NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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December 9, 2017

LETTER OPINION

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Pro se

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RE: *Anthony Hawks vs. Jeanne Ellen Libit*
CL-2017-7703

Dear Counsel:

This cause came before the Court on the motion of Defendant, Ms. Jeanne Ellen Libit, disputed by Plaintiff, Mr. Anthony Hawks, wherein Defendant seeks a stay of proceedings pending before this Court in contemplation of related litigation under appeal in Florida which purportedly is dispositive of the claims at issue. The facts in the Virginia case are related in time, space, origin, and motivation, to the facts of the litigation in Florida and appear to constitute a "convenient trial unit." However, for the reasons as

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more fully stated herein, after a careful balancing of the factors applicable, this Court finds that the issues in the instant case and in the Florida action differ though in reliance on the same underlying facts, that the claims averred in the current cause are distinct and of such nature they could not have been joined in the first suit in application of Florida law, that there is no "privity" as that legal concept pertains to this action, and that consequently, Defendant's motion for a stay of the Virginia proceedings is denied.

BACKGROUND

Anthony Hawks ("Plaintiff") is a D.C. licensed attorney who is suing Jeanne Ellen Libit ("Defendant") to collect legal fees for services Plaintiff performed in litigation concerning a Trust in Florida.

Defendant was involved in a complex trust litigation after her father passed away. On October 14, 2014, Northern Trust Company ("Northern" or the "Northern Trust") initiated a lawsuit against Defendant in Sarasota, Florida, for Declaratory Relief and Approval of Accounts (the "Florida Litigation"). In response to the suit, Defendant engaged Plaintiff to represent her both as Trustee and individually in the Florida Litigation. When Plaintiff was retained, he and Defendant signed two written engagement letters to reflect the dual representation.

The Trustee Engagement Letter: The scope of the Trustee Engagement Letter included "all matters arising in the Florida Litigation, including but not limited to (i) establishing ... [Jeanne's] right to serve as sole Trustee of [Sidney's Trust]; (ii) developing, asserting, and prosecuting any objections to the Third and Fourth Accountings; and if necessary (iii) expediting ... [Jeanne's] undisputed designation as sole Trustee of the DJL

and ACL Trust Shares." (Florida Appeal Record at 2368-2370). The Trustee Engagement Letter was signed by both parties.

The Individual Engagement Letter: In conjunction with the Trustee Engagement Letter, Defendant engaged Plaintiff to represent her individually in the Florida Litigation. The scope of this Individual Engagement Letter was "limited to (i) establishing ... [Jeanne's] right to serve as sole Trustee of [Sidney's Trust]; and if necessary (iii) expediting ... [Jeanne's] undisputed designation as sole Trustee of the DJL and ACL Trust Shares." (Florida Appeal Record at 2309-2310). The Individual Engagement Letter was signed by both parties.

During this time, Plaintiff prepared a settlement proposal for Defendant, which he sent to Defendant on June 27, 2017. The Settlement Proposal was sent along with a cover email ("Settlement Cover Email"). The Settlement Cover Email recommended that in the event of a minimum settlement of $1,500,000:

(i) Defendant would receive her requested $500,000 plus reimbursement of all her attorneys' fees and costs (estimated at that time to be $40,000 to $50,000);

(ii) Defendant's Brother would receive $700,000 plus the release of a $300,000 subtrust; and

(iii) *Plaintiff would receive the balance (approximately $250,000 or 16% of the total amount) in exchange for waiving his fees for legal services to the Trust.*

(Florida Appeal Record at 2688) (emphasis added).

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On June 29, 2015, Defendant reached a settlement agreement in the Florida Litigation. Thereafter, Defendant refused to pay any attorney's fees and costs to Plaintiff and, further, refused to authorize the payment of any attorney's fees and costs from the Trust. As part of a global settlement, however, Defendant did agree to indemnify the Trust for any attorney's fees and costs that Plaintiff might be entitled to receive.

Plaintiff served as counsel for Defendant in the Florida Litigation from October 17, 2014, through June 29, 2015. Plaintiff provided 406.8 hours of legal services. These legal services were itemized and explained in nine invoices prepared by Plaintiff. In accordance with the Trustee Engagement Letter, the unpaid charges for these legal services totaled $159,431.20. Defendant received the first of the invoices on November 4, 2014, and the last of the invoices on July 2, 2015. Plaintiff subsequently reduced this claim to $157,250.

Defendant intervened in the Florida Litigation to litigate his fee ("Florida Fee Litigation"). A portion of Defendant's share of the trust proceeds were escrowed pending the outcome of the Florida Fee Litigation. Plaintiff was awarded a sum of $40,000, which was a sum smaller than he sought. Plaintiff appealed the outcome of the Florida Fee Litigation, and that outcome is not yet final. On July 11, 2017, Plaintiff filed his First Amended Complaint in this Court for: (I) Breach of Implied Contract; and in the alternative, (II) Quantum Meruit ("Fairfax Fee Litigation").

(i) Breach of Implied Contract: Plaintiff claims that the implied contract alleged is based on a promise by Defendant to pay Plaintiff a certain sum if he waived his fees for legal services to the Trust.

(ii) Quantum Meruit: Alternatively, if the Court found that Plaintiff did not have an implied contract with Defendant, Plaintiff alleges he nonetheless provided the legal services that resulted in Defendant receiving a litigation settlement. His services provided Defendant significant benefits, which she accepted.

Defendant brings this Motion For a Stay because the Florida Appeal will not be decided until later in 2018, whereas the Fairfax Fee Litigation case is already set for trial on June 4, 2018. Defendant has asserted the defenses of res judicata, collateral estoppel and judicial estoppel. Defendant contends these defenses are not ripe for determination until after the pending appeal in Florida has been fully resolved.

ARGUMENTS

I. Defendant's Argument

First, Defendant identifies Rule 1:6 (Res Judicata Claim Preclusion) as the applicable law in this case. The trial court is tasked with determining whether the claims and issues presented in this case arise out of a common transaction or occurrence as the prior case. Defendant contends the parties in this case, Plaintiff Hawks and Defendant Libit, are the very same parties as in the Florida Fee Litigation. Plaintiff was an intervenor in the Florida Fee Litigation and Defendant was individually named as a party in Plaintiff's petition. Defendant states that Plaintiff argues the Florida Fee Litigation was against Defendant as Trustee and the Fairfax Fee Litigation is against her as an individual. Defendant claims this argument fails because she was in privity with herself and it did not matter whether she was acting as an individual, beneficiary, or Trustee. Further, Plaintiff

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is asserting claims that arise from the same conduct, transaction or occurrence raised in the prior lawsuit. Defendant cites to *Funny Guy, LLC v. Lecego*, as the case sets out a detailed history of the 2006 enactment of Rule 1:6. 293 Va. 135 (2017).

Defendant next summarizes the claims asserted in the Florida Fee Litigation. Defendant states that Plaintiff had Defendant sign two written engagement letters when she retained him in October 2014. Defendant signed one letter in her individual capacity and one letter in her capacity as Trustee. The individual engagement letter capped the fee at $5,000. The second letter was based on an hourly billing arrangement of $400 per hour. Although there were two separate letters, Defendant argues Plaintiff's sole client was Defendant. Most importantly, Defendant was never actually found to be the trustee of the Trust in question. The trustee was The Northern Trust Company. Further, Plaintiff prepared written invoices which described all the services provided. Defendant states Plaintiff did not distinguish his worked performed under the two separate engagement letters.

On June 12, 2015, Defendant claims she instructed Plaintiff not to perform any further work on the Florida Litigation. Plaintiff, however, prepared settlement documents and sent them to Defendant on June 27, 2015. It is these documents on which Plaintiff bases his Fairfax Fee Litigation. Defendant argues Plaintiff admits he had three available remedies under Florida law, and that he chose not to file an independent action at law or in equity to collect his fees.

On August 11, 2015, Plaintiff filed a charging lien which was to attach to any monies or assets Defendant received from the Trust as a result of the settlement.

Defendant claims the Charging lien was not directed at her in her capacity as a trustee of the Sidney Trust. In Defendant's individual capacity and as Trustee of the Jeanne Ellen Libit Trust, a subtrust of the Sidney Trust, she filed a Motion to Strike Charging Lien. It was in response to this Motion that Plaintiff filed his Intervenor's Petition. Defendant avers his status as "Intervenor" clearly made him a party to the Florida Fee Litigation. Defendant emphasizes, that she was named as a party in her individual capacity in the Florida Fee Litigation. From the very beginning, the Northern Trust named Defendant as a party in her individual capacity. Plaintiff did not take any steps to challenge Defendant's status as anything other than an individual. The very fact of whether Defendant was a Trustee to the Sidney Trust is a fact that was litigated in the Florida Fee Litigation. Northern Trust argued that Plaintiff never established Defendant's right to serve as Trustee and she never assumed the position of successor Trustee.

Defendant, acting in her individual capacity, filed a Petition for Order Designating Depository for Assets as a result of the settlement of the Florida Litigation. The Petition was granted, and an order was entered that required $225,200 to be deposited into the account. Defendant claims this money would have been distributed to Defendant personally, if not for the escrow account. Defendant contends Plaintiff argued she used his settlement documents and proposed summary judgment motion papers, and that he makes those same arguments in the Fairfax Fee Litigation.

Defendant's Motion to Strike the Charging Lien was denied and an evidentiary hearing was held in the Florida Fee Litigation on August 30, 2016. The Florida Circuit Court awarded Plaintiff $40,000. The Court made the following findings of facts: 1)

Defendant had paid Plaintiff a retainer of $5,000; 2) Plaintiff provided legal services to Defendant; 3) the Court had entered an order designating a depository for assets; and 4) the assets paid into the depository account were received from Defendant. Plaintiff filed a Motion to Alter or Amend Judgment, which the Court denied. Plaintiff then filed an appeal.

Defendant next proceeds to summarize the claims Plaintiff has asserted in Virginia. Defendant argues Plaintiff characterizes his causes of action as other than an express contract claim and argues he did not sue Plaintiff in her individual name. Defendant emphasizes that, at a minimum, Plaintiff was in individual privity with Jeanne Libit, as Trustee of the Sidney M. Libit Trust. Defendant argues Rule 1:6 applies not only to claims that were actually raised, but also as to those that arise from the same conduct, transaction or occurrence regardless of whether they were actually raised in the prior litigation.

Count I is a "Breach of Implied-In-Fact Contract" claim and alleges that an implied-in-fact contract exists because Defendant allegedly used the settlement documents. Count II is a "Quantum Meruit" claim and seeks equitable relief for the same work performed in the Florida Litigation. Defendant contends Plaintiff references the same Trustee Engagement and Individual Engagement Letter that was relied upon in the Florida Fee Litigation and admits that the scope of the Trustee Letter includes "all matters arising in the Florida Litigation." (Def.'s Supp. Memo. 14 (citing Compl. ¶50)). Further, Defendant claims he references the same nine invoices and settlement documents which he referenced in the Florida Fee Litigation.

Lastly, Defendant argues that Plaintiff's fee claims in the Florida Fee Litigation were based on the same set of facts which are the basis for the Fairfax Fee Litigation. The amount he seeks is almost exactly the amount he claimed in the Florida Fee Litigation and the parties are the same. The only portion of Rule 1:6 that is not satisfied is a final judgment. Defendant contends the appellate process in Florida will take approximately nine to twelve months. Defendant argues she has a meritorious defense based on res judicata and collateral estoppel. If a stay is not granted, this case may proceed to trial on the merits before a final judgment is rendered in the Florida Fee Litigation.

II. Plaintiff's Argument

Plaintiff begins by summarizing the factual background of the Florida Litigation. Sidney M. Libit, Defendant's father, died testate, leaving an estate valued at approximately $18,500,000 and five lineal descendants. Defendant was one of those descendants, along with her two brothers and two nephews. The residuary beneficiary of the estate was the trustee of a trust agreement titled the Sidney M. Libit Declaration of Trust. Defendant's brother, Jeffrey, served as trustee or co-trustee of Sidney's Trust along with The Northern Trust Company until Jeffrey's death on August 15, 2014. Four months prior to Sidney's death, Sidney drastically changed the plan of distribution, which sparked the beginning of the costly intra-familial litigation. A global settlement was reached in which Plaintiff contends Defendant "lost badly as a result." (Pl.'s Supp. Memo. 4). She ended up losing $1,151,553.61 in the settlement.

Plaintiff next summarizes the Florida Trust Litigation. What sparked this litigation is that Jeffrey and Northern Trust made a lump-sum payment from Sidney's Trust of

$372,500 to Jeffry. They also made a lump-sum payment of $50,000 to Northern Trust. Plaintiff states Sidney had named Defendant to succeed Jeffrey as successor personal representative of Sidney's estate but she executed a Declination based on the advice of her counsel at the time. It was later that she discovered the two lump-sum payments. Defendant states she met with Plaintiff to seek legal counsel and decided to invoke her express authority under Article IX, Section B.2 of the Trust Agreement to remove Northern Trust as corporate trustee. In turn, Northern Trust filed a declaratory judgment action challenging her status as successor trustee. Plaintiff argues Northern Trust got to choose the case caption. It refused to recognize Defendant as the trustee and named her as a defendant individually and as trustee of her subtrust. When Defendant began filing her own pleadings, she believed she was already the successor trustee and filed her pleadings as an individual and as trustee.

Plaintiff contends Defendant engaged him to represent her and to represent Sidney's Trust in the litigation. She had him execute two engagement letters. If he prevailed on the trustee claim, Defendant would pay Plaintiff's legal fees out of the Trust's residuary assets. If he lost, he would not collect any fees from the Trust. Plaintiff contends he represented the Trust and Defendant under this arrangement for nine months. Plaintiff claims he discovered two "smoking guns" during this time "that conclusively established Sidney's intent for Jeanne to have the power and authority to remove Northern trust as corporate trustee, and designate herself as a successor trustee of the Trust." (Pl.'s Supp. Memo. 7). The first "smoking gun" was a letter from Jeffrey and the second was an inter-office memorandum from the law firm in Florida that handled all of Sidney's estate

planning. These two pieces of information confirmed Sidney did not wish to remove Defendant as a possible successor trustee of the Trust.

Defendant wanted to use the information as leverage in her settlement negations with her nephew before Plaintiff filed the Motion for Partial Summary Judgment, so she instructed Plaintiff to prepare a set of global settlement proposal documents. Plaintiff avers Defendant never allowed Plaintiff to file the Motion for Partial Summary Judgment and the point became moot when Defendant settled with her nephew. Plaintiff argues the settlement agreement was remarkably similar to the settlement proposal he drafted for Defendant.

Plaintiff explains that as a result of Defendant's decision to discharge him two days after she received his settlement proposal, he did not receive payment for the 406.8 hours he served as lead litigation counsel for Sidney's Trust. He states that under Florida law, he had three remedies available to him: 1) an independent action at law against the Trust for money damages based on breach of contract; 2) a statutory remedy under Section 736.1005 of the Florida Trust Code in the form of a fee application; and 3) a common law equitable remedy in the form of a charging lien. Plaintiff explains he decided to file a Notice and Claim of Attorney's Charging Lien solely against Trust assets. He also filed a Petition for Order Authorizing Payment of Attorneys' Fees and Costs under Section 736.1005.

Plaintiff claims that to prevent the Charging Lien from delaying court approval of the settlement agreement, Defendant and Northern Trust arranged to set up a special depository account at Northern with enough funds to cover any award made to Plaintiff.

Plaintiff argues he had no way of verifying the representation that the funds came from Defendant individually. Defendant attempted to have the Charging Lien stricken but failed. The Order the lower tribunal entered, however, limited the hearing on Plaintiff's fee claim to the reasonableness of the hours spent for representation. Plaintiff contends he was therefore precluded from filing any other claims.

Plaintiff argues the Virginia litigation asks this Court to assess the legal consequences of Defendant's action after his services were rendered. He is asserting breach of an implied-in-fact contract. Plaintiff claims Defendant made a separate promise to pay him if he waived his fee claim against the Trust in the event his proposed settlement strategy resulted in a settlement. Plaintiff is also pursuing a quantum meruit claim resulting from Defendant's unjust enrichment. She used his settlement and litigation strategies while simultaneously taking steps to prevent him from being compensated for his role in achieving that settlement.

Plaintiff argues the Motion for a Stay makes key factual claims that are repudiated by the record as summarized in the chart below.

Fact in Dispute from Defendant's Memorandum	**Plaintiff's Argument**
Hawks intervened in the Florida litigation "so that he could be paid from trust proceeds which were then due to Libit."	This claim suggests Plaintiff sued Defendant in Florida. This claim only applies to the Charging Lien because an award for the Fee Petition would have been paid out of the trust's general assets. The Charging Lien attached to the Trust assets distributed under the Trust Settlement. They were still Trust assets until Defendant "bonded off" the charging Lien by funding the Depository Account.
"A portion of Libit's share of the Trust proceeds were escrowed pending the outcome of the Florida Fee Litigation."	Defendant and Northern Trust represented to the Florida court that the monies escrowed were Defendant's personal funds. Disclosure of the Trust

	Settlement terms would provide clarification, but Defendant and Northern refused to make such disclosures in Florida.
"Hawks prevailed in the Florida Fee Litigation . . ."	Defendant obtained a court order declaring her to have been the prevailing party.
"Both Hawks and Libit were parties in the Florida Litigation and in the Florida Fee Litigation . . ."	Plaintiff was only an attorney in the Florida Trust Litigation. He was not a party in the Fee Litigation because there was no actual lawsuit. There was merely a motion for attorney's fees. Defendant was not a party to the Fee Petition because Section 736.1005 only authorizes such a motion against a trust. The Charging Lien Motion was filed only against Trust assets. At most, she was an indemnitor.
"A motion to dismiss the appeal of the Florida Fee Litigation on this [satisfaction of judgment] basis is pending."	The motion to dismiss the appeal was denied last summer.
"Libit was never the Trustee of the SML Trust, not at the time she signed the Engagement Letters and not at any time thereafter."	This claim Plaintiff avers is "astonishing" considering Defendant litigated in Florida for nine months as the "Trustee of the Sidney Libit Trust, and repeatedly directed Plaintiff to file claims, pleadings, and motions on the Trust's behalf. Furthermore, Defendant waived her right to make this claim because she agreed the evidentiary hearing would be limited to the reasonableness of Plaintiff's billable hours under the Trustee Engagement Letter.
"On June 12, 2015, Libit instructed Hawks not to perform any additional work in the Florida Litigation."	This statement Plaintiff retorts is misleading by omission. She asked him to stop working on the case until new local counsel could be hired in Florida and a new litigation strategy devised. When he found new Florida counsel and devised a new litigation strategy, Defendant approved. He was not discharged until June 29, 2015.
"In the Florida Fee Litigation, Libit argued that she was not individually liable on the Individual Engagement Letter . . ."	This is irrelevant because Plaintiff never filed an attorney's fee claim under the Individual Engagement Letter.
"The Florida Court ruled that Hawks was not entitled to seek a fee based on his representation of the Sidney Libit Trust, but Hawks was, nonetheless, entitled to a fee based on the Trustee Engagement Letter."	While the Florida Court ruled during the evidentiary hearing that Chapter 736 of the Florida Trust Code did not apply, the Court granted the Fee Petition under 736, after further consideration over several months. The Court changed its mind.

" . . . the [Florida] Circuit Court Judge required Jeanne Libit to pay the fee individually; and "it is clear that . . . Jeanne Libit . . . individually was required to pay Hawks pursuant to the Fee Judgment."	Plaintiff maintains these quotations are simply false. The Fee Judgment does not order Defendant to do anything. It ordered that the judgment be paid out of monies escrowed in the Depository on behalf of the Trust.
"Hawks could have litigated the fee claim against Libit, individually or as trustee, and that he did, in fact, litigate the claim against Libit in both capacities."	This is an assertion with no factual or legal support. There was no procedural way for Plaintiff to have asserted the claims in the Virginia Litigation against Defendant individually in the Florida Fee Litigation.

Lastly, Plaintiff argues the Stay Motion should be denied because the res judicata claim is meritless. Plaintiff cites to the *Funny Guy, LLC v. Lecego, LLC*, 293 Va. 135 (2017), case. Plaintiff argues it comes down to two issues: 1) whether Plaintiff's claims in Florida and Virginia are part of "one core" dispute between the parties; and if so, 2) whether he could have resolved them together in the Florida Fee Litigation. Plaintiff contends Defendant focuses solely on the first issue and ignores the second issue by assuming that the Virginia claims could have been asserted in the Fee Litigation. The Fee Litigation was not a civil action with Plaintiff as the plaintiff in that case. He filed the Fee Petition and Charging Lien Motion by intervening, which is the only way he was able to do so.

Plaintiff avers the scope of the Fee Petition was statutorily restricted by Section 736.1005 of the Florida Trust Code. All he could do was apply to the Court for the fees, and he could not file the Virginia claims against Defendant as an individual. He did not file an independent civil action against the Trust to enforce the Charging Lien because Florida law prefers that chagrining liens be enforced as a summary proceeding in the original action. Additionally, he would have had to file the action against both the Trust

and Defendant individually. Plaintiff argues this, in turn, would have raised long-arm personal jurisdiction and venue issues because the claims originated in Virginia. Plaintiff emphasizes that the Strike Order also barred him from asserting the Virginia claims. In addition, Defendant claims she was in privity with the Trust, but Plaintiff argues this issue should not be decided until the "only contractual relationship between Jeanne and the Trust created by the Trust Settlement Agreement is fully disclosed." (Pl.'s Mot. 19).

ANALYSIS

The granting of a motion to stay pending the outcome of an action in another court is within the sound discretion of the Court. *Potomac Sav. Bank, F.S.B. v. Lewis*, 25 Va. Cir. 184, 184-85 (Fairfax Cir. 1991); *see also* 1 Am. Jr. 2d Actions § 94. The Court is to consider several factors in making its determination, including, but not limited to, the identity of the parties and issues in both actions; the time of filing; promotion of judicial efficiency; and possible prejudice to a party as a result of the stay. *Great Am. Ins. v. Cavalier Printing Ink*, 620 F. Supp. 1082, 1083 (E.D. Va. 1985). Therefore, it is within this Court's discretion to determine whether to stay the pending action.

To determine whether a stay of proceedings should be granted in the instant case, the Court must thus first apply the analysis more typical to determining whether there would be res judicata if there was finality in the Florida litigation, and then balance the factors gleaned from such analysis to arrive at the consequent conclusion as to whether a stay would thus be applicable.

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I. Whether Res Judicata applies

Virginia Supreme Court Rule 1:6 reads:

> **(a)** *Definition of Cause of Action.* --A party whose claim for relief arising from identified conduct, a transaction, or an occurrence, is decided on the merits by a final judgment, shall be forever barred from prosecuting any second or subsequent civil action against the same opposing party or parties on any claim or cause of action that arises from that same conduct, transaction or occurrence, whether or not the legal theory or rights asserted in the second or subsequent action were raised in the prior lawsuit, and regardless of the legal elements or the evidence upon which any claims in the prior proceeding depended, or the particular remedies sought. A claim for relief pursuant to this rule includes those set forth in a complaint, counterclaim, cross-claim or third-party pleading.
> **(b)** *Effective Date.* --This rule shall apply to all Virginia judgments entered in civil actions commenced after July 1, 2006.
> **(c)** *Exceptions.* --The provisions of this Rule shall not bar a party or a party's insurer from prosecuting separate personal injury and property damage suits arising out of the same conduct, transaction or occurrence, and shall not bar a party who has pursued mechanic's lien remedies pursuant to Virginia Code § 43-1 et seq. from prosecuting a subsequent claim against the same or different defendants for relief not recovered in the prior mechanic's lien proceedings, to the extent heretofore permitted by law.
> **(d)** *Privity.* --The law of privity as heretofore articulated in case law in the Commonwealth of Virginia is unaffected by this Rule and remains intact. For purposes of this Rule, party or parties shall include all named parties and those in privity.

Va. Sup. Ct. R. 1:6. Virginia case law breaks this rule down into a three part test: (1) whether the issue has been decided on the merits by a final judgment; (2) whether the parties are the same or in privity; and (3) whether the claim arises from the same conduct, transaction or occurrence. *Lee v. Spoden*, 290 Va. 235, 247-50 (2015). This Rule was the primary focus of *Funny Guy, LLC, et al. v. Lecego, LLC, et al.*, a case which both parties cite and on which they place great emphasis. 293 Va. 135 (2017).

In *Funny Guy*, the Supreme Court of Virginia held the trial court did not err in barring a second suit to recover payment for work done pursuant to an alleged contract,

under res judicata, where the first suit relied upon a "settlement theory" and the latter suit relied upon both an oral contract and a quantum meruit theory. In 2012 and 2013, Funny Guy allegedly provided IT and related services to *Lecego*, but was not paid. Thereafter, the two companies allegedly came to an agreement on payment of services. When Funny Guy was still not paid, it initiated a suit to enforce the alleged settlement. A demurrer in the initial suit was sustained when the trial court found there was no "meeting of the minds." The second action was filed less than a year later, to collect the same allegedly unpaid fees, but under an oral contract and, alternatively, a quantum meruit theory. Lecego filed a plea in bar under res judicata, and the trial court granted the plea in bar and dismissed the case. Funny Guy appealed.

In *Funny Guy*, the Supreme Court of Virginia provided detailed guidance on how a res judicata claim should be analyzed. As Plaintiff correctly argues, the "same conduct, transaction or occurrence" test is a two part test. First, one must ask, do the two cases arise from the same conduct, transaction or occurrence? Second, one must ask, was it possible for all of the legal claims to be joined in a single suit?

Analyzing the merits of Defendant's res judicata claim as the case stands before the Court at this juncture of the litigation is thus key to the resolution of the merits of the Motion for a Stay. The Court thus evaluates finality, the nature of the transactions, principles of joinder, and the concept of privity, to guide its decision.

A. Whether the Florida judgment orders are final

The Florida Court entered an Order on Intervenor's Petition for Order Authorizing Payment of Attorney's Fees and Costs and Intervenor's Consolidated Motion to Enforce

Charging Lien on February 21, 2017. (Florida Appeal Record at 2804). The order granted Intervenor's Petition for Attorney's Fees and Motion to Enforce Charging Lien in the sum of $37,053.42. The Court retained jurisdiction for the enforcement of the Order. Subsequently on April 20, 2017, the Florida Court entered an Order on Intervenor Anthony Hawks' Motion to Alter or Amend Judgment. (Florida Appeal Record at 2819). The Court denied the motion. Lastly, on August 16, 2017, the Florida Court entered a Final Judgment Awarding Costs order. (Pl.'s Supp. Memo. Ex. 2 at 2). The Judgment Orders appear to conclude the matter with sufficient finality that they might be considered a full and concluded disposition of the case were such orders issued in Virginia. To the extent the Florida litigation could be deemed not to be finalized, such a finding could have some bearing on the resolution of this motion. The parties, however do not address finality in their briefs. They both merely concede the matter is not final. The Court thus does not have before it sufficient information from which to determine finality is otherwise than lacking as assumed by the parties. The Court's decision whether to issue a discretionary stay of the Virginia proceedings does not however necessarily depend on the finality of the Florida case, for the Court focuses on the second and third prong of the test enunciated in *Lee v. Spoden*. The Court thus makes no finding as to finality except to note the apparent curiosity that it is unclear how or why the Florida orders are insufficient to show the matter was decided on the merits and is final for the purposes of res judicata.

B. Whether the Virginia and Florida cases arise from the same conduct, transaction or occurrence

In *Funny Guy*, the Court stated:

> For purposes of res judicata, deciding what constitutes a single transaction or occurrence under Rule 1:6 should be a practical analysis. The proper approach asks "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." Restatement (Second) of Judgments § 24(2). No "single factor" is indispensable or determinative. Id. § 24 cmt. b. The factors should instead be considered "pragmatically" with a view toward uncovering the true underlying dispute between the parties.

Funny Guy, LLC v. Lecego, LLC, 293 Va. 135, 154-155 (2017).

First, the facts in this case are related in time, space, origin, and motivation to the facts of the Fee Litigation in Florida. Very similar to Funny Guy, Plaintiff intervened in the Florida Litigation because he wanted to get paid for his services. He filed a complaint in Virginia for the same reason – he wants to get paid for his services. The underlying facts of what happened are the same in both cases. Defendant hired Plaintiff to represent him and to represent the Trust. Plaintiff created a settlement strategy, but Defendant discharged him before he could do anything with his settlement or litigation strategy.

Second, the facts appear to be a convenient trial unit. The facts are all relevant to the overall scheme of both cases, and the facts that have been alleged are the same in both cases. Accordingly, the treatment of these facts as a unit should conform to the parties' expectations. These last two factors are not factors that either party argues in detail. Defendant quotes the language from the *Funny Guy* case, but does not provide argument to support a finding that the facts are a convenient trial unit. Plaintiff, on the other hand, simply argues that the Fee Litigation was a summary proceeding and therefore it failed to qualify as a convenient trial unit.

The Virginia and Florida cases arise from the same conduct, transaction or occurrence, so this element of res judicata is met.

C. Whether it was possible for Plaintiff to join the claims brought in this suit with the claims set forth in the Florida Fee Litigation

In *Funny Guy*, the Court placed great emphasis on the importance of determining whether the claims brought in the second suit could have been joined in the first suit. "Claim preclusion has always been the stepchild of pleading and joinder rules. 'Determining which claims *should* have been brought in earlier litigation largely depends on which claims *could* have been brought.'" *Funny Guy, LLC v. Lecego, LLC*, 293 Va. 135, 143 (2017) (internal citations omitted) (emphasis in original).

> Virginia law has historically recognized that a litigant must unite every joinable claim that he has against a particular defendant in one proceeding or risk the preclusion of his other claims. "Every litigant should have opportunity to present whatever grievance he may have to a court of competent jurisdiction; but having enjoyed that opportunity and having failed to avail himself of it, he must accept the consequences." Miller v. Smith, 109 Va. 651, 655, 64 S.E. 956, 957 (1909). Thus, the "effect of a final decree is not only to conclude the parties as to every question actually raised and decided, but as to every claim which properly belonged to the subject of litigation and which the parties, by the exercise of reasonable diligence, might have raised at the time." Smith v. Holland, 124 Va. 663, 666, 98 S.E. 676, 677 (1919) (emphasis added).

Id. at 146-47.

Additionally, the Court stated:

> Code §§ 8.01-272 and 8.01-281, along with Rule 1:4(k), permit joinder of claims on the precondition that they arise out of the "same transaction or occurrence" — the exact phrase used in Rule 1:6(a) to define the scope of res judicata (but for the addition of the word "conduct" in Rule 1:6). By their very terms, "[b]oth enactments are conditioned . . . upon the requirement that the claims joined must 'arise out of the same transaction or occurrence.'" Powers, 249 Va. at 37, 452 S.E.2d at 669. In other words,

> absent agreement of the parties, claims can only be joined if they arise out of the same transaction or occurrence. If claims can truly be joined under Code §§ 8.01-272 and 8.01-281, then it necessarily follows that the very same claims would be prima facie within the scope of Rule 1:6. That is the symmetry intended when the phrase "conduct, transaction or occurrence" was repeated essentially verbatim in Rule 1:6. Rule 1:6 thus "effectuates Code §§ 8.01-272 and 8.01-281" and "applies the same test in res judicata issues." Sinclair & Middleditch, supra, § 14.11[B][5], at 1220 (emphasis added).

Id. at 152.

Defendant does not address this portion of the test in her brief. Plaintiff, to the contrary, did do so, and persuasively argued why he was unable to join his claims for breach of an implied-in-fact contract and quantum meruit in the Florida Fee Litigation. Plaintiff acknowledged that he had three remedies at his disposal under Florida law. Those remedies included 1) an independent action at law against the Trust for money damages based on breach of contract; 2) a statutory remedy under Section 736.1005 of the Florida Trust Code in the form of a fee application; and 3) a common law equitable remedy in the form of a charging lien. He opted to pursue the two latter options.

Plaintiff intervened in the underlying Florida Litigation when he filed his Fee Petition under Section 736.1005, which reads:

> (1) Any attorney who has rendered services to a trust may be awarded reasonable compensation from the trust. The attorney may apply to the court for an order awarding attorney fees and, after notice and service on the trustee and all beneficiaries entitled to an accounting under s. 736.0813, the court shall enter an order on the fee application.
> (2) If attorney fees are to be paid from the trust under subsection (1), s. 736.1007(5)(a), or s. 733.106(4)(a), the court, in its discretion, may direct from what part of the trust the fees shall be paid.(a) All or any part of the attorney fees to be paid from the trust may be assessed against one or more persons' part of the trust in such proportions as the court finds to be just and proper.

Fla. Stat. § 736.1005. The statute unequivocally limits the statutory remedy to reasonable compensation from the trust. Although the trustee must be noticed, the trustee is not individually responsible for payment of the fee.

Plaintiff acknowledges he had available to him the option to file an independent civil action. He argues, however, that doing so would have delayed any fee award, and it would have raised long-arm personal jurisdiction and venue concerns because the claims originated in Virginia. In Plaintiff's First Amended Complaint filed in Virginia, he states that both he and Defendant are citizens of the Commonwealth of Virginia. Both reside in Fairfax County. He argues he prepared the settlement documents for Defendant with a cover letter that explained he would get a fee of approximately $250,000 assuming there was a settlement of at least $1,500,000. He claims Defendant's actions and conduct in using his legal services for the Trust to obtain a settlement was an implied acceptance of the express offer set out in his letter.

Further, he argues that even if it was not an implied acceptance, she was unjustly enriched by using his services to obtain the settlement and not compensating him. Limiting the analysis to jurisdiction and venue, and without analyzing the validity of Plaintiff's Virginia claims, Plaintiff is correct that he probably would have encountered a personal jurisdiction and venue problem. The two parties are domiciled in Virginia and it appears that the alleged acceptance and breach of contract occurred in Virginia. As such, joinder of these claims would not have been practical or possible in Florida.

Joinder of all the claims was not possible, so this element of res judicata is not met.

D. Whether the parties were the same or whether there was privity

Addressing privity within the res judicata context, Virginia law holds that a party's interest must be "so identical with another that representation by one party is representation of the other's legal right" and "[w]hether privity exists is determined on a case by case examination of the relationship and interests of the parties." *Thomas Raley v. Naimeer Haider, et al.*, 286 Va. 164, 172 (2013).

One of the crucial issues in the instant motion, which the parties have properly identified and argued, is whether the two cases include the same parties. Defendant argues that she was a party in the Florida Fee Litigation case because she was sued as an individual, and in the alternative, she was in privity with herself, because her interests in both cases were identical. She argues she is a party in the Virginia Litigation because she is being sued as an individual. Plaintiff argues to the contrary. He claims that Defendant's role in the Fee Litigation was merely as an indemnifier and his role was merely as an interpleading litigant filing a motion for attorneys' fees. There was no actual case in which Plaintiff and Defendant were parties. Further, he argues that their respective roles did not make them parties for purposes of res judicata.

In Virginia, Rule 3:14 addresses intervention.

> A new party may by leave of court file a pleading to intervene as a plaintiff or defendant to assert any claim or defense germane to the subject matter of the proceeding.
>
> All provisions of these Rules applicable to civil cases, except those provisions requiring payment of writ tax and clerk's fees, shall apply to such pleadings. The parties on whom such pleadings are served shall respond thereto as provided in these Rules.

Va. Sup. Ct. R. 1:6. In Florida, Rule 1.230 governs intervention.

> Anyone claiming an interest in pending litigation may at any time be permitted to assert a right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding, unless otherwise ordered by the court in its discretion.

Fla. R. Civ. P. 1.230. The Virginia rule clearly identifies an intervenor as a new *party* and anyone on whom the intervenor's pleadings are served is also identified as a *party*. The Florida Rule is not as clear. Nonetheless, an analysis of the Florida Rule is not necessary because the Final Judgment Awarding Costs order says, "it is hereby ORDERED AND ADJUDGED . . . Intervenor Hawks was a *party* to the litigation." (Pl.'s Supp. Memo. Ex. 2 at 1) (emphasis added).

The next issue the Court must determine is whether Defendant was a party to the litigation, and if so, in what capacity. The Final Judgment Awarding Costs order again resolves this dispute. The order reads, "Respondent, Jeanne Ellen Libit, was the prevailing *party* in the resolution of this issue in that Attorney Hawks claimed $157,250.00 in fees and was awarded $40,000.00 in fees." (Pl.'s Supp. Memo. Ex. 2 at 2) (emphasis added). The Florida Court's determination must be given full faith and credit.

To determine whether the Fee Litigation was against Defendant in her capacity as Trustee or as an individual, it is important to review the pleadings. In the Notice and Claim of Attorney's Charging Lien, Plaintiff wrote "Anthony Hawks, hereby files this Claim of Attorney's Charging Lien . . . for legal services and costs incurred in the above-captioned case on behalf of Respondent Jeanne Ellen Libit, *Trustee of the Sidney Libit Trust*, pursuant to a written engagement letter executed by Jeanne Ellen Libit, *as trustee of the Sidney Libit Trust* . . . ." (Florida Appeal Record at 1891) (emphasis added). In the

Intervenor's Petition for Order Authorizing Payment of Attorney's Fees and Costs, and Incorporated Memorandum of Law, Plaintiff wrote "Intervenor Anthony Hawks ("Hawks"), as former attorney to Jeanne Ellen Libit *in her capacity as successor Trustee of the Sidney M. Libit Trust* . . . ." (Florida Appeal Record at 1914) (emphasis added).

When Plaintiff filed his motions, he was filing against Defendant in her capacity as Trustee. Defendant argues this was not possible because her status as Trustee was never determined. Defendant contends she was never Trustee to the Sidney Trust. The validity of this argument is not for the Court to consider at this juncture. The sole question for the Court to consider is whether Plaintiff intended to sue Defendant as an individual or as Trustee. It is evident that his intent was to sue Defendant in her capacity as Trustee. Although Northern filed suit against Defendant in her capacity as an individual and in her capacity as Trustee of the Jeanne Ellen Libit Trust, Northern's decision to sue her in these two capacities is not relevant to how Plaintiff chose to bring his claims against Defendant.

The next determination the Court must make is whether Defendant was in privity with herself. Defendant argues "no matter what 'hat' Jeanne Libit was wearing at a particular moment, she was still Jeanne Libit and she was clearly in privity with herself, whether acting as an individual, as a beneficiary, or a putative trustee of the Trust." (Pl.'s Supp. Memo. 5). It is not clear, however, that Defendant was in fact in privity with herself. First, Defendant vigorously argues she was never Trustee of the Trust in question. If she was not Trustee, then she cannot now, as an individual, be in privity to the Trust or the position of Trustee simply by default. Contrary to Defendant's argument, the "hat" Defendant was wearing is of importance.

"It is understood to be settled in Virginia, that no judgment against the executors can bind the heirs, or in any manner affect them. It could not be given in evidence against them." *Mason's Devisees v. Peter's Adm'rs*, 15 Va. 437 n.+ (1810). "Privity may not exist between heirs and a personal representative." *Bank of Am., N.A. v. Freier*, 56 Va. Cir. 15, 20 (Cir. Ct. 2001). This is a case of an alleged Trustee and a beneficiary of the trust, rather than an executor and an heir. However, the concept can easily be borrowed and applied because the relationship between an executor and an heir and that of a trustee and a beneficiary are fairly analogous to one another. The fact that the same person was serving in the role of Trustee does not automatically mean that the two roles of Trustee and an individual are one and the same, thus automatically giving rise to privity. The parties' nearly identical interests must still be established. *Thomas Raley v. Naimeer Haider, et al.*, 286 Va. 164, 172 (2013). Even if Plaintiff's status as Trustee was not proven, that does not eliminate the fact that Plaintiff believed her to be the proper Trustee when he brought suit. Further, the record is clear that she retained Plaintiff to serve as counsel for the Trust. She took these actions prior to any official determination as to her status as Trustee but signed the Engagement Letter in her claimed role of Trustee.

Defendant attempts to demonstrate the connection required between her role in the first suit and her role in the second suit by arguing that the money deposited into the depository account was her own personal money. This may very well be true. The Florida Court's order entered on November 30, 2015, reflects that "$225,200 of the assets belonging to Jeanne Libit" were deposited into the depository account. (Florida Appeal Record at 1910). A closer examination of the facts however, reveals that Defendant took

it upon herself to place the sum of $225,200 in escrow. She was not required to do so. Thus, the source of the funds is irrelevant because had Defendant not taken that action, the funds for Plaintiff's fees would have come directly from Trust assets. The assets may have been deducted from Defendant's share or someone else's share. Accordingly, Defendant has not sufficiently demonstrated that her actions in the first suit would bind her as an individual in the second suit, therefore making each party's interest "so identical with another that representation by one party is representation of the other's legal right." *Thomas Raley v. Naimeer Haider, et al.*, 286 Va. 164, 172 (2013).

The parties at issue in the Florida and Virginia suits are not identical, and there is no privity between Defendant and the Florida Trust as that concept applies in the factual framework of this cause, so this element of res judicata is not met.

II. Whether a balancing of factors supports Defendant's Motion for a Stay

As discussed above, the parties in this suit are not the same parties and there is no privity. Furthermore, the issues in both actions differ. They have the same underlying facts but they include different claims that could not have been joined in the first suit. The Court has not made any determination as to the likelihood that Plaintiff's two Virginia claims will succeed or as to their appropriateness, as that is not for the Court to decide at this time. The Court, however, decides to allow Plaintiff to proceed with his claims because Defendant has failed to persuade the Court that her res judicata defense has enough merit to support the granting of the Stay. Furthermore, Defendant will not be legally prejudiced by this outcome because she has not previously had to defend herself against Plaintiff's claims as an individual.

CONCLUSION

The Court has considered the motion of Defendant, Ms. Jeanne Ellen Libit, disputed by Plaintiff, Mr. Anthony Hawks, wherein Defendant seeks a stay of proceedings pending before this Court in contemplation of related litigation under appeal in Florida which purportedly is dispositive of the claims at issue. The Court finds the facts in the Virginia case are related in time, space, origin, and motivation to the facts of the litigation in Florida and appear to constitute a "convenient trial unit." However, for the reasons as more fully stated herein, after a careful balancing of the factors applicable, this Court finds that the issues in the instant case and in the Florida action differ though in reliance on the same underlying facts, that the claims averred in the current cause are distinct and of such nature they could not have been joined in the first suit in application of Florida law, that there is no "privity" as that legal concept pertains to this action, and that consequently, Defendant's motion for a stay of the Virginia proceedings is denied.

The Plaintiff shall prepare, circulate and submit to the Court an order incorporating the ruling in this Letter Opinion.

AND THIS CAUSE CONTINUES.

Sincerely,

[redacted]

David Bernhard
Judge, Fairfax Circuit Court

OPINION LETTER