NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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September 8, 2017

LETTER OPINION

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OPINION LETTER

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RE: *Westwood Buildings Limited Partnership v. Alan M. Grayson, et al.*
Case No. CL-2016-09728

Dear Counsel:

The Court has before it claims by the Plaintiff against various Defendants asserting Fraudulent Conveyance, Voluntary Conveyance and Conversion. After careful consideration of the evidence and argument of counsel, assessing the demeanor and credibility of each witness presented, and for the reasons as further stated in this letter opinion, the Court finds Plaintiff is entitled to judgment against Defendants Alan M. Grayson, AMG TR PC, Carla G. Coleman, GL CTR. P.C., Victor A. Kubli, Kubli & Associates PC, and The GSA Telecommunications Trust, as further set forth herein, with consideration of the amount of attorney's fees awarded left for further argument by agreement of the parties. The Court also finds Plaintiff is not entitled to judgment against Defendants Law Office of Victor A. Kubli, P.C., and Grayson Consulting, Inc., and claims against such entities must therefore be dismissed.

FACTS

The Relevant Parties

Plaintiff Westwood Buildings Limited Partnership ("Westwood"), is a Virginia Limited Partnership with its principal place of business in Vienna, Virginia.

Defendant Alan M. Grayson ("Grayson"), is an individual domiciled in Florida who also at times resides in Virginia. Grayson is a duly licensed attorney in Virginia, who

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regularly transacted business in Fairfax County, Virginia. From January 2009 until January 2011, Grayson served as a member of the U.S. House of Representatives for Florida's 8th Congressional District. From January 2013 until at least the filing of this action on July 11, 2016, Grayson served as a member of the U.S. House of Representatives for Florida's 9th Congressional District. At times relevant to this suit, Grayson was a business associate of Defendant Victor A. Kubli, an officer and/or director and the sole shareholder of Defendants AMG TR PC, GL Ctr., P.C., Grayson Consulting, Inc., and is also the Trustee of Defendant The GSA Telecommunications Trust.

Defendant Victor A. Kubli ("Kubli"), is an individual residing in Maryland. Kubli is a duly licensed attorney who regularly transacted business in Fairfax County, Virginia. At times relevant to this suit, Kubli was a business associate of Grayson, a principal of Defendant AMG TR PC prior to 2009, president, director and sole shareholder of Defendant Kubli & Associates, P.C. since January 2009, an employee of GL Ctr., P.C., from January 2011 through at least December 2012, and president, director and sole shareholder of Defendant Law Office of Victor A. Kubli, P.C. since January 2013 until at least July 2016.

Defendant AMG TR PC, formerly known as Grayson & Kubli, P.C. ("AMG") is a Virginia professional corporation which has ceased business operations. From approximately November 2007 to April 2011, AMG transacted business at its principal office located at 8605 Westwood Center Drive, Suite 410, Vienna, Virginia, 22182 (hereinafter referred to as "the Premises"). AMG was formed by Grayson for the

purpose of conducting the private practice of law in Virginia and elsewhere, and prior to January 2009, Grayson and Kubli practiced law together at such entity.

From November 2007 to at least January 2009, AMG's principal place of business consisted of the Premises, which was leased from Westwood pursuant to a written lease executed November 14, 2007 ("the Lease"). During the Lease negotiations, Grayson and AMG represented to Westwood that AMG was debt free and that AMG had not borrowed money from any source. Westwood did not seek a personal guarantee of the Lease from Grayson. The Lease terms granted Westwood a security interest in all of AMG's inventory and assets used in connection with AMG's business, and further, if AMG assigned its interest in the Lease to an assignee, AMG assigned to Westwood any amount due to AMG from such assignee.

Defendant Kubli & Associates, P.C. ("K&A"), is a corporation organized under the laws of the State of Maryland, is owned and controlled by Kubli, and has ceased business operations. From approximately January 2009 to April 2011, K&A transacted business at its principal office located at the Premises. K&A was formed by Grayson and Kubli as a result of Grayson's election to Congress in November of 2008, for the purpose of acquiring AMG's assets, succeeding to its business, and continuing its law practice.

On January 2, 2009, AMG assigned its interest in the Lease to K&A. Also in January of 2009, AMG sold, conveyed or otherwise transferred to K&A AMG's business and assets (hereinafter collectively referred to as "Assets"), including but not limited to receivables and business expectancies.

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Defendant GL Ctr., P.C., formerly known as Grayson Law Center, P.C. ("GLC"), is a Virginia corporation, owned and controlled by Grayson and has ceased business operations.

Defendant The GSA Telecommunications Trust ("GSA"), is a Virginia business trust, which at all times relevant to this cause transacted business in Virginia and was controlled by Grayson.

Defendant Grayson Consulting, Inc. ("GCI"), is a Virginia corporation owned and controlled by Grayson which was first registered as such with the Virginia State Corporation Commission in 2014 (Pl.'s Ex. 45), after the times of transactions relevant to this cause.

Defendant Law Office of Victor A. Kubli, P.C. ("LOVAK"), is a Maryland professional corporation with its principal place of business in Germantown, Maryland. At all times relevant to this cause, LOVAK transacted business in Virginia and elsewhere, and was owned and controlled by Kubli.

Defendant Carla G. Coleman ('Coleman") is an individual residing in Virginia. At all times relevant to this cause, Coleman was an officer and/or manager and bookkeeper of K&A and GCI. Coleman has also served as personal assistant, attorney-in-fact and/or authorized agent of Grayson, exercising duties including but not limited to signing drafts and other documents with Grayson's signature with authority to do so.

Nature of the case

The action was brought by Westwood to set aside numerous conveyances made by AMG" (or "G&K") and "K&A" to their respective owners, Grayson and Kubli, and to other entities they controlled. The Complaint alleges claims to set aside the transfers as

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Fraudulent Conveyances (Count I) and Voluntary Conveyances (Count II), and a separate claim against Grayson for Conversion with respect to transfers relating to the *Halldorson* case (Count IV).

The case is a follow-on enforcement action to collect amounts due pursuant to two prior suits for unpaid rent wherein Westwood obtained judgments ("Judgments") against G&K and K&A. The outstanding amounts of the Judgments with interest now total more than $452,599.76 against K&A and $398,921.19 against AMG. (Pl.'s Ex. 30B). During post-Judgments collection efforts, Grayson and Kubli entered into a series of transactions in which most of the assets of K&A and G&K were assigned or transferred to either themselves or entities they owned or controlled. This had the effect of leaving little from which Plaintiffs could satisfy their Judgments. An eleven day bench trial ensued at which Plaintiff detailed the following five transfers it alleged are reachable through its conveyance claims:

1. The "GSA Loan" and Confessed Judgment;
2. The "2011 G&K Transfers";
3. The Transfers relating to the "*Halldorson* Settlement Proceeds";
4. The "IDT Payments"; and
5. The Cancellation of K&A Debt and "Asset Take-Back."

Defendants asserted as an affirmative defense that such transfers constituted lawful preferences because all of the assets of K&A and/or G&K were purportedly the object of two perfected security interests, one in favor of G&K, and the other in favor of Grayson, which they argue place such assets beyond the reach of Plaintiff.

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Relevant Transactions

Both Plaintiff and Defendants filed detailed post-trial memorandums in summation of the evidence adduced at trial. The relevant transactions are largely accurately recounted in Plaintiff's Post-Trial Memorandum:

1. The GSA Loan and Confessed Judgment (Pl.'s Exs. 31, 32, 44, 49A):

Pursuant to a written Loan Agreement (the "GSA Loan" -- Pl.'s Ex. 31) made "as of January 12, 2009," GSA Telecommunications Trust ("GSA") agreed "to lend or cause to be lent, funds to K&A" through various Grayson "related persons or entities." (Pl.'s Ex. 31, at p. 1). Regardless of the entity which provided the loans, all amounts loaned would be considered commingled and be owed to GSA. According to G&K's 2009 Ledger (Pl.'s Ex. 38E), from January 15, 2009 through December 2, 2009, G&K transferred $885,200.00 to K&A pursuant to the GSA Loan Agreement. (Pl.'s Ex. 38E, G&K Ledger at 002 & 003; but *cf.* Def.'s Ex. 24). The testimony of Coleman established that none of the loans pursuant to the GSA Loan were made by GSA. On December 29, 2009, judgment was nevertheless confessed against K&A and in favor of GSA for $1,133,901.45. (Pl.'s Ex. 32). According to GSA's 2009 tax return (Pl.'s Ex. 44), immediately after the confessed Judgment was entered, GSA wrote off the entire debt. (Pl.'s Ex. 44, at p. 1, Line 10). According to Grayson's 2009 personal tax return (Pl.'s Ex. 49A), Grayson used GSA's "bad debt" write off as a loss to reduce his personal income and lower his 2009 tax liability. (Pl.'s Ex. 49A, AGTAX-2009-001 & 2009-008, at Line 28D).

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2. The 2011 G&K Transfers (Pl.'s Exs. 34A, 35C):

Between January 2011 and June 2011, G&K made a series of 4 transfers (the "2011 G&K Transfers") totaling $42,452.00 in cash to GLC, Grayson, and Grayson Consulting, Inc. The 2011 G&K Transfers consist of the following:

A. On January 10, 2011, G&K transferred $30,000.00 to GLC. (Pl.'s Ex. 34A, (see Check No. 7871)). At the time G&K transferred this amount to GLC, GLC had not yet been formed as a corporate entity in Virginia (its Certificate of Incorporation was activated with the SCC on 01/20/11 (Pl.'s Ex. 40, at 3)) and G&K did not owe any money to GLC. According to Grayson, this transfer was made for purposes of providing the initial capitalization of GLC. According to Defendants' own evidence (Def.'s Ex. 35), at the end of 2008 when G&K ceased operations, but before it began making advances to K&A under the GSA Loan, G&K was more than $3.6 million in debt.

B. On January 10, 2011, G&K transferred $2,500 to a payee named Grayson Consulting, Inc. (Pl.'s Ex. 34A (see Check No. 7882)).

C. On January 14, 2011, G&K transferred $3,000 to Grayson. (Pl.'s Ex. 34A, (see Check No. 7883)).

D. On June 23, 2011, G&K transferred an additional $6,541.67 to Grayson, leaving only $100 remaining in G&K's bank account. (Pl.'s Ex. 35C (see Check No. 3103 and June 2011 statement).

3. The *Halldorson* Settlement Proceeds (Pl.'s Exs. 19, 20, 21A-C, 22, 23A-23C, 24A-B, 38C):

In 2011, K&A with the assistance and cooperation of Grayson, Kubli, GLC, and Coleman, transferred $339,923.48 to GLC. Of this sum, Grayson testified $100,000 was

transferred to Kubli, personally. These sums represented amounts due and owing to K&A for attorney's fees pursuant to a settlement agreement made in the case of *United Halldorson v. The Sandi Group,* 934 F. Supp. 2d 147 (D.D.C. 2013) (the "*Halldorson* Settlement Proceeds").

4. The IDT Funds (Pl.'s Ex. 38C):

Between May 2011 and September 2012, GLC collected on a month-to-month basis, payments totaling $1.8 million from IDT (the "IDT Funds"). (Pl.'s Ex. 38C). Such payments were made in satisfaction of outstanding accounts receivable owed by IDT to G&K. All of the IDT Funds collected by GLC were immediately diverted by GLC, and directly transferred from IDT into GLC's bank account. At the time the IDT Funds were deposited into GLC's bank account, Defendants knew that GLC had not performed any work for IDT, that IDT was not indebted to GLC, and that the IDT Funds were an Asset of and owed to G&K, not GLC. At the time the IDT Funds were deposited into GLC's account, Defendants were aware that Westwood's claims against G&K were pending or threatened. (See Pl.'s Exs. 11, 13, 16).

5. K&A Debt and Asset Take Back (Pl.'s Exs. 9, 39A, 49C, 52A-D, 53A-D, 54):

According to K&A's 2011 Amended Tax Return, $1,594,641.00 in "assets [were] taken back by AG," which could only refer to Alan Grayson. In conjunction with the take back of K&A's assets, Grayson unilaterally forgave all indebtedness of K&A to the Grayson entities. K&A's 2009 tax return showed liabilities of $2,000,000 (the Buy-Out Price) and $1,162,865 (the 2009 GSA Loan / Confessed Judgment plus a small credit card payable). (See Pl.'s Ex. 39A at C000004 and 9, Sch. L, Lines 18, 20).

ANALYSIS

I. Claims against Grayson Consulting, Inc.

Among the named Defendants in this cause of action is an entity identified as "Grayson Consulting, Inc." Plaintiff served an entity by that name with its Complaint in 2016, service being effected on such named corporation duly registered in Virginia as of 2014. However, the operative transactions which are the object of this suit occurred before such Virginia entity came into lawful existence. The confusion arose because there is an identically named entity which is a Florida corporation pursuant to the uncontroverted testimony of Grayson, an entity which was not formally served with the Complaint, but which is also controlled by Grayson. At the time of the Defendants' Motions to Strike, the Court indicated that for purposes of such motions the claim against the named entity could survive, drawing all inferences in light most favorable to the Plaintiff under a theory that the entity could have been operating as a *de facto* corporation, participating in the earlier transactions. It has become clear though in contemplation of the Defendants' presentation of evidence that Plaintiff served the wrong entity, i.e., the Virginia entity, instead of the Florida entity which was the recipient of or participant in, some of the unlawful transfers of funds.

After the close of the evidence, Plaintiff, without conceding there was a distinction between the entities in practice, sought to amend its Complaint first under Virginia Code § 8.01-6 and then under Virginia Code § 8.01-377. "[A] trial court's decision refusing leave to amend after a showing of good cause is, in ordinary circumstances, an abuse of discretion." *Ford Motor Company v. Benitez,* 273 Va. 242, 252, 639 S.E.2d 203, 207 (2007) (citing *Mortarino v. Consultant Eng'g Servs.*, 251 Va.

289, 295-96, 467 S.E.2d 778, 782 (1996)). The Court therefore analyzes whether there is good cause for the amendment and whether the circumstances here presented are ordinary.

The proposed amendment pursuant to Virginia Code § 8.01-6 relates to situations wherein a stated misnomer in a pleading is the subject of correction. In this cause, the Plaintiff has correctly named the Defendant. The issue however is that there are two identically named separate entities, one formed in Florida and the other later in Virginia.

> [T]he party filing a civil action has an obligation to express the nature of the claim being asserted, and the identity of the party against whom it is asserted, in clear and unambiguous language so as to inform both the court and the opposing party of the nature of the claim being made.

James v. Peyton, 277 Va. 443, 450, 674 S.E.2d 864, 866 (2009). Here the Plaintiff served the registered agent for the Virginia entity and at the same time alleged in its complaint the corporation had its principal place of business in Virginia. Other parts of the record suggest there is an identically named entity with its principal place of business located in Florida. Grayson related the Virginia entity was initially created by Coleman without his knowledge and was "a mistake." The purpose of the entity, at least when created, was to satisfy the request of one of Grayson's associates, Alisa J. Roberts, to be paid by a Virginia entity as opposed to a Florida concern. It is unclear as to the reason for such request but the evidence from Defendants on this point was unrebutted.

The Court may allow that a complaint

> [o]n affidavit of the right name, be amended by inserting the right name. An amendment changing the party against whom a claim is asserted, whether to correct a misnomer or otherwise, relates back to the date of the original pleading if (i) the claim asserted in the amended pleading arose out of the

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> conduct, transaction, or occurrence set forth in the original pleading, (ii) within the limitations period prescribed for commencing the action against the party to be brought in by the amendment, that party or its agent received notice of the institution of the action, (iii) that party will not be prejudiced in maintaining a defense on the merits, and (iv) that party knew or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against that party.

Va. Code Ann. § 8.01-6 (2017). Substitution of the Florida entity for its identically-named Virginia counterpart is not the correction of a misnomer. "Misnomer arises when the right person is incorrectly named, not where the wrong defendant is named." *See Swann v. Marks,* 252 Va. 181, 184, 476 S.E.2d 170, 171 (1996) (citing *Rockwell v. Allman*, 211 Va. 560, 561, 179 S.E.2d 471, 472 (1971)).

While the Plaintiff may thus not avail itself of the relief offered by correction of a misnomer, a corollary question arises whether the Plaintiff need act at all inasmuch as the Florida entity is identically named and its director, Grayson, was validly served. *See* Va. Code Ann. § 8.01-301. The Defendant contends that while that may be true, any summons directed at Grayson was in a personal capacity and not as director of the foreign corporation, and so the foreign entity was not properly before the Court. The applicable rule was amended effective 2007, when the modern Rule 3.2 replaced the previous Rule 3.3 language directing how a civil suit is to be commenced. The old Rule 3:3(c) set out the proper form as "[t]he *notice* to be given of the motion for judgment," which was jurisdictional. *See Lifestar Response of Maryland v. Vegosen*, 267 Va. 720, 723, 594 S.E.2d 589, 590 (2004) (emphasis added). Rule 3.2(c) now instead references merely the "form of the complaint," and it appears from the amendment that service of the Complaint alone may satisfy jurisdiction over the Defendant.

Even if that is the case, however, and the Court has jurisdiction over the Florida entity, the Plaintiff's complaint still requires amendment to allege that it is the Florida entity rather than the Virginia corporation which is charged with the claim averred. In that regard, Plaintiff offered Virginia Code § 8.01-377 in support of such amendment:

> If, at the trial of any action, there appears to be a variance between the evidence and the allegations or recitals, the court, if it consider[s] that substantial justice will be promoted and that the opposite party cannot be prejudiced thereby, may allow the pleadings to be amended, on such terms as to the payment of costs or postponement of the trial, or both, as it may deem reasonable. Or, instead of the pleadings being amended, the court may direct the jury to find the facts, and, after such finding, if it consider[s] the variance such as could not have prejudiced the opposite party, shall give judgment according to the right of the case.

Va. Code Ann. § 8.01-377 (2017).

Assuming for the sake of argument that the Florida entity is properly before the Court by virtue of the service of process on Grayson, its director, albeit as a defendant himself, the next question is whether the Court should allow such amendment after the close of the evidence. It would be error to permit amendment at this late stage of trial without affording the Defendant at least a continuance and the right to prepare further to meet the amendment, including with the reopening of discovery. *See Russell Lumber Co. v. Thompson*, 137 Va. 386, 393-394, 119 S.E. 117, 120 (1923) (citing *Norfolk S. R. Co. v. Greenwich Corp.*, 122 Va. 634, 95 S.E. 389 (1917)). The *Russell Lumber Co.* case noted

> it is true that sometimes cases arise in which both parties ignore their pleadings and in fact by their testimony fairly present other cognate issues to the jury. In such cases, both may be held to have waived their right to limit the issues by the pleadings, and when this occurs the pleadings may be amended at a very late stage of the proceedings. This, however, is not such a case. To apply that liberal rule under the circumstances here shown and to establish such a precedent here, would neither simplify proceedings nor be conducive to the attainment of the ends of substantial justice. On the contrary there is danger that it would tend to complicate proceedings and promote injustice. It is

fundamental that the judge, the jury and the litigants should understand the issues being tried before the testimony is concluded.

The Plaintiff did not seek timely amendment of its Complaint. The Court is compelled to dismiss the claim against Grayson Consulting, Inc., for although acting in good faith, the Plaintiff either served only the wrong entity, or failed by timely amendment to bring the proper entity before the Court for adjudication of its claim. *See Robinson v. Giant of Maryland, Inc.,* 47 Va. Cir. 180 (1998).

II. Validity of Underlying Agreements

G&K, the seller, entered into a buy-out agreement ("the Buy-Out Agreement") with K&A purporting to transfer all its assets as of January 2, 2009. The purchase price was set at $2,000,000.00. (Pl.'s Ex. 9). Kubli testified the sales price was negotiated based on his evaluation of what G&K could earn in the future as informed in part by what it earned the previous year. The Buy-Out Agreement states that "it is anticipated that during the calendar year 2008, the Seller has recorded and will record approximately $2 million in legal fees…." (Pl.'s Ex. 9, at 2). In apparent contradiction of both Kubli's testimony and of the Buy-Out Agreement, a review of G&K's tax return for 2008 shows gross receipts of $394,660.00 and a net loss of $1,936,491.00, hardly a going concern. (Pl.'s Ex. 36C). K&A did not pay even a dime for succeeding to G&K's assets. K&A never paid the amortized monthly principal and interest in the amount of $52,667.67 required by the Buy-Out Agreement. G&K took no action to collect on the rapidly accumulating purported debt.

In a corollary transaction, the uncapitalized K&A entered into a loan agreement with GSA ("the GSA Loan") wherein GSA, "in its sole discretion" would make loans

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unspecific in amount to K&A. The GSA Loan by its terms, shielded Kubli from any personal liability for repayment of any of the debt. (Pl.'s Ex. 31).

Kubli operated the insolvent K&A entity free from any financial responsibility should it fail and with a lifeline that depended only on Grayson's whim. The Buy-Out Agreement also called upon K&A to assume debt G&K allegedly owed Grayson, "the Grayson Debt", but was unspecific in quantifying the amount. The debt was to be repaid "only if, as when the revenue of the Buyer permits payment...." (Pl.'s Ex. 9). At trial Grayson offered no compelling explanation why the amount of the debt was not fixed, averring that the parties had been in a hurry to get the agreement done and that there were still expenses to evaluate in order to determine the correct amount. Grayson also claimed that the amount of the Grayson Debt was $2,816,281.00. Thus, on the day K&A opened, it was already at least $4,816,281.00 in debt, if one believes Grayson's figures.

The essential arrangement between Grayson and Kubli amounted to Grayson effectively retaining *de facto* ownership of all assets of K&A, with G&K receiving no payment from Kubli other than the promise to pay in the future, an arrangement understood to require Kubli to pay only to the extent K&A received monies sufficient to make such transfers. Kubli further insisted on being shielded from personal liability, which essentially insulated Kubli from having to pay any of the debts of K&A, including on the agreement for sale and loan.

From the beginning, K&A was insolvent in the sense that it could only operate based on the largess of Grayson himself, who controlled the flow of capital to and from the concern, and therefore its lifeline. Grayson and/or his entities, transferred assets belonging to G&K and K&A back to themselves from time to time, which placed those

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assets out of the immediate reach of creditors. From the provision or allowance of use of operating funds it is inferable that Grayson did not set out to defraud creditors. However, he certainly constructed a scheme he thought would permit him to hedge his bets as to the viability of the new entity, and place the risk of failure onto the shoulders of creditors if he so chose. The agreements effectively allowed Grayson to pay only those creditors he chose to pay, by maintaining K&A in a perpetual state of insolvency which would shield it from creditors should it ultimately fail to succeed, even with the periodic infusions of operating capital.

In their purported agreements, Grayson and Kubli sought to protect themselves from creditors in the event of failure of the law practice, but their agreements lacked mutuality. The complexity of their arrangements masked the simplicity of the express and consummate failure of consideration in support of the agreements. Grayson through his entities including G&K, sought effectively to own and/or control all the current assets and contemplated receivables and expectancies of K&A for the foreseeable future, and in his sole discretion, to allow for operating capital to keep the perpetually insolvent K&A afloat. Perhaps he anticipated the possibility of returning to the practice of law should his efforts at elective office, end at least temporarily, in failure. Kubli and K&A promised nothing of value to G&K, GSA and Grayson. The arrangement allowed Kubli to depart the entity at will, with no consequence or obligation for any debts. K&A could shutter its doors upon its fancy. In sum, there was nothing of value exchanged and any promises where illusory and of no binding significance.

> "[W]here the consideration for the promise of one party is the promise of the other party, there must be absolute mutuality of engagement, so that each party has the right to hold the other to a positive agreement. Both parties must be bound, or neither is bound." *Vinton v. Roanoke*, 195 Va. 881, 896, 80

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> S.E.2d 608, 617 (1954); *American Agricultural Chem. Co. v. Kennedy*, 103 Va. 171, 176, 48 S.E. 868, 870 (1904).

Capps v. Capps, 216 Va. 378, 381, 219 S.E.2d 901, 903 (1975).

Here what is presented are agreements that purport to establish obligations on the part of the parties, obligations which the parties, and particularly G&K, K&A, Grayson and Kubli, could avoid from the beginning. "Fundamentally, an executory agreement...to be effective, must be obligatory, on both parties, or it lacks mutuality and is not enforceable." *Town of Vinton v. City of Roanoke,* 195 Va. 881, 896, 80 S.E.2d 608, 616 (1954) (citing *Town of Laurens v. Northern Iowa Gas & Elec. Co.*, 282 F. 432, 435).

When as here, an exchange of promises does not bind the principals to carry out those promises within a definite period of time or even at all, it is an agreement that serves only to deceive the parties into believing they have an arrangement that protects them from creditors. The Court, however, is not so misled. The law is clear that words which sound in contract but are essentially unenforceable bare promises designed to deter creditors from enforcing their rights, are not a legal basis upon which Defendants may rest their claim for entitlement to the assets at issue. The facts in this cause are "a striking illustration of *nudum pactum.*" *See Bott v. Wheeler,* 183 Va. 643, 647, 33 S.E.2d 184, 185 (1945).

In the instant case, tax returns purportedly recognized losses to K&A, but the last tax return was amended to reflect a forgiveness of such loss. At the same time Grayson claimed losses from "loans" to K&A on his tax returns. He explained his definition for the term, saying those loans which were deemed uncollectable for more than one year sufficed. He still hoped nevertheless to collect the Grayson Debt. It is dubious that a

person may both claim a debt is uncollectable and no longer an asset for tax purposes, and then conversely claim it still exists for litigation purposes after it has apparently been forgiven. The fact there were numerous financial transfers which gave the outward impression of bona fide economic justification is of little consequence to the illustrative analysis of the tax returns. "A transaction's true substance rather than its nominal form governs its Federal tax treatment." *Superior Trading, LLC v. Commissioner*, 137 T.C. 70, 88 (T.C. Sept. 1, 2011); *See Commissioner v. Court Holding Co.,* 324 U.S. 331, 334 (1945). The Defendants' tax treatment of the original "debt" is just another manifestation of the illusory operating scheme.

> A legal or economic sham, also known as a sham in substance, is a transaction that did take place but that had no independent economic significance aside from its tax implications. *See Krumhorn v. Commissioner*, 103 T.C. 29, 38, 46 (1994).... In a transaction that is a sham in substance, papers may have been signed and money moved around, but in concrete, economic terms, the transaction is a nullity. Afterward, the parties' beneficial interests remain essentially unchanged.

CNT Investors, LLC v. Commissioner, 144 T.C. 11, 55 (T.C. March 23, 2015). The treatment of debt transactions in this cause, through their various iterations, were essentially designed as shams in substance in that Grayson purportedly maintained effective beneficial interest over virtually all the assets of K&A.

This Court finds from the facts that performance by the parties of the purported terms of the contract provided nothing other than the illusive suggestion of consideration, which the Court finds lacking in whole. In addition, there is scant compelling evidence of the purported loans asserted. Grayson failed to present even a single canceled check extended from him to G&K in support of the existence of the Grayson Debt. When questioned why no supporting records were sought and

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presented, he deflected the question by stating that his attorneys should be asked to explain the absence of such documents. To document loans, the Court was presented with a self-serving summary prepared by an attorney, a self-serving printout purportedly drawn from a database and associated testimony. In sum, there is a paucity of compelling evidence that such claimed "loans" were supported by consideration.

Separately from the Grayson Debt, Grayson and his entities presented no bank records to corroborate any infusions of capital to K&A, to the extent made, were identified as "loans" for later repayment as opposed to capital contributions to K&A for payment of its debts. Even if the Defendants relied in equity on the notion of binding each other to the terms of the Buy-Out and GSA Loan agreements, and their confessed judgment and financing statement progeny, such argument fails.

> It is a fundamental rule in equity that a contract, to be specifically enforced, must, in general, be mutual in its obligation and in its remedy, and it must be mutual *ab initio.* If, therefore, from the personal incapacity of one of the parties, or other cause, the contract, when concluded, is not enforceable against such party, no subsequent act or event can render it capable of enforcement against either party. In other words, it must be enforceable originally, or not at all.

Shenandoah Valley R. R. Co. v. Dunlop and Wife, 86 Va. 346, 349, 10 S.E. 239, 239 (1889).

The Buy-Out Agreement and the GSA Loan Agreement lacked mutuality and consideration *ab initio,* were thus not originally enforceable, and stand as invalid in this cause. Even if the Court were found to be wrong in its conclusion the agreements were invalid, the relevant individual transfer transactions are unsupported by adequate consideration and/or were made to entities unentitled to receive the same. The result under either theory is the transfers are legally reachable by Plaintiff to the extent of its

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proof of damage claims for Fraudulent Conveyance, Voluntary Conveyance, and Conversion, as further detailed herein.

III. Fraudulent Conveyance Claim

Plaintiff alleges that Defendants collaborated in and/or where the recipients of a series of transfers of funds belonging to K&A which are reachable in damages under its Fraudulent Conveyance claim. Under Virginia Code § 55-80

> [e]very gift, conveyance, assignment or transfer of, or charge upon, any estate, real or personal, every suit commenced or decree, judgment or execution suffered or obtained and every bond or other writing given with intent to delay, hinder or defraud creditors, purchasers or other persons of or from what they are or may be lawfully entitled to shall, as to such creditors, purchasers or other persons, their representatives or assigns, be void. This section shall not affect the title of a purchaser for valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor.

An initial question arises: who is reachable by the ambit of the statute, i.e., who may be found liable for such claim in the context of participating in effecting a transfer. The statute provides the answer. It is primarily targeted at conduct and the undoing of a wrongful transfer. Those who participate in occasioning the transfer are called upon in equity to undo their conduct if the Plaintiff prevails in order to restore the status quo. Only those actors who have the "intent to delay, hinder or defraud creditors, purchasers or other persons of or from what they are or may be lawfully entitled to" may be held liable. Va. Code Ann. § 55-80 (2017). "Proof of the fraudulent intent must be 'clear, cogent and convincing'" and the "[f]raud may be proved not only by direct evidence, but also by circumstantial evidence." *Fox Rest Associates v. Little,* 282 Va. 277, 284, 717 S.E.2d 126, 131 (2011) (citations omitted). The statute thus protects from liability those

who merely are involved in ministerial conduct unknowing of its implication and who do not share the intent of an unlawful wrongdoer.

Plaintiff seeks damages with respect to five categories of transactions that it asserts fall within the claim. Defendants assert defenses including statute of limitations, laches, *res judicata*, lawful preferences, and lack of fraudulent intent. In this cause these defenses have insufficient merit to defeat the claims of the Plaintiff.

Defendant sought to bar consideration of the claim by revisiting by oral motion directed at the trial judge the prior ruling of a motions judge as to the applicable statute of limitations, which the Defendants contended was the two year limitation applicable to personal frauds. The statutory scheme does not specify a specific time bar for Fraudulent Conveyance, an equitable claim. The scheme does specify a five year statute of limitations for Voluntary Conveyance claims, which are arguably easier to prove. Va. Code Ann. § 8.01-253 (2017). It is clear from the absence of a specified statute of limitations for Fraudulent Conveyance that the General Assembly intended there be no set limitation on the period during which such claims could be advanced, so as to not allow fraudulent transfers or those designed to hinder creditors to become legal merely by the expiration of a fixed period of time. At the same time the law will not suffer a plaintiff who does not timely assert its equitable remedies.

> Under Virginia law, a fraudulent conveyance has no specific statute of limitations but is governed by the concept of laches. Laches is defined as the neglect or failure to assert a known right or claim for an unexplained period of time under circumstances prejudicial to the adverse party.

Bernstein Brothers Management v. Miller, 44 Va. Cir. 69 (1998) (citing *Hyman v. Porter,* 37 B.R. 56, 66 (E.D. Va. 1984); *Stewart v. Lady*, 251 Va. 106, 114, 465 S.E.2d 782 (1996). Thus it is the defense of laches which operates as the time limitation on

the claim of Fraudulent Conveyance and this Court reaffirms the prior ruling of the motions judge to that same effect.

Anticipating the Court's potential ruling, Defendants also asserted the defense of laches as to Plaintiff's equitable claims.

> The doctrine of laches involves the failure of a party to assert a known right or claim for an unexplained period of time resulting in prejudice to the adverse party. The burden of proving this defense rests with the party asserting it. Here, the LLC's defense failed completely because the LLC did not demonstrate that it was prejudiced by Dorothy's failure earlier to assert her ownership claim against the LLC.

1924 Leonard Road, L.L.C. v. Van Roekel, 272 Va. 543, 559, 636 S.E.2d 378, 387 (2006) (internal citations omitted). The record in the instant case discloses first that the Plaintiff did not fail to enforce its rights for an *unexplained* period of time. Some of the delay in reaching trial in this cause had to do with the relative opacity of the business arrangements between the various Defendants and in particular, between Grayson and K&A. Grayson indeed admitted the same by stating at trial that he and his entities did not "open the Kimono" (a traditional Japanese garment), to fully reveal the complex defenses they had attempted to construct until after all of the transfers of which Plaintiff complains had been accomplished. Plaintiff did not sit on its hands but first pursued its remedies directly against G&K and K&A, and then as the murky relationship between the various entities and individuals came into focus, pursued the remedies advanced in this suit.

Second, even if the Court had found an unexplained period of enforcement, the record in the instant case is devoid of prejudice to Defendants. Grayson effectively controlled or had controlling influence over all the entities and of both Kubli and Coleman, including directly as an employer and indirectly as their financial lifeline.

There is little issue of dissipation of evidence or control over records necessary to mount a defense prior to the filing of suit. There is insufficient evidence from which the Court can conclude the Defendants met their burden to show prejudice and thereby defeat Plaintiff's equitable claims.

Defendants also contend that the two prior actions to collect rent operate to preclude Plaintiff's subsequent action to collect on those Judgments. Pursuant to Rule 1:6 of the Supreme Court of Virginia.

> A party whose claim for relief arising from identified conduct, a transaction, or an occurrence, is decided on the merits by a final judgment, shall be forever barred from prosecuting any second or subsequent civil action against the same opposing party or parties on any claim or cause of action that arises from that same conduct, transaction or occurrence, whether or not the legal theory or rights asserted in the second or subsequent action were raised in the prior lawsuit, and regardless of the legal elements or the evidence upon which any claims in the prior proceeding depended, or the particular remedies sought. A claim for relief pursuant to this rule includes those set forth in a complaint, counterclaim, cross-claim or third-party pleading.

Va. Sup. Ct. R. 1:6. The defense fails based on three grounds. First, there is a lack of identity of parties between the past actions and the instant suit. (Pl.'s Exs. 13, 25). Coleman, Grayson, GCI, GLC, Kubli, and LOVAK were not parties to the 2011 and 2013 actions. Second, the prior actions concerned entirely different transactions and do not reach the conduct of the Defendants to thwart collection on the underlying judgments against G&K and K&A. Those judgments were limited to claims of breach of lease and assignment. The prior actions do not meet the "single transaction" test to pose a bar in these proceedings, for they are insufficiently "related in time, origin or motivation." *See The Funny Guy v. Lecego,* 293 Va. 135, 154-155, 795 S.E.2d 887, 896-97 (2017).

Turning to an analysis of the merits of the Fraudulent Conveyance claim, the Defendants defense of lawful preferences is necessarily intertwined with consideration of whether the Plaintiff carried the day in proving the preferences given were unlawful in nature.

> "Because of the difficulty of establishing 'actual intent,' evidence of fraud may be, and generally must be, circumstantial."
>
> Virginia courts have consequently relied upon presumptions of fraud, known as "badges of fraud," which consist of facts and circumstances that establish a prima facie case of fraudulent conveyance. The badges of fraud include:
>
> (1) retention of an interest in the transferred property by the transferor; (2) transfer between family members for allegedly antecedent debt; (3) pursuit of the transferor or threat of litigation by his creditors at the time of the transfer; (4) lack of or gross inadequacy of consideration for the conveyance; (5) retention or possession of the property by transferor; and (6) fraudulent incurrence of indebtedness after the conveyance.
>
> Once a party has introduced evidence to establish a badge of fraud, a prima facie case of fraudulent conveyance is established.

Fox Rest Associates, 282 Va. at 284-285, 717 S.E.2d at 131-32 (internal citations omitted).

With respect to the transfers alleged by the Plaintiff, the record supports a finding of one or more "badges of fraud" against each of the Defendants except GCI and LOVAK. As already treated GCI *of Virginia* does not appear to have been involved in any transactions, which instead involved its Florida twin of the same name. LOVAK succeeded to the assets of GLC, but because the Court cannot determine with specificity the reachable amount of those assets at the time of transfer, the claim against it must fail. While the Fraudulent Conveyance claim has the label of "fraud", the actual burden of the Plaintiff in proving the cause of action is less onerous than proving an actual fraud. The facts supporting "badges of fraud" in the record included "pursuit of

the transferor or threat of litigation by his creditors at the time of the transfer" and "lack of or gross inadequacy of consideration for the conveyance," among others.

There is little question that from the first day of its operation, K&A was insolvent in the sense that, upon its creation, it had a capital structure which did not even allow it to pay its immediate liabilities. This state of insolvency continued throughout its existence. As already duly noted, it allowed Grayson to determine which creditors were to be paid, considering he effectively controlled the capital flow to and from K&A. The state of subservience to Grayson by Coleman and Kubli was on display at trial, wherein at points they testified evasively or in contradiction of their prior statements under oath, all in a clear effort to appease their employer and defer to his recitation of the evidence. "When an insolvent corporation prefers a creditor who is in complete control of the corporation's affairs over other creditors of the corporation, the preference is fraudulent *per se." Mills v. Miller Harness Co.,* 229 Va. 155, 157, 326 S.E.2d 665, 666 (1985) (internal citation omitted).

Numerous transfers shown at trial support judgment in favor of the Plaintiff as further detailed herein, in that they encompass "badges of fraud" and otherwise meet the elements of the claim advanced.

The GSA Loan-related transactions included a December 29, 2009, confessed judgment against K&A and in favor of GSA in the amount of $1,133,901.45. (Pl.'s Ex 32). From January 15, 2009 through December 2, 2009, G&K transferred $885,200.00 to K&A pursuant to the GSA Loan Agreement. (Pl.'s Ex. 38E, G&K Ledger at 002 & 003; but *cf.* Def. Ex. 24). The testimony of Coleman established that none of the loans pursuant to the GSA Loan were made by GSA. The GSA Loan transfers were cloaked

with multiple badges of fraud: they were made among closely related parties, lacked adequate consideration, were made when both G&K and K&A were insolvent, and at a time both entities were being pursued by the creditor-Plaintiff.

The 2011 G&K transfers involved four transactions totaling $42,452.00, wherein G&K transferred $30,000.00 to GLC (Pl.'s Ex. 34A, at check No. 7871) at a time GLC was not yet a formed Virginia corporation (Pl.'s Ex. 40, at p. 3); G&K transferred $2,500.00 to GCI (Pl.'s Ex. 34A, at check No. 7882); G&K transferred $3,000.00 to Grayson (Pl.'s Ex. 34A, at check No. 7883); and G&K transferred $6,541.67 to Grayson (Pl.'s Ex. 35C, at check No. 3103), leaving only $100.00 in G&K's bank account. The 2011 G&K transfers were cloaked with multiple badges of fraud: they were made among closely related parties, lacked adequate consideration, were made when both G&K and K&A were insolvent, and at a time both entities were being pursued by the creditor-Plaintiff.

The *Halldorson* Settlement Proceeds transfers occurred during 2011 when K&A, with the necessary assistance, acquieșcence and affirmative action of Grayson, Kubli, Coleman and GLC, transferred a total of $339,923.48 to GLC. Of this sum, $100,000.00 was transferred to Kubli personally. (Pl.'s Exs. 19, 20, 21A-C, 22, 23A-23C, 24A-B, 38C). Coleman has contended throughout the litigation that she was nothing more than an unknowing scrivener and assistant to Grayson and Kubli, who did not have an understanding of the import of the transactions unfolding around her. The Court agrees that a mere conduit of a transaction whose conduct does not meet the statutory elements of the claim is not liable. Coleman was however more than a mere conduit. As but one example illustrates: in February 17, 2011 Coleman represented to Plaintiff that

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the *Halldorson* Settlement Proceeds would soon be forthcoming and that thus "all owed will be paid." (Pl.'s Ex. 19). Approximately nineteen separate events ensued, as more fully detailed in the record and recounted in Plaintiff's Post Trial Memorandum (p. 9-10), which were in derogation of Coleman's representations and which served to delay and hinder enforcement action by Plaintiff. The *Halldorson* Settlement Proceeds transfers were cloaked with multiple badges of fraud: they were made among closely related parties, lacked adequate consideration, were made when K&A was insolvent, and when it was being pursued by the creditor-Plaintiff.

The IDT Funds transfers occurred from May 2011 to September 2012, wherein CLC collected from IDT, on a month-to-month basis, payments totaling $1,800,000.00 (Pl.'s Ex. 38C), which were really due G&K. During direct examination of Coleman, parts of her June 6, 2017 deposition transcript were read into the record and admitted as substantive evidence. That prior testimony of Coleman, which the Court credits over her later disavowal on cross-examination and over that of Grayson to the contrary, conclusively established the IDT Funds paid to GLC were for work performed by G&K pursuant to a settlement agreement made by Grayson. The correctness of the original testimony was further punctuated on re-direct by Plaintiff, when Coleman was confronted with the affirming testimony she gave under penalty of perjury before the Office of Congressional Ethics on October 16, 2015. Her "new recollection" agreeing with Grayson that the IDT payments were a retainer for the then-present services of Grayson is rejected by the Court based on her prior testimony to the contrary and on Ms. Coleman's halting demeanor and testimonial delivery. Moreover, the testimony of Grayson himself that the IDT payments constituted retainer amounts for work he was

doing is evidentiarily discredited, inasmuch as there was no written agreement presented to that effect. IDT is a publicly traded corporation which presumably is charged with accounting for its expenditures to its shareholders in more than oral fashion. The IDT Fund transfers were cloaked with multiple badges of fraud: they were made among closely related parties, lacked adequate consideration, were made when G&K was insolvent, and when it was being pursued by the creditor-Plaintiff.

The K&A Debt and Asset Take Back (Pl.'s Exs. 9, 39A, 49C, 52A-D, 53A-D, 54) is set forth in K&A's 2011 Amended Tax Return, that $1,594,641.00 in "assets [were] taken back by AG," i.e. Grayson. In conjunction with the take back of K&A's assets, the inference may be drawn that Grayson unilaterally forgave all claimed indebtedness of K&A to the Grayson entities. K&A's 2009 tax return showed liabilities of $2,000,000 (the Buy-Out Agreement price) and $1,162,865 (the 2009 GSA Loan / Confessed Judgment plus a small credit card payable). (See Pl.'s Ex. 39A at C000004 & 9, Sch. L, Lines. 18 & 20).

K&A's tax returns characterize the GSA Loan / operating loans it received pursuant to Coleman's testimony as "Loan Payable to G&K" in apparent recognition of the true source of the loaned funds. (See Pl.'s Ex. 39D at C000009). K&A's 2010 tax return showed liabilities of $2,000,000 (the Buy-Out Agreement price) and $2,034,191 (the 2009 GSA Loan / Confessed Judgment plus additional operating loans advanced in 2010 and a small credit card payable). (See Pl.'s Ex. 39B at C000027, Sch. L, Lines. 18 & 20). K&A's 2011 tax return showed liabilities of $405,359 (the $2,000,000 Buy-Out Agreement price reduced by the $1,594,641.00 asset take back) and $2,397,607 (the 2009 GSA Loan/ Confessed Judgment plus additional operating loans advanced in

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2010 & 2011 and a small credit card payable). (See Pl.'s Ex. 39B at C000027 & 30, Sch. L, Lines. 18 & 20). No adequate explanation is provided in the 2011 tax return for this sharp reduction of liabilities. However, K&A's 2011 amended tax return provides additional detail. The amended return shows, as already noted, that there was $1,594,641.00 in "assets taken back by AG." The amended return further shows that K&A no longer had any liabilities (Pl.'s Ex. 39D at C000059, Sch. L, Lines. 18 & 20), because "[l]oans had been written off as a bad debt by the lender." (Pl.'s Ex. 39D at C000060). This tax treatment and notation demonstrates that in 2011, in association with taking back all of K&A's assets, Grayson forgave all debt incurred by K&A as a result of the Buy-Out Agreement and GSA Loan / operating loans. Grayson claimed that all K&A debt is still owed to him and that just because loans are deemed uncollectable in the tax context it does not mean they are forgiven. His testimony on this point is discredited both as a matter of logic and testimonial demeanor observed.

The K&A Asset Take Back has the consequence that Defendants cannot validly maintain in this suit as a defense, that as of 2011 K&A owed any of them any debt. Another curiosity is that the Grayson Debt identified in the Buy-Out Agreement is absent from all relevant federal tax returns at Schedule L, where loans are required to be reported. The lack of documentation, specificity or evidence other than vague oral testimony, is insufficient to persuade the Court the debt ever existed in a form which could pose a lawful preference defense to Plaintiff's claims. The K&A Asset Take Back transfer was cloaked with multiple badges of fraud: it was made among closely related parties, lacked adequate consideration, was made when K&A was insolvent, and when it was being pursued by the creditor-Plaintiff.

There is however a separate threshold issue pertaining to the characterization of the K&A Asset Take Back transfer, namely whether such transaction was a transfer reachable by the statutory scheme. Clearly, forgiveness of debt can be a transfer if such debt was incurred. As already discussed herein above, this Court finds that the original loan agreement creating the "debt" was void, and as such therefore, there is arguably no valid debt to transfer by means of forgiveness. The Court finds the forgiveness of the "debts" of K&A not to be a conveyance contemplated within the ambit of a valid Fraudulent or Voluntary Conveyance claim. One cannot convey what was never really validly given in the first place, but was instead a construct to hinder creditors. To the extent the "loans" are not void, the Court conversely finds that, in such event, the transfers made in contemplation of claimed repayment thereof were unlawful conveyances in derogation of the rights of the Plaintiff as already detailed with specificity elsewhere herein as to the consequent presence of multiple badges of fraud.

Consideration of the factual record as a whole along with an assessment of witness credibility, including testimonial demeanor, shows Plaintiff proved a *prima facie* case for its claim of Fraudulent Conveyance, while the Defendants failed in response to muster the evidence necessary to bring such claim into question.

> Once a party has established a *prima facie* case in support of its claim that a transfer is voidable, the *burden of producing evidence* to rebut the *prima facie* case shifts to the opposing party.

See Balzer and Associates v. The Lakes on 360, 250 Va. 527, 533, 463 S.E.2d 453, 455 (1995) (emphasis added). The evidence produced by Defendants was insufficient to outweigh the *prima facie* case established by Plaintiff or even leave the evidence in a state of equipoise. *Id.* The Plaintiff has thus proven its count of Fraudulent Conveyance

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and is entitled to an award of $380,864.91 in damages as pled, together with interest thereon, costs of suit, and reasonable attorney's fees, against Defendants Alan M. Grayson, AMG TR PC, Carla G. Coleman, GL CTR. P.C., Kubli & Associates PC, The GSA Telecommunications Trust, and Victor A. Kubli.

The Court bases its findings that an award of attorney's fees is not only warranted but mandated in this cause pursuant to two lines of authority. First, when as here "a breach of contract has forced the plaintiff to maintain or defend a suit with a third person, he may recover the counsel fees incurred by him in the former suit provided they are reasonable in amount and reasonably incurred." *Prospect Development Company v. Bershader,* 258 Va. 75, 92, 515 S.E.2d 291, 300 (1999) (citing *Owen v. Shelton*, 221 Va. 1051, 1055-56, 277 S.E.2d 189, 192 (1981); *accord Fidelity Nat. Title Ins. Co. v. Southern Heritage Title Ins. Agency, Inc.*, 257 Va. 246, 253-54, 512 S.E.2d 553, 557-58 (1999); *Hiss v. Friedberg*, 201 Va. 572, 577-78, 112 S.E.2d 871, 875-76 (1960)). Plaintiff was forced by the tangled web of conduct, arrangements and transactions weaved among Defendants to maintain a suit with "third persons" which is within the authority under *Owen* as recounted in *Bershader.*

Second, the dispute in this cause began as a fairly routine commercial scenario wherein Kubli found he was unable to sustain his law firm without the presence of Grayson, a very successful businessman and lawyer, who at the time had been elected to Congress and was as he put it, financially "blessed", i.e., an individual with a net worth well into the eight figures. Upon default for rent by his protégé Kubli and his law firm K&A, Grayson had a choice: he could allow receivables due AMG TR PC, G&K and K&A to be available to Plaintiff in the normal course of collection proceedings to satisfy

the Judgments, or he could as he indeed did, attempt to rely on the shield against creditors he believed he had validly constructed to interfere with their claims.

Grayson initially approached the Plaintiff in an effort to secure a reduction of the debt and more favorable lease terms. The landlord declined. What ensued bears similarity with the chancellor's observation in *Bershader* about the conduct of defendants in that case:

> To say that this case was hotly contested by the defendants I think is something of an understatement. It was certainly hotly contested in all respects by the defense. And it was not a precise, surgical defense in this case. It was a global, comprehensive, all inclusive — basically defend everything and deny everything. And I'm not by saying that faulting the attorneys. That was the position taken by the defendants themselves. . . . It did take an enormous amount of effort by the complainants to prove their case in this situation.

Bershader, 258 Va. at 93, 515 S.E.2d at 301. The extensive efforts to which the Plaintiff was put to collect rents due cannot be fully related in the pages of this opinion but were on display in the record of the eleven day trial.

It is the general rule "that in the absence of a statute or contract to the contrary, a court may not award attorney's fees to the prevailing party. There are, however, certain exceptions to this rule." *Bershader*, 258 Va. at 92, 515 S.E.2d at 300 (internal citation omitted). In addition to the "third party exception" already noted, attorney's fees have been approved in circumstances as varied as in a suit containing claims for constructive fraud, when a trustee defends his trust in good faith, in certain cases involving alimony and support disputes, and in a cause of action for malicious prosecution or false imprisonment. *See Bershader*, 258 Va. at 92, 515 S.E.2d at 300; Cooper v. Brodie, 253 Va. 38, 44, 480 S.E.2d 101, 104 (1997); Carswell v. Masterson, 224 Va. 329, 331-32, 295 S.E.2d 899, 900-01 (1982); Alig v. *Alig*, 220 Va. 80, 86, 255 S.E.2d 494, 498 (1979); *McKeel v. McKeel*, 185 Va. 108, 116-17, 37 S.E.2d 746, 750-51 (1946);

McClaugherty v. McClaugherty, 180 Va. 51, 69, 21 S.E.2d 761, 768 (1942); *Heflin v. Heflin*, 177 Va. 385, 399-400, 14 S.E.2d 317, 322 (1941); *Burruss v. Hines*, 94 Va. 413, 420, 26 S.E. 875, 878 (1897); *Bolton v. Vellines*, 94 Va. 393, 404, 26 S.E. 847, 850 (1897).

The legal concept that stitches together the justification for an award of attorney's fees in such diverse cases is that, but for such award as the *Bershader* court noted, the prevailing party's "victory would have been hollow" because of the amount that had to be expended to secure the remedy. *Bershader*, 258 Va. at 93, 515 S.E.2d at 301. An unanswered question remains as to whether the exception allowing the award of attorney's fees is restricted to situations where the underlying remedy sought is equitable. The Supreme Court of Virginia's "hollow victory" guidance seems logically also applicable to certain legal claims, but all the cases cited have in application been equitable in nature. The Court however need not decide the issue as this suit comprehends equitable claims. As already noted, "equity will not suffer a wrong to be without a remedy." *Price v. Hawkins*, 247 Va. 32, 37, 439 S.E.2d 382, 385 (1994) (citing *Drummond v. Rowe*, 155 Va. 725, 730-31, 156 S.E. 442, 444 (1931)). Plaintiff is entitled to have its attorney's fees considered, and if reasonable, reimbursed by Defendants so that its victory be not hollow.

IV. Voluntary Conveyance Claim

Plaintiff alleges that Defendants collaborated in and/or where the recipients of a series of transfers of funds belonging to K&A which are reachable in damages under its Voluntary Conveyance claim. Under Virginia Code § 55-81

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> [e]very gift, conveyance, assignment, transfer or charge which is not upon consideration deemed valuable in law, or which is upon consideration of marriage, by an insolvent transferor, or by a transferor who is thereby rendered insolvent, shall be void as to creditors whose debts shall have been contracted at the time it was made, but shall not, on that account merely, be void as to creditors whose debts shall have been contracted or as to purchasers who shall have purchased after it was made. Even though it is decreed to be void as to a prior creditor, because voluntary or upon consideration of marriage, it shall not, for that cause, be decreed to be void as to subsequent creditors or purchasers.

Virginia Code § 55-80 provides "that if a transferor is insolvent at the time a transfer is made, without valuable consideration, then the transfer shall be voidable by prior creditors." *Fox Rest Associates v. Little,* 282 Va. at 287, 717 S.E.2d at 133. The first threshold question is which standard of proof should be applied to such claim. The parties averred they were uncertain as to the answer and neither could point to authority which would inform the Court on the point. The Supreme Court has noted that "[i]t is well settled that when fraud is relied upon to set aside a conveyance it must be expressly charged and must be proven by evidence that is clear, cogent and convincing." *Col. Inv. Co. v. Cherrydale Cem. Bl. Co.,* 194 Va. 454, 459, 73 S.E.2d 419, 422 (1952). The reverse must therefore also be true: that when a conveyance does not involve fraud the standard of proof is thus lessened.

"Clear and convincing evidence" is "[t]hat measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established." *Edmonds v. Edmonds,* 290 Va. 10, 24, 772 S.E.2d 898, 905 (2015). It is noteworthy that the "clear and convincing" standard seems to apply mostly to situations where the intent of a party might be in question, as opposed to mere evaluation of a fact that is objectively measurable. In the case of Voluntary Conveyance, the central operative fact is primarily a determination of "insolvency," which is generally

of easy measurement. The Court holds that the standard of proof for Voluntary Conveyance claims is thus by a preponderance of the evidence. To the extent the Court were found to be wrong in its conclusion that the preponderance standard applies, the Court also applies the heightened "clear, cogent and convincing" standard to this cause, reaching the same result under either standard.

A voluntary conveyance is void when the transfer has been made (i) by an insolvent debtor, (ii) without legal consideration, (iii) after the transferor's debt to the creditor arose. *Hudson v. Hudson* 249 Va. 335, 340, 455 S.E.2d 14, 17 (1995).

> [T]he transfer can be alleged to have been made without receipt by the debtor of "consideration deemed valuable in law" while the debtor was, or as a result of the transfer became, insolvent. Code § 55-81. In such cases, fraud or other malicious intent is not an element required to prove the voidability of the transfer. In other words, a transfer undertaken by an insolvent debtor, or by a debtor who is thereby rendered insolvent, without return to him of valuable consideration is *de jure* fraudulent as against any existing creditor without any need to prove intent to defraud. "The principle upon which voluntary conveyances are held void as to existing creditors is that a man should be just before he is generous."

Balzer and Associates, 250 Va. at 531, 463 S.E.2d at 455 (internal citations omitted).

The transfers related to the GSA Loan and Confessed Judgment, the 2011 G&K Transfers, the *Halldorson* Settlement Proceeds and the IDT Payments, were unquestioningly made at a time when G&K and K&A were insolvent. K&A started its existence purportedly in debt to the tune of millions of dollars pursuant to the Buy-Out and GSA Loan agreements, and depended on Grayson for operating capital. As already noted, the agreements lacked mutuality and consideration *ab initio,* were thus not originally enforceable, and stand as invalid in this cause. Moreover, the relevant individual transfer transactions as already treated in the section applicable to the

Fraudulent Conveyance claim lacked adequate consideration and were made at a time after G&K and K&A were already indebted to Plaintiff.

The Plaintiff has proven its count of Voluntary Conveyance claim and is entitled to an award of $380,864.91 in damages as pled, together with interest thereon, costs of suit, and reasonable attorney's fees, against Defendants Alan M. Grayson, AMG TR PC, Carla G. Coleman, GL CTR. P.C., Kubli & Associates PC, The GSA Telecommunications Trust, and Victor A. Kubli. *See Bershader,* 258 Va. 75, 515 S.E.2d 291.

V. Conversion Claim

The Plaintiff's claim for Conversion presents a matter of legal interpretation of seeming first impression in Virginia state court jurisprudence. Plaintiff alleges that two payments totaling $120,000.00, made in connection with the *Haldorson* case, were unlawfully diverted from reaching K&A and delivered to Grayson in August of 2011. The evidence establishes that the *Haldorson* case was a *qui tam* action brought by Drew Haldorson in the name of the U.S. Government under the Civil False Claims Act, 31 U.S.C 3729-31. The case was originally filed by G&K before 2008. K&A assumed obligation over G&K's unfinished cases including the *Haldorson* matter after 2008. Kubli testified that K&A worked on the case during 2009 and 2010, but that such work was "minimal" in nature. The amount of transfers relating to the *Halldorson* Settlement Proceeds were $339,923.48 (See Pl.'s Ex. 38C), but because the Complaint pleads only a claim for $120,000.00 of which the Plaintiff was aware at the time of filing, potential recovery on this count is restricted to such prayed amount.

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The Defendant argues that at the time the *Haldorson* case settled at least in part by August of 2011, Kubli was working on the matter entirely as a GLC employee. If that were entirely the case, however, Grayson would not have enlisted the help of his personal lawyer, Mr. Gene Robinson. Mr. Robinson took steps to enforce the alleged debt agreement against K&A, by pressuring defense lawyers in the *Haldorson* matter as well as Kubli to effect the diverting of payment from K&A to Grayson.

The Plaintiff introduced exhibit 14 at trial, a writ of *fieri facias* found within a garnishment summons for $95,998.44. Plaintiff issued it on May 31, 2011, which was based on its judgment against K&A. The record shows the writ was placed in the hands of the Sheriff.

> Every writ of *fieri facias* shall, in addition to the lien it has under §§ 8.01-478 and 8.01-479 on what is capable of being levied on under those sections, be a lien from the time it is delivered to a sheriff or other officer, or any person authorized to serve process pursuant to § 8.01-293, to be executed, on all the personal estate of or to which the judgment debtor is, or may afterwards and on or before the return day of such writ or before the return day of any wage garnishment to enforce the same, become, possessed or entitled, in which, from its nature is not capable of being levied on under such sections[.]

Va. Code Ann. § 8.01-501 (2017). "[T]he execution lien upon intangibles dates from the time the writ is delivered to the proper officer." *Virginia National Bank v. Blofeld,* 234 Va. 395, 399, 362 S.E.2d 692, 694 (1987).

Defendant in effect argues that the writ does not reach the *Haldorson* Settlement Proceeds with a lien at all because the amounts were in effect due Grayson under the agreement that created K&A, and as such was a preexisting asset belonging to Grayson or entities he controlled. The Defendant further argues that even if a lien were applicable, it could not be for the full $120,000.00 to the extent the corpus stated in the

garnishment was for a lesser amount. The Defendant is mistaken in both positions. The tort of conversion

> encompasses "any wrongful exercise or assumption of authority . . . over another's goods, depriving him of their possession; [and any] act of dominion wrongfully exerted over property in denial of the owner's right, or inconsistent with it."

United Leasing Corp. v. Thrift Ins. Corp., 247 Va. 299, 305, 440 S.E.2d 902, 905 (1994) (quoting *Universal C.I.T. Credit Corp. v. Kaplan*, 198 Va. 67, 75, 92 S.E.2d 359, 365 (1956)). The effect of the Plaintiff delivering into the Sheriff's hands a garnishment directed at PNC Bank against K&A results in

> a lien...created on the property held by a third party debtor on the date the writ of *fieri facias* is delivered to the officer or authorized individual.
> However, the lien is not enforceable against a third party indebted to the judgment debtor until a garnishment summons is issued and served on the third party "garnishee."

PS Business Parks v. Deutsch & Gilden, Inc., 287 Va. 410, 419, 758 S.E.2d 508, 512 (2014) (citing *In re Lamm*, 47 B.R. 364, 368 (E.D. Va. 1984).

> [A] garnishment subjects to the execution lien of § 8.01-501, not only those debts already due the judgment debtor when the summons in garnishment is served upon the garnishee, but also any indebtedness of the garnishee to the judgement debtor which arises between the date of service of such summons on the garnishee and the return date of the summons.

Virginia National Bank, 234 Va. at 400, 362 S.E.2d at 694. Thus,

> Virginia Code 8.01-478 provides that...a writ of fieri facias may be levied on goods and chattels and money and banknotes of a judgment debtor and "shall bind what is capable of being levied on only from the time it is actually levied by the officer to whom it has been delivered to be executed." Under the Virginia law, the officer is not required to seize the property levied on, only that he have them in his power and note it on the execution. The lien acquired by the levy of the execution is both substantial and enduring, as much so as a mortgage or a pledge.

In Re Lamm, 47 B.R. at 367 (internal citations omitted).

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The consequence of this Court's detailed consideration of the effect of the issuance of the *fieri facias* is that any receivables due K&A at the time of such placement into the Sheriff's hand of the garnishment and thereafter, were within the scope of Plaintiff's lien on intangibles. Even if the Court were to be incorrect as to the range of the lien, at a minimum $95,998.44 plus any judgement costs and interest due, if any, were the subject of the reach of the lien, which in any case now exceeds the $120,000.00 claimed.

The Defendant asserts that even if the funds were subject to a lien in favor of the Plaintiff, Grayson had a confessed judgment and perfected security interest which was in priority to that of Plaintiff, and as such, there could be no conversion as K&A was merely paying off a creditor in priority. Determination of priority of claims in a dispute is normally a legal matter for determination by a court of competent jurisdiction, and the applicable law does not contain a safe harbor mechanism for creditors helping themselves to an asset to the exclusion of the rights of others pursuant to the *fieri facias*. "[T]he only person who can defeat the *fieri facias* lien is a bona fide purchaser or assignee for value *without notice....*" *In Re Acorn Electric Supply, Inc.,* 348 F. Supp. 277, 282 (E.D. Va. 1972) (emphasis added). The assertion by Grayson of a claimed status of being a lien creditor in priority to the claims of Plaintiff is not of itself a basis to prematurely help himself to funds subject to the reach of the *fieri facias*.

K&A's "inchoate intangible rights" in receivables from outstanding cases were subject to the lien of the writ obtained pursuant to Virginia Code § 8.01-501. As previously noted, because the original agreement for transfer of the law practice and related loan lacked mutuality and consideration, the resulting confessed judgment and

financing statement therefore obtained liens of no validity. Because Grayson's claim of entitlement to divert funds away from K&A and to himself and his entities rests on these void agreements, transfers in reliance thereof are invalid beyond the bar already posed by the issuance of the *fieri facias*. When Grayson resorted to help himself to the *Haldorson* Settlement Proceeds, he engaged in the "wrongful exercise or assumption of authority" over the funds at a time when such amounts were the subject of a lien claim in need of judicial resolution. The funds belonged to K&A even if the Court were wrong in concluding they were not validly subject to Grayson's debt claims, and were not at the time of their receipt by him, his property. K&A was in no legal position to concur in the diversion of receivables in derogation of the writ, yet that is what occurred. It does not matter ultimately whether the lien could be resolved in favor of Defendant or Plaintiff, for the wrong is to convert the funds in derogation of the *fieri facias* before the status of competing liens and the consequent entitlement of funds pursuant thereto is judicially resolved. *In Re Lamm,* 47 B.R. at 367-68.

The Plaintiff has thus proven its count of Conversion and is entitled to an award against Alan M. Grayson of $120,000.00 in damages as pled, together with interest thereon, costs of suit, and reasonable attorney's fees. *See Bershader,* 258 Va. 75, 515 S.E.2d 291.

Plaintiff has also prayed for exemplary damages in connection with his Conversion count.

> Punitive or exemplary damages are allowable only where there is misconduct or actual malice, or such recklessness or negligence as to evince a conscious disregard of the rights of others. They are allowed not so much as compensation for plaintiff's loss, as to warn others and to punish the wrongdoer, if he has acted wantonly, oppressively, or with such malice as to evince a spirit of malice or criminal indifference to civil obligations. Willful or

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> wanton conduct imports knowledge and consciousness that injury will result from the act done.
>
> Where punitive damages are asked there must be proof of actual or express malice. Actual malice is an essential and controlling factor for the recovery of punitive damages. Evil intent cannot be presumed or inferred from mere mistake.

Giant of Virginia v. Pigg, 207 Va. 679, 685-686, 152 S.E.2d 271, 276-77 (1967) (internal citations omitted). Grayson was mistaken in his belief he was entitled to divert *Haldorson* Settlement Proceeds away from payment to K&A, where upon receipt, the status of the funds could instead have been litigated. His conduct however, does not amount to malice or a conscious disregard of the rights of others. Accordingly, the Court finds an insufficient basis to award Plaintiff punitive damages against Grayson.

VI. Civil Conspiracy Claim and Timeliness of Motion to Amend

Plaintiff's original complaint contained claims among others for common law and statutory Civil Conspiracy. The affected Defendants demurred to such claims in the main, on grounds that the applicable statute of limitations was two years and eliminated those claims as a matter of law. The motions judge applying analysis not merely superficial in character, looked beyond the labels of the claims averred, and concluded that the underlying wrongs that could support a claim for civil conspiracy sounded in fraud, and consequent thereto applied a two year statute of limitations. The ruling was memorialized in an order from which one can infer such conclusion but not a letter opinion wherein the Court fully set forth its thinking. This Judge further does not have benefit of a transcript of such proceedings, but can nevertheless make the logical inferences that necessarily flow from the ruling.

Plaintiff, dissatisfied with the ruling, sought to have the motions judge reconsider the decision, which was again affirmed by the judge. Plaintiff's claims are thus more than preserved for purposes of appeal in the sense that the dismissal of these claims became the governing law of the case for purposes of trial, as this trial judge no longer had the claims before him.

At the motion to strike, in response to Defendants' motion to reconsider the ruling of the motions judge as to the statute of limitations applicable to the Fraudulent Conveyance claim, Plaintiff sought to revisit the statute of limitations ruling which had the prior effect by the sustaining of the demurrer, to strike out its statutory Civil Conspiracy claim. This Court as trier of fact, thus addresses the status of the statutory Civil Conspiracy claims which arguably have the more expansive limitations period than do the common law variant, in order to consider whether reinstatement of the claims at trial would have been proper. The determination of the motions judge that claims for Civil Conspiracy were extinguished by the statute of limitations in the context of a demurrer flow from one of the generally prevailing interpretations of the statutory sections which are involved.

In first analyzing the claim for Civil Conspiracy, one must determine whether such claims are for personal damages or for damage to property, in order to discern the probable overarching statute of limitations which is applicable. In this regard, the Supreme Court of Virginia has provided helpful guidance.

> The conspiracy statute was once codified as part of the antitrust laws of the Commonwealth. *See* Code § 59-21.1 (Cum. Supp. 1962) (superseded). In 1964, the General Assembly removed the conspiracy provisions from the antitrust statutes and placed them in the criminal code with much greater sanctions. *See* Code § 18.1-74.1:1 (superseded) (Chapter 623, 1964 Acts of Assembly). We conclude that the origin of Code §§ 18.2-499 and -500

> establishes that they apply to business and property interests, not to personal or employment interests.
>
> Traditional statutory construction requires the same conclusion. Code § 18.2-499 proscribes conspiracy to "willfully, and maliciously injur[e] another in his reputation, trade, business or profession." The maxim of *noscitur a sociis* provides that the meaning of doubtful words in a statute may be determined by reference to their association with related words and phrases. When general words and specific words are grouped together, the general words are limited and qualified by the specific words and will be construed to embrace only objects similar in nature to those objects identified by the specific words. *Commonwealth v. United Airlines, Inc.*, 219 Va. 374, 389, 248 S.E.2d 124, 132-33 (1978). Here the word "reputation" is at issue. Within the statute, its association with "trade, business or profession" requires the exclusion of personal reputation and interest in employment from the scope of the statute's coverage. We note that federal courts in Virginia have reached similar holdings. *See Buschi v. Kirven*, 775 F.2d 1240, 1259 (4th Cir. 1985), *Nationwide Mut. Fire Ins. Co. v. Jones*, 577 F. Supp. 968, 970 (W.D. Va. 1984).

Andrews v. Ring, 266 Va. 311, 319, 585 S.E.2d 780, 784 (2003). The clear import of *Andrews* is that claims for statutory civil conspiracy are for injury to property and subject to a five year statute of limitations. Va. Code Ann. § 8.01-243(B) (2017). While five years may provide an upper ceiling for the advance of such claims, it is not the only potential limitation:

> To recover in an action under these statutes, a plaintiff must establish: "(1) a combination of two or more persons for the purpose of willfully and maliciously injuring plaintiff in his business[;] and (2) resulting damage to plaintiff." *Allen Realty Corp. v. Holbert*, 227 Va. 441, 449, 318 S.E.2d 592, 596 (1984); *accord CaterCorp*, 246 Va. at 28, 431 S.E.2d at 282. It is not necessary for a plaintiff to prove that the defendant conspirators acted with actual malice, i.e., ill-will, hatred, or spite directed toward the plaintiff. *Commercial Bus. Sys., Inc. v. BellSouth Servs.*, 249 Va. 39, 47, 453 S.E.2d 261, 266-67 (1995). Rather, a plaintiff must establish by clear and convincing evidence only that the conspirators acted with legal malice, i.e., "intentionally, purposely, and without lawful justification." *Id.* at 47, 453 S.E.2d at 267; *accord Northern Va. Real Estate v. Martins*, 283 Va. 86, 110, 720 S.E.2d 121, 133 (2012); *Williams v. Dominion Tech. Partners, L.L.C.*, 265 Va. 280, 290, 576 S.E.2d 752, 757 (2003); *Simmons v. Miller*, 261 Va. 561, 578, 544 S.E.2d 666, 677 (2001).
>
> Because there can be no conspiracy to do an act that the law allows, *Werth*, 160 Va. at 855, 171 S.E. at 259, we have held that "an allegation of

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> conspiracy, whether criminal or civil, must at least allege an unlawful act or an unlawful purpose" to survive demurrer. *Hechler Chevrolet, Inc. v. General Motors Corp.*, 230 Va. 396, 402, 337 S.E.2d 744, 748 (1985). In other words, actions for common law civil conspiracy and statutory business conspiracy lie only if a plaintiff sustains damages as a result of an act that is itself wrongful or tortious. *See Beck v. Prupis*, 529 U.S. 494, 501 (2000); *see also Almy v. Grisham*, 273 Va. 68, 80, 639 S.E.2d 182, 188 (2007) ("[I]n Virginia, a common law claim of civil conspiracy generally requires proof that the underlying tort was committed."); *Werth*, 160 Va. at 855, 171 S.E. at 259 ("'To give action there must not only be conspiracy, but conspiracy to do a wrongful act.'") (quoting *Transportation Co. v. Standard Oil Co.*, 40 S.E. 591, 594 (W.Va. 1902)); *McCarthy v. Kleindienst*, 741 F.2d 1406, 1413 n.7 (D.C. Cir. 1984) ("[C]onspiracy allegations . . . do not set forth an independent cause of action; instead, such allegations are sustainable only after an underlying tort claim has been established."); *Halberstam v. Welch*, 705 F.2d 472, 479 (D.C. Cir. 1983) ("Since liability for civil conspiracy depends on performance of some underlying tortious act, the conspiracy is not independently actionable; rather, it is a means for establishing vicarious liability for the underlying tort."); *Koster v. P&P; Enters.*, 539 N.W.2d 274, 278 (Neb. 1995) ("[A] claim of civil conspiracy is not actionable in itself, but serves to impose vicarious liability for the underlying tort of those who are a party to the conspiracy."); *Selle v. Tozser*, 786 N.W.2d 748, 756 (S.D. 2010) ("[C]ivil conspiracy is merely a method of establishing joint liability for the underlying tort.").

Dunlap v. Cottman Transmissions Systems, 287 Va. 207, 214-216, 754 S.E.2d 313, 316-18 (2014).

It follows thus that while the statute of limitations may be at least five years, the underlying wrong may in effect, as noted by the motions judge in this cause, further restrict the period within which the claim may be actionable. The Court in *Dunlap* provides somewhat contradictory guidance. Citations to cases from other jurisdictions and from the *Werth* case suggest the underlying wrong must at least be a "tort." On the other hand, the Supreme Court has also stated that "allegations of unlawful conduct or unlawful purposes" suffice. *Hechler Chevrolet,* 230 Va. at 402, 337 S.E.2d at 748.

Irrespective, it appears clear that the actionable wrong must occur within at least the five year period applicable for property claims, and must then itself be unlawful at

such time. If the illegality committed by the defendant is one for which there is a more restrictive statute of limitations applicable if such claim was made only by one individual against the other, then the statutory civil conspiracy claim might arguably be advanced only within that more restrictive limitations period. The mere agreement to commit a wrong as noted in *Dunlap,* is not itself actionable independently, but serves instead to impose vicarious liability on other parties to the conspiracy. *Dunlap,* 287 Va. at 216, 754 S.E.2d at 318. In the instant case, the motions judge found that, as pled, Plaintiff's claims sounded only in fraud, and the actionable facts occurred more than two years prior to the filing of the Complaint. The claim for Civil Conspiracy thus was not within the applicable statute of limitations for personal fraud, which is two years.

An alternative suggested conclusion, not properly before this Court *at this time* is that the actionable underlying unlawful conduct could be the Fraudulent Conveyances, Voluntary Conveyances or the acts of Conversion found by the trial Court, which would have allowed the advancement of the statutory Civil Conspiracy claim. Under Virginia Code §§ 18.2-499 and 500, a plaintiff must undoubtedly allege and prove damages. *See PJS Associates v. Cosby,* 13 Cir. LF24201 (2000). Normally, claims which sound in equity or which are for the recovery of property, are not deemed to be ones for money damages and thus arguably would not qualify as wrongs contemplated by the civil conspiracy statute. *See Efessiou v. Efessiou,* 19 Cir. C143425, 41 Va. Cir. 142 (1996). However, in the narrow case where the property wrongfully transferred is commingled with other property so as to make its character indistinguishable, i.e. for example cash that is deposited with other cash, the equitable claim converts to one where money damages may be awarded, and as such might qualify as a contemplated underlying

wrong under the civil conspiracy statute. The Supreme Court of Virginia has set forth the confines of this narrow exception.

> A mere declaration under § 55-80 that the cash transfers are "void" is meaningless in terms of relief to the defrauded creditor in this case. This is not a situation where the property fraudulently conveyed is realty, when a declaration that the conveyance is void allows restoration of title in the name of the grantor to which the lien of the judgment could attach. This is not a situation where the fraudulent grantor conveys personal property that requires title records for proof of ownership, like motor vehicles, and the property is still in existence and can be located for attachment or levy when the fraudulent transfer is declared void. Here, cash money has been transferred and, if merely ordered to return money to court, the transferees may refuse to do so, or claim that the money transferred has been spent and is no longer available. In effect, the defrauded creditor in this case is without any effective remedy under § 55-80 unless personal judgments are entered against the defrauders.
>
> We will not presume that the General Assembly intended to provide a § 55-80 cause of action without a remedy. Moreover, equity will not suffer a wrong to be without a remedy. *Drummond v. Rowe*, 155 Va. 725, 730-31, 156 S.E. 442, 444 (1931). Indeed, remedies were fashioned under the statute in both *Darden* and *Mills.*
>
> Consequently, we hold that the trial court did not err by entering *in personam* judgments.

Price v. Hawkins, 247 Va. 32, 37-38, 439 S.E.2d 382, 385-86 (1994). Although some of these arguments were apparently advanced in written pleadings to the motions judge, they still do not sufficiently address whether the tenor of the Complaint, sounding in fraud, compelled such judge nevertheless to apply the two year statute of limitations.

Virginia Circuit Courts have seemingly split as to whether in the context of the Civil Conspiracy statute, fraudulent acts which deprive a complaining plaintiff of property are therefore subject to the two year statute of limitations applicable to personal fraud claims, or the five year limitations period applicable to injuries to property. In our own and other circuits, it appears that judges have ruled in different ways as to whether the five year or two year statute of limitations govern claims for civil conspiracy which could

sound in fraud. *See Orantes v. Polio Ranchero, Inc.*, 70 Va. Cir. 277 (2006) ("Fraud is a wrongful act 'aimed at the person,' not that person's property."); *Cf., EER Systems, Inc. v. Armfield, Harrison & Thomas, Inc.*, 51 Va. Cir. 84 (1999) (generally applying the five year statute of limitations to *statutory* civil conspiracy claims); *cf. Cherokee Corp. v. Chicago Title Ins. Corp.*, 35 Va. Cir. 19 (1994) ("In the instant case, the action is one for conspiracy rather than for fraud. According to the *Federated Graphics* court, all actions brought under §§ 18.2-499 and 18.2-500 concern injuries to property and are therefore governed by a five-year statute of limitations.").

The motions judge ruled that the pleadings sounded in fraud and thus the two year statute of limitations applied. The pleadings do not appear to the trial judge to make sufficiently clear that Plaintiff did not seek just the simple redress of the unlawful, and perhaps not fraudulent, seizure of assets from which its debts could be satisfied devoid of the taint of fraud. The tenor of the Complaint alleged there was an overarching scheme to defraud, when a lesser theory could still arguably sustain relief to Plaintiff. In this context it appears understandable and even appropriate for the motions judge to have ruled upon Plaintiff's pleadings being challenged by demurrer, that the underlying overarching claim was for fraud in the context of the Civil Conspiracy claim pled.

The actual test in the confines of a merits decision as opposed to of the sufficiency of pleadings appears to be a different one, namely whether the claimed fraud is personal or one that damages property. The Supreme Court of Virginia has illustrated this distinction.

> In *Pigott*, the purchasers of land alleged that a real estate agent perpetrated acts of fraud upon them by misrepresenting the zoning status of abutting property. The purchasers claimed that they had sought to purchase property in a residential neighborhood and that the agent had assured them that the

> abutting property was zoned for residential use when, in fact, it was zoned for industrial use. The purchasers asserted that they incurred a financial loss resulting from the diminution of the property's value. Holding that the purchasers' claim was personal in nature and, thereby, controlled by the one-year statute of limitation in Code § 8.01-248, we stated:
>
> Fraud is a tort. . . . The wrongful act is aimed at the person and, when sued upon at law, fraud will support a recovery for financial damage personal to the individual. This is the gist of the [purchasers'] claim. The fraud allegedly committed by the realtor had no impact on the real property itself. The purchasers' land was in the same condition and was available for the same use after the alleged fraud as it was before. The defendants' conduct was directed at the plaintiffs personally and not their property, real or personal. 231 Va. at 81, 341 S.E.2d at 182 (citations omitted). *See also J.F. Toner & Son v. Staunton Prod. Credit*, 237 Va. 155, 157-58, 375 S.E.2d 530, 531 (1989).
>
> Unlike the purchasers in *Pigott*, the gist of the cause of action asserted by Mrs. Bader is that Central Fidelity wrongfully exercised authority over her funds and, thus, she was deprived of possession and use of those monies. *See Vines v. Branch*, 244 Va. 185, 190, 418 S.E.2d 890, 894 (1992) (conduct directed at property constitutes an injury to property). Central Fidelity's alleged act of conversion was not aimed at Mrs. Bader's person, but was directed upon her property.
>
> Accordingly, we hold that the five-year period of limitations under § 8.01-243(B) is applicable to Mrs. Bader's conversion claim against Central Fidelity. Hence, we will reverse the judgment of the trial court and remand this case for further proceedings.

Bader v. Central Fidelity Bank, 245 Va. 286, 290, 427 S.E.2d 184, 186 (1993).

Of note, it does not appear the Plaintiff sought leave from the motions judge to have the claim reconsidered at trial. Even if it did, it did not otherwise again seek to revisit the ruling at trial by first filing a written motion for leave to obtain such relief well in advance of the trial date so that Defendants would have been prepared to adjudicate the claim should it be reinstated. The trial judge is thus governed by the prior ruling of this Court. The motion to reconsider such ruling at trial was untimely. The motivation of Plaintiff's counsel in not seeking such redress earlier is laudable, for as he expressed, his actions were in the spirit of respect for the prior ruling on reconsideration before the motions judge. However, it should be clear, in the view of this Court, a party is always

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entitled to seek leave to present legally well-founded arguments to the trial judge, when such judge may be different from the motions judge and may further be in the position at an eleven day trial to adduce facts and argument not available within the scope of the thirty minute motions hearing. Parties should not conclude that "civility and decorum" require they waive an opportunity to be heard. *See Maxwell v. Commonwealth,* 287 Va. 258, 270-271, 754 S.E.2d 516, 521 (2014) (dissent lamenting the majority decision that civility and decorum on the part of defense counsel caused waiver of an objection).

Plaintiff's counsel conceded at trial all the evidence presented was also the evidence relevant to the Civil Conspiracy claim, averring thereby that reinstatement of that claim was of no prejudice to Defendants. The Defendants were however prepared to meet argument on the claims that survived pretrial motions, so the Court finds it would have been of undue prejudice to Defendants to reinstate the Civil Conspiracy claim in the midst of trial. The Court finds it appears Plaintiff did produce all the evidence it could possibly muster against the Defendants which would have been of relevance to the issue of whether there was proof to support the claims of Civil Conspiracy because the same evidence was essential to proving the claim of Fraudulent Conveyance. The Court is of the view at this juncture that the Defendants did not act with "actual malice," i.e., "ill-will, hatred, or spite directed toward the [P]laintiff." *See Dunlap,* 287 Va. at 214-215, 754 S.E.2d at 316-18. The Defendants operated under the mistaken belief various transactions were supported by adequate consideration and that their agreements would not be found to lack mutuality, to them an unforeseen eventuality. The question of whether one or more Defendants acted with "legal malice" which amounts to acting "intentionally, purposely, and without lawful

justification" need not be decided by the Court at this time inasmuch as Defendants were not afforded a timely opportunity to address that issue by virtue of the fact the claim was not reinstated before this Court. *See Dunlap,* 287 Va. at 214-215, 754 S.E.2d at 316-18. It is thus left for another day, should Plaintiff appeal this cause, whether the claim should be reinstated and whether in such circumstance, Plaintiff would prevail.

CONCLUSION

For the reasons as stated herein and in consideration of the evidence adduced and argument of counsel, and in particular, in reliance on assessing the credibility of each witness presented including their demeanor on the witness stand, the Court thus renders its judgment in this cause:

On Plaintiff's claim against various Defendants asserting a Fraudulent Conveyance claim, the Court finds Plaintiff is entitled to judgment against Defendants Alan M. Grayson, AMG TR PC, Carla G. Coleman, GL CTR. P.C., Victor A. Kubli, Kubli & Associates PC, and The GSA Telecommunications Trust, in the amount of $380,864.91 for damages as pled, together with costs and post-judgment interest, with consideration of attorney's fees left for another day by agreement of the parties.

On Plaintiff's claim against various Defendants asserting a Voluntary Conveyance claim, the Court finds Plaintiff is entitled to judgment against Defendants Alan M. Grayson, AMG TR PC, Carla G. Coleman, GL CTR. P.C., Victor A. Kubli, Kubli & Associates PC, and The GSA Telecommunications Trust, in the amount of $380,864.91 for damages as pled, together with costs and post-judgment interest, with consideration of attorney's fees left for another day by agreement of the parties.

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On Plaintiff's claim for Conversion against Defendant Alan M. Grayson, the Court finds Plaintiff is entitled to judgment against Alan M. Grayson in the amount of $120,000.00 for damages as pled, together with costs and post-judgment interest, with consideration of attorney's fees left for another day by agreement of the parties.

It is of note that as to the three claims advanced by Plaintiff, there is ample evidence from which each count could be factually supported by transfers of money, divisibly. Each of the three awards noted above are thus subject to separate collection and satisfaction, but are nevertheless restricted by the Plaintiff's actual global damages of $452,599.76 as of July 10, 2017 (Pl.'s Ex. 30B) to prevent double recovery, and thus the final judgment order shall reflect the actual limitation due calculated when the order is entered.

The Court declines to award any punitive or exemplary damages for they are legally unwarranted in this cause.

The Court also finds Plaintiff is not entitled to judgment against Defendants Law Office of Victor A. Kubli, P.C., and Grayson Consulting, Inc., which claims against such entities must therefore be dismissed.

AND THIS CAUSE CONTINUES.

Sincerely,

David Bernhard
Judge, Fairfax Circuit Court

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