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Record No. 7393

In the
Supreme Court of Appeals of Virginia
at Richmond

LuMarRo DEVELOPMENT CORPORATION

v.

CITY OF VIRGINIA BEACH, A MUNICIPAL CORPORATION

FROM THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

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.

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HOWARD G. TURNER, Clerk.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 7393

VIRGINIA

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 19th day of January, 1970.

LuMarRo DEVELOPMENT CORPORATION, Appellant,

against

CITY OF VIRGINIA BEACH, A MUNICIPAL CORPORATION, Appellee.

From the Circuit Court of the City of Virginia Beach
Robert S. Wahab, Jr., Judge

Upon the petition of LuMarRo Development Corporation an appeal and *supersedeas* is awarded it from a decree entered by the Circuit Court of the City of Virginia Beach on the 30th day of September, 1969, in a certain chancery cause then therein depending, wherein the said petitioner was plaintiff and City of Virginia Beach, a municipal corporation, was defendant; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the said court below in the penalty of $300, with condition as the law directs.

RECORD

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PETITION FOR DECLARATORY JUDGMENT AND FURTHER RELIEF

To the Honorable Judge of the said Court:

For its Petition herein filed, plaintiff respectfully represents as follows:

1. That it is a Virginia corporation duly chartered under the laws of the State of Virginia, with its principal office in the City of Norfolk, Virginia;

2. That it, as fee simple owner of certain real property situate in the City of Virginia Beach, Virginia, did intend to record and did finally record in the Clerk's Office of the Circuit Court of the City of Virginia Beach, Virginia, a final subdivision plat, which fully complied with the requirements of the laws of the State of Virginia and of said City and was duly approved by the proper authorities as required by law;

3. That as a condition precedent to the acceptance by the Clerk of this Honorable Court of said plat for re-
page 2 } cordation and pursuant to the requirements of the then existing Ordinance Number 105 of said City, petitioner paid, under protest and duress, unto the Treasurer of the City of Virginia Beach, Virginia, the sum of $3,510.00, on or about October 15, 1965;

4. That said Ordinance, as enacted by the defendant City was declared unconstitutional and invalid by the Supreme Court of Appeals of Virginia on September 6, 1968, in the case styled *"National Realty Corporation* v. *City of Virginia Beach,* et al," Record Number 6761;

5. That the defendant, having exacted said sum under an ordinance which is unconstitutional, null and void, is under an obligation and duty to refund to your petitioner the sum of $3,510.00;

6. That your petitioner not only paid said sum under protest and duress, but in addition demanded of the defendant a refund of the sum herein alleged to have been paid to the City Treasurer, which demand for refund was made directly to the City Council of the defendant City. The City Council,

in formal session, denied plaintiff's demand for refund by unanimous vote of said City Council at its regular meeting on February 10, 1969.

Wherefore, Plaintiff respectfully petitions this Honorable Court to determine the rights of the plaintiff to the refund of payment aforesaid made by the plaintiff to said City; and for a judgment order by way of further relief ordering the City of Virginia Beach to make refund to the plaintiff of the sum of 3,510.00, plus interest at the rate of 6% per annum, from October 15, 1965, plus plaintiff's costs in this behalf expended.

Respectfully submitted,

LuMarRo Development Corporation

By Norris E. Halpern
Of Counsel for Petitioner

* * * * *

Filed in the Clerk's Office the 11 day of March, 1969.

Teste:
John V. Fentress, Clerk
Phyllis Newman, D.C.

* * * * *

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DEMURRER

Comes Now the defendant, City of Virginia Beach, and demurs to the plaintiff's Petition for Declaratory Judgment and Further Relief on the grounds that the plaintiff has an adequate remedy at law.

City of Virginia Beach

By Harry T. Marshall

* * * * *

Filed 4-14-69 P. Newman

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* * * * *

DECREE OVERRULING DEMURRER

This cause came on to be heard upon the Plaintiff's Petition for Declaratory Judgment and Further Relief and upon the Defendant's Demurrer thereto, and was argued by counsel for both Plaintiff and Defendant.

Whereupon, the Court having maturely considered the issues raised by the Demurrer, It Is Decreed That said Demurrer be overruled, to which action of the Court the Defendant duly excepted,

And It Is Further Decreed That the Defendant is hereby allowed fifteen days from the date of the entry of this decree in which to file responsive pleadings.

Enter: 4/22/69

RSW

Seen:
Norris E. Halpern p.q.

Seen and excepted to:
Harry T. Marshall, p.d.

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* * * * *

GROUNDS OF DEFENSE

To the Honorable Judge of Said Court:

The City of Virginia Beach, by its counsel, says that the petition of LuMarRo Development Corporation, shows that the alleged claim accrued to the petitioner more than three years next before the filing of the petition in this matter, and, that under the provisions of Section 8-13, Code of Virginia, as amended, this claim is barred in law, and, in equity and good conscience, should be refused by this Honorable Court.

ANSWER

The City of Virginia Beach, by its counsel, says further:

1. That it has no knowledge of the truth of the allegations contained in paragraphs 1, 2, and 3 of the petition filed herein and calls for strict proof thereof.

2. That it denies that Ordinance 105 was declared to be unconstitutional.

3. That it denies that it is under any duty to refund any monies to the petitioner.

page 9 } 4. That it admits that the Council of the City of Virginia Beach refused to make refund of any monies to the petitioner.

Wherefore, the City of Virginia Beach having fully answered, prays to be dismissed with reasonable costs.

City of Virginia Beach

By Harry T. Marshall
Of Counsel

* * * * *

Filed 5-7-69
P. Newman

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FINAL DECREE

This Cause came on to be heard upon the petition for declaratory judgment and further relief herein filed, and upon the papers formerly read herein, and the decree heretofore entered overruling the demurrer herein filed, and upon the agreement of counsel for plaintiff and defendant that this suit be consolidated and tried together with the following causes:

Avalon Hills, Inc. vs. *City of Virginia Beach,*
Fairfield Development Corporation vs. *City of Virginia Beach,*
Point "O" View, Inc. vs. *City of Virginia Beach,* and
Terry Corporation of Virginia vs. *City of Virginia Beach*

and it is

Ordered that said causes be consolidated for the purposes of a trial in this Court

And this Cause was heard only on the defendant's plea in its Grounds of Defense that under the provisions of Section 8-13, Michies Code of Virginia this claim on which this suit is founded is "barred in law and equity and good conscience should be refused by this Honorable Court."

Whereupon, after mature consideration this Court is of the opinion that the plea of the Statute of limitations should be sustained.

It is Ordered that plaintiff's petition for Declaratory Judgment and Further Relief be dismissed, to which action of the Court the plaintiff duly excepted.

Enter 9/30/69

P.W.A.

* * * * *

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

Plaintiff, LuMarRo Development Corporation, a Virginia corporation, respectfully gives Notice of Appeal from a final decree entered in this suit in favor of the Defendant on the 30th day of September, 1969, and assigns errors as follows:

1. The Court erred in sustaining Defendant's plea of the Statute of Limitations on the grounds that under the provisions of Section 8-13, Michie's Code of Virginia, the claim sued upon is "barred in law and equity and good conscience should be refused by this Honorable Court".

2. The Court erred in not ruling that the five year period of limitations applied.

3. The Court erred in dismissing Plaintiff's Petition for Declaratory Judgment and Further Relief.

Respectfully submitted,

LuMarRo Development Corporation

By Norris E. Halpern
Of Counsel

* * * * *

Filed 10/13/69
J. Curtis Frost

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NOTICE OF ASSIGNMENT OF CROSS ERROR

Defendant, City of Virginia Beach, respectfully gives Notice of Assignment of Cross Error as follows:

The Court erred in its ruling on April 18, 1969, as set forth in the order entered herein on April 22, 1969, in not sustaining the demurrer filed by the Defendant.

Respectfully submitted,

City of Virginia Beach

By Harry T. Marshall
Of Counsel

* * * * *

Filed 10/27/69
J. Curtis Frost

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Stenographic transcript of the proceedings had upon the trial of the above-entitled cause in said court on September 18, 1969, before the Honorable Robert S. Wahab, Jr., judge of said court.

APPEARANCES:

Messrs. Halpern and Kent (Mr. Norris E. Halpern) for the plaintiffs.

Mr. Harry T. Marshall for the City.

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The Court: The Supreme Court says so, but I'm not going to make new law here. I'm going to follow the established law.

And it's set forth very clearly, as far as I can see, that your only remedy is to sue in *assumpsit.*

Now, there are two sides to the story. With a great deal of merit you can stand there and say that taxes or fees which have been exacted illegally should be refunded, because this is unjust to the—but there's also another concept which is reflected by our Statute of Limitations that one who has a cause of action must reasonably assert that cause of action.

He cannot sit back, under your theory, for an in-
page 52 } definite period of time. We have a comparable doc-
trine of laches in equity—and pay fees to the City, and when this money is expended you can't come back at some indeterminate length of time and say, "Now I want all this money back." That's the reason for the Stature of Limitations. And, in the opinion of this court, it balances the rights of the parties. And I'm going to hold that the three years Statute of Limitations applies.

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Mr. Halpern: There is a limitation, your Honor. It's a five-year statute, because it affects real property.

The Court: That's their fees. Same situation we have here. What difference does it make? Here the underlying principle of law is a person who has a cause of action must seasonably assert that cause of action; otherwise he is barred by the Statute of Limitations at law by the doctrine of—

Mr. Halpern: All right. 8-13 says, "Every action to recover money which is founded upon an award on any contract other than a judgment or recognizance shall be brought within the following number of years next after the right to bring the same shall have accrued."

The Court: Now, this is three years.

Mr. Halpern: This is three years, I agree. This
page 60 } is what—

The Court: It's not five—

Mr. Halpern: All right. Now, let me go to the—this is on a contract express or implied. Now, the court held in the Marks' Shows case that there was an implied contract to return the money. But there is a distinction factually there, because they had the right to exact a license tax that would have been reasonable. But instead they exacted an unreasonable license tax in an amount out of all proportion to the police protection costs involved, if your Honor recalls.

The Court: Well, that may be a distinction which you draw, but the court didn't draw any distinction.

Mr. Halpern: Well, all we can do is try to—

The Court: Where do you—where in the law of Virginia do you have a right to proceed to collect taxes or fees illegally levied and paid under protest other than by following the—a prescribed procedure in the law or resorting to common law right of *assumpsit*?

Mr. Halpern: All right. I've got a few cases in Virginia I'm going to cite, but before I do I'd like to get in the record this statement of law. It appears in Michie's Jurisprudence, volume 12, Limitation of Actions, paragraph 6:

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"The statutes generally apply to actions at law.

"There is no positive direction in the statutes that courts of equity shall be bound by the periods therein prescribed. Thus, with respect to matters which are exclusively cognizable in equity, the statute of limitations is not binding on chancery courts."

I'm going to read everything—what's favorable and unfavorable—because that's the way I play the game.

"If a suit is founded on a right of purely equitable nature and without any corresponding legal right"—now, that can be construed as being against me, and I'm going to read it—"it must be determined entirely upon equity principles and rules, regardless of the statute of limitations.

"However, in demands which are strictly legal"—and if your Honor feels that my demand is strictly legal, then your Honor is correct—"of which equity has jurisdiction concurrent with the law courts"—and that's the point that might knock me out—"equity follows the law literally in applying the statute of limitations."

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This action before us is not strictly legal. It is based upon the theory of inequity and unjust enrichment.

The Court: May I just ask you from what you are quoting?

Mr. Halpern: I am reading—this is myself. I've just finished—

The Court: I mean quoting of law from some source. What was the source?

Mr. Halpern: The source was Michie's Jurisprudence, volume 12, Limitations of Actions. And I've got it right here, your Honor.

The Court: 12 Michie's Jurisprudence, Limitations of Actions.

Mr. Halpern: Paragraphs 6 and 7. I'll turn it over to your Honor, because I've got two cases I'd like to read from. And then I'll turn it over to your Honor.

Now, I read from paragraph 6 and paragraph 7 and I didn't skip anything that was unfavorable. Now, from the point where I said, "this action is not strictly legal" I was just reading from my notes. It is based upon the page 63 } theory of inequity and unjust enrichment to permit a city to retain funds paid under duress and upon which a refund was denied under an illegal ordinance, illegal *ab initio,* because the city had no right to enact it and retain the funds under the rights of the Constitution of the United States, which is the 14th amendment that I refer to.

Now, here are two cases I'd like to point out to your Honor. One is *Trust Company of Norfolk* against *Fletcher,* 152 Virginia 868. There the instant case was brought by the plaintiff to recover his damages, the purchase price paid by him to the defendant for certain worthless stock. The plaintiff contended that the five-year statute of limitations applied, while the defendant contended a one-year statute applied. Whether the one-year or the five-year statute applied depends on whether or not the cause of action would survive. That's the sole test. If it would survive the limitation is five years. Now, this action would survive, because if my client were a person and he died his administrator or executor could bring a suit against the city to recover this money. If it would not survive, the limitation is one year. It was page 64 } held that the five-year limitation applied. Why? Because it flowed from property; property was involved.

And I shall read the section of the Code of Virginia which deals with those instances where the five-year statute applies.

The next case is Marshall against Fredericksburg Lumber Company, 162 Virginia 136.

"The instant case was a suit by a creditor to subject funds of a corporation alleged to be in the possession of certain directors of the corporation to the payment of a debt of the corporation."

It was held "that the statute of limitations applicable to the cause of action was"—8-24, and that's the one I'm relying on—"providing a five-year period, and not the limitation of two years provided by"—13-207. Now—

The Court: Section 8- —

Mr. Halpern: Now, I'm relying on 8-24.

The Court: Well, that has to do with fraud and misrepresentation, does it not?

Mr. Halpern: No. Now, I'll see if I can locate 8-24.

The Court: Get volume 2, Mr. Garriott, will page 65 } you please?

Mr. Marshall: Here's a copy right here, your Honor.

Mr. Halpern: Doesn't that apply to actions not otherwise provided for?

The Court: Yes, sir, "Of actions not before specified. Every action for personal injuries shall be brought within two years next after the right to bring the same shall have accrued. Every personal action, for which no limitation is otherwise prescribed, shall be brought within five years next after the right to bring the same shall have accrued, if it be for a matter of such nature that in case"—whether or not he survives.

Mr. Halpern: That's correct. And your Honor will see at the bottom—

The Court: One year.

Mr. Halpern: No, sir. The cases that I refer to in the notes. The bank case. Because any case that involved property the statute is extended from three to five years. And this involved the use of real property. And, in fact, the effect of the ordinance was to deny the enjoinment and page 66 } use of that real property unless the money was paid.

The Court: All right. You've got it in the record.

Mr. Halpern: I note an exception. Your Honor rules that the three-year statute applies?

The Court: Three years.

Mr. Halpern: And I note an exception.

The Court: I'm bound by the law as the Supreme Court of Appeals has enunciated it. And if they're going to change it they will have to change it.

Mr. Halpern: Let the record show that I except on the grounds that 8-24 of the Code of Virginia applies since real property is involved and is a basis of the action.

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The Court: All right, sir. The court sustains the plea of Statute of Limitations in the case of *LuMarRo Development Corporation* versus *City of Virginia Beach,* and enters

judgment for the defendant, which for the record counsel notes his exception.

Mr. Halpern: I—yes, I note an exception to the court's ruling on the ground that the five-year Statute of Limitations applies where real estate is involved. If your Honor please, I would like to put in evidence—

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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