In The

Supreme Court of Virginia

RECORD NO. 082345

CITY OF SUFFOLK,

Appellant,

v.

LUMMIS GIN COMPANY, *et al.*,

Appellee.

BRIEF OF APPELLANT

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THE CITY OF SUFFOLK, VIRGINIA'S OPENING BRIEF

The City of Suffolk, Virginia, through its counsel, submits this Opening Brief.

ASSIGNMENTS OF ERROR

1. The circuit court erred by awarding attorney fees more than twenty-one days after the entry of an order granting a non-suit.
2. Where the City of Suffolk, Virginia took a first nonsuit as a matter of right and where the instant case did not involve the same cause of action or the same parties as a previously nonsuited delinquent tax sale case, the circuit court erred in granting attorney fees to Mills Staylor, Kay Simmons, Lewis B. Smith, David B. Smith, and William B. Smith.

QUESTIONS PRESENTED

1. Whether the circuit court lacked jurisdiction to award attorney fees because the circuit court awarded the attorney fees more than twenty-one days after the entry of the nonsuit order. (See Assignment of Error 1)
2. Whether the circuit court erred in granting attorney fees following a first nonsuit taken as a matter of right as the instant case involves neither the same cause of action nor the same parties as a previously nonsuited delinquent tax sale case involving the same real property. (See Assignment of Error 2)

STATEMENT OF THE CASE

The City of Suffolk, Virginia ("the City") filed this case in the Circuit Court for the City of Suffolk pursuant to Section 58.1-3965 et seq. of the Code of Virginia, seeking to sell a parcel of land to satisfy the City's delinquent real estate tax lien. The Complaint named Lummis Gin Company, R.C. Norfleet, Ryland Holland, J.L. Hare, John W. Lewter, J.V. Woodward, C.E. Duke, O.L. Baker, S.T. Holland, and Parties Unknown as defendants.

On October 17, 2006, the circuit court entered an order that added thirty-eight additional defendants, including Mills Staylor, Kay Simmons, Lewis B. Smith, David B. Smith, William B. Smith (collectively referred to as "the Baker heirs").[1] Only the Baker heirs and the Parties Unknown filed an Answer.

On February 12, 2008, the City moved for a nonsuit. The Baker heirs objected to the entry of the nonsuit asserting that a nonsuit taken in 1996 in the case captioned City of Suffolk, Virginia v. Western Branch Crossing LP, et al., Case No. CH95-285 served as the first nonsuit on the matter at issue in the instant case. On February 12, 2008, the circuit court entered an order granting a nonsuit and providing the following: "This suit shall remain on the docket for the Court to determine issues concerning attorney fees, costs and expenses incurred by the defendant."

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[1] The Order specifically added Rebecca N. Meyer, Allie Lee Norfleet, Emma Claudine H. Gardner, George Lee H. Copeland, Mamie Norfleet H. Sink, Ryland W. Holland, Morris C. Holland, Garland A. Holland, Winston C. Holland, Marjorie H. Powell, Christine H. Copeland, Shem Julius Holland, Elizabeth Hare Lasley f/k/a Elizabeth A. Hare, Joseph Williams Lasley, Novella L. Morgan, Betty Jean Wells, Anne H. White, James William Lewter, Jr., Mary Etta Lewter Edwards, Virginia Kegley, Marion B. Murphy f/k/a Marion B. Lenkerd, Odelle L. Gildersleeve, Marie Oliver Holland, Lessie J. Duke, Richard T. Duke, Robert G. Duke, Bessie Lee Vaughan, Linwood J. Duke, Edward E. Duke, Sadie Duke Putman, Goldie Duke, Mills Staylor, Kay Simmons, Lewis B. Smith, David B. Smith, William B. Smith, Sears, Roebuck & Company, and Sentara Hospitals as defendants.

On February 19, 2008, the City provided its argument as to why the nonsuit granted in the present matter was not a second nonsuit. On April 28, 2008, the Baker heirs filed their brief opposing the City's position. On August 12, 2008, the circuit court heard oral arguments on the issue of whether a second nonsuit had been taken by the City.

On September 22, 2008, the Court entered an order finding that the City had taken a second nonsuit and awarded attorney fees and costs to the Baker heirs. The City filed a notice of appeal on September 30, 2008.

STATEMENT OF FACTS

I. FACTS RELATED TO THE NONSUIT TAKEN IN THE PRESENT CASE

The City originally filed this case against Lummis Gin Company, R.C. Norfleet, Ryland Holland, J.L. Hare, John W. Lewter, J.V. Woodward, C.E. Duke, O.L. Baker, S.T. Holland, and Parties Unknown. (App. 1-4) This case sought the sale of the property for which the real estate taxes had remained delinquent for two years prior to December 31, 2005. (App. 2, 3) The owners of the property according to the recorded deed are R.C. Norfleet, Ryland Holland, J.L. Hare, John W. Lewter, J.V. Woodward, C.E. Duke, O.L. Baker, and S.T. Holland. (App. 5)

The Baker heirs were later added to this case, and the law firm of Pretlow & Pretlow, P.C. filed an Answer on behalf of those four new

defendants. (App. 8-9, 15-19) In the Answer, the Baker heirs claim to be the owners of O.L. Baker's 1/8th interest in the property. (App. 8)

On February 12, 2008, the City moved for a nonsuit and the court granted the motion. (App. 22) The Baker heirs objected to the entry of the nonsuit asserting that a nonsuit granted on May 16, 1996 in the case captioned City of Suffolk, Virginia v. Western Branch Crossing LP, et al., Case No. CH95-285 ("Case No. 95-285") served as the first nonsuit on the matter at issue in the instant case. (App. 23, 24-25) At the same hearing, the Baker heirs moved for the recovery of attorney fees and asserted that the nonsuit was a second nonsuit. (App. 30-31) The circuit court's order entered on February 12, 2008 granted a nonsuit that read "the Court . . . doth ORDER that this case be, and it is hereby Non-suited. . . ." (App. 43) The order also provided the following: "This suit shall remain on the docket for the Court to determine issues concerning attorney fees, costs and expenses incurred by the defendant." (App. 43)

On February 14, 2008, the City filed a letter to the circuit court concerning the issue of whether the nonsuit granted in this case was the first nonsuit. (App. 45) The City asserted that this case did not involve the same cause of action as alleged in Case No. CH95-285, and the Baker heirs were not parties to Case No. CH95-285.

On April 28, 2008, the Baker heirs filed a brief with the circuit court in opposition to the city's position regarding whether a first or second nonsuit had been taken. (App. 46-48) The Baker heirs asserted that the nonsuit was a second nonsuit because the present case involved the same cause of action as Case No. CH95-285. On May 22, 2008, the Baker heirs proffered to the circuit court that they were not "aware of any costs or legal fees incurred by anyone on behalf of Lummis Gin Company or the owners of the land" in Case No. CH95-285. (App. 70)

On August 12, 2008, the circuit court heard arguments regarding whether the City was taking a second nonsuit. (App. 109) The City opposed the Baker heirs' motion for attorney fees on the grounds that the circuit court had lost jurisdiction to decide the matter in accordance with Rule 1:1 of the Rules of the Supreme Court of Virginia and that the nonsuit taken in this matter was the first nonsuit taken as a matter of right. (App. 74-79) The circuit court ruled that the nonsuit taken in the present case was a second nonsuit. (App. 122, 127) The circuit court also denied the City's request for ruling on whether the case was still within the circuit court's jurisdiction. (App. 124-25; 127)

II. FACTS RELATED TO THE NONSUIT TAKEN IN CITY OF SUFFOLK, VIRGINIA v. WESTERN BRANCH CROSSING LP, et al., CASE NO. CH95-285

In 1995, the City filed a Bill of Complaint against Lummis Gin Company seeking the sale of land for the purpose of satisfying its lien that existed because of delinquent real estate taxes. (App. 83-93) The case was captioned City of Suffolk, Virginia v. Western Branch Crossing LP, et al., Case No. CH95-285 ("Case No. 95-285"). No answer was filed for Lummis Gin Company, nor did any individual make an appearance in Case No. CH95-285 claiming to be a successor in title to Lummis Gin Company. (App. 112) On May 14, 1996, the City moved for a nonsuit of Case No. CH95-285 as to Defendant Lummis Gin Company. (App. 98-107) On May 16, 1996, the circuit court entered an Order granting a nonsuit and dismissing the case as to Lummis Gin Company. (App. 108)

ARGUMENT

I. STANDARD OF REVIEW.

The issues raised in this appeal involve questions of law. This Court, therefore, should apply a *de novo* standard of review. Janvier v. Arminio, 272 Va. 353, 363, 634 S.E.2d 754, 759 (2006).

II. THE CIRCUIT COURT DID NOT HAVE JURISDICTION TO AWARD ATTORNEY FEES MORE THAN TWENTY-ONE DAYS AFTER THE ENTRY OF THE NONSUIT ORDER.

Nonsuit orders are final judgments subject to Rule 1:1 of the Rules of the Supreme Court of Virginia. Williamsburg Peking Corp. v. Kong, 270 Va. 350, 354, 619 S.E.2d 100, 102 (2005); James v. James, 263 Va. 474, 562 S.E.2d 133 (2002). The circuit court issued the nonsuit order in this case on February 12, 2008 that stated "the Court . . . doth ORDER that this case be, and it is hereby Non-suited. . . ." That nonsuit order ended the litigation as to all claims. Daloul v. Agbey, 255 Va. 511, 515, 499 S.E.2d 279, 282 (2001). "[A] nonsuit leaves the situation as if the suit had never been filed . . ." 6A Michie's Jurisprudence, Dismissals, Discontinuance and Nonsuit § 30 at 216 (2001). The nonsuit order issued on February 12, 2008 was a final order for the purposes of Rule 1:1 of the Rule of the Supreme Court. James at 481, 562 S.E.2d at 137 ("from its very nature, an order granting a nonsuit should be subject to the provisions of Rule 1:1, with or without the existence of a dispute over the propriety of granting the nonsuit.").

Rule 1:1 of the Rules of the Supreme Court provides:

> All final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer. . . . The date of

> entry of any final judgment, order, or decree shall be the date the judgment, order, or decree is signed by the judge.

In Super Fresh Food Mkts. of Virginia, Inc. v. Ruffin, 263 Va. 555, 561 S.E.2d 734 (2002), this Court held that "only an order within the twenty-one day time period that clearly and expressly modifies, vacates, or suspends the final judgment will interrupt or extend the running of that time period so as to permit the trial court to retain jurisdiction in the case." Id. at 563-64, 561 S.E.2d at 739. Pursuant to Rule 1:1 of the Rules of the Supreme Court of Virginia, the circuit court lost jurisdiction on March 4, 2008.

The nonsuit order is a final order and not an order that expressly provides that the court retains jurisdiction to reconsider the judgment or to address other matters still pending in an action. See Ruffin at 561, 561 S.E.2d at 737. A nonsuit order ends the litigation as to all claims. Daloul at 515, 499 S.E.2d at 282. The circuit court's order clearly provided that it granted a nonsuit. Upon entry of a nonsuit, the circuit court loses jurisdiction twenty-one days after the entry of the nonsuit. Williamsburg Peking Corp.

The statement added by the circuit court that "This matter shall remain on the court docket for the court to determine issues concerning attorney fees, costs and expenses incurred by the defendant" does not affect the finality of the nonsuit order. It is, in fact, consistent with Rule 1:1

of the Rules of the Supreme Court. Rule 1:1 provides final judgments "remain under the control of the trial court . . . for twenty-one days after the date of entry, and no longer." The case could have and should have remained on the Court's docket for twenty-one days.

The issue of whether any of the Baker heirs could recover attorney fees should have been ruled upon by the circuit court within twenty-one days of the entry of the nonsuit order. In Williamsburg Peking Corp., this Court held that the nonsuit order concluded the case but the motion for sanctions filed prior to the nonsuit order survived because "[t]he motion has no bearing on the facts giving rise to a right to seek judicial remedy." Id. at 354, 619 S.E.2d at 102. This Court further held that "the trial court is empowered to consider the sanctions motion either before the entry of nonsuit order or within 21 days after the entry of the nonsuit order." Id. at 355, 619 S.E.2d at 102-03.

In this case, the Baker heirs failed to timely request a ruling by the circuit court on whether they were entitled to attorney fees. Like the motion for sanctions in Williamsburg Peking Corp., the Baker heirs' request for attorney fees survived the nonsuit order because it was not based upon a right to a remedy raised in either the Complaint or the Baker heirs' Answer,

but only for twenty-one days. The Baker heirs, however, failed to request a ruling before the Court lost jurisdiction over this matter.

In accordance with Rule 1:1 of the Rules of the Supreme Court, the circuit court lost jurisdiction over this matter on March 4, 2008. The circuit court, therefore, erred in granting attorney fees and costs to the Baker heirs, and its September 22, 2008 Order is a nullity. See James at 483, 562 S.E.2d at 138 (action taken by the trial court after the expiration of the twenty-one (21) day period is a nullity).

III. THE CIRCUIT COURT ERRED IN GRANTING ATTORNEY FEES BECAUSE THE NONSUIT TAKEN BY THE CITY WAS A FIRST NONSUIT OF RIGHT BECAUSE THE CASE DID NOT INVOLVE THE SAME CAUSE OF ACTION OR THE SAME PARTIES AS A PREVIOUSLY NONSUITED DELINQUENT TAX SALE CASE.

Section 8.01-380(B) of the Code of Virginia clearly provides that attorney fees may be granted in a court's discretion if an additional nonsuit is taken after the first nonsuit. Section 8.01-380(B) of the Code of Virginia provides the following:

> Only one nonsuit may be taken to a cause of action or against the same party to the proceeding, as a matter of right . . . The court, in the event additional nonsuits are allowed, may assess costs and reasonable attorneys' fees against the nonsuiting party. . . .

Case No. CH95-285 does not involve the same cause of action as the current matter and the Baker heirs were not parties to Case No. CH95-285.

A. A different cause of action exists.

Whether the same cause of action exists is determined by whether the same evidence will support both claims. Flora, Flora & Montague, Inc. v. Saunders, 235 Va. 306, 311, 367 S.E.2d 493, 495 (1988). The evidence that would have been presented in Case No. CH95-285 against Lummis Gin Company does not support the claims made in the current case.

Section 58.1-3965 of the Code of Virginia provides that land may not be sold until December 31 of the second anniversary of the date the real estate taxes were due. Case No. CH95-285 would have been limited to real estate taxes due on or before December 31, 1993. The current case involves real estate taxes that were due on or before December 31, 2003. (App. 2) The evidence that real property taxes were not paid subsequent to the nonsuit of Case No. 95-285 on May 14, 1996 for Tax Years 1994 through 2003, could not have been presented in Case No. CH95-285 because those events had not happened at the time of the suit.

Additionally, Section 58.1-3940(B) of the Code of Virginia barred the collection of real property taxes due prior to December 31, 1983 in the current case. Section 58.1-3940(B) of the Code of Virginia provides that "[r]eal property taxes shall be enforceable by sale under Article 4 (§ 58.1-3965 et seq.) of the property on which such taxes were assessed and by

other means permitted under this chapter for 20 years after December 31 of the year for which such taxes were assessed . . ." In the present case, the City is not and may not recover any amount of real property tax that was delinquent prior to December 31, 1983.

Since a different cause of action occurs upon the passing of each December 31 of a year preceded by unpaid taxes, the current case is a new cause of action and the City is entitled to one nonsuit as a matter of right for this case. The nonsuit entered in a suit for the sale of delinquent real property tax parcels serves to extend the statute of limitation expressed in Section 58.1-3940(B) of the Code of Virginia for six months. In other words, the City would have been able to continue to collect any delinquent taxes barred by Section 58.1-3940(B) of the Code of Virginia if it had filed within six months of the nonsuit order. The City did not refile the same cause of action sought in Case No. CH95-285, and the present case does not serve as a continuation of Case No. CH95-285.

B. The City took a nonsuit against different parties.

Even if the current case did involve the same cause of action as Case No. CH95-285, the Baker heirs, who were awarded attorney fees in the instant case, were not parties in Case No. CH95-285. The Baker heirs assert to be heirs to the interest of O.L. Baker. O.L. Baker was not named

as a party in Case No. CH95-285. The only defendant named for the property at issue in the current case was Lummis Gin Company. On May 16, 1996, the circuit court granted a nonsuit in Case No. CH95-285 as to Lummis Gin Company only. (App. at 108).

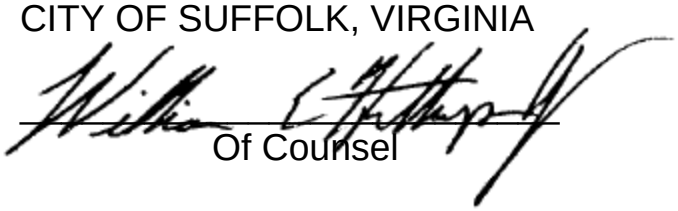
Section 8.01-380(B) of the Code of Virginia provides that "[o]nly one nonsuit may be taken to a cause of action or against the same party to the proceeding, as a matter of right . . ." Under the plain language of the statute, the City would be entitled to one nonsuit as a matter of right for a previously nonsuited cause of action if the City seeks to nonsuit new parties. The City was entitled to one nonsuit as a matter of right against the Baker heirs, and those defendants were not entitled to recover their attorney fees or expenses.

CONCLUSION

Wherefore, for the foregoing reasons, the City of Suffolk, Virginia, respectfully requests that this Court reverse the ruling of the circuit court awarding attorney fees and costs because the circuit court had lost jurisdiction over the matter prior to the entry of its order, and because the nonsuit taken by the City of Suffolk, Virginia, was a first nonsuit taken as a matter of right.

Respectfully submitted,

CITY OF SUFFOLK, VIRGINIA



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CERTIFICATE

Pursuant to Rule 5:26(d), I hereby certify:

1. The Appellant is City of Suffolk, and Counsel for the Appellant is:

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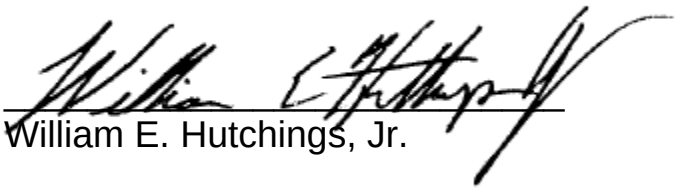
3. On this 10th day of April, 2009, fifteen paper copies and one electronic copy on CD of the foregoing Brief of Appellant and Appendix were hand filed with the Clerk of the Supreme Court of Virginia, and three copies of the same were served, via U.S. Mail, postage prepaid, upon Counsel for the Appellee and the Guardian Ad Litem.



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