In The

Supreme Court of Virginia

RECORD NO: 091410

STATION #2, LLC,

Appellant,

v.

MICHAEL AND LISA LYNCH, and MARATHON DEVELOPMENT GROUP, INC., and FRANK T. ("BUDDY") GADAMS,

Appellees.

REPLY BRIEF OF APPELLANT

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STATION #2, LLC,

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MICHAEL AND LISA LYNCH,
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Appellees.

REPLY BRIEF

Appellant, Station #2, LLC (hereinafter "Station #2"), by counsel, submits this Reply Brief pursuant to Rule 5:29.

I. PROBLEMS WITH "FACTS" STATED BY THE APPELLEES

In their "Counterstatement of Facts", Marathon and Gadams assert that the upper two floors of the subject building were purchased and are owned by "237 Granby, LLC." (Brief of Marathon and Gadams, p. 4). Marathon and Gadams cite ¶3 of the Second Amended Complaint (JA 2) as the source of this statement, but this specific allegation is found nowhere within the text of the Second Amended Complaint.

On page 6 of their brief, Marathon and Gadams assert that Station #2 claimed that "Marathon and Gadams changed their minds about the [sound attenuation installation] agreement because construction of the sound attenuation system was going to cause delay and cost (Gadams

and Marathon) money." They cite the Second Amended Complaint at ¶21 (JA 9), but misstate what that paragraph actually says. Specifically, ¶21 alleges the following:

> The Station 2 restaurant group and John Nolan then found out that Marathon and Hourigan had closed up the space without allowing the sound attenuation materials to be installed. **Hourigan representatives <u>claimed</u> that [Gadams] and Marathon had changed their minds because doing the sound attenuation was going to delay them and cost them money.** (Emphasis added).

Station #2 was very clear in asserting that the "changed their minds" statement was something said by a contractor working on behalf of Marathon and Gadams. This was not stated as factually true. Because the litigation was short-circuited at such an early stage, it was never established one way or the other what Marathon and Gadams actually said or intended when they made their various agreements with Station #2. [1]

Finally, Marathon and Gadams assert on brief that even without having the ability to play music and provide live entertainment, the

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[1] Because the pleading is clear in what it states, and because this was also explained orally during argument at the trial court level (JA 224-29), it is surprising that Marathon and Gadams continue to recharacterize Station #2's allegations in a manner that benefits them in their effort to argue that no viable fraud claim was presented. In their brief at p. 23, footnote 8, Marathon and Gadams again make the same mistaken assertion.

restaurant "could have continued to operate". (Brief of Marathon and Gadams, p. 7). This assertion ignores Station #2's allegations. A core function of Station #2 was to provide entertainment, and Station #2 even obtained an ordinance from the Norfolk City Council allowing for live entertainment and music. (JA 2). Throughout all of the events described in the lawsuit, all parties were aware of the nature of the business operation conducted by Station #2. (JA 8). The destruction of Station #2's ability to play music and provide entertainment caused the demise of the business. (JA 12, 24-25).

In the "Statement of the Facts" set forth in the brief filed by the Lynches, they claim that the entirety of the "salient allegations" relevant to the conspiracy count are set out in ¶¶71 and 72 of the Second Amended Complaint. They are mistaken. The following are additional key allegations relating to the conspiracy claim:

> 73. Lynch has stated that he was instructed by [Gadams] not to allow installation of sound proofing. Earlier, [Gadams] had met with representatives of Station 2 and assured them that they would be apprized by Hourigan when it was appropriate to put in the sound proofing. Station 2 continually asked about the date, and was never given a date; instead, Hourigan closed the space without telling Station 2. Then, Station 2, through its expert sound engineer, offered to supply an alternative sound proofing plan, but still the defendants concerted to deny Station 2

to put in sound attenuation that was clearly spelled out in the lease. The defendants conspired in bad faith together to prevent the sound attenuation which Station 2 was always ready, willing and able to carry out in good faith. Defendants conspired to undermine and interfere with business operations and economic expectancies of Station 2, and succeeded in ruining the business.

74. Hourigan and Mike Lynch promised that the work that Hourigan was carrying out above Station 2, to build the condos, would not be carried on during lunch hours, as it was clear that this would disrupt Station 2's lunch business. Instead, with the full knowledge, condonation and acquiescence of Lynch, Hourigan continually disrupted lunch by intentionally, recklessly and/or negligently hammering, drilling, dropping refuse into the lunch area, jack-hammering, and creating loud noise, such that lunch patrons would often walk in and immediately walk out. Many patrons were so unhappy with the circumstances that they were not charged for lunch, and many customers were lost forever.

(JA 23-26).

Additionally, ¶69 of the Second Amended Complaint incorporates by reference all prior factual allegations stated in the Complaint, including the following:

23. Mike Lynch filed an injunctive action in the Circuit Court of Norfolk to prevent live music at Station 2. At that hearing on July 29, 2005, agents and employees of Marathon Development were actively involved with Mike Lynch and his lawyer in the preparation and presentation of their evidence. During the hearing, Mike Lynch testified that prior to entering into the lease with Station 2, he had already sold the upper floors to [Gadams] and Marathon.

> Despite Lynch's efforts against Station 2, the court ruled in favor of Station 2 and against Lynch. The Court did not grant the injunction.
>
> 24. [Gadams] and Marathon Development conspired with Mike and Lisa Lynch to prevent the installation of the sound attenuation materials and acted in concert with them to prevent the playing of live music in the establishment. [Gadams] told officials of the city of Norfolk that he wanted Ned Rabinowitz and his business out of the space.

(JA 10).

Thus, Station #2 made allegations of malicious intent and conspiratorial conduct much more specific than what is cited in the brief filed by the Lynches.

II. LAW AND ARGUMENT

A. The trial court erred in sustaining the Special Plea of the Statute of Frauds.

In their brief, Marathon and Gadams acknowledge the lack of clarity in the record concerning who owned the "void space" in which Station #2 intended to install sound attenuation materials. Specifically, Marathon and Gadams assert that

> a review of the allegations in the Complaint demonstrates that the alleged agreement involved a promise to permit the installation of a sound attenuation structure either on the property owned by 237 Granby, a limited liability company

> controlled by Gadams, on the property owned by Michael and Lisa Lynch, or on the boundary between the property owned by 237 Granby and the property owned by Mike and Lisa Lynch.

(Brief of Marathon and Gadams, p. 11).[2]

Because Marathon and Gadams concede that neither of them held legal title to the upper two floors, and also concede that the record is unclear as to ownership of the void space, Station #2 cannot be said to have asserted the right to install anything on "their" property. Instead, Station #2 simply alleged that Marathon and Gadams agreed to allow access through the floor of property that they controlled. The sound attenuation material was to be placed in "void space" below the floor of the second floor and above the ceiling of the first floor, which continued to be owned by the Lynches.[3]

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[2] The exact physical contours of what the owner of the upper two floors purchased, owns and possesses has yet to be established.

[3] It must be emphasized that Code § 11-2(6) applies to contracts for the "sale" and "lease" of real estate, and nothing more. Courts are not at liberty to impose a statutory construction "which amounts to holding the legislature did not mean what it has actually expressed." Davis v. Tazewell Place Assocs., 254 Va. 257, 260-61, 492 S.E.2d 162, 164 (1997) (internal citations omitted). Station #2 has not alleged a "sale" or a "lease", which are the only agreements covered by § 11-2(6).

On brief, Marathon and Gadams claim that the insertion of sound attenuation materials into void space is indistinguishable from a "party wall agreement." (Brief of Marathon and Gadams, p. 12-15). The analogy is a false one. "Party wall" can mean one of several things, including a common support wall built and maintained on one or more adjacent properties under different ownership. Black's Law Dictionary, 1122 (6th Ed. 1990) (internal citation omitted).

Here, by contrast, the agreement consists of a one-time deposit of sound-muffling material into otherwise useless, empty "void space" between a ceiling and a floor.

Moreover, even assuming, *arguendo*, that the "party wall" comparison has any value, Marathon and Gadams can cite nothing more than a sparse smattering of statute of frauds cases from other jurisdictions, the most recent of which is 100 years old. One of those cases, Rudisill v. Cross, 54 Ark. 519, 16 S.W. 575 (1891), was rejected as being against the "great weight of authority" in Terry v. Cutts, 26 S.W.2d 739 (Tex. Civ. App. 1930). In Terry, the court held that an oral agreement to divide a partition fence is valid, and the court also cited the doctrine of partial performance

as a means of taking an oral agreement "out of the statutes" requiring a writing. Id., at 740.

Here, however, Station #2 does not ask this Court to evaluate competing cases about party walls or partition fences because Station #2 does not allege any property ownership in the "void space" nor any ongoing right to alter the space. Station #2 merely alleges that it was supposed to be allowed to install certain material before the void space was closed up.

Regarding the issue of "partial performance", Marathon and Gadams assert that "Station #2 makes a half-hearted attempt to avoid its statute of frauds problem by arguing that the partial performance exception to the statute of frauds applies to is claim." (Brief of Marathon and Gadams, p. 17). This statement mischaracterizes Station #2's position. First, Station #2 asserts that the statute of frauds has no application, and does not concede that it has a "statute of frauds problem". Second, the case of Runion v. Helvestine, 256 Va. 1, 501 S.E.2d 411 (1998) makes it perfectly clear that "subsequent occurrences can make enforceable an otherwise unenforceable contract, provided the rights of innocent parties without notice have not intervened." Id., 256 Va. at 8, 501 S.E.2d at 415. The

record in this case reveals Station #2's reliance and performance. Specifically, in direct reliance upon the agreements relating to sound attenuation, Station #2 applied to the City of Norfolk for the requisite permits, and obtained an ordinance from the City Council allowing for live entertainment and music. (JA 2). The same month that Station #2 obtained the ordinance allowing for entertainment and music, it began paying rent. (JA 6). The restaurant opened for business in February 2005. (JA 7). Marathon and Gadams benefitted from the improvements to the restaurant space and the opening of the restaurant because this type of investment and business operation drove up the value of the property being developed by Marathon and Gadams. (JA 21). To the extent that the statute of frauds has any application to the subject agreements (which Station #2 continues to deny), the kinds of "occurrences" described by Station #2 are the type which "can make enforceable an otherwise unenforceable contract...." Id. [4] Unfortunately, Station #2 was never

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[4] See also, Prospect Development Co. v. Bershader, 258 Va. 75, 90, 515 S.E.2d 291, 299 (1999) ("The statute of frauds will not be applied when the result is to cause a fraud or perpetrate a wrong.") (internal citations omitted).

allowed to prove these occurrences and resulting benefits to the appellees because the litigation was cut off prematurely.

B. The trial court erred in sustaining the demurrer to the fraud claims against Marathon and Gadams

The primary thrust of the arguments advanced by Marathon and Gadams is that Station #2 alleged promises relating to future events, which Marathon and Gadams claim to be insufficient to support fraud. (Brief of Marathon and Gadams, p. 20). This Court has addressed this defensive argument in numerous cases, including Elliott v. Shore Stop, Inc., 238 Va. 237, 384 S.E.2d 752 (1989), wherein it stated:

> Ordinarily, in an action based on fraud, the moving party must aver the misrepresentation of present or pre-existing facts; the action usually may not be predicated on unfulfilled promises or statements about future events. Sea-Land Service, Inc. v. O'Neal, 224 Va. 343, 351, 297 S.E.2d 647, 651 (1982). However, there is a recognized exception to that rule. An action in tort for fraud and deceit may be predicated in some cases on promises made with a present intention not to perform them; the gist of the fraud in such a situation is the fraudulent intent. *Id.*, 297 S.E.2d at 651. Accord Boykin v. Hermitage Realty, 234 Va. 26, 29, 360 S.E.2d 177, 178-79 (1987); Colonial Ford v. Schneider, 228 Va. 671, 677, 325 S.E.2d. 91, 94 (1985). This is such a case.

Id., 238 Va. at 245, 384 S.E.2d at 756.

There is no principled distinction to be made between the facts, analysis and authority set forth in Elliott and the allegations presented in the case now before this Court.

As permitted by Rule 1:4(k) of the Rules of the Virginia Supreme Court, Station #2 pled alternate theories concerning the agreements at issue. First, Station #2 alleged that the parties made a deal which was breached. That states a case of breach of contract. As an alternative, Station #2 alleged that the other parties to the sound attenuation deal never had any intention of fulfilling the agreements and pulled a classic "bait and switch", which constitutes fraud. In arguments before the trial court, Station #2 conceded that it could not recover pursuant to both theories, since the intent aspect dictates whether a claim is one for contract or fraud. (JA 226-29). The intention of the parties is something to be sorted out in the litigation process, and Station #2 should have been allowed to proceed.

C. **The trial court erred in dismissing the statutory conspiracy claim.**

On brief, all of the appellees rely heavily on this Court's opinion in Hechler Chevrolet, Inc. v. General Motors, 230 Va. 396, 337 S.E.2d 744

(1985), as authority for the proposition that Station #2 must allege an "unlawful act or an unlawful purpose." (Brief of Marathon and Gadams, p. 26; see also Brief of Lynches, p. 5). The appellees fail to acknowledge the evolution in the case law since the issuance of the Hechler opinion nearly 25 years ago. See generally, Casola, Virginia Business Torts, "Conspiracy to Injure a Business", § 8.305, Virginia CLE (2006).

In Hilb, Rogal and Hamilton Company v. DePew, 247 Va. 240, 246, 440 S.E.2d 918, 921-22 (1994), this Court stated:

> As a logical extension of [Duggin v. Adams, 234 Va. 221, 360 S.E.2d 832 (1987)], we hold that, under certain circumstances, an employee's breach of his/her contractual duties may constitute the "improper method" necessary to sustain a cause of action for intentional interference with an employer's at-will contract and for a conspiracy to interfere with that contract. See Hechler Chevrolet, Inc. v. General Motors Corp., 230 Va. 396, 402, 337 S.E.2d 744, 748 (1985) (defendant may be liable for conspiring to interfere with at-will contract if improper methods used in doing so).

In Simmons v. Miller, 261 Va. 561, 578, 544 S.E. 666, 677 (2001), this Court further explained:

> In order to sustain a claim for statutory conspiracy under Code §§ 18.2-499 and -500, the plaintiff must prove by clear and convincing evidence that the conspirators acted with legal malice, that is, proof that the defendant acted intentionally, purposefully, and without lawful justification. See Feddeman &

Co. v. Langan Assoc., 260 Va. 35, 44, 530 S.E.2d 668, 673 (2000); Tazewell Oil Co. v. United Virginia Bank, 243 Va. 94, 108, 413 S.E.2d 611, 619 (1992). Code §§ 18.2-499 and -500 do not require a plaintiff to prove that a conspirator's primary and overriding purpose is to injure another in his trade or business. Advanced Marine Enterprises v. PRC, Inc., 256 Va. 106, 117, 501 S.E.2d 148, 154 (1998); Commercial Business Systems, Inc. v. BellSouth Services, Inc., 249 Va. 39, 47, 453 S.E.2d 261, 267 (1995).

Thus, the discussion in Hechler about "unlawful" means is either (1) very fact-specific, (2) pure dicta, or (3) has been clarified or over-ruled by subsequent opinions. Station #2 made allegations sufficient to overcome a demurrer and it was error for the trial court to rule otherwise.

III. CONCLUSION

WHEREFORE, your appellant, Station #2, respectfully requests that this Honorable Court reverse the rulings of the trial court which are presented in this appeal, and remand this case for trial on the merits. Counsel for the appellants requests an opportunity to present oral argument to this Court.

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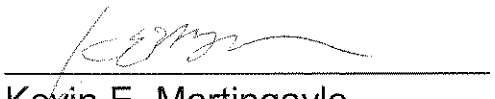
CERTIFICATE

I, hereby certify that Rule 5:26(d) of the Supreme Court of Virginia has been complied with and pursuant to the Rule, twelve (15) copies of this Reply Brief of Appellant was hand-delivered to the Clerk of the Supreme Court of Virginia and three copies of the Reply Brief of Appellant have been mailed to Daniel R. Warman, Esquire, *Counsel for Michael and Lisa Lynch*; and John C. Lynch, Esquire, Counsel for Marathon Development Group, Inc. and Frank T. ("Buddy") Gadams this 5th day of January, 2010. On this date, the Reply Brief was also filed electronically with the Court, with a copy being sent electronically to Daniel R. Warman, Esquire and John C. Lynch, Esquire.



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