

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

UNITED STATES OF AMERICA)	
)	
)	Case No. 1:10CR00026
)	
v.)	OPINION AND ORDER
)	
RONALD WADE SMITH, ET ALS.,)	By: James P. Jones
)	United States District Judge
Defendants.)	

Sharon Burnham, Assistant United States Attorney, Roanoke, Virginia, and Jennifer R. Bockhorst, Assistant United States Attorney, Abingdon, Virginia, for United States. T. Shea Cook, T. Shea Cook PC, Richlands, Virginia, for Third-Party Petitioner Charles Duty.

In this proceeding ancillary to criminal forfeiture, while I find that the innocent third-party claimant to the forfeited real estate has ownership of the property, I also determine, for the reasons that follow, that the government is entitled to an equitable lien for the value of the improved property, based upon the criminal defendants' contribution of money towards that improvement.

I

Defendants Ronald Wade Smith and his wife, Angela Allison Duty Smith, were convicted in this court of crimes arising out of their conduct of a Ponzi scheme. As part of their sentences, in addition to lengthy prison terms, their

interests in certain real property were forfeited to the government. That property was described as

One two story wood and vinyl dwelling constructed on or about 2007, including an in ground swimming pool located and situated as described below:

1059 Crossing Road, Vansant, VA
Tax Map #2HH192040

Tract No. 1 containing 26 acres, more or less, and being a portion of the same property acquired by Charles C. Duty from Willie D. Ownbey et al by Deed dated March 26, 1996, and recorded in Circuit Court Clerk's Office of Buchanan County, Virginia, in Deed Book 447, at page 559.

(Judgments, Mar. 30, 2012, attachment 1.)

Charles Duty, the father of Angela Allison Duty Smith, filed the present Petition seeking an adjudication of his interest in the forfeited property. A hearing was held on the Petition at which the government and Duty presented evidence. The parties were granted leave to file memoranda following the hearing in support of their respective positions.¹ The Petition is now ripe for determination.

The facts surrounding the present dispute are generally uncontested. Charles Duty purchased and received a recorded deed in 1996 to the 26-acre tract described in the orders of forfeiture and lived in a house on the property. In 2006 his daughter and her family moved from Michigan to Virginia, and first lived with

¹ The government filed such a memorandum; Duty did not.

Duty in his home, with the understanding that a separate residence would be built for them on the same tract. Duty testified without contradiction as to his understanding with the Smiths: “I would build a house for them; that they could stay, but they could never sell it, okay; that I would compensate them if they moved away because I did not want someone I didn’t know right next door to me.” (Tr. 9-10.) No written agreement was entered into and Duty never executed a deed conveying the property to the Smiths.

While Duty did contribute some money towards the construction of the new home and swimming pool, it is clear that the bulk of it came from the Smiths, and most of that from their criminal Ponzi scheme.² The government has shown that the Smiths spent at least \$148,130.22 in criminal proceeds in the construction of the home, and an additional \$94,747.74 in funds that the government cannot prove were criminal proceeds, perhaps including money from the sale of their former home in Michigan, for a total of \$242,877.96.³ The exact amount of money that Duty himself spent is not discernable from the evidence, but is likely not more than \$45,000, mainly at the beginning of the construction.

² There is certainly no evidence that Duty participated in the Smiths’ criminal activity. Indeed, he was a victim, having lost over \$100,000 of life savings that he had entrusted to his son-in-law in the phony investment scheme.

³ We are not concerned here with the furnishings of the home or other personal property.

II

Criminal forfeiture is detailed in 21 U.S.C.A. § 853 (West 1999 & Supp. 2012) and Federal Rule of Criminal Procedure 32.2. Under § 853, any person convicted of relevant crimes, “shall forfeit to the United States . . . any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of” their crimes. 21 U.S.C.A. § 853(a)(1).

The procedure for forfeiture is set forth in Rule 32.2. The process relevant to third-party claims arises after the court makes the finding that the property is subject to forfeiture and enters a preliminary order so directing forfeiture. Fed. R. Crim. P. 32.2(b)(2). Thereafter, “any third party who claims an interest in the property to be forfeited may file a petition with the district court contesting the forfeiture.” *United States v. Oregon*, 671 F.3d 484, 488 (4th Cir. 2012). The district court then considers the petition in an “ancillary proceeding.” *Id.* (citing Fed. R. Crim. P. 32.2(c)(1)). At the conclusion of the ancillary proceeding, the court may amend the preliminary order of forfeiture as necessary to account for the rights of the third party. *Id.* (citing Fed. R. Crim. P. 32.2(c)(2)).

Under § 853, the court must amend the order of forfeiture if it determines that the petitioner has established by a preponderance of the evidence that:

the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title,

or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section.

21 U.S.C.A. § 853(n)(6)(A). To determine whether a petitioner has a legal interest in the property and what that legal interest is, I must refer to state law. *See Oregon*, 671 F.3d at 490.

III

It is without dispute that Duty has title to the land upon which the Smiths' house and pool were built. In Virginia, and indeed in most common law jurisdictions, "permanent improvements placed upon land become a part of the realty." *Nixdorf v. Blount*, 68 S.E. 258, 259 (Va. 1910). Thus, the house and in-ground pool, as permanent improvements upon the land, became part of Duty's real property and are owned by him. Further, the construction materials purchased by the Smiths became part of the realty and Duty's property once they were incorporated into the building. *See Stoney v. Franklin*, No. CL00-387, 2001 WL 683963, at *8 (Va. Cir. Ct. Jun. 18, 2011). Duty clearly holds a legal interest in the property in question. *See United States v. Reckmeyer*, 836 F.2d 200, 205 (4th Cir. 1987) (noting that under § 853 "the term 'legal interest' encompasses all legally protected rights, claims, titles, or shares in real or personal property").

The government concedes, as it must, that Duty has legal title to the land. The government further agrees that "one who improves the property of another

does not thereby acquire title to the property.” (Gov’t’s Supplemental Mem. in Supp. of Forfeiture 2.) However, the government argues that the Smiths did in fact own the improved property because Duty gave it to them as a gift and intended that they own it. The government seems to be arguing that Duty is merely a nominal or straw owner. *See United States v. Morgan*, 224 F.3d 339, 343-44 (4th Cir. 2000) (holding that court may look beyond “bare legal title” to forfeited property in determining third party claims). To support its argument, the government cites various facts, including that: (1) Duty intended to give the property to his daughter in his will; (2) Duty and the Smiths were listed as joint owners of the house on a Health Department form and the local tax assessors’ records; and (3) the majority of the funds used to build the house and pool came from the Smiths. The government argues that because Duty is not the actual owner of the property, state law should not be applied to frustrate the federal interest in forfeiture and the whole property should be forfeited. *See Oregon*, 671 F.3d at 490 n.7 (“We have occasionally departed from state law in these circumstances where there is evidence a defendant has manipulated state law property rights to shield assets from the reach of the forfeiture law.”).

The evidence as a whole does not support the government’s theory. What the evidence does show is that Duty wanted his daughter and her family to come and live with him on his property and, as an inducement, agreed to help them build

a house. The agreement itself was very casual, as is often the case between family members. Little seems to have been established about the project *ex ante*, including the amount of money to be spent on construction by either party. However, what was clear was that Duty intended that ownership of the property remain with him. He maintained title to the property and restricted the Smiths ability to alienate the property should they desire to move away. Although he did indicate a possible intent to give the property to his daughter in his will, this does not indicate a present intent to transfer the property. Indeed, his intent was clearly the opposite of this. The facts indicate that while the Smiths could build and use the house, they did not own it in any real sense of the word because Duty maintained ownership and control over the fundamental property right of alienation. The parties understood that the new construction did not entitle the Smiths to ownership of the property, but only to a right to some measure of compensation should they decide to move. There is no indication from any of the evidence that the parties used this relationship to shield this asset from the reach of the federal forfeiture law.

While the Smiths thus did not have an ownership interest in the property, I find that under the circumstances present here, the Smiths would be entitled to an interest in the house and pool in the form of an equitable lien. *See* Restatement (Third) of Restitution and Unjust Enrichment § 56(1) (2008) (“If a recipient is

unjustly enriched by a transaction in which the claimant's assets or services are applied to enhance or preserve the value of particular property to which the recipient has legal title . . . the claimant may be granted an equitable lien on the property in question.”); *see also Frambach v. Dunihue*, 419 So. 2d 1115, 1117 (Fla. Dist. Ct. App. 1982) (“[W]here the plaintiff makes improvements upon the land of another under circumstances which entitle him to restitution, he is entitled only to an equitable lien upon the land and he cannot charge the owner of the land as constructive trustee and compel the owner to transfer the land to him.”).

Property subject to criminal forfeiture includes interests in or claims to real property less than the entire ownership. *See Pacheco v. Serendensky*, 393 F.3d 348, 354 (2d Cir. 2004). The government stands in the shoes of the Smiths and is entitled to forfeiture of the Smiths' equitable lien on the property, superior to Duty's fee ownership. I find that Duty has not proved that his ownership interest is vested in this equitable lien or is superior to it.

The proper amount of this lien should be measured by the increase in the value of the property as a result of the improvements. *See Porter v. Shaffer*, 133 S.E. 614, 617 (Va. 1926) (“[T]he general rule also is that when improvements are erected on the land of another . . . the measure of such compensation is governed by the benefit accruing to the owner of the land from the improvements erected thereon, and not by the cost of the improvements or the expenditures made.”). The

court has been presented with no direct evidence of the increase in the value of Duty's property resulting from the construction of the Smiths' house. However, because the construction of the house and pool occurred very recently, I find that the cost of construction is a reliable indicator of the increase in value to the property and the benefit that accrued to Duty. That amount should be decreased by Duty's contributions. Therefore, the amount spent on construction by the Smiths, or \$242,877.96, will be amount of the equitable lien.⁴

It is necessary to adjust enforcement of an equitable lien to protect an innocent recipient, in this case Duty, from any prejudicial effects. *See* Restatement, *supra*, § 56 cmt. c. The lien will not be subject to foreclosure by the government until Duty transfers title to the property, either voluntarily or involuntarily, by sale, death, bankruptcy, or other such occurrence, or treats the property in such a way as to diminish its value.

IV

For the foregoing reasons, the Petition (ECF No. 267) is GRANTED IN PART AND DENIED IN PART. The preliminary orders of forfeiture will be amended in accord with the rulings made herein. The government is directed to

⁴ Although, as the government notes, only \$148,130.22 of the amount spent on construction is directly traceable as criminal proceeds, the additional amount is forfeitable as "substitute property" of the defendants. *See* 21 U.S.C.A. § 853(p).

draft appropriate amending orders for prompt submission to the court for its approval.

It is so **ORDERED**.

ENTER: June 11, 2012

/s/ James P. Jones
United States District Judge