

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

KENT L. And LINDA DAVIS, ET AL.,)	THURSTON COUNTY
)	CAUSE NO.
)	11-2-01925-7
Plaintiff,)	
)	12(b)(6) Motion
vs.)	
)	
GRACE COX, ET AL.,)	
)	
Defendant.)	

THE COURT'S RULING

BE IT REMEMBERED that on February 25, 2016, the above-entitled matter came on for hearing before the HONORABLE CAROL MURPHY, Judge of Thurston County Superior Court.

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APPEARANCES

For the Plaintiff:

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For the Defendant:

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BROOKE HOWLETT
Davis Wright Tremaine
1201 Third Avenue
Seattle, Washington 98101

1 Before the Honorable CAROL MURPHY, Presiding
2 Representing the Plaintiff, ROBERT SULKIN
3 Representing the Defendant, BRUCE JOHNSON and
4 BROOKE HOWLETT
5 SONYA WILCOX, RDR, Official Court Reporter

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8 THE COURT: We are in session in the case of
9 Davis v. Cox for the Court's oral ruling. Before the
10 Court provides its ruling, I would like to have the
11 attorneys put their appearances on the record,
12 please.

13 MR. SULKIN: Your Honor, Bob Sulkin for the
14 plaintiffs.

15 MR. JOHNSON: Bruce Johnson, your Honor.

16 MS. HOWLETT: And Brooke Howlett.

17 MR. JOHNSON: For defendants.

18 THE COURT: Thank you. The Court heard oral
19 argument on the motion to dismiss. At that time, I
20 had thoroughly reviewed the file, including the
21 briefing on the motion itself. I have since taken
22 the opportunity to review the record even closer and
23 look at all of the case law that was cited again, as
24 well as look into a little bit more deeply some of
25 the issues that arose at argument. I appreciate the

1 parties coming back to hear the Court's oral ruling.
2 I had been prepared to issue a ruling after hearing
3 argument, but I think the Court benefitted greatly
4 from the time that it took to review things a little
5 bit more closely.

6 I also want to indicate how much I appreciate the
7 parties' briefing in this case. It was very helpful.
8 As I indicated at the oral argument, the Court is
9 striking and not considering for the purposes of this
10 motion the affidavits and attachments for the
11 pleadings. Although I recognize that I have the
12 authority to properly consider documents referenced
13 in the complaint, as well as various attachments to
14 pleadings, I'm declining to do so.

15 Some of the reasons for the Court declining to do
16 so include the difficulty that the parties had in
17 bringing some documents to the Court's attention.
18 I'm not making any rulings or findings regarding
19 that, but I know that the parties had attempted to
20 have the court file certain documents under seal.
21 The parties had an agreement generally regarding
22 confidential documents, and that somewhat complicated
23 the attachments and the other documents that the
24 Court could have considered in this motion but is
25 declining to do so.

1 The Court is considering this as a motion to
2 dismiss under CR 12(b)(6) and is not converting it to
3 a motion for summary judgment under CR 56. The
4 parties agree that the operative complaint is the
5 amended complaint filed January 8, 2016. The Court
6 in this matter does not weigh the evidence but must
7 determine whether any evidence may be put forth to
8 support the claims by the plaintiffs. All
9 plaintiffs' allegations are presumed true.

10 The first argument that the defendants bring in
11 this motion to dismiss the plaintiffs' claims is that
12 the plaintiffs lack standing to bring a derivative
13 action against the co-op. The plaintiffs assert
14 their only claims are derivative on behalf of the
15 co-op, so this is a very important argument and I
16 will say probably the one that the Court spent the
17 most time on.

18 There are three subparts to this argument. The
19 first is that Washington law prohibits a derivative
20 suit by minority members of non-profit corporations.
21 That argument by the defendants would preclude this
22 action completely.

23 The argument relies on the case of *Lundberg v.*
24 *Coleman*, 115 Wn. App. 172 (2002). That case does not
25 specifically address the language in RCW

1 24.03.040(2), and that language is, starting with the
2 language in 040, "No act of a corporation and no
3 conveyance or transfer of real or personal property
4 to or by a corporation shall be invalid by reason of
5 the fact that the corporation was without capacity or
6 power to do such act or to make or receive such
7 conveyance or transfer, but such lack of capacity or
8 power may be asserted," and then I skip to (2) of
9 that statute, "In a proceeding by the corporation
10 whether acting directly or through a receiver,
11 trustee, or other legal representative or through
12 members in a representative suit against the officers
13 or directors of the corporation for exceeding their
14 authority."

15 Having reviewed the cases and the authorities, I
16 find that there really aren't authorities on point,
17 unfortunately, and so the Court, in considering
18 whether to apply the rule in *Lundberg* or to apply
19 statutory language or some other case law, which
20 again I have reviewed, I find that the Court cannot
21 be convinced that the law clearly requires that this
22 suit be dismissed for lack of standing, and because
23 of that, the Court is denying that particular motion,
24 the motion to dismiss based upon that subpart to the
25 argument that Washington law prohibits this

1 particular derivative suit.

2 I make that finding based upon the particulars of
3 this lawsuit. It is a co-op. It is a member
4 organization. It doesn't specifically fit the fact
5 situation in *Lundberg*.

6 The next subpart to the argument that the
7 plaintiffs lack standing is that the plaintiffs
8 failed to exhaust intracorporate remedies. The Court
9 rejects this subargument. The remedy sought by the
10 plaintiffs is not identical to that which might be
11 available by the identified remedy. It appears that
12 the plaintiffs may pursue a vote of the membership,
13 and that has been argued, but that is not what the
14 plaintiffs have sought in their complaint. They are
15 asking, as I understand it, that the co-op follow its
16 own policies, which it argues requires a consensus of
17 the staff before moving forward on a boycott. That
18 specific remedy isn't available by the remedies that
19 the plaintiffs were directed to when they complained.

20 The third subargument is that the co-op suffered
21 no injury. The Court finds that the complaint
22 alleges damages in the way of decreased membership,
23 less business at the co-op, and other injuries. They
24 do not have to quantify the damages or the injuries
25 at this stage.

1 Therefore, the Court has now addressed all three
2 subparts of the first argument that the plaintiffs
3 lack standing to bring a derivative action against
4 the co-op, and the Court has denied the motion as to
5 that first argument by rejecting each of those three
6 subarguments.

7 The second argument is that the plaintiffs' claims
8 lack merit. The defendants may bring this argument
9 under CR 12(b)(6) to challenge the allegations in the
10 complaint, and that requires that the Court look at
11 all of the allegations in the complaint and, assuming
12 that all of those allegations are true, determine
13 whether they state a claim.

14 The first subargument is that the board acted
15 within its authority. So the defendants argue that
16 the plaintiffs' claims lack merit because the board
17 acted within its authority. The defendants argue
18 this under the business judgment rule, which states
19 generally that, "Corporate management is immunized
20 from liability in a corporate transaction where (1)
21 the decision to undertake the transaction is within
22 the power of the corporation and the authority of
23 management and (2) a reasonable basis exists to
24 indicate the transaction was made in good faith."

25 The Court finds that any ruling on this argument

1 is not appropriate in a motion under CR 12(b)(6) as
2 it requires review of and potential interpretation of
3 the bylaws and other documents beyond the complaint
4 in this case. The Court cannot and will not decide
5 this argument in a 12 (b)(6) motion. The Court is
6 not addressing whether the co-op board acted within
7 its authority.

8 The second subargument that the plaintiffs' claims
9 lack merit addresses the claims of breach of
10 fiduciary duty and ultra vires acts. The claims of
11 breach of fiduciary duty requires that the plaintiffs
12 allege, "(1) that a shareholder breached his
13 fiduciary duty to the corporation and (2) that the
14 breach was a proximate cause of the losses
15 sustained."

16 Again, the Court finds that there are adequate
17 allegations in the complaint to address these
18 elements. At this stage, the plaintiffs are not
19 required to provide evidence of the specific duty,
20 nor are they required to quantify damages.

21 As to the allegation of ultra vires acts, it's a
22 different standard, and that is that the act must be
23 performed with no legal authority and, therefore,
24 void. Again, the Court finds that it must consider
25 documents beyond the complaint in order to determine

1 whether dismissal may be appropriate as a matter of
2 law. Based upon those findings, the Court is denying
3 the motion to dismiss plaintiffs' claims on the basis
4 that they lack merit.

5 Finally, the defendants argue that plaintiffs'
6 claims are barred under the law-of-the-case doctrine.
7 Both parties have asserted that they can rely on the
8 Court of Appeals findings in order to assist them in
9 this motion. I find that the findings of the Court
10 of Appeals are not helpful to this Court. The Court
11 of Appeals findings do not apply to bar the
12 plaintiffs from presenting facts to this Court. In
13 fact, that, I believe, is contrary to the holding of
14 the Washington Supreme Court. The Court of Appeals
15 and the Supreme Court addressed this Court's prior
16 ruling on a specific statutory scheme. The Supreme
17 Court struck down the anti-SLAPP statute, the
18 specific statutory scheme under which this Court had
19 previously made findings.

20 The defendants ask this Court now in ruling on
21 this motion to accept certain findings of the Court
22 of Appeals regarding the application of the business
23 judgment rule as law of the case. The Court denies
24 that request as inappropriate given the holding of
25 the Washington Supreme Court.

1 The Court believes now that it has addressed each
2 of the arguments and subarguments on the motion to
3 dismiss. That motion is denied. I want to be clear
4 that, in denying this motion to dismiss, the Court is
5 not precluding the parties from addressing motions,
6 including summary judgment motions on some of these
7 same issues and arguments. The ruling that the Court
8 issues today is based solely on a motion to dismiss.

9 Do the parties require any further clarification?

10 MR. SULKIN: No, your Honor.

11 MR. JOHNSON: No, your Honor.

12 THE COURT: I would appreciate it if the
13 parties presented an order that reflects the Court's
14 ruling. I'm not sure if it would be helpful to the
15 parties to have an order that addresses each of the
16 arguments or provides more information than simply
17 denial of the motion to dismiss. I will leave it to
18 the parties and sign an order that is agreed to as to
19 form, and if the parties have trouble agreeing as to
20 the form of an order, I can address that at a later
21 hearing.

22 MR. SULKIN: Thank you, your Honor.

23 THE COURT: Do the parties today have an order
24 that they agree as to the form?

25 MR. SULKIN: I have an order that just says

1 denied, and I will be happy to talk to Mr. Johnson if
2 he wants more than that, and if he wants to attach a
3 transcript, I'm happy with that, too.

4 THE COURT: I will give the attorneys a moment
5 to discuss.

6 MR. SULKIN: I think we can reach agreement,
7 your Honor.

8 THE COURT: I did initial where counsel has
9 initialled changes and I have signed the order.

10 MR. SULKIN: Thank you, your Honor.

11 THE COURT: Thank you very much. We are
12 completed.

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14 (Proceedings adjourned for the day at 1:51 p.m.)

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CERTIFICATE OF REPORTER

STATE OF WASHINGTON)

COUNTY OF THURSTON)

I, SONYA L. WILCOX, RDR, Official Reporter
of the Superior Court of the State of Washington in and
for the County of Thurston hereby certify:

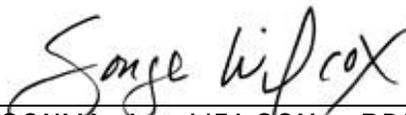
1. I reported the proceedings stenographically;

2. This transcript is a true and correct record of
the proceedings to the best of my ability, except for any
changes made by the trial judge reviewing the transcript;

3. I am in no way related to or employed by any
party in this matter, nor any counsel in the matter; and

4. I have no financial interest in the litigation.

Dated this day, March 3, 2016.



SONYA L. WILCOX, RDR
Official Court Reporter
Certificate No. 2112