FOURTH JUDICIAL CIRCUIT OF VIRGINIA
CIRCUIT COURT OF THE CITY OF NORFOLK

EVERETT A. MARTIN JR.
JUDGE

150 ST. PAUL'S BOULEVARD, SUITE 800
NORFOLK, VIRGINIA 23510

June 15, 2018

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RE: Walter Howell, III, *et al.* v. Kianna M. Boone, *et al.*
Civil No. CL17-8699-04

Dear Gentlemen:

The present motion demonstrates the wisdom of having attorneys prepare documents in business transactions.

I granted judgment by default against all three defendants on October 31, 2017, for $85,851.69, attorney's fees, and costs. On March 30, 2018, after several executions by the plaintiffs[1] to try to collect, the defendants filed a motion to set aside the default judgment. They raise four grounds. I overruled the three procedural grounds at the hearing on May 29, 2018, and I include those rulings in this letter as there was no reporter present.

Service on the Boones

The plaintiffs advanced money to 400 St. James, LLC (the "LLC"). Kianna Boone signed the promissory note in Portsmouth and the real property involved is located in Suffolk ("the Property"). The Boones are both residents of North Carolina.

As this dispute arises out of the transaction of business in Virginia, the plaintiffs served the Boones through the Secretary of the Commonwealth. *Code* §§ 8.01-328.1 (A), 8.01-329. That was proper. The Boones claim service was defective because the plaintiffs did not give

[1] In addition to Mr. Howell, Impact Mental Health Services, L.L.C., is named as a plaintiff.

them the notice required by *Code* § 8.01-296 (2)(b). The plaintiffs were not required to do so. That notice is required when a defendant is served by posting on the front door of his usual place of abode. That was not the mode of service the plaintiffs used, and Mr. Roussos's reference to *Code* § 8.01-296 (2)(b) in paragraph 3 of his motion for default judgment (whatever the reason may have been) did not impose that requirement on him.

Service on the LLC

The plaintiffs attempted to serve Carol Boone, the LLC's registered agent, at its registered office, 4006 Victory Boulevard, Portsmouth. The return stated: "Suites A-K. Suite J is a mailbox store." In their motion to set aside, the defendants allege that address:

> is in fact not a mail box, but rather a UPS Store owned by John Espinosa. Mr. Espinosa and his employees have specific instructions to notify [the LLC's] Agent, Carol Boone, if service of the LLC is attempted from a process server so she can make arrangements to accept service.

Motion to Set Aside at paragraph 9.

This is not how a registered agent and office work. First, if as here, an individual member of the LLC is to be the registered agent, she is to be a Virginia resident. *Code* § 13.1-1015 (A)(2)(a). Second, the registered agent may by a notarized writing designate a natural person in her office upon whom process may be served. *Code* § 13.1-1018 (B). Carol Boone did not do this and the address was not her office, but Espinosa's.

One of the purposes of a registered agent and office is to provide certainty to a plaintiff. Certainty that he has done what is required to give a defendant notice that a case has been instituted against it in a court of law. Boone's catch-me-if-you-can arrangement with Espinosa does not comply with the law.[2] The plaintiffs had no obligation to play her game, and service on the Clerk of the State Corporation Commission was proper. *Code* § 13.1-1018 (B).

Improper Venue

I need not determine if venue in Norfolk is proper. The first clause of the second sentence of *Code* § 8.01-258 resolves the issue.

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[2] The State Corporation Commission investigated the LLC's registered office and agent and came to the same conclusion. See letter of March 29, 2018, from Charles L. Rogers to Carol Boone, attached as Exhibit H to the plaintiffs' "Answer and Motion to strike Defendant's Motion to set aside Defendant Judgment."

Failure to State a Claim/Improper Defendants

This ground only attacks the judgment against the Boones. A default judgment ought not to be granted and can be set aside if the complaint fails to state a cause of action against the defendant. In deciding whether the complaint states a cause of action, the court reviews its allegations. *Landcraft Co. v. Kincaid*, 220 Va. 865, 870, 263 S.E.2d 419, 422 (1980).

The agreement was signed on August 23, 2016, and the promissory note was executed the next day. As they relate to the same transaction, they should be construed together. *Countryside Orthopaedics v. Peyton*, 261 Va. 142, 541 S.E.2d 279 (2001). The plaintiffs claim they were damaged when the defendants borrowed $75,000 from an unrelated third party on March 2, 2017, and encumbered the Property with a deed of trust to secure that loan. The plaintiffs were damaged because they never received a deed granting them a 55% interest in the Property. Any competent attorney would have insisted upon the delivery and recordation of such a deed when the money was advanced.

The plaintiffs compute their damages by adding the unpaid balance of the note - $20,665.98 – and an additional $65,187.71 they paid to contractors and materialmen for improvements to the Property. The complaint does not allege a note exists to evidence the payment of these additional funds, but in paragraphs 18 and 27, it does allege these additional funds were paid.

Count I is for breach of the agreement; Count II for default on the note; Count III for unjust enrichment. Counts I and III are pleaded against all defendants; Count II is pleaded only against the LLC, the maker of the note.

The LLC, not the Boones, owned the Property. Thus it, not they, was enriched by the money the plaintiffs paid. Count III was not properly plead against the Boones and it cannot support the judgment against them.

The agreement is a masterpiece of ambiguity. It is "between the two parties . . . I Kianna M. Boone and Carol Boone (sic) of the first party (sic) agree by our signatures of the follows (sic)." This is its operative provision:

> THE PROPERTY LISTED AS 400-402 AND 404 SAINT JAMES AVE SUFFOLK VA 23434, CURRENTLY OWNED SOLELY BY 400 SAINT JAMES AVE LLC AGREE AS OF August 23, 2016 TO HAVE THE SECOND PARTY OWN 55% UNTIL LOAN PROCEEDS HAVE BEEN PAID IN FULL. UPON COMPLETION

> OF SAID LOAN, SECOND PARTY WILL OWN A 50% OWNERSHIP UNDER A NEW NAME OF CHOSE....

Kianna Boone and Carol Boone both signed it. After each of their printed names under the signature lines appears "(400 Saint James Ave LLC)." The words "manager," "member," or "agent" do not appear after their signatures or under the signature lines. Thus they, not the LLC, are explicitly stated to be "the first party." The ambiguity raised by the inclusion of "(400 Saint James Ave LLC)" would be a defense to their individual liability. However, I am not to consider defenses in deciding whether the complaint states a cause of action. *Landcraft Co.*, 220 Va. at 871-72, 263 S.E.2d at 424. I find Count I states a cause of action against the Boones.

Count IV alleges promissory fraud against all defendants. The plaintiffs claim the defendants represented they would receive an interest in the Property, but the defendants had no intention of granting it; that the defendants had an obligation to record a security interest in the Property in favor of the plaintiffs and failed to do so[3]; that the defendants instead entered into another loan transaction with a third party and encumbered the Property. Complaint, paragraphs 41-44.

On brief, the Boones argue that the LLC was the owner of the Property and the only defendant that was a party to and had obligations under the agreement and the note. I have rejected the latter contention in my discussion of the agreement. With respect to the former argument, as an artificial person the LLC could convey no interest in the Property except by the acts of natural persons – here, the Boones.

At the hearing, the Boones relied on the source of duty rule to bar this claim. There will always be an agreement between the parties in a case of promissory fraud, and if the existence of the agreement barred the tort, the tort would not exist. Promissory fraud arises out of a duty the law, not an agreement, imposes. Do not make a promise to induce another to rely on it when you have no present intention to fulfill it. The deception occurs before the agreement is made. Our Supreme Court recently held with respect to a claim of fraudulent inducement: "a party making fraudulent representations cannot rely on the terms of a contract procured by fraud to defeat recovery in tort." *CGI Federal v. FCi Federal*, Record No. 170617, slip opinion at 12 (June 7, 2018). In this regard, see also *Abi-Najm v. Concord Condominiums*, 280 Va. 350, 699 S.E.2d 483 (2010). I find Count IV supports a judgment against the Boones.

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[3] The second sentence of paragraph 7 of the promissory note might contradict this claim. It seems to impose the obligation "to perfect the security interest in the Security" on the plaintiffs. But if the plaintiffs were acquiring a 55% interest in the Property, they would be co-tenants, not creditors, and the LLC, by its manager or members, would have to execute and deliver a deed. See first sentence of this letter, *supra*.

Count V alleges a breach of fiduciary duty. The plaintiffs allege they were to receive an interest in the Property. Complaint, paragraphs 6, 23, and 25. Yet they allege in paragraph 50 "As an intended member/owner of [the LLC, the Boones] owed fiduciary duties of loyalty and care to the Plaintiffs." Were the plaintiffs to be co-tenants in the Property with the LLC or members of the LLC with the Boones? Except for the allegation of paragraph 50 of the complaint, its other allegations and the terms of the agreement indicate the former. The plaintiffs received neither a deed to the Property nor membership in the LLC. Finding that Counts I and IV support a judgment against the Boones, I need not attempt to untangle the knot of the existence *vel non* of a fiduciary relationship among the parties, especially as neither of you briefed the issue.

I attach an order reflecting these rulings.

Sincerely yours,

Everett A. Martin, Jr.
Judge

EAMjr./mls