

STATE OF SOUTH CAROLINA  
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT  
2018-CP-46-02818

LAUREL MEADOWS HOME OWNERS  
ASSOCIATION, by and through JEFF  
SOCHKO, member and owner,

Plaintiff,

v.

DEBBIE MCDONAGH and JIMMY  
MCDONAGH, as acting the acting  
board of directors and ARC for Laurel  
Meadows nonprofit HOA; the Laurel  
Meadows Home Owners Assoc., Inc.,

Defendants.

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MAY 13 2019

**SC Court of Appeals**

**PROPOSED ORDER GRANTING  
DEFENDANTS' MOTION TO DISMISS  
PURSUANT TO RULE 12(b)(6), SCRPC**

This matter came before the Court on March 13, 2019, upon the Motion to Dismiss of Defendants Debbie McDonagh, Jimmy McDonagh, and the Laurel Meadows Home Owners Assoc., Inc. ("Defendants"), pursuant to Rule 12(b)(6), SCRPC. Representing the parties were: Cameron Halford for Plaintiff; and J. Nathaniel Pierce for Defendants. Defendants seek dismissal of Plaintiff's Complaint containing causes of action for derivative suit under the South Carolina Nonprofit Corporation Act and tortious interference with contractual relations.

**Standard for Motion to Dismiss under Rule 12(b)(6), SCRPC**

When a pleading filed in an action fails "...to state facts sufficient to constitute a cause of action," it may be dismissed. Rule 12(b)(6), SCRPC. The motion must be dealt with based solely on the allegations contained in the pleadings. *FOC Lawshe*

*Limited Partnership v. International Paper Company*, 352 S.C. 408, 574 S.E.2d 228 (Ct. App. 2002). In considering the motion, all allegations of the pleading, and all inferences reasonably deducible therefrom are deemed admitted. *Id.* "If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper." *Spence v. Spence*, 286 S.C. 106, 116, 628 S.E. 2d 869, 874 (2006).

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a claim and must be granted if the claim does not set forth sufficient allegations entitling the party to relief. *Williams v. Condon*, 347 S.C. 227, 232-33, 553 S.E.2d 496, 499 (Ct. App. 2001). This analysis looks to see if there are facts alleged that satisfy every element of the cause of action asserted.

### **Standing**

Standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right. *South Carolina Department of Social Services v. Boulware*, 422 S.C. 1, 7, 809 S.E.2d 223, 226 (2018). Further, standing is defined as "a personal stake in the subject matter of a lawsuit." *Joseph v. South Carolina Department of Labor, Licensing and Regulation*, 417 S.C. 436, 449, 790 S.E.2d 763, 769 (2016). For a plaintiff to possess standing, three elements must be satisfied: (1) the plaintiff must have suffered an injury-in-fact which is a concrete, particularized, and actual or imminent invasion of a legally protected interest; (2) a causal connection must exist between the injury and the challenged conduct; and (3) it must be likely

that a favorable decision will redress the injury. A lack of standing is grounds for the court to grant a motion to dismiss. See *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n.*, 407 S.C. 67, 81, 753 S.E.2d 846, 853 (2014).

### **Derivative Claim Pursuant to the South Carolina Nonprofit Corporation Act**

Derivative suits may be maintained on behalf of South Carolina corporations in federal and state court *in accordance with the applicable rules of civil procedure*. S.C. Code Ann. § 33-31-630 (1994, as amended) (emphasis added). According to the South Carolina Reporters' Comments to S.C. Code Ann. § 33-31-630, South Carolina Rule of Civil Procedure ("SCRCP") 23(b)(1) prescribes the pleading requirements for derivative actions by shareholders of South Carolina nonprofit corporations. The purpose of a derivative suit is to allow "one or more shareholders or members to enforce a right of the corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it..." SCRCP 23(b)(1) (2016, as amended).

SCRCP 23(b)(1) contains the following elements: (1) one or more members may bring a derivative action; (2) the complaint must be verified; (3) the complaint must alleged with particularity any effort made to obtain action from the board "and the reasons for his failure to obtain the action or for not making the effort;" (4) the plaintiff must fairly and adequately represent the interests of the members in enforcing the corporation's rights; (5) once begun, a derivative action may not be dismissed without court approval – notice of dismissal must be given to the members of the corporation. See *id.*

Per SCRCP 23(b)(1), a derivative suit allows "one or more shareholders or members to enforce a right of the corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it...." To distinguish a derivative claim from a direct one, the court considers: (1) who suffered the alleged harm, the corporation or the suing stockholders, individually, and (2) who would receive the benefit of any recovery or other remedy, the corporation or the stockholders individually? *Patterson v. Witter*, 2018 WL 5984105 at \*7 (2018). An action seeking to remedy a loss to the corporation is generally a derivative one. *Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001). If the gravamen of a complaint is injury to the corporation, and not the individual interests of the shareholder, a derivative suit is proper. *Id.* However, if a Plaintiff's loss is separate and distinct from that of the corporation, an individual action is the appropriate avenue for relief. *See id.*

Shareholders' obligation to make a demand on the corporation before bringing a derivative action assures compliance with the most fundamental principle of corporate governance. *Carolina First Corp. v. Whittle*, 343 S.C. 176, 188, 539 S.E.2d 402, 409 (Ct. App. 2000). A shareholder's pre-suit demand on the board of directors must be alleged, not in a conclusory fashion, but through particularized allegations in a derivative action. *See* 343 S.C. at 189, 539 S.E.2d at 409-10. The requirement that shareholders make a demand on the board of directors and allege their efforts with particularity should be rigorously enforced in a derivative action. *See* 343 S.C. at 192, 539 S.E.2d at 411. A shareholder derivative action that does not meet the heightened pleading requirements for alleging a shareholder's demand is properly dismissed for

failure to state facts sufficient to constitute a cause of action. *Clearwater Trust v. Bunting*, 367 S.C. 340, 339, 626 S.E.2d 334, 351 (2006).

### **Tortious Interference with Contractual Relations**

The elements of a cause of action for tortious interference with contract are: (1) the existence of a valid contract; (2) wrongdoer's knowledge thereof; (3) wrongdoer's intentional procurement of its breach; (4) absence of justification; and (5) resulting damages. *Gecy v. South Carolina Bank & Trust*, 422 S.C. 509, 812 S.E.2d 750 (Ct. App. 2018).

### **Legal Conclusions**

1. Plaintiff lacks standing to bring a claims tortious interference with contractual relations. Plaintiff is not Jeffrey Sochko, rather, the Plaintiff is the Laurel Meadow Home Owners Association. Per Plaintiff's complaint, Defendants are alleged to have tortiously interfered with a contract between Jeffrey Sochko and a contractor. There is no allegation, nor any factual basis, to support the Laurel Meadows Home Owners Association's right to make a legal claim or seek judicial enforcement of any right or duty to which it is not a party

2. Notwithstanding the standing issue, Plaintiff has not pled the required elements to support a claim of tortious interference with contractual relations.

3. Plaintiff has not properly pled its claim for a derivative suit under the South Carolina Nonprofit Corporations Act. First, the claim is not properly couched as a derivative suit. The gravamen of Plaintiff's complaint is the denial of his proposed reconstruction plans by the Laurel Meadow Homeowners' Association's Board of

Directors and Architectural Review Committee. Because the loss alleged by Plaintiff is separate and distinct from that of the corporation, and because Jeffrey Sochko would receive the benefit of any relief personally, this action is not properly brought as a derivative claim and must be dismissed. Next, Plaintiff has failed to submit a verified complaint. Plaintiff's complaint contains no representation by Plaintiff he has investigated the allegations contained in the Complaint and found them to be of substance. Next, Plaintiff's complaint makes no allegation concerning a demand on the board. To the extent a demand is tangentially referenced, the allegation does not meet the heightened pleading standard prescribed by SCRCP 23(b)(1) and *Whittle*. Last, Plaintiff does not fairly and adequately represent the interests of the members in enforcing the corporation's rights. As discussed above, Plaintiff seeks individual relief based on alleged individually-held grievances.

THEREFORE, it is ordered that Defendants' motion to dismiss is granted and Plaintiff's claims, *in toto*, are dismissed with prejudice.

IT IS SO ORDERED.

April\_\_\_\_, 2019

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The Honorable Daniel D. Hall  
Presiding Judge  
Sixteenth Judicial Circuit



York Common Pleas

**Case Caption:** Laurel Meadows Home Owners Association , plaintiff, et al VS  
Debbie Mcdonagh , defendant, et al  
**Case Number:** 2018CP4602818  
**Type:** Order/Dismissal

So Ordered

s/Daniel D. Hall 2753