

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

Jefferson Davis, Jr.,

Plaintiff,

v.

Chad Connelly, Tom Persons & South Carolina Educational Credit for Exceptional Needs Children Fund,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO.: 2020-CP-36-00093

**ORDER DENYING
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION AND
DISMISSING PLAINTIFF'S SUMMONS
AND COMPLAINT WITH PREJUDICE
AND DENYING
MOTION FOR SANCTIONS**

This matter came before the Court on March 5, 2020, upon Plaintiff's Motion for Immediate Temporary Restraining Order and Notice of Motion and Motion for Temporary Injunction filed on February 24, 2020, Defendants' Motion to Deny Preliminary Injunction and to Dismiss the Complaint filed on March 4, 2020, and Defendants' Motion for Sanctions filed on March 6, 2020.¹ Present at the hearing were Geoffrey K. Chambers, Esquire, and Justin P. Novak, Esquire, as counsel for Defendants South Carolina Educational Credit for Exceptional Needs Children Fund, Chad Connelly, and Tom Persons, as well as Chad Connelly and Tom Persons, and Plaintiff Jefferson Davis, Jr., pro se. After careful review and consideration of the parties' arguments and

¹ Plaintiff filed the Summons and Complaint for Declaratory Judgment and Injunctive Relief in this matter on February 12, 2020, followed by a Motion for Immediate Temporary Restraining Order and Notice of Motion and Motion for Temporary Injunction filed on February 24, 2020. On February 27, 2020, The Honorable William P. Keesley entered a form order denying Plaintiff's motion for a temporary restraining order and requiring Plaintiff to provide notice to Defendants of the remaining motion for preliminary injunction. The Court scheduled a hearing of the remaining motion for preliminary injunction for hearing on March 5, 2020. Although Defendants filed the Motion to Deny Preliminary Injunction and to Dismiss the Complaint on March 4, 2020, and the Motion for Sanctions on March 6, 2020, all parties consented to the Court's consideration of all pending motions at the hearing on March 5, 2020. In addition, the Court allowed Plaintiff an additional 10 days to respond to Defendants' motions and Defendants an additional 10 days after service of Plaintiff's response to serve and file any reply. After obtaining an extension to respond, Plaintiff served and filed responses to Defendants' motions and Defendants subsequently served and filed a timely reply.

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submissions, this Court grants Defendants' Motion to Deny Preliminary Injunction and to Dismiss the Complaint and denies Defendants' Motion for Sanctions.²

FINDINGS

South Carolina Educational Credit for Exceptional Needs Children Fund ("Exceptional SC") is a domestic nonprofit entity incorporated pursuant to a legislative budget proviso on June 16, 2016.³ Pursuant to S.C. Code § 12-6-3790, Exceptional SC operates as a public charity entirely dependent upon private donations to provide scholarships to exceptional needs children attending eligible schools for which donors receive refundable tax credits against their South Carolina income taxes.⁴ In order to fulfill its mission, Exceptional SC may expend up to two percent of the fund for administration and related costs. Exceptional SC is governed by five directors, including Defendant Tom Persons, and employs an executive director, Defendant Chad Connelly. As a domestic nonprofit entity incorporated in South Carolina, Exceptional SC is governed by the South Carolina Nonprofit Corporation Act, S.C. Code § 33-31-101 et seq.

Although Plaintiff is an attorney licensed to practice law in the State of Georgia, Plaintiff proceeds in this action pro se.⁵ In the action, Plaintiff challenges certain conduct of Exceptional SC, one of its directors, and its executive director by alleging, inter alia, that the conduct violates S.C. Code § 12-6-3790. Plaintiff also seeks an accounting of the nonprofit corporation's administrative expenses and donations. Plaintiff alleges standing to challenge the conduct and obtain such an

² A trial court may consider affidavits and other evidence outside the pleadings in support of a motion to dismiss based on lack of jurisdiction without converting the motion to dismiss into one for summary judgment. Baird v. Charleston County, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999).

³ Effective May 18, 2018, South Carolina codified the creation of Exceptional SC in S.C. Code § 12-6-3790.

⁴ Pursuant to statute, Exceptional SC may not receive any appropriation of public funds and the amounts on deposit in the fund do not constitute public funds and are not property of the State. S.C. Code § 12-6-3790(B)(1), (2). Exceptional SC is also statutorily prohibited from expending public funds. S.C. Code § 12-6-3790(B)(4).

⁵ Plaintiff is not licensed to practice law in South Carolina.

accounting as a citizen, resident, taxpayer, registered elector of South Carolina and as a donor to Exceptional SC.⁶

In response to Plaintiff's summons and complaint and motion for preliminary injunction, Defendants moved to dismiss Plaintiff's pleadings and motion pursuant, inter alia, to Rules 12(b)(1) and (6) on the ground that Plaintiff does not have standing to challenge the conduct of the nonprofit corporation or its officers and directors under South Carolina law. Defendants also moved pursuant to Rule 11, SCRCF, for an order imposing sanctions on Plaintiff for serving and filing a frivolous pleading and motion in bad faith and for which there exist no good ground for support under South Carolina law.

ORDER

A trial court must dismiss a complaint whenever the court lacks subject matter jurisdiction. Rule 12(b)(1), SCRCF; see also Edens v. Bellini, 359 S.C. 433, 440, 597 S.E.2d 863, 867 (Ct. App. 2004). One requirement of subject-matter jurisdiction is standing. Anders v. South Carolina Parole & Community Corrections Board, 279 S.C. 206, 211, 305 S.E.2d 229, 231 (1983). "Standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right." Michael P. v. Greenville County Dept. of Social Services, 385 S.C. 407, 415, 684 S.E.2d 211, 215 (Ct. App. 2009). "Standing may be acquired: (1) by statute; (2) through the rubric of "constitutional standing;" or (3) under the "public importance" exception." ATC South Inc. v. Charleston County, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008).

Plaintiff does not have standing to assert the subject claims pursuant to any South Carolina statute. S.C. Code § 12-6-3790 does not provide for any private right of action to enforce its provisions and the South Carolina Nonprofit Corporation Act expressly circumscribes standing to

⁶ Plaintiff is not a member or director of Exceptional SC nor a representative of the South Carolina Attorney General.

challenge the conduct of a nonprofit corporation such as Exceptional SC. S.C. Code § 33-31-304 (“A corporation’s power to act may be challenged in a proceeding against the corporation to enjoin an act where a third party has not acquired rights . . . by the Attorney General, a director, or by a member or members in a derivative proceeding.”); see also S.C. Code § 1-7-130 (“[t]he Attorney General shall enforce the due application of funds given or appropriated to public charities within the State, prevent breaches of trust in the administration thereof and, when necessary, prosecute corporations which fail to make to the General Assembly any report or return required by law.”). Moreover, in South Carolina, “the doctrine of ultra vires cannot be used as a sword by a third party to try and invalidate an action by a nonprofit corporation.” S.C. Code § 33-31-304 South Carolina Reporters’ Comments (citing Deborde v. St. Michaels and All Angels Church, 272 S.C. 490, 502, 252 S.E.2d 876, 881 (1979)).

South Carolina courts have also long held that “the assets of a corporation belong to the corporation and not the individual stockholders, and . . . the liability of directors or officers of a corporation for loss to the corporation due to their mismanagement is an asset of the corporation and . . . any recovery on such a cause of action belongs solely to the corporation.” Davis v. Hamm, 300 S.C. 284, 288, 387 S.E.2d 676, 678 (Ct. App. 1989). South Carolina law similarly circumscribes standing to remove a director of a nonprofit corporation to the corporation, certain of its members, and the Attorney General. S.C. Code § 33-31-810.

Plaintiff also does not have standing to assert the subject claims through the rubric of constitutional standing or through the narrow public importance exception. Constitutional standing is comprised of three elements: “(1) the plaintiff must have suffered an injury-in-fact that is concrete and particularized, and actual and imminent as opposed to hypothetical; (2) the injury and the conduct complained of the defendant must be causally connected; and (3) it must be likely that the

injury will be redressed by a favorable decision.” Michael P., 385 S.C. at 416, 684 S.E.2d at 215. “[S]tanding may [also] be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance.” ATC South Inc., 380 S.C. at 198, 669 S.E.2d at 341. In general, the public interest involved is the prevention of the unlawful expenditure of money raised by taxation or the accountability and integrity of government action. See, e.g., Sloan v. Greenville County, 356 S.C. 531, 550, 590 S.E.2d 338, 349 (Ct. App. 2003) (quoting Sloan v. School District of Greenville County, 342 S.C. 515, 523, 537 S.E.2d 299, 303 (Ct. App. 2000)). “However, “[t]he mere fact that the issue is one of public importance does not confer upon any citizen or taxpayer the right to invoke per se a judicial determination of the issue.” Crews v. Beattie, 197 S.C. 32, 32, 14 S.E.2d 351, 358 (1941).

Plaintiff does not have standing to assert the subject claims through the rubric of constitutional standing or through its narrow public importance exception as a citizen, resident, taxpayer, and registered elector of South Carolina because the challenged actions are those of a nonprofit corporation statutorily prohibited from receiving or expending public funds. S.C. Code § 12-6-3790(B)(1), (2), (4). The conduct of which Plaintiff complains also does not involve any legislative or executive action. Moreover, if the challenged conduct did involve public funds or government action, Plaintiff’s allegations of such standing would be indistinguishable from any other citizen, resident, taxpayer, and registered elector in South Carolina except for the allegation that Plaintiff is a donor to the nonprofit corporation. This feature of commonality would necessarily defeat the constitutional requirement of a concrete and particularized injury. ATC South Inc., 380 S.C. at 198, 669 S.E.2d at 340-41. Plaintiff’s status as a donor to the nonprofit corporation also does not accord him standing to assert the subject claims under South Carolina law. As discussed above, the South Carolina Nonprofit Corporation Act expressly circumscribes standing to challenge the

conduct of a nonprofit corporation or its officers and directors. S.C. Code § 33-31-304; S.C. Code § 33-31-810; Davis v. Hamm, 300 S.C. 284, 288, 387 S.E.2d 676, 678 (Ct. App. 1989). In South Carolina, the mere act of donating to a nonprofit corporation does not accord standing to the donor to challenge the conduct of the nonprofit corporation or its administration by duly appointed officers and directors. See S.C. Code § 33-31-304; S.C. Code § 33-31-810; Davis v. Hamm, 300 S.C. at 288, 387 S.E.2d at 678.

Although this Court finds that Plaintiff does not have standing to assert the claims contained in the Summons and Complaint for Declaratory Judgment and Injunctive Relief filed on February 12, 2020, or the Motion for Immediate Temporary Restraining Order and Notice of Motion and Motion for Temporary Injunction filed on February 24, 2020, this Court declines to impose sanctions upon Plaintiff for filing and serving them. However, this Court's denial of Defendants' Motion for Sanctions shall not be construed to prejudice in any way any right of any defendant in this action to seek sanctions against Plaintiff for any other conduct in any other action in which the parties are or may be involved arising from Plaintiff's filing and serving of the summons and complaint and motion for temporary restraining order and preliminary injunction in this action.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendants' Motion to Deny Preliminary Injunction and to Dismiss the Complaint is **GRANTED** and that Defendants' Motion for Sanctions is **DENIED** in accordance with the above order. Plaintiff's Complaint is hereby dismissed with prejudice pursuant to Rules 12(b)(1) and (6), SCRC.P.

AND IT IS SO ORDERED.

May_____, 2020

The Honorable Donald B. Hocker



Newberry Common Pleas

Case Caption: Jefferson Davis Jr VS Chad Connelly , defendant, et al
Case Number: 2020CP3600093
Type: Order/Other

Circuit Court Judge

s/Donald B. Hocker, Judge Code 2167

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