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ELECTRONICALLY FILED - 2021 Aug 17 3:20 PM - KERSHAW - COMMON PLEAS - CASE#2020CP2800926

STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

Joanne Schwartz,

Plaintiff,

vs.

The Camden Hunt, Ltd., Susan Sensor, and Amy Cantey,

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CIVIL ACTION NO. 2020-CP-28-00926

ORDER DISMISSING CLAIMS AGAINST DEFENDANTS SUSAN SENSOR AND AMY CANTEY

Before the court is a motion filed by Defendants Susan Sensor and Amy Cantey asking the court to dismiss the claims brought against them. For the following reasons, the motion will be granted.

ALLEGATIONS

Plaintiff, Joanne Schwartz, brought this lawsuit on Friday, October 16, 2020, alleging that Susan Sensor and Amy Cantey had failed to act on credible allegations of hound mistreatment, failed to properly maintain landowner relationships and subscriber relationships, and misappropriated assets of The Camden Hunt, and alleging that Susan Sensor had discharged a firearm on school property while on an activity of the Hunt. Ms. Schwartz asked that Susan Sensor and Amy Cantey be relieved from any responsibility for the hounds, kennels, and stables of the Hunt, that Susan Sensor and Amy Cantey be relieved from any duties and responsibilities as directors or purported directors for the Hunt, and that Susan Sensor and Amy Canty be taxed and assessed improper expenditures. She also asked the court to otherwise craft the best way to protect the interests of the subscribers of the Hunt as a mutual benefit corporation. Notably, the relief she seeks is for the benefit of the Hunt and not for herself.

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STIPULATION MADE AFTER SUIT WAS FILED

The parties have stipulated that Ms. Schwartz ceased being a director of the hunt four days after filing the suit, on October 20, 2020. As such, the court finds *sua sponte*[1] that she lost her standing to sue Susan Sensor and Amy Cantey for the benefit of the Hunt.

Ms. Schwartz does not contend that her removal from the Hunt's board at the Tuesday, October 20, 2020 meeting was an ineffective or illegal removal that she did not acquiesce in. Nor does she contend that her removal from the board was in direct response to this lawsuit (filed Friday, October 16, 2020). Ms. Schwartz does not contend that her removal was carried out in violation of the Articles of Incorporation or By-Laws of The Camden Hunt.

LAW

The dispositive case is *Johnson v. Baldwin*, 221 S.C. 141, 69 S.E.2d 585 (1952). There, the South Carolina Supreme Court analogized shareholder derivative suits with director derivative suits. Quoting from a case (*Kehaya v. Axton,* D.C., 32 F. Supp. 266 (S.D.N.Y. 1940)) where a director was found not to possess standing for a claim of negligence and waste against directors of a corporation after he was no longer a director, the South Carolina Supreme Court held, [i]f he is ousted as a director he no longer represents the corporation, and the only role which he can thereafter assume is that of a kind of self-appointed *dominus litus*, without interest, present or potential, in his subject matter, which is an anomalous situation involving gratuitous inquisition into the business of another, and fraught… with the dangerous possibilities always inherent in irresponsibility." Justice Oxner went on to state, "[t]o hold that if a director, who has sued, loses his status as director further maintenance of the suit by him is barred, does not mean that the cause

[1] The Court may raise standing *sua sponte*. *Carolina All. for Fair Emp. v. S.C. Dep't of Labor, Licensing, & Reg*., 337 S.C. 476, 486-87, 523 S.E.2d 795, 800-01 (Ct. App. 1999).

of action, if there is one, has disappeared. It merely means that that particular plaintiff cannot further pursue it."

Subsequent South Carolina cases have continued to apply the reasoning laid out in *Johnson v. Baldwin,* and no subsequent South Carolina case law has altered the Supreme Court's findings in this case as they relate to shareholder's or director's derivative suits. *See Wilson v. Gandis*, 430 S.C. 282, 844 S.E.2d 631 (2020); *Hite v. Thomas & Howard Co*., 305 S.C. 358, 361, 409 S.E.2d 340, 342 (1991), overruled on other grounds by *Huntley v. Young*, 319 S.C. 559, 462 S.E.2d 860 (1995). *See also Kreischer v. Kerrison Dry Goods Co*., 172 F.3d 863 [published in full-text format at 1999 U.S. App. LEXIS 1097] (4th Cir. 1999) (unpublished table decision). Ms. Schwartz has not shown that the case at hand can be distinguished from these South Carolina cases.

Ms. Schwartz relies on the Arizona case of *Workman v. Verde Wellness Center, Inc*., 382 P.3d 812 (Ariz. Ct. App. 2016), for the assertion that a director who initiates a suit while still on the board of directors and then is subsequently removed does not lose standing to continue the suit after it is commenced under Arizona's Nonprofit Corporations Act, A.R.S. § 10-11430(B)(2), (4). Ms. Schwartz states that Arizona's statute is substantively similar to S.C. Code Ann. § 33-31-1430 and thus, this court should follow the reasoning set out in *Workman*.

In *Workman*, a director filed suit on June 17, 2015, for judicial dissolution of the company because the directors had "acted, are acting or will act in a manner that is illegal, oppressive or fraudulent" and had wasted corporate assets. Only hours after filing the action, the board held a Special Meeting to have her removed as a director. They then moved to dismiss her suit because she lacked standing. However, the meeting notes showed the board actually adopted amended bylaws and resolutions to effectuate the removal. Plaintiff argued this was an ineffective removal

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and in response, the board held another Special Meeting in August 2015, where she was again voted off.

The Arizona Court of Appeals inferred she had been removed from her position on the board as a tactical maneuver and, therefore, expelling her from the board could not moot her claim. In reaching this conclusion, the court analogized derivative suits by shareholders, which have been understood to require a plaintiff to maintain his or her shareholder status for the duration of the suit. As the court states, "[t]he reason for the requirement is because the derivative plaintiff essentially stands in the shoes of the corporation to enforce the rights of the corporation, and the primary interest the shareholder has in doing so is by virtue of the related interest in protecting his or her shares." The court acknowledged there is a narrow exception for when a shareholder is deprived of his shares as "the result of corporate action in which the holder did not acquiesce." Consequently, because the court believed she had been removed from the board solely because of her claims against the corporation, "[u]nder such circumstances, [the company's] conduct cannot render the action moot."

However, in *Judson C. Ball Revocable Trust v. Phoenix Orchard Group I*, 245 Ariz. 519, 431 P.3d 589, 591 (Ariz. Ct. App. 2018) (*rev. denied* April 30, 2019) (*Trust II*), the Arizona Court of Appeals distinguished the holding in *Workman* and stated that, "to the extent the continuous ownership requirement would apply to a corporate dissolution, this Court merely applied an exception to the standing rule … where the plaintiff's loss of ownership 'is the result of corporate action in which the holder did not acquiesce.'"

Ms. Schwartz also cites a New York case, *Tenney v. Rosenthal*, 6 N.Y.2d 204 (N.Y. Ct. App. 1959), for support. In that case the court stated that a director's derivative suit is a right "based on public policy declared by the Legislature upon enactment of the statute. We may assume

that the right … has been granted in order to facilitate and improve the director's performance of the "stewardship obligation" which he owes to the corporation." Similar to *Workman*, the court takes note that a director who "insists that the corporation be managed for the benefit of all" and then is not re-elected because of the director's desire to "expose wrongdoing by the same dominant directors who actually cast the votes" should not thereafter lose standing as this could be an additional sign of "unhealthy corporate condition[s]." The case goes on to say that directors who succeed "by trick or otherwise" should not be allowed to render an action abated and such a reading of the New York statute would make it "practically ineffectual."

However, as stated above, the policy reasons addressed in *Tenney* for allowing an exception for directors ousted from their position are not present in the case at hand. Ms. Schwartz does not claim that her removal from the board was a demonstration of "unhealthy corporate condition[s]." Ms. Schwartz does not claim that her removal was based on her insistence that the Hunt be "managed for the benefit of all." Ms. Schwartz has also failed to allege that the South Carolina judicial dissolution statute (S.C. Code Ann. § 33-31-1430) would be "ineffectual" in instances where improper director removal practices are administered by the sitting board, let alone "ineffectual" in instances where there is proper director removal that is conducted without "tricks or otherwise."

Because the South Carolina Supreme Court analogizes director's suits with shareholder's derivative suits, it would likely agree with the saying found in the *Grosset* case: "Allowing a plaintiff to retain standing despite the loss of stock ownership would produce the anomalous result

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that a plaintiff with absolutely no dog in the hunt is permitted to pursue a right of action that belongs solely to the corporation."[2]

The Plaintiff's claims against Susan Sensor and Amy Cantey are dismissed.

AND IT IS SO ORDERED.

____
R. Lawton McIntosh
Presiding Judge
South Carolina Business Court

Anderson, South Carolina

June _____, 2021.

[2] Because Ms. Schwartz has lost standing to bring this suit, the court need not reach the arguments of the Hunt, which include without limitation that (a) S.C. Code Ann. § 33-31-1430 only authorizes a court to remove directors as part of a suit to dissolve a corporation (and Plaintiff has not asked this court to dissolve The Camden Hunt, Ltd.) and (b) as a matter of law, the alleged actions of Defendants Sensor and Cantey do not justify their removal as masters or directors of the Camden Hunt.

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Kershaw Common Pleas

Case Caption: Joanne Schwartz VS The Camden Hunt, Ltd. , defendant, et al

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