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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 20, 2022 Session

**BRYAN COLLEGE v. NATIONAL ASSOCIATION OF
CHRISTIAN ATHLETES**

Appeal from the Circuit Court for Rhea County
No. 2019-CV-120 Justin C. Angel, Judge

No. E2021-00931-COA-R3-CV

This appeal concerns the ownership of property following the trial court's grant of summary judgment in favor of the plaintiff college. We vacate the decision of the trial court and remand for further proceedings.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Vacated; Case Remanded**

JOHN W. MCCLARTY, J., delivered the opinion of the court, in which THOMAS R. FRIERSON, II and KRISTI M. DAVIS, JJ., joined.

John P. Konvalinka and Thomas M. Gautreaux, Chattanooga, Tennessee, and Russell Anne Swafford, Dunlap, Tennessee, for the appellant, National Association of Christian Athletes.

Anthony A. Jackson and Nathan L. Kinard, Chattanooga, Tennessee, for the appellee, Bryan College.

OPINION

I. BACKGROUND

The National Association of Christian Athletes ("NACA") was formed in 1984. The operations and affairs of NACA are managed by a Board of Trustees, which later formed an Executive Committee responsible for approving any lease, rental, sale or transfer of NACA's facilities. As pertinent to this appeal, NACA operates the Fort Bluff Camp ("the FBC"), a Christian camp located in Dayton, Tennessee, that has been in operation since at least 1990. NACA erected extensive facilities on the FBC property that have been utilized

for athletic events, tournaments, and hosting thousands of campers throughout the years for churches, schools, and organizations.

Beginning in 2009, allegations of misconduct were made against one of NACA's original incorporators, prompting NACA to pursue a change in leadership with the help of Bryan College ("Bryan"), a private Christian university also located in Dayton, Tennessee. Between 2009 and the filing of this action, a number of NACA's Board members and its Executive Committee resigned. These members were replaced with persons closely affiliated with Bryan, including Bryan's President, Steven Livesay, who served as the chairman of NACA's Board for a period of time.

Between 2009 and 2016, Bryan, through President Livesay and others, provided oversight and leadership to NACA and assisted in resolving litigation pending against NACA. On April 15, 2016, Bryan's Board of Directors passed a motion to accept the transfer of ownership of the FBC from NACA, at which time Bryan would assume the debt of the FBC in the amount of \$920,000 owed to SouthEast Bank and lease the property back to NACA for its ongoing use. On June 16, the property was appraised for approximately \$7 million.

On June 24, President Livesay emailed a proposed lease ("Lease 1") to NACA's Board. He explained that Lease 1 would not require NACA to pay rent during any year that Bryan ended its fiscal year in the black. If a deficit should arise, NACA would be liable for rent in the total amount of \$12,000, less the cost of any approved capital improvements to the FBC.

On June 27, a special meeting of NACA's Board was held to adopt a resolution evidencing the transfer of the FBC to Bryan. At that time, NACA's Board was comprised of seven members, President Livesay, Charles Fife, J. Wayne Cropp, Ralph Green, Vance Berger, Bob Coddington, and Bobbie McKenzie. The record reflects that everyone but J. Wayne Cropp signed the resolution, which provided, in part, as follows:

NOW THEREFORE, We, the Board of Trustees, desiring to show appreciation for the ministry of Bryan College and believing that the College is of similar purpose and mission do hereby transfer and give this 27th day of June 2016, to Bryan College all of the land and permanent fixtures owned by NACA located at Ft. Bluff Camp in Dayton, Tennessee.

During the meeting, a discussion was also held regarding the "makeup of the NACA [B]oard." The notes reflect that President Livesay said he could no longer serve on the Board due to a "conflict of interest" and that the Board needed four members who were independent from Bryan.

On that same day, President Livesay's assistant emailed a copy of a second lease ("Lease 2") to Bryan's Board of Directors. Lease 2 required a monthly payment in the amount of \$10,000, regardless of Bryan's financial condition and any improvements to the property. The next day, June 28, Vance Berger executed Lease 2 on behalf of NACA as the lessee and signed a quitclaim deed transferring ownership of the FBC to Bryan. NACA, through Mr. Berger, remitted payment in accordance with Lease 2 for approximately two years, in a total amount of approximately \$220,000.

In January 2018, NACA completed construction of a new building, Hawk's Landing, with an appraised value of approximately \$200,000. NACA, now under new leadership, refused to remit further rental payments to Bryan, citing an oral agreement that the cost of the building would offset any rent owed. NACA asserted that this agreement amounted to a rescission of the previously entered Lease 2. On April 9, NACA requested the return of the FBC.

Bryan refused, and later, on January 7, 2019, Bryan filed a detainer action in General Sessions Court and was granted possession of the FBC and damages in the amount of \$90,000 in unpaid rent. NACA appealed the decision to the Circuit Court.

On June 25, 2019, NACA filed a counter-complaint against Bryan, asserting two causes of action, one for declaratory judgment deeming the transfer of the FBC void and one for unjust enrichment in which NACA sought return of the FBC and rental payments made. As to its request for a declaratory judgment, NACA claimed as follows:

- (a) the Transaction was not fair to NACA;
- (b) individuals affiliated with [Bryan] took actions to consummate, enforce, approve[,] and/or conduct the Transaction despite the existence of clear and unavoidable conflicts of interest in violation of [Tennessee Code Annotated sections 48-58-701 through 704];
- (c) members of NACA's Board of Trustees and/or officers of NACA [] did not act in good faith;
- (d) NACA's Board of Trustees and/or officers of NACA [] engaged in ultra vires actions, in violation of NACA's Charter, Bylaws, and resolutions in connection with the Transaction;
- (e) NACA's Board of Trustees and/or officers [] committed various breaches of fiduciary duties (including the duty of loyalty) and breaches of NACA's Bylaws and Charter in connection with the Transaction.

Due to the unlawful, inequitable and improper conduct of [Bryan] and those individuals affiliated with [Bryan] identified herein [as Livesay, Coddington, Green, and Berger], the Transaction, including the 6/27/16 Resolution, the Quitclaim Deed[,] and Lease 2, should be invalidated, set aside and declared void and of no legal consequence. Further, NACA should be declared to be the lawful and rightful owner of the [FBC].

As to the unjust enrichment claim, NACA claimed as follows:

Through the receipt of the [FBC] and not less than \$220,000 in rent that has been paid to [Bryan] by NACA, [Bryan] has been unjustly enriched.

As a matter of equity, [Bryan] should be required to disgorge and return to NACA the [FBC], as well as the rent that NACA has paid to [Bryan] pursuant to Lease 2, which was never authorized nor approved by NACA's Board of Trustees, and which was executed by [Mr. Berger] despite his clear and inescapable conflict of interest and the fact that the terms of Lease 2 were patently unfair and inequitable as they relate to NACA's interests.

On October 21, 2019, Bryan filed a motion to dismiss, claiming that NACA failed to state a claim upon which relief can be granted because Bryan was not the proper defendant. In its memorandum in support of its motion, Bryan argued that while NACA may challenge decisions made by NACA's Board, such claims are only properly raised against "an incumbent or former director, officer, employee or agent of the corporation," not the opposing party in the transaction pursuant to Tennessee Code Annotated section 48-53-104(c).¹ Bryan further provided that such claims must be brought within the one-year statute of limitations found in Tennessee Code Annotated section 48-58-601.² Bryan asked the court to decline consideration of the issue of a declaratory judgment given its broad discretion in such matters. Bryan did not address the unjust enrichment claim.

NACA amended its counter-complaint to include a plethora of claims, all related to the transfer of the FBC and Bryan's unjust enrichment as a result of the transaction and resulting payments in accordance with Lease 2. Specifically, NACA pled (1) conversion related to Bryan's wrongful appropriation of the FBC without adequate consideration; (2) aiding and abetting as it related to Bryan's improper influence upon NACA's Board to breach their fiduciary duties; (3) conspiracy to accomplish by a concerted action the

¹ "A corporation's power to act may be challenged in a proceeding against an incumbent or former director, officer, employee or agent of the corporation. The proceeding may be brought by a director, the attorney general and reporter, or the corporation, directly, derivatively, or through a receiver, a trustee or other legal representative."

² "Any action alleging breach of fiduciary duties by directors or officers [] must be brought within one (1) year from the date of such breach or violation."

unlawful purpose of forcing NACA to transfer the FBC; and (4) fraud in the inducement to complete the transaction under the guise that Lease 1 would govern the relationship between the parties. NACA also included its original claim of (5) unjust enrichment based upon the improper transfer of the FBC without consideration and the rental payments made and again requested a (6) declaratory judgment. NACA sought punitive damages, claiming that Bryan's conduct in the transaction and ongoing conspiratorial conduct was committed intentionally, fraudulently, maliciously, and/or recklessly.

The parties then inundated the court with voluminous replies to the other's motions and also provided the court with extensive briefs in support of their respective positions. The case finally proceeded to a hearing on January 27, 2020, after which the trial court granted the motion to dismiss in its entirety on July 9, 2020. The court held that the causes of action alleged breach of fiduciary duties by NACA's own directors and officers and were, therefore, barred by the statute of limitations applicable in such actions filed pursuant to Tennessee Code Annotated section 48-53-104. The court explained that NACA simply filed suit against the wrong party and should have sued its own directors and officers, not Bryan. The court further found that Bryan was immune to the allegations of conspiracy and aiding and abetting under the intracorporate conspiracy immunity doctrine, which provides that "wholly intracorporate conduct does not satisfy the plurality requirement necessary to establish an actionable conspiracy claim." *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 703 (Tenn. 2002) (footnote omitted).³ Lastly, the court found that NACA failed to prove the essential element of reasonable reliance in its fraudulent inducement claim. NACA sought permission to file an interlocutory appeal.

On August 5, 2020, Bryan filed a motion for summary judgment, requesting possession, unpaid rent, and attorney's fees. Again, extensive litigation ensued, prompting the court to request shorter briefs and more concise statements for the court's consumption. Having dismissed the counter-complaint, the trial court ultimately granted summary judgment in favor of Bryan, awarding possession of the property and entering a money judgment in the amount of \$370,000, plus attorney's fees in the amount of \$393,557.41. At that time, the trial court also denied all outstanding motions, including the pending motion for interlocutory appeal. This timely appeal followed.

³ In *Trau-Med*, our Supreme Court explained that "there can be no actionable claim of conspiracy where the conspiratorial conduct alleged is essentially a single act by a single corporation acting through its officers, directors, employees, and other agents, each acting within the scope of his or her employment." 71 S.W.3d at 703-04 (footnote omitted).

II. ISSUES

NACA presented 25 issues for this court's review that can be summarized into the following 4 categories:

1. Whether the court erred in dismissing NACA's counter-complaint.
2. Whether the court's order entering summary judgment is sufficient.
3. Whether the court erred in entering summary judgment.
4. Whether Bryan was entitled to attorney's fees.

III. STANDARD OF REVIEW

Regarding the trial court's grant of the Tennessee Rule of Civil Procedure 12.02(6) motion to dismiss NACA's counter-complaint, our Supreme Court has instructed as follows:

A motion to dismiss a complaint for failure to state a claim for which relief may be granted tests the legal sufficiency of the plaintiff's complaint. The motion requires the court to review the complaint alone. Dismissal under Tenn. R. Civ. P. 12.02(6) is warranted only when the alleged facts will not entitle the plaintiff to relief [] or when the complaint is totally lacking in clarity and specificity . . .

A Tenn. R. Civ. P. 12.02(6) motion admits the truth of all the relevant and material factual allegations in the complaint but asserts that no cause of action arises from these facts. Accordingly, in reviewing a trial court's dismissal of a complaint under Tenn. R. Civ. P. 12.02(6), we must construe the complaint liberally in favor of the plaintiff by taking all factual allegations in the complaint as true []. We review the trial court's legal conclusions regarding the adequacy of the complaint de novo without a presumption of correctness.

SNPCO, Inc. v. City of Jefferson City, 363 S.W.3d 467, 472 (Tenn. 2012) (internal citations omitted).

IV. DISCUSSION

NACA first argues that its claims against Bryan were erroneously dismissed as

untimely based upon the one-year statute of limitations for director liability claims and that the claims alleged should have been filed against NACA's Board. NACA asserts that its claims were based upon Bryan's own independent actions and that the court failed to consider the gravamen for each claim as required by the Supreme Court's decision in *Benz-Elliott v. Barrett Enterprises, LP*, 456 S.W.3d 140 (Tenn. 2015).

In *Benz-Elliott*, our Supreme Court rejected the idea that a complaint must be reduced to a single gravamen based upon the type of damages requested. 456 S.W.3d 140, 148–49 (Tenn. 2015). The Court recognized that a complaint may allege more than one claim or even alternative claims and that such claims may be subject to different statutes of limitations. *Id.* The Court reasoned that in such cases, the trial court must “ascertain the gravamen of each claim, not the gravamen of the complaint in its entirety.” *Id.* at 149. The Court continued, “when ascertaining the gravamen of a claim for the purpose of choosing the statute of limitations[,] a court must first consider the legal basis of the claim and then consider the type of injuries for which damages are sought.” *Id.* at 151.

In its amended counter-complaint, NACA alleged five claims for relief, including (1) conversion related to Bryan's wrongful appropriation of the FBC without adequate consideration; (2) aiding and abetting as it related to Bryan's improper influence upon NACA's Board; (3) fraud in the inducement to complete the transaction under the guise that Lease 1 would govern the relationship between the parties; (4) conspiracy to accomplish by a concerted action the unlawful purpose of forcing NACA to transfer the FBC; and (5) unjust enrichment based upon the improper transfer of the FBC without consideration and the rental payments made. NACA further requested a declaratory judgment that the Quitclaim Deed and Lease 2 were void based, in part, upon the unlawful, inequitable and improper conduct of Bryan and President Livesay, Mr. Coddington, Mr. Green, and Mr. Berger. We will address each claim in turn.

1. Conversion

Conversion is an intentional tort, and a party seeking to make out a prima facie case of conversion must prove (1) the appropriation of another's property to one's own use and benefit, (2) by the intentional exercise of dominion over it, and (3) in defiance of the true owner's rights. *Mammoth Cave Prod. Credit Ass'n v. Oldham*, 569 S.W.2d 833, 836 (Tenn. Ct. App. 1977). An action for the conversion of personal property, e.g. the rental payments made, is subject to a three-year statute of limitations. Tenn. Code Ann. § 28-3-105. The statute of limitations for conversion of real property, e.g., the FBC, is not expressly provided for in the Tennessee Code; accordingly, such claims are subject to a ten-year statute of limitations. Tenn. Code Ann. § 28-3-110(a)(3). The conversion claim, filed within three years of the signing of Lease 2, was not untimely.

Here, NACA alleged that the transfer of the FBC was not supported by consideration, was commercially unreasonable, and made under economic duress. NACA

further claimed that the subsequent rental payments were made pursuant to Lease 2, which was not approved by NACA's Board but was signed by Mr. Berger, who was affiliated with Bryan and evidenced a conflict of interest. Construing these allegations as true, as is appropriate in our review of the trial court's decision on a motion to dismiss, we conclude that dismissal was not warranted at this stage of the proceeding based upon failure to state a claim upon which relief can be granted.

2. Aiding and Abetting

Tennessee recognizes a "common law civil liability theory of aiding and abetting," which would require NACA to prove that Bryan knew that NACA's Board's execution of the Resolution and Mr. Berger's subsequent execution of Lease 2 constituted a breach of fiduciary duty and that Bryan gave substantial assistance or encouragement in these acts. *See generally PNC Multifamily Capital Institutional Fund XXVI Ltd. P'ship v. Bluff City Cmty. Dev. Corp.*, 387 S.W.3d 525, 552 (Tenn. Ct. App. 2012) (setting forth the elements of the tortious conduct necessary to sustain a claim of aiding and abetting). The allegations contained in the amended complaint in support of this claim are sufficient to withstand a motion to dismiss. The statute of limitations for such actions is not expressly provided for; however, the injury is closely akin to that of conversion of personal property (rental payments) and real property (the FBC). Accordingly, the claim was also not untimely as previously established.

3. Fraudulent Inducement

Our Supreme Court has held that to sustain a claim of fraudulent inducement, the plaintiff must establish that the defendant

- (1) made a false statement concerning a fact material to the transaction
- (2) with knowledge of the statement's falsity or utter disregard for its truth
- (3) with the intent of inducing reliance on the statement,
- (4) the statement was reasonably relied upon, and
- (5) an injury resulted from this reliance.

Baugh v. Novak, 340 S.W.3d 372, 388 (Tenn. 2011). Actions for fraud are subject to a three-year statute of limitations. *Fortune v. Unum Life Ins. Co. of America*, 360 S.W.3d 390, 401 (Tenn. Ct. App. 2010).

Here, NACA alleged that Bryan advised the Board that the parameters of Lease 1 would govern the transaction but later executed Lease 2 with the help of Mr. Berger. Construing these allegations as true, as is appropriate in our review of the trial court's decision on a motion to dismiss, we conclude that the statement was reasonably relied upon when Lease 1, not Lease 2 was presented to the Board for approval. NACA further alleged that the payments made in accordance with Lease 2 were submitted by Mr. Berger and that NACA refused payment when the Board, once independent from Bryan, learned of the

execution of Lease 2. With these considerations in mind, we hold that dismissal was not warranted at this stage of the proceeding based upon failure to state a claim upon which relief can be granted.

4. Conspiracy

“An actionable civil conspiracy is a combination of two or more persons who, each having the intent and knowledge of the other’s intent, accomplish by concert an unlawful purpose, or accomplish a lawful purpose by unlawful means, which results in damage to the plaintiff.” *Trau–Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 703 (Tenn. 2002). Conspiracy claims must be pled with some degree of specificity. *McGee v. Best*, 106 S.W.3d 48, 64 (Tenn. Ct. App. 2002). Conclusory allegations unsupported by material facts will not be sufficient to state such a claim. *Kincaid v. SouthTrust Bank*, 221 S.W.3d 32, 38 (Tenn. Ct. App. 2006). A claim for civil conspiracy “requires an underlying predicate tort allegedly committed pursuant to the conspiracy.” *Watson’s Carpet & Floor Coverings, Inc. v. McCormick*, 247 S.W.3d 169, 180 (Tenn. Ct. App. 2007). Conspiracy, standing alone, is not actionable where the underlying tort is not actionable. *Id.* at 179–80.

The allegations contained in the amended complaint in support of this claim are sufficient to withstand a motion to dismiss. Further, this claim is not barred by the intracorporate conspiracy immunity doctrine as found by the trial court when NACA alleged facts to establish that the conspiracy involved agents or directors acting for both corporations and that those involved in the conspiracy acted outside of the scope of their employment and for their own personal interests. The claim was also not untimely as pled based upon NACA’s allegation of the ongoing conspiracy.

5. Unjust Enrichment

In Tennessee, a party asserting unjust enrichment must demonstrate the following elements:

(1) there must be no existing, enforceable contract between the parties covering the same subject matter; (2) the party seeking recovery must prove that it provided valuable goods and services; (3) the party to be charged must have received the goods and services; (4) the circumstances must indicate that the parties involved in the transaction should have reasonably understood that the person providing the goods or services expected to be compensated; and (5) the circumstances must also demonstrate that it would be unjust for the party benefitting from the goods or services to retain them without paying for them.

Smith v. Hi-Speed, Inc., 536 S.W.3d 458, 480 (Tenn. Ct. App. 2016) (citing *Crye–Leike, Inc. v. Carver*, 415 S.W.3d 808, 824 (Tenn. Ct. App. 2011)). Courts frequently use the

terms “unjust enrichment,” “quasi-contract,” “quantum meruit,” and “contract implied-in-law” interchangeably, as they are “essentially the same.” *Metro. Gov’t of Nashville & Davidson Cnty. v. Cigna Healthcare of Tenn., Inc.*, 195 S.W.3d 28, 32 (Tenn. Ct. App. 2005) (citing *Paschall’s, Inc. v. Dozier*, 219 Tenn. 45, 407 S.W.2d 150, 154 (1966)).

Here, NACA alleged, inter alia, that Lease 2 was void for lack of consideration and that Bryan accepted ownership of the FBC, valued at approximately \$7 million, and in excess of \$200,000 in rental payments from NACA. The allegations contained in the amended complaint in support of this claim are sufficient to withstand a motion to dismiss. The statute of limitations for such actions is not expressly provided for; however, the injury is closely akin to that of conversion of personal property (rental payments) and real property (the FBC). Accordingly, the claim was not untimely as previously established.

6. Declaratory Judgment

Lastly, NACA requested a declaratory judgment that the Quitclaim Deed and Lease 2 were void based, in part, upon the unlawful, inequitable, and improper conduct of Bryan and President Livesay, Mr. Coddington, Mr. Green, and Mr. Berger. The statute of limitations for such actions is not expressly provided for; however, the injury is closely akin to that of conversion of personal property (rental payments) and real property (the FBC). Accordingly, the claim was not untimely as previously established. Having found that the preceding allegations contained in the amended complaint are sufficient to withstand the motion to dismiss, we likewise hold that dismissal was not warranted at this stage of the proceeding on this claim.

With the above considerations in mind, we vacate the dismissal of NACA’s counter-complaint and remand for further proceedings. The remaining issues are pretermitted by this court’s remand for resolution of the counter-complaint.

V. CONCLUSION

For the reasons stated above, we vacate the decision of the trial court. The case is remanded for further proceedings consistent with this opinion. Costs of the appeal are taxed to the appellee, Bryan College.

JOHN W. MCCLARTY, JUDGE