NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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March 3, 2021

J. Chapman Peterson
CHAP PETERSON & ASSOCIATES, PLC
3970 Chain Bridge Road
Fairfax, VA 22030

Aristotelis A. Chronis
Chronis LLC
1145 N. Vernon Street
Arlington, VA 22201

Re: *Webb, et al.* v. *Horn, et al.*, CL 2020-10220

Dear Mr. Peterson and Mr. Chronis:

On January 7, 2021, the court heard argument on Plaintiffs' plea in bar to Defendants' Counterclaim and took the matter under advisement. The basis of Plaintiffs' plea in bar is that the Defendants' Counterclaim is barred by the doctrine of *res ajudicata*.

FACTS

As alleged in the Counterclaim, the material facts are the following:

The Webbs (Plaintiffs) are the owners of Lot 612, Section 6, Barcroft Lake Shores Subdivision, Fairfax County, Virginia ("Lot 612"), which they purchased on June 9, 2017. The Horns (Defendants) are the owners of Lot 615, Section 6, Barcroft Lake Shores Subdivision, Fairfax County, Virginia ("Lot 615"), which they purchased on March 7, 2005. Atul Rustgi was, until recently, the owner of Lot 613, Section 6, Barcroft Lake Shores Subdivision, Fairfax County, Virginia ("Lot 613"), which he purchased on March 11, 2013.

On September 23, 1966, the owners of Lots 612, 613, and 615 executed an *Easement Agreement*, in which the owners of Lot 612 granted to the owners of Lots

613 and 615 an easement on Lot 612 "along the rear of Lot 612 to Lake Barcroft for the purposes of ingress and egress to Lake Barcroft . . . ." The *Easement Agreement* also included a grant of an easement by the owners of Lot 613 to the owners of Lot 615 "over Lot 613 from Lot 615 to the easement" granted by the owners of Lot 612. In 1976, the owners of Lots 613 and 615 docked a co-owned, battery-powered pontoon boat alongside the pier wall of Lot 612; power for charging the boat's batteries was provided by an electric outlet which was powered by wires installed along the easement by the owners of Lots 613 and 615, although the easement's express terms did not permit the permanent docking and powering of a pontoon boat along the pier wall of Lot 612.

PRIOR ACTION

On July 25, 2019, Rustgi (the owner of Lot 613) filed suit against the Webbs (the owners of Lot 612), seeking a declaratory judgment that Rustgi had the right to dock the co-owned pontoon boat along the pier wall of Lot 612 because of the express ingress/egress easement and because the continued use of the pier wall created a prescriptive easement. *Rustgi* v. *Webb, et al.*, CL 2019-10190 ("*Rustgi*"). The Webbs filed a counterclaim, claiming that the docking and powering of the pontoon boat was a trespass and a nuisance. The Horns were not parties to the Rustgi suit and, according to the Horns, Rustgi's Complaint was filed without their knowledge or participation and they did not know of, or participate in, the trial.

At trial, the court found in favor of the Webbs, ruling that:

> 1) [T]he scope of the express easement may not be expanded by extrinsic evidence, does not convey riparian rights, and has been exceeded by the permanent docking of the boat and installation and use of the electrical line and outlet.
>
> 2) As it is Plaintiff's burden to prove the elements of a prescriptive easement by clear and convincing evidence and insufficient supporting evidence has been presented, this Court finds prescription fails for lack of demonstrated adversity.
>
> 3) Plaintiff's acts of tying the boat to the sea wall and plugging into the electrical outlet are trespassory and also a nuisance, interfering with Defendants' full use and enjoyment of their property.

Letter Opinion of June 7, 2020.

No appeal was taken by Rustgi from the court's final judgment of June 19, 2020.

THE INSTANT ACTION

The Webbs have brought an action for trespass and nuisance against the Horns. As related to the Webbs' plea in bar to the Horns' Counterclaim, the Webbs allege that Kevin Horn had notice of *Rustgi* as early as August 6, 2019 when Rustgi emailed him a copy of his Complaint that had been filed 12 days earlier (which is consistent with the Horns' contention that Rustgi's action was

filed without their knowledge or participation). The Webbs also allege that, on August 22, 2019, Rustgi wrote an email introducing his counsel and Kevin Horn and informing them that he and Kevin Horn intended to work together in *Rustgi*. Further, the Webbs allege that Kevin Horn was an active participant in *Rustgi*, assisting Rustgi in collecting facts and interviewing witnesses, and was both a sender and a recipient of the majority of emails to which Rustgi was party regarding *Rustgi* (which is consistent with the Horns' contention that they did not know of, or participate in, *the trial*).

The Horns have filed a counterclaim against the Webbs, seeking recognition of a prescriptive easement for the owners of Lot 615: i) to dock and power the pontoon boat at the boat dock located on Lot 612 at the bottom of the path described in the 1966 *Easement Agreement* and ii) to store up to four smaller boats (as well as reasonable accessories and attachments thereto) upon the portion of the upper flat area of Lot 612 that is adjacent to the boat dock located at the bottom of the path described in the 1966 *Easement Agreement*. Unlike Rustgi's previous action, the Horns' Counterclaim does not include a claim pursuant to the 1966 *Easement Agreement*.

ANALYSIS

The Webbs' plea in bar contends that the Horns' Counterclaim is barred by *res judicata* in light of the resolution of *Rustgi*, citing Va. Sup. Ct. Rule 1:6.

Va. Sup. Ct. Rule 1:6 provides in pertinent part:

> (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. . . .
>
> (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.** (Emphasis addded).

Although there is no dispute that *Rustgi* was decided on the merits by a final judgment, the Horns argue -- and the Webbs dispute -- that there has been no final judgment on the Horns' *unique* prescriptive easement claim and that their prescriptive easement claim does not arise from the same conduct as Rustgi's prescriptive easement claim. The parties also differ, and where the court will focus its attention, on whether the Horns are in privity with Rustgi. If the Horns are not in privity with Rustgi, there is no *res judicata* bar, the plea in bar fails, and the court need not address whether the Horns' claim arises from the same conduct as Rustgi's claim.

PRIVITY

To support their contention that the Horns are in privity with Rustgi, the Webbs assert that the Horns' and Rustgi's interests "were identical." This contention derives from: i) an email of April 6, 2020 (Pl. Ex. 2) where Rustgi, *without acknowledgment by the Horns*, refers to their interests as being "perfectly aligned"; ii) a proposed, but *unexecuted*, contract (Pl. Ex. 5) which refers to Rustgi and the Horns having "identical interests"; and iii) an email of October 3, 2019 (Compl. at Ex. J) in which Kevin Horn refers to "our full rights under the easement . . . ." The Webbs further contend that the Horns contributed $7,323.75 to Rustgi to assist with his legal fees (*Plaintiffs' Plea in Bar* at 4, 5) -- although the referenced email shows that the funds were returned on August 8, 2020 -- and that both Lots 613 and 615 had an easement on Lot 612 which was granted in the jointly-executed 1966 *Easement Agreement*.

The Webbs also assert that Kevin Horn had notice of Rustgi's case as early as August 6, 2019 when Rustgi emailed him a copy of his Complaint (which had been filed 12 days earlier) and that, on August 22, 2019, Rustgi wrote an email introducing his counsel to Kevin Horn and informing counsel that he and Kevin Horn intended to work together on Rustgi's case. Finally, the Webbs assert that Kevin Horn was an active participant in Rustgi's case by assisting Rustgi in collecting facts and interviewing witnesses, and that Horn was both a sender and a recipient of the majority of emails to which Rustgi was party regarding Rustgi's case.

The Horns respond that they were not parties in *Rustgi*, as the *Rustgi* opinion noted when it stated that the Horns "are not parties to this action," and that the 1966 *Easement Agreement* is not material because they are claiming a prescriptive easement only, not under the 1966 *Easement Agreement*.

ANALYSIS

The Supreme Court has made clear that "[w]hether privity exists is determined on a case by case examination of the relationship and interests of the parties." *State Water Control Board v. Smithfield Foods*, 261 Va. 209, 214 (2001). Subsequent cases have elaborated on this requirement.

In *Rawlings v. Lopez*, 267 Va. 4 (2004), the Court rejected a finding of privity where the "record reflects no relationship existing between appellants and the driver that would have permitted the driver to assert the appellants' legal rights during the first suit." 267 Va. at 5.[1]

A decade later, *Raley v. Haider*, 286 Va. 164 (2013), adopted the summary

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[1] *Lane v. Bayview Loan Servicing*, 297 Va. 645 (2019), approved a similar holding in *Spiker v. Capitol Milk Prod. Co-op, Inc.*, 577 F. Supp. 416 (W.D. Va. 1983):

> "[I]n Virginia, even members of the same family injured in the same automobile accident are not precluded, by virtue of their relationship to one another, from maintaining independent causes of action against the same defendant."

297 Va. at 656 (citing 577 F. Supp. at 419).

of Virginia law set forth in *Columbia Gas Transmission, LLC v. David N. Martin Revocable Trust*, 833 F. Supp. 2d 552 (E.D. Va. 2011):

> "Virginia courts typically find privity when the parties share a contractual relationship, owe some kind of legal duty to each other, or have another legal relationship such as co-ownership."

286 Va. at 172 (citing 833 F. Supp. 2d at 558).

More recently, *Lee v. Spoden*, 290 Va. 235 (2015), cited *Taylor v. Sturgell*, 553 U.S. 880 (2008) as authority.[2] While *Lee v. Spoden* did not apply (or even consider) *Taylor*'s holding on privity, and thus did not adopt its privity analysis, this court believes, in light of the cases cited above, that the Virginia Supreme Court would adopt *Taylor*'s analysis of privity.[3] This court thus adopts *Taylor*'s analysis in conjunction with the summary of Virginia law reflected in *Raley v. Haider, supra*.

The first point made by *Taylor* was that a "person who was not a **party** to a suit generally has not had a full and fair opportunity to litigate the claims and issues settled in that suit." 553 U.S. at 892 (emphasis added)(internal quotation marks omitted). The application of *res judicata* to nonparties, therefore, "runs up against the 'deep-rooted historic tradition that everyone should have his own day in court.' (Citation omitted)." 553 U.S. 880, 892-893. There is thus a "general rule that 'one is not bound by a judgment *in personam* in a litigation **in which he is not designated as a party** or to which he has not been made a party by service of process.' (Citation omitted)." *Id.* at 893 (emphasis added).

In view of these statements from *Taylor*, the Horns plainly would not be bound by *Rustgi* in that there is no dispute that they were not parties. *Taylor*, however, went to hold that "the rule against nonparty preclusion is subject to exceptions" and that, for "present purposes, the recognized exceptions can be grouped into six categories." *Id.* Of those six exceptions, only the following two could arguably apply here; their application will be addressed below:

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[2] Specifically, *Taylor* was cited for the proposition that:

> Under the doctrine of claim preclusion, a final judgment forecloses successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit. [553 U.S. at 892].

290 Va. at 245 (internal quotation marks omitted).

[3] While *Taylor* did not use the word "privity," the Court explained as follows:

> The substantive legal relationships justifying preclusion are sometimes collectively referred to as "privity." (citations omitted). The term "privity," however, has also come to be used more broadly, as a way to express the conclusion that nonparty preclusion is appropriate on any ground. (citations omitted). To ward off confusion, we avoid using the term "privity" in this opinion.

553 U.S. at 907.

> Second, nonparty preclusion may be justified based on a variety of pre-existing "substantive legal relationship[s]" between the person to be bound and a party to the judgment. (citations omitted). Qualifying relationships include, but are not limited to, preceding and succeeding owners of property, bailee and bailor, and assignee and assignor. . . .
>
> Fourth, a nonparty is bound by a judgment if she "assume[d] control" over the litigation in which that judgment was rendered. (citations omitted). Because such a person has had "the opportunity to present proofs and argument," he has already "had his day in court" even though he was not a formal party to the litigation. . . .

553 U.S. at 893-895.

As noted, *supra*, according to the Webbs, the material facts showing a relationship between the Horns and Rustgi are that Kevin Horn actively assisted Rustgi in collecting facts and interviewing witnesses, that the Horns contributed $7,323.75 to Rustgi to assist with his legal fees (which was returned), that both Lots 613 and 615 had easements on Lot 612 which were granted in the jointly-executed 1966 *Easement Agreement*, and that Horn was both a sender and a recipient of the majority of emails to which Rustgi was party regarding Rustgi's case.

These facts do not establish a "'substantive legal relationship'" (*Taylor*, 553 U.S. at 893) nor do they show that Kevin Horn "'assume[d] control'" (*Taylor*, 553 U.S. at 895) of Rustgi's case. They also do not show a contractual relationship within the meaning of *Raley*, 286 Va. at 172, nor do they indicate that the Horns and Rustgi owe some kind of legal duty to each other. *Id.*

Moreover, because "[e]asements are not ownership interests in the servient tract but the privilege to use the land of another in a particular manner and for a particular purpose," *Russakoff v. Scruggs*, 241 Va. 135, 138 (1991) (internal quotation marks omitted), the fact that Lots 613 and 615 were each granted an easement on Lot 612 by a joint *Easement Agreement*, does not make Lots 613 and 615 "co-owners" of the easement. Thus, the Horns and Rustgi do not have a "'legal relationship such as co-ownership.'" (*Raley*, 286 Va. at 172).[4]

Finally, the Webbs' contention that Rustgi's and the Horns' interests are identical is not supported by any of the three bases set forth by the Webbs: i) Rustgi's email of April 6, 2020 (Pl. Ex. 2) referring to their interests as being "perfectly aligned" is not acknowledged by the Horns and, even if it was, being "aligned" does not equate to being "identical"; ii) the contract (Pl. Ex. 5) which refers to Rustgi and the Horns as having "identical interests" is merely a proposal as it was not executed by either party; and iii) Kevin Horn's email of October 3, 2019 (Compl. at Ex. J) merely refers to "our full rights under the easement" and says nothing about their interests being identical.

In sum, the Horns and Rustgi are not in privity, so the instant matter is

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[4] In any event, the Horns are not making any claim pursuant to the *Easement Agreement*; they claim only a prescriptive easement.

not barred by the doctrine of *res adjudicata*. Accordingly, the Webbs' plea in bar is OVERRULED.

An appropriate order will enter.

Sincerely yours,

[redacted]

Richard E. Gardiner
Judge

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JAMES WEBB, *et al.*	)	
	)	
Plaintiffs	)	
	)	
v.	)	CL 2020-10220
	)	
KEVIN J. HORN, *et al.*	)	
	)	
Defendants	)	

ORDER

THIS MATTER came before the court on Plaintiffs' plea in bar to Defendants' Counterclaim.

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 Plaintiffs' plea in bar to Defendants' Counterclaim.

ENTERED this 3rd day of March, 2021.

[redacted]

Richard E. Gardiner
Judge

Copies to:

J. Chapman Peterson
Counsel for Plaintiffs

Aristotelis A. Chronis
Counsel for Defendants