

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**DAVID J. KILLIAN** : **CIVIL ACTION**  
 :  
 v. : **NO. 16-2874**  
 :  
**CHRISTOPHER RICCHETTI** :

**POST-TRIAL MEMORANDUM  
WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**KEARNEY, J.**

**January 10, 2017**

Evaluating often incredible trial testimony, we do not award damages for failed expectations when a real estate developer becomes fast friends with a nurse anesthetist owning a vacant commercial corner property in the Northern Liberties section of Philadelphia in the hope of jointly developing the nurse's vacant corner property. The friends never signed a contract or made definite promises about what happens if the owner does not quickly sell his Northern Liberties property. They helped each other with different properties and then walked away from each other before the owner sold the corner property. When the owner later sold his vacant corner property for an approximate \$105,000 gain, the developer sued claiming they were partners seeking an undefined percentage of the value of the owner's property when sold. We dismissed the developer's breach of contract claim and now evaluate whether the owner made a definite promise inducing the developer to incur costs to help obtain zoning approvals or whether the developer's efforts unjustly enriched the owner to some definite measure of value. After evaluating dispositive trial witness credibility and reviewing admitted evidence, we find no definite express promise concerning partnership or compensation terms necessary for promissory estoppel and no *quantum meruit* value owed to the developer.

**I. Findings of fact**

***Developer Killian envies Owner Ricchetti's investment property.***

1. David Killian worked in real estate development since approximately 2000.
2. In 2005, Killian owned a condominium at 1335-37 Pine Street, Unit 201 in Philadelphia ("Pine Street condo").
3. In September 2005, Killian provided a collateral mortgage against the Pine Street condo to Prudential Savings Bank to secure a construction loan.
4. The City of Philadelphia Records Department mis-indexed Prudential's collateral mortgage.
5. On May 6, 2006, Killian transferred ownership of the Pine Street condo to he and his wife.
6. On December 26, 2007, Wells Fargo Bank, N.A. loaned \$306,000 to the Killians secured by a mortgage ("Wells Fargo Mortgage") on the Pine Street condo.
7. Since the City mis-indexed the Prudential Collateral Mortgage, the Killians received the net proceeds of the Wells Fargo loan.
8. Upon discovery of their actual second lien position, Wells Fargo began mortgage foreclosure proceedings against the Pine Street condo in December 2010.

***Mr. Killian meets Mr. Ricchetti.***

9. Christopher Ricchetti is a nurse anesthetist.
10. In September 2010, Mr. Ricchetti withdrew much of his savings to buy a corner commercial lot in the Northern Liberties section of Philadelphia at 801-805 N. 2nd Street ("2<sup>nd</sup> and Brown") from Abington Bank for \$430,000.

11. Ricchetti purchased 2<sup>nd</sup> and Brown with existing zoning approvals allowing him to construct a 4-story commercial/residential mixed building.

12. In November 2010, Developer Killian also contacted Abington Bank expressing interest in purchasing 2<sup>nd</sup> and Brown.

13. Abington Bank told Killian of its sale of 2<sup>nd</sup> and Brown.

14. In midsummer 2011, Killian inquired of friends as to the identity of the 2<sup>nd</sup> and Brown purchaser.

15. Killian and Ricchetti met on August 17, 2011.

16. They hit it off immediately. Their first meeting lasted several hours. They discussed their mutual interest in real estate development and Ricchetti shared his woes developing properties as a part-time avocation and Killian described his various development experiences.

17. Killian never worked with a partner. He did not bill for time. Rather, he looked for properties to develop and make money upon selling the property.

18. Killian told Ricchetti of wanting to buy 2<sup>nd</sup> and Brown and described his concept to develop the vacant lot into a multi-story mixed use building with commercial and retail space on the street level and residential units above.

19. Owner Ricchetti thought Killian's 2<sup>nd</sup> and Brown "idea is truly worth looking into" and created "a buzz in [his] head." A fast friendship formed and the men frequently, almost incessantly, communicated by call, text, e-mail and in person.<sup>1</sup>

20. Within a day of their first meeting, Killian visited another of Ricchetti's properties and recommended a contractor to help finish work for Ricchetti.

21. On August 19, 2011, Killian contacted Starbucks site department about opening a

location at 2<sup>nd</sup> and Brown. Developer Killian told owner Ricchetti, and Ricchetti agreed, 2<sup>nd</sup> and Brown “would be killer for a TD Bank with a small Starbucks there.”<sup>2</sup>

***Co-development plans for 2<sup>nd</sup> and Brown.***

22. By early September 2011, owner Ricchetti and developer Killian began exploring a possible partnership to co-develop 2<sup>nd</sup> and Brown as a side endeavor to their day jobs. On September 10, 2011, Ricchetti sent two e-mails with partnership proposal terms to Ricchetti.

23. The proposal’s core terms required Killian investing \$600,000 to co-develop 2<sup>nd</sup> and Brown. Killian would invest the first \$200,000 by selling Ricchetti the Prudential mortgage on his Pine Street Unit, the second \$200,000 when Killian and Ricchetti re-finance 2<sup>nd</sup> and Brown, and Ricchetti agreed to leave \$200,000 in the ground until they sell the building. Ricchetti would own 51% and Killian 49% of 2<sup>nd</sup> and Brown.

24. In the afternoon of September 10, 2011, Killian separately replied to Ricchetti’s first e-mail and second e-mails and agreed with Mr. Ricchetti’s terms.

25. Later that evening, Ricchetti had second thoughts and withdrew his offer to assume Killian’s Prudential mortgage on the Pine Street condo stating “I’m just not interested in the Pine Street Condo.”

26. Killian never invested the first \$200,000 into 2<sup>nd</sup> and Brown as described in the September 10, 2011 emails.

27. The next day, Ricchetti and Killian continued on their 2<sup>nd</sup> and Brown co-development plan with Ricchetti e-mailing Killian “we get a plan down and start on this building and everything.”<sup>3</sup>

28. In late September 2011, Ricchetti suggested they design a plan for a six story building at 2<sup>nd</sup> and Brown to match the height of the nearby Piazza Apartment complex.

29. In November 2011, Killian and Ricchetti began pursuing zoning approvals from Philadelphia's Licensing and Inspection Unit ("L&I") to construct a six-story commercial/residential mixed building.

30. Killian credibly testified he took the lead in the zoning approval process.

31. Ricchetti envisioned "[Killian] to [be] the brain behind this but this is a chance maybe, just be maybe, I can help, I may not, but shame on me if I don't try and I want us both to succeed at this and quick[ly get] through zoning."<sup>4</sup>

32. On developer Killian's advice, Ricchetti engaged an architect, Vince Mancini and his firm Landmark Architectural Design, to seek necessary zoning approvals from L&I to construct a six-story commercial/residential mixed building.

33. Mancini credibly testified Killian worked with him to prepare the concept and design for the six-story commercial/residential mixed building for zoning approval.

34. Ricchetti and Killian's LLC Blackcomb Group paid Mancini for a portion of his services.

35. Ricchetti also retained Dawn Tancredi, Esq. to assist in receiving the necessary zoning approvals to construct a six-story commercial/residential mixed building.

36. Killian and Ricchetti worked with Attorney Tancredi during the zoning process.

37. Ricchetti paid for Attorney Tancredi's legal services.

38. Part of the zoning approval process involved approval by the Northern Liberties Neighbor's Association Urban Design Committee. Under this process, owners and developers present the concept sometimes over the course of several meetings to obtain and incorporate the Committee's feedback and eventually gain its approval.

39. Killian prepared for and attended presentations for the 2<sup>nd</sup> and Brown concept five

times during the course of the Committee approval process. Killian did not present at the meetings.

40. Owner Ricchetti often described developer Killian as his partner. He testified he did so because Killian told him it was necessary or preferred in dealing with the City and contractors. We find Ricchetti's testimony in this regard is not credible. He owns a valuable piece of property and knows he is the owner. He did not want to sell 2<sup>nd</sup> and Brown. Rather, he wanted help. We find it highly unlikely Ricchetti used the term "partner" simply because Killian told him to do so. There is no partnership agreement. We find it much more likely he inartfully described Killian as a partner because of their fast friendship and, to some extent, he wanted to keep Killian working on 2<sup>nd</sup> and Brown.

41. Both parties thought of themselves as working together and sharing in a reward should they succeed. They apparently did not consider what happens if their friendship faded. Ricchetti knew of Killian's efforts and accepted them. The question today is whether Killian is entitled to compensation for his undocumented efforts and incurred costs.

*An unanswered late night email giving rise to Killian's claim.*

42. The parties inexplicably continued to proceed without an agreement until, for unknown reasons, they shared late night emails in early February 2012 concerning terms for their efforts.

43. After 10:00 P.M. on February 6, 2012, owner Ricchetti emailed developer Killian:

Ok,

Upon the Clear title/mortgage with Chris Ricchetti is P[ine] Street, with being free and clear of any liens or lawsuits and a global settlement done, P[ine] Street will be put up for sale on the market, Mortgage fees, monthly dues, settlements, etc or any cost related to P[ine] Street will be paid and

in full when due and on time by Dave Killian. Upon Sale of the unit, 200,000 will go to Chris Ricchetti (you know is the 200,000, I want not the unit, what if it takes a year to sell)

2nd and Brown will be 50 percent dual equal ownership of Chris Ricchetti and Dave Killian with an LLC formed and a 50 percent partnership together.

Next 200,000 in the beginning of construction loan (First 6 months)

Last 200,000 in the ending of the construction loan (next six months)... if needed part can be paid at the end when loan is refi.

All things shared and cost related to 2nd and Brown will be 50%...

Theres are more little details, I'm getting very tired...it's a start..xo love Ricchetti

44. After 10:00 P.M. two nights later, Killian responded by email describing many of the same 2<sup>nd</sup> and Brown co-development terms but adding two new terms material to this dispute: "If the partnership doest [sic] purchase the lot from Ricchetti, the Ricchetti agree's [sic]to reimburse Killian, for the cost related to obtaining zoning approvals. Ricchetti also agree's [sic] to compensate Killian for the value that was added by the rezoning."

45. Ricchetti never responded to Killian's February 8, 2012 e-mail. There is no electronic or written communication where Ricchetti agrees to these two terms or evidencing Ricchetti promising reimbursement for the costs of re-zoning or payment for value added by re-zoning.

46. The parties did not produce a written response to these new terms central to this dispute. Ricchetti testified he would not have agreed to these new terms. Killian counters he spoke with Ricchetti late in the night of February 8, 2012 on the phone after he sent his February 8, 2012 e-mail and Ricchetti orally agreed to his new terms. Neither party produced phone records evidencing this call.

47. We find both men lack credibility in several respects regarding their facts, but most especially on whether Ricchetti ever promised, or consented to, reimburse costs or share in the increased value of 2<sup>nd</sup> and Brown should it be rezoned and sold. On this key issue, we find Killian's testimony concerning an oral consent late in the February 8, 2012 night in a phone call when there is no follow-up writing confirming these terms is not credible. These men captured, almost diary-like, often highly personal and scandalous thoughts in emails or texts but there is no writing confirming this late night oral consent to specific terms in an email, specifically something as significant, and contrary to a partnership concept, as "If the partnership doest [sic] purchase the lot from Ricchetti, the Ricchetti agree's [sic] to reimburse Killian, for the cost related to obtaining zoning approvals" and "Ricchetti also agree's [sic] to compensate Killian for the value added by the rezoning."

48. We find no mention of this repayment or shared concept until much later in 2012, although the parties discuss a great variety of other issues.

49. For example, on February 19, 2012, Ricchetti e-mailed Killian asking questions about the Pine Street condo and Prudential mortgage deal: "when the [Pine Street condo] is clear title we form an LLC with an equal partnership of 50% and We do so only to develop that property as planned with 10 or more units, 6 floors and retail bottom. We both agree that we have no there plans but to develop that property this year, cost are equal for us, as well as profit when we agree to sell. We both have rights to see and obtain all cost information records related to 2nd and brown. If one of us is found and proven stealing from the other or the business the Lose their half of the property."

50. On February 20, 2012, Killian responded to Ricchetti's e-mail inserting his responses after Ricchetti's questions about the Pine Street condo. Killian then responded "OF

COURSE” to Ricchetti’s terms to form a limited liability company and co-develop 2nd and Brown as equal partners.

51. The problem with this “of course” is we do not know the terms other than some performance of financial obligations which, in these e-mails, do not include reimbursing Killian or sharing in an increased value of 2<sup>nd</sup> and Brown should Killian sell his property.

52. As we held in granting summary judgment dismissing the breach of contract claim, Ricchetti and Killian never formed a contract defining their partnership. The issue at trial is whether Ricchetti made definite promises inducing reliance damages or would be unjustly enriched by Killian’s rezoning efforts.

***Without a written agreement, they continue acting to benefit the other.***

53. Ricchetti and Killian continued acting without an agreement presumably hoping they would work it out in the end as friends.

54. On March 5, 2012, Ricchetti agreed to buy the Killians’ Pine Street condo.

55. Prudential assigned its Collateral Mortgage on the Pine Street condo after Ricchetti paid it \$160,000.

56. On March 12, 2012, Ricchetti assured Killian he did not plan to independently sell his 2<sup>nd</sup> and Brown because they had an agreement to build a six-story commercial/residential mixed building.

57. On March 16, 2012 and April 16, 2012, Killian sent the six-story commercial/residential mixed building drawings to concrete contractors for estimates.

58. Ricchetti knew of Killian’s efforts to obtain concrete proposals and did nothing to stop him.

59. On May 2, 2012, the City of Philadelphia Zoning Board of Adjustment provided

an approval for 2<sup>nd</sup> and Brown to be used for a six-story commercial/residential mixed building.

60. We have no basis to determine what, if any, value this May 2, 2012 approval added to 2<sup>nd</sup> and Brown. No expert testimony established the value added by the change of the four-story zoning permit existing as of May 1, 2012 to the six-story zoning approval as of May 2, 2012.

61. According to the Philadelphia Department of Licenses & Inspections, the proposed 2<sup>nd</sup> and Brown design could have been built without the May 2, 2012 approvals.<sup>5</sup>

62. While Ricchetti knew of some of Killian's efforts during the zoning approval process, Killian did not maintain time records and could only estimate a total of 80 hours time invested in 2<sup>nd</sup> and Brown. Killian admitted never setting a consulting hourly rate. He also could not produce competent evidence of out-of-pocket expenses.

63. On May 16, 2012, Killian told Ricchetti he negotiated with Attorney Tancredi over the cost of her legal services and she lowered her bill. Killian also informed Ricchetti he contacted a Starbucks broker.

64. In June 2012, Killian sought construction insurance estimates from Trust Liberty Insurance and sought information about refinancing the mortgage on 2<sup>nd</sup> and Brown from Chase Bank.

65. Killian credibly testified Ricchetti knew of Killian soliciting bids, contacting possible tenants, and investigating refinancing and insurance.

***The parties stop talking to each other.***

66. As planned, Ricchetti used his purchased mortgage to file a mortgage foreclosure complaint against the Killians' Pine Street condo.

67. Because the City mis-indexed the Wells Fargo Mortgage ahead of the existing

Prudential Collateral Mortgage, Wells Fargo and Prudential engaged in a priority lien dispute.

68. Ricchetti never received \$160,000 from Killian through the Pine Street condo foreclosure action.

69. Neither party adequately explained the effect of Ricchetti's obligation to repay \$160,000 for the purchase of Prudential's mis-indexed collateral mortgage. We find Ricchetti's trial testimony credible concerning the harm caused by this loan taken out to help Killian. From Ricchetti's position, he incurred a \$160,000 debt to purchase a mortgage without the represented priority and still received no invested money from Killian. Ricchetti had to hire lawyers to work out the Pine Street condo mortgage issues. Although Killian knew, or should have known, of the problem with the mis-indexing of the Prudential collateral mortgage since he received proceeds from the later Wells Fargo financing, he apparently thought little of the risk to Ricchetti. We have no evidence as to Killian's efforts to cure Ricchetti's loan obligation understanding in reliance of Killian's statements.

70. By late November 2012, Ricchetti expressed concern about Killian's plan to pay back the \$160,000: "what's your plan to pay back that loan soon? Seriously...."

71. Later the same morning, Killian answered, "Maybe you should sell 2<sup>nd</sup> and Brown, and pay me for what I did." Other than Killian's late night February 8, 2012 unanswered email, we have no evidence of a discussion on these terms and certainly none of a promise from Ricchetti to pay Killian.

72. By mid-December 2012, Killian questioned why Ricchetti hired an attorney, "I guess all of your 'friend' talks were all bullshit. I new [sic] better, but believed you." Killian sent a further text, "We NEED to talk, because they'll [sic] be no turning back, once I make a move. I'm not going to sit here and play a f...king game... U going to be a coward p...sy about

this?”

73. As far as we can discern, the parties then went silent. The evidence confirms no communications between Killian and Ricchetti until July 30, 2013 when Killian texts, “YOU F....KING COWARD!!”

74. On July 30, 2013, Ricchetti sold 2<sup>nd</sup> and Brown as a vacant lot for \$740,000.

75. The U.S. Department of Housing and Urban Development Settlement Statement confirms Ricchetti’s \$154,724.23 payment of the existing loan at Prudential Savings Bank. Ricchetti used \$154,724.23 from the sale proceeds to pay off the Prudential collateral mortgage on the Pine Street condo.<sup>6</sup>

76. After the sale, the new owners constructed a 2-story commercial building.

77. We have no evidence what effect, if any, a zoning approval for six stories had on the willing buyer’s payment of \$740,000.

78. On February 11, 2014, the priority lien dispute on the Pine Street condo ended when Wells Fargo vacated its judgment and marked its mortgage foreclosure action as settled and discontinued.

79. On April 20, 2015, the Killians sold the Pine Street condo.

80. On June 8, 2016, Killian sued his former friend Ricchetti for breach of contract, promissory estoppel/detrimental reliance, unjust enrichment and *quantum meruit*.

81. On October 31, 2016, we granted Ricchetti's Motion for summary judgment dismissing Killian's claim for breach of contract.

82. We held a two day bench trial on December 19-20, 2016.

83. We heard testimony from Vince Mancini of Landmark Architectural Design regarding the 2<sup>nd</sup> and Brown zoning approval process from approximately November 2011 until

May 2012. Mr. Mancini credibly testified Killian worked on the zoning approval process and he provided helpful assistance.

84. We heard credible expert testimony from Eileen H. Lynn, a state certified appraiser, regarding the market value of 2<sup>nd</sup> and Brown with six-story commercial/residential mixed use zoning approvals as of February 3, 2013. Ms. Lynn offered no expert opinion as to the specific increase in value of 2<sup>nd</sup> and Brown after the six-story commercial/residential mixed use zoning approvals.

85. There is no evidence of the increased value to 2<sup>nd</sup> and Brown from Killian's efforts.

## II. Conclusions of Law

### A. There is no basis for promissory estoppel.

86. Ricchetti did not promise Killian he would compensate Killian for his out of pocket expenses or efforts upon the sale of 2<sup>nd</sup> and Brown. At most, the parties discussed a partnership through which it appears Killian agreed to invest at least \$200,000 and possibly as much as \$600,000 into a nascent limited liability company to be formed to own and sell 2<sup>nd</sup> and Brown. It is undisputed he did not do so.

87. Absent a definite promise from Ricchetti, we cannot estop Ricchetti from denying liability for a promise to reimburse Killian for undocumented costs or time.

88. Killian did not prove a definite promise or right to damages under promissory estoppel.

### B. While Ricchetti knew of Killian's efforts, we cannot find Killian's efforts benefitted Ricchetti by improving the value of 2<sup>nd</sup> and Brown.

89. No enforceable contract existed between Killian and Ricchetti.

90. Killian conferred a benefit on Ricchetti by assisting with the 2<sup>nd</sup> and Brown

zoning approval process.

91. Ricchetti passively accepted Killian's assistance in the successful 2<sup>nd</sup> and Brown zoning approval process.

92. While it would be unjust for Ricchetti to retain the benefit conferred by Killian, Killian did not prove the value of a benefit conferred by the May 2, 2012 zoning approval caused, in some undefined part, by his efforts in tandem with Ricchetti, a zoning lawyer and an appraiser.

93. Absent evidence of an increase in value in Ricchetti's 2<sup>nd</sup> and Brown property caused by Killian, we cannot award *quantum meruit* damages to Killian.

### III. Analysis

Real estate developer David J. Killian wanted to buy nurse anesthetist Christopher Ricchetti's investment property. Owner Ricchetti did not want to sell. Instead, he accepted the developer's help towards zoning approvals and reviewing plans. At some point, one or both thought they were acting together and possibly even as partners. But rather than sign agreements, they relied on their exceptionally fast friendship resulting in the owner relying upon the developer working on rezoning and contractor issues and the developer relying upon the owner's help with financing his unrelated property to help fund his investment in the Owner's property. For several months, the developer tried to arrange zoning and contractor assistance. The owner placed his finances at risk relating to an unrelated property owned by the developer and his wife. When the development process took longer than hoped and they faced several legal hurdles with the developer's and his wife's unrelated property, the fast friends had an equally fast and furious falling out. A year later, the owner sold his investment property for an approximate \$105,000 gain and moved away.

Acting in equity, we can understand Killian's frustration with wasted time and effort in helping his fast friend Ricchetti for a period of several months in 2011 and 2012. Killian provided time and effort. For reasons we cannot discern, he never reached agreement on terms other than the owner and developer would be "partners" in 2<sup>nd</sup> and Brown although Ricchetti would own it until transferred to an ownership entity. Absent terms, we have no idea the nature of their "partner" references. We appreciate the trust placed between friends, even ones we know for a very short time. But this matter involved commercial real estate development by two men who had full-time jobs other than developing 2<sup>nd</sup> and Brown. Killian, as a developer, proceeded at his own risk. He did not keep track of time. Killian adduced no credible evidence of the value of his time expended. We have no evidence of a definite promise. Ricchetti purchased a mortgage on the Killians' Pine Street condo but could not foreclose and recover. He lost money and Killian apparently did not help him with the lending issues. We have no evidence Killian ever paid, as a "partner", to compensate Ricchetti for his losses on the Pine Street condo problems.

While we find Ricchetti accepted the benefit of Killian's efforts, we have no evidence of the value of these efforts to 2<sup>nd</sup> and Brown. We have no evidence suggesting the May 2, 2012 zoning approvals added value not already existing or played any role in the sale of 2<sup>nd</sup> and Brown years later. Absent evidence of a monetary increase in the value of 2<sup>nd</sup> and Brown created by Ricchetti's known and accepted efforts, we also must decline to award *quantum meruit* damages.

**A. Developer Killian did not adduce evidence of Ricchetti's definite express promise to reimburse costs or pay an unknown percentage for value added by rezoning.**

Developer Killian alleges he worked on behalf of the 2nd and Brown property based on owner Ricchetti's promise they would form a partnership to co-develop and share in the profits.

He seeks to recover for his expenses or costs incurred in relying upon a definite promise of partnership under a promissory estoppel theory.

The elements of promissory estoppel are “(1) the promisor made a promise that [it] should have reasonably expected would induce action or forbearance on the part of the promisee; (2) the promisee actually took action or refrained from taking action in reliance on the promise; and (3) injustice can be avoided only by enforcing the promise.”<sup>7</sup>

The “essential element” of promissory estoppel is an express promise.<sup>8</sup> In *Burton Imaging Group v. Toys “R” Us, Inc.*, Burton Imaging entered into the bidding process with Toys “R” Us to do its Time Square store’s graphic display work.<sup>9</sup> Burton and Toys “R” Us met and exchanged information on the scope and requirements for the graphic display work for approximately four months before their July 20, 2005 meeting.<sup>10</sup> At the July 20, 2005 meeting, a Toys “R” Us representative told a Burton representative “you got what we want, you can deliver it at the price you say can deliver it at, we’re going to move ahead with you as long as everything you’re doing passes the Revolution Power test.”<sup>11</sup> Burton passed the Revolution Power test but Toys “R” Us did not award Burton the contract because it decided to stay with its current graphic display vendor.<sup>12</sup> Burton sued Toys “R” Us for promissory estoppel/detrimental reliance alleging the Toys “R” Us representative’s statement “we’re going to move ahead with you” is a promise made and Toys “R” Us should have reasonably expected Burton to rely on.<sup>13</sup> The district court found “‘going to move ahead’ is simply insufficient to qualify as a promise for a claim of detrimental reliance because it does not express the intent of the parties with reasonable certainty.”<sup>14</sup>

Killian did not credibly testify Ricchetti made an “express promise” to him regarding a partnership.<sup>15</sup> They referred to each other as partners for largely marketing reasons. The partner

discussion involved Killian providing funds. He never did so. He also changed or added terms in a February 8, 2012 email.

Ricchetti's silence in response to Mr. Killian's February 8, 2012 email cannot be construed as an express promise. Mr. Killian did not prove the first element of promissory estoppel/detrimental reliance because Mr. Ricchetti did not make an express definite promise to Mr. Killian. Mr. Killian did not prove a promissory estoppel/detrimental reliance cause of action.

**B. Developer Killian demonstrated liability for unjust enrichment but no value given to owner Ricchetti as a result of his efforts.**

Killian also seeks some undefined share of Mr. Ricchetti's sale of 2<sup>nd</sup> and Brown in July 2013 for \$740,000, or the alleged market value in excess of \$900,000, under a theory of unjust enrichment/*quantum meruit*. Regardless of the actual sale price or appraised value, Killian needs to show his efforts created a benefit which, absent our Order, would be unjustly retained by Ricchetti.

To prove unjust enrichment/*quantum meruit*, Killian must prove: “[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.”<sup>16</sup> In Pennsylvania, unjust enrichment is “an equitable remedy and synonym for *quantum meruit* [and] ‘a form of restitution.’”<sup>17</sup> As shown, Killian proved Ricchetti “‘wrongfully secured or passively received a benefit that it would be unconscionable for [the party] to retain’ without compensation.”<sup>18</sup>

The problem for Killian is we cannot find a basis for compensation. The measure of Killian's damages in unjust enrichment is the value of the benefit conferred on Ricchetti, not the value of his time and labor.<sup>19</sup> “Pennsylvania law requires that plaintiffs present a reasonable

quantity of information from which the fact finder can fairly estimate the damages.”<sup>20</sup>

In *Bouriez v. Carnegie Mellon University*, Bouriez, through his company, invested into a technology development project at Carnegie Mellon.<sup>21</sup> In relevant part, Carnegie Mellon it unjustly enriched Bouriez by approximately a million dollars when Carnegie Mellon continued to increase the intellectual property project after Bouriez stopped investing money.<sup>22</sup> Bouriez moved for summary judgment arguing Carnegie Mellon did not confer on benefit on him and in the alternative, Carnegie Mellon cannot value the intellectual property from the technology development project to quantify the benefit conferred.<sup>23</sup> Carnegie Mellon owned the intellectual property it claimed conferred the benefit onto Bouriez and alleges Bouriez would benefit from it in the future. The court found Carnegie Mellon’s allegations insufficient because “unjust enrichment is a retroactive equitable remedy, and as such, [Carnegie Mellon] must establish that [Bouriez] benefitted or were enriched in the past.”<sup>24</sup> The court also dismissed the claim Bouriez was unjustly enriched by the value of Carnegie Mellon’s materials and labors because “the party asserting unjust enrichment ‘cannot merely allege its own loss as the measure of recovery[,] i.e., the value of labor and materials expended[,] but instead must demonstrate that [the other party] has in fact been benefited.’”<sup>25</sup> The court found Carnegie Mellon’s expert reports and deposition testimony estimating the value of the intellectual property enough to determine the value of the intellectual property by the trier of fact if Carnegie Mellon had established it conferred a benefit on Bouriez.<sup>26</sup>

Killian cannot recover for the value of his time and labor under unjust enrichment. Killian can only recover for the value of benefit unjustly conferred on Ricchetti. No expert testimony<sup>27</sup> established the value added, the delta, from the change of the four-story zoning permit existing on May 1, 2012 to the six-story zoning approval on May 2, 2012. Instead, Eileen

H. Lynn testified to the market value of 2<sup>nd</sup> and Brown as of February 3, 2013 by comparing it to three similar properties and assessed the value at \$960,000. To the contrary, the evidence shows Philadelphia Department of Licensing & Inspections would have allowed the construction of a six-story building at 2nd and Brown without the May 2, 2012 zoning approvals.<sup>28</sup>

While Killian proved Ricchetti received some of his efforts toward rezoning, he did not prove the value, if any, of the benefit conferred on Ricchetti by the May 2, 2012 zoning approval process or meetings with contractors. Absent evidence as to a possible estimated value derived from this benefit, we cannot guess as to some value. Killian's expert did not opine on the value added by the May 2, 2012 zoning approval. To the contrary, we reviewed the City's December 16, 2016 letter confirming 2<sup>nd</sup> and Brown could have been developed as planned without the zoning approval obtained on May 2, 2012. We have no contrary evidence.

#### **IV. Conclusion**

Following our evaluation of the often strained credibility of both parties and as described in our Findings of Fact, we find no basis for either promissory estoppel or *quantum meruit* and must enter judgment in favor of Ricchetti in the accompanying Order.

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<sup>1</sup> Trial Ex. 3; Trial Ex. 4.

<sup>2</sup> Trial Ex. 5.

<sup>3</sup> Trial Ex. 7.

<sup>4</sup> Trial Ex. 13.

<sup>5</sup> Trial Ex. 77.

<sup>6</sup> Trial Ex. 72.

<sup>7</sup> *V-Tech Services, Inc. v. Street*, 72 A.3d 270, 276 (Pa. Super. 2013).

<sup>8</sup> *Burton Imaging Group v. Toys "R" Us, Inc.*, 502 F. Supp. 2d 434, 439 (E.D. Pa. 2007)

<sup>9</sup> *Id.* at 436-37.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 438.

<sup>13</sup> *Id.* at 438-39.

<sup>14</sup> *Id.* at 439.

<sup>15</sup> *Id.*

<sup>16</sup> *Quandry Solutions, Inc. v. Verifone, Inc.*, No. 07-97, 2009 WL 997041 at \*16 (E.D.Pa. Apr. 13, 2009).

<sup>17</sup> *Powers v. Lycoming Engines*, 328 Fed. App'x 121, 126 (3d Cir. 2009)(quoting *Mitchell v. Moore*, 729 A.2d 1200, 1202 n. 2 (Pa.Super.Ct.1999); see also *Ne. Fence & Iron Works, Inc. v. Murphy Quigley Co.*, 933 A.2d 664, 667 (Pa.Super.Ct.2007); *Sack v. Feinman*, 495 Pa. 100, 432 A.2d 971, 974 (1981) (citing Restatement of Restitution § 1 (1937) as a source for the elements of an unjust enrichment claim); *Meehan v. Cheltenham Twp.*, 410 Pa. 446, 189 A.2d 593, 595 (1963) (same). The Restatement views restitution as an area of the law “which is neither contract nor tort.” Restatement (Second) of Conflict of Laws § 221 introductory note (1971)).

<sup>18</sup> *Quandry Solutions*, 2009 WL 997041 at \*17 (citations omitted).

<sup>19</sup> See *In re James*, 463 B.R. 719, 729 (Bankr. M.D. Pa. 2011)(quoting *D.A. Hill Co. v. Clevetrust Realty Investors*, 573 A.2d 1005, 1009 (Pa. 1990)).

<sup>20</sup> *Cohen v. F.D.I.C.*, No. 91-CV-3944, 2003 WL 21118673, at \*6 (E.D. Pa. May 14, 2003), amended in part, No. 91-3944, 2003 WL 21419155 (E.D. Pa. June 19, 2003), and *aff'd sub nom. Cohen v. Resolution Trust*, 107 Fed. App'x 287 (3d Cir. 2004) (citing *Ashcraft v. C.G. Hussey &*

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*Co.*, 58 A.2d 170, 172–73 (Pa. 1948); see also *Molag, Inc. v. Climax Molybdenum Co.*, 637 A.2d 322, 324 (Pa. Super. 1993) (holding that Pennsylvania law requires damages to be proven with reasonable certainty so that intelligent estimate may be reached without conjecture)).

<sup>21</sup> *Bouriez v. Carnegie Mellon Univ.*, No. 02-2104, 2005 WL 3006831, at \*1 (W.D. Pa. Nov. 9, 2005)

<sup>22</sup> *Id.* at 9.

<sup>23</sup> *Id.* at 12.

<sup>24</sup> *Id.* at 11 (internal citations omitted).

<sup>25</sup> *Id.* at 12 (quoting *D.A. Hill*, 573 A.2d at 1009).

<sup>26</sup> *Id.* at 13.

<sup>27</sup> Expert testimony is required to determine market value of real estate. See *Aetna Life Insurance Co. v. Montgomery County Board of Assessment Appeals*, 111 A.3d 267, 283 (Pa.Cmwlth. 2015).

<sup>28</sup> Trial Ex. 77.