

DISTRICT COURT, ADAMS COUNTY, COLORADO 1100 Judicial Center Drive Brighton, CO 80601	DATE FILED: May 31, 2023 11:18 AM FILING ID: 56587EDF94B0B CASE NUMBER: 2023CV30537
Plaintiffs: EDIE APKE, individually, et al. v. Defendants: TODD CREEK FARMS HOMEOWNERS' ASSOCIATION, a Colorado nonprofit corporation, et al.	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<i>Attorneys for Defendants Jason Pardikes, Wendi Setchfield, Maryjo Montoya, Ben Cooper, and Sean Holdren</i> Joseph R. Kummer, No. 39984 Chrysovalantou G. Hoppe, No. 44218 Taylor A. Clapp, No. 52800 Jachimiak Peterson Kummer, LLC 860 Tabor Street, Suite 200 Lakewood, Colorado, 80401 Phone: 303.863.7700 E-mail: jkummer@jpk.law ; choppe@jpk.law ; taclapp@jpk.law	Case No.: 2023CV30537 Courtroom: C
DEFENDANTS JASON PARDIKES, WENDI SETCHFIELD, MARYJO MONTOYA, BEN COOPER, AND SEAN HOLDREN'S MOTION TO DISMISS INDIVIDUALLY NAMED DEFENDANTS PURSUANT TO C.R.C.P. 12(b)(5)	

COME NOW, Defendants Jason Pardikes, Wendi Setchfield, Maryjo Montoya, Ben Cooper, and Sean Holdren, by and through their attorneys Jachimiak Peterson Kummer, LLC, and pursuant to C.R.C.P. 12(b)(5) submit their Motion to Dismiss and state as follows:

Conferral Pursuant to C.R.C.P. 121 §1-15(8)

Undersigned counsel conferred with counsel for Plaintiffs via email and telephone on May 30, 2023, regarding the requested relief, and Plaintiffs oppose the Motion.

INTRODUCTION

Plaintiffs brought a derivative complaint against Defendant Todd Creek Farms Homeowners' Association (the "Association") and its Board of Directors Defendants Jason Pardikes, Wendi Setchfield, Maryjo Montoya, Ben Cooper, and Sean Holdren (collectively hereinafter "Board of Directors"). The Association, represent by other counsel, filed its Motion to Dismiss on May 10, 2023. The Board of Directors join in and adopt the Association's arguments asserted in their Motion to Dismiss. The Board of Directors make the following additional arguments in support of the dismissal of this action.

STANDARD OF REVIEW

To survive a Motion to dismiss, a complaint must contain sufficient factual matter to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). *See also Warne v. Hall*, 373 P.3d 588, 597 (Colo. 2016) (adopting the federal plausibility standard set forth in *Twombly* and *Iqbal*.) A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for alleged misconduct. *Iqbal*, 556 U.S. at 678, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 570).

ARGUMENT

Colorado law provides that an officer or director of a nonprofit corporation is immune from civil liability if his or her actions were within the scope of his or her duties and that person's actions do not equate to willful and wanton misconduct. *See* C.R.S. § 13-21-115.7. The Complaint does not provide any factual allegations demonstrating such willful and wanton conduct on the part of the individual Board of Directors. Plaintiff has named the Association's

Board of Directors Jason Pardikes, Wendi Setchfield, Maryjo Montoya, Ben Cooper, and Sean Holdren as Defendants in this lawsuit, despite making no specific allegations against the individual Board of Directors in their Complaint. C.R.S. 13-21-115.7 provides that:

any person who serves as a director, officer, or trustee of a nonprofit corporation or nonprofit organization who is not compensated for serving as a director, officer, or trustee on a salary or prorated equivalent basis **shall be immune from civil liability** for any act or omission which results in damage or injury if such person was acting within the scope of such person's official functions and duties as a director, officer, or trustee unless such damage or injury was caused by the willful and wanton act or omission of such director, officer, or trustee.

(Emphasis added).

It is undisputed that the Association is a nonprofit organization. *See* Complaint, ¶ 25. Its Board of Directors are not paid for their services. The Board of Directors would only be civilly liable if Plaintiffs' injuries/damages resulted from the Board of Directors' willful and wanton conduct. Plaintiffs make no actual allegations of willful and wanton conduct by the Board of Directors in their Complaint. "Willful and wanton conduct means conduct purposefully committed which the actor must have realized as dangerous, done needlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly plaintiff." *Messler v. Phillips*, 867 P.2d 128, 134 (Colo. App. 1993); C.R.S. § 13-21-102(1)(b). This definition has been interpreted as "conduct that creates a substantial risk of harm to another and is purposefully performed with an awareness of the risk in disregard of the consequences." *Messler*, 867 P.2d at 134. No such allegations of equivalent conduct appear in Plaintiffs' Complaint.

The good faith acts of directors of profit or nonprofit corporations which are within the powers of the corporation and within the exercise of an honest business judgment are valid. *Rywalt v. Writer Corp.*, 526 P.2d 316, 317 (Colo. App. 1974). Even supposing Plaintiffs can

somehow show the individual Board of Directors improperly filled an empty board seat, Plaintiffs have not shown they acted recklessly in disregarding certain harm to its members. Defendants Maryjo Montoya, Ben Cooper, and Sean Holdren only even appear in the caption of this Case, the introduction paragraph, and under the heading of “Parties, Jurisdiction, and Venue” of Plaintiffs’ Complaint. *See* Complaint, ¶¶ 29-31. Plaintiffs make no allegations against these Board of Directors.

Plaintiffs only make allegations related to Defendants Jason Pardikes and Wendi Setchfield, and even those allegations do not give rise to willful and wanton conduct. Instead, Plaintiffs make conclusory statements such as, “Pardikes conspired with the other directors to subvert the TCF HOA membership’s rights with a ‘swap’ of Board positions, not for the good of the TCF HOA, but for what was best for Pardikes personally.” *See* Complaint, ¶ 102. However, no factual allegations are actually pled about what exactly Defendant Pardikes conspired to accomplish or for what purpose, or more importantly, for what Defendant Pardikes was doing to benefit himself. Instead, Plaintiffs make conclusions to create inferences.

Plaintiffs make allegations about Defendant Pardikes receiving two separate payments from the Association. *See* Complaint, ¶¶ 94-96. However, there are no allegations pled by Plaintiffs that connect these alleged payments to any activity by Defendant Pardikes. Allegations that are purely conclusory are not entitled to be assumed true. *Ashcroft v. Iqbal*, 556 U.S. at 681. Defendant Pardikes has also, under oath, confirmed he has received no financial benefit or is affiliated with Method Landscaping Services LLC and its work with the Association. *See* Defendant Pardikes’ Affidavit filed with the Association’s Motion to Dismiss.

Similarly, Plaintiffs make no allegations about Defendant Setchfield other than her role in “swapping” Board seats. That alleged act alone does not give rise to willful and wanton conduct. Additionally, as alleged in the Complaint, the Board of Directors were acting within the scope of their official functions and duties as directors under the Association’s governing documents. The facts alleged in the Complaint against the individually named Defendants does not in any way satisfy the willful and wanton standard. Jason Pardikes, Wendi Setchfield, Maryjo Montoya, Ben Cooper, and Sean Holdren should be dismissed as individual Defendants in this case.

WHEREFORE, Defendants, Jason Pardikes, Wendi Setchfield, Maryjo Montoya, Ben Cooper, and Sean Holdren respectfully request the Court dismiss the claims asserted against them individually, for an award of attorneys’ fees and costs pursuant to C.R.S. § 38-33.3-123(1)(c), 302(1)(k), and/or Section 9.1(d) of the Amended and Restated Declaration of Protective Covenants for Todd Creek Farms, and for any such other and further relief as the Court deems proper.

DATED this 31st day of May 2023.

JACHIMIAK PETERSON KUMMER, LLC

Duly signed original on file at the office of the undersigned pursuant to C.R.C.P. 121, § 1-26

By: /s/ Chrysovalantou G. Hoppe
Chrysovalantou G. Hoppe, No. 44218
Joseph R. Kummer, No. 39984
Taylor A. Clapp, No. 52800
Attorneys for Defendants Jason Paradikes, Wendi Setchfield, Maryjo Montoya, Ben Cooper, and Sean Holdren

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of May 2023, a true and correct copy of the foregoing **DEFENDANTS JASON PARDIKES, WENDI SETCHFIELD, MARYJO MONTOYA, BEN COOPER, AND SEAN HOLDREN'S MOTION TO DISMISS INDIVIDUALLY NAMED DEFENDANTS PURSUANT TO C.R.C.P. 12(b)(5)** was filed with the Court via Colorado E-Filing and served to all counsel of record.

*Original signature on file at the office of Jachimiak Peterson
Kummer, LLC pursuant to C.R.C.P. 121 § 1-26*

/s/ Silvia G. Lopez
Silvia G. Lopez