

205Va 697
Record No. 5807

**In the
Supreme Court of Appeals of Virginia
at Richmond**

UNITED STATES OF AMERICA

v.

**NEW ROSE DEVELOPMENT
CORPORATION, ET AL.**

FROM THE CORPORATION COURT OF THE CITY OF NORFOLK

RULE 5:12 BRIEFS

§5. **NUMBER OF COPIES.** Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. **SIZE AND TYPE.** Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5807

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 29th day of November, 1963.

UNITED STATES OF AMERICA,

Appellant,

against

NEW ROSE DEVELOPMENT CORPORATION, CHARLES
U. O'DEA AND VIRGINIA EMPLOYMENT COMMIS-
SION, Appellees.

From the Corporation Court of the City of Norfolk
H. Lawrence Bullock, Judge

Upon the petition of United States of America an appeal is awarded it to an order entered by the Corporation Court of the City of Norfolk on the 3rd day of June, 1963, in a certain proceeding then therein depending wherein New Rose Development Corporation was plaintiff and Charles U. O'Dea, High Constable for the City of Norfolk, was defendant; upon the petitioner or some one for it, entering into bond with sufficient security before the clerk of the said corporation court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

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page 1]

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COMPLAINT

The plaintiff hereby makes the following complaint against the defendant and prays for the relief hereinafter set out. For its complaint the plaintiff says:

1. That by an agreement of lease dated April 5, 1961 between the plaintiff herein, Lessor, and Mike Levine, Lessee, the said Lessee leased for a term of five (5) years and fifteen (15) days beginning on May 15, 1961 and ending on May 31, 1966 the premises located at 110 West Little Creek Road, Norfolk, Virginia for Two Hundred Dollars (\$200.00) per month payable on the first day of each month.

2. That the said Mike Levine subleased the said premises to *Merlin Bakery, Incorporated* of which the said Mike Levine was the principal stockholder.

3. That the said Mike Levine failed to pay the rent for the month of April and the month of May, 1962 as provided for in said lease.

4. That the plaintiff herein caused a distress warrant to be issued on May 3, 1962 for the rent then due, to-
page 2] wit: Four Hundred Dollars (\$400.00), and that under said distress warrant a levy was made on May 6, 1962 by the defendant on the property of the subtenant located on said premises.

5. That the said Mike Levine then failed to pay the rent for the month of June and the month of July as provided by said agreement.

6. That the plaintiff then caused another distress warrant to be issued for the rent then due, namely Eight Hundred Dollars (\$800.00), and the defendant levied on the property of the subtenant located on said premises on July 19, 1962.

7. That pursuant to the levy of July 19, 1962, the said property was advertised for sale, the plaintiff posted a bond in the amount of Twelve Thousand Dollars (\$12,000.00), the premium for which cost One Hundred Twenty Dollars (\$120.00), and the property was sold on July 31, 1962 for Two Thousand Five Hundred Dollars (\$2,500.00).

8. That after the deduction of the auctioneer's fee and the High Constable's fee, a balance of Two Thousand Two Hundred Twenty-Seven Dollars and Ninety-three Cents (\$2,227.93) remained.

9. That the defendant has failed to pay over to the plaintiff the money due it including the rent of Eight Hundred Dollars (\$800.00), the bond premium of One Hundred Twenty Dollars (\$120.00), other costs of Four Dollars and Seventy-Five Cents (\$4.75).

WHEREFORE the plaintiff prays that the defendant be ordered by the court to pay to the plaintiff the sum of Nine
page 3] Hundred Twenty-Four Dollars and Seventy-Five Cents (\$924.75) out of the proceeds of said sale.

NEW ROSE DEVELOPMENT CORPORATION

By: WILLIAM T. PRINCE

Counsel

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Filed 10/1/62

IRA B. WHITE, D. C.

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ORDER

This day came the defendant, and it appearing from the affidavit of the defendant that he claims no interest in the proceeds of the sale of the property of *Merlin Bakery, Incorporated*, located at 110 West Little Creek Road, Norfolk, Virginia, which proceeds form the subject matter of this action, but that the United States of America and the Commonwealth of Virginia assert a claim thereto, and that the said defendant does not collude with the United States of America or the Commonwealth of Virginia, but is ready to pay or dispose of the subject matter of this action as the court may direct, it is therefore ORDERED that the United States of America and the Commonwealth of Virginia do appear before this court on or before the 14th day of Decem-

ber, 1962, and state the nature of their claim, and maintain or relinquish it; in the meantime, the proceedings herein shall be stayed.

It is further ORDERED that the United States of America be served with a copy of this order, affidavit and complaint, by serving the same on the Assistant United States Attorney for the Eastern District of Virginia, Federal Building, Norfolk, Virginia, with a copy of the same to the
 page 6] Attorney General of the United States, Washington, D. C. by certified mail; and serve the Commonwealth of Virginia by serving a copy of this order, affidavit and complaint upon the Commissioner of Virginia Employment Commission, Broad-Grace Arcade, Richmond, Virginia, with a copy thereof to the Attorney General of the Commonwealth of Virginia, Richmond, Virginia, by certified mail.

Enter this Order: October 5, 1962

H. LAWRENCE BULLOCK, Judge

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AFFIDAVIT

STATE OF VIRGINIA,
 City of Norfolk, to-wit:

This day personally appeared before me, Audrea R. Coleman, a Notary Public in and for the City of Norfolk, in my State aforesaid, Charles U. O'Dea, who, being duly sworn, says that he is the defendant named in the above cause; that he has been duly served with process in an action at law; that the same has been brought by the plaintiff for the recovery of part of the proceeds derived from the sale of certain property described in said Complaint; that he claims no interest in the subject matter of the action; that the United States of America by and through the District Director of the Internal Revenue Service makes claim to said proceeds under a judgment against *Merlin Bakery, Incorporated* in the amount of \$1450.41 for unremitted withholding taxes for the fourth quarter 1961 and under a judgment dated May 7, 1962 against the said *Merlin Bakery, Incorporated* in the amount

of \$1636.37 for unremitted withholding taxes for
page 8] the period ending first quarter 1962; and that the
Commonwealth of Virginia by and through the
Commissioner of the Virginia Employment Commission makes
claim to said proceeds under a lien dated July 20, 1962 against
the property of the said *Merlin Bakery*, Incorporated under
the provisions of §60-80 of the Code of Virginia; that he, the
said defendant, does not collude with either the said United
States of America or the Commonwealth of Virginia, but is
ready to pay or dispose of the said proceeds as the court may
direct.

That he prays that an order be entered directing the United
States of America and the Commonwealth of Virginia to
answer and state their claims to said proceeds by December
14, 1962 and that a copy of said order with a copy of the
plaintiff's complaint be served on the United States of America
by serving the same upon the Assistant United States
Attorney for the Eastern District of Virginia, Federal Building,
Norfolk, Virginia with a copy of said papers by certified
mail to the Attorney General of the United States at Washington,
D. C.; and that service of a copy of said order and
complaint be served on the Commonwealth of Virginia by
serving a copy thereof on the Commissioner of the Virginia
Employment Commission, Broad-Grace Arcade, Richmond,
Virginia, with a copy thereof by certified mail to the Attorney
General of the Commonwealth of Virginia, Richmond, Virginia.

CHARLES U. O'DEA, High Constable
for the City of Norfolk

Filed 10/5/62

IRA B. WHITE, D. C.

Subscribed and sworn to before me, a Notary Public in and
for the City of Norfolk, State of Virginia, in my said City and
State aforesaid, this 5th day of October, 1962.

AUDREA R. COLEMAN
Notary Public

My Commission expires: February 10, 1964

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**ANSWER AND CLAIM OF VIRGINIA
EMPLOYMENT COMMISSION**

Virginia Employment Commission, an instrumentality of the Commonwealth of Virginia, in response to an Order entered herein, answers and says:

(1) That during the first quarter of 1962, Merlen Bakery, Inc., one of the parties in this cause, was an employer under the provisions of Title 60 of the Code of Virginia of 1950, known as the "Virginia Unemployment Compensation Act."

(2) That during the period commencing January 1, 1962 and ending March 31, 1962, contributions or payroll taxes due under the provisions of Title 60 of the Code of Virginia by Merlen Bakery, Inc. have accrued and remain unpaid in the principal amount of TWO HUNDRED NINETY SEVEN DOLLARS AND FIVE CENTS (\$297.05), with interest thereon at the rate of 1% per month until paid as follows:

On \$297.05 from May 1, 1962

(3) That under the provisions of §60-80 of the Code of Virginia, all of that tax together with the interest thereon until paid, constitutes a lien against the assets of Merlen Bakery, Inc., prior to all claims of lien and general creditors, except any mortgage, deed of trust or other lien perfected prior to January 1, 1962 on which date a part of the tax first accrued and the claim of the United States of America as stated in the Affidavit sworn to by Charles U. O'Dea on

October 5, 1962 and filed in this court.

page 12] (4) That on July 20, 1962 the Virginia Employment Commission obtained a lien in the amount of TWO HUNDRED NINETY SEVEN DOLLARS AND FIVE CENTS (\$297.05), plus interest on certain personal property belonging to Merlen Bakery, Inc. This lien was obtained as a result of a warrant for delinquent taxes issued to the City Sergeant of Norfolk, Virginia on July 13, 1962, against said Merlen Bakery, Inc. under the provisions of §58-41 of the Code of Virginia.

(5) That as a result of the foregoing, the Virginia Employment Commission has two liens against the funds of Merlen Bakery, Inc., now held by the High Constable of the City of

Norfolk. The first lien which is given under §60-80 of the Code of Virginia is prior to all claims of lien and general creditors, except any mortgage, deed of trust or other lien perfected prior to January 1, 1962 and the claim of the United States Government, the second lien which is given under §58-41 of the Code of Virginia is prior to all claims arising after July 20, 1962.

Now having asserted its claim, the Virginia Employment Commission prays that its interest be protected, and that the above mentioned funds be distributed to those entitled thereto.

Respectfully submitted,

VIRGINIA EMPLOYMENT COMMISSION
By THOMAS O. BEANE
Counsel

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Filed 10/25/62

IRA B. WHITE, D. C.

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ANSWER AND CLAIM OF THE
UNITED STATES OF AMERICA

The United States of America, a sovereign power, by its attorney, in response to an order heretofore entered in this cause answers and says:

1. That Merlen Bakery, Inc., a corporation organized under the laws of the Commonwealth of Virginia and doing business in the City of Norfolk, Virginia, incurred tax liabilities to the United States of America for the fourth quarter of 1961 in the amount of \$553.39, and for the first quarter of 1962 in the amount of \$1,663.62, which amounts, together with interest thereon at the rate of 6% per annum, remain unpaid.

2. That an assessment was made by the District Director of Internal Revenue for the tax liability owing to the United States of America for the fourth quarter of 1961 in the amount of \$1,450.41 on February 9, 1962 and a notice of the

tax lien created thereby was docketed in the Clerk's Office of the Corporation Court of the City of Norfolk on March 15, 1962. Said amount has been reduced since docketing of the aforementioned tax lien by payments received by the District Director of Internal Revenue on March 14, 1962, April 3, 1962 and April 9, 1962, leaving a balance due and owing thereon of \$535.39 plus interest as aforesaid.

3. That the District Director of Internal Revenue made an assessment in the amount of \$1,663.62 for the first quarter of 1962 on May 3, 1962, and a notice of the tax lien created thereby was docketed in the Clerk's Office of the Corporation Court of the City of Norfolk on May 9, 1962, and that no payment has been received for any portion thereof.

page 14] 4. That the United States of America claims a priority in the funds in the hands of Charles U. O'Dea to the extent of \$2,199.01 plus interest thereon at the rate of 6% per annum over the claims of the Virginia Employment Commission and the New Rose Development Corporation since the claims of the United States of America are prior in time to the claims of the Virginia Employment Commission and the New Rose Development Corporation.

5. True copies, certified in accordance with the provisions of 28 U.S.C.A. 1733, of documents in support of the claim of the United States of America, that is to say, a Certificate of Assessments and Payments, a Statement of Tax Due on Federal Tax Return, and an Assessment Certificate are attached hereto to be filed herewith in support of the claim of the United States of America.

WHEREFORE, the United States of America prays that its interest in the funds in the hands of Charles U. O'Dea be protected and that it receive payment therefrom according to the priority to which it is entitled.

UNITED STATES OF AMERICA

By ROGER T. WILLIAMS

Assistant United States Attorney

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Filed 12/14/62

IRA B. WHITE, D. C.

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ORDER

This cause came on this day, on the Complaint filed by the plaintiff, New Rose Development Corporation, and on the separate Answers and Claims of the United States of America and the Virginia Employment Commission, and was argued by counsel upon a stipulation of the facts as set forth in said pleadings;

And it appearing to the Court that the plaintiff has reduced its claim as set forth in the Complaint to Five Hundred Twenty-four and 75/100 Dollars (\$524.75) plus the costs of this proceeding, said claim being composed of a claim for rent for the months of April and May, 1962, and a claim for One Hundred Twenty-four and 75/100 Dollars (\$124.75) representing the costs incurred by the plaintiff in creating the fund out of which this controversy arose;

And it further appearing to the Court that the funds in the hands of Charles U. O'Dea, High Constable for the City of Norfolk, the defendant herein, are in the amount of Two Thousand Three Hundred Twenty-five Dollars (\$2,325.00) before the deduction of his fee and expenses, rather than the Two Thousand Two Hundred Twenty-seven and 93/100 Dollars, \$2,227.93) alleged in the Complaint;

page 25] And it further appearing to the Court that the respective rights of the claimants to the said fund were established according to the following priorities:

1. The claim of the United States of America in the amount of Five Hundred Thirty-five and 39/100 Dollars (\$535.39) plus interest at the rate of six (6) per cent per annum from January 1, 1962, as established by the lien created by the assessment of the District Director of Internal Revenue of Feb. 9, 1962, notice of which was docketed in the Clerk's Office of this Court on March 15, 1962;

2. The claim of New Rose Development Corporation in the amount of Four Hundred Dollars (\$400.00) as established by the lien created by the levy of the distress warrant on May 6, 1962 for the rent due for the months of April and May, 1962;

3. The claim of New Rose Development Corporation in the amount of One Hundred Twenty-four and 75/100 Dollars (\$124.75), the costs incurred by said plaintiff in causing the

creation of the fund; and Seventeen and 25/100 Dollars (\$17.25), the costs of this proceeding;

4. The claim of the United States of America in the amount of One Thousand Six Hundred Sixty-three and 62/100 Dollars (\$1,663.62) with interest from March 31, 1962, as established by the lien created by the assesment of the District Director of Internal Revenue of May 3, 1962, notice of which was docketed in the Clerk's Office of this Court on May 9, 1962;

5. The claim of the Virginia Employment Commission in the amount of Two Hundred Ninety-seven and 05/100 Dollars (\$297.05) with interest thereon at the rate of one (1) per cent per month from May 1, 1962, as established by the
page 26] lien created by the execution on July 20, 1962 of a warrant for delinquent taxes;

Now, therefore, it is ORDERED that the defendant herein pay to the claimants thereof the funds in his hands after deducting therefrom the sum of Twenty-five and 62/100 Dollars (\$25.62), the amount of his commission and costs, according to the priorities set forth above insofar as is possible, to all of which action of the Court the United States of America objects and excepts.

Enter this Order: June 3 1963

H. LAWRENCE BULLOCK
Judge

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

To the Honorable H. Lawrence Bullock:

Take notice that the United States of America, by its attorney, notes an appeal from the final judgment of the Court entered herein on June 3, 1963, and sets forth its assignments of error as follows:

1. The Court erred in according a priority to the claim of the New Rose Development Corporation in the amount of \$400.00 as established by a lien created by the levy of a distress warrant issued on May 6, 1962, for rent due for the

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months of April and May 1962 over any claim of the United States of America.

2. The Court erred in according a priority to the claim of the New Rose Development Corporation in the amount of \$124.75, representing costs incurred by the New Rose Development Corporation in creating the fund in the hands of the High Constable and in allowing a priority to the claim of the New Rose Development Corporation in the amount of \$17.25, representing court costs expended by said New Rose Development Corporation, over any claim filed herein by the United States of America.

UNITED STATES OF AMERICA
By ROGER T. WILLIAMS
Assistant United States Attorney

Filed 8-2-63

IRA B. WHITE, D. C.

A Copy — Teste:

H. G. TURNER, Clerk.

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