Circuit Court

OF THE

City of Richmond

JOHN MARSHALL COURTS BUILDING
400 NORTH 9TH STREET
RICHMOND, VIRGINIA 23219

August 25, 2020

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RE: Taylor, et al. v. Northam, et al. (CL 20-3339)

Counsel,

On August 18, 2020, the parties appeared by Counsel on Defendants' Demurrer to Plaintiffs' Complaint.

Plaintiffs' action seeks declaratory and injunctive relief regarding the Governor's announced intention to remove the Lee Monument from its current location on Monument Avenue. Plaintiffs argue that (1) the Governor has no power or authority to remove the Lee Monument in contravention of the established public policy of the Commonwealth; and (2) the proposed removal would violate restrictive covenants established in the Deeds of 1887 and 1890.

The Defendants have filed a Demurrer alleging (1) Plaintiffs fail to identify an enforceable property right, and the 1887 and 1890 Deeds do not establish enforceable restrictive covenants; (2) Plaintiffs lack standing; (3) neither the 1889 Joint Resolution nor Va. Code § 2.2-2402(B) create a private right of action; (4) sovereign immunity bars certain claims; and (5) Plaintiffs' statutory and constitutional claims fail as a matter of law.

A Demurrer "tests the legal sufficiency of the facts properly alleged in the challenged pleading and the inferences fairly drawn from those facts." *Jared and Donna Murayama 1997 Trust v. NISC Holdings, LLC*, 284 Va. 234, 245 (2012). The issue before the Court on Demurrer is whether the facts, as pled in a complaint accepted as true, are "legally sufficient to state a cause of action upon which relief may be granted." *Ramos v. Wells Fargo Bank, N.A.*, 289 Va. 321, 322 (2015). Legal conclusions are not entitled to a presumption of truth. *See Dunn, McCormack & MacPherson v. Connolly*, 281 Va. 553, 558 (2011).

Analysis

Plaintiffs' Counts I, II, and III all similarly allege that the 1889 Joint Resolution of the Virginia General Assembly is binding, and the Governor's intended removal would violate Art.

V, § 1, Art. IV, § 1, Art. I, § 5, and Art. III, § 1 of the Virginia Constitution. This argument is based upon Plaintiffs' assertion that any such Executive action would violate the constitutionally mandated separation of powers, and invade the sole province of the powers exclusively delegated to the General Assembly. Plaintiffs argue that the Joint Resolution, authorized and adopted by the General Assembly in 1889, established public policy of the Commonwealth, which precludes the exercise of any implied authority of the Governor to act in contravention of that policy. Plaintiffs cite *Commonwealth v. Arlington Cty. Sch. Bd.*, 217 Va. 558 (1997) and *Lewis v. Whittle*, 77 Va. 415 (1883).

The General Assembly has long been recognized by the Courts of Virginia as "the sole 'author of public policy.'" *Tvardek v. Powhatan Village Homeowners Ass'n*, 291 Va. 269, 280 (2016) (quoting *Campbell v. Commonwealth*, 246 Va. 174, 184 n. 8 (1993)); *Marblex Design Int'l* v. *Stevens*, 54 Va. App. 299, 309 (2009).

In *Arlington County School Board*, the Virginia Supreme Court agreed with the Commonwealth which had sought declaratory and injunctive relief against the actions of Arlington County regarding collective bargaining with various labor unions for public employees. *Arlington Cty. Sch. Bd.*, 217 Va. 558 (1997). In doing so, the Court agreed with the position of the Commonwealth, that the public policy and legislative intent of the Commonwealth, as expressed in a Legislative Joint Resolution and other legislative history, clearly prohibited such collective bargaining. *Id.* at 564-80. Because there was no statute expressly conferring power upon the local school and County Board to bargain collectively with public employees, the issue before the Court was one of implied power. *Id.* at 576. The Court held:

> In questions of implied power, the answer is to be found in legislative intent. To imply a particular power from a power expressly granted, it must be found that the legislature intended that the grant of the express also would confer the implied.... the doctrine of

> implied powers should never be applied to create a power that does not exist or to expand an existing power beyond rational limits. *Id.* at 577.

The Court looked to state legislative history to determine that the General Assembly, "the source of legislative intent," had never conferred, by explication or otherwise, the power to bargain collectively with public employees. *Id.* at 578-79. Express statutory authority was found necessary to confer the power sought. *Id.* "And when legislative intent is plain, our duty is to respect it and give it effect." *Id.* at 579.

Plaintiffs further rely on *Lewis v. Whittle* in reciting that "[u]nder our system of government, the governor has and can rightly exercise no power except such as may be bestowed upon him by the constitution and the laws." *Whittle,* 77 Va. at 420. The Plaintiffs alleged any such action by the Governor, in contravention of the express public policy of the Commonwealth, would violate Art. V, § 1, Art. IV, § 1, Art. I, § 5, and Art. III, § 1 of the Virginia Constitution.

Art. IV, § 1, Art. I, § 5, and Art. III, § 1 are all self-executing. *Gray v. Virginia Sec'y of Transp.*, 276 Va. 93, 106 (2008). The fact that they are self-executing means that they are enforceable in a common law action. *Id.* "To give full force and effect to the provisions as self-executing, a person with standing must be able to enforce them through actions against the Commonwealth." *Id.* Therefore, Plaintiffs have a right of action to seek enforcement of these constitutional provisions. This Court has already found that the Plaintiffs have standing to bring these claims, as set out more fully in the Court's August 3, 2020 Temporary Injunction Order and Letter Opinion. That holding is incorporated herein. Furthermore, sovereign immunity is not a bar to asserting these claims, as fully explained by the Court in *Gray*, and adopted by this Court.

For all the reasons set out above, the Court overrules the Defendants' Demurrer as to Counts I, II, and III of the Complaint.

In Count IV, Plaintiffs allege that the Defendants are bound by the covenants in the 1887 Deed and the 1890 Deed. This Court already found in its August 3, 2020 Temporary Injunction Order and Letter Opinion that the Plaintiffs are likely to succeed on their claim under the common law doctrine of restrictive covenants running with the land. *See* Letter Opinion of August 3, 2020, 8-12. The Court therefore adopts that prior finding and incorporates the same herein. Except, as pointed out by Counsel for Defendants during oral argument, the Complaint only alleges that Plaintiffs Massey, Heltzel, and Hostetler are successors to the Allens' heirs and have a right to enforce the covenants. Therefore, Defendants argue that only those three Plaintiffs would have a right to enforce the covenants. The Court agrees, and therefore the Court sustains the Demurrer to Count IV as to Plaintiffs Taylor and Smith only. The Demurrer to Count IV as to the other three Plaintiffs is overruled.

The Commonwealth argues in its Demurrer that even if the Deeds of 1887 and 1890 created a restrictive covenant, that the covenant would be unenforceable as being contrary to public policy. *Hercules Powder Co. v. Continental Can Co.*, 196 Va. 935, 939 (1955). The Commonwealth cites "facts" in support of this argument. Defendants' Demurrer, 3-7. However, the Court does not set public policy, any such determination is a factual one, and can only be determined by the Court after the hearing of evidence, which is scheduled to be heard on October 19, 2020.

In Count V, Plaintiffs allege that section 2.2-2402(B) of the Virginia Code prohibits the removal of an existing structure identified in that subsection, including the Lee Monument. Plaintiffs allege that such a statutory violation constitutes an arrogation of power in violation of Art. I, § 5, Art. III, § 1, Art. IV, § 1, and Art. V, § 1 under the Virginia Constitution.

The problem with this claim is that the statute provides no legal right to seek judicial enforcement of Plaintiffs' claimed cause of action. *Cherrie v. Virginia Health Servs., Inc.*, 292 Va.

309, 318 (2016). "In Virginia, 'substantive law' determines whether a private claimant has a right to bring a judicial action." *Id.* Substantive law includes the Constitution of Virginia, laws enacted by the General Assembly, and common law. *Id.* However, the Plaintiffs' allegation that removal of the Lee Monument would violate the statute does not have a common law or constitutional basis. The Plaintiffs allege that violation of the statute would violate constitutional principles of separation of powers. However, the statute was passed by the General Assembly, and even if it restricts the Governor's ability to remove an existing structure like the Lee Monument, any violation of the statute would be just that, a violation of the statute, and not a constitutional or common law violation. There is nothing about the statute which implicates a violation of constitutional separation of powers. Consequently, the only basis for a right of action for a violation of the statute would necessarily require statutory standing.

Statutory standing "asks 'whether the plaintiff is a member of the class given authority by a statute to bring suit.'" *Cherrie*, 292 Va. at 315 (quoting *Small v. Federal Nat'l Mortg. Ass'n*, 286 Va. 119, 125 (2013) (internal quotations omitted)). "In other words, the question is whether the legislature 'accorded this injured plaintiff the right to sue the defendant to redress his injury.'" *Id.* (quoting *Small*, 286 Va. at 125). "It is simply not enough that the plaintiff has 'a personal stake in the outcome of the controversy,' or that the plaintiff's rights will be affected by the disposition of the case." *Id.* (quoting *Small*, 286 Va. at 126). "Rather, the plaintiff must possess the 'legal right' to bring the action, which depends on the provisions of the relevant statute.'" *Id.* (quoting *Small*, 286 Va. at 126). Further, "[t]his Court has made abundantly clear that when a statute…is silent on the matter of a private right of action, one will not be inferred unless the General Assembly's intent to authorize such a right of action is 'palpable' and shown by 'demonstrable evidence.'" *Fernandez v. Comm'r of Highways*, 842 S.E.2d 200, 202 (Va. 2020).

Upon review of the entirety of Virginia Code § 2.2-2402, the statute is silent as to any rights of the public to ensure its enforcement. The statute provides under what conditions a work of art may be accepted, removed, relocated, or altered by the Commonwealth and under what conditions a structure intended primarily for ornamental or memorial purposes may be procured, removed, remodeled, or added to by the Commonwealth. It is completely silent as to authorizing any public action. It provides no statutory standing, and it provides no right of action under which any member of the general public with statutory standing can proceed. Therefore, the Court sustains the Demurrer as to Va. Code § 2.2-2402 on these bases alone.

Accordingly, the Court **OVERRULES** Defendants' Demurrer to Counts I, II, and III, **OVERRULES** Defendants' Demurrer to Count IV as to Plaintiffs Massey, Heltzel, and Hostetler, but **SUSTAINS** Defendants' Demurrer to Count IV as to Plaintiffs Taylor and Smith and **SUSTAINS** Defendants' Demurrer to Count V. Pursuant to Rule 1:13 of the Supreme Court of Virginia, the Court dispenses with the parties' endorsement of this Order.

The matter is **CONTINUED** to October 19, 2020 at 1:00 p.m. for the final hearing and presentation of evidence.

The Clerk is directed to forward a certified copy of this Order to the parties.

It is so **ORDERED**.

ENTER: 8/25/2020

/ Reilly Marchant

W. Reilly Marchant, Judge