

Cultural Intrigue, Ltd. v. Trapeni and Lindell, Docket No. 217-5-06 Wmcv (Jan. 5, 2007)

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**STATE OF VERMONT  
WINDHAM COUNTY**

CULTURAL INTRIGUE, LTD.,  
Plaintiff,

v.

WINDHAM SUPERIOR COURT  
DOCKET NO. 217-5-06 Wmcv

LEE TRAPENI and STACEY LINDELL,  
Defendants.

**ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Currently pending is Plaintiff CI's motion for summary judgment on Count III, in which CI asks for specific enforcement of Defendants' agreement that they would take title to their residence as tenants in common in order to make Defendant Trapeni's obligation to CI more secure. It is undisputed that Defendant Trapeni and Defendant Lindell, his wife, promised to purchase and hold their home as tenants in common, but instead they elected to take title as tenants by the entirety. Nonetheless, Defendants argue against specific enforcement on the grounds that their promise is unenforceable because it was made under duress, that there has been an accord and satisfaction, and that it would be inequitable to enforce the promise.<sup>1</sup> Based

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<sup>1</sup> For purposes of convenience in discussion here, the Court groups Defendants and their arguments together. In case it should become important in another context, however, the Court notes that Defendants are separately represented, and that Defendant Lindell relies solely on the unenforceability

on the undisputed facts, however, the Court concludes as a matter of law that neither duress nor accord and satisfaction can be established, and that enforcement of Defendants' promise would not be inequitable. Accordingly, CI's motion for partial summary judgment will be **GRANTED**.

Summary judgment is appropriate if the Court determines that there are no genuine questions of material fact and the moving party is entitled to judgment as a matter of law. See *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). In making this determination, the Court views the evidence favorably to the non-moving parties and gives them the benefit of all reasonable doubts and inferences. *Id.* However, once the moving party submits evidence that appears to establish certain facts, the non-moving parties cannot rely on mere allegations to the contrary, but must submit their own evidence to controvert the moving party's evidence. See *id.*

Plaintiff initially brought this action against Defendant Trapeni, its former employee, alleging two counts – breach of contract and embezzlement. The contract allegedly breached was a document dated April 14, 2003, in which Trapeni acknowledged embezzling \$60,701.92 from CI and agreed “to make every possible effort to repay the embezzled funds [plus administrative costs and legal fees and 11% interest] as promptly as possible.” This agreement was also executed by Defendant Lindell, who joined with Defendant Trapeni in a promise to purchase the home they were about to acquire as tenants in common rather than tenants by the entirety, in order to facilitate use of Trapeni's share of the property to secure his obligation under the agreement. CI amended its complaint to include Defendant Lindell when it realized that she and

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argument while Defendant Trapeni raises all three.

Trapeni had breached their promise as regards title to their home, which they had taken as tenants by the entirety. Count III of the amended complaint seeks to specifically enforce the contract as regards title to Defendants' residence.

Defendants' primary contention is that there is a genuine dispute as to whether their promise was made under duress, based on their testimony that CI threatened criminal prosecution against Trapeni if they did not sign the agreement. However, CI had a legal right to press criminal charges against Trapeni;<sup>2</sup> and a party's threat to do what it has the legal right to do cannot generally provide the basis for duress because it is not wrongful. Cf. *Quazzo v. Quazzo*, 136 Vt. 107, 114 (1978) (defining duress as a *wrongful* act compelling assent to a transaction without the volition of the actor) (emphasis added); *Gubitz v. Security Mutual Life Ins. Co.*, 692 N.Y.S.2d 139, 140 (N.Y. App. Div. 1999) (where alleged threat was to exercise a legal right, there is no actionable duress).

Some courts have held that an otherwise legitimate threat to institute criminal (or civil) proceedings could become a wrongful act if used to coerce a grossly unfair transaction unrelated to the subject of such proceedings. See, e.g., *Stewart v. Stewart*, 300 S.E.2d 263, 265 (N.C. Ct. App. 1983). No such overreaching occurred here, however. The subject matter of the transaction and the threatened proceedings – Trapeni's embezzlement – were identical. More importantly, given the undisputed fact of Trapeni's embezzlement, the transaction cannot be

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<sup>2</sup> Indeed, when Defendant Trapeni failed to repay the embezzled funds as promised Plaintiff complained to law enforcement authorities, resulting in a conviction for embezzlement on May 1, 2006 and a probationary sentence of 3-6 years.

considered grossly unfair under any reasonable view of the facts and circumstances.

In return for Trapeni's promise to "make every possible effort" to repay the embezzled funds "as promptly as possible," Trapeni and Lindell's promise to purchase and hold their property as tenants in common, and Trapeni and Lindell's promise to grant a mortgage on their property, CI promised forbearance from immediate criminal or civil prosecution, confidentiality, and an interest rate *less* than the statutory amount. This agreement gave Trapeni a limited opportunity to avoid the worst consequences of his own wrongful acts if he was willing and able to reimburse his wronged employer within a reasonable time, and cannot be considered grossly unfair to Defendants. Accordingly, there is no genuine dispute regarding the absence of duress in this case.<sup>3</sup>

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<sup>3</sup> Defendant Lindell's alternative argument that the agreement should not be enforceable against her because she did not receive any independent consideration is without legal or logical support. She clearly sought and benefitted from CI's forbearance in bringing legal action against her husband, and that is sufficient consideration to make her promise enforceable.

Defendant Trapeni's argument that there has been an accord and satisfaction is also without merit. It is undisputed that in April 2006, Trapeni gave CI a check for \$54,125.41, approximately the principal amount of the embezzled funds, and that CI accepted and cashed the check. However, "[t]o constitute an accord and satisfaction, that which is offered must clearly be offered in full satisfaction of the claim in question, and it must be so understood when accepted." *Union Bank v. Jones*, 138 Vt. 115, 124 (1980).<sup>4</sup> Here, there is no evidence of such an understanding. Relying on a letter in which CI agrees to release its mortgage on Defendants' property when it receives the partial payment, Trepani suggests an agreement to also release the underlying obligation can and should be inferred. Yet, in the very letter Trepani relies on, after agreeing to release the mortgage it holds on Defendants' home, CI expressly reserves its right to pursue its claim for the remaining obligation, which is primarily accumulated interest (approximately \$30,000). Thus, in the face of this express reservation of rights, an accord and satisfaction of the underlying obligation cannot be reasonably inferred from the release of the mortgage. Rather, the only reasonable inference is that CI was willing to release the mortgage, which was signed by both Defendants and applied to the whole property, because the partial payment lessened the remaining balance owed to an amount that could be secured by Trapeni's share alone, making the mortgage on the whole property unnecessary.<sup>5</sup>

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<sup>4</sup> See also 9A V.S.A. § 3-311 (codifying and clarifying common law rules regarding when acceptance of check for partial payment may constitute accord and satisfaction). Under this code section, the party asserting accord and satisfaction must also show that the debt was unliquidated or the subject of a *bona fide* dispute at the time the partial payment was accepted. *Alpine Haven Prop. Owners Assn. v. Deptula*, 2003 VT 51, ¶ 19, 175 Vt. 559, 564. Given the absence of such a showing, this would be an alternative reason for rejecting this argument.

<sup>5</sup> Defendants complain that CI has not yet released the mortgage as it promised to do. The above reasoning – that CI could release the mortgage because attaching Trapeni's share alone would be enough to

Lastly, Defendants contend it would be inequitable to force Trapeni and his family from their home to pay a judgment for what is essentially interest and costs. This argument is also unsupportable. First, the remaining obligation may be essentially interest and costs, but it is a substantial amount, representing a real loss to CI caused by Trapeni's wrongful acts. Moreover, it is an amount Trapeni has contractually agreed to pay, in an agreement the Court has ruled is not unenforceable based on duress. Thus, it would be no more inequitable to enforce a judicial lien against Defendants' home for this debt than it would be to enforce a judicial lien against a home for any debt of similar size under similar circumstances (i.e., the debt pre-existed the acquisition of the home), and would arguably be *less* inequitable here, given the nature of Trapeni's wrongdoing that gave rise to the debt in the first place.

In any event, the forcible removal of Trapeni and his family from their home would not be an automatic or immediate consequence of enforcing Defendants' promise. A significant number of procedural steps stand between today's ruling specifically enforcing the promise as regards tenancy in common and any judicial decree displacing Defendants from their home. Even assuming matters proceeded to judicial foreclosure of a judgment lien, any sale would be subject

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secure the remaining balance – only held true on the assumption that Trapeni and Lindell had taken title to the property as tenants in common. CI's failure to follow through on its promise to grant a discharge stems from its discovery that Defendants had not kept their agreement as to the manner of taking title - the very subject of Plaintiff's request for relief in Count III. As indicated by the ruling below, the Court conditions its grant of specific performance on a discharge of the mortgage, to be replaced by an attachment covering the amounts claimed in Counts I & II to be levied on Trapeni's interest in the residence held as tenants in common.

to “such period of redemption as the court may determine”, 12 V.S.A. § 4531(b). Meanwhile, Trapeni would have the opportunity, and hopefully the incentive, to make good faith efforts to pay his debt – which would certainly strengthen any equitable arguments he might present in any subsequent proceedings to which they might apply.

The Court has considered the question of whether specific enforcement is necessary to protect CI's rights, and has concluded that it is. Boiled down to essentials, the parties' 2003 agreement provided Trapeni a reasonable time to repay the embezzled funds, interest, and costs, and provided CI security for Trapeni's obligation to do so. The Court has rejected as a matter of law Defendants' argument that this agreement is unenforceable based on duress, yielding the conclusion that CI has the right to security for the full amount of the agreed obligation. As long as CI holds the mortgage on Defendants' property signed by both Defendants, enforcement of Defendants' promise to hold their property as tenants in common is arguably unnecessary to protect CI's right to security. However, it is apparent from the record that CI agreed to release the mortgage at the time the partial payment was made last April, and that Defendants seek enforcement of that agreement. Thus, assuming a release of the mortgage, a tenancy in common will be necessary to protect CI's right to security. Cf. *Cooperative Fire Ins. Assn. v. Domina*, 137 Vt. 3, 5 (1979) (property owned as tenancy by the entirety is uniquely indivisible). Accordingly, CI is entitled to specific enforcement.

### **ORDER**

Based on the discussion above, it is hereby **ORDERED**:

Plaintiff's motion for summary judgment on Count III is **GRANTED**, and Defendants are ordered to transfer their property to themselves as tenants in common. It is a condition of this order for specific performance that: i) Plaintiff's execute a discharge of the mortgage encumbering Defendant's residence; ii) that in light of this opinion, Plaintiff's motion for attachment is hereby **RECONSIDERED and GRANTED**, to the extent of Defendant Trapeni's interest in the commonly held property, and to the amount of \$40,000; and iii) that the documents evidencing compliance with the order for specific performance, together with the mortgage discharge and the writ of attachment, be recorded simultaneously in the Westminster Land Records. Plaintiff shall submit a proposed Order of Approval and Writ of Attachment, forthwith.

Although the request for summary judgment was limited to matters raised by Count III, the Court's determination of the issues would appear to make Counts I & II susceptible to summary judgment as well. In the absence of the filing of dispositive motions as to the remaining claims for relief within 30 days, the Court will schedule the matter for a status conference to determine the scope of any material disputes remaining to be resolved

Dated at \_\_\_\_\_, Vermont, this \_\_\_\_ day of \_\_\_\_\_, 200\_\_.

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John P. Wesley  
Presiding Judge