



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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COUNTY OF FAIRFAX

CITY OF FAIRFAX

April 1, 2019

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Adam T. Kronfeld
Duff & Kronfeld
11320 Random Hills Road, Suite 603
Fairfax, VA 22030

Richard F. McDowell
10500 Sager Avenue, Suite F
Fairfax, VA 22030

Re: Lezlie Day v. Gregory Day, CL 2018-7672

Dear Mr. Kronfeld and Mr. McDowell:

This matter is before the court on Plaintiff's motion for reconsideration of the court's order of March 25, 2019 granting Plaintiff's motion for a nonsuit, but as a second nonsuit, and awarding costs and attorney fees to Defendant. For the reasons that follow, the motion is denied.

Background

Plaintiff filed an action for divorce in 2003, alleging acts which occurred up until the time the action was filed; she nonsuited that action and filed the instant action in 2018. The instant action alleges not only acts which occurred up until the time the 2003 action was filed, but acts which occurred since the 2003 action was filed.

In her motion for reconsideration, Plaintiff does not ask the court to reconsider its ruling that the instant action is a different cause of action; Plaintiff asks the court only to reconsider its ruling that, as to Defendant Gregory Day, this is a second nonsuit, thereby permitting the court to award costs and attorney fees to Defendant.

Analysis

In pertinent part, Code § 8.01-380(B) states:

Only one nonsuit may be taken to a cause of action or against the

same party to the proceeding, as a matter of right, although the court may allow additional nonsuits upon reasonable notice to counsel of record for all defendants (emphasis added).¹

In support of her argument that this is a first nonsuit as to Defendant, Plaintiff contends that the purpose of the emphasized language in Code § 8.01-380(B) is to "provide for circumstances where a party is nonsuited from an ongoing proceeding and subsequently re-joined, rather than circumstances where an entire case or individual claim or cause of action is nonsuited." Plaintiff's Memorandum 2. Plaintiff argues that, otherwise, the phrase "to the proceeding" would be rendered meaningless and would bar a person from bringing a lawsuit against another person who had been a defendant in a nonsuited case on an entirely different cause of action.

Although the court agrees that the phrase "to the proceeding" must be given meaning and that it cannot be construed to bar a person from bringing a lawsuit against another person who had been a defendant in a nonsuited case on an entirely different cause of action, the court disagrees with Plaintiff's construction of the phrase.

The word "proceeding" is not a word of singular meaning, but it has been used by the Supreme Court and in statute to refer to a type or category of case. *E.g.*, *Pure Pres. Church v. Grace of God Pres. Church*, 296 Va. 42, 55 (2018) ("a declaratory judgment proceeding"); *Catjen, LLC v. Hunter Mill West, L.C.*, 295 Va. 625, 633 (2018) ("a confessed judgment under Code § 8.01-433 initiates a proceeding"); *Commonwealth v. Malbon*, 195 Va. 368, 377 ("a proceeding to remove a public officer"); Code § 2.2-3809 ("a proceeding for injunction or mandamus"); and Rule 1:6 ("the prior proceeding"). Extending these usages to other areas would mean that a "proceeding" could be, for example, a divorce proceeding or a defamation proceeding or personal injury proceeding or a breach of contract proceeding.

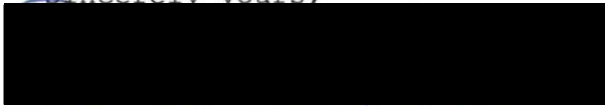
In light of the above construction of the word "proceeding," the "party" to whom reference is made in the phrase "against the same party to the proceeding" is a party in a case where the case was the same type of case as that in which the person was previously a party. Accordingly, where a nonsuit has been granted in a case involving a party to the same type of case as the case in which a subsequent nonsuit is sought, a nonsuit will not be considered a first nonsuit.

In the case at bar, Gregory Day is a party to the same type of case as was previously nonsuited. He is thus "the same party to the proceeding" and, because Plaintiff has previously been granted a nonsuit against him, Plaintiff does not have a right to a first nonsuit against him; Plaintiff is eligible only for a second nonsuit against him. Plaintiff's motion to reconsider is DENIED.

An appropriate order will enter.

¹ The case cited by Plaintiff, *City of Suffolk v. Lummis Gin Company*, 278 Va. 270 (2009) held that "the present action filed by the City was not the same cause of action filed by the City in 1995" 278 Va. at 276. As a result, the Court did not need to address, and did not address, the "against the same party to the proceeding" language. *City of Suffolk*, however, supports this court's finding that the causes of action in the 2003 divorce and the instant divorce are different causes of action.

Sincerely yours,



Richard E. Gardiner
Judge

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

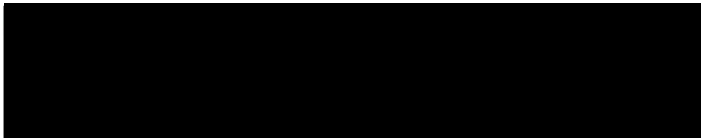
LEZLIE DAY)	
)	
Plaintiff)	
)	
v.)	CL 2018-7672
)	
GREGORY DAY)	
)	
Defendant)	

ORDER

THIS MATTER came before the court on Plaintiffs' motion for reconsideration of the court's order of March 25, 2019 granting Plaintiff's motion for a nonsuit, but as a second nonsuit, and awarding costs and attorney fees to Defendant.

THE COURT, for the reasons set forth in the court's letter opinion of today's date, hereby DENIES Plaintiffs' motion for reconsideration.

ENTERED this 1st day of April, 2019.



Richard E. Gardiner
Judge

**ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR
THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT
PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA**

Copies to:

Adam T. Kronfeld
Counsel for Plaintiff

Richard F. McDowell
Counsel for Defendant