IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

JULIUS SHEPPARD and MARILYNN SHEPPARD, Plaintiffs, v. REGENCY HILLS COMMUNITY ASSOCIATION, INC., COMMUNITY MANAGEMENT ASSOCIATES, INC., and NEIGHBORHOOD MANAGEMENT ASSOCIATES, INC., Defendants.	CIVIL ACTION FILE NO. 2015CV262623

ORDER ON ALL PENDING MOTIONS AND DISMSSING CERTAIN CLAIMS AND GRANTING DEFENDANTS' JUDGMENT ON THE PLEADINGS REGARDING CERTAIN CLAIMS IN PLAINTIFFS' COMPLAINT

The above-styled matter came before the Court on the following motions by the parties: 1) Plaintiffs' motions for a "no contact" order and a "protective" order, and 2) the Defendants' motions to quash subpoenas, for protective orders, to dismiss certain claims and for judgment on the pleadings on certain claims. Upon a review of the pleadings, motions, briefs and the entire record, the Court hereby DENIES each of the Plaintiffs' motions and GRANTS each of the Defendants' motions as set forth herein.

As shown by the Defendants' verified answer, and as admitted by Plaintiffs' in their Complaint and other pleadings, the Plaintiffs are owners of a lot and reside in the Regency Hills Subdivision and the Defendants are the governing homeowners association, the current management company and the former management company for the subdivision. The Verified Answer shows that the relationships between the parties are governed by the terms of the Declaration of Protective Covenants for

Regency Hills that is recorded in Deed Book 22161, Page 40 *et seq.*, of the Fulton County (hereafter the "Declaration"), the "By-Laws" of the Association (the "By-Laws"), and the Articles of incorporation of the Association (the "Articles") and that Plaintiffs are members of the Defendant Association, a Georgia Nonprofit corporation.

As the Plaintiffs make clear in their complaint and subsequent pleadings, they have numerous disagreements with the defendants with regard to how the Association is run, how the common property and amenities are managed and maintained, how the amenities are operated, how the Association's money is spent, how assessments are set, how the Association interacts with its members, how meetings and elections are run and how the Declaration is enforced.

I. **Plaintiffs' Motions for A "No Contact" Order & for a "Protective Order"**

In their motion for a "No Contact" order, the Plaintiffs are effectively seeking a "Family Violence" protective order in accordance with O.C.G.A. §19-13-1 *et seq*. While Plaintiffs do not cite to it, it appears from their motion that they are claiming that the Defendants and the third parties they reference have committed "stalking" within the meaning of O.C.G.A. § 16-5-90 & 94. The allegations in Plaintiffs' motion for a "no contact" order are clearly related to their claims against the Association.

In their "No Contact" motion, Plaintiffs allege that individuals named Sandra Maxberry and Jeffery Gripper have harassed them. Neither Mr. Gripper nor Ms. Maxberry are a party to this case and there is no evidence in the record that either is a member of the board of directors of the Association or are employed by or otherwise an agent for any Defendant. It appears that they are each property owners in Regency Hills. Plaintiffs do not allege otherwise.

Since there is no evidence that Ms. Maxberry and Mr. Gripper acted on behalf of any of the Defendants, and since the Plaintiffs do not even allege this, Plaintiffs have not alleged any actions by the Defendants that would justify the order they seek. Moreover, even if the Plaintiffs' allegations were true and even if Ms. Maxberry and/or Mr. Gripper acted on behalf of one or more of the Defendants, they are not entitled to a "No Contact" order.

O.C.G.A. § 19-13-1 (b) defines "Family Violence," O.C.G.A. § 16-7-21 defines "criminal trespass, and O.C.G.A. § 16-5-90 defines "stalking." There is no evidence in the record and Plaintiffs do not allege any facts that, if true, would meet the requirements of these statutes and justify the order that Plaintiffs seek. Even if true, the unsworn allegations in Plaintiffs' motion are wholly insufficient to constitute criminal trespass. Further, Plaintiffs do not allege any facts that, even if true, would constitute the related acts of "simple assault," "aggravated assault," "simple battery," "criminal damage to property" or "unlawful restraint" as required by the "family violence" statute in order to justify a "protective order." Plaintiffs have not alleged, nor is there any evidence in the record, that the Defendants engaged in a "pattern" of behavior at all, that the Plaintiffs had any fear (reasonable or otherwise) for their personal safety, or that they suffered any emotional distress. For these reasons, the motion is insufficient on its face, is devoid of any evidentiary support and therefore lacks merit.

Plaintiffs have sued the Defendants and the litigation process requires contact between the parties. Therefore, a "No Contact" order would be impractical and could be prejudicial to the Defendants' rights.

In their subsequent motion for a "Protective Order," the Plaintiffs are effectively seeking an Interlocutory Injunction preventing the Association from expending any money until what Plaintiffs would consider to be a "valid" election is held. Even if the allegations in their Pleadings and motion are accepted as true, Plaintiffs have not established: 1) any immediate and irreparable injury, loss or damage, 2) a substantial likelihood that they will prevail on the merits and 3) any injury that cannot be compensated with money. See generally, Lee v. Environmental Pest & Termite Control, Inc., 271 Ga. 371, 373, 516 S.E.2d 76, 78 (1999). Further, preventing the Association from spending money would not preserve the status quo, it would alter it. See, Bailey v. Buck, 266 Ga. 405, 467 S.E.2d 554 (1996) and Hampton Island Founders, LLC v. Liberty Capital, LLC, 283 Ga. 289, 658 S.E.2d 619 (2008).

Accordingly, Plaintiffs' motions for interlocutory relief termed "No Contact Order" and "Protective Order" are DENIED in their entirety.

II. **Plaintiffs' Motion For a Court Ordered Inspection Of Corporate Records and "Motion to Compel," And Defendants' Motions for Protective Orders and to Quash Subpoenas**.

Plaintiffs' subpoenas for corporate records are invalid since they do not meet the requirements of O.C.G.A. §§ 24-13-21 &-22, regardless of whether they can be considered Notices to Produce. The Subpoenas were only signed by the Plaintiffs, not an attorney or the Clerk, and they do not designate a hearing, trial or deposition where the documents can be produced.

Plaintiff's subpoenas and other filings requesting corporate records do not constitute proper requests under the Nonprofit Code (O.C.G.A. §14-3-1601-1604). There is no evidence or allegation that Plaintiffs satisfied the requirements set forth in

the Nonprofit Code. Further, the process established by the Code cannot be used to circumvent the discovery process of litigation. See, Parker v. Clary Lakes Recreation Assoc., Inc., 243 Ga. App. 681, 683 (2000). To the extent Plaintiffs' numerous filings requesting various records can be considered to be requests for documents pursuant to the Civil Practice Act, there is no reason for the Court to compel production since the requests seek documents that are dismissed or otherwise adjudicated in this Order.

Accordingly, Plaintiffs' motions to compel and for a court ordered inspection are DENIED in their entirety and the Defendants' motions to quash Plaintiffs' subpoenas and for protective orders are GRANTED in their entirety. Plaintiffs are not entitled to any discovery pursuant to any of their requests for information to date, but may serve subsequent requests with regard to the claims that survive this order in accordance with the Civil Practice Act.

III. **Defendants' Motion to Dismiss**

Plaintiffs, as members of the Association, lack standing to assert direct claims against the Association regarding alleged misappropriation/misuse/waste or operation of corporate funds, property and assets, the mismanagement of corporate affairs, failure to maintain common property and amenities, budgeting and assessments, and "abuse of power." Claims like these lie with the Association and can only be asserted by members derivatively, on behalf of the Association, since the alleged wrongs affect all members of the Association in general. See, Crittenton v. Southland Owners Ass'n, Inc., 312 Ga. App. 521, 524-25, (2011); Southwest Health & Wellness, L.L.C. v. Work 282 Ga. App.. 619; Matthews v. Tele-Systems, Inc. 240 Ga. App. 871, 872, (1999).

It is also well settled that claims concerning improper elections or voting procedures lie with the corporation and members/shareholders lack standing to bring a direct action on such claims. See, Crittenton, supra at 524-25, ("Plaintiffs' declaratory-judgment claim as to whether the defendants employed the proper election-voting procedures under SOA's bylaws is essentially a claim that defendants breached their fiduciary duties owed to SOA and all of its members. Indeed, election procedures properly conducted in accordance with the bylaws benefit all members; just as election irregularities harm all the members of a corporation."); Dunn v. Ceccarelli 227 Ga.App. 505, 508 (1997) ("the right to fair and reasonable election procedures inures to the benefit of all members, and. . . a director's interference with elections does not constitute a separate and distinct injury creating a right of direct action in an individual member. . ."). Plaintiffs' election, voting and meeting claims lie with the Association as a corporation, and cannot be asserted by individual members directly. This is because all members of the Association, not just Plaintiffs, are harmed if the Association did not follow corporate procedures, or held an invalid meeting or election.

Finally, it is clear that the Plaintiffs cannot enforce any obligations owed to the Association under its management agreements with Defendants CMA and NMA, to which Plaintiffs are admittedly not parties.

Accordingly, these claims, including the manner in which the common property and amenities are maintained and operated in general, are dismissed.

IV. **Plaintiffs' The Motion for Judgment on the Pleadings**

Even if Plaintiffs had standing or brought a proper derivative action, the claims discussed below fail as a matter of law since they: 1) merely amount to a disagreement

with the board of directors of the Association over spending priorities; 2) allege facts that, if true, might constitute a breach of duty to the Association by its directors for which the Association cannot be held vicariously liable; and/or 3) The Declaration and the By-Laws of the Association clearly show that the Association does not owe Plaintiffs the duties that they claim have been breached.

A. The Association Cannot be Held Vicariously Liable for a Breach of Fiduciary Duty By a Director

Plaintiffs allege that the Association's directors and committee members do not pay assessments and/or received improper refunds for assessments (Complaint, ¶ 32) and that that the Board has never held a membership vote to reduce assessments, on the amount of assessments or on what the Association should do with excess corporate funds (¶¶ 24 & 35). Plaintiffs also allege that the directors have committed waste by spending corporate funds on expensive pool covers, camera equipment, grills and other equipment (¶ 18) and that directors have received improper compensation (¶ 28).

Even assuming they are true, these claims would constitute a breach of fiduciary duty by the individual directors and committee members to the Association.[1] However, a corporation cannot be held vicariously liable to a member for the breach of fiduciary duty by a director. See, ULQ, LLC v. Meder, 293 Ga. App. 176, 181 (2008). Further, the corporation itself does not owe a fiduciary duty to its members. Id, at 181

Therefore, the Association cannot be held liable for these alleged acts/omissions and the Association is entitled to judgment on the pleadings on these claims.

B. The Association does not owe Plaintiffs the Duties That Allegedly Underlie Most of the Plaintiffs' Claims

[1] The directors and committee members are not parties.

Regardless of whether Plaintiffs have standing or whether the Association can be held vicariously liable for the acts/omissions of its directors, the Declaration, By-Laws and Articles clearly show that the Association does not owe its members, and Plaintiffs in particular, any duty with regard to many of the Plaintiffs' claims.

1) Director Compensation

Pursuant to Article III, Section 13 of the Bylaws, "no director shall receive any compensation from the Association for acting as such unless approved by a Majority of the Total Association Vote." While this section of the By-Laws clearly prohibits director compensation, it does not create any duty or otherwise obligate the Association to individual members in any way. If one or more directors received unauthorized compensation, then the Association may have a breach of fiduciary duty claim against those individual directors. But that does not mean that the Association breached a duty to the members or any particular member. Since the prohibition against director compensation does not create a duty between the Association and its members there is no duty owed to the Plaintiffs for the Association to breach. Since, the Association is not vicariously liable to individual members for such a purported breach of fiduciary duty by a director, the Association cannot be held liable for any unauthorized compensation of directors. There is simply no duty that the Association can have breached.

2) Budget, Assessment Rate and Excess Funds, "Abuse of Power" Claims.

Article IV, Section 3 of the Declaration establishes the Association's budgeting process and sets forth the authority of the Board over the budget as follows:

> It shall be the duty of the Board to prepare a budget covering the estimated costs of operating the Association during the coming year, which may include a capital contribution or reserve in accordance with a capital budget separately prepared. The Board shall cause the budget

> and the assessment to be levied against each Lot for the following year and to be delivered to each member at least thirty (30) days prior to the end of the current fiscal year (or at least thirty (30) days prior to the due date of the first installment in the case of the initial budget). The assessment shall become effective unless disapproved at a meeting by a Majority of the Total Association Vote…

Article III, C, 1 of the By-Laws vests the Board of Directors with the power and authority to govern the affairs of the Association. Article III, C, 18 authorizes the Board to "do all acts and things as are not by the Declaration, the Articles of Incorporation of the Association, or these Bylaws directed to be done and exercised exclusively by the members…" Article III, C, 18 then lists various items that are within the exclusive power of the Board of Directors including: (a) preparation of annual budget including contribution of members to the common expenses, (b) making assessments and providing for their collection, (c) providing for maintenance of common areas, (d) hiring, firing and compensating personnel, (d) collecting assessments. . . (i) contracting. Further, Section 19 authorizes the board of Directors to hire a management company.

Therefore, it is clear that Board—not the members—has the exclusive authority to prepare the Association's budget, determine the amount of annual assessments, levy annual assessments, and to determine how Association funds are spent and how excess funds are handled. Other than the right to disapprove the budget by vote of an absolute majority of the members, the Declaration and By-Laws do not give the members any control or rights with regard to the budget process, setting annual assessments and how Association money is spent or otherwise handled. The Declaration, By-Laws, Articles and Georgia Law do not obligate the Association to the members in any way on these issues.

If the Association's budget was not properly approved by the directors or if the approved budget was somehow inadequate to meet expenditures, provide an "acceptable" level of services or is otherwise "unreasonable," then as previously explained, the Association is the party that would be harmed and may have a breach of fiduciary duty claim against its directors. The Association does not owe its members, or Plaintiffs, any duty that could have been breached.

In this case, the Plaintiffs are not claiming that the budget was disapproved by the members or that the members even attempted to do so. Rather, Plaintiffs simply claim that the Association has never put the issues of reduction of annual assessments, the amount of annual assessments and what to do with alleged excess funds to a membership vote. Nothing in the Declaration, By-Laws, Article or Georgia Law requires or even authorizes the Association to put these issues to a membership vote.

Therefore, even if the Plaintiffs had standing to challenge the budget, the Defendants are entitled to judgment on the pleadings on these Budget, Assessments, excess funds and so-called "abuse of power" claims by the Plaintiffs since there is no duty owed to Plaintiffs that the Association could have breached.

3) Annual Assessment Refund And Reduction Claims.

Pursuant to Article IV, 2 of the Declaration, all lot owners in Regency Hills are obligated to pay assessments of the Declaratio, at a uniform rate.

As admitted by the Plaintiff's in their Complaint, the Association has certain continuing expenses such as security, maintenance, professional management, lifeguards, lights etc. Pursuant to the Declaration and By-Laws these expenses are allocated amongst the lots in Regency Hills and the lot owners are obligated to pay their

proportionate share as annual assessments. In other words, the assessments are levied in order to divide the costs and expenses amongst all the lot owners who share them equally. Assessments are not a fee for services rendered and Article IV, Section 6 of the Declaration specifically states that no owner "may waive or otherwise exempt himself from liability for the assessments" and [n]o diminution or abatement of any assessment shall be claimed or allowed by reason of any alleged failure of the Association to take some action or perform some function required . . ."

"T]he purpose of mandatory assessments is to maintain the common property in the subdivision for the use and enjoyment of all owners. The effect of invalidating mandatory payments of assessments for maintenance of amenities in a community without affirmative acceptance would render the provision of services or facilities in a community an impossibility because it would permit property owners to determine for themselves what portion of the amenities they would be willing to accept or to reject." Timberstone Homeowner's Assn., 266 Ga. at 323.

Since Plaintiffs must pay Assessments for their proportionate share of the common expenses in an amount equal to all other owners, and since no owner may exempt him/herself from an assessment or otherwise pay a lesser amount based on the services he/she desires, Plaintiffs have no basis to demand a refund or reduction of assessment. Therefore, Plaintiffs assessment claims fail as a matter of law.

C. Plaintiffs Are Not Entitled to Audit the Association's Books or to any Damages For The Failure of the Association To Disclose Records.

Plaintiffs allege that they have been denied the opportunity to review Association documents and to audit the Association's books (Complaint ¶¶ 8, 32, 39).

Nothing in O.C.G.A. §§14-3-1601-1604, or in the Declaration, By-Laws or Articles give Plaintiffs, or any member of the Association, the right to audit the Association's books. The statute simply sets forth how a member of a nonprofit corporation can seek intervention of the Superior Court to obtain records. Plaintiffs not only seek records, they seek damages for the alleged failure to provide them. However, the Code does not provide for damages. Plaintiffs may only seek an order requiring production of certain records after complying with O.C.G.A. §§14-3-1601 & 1602. Finally, Plaintiffs do not assert a claim for production of records under O.C.G.A. §14-3-1604, and their motions seeking records fail as more fully set forth above. Therefore, the Association is entitled to judgment as a matter of law on Plaintiffs' claims for damages regarding its alleged failure to produce records.

D. Plaintiffs' Corporate Spending Claims Are not Actionable.

Plaintiffs' claims concerning operation of the pool, clubhouse and basketball court, "security," maintenance of the detention ponds, amenities and the common property in general, and the enforcement of parking and other rules merely express the Plaintiffs' disagreement with how the Association spends money and otherwise allocates its resources and manages its affairs. Absent specific personal injury or damage to the Plaintiffs or their property, these claims merely concern a disagreement over corporate spending priorities and are not, in and of themselves, actionable. See, Rymer v. Polo Golf and Country Club Homeowners Ass'n, Inc. A15A1167. --- S.E.2d --- - 2015 WL 7270191 (11/18/15), ("The essence of the Rymers' complaint is that Polo should have exercised its right of abatement by forcing other homeowners to make repairs to the storm water drainage facilities. Thus, the controversy turns on a difference

in judgment between the Rymers and Polo and does not create a cause of action in favor of the Rymers."); Vernon Bowdish Builder, Inc. v. Spalding Lake Homeowners Ass'n, Inc. 196 Ga. App. 370, 371 (1990), ("The record reflects that the essence of plaintiff's complaint against the homeowners' association is that it did not take what its president believes were the necessary steps to maintain the lake at a water level which the president believes to be minimally acceptable. The controversy concerns a difference between the judgment and actions taken by the board of directors of the homeowners' association and the judgment of plaintiff's president, who was at all times relevant to this lawsuit a member of the homeowners' association. 'No principle of law is more firmly fixed in our jurisprudence than the one which declares that the courts will not interfere in matters involving merely the judgment of the majority in exercising control over corporate affairs.'"); Headrick v. Stonepark of Dunwoody Unit Owners Assn., Inc., 331 Ga. App 772, 779 (2015). Therefore, these claims fail as a matter of law.

Accordingly, it is hereby ORDERED that each of the Plaintiffs' motions are denied in their entirety, the Defendants' motions are Granted in their entirety, and the only claims that remain are those sounding in "discrimination," "trespass," and "harassment," and only with regard to damages allegedly to Plaintiffs' persons or property. There being no just reason for delay, this order shall be considered final in accordance with O.C.G.A. 9-11-54(b).

ORDERED AND ADJUDGED, this 4th day of December 2015.

Hon. Wendy Shoob, Judge
Superior Court of Fulton County