

V I R G I N I A :

IN THE CIRCUIT COURT OF ARLINGTON COUNTY
CIVIL DIVISION

U.S. NEWS & WORLD REPORT, INC.,

Plaintiff,

v.

In Chancery No. 95-1318

RAM AVRAHAMI,

Defendant.

DEFENDANT'S DEMURRER TO PLAINTIFF'S MOTION FOR
DECLARATORY JUDGEMENT

COMES NOW the Defendant, Ram Avrahami, by counsel, and demurrers to the Motion for Declaratory Judgement filed by U.S. News and World Report, Inc., ("U.S. News") on the grounds as set forth herein.

ARGUMENT

This action in chancery was filed by U.S. News on October 24, 1995, seeking declaratory relief that the sale and/or rental of mailing lists, and specifically the sale and/or rental of Defendant's name and/or likeness as part of a mailing list, by Plaintiff U.S. News does not violate Virginia Code Section 8.01-40.<1> Plaintiff should not be permitted to institute a declaratory judgement proceeding for the following reasons: (1) the question sought to be adjudicated is already at issue in another pending action; (2) Defendant would be deprived of a pending action at law; and (3) the procedure adopted by U.S. News allows it to choose its own forum and position upon the determination of Defendant's pending action.

I. The Question Sought to Be Adjudicated by U.S. News is Already at Issue in a Pending Action.

The Virginia Supreme Court has held that if declaratory relief would enjoin a pending action at law, a declaratory judgement motion will not lie. See *Andrews v. Universal Moulded Prods. Corp.*, 189 Va. 527, 529, 53 S.E.2d 837, 838 (1949) ("Having determined that the matter could be decided in the ... [pending] proceeding, the declaratory judgement proceeding served no further purpose and was properly dismissed.") In *Williams v. Southern Bank of Norfolk*, 203 Va. 657, 664, 125 S.E.2d 803 (1962), the Court held:

... [T]he court will not enjoin the prosecution of an action at law where the defendant can make a full and adequate defense in such action. A suit at law cannot be enjoined and the litigation transferred to the equity forum merely on the assertion of defenses that are pleadable at law.
(quoting *Belcher v. Davis*, 203 Va. 38, 41, 121 S.E.2d 760).

U.S. News should not be permitted to institute a declaratory judgement proceeding and transfer Defendant's pending action from law to equity where there is no allegation that it cannot plead its defense in law or that the pending action at law cannot provide an adequate remedy.<2>

II. Defendant Would Be Deprived of a Pending Action at Law.

A declaratory judgement proceeding would prevent Avrahami from pursuing his pending action in General District Court. The Virginia Supreme Court has noted that declaratory judgements "are intended to supplement rather than supercede ordinary causes of action. ... In common cases where a right has matured or a wrong has been suffered, customary processes of the court, where they are ample and adequate, should be adopted" *Williams*, 203 Va. at 662 (quoting *American National Bank v. Kushner*, 162 Va. 378, 386, 174 S.E. 777, 780 (1934)). See also *Portsmouth Restaurant Ass'n v. Hotel & Restaurant Employees Alliance Local 807*, 183 Va. 757, 33 S.E.2d 218 (1945); *American Nat'l Bank & Trust Co. v. Kushner*, 162 Va. 378, 174 S.E. 777 (1934). Where a dispute can readily and obviously be settled by an ordinary action, the court should exercise its discretion to refuse to entertain a petition for declaratory judgement. See *Liberty Mut. Co. v. Bishop*, 211 Va. 414, 177 S.E.2d 519 (1970); *Prince William City v. Hylton Enterprises, Inc.*, 216 Va. 582, 221 S.E.2d 534 (1976).

When U.S. News violated Defendant's property rights, he filed an action at law in General District Court for damages. Plaintiff is entitled to his day in General District Court.

III. The Procedure Adopted by U.S. News Allows It to Choose Its Own Forum and Position Upon the Determination of Defendant's Pending Action.

As stated in *Williams*, declaratory judgment proceedings "are not to be used as instruments of procedural fencing, either to secure delay or to choose a forum" 203 Va. at 662. U.S. News is attempting to choose its own forum and force Avrahami on the defensive in the determination of his own cause of action. In *Williams*, the Bank of Norfolk filed a motion for declaratory judgment against eleven separate prospective actions and asked the Court to make one determination of all eleven tort actions. The Court held that the procedure adopted by the Bank prevented the defendant,

...from going on the offensive and puts him on the defensive. It allows the Bank to choose its own forum and position upon the trial of the cause. It goes beyond the purpose and limitations of the declaratory judgments statute. It destroys the distinction between law and equity.

203 Va. at 663

Similarly, U.S. News, by filing a declaratory judgment motion, is attempting to choose its own forum and force the Defendant to respond defensively to its allegations. Avrahami has filed a proper action at law which is pending before the General District Court and which seeks to resolve issues regarding his property rights. U.S. News must defend against this pending action.

IV. Conclusion

WHEREFORE, for the aforementioned reasons, Defendant prays that this Court dismiss Plaintiff's Motion for Declaratory Judgment.

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<1> Defendant Avrahami is the Plaintiff in an action at law filed on July 21, 1995, in Arlington General District Court. There Plaintiff alleged that U.S. News violated Plaintiff's property rights by selling and/or renting his name and/or likeness without his consent, in violation of Virginia Code Section 8.01-40. U.S. News filed a Motion for Stay in that action on or about October 24, 1995. Plaintiff's Opposition to Defendant's Motion for Stay is attached to this Demurrer as Exhibit 1.

<2> U.S. News has filed no Answer to Avrahami's Motion for Judgement in General District Court and has not cited one case to support its broad allegation that U.S. News did not violate Virginia Code Section 8.01-40 when it used Avrahami's name and/or likeness for the purposes of trade without his consent.