In the

Supreme Court of Virginia

At Richmond

Record No. 161066

HEATHER GRAHAM,

Appellant,

– v. –

COMMUNITY MANAGEMENT CORPORATION,

Appellee.

REPLY BRIEF OF APPELLANT

GLENN H. SILVER, VSB #15722
ERIK B. LAWSON, VSB #79656
SILVER & BROWN
10621 Jones Street, Suite 101
Fairfax, VA 22030
T: (703) 591-6666
F: (703) 591-5618
ctbghs@aol.com
erik@virginia-lawyers.net

Counsel for Appellant

COUNSEL PRESS • VA – (800) 275-0668

SCV: Submitted on 01-19-2017 16:18:11 EST for filing on 01-19-2017

TABLE OF CONTENTS

ARGUMENT 1

I. COMMUNITY MANAGEMENT CORPORATION IS IN AGREEMENT WITH THE STATEMENT OF FACTS, THE MATERIAL PROCEEDINGS BELOW AND THE STANDARD OF REVIEW ON APPEAL AS STATED BY GRAHAM IN HER "OPENING BRIEF OF APPELLANT" 1

II. THE BRIEF OF APPELLEE CAREFULLY AVOIDS THE IMPORTANT ISSUE BEFORE THE COURT CONCERNING WHEN A CAUSE OF ACTION ACCRUES UNDER VIRGINIA CODE SECTION 8.01-230 AND INSTEAD ATTEMPTS TO DIVERT THE COURT'S ATTENTION AWAY FROM THE REAL ISSUE BY FOCUSING ON TANGENTIAL MATTERS THAT ARE LARGELY IRRELEVANT TO THIS APPEAL 2

A. CMC IS MISTAKEN IN ITS ARGUMENT THAT GRAHAM WAIVED HER ARGUMENT CONCERNING THE ACCRUAL OF HER CAUSE OF ACTION BECAUSE IT WAS NOT RAISED IN THE LOWER COURT 2

B. CMC'S RELIANCE ON THE CASES CITED BY IT IS MISPLACED, AS THOSE CASES DO NOT SUPPORT CMC'S ARGUMENTS 3

C. CMC'S CLAIM THAT HEATHER GRAHAM HAS ENGAGED IN APPROBATION AND REPROBATION AND THEREFORE HER APPEAL SHOULD BE DISMISSED IS WITHOUT A BASIS IN LAW OR IN FACT 6

III. IN DECIDING THIS APPEAL THE COURT SHOULD CONSIDER NOT ONLY THE WORDS CONTAINED IN VIRGINIA SUPREME COURT RULE 3:25 BUT ALSO THE WORDS CONTAINED IN VIRGINIA CODE SECTION 8.01-230 7

CONCLUSION 11

CERTIFICATE OF SERVICE 14

TABLE OF AUTHORITIES

Cases

Caudill v. Wise Rambler,
210 Va. 11, 168 S.E.2d 257 (1969).....10

Caudill v. Wise Rambler, Inc.,
210 Va. 11, 168 S.E.2d 257 (1969).....10

Ey v. Blume,
No. CL-2014-10534, 2016 Va. Cir LEXIS 6 (Fairfax Cir. Ct.).....5

Holtzman Oil Corp. v. Green Proj.,
No. 141863 (2016 Va. Unpub. LEXIS 13 (Va April 21, 2016).....3, 4

Kiser v. A.W. Chesterton Co.,
285 Va. 12, 736 S.E.2d 910 (2013).....7, 8

RECP IV WG and Investors, LLC v Capital One Bank,
(SCV 161506).....5

Reineck v. Lemen,
_Va._, 792 S.E. 2d 369 (Va. 2016) 4

Shea v. Spinici,
No. 399-13-4, 2013 WL 6230618 (Va. Ct. App Dec. 3 2013) 5

Shen Valley Masonry, Inc. v. Thor Inc.,
81 Va. Cir. 89 (Roanoke City Cir. Ct. 2010) 5

Shipman v. Kruck,
267 Va. 495, 593 S.E.2d 319 (2004).....10

Westminster Investing Corp. v. Lamps Unlimited, Inc.,
237 Va. 543, 379 S.E.2d 316 (1989).....9

Rules and Statutes

Va. Code § 8.01-230..... passim

Va. Code § 8.01-380 ..... 8, 10, 12

Va. Sup. Ct. R. 3:9 ..... 9, 12

Va. Sup. Ct. R. 3:25 ..... passim

Va. Sup. Ct. R. 3:25(A) 9

Va. Sup. Ct. R. 3:25(B) 9

Va. Sup. Ct. R. 5:25 2

Heather Graham ("Graham"), by counsel, files her Reply Brief in response to the Brief of Appellee as follows:

ARGUMENT

I. COMMUNITY MANAGEMENT CORPORATION IS IN AGREEMENT WITH THE STATEMENT OF FACTS, THE MATERIAL PROCEEDINGS BELOW AND THE STANDARD OF REVIEW ON APPEAL AS STATED BY GRAHAM IN HER "OPENING BRIEF OF APPELLANT".

While Community Management Corporation ("CMC") in its Brief In Opposition never expressly states it, it is clear that CMC is in agreement with most, if not all, of the relevant facts, the material proceedings in the trial court, and the standard of review on appeal as are expressed in the Opening Brief of Appellant. Significantly, CMC also concedes three factors critical to the issues on appeal. First, CMC concedes that Graham never sought or claimed attorney's fees in the underlying action (Brief of Appellee at 3). Second, CMC concedes that Graham was not a prevailing party until after the underlying action was final (Brief of Appellee at 3). Third, CMC concedes that the first time that Graham claimed or sought attorneys' fees as the prevailing party in the underlying action was ten (10) months after the underlying action had ended when she filed this action (Brief of Appellee at 3). In addition, CMC does not dispute that Graham's first demand upon it for payment of attorneys' fees was by letter dated February

16, 2016 (JA at 45) and that that this action was filed following CMC's failure to respond to Graham's demand letter of February 16, 2016.

II. THE BRIEF OF APPELLEE CAREFULLY AVOIDS THE IMPORTANT ISSUE BEFORE THE COURT CONCERNING WHEN A CAUSE OF ACTION ACCRUES UNDER VIRGINIA CODE SECTION 8.01-230 AND INSTEAD ATTEMPTS TO DIVERT THE COURT'S ATTENTION AWAY FROM THE REAL ISSUE BY FOCUSING ON TANGENTIAL MATTERS THAT ARE LARGELY IRRELEVANT TO THIS APPEAL.

A. CMC IS MISTAKEN IN ITS ARGUMENT THAT GRAHAM WAIVED HER ARGUMENT CONCERNING THE ACCRUAL OF HER CAUSE OF ACTION BECAUSE IT WAS NOT RAISED IN THE LOWER COURT.

CMC argues on Page "11" of its Brief of Appellee that because Graham failed to raise in the trial court that her claim for attorneys fees had not yet accrued under Va. Code §8.01-230 that this argument is waived pursuant to Va. Sup. Ct. R. 5:25. CMC's contention, however, is simply incorrect as the record in this case clearly reflects. Not only is the standard of review in this case *de novo* as CMC agrees, but more importantly, Graham made her claim respecting the accrual of her cause of action in both her "Plaintiff's Opposition to Demurrer and Plea In Bar" (JA at 176) and later in her oral argument on the Demurrer and Plea in Bar. In her written argument Graham argued the following:

> Moreover, Graham's **right of action for breach of contract did not accrue until 21 days after the Final Judgment Order had been entered** finding that CMC had not prevailed at trial on its claims since the Court until the expiration of that time period had the right to reverse, alter, amend, or otherwise

> change the Judgment Order. Following the finality of the judgment CMC thereafter had an additional 9 days in which to file its appeal of the Final Order which also could have resulted in a reversal of what occurred at trial. Heather Graham waited until all of these periods had expired. (Emphasis Supplied) (JA at 176)

Graham's position was reiterated in the ensuing oral argument on the Demurrer and Plea In Bar. (See JA at 197 lines 17-22; JA at 198 lines 1-3). Accordingly, CMC's argument is mistaken and cannot form the basis for dismissal of this appeal as urged by CMC.

B. CMC'S RELIANCE ON THE CASES CITED BY IT IS MISPLACED, AS THOSE CASES DO NOT SUPPORT CMC'S ARGUMENTS.

CMC argues that this is not a case of first impression before this Court as claimed by Heather Graham but rather contends that the unpublished opinion of Holtzman Oil Corp. v. Green Proj. No. 141863 (2016 Va. Unpub. LEXIS 13 at 15 (Va April 21, 2016) addresses the issues raised here on appeal and therefore has precedential value. Graham disagrees with CMC's analysis.

In Holtzman, supra, this Court did not address, much less discuss, the language or requirements of Va. Sup. Ct. R. 3:25 *per se* but rather limited its discussion and holding to a single finding that the trial court did not abuse its discretion by allowing the defendant to amend its previously filed answer in which it both sought and claimed attorney's fees but had failed to

provide the basis for its claim. Thus, the issues raised here are wholly distinguishable from those raised in the unpublished decision in Holtzman, supra and CMC's reliance is misplaced.

CMC further argues, in a similar manner, that a comment by a Justice of this Court made during oral argument in the case of Reineck v. Lemen, _____Va._____, 792 S.E. 2d 369 (Va. 2016) is both relevant, persuasive and even if not precedential, shows "significant skepticism" by the Court towards Lemen's argument with respect to his entitlement to attorney's fees incurred in an earlier proceeding that had been dismissed. In Reineck, supra the issue was whether attorney's fees could be awarded against a non-party to the previously dismissed action. Not only didn't this Court discuss Va. Sup. Ct. R. 3:25 but it declined to do so, and, in addition, expressed no opinion as to whether a party who had not sought attorneys' fees in a first case could later, in a second case, seek attorneys' fees incurred in the first case. Again, CMC's argument based on Reineck, supra is both inconsequential to and unavailing in this appeal.

CMC further argues that several Circuit Court cases as well as a Virginia Court of Appeals case, all of which are cited in its Brief of Appellee, have significance in this appeal. Graham again disagrees as those opinions fail to support CMC's position as they do not address the issues

raised in this appeal. For example, CMC cites Ey v. Blume No. CL-2014-10534, 2016 Va. Cir LEXIS 6 (Fairfax Cir. Ct.), a case in which the Court correctly declined to hear a claim for attorneys' fees that was brought more than 21 days after a final judgment had been entered. CMC further cites Shen Valley Masonry, Inc. v. Thor Inc., 81 Va. Cir. 89 (Roanoke City Cir. Ct. 2010) a case in which the trial Court refused to impose the requirements of Va. Sup. Ct. R. 3:25 because the Court found that the Rule could not be applied retroactively. Likewise, in Shea v. Spinici, No. 399-13-4, 2013 WL 6230618 at *1 (Va. Ct. App Dec. 3 2013), also cited by CMC, the Virginia Court of Appeals, while noting that "this memorandum opinion carries no precedential value", declined to reach any arguments concerning Va. Sup. Ct. R. 3:25 on the ground that they were not raised as an issue at trial or on appeal. Finally, the decision in RECP IV WG and Investors, LLC v Capital One Bank, also referenced by CMC, is currently on appeal to this Court, to wit: (SCV 161506). Although the case deals with attorney's fees in a tangential manner, there is no discussion of Va. Sup. Ct. R. 3:25 other than that the Rule allows, in the discretion of the Court, an amendment of pleadings for the purpose of stating the basis for a claim for attorney's fees where no prejudice is shown. Again, as with the other cases cited by CMC, this case does not deal with the issues in this case; and, it remains unclear

why CMC believes that this Court should consider this case or any of the other cases cited by it as a basis for any decision in this appeal.

C. CMC's Claim That Heather Graham Has Engaged in Approbation and Reprobation and Therefore Her Appeal Should Be Dismissed Is Without a Basis in Law or In Fact.

There are two primary reasons why CMC's argument on the issue raised should be disregarded. First, while CMC raised this issue in the trial court as part of its pleading entitled "Defendant's Demurrer or in the Alternative Plea In Bar to Plaintiff's Complaint" (JA at 55) the Court overruled the Demurrer in its entirety and granted the Plea in Bar solely on the basis of Graham's failure to seek attorney's fees under Rule 3:25 of the Virginia Supreme Court. (See Final Order, JA at 221). Having failed to assign cross-error to the Court's ruling and having also failed to file an appeal of this issue independently, CMC failed to preserve the issue and is not entitled to raise it on appeal.

Moreover, Graham did not engage in any prohibited form of approbation or reprobation as she never claimed that the Confidentiality Agreement did not exist or that it was not enforceable as written. Rather Graham argued that CMC was not an affiliate of Associa, Inc., a Texas Corporation. CMC , in opposition, argued that Associa, Inc. was simply a misnomer for Associations, Inc. which was a corporate holding company located in Texas

of which CMC was an affiliate. Regardless, the lower court accepted CMC's argument that this was simply a misnomer and held that CMC had the right to enforce the contract as an affiliate of the misnamed Associa, Inc.

III. IN DECIDING THIS APPEAL THE COURT SHOULD CONSIDER NOT ONLY THE WORDS CONTAINED IN VIRGINIA SUPREME COURT RULE 3:25 BUT ALSO THE WORDS CONTAINED IN VIRGINIA CODE SECTION 8.01-230.

While CMC argues at length that it should prevail in this case by simply looking to the plain language of Va. Sup. Ct. R. 3:25 which it contends is clear and unambiguous, in doing so, CMC not only ignores pertinent phrases contained within the Rule itself to which it attributes no meaning, but more importantly, it disregards the plain language of Va. Code §8.01-230 that defines when a cause of action accrues. By taking this simplistic approach, CMC fails to recognize, much less harmonize, the conflict that exists between the language of Va. Sup. Ct. R. 3:25 if it is construed in the manner urged by CMC and the plain and unambiguous language of Va. Code §8.01-230**.** In so doing, CMC fails to consider that its interpretation of Va. Sup. Ct. R. 3:25 necessarily conflicts with this Court's obligation to apply the plain meaning rule with respect to Va. Code §8.01-230. This Court recently observed in Kiser v. A.W. Chesterton Co., 285 Va. 12, 25, 736 S.E.2d 910, 918 (2013) that:

> "In construing a statute, we must apply its plain meaning, and 'we are not free to add [to] language, nor to ignore language, contained in statutes.' " *BBF, Inc. v. Alstom Power, Inc.,* 274 Va. 326, 331, 645 S.E.2d 467, 469 (2007) (quoting *SIGNAL Corp. v. Keane Fed. Sys., Inc.,* 265 Va. 38, 46, 574 S.E.2d 253, 257 (2003)). " '[When] the legislature has used words of a plain and definite import the courts cannot put upon them a construction which amounts to holding the legislature did not mean what it has actually expressed.' " *Barr v. Town & Country Props.,* 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) (quoting *Watkins v. Hall,* 161 Va. 924, 930, 172 S.E. 445, 447 (1934)).

Kiser v. A.W. Chesterton Co., 285 Va. 12, 25, 736 S.E.2d 910, 918 (2013).

Here, if this Court accepts CMC's interpretation, it would be violating the basic tenets of statutory construction by subjecting the plain meaning of Va. Code §8.01-230 to the provisions of Va. Sup. Ct. R. 3:25 by adding provisions beyond those "actually expressed" by the General Assembly in enacting the statute. On the other hand, this Court can easily harmonize Va. Sup. Ct. R. 3:25 and Va. Code §8.01-230 by holding that the trial court's application of Va. Sup. Ct. R. 3:25 was erroneous in this instance as Heather Graham could not be required to claim damages or seek damages under Va. Sup. Ct. R. 3:25 for CMC's breach of contract because that cause of action had not yet accrued under Va. Code §8.01-380. The Court could further harmonize the Rule and the statute by finding, as Heather Graham has also argued, that Va. Sup. Ct. R. 3:25 was intended to prevent a litigant from splitting its cause of action once it had declared its intention

to **claim** and **seek** prevailing party attorney's fees. By doing so, this Court would give meaning to the phrase found in Va. Sup. Ct. R. 3:25(A) "to **claims** for attorneys fees" and would also give meaning to the phrase "party **seeking** to recover attorney's fees" found in Va. Sup. Ct. R. 3:25(B). CMC in its opposition ignores the relevance, the plain language, and the meaning attributable to both phrases and treats them as being mere surplusage.

In this case, Heather Graham was not legally in a position to either claim or seek attorney's fees because Va. Code §8.01-230 did not allow her to do so as CMC had not yet breached the contract; she had not been declared the prevailing party while the underlying action was pending; and she had not yet suffered damages from a breach of the contract.[1] Those facts, taken with applicable law, ought to be dispositive of this appeal.

For example, in Westminster Investing Corp. v. Lamps Unlimited, Inc., 237 Va. 543, 546, 379 S.E.2d 316, 317 (1989) this Court recognized, as it has consistently done in the past, that:

---

[1] It is noteworthy that CMC argues the history of Va. Sup. Ct. R. 3:25 but fails to note that to the extent Rule 3:25 makes a claim for attorney's fees in a counterclaim compulsory or be waived such would fly in the face of the history of Va. Sup. Ct. R. 3:9 in that this Court has consistently rejected all attempts to require compulsory counterclaims. How does CMC reconcile the compulsory counterclaim language in Va. Sup. Ct. R. 3:25 with the permissive language of Va. Sup. Ct. R. 3:9?

> The essential elements of a cause of action for breach of contract are: (1) "a legal obligation of a defendant to the plaintiff," (2) "a violation or breach of that right or duty," and (3) "a consequential injury or damage to the plaintiff." *Caudill v. Wise Rambler,* 210 Va. 11, 13, 168 S.E.2d 257, 259 (1969).

Similarly, in Caudill v. Wise Rambler*,* 210 Va. 11, 13, 168 S.E.2d 257, 259 (1969) this Court stated with approval that:

> **A right of action cannot accrue until there is a cause of action.** 1 Am.Jur.2d, Actions s 58, p. 590. **The essential elements of a good cause of action,** whether based on an alleged breach of contract or on a tortious act**, are a legal obligation** of a defendant to the plaintiff**, a violation or breach of that right or duty, and a consequential injury or damage** to the plaintiff. **In the absence of injury or damage to a plaintiff or his property, he has no cause of action and no right of action can accrue to him.** 1 Am.Jur.2d, Actions s 58, p. 590. (Emphasis Supplied)

Caudill v. Wise Rambler, Inc., 210 Va. 11, 13, 168 S.E.2d 257, 259 (1969). Again, in Shipman v. Kruck, 267 Va. 495, 503, 593 S.E.2d 319, 323 (2004) this Court reiterated that:

> We continue to adhere to that principle. Under Code § 8.01-230 the injury is deemed to accrue "when the breach of contract occurs ... not when the resulting damage is discovered.

For these reasons alone, this Court should find that upon application of these principles of law Ms. Graham's cause of action had not accrued under Virginia Code Section 8.01-380 as she was not the prevailing party until a Final Order had been entered; that CMC was not in breach of contract until it refused to pay to Heather Graham the damages called for in

the contract; and that Heather Graham suffered no damages until her demand upon CMC had been refused. Because her cause of action had not accrued while the underlying case was pending, Heather Graham could neither claim nor seek prevailing party attorney's fees and she did not do so. While there are instances where a litigant may be compelled to claim and seek prevailing party attorney's fees or waive them under Virginia Supreme Court Rule 3:25, such as where the remedy is provided for by statute, or where the defendant has pleaded plaintiff's antecedent breach of contract as a defense, or where the defendant pleads that the plaintiff was first in breach, that is not what happened here as CMC was not in breach of the Confidentiality Agreement in issue and Heather Graham never made such a claim.

Accordingly, the Order of the Circuit Court ought to be reversed and the case remanded for trial.

CONCLUSION

This appeal is a case of first impression and presents this Court with the opportunity to clarify the parameters of Virginia Supreme Court Rule 3:25 with respect to prevailing party attorney's fees in (i) those cases where the issue of entitlement to attorney's fees is not covered by statute, and (ii) where a contract that provides for prevailing party attorney's fees

has not yet been breached so that no cause of action has accrued under Virginia Code Section 8.01-230. It also may allow this Court to clarify as to whether a counterclaim seeking prevailing party attorney's fees as referenced in Virginia Supreme Court Rule 3:25 is compulsory and therefore different from the permissive counterclaim allowed under Virginia Supreme Court Rule 3:9 and whether a counterclaim brought under Virginia Supreme Court Rule 3:25 can later be non-suited under Virginia Code Section 8.01-380 and thereafter brought again as an independent action or would such a non-suit constitute a waiver under Virginia Supreme Court Rule 3:25 barring a separate action.

Unlike other situations, the Complaint in this case was not a motion for prevailing attorney's fees from the prior case. Instead, it was an independent claim for damages for breach of contract where the element of damages was the attorney's incurred in the defense of the underlying action. In these circumstances Va. Sup. Ct. R. 3:25 is inapplicable and, in light of Va. Code §8.01-230 and related case law, should not be construed to prevent a subsequent action for breach of contract simply because the damages sought for that breach of contract happen to be attorney's fees incurred.

It is respectfully requested that this Court reverse the Final Order of the Circuit Court of Fairfax County and remand the case for trial.

RESPECTFULLY SUBMITTED

HEATHER GRAHAM
BY COUNSEL

/s / Glenn H. Silver
Glenn H. Silver, VSB#15722
Erik B. Lawson, VSB#79656
Silver & Brown
A Professional Corporation
10621 Jones Street
Suite 101
Fairfax, Virginia 22030
Tel. 703-591-6666
Fax 703 591-5618
ctbghs@aol.com
erik@Virginia-lawyers.net

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 12, 2016, the Reply Brief was filed electronically via the VACES system with the Supreme Court of Virginia and that ten copies of the brief were hand delivered to the clerk's office. This same date, a copy of the brief was sent via email to all counsel of record, at the email addresses below:

John E. Thomas, Jr. (VSB #81013)
David L. Greenspan (VSB#45420)
McGuireWoods LLP
1750 Tysons Blvd., Suite 1800
Tysons Corner, Virginia 22102
(703) 712-5000
(703) 712-5050 (Facsimile)
jethomas@mcguirewoods.
dgreenspan@McGuireWoods.com

The appellant respectfully requests Oral Argument.

/s/ Glenn H. Silver
Glenn H. Silver