In the

Supreme Court of Virginia

At Richmond

Record No. 102342

THE ST. JOE COMPANY,

Appellant,

– v. –

NORFOLK REDEVELOPMENT & HOUSING AUTHORITY,

Appellee.

OPENING BRIEF OF APPELLANT

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SUBJECT INDEX

TABLE OF CITATIONS iii

STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS OF THE TRIAL COURT 1

ASSIGNMENTS OF ERROR 4

STATEMENT OF FACTS 5

QUESTIONS PRESENTED 10

STANDARD OF REVIEW 11

ARGUMENT 12

- **I. THE COURT ERRED IN CONCLUDING THAT A PORTION OF THE FUNDS HELD IN ADVANTIS' MASTER OPERATING ACCOUNT REMAINED THE PROPERTY OF AND SUBJECT TO THE CONTROL OF NRHA AND THAT ADVANTIS HAD NO RIGHT TO THESE FUNDS** 12

- **II. THE COURT ERRED IN IMPOSING A CONSTRUCTIVE TRUST WHEN THERE WAS NO EVIDENCE THAT ST. JOE EXERCISED CONTROL OVER THE MASTER OPERATING ACCOUNT BY FRAUD, ABUSE OF CONFIDENCE, OR OTHER QUESTIONABLE MEANS** 14

- **III. THE COURT ERRED IN FINDING UNJUST ENRICHMENT IN THE ABSENCE OF ANY CLAIM OF FRAUD OR EVIDENCE OF INEQUITY** 18

IV. THE COURT ERRED IN IMPOSING A CONSTRUCTIVE TRUST OR UNJUST ENRICHMENT CLAIM ON FUNDS HELD IN AN ACCOUNT OVER WHICH A SECURED CREDITOR HELD A PERFECTED SECURITY INTEREST WHEN THE DEPOSIT WAS NOT ALLEGED TO BE THE PRODUCT OF MISTAKE OR FRAUD 21

1. St. Joe is a Secured Creditor with a Perfected Security Interest in the Master Operating Account. 21

2. Secured Creditors Have Priority Over Unsecured Creditors. 24

CONCLUSION 29

CERTIFICATE 30

TABLE OF CITATIONS

Cases

Anchor Savings Bank v. Berlin, 445 So.2d 675 (Fla. 1984) 18

Connemara Corp. v. St. Andrews, LLC, 72 Va. Cir. 289 (Lancaster County 2006) 24, 25

Crestar Bank v. Williams, 250 Va. 198, 462 S.E.2d 333 (1995). 15

Dameron v. Tyler, 155 F.3d 718 (4th Cir. 1998) 16, 17

Davidson v. Lely Estates, Inc., 330 So.2d 528 (Fla. 2nd Dist. Ct. App. 1976) 14

Evans Prods. Co. v. Jorgenson, 421 P.2d 978 (Or. 1966) 26

FDIC v. Quality Inns, Inc., 735 F. Supp. 1311 (D.Md.1990) 25

Fisher v. Grady, 178 So. 852 (Fla. 1937) 14

Fla. Power Corp. v. City of Winter Park, 887 So.2d 1237 n.4 (Fla. 2004) 18

Galloway Corp. v. Wise, 244 Va. 344, 421 S.E.2d 431 (1992) ... 15

Geter v. Simmons, 49 So. 131 (Fla. 1909) 15

Peerless Packing Co. Inc. v. Malone & Hyde, Inc., 376 S.E.2d 161 (W.Va. 1988) 25, 26

Quinn v. Phipps, 113 So. 419 (Fla. 1927) 14

Richardson v. Richardson, 242 Va. 242, 409 S.E.2d 148 (1991) 15

Tao Of Systems Integration, Inc. v. Analytical Services & Materials, Inc., 299 F.Supp.2d 565 (E.D.Va. 2004) 18

Velesz v. Simanavichus, 58 Va. Cir. 87 (Fairfax Cir. 2001) 18

Statutes

Fla. Stat. § 679.1041 ..... 22, 23, 24

Fla. Stat. § 679.1041(1)(b) 22

Fla. Stat. § 679.2011 23

Fla. Stat. § 679.3041(1) 22

Fla. Stat. § 679.3041(2)(a) 22

Fla. Stat. § 679.3141(1) 22

Fla. Stat. § 679.327(1) 24

STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS OF THE TRIAL COURT

Plaintiff Norfolk Redevelopment and Housing Authority ("NRHA") filed its Complaint against Defendants The St. Joe Company ("St. Joe") and Advantis Real Estate Services Company ("Advantis") seeking to recover certain funds paid by NRHA to Advantis and deposited by Advantis into its Master Operating Account (Appendix p. 1). In the Complaint, NRHA alleged that it paid these funds to Advantis to be used, after deducting Advantis' management fee, to pay contractors who had performed architectural or roofing services at NRHA's office building.

The NRHA Complaint contained four counts for (I) Constructive Trust; (II) Unjust Enrichment; (III) Detinue; and (IV) Conversion. It is notable that NRHA did *not* allege the existence of an express trust, nor seek recovery on that basis.

The Circuit Court for the City of Norfolk sustained St. Joe's Demurrer to Counts III and IV by Order dated February 10, 2010 (Appendix p.82). NRHA did not appeal the Order. NRHA obtained a judgment by default against Defendant Advantis on January 28, 2010. Advantis is not a party to this appeal.

To facilitate expedited and efficient resolution of the claims, NRHA and St. Joe agreed to and filed with the trial court Stipulations of Fact ("SOF") (Appendix pp. 92 -96) and cross motions for summary judgment on the remaining two claims for Constructive Trust (Count I) and Unjust Enrichment (Count II) (Appendix pp. 198 and 307). The trial court entertained the cross motions for summary judgment on August 10, 2010.

The stipulated evidence established that St. Joe held a perfected secured interest in Advantis' Master Operating Account (and other Advantis accounts) and was authorized to seize that account in the event of a default under a June 6, 2008 Deposit Account Control Agreement between St. Joe, Advantis, and Wachovia Bank, N.A.(Appendix p.158) A perfected UCC Financing Statement had been filed (Appendix pp 193 – 195).

The evidence further established that in November 2008 and March 2009, Advantis, as agent for NRHA, entered into contracts with a roofing company(Appendix p.174) and an architect (Appendix p.160) ("Contractors") for work to be performed on NRHA's main office building. In May 2009, Advantis invoiced

NRHA on Advantis letterhead for work performed by these Contractors and a management fee, expressed as a percentage of the draw payments sought by the Contractors (Appendix pp 173 - 176). One June 11 and 18, 2009, NRHA issued two checks made payable solely to Advantis with no reference to the Contractors or a trust (Appendix pp 177, 180). Each check was in an amount sufficient to pay the combined sum of the Advantis' management fee and the Contractor fee.

Although Advantis maintained a number of accounts, Advantis promptly deposited the checks into its Master Operating Account. One month later, Advantis defaulted on its obligations to St. Joe. On July 20, 2009, St. Joe exercised its right as a secured creditor over the Master Operating Account, transferring funds from the account to a St. Joe account in payment of Advantis' obligations to St. Joe.

After review of the cross motions for summary judgment and oral argument by counsel, the Circuit Court for the City of Norfolk, the Honorable John R. Doyle, III, presiding, issued a letter opinion dated August 16, 2010 (Appendix pp 483-488). In

it, the trial court found that the funds held by Advantis in its Master Operating Account remained the property of and subject to control by NRHA; that Advantis did not have legal rights to these funds; and that as a result, St. Joe's perfected security interest in the Master Operating Account failed to reach that portion of the funds contained therein necessary to pay the Contractors.

Based on these findings, the court granted summary judgment to NRHA on Counts I (constructive trust) and II (unjust enrichment); denied St. Joe's motion for summary judgment; and entered final judgment in favor of NRHA by Order dated September 10, 2010 (Appendix p.488).

St. Joe timely noted its appeal.

ASSIGNMENTS OF ERROR

I. THE COURT ERRED IN CONCLUDING THAT A PORTION OF THE FUNDS HELD IN ADVANTIS' MASTER OPERATING ACCOUNT REMAINED THE PROPERTY OF AND SUBJECT TO THE CONTROL OF NRHA AND THAT ADVANTIS HAD NO RIGHT TO THESE FUNDS (Appendix p.486, 487)

II. THE COURT ERRED IN IMPOSING A CONSTRUCTIVE TRUST WHEN THERE WAS NO EVIDENCE THAT ST. JOE EXERCISED CONTROL OVER THE MASTER OPERATING

ACCOUNT BY FRAUD, ABUSE OF CONFIDENCE, OR OTHER QUESTIONABLE MEANS (Appendix pp 486, 487).

III. THE COURT ERRED IN FINDING UNJUST ENRICHMENT IN THE ABSENCE OF ANY CLAIM OF FRAUD OR EVIDENCE OF INEQUITY (Appendix pp. 488, 489)

IV. THE COURT ERRED IN IMPOSING A CONSTRUCTIVE TRUST OR UNJUST ENRICHMENT CLAIM ON FUNDS HELD IN AN ACCOUNT OVER WHICH A SECURED CREDITOR HELD A PERFECTED SECURITY INTEREST WHEN THE DEPOSIT WAS NOT ALLEGED TO BE THE PRODUCT OF MISTAKE OR FRAUD (Appendix 488, 489).

STATEMENT OF FACTS

For the purpose of the cross motions for summary judgment only, the parties filed with the trial court the following Stipulations of Fact and attached thereto the exhibits as noted:

1. On September 1, 1999, NRHA and Advantis Real Estate Services Company ("Advantis") entered into a property management agreement ("Management Agreement") for NRHA's main office building located at 201 Granby Street in Norfolk, Virginia ("Property"). (Exhibit A)(Appendix p 97)

2. On June 6, 2008, St. Joe entered into a Deposit Account Control Agreement with Advantis and Wachovia Bank ("Wachovia"). (Exhibit B)(Appendix p.125)

3. On November 13, 2008, Advantis entered into an agreement as agent for NRHA with Eastern Waterproofing and Restoration of Virginia Co., LLC ("Eastern") for Eastern to perform roof repair work at the Property ("Contractor Agreement"). (Exhibit C)(Appendix p.141)

4. On March 6, 2009, Advantis entered into an agreement as agent for NRHA with DLM Architects ("DLM") for DLM to assist with the roof repair work at the Property ("Architect Agreement"). (Exhibit D)(Appendix 160)

5. On May 30, 2009, Advantis sent NRHA invoice number NRHA_PA2-143 in the amount of $119,221.44 for work performed on the Property, which amount included $112,474.06 due to Eastern and $6,478.38 due to Advantis as a construction management fee ("Contractor Invoice"). (Exhibit E)(Appendix p.173)

6. Also on May 30, 2009, Advantis sent NRHA invoice number NRHA_08002-9 in the amount of $3,041.14 for work performed on the Property, which amount included $2,869.00 due to DLM and $172.14 due to Advantis as a construction management fee ("Architect Invoice"). (Exhibit F)(Appendix p. 174)

7. On June 11, 2009, in response to invoice number NRHA_PA2-143, NRHA delivered to Advantis check number 363228 in the amount of $119,221.44 ("Contractor Check"), together with the check stub and a copy of invoice number NRHA_PA2-143, for the purpose of paying Eastern. The check stub for check number 363228 references invoice number NRHA_PA2-143. (Exhibit G)(Appendix p. 175).

8. On June 17, 2009, Advantis deposited the Contractor Check into its Wachovia account ending in 0390 ("Account"). (Exhibit H)(Appendix p. 177).

9. On June 18, 2009, in response to invoice number NRHA_08002-9, NRHA delivered to Advantis check number 363269 in the amount of $3,041.14 ("Architect Check"), together

with the check stub and a copy of invoice number NRHA_08002-9, for the purpose of paying DLM. The check stub for check number 363269 references invoice number NRHA_08002-9. (Exhibit I)(Appendix p. 178)

10. On June 29, 2009, Advantis deposited the Architect Check into the Account. (Exhibit J)(Appendix p. 180).

11. By letter dated July 17, 2009, NRHA issued a Cure Notice to Advantis demanding that Advantis transmit payment to the Contractor. (Exhibit K)(Appendix p. 181)

12. By letter dated July 20, 2009, NRHA issued a Cure Notice to Advantis demanding that Advantis transmit payment to the Architect. (Exhibit L)(Appendix p 184)

13. The Account is the one of the accounts listed on the Deposit Account Control Agreement.

14. On July 20, 2009, St. Joe took control of the Account pursuant to the Deposit Account Control Agreement.

15. Advantis did not transmit payment of the $112,474.06 to Eastern before St. Joe took control of the Account.

16. Advantis did not transmit payment of the $2,869.00 to DLM before St. Joe took control of the Account.

17. By letter dated July 27, 2009, St. Joe instructed Wachovia to wire the balance in the Account to St. Joe's account at Branch Banking & Trust Company in Florida. (Exhibit M)(Appendix p. 187)

18. Between June 17, 2009 and July 27, 2009, the balance in the Account at all times exceeded $115,342.06. (Exhibit N)(Appendix p. 188)

19. By letter dated September 4, 2009, NRHA notified St. Joe that St. Joe held property of NRHA and that NRHA demanded its return. (Exhibit O)(Appendix p. 189)

20. St. Joe received the September 4, 2009 letter from NRHA.

21. St. Joe has not returned or paid any amount to NRHA as of the date of these Stipulations.

22. St. Joe has maintained possession of the $115,342.06 that is the subject of this case during the pendency of this litigation.

23. St. Joe has been a secured creditor of Advantis since June 9, 2008.

24. A UCC Financing Statement was filed by St. Joe in the State of Florida. (Exhibit P)(Appendix p. 193) No UCC Financing Statement was filed by St. Joe in the Commonwealth of Virginia.

25. The Wachovia account statements for the Account bear the name "Advantis Real Estate Services Company Master Operating Account."

In addition, it was undisputed that

26. St. Joe is a Florida corporation. Compl. ¶ 2 (Appendix p. 1).

27. Advantis is a Florida corporation. Compl. ¶ 3 (Appendix p.1).

QUESTIONS PRESENTED

I. Whether a portion of the funds deposited into Advantis' Master Operating Account remained the property of and subject to control by NRHA and not Advantis

II. Whether Advantis' Master Operating Account can be the subject of a constructive trust in favor of NRHA when there was

no evidence that secured creditor St. Joe exercised control over the account by fraud, abuse of confidence, or other questionable means

III. Whether NRHA can prevail on a claim of unjust enrichment absent an allegation of fraud and with no evidence of inequity

IV. Whether NRHA, as an unsecured creditor, can defeat St. Joe's right as a secured creditor to an account over which St. Joe held a perfected security interest absent an allegation of mistake or fraud

STANDARD OF REVIEW

In this case the trial court granted NRHA's motion for summary judgment relying upon the stipulated facts presented by the parties. Accordingly, this Court will review the trial court's application of the law to those stipulated facts *de novo*. *Johnson v. Hart*, 279 Va. 617, 623, 692 S.E.2d 239, 242 (2010).

ARGUMENT

I. THE COURT ERRED IN CONCLUDING THAT A PORTION OF THE FUNDS HELD IN ADVANTIS' MASTER OPERATING ACCOUNT REMAINED THE PROPERTY OF AND SUBJECT TO THE CONTROL OF NRHA AND THAT ADVANTIS HAD NO RIGHT TO THESE FUNDS

Based upon the invoices submitted by Advantis to NRHA, the trial court determined that the "money was held by Advantis in trust, for a specific purpose, and Advantis was not permitted to use the money in any manner othat than that provided for in the specific invoices – payment of the Contractors," that "NRHA retained control over the funds even after they were in the hands of Advantis," and that "[a]t no point did these funds belong to Advantis." As a result, the trial court concluded that St. Joe could not seize the Master Operating Account to the extent that it contained the funds co-mingled in it as a result of the deposits by Advantis of the checks issued by NRHA.

The trial court's finding is in error; the record is devoid of any evidence that NRHA possessed authority to exercise control over funds in Advantis' Master Operating Account. The invoices, attached to the SOF as Exhibits E and F, were issued on Advantis

letterhead, and not in the name of the Contractors. There was no evidence for the Court to consider as to whether or not the Contractors had issued any invoices, and, if so, to whom. Only one of the invoices referenced one of the Contractors, and both invoices solicited payment to Advantis, not the Contractors.

[NRHA] Advantis likewise, issued its checks without restriction and made payable directly and solely to Advantis. The checks did not reference the Contractors, the agency, or a trust relationship, and there was no evidence that the checks were sent with specific instructions. In short, NRHA took no steps whatsoeverl to indicate a desire to control these checks. Once they were deposited and co-mingled, Advantis was free to utilize the funds in any manner it saw fit. While Advantis undoubtedly owed an obligation to NRHA (for which NRHA has obtained a judgment) to pay the Contractors, it could have done so in any manner it saw fit and from any source of funds in its possession, including any of its several other accounts. Indeed, these funds were not only subjected to control under St. Joe's DACA, but also were the potential target of garnishment summonses, bank

setoff, or governmental seizure or lien. Once deposited, these funds became instantly controlled by the Deposit Account Control Agreement, subject to seizure in the event of a default. NRHA had no right to control the co-mingled funds, and the trial court's finding is not supported by any credible evidence.

II. THE COURT ERRED IN IMPOSING A CONSTRUCTIVE TRUST WHEN THERE WAS NO EVIDENCE THAT ST. JOE EXERCISED CONTROL OVER THE MASTER OPERATING ACCOUNT BY FRAUD, ABUSE OF CONFIDENCE, OR OTHER QUESTIONABLE MEANS

Under Florida law, to impose a constructive trust, the court must find that the party against whom the trust is sought obtained property belonging to the claimant "through actual fraud, abuse of confidence…or through other *questionable* means" by which the party "gains something for himself which in equity and good conscience he should not be permitted to hold." Fisher v. Grady, 178 So. 852, 862 (Fla. 1937). See also, Davidson v. Lely Estates, Inc., 330 So.2d 528, 530 (Fla. 2nd Dist. Ct. App. 1976); Quinn v. Phipps, 113 So. 419 (Fla. 1927). The party seeking to impose a constructive trust must present evidence "so clear, strong and unequivocal as to remove from the mind of the

Chancellor every reasonable doubt … ." Id., quoting Geter v. Simmons, 49 So. 131, 133 (Fla. 1909).

Similarly, Virginia will not impose a constructive trust absent proof of fraud or to prevent an unjust enrichment. See Galloway Corp. v. Wise, 244 Va. 344, 345, 421 S.E.2d 431, 433 (1992); see also, Richardson v. Richardson, 242 Va. 242, 245-46, 409 S.E.2d 148, 150-51 (1991). Like Florida, Virginia law requires "clear and convincing" evidence in order to impose a constructive trust. Crestar Bank v. Williams, 250 Va. 198, 204, 462 S.E.2d 333, 335 (1995).

NRHA is not entitled to a constructive trust as a matter of law. NRHA did not allege that St. Joe engaged in fraudulent or abusive conduct, nor that it engaged in any "questionable means." To the contrary, NRHA acknowledged that St. Joe was a secured creditor under the DACA and exercised its rights thereunder.

Furthermore, NRHA did not demonstrate as required that St. Joe should not, in good conscience, retain the monies it lawfully seized from a deposit account that was subject to a recorded

security interest for over a year before the specific funds sought were even deposited. NRHA had ample opportunity to take steps to protect itself, and failed to do so. Specifically, NRHA could have issued the check made payable to Advantis and the Contractors, could have issued the check made payable to Advantis for the benefit of NRHA, or could have issued the check made payable solely to the Contractors.

There is an additional reason, however, why NRHA cannot prevail on a constructive trust under Virginia law. NRHA asserts that it was not required to "trace" funds subject to a constructive trust. It cited the case of Dameron v. Tyler for support of its claim to the application of the "lowest intermediate balance rule." See Dameron v. Tyler, 155 F.3d 718 (4th Cir. 1998). NRHA's reliance on Dameron is misplaced.

Dameron, a member of the Virginia State Bar, received and held real estate settlement funds in trust for certain lenders. The funds were to be used at closing to pay designated third parties. See id. at 720. After it was discovered that Dameron was misappropriating the funds held in his trust account, the court

appointed a receiver who froze Dameron's account and commenced an involuntary Chapter 11 proceeding. See id. at 721. A dispute arose between the lenders, who sought to recover the frozen trust account monies, and the bankruptcy Trustee, who sought the funds for use by the bankruptcy estate. See id. Applying the lowest intermediate balance rule, the Dameron court determined that the lenders were entitled to a return of their money from the trust account subject to the application of that anti-tracing rule. See id. at 724.

In this case, however, NRHA does not seek the return of money from an Advantis account, but rather seeks the return of money from St. Joe's account(s). There is no dispute that St. Joe properly exercised its rights as a secured creditor to seize the funds in the Account and transfer them to St. Joe's own account for its own use; or that St. Joe did so prior to NRHA's demand for a return of the funds. SOF ¶¶ 17, 19; Tr. pp. 41-42. Unlike the lenders in Dameron, NRHA seeks to follow these funds into St. Joe's possession, rather than argue for the return of monies from Advantis' Master Operating Account.

III. THE COURT ERRED IN FINDING UNJUST ENRICHMENT IN THE ABSENCE OF ANY CLAIM OF FRAUD OR EVIDENCE OF INEQUITY

NRHA's second count is one for unjust enrichment. Because there was no allegation of fraud or misconduct by St. Joe, NRHA could only have prevailed if it had proved unjust enrichment. Under either Florida or Virginia law, NRHA did not do so.

Florida and Virginia law governing an unjust enrichment are substantially the same. NRHA was required to prove a benefit conferred upon St. Joe by NRHA, NRHA's appreciation of the benefit, and St. Joe's acceptance and retention of the benefit under "circumstances that make it inequitable for [St. Joe] to retain … without paying the value thereof." Fla. Power Corp. v. City of Winter Park, 887 So.2d 1237, 1242 n.4 (Fla. 2004); see also, Tao Of Systems Integration, Inc. v. Analytical Services & Materials, Inc., 299 F.Supp.2d 565, 576 (E.D.Va. 2004). Money paid under a mistake of fact or as the result of fraud can be recovered. See Anchor Savings Bank v. Berlin, 445 So.2d 675, 676 (Fla. 1984); see also, Velesz v. Simanavichus, 58 Va. Cir. 87, 89 (Fairfax Cir. 2001) (providing for recovery where "but for the

mistake or fraud…[plaintiff] would have *unquestioned right* to the money."). "To bring an action to recover monies received by the defendant from a third party, a plaintiff must demonstrate that he had a preexisting right to that fund." Tao, 299 F.Supp.2d at 576.

NRHA presented no evidence that St. Joe received monies from the Master Operating Account under a mistake of fact or fraud, or that Advantis paid monies to St. Joe inadvertently or by mistake. Rather, the evidence was that St. Joe exercised its rights as a secured creditor to seize the Master Operating Account in which it had held a perfected security interest long before NRHA paid Advantis. NRHA did not allege or prove that Advantis mistakenly deposited the funds into the Master Operating Account; rather, NRHA alleged solely that the funds were present when St. Joe exercised its rights as a secured party. Under those circumstances, NRHA cannot legitimately claim and did not prove an inequitable retention of the monies by St. Joe.

NRHA furthermore did not claim that it was entitled to the money, but rather that it intended for Advantis to pay third party Contractors not present before the trial Court. While that may

very well have been the case, NRHA voluntarily relinquished the funds to Advantis for the purpose of paying these third parties without exercising any control. Advantis was entitled to use the money in any way it chose. It could have used the money to make payroll and used other funds to pay the Contractors. Unlike St. Joe, Advantis took no steps to secure itself in this relationship.

Measuring the equities between the two parties, one a secured creditor and the other a judgment creditor, both were harmed by Advantis' demise. St. Joe was a secured creditor; NRHA took no steps to protect itself, but rather delivered funds to Advantis even though it charged by the UCC filing with knowledge that Advantis had pledged its accounts to its secured creditor St. Joe.

IV. THE COURT ERRED IN IMPOSING A CONSTRUCTIVE TRUST OR UNJUST ENRICHMENT CLAIM ON FUNDS HELD IN AN ACCOUNT OVER WHICH A SECURED CREDITOR HELD A PERFECTED SECURITY INTEREST WHEN THE DEPOSIT WAS NOT ALLEGED TO BE THE PRODUCT OF MISTAKE OR FRAUD

1. St. Joe is a Secured Creditor with a Perfected Security Interest in the Master Operating Account

Although the trial court properly concluded that St. Joe was a perfected secured creditor, the facts and law regarding St. Joe's perfected security interest are critical to the appeal of this matter.

On June 6, 2008, St. Joe entered into a Deposit Account Control Agreement ("DACA") with Advantis and Wachovia Bank, N.A. Under the DACA, Advantis gave to St. Joe, for valuable consideration, a security interest in certain of its accounts, including the Master Operating Account into which the subject monies were deposited. SOF ¶¶ 2, 8, 10, 25; Exh. B. The DACA was subject to Florida law . SOF Exh. B §§ 1(a), 9(d). the DACA further provided specifically for application of Florida law to the perfection and priority of any security interest in the Account. It also provided for Florida as the jurisdiction governing Wachovia

for the purpose of Section 9-304 of the Florida Uniform Commercial Code. SOF Exh. B § 9(d).

Under Florida's Uniform Commercial Code, the local law of a bank's jurisdiction governs perfection. See Fla. Stat. § 679.3041(1). An agreement between a debtor and a bank governing a deposit account expressly specifying a particular jurisdiction will be enforced. See Fla. Stat. § 679.3041(2)(a).

A security interest in a deposit account can be perfected by control of the collateral under § 679.1041. See Fla. Stat. § 679.3141(1). A secured creditor has control of a deposit account if the bank and debtor "have agreed … that the bank will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor … ." Fla. Stat. § 679.1041(1)(b). In this case, the DACA expressly provided for such control:

> [Advantis] authorizes and directs [Wachovia] to comply, and [Wachovia] agrees to comply, with all instructions delivered by [St. Joe] to [Wachovia] in accordance with and subject to Section 7 of this Agreement … without further consent by [Advantis].

SOF Exh. B § 1(d). St. Joe thus became a perfected secured creditor of Advantis on June 6, 2008 with the execution of the DACA containing the necessary language for St. Joe's control of the Master Operating Account.

In addition to perfection by control, St. Joe further perfected its security interest in the Master Operating Account on June 9, 2008 by filing a Financing Statement ("UCC-1") with the Florida Secretary of the State, (Advantis' state of incorporation), covering the following collateral:

> All of Debtor's assets, including but not limited to, all now owned or hereafter acquired or arising ***accounts***, machinery, inventory, furniture, fixtures, equipment, general intangibles, chattel paper, contract rights, documents, instruments, ***deposit accounts*** and investment property, and all ***cash*** and non-cash proceeds thereof … and proceeds of proceeds.

SOF ¶¶ 23-24; Exh. P.

Florida's general priority statute provides, "[e]xcept as otherwise provided in the Uniform Commercial Code, a security agreement is effective … against creditors." Fla. Stat. § 679.2011. Florida's priority statute specific to deposit accounts provides that "…a secured party having control of the deposit

account under § 679.1041 has priority over a conflicting security interest held by a secured party that does not have control." Fla. Stat. § 679.327(1). Under any measure, St. Joe was secured creditor with perfected interest in the Master Operating Account well before NRHA paid the money to Advantis. NHRA conceded this point. The Court likewise acknowledged it.

2. Secured Creditors Have Priority Over Unsecured Creditors

Cases that have examined the conflict between unsecured and secured creditors have found for the secured creditor even when an inequity results. In Connemara Corp. v. St. Andrews, LLC, the bank secured a line of credit to St. Andrews by filing a deed of trust upon its real property and any subsequently erected buildings. See Connemara, 72 Va. Cir. 289, 289 (Lancaster County 2006). St. Andrews subsequently hired Connemara to construct buildings on the property. See id. After St. Andrews defaulted under both the line of credit with the bank and the payments due Connemara, the bank foreclosed upon the deed of trust. See id. In rejecting Connemara's claim that the bank was unjustly enriched by retention of the buildings on the foreclosed

property, the court noted that there were no allegations of fraud by the bank. See id. at 290. The court noted that Connemara "seeks to put itself in better position on an unsecured debt by pleading 'unjust enrichment' …" before concluding that the court "cannot put Connemara in a superior position in equity than it would have been in law." Id. at 290-91.

Other courts have reached the same result. In FDIC v. Quality Inns, Inc., the United States District Court for the District of Maryland, relying on a decision by the Supreme Court of West Virginia, succinctly noted that "an unsecured creditor is not entitled to maintain an equitable claim of unjust enrichment … against a secured creditor for the value of collateral purchased in settlement of debt." FDIC, 735 F.Supp. 1311, 1319 (D.Md.1990); see also, Peerless Packing Co. Inc. v. Malone & Hyde, Inc., 376 S.E.2d 161, 164 (W.Va. 1988).

In Peerless, the plaintiffs supplied groceries to a store on open account without perfecting purchase money security interests in the inventory. See Peerless, 376 S.E.2d at 162-63. The store had previously provided its financier with a security

interest in the inventory. See id. When the store was unable to meet its obligations to its financier, it transferred all of its assets to the financier without any of its obligations to avoid a substantially larger default. See id. at 163. Plaintiffs initiated suit against the financier on the basis of unjust enrichment. See id. The court determined that plaintiffs could not seek an equitable finding of unjust enrichment on assets subject to Article 9 of the Uniform Commercial Code. See id. In reaching this conclusion, the court cited with approval an Oregon Supreme Court decision, which noted that "[t]he purpose and effectiveness of the UCC would be substantially impaired if interests created in compliance with UCC procedure could be defeated by application of the equitable doctrine of unjust enrichment." *Id*. at 270; quoting, Evans Prods. Co. v. Jorgenson, 421 P.2d 978, 983 (Or. 1966). The Peerless court noted that while "the result of disallowing an equitable unjust enrichment claim in such a case may appear harsh, the unsatisfied creditors could have protected themselves…," Peerless, 376 S.E.2d at 270, and concluded that the "UCC provides justice in the long run in large part through the

certainty and predictability of its provisions, which should not be set aside absent truly egregious circumstance verging on actual fraud." Id.

In this case, the undisputed facts established that St. Joe transferred possession of funds from the Master Operating Account over which it had exercised control and for which it had a recorded security interest for over a year prior to the deposit by Advantis of unsecured monies into that account. SOF ¶¶ 2,14,17,23,24; Tr. pp. 41-42. The Master Operating Account statements contained other funds, as well, and it is likely that many of those funds were due and owing to other unsecured creditors. St. Joe took the prudent step of securing as much of its risk as it could; NRHA failed to take even the simplest steps to protect a six figure payment, but rather chose to rely on Advantis to make the payments. Under these facts, the trial court could not find that St. Joe must return monies properly obtained by it through the exercise of its rights as a secured creditor on a theory of "unjust" enrichment. To do so would vitiate the important protections upon which secured creditors rely in

making credit decisions and penalize the prudent creditor at the expense of the imprudent one.

Under NRHA's theory of recovery, a secured creditor would be required to analyze every deposit and determine whether or not the deposit was made with the intent that the monies be paid to an unidentified third party. In essence, a security interest in a deposit account would be reduced to a security interest in the net proceeds of a deposit account once all unsecured creditors with a claim were first paid.

CONCLUSION

For the foregoing reasons, the Norfolk Circuit Court erred in granting Summary Judgment for NRHA and denying the Summary Judgment Motion of The St. Joe Company. Appellant respectfully requests that this Court reverse the ruling of the Norfolk Circuit Court and grant judgment for The St. Joe Company.

Respectfully submitted,

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By Counsel

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The St. Joe Company certifies that on April 11, 2011 it mailed three copies of this Brief of Appellant and of the Joint Appendix to opposing counsel at the address listed above. This same date, 15 copies of the same were hand delivered to the Clerk's Office.

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