

TWENTY-THIRD JUDICIAL CIRCUIT  
OF VIRGINIA



J. CHRISTOPHER CLEMENS, JUDGE  
ROANOKE CITY COURTHOUSE  
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COMMONWEALTH OF VIRGINIA

CIRCUIT COURT FOR THE COUNTY OF ROANOKE  
CIRCUIT COURT FOR THE CITY OF ROANOKE  
CIRCUIT COURT FOR THE CITY OF SALEM

February 14, 2017

**VIA FACSIMILE AND REGULAR MAIL**

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Re: *Shenetta Reid v. Arthur Gary Meisenzahl, et. al*  
CL16-1774  
Circuit Court of the City of Roanoke

Dear Counsel:

This matter is before me on Defendant's demurrers to the Complaint, and Defendant Meisenzahl's demurrer to Windwards cross-claim. I have reviewed and considered the written submissions as well as the oral argument presented on February 6, 2017. For the reasons discussed below, the Court grants all demurrers with the exception of the Meisenzahl Defendants' demurrer to the claim of private nuisance.

To survive a challenge on demurrer, a pleading's facts must be sufficiently definite that the pleading informs the opposing party of the "true nature of the claim."<sup>1</sup> The Court must decide whether the plaintiff has alleged facts sufficient to state a cause of action.<sup>2</sup> The Court does not decide the merits of the allegations set forth in a complaint, but determines whether the factual allegations pled and the reasonable inferences drawn therefrom are sufficient to state a cause of action."<sup>3</sup>

First, the Court grants each Defendant's demurrer to the breach of contract claim. The Court finds that the Rules and Regulations Handbook of the Windward Condominium Unit Owners' Association, Inc. is not a contract between any of the parties to this litigation. The Plaintiff does not plead facts to show the elements of contract formation: an offer, acceptance, and consideration. Even if the handbook was a contract, there is no evidence that Defendants Anglin Realty or the Meisenzahls are parties to the contract, or that Windward had any obligations under the handbook. Because the handbook is not a contract and the Plaintiff has failed to plead a cause of action based on contract law, the Court grants each Defendants' demurrer to the breach of contract claim.

Second, the Court grants Defendant Windward's and Defendant Anglin Realty's demurrers to the nuisance action. The elements of private nuisance are:

"the using, or authorizing the use of one's property, or of anything under one's control, so as to injuriously affect an owner or occupier of property by (1) diminishing the value of the property; (2) by continuously interfering with his power of control or enjoyment of that property; or (3) by causing material disturbance or annoyance to him in his use or occupation of that property."<sup>4</sup>

Plaintiff fails to plead facts in the Complaint which show that either of these defendants used, owned, or had control of the Meisenzahls' condominium property. Taking the facts as pled in the light most favorable to the Plaintiff, the Plaintiff has failed to state a cause of action for private nuisance against Defendant Windward and Defendant Anglin Realty. Therefore, the Court grants the remainder of Defendant Windward's and Defendant Anglin Realty's demurrers.

Third, the Court denies Defendants Meisenzahls' demurrer to the nuisance cause of action. In *National Energy Corp. v. O'Quinn*, the Virginia Supreme Court considered a case where a neighboring business, even though lawful, became obnoxious "to occupants of neighboring dwellings and [rendered] enjoyment of those structures uncomfortable by virtue of, for example, smoke, cinders, dust, noise, offensive odors, or noxious gases."<sup>5</sup> In that case, dust from the coal

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<sup>1</sup> Va. Sup. Ct. R. 1:4(d) (2011).

<sup>2</sup> See VA. CODE ANN. § 8.01-273 (2016).

<sup>3</sup> *Friends of the Rappahannock v. Caroline Cnty. Bd. of Supervisors*, 286 Va. 38, 44 (2013).

<sup>4</sup> *Virginia Ry. v. London*, 114 Va. 334, 344-45 (1912).

<sup>5</sup> 223 Va. 83, 85 (1982).

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mine infiltrated the plaintiffs' homes causing "indescribable filth" and difficulty breathing.<sup>6</sup> The Court held that the plaintiffs had pled a private nuisance and commented that "the law does not allow an individual to be driven from his home, or to be forced to live in it in positive discomfort, even though the obnoxious condition may be caused by a lawful" act.<sup>7</sup>

The Plaintiff in this case has pled facts to show that the Meisenzahl Defendants have been using their property in a manner injurious to the Plaintiff by continuously interfering with the enjoyment of her property and by causing a material disturbance or annoyance to her occupation of the property. Plaintiff has submitted facts that the Meisenzahls' cigarette smoke has infiltrated her home, causing difficulty breathing and other medical concerns. Therefore, the Court finds that the Plaintiff has pled sufficient facts to state a cause of action for private nuisance against the Meisenzahl Defendants, putting them on notice of the claims against them.

Last, the Court grants the Meisenzahl Defendants' demurrer to Windward's cross claim. Windward is seeking indemnity and not contribution because it seeks the remedy of shifting all responsibility for any damages to the Meisenzahls. Windward has not pled any contractual indemnity provision, nor has it pled any facts that the Meisenzahls are without personal fault but nonetheless legally responsible. Windward also has not pled any facts that a party has been found negligent. As a matter of law, without those facts, an indemnity cause of action cannot be substantiated. Therefore, the Court grants the Meisenzahls' demurrer to the cross-claim.

By February 27, 2017, Mr. Hill shall prepare and submit an agreed Order consistent with this opinion that preserves all parties' objections. If the Order is not agreed to by all the parties, then opposing counsel may submit their proposed orders by March 6, 2017. I will then enter the Order I feel is most consistent with this opinion.

Very truly yours,



J. Christopher Clemens

JCC/amg

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<sup>6</sup> *Id.* at 88.

<sup>7</sup> *Id.* at 91.