

**IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS  
STATE OF MISSOURI**

MJR HOWARD, LLC,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Cause No. 08SL-CC02302
	)	
MATTHEW E. BURGHOFF and	)	Division 42
CAROLYN MARY BURGHOFF,	)	
	)	
Defendants.	)	

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT**

This matter came before the Court for non-jury trial on December 15 and 16, 2010 on Plaintiff's Petition for Preliminary and/or Permanent Injunction. Plaintiff appeared by its corporate representative, Thomas E. Howard, Jr. (Howard), and by counsel Scott Riley. Defendants appeared in person and by counsel Jack Spooner. Evidence was adduced and concluded. Plaintiff's Exhibits 1-12 and Defendants' Exhibits A-G were admitted into evidence by stipulation of the parties. The matter was then taken under submission. Being now fully advised, the Court enters the following Findings of Fact, Conclusions of Law and Judgment.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. Plaintiff MJR Howard is a limited liability company. Howard is the managing member of MJR Howard and oversees all management, administration and operation of the company and its investments. Howard and Defendant Matthew E. Burghoff were partners in various business ventures and commercial real estate developments.

2. Defendant Carolyn Mary Burghoff was not involved in her husband's business, Burghoff Development, LLC, except for the occasional signing of documents.

3. Since late 2004, the Burghoffs have been the owners of a 100% beneficial interest in the "Matthew Eduard Burghoff y Carolyn Mary Burghoff Trust," a "Fideicomiso," or Mexican land trust (the Trust), established with Banco Mercantil Del Norte, Sociedad Anonima, Institucion De Banca Multiple, Grupo Financiero Banorte, Division Fiduciaria as trustee. The Trust is the legal owner of record of real property located in or near Tulum, Mexico (the Mexico property). The Mexico property can only be sold, leased or transferred by the Trust.

4. In 2006, Matthew Burghoff began experiencing cash flow issues in his business and requested a loan from Howard "to tide them over."

5. On November 16, 2006, the Burghoffs executed a promissory note for \$250,000 to Willmore Management Corporation (the Willmore Note). Howard is also the Manager, Director and President of Willmore Management Corporation. When the Burghoffs were unable to pay off the Note by the maturity date of February 16, 2007, additional collateral was added and the term of the Note extended to June 16, 2007. By this time, Burghoff's business was faced with between \$10 and \$12 million of debt.

6. According to Howard's testimony the Burghoffs had been unable to pay off the \$250,000 Note which matured on June 16, 2007. He stated that the parties started negotiating his participation in the Mexico property in early 2007 and that Matthew Burghoff made specific requests during the negotiations. On cross-examination Howard stated that he could not recall whether any of Matthew Burghoff's suggested terms were in writing or that he had ever requested any in writing.

Howard also testified that Exhibit 1, signed by the parties, is a different document from any proposed drafts of the same but that he could not recall what differences may have existed between the drafts and the final documents.

7. Howard denied that he threatened to go to the authorities once he found out Matthew Burghoff was having problems but admitted that all documents were signed in Matthew Burghoff's office on August 13, 2007.

8. Additionally Howard stated that he had no direct discussions with Carolyn Burghoff regarding the Assignment and that "he was trying to get his hands on collateral" of the Burghoffs to protect his own interest.

9. Burghoff testified that in June 2007, Howard approached him with evidence of illegal check activity, "double billing," out of the 1405 Pine construction account and threatened to expose him to the authorities unless he and Carolyn assigned their interest in the Mexico property to him. Burghoff admitted "double billing" on the project in an effort to keep his business going and offered to give up ownership in several projects and/or leave the partnership. It was Burghoff's testimony that Howard was only interested in the Mexico property because Howard knew the property was free and clear.

10. Matthew told Howard that the Assignment and related documents were overreaching, but given his tenuous position, he signed them in an effort to protect his family.

11. In August 2007, Howard presented Matthew Burghoff with an "Assignment of Beneficial Interest in Trust" (the Assignment), to effect the transfer of his and Carolyn's ownership interest in the Mexico property to MJR Howard. Pursuant to the Assignment, the Burghoffs would assign to MJR Howard a minimum fifty percent (50%)

beneficial interest in the Trust, and a one hundred percent (100%) beneficial interest in the Trust if they did not satisfy certain conditions, i.e., “make the filings to perfect the necessary amendments to the Trust Agreement to reflect Assignee’s fifty percent (50%) beneficial interest in the Trust pursuant to this Assignment within five (5) months from the date of this Assignment.”

12. In connection with the purported Assignment, Howard presented Matthew Burghoff with a “Conditional Collateral Assignment,” an “Option to Purchase Beneficial Interest in Trust,” and a “Property Leasing and Management Agreement.”

13. Pursuant to the Conditional Collateral Assignment, in the event of a default under the Assignment, Matthew Burghoff agreed to transfer to MJR Howard all right, title and interest in Burghoff’s Developer’s Fee under a 2005 Agreement between BHat Development, LLC and BHat 2, LLC (two other development projects between Burghoff and Howard), equal to 40% of \$1,944,300.00, or \$777,720.00.

14. Pursuant to the Option to Purchase Beneficial Interest in Trust, the Burghoffs were granted a three-year option (from August 10, 2007 until August 10, 2010) to purchase back from MJR Howard all or part of its beneficial interest in the Trust in 25% increments. Each 25% interest was valued at \$1,009,212.00, which, according to Howard, represented 60% of the budgeted profit on the Des Peres Project. Although it was Howard’s testimony that the Des Peres Project was critical in the execution of the Option to Purchase Beneficial Interest in Trust, he acknowledged there is no reference to the Des Peres Project anywhere in the document.

15. Under the Property Leasing and Management Agreement, the Burghoffs were required to manage and lease the Mexico property to qualified tenants. Income generated

from the lease or rental of the property was to be put towards expenses incurred in the maintenance and operation of the property. If the income was insufficient to pay all expenses, then under the Management Agreement the Burghoffs were solely responsible for the payment of those expenses.

16. All of these documents were prepared at Howard's direction for MJR Howard.

17. After Howard presented the documents to Matthew Burghoff on August 10, 2007, Burghoff asked for the weekend to consider his options. The parties then agreed to meet on August 13, 2007 to sign the documents. Matthew Burghoff never discussed the documents with his wife.

18. With regard to the Assignment (Plaintiff's Exhibit 1) Option to Purchase Beneficial Interest in Trust (Plaintiff's Exhibit 3), and Property Leasing and Management Agreement (Plaintiff's Exhibit 4), Carolyn Burghoff testified that on August 13, 2007, her husband called her into his office and told her Howard needed her signature on some paperwork concerning the Mexico property. According to Carolyn, she felt something was wrong because Matthew had sounded stressed on the phone. She further testified that when she arrived in Matthew's office Mr. Howard was also there; that she had not seen any drafts of the documents prior to August 13 and could not recall any negotiations between Howard and her husband regarding these documents. Matthew told her Howard had discovered some fraud and would go to the police unless they signed. Carolyn testified to being very upset; she did not want to sign and did so only because she believed that if she did not sign Howard would go to the police and Matthew would go to prison. According to Carolyn, Howard said he would not go to the police if she and her

husband signed. She could not recall whether she read the documents but asked if they could have someone look over the documents, and was told Howard would go to the police if they were not signed. According to Carolyn, the documents were signed and she was in and out of her husband's office in ten minutes.

19. In November 2007, Burghoff approached KSI Capital, a non-conventional real estate lender, for a \$450,000 loan to pay off the Willmore Note. He wasn't able to get the loan, however, because Howard called KSI and asserted an ownership interest in the Trust, causing a title issue.

20. On April 3, 2008, Matthew Burghoff was indicted on federal charges of bank fraud, money laundering and violations of the Clean Air Act. He pleaded guilty on October 1, 2008; on December 19, 2008, Matthew Burghoff was sentenced to two years in federal prison and ordered to pay restitution.

21. On June 4, 2008, Plaintiff filed the instant action seeking a temporary restraining order and preliminary and/or permanent injunction; a preliminary injunction against the Burghoffs was entered on July 8, 2008.

22. Plaintiff alleges the Burghoffs have refused to perform their contractual obligations under the Assignment, and that it faces irreparable injury in the absence of permanent injunctive relief. Plaintiff further alleges this action is brought to protect its contractual right to a 100% beneficial interest in the Trust and to compel the Burghoffs "to affirmatively act and take all actions necessary to assign to Plaintiff a one hundred percent (100%) beneficial interest in the trust, including the preparation and execution of all necessary documents and filings necessary to assign to plaintiff a one hundred percent (100%) beneficial interest in the Trust."

23. An action seeking a permanent injunction is an action in equity. City of Greenwood, supra, 311 S.W.3d at 263. Injunction is an extraordinary and harsh remedy and should not be granted when there is an adequate remedy at law. Walker v. Hanke, 992 S.W.2d 925, 933 (Mo.App. W.D.1999).

24. To obtain injunctive relief, a party must prove: (1) that the party has no adequate remedy at law; and (2) that irreparable harm will result if the injunction is not granted. American Association of Orthodontists v. Yellow Book USA, Inc., 277 S.W.3d 686 (Mo.App. E.D. 2008). If a plaintiff's injury can be redressed by an award of damages or by another remedy apart from an injunction, injunctive relief will not be granted because there is an adequate remedy at law. *Id.*

25. "The powers of a court of equity to adjudicate are broad but limited to the claim for relief and issues made by the pleadings." Southern Star Central Gas Pipeline, Inc. v. Murray, 190 S.W.3d 423, 429 (Mo.App. S.D. 2006). In the instant case, Plaintiff MJR Howard has not pled a breach of contract. Instead, Plaintiff MJR Howard seeks to enjoin the Burghoffs, based on the Assignment and related documents, from exercising their rights under the Trust, including transferring or in any way encumbering the Mexico property.

26. It was Howard's testimony that MJR Howard's forbearance in instituting collection proceedings against the Burghoffs on the Willmore Note was the consideration for the Assignment. The Court finds his testimony not credible because MJR Howard was not a party to the Willmore Note. MJR Howard cannot agree to forbear action on the Willmore Note unless it had an assignment or was a party to the Note. Howard acknowledged on cross examination that MJR Howard has no assignment from Willmore

of the Note or to collect on the Note. Consequently, MJR Howard had no authority to agree to forbear any action on the Note by way of an Assignment. MJR cannot use as consideration an agreement to forbear on a Note in which it has no vested interest. The Court finds the Assignment cannot be consideration in exchange for forbearance on the Note. The Court further finds and concludes that the purported Assignment is invalid and unenforceable against the Burghoffs.

27. Even assuming there was sufficient consideration for the Assignment, the Court nevertheless finds the Assignment lacks sufficiently definitive terms to be deemed a forbearance agreement. Paragraph 1 of the purported Assignment states in pertinent part:

“For value received, including but not limited to Assignee’s [MJR Howard, LLC] and his controlled business entities’ forbearance in instituting collection proceedings against Assignor [Burghoffs] and/or their controlled entities related to an outstanding promissory note in the original amount of \$250,000 dated on the 16<sup>th</sup> day of November, 2006 through the date of this Assignment, Assignor hereby assigns, transfers and conveys to Assignee a fifty percent (50%) interest of the entire beneficial interest in the Trust and its Property...”

The Court finds the reference to “an outstanding promissory note in the original amount of \$250,000 dated on the 16<sup>th</sup> day of November, 2006,” vague and ambiguous in light of the many business dealings the parties worked on together. The Court cannot stretch this language to include the Willmore Note. Therefore the Court finds and concludes that the above-mentioned language in the Assignment is vague, ambiguous and unenforceable.

28. The Court further finds, based on the circumstances existing when the purported Assignment was executed by the Burghoffs, that the Assignment is unenforceable because it is unconscionable and because it was executed by the Burghoffs under duress. The evidence established a transaction orchestrated by Howard with terms



so overwhelmingly favorable to him and so one-sided that it resulted in a purported assignment of property valued at approximately \$4M in exchange for an alleged forbearance on a \$250,000 Note. Although Howard testified there were negotiations, which the Court does not find credible, the evidence indicates there was no reasonable opportunity for the Burghoffs to review, comment or suggest modification of the terms and conditions of the documents. The documents were presented to the Burghoffs on August 10 and signed on August 13. Finally, the evidence established that Howard took advantage of the Burghoffs' dire financial situation, threatening to go to the authorities, unless they signed the documents. "Duress by threat, such as will avoid a contract, is tested, not so much by the nature of the threat, but rather by the state of mind produced upon the victim. Duress exists when a person, by reason of threat of criminal prosecution, is bereft of his own free will to such an extent that he is induced to make a contract he otherwise would not have made." Nichols v. Wirts, 270 S.W.2d 801, 805 (Mo. 1954), and cases cited therein.

29. The Court finds based on the evidence before it that in direct response to Howard's threats; the Burghoffs executed the Assignment, the Conditional Collateral Assignment, the Option to Purchase Beneficial Interest in Trust, and the Property Leasing and Management Agreement.

30. Finally, a court of equity will not assist a plaintiff who comes to court with unclean hands. "A party who participates in inequitable activity regarding the very issue for which it seeks relief will be barred by its own misconduct from receiving relief." City of St. Joseph v. Lake Contrary Sewer District, 251 S.W.3d 362, 369 (Mo.App. W.D. 2008). The evidence established Howard was aware of Matthew Burghoff's financial

difficulties and threatened to go to the police with information about Matthew Burghoff's fraudulent conduct. The Court finds Howard attempted to take advantage of a desperate situation for his own benefit, namely to gain possession of the free and clear Mexico property. Howard assumed control, directing preparation of all the documents at issue herein and did not allow the Burghoffs a reasonable opportunity to review or negotiate the terms and conditions thereof. Although Howard denies threatening to expose Burghoff's fraudulent conduct to the authorities, the Court finds his testimony not credible, particularly in light of Defendants' Exhibit G, which contradicts his testimony that he did not learn of Burghoff's fraud until the bank so informed him in July of 2007.

31. With regard to the Conditional Collateral Assignment, Option to Purchase Beneficial Interest in Trust, and Property Leasing and Management Agreement, the Court finds and concludes these documents are also unenforceable, since they all hinge on the validity of the purported Assignment.

### JUDGMENT

Accordingly, Judgment on Plaintiff's Petition for Preliminary and/or Permanent Injunction is entered in favor of Defendants and against Plaintiff. The Preliminary Injunction entered herein on July 8, 2008 is hereby dissolved. Costs assessed against Plaintiff.

SO ORDERED:

3/1/11  
Date

Sandra Farragut-Hemphill, CJ2  
Sandra Farragut-Hemphill, Judge

cc: Scott Riley  
Attorneys for Plaintiff  
Jack Spooner  
Attorney for Defendants