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 BRIEF

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ASSIGNMENTS OF ERROR

1. Did the Circuit Court of Cabell County, West Virginia err in granting summary judgment to Respondent Ruth Ann Pinson and finding that Mark Pinson was not a debtor on the subject debt when the Uniform Fraudulent Transfers Act, W. Va. Code §§ 40-1A-1, et seq., does not require that a judgment be entered against the transferor (Mark Pinson) for a creditor (Petitioner Denise Johnson) to pursue a claim under the statute?

2. Did the Circuit Court of Cabell County, West Virginia err in granting summary judgment when it appears that there were questions of material fact that had not been resolved regarding Mark Pinson's individual liability on the underlying judgment and contracts?

3. Did the Circuit Court of Cabell County, West Virginia err in finding, without taking evidence, that the request to add Mark Pinson as a defendant failed to relate back to the date of filing of the action against Respondent, when at the time of the service of the complaint the Respondent and Mark Pinson were living together and the lawsuit was served on Respondent at the marital home?

STATEMENT OF THE CASE

The action below was brought by Petitioner Denise Johnson to set aside a real property transfer from Mark Pinson to Respondent Ruth Ann Pinson as a fraudulent conveyance pursuant to the Uniform Fraudulent Transfers Act, W. Va. Code §§ 40-1A-1, et seq. (J.A. 002-4). Petitioner has standing to pursue such a claim based on the following set of facts:

In 2014, Mark Pinson signed a personal payment guaranty in the approximate amount of $1,900,000.00 to James River Coal Sales, Inc. (J.A. 043-45). Mark Pinson also signed a promissory note as President of Producers Coal, Inc. in the approximate amount of $1,900,000.00 to James River Coal Sales, Inc. (J.A. 029-33). Mark Pinson subsequently defaulted on the obligations.[1] After defaulting on the obligations, Mark Pinson transferred his interest in a piece of real estate to Respondent on April 22, 2015. (J.A. 018-21).

On August 8, 2016, James River Coal Sales, Inc., obtained a confessed judgment against Producers Coal, Inc. in the Circuit Court for the City of Richmond, Virginia in the amount of $1,937,377.00. (J.A. 046-53). This judgment was assigned to Petitioner on March 29, 2017. (J.A. 023).

Petitioner sought to register the Virginia judgment in Cabell County, West Virginia after the assignment of the judgment. (J.A. 023-33). The Circuit Court of Cabell County, West Virginia issued a "Notice of Registration of Uniform Enforcement of Foreign Judgments" (Civil Action 17-C-287) on May 5, 2017. (J.A. 023-33). The Notice of Registration of Uniform Enforcement of Foreign Judgment listed both Producers Coal, Inc. and Mark Pinson as the Defendants/ Obligors. (J.A. 025).

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[1] Due to the circuit court's premature dismissal of this case, Petitioner was not provided an opportunity to provide evidence of the default. However, neither Respondent nor Mark Pinson have ever denied that Mr. Pinson defaulted on his obligation.

An Abstract of Judgment was issued by the Circuit Court of Cabell County, West Virginia by the Circuit Clerk on June 5, 2017. (J.A. 023). This judgment stated the following: "Judgment in favor of Plaintiff, James River Coal Sales, Inc., and against the Defendant, Producers Coal, Inc., and Obligor Mark Pinson for $1,937,377.00 with interest of 11.5% per annum from August 8, 2016, the date of Judgment, until paid, with costs of $356.00." (J.A. 023).

The instant case was brought by Petitioner to set aside the real estate transfer that Mark Pinson made of his residence to Respondent. (J.A. 018-21). Respondent filed a motion for summary judgment claiming that relief could not be granted against her as the transferee because the original Virginia judgment was never confessed against her husband Mark Pinson in his individual capacity. (J.A. 005-37).

After a hearing and an oral argument before the Honorable Christopher Chiles, Judge, in the Circuit Court of Cabell County, West Virginia on July 25, 2019, the Court suggested that Mark Pinson might be an indispensable party to the instant case. (J.A. 123-141). Petitioner thus sought to add Mark Pinson as a defendant. (J.A. 066-84). Mark Pinson retained separate counsel and objected to the motion for leave to amend the complaint. (J.A. 085-98). On October 7, 2019, the Court granted summary judgment in favor of Respondent and denied Petitioner's motion for leave to add Mark Pinson as a party to the case. (J.A. 112-122).

SUMMARY OF THE ARGUMENT

This appeal concerns two distinct issues: (1) did the circuit court err in granting summary judgment by finding that there were no genuine issues of material fact based upon its interpretation of the Uniform Fraudulent Transfers Act, W. Va. Code §§ 40-1A-1, et seq. and (2) did the circuit err in denying the Petitioner's motion to amend the complaint.

First, the circuit court granted summary judgment in favor of Respondent by finding that the Uniform Fraudulent Transfers Act, W. Va. Code §§ 40-1A-1, et seq. ("UFTA") did not apply to Petitioner's claim because Petitioner only had a judgment against Producers Coal, Inc. and not against Mark Pinson in his individual capacity. Although the foreign judgment recorded in the State of Virginia is against Producers Coal, Inc., the court erred in its interpretation of UFTA because the statute does not require a creditor to obtain judgment against an alleged debtor to pursue a claim against the debtor. Further, Mark Pinson signed a payment guaranty in his individual capacity for the promissory note between James River Coal Sales, Inc. and Producers Coal, Inc. The existence of the payment guaranty (and its legal effect) creates a genuine issue of material fact in the underlying action.

Second, the circuit court denied Petitioner's motion to amend the complaint to add Mark Pinson as a party to the case. To be clear, UFTA does not require the alleged debtor (in this case Mark Pinson in his role as a transferor of real property) be named in an action to set aside an alleged fraudulent real estate transfer. Nevertheless, the circuit court erred by ruling that the proposed amended complaint did not relate back to the original filing of the complaint. Petitioner made a good faith mistake in relying on her interpretation of UFTA and other evidence to believe that Mark Pinson was not a necessary party to the original action.

STATEMENT REGARDING ORAL ARGUMENT

This case is appropriate for oral argument under Rule 19 of the West Virginia Rules of Appellate Procedure because it involves the application of settled law.

ARGUMENT

1. The Circuit Court Erred in Granting Summary Judgment in Favor of Respondent

As noted recently by this Court, "[o]ur standard for reviewing an order granting summary judgment is well settled. 'A circuit court's entry of summary judgment is reviewed *de novo*.' Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). In conducting a de novo review, we apply the same standard for granting summary judgment that was applied by the circuit court." *Woods v. Jefferds Corporation*, 241 W.Va. 312, 317, 824 S.E.2d 539, 544 (2019). West Virginia law provides that summary judgment is appropriate in cases where there is no disputed issue relevant for trial. In considering the merits of a motion for summary judgment, the Court should grant such motion only when there is no genuine issue of material fact to be tried. *Kelley v. City of Williamson*, 221 W. Va. 506, 510, 655 S.E.2d 528, 532 (2007). A "material fact," for summary judgment purposes, is one that has the capacity to sway the outcome of the litigation under the applicable law. *Hawkins v. U.S. Sports Ass'n, Inc.*, 219 W. Va. 275, 278, 633 S.E.2d 31, 34 (2006). Summary judgment is thus appropriate only when "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Jochum v. Waste Mngmt. of W. Va., Inc.*, 224 W. Va. 44, 47, 680 S.E.2d 59, 62 (2009) (citations omitted).

A. The Circuit Court misinterpreted the UFTA

The Uniform Fraudulent Transfers Act, W. Va. Code §§ 40-1A-1, et seq. ("UFTA") provides a mechanism for creditors to obtain remedies for the fraudulent conduct of debtors. West Virginia Code § 40-1A-7(a) specifically states that a creditor may obtain "(1) [a]voidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim; [or] (2) [a]n

attachment or other provisional remedy against the asset transferred or other property of the transferee [.]" This section thus allows a creditor to file an action against the transferee, in this case Respondent, to obtain an attachment against the real property. Because Mark Pinson conveyed his entire interest in the asset (real property) to Respondent, the Respondent is the proper party to this suit as the grantee/transferee.[2] (J.A. 018-21).

Importantly, UFTA does not require Petitioner to obtain judgment against Mark Pinson to pursue her claim. The Act 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"; *See also* W. Va. Code § 40-1A-1(f), defining debtor as "a person who is liable on a claim."

The West Virginia Supreme Court of Appeals has not had the opportunity to interpret the definitions of UFTA. Significantly, West Virginia has adopted the model uniform act into its state code. "This article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among states enacting it." W. Va. Code § 40-1A-11, Uniformity of Application and Construction.

The Missouri Court of Appeals provides instruction on this issue in the case *Curtis v. James*, 459 S.W.3d 471 (Mo. Ct. App. 2015), where an injured party filed a fraudulent transfer action against the owners of the property where the injury occurred after the owners transferred significant assets to a trust following the accident. The injured party filed a civil suit against the

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[2] Petitioner, as an assignee to the judgment, has standing to pursue a claim under UFTA. Generally, any assignee in this scenario assumes the rights and responsibilities of the original creditor. Moreover, in *Solins v. White*, 128 W. Va. 189, 36 S.E.2d 132 (1945), the West Virginia Supreme Court of Appeals reversed a decision by the lower court and ruled that the plaintiff, an assignee to a judgment, was allowed to maintain his suit under the Act to obtain relief for his judgment lien. Although the case does not discuss whether an assignee has standing to pursue a claim under the Act, the mere fact that the Court ruled in favor of an assignee to a judgment shows that Petitioner has standing to pursue this action.

owners for his injuries and then filed another suit seeking to void the transfer of assets to the trust. *Curtis*, 459 S.W.3d at 473-474. The lower court granted summary judgment in favor of the owners and held that the injured party was not a creditor under the Missouri Uniform Fraudulent Transfer Act because he had not reduced his personal injury action to lien or judgment. *Curtis*, 459 S.W.3d at 473-474. The injured party appealed the decision. *Curtis*, 459 S.W.3d at 473-474.

The Missouri Court of Appeals looked to other courts to interpret its version of UFTA. In noting that UFTA is a uniform act among the various states, the court proceeded to cite to six cases in five different jurisdictions to conclude that a creditor does not need a judgment to pursue a claim against the debtor.

> The interpretation of other courts can provide guidance in analyzing an act based upon a uniform act. See *Thompson v. Hanson,* 142 Wash. App. 53, 174 P.3d 120, 126 (2007) (explicit purpose of the Uniform Fraudulent Transfer Act is uniformity; the interpretation of the other courts provide guidance). This Court's holding that a creditor is not required to obtain a judgment before pursuing an action under the Act is consistent with the interpretations of other jurisdictions that a pending or threatened lawsuit is a "claim" under the Uniform Fraudulent Transfer Act or similar state provisions. See *Tolle v. Fenley,* 132 P.3d 63, 66 (Utah App.2006) (under the broad definition of "claim" under the Uniform Fraudulent Transfer Act, a party was a creditor when her claim had arisen through a threat of civil action even though her claim was not reduced to a judgment at the time of the transfer); *Baker v. Geist* 457 Pa. 73, 321 A.2d 634, 636 (1974) (a "claim" that can be matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent does not require a judgment); *Bishop v. Patton,* 288 Ga. 600, 706 S.E.2d 634, 640 (2011) (holder of contingent tort claim may be a protected creditor); *In re Advanced Telecomm. Network, Inc.,* 490 F.3d 1325, 1335 (11th Cir.2007) (pending litigation is a prototypical contingent liability and thus a "claim" for determining insolvency); and *United States v. Green,* 201 F.3d 251, 257 (3d Cir.2000) (awareness of probable legal action against a debtor amounts to a debt for purposes of determining solvency).

Curtis, 459 S.W.3d at 475-76.

The Missouri Court of Appeals proceeded to reference the comments of the model act that various states, including West Virginia, have adopted:

> The comments to the Uniform Fraudulent Transfer Act further support this holding, emphasizing that "[a]n important reform effected by the Uniform Act was the elimination of any requirement that a creditor have obtained a judgment or execution returned unsatisfied before bringing an action to avoid a transfer as fraudulent." U.F.T.A. Refs & Annos (1984). See also, U.F.T.A. § 7. Remedies of Creditors, cmt. (4) (creditor not required to obtain judgment again debtor in order to proceed under the Uniform Act). The comments assert that under the Uniform Act's definitions of "creditor" and "claim," which are identical to those in the Missouri Act, the holder of an unliquidated tort claim or a contingent claim may be a protected creditor. U.F.T.A. § 1. Definitions, cmt. (4).

Curtis, 459 S.W.3d at 476. After analyzing the above cases and the comments to the model act, the Missouri Court of Appeals found that a creditor does not need a judgment to pursue an action against a debtor. *Curtis*, 459 S.W.3d at 475, 477-78.

West Virginia has adopted the uniform UFTA statute and thus the same legal interpretation should apply. Based on the interpretations of these courts, Petitioner meets the definition of creditor and possesses a claim to assert against Respondent. The circuit court thus erred in finding that "there being no judgment against Mark B. Pinson, there is no legal support, within this civil action, upon which to support Plaintiff's cause of action, as pleaded, under the UFTA against Defendant Ruth Ann Pinson and her said real estate." (J.A. 121). This conclusion of law stands in direct contrast to the majority view of interpreting UFTA and must be reversed.

B. The Circuit Court Erred in Finding That There Were No Genuine Issues of Material Fact Regarding President Mark Pinson's Liability for the Judgment

The circuit court erred in its interpretation of UFTA. On account of this error, the circuit court refused to allow the parties to engage in discovery to determine the extent of Mark Pinson's liability on the judgment. Although the confession of judgment was only filed against Producers Coal, Inc. in Virginia, significant issues of fact remain unsettled. 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. (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 received notice of the proceeding by certified mail on May 9, 2017, which provided him an opportunity to object to the domestication of the Virginia judgment with his name listed on the abstract. (J.A. 024). Despite receiving this notice, Mr. Pinson did not object to the domestication of the judgment in West Virginia that listed him as an obligor.

Importantly, Mr. Pinson signed a "Payment Guaranty" in his individual capacity to secure the note between Producers Coal, Inc. and James River Coal Sales, Inc. (J.A. 043-45). The Payment Guaranty 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).

Mr. Pinson admits that "[a] guaranty is an independent contract . . . In an action to enforce an independent contract of guaranty, the obligee is proceeding on the guaranty." *McDonald v. Nat'l Enterprises, Inc.*, 262 Va. 184, 189, 547 S.E.2d 204, 207 (2001). (J.A. 093). Naturally, due to the guaranty's independent nature, Mr. Pinson's personal default represents a separate default from Producers Coal, Inc. The language in the payment guaranty specifically states that the Beneficiary (at the time, James River Coal Sales, Inc.) of the note may directly collect from Mr. Pinson. This contractual liability appears to settle the issue on whether Petitioner has a direct claim for collection against Mr. Pinson, even without securing a judgment

against him in his personal capacity in the State of Virginia. Mr. Pinson's default on the underlying guaranty thus provides the basis for Petitioner to pursue a UFTA claim against Respondent for fraudulent transfer of assets.

In the contracts at issue, the parties agreed that Virginia law should apply to the enforcement and interpretation of the guaranty and note. The Supreme Court of Virginia case *First Virginia Bank-Colonial v. Baker*, 225 Va. 72, 77, 301 S.E.2d 8, 11 (1983), provides guidance on the liability of individuals who guaranty a note payment. "As between the principal obligor and the surety, the ultimate liability rests upon the former, but the obligee has a remedy against both." *First Virginia Bank-Colonial*, 225 Va. at 77, 301 S.E.2d at 11. The Supreme Court of Virginia further states the following

> Where the bond is a joint and several obligation conditioned on the principal's performance of a contract, the principal's breach of contract gives rise to a remedy by action against the principal for the breach of the contract, and a remedy by action against the surety for the penalty of the bond. The remedies are not inconsistent, but are merely cumulative; both may be pursued at the same time until the plaintiff's damages are satisfied. Stated differently, a creditor's right to proceed against the surety exists independently of his right to proceed against the principal.
> 74 Am.Jur.2d Suretyship § 135 (1974) (footnotes omitted). *See also* Restatement of Security § 82 (1941).

First Virginia Bank-Colonial, 225 Va. at 77, 301 S.E.2d at 11; *See also Restaurant Co. v. United Leasing Corp.,* 271 Va. 529, 540, 628 S.E. 2d 520, 525 (2006) (finding a party may pursue the surety / guarantor of a debt upon default of the principal and that said claim exists independently of the note). The liability of a guarantor should be measured by the terms of the contract.

Mr. Pinson attempts to argue that the payment guaranty may have merged with the note when the confession of judgment was entered in Virginia. In support of this position, Mr. Pinson cites *Sands v. Roller*, 118 Va. 191, 86 S.E. 857, 858 (1915), a case involving a bank's attempt to collect additional fees from a judgment it received against a debtor in a previous case where the

debtor defaulted on a loan agreement. The Court correctly found that the bank was barred from going back to court for fees from the default where the case had already been settled and reduced to judgment. Here, the parties have a separate, independent contract that by its own terms allows for the creditor (Petitioner) to collect directly from the guaranty / debtor (Mr. Pinson). Hence, the ruling in *Sands v. Roller, supra*, does not apply to the circumstances of this case.

The circuit erred by dismissing this case on summary judgment without creating a complete record. As previously noted, summary judgment is appropriate only when "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Jochum v. Waste Mngmt. of W. Va., Inc.*, 224 W. Va. at 47, 680 S.E.2d at 62 (quotation marks and citations omitted). An incomplete record exists in this case and numerous genuine issues of material fact remain unsettled regarding liability.

II. The Circuit Court Erred in Denying the Motion to Amend the Complaint to Add Mark Pinson as a Defendant

The final error committed by the circuit court concerns the court's refusal to allow Petitioner to amend her complaint to add Mark Pinson as a party to the UFTA action pursuant to Rule 15 of the West Virginia Rules of Civil Procedure. 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, yet the circuit court still dismissed her claim.

In reviewing a motion to amend the complaint under Rule 15(c), "[a]n interpretation of the *West Virginia Rules of Civil Procedure* presents a question of law subject to a *de novo* review." *Muto ex rel. Muto v. Scott*, 224 W. Va. 350, 354, 686 S.E.2d 1, 5 (2008) (citing Syllabus Point 4, *Keesecker v. Bird,* 200 W.Va. 667, 490 S.E.2d 754 (1997)). Importantly, the

Muto decision states "we believe it is significant that Rule 15 should be construed liberally to promote the ends of justice. Rule 15(a) states that leave to amend a complaint should be 'freely given when justice so requires.'" *Muto*, 224 W. Va. at 355, 686 S.E.2d at 6 (internal citations omitted). The West Virginia Supreme Court of Appeals went on to reaffirm the liberal construction of Rule 15(c) by quoting the following from *Brooks v. Isinghood*, 213 W. Va. 675, 584 S.E.2d 531 (2003),

> The purpose of this policy statement is to secure an adjudication on the merits of the controversy as would be secured under identical factual situations in the absence of procedural impediments." Franklin D. Cleckley, *et al., Litigation Handbook on West Virginia Rules of Civil Procedure* § 15(a) at 334 [Juris Publishing, 2002]. *See also,* Syllabus Point 3, *Rosier v. Garron, Inc.,* 156 W.Va. 861, 199 S.E.2d 50 (1973). "The goal behind Rule 15, as with all the Rules of Civil Procedure, is to insure that cases and controversies be determined upon their merits and not upon legal technicalities or procedural niceties." *Doyle v. Frost,* 49 S.W.3d 853, 856 (Tenn.2001) (citations omitted). *See also, Perdue v. S.J. Groves & Sons, Co.,* 152 W.Va. 222, 161 S.E.2d 250 (1968) (recognizing liberality to amend pleadings existed prior to the adoption of the *West Virginia Rules of Civil Procedure*). *Brooks,* 213 W.Va. at 684, 584 S.E.2d at 540 (footnote omitted).

Muto, 224 W. Va. at 355, 686 S.E.2d at 6.

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.

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). As the transferor of the disputed asset, Mr. Pinson's alleged actions fall within the same transaction as that alleged in the original complaint.

Second, Mark Pinson received notice of the original complaint and he is not prejudiced by maintaining a defense. Respondent 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. Moreover, Mr. Pinson is not prejudiced in maintaining a defense to this action based on a delay of approximately four months. 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).

Moreover, Mr. Pinson signed the personal guaranty for the underlying judgment concerning this case. A guaranty of payment is "an absolute guaranty . . . by which the guarantor unconditionally promises payment or performance of the contract on default of the principal debtor. It is further said that a guaranty is deemed to be absolute unless its terms import some condition precedent to the liability of the guarantor." *Esso Standard Oil Co. v. Kelly*, 145 W. Va. 43, 47-48, 112 S.E.2d 461, 465 (1960). Mr. Pinson is thus aware of his potential liability for any type of asset transfer.

As noted by the West Virginia Supreme Court of Appeals, "we have made clear that '[p]rejudice to the adverse party is the paramount consideration in motions to amend. Absent a showing of prejudice to an adverse party motions to amend should be granted.'" *Muto*, 224 W. Va. at 355, 686 S.E.2d at 6 (citing *State ex rel. Bd. of Ed., etc. v. Spillers,* 164 W.Va. 453, 455, 259 S.E.2d 417, 419 (1979)). Given the history between the parties in this case and Mark Pinson's presumed liability for the judgment, he simply cannot be deemed to be prejudiced by the UFTA action.

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). The Answer filed by Respondent does not contain an argument for dismissal for failure to join Mark Pinson as an indispensable party. (J.A. 080-83.) Petitioner relied upon this Answer in forming a good faith belief that Mark Pinson was not an indispensable party to this type of action. Further, Respondent arguably waived her right to assert that Mark Pinson is an indispensable party by not raising the argument in the previous action. (J.A. 080-83).

The West Virginia Supreme Court of Appeals has concluded that "under Rule 15(c)(3)(B), a 'mistake concerning the identity of the proper party' can include a mistake by a plaintiff of either law or fact, so long as the plaintiff's mistake resulted in a failure to identify, and assert a claim against, the proper defendant. A court considering whether a mistake has occurred should focus on whether the failure to include the proper defendant was an error and not a deliberate strategy." *Brooks v. Isinghood*, 213 W. Va. at 690, 584 S.E.2d at 546. Here, an arguable mistake of law may have occurred because Petitioner (1) interpreted the Act to only

require an action to be brought against the transferee and (2) relied upon the pleadings in the 2017 action. Importantly, this mistake does not prejudice Mr. Pinson by adding him as a party to the Amended Complaint.

For the final and fourth requirement, 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. Mr. Pinson's notice and knowledge of this matter falls within this timeframe.

Alternatively, no statute of limitations issue exists to the extent Petitioner is seeking equitable relief from Mr. Pinson and Respondent. *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, to the extent Petitioner seeks equitable relief such as rescission or reformation of the deed, said relief does not have a statute of limitations.

CONCLUSION

Based on the foregoing, 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.

DENISE JOHNSON,
Plaintiff Below, Petitioner,
By Counsel

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