

THE STOLEN FUNDS

Our company once handled what certainly had to be one of the more unusual house closings of all time. One of our builder clients had sold a fairly expensive new home in Maryland, the price was a little over \$1.6 Million and the buyer was going to pay "all cash" meaning no financing. Closing was scheduled for the Wednesday before Thanksgiving and one of my partners was going to handle the sale. I knew nothing about the transaction at the time, and knew about it after closing only because the processor had told me that the "all cash" funds had not been received that day, supposedly some snafu at the bank but that it would probably be straightened out on Friday.

I had planned to play golf Friday based upon a favorable late November weather forecast but was going to have to tote my laptop to the course in case the funds arrived so that I could wire the proceeds to our builder client. Most of the rest of the office was out that Friday and I was going to be the second person necessary to confirm a wire transfer. The only other thing I knew about the closing was that afterwards my partner who had conducted the closing said that the woman buyer (there was also a man, they were a couple of some sort, but the woman was the leader in the transaction) had told him that she was the niece of Arnold Palmer. Somehow, the way things turned out, we have our doubts about that claim.

The funds did not arrive on Friday after all, but were received by our bank on Monday morning. We promptly wired out the construction loan payoff and the remaining proceeds to the builder. I never knew anything about that part of the transaction at the time, it was just routine post-closing activity that would not require my attention.

The next Wednesday this closing came to my full attention and it would hold my attention for about the next six months. About 8:30 that morning I walked into my office, and had not yet had a chance to take off my overcoat, when the receptionist rang to ask if I could take a call from a detective from the Montgomery County, Maryland police fraud unit. I took the call, after all, it is not the kind of call you just send to voice mail.

The Detective asked me if I knew if we had done a transaction for a person named Darcy Hayes. The name meant nothing to me so I booted up my computer and did a search for that name on the title closing program. Sure enough, the name got a hit and I sent a message via computer to my staff asking someone to pull the file and bring it to me. Meanwhile the detective began hitting me with a barrage of questions:

"Did you receive a wire transfer purportedly from Ms. Hayes?"

"What type of transaction? If it was a purchase, who was the seller? What was the property address?"

Has the transaction closed?

He did not wait for answers but just spit his line of questions out staccato style. I asked why that might be information that the police would want to know and he advised me that the police had reason to believe that the funds we received had been stolen from the buyer's employer.

At some point during this exchange with the detective, the Darcy Hayes file had been located and was on my desk. I was surprised to see the original executed deed in the file with the checks to the county required for recording. I no idea why they were still in the file, but what I did know was that the answers to the questions the detective was asking were not yet public information. If the deed had already been recorded, I could easily have just told him the answers.

Suddenly, it occurred to me that I really had no idea who this person on the phone really was and that, like so many companies today, our firm had a written privacy policy. My natural reaction to this sort of questioning is usually to ask the next question, so I asked him:

"Do you know what you are?"

To which he sternly replied: "Of course I know who I am, I am Detective so-and-so of the Montgomery County Police Fraud Unit!"

I replied: "Not from where I sit. From my perspective you are some electrons running down this wire into a piece of plastic being held next to my ear, and when you morph into a subpoena I'll be glad to give you all of that information."

I am not sure what reaction I expected but I never expected the hearty laugh I heard in reply. He then said "Exactly the correct answer, but the other title company told me everything. I am putting together a subpoena right now and can be at your office in a few hours."

We talked a little longer and he shared a little more information about the case, telling me that they believed Ms. Hayes had stolen over \$2 Million from her employer and had used the money to buy a house for herself and another house for her daughter. Another title company (now out of business) had handled that closing, and, based upon what they had volunteered, he already had a lot of the scoop on the scheme.

After the detective had hung up, I investigated the file and found that because of the delays and the holidays, the file had bounced between two of our processors and as a result, it sat on one person's desk for a day when it should have gone to record. Not such a big deal usually, since the seller is our longtime client and very trustworthy. We were not worried that the builder would put on new liens or otherwise cause problems during the "gap" between closing and record and recording of the deed.

However, assuming that what the detective had said was true, the fact that the deed had not yet been recorded was a big problem for our company. I next called our builder client's general

counsel and told him the whole story. He had worked for us for about 10 years many years before so he knew how things worked in our business. I told him that while *we* could not tell the police the details of the transaction, he could since he was one of the parties. He then called the detective and gave the police the answers to their questions.

The nagging problem was what to do with the unrecorded deed. It was our opinion that the sale had concluded, since under Maryland law a deed is valid as between the parties upon its execution, and recording the deed primarily provides notice to others. In our case, the buyer had the keys, the seller's loans were paid off and the seller had its sales proceeds. In our opinion, recordation of the deed was a mere formality. However, the detective had given me the hint that the employer wanted to "undo" the transaction, and I knew that our builder client would not want that result, in what, at that time, was a declining real estate market. It would have the house back and would not be able to come close to the price it had sold it to Darcy Hayes on a contract signed nine months earlier.

Having handled many cases as panel chair for the Maryland Attorney Grievance Commission, I had a sense that I needed advice. I called the representative from our malpractice insurance carrier, someone I knew pretty well just from renewing the policy every year, and told them the story. They immediately referred me to Ed Hutchins of Eccleston and Wolfe, a law firm and lawyer I had worked with before.

I called Ed and told him the story. Then I said "If I record the deed, someone is going to sue me. If I do not record the deed, someone is going to sue me. Which case would you like to defend?" It was a true Catch-22 situation if ever there was one. We agreed to hold on to the deed for a little while. What we did not want to do was be an enabler. We considered that maybe Darcy intended to refinance the house immediately, take the cash and run off, effectively laundering the stolen money. If the deed was not yet recorded, she would not be able to do that. We wanted to give the aggrieved employer the opportunity to take action to defend itself.

A few days later, it was apparent to us that the employer had hired counsel and was actively working the case. There was no pressure from our builder client, but we felt that the right thing to do was record the deed, so we did so. A week or so later, suit was filed and our company was, as predicted, a defendant.

In technical legal jargon, the claim against our company was for "conversion." The concept being that we took someone's money without permission and converted it to another, unauthorized use. However, by law, once the money was wired into our general title company escrow account, it was legally co-mingled with other client funds and, as a result, we could not be liable for conversion because the exact dollars we were originally given by Ms. Darcy could no longer be identified. Sounds like an odd concept probably, at least to a non-lawyer, but it was an effective defense and a short time later, our case was dismissed.

Eventually, the employer was able to establish a trust against the house for the stolen funds and took title to the house, sold it and recovered some of its loss. Darcy Hayes was sentenced to 5 years in prison. Fenton Title Company, which had done nothing wrong whatsoever, had paid about \$6,000 in legal fees to Eccleston and Wolfe, and I had spent a lot of time on a case for no compensation, but in the end had a good tale to tell.

One of the interesting twists was the question of what to do about the title insurance premium? We had collected funds from Ms. Hayes for her to buy an owner's title insurance policy, but, of course, we could never issue the policy since the transaction was a fraud and her title in the house was eventually reversed due to that fraud. The check sat in the Darcy Hayes files for years, since no one wanted to touch it. Eventually, with the permission of the insurer, we filed to escheat the premium to the state of Maryland and sent the funds to the state, and we were finally able to close the file on Darcy Hayes.

©Louis S. Pettey 2019