

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

PETER C. FESSENDEN,)
CHAPTER 13 TRUSTEE, ET AL.,)
)
 PLAINTIFFS)
)
v.)
)
RONALD A. BOUTET, ET AL.,)
)
 DEFENDANTS)

Civil No. 96-304-P-H

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After a bench trial held on October 6, 7, 30, and 31, 1997, I make the following findings of fact and conclusions of law. A “first draft” version of these findings of fact and conclusions of law appears in the record on October 7 and November 5, 1997.

I. FINDINGS OF FACT

1. On September 15, 1988, Holt Excavation, Inc. (“HEI”) assumed “[a]ll liabilities and assets of Jerome Holt dba Holt Excavation” in a written document (“Agreement”).

2. At that time, HEI’s shareholders were Ronald Boutet (“Boutet”) (25%), Stephen Kurutz (“Kurutz”) (25%), and Jerome Holt (“Holt”) (50%).

3. From August, 1988 to November, 1989, HEI worked on the Dunegrass project site in Old Orchard Beach, Maine. Dunegrass was owned by Sealand Development Corporation (“Sealand”), of which Boutet and Kurutz were both 50% owners.

4. In October 1989, Kurutz transferred his 25% share of HEI to Boutet, making Boutet and Holt each 50% owners of HEI. Additionally, Kurutz transferred his stock in Sealand to Boutet so that Boutet became the 100% owner of Sealand.

5. Dunegrass was shut down in November 1989 because the project ran out of funds.

6. Four and one half years later, on June 30, 1994, Boutet, Barbara Boutet (“Mrs. Boutet”), Holt and HEI entered into a Settlement Agreement (“Settlement Agreement”) to settle a mechanics lien that HEI held against Sealand on Dunegrass. Under the Settlement Agreement, Holt transferred his 50% ownership in HEI to Boutet and Boutet became the sole owner of HEI. (Boutet was already the sole owner of Sealand. See ¶ 4, supra.)

7. In return for Holt’s share of HEI, the Boutets agreed to compensate and indemnify Holt according to Paragraphs 2-4 of the Settlement Agreement.

A. THE NOTE

8. Under Paragraph 2 of the Settlement Agreement,¹ Boutet and Mrs. Boutet agreed to pay Holt a total of \$80,000 over the following four years,² and signed a Promissory Note (“Note”) for that amount.

9. Mrs. Boutet secured the Note by signing a Mortgage Deed to property she owned at 551 Ferry Road, Saco, Maine.

10. It is undisputed that Boutet and Mrs. Boutet have defaulted on their obligations under the Note.

11. The parties have stipulated that the current indebtedness under the Note with interest and accelerated payments is \$105,650.

12. Under the terms of the Note, Holt can collect attorney fees from Boutet and Mrs. Boutet that he incurs in enforcing the Note against them.

¹ Paragraph 2 of the Settlement Agreement states:

In exchange for the transfer of said shares of the Corporation’s stock, Mr. Boutet shall pay Holt One Hundred Thousand Dollars (\$100,000.00) as follows:

- a) \$20,000.00 by bank or certified check upon the execution of this Agreement;
- b) \$80,000.00 in the form of the Promissory Note attached hereto as Exhibit A, executed by Mr. and Mrs. Boutet, requiring a payment of \$30,000.00 on February 11, 1995 and additional payments of \$16,667.00 on February 11, 1996, February 11, 1997 and February 11, 1998. Said Promissory Note shall be secured by a second mortgage in the form of Exhibit B attached hereto, granted by Mrs. Boutet to Holt on real estate owned by Mrs. Boutet located at 551 Ferry Road in Saco, Maine.

² The Court recognizes that the parties stipulated to the fact that Mrs. Boutet’s liability under the Settlement Agreement is limited to Paragraph 2.

B. THE INDEMNIFICATION

13. Under Paragraph 3 of the Settlement Agreement (“the Indemnity Provision”), Boutet personally assumed all HEI debt for which Holt was personally liable that had been incurred during the period of August 1, 1988 through January 31, 1990 (“the Indemnity Period”) and that was related to Dunegrass.³ As stated in ¶ 1 of these Findings, HEI had

³ Paragraph 3 of the Settlement Agreement states:

As further consideration for the transfer of Holt’s stock to Mr. Boutet, Mr. Boutet hereby assumes and agrees to make payment of all existing debts, liabilities and obligations of the Corporation which Holt is personally liable for or hereinafter found to be personally liable for, penalties or assessments, of whatever nature relating to the Dunegrass project in Old Orchard Beach, Maine, incurred during the period August 1, 1988 through January 31, 1990, including without limitation certain of the debts, liabilities and obligations described in Exhibit C attached hereto and incorporated herein as well as such other debts or liabilities of the Corporation which Holt is personally liable for or hereinafter found to be personally liable for relating to the Dunegrass project or which payment is sought within two years of the date of this Agreement.

Mr. and Mrs. Boutet hereby agree to indemnify, defend and hold Holt harmless from and against any and all claims, demands, liabilities, obligations, actions, suits, proceedings, losses, damages, costs, expenses, assessments, judgments, recoveries and deficiencies, including interest, penalties and reasonable attorneys’ fees of every kind and description, contingent or otherwise occasioned by, arising out of, resulting from or in any way related to (1) the debts, liabilities and obligations assumed by Mr. Boutet hereunder; and (2) all of Mr. and Mrs. Boutet’s other obligations arising hereunder. Payment of the indemnification obligations set forth herein shall be guaranteed by Oceanside Lounge Trust and Brunswick Hotel Corporation pursuant to Guaranties attached hereto as Exhibit D and Exhibit E, and secured by mortgages of properties owned by said Oceanside Lounge Trust and Brunswick Hotel Corporation in the form of Exhibit F and Exhibit G attached hereto.

The plaintiffs stated during the trial that they were proceeding only under the first part of the first paragraph. Specifically, the plaintiffs stated that they were not pursuing their claim under the language following “as well as.” The Indemnity Provision makes clear that Boutet’s obligation to indemnify Holt only extends to *certain* of the debts listed in Exhibit C, an itemized list of debts attached to the Settlement Agreement, and the parties limited their attention to the ones I describe in text.

already assumed all of Jerome Holt d/b/a Holt Excavation's ("Holt d/b/a") debts existing on September 15, 1988.

14. The so-called "Kendall Insurance debt" is solely Holt's responsibility. At trial, the defendants elicited testimony from Holt that portions of this insurance were not HEI debt, but were for his own personal use, and the plaintiffs failed to prove what amount was for HEI. Moreover, Boutet is not liable because the debt was not incurred during the Indemnity Period covered by the Indemnity Provision.

15. The so-called "New Hampshire Insurance debt" was originally incurred by Holt d/b/a to pay for workers compensation insurance for the time frame of October 9, 1987 through October 9, 1988. It is all HEI debt because it was either assumed in the September 15, 1988, Agreement or incurred directly by HEI. One-sixth (1/6) (the parties stipulated to this fraction) of the debt is also Boutet's personal responsibility under the Indemnity Provision if Holt is ultimately held to be liable individually because it was incurred during the Indemnity Period and it related to Dunegrass inasmuch as HEI employees covered by the insurance were working on the Dunegrass project.

16. The so-called "Key Bank debt" was incurred primarily in the 1980's by Holt d/b/a to buy excavation equipment. HEI assumed it in the September 15, 1998, Agreement. The debt was refinanced and consolidated into one loan in late 1989 to avoid repossession. Although HEI arguably thereby re-incurred it during the Indemnity Period, the debt was not "related to" the Dunegrass project and Boutet, therefore, is not responsible for this debt.

17. The so-called “Southworth-Milton, Inc. debt” was incurred by HEI to buy parts for a bulldozer that was used on the Dunegrass project during the Indemnity Period. Therefore, HEI is liable, and because this debt was incurred during the Indemnity Period and related to Dunegrass, so is Boutet if Holt is ultimately held to be liable individually.

18. The September 15, 1988, Agreement has no provision obligating HEI to pay attorney fees incurred in enforcing that Agreement.

19. Under the Settlement Agreement, Boutet is not responsible for attorney fees Holt incurs in enforcing the Indemnity Provision against Boutet. Instead, the Indemnity Provision provides for Boutet to indemnify Holt for all Holt’s expenses in defending himself against claims of creditors for those claims for which Boutet is ultimately liable under the Indemnity Provision. (Boutet is also not liable for Holt’s attorney fees in defending himself against Sealand’s and HEI’s claims in bankruptcy court because Boutet is not liable for these claims under the Indemnity Provision.)

C. THE LOAM

20. Paragraph 4 of the Settlement Agreement⁴ entitled Holt to remove 50,000

⁴ Paragraph 4 of the Settlement Agreement states:

Holt shall be entitled to remove fifty thousand (50,000) yards of loam, truckload measurement, screened, currently located on the premises of the Dunegrass project located in Old Orchard Beach, Maine as follows:

- a. The loam from Fairway Three shall be removed first and removal shall be complete by the end of Spring of 1994;
- b. The remaining loam shall be removed from the practice fairway by the

(continued...)

cubic yards of loam from the Dunegrass project premises under certain conditions. I conclude that Paragraph 4(c)'s requirement that "50,000 yards of loam will remain on site" was a condition to Holt removing the 50,000 cubic yards granted to him under Paragraph 4. Therefore, Holt could remove up to a maximum of 50,000 cubic yards of loam provided that 50,000 cubic yards remained for Boutet's use. According to the testimony at trial, the market rate for screened loam varied from \$12 to \$17 per cubic yard.

21. The parties disagree about how much loam was "on site" at Dunegrass in 1994.⁵

22. I conclude that the trucking logs are the best method of estimating the amount of loam excavated by HEI and, therefore, available at the Dunegrass site. HEI's employees tracked the date, the number of truckloads, the type of material, and the destination of material transported on the Dunegrass premises in these logs. Additionally, I credit the testimony of Will Martin, a former Sealand employee, that the HEI employees did a good job completing the trucking logs.

⁴ (...continued)

end of June, 1995;

- c. The parties agree that at least 50,000 yards of loam will remain on site and that this is sufficient to cover the land along the roads at the Dunegrass project.

⁵ Paragraph 4 of the Settlement Agreement is ambiguous as to whether the language, "currently located on the premises of the Dunegrass project," includes both excavated and unexcavated loam or simply excavated loam. Because the Settlement Agreement is not clear, I relied on parole evidence, including the context in which the agreement was negotiated, the existence of loam at the time of negotiations, and the ordinary use of the language in the agreement. After considering all the testimony, I interpret the language as including only the excavated loam on the Dunegrass project.

23. It is undisputed that a volume of some type of material totaling at least 100,000 yards was in fact trucked on the Dunegrass premises.

24. The parties disagree, however, over whether all the material trucked at the Dunegrass project was indeed loam. After listening to the testimony and reviewing the evidence, I conclude that the transported material was loam.

25. The testimony that I credit shows that over 103,000 cubic yards of loam were trucked and stockpiled; of that amount 1,200 to 1,500 cubic yards may have been used on the sides of the roads and 1,500 to 2,000 cubic yards may have been double counted. I find that a net of 100,000 cubic yards of loam was trucked and available on the Dunegrass project premises for other uses.

26. Several months after signing the Settlement Agreement, Holt entered into a contract to sell 10,000 cubic yards of unscreened Dunegrass loam to Blue Rock Industries (“Blue Rock”) at \$3/cubic yard. Blue Rock also stated an interest in buying an additional 10,000 cubic yards of unscreened loam at the same price.

27. After Blue Rock had removed 9,600 cubic yards of unscreened loam from Dunegrass, Boutet prevented Blue Rock from removing the remaining 400 cubic yards to which it was entitled under its contract with Holt.

28. Although Holt testified that loam could be screened the loam for \$2/cubic yard and delivered for \$3/cubic yard, there was no evidence presented that Holt could have actually screened or delivered the loam, and the testimony was that only two parties (Blue

Rock was one of them) showed any interest in the loan. Holt did not own the equipment to screen and failed to present any evidence that he could have rented the necessary equipment.

D. THE GUARANTIES

29. The Oceanside Lounge Trust, of which Boutet is Trustee, guaranteed certain of the personal debts of Boutet arising under the Settlement Agreement in its Guaranty (“OLT Guaranty”).⁶

30. The Brunswick Hotel Corporation, of which Boutet is President, guaranteed certain of the personal debts of Boutet arising under the Settlement Agreement in its Guaranty (“BHC Guaranty”).⁷

31. The Oceanside Lounge Trust signed a Mortgage and Security Agreement to secure its OLT Guaranty with a condominium unit in Old Orchard Beach, Maine.

32. The Brunswick Hotel Corporation signed a Mortgage and Security Agreement to secure its BHC Guaranty with a condominium unit in Old Orchard Beach, Maine.

⁶The Oceanside Lounge Trust “guarantees to [Holt], its successors and assigns, all amounts which may become payable with respect to the indemnification provisions of the Settlement Agreement and all other obligations made or endorsed by [Boutet], . . . together with all other obligations of [Boutet] to [Holt] and all attorneys’ fees, costs and expenses of collection incurred in connection with the foregoing or in connection with the enforcement of this Guaranty, including without limitation attorneys’ fees.” Ex. B to Settlement Agreement, OLT Guaranty at 1.

⁷ The BHC Guaranty tracks the same language as the OLT Guaranty. See footnote 6, supra.

33. The Brunswick Hotel Corporation and the Oceanside Lounge Trust are both responsible under their respective guaranties for guaranteeing the amount Boutet owes under the Note and the Indemnity Provision.

34. Under the terms of the BHC Guaranty and the OLT Guaranty, the Brunswick Hotel Corporation and the Oceanside Lounge Trust, respectively, must pay Holt's attorney fees in enforcing the guaranties.⁸

35. I hold, however, that the Brunswick Hotel Corporation and the Oceanside Lounge Trust are not liable for guaranteeing the money damages owed by Boutet to Holt under the loam provision of the Settlement Agreement because this issue was not litigated and the plaintiffs did not raise it until after trial.⁹

II. CONCLUSIONS OF LAW

1. This court has subject matter jurisdiction over this claim under 28 U.S.C. § 1334. The case was originally brought in bankruptcy court and a withdrawal of reference to this court occurred by consent.¹⁰

⁸ See footnotes 6 & 7, *supra*.

⁹ The plaintiffs, in a Motion to Clarify Judgment filed on November 17, 1997, asked the court to clarify whether the guaranties' provisions covered Boutet's obligation under the loam provision of the Settlement Agreement. These Findings of Fact and Conclusions of Law are the court's ruling on that motion.

¹⁰ In early 1995, Holt declared Chapter 13 bankruptcy. The bankruptcy court named one of the plaintiffs, Peter C. Fessenden, as trustee. On June 20, 1995, Sealand made a claim on Holt's estate claiming that "[d]ebtor wrongfully removed 10,000 yds. of loam from Creditor's property" and stating that the claim totaled \$100,000. On the same day, HEI also filed a creditor's claim against Holt's estate for \$76,573.58.

2. Holt's claim of unjust enrichment against Sealand and Pine Ridge Realty fails.

The evidence presented does not satisfy the three-part test articulated in Gillespie v. Town of Southwest Harbor, 675 A.2d 501, 503 (Me. 1996).¹¹

3. Boutet breached the Settlement Agreement by preventing Blue Rock from removing the last 400 cubic yards of loam it had contracted to purchase from Holt and stating that no additional loam could be removed unless Holt first showed him the 100,000 cubic yards of loam on the Dunegrass premises. Such a prior demonstration by Holt was not a precondition to Holt's right to remove loam under the Settlement Agreement. Boutet must pay damages totaling One Hundred Twenty-One Thousand Two Hundred Dollars (\$121,200), or \$3/cubic yard for 40,400 cubic yards of loam, the remainder of the 50,000 yards to which Holt was entitled.¹² These are expectation damages. According to sections 347 and 352 of the Restatement (Second) of Contracts,¹³ the value of expectation damages

¹¹ The Maine Law Court outlined this three part test:

To prevail on a claim for unjust enrichment Gillespie had the burden to establish that (1) he conferred a benefit on the Town, (2) the Town had appreciation or knowledge of the benefit, and (3) the Town's acceptance or retention of the benefit was under such circumstances as to make it inequitable for them to retain the benefit without payment for its value.

Gillespie v. Town of Southwest Harbor, 675 A.2d 501, 503 (Me. 1996).

¹² The plaintiffs' motion for reconsideration of the damages awarded under the loam provision is **DENIED**.

¹³ If defective or partial performance is rendered, the loss in value caused by the breach is equal to the difference between the value that the performance would have had if there had been no breach and the value of such performance as was actually rendered. In principle, this requires a determination of the values of those performances to the injured party himself and not their values to some hypothetical reasonable person or on some market.

(continued...)

is the value of the loss to Holt personally. The gain to Boutet, the market value, the value to a hypothetical reasonable person, and what Holt thought he could realize when he signed the Settlement Agreement in June of 1994 are not the measure. Holt sold 10,000 cubic yards of unscreened loam to Blue Rock in the fall of 1994 for \$3/cubic yard and Blue Rock indicated an interest in buying an additional 10,000 cubic yards at the same price. There were no other buyers at any price. I find that \$3/cubic yard is the only damage figure for Holt that is not speculative.

4. The plaintiffs pleaded a claim of fraudulent conveyance in the alternative. Specifically, the plaintiffs were prepared to argue that if the court found against the plaintiffs on their claim for recovery under the Settlement Agreement, then the plaintiffs would have asserted, under 11 U.S.C. § 548, that Holt's conveyance of the 50% ownership of HEI to Boutet was in actuality a fraudulent conveyance because Holt did not receive sufficient value in return.

5. I found in the course of the trial that the Settlement Agreement did have the value the plaintiffs asserted. (That value is undoubtedly significantly higher than the damages the plaintiffs are actually able to recover in this lawsuit for the loam. The value for purposes of fraudulent conveyance doctrine is the value of the Settlement Agreement at the time it was signed at the end of June, 1994. See 2 Collier Bankruptcy Manual ¶ 548.04 at

¹³ (...continued)

Restatement (Second) of Contracts § 347 cmt. b (1981). Additionally, section 352 states that “[d]amages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.” Restatement (Second) of Contracts § 352 (1981).

548-17 (Lawrence P. King ed., 3d ed. 1997). Holt's inability ultimately to realize the full value of delivered, unscreened loam because of his lack of equipment does not diminish the value of the loam on site at Dunegrass for calculating the value of the consideration at the time the Settlement Agreement was entered into.) I concluded under Federal Rule of Civil Procedure 52(c), therefore, that the plaintiffs' claim of fraudulent conveyance failed as a matter of law and declined to permit the plaintiffs to prove the value of the fifty per cent (50%) share of HEI transferred to Boutet.

6. If the Court of Appeals for the First Circuit determines that my findings were erroneous regarding the value of the Settlement, then this remaining claim of fraudulent conveyance remains to be resolved.

JUDGMENTS

A. Judgment is entered against Boutet and Mrs. Boutet for One Hundred Five Thousand Six Hundred Fifty Dollars (\$105,650), plus attorney fees, due to their default under the Note, and for foreclosure of the mortgage securing the Note.

B. Declaratory judgment is entered against Boutet for one-sixth (1/6) of the New Hampshire Insurance debt and for the total Southworth-Milton, Inc. debt.

C. Declaratory judgment is entered against HEI for the total New Hampshire Insurance debt, the total Southworth-Milton, Inc. debt and the total Key Bank debt.

D. Declaratory judgment is entered against the Brunswick Hotel Corporation to guaranty Boutet's payment of the Note, the amounts due under the Indemnity Provision (but not as to the loan), and the attorney fees incurred in enforcing the BHC Guaranty, and for foreclosure of the mortgage securing these obligations.

E. Declaratory judgment is entered against the Oceanside Lounge Trust to guaranty Boutet's payment of the Note, the amounts due under the Indemnity Provision (but not as to the loan), and the attorney fees incurred in enforcing the OLT Guaranty, and for foreclosure of the mortgage securing these obligations.

F. The parties shall prepare a form of judgment to reflect the foregoing Findings of Facts and Conclusions of Law for the court's review by January 5, 1998.

SO ORDERED.

DATED THIS 22ND DAY OF DECEMBER, 1997.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE