



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

MARIE S. HENDRY, Administratrix )  
of the Estate of David J. Hendry, )  
 )  
Plaintiff, )

v. )

Civil Action No. 12236

GORDON G. HENDRY, )  
 )  
Defendant. )

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MARIE S. HENDRY, Administratrix )  
of the Estate of David J. Hendry, )  
 )  
Plaintiff/Counterclaim Defendant, )

v. )

GORDON G. HENDRY, MARYANN M. )  
HENDRY, "DAVE'S SHOPPING )  
CENTER", "DSC", STS SERVICES, INC., )  
 )  
Defendants. )

Civil Action No. 18625

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GORDON G. HENDRY, )  
 )  
Counterclaimant/ )  
Third Party Plaintiff, )

v. )

TRUST OF DAVID JOHN HENDRY, )  
KATHIE LIND and MARIE S. HENDRY, )  
Co-Trustees, BRIAN P. GLANCY, Esquire )  
 )  
Third Party Defendants. )

**MEMORANDUM OPINION**

Submitted: March 17, 2006

Decided: May 26, 2006

Jason C. Powell, Esquire, FERRY, JOSEPH & PEARCE, P.A., Wilmington, Delaware,  
*Attorney for Plaintiff/Counterclaim Defendant*

Gordon G. Hendry, Newark, Delaware, *Pro Se Defendant, Counterclaimant and Third  
Party Plaintiff*

Curtis J. Crowther, Esquire, YOUNG CONAWAY STARGATT & TAYLOR LLP,  
Wilmington, Delaware, *Attorney for Defendant in Civil Action No. 12236*

Richard L. Abbott, Esquire, ABBOTT LAW FIRM LLC, Hockessin, Delaware, *Attorney  
for Defendant Maryann M. Hendry*

Brian P. Glancy, Esquire, *Pro Se Third Party Defendant*

**PARSONS, Vice Chancellor.**

Pending before the Court are several motions arising from two different civil actions, Nos. 12236 and 18625. In No. 12236, defendant Gordon Hendry filed a motion to enforce the Court's previous order regarding a disputed piece of real property. For purposes of this motion, the Court need only determine the parameters of that order and then order its enforcement. In the main action of this dispute, No. 18625, plaintiff Marie Hendry and defendant Gordon Hendry have both moved for summary judgment. In addition, defendant Maryann Hendry seeks dismissal of the claims asserted against her in No. 18625. Because the decision on Gordon Hendry's motion to enforce in No. 12236 impacts Marie Hendry's summary judgment motion in No. 18625, the Court addresses the issues in both cases in this memorandum opinion.

For the reasons set forth below, the Court interprets and directs enforcement of the earlier order in No. 12236 that found enforceable an oral agreement between Gordon Hendry and his father, David J. Hendry. The Court arrived at its understanding of the oral agreement via evaluation of the evidence, testimony and argument presented at a December 22, 1997 hearing (the "1997 Hearing"), among other things. That evidence demonstrates that Gordon Hendry agreed to convey all right, title, and interest in a portion of the disputed property referred to in both actions as Parcel A to Marie Hendry, as Administratrix of the estate of David J. Hendry. In No. 18625, the Court grants Marie Hendry's partial summary judgment motion finding that Gordon Hendry's leasehold claim to Parcel A based on a lease from Gordon Hendry and his father to Dave's Shopping Center is not valid because the Court's order in No. 12236 enforced a settlement agreement pursuant to which Gordon Hendry relinquished any interest in that

lease. Alternatively, the Court finds that even if Gordon Hendry retained a leasehold interest in Parcel A after he entered into the settlement agreement, res judicata bars him from pressing that interest because it was or could have been addressed during the earlier litigation. Finally, the Court grants Maryann Hendry's motion to dismiss Marie Hendry's claim against her for an accounting, denies her motion to dismiss the claim for a constructive trust and denies her motion to dismiss pursuant to Court of Chancery Rule 17(a).

## **I. BACKGROUND**

### **A. No. 12236 and the Motion to Enforce**

The first case, No. 12236,<sup>1</sup> involved a dispute over land located at the intersection of Telegraph Road and Old Capital Trail in New Castle County, Delaware (the "Property").<sup>2</sup> The Property contains a shopping center and undeveloped land. Initially, David J. Hendry, Gordon Hendry's father, owned the Property. In 1985, he purportedly executed a deed that conveyed the Property to himself and his son Gordon Hendry as co-owners. David J. Hendry filed No. 12236 in this Court in 1991 challenging the validity of that deed. The parties entered into a settlement agreement in March 1994, thereby avoiding a trial scheduled for that same month.<sup>3</sup>

The parties orally agreed to settle No. 12236 on or around March 23, 1994. Joseph Bernstein, Gordon Hendry's attorney at the time, approached John Newcomer,

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<sup>1</sup> Former Vice Chancellor (now Justice) Jacobs presided over No. 12236.

<sup>2</sup> See New Castle County Deed Record F Vol. 61 for a description of property.

<sup>3</sup> See generally *Hendry v. Hendry*, 1998 WL 294009 (Del. Ch. June 3, 1998).

David J. Hendry's attorney, to negotiate a settlement.<sup>4</sup> Bernstein, Newcomer, and Gordon Hendry negotiated a division of the Property using a large plot plan. Gordon Hendry orally agreed to take the undeveloped part of the Property; his father relied on the rental income from the developed portion.<sup>5</sup> Newcomer relayed the terms to David J. Hendry, who agreed to keep the developed portion and to give the undeveloped portion to Gordon.<sup>6</sup> Gordon Hendry reduced his understanding of some key terms of the settlement to writing in a document entitled "Verbal Agreement" that he signed on March 24, 1994.<sup>7</sup> Gordon Hendry and Bernstein presented the writing and a map of the Property to Newcomer on March 25, 1994.<sup>8</sup> Newcomer objected that the boundary line on the attached map differed from the parties' oral agreement.<sup>9</sup>

The parties continued to disagree about the location of the boundary line for the physical division of the Property.<sup>10</sup> Gordon Hendry wanted the line to come out from Telegraph Road and then turn at a right angle just before an occupied laboratory.<sup>11</sup> This

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<sup>4</sup> 12/22/97 Tr. at 10, 12 (Newcomer), 89 (Bernstein). Citations in this form are to the transcript of the 1997 Hearing and indicate the page and, where it is not clear from the text, the witness testifying.

<sup>5</sup> 12/22/97 Tr. at 14 (Newcomer), 89 (Bernstein).

<sup>6</sup> 12/22/97 Tr. at 18 (Newcomer).

<sup>7</sup> 12/22/97 Tr. at 72 (Gordon Hendry).

<sup>8</sup> 12/22/97 Tr. at 18 (Newcomer)

<sup>9</sup> 12/22/97 Tr. at 90 (Bernstein).

<sup>10</sup> Docket Item ("D.I.") No. 37, No. 12236.

<sup>11</sup> 12/22/97 Tr. at 24 (Newcomer)

division would have resulted in Gordon Hendry receiving the laboratory. David J. Hendry asserted that the agreement contemplated a boundary line going straight back to Telegraph Road, following a depicted easement to Mill Creek Road.<sup>12</sup> Under David's construction, he would have received the laboratory.

Negotiations regarding the boundary line continued and Gordon Hendry's attorney drafted a formal settlement agreement based on the parties' oral agreement. On July 25, 1994, he forwarded a copy of that draft (the "Draft Settlement Agreement") to Newcomer.<sup>13</sup> The Draft Settlement Agreement did not have a map attached.<sup>14</sup> Although the parties had reached an oral agreement to settle the case, they never executed a written agreement because the dispute regarding the boundary line persisted.<sup>15</sup>

In February 1995, the parties' attorneys sent separate "Status Reports" to the Court indicating that settlement negotiations were continuing.<sup>16</sup> The plaintiff, David J. Hendry, died on March 25, 1996. Thereafter, Gordon Hendry attended meetings with the representatives of David J. Hendry's Estate (the "Estate") and the representatives of a

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<sup>12</sup> 12/22/97 Tr. at 25 (Newcomer).

<sup>13</sup> 12/22/97 Tr. at 27 (Newcomer).

<sup>14</sup> 12/22/97 Tr. at 27 (Newcomer).

<sup>15</sup> 12/22/97 Tr. at 30 (Newcomer).

<sup>16</sup> D.I. No. 37, No. 12236, at 2.

Trust named as a beneficiary of the Estate<sup>17</sup> to finally resolve the dispute.<sup>18</sup> The parties exchanged proposals and counter-proposals, but could not agree.<sup>19</sup>

Marie Hendry, David J. Hendry's wife (but not Gordon Hendry's mother), later filed a motion in No. 12236 to enforce the settlement agreement in her capacity as Administratrix of the Estate.<sup>20</sup> Gordon Hendry argued that the settlement agreement was unenforceable because the parties neither signed the agreement nor agreed to the boundary line. The Court of Chancery rejected both of these arguments and found that there was a contract based on the parties' oral agreement that David J. Hendry would receive the income-generating portion of the Property ("Parcel A") while Gordon Hendry would receive the undeveloped portion ("Parcel B").<sup>21</sup> In an order dated March 29, 1999 (the "1999 Order") the Court granted Marie Hendry's motion to enforce the settlement agreement. By order of December 27, 1999, the Delaware Supreme Court affirmed that

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<sup>17</sup> David J. Hendry's will names the Trust as residuary beneficiary. Marie Hendry, David J. Hendry's wife, and Kathie Lind, his daughter, are the co-trustees of the Trust. Under the terms of the Trust, Marie Hendry has a lifetime interest in the income from the corpus. Erik Lind, David Hendry's grandson, is the remainderman. 12/22/97 Tr. at 33 (Newcomer).

<sup>18</sup> D.I. No. 37, No. 12236, at 2.

<sup>19</sup> *Id.*

<sup>20</sup> Marie Hendry was appointed Administratrix of the Estate of David J. Hendry after Bank of Delaware renounced its right to serve as Executor pursuant to his will. Second Am. Compl. ¶ 1.

<sup>21</sup> 12/22/97 Tr. at 129. *See also Hendry v. Hendry*, 1998 WL 294009, at \*1.

decision.<sup>22</sup> Notwithstanding the Supreme Court's affirmance, however, no deeds effectuating the specified division of the Property were ever executed and, according to Gordon Hendry, the current deed for the Property shows Kathie Lind and Gordon Hendry as co-owners.<sup>23</sup>

### **B. No. 18625**

The complaint in No. 18625 asserts numerous claims against Gordon Hendry and his wife, Maryann Hendry, including misappropriation of funds, interference with contracts, and unjust enrichment.<sup>24</sup> In response, Gordon Hendry filed a number of counterclaims alleging, among other things, that a 1986 lease agreement with the Dave's Shopping Center partnership is still valid.<sup>25</sup> Marie Hendry's second amended complaint (the "Complaint") also names as defendants Dave's Shopping Center, DSC, and STS Services, Inc. ("STS Services").

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<sup>22</sup> *Hendry v. Hendry*, 746 A.2d 276 (TABLE), 1999 WL 1425004 (Del. Dec. 27, 1999).

<sup>23</sup> *See* Def.'s Verified Answer to Second Am. Compl. ¶ 6. This is the currently operative Answer.

<sup>24</sup> Plaintiff Marie Hendry has amended the complaint twice. She filed the original complaint in January 2001 and then amended it in May 2001. This Court granted plaintiff's request to amend the complaint a second time in December 2005 to add Maryann Hendry as a defendant. Plaintiff claimed to have learned in discovery that some relevant assets were deposited into accounts owned not only by Gordon Hendry, but also by his wife.

<sup>25</sup> Def.'s Verified Answer to Second Am. Compl. ¶ 78.



## 1. STS Services

Gordon Hendry incorporated STS Services in 2000. David J. Hendry obtained a mortgage on the Property in 1982 from Bank of Delaware (the “Mortgage”).<sup>26</sup> PNC Bank, the successor by merger to Bank of Delaware, assumed the Mortgage.<sup>27</sup> After David J. Hendry’s death, the Estate no longer received income from the Property and was unable to make payments on the Mortgage to PNC Bank. STS Services later purchased the Mortgage and the underlying note for the Property from PNC Bank for less than the full amount owed.<sup>28</sup>

The Complaint asks the Court to prevent STS Services, as holder of the Mortgage, from foreclosing on the Property.<sup>29</sup> This Court directed STS Services, a corporation, to obtain counsel to answer Plaintiff’s Complaint on September 29, 2005. In response, Gordon Hendry dissolved the corporation. The assets of STS Services have been transferred to Gordon Hendry and he has assumed personal responsibility for its actions.<sup>30</sup>

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<sup>26</sup> Second Am. Compl. ¶ 46.

<sup>27</sup> *Id.* ¶ 47.

<sup>28</sup> *Id.* ¶¶ 48, 50.

<sup>29</sup> *Id.* ¶ 53.

<sup>30</sup> Letter from Gordon Hendry to the Court (Nov. 30, 2005). It is not entirely clear what claims, if any, still involve STS Services separate and apart from Gordon Hendry. To the extent such claims remain, it will be necessary to address the status of STS Services because even a dissolved corporation normally cannot appear pro se. For purposes of the motions currently before the Court, however, I need not resolve that issue.

The Estate continues to be obligated to Gordon Hendry through his operation and control of the former STS Services and its assets. STS Services had threatened default against the Estate for failure to make mortgage payments.<sup>31</sup> During the course of this litigation, however, Gordon Hendry agreed not to file for foreclosure pending the sale of the Property or the outcome of this case.<sup>32</sup> At argument on March 3, 2006, Gordon Hendry reaffirmed to the Court that “there will be no action [with respect to the Mortgage] until this is completed.”<sup>33</sup>

## **2. Dave’s Shopping Center and the Dave’s Shopping Center Lease**

On or about January 23, 1985, David J. Hendry, Gordon Hendry, and D. Hendry<sup>34</sup> formed a corporation known as Dave’s Shopping Center, Inc.<sup>35</sup> One year later, the corporation was converted into a partnership, operating under the name Dave’s Shopping Center (the “Partnership”).<sup>36</sup> In 1986, David J. Hendry and Gordon Hendry, as owners of the Property, entered into an agreement to lease a part of the Property to the Partnership (the “Dave’s Shopping Center Lease” or the “Lease”).<sup>37</sup>

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<sup>31</sup> Second Am. Compl. ¶ 52.

<sup>32</sup> Letter from Gordon Hendry to the Court (Nov. 4, 2005).

<sup>33</sup> 03/03/06 Tr. at 3–4. Citations in this form are to the transcript of Excerpts from Oral Argument on Cross Motions for Summary Judgment (Mar. 3, 2006).

<sup>34</sup> D. Hendry is Gordon Hendry’s late son. The Court will refer to Gordon’s father as David J. Hendry and Gordon’s son, who had the same name, as D. Hendry.

<sup>35</sup> Def.’s Verified Answer to Second Am. Compl. ¶ 57.

<sup>36</sup> *Id.* ¶ 58.

<sup>37</sup> Def.’s Verified Answer to Am. Compl. Ex A.

The Lease specified a 30 year term and set rent at one hundred dollars per month “payable equally to the owners.”<sup>38</sup> It granted the Partnership a right of first refusal during the term of the Lease to purchase the part of the Property located at 2038-2050 Telegraph Road for \$200,000.<sup>39</sup> It also provided that the Partnership was to act as lessor to rent the property and enter into leases with other persons or entities. Dave’s Shopping Center, acting as lessor, leased at least some of the property to third party lessees such as Joseph Barker.<sup>40</sup> There are at least seven tenants, each with their own lease.<sup>41</sup> At least some of these tenants lease from the Partnership.<sup>42</sup>

D. Hendry passed away in 1989 and the Partnership dissolved as a matter of law.<sup>43</sup> David J. Hendry, Gordon Hendry, and the Estate of D. Hendry received title to the Partnership assets as tenants in common.<sup>44</sup> The Partnership assets included the Dave’s Shopping Center Lease. The beneficiaries of the estate of D. Hendry were Gordon Hendry and Maryann Hendry.<sup>45</sup> Maryann Hendry renounced any portion of her son’s estate, however, and Gordon Hendry thereby became the sole beneficiary of D. Hendry’s

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Def.’s Answer to the Mot. for Partial Summ. J. Ex. H-6.

<sup>41</sup> Am. Compl. ¶ 24.

<sup>42</sup> *See supra* n.40.

<sup>43</sup> Def.’s Verified Answer to Second Am. Compl. ¶ 60.

<sup>44</sup> *Id.* ¶ 60.

<sup>45</sup> Def.’s Verified Answer to Am. Compl. ¶ 75.

estate.<sup>46</sup> Gordon Hendry thus inherited D. Hendry's one-third interest in the Dave's Shopping Center Lease.<sup>47</sup> As a result, Gordon Hendry held a two-third's interest in that Lease with his father, and later the Estate of David J. Hendry, holding the remaining one-third interest.

Marie Hendry moves for summary judgment in No. 18625 on two issues. First, she asserts that Gordon Hendry has no interest in Parcel A of the Property because he transferred all his right, title and interest in the parcel to David J. Hendry in the settlement agreement found enforceable in No. 12236. Second, she asserts that res judicata bars Gordon Hendry's counterclaims that are premised on his having a continuing interest in the Dave's Shopping Center Lease.

Defendant Gordon Hendry, a pro se litigant in No. 18625, moved for partial summary judgment on several of Marie Hendry's claims. In one respect, his motion requests dismissal of Count VI, which seeks to compel execution of the deed or deeds contemplated by the 1999 Order. This issue will be resolved with the motion to enforce in No. 12236 and does not have to be addressed separately. Gordon Hendry also asked the Court to dismiss Count IV, which relates to delinquent taxes. Marie Hendry and Gordon Hendry recently agreed to change the records regarding the payment of taxes on the Property so notices of taxes due will go to Marie Hendry's attorney until the Court

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<sup>46</sup> 03/03/06 Tr. at 10.

<sup>47</sup> Def.'s Verified Answer to Second Am. Compl. ¶ 61.

reaches the issue of an accounting in this matter.<sup>48</sup> Based on that and other procedural agreements of the parties, the Court bifurcated the issue of whether an accounting is necessary and stayed the issue of delinquent taxes until after resolution of the pending motions for summary judgment.

### **3. Maryann Hendry**

Marie Hendry alleges that Maryann Hendry has helped her husband Gordon Hendry collect rents from the Dave's Shopping Center property.<sup>49</sup> The Complaint also asserts that Maryann Hendry may have received some of the proceeds of the allegedly wrongful conduct of her husband. In terms of relief, Marie Hendry seeks an accounting from Maryann Hendry "of any and all rents received in connection with the Property . . . ."<sup>50</sup> Plaintiff also asserts claims of conversion and unjust enrichment against Maryann Hendry and asks this Court to impose a constructive trust on any income Maryann Hendry has received from the Property.<sup>51</sup>

## **II. ANALYSIS**

### **A. The Motion to Enforce in No. 12236**

At various times, both parties have wanted the Property divided and division of the Property has been and remains an issue in both actions. In 2001, Marie Hendry filed No. 18625, which contains a count to compel execution of a deed to the Property held by

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<sup>48</sup> 03/03/2006 Tr. at 8–9.

<sup>49</sup> Second Am. Compl. ¶ 9.

<sup>50</sup> *Id.* ¶ 14.

<sup>51</sup> *Id.* ¶¶ 16, 21–22.

Gordon Hendry and the Estate that would convey clear title of Parcel A to the Estate. After asserting a leasehold interest in Parcel A through the Dave's Shopping Center Lease,<sup>52</sup> Gordon Hendry filed a motion in No. 12236 to enforce the Court's 1999 order in that action.<sup>53</sup> The motion to enforce requested only that the property be partitioned so that Marie Hendry received Parcel A and Gordon Hendry received Parcel B. In the apparently well-founded belief that Gordon Hendry still intended to claim rents and income from Parcel A if the Property was partitioned under No. 12236, Marie Hendry objected to the enforcement of the 1999 Order until the validity of Gordon Hendry's leasehold interest in the Dave's Shopping Center Lease could be determined.

The 1999 Order constitutes a final order of the Court of Chancery. Civil Action No. 12236 remains open solely as a result of Gordon Hendry's motion to enforce. This Court finds that the only remaining issues in No. 12236 are the scope of the 1999 Order and its effect on Gordon Hendry's claimed interest in the Dave's Shopping Center Lease. Marie Hendry asks the Court to find that the settlement agreement included an agreement by Gordon Hendry to transfer and convey to David J. Hendry all of his right, title and interest in Parcel A, including any interest Gordon Hendry had in the Dave's Shopping Center Lease. Gordon Hendry, on the other hand, argues that the settlement's terms only

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<sup>52</sup> Def.'s Verified Answer to Second Am. Compl. ¶ 67.

<sup>53</sup> See Def.'s Mot. To Enforce the Court's March 29, 1999 Order (Nov. 28, 2005).

included an agreement to partition the land and that he never agreed to transfer all right, title and interest in Parcel A to David J. Hendry or his Estate.<sup>54</sup>

This Court thoroughly has reviewed the record in No. 12236, including the parties' briefing on the 1997 motion to enforce,<sup>55</sup> the transcript from the 1997 Hearing, the post-hearing briefs, the Court's June 3, 1998 memorandum opinion and the documentation that was available to the Delaware Supreme Court on appeal. In addition, the Court reviewed the parties' briefing on the current motion to enforce and heard argument on that motion from the parties' current counsel on March 17, 2006.<sup>56</sup>

Based on that review, I find that the record is replete with evidence that the Court of Chancery ordered the enforcement of an oral agreement under which Gordon Hendry agreed to transfer all right, title, and interest in Parcel A to David J. Hendry. The crux of that oral agreement, as illustrated by the written documents presented at the 1997 Hearing and testimony by both parties, was that David J. Hendry was to retain the income-producing portion of the Property, the rents from which he relied for income. The Court expressly held that the agreement transferred the income producing portion of the Property to David J. Hendry and the non-income producing portion to Gordon Hendry. Gordon Hendry appealed the rulings in No. 12236, and the Supreme Court affirmed.

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<sup>54</sup> Def.'s Supplemental Br. in Supp. of Mot. to Enforce at 2 (Mar. 13, 2006).

<sup>55</sup> *See* Opening Br. in Supp. of Pl.'s Mot. to Enforce Settlement Agreement (May 30, 1997); Def.'s Answering Br. in Opp'n to Pl.'s Mot. to Enforce Settlement Agreement (July 2, 1997).

<sup>56</sup> Although Gordon Hendry is proceeding pro se in No. 18625, he is represented by counsel in No. 12236.

Gordon Hendry contends that the terms of the agreement are limited to the understanding he reduced to writing in March 1994.<sup>57</sup> Gordon Hendry argues that his understanding included only a partitioning of the Property into Parcel A and Parcel B. Based on my review of the record, I conclude that former Vice Chancellor Jacobs had a different understanding of the agreement. The Court asked Gordon Hendry at the 1997 Hearing if he agreed to all of the terms of the 1994 proposal, and I find that the Court meant the oral agreement, not just the matters reflected in Gordon Hendry's March 1994 writing. Gordon Hendry responded that he agreed with the "original proposal."<sup>58</sup>

Gordon Hendry's attorney formalized the oral agreement by preparing the Draft Settlement Agreement.<sup>59</sup> He sent it to plaintiff's attorney in July 1994 in response to David J. Hendry's request for a memorialization of the oral agreement.<sup>60</sup> The Draft

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<sup>57</sup> 12/22/97 Tr. at 72; *see also* Aff. of Gordon G. Hendry (July 2, 1997) ¶ 4. ("It was also the intention of the parties at the time of the preparation of the memorandum that I would be the owner of the land designated as Parcel No. 1 [Parcel B] and David [J.] Hendry would be the owner of the land designated as Parcel No. 2 [Parcel A].")

<sup>58</sup> 12/22/97 Tr. at 72.

THE COURT: Are you saying that you agreed to all the terms of the 1994 proposal except for the boundary line?

MR. HENDRY: I agreed to the terms of the original proposal, except a discussion came up over the boundary lines. And I stuck to my guns and said, "What I signed and wrote is exactly what I said."

The March 1994 writing included Gordon Hendry's version of what the boundary line was to be.

<sup>59</sup> 12/22/97 Tr. at 106–07 (Bernstein).

<sup>60</sup> 12/22/97 Tr. at 27–28 (Newcomer).



Settlement Agreement, which embodied the oral agreement and was drafted by Gordon Hendry's own attorney, stated "Gordon G. Hendry will transfer and convey to David J. Hendry all of his right, title and interest in . . . Parcel A."<sup>61</sup> The Court admitted the Draft Settlement Agreement into evidence at the 1997 Hearing without objection from Gordon Hendry except to the extent that it did not include a map.<sup>62</sup>

The transcript of the 1997 Hearing makes clear that the Court understood that David J. Hendry was to retain all right, title and interest to the income producing portion of the Property and Gordon Hendry would take the non-income producing portion. The March 24, 1994 document signed by Gordon Hendry, the Draft Settlement Agreement, and witnesses' testimony supports the conclusion that the parties intended the partition to include a division of all rights and interests in Parcels A and B of the Property.

Gordon Hendry argues that the Court meant to hold enforceable only the agreement to divide the Property reflected in the March 1994 document, and nothing more. Gordon Hendry relies extensively on the language of the 1999 Order and a few isolated statements in the June 3, 1998 Opinion (the "1998 Opinion") that arguably provide some support for his position.<sup>63</sup> When considered in its entirety and in context, however, the 1998 Opinion reflects a holding that the oral settlement agreement was

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<sup>61</sup> Pl.'s Opening Br. in Supp. of her Mot. for Summ. J. Ex E.

<sup>62</sup> 12/22/97 Tr. at 27–28 (Newcomer).

<sup>63</sup> At one point, for example, the 1998 Opinion seems to say that the "[March 1994] Memorandum constituted an enforceable agreement." *Hendry v. Hendry*, 1998 WL 294009, at \*1.

enforceable. Repeatedly in the opinion, the Court refers to “an enforceable agreement.” Having carefully reviewed the filings and evidence from the litigation in No. 12236, I am convinced that Gordon Hendry has construed the Court’s Order too narrowly. The 1999 Order expressly states that the Court “determined at a trial held in December, 1997 that an enforceable settlement agreement was reached between the parties.” Furthermore, the Order directs “that the Plaintiff shall receive fee title to the developed income producing portion of the property (shown as ‘Parcel A’ on the Exhibit) and the Defendant shall receive fee title to the undeveloped non-income producing portion of the real estate (shown as ‘Parcel B’ on the Exhibit).” In September 1998, Gordon Hendry’s counsel specifically attempted to include certain income producing property in Parcel B, but the Court rejected that aspect of his proposed order. In a letter to counsel dated September 22, 1998, then Vice Chancellor Jacobs wrote, “If the issue is only whether Parcel B should include any income-producing buildings or other property, the answer is no.”<sup>64</sup>

Accordingly, the Court holds that the 1999 Order contemplated the transfer of all right, title and interest in Parcel A to the Estate. The parties are ordered to execute an appropriate deed or deeds partitioning the property into Parcel A and Parcel B as defined in this Court’s 1998 Opinion. As per the settlement agreement, Gordon Hendry shall bear the costs of the partitioning.

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<sup>64</sup> D.I. No. 66, No. 12236.

The Court must now decide how the terms of the settlement agreement, as effectuated by the 1998 Opinion and 1999 Order, affected Gordon Hendry's rights with respect to the Dave's Shopping Center Lease. Specifically, the Court must consider whether Gordon Hendry retained any of his rights or interests in the Dave's Shopping Center Lease after the Court of Chancery declared on June 3, 1998 that the settlement agreement in No. 12236 was valid and enforceable.

Gordon Hendry purportedly pays \$50 every month to the Estate under the assumption that he still holds some right or interest in the Dave's Shopping Center Lease that was executed in 1986.<sup>65</sup> In deciding the motion to enforce, this Court has determined that under the enforceable settlement agreement Gordon Hendry entered into in 1994, he agreed to transfer all of his rights as an owner of Parcel A of the Property to David J. Hendry's Estate.

Gordon Hendry suggests that he retains an interest in the income producing property because he still owns a two-thirds interest in the Dave's Shopping Center Lease.<sup>66</sup> In fact, however, Gordon Hendry only retained the non-income producing portion of the Property or Parcel B. When Gordon Hendry agreed to transfer all "right, title and interest" in Parcel A, he implicitly relinquished any leasehold interest he may have had in the Dave's Shopping Center Lease. All right, title and interest includes any

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<sup>65</sup> Def.'s Verified Answer to Am. Compl. ¶ 76.

<sup>66</sup> Def.'s Verified Answer to Second Am. Compl. ¶¶ 10, 43.

leasehold interest Gordon Hendry held. As such, Gordon Hendry agreed to transfer that right or interest to the Estate.

The word “interest” as it applies to land has been defined to include leasehold interests and rights.<sup>67</sup> It has been found to be broader than the word “title” and embraces legal and equitable rights.<sup>68</sup> In a venerable case, *Donovan v. Maloney*, a Delaware court described a contract for a lease of land as an interest in land.<sup>69</sup> Further, the Delaware Superior Court has held that a leasehold interest is an “intangible interest owned by Defendants, as the tenant, as transferred from Plaintiff, as landlord, to the tenant.”<sup>70</sup>

The Court holds that Gordon Hendry relinquished any leasehold interest that he had in Parcel A when he agreed to transfer “all right, title and interest” in the Property to David J. Hendry. Therefore, when the Court of Chancery ordered on March 29, 1999 that the settlement be enforced and the Property partitioned, Gordon Hendry lost all

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<sup>67</sup> *Lookholder v. Ziegler*, 91 N.W. 834, 838 (Mich. 1958); *see also Shepard v. Dept. of Community Corrections*, 646 P.2d 1322, 1325 (Or. 1982); Roger A. Cunningham, *et al.*, THE LAW OF PROPERTY § 6.11 (2d ed. 1993) (“A tenant has an estate in land in the strictest sense. He has the right to possession, the hall mark of every estate, for a determinant period of time.”).

<sup>68</sup> *Lookholder*, 91 N.W. at 839 n.7 (“Interest in common speech in connection with land includes all varieties of titles and rights. When given its plain and natural meaning it comprehends estates in fee, for life and for years, mortgages, liens, easements, attachments, and every kind of claim to land which can form the basis of a property right.”).

<sup>69</sup> *Donovan v. Maloney*, 84 A. 1032 (Del. Super. 1912); *see also 99-Year Lease Tenants of Lynn Lee Village v. Key Box “5” Operatives, Inc.*, 2003 WL 22769428, at \*4 (Del. Ch. Nov. 17, 2003) (characterizing leases as “property interests”).

<sup>70</sup> *Concord Mall, LLC v. Best Buy Stores, L.P.*, 2004 WL 1588248, at \*5 (Del. Super. July 12, 2004).

interest in Dave’s Shopping Center, the Dave’s Shopping Center Lease and any rents that were paid thereafter by any tenants of the Shopping Center.

**B. Summary Judgment in No. 18625**

**1. The Applicable Standard**

Summary judgment may be granted where the moving party demonstrates that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law.<sup>71</sup> The burden is on the moving party to show the absence of any genuine issue of material fact.<sup>72</sup> The Court views the facts in the light most favorable to the non-moving party.<sup>73</sup> Summary judgment will be denied where the proffered evidence provides “a reasonable indication that a material fact is in dispute.”<sup>74</sup>

**2. Res Judicata**

Gordon Hendry’s counterclaim in No. 18625 asserts that because he held a two-thirds interest in the Partnership assets after the Partnership dissolved he has a two-thirds interest in the Dave’s Shopping Center Lease. Gordon Hendry further contends that the Lease provides him with a “right of first refusal during the term of the lease to purchase the leased property for a sum of two hundred thousand dollars (\$200,000).”<sup>75</sup> He also

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<sup>71</sup> Ch. Ct. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

<sup>72</sup> *Quereguan v. New Castle County*, 2004 WL 2271606, at \*2 (Del. Ch. Sept. 28, 2004).

<sup>73</sup> *Acro Extrusion Corp. v. Cunningham*, 810 A.2d 345, 347 (Del. 2002).

<sup>74</sup> *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

<sup>75</sup> Def.’s Verified Answer to Second Am. Compl. ¶ 63.

asserts rights to rents and profits from the Property based on the Dave's Shopping Center Lease.<sup>76</sup> Marie Hendry argues that Gordon Hendry no longer has a leasehold interest in Parcel A because (1) he relinquished that right when he agreed to the settlement in No. 12236 and (2) in any event, his claim is barred by res judicata. The Court has already found that Gordon Hendry did in fact relinquish any leasehold interest he had in Parcel A. Acting pro se in No. 18625, Gordon Hendry also has failed to articulate an effective response to Plaintiff's second or res judicata argument. Based on the proceedings and the 1999 Order in No. 12236, this Court concludes that res judicata does bar Gordon Hendry's counterclaims that are based on the Lease.

A party claiming that res judicata bars a subsequent action must demonstrate that (1) the court making the prior adjudication had jurisdiction; (2) the parties in the present action are either the same parties or in privity with the parties from the prior adjudication; (3) the prior adjudication was final; (4) the causes of action were the same in both cases or the issues decided in the prior action were the same as those raised in the present case; and (5) the issues in the prior action were decided adversely to the party's contention in the instant case.<sup>77</sup> Res judicata constitutes an absolute bar on all claims that were litigated or which could have been litigated in the earlier proceeding.<sup>78</sup>

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<sup>76</sup> *Id.* ¶ 65.

<sup>77</sup> *Bailey v. City of Wilmington*, 766 A.2d 477, 481 (Del. 2001); *see also Appoquinimink Educ. Ass'n v. Appoquinimink School District*, 2003 WL 1794963, at \*4 (Del. Ch. Mar. 31, 2003). Delaware courts appear to use the terms res judicata and claim preclusion interchangeably and distinguish them from collateral estoppel and issue preclusion. *See id.*; *Fox v. Christina Square Ass'n, L.P.*, 1994 WL 146023, at \*2 & n.3 (Del. Super. Apr. 5, 1994). The Restatement (Second) of

There is no dispute as to each of the first three factors. This Court and the Delaware Supreme Court decided the previous adjudication and had jurisdiction to do so. Similarly, no one disputes that the parties in this action (No. 18625) are the same as in No. 12236. Furthermore, the prior adjudication is final; it was reviewed by the Delaware Supreme Court and affirmed.<sup>79</sup> The fourth and fifth elements of res judicata, however, require more discussion.

The fourth factor requires that both cases involve the same cause of action. A cause of action is defined as “a factual situation that entitles one person to obtain a remedy in court from another person or a group of operative facts giving rise to one or more bases for suing.”<sup>80</sup> The cause of action in the prior litigation, No. 12236, arose from a property dispute between Gordon Hendry and David J. Hendry, the late husband

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Judgments also contrasts claim preclusion and the narrower concept of issue preclusion. *See* RESTATEMENT (SECOND) OF JUDGMENTS § Scope (“The principle underlying the rule of claim preclusion is that a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not to have another chance to do so. A related but narrower principle – that one who has actually litigated an issue should not be allowed to relitigate it – underlies the issue of issue preclusion.”).

<sup>78</sup> *RSS Acquisition Inc. v. Dart Group Corp.*, 1999 WL 1442009, at \*3 (Del. Super. Dec. 30, 1999).

<sup>79</sup> *Hendry v. Hendry*, 746 A.2d 276 (TABLE), 1999 WL 1425004 (Del. Dec. 27, 1999).

<sup>80</sup> BLACK’S LAW DICTIONARY (8th ed. 2004); *accord Application of Buresch*, 672 A.2d 64, 65 (Del. 1996) (per curiam) (“A cause, or a cause of action, is generally defined as a dispute or controversy between litigants arising out of the infringement of a civil right or breach of a civil duty.”) (citing BLACK’S LAW DICTIONARY 221 (6th ed. 1990)).

of Marie Hendry, the current plaintiff in both actions, over the same property that is at issue in No. 18625.

In No. 18625, Gordon Hendry relies on the same operative facts to make his counterclaims as were at issue in No. 12236. Those counterclaims allege that Gordon Hendry holds a valid two-thirds interest in the Dave's Shopping Center Lease in which he is a lessee with a right of first refusal. Gordon Hendry claims that he continues to pay fifty dollars per month to the Estate pursuant to the Lease and that he has a right to rents and profits from the shopping center property.<sup>81</sup>

The Dave's Shopping Center Lease was not explicitly discussed in the Court's opinion in the earlier action, but the causes of action that Gordon Hendry asserts in No. 18625 rely on the same factual situation litigated in No. 12236. The testimony from certain witnesses and various comments made by the Court at the 1997 Hearing indicate that the Court recognized that rents were being received from the income producing property and concluded that the parties' settlement agreement intended those rents to go to David J. Hendry in the future.<sup>82</sup> These are the same rents that Gordon Hendry now

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<sup>81</sup> Def.'s Verified Answer to Am. Compl. ¶ 76. Marie Hendry admits receiving some payments of fifty dollars from "DSC." Pl.'s Answer to Counterclaim of Def. Gordon G. Hendry ¶ 76.

<sup>82</sup> For example, Newcomer testified as follows:

Q: Did you talk about it in terms—in any other terms, in terms—you mentioned developed and undeveloped.

A: That was always the understanding, is that we knew that David Hendry was getting the rents from the property; even though Gordon had asserted that he had some interest in this property since '85, that



asserts a right to in his counterclaim.<sup>83</sup> Thus, Gordon Hendry had the opportunity in No. 12236 to assert any continuing interest or right he claimed in Parcel A based on his two-thirds interest in the Dave's Shopping Center Lease. In my opinion, the Court in the prior litigation understood from Gordon Hendry's silence on the question of rents or income that he had agreed to relinquish any such claims as to Parcel A as part of the settlement agreement. Furthermore, this Court finds that the operative facts giving rise to Gordon Hendry's counterclaim in No. 18625, *i.e.*, the settlement agreement and the Dave's Shopping Center Lease, are the same as in the prior case.

Marie Hendry's opening brief in No. 12236 in support of her 1997 motion to enforce the settlement agreement also specifically discusses the rents received from the Property.<sup>84</sup> Her brief explains that net rentals from the tenants of the shopping center supported her and her late husband. This discussion of the rental income and David J. Hendry's role as lessor to the tenants put Gordon Hendry on notice that he should assert any alleged interest he claimed as lessor or lessee in the Dave's Shopping Center Lease in

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David Hendry had always collected all the rents on the property and kept them for himself. That was the income for himself and his wife, Marie.

Tr. at 13–14; *see also* D.I. No. 66 (Letter from the Court to counsel concerning the division of the income-producing buildings (Sept. 22, 1998)).

<sup>83</sup> Def.'s Verified Answer to Second Am. Compl. ¶ 65. These rents are distinct from the rent that the Partnership paid (and now Gordon Hendry sometimes pays) to the owners of the Property, *i.e.*, Gordon Hendry and the Estate.

<sup>84</sup> Opening Br. in Supp. of Pl.'s Mot. to Enforce Settlement Agreement at 4–6.

that action. Gordon Hendry did not assert any interest in that Lease in his response to Marie Hendry's motion to enforce or at trial when rental income was discussed.

Alternatively, even if Gordon Hendry's counterclaims were not specifically litigated in the earlier action, res judicata still would apply because these claims could have been presented at that time. The earlier motion in No. 12236 focused on the parties' interests in the Property. Gordon Hendry's more recent counterclaims in No. 18625 also deal with property interests in the form of leasehold interests in Parcel A of the Property. This Court has held that a plaintiff will not be permitted, after losing on one theory, to pursue another theory based on the same evidence that was presented in the first action.<sup>85</sup>

Gordon Hendry argues that he attempted to raise the issue of the Dave's Shopping Center Lease at the 1997 Hearing, but the Court precluded him from doing so. Thus, he argues, res judicata cannot bar his claim because he never had a chance to litigate the Lease issue. Gordon Hendry misconstrues the record. The testimony precluded by the Court in 1997 pertained to leases to the individual tenants, not the Dave's Shopping Center Lease.<sup>86</sup> There is no reference to the Dave's Shopping Center Lease anywhere in the record in No. 12236 until after the Delaware Supreme Court affirmed the decisions of the Court of Chancery in December 1999. As such, this argument provides no basis for

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<sup>85</sup> *Trans World Airlines, Inc. v. Hughes*, 317 A.2d 114, 119 (Del. Ch. 1974).

<sup>86</sup> *See, e.g.*, 12/22/97 Tr. at 95–96 (Gordon Hendry referring to leases “in the records filed with the Court”). The only leases mentioned in No. 12236 are those leases between David J. Hendry and Gordon Hendry and various tenants listed as exhibits in the Pretrial Stipulation and Order filed September 21, 1993, at 5–6.

questioning Gordon Hendry's ability to have raised the Lease issue in No. 12236. Thus, the fourth res judicata factor exists in this case.

Finally, the Court addresses the fifth factor, whether or not the original action was decided adversely to the defendant. In No. 12236, Gordon Hendry challenged the validity of a settlement agreement and this Court and the Delaware Supreme Court upheld that agreement. Pursuant to the settlement agreement, Gordon Hendry agreed to convey all right, title, and interest to the income-producing Parcel A portion of the Property to David J. Hendry. Hence, the initial litigation was decided adversely to Gordon Hendry. Because he is now trying to lay claim to two-thirds of the income produced by Parcel A based on the Dave's Shopping Center Lease, as well as a right of first refusal, the relief Gordon Hendry seeks is contrary to the decision in the earlier action. Thus, the fifth factor of the res judicata test is satisfied.

In summary, the Court finds that the five factors necessary for a bar under res judicata exist in No. 18625 in that Gordon Hendry either did present unsuccessfully or could have presented claims under the Dave's Shopping Center Lease in the previous litigation. Accordingly, res judicata bars Gordon Hendry's counterclaims.

**C. Maryann Hendry's Motion to Dismiss for Failure to State a Claim in No. 18625**

**1. Legal Standard**

The standard for dismissal pursuant to Court of Chancery Rule 12(b)(6) for failure to state a claim upon which relief may be granted is well established. The motion will be granted if it appears with reasonable certainty that the plaintiff could not prevail on any

set of facts that can be inferred from the pleadings. In considering a motion to dismiss under Rule 12(b)(6), the Court is required to assume the truthfulness of all well-pleaded allegations of fact in the complaint. All facts alleged in the pleadings and inferences that can reasonably be drawn therefrom are accepted as true. That is not true, however, for inferences or conclusions of fact unsupported by allegations of specific facts. That is, a trial court need not blindly accept as true all allegations, nor must it draw all inferences from them in the plaintiff's favor unless they are reasonable inferences.<sup>87</sup>

## **2. Marie Hendry's Claim for an Accounting by Maryann Hendry**

An accounting will lie only where 1) a fiduciary relationship exists between the parties and a duty to account rests upon the defendant, 2) there are mutual accounts between the parties or 3) the accounts are all on one side but there are circumstances of great complication.<sup>88</sup> Marie Hendry neither alleges that she and Maryann Hendry have mutual accounts nor contends that there are circumstances of great complication.<sup>89</sup>

The only question then is whether a fiduciary relationship exists between Marie Hendry and Maryann Hendry. It does not. "A fiduciary relationship is a situation where one person reposes special trust in and reliance on the judgment of another or where a special duty exists on the part of one person to protect the interests of another. The

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<sup>87</sup> *Albert v. Alex Brown Mgmt. Servs.*, 2005 WL 1594085, at \*12 (Del. Ch. June 29, 2005) (internal citations omitted).

<sup>88</sup> Donald J. Wolfe, Jr., & Michael A. Pittenger, *CORPORATE & COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY* § 12-6 at 12-65 (citing cases).

<sup>89</sup> Even if there were mutual accounts or circumstances of great complication, it is doubtful, given the availability of modern discovery procedures, that an accounting would be an appropriate remedy. Wolfe & Pittenger § 12-6 at 12-66.

relationship connotes a dependence.”<sup>90</sup> Classical fiduciary relationships are those between “trustee and beneficiary, corporate directors and stockholders, guardian and ward, and relationships among partners, joint venturers, and, in some instances, principal and agent.”<sup>91</sup> A thorough review of the 53 paragraphs in Marie Hendry’s Second Amended Complaint reveals no facts from which this Court could infer that a fiduciary relationship exists between Marie Hendry and Maryann Hendry. Instead, most of the allegations in the Second Amended Complaint concern Gordon Hendry; Plaintiff’s claims against Maryann appear to exist solely to ensure that Marie Hendry will be able to collect money damages. Therefore, the Court will dismiss Marie Hendry’s claim for an accounting by Maryann Hendry.

### **3. Marie Hendry’s Claims for Conversion, Unjust Enrichment and a Constructive Trust against Maryann Hendry**

In briefing and arguing Maryann Hendry’s motion to dismiss, the parties focused on whether the Court may impose a constructive trust on money Maryann Hendry may have received from the Property in the present circumstances. Courts impose constructive trusts “to compel a person who wrongfully has obtained or asserted title to property, *by virtue of fraud or unfair and unconscionable conduct*, to hold such property in trust for the person by whom in equity it should be owned and enjoyed and to convey it

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<sup>90</sup> *Id.* § 12-6[a] at 12-66 (quoting *Cheese Shop Int’l v. Steele*, 303 A.2d 689, 690 (Del. Ch.), *rev’d on other grounds*, 311 A.2d 870 (Del. 1973)).

<sup>91</sup> *Id.* § 12-6[a] at 12-67 (citing cases).

to that rightful owner.”<sup>92</sup> “The primary criterion for imposing a constructive trust is fraudulent, unfair or unconscionable conduct that has resulted in unjust enrichment,”<sup>93</sup> but it remains an open question whether conduct that is unfair but not unconscionable justifies imposition of a constructive trust.<sup>94</sup>

If unfair conduct alone is a sufficient ground to impose a constructive trust, and Marie Hendry can identify proceeds from the Property in Maryann Hendry’s possession,<sup>95</sup> then it may be appropriate to impose a constructive trust as to certain assets of Maryann Hendry. Although Marie Hendry’s averments with respect to Maryann Hendry lack detail,<sup>96</sup> when all inferences are drawn in Marie Hendry’s favor, as the Court must, the averments are sufficient to satisfy notice pleading requirements and withstand dismissal.

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<sup>92</sup> *Id.* § 12-7[b] at 12-75 (citing cases).

<sup>93</sup> *Id.*

<sup>94</sup> *Moseley v. Obara, Jr.*, 1995 Del. Ch. LEXIS 129, at \*20–21 (Del. Ch. Sept. 28, 1995) (discussing whether unfair conduct alone justifies imposition of a constructive trust in light of the fact that “[n]o court after [*Greenly v. Greenly*, 49 A.2d 126 (Del. Ch. 1946)] has articulated whether it intentionally replaced ‘and’ with ‘or.’”), *rev’d on other grounds*, 1997 Del. LEXIS 46 (Del. Jan. 31, 1997).

<sup>95</sup> Wolfe & Pittenger § 12-7[b] at 12-75–76 (“[A] constructive trust may be imposed only upon specific property, including real property, identifiable proceeds of specific property, and even money so long as it resides in an identifiable fund to which the plaintiff can trace equitable ownership.”).

<sup>96</sup> *See, e.g.*, Second Am. Compl. ¶ 9 (averring that Maryann Hendry collected rents from the Property (unfair conduct); *id.* ¶ 16 (averring that Maryann Hendry kept these funds for her personal use (proceeds from a specific piece of property))).

Moreover, even if imposition of a constructive trust was inappropriate under these circumstances and Count II of the Complaint failed to state a claim for imposition of a constructive trust, an alternative ground exists on which to deny dismissal. Count II accuses Maryann Hendry of conversion. “Conversion is an act of dominion wrongfully exerted over the property of another, in denial of his right, or inconsistent with it.”<sup>97</sup> The Complaint alleges that Maryann Hendry aided her husband in the collection of rents and that those rents rightfully belong to the Estate of David J. Hendry.<sup>98</sup> Although the Complaint is devoid of specific examples of Maryann Hendry collecting rent attributable to Parcel A, it alleges enough to survive a motion to dismiss. Drawing all inferences in favor of Marie Hendry, as the Court must, the Court concludes that the Plaintiff conceivably could prove that Maryann Hendry converted rents from Parcel A of the Property.

A constructive trust ultimately may prove inappropriate, but at this stage of the proceedings, Marie Hendry has pled enough for Count II of the Complaint to survive Maryann Hendry’s motion to dismiss.

**D. Maryann Hendry’s Motion to Dismiss Pursuant to Court of Chancery Rule 17(a)**

Maryann Hendry also moves to dismiss, pursuant to Court of Chancery Rule 17(a), on the ground that Marie Hendry, as Administratrix of the Estate of David J.

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<sup>97</sup> *Arnold v. Soc’y for Sav. Bancorp, Inc.*, 678 A.2d 533, 536 (Del. 1996) (internal quotation omitted).

<sup>98</sup> Second Am. Compl. ¶ 9.

Hendry, is not the real party in interest. Rule 17(a) provides that “[e]very action shall be prosecuted in the name of the real party in interest.” Because, according to Maryann Hendry, this action is about the collection of rents, she argues that the real party in interest is the Trust of David J. Hendry, which is not a party. Thus, she contends No. 18625 must be dismissed.

Maryann Hendry ignores the second sentence of Rule 17(a), which provides that “[a]n executor, administrator, guardian, bailee, trustee of an express trust . . . may sue in that person’s own name without joining the party for whose benefit the action is brought . . . .” Marie Hendry has sued Maryann Hendry as the Administratrix of the Estate on behalf of the Trust, but has not joined the Trust as a party. The language of Rule 17(a) explicitly provides for this situation and authorizes a person in Marie Hendry’s position to sue in her own name as Administratrix.

Further, Maryann Hendry’s argument ignores the reality of this case. When David J. Hendry died on March 25, 1996, his interest in the Property passed under his will to the Trust. Marie Hendry has a life interest in the income from the Trust. Civil Action No. 18625, along with No. 12236, concerns who, in fact, has rights in Parcel A and who is entitled to the rent from Parcel A. Marie Hendry thus is a real party in interest to this case. As such, the Court denies Maryann Hendry’s motion to dismiss pursuant to Rule 17(a).

### **III. CONCLUSION**

For the foregoing reasons, the Court enforces the settlement agreement in No. 12236 that transfers and conveys all right, title, and interest in Parcel A, the income-



producing portion of the Property, to Plaintiff Marie Hendry as Administratrix of the Estate of David J. Hendry. Gordon Hendry will retain the undeveloped portion, Parcel B, only. Thus, Marie Hendry's motion for partial summary judgment in No. 18625 is GRANTED. Gordon Hendry does not retain any interest, including any leasehold interest, in Parcel A or any portion thereof. Defendant Maryann Hendry's motion to dismiss pursuant to Rule 12(b)(6) is GRANTED as to Count I of the Second Amended Complaint and DENIED in all other respects; her motion to dismiss pursuant to Rule 17(a) is DENIED.

Now that the Court has decided the motion to enforce in No. 12236 and the status of the Dave's Shopping Center Lease in No. 18625, the parties can litigate the remaining counts in No. 18625, *i.e.*, Count I for an Accounting, Count II for imposition of a constructive trust, trespass and unjust enrichment and Count III for interference with contracts, as well as any related claims. There are no outstanding issues in No. 12236, but the Court retains jurisdiction to enforce its order. The Court will conduct a teleconference with the parties on June 27, 2006 at 10:00 a.m. to discuss a schedule to address the remaining claims in No. 18625.

**IT IS SO ORDERED.**