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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

770373

JOSEPH S. GOODSTEIN and SHELODN RUBEN,
Individually and t/a
G & R ASSOCIATES,
Appellants

v.

JAY M. WEINBERG, ALLAN S. BUFFENSTEIN,
HIRSCHLER & FLEISCHER, ATTORNEYS, A PARTNERSHIP
and HIRSCHLER, FLEISCHER, WEINBERG, COX & ALLEN,
ATTORNEYS, A PARTNERSHIP,
Appellees

APPENDIX

John C. Lowe
Counsel for Appellants
Lowe and Gordon, Ltd.
409 Park Street
Charlottesville
Virginia 22901

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VIRGINIA

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND, DIVISION II

JOSEPH S. GOODSTEIN,

and

SHELDON RUBEN, Individually and t/a

G & R ASSOCIATES,

Plaintiffs

AMENDED MOTION
FOR JUDGMENT
9-24-75

v.

FROEHLING & ROBERTSON, INC.
a Virginia Corporation

JAY M. WEINBERG,

ALLAN S. BUFFENSTEIN,

HIRSCHLER & FLEISCHER, Attorneys, a Partnership

and

HIRSCHLER, FLEISCHER, WEINBERG, COX, & ALLEN, Attorneys,
a Partnership,

Defendants

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the Plaintiffs, by their counsel, and represent unto the court as follows:

1. Plaintiffs, Joseph S. Goodstein and Sheldon Ruben are residents of the City of Richmond, State of Virginia, and as to the real estate in question in this lawsuit, hold the same as partners in a partnership known as G & R Associates.

2. Defendant Froehling & Robertson, Inc., is, and at all times mentioned herein was, a corporation duly authorized and existing under the laws of the State of Virginia.

3. Defendants Jay M. Weinberg and Allan Buffenstein are residents of the State of Virginia and partners in the Defendant Law Firm of Hirschler, Fleischer, Weinberg, Cox & Allen, which is a partnership for the practice of law organized and existing under the laws of the State of Virginia. Defendant Hirschler, Fleischer, Weinberg, Cox & Allen is a successor partnership to the partnership of Defendant Hirschler & Fleischer and is legally liable for any liability of Defendant Hirschler & Fleischer in this cause for action.

4. On June 5, 1972, the Plaintiffs and Darbytown Road Associates, a Virginia partnership, entered into an agreement whereby Plaintiffs agreed, subject to satisfaction of certain conditions, to purchase from Darbytown Road Associates approximately 53.88 acres, of land, said real estate being located on Darbytwon Road, Henrico County, Virginia. A true copy of said purchase agreement is attached hereto, marked Exhibit "A".

5. Plaintiffs engaged Defendant Weinberg and his law firm, Defendant Hirschler & Fleischer to represent them in the purchase of the aforementioned property, and to advise them on all aspects of the acquisition of the property.

6. In late June or early July, 1972, Plaintiffs and Defendant Weinberg visited the property in question and, following a cursory examination of the property, Defendant Weinberg advised the Plaintiffs that there appeared to be potential problems with the property relating to fill dirt

and mining which may have been conducted in the past. Defendant Weinberg recommended that they obtain a geological survey of the property for the purpose of ascertaining whether the provisions of paragraph 4(c) of the purchase agreement had been satisfied.

7. Based on the discussions with Weinberg, Plaintiffs instructed him to obtain the best geological advice available with regard to the provisions of paragraph 4(c) of the purchase agreement and to spare no expense in doing so.

8. On July, 1972, Defendant Buffenstein, on instructions from Defendant Weinberg, engaged Defendant Froehling & Robertson, Inc. (hereafter F & R) to make an examination of the property. In order to comply with the requirements of paragraph 4(c) of the purchase agreement, said examination should have ascertained and determined whether any fill dirt, underground rock or streams were on the property which would increase the cost of construction for industrial use as opposed to the cost of the same construction if such items were not present.

9. Defendant Buffenstein provided Defendant F & R with a zoning section sheet plat of the property. A true copy of this zoning section is attached hereto and marked Exhibit "B".

10. At the time Defendant Buffenstein obtained the aforesaid services of Defendant F & R on behalf of Plantiffs,

Defendant Buffenstein realized, or should have realized, that any failure on his part to secure competent and adequate services for a complete examination of the property pursuant to the aforementioned paragraph 4(c) of the purchase agreement would directly result in the Plaintiffs suffering substantial damages.

11. At the time Defendant Buffenstein obtained the services of F & R, he either realized, or should have realized, that if a dispute arose at some time in the future as to the report rendered by F & R on the property, it would be important to be able to prove exactly what instructions F & R received from him as counsel for Plaintiffs, and to be able to show that F & R failed to comply with the instructions properly. Defendant Buffenstein realized, or should have realized, that such instructions should be in writing to F & R pursuant to good practice, custom and usage, and the exercise of prudence on behalf of the Plantiffs.

12. At the time that Defendant F & R agreed to perform the examination of the property being purchased by the Plaintiffs, and at the time that the agreement with Defendant Buffenstein was entered into, Defendant F & R realized, or should have realized, that any failure to perform on its part or breach any terms of the agreement would directly result in Planintiffs suffering substantial damages.

COUNT ONE

13. Defendant Buffenstein engaged Defendant F & R to make a thorough inspection and examination of the property and to perform any and all other tasks necessary to ascertain whether any fill dirt, underground rock or streams were on the property which would increase the cost of construction for industrial use as opposed to the use of constructing the same if such items were not present, all without regard to cost. In pursuance to this Defendant Buffenstein actually read paragraph 4(c) of the purchase agreement to W. H. Vogelsang, agent of F & R.

14. On or about August 16, 1972, Defendant F & R advised Defendant Buffenstein verbally that it had performed the inspection of the property and found it to satisfy the terms of the purchase agreement paragraph 4(c), and provided Plaintiffs with a written report to the effect that there was no fill dirt present on the property. A true copy of the report of Defendant F & R, dated August 15, 1974, addressed to Defendant Hirschler & Fleischer, and a plat sketch showing where auger borings were made by Defendant F & R, are attached hereto and marked Exhibits "C1" and "C2".

15. Defendant F & R charged Plaintiffs $150 for performing said contract and Plaintiffs promptly paid the same. Attached is a true copy of the invoice from Defendant F & R, dated August 15, 1972, marked Exhibit "D".

16. On September 26, 1972, W. H. Vogelsang, agent of Defendant F & R, verbally advised Defendant Buffenstein that Defendant F & R had examined and inspected the subject property and, based upon its investigation, Plaintiffs could "build a twenty story building on the property".

17. At the date set for closing on the real estate purchase, on September 26, 1975, Defendant Buffenstein advised Plaintiffs that all conditions of the contract of purchase had been satisfied and that they should close the transaction. Based on this advice, Plaintiffs closed the transaction, paid the full purchase price, and caused the deed to be recorded in their names.

18. Defendant F & R breached its contract with Plaintiffs in that, among other things, Defendant F & R did not examine the entire tract of land, did not locate and report open and obvious defects on the property, and did not locate the fill dirt which in fact, was on the property. A true copy of the report of Defendant F & R dated July 29, 1974, addressed to Defendant Hirschler & Fleischler, is attached hereto and marked Exhibit "E".

19. Subsequent investigation ascertained that the conditions of paragraph 4(b) of the purchase agreement of the property, relating to the availability of sewer

facilities were not satisfied, and that Defendant Buffenstein had failed to ascertain that the conditions of paragraph 4(b) had not been satisfied prior to advising the Plaintiffs to close the transaction on September 26, 1972.

20. Defendants Weinberg, Buffenstein and Hirschler & Fleischer breached their contract of legal representation with the Plaintiffs in the following ways:

a. By failing adequately to document the agreement entered into with Defendant F & R, thus failing to protect the contract rights of the Plaintiffs when they relied upon the report of F & R in closing the real estate transaction.

b. By failing properly to instruct and supervise F & R and to require them to perform the necessary services and investigations and to submit a proper report in order to assure Plaintiffs that condition 4(c) had been complied with.

c. By failing to conduct adequate investigation in order to ascertain that the conditions of paragraph 4(b) had not been complied with and to advise clients accordingly.

d. By closing the real estate transactions before all conditions of the purchase agreement had been satisfied.

21. As a direct and proximate result of the failure of Defendant F & R to perform its oontract, Plaintiffs have

been damaged and have incurred substantial expenses in the purchase of, payment for, and orderly sale of said property in order to mitigate their damages.

22. As a direct and proximate result of the failure of Defendants Buffenstein, Weinberg and Hirschler & Fleischer to perform their contract of legal representation, Plaintiffs have been damaged and have incurred substantial expenses in the purchase, payment for, and orderly sale of said property in order to mitigate their damages.

COURT TWO

23. In the alternative to the facts alleged in Count One, Plaintiffs alleged the following facts of Count Two for the reasons that the facts are within the peculiar knowledge of the Defendants, all of the Defendants are liable under either the facts alleged in Count One or the facts alleged in Court Two, and because such alternative pleading is permitted under Rule 1:4 of the Supreme Court of Virginia.

24. Defendant Buffenstein, contrary to the instructions from Plaintiffs, only engaged Defendant F & R to make a cursory "walk-over" of the property for a minimum fee of $150. He knew, or should have known, that such an examination by Defendant F & R would not satisfy the requirements of the Plaintiffs and would not result in a reasonable inspection to assure compliance with the conditions of paragraph 4(c) of the purchase agreement.

25. Defendant Buffenstein only engaged Defendant F & R to make a "walk-over" examination of the property by one man, and told Defendant F & R that only a cursory examination was desired because money was a problem; Defendant Buffenstein "pled poverty" on behalf of his clients, the Plaintiffs, without their knowledge and with the full knowledge that Plaintiffs could have and would have paid any reasonable fee required.

26. On or about August 16, 1972, Defendant F & R provided Defendant Buffenstein and the Plaintiffs with a written report to the effect that there was no fill dirt present on the property. A true copy of Defendant F & R's report dated August 15, 1975, addressed to Defendant Hirschler & Fleischer, and a plat sketch showing where auger borings were made by Defendant F & R, are attached hereto and marked Exhibits "C1" and "C2".

27. Defendant F & R charged Plaintiffs $150 for performing said contract and Plaintiffs promptly paid the same. Attached is a true copy of the invoice from Defendant F & R dated August 15, 1972, marked Exhibit "D".

28. On September 26, 1972, at the closing of the transaction in the offices of Defendant Hirschler & Fleischer, Defendant Buffenstein feigned a telephone call to W. H. Vogelsang, agent of Defendant F & R, and reported to Plaintiffs, who were present with Defendant Buffenstein at

the time he was making the phone call, that Vogelsang was on the other end of the telephone conversation and that Vogelsang had just reported to Buffenstein that Plaintiffs "could build a twenty story building on the property".

29. In fact, W. H. Vogelsang never made such representation to Buffenstein, and Buffenstein made the representation to Plaintiffs in order to conceal his neligence in the manner in which he had obtained the services of Defendant F & R and his neligence in the manner of ascertaining whether the conditions of paragraph 4(c) of the purchase agreement had been satisfied.

30. At the same closing with Plaintiffs, Defendant Buffenstein verbally advised the Plaintiffs that he had made investigation of compliance with the conditions of paragraph 4(b) of the purchase agreement, when in fact he had made no such investigation or had made a completely inadequate investigation of the terms of paragraph 4(b).

31. In good faith reliance upon the advice of Defendant Buffenstein as their lawyer, and upon his representations that he had satisfied himself that all of the conditions of the purchase agreement had been met, the Plaintiffs closed the transaction, purchased the property in questions and caused the deed to the property to be recorded in their names.

32. The actual condition of the subject property was such that any person with knowledge of land conditions, particularly anyone with the expertise of Defendant F & R and its duly authorized agents, would immediately recognize upon a "walk-over" of the rear portion of the property that mining or quarrying operations had been performed at an earlier time on the property, that fill dirt was present, and that the property was unsatisfactory for industrial development purposes without the expenditure of substantial funds for preparation of the land. Any person aware of the conditions of paragraph 4(c) of the purchase agreement would immediately recognize upon a visual examination of the rear portion of the property that the property did not satisfy the conditions of paragraph 4(c).

33. Defendant F & R breached its contract with Plaintiffs in that, among other things, Defendant F & R did not examine the entire tract of land, did not locate and report open and obvious defects on the property, and did not locate the fill dirt on the property. A true copy of F & R's report dated July 29, 1974, addressed to Defendant Hirschler & Fleischer is attached hereto and marked Exhibit "E".

34. Subsequent investigation ascertained that the conditions of paragraph 4(b) of the purchase agreement relating to the availability of sewer facilities were not satisfied, and that Defendant Buffenstein had failed to

ascertain that the conditions of paragraph 4(b) had not been satisfied prior to advising the Plaintiffs to close the transaction on September 26, 1972.

35. Following the closing of the transaction on September 26, 1972, Defendant Weinberg, Buffenstein and Hirschler, Fleischer, Weinberg, Cox & Allen, or some of them, jointly or severally intentionally and with intent to defraud the Plaintiffs entered into a course of conduct designed to conceal from the Plaintiffs the negligence of Defendants Weinberg, Buffenstein and Hirschler & Fleischer, to defraud the Plaintiffs of their rightful legal recovery against said Defendants for the negligence and breach of contract of said Defendants in the handling of real estate transaction, to cover up the negligence and breach of contract in such a way as to deny Plaintiffs recovery, and to delay Plaintiffs beyond the statuatory period of limitations within which the Plaintiffs could obtain recovery against said Defendant. Said intentional actions and material misrepresentations by said Defendants included, but were not limited to, the following:

a. Continuing to assert to Plaintiffs that Defendant Buffenstein had requested Defendant F & R to do a thorough investigation without regard to cost, when in fact, this was not true.

b. Continuing to assert that W. H. Vogelsang had represented to Defendant Buffenstein by telephone at the

time of the closing that the property was capable of supporting a twenty story building.

c. Continuing to represent to Plaintiffs as counsel in the face of obvious conflict of interest between the Defendants Weinberg, Buffenstein, Hirschler & Fleischer and Hirschler, Fleischer, Weinberg, Cox & Allen, on the one hand, and the Plaintiffs on the other hand, to include the filing of a motion for judgment against Defendant F & F in January, 1975.

d. Failing to withdraw as counsel from Plaintiffs immediately upon having knowledge, actual or constructive, of the neligence and breach of contract of Defendants Buffenstein, Weinberg and Hirschler & Fleischer.

e. Misleading Plaintiffs by words and actions into foregoing or delaying their obtaining competent legal representation to assert claims against said Defendants until some of the periods of limitations of actions against said Defendants, in any causes of action by the Plaintiffs, had expired.

f. Other diverse acts, words or omissions which were intended to, and in fact did, lull the Plaintiffs into a sense of security with said Defendants as their counsel, to

the great detriment of the Plaintiffs, and in violation of said Defendants' contractual, legal and ethical obligations to the Plaintiffs.

36. As a direct and proximate result of the failure of Defendant F & R to perform its contract, Plaintiffs have been damaged and have incurred substantial expenses in the purchase, payment for, and orderly sale of said property in order to mitigate their damages.

37. As a direct and proximate result of the failure of Defendant Buffenstein, Weinberg and Hirschler & Fleischer to perform their contract of legal representation, Plaintiffs have been damaged and have incurred substantial expenses in the purchase, payment for, and orderly sale of said property in order to mitigate their damages.

38. As a direct and proximate result of the fraud of the Defendants Weinberg, Buffenstein, Hirschler & Fleischer and Hirschler, Fleischer, Weinberg, Cox & Allen in covering up and concealing their negligence and breach of contract, Plaintiffs have been damaged and have incurred substantial expenses in the purchase of, payment for, and orderly sale of said property in order to mitigate their damages.

39. Because of the fraud of Defendants Weinberg, Buffenstein, Hirschler & Fleischer, and Hirschler, Fleischer, Weinberg, Cox & Allen, Plaintiffs are entitled to recover

punitive damages against said Defendants for their willful violations of their legal, contractual and ethical obligations to Plaintiffs.

WHEREFORE, your Plaintiffs move the Court to enter judgment in their behalf against the Defendants as follows:

a. In Count One against Defendant F & R for $400,000 compensatory damages, interest and costs.

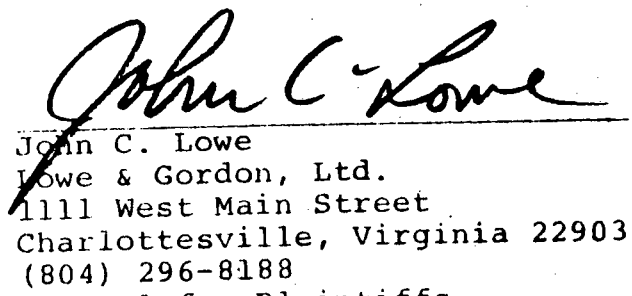
b. In Count One against Defendants Weinberg, Buffenstein, Hirschler & Fleischer, and Hirschler, Fleischer, Weinberg, Cox & Allen, jointly and severally, in the amount of $400,000 compensatory damages, interest and costs.

c. In Count Two against Defendant F & R for $400,000 compensatory damages, interest and costs.

d. In Count Two against Defendants Weinberg, Buffenstein, Hirschler & Fleischer, and Hirschler, Fleischer, Weinberg, Cox & Allen, jointly and severally, in the amount of $400,000 compensatory damages, $300,000 punitive damages, interest and costs.

JOSEPH S. GOODSTEIN AND
SHELDON RUBEN
Individually and t/a
G & R ASSOCIATES

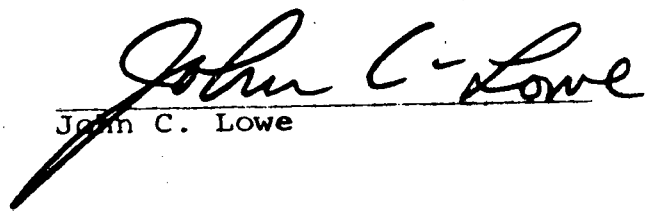
By Counsel



John C. Lowe
Lowe & Gordon, Ltd.
1111 West Main Street
Charlottesville, Virginia 22903
(804) 296-8188
Counsel for Plaintiffs

CERTIFICATE

I hereby certify that on September 24, 1975, I delivered a true copy of the foregoing amended motion for judgment to M. Wallace Moncure, Jr., Esq., Counsel for Defendant Froehling & Robertson, Inc.



John C. Lowe

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND, DIVISION II

JOSEPH S. GOODSTEIN,
and
SHELDON RUBEN, Individually and t/a
G & R ASSOCIATES, Plaintiffs,

v.

FROEHLING & ROBERTSON, INC.

JAY M. WEINBERG,
ALLAN S. BUFFENSTIIN,
HIRSCHLER & FLEISCHER, Attorneys,
and
HIRSCHLER, FLEISCHER, WEINBERG,
COX & ALLEN, Attorneys, Defendants.

DEMURRER

Come now the defendants, Jay M. Weinberg, Allan A. Buffenstein, Hirschler & Fleischer and Hirschler, Fleischer, Weinberg, Cox & Allen, by counsel, and demur to the Amended Motion for Judgment saying that it is insufficient in law, and for their grounds of demurrer say as follows:

1. As to these defendants, the Amended Motion for Judgment misjoins an alleged cause of action in tort with an alleged cause of action in contract.

2. As to these defendants, the Amended Motion for Judgment misjoins alleged causes of action against these defendants with unrelated alleged causes of action against the defendant Froehling & Robertson, Inc.

3. As to these defendants, the Amended Motion for Judgment misjoins in Count Two thereof an alleged cause of action in tort with an alleged cause of action in contract.

4. As to these defendants, the Amended Motion for Judgment misjoins two separate and distinct alleged causes of action against these defendants with an unrelated alleged cause of action against the defendant Froehling & Robertson, Inc.

5. As to these defendants, the Amended Motion for Judgment fails to state any cause of action in fraud which would give rise to any claim for compensatory or punitive damages.

JAY M. WEINBERG,
ALLAN S. BUFFENSTEIN,
HIRSCHLER & FLEISCHER
HIRSCHLER, FLEISCHER, WEINBERG,
COX & ALLEN

By _____
Of Counsel

_____
Of Counsel

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND, DIVISION II

JOSEPH S. GOODSTEIN,
and
SHELDON RUBEN, Individually and t/a
G & R ASSOCIATES, Plaintiffs,

v.

FROEHLING & ROBERTSON, INC.

JAY M. WEINBERG,
ALLAN S. BUFFENSTEIN,
HIRSCHLER & FLEISCHER, Attorneys,
and
HIRSCHLER, FLEISCHER, WEINBERG,
COX & ALLEN, Attorneys, Defendants.

PLEA OF STATUTES OF LIMITATIONS

Come now the defendants, Jay M. Weinberg, Allan S. Buffenstein, Hirschler & Fleischer and Hirschler, Fleischer, Weinberg, Cox & Allen, by counsel, and say that as to each of these defendants each of the several alleged causes of action stated in the Amended Motion for Judgment are founded upon purported claims in contract and in tort that are barred respectively by the Statutes of Limitation set forth in §§ 8-13 and 8-24, Code of Virginia, as amended, and were so barred before the commencement of this action against these defendants.

JAY M. WEINBERG,
ALLAN S. BUFFENSTEIN,
HIRSCHLER & FLEISCHER
HIRSCHLER, FLEISCHER, WEINBERG,
COX & ALLEN

By _____
Of Counsel

_____
Of Counsel

THOMPSON, SAVAGE, SMITHERS,
PRESS & MARSHALL
5911 West Broad Street
Richmond, Virginia 23230

and

MAYS, VALENTINE, DAVENPORT & MOORE
23rd Floor, F & M Center
1111 East Main Street
P. O. Box 1122
Richmond, Virginia 23208
Counsel for Defendants,
Jay M. Weinberg,
Allan S. Buffenstein,
Hirschler & Fleischer,
Hirschler, Fleischer, Weinberg,
Cox & Allen.

VIRGINIA

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND, DIVISION II

March 22, 1976
Nunc pro tunc to - March 4, 1976

JOSEPH S. GOODSTEIN, et al,

Plaintiffs

v.

FROEHLING & ROBERTSON, INC., et al,

Defendants

ORDER -
Civil Action
No. 10108-L

This day came the parties, by counsel, for argument on the Demurrer filed herein by the defendants Jay M. Weinberg, Allan S. Buffenstein, Hirschler & Fleischer, and Hirschler, Weinberg, Cox and Allen, herein referred to as Hirschler and Fleischer, by counsel, and upon the pleas of the Statute of Limitations filed herein by both defendants, and was argued by counsel.

Upon consideration whereof, the Court finds that there is a misjoinder of parties defendant in that there are separate contracts sued upon as to each defendant, and ORDERS that the plaintiffs' claims against the defendants Hirschler and Fleischer be severed and hereafter constitute and proceed as a separate action at law, to which ruling of the court all parties object;

Further the Court finds as to such severed action at law by the plaintiffs against the defendants Hirschler and Fleischer, that there is a misjoinder of actions in that the plaintiffs'

claims against the defendants Hirschler and Fleischer are claims in contract and tort, and with such finding ORDERS that the plaintiffs, by March 4, 1976, file herein its election as to which cause of action it will pursue against the defendants Hirschler and Fleischer. Upon such filing of election the Court dismisses without prejudice the cause of action of the plaintiffs against the defendants Hirschler and Fleischer which the plaintiffs elect not to pursue, as to which ruling of the court the plaintiffs object.

It is further ORDERED that the Court defers a ruling on the plea of the Statute of Limitations filed herein by the defendants until the election of the plaintiffs as herein ordered is made, after which time the Court will consider the plea of the Statute of Limitations of the defendants Hirschler and Fleischer and Froehling and Robertson, Inc.

A Copy,

Teste : IVA R. PURDY, Clerk

by: Joyce C. Snead
Deputy Clerk

VIRGINIA

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND, DIVISION II

JOSEPH S. GOODSTEIN

and

SHELDON RUBEN, Individually and t/a

G & R ASSOCIATES,

Plaintiffs

v.

AMENDED MOTION FOR JUDGMENT (5-25-76)

JAY M. WEINBERG,

ALLAN S. BUFFENSTEIN,

HIRSCHLER & FLEISCHER, Attorneys, a Partnership, and

HIRSCHLER & FLEISCHER, WEINBERG, COX & ALLEN, Attorneys, a Partnership,

Defendants

TO THE HONORABLE JUDGE OF SAID COURT:

Now come the Plaintiffs, by their Counsel, and represent unto the Court as follows:

1. Plaintiffs, Joseph S. Goodstein and Sheldon Ruben are residents of the City of Richmond, State of Virginia, and as to the real estate in question in this lawsuit, hold the same as partners in a partnership known as G & R Associates.

2. Defendants Jay M. Weinberg and Allan Buffenstein are residents of the State of Virginia and partners in the

Defendant Law Firm of Hirschler, Fleischer, Weinberg, Cox & Allen, which is a partnership for the practice of law organized and existing under the laws of the State of Virginia. Defendant Hirschler, Fleischer, Weinberg, Cox & Allen is a successor partnership to the partnership of Defendant Hirschler & Fleischer and is legally liable for any liability of Defendant Hirschler & Fleischer in this cause for action.

LAW OFFICES
'E & GORDON, LTD.

3. On June 5, 1972, the Plaintiffs and Darbytown Road Associates, a Virginia partnership, entered into an agreement whereby Plaintiffs agreed, subject to satisfaction of certain conditions, to purchase from Darbytown Road Associates approximately 53.88 acres of land, said real estate being located on Darbytown Road, Henrico County, Virginia. A true copy of said purchase agreement is attached hereto, marked Exhibit "A".

4. Plaintiffs engaged Defendant Weinberg and his law firm, Defendant Hirschler & Fleischer to represent them in the purchase of the aforementioned property, and to advise them of all aspects of the acquisition of the property.

5. In late June or early July, 1972, Plaintiffs and Attorney Jay M. Weinberg, of the firm of Hirschler and Fleischer, visited the property in question and, following a cursory examination of the property, Weinberg advised the Plaintiffs that there appeared to be potential problems with the property relating to fill dirt and mining which may have been conducted

in the past. Weinberg recommended that they obtain a geological survey of the property for the purpose of ascertaining whether the provisions of paragraph 4(c) of the purchase agreement had been satisfied.

6. Based on the discussions with Weinberg, Plaintiffs instructed him to obtain the best geological advice available with regard to the provisions of paragraph 4(c) of the purchase agreement and to spare no expense in doing so.

7. On July, 1972, Attorney Allan Buffenstein, of Hirschler and Fleischer, on instructions from Weinberg, engaged Froehling & Robertson, Inc. (hereafter F & R), Engineers, to make an examination of the property. In order to comply with the requirements of paragraph 4(c) of the purchase agreement, said examination should have ascertained and determined whether any fill dirt, underground rock or streams were on the property which would increase the cost of construction for industrial use as opposed to the cost of the same construction if such items were not present.

8. Defendant Buffenstein provided F & R with a zoning section plat of the property. A true copy of this zoning section is attached hereto and marked Exhibit "B".

9. At the time Defendant Buffenstein obtained the aforesaid services of F & R on behalf of Plaintiffs, Defendant Buffenstein realized, or should have realized, that any failure on his part to secure competent and adequate services for a

complete examination of the property pursuant to the aforementioned paragraph 4(c) of the purchase agreement would directly result in the Plaintiffs suffering substantial damages.

10. At the time Defendant Buffenstein obtained the services of F & R, he either realized, or should have realized, that if a dispute arose at some time in the future as to the report rendered by F & R on the property, it would be important to be able to prove exactly what instructions F & R received from him as counsel for Plaintiffs, and to be able to show that F & R failed to comply with the instructions properly. Defendant Buffenstein realized, or should have realized, that such instructions should be in writing to F & R pursuant to good practice, custom and usage, and the exercise of prudence on behalf of the Plaintiffs.

COUNT ONE

11. Defendant Buffenstein, contrary to the instructions from Plaintiffs, only engaged F & R to make a cursory "walk-over" of the property for a minimum fee of $150. He knew, or should have known, that such an examination by F & R would not satisfy the requirements of the Plaintiffs and would not result in a reasonable inspection to assure compliance with the conditions of paragraph 4(c) of the purchase agreement.

LAW OFFICES

12. When Defendant Buffenstein engaged F & R to make a "walk-over" examination of the property by one man, he told Defendant F & R that only a cursory examination was desired

because money was a problem and "pled proverty" on behalf of his clients, the Plaintiffs, without their knowledge and with the full knowledge that Plaintiffs could have and would have paid any reasonable fees required.

13. On or about August 16, 1972, F & R provided Defendant Buffenstein and the Plaintiffs with a written report to the effect that there was no fill dirt present on the property. A true copy of F & R's report dated August 15, 1975, addressed to Defendant Hirschler & Fleischer, and a plat sketch showing where auger borings were made by F & R, are attached hereto and marked Exhibits "C1" and "C2".

14. F & R charged Plaintiffs $150 for performing said contract and Plaintiffs promptly paid the same. Attached is a true copy of the invoice from F & R, dated August 15, 1972, marked Exhibit "D".

15. On September 26, 1972, at the closing of the transaction in the offices of Defendant Hirschler & Fleischer, Defendant Buffenstein feigned a telephone call to W. H. Vogelsang, agent of F & R, and reported to Plaintiffs, who were present with Defendant Buffenstein at the time he was making the phone call, that Vogelsang was on the other end of the telephone conversation and that Vogelsang had just reported to Buffenstein that Plaintiffs "could build a twenty story building on the property".

16. In fact, W. H. Vogelsang never made such repre-

sentation to Buffenstein, and Buffenstein made the representation to Plaintiffs in order to conceal his negligence in the manner in which he had obtained the services of F & R and his negligence in the manner of ascertaining whether the conditions of paragraph 4(c) of the purchase agreement had been satisfied.

LAW OFFICES

17. At the same closing with Plaintiffs, Defendant Buffenstein verbally advised the Plaintiffs that he had made investigation of compliance with the conditions of paragraph 4(b) of the purchase agreement, when in fact he had made no such investigation or had made a completely inadequate investigation of the terms of paragraph 4(b).

18. In good faith reliance upon the advice of Defendant Buffenstein as their lawyer, and upon his representations that he had satisfied himself that all of the conditions of the purchase agreement had been met, the Plaintiffs closed the transactions, purchased the property in question and caused the deed to the property to be recorded in their names.

19. Subsequent investigation ascertained that the conditions of paragraph 4(b) of the purchase agreement relating to the availability of sewer facilities were not satisfied, and that Defendant Buffenstein had failed to ascertain that the conditions of paragraph 4(b) had not been satisfied prior to advising the Plaintiffs to close the transactions on September 26, 1972.

20. Following the closing of the transaction on ~~September 26~~ October 3, 1972, Defendant Weinberg, Buffenstein and Hirschler,

Fleischer, Weinberg, Cox & Allen, or some of them, jointly or severally intentionally and with intent to defraud the Plaintiffs entered into a course of conduct designed to conceal from the Plaintiffs the negligence of Defendants Weinberg, Buffenstein and Hirschler & Fleischer, to defraud the Plaintiffs of their rightful recovery against said Defendants for the negligence of said Defendants in the handling of the real estate transaction, to cover up the negligence in such a way as to deny Plaintiffs' recovery, and to delay Plaintiffs beyond the statutory period of limitations within which the Plaintiffs could obtain recovery against said Defendant. Said intentional actions and material representations by said Defendants included, but were not limited to, the following:

LAW OFFICES

a. Continuing to assert to Plaintiffs that Defendant Buffenstein had requested F & R to do a thorough investigation without regard to cost, when in fact, this was not true.

b. Continuing to assert that W. H. Vogelsang had represented to Defendant Buffenstein by telephone at the time of the closing that the property was capable of supporting a twenty story building.

c. Continuing to represent to Plaintiffs as counsel in the face of obvious conflict of interest between the Defendants Weinberg; Buffenstein; Hirschler & Fleischer; and Hirschler, Fleischer, Weinberg, Cox & Allen, on the one hand; and the Plaintiffs on the other hand, to include the filing of a motion

for judgment against F & R in January, 1975.

d. Failing to withdraw as counsel from Plaintiffs immediately upon having knowledge, actual or constructive, of the negligence of Defendants Buffenstein, Weinberg and Hirschler & Fleischer.

e. Misleading Plaintiffs by words and actions into foregoing or delaying their obtaining competent legal representation to assert claims against said Defendants until some of the periods of limitations of actions against said Defendants, in any causes of action by the Plaintiffs, had expired.

f. Other divers acts, words or omissions which were intended to, and in fact did, fraudulently lull the Plaintiffs into a sense of security with said Defendants as their counsel, to the great detriment of the Plaintiffs, and in violation of said Defendants' legal and ethical obligations to the Plaintiffs.

21. The acts and omissions enumerated in paragraphs 11, 12 and 17 constitute actionable negligence by Defendants against the Plaintiffs.

22. As a proximate result to the negligence of the Defendants, the Plaintiffs have been damaged and have incurred substantial expenses in trying to mitigate their damages.

23. Because of the fraudulent acts described in paragraphs 15, 16, 17 and 20, the Defendants should be estopped from pleading the statute of limitations for negligence actions prior to two years following the Plaintiffs' discovery of the fraud.

COUNT TWO

24. Paragraphs 1 through 20 are adopted for Count Two.

25. The allegations of paragraphs 11, 12, 15, 16, 17 and 20 constitute actionable fraud against the Plaintiffs. As a direct and proximate result of the fraud of the Defendants Weinberg, Buffenstein, Hirschler & Fleischer and Hirschler, Fleischer, Weinberg, Cox & Allen, Plaintiffs have been damaged and have incurred substantial expenses in the purchase of and payment of said property, and the orderly sale of said property in order to mitigate their damages.

26. Because of the fraud of Defendants Weinberg, Buffenstein, Hirschler & Fleischer, and Hirschler, Fleischer, Weinberg, Cox & Allen, Plaintiffs are entitled to recover punitive damages against said Defendants for their willful violations of their duties to Plaintiffs.

WHEREFORE, your Plaintiffs move the Court to enter judgment in their behalf against the Defendants, jointly and severally, based solely on tort liability, as follows:

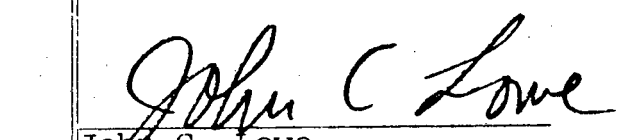
a. Count One in the amount of $400,000 compensatory damages, interests and costs;

b. Count Two in the amount of $400,000 compensatory damages, $300,00 punitive damages, interest and costs.

LAW OFFICES
E & GORDON, LTD.

JOSEPH S. GOODSTEIN and
SHELDON RUBEN
Individually and t/a
G & R ASSOCIATES

By Counsel



John C. Lowe
Counsel for Plaintiffs
Lowe and Gordon, Ltd.
1111 West Main Street
Charlottesville, Virginia 22903
(804-296-8188)

CERTIFICATE

I hereby certify that on or before the 28th day of May, 1976, I mailed or delivered a true copy of the foregoing Amended Motion for Judgment to James C. Roberts, Esq., Post Office Box 1122, Richmond, Virginia, 23208, and William S. Smithers, Jr., Esq., Post Office Box 6447, Richmond, Virginia, 23230, Counsel for Defendants.

John C. Lowe

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND, DIVISION II

JOSEPH S. GOODSTEIN and SHELDON RUBEN, Individually and t/a G & R ASSOCIATES, Plaintiffs, v. JAY M. WEINBERG, ALLAN S. BUFFENSTEIN, HIRSCHLER & FLEISCHER, Attorneys, a Partnership, and HIRSCHLER & FLEISCHER, WEINBERG, COX & ALLEN, Attorneys, a Partnership, Defendants.	SUIT NO. 10108-L

PLEA OF STATUTES OF LIMITATION

Come now the defendants, Jay M. Weinberg, Allan S. Buffenstein, Hirschler & Fleischer and Hirschler, Fleischer, Weinberg, Cox & Allen, by counsel, and say that as to each of these

defendants the alleged cause or causes of action stated in the Amended Motion for Judgment (5-25-76) are barred by the statutes of limitation in such cases made and provided, and were so barred before the commencement of this action against these defendants.

DEMURRER

Come now the defendants, Jay M. Weinberg, Allan S. Buffenstein, Hirschler & Fleischer and Hirschler, Fleischer, Weinberg, Cox & Allen, by counsel, and demur to the second Count of the Amended Motion for Judgment (5-25-76) saying that said Count is insufficient in law, and for their Ground of Demurrer say:

Said second Count of the Amended Motion for Judgment fails to state any cause of action in fraud which would give rise to any claim for compensatory or punitive damages.

JAY M. WEINBERG,
ALLAN S. BUFFENSTEIN,
HIRSCHLER & FLEISCHER,
HIRSCHLER, FLEISCHER, WEINBERG, COX & ALLEN

By _____
Counsel

Virginia:

In the Circuit Court of the City of Richmond, Division 11,

the 22nd day of November 1976

Joseph S. Goodstein, and Sheldon Ruben, Individually and t/a G & R Associates, Plaintiffs against Jay M. Weinberg, Allan S. Buffenstein, Hirschler & Fleischer, Attorneys, a Partnership and Hirschler, Fleischer, Weinberg, Cox & Allen, Attorneys, a Partnership Defendants	)	OPINION AND ORDER (Case No. 10108-L)

The Court, having fully heard the argument on the plea of statute of limitations by the defendants, Hirschler & Fleischer, and having fully considered the case of Oleyar v. Kerr, Trustee, 217 Va. 88, is of the opinion that while the Supreme Court of Virginia held that "an action for the negligence of an attorney in the performance of professional services, while sounding in tort, is an action for breach of contract and thus governed by the statute of limitations applicable to contracts".

Nevertheless, the Court by its order of March 4, 1976, having required the plaintiffs to elect whether they were suing in contract or tort, and the plaintiffs having so elected by their Amended Motion for Judgment filed July 9, 1976 and having asserted therein that they are entitled to judgment "based solely on tort liability", that this is a suit purely in tort and not merely sounding in tort,

and therefore the one-year statute of limitations under Code Section 8-24 applies.

The Court distinguishes Oleyar v. Kerr, Trustee from McCormick v. Romans and Gunn, 214 Va. 144. In that case, suit was brought in both contract and tort as was this case, and upon being required to make an election, the plaintiff in that case elected to sue in contract.

The Court finds the beginning date of the running of the statute of limitations to be August 4, 1972 as to paragraph 4(c) as the plaintiffs partially examined the land prior thereto and had a right to repduciate the contract any time up to that date, and while they partially examined the bond they had an opportunity to fully examine it, which examination would have revealed the sand and gravel mining of the major portion of the land, they failed to do so. As to paragraph 4(b) of the contract and Count II of the Amended Motion for Judgment alleging fraud, the Court finds that the statute of limitations commences to run as of October 3, 1972, the closing date of the purchase under the contract.

It is further ORDERED that all depositions filed in this case numbered 10108-L be made a part of the record therein, as well as a part of the record in the case of Joseph S. Goodstein and Sheldon Ruben, Individually and t/a G & R Associates v. Froehling & Robertson, and all depositions filed in that case are hereby made a part of the record in Joseph S. Goodstein and Sheldon Ruben, Individually and t/a G & R Associates v. Hirschler & Fleischer, et als.

Wherefore, the Court doth sustain the said plea of the statute of limitations, to all of which the plaintiffs by counsel object and except.

It is further ORDERED that a copy of this Order be mailed to John C. Lowe, Lowe and Gordon Limited, 409 Park Street, Charlottesville, Virginia 22901, a copy to William S. Smithers, Jr., 5911 West Broad Street, Richmond, Virginia, and a copy to James C. Roberts, P. O. Box 1122, Richmond, Virginia.

A Copy,

Teste : IVA R. PURDY, Clerk

by: Joyce C. Greene
Deputy Clerk

ASSIGNMENTS OF ERROR

1. It was error for the Court to grant the demurrer of Defendants' to reach the misjoinder of actions complained of.

2. It was error for the Court to hold that an action against a lawyer for breach of contract and an action against the same lawyer for negligence and fraud cannot be joined.

3. It was error for the Court to rule that an action sounding in tort against a lawyer for fraud and negligence is governed by a one-year period of limitations.

IN THE

Supreme Court of Virginia

AT RICHMOND

Record No. 750876

GEORGE L. OLEYAR, JR.,
Appellant

v.

ELAINE W. KERR, Trustee for William F. Stone and Angelo Verdicanno, deceased, and Elaine W. Kerr, Individually.
Appellee

APPENDIX EXTRACT

John H. Johnston
SLENKER, BRANDT, JENNINGS & O'NEAL
1012 North Utah Street
Arlington, Virginia 22201

Counsel for Appellant

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

ELAINE W. KERR, as TRUSTEE for William F. Stone and Angelo Verdicanno (Deceased) and ELAINE W. KERR, Individually 310 Hillwood Avenue Falls Church, Virginia Plaintiffs	)	
v.	)	AT LAW NO. 24196
GEORGE L. OLEYAR, JR., ESQ. 2331 Dale Drive Falls Church, Virginia Defendant	)	

MOTION FOR JUDGMENT

COMES NOW, the Plaintiff as Trustee and the Plaintiff, Elaine W. Kerr, as an individual, and moves this Honorable Court for Judgment against the Defendant in the amounts of $16,000.00 with interest from November 9, 1970 and $10,000.00 attorneys fees and costs and for $200,000.00 in damages relating to negligence in examining title and encumbrances overlooked, and as grounds therefor respectfully state the following:

1. On November 20, 1968, Plaintiff as Trustee entered into a Sales Contract with Paul G. Ziluca and Louise L. Ziluca, his wife, herein referred to as "the Zilucas" wherein the "Zilucas" agreed to purchase from

said Plaintiff certain improved real property described as follows: Lot 78, Section 2, Potomac Hills, known as 6207 Loch Raven Drive, Potomac Hills, McLean, Virginia for the total purchase price of $62,500.00 which property the Plaintiff as Trustee (Vendor) assumed to own in fee clear and free of all money encumbrances excepting a First Deed of Trust in the remaining principal balance of $43,000.00 and a Second Deed of Trust in the amount $10,000.00 which the Plaintiff paid. Copy of Warranty Deeds with Plaintiff Trustee as Grantee and Grantor are attached hereto as Exhibits "A" and "B".

2. At all times hereinafter mentioned, Defendant was an attorney duly licensed under the laws of the Commonwealth of Virginia to practice the profession of law.

3. That on or about November 1, 1968, Defendant undertook for a consideration paid to him to examine the title of Plaintiff as Trustee, to said real property and to ascertain if said title was good and marketable, and whether any encumbrances existed thereon (over and above the First and Second Deed of Trust), and to cause an estate therein in fee simple, free and clear of all money encumbrances, excepting the said First and Second Deed of Trust to be conveyed to "the Zilucas", which defendant, for

compensation agreed to do. Defendant's Title Certificate, signed by Defendant is attached hereto as Exhibit "C".

4. The Defendant negligently, carelessly, and unskillfully conducted such examination of title, and did not use proper diligence or endeavors to cause a good and sufficient title in fee, clear of all money encumbrances, excepting as aforesaid, to be conveyed to "the Zilucas" by the Plaintiff as Trustee; but the said title was subject to an additional lien in the form of a Default Judgment entered in favor of Security National Bank of Bailey's Crossroads in the principal sum of $50,937.50 plus interest and attorneys' fees in the amount of $7,640.54 against Reynolds Construction Company, Grantor, of the real property involved, to Elaine W. Kerr, Trustee, as Grantee, which Default Judgment lien was docketed in the Circuit Court of Fairfax County, Virginia, on August 25, 1967 and October 4, 1967, copy of said Default Judgment is attached hereto as Exhibit "D".

5. As the proximate cause of the Defendant's negligence in examining the Title of the subject real property involved here, and overlooking the encumbrances recorded against the said property, the Plaintiff, individually, has suffered not only economic injury but injury to her health

as well. Defendant by the exercise of due care and skill could have discovered the said encumbrances in the form of the said recorded Default Judgment Lien against the subject property.

6. The Plaintiff, in addition to great mental anguish and humiliation suffered, has suffered professionally and to her reputation and credit standing affecting her ability to obtain credit causing great damage and loss economically and is hereby moving this Court for a Judgment against the defendant as follows:

(a) $16,000.00 plus interest from November 9, 1970 plus $10,000.00 attorneys fees, and Court costs and

(b) $200,000.00 for damages for injury suffered by the Plaintiff to her reputation and professional standing, the loss of credit standing and the mental anguish suffered because of the humiliation:

WHEREFORE, the Plaintiff prays this Honorable Court for a Judgment against the Defendant in the amount of $16,000.00 plus interest from November 9, 1970, plus $10,000.00 in attorneys fees, Court costs, and $200,000.00 for damages suffered as set forth above.

ELAINE W. KERR, as Trustee
for William F. Stone, and
Angelo Verdicanno (Deceased)
and ELAINE W. KERR, Indivi-
dually

the retainer account and a total balance due of %622.20 which was not paid.
That was rebilled on May 26, 1971, and was not paid and not further pursued.

Q. All right, sir. If I understand it then, you got a thousand dollar retainer from her and credited bills until that was done [sic] to a dollar; is that correct?
A. Well, we actually credited that dollar as well.

Q. All right. Then you sent her a final bill for $623 and some cents?
A. Yes. The final bill with the dollar credit that we had left in the retainer on the retainer was $622.20.

Q. All right.
A. So, in brief answer to the question, we billed her sixteen hundred and some odd dollars and she has paid a thousand dollars.

Q. Do you [sic] records reflect or does your recollection of that meeting reflect that she ever paid a retainer of $4,000.00?
A. No. My recollection is that she did not pay a retainer of $4,000.00. And that further is -- there's no $4,000.00 in the firm. That is the law firm did not receive $4,000.00 as far as the records of the firm are concerned.

****

Excerpt from Judge Cacheris' Ruling

[TR 231] But, nevertheless, to consider the issue in the case, whether or not Mr. Oleyar was negligent at the time he examined title to the property, the Court has to enter that on the basis of the affirmative.
The Court finds the proximate cause of the negligence was the $16,000 damage

compromise judgment that was granted against Mrs. Kerr, and will enter judgment for the 16,000 plus the 1622.22. So, it will be 16,622.22 [sic]. The defendant's exceptions are noted to the Court's ruling.

Present an order noting and preserving the defendant's exceptions to all rulings of the Court.

MR. THOMSON: Thank you, Your Honor.

MR. JOHNSTON: Thank you.

(Whereupon, at 6:25 p.m., the hearing in the above-entitled matter was concluded.)