No. 09-CV-894

In the

District of Columbia Court of Appeals

EUCLID STREET, LLC,

Plaintiff-Appellant,

v.

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY,

Defendant-Appellee.

On Appeal from the Superior Court of the District of Columbia, Civil Division No. 2008 CA 6780B (Hon. Brian F. Holeman, Judge)

BRIEF FOR APPELLANT

*PETER T. ENSLEIN
PATRICK S. GUILFOYLE (Of Counsel)
LAW OFFICES OF PETER T. ENSLEIN, PC
1738 Wisconsin Avenue, N.W.
Washington, D.C. 20007
Tel: (202) 329-9994
Fax: (202) 625-3490
penslein@gmail.com

Attorneys for Appellant Euclid Street LLC

December 4, 2009

COUNSEL PRESS, LLC (202) 783-7288 * (888) 277-3259 226601

PARTIES AND COUNSEL

Appellant Euclid Street, LLC appeared below, and in this Court, through its counsel Peter T. Enslein, 1738 Wisconsin Avenue, NW, Washington, DC 20007. Appellee District of Columbia Water and Sewer Authority appeared below through its counsel, Nat N. Polito, Law Offices of Nat N. Polito, PC, 1776 K Street, NW, Suite 200, Washington, DC 20006.

DISCLOSURE OF CORPORATE AFFILIATIONS

Euclid Street, LLC is a limited liability company and is neither a subsidiary nor an affiliate of a publicly owned company; none of its stock is held by other companies.

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

Page(s)

CASES (continued)

STATUTES

REGULATIONS

RULES

ISSUE PRESENTED FOR REVIEW

Did the trial court err when it dismissed Euclid Street LLC's well-pled complaint that asserted actionable claims for declaratory relief against the District of Columbia Water and Sewer Authority?

STATEMENT OF THE CASE

On October 18, 2006, Euclid Street LLC ("Euclid Street") filed an action in the Superior Court (Super. Ct. Civ. No. 2006 CA 007755) which sought, *inter alia*, a declaratory judgment that (1) Euclid Street was not liable to the District of Columbia Water and Sewer Authority ("WASA") for the unpaid water bills of its apartment-building tenants and (2) WASA was equitably estopped from imposing liens on Euclid Street's building for the sums owed by delinquent tenants.

WASA moved to dismiss the action alleging that Euclid Street had failed to exhaust administrative remedies allegedly afforded by WASA. Euclid Street opposed the motion. The trial court granted the motion and dismissed the action on March 13, 2007 (Rechin, J.). Euclid Street appealed (D.C. App. No. 07 CV 293).

A mediation session was then held in this Court. The parties reached an agreement that required Euclid Street to dismiss its appeal, without prejudice, and then pursue the administrative remedies which WASA claimed were available to it. On October 22, 2007, a WASA hearing officer considered Euclid Street's claims,

determined that no WASA remedies were available to it and dismissed Euclid Street's action on June 10, 2008 (A 10-12).

On September 19, 2008, Euclid Street renewed its earlier dismissed action by refiling essentially the same complaint (A 3). WASA thereafter filed a motion to dismiss on the grounds that the complaint failed to state a claim upon which relief could be granted. Euclid Street opposed the motion. At the January 9, 2009 initial status conference, the trial court held a brief hearing on WASA's motion. The court granted the motion from the bench holding that, by statute, Euclid Street was responsible for the unpaid water bills of its tenants (Holeman J.) (A 24-26). A subsequent motion to vacate the judgment was denied (Holeman J.) (A 13). This appeal from both orders followed.

STATEMENT OF FACTS

Euclid Street owns and operates an apartment building located at 1460 Euclid Street, N.W., Washington, DC 20009 (Compl. at ¶ 2-3, A 4). The building contains thirty-two separate apartments, which are occupied by tenants (Compl. at ¶ 9, A 5). When Euclid Street purchased the building in 1990, it was master-metered to receive water service from WASA (Compl. 11, A 5). Until several years ago, Euclid Street received a single bill for all of the water service delivered to the Building by WASA (Compl. at ¶ 11, A 5).

On March 8, 2000, WASA was advised in writing that Euclid Street's tenants wished to be billed individually for their water charges (Compl. at ¶ 13, A 5). This correspondence also requested that the apartments be individually metered to enable such direct tenant billing (Compl. at ¶ 13, A 5).

WASA agreed to the written request and delivered thirty-two water meters to Euclid Street for installation (Compl. at ¶ 14, A 5). At its own expense, Euclid Street had the Building's plumbing modified and the individual meters installed in each apartment (Compl. at ¶ 14, A 5).

Prior to the commencement of direct tenant billing, WASA read the building's master-meter for the last time and rendered a final bill to Euclid Street (Compl. at ¶ 15, A 6). Thereafter, WASA billed Euclid Street's tenants directly for their water service charges as they had assumed sole financial responsibility for payment of the water service provided to them by WASA (Compl. at ¶ 16-17, A 6).

Some tenants were delinquent in paying their water bills, but WASA failed to exercise its statutory authority to terminate water service for any delinquent tenant (Compl. at ¶ 18-19, A 6). Only after several tenant accounts had become significantly past due did WASA notify Euclid Street of the tenant delinquencies (Compl. at ¶ 22, A 6). WASA demanded that Euclid Street pay all of the

delinquent tenant accounts plus accumulated penalties and interest (Compl. at ¶ 23, A 7).

WASA's notice and demand did not advise Euclid Street of any right to a hearing for the purpose of disputing or appealing liability for these tenants' water charges (Compl. at ¶ 29, A 7). Indeed, WASA lacks any formal written policy or procedure that would allow landlords to challenge liability for the delinquent accounts of their tenants, or any resulting liens on the landlords' buildings (Compl. at ¶ 31, A 8).

Euclid Street refused WASA's demand for payment of the delinquent tenant accounts (Compl. at ¶ 23, A 7). Thereafter, WASA filed a continuing lien against the Building for the sums that WASA claims are due and owing from Euclid Street on its tenants' delinquent accounts (Compl. at ¶ 24, A 7).

ARGUMENT

The Trial Court Erred When It Dismissed Euclid Street's Well-Pled Complaint That Asserted Actionable Claims For Declaratory Relief Against WASA.

A. Standard of Review

"Because a motion to dismiss a complaint under Rule 12(b)(6) presents questions of law, [this Court's] standard of review is *de novo*" (internal citations and quotation marks omitted) *Solers, Inc. v. Doe*, 977 A.2d 941, 947 (D.C. 2009). This Court "applies the same standard as the trial court, meaning [that it] accepts

the allegations of the complaint as true, and construes all facts and inferences in favor of the plaintiff" (internal citations and quotation marks omitted) *Id*.

"Dismissal under Rule 12(b)(6) is appropriate only when it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief" (citation and internal quotation marks omitted) *Darrow v. Dillingham & Murphy, LLP*, 902 A.2d 135, 137-38 (D.C. 2006). Moreover, "[a]ny uncertainties or ambiguities involving the sufficiency of the complaint must be resolved in favor of the pleader, and generally, the complaint must not be dismissed because the court doubts that plaintiff will prevail." *Washkoviak v. Student Loan Marketing Ass'n*, 900 A.2d 168, 177 (D.C. 2006) (citations omitted). Finally, "[i]n reviewing a motion to dismiss, [an appellate] court is limited to assessing the legal sufficiency of the allegations contained within the four corners of the complaint." *Archuleta v. Wagner*, 523 F.3d 1278, 1281 (10th Cir. 2008).

B. Euclid Street's Liability To WASA Ended Once The Tenants Assumed Financial Responsibility For Their Water Bills

When interpreting a statute, the Court "must first look at the language of the statute by itself to see if the language is plain and admits of no more than one

meaning." *United States v. Young*, 376 A.2d 809 (D.C. 1977).[1] "The words of the statute should be construed according to their ordinary sense and with the meaning commonly attributed to them." *United States v. Thompson*, 347 A.2d 581 (D.C. 1975). "When the plain meaning of the statutory language is unambiguous, the intent of the legislature is clear, and judicial inquiry need go no further." *District of Columbia v. Gallagher,* 734 A.2d 1087, 1091 (D.C. 1999).

Under D.C. Code § 34-2407.01, "[WASA] is authorized to provide for the collection of water charges, in advance or otherwise, from the owner or occupant of any building, establishment, or other place furnished water or water service by the District[.]" Section 34-2407.02 then authorizes WASA to file a continuing lien "if an owner of real building fails to pay District water and sanitary sewer service charges in full accordance with § 34-2407.01[.]" But if WASA agrees to transfer liability from the owner to the tenants/occupants, then the owner has no obligation under § 34-2407.01 to pay its tenants' water bills. In this scenario, WASA has elected to provide for the collection of water charges from the *occupants* of a building, rather than its owner.

The Municipal Regulations clearly provide that WASA may transfer liability for water charges from the owner of a building to the tenants/occupants. DCMR §

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[1] Euclid Street does not challenge the trial court's decision respecting its due process and Takings Clause claims.

21-429 applies to all master-metered buildings in which charges are billed directly to the owner, and states that "WASA shall provide the tenants with the opportunity to assume *prospective financial responsibility* for the water and sewer services pursuant to the provisions of §§ 428 and 430." Merriam-Webster defines "prospective" as "relating to or effective in the future."[2] Tenants are thus able to assume *future* financial responsibility for water charges. Sections 21-428 and 430 demonstrate that once the tenants assume financial responsibility, the owner is no longer liable to WASA for future water charges.

DCMR § 21-428 provides that "WASA may permit the tenant(s) to receive the bills in their own name[.]" WASA must first determine that it is "practicable for the tenants to assume prospective financial responsibility for water and sewer services by receiving the service in their own names, either individually or collectively, on the same terms as any other customer and without any liability for the amount due while service was billed directly to the owner." DCMR § 21-430.1.

Under DCMR § 21-428.3, "[o]nce it is determined that the tenants will be billed directly for the water and sewer charges, WASA will read the meter on service at the affected address and render a *final* bill to the owner or the agent for the owner" (emphasis added). This provision demonstrates that the owner does not

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[2] Merriam-Webster Dictionary (Rev. ed. 2004).

remain liable to WASA for future water charges once the tenants assume prospective financial responsibility. If the owner remained liable to WASA for future charges, the master-meter bill described in § 21-428.3 would not be the owner's *final* bill.

Under DCMR § 428.4, "[i]f water and sewer charges *incurred by the tenant(s)* remain unpaid for more than thirty (30) days after the rendering of a bill for the charges, penalties and interest shall be applied to the *tenant's outstanding charges*, and water and sewer services may be terminated" (emphasis added). This provision demonstrates that (1) future water charges are incurred by the tenant, *not* by the owner; and (2) liability for outstanding future charges belongs to the tenant, *not* to the owner.

Under DCMR § 21-428.5, "[i]f water and sewer service charges billed directly to the tenant or tenants are unpaid and result in the termination of services, *the tenant or tenants shall be required to pay all delinquent charges*, penalties, interest and fees incurred during the period they received bills" (emphasis added). This provision demonstrates that the tenants assumed liability for the water charges and the tenants, *not* the owner, are required to pay any delinquent charges.

Under DCMR § 21-428.6, "[i]f service has been *terminated due to a delinquent tenant account*, services shall not be restored until all charges, penalties,

interest and fees for the building are paid in full" (emphasis added). This provision demonstrates that the account belongs to the tenant, *not* to the owner.

The simple fact is that, once tenants assume prospective financial responsibility, the applicable statute and regulations unambiguously provide that the building owner is no longer liable to WASA for future water charges or delinquent tenant accounts. As such, WASA lacked statutory authority under D.C. Code § 34-2407.01 to file a continuing lien against the Building based on the *tenants'* delinquent accounts.

C. Equitable Estoppel

If permitted to stand, the Court's January 9, 2009 Order will require a building owner to defray the cost of water for his tenants where, as here, WASA will not exercise its exclusive power to cut off the water when payment is delinquent. As set forth in the complaint and discussed below, this outcome is manifestly unfair to Euclid Street LLC ("Euclid Street") and will assure that Euclid Street is dunned for several and serial water bills with no practical recourse.[3] In its complaint, Euclid Street asserted an alternative basis for the entry of injunctive

[3] That the task of mounting a legal action to evict a tenant is time-consuming and expensive is an inarguable fact and cannot be expected to make Euclid Street whole. That remedy, which would find Euclid Street paying mounting delinquent water bills, penalties and interest, combined with legal fees and court costs, is a manifestly odious burden on a building owner.

relief against WASA -- equitable estoppel. The facts warranting this relief, stated in the complaint, are as follows:

Some tenants failed to pay the water charges billed to them by WASA (Compl. at ¶ 18, A at 6). "Under DCMR §428.3, if water charges incurred by a tenant remain unpaid for more than 30 days after the rendering of a bill for the charges, WASA is entitled to apply penalties and interest to the tenant's outstanding charges and terminate water service" (Compl. at ¶ 19, A 6). However, "WASA failed to terminate water service for any delinquent tenant" (emphasis supplied) (Compl. at ¶ 20, A 6). "WASA has demanded that Euclid Street LLC pay all delinquent tenant accounts plus accumulated penalties and interest [and] recorded liens against 1460 Euclid Street for the sums WASA claims that are due and owing from Plaintiff" (Compl. at ¶ 22-23, A 6-7).

In the instant case, each Euclid Street tenant has entered into a contract with WASA for the metered amount of water that the tenant uses on a monthly basis. The Court has construed theoretically applicable statutes and regulations as standing for the conclusion that Euclid Street is secondarily liable for unpaid tenant water bills. In short, if a tenant breaches his contract with WASA (*i.e.*, by failing to pay his bill), Euclid Street is liable for the damages.

The fundamental unfairness of WASA's conduct here is that it allows water bills to pile up (laden with penalties and interest) in a situation where Euclid Street

is, as a matter of law, not empowered to cut the water off. Here is the bottom line: After nonpayment of a water bill in excess of the one-month period for proper payment under DCMR §428.3, WASA (and *only* WASA) is empowered to cut the water off. *Id*. In its continuing refusal to cut the water off, WASA becomes Lord Bountiful and Euclid Street is stuck with the bill. WASA is thereby unjustly enriched.

"The doctrine of unjust enrichment…postulates that one shall not be allowed to profit or enrich oneself at the expense of another contrary to equity and fairness." *S.B. v. A.D.W*, 2003 WL 22884039, *8 n.22 (D.C. Super. Oct. 21, 2003), citing *American University v. Forbes,* 88 N.H. 17, 183 A. 860 (N.H. 1936); *Marmo v. Tyson Fresh Meats, Inc.,* 457 F.3d 748, 755 (8th Cir. 2006) ("An unjust enrichment claim embodies the equitable doctrine that one will not be allowed to profit or enrich oneself unjustly at the expense of another"). The doctrine is closely linked to equitable estoppel. *See Stewart v. NYNEX Corp*., 78 F.Supp. 2d 172, 183 (S.D. N.Y. 1999) ("equitable estoppel and unjust enrichment [claims], seek essentially the same relief").[4]

Moreover, "[t]he 'mitigation of damages doctrine' holds that a plaintiff who suffers damage as a result of either a breach of contract or a tort has a duty to take

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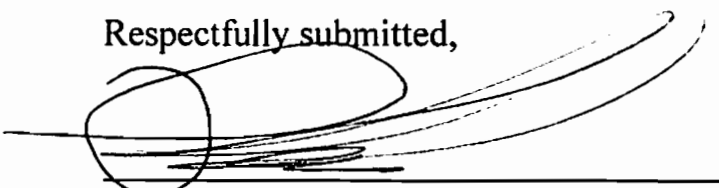
[4] *See also Federal Power Com'n v. Interstate Natural Gas Co*., 336 U.S. 577 (1949) ([E]quitable considerations must determine [the fund's] distribution . . . [t]he governing principle is that of unjust enrichment.")

reasonable steps to mitigate those damages and will not be able to recover for any losses which could have been thus avoided." *State v. Continental Ins. Co.*, 88 Cal. Rptr.3d 288, 231 (Cal. App.) *review granted*, 203 P.3d 425, 91 Cal. Rptr.3d 106 (Cal. 2009) (citation and quotation marks omitted), *accord Tatum v. Morton,* 386 F.Supp. 1308, 1311 (D. D.C. 1974). WASA's conduct clearly reflects the breach of its duty to mitigate damages and Euclid Street is therefore right to seek equitable relief against Defendant on this ground. *See Carrizales v. State Farm Lloyds*, 518 F.3d 343, 350 (5th Cir 2008).

CONCLUSION

For the foregoing reasons, the trial court's dismissal of this action should be reversed.

Respectfully submitted,



Peter T. Enslein (#367467)
Patrick S. Guilfoyle (#279232) (Of Counsel)
Law Offices of Peter T. Enslein, PC
1738 Wisconsin Avenue, N.W.
Washington, D.C. 20007
Tel: (202) 329-9994
Fax: (202) 625-3490
penslein@gmail.com

Attorneys for Euclid Street LLC

APPENDIX

DC Code § 34-2407.01. Discontinuance of water service for failure to pay water charges.

(a) The Mayor of the District of Columbia is authorized to provide for the collection of water charges, in advance or otherwise, from the owner or occupant of any building, establishment, or other place furnished water or water service by the District, and to shut off the water supply to any such building, establishment, or other place upon failure of the owner or occupant thereof to pay such water charges within 30 days from the date of rendition of the bill therefor. Such authority to shut off the water supply may be exercised by the Mayor regardless of any change in ownership or occupancy of such building, establishment, or other place. When the water supply to any such building, establishment, or other place has been shut off for failure to pay such water charges, whether the water supply to such building, establishment, or other place was shut off before or after May 18, 1954, the Mayor shall not again supply such building, establishment, or other place with water until all arrears of water charges, together with penalties and the costs actually incurred in shutting off and restoring the water supply, are paid.

(b) If the water supply to any property has been shut off for failure to pay District water and sanitary sewer service charges, and later restored without the express authorization of the Mayor, the Mayor shall impose a fine in an amount not less than 20% of the delinquent charges or more than $100, whichever is greater, upon the owner or occupant of the property, unless the Mayor determines that the owner or occupant did not restore or solicit a person to restore the water.

DC Code § 34-2407.02. Lien for water charges.

(a)(1) Except as provided in subsections (c) and (d) of this section, if an owner of real property fails to pay District water and sanitary sewer service charges in full accordance with § 34-2407.01, for all bills rendered which remain unsatisfied for 60 days or more the Mayor may file a certificate of delinquency with the Recorder of Deeds.

(2) Upon filing, the certificate of delinquency shall constitute a continuing lien against the real property and show the amount of unpaid charges for District water and sanitary sewer services. The continuing lien shall be for the current full amount of the unpaid water and sanitary sewer service charges, penalties, interest, and administrative costs.

(3) The Mayor may enforce the lien if any water and sanitary sewer service charges remain unpaid for more than 180 days from the date the bill is rendered or for more than 15 days after a final decision of an appeal challenging the bill, whichever is later in the same manner that real property tax liens are enforced pursuant to Chapter 13 and Subchapter IV of Chapter 13A of Title 47.

(4) The real property may be sold for the unpaid water and sanitary sewer charges, penalties, interest and administrative costs at a tax sale in accordance with the provisions for the sale of property for delinquent real property taxes pursuant to Chapter 13 of Title 47.

(5) If any real property sold for unpaid water and sanitary sewer service charges is not redeemed by the owner within 180 days from the date of sale, including payment of 2% interest for each month until the property is redeemed, the Mayor shall furnish a deed to the purchaser or holder of the certificate of sale in accordance with § 47-1304.

(6) Proceeds from the sale that represent unpaid water charges shall be credited to the Water and Sewer Enterprise Fund of the District of Columbia as established by § 47-375(g).

(b) A lien for water and sanitary sewer charges shall have priority over any other lien, except a lien for District taxes. The lien for water and sanitary sewer service charges shall remain in effect until the charges set forth in the certificate and any accrued additional charges, interest, penalties, and administrative costs are paid in full. Upon final payment of any delinquent charges, penalties, interest, and administrative costs, the Mayor shall file promptly a certificate of satisfaction with the Recorder of Deeds.

(c) The Mayor may defer or forgive, in whole or in part, any water and sanitary sewer service charges due the District for any qualified real property pursuant to § 6-1503.

DCMR § 21-428 Opportunity for a Tenant to Receive Service In Own Name

DCMR § 21-428.1 WASA may permit the tenant(s) to receive the bills in their own name, when the owner or agent of the rental property fails to pay the delinquent account in full and it is determined to be practicable.

DCMR § 21-428.2 At least ten (10) working days prior to terminating water and sewer services to the premises, WASA shall send a notice to the tenant(s) in accordance with § 425.2.

DCMR § 21-428.3 Once it is determined that the tenants will be billed directly for water and sewer charges, WASA will read the meter on service at the affected address and render a final bill to the owner or the agent for the owner.

DCMR § 21-428.4 If water and sewer charges incurred by the tenant(s) remain unpaid for more than thirty (30) days after the rendering of a bill for the charges, penalties and interest shall be applied to the tenant's outstanding charges, and water and sewer services may be terminated.

DCMR § 21-428.5 If water and sewer service charges billed directly to the tenant or tenants are unpaid and result in the termination of services, the tenant or tenants shall be required to pay all delinquent charges, penalties, interest and fees incurred during the period they received bills.

DCMR § 21-428.6 If service has been terminated due to a delinquent tenant account, services shall not be restored until all charges, penalties, interest and fees for the property are paid in full.

DCMR § 21-429. Special Provisions Governing Master-Metered Apartment Buildings

DCMR § 21-429.1 This section shall apply to all master-metered water and sewer accounts in residential rental apartment buildings billed directly to the owner, agent, lessor, or manager of the premises (hereinafter referred to as "owner").

DCMR § 21-429.2 WASA shall provide the tenants with the opportunity to assume prospective financial responsibility for the water and sewer services pursuant to the provisions of §§ 428 and 430.

DCMR § 21-430 Determination of Practicability

DCMR § 21-430.1 WASA may decide to continue water and sewer service to any mastermetered residential, rental apartment building despite the nonpayment of a delinquent account by the owner, if the General Manager determines that it is practicable for the tenants to assume prospective financial responsibility for water and sewer services by receiving the service in their own names, either individually or collectively, on the same terms as any other customer and without any liability for the amount due while service was billed directly to the owner.

CERTIFICATE OF SERVICE

District of Columbia Court of Appeals
Nos. 09-CV-891 & 09-CV-1057
----------)
EUCLID STREET, LLC,
Plaintiff-Appellant,
v.
DISTRICT OF COLUMBIA WATER
AND SEWER AUTHORITY,
Defendant-Appellee.
----------)

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by LAW OFFICES OF PETER T. ENSLEIN, PC, Attorneys for Appellant, to print this document. I am an employee of Counsel Press.

On the **4th Day of December, 2009**, I served the within **BRIEF FOR APPELLANT** upon:

Nat N. Polito
Law Offices of Nat N. Polito, PC
1776 K Street, N.W.
Suite 200
Washington, DC 20006
(202) 463-0110

via Hand Delivery.

Unless otherwise noted, 4 copies have been sent to the Court on the same date as above via hand delivery.

December 4, 2009