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VIRGINIA:

IN THE CIRCUIT COURT OF RAPPAHANNOCK COUNTY

DAVID L. KONICK,)
)
 Plaintiff,) Case No.
)
 v.) CL15000043-00
)
 TOWN OF WASHINGTON, et al.,)
)
 Defendants.)
 -----)
 DAVID L. KONICK,)
)
 Plaintiff,) Case No.
)
 v.) CL15000051-00
)
 PATRICK J. O'CONNELL, et al.,)
)
 Defendants.)

Washington, Virginia

Thursday, August 20, 2015

P A R T I A L T R A N S C R I P T

JUDGE'S RULINGS

Excerpts of a hearing in the above-styled
 matter before the Honorable Jeffrey W. Parker, Judge
 of the Circuit Court of Rappahannock County, 250 Gay
 Street, Washington, Virginia, on the 20th day of

1 August, 2015, set for 10:00 a.m., when there were
2 present on behalf of the respective parties:

3 A P P E A R A N C E S

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P R O C E E D I N G S

1
2 [The court reporter having been duly sworn,
3 the proceedings commenced at 10:30 a.m.]

4 * * * * *

5 THE COURT: All right. I'm going to seek to
6 address these issues at this time. The Court
7 previously took the matter under advisement when the
8 initial complaint was filed and gave an opinion on
9 the matter -- wrote an opinion. But I think I can
10 address this -- these issues here orally. It will
11 lack, perhaps, the organization of a letter when you
12 have the time to sit down and do it in a more
13 leisurely fashion, but I think it will be better for
14 the Court simply to resolve the matter now.

15 I'm going to sustain the demurrer with
16 prejudice on the standing question. And I'm going to
17 give my reasons here. I'll try to do it one by one.

18 First of all, the plaintiff alleges he's
19 forced to pay meals tax. The Court does not agree.
20 He's not forced to pay anything but his bill. If the
21 bill -- if the merchant wishes to construct the meal
22 tax by adding its total and putting the amount of the

1 meals tax in there, it's certainly free to do so.
2 But, as argued by counsel, the Town is not going to
3 come after Mr. Konick for its meals tax if a portion
4 of that bill isn't paid. It's going to come after
5 the merchant. The merchant has to charge it and then
6 remit it.

7 But that's irrelevant as far as Mr. Konick
8 is concerned any more than he would have to pay the
9 cost of the food itself that's used in the
10 preparation of the meal to the person that provided
11 the food. If he didn't pay and said, well, I don't
12 like the hotdog that I just ate, so I'm not paying
13 for the hotdog, I'll just pay for the bun, well, the
14 person that sold them the hotdog is not going to come
15 after Mr. Konick for the cost of the hotdog, it would
16 be the merchant that sold him the hotdog.

17 So that's really a red herring at this
18 point. Mr. Konick is simply not a taxpayer. And
19 that really is, I think, a basic fundamental
20 underpinning of this claim.

21 The second aspect to this question is,
22 because the town is small and dominated by the Inn

1 here, that that somehow would constitute standing on
2 a party who feels it's appropriate for him to take up
3 the cause and litigate this issue. I don't think
4 there's any authority for such a position. It's kind
5 of a knight in shining armor, Don Quixote type who
6 goes from town to town taking up issues that need to
7 be litigated because the poor, simple town residents
8 don't have the wherewithal to bring these actions on.
9 I don't think there's anything whatsoever to justify
10 standing on that basis.

11 He also says, well, he lives close by. You
12 either live in the town or you don't. You know,
13 there's no kind of a, you know, we're going to say,
14 well, you're a stone's throw away, so we're going to
15 go ahead and say that that means you have standing.
16 But if you weren't a stone's throw away, well, then,
17 maybe it wouldn't count anymore. I mean, that would
18 be preposterous. You're either in the town, you have
19 venue, you have jurisdiction, or you don't. It's
20 black and white. So there's no basis here.

21 When he says he works here, well, he can
22 work anywhere. He can work all over town, fly

1 around. He might go off to D.C. and work for a
2 while. Does that give him standing if he went up to
3 D.C. and had some cases? You know, I had a case in
4 D.C. last week, or in Maryland. You know, I was
5 received as counsel, and so now I want to go ahead
6 and start litigating Maryland cases because I don't
7 like their law. There's no basis for that. He can't
8 litigate because of that kind of a situation.

9 I already talked about the post office box.
10 I don't think that amounts to anything either. I
11 talked about that in my previous letter.

12 I'm going to talk a little about this
13 conflict of interest issue that's been brought up
14 under 2.2-3126, which is a fairly lengthy code
15 section.

16 And if you look at Subsection B, it talks
17 about the Attorney General initially. And then it
18 works down to the attorney for the Commonwealth.

19 And in the third paragraph of that, it says,
20 "Each attorney for the Commonwealth shall render
21 advisory opinions as to whether the facts in a
22 particular case would constitute a violation of the

1 provisions of the chapter to the governing body and
2 any local officer or employee in his jurisdiction."
3 His jurisdiction.

4 It doesn't say that the Commonwealth's
5 Attorney here for Rappahannock can go over to
6 Fauquier and say, you know, I don't think you guys
7 are doing things right, I'm going to go ahead and
8 give an opinion as to what I think about how you do
9 things in Fauquier.

10 Or maybe I'll go over to Loudoun County and
11 give them an opinion. Or they can come over here.
12 No, that doesn't permit that.

13 In the next paragraph immediately after that
14 preceding paragraph it says: "Irrespective of
15 whether an opinion of the attorney for the
16 Commonwealth or the Attorney General has been
17 requested and rendered, any person has the right to
18 seek a declaratory judgment."

19 Well, that's fine. But it refers back to
20 the preceding paragraph. It talks about the local
21 governing body where the Commonwealth's Attorney is.
22 It doesn't say you can, all of a sudden, go down to

1 Suffolk County and bring a declaratory judgment
2 action or file an action because you don't like the
3 way the Attorney General did or didn't do his job or
4 the local Commonwealth's Attorney did or didn't do
5 his job. It has to be your county. It has to be
6 your jurisdiction. That's not here. I think that's
7 fairly clear.

8 I'm trying to go through some of these other
9 matters here.

10 Sliding scale. Sliding scale jurisdiction.
11 Because this is an establishment clause case, somehow
12 or another it puts it on a different level than other
13 cases. Well, I would commend the case of *Valley*
14 *Forge Christian College vs. The Americans United for*
15 *Separation of Church and State, Inc.*,
16 454 U.S. 464, a 1982 case. In that particular
17 matter -- which was written by Justice Rehnquist, on
18 which the court found no standing on the part of a
19 local jurisdiction which was complaining about the
20 conveyance. In that particular case, the federal
21 government was conveying real estate to churches.
22 It's kind of a similar issue here. And this person

1 said, well, no, you can't convey this real estate at
2 a discounted rate to a church because of the issue of
3 separation of the church and state.

4 And the court, again, in denying standing in
5 that particular case, said that, note, this court
6 should -- I have a problem reading my handwriting, so
7 I apologize. It's not the best in the world. "The
8 court should avoid converting legal actions into no
9 more than of a vehicle for the vindication of the
10 value interests of concerned bystanders."

11 And I'm going to get into this question of
12 some kind of a hierarchy of rights. Again, reading
13 from that case, "We know of no principled basis on
14 which to create a hierarchy of constitutional values
15 or a complementary 'sliding scale' of standing which
16 might permit respondents to invoke the judicial power
17 of the US." There is no sliding scale. None.

18 And that's a much more recent case than the
19 Cohen case, which kind of might suggest there might
20 be an enhanced value system here on these cases.
21 That's a 1982 case, the Valley Forge case. The *Flast*
22 *vs. Cohen*, I think, was a 1962 case. It didn't

1 overrule Cohen, but I think it clarified Cohen.

2 So, again, there's no basis on any of the
3 issues that the Court saw that would justify standing
4 in this particular case. And if you don't have
5 standing, you're out. You either have standing or
6 you don't. You have jurisdiction or you don't.

7 And no matter how urgent or vital or
8 concerned you are about the case or how important you
9 think it is, that doesn't give you the right to come
10 into court and litigate these rights unless you have
11 the standing and have a stake in the outcome of the
12 litigation.

13 I think that the law is absolutely clear on
14 the subject. And that's why the Court is going to
15 sustain the demurrer with prejudice, and the matter
16 will be dismissed on that basis.

17 And just as a -- and, also, a point that has
18 been raised here, just on a periphery, and I'll
19 dispose of this here shortly, I believe that
20 Ms. Schimke filed a motion to intervene in this
21 matter. Well, she can't intervene unless there's
22 standing on the part of the original plaintiff. The

1 law is absolutely clear on that one.

2 So that, by ipso facto, causes this Court to
3 dismiss her motion to interview in this case because
4 there's no standing on the part of the plaintiff. So
5 that matter will be dismissed. Her motion to
6 intervene will be dismissed, also.

7 Now, I think, as I seem to recall, we have
8 another matter to address. I know the Court has
9 addressed this.

10 And I think you had a motion, as I recall,
11 to nonsuit your case on the matter of CR15-51,
12 Mr. Konick. Do you wish to be heard on that?

13 MR. KONICK: That's correct, Your Honor.
14 Well, Your Honor, I guess there's not much to say
15 except I moved to nonsuit it before it was served on
16 anybody.

17 THE COURT: Yes, sir.

18 MR. KONICK: And after the motion for
19 nonsuit was filed, the Attorney General's office
20 filed an answer. And then after that, Mr. Fiske
21 filed a motion and entered an appearance and filed a
22 motion for sanctions.

1 So I think that the motion for -- I mean, if
2 they had filed -- I mean, technically --

3 THE COURT: I don't mean to cut you off,
4 Mr. Konick. I think I understand your motion. If
5 you have anything -- I'll hear their response. And
6 if you need to address it further, I'll hear you.

7 MR. KONICK: Okay. Well, if they're going
8 to move forward with their motion for sanctions --

9 THE COURT: Let me hear what they have to
10 say, and then I'll give you a chance to respond.

11 Yes, sir.

12 MR. FISKE: Sure, Your Honor. One, I have
13 no objection to the nonsuit, of course. I mean, he's
14 got a right to do that.

15 THE COURT: It would appear he would.

16 MR. FISKE: Yeah. But he filed -- we've
17 already been through that first lis pendens.

18 THE COURT: Yes, sir.

19 MR. FISKE: We have an order for that, Your
20 Honor.

21 THE COURT: Right.

22 MR. FISKE: The second one is basically the

1 same thing. He files a second suit, files a second
2 lis pendens, doesn't tell anyone about it, says he
3 didn't serve the complaint.

4 But in the complaint, which really goes to
5 the importance of this lis pendens, it's really filed
6 under that -- it's kind of a baby terrorist statute.
7 It calls for forfeiture and all that kind of stuff.
8 He didn't serve it on anybody; but, by God, he sent
9 it to the Attorney General, you know, just trying to
10 cause issues here for our clients.

11 So he files a lis pendens. There's
12 absolutely no interest in the title. We've been over
13 that and over that. So I'm not going to belabor
14 that.

15 Like I said, it's a forfeiture statute.
16 Lis pendens -- frankly, under that statute, I believe
17 a lis pendens is filed after the forfeiture. But it
18 really doesn't make any difference because Mr. Konick
19 has no interest in the property.

20 And I have a -- I have an affidavit that,
21 you know, we spent \$1,600 on this that I'm happy to
22 hand up. I do think the Court has absolutely

1 inherent authority to award sanctions just on the
2 behavior.

3 This is really -- well, if anything, it's
4 worse than the other one because there's truly no
5 basis. He's trying --

6 THE COURT: They were filed all at the same
7 time, were they not?

8 MR. FISKE: The second suit was filed later.
9 And he says, oh, after the -- you know, I removed
10 that lis pendens. Well --

11 THE COURT: Right. He has released it at
12 this point.

13 MR. FISKE: He has released it. He released
14 it after you ruled on the first one. So -- and
15 that's fine.

16 But here's the problem in a nutshell, Judge.
17 It's a sophisticated business. There's sophisticated
18 lending relationships. And when someone, even a
19 prospective -- I don't even want to say it but, you
20 know, if someone wants to buy the place or something,
21 I mean -- but a lender, which is a very -- you know,
22 it's an issue. They're going to go to the land

1 records. And they're going to see a lis pendens and
2 another lis pendens.

3 And it's simply not enough, especially if
4 you go to the allegations of that complaint calling
5 for forfeiture of property, it's not enough that it
6 shows it dismissed. But if you can point them to an
7 order that says, not only is it dismissed, but it was
8 sanctionable behavior and, you know, that gives us
9 something to hook on to to say, okay, there's really
10 no issue here.

11 But what it does is these series of these
12 things, each of which is improper, just gets the land
13 records in a state that someone looking at it is
14 going to raise a lot of questions. Our clients
15 shouldn't have to go through that, especially when
16 there's no basis for that lis pendens.

17 THE COURT: All right. Thank you, sir.

18 All right. Mr. Konick.

19 MR. KONICK: Your Honor, back in the
20 previous hearing when you awarded the first sanction,
21 you said the following -- I'm quoting from the
22 transcript at page 45 of the June 4th hearing. You

1 said, "As far as the sanction that I should impose, I
2 think it should be somewhat limited in this case
3 because I don't think that's -- I don't think the
4 lis pendens has caused any material injury that I can
5 determine other than, perhaps, attorney's fees. Many
6 of these attorney's fees probably would have been
7 incurred anyway regarding the subject matter, the
8 declaratory judgment."

9 And, Your Honor, with all respect, this
10 other case was sort of the companion. It was going
11 to be filed as one case. And it was under
12 investigation by the attorney -- I don't know about
13 the attorney -- I don't know that, but I was told
14 that by the Commonwealth's Attorney. And he asked me
15 not to file these -- this complaint on the conflicts
16 part until his investigation was over.

17 And so, when he gave me -- he said he
18 didn't -- he sort of withdrew his objection after he
19 had finished his investigation and told me to go
20 ahead, if I wanted to, and file it. And so that's
21 the only reason it was filed separately.

22 There is a specific statutory provision for

1 a lis pendens being filed, which is cited in my
2 response. And the respondents haven't shown any
3 damage in this case either. As a matter of fact,
4 they were certainly aware of it because it was
5 publicized. And they mentioned it in previous
6 argument before this Court about the other case
7 before it was nonsuited back in the original
8 argument, I think, in April.

9 So they didn't -- they didn't take any
10 action to quash it or anything else or enter their
11 appearance until after I nonsuited it. And the
12 reason that I nonsuited it, because in light of your
13 order -- well, in the 43 case, I knew that, at that
14 point, I was going to -- if I filed an amended
15 complaint -- I hadn't really decided at that point --
16 it was going to be combined the way it originally
17 was.

18 And I moved to voluntarily nonsuit the case
19 and to dismiss the lis pendens. I did that before
20 you ruled. I did that on May 27. And June 4th, you
21 then ruled on the other case. And to, I don't know,
22 to ameliorate any possible harm, the next day, I went

1 in and released -- filed a release of the lis
2 pendens.

3 And so there hasn't been any evidence
4 shown -- showing any damage. All what Mr. Fiske just
5 talked about, about whether somebody examining the
6 title might come across this, and there might be some
7 damage or so forth, is all completely speculative.
8 And there isn't any showing that any such a thing
9 happened.

10 And there isn't any showing that they
11 incurred any attorney's fees beyond what was in the
12 other matter because they didn't even do anything
13 until after it was nonsuited. They could have done
14 nothing, and it would have been nonsuited, and the
15 lis pendens would have been released automatically,
16 and that would have been the end of that.

17 So my position is that I've done everything
18 I could after the Court ruled and in light of the
19 ruling in the other case to voluntarily dismiss it.
20 And I don't think -- I mean, I noted my exception to
21 the Court's previous ruling.

22 And without prejudice to that, I just don't

1 think that additional sanctions -- I mean, it's
2 pretty much the same thing. Technically, it is a
3 separate filing. But -- and plus it was based on the
4 statute.

5 When there's a forfeiture claimed, as there
6 was in this case -- 51 is only about the conflicts
7 matter. And so forfeiture is a remedy. And the
8 statute specifically provides for the filing of a
9 notice of lis pendens. So I think that I had ample
10 authority to do it. I'm not going to reargue that.

11 But, I mean, after the Court ruled in the
12 other case and after I knew I was going to
13 consolidate the two pleadings, I voluntarily -- well,
14 I asked for the nonsuit, and I dismissed the --
15 quashed the
16 lis pendens.

17 THE COURT: All right.

18 MR. KONICK: So I don't think sanctions are
19 appropriate.

20 THE COURT: Thank you. I think I've heard
21 sufficient argument.

22 First of all, of course, I'm going to grant

1 the nonsuit. I think Mr. Konick is absolutely
2 entitled to the nonsuit, and the Court will enter
3 that upon submission of the appropriate order.

4 Regarding the sanctions, regarding the
5 lis pendens is concerned, as we have discussed
6 previously and discussed again today, the lis pendens
7 statute is a very limited statute. And, again, it
8 does tie up, so to speak, real estate while the
9 litigation is pending. That's what the purpose
10 behind that type of document is when it's filed in
11 the clerk's office. But it's only appropriate when a
12 party is seeking to establish an interest in the real
13 property.

14 And the Court does not believe that that
15 litigation met that standard. That was why I entered
16 sanctions previously. I think they were measured. I
17 don't think they were extreme because there wasn't a
18 lot -- I don't think there was really any evidence
19 other than attorney's fees of damages that were
20 incurred by the party that owned the real estate. So
21 the Court, I think, was conservative in the amount of
22 sanctions that it imposed.

1 I do believe that each time you file a
2 document such as a lis pendens, you have created
3 another cloud on that party's title. If it didn't
4 have that effect, then you would only file one. You
5 wouldn't file more than one. So the intention was, I
6 think, clearly to tie up this real estate by the
7 filing of a lis pendens.

8 So I think sanctions are appropriate. But I
9 think they should be just incremental. I don't think
10 they should be as great as the sanctions were the
11 last time because that covered, I think, a fair
12 amount of what we have discussed here.

13 So I'm going to impose sanctions of \$500 in
14 this case, which is half the sanctions of the last
15 time, for the incremental filing of the lis pendens.
16 I think that's sufficient in this matter. Mr. Konick
17 has released the lien. If it had not been released,
18 then I would look at it differently. But I'm taking
19 that into consideration in the amount of sanctions
20 I'm imposing. I think these are, again, limited and
21 measured sanctions, but I think they're appropriate
22 under the circumstance. So that will be payable.

1 I think there was some question last time,
2 well, who do we pay the sanctions to? You pay it to
3 the landowner, the titled owner of the property,
4 which apparently is the Inn at Little Washington.
5 Who else would it be? It wouldn't be me. So you pay
6 it over -- or any of the attorneys. So you pay it
7 over to the landowner whose interest was affected by
8 the filing of that document, of that possible lien on
9 the real estate.

10 So that will be the ruling of the Court.

11 I think I -- you'll prepare the appropriate
12 order, Mr. Fiske.

13 MR. FISKE: (Nodding head.)

14 THE COURT: Are there any other unresolved
15 issues that need to be addressed regarding these
16 matters at this time?

17 MR. KONICK: Your Honor, I've got an order,
18 and this one just says that the -- I mean, I think we
19 can interlineate it and just put that the sanctions
20 are \$500.

21 THE COURT: Yeah. I think if you put it all
22 in the same order. I don't want to do separate

1 orders. I don't have some question of jurisdiction
2 or something. I'd like you to do it in one order.

3 MR. KONICK: Well, they are separate cases.

4 THE COURT: Oh, okay. I thought you were
5 talking about the lis pendens and the nonsuit.

6 MR. KONICK: I mean, I have the nonsuit
7 order in 51, and we can just, maybe, change it to
8 reflect your ruling on that.

9 THE COURT: Right.

10 MR. KONICK: He's got an order.

11 MR. FISKE: Your Honor, I have the order on
12 the lis pendens in 43, not 51 --

13 THE COURT: All right.

14 MR. FISKE: -- which -- and I think
15 Mr. Konick has seen this.

16 THE COURT: All right.

17 MR. FISKE: I'll just hand this to him. If
18 you sign this.

19 THE COURT: All right.

20 MR. KONICK: The only other thing, Your
21 Honor, there's a pending motion to -- order
22 dismissing the motion for sanctions in the other

1 case.

2 THE COURT: Oh, okay.

3 MR. KONICK: And that was never entered.

4 THE COURT: All right.

5 MR. KONICK: So I have --

6 THE COURT: If you want to tender that. Has
7 that been endorsed? Have you gentlemen endorsed
8 that?

9 MR. KONICK: Well, they have some issue that
10 they're trying to change the consent.

11 MR. FISKE: Well, your Honor, we just
12 disagreed with his order.

13 THE COURT: That's fine. I can look at the
14 order and make -- it's going to be a fairly
15 straightforward order.

16 MR. FISKE: I have an alternative order.

17 THE COURT: Well, if you want to submit
18 competing orders, I'll look at it, and I'll enter the
19 order that I think is appropriate.

20 MR. FISKE: Your Honor --

21 THE COURT: And I may not enter either one.
22 I may enter my own.

1 MR. FISKE: In the interest of time, we're
2 perfectly willing to do that.

3 THE COURT: Okay. All right. You want to
4 just --

5 MR. KONICK: Do what?

6 THE COURT: Submit competing orders.

7 MR. FISKE: Submit them and the Judge will
8 determine.

9 THE COURT: And I'll just look it over and
10 see what I want to enter. If I need a transcript,
11 I'll have you order a transcript. If not, I'll just
12 go ahead and sign it based on what I have in front of
13 me.

14 MR. KONICK: Well, one other thing. The one
15 I've got, I got back from the Attorney General, Your
16 Honor, this order dismissing the nonsuit. So....

17 THE COURT: Well, again, just give me what
18 you think the order should be. I'll look it over and
19 I'll review it. If I have any questions, I'll let
20 you know. If I don't, then I'll take care of it.

21 Okay. Is there anything else we need to
22 take up?

1 MR. FISKE: I don't think so, Your Honor.

2 THE COURT: All right. If not, thank you
3 very much, gentlemen.

4 (Whereupon, at 11:32 a.m., the hearing
5 concluded.)

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CERTIFICATE

State of Virginia }
 } Ss:
County of Rappahannock }

I, Vicky Jo Reiner, Notary Public in and for the State of Virginia, do hereby certify that I reported by stenographic and electronic means the hearing styled on the title sheet hereof, taken at the time and place shown and that the foregoing pages constitute a true and accurate transcript of said hearing, to the best of my ability.

I further certify that I am not related to any of the parties, nor am I employed by or related to any of the attorneys representing the parties, and I have no interest in the outcome of this matter.

VICKY JO REINER
Notary Public in and for the
Commonwealth of Virginia

My commission expires:
December 31, 2015

Registration No. 7117657

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