

HARRY C. NEEL, MICHAEL JENKINS,
AND LEE CAVANAUGH,
INDIVIDUALLY AND DERIVATIVELY
ON BEHALF OF THE STONYCREEK
VALLEY DEVELOPMENT
CORPORATION,

Plaintiffs

v.

DANIEL DIVELY AND THE
STONECREEK VALLEY
DEVELOPMENT CORPORATION,

Defendants

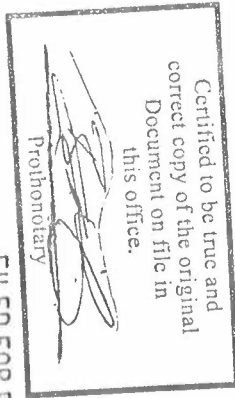
) IN THE COURT OF COMMON PLEAS
) OF SOMERSET COUNTY,
) PENNSYLVANIA

) NO. 275 CIVIL 2019

) PROthonotary
) SOMERSET PA

) 2023 OCT 31 A 10: 08

) FILED FOR RECORD



ORDER

AND NOW, THIS 31st day of October, 2023, for the reasons that follow, it is hereby **ORDERED** that Plaintiffs’ Objections to Defendants’ Notice to Plead and Scheduling Praecipe are **SUSTAINED**. As such, Defendants Daniel Dively and The Stonycreek Valley Development Corporation (SVDC) are directed to **WITHDRAW** their Motions for Summary Judgment and the Scheduling Praecipe is **VACATED**. Further, it is **ORDERED** that discovery in this matter shall end within 90 days from the issuing of this order. Additionally, Plaintiffs’ requests for sanctions to be placed on Defendants is **DENIED** and Plaintiffs’ Renewed Motion for Contempt is **DENIED**.

Given that Plaintiffs were actively sending Defendants letters alleging discovery deficiencies up to and beyond Defendants filing their Motions for Summary Judgment, as well as the fact that no end date for discovery had been agreed upon by the parties or determined in a case management conference, it is clear that discovery in this matter has not closed. (Tr. Evidentiary Hr’g Vol. 1 at 22-35). However, summary judgment “may be entered prior to the completion of

the discovery in matters where additional discovery would not aid in the establishment of any material fact.” *Manzetti v. Mercy Hospital of Pittsburgh*, 776 A.2d 938, 950 (Pa. 2001). Among other things, Plaintiffs have stated that they expect to discover in the additional material “roughly \$90,000 in volunteer work, and actual services performed by Mr. Dively presumably through Dirt Bottom Excavating that are unaccounted for.” (Tr. Evidentiary Hr’g Vol. 1 at 48). If found such additional discovery could aid in the establishment of material facts regarding the breach of fiduciary duty claims. Therefore, Defendants’ Motions for Summary Judgment must be withdrawn and the Scheduling Praecipe vacated.

Plaintiffs also claim that the Defendants knew this case was not ready for the disposition of the Court but that they still filed their Summary Judgment Motions prior to the completion of discovery. (Atty. Must Ltr. Arg. at 9). Somerset County Local Rule 1035.2(a)(C)(5) makes the imposition of sanctions for this matter discretionary. At this time, the Court finds that imposing sanctions would not further the resolution of this case and so declines to do such.

Although discovery is not yet complete, the Court is cognizant that it has been proceeding for nearly four years. Plaintiffs do not have an unlimited amount of time for discovery. *Fort Cherry School District v. Gedman*, 894 A.2d 135, 140 (Pa. Super. 2006). Consequently, it is hereby ordered that discovery shall conclude within 90 days from the date of this order.

Plaintiffs also claim that Defendant SVDC’s production has been insufficient after this Court’s June 29, 2021 Order¹ and argue that this Court should find Defendant SVDC in contempt and should direct the corporation to produce responsive documents and information from multiple individuals. (Proposed Order attached to Pls.’ Obj. to Notice to Plea and Renewed Mot. Contempt).

¹ It is noted that after the Order, Defendant SVDC produced its QuickBook entries and has facilitated the voluntary production of emails from some current and former Board Members. (Atty. Cascio Ltr. Arg. at 2).

Plaintiffs argue that (1) the individuals, who are current and former SVDC Board Members, are in fact SVDC for the purposes of discovery and thus are not nonparties, (2) that SVDC is in possession, control, or custody of the documents and so can produce them, and alternatively (3) that it is permissible for the Court simply to direct nonparties to produce documents. Defendant SVDC contends that (1) the individuals that Plaintiffs seek discovery from are nonparties and that it is improper for the Court to sua sponte direct nonparties to produce documents, and (2) that SVDC does not have the means or authority to compel those individuals to produce documents. (Atty. Cascio Ltr. Arg. at 1). This Court finds in favor of Defendant SVDC's positions for the reasons below and so denies Plaintiffs' Motion for Contempt.

First, it is improper for this Court to sua sponte direct nonparties to produce documents. Relevant materials in the hands of nonparties are generally discoverable. *Rohm and Haas Co. v. Lin*, 922 A.2d 132, 145 (Pa. Super. 2010). The Rules of Civil Procedure dictate, among other requirements, that a party seeking production from a nonparty must do so by either a subpoena *duces tecum* or an independent action in equity against the nonparty. Pa.R.C.P. 4007.1(d)(2), 4009.21 - 4009.27; *Leonard v. Latrobe Area Hosp.*, 549 A.2d 997, 999 (Pa. Super. 1988). Simply directing nonparties in this case to produce documents would be similar to deviations from procedure that the Superior Court has condemned in the past. *See Barley v. Consolidated Rail Corp.*, 820 A.2d 740, 744 (Pa. Super. 2003) (explaining that the trial court had erred in ordering nonparties, who had not been served subpoenas, to comply with notice of depositions).

The individuals that Plaintiffs seek discovery from are nonparties. As a corporation it is clear that Defendant SVDC is a separate entity from its officers and directors. *Lokay v. Lehigh Valley Co-op. Farmers, Inc.*, 492 A.2d 405, 409 (Pa. Super. 1985) (citation omitted). There are circumstances in which a corporation and its agents can be treated as less than distinct for the

purposes of discovery. *See Rohm*, 992 A.2d at 145. Such circumstances arise when a corporation and its agent(s) are intensely intertwined. *See id.* (explaining how the trial court viewed the defendant and her company as “one in the same for purposes of this matter.”). Plaintiffs attempt to bolster their argument by discussing *TD Bank v. Washington Abstract, LLC*, 2012 WL 7148994 (C.P. Philadelphia 2012). But in that case the defendant had “failed to draw a meaningful distinction between himself as an individual and his legal business.” *Id.* Unlike the defendants and their businesses in *Rohm* and *TD Bank*, it has not been demonstrated, nor are facts readily present to conclude, that Defendant SVDC and the individual board members that Plaintiffs seek documents from are so intertwined as to permit this Court to treat them the same for discovery purposes. Because the individuals in question are nonparties it would be improper for this Court to sua sponte direct them to produce the documents.

Finally, Plaintiffs insist that Defendant SVDC has possession, custody, or control over the documents and so it would be proper to direct the corporation to produce them. Parties are required to produce requested documents if they are within their “possession, custody, and control.” Pa.R.C.P. 4009.1 (a). The application of this rule is not to be a narrow physical possession test but rather courts are to focus “on whether the subpoenaed party has a legal right to custody or control of the documents in question.” *Tribune-Review Pub. Co. v. Westmoreland County Housing Auth.*, 833 A.2d 112, 118 (Pa. 2003). In *Tribune-Review*, the Supreme Court determined that despite requested materials being in the hands of a nonparty the appellant still had to produce them. The court decided that the appellant had the requisite custody and control of requested materials, even without physical possession, because the materials were in the hands of appellant’s insurer and appellant had the authority to require their insurer to release those documents. *Id.* In contrast to an insured/insurer relationship, this Court fails to see the authority Defendant SVDC possesses that

would allow it to require unpaid volunteer board members to disclose their personal email accounts and text messages. Due to this, the Plaintiffs' Motion for Contempt must be denied and this Court rejects the invitation to direct Defendant SVDC to produce documents that are in the possession of nonparties.

BY THE COURT:



D. Gregory Geary, P.J.