

**IN THE CIRCUIT COURT OF ST. LOUIS COUNTY  
STATE OF MISSOURI**

<b>FREEDOM TITLE, L.L.C.,</b>	)	
	)	<b>Case No. 07SL-CC01014</b>
	)	
<b>Plaintiff,</b>	)	<b>Div. 18</b>
	)	
<b>vs.</b>	)	
	)	
<b>JEFFREY JOHNSON and</b>	)	
<b>TRUDY JOHNSON,</b>	)	
	)	
<b>Defendants.</b>	)	

**FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT AND ORDER**

This matter is before the Court after a bench trial on July 1, 2010. Plaintiff Freedom Title, LLC ("Freedom Title") appeared through its representatives and by counsel. Defendant Jeffrey Johnson appeared in person and through counsel. Defendant Trudy Johnson appeared through counsel, but not in person. The parties presented evidence and the case was submitted for determination.

The following are the Court's findings of fact and conclusions of law, and the Judgment rendered herein. Some paragraphs contain combined findings and conclusions in order to avoid repetition.

**FINDINGS OF FACT**

Based upon the evidence presented at trial, the Court finds the following facts:

1. Freedom Title is a Missouri limited liability company in good standing with a principal place of business in St. Louis County, Missouri. **See Joint Stipulation of Facts.**

2. Defendants Jeffrey and Trudy Johnson (collectively, the "Johnsons" or "Defendants") at all times were husband and wife and the owners of real property and

improvements thereon located at 970 Arlington Oaks, Town and County, Missouri 63017 (the "Property"). **See Joint Stipulation of Facts.**

3. On or about August 10, 2004, Freedom Title, Union Planter's Bank and the Johnsons entered into a written Construction Escrow Agreement (the "Agreement") in which the Johnsons as Owners were to have their home construction funded by Union Planter's Bank as Lender and Freedom Title was to act as disbursing agent, disbursing funds from the loan proceeds issued by Lender to those parties that provided labor, material or services in connection with the construction of the Johnsons' Property. **See Joint Stipulation of Facts.**

4. The proceeds of the Johnsons' loan from Union Planter's Bank were used to pay off a prior mortgage loan and for construction and renovations at their Property. **See Joint Stipulation of Facts.**

5. The Johnsons hired Glidewell Building and Development, LLC to perform the construction services, either by itself or through subcontractors. **See Joint Stipulation of Facts.**

6. Pursuant to the Agreement, Freedom Title served as the disbursing agent for the construction project at the Property. **See Exhibit 1.**

7. Freedom Title's procedure for disbursing of the Johnsons' loan proceeds required that the Johnsons submit draw requests for the payment of construction services. Jeffrey Johnson reviewed and approved the draw requests that were prepared by Glidewell and submitted to Freedom Title for payment. Freedom Title would in turn request the funds from the Johnsons' lender, deposit the funds in an escrow account, and use the funds to pay contractors as requested by the Johnsons in the draw requests.

8. The Johnsons requested all of the construction services provided at the Property

and approved the draw requests submitted to Freedom Title, requesting payment for those services. Freedom Title did not disburse any funds without a request approved by the Johnsons.

**See Exhibit 5.**

9. The Johnsons did not pay attention to the loan statements sent to them by their lender. They also failed to maintain any records of the draw requests or what was paid to contractors for construction services.

10. During the course of disbursing and the project at the Property, the Johnsons requested construction services in excess of their loan funds and were required to deposit money directly with Freedom Title to cover these change orders.

11. During the course of disbursing, Freedom Title made an accounting error concerning an anticipated deposit to the Johnsons' escrow account. On August 15, 2005, Freedom Title entered an anticipated deposit of \$31,701.11. This deposit was never made. Instead, the actual deposit was made in the amount of \$31,492.21. Due to the difference in the amounts, both entries were entered into the escrow account ledger, despite the \$31,701.11 deposit having never been made. As a result, the Johnsons' escrow account ledger reflected a balance of \$31,701.11 more than what was actually deposited. **See Exhibit 2.**

12. Ultimately, only \$1,042,228.03 was deposited into Freedom Title's escrow account on the Johnsons' behalf. However, due to the accounting error described above, \$1,073,082.45 was disbursed by Freedom Title to pay off the Johnsons' prior mortgage loan and to pay for the construction at the Property. **See Exhibits 2a, 3, 4.**

13. Freedom Title did not discover the accounting error in the escrow account until an audit of the account was completed in January, 2007. William Nix, Freedom Title's general

counsel, contacted Mr. Johnson and sent him a series of letters and documentation to advise him of the mistake and requesting payment of the \$30,854.42 shortage in the escrow account. See Exhibits 6-13.

14. The Johnsons have not paid Freedom Title in response to Mr. Nix's demands.

15. Freedom Title has paid for the escrow shortage, in the amount of \$30,854.42, from its own funds.

16. Freedom Title has incurred \$28,087.00 in attorneys' fees attempting to collect this escrow shortage from the Johnsons, however the Court finds the attorneys fees provision in Plaintiffs Exhibit 1 paragraph 6I does not entitle Plaintiff to recover attorneys fees due to the Court finding no breach of contract by Defendant.

17. The Johnsons never made any complaints to Freedom Title about the disbursing during the course of the Project. Both Dr. and Mrs. Johnson admitted either at trial or in deposition that they did not know of any errors or omissions on the part of Freedom Title during the disbursing. See Exhibit 14, pp. 10, 20; Exhibit 15, pp. 66-68, 73.

18. The construction at the Property was completed, all contractors were paid in full, and no mechanic liens were filed against the Property as a result of the construction.

19. In June, 2007, after requesting payment from the Johnsons, Freedom Title recorded a Claim of Lien and Notice of Lis Pendens against the Property in order to protect an equitable claim against the Property.

20. The Claim of Lien and Notice of Lis Pendens was released during this litigation and no effort was made to enforce it.

21. The Johnsons did not suffer any damages as a result of the Claim of Lien and

Notice of Lis Pendens against the Property. See Exhibit 14, p. 19.

### CONCLUSIONS OF LAW

22. Venue for this action is proper in this Court.
23. The Court has subject matter jurisdiction over this action.

#### Count I of Petition - Breach of Contract

24. Neither party breached the agreement. The overpayment by Plaintiff was due to it's accounting error.

#### Count II of the Petition - Money Had and Received

25. "The appropriate action when one party has been unjustly enriched through the mistaken payment of money by the other party is an action at law for money had and received." Blue Cross Health Services, Inc. v. Sauer, 800 S.W.2d 72, 76 (Mo. App. E.D. 1990). "The action for money had and received has always been one favored in the law and the tendency is to widen its scope..." Webster v. Sterling Finance Co., 173 S.W.2d 928, 931 (Mo. 1943).

26. In order to establish a claim for money had and received, Freedom Title need only show that the Johnsons received money, *or its equivalent*. Koller v. Shannon County Bank, 74 S.W.2d 271, 274 (Mo. App. S.D. 1934); Hildebrand v. Anderson, 270 S.W.2d 406, 408 (Mo. App. S.D. 1954).

27. The Johnsons received the equivalent of money from Freedom Title in two ways. First, by the erroneous credit to the construction escrow account on the Johnsons' behalf, and second, by Freedom Title's payment of \$30,854.42 for construction services at the Johnsons' residence, and provided at their request. Freedom Title's actions ultimately relieved the Johnsons of an obligation to their contractors and the result was \$30,854.42 of construction to

their home, for which they have not paid. The Johnsons have retained the benefit of these services and the corresponding relief from the obligation to pay their contractors.

### **Count III of the Petition - Unjust Enrichment**

28. Unjust enrichment occurs when a person retains and enjoys a benefit conferred on that person without paying the benefit's reasonable value. Archway Kitchen & Bath, Inc. v. Lands Dev. Corp., 838 S.W.2d 13, 14 (Mo. App. E.D. 1982). The focus is not on the loss sustained by the plaintiff, but on the benefit conferred on the defendant for which it would be inequitable for him to retain. Inauen Packaging Equip. Corp. v. Integrated Indus. Servs., Inc., 970 S.W.2d 360, 366 (Mo. App. W.D. 1998).

29. It is undisputed that the Johnsons received \$30,854.42 worth of construction services without having actually paid for them. The Johnsons requested the services, then requested that this amount be disbursed from the escrow account, even though there were not sufficient funds in the account to cover these costs. Freedom Title paid this amount based on an accounting error which resulted in an inequitable windfall for the Johnsons, who have accepted and retained the benefit of this mistake and the resulting payment by Freedom Title by virtue of the improvements to the Property and the elimination of their obligation to pay for these services.

30. The Johnsons either knew or had reason to know the exact amounts disbursed by Freedom Title from the escrow account on the Johnsons' behalf, and the exact amounts received by Freedom Title from the Johnsons' lender. The Johnsons requested all construction services and subsequently approved the draw requests themselves. **See Exhibit 5.** These draw requests were then used by Freedom Title to request funds from the Johnsons' lender and pay the Johnsons' contractors. Additionally, the Johnsons received monthly statements from their

lender. The Johnsons' failure to pay attention to all of these documents, which would have informed them of the financial status of the project, or keep their own records concerning their own construction project, is not a defense.

31. The existence of Freedom Title's accounting error, which contributed to the overpayment from the escrow account, does not preclude recovery based on unjust enrichment. Ticor Title Insurance Co. v. Mundelius, 887 S.W.2d 726, 728 (Mo. App. E.D. 1994).

32. The Johnsons have retained the benefit of these funds for nearly five years interest free. The amount sought by Freedom Title was liquidated when the demand was made and therefore, prejudgment interest at the statutory rate of 9% is appropriate and warranted on the principal amount due, beginning on the first date demand was made by Freedom Title, which was January 31, 2007, through the date of trial. Fohn v. Title Insurance Corp. of St. Louis, 529 S.W.2d 1, 5 (Mo. banc 1975); Lester E. Cox Medical Centers v. Richards, 252 S.W.3d 236, 241-42 (Mo. S.D. 2008).

33. The Johnsons are entitled to an offset in the amount of \$864.69 plus 48 months of interest at 9% totaling \$304.80 for a total offset of \$1169.49 for the balance due defendants in their construction escrow account at closing in July 2006.

#### **Count I of the Counterclaim - Breach of Contract**

34. Freedom Title did not breach the Agreement. Freedom Title's primary responsibility under the Agreement was to disburse the Johnsons' loan proceeds in a manner that protected the Property from mechanic's liens, and only upon the approved request of the Johnsons. The evidence is undisputed that all contractors were paid and no liens were placed against the Property. See Joint Stipulation of Facts.

35. Further, the Johnsons did not have any complaints about Freedom Title's disbursing during the course of the construction project, and both Dr. and Mrs. Johnson admitted either at trial or in deposition that they did not know of any errors or omissions on the part of Freedom Title during the disbursing. See Exhibit 14, pp. 10, 20; Exhibit 15, pp. 66-68, 73.

**Count II of the Counterclaim - Slander of Title**

36. The Johnsons did not offer any evidence that Freedom Title recorded the Claim of Lien and Notice of Lis Pendens with a malicious intent, and therefore, they have not met their burden with respect to this claim. Tongay v. Franklin County Mercantile Bank, 735 S.W.2d 766, 770 (Mo. App. E.D. 1987).

37. Additionally, the evidence was undisputed that the Johnsons suffered no monetary damages as a result of the recording of the Claim of Lien and Notice of Lis Pendens, and there was no evidence that Freedom Title's actions were egregious. See Exhibit 14, p. 19. As a result, the Johnsons have not met their burden for nominal or punitive damages against Freedom Title with respect to this claim.

THEREFORE, IT IS HEREBY ADJUDGED AND DECREED that plaintiff, Freedom Title, LLC have and is hereby awarded Judgment in its favor and against defendants Jeffrey and Trudy Johnson, jointly and severally, on its Petition, in the principal amount of \$30,854.42, plus prejudgment interest thereon in the amount of \$9,477.20, less the offset due defendants in the amount of \$1169.49, for a total net Judgment in the amount of \$39,162.13.



IT IS FURTHER ADJUDGED AND DECREED that, on the Counterclaim of defendants Jeffrey and Trudy Johnson against plaintiff Freedom Title, LLC, Judgment is hereby entered in favor of plaintiff Freedom Title, LLC and against defendants Jeffrey and Trudy Johnson.

Costs taxed against defendants Jeffrey and Trudy Johnson.

**SO ORDERED, ADJUDGED AND DECREED:**

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**Hon. Richard C. Bresnahan**  
**St. Louis County Circuit Court**

**Date:** \_\_\_\_\_

cc: Jeffrey Schmitt, Attorney for Plaintiff  
Sean O'Hanlon, Attorney for Defendants