

13-0234

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

HUGH E. HEGYI, Trustee of that certain
"Trust Agreement" a/k/a the "Herman
E. Hegyi Trust",

Plaintiff,

v.

CIVIL ACTION NO: 11-C-979
Judge Wilkes

DEMAR REVOCABLE TRUST, DEAN
LOWE and MARTHA LOWE, individually
and as Trustees, and GEORGE L. SEKEL,

Defendants,

and

DEAN LOWE and MARTHA LOWE, Trustees
of the Demar Revocable Trust,

Counter-Plaintiffs and Third Party Plaintiffs,

v.

HUGH HEGYI, Trustee of the Hegyi Trust,

Plaintiff and Counter-Defendant, and

JOSEPH C. RICHARDS and JOYCE A. RICHARDS,

Third Party Defendants.

BERKELEY COUNTY
CIRCUIT CLERK
2013 FEB 15 PM 1:02
VIRGINIA T. JAMES, CLERK

**ORDER GRANTING MOTION TO DISMISS COUNTERCLAIM AND
THIRD PARTY COMPLAINT**

ON A PREVIOUS DAY came JOSEPH C. RICHARDS and JOYCE A. RICHARDS ("the Richards"), Third Party Defendants, by counsel, to dismiss the Counterclaim and Third Party Complaint filed by Dean Lowe and Martha Lowe, Trustees of the Demar Revocable Trust ("the Lowes"). The Court has reviewed the motion and all responses and

replies thereto and finds that the motion to dismiss should be GRANTED. The Court agrees with the Richards that the Lowes' claims necessarily depend upon the Court's decree of the true physical location of the Virginia/West Virginia boundary and that this Court cannot make that decree because:

- state boundary line determinations are nonjusticiable political questions specifically relegated to the executive and legislative branches of the respective states;
- state boundary line disputes fall within the exclusive original jurisdiction of the United States Supreme Court granted by Article III, § 2, clause 2 of the U.S. Constitution; and
- the States of Virginia and West Virginia are indispensable parties to a dispute over their shared boundary and are immune to suit before this Court.

Because the Court cannot resolve the underlying issue of the physical location of the Virginia/West Virginia boundary, the Lowes cannot succeed on their ejectment and adverse possession claims for all property north of a line running N. 50° 16' 09" West. Accordingly, the Court hereby ORDERS that the Lowes' claims be DISMISSED.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Lowes' Counterclaim and Third Party Complaint against Hugh E. Hegyi and the Richards alleges causes of action for (1) Ejectment, (2) Adverse Possession, and (3) Boundary Line Determination.

2. Count Three (3) of the Counterclaim and Third Party Complaint, styled as "Boundary Line Determination," alleges that "there is a certain controversy and disagreement as to where the Virginia/West Virginia state line is situate . . . between the real estate of these Defendant Lowe Trustees, and that of the Hegyi Trust and Richards"

3. Count Three (3) further alleges "[t]hat Defendant Lowe Trustees believe upon information that the correct boundary line between the State of West Virginia and the

Commonwealth of Virginia and as between the properties of these parties is the line whose course is N. 50° 16' 09" West, and the Defendant Lowe Trustees seek a declaration of this Honorable Court that that is the boundary line between the State of West Virginia and the Commonwealth of Virginia"

4. Count Three (3) thus requests that the Court "enter an order and decree, and declare that the boundary line between the State of West Virginia and the Commonwealth of Virginia is, as it relates to the real estate of the Defendant Lowe Trustees in West Virginia, and that of the Plaintiff Hegyi Trust and Third Party Defendants Richards' property in the Commonwealth of Virginia, as being that line designated by the course of N. 50° 16' 09" West"

5. Count One (1) of the Counterclaim and Third Party Complaint, styled as "Ejectment," alleges "[t]hat Defendant Lowe Trustees' title to all real estate situate north of the Virginia/West Virginia state line, being N. 50° 16' 09" West, is superior to the titles of the Hegyi Trust and that of Richards."

6. Count One (1) further alleges "[t]hat the Hegyi Trust and Richards . . . must be ousted and evicted from all property lying north of the line described as: N. 50° 16' 09" West, as being the state line between the Commonwealth of Virginia and the State of West Virginia."

7. Count One (1) thus requests "judgment against Plaintiff and Counter Defendant, Hugh Hegyi . . . and, against the Third Party Defendants, Joseph C. Richards and Joyce A. Richards . . . that they all be evicted and ousted from all real estate lying north of the line designated as N. 50° 16' 09" West and that the Court order and declare that all property situate north of said line belongs in fee solely to the Defendant Lowe Trustees"

8. Count Two (2) of the Counterclaim and Third Party Complaint, styled as “Adverse Possession,” alleges that “Defendant Lowe Trustees have openly, notoriously, continuously, hostilely and under color of title and/or claim of right possessed all real estate in the State of West Virginia, situate north of the line designated as N. 50° 16’ 09” West for a period in excess of ten (10) years prior to the filing of this civil action”

9. Count Two (2) thus requests “that the Court order and declare that Defendant Lowe Trustees are the owners in fee of all of that certain real estate situate in Gerrardstown District, Berkeley County, West Virginia, lying north of the West Virginia/Virginia state line, being that line designated as N. 50° 16’ 09” West as against Plaintiff and Counter Defendant Hugh Hegyi, as Trustee of the Hegyi Trust, and Third Party Defendants, Joseph C. Richards and Joyce A. Richards.”

10. Both Count One (1) and Count Two (2) rely upon the Court’s determination of Count Three (3), which seeks a judicial decree that the location of the Virginia/West Virginia state boundary is “that line designated by the course of N. 50° 16’ 09” West.”

11. If this Court cannot decree that the physical location of the Virginia/West Virginia state boundary is “that line designated by the course of N. 50° 16’ 09” West,” the Lowes’ claims for Ejectment and Adverse Possession cannot succeed.

A. DETERMINATION OF THE EXACT PHYSICAL BOUNDARY BETWEEN VIRGINIA AND WEST VIRGINIA IS A NONJUSTICIABLE POLITICAL QUESTION OUTSIDE OF THE COURT’S SUBJECT MATTER JURISDICTION.

12. This Court cannot decree that the boundary line between West Virginia and Virginia is demarcated by a line running N. 50° 16’ 09” West because the exact physical boundary between the two states is a nonjusticiable political question committed to the

legislative and executive branches of government. The Court, therefore, must dismiss Count Three of the counterclaim and third party complaint for lack of subject matter jurisdiction.

13. The political question doctrine is a jurisdictional limitation on the courts derived from the case-or-controversy requirement of Article III of the United States Constitution. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006).

14. “A controversy is nonjusticiable -- *i.e.*, involves a political question -- where there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it....” *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

15. “Who is the sovereign, *de jure* or *de facto*, of a territory, is not a judicial, but a political, question, the determination of which by the legislative and executive of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances.” *Jones v. United States*, 137 U.S. 202, 212 (1890).

16. West Virginia has clearly committed the issue put before this Court – the determination of the exact physical boundary between West Virginia and an adjoining state – to the legislative and executive branches of government, which ordinarily sets the state’s physical boundaries by taking recommendations from the West Virginia boundary commission and enacting them as law.

17. West Virginia Code Chapter 29, Article 23 established the West Virginia boundary commission, which is authorized to “meet with similar commissions or bodies of any

of the several states contiguous with this state, whose purpose in their respective states is to establish state boundary lines coterminous with the boundary of the state of West Virginia and submit findings and recommendations to the Legislature, applicable to the location of any particular boundary segment in question.” W.Va. Code § 29-23-2(c)(5) (1987). Once its investigation is complete, the commission recommends to the Legislature “that appropriate legislation be enacted, establishing the true boundary line at those portions of the state boundary that are in dispute with another state or whose location is uncertain: Provided, That the contiguous state agrees with the recommendation.” W.Va. Code § 29-23-2(c)(6) (1987). The exact physical boundary is only determined by this process if the affected states enact legislation approving the boundary commissions’ recommendations.¹ *See* Va. Code § 1-313 (2005) (adopting boundary commission survey as the physical boundary between Loudon County, Virginia and Jefferson County, West Virginia); W.Va. Code § 29-23-3 (1998) (same).

18. The physical location of the boundary between Virginia and West Virginia is a nonjusticiable political question clearly reserved for the legislative and executive branches. Count Three of the counterclaim and third party complaint, therefore, must be dismissed because this Court cannot decree that the boundary line between West Virginia and Virginia is demarcated by a line running N. 50 16’ 09” West.

A. **LITIGATION OVER THE EXACT PHYSICAL BOUNDARY BETWEEN STATES IS WITHIN THE EXCLUSIVE ORIGINAL JURISDICTION OF THE UNITED STATES SUPREME COURT.**

¹ As discussed in the next section, if the states cannot agree on the exact physical boundary they may file an original action before the United States Supreme Court to resolve the dispute. West Virginia, however, may only file such an action if the state legislature enacts “proper legislation to direct that the attorney general proceed under the constitution of the United States with litigation to adjudicate the exact and true location of any boundary line in dispute or whose precise location is unascertainable.” *See* W.Va. Code § 29-23-2(c)(7) (1987).

19. Even if there were a dispute between Virginia and West Virginia over their shared boundary, this Court would nonetheless lack subject matter jurisdiction because the United States Supreme Court has exclusive original jurisdiction over boundary disputes between states.

20. “The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.” 28 U.S.C. § 1251 (1978). *See also* U.S. Const. art. III, § 2, cl. 2 (“In all cases . . . in which a State shall be Party, the supreme Court shall have original jurisdiction.”).

21. An action between sister states to establish the boundary between them is within the original and exclusive jurisdiction of the United States Supreme Court pursuant to Article III, § 2, clause 2. *See Ohio v. Kentucky*, 410 U.S. 641 (1973).²

22. Even if this action were authorized by the respective states, only the United States Supreme Court has jurisdiction to resolve a dispute over the location of the Virginia/West Virginia boundary. Count Three of the counterclaim and third party complaint must therefore be dismissed.

A. THE STATES OF VIRGINIA AND WEST VIRGINIA ARE INDISPENSABLE PARTIES TO THE DETERMINATION OF THE PHYSICAL LOCATION OF THE STATE BOUNDARY AND NEITHER STATE CAN BE JOINED AS A PARTY TO THIS ACTION.

23. Even if this action could otherwise proceed, Count Three of the counterclaim and third party complaint must also be dismissed pursuant to Rule 12(b)(7) and Rule 19(b) of the West Virginia Rules of Civil Procedure because the States of Virginia and West Virginia are indispensable parties to that determination and cannot be joined.

² Boundary disputes under the United States Supreme Court’s original jurisdiction are equitable in nature and are governed by the law of nations. *See Ohio v. Kentucky*, 410 U.S. 641 (1973); *Rhode Island v. Massachusetts*, 37 U.S. 657 (1838).

24. “A person who is subject to service of process shall be joined as a party in the action if (1) in the person’s absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person’s absence may (i) as a practical matter impair or impede the person’s ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.” W.Va. R. Civ. P. 19(a).

25. “If a person as described in subdivision (a)(1)-(2) [of Rule 19] cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable.” W.Va. R. Civ. P. 19(b).

26. “Under Rule 19(a) of the West Virginia Rules of Civil Procedure a party becomes an indispensable party if he has an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may as a practical matter impair or impede his ability to protect that interest.” Syl. Pt. 2, *State ex rel. One-Gateway v. Johnson*, 208 W.Va. 731, 542 S.E.2d 894 (2000) (quoting Syl. Pt. 1, *Pauley v. Gainer*, 177 W.Va. 464, 353 S.E.2d 318 (1986)).

27. “It may be accepted as a point of departure unquestioned, that neither a state nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a state may be made a party in the supreme court of the United States by virtue of the original jurisdiction conferred on that court by the constitution. This principle is conceded in all the cases, and whenever it can be clearly seen that the state is an

indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction.” *Cunningham v. Macon & B. R. Co.*, 109 U.S. 446, 451 (1883).

28. Both the States of Virginia and West Virginia are indispensable parties to the determination of the physical location of the border between the two states. A decree setting the boundary between Virginia and West Virginia would distribute territory between the two states, diminishing the area of one state to the benefit of the other. Any decree of the border without the presence of the states as parties would impair the rights of those states to protect their sovereign territory and thus cannot be made without their presence.

29. Virginia and West Virginia, however, have not consented to suit in this Court over the extent of their respective borders.

30. Because the States of Virginia and West Virginia are indispensable parties to Count Three that cannot be joined to this suit, the Court must dismiss Count Three of the counterclaim and third party complaint.

A. **THE LOWES CANNOT STATE A CLAIM FOR EJECTMENT OR ADVERSE POSSESSION BECAUSE THEIR CLAIMS RELY ON THE COURT’S DETERMINATION OF THE EXACT PHYSICAL BOUNDARY BETWEEN VIRGINIA AND WEST VIRGINIA AND THE COURT LACKS JURISDICTION TO MAKE THAT DETERMINATION.**

31. The Lowes’ Counterclaim and Third Party Complaint for ejectment and adverse possession rely upon a decree from this Court that the physical boundary between Virginia and West Virginia is demarcated by a line running N 50 16’ 09” West. Because this Court lacks jurisdiction to determine the exact physical boundary between Virginia and West Virginia, the Lowes’ ejectment and adverse possession claims must be dismissed.

32. “The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Syl., *John W. Lodge Distrib. Co., Inc. v. Texaco, Inc.*, 161 W.Va. 603, 245 S.E.2d 157 (1978) (quoting Syl. Pt. 3, *Chapman v. Kane Transfer Co.*, 160 W.Va. 530, 236 S.E.2d 207 (1977)). For purposes of the motion to dismiss, the complaint is construed in the light most favorable to the plaintiff and its allegations are to be taken as true. *John W. Lodge Distrib. Co., Inc. v. Texaco, Inc.*, 161 W.Va. 603, 605, 245 S.E.2d 157, 158 (1978). “The trial court’s inquiry (is) directed to whether the allegations constitute a statement of a claim under Rule 8(a).” *John W. Lodge Distrib. Co., Inc. v. Texaco, Inc.*, 161 W.Va. 603, 605, 245 S.E.2d 157, 159 (1978) (quoting *Chapman v. Kane Transfer Co.*, 160 W.Va. 530, 236 S.E.2d 207 (1977)). “A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief” W.Va. R. Civ. P. 8(a).

33. Count One (1) of the Counterclaim and Third Party Complaint alleges “[t]hat Defendant Lowe Trustees’ title to all real estate situate north of the Virginia/West Virginia state line, being N. 50° 16’ 09” West, is superior to the titles of the Hegyi Trust and that of Richards.”

34. Count Two (2) of the Counterclaim and Third Party Complaint alleges that “Defendant Lowe Trustees have openly, notoriously, continuously, hostilely and under color of title and/or claim of right possessed all real estate in the State of West Virginia, situate north of the line designated as N. 50° 16’ 09” West for a period in excess of ten (10) years prior to the filing of this civil action, adverse to the Hegyi Trust and Richards, and any and all persons and parties acting by and through them.”

35. Counts One and Two are entirely dependent upon the Court's resolution of Count Three (3), which alleges "[t]hat Defendant Lowe Trustees believe upon information that the correct boundary line between the State of West Virginia and the Commonwealth of Virginia and as between the properties of these parties is the line whose course is N. 50° 16' 09" West, and the Defendant Lowe Trustees seek a declaration of this Honorable Court that that is the boundary line between the State of West Virginia and the Commonwealth of Virginia as it relates to the boundary between these parties' properties as the resolution of this boundary controversy between Defendant Lowe Trustees with the Hegyi Trust and Richards."

36. As discussed above, this Court cannot declare "the correct boundary line between the State of West Virginia and the Commonwealth of Virginia" because the exact physical boundary between the states can only be determined (a) through specific legislation, enacted by the legislative bodies of both Virginia and West Virginia, adopting the findings of an interstate boundary commission; or (b) upon original action between the two states before the United States Supreme Court. Because this Court cannot declare as a matter of law that the Virginia/West Virginia boundary between the properties of the parties is N. 50° 16' 09" West, the Lowes' claims of ejectment and adverse possession must fail.

RULING

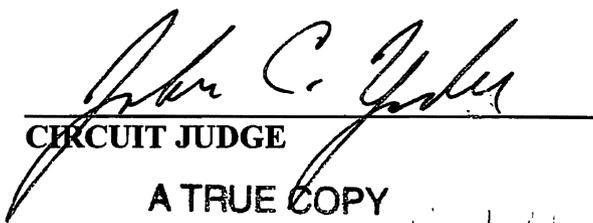
The Lowes request relief that this Court cannot consider. The Court FINDS that it lacks jurisdiction to decree the exact physical location of the Virginia/West Virginia boundary, and FURTHER FINDS and the Lowes' claims for ejectment and adverse possession necessarily depend upon the Court's determination of the boundary's location. Because the Lowes cannot establish the necessary predicates demonstrating their right to relief, the Court FURTHER FINDS that the Counterclaim and Third Party Complaint must be dismissed.

Accordingly, pursuant to Rules 12(b)(1), 12(b)(6), and 12(b)(7) of the West Virginia Rules of Civil Procedure, the Court GRANTS the Motion to Dismiss and ORDERS that the Counterclaim and Third Party Complaint be DISMISSED and stricken from the active docket of the Court and that the Third Party Defendants Joseph C. Richards and Joyce A. Richards be and they are DISMISSED as parties from this action.

The objections and exceptions of the non-moving party to this ruling are noted.

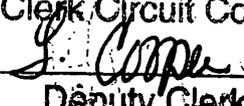
* The Clerk shall mail attested copies of this Order to all counsel of record.

ENTERED: 2/15/13


CIRCUIT JUDGE

A TRUE COPY
ATTEST

Virginia M. Sine
Clerk, Circuit Court

By: 
Deputy Clerk

Prepared by:

Charles F. Printz, Jr., Esq. (WVSB #2985)
Counsel for Third Party Defendants