NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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COUNTY OF FAIRFAX CITY OF FAIRFAX

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April 23, 2018

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Stephen L. Pettler, Jr., Esquire
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Re: *Richard W. Davidson vs. Steve DuBrueler*, Case No. CL-2016-5985

Dear Counsel:

Plaintiffs Richard W. Davidson and Tina L. Davidson held the majority interests of a limited liability company known as Capital Realty Service, LLC (Company). On March 22, 2006, Plaintiffs and Defendant Steve DuBrueler entered into an agreement entitled, "Agreement for Issuance of Membership Interests" (the Agreement). Pursuant to the Agreement, Defendant DuBrueler acquired virtually all the Membership Interests in the Company. The Agreement also provided for the defendant to guarantee the payment of certain debts of the Company. The parties executed the following Guarantee Agreements:

a) Guarantee of all amounts owed to Hampshire Holdings by the Company pursuant to a promissory note in the principal amount of $100,000;

b) Guarantee of fifty percent of amounts owed to Richard J. Davidson pursuant to a promissory note in the principal amount of $200,000;

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c) Guarantee of fifty percent of amounts owed to Richard W. Davidson pursuant to a promissory note in the principal amount of $65,000;

d) Guarantee of fifty percent of amounts owed to Richard W. Davidson pursuant to a promissory note in the principal amount of $30,000; and

e) Guarantee of fifty percent of amounts owed to Tina K. Davidson pursuant to a promissory note in the principal amount of $48,000.

The parties entered into a second agreement dated March 20, 2009 (Second Agreement), which reiterated the prior obligations contemplated in the prior Agreement that were allegedly unsatisfied. The Second Agreement provided that Defendant DuBrueler agreed to defend, protect, indemnify and hold Plaintiffs harmless from any losses on account of Defendant's failure to fully satisfy any payment or guarantee obligations of the Company and/or Plaintiffs. Pursuant to both the Agreement and Second Agreement, Defendant DuBrueler guaranteed, jointly and severally with Plaintiff Richard W. Davidson, payment of certain debts to Branch Banking and Trust Company ("BB&T"). Defendant further agreed to reimburse Plaintiffs, "for all costs and expenses in the event that [Plaintiffs] are required to repay all or any portion of the loans made by BB&T to the Company."

On June 7, 2013, Plaintiffs commenced an action against Defendant DuBrueler for breach of both the Agreement and Second Agreement (2013 Suit), alleging that multiple obligations and guarantee payments to the aforementioned parties remained unsatisfied. The 2013 Suit ultimately was nonsuited on April 12, 2014.

In December 2014, one Lee Alexander filed a complaint in the United States District Court for the Eastern District of Virginia against Plaintiff Richard W. Davidson. Mr. Alexander sought judgment for sums due under a promissory note executed by the Company on April 20, 2005 in the amount of $100,833 (the Note). On August 14, 2015, Mr. Alexander obtained a judgment against Richard W. Davidson on the Note in the amount of $97,244.79. On October 5, 2015, Mr. Alexander obtained another judgment against Richard W. Davidson for attorney's fees in the amount of $11,196.65. Richard Davidson paid Mr. Alexander in full, including interest on the attorney's fees, on March 14, 2016.

On April 22, 2016, Plaintiff Richard W. Davidson filed this action against Defendant DuBrueler for breach of the Agreement and Second Agreement (2016 Suit), alleging Defendant was responsible for payment of the Note to Mr. Alexander. Plaintiff filed a Motion for Nonsuit in Court on April 12, 2017—the date originally

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scheduled for trial. Defendant DuBrueler was prepared to proceed and opposed the nonsuit. A briefing schedule was set by the Court and hearing held on May 19, 2017. Plaintiff ultimately withdrew his Motion for Nonsuit.

Trial was then rescheduled for November 6, 2017. On Friday November 3, 2017, Plaintiff advised the Court that he would once again move for nonsuit at trial. Defendant DuBrueler contended that since the 2013 Suit against him resulted in a nonsuit, Plaintiff's motion for nonsuit in the instant matter constituted a request for a second nonsuit. Defendant DuBrueler sought an award of attorney's fees and costs. On December 1, 2017, the Court heard oral argument on whether Plaintiff's one nonsuit as a matter of right had already been taken.

Virginia Code § 8.01-380, in pertinent part, provides that:

> Only one nonsuit may be taken to a cause of action or against the same party to the proceeding, as a matter of right, although the court may allow additional nonsuits . . . or counsel may stipulate to additional nonsuits. The court, in the event additional nonsuits are allowed, may assess costs and reasonable attorney fees against the nonsuiting party.

Va. Code Ann. § 8.01-380. This section permits the plaintiff one nonsuit as a matter of right "as to any cause of action or claim," subject to limitations imposed by statute. The parties disagree as to whether the newly added claims are part of the originally nonsuited cause of action. The determination of this issue depends upon whether the Court will adopt and apply the "same evidence" test or the "same transaction" test. Plaintiff cites *Davis v. Marshall Homes, Inc.*, 265 Va. 159, 161 (2003) for the proposition that, "the test to determine whether claims are part of a single cause of action is whether the same evidence is necessary to prove each claim." Conversely, Defendant suggests that, "a cause of action is a set of operative facts," which arise from the same "transaction or occurrence." *Roller v. Basic Construction Co.*, 238 Va. 321, 327 (1989); Va. Sup. Ct. R. 1:6.

In *Davis*, the Virginia Supreme Court applied the evidentiary approach when asked to decide whether a contract claim was barred by the doctrine of *res judicata*. *Davis*, 265 Va. at 163. Virginia Supreme Court Rule 1:6 superseded the test promulgated in *Davis*. *See* Va. Sup. Ct. R. 1:6; *see also, Virginia Imports v. Kirin Brewery*, 50 Va. App. 395, 412, (2007). Although Rule 1:6 concerns *res judicata* and Virginia § 8:01-380 involves nonsuits, it cannot reasonably be maintained that the transactional approach is not applicable to the nonsuit provisions. *See Law v. PHC-Martinsville, Inc.*, 89 Va. Cir. 231, 232 (Martinsville, Oct. 2, 2014) (applying the "same transaction" test when determining whether new claims are barred by the statute of limitations); *see also, Dunston v. Huang*, 709 F. Supp. 2d 414, 420 (E.D.

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Va. 2010) (finding Rule 1:6 supersedes the same evidence test and applying the same transaction or occurrence test to the Virginia Code § 8.01-61—the nonsuit tolling provision). Given that the evidentiary test has been abandoned and superseded in both the *res judicata* and nonsuit tolling contexts, this Court finds that Virginia Code § 8.01-380 commands the application of the "same transaction" test.

On the merits, Plaintiff has commenced two separate causes of action with overlapping but different sets of operative facts. The 2013 Suit concerned Defendant's alleged obligations to Plaintiff for Hampshire Holdings, Richard J. Davidson, Tina J. Davidson and BB&T Bank. In contrast, the present action involves Plaintiff's payment of Mr. Alexander's judgment. While both suits involve the same agreements and allege breach of those agreements, the salient feature of Plaintiff's 2013 and present causes of action is when the actions accrued. Significantly, the 2013 Suit was nonsuited prior to the accrual of the present cause of action. In other words, the cause of action brought in the present case did not even arise until August 14, 2015—long after the nonsuit of the 2013 suit. Additionally, it would be nonsensical to bar Plaintiff from bringing another suit against the same Defendant, under the same agreements, but arising from a different and distinct set of operative facts. Therefore, Plaintiff's present suit arises from a distinct "transaction or occurrence."

Additionally, even if the Court were to apply the same evidence test, there is no doubt that the 2013 Suit and the present suit require different evidence necessary to prove each claim. Most apparent is the fact that Plaintiff must prove in the present suit that he paid the judgment of Mr. Alexander, an individual who apparently has no relation to the 2013 Suit.

For the reasons stated above, the Court grants Plaintiff's Motion for Nonsuit and denies Defendant's request for attorney's fees and costs.

Sincerely,

Robert J. Smith

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V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Richard W. Davidson	)	
	)	
Plaintiff	)	
	)	
v.	)	**Case Number CL-2016-5985**
	)	
Steve DuBrueler	)	
	)	
Defendant.	)	

ORDER

UPON Plaintiff's Motion for Nonsuit as a Matter of Right;

It is hereby ORDERED, ADJUDGED, AND DECREED that Plaintiff's Motion is GRANTED

Entered this 24th day of April 2018.

Judge Robert J. Smith

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.