



IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, LAW DIVISION



Frank Hesser, on behalf of The	)	
Riviera In Palos Improvement	)	
Association,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Case No. 2014 L 012093
The Board of Directors of The Riviera	)	
In Palos Improvement Association,	)	Commercial Calendar T
Kovitz Shifrin Nesbit, P.C., Robert B.	)	
Kogen, Phil Lewan, Ernie Harrison,	)	Judge John C. Griffin
Debbie Nottelmann, Donna	)	
O'Connell, Richard Pendowski,	)	
Catherine Bork, Kathy Canty, John	)	
Groebe, Laura Schuldt, Kathie	)	
Anderson, Maria Novoa, Laura	)	
Smyth, Jeff Holloway, Gina Miller	)	
and Mary Ann Krueger,	)	
	)	
Defendants.	)	

OPINION

This cause is before the Court on Defendants', The Board of Directors of The Riviera In Palos Improvement Association, PC, Phil Lewan, Ernie Harrison, Debbie Nottelmann, Donna O'Connell, Richard Pendowski, Catherine Bork, Kathy Canty, John Groebe, Laura Schuldt, Kathie Anderson, Maria Novoa, Laura Smyth, Jeff Holloway, Gina Miller and Mary Ann Krueger (collectively the "Board" or the "Defendants"), Motion to Dismiss Plaintiff's, Frank Hesser, on behalf of The Riviera In Palos Improvement Association, Second Amended Complaint pursuant to 735 ILCS 5/2-615.

I. BACKGROUND

The following is a summary of the allegations contained in the Second Amended Complaint. The Board of Directors of The Riviera In Palos Improvement Association manages a townhouse community in Palos, Hills, Illinois, and it collects assessment fees to manage the common areas and to pay attorneys. In October 2011, the Board held an illegal election because it violated the 1998 By-Laws. Thereafter, the Board illegally amended the By-Laws because it, among other

14L/2093

things, did not give proper notice to the members and the Special Meeting did not have the required quorum. In 2012, the Board allegedly allocated common funds for balcony maintenance and repair, which was against the advice of the Association's counsel, KSN. Plaintiff's Second Amended Complaint alleges three counts against the Board Defendants, including derivative claim of breach of fiduciary duty (Count III), civil conspiracy (Count IV), and breach of contract (Count V).

## II. STANDARD OF REVIEW

In a 2-615 motion to dismiss, the movant challenges the legal sufficiency of a complaint based on certain defects or defenses apparent on the face of the complaint. *Beacham v. Walker*, 231 Ill. 2d 51, 57 (2008). In a 2-615 motion to dismiss, all well-pleaded facts in the complaint are taken as true. *Jarvis v. South Oak Dodge*, 201 Ill. 2d 81, 85 (Ill. 2002). When reviewing a 2-615 motion, a court must view all reasonable inferences in the light most favorable to the plaintiff. *Alpha Sch. Bus Co. v. Wagner*, 391 Ill. App. 3d 722, 725 (1st Dist. 2009). A complaint should only be dismissed pursuant to section 2-615 if it is clear that there are no set of facts to support plaintiff's cause of action. *Kaiser v. Fleming*, 315 Ill. App. 3d 921, 925 (2d Dist. 2000). Illinois is a fact pleading jurisdiction; therefore, "a plaintiff must allege facts sufficient to bring a claim within a legally recognized cause of action." *Alpha Sch. Bus Co. v. Wagner*, 391 Ill. App. 3d 722, 736 (1st Dist. 2009). Pleadings are to be liberally construed so as to do justice between opposing parties. *Abbott v. Amoco Oil Co.*, 249 Ill. App. 3d 774, 778 (2d Dist. 1993).

## III. DISCUSSION

The issue is whether the plaintiff has sufficiently pled that a pre-suit demand would be futile, and therefore, whether he may properly assert a derivative action. 805 ILCS 5/7.80 states, in pertinent part, as follows:

(b) A complaint in a proceeding brought in the right of a corporation must allege with particularity the demand made, if any, to obtain action by the directors and either why the complainant could not obtain the action or why he or she did not make the demand.

"Under Illinois law, '[a] complaint in a proceeding brought in the right of a corporation must allege with particularity the demand made, if any, to obtain action by the directors and either why the complainant could not obtain the action or why he or she did not make the demand. . . .'" *Silver v. Allard*, 16 F. Supp. 2d 966, 969 (N.D. Ill. 1998) (quoting, 805 ILCS 5/7.80(b)). "The demand requirement is intended to allow the corporation an opportunity to take over a suit brought on its behalf." *Powell v. Gant*, 556 N.E.2d 1241, 1245 (4th Dist. 1990). However, in some circumstances, the demand may be excused. *Silver*, 16 F.Supp.2d at 969; *Powell*, 556 N.E.2d at 1245. "[T]he doctrine of futility excuses demand on directors when

14 L1 2093

the majority of the directors are the alleged wrongdoers." *Powell*, 556 N.E.2d at 1245.

"To determine whether demand is futile, Illinois courts apply the two-prong standard the Delaware Supreme Court articulated in *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984)." *Silver*, 16 F.Supp.2d at 969. "In *Aronson*, the Delaware Supreme Court concluded that the futility of a pre-suit demand is established if, accepting the well-pleaded facts as true, the plaintiff raises a reasonable doubt that (1) the directors are disinterested and independent or (2) that the challenged transaction was the product of a valid exercise of the directors' business judgment. See *Powell*, 556 N.E.2d at 1245 (citing *Aronson*, 473 A.2d at 814)." *Silver*, 16 F.Supp.2d at 969; See also *Powell v. Gant*, 556 N.E.2d 1241, 1245 (4th Dist. 1990). "In order to show lack of disinterest and independence, Plaintiffs must allege with particularity 'self-dealing, personal benefit or bias.'" *Silver*, 16 F. Supp. 2d at 970 (quoting *Abbott Lab. Derivative Litig.*, 1994 U.S. Dist. LEXIS 938, \*5, 1994 WL 31034 (N.D. Ill. Jan. 31, 1994). "Whether the demand requirement is excused is within the trial court's discretion." *Powell*, 556 N.E.2d at 1245.

After reviewing the parties' briefs, Second Amended Complaint, and after applying standards set forth above, including accepting all well-pled facts as true, the Court denies the defendants' motion to dismiss because the plaintiff has raised "a reasonable doubt that (1) the directors are disinterested and independent or (2) that the challenged transaction was the product of a valid exercise of the directors' business judgment."

With respect to the first prong, the plaintiff has sufficiently pled facts to support "self-dealing, personal benefit or bias" by the Board. For example, the defendants have pled that the Board members participated in the wrongdoing, that the Board members knowingly and willfully disregarded the governing documents and made decisions in order to retain their positions and control of the Board of Directors, and that the Board members' decisions were made to further their own personal interests. Allegations such as the foregoing raise a reasonable doubt that the Board is disinterested and independent, and therefore, pre-suit demand would be futile.

With respect to the second prong, the Court finds that the plaintiff has sufficiently pled allegations to support that defendants acted in bad faith. For example, the plaintiff has pled that the Board members made decisions to retain their positions, that the Board members put their interests before the Association's interests, that the Board members' "knowingly and willfully failed to comply with the By-Laws and Declaration," that the Board members made decisions regarding the balcony maintenance that were against the advice of counsel and that violated the By-Laws and Declaration. Based on allegations such as the foregoing, the Court finds that the plaintiff has sufficiently pled allegations to raise a reasonable doubt that the challenged transactions were the product of a valid exercise of the directors' business judgment.

Accordingly, after accepting all well-pled facts as true, the Court finds that the plaintiff has sufficiently pled facts to raise "a reasonable doubt that (1) the

HC 12093

directors are disinterested and independent” and “(2) that the challenged transaction was the product of a valid exercise of the directors' business judgment.”

**Illinois General Not for Profit Corporation Act of 1986**

The issue is whether the plaintiff's claims against the defendants are barred by Section 108.70 of the General Not for Profit Corporation Act of 1986 (“Act”).

Section 108.70(a) of the General Not for Profit Corporation Act of 1986 states as follows:

(a) No director or officer serving without compensation, other than reimbursement for actual expenses, of a corporation organized under this Act or any predecessor Act and exempt, or qualified for exemption, from taxation pursuant to Section 501(c) of the Internal Revenue Code of 1986, as amended, shall be liable, and no cause of action may be brought, for damages resulting from the exercise of judgment or discretion in connection with the duties or responsibilities of such director or officer unless the act or omission involved willful or wanton conduct.

For the exemption under Section 108.70 to apply, “several prerequisites must be met. First, the directors must serve without compensation. Second, the corporation must be organized under the Not For Profit Corporation Act. Next, the corporation must be exempt from or qualify for exemption from taxation under Federal law.” *Robinson v. LaCasa Grande Condominium Ass'n*, 204 Ill. App. 3d 853, 858, 562 (4th Dist. 1990). Further, “[i]f these requisites are satisfied, then the analysis moves to the final requirement: the conduct of the directors or officers must not have been willful or wanton.” *Robinson* 204 Ill. App. 3d at 562.

After reviewing the parties' briefs, Second Amended Complaint, and after applying the section 2-615 standards, the Court denies the defendants' motion to dismiss based on the Act without prejudice for the defendants to raise the issue as an affirmative defense.



14C/2093



IV. ORDER

For the reasons stated, it is so ORDERED:

- (1) Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint pursuant to section 2-615 is DENIED;
- (2) Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint pursuant to section 2-615 based on Section 108.70 of the General Not for Profit Corporation Act of 1986 is DENIED without prejudice for the defendants to raise the issue as an affirmative defense;
- (3) Defendants are given 21 days to February 19, 2016 answer Plaintiff's Second Amended Complaint;
- (4) This matter is set for a report on status on February 23, 2016 at 9:30 am in Room 2303 without further notice.

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**ENTERED**  
 JUDGE JOHN C. GRIFFIN-1981

JAN 27 2016

JOROTHY BROWN  
 CLERK OF THE CIRCUIT COURT  
 OF COOK COUNTY, IL  
 DEPUTY CLERK

ENTERED

Judge John C. Griffin, No. 1981