

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL**

JASON DANA, individually and derivatively	:	February Term 2017	DOCKETED
On behalf of LOFTS AT 1234 CONDOMINIUM	:		JAN 16 2018
ASSOCIATION,	:	No. 6522 (L)	
	:	Plaintiff,	
v.	:	Commerce Program	R. POSTELL COMMERCE PROGRAM
LOFTS AT 1234 CONDOMINIUM	:		
ASSOCIATION, ET. AL.	:		
	:	Defendants.	

RONALD P. COOLEY, individually and	:	April Term 2016	
Derivatively on behalf of LOFTS AT 1234	:		
CONDOMINIUM ASSOCIATION,	:	No. 3513	
	:	Plaintiff,	
v.	:	Commerce Program	
LOFTS AT 1234 CONDOMINIUM	:		
ASSOCIATION, ET. AL.,	:		
	:	Defendants.	
	:	Control Nos. 17083897/17093140	
	:	17103512/17102483/17101271	

ORDER

AND NOW, this 16th day of January, 2018 upon consideration of the pending motions in the above matters, the respective responses in opposition, oral argument, the attached Opinion and all matters of record, it hereby is **ORDERED** as follows:

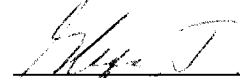
1. Plaintiff Ronald P. Cooley's Motion for Partial Summary Judgment as to count IV (declaratory judgment)(cn 17083897) is **Denied**.
2. Defendant Association's Cross Motion for Summary Judgment to Plaintiff Ronald P. Cooley's Motion for Partial Summary Judgment (cn 17093140) and Defendant Marrone and Volla's joinder in said Motion is **Granted** and count IV (declaratory judgment) and all derivative claims are dismissed.
3. Plaintiff Ronald P. Cooley's Cross Motion to Strike portions of the Association's Cross Motion for Summary Judgment (cn 17103512) is **Denied**.

Cooley Vs Lofts At 1234-ORDOP



4. Defendants Thomas Marrone and Echo Volla's Motion for Summary Judgment to counts II (breach of fiduciary duty) and IV (declaratory judgment) (cn 171012483) is **Granted**.
5. Defendants Thomas Marrone and Echo Volla's Petitions for a Rule to Show Cause why Plaintiffs' Derivative Claim should not be dismissed for Lack of Standing (cn 17101271) is **Moot**.¹
6. Within five (5) days of the docketing of this order and opinion, the parties shall confer and agree on three (3) mutually agreeable dates and advise Court Officer Jerome Kelleher at 215-686-9540 so that the court may schedule a settlement conference on the remaining claim of defamation on a date convenient to the parties and the court.

BY THE COURT,



GLAZER, J.

¹ See ¶¶ 2 and 4 of this order.

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL**

JASON DANA, individually and derivatively	:	February Term 2017
On behalf of LOFTS AT 1234 CONDOMINIUM	:	
ASSOCIATION,	:	No. 6522 (L)
	:	
Plaintiff,	:	
	:	
v.	:	Commerce Program
LOFTS AT 1234 CONDOMINIUM	:	
ASSOCIATION, ET. AL.	:	
	:	
Defendants.	:	

RONALD P. COOLEY, individually and	:	April Term 2016
Derivatively on behalf of LOFTS AT 1234	:	
CONDOMINIUM ASSOCIATION,	:	No. 3513
	:	
Plaintiff,	:	
	:	
v.	:	Commerce Program
LOFTS AT 1234 CONDOMINIUM	:	
ASSOCIATION, ET. AL.,	:	
	:	
Defendants.	:	Control Nos. 17083897/17093140
	:	17103512/17102483/17101271

OPINION

In this consolidated action, plaintiffs, Ronald P. Cooley (“Cooley”) and Jason Dana (“Dana”), unit owners at Lofts at 1234 Condominium, bring actions against Lofts at 1234 Condominium Association (“Association”) and Thomas M. Marrone (“Marrone”) and Echo Volla (“Volla”), past executive board members and unit owners. Plaintiffs bring the actions individually and derivatively on behalf of the Association. These actions have prompted the filing of many rounds of preliminary objections, numerous amended complaints, discovery disputes and motion practice. Presently, the court will address five motions currently pending with this *omnibus* opinion.

Procedural Background

On April 29, 2016, Cooley, a unit owner and Association member, individually initiated this action by writ of summon against the Association, Marrone and Volla. On September 30,

2016, Cooley, individually and derivatively on behalf of the Association, filed a complaint asserting claims for intentional violations of the Pennsylvania Condominium Act, breach of fiduciary duty, defamation and declaratory judgment against defendants. Cooley alleges that he brings the action individually and derivatively on behalf of the Association pursuant to the Nonprofit Corporation law, 57 Pa. C. S. A. § 5101 *et. seq.* Alternatively, Cooley alleges that if the Association is found to be an unincorporated association, Cooley brings the action individually and as trustee *ad litem* of the Association.

Defendants Association, Volla and Marrone in his official capacity filed preliminary objections to the complaint. On November 9, 2016, Cooley filed an amended complaint. Defendants filed preliminary objections to the amended complaint. On March 1, 2017, the court issued an order and opinion sustaining in part defendants' preliminary objections. Specifically, this court found that "All claims challenging the validity of the Second and Third Amendments to the Declaration are barred by the statute of limitations and are dismissed from the amended complaint." On March 20, 2017, defendants Association, Marrone and Volla filed their answer to the amended complaint.

On March 21, 2017, without leave of court or consent of the parties, Cooley filed a second amended complaint. Defendants filed preliminary objections to the second amended complaint. On July 21, 2017, this court struck the second amended complaint and reinstated the amended complaint. On August 14, 2017, Defendant Marrone, individually, filed his answer. On August 29, 2017, Cooley filed his response to defendants' new matter. The pleadings in the Cooley matter are closed.

The Condominium

The Association is the condominium association for the condominium building commonly referred to as the “Lofts” and located at 1234 Hamilton Street, Philadelphia, Pa. 19123. The Lofts is a three story building consisting of seventeen units and parking spaces. Cooley is the owner of unit 301 and parking space P12 and is a current member of the Executive Board for the Association. Defendants are Thomas Marrone and Echo Volla. Marrone is the owner of unit 303 and 305, a combined unit, and parking spaces P13 and P14. Volla resides in unit 302. Cooley, Marrone and Volla reside on the third floor of the Lofts. Marrone, Cooley and Volla served on the Executive Board for the Association at all times relevant to the complaints. Marrone and Volla no longer serve on the Executive Board. Cooley was reelected to the Board in September, 2017.

Governing Documents

The Lofts was created by the execution and recording of the Declaration of Condominium (“Declaration”) on November 15, 2005 with the Philadelphia Department of Records. In 2005. Bylaws were adopted for the Association. The Bylaws provide that the Association is an unincorporated association that consists of all unit owners acting as a group.² On October 9, 2006, the Declaration was amended by way of the First Amendment which subdivided dwelling and garage development into seventeen dwelling units and parking spaces.³ The Plots and Plans attached to the First Amendment, drawing A1-1, showed a walkway designated as part of the common element between P12 (Cooley’s space) and P13 (Marrone’s

² Section 2.1 Bylaws.

³The Amendment also designated the elevator as a limited common element and restated schedule of unit identifying numbers and there percentage interest.

space) and that parking units P10-P17 did not extend in length to the eastern side of existing columns and were designated common elements. On February 6, 2007, a revised and restated Declaration of Condominium was recorded reflecting the First Amendment. Attached to the First Amendment is, drawing A1-1, a drawing depicting the parking for Lofts and the areas of P12 and P13. The drawing attached to the First Amendment depicts the parking space P12 as 9 feet and 4 inches wide. Additionally, drawing A1-1 depicted the future development of the roof unit 105 as a limited common element.

On December 22, 2006, a Revised and Restated Declaration of Condominium was executed and filed on February 6, 2007. The revision shows the location and dimension of dwelling units, garage units, common elements and limited common elements.

On September 12, 2012, Articles of Incorporation were filed by Jeffrey Pustizzi, Esquire for Lofts at 1234 Condominium Association with the Pennsylvania Department of State registering this entity as a domestic Non Profit Corporation. The articles of incorporation provided that the corporation shall have no members. There was no vote to convert the Association from an unincorporated association to a nonprofit corporation with no members.⁴ On August 4, 2017, the nonprofit corporation was dissolved by Pustizzi.

On April 10, 2015, a Second Amendment to the Declaration was signed and filed on April 15, 2017. This amendment grants Cooley, Marrone, and Volla the right to build a roof deck. The Amendment specifically states that it was previously approved by the unanimous vote of all the unit owners at a meeting of the unit owners where a quorum was present. It was signed by Marrone. The Second Amendment refers to the Association as a Pennsylvania Non Profit Corporation.

⁴ 15 Pa. C. S. § 5331.

On May 5, 2015, the Third Amendment was executed and filed on May 15, 2015. This amendment extended the length of parking units P10-P17 to the eastern side of the existing columns. It also converted a walkway that was part of the common elements separating parking space P12 (Cooley) and P13 (Marrone) to become the property of P13 (Marrone). Similar to the Second Amendment, the Third Amendment also contained the following language, “The Third Amendment was previously approved by unanimous vote of all the unit owners at a meeting of the unit owners at which a quorum was present.” The Third Amendment also referred to the Association as a nonprofit corporation and was signed by Marrone.⁵

On May 30, 2015, Revised and Restated bylaws were filed.

Executive Board

According to the Bylaws, the Association is composed of all of the Loft’s unit owners. The Bylaws permit a three member executive board to convene and hold annual meetings to be held on the third Tuesday of September. On September 24, 2013, Cooley and Volla were elected to a three year term on the Executive Board. At the time Teri Gerbec was the President and her term was scheduled to expire in 2014. In July, 2014, at an annual meeting, Gerbec’s term was extended to 2017. Present at the meeting were five unit owners including Leo Addimando, a unit owner, representative of the property manager and member of Hamilton GP LLC which was the general partner of 1234 Hamilton LP, the declarant. On January 28, 2015, Gerbec resigned as the president of the executive board and a member of the executive board. On the same date a special meeting of the executive board was held and Cooley and Volla appointed Marrone to fill Gerbec’s vacancy and position as president for the remainder of her term.

⁵ Any and all claims related to the Second and Third Amendment are not before the court since they were dismissed by this court as barred by the statute of limitations.

Alleged Wrongful Acts of Marrone and Volla

Cooley alleges that Marrone and Volla perpetrated wrongful acts against the Association and Cooley which included failing to abide by the bylaws when it lengthened the minimum term of leases, adopting the Second and Third Amendments for their own purposes, illegal taking of common elements for their own purposes, retaliation and illegal removal of Cooley from the Executive Board, failure to produce requested documents for inspection, improper borrowing on behalf of the Association, improper use of funds, providing false information in the FAQ, failure to hold elections, making defamatory statements about Cooley, and submitting a fraudulent insurance claim.

Removal of Cooley from the Executive Board

On May 27, 2015, Cooley received notice for a regular meeting of the Executive Board for May 30, 2015. At the scheduled meeting Cooley was removed as a member of the Board. On the same date, John Howell, unit owner and member of the Association, was appointed to the Executive Board by Marrone and Volla with his term to expire in the summer/fall of 2017. On May 16, 2016, approximately one year later, Cooley was once again recognized as a member of the Executive Board.

Demand on the Executive Board

On October 7, 2016, Cooley, Dana and three other unit owners submitted a petition to Marrone requesting a special meeting of the unit owners to discuss the complaint filed Cooley against Marrone and Volla and the allegations contained therein. These petitioners demanded that the following items be added to the meeting agenda already scheduled meeting by Marrone:

- a) Forming a temporary Executive Board made up of three disinterested unit owners to replace Cooley, Volla and Marrone until a new Executive Board is selected,
- b) hiring an independent

investigator to conduct an investigation into the allegations raised in the complaint filed by Cooley, c) removing Marrone as President of the Association until conclusion of the independent investigation, and d) filing an action against Marrone, Volla and the Association or joining in and ratifying the lawsuit filed by Cooley. The special meeting was held on November 17, 2016 and the unit owners were provided with two ballots. One ballot posed as questions the concerns raised by Cooley, Dana and the three other unit owners, set forth above. The second ballot posed two questions: a) should the Executive Board of the Association conduct an immediate, independent investigation of the allegations against Marrone and Volla outlined in the October 7 letter? and b) should the Board commence suit against Marrone and Volla on behalf of the Association for self-dealing conduct, breaches of fiduciary duty, and violations of the Pennsylvania Uniform Condominium Act? After a vote, the ballot questions were rejected by the unit members.

Reelection of Cooley

Marrone, Volla and Cooley's term on the Executive Board ended in September 2017. On September 19, 2017, Cooley ran for reelection and was reelected to the Executive Board. Marrone and Volla did not seek reelection.

DISCUSSION

I. Cooley's Derivative Claims are dismissed for lack standing.⁶

⁶ The Association raised the issue of standing in its partial motion for summary judgment which defendants Marrone and Volla joined. Additionally, defendants Marrone and Volla filed a separate petition for a rule to show cause why this court should not dismiss the derivative claims for lack of standing. Initially, the court denied the petition. However, the court later vacated its order and scheduled a rule hearing for December 14, 2017. In response to this petition, plaintiffs argue that the Pa. R. Civ. P. and Philadelphia Local Rules do not recognize nor authorize the filing of defendants' petition as one of the petitions permitted by the rules. While plaintiffs are correct that the petition filed by defendants is not specifically designated as a petition in the rules, the court may nonetheless address the question of standing since it is raised in the motions for summary judgment currently pending before the court.

The Association's legal status has been the subject of much contention and scrutiny since the filing of preliminary objections. Initially, the Association, Marrone and Volla raised the issue in preliminary objections in the form of lack of capacity to sue. At the time, the court overruled the objection and explained as follows:

“As to the preliminary objection concerning the legal status of the Association, Unincorporated or Non Profit Corporation, at this stage in the litigation, questions of fact exist as to whether the Association is an unincorporated association or a nonprofit corporation. Additionally, as to the question of Cooley's standing and pre-suit demand to bring a derivative claim pursuant to the Non Profit Corporation Law, 15 Pa. C. S. A. § 5726, if the Association is indeed a nonprofit corporation, Cooley has standing to bring the claim and his failure to make pre-suit demand is excused. *See, Cucker v. Mikalauskas*, 692 A.2d 1042, fn. 5 (Pa. 997), 7.01 *American Law Institute, Principles of Corporate Governance*, 2016, Comments to 15 Pa. C. S. A. §§ 5781, 5782 and *Hill v. Ofalt*, 85 A. 3d 540, 556 (Pa. Super. 2014).⁷

The question of Cooley's standing is now ripe for consideration. The Association's Bylaws adopted on November 15, 2005 and revised and restated on May 30, 2015, provide in relevant part as follows:

2.1.Composition. The Association is hereby organized on the date of the recording of the Declaration as an unincorporated association. The Association shall consist of all of the Unit Owners acting as a group in accordance with the Act, the Declaration and these By-Laws....

The foregoing section shows that on the date of the recording of the Declaration, November 2005, the Association was an unincorporated association. On September 12, 2012, Articles of Incorporation were filed by Jeffrey Pustizzi, Esquire with the Pennsylvania Department of State registering this entity as a domestic Nonprofit Corporation. However, absent from the record is any evidence that the members of the Association, all the unit owners,

⁷ Order and Opinion dated March 1, 2017 p. 7 fn. 16.

voted to convert the legal status of the Association from unincorporated association to a nonprofit corporation as required by the Nonprofit Corporation Act.⁸ The Act provides that in order to incorporate an unincorporated association as a non-profit corporation, the articles of incorporation “shall contain ...a statement that the incorporators constitute a majority of the committee authorized to incorporate the association by the requisite vote required by the organic law of the association for the amendment of the organic law.”⁹ At the time the articles of incorporation were filed, the declarant had already ceded control of the Condominium to the Association and therefore a vote by the unit owners was required.¹⁰ At best, the articles of incorporation created a separate entity with the same name of the Association with the intent to convert the unincorporated association to a nonprofit corporation in the future. The articles of incorporation solely created a shell entity. This conclusion is further supported by the fact that the Bylaws were revised and restated in May 2015 without any revisions to § 2.1.¹¹ Based on the foregoing, this court concludes the Association is an unincorporated association, claims under the Nonprofit Corporation Act are not proper and therefore Cooley lacks standing to bring a derivative claim pursuant to the Act on behalf of the Association.

Cooley also lacks standing to bring a derivative claim on behalf of the Association as a trustee *ad litem*. Pa. R. Civ. P. 2152 requires that an action prosecuted by an unincorporated

⁸ The Articles of Incorporation show a strike through in the section requesting if a vote occurred. See section 6.

⁹ 15 Pa. C. S. § 5331.

¹⁰ The Declarant ceded control of the Condominium to the Association in 2011. The articles of incorporation were filed in September 2012. The articles also indicated that the nonprofit corporation would have no members.

¹¹ While the Second and Third Amendments in their preamble statements do refer to the Association as a nonprofit corporation, these references are insufficient to overcome absence of a vote by the unit owners to convert the entity from an unincorporated association to a nonprofit corporation.

association be prosecuted in the name of a member or members thereof as trustees *ad litem* for such association. An action so prosecuted shall be entitled “X association by A and B, Trustees ad Litem” against the party defendant.¹² While it is sufficient for Cooley to allege in the complaints filed that he is bringing the action on behalf of the Association as a trustee *ad litem* to overcome preliminary objections, at this stage in the litigation, relying solely upon pleadings is not enough.¹³ Here, it is clear from the record that Cooley did not have the authority to bring the action as trustee *ad litem* on behalf of the Association. The Association members overwhelmingly rejected the proposals to replace the current board, to hire an independent investigator to investigate allegations in Cooley’s complaint, to remove Marrone from his role as President of the Association and to file or ratify Cooley’s lawsuit against Marrone, Volla and the Association. Based on the foregoing, the court finds that Cooley does not have standing to bring this action derivatively on behalf of the Association and the Associations’ cross motion for summary judgment is granted and counts I (intentional violations of the Act), II (breach of fiduciary duty) and IV (declaratory judgement) are dismissed.¹⁴

II. Cooley’s individual claim in Count IV for declaratory relief is dismissed.

¹² *Newtown Heights Civic Ass’n v. Zoning Hearing Bd. of Newtown Tp.*, 454 A.2d 1199, 1201, 71 Pa.Cmwth. 438, 442 (Pa.Cmwth.,1983)

¹³ *See, Highway Truck Drivers and Helpers, Local 107 v. Cohen*, 172 A.2d 824, 827, 405 Pa. 55, 60 (Pa. 1961)(if the form of the action complies with the requirements of the rule, the question of lack of authority is an issue to be resolved at trial).

¹⁴ Plaintiff Cooley filed a motion to strike portions of the Association’s Cross Motion for Summary Judgment, specifically paragraphs 250-256, 267-282 and Exhibits 12-15 as scandalous and impertinent. This motion is denied. “To be scandalous and impertinent, the allegation must be immaterial and inappropriate to the proof of the cause of action.” *Green v. Klein*, 16 Pa. D. & C. 5th 144, 152 (Pa. Com. PL 2010). “[T]he right of a court to strike impertinent matter should be sparingly exercised and only when a party can affirmatively show prejudice.” *Dept of Environmental Resources v. Hartford Acc. and Indem. Co.*, 396 A.2d 885, 888, 40 Pa.Cmwth. 133 (Pa.Cmwth.1979). “‘Prejudice’ is defined as any substantial diminution of a party’s ability to properly present its case at trial.” *Keffer v. Bob Nolan’s Auto Service, Inc.*, 59 A.3d 621, 655 (Pa.Super.2012). Cooley has not showed how the above paragraphs and attached exhibits prejudice him. Without a showing of prejudice, the paragraphs and exhibits will not be stricken but is treated as “mere surplusage” and ignored. *See, Commonwealth, Dept. of Envntl, Resources v. Hartford Accident & Indem. Co.*, at 396 A.2d 885, 888 (1979) (citations omitted).

Cooley filed his request for declaratory relief in count IV of the complaint individually and derivatively. Since Cooley lacks standing to bring the derivative claim, the only aspect of the declaratory relief request that remains to be disposed of is whether Cooley, individually, is entitled to summary judgment on the declaratory relief claim. Cooley's motion is denied and defendants cross motions are granted.

The Declaratory Judgment Act empowers courts "to declare rights, status, and other legal relations whether or not further relief is or could be claimed," and these declarations "have the force and effect of a final judgment or decree."¹⁵ To bring a declaratory judgment action, an actual controversy must exist as declaratory judgment is not appropriate to determine rights in anticipation of events which may never occur. It is an appropriate remedy only where a case presents antagonistic claims indicating imminent and inevitable litigation.¹⁶ Here, the relief requested by Cooley is either moot or an appropriate remedy at law exists precluding the entry of declaratory relief.

Cooley requests that the court declare that the Second and Third amendments are no longer viable and are void. Cooley's request is not possible since by order of this court on March 1, 2017 all claims challenging the validity of the Second and Third Amendments to the Declaration were dismissed as barred by the statute of limitations. As such, at the present time, no actual controversy exists regarding these amendments. Additionally, the relief requesting the removal of Marrone and Volla from the Executive Board is also moot. Marrone and Volla's term on the Board expired on September 19, 2017, they did not seek reelection and are not

¹⁵ 42 Pa.C.S.A. § 7532.

¹⁶ *Bromwell v. Michigan Mut. Ins. Co.*, 716 A.2d 667, 670 (Pa.Super.1998).

currently sitting members of the Executive Board. Declaratory judgment requires an actual controversy. Here, an actual controversy does not exist regarding either the Second and Third Amendments or the removal of Marrone and Volla.

As for the remaining requests, production of documents and removal of defamatory statements from the board minutes, resolutions and declarations, are not matters appropriate for declaratory relief since an adequate remedy at law exists to acquire the relief requested. For instance, Cooley, individually, has a claim for defamation in which he may seek the removal of defamatory statements if indeed the alleged statements are defamatory. Moreover, the Bylaws and Declarations contain specific guidelines to implement in order to amend the minutes of meetings which contain allegedly defamatory statements. As for the production of documents, Cooley may file a motion to compel defendants to produce documents through the discovery process. Based on the foregoing, Cooley's individual claim for declaratory relief is dismissed, Cooley's partial motion for summary judgment to count IV (declaratory judgment) is denied and defendant Association's cross motion for summary judgment is granted.

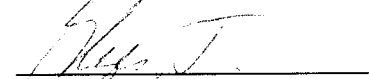
CONCLUSION

For the foregoing reasons, it is hereby **ORDERED** as follows:

1. Plaintiff Ronald P. Cooley's Motion for Partial Summary Judgment as to count IV (declaratory judgment)(cn 17083897) is **Denied**.
2. Defendant Association's Cross Motion for Summary Judgment to Plaintiff Ronald P. Cooley's Motion for Partial Summary Judgment (cn 17093140) and Defendant Marrone and Volla's joinder in said Motion is **Granted** and count IV (declaratory judgment) and all derivative claims are dismissed.

3. Plaintiff Ronald P. Cooley's Cross Motion to Strike portions of the Association's Cross Motion for Summary Judgment (cn 17103512) is **Denied**.
4. Defendants Thomas Marrone and Echo Volla's Motion for Summary Judgment to counts II (breach of fiduciary duty) and IV (declaratory judgment) (cn 171012483)) is **Granted**.
5. Defendants Thomas Marrone and Echo Volla's Petitions for a Rule to Show Cause why Plaintiffs' Derivative Claim should not be dismissed for Lack of Standing (cn 17101271) is **Moot**.¹⁷
6. Within five (5) days of the docketing of this order and opinion, the parties shall confer and agree on three (3) mutually agreeable dates and advise Court Officer Jerome Kelleher at 215-686-9540 so that the court may schedule a settlement conference on the remaining claim of defamation on a date convenient to the parties and the court.

BY THE COURT,



GLAZER, J.

¹⁷ See ¶¶ 2 and 4 of this order.