



## NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse  
4110 Chain Bridge Road  
Fairfax, Virginia 22030-4009

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JUDGES

COUNTY OF FAIRFAX

CITY OF FAIRFAX

March 10, 2017

THOMAS A FORTKORT  
JACK B STEVENS  
J HOWE BROWN  
F BRUCE BACH  
M LANGHORNE KEITH  
ARTHUR B VIEREGG  
KATHLEEN H MACKAY  
ROBERT W WOOLDRIDGE JR  
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MARCUS D WILLIAMS  
JONATHAN C THACHER  
CHARLES J MAXFIELD  
DENNIS J SMITH  
LORRAINE NORDLUND  
DAVID S SCHELL

RETIRED JUDGES

Matthew C. Indrisano  
ALLRED, BACON, HALFHILL & YOUNG, P.C.  
11350 Random Hills Road, Suite 700  
Fairfax, VA 22030

Kevin Fitzpatrick  
4118 Leonard Drive, Suite 200  
Fairfax, VA 22030

Re: *Burrill, et al. v. Palmer, et al.*, CL 2012-16072

Dear Mr. Indrisano and Mr. Fitzpatrick:

This matter is before the court on the motion of Defendant Zar Bo Aung to vacate the default judgment against him of October 18, 2013.

Defendant Aung makes two arguments: 1) the complaint failed to state a cause of action, making the judgment void; and 2) the default judgment was based upon a pleading that was a nullity.<sup>1</sup> The court GRANTS the motion for the reasons that follow.

### Analysis

The motion was brought pursuant to Code § 8.01-428(A), which provides in pertinent part:

Upon motion of the plaintiff or judgment debtor and after reasonable notice to the opposite party, his attorney of record or other agent, the court may set aside a judgment by default

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<sup>1</sup> Defendant Aung made a third argument in his written motion - that the amended complaint should be dismissed because it was served more than a year after filing - but withdrew that argument at the motion hearing as premature.

or a decree pro confesso upon the following grounds: (i) fraud on the court, (ii) a void judgment, (iii) on proof of an accord and satisfaction, or (iv) on proof that the defendant was, at the time of service of process or entry of judgment, a servicemember as defined in 50 U.S.C. § 3911.

As the first ground of his motion, Defendant Aung argues that the complaint failed to state a cause of action because it was brought pursuant to Code § 55-80, but sought an *in personam* judgment for damages which Code § 55-80 does not authorize. Defendant Aung further argues that, because the complaint failed to state a cause of action, the judgment is void.

With respect to whether the complaint states a cause of action, Code § 55-80 provides:

Every gift, conveyance, assignment or transfer of, or charge upon, any estate, real or personal, every suit commenced or decree, judgment or execution suffered or obtained and every bond or other writing given with intent to delay, hinder or defraud creditors, purchasers or other persons of or from what they are or may be lawfully entitled to shall, as to such creditors, purchasers or other persons, their representatives or assigns, be void.

By its terms, Code § 55-80 does not authorize an *in personam* judgment for damages. Thus, in *Mills v. Miller Harness Co.*, 229 Va. 155, 326 S.E.2d 665 (1985), the Court stated: "We find nothing in the statute authorizing a court to award an *in personam* judgment when a fraudulent conveyance is set aside." 229 Va. at 158. Subsequently, however, in certain limited circumstances, the Court has read into Code § 55-80 an authorization for a plaintiff to recover damages.

In *Price v. Hawkins*, 247 Va. 32, 37, 439 S.E.2d 382, \_\_\_ (1994), the Court stated:

[O]ur statement in *Mills* that we "find nothing in the statute authorizing a court to award an *in personam* judgment when a fraudulent conveyance is set aside," should be read in the context of that case and should not be interpreted so broadly as to preclude personal judgments under all circumstances in every case when a fraudulent conveyance is declared void.

247 Va. at 37.

The Court went on to outline what those circumstances might be:

A mere declaration under § 55-80 that the cash transfers are "void" is meaningless in terms of relief to the defrauded creditor in this case. This is not a situation where the property fraudulently conveyed is realty, when a declaration

that the conveyance is void allows restoration of title in the name of the grantor to which the lien of the judgment could attach. This is not a situation where the fraudulent grantor conveys personal property that requires title records for proof of ownership, like motor vehicles, and the property is still in existence and can be located for attachment or levy when the fraudulent transfer is declared void. Here, cash money has been transferred and, if merely ordered to return money to court, the transferees may refuse to do so, or claim that the money transferred has been spent and is no longer available. In effect, the defrauded creditor in this case is without any effective remedy under § 55-80 unless personal judgments are entered against the defrauders.

*Id.*<sup>2</sup>

*Price* summarized its holding as follows:

We will not presume that the General Assembly intended to provide a § 55-80 cause of action without a remedy. Moreover, equity will not suffer a wrong to be without a remedy.

*Id.*

The important language for the case at bar is *Price*'s statement that its exception does not apply to "a situation where the property fraudulently conveyed is realty," which is the situation in the case at bar. Accordingly, this case is controlled by *Mills*, not *Price*, i.e., Plaintiffs' complaint did not state a cause of action pursuant to Code § 55-80 because the complaint sought damages.

Having determined that the complaint did not state a cause of action, the court must next determine whether that makes the default judgment void.

In *Landcraft Co. v. Kincaid*, 220 Va. 865, 263 S.E.2d 419 (1980), the plaintiff argued that "the trial court erred in holding that the motion for judgment failed to state a cause of action against Kincaid and in declaring the default judgment void on that basis." 220 Va. at 869. First addressing whether a default judgment could be void because the complaint did not state a cause of action, the Court held:

[O]ne of the bases upon which such a judgment may be invalidated is when the motion for judgment fails to state a cause of action; under such circumstances, "that failure is

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<sup>2</sup> In *Efessiou v. Efessiou*, 19 Cir. C143425, 41 Va. Cir. 142 (1996), Judge Kenny of this court referred to *Price* as "craft[ing] a narrow exception to the general rule against the imposition of personal liability in fraudulent conveyance cases" when "the property fraudulently transferred cannot be identified in any form because it has been commingled with funds in the hands of the transferee . . . ."

held to disable the court from entering a valid default judgment."

220 Va. at 870 (citation omitted).

The Court further explained that "[s]uch a judgment beyond the issue is not merely irregular, it is extrajudicial and invalid." *Id.*<sup>3</sup>

In light of the unambiguous holding *Landcraft Co. v. Kincaid*, and that Plaintiffs' complaint did not state a cause of action pursuant to Code § 55-80, Defendant Aung's motion to set aside the default judgment against him of October 18, 2013 is GRANTED.<sup>4</sup>

An appropriate order will enter.

Sincerely yours,

A large black rectangular redaction box covering the signature of the judge.

Richard E. Gardiner  
Judge

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<sup>3</sup> *Price* ultimately concluded that the complaint stated a cause of action, so that there was not a basis upon which to set aside the default judgment.

<sup>4</sup> Because the court has granted Defendant Aung's motion on the first ground, the court does not address the second ground (that the default judgment was based upon a pleading that was a nullity).

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

SANDRA BURRILL, <i>et al.</i>	)	
	)	
Plaintiffs	)	
	)	
v.	)	CL 2012-16072
	)	
RICHARD S. PALMER, <i>et al.</i>	)	
	)	
Defendants	)	

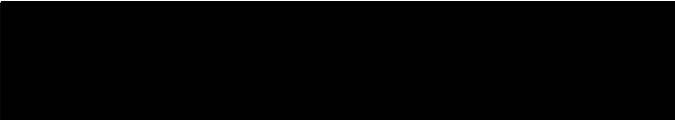
ORDER

THIS MATTER came before the court on Defendant Zar Bo Aung's motion to vacate the default judgment against him of October 18, 2013.

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 GRANTS Defendant Zar Bo Aung's motion, and it is hereby

ORDERED that the default judgment entered against Defendant Zar Bo Aung of October 18, 2013 is SET ASIDE.

ENTERED this 10<sup>th</sup> day of March, 2017.



Richard E. Gardiner  
Judge

Copies to:

Matthew C. Indrisano  
Counsel for Defendant Defendant Zar Bo Aung

Kevin Fitzpatrick  
Counsel for Plaintiffs