforceable because of the statute of frauds, the plaintiff may have restitution for the value of his performance.⁴⁶

The 150-year *Argenti-McCracken* line of California cases is precisely to this effect, is discussed by Civic in its opening brief, but is ignored by the agency. A public entity is liable for restitution so long as the plaintiff is not seeking to circumvent the statutory “mode of contracting.”⁴⁷

⁴⁶ D. Dobbs, *LAW OF REMEDIES*, note 1, at § 4.2(1).

⁴⁷ See Civic’s opening brief, 40 n. 98.

III. The city and the agency ignore the legislative note to section 814, which determines the meaning of the statute.

The agency argues that the court should indulge the “whole scheme” of the tort claims act,⁴⁸ but ignores section 814, which establishes that scheme. It exempts contract from the tort claims act—not by interpretation or surmise, but by the legislative note and the title to the section. None of the *Hart/Loehr* line of cases the city and agency rely on here discovered this language, and the answer brief ignores it.

The answer brief does a good job of pulling threads from the tort claims act, which anyone might do from an awkward law, but the answer brief remains at odds with section 814. The brief makes an important error in relying on section 930.2, which allows a city to impose on its contracts a requirement for a written claim on a

⁴⁸ Answer brief, 18

dispute, and which suggests in turn that no such requirement exists except when written into the contract.

IV. The city and the agency argue, against the allegations in the second amended complaint, that they did not have time to investigate and settle with Civic and that Civic did not “prove” reliance on the representations made by Mr. Pinkerton.

The answer brief pleads that the city and agency were not given time to investigate Civic’s claim, to settle the claim, or to budget for its payment.⁴⁹ This is another basic contradiction of the second amended complaint.

When pressed to explain what it could possibly not have known about Civic’s claim after its negotiations with Civic in early 2002, the agency claims ignorance (1) of Civic’s name and address, (2) of the facts giving rise to Civic’s claim, (3) of the name of the public employee causing Civic’s injury, and (4) of a description of what the agency owed Civic.⁵⁰

⁴⁹ Answer brief, 33.

⁵⁰ Answer brief, 35-36.

None of these claims withstands minimal scrutiny. Section 10.1 of Civic's 1998 hotel agreement names Civic Partners Stockton, LLC, the developer of the hotel, giving its addresses in Costa Mesa and Modesto. Mr. Pinkerton knew where to find Civic; he met in Civic's offices with Civic and Mr. Youssefi in January 2002.⁵¹ Claiming ignorance of the obvious illustrates how shallow the agency's position has become.

There was no "employee" who caused Civic's injury; this refers to a tort claim, an auto accident. The "facts giving rise to the claim" were better known to the agency than to Civic—they were the agency's scheme to substitute Youssefi for Civic when Civic held the hotel contract and the agency's blessing to install senior housing in the hotel. The agency approached Civic to avoid a breach if the agency imposed Mr. Youssefi on Civic. The agency did

⁵¹ Civic offer of proof, ¶ 6.

not want Civic to refuse to part with the investments that Youssefi wished to claim as his own when he applied for the tax credits.

A “general description” of the agency’s obligation, which the agency claims is missing, is set expressly forth in the March 15, 2002 memorandum of the amounts the agency acknowledged were due to Civic.⁵²

These efforts to avoid the ripening of Civic’s claim are remarkably close to *Ocean Services Corporation v. Ventura Port District*, 15 Cal.App. 4th 1762 (1993). The port district, afflicted with problems of its own making, induced Ocean Services not to proceed against the district for breach of contract, but to await a promised settlement with the district when the district had solved its problems. Months later, unable to cure its own breach, the district repudiated the settlement and claimed for the first time

⁵² Memorandum of March 15, Civic offer of proof, figure 3.

that Ocean Services was in breach. The court saw this for the mischief it was:

The claims statute may not be invoked to penalize a plaintiff who at the behest of a public entity has been induced not to take action, but instead to wait until the conflict has stabilized.⁵³

Civic became confident in the agency's proposal and gave the agency conditional possession of Civic's assets, especially when the agency repeatedly represented that it was raising the funds to pay for them.⁵⁴ Civic entrusted its plans to the agency in its February 19 letter, which the agency countersigned acknowledging its commitment not to give them to Mr. Youssefi until the settlement was signed. The agency breached this trust.⁵⁵ It then seized the balance of the plans from Civic's architect in violation of section 9.7 of the hotel agreement. The agency refused to pay for the plans, claiming it did not know how much

⁵³ 15 Cal.App.4th 1762, at 1776.

⁵⁴ Civic offer of proof, ¶¶ 14-20.

⁵⁵ Civic offer of proof, ¶¶ 16-21.

Civic had paid its architect, even as the agency sat with the architect and need only have asked.⁵⁶

VI. The agency misstates the test for estoppel to defend under the tort claims act.

The agency complains Civic does not satisfy the *Driscoll* criteria for claims act estoppel.⁵⁷ *Frederichsen*,⁵⁸ which relaxed the *Driscoll* test,⁵⁹ allegedly does not apply because “Civic did not prove reliance” on the representations of the agency.⁶⁰

This is a another attack on the second amended complaint. Civic agreed not to claim breach of contract in deference to the agency’s approach.⁶¹ It relied on the

⁵⁶ Second amended complaint, ¶ 34.

⁵⁷ Answer brief, 43.

⁵⁸ *Frederichsen v. City of Lakewood*, 6 Cal.3d 353 (1971).

⁵⁹ *Id.* at 358.

⁶⁰ Answer brief, 44-45.

⁶¹ Civic offer of proof, ¶¶ 10-13.

agency’s request for a settlement in return for restoration of Civic’s investment. The agency makes the error the court of appeal made—asserting that Civic has not “proved” elements of its claim for estoppel.⁶² (The court of appeal held that Civic had not proved that the agency knew of Civic’s claims before Civic filed suit.)

Civic has not been permitted or required to prove its case for estoppel, since it has not received the hearing on the estoppel that it must have.⁶³ It has offered to prove the facts, including reliance, that readily satisfy the tests for estoppel arising from a series of deceptive acts by the agency.

It does not matter that Civic did not file a claim, especially after it relied on the agency’s representations

⁶² Answer brief, 44-45.

⁶³ *California Cigarette Concessions v. City of Los Angeles*, 53 Cal.2d 865, 868 (1960); *Rand v. Andreatta*, 60 Cal.2d 846, 850 (1964); *Driscoll v. City of Los Angeles*, 67 Cal.2d 297, 305 (1967); *John R. v. Oakland Unified School Dist.*, 48 Cal.3d 438, 446 (1989) (remand required for hearing on estoppel).

and lost possession of its assets. Without deceiving Civic and gaining its reliance, the agency would never have gained possession of Civic's assets. Estoppel to plead the tort claims act excuses even total lack of compliance in the right case.⁶⁴

Driscoll held that the public entity must know the facts and must intend that its conduct be acted on; the other party must be ignorant of the truth and must rely on the conduct of the entity.⁶⁵ *Frederichsen* held that not all the *Driscoll* elements must be present "where the complaint alleges facts which, if true, would establish that the government has acted in an unconscionable

⁶⁴ *Rand v. Andreatta*, 60 Cal.2d 846 (1964); *Frederichsen v. City of Lakewood*, 6 Cal.3d 353 (1971).

⁶⁵ *Driscoll v. City of Los Angeles*, 67 Cal.2d 297 (1967).

manner.”⁶⁶ False or misleading statements about a claim or the settlement of a claim estop the entity.⁶⁷

Whether estoppel is made out is a question of fact, not to be decided by the court of appeal or even in the supreme court, but in the trial court,⁶⁸ not on demurrer, but in a hearing.⁶⁹ This case by all the rules must be remanded to the trial court for a hearing on estoppel.

VII. The federal and California cases explicitly hold that Civic’s restitution claims are not preempted by the Copyright Act.

Del Madera Properties v. Rhodes and Gardiner, 820 F.2d 973 (9th Cir. 1987), and *Gladstone v. Hillel*, 203

⁶⁶ *Frederichsen v. City of Lakewood*, 6, Cal.3d at 358.

⁶⁷ *John R. v. Oakland Unif. School Dist.*, 48 Cal.3d 438, 445 (1989).

⁶⁸ The court of appeal held that Civic had not proved to the trial court that the city knew of Civic’s claims when Civic filed suit, when there had been no hearing on that issue, and when Civic had alleged that the city knew Civic’s claims a good year before it sued the city.

⁶⁹ 1 CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE § 5.83 (4th ed. 2006).

Cal.App.3d 977 (1988), discuss copyright act preemption, when rights under state law are equivalent to exclusive rights within the general scope of copyright law.⁷⁰ To avoid preemption, the state claims must be “qualitatively different”—they must have an “extra element.”⁷¹

Where there is unjust enrichment or promissory estoppel, the extra element is present.⁷² Thus, where there is a promise implied from the defendant’s conduct to pay the reasonable value of material the plaintiff discloses to the defendant, the implied promise constitutes the extra element.⁷³ Where there is an implied promise to pay

⁷⁰ *Del Madera*, at 976; *Gladstone*, at 987.

⁷¹ *Del Madera*, at 977; *Gladstone*, at 987.

⁷² *Del Madera*, at 978; *Gladstone*, at 987 (fraud or conversion satisfy the extra-element test).

⁷³ *Grosso v. Mirimax Film Corp.*, 383 F.3d 965, 978 (9th Cir. 2004).

reasonable value to avoid an unjust enrichment of the defendant, the extra element is present.⁷⁴

Dated: June 26, 2006

THE LAW OFFICES OF MALCOLM A. MISURACA

By _____
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Certificate of Length

I, Malcolm A. Misuraca, say:

1. This reply brief is produced in WordPerfect 12.0 in Bookman Old Style, 15 point, except for quotations and footnotes produced in 13 point, and contains 4151 words, according to the program that produced it.

⁷⁴ *Landsberg v. Scrabble Crossword Game Players, Inc.*, 802 F.2d 1193 (9th Cir. 1986).

The courts do not always distinguish between an implied contract, i.e., one fashioned by conduct under Civil Code § 1621, and unjust enrichment, which is not a contract but a remedy of restitution. Either will suffice to avoid preemption. Compare *Grosso v. Mirimax Film Corp.*, *supra*, and *Landsberg v. Scrabble Crossword Game Players, Inc.*, *supra*. In *Grosso* the court speaks of a traditional implied contract claim under *Desny v. Wilder*, where in *Landsberg*, the court explicitly relies on unjust enrichment.

2. This brief complies with the rules of capitalization in the Chicago Manual of Style (14th ed. 1993) and The New York Times Manual of Style and Usage (1999).

Dated: June 26, 2006

Malcolm A. Misuraca