Reporter: 1999 Va. Cir. LEXIS 563

Re: Sport and Health Co. L.C. v. Club Properties Co., L.C.

Core Terms

bubble, tennis, conversion, termination, attorney's fees, ownership, event of default, notice of default, unjust enrichment, joint trial, furniture, default, dispose, constructive trust, fixtures, tenant, pool

Case Summary

Procedural Posture
Petitioner lessee filed for injunctive relief relating to a notice of default from respondent lessee, for declaratory judgment, and for attorney's fees and costs; respondent lessee filed a cross-bill of complaint seeking declaratory judgment, damages for conversion, breach of contract, unjust enrichment, and imposition of a constructive trust.

Overview
A declaratory judgment was entered establishing ownership of a tennis bubble by respondent lessor. Petitioner lessee sold this property prior to the entry of the declaratory judgment. This sale constituted conversion, and petitioner was liable to respondent for damages. Ambiguities as to some contractual language and the relationship among the parties and a third party led petitioner to have a good faith belief that it possessed the necessary ownership rights to sell the property. Such a sale of property did not constitute an ″event of default″ as defined in the master lease between the parties, so petitioner had not breached the contract. Because there were fair issues of interpretation regarding the claims brought by each party, and both parties were responsible for causing the events which led to litigation, neither party was a prevailing party as defined in their master lease, and their requests for attorneys' fees were, therefore, denied.

Outcome
Declaratory judgment was entered establishing respondent lessor as owner of property sold by petitioner lessee; this sale constituted a conversion by petitioner, and respondent was awarded damages. Petitioner had a good faith belief that it had ownership rights of the property, so the conversion did not constitute a default on the parties' master lease. Attorneys' fees were denied to both parties as neither was deemed as prevailing.

LexisNexis® Headnotes

Torts > Intentional Torts > Conversion > General Overview
Torts > Intentional Torts > Conversion > Elements
Torts > Intentional Torts > Conversion > Remedies

HN1 Conversion has been defined as the wrongful exercise or assumption of authority over another's goods, depriving him or her of possession; and any act of dominion wrongfully exerted over property in denial of the owner's right or inconsistent with it. The Supreme Court of Virginia has held that the correct measure of damages for conversion is the value of the property converted at the time and place of conversion.

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Judges: Joanne F. Alper, Judge.

Opinion by: Joanne F. Alper

Opinion

Dear Counsel:

This case has come before the Court for decision upon the Bill of Complaint for Injunctive and Other Relief filed by petitioner Sport and Health Company, L.C. (hereinafter referred to as ″Sport and Health″) and the Cross-Bill of Complaint filed by respondent Club Properties Company, L.C. (hereinafter referred to as ″Club Properties″). The Court has carefully considered the pleadings filed by both parties, the pre-trial and post-trial memoranda of law, the stipulated facts, the joint trial exhibits, and the testimony and other exhibits which were introduced into evidence at the *ore tenus* hearings on February 11 and March 17, 1999.

I. *BACKGROUND OF THE CASE*

Sport and Health filed its Bill of Complaint for temporary, preliminary, and permanent injunction and for declaratory judgment on November 12, 1998, seeking injunctive relief relating to a notice of default which had been sent to it by Club Properties, for declaratory judgment regarding the **[*2]** issue as to whether Sport and Health had breached the terms of the Master Lease entered into by the parties dated October 31, 1997 (hereinafter referred to as the ″Master Lease″), and for an award of attorney's fees and costs under the Master Lease. A temporary injunction was granted by the Court on November 19, 1998, enjoining the effectiveness of the notice of default until the claims could be fully heard. On November 30, 1998, Club Properties filed its Answer and Grounds of Defense and Cross-Bill of Complaint seeking a declaratory judgment together with damages for conversion, breach of the Master Lease, unjust enrichment, and the imposition of a constructive trust. Club Properties also seeks to recover its attorney's fees and costs under the terms of the Master Lease.

The parties entered into a twelve page stipulated factual chronology. Rather than repeating or restating the facts here, the Court incorporates the stipulated factual chronology executed by counsel for both parties. This case requires a determination of certain rights of the parties under a comprehensive, sophisticated, and highly detailed Master Lease consisting of approximately 82 pages (joint trial exhibit 17), **[*3]** which was carefully and intensely negotiated over an eight month period by lawyers for client groups, which included lawyers on both sides. Sport and Health is the Tenant under the Master Lease, and Club Properties is the Landlord. Both parties are now separately owned entities that emerged from a corporate reorganization in 1997 of a racquet sports and fitness business generally operated under the trade name ″Sport and Health″ (hereinafter referred to as ″S&H″). As a result of the 1997 corporate reorganization, certain physical assets of S&H were transferred to and/or retained by Club Properties. Club Properties as Landlord then leased these assets to Sport and Health as Tenant under the terms of the Master Lease dated October 31, 1997. The Master Lease affects ten facilities operated by Sport and Health in the greater Washington Metropolitan area.

The dispute herein concerns various items of personal property that were used at the Mount Vernon College Sport and Health Club (hereinafter referred to as the ″MVC Facility″) prior to May 15, 1998. [1] The items of property consisted of a removable tennis bubble and related equipment (hereinafter referred to collectively as the ″tennis **[*4]** bubble″), a number of plastic chaise lounges, tables, and umbrella stands (referred to collectively as the ″pool furniture″), a number of lockers, and a trailer used as an office at the MVC facility. Club Properties claims that these items were owned by it and that they were a part of the ″fixtures, furniture, equipment, and leasehold improvements owned by the Landlord″ defined in section 1.6 of the Master Lease (joint exhibit # 17) (hereinafter referred to as ″Landlord's FFE″). Sport and Health maintains that either (i) Mount Vernon owned the tennis bubble from the inception of its acquisition and installation until the College transferred all its ownership to Sport and Health pursuant to a termination agreement (joint exhibit # 33) or (ii) Mount Vernon College held a prior right to purchase the tennis bubble under the Management Agreement for $ 100.00 that was validly assigned to Sport and Health and subsequently exercised by Sport and Health. Under either scenario advanced by Sport and Health, Club Properties did not own the tennis bubble at the time the notice of default was issued.

[*5] The fundamental issue in this case is whether Sport and Health's disposition and sale of the tennis bubble and the pool furniture [2] constituted an event of default under the Master Lease. Specifically and pointedly the issue is whether Sport and Health's removal and sale of the tennis bubble which had been previously located at the MVC Facility was an event of default, giving Club Properties the right to issue a notice of default under the Master Lease.

II. *OWNERSHIP OF THE TENNIS BUBBLE*

The Court must first determine who owned the tennis bubble prior to May 15, 1998, and based on the outcome of that inquiry, whether Sport and Health had a right to sell or dispose of it. On October 31, 1997, the parties **[*6]** entered into a Membership Interest Transfer Redemption and Distribution Agreement (hereinafter referred to as ″Distribution Agreement″). This agreement restructured the old company and set the terms, rights, and obligations of the new companies. According to the plain language of the Distribution Agreement, Club Properties was to:

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[1] The MVC Facility was operated pursuant to a management agreement made in 1993 between Washington Sport and Health, Inc., and Mount Vernon College (hereinafter referred to as the ″Management Agreement″, joint exhibits # 1 and 20). As a result of the 1997 corporate reorganization, Washington Sport and Health, Inc., became a wholly-owned subsidiary of Sport and Health, the Management Agreement remained with Washington Sport and Health, Inc., and all intangible assets related to the MVC Facility were transferred Sport and Health. Under the terms of the Master Lease, the furniture, fixtures, and equipment became the property of Club Properties (joint trial exhibit # 18).

[2] There was no evidence presented at trial to refute Club Properties claim to ownership of the pool furniture; accordingly, as a matter of law, the pool furniture was property of Club Properties which was disposed of by Sport and Health. There is, however, a dispute as to the value of that property.

> retain title to (i) all the land and improvements … fixtures, furniture, and equipment …. The Retained Assets are described specifically in Schedule 7.0 attached hereto.

(Distribution Agreement, page 13.) Schedule 7.0 lists the assets owned by Club Properties for each location. The asset list of the MVC Facility specifically lists the permit for the tennis bubble, construction of the bubble, tennis courts, and new tennis building.

The Master Lease, signed the same day as the Distribution Agreement, also makes reference to the fact that Sport and Health was leasing the properties along with the fixtures and equipment and that those items were owned by Club Properties. Section 1.6 of the Master Lease, entitled ″Landlord's FFE″, states that the landlord's FFE includes ″all fixtures, furniture, equipment, and leasehold improvements owned **[*7]** by the Landlord″ and located at the various locations including the MVC Facility. Also, in Section 7.1.7, entitled, ″Ownership of Improvements″ the Master Lease provides that the Landlord owns the structures and improvements with which it came into the lease agreement and that Sport and Health cannot remove them until the expiration or termination of the Master Lease. Specifically, section 7.1.7 provides:

> To the extent of its interest in the ***structures and improvements within and upon the Premises existing as of the date of this Master Lease, the Landlord shall continue as the owner thereof.*** The tenant shall be the owner of structures and improvements constructed by it within and upon the Premises in accordance with this Master Lease; provided however, that except as otherwise permitted under this Master Lease, the ***Tenant shall not have the right to remove such structures or improvements***, and upon the expiration or sooner termination of this Master Lease, the ownership of all such structures and improvements shall immediately, without more, become vested in the Landlord or the Primary Lessor, as applicable. (Emphasis added).

(Master Lease, page **[*8]** 36). According to the Distribution Agreement of October 31, 1997, Club Properties owned the tennis bubble. Regardless of any prior agreements, the language is clear that under the Master Lease, Club Properties held the ownership rights to the tennis bubble. Even if Mt. Vernon College had a right to purchase the tennis bubble at the end of its contract, Club Properties owned it during the relevant time period and was the only entity possessing the right to dispose of it.

When read together, the language of the Distribution Agreement and the Master Lease resolve any doubts that Club Properties owned the tennis bubble. Accordingly, the Court holds that Club Properties was the owner of the tennis bubble and that Sport and Health had no right to sell or dispose of it. [3]

However, there was **[*9]** sufficient ambiguity as to some of the contractual language and the relationship among Sport and Health, Club Properties and Mount Vernon College for Sport and Health to have a good faith belief that it possessed the necessary ownership rights to the tennis bubble to sell it. First, some of the confusion can be attributed to the fact that the Management Agreement provides Mount Vernon College with the option to purchase the tennis bubble at the end of its term for $ 100.00. There was an issue at trial as to the definition of the ″end of the term″, but when Mount Vernon College terminated the Management Agreement it assigned the option to Sport and Health. Based upon the assignment, Sport and Health believed, in good faith, that it owned the tennis bubble.

Second, there was testimony concerning how the tennis bubble was characterized in the financial records of the business before the 1997 corporate reorganization. Specifically, Marilyn Essex, the controller for Sport and Health testified that the funds advanced by S&H, the predecessor corporation, for the purchase of the bubble were booked on its financial records as an account receivable from Mount Vernon College. This characterization **[*10]** could also have supported Sport and Health's belief that the tennis bubble was not part of the Landlord's FFE.

Third, Mount Vernon College had to repay Sport and Health for the cost of the purchase and installation of the tennis bubble from the profits of the club, pursuant to the Management Agreement. During the relevant time period, Mount Vernon College had been reimbursing Sport and Health, not Club Properties. Based on this provision Sport and Health could reasonably believe that it owned the tennis bubble.

For the foregoing reasons, the Court finds that while incorrect, Sport and Health did have sufficient grounds to believe in good faith that it owned the tennis bubble when it disposed of the property.

III. SALE NOT EVENT OF DEFAULT UNDER MASTER LEASE

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[3] The pool furniture is subject to the same ruling. The evidence established that the lockers were not disposed of and the trailer was not the property of Club Properties. Therefore, those items are not subject to this ruling.

The next question that arises is whether the unauthorized sale of the tennis bubble by Sport and Health constituted an ″event of default″ under the Master Lease. Section 17.1 of the Master Lease includes and describes a list of various events or behaviors that would constitute a default. The one which Club Properties claims that Sport and Health's sale of the tennis bubble violates is:

> If the Tenant fails to perform **[*11]** or observe **any other term** of this Master Lease and such failure continues for more than thirty (30) days following the Landlord's written notice to the tenant of such failure, or if such failure cannot reasonably be remedied within such thirty (30) days and thereafter prosecute such action to completion within a reasonable time, which in any event must be prior to the time that the Tenant's failure to complete remedial action (i) results in the institution of any public enforcement action which could subject the Landlord to civil or criminal penalties for violation of any law, rule, ordinance or regulation (unless such action is abated during the pendency of the Tenant's remedial efforts); or (ii) causes an event of default continuing beyond any applicable cure period under the terms of an Secured Financing and the institution of enforcement action by the holder of such Secured Financing.

(Master Lease, section 71.1(h), page 52). The parties stipulated that the section means that:

> Sport and Health Company. L.C., as tenant under the Master Lease, cannot violate Section 17.1(h) without having previously or concurrently failed to perform or otherwise observe another **[*12]** term of the Master Lease as well.

(Stipulated Facts, # 55, page 11). Pursuant to the parties' stipulation, they have agreed that this section means that in order to violate section 17.1(h), there must be a breach of at least two terms of the Master Lease. [4]

Section (h) focuses on a failure to perform obligations or observe any **other** term of the Master Lease and the parties have stipulated that a breach hereunder requires two or more failures to perform or observe its terms. There was no evidence presented of any alleged breach of the Master Lease by Sport and Health other than the sale of the tennis bubble. Moreover, Club Properties **[*13]** cannot claim a violation of this section when it failed to perform as required.

Specifically, on October 30, 1998, after the sale of the tennis bubble, Club properties sent a notice of default to Sport and Health (joint trial exhibit 45). Ten days later, Sport and Health responded to the notice of default and attempted to cure by tendering a check for $ 14,326.07 (joint trial exhibit 46). [5] The following day, Club Properties replied essentially saying that the matter would be on hold until Mr. Ramsey returned from his trip abroad (joint trial exhibit 47) which would occur after the 30 day cure period had passed. Thus, Club Properties failed to perform its obligation under section 17.1(h) since it was unwilling or unable to respond as required.

[*14] When Sport and Health sold the tennis bubble, it did so in good faith with the understanding that it was entitled to do so. While the Master Lease states that the tenant may not remove the structures, it does not specifically address the issue of the tenant selling the structures, fixtures or equipment. The parties did not include sale or disposal of the Landlord's FFE as one of the specific events of default.

The fact that the amount of rent paid to Club Properties was not reduced by the termination of the Mount Vernon College agreement or sale of the tennis bubble also gives weight to Sport and Health's position that the sale of the tennis bubble was not a default under the Master Lease. The operation of the Master Lease and the relationship between Sport and Health was not affected by the sale of the tennis bubble. Club Properties was not going to lose any income or rent because of the sale of this property.

The construction maxim *expresio unius est exclusio alterius*, means that the expression of one thing is the exclusion of another. The Master Lease was drafted by skilled and experienced lawyers for sophisticated clients some of whom were lawyers. The Master Lease includes **[*15]** an extensive list of specific events and behaviors which constitute ″events of default,″ none of which refer to the sale of the Landlord's FFE or property. Accordingly, since the sale of the tennis bubble was not a specific event of default or defined by the Master Lease, and since there was not a second failure of Sport and Health to perform or otherwise observe another term of the Master Lease, the sale of the tennis bubble by Sport and Health

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[4] This interpretation is not necessarily the conclusion that the Court would have reached in considering and interpreting this section. Nevertheless, the Court feels constrained to follow the stipulated interpretation which the parties, who were the ones who negotiated and wrote the Master Lease and who must continue to function thereunder, have agreed to.

[5] Sport and Health tendered $ 14,326.07 believing it would be a full cure. This amount was calculated pursuant to section 8.3 of the Master Lease which allows for Sport and Health to purchase fully depreciated FFE property at a price equal to 5% of its original cost. $ 14,326.07 was 5% of the original cost of the tennis bubble.

was not a default under the Master Lease.

IV. CONVERSION

Club Properties has filed a Cross-Bill against Sport and Health seeking damages for conversion. Since the Court has determined that the tennis bubble was the property of Club Properties and that Sport and Health had no right to sell it, it is appropriate to address this claim.

HN1 Conversion has been defined as the wrongful exercise or assumption of authority over another's goods, depriving him of possession; and any act of dominion wrongfully exerted over property in denial of the owner's right or inconsistent with it. *Hairston Motor Company v. Newsome*, 253 Va. 129, 480 S.E.2d 741 (1990), citing *Universal C.I.T. Credit Corp. v. Kaplan*, 198 Va. 67, 92 S.E.2d 359 (1956). **[*16]** Based upon the Court's finding set forth above that the tennis bubble (and the pool furniture) were the property of Club Properties and that Sport and Health had no right to sell or dispose of such property, the Court finds that Sport and Health is liable to Club Properties for conversion. The issue now to be determined is the value of the property so converted. The Supreme Court of Virginia has held that the correct measure of damages for conversion is the value of the property converted at the time and place of conversion, *Straley v. Fisher* 176 Va. 163, 10 S.E.2d 551 (1940). [6]

The uncontradicted evidence was that Sport and Health sold the tennis bubble in an ″arms-length″ sale to Air Structures & Tennis Court Maintenance, Inc. (hereinafter referred to as ″AST″) for a cash **[*17]** payment of $ 50,000.00, payable in two installments, and AST's agreement to provide certain services. The services were to include the removal of the tennis bubble from the MVC Facility and the takedown of the air-inflated tennis enclosure and the air-inflated swimming pool enclosure at Sport and Health's Regency Club (stipulated factual chronology paragraph 48). The $ 50,000.00 has been paid by AST to Sport and Health (stipulated factual chronology paragraph 49). At trial, Cwi Steiman, one of the principals of Club Properties, was qualified as an expert witness in the area of management of tennis clubs and purchase, sale, installation and use of inflatable air structures, particularly tennis bubbles. Mr. Steiman testified without contradiction that the value to Sport and Health of AST's ″takedown″ of the tennis and swimming pool bubbles was $ 5000.00 per takedown, which would establish the value of the 3 jobs which were a part of the AST purchase price in the total of $ 15,000.00. Therefore, upon the evidence the Court finds that the value received by Sport and Health for the sale of the tennis bubble was $ 65,000.00.

Club Properties claims that the sale price realized by Sport and **[*18]** Health did not accurately reflect the value of the tennis bubble. Mr. Steiman testified as an expert that in his opinion the used tennis bubble was worth $ 105,000.00; however, the Court believes that his opinion is not entitled to great weight since he admitted he had no experience with the purchase and sale of used tennis bubbles, and his opinion was largely based upon the sale of the subject tennis bubble by AST to another tennis club for a price which included more than simply the direct sale of the bubble to another user. There was simply no credible evidence upon which Mr. Steiman's opinion testimony was based. Mr. Steiman admitted that the sale by Sport and Health to AST was an arms-length transaction; however, he asserted that Sport and Health should have tried to market the tennis bubble to other dealers in addition to AST. The evidence produced by Sport and Health was that they did in fact attempt to market the bubble to Mike Roche, the other dealer identified by Mr. Steiman, as well as to other potential purchasers.

The measure of recovery in a case for conversion is usually the market value of the goods at the time of recovery. At the time of the sale of the tennis bubble, **[*19]** Sport and Health believed that it was the owner of the bubble and accordingly it would receive the economic benefit of any sale. Therefore, there was no motive for Sport and Health to attempt to sell the bubble for less than its full and fair market value. In addition, there is no dispute that the sale was anything but an arms-length transaction and that appropriate efforts were made to market the bubble to other potential purchasers. Accordingly, the Court finds that the best and most compelling evidence of the value of the tennis bubble at the time of the conversion is the amount for which it was sold by Sport and Health to AST.

Therefore, the Court will enter judgment in favor of Club Properties against Sport and Health on Count 2 of the Cross-Bill in the sum of $ 65,000.00.

V. OTHER RELIEF

Club Properties asserted claims for unjust enrichment and a constructive trust. These claims seem to be based upon allegations that Sport And Health has been unjustly enriched as a result of both the payments which Mount Vernon College has made and will make to Sport and Health as part of the Termination Agreement and any funds received by Sport and Health as a result of its sale **[*20]** of the tennis bubble to AST. Club Properties has asked the Court to impose a constructive trust on all funds received by Sport and Health from either source. Sport and Health was not unjustly enriched by the payments which were made or are to be made by

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[6] There was no credible evidence of the value of the pool furniture at the time of the conversion placed before the Court, therefore there can be no determination by this Court of any value for recovery by Club Properties.

Mount Vernon College in order to buy out the Management Agreement. At the time the College asked to terminate the Management Agreement there remained approximately one-half of its term, and Sport and Health earned a substantial fee for managing the MVC facility. In order to obtain Sport and Health's consent to the termination of the Management Agreement Mount Vernon College agreed to pay Sport and Health $ 225,000.00 together with the tennis bubble. This payment of cash and property was in full satisfaction of the College's obligations under the Management Agreement both to repay Sport and Health for the funds advanced to purchase the tennis bubble in 1993 and for Sport and Health's surrender of its right to earn management fees through at least the year 2003.

The parties stipulated at Number 23 that ″[A] consequence of the 1997 Restructure, Sport and Health Company, L.C. obtained ownership of all operating rights to the S&H Business **[*21]** and all intangible property of the S&H Business including receivables″. Stipulation Number 26 states the converse, that Club Properties had no ownership in Washington Sport & Health, Inc. after the 1997 Restructure. Accordingly, Club Properties had no interest in the continuation or termination of the Management Agreement between Mount Vernon College and Sport and Health after the 1997 Restructure. Accordingly, there is no basis for a claim either under the theory of unjust enrichment or constructive trust by Club Properties against Sport and Health arising out of the termination of the Mount Vernon College Management Agreement.

VI. ATTORNEY'S FEES

Finally, the Court turns its attention to the issue of attorney's fees. Both sides have presented arguments for the award of attorney's fees. Section 1.6 of the Master Lease (joint trial exhibit 17) states:

> In the event either the Landlord or the Tenant resort to Legal proceedings (whether by litigation or alternative mediation or arbitration) to enforce its rights under this Master Lease, the prevailing party shall be entitled to recover from the other all reasonable costs and expenses (including reasonable attorneys' fees) **[*22]** incurred, and including with respect to the Landlord, all reasonable attorneys' fees incurred by it in connection with the collection of any sums due hereunder.

The Court finds that since there was a fair issue of interpretation regarding both the ownership of the tennis bubble and the events of default, and both parties were responsible for causing the events which led to the litigation, neither party is the ″prevailing party″, as defined by the Master Lease. Therefore, each party's request for attorneys fees will be denied.

VII. CONCLUSION

Pursuant to the foregoing opinion:

1. The Court will enter a declaratory judgment regarding the issues of ownership of the tennis bubble and other personalty and the determination of default pursuant to the opinion set forth above (Bill of Complaint, Count 1, Cross-Bill of Complaint, Count 1).

2. Upon the entry of a final order embodying the Court's rulings in this matter, the preliminary injunction herein will be dissolved (Bill of Complaint, Count 2).

3. Judgment will be entered in favor of Club Properties against Sport and Health for damages for conversion in the sum of $ 65,000.00 (Cross-Bill of Complaint, Count 2).

4. Upon **[*23]** the Court's finding of no breach of the Master Lease or the Distribution Agreement, judgment will be entered in favor of Sport and Health against Club Properties on those counts (Cross-Bill of Complaint, Counts 3 and 4).

5. Based upon the findings set forth above judgment will be entered in favor of Sport and Health against Club Properties on the claims of unjust enrichment and constructive trust (Cross-Bill of Complaint, Counts 5 and 6).

6. Each party's request for an award of counsel fees and costs in this matter will be denied (Bill of Complaint, Count 3).

Counsel for Sport and Health should prepare an appropriate order embodying this Court's rulings have it endorsed by counsel for Club Properties and forward to me for entry as soon as possible.

Very truly yours,

Joanne F. Alper

Judge