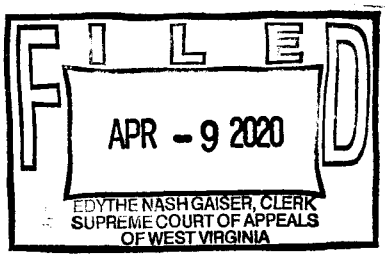
SUPREME COURT OF APPEALS OF WEST VIRGINIA

DENISE JOHNSON,
Plaintiff Below, Petitioner

v.

APPEAL NO. 19-1014
(Civil Action No. 19-C-178)

RUTH ANN PINSON,
Defendant Below, Respondent



PETITIONER'S REPLY BRIEF

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INTRODUCTION

This appeal centers on two issues: (1) whether the circuit court correctly interpreted the Uniform Fraudulent Transfers Act, W. Va. Code §§ 40-1A-1, et seq. ("UFTA") and (2) whether the circuit court erred in denying Petitioner's motion to add a third party to the underlying case.

Respondent asserts that UFTA does not provide a remedy to the holder of a claim that is not reduced to judgment. This interpretation is incorrect based on the various cases cited in "Petitioner's Brief" regarding an individual's right to pursue a claim under analogous statutes as well as the clear wording of UFTA. Here, the record shows that Mark Pinson signed as an individual to an absolute, independent and unconditional guaranty to the Promissory Note. Even though the confessed judgment was not entered against him personally in the State of Virginia, the guaranty provides a separate and distinct avenue of liability which allows a party to pursue a claim under UFTA even if said claim has not been reduced to judgment. Respondent solely focuses on the fact that Mark Pinson was not a party to the confessed judgment in the State of Virginia and that this somehow insulates Mr. Pinson from any fraudulent action he may take to avoid paying his separate guaranty, such as transferring assets out of his name and into his wife's name. This interpretation is at odds with the purpose of UFTA. Petitioner should have the right to pursue her fraudulent transfer claim against Respondents.

Regarding the issue of adding Mark Pinson as a party to the underlying case, Respondents cannot reasonably argue that they would be prejudiced by Mr. Pinson's addition. Although UFTA allows a party to pursue a claim directly and solely against the transferee of a fraudulent benefit, Petitioner's failure to add Mark Pinson as a party at the beginning of the case should not prohibit Petitioner from being granted leave to amend the complaint on the basis of a good faith mistake and allow the amendment to relate back to the date of filing.

ARGUMENT

I. Petitioner Has Standing Under UFTA Against Respondents

Petitioner received an assignment from James River Coal Sales, Inc. of its confessed judgment against Producers Coal, Inc. in the State of Virginia. Mark Pinson was the President of Producers Coal, Inc. and he signed a separate, unconditional personal guaranty for the note between James River Coal Sales, Inc. and Producers Coal, Inc. Respondent argues that Petitioner has no right to pursue a claim against Respondents Mark and Ruth Pinson under the UFTA because "Mark Pinson was never made indebted to James River Coal Sales, Inc." (Respondent's Brief, Page 8). By making this argument, Respondent ignores a significant fact: Petitioner has the right to pursue her claim directly against Mark Pinson under the personal guaranty and is thus not bound by the terms of the confessed judgment.

UFTA defines a claim as "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent . . . ." W. Va. Code § 40-1A-1(c); *See also* W. Va. Code § 40-1A-1(d), defining creditor as a "person who has a claim." Here, the judgment is actionable against both Producers Coal, Inc. and Mark Pinson. The Payment Guaranty signed by Mr. Pinson states the following:

> 1. **GUARANTY OF PAYMENT.** The Guarantors hereby jointly and severally guarantee to Beneficiary the full and punctual payment when due of all monetary obligations of Obligor to Beneficiary arising out of the Promissory Note, as such Promissory Note may be amended from time to time hereafter (the "Note Obligations"). This Guaranty is an absolute, unconditional and continuing guaranty of the full and punctual payment of the Note Obligations when due and their collectability, and is in no way conditioned upon any requirement that Beneficiary first attempt to collect any of the Note Obligations from Obligor or resort to any security or other means of obtaining their payment. Payments by the Guarantors hereunder may be required by Beneficiary on any number of occasions.

(J.A. 043).

The language of this guaranty clearly shows that Mr. Pinson has independent liability on the basis of the default. The guaranty is "absolute, unconditional, and continuing" and "is in no way conditioned upon any requirement that Beneficiary first attempt to collect any of the Note Obligations from Obligor [.]" (J.A. 043). Respondent attempts to argue that the personal guaranty was subsumed by the confessed judgment "with no independent viability left in the note" by citing the case *Sands v. Roller*, 118 Va. 191, 86 S.E. 857, 858 (1915). (Respondent's Brief at 8). As discussed in Petitioner's Brief, *Sands v. Roller* involved a bank's attempt to collect attorney's fees and costs arising from its previous suit to obtain a judgment against a debtor who defaulted on a loan agreement. The Virginia Court correctly found that the bank was barred from going back to court for frees from the default where the litigation on the note had already been settled and reduced to judgment as to that party. As noted in *Ives v. Williams*, 143 Va. 855, 860, 129 S.E. 675, 676 (1925), "a guaranty is deemed to be absolute unless its terms import some condition precedent to the liability of the guarantee. 28 C.J. 895 and 972." The payment guaranty does not include any condition precedent and by its own terms allows for the Petitioner to pursue a claim against Mark Pinson.[1]

Respondent also claims that even if Petitioner were allowed to pursue her claim against Mr. Pinson, "her task of going forward under the UFTA would still be formidable." (Respondent's Brief at 12). Respondent argues that Petitioner would face great difficulty proving that Mr. Pinson's real property transfer was an attempt to protect his assets from a potential judgment. These editorial comments make clear that this matter involves genuine issues of material fact and that this matter was not ripe for summary judgment.

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[1] Petitioner's Brief provides a more detailed analysis of the Virginia law on absolute guaranty contracts at pages 9-12.

Finally, it cannot be overstated that Mr. Pinson was listed as an obligor to the abstract of judgment filed with the Clerk of the County Commission of Cabell County, West Virginia during the domestication of the confessed judgment. (J.A. 023). This abstract made Mark Pinson an obligor to the judgment when the judgment was domesticated in Cabell County, West Virginia. (J.A. 023). Mr. Pinson had an opportunity to object to the form of the requested domesticated document that listed him as an obligor, but he never objected despite receiving notice of the case and the domestication procedure.

Further, Petitioner did ask the lower court to "take the filings in the light most favorable to Plaintiff, or, in the alternative, allow discovery to proceed so a factual record may be developed." (J.A. 109). Given the disputed facts and evidence of record, the circuit court erred in granting summary judgment in favor of Respondent before allowing the record to be factually developed.

II. Petitioner Should Have Been Granted Leave To Amend Her Complaint

As noted in Petitioner's Brief, Petitioner does not concede that Mark Pinson is an indispensable party to the underlying action; however, the circuit court appeared to express the opinion that Mr. Pinson may be a necessary party to the case at the hearing. (J.A. 123-141). Following the hearing, Petitioner moved to amend the complaint to add Mr. Pinson as a party under Rule 15 of the West Virginia Rules of Civil Procedure. Rule 15 is to be construed liberally "to promote the ends of justice." *Muto ex rel. Muto v. Scott*, 224 W. Va. 350, 355, 686 S.E.2d 1, 6 (2008). In the case at hand, justice clearly mandates that Petitioner be provided the opportunity to amend her complaint and add Mark Pinson as a party.

Under Rule 15(c)(3) of the *West Virginia Rules of Civil Procedure* [1998], an amendment to a complaint changing a defendant or the naming of a defendant will relate back to the date the

plaintiff filed the original complaint if: (1) the claim asserted in the amended complaint arose out of the same conduct, transaction, or occurrence as that asserted in the original complaint; (2) the defendant named in the amended complaint received notice of the filing of the original complaint and is not prejudiced in maintaining a defense by the delay in being named; (3) the defendant either knew or should have known that he or she would have been named in the original complaint had it not been for a mistake; and (4) notice of the action, and knowledge or potential knowledge of the mistake, was received by the defendant within the period prescribed for commencing an action and service of process of the original complaint. Syl. Pt. 4, *Brooks v. Isinghood*, 213 W. Va. 675, 584 S.E.2d 531 (2003). Petitioner details how she meets these four requirements in "Petitioner's Brief" at pages 12-15.

Respondent focuses on the "mistake" requirement (3) in her brief and claims that "the circuit court was clearly correct in finding that such a representation that Mark Pinson was overlooked by 'mistake' in these proceedings is preposterous." (Respondent's Brief at 14). However, Respondent also concedes that a party may pursue a transferee of a fraudulent conveyance under the UFTA. (Respondent's Brief at 12.) Petitioner originally pursued the claim only against Respondent Ruth Pinson, the transferee, because the transferee is the only party with the authority to rescind the real property transfer. Mark Pinson was arguably not an indispensable party to the case given that he did not have the legal authority to satisfy the relief requested in the Complaint.

Even if Mark Pinson is an indispensable party to the case, Petitioner's initial mistake in not including him does not prejudice either Mark or Ruth Ann Pinson. First, there is no question that the claim asserted in the Amended Complaint arose out of the same transaction as alleged in the original complaint. Mark Pinson made the alleged fraudulent transfer to Respondent on

April 22, 2015. (J.A. 018-21). Second, Respondent Ruth Ann Pinson was personally served in late April 2019 at the marital home where she resides with Mr. Pinson. Mr. Pinson likely would have received notice of the complaint on that date and is not prejudiced in maintaining a defense to this action. Furthermore, Mr. Pinson was present in court on July 25, 2019 for the hearing on Respondent's motion for summary judgment and counsel for Respondent acknowledged that Respondent and Mr. Pinson reside together at the subject property. (J.A. 128, 135).

Third, Mr. Pinson knew or should have known that he could have been named in the original complaint if not for the alleged mistake. A similar case was filed against Respondent on September 5, 2017 by The Ohio Valley Bank Company alleging that the same fraudulent real estate transfer caused damage to the mortgagor creditor. (J.A. 074-79). Mr. Pinson was thus on notice of this type of claim and understood the kind of relief that could be requested and granted. Fourth, and finally, Mr. Pinson has notice and knowledge that there may have been a mistake in not adding him as a party within 120 days after the commencement of the action. The original complaint was filed on April 18, 2019 and Petitioner had until August 18, 2019 (120 days) to get service. Based on the foregoing, there is simply no way to claim that he will be prejudiced by being added to the complaint. The amendment of the complaint should have been granted and said amendment should have related back to the date of filing.

Moreover, equitable remedies are not subject to any statute of limitations in West Virginia. *See Dunn v. Rockwell*, 225 W. Va. 43, 54, 689 S.E.2d 255, 266 (2009)("Our law is clear that there is no statute of limitation for claims seeking equitable relief . . . . '[s]tatutes of limitation are never applicable to causes of action falling within the exclusive jurisdiction of courts of equity.'"). Therefore, notwithstanding any statute of limitations defense, Petitioner may pursue relief against the Respondents to solely have the real property transfer rescinded.

III. Petitioner Established Genuine Issues of Material Fact

Respondent's final argument claims that Petitioner should have followed the process of Rule 56(f) of the West Virginia Rules of Civil Procedure and requested a formal discovery continuance. Rule 56(f) provides a process for a party opposing a motion for summary judgment request additional time for discovery "should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition [.]" W. Va. R. Civ. P. 56(f). To begin, counsel for Petitioner noted that discovery would be helpful in the case at the hearing on Respondent's motion for summary judgment: "we would anticipate that there would be facts that would be disclosed in discovery . . . that the allegations can be supported by facts showing that there was an intent of Mr. Pinson to unload an asset [.]" (J.A. 131). Petitioner also requested discovery in "Plaintiff Denise Johnson's Reply Memorandum In Support of Motion for Leave to Amend Complaint" following the hearing on Respondent's motion for summary judgment. (J.A. 109).

The record evidence establishes genuine issues of material fact. Petitioner did not believe it was necessary to make a request under Rule 56(f) because the record established the disputed personal guaranty and confessed judgment. No written discovery or depositions occurred in the underlying case. "As a general rule, summary judgment is appropriate only after the parties have had adequate time to conduct discovery." *Elliott v. Schoolcraft*, 213 W. Va. 69, 73, 576 S.E.2d 796, 800 (2002). Given the posture of this case at the time of the hearing, a request under Rule 56(f) did not appear to be necessary.

CONCLUSION

The Respondents' Brief does not provide any significant support to uphold the circuit court's holding. The West Virginia Supreme Court of Appeals should reverse the circuit court's decision and find that (1) a creditor under UFTA does not need a judgment against an alleged debtor to pursue a claim under the Act; (2) genuine issues of material fact exist to determine the extent of Mark Pinson's liability under the judgment and contracts; and (3) Petitioner should be granted leave to amend her complaint to add Mark Pinson as a party to the underlying case.

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