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.

REPLY BRIEF OF APPELLANTS

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SUMMARY OF ARGUMENT

Fredericksburg 35 does not dispute that (i) the Lease is subject to Virginia Code § 55-2 – the Statute of Conveyances – which requires that all estates in land for a period of greater than five years, including leases, be conveyed by deed or will, (ii) at common law the Lease is required to be under seal, and (iii) the Lease does not satisfy the common law seal requirements. Fredericksburg 35 does not even contend that the trial court's ruling – that the Lease satisfies the relaxed seal requirements set forth in Virginia Code § 11-3 – was correct.

Instead, Fredericksburg 35 argues that the "Savings Statute" – Virginia Code § 55-51 – cures the failure of the Lease to comply with the common law seal requirement, as modified by Virginia Code § 11-3. Fredericksburg 35's reliance on Virginia Code § 55-51 is misplaced because that statute only cures a failure to comply with a statutory requirement set forth in Chapter 4 of Title 55 of the Virginia Code. The Lease is unenforceable because it fails to satisfy the common law seal requirement, as modified by Virginia Code § 11-3, not any statutory requirement set forth in Chapter 4 of Title 55 of the Virginia Code. Moreover, § 55-51 only purports to "save" an instrument as between the parties thereto, not successors in interest. For these reasons, § 55-51 does not apply.

Fredericksburg 35's argument that the Guaranty is supported by consideration is also flawed. Fredericksburg 35 does not and cannot dispute that

(i) the stated consideration for Lightburn's Guaranty was the consent of the landlord to the Assignment, (ii) Silver Company – the landlord at the time – did not consent to the Assignment, and (iii) when Silver Company conveyed the Property to Fredericksburg 35, Fredericksburg 35 stepped into its shoes with respect to the Lease, acquiring only the rights that Silver Company had. Silver Company could not enforce the Guaranty for lack of consideration. It follows that Fredericksburg 35 cannot enforce the Guaranty.

Perhaps recognizing the flaws in its argument, Fredericksburg 35 makes the extraordinary claim that "no proof was required that Fredericksburg 35 was the owner at the time of the Assignment of Lease was executed [sic]" pursuant to Virginia Code § 8.01-279(B). See Brief of Appellee at 13-14. This argument has no factual or legal basis. There is no dispute that Silver Company was the owner of the Property on November 15, 2002, when the Assignment was executed. There is also no allegation in the Complaint or the Amended Complaint that Fredericksburg 35 owned the Property at the time Assignment was executed. Although Virginia Code § 8.01-279(B) provides that if a party alleges that an entity "at a stated time, owned . . . any property . . . no proof of the fact alleged shall be required unless an affidavit be filed with the pleading putting it in issue," Fredericksburg 35 made no such allegation. This code section therefore has no application to this case.

ARGUMENT

I. Va. Code § 55-51 Does Not Cure the Failure to Satisfy the Seal Requirement

Fredericksburg 35 erroneously argues that Virginia Code § 55-51 cures the failure to satisfy the common law seal requirement. The plain language of § 55-51, however, 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, as modified by Virginia Code § 11-3, not any statutory requirement set forth in Chapter 4 of Title 55 of the Virginia Code, the chapter in which § 55-51 is located. *See Smith v. Plaster*, 151 Va. 252, 258-59 (1928) (noting that "[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" and that common law seal requirement has been relaxed by predecessor to Section 11-3).

Fredericksburg 35's argument that § 55-51 cures the failure to satisfy the "requirements" of Virginia Code §§ 55-48 and 55-57, which set forth optional forms for deeds and leases, is unpersuasive. Section 55-48, for example, provides that a deed "*may* be made in the following form, or to the same effect . . ."

(emphasis added). Likewise, § 55-57 provides that a "deed of lease *may* be made in the following form, or to the same effect . . ." (emphasis added). Neither of these sections impose any relevant *requirements* for the Lease, however. Indeed, there is no provision in Chapter 4 of Title 55 that imposes a seal requirement. As noted above, that requirement exists at common law, not by virtue of Chapter 4 of Title 55.

Moreover, § 55-51 only "saves" an instrument as between the "parties" to the instrument. In this case, Amusement as the original Landlord and Nicol, Inc. as the original tenant were the parties to the Lease. Neither Fredericksburg 35, as successor in interest to Silver Company and to Amusement, nor the Game Place, as assignee of Nicol, Inc., was a party to the Lease at issue.

For the foregoing reasons, there is no authority for Fredericksburg 35's argument.[1]

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[1] The circuit court cases cited by Fredericksburg 35 are unpersuasive. In *Kassco LLC v. Geodigital Mapping, LLC*, 69 Va. 137 (Loudoun 2005), the lease "was signed under the seals of both landlord and tenant." Not surprisingly, the trial court overruled the demurrer filed pursuant to Va. Code § 55-2. In *Moorman v. Shinn*, 49 Va. Cir. 140 (Fairfax County 1999), the trial court erroneously determined that § 55-51 cures a failure "to satisfy the requirements of § 55-2," even though § 55-2 is *not* found in Chapter 4 of Title 55.

II. The Guaranty is Not Supported by Consideration

Fredericksburg 35 (i) claims that its provision of the Leased Premises to the Game Place in exchange for payment of rent – after Fredericksburg 35 acquired the Property – somehow provides consideration for the Guaranty and (ii) makes a convoluted argument that "no proof was required that Fredericksburg 35 was the owner at the time of the Assignment of Lease was executed [sic]" pursuant to Virginia Code § 8.01-279(B). See Brief of Appellee at 13-14. These arguments are misplaced and fail to establish that any consideration for Lightburn's Guaranty exists.

Fredericksburg 35's provision of the Leased Premises to the Game Place in exchange for the Game Place's payment of monthly rent does not provide consideration for the Guaranty – it merely provides consideration for the Game Place's occupancy. The Guaranty was part of the Assignment, which was executed on November 15, 2002. JA 224-25. Silver Company owned the Leased Premises at that time and therefore, by operation of law, was the "landlord" under the Lease. JA 98, 235-37; see Va. Code §§ 55-217 and 218 (grantee steps into shoes of grantor with respect to any leases encumbering property). Lightburn purported to provide his Guaranty in exchange for the "landlord's" consent to the Assignment. Silver Company did not, however, consent to the Assignment. Instead, Amusement purported to consent to the Assignment as landlord, despite

having conveyed away the property over a year before and having ceased to exist as a corporate entity. JA 98-99, 235-39.

Fredericksburg 35 did not acquire the Property until December 18, 2002, well-after the Assignment was executed. JA 193-98. The fact that the Game Place and Fredericksburg 35 treated each other as landlord and tenant *after* Fredericksburg 35 acquired the Property does not provide any consideration for the previous Guaranty.[2] Simply put, Fredericksburg 35 has presented no evidence that Lightburn or the Game Place received anything of value in exchange for the Guaranty. Indeed, there is no evidence that Lightburn and the Game Place received the consent of the landlord at the time – Silver Company – to the Assignment. There is also no evidence that Silver Company would have objected to the Assignment or to the Game Place's occupancy absent a guarantee from Lightburn. Thus, there is no evidence that Silver Company provided any consideration for the Guaranty.

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[2] The fact that Fredericksburg 35 testified that a general district court action was filed against the "tenant entity" and that a judgment for possession was awarded has no bearing on the issues in this case. JA 60. No record of those proceedings was introduced into evidence and no evidence was offered as to the basis for the award of possession, i.e. whether the action was based on a written lease or on a month-to-month tenancy. Moreover, there was no testimony that Lightburn was a party to any such action.

Fredericksburg 35's reliance on the Game Place's execution of a tenant estoppel is also misplaced. Lightburn did not execute the certificate as guarantor. Indeed, Fredericksburg 35 testified that there was nothing in the estoppel certificate to indicate that Lightburn was "assuming or confirming any guarantee in his individual capacity." JA 124-25.

When Silver Company conveyed the Property to Fredericksburg 35, Fredericksburg 35 took only what Silver Company had, i.e. Fredericksburg 35 could not acquire greater rights with respect to the Lease or the Assignment than Silver Company. Because Silver Company provided no consideration for the Guaranty, it could not enforce the Guaranty. It follows that Fredericksburg 35 cannot enforce the Guaranty.[3]

Fredericksburg 35's argument that "no proof was required that Fredericksburg 35 was the owner at the time of the Assignment was executed [sic]" pursuant to Virginia Code § 8.01-279(B) makes no sense. That code section provides that if a party alleges that an entity "at a stated time, owned . . . any property . . . no proof of the fact alleged shall be required unless an affidavit be filed with the pleading putting it in issue."

As an initial matter, there is no dispute in this case that (i) the Assignment was executed on November 15, 2002 (ii) Silver Company owned the Property at that time, and (iii) Fredericksburg 35 did not acquire the Property until December 18, 2002. JA 224-25; 193-98. Thus, Fredericksburg 35 did not own the Property at the time of the Assignment.

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[3] Moreover, Fredericksburg 35 did not even provide any testimony that it "consented" to the Assignment or took any other action in reliance on or in exchange for the Guaranty. Instead, Fredericksburg 35 testified that it simply "accepted the assignment" by "essentially treat[ing] this tenant as its own," with no mention of the Guaranty. JA (77).

Moreover, Fredericksburg 35 never alleged that it owned – or that Amusement owned – the Property at the time the Assignment was executed. Indeed, there is no allegation in the Complaint or the Amended Complaint as to who owned the Property as of November 15, 2002 when the Assignment was executed. Fredericksburg 35's allegations that Amusement was its "predecessor in interest" and that Fredericksburg 35 "has succeeded to the interest" of Amusement simply do not allege facts that require a verified response under statute. Brief of Appellee at p. 14. Moreover, even if those allegations were admitted pursuant to the statute, neither of those allegations would establish ownership of the Property as of November 15, 2002. They merely establish that Amusement falls somewhere in Fredericksburg 35's chain of title – a fact about which there is no dispute.

CONCLUSION

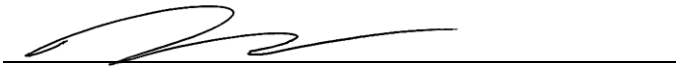
The Lease is unenforceable because it failed to comply with Section 55-2 and therefore "did not convey any interest in the property." *Granva Corp. v. Dietrich Walter Heyder*, 205 Va. 660, 665 (1964). All that was created when the Game Place took possession of the Leased Premises was a tenancy measured by the manner in which periodic rent was paid, month to month in this case. *See id.,* 205 Va. at 664 ("when tenant takes possession under a defectively executed instrument a tenancy is created. The kind of tenancy created, however, depends upon the manner in which the rent is received"), *citing Stores Building Corp v.*

Conover, 204 Va. 457, 459 (1963). That tenancy was properly terminated when the Game Place sent a notice to that effect on May 29, 2014. JA 50; Joint Trial Exhibit 6 (The Game Place "hereby gives notice of the termination of its month-month tenancy."); Virginia Code § 55-222 (tenancy from month to month "may be terminated by giving 30 days' notice in writing").

Even if the Lease was enforceable, Lightburn would have no liability under the Guaranty because the stated consideration – the consent of the landlord at the time to the Assignment – was never provided.

For these reasons, 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 9th day of January, 2018, pursuant to Rule 5:26, three paper copies of the Reply Brief of Appellants were hand-filed with the Clerk of the Supreme Court of Virginia and an electronic copy of the Brief was filed, via VACES. On this same day, an electronic copy of the Reply Brief of Appellants was served, via email, upon:

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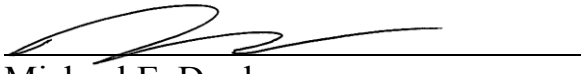

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