

CAUSE NO. JP2-CV1900141

CAROL A AND DARREN G YANCY, SR.,

Plaintiffs

v.

**THE BURLESON MAGNOLIA FARMS
HOMEOWNERS ASSOCIATION BOARD OF
DIRECTORS**

Defendants

IN THE JUSTICE COURT

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2ND PRECINCT

**JOHNSON COUNTY,
TEXAS**

**PLAINTIFF'S THIRD AMENDED PETITION AND ANSWER TO DEFENDANTS
COUNTERCLAIMS**

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES CAROL AND DARREN G YANCY, SR., ("Plaintiffs"), who files this Third Amended Petition against the Individually named Defendants for acting as Board Members in an unauthorized capacity for a specified period of time, Board breaches of contract and of duty when in an authorized capacity, for violations of Texas Business & Organizations Code, violations of Texas Property Code, and violation of the Burleson Magnolia Farms Homeowner Association filed Deed Restrictions by Defendants. Plaintiffs seek judgement and specific remedy from the court in matters as they relate to the enforcement of the filed Deed Restrictions and Texas Law, and for all other relief to which they deem themselves entitled that are within the jurisdictional limits of the court.

1. DISCOVERY LEVEL

1.1. Plaintiff intends that this case be under Discovery Level 3.

2. VENUE and JURISDICTION

- 2.1. Both Plaintiff and Defendants are domiciled in the State of Texas.
- 2.2. Venue is proper in Johnson County, as all individual parties are residents of Johnson County and the Burleson Magnolia Farms Homeowner Association (hereinafter “BMFHOA”) Board of Directors are subject to the formation of the homeowners association in Johnson County.

3. PARTIES

- 3.1. Plaintiffs Carol A. Yancy and Darren G. Yancy, Sr. reside in Johnson County in the Magnolia Farms Subdivision.
- 3.2. Magnolia Farms Board of Directors from June 11, 2017 to May 15, 2018 - Defendant Charles Duello resides at 230 Sherry Lane, Burleson, Texas; Defendant David Ledford resides at 244 Sherry Lane in Burleson, Texas; Defendant Gene Young who resides at 237 Sherry Lane in Burleson, Texas; Defendant Kyle Sherman who resides at 240 Sherry Lane in Burleson, Texas. All reside in Johnson County in the Magnolia Farms Subdivision.
- 3.3. Magnolia Farms Board of Directors from June 3, 2019 to present - Defendant Charles Duello resides at 230 Sherry Lane, Burleson, Texas; Defendant David Ledford resides at 244 Sherry Lane in Burleson, Texas; Defendant Kyle Sherman who resides at 240 Sherry Lane in Burleson, Texas. All reside in Johnson County in the Magnolia Farms Subdivision.

4. FACTS

- 4.1. The BMFHOA is a nonprofit corporation formed and operated under the Business Organizations Act, Chapter 22 Nonprofits of the Constitution of the State of Texas. As such, the Laws of the State of Texas are the final authority in all matters regarding said corporation.
- 4.2. The operation of a nonprofit comes with specific duties and regulations to be followed to keep the corporation in compliance with state law.

4.3. The purpose of a homeowner association is to establish and enforce a specific set of standards designed to preserve the property values of residing Members.

4.4. History of the BMFHOA. The BMFHOA lies within the Extraterritorial Jurisdiction of the City of Burleson, is in the Magnolia Farms Subdivision, has 16 plots and 15 Members, along with 2 separate non-Member acreage tracts known as 204 & 206 Sherry Lane. The Association was originally known as the Magnolia Farms Homeowner Association, but was changed to the Burleson Magnolia Farms Homeowner Association in 2006 due to the default of the nonprofit status. This was caused by an error when the former Secretary and Treasurer were not aware of forms to be filed with the Texas Secretary of State. The original name was claimed by another HOA during the reinstatement period.

4.5. The current Deed Restrictions on file with Johnson County were unanimously approved by the BMFHOA on April 4, 2008 and filed with the County on the same day. As such, all Board elected from that point forward were to follow these Deed Restrictions.

5. CLAIM – BREACH OF CONTRACT TAKEOVER OF BMFHOA WEBSITE AND CORRELATED COSTS

5.1. In January 2017, Plaintiff Darren Yancy launched the Member website www.bmfhoa.org. The site contained member information regarding Deed Restrictions, Board Communications, Financial Data, etc. The site was launched for the benefit of all HOA Members. Plaintiff had purchased the domain name www.bmfhoa.org in June of 2015.

5.2. After launch of the site in January 2017, then Board Treasurer Cynthia Jackson was to set up an HOA account with a domain manager whereby the domain and site could be transferred. For an unknown reason, that did not happen and Plaintiff maintained the site for the benefit of all

Members.

5.3. On June 11, 2017 a new Board was voted in to replace the outgoing Board. This Board contained the named Defendants in this petition.

5.4. At the June 11, 2017 meeting, it was agreed and voted on by the new Board that a specific Board Member, Defendant Young, would take over the domain and site. This action constituted an agreement by the Board to take over the site, its administration, and all correlated costs.

5.5. In December 2017, Plaintiff's began renewing site mapping, site package, and other costs associated with the site.

5.6. In April of 2018, when Member dues were sent out, Plaintiff's had not received any contact or instruction on the site, but had incurred expenses on the site. At no time had Plaintiff agreed to maintain the site at Plaintiff's expense and deducted the budgeted cost already communicated in past Board Communications. Furthermore, past history will show where Plaintiffs were able to deduct the cost of the site from prior dues without any issue, thus establishing precedent.

5.7. On May 1, 2018, Plaintiff's received a threatening electronic mail from Defendant Duollo over the deduction, threatening suspension of Member status if the costs were not submitted on a separate basis. These have been follow up with multiple threats from Defendants.

5.8. Plaintiff's view this threat as a breach of the original agreement on June 11, 2017.

5.9. Defendants have now filed a counter claim, ignoring their original agreement to take over the site.

6. CLAIM – VIOLATIONS OF THE TEXAS PROPERTY CODE 209.0051

6.1. The Texas Property Code Section 209.0051 governs open Board Meetings and the

requirements for notice, participation, and conduct. Specifically, there must be a 72 hour notice sent to all members either via email, posted on an HOA website, or a conspicuous location such as a common area.

6.2. While certain meetings can be without notice, such as administrative or emergency action, under no circumstances may notice be waived for matters such as fines, suspending an owner's rights, or election of officers.

6.3. On or about **May 1, 2018** the Burleson Magnolia Farms HOA Board of Directors held an unannounced and closed meeting to make a decision regarding the dues paid by Plaintiff in April 2018. In that meeting it was decided to communicate a loss of Member standing to Plaintiffs as evidenced by an electronic mail from Defendant Duello to Plaintiffs on May 1, 2018.

6.4. This action on behalf of Defendants violates Texas Law under Texas Property Code 209.0051(h) (8) and is invalid.

6.5. It should be noted that Board Secretary Tery Bean came to the residence of Plaintiffs to procure prior HOA records on May 11, 2018. After turning over said records, Plaintiffs sent a specific email to Secretary Bean regarding the following of rules under the Texas Property Law, referencing a prior Board issue in spring of 2017. It was the direct instruction of this communication to remind the Board to follow Open Meetings rules and obey the law.

6.6. On or about **July 2, 2018**, individual Defendants posing as the Burleson Magnolia Farms HOA Board of Directors held an unannounced and closed meeting to make a decision regarding the dues paid by Plaintiff in April 2018. In that meeting it was decided to communicate to Plaintiffs that the Board would not accept deduction of incurred costs for the operation of the site, would demand payment in the place of incurred cost, and demanded stopping all operations as evidenced by an electronic mail from Defendant Duello to Plaintiffs on with letter attached on July 2, 2018.

6.7. This action on behalf of Defendants violates Texas Law under Texas Property Code 209.0051(h) (4) and is invalid.

6.8. On or about **August 24, 2018**, individual Defendants posing as the Burleson Magnolia Farms HOA Board of Directors held an unannounced and closed meeting to make a decision regarding the dues paid by Plaintiff in April 2018. In that meeting it was decided to communicate to Plaintiffs that the Board would not accept deduction of incurred costs for the operation of the site, would demand payment in the place of incurred cost, and demanded stopping all operations as evidenced by an certified mail from Defendant Duello to Plaintiffs on with letter attached on August 25, 2018.

6.9. This action on behalf of Defendants violates Texas Law under Texas Property Code 209.0051(h) (4) and is invalid.

6.10. On or about **December 29, 2018**, individual Defendants posing as the Burleson Magnolia Farms HOA Board of Directors held an unannounced and closed meeting to make a decision regarding the dues paid by Plaintiff in April 2018. In that meeting it was decided to communicate to Plaintiffs that the Board would not accept deduction of incurred costs for the operation of the site, would demand payment in the place of incurred cost, and demanded stopping all operations as evidenced by an electronic mail from Defendant Duello to Plaintiffs on with letter attached on December 29, 2018.

6.11. This action on behalf of Defendants violates Texas Law under Texas Property Code 209.0051(h) (4) and is invalid.

6.12. From records provided by Defendant, former Board Secretary Tery Bean resigned on May 15, 2018. On or about **July 2, 2018**, individual Defendants posing as the Burleson Magnolia Farms HOA Board of Directors held an unannounced and closed meeting to make a decision regarding

replacement of this position as allowed under Business Organizations Code 22.212 Vacancy. However, due to the circumstance being held by a homeowner association, Section 209 of the Texas Property Code also applies. The Board must give notice and have an open Board meeting in regard to the filling to the vacancy on the Board, as per 209.0051(h)(13). No notice was ever given to the Members of the HOA, nor were any Members allowed to participate, as required by statute.

6.13. The apparent selection and Board approval for Kyle Sherman as replacement Board Secretary violates Texas Law under Texas Property Code 209.0051(h) (13) and is invalid.

6.14. Any action or communication taken by these individuals after this date were invalid as a Board. This includes the ability to accept and receipt monies on behalf of other Board Members.

6.15. On June 3, 2019 an HOA Meeting was held at the residence of Defendant Duello to replace the Board in default since July 2018. The Defendants were re-elected by a meeting of Members, excluding Plaintiffs. Defendant Sherman was officially elected as Board Secretary per records obtained from Defendants.

6.16. Sometime between **August 3 and 13, 2019**, the Burleson Magnolia Farms HOA Board of Directors, which included 3 Defendants from Original Petition, held an unannounced and closed meeting to make a decision regarding the acceptance of a settlement offer from Plaintiff. Instead of accepting settlement, Defendants have chosen to file unsubstantiated counter claims to include a fine and penalty in excess of Texas Law.

6.17. This action on behalf of Defendants violates Texas Law under Texas Property Code 209.0051(h) (8) and is invalid.

**7. CLAIM – INDIVIDUAL DEFENDANTS OPERATING AS AN UNAUTHORIZED
BOARD OF DIRECTORS July 2018 through June 2019**

7.1. Defendants and Tery Bean, a former resident of the Magnolia Farms Subdivision and Member of the HOA, were duly elected as a Board of Directors in June 2017.

7.2. Defendant Charles Duello was elected as HOA President; Defendant David Ledford was elected as HOA Vice President; Former resident Tery Bean was elected HOA Secretary; Defendant Gene Young was elected HOA Treasurer; and Defendant Kyle Sherman was elected Member at Large.

7.3. Defendants Duello, Ledford, and Young have had prior Board positions in past years.

7.4. By accepting the elected positions, Defendants accepted the rights and responsibilities to follow Texas Law under Business Organizations Code, Chapter 22 Non Profit Corporations and the Texas Property Code, Chapter 201 Restrictive Covenants Applicable to Certain Subdivisions and Chapter 209 Texas Residential Property Owners Protection Act.

7.5. By accepting the elected positions, Defendants also accepted the rights and responsibilities to follow the filed Deed Restrictions for the HOA on file with Johnson County filed as of April 8, 2008.

7.6. By accepting these elected positions, Defendants accepted the duties of Care and Loyalty to the Members.

7.7. On May 15, 2018, former resident Tery Bean resigned as Secretary of the HOA. This was not an announced action by Defendants, but one Plaintiffs found in direct contact with Tery Bean and later revealed through records request. This action forced the Defendants, acting in a duly authorized capacity at the time, to respond and replace the position in accordance with **Section 22.212 of The Business Organizations Code for Board Vacancies and Texas Properties Code**

Section 209.0051(h) (13). The Defendants also had guidance from the filed Deed Restrictions to hold a special meeting to replace the position. Keys to the process being notice to the Members and have an open meeting on the matter. None of which was done by the individuals acting as the Board.

7.8. In the spring of 2017, a similar situation had occurred when the Board President from 2015 to 2017 had to resign in term. Plaintiff Darren Yancy was Board Secretary at this time. Section 22.212 of the Business Organizations Code for Board Vacancies was invoked by the remaining Board Members to replace the President. Defendant Duello, acting as Board VP at the time, was the sole objector on the Board and wanted a full election to replace the position. Defendant Duello went so far as to have a petition signed by residents to call upon a clause in the filed Deed Restrictions to overturn the Board vacancy replacement process. All other Defendants signed onto said petition. As such, none may make the claim of no prior knowledge of the process to fill a Board Vacancy.

7.9. The spring 2017 Board Vacancy Replacement was invalid as the other Board members were advised by counsel that the meeting to hold the Vacancy Replacement was not announced to all HOA Members to be at the meeting and thus violated **Open Meetings under Texas Property Code Section 209.0051(h)(13).** This information was shared at the time with the Defendants. As such, none may make the claim of no prior knowledge of the rules regarding Open Meetings Acts for Board Vacancy Replacement.

7.10. **Business Organizations Code, Nonprofit Section 22.204 requires at least 3 Board members, 2 of which must be the President and Secretary with these positions being held by separate people.** Additionally, the Original Charter filing for the HOA completed July 23, 2001 specifically has 3 Board Members of different names under the positions of President, Vice

President, and Secretary as called for by Texas Law dictating the required positions. While, there was apparent intent for action, the deliberate intention of providing no notice of an election and no open meeting to perform it in by individuals acting as Board Members, effectively invalidated the Board from July 2, 2018 until its replacement was elected on June 3, 2019.

8. Violation of the Texas Property Code Section 209.005 Request for Association Records.

8.1. On August 15, 2019 a records request was sent to Defendant Duello as the recorded agent of record for Burleson Magnolia Farms HOA. Certified Mail records show receipt on August 16, 2019, meaning a return date of August 30, 2019.

8.2. An incomplete record was received on August 30, 2019 and the balance of the request was not received until Monday September 2, 2019. As such, the response was late.

8.3. Defendants did not include the request for tax records and franchise tax filings, as per the request. As such, Defendants are in violation of this statute.

9. CLAIM – Failure to Enforce HOA Deed Restriction

Violation of **BMFHOA CCR 6.01 (a) Collection of Regular Assessment for Maintenance.** In 2018 Defendants, during their authorized capacity as Board Members, failed to access and collect maintenance fees for 204 and 206 Sherry Lane as called for in the filed Deed Restrictions.

10. CLAIM – BREACH OF DUTY

10.1. Texas Directors of Nonprofits owe two specific areas of duty in the acceptance of a Board position. **The Duty of Care** is the duty to stay informed and exercise reasonable care and prudence in the management of an organization. **The Duty of Loyalty** requires Board members act for the benefit of the organization and not for personal benefit.

10.2. The Defendants have breached these duties. The residences of the BMFHOA agreed to be

in an HOA when they purchased their homes in a deed restricted subdivision. The exchange for that right was consistent building standards to protect and promote property values.

10.3. Numerous examples have been given in fact from the Original and Amended Petitions where the Defendants are not acting to preserve property values, the sole purpose of the organization. The lack of enforcement of rules the Defendants did not enforce during their period as authorized Board members has only been compounded by the fact the Defendants have intentionally chosen to act in an unauthorized manner by not replacing the Board Secretary.

10.4. It has only been through this action of petition that most of the violations of the Deed Restrictions have been cured.

11. CLAIM – ATTORNEY & COURT FEES

11.1. Plaintiffs ask for an award of attorney's fees, should such expense arise, as their claims are based on causes which carry a statutory claim for reasonable and necessary attorney fees.

11.2. Plaintiffs ask for an award of all court fees including filing fees, charges for serving Defendants, and any other charges related to the Petition.

PLAINTIFFS ANSWER TO DEFENDANTS COUNTERCLAIMS

Plaintiffs general deny all Defendants Counterclaims and demand strict proof of all allegations contained therein.

MOTION TO DISMISS COUNTER CLAIMANT AS CREDITOR

Plaintiff has shown through evidence that Defendants entered into an agreement to take over the Burleson Magnolia Farms HOA Website in June 2017. Plaintiff used and relied upon this agreement and Defendants' affirmative representation to continue to maintain the site for the Members through June 2019 when the site was voted down. Expenses incurred from June 2017 were for the benefit of the Members and not an expense to be born my Plaintiffs individually. As such, said expenses were deducted from Plaintiffs 2018 Member Dues.

Satisfaction and Accord and Usury:

Counter-Claimant seeks recovery of \$200 in fees which it alleges is due and owing since 2018. Those amounts are billed by the HOA to its members in April 2018. Counter-Defendant/Plaintiffs timely paid the amount due that same month, minus an offset for the costs of the website because the HOA Board had not taken over the website as promised and agreed to in 2017. The HOA accepted and cashed that check, thereby accepting payment as offered by Plaintiffs in satisfaction and now, approximately 16 months later, Counter-Claimant, as a creditor, seeks \$1,275.00 in charges and late fees for the original \$200 debt claimed to be owed by Plaintiff at a debtor. These additional charges constitute an effective annual interest rate of 396%. Under Texas law, any interest rate in a consumer transaction over 10% is considered usury and against public policy. The Counter-Claimant's demand effectively seeks forty times the allowed interest rate.

Counter-Claimant seeks recovery on a usurious debt, and as such, is contrary to public policy and subject to the appropriate penalty prescribed by § 305.001 *et seq.* of the Texas Finance Code, in

that: (1) it has contracted for and charged interest greater than the 10% maximum amount allowed by law; and (2) it has contracted for and demanded interest in an amount more than twice the amount authorized by Tex. Fin. Code Ann. §§ 301.001 *et seq.*

Accordingly, pursuant to Tex. Fin. Code Ann. § 305.001(a), the HOA is liable to Plaintiff for the greater of: (1) three times the amount computed by subtracting the amount of interest allowed by law from the total amount of interest contracted for and charged; or (2) the lesser of \$2,000 or 20% of the amount of the principal.

In addition to the sums set forth above, pursuant to § 305.002(a) of the Texas Finance Code, the HOA is liable to Plaintiffs for the principal amount on which it charged and received interest, together with the interest and all other amounts charged and received, as well as attorney's fees and all costs of court.

MOTION TO DISMISS COUNTER CLAIM OF BREACH OF FIDICUARY

RESPONSIBILITY

Counter-Claimants/Defendants have placed for the claim that Counter-Defendants/Plaintiffs breached their fiduciary duty in relation to the site. Plaintiff spent several months, at Plaintiffs time and expense that have never been reimbursed or inquired upon to be reimbursed, to create a site that would be a repository for HOA records as well as a communications site for compliance and Member benefit. That has been maintained since the date of its inception and Counter-Claimant/Defendants have no evidence to the contrary.

Counter-Defendant/Plaintiff has used the domain name to connect to a webpage, where he shares information regarding the Burleson Magnolia Farms Home Owners Association, including commentary and criticism of the organization, when applicable. Pursuant to the First Amendment

of the United States Constitution and like protections under the Texas Constitution, Plaintiff's speech and right to association with others of like mind and interest in this regard is a protected right, as such communications are a matter of public concern. Even though it has been communicated that HOA Members no longer want the site, Counter-Defendant/ Plaintiff has now assumed operation of the site to maintain communications that are of a public concern with the HOA. Counter-Claimant/Defendants now wish to recover the domain name and cease operation of the site connected to that domain in an attempt to stifle Plaintiff's right to freedom of speech and association. Accordingly, Counter-Defendant/Plaintiff moves to dismiss this counter-claim in accordance with the Texas Anti-SLAPP statute. TEX. CIV. PRAC. & REM. CODE ANN. § 27.001 *et seq.* Plaintiffs respectfully requests that the Court set this matter for hearing and after taking of evidence, find that Counter-Claimant/Defendants has violated Texas Anti-SLAPP statute and dismiss the counter-claim and award Counter-Defendant/Plaintiff court costs, expenses and attorneys' fees, if applicable.

12. PRAYER for RELIEF and REMEDIES SOUGHT

12.1 Plaintiff's pray that the Court will take the evidence presented and judge Defendants to be in violation of **Business Organizations Code, Nonprofit Section 22.204 and Texas Property Code 209.0051(h)(13)** by operating without a Board Secretary from May 15, 2018 through June 3, 2019.

12.2 Plaintiff's pray that the Court will direct any and all communications, directives, or any other actions against Plaintiffs during this period to be unauthorized, invalid, and void.

12.3 Plaintiff's pray that the Court will take the evidence presented and judge Defendants in multiple violation of the **Texas Property Code 209.0051** for holding close meetings without

proper notice to Members.

12.4 Plaintiff's pray that the Court will take the evidence presented and judge Defendants in violation of the **Texas Property Code 209.005** and direct Defendants to fully comply with the request and release requested tax return and state franchise tax return data.

12.5 Plaintiff's pray that the Court will find the Defendants in breach of their agreement to take over the HOA website in June 2017 and direct acceptance of payment of dues in April 2018 with deductions of related costs as appropriate.

12.6 Plaintiff's pray that they be excluded in any recover of cost from Petition against Defendants in any special assessment that may come forth from the current Board as a result of suit.

12.7 Plaintiff's pray that the Court will take the evidence presented regarding the lack of enforcement of the Burleson Magnolia Farms HOA Covenant, Conditions, & Restrictions as filed with Johnson County on April 4, 2008 and judge Defendants in breach of their legal duties when in an authorized capacity.

12.8 Plaintiff's pray that the Court will direct Defendants, as well as elected Boards that follow to enforce the Burleson Magnolia Farms HOA Covenant, Conditions, & Restrictions as filed with Johnson County on April 4, 2008 without prejudice or discriminatory enforcement against Plaintiffs or other Members, and to seek competent legal counsel in any matter of dispute on enforcement.

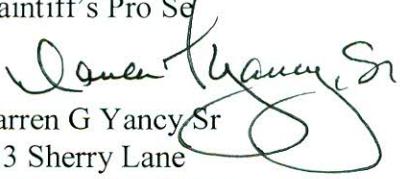
12.9 Plaintiff's pray that the Court will direct Defendants, as well as elected Boards that follow to comply will all state laws regarding the Burleson Magnolia Farms HOA and to seek competent legal counsel in any matter of dispute on enforcement.

12.10 Plaintiffs' pray that the Court will deny Counter-Claimant/Defendants claims by granting

Counter-Defendant/Plaintiff's Motions To Dismiss, and that they take nothing in return.

WHEREFORE, PREMISES CONSIDERED, plaintiffs respectfully request that the Court render judgment in favor of plaintiffs; that plaintiffs recover from defendant's damages available pursuant to law or equity, reasonable and necessary attorney's fees, costs, and such other relief to which plaintiffs may show themselves justly entitled.

Respectfully Submitted,
Plaintiff's Pro Se


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