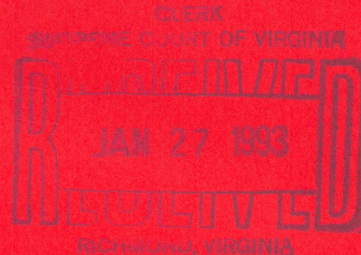


245 Va 465



IN THE  
SUPREME COURT OF VIRGINIA  
AT RICHMOND

---

Record No. 920870

THOMAS R. NEDRICH,

Appellant

v.

LES G. JONES, et al,

Appellees

---

Record No. 920947

JOHN F. WEBER,

Appellant

v.

LES G. JONES, et al,

Appellees

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APPELLEES' SECOND SUPPLEMENTAL APPENDIX

---

Kenneth E. Labowitz  
B. G. Stephenson  
Gregory L. Murphy  
J. Thomas Fromme II  
Alan B. Croft  
David G. Fiske

Counsel for Appellees



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APPELLEES' SECOND SUPPLEMENTAL APPENDIX

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1 VIRGINIA:

2 IN THE CIRCUIT COURT OF FAIRFAX COUNTY

3 - - - - - X

4 JOHN F. WEBER, :

5 Plaintiff, : Law No. 104935

6 v. :

7 LES G. JONES, et al., :

8 Defendants. :

9 - - - - - X

10

11 Wednesday, July 31, 1991

12 Fairfax County Circuit Court

13 4110 Chain Bridge Road

14 Fairfax, Virginia

15

16 The hearing in the above-entitled matter was  
17 convened at 12:02 p.m.

18

19 BEFORE:

20 HONORABLE ROSEMARIE ANNUNZIATA

21

22

23

24

25

ALDERSON REPORTING COMPANY, INC.  
1111 14th ST., N.W., 4TH FLOOR, WASH., D.C. 20005 (202) 289-2260

1 responsible?

2 MR. NEDRICH: At that point in time it was  
3 going down the tubes. There is more to it than that.  
4 That's the problem with dealing with the demurrer  
5 because literally we have documents, Your Honor, that we  
6 could go into that are this thick, and I am just looking  
7 at it from a pleading point of view.

8 JUDGE ANNUNZIATA: I am looking at the effect  
9 of the existence of the contract which specifically  
10 dealt with the issue.

11 MR. NEDRICH: Exactly.

12 JUDGE ANNUNZIATA: And made it the obligation  
13 of another party.

14 MR. NEDRICH: But that obligation has not been  
15 satisfied.

16 JUDGE ANNUNZIATA: I don't think that is  
17 relevant.

18 MR. NEDRICH: Your Honor, I think we will have  
19 to be guided by how Your Honor looks at this, whether  
20 Your Honor agrees with me that Riggs knew.

21 JUDGE ANNUNZIATA: Under the hypothetical it  
22 is not relevant.

23 MR. NEDRICH: When Riggs accepted that, when  
24 Riggs accepted that benefit, knew he had provided it and  
25 he hadn't been paid, said we will take the benefit, I

1 don't know, I don't know since there was no contract  
2 between Riggs and Weber, I don't think the law says it  
3 has to be the same party.

4 I think under the quantum meruit theory  
5 another party can come along, take the benefit, knew  
6 whose service engendered the benefit, and I think they  
7 are responsible. I think the transformation here is to  
8 go from the relevant precontract or failure of contract  
9 have to be necessarily between the same parties. I  
10 don't think any case law says it does.

11 And, again, I always like to go back to a  
12 little sensible thing which says, hey, if these guys  
13 knew that Weber did this work and hadn't been paid and  
14 they took the benefit of the work, definitely no  
15 contract between Weber and Riggs.

16 Now, does the fact that there was a contract  
17 unsatisfied to this date, still unsatisfied between  
18 Weber and Dulles Equities, mean that that is the  
19 contract which would govern Riggs' position? And I  
20 don't think the law says that. I don't think the law  
21 has ever said it one way or the other.

22 JUDGE ANNUNZIATA: Let me ask you briefly, you  
23 may want to do this in writing, but it seems to me that  
24 you need to identify the elements of each of your claims  
25 and you need to identify the allegations that support

1       those elements, for example, on fraud and conversion,  
2       with respect to each defendant against whom the claims  
3       arise, or constructive trust.

4               The defendants have argued that there are no  
5       facts alleged that support conversion, for example,  
6       because there is no right to, immediate possessory  
7       interest has not been alleged and, therefore, there is  
8       no right to the property in question.

9               You need to identify what those facts are in  
10       your allegations that support those elements.

11              MR. NEDRICH: You are talking about all  
12       defendants other than Jones and Dulles Equities, I  
13       presume, Your Honor?

14              JUDGE ANNUNZIATA: Yes, I am.

15              MR. NEDRICH: I presume that. I think you are  
16       talking about the others. I understand. I can  
17       appreciate that.

18              JUDGE ANNUNZIATA: I don't know if you can do  
19       it now, or if you don't want to do it now --

20              MR. NEDRICH: I don't think I can restructure  
21       the whole pleading now. I don't think that would be  
22       appropriate.

23              JUDGE ANNUNZIATA: I would like you to submit  
24       a memorandum in which you take each theory and for each  
25       defendant and you reference those allegations that

1 support a cause of action being --

2 MR. NEDRICH: It is almost asking me to plead  
3 an argument of my case up front.

4 JUDGE ANNUNZIATA: If you can identify what is  
5 in your pleading that supports conversion.

6 MR. NEDRICH: Yes, I can.

7 JUDGE ANNUNZIATA: Then the demurrer will be  
8 granted.

9 MR. NEDRICH: That I can.

10 JUDGE ANNUNZIATA: I am talking about doing  
11 the same thing.

12 MR. NEDRICH: I can understand that. What I  
13 am saying is that, are you applying it to all  
14 defendants, including the Jones and Dulles Equities, or  
15 just to those collateral defendants?

16 JUDGE ANNUNZIATA: I understand that the  
17 dispute with respect to Jones is whether, I think it is  
18 a little different. I think there is an argument that  
19 the contract will determine whether or not there is a  
20 right, an underlying right to, and that's, of course,  
21 subject to demurrer, but if you want to go through the  
22 contract and make an argument that there are provisions  
23 for payment in January and February of '91, and there is  
24 a provision for bonus, notwithstanding the fact that the  
25 lease was entered into with the limited partnership and



1 not Dulles Equities, Inc., that's something you can do,  
2 but I am at this point more concerned about the other  
3 defendants because, on the face of the argument, and I  
4 concede I haven't read the pleading, but on the face of  
5 the argument it would seem as though you have not pled  
6 good causes of action on conversion, constructive trust,  
7 conspiracy throughout, and I think that is it.

8 MR. NEDRICH: As with collateral.

9 JUDGE ANNUNZIATA: The quantum meruit  
10 theory --

11 MR. NEDRICH: You want me to respond more to  
12 that as well, Your Honor?

13 JUDGE ANNUNZIATA: It is almost more a  
14 question of law than anything else. I don't know what  
15 else.

16 MR. NEDRICH: I can provide the citations I  
17 have just as a commentary on that.

18 Let me make a couple very brief comments, I am  
19 taking Your Honor's suggestions constructively now, but  
20 the contracts attached to the motion for judgment, and  
21 what it says is that the bonus is to be paid based upon  
22 a formula for leased space.

23 The motion for judgment says we lease so many  
24 square feet. The contract says that you are going to  
25 get your money, 50 percent when the lease is executed

1 and 50 percent when the defendant takes, or the tenant  
2 takes possession.

3 JUDGE ANNUNZIATA: Does it state by whom the  
4 lease has to be executed?

5 MR. NEDRICH: It says, in addition, the  
6 company shall pay to the employee a bonus for all leases  
7 executed by the company. It executed the lease.

8 Here is the problem we have. I alleged that  
9 they executed the lease. He brings the lease in, he has  
10 moved it beyond demurrer and moved it into the summary  
11 judgment realm, and he says, well, they didn't execute  
12 it except as the general partner.

13 JUDGE ANNUNZIATA: Well, if it is beyond the  
14 pleading I can't consider it.

15 MR. NEDRICH: That's the problem and I wanted  
16 to point that out to Your Honor. It is beyond the  
17 pleading. This is summary judgment and gets into the  
18 whole thing.

19 JUDGE ANNUNZIATA: Maybe this issue was  
20 premature.

21 MR. NEDRICH: I think it is and I think,  
22 therefore, their demurrer is improper, but I will  
23 comment on that also.

24 I am willing to write, if the Court will give  
25 me a few days, I am willing to write a letter memorandum

• 1 or a memorandum, and then maybe the other side would  
2 want a brief opportunity to respond.

3 JUDGE ANNUNZIATA: If they feel it needs to be  
4 responded to, I certainly will allow it. I want to read  
5 the pleading. I know that what I am going to do myself  
6 at some point in time is to go through and see if there  
7 are allegations that support these theories.

8 And if you want to have input, then I would  
9 suggest to you that that be the format that you take,  
10 that is, doing it in written form and say I made these  
11 allegations on the claim of conversion against whomever  
12 you claim.

13 MR. NEDRICH: If Your Honor please, what I  
14 will do, I will say, and we specifically alleged as a  
15 matter of fact, ABC, see Paragraph 17, rather than  
16 saying we incorporate by reference Paragraph 17, which  
17 is what we have done here when we brought this thing.  
18 We were literally getting down to, at 28 pages it was  
19 getting a little cumbersome.

20 JUDGE ANNUNZIATA: One other question and then  
21 I will recess. The issue of the declaratory judgment,  
22 does that need any further comment, argument, review?  
23 Does it change anything that was said this morning or  
24 this afternoon? Does the fact that there is a request  
25 that this simply be a declaration of rights change

1 anything?

2 MR. ZUPAN: He has not pled that with respect  
3 to Count 10 in Riggs, so I don't think it is.

4 MR. LABOWITZ: Speaking as one against whom I  
5 think this argument is being made, Trafalgar, in this  
6 conversion, constructive trust, lis pendens argument, I  
7 don't see that he says it is a declaratory judgment  
8 action.

9 I don't think it makes a difference because  
10 you still have to get to the basic underlying issue as  
11 to whether there is a claim that can be carried forward  
12 at this point, and then what remedy, as a consequence of  
13 that claim, if you find that there is a constructive  
14 trust, then you can do what you need to do.

15 JUDGE ANNUNZIATA: I guess the only  
16 relationship that I see potentially goes to the  
17 arguments about this being, in effect, a creditor's bill  
18 or prejudgment attachment attempt. If it were a  
19 declaratory judgment, does that change that?

20 MR. LABOWITZ: Your Honor, I guess my analysis  
21 is that he can't get past the claims status, that where  
22 we go in terms of remedies is sort of academic because  
23 there is not a claim that can be carried forward.

24 If there is a claim that can be carried  
25 forward, if he is asking to be substituted as a party to

1 the contract between Mr. Jones and Trafalgar, that is  
2 one thing. If he is being asked that somehow he now  
3 stands in the shoes of --

4 JUDGE ANNUNZIATA: He wants the Court to say,  
5 yes, you have, Mr. Weber, you have a right to the  
6 property, whether it be funds or real property or  
7 anything else, that these other defendants have in their  
8 possession.

9 MR. LABOWITZ: We are talking in the abstract.

10 JUDGE ANNUNZIATA: That's what a declaratory  
11 judgment action would result in, is the Court saying you  
12 have got a right, what it is may not be determined yet,  
13 but unquestionably, Mr. Weber, you have a right, you can  
14 proceed.

15 MR. LABOWITZ: I think he can only say that  
16 after there has been a full exposition of the issues and  
17 the facts, basically a trial, as opposed to saying  
18 today, as in a prejudgment attachment, he has that claim  
19 pending everything else. That's not what is going on  
20 here, if I understand it correctly.

21 JUDGE ANNUNZIATA: If the demurrer is raised  
22 with respect to the declaratory judgment, does it change  
23 anything? That's all I am asking.

24 MR. FROMME: I would respectfully submit that  
25 it does. I think it changes the positions of the



1 parties because in the pleadings he is asking, for  
2 instance, Dulles Equities of Virginia, asking everything  
3 be held in trust for the benefit of satisfying any  
4 judgments entered on favor of the plaintiff.

5 He is asking for this Court to impose a trust  
6 on specific assets. That is not the issue that is  
7 raised by declaratory judgment actions.

8 MR. NEDRICH: Can I respond?

9 MR. FROMME: I think that is applicable to all  
10 of the defendants.

11 MR. STEPHENSON: Including individual  
12 defendants, too, Your Honor.

13 JUDGE ANNUNZIATA: Most of you, all of you,  
14 really haven't had an opportunity to think through  
15 whether this is a declaratory judgment or whether, if it  
16 is, if it has any impact. Let's leave it where it  
17 sits.

18 If you feel that some further airing of the  
19 issue, either in written form or oral, is necessary, I  
20 request that you contact me. At this point I will treat  
21 it as making no difference. In other words, I will  
22 treat it on its face, it is a demurrer, and the same  
23 principles, analytical principles that will apply will  
24 be used. Either there is a cause of action stated or it  
25 isn't.

1           If there is something else you feel needs to  
2       be addressed, let me know.

3           MR. NEDRICH: I will write a memo to the  
4       Court. If the Court will give me, today is Wednesday, a  
5       week from Friday, nine days?

6           JUDGE ANNUNZIATA: All right.

7           MR. NEDRICH: By 4 o'clock Friday I will have  
8       delivered or 9 o'clock the following morning because I  
9       don't think Your Honor will want to read this on a  
10      Saturday or Sunday. And possibly counsel might want to  
11      suggest they will have a few days. I will get it to  
12      them by fax. I think everybody here has a fax machine.

13          JUDGE ANNUNZIATA: If you want 10 days, you  
14      can write the memo in 10 days and the defense will have  
15      10 days to respond, so that would put us, I will give  
16      you until Monday. I don't have a good calendar here.  
17      Where are we, today is the 31st, so you will want until  
18      Monday, August 12 it looks like to me.

19          And then plaintiffs will have, let's give it  
20      Friday, August 23 for the defendants.

21          MR. NEDRICH: We have one other matter, very  
22      briefly. We have a motion to compel production of  
23      documents from Les Jones, Dorothy Jones and Dulles  
24      Equities, Inc. and they filed an opposition. I would be  
25      willing to just submit their opposition in our