

IN THE CHANCERY COURT FOR MONROE COUNTY, TENNESSEE
AT MADISONVILLE

MICHAEL FRISBEY and wife,
JAMIE FRISBEY,
Plaintiffs

VS.

NO. 21579

SALEM POINTE CAPITAL, LLC,
MICHAEL AYERS, and RARITY BAY
COMMUNITY ASSOCIATION, INC.,
Defendants

FILED
MAR 16 2023
TIME 4:25
TERESA A. CHOATE
CLERK & MASTER MONROE CTY.

ORDER

This cause was heard on the 7th day of February 2023 as a trial of the Verified Complaint filed on June 13, 2022. Before beginning the trial, the parties agreed that Plaintiffs would be reinstated to the Rarity Bay Country Club with full rights and privileges. Any restraining order or “no trespass” document placed against Plaintiffs is hereby dissolved.

The parties further agreed to utilize the transcript from the July 21, 2022 hearing on the temporary injunction as evidence in this hearing. Said transcript contains ten (10) exhibits. The transcript was marked as Exhibit A to this hearing. The parties further agreed to mark as Exhibit B the Assignment of Right dated May 15, 2015, and Exhibit C as the Master Declaration of Covenants, Conditions, and Restrictions for Rarity Bay dated October 14, 1998. The Fifth Amendment to the Master Declarations for Rarity Bay was marked as Exhibit D.

Plaintiffs are citizens and residents of Loudon County, Tennessee. Plaintiffs own property in and are residents of the Rarity Bay community. Defendant Salem Pointe Capital, LLC (hereinafter referred to as LLC) is a Tennessee Limited Liability Company. Defendant Michael Ayers (hereinafter referred to as Defendant Ayers) claims to have the decision-making authority for Salem Pointe Capital, LLC. Salem Pointe Capital, LLC is included in the Fifth Amendment to the Master Declarations as the Declarant. As the Declarant, LLC took title to certain property. Defendant

Rarity Bay Community Association, Inc. (hereinafter referred to as the Association) is a Tennessee Non-Profit Corporation created pursuant to the restrictive covenants of Rarity Bay Subdivision. The purpose of the Association is to administer and enforce the provisions of the Master Declarations, the By-Laws, and the design guidelines, as well as own, operate, and maintain the areas of common responsibility. Membership in the Association is mandatory.

Plaintiffs' cause of action primarily challenges the recent removal of Plaintiff Michael Frisbey from the Board of Directors of the Association after being elected by the members of the Association on February 23, 2022.

Four (4) Board seats had been up for election, including Defendant Ayers' own seat on the Board. Members voted for the positions on the Board of Directors at the annual election on February 23, 2020. Just prior to the election on February 22, 2022, Defendant Ayers, as the Declarant, sent an email to the existing Board members claiming he had the right to remove, with or without cause, any director of the Association, and that any replacement director elected by the members would have to be approved by him in advance. He informed the Board he was calling a meeting regarding the removal of one (1) or more of the directors at the organizational board meeting on March 1, 2022. At that time, Plaintiff Frisbey was not a board member. The notice of the called meeting was subsequently sent as a blanket email to all board members, including those newly elected. The notice did not specify which board members would be removed, nor did it state it was a meeting called for the purpose of removal of board members. The notice was not signed by the president or vice-president.

The election was held on February 23, 2022 and the results provided to the community on February 24, 2022. Defendant Ayers received 6% of the votes and was not elected to the Board. Plaintiff Frisbey received 15% of the votes and was elected to the Board. At the March 1, 2022 meeting, Defendant Ayers, as the Declarant, announced he was removing Plaintiff Frisbey and

Crystal Pate from the Board. Objections were made to the notice as being improper. Defendant Ayers is relying on the Amended By-Laws which provide in Section 8.5 as follows:

Removal of Directors and Vacancies. Any director may be removed with or without cause, by members holding a majority of the total votes in the Association, **or by the Declarant.** Any director whose removal is sought, shall be given notice prior to any meeting for that purpose. Upon removal of a director, a successor shall be elected by the members to fill the vacancy for the remainder of the term of such director, which successor must also be approved by the declarant.

The complaint filed in this case challenges the removal of the two (2) members from the Board of Directors of the Association. The first ground for the challenge of the removal is "equitable considerations". Plaintiffs argue that to allow an entity with such a relatively minor investment in the community to have the ongoing control and power it is claiming under the Fifth Amendment is inequitable and unjust. Additionally, Plaintiffs challenge the removal from the Board on five (5) grounds:

1. There was improper notice pursuant to the By-Laws;
2. Under Tennessee law the declarant does not have the power to unilaterally remove the directors; therefore, the By-Law change is invalid;
3. The action was a violation of the fiduciary duty by the declarant;
4. The action was improper because it in effect prevents the Board from managing and controlling the Association as required in the By-Laws and by the Charter; and
5. The action of the declarant, in partially undoing the results of the election by the members, was in violation of the spirit of the court's order that the Association have an election to elect board members.

Plaintiffs contend that the adoption of the Amended Article 8.5 to the By-Laws permitting the removal of board members by the declarant, was contrary to the statutes of this state; therefore, any action taken by the declarant to remove a board member is void.

On or about March 12, 2015, pursuant to authorization by the United States District Court for the Eastern District of Tennessee, the receiver entered into a real estate contract for the purchase and sale in which the lots, golf course, condominiums, vacant unplatted land, and the declarant rights related to the Rarity Bay Development were agreed to be sold to the LLC for the purchase price of \$5,750,000. On May 18, 2015, several other documents were executed

simultaneously by the LLC, an entity now known as Rarity Bay Partners and the Receiver. The Receiver executed the Fifth Amendment to the Master Declarations, which assigned the declarant rights to the LLC. Next, the LLC, Partners and the Receiver executed an Assignment of Right to purchase real property whereby Rarity Bay Partners purchased 172 platted lots for \$2,500,000. The declarant, Salem Pointe Capital, LLC, then unilaterally amended the By-Laws for the Rarity Bay Community Association and the Master Declaration and Covenants and Conditions for Rarity Bay on the same day. Among other things, this document implemented the exemptions from the payment of dues for Partners and added an amended Article 8 to the By-Laws to include the language that the declarant could remove any director with or without cause. It is this amendment that the Plaintiffs state is not consistent with State law and is contrary to T.C.A. §48-58-108.

Section 11(A) of the Charter of Rarity Bay Community Association provides that the business and affairs of the Association shall be conducted, managed, and controlled by a Board of Directors. The Charter further provides that the method of election, removal, filling of vacancies on the Board of Directors, and the term of office of directors and officers shall be set forth in the By-Laws. Article 12 of the Charter provides that the By-Laws of the Association shall be adopted by the Board and may be altered, amended, or rescinded in the manner provided in the By-Laws. T.C.A. §48-53-102(3) provides that By-Laws for a non-profit corporation must not be inconsistent with the Charter of the corporation or the laws of the State of Tennessee. In this case, the Charter does not allow a third party to amend or repeal the By-Laws and, under T.C.A. §48-60-301, that power was not reserved in the Charter for the declarant. T.C.A. §48-58-108 provides that directors are to be elected by the members of a non-profit corporation and provides the method for removal. Further, T.C.A. §48-58-108(e) provides that a director elected by the members may be removed only by the members and only at a meeting called for that purpose.

Defendant Ayers argues state law allows property owners to adopt restrictive covenants that reserve to a designated declarant the right to regulate the makeup of the board of directors. This Court has been provided no such authority. It is noted the property owners did not adopt this amendment to the By-Laws, and it is not in the Charter. This unilateral amendment to the By-Laws was made by Defendant Ayers as the Declarant.

Additionally, under Section 8.8 of the By-Laws, special meetings of the board shall be held when called by written notice and signed by the president, the vice-president, or any two directors. None of these methods were utilized. Changing Section 8.5 of the By-Laws by the declarant, to add powers to himself, is inconsistent with T.C.A. §48-58-101(b) which provides that "all corporate power shall be exercised by or under the authority of the corporation shall be managed under the direction of its board".

The By-Laws further provide in Section 13.11 that any conflict between Tennessee law, the By-Laws, the Charter, and the Declarations shall be resolved in accordance with Tennessee law first, the Charter second, the By-Laws third, and the Declarations fourth.

In this case, the Charter requires a 2/3 vote of the members to amend it. The By-Laws in Section 13 provide they may be amended by (1) the Declarant until termination of the "Development Period", or (2) by the members holding 67% of the votes in the Association. T.C.A. §48-60-301 allows a specified person to amend By-Laws if the charter has provided it. It did not here; therefore the question then becomes "May the Declarant amend the By-Laws without the approval of the Board?" This Court answers this in the negative. T.C.A. §48-60-201 et seq provides that any amendments to the By-Laws are to be amended by the Board of Directors or the members. Since this power was not reserved in the Charter, it is inconsistent with state law and therefore, state law prevails. Members do not need the approval of the Declarant to amend unless the Charter provides it pursuant to T.C.A. §48-60-202(c). Here it does not. Further, the By-Laws may not allow

an amendment to increase or decrease the number of memberships authorized for another class without a vote by the members.

Therefore, this Court finds the By-Laws relied upon by the Board and the Declarant are inconsistent with state law and the Charter, and Defendant Ayers has no authority to remove properly elected Directors from the Board, both because of the inappropriate allocation of that power to himself and the method he used. Additionally, it is clear, under state law and the Charter, that the Board is to conduct the business and affairs of the corporation, not a third person. Defendant Ayers has pointed to no statute otherwise, and T.C.A. §48-58-101 says such authorization must be in the charter. The Court notes that the Board of Directors allowed Defendant Ayers to choose the two new board members to replace the two he had inappropriately removed instead of having a new election by the members as provided by the By-Laws. This was inappropriate.

Plaintiffs next argue that even if the By-Laws were properly amended, the notice given by Defendant Ayers was not sufficient. This Court agrees and adopts its previous findings on this issue as stated in the Order from the July 21, 2022 hearing. Additionally, the By-Laws require that any such removal occur at a special called meeting. See By-laws, Section 7.3 and 8.5. By-Laws at Section 7.3 provides the President may call special meetings, not the declarant. This method was not followed. Based upon the two emails sent by Defendant Ayers and Section 7.3 of the By-Laws, the Court finds that Defendant did not have the authority to call a special meeting of the Board of Directors. In addition, it shall be the duty of the president to call a special meeting within thirty days if so directed by resolution of the Board or upon a signed petition by the members, holding at least 25% of the total votes in the association or upon written request of the declarant. This was not done.

Plaintiffs also argue that by allowing the Declarant to remove a director with or without cause destroys the power of the Board to act independently and in response to those who elected them versus the Declarant who may remove those who disagree with him. Certainly, this becomes a poignant argument when the Board is discussing using member funds to build a facility on land owned by the Declarant.

This raises questions that have not been fleshed out to this Court and while Unrau v. Kidron Bethel RET Survs., 271 Kan. 743, 27 P 3d1 (2001) is informative there is no proof in this record that the Declarant has breached a specific fiduciary duty. The Court dismisses this ground.

It is therefore ORDERED, ADJUDGED and DECREED that Michael Frisbey is declared a duly elected member of the Board of Directors of Rarity Bay Community Association, Inc. and Defendants Salem Pointe Capital, LLC, Michael Ayers, and Rarity Bay Community Association, Inc. are hereby enjoined from removing him from his position unless it is done lawfully and pursuant to state law which provides only for members to remove directors.

Costs in this cause are taxed to Defendants for which execution may issue if necessary.

ENTER this 16 day of March, 2023.



Chancellor Jerri S. Bryant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing Order has been forwarded to the following by ~~placing a copy~~
~~of same in the United States Mail, postage pre-paid~~ *email*.

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This 16 day of March, 2023.


Clerk & Master