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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 6681

In the
Supreme Court of Appeals of Virginia
at Richmond

B. B. WOODSON, TRUSTEE, ETC.

v.

COMMONWEALTH UTILITIES, INCORPORATED

FROM THE CORPORATION COURT OF THE
CITY OF CHARLOTTESVILLE

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 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. 6681

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 17th day of April, 1967.

B. B. WOODSON, TRUSTEE IN BANKRUPTCY FOR STERLING R. DECKER AND MARY JANE DECKER, PARTNERS T/A BERKELEY COMMUNITY BUILDERS, BANKRUPT, Plaintiff in error,

against

COMMONWEALTH UTILITIES, INCORPORATED, Defendant in error.

From the Corporation Court of the City of Charlottesville
George M. Coles, Judge

Upon the petition of B. B. Woodson, Trustee in bankruptcy for Sterling R. Decker and Mary Jane Decker, partners t/a Berkeley Community Builders, bankrupt, a writ of error is awarded him to a judgment rendered by the Corporation Court of the City of Charlottesville on the 20th day of October, 1966, in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and Commonwealth Utilities, Inc., was defendant: upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said corporation court in the penalty of three hundred dollars, with condition as the law directs.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 8th day of June, 1967.

E. V. ECHOLS, TRUSTEE IN BANKRUPTCY FOR ALBERT MAHANES COMPANY, INCORPORATED, BANKRUPT, Plaintiff in error,

Record No. 6680

against

COMMONWEALTH UTILITIES, INCORPORATED, Defendant in error.

B. B. WOODSON, TRUSTEE IN BANKRUPTCY FOR STERLING R. DECKER AND MARY JANE DECKER, PARTNERS T/A BERKELEY COMMUNITY BUILDERS, BANKRUPT, Plaintiff in error,

Record No. 6681

against

COMMONWEALTH UTILITIES, INCORPORATED, Defendant in error.

From the Corporation Court of the City of Charlottesville

On consideration of the stipulation of the parties, by counsel, it is ordered that the record and briefs not be printed in the case of *E. V. Echols, Trustee, etc.* v. *Commonwealth Utilities, Incorporated,* Record No. 6680, and that the judgment of this court reached in the case of *B. B. Woodson, Trustee, etc.* v. *Commonwealth Utilities, Incorporated,* Record No. 6681, shall control as to the case of *E. V. Echols, Trustee, etc.* v. *Commonwealth Utilities, Incorporated,* Record No. 6680.

RECORD

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To the Honorable George M. Coles, Judge of Said Court:

Your Plaintiff respectfully represents unto Your Honor's Court as follows:

1) That your Plaintiff was duly appointed Trustee in Bankruptcy for Sterling R. Decker and Mary Jane Decker, Partners t/a Berkeley Community Builders, by Order of the United States District Court for the Western District of Virginia entered on the 15th day of February, 1962 and was, by Order of the Referee in Bankruptcy of said Court entered on 8 December 1965, authorized to institute and prosecute this suit for judgment on the claim hereinafter set forth;

2) That the Defendant corporation, Commonwealth Utilities, Inc., is a Virginia corporation, with its registered office at Court Square Bulding, Charlottesville, Virginia

3) That Berkeley Community Builders and the Defendant corporation were, in the period from 1957 through the early part of 1962, engaged in the development of the subdivision located in Albemarle County, Virginia, and known as "Berkeley",

4) That Berkeley Community Builders was engaged, during the period noted above, primarily in home con-
page 2 } struction work involved in the development of "Berkeley" and that during the said period of time Berkeley Community Builders paid for materials and labor supplied to the Defendant corporation, and, in addition, paid other charges which were properly the obligations of the said Defendant corporation, the total of said payments by Berkeley Community Builders being $37,132.75;

5) That the said Defendant corporation did not reimburse Berkeley Community Builders for the payments above nor has it made any payments therefor to your Plaintiff, so that the Defendant corporation therefore now is indebted to your Plaintiff in the amount of $37,132.75;

WHEREFORE, your Plaintiff asks judgment against the defendant corporation in the amount of $37,132.75 with interest at 6% from 1 January 1961.

B. B. WOODSON
B. B. Woodson, Trustee in Bankruptcy for Sterling R. Decker and Mary Jane Decker, Partners, t/a Berkeley Community Builders,
By Counsel

MICHAEL AND DENT
By FRED G. WOOD, JR.
414 Park Street,
Charlottesville, Virginia.

Filed December 14, 1965.

G. STUART HAMM, JR., Clerk

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GROUNDS OF DEFENSE
MOTION FOR BILL OF PARTICULARS
COUNTERCLAIM

Now comes Commonwealth Utilities, Inc. and states its grounds of defense, moves for a Bill of Particulars, and states its counterclaim as follows:

1. Commonwealth Utilities, Inc. Does not contest the statements in Plaintiff's paragraph one and two.

2. Plaintiff's paragraph 3 is mostly in error. Commonwealth Utilities, Inc. was not engaged in the development of "Berkeley" or any other subdivision at any time. This Defendant is a public utilities Corporation and its charter and operation is limited to supplying water and sewer services. It has no right or authority to engage in development and never has. Berkeley Community Builders is not believed to have existed as early as 1957. Berkeley Community Builders filed a petition for receivership in November 1961 and, based on this proceeeding a petition in Bankruptcy was filed against it in December 1961. It was adjudicated a bankrupt in 1962. It

is not believed to have been engaged in any activity during 1962. Plaintiff's motion for judgment claims interest from January 1, 1961, so whatever claim is made must be for something done before that date.

3. Commonwealth Utilities, Incorporated denies that it is indebted to the Plaintiff in any amount.

4. All claims asserted by the Plaintiff are based on a contract, express or implied, not in writing, and are barred by a three year statute of limitation under Virginia Law (Section 8-13 Code of Virginia)

page 6 } 5. Plaintiff is substitute trustee for T. J. Michie who had Sterling R. Decker, as then President of Commonwealth Utilities, Inc., confess a judgment without authority, before the Clerk of the Circuit Court of Albemarle County, Virginia against Defendant on February 21, 1962, which is believed to have been based upon the same claim as is now being sued for. This judgment has been held to be void by the Circuit Court of Albemarle County, Virginia on May 31, 1965. A Petition for Appeal was denied by the Supreme Court of Appeals of Virginia on November 23, 1965. Commonwealth Utilities, Inc. denied in that proceeding on April 18, 1962 that the alleged debt on which the judgment was confessed was due to the Trustee in Bankruptcy. Plaintiff here never set out, in those Proceedings, any itemized account of the claim for which it asked for judgment, in the proceedings attacking the judgment that was confessed. It was alleged, in those proceedings, that the judgment was to hinder, delay and defraud the true creditors of Commonwealth Utilities, Incorporated.

6. Defendant states that each and every act and service performed for it by Berkeley Community Builders was in part payment only for lots conveyed to Sterling R. Decker and for connection fees collected by Berkeley Community Builders as part of the purchase price for its lots sold to the public and not paid to the Defendant. Sterling R. Decker's interests in Berkeley have been adjudged in Bankruptcy as those of Berkeley Community Builders.

Under an agreement dated April 26, 1957, Decker agreed to provide utilities for the development of Berkeley, which he did not do. It was and is his obligation and that of Berkeley Community Builders to pay for all of the obligations of constructing and operating Commonwealth Utilities, Inc., during the entire period of development under the said agreement of April 26, 1957. All lots conveyed to Decker under this agreement are held by him under a constructive trust for the benefit of defendant, to pay these obligations.

page 7 } By deed dated October 5, 1960, D. B. 364, p. 78, Commonwealth Utilities, Inc. released the obligation of Sterling R. Decker to his other partners under the April 26, 1957 agreement, to furnish the partners a site on Berkeley for the Commonwealth Utilities, Inc. disposal plant. This was in consideration of Decker having agreed to furnish a disposal plant across Route US 29 from Berkeley, and the conveyance by the other partners of 9 lots in Berkeley by said deed under the obligation of the partners to furnish sites for Commonwealth Utilities, Inc.'s facilities. Decker has not only not met his reciprocal obligation by furnishing the cost of constructing utilities, but by his actions in confessing the judgments against the defendant and his present suit is attempting to destroy the Defendant to its damage.

7. The defendant demands a Bill of Particulars setting forth the basis of the plaintiff's claim, and the reason why it is made, setting forth the date and amount of each charge and listing all credits on the accounts, Defendant states this information is necessary to a proper defense of Plaintiff's Claims.

8. The confession of Judgment and the failure to furnish "paid for" utilities was done to the damage of this defendant.

COMMONWEALTH UTILITIES, INCORPORATED
By Counsel

CARL E. HENNRICH Pd
Court Square Building
Charlottesville, Virginia

Filed December 27, 1965.

G. STUART HAMM, JR., Clerk

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SPECIAL PLEA

Comes now the plaintiff, B. B. Woodson, Trustee, and makes this, his Special Plea unto the Court, in response to a plea of the bar of the statute of limitations made in the name of Commonwealth Utilities, Inc., the defendant, saying as follows:

1) That the plaintiff obtained a judgment against the defendant in an action heretofore undertaken by the plaintiff, which said judgment was appealed to the Supreme Court of Appeals of the Commonwealth of Virginia, wherein the action of the lower Court in setting aside the judgment was affirmed by denial of the Petition for Writ of Error on 23 November 1965;

2) That the action of the trial court in setting aside said judgment was entered of record as of 31 May 1965, so that the plaintiff herein is entitled to the benefit of Section 8-34 of the Code of Virginia (1950), as amended, and has thereunder twelve (12) months from 31 May 1965 within which to proceed further in the prosecution of the claim set out in the Motion for Judgment now before this Court.

B. B. WOODSON, Trustee
By Counsel

* * * * *

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Filed January 6, 1966.

G. STUART HAMM, JR., Clerk

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* * * * *

IN THE CORPORATION COURT OF THE CITY
OF CHARLOTTESVILLE
October 20, 1966

ORDER

On March 29, 1966 came the plaintiff, in person and by counsel, and the defendant, a corporation, by counsel, to be heard at Pretrial conference on the defendants plea of the bar of the statute of limitations to the plaintiff's motion for judgment, and on the plaintiff's special plea, in response to defendants plea in bar, that he is entitled to the benefits of Section 8-34 CODE OF VIRGINIA, and that the motion for judgment herein was filed within 12 months from the entry of an order on May 31, 1965 by a trial court setting aside a judgment obtained heretofore by the plaintiff against the defendant, which order of the trial court was appealed to the Supreme Court of appeals where the action of the Trial

Court in setting aside the judgment was affirmed; and upon the stipulation of the parties that more than 3 years had passed, from the date of accrual of the alleged right to bring action to the date when the motion for judgment herein was filed in December 1965, and the further stipulation that a confession of judgment on February 21, 1962 by Sterling R. Decker before the clerk of the Circuit Court of Albemarle County Virginia against Commonwealth Utilities Inc. in favor of plaintiff, record of which was submitted to this court and made part of the record, represents the same alleged right of action as the motion for judgment herein, and is the basis for plaintiff's plea that he is entitled to the benefit of Section 8-34 CODE OF VIRGINIA. The Circuit Court having found that the confessed judgment was made without authority and was Void, by the decree of May 31, 1965.

page 20 } It being shown to the Court that the confession of judgment in favor of the plaintiff made by Sterling R. Decker against defendant corporation made on February 21, 1962, before the clerk of the court, was made when there was no pending action under Section 8-356 CODE OF VIRGINIA and has been found by the Circuit Court of Albemarle County as made without authority and void and that more than 3 years elapsed after the alleged right to bring the action accrued and the date of filing suit herein, the Court finds that no action was commenced by the plaintiff against Commonwealth Utilities, Inc. by the aforesaid confession of judgment, it being confessed under Section 8-356, not in a pending action, the Void confession of judgment does not meet the requirements of Rule 3:3 of the Supreme Court of Appeals of Virginia for commencing an action, that Section 8-34 CODE OF VIRGINIA is not applicable, and defendant is entitled to the benefits of the statute of limitations as no previous action had been commenced. It is accordingly

ADJUDGED ORDERED and DECREED that the plaintiff's special plea that he is entitled to bring this action under Section 8-34 Code of Virginia be and the same is hereby DENIED. It is further ordered that the plaintiff's motion for judgment is barred by the Statute of Limitation and his motion for judgment is accordingly DISMISSED. The Clerk is instructed to strike this case from the Docket.

And to all of the foregoing the plaintiff, by counsel, excepts, on the ground that the same is contrary to the facts and the law, as set out in the memoranda heretofore filed on behalf of the plaintiff.

G.M.C.
GEORGE M. COLES, Judge

CARL E. HENNRICH
Counsel for Commonwealth
Utilities Incorporated
JAMES H. MICHAEL, JR.
Of Counsel for the Plaintiff

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

To: G. Stuart Hamm, Jr., Clerk of the Corporation Court of the City of Charlottesville

Notice is hereby given that B. B. Woodson, Trustee in Bankruptcy, etc., by counsel, will apply for a Writ of Error from the Final Order entered by the Corporation Court of the City of Charlottesville, Virginia, on the 20th day of October, 1966, and spread in Law Order Book 30, page 8.

ASSIGNMENTS OF ERROR

Said B. B. Woodson, Trustee, by counsel, asserts as Assignments of Error the following:

That the Final Order aforesaid is contrary to the facts and the law, for the reasons and on the grounds set out in the memoranda heretofore filed by counsel for the plaintiff with the said Corporation Court in support of the Plaintiff's position.

B. B. WOODSON, TRUSTEE, etc.,
by JAS. H. MICHAEL, JR.
Of Counsel

Filed November 30, 1966.

G. STUART HAMM, JR., Clerk

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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