

IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

FILED

December 12, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

JIM BALDWIN and)	C/ A NO. 03A01-9508-CH-00250
EDW NA BALDWIN,)	
)	KNOX CHANCERY
Plaintiffs - Appellants,)	
)	HON. DENNIS H. INMAN,
v.)	CHANCELLOR
)	
UNITED AMERICAN LAND COMPANY,)	AFFIRMED
)	AND
Defendant - Appellee.)	REMANDED

A. BENJAMIN STRAND, JR., STRAND AND GODDARD, Dandridge, for
Plaintiffs - Appellants.

DOUGLAS L. DUNN, MORRISON, TYREE & DUNN, P. A., and BERNARD E.
BERNSTEIN, BERNSTEIN, STAIR & MCADAMS, Knoxville, for
Defendant - Appellee.

O P I N I O N

Franks. J.

In this action for breach of contract and unjust enrichment, the Trial Court awarded plaintiff \$1,199.00 for equipment and supplies furnished under the theory of unjust enrichment.

Plaintiff has appealed and defendant has also appealed, insisting plaintiff is entitled to no judgment.

For five years, Plaintiff managed a flea market on

the property of Defendant. From April 1977 to November 1977, the parties operated under an agreement as determined by the Trial Court. Plaintiff received 25% of the gross take, in return for collecting and keeping track of money received, being in charge of clean-up, and recruiting new vendors. Defendant was to pay for advertising and toilet facilities.

In November of 1977, the flea market was moved indoors for the winter, and at that time the arrangement was changed to an 80%-20% split for outdoor booths and a 90%-10% split for indoor booths.

The parties operated on this basis through 1982, when defendant ended the arrangement with plaintiff. Plaintiff has sued on a duress theory, arguing that he never agreed to the reduction in his share of the weekly profits. He asked for \$28,826, representing 25% of the gross take which he would have received under the initial agreement. He also sued under an unjust enrichment theory for reimbursement of costs incurred in running the flea market, including clean up, replacement of lights and locks, repair to heaters, and installation of a public address system.

The Trial Court determined the agreement between the parties had no specific time for performance, or termination, and was terminable at will by either party, with an implied covenant of fair dealing and good faith. Because the contract was terminable at will, the Court held plaintiff could not recover for future income. Moreover, the cost of cleanup, which was one of plaintiff's duties under the contract, was not recoverable. The cost of license fees and costs incurred in allocating spaces to vendors were not recoverable because

they were costs of doing business. The reduction in the percentage of revenue received by plaintiff was not recoverable since a new agreement was effectively made by plaintiff's acquiescence in accepting the lower percentages for more than four years. Advertising costs incurred by plaintiff, which were to be paid by defendant under the terms of the initial agreement, were never passed on to defendant. Plaintiff's acquiescence in paying the advertising over a long period of time also served to modify the agreement.

The Trial Court found the initial contract was later amended by the parties' conduct and the plaintiff was bound by the modifications which he had acquiesced to over four years.

Whether a contract has been modified by the parties is a question of fact for the trier of fact. 17A Am Jur 2d §523. The Trial Court's finding is entitled to a presumption of correctness unless the evidence preponderates otherwise. Assent may be manifested wholly or partially by written or spoken words or by other acts. *Cole-McIntyre-Norfleet, Co. v. Holloway*, 141 Tenn. 679, 685, 214 S.W. 817, 818 (1919). The evidence does not preponderate against the terms of the agreement, as found by the Chancellor. T.R.A.P. Rule 13(d).

Appellant argues that he objected to the change in terms and only acceded to them under duress. Economic duress is defined as:

Imposition, oppression, undue influence, or the taking of undue advantage of the business or financial stress or extreme necessities or weakness of another; the theory under which relief is granted being that the party profiting thereby has received money, property, or other advantage, which in equity and good conscience he ought not to be permitted to retain.

Johnson v. Ford, (1922) 147 Tenn. 63, 92-93. 245 S.W. 531, 539 (1922) (quoting *Rees v. Schmits*, 164 Ill.App. 250, 258 (1911)).

It is summarized as "an involuntary payment made necessary by the fraud and bad faith of the defendants." *Id.* at 96. Duress has been found in a situation where the plaintiff has invested large sums of money in reliance on one set of contract terms and then was forced to change such terms. *Id.* Also see *Jaffe v. Bolton*, 817 S.W2d 19 (Tenn.App. 1991).

The evidence does not establish that defendant took undue advantage of plaintiff. Plaintiff's investments in fixing up the building for the indoor flea market had not taken place at the time of modification, nor had he yet invested moneys which he would in later years for security, vacuum cleaners for parking lots, entertainment, and advertising. The evidence does not preponderate against the Trial Court's determination that the parties modified the agreement by the continuation of the new business arrangement for more than four years. See *Crocker v. Schneider*, 683 S.W2d 335 (Tenn.App. 1984); also see *Hamblen County v. City of Morristown*, 656 S.W2d 331 (Tenn. 1983)

The Court ordered reimbursement to plaintiff for the costs of equipment and supplies. Unjust enrichment requires "a benefit conferred upon the defendant by the plaintiff, appreciation by the defendant of such benefit, and acceptance of such benefit under such circumstances that it would be inequitable for him to retain the benefit with out payment of the value thereof." *Paschall's, Inc. v. Dozier*, 407 S.W2d 150, 155 (Tenn. 1966). The evidence does not preponderate against the Trial Judge's judgment. Accordingly, we affirm

the Trial Court's judgment, and assess one-half of the costs to each party.

Herschel P. Franks, J.

CONCUR:

Houston M. Goddard, P. J.

Don T. Murray, J.