In the

Supreme Court of Virginia

At Richmond

Record No. 102342

THE ST. JOE COMPANY,

Appellant,

– v. –

NORFOLK REDEVELOPMENT & HOUSING AUTHORITY,

Appellee.

REPLY BRIEF OF APPELLANT

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STATEMENT OF CASE

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. Both NRHA and St. Joe are innocent parties in the instant matter as both served as creditors of Advantis. However, St. Joe perfected its security interest while NRHA did not. NRHA alleged four counts for (I) Constructive Trust; (II) Unjust Enrichment; (III) Detinue; and (IV) Conversion. The Circuit Court for the City of Norfolk sustained St. Joe's Demurrer as to Counts III and IV. Both parties filed motions for summary judgment. After review of the motions and oral argument by respective counsel, the Circuit Court for the City of Norfolk, the Honorable John R. Doyle III, presiding, issued an opinion dated August 16, 2010 granting summary judgment to NRHA on Counts I (constructive trust) and II (unjust enrichment). Final judgment

was entered September 10, 2010. St. Joe timely noted its appeal. It is this judgment that is at issue on appeal.

SUMMARY

While Appellee's Summary is factually accurate, its argument is flawed. The case actually arises out of the relationships of the St Joe Company with Advantis and Advantis' with NRHA. The parties stipulated that Advantis was the agent of NRHA. NRHA acknowledges and agrees that St Joe was a secured creditor of Advantis; thus, NRHA is deemed by the law to have known that funds it paid to Advantis were deposited into an account in which St. Joe had control via its security interest. NRHA furthermore knew that Advantis' Master Operating Account, into which it deposited checks from NRHA, did not comply with its own Management and Leases Services Agreement. NRHA therefore relinquished control of its monies when it paid them to Advantis and the Trial Court erred in finding otherwise.

STATEMENT OF FACTS

As recited in NRHA's Brief at p. 3, the parties indeed submitted this case on stipulated facts and evidence on cross-

motions for summary judgment. See Appx. 92 – 197. The Trial Court was not, of course, required to find Summary Judgment appropriate if it deemed essential facts lacking. The following amplifies significant facts pursuant to Rule 5:28(c).

Foremost, although virtually ignored in NRHA's Brief is the fact that on June 6, 2008, St. Joe entered into a Deposit Account Control Agreement with Advantis and Wachovia Bank ("Wachovia"). It was several months later, on November 13, 2008 that the contracts of construction were made. The stipulations recited by NRHA in its Statement concerning its efforts to identify the funds it was depositing into Advantis' account are accurate as far as they go; however, what NRHA omits is the fact that Advantis' Master Operating Account with Wachovia did not comply with the requirements of the Management and Leasing Services Agreement which effect the trust control NRHA desired. It is unclear how long Advantis maintained its Master Operating Account in violation of the Management and Leasing Services Agreement, but that

Agreement was stipulated to be in effect on September 1, 1999, nearly ten years before the events in question!

STANDARD OF REVIEW

The parties have both acknowledged that the standard of revise of the trial court's application of law to the undisputed facts is de novo. Johnson v. Hart, 279 Va. 617, 623, 692 S.E.2d 239, 243 (2010).

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES

I. NRHA Relinquished Control of the Monies, Allowing Advantis "Unrestrictive Use" of the Monies

The trial court erroneously found that the money was held by Advantis for a specific purpose and that Advantis was not free to use the monies in any way other than that was provided for in the invoice, meaning the payment of the contractors. The court also ruled that the funds never belonged to Advantis and that, therefore, St. Joe could not seize the Master Operating Account.

NRHA, however, did not issue specific instructions to Advantis as to how to pay the bills. The invoice sent to NRHA was on Advantis letterhead and was made payable solely to Advantis. Only one of the invoices sent even made mention of

the contractor; the other invoice was simply a bill due to Advantis. Each invoice directed payment to Advantis. Once Advantis received the funds in that account, it was free to proceed as it saw fit. NRHA argues in its Brief that, "to transform a trust relationship into one of debtor and creditor, the trustee must be granted 'unrestrictive use' of the funds." See Appellee Brief 7, citing Broaddus v. Gresham, 181 Va. 725, 732, 26 S.E.2d 33, 36 (1943). Appellee argues that Advantis never had "unrestricted use" because it still owed the contractors their fee.

Appellee further argues that it took great steps in order to specify how the funds should be disbursed. NRHA argues that it took four different steps to effectuate the transaction and identify how the funds were to be distributed. These four steps were sending the funds to Advantis in response to specific invoices, issuing checks in the amount due, including the numbers on the check stub, and attaching copies of the invoice. See Appellee Brief, 4. NRHA made its checks payable directly and solely to Advantis with no restrictions. 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 whatsoever to indicate a desire to control these checks. Once the checks were deposited and commingled, Advantis possessed "unrestrictive use" of the funds, thereby making the business relationship between Advantis and NRHA that of a creditor-debtor, invalidating the applicability of a constructive trust.

St Joe agrees with NRHA that a fundamental premise of its argument is that NRHA monies deposited in the Advantis' Wachovia account did NOT remain property of NRHA; instead it became property of Advantis subject to the terms of the DACA. NRHA's assertion that "every stipulated fact undercuts this argument" (Appellee Brief P6) is false.

The parties stipulated that NRHA and Advantis entered into Management and leasing Services Agreement. See Appendix 92. A copy of the Agreement was attached to the Stipulations as Exhibit A. See Appendix 97 – 124. The Agreement defines Advantis as Manager and that "Manager shall be the agent of Owner solely to perform the duties as set forth in this

Agreement". Transcript p98. Pursuant to the Agreement NRHA acknowledges that Manger is in the business of operation, management and leasing of commercial real property and that Manager may provide services for other property owners that may be in direct competition with the Property". Transcript p. 98. The Agreement defines Bank Accounts as follows:

> 7.1 Depository Account. The manager shall deposit all rents and other funds collected from the operation of each property or Properties, including any and all advance rents, in a bank approved by the Owner in a separate or combined account or account at the direction of the Owner ("the "Depository Account") for the Property in the name of : Advantis Real Estate Services Company as Agent for Norfolk Redevelopment & Housing Authority.
>
> The Bank shall be informed in writing that the account and funds therein are held in trust for and owned by the Owner. Out of each account, Manager shall pay the operating expenses of the Property and any other payments relative to the Property as required by the terms of this Agreement. If more than one account is required to operate the Property, each account must have a unique name.

See Transcript at p. 107.

The parties stipulated that the Wachovia account statement for the Account beat the name "Advantis Real Estate Services Company Master Operating Account". See Transcript p. 96.

Obviously, it was not titled in accordance with the Agreement. There was no stipulation of fact regarding letter notification to Wachovia that the funds therein were held in trust for NRHA.

While the Trial Court did mention the Management Services Agreement in concluding that the funds in the Advantis account were property of NRHA (See Transcript p. 485), it did NOT analyze whether the Advantis' Wachovia account was one contemplated by the Management Services Agreement as holding funds in trust. Clearly it was not.

Agency law in Virginia imputes knowledge of the agent to its principal; the law imputes to the principal and charges him with all notice or knowledge relating to the subject matter of the agency which the agent acquires or obtains while acting as such agent and within the scope of his authority, which he had acquired and which he then had in mind or which he had acquired so recently as to reasonably warrant the assumption he still retained it. Eitel v. Schmidlapp, 459 F.2d 609 (4th Cir. 1972); Burruss v. Green Auction & Realty Co., 228 Va. 6, 319 S.E.2d 725 (1984). It is presumed that the agent will disclose to the

principals all matters which it is his duty to disclose to them. Burruss v. Green Auction & Realty Co., 228 Va. 6, 319 S.E.2d 725 (1984). Outsiders dealing with the agent are entitled to rely on this presumption whether the agent in fact communicates his knowledge to the principals or not. Burruss v. Green Auction & Realty Co., 228 Va. 6, 319 S.E.2d 725 (1984). This is true whether the agent communicates his knowledge to the principal or not. Lisk v. Criswell, 52 Bankr. 184 (Bankr. E.D. Va. 1985). As applied to the instant case, the law charges NRHA with knowledge that Advantis' Master Operating Account did not comply with the Management and Leasing Services Agreement; that it the account was not titled in its name as required; that Wachovia was not notified of any trust status of the deposited funds; that Advantis' account was subject to the Deposit and Control Agreement; and that St. Joe had a security interest in any funds deposited in the account.

NRHA also argues that their claim on the monies should follow from Advantis' account to St. Joe. In positing this argument, it misguidedly relies on Dameron v. Tyler, which allows

for commingled funds to be traced and identified as long as the amount remaining in the account exceeds the amount in the trust. There are two problems with this reasoning. First, since NRHA did not express the necessary desire to control the check, the relationship was changed to that of creditor-debtor rather than trustee, invalidating a constructive trust. Second, Dameron dealt with creditors attacking frozen funds that remained in the control of the trustee, Dameron. In the instant case, NRHA is attempting to remove funds already transferred to St. Joe, an innocent third party.

II. NRHA's Claims for Constructive Fraud and Unjust Enrichment Fail Because St. Joe Equitably Deserves Monies

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). Evidence must be "clear and convincing" to satisfy a claim of constructive trust. Crestar Bank v. Williams, 250 Va. 198, 204, 462 S.E.2d 333, 335 (1995). Clearly, NRHA

does not allege St. Joe committed any fraud or abuse of confidence; in fact, it stipulated that St. Joe had a perfected security interest prior to the deal between Advantis and NRHA. NRHA relies on the language in Leonard v. Counts to establish their right to the monies. There, the Virginia Supreme Court held that constructive trusts arise not only where fraud or abuse of confidence has been committed, but any time that it is contrary to the principles of equity, even if the third party acquired the property fairly and properly. Leonard v. Counts, 221 Va. 582, 589, 272 S.E.2d 190, 195.

NRHA has not established its entitlement to the funds on equitable grounds. St. Joe had a perfected security interest for Advantis' deposit account before the subject construction contracts were entered. NRHA could have easily established its trust control of the construction payments by requiring Advantis to abide by the terms of the Management and Leasing Services Agreement. It did not! It could have paid the money due directly to the contractors or written checks jointly payable to Advantis and the contractors. However, NRHA failed to perform any

substantial actions to perfect its interest. Furthermore, NRHA knew that monies it paid to Advantis would be deposited in an account in which St. Joe already had a perfected security interest. The Trial Court's ruling erroneously favors an unsecured creditor over a secured creditor disregarding the fundamental principles underlying the UCC.

In points III and IV of its Brief, NRHA argues that the Trial Court rejected St. Joe's constructive trust and unjust enrichment arguments. The Trial Court in ruling on the constructive trust issue, essentially found that the funds in the Advantis account remained property of NRHA, because they were "entrusted to Advantis." In so ruling, however, the Trial Court erroneously ignored NRHA'S own requirements in the Management and Leasing Services Agreement. It further ignored NRHA's knowledge that Advantis' Master Operating Account with Wachovia did not comport with the trust requirements of the Management Agreement; and ignored that NRHA knew that St. Joe, via its security interest had as much right to the funds in the

Wachovia account as Advantis did! The Trial Court's analysis was fatally flawed.

NRHA's argument on unjust enrichment suffers from the same defects. It argues at p. 17, that "like a constructive trust, a cause of action for unjust enrichment is designed to prevent injustice, not necessarily fraud or mistake". The Trial Court, unfortunately made no comment on unjust enrichment in its ruling; did not discuss the elements of the cause, or articulate its analysis. The ruling was subsumed in its erroneous analysis of constructive trust and is flawed for the same reasons. Furthermore, the trial Court made no comment on St. Joe's positions on the application of Florida law, other than to grant NRHA summary judgment. In doing so, it ignored fundamental elements of the parties' stipulations.

CONCLUSION

For the foregoing reasons, the St. Joe Company prays that this Court reverse the judgment of the trial court and enter judgment for St. Joe, or in the alternative remand the case for trial or such further proceedings as are appropriate.

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CERTIFICATE

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The St. Joe Company certifies that on May 20, 2011 it mailed three copies of this Reply Brief of Appellant to opposing counsel at the address listed above.

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