

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY

) FIFTEENTH JUDICIAL CIRCUIT

) CASE NO.: 2023-CP-26-00045

Suzanne N. Norton, Individually; Kenneth R. Norton, Individually; Suzanne N. Norton, as Trustee of the Suzanne N. Norton Living Trust dated May 8, 2012; and Kenneth R. Norton as Trustee of the Kenneth R. Norton Living Trust dated May 8, 2014,

Plaintiffs,

vs.

Tidewater Plantation Community Association, Inc.; The City of North Myrtle Beach Board of Zoning Appeals; and Tidewater Plantation Community Association Design Review Board; and J.D. Jeffers, as Chairman of Tidewater Plantation Community Association Design Review Board,

Defendants.

**ORDER ON DEFENDANTS
TIDEWATER PLANTATION
COMMUNITY ASSOCIATION, INC.,
TIDEWATER PLANTATION
COMMUNITY ASSOCIATION DESIGN
REVIEW BOARD, AND J.D. JEFFERS'
MOTIONS TO DISMISS PLAINTIFFS'
AMENDED COMPLAINT**

RECEIVED
Oct 03 2023
SC Court of Appeals

THIS MATTER came before the Court at a hearing on June 1, 2023, on the Motions to Dismiss Plaintiffs' Amended Complaint filed by Defendants Tidewater Plantation Community Association Inc. (the "Association") and Tidewater Plantation Community Association Design Review Board (the "DRB") on March 14, 2023 and filed by J.D. Jeffers, as Chairman of Tidewater Plantation Community Association Design Review Board ("Jeffers" and collectively when referred to with the Association and the DRB, the "Tidewater Defendants") on May 3, 2023 (the "Tidewater Defendants' Motions). After carefully considering the pleadings, memoranda filed in this case, arguments of counsel, and the applicable law, the Tidewater Defendants' Motions are hereby GRANTED. In support of this Order, the undersigned finds and concludes as follows:

FINDINGS OF FACT

1. Plaintiffs, Susanne N. Norton, Individually, Kenneth R. Norton, Individually (the “Nortons”), Suzanne Norton, as Trustee of the Suzanne N. Norton Living Trust dated May 8, 2012, and Kenneth R. Norton, as Trustee of the Kenneth R. Norton Living Trust dated May 8, 2014 (the “Plaintiffs”) are owners of certain residential property located at 4628 and 4630 South Island Drive (Lots 407 and 408), North Myrtle Beach, South Carolina (the “Lots”), which are located within the Association.

2. The Association is an upscale planned unit development (“PUD”) residential and golf community, located in North Myrtle Beach, South Carolina.

3. The Association’s PUD was created by agreement with the City of North Myrtle Beach dated April 4, 1989, and development within the community is subject to certain terms and conditions of the PUD and is governed by certain documents, including, but not limited to, the Third Amended and Restated Declaration of Covenants, Conditions, and Restrictions for Tidewater Plantation, recorded in the Horry County ROD Office in Book 3831 at Page 1733 (“Covenants”), Property Owner Rules and Regulations recorded in Book 4369 at Page 1318 (“Rules and Regs”), and Design Review Board Standards, Requirements and Procedures recorded in Book 4275 at Page 2053 (“DRB Standards”).

4. The Association is a nonprofit corporation organized to manage the community’s affairs, provide for maintenance and upkeep of the common areas, and enforcement of the community’s rules and regulations for the benefit of Tidewater Plantation and its residents.

5. The Association primarily acts through its Board of Directors (“Board”), created by the Covenants.

6. In addition to the Board, the Covenants also established the Design Review Board (“DRB”), which is responsible for the review and approval of exterior and structural improvements, the siting of such improvements, and any additions and changes to homes and/or lots within Tidewater Plantation.

7. Jeffers is the DRB’s Chairman.

8. On October 15, 2020, City of North Myrtle Beach (the “City”) Zoning Administrator, Ben Caldwell (“Caldwell”) approved Nortons’ application for a Building Permit: BLD-20-3121 with architectural plans and/or drawings (the “Subject Application”), by the, . Caldwell found “that the proposed cupola was a necessary mechanical feature under the plain and unambiguous language of Section 23-106 of the City Zoning Ordinance.”

9. On June 25, 2021, the DRB filed an administrative appeal to the Co-Defendant, The City of North Myrtle Beach Board of Zoning Appeals (“Board of Zoning Appeals”), challenging “the decision that the proposed cupola was a necessary mechanical feature under Section 23-106 of the City Zoning Ordinance.”

10. On September 3, 2021, the Board of Zoning Appeals held a hearing, which Plaintiffs participated in, and, on September 5, 2021, the Board of Zoning Appeals issued an Order “reversing the decision of Zoning Administrator Caldwell because the proposed cupola was not a necessary mechanical feature under Section 23-106 of the City Zoning Ordinance” (the “Zoning Board Order”).

Tidewater Plantation Community Association, Inc. v. Norton, et al., C/A# 2021-CP-26-04599

11. On July 12, 2021, the Association filed an action against the Nortons titled *Tidewater Plantation Community Association, Inc. v. Norton, et al.*, Case No. 2021CP2604599 (Horry County) (the “Prior Action”) alleging preliminary and permanent injunctive relief in

connection with the Plaintiffs' disregard for the procedures required by the Association's governing documents to commence construction on the Lots.

12. In the Prior Action, this Court entered a Consent Order for Preliminary Injunction dated July 20, 2021 (the "Preliminary Injunction Order"), which enjoins the Nortons from the following:

engaging in, authorizing, allowing, permitting, or otherwise undertaking any work, clearing or construction activity on or at the Subject Property until such time as the [Nortons] obtain Tidewater and DRB approval of a preliminary and final plan, complete a stake out inspection, pay deposits and fees, provide a signed copy of the Contractor Work Rules, obtain a Tidewater building permit for the Tidewater approval final plan, or without prior approval of this Court.

13. The Nortons then filed an Amended Answer and Counterclaim, dated August 25, 2021 (the "Counterclaims") in the Prior Action, which asserted counterclaims against the Association for (1) breach of contract; (2) breach of fiduciary duty; and (3) trespass/harassment.

14. The Nortons' Counterclaims in the Prior Action were based on the Subject Plans submitted to the City of North Myrtle Beach, and the DRB's rejection of the plans based on the height of the proposed home.

15. In connection with the Nortons' breach of contract claim, the Nortons' alleged the Association and its DRB breached the terms of the governing documents "by attempting to circumvent City ordinances regarding AE13 FEMA designated flood zone variances and by factoring the height of a necessary mechanical feature into the height of the Nortons' home," affecting the Subject Application.

16. The basis of the Nortons' breach of fiduciary claim was "shar[ing] the Nortons' building plans without their permission" and taking "the Norton[s'] plans to the City without the Nortons' permission."

17. The Nortons' trespass/harassment counterclaim alleged that Association representatives trespassed on the Lots.

18. A few months later, the Association filed an Amended Summons & Complaint in the Prior Action adding as Defendants Suzanne N. Norton, as Trustee of the Suzanne N. Norton Living Trust dated May 8, 2012, and Kenneth R. Norton, as Trustee of the Kenneth R. Norton Living Trust dated May 8, 2014, which constitutes all the Plaintiffs in this action, and an additional cause of action for declaratory judgment that the DRB acted properly and the Plaintiffs failed to comply with the Association's governing documents.

19. In response, on October 11, 2021, the Plaintiffs filed an Answer to the Amended Complaint.

20. As of today's date, the Prior Action remains active.

Norton, et al. v. Tidewater Plantation Community Association, Inc., et al.,
C/A# 2023-CP-26-00045

21. On January 5, 2023, the Plaintiffs commenced this action by filing a Summons and Complaint against the Association, DRB, and the Zoning Board, and later filed the Amended Complaint adding Jeffers as a Defendant.

22. Plaintiffs' Amended Complaint asserts seven (7) causes of action, including the first cause of action against all Defendants for a declaratory judgment that the DRB failed to timely file an appeal with the Board of Zoning Appeals and that the Zoning Board Order is void; the second cause of action against all Defendants for a declaratory judgment that the Subject Application meets the requirements of the Associations' governing documents and the City Zoning Ordinance; the third cause of action against all Defendants seeking to vacate the Zoning Board Order pursuant to Rule 60, SCRCP; the fourth cause of action against the Association and DRB alleging breaches of the Associations' governing documents in connection with Plaintiffs' Subject

Application; the fifth cause of action for negligence against the DRB and Association for “failing to allow” Plaintiffs to construct the plans that were the subject of the Subject Application; the sixth cause of action for injunctive relief against the DRB and Association requiring the Association to essentially approve the Subject Application; and the seventh cause of action for a permanent injunction against the DRB and Association requiring the Association to essentially approve the Subject Application.

GOVERNING LEGAL STANDARD

A defendant may move to dismiss a complaint based upon a failure to state facts sufficient to constitute a cause of action. Rule 12(b)(6), SCRPC; *Spence v Spence*, 368 S.C. 106, 117, 628 S.E.2d 869, 874 (2006). If, in viewing the complaint in the light most favorable to the plaintiff, the court determines the facts in the complaint are insufficient to entitle the plaintiff to the relief it seeks, the court should grant the motion. *Baird v. Charleston Co.*, 333 S.C. 519, 527, 511 S.E.2d, 69, 73 (1999). In ruling on a motion to dismiss pursuant to Rule 12(b)(6), SCRPC, “[t]he question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief.” *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247-48 (2007).

CONCLUSIONS OF LAW

Based upon the foregoing, the Court makes the following Conclusions of Law:

23. The Court has jurisdiction over the subject matter of this case and the parties hereto.

24. Venue is proper in Horry County, South Carolina.

I. Plaintiffs’ Claims Against the DRB

25. Plaintiffs’ Amended Complaint against the DRB must be dismissed with prejudice because the DRB is not a legal entity and is a committee within the Defendant Association.

26. Therefore, the DRB is not a separate and distinct legal entity that can “suffer legal wrongs.”

27. As a result, Plaintiffs’ Amended Complaint is dismissed with prejudice against the DRB in its entirety.

II. Plaintiffs’ Claims against Defendant Jeffers

28. Plaintiffs first, second, third causes of action against all of the Defendants, which request various forms of declaratory judgment regarding Defendants’ action in connection with Plaintiffs’ construction plans on the Lots and seek to void and vacate the Zoning Board Order, must be dismissed with prejudice against Jeffers in his capacity as Chairman of the DRB and/or in his individual capacity because Plaintiffs’ Amended Complaint fails to allege any facts and/or actions by Jeffers upon which such claims may be based.

III. Plaintiffs’ Amended Complaint is the Same or Substantially the Same to Plaintiffs’ Counterclaims in the Prior Action

29. Additionally, Tidewater Defendants moved for dismissal, pursuant to Rule 12(b)(8), SCRPC, because another action is pending between the same parties for the same claim. In South Carolina, dismissal under Rule 12(b)(8) is proper where there is “(1) another action pending, (2) between the same parties, (3) for the same claim.” *See Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 105 (Ct. App. 2009); *Corbett v. City of Myrtle Beach, S.C.*, 336 S.C. 601, 610-11 (Ct. App 1999).

30. The Prior Action, as defined above, involves the same parties because the DRB, a non-legal entity, and Jeffers, in his capacity as Chairman of the DRB, are the Association (the plaintiff in the Prior Action), and the Plaintiffs in this action are the defendants in the Prior Action.

31. The Plaintiffs’ Counterclaims against the Association in the Prior Action were based upon the same facts and circumstances, i.e., the Subject Application, interpretations of the

Association's governing documents, and the Association's objections to the Plaintiffs' construction plans. Additionally, the claims seek the same ultimate relief, i.e., the approval of the Plaintiffs' Subject Application. *See Doe v. Duncan*, No. 2008-UP-596, 2008 WL 9846820, at *1 (Ct. App. Oct. 17, 2008); *Corbett*, 336 S.C. at 610.

32. As a result, the Plaintiffs' Amended Complaint is dismissed with prejudice against the Tidewater Defendants pursuant to Rule 12(b)(8), SCRCF.

IV. Plaintiffs' First Cause of Action for Declaratory Judgment and Third Cause of Action for Relief Pursuant to Rule 60, SCRCF

33. The Plaintiffs' first and third causes of action seek to set aside the Zoning Board Order.

34. Plaintiffs' first and third causes of action must be dismissed as untimely.

35. Section 23-162 of the City of North Myrtle Beach Zoning Ordinance ("Zoning Ordinance") states that:

any person who may have a substantial interest in any decision of the board of zoning appeals may appeal from any decision of the board to the circuit court in and for the county by filing with the clerk of such court a petition in writing setting forth plainly, fully and distinctly wherein such decision is contrary to law. The appeal shall be filed *within thirty (30) days after the decision of the board is rendered.*

See Zoning Ordinance at § 23-162 (emphasis added).

36. The Zoning Board issued the Zoning Board Order on September 5, 2021.

37. Plaintiffs commenced this action over a year later, on or about January 1, 2023.

38. Therefore, Plaintiffs first and third causes of action seeking to set aside the Zoning Board Order are untimely, and Plaintiffs cannot avoid the requirements of the Zoning Ordinance by commencing declaratory judgment causes of action regarding the Zoning Board Order.

Allowing Plaintiffs to do so would allow them to use the judicial system to circumvent the applicable Zoning Ordinance.

39. Therefore, for this additional basis, the Plaintiffs' first and third causes of action are dismissed with prejudice against the Tidewater Defendants.

WHEREFORE, it is hereby ORDERED, ADJUDGED, and DECREED that the Tidewater Defendants' Motions are GRANTED and Plaintiffs' Amended Complaint is hereby dismissed with prejudice against the Tidewater Defendants.

SO ORDERED!

This _____ day of June, 2023.

The Honorable Benjamin H. Culbertson
Fifteenth Judicial Circuit

[Electronic Signature Page Follows]



Horry Common Pleas

Case Caption: Suzanne N Norton , plaintiff, et al VS Tidewater Plantation
Community Association Inc , defendant, et al

Case Number: 2023CP2600045

Type: Order/Dismissal

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148