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In the Court of Special Appeals of Maryland

September Term, 2007

No. 1230

HILL CONSTRUCTION COMPANY, INC.,

Appellant,

v.

SUNRISE BEACH, LLC, ET AL.,

Appellees.

Appeal from the Circuit Court for Worcester County, Maryland
(Hon. Thomas C. Groton, III, Judge)

BRIEF OF APPELLEES SUNRISE BEACH, LLC, GERALD T. DAY, AND J. WESLEY HUGHES AND APPELLEES' MOTION TO DISMISS APPEAL

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Attorneys for Appellees

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IN THE COURT OF SPECIAL APPEALS OF MARYLAND

HILL CONSTRUCTION COMPANY, INC.	*	
	*	
Appellant		
	*	No. 01230
v.		September Term, 2007
	*	
SUNRISE BEACH, LLC, et al.		
	*	
Appellees		

* * * * * * * * * * * * *

APPELLEES' MOTION TO DISMISS APPEAL

NOW COME Appellees, by and through their attorneys, Guy R. Ayres III, Bruce F. Bright and Ayres, Jenkins, Gordy & Almand, P.A., and, pursuant to Maryland Rules 8-602 and 8-603, move to dismiss this appeal, and, in support thereof, state as follows:

1. The corporate charter of Hill Construction Company, Inc. ("Hill Construction" or "Appellant"), a Maryland corporation, was forfeited on October 8, 2004, and has remained forfeited at all times from that date to the present. *See* Affidavit of Bruce F. Bright, attached hereto.

2. Under Maryland law, when a corporation's charter is forfeited, it ceases to exist as a legal entity. Md. Code, *Corporations and Associations*, §3-503(d); *Atlantic Mill & Lumber Realty Co. v. Keefer*, 179 Md. 496 (1941). Because it no longer legally exists, a forfeited entity does not have the power to sue or be sued, it has no standing in court, and it may not maintain any legal proceedings to enforce rights it acquired during the life of

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the charter. *Atlantic Mill & Lumber Realty Co. v. Keefer*, 179 Md. at 499-500. *See also Kroop & Kurland v. Lambros*, 118 Md. App. 651, 658-659 (1998).

3. Maryland law is clear that a pleading filed in court by a forfeited entity is a "nullity," and is of no legal effect. *See Dual, Inc. v. Lockheed Martin*, 383 Md. 151, 162-167 (2004); *T-J Siding Contractors, Inc. v. Fireman's Insurance Co. of Newark New Jersey*, 869 F. Supp. 347 (D. Md. 1994). There is no dispute that Appellant's Notice of Appeal was filed in this case at a time when its charter was forfeited, i.e., at a time when it did not exist as a legal entity. Accordingly, this appeal is a "nullity," and Appellant has, since October 8, 2004, lacked standing to pursue any legal action or proceedings, including this appeal and the underlying case.

4. Under Rule 8-602, this Honorable Court may properly dismiss an appeal if: (a) it is not allowed by Rule or other law; or (b) it is "not properly taken." *See* Md. Rule 8-602(a)(1)-(2). Under Rule 8-603, a motion to dismiss pursuant to Rule 8-602(a)(1) or 8-602(a)(2) may be included in the appellee's brief. Md. Rule 8-603(c).

WHEREFORE, Appellees respectfully request that this Honorable Court dismiss this appeal in its entirety, with prejudice.

Respectfully submitted,

_____

Bruce F. Bright
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IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

HILL CONSTRUCTION COMPANY, INC.	*	
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Appellant		
	*	No. 01230
v.		September Term, 2007
	*	
SUNRISE BEACH, LLC, et al.		
	*	
Appellees		

* * * * * * * * * * * * *

AFFIDAVIT OF BRUCE F. BRIGHT IN SUPPORT OF MOTION TO DISMISS

NOW COMES the undersigned Affiant and states as follows under penalties of perjury:

1. My name is Bruce F. Bright. I am a legal adult and am competent to testify as to the matters stated herein. I am an attorney of record in this case, representing the Appellees.

2. The documents attached hereto, and incorporated herein by reference, are true and correct copies of records maintained and kept by the Maryland State Department of Assessments and Taxation ("SDAT"), with respect to the Appellant in this case, Hill Construction Company, Inc.

3. The attached records were "downloaded" and printed by the undersigned, from the SDAT website, on January 22, 2008. They are records which reflect the status of the corporate charter of Hill Construction Company, Inc., a Maryland corporation, as of

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January 22, 2008. The attached records reflect further that the corporate charter of Hill Construction Company, Inc., has been forfeited at all times since October 8, 2004.

I SOLEMNLY SWEAR AND AFFIRM UNDER PENALTIES OF PERJURY THAT THE CONTENTS OF THIS AFFIDAVIT ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF.

_____
Date

_____
Bruce F. Bright
Ayres, Jenkins, Gordy & Almand, P.A.
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STATEMENT OF THE CASE

Hill Construction Company, Inc. ("Hill Construction" or "Appellant") filed a lawsuit in Worcester County Circuit Court on or about November 18, 2003, against Sunrise Beach, LLC, Gerald T. Day, and J. Wesley Hughes (collectively "Appellees"). Hill Construction asserted claims for Breach of Contract (Counts I and II), Breach of Fiduciary Duty (Count III), Fraud (Count IV), Constructive Fraud (Count V), Civil Conspiracy (Count VI), Conversion (Counts VII-IX), Fraudulent Conveyance (Count X), Constructive Trust (Count XI), and for an Accounting (Count XII). Appellees thereafter filed a Counter-Claim and Third-Party Complaint against Hill Construction and its principal, Mark Hill.

Extensive discovery was conducted in the case over a period of many months. At a hearing on May 23, 2005, the trial court granted Appellees' Motion for Partial Summary Judgment, striking Hill Construction's claim for punitive damages. Trial was scheduled for November 14-15, 2005. Just ten days prior to that trial date, Hill Construction filed an emergency Motion for Continuance, which was granted by the Court. Trial was re-scheduled for July 17-18, 2006. Three days before that trial date, Hill Construction's counsel notified the Court of Hill Construction's Chapter 11 bankruptcy filing, and the case was stayed by the Circuit Court. On September 11, 2006, the Bankruptcy Court dismissed Hill Construction's bankruptcy case, and the case was re-activated in the Circuit Court.

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Thereafter, Appellees filed a dispositive motion seeking dismissal of the case based on the forfeited status of Hill Construction's corporate charter; and alternatively seeking summary judgment as to Counts III-V and VII-XII of Hill Construction's Complaint. Appellees also filed a Motion for Partial Summary Judgment as to one of Hill Construction's theories of damages. Following a hearing on November 29, 2006, the trial court granted Appellees' Motion for Summary Judgment as to Counts III-V and VII-XI, but denied the motion as to Count XII. The Court reserved ruling as to the request for dismissal based on the forfeited charter, and granted the motion for summary judgment as to Hill Construction's theory of damages. After giving Hill Construction over two months of additional time to revive its charter, by Order dated February 14, 2007 (E. 16-17), the Circuit Court granted Appellees' request for dismissal, dismissing Hill Construction's case in its entirety. To this day, Hill Construction's charter continues to be forfeited. On June 25, 2007, the parties stipulated to a dismissal without prejudice as to Appellees' Counterclaim and Third-Party Complaint. On July 24, 2007, Hill Construction filed its Notice of Appeal, challenging all of the trial court's dispositive rulings.

QUESTIONS PRESENTED

I. Whether the trial court committed reversible error by dismissing the case based on the forfeited status of Hill Construction's corporate charter.

II. Whether the trial court committed reversible error by striking Appellant's claim for punitive damages.

III. Whether the trial court committed reversible error by granting summary judgment as to Counts III - IV and VII - XI of Hill Construction's

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Complaint.

IV. Whether the trial court committed reversible error by granting partial summary judgment as to Appellant's theory of damages.

STATEMENT OF FACTS

This case arises from the development of a four-unit condominium project located on Atlantic Avenue in Ocean City, Maryland, known as "Sunrise Beach" ("the Project"). Gerald T. Day ("Day"), J. Wesley Hughes ("Hughes"), and Hill Construction, are all members of Sunrise Beach, LLC ("Sunrise Beach" or "LLC"), the developer of the Project. Mark Hill is the principal of Hill Construction and, at all relevant times, he acted on Hill Construction's behalf in connection with the Project.

Pursuant to a written agreement dated November 1, 2001 ("Agreement"), Hill Construction acquired a forty percent (40%) membership interest in Sunrise Beach and, in exchange, Hill Construction agreed to complete construction of the Project on a cost only basis. (E. 285-287).[1] Under the Agreement, (i) Sunrise Beach was to pay Hill Construction "for labor and materials only and no profit and overhead"; (ii) Hill Construction's workmanship was required to be "first class and in accordance with all codes, regulations and strictly in accordance with the plans and specifications"; (iii) the construction was to be completed by June 1, 2002; and (iv) Hill Construction's 40% share was "liable for any failure on his part to live up to his obligations under [the] Agreement."

[1] Pursuant to the Sunrise Beach, LLC Operating Agreement, Gerald Day is a fifty-two percent (52%) member of the company, and J. Wesley Hughes is an eight percent (8%) member. (E. 289-299).

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(E. 285-287).

Pursuant to a separate written agreement dated December 15, 2001, Hill Construction was entitled to a monthly "Administrative Fee" (in the amount of $1,650.00), and a monthly "draw" payment in the amount of $4,000.00 (up to a maximum total draw amount of $40,000.00). (E. 303). Under that agreement, the total draw amount paid to Hill Construction was "to be deducted from Hill Construction's 40% share of the profit from the sale of the condominiums." (E. 303). During the course of Hill Construction's involvement with the Project, Sunrise Beach made "draw" payments to Hill Construction totaling $46,270.00. (E. 307).

Hill Construction failed to complete the Project by June 1, 2002, as required under the Agreement. (E. 316), at p. 89); (E. 327). Indeed, Hill Construction abandoned the Project *in March 2003* (nine months after the required completion date), before the Town of Ocean City had issued an occupancy certificate, and prior to completion of the Project. (E. 329; E. 316).[2] Direct costs incurred by Sunrise Beach as result of Hill Construction's

[2] After Hill Construction abandoned the project, Ocean City building inspectors identified several problems which Sunrise Beach was required to address in order to obtain a Certificate of Occupancy, including the following: (a) the elevator entrance in the lobby was six inches too small; (b) a shed had been built on the property by Hill Construction without permission from Ocean City; (c) stairwell doorways had been installed incorrectly, and had to be ripped out and replaced; (d) four egress doors were the wrong size, and had to be ripped out and replaced; (e) the elevation of the south lobby entrance was wrong and had to be re-poured; (f) the landscaping was incomplete; (g) the system for storm water management was not properly constructed or completed – Appellees were required to post a bond as to that issue in order to obtain the Certificate of Occupancy; and (h) flood vents were not installed in the mechanical rooms and lobby. In

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failure to complete the project in a timely manner included, but were not limited to, the following: (1) $17,876.11 for insurance premiums; (2) $89,959.00 for interest on the construction loan (made by Severn Bank); and (3) $34,778.00 for equipment rentals. (E. 307). In addition, quite apart from the delay, there were significant cost overruns arising from Hill Construction's mis-management of the Project. (E. 347).

All four Sunrise Beach units were sold between May 15, 2003, and June 8, 2003. As reflected in the spreadsheet prepared by Sunrise Beach's accountant, the gross amount of sale proceeds from all of the units was $3,238,030.00. After deducting settlement costs ($163,810.00) and construction costs ($2,739,530.00), the net profit was $334,690.00. (E. 354; E. 307-308). Based upon their respective membership interests, J. Wesley Hughes (8%) would have received $26,775.00, Hill Construction (40%) would have received $133,876.00, and Gerald Day (52%) would have received $174,039.00. (E. 307-308).

Hill Construction's putative share of profits was reduced, first, by $46,270.00, the amount of draw payments that it had received during the course of its involvement with the project. (E. 307-308). The remaining balance of Hill Construction's share of profits ($87,606.00) was further reduced to zero, based upon the costs and expenses attributable to Hill Construction's mismanagement and abandonment of the project, and its failure to

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addition, seven or eight "door swings" on ground floor were not consistent with the plans and specifications, resulting in changes that needed to be made to the recorded plat. (E. 344). A Certificate of Occupancy was not issued for the Project until May 23, 2003, after all of those issues had been addressed and resolved by Appellees. (E. 353).

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complete the Project by June 1, 2002, as required under the Agreement. (E. 307-308). Hill Construction's putative share of the profits, having been reduced to zero based on its breach of the Agreement, was then re-allocated to Day and Hughes, resulting in $49,900.00 going to Hughes and $238,520.00 going to Day. (E. 307-308).

On or about June 8, 2003, Gerald Day purchased one of the four Sunrise Beach units, specifically, Unit 101. He purchased such unit with Mark Hill's prior knowledge and approval. (E. 314-315).[3] The net sale price of the Unit was $780,000.00, because Hughes, who acted as Sunrise Beach's realtor in connection with the sale of the four units[4], agreed to waive half of the real estate commission on such transaction, resulting in a $20,000.00 reduction in the sale price (at no cost to Sunrise Beach LLC or Hill Construction, as a member thereof). (E. 305-306).

The effective purchase price for Unit 101 ($780,000.00) was paid by Gerald Day as

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[3] Mark Hill first became aware of Day's desire to purchase Unit 101 (at its list price) in or about April or May of 2002. (E. 305; E. 314-315). In May 2002, during a meeting at the project site between Hughes, Day and Mark Hill to discuss the affairs of the LLC, Day stated that he would like to purchase such Unit at its list price. (E. 305). During the meeting, Mark Hill stated his approval of the contemplated transaction and, at no time thereafter, including numerous instances where the sale of Unit 101 to Day was discussed, did he raise any objection. (E. 305). The list price of Unit 101 at the time Day agreed to purchase it in May 2002 was $799,000.00. The list price had previously been increased on three occasions from an original amount of $709,000.00. (E. 305; E. 318).

[4] The Agreement provided explicitly that "[t]he initial listing of the units for sale shall be with Prudential, through Wes Hughes. The commission shall be pursuant to a separate agreement." (E. 286). Wesley Hughes received a 50% share (Erik Windrow received the other 50%) of the listing commission on the sale of the Units 102, 103, and 104. He received a 2.5% commission on the sale of Unit 101. (E. 308).

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follows: (1) $88,520.00 deducted from Day's share of the net profits (and credited toward the purchase); (2) $100.00 credited toward the purchase based on capital contribution(s) in that amount; and (3) $691,380.00 credited toward the purchase in satisfaction of loans Day made to Sunrise Beach, plus interest. (E. 308). The remaining portion of Day's re-allocated share of the profits ($150,000.00) was distributed to him in cash, in connection with the settlement on his purchase of Unit 101, which was the last unit sold. (E. 308-309). Hughes received a distribution in the amount of $50,000.00. (E. 308).

During his deposition in this case, Mark Hill admitted that: (1) he was fully involved in determining the list prices for all of the units, including Unit 101 (E. 314); and (2) he consented to Day's purchase of Unit 101 at its list price, and never expressed any objection to such transaction (E. 314-315). Mark Hill admitted further in his deposition that he walked off the Project in March 2003, before it was completed and before an occupancy certificate had been issued, due to other demands on his time, specifically, trial preparations for an unrelated lawsuit in which he was involved. (E. 316, 319-320). Finally, Mr. Hill admitted that he understood back in March 2003 that his abandonment of the Project before its completion would result in reductions from his putative share of the net profits. (E. 320).

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ARGUMENT

I. STANDARD OF REVIEW

This Court's review of the Circuit Court's grant of summary judgment is *de novo*. *Avantis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 440 (2007). The Court must "determine whether the Circuit Court properly concluded that there was no dispute of material fact, and, if so, whether the Circuit Court's decision that the moving party was entitled to summary judgment was legally correct." *Cruickshank-Wallace v. County Banking & Trust Co.*, 165 Md. App. 300, 310 (2005), *cert. denied*, 391 Md. 114 (2006). "On appeal from an order entering summary judgment, [the Court of Special Appeals] review[s] only the legal grounds relied upon by the trial court in granting summary judgment." *Cochran v. Norkunas*, 398 Md. 1, 12 (2007).

A trial court may properly grant summary judgment if "the moving party demonstrates the absence of any genuine dispute as to any material fact and that party is entitled to judgment as a matter of law." *Singer Co. v. Baltimore Gas & Electric Co.*, 79 Md. App. 461, 466 (1989). *See also* Md. Rule 2-501(a); *Presbyterian Univ. Hospital v. Wilson*, 99 Md. App. 305, 313 (1994), *affirmed*, 337 Md. 541 (1995).

To obtain summary judgment, a defendant is not required to disprove the plaintiff's case; rather, the defendant need only disclose the absence of evidence supporting the plaintiff's case. Once the moving party has done so, the burden then shifts to the non-moving party to put forth admissible evidence of a genuine issue for trial. *Beatty v.*

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Trailmaster, 330 Md. 726, 738 (1993). As the United States Supreme Court explained in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), "[t]he moving party is 'entitled to judgment as a matter of law' . . . [when] the non-moving party has failed to make a sufficient showing on an essential element of her case." *Id*. at 323.

The existence of "*some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Beatty v. Trailmaster*, 330 Md. at 738 *(quoting Anderson v. Liberty Lobby*, 477 U.S. 242, 247-248 (1986)). In *Celotex*, a case of which the Maryland Court of Appeals has taken "particular cognizance," *Beatty v. Trailmaster*, 330 Md. at 738, the Supreme Court held that the party opposing the motion for summary judgment must offer more than the conclusory allegations of the complaint. *Celotex v. Catrett*, 477 U.S. at 325. "[M]ere general allegations which do not show facts in detail and with precision are insufficient to prevent summary judgment." *Beatty v. Trailmaster*, 330 Md. at 738. Furthermore, a "mere scintilla" of evidence is not enough to create a triable fact issue; there must be evidence on which a jury could reasonably find for the plaintiff. *Id*. at 738-739 (*citing Anderson v. Liberty Lobby*, 477 U.S. at 252).[5]

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[5] In *Hayes v. Hambruch*, 841 F. Supp. 706 (D. Md. 1994), *affirmed without opinion*, 64 F.3d 657 (4th Cir. 1995), the court held that "[o]ne of the purposes of [summary judgment], is to require a plaintiff, in advance of trial . . . to come forward with some minimal facts to show that a defendant may be liable under the claims alleged." *Id*. at 709.

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II. THE TRIAL COURT DID NOT ERR IN DISMISSING PLAINTIFF'S CASE BASED ON ITS FORFEITED CORPORATE CHARTER.

Under Maryland law, when a corporation's charter is forfeited, it ceases to exist as a legal entity. Md. Code, *Corporations and Associations*, §3-503(d); *Atlantic Mill & Lumber Realty Co. v. Keefer*, 179 Md. 496 (1941). Because it no longer legally exists, a forfeited entity does not have the power to sue, it has no standing in court, and it may not maintain any legal proceedings to enforce rights it acquired during the life of the charter. *Atlantic Mill & Lumber Realty Co. v. Keefer*, 179 Md. at 499-500. *See also Kroop & Kurland v. Lambros*, 118 Md. App. 651, 658-659 (1998).

Hill Construction's charter is presently forfeited, and has been forfeited since October 8, 2004. (E. 467-471). Accordingly, at all times since October 8, 2004, it lacked legal existence, and did not have the power to pursue or maintain its claims against Appellees. Furthermore, as a non-existent legal entity, it lacked standing in the trial court and, likewise, lacks standing in this Court.

Appellant contends (as it did below before Judge Groton) that, notwithstanding its forfeited charter, it should be entitled to continue pursuing this case as part of the purported "winding up" of its affairs. Appellant suggests that a forfeited corporation may *maintain* litigation after its forfeiture, so long as the corporation was in good standing at the time the litigation was *initiated*. Appellant is plainly wrong, and its argument in this regard was properly rejected by the Circuit Court.

The Court of Appeals has specifically held that a forfeited corporation has "no

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standing in court" and "can ***maintain*** no action to enforce rights acquired during the life of the charter." *Atlantic Mill & Lumber Realty Co. v. Keefer*, 179 Md. 496, 500 (1941) (emphasis added). In *F.D.I.C. v. Heidrick*, 812 F. Supp 586 (D. Md. 1992), the Court, applying Maryland law, granted summary judgment against two corporate plaintiffs because their charters were forfeited. The Court held that "Maryland law clearly provides that a corporation whose charter has been forfeited has no legal existence, and thus no capacity to sue . . . Because the [SDAT] has forfeited their charters, [the corporate plaintiffs] ***have no capacity to maintain this lawsuit***." *Id*. at 592-593 (emphasis added). Contrary to what Appellant contends, these cases make clear that, even if a corporation initiates litigation while it is in good standing, it may not continue to maintain the litigation if its charter is thereafter forfeited. *See Dual v. Lockheed Martin*, 383 Md. 151, 163 (2004) (a forfeited corporation loses its power to sue or be sued "as of and during the forfeiture period").

Appellant argues that it should be permitted to maintain its appeal based on section 3-515 of the Corporations and Associations Article, which provides that, until a receiver is judicially appointed, directors of a dissolved corporation may, as trustees of the corporation's assets, "[s]ue or be sued in their own names as trustees or in the name of the corporation." Md. Code, *Corporations and Associations*, §3-515(c)(3). The underlying lawsuit and this appeal were not brought, and have never been maintained, by any individual director of Hill Construction Company, Inc., acting as a "trustee" of the

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corporation's assets. The lawsuit and this appeal were initiated, and at all times have been maintained, by and in the name of "Hill Construction Company, Inc."

Indeed, in its Complaint (which was never amended), Appellant stated and alleged that Hill Construction (the "Plaintiff") is a Maryland corporation which "***is primarily engaged*** in the business of commercial construction, development and contracting." (E. 115-116, Complaint, at ¶1). There was no trustee or individual director of Hill Construction that was ever a party to the case as a plaintiff. Indeed, there was no allegation or mention *anywhere* in the Complaint or any amendment to the Complaint of any director or "trustee" pursuing the case on behalf of Hill Construction, as a dissolved or forfeited corporation "winding up" its affairs. The record is clear that, at all times, the underlying litigation and this appeal have been maintained by and in the name of Hill Construction Company, Inc., not by any director-trustee.

In *Dual v. Lockheed Martin*, 383 Md. 151 (2004), the plaintiff (Dual, Inc.), a corporation facing dismissal based on its forfeited charter, advanced the argument that its claims should not be dismissed because its sole shareholder (Mr. Dual) had filed the complaint in his capacity as trustee of the forfeited entity under section 3-515 of the Corporations and Associations Article. The Court rejected that argument, pointing out that "nowhere in the initial or amended complaint did [Dual] claim to be a director or trustee of Dual, Inc.," and that he only asserted the trustee status in opposition to the defendant's motion to dismiss. *Id*. at 163, fn. 4. The Court held that:

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> [t]here are no allegations in the initial or amended complaint to support Dual's argument that he was 'winding up' Dual, Inc.'s affairs at the time of the October 2001 complaint or at any time between forfeiture [of the corporation's charter] and these filings . . . In fact, the record indicates not that Dual was 'winding up' Dual Inc.'s affairs after its charter became forfeit in 1997, but rather that he actively was conducting business during this time on behalf of a corporation with a forfeit charter.

Id. at 165.

Appellant's original Complaint – ***which was never amended*** – does not name as a plaintiff or otherwise identify or allege any individual acting as a trustee or director bringing suit on behalf of or in the name of the corporation pursuant to section 3-515; neither the Complaint nor any amendment to the Complaint makes any allegation of or reference to the "winding up" of the affairs of Hill Construction, or to any dissolution of the corporation; Hill Construction's charter was forfeited at the instruction of the Comptroller of the Treasury in October 2004, *well after the litigation was initiated*; in July 2006, Hill Construction Company filed *reorganization* (Chapter 11) as opposed to *liquidation* (Chapter 7) bankruptcy proceedings. (E. 384-388). In February 2005, Mark Hill stated in his deposition that Hill Construction was "still . . . up and running, I mean still a company . . . doing small projects." (E. 547).

All of this belies and undermines Appellant's assertion that this appeal may be maintained pursuant to section 3-515 of the Corporations and Associations Article. To "take cover" under that statute, litigation must be, on its face, maintained by a director-trustee of a dissolved corporation in connection with the "winding up" of the corporation's

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affairs. There is nothing anywhere in the record to support an assertion that Appellant's lawsuit or this appeal was ever maintained in that fashion or for that purpose.

Appellant's right to maintain the underlying lawsuit and this appeal (and any other rights it had as a corporate entity) were forfeited *by Appellant's own failure to maintain or revive its corporate charter*. Appellant, by failing (over a period of years) to take simple steps to revive its corporate charter, or alternatively, by failing to re-cast the lawsuit as one being brought pursuant to Section 3-515 of the Corporations and Associations Article, has – by deliberate inaction – brought this situation upon itself, and must bear the consequences. This entire appeal can, and properly should, be disposed of based solely on Hill Construction's forfeited corporate charter.

III. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT AS TO HILL CONSTRUCTION'S CLAIM FOR PUNITIVE DAMAGES.

A. Maryland Law on Punitive Damages.

In this State, in order to recover punitive damages in any tort action, including those arising from a contractual relationship between the parties, a plaintiff must demonstrate by clear and convincing evidence that the defendant(s) acted with "actual malice." *Owens-Illinois v. Zenobia*, 325 Md. 420, 460 (1992); *Schaefer v. Miller*, 322 Md. 297 (1991); *Bowden v. Caldor, Inc.*, 350 Md. 4, 23-24 (1998). "Actual malice" has been defined by the Court of Appeals as "evil motive, intent to injure, ill will, or fraud." *Owens-Illinois v. Zenobia*, 325 Md. at 460. *See also Schaefer v. Miller*, 322 Md. at 300 ("Actual or express malice . . . has been characterized as the performance of an act without legal justification

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or excuse, but with an evil or rancorous motive influenced by hate, the purpose being to deliberately and willfully injure the plaintiff."). Punitive damages are not recoverable, as an absolute matter, in a pure action for breach of contract. *Schaefer v. Miller*, 322 Md. at 299.

In cases where the defendant's conduct, "though wrongful, is committed in the honest assertion of a supposed right and without any evil intention, there is no ground on which punitive damages can be awarded." *Siegman v. Equitable Trust Co.*, 267 Md. 309, 314 (1972). In *Bowden v. Caldor, Inc.*, the Court of Appeals made clear that engagement in some "heinous" or "egregiously bad conduct" is a "prerequisite for any award of punitive damages." *Bowden v. Caldor, Inc.*, 350 Md. at 27.

B. There was no evidence whatsoever demonstrating that Appellees acted with "actual malice."

All of Hill Construction's claims in which it sought punitive damages[6] were based on the following actions by Appellees: (1) the reduction to zero of Hill Construction's putative share of the net profits from the Project (based on its violations of the Agreement), and the re-allocation of such putative share to Day and Hughes; and (2) the sale of Unit 101 to Day.

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[6] In Count I, Hill Construction asserted a claim against Sunrise Beach for Breach of Contract, based on the alleged non-payment of certain purported invoices submitted to Sunrise Beach. In Count II, Hill Construction asserted a claim for Breach of Contract against Sunrise Beach, based on its alleged breach of the Agreement and the Operating Agreement. Hill Construction did not seek punitive damages in connection with either of those claims.

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As stated above, the Agreement by which Hill Construction acquired its forty percent (40%) interest in Sunrise Beach provided clearly and unequivocally that: (1) Hill Construction was responsible for completing the Project; (2) Hill Construction's workmanship was required to be "first class and in accordance with all codes, regulations and strictly in accordance with the plans and specifications"; (3) the Project was to be completed by June 1, 2002; and (4) Hill Construction's interest in Sunrise Beach was "liable for any failure on his part to live up to his obligations under [the] Agreement." (E. 285-288).

It is undisputed that: (1) Hill Construction did not complete the project on or before June 1, 2002, in breach of the Agreement; (2) Hill Construction abandoned the Project nine months after the required completion date (in March 2003), before it was completed and before an occupancy certificate had been issued by the Town of Ocean City; (3) due to the delays in the completion of the Project, Sunrise Beach incurred costs including $17,876.11 for insurance premiums, $89,959.00 for interest on the construction loan, and $34,778.00 for equipment rentals; (4) during its involvement with the Project, Hill Construction received $46,270.00 in draw payments from Sunrise Beach, as advances against its putative share of the net profits; and (5) the aforementioned costs arising from Hill Construction's failure to complete the Project in a timely fashion, when added to the advances paid to Hill Construction in the amount of $46,270.00, far exceeded its putative share of the net profits ($133,876.00).

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Appellees acted justifiably, in good faith, and in a manner consistent with the explicit terms of the Agreement, when, based upon Hill Construction's failure to fulfill its contractual obligations, they decided to reduce Hill Construction's putative share of the net profits to zero, and re-allocate such share to the other members. Appellees did not make such decision arbitrarily or with malicious intent, nor did they do so without a factual and legal (indeed, contractual) basis. There may have been some disagreement below as to who was responsible for the delays in the completion of the Project, the amount of costs arising from such delays, and/or the accuracy and completeness of Appellees' accounting. There was no dispute, however, that the Agreement required Hill Construction to complete the Project by June 1, 2002, in accordance with the plans and specifications and all regulatory requirements; and Hill Construction voluntarily left the Project in March 2003, before it was completed and two months prior to the issuance of a Certificate of Occupancy.

Appellees calculated in good faith what costs Sunrise Beach incurred as a result of Hill Construction's breach of the Agreement, and, consistent with the explicit terms of the Agreement, reduced Hill Construction's share of the net profits accordingly. There was no evidence in the record to support a contention that, in distributing the net profits as they did, Appellees acted with "actual malice" — i.e., without any justification or excuse, and with an evil or rancorous motive influenced by hate, the purpose being to deliberately and willfully injure Hill Construction. While there may have been genuine issues of material

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fact as to whether Appellees' conduct violated the terms of one or more of the agreements between the parties (i.e., constituted a breach of those agreements), there was no evidentiary basis for, and no genuine factual dispute as to, Hill Construction's claim(s) for punitive damages.

As for the sale of Unit 101 to Gerald Day, it is undisputed that: (1) Day purchased the unit at its list price, less one-half of the real estate commission, which was waived by Wes Hughes (at no detriment or cost to Sunrise Beach or its members); (2) the list price of Unit 101 was initially determined and increased several times by agreement among Day, Hughes, and Mark Hill; and (3) Mark Hill was aware since the Fall of 2002 (or earlier) that Day planned to purchase Unit 101 at its list price, and he never once objected or withdrew his approval. Again, given those undisputed facts, there was absolutely no basis for any punitive damages claim in connection with Day's purchase of Unit 101 from Sunrise Beach.

IV. THE TRIAL COURT DID NOT ERR BY GRANTING SUMMARY JUDGMENT IN APPELLEES' FAVOR AS TO COUNTS III-V AND VII-XI.

Based on the undisputed facts, there was no factual or legal basis for Hill Construction's breach of fiduciary duty claim (Count III), its fraud claims (Counts IV and V), its conversion claims (Counts VII - IX), or its claims for fraudulent conveyance and constructive trust (Counts X and XI). Hill Construction's claims were all based on the following actions by Appellees: (a) the reduction to zero of Hill Construction's share of the net profits from the Project, and the re-allocation of such share to Day and Hughes;

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and (b) the sale of Unit 101 to Day. Appellees acted justifiably, in good faith, and in a manner consistent with the explicit terms of the Agreement when, based upon Hill Construction's failure to fulfill its contractual obligations, they decided to reduce Hill Construction's share of the profits to zero, and re-allocate such share to the other members.

Again, Appellees did not make that decision arbitrarily or with any fraudulent intent, nor did they do so without a factual and legal (indeed, contractual) basis. The sale of unit 101 from Sunrise Beach to Gerald Day occurred ***with Mark Hill's prior knowledge and consent***, at a list price that had been determined and set ***with Mark Hill's participation***. Mark Hill has admitted that he understood in March 2003 that his voluntary abandonment of the Project before its completion would result in reductions of his putative share of the net profits.

While there may have been genuine issues of material fact as to whether Appellees' conduct violated the terms of one or more of the agreements between the parties (i.e., constituted a breach of those agreements), there was *no* legal and/or evidentiary basis for, and no genuine factual dispute as to, the non-contractual claims asserted by Hill Construction.

A. Summary Judgment was proper as to Count III (Breach of Fiduciary Duty).

In *Kann v. Kann*, 344 Md. 689 (1997), the Court of Appeals held that there is "no universal or omnibus tort for the redress of breach of fiduciary duty." *Kann v. Kann*, 344

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Md. at 713. Several years later, in a footnote set forth in *Teamsters v. Corroon Corp.*, 369 Md. 724 (2002), the Court of Appeals reiterated as follows: "In *Kann v. Kann* . . . we pointed out that, although the breach of fiduciary duty may give rise to one or more causes of action, in tort or in contract, ***Maryland does not recognize a separate tort action for breach of fiduciary duty***." *Id*. at 727, n. 1 (emphasis added). Accordingly, as a matter of settled Maryland law, an independent cause of action for "breach of fiduciary duty" *does not exist*. Appellees were therefore entitled to summary judgment as to Count III of the Complaint, as a purely legal matter and without reaching the factual "merits" of the purported claim.

_____B. Summary Judgment was proper as to Counts IV and V (the Fraud Claims).

To recover in damages for fraud, a plaintiff must demonstrate that: (1) the defendant made a false representation of a material fact; (2) the defendant knew of the falsity of the representation, or made it with such reckless indifference to the truth that it would be reasonable to charge the defendant with knowledge of the falsity; (3) the defendant intended that the plaintiff would act in reliance on such statements; (4) the plaintiff justifiably relied on the misrepresentations of the defendant; and (5) the plaintiff suffered damages as a result. *See Suburban Props. Mgmt., Inc. v. Johnson*, 236 Md. 455, 460 (1964); *Martens Chevrolet, Inc. v. Seney*, 292 Md. 328, 333-334 (1982); *Marcus v. Bathon*, 72 Md. App. 475, 481-482 (1987), *cert. denied*, 313 Md. 612 (1988). All of these elements must be established ***by clear and convincing proof***. *Colandrea v. Colandrea*, 42

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Md. App. 421, 428 (1979).

There was no evidence in the record, much less clear and convincing evidence, that raised a triable question of fact as to Appellant's fraud claims. No specific misrepresentation by Appellees was alleged, and there was no evidence in the record as to any specific misrepresentation, any fraudulent intent on the part of Appellees, or any reliance by Hill Construction on a misrepresentation by Appellees. Appellees were therefore fully entitled to summary judgment as to Counts IV and V.

In the proceedings below and in this appeal, Appellant has at every turn made vague and unsupported allegations of fraudulent conduct, but has pointed to no evidence or facts whatsoever to support those allegations. In its Brief, Appellant describes in broad terms what it believes to be fraudulent conduct on the part of Appellees, without citing to any part of the evidentiary record. The trial court properly refused to permit Appellant to proceed to trial based merely on allegations and conclusory assertions of fraud.

C. Summary Judgment was proper as to Counts VII-IX (the Conversion claims).

"Conversion" under Maryland law includes the wrongful taking and the wrongful retention of property belonging to another. *See K&K Management v. Lee*, 316 Md. 137, 173 (1989). *See also Vaughn v. Vaughn*, 146 Md. App. 264, 272 (2002) ("[a] conversion is any distinct act of ownership or dominion exerted by one person over *the personal property of another* in denial of his right or inconsistent with it"). In order to recover for conversion, one must either have been in actual possession of the subject property or had

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the right to immediate possession. *Hamilton v. Ford Motor Credit Co.*, 66 Md. App. 46, 64 (1986), *cert. denied*, 306 Md. 118 (1986) (*citing Dungan v. Mutual Benefit Life Insurance Company*, 38 Md. 242, 249 (1973)).

As a general matter, "monies are intangible and, therefore, not subject to a claim of conversion." *Allied Investment Corp. v. Jasen*, 354 Md. 547, 564 (1999). *See also Darcars Motors of Silver Spring, Inc. v. Borzym*, 379 Md. 249, 258, fn. 3 (2004). An exception to that general rule exists only in cases where the plaintiff is seeking to recover *specific, segregated, or identifiable funds*. *Id*. Accordingly, a claim of trover and conversion as to money can properly be maintained *only* in cases where the plaintiff is seeking to recover specific, segregated, or identifiable funds which the defendant is wrongfully holding.

In the present case, Hill Construction's conversion claims (Counts VII-IX) were based upon the following allegations: (1) Hill Construction held some purported "ownership interest" in Sunrise Beach Unit 101 (which was sold to Gerald Day by Sunrise Beach); (2) Hill Construction had some right to object to the sale of Unit 101 to Gerald Day; (3) the conveyance of Unit 101 to Gerald Day by Sunrise Beach was "without permission or justification" and "constituted a conversion of [Hill Construction's] property"; and (4) the re-allocation and distribution to Day and Hughes of Hill Construction's putative share of the profits (i.e., monies allegedly belonging to Hill Construction) constituted conversion. (E. 125-128).

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Count VII of the Complaint was based *entirely* upon allegations of Appellees' alleged "conversion" of real property, specifically, Unit 101 of the Sunrise Beach condominium. There is no cognizable claim under Maryland law for conversion *of real property* – as stated, conversion is the exercise of dominion and control by one person over the *personal property* of another person. No such conversion of personal property is even alleged in Count VII. Even assuming *arguendo* that there is a cognizable claim under Maryland law for conversion of real property, there was no evidence anywhere in the record that Hill Construction, as a member of Sunrise Beach LLC or otherwise, ever had (i) possession of Unit 101, (ii) any right to immediate possession of Unit 101, or (iii) any ownership interest or right of ownership in Unit 101.

Again, to recover for conversion, one must either have been in *actual* possession of the subject property *or had the right to immediate* possession thereof. *Hamilton v. Ford Motor Credit Co.*, 66 Md. App. 46 (1986), *cert. denied*, 306 Md. 118 (1986). Unit 101 was, at all times until it was sold to Gerald Day, owned and possessed by Sunrise Beach LLC. (E. 472-473). Finally, as stated, the sale of unit 101 from Sunrise Beach, LLC, to Gerald Day occurred ***with Hill Construction's and Mark Hill's prior knowledge and consent***, at a list price that had been determined and set ***with Hill Construction's and Mark Hill's participation***.

The conversion claims asserted in Counts VIII and IX were based on allegations that Gerald Day and Wesley Hughes "converted" money belonging to Hill Construction.

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(E. 126-128). Again, except for one narrow exception, Maryland courts do not recognize a claim for conversion of money. Such a claim may only be maintained where the plaintiff is seeking to recover *specific, segregated* and *identifiable* funds which the defendant is wrongfully holding. There were no specific, segregated, and/or identifiable funds that Hill Construction was seeking to recover and over which Appellees were wrongfully exercising dominion and control. There was only evidence that, in or about May 2003, certain funds were distributed in good faith and pursuant to the parties' contractual rights to Gerald Day and Wesley Hughes, rather than to Hill Construction.[7] There was no evidence whatsoever that those monies were, at any time during the litigation, segregated in some specified, separate account(s), or otherwise specifically identifiable. In other words, this case clearly, as a matter of law, did not fit within the narrow exception to the general rule *that a*

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[7] All four Sunrise Beach units were sold between May 15, 2003, and June 8, 2003. The gross amount of sale proceeds from all of the units was $3,238,030.00. (E. 354). After deducting settlement costs ($163,810.00) and construction costs ($2,739,530.00), the net profit was $334,690.00. (E. 354). Based upon their respective membership interests, J. Wesley Hughes (8%) would have received $26,775.00, Hill Construction (40%) would have received $133,876.00, and Gerald Day (52%) would have received $174,039.00. (E. 307-308).

Hill Construction's putative share of profits was reduced, first, by $46,270.00, the amount of draw payments that it had received during the course of its involvement with the project. (E. 307-308). The remaining balance of Hill Construction's share of profits ($87,606.00) was further reduced to zero, based upon the costs and expenses attributable to Hill Construction's mismanagement and abandonment of the project, and its failure to complete the Project by June 1, 2002, as required under the Agreement. (E. 307-308). Hill Construction's putative share of the profits, having been reduced to zero based on its breach of the Agreement, was then re-allocated to Day and Hughes, resulting in $49,900.00 going to Hughes and $238,520.00 going to Day. (E. 307-308).

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plaintiff may not maintain a cause of action for conversion of money. Appellees were therefore entitled to summary judgment as to Counts VIII and IX of the Complaint (the Conversion claims).

As it did below, Appellant advances the convoluted argument that, because Hill Construction is a 40% member of Sunrise Beach LLC, and such membership interest constitutes personal property, the sale of Unit 101 (which was owned by Sunrise Beach LLC) constituted a conversion of Hill Construction's personal property. This is a tortured line of argument that has no support in the law or under the facts of this case. None of the Conversion claims are based on any allegation that Appellees exercised dominion and control over and/or wrongfully took or retained Hill Construction's 40% membership interest in the LLC, and there is no evidence to support such an allegation. Appellees did nothing to assign away from Hill Construction, take back from Hill Construction, or exercise dominion and control over its 40% membership interest in the company.

Appellant refers to its so-called "40% interest in Unit 101" as having been "converted" by Appellees when the unit was sold. Appellant never held any interest, legal or equitable, in unit 101 or any other part of the Sunrise Beach Condominium project – *all that Hill Construction has ever owned (subject to certain conditions) is a 40% interest* ***in the profits of Sunrise Beach, LLC***. Indeed, in Appellant's own Complaint, it stated that "[Sunrise Beach LLC] was the sole beneficial owner of Unit 101 and all right, title and interest to Unit 101 was the property of [Sunrise Beach LLC]." (E. 125). Likewise, the

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Operating Agreement for Sunrise Beach LLC states, in paragraph 11, that "the Company shall be the sole beneficial owner of the assets of the Company, and all of the profits and other benefits derived therefrom shall accrue solely to the benefit of the Company." (E. 291). There is no support at all, anywhere in the record, for the proposition that Appellant at any time held a 40% (or other) interest in unit 101.

D. Summary Judgment was proper as to Count X (Fraudulent Conveyance claim).

In Count X of its Complaint, Hill Construction alleged that Appellees distributed the proceeds from the sale of the Sunrise Beach units, and conveyed Unit 101 to Gerald Day, (1) "with the intent to hinder, delay, or defraud [Hill Construction] and remove said assets from [Hill Construction's] reach," (2) without fair consideration, and (3) at a time when the LLC was legally insolvent or rendered insolvent by the conveyance. (E. 128-129).

Fraudulent conveyance actions are governed by section 15-201, et seq., of the Commercial Law Article of the Maryland Code, a/k/a the "Maryland Uniform Fraudulent Conveyance Act" ("Act"). Under the Act, where a conveyance is valid on its face, the burden of proof *is on the party attacking the conveyance* to show either (1) that it was not made upon good consideration, or (2) that it was made with fraudulent intent to hinder, delay, or defraud creditors. *In re Adams*, 254 B.R. 857 (Md. 2000).

Under §§15-204 and 15-206 of the Act, a conveyance is fraudulent as to creditors if it is made *"without a fair consideration"* (a) by a person who is or will be rendered

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insolvent by such conveyance, or (b) by a person who intends or believes that he will incur debts beyond his ability to pay as they mature. *See* Md. Code, *Commercial Law*, §§15-204, 15-206. In the present case, the distribution of proceeds to Day and Hughes, and the conveyance of Unit 101 to Day, *were both clearly made with "fair consideration."* Specifically, the distributions of cash proceeds were made to Day and Hughes in consideration of and pursuant to their contractually-established membership rights and interests, and their respective contributions of money, time, and effort to the project; Unit 101 was conveyed to Gerald Day for a net purchase price of $780,000.00.

It is well-settled that a "debtor" may, for "fairly equivalent consideration," transfer all or part of the debtor's property to one of its creditors. *Drury v. State Capital Bank of Eastern Shore Trust Co.*, 163 Md. 84, 90 (1932). To declare a conveyance fraudulent under Maryland law, the disparity between the "real value" (i.e., market value) of the property and the consideration for the transfer "must be so glaring as to satisfy the court that the conveyance was not made in good faith." *Id*. at 90.

Even viewing all of the evidence in a light most favorable to Hill Construction, there was no way it could prove, or that any trier of fact could reasonably have concluded, that the distribution of proceeds to Day and Hughes, or the conveyance of Unit 101 to Day, was "without fair consideration" within the meaning of the Act.[8]

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[8] Under §15-203 of the Act, "[f]air consideration is given for property . . . if . . . [i]n exchange for the property . . . , as a fair equivalent for it and in good faith, property is conveyed or an antecedent debt is satisfied." Md Code, *Commercial Law*, §15-203(1).

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Under section 15-207 of the Act, a conveyance is fraudulent if it is made with the *actual intent* to hinder, delay, or defraud creditors. Md. Code, *Commercial Law*, §15-207. There was no evidence in this case of any "actual intent" on the part of Appellees to hinder, delay, or defraud any creditors, including Appellant. The only genuinely triable issue in this case was whether Appellees' conduct constituted a breach of contract, and a breach of contract does not serve as a valid factual or legal basis for a fraudulent conveyance claim under section 15-207 of the Act.

E. Summary Judgment was proper as to Count XI (Constructive Trust).

In Count XI of the Complaint, Hill Construction sought to impose a constructive trust over Unit 101 (which was sold by the LLC to Day in May 2003), and unspecified funds that were distributed at that time to Day and Hughes. (E. 130).

Either fraud, duress, or some other circumstance rendering it inequitable for a person to hold absolute title to property as against another is essential in order to create a constructive trust. *Levin v. Levin*, 43 Md. App. 380 (1979); *Hartstock v. Strong*, 21 Md. App. 110 (1974); *Wooddy v. Wooddy*, 258 Md. 224 (1970); *Eisinger Mill & Lumber Co. v. Dillon*, 159 Md. 185 (1930). In order to impose a constructive trust over money, specific funds must be ascertained as traceable to fraudulent or wrongful conduct of the defendant. *Baltimore & Ohio R. Co. v. Equitable Bank, N.A.*, 77 Md. App. 320, 330 (1988).

Again, there was no evidence of any fraud in this case, in particular, there was no fraudulent intent on Appellees' part in connection with the distribution of profits or the

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sale of Unit 101 to Gerald Day. There were no other circumstances rendering it inequitable for Gerald Day to have title to Unit 101 as against Hill Construction, which, notwithstanding its status as a member of the LLC, has never had *any* claim of title or ownership whatsoever with respect to Unit 101. Also, there was no evidence at all of any specific, identifiable funds traceable to any wrongful conduct, therefore, there were no monetary funds over which a constructive trust could be imposed.

V. THE TRIAL COURT DID NOT ERR BY GRANTING PARTIAL SUMMARY JUDGMENT AS TO HILL CONSTRUCTION'S THEORY OF DAMAGES.

One of Hill Construction's "theories" as to damages was that it was entitled to recover some percentage of the appreciation in the value of Unit 101 that had occurred since Gerald Day purchased it in 2003. As purported evidentiary support for such theory of damages, Hill Construction's real estate appraisal expert, Waring S. Justis, Jr., had prepared a written report, dated January 4, 2005, in which he expressed an opinion as to the value of Unit 101 at two points in time: (1) the date of settlement of Day's purchase (June 8, 2003); and (2) the date of the appraisal (January 4, 2005). (E. 259-283).

It is undisputed that Hill Construction and Mark Hill consented fully to Day's purchase of Unit 101. It is also undisputed that the list price for Unit 101 was initially set, and then increased several times, by agreement among Day, Hughes, *and Mark Hill*. It is undisputed that selling Unit 101 and all of the other Sunrise Beach units in order to generate profits was always the ultimate objective of Sunrise Beach and its members. It is undisputed that it was never the intention of the parties, including Hill Construction, for

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Hill Construction (or Mark Hill) to purchase Unit 101 or any of the other Sunrise Beach units. It is undisputed that Hill Construction, as a member of Sunrise Beach LLC or otherwise, never had: (i) possession of Unit 101; (ii) any right to immediate possession of Unit 101; or (iii) any ownership interest or right of ownership in Unit 101. It is undisputed that Sunrise Beach LLC was the owner of Unit 101 until such time that it was conveyed to Gerald Day for a purchase price of $780,000.00, and that Gerald Day has been the owner of Unit 101 ever since.

Given all of those undisputed facts, there was no evidentiary support before the trial court for Hill Construction's purported theory of damages (that it was entitled to recover some percentage of the appreciation in the value of Unit 101 that occurred since 2003). Moreover, such theory of damages had no basis in the law. In other words, Hill Construction's damages "theory" was unfounded both legally and factually, and the trial court properly granted partial summary judgment as to such theory.

CONCLUSION

The bottom line is that Appellant's purported claims for constructive trust, constructive fraud, fraudulent conveyance, misrepresentation, conversion, breach of fiduciary duty, and punitive damages had no legitimate place in the underlying lawsuit. The case was properly one for breach of contract, and nothing more, and the trial court would have allowed Appellant's breach of contract claims to go forward, if not for its forfeited corporate charter. Appellant grossly over pled its case and asserted a variety of

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claims and theories for which there was ***never any*** evidentiary or legal support. Indeed, in Appellees' view, the fraudulent conveyance and constructive trust claims were asserted in bad faith for the purpose of wrongfully creating a *lis pendens* against Unit 101 and "tying up" Gerald Day's title to that property while the case was pending. The trial court properly took action, on Appellees' motions, to narrow the case to what was actually at issue – whether Appellees had breached the contractual duties they owed to Hill Construction under the pertinent agreements – and the Court brought an end to all of the other extraneous and unsupported claims and allegations with which Hill Construction had encumbered Day's title to unit 101, and with which it hoped to confuse and distract the jury.

In any event, the Court's dismissal of the case based on the forfeited status of Hill Construction's corporate charter properly terminated the litigation, in its entirety. The charter was forfeited on October 8, 2004. At no time thereafter, including a period of several months while the Court suspended ruling on Appellees' Motion to Dismiss, did Hill Construction revive the charter or, alternatively, amend the Complaint and put forth evidence to enable it to proceed under section 3-515 of the Corporations and Associations Article of the Maryland Code.

The trial court properly dismissed the case based on the forfeited corporate charter and, before doing so, it properly granted partial summary judgment as to punitive damages, as to Counts III-V and VII-XI of the Complaint, and as to Hill Construction's

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flawed theory of damages.

As it did below, in its appeal brief, Appellant makes a number of broad, inflammatory, and false *allegations* that Appellees: "fraudulently induced" Hill Construction to become a member of the LLC, "siphoned" money out of the LLC, failed to reveal to Appellant the market value of Unit 101, never intended to pay any proceeds to Appellant, "conspired" to withhold proceeds from Appellant, and made "numerous material misrepresentations." It is conspicuous that Appellant makes all of these wild assertions *without citing to any part of the evidentiary record, i.e., without offering any evidentiary support, at all*. Appellant continues in this appeal, as it did below, to demonstrate a lack of appreciation for the difference between facts and evidence, on the one hand, and allegations and beliefs, on the other. It is the former that must be presented to survive summary judgment, and all that Appellant has ever advanced in this case, at any stage, is the latter.

For all of the foregoing reasons, Appellees respectfully ask this Honorable Court to affirm the trial court's rulings, in all respects.

Respectfully submitted,

_____

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Pursuant to Maryland Rules,

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this Brief has been typed in
Times New Roman, 13-point font.

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Bruce F. Bright, Esq.

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CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of February, 2008, two (2) copies of the foregoing Brief of Appellees and Appellees' Motion to Dismiss Appeal were served, via first class, postage pre-paid mail, on:

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_____
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VERBATIM TEXT OF PERTINENT RULES, STATUTES AND CONSTITUTIONAL PROVISIONS