IN THE
SUPREME COURT OF VIRGINIA

Record No. 140983

MITCHELL KAMBIS, JOHN ROLFE REALTY, and ELEGANT HOMES OF VIRGINIA, INC.,

Appellants,

v.

APRIL CONSIDINE, PATRICIA G. WOLFE, AND VILLA DESTE, LLC,

Appellees.

BRIEF OF APPELLEES

John K. Burke, Jr. (VSB No. 16798)
SETLIFF & HOLLAND, P.C.
4940 Dominion Boulevard
Glen Allen, Virginia 23060
Telephone: (804) 377-1263
Facsimile: (804) 377-1280
jburke@setliffholland.com

Counsel for Appellees April Considine, Patricia G. Wolfe, and Villa Deste, LLC

SCV: Submitted on 07-06-2015 17:21:58 EDT for filing on 07-06-2015

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   A. Because this Court did not grant an appeal with respect to the Kambis Parties' assignments of error relating to the real property owned by Villa Deste and Considine, the issue presented by the assignment of cross-error is moot, and this case should be remanded to the Circuit Court with instruction from this Court to enter an order to be recorded in the land records of the clerk's office vacating the Order of February 18, 2014 and declaring that the Memorandum of Lis Pendens filed by the Kambis Parties in October, 2009 is vacated and is null and void……..……32

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PRELIMINARY STATEMENT

The Circuit Court did not abuse its discretion in imposing sanctions pursuant to Va. Code § 8.01-271.1 against Mitchell Kambis ("Kambis") for filing pleadings, motions, and other papers, and making oral motions, that were interposed for the improper purpose of harassing and intimidating the defendants and which caused unnecessary delay and needless increase in the cost of the litigation.

Furthermore, the Assignment of Cross-Error is now moot, because this Court did not grant an appeal with respect to any assignment of error relating to the Circuit Court's dismissal of claims which even arguably involved the title to real estate, and therefore April Considine and Villa Deste, LLC request this Court to enter an Order vacating and releasing the Memorandum of Lis Pendens filed by Kambis and the corporate plaintiffs on October 19, 2009, or, in the alternative, to remand that portion of the case to the Circuit Court to enter such an Order.

STATEMENT OF THE CASE

Considine and Villa Deste submit that the entire history of this litigation is relevant to the issue of whether the Circuit Court abused its discretion in awarding sanctions pursuant to Va. Code §8.01-

271.1. As this Court stated in a recent case involving an award of sanctions under Va. Code § 8.01-271.1, "The relatively tortious path of complaints, demurrers, motions, amended complaints, and other pleadings is recited here to illustrate why and how expenses and legal fees ultimately accumulated." *N. Va. Real Estate, Inc. v. Martins*, 283 Va. 86, 94, 720 S.E.2d 121, 124 (2012), at footnote 1.

A. THE COMPLAINT, THE AMENDED COMPLAINT AND THE SECOND AMENDED COMPLAINT.

On October 13, 2009, Kambis, an experienced real estate developer and salesperson, and two entities of which Kambis is the principal, Elegant Homes of Virginia, Inc. ("Elegant Homes") and John Rolfe Realty (a nonexistent entity), (collectively referred to as "the Kambis Parties") filed a Complaint seeking $2,458,502 in damages plus nonmonetary relief against April Considine ("Considine"), with whom Kambis formerly had a romantic and business relationship; Considine's elderly mother, Patricia G. Wolfe ("Wolfe"), whose main sin seems to have been that she lent Kambis and Considine over $2,000,000 for their real estate venture, and lent another $160,000 to Kambis personally; and Villa Deste, LLC ("the Company"), a limited liability company formed by Kambis and Considine, from which Kambis withdrew as a member on December 30, 2005 in return for

valuable consideration. (Considine, Wolfe, and the Company are referred to collectively as "the Considine Parties.")

Despite Kambis's allegations in the Complaint that the Company was the owner of the real estate that is the subject of his claims (Complaint ¶ 10, 37), and that he withdrew from the Company on December 30, 2005 (Complaint ¶ 21, 24), Kambis claimed that he was entitled to be compensated for an alleged interest in the Company's real estate, and in addition he sought damages for, *inter alia*, alleged breaches of written and oral contracts, breaches of Considine's duties as the manager of the Company, fraud, conspiracy, unjust enrichment, defamation, battery, and intentional infliction of emotional distress.

Most of the seventeen counts alleged by plaintiffs in the original Complaint failed to state a valid cause of action and failed to state facts upon which the relief demanded could be granted. A number of the claims were barred by the applicable statutes of limitations, and many failed to state a valid cause of action because the Kambis Parties and their former counsel ignored fundamental principles of law that members of a limited liability company have no ownership interest in the assets of a limited liability company, *e.g., Jordan v.*

Commonwealth, 36 Va. App. 270, 274, 549 S.E. 2d 621, 623 (2001), and there is no right under Virginia law for a member or former member of a limited liability company to sue another member/manager of the limited liability company for alleged breach of duties as a manager. That cause of action belongs solely to the limited liability company. *Remora Investments, L.L.C. v. Orr*, 277 Va. 316, 673 S.E. 2d 845 (2009).

The Considine Parties filed a Demurrer and a Special Plea of the Statute of Limitations in response to the original Complaint. After establishing a briefing schedule and a hearing date for the defendants' Demurrer to the original Complaint, the Kambis Parties, realizing the deficiencies in the Complaint, sought and obtained leave to file an Amended Complaint, which was attached to their Motion.[1] The Kambis Parties then filed what they termed a "Second Amended Complaint" ("SAC"), in which they sought to avoid dismissal by making allegations that were different, and in some cases, completely

[1] Contrary to the statement at the bottom of page 2 of the Kambis Parties' brief, the first hearing in the Circuit Court was held on May 11, 2012 on Kambis's Motion for Leave to File the Amended Complaint, which the defendants objected to on the grounds that the Kambis Parties were acting in bad faith and that the amendment would be futile. At the May 11, 2012 hearing, counsel for the parties argued regarding the futility of the proposed Amended Complaint, so the Considine Parites disagree with the statement at the top of page 2 of the Kambis Parties' brief that "the Second Amended Complaint was the first 'Complaint' where sufficiency was argued before the trial court on demurrer or otherwise."

contradictory, vis-à-vis those in the original Complaint. (App. 1-111.) Even with the changes, however, most of the claims of the SAC were deficient as a matter of law. In the SAC, plaintiffs sought damages of approximately $4 million plus nonmonetary relief.

The most egregious of the amendments was to simply eliminate the word "verbal" when describing certain alleged contracts, and, incredibly, to describe them as "written," in an effort to avoid dismissal because of the statute of frauds, Va. Code § 11-2, and the three-year statute of limitations applicable to claims for breach of an oral contract, Va. Code § 8.01-246(4). Compare Counts V and VI of the Complaint with Counts VI and VII of the SAC (App. 21-24).

In another effort to avoid dismissal, plaintiffs attempted to convert several counts in which Kambis sought money damages for himself from Considine for alleged breaches of her duties as a member/manager of the Company (Counts XI, XIII and IV of the Complaint) into purported derivative claims on behalf of the Company (Counts XII, XV and XVI of the SAC, App. 30,), but instead of seeking relief on behalf of the Company (the purpose of a derivative suit), the only relief sought in such counts of the SAC were damages to plaintiff Kambis, demonstrating that he could not fairly and adequately

represent the Company in a derivative suit, which is one of the basic requirements when filing derivative claims. Va. Code § 13.1-1042.

Despite plaintiffs' contorted efforts, most of the *nineteen* counts contained in the SAC still failed to state valid causes of action and failed to state facts upon which the relief demanded can be granted.

In addition, plaintiffs went to fantastic lengths to avoid the bar of the applicable statute of limitations by, among other allegations, claiming that the limitations periods were tolled because plaintiff Kambis was suffering from "post-traumatic stress disorder" (App. 15, 20, 25, 33, 41, 42), and that because of alleged fraud by Considine, Kambis did not realize he had various causes of action until November, 2011 (App. 18, 27, 35, 37), *even though he previously filed claims in the original Complaint based on such causes of action in October, 2009.* In an effort to avoid the bar of the applicable statutes of limitations, the Kambis Parties also alleged in the SAC that new oral promises were made by Considine, (App. 22, 24, 28, 29), despite Va. Code § 8.01-229(G), which requires such new promises to be in writing.

Ultimately, the Circuit Court rejected Kambis's efforts to avoid dismissal of most of the claims pursuant to the Demurrer and the

applicable statutes of limitations. After a hearing on the Demurrer to the Second Amended Complaint and the Special Plea of the Statute of Limitations, the Circuit Court dismissed Counts II[2], III, IV, VI, VIII, IX, X, XII, XIII, XIV, XV, XVI, XVIII, XIX (to the extent that it was based on events occurring prior to October 13, 2007), and XX (with leave to file an amended XX if plaintiff Kambis so chose). See the transcript of the Circuit Court's rulings from the bench (App.152-178) and the Court's Order dated October 18, 2012. (App. 147-151.)

The Circuit Court also entered a second Order on October 18, 2013 vacating a Memorandum of Lis Pendens which the Kambis Parties had recorded in the land records of the Clerk's office in conjunction with their filing of the lawsuit, and which affected the title to eight lots owned by Villa Deste and Lot 2 and the home on it owned by Considine. This Order also provided that it was to be recorded in the land records of the Clerk's office.

Defendants incurred reasonable attorneys' fees and costs of at least $116,809.26 defending against plaintiffs' spurious claims described above. (App. 355.)

[2] There was no Count I.

Defendants' legal fees were further increased by $5,377.97 having to respond to two Motions for Reconsideration plaintiffs filed on or about October 5, 2012 and August 22, 2013 and which the Court also denied. (App. 362-363.)

B. THE PREMATURE APPEAL TO THIS COURT.

The Kambis Parties improperly filed an appeal to this Court from the Circuit Court's non-appealable interlocutory order granting the Demurrer and Special Plea of the Statute of Limitations to portions of the SAC (Record No. 130141), causing defendants to needlessly incur substantial legal fees.

After defendants had incurred at least $12,406.23 in legal fees and expenses filing a Motion to Dismiss Petition for Appeal and a Brief in Opposition in this Court (Record No. 130141), this Court dismissed plaintiffs' improper appeal because the Order appealed from was not a final, appealable Order. (See this Court's Order entered March 8, 2013 in Record No. 130141.)

C. THE THIRD AMENDED COMPLAINT.

By leave of Court, and while the Kambis Parties were pursuing their premature appeal, they filed a Third Amended Complaint ("TAC") in the Circuit Court on or about March 5, 2013. (App. 182.)

The TAC contained seven counts. Count II was a fraud count by Kambis against Considine which was virtually the same as Count V of the SAC. Counts III and IV were claims on behalf of John Rolfe Realty for $22,500 for breach of contract and unjust enrichment that were virtually the same as Counts VII and XI of the SAC. Count V was a claim by Elegant Homes against Villa Deste for "in excess of $250,000" in expenses allegedly incurred in connection with the home on Lot 2. Kambis's claims in Counts VI, VII, and VIII of the TAC were virtually identical to Counts XVII, XIX, and XX of the SAC, for replevin, battery, and intentional infliction of emotional distress, respectively.

The case had been scheduled to be tried on March 11 through 15, 2013, but the trial date was continued until September 23 through 27, 2013.

Although the cause of action for replevin had been abolished by the General Assembly in 1977, Va. Code §8.01-218, Kambis resisted Considine's efforts to have Count VI of the TAC dismissed pursuant to Demurrer, but by Order entered June 27, 2013, the Circuit Court granted Considine's Demurrer to Count VI for replevin. (App. 248.)

In Count II of the TAC, Kambis alleged that Considine intentionally misrepresented that she intended to maintain a long-term business relationship with Kambis (App. 187, ¶ 28), that "Kambis would retain 50% ownership assets of Villa Deste, LLC" (App. 189, ¶ 33), that "Kambis relied upon Considine's statements affirming his ownership interests in Villa Deste Properties and continued to work to increase the value of the assets of Villa Deste, LLC" (App. 189, ¶ 36), and that Kambis had been damaged by the false representations of Considine. (App. 190, ¶ 40.) On May 7, 2013, Considine filed a Motion for Summary Judgment with respect to Count II, on the grounds that, regardless of other facts, in order to recover for fraud in Virginia, "It is essential that the defrauded party demonstrates the right to reasonably rely upon the misrepresentation," *E.g., Metrocall of Delaware v. Continental Cellular Corp.*, 246 Va. 365, 374, 437 S.E.2d 189, 194 (1993), and that, as a matter of law, there can be no reasonable reliance on an alleged misrepresentation where the alleged misrepresentation contradicts the plain language of a written contract. *See Grubb & Ellis Co. v. Potomac Med. Bldg.*, LLC, 2009 U.S.Dist. LEXIS 93471 (E.D.Va. 2009); *Foremost Guaranty Corp. v Meritor Sav. Bank*, 910

F.2d 118, 126 (4th Cir. 1990) ("there [can] be no reasonable reliance in the face of plainly contradictory contractual language."); *Ostolaza-Diaz v. Countrywide Bank, N.A.*, 360 Fed. Appx. 504 (4th Cir. 2010). See Defendants' Memorandum and Reply Memorandum filed in support of the Motion for Summary Judgment with respect to Count II of the TAC filed on May 7 and June 25, 2013. Because Kambis's allegations were plainly contradicted by the Assignment of Membership Interest (App. 48), in which Kambis, for valuable consideration conveyed all of his interests in the Company, to Considine, "free and clear of all liens, pledges, encumbrances, or security interests of any kind," Kambis could not prove reasonable reliance on the alleged misrepresentations that he would continue to have an interest in Villa Deste, LLC. However, the Circuit Court denied the Motion for Summary Judgment, on the ground that "There are potentially material significant facts that would need to be determined before the Motion for Summary Judgment could be granted." (Transcript of June 27, 2013 hearing, p. 108.)[3]

[3] The Circuit Court had earlier denied a Motion for Summary Judgment to Count V of the SAC, which was virtually identical to Count II of the TAC.

D. KAMBIS'S FAILURE TO PAY HIS LAW FIRM AND HIS DEMAND THAT IT PROVIDE ADDITIONAL PERSONNEL TO PRESENT HIS CASE DESPITE HIS FAILURE TO PAY RESULTS IN THE LAW FIRM'S WITHDRAWAL FROM THE CASE.

Because Kambis refused to pay his law firm the significant fees that he owed it, while at the same time demanding that the law firm commit additional personnel and resources to his case (Transcript of hearing on September 11, 2013, pp. 164-167), after a series of motions by the law firm and hearings which stretched from June 12, 2013 to September 11, 2013, the Circuit Court allowed the law firm to withdraw as counsel of record for Kambis by Order entered on September 11, 2013.

E. THE TRIAL SCHEDULED FOR SEPTEMBER 23, 2013.

After a hearing on September 12, 2013, the Circuit Court denied Kambis's Motion to Continue the trial scheduled for September 23, 2013 with respect to his claims against Considine for fraud, battery and intentional infliction of emotional distress (Counts II, VII and VIII of the TAC), because the original trial had been scheduled for March 11, 2013, at the request of the Kambis Parties and much later than the Considine Parties wanted it set, the trial date had subsequently been postponed due to the Kambis Parties

premature appeal, and because the Circuit Court found that Kambis had delayed in addressing his issues with his former law firm (including his nonpayment of substantial fees) and had created problems by demanding that it provide additional personnel to work on his case while at the same time refusing to pay it. (Transcript of hearing on September 12, 2013, p. 51.) However, because Kambis could not represent the corporate plaintiffs on their claims, the claims of Elegant Homes and the nonexistent John Rolfe Realty, which were contained in Counts III, IV, and V of the TAC, was continued until March 24-26, 2014. Kambis's claims against Considine for fraud, battery, and intentional infliction of emotional distress (Counts II, VII, and VIII of the TAC) were the only Counts to be tried on September 23, 2013. (See Order entered on January 29, 2014, App. 329.)

On September 20, 2013, Kambis, *pro se,* pursuant to Va. Code § 8.01-380, filed a Motion to Nonsuit the claims asserted by him as an individual and scheduled to be tried beginning September 23, 2013. (App. 254-255.)[4]

[4] Although Kambis stated in the Certificate of Service on the Motion for Nonsuit that it was filed on September 29, 2013, it was actually filed on September 20, 2013, as shown by the Clerk's stamp at the top of page 254 of the appendix.

On September 23, 2013, when the trial of Kambis's claims against Considine was to begin, Kambis argued in support of his Motion to nonsuit those claims, and such Motion was granted with respect to Counts VII (battery) and VIII (intentional infliction of emotional distress), but was denied with respect to Count II (fraud), because Considine had asserted a counterclaim to Count II which arose out of the same transaction or occurrence as Kambis's claim in Count II, and such counterclaim could not remain pending for independent adjudication by the Court, and defendants did not consent to the nonsuit. Va. Code § 8.01-380(D) does not permit a nonsuit in such a situation. (See Order dated January 29, 2014, App. 332-335.)

After the Circuit Court's denial of his Motion for Nonsuit with respect to Count II, Kambis moved for a continuance of the trial of Count II, which motion was denied. (App. 332-355.) Kambis then advised the Court that he did not believe he could proceed with the trial on Count II, and the Court granted a recess to allow Kambis to consult with an attorney who was in the courtroom regarding his options. At the conclusion of such recess, Kambis advised the Court that he wished to voluntarily dismiss Count II, and counsel for the

Considine Parties stated that they had no objection to such dismissal as long as the dismissal of Count II was with prejudice. The Circuit Court granted plaintiff's motion to voluntarily dismiss Count II, and while the Court recognized that such dismissal may have the effect of dismissing Count II with prejudice, the Court declined to rule at that time whether the dismissal of Court II was with or without prejudice. (App. 332-335.)

F. KAMBIS'S SUBSEQUENT EFFORTS TO AVOID THE DISMISSAL OF COUNT II OF THE TAC.

Kambis subsequently refused to endorse the Order prepared by counsel for the Considine Parties and which accurately reflected the Circuit Court's rulings on September 23, 2013, and even submitted to the Circuit Court a proposed Order which eliminated portions of the Order submitted by counsel for defendants, and which provided, contrary to the Circuit Court's ruling on September 23, 2013, that the dismissal of Count II was "without prejudice." (See Kambis's letter to the court dated December 6, 2013 and the enclosed Order, App. 312-315.[5])

[5] The Order submitted to Kambis for his endorsement by counsel for defendants was the Order eventually entered by the Circuit Court on January 29, 2014, except for the handwritten addition by Judge Higgins. (App. 332-335.)

Because it was clear from *Gilbreath v. Brewster*, 250 Va. 436, 463 S.E.2d 836 (1995), that the effect of the dismissal of Count II by Kambis had the effect of dismissing that count with prejudice, defendants filed a Motion for Entry of Order that the Dismissal of Count II of the Third Amended Complaint was with Prejudice. (App. 339-40.)

Incredibly, Kambis (now represented by new counsel) then filed a pleading in which Kambis sought to withdraw his Motion for dismissal, months after he had successfully avoided the trial of Count II and the Kambis Parties' counterclaim. See the Opposition to Motion for Entry of Order that Dismissal of Count II of the Third Amended Complaint was with Prejudice, filed on or about February 12, 2014. (App. 415.)

After a hearing on February 18, 2014, the Circuit Court ruled that the dismissal of Count II of the TAC pursuant to Kambis's oral Motion to Dismiss made on September 23, 2013, after his Motion for Continuance and Motion for Nonsuit were denied, was a dismissal with prejudice. See Order entered on April 11, 2014 *nunc pro tunc* February 18, 2014. (App. 413-414.)

G. KAMBIS FILES A SECOND MEMORANDUM OF LIS PENDENS ALTHOUGH HE HAS NO BASIS TO DO SO.

On January 15, 2014, plaintiff Kambis improperly filed a Memorandum of Lis Pendens against nine properties owned by defendants, even though Kambis, individually, had no remaining claims against defendants, let alone any claims seeking to establish an interest in the real estate. (See Exhibit A to defendants' Motion to Dismiss Memorandum of Lis Pendens, etc. filed on January 18, 2014.) After a hearing on January 28, 2014 (at which new counsel appeared for the first time on behalf of the Kambis Parties), the Court ordered that Kambis' Memorandum of Mechanic's Lien was null and void and should be released. See Order entered January 28, 2014. Defendants incurred at least $3,964 in fees to have the improperly recorded Memorandum of Lis Pendens dismissed. (App. 363.)

H. THE CIRCUIT COURT AWARDS SANCTIONS AGAINST KAMBIS AND HIS LAW FIRM.

A lengthy hearing on defendants' Motion for Sanctions pursuant to Va. Code §8.01-271.1 against Kambis and his former law firm was held on February 28, 2014. The Considine Parties sought an award of sanctions in the amount of $221,325.23,[6] representing legal fees

[6] Sanctions in the amount of $137,819.61 were sought against Kambis and his law firm, while an additional $83,515.62 was sought only from Kambis, plus the fees incurred in obtaining the sanctions award. See the copies of Setliff &

they had incurred defending against the dismissed claims, plus approximately $20,000 for fees incurred pursuing the sanctions motion.

It was the Considine Parties' position that "[t]hroughout the long history of this litigation, [the Kambis Parties] and their [former] counsel have relentlessly pursued claims for approximately $4,000,000 and strategies that were not warranted by Virginia law, or a good faith extension, modification, or reversal of existing law, and which were made in an attempt to harass and intimidate defendants, including the eighty-three year old Patricia Wolfe, which antics have needlessly increased the costs of this litigation and absorbed large amounts of the Court's time." (App. 351.)

The Circuit Court announced its rulings on the Motion for Sanctions at a hearing on March 24, 2014. The Circuit Court held that plaintiffs' former counsel should pay $64,319.38 for legal fees

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Holland's bills to plaintiffs admitted as Exhibit N at the hearing on February 28, 2014. (App. 480-587.) Some redactions were made for time spent and for which defendants did not seek to recover as sanctions. The entries for which defendants sought sanctions were indicated. "OMS" stands for Original Motion for Sanctions; "A" stands for Appeal; "MR" stands for Motion for Reconsideration; "F" stands for the fraud count alleged in Count II of the TAC; "ML" stands for Memorandum of Lis Pendens, and refers to the Memorandum of Lis Pendens improperly recorded by plaintiff on January 15, 2014; "RP" stands for replevin; "CS" stands for Cynthia Starnes; and "S" stands for sanctions, and relates to the time spent on the sanctions motion.

incurred by the Considine Parties in connection with certain claims, including the purported derivative claims and the clearly premature petition for appeal filed by plaintiffs. (App. 605-608.)[7] In addition, the Circuit Court ruled that Kambis should be sanctioned in the amount of $84,541.61. In announcing its ruling, the Circuit Court explained that it weighed all of the relevant factors, including whether the behavior was sanctionable and, if so, was it significant? (App. 606.) The Circuit Court also made it clear that, with respect to certain of the claims which it had dismissed, it did not believe that the position of the plaintiffs and their counsel was sanctionable under Virginia Code §8.01-271.1. (App. 606-07.)

With respect to whether sanctions should be imposed on Kambis personally, the Circuit Court noted that it "did find a certain level of intent to intimidate Ms. Considine in this particular case, and that Mr. Kambis was aware of the extent of the litigation…." (App. 608.) The Court also stated that it "did find [Kambis] to be responsible for the costs of the trial and going forward" and that "[w]hile the Court understood he didn't have counsel, that was a great deal because of his making." (App. 608-09.)

[7] Former counsel did not appeal the award of sanctions against it.

I. AS PREDICTED BY COUNSEL FOR THE CONSIDINE PARTIES AT THE HEARING ON FEBRUARY 28, 2014, ELEGANT HOMES AND JOHN ROLFE REALTY NONSUITED THE REMAINING CLAIMS WHICH WERE SCHEDULED TO BE TRIED ON MARCH 24-26.

By February 28, 2014, the date of the sanctions hearing, it was readily apparently that the Kambis Parties had no intent to actually try any of the claims, including the claims of John Rolfe Realty and Elegant Homes that were set for trial on March 24–26, 2014, and that Kambis's entire strategy had been to harass and intimidate the Considine Parties into a settlement. During the hearing on February 28, 2014, counsel for the Considine Parties stated as follows:

> And I'm going to stand here today…we're not going to have a trial on March 24th. They're not going to go through with that. This is a shakedown. I hope I'm wrong, because I want to go through with it. We've got defenses. But it's going to get dismissed or something or continued. That's what this case has been, Your Honor…..

Transcript of hearing on February 28, 2014, p. 49-50.

Sure enough, on March 14, 2014, Elegant Homes and John Rolfe Realty filed a Motion for Nonsuit of the claims that were scheduled to be tried on March 24 - 26, 2014 (App. 588-589), which Motion was granted. (App. 595.) Because all the claims asserted by the Kambis Parties had either been dismissed with prejudice or nonsuited pursuant to Va. Code §8.01-380, and the Circuit Court had

ruled on the Motion for Sanctions, a Final Order was entered striking the case from the Circuit Court's docket on March 24, 2014. (App. 597.)

ASSIGNMENT OF CROSS-ERROR

The Circuit Court erred when it entered its Order dated February 18, 2014 vacating a portion of the Order dated October 18, 2012 and reinstating the original Memorandum of Lis Pendens.

Preserved: Defendants' Memorandum in Opposition to Plaintiffs' Motion to Vacate the Portion of the Court's October 18, 2012 Order Dismissing Plaintiffs' Memorandum of Lis Pendens, filed on or about February 15, 2014 (App. 418); Transcript of hearing on February 18, 2014; Order entered February 18, 2014.[8]

QUESTIONS PRESENTED

1. Did the Circuit Court abuse its discretion in awarding sanctions against Kambis in the amount of $84,541.62?

[Assignments of Error Nos. 8 and 9.]

2. **[Assignment of Cross-Error]** Did the Circuit Court err in vacating that portion of its order dated October 18, 2012, which invalidated the Memorandum of Lis Pendens filed by the Kambis

[8] Such Order is not included in the Appendix, but it is attached as Exhibit A to this brief.

parties and reinstating such Memorandum of Lis Pendens, where there was no basis for the plaintiffs to file a Memorandum of Lis Pendens in the first place?

ARGUMENT

1. The Circuit Court did not abuse its discretion in awarding sanctions against Kambis. **(Assignments of Error Nos. 8 and 9)**

Standard of review: In reviewing a trial court's award of sanctions, this Court applies an abuse of discretion standard. *N. Va. Real Estate, Inc. v. Martins, 283 Va. 86, 103, 720 S.E.2d 121, 129 (2012)*. A trial court's award of sanctions is an abuse of discretion if its ruling is based on an erroneous view of the law or a clearly erroneous assessment of the evidence. *Oxenham v. Johnson*, 241 Va. 281, 287, 402 S.E.2d 1, 4 (1991); *Sanchez v. Sanchez*, 1997 Va. App. LEXIS 726, at 6.

The Considine Parties submit that the Circuit Court did not abuse its discretion in awarding sanctions against Kambis, and its finding that Kambis's actions with respect to Count II had been motivated by an improper purpose was not clearly erroneous.

The Circuit Court agreed with defendants that former counsel for Kambis relentlessly pursued certain claims and strategies that were not warranted by Virginia law, or a good faith extension,

modification, or reversal of existing law, and imposed a sanctions award of $64,319.38 against counsel. (App. 603-609.) The Circuit Court also found that Kambis had "a certain level of intent to intimidate Ms. Considine in this particular case, and that Mr. Kambis was aware of the extent of the litigation..." and that he was "responsible for the costs of the trial and going forward. While the Court understood he didn't have counsel, that was a great deal because of his making." (App. 608-609).

Code § 8.01-271.1 provides that the signature of an attorney or party on a "pleading, motion, or other paper" or an oral motion made by an attorney or party is a certification that, to the best of his knowledge, "formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law… and it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Under the last paragraph of the code section, if a pleading, motion (including oral motions), or other paper is signed or made in violation of the statute, the Court "*shall* impose upon the person who signed the paper or made the motion, *a represented party*, or both, an

appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper or making of the motion, including a reasonable attorney's fee." (Emphasis supplied.)

Sanctions are appropriate pursuant to Va. Code §8.01-271.1 when pleadings, motions, or other papers are (1) not well grounded in fact or (2) not warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, or (3) are interposed for any improper purpose, such as to harass or to cause unnecessary delay or needlessly increase the cost of litigation. "The possibility of a sanction can protect litigants from the mental anguish and expense of frivolous assertions of unfounded factual and legal claims and against the assertions of valid claims for improper purposes." *Oxenham*, *id.* at 286, 402 S.E.2d at 3. Although the Circuit Court did not grant Considine's Motion for Summary Judgment with respect to Count II (the fraud count) of the TAC, Considine submits that Virginia law is clear that Kambis could not recover for fraud under Count II on his claim that Considine allegedly misrepresented that he would continue to have a fifty percent

ownership interest in the assets of Villa Deste, LLC, because such representation conflicted with the clear terms of the written Assignment of Membership Interest (App. 48), which clearly provided that, for valuable consideration, including Considine's agreement to indemnify Kambis for his liability on the loans from defendant Patricia Wolfe, Kambis conveyed all of his membership interests in Villa Deste, LLC, to Considine "free and clear of all liens, pledges, encumbrances, or security interests of any kind." *See Grubb & Ellis Co. v. Potomac Med Bldg.*, LLC, 2009 U.S.Dist. LEXIS 93471 (E.D.Va. 2009); *Foremost Guaranty Corp. v Meritor Sav. Bank*, 910 F.2d 118, 126 (4th Cir. 1990) ("there [can] be no reasonable reliance in the face of plainly contradictory contractual language."); *Ostolaza-Diaz v. Countrywide Bank, N.A.*, 360 Fed. Appx. 504 (4th Cir. 2010).

Kambis incorrectly argues on page 12 of his brief that "At no time…did the Considine Parties ever offer any evidence that the fraud claim was not 'well grounded in fact' or not 'warranted by existing law.'" This is not correct, as the Considine Parties argued their Motion for Summary Judgment on Count II of the TAC before the Circuit Court on June 27, 2013 and stressed (as they had in memoranda) that Count II for fraud was insufficient as a matter of law

because the alleged misrepresentations were contradicted by the plain language of the Assignment, and therefore there could be no reasonable reliance on the alleged misrepresentations as a matter of law. (App. 48.) See also the transcript of the hearing on June 27, 2013.

However, even if it is assumed that there was arguably a proper factual and legal basis for the filing of Count II, Kambis's actions relating to it and the litigation in general demonstrated that it was asserted for the improper purposes of intimidating Considine, harassment, and to increase the legal expenses of the Considine Parties.

In *Cohen v. Virginia Electric & Power Co.*, 788 F.2d 247 (4th Cir. 1986), the Fourth Circuit affirmed an award of sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure which is virtually identical to Va. Code § 8.01-271.1, against a plaintiff and his counsel who filed a legally valid motion for an improper purpose. Similarly, in *FDIC. v. Maxxam, Inc.*, 523 F.3d 566, 584 (5th Cir. 2008), the Court of Appeals for the Fifth Circuit stated that "Litigation calculated to harass or increase costs warrants sanctions, the merits of the case notwithstanding."

This case is similar to *N. Va. Real Estate, Inc. v. Martins,* 283 Va. 86, 720 S.E.2d 121 (2012). The plaintiffs in that case, who, at most, had a breach of contract claim for $37,500 in real estate commissions, filed a complaint alleging not only breach of contract but many other claims similar to the counts that were dismissed in this case, and seeking $1 million compensatory damages and $500,000 in punitive damages. The Circuit Court imposed sanctions against plaintiffs and their counsel, which this Court affirmed on appeal. The Circuit Court found that the plaintiff's claims were baseless and "were filed out of a vindictive and malevolent desire to injure and intimidate a business competitor." *Id*. at 99, 720 S.E.2d at 127. In its ruling, the Circuit Court stated as follows:

> Standing alone, the Court might conclude that any of these claims were merely a mistake or an oversight by counsel, and might warrant only a mild sanction. However, the combination of so many frivolous claims, supported by such wild speculation, so virulently prosecuted even after any legitimate prospect of success had vanished, convinces the Court that the claims were not an oversight or mistake. The Court is of the firm conviction that they were filed out of vindictive and malevolent desire to injure and intimidate a business competitor.

Id. at 106-107, 720 S.E.2d at 131.

Included in the sanctions motion against Kambis was a request for sanctions of $79,359.08 for his shenanigans with respect to the

fraud count (Count II) of the TAC. Kambis prosecuted this claim, *pro se*, subsequent to the withdrawal of his original counsel of record and prior to retaining his current counsel. Then, on September 20, 2013, he filed a Motion for Nonsuit, which was denied when the parties appeared before the Court on the first day of the scheduled trial on the fraud claim of the TAC (September 23, 2013), because the Considine Parties had asserted a counterclaim against Kambis which grew out of the same occurrence as the fraud count and which could not be adjudicated independently. Va. Code § 8.01-380(D). (9/23/14 Tr. at 12-13, App. 267-268.)

After his motion for nonsuit was denied, Kambis made a motion to continue the trial of the fraud count, which was also denied. (App. 296-297.) After discussing his options with a local attorney who was in court, Kambis moved to voluntarily dismiss the fraud count. (App. 299.) Defendants objected to such dismissal unless it was with prejudice. The Circuit Court granted Kambis's motion to dismiss the fraud count, and explained that she was not ruling at that time whether the dismissal was with or without prejudice (while recognizing that the dismissal may well have had the effect of dismissing Count II with prejudice). (App. 54.)

Kambis subsequently refused to endorse the order prepared by counsel for defendants and which accurately reflected the Court's rulings, and even submitted to the Court a proposed order which eliminated portions of the order submitted by counsel for defendants, and incorrectly provided that the dismissal was "without prejudice." (See Kambis's letter to the Court dated December 6, 2013 and the enclosed order. App. 311-315.) Even worse, new counsel for Kambis subsequently filed a pleading in which Kambis sought to withdraw his motion for dismissal, months after he had successfully avoided the trial of Count II and defendants' Counterclaim based on Count II. See the Opposition to Motion for Entry of Order that Dismissal of Count II of the Third Amended Complaint was with Prejudice, filed on or about February 12, 2014. (App. 415.) After a hearing on February 18, 2014, the Circuit Court ruled that the dismissal of the fraud count in the TAC was with prejudice. See the Order entered April 11, 2014, *nunc pro tunc* February 18, 2014. (App. 413.)

Kambis's actions throughout the history of this litigation, including but not limited to his failure to pay his counsel, and his failure to go forward on the claims that were not dismissed and which

were scheduled for trial on March 24-26, 2014, after he had retained new counsel, demonstrate his lack of intent to actually try any of his claims, including the fraud claim in Count II based on Considine's alleged misrepresentations which were contradicted by the plain language of the Assignment of Membership Interest that Kambis signed. Rather, as the Circuit Court found, he was trying to intimidate and harass Considine. Furthermore, Kambis's oral motion for dismissal on September 23, after defendants had incurred tens of thousands of dollars defending the bogus fraud claim, his submission on December 6, 2013 of a proposed order which incorrectly provided that the dismissal of Count II was "without prejudice," and the subsequent pleading in which Kambis sought to retract the motion to dismiss Count II, after he had already avoided the September 23 trial and defendants' counterclaim, further illustrate Kambis's continuing pattern of harassing defendants with groundless claims, attempting to unnecessarily delay the litigation, and needlessly increasing the costs of the litigation. All of such actions by Kambis are specifically covered by Va. Code § 8.01-271.1, and the Circuit Court so held. Although Kambis was acting *pro se* after September 11, 2013, he caused that situation by refusing to pay his law firm while at the same

time insisting that it provide even more personnel and resources to prosecute his claims.

Kambis is not inexperienced in litigation. As he testified at the sanctions hearing, he completed at least one year of law school, had been involved in 19-24 cases in the Circuit Courts of Albemarle County, the City of Charlottesville, Henrico County, Goochland County, the City of Williamsburg and James City County, and had "been involved in perhaps a hundred or more disputes in my business." (App. 469-472.)

As shown at the hearing on February 28, 2014, defendants incurred at least $79,358.08 in legal fees and costs in connection with the fraud count of the TAC, and it was clearly appropriate for the Circuit Court to include that amount as sanctions, as well as the additional fees incurred in pursuing the sanctions motion.

Furthermore, on January 15, 2014, Kambis improperly recorded a second Memorandum of Lis Pendens, even though he had no remaining claims against defendants, let alone any claims asserting an interest in the real estate. As shown by the time entries on Exhibit N marked "ML", and introduced at the hearing on February 28, 2014, defendants incurred at least $3,964 in fees in obtaining the dismissal

of the improperly filed Memorandum of Lis Pendens and it was appropriate to award sanctions in that amount as well.

2. The Circuit Court erred in reinstating the Memorandum of Lis Pendens filed by plaintiffs and which the Circuit Court had previously invalidated. (Assignment of Cross-Error No. 1)

A. Because this Court did not grant an appeal with respect to the Kambis Parties' assignments of error relating to the real property owned by Villa Deste and Considine, the issue presented by the Assignment of Cross-Error is moot, and this case should be remanded to the Circuit Court with instruction from this Court to enter an order to be recorded in the land records of the clerk's office vacating the Order of February 18, 2014 and declaring that the Memorandum of Lis Pendens filed by the Kambis Parties on October, 2009 is vacated and is null and void.

In October, 2009, the Kambis Parties recorded a Memorandum of Lis Pendens in deed book 3809, page 225, in conjunction with the filing of the original Complaint. In the Memorandum of Lis Pendens, the Kambis Parties claimed an interest in the eight lots owned by Villa Deste and Lot 2 and the home owned by Considine. Because all the counts of the SAC which were arguably based on Kambis's alleged interest in the real estate were dismissed pursuant to the Circuit Court's October 18, 2012 Order Granting the Demurrer and Special

Plea of the Statute of Limitations, the Circuit Court also entered another Order on October 18, 2012 vacating the Memorandum of Lis Pendens filed in October, 2009.

On or about January 29, 2014, over one year after the entry of the October 18, 2012 Order vacating the Memorandum of Lis Pendens, the Kambis Parties filed a Motion to Vacate and Set Aside Portion of Court's Order Entered October 18, 2012 and/or for a Continuance, in which plaintiffs sought to vacate that portion of the October 18, 2012 Order which nullified the Memorandum of Lis Pendens. (App. 336.) Plaintiffs argued that the Order vacating the Memorandum of Lis Pendens was improperly recorded in the land records of the Circuit Court of Albemarle County, based on the provisions of Va. Code §8.01-269. (App. 336.)

After a hearing on February 18, 2014, the Circuit Court ruled that that portion of the Order entered on October 18, 2012 vacating the Memorandum of Lis Pendens was wrongfully recorded in the land records, and the Court ordered that the provisions of the Order relating to the Memorandum of Lis Pendens were set aside and vacated and that the Memorandum of Lis Pendens recorded on

October 13, 2009, remained in full force and effect until further order of the Court. (See the Order entered February 18, 2014.)[9]

In opposition to the Motion to vacate the Memorandum of Lis Pendens, counsel for Considine and Villa Deste argued that the Memorandum of Lis Pendens was improperly recorded in the first place, because none of the counts in the SAC, which was the operative complaint when the Order vacating the Memorandum of Lis Pendens was entered, sought to establish an interest in title to real property. (App. 377-386, 389-397, 418-421.) Although plaintiffs alleged in the SAC, without any legal basis, that Kambis somehow had an interest in the properties owned by Villa Deste, he did not dispute that title to the undeveloped lots was in Villa Deste, or that title to Lot 2 and the home on it was in Considine's name. Kambis did not request a declaratory judgment that title to the properties be changed, or an injunction prohibiting their sale, or that they be conveyed to him. All that was sought in the SAC with respect to the properties was that Kambis should be paid money damages based on the "net equity" in the properties. Virginia law expressly prohibits the filing of a Memorandum of Lis Pendens "unless the action on

[9] Unfortunately, such Order is not in the appendix, but it is attached as Exhibit A to this brief.

which the lis pendens is based seeks to establish an interest by the filing party in the real property described in the memorandum…." Va. Code §8.01-268(B); *See also Melini v. Jade Dunn Loring Metro, L.L.C.*, 286 F.Supp. 2d 741 (E.D.Va. 2003); *O'Bryan v. O'Bryan*, 28 Va. Cir. 30, 33 (Fairfax 1992).

Because there was no basis in the SAC for the Memorandum of Lis Pendens, even before the counts were dismissed pursuant to the Demurrers and Special Pleas, there was no basis for the Memorandum of Lis Pendens to remain as a blight on the title to the properties pending an appeal, because even in the unlikely event that the dismissal of the Kambis Parties' claims was reversed on appeal, there still would be no basis for the recordation of a memorandum of lis pendens pursuant to Va. Code §8.01-268(B); *See O'Bryan v. O'Bryan*, 28 Va. Cir. 30, 33 (1992).

Although the Circuit Court rejected defendants' arguments and vacated the October 18, 2012 order which released the Memorandum of Lis Pendens pending the Kambis Parties' appeal, this Court did not grant the Kambis Parties an appeal with respect to any of the assignments of error which related to the real estate. Thus, the issue of whether the Circuit Court erred in allowing the Memorandum

of Lis Pendens to remain pending the appeal is now moot. Accordingly, this Court should immediately remand this portion of the case to the Circuit Court with instruction to enter an Order to be recorded in the land records in the Clerk's office of the Circuit Court of Albemarle County vacating the Order of February 18, 2014 and declaring that the Memorandum of Lis Pendens recorded by the Kambis Parties on October 19, 2009 is vacated and is null and void.

B. The Circuit Court erred in reinstating the Memorandum of Lis Pendens.

Standard of review: *De Novo*, for legal error. *E.g. Alston v. Harrell*, 274 Va. 759, 764, 652 S.E.2d 456, 459 (2007).

For the reasons stated above, and argued in the Circuit Court, none of the counts in the SAC sought to establish an interest in title to the real property, and therefore the Memorandum of Lis Pendens was improper to begin with, and so it would be nonsensical to allow the Memorandum of Lis Pendens to remain pending during the appeal by the Kambis Parties. However, that issue is now moot, because this Court did not grant the Kambis Parties an appeal with respect to such claims.

RELIEF REQUESTED

For the reasons stated above, the Considine Parties request this Court to affirm the Circuit Court's award of sanctions against Kambis pursuant to Va. Code § 8.01-271.1.

In addition, and with respect to the Assignment of Cross-Error, the Considine Parties request the Court to enter an Order to be recorded in the land records of the Clerk's office of the Circuit Court of Albemarle County vacating and releasing the Memorandum of Lis Pendens filed by the Kambis Parties on October 19, 2009, or, in the alternative, to remand that portion of the case to the Circuit Court to enter such an Order.

APRIL CONSIDINE,

PATRICIA G. WOLFE,

and

VILLA DESTE, LLC

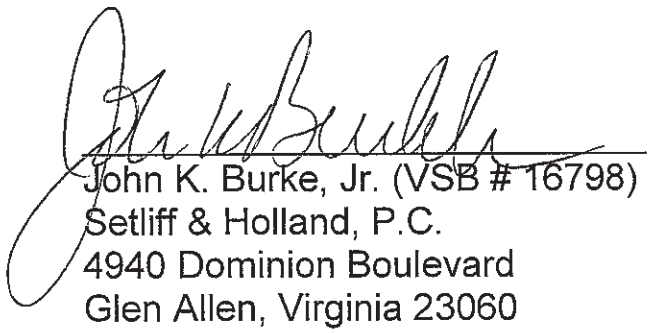
By_____
Of Counsel

John K. Burke, Jr. (VSB #16798)
SETLIFF & HOLLAND, PC
4940 Dominion Boulevard
Richmond, VA 23060
(804) 377-1263 Telephone
(804) 377-1283 Facsimile
jburke@setliffholland.com

Counsel for Appellees

CERTIFICATE

I hereby certify that there has been compliance with Rule 5:26 and that an electronic copy of the Brief of Appellees in Portable Document Format (PDF) has been served on Mark H. Schmidt, Esq., counsel for Appellants, at mschmidt@ayerslaw.com on July 6, 2015.



John K. Burke, Jr. (VSB # 16798)
Setliff & Holland, P.C.
4940 Dominion Boulevard
Glen Allen, Virginia 23060
Telephone: (804) 377-1263
Facsimile: (804) 377-1283
jburke@setliffholland.com

VIRGINIA:

IN THE CIRCUIT COURT OF ALBEMARLE COUNTY

MITCHELL KAMBIS, et al.,

Plaintiffs,

v. Case No. CL09-789

APRIL CONSIDINE, et al.,

Defendants

ORDER

ON THIS DAY came the parties on the plaintiffs' motion to set aside and vacate that portion of the Court's Order entered October 18, 2012, which declared null and void and released the plaintiffs' Memorandum of *Lis Pendens* filed in conjunction with this case, and was argued by counsel.

IT APPEARING to the Court that paragraph 3 of its Order entered October 18, 2012, (attached hereto as Exhibit "A") was wrongfully recorded in the land records of the Clerk's Office of this Court in a manner prohibited by Va. Code § 8.01-269; it is

ORDERED that paragraph 3 of the Court's Order entered October 18, 2012, and recorded in the land records of the Clerk's Office of this Court on December 12, 2012, in Deed Book 4274, page 11 (pertaining to the Memorandum of *Lis Pendens* recorded October 13, 2009 at Deed Book 3809, page 225) is hereby set aside and that paragraph 3 is vacated in its entirety and declared void and without effect, and that the Memorandum of *Lis Pendens* recorded October 13, 2009 at Deed Book 3809, page 225, remains in full force and effect until further order of this Court; it is further ordered that all portion of the October 18, 2012 order remain in full force and effect, except paragraph 3.

EXHIBIT A

It is further ORDERED that the Memorandum of *Lis Pendens* recorded in the land records of the Clerk's Office of this Court on January 15, 2014, at Deed Book 4454, page 156, is hereby set aside and vacated and declared void and without effect.

The Court further **DIRECTS** that this Order be spread in the land records of the Clerk's Office of this Court and indexed in the names of **APRIL CONSIDINE** and **VILLA DESTE, LLC**, as **Grantors**, and **MITCHELL KAMBIS, ELEGANT HOMES OF VIRGINIA, INC.**, and **JOHN ROLFE REALTY**, as **Grantees.**

The Clerk shall mail certified copies of this Order to counsel of record.

ENTERED: 2, 18, 14

Circuit Court Judge

I ASK FOR THIS:

Mark H. Schmidt, Esq. (VSB # 44521)
AYERS & STOLTE, P.C.
710 North Hamilton Street
Richmond, Virginia 23221
Telephone: (804) 358-4731
Facsimile: (804) 864-0895
Email: mschmidt@ayerslaw.com
Attorney for the Plaintiffs

SEEN AND OBJECTED TO FOR THE REASONS STATED IN THE RECORD:

John K. Burke, Esq. (VSB # 16798)
J. Christopher Upton (VSB # 75529)
SETLIFF & HOLLAND, PC
4940 Dominion Boulevard
Richmond, Virginia 23060
Telephone: (804) 377-1263
Facsimile: (804) 377-1283
Attorney for the Defendants