IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

JUSTICE HOLDINGS LLC,

Plaintiff/Counterclaim Defendant,

v.

Civil Action No. 19-C-481
Judge Robert A. Burnside, Jr.

GLADE SPRINGS VILLAGE PROPERTY OWNERS ASSOCIATION, INC.

Defendant/Counterclaim Plaintiff.

and

GLADE SPRINGS VILLAGE PROPERTY OWNERS ASSOCIATION, INC.,

Plaintiff

v.

Civil Action No. 21-C-129
Judge Robert A. Burnside, Jr.

COOPER LAND DEVELOPMENT, INC., an Arkansas corporation, and JUSTICE HOLDINGS LLC, a West Virginia Limited Liability Company

Defendant.

ORDER DENYING MOTIONS TO DISMISS

On July 29, 2021, the Court convened for a hearing on (i) *Defendant Justice Holdings LLC's Motion to Dismiss the Complaint* (the "Justice Motion to Dismiss"), (ii) *Defendant Cooper Land Development, Inc.'s Motion to Dismiss Plaintiff's Complaint* (the "Cooper Motion to Dismiss"), (collectively, the "Motions to Dismiss"), (iii) *Glade Springs Village Property Owners Association, Inc.'s Response To Defendant Justice Holdings LLC's Motion To Dismiss*

("GSVPOA's JH Response"), and (iv) *Glade Springs Village Property Owners Association, Inc.'s Response To Defendant Cooper Land Development, Inc.'s Motion To Dismiss* ("GSVPOA's CL Response") ("collectively, the "GSVPOA Responses").[1] The *Motions to Dismiss* have been fully briefed and are ripe for decision.

The *Motions to Dismiss* sought dismissal of the Complaint filed by Glade Springs Village Property Owners Association, Inc. ("GSVPOA") under Rules 12(b)(1) and 12(b)(6) of the West Virginia Rules of Civil Procedure, alleging that: (i) the Court lacks subject matter jurisdiction because the claims in the Complaint are not ripe for decision; (ii) that the claims in the Complaint fail to state a claim upon which relief may be granted in that they are barred by the applicable statute of limitations; and (iii) that the claims in the Complaint were barred by the prohibition against claim splitting.

In its *Responses*, GSVPOA argues that (i) the Court has subject matter jurisdiction and the claims in the Complaint are ripe for adjudication because they are based upon concrete, fixed facts and there are no future or contingent events that would impact adjudication of GSVPOA's claims; (ii) that GSVPOA timely filed the Complaint within the applicable statute of limitations because any applicable statute of limitations was tolled under the doctrine of adverse domination until the GSVPOA board of directors was independently elected by the members and assumed office on May 1, 2019; (iii) the claims asserted in the *Complaint* were not prohibited under the doctrine of claim splitting because the subject Working Capital Loan did not arise from the same set of operative facts as the Infrastructure Loan that is being litigated between GSVPOA and Justice Holdings in Civil Action No. 19-C-481 and therefore did not constitute a compulsory counterclaim

[1] The Court also convened on July 29, 2021 for a hearing on *Plaintiff Glade Springs Village Property Owners Association, Inc.'s Rule 42(a) Motion to Consolidate*. That motion has been addressed by separate order entered August 12, 2021.

in that matter.

Standard of Review

> "The requirement of subject matter jurisdiction is met initially if: 1) the court has the general power to grant the type of relief demanded under any circumstances; 2) the pleadings demonstrate that a set of facts may exist which could arguably invoke the court's jurisdiction; and 3) the allegations both with regard to the facts and the applicable law are of sufficient substance to require the court to make, in an adversary proceeding, a reasoned determination of its own jurisdiction."

State ex rel. Barden and Robeson Corp. v. Hill, 208 W.Va. 163, 169 n. 3, 539 S.E.2d 106, 112 n. 3 (2000) (quoting *Eastern Associated Coal Corp. v. Doe*, 159 W.Va. 200, 210, 220 S.E.2d 672, 679 (1975)). It should be noted that if a plaintiff fails to file a response to a motion to dismiss, the trial court must still address the merits of the motion and decide for itself whether jurisdiction exists. *See Chocallo v. I.R.S. Dept. of Treasury*, 145 Fed. Appx. 746, 747-748 (3rd. Cir. 2005) (citing *Stackhouse v. Mazurkiewicz*, 951 F.2d 29, 30 (3rd Cir. 1991)).

"Under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, a party can file a motion requesting dismissal of a claim or counterclaim for 'failure to state a claim upon which relief can be granted.'" *Newton v. Morgantown Mach. & Hydraulics of W. Va., Inc.*, 838 S.E.2d 734, 736, 2019 W. Va. LEXIS 595, *5 (2019) (quoting W. Va. R. Civ. P. 12(b)(6)). A Circuit Court should grant a Rule 12(b)(6) motion to dismiss "only if 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id.* at 737 (quoting Syl. pt. 3, in part, *Chapman v. Kane Transfer Co., Inc.*, 160 W. Va. 530, 236 S.E.2d 207 (1977)). Additionally, "the complaint is construed in the light most favorable to plaintiff, and its allegations are to be taken as true." *Id.* at 737 (quoting *Lodge Distrib. Co., Inc. v. Texaco, Inc.*, 161 W. Va. 603, 605, 245 S.E.2d 157, 158 (1978)).

When reviewing a motion to dismiss under Rule 12(b)(6), a trial court may consider: "(1)

factual allegations in the complaint; (2) documents attached to the complaint as exhibits or incorporated in it by reference; (3) matters of which judicial notice may be taken; and (4) documents that are integral to the complaint." Louis J. Palmer, Jr. & Robin Jean Davis, *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 12(b)[8], at 407 (5th ed. 2017) (citation in footnote omitted) (hereinafter the "*Litigation Handbook*").

Based upon the factual allegations set forth in the Complaint, which must be accepted as true for purposes of a 12(b)(6) motion to dismiss, the *Motions to Dismiss* and the GSVPOA *Responses*, which are incorporated herein by reference, the representations of counsel during the July 29, 2021 hearing, and the transcript of the proceedings of the July 29, 2021 hearing, which is also incorporated herein by reference, the Court makes findings:

Ripeness

"The ripeness doctrine 'seeks to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" *State ex rel. Universal Underwriters Ins. Co. v. Wilson*, 239 W. Va. 338, 345, 801 S.E.2d 216, 223 (2017) (quoting *Paraquad v. St. Louis Housing Auth.*, 259 F.3d 956, 958 (8th Cir. 2001)). "'A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Universal Underwriters*, 239 W. Va. at 346 (quoting *Texas v. United States*, 523 U.S. 296, 300, 118 S. Ct. 1257, 140 L. Ed. 2d 406 (1998)).

> In determining whether a pre-enforcement challenge is ripe, two considerations must be weighed: (a) the fitness of the issues for judicial determination and (b) the hardship to the parties of withholding court consideration. One aspect of the judicial fitness of the issues is the extent to which the legal analysis would benefit from having a concrete factual context. The second aspect of the judicial fitness of the issues is the extent to which the enforcement authority's legal position is subject to change before enforcement. A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is

> required. However, even where an issue presents purely legal questions, the plaintiff must show some hardship in order to establish ripeness.

Litigation Handbook § 12(b)[3][b], at 351 (citing, in the footnotes, *National Park Hospitality Ass'n v. Department of Interior,* 538 U.S. 803, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003); *State ex rel. Rist v. Underwood,* 206 W.Va. 258, 524 S.E.2d 179 (1999) (discussing exceptions to ripeness doctrine); *Ammex, Inc. v. Cox,* 351 F.3d 697 (6th Cir. 2003); *Choice Inc. of Texas v. Greenstein,* 691 F.3d 710 (5th Cir. 2012)).

This Court finds that the allegations in the Complaint are not based upon the outcome of some contingent or future event that has yet to occur. Rather, the claims asserted in GSVPOA's *Complaint* are premised upon concrete facts that have become fixed and are no longer contingent or uncertain. Accordingly, this Court finds that it has subject matter jurisdiction over the claims set forth in GSVPOA's *Complaint* and **DENIES** the *Motions to Dismiss* to the extent the Defendants argue that the claims set forth in GSVPOA's *Complaint* are not ripe for adjudication.

Statute of Limitations

In its *Motion*, CLD argues that the claims set forth in GSVPOA's Complaint are time barred under the applicable statutes of limitations or the doctrine of laches. Specifically, CLD argues that the applicable statutes of limitations began to run more than 10 years ago on October 20, 2010 when CLD sold Glade Springs Village to Justice Holdings and expired prior to the filing of the Complain on April 30, 2021. As noted by GSVPOA in its *Response*, the West Virginia Supreme Court of Appeals established a five step analysis to determine whether a cause of action is time-barred in *Dunn v. Rockwell*, 225 W. Va. 43, 689 S.E.2d 255 (2009):

> First, the court should identify the applicable statute of limitation for each cause of action. Second, the court (or, if material questions of fact exist, the jury) should identify when the requisite elements of the cause of action occurred. Third, the discovery rule should be

> applied to determine when the statute of limitation began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action, as set forth in Syllabus Point 4 of *Gaither v. City Hosp., Inc., supra*. Fourth, if the plaintiff is not entitled to the benefit of the discovery rule, then determine whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action. Whenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action, the statute of limitation is tolled. And fifth, the court or the jury should determine if the statute of limitation period was arrested by some other tolling doctrine. Only the first step is purely a question of law; the resolution of steps two through five will generally involve questions of material fact that will need to be resolved by the trier of fact.

Dunn v. Rockwell, 225 W. Va. at 53, 689 S.E.2d at 265 (2009). GSVPOA's argues that its claims against CLD were tolled during the entire period of declarant control pursuant to the doctrine of adverse domination. *Clark v. Milam*, 192 W. Va. 398, 452 S.E.2d 714 (1994); see *also Clark v. Milam*, 847 F.Supp. 409 (S.D. W. Va. 1994) (applying doctrine of adverse domination to toll state statutes of limitations) and *State ex rel. Ashworth v. State Road Comm'n*, 147 W. Va. 430, 128 S.2d 471 (1962) (where statute of limitations tolled until public official made adverse conduct known).

The doctrine of adverse domination is akin to the discovery rule. *Id.* As such, this Court finds that *Harrison v. Davis*, 197 W. Va. 651, 478 S.E2d 104 (1996) to be instructive. Therein, the Supreme Court of Appeals of West Virginia reaffirmed its prior expression that it is generally inappropriate to apply Rule 12(b)(6) when the defense raises a statute of limitations defense. *Id.*, *citing Richards v. Mileski*, 213 U.S. App. D.C. 220, 662 F.2d 65, 73 (D.C. Cir. 1981) ("There is an inherent problem in using a motion to dismiss for purposes of raising a statute of limitations defense. Although it is true that a complaint sometimes discloses such defects on its face, it is more likely that the plaintiff can raise factual setoffs to such an affirmative defense. The filing of an

answer, raising the statute of limitations, allows both parties to make a record adequate to measure the applicability of such a defense, to the benefit of both the trial court and any reviewing tribunal.").

Dismissal is proper pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syl. Pt. 3, in part, *Chapman v. Kane Transfer Co., Inc.*, 160 W. Va. 530, 236 S.E.2d 207 (1977), *citing Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80, 84 (1957). *See also Sattler v. Bailey*, 184 W. Va. 212, 222, 400 S.E.2d 220, 230 (1990) (holding dismissal of complaint to be improper where allegations in complaint were adequate to state cause of action or basis for tolling applicable statute of limitations). GSVPOA alleged in its Complaint that the Declarant, whether Cooper Land or Justice Holdings, exercised complete dominion and control of the actions of the Declarant-Appointed Board of Directors through April 30, 2019. Complaint, ¶ 30. As such, this Court finds that the allegations in the Complaint are adequate to state a basis for tolling the applicable statutes of limitations. Accordingly, the Court DENIES CLD's *Motion to Dismiss* to the extent CLD argues that GSVPOA's claims in this civil are time-barred.

Claim Splitting

Justice Holdings argues that the claims asserted against it in this matter related to the Working Capital Loan are barred by the doctrine claim splitting and more properly should have been raised in Civil Action No. 19-C-481. "Res judicata seeks to avoid parties being 'twice vexed for one and the same cause.'" *Bison Interests, LLC v. Antero Res. Corp.*, 854 S.E.2d 211, 217-218 (2020) (quoting *Conley v. Spillers*, 171 W. Va. 584 588, 301 S.E.2d 216, 219 (1983) (internal quotation omitted)). "'Res judicata, or its modern term, claim preclusion, prohibits 'splitting' a

claim or cause of action. Claims that could have been raised by a prevailing party in the first action are merged into, and are thus barred by, the first judgment.'" *Bison Interests, LLC*, 854 S.E.2d at 218-219 (quoting *Chesterfield Vill., Inc. v. City of Chesterfield*, 64 S.W.3d 315, 318 (Mo. 2002) (*en banc*) (citation omitted)). "'*[R]es judicata* may operate to bar a subsequent proceeding even if the precise cause of action involved was not actually litigated in the former proceeding *so long as the claim could have been raised and determined.*'" *Bison Interests, LLC*, 854 S.E.2d at 219 (*Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 477, 498 S.E.2d 41, 49 (1997) (emphasis supplied by Court in *Bison*)).

The three-factor test for determining whether an action is barred by *res judicata* is as follows:

> First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.

Bison Interests, LLC, 854 S.E.2d at 219 (quoting Syl. Pt. 4, *Blake*; emphasis added by Court in *Bison*); *see Esposito v. Mastrantoni*, 2021 W. Va. LEXIS 9, 2021 WL 195288, at *10 (W. Va. Jan 20, 2021).

The Supreme Court of Appeals of West Virginia has explained the final adjudication factor as follows:

> The requirement of a prior "final adjudication" pertains to the prior *action*—not the specific claim allegedly barred by res judicata. Otherwise, matters that were not raised, yet "could have been resolved" would never give rise to res judicata. The question presented is whether there was a prior action which received a final adjudication on the merits, in which action the specific claim was or could have been presented. As explained above, claims that could

> have been resolved but were not, are "merged into, and are thus barred by, the first judgment."

Bison Interests, LLC, 854 S.E.2d at 219 (citations omitted; emphasis supplied by Court); *see Esposito*, at *10 ("There is nothing in the record to indicate that petitioners' claims regarding water discharges from respondents' property, whether raised in the first action or the second action, have been litigated to a final conclusion on the merits that would require imposition of res judicata principles."). Therefore, "[w]hen a litigant does not join all of their claims in one action, as permitted by Rule 18(a), and chooses to file multiple suits concerning the same operative facts in the same court, Rule 42(a) of the Rules of Civil Procedure establishes the procedure for a trial court to follow." *Esposito*, at *11.

This Court find that the claims pending in Civil Action No. 19-C-481-B relate to the Infrastructure Loan. In contrast, the claims pending in the above-styled civil action relate to a Working Capital Loan governed by an independent and separate set of loan documents. Although there are common facts with respect to the history of the two loans and the parties involved, this Court does not find that the separate loans arise from the same set of operative facts such that the claims in GSVPOA's *Complaint* related to the Working Capital Loan would be compulsory counterclaims in Civil Action No. 19-C-418-B. Accordingly, the Court **DENIES** Justice Holdings' *Motion to Dismiss* to the extent Justice Holdings argues that GSVPOA's claims in this civil action were compulsory counterclaims or that GSVPOA has otherwise engaged in impermissible claim splitting.

Based upon the foregoing analysis, it is accordingly **ORDERED** that the *Motions to Dismiss* are **DENIED** and Justice Holdings and Cooper Land shall have thirty days from the date of the July 29, 2021, hearing, to file an answer to GSVPOA's Complaint.

The Clerk of Circuit Court is directed to transmit a copy of this order to all parties in both

actions in accordance with the protocols of that office, and to take the action necessary to link these actions in the court's electronic filing system.

The objections and exceptions articulated by any party in the briefing of the Motions to Dismiss or during the hearing of the motion are preserved.

ENTER: ~~September~~ November 4, 2021

ROBERT A. BURNSIDE, JR.
CIRCUIT JUDGE

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