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Record No. 5228

In the Supreme Court of Appeals of Virginia at Richmond

HENRY J. ROLFS

vs.

DANIEL W. MASON, ET AL.

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY

RULE 5:12—BRIEFS.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 5228

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 5th day of October, 1960.

HENRY J. ROLFS, Appellant,

against

DANIEL W. MASON, ET AL., Appellees.

From the Circuit Court of Fairfax County

Upon the petition of Henry J. Rolfs an appeal is awarded him from a decree entered by the Circuit Court of Fairfax County on the 23rd day of May, 1960, in a certain chancery cause then therein depending wherein the said petitioner was plaintiff and Catherine Byrne and others were defendants; upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

* * * * *

Filed in Circuit Court Clerk's Office Feb. 10, 1960.

THOMAS P. CHAPMAN, JR.
Clerk Fairfax County, Va.

BILL OF COMPLAINT.

To the Honorable Judges of the Circuit Court of Fairfax County:

Your complainant would show unto this Honorable Court as follows:

1. That on August 21, 1952 the defendant Catherine Byrne and George W. Byrne, her husband, since deceased, entered into an agreement with Robert Emerson Nay and Merle Marie Nay, his wife, whereby the defendant, Catherine Byrne and her late husband contracted to sell and convey certain real property therein described to the said Robert E. Nay and Merle Marie Nay. The said defendant further covenanted in paragraph 8 of said contract that in the event cer-
page 2 } tain other property owned by her and therein described be sold, the said Robert E. Nay and Merle Marie Nay should have the privilege of purchasing the said property before any sale of the same to others. A copy of the said contract is attached hereto as Exhibit "A."

2. That on April 17, 1957 the above mentioned contract was duly recorded in Deed Book 1545 at Page 249 among the land records of Fairfax County.

3. That by deed of bargain and sale dated August 28, 1957 and recorded on September 12, 1957 in Deed Book 1588 at Page 92 among the land records of Fairfax County, the said defendant, Catherine Byrne, and her husband conveyed to the said Robert E. Nay and Merle Marie Nay the property which the said contract then obligated them to convey.

4. That by deed of bargain and sale dated December 8, 1958 and recorded on January 19, 1959 in Deed Book 1733 at Page 552 among the land records of Fairfax County, defendant Catherine Byrne, in violation of the above mentioned preemptive right contained in paragraph 8 of Exhibit "A" hereto, and without advising the said Robert E. Nay and Merle

W. Nay of her intention to sell, conveyed a one half undivided interest in the said property which was the subject of such preemptive right to Daniel W. Mason and Rosa Lee Mason, his wife, as tenants by the entirety with common law right of survivorship as to their one-half undivided interest, and the remaining one-half undivided interest to defendants Emmert E. Mason and Mary Lee Mason, his wife, as tenants by the entirety, with common law right of survivorship as to their one half undivided interest. A full metes and bounds description of the said property is attached hereto as Exhibit "B."

5. That by deed of bargain and sale dated November 18, 1959 and recorded in Deed Book 1833 at Page 260 among the land records of Fairfax County, Virginia, the said Robert E. Nay and Merle W. Nay conveyed to your complainant the property mentioned in paragraph 3 above.

6. That as a condition of the said transaction, and for value, by instrument dated November 18, 1959 the said Robert E. Nay and Merle W. Nay granted and assigned to your complainant all their right, title and interest in and to the contract described in paragraph 1 above.

page 3 } 7. That as successor in interest to the said Robert E. Nay and Merle W. Nay your complainant has always been willing, ready and able to comply with the terms of the said agreement by purchasing the said property (particularly described in Exhibit "B") at a price equal to that paid by defendants Daniel W. Mason, et al. That complainant has offered to purchase such property from defendants Daniel W. Mason, et al. at such price but they have refused to convey such property to him. Complainant is and always has been ready and able to fully perform his part of the said assigned contract, whenever defendants will make and deliver to him a good and sufficient deed for the premises aforesaid.

WHEREFORE, your complainant prays:

1. That the defendants, Daniel W. Mason, Rosa Lee Mason, Emmert E. Mason and Mary Lee Mason be decreed specifically to convey the said property to your complainant upon payment to them of the amounts paid by them to the said Catherine Byrne.

2. That, should the Court not see fit to grant such relief, judgment be entered against the defendant Catherine Byrne in favor of complainant for damages suffered as a result of the said breach of the said contract by her.

3. For such further relief as to the Court may seem mete and proper.

HENRY J. ROLFS
Complainant, by Counsel.

BAUKNIGHT, WILLIAMS, SWAN & TROTTER
By WM. C. BAUKNIGHT
Moore Building
Fairfax, Virginia
Attorneys for Complainant.

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EXHIBIT "A."

THIS CONTRACT made and entered into this 21st day of August, 1952, by and between CATHERINE BYRNE and GEORGE W. BYRNE, her husband, parties of the first part; and ROBERT EMERSON NAY and MERLE MARIE NAY, his wife, parties of the second part; For and in consideration of the sum of $90.00, cash in hand paid, receipt of which is hereby acknowledged, the parties of the first part hereby agree to sell to the parties of the second part, and the parties of the second part do hereby agree to purchase from the parties of the first part under the hereinafter stated terms and conditions, the following described tract of land with house thereon located in Falls Church Magisterial District, Fairfax County, Virginia, and described as follows:

Beginning at the intersection of Hillbrook Drive and Little River Turnpike (Route #236) and running thence East 132 feet along Little River Turnpike to a point; thence south along the adjoining land owned by the parties of the first part 450 feet to the McAdams property; thence west 132 feet along the McAdams line to Hillbrook Drive; thence north 435 feet along Hillbrook Drive to the point of beginning, containing 1.00 acre of land, more or less.

(1) The purchase price of said property shall be Eighteen Thousand Dollars ($18,000.00), payable Ninety Dollars ($90.00) per month with interest at four per centum (4%)

per annum on the unpaid balance, beginning on the 15th day of August, 1952, and continuing thereafter on the 15th day of each month, until paid. Said sum is to be applied first to the interest due and the balance to the principal.

(2) Upon the expiration of six (6) years, or when Four Thousand Dollars ($4,000.00) has been paid on the full purchase price, whichever shall come first, the parties of the first part agree to convey a General Warranty Deed to the parties of the second part, and the parties of the second part agree to convey a Deed of Trust to a trustee to be selected by the parties of the first part to secure the balance of the purchase price payable Ninety Dollars ($90.00) per month as above with interest at four per centum (4%) per annum. The parties of the second part may pay in addition to the regular monthly payment any additional payment or payments not less than $90.00, on any payment date.

(3) Prior to the actual conveyance of said property, if any monthly payment or any tax assessment or fire insurance payment has not been paid within thirty (30) days after it becomes due, then this contract shall be null and void, and the parties of the second part shall forfeit any payments made under this contract and shall vacate said premises at once.

(4) All taxes, assessments and any other charges which shall become due after August 15, 1952, shall be payable by the parties of the second part, with proper adjustment for 1952 taxes.

(5) The parties of the second part agree to pay all utility bills and any other service charges as a result of the use of said property.

(6) The parties of the second part shall be responsible for all repairs of whatever nature upon said property; the parties of the second part may renovate said property on the specific approval of the parties of the first part; the parties of the first part shall give their approval to any renovation which increases the value of said property; the parties of the first part further agree to cooperate with the parties of the second part in repairing or renovating said property.

(7) The parties of the second part agree to keep said premises insured from loss by fire in the amount of $15,000.00, with loss, if any, payable to the parties of the first part as their interest may appear, and the parties of the second part agree to deposit said policy with the parties of the first part.

(8) The parties of the first part agree that if they should sell the two lots adjoining this tract on the east, they shall give the parties of the second part first choice.

(9) The parties of the second part will pay all costs of

conveyancing, with the exception of the preparation of the Deed and revenue stamps thereon, which shall be paid by the parties of the first part.

page 4B } WITNESS the following signatures and seals:

MERLE MARIE NAY	(Seal)
ROBERT EMERSON NAY	(Seal)
CATHERINE BYRNE	(Seal)
GEO. M. BYRNE	(Seal)

State of Virginia,
County of Fairfax, to-wit:

I, C. Douglas Adams, Jr., Notary Public for the city of Alexandria, whose boundaries are continguous to those of Fairfax County, in the State of Virginia do certify that CATHERINE BYRNE and GEORGE W. BYRNE, her husband, and ROBERT EMERSON NAY and MERLE MARIE NAY, his wife, whose names are signed to the writing above bearing date on the 21st day of August, 1952, have acknowledged the same before me in Fairfax County, Virginia.

Given under my hand this 21st day of August, 1952.

C. DOUGLAS ADAMS, JR.
Notary Public.

My commission expires 17 November 1953.

In the Clerk's Office of the Circuit Court of Fairfax County, Virginia Apr. 17, 1957 at 11:47 A. M. This instrument was received and, with the certificate annexed, admitted to record.

Teste:

THOMAS P. CHAPMAN, JR., Clerk.

A Copy—Teste:

THOMAS P. CHAPMAN, JR., Clerk
By EDWARD E. YOUNG, Deputy Clerk.

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DEMURRER.

The Defendants, Daniel W. Mason, Rosa Lee Mason, Emmert E. Mason and Mary Lee Mason, demur to the bill of complaint and say that the same is not sufficient in law.

DANIEL W. MASON
By Counsel.

ROSA LEE MASON
By Counsel.

EMMERT E. MASON
By Counsel.

MARY LEE MASON
By Counsel.

McCANDLISH, LILLARD,
MARSH & VAN DYCK
102 South Payne Street
Fairfax, Virginia.

Filed Mar. 4, 1960.

THOMAS P. CHAPMAN, JR.
Clerk of the Circuit Court of
Fairfax County, Va.

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Filed Mar. 15, 1960.

THOMAS P. CHAPMAN, JR.
Clerk of the Circuit Court of
Fairfax County, Va.

GROUNDS OF DEMURRER.

Pursuant to the motion of the Complainant requiring the Defendants Daniel W. Mason, Rosa Lee Mason, Emmert E. Mason, and Mary Lee Mason to state specifically the grounds relied upon in support of the demurrer heretofore filed by them, these Defendants state the grounds of demurrer as follows:

1. The sales contract dated August 21, 1952, attached to the bill of complaint as Exhibit "A," shows that the rights, if any, acquired by Robert E. Nay and Merle Nay by paragraph 8 of said contract, are not assignable. Consequently, the Complainant acquired nothing by the attempted assignment described in paragraph 6 of the bill of complaint, and has acquired no claim against the Defendants.

2. The bill of complaint contains no allegation that Robert E. Nay and Merle Marie Nay were ready, willing, and able to comply with the terms of the alleged agreement.

3. Paragraph 8 of the alleged contract, Exhibit "A," is too indefinite to give rise to enforceable rights. No allegation is made of facts which would indicate a meeting of minds of the contracting parties with respect to price or terms, and paragraph 8 of the alleged contract, Exhibit "A," contains no provision for a method whereby agreement on price and terms could be reached.

4. The terms of the alleged contract, Exhibit "A," were merged in the deed of bargain and sale alleged in paragraph 3 of the bill of complaint.

page 15 } 5. The bill of complaint attempts to state a cause of action against Defendant Catherine Byrne arising from an alleged breach of contract to which these Defendants were not parties. Additionally, if the Complainant has such a cause of action, he has a complete and adequate remedy at law. Consequently, the bill of complaint is defective because of misjoinder of parties, misjoinder of causes of action, and the inclusion in an equity suit of an alleged cause of action of which an equity court does not have jurisdiction.

DANIEL W. MASON
By R. J. LILLARD
Counsel.

ROSA LEE MASON
By R. J. LILLARD
Counsel.

EMMERT E. MASON
By R. J. LILLARD
Counsel.

MARY LEE MASON
By R. J. LILLARD
Counsel.

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This cause came on to be heard on the 20th day of May, 1960 upon the plea in abatement filed by Defendant, Catherine Byrne, upon the demurrer filed by Defendants Daniel W. Mason, Rosa Lee Mason, Emmert E. Mason and Mary Lee Mason, and was argued by Counsel.

Upon Consideraiton Whereof the Court was of opinion that the plea in abatement should be sustained, the same having been agreed to by Counsel of record for the Complainant and for Defendant Catherine Byrne, and was further of the opinion that the demurrer should be sustained.

Wherefore, it is adjudged, ordered and decreed:

(1) The plea in abatement is hereby sustained and this suit is hereby abated as to Defendant Catherine Byrne.

(2) The demurrer filed by Defendants Daniel W. Mason, Rosa Lee Mason, Emmert E. Mason and Mary Lee Mason is hereby sustained, to which action the Complainant, by Counsel, excepted.

And this order is final.

Enter May 23, 1960.

ARTHUR W. SINCLAIR
Judge of said Court.

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NOTICE OF APPEAL AND ASSIGNMENT OF ERROR.

The complainant in the above entitled cause, aggrieved by the decree entered by this Court on May 23rd, 1960, files this Notice of Appeal and alleges that the Court erred in sustaining the demurrer filed by defendants Daniel W. Mason, Rosa Lee Mason, Emmert E. Mason and Mary Lee Mason.

BAUKNIGHT, WILLIAMS,
SWAN & TROTTER
By WM. C. BAUKNIGHT
Counsel for Complainant
Moore Building
Fairfax, Virginia.

Filed Jul. 5, 1960.

THOMAS P. CHAPMAN, JR.
Clerk of the Circuit Court of
Fairfax County, Va.

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STATEMENT OF PROCEEDINGS AND INCIDENTS OF CASE.

In this cause Henry J. Rolfs filed a Bill of Complaint seeking specific performance of an alleged real estate option contract which had been assigned to him by Robert E. Nay and Merle Marie Nay. The contract was filed as an exhibit to the Bill of Complaint.

The defendant, Catherine Byrne, filed a plea in abatement and the remaining defendants filed a demurrer jointly. These defendants specified their Grounds of Demurrer in writing.

In open Court counsel for the complainant stated that he consented to the Court's sustaining the plea in abatement and the Court so ordered.

The Court then proceeded to hear arguments on the demurrer. The defendants relied on the grounds specified in their written Grounds of Demurrer with the exception of Ground No. 5 thereof, such point having been rendered moot by the action of the Court in sustaining the plea in abatement filed by defendant Catherine Byrne.

After consideration of the arguments of counsel, the Court expressed the opinion that the demurrer should be sustained.

The complainant's counsel noted his exception to this ruling.

Final decree embodying this ruling was entered page 24 } on May, 1960.

The foregoing statement was tendered to me the 19th day of July, 1960, and was signed by me the 19th day of July, 1960.

ARTHUR W. SINCLAIR, Judge.

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DECREE MODIFYING ORDER.

Upon motion of the complainant, through counsel, it is

ADJUDGED, ORDERED AND DECREED that the order entered by the Court in this cause on May 23, 1960, be and it hereby is, *nunc pro tunc* as of May 23, 1960, modified by amending subparagraph (2) thereof to read as follows:

"(2) The demurrer filed by Defendants Daniel W. Mason, Rosa Lee Mason, Emmert E. Mason and Mary Lee Mason is hereby sustained and the Bill of Complaint Dismissed, to which action the Complaint, by counsel, excepted."

Entered this 28th day of July, 1960.

ARTHUR W. SINCLAIR, Judge.

Requested:

BAUKNIGHT, WILLIAMS, SWAN
& TROTTER
By HAYNI S. TROTTER
Attorneys for Complainant.

Seen and consented to:

McCANDLISH, LILLARD, MARSH
AND VAN DYCK
By R. J. LILLARD
Attorneys for Defendants
Daniel W. Mason, Rosa Lee Mason,
Emmert E. Mason, Mary Lee Mason.

H. WISE KELLY, JR.
Attorney for Defendant
Catherine Byrne.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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