

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)
)
 Gregory Cutlip, individually and as a)
 member of the Legends Property Owners)
 Association, Inc. and Parkland Property)
 Owners Association, Inc.,)
)
 Plaintiff,)
)
 vs.)
)
 LDY Properties, LLC, Estate and/or Trust of)
 Larry D. Young, Legends Property Owners)
 Association, Inc., Parkland Property Owners)
 Association, Inc., Legends Properties, LLC,)
 New Town Management, LLC, Michael R.)
 Latta, Marianne Johnson, Carl A. Rubano,)
 Camden C. McCarl, Robert L. Schechter,)
 Richard Apolenis, John K. Manley, Michael)
 Marino, Legends Golf Holding, LLC, Jigger)
 Holding, LLC, and Daniel Larry Young, Jr.,)
)
 Defendants.)
)
 _____)

IN THE COURT OF COMMON PLEAS
 FIFTEENTH JUDICIAL CIRCUIT
 Civil Action No. 2019-CP-26-01211

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SC Court of Appeals

**Order Denying Multiple Defendants' Motions
 to Dismiss Derivative Claims**

This matter came before the Court on September 13, 2021 for a hearing on multiple defendants' Motions to Dismiss Derivative Claims. After considering the Complaint, the filed briefs, and the arguments of counsel, the Court makes the following findings and conclusions of law:

1. On August 5, 2020, the Defendants filed a motion to dismiss all derivative claims in this action.
2. On March 5, 2021, the Court ruled on the motion to dismiss as follows: "Defendant's Motion to Dismiss is GRANTED and plaintiff's derivative action is dismissed. Plaintiff's Amended Complaint fails to allege with particularity the efforts made by plaintiff to obtain the action he desires from the directors. See Rule 23(b)(1), SCRPC." The Order does not state whether the dismissal is with or without prejudice.
3. On March 15, 2021, the Plaintiff filed a Motion to Amend the Complaint which asked the Court for leave to file an amended complaint adding detail regarding the Plaintiff's efforts to obtain action by the POA boards, and attaching as exhibits the demand letters Plaintiff sent to the POAs.

4. On May 11, 2021, the Court heard arguments on whether to allow Plaintiff to file the amended complaint. Counsel for Defendants argued that the motion should be dismissed because any such effort would be futile.
5. On May 28, 2021, the Court granted Plaintiff's Motion to Amend Complaint. The Second Amended Complaint was filed on June 2, 2021.
6. Multiple Defendants filed a Motion to Dismiss the derivative claims in the Second Amended Complaint. Defendants argue that (1) the prior dismissal of the derivative claims was an adjudication on the merits, and thus an attempt to re-assert those claims is barred by *res judicata*; and (2) Plaintiff has failed to meet the requirements of Rule 23(b)(1), SCRCP, requiring that Plaintiff allege a demand on the board of directors or the futility of doing so.
7. Concerning the Defendants' first argument, in view of the totality of the circumstances surrounding the Court's rulings, the Court finds that the prior dismissal of the derivative claims was not an adjudication on the merits. The Order of May 28, 2021 granting the Plaintiff's Motion to Amend Complaint makes this clear. It would be inherently unfair for the Court to dismiss an improperly plead complaint on the merits. The Court regards the May 28, 2021 Order as a re-set in this matter, allowing the Plaintiff to cure his pleading to meet the requirements of Rule 23, just as the Plaintiff could have done in a new, separate complaint following the dismissal of the derivative claims. Therefore, the derivative claims asserted in the Second Amended Complaint are not barred by *res judicata*.
8. Concerning the Defendants' second argument, the Court finds that the Plaintiff alleged multiple demands and attached them to the Second Amended Complaint. Some of the demands pre-date the original filing of this action, and all of the demands pre-date the filing of the Second Amended Complaint on June 2, 2021. The Plaintiff alleges that the demands were never responded to in full or in good faith. Given the amount of time that has passed and the ongoing controversy, the Court finds that there is a question of fact whether the demands upon the board were futile. Therefore, the derivative claims are not subject to dismissal for failure to state a

claim because there are material questions of fact regarding the validity of the demands and the sufficiency of the board's responses.

IT IS THEREFORE ORDERED that the Defendants' Motion to Dismiss Plaintiff's Derivative Claims is DENIED.

IT IS SO ORDERED.

The Honorable H. Steven DeBerry, IV
Judge, Fifteenth Judicial Circuit

Date: _____



Horry Common Pleas

Case Caption: Gregory Cutlip , plaintiff, et al VS LDY Properties LLC , defendant,
et al
Case Number: 2019CP2601211
Type: Order/Dismissal

H. Steven DeBerry, IV

Circuit Court Judge 2771

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