Case No. 22-CV-0548

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IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

CAPITAL RIVER ENTERPRISES, LLC, ET AL.

Appellants,

v.

CHRISTOPHER ABOD, ET AL.,

Appellees.

Appeal from the Superior Court of the District of Columbia
Civil Division

REPLY BRIEF FOR APPELLANTS CAPITAL RIVER ENTERPRISES, LLC AND KUEI-YIN CHANG LIU IN RESPONSE TO PREMIUM TITLE & ESCROW, LLC'S BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

1. The Superior Court erred in granting Premium Title's Motion for Summary Judgment based on its finding that the submission of a forged and fraudulent operating agreement did not automatically void the two Deeds of Trust 2

2. The Superior Court erred in finding that the MOU provided Ibiezugbe and Falkner with actual authority to encumber the Property. 4

3. The Superior Court erred in granting Premium Title's Motion for Summary Judgment as to Count Two, Negligence. 7

CONCLUSION 14

CERTIFICATE OF SERVICE 16

TABLE OF AUTHORITIES

Cases **Page(s)**

Aronoff v. Lenkin Co., 618 A.2d 669 (D.C. 1992) 8, 9

Burke v. Scaggs, 867 A.2d 213 (D.C. 2005) 7

D.C. v. Watkins, 684 A.2d 395 (D.C. 1996) 11

HBR Lewisport, LLC v. Hamilton, No. 4:16-CV-00044-JHM, 2016 WL 5897769 (W.D. Ky. Oct. 7, 2016) 3

Kemp v. Eiland, 139 F. Supp. 3d 329 (D.D.C. 2015)....................4

Nader v. de Toledano, 408 A.2d 31 (D.C. 1979)....................10

Pitman Place Dev., LLC v. Howard Invs., LLC, 330 S.W.3d 519 (Mo. Ct. App. 2010)....................3, 4

Ray v. Am. Nat. Red Cross, 696 A.2d 399 (D.C. 1997) 7, 8

Sanders v. Molla, 985 A.2d 439 (D.C. 2009) 6

* Smith v. Wells Fargo, 991 A.2d 20 (D.C. 2010) 2, 3, 4, 5

Statutes

D.C. Code § 29-801.07 2

D.C. Code § 21-2103 2

Other Sources

Restatement (Second) of Agency § 381 9

* Cases principally relied on

INTRODUCTION

Appellee Premium Title's[1] entire argument really comes down to a single point that it repeats over and over again – the Superior Court determined that Ibiezugbe and Falkner had actual authority to use the Property as collateral to secure their own personal loans. Premium Title largely ignores the fact that Ibiezugbe and Falkner submitted a forged and fraudulent operating agreement in connection with securing the Deeds of Trust, thereby voiding the Deeds of Trust under D.C. law. Premium Title also ignores its own negligence in its role as the closing/escrow agent for the relevant transactions. Even if the Superior Court properly determined that Ibiezugbe and Falkner had actual authority to use the Property as collateral for their personal loans (they did not), the Superior Court still erred in granting Premium Title's motion for summary judgment as to the negligence count. Indeed, any purported authority for Ibiezugbe and Falkner to act does not excuse Premium Title's clear negligence. Significant issues of material fact remain as to (a) the standard of care to which Premium Title was subject, and (b) whether the breaches of duty proximately caused harm to Capital River and Ms. Liu. The Superior Court thus erred in granting Premium Title's motion for summary judgment.

[1] Capitalized terms have the same meaning ascribed to them in Capital River and Ms. Liu's opening brief unless otherwise stated herein.

ARGUMENT

1. The Superior Court erred in granting Premium Title's Motion for Summary Judgment based on its finding that the submission of a forged and fraudulent operating agreement did not automatically void the two Deeds of Trust.

Premium Title's argument that the submission of a forged operating agreement "provides no basis to void a deed of trust" (see Appellee's Br. at 7-11) is inconsistent with D.C. law and defies basic logic. As discussed at length in Capital River and Ms. Liu's opening brief, it is well-settled law in the District of Columbia that property rights cannot be acquired "by means of a forged instrument ***relating to*** the property." See Smith v. Wells Fargo, 991 A.2d 20, 31 (D.C. 2010) (emphasis added). Premium Title tries to distinguish the Smith case because it deals with a forged power of attorney rather than a forged operating agreement. See Appellee's Br. at 8. But that is a distinction without a difference. Both documents provide and define the authority by which a person (or persons) can act on behalf of another. Compare D.C. Code § 29-801.07 (noting that an LLC's "operating agreement shall govern…[t]he activities and affairs of the company and the conduct of those activities and affairs.")[2] with D.C. Code § 21-2103 ("By executing a statutory power

[2] See also Appx.0270 (the Commitment for Title Insurance issued by Chicago Title Insurance Company in this case, which provides at Schedule B, Paragraph 23(f) that for a limited liability company (like Capital River), the title company (here Premium Title) was required to obtain and submit "a full and complete copy of the Operating Agreement ***governing the authority of any or all of the members of the LLC to act on behalf of the LLC***.") (emphasis added).

of attorney…the principal…empowers the agent to" act on its behalf); see also HBR Lewisport, LLC v. Hamilton, No. 4:16-CV-00044-JHM, 2016 WL 5897769, at *1 (W.D. Ky. Oct. 7, 2016) ("A power of attorney is a 'written, often formally acknowledged, manifestation of [a] principal's intent to enter into [an agency] relationship with a designated agent' to act on the principal's behalf."). Thus, it is of no consequence that the Smith case deals with a power of attorney as opposed to an operating agreement. This Court held that property rights cannot be acquired through use of a forged instrument "relating to" the property. The forged operating agreement used in this case clearly satisfies that criterion and the Superior Court erred in disregarding this fraud.[3]

Premium Title, on the other hand, was unable to cite to ***any*** D.C. law supporting its argument. Instead, it cited to a single Missouri Court of Appeals decision, Pitman Place Development v. Howard Investments, in an attempt to support its position. Premium Title argued that in the Pittman case, the Missouri Court of Appeals "did not automatically declare a deed of trust void based on a fraudulently altered operating agreement, but reviewed whether the member of the LLC had the authority to undertake the transaction." See Appellee's Br. at 10.

[3] Premium Title's argument that "there was no 'fraud'" perpetrated here also is wrong. See Appellee's Br. at 10-11. Ibiezugbe and Falkner created and submitted a forged and fake operating agreement with the intention that others would rely on it. They did not tell Ms. Liu about this. It is undeniable that fraud has taken place.

Premium Title neglects to mention that whether the fraudulently-altered operating agreement voided the deed of trust was ***not*** a question before the appellate court in that case. Instead, the ***only*** issue on appeal was whether the LLC member had authority to act. See Pitman Place Dev., LLC v. Howard Invs., LLC, 330 S.W.3d 519, 525-26 (Mo. Ct. App. 2010) (noting the points on appeal, including "that the trial court erred in finding that the Rockwood Bank loan documents were binding upon Pitman because Burghoff lacked authority to execute the loan documents."). The Pitman case is thus inapposite and irrelevant to Premium Title's argument.

In short, dismissal of a quiet title action is improper where there are allegations supporting "a basis for finding as void the documents" which cloud the title. See Kemp v. Eiland, 139 F. Supp. 3d 329, 339 (D.D.C. 2015). Because Ibiezugbe and Falkner submitted a forged and fraudulent operating agreement in securing the Deeds of Trust, the Deeds of Trust are void.

2. The Superior Court erred in finding that the MOU provided Ibiezugbe and Falkner with actual authority to encumber the Property.

Next Premium Title argued that the MOU gave Ibiezugbe and Falkner authority to enter into the Deeds of Trust at issue in this case. See Appellee's Br. at 11-14. First, this argument is unavailing given the fraud discussed above. Indeed, the Wells Fargo v. Smith case makes clear that the transaction is void if ***either*** (a) the document(s) on which it was based were forged/fraudulent, ***or*** (b) a party exceeded its authority: "The underlying deed to Mary Smith and the deed of trust in

favor of her mortgage lender would be void if the POA was a forgery, ***or*** if the POA was valid but Mary Smith exceeded the authority it gave her as attorney-in-fact when she conveyed the property to herself." See Smith, 991 A.2d at 26-27 (emphasis added). Because the Deeds of Trust in this case were obtained through use of a forged and fraudulent operating agreement, they are void.

Second, Ibiezugbe and Falkner did exceed their authority in using the Property as collateral to secure their own personal loans. At a minimum, the language from the MOU relied on by Premium Title and the Superior Court in its decision is ambiguous. For example, there is no definition of what constitutes a "major decision" or whether such decisions were limited to "investments" in the Property.[4] Indeed, Ibiezugbe and Falkner were tasked with obtaining a building permit and potential construction on the Property. Appx.0123-125. The whole purpose of the Capital River venture was to acquire, build out and/or flip the Property for a profit. Appx.0003; Appx.0026; Appx.0123. Ibiezugbe's and Falkner's joint decisions relating to the Property were required to "further the investment opportunity" and "not necessarily impact the Net Profits of the investment." Appx.0125. Such ends are not accomplished by encumbering the Property with multiple, significant personal loans. Indeed, the parties never contemplated encumbering the Property

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[4] This does not mean, as Premium Title argues, that "each word in this commercial contract would need to be given a definition." See Appellee's Br. at 13.

with loans. Capital River and Ms. Liu should be entitled to present evidence as to the Capital River members' understanding and intention of the MOU. See Sanders v. Molla, 985 A.2d 439, 441-42 (D.C. 2009). Such evidence would clearly show that Ibiezugbe and Falkner did **not** have authority to use the Property as collateral for their own personal loans (Appx.0004; Appx.0018; Appx.0251) and that the members of Capital River each understood Ms. Liu's approval was necessary to use the Property as collateral (Appx.0012; Appx.0251). Indeed, Ibiezugbe and Falkner have ***admitted*** both in discussions with Ms. Liu's agents and in writing that they did not have authority to encumber the Property. See Appx.0009; Appx.0251; Appx.0181 (where following the discovery of their fraud, Ibiezugbe and Falkner executed an amendment to the operating agreement stating: "the Parties acknowledge that the Contractors [Ibiezugbe and Falkner] ***have breached the OA [Operating Agreement] and MOU [Memorandum of Understanding]***…") (emphasis added).

Perhaps most tellingly, if Ibiezugbe and Falkner could actually encumber the Property under the terms of the real Capital River Operating Agreement and MOU, why would they create a forged and fraudulent operating agreement in connection with securing the Deeds of Trust? Why wouldn't they just submit the real Operating Agreement and MOU? Why would they risk criminal prosecution by committing fraud? Simply put, there is no reason at all for them to create a forged and fraudulent

operating agreement if they had actual authority under the real LLC documents, which they clearly did not believe that they had.

3. The Superior Court erred in granting Premium Title's Motion for Summary Judgment as to Count Two, Negligence.

Premium Title does little in the way of disputing its negligence stemming from its role as the closing/settlement agent for the Deeds of Trust. Premium Title primarily argues that there is no "duty of care for a title company to review previously closed files before comp[l]eting and closing out a transaction." See Appellee's Br. at 14; see also id. at 15 (acknowledging its duty to act with a reasonable degree of skill and care but arguing there is "no affirmative duty for a title company to review previously closed file[s] before comp[l]eting a closing out [of] a transaction."). First, Capital River and Ms. Liu discussed at length in their opening brief the well-established distinction between duty and standard of care. See Appellants' Br. at 23-24. Premium Title concedes, as it must, it owes a duty of reasonable care. The scope of such a duty, and whether it includes checking its prior files relating to the parties or property at issue, is a factual question for the jury to make based on expert testimony or other evidence, ***not*** a question to be resolved at the summary judgment stage. See Ray v. Am. Nat. Red Cross, 696 A.2d 399, 404 (D.C. 1997) ("the jury, informed by expert testimony where appropriate, determines what the applicable standard of care is in a particular case."); Burke v. Scaggs, 867 A.2d 213, 219 (D.C. 2005) ("Determining the applicable standard of care is a

question of fact for the jury."). The standard of care "is measured by 'the course of action that a reasonably prudent [professional] with the defendant's specialty would have taken under the same or similar circumstances.'" See Ray, 696 A.2d at 404. So the question in this case is what would a reasonably prudent course of action have been for Premium Title in its role as a settlement/escrow agent when closing a real estate transaction involving a limited liability company as a party. Capital River and Ms. Liu intended to submit expert testimony that a reasonable settlement/escrow agent in such circumstances ***would*** (among other things) check its prior records on both the subject property and the parties.[5] Second, even if there was no duty to check its prior files, that is not the only duty alleged to have been breached. Premium Title cannot (and does not) dispute the other duties it owed to Capital River in its capacity as settlement/escrow agent. As the Court of Appeals recognized in the Aronoff v. Lenkin Co. case, settlement/escrow agents owe (1) "the duty to deal fairly" with each party (see 618 A.2d 669, 687 (D.C. 1992)); (2) fiduciary duties to both parties (see id.); and (3) "a duty of good faith and candor in affairs connected with the undertaking, including the duty to disclose to the principal 'all matters coming to [the agent's] notice or knowledge concerning the subject [] of the agency, which it

[5] This is particularly true when dealing with an LLC, where there are questions as to who has authority to act on the LLC's behalf. See, e.g., Appx.0270 (title insurance commitment detailing steps in paragraph 23 that closing agent must take "With regard to a limited liability company").

is material for the principal to know for his protection or guidance.'" (see id.). Capital River is one of the parties to whom such duties were owed. Certainly, Capital River would be interested in knowing that (1) a fake, forged, and fraudulent Capital River operating agreement (that completely eliminated the 50 percent owner's interest) had been submitted in connection with multi-million dollar loans; and (2) that the loans were not going to Capital River, but rather to the personal bank accounts of two individuals. As the Aronoff court held, "Whether as settlement agent or escrowee, the agent has a duty in such circumstances to alert the principal to the real state of affairs." See id. (citing to Restatement (Second) of Agency § 381 ("duty to give information arises when agent 'has notice of facts which, in view of his relations with the principal, he should know may affect the desires of his principal as to his own conduct or the conduct of the principal....')"). Being deprived of millions of dollars is information that "may affect the desires…or conduct" of Capital River.

Beyond improperly disputing the standard of care, Premium Title also takes issue with other factual allegations in the Complaint. For example, Premium Title argues "The Capital River Parties rely on conclusion and innuendo for the proposition that Premium Title knew or should have known of Capital River's ownership status." See Appellee's Br. at 16. Of course, at this stage in the proceedings, when all facts and reasonable inferences therefrom must be considered

in the light most favorable to the nonmoving party (see Nader v. de Toledano, 408 A.2d 31, 42 (D.C. 1979)), Capital River and Ms. Liu plainly alleged facts sufficient to support the allegation that Premium Title knew or should have known Capital River's true ownership when it served as closing/escrow agent for the Deeds of Trust. For example, Capital River and Ms. Liu alleged (1) that Premium Title received a true and correct copy of the real Capital River Operating Agreement, reflecting Capital River's actual ownership status, in connection with Premium Title's role as the closing/escrow agent for Capital River's purchase of the Property in 2017 (Appx.0013; Appx.0254); (2) that the same exact person (Lola Shannon) served as the agent for Capital River's purchase of the Property and both Deeds of Trust (Appx.0013; Appx.0254); (3) that Ms. Shannon was personally familiar with Jerry Boutcher and his involvement in the original purchase of the Property (Appx.0013; Appx.0254); and that Premium Title received the full $1.6 million purchase price for the Property from Ms. Liu, not Ibiezugbe or Falkner (Appx.0006-7). Premium Title is not able to dispute factual allegations at the summary judgment stage. Couple these factual allegations with the expert testimony that Premium Title should have checked its files relating to the Property and parties involved in the Deeds of Trust, and clearly Premium Title knew or should have known of Capital River's true ownership status. And notably, Premium Title has not submitted any evidence to the contrary. It is Premium Title's burden to demonstrate the absence of

any material fact. It has failed to meet that burden and the facts alleged in the Complaint are sufficient to show Premium Title knew or should have known about the forged/fraudulent operating agreement.

Premium Title also brings up several times the Superior Court's finding that Ibiezugbe and Falkner had actual authority to enter into the Deeds of Trust. See Appellee's Br. at 14, 15, 16, 18. In Premium Title's view, that caused Capital River's harm. But even if the Superior Court properly determined that Ibiezugbe and Falkner had actual authority to use the Property as collateral for their personal loans (they did not for the reasons discussed above), that is not relevant to the determination of whether Premium Title was negligent in its duties or not, and it is not determinative as to whether Premium Title's negligence caused Capital River and Ms. Liu harm. "Cases in which issues of negligence and proximate cause will not be for the jury are unusual." D.C. v. Watkins, 684 A.2d 395, 401 (D.C. 1996). This is not one of the "unusual" cases where negligence and proximate cause are not for the jury. Indeed, Capital River and Ms. Liu clearly alleged facts supporting the assertion that Premium Title's negligence caused harm. First, if Premium Title had not failed in its duties, Capital River and Ms. Liu would have stopped the Deeds of Trust from being executed and the liens on the Property today would not exist. Appx.0251. Strong evidentiary support exists for this assertion given Ibiezugbe's and Falkner's oral and written ***admissions*** that they did ***not*** have authority to enter into the Deeds

of Trust without Ms. Liu's signoff. Appx.0009; Appx.0181; Appx.0251. The evidence will be that if Capital River and Ms. Liu had been properly informed and Ibiezugbe and Falkner been confronted, the Deeds of Trust would not have been executed and Capital River/Ms. Liu's damages avoided.

But even assuming Ibiezugbe and Falkner did have authority to enter into the Deeds of Trust and there was nothing Ms. Liu could do to stop them from obtaining the loans, at the very least the $874,000 in loans obtained from Mr. Abod/Mr. Roupas and BCJCL would have gone to Capital River and Ms. Liu – not directly (and solely) into Ibiezugbe's and Falkner's personal bank accounts. Those loans would have rightfully belonged to Capital River and Ms. Liu, as Ms. Liu is entitled to recoup her $1.6 million investment plus 10 percent profit before Ibiezugbe and Falkner realize any return. Appx.0007; Appx.0250; Appx.0124. Instead, Premium Title directed the loans into Ibiezugbe's and Falkner's personal accounts. Premium Title cannot possibly argue in good faith that Ibiezugbe and Falkner were entitled to the loan proceeds for their own personal use. The Property was purchased by Capital River in Capital River's name. It necessarily follows that if the Property is used as collateral to secure loans (as here), Capital River would have been entitled to the proceeds. Ms. Liu was the financier, putting up the full $1.6 million to purchase the Property while Ibiezugbe and Falkner contributed nothing. In no world are Ibiezugbe and Falkner entitled to the loan proceeds. Notably, Premium Title does not point to

anything at all even hinting at such a possibility in its brief. See Appellee's Br. at 17-18. Instead, Premium Title argues only that the MOU talks about "Net Profits", not loans. If anything, this shows that the Capital River members did not even contemplate encumbering the Property, which supports Capital River and Ms. Liu's argument that Ibiezugbe and Falkner acted outside of their authority in doing so. At a minimum, the MOU language shows that the intent of the Capital River members was for Ms. Liu to recover her $1.6 million investment plus 10 precent profit before Ibiezugbe and Falkner receive anything. Premium Title cannot and does not point to anything at all showing Ibiezugbe and Falkner would be entitled to take the loan proceeds for themselves.

Had Premium Title not breached its duty to disclose (1) that a fake, forged, and fraudulent Capital River operating agreement had been submitted in connection with multi-million dollar loans; and (2) that the loans were not going to Capital River, but rather to the personal bank accounts of Ibiezugbe and Falkner, then Capital River would have received the loan proceeds (if not outright stopped the Deeds of Trust from being executed). Premium Title's negligence thus caused harm to Capital River and Ms. Liu.

For these reasons, even if the Superior Court properly determined that Ibiezugbe and Falkner had actual authority to use the Property as collateral for their personal loans (they did not), the Superior Court still erred in granting Premium

Title's motion for summary judgment as to Count Two, Negligence. There are significant material facts still in dispute, including whether Premium Title breached the standard of care (it did) and whether such breach caused harm to Capital River and Ms. Liu (it did). Those are questions for the jury and not properly resolved at the summary judgment stage. Capital River and Ms. Liu should have been afforded an opportunity to submit evidence and testimony showing that but for Premium Title's negligence and abject failure in its duties as escrow/closing agent, the liens presently encumbering the Property would not exist (or that Capital River would have received the loan proceeds).

CONCLUSION

This Honorable Court should hold that the Superior Court erred in granting the motion for summary judgment of Premium Title, and reverse and remand the order.

January 10, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 10th day of January 2023, I caused a copy of the foregoing to be served via the Court's electronic filing system and by email on the following:

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Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

Andrew Crawford
Signature

22-CV-0548
Case Number(s)

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