

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 14th day of May, 2010.

Tir Conaill Properties, L.C., Appellant,

against Record No. 090855
 Circuit Court No. 08-575

2401 Wilson, LLC, Appellee.

Upon an appeal from a
judgment rendered by the Circuit
Court of Arlington County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is no error in the order appealed from.

The circuit court dismissed the complaint filed by the appellant, Tir Conaill Properties, L.C., pursuant to the provisions of Code § 59.1-76 for failure to file the certificate for transacting business under an assumed name required by Code § 59.1-69(A). The appellee, 2401 Wilson, LLC, raised this issue for the first time in a pre-trial memorandum filed the day before trial and, again, orally on the day of trial. The appellant, however, did not move for a continuance to respond, nor did it argue that it was prejudiced by the circuit court's consideration of the issue at that time.

Likewise, the appellant did not request a continuance for the purpose of filing the required certificate. Instead, the appellant argued that a certificate filed by "Tirconaill Properties LLC" stating that it was conducting business in the name of "Kitty O'Shea's" satisfied the statutory filing requirement for the

appellant, "Tir Conaill Properties, L.C." In light of these facts, the Court holds that the circuit court did not abuse its discretion in allowing the appellee to raise this issue at that stage of the litigation. See Ortiz v. Commonwealth, 276 Va. 705, 713, 667 S.E.2d 751, 756 (2008). Also, since noncompliance with the requirements of Code § 59.1-69 is not an issue required to be raised in a defensive pleading, see Monahan v. Obici Med. Mgmt. Servs., Inc., 271 Va. 621, 632-634, 628 S.E.2d 330, 336-37 (2006) (citing examples of defenses that must be pled), the circuit court did not err by dismissing the complaint on a ground not pled by the appellee.

Contrary to the appellant's challenge on appeal, the circuit court did not treat the filing requirement as an issue of subject matter jurisdiction. Rather, the circuit court dismissed the complaint because the appellant's action could not be "maintained . . . unless and until the certificate" required by Code § 59.1-69 was filed. Code § 59.1-76. The circuit court did not err in doing so.

Finally, the appellant contends that the appellee's pre-trial memorandum was the equivalent of a motion for summary judgment and that the circuit court erred by "summarily dismissing" the complaint upon consideration of a discovery deposition as the parties had not agreed for the deposition to be so used. See Rules 3:20 and 4:7(e). This assignment of error is waived because the appellant did not object to the circuit court's use of the deposition, to the extent there was any such use, when the court was deciding whether the appellant could "maintain" this action despite its failure to comply with the filing requirement of Code § 59.1-69. See Rule 5:25.

For these reasons, the judgment of the circuit court is affirmed. The appellant shall pay to the appellee thirty dollars damages.

This order shall be certified to the said circuit court.

A Copy,

Teste:

*original order signed by the
Clerk of the Supreme Court of
Virginia at the direction of the
Court*