NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

May 4, 2021

Christopher T. Robertson, Esq.
Chap Petersen & Associates, PLC
3970 Chain Bridge Road
Fairfax, Virginia 22030

Martin Schubert, Esq.
Bancroft, McGavin, Horvath, & Judkins, P.C.
9990 Fairfax Blvd. Suite 400
Fairfax, Virginia 22030

Re: Kim F. Henderson v. Singleton Grove Homeowners Association, Inc., CL-2021-1653
Letter Opinion on Defendant's Demurrer or in the alternative, Plea in Bar

Dear Counsel:

This matter came before the Court on Defendant Singleton Grove Homeowners Association, Inc.'s ("Defendant") Demurrer or in the alternative, Plea in Bar. The issue to be decided is whether Plaintiff Kim F. Henderson ("Plaintiff") may amend his complaint to add another count when he had previously nonsuited a case involving the same facts, and in that case, failed to amend a sustained demurrer with leave to amend.

Background

Plaintiff owns two townhomes in the Singleton Grove's Residential Community ("SGRC"). He brought this suit for declaratory judgment against Defendant to determine whether Defendant's governing declaration and parking regulations are valid and whether Plaintiff is entitled to two parking spaces, *inter alia*. In SGRC, the townhomes with a garage

and/or driveway get no assigned parking spaces in the surrounding parking lots, and any townhome in the community without a garage and/or driveway is licensed two parking spaces each. Plaintiff's townhomes have garages and driveways and were therefore not assigned parking spaces.

The SGRC homeowner's association fees ("HOA Fees") paid by all residents contribute to the upkeep and maintenance of the parking area. Plaintiff believes that as he is not assigned parking spaces, that he either should be allotted two spaces or should not have to pay HOA Fees contributing to the parking lot's upkeep.

On a motion before the Court on March 19, 2021, Defendant argued that Plaintiff, in a separate case CL-2020-6362, brought claims against the Defendant for Breach of Fiduciary Duty, Bad Faith, Harassment, Fraudulent Misrepresentation, Tort, and Negligence of Fiduciary Duty on virtually the same facts. In that case, demurrers were thrice sustained with leave to amend specific counts. On November 13, 2020, the third demurrer was sustained with leave to amend one remaining count within 21 days, Count 1: Breach of Contract. Instead of amending the complaint, Plaintiff instead moved for a nonsuit on December 4, 2020, which was entered December 9, 2020.

At the March 19, 2021 hearing, this Court sustained the demurrer and asked the parties to submit additional briefing on whether Plaintiff may be permitted leave to amend.[1] Plaintiff now requests that he be permitted to amend his current complaint to supplement his declaratory judgment count and alternatively, to bring claims of breach of contract and interference with an easement.

Whether Plaintiff may be Given Leave to Amend

The question before the court is two-fold, (1) whether Plaintiff *can* be permitted leave to amend his complaint in this second case before the Court and, if so, (2) whether Plaintiff *should* be granted leave. We turn to the former question first.

Under Virginia Supreme Court Rule 1:1, "[a]ll final judgments, orders, and decrees, irrespective of terms of court, remain under the control of the trial court and may be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer." "Where leave to amend is granted . . . on demurrer . . . the amended pleading must be filed within 21 days after leave to amend is granted or in such time as the court may prescribe." Va. Sup. Ct. R. 1:8. "If [an] order merely sustains such a demurrer, it is not a final order; to be final, it must go further and dismiss the case. However, if the order also gives the plaintiff leave to amend, it does not become final 'until after the time limited therein for the plaintiff to amend his bill has expired.'" *Norris v. Mitchell*, 255 Va. 235, 239 (1998) (citing *London–Virginia Mining Co. v. Moore,* 98 Va. 256, 257 (1900); *Bibber v. McCreary,* 194 Va. 394, 395 (1952)) (internal citations omitted).

[1] At the March 19th, 2021 hearing, the Judge found that declaratory judgment was an inappropriate claim based on the facts alleged and relief prayed for.

In *Norris*, the circuit court sustained a demurrer on June 20, 1996, but allowed leave to amend the complaint by July 8, 1996. Plaintiffs instead filed a nonsuit on July 5, 1996, that was entered by written order on July 15, 1996. *Id.* at 239. The court permitted the plaintiffs to proceed with refiling the case because the nonsuit order was entered more than 21 days after the June 20 order, but less than 21 days after the July 8 deadline. *Id.* "[T]he court had 21 days after [the July 8, 1996 deadline] in which to 'modify, vacate, or suspend' its order. *Id.* at 239 (quoting Va. Sup. Ct. R. 1:1). The Virginia Supreme Court held that the circuit court did in fact modify its order during that time by entering the nonsuit. *Id.*

Relying on that same logic, in *Berean L. Grp., P.C. v. Cox*, the court reversed a lower court's nonsuit entered nearly three months after a demurrer was sustained with leave to amend. The Virginia Supreme Court noted that, unlike in *Norris* in which the nonsuit was entered within 21 days of the sustained demurrer, here the nonsuit came too late after the court would have already lost jurisdiction and could therefore not have entered the nonsuit. 259 Va. 622, 627-28 (2000). "[A]n order that sustains a demurrer and dismisses the case if the plaintiff fails to amend his motion for judgment within a specified time becomes a final order upon the plaintiff's failure to file an amended motion within the specified time." *Id.* at 626 (citing *Norris v. Mitchell,* 255 Va. 235, 239 (1998); *Bibber v. McCreary,* 194 Va. 394, 395 (1952); *London–Virginia Mining Co. v. Moore,* 98 Va. 256, 257 (1900).

Therefore, Plaintiff's nonsuit in the previous case was validly entered as it was filed while the court still maintained jurisdiction.[2] The Judge's entry of that order was a modification of the order sustaining the demurrer with leave to amend the breach of contract count, and Plaintiff preserved his right to refile the case and to bring another breach of contract claim.

Whether Justice Requires Leave to Amend

"Leave to amend should be liberally granted in furtherance of the ends of justice." Va. Sup. Ct. R. 1:8. "'The decision whether to grant leave to amend a complaint rests within the sound discretion of the trial court.'" *Brown v. Jacobs*, 289 Va. 209, 218 (2015) (citing *Kimble v. Carey,* 279 Va. 652, 662 (2010)).

Defendant contends that permitting Plaintiff to amend his claim in this action would be allowing, yet again, another bite at the apple to assert a justiciable claim. Defendant points out that Plaintiff has now put forth four different complaints alleging essentially the same facts under different theories of law, each insufficient. Defendant argues that justice requires an end to litigating this matter. Furthermore, Defendant also raises the argument that Plaintiff is seeking relief from this Court for money that he previously paid Defendant in compliance with an agreed dismissal order submitted by the parties in a separate case in which Defendant sued Plaintiff for

[2] During the March 19, 2021 hearing, the Judge found that the nonsuit was timely as it was filed within the 21 day period. *See* Va. Code § 8.01-380 (2020) (stating that one nonsuit may be taken by the plaintiff as a matter of right); *see also* (*Burton v. Fifer*, 5 Va. Cir. 230 (1985) (noting that neither the court nor opposing counsel can prevent the plaintiff from taking his one nonsuit); *see also Norris v. Mitchell*, 255 Va. 235 (1998) (recognizing the filing date of the nonsuit as the effective date of the order for jurisdictional purposes).

these same past due assessments.[3] As such, Defendant asserts that Plaintiff should be judicially estopped from now bringing a claim attempting to recoup past assessments which he agreed to pay and did in fact pay.

> The 'fundamental' requirement for [applying judicial estoppel] is that 'the party sought to be estopped must be seeking to adopt a position of fact that is inconsistent with a stance taken in a prior litigation. *Bentley Funding Group, L.L.C. v. SK&R Group, L.L.C.*, 269 Va. 315, 326, 609 S.E.2d 49, 54 (2005) (quoting *Lowery v. Stovall*, 92 F.3d 219, 224 (4th Cir. 1996)). Additionally, if the inconsistent positions involve different proceedings, the parties to the proceedings must be the same, and the inconsistent position must have been relied upon by the court or prior court in rendering its decision. *Virginia Electric & Power Co. v. Norfolk S. Ry.*, 278 Va. 444, 462, 683 S.E.2d 517, 527 (2009) (citations omitted).

D'Ambrosio v. Wolf, 295 Va. 48, 58 (2018). First, judicial estoppel is not appropriate in this case. The case to recover past due assessments from Plaintiff was resolved by a February 14, 2019 dismissal order which was submitted by Defendant to the court and represented only that Defendant and Plaintiff had resolved the matter between them and wished to dismiss the case. The court relied on this representation in dismissing the case without hearing argument on the matter or fact-finding. Thus, the court did not rely on an inconsistent position in rendering its decision and therefore, should not employ judicial estoppel here.

Leave to amend is granted liberally unless "it will unfairly prejudice the other party . . . or where discovery and trial preparation are virtually complete. *Chong Kil Yom v. Toyota Motor Credit Corp.*, 93 Va. Cir. 45 (2016) (citing *Hetland v. Worcester Mut. Ins. Co.*, 231 Va. 44, 46 (1986)). The Court is persuaded that Plaintiff should be provided leave to amend. This case was filed several months ago, no trial date has been set, and it is unlikely that discovery is significantly underway. Plaintiff properly nonsuited the previous case and should be afforded the opportunity to amend his pleading for the first time in this case.

Conclusion

For the above reasons, this Court overrules the demurrer. Plaintiff shall amend his complaint within 21 days of the entry of this Order.

A copy of this letter opinion and the accompanying order was mailed and emailed to both parties, on April 28, 2021.

Sincerely,

[redacted]

The Honorable Grace Burke Carroll
Fairfax County Circuit Court Judge

[3] Fairfax County Circuit Court: *Singleton's Grove Homeowners Association, Inc. v. Kim F. Henderson, et. al*, CL-2019-13689

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Kim F Henderson, Plaintiff	)	
v.	)	CL-2021-1653
Singleton Grove Homeowners Assoc.) Defendant	)	

ORDER

This matter came before the Court on Defendant Singleton Grove Homeowners Association, Inc.'s Demurrer or, in the alternative, Plea in Bar.

ADJUDGED, **ORDERED**, and **DECREED** as follows:

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 overrules the demurrer. Plaintiff has 21 days to amend his complaint.

Entered this 4th day of May, 2021

[redacted]

JUDGE GRACE BURKE CARROLL

[redacted]

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.