NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

November 2, 2017

LETTER OPINION

Mr. Daniel L. Hawes
Virginia Legal Defense
Post Office Box 100
Broad Run, VA 20137
Counsel for Plaintiff Leiser, Leiser & Hennessy, PLLC

Mr. August McCarthy
C/O: Mr. Daniel L. Hawes
Registered Agent for Leiser, Leiser & Hennessy, PLLC
Virginia Legal Defense
Post Office Box 100
Broad Run, VA 20137

Mr. Phillip B. Leiser
The Leiser Law Firm
1750 Tysons Boulevard, Suite 1500
Tysons Corner, VA 22102
Counsel for Defendants

RE: *Leiser, Leiser & Hennessy, PLLC v. Phillip Ben-Zion Leiser, et al.*
Case No. CL-2016-10982

Dear Counsel:

This cause came before the Court October 31, 2017, on Defendants' Phillip B. Leiser ("Mr. Leiser") and Karen A. Leiser ("Ms. Leiser") motion for sanctions against

OPINION LETTER

counsel for Plaintiff, Mr. Daniel L. Hawes ("Hawes"), and against Mr. August McCarthy ("McCarthy"), "sole member" and *alter ego* of Plaintiff, an alleged shell entity "Leiser, Leiser & Hennessy, PLLC," created to mirror in name a previously constituted entity belonging to Mr. Leiser. For the reasons as more fully stated herein the Court holds Plaintiff's Complaint was frivolously filed in violation of Virginia Code § 8.01-271.1, and that the imposition of monetary sanctions against Hawes and McCarthy is just and appropriate.

FACTS

Defendants Phillip B. Leiser and Karen A. Leiser are spouses and attorneys who have worked together at one or more legal entities since July, 2002. As of August, 2013, Mr. Leiser was the sole managing member of the law firm "Leiser, Leiser & Hennessy, PLLC" ("LLH"), wherein Ms. Leiser also was employed as an attorney. Due to a mix up in addresses, Mr. Leiser did not timely receive the notice of renewal of his entity from the Virginia State Corporation Commission ("SCC") and thus he unwittingly allowed the charter to lapse out of status on August 31, 2013.

At the time of such lapse, Mr. Leiser was embroiled as plaintiff in two actions referencing employment-related litigation against Mr. August McCarthy pending in the Fairfax Circuit Court. On September 17, 2013, Hawes registered a Professional Limited Liability Company with the SCC with the name of "Leiser, Leiser, & Hennessy, PLLC." Such entity differed in name from the entity operated by Mr. Leiser now in *de facto* status only in that a comma was added after the second "Leiser" in the title. The entity Hawes created obtained a SCC identification number of "S471865-8", while the entity belonging

to Mr. Leiser had a SCC identification number of "S050118-1." On September 24, 2013, Hawes amended the Articles of Organization for the entity he created to reflect "that August McCarthy, a member of the Virginia State Bar in good standing, is, and shall be, the sole member of the said Professional Limited Liability Company, henceforth, and in perpetuity." Hawes has served as registered agent for such entity since that time. At some point prior to the instant case being filed, Hawes amended the name of the entity belonging to McCarthy to remove the extra comma, thus making the name identical to the previously existing concern belonging to Mr. Leiser.

During September, 2013, Hawes served as defense counsel for McCarthy in the first employment action between Mr. Leiser and McCarthy. In such capacity, Hawes advised Mr. Leiser in contemplation of the existence of the new entity, that in the event Mr. Leiser prevailed in the employment litigation, McCarthy could simply "rub [his] neck, write him[self] a check, and [Leiser] could go [his] merry way-ay-ay." Hawes further explained to Mr. Leiser that he meant McCarthy could write a check to the new entity, deposit it in the entity's bank account, and then submit that as evidence to the Court that the judgment had been satisfied. Upon learning of the registration of the Hawes-created entity, Mr. Leiser reinstated his entity with the SCC effective September 27, 2013, and at the same time changed its name to "The Leiser Law Firm, PLLC."

On August 3, 2016, Hawes filed an action against Defendants setting forth two claims for misappropriation of Plaintiff's name and for legal malpractice. Plaintiff alleged McCarthy had exercised his prerogative to "take over the defunct entity," inasmuch as he was as one of the parties to a "Limited Partnership Agreement" attached to the Complaint,

creating an entity named "Leiser, McCarthy, Hennessy, PLLC" ("LMH") on October 2, 2006. That agreement states Mr. Leiser was the sole member of LMH, with McCarthy having the status of an employee-at-will and non-equity limited partner. On May 3, 2017, the Plaintiff served the Complaint on the Defendants.

On June 13, 2017, Plaintiff sought to nonsuit the instant cause. The Court entered a suspending order blocking entry of the final order of nonsuit for 45 days. On July 7, 2017, Defendants filed their motion for sanctions against both Hawes and McCarthy, serving Hawes inasmuch as he functions both as counsel of record for Plaintiff and registered agent for the entity solely controlled by McCarthy. On July 21, 2017, the Court extended the previously-entered suspending order until such time as a final order on the Defendants' motion for sanctions is entered.

On October 31, 2017, trial was had on the Defendants' motion for sanctions. Before the hearing began, Hawes submitted a letter to the Court via fax, advising that he would be unable to attend the hearing "due to illness." Hawes attached to the letter copies of "some of the prescriptions" he has "for asthma, atherosclerosis, rheumatoid arthritis, idiopathic nerve pain, chronic fatigue syndrome and coeliac, all symptoms of 'the autoimmune disorder.'" Hawes averred he was suffering an unspecified "attack," but that fortunately he had a supply of medicines which he hoped would help him avoid the contingency of having to be hospitalized. He stated he was unable to take the risk that his condition could worsen during the two hour trip to the courthouse. The writing was neatly typed and with an accompanying certificate of service to the Defendants. No note

from a physician or other health provider confirming the unspecified claimed medical condition was included.

Hawes asked "the Court to excuse [his] absence and to consider [his] written memorandum and supplemental memorandum in opposition to Mr. Leiser's motion for sanctions, and in particular [his] motion to exclude evidence, should the Court wish to proceed in [his] absence; to deny Mr. Leiser's motion and enter a final order of nonsuit as originally requested; otherwise [he] request[ed] a continuance." The Court invited a response from Defendants after first reading the letter into the record in its entirety. Defendants did not object to the Court considering the legal arguments in Hawes' memoranda, but did object to consideration of any evidence contained therein as barred hearsay.

The Court ruled that Hawes failed to demonstrate good cause for a continuance, and that in any event his preferred position in lieu of a continuance appeared to be that the Court excuse his absence and consider his legal averments.

The Court proceeded to conduct trial on the sanctions motion, taking testimonial and documentary evidence introduced by the Defendants. McCarthy did not appear to answer the motion for sanctions against him personally despite receiving notice through Hawes, who served as both counsel and registered agent for Plaintiff. Testimony was introduced at trial that McCarthy had failed to appear previously at another hearing in this cause, in derogation of a Court subpoena.

At the conclusion of the introduction of evidence, no motion to strike ensued inasmuch Hawes and McCarthy had voluntarily absented themselves. The Court then

indicated the evidentiary portion of the trial was closed, and due to a number of legal issues which required research for resolution, it would issue its written decision in the near term. The Court continued the matter to November 17, 2017, for entry of a final order in this cause.

ANALYSIS

I. The Complaint is transparently and egregiously frivolous.

Plaintiff's registration as a Professional Limited Liability Company on September 17, 2013, with the SCC, using a name virtually identical to that of a concern previously owned and operated by Mr. Leiser, did not entitle Plaintiff to assert an action for unauthorized use of a name in violation of Virginia Code § 8.01-40 or for professional malpractice against Defendants. The Plaintiff entity had a separate SCC registration number and had in its name an extra comma. Defendant, Mr. Leiser, additionally reinstated his entity with the SCC effective September 27, 2013, and at the same time changed its name to "The Leiser Law Firm, PLLC." It is therefore axiomatic Plaintiff was not a successor in interest to the original LLH entity. The point is further accentuated by Plaintiff's Complaint which alleges McCarthy exercised his prerogative to "take over the defunct entity" as one of the parties to a "Limited Partnership Agreement" of the entity named LMH, executed on October 2, 2006. The agreement however states to the contrary: Mr. Leiser was the sole member of LMH, with McCarthy having the status merely of an employee-at-will and non-equity limited partner. Without ownership or even the right to prevent his termination, McCarthy could hardly claim he had a possessory or property right in such predecessor entity of which he was no longer a part.

The Complaint of Plaintiff amounts to an exercise in sophistry. Plaintiff first alleges Defendants misappropriated its name in violation of Virginia Code § 8.01-40. It is unclear how Defendants could have misappropriated a name which they had long used to designate their original LLH entity and which preexisted the creation of Plaintiff. In fact it was Plaintiff, its sole owner McCarthy, and its counsel Hawes, who attempted to usurp the identity of Defendants' law firm and interfere with their business starting September 17, 2013. In addition, Ms. Leiser specifically was not an owner of the original LLH entity, so inclusion of her in this claim is factually ungrounded. Furthermore, Mr. Leiser reinstated his entity with the SCC effective September 27, 2013, and at the same time changed its name to "The Leiser Law Firm, PLLC." His entity was thus out of status from only August 31 to September 27, 2013. More importantly, he reinstated *his entity*, meaning he remained a successor in interest to the rights of the original LLH.

In its Complaint, Plaintiff falsely alleges Defendants operated their firm under the name of "Leiser, Leiser & Hennessy, PLLC" since September 17, 2013, and claims therefor to be entitled to all Mr. Leiser's firm's profits since that time, asserting damages of $2,000,000.00 and requesting a further award of $350,000.00 in punitive damages. The Complaint ignores the fact that the two entities overlapped in similar but not exact names, due to the added comma, for only 10 days. The Plaintiff's misrepresentation of its status as successor in interest, the period it claims Defendants used its name, and of its entitlement to the profits of Mr. Leiser's firm, drips disturbingly from the pages of its Complaint.

The second claim in Plaintiff's Complaint is even more surreal and absurd. The Plaintiff claims that when Mr. Leiser sued McCarthy on behalf of the original LLH in 2013, Mr. Leiser's failure to prevail in one of his two such lawsuits was an act of "legal malpractice" and breach of duty to the original LLH of which he was sole owner. As claimed successor in interest to Mr. Leiser's LLH entity, Plaintiff thus avers that Defendants owed it a duty which was breached *for failing to prevail against McCarthy, the effective sole owner of Plaintiff,* and are thus liable for $188,332.09, plus a *contract rate* of interest of 12%, plus punitive damages. It is unclear from the Complaint what good faith basis there would be for a claim to contract interest or punitive damages in the confusedly pled cause. Ms. Leiser's liability is alleged to flow from her status as a "partner" when Plaintiff knew her status was that of a limited non-equity partner, terminable at will, and not as an owner of Mr. Leiser's LLH entity. For McCarthy to effectively claim he is owed damages from the Leisers because either of them failed to prevail against *him* in a prior lawsuit is the height of hubris and gamesmanship.

Hawes and McCarthy used Plaintiff as a vehicle to bring the fallacious suit against Defendants in the instant case. Plaintiff's Complaint in this cause is not well grounded in fact, is unwarranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and was interposed for a vexatious purpose, namely to harass the Defendants. Such misconduct may not stand, for the Court is not a forum which may be mocked or toyed with to the detriment of justice, and in derogation of the rights of the Defendants. Hawes and McCarthy, by their conduct, compel the Court to impose financial sanctions of a sufficient quantum the Court judges they are able to

pay, which will punish and deter such outrageous misbehavior. *See* Va. Code Ann. § 8.01-271.1.

II. McCarthy, who controlled and directed Plaintiff, his *alter ego,* may be sanctioned personally as a "represented party."

Having resolved the imposition of sanctions are appropriate in this cause, the next issue is against whom such monetary award should be made. Clearly, Hawes, as signatory to the Complaint, is sanctionable.

> If a pleading, motion, or other paper is signed or made in violation of this rule, the court, upon motion or upon its own initiative, shall *impose upon the person who signed the paper or made the motion, a represented party, or both*, an appropriate sanction.

Va. Code Ann. § 8.01-271.1 (emphasis added). The more difficult question in the context of this cause is as to who constitutes the "represented party." The Supreme Court of Virginia has guided it

> is elementary that a corporation is a legal entity entirely separate and distinct from the shareholders or members who compose it. This principle is applicable even when the corporation is owned totally by a single person, unless the corporation is held to be the alter ego, alias, stooge, or dummy of the individual shareholder.

Barnett v. Kite, 271 Va. 65, 70, 624 S.E.2d 52, 55 (2006) (citations and internal quotation marks omitted). Thus, Plaintiff's status as a "Professional Limited Liability Company" is not easily disregarded to reach its sole owner, McCarthy, with a sanction. The instant action however, comprehends a set of highly unusual facts.

The original purpose for the creation of Plaintiff was to thwart employment litigation Mr. Leiser was pursuing through his entity against McCarthy. Hawes betrayed in September, 2013, the fraudulent intent he and McCarthy shared when he told Mr. Leiser

that if Mr. Leiser prevailed against McCarthy, McCarthy could write a check to his new entity, deposit it in the entity's bank account, and then submit to the Court the judgment had been satisfied. Such a submission would constitute a fraud on the Court for it would attempt in banal fashion to mislead the Court into believing payment to a similarly-named entity to that of Mr. Leiser's constituted payment to an entity which was a successor in interest.

Correspondingly in the instant action, Hawes, having reason to know Plaintiff is not a successor in interest to the entity belonging to Mr. Leiser, has nevertheless misrepresented such status to the Court in its Complaint. Hawes "represents" Plaintiff, but Plaintiff is solely owned and controlled by McCarthy. It is noteworthy that Hawes, in his supplemental memorandum in opposition to the motion for sanctions, takes the extra step of undertaking argument in defense of McCarthy, rather than just his purported nominal client, the Plaintiff. Hawes states: "McCarthy is not and never was a party to this action, never signed any document filed with the Court, and has no relationship to this action in any way." If Hawes is not representing at a minimum the interests of McCarthy, it is unclear why he would unnecessarily undertake argument in his defense in an effort to shield him from sanction. Hawes conduct in this cause and past attempts to misuse the Plaintiff entity on behalf of his then client McCarthy in 2013, suggests McCarthy has a *relationship to this action in every way.* The Court draws the reasonable inference from McCarthy's sole ownership and control of Plaintiff, and the fact that the sole intended beneficiary of the actions of Plaintiff is its owner, that McCarthy controls the litigation maliciously hurled at Defendants.

> A corporate entity may be disregarded if it
>
> is the *alter ego*, alias, stooge, or dummy of the individuals sought to be [held personally accountable] and that the corporation was a device or sham used to disguise wrongs, obscure fraud, or conceal crime.

RF&P Corp. v. Little, 247 Va. 309, 316, 440 S.E.2d 908, 913 (1994) (citations and internal quotation marks omitted).[1] It is abundantly clear Plaintiff was created only to exact litigation mischief, occasion disguised wrongs and obscure fraud. The behavior of Hawes and McCarthy is further in apparent derogation of the prohibition against Barratry. Va. Code Ann. § 18.2-452. Their actions also appear to constitute misrepresentation in violation of Rule 4.1 of the Virginia Rules of Professional Conduct for Hawes alone, and Rule 8.4 for both Hawes and McCarthy.

> [W]hen the facts justify it, the courts will look beyond the mere corporate entity to the persons who compose the corporation. This rule is applicable wherever reason and justice require it although the acts of the parties amount to constructive fraud only, the rule not being limited to cases where they have been guilty of actual fraud and criminal intent. While the legal conception of a corporation distinct from its members has often been regarded as a mere fiction adopted by the law for the purpose of enabling natural persons to transact business in this peculiar way, whenever it is necessary to do so, the law will look behind the corporate body and recognize the members and disregard the fiction.

Lewis Trucking Corporation v. Commonwealth, 207 Va. 23, 31-32, 147 S.E.2d 747, 753 (1966) (internal quotation marks omitted).

---

[1] In *Corrigan v. Baird*, 49 Va. Cir. 511 (March 11, 1996), the Court "declined" to "'pierce the corporate veil' of the corporate plaintiff in order to assess sanctions." The Court went on to note under the facts of that cause that the principal officer and shareholder of a corporate entity could not be subject to sanctions under the plain reading of Virginia Code § 8.01-271.1 as he was not the "represented party." The Court made no finding he was the *alter ego* of the entity nor were the facts adduced similar to those in this cause. It is unclear from the opinion whether the Court refused to impose sanctions because it declined to find there was *alter ego* status or because it believed such status could not be equated with that of a "represented party." This Court is therefore unpersuaded the reasoning in *Corrigan* is in conflict with or applies to the decision in the instant case.

The clear intent of the General Assembly in enacting Virginia Code § 8.01-271.1 can be discerned from the plain and ordinary reading of the statute, which incorporates the concept that a filer of pleadings in bad faith or for improper purpose, be held accountable. The code section mandates the striking of unsigned pleadings to ensure there is always an answerable party. Both the signatory and the "represented party" may be held liable for transgressions. The intent of the General Assembly thus could not therefor be divergent in the instance where an individual constitutes an *alter ego* of an entity, not established for a legitimate business purpose but rather to enable the misuse of the legal system in a manner which attempts to insulate such person from sanction for misconduct. Under the rather unique facts of this case, McCarthy and Plaintiff, a construct for the sole purpose of occasioning mischief to the Leisers, are virtually indistinguishable. This Court holds McCarthy constitutes the *alter ego* of Plaintiff and was validly served with the motion for sanctions through Hawes, the registered agent of Plaintiff. McCarthy is thus subject to being sanctioned as a "represented party" pursuant to Virginia Code § 8.01-271.1.

CONCLUSION

The Court has considered adduced documentary and testimonial evidence, the credibility of the witnesses, the written legal arguments of Plaintiff, and legal arguments of Defendants, Phillip B. Leiser and Karen A. Leiser, in support of their motion for sanctions against counsel for Plaintiff, Mr. Daniel L. Hawes, and Mr. August McCarthy. The Court consequently finds Plaintiff's Complaint was frivolously filed in violation of

Virginia Code § 8.01-271.1, and that the imposition of monetary sanctions against Hawes and McCarthy is just and appropriate.

Pursuant to Virginia Code § 8.01-271.1, the Court thus shall enter an order awarding monetary sanctions to Defendant Phillip B. Leiser in the amount of $40,000.00 plus $697.50 for litigation-related costs, and to Defendant Karen A. Leiser, in the amount of $40,000.00, as against Mr. Daniel L. Hawes and Mr. August McCarthy, for a total of $80,697.50, jointly and severally.

A separate order shall be issued by the Court incorporating the ruling in this letter opinion. After entry of such order, the Plaintiff may circulate and submit its nonsuit order to the undersigned Judge if Plaintiff be so advised.

AND THIS CAUSE CONTINUES.

Sincerely,

[redacted]

David Bernhard
Judge, Fairfax Circuit Court

OPINION LETTER