214 Va. 596

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RICHMOND, VIRGINIA

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

Record No. 730147

ANN W. PATE

APPELLANT

VS.

SOUTHERN BANK & TRUST COMPANY

APPELLEE

APPENDIX

Gammiel G. Poindexter
GREENE, BUXTON & POINDEXTER, INC.
10 S. 10th Street, Suite 613
Richmond, Virginia 23219

John M. Levy
NEIGHBORHOOD LEGAL AID SOCIETY, INC.
P. O. Box 417
Richmond, Virginia 23203
Counsel for Appellant

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BILL OF INJUNCTION -- Filed June 8, 1972

VIRGINIA:

IN THE LAW AND EQUITY COURT FOR THE CITY OF RICHMOND

ANN W. PATE Plaintiff V. SOUTHERN BANK & TRUST COMPANY Defendant	)))))))))	BILL OF INJUNCTION

TO THE HONORABLE JUDGES OF SAID COURT:

Your plaintiff, Ann W. Pate, respectfully represents:

I.

That Southern Bank & Trust Company, the defendant, recovered a judgment at law against the plaintiff and David A. Pate, Jr., her ex-husband in the Law and Equity Court for the City of Richmond on May 9, 1969, for $844.45 with interest from the 30th day of March at the rate of six per centum per annum until paid, and the costs amounting to $15.50 and attorney fees of $202.90, an attested copy of which judgment is herewith filed, marked Exhibit "A", and is prayed to be taken and considered as part of this bill;

II.

That the defendant has threatened to proceed against the plaintiff for execution of said judgment;

III.

That the said judgment is null and void and should never have been rendered against the plaintiff;

IV.

The facts are represented as follows: The aforementioned judg-

ment was recovered on a note allegedly drawn by David A. Pate, Jr. and Ann W. Pate on the 17th of December, 1968, to the order of Len Truck Appliance Company which in turn assigned said note to Southern Bank & Trust Company, an attested copy of which is herewith filed, marked Exhibit "B" and is prayed to be taken and considered as part of this bill;

V.

That the judgment was recovered by virtue of a confession of judgment authorized in said note allegedly signed by David A. Pate, Jr. and Ann W. Pate, the petitioner;

VI.

The alleged signature of the plaintiff, Ann W. Pate, on said note which included a confession of judgment was a fraud and she had no knowledge of the circumstances surrounding the signing of the note or the confession of judgment;

VII.

That a copy of the confession of judgment was posted on the front door of 2451 N. 21st Street on May 16, 1969, at a time that the petitioner, Ann W. Pate was not residing therein;

VIII.

That furthermore, the plaintiff had no knowledge of the rendition of said judgment until the term of the court at which it was rendered had expired.

IN CONSIDERATION WHEREOF, and as the plaintiff is remediless save by the aid of a court of equity, the plaintiff prays that Southern Bank & Trust Company may be made a party defendant to this bill, and required to answer; that the said defendant, his agents,

attorneys, and all others, be enjoined and restrained from levying any writs of fieri facias or garnishments now or hereinafter requested by the defendants; that the said judgment be set aside and the fraudulent signature to the confession of judgment and note be declared null and void and without effect; and that all such other, further and general relief may be afforded the plaintiff as the nature of her cause may merit.

/s/ ANN W. PATE

/s/ GAMMIEL G. POINDEXTER
NEIGHBORHOOD LEGAL AID SOCIETY, INC.
P.O. Box 417
Richmond, Virginia 23203
643-0218
Counsel for Plaintiff

By: Gammiel G. Poindexter

STATE OF VIRGINIA)
) to wit:
CITY OF RICHMOND)

Ann W. Pate, the plaintiff in the foregoing bill, being duly sworn, says that the facts and allegations therein contained are true, except as far as they are stated to be on information and belief, and that so far as they are stated to be on information and belief, she believes them to be true.

/s/ Ann W. Pate

Subscribed and sworn to before me, /s/ Catherine A. Miller, a Notary Public in and for the city and state aforesaid this 7th day of June, 1972.

/s/ Catherine A. Miller
Notary Public

My commission expires the 27th day of March, 1976.

EXHIBIT "A"TO BILL OF INJUNCTION (CONFESSION OF JUDGMENT rendered on May 9, 1969 with Sheriff's return dated May 16, 1969).

VIRGINIA: In the Clerk's Office of the Law and Equity Court of the City of Richmond, THE 9th day of May, 1969.

Southern Bank and Trust Company, Plaintiff,

against

David A. Pate, Jr., and Ann W. Pate, Defendant,

Confession of Judgment

This day came the plaintiff, by counsel, as well as the defendant s by their attorney in fact, and thereupon the said defendant s by their attorney in fact acknowledged the plaintiff's action against them for the sum of Eight Hundred Forty Four Dollars and Forty Five Cents with interest thereon to be computed after the rate of six per centum per annum from the 30th day of March, 1969 until paid, and the costs of the proceeding, and the further sum of Two Hundred Two Dollars and Ninety Cents attorney's fees as provided for in the instrument upon which this proceeding is based.

Therefore, it is considered that the plaintiff recover of the defendants, the sum of Eight Hundred Forty Four Dollars and Forty Five Cents with interest thereon to be computed after the rate of six per centum per annum from the 30th day of March, 1969 until paid, and the further sum of Two Hundred Two Dollars and Ninety Cents attorney's fees and its costs by it about its suit in this behalf expended.

Upon an instrument waiving the benefit of the homestead exemption as to this debt.

A Copy, Teste: LUTHER LIBBY, JR., Clerk

by _____ D. C.

Costs $ 15.50

The foregoing judgment was duly confessed before me in my said office on the 9th day of May, 1969, at 12:15 o'clock P.M., and has been duly entered of record in Clerk's Order Book No. 3.

Teste: LUTHER LIBBY, JR., Clerk

by _____ D. C.

L. Mercer Smith, p.q.

CS 140645

A Copy, Teste: LUTHER LIBBY, JR., Clerk

By _____ D.C

Exhibit "A" to Bill of Injunction (Confession of Judgment rendered on May 9, 1969 with Sheriff's return dated May 16, 1969)

VIRGINIA:

IN THE LAW & EQUITY COURT
OF THE CITY OF RICHMOND,

SOUTHERN BANK AND TRUST CO.,

V.

DAVID A. PATE, JR., and
ANN W. PATE,
2451 N. 21st St.,
Richmond, Va.,

CONFESSION OF JUDGMENT

David A. Pate, Jr. and

NOT FINDING Ann W. Pate
OR ANY MEMBER OF THE FAMILY UPON WHOM
LEGAL PROCESS COULD BE SERVED AT
USUAL PLACE OF ABODE. EXECUTED IN THE
CITY OF RICHMOND, VA., THIS 16th DAY OF
MAY 16 1969, 19 ..., BY LEAVING
A COPY OF THE WITHIN Confession
POSTED ON THE FRONT DOOR OF THE RESIDENCE
2451 N. 21st St. THAT BEING
THE USUAL PLACE OF ABODE.
JAMES H. YOUNG
SHERIFF, CITY OF RICHMOND, VA.
By ...
DEPUTY SHERIFF

May 9, 1969

L. Mercer Smith, p.q.

$2.50 paid Sheriff-----Richmond

EXHIBIT "B" TO BILL OF INJUNCTION (Note containing cognovit clause).

Filed June 8, 1972

EXHIBIT "B"

SOUTHERN BANK AND TRUST COMPANY

$860.96

No. 5

Richmond, Va., Dec. 17, 1968

For Value Received the undersigned, jointly and severally, promise to pay to the order of Lee Tech Appliance Co.

at any office of Southern Bank And Trust Company in the State of Virginia, the sum of Eight Hundred Sixty and 96/100 Dollars

in 36 consecutive monthly installments of $ 23.91 each, except that the final installment shall, in any event, be the difference between the face amount hereof and the sum of the preceding installments, the first installment being due and payable on the 31 day of Jan., 1969, and the subsequent installments on the 31st day of each successive month, plus a late charge of 5% of any amount delinquent.

YOUR LIFE INSURED

Upon the happening of any of the following events, each of which constitutes a default hereunder, this note and any other obligation of any of the parties (which term includes makers, guarantors, endorsers or any other parties hereto) to the holder shall immediately become due and payable at the option of the holder: any installment of this note is not paid when due; any party shall default in the performance of its obligations under the provisions of this note or under the provisions of any other obligation of any such party to the holder of this note; any party shall die, dissolve or become insolvent; a receiver shall be appointed for any party; a petition in bankruptcy shall be filed by or against any party; the undersigned shall fail to execute any financing statement or other document which the holder may deem necessary from time to time to perfect and maintain the security interest of the holder as evidenced by any security agreement, and to pay all filing costs and expenses in connection therewith; the holder shall determine that a material adverse change in the financial condition of any party has occurred since the date hereof, or the holder shall deem itself insecure.

#GS57187

All parties to this note hereby: waive presentment, demand, protest and notice of dishonor and protest, and agree that extension or extensions of the time of payment of this note or of any installment or part thereof may be made before, at or after maturity by agreement with any one or more of the parties without notice to and without releasing the liability of any other party to this note; waive the benefit of all homestead exemptions as to this debt and any right which they may have to require the holder to proceed against any person or against any collateral; agree to pay all expenses incurred in collecting the same, including an eighteen per cent attorney's fee, and a suit fee of fifty dollars or fifteen per cent of the balance due, whichever is the lesser, in case this note shall not be paid at maturity or when declared due and payable as provided herein; and do hereby constitute and appoint T. K. Durham, C. C. Baldwin, L. M. Smith, and J. G. Bates, or any one of them, their true and lawful attorneys in fact to appear in the office of the Clerk of the Law and Equity Court of the City of Richmond, Virginia and confess judgment in favor of the holder of this note against them for any amount then due hereon as well as the costs of collecting the same and an attorney's fee and suit fee as aforesaid, in the event of default.

David A. Pate Jr. (SEAL) 2451 North 21st St.
Address

Ann W. Pate (SEAL) Richmond, Va.
Address

(SEAL) Address

Home Phone: Employment: Business Phone:

PAYMENT OF THIS NOTE IS SECURED BY AN INSTALLMENT SALE SECURITY AGREEMENT

Form 65-66—Rev. 6-67

A Copy,
Teste: LUTHER LIBBY, JR., Clerk.
By _____ D. C.

Exhibit "B" to Bill of Injunction (Note containing cognovit clause)

DEFENDANT'S EXHIBIT "3" (Excerpts From depositions in divorce action styled Ann Walker Pate v. David Allen Pate, Jr.)

ANN WALKER PATE

the plaintiff, appearing in her own behalf, after being first duly sworn, deposes and says as follows:

EXAMINATION BY JOHN M. McCARTHY:

Q. Would you state your name and age, please?

A. Ann W. Pate, 25.

Q. Are you the plaintiff in the divorce suit presently pending in the Law and Equity Court under the Style of "Ann Walker Pate vs. David Allen Pate, Jr."?

A. Yes.

Q. When and where were you and the defendant, David Allen Pate, Jr., married?

A. February 12, 1965, in Richmond, Virginia.

Q. Are both of you members of the Negro race and over the age of twenty-one years?

A. Yes.

Q. Were there any children born of this marriage?

A. Yes.

Q. What is the child's name and age, please?

A. Carlotta Renee Pate, 5 years old.

Q. Are you now and have you been for more than one year next perceding the commencemement of this suit an actual bona fide resident of and domiciled in the State of Virginia?

A. Yes.

Q. When and where did you and your husband last cohabit as husband and wife?

A. 2451 North 21st Street, Richmond, Virginia.

Q. That was in the City of Richmond?

A. Yes.

Q. And what date was that?

A. July 20, 1969.

Q. Has your separattion since the aforesaid date of July 20, 1969, been continuous and uninterrupted and without cohabitation?

A. Yes.

Q. Would you tell us the circumstances surrounding your separation from your husband on the date of July 20, 1969?

ORDER OF TRIAL COURT - Filed October 2, 1972

VIRGINIA:

IN THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND,

THE 2nd DAY OF October, 1972.

Ann W. Pate,	Plaintiff
against	In Chancery
Southern Bank & Trust Company,	Defendant

This cause came on this day to be heard upon the plaintiff's bill of injunction; upon the defendant's response thereto in the form of a statement at the bar by counsel for the defendant generally denying the allegations of the bill; upon the testimony heard in open court on September 6, 1972 of the plaintiff; upon the review of a certain deposition of the plaintiff taken in another suit and filed in this court on September 17, 1971 (a page thereof being marked as defendant's exhibit 3 herein); and was argued by counsel.

Upon consideration whereof, the bill is hereby dismissed. The court finds as a fact that the return of the Sheriff of the City of Richmond showing service of the notice of the judgment by confession entered on May 9, 1969 against the plaintiff is accurate and that the return has not been impeached. Furthermore, the court holds that the fraud complained of by the plaintiff herein is not extrinsic or collateral to the judgment at law but is such a false or fraudulent act, the truth of which was, or might have been, in issue in the prior proceeding.

To all of which action of the court the plaintiff, by counsel, objected.

And nothing further remaining to be done herein, this cause is stricken from the docket, and the papers to be placed among the ended causes.

ENTER

/s/ A. Christian Compton

VIRGINIA:

IN THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND

ANN W. PATE,	Plaintiff,
v.	In Chancery
SOUTHERN BANK & TRUST COMPANY,	Defendant.

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR

TO: Mr. Luther Libby, Jr., Clerk of the Law and Equity Court of the City of Richmond, Clerk's Office, Richmond, Virginia

Notice is hereby given that Ann W. Pate appeals from a final judgment rendered by this Court on the 2nd day of October, 1965, and announces her intention of applying for a Writ of Error and Supersedeas to the Supreme Court of Appeals of Virginia.

ASSIGNMENT OF ERROR

(1) The Trial Court erred in refusing to enjoin the execution of the prior judgment entered on May 9, 1969, against the plaintiff in favor of the defendant without a finding that the court had jurisdiction over the plaintiff by virtue of a valid authorization to appear and confess judgment in favor of the defendant;

(2) The Trial Court erred in holding that the fraud complained of by the plaintiff in seeking to enjoin execution of the judgment by confession entered on May 9, 1969, against the plaintiff and in favor of the defendant is not extrinsic or collateral to the judgment at law;

(3) The Trial Court erred in holding that the execution of a judgment by confession is not a violation of the Fourteenth and Fifth Amendments of the United States Constitution.

Given under my hand this 19th day of October, 1972.

ANN W. PATE

By Counsel

/s/ Gammiel G. Poindexter
NEIGHBORHOOD LEGAL AID SOCIETY, INC.
P. O. Box 417
Richmond, Virginia 23203
643-0218
Counsel for Plaintiff

By: Gammiel G. Poindexter

C E R T I F I C A T E

This is to certify that the foregoing Notice of Appeal and Assignment of Error in the above styled case was served upon Southern Bank & Trust Company, defendant, by mailing a true copy thereof to L. Mercer Smith, Attorney of Record for the defendant at his office 713 Mutual Building, Richmond, Virginia 23219, on this 19th day of October, 1972.

/s/ Gammiel G. Poindexter

WRITTEN STATEMENT OF TESTIMONY AND EVIDENCE TAKEN IN HEARING ON SEPTEMBER 6, 1972.

FILED NOVEMBER 27, 1972

VIRGINIA:

IN THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND

ANN W. PATE, Plaintiff,

Vs.

SOUTHERN BANK AND TRUST COMPANY, Defendant.

WRITTEN STATEMENT OF TESTIMONY AND EVIDENCE TAKEN IN HEARING ON SEPTEMBER 6, 1972

The following is a statement of testimony and evidence as presented before the Honorable A. Christian Compton, Judge of the Law and Equity Court of Richmond, without a jury, on the 6th day of September, 1972 at a hearing, pursuant to proper notice to the defendant, on the plaintiff's bill of injunction.

PRESENT:

Ann W. Pate, Plaintiff

Gammiel G. Poindexter, Counsel for Plaintiff

L. Mercer Smith, Counsel for Defendant

Direct Examination:

Mrs. Ann White Pate, residing at 1823 Maplewood Avenue, Richmond, Virginia, testified under oath during direct examination by her attorney, that:

1. She was the petitioner in the action entitled Ann W. Pate v. Southern Bank & Trust Company, then pending in the Law and Equity Court of the City of Richmond;

2. The Southern Bank and Trust Company has recovered a judgment at law against her and David A. Pate, Jr., her ex-husband in the Law and Equity Court of the City of Richmond on May 9, 1969 for $844,45 with

interest from the 30th day of March, 1969, at six per centum per annum until paid, and the costs amounting to $15.50 and attorney fees of $202.90;

3. She and her husband were divorced in February, 1971;

4. She was not aware of the judgment obtained by Southern Bank until the fall of 1969 when she was notified by an agent of Southern Bank and Trust Company that they would proceed to collect on the judgment obtained against her;

5. At that time she talked to someone at the bank and explained that she did not know about the judgment and that it was not her signature on the contract upon which judgment was obtained; and she signed her name on scratch paper fortthe Bank agent who appeared to be satisfied that it was not her signature;

The petitioner was then shown plaintiff's exhibit "B", being a certified copy of the contract on which judgment was obtained by the Bank on May 9, 1969 and which was attached to the Bill of Injunction. After a review of said document, the petitioner testified that the signing of "Ann W. Pate" on that document was not her signature and that she had never authorized anyone to sign her name to the same.

The petitioner further stated that she was residing at 2027 Gilbert Street in May, 1969.

Cross-Examination:

The petitioner was cross-examined by L. Mercer Smith, Counsel for the defendant and the Court was asked to take judicial notice of evidence taken in depositions filed in the case styled Ann White Pate v. David A. Pate (case No. E 2382) in the Law and Equity Court for the city of Richmond (Exhibit 3).

The petitioner was asked whether she was the plaintiff in that action

and she indicated that she was. Part of the disposition in that divorce action was introduced into the record which indicated that she and her husband last cohabited on July 20, 1969 at 2451 N. 21st Street, Richmond. (Exhibit 3).

Re-Direct:

On re-direct by her attorney, the petitioner explained that in the depositions she had given the date July 20, 1969 as the date of desertion because that was when her husband had gone to Michigan and that they had last cohabited on North 21st Street, Richmond, Virginia; but that they had last cohabited and separated before May, 1969 when she left their common dwelling on North 21st Street.

/s/ A. Christian Compton
Judge

November 27, 1972

C E R T I F I C A T E

This is to certify that twenty-five copies of the foregoing APPENDIX were served upon the Supreme Court of Virginia and three copies were served upon Southern Bank and Trust Company, defendants, by mailing a true copy thereof to L. Mercer Smith, Attorney of Record for the defendants at his office at 1900 E. Parham Road, Richmond, Virginia, 23228, on or before the 27th day of December, 1973.

Attorney for Plaintiff