



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

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CITY OF FAIRFAX

January 3, 2024

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RETIRED JUDGES

David J. Gogal
BLANKINGSHIP & KEITH, P.C.
4020 University Drive, Suite 300
Fairfax, VA 22030

John D. McGavin
MCGAVIN, BOYCE, BARDOT, THORSEN & KATZ, P.C.
9990 Fairfax Boulevard, Suite 400
Fairfax, VA 22030

Raighne C. Delaney
BEAN KINNEY & KORMAN, P.C.
2311 Wilson Boulevard, Suite 500
Arlington, VA 22201

Matthew J. MacLean
PILLSBURY WINTHROP SHAW PITTMAN LLP
1200 Seventeenth Street NW
Washington, DC 20036

Re: *Zurich American Insurance Company, et al. v. Hilton Worldwide Holdings, Inc. et al.*, CL 2022-16958

Dear Mr. Gogal, Mr. McGavin, Mr. Delaney, and Mr. MacLean:

This matter is before the court on Plaintiffs' *Motion to Reconsider Denial of Their Motion For Summary Judgment*. For the reasons set forth below, the court DENIES the motion.

ANALYSIS

Plaintiffs' motion asserts that the court's denial of Plaintiffs'

motion for summary judgment "contravenes two prior rulings" by Judge Michael Devine and that the denial is contrary to Virginia law concerning declaratory judgments. The court will address those two contentions in reverse order.

I. Virginia Law On Declaratory Judgments
Does Not Support Plaintiffs

At the outset, the court should restate the basis for its denial of Plaintiffs' motion for summary judgment. It was not simply, as Plaintiffs suggest, that there was another case pending in Nevada between the same parties. Rather, it was that Plaintiffs' action does not seek guidance on future conduct, but rather seeks "to avoid damages for activities that have long since passed" (Tr. 8:12-16) and is thus not an appropriate matter for declaratory judgment.

The court's holding was based upon not only the plain language of Code § 8.01-191,¹ but upon the case law interpreting Article 17.

In *American Nat. Bk. v. Kushner*, 162 Va. 378 (1934), the Court explained that, "[i]n common cases where a right has matured or a *wrong has been suffered*, customary processes of the court, where they are ample and adequate, should be adopted" (162 Va. at 386) (emphasis added), not an action for declaratory judgment. *Liberty Mutual Ins. Co. v. Bishop*, 211 Va. 414 (1970) stated that the intent of the declaratory judgment act is:

to have courts render declaratory judgments which may guide parties in their future conduct in relation to each other, thereby relieving them from the risk of taking undirected action incident to their rights, which action, without direction, would jeopardize their interests. This is with a view rather to avoid litigation than in aid of it.

211 Va. at 421.

In *Prince William Co. v. Hylton Enterprises*, 216 Va. 582 (1976), the Court held:

[W]here claims and rights asserted have fully matured, and *the alleged wrongs have already been suffered*, a declaratory judgment proceeding, which is intended to permit the declaration of rights before they mature, is not an available remedy.

¹ The purpose of Article 17 -- declaratory judgments -- is "to afford relief from the uncertainty and insecurity attendant upon controversies over legal rights, without requiring one of the parties interested so to invade the rights asserted by the other as to entitle him to maintain an ordinary action therefor."

216 Va. at 585 (emphasis added).

Plaintiffs point out that there is no Virginia case where the court "declined to exercise its authority to issue a declaratory judgment either: (1) based on the existence of a competing action in another state; or (2) when doing so would leave a party without a remedy in Virginia, forcing it to litigate in another jurisdiction." *Motion 8*.

While Plaintiffs may be correct, that does not exclude the possibility that a court could decline to exercise its authority to issue a declaratory judgment in those circumstances. Thus, the absence of cases where the court declined to exercise its authority to issue a declaratory judgment in the circumstances outlined by Plaintiffs is not helpful in determining whether this court properly declined to exercise its authority. What are more useful in determining whether this court properly declined to exercise its authority are the cases where the Virginia Supreme Court has held that the exercise of the authority was proper.

Starting with *Criterion Ins. Co. v. Grange Mutual*, 210 Va. 446 (1970), where Criterion Insurance Company filed a declaratory judgment action which "request[ed] the court to declare whether it or Grange [Mutual Casualty Company] is obligated to defend the actions [for damages for injuries in an automobile accident] pending against" Grange's insureds (210 Va. at 448), the Court held:

When a justiciable controversy exists between two insurance companies as to their obligations under the terms of their respective policies, a declaratory judgment proceeding may be maintained by one of the companies against the other.

210 Va. at 449.

In the case at bar, there is no issue as to whether Plaintiffs must defend actions for damages for injuries to a third party caused by Hilton (its insured); it is Hilton itself which is claiming injury by virtue of breach of contract.

Reisen v. Aetna Life and Cas. Co., 225 Va. 327 (1983), is similar. In *Reisen*, Goins drove his truck into Reisen. Goins' insurance carrier, Aetna, "notified Reisen and Goins that the loss was not covered by the terms of its policy because Goins' act was intentional; it refused to provide Goins a defense at that time." 225 Va. at 330. After Reisen sued Goins, Aetna filed a declaratory judgment action seeking a determination whether its policy "excluded coverage for bodily injury caused by Goins' intentionally tortious conduct" *Id.* In holding that a declaratory judgment action was appropriate, the Court explained that:

Aetna had a duty to defend Goins, but it owed no duty, unless coverage existed, to negotiate a settlement with Reisen within

policy limits, thus eliminating Goins' exposure, and its own, to an excess judgment. Accordingly, advance determination of the coverage question served to remove the clouds from the legal relations of the parties.

Id. at 327.

In the case at bar, there is no issue of whether Plaintiffs owed any duty to Hilton (Plaintiffs' insured) because Hilton is being sued by a third party; thus, unlike in *Reisen*, there is no need for an "advance determination" of the coverage question.

Asplundh Tree Expert Co. v. Pacific Employers Ins., 269 Va. 399 (2005), presented essentially the same circumstances as *Criterion Ins. Co.* and *Reisen*:

Pacific Employers, pursuant to Code § 8.01-184, filed a bill of complaint in the Circuit Court of the City of Roanoke seeking a declaratory judgment that it was not liable on its policy of insurance with Asplundh for Wimmer's claims in the West Virginia civil case.

269 Va. at 404.

The Court held:

At the time the declaratory judgment action was filed by Pacific Employers in this case, the procedural posture of that action was indistinguishable from the procedural posture of the declaratory judgment action in *Reisen*.

269 Va. at 408.

Asplundh Tree Expert Co. is, therefore, inapposite to the case at bar for the same reason as *Reisen*.

In sum, Virginia law supports the court's decision to decline to exercise its authority to issue a declaratory judgment in the circumstances present in the case at bar.

II. Declining To Issue A Declaratory Judgment Is Not Inconsistent With Judge Devine's Prior Rulings

Judge Devine's prior rulings were made on July 28, 2023 and September 28, 2023. The issue before Judge Devine on July 28, 2023 was whether to dismiss or, in the alternative, stay the case. On September 28, 2023, the issue was whether Judge Devine should grant injunctive relief against Defendant's application in Nevada to enjoin Plaintiffs from further participation in this action. The question of whether a declaratory judgment was appropriate was not before Judge Devine on either occasion.

Turning first to Judge Devine's ruling on July 28, 2023 concerning Defendant's motion to dismiss or, in the alternative, to stay the action. At the time of Judge Devine's ruling, Hilton had filed (on March 31, 2023) only its motion to dismiss or, in the alternative, stay the proceedings as it was entitled to do pursuant to Rule 3:8(a)²; no answer had been filed. At the hearing on July 28, 2023, Judge Devine noted that he was not sure that he had the "authority to dismiss" the action. *Tr.* 30.³ Thus, the parties "focus[ed] on the stay request" *Id.* Judge Devine denied the motion to dismiss; as to the alternative motion to stay, Judge Devine denied the motion "without prejudice to subsequent raising after the parties are -- are at issue" (*Tr.* 48), having previously noted that the motion for stay "should not be granted at this time. Perhaps at some point where we have two cases that are at issue and ready for discovery." *Tr.* 47. Judge Devine had also commented that the case is:

one of these rare cases where I think having parallel litigation actually will promote judicial efficiency, at least for a period of time. At such point that perhaps if this case were to get past the pleading stage and where they're at issue, then it becomes a question of who can most effectively and conveniently and efficiently resolve the disputes that may survive at that point

Tr. at 48.

Subsequent to the denial of the motion to dismiss and the alternative motion to stay, Defendant filed its answer on September 1, 2023⁴ -- putting the parties at issue -- and Plaintiffs filed their motion

² "Pleadings in response under this Rule -- other than an answer -- are limited to the following, and are deemed responsive only to the specific count or counts addressed therein: a demurrer, plea, motion to dismiss, motion for a bill of particulars, motion craving over, and a written motion asserting any preliminary defense permitted under Code § 8.01-276."

³ The court notes that, in Defendant's *Brief In Support of Motion to Dismiss Or, In the Alternative, Stay*, Defendant did not cite a single case supporting its argument for dismissal; all the cases cited related to requests for a stay. Further, the court notes that, where "'no evidence [has been] taken with regard to [a] motion to dismiss[,] we treat the factual allegations in the petition as we do on review of a demurrer.'" *Virginia Marine Res. Comm'n v. Clark*, 281 Va. 679, 686, 709 S.E.2d 150, 154 (2011). We accept 'the truth of all material facts that are . . . expressly alleged, impliedly alleged, and those that may be fairly and justly inferred from the facts alleged.' *Harris v. Kreutzer*, 271 Va. 188, 195-96, 624 S.E.2d 24, 28 (2006)." *Bragg v. Board of Supervisors*, 295 Va. 416, 423 (2018). Accordingly, the below-signed agrees with Judge Devine that he could not grant the motion to dismiss.

⁴ Defendant also filed a demurrer/plea in bar/motion to dismiss on September 1, 2023. The demurrer was overruled as untimely on November 17, 2023.

for summary judgment on September 6, 2023.⁵

With respect to Plaintiffs' motion for injunctive relief against Defendant's application in Nevada to enjoin Plaintiffs from further participation in this action (heard on September 28, 2023), Judge Devine declined to grant the relief sought as it was an incursion on the sovereignty of the State of Nevada. He explained that, "[i]f a judge in Nevada issues an injunction against lawyers in this case from litigating this case here, then I will meet that with a similar injunction to preclude anyone from enforcing that." Tr. 25.

In contrast to Judge Devine's rulings, the below-signed, in declining to exercise the court's authority to issue a declaratory judgment, ruled only on whether a declaratory judgment was appropriate where Plaintiffs' action does not seek guidance on future conduct, but rather seeks "to avoid damages for activities that have long since passed." Tr. 8.

Plaintiff errs in contending that Judge Devine "ruled that parallel litigation was not only allowed and proper" *Plaintiff's Memorandum* 5. As discussed, *supra*, Judge Devine's ruling was more limited; he denied the alternative motion to stay at that time "without prejudice to subsequent raising after the parties are -- are at issue." Tr. 48.

Plaintiff also errs in asserting that Judge Devine "twice ruled that this litigation should proceed on a parallel track to the Nevada action to a declaratory judgment that would resolve or substantially narrow the parties' dispute" *Plaintiff's Memorandum* 6. In fact, the sole issue before Judge Devine on July 28, 2023 was whether to dismiss or, in the alternative, stay the case -- which was not then at issue -- and Judge Devine denied the motions. In denying the motions, he said nothing whatever concerning "proceed[ing] on a parallel track" to "a declaratory judgment that would resolve or substantially narrow the parties' dispute"

Similarly with regard to the ruling of September 28, 2023; the only issue before Judge Devine was whether he should grant injunctive relief against Defendant's application in Nevada to enjoin Plaintiffs from further participation in this action; again, Judge Devine said nothing whatever concerning "proceed[ing] on a parallel track" to "a declaratory judgment that would resolve or substantially narrow the parties' dispute"

Plaintiffs' *Motion to Reconsider Denial of Their Motion For Summary Judgment* is DENIED.

⁵ Plaintiffs filed their emergency motion for injunctive relief on September 26, 2023.

An appropriate order will enter.

Sincerely yours,

A large black rectangular redaction box covering the signature of Richard E. Gardiner.

Richard E. Gardiner
Judge

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

ZURICH AMERICAN
INSURANCE COMPANY, *et al.*

Plaintiffs

v.

CL 2022-16958

HILTON WORLDWIDE
HOLDINGS, INC., et al.

Defendants

ORDER

THIS MATTER came before the court on Plaintiffs' *Motion to Reconsider Denial of Their Motion For Summary Judgment*.

THE COURT, having considered the written arguments of the parties, hereby DENIES Plaintiffs' *Motion* for the reasons set forth in the letter opinion of today's date.

ENTERED this 3rd day of January, 2024.

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:

David J. Gogal
Counsel for Plaintiff Zurich American Insurance Company

John D. McGavin
Counsel for Plaintiff Liberty Mutual Fire Insurance Company

Raighne C. Delaney
Counsel for Lexington Insurance Company

Matthew J. MacLean
Counsel for Defendant Hilton Worldwide Holdings, Inc.