VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 12th day of December, 2019.

Present: All the Justices

McClung-Logan Equipment Company, Inc., Appellant,

against Record No. 181633
Circuit Court No. 177CL18002476-00

Harbour Constructors, Co., et al., Appellees.

Upon an appeal from a judgment rendered by the Circuit Court of Spotsylvania County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is no reversible error in the judgment of the circuit court.

Appellant McClung-Logan Equipment Company, Inc. appeals a judgment in which the Circuit Court of Spotsylvania County sustained the demurrer of Harbour Constructors, Co. and Cross-Land Harbour, Inc. (collectively "appellees") as to all counts alleged in appellant's complaint.[1]

In December 2011, appellant filed suit against appellees alleging a breach of contract for failing to pay for the rental of construction equipment. The parties engaged in extensive litigation for the next five years, including the assertion of counterclaims, discovery, and numerous motions. At a motions hearing in December 2016, weeks prior to a trial date, appellees filed a motion to dismiss asking the trial court to enforce the contract's forum selection clause, which stated that all litigation "shall be instituted" in Maryland.[2] It further stated that the courts in Maryland "shall be the exclusive forum of all actions, proceedings, or litigation between and among the parties, notwithstanding that other courts may have jurisdiction over the

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[1] Appellees also filed a plea in bar, but the trial court expressly declined to address it.

[2] Though illegible in the rental agreement in the manuscript, the provision was read into the record at the December 2016 hearing, a transcript of which was incorporated into the pleadings of the instant case.

parties in the subject matter."

The trial court inquired whether "all claims . . . on behalf of [appellees] follow this case to Maryland," and appellees agreed. Appellees posited that the five years of litigation and a trial would not have been necessary had the suit been brought in Maryland because Maryland allows the use of depositions in motions for summary judgment, unlike Virginia. Appellees stated that if the suit proceeded in Maryland federal court, they would "have this case over with in no time flat because . . . this case ought not to be proceeding to trial." Appellees further claimed that they had "no interest in pursuing [their] counterclaims other than [as] a defense to [appellant's] claims."

Appellant's complaint in the instant litigation alleged that the trial court "conditionally granted [appellees'] motion and gave [an] opportunity to either party to proceed with the case in Maryland, based on [appellees'] representation and promise to [the trial court] that the case would, in fact, proceed to final disposition . . . in Maryland." The trial court stayed the Virginia proceedings for a period of six months to allow for refiling, and upon notice to the trial court of a new filing in Maryland, the Virginia proceedings would be dismissed. If, after six months had passed, neither party filed suit in Maryland, the Virginia proceedings would be placed back on the docket for trial.

Appellant admitted that it initially "exercised its option not to refile in Maryland" so that it could "rely on the provision allowing the case to be calendared for trial in [Virginia] should [appellees] not file in Maryland," despite appellees' stated disinterest in pursuing anything other than defenses to appellant's claims. Prior to the expiration of the six-month stay, appellee Cross-Land Harbour filed suit in Maryland's federal court and subsequently filed a copy of its complaint with the Virginia trial court. The Virginia trial court dismissed the stayed proceedings without prejudice on June 20, 2017. Appellant did not appeal the trial court's dismissal. Thereafter, without serving a summons or the complaint on appellant, appellee Cross-Land Harbour moved to voluntarily dismiss its Maryland action, and the Maryland court granted the dismissal. Appellant did not file any sort of request to set the dismissal aside.

On September 14, 2017, appellant filed its own complaint in the Maryland federal court, and appellees filed a motion to dismiss pursuant to Maryland's statute of limitations. The Maryland court dismissed the complaint as time-barred. In its May 16, 2018 memorandum opinion, the Maryland court noted that appellant "failed to plead any allegations related to tolling

of limitations or equitable estoppel." However, the Maryland court granted leave to appellant to amend its complaint in order to plead "allegations sufficient to overcome Maryland's limitations period." Appellant declined to do so, choosing "not to waste more time on an otherwise futile act."

Instead, on June 22, 2018, appellant again brought suit in the Virginia trial court, initiating the instant litigation. Appellant alleged four counts in its complaint: breach of contract, unjust enrichment, *quantum meruit*, and a claim for relief from the trial court's dismissal of the prior Virginia proceedings regarding these same claims on the basis of fraud on the court. Attached to its complaint, appellant included three exhibits: the rental agreements; a statement for the amount due to appellant as of July 31, 2011; and the Maryland court's memorandum opinion granting appellees' motion to dismiss.

Appellees demurred to appellant's complaint and attached several exhibits to their memorandum in support of demurrer, including copies of the trial court's orders staying and dismissing the original Virginia proceedings, the transcript of the trial court's December 2016 motions hearing, and selected pleadings filed by both parties in the previous suits. Appellees contended that appellant did not sufficiently allege the fraud required to claim relief from the trial court's prior dismissal, which appellant needed to establish in order to reinstate its original claims.

At a hearing on September 17, 2018, the parties limited their arguments to the ability to proceed based on enforcement of the forum selection clause and appellant's claim of fraud on the court. Without elaborating on its ruling, the trial court stated that appellees were "acting within their legal rights" and that "the demurrer must be sustained."

On appeal, appellant posits three assignments of error. First, appellant asserts that it was error to sustain the demurrer as to appellant's claims for breach of contract, unjust enrichment, or *quantum meruit* where it sufficiently stated a claim for each cause of action. Second, appellant contends that it was error to sustain the demurrer as to fraud on the court where appellees falsely asserted that they would litigate in Maryland, inducing the trial court to dismiss the prior Virginia proceedings. Lastly, appellant argues that it was error to sustain the demurrer as to the forum selection clause where appellant demonstrated that appellees had waived its enforcement.[3]

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[3] *See generally RMBS Recovery Holdings, I, LLC v. HSBC Bank USA*, 297 Va. 327 (2019) (a defendant's delay in asserting forum selection clauses in the operative documents,

"Because this appeal arises from the grant of a demurrer, we accept as true all factual allegations expressly pleaded in the complaint and interpret those allegations in the light most favorable to the plaintiff." *Sweely Holdings, LLC v. Suntrust Bank*, 296 Va. 367, 370-71 (2018). However, "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." *Ward's Equipment, Inc. v. New Holland North America, Inc.*, 254 Va. 379, 382 (citing *Fun v. Virginia Military Institute*, 245 Va. 249, 253 (1993)). "[W]here the plaintiff refers to another proceeding or judgment, and specifically bases his right of action, in whole or in part, on something which appears in the record of the prior case, the court, in passing on a demurrer to the complaint, will take judicial notice of the matters appearing in the former case." *Titan America, LLC v. Riverton Inv. Corp.*, 264 Va. 292, 305 (2002); *Fleming v. Anderson*, 187 Va. 788, 794-95 (1948).

Appellant claims it was error for the trial court to sustain appellees' demurrer and enforce the forum selection clause where appellant sufficiently alleged that appellees' actions had waived their reliance on the clause. Upon review of the record, we agree with the trial court's ultimate decision as an evident application of the "law of the case" doctrine. Under the "law of the case" doctrine, "when a party fails to challenge a decision rendered by a court at one stage of litigation, that party is deemed to have waived [its] right to challenge that decision during later stages of the 'same litigation.'" *Miller-Jenkins v. Miller-Jenkins*, 276 Va. 19, 26 (2008) (citing *Kondaurov v. Kerdasha*, 271 Va. 646, 658 (2006)). This Court has held that the "law of the case" doctrine "extends to 'future stages of the same litigation.'" *Id.* at 26-27 (quoting *Kondaurov*, 271 Va. at 658). "Thus, when two cases involve identical parties and issues, and one case has been resolved finally . . . , we will not re-examine the merits of issues necessarily involved in the first [stage of litigation], because those issues have been resolved as part of the 'same litigation' and have become the 'law of the case.'" *Id.* at 27. Finally, this doctrine extends not only to adjudicated issues, but also to issues "necessarily involved in the first [litigation], whether actually adjudicated or not." *Id.* (quoting *Kemp v. Miller*, 160 Va. 280, 285 (1933)).

The instant litigation involves the same parties as in the original Virginia proceedings that were dismissed. In those proceedings, appellees moved for dismissal of appellant's contract

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while actively continuing litigation, resulted in a waiver of the right to rely upon that contractual provision).

claims based on the contract's forum selection clause. Appellant objected to the motion, arguing that appellees had waived any basis to assert the forum selection clause by taking actions inconsistent with its enforcement. The trial court, in those original proceedings, found that the forum selection clause was valid and enforceable, and it dismissed the case for the parties to proceed in Maryland as required by the contract. Appellant did not appeal the dismissal.

When appellant brought the instant litigation after the litigation was dismissed in Maryland, appellees again asserted the forum selection clause as controlling of the contract claims, and appellant again argued that appellees had waived its enforcement by their actions. Thus, not only does the instant litigation involve the same parties, it also involves the same issues as previously decided by the trial court. Because appellant did not appeal the trial court's dismissal based on the forum selection clause in the original litigation, the trial court's decision became the law of the case. This decision also extended to the contract claims, despite their not being adjudicated on the merits, since such claims were necessarily involved in adjudicating the forum selection clause.

Appellant based its present claims on those same issues that were presented to and adjudicated by the trial court in the December 2016 hearing. Because appellant's complaint thoroughly addressed the parts of the hearing that led to the trial court's original decision, the trial court was permitted to take judicial notice of the matters appearing in that proceeding. *See Titan America*, 264 Va. at 305. Thus, the trial court was aware it had already resolved the issues before it in the refiled action as part of its prior rulings in the same litigation. It was then also aware that appellant could not plead any allegations that would allow the litigation to proceed for a second time in Virginia. The trial court was therefore justified in noting that the demurrer must be sustained because the contract claims were necessarily involved in its original decision that the claims were controlled by the contract's forum selection clause.

The only new claim raised by appellant's complaint in the instant litigation is fraud on the court. Appellant argues that the trial court erred in sustaining the demurrer where it had adequately pled a claim of fraud on the court based on appellees' false assertion of its intent to litigate the claims on the merits in Maryland, which induced the trial court to dismiss the prior lawsuit. Though rarely discussed, this Court has stated that a controlling factor of fraud on the court is "whether the misconduct tampers with the judicial machinery and subverts the integrity

of the court itself." *State Farm Mut. Auto. Ins. Co. v. Remley*, 270 Va. 209, 217 (2005) (quoting *Owens–Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 142 (1992)). In applied terms,

> "[t]he judgment of a court, procured by *intrinsic* fraud, *i.e.*, by perjury, forged documents, or other incidents of trial related to issues material to the judgment, is *voidable* by direct attack at any time before the judgment becomes final; the judgment of a court, procured by *extrinsic* fraud, *i.e.*, by conduct which prevents a fair submission of the controversy to the court, is *void* and subject to attack, direct or collateral, at any time."

Id. at 218 (quoting *Jones v. Willard*, 224 Va. 602, 607 (1983)); *accord Rowe v. Big Sandy Coal Corp.*, 197 Va. 136, 143 (1955); *O'Neill v. Cole*, 194 Va. 50, 56-57 (1952); *McClung v. Folks*, 126 Va. 259, 268-74 (1919).

Since the trial court's original decision is final and no longer subject to direct attack, appellant's present claim of fraud on the court required an allegation of extrinsic fraud rather than intrinsic fraud. Because "extrinsic fraud on the court must be supported by clear and convincing evidence," appellant was required to plead as much in its complaint. *Gulfstream Bldg. Assoc., Inc. v. Britt*, 239 Va. 178, 183 (1990). Upon review, it is clear that appellant did not plead allegations that would rise to the level of clear and convincing evidence, let alone that of an extrinsic fraud that prevented a fair submission of appellant's claims to the court.

Appellant acknowledges as much in its complaint, noting that there "was no prevention," but rather there was conduct that "allowed [appellees] to game the system to the detriment of [appellant]." Appellant relies on appellees' allegedly false assertion in the December 2016 hearing that they "want [the case] to go to Maryland." The complaint alleges that appellees made this assertion "to induce [the trial court] to grant [appellees'] motion to dismiss," knowing "that they had no intention of litigating the matter in Maryland." Such allegations, even taken as true, are not instances of conduct that prevent the submission of the controversy to the court, as is necessary for extrinsic fraud. Rather, these allegations fall more in line with "other incidents of trial related to issues material to the judgment" that could amount to intrinsic fraud. *See Remley*, 270 Va. at 217.

Furthermore, the trial court could see for itself that appellant was not prevented from submitting its controversy to the court because the memorandum opinion from the Maryland proceedings was attached to appellant's complaint as an exhibit, showing that appellant did in fact submit its claims in Maryland. *See* Rule 1:4(i) ("The mention in a pleading of an

accompanying exhibit shall, of itself and without more, make such exhibit a part of the pleading."); *Ward's Equipment,* 254 Va. at 382 ("[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."). Maryland's dismissal of appellant's claims as time-barred does not alter the fact that appellant was not prevented from submitting its claims. While the Maryland court noted that appellant "failed to plead any allegations related to tolling of limitations or equitable estoppel," it expressly granted appellant leave to amend its complaint in order to plead such allegations. Despite being given the opportunity, appellant chose not to do so.

Because the trial court could take judicial notice of the hearing regarding the conduct that is the basis for appellant's claim of fraud on the court, *see Titan America*, 264 Va. at 305, and because the court could also see from the Maryland court's memorandum opinion that appellant was not prevented from making a fair submission of its case to the court, *see Remley*, 270 Va. at 217, the trial court could properly find that appellant had not met its burden to plead extrinsic fraud by clear and convincing evidence, nor could it do so. Therefore, in this set of circumstances, the trial court did not err in sustaining the demurrer as to appellant's claim.

Finding that the trial court did not err in sustaining the demurrer, this Court will affirm the trial court's dismissal of the complaint.

This order shall be certified to the Circuit Court of Spotsylvania County.

A Copy,

Teste:

Douglas B. Robelen, Clerk

By: 

Deputy Clerk