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Re: Asterita v. Ghent Development Partners, et al.
Civil Docket Number: CL07-6408

Dear Counsel:

This matter came before the Court on October 20, 2008 on Defendants' plea of *res judicata* and collateral estoppel and their demurrer. After considering the pleadings, the record, the oral and written arguments of counsel, and the relevant legal authority, the Court has decided to sustain the Defendants' plea of *res judicata*. As a result, the Court does not find it necessary to rule on Defendants' plea of collateral estoppel or their demurrer.

Res Judicata

I. Current Suit

A. Count I- Breach of Warranty, Common Elements

1. Background

The Defendant, Ghent Development Partners, LLC (hereinafter "GDP"), provides services for real estate transactions; specifically, the purchase and renovation of residential housing in the Hampton Roads area. (Plaintiff's Amended Complaint (CL07-6408), pg. 1). Jonathan Z. Rubin (hereinafter "J. Rubin") is GDP's manager. Id. Ruth Rubin (hereinafter "R. Rubin") is GDP's sole shareholder. Id. at 2. On March 24, 2004, GDP purchased a five-unit

apartment building (hereinafter "Complex") at 617 Boissevain Avenue in Norfolk, Virginia. Id. The Plaintiff, Anthony M. Asterita (hereinafter "Asterita"), is a Virginia citizen. Id.

According to Asterita, under the Virginia Condominium Act, Va. Code §§ 59-79.39, *et seq*. (hereinafter "Condo Act") GDP was required to convert the apartments in the Complex into condominium units. Id. GDP became the Complex's owners' association (hereinafter "Association") "manager or president" around August 24, 2004. Id. at 4.

GDP sold unit one of the Complex to Joseph Longo on September 30, 2004. Id. Asterita contends that Longo is a long time friend and business partner of R. Rubin and J. Rubin. Id. Asterita alleges that GDP sold the unit to Longo in order to start the two-year warranty required under the Condo Act. Id. Also, Asterita asserts that under Virginia law, GDP could not properly have sold the unit to Longo because the renovation had not been completed. Id. On February 28, 2005, Asterita purchased unit two, and GDP had not completed renovation of the Complex. Id.

2. Specific Defective Items in the Common Elements of Complex

Asterita alleges that GDP's renovation of the common elements was miniscule, if done at all. Id. at 7. GDP was required to repair common element deficiencies per the two-year warranty under the Condo Act. Id. Asterita alleges that he made repeated demands, along with other unit owners, within this two year warranty time frame for GDP to remedy the defects existing in the Complex's common elements, and GDP failed to do so. Id. Specifically, Asterita demanded GDP remedy or repair,

a. Faulty roof on the two-story part of the Complex that needs to be replaced;
b. Faulty roof above Unit Two that needs to be replaced;
c. Moisture damage to the areas below the two faulty roofs;
d. Asbestos contamination in the Complex's basement that needs to be abated to protect the safety of the Complex's residents;
e. Rotted windows;
f. Windows…[which] lifespan has ended, requiring their replacement;
g. Rotten wood on various walls of the Complex, [lessening the structural integrity of the walls];
h. Paint peeling, flaking, and chipping off the entire Complex, requiring the entire Complex to be repainted;
i. Holes in the walls of the main interior staircase;
j. A faulty fire escape that is a safety hazard that needs to be replaced;
k. Faulty electrical work throughout the Complex;
l. Faulty plumbing work throughout the Complex;
m. Failure of the brick walls on the Complex based on extensive moisture damage requiring their replacement;

n. Faulty work in the construction of a one-hour fire separation separating the boiler room from the laundry room and storage area in the basement;
o. Faulty work in the construction of a one-hour fire separation separating the boiler room, laundry room, and storage area in the basement from the five units above in the two-story part of the Complex;
p. A piece of plywood covering a hole in the two-story part of the Complex where a piece of stained glass was placed by GDP, removed by GDP, and covered with a 4' by 8' piece of painted plywood; and
q. Rusted handrails on the outside of the Complex that require replacement.

Id. at 7-8. Therefore, Asterita contends that GDP breached the two-year warranty the Condo Act provides for the common elements by not remedying the defects listed above to the common elements. Id. at 9.

Asterita prays that the Court award him compensatory damages in the amount of $1,000,000 for breach of warranty of the common elements. Id. at 16.

B. Count II- Warranty, Unit 2

1. Specific Defective Items in Unit 2

Asterita asserts GDP refuses to honor its two year warranty provided under the Condo Act to repair the defects in unit two, Asterita's unit. Id. at 13. Specifically, Asterita alleges that GDP refused to remedy or repair,

a. Appliance installation;
b. Flooring installation;
c. Drywall installation;
d. Woodwork;
e. Cabinet installation;
f. Window installation; and
g. Wall paper installation

Id. at 8-9. Asterita contends he has sustained damages and will continue to do so until GDP honors the two-year warranty. Id.

Asterita is seeking $150,000 in compensatory damages for breach of warranty because GDP refused to honor the two-year warranty and repair the unit two defects. Id.

C. Count III- Piercing the Corporate Veil

1. Derivative of Counts I and II seeking to make individual defendants liable for warranty claim

Asterita contends that GDP's real estate purchase of the Complex was insufficiently capitalized. Id. at 14. In particular, Asterita asserts that GDP did not obtain insurance or create a reserve fund to be able to fund the Complex project. Id. at 5. Asterita alleges that GDP took the sale proceeds from the units and immediately distributed these proceeds to R. Rubin and J. Rubin, without leaving funds to honor the two-year warranty provided under the Condo Act to repair the units. Id. at 6. Therefore, Asterita is asking the Court to pierce GDP's corporate veil and hold R. Rubin and J. Rubin personally responsible for his alleged damages. Id. at 15.

D. Assertions for others under Condo Act

1. What Asterita alleges re: "for others"

As noted, Asterita alleges that the Complex had numerous defects that GDP refused to remedy, and contends that GDP failed to adhere to the two-year warranty provided by § 55-79.74 of the Condo Act. Id. at 7. Asterita asserts that other individuals who own units in the Complex have made demands upon GDP to remedy the problems within the common elements. Id. at 9.

Section 55-79.74 of the Condo Act provides that a unit owners' association may have responsibility over the units. However, it states that this time limit may not exceed two years from the time the first unit is sold or when more than three-fourths of the interests in the common elements have been conveyed. This time frame purportedly started on September 30, 2004 when unit one was sold. Id. at 4. However, Asterita alleges that GDP refuses to transition control to the unit owners, and the two-year time limit has passed. Id. at 12. Per Asterita, GDP should have transitioned control around August 24, 2006. Id.

Asterita contends that GDP refuses to transition control over the Association to the unit owners because it does not want the Association to bring an action against GDP for the breach of the two-year warranty. Id. at 12. The Supreme Court of Virginia stated,

> [h]ence, while a unit owner may assert a claim under the provisions of the Condominium Act for the violation of some individual right, *Code § 55-79.53* contemplates that a violation of a right held in common by all unit owners shall be maintained by a unit owners' association, unless the association fails or refuses to assert the common right.

Frantz, et al. v. CBI Fairmac Corporation, 229 Va. 444, 450-51, 331 S.E.2d 390, 395 (1985). Therefore, because GDP has control over the Association and will not pursue a breach of warranty claim against GDP, Asterita alleges he possesses legal standing to pursue this breach of warranty claim for himself and other unit owners. Id. at 12.

2. The relief Asterita putatively seeks "for others"

As noted, for the breach of warranty claim regarding the common elements, Asterita asks for "[c]ompensatory damages for [c]ount [o]ne of the [c]omplaint in the amount of one million dollars ($1,000,000)." Id. at 16.

3. Class Action under the Condo Act

Virginia does not have a class action statute. However, notwithstanding this procedural void, Virginia's adoption of the uniform statutes compromising its Condo Act provides guidance for how a unit owner may maintain a claim against persons or entities that do not comply with the Condo Act. Section 55-79.53 of the Condo Act states,

> [t]he declarant, every unit owner, and all those entitled to occupy a unit shall comply with all lawful provisions of this chapter…Any lack of such compliance shall be grounds for an action or suit to recover sums due, for damages or injunctive relief, or for any other remedy available at law or in equity, maintainable by the unit owners' association, or by its executive organ or any managing agent on behalf of such association, or, in any proper case, by one or more aggrieved unit owners on their own behalf or as a class action.

The Virginia Supreme Court limited the phrase "in any proper case" in *Frantz v. CBI Fairmac Corp.* The Court stated a unit owner may bring a claim under the Condo Act for a violation of their rights, however, "this section contemplates that a violation of a right held in common by all unit owners shall be maintained by a unit owners' association, unless the association fails or refuses to assert the common right." *Frantz*, 229 Va. at 450-51. Therefore, Asterita and/or other unit owners would have standing to bring such a claim against GDP "on their own behalf or as a class action" only if in fact GDP, as the Association, failed to assert the common claim. *See* § 55-79.53 of the Condo Act.

II. Description of Prior Suit

A. Counts of First Lawsuit in 2007

On October 26, 2007, Asterita filed his first lawsuit against GDP, J. Rubin, and Longo. Asterita therein asserted five counts against GDP and four counts against J. Rubin and Longo, all relating to the Complex. (Second Amended Complaint, CL06-1700).

Asterita therein alleged that J. Rubin and Longo induced Asterita into purchasing from GDP a condominium unit in Norfolk. Id. at 3. Asterita stated he, "agreed to enter into an Acquisition and Equity Agreement (Agreement) with GDP, whereby Asterita would purchase Unit 6 for $262,000 and, thereafter, GDP would manage the property on Asterita's behalf for a year or two before he began using it as a personal residence." Id. at 6-7. Subsequently, Asterita could not conveniently perform the final walk-through and made Longo his "attorney-in-fact" to conduct the walk-through so that Asterita could close on the unit. Id. at 8. After the closing

Asterita and GDP terminated the Agreement by a Mutual Release of Claims agreement dated April 11, 2005. Id. at 8-9.

Asteria was dissatisfied with the Complex and the unit he purchased when he later personally visited it. Asterita hired a building inspector who concluded that the building and Asterita's unit had the following problems:

(1) faulty windows;
(2) rotten wood in numerous areas of the Complex and unit;
(3) numerous City of Norfolk and BOCA code violations;
(4) poor installation of appliances;
(5) inadequate asbestos removal;
(6) inadequate removal of lead paint;
(7) substandard renovations;
(8) a faulty roof; and
(9) faulty electrical wiring.

Id. at 11. In addition, Asterita contended that certain representations made about the unit and the Complex were false; specifically, that asbestos abatement had been completed, and that there were "one-hour fire separations between the basement units above the basement." Id.

In count one, Asterita alleged actual fraud against GDP, J. Rubin and Longo. Id. at 12. Asterita contended that GDP, J. Rubin, and Longo made numerous material misrepresentations and omissions regarding the unit it sold to Asterita. Id. at 12-15. Those misrepresentations allegedly included, but were not limited to, that GDP would perform certain "renovations" to the unit such as "asbestos abatement" and "the addition of one-hour fire separations between the basement and the units above the basement." Id. at 13. Asterita also alleged that he had been falsely told the unit had been "gutted." Id. In addition, Asterita alleged that GDP purported that four of the six units were sold to bonafide purchasers when in reality they were sold to affiliates of GDP. Id. Also, Asterita contended that Longo did not perform to par the "final walk-through." Id. In addition, Asterita alleged that GDP misrepresented the unit's value, and that it would qualify for a "ten-year tax abatement program." Id.

In count two, Asterita alleged constructive fraud against GDP, J. Rubin, and Longo alleging that they had "no reasonable belief" in the misrepresentations and omissions made to Asterita. Id. at 16-17.

Count three alleged common law conspiracy, and count four alleged statutory conspiracy against GDP, J. Rubin, and Longo, asserting that the three parties devised a "joint-scheme" to convince Asterita that the Complex and his specific unit had been "completely renovated and 'gutted.'" Id. at 18.

In count five, Asterita alleged unjust enrichment against GDP. Id. at 19. Specifically, Asterita contended that "[b]y having Asterita execute the Note through the misconduct of its member, manager, and agent, J. Rubin, GDP has been unjustly enriched at Asterita's expense."

Id. at 20. Therefore, Asterita contended that to allow GDP to keep the money for the unit would be inequitable. Id.

1. Similarities between Initial Suit and Current Suit

a. The Amended Complaint

Numerous similarities exist between the contentions of Asterita's first and second lawsuits. In the first suit Asterita filed an action against GDP, J. Rubin, and Longo. In the current suit Asterita filed against GDP, R. Rubin, and J. Rubin.

In the first lawsuit, Asterita attached the Acquisition and Equity Agreement that listed the address 617 Boissevain Avenue, Norfolk, VA 23507. (Second Amended Complaint (CL06-1700), at Exhibit 1)). It also stated Asterita purchased unit 6 for $262,000. Id. In the first suit, Asterita called it "Unit" when speaking of the unit 6. Id. at 6. When Asterita filed the second suit it failed to attach the Acquisition and Equity Agreement and Mutual Release of Claims agreements. (Plaintiff's Amended Complaint (CL07-6408)). The Defendants' motion craving oyer was granted and the Acquisition and Equity Agreement and Mutual Release of Claims became part of the second lawsuit's pleadings. (Order (2-1-2008)). It is the same Mutual Release of Claims whereby Asterita and GDP agreed on April 11, 2005 for consideration of $33,592.14 to mutually release all agreed conditions and obligations in the Acquisition and Equity Agreement. In regards to the Acquisition and Equity Agreement, it is the same address and same unit listed. [Note, however, that in the current lawsuit Asterita now calls the unit, "unit two." (Plaintiff's Amended Complaint (CL07-6408), at pg. 5)].

b. Building Conditions

The building conditions complained of in Asterita's first and second suits essentially are identical. The Court finds that the following specific items of the current suit were also found similarly complained of in Asterita's first suit; "[f]aulty roof on the two-story part of the Complex" and "[f]aulty roof above [u]nit two" (listed in ¶ 40(8) of Second Amended Complaint (CL06-1700) of the first suit as "faulty roof");"moisture damage…below the two faulty roofs," "[f]ailure of the brick walls on the Complex based on extensive moisture damage," and "rotten wood" (Id. at ¶ 40(2) "rotten wood in numerous areas of the Complex and unit"); "asbestos contamination in the Complex's basement" (Id. at ¶ 40(1) "asbestos abatement" not completed and ¶ 40(5) "inadequate asbestos removal); "rotted windows", "windows whose lifespan has ended," "window installation" in "unit two" (Id. at ¶ 40(1) "faulty windows"); "[p]aint peeling," "[h]oles in the walls," "faulty fire escape," "faulty plumbing," "[a] piece of plywood covering a hole," "[r]usted hand-rails" and when speaking of unit two, poor "[d]rywall installation," "[f]looring installation," "woodwork" (Id. at ¶ 40(7) "substandard renovations"); "[f]aulty electrical work," (Id. at ¶ 40(9) "faulty electrical wiring"); "[f]aulty work in the construction of a one-hour fire separation," (Id. at ¶ 40(2) "the addition of one-hour fire separations" not completed); and "[a]ppliance installation" "[c]abinet installation,"[w]all paper installation (Id. at ¶ 40 "poor installation of appliances.").

In addition, in Asterita's first lawsuit, it complained of "numerous City of Norfolk and BOCA code violations." (Plaintiff's Second Amended Complaint (CL06-1700, pg. 11)). The Court finds that these allegations constitute a summary, or a "catchall," phrase for many of the conditions complained of in Asterita's current lawsuit.

2. Disposition of each count

a. Summary Judgment Sustained

On January 3, 2007, this Court granted the Defendants' motion for summary judgment on counts one, two, and five of the second amended complaint in the initial suit (CL06-1700).

b. Demurer Sustained

On January 3, 2007, this Court sustained the Defendants' demurrer on counts three and four of the second amended complaint in the initial suit, and granted Asterita leave to amend on or before February 9, 2007. The Court cautioned that counts three and four would need to "list with reasonable particularity the acts of conspiracy which are being alleged as actionable in this matter and…the elements of damage that are being claimed as a result of conspiracy." The Plaintiff did not file an additional amended complaint.

c. Nonsuit

On January 17, 2007, Asterita non-suited as to counts three and four of the second amended complaint.

B. Issues Appealed to the Supreme Court of Virginia

Asterita appealed this Court's January 3, 2007 decision to the Virginia Supreme Court, which denied his Writ of Error on September 6, 2007.

C. Second Lawsuit filed

Asterita filed the current lawsuit (CL07-6408) on October 26, 2007.

III. Plea of *Res Judicata* and Collateral Estoppel

A. Defendants' Plea of *Res Judicata* and/or Collateral Estoppel

On February 2, 2008, the Defendants, by counsel, filed a special plea of *res judicata* and/or collateral estoppel. Asterita filed an Amended Complaint on August 7, 2008. The Defendants claim that Asterita's Amended Complaint is barred by Rule 1:6(a) of the Supreme Court of Virginia.

The Defendants assert that Asterita is barred "from pursuing the claims alleged in the Amended Complaint regarding defective renovations to his unit and the Complex's common elements since these claims arise from the same identified conduct, transactions or occurrence, as those asserted and decided on the merits by a final judgment" in Asterita's first lawsuit. (Defendants Plea of Res Judicata and/or Collateral Estoppel, pg. 2)

The Defendants allege that this Court dismissed Asterita's claims in the first case because the

> Acquisition and Equity Agreement by which Plaintiff acquired the subject unit held him harmless for any damages he would suffer and that Plaintiff voluntarily abandoned that protection through a second agreement which released the parties from their obligations under the Acquisition and Equity Agreement, including GDP's obligation to indemnify Plaintiff against any loss or damage suffered as a result of the condominium purchase…In the hearing of January 3, 2007, and its subsequent Order, this Court also found, as a factual matter, that the Plaintiff had acted "with exceeding negligence with respect to his own best interest in a number of categories" due to his failure to ever inspect, or even visit, the unit and condominium prior to his acquisition of the subject unit and that such failure on his part barred recovery from any damages resulting from his acquisition. Exhibit 2, page 89,

and therefore this Court should dismiss this current suit because it is barred by the doctrines of *res judicata* and/or collateral estoppel. Id. at 2-3.

On October 20, 2008, this Court heard the Defendants' plea of *res judicata* and/or collateral estoppel. The Defendants, by counsel, stated that they believed all the allegations of "defective renovations" in Asterita's first suit were all the same as those alleged in Asterita's current suit. (Trial Tr., pg. 8). The Defendants posit that Asterita is arguing the same defects in both the common elements and Asterita's unit but merely,

> asserting a different theory, that is breach of contractual warranty rather than the fraud and conspiracy and breach of contract claims they were asserting the last time, but it all arises out of the same transaction. It's all based on the same complaint of defective renovations to the unit, and therefore under our res adjudicata principles from *Bates vs. Devers*… and codified in 1:6 it needed to be brought up again in that first lawsuit and not piecemeal with a second one.

Id. at 8-9. Defendants assert their plea of *res judicata* to all of Asterita's counts. Id. at 13-14. That is, not only do the Defendants claim *res judicata* to breach of warranty with regard to unit two and the common elements, but also to the claim to pierce GDP's corporate veil to impose personal liability on J. Rubin and R. Rubin because,

> it's a derivative. Piercing the corporate veil is derivative liability saying that the declarant, GDP, did not meet its obligations, and according to their theories on the veil piercing provisions they can hold Mr. Rubin and his mother individually liable for those failures; but you have to have the original finding that failed before you get the derivative liability on that, so it applies to all the claims that were asserted.

Id. Therefore, the Defendants claim, by counsel, that all three counts in Asterita's current suit arise from the "same transaction or occurrence" and Asterita is merely claiming a different "right to a remedy and a different remedy;" however, under case law and Rule 1:6 of the Virginia Supreme Court, Asterita is barred to bring this claim by *res judicata* principles. Id. at 18.

B. Asterita's Response to Defendants' Plea of *Res Judicata* and/or Collateral Estoppel

On May 9, 2008, Asterita filed a brief in opposition to the defendants' special plea of *res judicata* and/or collateral estoppel. He contends that GDP refused to honor the warranties provided by the Condo Act and therefore the "[u]nit and the Complex's common elements have worsened since Asterita's initial lawsuit and new problems have arisen." (Plaintiff's Brief in Opposition to Defendants' Special Plea of *Res Judicata* and/or Collateral Estoppel, pg. 3). Specifically, Asterita, by counsel, contends

> it's like saying you had a hole the size of a pinhead two years ago and now it's the size of a tire. You know, it's hard to say you're complaining about the same problem when it was never remedied. There are new allegations, new problems, that were never fixed despite being sued and going through discovery and all of that.

Id. at 26. He also asserts that that this Court's January 17, 2008 Order was not a final order because Asterita was allowed time to amend his conspiracy claims, and non-suited these claims before the amendment time expired. Id. Therefore, Asterita asserts he should not be barred from filing the current suit based on *res judicata* because he could refile his initial lawsuit based on the conspiracy claims, in addition to the new claims made. Id.

Asterita also offers an alternative theory reasoning why *res judicata* is not appropriate in this instant case. He contends that he has a right to maintain an action on behalf of himself as well as the other unit owners per § 55-79.53 of the Condo Act. Id. at 6. Because GDP has control over the unit owners' association and refuses to honor the warranties, Asterita as a unit owner maintains that he has standing to bring the breach of warranty claims, and that, denying this claim would be denying the other five unit owners' rights. Id. at 3.

Asterita adds that in the Acquisition and Equity Agreement and Mutual Release of Obligations agreement, warranties under the Condo Act, and giving up these warranties, was never discussed. Id. at 27, 31.

C. This Court will focus upon and decide the *Res Judicata* Claim

This Court will decide the Defendants' *res judicata* claim. This Court finds that they are seeking to preclude a "cause of action" rather than a factual "issue" and therefore *res judicata* and not collateral estoppel is applicable to this case. *See Bates v. Devers*, 214 Va. 667, 672, 202 S.E.2d 917, 922 (1974) (wherein the Court discusses the distinctions between *res judicata*, collateral estoppel and other preclusive effects).

D. Burden of Proof

A defendant asserting *res judicata* must prove by a preponderance of the evidence that the claim is precluded by a prior judgment. *Scales v. Lewis*, 261 Va. 379, 383, 541 S.E.2d 899, 901 (2001).

E. Rule 1:6 standard for *Res Judicata* promulgated in 2006

Rule 1:6, which was promulgated for civil actions commenced after July 1, 2006, states in relevant part,

> (a) 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 the 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.
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> * * *
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> (d) The law of privity as hereto 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.

F. Prior law regarding *Res Judicata*

1. Key Test of *Res Judicata* in *Bates v. Devers*

The Virginia Supreme Court in *Bates v. Devers* defined the test of *res judicata*. 214 Va. at 670-71, 202 S.E.2d at 920-921. In that case, the Court determined that the plaintiff's claim was not barred by the doctrine of *res judicata*. Id. at 673, 202 S.E.2d at 922. The Court stated the test regarding *res judicata*, "[a] valid, personal judgment on the merits in favor of defendant bars relitigation of the *same cause of action* [emphasis added], or any part thereof which could have been litigated, between the same parties and their privies." Id. at 670-71, 202 S.E.2d, 920-921. The Court found that because the first claim dealt with a completely different contract than

the second claim it was not the same cause of action, and therefore not precluded. Id. at 672, 202 S.E.2d at 922.

2. Cases subsequent to *Bates v. Devers* that explained and/or followed it regarding Claim Preclusion

a. Res Judicata tests that emerged to help clarify

i. Four Part Test for Res Judicata

In deciding the plaintiff's second claim was not barred by the doctrine of *res judicata* in *Wright v. Castles*, the Court stated four elements must "concur" for a *res judicata* bar to apply,

> (1) identity of the remedies sought;
> (2) identity of the cause of action;
> (3) identity of the parties; and
> (4) identity of the quality of the persons for or against whom the claim is made

232 Va. 218, 222, 349 S.E.2d 125, 128 (1986). Plaintiff's first claim was brought in a chancery suit wherein an injunction was granted. The plaintiff then filed a subsequent action alleging slander and requesting monetary damages. Id. at 220, 349 S.E.2d at 127. The Court concluded that the "evidence necessary to obtain an injunction…differs from evidence necessary to prove that Castles slandered…" Id. at 224, 349 S.E.2d at 129. Therefore, the Court found that "neither the causes of action nor the remedies sought are identical to those in the prior chancery suit."[1] Id. at 226, 349 S.E.2d at 130.

The Court in *Wright v. Castles* concluded that because the Commonwealth adhered to the common law distinction between law and equity claims, the second claim was not barred by *res judicata*. Id. The Court reasoned that because the evidence and remedies sought in the first chancery suit were different than the evidence and remedies sought in the second lawsuit, *res judicata* did not bar the plaintiff from bringing a legal slander claim after an equitable injunction was denied when based upon the defendant's same conduct. Id.

ii. Privity of Parties Required

The Supreme Court of Virginia addressed the issue of privity in *res judicata* cases in *Nero v. Ferris*. 222 Va. 807, 284 S.E.2d 828 (1981). The Court stated,

> [t]here is no fixed definition of privity that automatically can be applied to all cases involving res judicata issues. While privity generally involves a party so identical in interest with another that he represents the same legal right, a determination of just who are privies requires a careful examination into the circumstances of each case.

[1] Effective January 1, 2006 legal and equitable claims are filed under the same pleading, a "complaint." (*See* Va. Sup. Ct. R. 3:1).

Id. at 813, 284 S.E.2d at 831.

b. Virginia Case Law on Privity following *Bates v. Devers*

Following the rulings in *Bates v. Devers*, *Wright v. Castles*, and *Nero v. Ferris*, a Virginia Court of Appeals decision held that although the doctrine of *res judicata* barred the plaintiff's second claim, it did not bar her son's claim because he was not a named party, and his interest was not similar to the plaintiff's. *Commonwealth ex rel. Gray v. Johnson*, 7 Va. App. 614, 376 S.E.2d 787 (1989). In that case the plaintiff filed a child support petition against the defendant. Id. at 617, 376 S.E.2d at 788. Counsel did not represent the plaintiff, and her two children, Petey and Myron, were not named parties to the case. The court found that the defendant was the father of Petey, but not Myron. Id.

The court stated,

> *Res judicata* is a judicially created doctrine founded upon the "consideration of public policy which favor certainty in the establishment of legal relations, demand to an end to litigation, and seek to prevent harassment of parties."

Id. at 617, 376 S.E.2d at 787 (*quoting Bates v. Devers*, 214 Va. at 670, 202 S.E.2d at 920). The court also laid out the four-part test in *Wright v. Castles* and the privity test stated in *Nero v. Ferris*. (*See Wright*, 232 Va. at 222, 349 S.E.2d at 128 and *Nero*, 222 Va. at 813, 284 S.E.2d at 832.) The court stated,

> [i]n the present case, the issue presented in Louise Gray's 1981 and 1983 paternity actions was the same, *i.e.*, whether Alonzo Johnson is the father of Myron… Therefore, the trial court was correct in ruling that the doctrine of *res judicata* bars her 1983 action. However, Louise Gray initiated the first action individually…while the mother and child's rights may relate to the same subject matter, and may be coextensive to some extent, they are distinct.

Id. at 619-22, 376 S.E.2d at 789-791. Therefore, the court found that the plaintiff's claim was barred, but because the mother and son did not have the same interest, and the son was not represented, the son's claim was not barred by the doctrine of *res judicata*. Id. at 625, 376 S.E.2d at 793.

3. Davis v. Marshall Homes

a. Issue Presented

In the case of *Davis v. Marshall Homes, Inc*. the Virginia Supreme Court decided that the Plaintiff's second claim was not barred by the doctrine of *res judicata*. 265 Va. 159, 576 S.E.2d 504 (2003), *superseded by court rule,* Va. Sup. Ct. R. 1:6, *as recognized in Va. Imports, Ltd. v. Kirin Brewery of Am., LLC,* 50 Va. App. 395, 410, 650 S.E.2d 554, 561 (2007). In the first case the plaintiff alleged actual fraud based upon the allegation that the "defendants intentionally

misrepresented to her the value of the real properties, and deceived her because even though they told her that they would 'refurbish' each property, defendants never intended to do so." Id. at 162-63, 576 S.E.2d at 505. Therefore, the plaintiff alleged the defendants caused her to purchase this property that was to her detriment. Id. at 163, 576 S.E.2d at 505. The plaintiff's first case was "dismissed with prejudice," and the plaintiff subsequently filed a second suit against the defendants. Id.

In the plaintiff's second suit, the plaintiff alleged breach of contract because the defendants failed to make any payments on the deed of trust notes, and surrendered the notes to the properties to the plaintiff. Id. The plaintiff claimed she incurred losses after the properties were sold. Id. The defendants filed a plea of *res judicata* claiming that "the factual allegations and damages claimed in the fraud action were based upon the same facts and damages described in the breach of contract action." Id. at 163-64, 576 S.E.2d at 505.

b. *Marshall Homes* Primary test for Claim Preclusion

The Supreme Court of Virginia denied the defendants' plea of *res judicata* in *Marshall Homes.* Id. at 172, 576 S.E.2d at 510. The Court attempted to reconcile its decision with the *Bates v. Devers* test, stating *res judicata* "precludes relitigation of the same cause of action, or any part thereof, which could have been litigated between the same parties and their privies." Id. at 164, 576 S.E.2d at 506 (*quoting Bates v. Devers*, 214 Va. at 670-71, 202 S.E.2d at 920-921). The Court also cited the four-part test established in *Wright v. Castles*; however, the Court found the plaintiff's second claim did not have the "identity of the cause of action" from the plaintiff's first case. Id. at 164-65, 576 S.E.2d at 506. The Court found the plaintiff had two distinct claims stating,

> [a] review of the motion for judgment in the fraud action reveals that plaintiff would have been required to establish by clear and convincing evidence that defendants approached her and requested loans for the purpose of refurbishing and selling the real properties for a profit…In her later contract action to recover for losses sustained because of defendants' failure to pay the deed of trust notes, plaintiff would have been required to prove, by a preponderance of the evidence, the existence of the notes, the defendants' failure to pay the notes, and damages…The mere fact that *some* [emphasis added] evidence relevant in plaintiff's action for fraud may be relevant to prove her distinct and separate contract claim for nonpayment of the deed of trust notes does not, for purposes of *res judicata*, mean that plaintiff only has one cause of action.

Id. at 165-166, 576 S.E.2d at 506-507. Therefore, because the evidence and facts that needed to be proven were different from that of the first case, the Court found that the plaintiff's second suit was not subject to the *res judicata* bar. Id.

The Court in *Marshall Homes* explicitly rejected the "transactional analysis test" when deciding whether a claim is barred by *res judicata*, and turned to a same evidence and facts approach. Id. at 171, 576 S.E.2d at 510. That is, the Court stated it would determine a plea of *res judicata* by determining whether "a 'cause of action' involves an assertion of *particular legal rights* [emphasis added]" determined by whether the same evidence was presented, rather than whether the claim arose from the same transaction as the first claim. Id. at 172, 576 S.E.2d at 510. Therefore, the Court found that because the "legal rights" in contract claims are different from "legal rights" in fraud claims, the same evidence was not indicated, and therefore, the plaintiff's claim was not barred by the doctrine of *res judicata*. Id.

4. Rule 1:6 adopts the transactional analysis test of *Res Judicata* in Virginia, as it stood prior to the *Marshall Holmes* decision

On January 1, 2006, the Commonwealth changed its long standing common law rule of dividing legal and equitable claims into two different actions. The Virginia Supreme Court adopted Rule 3:1 which states in relevant part, " [t]here shall be one form of civil case, known as a civil action. These Rules apply to all civil actions, in the circuit courts, whether the claims involved arise under legal or equitable causes of action."

On July 1, 2006, Rule 1:6 of the Virginia Supreme Court came into effect. This Rule was "promulgated to supersede the holding in Davis." *Va. Imports, Ltd.*, 50 Va. App. at 410, 650 S.E.2d at 561. Therefore, it appears that Rule 1:6 changed the "same evidence" test back to the same "transactional" approach that *Marshall Homes* explicitly rejected.

Under Rule 1:6, a plaintiff is barred from bringing a subsequent claim against a defendant on the same "cause of action" that; 1) arose from the same "conduct," "transaction", or "occurrence;" 2) that was previously "decided on the merits by a final judgment;" and 3) that was against the "same party or parties." The Rule further clarifies the first element, "same conduct, transaction, or occurrence," by stating that the bar applies "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 dependent, or the particular remedies sought." Therefore, the Rule explicitly states that the "legal rights," "legal elements," "evidence," and "remedies sought" do not have to be identical with those of the first suit for the second suit to be barred by *res judicata*.

a. Virginia Circuit Court Discussion of Rule 1:6

In 2008, the Winchester Circuit Court applied the "transactional analysis" test as set forth in *Bates v. Devers* and promulgated in Rule 1:6, and sustained the defendant's plea of res judicata, noting that Virginia adheres to the "could-have-been-should-have-been" litigated rule of *res judicata* in all civil claims. (*See Winchester Neurological Consultants, Inc. v. Landrio*, 74 Va. Cir. 480, 486 (2008)). In that case, Dr. Landrio was employed by Winchester Neurological Consultants (hereinafter "WNC"). Id. at 481. WNC brought an arbitration claim against Dr. Landrio for breach of covenant not to compete. Id. Three contracts were brought into evidence in this arbitration proceeding, a 1998 employment contract, a 1998 Stock Sale Agreement, and a

2003 Shareholders' Agreement. Id. Dr. Landrio filed a counterclaim against WNC for loss of revenues. Id. The arbitration panel awarded Dr. Landrio actual damages based on his counterclaim for lost revenue, and WNC nominal damages for Dr. Landrio's breach of fiduciary duty. Id. at 481-82.

Subsequently, Dr. Landrio filed a second arbitration claim against WNC stating WNC violated the 2003 Shareholders' Agreement by not purchasing the shares on agreed-upon terms. Id. at 483. The court stated, finding the claim was barred by the doctrine of *res judicata* because it involved the same cause of action from the first arbitration suit,

> sometimes both courts and lawyers indiscriminately use the term "cause of action," when they mean "right of action," and the two are not the same…One transaction (cause of action) may give rise to myriad rights of action…*Rule 1:6* is a restatement of the principles of *Bates v. Devers, supra*, as further refined in *Allstar Towing, Inc. v. City of Alexandria*… Accordingly, those well established principles govern the resolution of this case, not the "same evidence" dicta in *Davis*, upon which Dr Landrio relied upon….The concept of applying a transactional analysis to determine the scope of the bar of res judicata is nothing new in Virginia and is in keeping with the modern doctrine as set forth in *Bates v. Devers*.

Id. at 485-87. Therefore, the court ruled that although the Shareholder Agreement was not a main issue in the first arbitration dispute, it was part of the evidence, and under Virginia precedent it "could-have-been-should-have-been" litigated in the first suit. Id. at 488.

b. Commentary by Professor Kent Sinclair

Professor Kent Sinclair's book, *Guide to Virginia Law & Equity Reform and Other Landmark Changes* (2006) (hereinafter "Sinclair's Guide"), posits that the "same evidence" approach that was used as the *res judicata* test in the *Marshall Homes* decision "assures that a plaintiff will never be barred in bringing a second suit in Virginia, because each cause of action has different elements and one can almost always identify proof variations that would follow." § 11.2 *et. seq* at pg. 251. This book was written after Rule 1:6 was promulgated by the Virginia Supreme Court, and contends that prior Virginia precedent will likely remain unaltered because Virginia precedent "implicitly" already defined *res judicata* in a "factual transaction" approach rather than "same evidence" approach. Id. at 258.

Sinclair's Guide also addresses how the law and equity merger changed the doctrine of *res judicata*. It contends that the doctrine of *res judicata* changed after equity and law merged,

> [b]ecause what could have been brought in the former suit should have been brought, the merger-bar principle of claim preclusion depended on the procedural constraints on the first suit. If the later asserted claim could not be raised in the earlier trial,…claim preclusion permitted the second trial—no matter that both trials involved the same contest between the same litigants.

Id. at 248-49. Therefore, because equity claims could not be pled with law claims and visa versa, one could bring an equity claim based upon the same facts as a legal claim brought subsequently and *res judicta* would not bar the subsequent claim. An example was seen in *Wright v. Castles, supra*. 232 Va. at 222, 349 S.E.2d at 128.

IV. Asterita's second claim is barred under Rule 1:6

A. The first Suit Contained Counts Decided on the Merits

1. Some counts subject to leave to amend, and non-suited

Asterita argues that because he was allowed leave to amend counts three and four in the initial suit, the Court entered no final order in that lawsuit and therefore no *res judicata* bar applies to his current lawsuit. The Court disagrees with this argument.

a. *Norris v. Mitchell*

Asterita principally relies on the case of *Norris v. Mitchell*. 255 Va. 235, 495 S.E.2d 809 (1998). In this case, the purchasers' of a home sued the sellers for misrepresentations made at the closing. Id. at 238, 495 S.E.2d at 811. The Court sustained the defendants' demurrer and dismissed the action; however, the Court granted the purchasers leave to amend before July 8, 1996. Id. The purchasers were granted a non-suit before the time for amendment expired and the purchasers again sued the sellers. Id.

The sellers argued the purchasers' second claim was barred by *res judicata* because, "the dismissal order in the first action was a final order effective on the date it was entered and, under Rule 1:1, the court lost jurisdiction to enter the nonsuit order more than 21 days after the effective date." Id. at 239, 495 S.E.2d at 811. The Court disagreed and stated, "if the order also gives the plaintiff leave to amend, it does not become final 'until after the time limited therein for the plaintiff to amend his bill has expired.'" Id., *quoting London-Virginia Mining Co v. Moore*, 98 Va. 256, 257, 35 S.E.2d 722, 723 (1900). Therefore, the Court found that because the plaintiffs non-suited the case before the time limit for leave to amend expired, it was not a final order per Rule 1:1 of the Virginia Supreme Court. Id.

b. *Norris v. Mitchell* included no claims decided on the merits

The Court disagrees with Asterita's argument that his case is controlled by *Norris v. Mitchell*. In Asterita's first suit, this Court granted defendants' summary judgment motion on three counts; actual fraud and constructive fraud against GDP, J. Rubin, and Longo, and unjust enrichment against GDP. Thus, in the first case, three counts were fully litigated and decided on the merits. In addition, in the current suit, Asterita did not file a complaint based upon a conspiracy claim.

The Court finds that merely because this Court allowed Asterita leave to amend counts three and four with regard to his conspiracy claims, he cannot now contend that the first suit did not constitute a final judgment on the merits. Because the Court decided three counts of Asterita's first lawsuit, the Court's order of January 3, 2007 constituted a final order as to those claims, and Virginia Supreme Court Rule 1:1 applied to that judgment. Asterita unsuccessfully appealed those rulings. Thus, Rule 1:6 applies to the current lawsuit.

B. Same Cause of Action

1. Warranty Claims

The Court finds that this case presents warranty claims that had accrued at the time of the the prior litigation, and could have been brought in the prior suit. In this second suit, Asterita alleges GDP failed to remedy defects in his unit as well as the common elements, and was required to do so, and therefore GDP breached Asterita's warranty required under the Virginia Condo Act. As noted above, each breach of warranty item complained of in this lawsuit was complained of in Asterita's first lawsuit, merely under a different theory of recovery. (*See discussion supra*, § II, 1, b).

2. No longer Law v. Equity Distinction

a. Plaintiff could have and did combine law and equity claims in his initial suit, as Virginia law permitted at the time

Asterita claims that claim preclusion cannot apply because under Virginia law there is a law and equity claim distinction. (*See* Trial Tr., pg. 34-35). The Court disagrees with this argument; a litigant cannot escape claim preclusive effect of *res judicata* by seeking to distinguish law and equity pleading requirements regarding former litigation occurring after July 1, 2006.[2] Regardless, the Court finds that Asterita did in fact have both law and equity claims in the first suit, and this Court decided legal and equitable claims on the merits.

C. Parties are in Privity

1. Parties have same Legal Rights

In Asterita's first suit, he sued GDP, Longo, and J. Rubin. In Asterita's second suit he brought an action against GDP, R. Rubin, and J. Rubin. Rule 1:6(d) of the Supreme Court of Virginia states that the law of privity continues to apply to claim preclusion decisions. The Virginia Supreme Court stated in *Nero v. Ferris* that although there is no "fixed definition of privity" in cases involving *res judicata*, it generally "involves a party so identical in interest with another that he represents the same legal right." 222 Va. at 813, 284 S.E.2d at 831.

[2] *Cf*: This decision may seem contrary to *Wright v. Castles*, 232 Va. at 222, 349 S.E.2d at 128. However, that case was decided prior to the adoption of Supreme Court of Virginia Rules 1:6 and 3:1.

In essence, Asterita herein alleges that because "R. Rubin is GDP's sole member and one hundred (100%) owner," she "represents the same legal right" as GDP. Id. (*See* Amended Complaint, pg. 2). Asterita is derivatively requesting GDP's corporate veil be pierced so personal liability can be imposed on R. Rubin. Therefore, the Court finds there is no distinction between the legal rights of GDP and its sole member, R. Rubin. All parties in the first and second suits are in privity as required under Rule 1:6(d).

2. Not a Class Action under the Condo Act

a. No Class Action Procedure Exists

The Virginia Supreme Court, interpreting Va. Code § 55-79.53, has indicated that pursuant to the Condo Act a unit owner may bring a class action suit if the unit owners' association fails to assert the unit owners common right. (*See Frantz*, 229 Va. at 451, 331 S.E.2d at 395). However, neither the Condo Act nor other Virginia law provides a procedure for a person to maintain a class action. In addition, Asterita did not style his claim as a class action.

b. Prayer for relief seeks relief for Asterita alone

In Asterita's second suit, he stated that "other unit owners, including Lampkin and Beck, have made repeated demands….and GDP refuses to honor the two-year warranty provided by § 55-79.79B." (*See* Amended Complaint, pg. 11). Asterita contends that because GDP refuses to honor the Condo Act warranties, then he has standing to "maintain this action on his behalf and on behalf of the owners of units in the Complex pursuant to § 55-79.79B." Id. at 12. While the Court agrees that if in fact GDP refused to honor these warranties Asterita and other unit owners may have standing to bring an action in their own names, it does not agree that the statute permits Asterita to sue in a representative capacity. Moreover, Asterita does not seek damages on behalf of other unit owners. Instead, Asterita sues for one million dollars in compensatory damages for breach of warranty for the common elements. Nowhere in his prayer for relief does he seek an award for the benefit of any other person or persons. Indeed, none of the other unit owners joined with Asterita as plaintiffs in the current suit.

Therefore, this Court holds that Asterita's suit wherein he is the only named plaintiff, cannot be maintained for anyone else but him, and its allegations seek relief only for him.

V. Conclusion

Based upon the foregoing discussion, the Court will sustain the Defendants' plea of *res judicata*. The Court finds that the Defendants' have established that this lawsuit is barred by Rule 1:6 of the Virginia Supreme Court. It involves the same cause of action that was in substantial part decided on the merits in the previous case, and the parties herein are in privity with the parties in the first action.

Demurrer

I. Current Suit

The Court, having sustained the Defendants' plea of *res judicata*, need not rule on the issues raised on demurrer.

Thank you for your cooperation and patience in this matter.

Very truly yours,

Norman A. Thomas
Judge

SMH/NAT