



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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March 14, 2014

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Re: Lanie E. Nikes v. Michael R. Abidin, M.D., et al., CL-2013-13799

Dear Counsel:

Upon review of the supplemental briefs the Court reconsiders the February 21, 2014 Ruling and overrules Defendants' Plea in Bar for the following reasons:

Notwithstanding this Court's inherent right to "be inconsistent with itself," particularly when Plaintiff's counsel fails to cite this Court's previous ruling in McCarty v. Harold H. Allen, Jr. MD et al. (CL-2009-12407, Fairfax County Circuit Court), in original pleadings or oral argument, the Court finds that the amendment to Va. Code § 8.01-6 to include "whether to correct a misnomer or otherwise" is inapplicable because the misnomer does not "chang[e] the party against whom the claim is asserted. . ." Va. Code Ann. § 8.01-6 (1950 as amended).

Under the specific facts of this case, the Court concludes that the Metropolitan ENT & Facial Plastic Surgery (Fairfax County) trading under the fictitious name of Loudoun Medical Group, P.C. is a misnomer as it relates to Loudoun Medical Group, P.C., because, “a misnomer is a mistake in name, but not person.” Rockwell v. Allman, 211 Va. 560, 561, 179 S.E.2d 471, 472 (1971). In essence, even though no Motion to Amend has been made by Plaintiff, and the Court has not been asked to grant same, there can be no question that the proper party under a wrong name, as opposed to substituting an additional or different party, exists in this case.

Furthermore, where “the right party is before the Court[,] although under a wrong name, an amendment to cure a misnomer will be allowed, notwithstanding the running of the statute of limitations, provided there is no change in the cause of action originally stated.” Jacobson v. So. Biscuit Co., 198 Va. 813, 817, 97 S.E.2d 1, 4 (1957).

Moreover, the Court concludes that it ignored the plain meaning of § 8.01-6 by not recognizing the limiting language applicable to changing a party, as opposed to having the proper party under the wrong name. The Code provides that “an amendment *changing the party against whom a claim is asserted, whether to correct a misnomer or otherwise, relates back to the date of the original pleading . . .*” Va. Code Ann. § 8.01-6 (1950 as amended). To hold otherwise would give no effect to the first sentence in § 8.01-6, and would more particularly remove the distinction between misnomer and adding an entirely new party. Further, as stated by Professor Sinclair,

In the 1986 Session of the General Assembly, the words, “whether to correct a misnomer or otherwise” were added near the beginning of the second sentence of Code § 8.01-6. This addition dispels any reading of the Code section as being limited to misnomer situations. Thus, the first sentence of this section preserves the traditional basis for correcting misnomer. The lengthy second sentence added in 1990 incorporates a general test for adding new parties, which, as the 1996 amendment makes clear, is not limited to correction of misnomer. *Kent Sinclair & Leigh B. Middleditch Jr.*, 1-4 Virginia Civil Procedure § 4.8, fn. 4 (5th ed. 2013).

The cases cited by Defendant are either distinguishable or not true misnomer cases.

Further, while Defendant criticizes Plaintiff for failing to cite a Virginia case on point, he fails to cite Supreme Court authority for the proposition that misnomer dictates dismissal under the specific facts of this case. Moreover, while counsel is under no ethical obligation to apprise the Court of persuasive authority in this district contrary to its position, this Judge would have expected counsel to at least

acknowledge during oral argument that this Court ruled contrary to its' present position at a previous hearing, where it was a party, involving this identical issue.

The Plaintiff's Motion to Reconsider is granted and Defendant's Plea in Bar is overruled. Plaintiff's counsel is directed to prepare an order vacating the *Nunc Pro Tunc* Suspending Order and upon reconsideration, overruling Defendant's Plea in Bar, and circulate same to Defendant's counsel for entry. In the alternative, both counsels are directed to appear on March 21, 2014 at 10:00 am for entry.

Sincerely,

A handwritten signature in black ink, appearing to read 'Brett A. Kassabian', written over a horizontal line.

The Honorable Brett A. Kassabian
Fairfax Circuit Court Judge