VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE

FREDERICK W. PAYNE, et al.

Plaintiffs,

v. Case No. CL 17 - 145

CITY OF CHARLOTTESVILLE, VIRGINIA, et al.

Defendants

Plaintiff's Brief: Grounds for Temporary Injunction

Introduction

The applicable statutory provisions are straightforward: the Circuit Court has jurisdiction to grant an injunction under Va Code § 8.01-620. The court must be satisfied of "the plaintiff's equity," and the prayer for injunctive relief may be supported by a verified Complaint. Va Code § 8.01-628. A temporary injunction must be limited to a stated duration. Va Code § 8.01-624. These code provisions are appended.

Section 8.01-622 of the Code of Virginia, 1950, as amended, prescribes that, "an injunction may be awarded to protect any plaintiff in a suit for specific property, pending either at law or in equity, against injury from the sale, *removal*, or concealment of such property [emphasis added]. The Lee and Jackson Monuments are affixed to the real property upon which they are situated and are, therefore, real property. As such, Virginia law specifically provides for injunctive relief to a Plaintiff in order to preserve the status quo and protect against injury from removal of property pending the outcome of litigation.

Facts

The verified Complaint avers that the Charlottesville City council voted on 6 February 2017 to remove the Monument to General Robert E Lee and to rename "Lee Park," and to transform and re-interpret and rename "Jackson Park." Council further directed their staff to provide, within 60 days, options for accomplishing the resolutions.

Virginia law proscribes disturbing or interfering with monuments for wars or memorials to war veterans. The law protects the monuments from local government efforts to remove, damage, deface, or destroy these historic monuments.

Plaintiff's verified Complaint avers three causes of action, to include the statutory violations, a challenge to the City council's authority to disturb or interfere with the monuments, and the violations of the terms of the gifts to the City of Charlottesville by Paul Goodloe McIntire. McIntire gifted the tract or parcel of land where the monument to General Lee is situated by deed dated 14 June 1918 and the monument was dedicated on 21 May 1924 and re-dedicated on 26 September 1999. Mr. McIntire gifted the tract or parcel of land where the monument to Lieutenant General Jackson is situated by deed dated 24 September 1918, and the monument was dedicated on 19 October 1921 and rededicated on 26 September 1999.

Argument

To establish the plaintiff's equity as required by Va Code § 8.01-628 the plaintiff must show "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tips in his favor, and that an injunction is in the public interest." Winter v. NRDC, Inc., 555 U.S. 7, 20 (2008)("Winter"). The Fourth Circuit expressly adopted the Winter test, concluding

that the "balance-of-hardship test" in Blackwelder Furniture Co. of Statesville v. Seilig Manufacturing Co., 550 F.2d 189 (4th Cir. 1977)("Blackwelder") "stands in fatal tension" with Winter. Real Truth About Obama, Inc. v. Fed. Election Comm'n, 575 F.3d 342, 346 (4th Cir. 2009); see also Kalos v. Greenwich Ins. Co., 404 Fed. Appx. 792, 793 (4th Cir. 2010)("Real").

1) Plaintiffs are likely to succeed on the merits

Virginia Code § 15.2-1812 explicitly bars the action sought by the defendants. Even though there is a dearth of case law interpreting and applying the relevant Code provisions, the language of the law is clear and unambiguous. Both the facts in the verified Complaint, and evidence to be adduced at the hearing on the temporary injunction, indicate the monument to General Lee and the monument to General Jackson are clearly monuments to Confederate veterans, which the law explicitly protects. Out of respect of the Court's time and for the sake of brevity, the Plaintiffs here incorporate by reference the facts as already stated in their verified Complaint, those facts to be adduced at the hearing on the temporary injunction, and the arguments in Plaintiff's briefs on the Monument Protection Law and the Dillon Rule; the Danville Case; and Standing.

2) Plaintiffs will suffer irreparable harm

If an injunction is not granted, the defendants will be free to remove the Lee monument by sale to anyone they chose, and to obscure or desecrate the Jackson monument, and to alter in a manner to desecrate the namesake memorial parks in which the monuments stand. Any disruption to the status quo would inherently result in irreparable harm, in that the monuments are unique works that have spent nearly a century in their current position without change. The artists who created them are long

dead. They are antique and fragile, they are of tremendous size; due to the value of the sculptures, and the value of the materials used, no restoration or replacement could return the monuments to their current form. The city acknowledges moving Lee without workmen with special expertise risks damaging or destroying the statue. Moving the monument, or reconfiguring either memorial park would entail cutting down 100 year old trees, digging up gardens and walkways. To proceed with any physical alteration would set off a series of events that cannot be undone.

3) An injunction is in the public interest

Given the City's ownership of the monuments, an injunction is in the public interest in that it will prevent violation of the law, and preserve significant public resources including tax money, against being used without authority and illegally. The injunction is also in the public interest in preserving historical evidence in situ, priceless hmonuments. And the injunction by preserving the status quo would allow the parties or the judicial process to work out what is and is not legal; what is and is not acceptable; what should and should not be done. A constructive resolution if obtainable requires time, is only possible with an injunction in place to provide that time.

4) The balance of equities favors an injunction

After the Supreme Court's decision in Winter, the balance of hardships and equities is no longer considered a material factor for purposes of a temporary injunction. 555 U.S. 7, 20 (2008). Nevertheless, it is worth noting that the monuments have been unaltered but for cleaning and restoration over the last ninety-eight years and present no objective cost nor any harm while they remain in their current state. In contrast the Defendants' proposed action is radical, constitutes a loss of irreplaceable historic resources, and

causes significant harm. The requested temporary injunction is just that: temporary. But what the Defendants propose is permanent.

Conclusion

WHEREFORE, the Plaintiffs respectfully request that this Court enter an order granting a temporary injunction prohibiting the Defendants from removing Lee or Jackson or reconfiguring or or renaming their memorial parks in any way pending the final outcome of this case.

Respectfully submitted:

_____ (date) April 27, 2017

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CERTIFICATE OF SERVICE

I certify that I had the foregoing Plaintiff's Brief: Grounds for Injunction, hand delivered to the offices of Craig Brown, Esq., attorney for the City of Charlottesville and for the individual Defendants, on April 27, 2017 ..

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Va. Code Ann. § 8.01-628

Current through the 2016 Regular Session and Acts 2017, cc. 1-3, 32, 55, 58, 82, 107, 110, 147, 156, 168, 181, 287 and 291

Code of Virginia > *TITLE 8.01. CIVIL REMEDIES AND PROCEDURE* > *CHAPTER 24. INJUNCTIONS*

§ 8.01-628. Equity of prayer for temporary injunction to be shown by affidavit or otherwise

No temporary injunction shall be awarded unless the court shall be satisfied of the plaintiff's equity. An application for a temporary injunction may be supported or opposed by an affidavit or verified pleading.

History

Code 1950, § 8-620; 1977, c. 617; *2015, c. 125*.

Annotations

Notes

THE 2015 AMENDMENTS. --

The 2015 amendment by c. 125 added the second sentence.

Case Notes

FEDERAL STANDARD COMPARED. --There is no great difference between federal and Virginia standards for preliminary injunctions. Both draw upon the same equitable principles. *Capital Tool & Mfg. Co. v. Maschinenfabrik Herkules, 837 F.2d 171 (4th Cir. 1988).*

AFFIDAVIT HELD SUFFICIENT. --The affidavit of the president of a corporation that the allegations of the bill of which he has knowledge are true, and that he believes that all other matters stated therein are true, is a sufficient compliance with this section. *Southern Ry. v. Washington, A. & M.V. Ry., 102 Va. 483, 46 S.E. 784 (1904)* (decided under prior law).

ERROR FOR PERPETUAL INJUNCTION TO BE GRANTED ON AFFIDAVITS. --It is sometimes necessary, from force of circumstances, for preliminary applications for injunctions to be heard upon affidavits only, but the general rule is that, where a case made on a bill for injunction is heard upon the merits, the hearing should be had on depositions regularly taken. It is error for the issues in an injunction suit to be heard and determined upon affidavits and a perpetual injunction granted thereon. *Virginian Ry. v. Echols, 117 Va. 182, 83 S.E. 1082 (1915)* (decided under prior law).

APPLIED in

Vardell v. Vardell, 225 Va. 351, 302 S.E.2d 41 (1983).

Va. Code Ann. § 8.01-629

Current through the 2016 Regular Session and Acts 2017, cc. 1-3, 32, 55, 58, 82, 107, 110, 147, 156, 168, 181, 287 and 291

Code of Virginia > *TITLE 8.01. CIVIL REMEDIES AND PROCEDURE* > *CHAPTER 24. INJUNCTIONS*

§ 8.01-629. Notice required

Any court may require that reasonable notice be given to the adverse party, or to his attorney of record, of the time and place of moving for it, before the injunction is granted, if, in the opinion of the court, it be proper that such notice be given.

History

Code 1950, § 8-621; 1977, c. 617.

Annotations

Notes

REVISERS' NOTE

Former § 8-621 has been changed by (1) deleting reference to the attorney-in-fact of an adverse party, (2) replacing "attorney-at-law" with the language "attorney of record," and (3) deleting the last sentence as surplusage.

Case Notes

DISCRETION OF COURT AS TO NOTICE. --It is obvious from this section that the requirement for notice to defendant before the award of a preliminary injunction rests largely in the discretion of the trial court, and this has always been the approved practice. The cases are rare indeed which justify the awarding of a preliminary injunction without notice to those affected thereby. The ex parte statement of the bill and affidavits usually presented for the complainant in such cases, should not be accepted as justifying the issuance of a preliminary injunction unless necessary to prevent threatened and irreparable damage. Frequently the application is so delayed by the complainant that there is little time for notice, but this delay should impel the judge to whom application is made to scrutinize the alleged reasons therefor with greater care, so as to avoid abuse of the power. *Cohen v. Rosen, 157 Va. 71, 160 S.E. 36 (1931)* (decided under prior law).

NOTICE SHOULD USUALLY BE GIVEN. --Notice of an application for an injunction should always be given to the adverse party except in case of most obvious necessity for prompt action. *Bristow v. Catlin, 91 Va. 18, 20 S.E. 946 (1895)* (decided under prior law).

Research References & Practice Aids

MICHIE'S JURISPRUDENCE REFERENCES. --

10A M.J. INJUNCTIONS § 61

Michie's Jurisprudence of Virginia & West Virginia > 1 INJUNCTIONS > II. RIGHT TO RELIEF. > I. OTHER INSTANCES.

§ 61. To Maintain Status Quo Pending Litigation.—

Courts have the power to issue mandatory injunctions to preserve the status quo before a final hearing.[373] If the mischief complained of is irremediable and destroys the substance of the property, such as the cutting of timber, the mining of minerals, and the extracting of ores, an injunction restraining such acts will issue, in order that the

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Generally.—

Powhatan Coal & Coke Co. v. Ritz, 60 W. Va. 395, 56 S.E. 257 (1906).

Injunction to Protect Plaintiff in Suit for Specific Performance.—

See *§ 8.01-622, Code of Virginia* (1950).

Injunction Will Lie to Preserve Property in Controversy Pending Decision on Merits.—

See State v. *Baker, 112 W. Va. 263, 164 S.E. 154 (1932).*

Preliminary Injunction Pending Arbitration.—

The Federal Arbitration Act does not absolutely preclude a district court from granting one party a preliminary injunction to preserve the status quo and pending the arbitration of the parties' dispute. However, where a dispute is subject to mandatory arbitration under the Federal Arbitration Act, a district court has the discretion to grant a preliminary injunction to preserve the status quo pending the arbitration of the parties' dispute if the enjoined conduct would render that process a hollow formality. The arbitration process would be a hollow formality where the arbitral award when rendered could not return the parties substantially to the status quo ante. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley, 756 F.2d 1048 (4th Cir. 1985).*

Freeze Orders.—

Freeze orders and similar injunctions are designed to prevent the defendant from further dissipating the funds he allegedly has already misappropriated. Absent explicit language to the contrary, a freeze order should not be construed to prohibit post-freeze deposits by persons aware of the freeze. *Commodity Futures Trading Comm'n v. Franklin, 652 F. Supp. 163 (W.D. Va. 1986).*

Courts typically freeze accounts without giving serious thought as to who might add to the assets in a frozen account. However, public policy certainly should not discourage an individual from depositing funds into a frozen account, especially if the depositor is the same person who effected the fraud in the first place. *Commodity Futures Trading Comm'n v. Franklin, 652 F. Supp. 163 (W.D. Va. 1986).*

When a plaintiff creditor asserts a cognizable claim to specific assets of a defendant or seeks a remedy involving those assets, a court may in the interim invoke equity to preserve the status quo pending judgment where the legal remedy might prove inadequate and the preliminary relief furthers the court's ability to grant the final relief requested. This nexus between the assets sought to be frozen through an interim order and the ultimate relief requested in the lawsuit is essential to the authority of a district court in equity to enter a preliminary injunction freezing assets. *Travelers Cas. & Sur. Co. of Am. v. Beck Dev. Corp., 95 F. Supp. 2d 549 (E.D. Va. 2000).*

property may be preserved from destruction during such time as may be necessary to try the title.[374] Under the West Virginia statute,[375] the sale of property conveyed to secure the payment of a usurious debt may be enjoined pending a suit to purge the usury.[376]

The granting, refusal or dissolution of an injunction filed ancillary to an action for ejectment is wholly within the discretion of the court. It is for the court to say, after the examination of the claim of title in the complainant, whether the prima facie showing is such as to render it proper to preserve the status quo.[377]

An injunction against the sale of property pending a suit should not be in excess of what is necessary to protect the interest of the person seeking the injunction.[378] Accordingly, an injunction restraining the defendant from enjoying the complete use of personalty has been held an abuse of discretion.[379]

M.J.

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Generally.—

Buskirk v. King, 72 F. 22 (4th Cir. 1896), aff'd, *78 F. 233 (4th Cir. 1897)*.

Under certain circumstances, a complainant out of possession may be awarded an injunction preventing the destruction of the property, but it should be only in cases where an action of law is either pending or contemplated, and ancillary thereto so as to preserve the status quo. *Buchanan Co. v. Adkins, 175 F. 692 (4th Cir. 1909)*.

Cutting Timber.—

When the title to land is in dispute, and an action for ejectment has been, or is about to be, instituted by the claimant out of possession, he may enjoin the other from cutting timber on the land pending the determination of the question of title. *Ulman v. Ritter, 72 F. 1000 (D.W. Va 1896)*; *King v. Campbell, 85 F. 814 (W.D. Va. 1898)*; *Pardee v. Camden Lumber Co., 70 W. Va. 68, 73 S.E. 82 (1911)*; *Waldron v. Ritter Lumber Co., 70 W. Va. 470, 74 S.E. 687 (1912)*.

375 *§ 47-6-8, W. Va. Code*.

376 *Webb v. Lincoln Finance Co., 112 W. Va. 349, 164 S.E. 300 (1932)*.

377 *King v. Williamson, 80 F. 170 (4th Cir. 1897)*, *aff'g 78 F. 233 (4th Cir. 1897)*, *cert. granted*, ***168 U.S. 708 (1897)***, *decree aff'd*, ***172 U.S. 645, 19 S. Ct. 878, 43 L. Ed. 1183 (1899)***.

378 *Blackshere v. Blackhere, 111 W. Va. 213, 161 S.E. 27 (1931)*.

379 *Blackshere v. Blackhere, 111 W. Va. 213, 161 S.E. 27 (1931)*.

Va. Code Ann. § 8.01-622

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Code of Virginia > *TITLE 8.01. CIVIL REMEDIES AND PROCEDURE* > *CHAPTER 24. INJUNCTIONS*

§ 8.01-622. Injunction to protect plaintiff in suit for specific property

An injunction may be awarded to protect any plaintiff in a suit for specific property, pending either at law or in equity, against injury from the sale, removal, or concealment of such property.

History

Code 1950, § 8-612; 1977, c. 617.

Annotations

Research References & Practice Aids

CROSS REFERENCES. --

As to recovery of damages upon dissolution of injunction, see *§ 8.01-123*.

MICHIE'S JURISPRUDENCE REFERENCES. --

For related discussion, see *10A M.J. Injunctions, § 61*.

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