IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

WONG, ET AL.,	:	**DECEMBER TERM, 2011**
	:	
Plaintiffs,	:	**NO. 1224**
	:	
vs.	:	**COMMERCE PROGRAM**
	:	
LIU, ET AL.,	:	
	:	
Defendants.	:	

OPINION

BY: Patricia A. McInerney, J. July 21, 2014

Judgment having been entered, this is an appeal from, among other matters, the order imposing sanctions on certain defendants for discovery violations and the order denying the defendants' motion for post-trial relief.

I. BACKGROUND

On December 12, 2011, Henry and Linda Wong, Bing Lu Ruan, and Lisa Lee (collectively, "Plaintiffs") commenced an action by complaint against a number of defendants, including Rong Liu, Gui Liu, Chung May Food Market 2, Chung My, LLC, and Asia Supermarket. In the complaint, Plaintiffs averred "Defendants Rong Liu and Gui Liu are brothers who were known in Chinatown as supermarket operators [that] successfully operated Asia Supermarket..for years." (Compl. ¶ 11.) Asia Supermarket is located at 143 N. 11th Street, Philadelphia, PA. (Compl. ¶ 10; Answer ¶ 10.) The complaint further averred that "[f]or years prior to 2010, Plaintiff Henry Wong owned and operated a supermarket [located at 1017 Race St., Philadelphia, PA] called 'Chung May Food Market' that he sold to Gui Liu on behalf of 'Chung My LLC' in September 2010." (Compl. ¶¶ 6, 12.) Thereafter, the complaint asserts

Defendant Rong Liu, in exchange for varying sums of money, offered (1) Mr. and Mrs. Wong, (2) Mr. Ruan, and (3) Ms. Lee each a 25% ownership interest in a new Chung May supermarket that Defendants Rong Liu and Gui Liu would operate in a competent manner at the location of the old Chung May market as "Chung May Food Market 2." (Compl. ¶¶ 6, 13, 15, 17.) However, with Plaintiffs having paid varying sums of money, the complaint asserts:

> Rong Liu and Gui Liu had no intention of running Chung May competently. [Rather,] [u]sing Plaintiffs' funds, Rong Liu and Gui Liu renovated the new Chung May and opened [for] business. However, much of the inventory in Chung May was purchased from Asia Supermarket at retail prices. Chung May is not profitable, and it cannot be profitable under the mismanagement of Rong Liu and Gui Liu.

(Compl. ¶ 19.) And when Plaintiffs asked to receive evidence of their ownership interests in the new Chung May market the most they received were receipts for the money they had invested, according to the complaint. (*See* Compl. ¶¶ 14, 16, 18.)

Based on these and other averments, Plaintiffs asserted causes of action for: (1) breach of contract; (2) a declaratory judgment; (3) breach of contract/rescission; (4) fraud; (5) breach of the implied covenant of good faith and fair dealing; (6) conversion; and (7) unjust enrichment. (Compl. pp. 7-10.) In their first count for breach of contract against Defendants Rong Liu, Gui Liu, and Chung May Food Market 2, Plaintiffs argued these defendants "have delivered nothing whatsoever in return for Plaintiffs' investment" and Plaintiffs "have received no stock or other indicia of ownership in Chung May." (Compl. ¶¶ 26-27.) Against all the defendants in their count for unjust enrichment, Plaintiffs argued:

> All defendants have received and appreciated benefits from Plaintiffs. Defendants Rong Liu, Gui Liu, and Chung May received investment funds. Defendants Asia Supermarket received an outlet to sell its own goods at a profit, ultimately to the benefit of Rong Liu and Gui Liu. It would be unjust and inequitable to allow Defendants to keep the investment funds and profits they have unlawfully obtained.

(Compl. ¶ 42.)

On January 10, 2012, the defendants answered Plaintiffs' complaint. Therein, the defendants asserted each of the three groups of plaintiffs' were offered an ownership interest in the new Chung May supermarket. (Answer ¶¶ 13, 15, 17.) The defendants, however, contended each group was offered a 20% stake in exchange for $150,000, not 25% stakes for varying, lesser sums of money. (Answer ¶¶ 13, 15, 17.) The defendants admitted that they used Plaintiffs' money to renovate the new Chung May market and open for business and that the business is not presently profitable. (Answer ¶ 19.) The defendants, however, denied that the purchases from Asia Supermarket were made at retail prices or that the lack of profitability is due to any mismanagement on the part of Defendants Rong Liu or Gui Liu. (Answer ¶ 19.) Rather, the defendants asserted "groceries were purchased from Asia Supermarket at wholesale prices and on credit extended to Chung May by Asia Supermarket" and there had been no misuse or mismanagement by Defendants Rong Liu or Gui Liu. (*See* Answer ¶¶ 19-21.)

In terms of Plaintiffs' first count for breach of contract, it was denied "that Defendants Rong Liu, Gui Liu and Chung May have breached their contracts with the Plaintiffs." (Answer ¶ 26.) Rather, the defendants asserted "none of the Plaintiffs have paid the full $150,000.00 required for a 20% interest in Chung May[,]" and that is why "the Plaintiffs have not received stock or other indicia of ownership in Chung May ... ." (Answer ¶¶ 26-27.) In terms of Plaintiffs' count for unjust enrichment, "[i]t [wa]s denied that [the] [d]efendants have received and appreciated benefits from the Plaintiffs and further denied that investments from the Plaintiffs were unlawfully obtained." (Answer ¶ 42.) Rather, according to the defendants, "Plaintiffs of their own volition offered to invest in Chung May supermarket and those investments were applied to the [b]usiness of Chung May." (Answer ¶ 42.)

On December 12, 2012, Plaintiffs filed a motion to compel answers to interrogatories and requests for production of documents. When neither the defendants nor their counsel appeared at the January 8, 2013 hearing on the motion, an order was entered that day giving Defendants fifteen days to answer or face sanctions upon further application to the court.

When the defendants failed to respond to the order and answer the discovery requests, Plaintiffs filed a motion for sanctions on February 19, 2013. Therein, Plaintiffs asserted the defendants had still not answered their discovery requests and requested an order striking the defendants' defenses as a sanction for their dilatory conduct. (Pls.' 1st Mot. for Sanctions ¶¶ 5, 15.)

After neither the defendants nor their counsel appeared on March 5, 2013 at 9:30 a.m. for a hearing on the motion for sanctions, Plaintiffs' filed a second motion for sanctions on March 8, 2013. (Pls.' 2nd Mot. for Sanctions ¶ 21.) Therein, Plaintiffs' asserted "[t]o the extent there was any question as to whether the sanctions Plaintiffs sought in their prior motion ... [are appropriate], all such doubt has now been removed." (Pls.' 2nd Mot. for Sanctions ¶ 22.)

Considering Plaintiffs' motions for sanctions, an order was entered on March 19, 2013 that Defendants Rong Liu, Gui Liu, Chung May Food Market 2, Chung My, LLC, LC Food Corp., and Asia Supermarket were prohibited from introducing evidence at trial as a sanction for their failure to comply with any discovery.

On July 3, 2013, Plaintiffs filed a motion to amend the caption to list Chinatown Market, Inc. as a defendant. In this motion, Plaintiffs stated:

> [the] [d]efendants['] counsel asserted on the record on July 2, 2013 that the market is operated by "Chinatown Market." There is a "Chinatown Market, Inc." registered to do business at 143 N. 11th St., the same address as Asia Supermarket. However, it is undisputed and indisputable that the supermarket operating at 143 N. 11th St. is operating as "Asia Supermarket."

(Pls.' Mem. re Mot. to Amend p. 3 (citation omitted).) In this motion, Plaintiffs also stated they "served 'Asia Supermarket' at 143 N. 11th St., Philadelphia, PA" and "[s]ervice was made upon 'Tat Woo who is authorized to accept service on behalf of the Corporation/Entity Company.'" (Pls.' Mot. to Amend ¶ 2.) Citing *Clark v. Wakefern Food Corp.*, 910 A.2d 715 (Pa. Super. Ct. 2006), Plaintiffs argued the amendment should be allowed because "the assets of the entity operating a[s] 'Asia Supermarket' at 143 N. 11th St., Philadelphia, PA are subject to liability in this suit[.]" (Pls.' Mot. to Amend pp. 1-5.)

Plaintiffs argued "the plaintiff [in *Clark*] sued a 'Shop Rite' supermarket and served the 'Shop Rite' in the premises, but the defendant claimed the wrong corporate name was sued." (Pls.' Mot. to Amend p. 4.) Under such circumstances, Plaintiffs stated the Superior Court held "'it is the assets of the entity operating a Shop Rite at [the address served] which are subject to liability' because ... 'when the plaintiff serves the manager of the store in question and uses the name of the entity supplied by defendant, the defendant should not be heard to complain that the name was wrong, and amendment of the complaint should be permitted.'" (Pls.' Mot. to Amend p. 4 (*quoting Clark*, 910 A.2d at 716 (emphasis removed)).) Plaintiffs argued that is exactly what happened here: "the defendant supermarket was served on Tat Woo [who was authorized to accept service at] the location where the alleged tort occurred, 143 N. 11th St." (Pls.' Mot. to Amend p. 4.) Accordingly, Plaintiffs argued "[t]he caption should be amended to assert the claims against Chinatown Market, Inc. [and] that entity must be subject to the same orders as was LC Food Corp. and/or Asia Supermarket[,]" including the March 19, 2013 discovery sanctions order.

On July 25, 2013, the defendants filed a response in opposition to Plaintiffs' motion to amend the caption. In their response, the defendants asserted "Plaintiff pursued Asia

Supermarket, the fictitious name for LC Food Corp., which is owned by unrelated individuals." (Defs.' Resp. to Motion to Amend p. 3.) Defendants further asserted:

> Chinatown Market, Inc. is a new and separate entity from ... LC Food [] Corp. Plaintiffs' intentions as to Asia Supermarket ... LC Food [] Corp. are clear from its own allegations in ... the Motion to Amend, in which they assert that LC Food Corp. as owner of the fictitious name Asia Supermarket should remain a party to the lawsuit. Therefore, the Plaintiff[s] [are] seeking to add a Defendant, Chinatown Market, Inc., in addition to keeping LC Food Corp. in the case. According to the Pennsylvania Supreme Court[] ... , where the statute of limitations is expired, the party seeking to bring in a new party will be refused.

(Defs.' Resp. to Motion to Amend pp. 4-5.) Regarding the statute of limitations, Defendants argued:

> the two year statute of limitations has expired on Plaintiffs' claims for conversion and fraud. The alleged actions on the part of [the] Liu['s] and other [d]efendants occurred back in November and December, 2010. Any attempt to hold the Defendant Chinatown Market, Inc. liable in the case should at best be limited to breach of contract and unjust enrichment [because tort claims such as Plaintiffs' counts in conversion and fraud have expired].

(Defs.' Resp. to Motion to Amend pp. 4, 6.) And finally, in terms of the sanctions order applying to Chinatown Market, Inc., the defendants argued "[t]he *Clark v. Wakefern* case cited by ... Plaintiff[s] in support of the amendment to the caption does not reach the further assertion that [the] sanctions, particularly as severe as those under [*Pennsylvania Rule of Civil Procedure*] 4019(c)(2)[,] should apply to newly added parties." (Defs.' Resp. to Motion to Amend pp. 5-6.)

By order docketed August 6, 2013, this court granted Plaintiffs' motion in part, amending the caption to include Chinatown Market, Inc. d/b/a Asia Supermarket as a defendant in this matter. The court, however, dismissed LC Food Corp. from this action and declined to hold Defendant Chinatown Market, Inc. to the terms of the sanctions order.

On October 16, 2013, the defendants filed a motion to rescind the sanctions order of March 19, 2013. Therein, counsel for the defendants argued once he entered the case in May

2013, the defendants' answered discovery; produced documents; agreed to appear for depositions; etc. (*See* Defs.' Mot. for Rescission Mem. pp. 2-3.) Citing *Boyle v. Steiman*, 631 A.2d 1025 (Pa. Super. Ct. 1993), he argued there was now a material change in the record and rescission of the sanctions order was warranted. (Defs.' Mot. for Rescission Mem. pp. 2-3.)

On November 6, 2013, Plaintiffs filed a response in opposition to the defendants' motion for rescission of the sanctions order. Therein, Plaintiffs asserted "[o]nly Defendant Asia Supermarket ha[d] responded to discovery. No response to discovery was ever provided by Defendants Rong Liu, Gui Liu or Chung May Market." (Pls.' Resp. to Defs.' Mot. for Rescission ¶ 8.) Noting the upcoming November trial date for their case, Plaintiffs argued [the] [d]efendants' representation that "circumstances have changed because all [the] [d]efendants have answered discovery" was not true. (*See* Pls.' Resp. to Defs.' Mot. for Rescission Mem. pp. 1, 3.) Rather, Plaintiffs argued the evidence showed "only Chinatown Market d/b/a Asia Supermarket has answered discovery" and "[t]he instant motion is unfounded." (Pls.' Resp. to Defs.' Mot. for Rescission Mem. p. 3.)

By order docketed November 13, 2913, this court denied the defendants' motion in substance. The court, however, made clear Defendant Chinatown Market, Inc. would be permitted to offer evidence at trial.

On November 21, 2013, the case proceeded to bench trial against the remaining defendants (collectively, "Defendants") and before this court. The following facts were adduced at trial.

Prior to and during September 2010, Henry and Linda Wong operated a supermarket in Chinatown known as "Chung May Food Market." (N.T., 11/22/13, pp. 61-62; Pls.' Ex. A ¶ 12; Pls.' Ex. B ¶ 12.) In or around September 2010, Rong Liu and Gui Liu approached Mr. and Mrs.

Wong about buying their 1017 Race St., Philadelphia, PA supermarket and opening a new Chung May supermarket in its stead, which would be known as "Chung May Food Market 2." (*See* N.T., 11/22/13, pp. 61-66; Pls.' Ex. A ¶¶ 11-13; Pls.' Ex. B ¶¶ 11-13.) In or around that time, Mr. Rong Liu also offered to sell an ownership interest in a new Chung May supermarket to: (1) Mr. and Mrs. Wong, (2) Bing Lu Ruan, and (3) Lisa Lee. (*See* N.T., 11/21/13, pp. 13-14, 61-62, 80-82.) Mr. Rong Liu's proposal was that the new Chung May supermarket would sell fresh (or "wet") goods to complement dry goods that would be sold at Asia Supermarket. (N.T., 11/21/13, pp. 13-14, 62.)

Asia Supermarket is a supermarket in Chinatown, which is owned by Mr. Rong Liu's brother, Gui Liu, and operated by Messrs. Rong Liu and Gui Liu. (N.T., 11/21/13, pp. 14, 118; N.T., 11/22/13, pp. 10, 72; Pls.' Ex. A ¶ 11; Pls.' Ex. B ¶ 11.) Asia Supermarket is located at 143 N. 11th Street, Philadelphia, PA, just around the corner from the Chung May supermarket. (N.T., 11/21/13, pp. 13-14; Pls.' Ex. A ¶ 10; Pls.' Ex. B ¶ 10.) Asia Supermarket is owned by Chinatown Market, Inc., which is solely owned by Mr. Gui Liu. (N.T., 11/21/13, pp. 118-20; N.T., 11/22/13, pp. 10, 72.) For their work with Asia Supermarket, Messrs. Rong Liu and Gui Liu were known in Chinatown as successful supermarket operators. (*See* N.T., 11/21/13, p. 14; Pls.' Ex. A ¶ 11; Pls.' Ex. B ¶ 11.)

In September 2010, Mr. and Mrs. Wong sold the assets of Chung May Food Market, which did not include the real estate, to Mr. Gui Liu on behalf of "Chung My, LLC." (*See* N.T., 11/22/13, pp. 61-66; Pls.' Ex. A ¶¶ 7, 12; Pls.' Ex. B ¶¶ 7, 12.) Mrs. Wong testified Mr. Rong Liu offered her and her husband a 25% stake in the new Chung May supermarket for $118,000, which they paid. (N.T., 11/21/13, pp. 81-82.) Mr. Rong Liu, however, testified the Wong's

were offered a 20% stake for $150,000, which they never paid for in full. (N.T., 11/22/13, p. 61.)

Mr. Bing Lu Ruan testified he was offered a 25% stake in the new Chung May supermarket for $110,000, which he paid in full. (N.T., 11/21/13, p. 73.) Mr. Rong Liu, however, testified Mr. Ruan was offered a 20% stake for $150,000, which he never paid for in full. (N.T., 11/22/13, p. 61.)

Ms. Lee testified she was offered a 25% stake in the new Chung May supermarket for $110,000, of which she paid $70,000. (N.T., 11/21/13, p. 60.) Mr. Rong Liu, however, testified Ms. Lee was offered a 20% stake for $150,000, which she never paid for in full. (N.T., 11/22/13, p. 61.)

The new Chung May supermarket opened on December 18, 2010. (N.T., 11/21/13, p. 18.) At that time and for a few months thereafter, Mrs. Wong, Mr. Ruan, and Ms. Lee all worked there. (N.T., 11/21/13, pp. 15, 18-20, 40, 62-63, 73-74, 82-84, 86.) And shortly after the opening, it became clear to them that the new Chung May supermarket was being managed in a way to drive profits to Asia Supermarket and Mr. Rong Liu and Mr. Gui Liu.

As an example, Asia Supermarket as one of its main vendors sold merchandise to the new Chung May supermarket at substantially marked-up prices, so that Asia Supermarket would profit at the expense of Chung May. (*See* N.T., 11/21/13, pp. 22-23.) Ms. Lee testified that Mr. Rong Liu admitted this at the end of January 2011. (N.T., 11/21/13, pp. 22.) Specifically, when asked what her conversation was with Mr. Rong Liu at the end of January 2011, Ms. Lee testified that with Mrs. Wong present: "I ask[ed] him why the price and bill are so high and he told me – he told me the old lady [at Asia Supermarket] mark[s] up the price when deliver[ing] ... goods to Chung May from Asia [Supermarket]. It's about maybe 30 percent higher." (N.T.,

11/21/13, p. 22.) A problem with the price of the goods purchased from Asia Supermarket being so high was that the prices could not be marked up any further by Chung May so that it could make a profit as customers were already complaining about the prices of these goods and the prices of these goods were affecting their resale. (*See* N.T., 11/21/13, p. 23.)

Ms. Lee's testimony regarding Mr. Rong Liu's admission was corroborated by Mrs. Wong who testified that during this conversation Mr. Rong Liu said "the products ... brought up from Asia [Supermarket] to Chung May [have] already been marked up 30 percent." (N.T., 11/21/13, p. 92.) And Mr. Ruan testified that in investigating customer complaints about Chung May's prices, he confirmed a 30% price differential between certain products at Chung May and Asia Supermarket. (*See* N.T., 11/21/13, p. 65.)

In connection with this, Mr. Ruan also testified about another promise broken by Messrs. Rong Liu and Gui Liu. Specifically, when asked by the court "[i]f Chung May sells wet goods and Asia [Supermarket] sells dry goods, how are the prices higher if they're not selling the same goods[,]" Mr. Ruan answered:

> Okay. Just because at the beginning we said Chung May sells the fresh products and the Asia [Supermarket] sells the dry products. But after its opening, [Messrs. Rong Liu and Gui Liu] did [it] different. They mix up together. It was not follow up with the promise. So [Asia Supermarket] sell[s] the fresh products and sell[s] [the] dry products and [the new Chung May] also sell[s] ... [the] fresh products and the dry products.

(N.T., 11/21/13, p. 65.)

As another example, Mr. Rong Liu and Mr. Gui Liu rampantly took product out of the new Chung May supermarket without paying for it to be sold at Asia Supermarket (or for their own personal use). Ms. Lee testified that this happened all the time; Rong Liu would have one of a number of Asia Supermarket employees come into Chung May with a handcart and take meat, fish, lobsters, vegetables, etc. and not pay for it. (N.T., 11/21/13, pp. 26-29.) Mr. Ruan,

on the other hand, testified that on a number of occasions he saw Mr. Rong Liu personally take product out of Chung May without paying for it; Chinese buns, string beans, shrimp, fish, lobsters, etc. (N.T., 11/21/13, pp. 71-73.) Mrs. Wong too saw this happen all the time—Mr. Rong Liu or Asia Supermarket employees taking product out of the new Chung May supermarket and to Asia Supermarket without paying for it. (N.T., 11/21/13, pp. 83-85.)

In terms of the new Chung May supermarket, Mrs. Wong, Mr. Ruan, and Ms. Lee all worked at the store. For the first couple of months, Mrs. Wong was involved with counting the money in the registers. (N.T., 11/21/13, pp. 85-86.) Mr. Ruan, on the other hand, was in charge of ordering the fruit and vegetables and also sometimes stocked the shelves, (N.T., 11/21/13, p. 63), while Ms. Lee was in charge of organizing the bills from vendors for the goods the store received, (N.T., 11/21/13, p. 15).

It, however, was Mr. Gui Liu who was responsible for signing all the checks and Mr. Rong Liu who was in charge of all the cash. (N.T., 11/21/13, pp. 15-17.) At trial, Messrs. Rong Lui and Gui Liu testified that the money Plaintiffs invested into the new Chung May supermarket was invested into a limited liability company, Chung My, LLC and used to renovate and buy product for the new store. (N.T., 11/21/13, pp. 132-33; 11/22/13, pp. 15-17, 33-34, 59-66, 74-77.) The business, however, was registered exclusively in the names of Messrs. Rong Liu and Gui Liu. (N.T., 11/22/13, p. 86.) And while Defendants presented an operating agreement for Chung My, LLC dated September 18, 2010, the agreement was only signed by Messrs. Rong Liu and Gui Liu as members and there was no evidence the LLC agreement was ever presented to any Plaintiff, let alone assented to by any Plaintiff. (*Cf.* Defs.' Ex. 14 (stating "[n]o prospective Member shall become a Member until such prospective Member shall execute

such joinder and/or other agreements (in form and substance satisfactory to the Manager) indicating the prospective Member's acceptance of this Agreement.").)

With all the money and overarching authority in the hands of Messrs. Rong Liu and Gui Liu, Mr. Rong Liu began demanding more money from Plaintiffs at meetings held with Mrs. Wong, Ms. Lee, and Mr. Ruan at the end of January, February, and March of 2011. At the January meeting Mr. Rong Liu asked the investors for more money to pay for product. (N.T., 11/21/13, p. 87.) At the February meeting Mr. Rong Liu again demanded more money from the investors to pay for product. (N.T., 11/21/13, p. 87.) This time, however, Mr. Rong Liu gave invoices to Mrs. Wong and Plaintiffs discovered they were being asked to pay invoices for product delivered to Asia Supermarket. (N.T., 11/21/13, p. 88.) Based on their knowledge of the business, Plaintiffs also knew that Rong Liu's representations about the unprofitability of Chung May were not true. (N.T., 11/21/13, pp. 89-90.) Mrs. Wong and Ms. Lee had access to sufficient information to know that Chung May's expenses were being overstated, and included expenses that were clearly attributable to just Asia Supermarket. (N.T., 11/21/13, pp. 17-20, 22-31, 33-40, 43-44, 83-86, 88-90.)

At the March meeting Mr. Rong Liu was angry and again demanded more money from Plaintiffs to pay bills. (N.T., 11/21/13, pp. 86, 90.) This time, however, he told them if they did not meet his demands, they would lose their investments. (N.T., 11/21/13, pp. 90-91.) Plaintiffs did not give Rong Liu more money. But as a result of his demands, Mrs. Wong, Ms. Lee, and Mr. Ruan all stopped working at Chung May within a matter of a couple of weeks. (N.T., 11/21/13, 42, 73-74, 90-91.) Regarding this March 2011 meeting, Mrs. Wong testified:

> Q. Please tell me what was discussed at the third meeting ... .
> A. The whole time [Mr. Rong Liu] bring a lot of bills to us and asked us to pay for them.
> Q. What did [he] say ... ?

A. So if there is – you don't [give] more money, you – we close the store and then you can leave.
Q. That's what Mr. Rong Liu told you?
A. Yes. He talked to us very loud. A lot of people heard it. If you leave and we bring some products from [Asia Supermarket] to Chung May, then the business will all belong to us then there is nothing to do with you guys.
Q. At that point you, the three of you, stopped working at Chung May?
A. Yes. *** Lisa and [I] left the store by the end of March.

(N.T., 11/21/13, pp. 90-91.) Ms. Lee testified, on the other hand, testified:

Q. What transpired in that conversation?
A. [Mr. Rong Liu] told me all the investment is totally lost. So the business belongs to me so you can go, leave. So all the registers and the license [i]n the name of Rong Liu and Gui Liu.
Q. By "all the registers," you mean the business registration?
A. Yes.

(N.T., 11/21/13, p. 42.) And Mr. Ruan testified:

Q. Why did you stop working at Chung May in April 2011?
A. Just because [Mr. Rong Liu] come into Chung May he asked me total investment of $110,000, 25-percent stockholder. And then in January we don't have enough money and you're to put more investment in. How much he did not specify. If you don't put more investment, you can leave.
Just because the [new] Chung May [supermarket] is under – the registers under his name. So we have no choice. We have to. We are forced to go. The one way you keep investment more and maybe you can get to it over there; otherwise, you leave. So, finally, I choose to leave.

(N.T., 11/21/13, pp. 73-74.) Mr. Ruan also testified that before he left he asked to have his $110,000 returned and Mr. Rong Liu promised to do so, but only $25,000 was returned to him. (N.T., 11/21/13, p. 79.)

While Mr. Rong Liu threatened he and his brother would close the store if Plaintiffs did not give them more money, Chung May remained open. (N.T., 11/21/13, pp. 90-91.) Mr. Gui Liu testified that he invested a total of $450,000 into the new Chung May supermarket and owns 60% of the business. (N.T., 11/21/13, p. 133.) Mr. Rong Liu, however, testified that at the time of the grand opening his brother had invested $250,000 for a 40% stake in the new Chung May

supermarket. (N.T., 11/22/13, pp. 69-70.) If that were the case, Mr. Gui Liu only had to pay $125,000 for each 20% stake in the company at a time Mr. Rong Liu was testifying Plaintiffs were being offered three 20% stakes in the company for $150,000 each, not the lesser sums they testified to.

At the conclusion of the bench trial on November 26, 2013, this court found in favor of Plaintiffs and against Defendants Rong Liu, Gui Liu, Chung May Food Market 2, Chung My, LLC, and Chinatown Market, Inc. in the amount of $273,000 on Plaintiffs' claim for unjust enrichment.[1] As the fact finder, this court found the plaintiffs who testified credible on most points and the defendants and other defense witnesses who testified lacking credibility on most points.

On December 9, 2013, Defendants filed a motion for post-trial relief requesting a judgment notwithstanding the verdict or a new trial. In their motion, Defendants made a number of arguments, including that "Plaintiffs never pleaded piercing of the corporate veil in their Complaint" and that "Plaintiffs wanted to be members of Chung My, L.L.C. without assuming any of the debts or losses suffered by the company and their special relationship to Chung My[,] L.L.C. prevents any benefit which their investment conferred from constituting unjust enrichment." (Defs.' Post-Trial Mot. ¶¶ 30, 37.)

By order dated December 10, 2013, this court directed the parties to brief the matter. In Defendants' brief, they argued Defendants Rong Liu and Gui Liu should not be "personally liable for the debts of Chung My[,] L.L.C." because "Plaintiffs never pleaded 'piercing the corporate veil' in order to hold" them personally liable nor "proved the elements necessary to pierce the corporate veil." (Defs.' Post-Trial Mem. p. 5.) Moreover, Defendants argued

---

[1] A trial worksheet reflecting this disposition was filed the same day and docketed the next day.

Pennsylvania's LLC statute, which provides that "members of a limited liability company shall not be liable, solely by reason of being a member, under an order of a court or in any other manner for a debt, obligation or liability of the company of any kind ... [,]" 15 Pa. C.S. § 8922 (a), prevents Defendants Rong Liu and Gui Liu from being held individually liable in this case. (Defs.' Post-Trial Mem. p. 6.)

Defendants also argued the court's finding of unjust enrichment was improper because "[u]nder Pennsylvania [l]aw, a plaintiff can successfully maintain a claim for unjust enrichment only in the absence of any express or implied contract between the plaintiff and the defendant." (Defs.' Post-Trial Mem. p. 6.) Here, according to Defendants:

> the undisputed evidence establishes that ... Plaintiffs Wong, Ruan, and Lee were each offered a 20% ownership interest in Chung My, L.L.C. in exchange for investing $150,000. Although none of the plaintiffs accepted that offer, because none of them invested the entire $150,000, each plaintiff made a counter-offer, which Chung My, L.L.C. accepted by accepting their contributions of lesser amounts. *** If a $150,000 investment sufficed to purchase a 20% ownership interest in Chung My, L.L.C., then the Wongs' investment of $118,000 purchased a 15.7% ownership interest, Ruan's investment of $100,000 purchased a 13.3% ownership interest, and Lee's investment of $70,000 purchased a 9.3% ownership interest. In combination, the plaintiffs['] investment of a total of $288,000 in Chung My, L.L.C. purchased ownership interests totaling slightly more than 38%.

(Defs.' Post-Trial Mem. pp. 6-7.)

In opposition, Plaintiffs argued in their brief that Defendants Rong Liu and Gui Liu are personally liable under the participation theory by which courts impose personal liability upon corporate officers and shareholders when they personally participate in a wrongful act. (Pls.' Post-Trial Mem. pp. 15-16.) Here, Plaintiffs asserted "the participation theory establishes Plaintiffs' right to damages against" the only registered owners of Chung My, LLC, Defendants Rong Liu and Gui Liu, "because they were personally and unjustly enriched by their own unlawful conduct." (Pls.' Post-Trial Mem. p. 16.) Regarding Defendants argument about the

LLC statute, Plaintiffs asserted Defendants' argument was waived because it was not raised until after the close of evidence or, alternatively, was without merit because they "attempt to bind Plaintiffs to an alleged preexisting LLC Agreement (D-14) that not one Plaintiff even saw, let alone consented to." (Pls.' Post-Trial Mem. pp. 16-17, 19.)

Plaintiffs also argued the court's finding of unjust enrichment was proper because:

> there is no question that Plaintiffs conferred benefits upon Defendant[s] in the form of $273,000, not to mention their hours upon hours of sweat equity lodged over several months. Defendants appreciated the benefits – Rong Liu and Gui Liu are the only registered owners of Chung May, Asia Supermarket sold merchandise to Chung May at inflated prices; Asia Supermarket charged salaries to Chung May for workers employed at Asia [Supermarket]; [and] Asia Supermarket took whatever merchandise it wanted from Chung May for sale in its own market. It is inequitable to[, *inter alia*,] allow Defendants [Rong Liu and Gui Liu] to continue to enjoy their ownership of Chung May without paying Plaintiffs anything.

(*See* Pls.' Post-Trial Mem. p. 13.)

By order dated April 8, 2014, the court entered an order denying Defendants' post-trial motion for judgment notwithstanding the verdict or a new trial. And on April 10, 2014, Plaintiffs entered judgment on the court's findings.

Defendants then filed a timely notice of appeal and this court ordered they file a Pa. R. App. P. 1925(b) statement. In their 1925(b) statement, Defendants delineated the following eight complaints of error:

> 1. This Court erred or abused its discretion in holding the individual defendants, Rong Liu and Gui Liu, liable to plaintiffs in the absence of any pleading or proof that justified piercing the corporate veil in this case.
>
> 2. This Court erred or abused its discretion in holding the individual defendants, Rong Liu and Gui Liu, liable to plaintiffs because plaintiffs failed to satisfy the requirements of 15 Pa. Cons. Stat. Ann. § 8922, setting forth the requirements for holding members of a limited liability company individually liable for the obligations of the company or any member, manager, agent, or employee of the company.

3. This Court erred or abused its discretion in holding defendants liable on a claim of unjust enrichment because:

(a). A claim for unjust enrichment can succeed only in the absence of any express or implied contract between the parties. Here, the existence of such a contract precludes plaintiffs' unjust enrichment claim.

(b). Plaintiffs failed to show that any of the defendants were enriched as the result of the investment that plaintiffs made.

(c). Plaintiffs failed to show that even if any of the defendants were enriched as the result of the investment that plaintiffs made, that such enrichment was unjust under the circumstances.

(d). Plaintiffs failed to show that the loss of their investment was unjust, because the evidence at trial failed to show that any investor in Chung My, L.L.C. received any dividends or distributions of profit on account of their investment in that company through the time of trial or at any other time.

4. This Court erred or abused its discretion in holding either defendant Rong Liu or defendant Gui Liu personally liable on plaintiffs' claim for unjust enrichment, because they received no personal benefit as the result of plaintiffs' investment in Chung My, L.L.C.

5. This Court erred or abused its discretion in holding defendant Chinatown Market, Inc. liable on plaintiffs' claim for unjust enrichment, because defendant Chinatown Market, Inc. realized no benefit as the result of plaintiffs' investment in Chung My, L.L.C.

6. This Court erred or abused its discretion in holding defendant Chung My, L.L.C. liable on plaintiffs' claim for unjust enrichment, because defendant Chung My, L.L.C. did not wrongly secure or passively receive plaintiffs' investment. Rather, new businesses routinely fail to succeed, or fail to earn a profit, early in their corporate lives, and the evidence at trial failed to show either that defendant Chung My, L.L.C. appreciated any long-term benefit as the result of plaintiffs' investment or that the loss of plaintiffs' investment was in any way unfair.

7. This Court erred or abused its discretion in granting plaintiffs' motion to amend the caption of this case to include Chinatown Market Inc. d/b/a Asia Supermarket as a defendant in this matter.

8. This Court erred or abused its discretion in failing to rescind its sanction order of March 19, 2013, and the failure to rescind that order unfairly contributed to this Court's finding and verdict in favor of plaintiffs.

(Defs.' 1925(b) Statement ¶¶ 1-8.)

II. DISCUSSION

A. Standards and Scopes of Review

Judgment n.o.v. is an extreme remedy and should only be entered in the clearest of cases. *Moure v. Raeuchle*, 604 A.2d 1003, 1007 (Pa. 1992). "There are two bases upon which a judgment n.o.v. can be entered: one, the movant is entitled to judgment as a matter of law, and/or two, the evidence was such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant." *Id.* (citations omitted). "An appellate court will reverse a trial court's grant or denial of a JNOV only when the appellate court finds an abuse of discretion or an error of law." *Dooner v. DiDonato,* 971 A.2d 1187, 1193 (Pa. 2009).

A new trial should only be granted when the verdict is so contrary to the evidence so as to shock one's sense of justice. *Barrack v. Kolea*, 651 A.2d 149, 152 (Pa. Super. Ct. 1994). The decision of the trial court to refuse to grant a new trial will only be reversed when "there has been a clear abuse of discretion or an error in law determinative to the outcome of the case." *Id.*

During a bench trial, "[q]uestions of credibility and conflicts in the evidence are for the trial court to resolve and the reviewing court should not reweigh the evidence." *Adamski v. Miller*, 681 A.2d 171, 173 (Pa. 1996). "Absent an abuse of discretion, the trial court's determination will not be disturbed." *Id.*

B. Defendants' Appeal

Defendants' 1925(b) statement delineates eight complaints of error. This court reduced Defendants' complaints to the following four categories: (1) finding unjust enrichment, (2) holding Defendants Rong Liu and Gui Liu personally liable; (3) amending the caption to include

Chinatown Market, Inc. d/b/a Asia Supermarket as a defendant; and (4) not rescinding the March 19, 2013 sanctions order.

1. Finding unjust enrichment.

Defendants make a number of complaints regarding this court finding unjust enrichment in favor of Plaintiffs and against Defendants. Defendants primary argument is that the court "erred or abused its discretion in holding [D]efendants liable on a claim of unjust enrichment because ... a claim for unjust enrichment can succeed only in the absence of any express or implied contract between the parties [and,] [h]ere, the existence of such a contract precludes [P]laintiffs' unjust enrichment claim." (Defs.' 1925(b) Statement ¶ 3(a).) In support of this argument, Defendants contended in their post-trial brief that:

> the undisputed evidence establishes that ... Plaintiffs Wong, Ruan, and Lee were each offered a 20% ownership interest in Chung My, L.L.C. in exchange for investing $150,000. Although none of the plaintiffs accepted that offer, because none of them invested the entire $150,000, each plaintiff made a counter-offer, which Chung My, L.L.C. accepted by accepting their contributions of lesser amounts.

(Defs.' Post-Trial Mem. pp. 6-7.)

It is the height of disingenuousness to assert undisputed evidence established Plaintiffs Mr. and Mrs. Wong, Mr. Ruan, and Ms. Lee were each offered a 20% ownership interest in Chung My, LLC in exchange for investing $150,000. Rather, each group of plaintiffs asserted they were offered 25% ownership interests in the new Chung May supermarket for significantly lesser sums of money.

While Defendants are correct that a finding of unjust enrichment is appropriate "only when a transaction is not subject to a ... contract[,]"*Northeast Fence & Iron Works, Inc. v. Murphy Quigley Co., Inc.*, 933 A.2d 664, 669 (Pa. Super. Ct. 2007), here, the court found there was no meeting of the minds in terms of what percentage of ownership Plaintiffs were being

offered in exchange for what amount of money; just that Defendants retained $273,000 of Plaintiffs' money and Plaintiffs had no recorded ownership interest in Defendant Chung My, LLC. Price and quantity were essential terms of the purported contract. *See generally Northeast Fence*, 933 A.2d at 669 (stating price is an essential term of a contract); *N. Jersey Sales & Const. Co. v. Emerman Erie Steel Co.*, 82 A.2d 307, 309 (Pa. Super. Ct. 1951) (stating quantity was an essential term of the contract). Thus, the court rightly found there was no contract between Plaintiffs and Defendants, and a finding of unjust enrichment was appropriate.

"Unjust enrichment is the retention of a benefit conferred by another, without offering compensation, in circumstances where compensation is reasonably expected, and for which the beneficiary must make restitution." *Roethlein II*, 81 A.3d at 825 n.8. "An action based on unjust enrichment is an action which sounds in quasi-contract or contract implied in law." *Id.* "A quasi-contract imposes a duty, not as a result of any agreement, whether express or implied, but in spite of the absence of an agreement, when one party receives unjust enrichment at the expense of another." *Northeast Fence*, 933 A.2d at 688. In determining if the doctrine applies, the focus is "not on the intention of the parties, but rather on whether the defendant has been unjustly enriched." *Id.* at 688-89. "The elements of unjust enrichment are [1] benefits conferred on defendant by plaintiff, [2] appreciation of such benefits by defendant, and [3] acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value." *Id.* at 699 (quotations omitted). In this case, all the elements of unjust enrichment were met.

First, benefits were clearly conferred on Defendants by Plaintiffs. Plaintiffs gave Defendants a total of $298,000, of which $25,000 was refunded to Mr. Bing Lu Ruan.[2] Second, Defendants appreciated the benefits of the remaining $273,000 conferred on them by Plaintiffs. Defendant Chung My, LLC, and Defendants Rong Liu and Gui Liu as the only owners of Chung My, LLC, received this money and appreciated the benefit of it by, among other things, renovating and purchasing merchandise for the new Chung May supermarket (which operates under the fictitious name of Defendant Chung May Food Market 2) with it. Defendant Chinatown Market, Inc. d/b/a Asia Supermarket and Defendant Gui Liu also received the benefit of this money as Defendants Rong Liu and Gui Liu used some of it to sell merchandise to the new Chung May supermarket at inflated prices. In addition, Defendant Chinatown Market, Inc. d/b/a Asia Supermarket and Defendant Gui Liu received the benefit of this money as Defendants Rong Liu and Gui Liu charged salaries to the new Chung May supermarket for workers employed by Asia Supermarket, and took whatever merchandise they wanted out of the new Chung May supermarket to sell at Asia Supermarket (or for their own personal use).

Finally, in this case it would be inequitable for Defendants to accept and retain such benefits without the payment of value. There was no meeting of the minds regarding price or quantity. Plaintiffs gave $273,000, but received no ownership interest in Defendant Chung My, LLC or Defendant Chung May Food Market 2 or any other benefit for their investment. Moreover, Defendants Rong Liu and Gui Liu never ran the two markets that were across the street from one another with the synergy Defendant Rong Liu promised. And Defendants Rong Liu and Gui Liu committed misfeasance in purchasing merchandise for the new Chung May

---

[2] Mrs. Wong, Ms. Lee, and Mr. Ruan also conferred benefits in the form of the hours upon hours they worked at the new Chung May supermarket in its first few months with little or no compensation. Plaintiffs, however, did not provide the court with a sufficient basis to award damages for this spent labor.

supermarket from Defendant Chinatown Market, Inc. d/b/a Asia Supermarket at inflated prices; charging salaries for Asia Supermarket employees to the new Chung May supermarket; and taking merchandise out of the new Chung May supermarket without paying for it. Under such circumstances, it would be inequitable for Defendants to accept and retain the benefits they received without returning $273,000 to Plaintiffs.

2. Holding Defendants Rong Liu and Gui Liu personally liable.

In terms of holding Defendants Rong Liu and Gui Liu personally liable for unjust enrichment, Defendants complain this court erred or abused its discretion in doing so "in the absence of any pleading or proof that justified piercing the corporate veil in this case." (Defs.' 1925(b) Statement ¶ 1.) Plaintiffs, however, counter that these defendants were rightly held personally liable under the "participation theory." (Pls.' Post-Trial Mem. pp. 15-16.)

"In addition to potential [individual] liability under the doctrine of piercing the corporate veil," liability may be imposed under the "participation theory." *Roethlein v. Portnoff Law Assocs., Ltd.*, 25 A.3d 1274, 1280 (Pa. Commw. Ct. 2011) ("*Roethlein I*"), *rev'd on other grounds in Roethlein v. Portnoff Law Assocs., Ltd.*, 81 A.3d 816 (Pa. 2013) ("*Roethlein II*"). "Under the 'participation theory,' the court imposes liability on the participating individual as an actor, not as an owner." *Roethlein I*, 25 A.3d at 1280. "To impose liability under the participation theory, a plaintiff must establish the individual engaged in misfeasance." *Id. See also USTAAD Sys., Inc. v. iCap Int'l Corp.*, 2010 WL 3984882 (M.D. Pa. 2010) (finding it significant that the participation theory is articulated in terms of "misfeasance" in letting a claim of unjust enrichment against an individual defendant survive a motion to dismiss).

In this case, there was pleading and proof to impose liability for unjust enrichment on Defendants Rong Liu and Gui Liu under the participation theory. In terms of pleading, Plaintiffs

sought to hold all Defendants, including Rong Liu and Gui Liu, liable for unjust enrichment. (Pls.' Compl. p. 10.) Plaintiffs also pleaded misfeasance on the part of Defendants Rong Liu and Gui Liu that resulted in the unjust enrichment. For example, it was pled in the complaint that these defendants purchased inventory from Asia Supermarket at retail prices as a way to shift profit from the new Chung May supermarket to a supermarket that only they had an interest in. (*See* Pls.' Compl. ¶¶ 19 ("[M]uch of the inventory in Chung May was purchased from Asia Supermarket at retail prices. Chung May is not profitable, and it cannot be profitable under the mismanagement of Rong Liu and Gui Liu."), 38 ("Asia Supermarket participated in the scheme to deprive Plaintiffs of any investment income by selling groceries and other goods to Chung May at a profit. Defendants Rong Liu and Gui Liu have profited from this scheme because they own and[/or] manage Asia Supermarket."), 42 ("Defendant Asia Supermarket received an outlet to sell its own goods at a profit, ultimately to the benefit of Rong Liu and Gui Liu.").) In terms of proof, Plaintiffs presented evidence of this—and other—misfeasance on the part of Defendants Rong Liu and Gui Liu such as charging salaries for Asia Supermarket employees to the new Chung May supermarket and taking merchandise out of the new Chung May supermarket without paying for it.

Regarding holding Defendants Rong Liu and Gui Liu personally liable for unjust enrichment, Defendants also complain this court erred or abused its discretion "because [P]laintiffs failed to satisfy the requirements of 15 Pa. Cons. Stat. Ann. § 8922, setting forth the requirements for holding members of a limited liability company individually liable for the obligations of the company or any member, manager, agent, or employee of the company." (Defs.' 1925(b) Statement ¶ 2.) For the reasons stated above, there is no error or abuse of discretion here as well.

The general rule is that in order to protect the corporate form, a "court must start from the general rule that the corporate entity should be recognized and upheld, unless specific, unusual circumstances call for an exception ... ." *Wedner v. Unemployment Comp. Bd. of Review*, 296 A.2d 792, 794 (Pa. 1972). The participation theory is one such exception, *Roethlein I*, 25 A.3d at 1280, and can be applied where the business entity is a limited liability company as well as where the business entity is a corporation, *see Parker Oil Co. v. Mico Petro and Heating Oil, LLC*, 979 A.2d 854 (Pa. Super. Ct. 2009) (analyzing the participation theory where the business entity was a limited liability company rather than a corporation).

Section 8922(a) of Pennsylvania's limited liability company law provides "members of a limited liability company shall not be liable, solely by reason of being a member, under an order of a court or in any other manner for a debt, obligation or liability of the company of any kind or for the acts of any member, manager, agent or employee of the company." 15 Pa. C.S. § 8922(a). Here, Defendants Rong Liu and Gui Liu are not being held liable for unjust enrichment solely by reason of being members of Chung My, LLC. Rather, these defendants are being held liable for another reason—their personal participation and misfeasance in causing the unjust enrichment—and thus there was no error or abuse of discretion in this regard.

3. Amending the caption to include Chinatown Market, Inc. d/b/a Asia Supermarket as a defendant.

Defendants next complain "[t]his [c]ourt erred or abused its discretion in granting [P]laintiffs' motion to amend the caption ... to include Chinatown Market Inc. d/b/a Asia Supermarket as a defendant in this matter." (Defs.' 1925(b) Statement ¶ 7.) What Defendants argued here was that "Plaintiff[s] pursued Asia Supermarket, the fictitious name for LC Food Corp., which is owned by unrelated individuals[,]" and that:

> Chinatown Market, Inc. is a new and separate entity from ... LC Food [] Corp. Plaintiffs' intentions as to Asia Supermarket and ... LC Food [] Corp. are clear from its own allegations in ... the Motion to Amend, in which they assert that LC Food Corp. as owner of the fictitious name Asia Supermarket should remain a party to the lawsuit. Therefore, the Plaintiff[s] [are] seeking to add a Defendant, Chinatown Market, Inc., in addition to keeping LC Food Corp. in the case. According to the Pennsylvania Supreme Court[] ... , where the statute of limitations is expired, the party seeking to bring in a new party will be refused.

(Defs.' Resp. to Motion to Amend pp. 3-5.)

Pursuant to Rule 1033 of the *Pennsylvania Rules of Civil Procedure*, amendments "should be liberally granted at any stage of the proceeding unless there is an error of law or resulting prejudice to an adverse party." *Piehl v. City of Philadelphia*, 987 A.2d 146, 154 (Pa. 2009). "However, an amendment to a pleading that adds a new and distinct party [after] the statute of limitations has expired is not permitted." *Tork-Hiis v. Commw.*, 735 A.2d 1256, 1258 (Pa. 1999).

The test in terms of whether an amendment adds a new and distinct party after the expiration of the statute of limitations "is whether the right party was sued but under a wrong designation—in which event the amendment [i]s permissible—or whether a wrong party was sued and the amendment [i]s designed to substitute another and distinct party"—in which event the amendment is impermissible. *Id.* (quotations omitted). While not controlling, a factor that may be considered in making this determination is whether the asset pool available for a potential judgment would be enlarged or diminished by the amendment. *Id.* If the assets subject to liability do not change, amendment is often permitted. *See id. See also Clark v. Wakenfern Food Corp.*, 910 A.2d 715, 717-18 (Pa. Super. Ct. 2006)(stating "it is the assets of the entity operating a Shop Rite at 301 West Chelten Avenue, sued as Shop Rite # 411, which are subject to liability. While Wakefern [Food Corporation, the defendant originally sued,] should not be

subject to liability, the true owner of the store where the manager accepted service[, Trio Food Centers, Inc.,] ... should be.").

In this case, it is clear Plaintiffs were suing, and a defendant in this case was, the supermarket at 143 N. 11th Street that was profiting at their expense.[3] Rule 2177 of the *Pennsylvania Rules of Civil Procedure* provides that actions against a corporation or similar entity shall be prosecuted in its "corporate name." Pa. R. Civ. P. 2177. This "corporate name," however, "is not only the formal corporate designation." *Clark*, 910 A.2d at 717. Rather, "corporate name" is defined in Rule 2176 of the *Pennsylvania Rules of Civil Procedure* to be "any name, real or fictitious, under which a corporation or similar entity was organized, or conducts business, whether or not such name has been filed or registered." Pa. R. Civ. P. 2176. Thus, it was completely within Plaintiffs' purview to name "Asia Supermarket" as a defendant in this case, (Pls.' Compl. ¶ 10), and make service on this entity at 143 N. 11th Street as they did, (Attach. 1, Affidavit of Service for Asia Supermarket). And the amendment to include Chinatown Market, Inc. d/b/a Asia Supermarket as a defendant in this matter did not add a new party since the party named was "Asia Supermarket," the corporate name of the store's actual owner, which was later determined to be Chinatown Market, Inc. rather than LC Food Corp. as originally alleged.

In the instant case, it is the assets of the entity operating "Asia Supermarket" at 143 N. 11th Street that should be subject to liability. Thus, when the court amended the caption to include Chinatown Market, Inc. d/b/a Asia Supermarket, it also dismissed LC Food Corp. from

---

[3] While it was originally averred and admitted that Defendant Asia Supermarket "is a fictitious name registered with [the] PA DOS as owned by Defendant LC Food Corp. which is ... listed as operating at Defendant Rong Liu's home address, 1826 S. 17th St.[,] Philadelphia, PA[,]" it was also averred and admitted that "LC Food Corp. d/b/a Asia Supermarket (collectively referred to [in the complaint] as 'Asia Supermarket') is a supermarket that operates at 143 N. 11th St., Philadelphia, PA[.]" (Compl. ¶ 10; Answer ¶ 10 (emphasis added).)

this action as it is the true owner of the store where the manager accepted service that should be subject to liability.

> When the owner of the store[, Mr. Gui Liu,] wants [people] to think [it is "Asia Supermarket,"] and [these people] later sue[] ["Asia Supermarket"] and make[] service on the very store premises by serving the person in charge, the actual corporate entity created to own the store[, Chinatown Market, Inc.,] should not be heard to complain. To find otherwise would contradict the purpose of Pa. R.C.P. 2177, which permits service on a business entity by the name under which it does business and advertises to the public.

Clark, 910 A.2d at 718.

Moreover, there was no harm in amending the caption to include Chinatown Market, Inc. d/b/a Asia Supermarket as a defendant in this case because the court only found against Chinatown Market, Inc. on Plaintiffs' claim for unjust enrichment, not Plaintiffs' claims for conversion and fraud that Defendants argued had expired statutes of limitations. An amendment to a pleading that adds a new and distinct party is only precluded after the expiration of the relevant statute of limitation. *See Tork-Hiis v. Commw.*, 735 A.2d 1256, 1258 (Pa. 1999). In this case, Defendants themselves argued in opposition to Plaintiffs' motion to amend that "the two year statute of limitations has expired on Plaintiffs' claims for conversion and fraud" and "[a]ny attempt to hold the Defendant Chinatown Market, Inc. liable in the case should at best be limited to breach of contract and unjust enrichment." (Defs.' Resp. to Motion to Amend p. 6.) As the court only found against Defendant Chinatown Market, Inc. on unjust enrichment, Defendants should not now be heard to complain about the amendment.

4. Not rescinding the March 19, 2013 sanctions order.

Finally, Defendants complain "[t]his [c]ourt erred or abused its discretion in failing to rescind its sanction order of March 19, 2013, and the failure to rescind that order unfairly contributed to this [c]ourt's finding and verdict in favor of [P]laintiffs." (Defs.' 1925(b)

Statement ¶ 8.) In their post-trial brief, Defendants argued "[t]o the extent that the court questioned the credibility of ... [certain] [d]efendants' testimony based on documents that they were barred from marking for trial, the [c]ourt committed error." (*See* Defs.' Post-Trial Br. p. 16.) In their pre-trial motion for rescission of the discovery sanction order filed on October 16, 2013, citing *Boyle v. Steiman*, 631 A.2d 1025 (Pa. Super. Ct. 1993), Defendants argued the sanctions order should have been rescinded because after present counsel for Defendants entered the case in May of 2013, he answered discovery requests and therefore there was a material change in the record that warranted such relief pursuant to *Boyle v. Steiman*, 631 A.2d 1025 (Pa. Super. Ct. 1993). (Defs.' Mot. for Rescission Mem. pp. 2-3.)

First, the March 19, 2013 order imposing sanctions for discovery violations was warranted. "[T]he decision whether to sanction a party for a discovery violation and the severity of such a sanction are matters vested in the sound discretion of the [trial] court." *Philadelphia Contributionship Ins. Co. v. Shapiro*, 798 A.2d 781, 784 (Pa. Super. Ct. 2002)(quotations omitted). The Superior Court "will only disturb a discovery sanction where the lower court has abused that discretion." *Id.*

> In deciding upon the proper sanction, the trial court must consider the following factors:
>
> (1) the nature and severity of the discovery violation;
>
> (2) the defaulting party's willfulness or bad faith;
>
> (3) prejudice to the opposing party;
>
> (4) the ability to cure the prejudice; and
>
> (5) the importance of the precluded evidence in light of the failure to comply.

Id. at 784-85 (quotations omitted).

Here, the discovery violations were severe. Over a period of months, Defendants and their counsel (with the exception of Chinatown Market, Inc. who was not yet named) failed to respond to any discovery requests or provide any discovery even when ordered to do so. This is not a case where there was an issue of the completeness of discovery provided, etc. Rather, this was a case where there was a complete lack of participation throughout the relevant discovery period. And relatedly, these defendants' violations were also extremely willful. Over a period of months, these defendants not only failed to provide Plaintiffs with any discovery, they ignored court orders to do so and failed to appear at multiple hearings to respond to Plaintiffs' claims regarding their failures to provide discovery.

The pertinent defendants' discovery violations also prejudiced Plaintiffs. These defendants failed to provide any discovery during the relevant discovery period and the discovery Plaintiffs were seeking was extremely relevant to their claims and countering defenses against them such as information related to the profitability of the new Chung May supermarket and Asia Supermarket and invoices showing purchases of goods by the new Chung May supermarket from Asia Supermarket. This information went to the heart of Plaintiffs' claims and was almost exclusively within the control of Defendants.

Contrary to their counsel's assertions, the pertinent defendants made no effort to cure these deficiencies until just weeks before trial when they attempted to get the discovery sanctions order rescinded. Their actions were too little, too late. If Plaintiffs' had to prove their claims with a lack of this evidence, it was fair to let these defendants stand without it as well, particularly in light of there being no preclusion against Chinatown Market, Inc. presenting evidence and the late hour of their request to rescind the order.

Second, there was no basis for rescinding the order imposing sanctions for discovery violations. Contrary to Defendants assertions, *Boyle v. Steiman* is inapposite. In *Boyle*, the defendant argued one trial judge erred in lifting another trial judge's order imposing sanctions on the plaintiff for discovery violations. 631 A.2d at 1031. In finding there was no error under the coordinate jurisdiction rule, the Superior Court said the record before the first trial judge did not inform the court that the defendant was in possession of all the information that he was seeking in discovery from the plaintiff, while the record before the second trial judge did. *Id.* at 1031-32. Having stated the defendant's insistence that the plaintiff "compile information that he subsequently was able to retrieve from his own files amounted to discovery gamesmanship[,]" the Court found the evidence offered to the second trial judge "represented a material change in the record and thereby permitted [the second trial judge] to reexamine and rescind the preclusion order entered by his predecessor ... ." *Id.* at 1032. Here, the coordinate jurisdiction rule is inapplicable and the information Plaintiffs were requesting was not in their own possession, but rather the defendants. *Boyle* is, therefore, inapposite and there was no basis for rescinding the order imposing sanctions for discovery violations.

Finally, the sanctions order did not unfairly contributed to this court's verdict in favor of Plaintiffs. Defendants argued [t]o the extent that the court questioned the credibility of ... [certain] [d]efendants' testimony based on documents that they were barred from marking for trial, the [c]ourt committed error." (*See* Defs.' Post-Trial Br. p. 16.) As the court did not question the credibility of these defendants' testimony based on documents that they were barred from marking for trial (and which Defendants have not identified), but rather on numerous other aspects of their incredulous testimony, there was no error according to Defendants themselves.

Moreover, Defendant Chinatown Market, Inc. was not subject to the sanctions order. Defendant Chinatown Market, Inc.'s defense inured to the benefit of all Defendants. No offer of proof was made as to what—if any—document the other defendants were prohibited from presenting, probably because such a document does not exist or would have been of minimal relevance in light of evidence showing a lack of record keeping on the part of Defendants.

WHEREFORE, for the above-mentioned reasons, this court's orders should be affirmed.

BY THE COURT:

McINERNEY, J

Attachment 1

AFFIDAVIT OF SERVICE

Henry Wong et. al.	:	Court of Common Pleas
	:	Philadelphia County
vs.	:	State of Pennsylvania
	:	
Rong Liu et. al.	:	No. December 2011-001224
	:	

I, **Brandon Segal**, being duly sworn according to law, deposes and says the following:

I am the process server below named and a competent adult over 18 years of age. I served and made known to **Asia Supermarket** on the **15th** day of **December 2011**, at **11:55AM** at **143 North 11th Street Philadelphia, PA 19107**, a **Complaint** filed in the above-captioned matter and served in the manner described below:

____ PERSONAL SERVICE: Served the within-named person

____ SUBSTITUTE SERVICE: By serving _____ as _____ who is in charge of above address

_X__ CORPORATE SERVICE: By serving **Tat Woo** who is authorized to accept service on behalf of the Corporation/Entity/Agency

____ POSTED SERVICE: By posting copies in a conspicuous manner to the front door of the property/entity/person being served

____ NON SERVICE: For the reason detailed in the comments below

COMMENTS: _____

The facts herein set forth are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to penalties of the 18 Pa.C.S. 4904 relating to unsworn falsifications to authorities.

Date: **12/16/11**

Brandon Segal
Seagull Legal Services, Inc.
P.O. Box 1706
Southampton, PA 18966