

**APF Mgt. Co., LLC v Munn**

2018 NY Slip Op 30959(U)

March 31, 2018

Supreme Court, Westchester County

Docket Number: 67946/2013

Judge: Charles D. Wood

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
APF MANAGEMENT COMPANY, LLC, d/b/a APF  
MASTER FRAMEMAKERS, et al.,

Plaintiffs,

DECISION AND ORDER

Index No. 67946/2013

Index No. 61930/2014

Index No. 50801/2015

- against -

MAX MUNN, MOLLY MUNN, MUNNWORKS, LLC,  
ABBOT PEDROSO, et al.,

Defendants.

Seq Nos. 12, 13 &14

-----X  
MAX MUNN, MOLLY MUNN, MUNNWORKS, LLC,  
ABBOT PEDROSO, et al.,

Counterclaim-Plaintiffs,

-against-

APF MANAGEMENT COMPANY, LLC, d/b/a APF  
MASTER FRAMEMAKERS, et al.,

Counterclaim-Defendants,

-----X  
WOOD, J.

The following papers were read in connection with Max Munn, Molly Munn, Munn Works LLC ('MunnWorks'), ('the Munn Parties') motion by order to show cause, and opposition by Plaintiffs'/Counterclaim Defendants ('Plaintiff') (Seq 12); Munn Parties motion to quash subpoena; (Seq 13); Plaintiff's Cross-Motion to grant examination (Seq 14):

Seq 12

Munn Parties' Order to Show Cause, Counsel's Affirmation, Exhibits, Memorandum of Law.  
Plaintiff's Counsel's Affirmation in Opposition, Exhibits, Memorandum of Law,  
Munn Parties' Counsel's Reply Affirmation, Exhibit, Memorandum of Law.

Seqs 13 and 14

Munn Parties Order to Show Cause, Counsel's Affirmation, Exhibits.

Plaintiff's Notice of Cross-Motion, Counsel's Affirmation.  
Munn Parties Counsel's Affirmation in Opposition, Max Munn's Affidavit,  
Munn Parties Counsel's Reply Affirmation in support of motion to quash.  
Plaintiff's Counsel's Reply Affirmation for PreJudgment Relief.

Based upon the foregoing papers, the instant post-trial motions are decided as follows:

These three actions, which have not been consolidated came on for a joint trial. The trial began on October 5, 2017, and ended on October 19, 2017. At the close of plaintiff's case, the Munn Parties made a motion for a directed verdict on all causes of action, arguing that plaintiff had not proven any damages. They also moved to dismiss plaintiff's claim against Max Munn based on the Asset Purchase Agreement, because Mr. Munn was not a party to said agreement, and had no personal liability under said agreement. The following day at the charging conference the court dismissed plaintiff's claim against Mr. Munn under the Asset Purchase Agreement. After both parties rested and made their summations to the jury, the Munn Parties renewed their motion for judgment dismissing all of plaintiff's claims on the ground that it had failed to prove damages. The court denied the motion without prejudice to renewal if the jury came back with findings that appeared to be improper.

As for the Munn Parties, the jury awarded plaintiff \$50,000 against Molly Munn for material breach of the Operating Agreement; \$100,000 breach of the implied covenant of good faith and fair dealing against Max Munn and Molly Munn; total amount of net lost profits of \$300,000 as against Abbott Pedroso and Max Munn and Munn Works; \$900,000 as a result of diversion of corporate opportunity as against Max Munn, Molly Munn and Abbott Pedroso; \$1.1 million reasonable value of the good will that defendants misappropriated as against Max Munn and Munn Works. Max Munn was awarded \$46,000, as a result of plaintiff's breach of the Employment

Agreement.

Munn Parties now move this court for an order pursuant to CPLR 4404(a) setting aside the jury's "special" verdict; entering judgment in favor of the Munn Parties, dismissing all claims against them asserted by plaintiff, or alternatively, ordering a new trial on the claims asserted against the Munn Parties; and ordering a new trial with respect to damages on Molly Munn's claim of breach of fiduciary duty against Carl Petrillo, Greg Petrillo, and Matthew Petrillo, and on Max Munn's claim for his unpaid salary and benefits due under his employment agreement. Moreover, they seek a temporary restraining order directing the Westchester County Clerk not to enter any judgment in these actions pending further order of the court after determination of the Munns Parties' within motion.

In support of their motion, the Munn Parties claim that none of the damages awarded to plaintiff were supported by the evidence, the differing round numbers did not make sense, and in addition, the entire trial and verdict was tainted by the inflammatory and prejudicial summation delivered by plaintiff's counsel, Timothy Coon.

The Munn Parties' also argue that pursuant to CPLR 5016(b) any judgment based upon the special verdict rendered by the jury in this case may not be entered by the County Clerk, but may only be entered upon direction of the Court after fashioning an appropriate judgment. Plaintiff takes the position that the Verdict Sheet asked the jury to provide a general verdict with responses to interrogatories, and not a special verdict sheet.

As to the question as to whether this was a general or special verdict, the court may direct the jury to find either a general verdict or a special verdict. A general verdict is one in which the jury finds in favor of one or more parties. A special verdict is one in which the jury finds the facts only, leaving the court to determine which party is entitled to judgment thereon (CPLR 4111). A general

verdict may be accompanied by answers to interrogatories. When the court requires the jury to return a general verdict, it may also require written answers to written interrogatories submitted to the jury upon one or more issues of fact. (CPLR 4111).

Here, plaintiff submitted a Proposed Judgment to the Clerk followed by two amended proposed judgments. Upon this court's review of the Verdict Sheet, the jury returned a general verdict, as the jury was required to apply the law to the facts and required legal instruction, and was not purely charged a fact finding function. The court has no further role in the claims that were presented to the jury, inasmuch as the jury's responses to questions posed to them do not require the court to draw any additional legal conclusions. As plaintiffs argue, interrogatories aid a general verdict--they do not disqualify one. Munn Parties have failed to establish that the clerk should not enter judgment. Accordingly, the court directs that the stay of entry of the proposed judgment is lifted and vacated. Generally, a jury's award of damages is given great deference and the amount of damages is principally a question of fact to be resolved by the jury (Coker v. Bakkal Foods, Inc., 52 AD3d 765 [2d Dept 2008]); Cinao v. Reers, 109 AD3d 781, 782 [2d Dept 2013]). Only in a case where the record indicates that an award deviates so materially from what would be reasonable compensation, that the verdict could not have been reached on any fair interpretation of the evidence, will a court adjust a jury's verdict (Giugliano v Giammarino, 37 AD3d 533 [2007]; Duncan v Hillebrandt, 239 AD2d 811, 814 [1997]). "Fact-finding is the province of the jury, not the trial court, and a court must act warily lest overzealous enforcement of its duty to oversee the proper administration of justice leads it to overstep its bounds and "unnecessarily interfere with the fact-finding function of the jury to a degree that amounts to an usurpation of the jury's duty" [internal citations omitted]. This is especially true if a verdict is contested solely on weight of the evidence

grounds and interest of justice factors have not intervened to flavor the judicial response to the motion. Absent such complications, the challenge is directed squarely at the accuracy of the jury's fact-finding and must be viewed in that light" (Nicastro v Park, 113 AD2d 129, 133-34 [2d Dept 1985]).

The Munn Parties object that the proposed judgments did not dispose of all of the causes of action, and in accordance with CPLR 5012, a judgment upon less than all causes of action against all parties is not proper unless the court orders a severance of those claims, and no severance was ordered in this case. In addition, Munn Parties' counsel notes that one judgment covering all three separate actions that were tried together is not proper since the three actions were never consolidated, just tried jointly.

Munn Parties' also contend that there is no rational explanation for how plaintiff's net lost profits could be five different figures. They continue that there is no rational basis to choose one figure over another as the measure of lost profits no rational basis for adding all the figures together as one lost profits recovery, and no rational basis for awarding damages for the same loss multiple times, let alone one time. Having no evidence from which to assess any net lost profits damages on those claims, the jury apparently engaged in rank speculation and awarded random round numbers that indisputably are not supported by any evidence in the case. This was contrary to the Court's charges to the jury with respect to damages, and was contrary to the law. They also argue that the verdict should also be set aside because of the likelihood that it was unduly influenced by the alleged false, inflammatory, and prejudicial comments made by Mr. Coon in his summation, in an apparent attempt to get the jury to award punitive type damages based on passion rather than on the admissible

evidence. As an example, they argue that Mr. Coon accused Max Munn of forging his daughter's signature on documents and accused Molly Munn of lying about it, accusations that were not the subject of any testimony or supported by any evidence. He also improperly solicited irrelevant testimony about Mr. Munn's prior financial dealings and both his personal and corporate bankruptcies, misrepresented that testimony in his summation, and then improperly suggested that the jury should conclude that Mr. Munn was a person of general bad character who was out to defraud anyone with whom he transacted business. Mr. Coon resorted to personal attacks on Munn Parties' counsel. Mr. Coon intentionally misled the jury with his calculated misrepresentation that Mr. Munn, acting as President of APF Group, sold the customer list to plaintiff and decided that the price tag for his sale of the customer list was \$2.2 million. The court had already dismissed plaintiff's claim against Mr. Munn based on the alleged sale of the customer list under the Asset Purchase Agreement because Mr. Munn was not a party to the agreement and had no personal liability; it was therefore highly improper and prejudicial for Mr. Coon to imply to the jury that Mr. Munn sold the customer list to plaintiff and received millions for it. Allegedly, Mr. Coon also misrepresented that the price tag for the customer list was \$2.2 million because plaintiff had very little else to sell. All of the above was highly prejudicial to the Munn Parties deprived them of a fair trial and was meant to induce the jury to award something to plaintiff despite no proof of loss.

Munn Parties also believe that as to Molly Munn's claim for breach of fiduciary duty, there should be a new trial regarding damages. The jury found that Carl, Gregory, and Matthew Petrillo each breached their fiduciary duty to Molly Munn, but awarded no damages. The jury's decision to award no damages at all was thus against the weight of the evidence. Mr. Coon's misleading summation may have played a part here in inducing the jury to rule on the basis of passion and matter

not properly before them.

Moreover, Munn Parties contend that the jury's decision to award Max Munn only \$46,000 as compensation for plaintiff's failure to pay him the full salary and benefits to under his employment agreement is without merit. The jury found that plaintiff breached the employment agreement by cutting Max Munn's salary from \$250,000 to \$100,000 per year.

After carefully scrutinizing the record and Munn Parties submissions and arguments, as well as those of plaintiffs, the court finds no merit for their assertions as there was documentary evidence including bank records, and testimony of witnesses that greatly weighs in favor of the verdict that the jury reached in favor of plaintiff. There is sufficient evidence that plaintiff proved its net lost profits, and that Munn Works filled orders for their own gain that were meant for plaintiff. Documents and testimony demonstrated the value of the orders that were redirected by Max Munn and Abbot Pedroso from plaintiff to Munn Works. Munn Works even used some of the same vendors as plaintiff.

Moreover, contrary to Munn Parties' contention, as the court had acknowledged at the close of the trial, different damage awards indicate that the jury based its various awards on different conduct, as the parties essentially asked it to do with the questions posed on the verdict sheet. The court finds no inconsistencies with the damage awards and the Verdict Sheet.

Lastly, Munn Parties' application to set aside the jury verdict on the ground that plaintiff's counsel made improper comments to the jury during summation is denied. Plaintiff's counsel's arguments, and demeanor at the trial was well within bounds of appropriate conduct, and did not poison the jury process by raising misleading and or prejudicial matters. When considered within the context of the summation, the plaintiff's counsel's zealous comments objected to here "were within



the bounds of the wide latitude allowed to counsel in summation (Schneer v Bellantoni, 250 AD2d 666, 667 [2d Dept. 1998]); and they are not per se grounds for a new trial. The court also notes, that it read the PJI 1:5 to the jury before the case began, advising that comments of counsel, whether in opening statements, during the trial, or in summations, are not evidence. The court reminded the jury of this principle prior to defendant's counsel's summation, and took the additional step of further reminding the jury of that principle immediately prior to Mr. Coon's summation:

I will remind you that nothing that is said during this is evidence. You have already heard all of the evidence. Again, just like the other closings, this is argument intended to help you marshal the evidence and asking you to look at the evidence in a certain way.

(10/18/17 Tr. p 4, lines 13-18)

Finally, in the charge to the jury, the PJI instruction was again read to the jury, advising them that :

As I instructed you before the trial began, in deciding the case, you may consider only the evidence which has been admitted into evidence and the testimony of the witnesses as you have heard it in this courtroom. Arguments, remarks, and the summations of the attorneys are not evidence, nor is anything that I now say or may have said with regard to the fact evidence.

(10/18/17 Tr. p 84, line 20- p. 84, line 2)

In conclusion, based on the evidence adduced at trial and the testimony heard, the court finds that the jury's verdict could be reached from a fair interpretation of the evidence, and thus should not be disturbed. Accordingly, the court declines to set aside the verdict and for Munn Parties' requested relief.

Turning to Motion Seq. 13, Munn Parties' application to quash a subpoena issued by counsel for plaintiff to JP Morgan Chase Bank, N.A, demanding production of bank account records for accounts owned or maintained by Munn Works LLC or Max Munn. Plaintiff opposes the motion.

raising that Max Munn's course of dishonest conduct demonstrated at the trial of this action justifies the denial of the Munn's Parties application to quash the subpoena.

As for plaintiff's cross-motion for an order granting examination of and restraining defendants pursuant to CPLR 5529:

In any court, before a judgment is entered, upon motion of the party in whose favor a verdict or decision has been rendered, the trial judge may order examination of the adverse party and order him restrained with the same effect as if a restraining notice had been served upon him after judgment".

As this court may issue a pre-judgment restraining order pursuant to CPLR 5229, upon motion of the party in whose favor a verdict or decision has been rendered, and said conditions having been satisfied herein, plaintiff's cross motion is granted. This is so in light of these circumstances, and the court's decision herein not to set aside the jury verdict, and lifting any stay to have the Clerk enter Judgment, the delay in entering a judgment, evidence and testimony elicited at trial, which certainly at times did not depict Mr. Munn in a favorable light, and the various companies associated with some of the Munn Parties, plaintiff's cross-motion is granted for a pre-judgment examination and restraint of the Munn Parties, as if a restraining notice had been served on a judgment debtor pursuant to CPLR 5229; and the Munn Parties' motion is denied.

Based upon the foregoing, it is hereby

ORDERED, that this motion by Munn Parties' to set aside the verdict pursuant to CPLR 4404(a) is **denied** (Seq 12), and any stay to direct the Clerk not to sign the Judgment in this matter is lifted and vacated; and it is further

ORDERED, that the Munn Parties' motion to quash the subpoena is **denied** (Seq 13); and plaintiff's cross-motion for an order granting examination of and restraining Munn Parties pursuant to CPLR 5529 is **granted** (Seq 14).

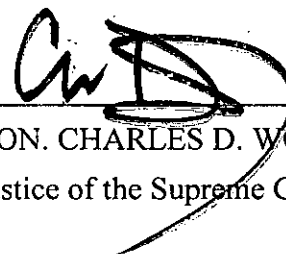
Any other relief requested and not specifically mentioned herein is **denied**.

The foregoing shall constitute the Decision and Order of this Court.

**LET JUDGMENT BE ENTERED ACCORDINGLY**

Dated: White Plains, New York

March 31, 2018



HON. CHARLES D. WOOD  
Justice of the Supreme Court

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