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*Angie Svonavec*  
Prothonotary

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

**DEFENDANT DANIEL DIVELY'S FIRST SET OF PRELIMINARY OBJECTIONS TO PLAINTIFFS' FIRST COMPLAINT**

AND NOW comes Daniel Dively, one of the above named Defendants, by and through his attorney, David T. Leake, Esq., who sets forth the following:

**I. The Complaint**

1. On April 17, 2019, the above captioned Plaintiffs filed a Complaint against the Defendants, Daniel Dively and Stonycreek Valley Development Authority Corporation (hereinafter "SVDA"), alleging several causes of action.

2. Paragraph "5" of the Complaint states that "Defendant Daniel Dively ("Dively") . . . has been a member of the Stonycreek Valley Development Corporation Board of Directors since 2015."

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SOMERSET, PA

3. Paragraph "27" of the Complaint states that "Dively owns, or partially owns, Dirt Bottom Excavating, Inc. ("Dirt Bottom"), a Pennsylvania corporation with a principle place of business at 162 Sunset Road, Friedens, PA 15441."

4. Count I of the Complaint is titled "Breach of Fiduciary Duty" which has the phrase "(derivative claim)" following the title.

5. Count II of the Complaint is also titled "Breach of Fiduciary Duty" and has the phrase "(direct claim)" following the title.

6. Count I and Count II are identical other than the words derivative and direct and have the exact same thirteen (13) averments.

7. Count III of the Complaint is titled "Violations of the Nonprofit Corporations Law of 1988 (Direct and Derivative)" and the averments therein are all against the SVDC's Board of Directors.

8. 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.

## **II. The Preliminary Objections**

### **Preliminary Objection I: Legal Insufficiently/Demurrer Pursuant to Pa.R.C.P 1028(a)(4)** **Motion to Dismiss Count III**

9. Defendant Dively incorporates herein by reference Paragraphs 1 through 8 above, inclusive, as if the same were more fully set forth herein at length.

10. Count III of the Complaint should be dismissed against Dively individually pursuant to Pa.R.C.P. 1028(a)(4).

11. The question presented by a demurrer is whether, on the facts as averred, the law says with certainty that no recovery is possible. *Corestates Bank, N.A. v. Curtillo*, 723 A.2d 1053, 1057 (Pa. Super. 1999).

12. Count III has NO AVERMENTS against Dively individually; it only contains general averments regarding actions by SVDC's Board Members.

13. In fact, from the allegations in Count III it appears that Plaintiffs probably do not even intend Count III to be against Dively individually. However, in Count III's prayer for relief, Plaintiffs request relief against Dively individually.

14. As Count III is void of any averment that could be construed to be against Dively individually, nor does it indicate how Dively should somehow be responsible individually for alleged actions of the Board, recovery against Dively under the averments in Count III is impossible.

15. Furthermore, it is unclear what the cause of action is that is being brought in Count III in regard to Dively, which is a second independent reason why Count III should be dismissed.

16. Lastly, the suit against Dively individually is invalid as the Plaintiffs filing the suit are doing so under the guise of a derivative action as shareholders in SVDC, and lack standing to sue Dively directly.

17. As such Pa.R.C.P. 1028(a)(4) requires dismissal of Count III.

WHEREFORE, Defendant Dively respectfully request that Your Honorable Court dismiss Count III of Plaintiffs' Complaint against him individually.

**Preliminary Objection II: Legal Insufficiently/Demurrer Pursuant to Pa.R.C.P. 1028(a)(4)**  
**Motion to Dismiss All Claims for Attorney's Fees, Costs, and Expenses**

18. Defendant Dively incorporates herein by reference Paragraphs 1 through 17 above, inclusive, as if the same were more fully set forth herein at length.

19. Plaintiffs request attorney's fees and expenses in the prayers for relief in Counts I through III of the Complaint.

20. Plaintiffs also request attorney's fees, costs, and expenses in an additional prayer for relief at the end of the Complaint.

21. Plaintiffs' claim for attorney's fees, costs, and expenses should be dismissed as Plaintiffs have failed to state a claim to recover the same.

22. The Complaint is void of any allegations of a statutory authority authorizing Plaintiffs to seek said damages.

23. The Complaint is also void of any allegations that would support an award of said fees under common law principles, such as bad faith.

24. Therefore, Plaintiffs' claim for attorney's fees, costs, and expenses should be dismissed.

WHEREFORE, Defendant Dively respectfully requests that your Honorable Court dismiss Plaintiffs' claim against him for attorney's fees, costs, and expenses.

**Preliminary Objection III: Legal Insufficiently/Demurrer Pursuant to Pa.R.C.P. 1028(a)(4)**  
**Motion to Dismiss Counts I & II**

25. Defendant Dively incorporates herein by reference Paragraphs 1 through 24 above, inclusive, as if the same were more fully set forth herein at length.

26. Counts I and II of the Complaint should be dismissed pursuant to Pa.R.C.P. 1028(a)(4) because said counts fail to state a claim for which recovery is possible.

27. Throughout the Complaint there are numerous allegations regarding the actions of the SVDC's Board of Directors.

28. However, the Complaint is void of any specific averments of Dively acting individually.

29. Paragraph "27" of the Complaint states that "Dively owns, or partially owns, Dirt Bottom Excavating, Inc. ("Dirt Bottom"), a Pennsylvania corporation with a principle place of business at 162 Sunset Road, Friedens, PA 15441."

30. The Complaint goes on to allege generally that Dively has used his position as a SVDC Board member to secure contracts for Dirt Bottom Excavating, Inc.

31. Overall, every allegation in the Complaint relates to either Dively acting as a SVDC Board member, or as an alleged owner/member of Dirt Bottom Excavating, Inc.

32. It is well established in Pennsylvania, that there are only limited circumstances in which a Plaintiff may pierce the corporate veil and sue a Defendant individually.

33. The Complaint is void of any allegations that support piercing the corporate veil of SVDC in order to hold Dively liable individually.

34. The Complaint is also void of any allegations that support piercing the corporate veil of Dirt Bottom Excavating, Inc. in order to hold Dively liable individually as an alleged owner.

35. Additionally, nowhere in the Complaint are there any allegations that would constitute a valid claim for breach of fiduciary duty.

36. Counts I and II state that Dively breached his fiduciary duty, but Plaintiffs fail to cite a single specific instance to support that allegation.

37. The closest thing in the Complaint to an allegation against Dively with any degree of particularity is paragraph 35 which alleges a contract with no date, not even a year, having to do with dredging a channel. In the context, it is also unclear whether the contract is alleged to be with SVDC and Dively or SVDC and Dirt Bottom Excavating, Inc. Further said allegation does not indicate said alleged contract was unfair, or that the consideration paid was above fair market value, in order to support a claim for breach of fiduciary duty.

38. As such, Counts I and II fail to state a claim against Dively as there are no allegations offered to support piercing the corporate veil of either SVDC (with Dively as a Board Member) or Dirt Bottom Excavating, Inc., (Dively as an alleged owner in the Complaint) and even if there were, the allegations fail to even establish one element of breach of fiduciary duty.

39. Lastly, the suit against Dively individually, and particularly Counts I and II are invalid as the Plaintiffs filing the suit are doing so under the guise of a derivative action as shareholders in SVDC, and lack standing to sue Dively directly.

WHEREFORE, Defendant Dively respectfully requests that your Honorable Court dismiss Counts I and II of Plaintiffs' Complaint against him individually.

**Preliminary Objection IV: Insufficient Specificity Pursuant to Pa.R.C.P. 1028(a)(3)**  
**Motion for a More Specific Complaint: Counts I & II**

40. Defendant Dively incorporates herein by reference Paragraphs 1 through 39 above, inclusive, as if the same were more fully set forth herein at length.

41. Based on the foregoing, the entire Complaint should be dismissed in regard to the suit against Dively. However, in the event the Complaint is not dismissed, a more specific Complaint should be ordered.

42. Pa.R.C.P. 1028(a)(3) requires that a Plaintiff plead enough facts to enable a Defendant to prepare a defense.

43. Plaintiffs' Complaint, in its entirety, is not sufficiently specific as to enable Defendant Dively to prepare a response to any of the allegations set forth therein.

44. First, the Complaint avers general allegations in the fraudulent nature against Dively.

45. Pa.R.C.P. 1019(b) states that "[a]verments of fraud or mistake shall be averred with particularity."

46. Particularly, Count I & II contain general allegations that Dively committed self-dealing and fraudulent behavior.

47. However, nowhere in the Complaint are ANY instances of self-dealing or fraudulent activity averred with any degree of particularity in regard to Dively acting individually.

48. The closest thing in the Complaint to an allegation against Dively with any degree of particularity is paragraph 35 which alleges a contract with no date, not even a year, having to do with dredging a channel. In the context, it is also unclear whether the contract is alleged to be with SVDC and Dively or SVDC and Dirt Bottom Excavating, Inc. Furthermore, said allegation does not indicate said contract was unfair, or that the consideration paid was above fair market value, in order to support a claim for breach of fiduciary duty.

49. As the allegations contained in the Complaint that are purported to support Counts I and II are general and vague, and said counts require allegations of the fraudulent nature requiring heightened specificity under Pa.R.C.P. 1019(b), said counts should be dismissed, and a more specific Complaint should be required.

50. Additionally, nowhere in the Complaint are there any allegations indicating that the corporate veil of either SVDC or Dirt Bottom Excavating, Inc. should be pierced to allow a suit against Dively individually as a Board member of SVDC and or as an “alleged owner” of Dirt Bottom Excavating, Inc. to progress.

51. As Defendant Dively is unable to formulate a meaningful response to Counts I & II, the counts should be dismissed pursuant to Pa.R.C.P. 1028(a)(3), and Plaintiffs should be required to file a more specific Complaint.

WHEREFORE, in the event that Plaintiffs’ Complaint is not dismissed as requested above, Defendant Dively respectfully requests Your Honorable Court to order the Plaintiffs to file a more specific Complaint as to counts I and II.

**Preliminary Objection V: Insufficient Specificity Pursuant to Pa.R.C.P. 1028(a)(3)**  
**Motion for a More Specific Complaint: Count III**

52. Defendant Dively incorporates herein by reference Paragraphs 1 through 51 above, inclusive, as if the same were more fully set forth herein at length.

53. As stated above, it is unclear whether Plaintiffs even meant for Count III to be against Dively individually, as every allegation in Count III is against the SVDC Board as a whole, and not Dively individually.



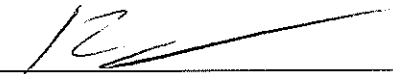
54. To the extent, if any, Count III is meant to be a claim against Dively individually, it should be dismissed against Dively individually, as outlined in the Demurrer above.

55. In the event Count III is not dismissed, at a minimum Plaintiffs should be required plead count III with more specificity to include allegations supporting a claim against Dively individually i.e. why the corporate veil of both SVDC and Dirt Bottom Excavating, Inc. should be pierced, with any allegations of fraud to be pled with heightened specificity as set forth in Pa.R.C.P. 1019(b), in order to allow Defendant Dively to be able to formulate a meaningful response as required by Pa.R.C.P. 1028(a)(3).

WHEREFORE, in the event that Plaintiffs' Complaint is not dismissed as requested above, Defendant Dively respectfully requests Your Honorable Court order the Plaintiffs to file a more specific Complaint as to count III.

Respectfully Submitted,

Date: 5-6-14

  
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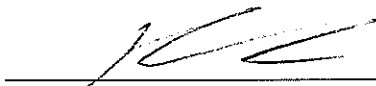
HARRY C. NEEL, MICHAEL JENKINS,	)	IN THE COURT OF COMMON PLEAS
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DEVELOPMENT CORPORATION,	)	
Plaintiffs,	)	NO. 275 CIVIL 2019
vs.	)	
	)	
DANIEL DIVELY and THE	)	
STONYCREEK VALLEY	)	
DEVELOPMENT CORPORATION	)	
Defendants.	)	

**CERTIFICATE OF SERVICE**

I hereby certify that I have this date served a certified copy of the foregoing Preliminary Objections, via first class mail, to:

Brian T. Must, Esq.  
Metz Lewis Brodman  
Must O'Keefe LLC  
535 Smithfield Street, Suite 800  
Pittsburgh, PA 15222

Date: 5-6-14

  
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CERTIFICATE OF COMPLIANCE

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

Submitted by: DAVID T LEAKE, ESQ

Signature: 

Name: DAVID T LEAKE, ESQ

Attorney No. (if applicable): 319455