Station #2 v. Lynch, 4 Cir. CL066106, 75 Va. Cir. 179* (2008)

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

STATION #2, LLC
v.
MICHAEL & LISA LYNCH, et al

Civil Case No.: CL06-6106
Decided: April 30, 2008

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LETTER OPINION BY JUDGE CHARLES D. GRIFFITH, JR.:

Defendant Hourigan Construction Corporation submitted a Demurrer to the First Amended Complaint and Motion to Crave Oyer. Find my opinion below.

Background

The facts of the case, presented most favorably to Plaintiff, are as follows. Defendants Michael and Lisa Lynch ("Lynch") owned a building at 233 through 239 Granby Street in Norfolk, Virginia. Lynch sold the top two floors of the building to 237 Granby L.L.C, which contracted with Defendant Hourigan Construction Corporation ("Hourigan") to build condominiums. Lynch then entered into a lease with Plaintiff, Station #2, LLC ("Station #2"), giving him part ownership of the business as partial payment, to open a restaurant on the first floor at 233 Granby Street. After discussions with Lynch, and Frank Gadams ("Gadams" is associated with 237 Oranby L.L.C.), Station #2 planned at that time to build a stage and provide live entertainment to the restaurant's guests. The lease agreement between Lynch and Station #2 allowed Lynch to take necessary measures to reduce noise in the restaurant so as to preserve the comfort of the condominium residents, and requires tenant to install sound attenuation materials in a space below the floor of the condominiums.

Because of the construction planned for the upper levels of the building, Station #2 claims to have made agreements with Lynch, Hourigan, and Mr. Gadams, who is associated with 237 Granby L.L.C., to not allow construction during the restaurant's lunch service. The construction allegedly continued during lunch on several occasions, causing noise and dust which dirtied the establishment and disturbed many customers, causing them to leave without paying. Station #2 also alleges that the Hourigan's construction workers caused a hole in Station #2's office which allowed dust and rain to fall upon computer equipment.

As a further setback to Station #2, in an effort to lower construction costs the condominium developers cut plans to leave a space below the floor of the condominiums where Station #2 had planned to install its sound attenuation material. Additionally, the City of Norfolk issued Station #2 several noise citations following complaints of noise from owners of the condominiums above the restaurant and eventually ordered the restaurant to stop playing music. Soon thereafter Station #2 closed its doors and stopped paying money toward its lease.

Subsequent to these events Station #2 filed a seven count complaint against Lynch, Mr. Gadams, Marathon Development Group, and Hourigan Construction alleging negligence and civil trespass, breach of contract, fraud, and tortious interference. This letter will address the counts presented against Defendant Hourigan.

Plaintiff alleges two causes of action against Hourigan. Count I of the First Amended Complaint alleges that Hourigan damaged Plaintiff's property and that Hourigan is liable for civil trespass. Count VII of the complaint alleges that Hourigan conspired with Lynch and Mr. Gadams to cause the demise of Station #2. Hourigan now demurs to both counts against it.

Discussion

I. *Motion to Crave Oyer*

Hourigan submitted to the Court a Motion to Crave Oyer the construction contract between Hourigan and 237 Oranby L.L.C. and Station #2's Certificate of Occupancy. Both documents support Hourigan's position and are mentioned in the First Amended Complaint.

A. *Standard of Review*

> A defendant may crave oyer of all documents that form the basis of Plaintiff's claim, as "no intelligent construction of any writing or record can be made unless all of the essential parts of such paper or record are produced." *Culpeper Nat'l Bank v. Morris*, 168 Va. 379, 382, 191 S.E. 764, 765 (1937). "A litigant has no right to put [blinders] on the Court and attempt to restrict its vision to only such parts of the record as the litigant thinks tend to support his view." *Id.* at 382-83, 191 S.E. at 765.

Bagwell v. City of Norfolk, 4 Cir. CL013045, 59 Va. Cir. 205, 208 (2002).

A document for which oyer is craved must serve as more than mere evidence — the document must be essential to the complaint. *See id.* In other words, the document must be one that is essential to the plaintiff's complaint.

B. *Analysis*

Although Plaintiff may decide to use Hourigan's construction contract as evidence at trial, and the contract may be beneficial to Hourigan's position, the contract is not vital to Plaintiff's First Amended Complaint. Hourigan's Motion to Crave Oyer, therefore, will be denied and the Court will not take the contract into consideration for purposes of considering Hourigan's Demurrer.

II. *Demurrer*

A. *Standard of Review*

"To survive a challenge by demurrer, a pleading must be made with sufficient definiteness to enable the court to find the existence of a legal basis for its judgment." *Moore v. Jefferson Hosp., Inc.*, 208 Va. 438, 440, 158 S.E.2d 124, 126 (1967) (internal quotation marks and citations omitted). "A demurrer tests the legal sufficiency of facts alleged in pleadings, not the strength of proof." *Glazebrook v. Bd. of Supervisors*, 266 Va. 550, 554, 587 S.E.2d 589, 591 (2003). "If, on demurrer, the court can say, if the facts stated are proved, the plaintiff is entitled to recover, then the declaration is sufficient." *E. I. Du Pont De Nemours & Co. v. Snead's Adm'r*, 124 Va. 177, 184, 97 S.E. 812, 813 (1919). When considering a demurrer the Court accepts "as true all facts properly pleaded in the bill of complaint and all reasonable and fair inferences that may be drawn from those facts." *Id.*

B. *Analysis*

1. *Property Damage and Civil Trespass*

The Supreme Court of Virginia has defined a trespass at common law to be "an unauthorized entry onto property which results in interference with the property owner's possessory interest therein." *Cooper v. Horn*, 248 Va. 417, 423, 448 S.E.2d 403, 406 (1994) (citing 5 Richard R. Powell, *The Law of Real Property* 707 (Patrick J. Rohan ed., 1994). "Thus," the court added, "in order to maintain a cause of action for trespass to land, the plaintiff must have had possession of the land, either actual or constructive, at the time the trespass was committed." *Id.*

Plaintiff alleges that it had an oral lease agreement with the owner of the first floor of the building beginning in October of 2004. (*See* First Am. Compl. ¶ 12.) Station #2 and Lynch signed a written lease agreement signed on December 27, 2004. (*See* First Am. Compl. ¶ 14; ex. 1.) Plaintiff alleges, however, that it was unable to take up occupancy in the building until the City of Norfolk issued a Certificate of Occupancy on an unspecified date in mid-February of 2005. (*See* First Am. Compl. ¶ 16.)

The Court must sustain the Demurrer if Plaintiff did not plead facts which, if true, suggest Station #2 had either actual or constructive possession of the restaurant space at the times it alleges Hourigan trespassed on its property.

The Supreme Court of Virginia has explained the concept of constructive possession:

> The owner of personal property may deliver it to another upon conditions, or in circumstances, which give the recipient bare custody of the property. Constructive possession remains in the owner. Examples are: a watch handed to a friend to time a race, the owner expecting its return at the end of the race; clothing handed to a customer in a clothing store, to try on for size, the owner expecting it to be returned if rejected, paid for if accepted; groceries loaded into a shopping cart in a supermarket, the owner expecting them to be paid for at a cash register before they are removed from the premises.

Pritchard v. Commonwealth, 225 Va. 559, 562, 303 S.E.2d 911, 913 (1983). And actual possession, then, is the "bare custody" of property. *See id.*

Under this definition of constructive possession, Lynch, the owner of the first floor of the building in which Station #2 was located, retained constructive possession of the property at all times. So Hourigan can only be liable for civil trespass at times when Station #2 had bare custody of its leased space. By its own allegations, it did not obtain bare custody of the property until sometime in February of 2005.

Plaintiff's allegations of property damage and civil trespass include:

1) November 19, 2004: Hourigan caused or allowed refuse to drop from the third floor of the building into Station #2's mezzanine space, causing dust and debris to contaminate the area. Station #2 repaired the damage by restaining wood steps and bar and cleaning and waxing the floor. (First Am. Compl. ¶ 36.)

2) November 2004 through February 2005: Hourigan caused Station #2 and its associated sound equipment to be vulnerable to rainfall requiring employees of Station #2 to wipe down the sound equipment during heavy rain. (First Am. Compl. ¶ 36.)

3) Date not specified: Hourigan used the elevator shaft for refuse causing dust to dirty Station #2's new kitchen, which employees of Station #2 were required to clean. (First Am. Compl. ¶ 37.)

4) Date not specified: Hourigan caused a hole above the office of Station #2, allowing water to enter the office. (First Am. Compl. ¶ 38.)

5) Date not specified; Hourigan used hot water from Station #2's lines. (First Am Compl. ¶ 39.)

Of this list of allegations, the second, third, fourth, and fifth, do not specify exactly the date of the violations, and therefore could possibly have occurred after November of 2004. Even these allegations, however, are insufficient to state a claim for which relief can be granted because, even Plaintiff could prove the truth of the allegations at trial, it still would not be entitled to relief because the allegations leave open the possibility that the violations may have occurred before Station #2 took possession of the restaurant.

2. *Interference with Business*

Plaintiff alleges in Count VII of its First Amended Complaint that Hourigan tortiously interfered with Station #2's business expectancy and conspired with others to injure its business by Preventing Station #2 from installing sound attenuation material underneath the floor of the condominiums Hourigan constructed. Tortious interference with business expectancy is a common law tort, while conspiracy to injure a business is governed by Virginia Code Annotated, sections 18.2-499 and 18.2-500.

i. *Tortious Interference with Business Expectancy*

The Supreme Court of Virginia lists the elements of tortious interference with a business relationship in *Glass v. Glass*, 228 Va. 39, 51, 321 S.E.2d 69, 76-77 (1984): "(1) the existence of a business relationship or expectancy, with a probability of future economic benefit to plaintiff; (2) defendant's knowledge of the relationship or expectancy; (3) a reasonable certainty that absent defendant's intentional misconduct, plaintiff would have continued in the relationship or realized the expectancy; and (4) damage to plaintiff."

Addressing each element in turn, the Complaint makes allegations of a business relationship sufficient to meet the first element. Paragraph 32 of the First Amended Complaint states that Station #2 was scheduled as a venue for weddings, and that it had "regular crowds" on weekends.

The Complaint does not allege that Hourigan knew that Station #2 had weddings scheduled and had "regular crowds" on weekends, failing in the second element.

The Complaint is also deficient with regard to the third element — Plaintiff alleges that Hourigan took part in barring Station #2 from installing sound attenuation, which then resulted in a directive from the City of Norfolk prohibiting live music at Station #2. The third element of tortious interference requires "misconduct," and therefore relies on the ability of Station #2 to prove its civil trespass claim against Hourigan, which, as explained above, it cannot do.

With regard to the fourth element, Station #2 still had an operating restaurant after the City's alleged February 19, 2006, directive, albeit one without live entertainment. The damages, accordingly, would be the difference in business expectancy of a restaurant with live entertainment, and one without live entertainment. Station #2 was in operation for less than ten days after the City's directive, with one weekend during that time.[1] Arguably, it may be possible for Station #2 to prove damages despite this short operating period. *See* Va. Code Ann § 8.01-221.1.

Based on the above discussion the Court must sustain Defendants' Demurrer because, even if Plaintiff proves the allegations in its First Amended Complaint, Hourigan would not be subject to liability for tortious interference with Station #2's business expectancy.

ii. *Conspiracy to Injure Business*

Section 18.2-499(A) of the Virginia Code makes it illegal for

> [a]ny two or more persons who combine, associate, agree, mutually undertake or concert together for the purpose of (i) willfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever or (ii) willfully and maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act . . . .

Section 18.2-500(A) awards treble civil damages to a person injured by reason of a violation of 18.2-499(A).

The Supreme Court of Virginia has clarified what elements are necessary for a plaintiff to succeed in a civil action for violation of section 18.2-499(A): "(1) a combination of two or more persons for the purpose of willfully and maliciously injuring plaintiff in his business, and (2) resulting damage to plaintiff." *Allen Realty Corp. v. Holbert*, 227 Va. 441, 449, 318 S.E.2d 592, 596 (1984). The statutes do not require a plaintiff to prove that a defendant acted with actual malice; they require only proof that a defendant acted with legal malice — "intentionally, purposely, and without lawful justification." *Simmons v. Miller*, 261 Va. 561, 578, 544 S.E.2d 666, 677 (2001); *commercial Bus. Sys. v. Bellsouth Servs., Inc.*, 249 Va. 39, 47, 453 S.E.2d 261, 267 (1995). However, to be "without lawful justification," the Supreme Court of Virginia clarifies, a civil conspiracy must necessarily include "some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself

criminal or unlawful, by criminal or unlawful means." *Hechler Chevrolet, Inc. v. General Motors Corp.*, 230 Va. 396, 402, 337 S.E.2d 744, 748 (1985). Additionally, in order to succeed on a claim of civil conspiracy under section 18.2-499 and 18.2-500, a plaintiff must prove with clear and convincing evidence each element of the offense. *Simmons v. Miller*, 261 Va. at 578, 544 S.E.2d at 677.

Station #2 must prove, then, by clear and convincing evidence, that: (1) Hourigan conspired with someone; (2) the conspiracy involved an intent to injure Plaintiff; (3) it used illegal means or intended to serve an unlawful purpose; and (4) it succeeded in damaging Plaintiff.

Although the City of Norfolk's directive silencing Station #2 may have damaged Plaintiff, as discussed above Plaintiff does not make any allegations suggesting that Hourigan used any illegal means to procure this directive.

Based on the foregoing, Defendant's Motion to Crave Oyer is moot.

Conclusion

The court DENIES Defendant Hourigan Construction Company's Motion to Crave Oyer and SUSTAINS Defendant's Demurrer with regard to Counts I and VII of the Second Amended Complaint.

Plaintiff's counsel is directed to prepare an Order reflecting the Court's ruling and distribute it for signatures before presenting it to the Court for entry.

FOOTNOTES

[*] [Editor's Note: See also *Station #2 v. Lynch*, 4 Cir. CL066106, 75 Va. Cir. 179, 4 Cir. CL066106, 75 Va. Cir. 179 (2008)

[1] February 19, 2006, was a Sunday, so Plaintiff may have misstated the date of the directive, but the Court will assume this date is correct. Plaintiff alleges that it infomed Lynch in February of 2006 that it would withhold rent unless he would allow sound attenuation in the restaurant, to which he responded by changing the locks. (*See* First Am. Compl. ¶ 34.) So, assuming Station #2 operated without music until and including the last day of February, it would have operated without live entertainment for nine days.