In the

Supreme Court of Virginia

At Richmond

Record No. 102342

THE ST. JOE COMPANY,

Appellant,

– v. –

NORFOLK REDEVELOPMENT & HOUSING AUTHORITY,

Appellee.

BRIEF OF APPELLEE

W. RYAN SNOW, VSB #47423
AMY MCCLURE, VSB #77937
CRENSHAW, WARE & MARTIN, P.L.C.
1200 Bank of America Center
Norfolk, Virginia 23510
T: (757) 623-3000
F: (757) 623-5737
wrsnow@cwm-law.com
amcclure@cwm-law.com

Counsel for Appellee

COUNSEL PRESS • VA – (800) 275-0668

TABLE OF CONTENTS[1]

TABLE OF AUTHORITIES ii

SUMMARY 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

STANDARD OF REVIEW 5

LAW AND ARGUMENT 6

I. The trial court did not err in holding that NRHA's funds remained NRHA's property in Advantis' account until used for their intended purpose (Assignment of Error I) 6

A. The NRHA funds were entrusted to Advantis as NRHA's agent for the sole purpose of paying the contractor and architect 6

B. The trust imposed on the NRHA funds followed the funds into the hands of St. Joe 9

II. The trial court did not err in rejecting St. Joe's argument that a constructive trust requires proof of fraud or abuse of confidence (Assignment of Error II) 11

[1] As used herein, "NRHA" refers to Norfolk Redevelopment and Housing Authority; "Advantis" refers to Advantis Real Estate Services Company, also known as GVA Advantis; and "St. Joe" refers to The St. Joe Company.

III. The trial court did not err in rejecting St. Joe's argument that unjust enrichment requires proof of fraud or inequity (Assignment of Error III) 15

IV. The trial court did not err in rejecting St. Joe's argument that it was allowed to seize and retain NRHA's property as a secured creditor of Advantis(Assignment of Error IV) 18

CONCLUSION 20

CERTIFICATE 21

TABLE OF AUTHORITIES

Cases

Anchor Savings Bank v. Berlin,
445 So.2d 675 (Fla. 1984) 17

Baldwin v. Adkerson,
156 Va. 447, 158 S.E. 864 (1931) ..... passim

Beacon Homes, Inc. v. Holt,
146 S.E.2d 434 (N.C. 1966) 17

Broaddus v. Gresham,
181 Va. 725, 26 S.E.2d 33 (1943) 7

City of Norfolk v. Norfolk County,
120 Va. 356, 91 S.E. 820 (1917) 16

Dameron v. Tyler,
155 F.3d 718 (4th Cir. 1998) 10

Faulknier v. Shafer,
264 Va. 210, 563 S.E.2d 755 (2002) 13

Federal Reserve Bank of Richmond v. Peters,
139 Va. 45, 123 S.E. 379 (1924) 10

Florida Power Corp. v. City of Winter Park,
887 So.2d 1237 (Fla. 2004) 17

Frye v. Commonwealth,
231 Va. 370, 345 S.E.2d 267 (1986) 12

In re Strack,
524 F.3d 493 (4th Cir. 2008) 8

Johnson v. Hart,
279 Va. 617, 692 S.E.2d 239 (2010) 5

Jones v. Harrison,
250 Va. 64, 458 S.E.2d 766 (1995) 13

Leonard v. Counts,
221 Va. 582, 272 S.E.2d 190 (1980) 12, 13

Richardson v. Richardson,
242 Va. 242, 409 S.E.2d 148 (1991) 13

Schmidt v. Household Finance Corp.,
276 Va. 108, 661 S.E.2d 834 (2008) 16

Rules, Statutes and Other Authorities

Va. Supreme Court Rule 5:28(c) 3

SUMMARY

This case arises out of a roof repair project at NRHA's office building in Norfolk. In June 2009, NRHA delivered $122,262.58 to its property management agent, Advantis, of which $115,343.06 was designated for payment on NRHA's behalf to the contractor and architect on the project.[1] On July 20, 2009, while NRHA's funds were still in Advantis' account, St. Joe seized the account as a secured creditor of Advantis. St. Joe then emptied the account, including NRHA's funds, notwithstanding notice from NRHA that its funds were improperly seized.

The trial court granted summary judgment to NRHA on stipulated facts for the full amount of its claim. In so doing, the trial court squarely rejected St. Joe's argument that it properly seized NRHA's funds as a secured creditor of Advantis:

> **Unlike funds held in the hands of a debtor, Advantis had no legal rights to these funds, $115,343.06 in total**. It was not permitted to

[1] The remaining $6,919.52 was designated for payment to Advantis as a management fee.

> spend this money in any manner, other than to make payment to the contractors for their completed work. . . .
>
> While it is true that St. Joe is a perfected secured creditor under the Deposit Account Control Agreement, **this only permits St. Joe to lawfully gain access to funds that are the property of Advantis, the debtor, and not property belonging to other parties**.

Appx. 486-87 (J. Doyle Opinion) (emphasis added).

St. Joe now asks this Court to reverse the trial court and hold that St. Joe lawfully seized NRHA's funds for its own purposes as a secured creditor of Advantis, even though Advantis never could have done so. NRHA respectfully asks this Court to decline.

STATEMENT OF THE CASE

St. Joe correctly recites the procedural background in its Statement of the Case. Its recitation of facts omits several pertinent facts as discussed in detail below.

STATEMENT OF FACTS

The parties submitted this case on stipulated facts and evidence on cross-motions for summary judgment. See Appx. 92-197. The following amplifies significant facts pursuant to Rule 5:28(c).

Foremost, although virtually ignored in St. Joe's brief, the parties stipulated to the agency relationship between NRHA and Advantis. In particular, the parties stipulated that on November 13, 2008 and March 6, 2009, Advantis entered into contracts with the contractor and architect "as agent for NRHA." Appx. 92-93 (Stip. 3 and 4). The parties included the contracts as stipulated exhibits, both of which identify Advantis as "[a]gent for owner, NRHA." Appx. 141, 160 (Ex. C and D).

The parties also stipulated that NRHA delivered the funds to Advantis exclusively "for the purpose of paying" the contractor and architect. This is stated without qualification in Stipulations 7 and 9:

> 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. A stipulated copy of the signed Contractor Check with check stub and invoice is attached as Exhibit G.
>
> 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. A stipulated copy of the Architect Check with check stub and invoice is attached as Exhibit I.

Appx. 93-94 (Stip. 7 and 9) (emphasis added).

The parties further stipulated that NRHA took at least four different steps to identify the funds as designated for the contractor and architect. First, NRHA delivered the funds to Advantis in response to specific invoices identified by specific numbers. See Appx. 93-94 (Stip. 7 and 9). Second, NRHA identified the invoice numbers on the check stubs attached to each of the checks. Id.; see also Appx. 175, 178 (Ex. G and I). Third, NRHA issued the checks in the exact amounts of the invoices. Id. Fourth, NRHA included copies of

the invoices with the checks in the packages to Advantis. Id.

Finally, the parties stipulated that, at no time between deposit of the NRHA funds by Advantis and seizure of the account by St. Joe did the balance in the account drop below the amount of the NRHA funds, or $115,343.06. See Appx. 95 (Stip. 18). Since that time, "St. Joe has maintained possession of the $115,343.06 that is the subject of this case during the pendency of this litigation." Appx. 95 (Stip. 22).

STANDARD OF REVIEW

St. Joe correctly states the standard of review as *de novo* "review of the trial court's application of the law to the undisputed facts." Johnson v. Hart, 279 Va. 617, 623, 692 S.E.2d 239, 243 (2010).

LAW AND ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN HOLDING THAT NRHA'S FUNDS REMAINED NRHA'S PROPERTY IN ADVANTIS' ACCOUNT UNTIL USED FOR THEIR INTENDED PURPOSE (ASSIGNMENT OF ERROR I).

The fundamental premise of St. Joe's first assignment of error is that the NRHA funds, once delivered to Advantis, immediately became Advantis' property such that St. Joe was free to seize and keep them. See Appellant Brief, 13 (stating that "[o]nce they were deposited and co-mingled, Advantis was free to utilize the funds in any manner it saw fit"). Every stipulated fact undercuts this argument.

A. THE NRHA FUNDS WERE ENTRUSTED TO ADVANTIS AS NRHA'S AGENT FOR THE SOLE PURPOSE OF PAYING THE CONTRACTOR AND ARCHITECT.

The NRHA funds belong to NRHA and always have. Under Virginia law, "Where money or property is [e]ntrusted to an agent for a particular purpose, it is impressed by the law with a trust in favor of the principal **until it has been devoted to such purpose**." Baldwin v. Adkerson, 156 Va. 447, 463, 158 S.E. 864, 869 (1931) (emphasis added). Such trust "follows the fund

or property in the hands of a third person" (like St. Joe) so that it may be recovered "as long as it can be traced and identified. . ." Id.

It is undisputed that Advantis acted as NRHA's agent when it contracted with the contractor and architect and received funds from NRHA to pay them. See Appx. 92-93 (Stip. 3 and 4); see also Appx. 141, 160 (Ex. C and D). It is also undisputed that NRHA delivered the funds to Advantis exclusively "for the purpose of paying" the contractor and architect. See Appx. 93-94 (Stip. 7 and 9); see also Appx. 175, 178 (Ex. G and I). Under these circumstances, the funds were imposed with a trust in favor of NRHA from the moment NRHA delivered them to Advantis. See Baldwin, 156 Va. at 463, 158 S.E. at 869.

Contrary to St. Joe's argument, a trustee in such a situation does not become owner of entrusted funds just by depositing them in its account. To transform a trust relationship into one of debtor and creditor, the trustee must be granted "unrestricted use" of the funds. See Broaddus v. Gresham, 181 Va. 725, 732, 26 S.E.2d 33,

36 (1943) (where trustee is under duty to pay to beneficiary money held in trust, trustee is fiduciary and not debtor of the principal); In re Strack, 524 F.3d 493, 500 (4th Cir. 2008) (where trustee is not entitled to unrestricted use of funds, fiduciary relationship is created, not one of debtor and creditor).

Advantis never had "unrestricted use" of the NRHA funds, and was at all times obligated to forward them to the contractor and architect as NRHA's agent. See Appx. 92-93 (Stip. 3 and 4). NRHA delivered the funds in response to specific invoices, issued checks in the exact amounts of those invoices, included invoice numbers on the check stubs, and attached copies of the invoices in the package. See Appx. 93-94 (Stip. 7 and 9); see also Appx. 175, 178 (Ex. G and I). Nothing in this Court's precedent required NRHA to actively "exercise control over [its] funds" while in Advantis' account. See Appellant Brief, 12 (stating that NRHA offered no "evidence that [it] possessed authority to exercise control over funds in Advantis' Master

Operating Account"). The inquiry under this Court's precedent is whether a principal "[e]ntrusted [funds] to an agent for a particular purpose," not whether the principal maintained active control.[2] See Baldwin, 156 Va. at 463, 158 S.E. at 869.

Because ownership of the NRHA funds never passed to Advantis, St. Joe was never authorized to seize them. As the trial court correctly concluded:

> The funds in dispute, $115,343.06, never in fact belonged to Advantis, and at all relevant times were the property of NRHA with instructions for Advantis to hold in trust and pay the Contractors for the completion of specified renovations.

Appx. 487 (J. Doyle Opinion).

B. THE TRUST IMPOSED ON THE NRHA FUNDS FOLLOWED THE FUNDS INTO THE HANDS OF ST. JOE.

The stipulated facts also establish that the trust imposed on the NRHA funds followed the funds through the Advantis account into the hands of St. Joe. See Baldwin, 156 Va. at 463, 158 S.E. at 869. Where funds are deposited in a commingled account, they can be

[2] A requirement of active control would largely undermine the benefit of using an agent.

traced and identified as long as "the amount on deposit in the commingled fund has at all times equaled or exceeded the amount of the trust." Dameron v. Tyler, 155 F.3d 718, 724 (4th Cir. 1998); see also Federal Reserve Bank of Richmond v. Peters, 139 Va. 45, 69, 123 S.E. 379, 386 (1924) ("This money passed from the agent's hands to the hands of the receiver impressed with a trust, and is sufficiently identified, since it appears that an amount equal to the amount held for the [plaintiff] was in its hands from January 5, 1922, until its failure").

St. Joe stipulated that the balance in the Advantis account never dropped below $115,343.06, the amount of the NRHA funds. See Appx. 95 (Stip. 18). St. Joe also stipulated that, "St. Joe has maintained possession of the $115,343.06 that is the subject of this case during the pendency of this litigation." Appx. 95 (Stip. 22). Because the NRHA funds were at all times traceable and identifiable, they can be recovered by NRHA. See Baldwin, 156 Va. at 463, 158 S.E. at 869 (funds can be

recovered "as long as [they] can be traced and identified"). The trial court did not err in so holding.

II. THE TRIAL COURT DID NOT ERR IN REJECTING ST. JOE'S ARGUMENT THAT A CONSTRUCTIVE TRUST REQUIRES PROOF OF FRAUD OR ABUSE OF CONFIDENCE (ASSIGNMENT OF ERROR II).

St. Joe's second assignment of error asserts that the trial court erred in rejecting St. Joe's argument that a constructive trust requires evidence of fraud or abuse of confidence. Virginia recognizes no such requirement, and this Court has rejected the same argument on multiple occasions.

For reasons not explained, St. Joe relies primarily on Florida law for its argument.[3] Under choice of law rules, questions of substantive law are governed by the law of the place where the events occurred (*lex loci*),

[3] St. Joe does not assign error to the trial court's application of Virginia law to this case. Although Judge Doyle does not specifically state in his opinion that Virginia law applies, he did not apply Florida law as urged by St. Joe. Moreover, his conclusions are consistent with those of Judge Hall in ruling on St. Joe's demurrer, where the trial court expressly applied Virginia law.

and the events in this case occurred in Virginia. See Frye v. Commonwealth, 231 Va. 370, 376, 345 S.E.2d 267, 272 (1986). NRHA entrusted the funds to Advantis in Virginia for payment to others for work performed in Virginia. Advantis deposited the funds in its Wachovia account located in Virginia, and when St. Joe exercised control over the account, it did so in Virginia. See Appx. 138 (identifying account located in Virginia). The only connection to Florida is the Deposit Account Control Agreement between Advantis and St. Joe, but NRHA is not a party to that contract. Id.

Under Virginia law, a constructive trust arises by operation of law to prevent injustice, not necessarily as a result of fraud or abuse of confidence. As this Court explained in Leonard v. Counts, 221 Va. 582, 589, 272 S.E.2d 190, 195 (1980):

> [Constructive trusts] occur **not only where property has been acquired by a fraud or improper means**, but also where it has been fairly and properly acquired, but it is contrary to the principles of equity that it should be retained, at least for the acquirer's own benefit.

Id. (emphasis added). In Leonard, this Court held that an equitable duty to convey property gave rise to a constructive trust even absent a finding of actual fraud.

Following Leonard, this Court has repeatedly confirmed that fraud and abuse of confidence are not prerequisites to imposition of a constructive trust. See, e.g., Richardson v. Richardson, 242 Va. 242, 245, 409 S.E.2d 148, 150 (1991) (constructive trust may arise even where property is fairly acquired but equity dictates that it should not be retained); Jones v. Harrison, 250 Va. 64, 69, 458 S.E.2d 766, 769 (1995) (equity will impose constructive trust upon property in the hands of a recipient even absent breach of a fiduciary duty, actual or constructive fraud, or recipient's knowledge of wrongdoing or breach); Faulknier v. Shafer, 264 Va. 210, 215, 563 S.E.2d 755, 758 (2002) (same).

A contrary holding would allow St. Joe to keep funds in which Advantis never had a lawful interest. It also

would render a constructive trust count in Virginia meaningless -– or at least redundant of a cause of action for fraud -- since the same proof would be required for both causes of action.

Finally, St. Joe's argument that NRHA failed to take steps to protect itself ignores the multiple stipulations establishing that NRHA took deliberate steps to designate its funds solely for payment to the contractor and architect.[4] See Appellant Brief, 16; see also Appx. 93-94 (Stip. 7 and 9). St. Joe's argument effectively amounts to a complaint that NRHA could have done more. Whether correct or not, the argument is moot. This Court has expressly held that a trust is created whenever "money or property is [e]ntrusted to an agent for a particular purpose," Baldwin, 156 Va. at 463, 158 S.E. at 869, and St. Joe stipulated that NRHA

[4] St. Joe does not cite authority for its argument that NRHA was required to protect itself. Taken to its logical conclusion, St. Joe's argument would have this Court deny NRHA the benefit of a constructive trust on grounds that NRHA did not take sufficient steps to create an express trust. That position is not supported by this Court's case law.

delivered its funds to Advantis "for the purpose of paying" the contractor and architect. See Appx. 93-94 (Stip. 7 and 9).

III. THE TRIAL COURT DID NOT ERR IN REJECTING ST. JOE'S ARGUMENT THAT UNJUST ENRICHMENT REQUIRES PROOF OF FRAUD OR INEQUITY (ASSIGNMENT OF ERROR III).

St. Joe's third assignment of error asserts that the trial court erred in rejecting St. Joe's argument that unjust enrichment requires evidence of fraud or inequity. As St. Joe states, "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." Appellant Brief, 19.[5]

No such showing is required under Virginia law. In Virginia, "[t]o establish the cause of action for unjust enrichment, a plaintiff must [show] that (1) it conferred a benefit on the defendant; (2) the defendant knew of the benefit and should reasonably have expected

[5] Contrary to St. Joe's assertion, the stipulated facts provide ample support for the conclusion that St. Joe took the NRHA funds under the mistaken belief that Advantis owned them, which it did not.

to repay the plaintiff; and (3) the defendant accepted or retained the benefit without paying for it." Appx. 84 (J. Hall Opinion), citing Schmidt v. Household Finance Corp., 276 Va. 108, 116, 661 S.E.2d 834, 838 (2008).

In this case, St. Joe obtained a benefit from NRHA as soon as it took the NRHA funds out of the account. It makes no difference that the funds were held by Advantis instead of NRHA. The law implies a promise to pay regardless of privity:

> [T]he law will make such implications . . . in all cases where one person has received money, or its equivalent, under such circumstances that in equity and good conscience he ought not retain it and *ex aequo et bono* it belongs to the plaintiff . . . And this is so **irrespective of whether the money was received from the plaintiff or a third person**.

City of Norfolk v. Norfolk County, 120 Va. 356, 364, 91 S.E. 820, 822 (1917) (emphasis added). NRHA notified St. Joe of the benefit and demanded return of the funds as soon as NRHA learned what happened. See Appx. 95

(Stip. 19). St. Joe refused to return the funds, deciding instead to retain the benefit.

St. Joe seeks to avoid its unjust enrichment by effectively adding an element of "fraud" or "mistake" to the cause of action. In support of its argument, St. Joe again turns to Florida law, none of which applies in this case. See, e.g., Florida Power Corp. v. City of Winter Park, 887 So.2d 1237, 1242 (Fla. 2004) (stating elements of unjust enrichment; no mention of mistake or fraud); Anchor Savings Bank v. Berlin, 445 So.2d 675, 676 (Fla. 1984) (holding that money paid under mistake of fact may be recovered, but not that mistake is an element of unjust enrichment).

Like a constructive trust, a cause of action for unjust enrichment is designed to prevent injustice, not necessarily fraud or mistake. As the trial court held in overruling St. Joe's demurrer, "[I]t is not the way the defendant acquired the benefit that matters, but rather his right to retain it." Appx. 86 (J. Hall Opinion), citing Beacon Homes, Inc. v. Holt, 146 S.E.2d

434, 439 (N.C. 1966). In this case, St. Joe has no right to retain NRHA's money, and the trial court did not err in so holding.

IV. THE TRIAL COURT DID NOT ERR IN REJECTING ST. JOE'S ARGUMENT THAT IT WAS ALLOWED TO SEIZE AND RETAIN NRHA'S PROPERTY AS A SECURED CREDITOR OF ADVANTIS (ASSIGNMENT OF ERROR IV).

St. Joe lastly assigns error to the trial court's refusal to recognize St. Joe's claim to the NRHA funds as a secured creditor of Advantis. In this regard, the trial court correctly reasoned:

> The argument put forward by St. Joe that NRHA is an unsecured creditor is not supported by the stipulated facts in this case. **Unlike funds held in the hands of a debtor, Advantis had no legal rights to these funds, $115,343.06 in total**. It was not permitted to spend this money in any manner, other than to make payment to the contractors for their completed work. Advantis would not have been permitted to use these funds to pay other creditors or to invest it in any other manner –- the sole purpose of these funds was to provide payments to the contractors for the work completed on NRHA's property.

Appx. 486-87 (J. Doyle Opinion) (emphasis added). The trial court continued:

> While it is true that St. Joe is a perfected secured creditor under the Deposit Account Control Agreement, **this only permits**

> **St. Joe to lawfully gain access to funds that are the property of Advantis, the debtor, and not property belonging to other parties**.

Id. at 487 (emphasis added).

This analysis is entirely correct. Nothing about St. Joe's status as a secured creditor of Advantis allows it to seize or retain property owned by NRHA. A contrary rule would permit St. Joe to acquire a greater interest in the NRHA funds than both NRHA, as owner of the funds, and Advantis, as St. Joe's debtor. No aspect of Virginia law allows that result. The trial court did not err in rejecting St. Joe's argument.

CONCLUSION

WHEREFORE, for the foregoing reasons, Norfolk Redevelopment and Housing Authority respectfully prays that this Court affirm the judgment of the trial court and award NRHA all other just relief.

This 6th day of May 2011.

NORFOLK REDEVELOPMENT AND
HOUSING AUTHORITY

By: _____
Of Counsel

W. Ryan Snow, VSB No. 47423
Amy Taipalus McClure, VSB No. 77937
CRENSHAW, WARE & MARTIN, P.L.C.
1200 Bank of America Center
One Commercial Place
Norfolk, Virginia 23510-2111
Telephone: (757) 623-3000
Facsimile: (757) 623-5735
wrsnow@cwm-law.com
amcclure@cwm-law.com

CERTIFICATE

Counsel for Appellant,
The St. Joe Company:

Thomas B. Kelly, VSB No. 21802
Bowman, Green, Hampton & Kelly, PLLC
501 Independence Parkway, Suite 201
Chesapeake, Virginia 23320
Telephone: (757) 548-2323
Facsimile: (757) 548-2345
Email: tkelly@bghklaw.net

Counsel for Appellee,
Norfolk Redevelopment and Housing Authority:

W. Ryan Snow, VSB No. 47423
Amy T. McClure, VSB No. 77937
Crenshaw, Ware & Martin, PLC
1200 Bank of America Center
Norfolk, Virginia 23510
Telephone: (757) 623-3000
Facsimile: (757) 623-5735
Email: wrsnow@cwm-law.com
amcclure@cwm-law.com

I certify that on May 6, 2011 I caused 3 copies of this Brief of Appellee to be mailed or delivered to opposing counsel at the address above and 15 copies of this Brief of Appellee to be hand-delivered to the Clerk of this Court.

By: _____