COURT OF APPEALS
DECISION
DATED AND FILED

June 13, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP2204 **Cir. Ct. No. 2005CV1718**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

NII-JII ENTERTAINMENT, LLC, PARADISE KEY MANAGEMENT CO., AND RAP I, LLC, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

PLAINTIFFS-APPELLANTS,

V.

DENNIS M. TROHA, KENESAH GAMING DEVELOPMENT, LLC, DOE 2, DOE 3, DOE 4, DOE 5, DOE 6, AND DOE 7,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Kenosha County: STEPHEN A. SIMANEK, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. NII-JII Entertainment, LLC, its manager, Paradise Key Management Co., and a member, RAP I, LLC,[1] (collectively NII-JII) appeal from a judgment dismissing their complaint against Dennis Troha and his company, Kenesah Gaming Development, LLC. NII-JII argues that the circuit court erred by taking judicial notice of prior litigation, that Troha is bound by and has breached confidentiality and noncompete provisions in an operating agreement, and that Troha is unjustly enriched unless equitable relief is granted. We affirm the judgment dismissing the action.

¶2 Beginning in 1994, NII-JII sought to develop an Indian gaming casino with the Menominee Indian Tribe. Investors in NII-JII, individuals as well as other limited liability corporations and partnerships, executed an operating agreement. Dennis Troha was not an individual investor in NII-JII. The complaint alleges that he was an interest holder in Kenosha Casino Partners, LLC (KCP) and Seven T's Plus, LLC, a member of KCP.[2] KCP was a NII-JII investor and member. Troha served on NII-JII's founder's board.

¶3 By 2001, NII-JII's ability to proceed with the casino development was significantly impaired by the actions of Morgan Murphy and Robert Boyle, NII-JII promoters and managers. As a class, NII-JII investors and members filed suit and were successful in expelling Murphy and Boyle from NII-JII as of

[1] RAP I, LLC, purports to serve as a class representative for all owners and successors in interest to owners of NII-JII Entertainment, LLC, other than Dennis Troha and his family members. Certification of a class was never addressed.

[2] The allegation in the complaint does not make clear if Troha was an individual member of KCP or if his link to KCP is only by the membership of Seven T's Plus. From the parties' briefs, it is apparent that Troha was only a member of Seven T's Plus, which in turn was a member of KCP.

July 12, 2005.[3] The jury verdict in that case awarded the investor class their original investment and punitive damages and NII-JII projected profits.

¶4 Sometime in or after 2001, Troha began to work with the tribe. He formed Kenesah Gaming Development for the purpose of developing the casino for the tribe. NII-JII commenced this suit against Troha alleging that he secretly made a deal with the tribe to develop the casino independently of NII-JII by appropriating NII-JII's business plan, work product and confidential information. The complaint seeks declaratory relief and damages for breach of the operating agreement, breach of implied covenants of good faith and fair dealing, and unjust enrichment. It also requests the imposition of a constructive trust. Without filing an answer, Troha moved to dismiss the complaint. In a well-written decision, the circuit court concluded that there was no justiciable issue to support declaratory judgment, that Troha was not a party to the operating agreement, that the non-compete provision ceased to be enforceable when NII-JII was unable to develop the casino, that no implied covenant of good faith and fair dealing was breached, and that no unjust enrichment claim exists because NII-JII was compensated in prior litigation for its lost opportunity to develop the casino.

¶5 Our review of an order granting a motion to dismiss a complaint is de novo. ***State ex rel. Lawton v. Town of Barton***, 2005 WI App 16, ¶9, 278 Wis. 2d 388, 692 N.W.2d 304.

> A motion to dismiss for failure to state a claim "tests the legal sufficiency of the complaint." A reviewing court "accept[s] the facts pled as true for purposes of [its] review, [but is] not required to assume as true legal conclusions

[3] The divestment order also transferred Morgan Murphy's management company, Paradise Key Management Co., to NII-JII's receiver.

> pled by the plaintiffs." Although the court must accept the facts pleaded as true, it cannot add facts in the process of liberally construing the complaint. Rather, "[i]t is the sufficiency of the facts *alleged* that control[s] the determination of whether a claim for relief" is properly pled.

John Doe 67C v. Archdiocese of Milwaukee, 2005 WI 123, ¶19, 284 Wis. 2d 307, 700 N.W.2d 180 (citations omitted).

¶6 NII-JII argues that Troha has violated the noncompete and confidentiality provisions of the operating agreement as well as the implied duty of good faith and fair dealing applicable to every signatory to a contract. The complaint alleges that in becoming a member of NII-JII, Troha, individually and through various investment vehicles, "were and are parties to and subject to the provisions of the NII-JII Operating Agreement." The allegation that Troha is a party to the operating agreement is a legal conclusion that we need not accept. *See* ***id.***

¶7 Troha did not sign the operating agreement, a copy of which is attached to the complaint. The noncompete provision in the operating agreement purports to bind any shareholder, member, equity holder or affiliate of any NII-JII investor to the restriction. It provides:

> During the existence of the Company, each Member hereby agrees that the Member, and each shareholder, member, partner or equity holder of such Member, will not directly or indirectly, including through any Affiliates, own, manage, develop, construct, operate, lease or otherwise be involved in any manner whatsoever with the development or operation of [a nearby gaming facility].… Each Member shall require each shareholder, member, partner or other equity holder of such Member to agree in writing to the restrictions set forth in this Section 8.6 and, upon request by the Manager, to assign the right to enforce such agreement to the Company. If any Member fails to require each Member Owner of such Member to agree in writing to such restrictions and such failure is not cured within 30

> days after written notice from the Manager to the Member, the Member shall, at the Manager's option, be deemed to have dissociated from the Company.

¶8 There is no allegation that Troha, as a controlling member of Seven T's Plus, a member of KCP, agreed in writing to the noncompete restrictions.[4] As the circuit court observed, the operating agreement provides its own remedy for the failure of any shareholder, member, partner or other equity holder of a NII-JII investor to agree to the noncompete restriction. The remedy is not imposition of the contract terms against that person or entity.

¶9 Absent Troha's execution of the written agreement, a contract can only be established by factual allegations sufficient to show offer, acceptance, and consideration. *See* ***Peters v. Peters Auto Sales, Inc.***, 37 Wis. 2d 346, 349-50, 155 N.W.2d 85 (1967) ("In an action based upon contract the complaint must allege the essential and ultimate facts constituting consideration."); ***Garvey v. Buhler***, 146 Wis. 2d 281, 289, 430 N.W.2d 616 (Ct. App. 1988) ("Both implied and express contracts require the element of mutual meeting of the minds and of intention to contract."). There are no allegations in NII-JII's complaint of offer, acceptance and consideration flowing to and from Troha.

[4] NII-JII asserts that "equity regards as done what ought to have been done." Equity has no role in determining whether a written contract is binding.

¶10 NII-JII argues that under WIS. STAT. § 183.0304(2) (2005-06),[5] KCP and Seven T's Plus are fictitious entities that can be ignored and Troha is bound by the operating agreement as the principal of those entities. Essentially NII-JII contends that KCP and Seven T's Plus were Troha's agents and Troha is bound by any contract his agents enter into. There are no allegations in the complaint that support application of § 183.0304(2) to ignore or "pierce" the separate existence of KCP and Seven T's Plus. The complaint fails to allege conduct by Troha that demonstrates that he operated KCP and Seven T's Plus as his own personal business. *See* ***Consumer's Co-op of Walworth County v. Olsen***, 142 Wis. 2d 465, 484-85, 419 N.W.2d 211 (1988) (the "instrumentality" or "alter ego" doctrine is applied to determine when equity requires piercing the corporate veil, and this doctrine requires proof of the following elements: (1) control and complete domination of finances, policy and business practice in respect to the transaction attacked so that the corporate entity had at the time no separate mind, will or existence of its own; (2) control used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or dishonest and unjust act in contravention of plaintiff's legal rights; and (3) control and breach of duty must proximately cause the injury or unjust loss complained of).

¶11 To state a claim based on agency, the complaint must allege conduct by the principal that either gave the agent reason to believe it was authorized to act

[5] WISCONSIN STAT. § 183.0304(2) provides: "Notwithstanding sub. (1), nothing in this chapter shall preclude a court from ignoring the limited liability company entity under principles of common law of this state that are similar to those applicable to business corporations and shareholders in this state and under circumstances that are not inconsistent with the purposes of this chapter."

All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

on the principal's behalf or gave a third person reason to believe that the agent was so authorized. *See* ***Pavlic v. Woodrum***, 169 Wis. 2d 585, 591, 486 N.W.2d 533 (Ct. App. 1992). No such allegations are made here. Indeed, that the operating agreement set forth the requirement that each shareholder, member, partner or equity holder of NII-JII investors separately agree in writing to the terms of the noncompete restrictions demonstrates that investors were not authorized to bind their shareholders, members, partners or equity holders.

¶12 NII-JII's final attempt to bind Troha to the operating agreement is as a successor to the dissolved entities KCP and Seven T's Plus.[6] The complaint does not allege that KCP and Seven T's Plus are dissolved and that Troha is the successor to them. Yet it is undisputed that both dissolved in 2002. NII-JII asserts that by operation of WIS. STAT. § 183.0905,[7] KCP's and Seven T's Plus's interest

[6] The operating agreement provides: "The agreements contained in this Operating Agreement shall be binding on and inure to the benefit of heirs, executors, administrators, personal representatives, successors and assigns of the respective parties to this Operating Agreement."

[7] WISCONSIN STAT. § 183.0905 provides:

> Upon the winding up of a limited liability company, the assets shall be distributed in the following order:
>
> (1) To creditors, including, to the extent permitted by law, members who are creditors, in satisfaction of liabilities of the limited liability company.
>
> (2) Unless otherwise provided in an operating agreement, to members and former members in satisfaction of liabilities for distributions under ss. 183.0601, 183.0603 and 183.0604.

(continued)

in NII-JII devolved to Troha personally at dissolution. Section 183.0905 sets forth a plan of distribution at dissolution in the absence of an operating agreement and when assets remain after paying creditors. In the absence of allegations in the complaint, it is only speculation that the entities were dissolved without an operating agreement, with assets remaining after payment of creditors, and that Troha received the NII-JII membership to the exclusion of other members of the dissolved entities. A complaint is properly dismissed if it requires too much speculation. ***Doe***, 284 Wis. 2d 307, ¶36. The complaint does not permit a reasonable inference that Troha is the successor to KCP's or Seven T's Plus's interest in NII-JII.[8]

¶13 The complaint does not establish that Troha is bound by the operating agreement.[9] Consequently, the complaint fails to state a claim for breach of contract and for breach of the implied duty of good faith and fair

> (3) Unless otherwise provided in an operating agreement, to members and former members first for the return of their contributions in proportion to their respective values as specified in the records required to be maintained under s. 183.0405 (1) and, 2nd, for their membership interests in proportion to their respective rights to share in distributions from the limited liability company before dissolution.

[8] Additionally, the operating agreement provides that no investor shall actively attempt to transfer his interest in NII-JII and shall not do so without majority consent.

[9] NII-JII makes much of the circuit court's decision in the prior litigation on a motion to stay the judgment pending appeal as a nod of approval to this lawsuit. In that case the circuit court noted that other parties were negotiating to develop the casino and "that plays a role here in terms of what the parties in this case might be able to do with respect to their contract right under this previous contract and playing into that whole picture." NII-JII overreads the circuit court's comment as a stamp of approval of an action against Troha. In any event, the circuit court's comment cannot create a cause of action where none exists.

dealing. If there is no contract, the implied duty of good faith and fair dealing does not come into play.[10]

¶14 We next examine NII-JII's unjust enrichment claim.[11] The circuit court found that NII-JII is judicially estopped from claiming that Troha benefited from NII-JII's efforts to develop the casino when it proved in prior litigation that its opportunity to develop the casino failed and was destroyed by the conduct of and association with Murphy and Boyle. Judicial estoppel is based on the circuit court's judicial notice of the prior litigation in which Murphy and Boyle were divested from the business. Thus, we first address NII-JII's claim that the circuit court improperly took judicial notice of the prior litigation.

¶15 NII-JII quotes ***Perkins v. State***, 61 Wis. 2d 341, 346, 212 N.W.2d 141 (1973): "[A] circuit court cannot take judicial notice of its own records in another case." The quoted portion of ***Perkins*** is limited to a situation where the records of other cases are not made part of the record before the circuit court. "While a court can take judicial notice of many facts that are matters of

[10] We summarily affirm the circuit court's alternative reason for dismissing the breach of contract claim—that the noncompete restriction was unenforceable because NII-JII became unable to pursue the casino development. The circuit court addressed the appellants' contentions carefully and thoroughly; we adopt by reference the circuit court's reasoning as our own. The concepts of judicial notice and judicial estoppel that NII-JII advances in challenging the circuit court's holding that the noncompete restriction was unenforceable will be addressed later in the opinion.

We also summarily reject NII-JII's suggestion for the first time on appeal that Troha's failure to alert NII-JII members to the Murphy/Boyle problems might give rise to liability. The complaint makes no such allegations.

[11] The complaint alleges that NII-JII conferred benefits upon Troha in creating the casino concept, developing the business plan, investing over $10 million cash in developing the plan, and completing concrete steps toward developing the casino. It further alleges that Troha accepted and retained those benefits and it would inequitable for him to do so without reasonable compensation to NII-JII.

indisputable common knowledge, it cannot take judicial notice of records that are not immediately accessible to it or are not under its immediate control." ***Id.*** Where, as here, the record of the other case is made part of the record before the circuit court, judicial notice is appropriate and required. *See* WIS. STAT. § 902.01(2)(b), (4) (judicial notice of adjudicative facts is allowed when a fact capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned and required when requested by a party and the necessary information is supplied to the court). *See also* ***Swan Boulevard Dev. Corp. v. Cybulski***, 14 Wis. 2d 169, 171, 109 N.W.2d 671 (1961). It was not error for the circuit court to take judicial notice of the pleadings and decisions in NII-JII's prior litigation.

¶16 Judicial estoppel is an equitable doctrine applied to prevent a litigant from playing fast and loose with the courts by asserting inconsistent positions in litigation. ***Mrozek v. Intra Fin. Corp.***, 2005 WI 73, ¶22, 281 Wis. 2d 448, 699 N.W.2d 54. Judicial estoppel may be invoked where "(1) the later position is clearly inconsistent with the earlier position; (2) the facts at issue are the same in both cases; and (3) the party to be estopped convinced the first court to adopt its position." ***Riccitelli v. Broekhuizen***, 227 Wis. 2d 100, 111-12, 595 N.W.2d 392 (1999). Application of judicial estoppel is a question of law decided independently of the circuit court. ***Id.*** at 112.

¶17 In the prior class action, NII-JII and its investors alleged that the defendants in that action were in control of NII-JII, that they breached fiduciary duties owed to the class, and that the defendants' self-dealing, waste, other misdeeds and associations with convicted criminals caused the failure of NII-JII's role in the casino development. At the jury trial, NII-JII argued that the casino deal was dead in April 2001, if not earlier, and that if Murphy and Boyle had

removed themselves at that time, NII-JII could have proceeded with the development plan. NII-JII acknowledged that the tribe indicated it would never again deal with NII-JII and NII-JII itself was dead. NII-JII and the class were successful in their claims and compensatory and punitive damages were awarded in addition to the divestment of Murphy and Boyle.

¶18 In this litigation, NII-JII claims that the work product and development plans of NII-JII conferred a benefit on Troha. This conflicts with the position in the prior litigation that NII-JII failed because of mismanagement and waste of investment and resources.[12] The plan to develop the casino failed and the casino application supported by NII-JII's plan was withdrawn. NII-JII cannot now claim that its flawed effort was beneficial to someone else. NII-JII is judicially estopped from claiming a benefit was conferred on Troha.

¶19 A claim of unjust enrichment also requires inequitable circumstances. *See* ***Puttkammer v. Minth***, 83 Wis. 2d 686, 690, 266 N.W.2d 361 (1978). "'The mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor...'" ***Id.*** (quoted source omitted). In the prior litigation, NII-JII investors were compensated and NII-JII recovered anticipated profits for its lost opportunity to develop the casino. No inequitable

[12] We ignore NII-JII's suggestion for the first time on appeal that Troha's "secret meetings" triggered the tribe's termination of its relationship with NII-JII.

circumstances exist to support a claim of unjust enrichment.[13] "[I]t goes without saying that the courts can and should preclude double recovery by an individual." ***Olstad v. Microsoft Corp.***, 2005 WI 121, ¶82, 284 Wis. 2d 224, 700 N.W.2d 139 (quoting ***EEOC v. Waffle House, Inc.***, 534 U.S. 279, 297 (2002)). That NII-JII may not actually collect the damages awarded in the prior litigation does not change that compensation was judicially determined and cannot be sought a second time.

¶20 NII-JII's claim for imposition of a constructive trust was properly dismissed. A constructive trust is an equitable device imposed to prevent unjust enrichment. ***M & I First Nat'l Bank. v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 512, 536 N.W.2d 175 (Ct. App. 1995). Thus, a viable cause of action for unjust enrichment is required before the imposition of a constructive trust can be considered. *See* ***id.*** We have concluded NII-JII does not state an unjust enrichment claim and the constructive trust claim also fails.

¶21 NII-JII's complaint seeks declaratory relief. The circuit court concluded that the complaint really seeks an advisory opinion and fails to allege a real controversy. We agree. The complaint alleges that the NII-JII is entitled to a declaration of the parties' respective interests in the casino development venture and revenue from the casino when it becomes operational and "what claims and

[13] As an alternative ground for dismissing the unjust enrichment claim, the circuit court found that NII-JII had "unclean hands" and therefore, was not entitled to equitable relief. "'The principle that a plaintiff who asks affirmative relief must have clean hands . . . is both ancient and universally accepted.'" ***Fields Found., Ltd. v. Christensen***, 103 Wis. 2d 465, 496, 309 N.W.2d 125 (Ct. App. 1981) (quoted source omitted). We observe that inasmuch as the mismanagement of NII-JII and NII-JII's own conduct precipitated its losses, a viable claim for unjust enrichment does not exist. *See* ***David Adler & Sons Co. v. Maglio***, 200 Wis. 153, 159-60, 228 N.W. 123 (1929). We need not further discuss the alternative ground for dismissal.

causes of action the plaintiffs have or may have against the defendants and other who may be working in concert with them." Declaratory judgment is appropriate only when the question presented to the court is justiciable. ***Sipl v. Sentry Indem. Co.***, 146 Wis. 2d 459, 464, 431 N.W.2d 685 (Ct. App. 1988). Two elements in the concept of justiciability include a legally protectible interest by the party seeking declaratory relief and a controversy ripe for judicial determination. ***Id.*** NII-JII's complaint does not establish a protectible legal interest in the future revenues of the casino, if and when it becomes functional. Further, the circuit court cannot make a declaration about revenues that may or may not come into existence in the future. The demand for a declaration about what causes of action may exist is nothing more than a demand for an impermissible advisory opinion. *See* ***Miller Brands-Milwaukee, Inc. v. Case***, 162 Wis. 2d 684, 696-97, 470 N.W.2d 290 (1991). The circuit court properly dismissed the declaratory relief claim along with the other claims in the complaint.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.