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IN THE

Supreme Court of Virginia

RECORD NO. 160349

CHARLES R. CHAMBERLAIN,

Appellant,

v.

MARSHALL AUTO & TRUCK CENTER, INC.,

Appellee.

OPENING BRIEF OF APPELLANT

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INTRODUCTION

This appeal concerns a guarantor's rights, pursuant to Virginia Code § 49-27, against the maker of a promissory note where the guarantor has partially satisfied the maker's obligations under the note. Specifically, the maker borrowed money from a bank at which the guarantor held a deposit account. When the maker failed to make timely payments, the bank drew down and depleted the guarantor's account. In the action before the trial court, the guarantor sought recovery from the maker for the amount the bank appropriated from the guarantor's account in partial satisfaction of the note. The trial court denied recovery to the guarantor, holding that the funds were a gift and entering a verdict in favor of the maker.

The trial court ignored the plain and unambiguous language of Virginia Code § 49-27, which rendered the guarantor a creditor of the maker by operation of law. It also found that the guarantor made a gift to the maker contrary to the recitation in the guaranty that it was given for consideration and in the absence of any evidence, much less clear and convincing evidence, establishing the elements of a gift.

This appeal asks the Court to do what the trial court failed to do—to properly apply Virginia Code § 49-27.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN ORDERING THAT THE PLAINTIFF RECOVER NOTHING AND ENTERING A VERDICT IN FAVOR OF THE DEFENDANT.[1]

a. THE TRIAL COURT ERRED IN FAILING TO APPLY § 49-27 OF THE VIRGINIA CODE.

b. THE TRIAL COURT ERRED IN FINDING A GIFT.

STATEMENT OF THE CASE

This action concerns a promissory note (the "Note") executed by Marshall Auto & Truck Center, Inc. ("Marshall") in the principal amount of $950,000.00 in favor of Middleburg Bank ("Middleburg") and a guaranty (the "Guaranty") executed by Charles R. Chamberlain ("Chamberlain") guaranteeing payment on the Note.

On January 5, 2015, Chamberlain filed a Complaint against Marshall in the Circuit Court of Fauquier County alleging that Middleburg withdrew

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[1] Preserved at JA 12-15; JA 20-22; JA 71-75; 77-79.

the sum of $50,614.94 from Chamberlain's bank account in partial satisfaction of Marshall's obligations under the Note. (JA 1-8). Chamberlain asserted that pursuant to Code § 49-27, he was substituted for and became the owner of Middleburg's rights and remedies for the collection of the amounts he paid toward satisfaction of Marshall's obligations under the Note. (JA 2). Marshall filed an Answer admitting the Note and the Guaranty, but denying the remainder of Chamberlain's allegations. (JA 9-10).

The matter proceeded to a bench trial on November 2, 2015, at which the only witnesses were Chamberlain and Marshall's representative. (JA 27-81). Following the presentation of the evidence, the trial court ruled that the amount paid by Chamberlain was a gift. (JA 79-80). The trial court entered an Order on January 19, 2016 (the "Judgment Order") consistent with its ruling from the bench. (JA 16-22). Chamberlain noted his objections on the Judgment Order and filed a Motion to Reconsider (JA 12-15), which the trial court summarily denied by Order dated January 21, 2016 (JA 23).

STATEMENT OF MATERIAL FACTS

On March 20, 2007, Marshall executed the Note in favor of Middleburg. (JA 4-5) On the same date, Chamberlain executed the Guaranty, which recites that it is given "[f]or good and valuable consideration". (JA 6-8). During 2009, 2010, and 2011, Marshall was unable to make its scheduled payments on the Note. Pursuant to the rights it held under the Guaranty, Middleburg withdrew sums from a $50,000.00 certificate of deposit owned by Chamberlain and held by Middleburg (the "CD") to partially satisfy Marshall's obligations, eventually reducing the CD's value to approximately $600.00. (JA 45-46; 52-57).

Despite demands for repayment, Marshall refused to reimburse Chamberlain for these payments, and took the position that they were a gift. At trial, Chamberlain testified that in 2007, when the Note and Guaranty were executed, he had an intimate relationship with Marshall's sole owner and president, Manzar Asjodi ("Asjodi"), and that he signed the Guaranty to help her out. (JA 50-51). However, during the time Middleburg was making withdrawals from Chamberlain's CD, Chamberlain and Asjodi were no longer communicating. (JA 59).

STANDARD OF REVIEW

> [W]hen a case is decided by a court without the intervention of a jury and a party objects to the decision on the ground that it is contrary to the evidence, the judgment of the trial court shall not be set aside unless it appears from the evidence that such judgment is plainly wrong or without evidence to support it.

Va. Code § 8.01-680. However, when the trial court's decision is based on the application of law to undisputed facts, this Court "must determine whether the trial court correctly applied the law to those facts." Cinnamon v. International Business Machines Corp., 238 Va. 471, 74, 384 S.E.2d 618, 619 (1989). Questions of law are reviewed by this Court de novo. Johnson v. Hart, 279 Va. 617, 623, 692 S.E.2d 239, 242 (2010).

ARGUMENTS AND AUTHORITIES

THE TRIAL COURT ERRED IN AWARDING JUDGMENT TO THE DEFENDANT.

A. The Trial Court Failed to Apply Code § 49-27.

The Complaint asserts a cause of action pursuant to § 49-27 of the Code. That statute states, in part:

> If any person liable as . . . guarantor . . . pay, in whole or in part, such note . . . the person having a right of action for the amount so paid may . . . obtain a judgment or decree against any person against whom such right of action exists for the amount

> so paid, with interest from the time of payment, and five per centum damages on such amount. The person so paying, in whole or in part . . . any such note . . . shall, by operation of law, in addition to the remedy above provided, be substituted to and become the owner of all of the rights and remedies of the creditor for the enforcement and collection of the amount or amounts so paid, and shall be deemed the assignee thereof.

Va. Code § 49-27 (emphasis added).

As explained by United States District Court Judge Michie:

> [I]n Virginia, by statute, a surety or other party secondarily liable, upon payment of the debt of his principal, may be substituted to and become the owner of all of the rights and remedies of the creditor for the enforcement and collection of the amount or amounts so paid, and shall be deemed the assignee thereof. Va.Code Ann. § 49-27 (Repl. vol. 1958). And equity will allow the surety to treat the original debt to the creditor as still subsisting and to be subrogated to the rights of the creditor for the repayment of any funds expended on behalf of the principal . . .. These rights are not based upon the instrument evidencing the original obligation, however; they are merely additional remedies given to enforce the implied obligation of the person whose primary duty it was to pay the debt, as between the two obligors. Perkins v. Hall, supra, 17 S.E.2d at 801.

In re Worley, 251 F. Supp. 725, 727-28 (W.D. Va. 1966).

There is very little case law applying Code § 49-27, and there is no authority construing the meaning of the phrase "by operation of law" as used in the statute. "Operation of law" is defined by Black's Law Dictionary to mean "the manner in which rights, and sometimes liabilities, devolve

upon a person by the mere application of the particular transaction of the established rules of law, without the act or co-operation of the party himself." Black's Law Dictionary 1092 (6th ed. 1990). For example, "[a] constructive trust arises by operation of law, independently of the intention of the parties, . . ." Crestar Bank v. Williams, 250 Va. 198, 204, 462 S.E.2d 333, 335 (1995). Accordingly, the application of the statute at issue is not dependent upon any facts other than those which render the statute applicable and is not dependent upon the intention of the parties.

Pursuant to the Note, Marshall was primarily responsible for the repayment of principal and interest. Pursuant to the Guaranty, Chamberlain was secondarily obligated on the Note. Neither the existence nor the validity of the Note or the Guaranty are disputed. (JA 1-2 (¶¶ 3, 4); JA 9 (¶ 1)). Although Marshall denied in its Answer that it failed to make timely payments on the Note and that Middleburg took funds from Chamberlain's CD to partially satisfy Marshall's obligation under the Note, Marshall's representative readily admitted these facts at trial, and further admitted that Middleburg was entitled to take such action pursuant to the loan documents. (JA 45-46).

Accordingly, by operation of law, Chamberlain acquired the rights of the creditor, Middleburg, at the time the amounts were withdrawn by Middleburg from his CD in satisfaction of Marshall's obligations. The trial court erred in failing to apply the unambiguous language of Code § 49-27 to the undisputed facts. Given the clear application of the statute on these undisputed facts, the trial court was required to apply it, and the issue of whether there was a gift was irrelevant.

B. The Trial Court Erred in Finding a Gift.

"A gift has been defined as a contract without a consideration. Donative intent on the grantor's part is an essential element of a gift." Ott v. L&J Holdings, LLC, 275 Va. 182, 188, 654 S.E.2d 902, 905 (2008) (internal citations omitted).

> [T]he common elements necessary to constitute . . . a gift inter vivos, are: (1) The gift must be of personal property; (2) possession of the property must be delivered at the time of the gift to the donee, or some other for him and the gift must be accepted by the donee; and (3) the title to the property must vest in the donee at the time of the gift.

Thomas v. First Nat'l Bank, 166 Va. 497, 504, 186 S.E. 77, 80 (1936). "A gift will not be presumed merely from the relationship of the parties, or the

existence of motives for making it." Grace v. Virginia Trust Co., 150 Va. 56, 66, 142 S.E. 378, 381 (1928).

> [I]t is well settled that the law does not presume a gift and where a donee claims title to personal property by virtue of a gift inter vivos, the burden of proof rests upon him to show every fact and circumstance necessary to constitute a valid gift by clear and convincing evidence.

Rust v. Phillips, 208 Va. 573, 578, 159 S.E.2d 628, 631 (1968).

As an affirmative defense to the Complaint, Marshall asserted that any payments by Chamberlain "constituted a gift" to Marshall. (JA 9). At trial, Marshall emphasized the existence of a romantic relationship between Chamberlain and Marshall's sole owner and president, Asjodi, at the time the Guaranty was signed. Chamberlain admitted that he signed the Guaranty to help Asjodi secure the loan at issue. (JA 51-52). However, Chamberlain denied that he transferred any funds from the CD to Asjodi or Marshall, (JA 56-57), and no evidence was presented to the contrary. In fact, at the time Middleburg drew down Chamberlain's CD, Chamberlain and Asjodi were no longer romantically involved and were not in communication with one another. (JA 59).

The trial court denied relief to Chamberlain on the basis that he made a gift. (JA 79-80). The trial court's reasoning was threefold: (1) placing the

CD at Middleburg was a gift; (2) Chamberlain wished to help Asjodi; and (3) there were no documents (in addition to the Note and Guaranty) specifying the obligations of the parties. (JA 79-80). The trial court was particularly influenced by the romantic relationship between Chamberlain and Marshall's owner. (JA 79-80). In addition to confusing the defendant entity with its owner, the trial court did not address the required elements of a gift, and the evidence did not support a finding of a gift.

As a preliminary matter, Marshall pled only that the amount paid by Chamberlain was a gift, not that signing the Guaranty or placing the CD at Middleburg was a gift. (JA 9). As the master of its pleadings, Marshall was limited to what it actually pled. See Alexandria Redev. & Housing Auth. v. Walker, ___ Va. ___, ___, n.10, 772 S.E.2d 297, 302, n.10 (2015) ("[p]leadings are as essential as proof, and no relief should be granted that does not substantially accord with the case as made in the pleadings" (citations omitted)); Ted Lansing Supply Co. v. Royal Aluminum & Constr. Corp., 221 Va. 1139, 1141, 277 S.E.2d 228, 230 (1981) ("[n]o court can base its decision on facts not alleged, nor render its judgment upon a right, however meritorious, which has not been pleaded and claimed"). For Marshall to prevail, then, the gift must have existed at the time the funds

were taken from Chamberlain's account. However, the evidence does not establish that a gift existed at that time.

To find a gift, Marshall must prove donative intent. Rust, 208 Va. at 578, 159 S.E.2d at 632. To the extent that the evidence revealed any donative intent, such intent was present only at the time the Guaranty was signed and the CD was deposited at Middleburg. This evidence is not in accord with the allegations in Marshall's Answer, which alleges that a gift was made when Chamberlain's funds were transferred to Middleburg. (JA 9 (Affirmative Defense ¶ 1)). Nevertheless, the Guaranty itself unambiguously states that it was given in exchange for good and valuable consideration. Additionally, the romantic relationship, to which the trial court gave so much consideration, was over at the time the CD was drawn down and applied to Marshall's debt.

The statute conferred upon Chamberlain the status of creditor when Middleburg drew down his CD. Therefore, if the trial court held that Chamberlain lost his status as a creditor because he actually made a gift at that time, Marshall was required to prove the gift by clear and convincing evidence. There was no evidence that a gift was intended or made when Middleburg made withdrawals against the CD.

Further, there was no evidence, much less clear and convincing evidence, that possession of any of Chamberlain's personal property was ever transferred to Marshall or that title to such property vested with Marshall. Instead, the undisputed evidence was that the CD was and remains (although now depleted) titled in Chamberlain's name on deposit at Middleburg. (JA 56-57). Thus, Marshall failed to prove additional critical elements of a gift – possession and transfer of title.

As the party claiming a gift, Marshall bore the burden of establishing the elements of a gift by clear and convincing evidence. It failed to do so. Even if Marshall had presented evidence of a gift, such evidence would be in direct contravention of Chamberlain's statutory status as a creditor pursuant to Code § 49-27. Accordingly, the trial court erred in denying relief to Chamberlain on the basis that the partial repayment of the Note pursuant to the terms of the Guaranty was a gift.

CONCLUSION

Accordingly, Chamberlain asks this Court to reverse the trial court's decision and enter judgment in his favor as a matter of law.

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CERTIFICATE OF SERVICE

On October 14, 2016, Rule 5:26(e) was complied with and the correct number of true and accurate copies of this Opening Brief were filed with the Supreme Court of Virginia, and the correct number of copies have been served upon counsel for the appellee by first class mail and an electronic copy by email: Robin C. Gulick (VSB No. 16715), Gulick, Carson & Thorpe, P.C., 70 Main Street, Suite 52, P. O. Box 880, Warrenton, Virginia 20188, Telephone: (540) 347-3022, Facsimile: (540) 347-9711, Email: rjulick@gctlaw.com.

Counsel does not waive oral argument.

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