



IN THE SUPREME COURT OF THE STATE OF DELAWARE

UNIVERSAL ENTERPRISE GROUP, L.P., *
617 NORTH SALISBURY BOULEVARD, *
LLC, 176 FLATLANDS ROAD, LLC, 106 *
CEDAR STREET, LLC, 102 WEST *
CENTRAL AVENUE, LLC, 326 EAST *
DOVER STREET, LLC, 101 MAPLE *
AVENUE, LLC, 241 CYPRESS STREET, *
LLC, 28768 OCEAN GATEWAY *
HIGHWAY, LLC, 610 SNOW HILL *
ROAD, LLC, 5318 SNOW HILL ROAD, *
LLC, 302 MAPLE AVENUE, LLC, 177 *
OLD CAMDEN ROAD, LLC, 111 SOUTH *
WEST STREET, LLC, 1272 SOUTH *
GOVERNORS AVE, LLC, 505 *
BRIDGEVILLE HIGHWAY, LLC, 323 *
WEST STEIN HIGHWAY, LLC, 100 S. *
MAIN STREET, LLC, 1104 SOUTH *
STATE STREET, LLC, 133 SALISBURY *
ROAD, LLC, UNIVERSAL DELAWARE, *
INC., and DANIEL SINGH a/k/a/ *
DAMINDER S. BATRA, *

Plaintiffs Below,
Appellant,

v.

DUNCAN PETROLEUM CORPORATION *
and ROBERT M. DUNCAN. *

Defendant Below,
Appellee.

No. 13-540

On appeal from the Court of
Chancery of the State of Delaware,
C.A. No. 4948-VCL

APPELLANT'S SUPPLEMENTAL BRIEF

/s/ Jennifer L. Dering

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I. ARGUMENT¹

A. It Was an Abuse of Discretion for the Trial Court to Refuse to Apply the Equitable Defense of Unclean Hands

By Order dated March 19, 2014, this Court remanded the matter to the Chancery Court to address the issues raised on appeal—mainly to address Appellant’s argument that the unclean hands doctrine should have been applied by the trial court to bar any grant of recoupment to Appellee. On remand, the trial court directed the parties to submit supplemental briefing on the issues raised on appeal which the parties did through the submission of simultaneous supplemental briefing on March 28, 2014.² Thereafter, the trial court issued its Report Pursuant to Delaware Supreme Court Rule 19(c) on April 29, 2014. *See* Report, Appendix to Appellants’ Supplemental Brief (“SA”), SA59-78.

In refusing to apply the equitable defense of unclean hands to bar recoupment, the trial court did not find that Universal waived the unclean hands defense *or* that the equitable defense of unclean hands cannot apply to Duncan’s request for recoupment—as Duncan argues. SA59-78. Rather, the trial court refused to apply the equitable defense of unclean hands simply because it determined that 1) Duncan’s misrepresentations were insufficient to support an

¹ Universal incorporates by reference the definitions of terms used in its Opening Brief (“Universal’s Op. Br.”).

² *See* Plaintiff’s Supplemental Briefing Addressing Issues Raised in the Delaware Supreme Court’s March 19, 2014 Remand Order, SA1-35 and Supplemental Brief on Remand of Defendants Duncan Petroleum Corporation & Robert M. Duncan, SA36-58.

extra-contractual remedy and 2) it was equitable to hold the parties to their bargained-for agreement. SA77. The trial court's refusal to apply unclean hands is, however, facially inconsistent with its own stated goal of *holding the parties to their agreement* and, therefore, is an abuse of discretion.

Abuses of discretion "can occur in 'three principal ways: when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment.'" *Homestore, Inc. v. Tafteen*, 886 A.2d 502, 506 (Del. 2005) (*quoting Kern v. TXO Production Corp.*, 738 F.2d 968 (8th Cir. 1984)).

Here, the trial court failed to give *any* weight to the fact that when Universal confronted Duncan regarding Duncan's misrepresentations and stated its intent to exercise its contractual right of setoff against the Notes, Duncan expressly refused to allow Universal to exercise its contractual remedy and setoff any expenses.

AR4-5 and SA27. While the trial court determined that equity requires holding the parties to their agreement, the trial court's ruling is in fact contrary to its determination as it held only Universal, not Duncan, to the agreement. The trial court, on the one hand, decided that Universal should be held to its contractual remedy post-trial (and denied rescission and rescissory damages), but on the other

hand, entirely ignored the fact that Universal's pre-trial efforts to exercise the very contractual remedy had been prohibited by Duncan, in breach of Duncan's contractual obligations. The trial court's failure to consider Duncan's wrongful refusal to permit Universal to exercise its contractual remedy constitutes abuse of discretion.

As the trial court found, Universal had a contractual right to set off its damages against the Notes arising from Duncan's misrepresentations. SA64-65. Shortly after taking possession of the Properties, Universal discovered problems with the Properties and asserted that Duncan had breached the representations in the Sale Agreement by failing to disclose such problems. SA65. It is undisputed that Universal asserted the right of setoff to address the problems it discovered after closing and that Duncan vehemently denied any wrongdoing and stubbornly and expressly refused to permit Universal to exercise its right of setoff. Duncan's unfounded refusal and waiver of this contractual setoff remedy resulted in this litigation. By now "enforcing" the parties' contractual agreement to allow recoupment, the trial court is inequitably tilting the scale in Duncan's favor and providing him with refuge, not only from his wrongful acts and misrepresentations, but also from his wrongful breach of his contractual obligation to permit Universal to setoff its damages against the Notes.

It is also undisputed that while Universal incurred significant expenses (total actual damages of \$1,497,429) and allocated its resources to address the myriads of problems with the Properties that Duncan had failed to disclose, Universal continued to make payments to Duncan on the Notes and did so for nineteen months because Duncan refused to permit Universal to offset any expenses. Pursuant to the Notes, Universal made payments totaling \$1,178,454.29 and stopped making payments on the Notes only after Universal Marketing filed for bankruptcy in July 2009. A690-775. The remaining unpaid balance on the Notes as of July 2009 (when Universal ceased payments) was \$7,692,375.06.

B19-20. Had Universal been permitted to exercise its bargained-for remedy of setoff from the beginning when Universal initially sustained damages arising from Duncan's misrepresentations—instead of making monthly payments to Duncan—Universal could have applied the monthly payments to such expenses (instead of paying out-of-pocket for such expenses and thereby retained such funds for its own use), while receiving a credit against the Notes as though Universal had made the payments to Duncan. In other words, instead of paying \$1,178,454.29 to Duncan as payments on the Notes, Universal would have retained that amount to pay for damages and would have been afforded a credit against the Notes for that amount.

Simply put, Universal merely seeks the return of the payments it was always contractually entitled to withhold from Duncan. Only by permitting Universal to

recover the payments made to Duncan (\$1,178,454.29), can both parties be held to the bargained-for agreement.³ Thus, applying the defense of unclean hands to bar Duncan's request for recoupment would not work an inequitable result. To do otherwise would work an injustice against Universal and result in rewarding the only bad actor in the transaction—Duncan.

II. CONCLUSION

The trial court's failure to consider Duncan's intentional and wrongful interference with Universal's exercise of the very contractual setoff right that the trial court held Universal to in refusing to apply the doctrine of unclean hands is an abuse of discretion. Thus, Universal respectfully requests that this Honorable Court **reverse** and **vacate** the Order of the trial court permitting Duncan to rely on recoupment and **remand** this case to the trial court with instructions to **deny** the equitable relief of recoupment based on the doctrine of unclean hands to the extent of the payments made by Universal to Duncan and to **enter** judgment in favor of Universal in that amount.

³ Permitting Universal to recover the payments made to Duncan would reduce its remaining actual damages to \$318,974.71 (\$1,497,429 - 1,178,454.29) which would be setoff against the outstanding unpaid balance on the Notes, thereby reducing the outstanding amount on the Notes to \$7,373,400.35 (\$7,692,375.06 - \$318,974.71).

Dated: May 19, 2014

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