

RECEIVED
APR 25 2019

BY: *aw*

CAUSE NO. JP2-CV1900141

CAROL A AND DARREN G YANCY, SR,

Plaintiffs

v.

THE BURLESON MAGNOLIA FARMS
HOMEOWNERS ASSOCIATION BOARD OF
DIRECTORS, CHARLES DUELLO, DAVID
LEDFOORD,
GENE YOUNG, AND KYLE SHERMAN
INDIVIDUALLY

Defendants

§ IN THE JUSTICE COURT

§

§

§

§

§

§

§

§

§

§

§

§

§

FILE COPY

2ND PRECINCT

JOHNSON COUNTY,
TEXAS

PLAINTIFF'S AMENDED PETITION,
AND RESPONSE TO DEFENDENTS PLEAS TO THE JURISDICTION AND
ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES CAROL AND DARREN G YANCY, SR., ("Plaintiffs"), who files this Amended Petition against the Individually named Defendants for acting as Board Members in an authorized capacity, Board breaches of duty when in an authorized capacity, for violation of Texas Business & Organizations Code, violation of Texas Property Code, and violation of the Burleson Magnolia Farms Homeowner Association filed Deed Restriction by all named 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, Darren G. Yancy, Sr. Sylvia Rosario, and Gregory Rosario reside in Johnson County in the Magnolia Farms Subdivision.

3.2. Defendant Charles Duello resides at 230 Sherry Lane, Burleson, Texas in Johnson County in the Magnolia Farms Subdivision; 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

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 – INDIVIDUAL DEFENDANTS OPERATING AS AN UNAUTHORIZED BOARD OF DIRECTORS

5.1. 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.

5.2. 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.

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

5.4. 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.

5.5. 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.

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

5.7. In May of 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. The resignation was logical, as Bean was moving from the HOA. 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**. The Defendants also had guidance from the filed Deed Restrictions to hold a special meeting to replace the position.

5.8. 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.

5.9. The spring 2017 Board Vacancy Replacement was ultimately yielded 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**. 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 Boards.

5.10. On May 24, 2018, Defendant Duello filed a Change of Registered Agent with the Texas Secretary of State appointing himself agent, a position customarily held by the Board Secretary.

5.11. No announcement of the resignation was made to Members or any communication as to the manner and timing of the replacement of the Secretary position has ever been made by Defendants. In the action of appointing himself Registered Agent, Defendant Duello has apparently assumed the position of Board Secretary with the knowledge and consent of the other Defendants. While it is unclear whether Defendant Duello is acting as Board President and Board Secretary or Defendants acting as a Board at the time have chosen to not replace the Board Secretary, this inaction is in violation of Texas Law. **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. There is no provision for vacancy replacements in the Deed Restrictions or formation documents. As such, the Board is violation of not using **Section 22.212 of The Business Organizations Code for Board Vacancies** or utilizing the filed Deed Restrictions General Elections rules.

5.12. This inaction by the authorized Board at the time to replace Board Secretary Bean was **an intentional act**. As such, any actions Defendants have attempted since May 24, 2018 have been in an unauthorized capacity.

6. CLAIM – Failure to Follow Texas Law and Failure to Enforce HOA Deed Restriction

6.1. Violation of **BMFHOA CCR 4.02 (a) – Use of Maintenance Funds for the Care of the Common Property**. The current road for the HOA is in excess of 25 years old and is in need of replacement. CCR 4.02 calls for “The Board, for the benefit of the Common Properties and the Owners... shall payout of the maintenance funds...” (a) “Care and preservation of the Common Properties...” The road is the common property of the Member Owners.

6.2. At the 2013 Member & Election Meeting, Plaintiff Yancy forced a topic for the HOA Members to consider – research to determine whether the road was fine as is, needed repairs, or replacement in total. Per details in the meeting, the Board would report to the HOA of its findings before proceeding. What happened instead was Defendant Duello authorized a repair to the road one month prior to the next Member & Election Meeting in 2015. No report was made to the condition or what was needed. However, HOA records reveal that research was indeed performed as far back as 2010, but never presented to the HOA. A proposal had even been drafted for a Sherry Lane Road Fund as well as a long term plan to fund replacement. None of this was ever presented to the HOA for evaluation. While the repair action was a cosmetic upgrade, no discernable repair work was done. Minimal crack fill was done and no repair or replacement of the road failure already in existence. Defendant Duello represented to the Members at the Member & Election Meeting that the road had been repaired and that no further action was needed for the road. Today, this expensive seal is wearing off.

6.3. In August 2015, during his tenure at 2015-2017 Board Secretary, Plaintiff Yancy met with Precinct Three County Commissioner Jerry Stringer to discuss the condition of Sherry Lane and if the County would consider taking over the maintenance. The road could have potentially been returned to the County for maintenance if the road qualified in its condition. This topic had come up in the 2015 Member & Election Meeting and Plaintiff Yancy was charged in getting this research. Commissioner Stringer came and inspected the road and wrote the following concerning the condition of the road: **“There is considerable cracking of the asphalt surface that would need to be repaired. I know that the homeowners recently had the road treated with a “fog seal”, however that is not a suitable repair for cracking road.”** In essence, the work authorized and paid for by Defendant Duello was a waste of HOA Member monies. Plaintiff Yancy included Commissioner Stringer’s letter in the 2016 Spring Communication to the Members of the HOA.

6.4. When the Defendants were elected as to the Board in June of 2017, they were aware of the condition of the common road and its need for replacement through proper planning, communication with Members, and ultimately a way to fund the effort. At a bare minimum, a need for repairs in areas of existing failure. They failed at their duties to the Member Owners to address this issue while in an authorized capacity. To date, the 25 year plus old Sherry Lane road within the confines of The Burleson Magnolia Farms HOA continues to deteriorate at the inactions of Defendants and have a negative impact on Plaintiffs market value of their and other Member homes.

6.5. 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.

6.6. Violation of **Business Organizations Code, Nonprofit Sections 22.352 and 22.354 as well as BMFHOA CCR 4.03 (f) - Providing annual report within 90 days of fiscal year end.**

In 2018 the Board, during their authorized capacity as Board Members, failed to produce the required annual report. Plaintiff included a request of financials in 2018 when paying dues to Defendant Young and followed up with an email, but no financials were ever produced for the year. Violation of Section 22.354 is a Class B Misdemeanor.

6.7. Violation of **BMFHOA CCR 9.03 Exterior Surfaces** of the Deed Restrictions. In 2016, the mailbox at 206 Sherry Lane was hit by another vehicle, assumed to be operated by a guest in the HOA. The mailbox was a brick mailbox, as required by Compliance with. It is now a mailbox on a wood stand and out of compliance with the Deed Restrictions.

6.8. Violation of **BMFHOA CCR 9.19 Offensive Activities as well as violation of Nuisance Laws in Texas.** In spring of 2017, Defendant Young acquired 2 Australian Shepherds that occupy their backyard. While dogs are certainly permitted, these 2 dogs have continuously harassed Plaintiff Carol Yancy and her horses on a daily basis. **The dogs disturb the peace and make the Yancy's pasture unusable in a safe manner.** They represent a threat to Carol Yancy's life anytime she wishes to ride her horse, as these dogs run at the fence and bark in high pitched manners that spook the horses. The noise also **poses a potential issue for resale** for the Yancy's when they decide to sell in the future. In the recent Texas Supreme Court ruling *Crosstex North Texas Pipeline, L.P. v Gardiner*, the Court clarified Nuisance Law in Texas. Under Texas law, nuisance is a "condition that substantially interferes with the use and enjoyment of land by causing

unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it.” The dogs are a substantial interference with the use and enjoyment of Plaintiff’s property. The dogs, in their constant harassment of Plaintiff’s horses, their high pitched barks intended to scare the horses, are an unreasonable discomfort to the use and safety of Plaintiff’s pastures. Defendants were aware of this nuisance and violation in their authorized capacity and have done nothing. Defendant Young has made no discernable efforts to remedy the situation.

6.9. Violation of **BMFHOA CCR 9.01 (c) Permitted Use and (d) Use of Contractor**.—In January or February of 2018, Defendant Duello began a backyard project. All projects must fall within established guidelines or seek Board approval for variances, and require the use of Contractors. Duello has been doing the project “DIY” manner, which is in violation of **BMFHOA CCR 9.01 (c) Permitted Use and (d) Use of Contractor** as written in the Deed Restrictions. The project has been an eyesore and carried on over the summer and into the fall. Plaintiffs are not aware of any permit filed by Duello with the County to perform work himself; know of no background experience Duello may have to perform this project and not create a potential fire hazard for himself and the community. Defendants, while in their authorized capacity, made no attempts to enforce the use of contractors on this project.

6.10. Violation of **Business Organizations Code, Nonprofit Section 22.153**. Defendants, during their authorized capacity during 2018, failed to call or hold an annual Member meeting as required by law.

6.11. Violation of **209.0051 Open Meetings Act**. Through communications sent to Plaintiffs after May 2018, that Defendants have held closed Board meetings, both as authorized Board Members and as unauthorized Board Members. As has been provided in earlier claims, Defendants

have been aware of the rules of Open Meetings Act since spring of 2017. As such, Defendants have willfully violated this rule.

7. CLAIM – BREACH OF DUTY

7.1. 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.

7.2. 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.

7.3. Numerous examples have been given in fact 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.

8. CLAIM – ATTORNEY FEES

8.1. 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.

9. REQUEST FOR DISCLOSURE

9.1. Pursuant to Rule 194 of the Texas Rules of Civil Procedure, plaintiffs request that defendants disclose the information and materials described in 194.2(a-l) within 30 days of service

of any such request.

10. RESPONSE TO DEFENDANTS PLEAS TO THE JURISDICTION AND ORIGINAL ANSWER

10.1. Plaintiffs Amended Petition has removed any potential jurisdictional issues.

Chapter 27 of the Texas Government Code, Subsection 031(a) places all matters of damages below \$10000 in this court. Furthermore, Subsection 034 specifically places matters of Deed Restrictions within this Court unless the matter involves a structural change to a dwelling. Nothing in Plaintiffs Amended Petition or Prayer involves a structural change to any dwelling in the Magnolia Farms Subdivision or the Members of the Burleson Magnolia Farms Home Owners Association. As such, the Justice Court is the proper jurisdiction.

10.2. Plaintiffs Original Petition sought and served all parties.

10.3. Plaintiff is not required to retain counsel in Justice Court per Texas Rules of Civil Procedure under rules 500.3 and 500.4(a)(1).

10.4. There is no requirement to petition the Burleson Magnolia Farms Home Owners Association.

11. PRAYER for DAMAGES and REMEDIES SOUGHT

16.1 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** by operating without a Board Secretary since May 24, 2018.

16.2 Plaintiff's pray that the Court will direct the Defendants to immediately fill the Board Secretary position as allowed by the Vacancy Rules of Texas Law or to have a general

election to elect a new Board as per the filed Deed Restrictions.

16.3 Plaintiff's pray that the Court will take the evidence presented and judge Defendant Gene Young in violation of **BMFHOA CCR 9.19 OFFENSIVE ACTIVITIES and TEXAS NUISANCE LAWS** and to train his dogs to stop their constant assault on the Yancy's horses or have the animals removed from Defendants property.

16.4 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.

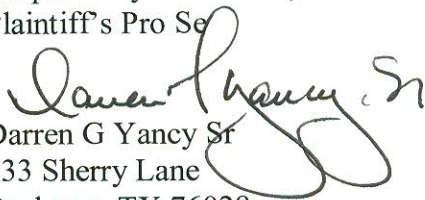
16.5 Plaintiff's pray that the Court will direct Defendants, upon complying with the replacement of the Board Secretary, as well as elected Boards that follow to enforce the Burleson Magnolia Farms HOA Covenant, Conditions, & Restrictions as filed with Johnson County on April 4, 2008 without prejudice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

16.6 Plaintiffs' pray that the Court will take the evidence presented regarding violations of various Texas Laws spelled out in facts and judge Defendants in violation of said laws.

16.7 Plaintiff's pray that the Court will direct Defendants, upon complying with the replacement of the Board Secretary, 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 to comply will all state laws regarding the Burleson Magnolia Farms HOA.

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


Darren G Yancy Sr
233 Sherry Lane
Burleson, TX 76028
dgyancy@ntunwired.com
817-447-9046