NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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February 24, 2020

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Re: *Amar v. Jefferson Green Unit Owners Association, Inc. et al.*,
CL 2019-16178

Dear Counsel:

This matter came before the Court on February 14, 2020 upon Defendant PLM, Inc.'s motion craving *oyer* of a contract referred to in the complaint ("PLM contracted . . . to provide maintenance services to Jefferson Green [Unit Owners Association, Inc.]") (Complaint ¶ 31).[1] PLM argues that it is entitled to crave *oyer* of the contract; Amar disagrees.

To understand the current status of the rather antiquated procedural tool of craving *oyer*, resort must be had to the development of the doctrine by the Virginia Supreme Court to determine its most recent expression.[2]

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[1] It is not clear from the Complaint whether the use of the word "contracted" means that there was a written contract, or just an oral agreement. For purposes of this motion, the court will assume that the contract is a written contract.

[2] While this court has not found any case that explicitly holds that trial courts are bound by the most recent expression of the law by the Supreme Court, the Court has made that requirement implicit in a numerous cases. For instance, in *Edmonds v. Edmonds*, 290 Va. 10 (2015), the Court stated that "the law controlling this case is well-established" and then referred to the "most recent case this Court decided involving this issue . . . ." 290 Va. at 18. Similarly, in *Newman v. Erie Insurance*

OPINION LETTER

The earliest reported case which expressly describes the office of *oyer* is *Langhorne* v. *Richmond R. Co. & Another*, 91 Va. 369 (1895), which stated:

> The right to crave *oyer* of papers mentioned in a pleading applies, as a general rule, only to deeds and letters of probate and administration, not to other writings, and only applies to a deed when the party pleading relies upon the direct and intrinsic operation of the deed.

91 Va. at 372.[3]

Two years later, *Grubbs v. National Life, &c. Co.*, 94 Va. 589 (1897), held:

> As a general rule, the right to crave *oyer* of papers mentioned in a pleading, applies only to specialties and letters of probate and administration, not to other writings, and only applies to a deed when the party pleading relies upon the direct and intrinsic operation of the deed. *Langhorne v. Richmond R. Co., &c.*, 91 Va. 369. But if it be conceded that the defendants had the right to crave *oyer* of the policy sued on, the question whether or not it is a sealed instrument, intended and issued by the company as such, since it is not averred in the declaration that it is a sealed instrument, is one of fact to be presented at the hearing by proper motion or plea, but not by a demurrer to the declaration.

94 Va. at 591.

In *Grubbs*, the plaintiffs brought an action in *assumpsit* (which only lies for an action on a contract not under seal).[4] The circuit court sustained the demurrer because it concluded that the contracts were under seal and an action in *assumpsit* thus did not lie. In reversing the circuit court,

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Exchange, 256 Va. 501 (1998), the Court rejected an argument because it was contrary to "our most recent case addressing" that issue. Indeed, the Court held that the holding of the most recent case compelled the Court to overrule a prior decision. 256 Va. at 509. And in *Allaun v. First, Etc. Nat. Bank*, 190 Va. 104 (1949), the Court held that the "most recent case" is "controlling of the case at bar." 190 Va. at 109, 110.

[3] There were numerous cases from the Virginia Supreme Court prior to *Langhorne* in which *oyer* was used to have a document included with a complaint, but *Langhorne* appears to be the first case in which the office of *oyer* was described. One of the prior cases was *Welch and al. v. McDonald*, 85 Va. 500 (1888), which noted that the "defendants did not crave oyer of the contract, but demurred to the declaration and to each count thereof" but, had they done so, "and the true contract made known to the court, the demurrer to these counts ought to have been, and, doubtless, would have been sustained." 85 Va. at 504. It appears that the Court would have permitted *oyer* of a contract in 1888, but, in 1895, when the Court actually addressed the limits of *oyer*, it narrowed the application of *oyer*.

[4] An action on a contract under seal was an "action in covenant."

the Supreme Court noted that nothing in the insurance policies indicated that the policies were under seal and noted that the plaintiff's declarations did not allege that the policies were under seal. 94 Va. at 590. The holding of the Court, therefore, was only that the demurrer should not have been sustained because the question of whether a contract was, or was not, under seal was "one of fact to be presented at the hearing by proper motion or plea, but not by a demurrer to the declaration." 94 Va. at 591. Thus, the Court stated: "We are therefore of opinion that the demurrer in each of the cases before us should have been overruled, and the cases proceeded in to a trial upon their merits." 94 Va. at 592.

In light of the fact that the Court held that the question of whether a contract was, or was not, under seal was "one of fact to be presented at the hearing," the Court did not express a view on whether *oyer* extended to contracts not under seal since there was no need to do so.

In short, other than referring to "specialties" (contracts under seal)[5] rather than "deeds," *Grubbs* adhered to *Langhorne*.

In 1916, the Court again adhered to *Langhorne*, but allowed the parties to agree to the use of *oyer*, even where *oyer* would not be permitted under *Langhorne*. In *Smith v. Wolsiefer*, 119 Va. 247 (1916), the Court wrote:

> The proceeding in this case by which the defendant craved *oyer* of the lease is unusual. "As a general rule, the right to crave *oyer* of papers mentioned in a pleading, applies only to specialties and letters of probate and administration, not to other writings, and only applies to a deed when the party pleading relies upon the direct and intrinsic operation of the deed. *Langhorne v. Richmond R. Co.*, 91 Va. 369 [22 S.E. 159]." *Grubbs v. National Life, &c. Co.*, 94 Va. 589, 27 S.E. 464.
>
> But this case has peculiar features. All the parties are *sui juris* and appear to have consented for the trial court to consider the deed of lease of the 18th of May, 1914, as a part of the declaration.

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[5] *Grubbs* adopted the decision in *Weeks v. Esler*, 68 Hun. 518 (Supreme Court of New York):

> Before an instrument in the form of a promissory note, made by a corporation, with what purports to be the seal of the corporation impressed thereon, but containing no words indicating an intention to execute it as an instrument under seal, can be held to be a specialty and not a negotiable promissory note, it must be shown that the seal is the seal of the corporation and was affixed by its authority, and that it was the intention of the parties to the instrument that it should be an instrument under seal, and not negotiable.

94 Va. at 591.

See also *Taylor v. Forbes*, 101 Va. 658, 663 (1903) (document was a "covenant under seal, and consequently a specialty").

119 Va. at 250.

Twenty-one years later, the Court allowed the use of *oyer* to ensure that it had a complete record before it, where a plaintiff had attached to the complaint only a small part of the record of a former suit:

> The first assignment of error is to the ruling of the trial court granting respondents *oyer* of the entire record of the former suit. It appears from the bill in this cause that appellant undertook to describe the proceedings in the other suit, the purpose for which it was brought, the evidence introduced, the issues submitted, the verdict of the jury, the motion to set aside the verdict, and the order of the court admitting the will to probate, but filed as exhibits with its bill only a small part of the record, and then asked the court to accept its construction of the whole record by an inspection of only such parts as complainant saw fit to introduce. No intelligent construction of any writing or record can be made unless all of the essential parts of such paper or record are produced. A litigant has no right to put blinkers on the court and attempt to restrict its vision to only such parts of the record as the litigant thinks tend to support his view. When a court is asked to make a ruling upon any paper or record, it is its duty to require the pleader to produce all material parts.

Culpeper Nat'l Bank v. Morris, 168 Va. 379, 382-383 (1937).[6]

The next *oyer* case was not until 1985, when the Court, following the decision in *Smith v. Wolsiefer, supra,* approved the use of *oyer* where the parties agreed. *Hechler Chevrolet v. General Motors Corp.,* 230 Va. 396, 398 (1985) ("General Motors filed a motion craving oyer of the agreements on which the action was based. Hechler had no objection, the motion was granted, and the agreements were filed."). Similarly, in 1997, the Court again approved the use of *oyer* where the parties agreed. *Ward's Equipment v. New Holland North America,* 254 Va. 379, 382 (1997) ("motion craving oyer "was unopposed").[7] Again, in 2008, the Court approved the use of *oyer* where the parties agreed. *Dodge v. Randolph-Macon Woman's College,* 276 Va. 1, 4 (2008) (when College filed motion for a "bill of particulars and craving oyer," "litigants agreed upon an order requiring the plaintiffs to file a bill of particulars and the documents that the plaintiffs claim comprise their contracts with the College."). See also *EMAC v. County of Hanover,* 291 Va. 13, 19 (2016) ("the documents made exhibits pursuant to the joint consent

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[6] *Culpeper Nat'l Bank v. Morris* does not extend so far as to allow *oyer* of *any* document that forms the basis of a complaint. By its plain language, *oyer* is limited to the "entire record of the former suit" where "only a small part of the record" was attached to the complaint.

[7] In *Murayama 1997 Trust v. NISC Holdings,* 284 Va. 234 (2012), it appears that the parties agreed to the use of *oyer* because *Ward's Equip.* was cited as authority for the defendants "properly submitt[ing] the agreement for the circuit court's consideration through its motion craving *oyer*." 284 Va. at 238.

order on defendants' motion craving oyer")[8] and *Sweely Holdings v. Sun Trust Bank,* 296 Va. 367, 385, n.2 (2018) ("Sweely consented to [various documents that were the subject of a motion craving oyer] being made part of the record").

In sum, in its most recent expression of the law, the Supreme Court has approved the use of *oyer*: for deeds (when the party pleading relies upon the direct and intrinsic operation of the deed); for "specialties" (contracts under seal); letters of probate and administration; where the parties agreed to the use of *oyer;* and for a complete record where the plaintiff had attached to the complaint only a small part of the record of a former suit.

The document sought in the case at bar (a contract to provide maintenance services) is not any of the types of documents for which the Supreme Court has approved the use of *oyer*. The court thus DENIES Defendant's motion.

An appropriate order will enter.

Sincerely yours,

[redacted]

Richard E. Gardiner
Judge

[8] In *Hensel Phelps Constr. v. Thompson Masonry,* 292 Va. 695 (2016),it appears that the parties agreed to the use of *oyer* because *EMAC* was cited as authority for the Court's consideration of "the contract documents produced by Hensel Phelps in response to a motion craving *oyer.*" 292 Va. at 700.

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FREDA S. AMAR	)	
	)	
Plaintiff	)	
	)	
v.	)	CL 2019-16178
	)	
JEFFERSON GREEN UNIT OWNERS ASSOCIATION, INC., *et al.*	)	
	)	
	)	
Defendants	)	

ORDER

THIS MATTER came before the court upon Defendant PLM, Inc.'s motion craving *oyer* of a contract referred to in the complaint.

THE COURT, having considered the arguments of the parties and for the reasons set forth in the court's letter opinion of today's date, hereby DENIES Defendant PLM, Inc.'s motion craving *oyer*.

ENTERED this 24th day of February, 2020.

[redacted]

Richard E. Gardiner
Judge

Copies to:

Nicholas J. Lawrence
Counsel for Defendant PLM, Inc.

Gobind S. Sethi
Counsel for Plaintiff