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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 770982

CLAIRE BERNAU,
FORMERLY KNOWN AS CLAIRE NEALON,

.....Appellant

v.

JOSEPH P. NEALON, JR.,

.....Appellee

APPENDIX

Frederick M. Quayle, Esq.
825 UVB Building
Post Office Box 3553
Norfolk, Virginia 23514

Counsel for Appellant

FRED R. SURFACE & ASSOC. INC., HERITAGE BUILDING, RICHMOND, VA. (804) 643-7789

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MOTION FOR JUDGMENT

The undersigned, Claire Bernau, formerly known as Claire Nealon, hereby moves the Circuit Court of the City of Hampton for a judgment and an award of execution against the Defendant, Joseph P. Nealon, Jr., for the sum of Three Thousand Seven Hundred Thirty-Nine and 66/100 Dollars ($3,739.66), plus interest and the costs of these proceedings, due by reason of the following:

1. Plaintiff and Defendant were divorced by decree of this Court dated October 31, 1969, in a suit bearing the style, Claire B. Nealon vs. Joseph P. Nealon, Jr., In Chancery No. 8448.

2. On or about October 12, 1968, pursuant to the terms of a certain property settlement agreement entered into between the parties dated October 12, 1968, Defendant conveyed to Plaintiff all of his right, title and interest in and to certain real property located in the City of Hampton, Virginia, in which the parties had previously resided as husband and wife, which property is described as follows:

> All that certain lot, piece or parcel of land together with the improvements and appurtenances thereunto belonging or in anywise appertaining, located in the City of Hampton, Virginia, and known, designated and described as Lot Numbered Three (3) in Block "C", as shown on that certain plat entitled "Revised Plat, Cedar Park, Section One," made by R. F. Pyle, Certified Land Surveyor, dated June 12, 1959, and revised September 3, 1959, and recorded in Plat Book 4, page 47, in the Clerk's Office of the Circuit Court for the City of Hampton, Virginia.

3. On or about August 1, 1970, Defendant took possession of the property hereinbefore described under an alleged rental agreement with Plaintiff whereby Defendant was to make all payments on the two outstanding notes secured by deeds of trust on

said property, which payments included real estate taxes and hazard insurance premiums, as well as all payments for utilities and general upkeep.

4. Defendant resided in said residence and made the agreed payments until February, 1973, when Plaintiff refused Defendant's offer to convey said property to him. Thereafter, Defendant abandoned said property.

5. On or about May 6, 1974, Plaintiff conveyed said property to Joseph W. and Kathleen H. Weitz, for the sum of Thirty Thousand Dollars ($30,000.00), with net proceeds, after the payment of all outstanding indebtedness secured by said property and all expenses of said sale, of Twelve Thousand Eight Hundred Twenty-Six and 05/100 Dollars ($12,826.05).

6. From February, 1973, when Defendant abandoned said property, until May, 1974, when Plaintiff conveyed said property as aforesaid, Plaintiff made all payments on the two notes secured by deeds of trust on the property, which payments included real estate taxes, hazard insurance premiums, and all payments for utilities, which payments are as follows:

United Virginia Mortgage Corporation (First Deed of Trust)	$1,741.52
Cameron Brown Company (Second Deed of Trust)	1,081.15
Virginia Electric & Power Company	452.45
C & P Telephone Company	92.46
City of Hampton, Virginia - water	22.28
Hampton Roads Sanitation District	28.88
State Fidelity - termite contract	93.42
	$3,512.16

7. At the time of the sale set forth in paragraph 5 above, Plaintiff was caused to expend the sum of Two Hundred Twenty-Seven and 50/100 Dollars ($227.50) for repairs, et cetera, to said property in order that the sale could be consummated, said expenditures being as follows:

Handyman Services, repairs to house	$167.50
G. R. Owens, repairs to downspout	10.00
Harrison & Lear, VA appraisal	50.00
	$227.50

8. On or about April 6, 1973, Defendant filed a Bill of Complaint in this Court bearing the style, Joseph P. Nealon, Jr. vs. Claire B. Nealon, In Chancery No. 11735, said suit alleging that Plaintiff had agreed to convey the subject property to Defendant. Said suit was terminated on March 3, 1976, by decree of this Court awarding the proceeds from the sale of the subject property to Defendant. A Petition for Appeal filed by Plaintiff in the Supreme Court of Virginia was denied on October 15, 1976.

9. Plaintiff made all payments on the two notes secured by deeds of trust on the property, which payments included real estate taxes and hazard insurance premiums, all utility payments and payments for repairs to the property in order to effect its sale in the belief that she had a good and sufficient title to said property, which belief was a mistaken belief as evidenced by the ruling of this Court in the suit of Joseph P. Nealon, Jr. vs. Claire B. Nealon set forth above.

10. Defendant has been and presently is unjustly enriched by the sum of Three Thousand Seven Hundred Thirty-Nine and 66/100 Dollars ($3,739.66), which sums were mistakenly paid by

Plaintiff on his behalf and he has received the sole benefit therefrom, and Plaintiff is entitled to restitution.

11. Demand has been made by Plaintiff on Defendant for payment and restitution of this sum, but Defendant has failed and refused, and continues to fail and refuse, to pay the sums or any part thereof.

WHEREFORE, Plaintiff moves this Court for judgment against the Defendant for the sum of Three Thousand Seven Hundred Thirty-Nine and 66/100 Dollars ($3,739.66), with interest thereon and the costs of this proceeding.

Claire Bernau

By _____
Of Counsel

Frederick M. Quayle, p.q.
Wilkins and Quayle
825 United Virginia Bank Bldg.
Post Office Box 3441
Norfolk, Virginia 23514

Filed in the Clerk's Office 22 day Nov. 1976
Writ Tax 5.00
Fee 15.00
Deposit 208 1.00
Total Paid 21.00
C. Rogers D. C.

PLEA OF RES ADJUDICATA

The Defendant comes and says that the Plaintiff may not maintain this action against the Defendant because in a chancery suit hereto fore instituted and adjudicated in the Circuit Court for the City of Hampton, Virginia, Part I, wherein the Plaintiff herein was the Defendant and the Defendant herein was the Plaintiff, all issues asserted as the basis of the Plaintiff's claim herein were adjudicated or should have been adjudicated with a final judgment rendered in favor of the Defendant herein by a Decree entered on March 3, 1976 (Chancery No. 11735), a copy of which is attached hereto and to be read as a part hereof.

WHEREFORE, the Defendant says that the matters in issue in this suit have already been adjudicated.

And this he is ready to verify.

JOSEPH P. NEALON, JR.

By _____
Counsel

I certify that on this 10th day of December, 1976, I mailed a true copy of the foregoing pleading to Frederick M. Quayle, Attorney for the Plaintiff, at P.O. Box 3441, Norfolk, Virginia 23514.

_____
Eugene M. Jordan

Eugene M. Jordan, p.d.
Attorney at Law
One East Mellen Street
Hampton, Virginia 23663

FINAL DECREE

This cause came on this day to be heard upon the Bill of Complaint duly filed and service upon the Defendant, upon the Defendant's answer, upon evidence taken on behalf of both parties before the Commissioner in Chancery who filed his report together with depositions and exhibits, upon the Complainant's Exceptions to the Report of the Commissioner in Chancery, and upon the Complainant's Petition to Re-Hear and evidence heard ore tenus by this Court on the Re-hearing, and was argued by Counsel.

WHEREUPON, it appearing to the Court at the time that arguments were had upon the Exceptions to the Commissioner in Chancery's Report that the said report should be confirmed, however, upon hearing the Complainant's evidence on his Petition to Re-Hear, which evidence was bona fide after-discovered evidence, the Court was then of the opinion that the Complainant had proved his allegations in the Bill of Complaint.

It further appearing to the Court at the time of the hearing on the Petition to Re-Hear that the Defendant should have the opportunity to present any further evidence in this cause, however, the Defendant, by Counsel, stated to the Court that no continuance was desired and that no further evidence would be presented on behalf of the Defendant.

UPON CONSIDERATION WHEREOF, it is ADJUDGED, ORDERED and DECREED that the Exceptions filed in this cause by the Complainant be sustained.

It further appearing to the Court, independently of the pleadings or otherwise, that there was an agreement between the parties that the Defendant would reconvey to the Complainant certain property owned by the Defendant

in the City of Hampton, Virginia, which property is described as Lot 3 in Block C on a certain plat entitled,"Revised Plat, Cedar Park, Section One," recorded in the Clerk's Office of this Court in Plat Book 4 at page 47, and presently numbered 10 Plantation Drive, Hampton, Virginia; that said property was sold on or about May 6, 1974, and the proceeds therefrom were deposited in escrow in the Newport News Savings and Loan Association, Hampton, Virginia, in Account No. 70967-3; and that the Complainant is entitled to the proceeds from said sale.

It is therefore further ADJUDGED, ORDERED and DECREED that the Complainant, Joseph P. Nealon, Jr., be and he hereby is awarded the proceeds from the sale of the property known as 10 Plantation Drive, Hampton, Virginia, and that the said Newport News Savings and Loan Association, Hampton, Virginia, be and they hereby are directed to pay to Eugene M. Jordan, attorney for Joseph P. Nealon, Jr., the balance of Account No. 70967-3, including accrued interest, and that the Complainant [redacted] be required to pay all taxable court costs of this proceeding, including a commissioner's fee of $750.00 to Gorin F. Hatchett, Esquire, Commissioner in Chancery, for his services rendered herein, and the cost of depositions taken at the Commissioner's hearing on June 18, 1975, and the Complainant be required to pay the cost of the depositions at the Commissioner's hearing on September 23, 1975, to all of which action of the Court the Defendant duly objects and excepts.

Enter this Decree this 3d [redacted] day of [redacted] March, 1976, [redacted]

Judge

GROUNDS OF DEFENSE

The Defendant comes by way of this his Grounds of Defense to the Motion for Judgment herein filed and says:

1. The Defendant denies that he is indebted to the Plaintiff in any amount whatsoever and more particularly for the amount set forth in the Motion for Judgment.

2. That all issues between the parties relative to the said real estate in Hampton, Virginia, have been formerly adjudicated in this Court with the final decree entered in Chancery Cause #11735.

3. The Defendant prays that this cause be dismissed with prejudice to the Plaintiff.

COUNTER CLAIM

The Defendant, Joseph P. Nealon, Jr., comes by way of this Counter Claim against the Plaintiff and states:

1. That if this Court is of the opinion that a cause of action lies against this Defendant, then he desires to pursue a counter claim as hereinafter set forth.

2. That this Defendant prevailed in the chancery suit in this Court under the style of Joseph P. Nealon, Jr. v. Claire B. Nealon, Chancery No. 11735, wherein it was determined he was the owner of the real estate which is described in the Plaintiff's Motion for Judgment.

3. That the Plaintiff refused to comply with the terms of a valid contract to transfer the said real estate to the Defendant which resulted in great expense to the Plaintiff.

4. That all of the expenses incurred by the Plaintiff are listed as follows:

Commissioner's Fee	$ 750.00
Filing Suit	32.25
Service Process	2.50
Filing Lis Pendens	8.00
Depositions	316.35
Attorney Fee	4,900.00
	$ 6,009.10

5. That all of the aforesaid expenses were directly attributable to the Plaintiff's willful and intentional failure to comply with the terms of a binding contract between the parties.

THEREFORE, the Defendant asks judgment at the hands of this Court in this his Counter Claim in the sum of $6,009.10, together with legal interest from March 3, 1976.

Respectfully submitted,

JOSEPH P. NEALON, JR.

By _____
Counsel

I certify that on this 21st day of December, 1976, I mailed a true and correct copy of the foregoing pleadings to Frederick M. Quayle, Attorney for the Plaintiff, at P.O. Box 3441, Norfolk, Virginia, 23514

_____
Eugene M. Jordan

Eugene M. Jordan, p.d.
Attorney at Law
One East Mellen Street
Hampton, Virginia 23663

D E M U R R E R

Now comes the Plaintiff, Claire Bernau, and says that the Counterclaim filed herein by the Defendant, Joseph P. Nealon, Jr., is not sufficient in law.

CLAIRE BERNAU

By _____
Of Counsel

Frederick M. Quayle, p.q.
Wilkins and Quayle
825 United Virginia Bank Bldg.
Post Office Box 3553
Norfolk, Virginia 23514

I certify that on the 10th day of January, 1977, a true copy of the foregoing Demurrer was mailed to Eugene M. Jordan, Esquire, attorney for Defendant, One East Mellen Street, Hampton, Virginia 23663.

_____
Frederick M. Quayle

C. M. GIBSON, CLERK
1977 JAN 11 AM 10:32

GROUNDS OF DEFENSE TO COUNTERCLAIM

Now comes the Plaintiff, Claire Bernau, and for her Grounds of Defense to the Counterclaim filed herein by the Defendant, Joseph P. Nealon, Jr., states as follows:

1. That Paragraph 1 of the Counterclaim calls for no response from the Plaintiff.

2. That the Plaintiff admits the allegations of Paragraph 2 of the Counterclaim filed herein.

3. That the Plaintiff denies the allegations of Paragraph 3 of the Counterclaim filed herein.

4. That the Plaintiff has no knowledge of the expenses incurred by the Defendant, if any, and demands strict proof thereof.

5. That the Plaintiff denies the allegations of Paragraph 5 of the Counterclaim filed herein.

6. That the Plaintiff denies that she is indebted to the Defendant in any sum whatsoever.

WHEREFORE, the Plaintiff having fully answered the Counterclaim filed herein prays that said Counterclaim be dismissed with prejudice to the Defendant.

CLAIRE BERNAU

By _____
Of Counsel

Frederick M. Quayle, p.q.
Wilkins and Quayle
825 United Virginia Bank Bldg.
Post Office Box 3553
Norfolk, Virginia 23514

I certify that on the 10th day of January, 1977, a true copy of the foregoing Demurrer was mailed to Eugene M. Jordan, Esquire, attorney for Defendant, One East Mellen Street, Hampton, Virginia 23663.

_____
Frederick M. Quayle

ORDER

This cause came on this day to be heard upon the Defendant's Plea of Res Adjudicata, both parties having been represented by Counsel, and was argued by Counsel.

WHEREUPON, it appearing to the Court that the issues raised by the Motion for Judgment in this cause were the same that were submitted or might have been submitted in previous litigation between the same parties in this Court in the Chancery suit of Joseph P. Nealon, Jr. v. Claire B. Nealon, Chancery #11735, which said chancery suit has been determined by a decree entered therein on March 3, 1976. Therefore, the Court is of the opinion that the Plea of Res Adjudicata should be sustained and the Plaintiff's Motion for Judgment be dismissed.

NOW, THEREFORE, it is ADJUDGED, ORDERED and DECREED that the Plaintiff's Motion for Judgment in this cause be dismissed.

Enter this Order this 15th day of March, 1977.

Judge

I Ask for This:

p.d.

I Object and Note Exception Thereto:

p.q.

Eugene M. Jordan, p.d.
Attorney at Law
One East Mellen Street
Hampton, Virginia 23663

ORDER

This cause came on this day to be heard upon the Defendant's Motion to take a voluntarily non suit to the Counter Claim filed in this cause to which Motion the Plaintiff by Counsel does not object. Therefore, it is ADJUDGED, ORDERED and DECREED that the Defendant's Counter-Claim is non-suited.

Enter this Order this 15 day of March, 1977.

Judge

p.q.

p.d.

Eugene M. Jordan
Attorney at Law
One East Mellen Street
Hampton, Virginia 23663

NOTICE OF APPEAL

The Plaintiff, Claire Bernau, hereby files with the Clerk, pursuant to the provisions of Rule 5:6 of the Rules of the Supreme Court of Virginia, a Notice of Appeal from the final decree entered herein March 15, 1977, sustaining Defendant's Plea of Res Adjudicata and dismissing Plaintiff's Motion for Judgment.

No transcript or statement of facts, testimony, or other incidents of the case are to be hereafter filed.

CLAIRE BERNAU,
FORMERLY KNOWN AS CLAIRE NEALON,

By _____
Of Counsel

Frederick M. Quayle, p.q.
WILKINS AND QUAYLE
825 United Virginia Bank Bldg.
Post Office Box 3441
Norfolk, Virginia 23514

I certify that on the 5TH day of April, 1977, a true copy of the foregoing Notice of Appeal was mailed to Eugene M. Jordan, Esquire, Attorney for Defendant, One East Mellen Street, Hampton, Virginia 23663.

_____
Frederick M. Quayle