

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL**

DOCKETED

RONALD P. COOLEY, individually and
Derivatively on behalf of LOFTS AT 1234
CONDOMINIUM ASSOCIATION,

Plaintiff,

v.

LOFTS AT 1234 CONDOMINIUM
ASSOCIATION, THOMAS MARRONE, and
ECHO VOLLA,

Defendants.

April Term 2016

No. 3513

Commerce Program

Control Number 16120084

MAR -1 2017

**R. POSTELL
COMMERCE PROGRAM**

ORDER

AND NOW, this 1st day of March 2017, upon consideration of Defendants Lofts at 1243 Condominium Association, Thomas Marrone and Echo Volla's Preliminary Objections to Plaintiff's Amended Complaint, all responses in opposition and the attached Memoranda, it hereby is **ORDERED** that the Preliminary Objections are **Sustained in part** as follows:

1. All claims challenging the validity of the Second Amendment to the Declaration instituted by Plaintiff Roger P. Cooley individually and derivatively on behalf of Lofts at 1234 Condominium Association are barred by the statute of limitations and are dismissed from the amended complaint.
2. All claims challenging the validity of the Third Amendment to the Declaration instituted by Plaintiff Roger P. Cooley derivatively on behalf of the Lofts at 1234 Condominium Association are barred by the statute of limitations and are dismissed from the amended complaint.
3. Paragraphs 7 and 8 of the amended complaint are stricken as scandalous and impertinent.

Cooley Vs Lofts At 1234-ORDOP

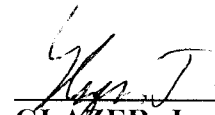


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4. The claims asserted by Plaintiff Robert P. Cooley, individually, in Count I (Intentional Violations of Act) are dismissed for lack of standing.

All other Preliminary Objections are **Overruled**. Defendants shall file an answer to the amended complaint within twenty (20) days from the date of this Order.

BY THE COURT,



GLAZER, J.

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL**

RONALD P. COOLEY, individually and	:	April Term 2016
Derivatively on behalf of LOFTS AT 1234	:	
CONDOMINIUM ASSOCIATION,	:	No. 3513
Plaintiff,	:	
v.	:	Commerce Program
LOFTS AT 1234 CONDOMINIUM	:	
ASSOCIATION, THOMAS MARRONE, and	:	Control Number 16120084
ECHO VOLLA,	:	
Defendants.	:	
	:	

OPINION

Presently before the court are defendants Lofts at 1243 Condominium Association, Thomas Marrone and Echo Volla’s Preliminary Objections.¹ For the reasons set forth below, the Preliminary Objections are sustained in part and overruled in part.

Plaintiff Ronald P. Cooley (“Cooley”) brings this action individually and derivatively on behalf of Lofts at 1243 Condominium Association (“Association”) against defendants 1234 Condominium Association and the Executive Board Members of the Association Thomas Marrone and Echo Volla. The Lofts at 1234 Condominium is a condominium building situated at 1234 Hamilton Street, Philadelphia, Pa. 19123. The Condominium has sixteen residential units and seventeen parking spaces in the garage. Defendant Echo Volla (“Volla”) resides in unit 302, Cooley resides in Unit 301 and utilizes parking space P12 and Thomas Marrone (“Marrone”) resides in combined units 304 and 305 and utilizes parking spaces P13 and P14. The Bylaws of the Association were adopted in 2005 and the Revised Bylaws were adopted on Mary 30, 2015. Under both the Bylaws and the Revised Bylaws, there is a three member

¹ Also pending at this time are individual defendant Thomas Marrone’s preliminary objections to the amended complaint (cn 16113494) and plaintiff’s preliminary objections to individual defendant Thomas Marrone’s preliminary objections (cn 16122172) which will be addressed in a separate order issued by the court.

Executive Board that hold mandatory duties and fiduciary duties. The members of the Executive Board serve three year terms.

The Condominium was created by the recording of the Declaration of Condominium dated November 15, 2005 at the Philadelphia Department of Records on November 15, 2005. The Declaration was amended by way of a First Amendment recorded on October 30, 2006, Second Amendment recorded on April 15, 2015 and Third Amendment recorded on May 15, 2015.²

On September 24, 2013, during an Association meeting, the unit owners voted and elected Volla and Cooley to the Executive Board and Terri Gerbec remained as the third member. On July 7, 2014, during an Association meeting, the unit owners voted to keep Gerbec as a member of the Board. A special meeting was held on January 28, 2015, at which time Gerbec resigned as President of the Board and Marrone was elected to replace her. During a meeting of the Executive Board on May 30, 2015, Volla moved to remove Cooley from the Board and Marrone seconded the motion. On May 16, 2016, Cooley was reinstated as a member of the Board when the person who replaced Cooley resigned.

On April 29, 2016, Cooley, in his individual capacity, instituted this action against the Association, Marrone and Volla by writ of summons. On September 30, 2016, after a rule was issued to file a complaint, Cooley filed his complaint against defendants alleging improprieties in the administration of the Association and the conduct of the Executive Board. The claims alleged against the defendants were breaches of fiduciary duty, self-dealing and defamation. The complaint also added the Association as a party and asserted derivative claims on behalf of the

² Plaintiff contests the validity of the Second and Third Amendments.

Association.³ Defendants filed preliminary objections to the complaint and on November 9, 2016, Cooley filed an amended complaint asserting claims against defendants for intentional violations of the Pennsylvania Uniform Condominium Act, breach of fiduciary duty and defamation. The complaint also seeks declaratory and equitable relief. Defendants have now filed preliminary objections to the amended complaint.

DISCUSSION

I. All claims challenging the validity of the Second Amendment and Third Amendment to the Declaration are barred by the statute of limitations and are dismissed from the amended complaint.

Defendants argue that the claims challenging the Second and Third Amendments to the Declaration should be dismissed as legally insufficient pursuant to Pa. R. Civ. P. 1028 (a)(4) because the amended complaint on its face demonstrates that they are barred by the statute of limitations. The defense of statute of limitations is an affirmative defense to be raised as new matter in a responsive pleading, not by means of preliminary objections in nature of demurrer.⁴ The defense, however, may be considered in preliminary objections in nature of demurrer if a party fails to file preliminary objections to preliminary objections challenging this procedural irregularity. The failure to file preliminary objections to preliminary objections waives the right to object to the form of the pleading.⁵ Here, plaintiff did not file preliminary objections to defendants' preliminary objections on the ground that defendants improperly raised the

³ As noted by defendants, the docket in this action fails to reflect the filing of a stipulation wherein defendants consented to adding the Association as a party or an order from the court granting plaintiff leave to amend to add the Association as a party.

⁴ See Pa.R.C.P. 1030.

⁵ *Duquesne Slag Products Co. v. Lench*, 490 Pa. 102, 415 A.2d 53 (1980); *Stilp v. Commonwealth*, 910 A.2d 775 (Pa.Cmwlth.2006).

affirmative defense of statute of limitations.⁶ Hence, plaintiffs waived the right to object to the statute of limitations defense.⁷

Turning our attention to the merits of the preliminary objection, which questions whether the statute of limitations bars the challenge to the Second and Third amendments to the Declaration, the pertinent provisions provide that “[n]o action to challenge the validity of an amendment adopted by the Association pursuant to this Section may be brought more than one year after the amendment is recorded.”⁸ The second amendment was recorded on April 15, 2015. Hence, any challenge to the validity of the second amendment should have been brought on or before April 15, 2016. Here, Cooley in his individual capacity, filed his writ of summons on April 29, 2016, fourteen (14) days after the one year anniversary of the Second Amendment’s recording. As such, any claims challenging the validity of the Second Amendment are barred by the statute of limitations and the claims are dismissed.⁹

With respect to the Third Amendment, the amendment was recorded on May 15, 2015. While the writ of summons was filed on April 29, 2016, the only plaintiff who preserved its right to bring the claim challenging the validity of the amendment is Cooley in his individual capacity, only. However, Cooley individually, does not have standing to assert a challenge to the validity of the Third Amendment since the claim is a derivative claim and belongs to the Association. Cooley did not timely assert a derivative claim on behalf of the Association to challenge the

⁶ However, plaintiff did file preliminary objections to preliminary objections (cn 16122172) to the preliminary objections of Thomas Marrone, individually.

⁷ *Duquesne Slag Products; Stilp. Richmond v. McHale*, 35 A.3d 779, 782–83 (Pa. Super. 2012); *DeMary Latrobe Printing and Pub. Co.*, 762 A.2d 758, 762 (Pa. Super. 2000).

⁸ Exhibit 1 to Defendants’ Preliminary Objections to Plaintiff’s Amended Complaint, Exs. A, Declaration & D Revised Declaration, § 7.2.

⁹ The court need not address the question of whether Cooley has standing to challenge the validity of the Second Amendment since the statute of limitations ran before the writ of summons was filed.

Third Amendment, however, since the Association was not added as a plaintiff until September 30, 2016, more than three months after the statute of limitations expired. Hence, the claim challenging the validity of the Third Amendment is untimely.¹⁰ Based on the foregoing, defendants' preliminary objection is sustained and any claim challenging the validity of the Second and Third Amendments is time barred and dismissed.¹¹

II. Paragraphs 7 and 8 of the Amended Complaint are dismissed as Scandalous and Impertinent.

Under Pennsylvania Rule of Civil Procedure 1028(a)(2), a party may object to a pleading's inclusion of "scandalous and impertinent matter." "Scandalous and impertinent matter" is defined as "allegations ... immaterial and inappropriate to the proof of the cause of action."¹²

Paragraphs 7 and 8 of the amended complaint allege the following:

7. Marrone has a law firm called MoreMarrone LLC. Marrone claims that "I can't stand it when big guys pick on little guys...I grew up in a family of immigrants. I grew up with the 'little guys'...They were my grandparents, my mom and dad, my aunts and uncles and cousins...so I take that kind of thing very personally,"<https://www.bestlawyers.com/lawyers/thomas-moremarrone/149539/>.

8. As set forth below, despite his claim that he "can't stand it when big guys pick on little guys," Marrone did exactly that: He picked on a little guy, Cooley, resulting in this action.¹³

¹⁰ Pa.R.C.P. 1033 allows parties to correct the name of a party at any time either with the consent of the adverse party or by leave of court. See, *Tork-Hiis v. Com.*, 558 Pa. 170, 175, 735 A.2d 1256, 1258 (1999). However, an amendment to a pleading that adds a new and distinct party once the statute of limitations has expired is not permitted. *Id.*

¹¹ As for adding the Association as a party after the filing of the writ of summons and without leave of court and consent of the parties, pursuant to Pa. R. Civ. P. 126, the court will disregard the procedural defect since the substantial rights of the parties do not appear to be affected.

¹² *Common Cause/Pa. v. Commonwealth*, 710 A.2d 108, 115 (Pa.Comm.w.Ct.1998) (citing *Department of Env'tl. Resources v. Peggs Run Coal Co.*, 55 Pa. Commw. 312, 423 A.2d 765 (1980)).

¹³ Amended Complaint.

These allegations in paragraphs 7 and 8 are impertinent and immaterial to the causes of action alleged. Consequently, defendants' preliminary objection in this regard is sustained and paragraphs 7 and 8 are stricken from the amended complaint.

III. The claims asserted by plaintiff Robert P. Cooley, individually, in Count I (Intentional Violations of Act) are dismissed for lack of standing.

Count I of the amended complaint purports to state a claim against defendants Marrone and Volla for intentional violations of the Condominium Act. The claim is asserted by Ronald P. Cooley individually and derivatively on behalf of the Association. Ronald P. Cooley in his individual capacity does not have standing to assert said claim and the preliminary objection is sustained.

In count I of the amended complaint, Cooley, individually and derivatively on behalf of the Association, allege that Marrone and Volla intentionally, knowingly and willfully violated the Act, breached their fiduciary duty to the Association, acted in bad faith, and engaged in self-dealing.¹⁴ Title 68 Pa. C. S. A. § 3303 provides in pertinent part as follows:

“...In the performance of their duties, the officers and members of the executive board shall stand in a fiduciary relation to the association and shall perform their duties, including duties as members of any committee if the board upon which they may serve, in good faith in a manner they reasonably believe to be in the best interests of the association and with such care, including reasonable inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances.”

The fiduciary duty is owed to the Association and not to the unit owner individually. As such, Cooley lacks standing to bring the claims alleged in count I individually. Based on the foregoing, the claims asserted by Cooley individually in count I are dismissed.¹⁵

¹⁴ Amended Complaint ¶¶323-342.

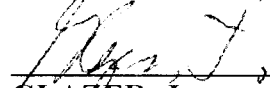
¹⁵ Defendants argue that Marrone and Volla may not be sued individually and rely upon 68 Pa. C. S. § 3311(a)(2)(i). However, the claims alleged against Marrone and Volla are for breach of their fiduciary duties to the Association, a duty which is statutorily provided for in 68 Pa. C. S. A. § 3303. While section 3303 does not address the question of whether Marrone and Volla's are subject to individual liability, the pertinent Declarations and Bylaws do provide for individual liability in certain circumstances. See, Exhibit “A” to the Amended Complaint, Declaration 14.3, Exhibit

CONCLUSION

For the foregoing reasons, upon consideration of Defendants Lofts at 1243 Condominium Association, Thomas Marrone and Echo Volla's Preliminary Objections to Plaintiff's Amended Complaint, the Preliminary Objections are sustained in part and all claims challenging the validity of the Second and Third Amendments to the Declaration are barred by the statute of limitations and are dismissed from the amended complaint; Paragraphs 7 and 8 of the Amended Complaint are stricken as scandalous and impertinent and the claims asserted by plaintiff Robert P. Cooley, individually, in Count I (Intentional Violations of Act) are dismissed for lack of standing. All other Preliminary Objections are overruled. ¹⁶

Defendants shall file an answer to the amended complaint within twenty (20) days from the date of this Order.

BY THE COURT,



GLAZER, J.

"B" to the Amended Complaint, ByLaws 7.3, Exhibit "D" to the Amended Complaint, Revised Declaration 14.3 and Exhibit "J" to the Amended Complaint, Revised ByLaws 7.3.

¹⁶The additional preliminary objections raised by defendants including improper prolixity, striking attorney fees and punitive damages and legal demurrers are overruled. As to the preliminary objection concerning the legal status of the Association, Unincorporated Association or Non Profit Corporation, at this stage in the litigation, questions of fact exist as to whether the Association is an unincorporated association or a nonprofit corporation. Additionally as to the question of Cooley's standing and pre-suit demand to bring a derivative claim pursuant to the Non Profit Corporation Law, 15 Pa. C. S. A. § 5726, if the Association is indeed a nonprofit corporation, Cooley has standing to bring the claim and his failure to make pre-suit demand is excused. See, *Cuker v. Mikalauskas*, 692 A.2d 1042, fn.5 (Pa. 1997), 7.01 American Law Institute, Principles of Corporate Governance, 2016 Comments to 15 Pa. C. S. A. §§ 5781, 5782 and *Hill v. Ofalt*, 85 A.3d 540, 556 (Pa. Super. 2014).