

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

Bonnie Brae Homeowners' Association, Inc.,

Plaintiff,

v.

HOA Community Management, LLC,
Charlene Rice, Jeff Dumpert, Tim Roach
Janine Wyman, Julie Hrobsky, Jason Resotka,
and Donald Peake

Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

CIVIL ACTION NO. 2016-CP-23-06406

**DEFENDANTS' MEMORANDUM OF
LAW IN SUPPORT OF MOTION TO
DISMISS**

**TO: MICHAEL DODD, ATTORNEY FOR PLAINTIFF AND TO THE ABOVE
NAMED PLAINTIFF:**

Please take notice that the Defendants HOA Community Management, LLC, Charlene Rice, Jeff Dumpert, Tim Roach, Janine Wyman, Julie Hrobsky, Jason Resotka, and Donald Peake ("the Defendants"), by and through undersigned counsel, file this Memorandum of Law in Support of Defendants' Motion to Dismiss.

INTRODUCTION

Bonnie Brae Homeowners' Association, Inc. ("the Association") is a non-profit corporation that serves as the homeowners' association for the Bonnie Brae neighborhood in Greenville County South Carolina. The Association consists of approximately 273 members, all of whom own real property in the Bonnie Brae neighborhood. Roman Kanach, Thomas Wells, Nancy Gresham, and Patricia Crocker (the "Individual Members") are all members of the Association who claim they were elected to the Board of Directors in a special meeting held on April 28, 2016. Defendants Dumpert, Roach, Wyman, Hrobsky, Resotka¹, and Peake ("Individual Defendants") were all members of the Association who were serving as the Board

¹ Jason Resotka is no longer a member or director of the Association because he sold his property during the pendency of this litigation.

of Directors at the time of the Special Meeting. Defendants HOA Community Management and Charlene Rice are the Association's management company and community manager, respectively. Because the Individual Members are the real parties in interest in this dispute and because Plaintiff lacks standing to bring this suit, this suit should be dismissed, or in the alternative, the Individual Members should be substituted for the Plaintiff as the real parties in interest.

LEGAL STANDARD

“The United States Supreme Court has set forth the ‘irreducible constitutional minimum of standing’, which consists of three elements: (1) the plaintiff must have suffered an ‘injury in fact;’ (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Joseph v. S.C. Dep’t of Labor, Licensing & Regulation*, 417 S.C. 436, 449, 790 S.E.2d 763, 769–70 (2016), *reh’g denied* (Dec. 7, 2016) (citing *Sean Pines Ass’n for Prot. of Wildlife, Inc. v. S.C. Dep’t of Natural Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001). “Generally, a party must be a real party in interest to the litigation to have standing. A real party in interest is a party with a real, material, or substantial interest in the outcome of the litigation.” *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 28, 630 S.E.2d 474, 479 (2006). “As a general rule, to have standing, a litigant must have a personal stake in the subject matter of the litigation. One must be a real party in interest, i.e., a party who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action.” *Ex parte Morris*, 367 S.C. 56, 62, 624 S.E.2d 649, 652 (2006).

FACTUAL ALLEGATIONS

On February 27, 2016, the Association held its annual meeting. (Pl. Am. Compl. ¶ 8). At that meeting the Individual Members attempted to present proxies that they claimed would establish a quorum for the meeting and elect them as the new Board of Directors for the Association. (Pl. Am. Compl., ¶ 14.) However, because a majority of the proxies submitted by the Individual Members were invalid, the Association was unable to establish a quorum and no election was held. (Pl. Am. Compl., ¶¶ 14-16; Aff. of Jeff Dumpert ¶ 8, attached hereto as Exhibit “A”). Thereafter, on April 28, 2016, the Individual Members attempted to convene a special meeting for the purpose of removing the Individual Defendants and electing new directors (“Special Meeting”). (Pl. Am. Compl., ¶ 22.) The Individual Members did not send notice of the Special Meeting to the Individual Defendants and further failed to send notice of the Special Meeting to the membership at least ten days before the meeting as required by the S.C. Non-Profit Act and the Association’s Bylaws. (Aff. Of Dumpert, ¶ 18.) The Individual Defendants were also denied the opportunity to speak at the Special Meeting. (Aff. of Dumpert, ¶ 19).

At the Special Meeting sixteen members were present. (Plf. Mot. For Sum. Jmt., Exhibit C.) The Individual Members also presented eighteen “quorum only” proxies and five other valid proxies for quorum and voting purposes. (Plf. Mot. For Sum. Jmt., Exhibit C.) Five proxies were invalid or not counted because the property owner sold their property before the Special Meeting, the property owner appeared at the meeting in person, or the proxy holder did not attend the meeting. (Plf. Mot. For Sum. Jmt., Exhibit C.) The remaining fifty-six proxies alleged by the Individuals Members expressly stated on their face that they were to be used for the 2016 Bonnie Brae Annual Meeting. (Plf. Mot. For Sum. Jmt., Exhibit C.) Despite this limitation the

Individual Members counted these proxies and stated that ninety members were present or represented at the meeting, thus establishing a quorum. (Plf. Memo in Supp. of Sum. Jmt.) The Individual Members then conducted a vote which they allege resulted in the removal of the Individual Defendants as directors and the election of the Individual Members as the new Board of Directors. (Plf. Memo in Supp. of Sum. Jmt.) Upon learning of the Special Meeting and alleged removal and election, the Defendants notified the Individual Members they determined the Special Meeting was invalid for lack of notice and lack of quorum.

The Individual Members subsequently filed this lawsuit in the name of the Association seeking a declaratory judgment that they are the legal board of directors and an injunction halting Defendants from conducting Association business. (Pl. Am. Compl.) Neither Plaintiff nor the Individual Members requested membership approval before bringing this suit. Plaintiff has since filed three separate motions for temporary injunctive relief in order to prevent or delay the 2017 Annual Meeting. (Pl. Mot. Jan. 6, 2017.; Pl. Mot. Feb. 6, 2017; Pl. Mot. Mar. 9, 2017.) This Court ultimately ordered the 2017 Annual Meeting be held on March 10, 2017. The membership of the Association therein elected the Individual Defendants (except Resotka), Brad Stehl and Ken Howell to serve as the Board of Directors for the Association. Despite the results of the most recent election the Individual Members have refused to dismiss this suit and these motions have followed.

ARGUMENT

I. THE INDIVIDUAL MEMBERS ARE THE REAL PARTIES IN INTEREST

A. The corporate entity lacks standing to bring this suit because the suit was not authorized by the corporation's directors.

A non-profit corporation can only conduct those acts authorized by the board of directors. S.C. Code Ann. § 33-31-801(b). A director continues to serve until the director's successor is

elected or appointed. S.C. Code Ann. § 33-31-805. It is undisputed that the Individual Defendants constituted the Board of Directors as of the February 2016 Annual Meeting. It is also undisputed that no election was held at the February 2016 Annual Meeting. Accordingly, the Individual Defendants served as the Board of Directors at the time of the Special Meeting. At the Special Meeting the Individual Members attempted to remove the Individual Defendants and elect themselves to the Board of Directors. However, for the reasons more fully stated in Plaintiff's Memorandum in Support of Summary Judgment, the Special Meeting was invalid and no valid election was held. Therefore, the Individual Defendants continued to serve as the Board of Directors until the next election on March 10, 2017. As the Board of Directors, only the Individual Defendants could have authorized the filing of this suit in the corporation's name. The Individual Defendants did not authorize this suit and therefore this suit was brought without the requisite authority.

B. Plaintiff's own pleadings indicate the Individual Members are the real parties seeking redress from the court.

The Individual Members, through their attorney, have styled this action with Bonnie Brae Homeowners' Association, Inc. as the named Plaintiff. However, the pleadings filed on their behalf indicate that the Individual Members are the real parties alleging injury and seeking redress from this court.

Plaintiff's Complaint and Amended Complaint start by alleging "Plaintiff is the legal Board of Directors for Bonnie Brae Homeowners' Association, Inc." (Plf. Compl. ¶ 1; Plf. Am. Compl., ¶ 1). The prayers for relief similarly ask the court to declare "Plaintiff to be the legal board of directors." Paragraph 31 of the Amended Complaint alleges that "Plaintiff believes it is the legal and duly elected board of directors of the Association."

Plaintiff's January 6, 2017 Motion for Temporary Injunction repeats these allegations and further alleges that "Defendants refuse to recognize Plaintiff as the legal and duly elected board of directors of the Association and as such Defendants have continued to . . . cause irreparable harm to the Plaintiff, the Association, and its members." (Paragraph 21.)

Plaintiff continues this trend in its January 23, 2017 Memorandum in Support of Summary Judgment, stating "this action is based on the fact that Plaintiff is the legal duly elected Board of Directors for the Association and was elected at a special meeting held by the members of the Association . . ." Most recently, Plaintiff has asked this Court to allow a second amended complaint in this matter. The first paragraph of the proposed amended complaint repeats pertinent the allegation verbatim: "Plaintiff is the legal Board of Directors for Bonnie Brae Homeowners' Association, Inc."

The Amended Complaint and proposed Second Amended Complaint literally asks this court to declare that Bonnie Brae Homeowners' Association, Inc. is the legal board of directors for the Bonnie Brae Homeowners' Association, Inc. This, of course, is impossibility. Instead, the Individual Members are really asking this court to declare them the legal and duly elected board of directors for Bonnie Brae Homeowners' Association, Inc. As such, the Individual Members are the real party in interest here.

Other allegations in Plaintiff's pleading support this conclusion. For example, Plaintiff's Amended Complaint alleges that the Plaintiff sent HOA Community Management and Charlene Rice a petition to hold a special meeting on March 1, 2016. (Plf. Am. Compl. ¶ 19). However, Plaintiff's pleadings make it clear that it was actually two individuals, Roman Kanach and Tom Wells, who sent the special meeting petition. (Plf. Mot. Temp. Inj., Ex. G, January 6, 2017.) The March 1 petition letter does not claim to be, nor can it be, from the Association. It is clearly

from two members who are petitioning the current Board of Directors to hold a meeting. The Association is not the entity claiming to be wronged in this situation; the Individual Defendants are.

When taken as a whole, the only logical way to read the pleadings in this matter is that the Individual Members are the real parties in interest in this matter. For that reason the Individual Members must be substituted in for the Plaintiff as the real parties in interest. Alternatively this matter should be dismissed with leave for the Individual Members to refile at a later date.

II. PLAINTIFF LACKS STANDING TO BRING THIS SUIT BECAUSE IT FAILED TO OBTAIN 75% APPROVAL OF THE MEMBERSHIP BEFORE BRINGING THIS SUIT.

Standing to sue is a fundamental requirement in instituting an action. *Connor Holdings, LLC v. Cousins*, 373 S.C. 81, 84, 644 S.E.2d 58, 60 (2007).). “Standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right.” *Powell ex rel. Kelley v. Bank of Am.*, 379 S.C. 437, 444, 665 S.E.2d 237, 241 (Ct. App. 2008). Plaintiff has the burden of proving the elements of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 2136–37, 119 L.Ed.2d 351, 364 (1992).

Article 15 of the Declaration of Protective Covenants for Bonnie Brae Subdivision states, “[n]o judicial or administrative proceeding shall be commenced or prosecuted by the Association unless approved by at least seventy-five percent (75%) of the Total Association Vote.” The Declaration creates four distinct exceptions to the litigation approval requirement: (a) actions brought by the Association to enforce the **Declaration**; (b) imposition and collection of assessments; (c) proceedings to challenge property tax rates; and (d) counterclaims brought by the Association in response to litigation initiated against it. (Declaration, Article 15, None of

those exceptions apply here because the Individual Members, acting under the name of the Plaintiff, have not asked this court to enforce any provision of the Declaration or any of the other three exceptions cited herein.

The Declaration clearly requires the Association obtain approval of 75% of the members before bringing suit in its own name. Without membership approval the Association does not have the right to seek judicial enforcement outside the exceptions noted above. Plaintiff's Complaint and Amended Complaint fail to plead any allegation that Plaintiff obtained the requisite membership approval. Plaintiff has similarly failed to present any affidavit or other evidence demonstrating it obtained approval from the membership and thereby has standing to bring this action.

The North Carolina Court of Appeals considered facts remarkably similar to this case in *Peninsula Prop. Owners' Ass'n, Inc. v. Crescent Resources, LLC*, 171 N.C. App. 89, 95, 614 S.E.2d 351, 355 (2005). In *Peninsula* several property owners brought suit in the name of the property owners' association against the developer seeking damages related to an agreement between the developer and Duke Power energy for certain infrastructure leases within the association's property. The restrictive covenants contained a two-thirds approval requirement before bringing suit against the developer. The court held that because the property owners' association failed to establish that two-thirds of the members approved the suit prior to initiation, the association lacked standing to sue and dismissed the suit.

Just as in the case of *Peninsula Prop. Owners' Ass'n.*, Plaintiff was required to obtain approval of the membership prior to bringing suit. Plaintiff has failed to plead or demonstrate that it requested or obtained such approval. Therefore Plaintiff lacks standing to bring this suit and it should be dismissed.

SIGNATURE PAGE ATTACHED

MCCABE, TROTTER & BEVERLY, PC

/s/ J. Ryan Oates

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April 3, 2017.