In The

Supreme Court of Virginia

RECORD NO. 170631

THE GAME PLACE, L.L.C. and ROBERT C. LIGHTBURN,

***Appellants*,**

v.

FREDERICKSBURG 35, LLC,

Appellee.

BRIEF OF APPELLANTS

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INTRODUCTION

This appeal arises from an action to enforce a commercial lease against the Game Place, L.L.C. (the "Game Place") as tenant and Robert C. Lightburn ("Lightburn") as guarantor. The trial court erred in finding the lease enforceable against Lightburn for two reasons: (1) the lease failed to meet the requirements of Va. Code § 55-2; and (2) Lightburn's guarantee was not supported by consideration.

The original tenant assigned the lease to the Game Place in 2002. Lightburn purported to guarantee the Game Place's obligations under the lease in exchange for the original landlord's consent to the assignment. After the assignment, Fredericksburg 35 acquired the leased property and thereby became the landlord.

The Game Place and Lightburn filed a demurrer to the complaint on the ground that the lease failed to satisfy the requirements of Virginia's Statute of Conveyances, Va. Code § 55-2, and was therefore unenforceable. That statute requires that all estates in land for a period of greater than five years, including leases, be conveyed by deed or will. In this case, the lease at issue was for a term of greater than five years, but did not satisfy the common law requirements for a deed because it was not under seal.

In overruling the demurrer, the trial court erroneously found that the 15-year lease at issue (the "Lease") satisfied the requirements of Virginia Code § 55-2

because the Lease should be treated *as if* it was sealed. Specifically, the trial court determined that the Lease was a sealed instrument within the meaning of Virginia Code § 11-3, which provides that writings that state "this deed" or "this indenture," or "other words importing a sealed instrument," are treated as if they are sealed. In making this ruling, the trial court noted in its March 30, 2015 letter opinion that:

> The seventeen page Agreement of Lease exemplifies a sealed instrument as alluded to in Section 11-3 even though it is not referred to as "this deed" or "this indenture." The law looks at substance not form. The subject lease could just as easily have been entitled "Deed of Lease" or "Lease Indenture."
>
> Defendant's Demurrer is therefore overruled.

JA 9. According to the trial court, the mere fact that a Lease is in writing and *could* have been titled "Deed of Lease" or "Lease Indenture" is sufficient for a seal. Under that analysis, any signed written lease is considered "sealed," meets the requirements of a deed, and therefore satisfies the Statute of Conveyances. This analysis renders the requirement of a seal – and the provisions of Virginia Code § 11-3 – meaningless.

At trial, Lightburn moved to strike the claims against him as guarantor on the ground that his guarantee was unenforceable due to a lack of consideration. When the original tenant assigned the Lease to the Game Place (the "Assignment"), Lightburn executed the Assignment as guarantor in consideration for the original landlord's "consent" to the Assignment. The original landlord was

a limited partnership, which conveyed the property subject to the lease to a third-party, dissolved, and then cancelled its existence. *After* that conveyance, and *after* its existence had been cancelled, the original landlord "consented" to the assignment of the Lease as "landlord," when it no longer had an interest in the Lease or in the underlying property.

Having conveyed away the property, by operation of law pursuant to Virginia Code §§ 55-217-18, the original landlord was no longer the landlord under the Lease and could not provide the necessary consent of the landlord to the Assignment. As a result, the original landlord's "consent" to the Assignment failed to provide any consideration for Lightburn's guarantee (the "Guaranty").

ASSIGNMENTS OF ERROR

1. The trial court erred in overruling the Demurrer and in determining that the unsealed commercial lease at issue satisfied Virginia's Statute of Conveyances, Virginia Code § 55-2, and was therefore enforceable. **Preserved:** JA 5-7, 10-14, 16-17, 253-55.

2. The trial court erred in denying the Motion to Strike, and in entering judgment against Lightburn, by determining that the original landlord's "consent" to the Assignment of the Lease could provide consideration for the Guaranty where, at the time of such "consent," the original landlord no longer owned the property and had ceased to exist under Virginia law. **Preserved:** JA 127-141, 148-52, 154, 253-55.

STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

On December 17, 2014, Fredericksburg 35 filed its Complaint against the Game Place and Lightburn seeking to collect unpaid rent and other charges allegedly due from the date the Game Place vacated the leased premises through the end of the term of the Lease. JA 1-4.

On March 30, 2015, the trial court issued a letter opinion overruling the Demurrer filed by Lightburn and the Game Place, finding that the Lease satisfied the Statute of Conveyances, Virginia Code § 55-2. JA 8-9. Lightburn and the Game Place filed a Motion for Reconsideration, asking the trial court to reconsider its ruling on Demurrer. JA 10-14. On July 20, 2015, the trial court issued its second letter opinion declining to reconsider its earlier ruling. JA 15. On August 3, 2015, the trial court entered its order overruling the Demurrer and denying the Motion for Reconsideration. JA 16-17.

On September 19, 2016, Lightburn and the Game Place moved for leave to amend their Answer and assert affirmative defenses, including the defense of lack of consideration for the Guaranty, which motion was granted by order of the trial court on September 29, 2016. JA 32-35, 36-37.

The trial of this matter was heard in the Circuit Court for the City of Fredericksburg on February 3, 2017. At the close of Fredericksburg 35's case in chief, Lightburn made a motion to strike the claims against him under the Guaranty

to the Lease on the grounds that there was no consideration for the Guaranty. JA 127-141. The trial court overruled the motion to strike. JA 152. Lightburn and the Game Place did not put on any evidence in their case in chief. Lightburn renewed the motion to strike prior to Fredericksburg 35's closing argument, and renewed those arguments once again during Lightburn's closing argument. JA 152, 154. The trial court entered judgment against the Game Place and Lightburn, jointly and severally, on February 13, 2017. JA 253-55.

STATEMENT OF FACTS

On September 14, 2000, Amusement-Central Park Limited Partnership ("Amusement") as Landlord and Nicol, Inc. as Tenant entered into the Lease for 3,662 square feet space in the Central Park Shopping Center in Fredericksburg, Virginia. JA 199-215. The Lease was for a term of 15 years. *Id*. Shortly thereafter, in 2001, Amusement conveyed certain real property, including the leased premises (the "Property"), to Carl D. Silver. JA 98. That deed was lost and was never recorded. JA 194. Carl D. Silver promptly re-conveyed the Property to Carl D. Silver Company ("Silver Company") on November 30, 2001. JA 98, 235-37.

Amusement, having conveyed away the Property and presumably having no further business purpose, dissolved on November 31, 2001. JA 98-99, 238. On January 31, 2002, Amusement filed its Certificate of Cancellation with the State

Corporation Commission "cancelling the existence of Amusement." JA 238. The sole general partner of Amusement, identified as ACP Management I, LLC, stated that the certificate of cancellation was being filed because:

> The limited partnership **has ceased to exist** by declaration of all of its partners.

JA 239 (emphasis added).

On November 15, 2002 Nicol, Inc., the original tenant under the Lease, assigned its rights under the Lease to the Game Place pursuant to the Assignment. JA 224-25. The Lease required the written consent of the landlord to any assignment thereof by the tenant. JA 212 at ¶ 30. The Assignment also contained the purported Guaranty of the Game Place's obligations under the assigned Lease.

Despite the fact that the November 15, 2002 Assignment was executed a year after Amusement ceased to own the Leased Premises and more than nine months after Amusement ceased to exist, Amusement purported to consent to the Assignment[1] as the landlord in consideration for the Guaranty:

> 5. Landlord consents to this Assignment and agrees to recognize Assignee as its new tenant under the Lease as of the Closing Date.

---

[1] Amusement signed the Assignment through its general partner, "Silver GP, Inc." JA 225. This is inconsistent with Amusement's Certificate of Cancellation, which was executed by its sole general partner, ACP Management I, LLC. JA 239. Fredericksburg 35 did not produce any evidence that there was a post-cancellation change in general partner for Amusement or that Silver GP, Inc. was authorized to sign on behalf of Amusement. JA 100.

> 6. **Provided Landlord consents to this Assignment . . . Guarantor agrees to personally guaranty the obligations of Assignee under the Lease** and Guarantor hereby guarantees to Landlord the prompt and faithful performance of all duties, payments and obligations of the Tenant under the Lease. Guarantor hereby waives all defenses provided Landlord is not in default under the Lease. **Landlord would not consent to this Assignment without the unconditional guaranty of Robert C. Lightburn.**

JA 225 (emphasis added). Thus, Lightburn purported to guarantee the obligations under the lease in consideration for the "consent" of the landlord under the Lease. Amusement was no longer the landlord under the Lease, however, having conveyed away the Property over a year prior to executing the Assignment. *See* Va. Code §§ 55-217-18 (by operation of law in Virginia, when a landlord conveys property subject to a lease, the new owner steps into the prior owner's shoes as the landlord under any lease agreement).

On December 18, 2002, Silver Company conveyed the Property to Fredericksburg 35. JA 193-98.

A brief timeline of the events noted above is as follows:

9/14/00	Amusement and Nicol, Inc. enter into the Lease.
2001	Amusement conveys the Property to Carl D. Silver.
11/30/01	Carl D. Silver conveys the Property to Silver Company.
12/31/01	Amusement is dissolved.
1/31/02	Amusement's corporate existence is cancelled.

11/15/02 Lightburn signs Assignment as guarantor in exchange for Amusement's "consent" to the Assignment of the Lease.

12/18/02 Silver Company conveys the Property to Fredericksburg 35.

SUMMARY OF ARGUMENT

The Lease is unenforceable as a matter of law pursuant to Virginia Code § 55-2, also known as the Statute of Conveyances. The Statute of Conveyances requires that all estates in land for a period of greater than five years, including leases, be conveyed by deed or will. The Lease is for a term of more than five years and does not satisfy the requirements for a deed because it is not sealed.

The trial court's ruling that the Lease meets the requirements of a deed because it is the equivalent of a "sealed instrument" under Virginia Code § 11-3 is erroneous. Under the trial court's reading of that statute, any written lease is the equivalent of a sealed instrument. Such a reading would render the seal requirement, and the provisions of Virginia Code § 11-3, meaningless. As a result, the trial court erred in overruling the Demurrer.

The trial court also erred in denying Lightburn's motion to strike, and in entering judgment against Lightburn under the Guaranty. Fredericksburg 35 cannot enforce the Guaranty against Lightburn. At the time of the Assignment, Amusement no longer owned the Leased Premises, and was therefore no longer the "landlord" under the Lease and could not provide any consideration for the

Guaranty. Indeed, Amusement as an entity did not even exist at the time of the Assignment.

ARGUMENT

I. The trial court erred in overruling the Demurrer and in determining that the unsealed commercial lease at issue satisfied Virginia's Statute of Conveyances, Virginia Code § 55-2, and was therefore enforceable. (Assignment of Error 1)

Standard of Review: *De novo*, for legal error. *Desetti v. Chester* 290 Va. 50, 56 (2015).

A. The Lease Is Not Under Seal

The Lease is unenforceable as a matter of law pursuant to Virginia Code § 55-2, also known as the Statute of Conveyances. Virginia's Statute of Conveyances requires that all estates in land, including leases, for a period greater than five years be conveyed by deed or will:

> No estate . . . for a term of more than five years in lands shall be conveyed unless by deed or will . . .

Va. Code Ann. § 55-2 (2003); *see Smith v. Payne*, 153 Va. 746 (1930) (Virginia's statute of conveyances requires that leases for a term of more than five years must be by deed).

The Lease does not satisfy the common law requirements of a deed, which are a "lawful subject-matter, a valuable consideration, apt words of conveyance, and proper execution." *Morison v. American Ass'n, Inc.*, 110 Va. 91, 93 (1909). Proper execution requires a seal. *Smith v. Plaster*, 151 Va. 252, 258 (1928).

Indeed, "[o]ne of the essential requisites of a deed [conveying an estate of more than five years] is that it shall have a seal affixed thereto." *Id.* The Lease is not sealed so it does not qualify as a deed and, therefore, is not enforceable under Va. Code § 55-2. *See Granva Corp. v. Dietrich Walter Heyder*, 205 Va. 660 (1964) (affirming trial court ruling sustaining demurrer on ground that written lease for term of more than five years unenforceable under statute of conveyances because not executed under seal); *see also Stores Building Corp. v. Conover*, 204 Va. 457 (1963) (parties bound by trial court's ruling in prior action that that ten-year written lease was invalid pursuant to Va. Code § 55-2 for lack of seal, resulting in tenancy from year to year).

In *Granva*, for example, this Court determined that a *written* lease for a term of more than five-years was unenforceable because there was no seal affixed to the document. In that case, the landlord sought to specifically enforce the lease against the tenant. Although the tenant signed the lease under seal, the landlord failed to do so, which was fatal to the enforceability of the lease. This Court recognized that the lease at issue was "a very comprehensive one" which contained "practically every conceivable provision found in leases of property." *Granva Corp.* 205 Va. at 662. Because the lease failed to comply with the seal requirement, however, the landlord could not enforce the lease and this Court affirmed the trial court's dismissal of the case on demurrer.

B. Va. Code § 11-3 Does Not Render The Lease Sealed

The trial court erred in determining that the Lease constituted a sealed instrument under Virginia Code § 11-3.

At common law, the application of a wax impression or seal provided attributes of formality that emphasized the importance of the documents to which they were attached. *Virginia Title Examiner's Manual*, § 16-14(a) (3d ed. 1998). The requirements for a seal were relaxed somewhat over time, as reflected in Virginia Code § 11-3, to allow substitutes for a seal, e.g. affixing a scroll, making an impression on paper rather than in wax, or merely typing the word "seal." *Id., citing Bradley Salt Co. v. Norfolk Importing & Exporting Co.*, 95 Va. 461 (1897); *Pascoe Steel Corp. v. Shannon*, 227 Va. 530 (1982).

Virginia Code § 11-3 provides:

> any writing to which a natural person, corporation, limited liability company or partnership . . . making it **affixes a scroll** by way of a seal, shall be of the same force as if it were actually sealed . . . And any writing to which a natural person, corporation, limited liability company or partnership . . . affixes his signature, or their signatures, and **which writing in its body says "this deed" or "this indenture," or other words importing a sealed instrument, or recognizes a seal,** shall be of the same force as if it were actually sealed . . .

A scroll is defined as a "mark intended to supply the place of a seal, made with a pen or other instrument of writing." *Black's Law Dictionary* (4th ed.)

The Lease does not contain a seal, a scroll, or the words "this deed" or "this indenture." There also are no "words importing a sealed instrument" and no recognition of a seal. As noted above, merely typing the word "seal" is sufficient under Virginia law, because those are "words importing a sealed instrument." *See Pascoe Steel Corporation v. Shannon*, 224 Va. 530 (1982) (typing the word "seal" next to a signature block constitutes a seal under Virginia law). The Lease contains no such language, and thus, the Lease is not considered sealed under Virginia Code § 11-3.

The trial court erroneously ruled, however, that:

> The seventeen page Agreement of Lease exemplifies a sealed instrument as alluded to in Section 11-3 even though it is not referred to as "this deed" or "this indenture." The law looks at substance not form. The subject lease could have just as easily been entitled "Deed of Lease" or "Lease Indenture."
>
> Defendant's Demurrer is therefore overruled.

(3/30/15 Ltr. Op. at 2).

This ruling ignores the plain language of Virginia Code § 11-3 and renders the statute and the requirement of a seal meaningless. Under the trial court's interpretation, the mere fact that a Lease is in writing and *could* have been titled "Deed of Lease" or "Lease Indenture" is sufficient for a seal. Under that analysis, the fact that a document *could* have been sealed, means that *it is* sealed. Carrying that logic further, the fact that a document *could* have been notarized means that *it*

is notarized and the fact that an agreement *could* have been in writing means that *it is* in writing. The trial court's analysis is nonsensical.

As noted above, this Court has previously ruled in *Granva Corp. v. Dietrich Walter Heyder*, 205 Va. 660 (1964), that the mere fact that a Lease is in writing and has all of the other formalities of a sealed instrument does not satisfy the seal requirement. If it did, the seal requirement would be rendered meaningless. That requirement is not meaningless, and there is no authority for the trial court's ruling on demurrer that the Lease constitutes a sealed instrument under Virginia Code § 11-3.

C. Va. Code § 55-51 Does Not "Save" The Lease

Fredericksburg 35 erroneously argued at the trial court level and in response to the Petition for Appeal that Virginia Code § 55-51 cures the defects in the Lease. The plain language of § 55-51 makes clear that it only cures a failure to comply with a statutory requirement set forth in Chapter 4 of Title 55 of the Virginia Code:

> Any deed, or part of a deed, **which shall fail to take effect by virtue of this chapter shall**, nevertheless, be as valid and effectual and as binding upon the parties thereto, so far as the rules of law and equity permit, **as if this chapter had not been enacted**.

Here, the Lease is deficient because it fails to satisfy the common law seal requirement, not any particular statutory requirement set forth in Chapter 4 of Title

55 of the Virginia Code, the chapter in which § 55-51 is located. Thus, § 55-51 cannot cure the defect in the Lease.

II. The trial court erred in denying the Motion to Strike, and in entering judgment against Lightburn, by determining that the original landlord's "consent" to the Assignment of the Lease could provide consideration for the Guaranty where, at the time of such "consent," the original landlord no longer owned the property and had ceased to exist under Virginia law. (Assignment of Error 2)

Standard of Review: Whether the finding is plainly wrong or without evidence to support it. Virginia Code § 8.01-680; *Saks Fifth Ave., Inc. v. James, Ltd*., 272 Va. 177, 188 (2006), *quoting Williams v. Vaughan*, 214 Va. 307, 309 (1973) (citations omitted).

The Lease required the consent of the "landlord" to any assignment. JA 212 at ¶ 30. Amusement purported to provide such consent, by stating that it "consents to this Assignment and agrees to recognize Assignee as its new tenant under the Lease." JA 225. Lightburn executed the Guaranty in consideration for that consent, as is clear from paragraph 6 of the Assignment, which states that "[p]rovided Landlord consents to this Assignment . . . Guarantor agrees to personally guaranty the obligations of Assignee." *Id*.

The "landlord" did not consent to the Assignment, however, because Amusement was no longer the landlord under the Lease at the time of the Assignment. Amusement ceased to be the "landlord" under the Lease when it conveyed the Property to Carl D. Silver in 2001, who in turn conveyed the Property to Silver Company on November 30, 2001. JA 194, 235-37. By

operation of law in Virginia, when a lessor conveys property subject to a lease, the grantee automatically steps into the grantor's shoes and assumes the rights that the grantor had under that lease prior to such conveyance:

> A grantee or assignee of any land let to lease . . . shall enjoy against the lessee . . . the like advantage, by action or entry for any forfeiture or by action upon any covenant or promise in the lease, which the grantor, assignor, or lessor . . . might have enjoyed.

Va. Code § 55-217; *see* Va. Code § 55-218 (lessees have same rights against grantees "as [lessees] could have had against the lessors themselves"). Because Amusement was no longer the landlord, its "consent" was meaningless and failed to provide any consideration for the Guaranty.

In addition, Amusement could not consent to the Assignment because it had no authority to act, its existence having been terminated nine months before. On January 31, 2002, the general partner of Amusement filed a Certificate of Cancellation with the State Corporation Commission. JA 239. The relevant statute at the time provided that a certificate of limited partnership may only be cancelled upon:

> the dissolution and when all of the debts, liabilities, and obligations of the limited partnership have been paid and discharged or reasonably adequate provision therefor has been made, and all of the remaining property and assets of the limited partnership have been distributed to the partners.

Va. Code § 50-73.13.[2] In other words, as of January 31, 2002, Amusement did not have any assets and ceased to exist as a corporate entity. Indeed, in its Certificate of Cancellation, the general partner of Amusement stated that the certificate of cancellation was being filed because:

> The limited partnership has ceased to exist by declaration of all its partners.

JA 239. Thus, as of January 31, 2002, Amusement could no longer transact business in any manner as an entity. As a result, Amusement's execution of the November 15, 2002 Assignment was of no effect.

In either case, Amusement could not and did not provide any consideration for the Guaranty. The trial court overruled Lightburn's Motion to Strike on this issue, however, finding that:

> The consideration is as stated that the owner of the property landlord [sic] would not have consented to the assignment of the lease to Game Place, LLC, without the guarantee of Mr. Lightburn and that is the consideration . . . the Court believes that consideration existed at the time and is as stated in the assignment of lease, even though if by mistake there was some misnomer or misunderstanding of who actually the landlord, the right landlord was -- landlord at the time.

JA 151. As an initial matter, Fredericksburg 35 did not introduce any evidence from the owner of the Property at the time of the November 15, 2002

[2] This statute was in effect from 1993 until 2007.

Assignment – Silver Company – that (i) it was aware of the Assignment or (ii) would have objected to the Assignment unless it could obtain Lightburn's guaranty. Silver Company only owned the Property for a little over a month after the Assignment was executed. Thus, Silver Company may not have even known that the Lease had been assigned when it conveyed the Property to Fredericksburg 35 on December 18, 2002.

Moreover, the trial court's analysis completely ignores the concept of corporate formalities. Setting aside the trial court's failure to address at all the fact that Amusement had dissolved and ceased to exist at the time of the Assignment, and therefore had no power to act, Amusement's consent to the Assignment is not the equivalent of Silver Company's consent to the Assignment. If the trial court were correct that Amusement's name on the Assignment was the result of a mistake or a misnomer – despite the fact that no evidence was introduced to that effect – then the proper remedy would be to reform the instrument, not to ignore the plain language of the Assignment.

The Guaranty fails for lack of consideration and the trial court was plainly wrong in entering judgment against Lightburn on the Guaranty. *See Southern Ry. Co. v. Willcox*, 98 Va. 222 (1900) (holding that a contract "in order to be enforceable, must have a consideration to support it"). Moreover, the trial court erred in overruling the Motion to Strike because there was no evidence presented

to support the trial court's determination that Amusement provided any consideration for the Guaranty.

CONCLUSION

Wherefore, this Court should reverse the judgment and enter final judgment dismissing the complaint against Lightburn and the Game Place on the ground that the Lease is unenforceable under the Statute of Conveyances. Alternatively, this Court should reverse the judgment and enter final judgment dismissing the complaint against Lightburn as the purported guarantor under the Lease.

Respectfully Submitted,

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CERTIFICATE

I hereby certify that on this 8th day of December, 2017, pursuant to Rules 5:26(h), three paper copies of the Brief of Appellants and Joint Appendix were hand-filed with the Clerk of the Supreme Court of Virginia and electronic copies of the Brief and Appendix were filed, via VACES. On this same day, an electronic copy of the Brief of Appellants was served, via email, and electronic copies on CD of the Brief and Appendix were served, via UPS Ground Transportation, upon:

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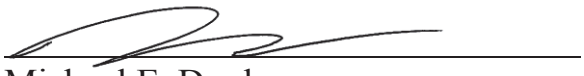

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