

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

THE LOFTS AT 1234 CONDOMINIUM	:	May Term 2019
ASSOCIATION by ARSTECHNEPROPERTIES,	:	
LLC, Trustee ad Litem,	:	No. 2093
	:	
Plaintiff,	:	
	:	
v.	:	Commerce Program
JIM THOMPSON, in his capacity as Officer or	:	
Member of the Executive Board of the Lofts at	:	Control Number 20110483
1234 Condominium Association; & THE LOFTS	:	
AT 1234 CONDOMINIUM ASSOCIATION,	:	
Defendants.	:	

ORDER

AND NOW, this 26th day of May, 2021, upon consideration of Defendants Jim Thompson and The Lofts at 1234 Condominium Association's Motion for Summary Judgment and Plaintiff's response in opposition and in accord with the attached Opinion, it hereby is **ORDERED** that the Motion for Summary Judgment is **GRANTED** and judgment is entered in favor of Defendants Jim Thompson and The Lofts at 1234 Condominium Association and against Plaintiff.

It is further **ORDERED** that Defendant Jim Thompson and The Lofts at 1234 Condominium Association's request for sanctions in the form of payment of all costs and fees, including attorney's fees associated with the defense of this action is **Denied**.

DOCKETED

MAY 27 2021

R. POSTEL
COMMERCE PROGRAM

BY THE COURT


RAMY I. DJERASSI, J.

190502093 Lofts At 1234 Condo Ass. By Arstechneproperties, LI



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AT 1234 CONDOMINIUM ASSOCIATION,	:	
Defendants.	:	

OPINION

Plaintiff ArsTechneProperties, LLC¹ (“ArsTechneProperties” or “Plaintiff”) brings this action as *trustee ad litem* on behalf of The Lofts at 1234 Condominium Association (“Association”), an unincorporated non-profit condominium association for the condominium known as The Lofts @ 1234 Hamilton Street, Philadelphia, PA. Plaintiff seeks injunctive relief in the form of an order to remove and permanently ban the sole remaining individual defendant Jim Thompson (“Thompson”) from serving on the Executive Board of the Association and for the appointment of a receiver to assume the functions of the Association’s executive board.²

Animosity and hostility among the unit owners and members of the Association’s Executive Board has spawned a plethora of litigation, including the pending action before this court.³ All this litigation shows an overarching emphasis on vengeance which is destroying

¹ ArsTechneProperties, LLC is a limited liability company with two members, Steve Volla and Echo Volla. ArsTechneProperties, LLC owns two units.

² Defendants Ronald P. Cooley and Jason Dana were dismissed as parties to this action by stipulation.

³ Ronald P. Cooley and Jason Dana, unit owners, respectively filed actions against the Association, Thomas More Marrone and Echo Volla in the actions captioned *Cooley v. Lofts at 1234 Condominium Association et. al.*, 1604-3513 and *Dana v. Lofts at 1234 Condominium Association, et. al.*,

attempts at peaceful accord. "An eye for an eye will only make the whole world blind."⁴ On November 12, 2020, this court denied plaintiff's petition for the appointment of a temporary receiver after finding that plaintiff failed to produce sufficient evidence of nonfeasance on the part of the executive board. This board included defendant Thompson. Presently pending is defendants' motion for summary judgment. On renewed review, the record continues to lack sufficient evidence of nonfeasance. Therefore, summary judgment is granted.

Alleged Nonfeasance of the Board

On August 7, 2019, plaintiff filed its first amended complaint alleging serial nonfeasance by the Association's executive board from 2017 to the present. At the time the amended complaint was filed, the executive board consisted of Ronald P. Cooley, Jason Dana and defendant Jim Thompson. Plaintiff alleged the following nonfeasance:

1. Failure to prepare and approve budgets for fiscal years 2018 and 2019 and submit them to the Association.
2. Failure to utilize the proceeds from the Hamilton Litigation to undertake necessary structural repairs to the Lofts and to Units 103, 204 and 303.⁵
3. Failure to take action to remedy defendant Cooley's unlawful usurpation of the Common element balcony.

1702-6522. Additionally, there are two other actions *Marrone v. Lofts at 1234 Hamilton St Condominium Ass'n and Steven James Dana*, 2004-189 and *Marrone v. Cooley, et. al.*, 1903-45 which are currently pending in this court.

⁴ Mahatma Gandhi.

⁵ In November 2015, the Association sued a neighboring condominium building and its association, Hamilton 1220 Square, LLC for property damage to the Loft units 103, 204 and 303 allegedly caused by excavation work. Following a binding arbitration, the Association was awarded \$178,000.00.

4. Failure to provide a reasoned response to a prior Board member Thomas More Marrone's demand for indemnification.⁶
5. Failure to investigate the identity of those Board and/or Association members allegedly responsible for providing Hamilton 1220's counsel with a report damaging to the Association in condominium litigation.
6. Failure to investigate the identity of those Board and/or Association members responsible for procuring litigation against a former Board member thus threatening the Association with a sizeable assessment for indemnification.
7. Failure to schedule regular annual meetings of the Association;
8. Failure to promptly hold a vote to elect three (3) new members to the Board.

On March 10, 2020, Cooley and Dana resigned from the Executive Board and on June 18, 2020, plaintiff dismissed Cooley and Dana from the instant matter as they were no longer serving on the Executive Board. On March 10, 2020, the same day that Cooley and Dana resigned from the executive board, Ashley Leonard ("Leonard") was appointed to fill the vacancy created by Dana's resignation. Plaintiff and Marrone filed a petition for a Special Meeting to remove defendant Thompson from the Executive Board. At the time and until September 15, 2020, there were only two executive board members.

On June 22, 2020, Steve Volla, a member of plaintiff, submitted a nomination to be elected to the executive board. On June 25, 2020, Volla withdrew his nomination. On July 13,

⁶ Thomas More Marrone (Marrone) is co-owner of units' #304-305 in the Loft Condominium. Mr. Marrone served on the Executive Board of the Association from 2015 to 2017 along with Echo Volla, a member of ArsTechneProperties, LLC. Marrone and Volla were defendants in *Cooley v. Lofts at 1234 Condominium Association et. al.*, 1604-3513 and *Dana v. Lofts at 1234 Condominium Association, et. al.*, 1702-6522. Marrone is also the plaintiff in *Marrone v. Lofts at 1234 Hamilton St Condominium Ass'n and Steven James Dana*, 2004-189 and *Marrone v. Cooley, et. al.*, 1903-45 which are currently pending in this court.

2020, a few minutes before the start of a Special Meeting to decide whether Thompson should be removed, Volla sought to table a vote. However, the Association resolved to take a vote anyway, and all present voted to retain Thompson with one abstention. Plaintiff now alleges that the vote did not have any binding effect because the petition calling for the vote was withdrawn before the meeting and that the Board did not conduct the meeting in accord with Roberts' Rules of Order.⁷

On July 24, 2020, counsel for the Association advised plaintiff's counsel that the Association will put to a vote the question of appointment of a receiver to oversee all affairs of the Association on the agenda for the annual meeting, scheduled for September 15, 2020. Indeed, on July 28, 2020, a petition requesting a special meeting was filed to consider the appointment of a special receiver. The meeting was also scheduled to hold an election for a new Executive Board. Volla and Marrone filed nominations to serve.

On September 14, 2020, plaintiff and Marrone withdrew their petition for special meeting and vote on the issue of appointing a receiver and on the following day, on September 15, 2020, Marrone and Volla withdrew their nominations for election to the executive board. The annual meeting was held on September 15, 2020. Those present at the meeting voted to elect Leonard, Cooley and Thompson to the executive board, to respective three, two and one year terms. The Association also voted on whether to appoint a trustee/receiver to replace the executive board. The members voted against this extraordinary measure. Additionally, the Association members did not ratify plaintiff as the trustee *ad litem* on their behalf. Plaintiff alleges that the vote does

⁷ Robert's Rules of Order are comprehensive rules which govern meetings of political, social, and other organizations. The rules of order were developed by Civil War army officer Henry Robert based on rules used by the House of Representatives and were first printed in 1876. These rules provide for the protection of the rights of the majority, the rights of the minority, the rights of the individuals and the rights of those absent, in conduct of meetings. <https://definitions.uslegal.com/r/roberts-rules-of-order/>

not have any legal effect because the board did not conduct the meeting in accordance with Roberts' Rules of Order under the bylaws and that the board allowed Association members present to vote three times, when the bylaws call for one vote per unit only. Plaintiff also alleges that the vote garnered the votes of seven highly conflicted members of the sixteen member Association on the question of appointment of a receiver.

On March 8, 2021, defendant Jim Thompson resigned from the Association's executive board.

DISCUSSION

I. Plaintiff lacks standing to bring this action as *trustee ad litem* on behalf of the Association.

A. Factual Background

Pennsylvania Rule of Civil Procedure 2152 provides in pertinent part that an action prosecuted by an association shall be prosecuted in the name of a member or members thereof as trustees' *ad litem* for such association. An action so prosecuted shall be entitled "X Association by A and B, Trustees *ad Litem*" against the party defendant.⁸ While plaintiff's first amended complaint conforms to the requirement of Rule 2152 identifying ArsTechneProperties as trustee *ad litem*, at this stage in the litigation relying solely upon the pleadings is not enough. Plaintiff must now come forward with evidence showing that it was authorized to act as trustee *ad litem* for the Association.⁹

⁸ Pa. R.C.P. 2152.

⁹ See *Nicastro v. Cuyler*, 467 A.2d 1218, 1220 (Pa. Cmwlth. 1983) (stating that when a motion for summary judgment is filed, the responding party "may not rely solely on allegations in his pleadings, but must submit supplemental materials which establish a genuine issue of material fact"); see also *Highway Truck Drivers & Helpers, Local 107 v. Cohen*, 172 A.2d 824, 827 (Pa. 1961) (holding that members of an unincorporated association, who filed a complaint as trustees *ad litem* of the association, need not allege in the body of their complaint the authority conferred upon them by the association to bring an action as

A review of the record shows that ArsTechneProperties is not authorized to act on behalf of the Association in instituting and prosecuting this action. At the annual meeting on September 15, 2020, in accordance with Roberts Rules of Order and the Association Bylaws, a unit owner made a moving motion to vote on whether ArsTechneProperties could serve as trustee *ad litem* in this action. The motion was seconded. A quorum was present. The unit owners voted. The result, seven owners voted “no” to authorizing plaintiff to bring the instant action and one owner abstained from voting.¹⁰ The vote was not improper as plaintiff claims. Moving motions, according to the Roberts Rules of Order, are proper means for members to express themselves and allow members to take an action or take a stand.¹¹ Additionally, the Association Bylaws § 2.2 permits members at annual meetings to consider “such other business as may properly come before the meeting...” thereby acknowledging and anticipating the making of motions. Based on these factual findings, this court concludes that the matter of plaintiff’s authority to bring this action as trustee *ad litem* was properly considered by the Association and rejected.¹²

B. Legal Analysis

Plaintiffs do not have legal standing in this case. Ratification of a member’s decision to proceed with litigation on behalf of a condominium association as trustee *ad litem* is necessary and was not accomplished in this case. This rule applying to condominiums is vital in situations

trustees *ad litem*; rather, the question of the members’ authority to act as trustees *ad litem* is an issue to be resolved by the trier of fact).

¹⁰ See, Exhibit “S” to defendant’s motion for summary judgment.

¹¹ www.robertsrules.org

¹² Plaintiff argued that the vote was improper because those that voted had conflicts of interest. However, plaintiff failed to produce any evidence of any such conflict or provide any explanation of the conflict. Additionally, other than conclusory statements, plaintiff failed to produce evidence that any unit owners submitted three votes as alleged during the annual meeting of September 15, 2020.

like this where a putative condo trustee *ad litem* is not bringing a claim on behalf of itself, but ostensibly on behalf of *all* members of a condominium association. And in this case, ArsTechneProperties is requesting a receiver whose appointment will mean all unit owners at The Lofts would pay for the receiver--- while losing their own vote over condominium affairs.

Recently, the Commonwealth Court affirmed two trial court orders granting summary judgment wherein the issue of standing as trustees' *ad litem* was addressed in earlier cases involving this same situation. The Commonwealth Court in *Cooley v. Lofts at 1234 Condominium Association*, 2020 WL 1231394 (Pa.Cmwlt., 2020) and *Dana v. Lofts at 1234 Condominium Association*, 2020 WL 1188460 (Pa.Cmwlt., 2020)¹³ held that the trial courts properly found, based on the evidence adduced during discovery, that putative trustees *ad litem*, “did not have the authority to bring the action as trustee[s] *ad litem* on behalf of the Association.” This was because authorized condo owners had a meeting and rejected their plans.¹⁴ In *Dana*, the Commonwealth Court specifically rejected the notion that Dana was entitled to bring a derivative claim as trustee *ad litem* of the Association solely because he was a member of the Association.¹⁵

Plaintiff, however, argues that the following cases, *First Highway Truck Drivers and Helpers, Local 107 v. Cohen*, 405 Pa. 55 (1961), *Patterson v. Shelton*, 2013 WL 3961047, and *Girard Estate Area Residents v. Defense Realty, LLC*, 2009 WL 3152177 (E.D. Pa. 2009),

¹³ While these decisions are not binding precedent, they are persuasive especially since the Association at issue is the same.

¹⁴ *Cooley v. Lofts at 1234 Condominium Association*, 2020 WL 1231394, at *11 (Pa.Cmwlt. 2020) and *Dana v. Lofts at 1234 Condominium Association*, 2020 WL 1188460, at *11 (Pa.Cmwlt. 2020).

¹⁵ *Dana v. Lofts at 1234 Condominium Association*, 2020 WL 1188460, at *10 (Pa.Cmwlt. 2020).

support their position that ratification to act as trustee *ad litem* is not necessary. These cases, however, are distinguishable. In *First Highway Truck Drivers and Helpers, Local 107 v. Cohen*, *id.*, the Court did not address the question whether ratification by condo owners is necessary to a purported trustee *ad litem* to bring a derivative suit. Instead the Court addressed a procedural pleading issue and held it was unnecessary for the plaintiffs to incorporate into their pleadings evidence to prove their actual authority to sue as trustees' *ad litem*. Similarly, in the instant case the Commerce Court permitted ArsTechneProperties to proceed as trustee *ad litem* at the preliminary objection stage. But now at summary judgment, ArsTechneProperties must come forward with evidence to support its putative authority to sue on behalf of the Association---and has not done so.

Patterson v. Shelton, *supra* and *Girard Estate Area Residents v. Defense Realty, LLC*, *supra*, are also distinguishable. In *Paterson*, the plaintiff sued on behalf of church members as trustee *ad litem* and also sued on his own behalf. He was granted standing but he was also part of a beneficiary class bringing an action against a trust holding the church's assets. Here, ArsTechneProperties is bringing this action as a derivative claim; unlike plaintiff in *Patterson*, ArsTechneProperties is not a beneficiary trustee. And plaintiff's reliance upon on *Girard Estate Area Resident* is misplaced since that Court never considered the question of standing.

Since the Lofts did not authorize ArsTechneProperties to bring this derivative action, plaintiff lacks standing to sue on behalf of the Association. The motion for summary judgment is granted and the complaint is dismissed.

II. Further reasons supporting granting of summary judgment.

A. Action is Moot

Apart from the standing issue, plaintiff's action is moot because Defendant Jim Thompson is no longer on the Associations' Executive Board and summary judgment is denied as moot. On March 8, 2021, Mr. Thompson resigned from the Association's executive board, like Dana and Cooley.

B. Insufficient evidence of nonfeasance

Plaintiff has not presented any new evidence for the appointment of a receiver since November 12, 2020, when this Court denied plaintiff's original injunctive petition for the appointment of a temporary receiver. We had found at that time that plaintiff failed to produce sufficient evidence of nonfeasance on the part of the executive board to authorize the extreme step to appoint a receiver. Upon review again, in consideration of defendants' motion for summary judgment and plaintiff's response in opposition and the record evidence, we note that ArsTechnProperties relies on the same evidence used to petition for appointment of receiver. It was insufficient then and is insufficient now.

Generally, the power to appoint a receiver is a delicate one, justly safeguarded and reluctantly exercised by the courts. When considering a request for receivership, courts consider whether: (1) the right to a receivership is free from doubt, and (2) a receivership is clearly required by the facts and circumstances and equities of the particular case. More particularly, a receiver should be appointed (a) only when the right to a receivership is clear, (b) irreparable damage will in all probability result unless a receiver is appointed, (c) a receivership will not substantially injure or interfere with the rights of creditors and stockholders, and (d) greater damage will result if a receiver is not appointed than if one is appointed.¹⁶ Moreover, a receiver will be appointed only in aid of some recognized presently existing right, and no appointment

¹⁶ *Tate v. Philadelphia Transp. Co.*, 190 A.2d 316, 321, 410 Pa. 490, 500-01 (Pa. 1963).

will be made in a case where a receivership is the sole remedy requested. Additionally, a receiver may be appointed by the court where there has been such gross mismanagement or fraud or similar circumstances that a receiver is clearly required.¹⁷ Here, plaintiff has failed to carry its burden to produce evidence of gross mismanagement, fraud or similar circumstances for the appointment of a receiver. As such, defendants' motion for summary judgment is granted on this ground as well.¹⁸

CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment is granted and the Complaint of The Lofts at 1234 Condominium, Association by ArsTechneProperties LLC, Trustee *Ad Litem* is dismissed against remaining defendants Jim Thomson and the Lofts at 1234 Condominium Association.

BY THE COURT



RAMY I. DJERASSI, J.

Date: May 26, 2021

¹⁷ *Id.*

¹⁸ Defendants request sanctions in the form of costs and fees associated with defending this action which defendants describe as frivolous. Defendants rely upon plaintiff's counsel's failure to dismiss this action despite his representation in an email to support its request for sanctions. (Defendants' motion for summary judgment Exhibit "AA"). We decline to award attorneys' fees as no statutory or contractual authority to do so are before the court.