



## NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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March 23, 2020

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Re: *Stuart Gordon v. Arrowhead Apartments Limited Partnership, et al.*  
Case No. CL-2019-12140

Dear Counsel:

This matter came before the Court on November 15, 2019, for argument on Defendant's Demurrer to Plaintiff's Amended Petition. At the conclusion of the hearing, the Court took the matter under advisement. The Court sought supplemental briefing on the question of whether a demand for the inspection of a limited partnership's records pursuant to Va. Code § 50-73.26 must state a proper purpose for the demand or whether the proper purpose can be stated in subsequent litigation.

### BACKGROUND

Plaintiff Stuart Gordon is a limited partner of Defendant Arrowhead Apartments Limited Partnership ("AALP"). Plaintiff propounded a demand to inspect AALP's records on June 10, 2019, seeking information regarding the management of the limited partnership. Am. Pet. ¶¶ 23,

**OPINION LETTER**

26. Plaintiff was worried that mismanagement had occurred and is ongoing based on a steeply discounted buy-out offer and overall depressed levels of profitability. *Id.* ¶ 23. On July 11, 2019, AALP represented through counsel the costs associated with Plaintiff's demand and requested Plaintiff provide thumb drives to compile the information sought. *Id.* ¶ 27-28. Some limited information was eventually propounded in August 2019; however, the extent of the information provided did not amount to the total information sought by Plaintiff.<sup>1</sup> *Id.* ¶¶ 29-30. Plaintiff filed the Amended Petition at issue on September 6, 2019, pleading ten counts that requested the Court compel Defendant to provide the information sought pursuant to Va. Code § 50-73.26, as well as a count for injunctive relief asking for the same. Defendants demurred to this Amended Petition on the grounds that there was no "proper purpose"<sup>2</sup> in the demand letters attached to the Original Petition but omitted from the Amended Petition, making the request unreasonable *per se*. Defs.' Dem. 2-5.

## ARGUMENTS

The parties provided the Court with supplemental briefing regarding the present issue and Defendants' Demurrer generally. On the one hand, Defendants assert that (1) Plaintiff's Amended Petition falsely states that the demand letter stated a proper purpose when it did not; (2) Defendants are unaware of any case law governing the issue of whether such a purpose or reason may be manufactured during litigation after the demand is made; (3) a plain language analysis of Va. Code § 50-73.26 dictates that records are subject to inspection upon a "reasonable demand" to the general partners, and Va. Code § 50-73.8(B) states that records are subject to inspection "at the reasonable request" to the limited partnership; (4) the General Assembly would not have included the language "reasonable demand" or "at the reasonable request" in the Code had it wished to allow a partner to obtain the information upon any request or demand; and (5) that by sending a demand request without stating any purpose at all is *per se* unreasonable. Defs.' Mem. Re. Statutory Requirements 1-2.

On the other hand, Plaintiff contends that the plain language of Va. Code § 50-73.26 contains no requirement for a limited partner seeking information to state any particular reason.

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<sup>1</sup> Plaintiff alleges that while some information was provided, none of the following documentation requested in the Amended Petition was produced: (1) an "accountant copy" of AALP's QuickBooks, (2) copies of federal income tax returns since 2010, (3) a copy of a document with all minutes, resolutions, and other record of Partnership actions, (3) a copy of all signed versions of the Limited Partnership Agreement and any addenda thereto, (4) documents evidencing every transfer in an amount of \$500.00 or greater from the LP to any other entity owned in whole or in part by Defendant-Partner Albert Dwoskin, (5) copies of cancelled checks and wire or electronic transfer confirmations, evidencing a distribution by the LP to any of the Gordons for the period 2010 to the present, (6) a copy of the rent roll from each real property owned by the LP for the end of each quarter from 2010 through the present.

<sup>2</sup> Defendants assert in their supplemental brief that the reasonableness requirement effectively means that Plaintiff must assert a "proper purpose" for demanding the information, and that a demand without any purpose is *per se* unreasonable. Defs.' Mem. Re. Statutory Requirements 2. Further, Plaintiff repeatedly alleges in the Amended Petition that the demand letters stated a proper purpose. Am. Pet. ¶¶ 34, 42, 50, 58, 66, 74, 82, 90, 98, 106. Because this Opinion declines to apply corporate law to the present issue, the Court will consider the arguments as Plaintiff's failure to state a reasonable purpose for seeking the information pursuant to Va. Code § 50-73.26.

Pl.'s Suppl. Br. 1. Plaintiff argues that under Va. Code § 50-73.26(1), a limited partner has an unqualified right to inspect and copy records without demand, and that under § 50-73.26(2) a limited partner may demand further information provided the demand is "reasonable." *Id.* Plaintiff asserts that nowhere does the Code reference a requirement to state a "proper purpose" as Defendants contend. *Id.* Second, Plaintiff argues that even if the proper purpose doctrine of corporate law did apply to partnerships, it merely establishes an evidentiary burden that applies only if a request for information is denied. *Id.* at 2 (citing *Retail Property Investors, Inc. v. Skeens*, 252 Va. 36, 41 (1996)). Third, Plaintiff contends that limited partnership law derives from doctrine governing partnership law, which is distinct from corporate law. Thus, Plaintiff contends that this Court should look to Va. Code § 50-73.101(C)(1), which gives partners in ordinary partnerships an unqualified right to any information without demand or the need for stating a proper purpose. *Id.* at 3. Finally, Plaintiff argues that Defendants waived any right to a proper purpose by their conduct because they initially promised to comply with the demand but later reneged after providing only limited information. *Id.* (citing *RMBS Recovery Holdings I, LLC v. HSBC Bank USA, N.A.*, 297 Va. 327, 342 (2019)).

## ANALYSIS

### *Demurrer Standard*

The Court may sustain a demurrer when a pleading fails to state a cause of action or to state facts upon which the relief demanded can be granted. Va. Code Ann. § 8.01-273. A demurrer admits the truth of all "properly pleaded material facts" and all reasonable inferences are drawn in favor of the plaintiff. *Ward's Equip. v. New Holland N. Am.*, 254 Va. 379, 382 (1997). However, a plaintiff's conclusions of law are not admitted as correct. *Id.* The Court does not decide the merits of a claim when ruling on a demurrer; the Court merely determines whether the Plaintiff's factual allegations are sufficient to state a cause of action. *Barber v. Vista RMS, Inc.*, 272 Va. 319, 327 (2006). A complaint need not state the elements of a cause of action but must "allege sufficient facts to constitute a foundation in law for the judgment sought, and not merely conclusions of law." *Dunn, McCormack & MacPherson v. Connolly*, 281 Va. 553, 558 (2011). Nonetheless, "a court considering a demurrer may ignore a party's factual allegations contradicted by the terms of authentic, unambiguous documents that properly are a part of the pleadings. See *Fun v. Virginia Military Inst.*, 245 Va. 249, 253 (1993). The decision whether to sustain a demurrer is a question of law. *Kaltman v. All Am. Pest Control, Inc.*, 281 Va. 483, 489 (2011).

### *The Plain Language of the Virginia Revised Uniform Limited Partnership Act Requires Plaintiff's Request for Information to State a Reasonable Purpose*

Virginia Code § 50-73.26 of the Virginia Revised Uniform Limited Partnership Act ("VRULPA") governs the present dispute and states the following:

Each limited partner has the right, subject to such reasonable standards as set forth in the partnership agreement, to:

1. Inspect and copy any of the partnership records required to be maintained by § 50-73.8; and
2. Obtain from the general partners from time to time upon reasonable demand (i) true and full information regarding the state of the business and financial condition of the limited partnership, (ii) promptly after becoming available, a copy of the limited partnership's federal, state and local income tax returns for each year, and (iii) other information regarding the affairs of the limited partnership as is just and reasonable.

Va. Code § 50-73.26. Section 50-73.8 states:

- A. Each limited partnership shall keep at its principal office the following:
  1. A current list of the full name and last known business address of each partner, separately identifying the general partners in alphabetical order and the limited partners in alphabetical order;
  2. A copy of the certificate of limited partnership and all certificates of amendment thereto, together with executed copies of any powers of attorney pursuant to which any certificate has been executed;
  3. Copies of the limited partnership's federal, state and local income tax returns and reports, if any, for the three most recent years;
  4. Copies of any then-effective written partnership agreements and of any financial statements of the limited partnership for the three most recent years; and
  5. Unless contained in a written partnership agreement, a writing setting out:
    - a. The amount of cash and a description and statement of the agreed value of the other property or services contributed by each partner and which each partner has agreed to contribute;
    - b. The times at which or events on the happening of which any additional contributions agreed to be made by each partner are to be made;
    - c. Any right of a partner to receive, or of a general partner to make, distributions to a partner which include a return of all or any part of the partner's contribution; and
    - d. Any events upon the happening of which the limited partnership is to be dissolved and its affairs wound up.

B. Records kept under this section are subject to inspection and copying **at the reasonable request**, and at the expense, of any partner during ordinary business hours.

Va. Code 50-73.8 (bold emphasis added). Reading these two provisions together, it is apparent that the information sought pursuant to § 50-73.26(1) must be “at the reasonable request” of a limited partner notwithstanding Plaintiff’s argument that § 50-73.26(1) does not have the same limitation as § 50-73.26(2). *See* Va. Code § 50-73.8(B). Furthermore, based on the plain language of the Code, this Court holds that § 50-73.26 requires Plaintiff to state some reasonable purpose for the demand. This Court agrees with Defendants’ assertion that the General Assembly would not have qualified the language of the above provisions with the words “upon reasonable demand” and “as is just and reasonable” if it intended to allow limited partners to demand information for no reason at all. *See* Va. Code § 50-73.26(1)-(2). The General Assembly’s intent to restrict a limited partner’s right to demand information is further shown in § 50-73.26(2), which only allows limited partners to seek further information that is not otherwise outlined in Va. Code § 50-73.8 “from time to time.” Va. Code § 50-73.26(2).

As for the remaining arguments made by Plaintiff, this Court finds that it will not apply the law of corporations to that of partnership law and thus will not accept the argument that the reasonableness requirement is merely an evidentiary burden. *See Retail Property Investors, Inc. v. Skeens*, 252 Va. 36, 41 (1996) (concluding that a shareholder seeking corporate records pursuant to Code § 13.1-771(C)(2) has the burden of satisfying a trial court that he seeks such records for a proper purpose).

Further, while Plaintiff asserts that the Virginia Uniform Partnership Act (“VUPA”) should be informative of the limited partnership law issue presently before the Court, § 50-73.75 of the VRULPA states that “any case not provided for in this chapter [shall be governed by] the provisions of the Uniform Partnership Act.” Here, § 50-73.26 of the VRULPA governs a limited partner’s right to seek information, so the VUPA does not apply. The VUPA would only apply where there is a conflict between the operating agreement and the Code. This is because the VRULPA does not provide guidance for resolving issues between the operating agreement and the VUPA, which in turn means that the Court must look to the VUPA to resolve such a conflict. *See* Va. Code § 50-73.75. Here, Plaintiff argues in his Memorandum Opposing Defendant’s Demurrer that the operating agreement provides limited partners “the right to a private examination of the books and records of the Partnership” or “the right . . . to an audit of the books and records of the partnership.” Pl.’s Mem. Opp. Defs.’ Dem. 1. Plaintiff further asserts that the VUPA provides that “the relations . . . between partners and the partnership are governed by the partnership agreement.” Va. Code § 50-73.81. While the partnership agreement argument may have controlled as to Plaintiff’s rights to seek information, Plaintiff only raised this argument in his brief, and the Court is bound to the four corners of the Complaint and any documents attached thereto when ruling on a demurrer. *See Flippo v. F & L Land Co.*, 241 Va. 15, 16 (1991). Further, “[a] court in ruling upon a demurrer may [only] consider documents not mentioned in the challenged pleading when the parties so stipulate.” *Id.* (citing *Elder v. Holland*, 208 Va. 15, 18 (1967)). Because Plaintiff did not attach the partnership agreement to the

Amended Petition or plead the language of the agreement, and because there was no stipulation allowing the Court to consider the partnership agreement, the Court cannot rule in Plaintiff's favor based on this argument.

Fourth, the Court does not find that § 50-73.26 creates a right to a reasonable request that may later be waived; the reasonableness language of the Code is a requirement that Plaintiff must meet in order to obtain the information sought.

Finally, this Court recognizes that Plaintiff omitted the original demand letters propounded on AALP and its partners in its Amended Petition, which might support a finding that Plaintiff met the demurrer standard because Plaintiff repeatedly alleges the demand letters stated a "proper purpose." Am. Pet. ¶¶ 34, 42, 50, 58, 66, 74, 82, 90, 98, 106. Still, this Court will not make that finding because the original petition—although not at issue in a demurrer to the Amended Petition—contains the demand letters as attachments, and nowhere in those letters does Plaintiff state any reason for seeking the information beside his statutory right.<sup>3</sup> Although courts do not typically consider documents not attached to the pleadings on demurrer without a stipulation between the parties, *Flippo*, 241 Va. at 16, this Court will not entertain a legal fiction in light of case law that forbids the Court from accepting conclusions and assertions of fact that are contradicted by documents attached to the pleadings. See *Fun v. Virginia Military Inst.*, 245 Va. 249, 253 (1993). To hold otherwise would encourage plaintiffs to seek leave of court to amend their pleadings in a disingenuous way.

### CONCLUSION

For the foregoing reasons, this Court holds that Plaintiff was required to state some reasonable purpose for demanding the information sought. Because Plaintiff failed to do so, Defendants' Demurrer is sustained with leave to amend as to all counts.

Sincerely,



Bruce D. White

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<sup>3</sup> In an effort to give full consideration to what the demand letters stated since the Court considered them when denying Plaintiff's argument about them stating a proper purpose, it is worth noting that the end of the demand letters state, "failure to provide the requested documentation will result in Mr. Gordons pursuing all his rights and remedies pursuant to the LP's Operating Agreement and applicable law." Although this statement references the Operating Agreement, the letter itself only seeks the information pursuant to Plaintiff's statutory rights set forth in the VRULPA and never references the language of the operating agreement.