223 Va. 59

CLERK
OF COURT OF
JAN 25 1980
RECEIVED
RICHMOND, VIRGINIA

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

RECORD NOS. 79-802, 79-1340

LAWRENCE P. LATAIF

Appellant

Versus

COMMERCIAL INDUSTRIAL CONSTRUCTION, INC.,

DOUGLAS COBB,

LAURENCE O. MYERS

Appellees

APPENDIX

Peter L. Sissman
Attorney for Appellant
2305 Wilson Boulevard
Arlington, Virginia 22201
Telephone: (703) 522-2220

VOLUME II OF II

1 THE COURT: -- Commercial Industrial.

2 MR. SISSMAN: Well, that --

3 MR. ECHOLS: This would be a matter for trial on

4 May 22nd, if Mr. Sissman wants to pursue it.

5 THE COURT: All right. If this, indeed, is an open

6 question on the facts that hasn't been tried. I thought that

7 was behind you all.

8 MR. ECHOLS: There's a sworn answer that Cobb

9 individually never employed Mr. Myers. I'd be happy to put

10 Mr. Myers under oath and he could testify to that.

11 MR. SISSMAN: I think so, and I'm also con-

12 cerned in putting this case in the proper posture for

13 appeal. Either, I don't know how to treat this, whether to

14 have --

15 THE COURT: That's why I raised the question at

16 the beginning as to who was the moving party and how you

17 framed these issues. Indeed, if you've agreed to try this

18 case in two steps, bifurcating it as you say, then I suppose

19 you can take a judgment only as to Commercial Industrial

20 today, leaving the rest of it for future determination.

21 MR. ECHOLS: This was our understanding, Your

22 Honor. Today was to try to see if they could convince the

23 Court that this assignment was good against Commercial

1 Industrial Construction, Inc. when Mr. Sissman calls it
2 the misnomer question, and that was set for today.
3 MR. SISSMAN: You'll enter judgment today and
4 we'll --
5 THE COURT: I'll enter judgment today as to that
6 Defendant. The case then would remain pending as to Mr.
7 Cobb, and you all can resolve that on the day that you al-
8 ready have set for trial or any other time.
9 MR. SISSMAN: Thank you, Your Honor. Excuse me.
10 Your indulgence?
11 (Whereupon, remarks were made off the record.)
12 MR. SISSMAN: Your Honor, one suggestion. Rather
13 than bifurcate things, if Your Honor's heard the evidence,
14 but if you could enter the judgment for the Defendant
15 Commercial, the corporate Defendant here on the trial date,
16 if then there was an appeal it could all go up at once. And
17 you know the feeling of the appellate courts on final
18 amount of judgments and not taking them in pieces. Would the
19 Court be amenable to that?
20 In other words, you've heard the evidence.
21 You've made your ruling, but enter judgment on trial date.
22 THE COURT: Could you all get this matter of
23 Mr. Cobb's responsibility straightened out? If you can do

1 that on an earlier date, don't you have some discovery in
2 the case?
3 MR. SISSMAN: There is some discovery, and I
4 think Mr. Echols is correct when he said that Cobb denied
5 owing money personally. On the other hand, we do have the
6 evidence this morning when Cobb said, "I will pay. We
7 owe him the money," and that sort of thing.
8 I think that raises some questions. If they're
9 correct that Commercial Industries, if the corporate
10 Defendant is not liable and Cobb is admitting liability, I
11 think we have some --
12 THE COURT: Without trying to pass on any of
13 that today, I have heard all of the background on it. So
14 it shouldn't take long to present that question. And I
15 don't know why you couldn't present that on a Friday and
16 get a ruling on that within the next week or two.
17 MR. SISSMAN: I don't think so, Your Honor. I
18 think we're going to need some more discovery.
19 MR. HYMAN: Your Honor, may I say on this point
20 what Mr. Sissman is saying is that Mr. Cobb is liable for
21 the debt of the third party because of a parol promise.
22 And, of course, that's simply contrary to law. He can't be
23 liable on that basis. That is the statute of fraud or

1 written agreement in such a situation. So I don't quite
2 know what we're talking about.
3 If we assume Mr. Cobb's answer is a correct
4 answer, and I'm sure it is, that he had no personal obliga-
5 tion --
6 THE COURT: Well, certainly the Plaintiff isn't
7 bound to accept your answer.
8 MR. HYMAN: No, I understand that. But I
9 thought he had. But I thought he had. Now, I take it
10 we're talking about estoppel on the basis of a --
11 THE COURT: I'd be reluctant to defer the entry
12 of an order simply because it puts a burden on me to remem-
13 ber this thing in May or whatever. And, besides, I expect
14 to be here but I might be hit by a truck between now and
15 then and then we'd have to try it all over again.
16 So I think it would be better if you took a
17 judgment on this at this time.
18 MR. ECHOLS: Your Honor, I'm not sure that's a,
19 is that a final, that's not a final disposition of the entire
20 case. And I don't, well, you know your appeal rules.
21 MR.SISSMAN: I wouldn't count on that.
22 MR. ECHOLS: I'm not going to suggest them to
23 you.

1 MR. SISSMAN: I guess one thing is that per-
2 haps the Court will reconsider, if you would, if you didn't
3 object to judgment being entered on the trial date. Maybe
4 the Court would take that into consideration.
5 MR. ECHOLS: Well, that's -- March, April --
6 that's two and two-thirds months, and I don't think that's
7 very sound. I'd like to get an order on this.
8 MR. SISSMAN: Very well.
9 MR. ECHOLS: But we can say --
10 THE COURT: To protect yourself, Mr. Sissman,
11 I suppose you could always file a notice of appeal right
12 away. And then you have four months to file your petition,
13 as I remember, or is it down to three?
14 MR. ECHOLS: I believe it's down to three now,
15 Your Honor. Nothing stays the same any more.
16 THE COURT: It's been a long time since I've
17 been in the appeal business.
18 MR. SISSMAN: Could I have your indulgence one
19 minute, Your Honor?
20 THE COURT: Yes.
21 MR. SISSMAN: Your Honor, if another -- I mean,
22 I don't mean to belabor the point here and apologize. But
23 another reason for possibly deferring judgment would be that

1 if in discovery we find ostensibly a substantial corporate
2 veil problem; that is, it turns out that Cobb's relationship
3 with his corporation and the relationship with Myers was
4 not truly a, well, essentially a corporate veil problem
5 and we pierce the corporate veil, it seems to me you might
6 want to reconsider the whole issue.
7 I'm not sure you want to let the corporate
8 Defendant out when they're that intermingled. And it seems
9 to me -- matter of fact, there is a pretty good reason for
10 your hearing the case. I think we need to do more dis-
11 covery in light of what's happened today.
12 MR. ECHOLS: This came on on Judge Duff's re-
13 cital from the bench what was going to be tried today,
14 by heaven. And it's been tried today, and it's over. I
15 don't know what this is all about.
16 THE COURT: I'll just have to leave that to
17 counsel. If you want to present an order of judgment, I'll
18 sign it. If you can work something --
19 MR. SISSMAN: Thank you, Your Honor.
20 (Whereupon, at 12:20 p.m. the hearing was con-
21 cluded.)
22 - - -
23

LAWRENCE P. LATAIF
ATTORNEY AND COUNSELOR AT LAW

TELEPHONE
703/527-7750

SUITE 407
COURT SQUARE WEST BUILDING
1400 NORTH UHLE STREET
ARLINGTON, VIRGINIA 22201

EXHIBIT 1

June 18, 1976

ASSIGNMENT OF WAGES AND MONEY DUE

For value received, I hereby assign to LAWRENCE P. LATAIF, ESQUIRE, the sum of $3,500.00 which is due and payable to the said LAWRENCE P. LATAIF from any and all salary and wages, draws, commissions or monies due to me from COMMERCIAL INDUSTRIES, INC. and/or DOUG COBB as a result of my employment with the said COMMERCIAL INDUSTRIES, INC. and/or MR. DOUG COBB; and I hereby further authorize the said LAWRENCE P. LATAIF to prosecute in his name or otherwise, any proceedings for the collection of this debt.

I further authorize and direct the said COMMERCIAL INDUSTRIES, INC. and/or MR. DOUG COBB, to make payment of the aforesaid wages directly to LAWRENCE P. LATAIF, Suite 407, 1400 North Uhle Street, Arlington, Virginia 22201 .

Signed this 18 day of June , 1976.

Laurence O Myers LEH.
L.E.M., INC.
Laurence O. Myers, President

Laurence O Myers
LAURENCE O. MYERS, individually

SUBSCRIBED AND SWORN to before me this 18th day of June, 1976.

Lisa A. Pascoal
Notary Public
State of Virginia at Large

My commission expires: November 20, 1979

LAWRENCE P. LATAIF
ATTORNEY AND COUNSELOR AT LAW

TELEPHONE
703/527-7750

SUITE 407
COURT SQUARE WEST BUILDING
1400 NORTH UHLE STREET
ARLINGTON, VIRGINIA 22201

EXHIBIT 2

July 12, 1976

Mr. Doug Cobb
Post Office Box 108
Great Falls, Virginia 22066

Dear Mr. Cobb:

As we discussed by telephone today, I am enclosing herein a copy of the Assignment executed by Larry Myers.

I greatly appreciate your willingness to accept this Assignment and disburse the amount due directly to me.

In the event that Larry's next draw is for less than $3,500.00, I would be more than willing to accept half of it and of future draws until the total of $3,500.00 has been paid. In this fashion, Larry would have some part of the draw to tide him over.

I have been working with Larry for many months on some business matters and I think you will agree that he is a fine man and a very hard worker. I am convinced that any financial difficulty he is presently experiencing will be short-lived and that he will be back in his usual sound financial footing in the very near future.

Thanks again for your cooperation in this matter.

Sincerely yours,

LAWRENCE P. LATAIF

LPL:ldp
Enclosure: Authorization
cc: Larry Myers

L.E.M.

PS Form 3811, Jan. 1975

RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED

SENDER: Complete items 1, 2, and 3.
Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).

- [x] Show to whom and date delivered..... 15¢
- [ ] Show to whom, date, & address of delivery.. 35¢
- [ ] RESTRICTED DELIVERY.
  Show to whom and date delivered..... 65¢
- [ ] RESTRICTED DELIVERY.
  Show to whom, date, and address of delivery 85¢

2. ARTICLE ADDRESSED TO:

Doug Cobb
Post Office Box 108
Great Falls, Va. 22066

3. ARTICLE DESCRIPTION:

REGISTERED NO.	CERTIFIED NO.	INSURED NO.
,	774290	

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE [ ] Addressee [x] Authorized agent

John W. Hartsdiel

4. DATE OF DELIVERY
7-14-76

POSTMARK
GREAT FALLS
JUL 14 1976

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE:

LAWRENCE P. LATAIF
ATTORNEY AND COUNSELOR AT LAW

TELEPHONE
703/527-7750

SUITE 407
COURT SQUARE WEST BUILDING
1400 NORTH UHLE STREET
ARLINGTON, VIRGINIA 22201

EXHIBIT 3

August 5, 1976

MEMO
TO: FILES
FROM: LARRY
RE: LARRY MYERS

On Thursday, August 5, 1976, I spoke to Doug Cobb by phone. He indicated that the post office job had been completed and that he received Larry Myer's final bill htis morning.

Cobb indicated that he would be in a position to disburse money to Larry towards the end of next week. He indicated that he would take care of me and insure that the amount of the Assignment would be disbursed separately to me and a check made payable either to me or to me and Larry Myers jointly. He states he would make a separate check for the balance due to Larry payable to Larry only so that Larry would have some funds available without the necessity of my signing the check.

I suggested that he make my check payable to me directly and solely and note on the bottom of it that it was for Larry Myers. He indicated that this was a good idea and would do it.

LAWRENCE P. LATAIF
ATTORNEY AND COUNSELOR AT LAW

TELEPHONE
703/527.7750

SUITE 407
COURT SQUARE WEST BUILDING
1400 NORTH UHLE STREET
ARLINGTON, VIRGINIA 22201

EXHIBIT 4

September 7, 1976

Mr. Doug Cobb
Post Office Box 108
Great Falls, Virginia 22066

Dear Mr. Cobb:

Since our last telephone conversation on Monday, July 12, 1976, I have, as you requested, been waiting for payment from you on behalf of Larry Myers.

You indicated on that occasion that you were expecting approximately $7,000.00 for Mr. Myers and that you would disburse to me the amount of the assignment which you accepted some time ago.

As I mentioned to you over the phone, I have held off taking any other action to collect this fee because of your kind agreement to disburse the funds in accordance with the assignment.

I would appreciate knowing how things stand if payment will not be forthcoming during the month of September.

Sincerely yours,

Lawrence Lataif
LAWRENCE P. LATAIF

LPL:ldp
certified mail; return receipt requested

Dear MR. LATAIF,

LARRY Myers indicated the account had been settled and we paid him, in full, on 13 August 1976. I had, and have, complete faith in Mr Myers and assumed you two were in agreement.

Sincerely
Doug Cobb

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

LAWRENCE P. LATAIF, Plaintiff,	)	
vs.	)	AT LAW NO. 19113
COMMERCIAL INDUSTRIAL CONSTRUCTION, INC., et al, Defendants.	)	

Recorded in Circuit Court Order Book 171 Page 638 February 28 1979

JUDGMENT ORDER

THIS CASE came on to be heard the 5th day of February, 1979, before the Court without a jury on the issue raised by the Defendants' second ground of defense as stated in their Amended Answer and Grounds for Defense, and upon the testimony of the Plaintiff and his exhibits and the Clerk's Charter Books exhibited to the Court by Defendants and was argued by Counsel, and,

IT APPEARING to the Court for the reasons stated from the bench that Plaintiff may not recover from Commercial Industrial Construction, Inc., and therefore judgment should be granted for the corporate Defendant as to the claim against it, upon consideration of which it is

ADJUDGED, ORDERED and DECREED that judgment be, and hereby is, granted in favor of Commercial Industrial Construction, Inc., and this order is a final order to such Defendant, and

THIS CASE is continued until 10:00 a.m. on May 22, 1979, for trial on any remaining issues.

ENTERED this 28th day of February, 1979.

Charles S. Russell
JUDGE

WE ASK FOR THIS:

Echols & Hyman

By: _____
Counsel for Defendants Cobb
and Commercial Industrial
Construction, Inc.

SEEN AND EXCEPTED TO:

_____
Peter L. Sissman
Counsel for Plaintiff
2305 Wilson Boulevard
Arlington, Virginia 22201
(703) 522-2220

SEEN:

Linda Thomas
Linda Thomas
Counsel for Laurence Myers

Recorded in Common Law Order Book
Civil Docket No. 17 639
on February 25 19 21

ORDER

THIS CASE came on to be heard on the motions calendar March 16, 1979, pursuant to notice and motion of the Defendants to quash a subpoena hitherto served on Commercial Industrial Construction, Inc., and, on the motion made in open court by the Plaintiff for reconsideration of the order entered in this case February 28, 1979, and was argued by counsel; and

IT APPEARING TO THE COURT that the order entered February 28, 1979, correctly states the issue tried and the judgment rendered in furtherance of the hearing of February 5, 1979, and ought not to be disturbed; and that the motion of the corporate Defendant to quash the subpoena is well taken and ought to be granted, upon consideration of which it is

ADJUDGED, ORDERED AND DECREED that the motion to reconsider the judgment order entered February 28, 1979, and for the entry of a different order be, and the same hereby is, denied, and

IT IS FURTHER ADJUDGED, ORDERED AND DECREED that the subpoena duces tecum hitherto served on Defendant Commercial

Recorded in Order Book
Civil No. 50
On March 23rd, 1979

Industrial Construction, Inc., pursuant to Plaintiff's request to the Clerk of, on, or about February 28, 1979, be, and it hereby is, quashed, and

THIS CASE is continued as before until 10 o'clock a.m., on May 22, 1979, for trial on any remaining issues.

ENTERED this 25th day of March 1979.

Charles S. Russell, Judge

WE ASK FOR THIS:

Echols & Hyman

By: _____
Counsel for Defendants Cobb and Commercial Industrial Construction, Inc.

SEEN AND EXCEPTED TO:

_____
Peter L. Sissman
Counsel for Plaintiff
2305 Wilson Boulevard
Arlington, Virginia 22201

SEEN:

Linda Thomas
Linda Thomas
Counsel for Laurence Myers

JUDICIAL ADMISSIONS

INTERROGATORIES AND ANSWERS

(DEFENDANT COBB)

Interrogatory 2:

Please state:

(a) The name and address of your employer.

(b) The amount of time that you have been employed by the above employer.

(c) The name, address and telephone number of your immediate supervisor.

Answer 2:

(a). Commercial Industrial Construction, Inc., P.O. Box 108, Great Falls, Virginia.

(b). I am the Chief Executive Officer and have been since the corporation was formed in 1969.

(c). Not applicable.

Interrogatory 3:

Please describe in detail your relationship with Commercial Industries, Inc., and Restaurant Equities, Inc.

Please include in your answer the length of time that you have been associated with each of the two entities, the position that you held with them, whether you own stock in either of the entities, whether you are an officer or director of the two entities or have ever been so and any other aspects of your relationships with the entities.

Answer 3:

I have no connection with the companies mentioned.

Interrogatory 6:

Prior to August 5, 1976, or any other time prior to disbursement to Laurence O. Myers or L.E.M., Inc., were you aware that both Laurence O. Myers and L.E.M., Inc. had executed an assignment of monies due from you and/or Commercial Industries, Inc., in the amount of $3,500.00? If so, please explain the circumstances in detail.

Answer 6:

I received a paper purporting to be such an Assignment. I understood that Mr. Myers was indebted to Mr. Lataif. Mr. Myers later informed me that he had cleaned up the matter. Since the Assignment did not mention Commercial Industrial Construction, Inc., and since Mr. Myers had represented that Mr. Lataif had been paid, there was no reason to direct Commercial Industrial Construction, Inc. to hold up his money at the time he did the work for that company.

REQUEST FOR ADMISSIONS

(DEFENDANT COBB)

Request for admissions #1 into evidence:

That each of the following statements is true:

On July 12, 1976, defendant, Douglas Cobb accepted an assignment by Laurence O. Myers and/or L.E.M., Inc. in favor of Lawrence P. Lataif in the amount of $3,500.00.

Answer to request for admissions #1:

The first statement is denied but he admits that he did received in the mail a certain paper purporting to be an Assignment.

V I R G I N I A:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

LAWRENCE P. LATAIF, Plaintiff,	
-vs-	AT LAW NO. 19113
RESTAURANT EQUITIES, INC., and DOUGLAS COBB, Defendants.	

Arlington, Virginia

May 22, 1979

The above-entitled matter came on to be heard before the Honorable Charles J. Russell in the Circuit Court of Arlington County, Virginia, on the 22nd day of May, 1979, in Arlington, Virginia, commencing at approximately 10:20 o'clock a.m.

1 APPEARANCES:

2 FOR THE PLAINTIFF:

3 PETER L. SISSMAN, ESQUIRE
4 2305 Wilson Boulevard
Arlington, Virginia 22200

5 FOR THE DEFENDANT MYERS:

6 LINDA S. THOMAS, ATTORNEY
7 1439 Courthouse Road
Arlington, Virginia 22200

8 FOR THE DEFENDANT COBB:

9 M. PATTON ECHOLS, JR., ESQUIRE
10 Echlos & Hyman
1419 North Courthouse Road
Arlington, Virginia 22200

11

12

13 C O N T E N T S

WITNESS:	DIRECT:	CROSS:	REDIRECT:
DOUGLAS COBB	19	--	--

14

15

16

17 E X H I B I T S

NUMBER:	IDENTIFICATION:	EVIDENCE:
(None.)		

18

19

20

21

22

23

1 P R O C E E D I N G S

2 (Whereupon, the Court Reporter was sworn after
3 which the witness was sworn, and the following proceedings
4 occurred:)

5 MR. SISSMAN: May we approach the Bench, Your Honor?

6 THE COURT: Yes.

7 MR. SISSMAN: I notice there is a jury panel in
8 here, and they are not connected with this case. And I was
9 wondering, Mr. Lataif, the plaintiff, is a practicing attorney
10 and may, in fact, appear before this panel. And I think
11 it would otherwise be useful if the panel would be excused
12 from this room.

13 THE COURT: No other place to put them. They are
14 deliberately being kept out of the other rooms. We have
15 no open jury waiting rooms. So, since they are not connected
16 with this case, there isn't any other place to put them.

17 MR. SISSMAN: Very well, Your Honor. Thank you.

18 THE COURT: All right, Mr. Sissman.

19 MR. SISSMAN: Thank you, Your Honor. I had filed a
20 motion for summary of judgment, and Ms. Thomas was unavailable
21 for it. And at her suggestion, we continued it until today.
22 And so I would think the appropriate thing to do would be to
23 take up that matter right now. I think that will simplify the

1 burden.

2 THE COURT: All right.

3 MR. SISSMAN: Your Honor, I filed a motion for summary
4 judgment. I think that it really sounds by way of plea in
5 bar. I would show Counsel a triple seal document from the
6 United States District Court from the Eastern District of
7 Virginia which are proceedings in bankruptcy. And I have
8 them all together, and I am not going to disentangle them
9 now, because if this case goes to trial, I will resubmit
10 them.

11 But, essentially, what I am going to show the Court
12 is the top document which is a discharge in bankruptcy for
13 the third party defendant and the counterclaimant, Lawrence
14 Myers. And Your Honor is probably overwhelmingly familiar
15 with this case.

16 So to recount it in the briefest terms, as you know,
17 Mr. Lataif is here today suing Mr. Cobb. Mr. Cobb out of
18 a matter that arose in August of 1976 when Mr. Cobb paid off
19 money or money was paid off that Mr. Lataif claims should
20 have gone to him was paid to Mr. Myers.

21 In, I believe it is in late '76, in December of
22 '76 at least it was signed, a petition in bankruptcy was filed
23 by '76 or early '77. A petition was filed by Mr. Myers in

1 bankruptcy, and it was for filing this charge in 1978. In
2 any event, Mr. Cobb who is being sued by Mr. Lataif cross-claimed
3 against Mr. Myers for this debt that precedes the filing of
4 bankruptcy.
5 And in return, Mr. Myers has sued to rescind the
6 assignment given Mr. Lataif. I would submit that now, if I
7 may. Now, I might add for the record that document is under
8 triple seal.
9 THE COURT: All right.
10 MR. SISSMAN: Then although I don't think it's
11 really required for this motion but I might as well put it
12 in. In page 97 of Mr. Myer's deposition that we took, on line
13 14, the question by me is,"Question: Did you give Mr. Cobb
14 notice of this bankruptcy? Answer: Afterwards. After I
15 took it out. Question: When you say quote 'took it out' close
16 quote, before you were discharged? Answer: Yeah. I called
17 Mr. Cobb. No. He called me to tell me Mr. Lataif was suing
18 me, and I told him that I had taken out bankruptcy."
19 So, it is clear that -- well, Mr. Cobb had notice,
20 but also the burden of proof once we show bankruptcy of the
21 preexisting debt, then it is presumed that all debts are
22 discharged and the burden shifts. But I think there is notice
23 here. There is evidence and undisputed.

1 Now, the legal effect of these facts are this:
2 Number one, Mr. Cobb doesn't -- his cross-claim against Mr.
3 Myers was effectively discharged by the bankruptcy. And if
4 that has any effect on the cross-claim, on the counterclaim
5 against Mr. Lataif, which is all I am concerned with, then
6 it cannot arise out of that cross-claim. Because that was
7 discharged once the final discharge of bankruptcy was granted
8 as to debts, you know, prior to the filing of the bankruptcy.
9 Secondly, and really more importantly, once Mr.
10 Myers filed bankruptcy, his assets, if any, went to the
11 trustee in bankruptcy. And they aren't his anymore. And
12 any claims or any rights, any claims or choses in action
13 transferred to the trustee in bankruptcy.
14 So if he had a right to rescind, again, I don't
15 think he did under the circumstances. And we are not going
16 to the merits of whether he did. But if he did, and of course
17 he says on the schedules that he didn't which may be a
18 binding to judicial admission, but if he did, it passed to
19 the trustee. And he has no right to rescind against Mr.
20 Lataif. Now it's not his assignment any longer.
21 I think the fairness of it, that's the law. And
22 incidentally, I have here, I can cite you Section 17 in the
23 bankruptcy act. I believe it's A-3. I have the -- there is

1 no specific on this, but on some of these matters if you want
2 to examine it. The equities of it are clear.
3 Mr. Lataif was owed money by Mr. Myers. There is no
4 question of discharging of bankruptcy. We are not claiming
5 that. However, it really isn't fair to let him come in now
6 and take back the assignment. Mr. Lataif can't litigate on
7 alternative ways of collecting the money on the note we had
8 or anything like that. Because he has been discharged.
9 But he should have lost his right to take back the assignment.
10 THE COURT: I am not sure that I am following you
11 entirely, Mr. Sissman. Because this file has been all torn
12 apart for the purposes of appeal. I looked through it last
13 night, and I couldn't find anything.
14 Now, what has Mr. Myers done with respect to the
15 assignment? And what effect does that have? It is my under-
16 standing that in this proceeding this morning, you are proceeding
17 directly against Mr. Cobb on the theory of estoppel.
18 MR. SISSMAN: Yes. That's what we are doing.
19 THE COURT: So what would the effect of a rescission
20 of the purport of assignment have? What difference would it
21 make?
22 MR. SISSMAN: Well, we are doing some other things
23 this morning as I understand it. We are here for trial on the

1 whole shooting match. Well, we are just here to on the estoppel,
2 on the assignment and the estoppel theory.
3 THE COURT: What else remains?
4 MR. SISSMAN: Okay. As I understand it, Mr. Cobb is
5 cross-claiming against Mr. Myers saying that if I owe, then
6 you owe. And Mr. Myers -- I warned you about this, Your Honor.
7 I said don't let them come in. You will be sorry. But that's
8 why we are here. It's not that I didn't oppose all of this
9 combined. I thought it should be in a separate case.
10 THE COURT: That's a third party contingent claim,
11 I take it, that Mr. Cobb is saying that if indeed he is
12 indebted to you on any theory of estoppel, he has a right to
13 indemnification from Mr. Myers.
14 MR. SISSMAN: Well, that is the claim here although
15 the claim was not contingent. If he had the claim against --
16 THE COURT: So that makes no difference to you, does
17 it? You don't really care?
18 MR. SISSMAN: I don't care. I don't care except for
19 purposes on the argument of bankruptcy. The claim is contingent
20 in this lawsuit. It wasn't contingent at the time bankruptcy
21 was filed. It was matured.
22 THE COURT: But all you have at this juncture at
23 this case is a claim against Mr. Cobb on estoppel theory.

1 MR. SISSMAN: No. One more thing. Mr. Myers turned
2 around and sued Mr. Lataif for a rescission of the assignment
3 that brought us here in the first place. And I am saying this
4 morning --
5 THE COURT: Is that before the Court today?
6 MR. SISSMAN: Yes, sir.
7 THE COURT: That I haven't seen in there.
8 MR. SISSMAN: Yes, sir. It was served on me.
9 THE COURT: How can you sue for rescission in a lawsuit?
10 I would like to hear you on that, Ms. Thomas. I will get to
11 you in a minute. All right. So what you have been saying is
12 by way of defense to that claim?
13 MR. SISSMAN: Yes, sir.
14 THE COURT: I see. All right.
15 MR. SISSMAN: Thank you for your patience.
16 THE COURT: All right. Go ahead.
17 MS. THOMAS: Your Honor, I would oppose Counsel's
18 motion for summary judgment. While it's true that Mr.
19 Myers' original debt to Mr. Lataif was discharged by bankruptcy,
20 as a matter of fact, that is not why he is here in court today.
21 He is not here in court to defend himself for that original
22 debt to Mr. Lataif. But because Mr. Cobb is suing him on a
23 cross-claim alleging such things as Defendant Cobb relied on

1 the representations of Mr. Myers. If this cross-claim prevails,
2 then Mr. Lataif may owe -- excuse me, Mr. Myers may owe
3 Cobb money based on representation and so on. And for that
4 reason, the debt which might arise indirectly out of the
5 assignment is only now arising, and is not discharged by
6 bankruptcy.
7 Secondly, I refer you to --
8 THE COURT: What is the nature of the claim?
9 MS. THOMAS: Of the cross-claim of Cobb against
10 Myers?
11 THE COURT: Yeah.
12 MS. THOMAS: Essentially that Defendant paid Myers
13 based on representations by Myers that the situation between
14 Myers and Lataif was under control, was taken care of, and so
15 on.
16 THE COURT: So it's a tort claim then?
17 MS. THOMAS: Yes.
18 THE COURT: Deceit I guess. Action of tort for
19 deceit.
20 MS. THOMAS: Or misrepresentation.
21 THE COURT: Yeah. Well, that is a contingent claim,
22 a third party contingent claim I take it. But you assert if
23 Mr. Cobb is indeed indebted to him, Mr. Lataif. Otherwise, no.

1 No independent claim.

2 MS. THOMAS: Correct. However, Mr. Myers has

3 brought suit for rescission. There is a code provision.

4 THE COURT: Is that another suit, or in here?

5 MS. THOMAS: It's in here, Your Honor. It was

6 filed at the same time as Mr. Myers' answer to this cross-claim.

7 And I did cite a code section in Virginia which provides by

8 statute for an equitable answer or --

9 THE COURT: Equitable defense.

10 MS. THOMAS: I believe it goes beyond that too,

11 but it definitely provides for something on the order of

12 rescissionin the lawsuit, in the contract suit. And since

13 this whole thing arose on an assignment, that being a form

14 of a contract, I felt it was appropriate. But it is in the

15 file, should be.

16 THE COURT: Well, it is just that the file is

17 hopelessly scrambled.

18 MS. THOMAS: And my other point as to Mr. Sissman's

19 motion for summary judgment. There is a material dispute

20 of fact, namely, of whether there was duress and coercion

21 in the creation of the assignment. So, in view of the fact

22 that the money which may be owing out of the assignment is

23 not discharged because it may be a modern debt, and in view

1 of the fact that there is that material dispute, I would
2 oppose a motion for -- Counsel's motion for summary judgment.
3 THE COURT: I will hear from Mr. Echols.
4 MR. ECHOLS: Your Honor, I would dispute the view
5 that the bankruptcy had the effect of discharging any unlisted
6 obligation. And the obligation of Myers to reimburse Cobb
7 or Commercial Industrial for any loss occasioned by his
8 having been paid was not listed as an obligation in bankruptcy.
9 Therefore, I don't think that would -- I think that
10 we are still alive against Myers despite the bankruptcy if
11 we lose anything here. I also might add is that the dismissal
12 of my claim or Cobb's claim against Myers was not noticed for
13 the motion. The only thing that was noticed was the counter-
14 claim, the claim for rescission of Myers. So we are really
15 not here on this.
16 I would suggest maybe the thing to do would be to
17 bifurcate this thing again and take up the Cobb claim first
18 and see if it binds or not. And then the rest comes. I don't
19 know if Counsel would want to agree with that or not, but it
20 might be an orderly way to proceed.
21 THE COURT: I will deny the motion for summary
22 judgment and let Mr. Lataif's case go forward on the merits.
23 And I think the others fall into place behind that. All right,

1 Mr. Sissman. Go ahead.

2 MR. SISSMAN: The only problem I have is I am not
3 sure the rescission was -- is it that the rescission is moved
4 if we fall on that?

5 THE COURT: I don't think the rescission -- yes. I
6 think the rescission is moved either way. I don't want to
7 prejudge that or if anybody can show me some authority on it,
8 I will look at it. But my initial feeling is that you cannot
9 have affirmative equitable relief in an action at law. And
10 therefore, I cannot decree a rescission in this lawsuit.

11 Secondly, I don't think it makes any difference,
12 because an attempt by Mr. Myers now to rescind the assignment
13 would have no effect whatever on your claim against Mr. Cobb
14 based on an estoppel theory. It would come too late.

15 You would have independent -- what you are asserting
16 is I have already ruled that the assignment is out of the
17 case. So it doesn't make any difference to me whether it is
18 rescinded or not. You are asserting independent grounds of
19 relief against Mr. Cobb. And I think you are entitled to be
20 heard on that.

21 The assignment has no effect on it whether it's
22 rescinded or not.

23 MR. SISSMAN: Very well, Your Honor. Could I ask

1 at this time for a move to dismiss on the ground that it's
2 in the wrong court, the counterclaim?
3 THE COURT: The claim for rescission?
4 MR. SISSMAN: The claim for rescission.
5 THE COURT: Yes. Motion is granted, and that will
6 be dismissed.
7 MR. SISSMAN: All right. Thank you, Your Honor.
8 Now what I would suggest, and Your Honor has filed the other
9 part of this case involving the corporate defendant. And
10 looking over the transcript which I had here, probably the
11 other copy of the transcript is down in Richmond. And I will
12 be happy to give you my transcript which is unmarked except
13 for a marker here which begins Mr. Lataif's testimony.
14 I would be happy rather than go through all of
15 this again to submit this transcript and some documents as
16 our case in chief. That way it would save the Court some
17 time. I have prepared a legal memorandum on the law which
18 I will be happy to argue. And that would be our case in chief.
19 THE COURT: All right. I think it could well be
20 taken. If you are going to rely on the testimony at the
21 previous hearing plus some documents, I think I could probably
22 read that.
23 MR. SISSMAN: All right. Let me get the documents.

1 Your indulgence, Your Honor. I thought I had them all in one
2 place, and they seemed to have walked off.
3 THE COURT: Why don't you let me be working on the
4 transcript while you are looking at the documents. Now which
5 part did you want me to read?
6 MR. SISSMAN: I would think the whole thing, Your
7 Honor. Actually starting with that tab mark where Mr. Lataif
8 begins to testify.
9 MR. ECHOLS: Your Honor, this is going to lead to a
10 little practical difficulty, because I don't know how I am
11 going to cross-examine that transcript except reading it
12 after you read it.
13 THE COURT: Well, I will read the original cross-
14 examination. Of course, if you wish to call any witnesses,
15 you can do so.
16 MR. ECHOLS: But see, we don't have a copy of it.
17 That's the only copy around, because the other one is gone
18 to Richmond. You have the only one. I don't have --
19 THE COURT: If you look through these files, there
20 are some envelopes here. Some of them might contain this thing.
21 MR. ECHOLS: We looked through them in view of the
22 appeal points. I would like the opportunity to scan it.
23 (Whereupon, the Court commenced reading the above

1 mentioned transcript.)

2 THE COURT: Mr. Sissman, did you have some other

3 matters you wanted to present as a part of your case in chief?

4 MR. SISSMAN: Yes, Your Honor. I wanted to submit --

5 well, my documents, some of these documents are down in

6 Richmond, I imagine.

7 THE COURT: If they are, the ones that were submitted --

8 MR. ECHOLS: I don't believe the file has been trans-

9 mitted. I think it's in the posture to be -- it's been

10 shuffled. So it's in the posture to be transmitted. Because

11 I didn't --

12 THE COURT: But the things that came in at the previous

13 hearing, they are already in the record. There would be the

14 assignment. There would be Mr. Lataif's letter of what was

15 it -- August 13th?

16 MR. SISSMAN: There is one of July 12th, Your Honor.

17 The letter of July 12th. I have had them mark here for this

18 thing. But the memo to the file of August 5th which I think

19 Your Honor has read, the letter of September 7, 1976, Mr.

20 Cobb's handwritten answer on the bottom, I don't think this is

21 in the file. There is a letter of September 21st which is a

22 letter from Mr. Lataif to Mr. Cobb in response to his letter.

23 MR. ECHOLS: Your Honor, I don't think that belongs

1 in the case, because it's after the fact. I don't see that it
2 does. It's a letter saying that he is going to file suit if
3 he doesn't pay a certain sum of money. Because it's what
4 happened up until the time of the payment.
5 MR. SISSMAN: I think as argument will make clear that
6 the reason I want it in the file is to show the continuing
7 course of conduct between Mr. Lataif and not any corporation,
8 but Mr. Cobb. That is a consistent trend through all of the
9 documents. Every single one of these documents is addressed
10 to Mr. Cobb. No corporation is mentioned.
11 THE COURT: If its authenticity can be stipulated, I
12 will receive it in evidence for whatever effect it may have on
13 that total picture. I don't regard it as a determinative.
14 MR. ECHOLS: I don't have any question about this being
15 proper copy of something that was mailed. Do you recall it?
16 I may have somewhere --
17 MR. COBB: I don't recall seeing it.
18 MR. SISSMAN: While he is looking, Your Honor, I also
19 have again, I put together a judicial admission and there are
20 some extra ones in here. But what I have done, I have gone
21 through the interrogatories and requests for admissions, and
22 put them in one form just so Your Honor will have them.
23 MR. ECHOLS: Your Honor, I don't have any objection

1 to this thing, but I think it's nothing in the world but
2 argument of the Plaintiff rather than argument of Counsel.
3 MR. SISSMAN: I think I marked that as a letter exhibit,
4 Exhibit E.
5 THE COURT: One-E. Let me have your others then.
6 MR. SISSMAN: Yes, Your Honor.
7 THE COURT: Thank you. All right, sir.
8 MR. SISSMAN: I have thought it over, and I decided
9 that I would like to call Defendant Cobb as an adverse witness
10 for a few questions. But I do have a memorandum on estoppel
11 that I prepared. I don't know if you would like it now or
12 wait with argument or what.
13 THE COURT: Wait until you are through with the evidence.
14 MR. SISSMAN: Thank you, Your Honor. I would like
15 under the Virginia Code to call as an adverse witness the
16 defendant, Douglas Cobb.
17 THE COURT: All right.
18 Whereupon,
19 DOUGLAS COBB
20 a defendant, called for examination by counsel for the Plaintiff,
21 having been previously duly sworn, was examined and testified
22 as follows:
23 DIRECT EXAMINATION

1 BY MR. SISSMAN:

2 Q. Would you please for the record state your full

3 name and address?

4 A. Douglas Allen Cobb.

5 Q. What's your address?

6 A. 820 Crooked Crow Lane, Great Falls, Virginia.

7 Q. And are you employed for a corporation or with a

8 corporation?

9 A. Yes. I work for a corporation.

10 Q. What's the name of that corporation?

11 A. Commercial Industrial Construction, Incorporated.

12 Q. And isn't it true you are president and chief

13 executive officer of that corporation?

14 A. President.

15 Q. Are you the chief executive officer?

16 A. Never used that.

17 Q. Are you on the board of directors of that corporation?

18 A. I am.

19 Q. Do you run it in its day-to-day operations?

20 A. Day-to-day? Yes.

21 Q. I see. Now, Mr. Cobb, isn't it true that you are a

22 graduate of Princeton University?

23 A. Yes.

1 Q. And you have a bachelor of science in electrical
2 engineering?
3 A. Mechanical.
4 Q. Mechanical engineering. And isn't it true, Mr. Cobb,
5 that you took a prep course for those seeking admission to
6 the Harvard Business School?
7 A. No. That's not true. I think what you are referring
8 to is the fact that I took a course of the type that is
9 offered at Harvard Business School for a half of a semester,
10 case studies of various business problems.
11 Q. I see. Now isn't it true, Mr. Cobb, that you are
12 also a partner in a limited partnership?
13 A. Separate limited partnership.
14 Q. And isn't it true that you have taken bankruptcy?
15 A. Yes, sir.
16 Q. And isn't it also true that you have been involved
17 in business for some time?
18 A. Yes, sir.
19 Q. How long would you say?
20 A. Ever since I have been out of the Navy.
21 Q. What year was that?
22 A. In '59 -- '60.
23 Q. And you have owned your own company, have you not?

1 A. Uh-huh.

2 Q. And you worked for others who own their companies?

3 A. I worked for other companies.

4 Q. And isn't it true that you handle contracts on a

5 day-to-day basis?

6 A. Oh, I wouldn't say that. We do two or three contracts

7 a year.

8 Q. And this has been going on for some time?

9 A. Yes.

10 MR. SISSMAN: I have no further questions.

11 MR. ECHOLS: I have no further inquiry on that line,

12 Your Honor.

13 THE COURT: All right. You may step down. Thank

14 you. Does the Plaintiff rest?

15 MR. SISSMAN: Yes, Your Honor.

16 THE COURT: Mr. Echlos.

17 MR. ECHOLS: Your Honor, I would like to move to

18 strike, but I would like first for you to read the memorandum

19 of Mr. Sissman's. I will just refer to the points when I

20 make my motion.

21 THE COURT: All right. Is it in the file or what?

22 MR. SISSMAN: No, sir. I have it here.

23 THE COURT: All right. I will read it.

1 MR. SISSMAN: Thank you, Your Honor.

2 THE COURT: All right.

3 (Whereupon, the Court read the document previously

4 mentioned.)

5 THE COURT: All right. Mr. Echols.

6 MR. ECHOLS: Your Honor, I think it's -- we are all

7 understanding, and we all know that the corporation was the

8 only one who was ever indebted to Mr. Myers in any way.

9 And that the corporation through Mr. Cobb or whoever writes

10 the checks did pay Mr. Myers on or about August the 13th.

11 The testimony of Lataif indicates that he got the

12 name of the corporation from Mr. Myers. That he prepared the

13 assignment before Mr. Myers came to his office. That he

14 phoned Cobb on July 12th, and he mailed it to him on the

15 13th. And the receipt indicated it was received at the actually

16 the P. O. box Commercial Industrial on July 14th. And Cobb

17 paid the man on the 13th of August.

18 Now, I don't find the connection between Defendant

19 Cobb as an individual and Myers and Lataif to give rise to

20 the kind of situation that is suggested in the cases that Mr.

21 Sissman comes up with. It seems to me that you are again

22 trying to get at the individual through the -- or get at the

23 corporation through the back door by breathing some life into

1 the assignment by saying that the person who was the operator
2 of the corporation did certain things, but that he should be
3 charged as an individual. And this is, I think, the vice of
4 the basic approach. The interesting observation is made and
5 the argument is made that if Cobb had received or Commercial
6 Industrial, vis-a-vis Cobb, had received this assignment in the mail,
7 there might be some excuse. But essentially it was called
8 on the telephone to him. And he explained it to him, and
9 thereafter mailed it. There certainly was no excuse for
10 Cobb having made this mistake.
11 What mistake? Of not having read the assignment in
12 detail. And, therefore, not discovering the Plaintiff's
13 mistake. Your Honor, the Plaintiff is a lawyer. He called
14 the man, and he says, "I am sending you an assignment. And
15 Larry Myers' money is to be paid to me. And it's going to be
16 put in the mail."
17 All right. It comes to we don't have any idea here
18 that Cobb read it. He obviously did not make any immediate
19 claim that the corporate name was wrong. But where was the
20 duty on him to read that thing in detail, a document prepared
21 by a lawyer, explained to him by a lawyer as to its legal
22 effect? Obviously, the claim that he could have seeked immediate
23 or sought immediate attachment or garnishment of Myers' funds

1 into less than one month that Cobb had the, or the Commercial
2 Industrial, either of them, had the assignment is pretty far
3 out. We don't find that Mr. Myers is a nonresident of Virginia
4 who has been subject to attachment.
5 Obviously, there would be no garnishment, if there
6 were no judgment against him. In each case that he cited
7 these insurance companies had a contractual relationship with
8 one person who was doing something perfectly proper and who
9 transferred a car policy or something else to someone else.
10 And a duty would arise.
11 Now, the obligation Cobb had was to pay Myers when
12 Myers completed his work. But this is not the kind of thing
13 that gives rise to a new contract between Cobb and Lataif,
14 and thereby created privity between them, but between the
15 corporation and Lataif. It is a negative assignment, and the
16 fact that there was notice of an assignment is all the law
17 requires to set in force as high a legal concept that says
18 you will pay someone else, if the assignment is valid.
19 Lataif talks about conduct. And on page something or
20 other here on this quotes language -- next to the last page --
21 quotes language to say that the person who by his conduct has
22 rendered the injury impossible. Well, Your Honor, the person
23 who by his -- wait a minute, -- injury possible. Excuse me.

1 The person who by his conduct who rendered the injury possible
2 is the person in this case who wrote the assignment, and used
3 the wrong name in it. The layman is -- suppose the contractor
4 got ready to pay Myers and looked at the assignment and said we
5 better pay Mr. Lataif. And then he said no. I now read that
6 this says Commercial Industry, Incorporated. Couldn't Myers
7 have said at this point say, "Ha. Give me my money back. The
8 assignment is no good."
9 All right. Let's suppose that Cobb had not given Myers
10 his money. Well, suppose there were all sorts of things
11 happening. Lots of suppositions, but they all started out
12 because Lataif put the wrong corporate name on it. But even if
13 there were, then the bankruptcy arriving in December would have
14 washed the whole thing out. And it would have gone to the
15 trustee in the bankruptcy.
16 So this assertion that Defendant acquired a duty to
17 let Lataif know that he was not protected, now, this is
18 impossible. A layman is supposed to advise a lawyer that he is
19 not protected because the assignment he made turns out to be
20 incorrect? It says his silence in the face of the receipt of
21 the assignment is a representation.
22 Your Honor, there was no connection between, no privity
23 between Cobb and/or the corporation or anybody else and Lataif.

1 There was only the naked fact of an assignment which, if correct
2 and properly done, would have been enforceable. I would just
3 say again that the corporation was there, and I can see nothing
4 in here that isn't a method of getting at the corporation throug
5 the person who was acting for it as its agent, servant and
6 employee. And he can't rise any higher. There is nothing.
7 It's just very difficult to respond to this on the basis of
8 the facts that we have, because there is no duty. I can con-
9 ceive of no duty to tell a lawyer that he has prepared a
10 document incorrectly.
11 MR. SISSMAN: Your Honor, I think that Mr. Echols has
12 pointed to the wrong facts here. The corporation has been
13 dismissed from this lawsuit. If you -- I learned about the
14 law of estoppel somewhat late in this case, after the February
15 5th hearing. And I couldn't have written Mr. Lataif's testimony
16 any better than what it was. Because if you look at his testi-
17 mony, and you look at those letters, there is only the vague
18 reference at the beginning of the assignment with the corporatio
19 But all of the discussions were with Doug Cobb. Mr.
20 Lataif said that he was under the impression that the debtor
21 was Doug Cobb. All of those letters are addressed to Doug
22 Cobb. The corporation -- other than the assignment, no corporat
23 name of any type appears. And most telling of all is the

1 response of Mr. Cobb, the Princeton graduate who writes back
2 and says we paid them, and signs it Doug Cobb. He doesn't say
3 the corporation paid him. That's the issue.
4 The issue is Mr. Lataif thought Doug Cobb was a
5 true debtor in this case. He talked to Doug Cobb, and he
6 read him the assignment, and he sent him the assignment.
7 And I think the key issue isn't the first telephone call when
8 he said I am sending you this assignment. He sent the assign-
9 ment not to the corporation, but to Doug Cobb.
10 He called him again after Mr. Cobb had the assignment.
11 And that is why this case is just like that insurance case
12 where the man came in with the papers. Doug Cobb apparently
13 did not bother to read the papers. I don't know why he didn't
14 read the papers, but then --
15 THE COURT: Excuse me.
16 (Whereupon, the Court addressed other matters not
17 relating to this case.)
18 THE COURT: Go ahead, Mr. Sissman.
19 MR. SISSMAN: It's a point of some sadness. Will
20 that be off the record? I believe I was pointing to the
21 second telephone call. And that's after he got the assignment.
22 And it referred to him specifically. And he never said, "It
23 isn't me." And, in fact, he once again said, you know, "I am

1 going to pay you." That's what Mr. Lataif is relying on. And,
2 Your Honor, as I read Mr. Lataif's testimony, I think, and
3 I read the correspondence here, Doug Cobb was the man who
4 said, I will pay you. He didn't say my corporation will
5 pay you. And I don't think he can turn around and say,
6 Gee, my corporation owed you. But, my corporation had the
7 debt, but you got the wrong name. So you don't get paid
8 by the corporation. I don't think he can do that.
9 The law of estoppel is you don't need bad faith.
10 You don't need recklessness according to the case I cited.
11 These federal cases I cited apply to Virginia law. I think
12 the cases are clear. You don't need bad faith. The standards
13 are clear. I don't want to read them over to you, but it used
14 to be thought in Virginia you need bad faith or deceit. But all
15 you need, if you don't have that, is a representation. And
16 we have that. Cobb said both before and after he received the
17 assignment," I will pay you." I think we have the reliance.
18 I think Mr. Lataif had a number of remedies, one is immediately
19 filing the suit.
20 That would not necessarily be discharged by the
21 bankruptcy. Unless you want me to discuss that, I won't go
22 into that. A change of position. He stopped trying to get
23 the money from Mr. Myers because he thought he had the assignment.

1 And he doesn't have any money now. And I think we have got
2 an estoppel there as almost a matter of the law. Is anything
3 troubling you about that, Your Honor?
4 THE COURT: Do you have that T versus T decision
5 there?
6 MR. SISSMAN: I have the last page. It talks
7 about that. Would you want that now?
8 THE COURT: I probably better see the whole thing.
9 Do you happen to have it, Mr. Echlos?
10 MR. ECHOLS: No, sir.
11 THE COURT: I will send for it.
12 MR. SISSMAN: May I summarize it, Your Honor?
13 THE COURT: No. I would really like to read over
14 all of the facts.
15 MR. SISSMAN: These estoppel cases are not limited
16 to insurance matters. The Thomason case was a deed case, one of the
17 cases I mentioned to you. The other circuit court case involves
18 a statute of limitations case that says you can be estopped.
19 The T versus T case involved a statute of fraud.
20 THE COURT: Tell me about the City of Bedford, the
21 fourth circuit case, 1977, if you have that.
22 MR. SISSMAN: Yes, sir. I believe that's the one
23 I just referred to. What that says is that a party may be

1 estopped from interposing the statute of limitations.

2 THE COURT: By lulling a perspective plaintiff?

3 MR. SISSMAN: That's right. I believe what happened

4 in that case as I recall the case, the Defendant said don't

5 resort to litigation. We will work it out. Don't resort to

6 litigation, and then the statute passed. And T versus T

7 is a statute of fraud case. In any event, this matter survives

8 motion to strike. And if Defense wants to put on testimony,

9 I have no objection to letting Your Honor read the depositions

10 rather than take up your time here.

11 And I would trust Your Honor to discard that which

12 ought to be discarded.

13 MR. ECHOLS: Since Mr. Sissman took the defendant's

14 deposition, and since I asked no questions on those occasions

15 except maybe one or two, why I would politely decline his

16 magnificent offer, Your Honor. I obviously would have my

17 witness testify in response.

18 MR. SISSMAN: Well, due to the fact that Mr. Cobb

19 kind of left the deposition early, we had him back twice to

20 let him enjoy my hospitality.

21 I might add that the Bedford Case or the case I

22 just discussed cites T versus T for its authority that you

23 don't need bad faith.

1 THE COURT: The case of T versus T in 216 Virginia
2 probably comes about as close to framing this question of law
3 as any one case is likely to find. It states that the elements
4 necessary to establish equitable estoppel absent a showing
5 of fraud and deception are a representation, reliance, a change
6 of position and detriment.
7 The question of estoppel is one of the most subtle
8 I know of. A great deal depends upon the relative positions
9 of the parties. Estoppel is much more likely to be invoked
10 where there is a disparity in the bargaining power of the two,
11 where the party to be estopped has superior knowledge or
12 superior leverage in negotiations and where he is able to
13 take advantage of his position by some representation that
14 he had made to a person on an inferior footing.
15 It also seems to me to be more likely to be invoked
16 in a case where the parties have an existing and ongoing
17 relationship with each other, where they are bound together
18 by a business commitment that preexists, or where they are
19 husband and wife, attorney and client, or otherwise have some
20 duties already existing toward one another.
21 Total strangers meeting on the street and having no
22 relationship, no duty to speak, no duty to protect each other's
23 rights are much less likely to be affected by this doctrine.

1 In this particular case, it does not seem to me that
2 there is any disparity of bargaining power or any inequality
3 of knowledge between the plaintiff, Mr. Lataif, and the defendant
4 Mr. Cobb. Mr. Lataif was a sophisticated attorney at law.
5 He was acting in this case to protect himself and to recover
6 a fee. He had the responsibility to act as best he could for
7 the protection of his own interests. And he undertook to do
8 that by the assignment right.
9 There were certain motivating considerations for
10 his doing that. As I recall the testimony in the former
11 hearing -- and I re-read it this morning -- he did not wish to
12 imperil the relationship between Cobb and Myers. Cobb was
13 Myers' employer. And he wanted Cobb to pay Myers when the time
14 came. And he indulged Myers' request that he not do anything
15 more drastic, such as an attachment before judgment, in order
16 to protect himself. In fact, when he did write to Cobb for
17 the first time, he praised Myers.
18 This was a selection of business tactics on Mr. Lataif's
19 part which were perfectly proper for him to do, but it
20 demonstrates the fact that he was by no means at the mercy
21 of Mr. Cobb. But he was acting in what he conceived at that
22 time to be his own interests. In cases involving insurance
23 companies, they all seem to me to be cases in which there is a

1 superiority of bargaining power or a superiority of knowledge
2 imputed to the insurance company which is estopped. And in
3 those cases, the insurance company knows so much more about
4 insurance law than the poor customer or knows so much more
5 about the conditions of coverage and knows so much more about
6 the requirements of the policy than the layman he is dealing
7 with, that the insurance companies through their agents are
8 held under similar circumstances of these cases which have
9 been cited to have a responsibility to speak.

10 And by their silence, they may be estopped to deny
11 coverage. And even more strongly, if they make a representa-
12 tion upon which the insured relies, they are more clearly
13 estopped to deny coverage.

14 In the case of T versus T, one can hardly conceive
15 of a situation in which there is a stronger case of superiority
16 and bargaining position and the close knit relationship
17 between the parties. There, a woman pregnant by another man
18 was about to put her expected child up for adoption. Then the
19 Defendant came along and entreated her to marry him, and
20 said, "If you marry me, I will treat that child as my own when
21 it is born."

22 So she gave up the opportunity to place the child
23 for adoption as an infant, when it's easy to have children

1 adopted. And she married the man. He consented to have his
2 own name listed on the birth certificate as the biological
3 father of the child, which everyone knew he was not. And he
4 did, in fact, support the wife for four years until he, for
5 his own reasons, terminated the relationship and abandoned her
6 and the child.

7 And when she sought to recover child support from
8 him, he pleaded the statute of fraud on the ground that he
9 had not ever agreed in writing to assume the obligation of
10 another man. And the Supreme Court said that he was estopped
11 by his conduct and by his statements to take that position.
12 Because he had, by his representations, induced his wife to
13 change her life completely. She had given up the opportunity
14 to place the child for adoption and was now, because of his
15 representations, was in the position of caring for a fatherless
16 child for the rest of her life. And she had also given up the
17 right to -- I shouldn't say right -- but a plan which she
18 had evolved. After she had placed the child for adoption, she
19 was going to go to New York where she had an employment
20 opportunity. And she relinquished that as well.

21 She had very substantially changed her position in
22 reliance on a positive representation made by someone who
23 had, as between them, superior bargaining position. She

1 became -- she was dependent upon him at the time and became
2 very dependent upon him as a result of his representations.
3 The elements spelled out in that case are a representation,
4 reliance, a change of position, and detriment.
5 There seems to me also to be a strong element
6 running through those cases that I have just mentioned of
7 superior knowledge or bargaining position. In this case, it
8 would seem to me that Mr. Lataif had as much knowledge of the
9 circumstances as Mr. Cobb, and perhaps more. Certainly he
10 was ever bit as sophisticated in the area of the law. The
11 representationdid not flow from Mr. Cobb initially. It was
12 Mr. Lataif who set this ball in motion by going to Mr. Cobb with
13 an assignment. Mr. Cobb did not go to Mr. Lataif and entreat
14 him to withhold collection procedures.
15 Rather, the moving party was Mr. Lataif. There was
16 reliance and there was a detriment. No question about that.
17 But was there a change of position? I think that the evidence
18 falls short of showing that there was. Mr. Lataif for his
19 own reasons had selected this particular remedy. His reasoning
20 at the time was sound.
21 He did not wish to imperil the relationship between
22 Cobb and Myers by jumping in with a lawsuit or an attachment
23 or taking a judgment and getting a garnishment. He chose to

1 proceed in a very low key way to allow Cobb and Myers to
2 finish their business and then present his assignment for
3 payment at that time. And therefore, I don't think he changed
4 his position in reliance upon anything that Cobb said. He
5 pursued the strategy that he adopted at the outset.
6 Turning then to the touch stone which is mentioned
7 in the plaintiff's memorandum, quoting Thomason versus Walker,
8 the memorandum on page five says, "It is generally agreed
9 that when one of two innocent persons, each of whom is guiltless
10 of an intentional moral wrong must suffer a loss, it should
11 be borne by that one of them who by his conduct has rendered
12 the injury possible."
13 And I find myself in agreement with Mr. Echols on
14 that. The injury became possible because of the simple error
15 in the naming of the assignee. We are back to the point
16 where we started. This error was Mr. Lataif's. Mr. Cobb
17 had, as held in the previous hearing, no obligation to honor
18 that assignment at all.
19 And the only question before us today is: Was he
20 guilty of a fraud or of a deceit or was he conduct unconscion-
21 able in such a way as to entitle Mr. Lataif to rely on the
22 doctrine of estoppel? For the reasons stated, I do not think
23 that it was, and I will grant the motion to strike the

1 evidence in the case, and enter judgment for the Defendant.

2 This renders the third-party claim by Lataif -- excuse

3 me -- by Cobb against Myers, and the counterclaim has already

4 been disposed of. So would you prepare an order, Mr. Echols?

5 MR. SISSMAN: Your Honor, two matters. One is to

6 put this case for appeal. How would the transcript be entered

7 into this record, because the other record is going off? Can

8 you make some suggestion on that?

9 THE COURT: Well, it's all one case. The transcript

10 is already in the record.

11 MR. SISSMAN: My problem is that's my transcript you

12 have.

13 MR. ECHOLS: This is the transcript of the first hear-

14 ing. So the file is not in Richmond. It's right here.

15 MR. SISSMAN: Does the file not go down until the

16 appeal is granted, if it is? Is that how it works?

17 THE COURT: No. It goes down before that.

18 MR. SISSMAN: I am surprised it is not down there.

19 Well, I guess if Your Honor would find on the record -- I guess

20 you already have -- that is the same transcript that is in

21 the --

22 THE COURT: Let the record show that the transcript

23

1 that was read in evidence this morning was a true copy of
2 the transcript of the proceedings at the former hearing. I
3 noticed a few typographical errors in it as I read it. Obligor,
4 for instance, is spelled obligator, and a few things like that.
5 But basically, it's all right. I saw nothing in it that I
6 thought should be corrected. If Counsel doesn't, I should think
7 it's satisfactory.
8 MR. SISSMAN: I did properly notice it for that appeal.
9 So I guess it's in for this appeal too. Now, another matter
10 is, just to keep the record straight, we had a motion the
11 other day to amend the complaint which I asked for to include
12 misrepresentation, in addition. But you also found that
13 estoppel was included in the civil warrant pleadings. And
14 I submitted an order to Mr. Echols and asked him to give it to
15 Ms. Thomas. And I haven't got it back. Do you have that
16 order there?
17 MR. ECHOLS: No. I think it was endorsed by all
18 hands, and taken to the clerk.
19 MR. SISSMAN: It's been filed?
20 THE COURT: I think I entered it this morning. Yeah.
21 I did.
22 MR. SISSMAN: Very well.
23 THE COURT: I did it today.

1 MR. SISSMAN: One thing, a final thing would be as
2 I understand the rules of procedure, there are two ways to
3 get this transcript that is being taken down to the --
4 THE COURT: Mr. Sissman, I don't think I ought to
5 discuss with you appellate practice. I have no control over
6 it, and if I made some misstatement, I would be doing you a
7 grave injustice. So I think I had better leave you to a
8 reading of the big black book.
9 MR. SISSMAN: I am going to ask you to do something
10 or ask Mr. Echols to do something. Under the rules, there
11 are two ways you can get the transcript into the record. And
12 one way is to have it recited in the final judgment order.
13 That any transcript to be filed shall be included in the
14 record. I wonder if Mr. Echols would agree to that? That
15 would save me from having to notice notice him when it was
16 filed.
17 MR. ECHOLS: I don't want to do that for the same
18 reason I didn't want to do it before. I want to know when
19 it goes over there so we can go over to make our notes.
20 THE COURT: I will have to leave that to you, gentlemen.
21 Court is recessed.
22 (Whereupon, the above-entitled matter was concluded
23 at approximately 12:04 p.m.)

1 CERTIFICATE OF REPORTER

2 I, Teresa A. Norris, do hereby certify that the
3 testimony of the witnesses in the foregoing hearing was taken
4 by me in stenotype and thereafter reduced to typewriting
5 under my supervision; that said deposition is a true record
6 of the testimony given by said witnesses; that I am neither
7 counsel for, related to nor employed by any of the parties
8 to the action in which this hearing was taken; and, further,
9 that I am not a relative or employee of any attorney or
10 counsel employed by the parties thereto, nor financially or
11 otherwise interested in the outcome of this action.
12
13 Teresa Norris
14 Teresa A. Norris, Court Reporter
15
16
17
18
19
20
21
22
23

IN THE CIRCUIT COURT OF ARLINGTON COUNTY, VIRGINIA

LAWRENCE P. LATAIF	)	
	)	
Plaintiff	)	
	)	
v.	)	LAW NUMBER 19113
	)	
RESTAURANT EQUITIES, INC., et al	)	
	)	
Defendant	)	

Recorded in Circuit Court
Civil Book No. 173 Page No. 18
On 6 June 1979

JUDGMENT ORDER

THIS CASE came on for trial before the court without a jury on May 22, 1979, the parties and their counsel being present,

WHEREUPON the Plaintiff moved for summary judgment on the third party counter-claim for recission and the said motion was argued by counsel, and

IT APPEARING TO THE COURT that said motion for summary judgment ought to be denied but that nevertheless the counter-claim ought to be dismissed for the reason that the bankruptcy of Laurence Myers extinguished the obligation sought to be rescinded; whereupon,

THE COURT heard the evidence of the Plaintiff and received his exhibits as to the merits of his claim against the individual Defendant Douglas Cobb, after which the Plaintiff, having rested his case, the Defendant Cobb by counsel, moved to strike the Plaintiff's evidence as not having been sufficient at law; and

IT APPEARING TO THE COURT for the reasons stated from the bench that the Plaintiff failed to produce evidence which would justify a judgment in his favor against Defendant Cobb; it is accordingly

ADJUDGED, ORDERED AND DECREED that the motion for summary judgment on a counter-claim of the third party from Defendant Myers be, and the same hereby is denied; however the motion to dismiss the said counter-claim upon the additional evidence of the bankruptcy be, and the same hereby is granted; and it is further

ADJUGED, ORDERED AND DECREED that the claim of the Plaintiff and the various other claims of the parties be, and they hereby all are dismissed with prejudice and judgment is rendered in favor of the Defendant Cobb on the case against him individually and .

THIS IS A FINAL ORDER.

Entered this 11th day of ~~MXX~~ June 1979.

Charles S. Russel, Judge

WE ASK FOR THIS:

ECHOLS & HYMAN

By: _____
Counsel for Defendants Cobb and Commercial Industrial Construction, Inc.

Seen and excepted to as to the dismissal of the Myers' counter claim:

Linda S. Thomas

Linda S. Thomas, Counsel for Defendant Myers

Seen and excepted to as to the ruling in favor of Defendant Cobb:

_____
Peter L. Sissman, Counsel for Plaintiff