UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

ALYSSON MILLS, IN HER CAPACITY AS RECEIVER FOR ARTHUR LAMAR ADAMS AND MADISON TIMBER PROPERTIES, LLC

Plaintiff,

v.

GARY PROPERTY MANAGEMENT, LLC,

Defendant

Cause No. 3:22-cv-296-CWR-BWR

GARY PROPERTY MANAGEMENT, LLC'S REBUTTAL IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

Comes now, Gary Property Management, LLC ("GPM"), the Defendant in the above styled and numbered cause, and files its Rebuttal Memorandum of Authorities in Support of its Motion for Partial Summary Judgment, and would state as follows:

I. Introduction

GPM is clearly entitled to summary judgment as to the Receiver's Fraudulent Transfer Act claim (based on a theory of "constructive fraud") because the Receiver has recovered the entirety of Adams and Madison Timber's Ponzi – related assets which were contributed to the Oxford Springs venture. Moreover, the Receiver wrongly asserts that she has standing to assert this claim as a "creditor" of Oxford Springs which, she alleges, "paid too much" to acquire Parcel 2 from GPM in September 2016. That is a curious assertion given that the Receiver was also the single-member owner of Oxford Springs before she chose to dissolve the Company in 2021. She apparently is both creditor and owner (former) of Oxford Springs an entity which no longer exists.

In any event, to advance her claim under Mississippi's Fraudulent Transfer Act, the Receiver asserts that Oxford Springs did not receive "reasonably equivalent value" when it purchased Parcel 2 from GPM and that, at the time of the purchase, Oxford Springs was insolvent. Both propositions are incorrect as a matter of undisputed fact and law. Under the prevailing case law, Oxford Springs was not "insolvent" within the meaning of the Act at the time it purchased parcel 2 from GPM and, in any event, Oxford Springs received "reasonably equivalent value" under the totality of circumstances relevant to the determination of "value." Ultimately, GPM's sale of the 100 acre parcel to Oxford Springs in September 2016 does not fall within the ambit of the Act. Oxford Springs acquired the property through a loan provided by First National Bank of Clarksdale and the purchase was the product of a good faith, arm's-length negotiation. Indeed, the record shows that the Bank eventually canceled the indebtedness and related deed of trust arising from the purchase, and the eventual sales of Parcels 1 and 2 inured to the benefit of the Receivership Estate.

Regarding the "unjust enrichment" claim, the receiver fails to address the arguments raised by GPM in its Motion for summary judgment, namely, that claims for unjust enrichment arise only when there is no written or legal agreement. That is not the case here.

Finally, receiving fraudulent transfer claim is barred by the applicable one year statute of limitations. In our case, the cause of action accrued no later than the date the receiver entered into a settlement agreement with the Bank and Patrick Sands (August 2019).

II. Equity Powers of The Receiver

GPM recognizes the appropriateness of this Court's broad equity powers to appoint receivers and administer receivership estates for the purpose of preserving and protecting property placed within its control pending final disposition. See Gordon v. Washington, 295 U.S. 30 (1935). Once assets have been placed in a receivership, "it is a recognized principle of law that the district court has broad powers and wide discretion to determine the appropriate relief in an equity receivership." See SEC v. Stanford Int'l Bank, Ltd., 927 F.3d 830, 840 (5th Cir. 2019). However, neither a receiver's nor a receivership court's powers is unlimited. See Whitcomb v. Chavis, 403 U.S. 124, 161 (1971). When such limitation on a receiver's powers "derive from the broader principle that the receiver collects and distributes only assets of the entity in receivership." Stanford Int'l Bank, 927 F.3d at 840 ("like a trustee in bankruptcy or for that matter the plaintiff in a derivative suit, and equity receiver may sue only to redress injuries to the entity in receivership"). Here, the Receiver may only sue to redress injuries to Madison Timber and its investors.

Consistent with the broad, yet limited nature of its equity powers, the Receiver entered into settlement agreements, subject to the court's approval, with First National Bank of Clarksdale and Patrick Sands in August2019. According to the Receiver's motion for approval of the proposed settlement with FNBC, (the "Bank") the Bank not only financed Oxford Springs' purchase of Parcel 2, it also maintained a banking relationship with Adams and Madison Timber and was therefore susceptible to a claim by the Receiver on behalf of Madison Timber's defrauded investors. In order to resolve the Receiver's threatened claims, the Bank agreed to cancel the entire indebtedness ($4,552,113) owed by Oxford Springs and the related deeds of trust. (Motion to Approve FNBC Settlement).

Simultaneously with its Agreement with the Bank, the Receiver entered into a settlement agreement with Patrick Sands. In its motion to approve the settlement, the Receiver acknowledged that Sands owned a 47.5% interest in Oxford Springs and was a guarantor of the Bank loans to Oxford Springs and, separately, that Sands was a Madison Timber investor who was a likely claimant of the Receivership Estate. (Motion to Approve Sands Settlement, Exhibit D). Essentially, Sands agreed to settle convey his 47.5% interest in Oxford Springs to the Receiver and release the Receivership Estate of any claim for amounts due under its outstanding Madison Timber promissory notes, in exchange for the Receiver's obtaining the Bank's release of Sands' guarantees of the Bank's loans to Oxford Springs. The settlements, which the court approved, resulted in the Receiver becoming the sole member of Oxford Springs free and clear of any debt. (Complaint, ¶ 35). Eventually, the Receiver sold Parcels 1 and 2 for the combined amount of $5,565,000, an amount well in excess of the $1.3 million Adams contributed to the Oxford Springs venture.

II. Fraudulent Transfer Act

The Receiver alleges that Oxford Springs engaged in "constructive fraud" within the meaning of the Fraudulent Transfer Act because it did not receive "reasonably equivalent value" when it purchased Parcel 2 from GPM, and did so at the point that Oxford Springs was "insolvent." Both propositions are wrong. First, by way of a preliminary yet essential point, receiver is acting for the benefit of the creditors of Madison Timber, not Oxford Springs. It is true that Oxford Springs held Ponzi – related funds in the form of Adams capital contributions but the Receiver's authority and power in that regard was limited to the return of those monies to the Receivership Estate for the benefit of Madison Timber's investors. In that sense, receiver was functioning as a "creditor" of Oxford Springs. However, the Receiver does not explain how her position as creditor of Oxford Springs on behalf of the Receivership Estate entitles her to assert a claim under the Act against GPM. Again, the moneys GPM received from Oxford Springs were derived from a loan from First National Bank of Clarksdale and had nothing to do with Adams capital contribution. The Receiver's right and authority to follow the ill-gotten assets does not lead to GPM or the sale of Parcel 2 to Oxford Springs. The Receiver ignores this point in advancing her argument.

As to the elements of the Act on which the Receiver has the burden of proof, she cannot establish a genuine issue of material fact as to whether Oxford Springs failed to receive "reasonably equivalent value" for the transfer or that Oxford Springs was "insolvent" at the time of the purchase of the GPM property.

"Reasonably equivalent value" within the meaning of the Act has been interpreted to include "any benefit whether direct or indirect." Pension Transfer Corp. v. Beneficiaries, 444F 3rd 203, 212 (3d Cir. 2006). In evaluating whether the debtor received reasonably equivalent value", the courts typically employ a "totality of the circumstances" analysis which includes (1) the fair market value of the benefit received as a result of the transfer, (2) the existence of an arm's-length relationship between the debtor and the transferee, and (3) transferee's good faith. Id. under this analysis, "indirect economic benefits" are the appropriate factor to consider when evaluating value. In our case, Oxford Springs received property that regarded as "critical" to the economic success of its future development. Obviously, according to Oxford Springs, having direct access to Highway 7 was critical and therefore justified paying the price GPM required. Although the receiver points to the costs of the infrastructure improvements identified in the warranty deed as a measure of "value," the cost of these improvements inured to the direct benefit of Oxford Springs since they were to take place on its property and therefore should not be considered as a measure of whether received "substantially equivalent value." GPM would add to the value analysis the fact that the bank, when making the loan to Oxford Springs purchased parcel to value the property at $860,000. The appraiser's report which the bank relied on to substantiate the loan to Oxford Springs is clearly a business record and admissible for purposes of the present motion for summary judgment.

In North American Catholic Educational Programming Foundation v. Gheewalla, 930 A 2d 92 (De. 2007) citing Prod. Res. Grp. v. NCT Grp., 863 A.2d 772, 782 (Del. Ch. 2004); Geyer v. Ingersoll Publ'ns Co., 621 A.2d 784, 789 (Del. Ch. 1992); and then McDonald v. Williams, 174 U.S. 397, 403 (1899)), the Delaware Supreme Court held "insolvency may be demonstrated by either showing (1) 'a deficiency of assets below liabilities with no reasonable prospect that the business can be successfully continued in the face thereof,' or (2) 'an inability to meet maturing obligations as they fall due in the ordinary course of business.'"

Citing the North America Catholic case, the Arizona Appellate Court recognized a company's balance sheet could show negative equity in the amount of $18.3M and still not necessarily fall under the first prong of the test. See Kottayil v. Insys Therapeutics, Inc. (Ariz. App. 2017), where the court found;

> "The mere fact that Insys's balance sheet reflected total assets of $8.5 million and total liabilities of $26.8 million (including almost $22 million in debt owed to Kapoor) does not equate to a finding under the first test of North American Catholic that there is "no reasonable prospect that the business can be successfully continued." *Id*.; see also In re Teleglobe Commc'ns Corp., 392 B.R. 561, 599-601 (D. Del. 2008) (rejecting the argument that the "no reasonable prospect that the business can be successfully continued 'prong' adds an unreasonable qualifier to the basic definition of insolvency"). Indeed, Insys's

> negative equity is only marginally relevant given the company's status as a start-up. *See* U.S. Bank Nat'l Ass'n v. U.S. Timberlands Klamath Falls, L.L.C., 864 A.2d 930, 948 (Del. Ch. 2004) ("The defendants are clearly right to argue that having liabilities in excess of the book value of assets is not dispositive of the issue of whether a company is insolvent. If it were, many start-up companies would be insolvent."), *vacated and remanded on procedural grounds*, 875 A.2d 632 (Del. 2005). Furthermore, "as long as [Insys] was actually receiving funding from [Kapoor], there were reasonable prospects that the business . . . could be continued." Teleglobe, 392 B.R. at 600. The record supports the trial court's conclusion that Insys could continue successfully, as it had from its inception, with Kapoor's ongoing financial support."

At the time of the purchase of the Gary Property, there is no evidence that Oxford Springs, LLC was not meeting its obligations as they would come due under the usual course of business for a large-scale developer in its start-up phase or that one Member in particular would not provide such funding . Patrick Sands, a multimillionaire developer who was a Member in Oxford Springs, LLC, was clearly enamored with Oxford Spring's prospects and progress in obtaining contracts and the described the acquisition of the Gary Property as having obtained a "critical" piece of land to the success of the project. The LLC had contracts on other acreage for $10,000 per acre which it had purchased for less than $2,500 per acre.

Based on the foregoing, GPM is entitled to summary judgment to any and all claims brought pursuant to the Mississippi Fraudulent Transfer Act.

III. Unjust Enrichment

The Receiver's response does not address the elements of her "unjust enrichment" claim under Mississippi law. Instead, she asks the court to disregard the legal shortcomings of her claim and pleads equity. Again, however, "unjust enrichment" claims only apply to situations where there is no legal contract but where the person sought to be charged is in possession of money or property which in good conscience and justice should not retain but should deliver to another." Hans v. Hans, 42 So.2d 1117, 1122 (Miss. 1986). In our case, we have a contract.

Furthermore, and again, GPM did not enrich itself "unjustly" as to Oxford Springs in the sense that GPM had promised to do some form of act or conveyance in exchange for consideration, which it received, yet failed to perform the act or conveyance. Instead, GPM and Oxford Springs engaged in a lengthy series of arm's-length negotiations resulting in a written agreement providing for the payment of $10,000 per acre for the 100 acre tract and certain covenants which were entirely reasonable under the circumstances. See Magnolia Federal Savings and Loan Assoc.v. Randall Craft Realty Co., 342 So.2d 1308 (Miss. 1977). That is not unjust enrichment.

Furthermore, like claims brought pursuant to the Fraudulent Transfer Act, claims for unjust enrichment are subject to a three year limitations period. Anderson v. LaVere, 136 So.3d 404,411 (Miss. 2014). Limitations period begins to run when the cause of action accrues, that is, when it comes into existence as an enforceable claim. Id. In our case, the cause of action for unjust enrichment accrued, under the Receiver's theory of this claim, at the moment Oxford Springs and GPM closed on the property in September, 2016. Accordingly, a claim for unjust enrichment is barred by the three year statute of limitations.

IV. Conclusion

In conclusion, GPM respectfully requests this court to enter summary judgment in its favor as to Counts III and IV of the Complaint given the lack of a genuine issue of material fact as to each of the elements of the Receiver's claims under each Count and, further, based upon the bar of the applicable statutes of limitation to each claim.

Respectfully Submitted this 26th day of May, 2023.

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CERTIFICATE OF SERVICE

I certify that I electronically filed this Rebuttal in Support of its Motion for Summary Judgment via the court's ECF System and thereby served all counsel of record.

This, the 26th day of May, 2023.

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