

HARRY C. NEEL, MICHAEL JENKINS,
and LEE CAVANAUGH, Individually and
Derivatively on Behalf of THE
STONYCREEK VALLEY
DEVELOPMENT CORPORATION,
Plaintiffs,

vs.

DANIEL DIVELY and THE
STONYCREEK VALLEY
DEVELOPMENT CORPORATION
Defendants.

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

) NO. 275 CIVIL 2019
)

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**BRIEF IN SUPPORT OF DEFENDANT DANIEL DIVELY'S
MOTION FOR SUMMARY JUDGMENT**

Introduction

This Brief is being filed together with, and in support of, a Motion for Summary Judgment in the above captioned case. It should be noted that any Exhibits referenced herein are not attached to this Brief, but rather are attached to the Motion for Summary Judgment or have been filed of record in this case. It should further be noted that Exhibits D, E, and F, the depositions of the three Plaintiffs, have been filed as individual documents of record the date of the filing of this Brief and the Motion for Summary Judgment as they are voluminous. All other Exhibits are attached to the Motion for Summary Judgment.

Procedural Background

This suit was initiated on April 17, 2019 by Harry Neel, Michael Jenkins, and Lee Cavanaugh (hereinafter the "Plaintiffs") as a direct suit, and by Stonycreek Valley Development Corporation (hereinafter "SVDC") as a derivative suit, against Daniel Dively and SVDC.

The overall gist of the suit when it was filed over three years ago appeared to be that Plaintiffs were complaining of two primary things: 1) That SVDC should stay a share vote based non-profit corporation and the proposed "one lot one vote" upcoming bylaw change should not be allowed and 2) That Daniel Dively (hereinafter "Dively"), a SVDC Board Member, and the other SVDC

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Prothonotary

board members, from April 17, 2017 to present, were actively breaching their fiduciary duties and self-dealing to the detriment of SVDC.

On May 23, 2019, a hearing took place on an Emergency Injunction filed by the Plaintiffs in an attempt to halt the vote on the SVDC bylaws the following day which would change the share-based voting system to “one lot one vote.” Following said hearing, this Court dismissed the Emergency Injunction, and the vote passed on May 24, 2019, changing the voting system to “one lot one vote.”

Thereafter, Dively and SVDC filed Preliminary Objections, Plaintiffs filed an Amended Complaint, a second round of preliminary objections took place, and thereafter Dively filed an Answer, New Matter and Counterclaim, followed by an Amended Answer, New Matter, and Counterclaim, followed by Plaintiffs filing Preliminary Objections.

Plaintiffs’ Amended Complaint had three counts. Count I “Breach of Fiduciary Duty (derivative claim)”, Count II “Breach of Fiduciary Duty (direct claim)” and Count III “Violations of the Nonprofit Corporations Law of 1988 (Direct and Derivative).” The averments in Count I and Count II appear to be identical other than the words derivative and direct. The averments in Count III are all against the SVDC’s Board of Directors. In fact, Dively’s name does not appear in any of the averments in Count III, but only appears in the prayer for relief of Count III, which is identical to the prayer for relief in both Counts I and II.

The procedural history of litigation in this case could take up twenty (20) pages explain, however, to summarize, the current state of Plaintiffs suit and Dively’s Countersuit is as follows:

Dively’s Preliminary Objections regarding self-dealing and standing relative to Count II: Breach of Fiduciary Duty (direct claim) of Plaintiffs’ Amended Complaint was sustained, and allegations of self-dealing against Dively in Count II of Plaintiffs’ Amended Complaint were stricken by Order of Court of December 5, 2019. In essence, the direct claim against Dively regarding self-dealing was dismissed.

Dively’s Counterclaims for Defamation and Intentional Interference with Contractual Relations were either disposed of on Preliminary Objections, or were settled, and are not before the court on summary judgment.

Dively's Counterclaim Count III: Wrongful Use of Civil Proceedings pursuant to the Dragonetti Act, 42 Pa.C.S.A. § 8351, et. seq was dismissed as "unripe" and "without" prejudice pending resolution of the case by Order of Court of July 22, 2020 (i.e. if Plaintiffs' suit is terminated, Dively may seek relief under Dragonetti at that point).

Plaintiffs' claim challenging "one lot one vote" has survived, as well as Plaintiffs' derivative claim for Breach of Fiduciary Duty against Dively and SVDC, while the direct claim for self-dealing against Dively died on preliminary objections.

Questions Presented

- I. Whether the claim by Plaintiffs to undo the bylaw change on May 24, 2019 from shareholder voting to "one lot one vote" and claim for violation of the non-profit law against SVDC should be dismissed as a frivolous and abandoned claim?
Advocated Answer: Yes
- II. Whether Plaintiffs' derivative claim for Breach of Fiduciary Duty through self-dealing against Dively should be dismissed due to lack of evidence and lack of genuine issues of material fact?
Advocated Answer: Yes
- III. Whether Plaintiffs' entire suit against Dively and SVDC should be dismissed pursuant to the Doctrine of Unclean Hands?
Advocated Answer: Yes
- IV. Whether the entire suit against Dively should be dismissed as he was singled out and sued in bad faith?
Advocated Answer: Yes
- V. In the event Plaintiffs' claim against Dively is dismissed, whether Dively is entitled relief pursuant to the Dragonetti Act?
Advocated Answer: Yes

Discovery

Since the initiation of this suit over three (3) years ago, hundreds (100s) of hours of written discovery and depositions have taken place.

a) Written Discovery

On October 13, 2020, Dively Responded to Interrogatories and Requests for Production of Documents directed to him by Plaintiffs, which response was a total of one hundred and fifty-seven (157) pages, a copy of which is attached to the Motion for Summary Judgment as Exhibit A (the exhibit excludes the last 137 pages for efficiency as they are meeting minutes not relevant to this motion).

On June 10, 2022, Dively responded to another request to produce documents by Plaintiffs by providing approximately 5,500 pages of written discovery to Plaintiffs, a task the took approximately sixty (60) hours. A copy of the letter sending send discovery a copy of which is attached to the Motion for Summary Judgment as Exhibit B. SVDC has made similar written discovery disclosures as Dively throughout the years.

b) Depositions

In addition to the written discovery that has taken place, depositions, ranging in the multiple hour timeframe per deposition have taken place for the following fifteen (15) individuals:

- a. Lawrence Rosage (Former Board President)
- b. James Bandstra (Former Board Vice-President)
- c. John Weir (Former Board Member)
- d. Derrick St. Clair (Current Board Member and Former Treasurer)
- e. Joseph Piccini (Former Board President)
- f. Julie Fisher (Former Board Member)
- g. Phyllis Picoulas (Former Board Member)
- h. William Blackburn, Sr. (Former Board Member)
- i. William Blackburn, Jr. (Former Board Member)
- j. Macia Rogish (Current Board Member)
- k. Brad Meneilly (Current Board Member and Former Vice-President)

- l. Shelly Glessner (Current Treasurer and Secretary)
- m. Harry Neel (Plaintiff)
- n. Lee Cavanaugh (Plaintiff)
- o. Michael Jenkins (Plaintiff)

Legal Standard

A motion for summary judgment provides a means of expediting litigation and avoiding trials which are unnecessary in those cases where the pleadings may be sufficient on their face to withstand a demurrer in the form of a preliminary objection, but where, in reality, there is no genuine issue of fact and the moving party is entitled to a judgment as a matter of law. *Penn Center House, Inc. Vs. Hoffman*, 520 Pa. 171, 553 A.2d 900 (1989). See Pa. R.C.P. 1035(b).

A motion for summary judgment should be granted only when there is no genuine issue of material fact as to a necessary element of the cause of action which could be established by additional discovery or expert report, or if after the completion of discovery relevant to the motion, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury. See Pa. R.C.P. 1035(b). Moreover, the party who moves for summary judgment has the burden of proving to the court that there is no genuine issue of material fact, and all doubts on this question must be resolved against the granting of the motion. *Thompson Coal Co., vs. Pike Coal Co.*, 488 Pa. 198, 412 A.2d 466 (1979)

In ruling on a motion for summary judgment, the court should examine the entire record in the light most favorable to the party opposing the motion. The court must accept as true all well pleaded facts in the opposing party's pleading, as well as any admissions of record. *Penn Center House Inc., vs. Hoffman*, 520 A. 171, 553 A.2d 900 (1989); *O'Neill vs. Checker Motors Corp.*, 389 Pa. Super, 430, 567 A.2d 680 (1989); *Thompson vs. Nason Hospital*, 37 Pa. Super. 115, 535 A.2d 117 (1988).

Argument

- I. *The claim by Plaintiffs to undo the bylaw change on May 24, 2019, from shareholder voting to “one lot one vote” should be dismissed as a frivolous and abandoned claim.*

Count III of Plaintiffs’ Amended Complaint takes issue with SVDC halting the sale of stock shares, and subsequent litigation has uncovered Plaintiffs’ main contention was that the bylaw changes on May 24, 2019, to one lot one vote, was illegal.

First, it should be noted that this issue was already examined by the court and disposed of in favor of SVDC and Dively regarding its impact on emergency injunctive relief on May 23, 2019, see the attached transcript of said proceeding, a copy of which is attached to the Motion for Summary Judgment as Exhibit C.

Second, SVDC is a cooperative non-profit organization, as pled in Plaintiffs’ Amended Complaint, which operates similar to that of a homeowners’ association falling under the Planned Communities Act and based on those things alone Count III of the Amended Complaint should be dismissed, as each lot owner is entitled to a vote.

Third, during discovery, and particularly during the deposition of Harry Neel, it was discovered that for at least the past twenty (20) years, at the SVDC annual meeting, voting was done by hand raising and NOT BY SHARES.

A copy of the Transcript of the Deposition of Harry Neel which took place on July 29, 2022, is attached to the Motion for Summary Judgment as Exhibit D. Mr. Neel testified that he has been attending annual SVDC shareholder meetings since 1995, and that from 1995 to 2018 the SVDC Board of Directors was elected at the annual meeting by a simple hand raise method of those present at the meeting. *See* Exhibit D, Neel Deposition Transcript Pg. 41, ¶¶15-17 “Q (Leake): So from 1995 to 2018, the Board of Directors was elected by people raising their hands?; A (Neel): Yes.”

Additionally, all three Plaintiffs appear to have abandoned their claim regarding their challenge to the “one lot one vote” bylaws change three (3) years into this suit. A copy of the Transcript of the Deposition of Michael Jenkins which took place on November 18, 2022, is

attached to the Motion for Summary Judgment as Exhibit E. A copy of the Transcript of the Deposition of Lee Cavanaugh which took place on July 29, 2022, is attached to the Motion for Summary Judgment as Exhibit F.

Neel stated during his deposition “I have no objection to one lot, one vote.” (Exhibit D, Neel Deposition Transcript Pg. 53, ¶¶5-6). Jenkins stated during his deposition “I actually do agree with one lot, one vote.” (Exhibit E, Jenkins Deposition Transcript, Pg. 77, ¶¶19-20). Cavanaugh stated “[o]ne lot, one vote makes perfect sense” (Exhibit F, Cavanaugh Deposition Transcript, Pg. 36, ¶¶9-10).

Lastly, Plaintiffs allegations in Count III regarding failure of SVDC to respond to requests for information has not been established in discovery, and therefore, cannot be supported on summary judgment. As the claim in Count III of the Amended Complaint was already addressed by the Court, SVDC is a cooperative non-profit which primarily operated as one over the past twenty (20) years, and Plaintiffs now agree with the one lot one vote structure, Count III of the Amended Complaint should be dismissed.

II. Plaintiffs’ derivative claim for Breach of Fiduciary Duty through self-dealing against Dively should be dismissed due to lack of evidence and lack of genuine issues of material fact.

It should be noted that the allegations in Count I and II of the Amended Complaint appear to be identical, other than Count I is a derivative claim and Count II is a direct claim.

The direct claim against Dively was dismissed on Preliminary Objections by Order of Court of December 5, 2019. As such, Count II regarding Dively is not before the court on summary judgment as previously dismissed, and to the extent Count II is before the court, it should be dismissed based on the same reasoning as that of Count I. Count I of the Amended Complaint, the derivative action, is directed toward Dively and is before the Court. Count I alleges that “Dively breached his fiduciary duties to the Corporation by manipulating SVDC's bidding process, undercutting known bids, and participating in discussions and votes concerning his businesses' transactions with SVDC” to the detriment of SVDC. (Plaintiffs Amended Complaint). Count I

goes on to allege that other SVDC Board Members (without mentioning who) assisted in this conduct, which is the basis against SVDC for this particular claim.

As stated above, upward of six thousand (6000) pages of written discovery has been provided by Dively to the Plaintiffs and fifteen (15) depositions have taken place over the past three (3) years. However, to date, no evidence to support Plaintiffs claim in terms of liability or damages has been uncovered, and none ever will, because none exists.

In terms of liability and damages, through the written and deposition discovery it has been established that Daniel Dively, through his company Dirt Bottom Excavating, Inc., provided SVDC with five (5) invoices for work he conducted from April 17, 2017 until present, see Exhibit G, a copy of which is attached to the Motion for Summary Judgment. Of said five (5) invoices, only one (1) invoice was “Paid” invoice, the other invoices were him donating his time and materials to SVDC for free. As Exhibit G shows, since April 17, 2017 Dively documented donations in the amount of “\$3,272.01” representing free time and materials to SVDC, and was paid for one (1) job he did in the amount of “\$2,300.00.” The one invoice paid was for “[r]emoval of 3 stumps and 1 telephone pole” in the amount of \$2,300.00. (Exhibit G, Pg. 5).

Throughout the discovery responses and the proceedings, Dively has asserted that this one job he was paid, he charged far under fair market value. During the Deposition of previous SVDC Board Member John Weir, Mr. Weir was presented with the invoice of the \$2,300.00 job and he indicated that the job was done for far under fair market value stating that the \$2,300.00 “might have covered his [Dively’s] fuel” for the job, see Exhibit H, a Deposition Transcript Excerpt of John Weir, Pg. 57 ¶¶1-10, a copy of which is attached to the Motion for Summary Judgment.

Throughout all the written and deposition discovery, and even the Plaintiffs’ depositions, there is no indication that the \$2,300.00 job was the result of “undercut bids” or “manipulation” nor has it been indicated that it was to the detriment of SVDC. To the contrary, evidence supports that the \$2,300.00 job was in the best interest of SVDC, saving the money on a job that was done far under fair market value.

During the deposition of Derrick St. Clair, the Treasurer of SVDC throughout the relevant time period, the following exchange took place:

- a. “Q (Leake): Again, if you can recall, do you recall Mr. Dively or Dirt Bottom Excavating ever doing a job for SVDC that you felt was not for fair market value, meaning, it was for more than fair market value.”
- b. “A (St. Clair): No.” (Exhibit I, Deposition Transcript Excerpt of Derrick St. Clair, Pg. 130 ¶¶12-17, a copy of which is attached to the Motion for Summary Judgment).

During the deposition of James Banstra, previous SVDC Vice-President, the following exchange took place:

- a. “Q (Leake): Did Mr. Dively and Dirt Bottom Excavating, any work that they did that they charged the corporation, was it always under fair market value?”
- b. “A (Banstra): In my opinion, yes . . .” (Exhibit J, Deposition Transcript Excerpt of James Bandstra, Pg. 117 ¶¶13-16, a copy of which is attached to the Motion for Summary Judgment).

Based on the written discovery and also the depositions conducted thus far, nothing has indicated the \$2,300.00 job was the result of a breach of a fiduciary duty, under cutting bids, self-dealing, or to the detriment of SVDC. If anything, the opposite has been presented. During John Weir’s deposition he testified that throughout the years Dively donated “\$15,000.00 to \$20,000.00” in time and materials to SVDC. (Exhibit H, Deposition Transcript Excerpt of John Weir, Pg. 57 ¶2, a copy of which is attached to the Motion for Summary Judgment).

Derrick St. Clair, the Treasurer of SVDC, stated that the donation figure of \$3,272.01 for Exhibit G was “very low”. (Exhibit I, Deposition Transcript Excerpt of Derrick St. Clair, Pg. 128 ¶¶20-22, a copy of which is attached to the Motion for Summary Judgment).

Lawrence Rosage, the President of SVDC during the relevant time period, testified during his deposition as follows:

- a. “Q (Leake): So your tenure as president, you cannot recall a time where SVDC actually contracted Dirt Bottom Excavating after going through the bidding process?”

- b. “A (Rosage): Right. (Exhibit K, Deposition Transcript Excerpt of Lawrence Rosage, Pg. 180 ¶¶5-9, a copy of which is attached to the Motion for Summary Judgment)

Additionally, throughout all the depositions, there was no indication that the figures in Exhibit G were not accurate, other than the donation figure being low, and the possibility that a job for \$4,000.00 may have been done at some point prior to April 2017 by Dirt Bottom Excavating for shoreline restoration for under fair market value according to Quickbooks records recently received from SVDC, which may be outside the relevant time period for this suit. *See* Exhibits A, D, E, F, G, H, I, J, & K, copies of which are attached to the Motion for Summary Judgment.

There was further evidence that neither Dively, nor Dirt Bottom Excavating, Inc., won a bid for a SVDC job ever. *See* Exhibit K. Also, throughout all three Plaintiff depositions, it became clear that none of the Plaintiffs had evidence to support a claim against Dively before filing the lawsuit. On Page 115 of the transcript of Jenkins’s deposition he stated that “I don’t have physical proof of exact documents. I have not read all of his information that you presented yet either.” (Exhibit E, Jenkins Deposition, Pg. 115, ¶¶12-15). Jenkins went on to admit that he signed the Complaint without evidence, and to this day he continues to have no evidence against Dively, regardless of the ridiculously large amount of discovery that has taken place. *See* Exhibit E.

The overwhelming evidence indicates that Dively never undercut bids, manipulated bids, self-dealt, nor did he ever breach his fiduciary duties, nor does a genuine issue of material fact exist as to this issue. Therefore, Summary Judgment in Dively’s favor is warranted and this court should enter judgment in favor of Dively and SVDC by dismissing Count I (and Count II to the extent it is before the Court) of Plaintiffs’ Amended Complaint based on lack of evidence.

III. *Plaintiffs' entire suit against Dively and SVDC should be dismissed pursuant to the Doctrine of Unclean Hands.*

In Dively's Amended Answer, New Matter, and Counter Claim he brought forth as his Second Affirmative Defense the Doctrine of "Unclean Hands."

During Neel's testimony he testified that he felt that Dively being on the SVDC Board and providing paid services for SVDC at the same time somehow created wrongdoing, even if the work was being done for far under fair market value, thus creating a direct benefit to SVDC. See Exhibit D. Neel went on to claim that this was partially the basis for his lawsuit. *Id.* While Mr. Neel's assertion is not supported by any legal authority and thus irrelevant, his testimony uncovered evidence of Unclean Hands on the part of his Co-Plaintiffs Jenkins and Cavanaugh, later confirmed during Jenkins's and Cavanaugh's depositions.

Both Jenkins and Cavanaugh admitted that their personal businesses were paid for work by SVDC while they were sitting SVDC Board Members. Jenkins's conduct even occurred after he filed this lawsuit. Jenkins was partial owner of HomeTeam Graphix and was paid directly by SVDC for a job he secured for his business while he was a board member. (Exhibit E, Jenkins Deposition Transcript, Pg. 99-104).

Cavanaugh's accounting firm was also paid by SVDC while Cavanaugh was a board member for services it provided to SVDC (Exhibit F, Cavanaugh Deposition Transcript Pg. 80-81).

Neel disagreed with this conduct, as he stated in his deposition: "Q (Leake): Just so we are clear, you just testified that Mr. Jenkins, through his business, receiving work while he was a board member, you do not agree with. A (Neel): I did not for that one issue, no". (Exhibit D, Neel Deposition Transcript Pg. 75, ¶¶2-5).

As the Plaintiffs were participating in the same conduct for which they are suing Dively and SVDC, the entire Amended Complaint should be dismissed under the Doctrine of Unclean Hands.

IV. The entire suit against Dively should be dismissed as he was singled out and sued in bad faith.

The Amended Complaint in this case states that there were breaches of fiduciary duties by board members (plural) and the allegations against SVDC are similar to the allegations against Dively.

However, the Plaintiffs in bad faith singled out Dively and sued him individually. During the deposition of Jenkins, the following exchange took place:

- a. “Q. (Leake): And you would agree that other board members acted inappropriately in 2018.
- b. A. (Jenkins): Yeah.
- c. Q. (Leake): Is there a reason Mr. Dively was the only board member named in this lawsuit?
- d. A. (Jenkins): I don’t draft law --- I don’t know. I don’t draft this. I don’t know how --- why it was done that way or which it was done that way.” (Jenkins Deposition Transcript Pg. 107, ¶¶13-22).

Jenkins’s deposition highlights Dively being singled out and sued in bad faith, as well as all the written discovery and other evidence in this case.

Additionally, Dively has always denied allegations of self-dealing and breaches of fiduciary duties as evidenced in the Affidavit labeled as Exhibit G attached to the Motion.

Therefore, this Court should enter judgment in favor of Dively by dismissing Plaintiffs’ Amended Complaint based on him being singled out and sued in bad faith.

V. *In the event Plaintiffs' claim against Dively is dismissed, Dively is entitled relief pursuant to the Dragonetti Act.*

Dively's Counterclaim Count III: Wrongful Use of Civil Proceedings pursuant to the Dragonetti Act, 42 Pa.C.S.A. § 8351, et. seq was dismissed as "unripe" and "without" prejudice pending resolution of the case by Order of Court of July 22, 2020 (i.e. if Plaintiffs' suit is terminated, Dively may seek relief under Dragonetti at that point).

In the event Plaintiffs' claims against Dively are dismissed, Dively is moving for relief pursuant to the Dragonetti Act. The overwhelming evidence indicates that Dively was singled out and sued in bad faith with a frivolous lawsuit. The evidence set forth above establishes the elements for Wrongful Use of Civil Proceedings pursuant to the Dragonetti Act, 42 Pa.C.S.A. § 8351, et. seq.

This motion and the Dragonetti claim in general is, and always was, only directed toward Michael Jenkins, Harry Neel, and Lee Cavanaugh, individually, and not toward any attorney or law firm representing them throughout these proceedings. There has been no evidence of any wrongdoing by any attorney or law firm involved in these proceedings. Moreover, the claim is based on misleading information provided by the Plaintiffs to their various legal counsel, information which if true, would have led to discoverable information to build a legitimate case. Unfortunately, as the initial information was incorrect, no amount of discovery will ever uncover evidence for the Plaintiffs to build legitimate case.


Based on the foregoing, Dively this Court should reinstate Dively's Counterclaim Count III: Wrongful Use of Civil Proceedings pursuant to the Dragonetti Act, 42 Pa.C.S.A. § 8351, et. seq., and schedule a hearing for submission of fees and loss in which the individual Plaintiffs shall be personally liable to reimburse him and his insurance carrier.

Conclusion

Based on the foregoing, Plaintiffs' entire suit should be dismissed against Dively and SVDC and this case should move into Dragonetti Proceedings.

Respectfully Submitted,

Date: 4/12/23



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HARRY C. NEEL, MICHAEL JENKINS,)	IN THE COURT OF COMMON PLEAS
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)	
DANIEL DIVELY and THE)	
STONYCREEK VALLEY)	
DEVELOPMENT CORPORATION)	
Defendants.)	


CERTIFICATE OF SERVICE

I hereby certify that I have this date served a certified copy of the foregoing Brief in Support of Motion for Summary Judgment, via first class mail, to:

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: David T. Leake, Esq.

Signature: 

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