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

COUNSEL

Kevin E. Martingayle, Esquire
Stallings & Bischoff, P.C.
2101 Parks Ave. Suite 801
Virginia Beach, Virginia 23451
Counsel for Station #2, LLC

Daniel R. Warman, Esquire
Ventker & Warman, PLLC
101 West Main Street, Suite 810
Norfolk, Virginia 23510
Counsel for Michael and Lisa Lynch

Roger W. Heald, Esquire
Hogan & Heald
11130 Fairfax Blvd., Suite 310
Fairfax, Virginia 22030
Counsel for Hourigan Construction Corp.

George H. Bowles, Esquire
Williams Mullen, P.C.
222 Central Park Avenue, Suite 1700
Virginia Beach, VA 23462
Co-counsel for Hourigan Construction Corp.

John C. Lynch, Esquire
E. Kyle McNew, Esquire
Troutman Sanders LLP
150 West Main Street, Suite 1600
Norfolk, VA 23510
Counsel for Frank T. Gadams and Marathon Development Group, Inc.

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

Defendants Marathon Development Group, Inc., and Frank T. Gadams submitted a Demurrer, Special Plea in Bar, Motion Craving Oyer. Find my opinon 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 ("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 allow the installation of sound attenuation in a space below the floor of the condominiums. Without sound attenuation material in place, 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, Inc. ("Marathon" is associated with Gadams), and Hourigan Construction alleging negligence and civil trespass, breach of contract, fraud, and tortious interference. This letter will address the counts presented against Defendants Marathon and Gadams.

Plaintiff alleges three causes of action against Gadams. Count V of the First Amended Complaint alleges Gadams breached an oral contract by Mr. Gadams to allow Station #2 to install sound attenuation material beneath the floor of the condominium units he owned. Count VI alleges fraud on the part of Gadams. And Count VII alleges that Gadams toriously interefered with Station #2's business expectancy

and violated section 18.2-499 of the Virginia Code by allowing Hourigan to perform disruptive activities during Station #2's lunch service and preventing Station #2 from installing sound attenuation. Lynch now demurs to the First Amended Complaint, craves oyer of certain documents, and requests that the Court recognize that the statute of limitations has run on several of Station #2's claims.

Discussion

I. *Motion Craving Oyer*

Defendants Marathon and Gadams submitted to the Court a Motion Craving Oyer of an alleged contract between Plaintiff and themselves and the deed of sale of 237 Granby from Lynch to 237 Granby L.LC.

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*

The Court will deny the Motion with regard to the alleged contract because Plaintiff nowhere alleges such contract in written form. Additionally, the Court may take judicial notice of matters of public record, including the ownership of the floors above Station #2 by 237 L.L.C. and therefore has no need to grant oyer of the deed, which was filed with the Norfolk Circuit Court Clerk's Office on August 12, 2004. *See* Va. Code § 8.01-389; *Pratt v. Kelly*, 585 F.2d 692, 696 (4th Cir. 1978) (holding that a court may take judicial notice of a deed).

II. *Statute of Limitations*

1. *Standard of Review*

Virginia Code Annotated, section 8.01-243(A), requires that "every action for damages resulting from fraud, shall be brought within two years after the cause of action accrues." The cause of action accrues

when the fraud is discovered or should reasonably have been discovered by the exercise of due diligence. *See* Va. Code Ann. § 8.01-249(1); *Eshbaugh v. Amoco Oil Co.*, 234 Va. 74, 7, 360 S.E.2d 350, 351 (1987).

The limitations period for Count VII against Marathon and Gadams alleging tortious interference with Station #2's business is governed by the "catch-all" provision found in section 8.01-248 of the Virginia Code. This section sets a two-year limitation on all actions not addressed elsewhere. Section 8.01-230, then, sets the date of accrual of a right of action at "the date the injury is sustained in the case of injury to the person or damage to property, when the breach of contract occurs in actions ex contractu and not when the resulting damage is discovered . . ." Because the right of action accrues at the time of a breach of duty, several breaches can support several causes of action. *See Hampton Rds. Sanitation Dist. v. McDonnell*, 234 Va. 235, 239, 360 S.E.2d 841, 843 (1987).

2. *Analysis*

Gadams argues that Plaintiff's claims of fraud and tortious interference against Marathon and himself, as stated in the First Amended Complaint, are barred by the associated statutes of limitations because they are based on Plaintiff's assertion that Marathon agreed to allow Station #2 to install sound attenuation sometime before mid-November of 2004. The First Amended Complaint, however, contains no such assertion. The alleged agreement originally contemplated that the restaurant would open for business in mid-November, but construction delays caused the restaurant to open in February of 2005, according to the Complaint. The Complaint also alleges that Hourigan was engaged in demolition until the Spring of 2005. It is plausible, then, that no breach of contract could have occurred or fraud discovered until it came time for the sound attenuation material to be installed, after demolition was completed and construction began. The statute of limitations, therefore, does not bar Plaintiff's fraud and tortious interference claims against Gadams and Marathon.

III. *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. *Breach of Contract*

Station #2 alleges in Count V of the First Amended Complaint that Marathon and Gadams breached their agreement to allow sound attenuation beneath the floors of the condominiums above Station #2. Plaintiff does not refer to or attach any written document memorializing such an agreement.

In order to be enforceable, a contract "must be sufficiently definite to enable a court to give it an exact meaning." *Smith v. Farrell*, 199 Va. 121, 127-28, 98 S.E.2d 3, 7 (1957). The contract must also be complete. *See id.* The agreement alleged by Plaintiff lacks one essential element of a contract — consideration. *See, e.g., Montagna v. Holiday Inns, Inc.*, 221 Va. 336, 346, 269 S.E.2d 838, 844 (1980). The Supreme Court of Virginia, however, has found the existence of consideration sufficient to support a simple contract in instances in which an estopped party "caused the other party to occupy a more disadvantageous position than that which he would have occupied except for that conduct." *Georgeton v. Reynolds*, 161 Va. 164, 173-74, 170 S.E. 741, 744 (1933). This theory is distinct from promissory estoppel, which is not recognized in Virginia. *See W.J. Schafer Assocs. v. Cordant, Inc.*, 254 Va. 514, 520-21, 493 S.E.2d 512, 515-16 (1997).

It is therefore possible that Marathon and Gadams may have entered into a valid oral contract with Station #2 and that Marathon and Gadams may have violated that contract when it failed to work with Station #2 with regard to the installation of sound attenuation material.

2. *Fraud*

Station #2 alleges that Marathon and Gadams pulled a "bait and switch" scam on the restaurant by making promises that induced Station #2 to enter into a lease agreement with Lynch and then refusing to allow the restaurant to install sound attenuation underneath the floor of the above condominiums.

Marathon and Gadams, directing the Court's attention to *Richmond Metropolitan Authority v. McDevitt Street Bovis, Inc.*, 256 Va. 553, 558, 507 S.E.2d 344, 347 (1998), argue that Plaintiff's fraud claim is merely an attempt to "double dip" by turning a breach of contract claim into a claim for fraud:

> In determining whether a cause of action sounds in contract or tort, the source of the duty violated must be ascertained. In *Oleyar v. Kerr, Trustee*, 217 Va. 88, 90, 225 S.E.2d 398, 399-400 (1976) (quoting *Burks Pleading and Practice* § 234 at 406 (4th ed. 1952)), we distinguished between actions for tort and contract:
>
> If the cause of complaint be for an act of omission or non-feasance which, without proof of a contract to do what was left undone, would not give rise to any cause of action (because no duty apart from contract to do what is complained of exists) then the action is founded upon contract, and not upon tort. If, on the other hand, the relation of the plaintiff and the defendants be such that a duty arises from that relationship, irrespective of the contract, to take due care, and the defendants are negligent, then the action is one of tort.

> We have acknowledged that a party can, in certain circumstances, show both a breach of contract and a tortious breach of duty. *Foreign Mission Bd. v. Wade*, 242 Va. 234, 241, 409 S.E.2d 144, 148 (1991). However, "the duty tortiously or negligently breached must be a common law duty, not one existing between the parties solely by virtue of the contract." *Id.* (citing *Spence v. Norfolk & W. R.R. Co.*, 92 Va. 102, 116, 22 S.E. 815, 818 (1895)).

And again, in *Blair Construction Inc. v. Weatherford*, 253 Va. 343, 346, 485 S.E.2d 137, 139 (1997) (quoting *Patrick v. Summers*, 235 Va. 452, 454, 369 S.E.2d 162, 164 (1988)), the Supreme Court of Virginia states that "fraud must relate to a present or a pre-existing fact, and cannot ordinarily be predicated on unfulfilled promises or statements as to future events." The court went on to explain that "[a]n action based upon fraud must aver the misrepresentation of present pre-existing facts, and cannot ordinarily be predicated on unfulfilled promises or statements as to future events. Were the general rule otherwise, every breach of contract could be made the basis of an action in tort for fraud." *Id.* at 347, 485 S.E.2d at 139 (quoting *Lloyd v. Smith*, 150 Va. 132, 145, 142 S.E. 363, 365 (1928)).

The common law does not require Gadams, Marathon, or 237 Granby, L.L.C. to allow sound attenuation underneath the floor of their condominium project, and Plaintiff alleges only that Gadams and Marathon changed their minds with regard to the insertion of sound attenuation due to cost (First Am. Compl. ¶ 21), not that they had lied from the beginning about their plan to allow Station #2 to install sound attenuation. Therefore Station #2 has not alleged facts which, if proven,would amount to a claim of fraud against Marathon or Gadams.

3. *Interference with Business*

Plaintiff alleges in Count VII of its First Amended Complaint that Lynch tortiously interfered with Station #2's business expectancy and that Lynch conspired with others to injure its business, 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 Marathon or Gadams knew that Station #2 had weddings scheduled and had "regular crowds" on weekends. It does allege facts, however, that suggest Gadams and Marathon understood that Station #2 planned from the beginning to draw guests using live performances. (*See* First Am. Compl. ¶¶ 4 & 5.)

With regard to the third element, Plaintiff alleges that Marathon and Gadams 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," relying on the ability of Station #2 to prove either its breach of contract or fraud claims against Marathon or Gadams. Plaintiff may be able to do so, as its breach of contract claim has survived Defendants' Demurrer.

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.

Therefore, with regard to Plaintiff's claim of tortious interference with a business against Marathon and Gadams, it has pled facts sufficient to support a cause of action.

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) Marathon and Gadams conspired with someone; (2) the conspiracy involved an intent to injure Plaintiff; (3) they used illegal means or intended to serve an unlawful purpose; and (4) they succeeded in damaging Plaintiff.

Station #2 alleges that (1) Marathon and Gadams conspired with Lynch and Hourigan (*see* First Am. Compl. ¶¶ 23, 55, 73); (2) with the intent to bar Station #2 from providing live entertainment, vital to the restaurant's profits (*see* First Am. Compl. ¶¶ 24, 53, 55); (3) violating an enforceable oral contract in order to achieve its end goal (*see* First Am. Compl. ¶¶ 60-63); (4) and the plan culminated in a directive prohibiting Station #2 from providing live entertainment, which damaged Station #2's profits (*see* First Am. Compl. ¶¶ 31, 32).

Accordingly, the Court will overrule Defendants' Demurrer to Count VII of the First Amended Complaint.

Conclusion

The court DENIES Defendants Marathon and Prank T. Gadam's Motion Craving Oyer, DENIES Defendants' Special Plea in Bar, SUSTAINS Defendants' Demurrer with regard to Count VI of the First Amended Complaint, and OVERRULES Defendants' Demurrer with regard to Counts V 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 informed 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.