NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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May 24, 2019

LETTER OPINION

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Re: *HCP Properties-Fair Oaks of Fairfax VA, LLC vs. County of Fairfax, Virginia*
Case No. CL-2017-18207

Dear Counsel:

This cause comes before the Court on the Motion to Substitute Party Plaintiff of HCP Properties-Fair Oaks of Fairfax VA, LLC ("Plaintiff" or "HCP"), and on the Plea in Bar

and Motion for Sanctions of the County of Fairfax, Virginia ("Defendant" or the "County"). Plaintiff brought this suit in 2017 against the County alleging erroneous tax assessments for the tax years 2015, 2016, and 2017. The Motions before the Court raise the questions of whether the proposed Substitute Plaintiffs are successors in interest of HCP, and whether this Court must follow Delaware law in determining whether HCP can maintain this suit under its name. The Court holds the following: (1) Substitution of the proposed Substitute Plaintiffs in HCP's place is not proper in this case as Arden Courts-Fair Oaks of Fairfax VA, LLC ("Arden Courts"), Manor Care-Fair Oaks of Fairfax VA, LLC ("Manor Care"), and HCR III Healthcare, LLC ("HCR III") are not successors in interest merely because the Master Lease and Subleases obligated them to pay taxes on the Property; (2) Virginia Code § 13.1-1056(C) requires this Court look to Delaware law, where HCP, a voluntarily cancelled LLC, was organized, to determine whether HCP can continue to prosecute this case; (3) HCP cannot continue to maintain this action pursuant to Delaware law, which requires a trustee or receiver be appointed to maintain a suit for a voluntarily cancelled LLC; (4) The County can use a Corporate Designee deposition of an adverse party in support of a Plea in Bar seeking dismissal of an action, even in light of the stricture in Virginia Code § 8.01-420, because the County did not merely conduct a "discovery deposition," but instead designated and conducted the deposition as *de bene esse*[1]; and (5) Sanctions against the Plaintiff or its counsel are not mandated by the evidence adduced in this case.

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[1] A *de bene esse* deposition is taken for the express purpose of later "use at trial." *See Emerald Point v. Hawkins,* 294 Va. 544, 552, 808 S.E.2d 384, 389 (2017).

> To take or do anything "de bene esse" is to allow or accept it for the time being until it comes to be more fully examined, when it may be accepted or rejected. The phrase was used at least as early as 1272, and seems to be one of the many legal borrowings from

Consequently, this Court shall by separate order DENY HCP's Motion to Substitute Party Plaintiff, GRANT the County's Plea in Bar, DENY the County's Motion for Sanctions, and DISMISS HCP's suit.

BACKGROUND

Plaintiff brought this action to correct allegedly erroneous assessments of real property taxes made by the County for tax years 2015, 2016, and 2017. Plaintiff is a limited liability company whose principal place of business is Ohio, formerly organized under the laws of Delaware but with a now voluntarily canceled status as of July 26, 2018, and whose registration to do business in Virginia was also voluntarily canceled on July 25, 2018. HCP owns real property in Fairfax County, specifically Arden Courts of Fair Oaks, located at 12469 Lee Jackson Memorial Highway, Fairfax, VA 22033. The Property houses two live-in facilities, namely a nursing home and a memory care facility.

During the tax years at issue, the County assessed and taxed the Property as follows:

Year	Actual Assessed Value	Tax Rate	Actual, Total Tax
2015	$22,901,730	1.172%	$268,485
2016	$21,889,790	1.196%	$261,754
2017	$20,943,860	1.161%	$243,158
Combined, Actual Total Tax			$773,397

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the Church, which in turn had borrowed from philosophers who found classical Latin inadequate for their musings on the nature of being.

De bene esse, Black's Law Dictionary (10th ed. 2014) (quoting R.E. Megarry, *Miscellany-at-Law* 36 (1955)).

Plaintiff timely paid the tax bills issued by the County, but now alleges the County erred and violated the Constitution of Virginia and Title 58.1 of the Code of Virginia by assessing the Property pursuant to values significantly exceeding its fair market value. Plaintiff further alleges the County erred by employing an improper method to determine fair market value. According to Plaintiff, the County used only the income approach and not the proper cost approach or sales approach in determining the properly taxable value. Plaintiff posits that, if the County had considered other valuation methodologies, it would have assessed the Property as follows for each of the tax years:

Year	Correct Fair Market Value	Tax Rate	Correct Assessment
2015	$13,820,000	1.172%	$162,017
2016	$15,565,300	1.196%	$186,127
2017	$14,800,000	1.161%	$171,828
Combined, Actual Total Tax			$519,972

In sum, the Plaintiff alleges the County over-assessed the Property by a total combined value of $253,425 for the tax years at issue, resulting in Plaintiff paying more than 148% of the tax owed.

Plaintiff filed administrative appeals for each of the years at issue with the County's Board of Equalization of Real Estate Assessments but was denied each time.

Plaintiff filed its Complaint on December 29, 2017, asking the Court: enter judgment against the County for erroneously assessing real property taxes due by Plaintiff on the Property for the 2015, 2016, and 2017 tax years; issue an order requiring the County and its agents to correct the erroneous assessments, refund the excess taxes paid by Plaintiff; and award the Plaintiff interest on the amounts to be refunded from the date each payment was made by the Plaintiff.

ANALYSIS

I. Arden Courts, Manor Care, and HCR III may not be substituted as party plaintiffs because none are a successor in interest to HCP.

At the time of filing, HCP was one of many individual owner-entity limited liability companies ultimately held by Quality Care Properties, Inc. ("QCP"). HCP leased the Property to HCR III under a Master Lease entered into in April 2011. HCR III subleased the assisted living facility to Arden Courts and the skilled nursing facility to Manor Care. Both Arden Courts and Manor Care are ultimately owned by HCR ManorCare, LLC.

Under the Master Lease and the subleases, HCP purportedly authorized HCR III to pay taxes and challenge the tax assessments of the Property. Those authorities were also ostensibly provided through the subleases to Arden Courts and Manor Care.[2]

On or about July 26, 2018, QCP was acquired by Welltower Inc. As part of QCP's acquisition by Welltower, HCP and other owner-entities were merged into HCP Properties, LP, which was renamed Well PM Properties, LLC ("Well PM"). On or about July 26, 2018, HCP granted the Property by Special Warranty Deed to Well PM. Well PM now directly owns and holds the Property and is subject to tax assessments. Well PM is a joint venture owned 80% by Welltower and 20% by HCR ManorCare, LLC.

The lease formerly between HCP and HCR III was reissued between Well PM and HCR III, with substantially the same language. The reissued amended subleases

[2] This Court does not reach the question of whether the three entities could themselves validly challenge the tax assessments in their individual capacity for the issue before the Court is rather whether they may step into the legal shoes of HCP as successors in interest, a wholly different test.

between HCR III and Arden Courts and Manor Care also reflect the changes in corporate ownership of the Lessor, and substantially mirror the prior sublease language.

Plaintiff requests the Court substitute the named Plaintiffs HCR III, Arden Courts and Manor Care (collectively the "Substitute Plaintiffs") as the corporate entities with interest in the current action and the ability to continue the challenge of Plaintiff's real estate tax assessments. Arden Courts and Manor Care are the operating entities of the two facilities on the real property at issue and have authority to manage such property and administer its tax affairs. HCR III is a holding company that leases the facilities from the current Owner and subleases the facilities to Arden Courts and Manor Care. Under the Master Lease in effect, HCR III has the obligation to pay all real estate and personal property taxes for the subject Property.

A. Substitution under Virginal Supreme Court Rule 3:17 is impermissible in this case.

Virginia law enables Courts to substitute the name of a Plaintiff in certain circumstances. "If a person becomes incapable of prosecuting or defending because of death, disability, conviction of felony, removal from office, or other cause, a successor in interest may be substituted as a party in such person's place." Va. Sup. Ct. R. 3:17(a). A successor in interest is one "who follows another in ownership or control of property" and who "retains the same rights as the original owner, with no change in substance". *Successor in Interest*, Black's Law Dictionary (10th ed. 2014). Amendment of a pleading to substitute a party is appropriate "'[w]here the substituted party bears some relation of interest to the original party and to the suit, and there is no change in the cause of action....'" *Lake v. N. Va. Women's Med. Ctr., Inc.*, 253 Va. 255, 262, 483 S.E.2d 220,

223 (1997) (quoting *Jacobson v. Southern Biscuit Co.*, 198 Va. 813, 817, 97 S.E.2d 1, 4 (1957)). "'[The] discretionary power of the court to such end is to be liberally exerted in favor of, rather than against, the disposition of a case upon its merits.'" *Id.*

Plaintiff relies heavily on both *Jacobson* and *Lake* for its position that substitution is appropriate. Plaintiff argues Substitute Plaintiffs bear some relation of interest to HCP as they purportedly have the authority to pay real estate taxes and the right to appeal tax assessments pursuant to the Master Leases and subleases, and that Arden Courts and Manor Care continue to pay the real estate taxes assessed against the Property.

There are important differences between *Jacobson* and *Lake* and the case at hand, however, which this Court finds compelling. The Court in *Jacobson* dealt with a plaintiff's motion to substitute a corporate parent of the original defendant when the original defendant was dissolved and absorbed by the corporate parent. *See Jacobson*, 198 Va. at 814, 97 S.E.2d at 2. There, the substitute defendant was a true successor in interest to the original defendant. Further, in that case the corporate parent was served with an action brought against the corporation it had already absorbed for claims arising during years subsequent to the parent absorbing the original defendant. *Id.,* 198 Va. at 818, 97 S.E.2d at 4. Moreover, "[w]hen the original motion for judgment on the account against [the original defendant] ... was served on ... [the corporate parent], that officer ... knew that the plaintiffs were asserting a claim on a contract made by [the corporate parent] in its trade name and that [the corporate parent] was the corporation intended to be sued." *Id.* The facts in *Jacobson* are entirely different than those of the case at hand. That case dealt with a plaintiff suing an incorrect corporate entity, not a corporate entity bringing its own suit. Further, the original defendant had already been absorbed by the

corporate parent at the time the suit was brought, unbeknownst to plaintiff, but information that was readily available to the corporate defendant. Finally, that case dealt with true successors in interest as the corporate parent retained the same rights and control as the original defendant. *See Id.*, 198 Va. at 815, 97 S.E.2d at 2 (the original defendant's corporate assets had been entirely transferred to the substituted party).

Similarly, the decision of the Court in *Lake* involved a plaintiff's motion to substitute a corporate defendant. In ruling in favor of substitution, the Court found "the principals of the proper corporate defendant have been parties to the suit from the beginning, and substitution of the proper corporate defendant would not alter the nature of the cause of action." *Lake*, 253 Va. at 262, 483 S.E.2d at 224. Again, the case at bar is distinguishable from *Lake*, making the holding in *Lake* inapplicable to this cause. In *Lake*, the plaintiff sought to substitute the proper corporate defendant "where the error in the original pleadings was known to the defendants and actions taken by them misled the plaintiff as to the identity of the proper corporate defendant." 253 Va. at 257, 483 S.E.2d at 220. In the instant case, importantly, the proposed Substitute Plaintiffs have not been parties to the suit from the beginning and are being introduced for the first time by Plaintiff's motion.

A main issue in this case for the Court to rule on is whether the proposed Substitute Plaintiffs are successors in interest to HCP. The Master Lease and Subleases require Substitute Plaintiffs to pay real property taxes on the Property at issue, but that is not enough for them to be considered successors in interest. The ownership and control HCP had over the Property is dissimilar from what the proposed Substitute Plaintiffs have, as they are still only lessees acting with power granted to them under separate leases signed by Well PM and HCR III. The Substitute Plaintiffs cannot validly claim they are HCP's

successors in interest. This Court finds the designated Substitute Plaintiffs are not successors in interest to HCP and therefore cannot be substituted under Rule 3:17.

B. Virginia Code § 8.01-6 does not support Plaintiff's amending of the Pleadings to designate the Substitute Parties.

Plaintiff argues that Virginia Code § 8.01-6 supports the amendment of the pleadings to substitute parties. This argument is, however, without merit. "A misnomer in any pleading may, on the motion of any party, and on affidavit of the right name, be amended by inserting the right name." Va. Code § 8.01-6. Virginia courts have consistently held that one party cannot be substituted for another under Code section 8.01-6, because a "[m]isnomer arises when the right person is incorrectly named, not where the wrong [party] is named." *Swann v. Marks*, 252 Va. 181, 184, 476 S.E.2d 170, 172 (1996); *Ricketts v. Strange*, 293 Va. 101, 110, 796 S.E.2d 182, 187 (2017).

C. HCP's suit does not survive cancellation of its status as a Delaware entity pursuant to Virginia Code § 13.1-1056(C).

Plaintiffs argue this action survives HCP's cancellation as an entity in Delaware pursuant to Virginia Code § 13.1-1056(C). That Code section provides:

> [T]he cancellation of the existence of a foreign limited liability company shall not take away or impair any remedy available against the foreign limited liability company for any right or claim existing or any liability incurred before the cancellation. Any action or proceeding against a foreign limited liability company whose existence has been canceled may be defended by the foreign limited liability company in its name.

Plaintiffs argue this suit was filed prior to HCP's merger with Well PM and its subsequent cancellation and thus HCP may continue to prosecute this action. Defendants argue, and this Court agrees, that this Code section applies only to the rights or claims *against* a cancelled foreign LLC. There is an important line to be drawn between a

cancelled foreign LLC's authority to maintain a suit as plaintiff versus continued participation as a defendant, "a distinction likely intended to ensure that a foreign LLC cannot avoid liability by strategically cancelling its registration." Def.'s Mem. of P. & A. in Opp'n to Pl.'s Mot. to Substitute Parties, 4. HCP brought this suit and later voluntarily cancelled its registration as a LLC, both in Virginia and then in Delaware. Virginia Code § 13.1-1056(C) speaks only to actions against a foreign LLC and would allow HCP to *defend* itself subsequent to its cancellation in any suit brought against it prior to the cancellation, but it does not give HCP the power to maintain a suit as plaintiff. As such, the Court finds Code section 13.1-1056(C) does not apply to the issues before it and, further, that it does not support the Plaintiff's notion that this action survives HCP's cancellation.

II. The County's Plea in Bar is granted, and this action will be dismissed as HCP has no standing under Delaware law to maintain this suit.

A plea in bar is a defensive pleading which "shortens the litigation by reducing it to a distinct issue of fact which, if proven, creates a bar to the plaintiff's right of recovery." *Tomlin v. McKenzie*, 251 Va. 478, 480, 468 S.E.2d 882, 884 (1996) (internal citation omitted). A plea in bar does not address the merits of the complaint but raises a single issue of fact that might constitute an absolute defense to the suit. *Angstadt v. Atlantic Mut. Ins. Co.*, 254 Va. 286, 292, 492 S.E.2d 118, 121 (1997). The moving party carries the burden of proof on that issue of fact. *See Campbell v. Johnson*, 203 Va. 43, 47, 122 S.E.2d 907, 909 (1961). Where no evidence is taken in support of the plea, the trial court, and the appellate court upon review, must rely solely upon the pleadings in resolving the issue presented. *See Weichert Company of Va., Inc. v. First Commercial Bank*, 246 Va.

108, 109, 431 S.E.2d 308, 309 (1993). "When considering the pleadings, 'the facts stated in the plaintiffs' motion for judgment [i.e., the complaint] [are] deemed true.'" *Tomlin*, 251 Va. at 480, 468 S.E.2d at 884 (quoting *Glascock v. Laserna*, 247 Va. 108, 109, 439 S.E.2d 380, 380 (1994)).

The dispositive issue to be decided in this plea in bar is whether HCP can maintain this suit in its name. Both parties argue this issue based on different readings of Virginia Code § 13.1-1056(C), which provides:

> Before any foreign limited liability company registered to transact business in the Commonwealth cancels its existence, it shall deliver to the Commission for filing an application for a certificate of cancellation. Whether or not an application is filed, the cancellation of the existence of a foreign limited liability company shall not take away or impair any remedy available against the foreign limited liability company for any right or claim existing or any liability incurred before the cancellation. Any action or proceeding against a foreign limited liability company whose existence has been canceled may be defended by the foreign limited liability company in its name. The members, managers, and officers shall have power to take any action as shall be appropriate to protect any remedy, right, or claim. The right of a foreign limited liability company whose existence has been canceled to institute and maintain in its name actions, suits, or proceedings in the courts of the Commonwealth shall be governed by the law of the state or other jurisdiction of its organization.

HCP reads this Code section to mean it can maintain suit even after cancellation of its LLC status for claims that existed prior to such cancellation. The County, on the other hand, argues Delaware law must control whether HCP can maintain this particular suit in its name after its voluntary cancellation, and that under Delaware law, HCP may not continue to proceed with this action.

As previously averred, HCP misreads the above-cited statute to protect foreign LLC's that file suit as plaintiff. Rather, the statute only allows parties who bring suit against

a foreign LLC to maintain said suit after a voluntary cancellation so as to prevent the foreign LLC from escaping liability.

Pursuant to Virginia Code § 13.1-1056(C), the Court must look to Delaware law, where HCP was organized, to determine whether HCP can maintain this suit in its name. Delaware Superior Court Rule of Civil Procedure, Rule 17 provides:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Here, the County maintains, and the Court agrees, that substitution of the Substitute Plaintiffs in this case is not permitted. This Rule does not mean, as Plaintiff wants the Court to read it, that "the action should not be dismissed if a new 'party in interest' may be ratified, joined, or substituted to replace a party who no longer is the real party in interest." Pl.'s Opp'n to Def.'s Plea in Bar & Mot. for Sanctions, 3. Instead, this Court understands the Rule to mean that an action cannot be dismissed if there has not been enough time to determine whether substitution is permissible. As mentioned above, substitution of HCP with the Substitute Parties is not permissible in this case. As such, Delaware Superior Court Rule of Civil Procedure, Rule 17 does not prohibit the Court from dismissing this action.

Under Delaware's Limited Liability Act, HCP cannot maintain this suit in its name. Once a LLC files its certificate of cancellation in Delaware, it can no longer "prosecute or defend" lawsuits without a trustee or receiver appointed by the Delaware Court of Chancery. Del. Code tit. 6, § 18-805. Further, Delaware law provides that the person

winding up the LLC upon its dissolution can only prosecute or defend suits on behalf of the LLC "until the filing of a certification of cancellation ...." Del. Code tit. 6, § 18-803(b).

In her deposition, Lynne Davis, HCP's Corporate Designee, testified that there was no trustee or receiver appointed during the winding down process. *See* Mem. in Sup. of Def.'s Plea in Bar & Mot. for Sanctions, Ex. C 155:13-156:13. This raises a further question for the Court to answer, namely, whether a party can use a deposition of a Corporate Designee of an adverse party in support of its plea in bar seeking dismissal of an action in light of the stricture in Virginia Code § 8.01-420 on the use of depositions in support of summary judgment. To answer this question, the Court must first determine whether the Code section also applies to motions that do not seek summary judgment on the merits but instead interpose a bar to the maintenance of a suit. The Supreme Court of Virginia has indicated the label placed on a motion is not dispositive of whether the statute applies to bar the use of depositions. Rather, the test appears to comprehend whether the use of depositions has the effect of ending all or part of the litigation with permanence. The Supreme court stated the applicable analysis in the following example:

> N&W also argues that the trial court's use of the deposition testimony was not error because its motion was not a motion for summary judgment but a "Motion to Dismiss for Lack of Subject Matter Jurisdiction" and, therefore, Rule 3:18 and § 8.01-420 do not apply. This argument is disingenuous. Regardless of the label N&W placed on it, this *motion was functionally a motion for summary judgment* and subject to Rule 3:18 and § 8.01-420.

See Gay v. Norfolk and Western Railway, 253 Va. 212, 215, n.*, 483 S.E.2d 216, 218 (1997) (emphasis added).

In this case, the Defendant concedes that if it succeeds in its Plea in Bar, the Plaintiff could be divested of its right to refile its tax challenge for the year 2015, given the

three-year statute of limitations applicable to such proceedings. Va. Code § 58.1-104.[3] This fact operates to make the Plea in Bar into the "functional equivalent" of a motion for summary judgment, indicating Code section 8.01-420 applies in this instance.

The analysis does not, however, end there. The type of deposition sought to be introduced here is that of a Corporate Designee. Not only is this a deposition of a party, but of the party's self-identified representative with purported authority to bind such party to facts stated under oath. The Supreme Court Rules recognize the distinction of this type of deposition in the scope for which it may be used:

> The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 4:5(b)(6) or 4:6(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party *may be used by an adverse party for any purpose*.

Va. Sup. Ct. R. 4:7(a)(3). The Rule, however, does not expand the permissible scope of the use of depositions restricted by Code section 8.01-420. *See* Va. Sup. Ct. R. 4:7(e). The Code limitation is that, "no motion for summary judgment or to strike the evidence shall be sustained when based in whole or in part upon any *discovery depositions* under Rule 4:5, unless all parties to the suit or action shall agree that such deposition may be so used." Va. Code § 8.01-420 (emphasis added).[4]

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[3] Plaintiff's counsel also expressed the concern without conceding his client would be barred from refiling the entire claim, that the grant of the Plea in Bar would exact a permanent detriment to his client's ability to refile suit with respect to at least the first of the challenged tax years. Plaintiff concedes it ceased to have any employees once it voluntarily cancelled its status as a Delaware LLC. When queried why Plaintiff had not sought appointment of a trustee or otherwise reconstituted itself to maintain the instant case, Plaintiff's counsel declined to offer explanation or even to identify, in light of attorney-client privilege, who Plaintiff maintains is in authority to direct the conduct of this suit. It is thus unclear to this Court whether Plaintiff's counsel has any current valid authority to act at all in representation of the now defunct Plaintiff.

[4] On February 21, 2019, the Governor of Virginia signed Senate Bill 1486 and House Bill 2197, thereby amending § 8.01-420 (effective July 1, 2019) to expand the right of litigants to use discovery depositions in summary judgment motions as follows:

Here the Plaintiff objects to the use of the deposition of the Corporate Designee in reliance on Virginia Code § 8.01-420. However, the Defendant did not merely conduct a "discovery deposition," but instead designated and conducted the deposition as *de bene esse*. As such, the deposition is not a discovery deposition, but rather a deposition created for use at trial. This distinction is important because the parties followed the formalities attendant to the creation of trial testimony, an evidentiary scope much narrower than that for mere discovery depositions. The scope of discovery depositions permits inquiry into matters reasonably calculated to lead to discovery of admissible evidence. Va. Sup. Ct. R. 4:1(b). Trial depositions in contrast, by definition, permit only testimony that is admissible in evidence. When a deposition is noticed for use at trial the parties are on notice of its use as evidence in the merits case and may thus take all measures to protect the record being created consequent thereto. It is presumed "the General Assembly, in framing a statute, chose its words with care." *Halifax Corp. v. First Union Nat'l Bank*, 262 Va. 91, 100, 546 S.E.2d 696, 702 (2001). "When statutory terms are plain and unambiguous, [courts] apply them according to their plain meaning without resorting to rules of statutory construction." *Smith v. Commonwealth*, 282 Va. 449, 454-55, 718 S.E.2d 452, 455 (2011) (citing *Halifax Corp.*, 262 Va. at 99-100, 546 S.E.2d at 702). The restriction on use of depositions in Code section 8.01-420, which this Court has found applicable to Defendant's Plea in Bar, applies only to *discovery depositions*. The

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> C. Notwithstanding the provisions of subsection A, discovery depositions under Rule 4:5 and affidavits may be used in support of or in opposition to a motion for summary judgment in any action when the only parties to the action are business entities and the amount at issue is $50,000 or more.

Thus, even if this Rule were of immediate effect, it would not apply in this instance because the Defendant, Fairfax County, is not a business entity.

deposition of Plaintiff's Corporate Designee introduced by Defendant is a *trial deposition*, which may be used "for any purpose," including in support of the Plea in Bar. Va. Sup. Ct. R. 4:7(a)(3).

Irrespective of the admissibility of the deposition, even were the Court to exclude the deposition of Plaintiff's Corporate Designee, the Court's holding with respect to the Plea in Bar would be the same, for there is ample other evidence in the record to support the same conclusions arrived at herein. Further, the deposition may be used without restriction in consideration of Defendant's Motion for Sanctions, even were the Court mistaken with respect to its use in support of the Plea in Bar, for such sanctions motion is not the "functional equivalent" of a motion for summary judgment.

As there has been no trustee or receiver appointed by the Delaware Court of Chancery under Delaware law, which the Court must look to pursuant to Virginia Code § 13.1-1056(C), HCP cannot continue to prosecute the instant suit.

III. The Defendant's Motion for Sanctions is denied.

Virginia courts use an objective test of reasonableness to determine whether an attorney or party should be sanctioned. The operative question is whether after reasonable inquiry, counsel could have formed a reasonable belief that the pleadings were well grounded in fact, warranted by existing law, or a good faith argument for the extension, modification, or reversal of existing law, and not interposed for an improper purpose. *Williams & Connolly, LLP v. People for the Ethical Treatment of Animals*, 273 Va. 498, 510, 643 S.E.2d 136, 141 (2007). Upon a finding of such violation of Virginia Code § 8.01-271.1, the Court "shall impose ... an appropriate sanction." *See Ford Motor*

Co. v. Benitez, 273 Va. 242, 249, 639 S.E.2d 203, 206 (2007) (stating that sanctions are mandatory for a violation of this rule).

With respect to its Complaint, Plaintiff's counsel conceded in reference to the use of the word "plaintiff" that discovery disclosed some of the actions attributed to Plaintiff therein were actually performed by other entities for the benefit of HCP. Counsel apologetically described his client's representations as the "holistic" use of the word "plaintiff." Because of the complex nature of the corporate ownership structure involving HCP, it is unclear to this Court what information anyone in authority at HCP or their counsel *knew or should have known at the time of filing*. This is important because the test is not merely one of whether the Complaint contains false information, but rather whether there was sufficient knowledge after reasonable inquiry by the signatory and/or the party that the representations made therein were false when the Complaint was filed. *See id.*, 273 Va. at 252, 639 S.E.2d at 208.

At the hearing on the Plea in Bar, no testimony from witnesses from the defunct HCP entity was available since it no longer had any employees, so it is uncertain what Plaintiff represented to its counsel to place in its Complaint with knowledge of any falsity. There was also no evidence adduced that indicated Plaintiff's counsel failed to make reasonable inquiry and knew or should have known at the time he filed the Complaint that it contained any falsity. As such, the evidence is insufficient to sanction HCP or its Counsel for the filing of the Complaint, though it appears to contain factual inaccuracies.

The County also complains of material written misrepresentations in the process of discovery. After the filing of suit and during the discovery process, Plaintiff's counsel in effect found himself without a client. HCP dissolved itself, presumably, without those in

authority in the complicated web of the corporate structure of which it was a part realizing this could cause the abandonment of the instant suit. When Plaintiff's counsel encountered the unusual situation of the legal death of his entity-client, he apparently continued to take direction from those who succeeded to HCP's assets or others in the corporate ownership structure related by transactional relationships. He produced a Corporate Designee to be deposed by Defendant. His arguably good faith belief was that because the Designee functioned in another entity as a person responsible for payment of the taxes of various entities, including those of HCP, that such Designee was a person with authority to bind Plaintiff. Counsel also continued to answer discovery but did not initially fully make clear his predicament to Defendant. Counsel believed he had authority to act and that he still had a client, albeit in transition to the appointment of substitute parties. As already noted, the Court questions whether Plaintiff's counsel retained any authority to act on behalf of his client once HCP voluntarily dissolved itself, because it no longer had anyone with proper authority to direct its counsel. Counsel's choice to continue his representation and try to salvage the suit in presumed contemplation of the duty of zealous representation, was in hindsight, unwise. The best practice would have been to demand Plaintiff reconstitute itself or have a trustee appointed as per Delaware law before continuing to proceed along the course of this litigation. Plaintiff's counsel's actions also led to confusion and arguably unnecessary discovery expense by Defendant, as the County's attorneys disentangled the opaque relationship between the Plaintiff and the entities sought to be substituted as parties. The County asserted that Plaintiff's counsel intentionally misled Defendant. The Court finds the proof on this score only rises to the level of suggesting Plaintiff's counsel believed he had proper direction from a paying client

he deemed to be properly in interest and from the suggested Substitute Plaintiffs, acting in accordance therewith. His actions were arguably mistaken and came close to crossing the line into sanctionable territory, but in this unusual instance, merely skirted that line at various points of friction during the discovery process.

While not thereby approving of the manner Plaintiff has conducted this litigation, this Court does not find the evidence adduced pertaining to the written filings of Plaintiff or its counsel prove the imposition of sanctions under Virginia Code § 8.01-271.1 is mandated.

CONCLUSION

This Court has considered the Motion to Substitute Party Plaintiff of HCP Properties-Fair Oaks of Fairfax VA, LLC, and the Plea in Bar and Motion for Sanctions of Defendant, the County of Fairfax, Virginia. Plaintiff brought this suit in 2017 against the County alleging erroneous tax assessments for the tax years 2015, 2016, and 2017. The Motions before the Court raise the questions of whether the proposed Substitute Plaintiffs are successors in interest of HCP, and whether this Court must follow Delaware law in determining whether HCP can maintain this suit under its name. The Court holds the following: (1) Substitution of the proposed Substitute Plaintiffs in HCP's place is not proper in this case as Arden Courts, Manor Care, and HCR III are not successors in interest merely because the Master Lease and Subleases obligated them to pay taxes on the Property; (2) Virginia Code § 13.1-1056(C) requires this Court look to Delaware law, where HCP, a voluntarily cancelled LLC, was organized, to determine whether HCP can continue to prosecute this case; (3) HCP cannot continue to maintain this action pursuant to Delaware law, which requires a trustee or receiver be appointed to maintain a suit for

a voluntarily cancelled LLC; (4) The County can use a Corporate Designee deposition of an adverse party in support of a Plea in Bar seeking dismissal of an action, even in light of the stricture in Virginia Code § 8.01-420, because the County did not merely conduct a "discovery deposition," but instead designated and conducted the deposition as *de bene esse*; and (5) Sanctions against the Plaintiff or its counsel are not mandated by the evidence adduced in this case.

Consequently, this Court shall by separate order DENY HCP's Motion to Substitute Party Plaintiff, GRANT the County's Plea in Bar, DENY the County's Motion for Sanctions, and DISMISS HCP's suit.

The Court shall enter an order incorporating its ruling herein, and until such time, THIS CAUSE CONTINUES.

Sincerely,

[redacted]

David Bernhard
Judge, Fairfax Circuit Court

OPINION LETTER