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STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
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.	CIVIL ACTION NO. 2016-CP-23-06406 **DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF SUMMARY JUDGMENT**

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

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, hereby file this Memorandum of law in support of Defendants' Motion for Summary Judgment.

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, Nikki Ensley, 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, Resotka[1], and Peake

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

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("Individual Defendants") were all members of the Association who were serving as the Board of Directors at the time of the Special Meeting. (Pl. Am. Compl. ¶ 22.) Defendants HOA Community Management and Charlene Rice ("Management Company Defendants") are the Association's management company and community manager, respectively. Because there is no genuine issue of material fact regarding the Individual Members' claims, the Court should grant Defendants' Motion for Summary Judgment.

LEGAL STANDARD

A trial court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003). Summary judgment should be granted when it is perfectly clear that no genuine issue of material fact exists and inquiry into facts is not desirable to clarify application of the law. *Wortman v. Spartanburg,* 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992). When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. *Ellis v. Davidson*, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct.App.2004). "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006). When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his

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pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. Rule 56(e), SCRCP.

FACTUAL BACKGROUND

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). 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 10 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

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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

Defendants are entitled to summary judgment because Plaintiff lacks standing to bring this suit because the litigation was not approved by 75% of the members of the Association as

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required by the restrictive covenants. Additionally, the claims are now moot because the 2017 Annual Meeting resulted in the election of new directors, thereby replacing the previous Board of Directors. Finally, the Individual Members are not entitled to a Declaratory Judgment because the Special Meeting was not validly conducted pursuant to the Association's Bylaws and the S.C. Non-Profit Corporations Act.

I. PLAINTIFF LACKS STANDING TO BRING THIS SUIT BECAUSE PLAINTIFF DID NOT OBTAIN THE PREREQUISITE MEMBER APPROVAL NECESSARY TO BRING LITIGATION IN THE NAME OF THE ASSOCIATION.

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 ("Declaration") 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 and none of the other three exceptions are even remotely applicable.

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The Declaration clearly requires the Association obtain approval of 75% of the members before bringing suit in its own name. Plaintiff's pleadings never ask this court to enforce the Declaration. Instead the Amended Complaint asks the court to determine the legal board of directors pursuant to the Bylaws and S.C. Non-Profit Corporation. (Pl. Am. Compl., Prayer for Relief ¶ a.) 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 an energy company 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.

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II. THE INDIVIDUAL MEMBERS' CLAIMS ARE MOOT

A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party. *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1335, 185 L. Ed. 2d 447 (2013). "The court does not concern itself with moot or speculative questions." *Sloan v. Greenville Cty*., 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009). "A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy. Mootness also arises when some event occurs making it impossible for the reviewing court to grant effectual relief." *Id.* Issues may become moot as a result of events occurring during the course of the proceedings. See generally, *Seldon v. Singletary*, 284 S.C. 148, 152, 326 S.E.2d 147, 150 (1985); *McCoy v. McCoy*, 283 S.C. 383, 385, 323 S.E.2d 517, 519 (1984). "A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court." *Seabrook v. Knox*, 369 S.C. 191, 197, 631 S.E.2d 907, 910 (2006).

Plaintiff's Amended Complaint asks this court for a declaratory judgment "declaring Plaintiff to be the legal board of directors." (Pl. Am. Compl., Prayer for Relief (a)).[2] The basis for that request is the Plaintiff's assertion that the Individual Members were elected to replace the Board of Directors at the Special Meeting. However, the Bylaws for the Association provide that each director elected to fill a vacancy on the Board "shall serve the unexpired portion of the term." (Bylaws, § 3.7) It is undisputed that the term for each position allegedly filled by the

[2] Plaintiff's Amended Complaint repeatedly alleges that "Plaintiff is the legal Board of Directors for Bonnie Brae Homeowners' Association, Inc." Because Bonnie Brae Homeowners' Association, Inc. cannot possibly be the Board of Directors for itself, Defendants assume for the sake of argument that Plaintiff intends to refer to the Individual Members in these instances.

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Individual Members at the Special Meeting expired and was up for re-election at the 2017 Annual Meeting. (Plf. Mot. Mar. 9, 2017, Ex. H.)

Pursuant to order of this Court, the Association held its 2017 Annual Meeting on March 10, 2017. At that meeting the Association members elected the Individual Defendants (except Resotka), Brad Stehl and Ken Howell to serve new terms as directors of the Association. This election rendered this case moot because the parties no longer need any judicial determination of the validity of the Special Meeting election results. Assuming, arguendo, that the Individual Members were elected as directors at the Special Meeting, their terms have expired and the membership voted to replace them at the 2017 Annual Meeting.

III. THE INDIVIDUAL MEMBERS' WERE NOT ELECTED AT THE SPECIAL MEETING BECAUSE THE SPECIAL MEETING AND ELECTION WERE NOT CONDUCTED IN ACCORDANCE WITH THE BYLAWS AND S.C. NON-PROFIT ACT

A. The Individual Members failed to notice the special meeting at least ten days prior to the meeting.

The Association's Bylaws provide that "a director may be removed, with or without cause, by a majority of the Total Association Vote and a successor may then and thereby elected to fill the vacancy thus created." (Bylaws, § 3.6). Such a removal may happen "[a]t any regular or special meeting of the Association duly called . . ." (Bylaws, § 3.6). The Association must send notice of all meetings to the membership and "[n]otices shall be served not less than ten days nor more than sixty days before a meeting." (Bylaws, § 2.4). On March 1, 2016 the Roman Kanach and Tom Wells delivered to HOA Community Management a petition for a special meeting. (Plf. Mem. In Supp. of Sum Jmt., Jan. 23, 2017.) Subsequently, on April 25, 2016 Kanach and Wells requested a list of eligible voting members of the Association. (Pl. Mot. For Temp. Inj., ¶ 14, Jan. 6, 2017). The Individual Members further claim that "in good faith, and

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with special attention to the Bylaws and the [SC Nonprofit Corporations] Act, [it] diligently found the names of the membership of the Association, and ***did then notice*** and hold a special meeting for election of new board members." (Plaintiff's Mot. ¶ 15, Jan. 6, 2017). If the Individual Members did not send notice to the members for the April 28, 2016 Special Meeting until after their April 25, 2016 membership list request then the notice was not sent within the ten day requirement proscribed by the Bylaws and S.C. Code Ann. § 33-31-705(c)(1). Because the Individual Members failed to send notice of the Special Meeting within the time requirement the Special Meeting was a legal nullity.

B. The Individual Members failed to give the Individual Defendants notice of and an opportunity speak at the Special Meeting.

Article III, Section 3.6 of the Bylaws provides that "[a] director whose removal has been proposed by the Owners shall be given at least ten days' notice of the calling of the meeting and the purpose thereof and shall be given an opportunity to be heard at the meeting." The Individual Defendants were not given notice of the Special Meeting or an opportunity to speak at the Special Meeting. (Aff. of Dumpert ¶¶ 18-19). Because the Individual Defendants were not given notice of the meeting or an opportunity to speak as required by the Bylaws, their alleged removal and replacement by the Individual Members was invalid.

C. The Special Meeting was invalid because the Association could not establish the quorum required to conduct business at the meeting.

To conduct an election at the Special Meeting the Association needed 25% of the membership, or sixty-nine members, present in person or by proxy. (Bylaws, § 2.8.) Because the Individual Members impermissibly used Annual Meeting proxies at the Special Meeting the Association failed to establish a quorum at the Special Meeting and any election allegedly held at that meeting was invalid.

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1. The Individual Members attempted to use proxies that were issued by the members for use at the 2016 Annual Meeting and not the Special Meeting.

Plaintiff alleges that ninety members were present or represented by proxy at the Special Meeting. (Plf. Mem. in Supp. of Sum. Jmt.) However, fifty-six of the proxy appointment forms submitted by Plaintiff in support of that figure were expressly limited to use at the annual meeting and were therefore invalid for use at the Special Meeting. (Plf. Mem. in Supp. of Sum. Jmt., Ex. C.) After removing the fifty-six annual meeting appointment forms, only thirty-four members were present or represented by proxy, a number well short of the sixty-nine members required to establish a quorum.

"At all meetings of members, each member may vote in person or by proxy." (Bylaws, § 2.8.) "An appointment of proxy is effective when received by the secretary or other officer or agent authorized to tabulate votes." S.C. Code Ann. § 33-31-724(b). "A corporation is entitled to accept the proxy's vote . . . as that of the member making the appointment" unless there is an "express limitation on the proxy's authority appearing on the face of the appointment form." S.C. Code Ann. § 33-31-724(f).

Fifty-six of the proxy appointment forms submitted by the Individual Members in support of the validity of the Special Meeting were on forms that specify "Bonnie Brae HOA 2016 ***Annual Meeting*** Proxy/Absentee Ballot" (emphasis added). By its very terms this appointment form only authorized the proxy to act on the member's behalf at the Bonnie Brae 2016 Annual Meeting and therefore could not be used at the Special Meeting. The Association is statutorily prohibited from accepting the proxy's vote at the Special Meeting because the appointment form only grants the proxy authority to act at the annual meeting.

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2. The Individual Members attempted to use proxies that were immediately revoked upon sale of the lots by signor prior to the Special Meeting.

Only the record owners of real property within Bonnie Brae are allowed to be members of the Association. (Declaration, Art. I, §§ j, n.) Member are allowed to vote by proxy, however, "[e]very proxy shall be revocable and shall automatically cease upon conveyance by the member of such member's Lot . . ." (Bylaws, Section 28.) Three of the proxies proffered by Plaintiff at the Special Meeting were signed by individuals who sold their homes prior to the April 28, 2016 Special Meeting. (See Exhibits B-D.) Pursuant to the Bylaws these proxies were immediately revoked upon sale of the lot and therefore were not valid for proxy or voting purposes. Additionally, one proxy holder did not appear at the meeting and so the proxy was not exercised. Finally, one member who issued a proxy appeared at the meeting, thus revoking her prior proxy.

CONCLUSION

For the reasons stated herein this court should grant Defendant's Motion for Summary Judgment in this matter.

MCCABE, TROTTER & BEVERLY, P.C.

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