

**IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA
BUSINESS COURT**

**GLADE SPRINGS VILLAGE PROPERTY
OWNERS ASSOCIATION, INC.,
a West Virginia non-profit corporation,**

Plaintiff,

v.

**Civil Action No. 19-C-357
Presiding Judge: Jennifer P. Dent
Resolution Judge: Michael D. Lorensen**

**EMCO GLADE SPRINGS HOSPITALITY, LLC,
a West Virginia limited liability company;
ELMER COPPOOLSE, an individual;
JAMES TERRY MILLER, an individual;
R. ELAINE BUTLER, an individual; and
GSR, LLC, a West Virginia limited liability company.**

Defendants.

ORDER DENYING MOTION TO DISMISS OR JOIN PARTIES

This matter came before the Court on the *Motion by EMCO Glade Springs Hospitality, LLC and GSR, LLC to Dismiss or to Join Parties* (the “Motion”). Pursuant to the *Briefing Order* entered by this Court on December 11, 2019, Plaintiff Glade Springs Village Property Owners Association, Inc. (“Plaintiff” or “GSVPOA”) filed its response in opposition to the Motion. As such, the Motion has been fully briefed and is now ripe for decision by this Court.

The Moving Defendants argue this civil action should be dismissed pursuant to Rule 12(b)(7) of the West Virginia Rules of Civil Procedure because GSVPOA did not name two individuals – Allen Tienert and Dr. Thomas Jarrett – members of the Declarant Board of Directors, and the Declarant, Justice Holding, LLC (“Justice Holdings”), defendants in this matter, and said persons and LLC are necessary parties. Alternatively, Moving Defendants argue that Mr. Tienert, Dr. Jarrett and Justice Holdings must be joined as defendants in this matter pursuant to Rule 19.

This Court having proper jurisdiction and having been fully advised of the matters herein,
HEREBY MAKES THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

1. West Virginia Rule of Civil Procedure 19(a) states:

A person who is subject to service of process shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party....

W. Va. R. Civ. Pro. 19(a). If a party is determined to be necessary under this Rule, the Court must determine if the party can be joined. If a party is determined to be necessary and cannot be joined, then the Court will determine if that party is indispensable and whether the case should proceed without that party. W. Va. R. Civ. P. 19(b). If not, the Court considers whether the party is indispensable and the Court may consider dismissal although it is disfavored. *See* W. Va. R. Civ. Pro. 12(b)(7); W. Va. R. Civ. Pro. 19(b). *See also* Syl., *Wachter v. Dostert*, 172 W. Va. 93, 303 S.E.2d 731 (1983)(discussing joinder and stating that "... in the event that the absent person cannot be joined, the suit should be dismissed only if the court concludes that the 19(b) criteria cannot be met."). *Accord* *Sec. Alarm Fin. Enters., Inc., v. Parmer*, 2013 U.S. Dist. LEXIS 156468, 10 (N. D. W. Va. 2013) (discussing the standard under the substantially similar Federal Rule of Civil Procedure 12(b)(7) and 19 and noting that "'Dismissal of a case is a drastic remedy, however, which should be employed only sparingly.'" (internal citations omitted). The party seeking dismissal, in this case the Moving Defendants, bears the burden of showing that the absent parties are indispensable to this case. *See* *Sec. Alarm Fin. Enters., Inc., v. Parmer*, 2013 U.S. Dist.

LEXIS 156468, 10 (N. D. W. Va. 2013) (citing 5C Chares Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1356 (3d ed. 1998) and discussing the substantially similar federal rule and stating that “[t]he party moving for dismissal under Rule 12(b)(7) bears the burden of showing an absent party is indispensable.”).

2. The Amended Complaint sets forth the following causes of action:

Count I - Accounting Against EMCO and GSR;

Count II - Breach of Contract Against EMCO;

Count III - Breach of Fiduciary Duty Against
the Declarant Board of Directors;

Count IV - Breach of Contract against GSR on
Real Property Rights of GSVPOA;

Count V - Breach of Contract Against GSR; and

Count VI - Punitive Damages Against GSR and EMCO.

See Amended Complaint. To summarize the factual allegations of the Amended Complaint, GSVPOA’s claims against EMCO and GSR (the Moving Defendants) are premised upon their respective breach of various contracts with GSVPOA. Count I deals with EMCO’s alleged failure to provide information and accountings as required under various agreements with GSVPOA from 2010 forward. Count II alleges a breach of contract claim against EMCO based on EMCO’s alleged late payments, arrearages, and general failure to tender full and timely payments to GSVPOA. Count III asserts breach of fiduciary duty claims against Coppoolse, Miller and Butler (*i.e.*, the “Fiduciary Defendants”) based upon their alleged actions, or failure to take action, on behalf of GSVPOA over a number of years. The Court notes Teinert and Jarrett were appointed to the Board in 2018 and were not on the Board for a number of years that the conduct in Count

III alleges. Count IV alleges that GSR breached and continues to breach written agreements for the use, benefit and enjoyment of GSVPOA's real estate interests. Count V alleges that GSR breached written management agreements with GSVPOA. Count VI seeks punitive damages against EMCO and GSR based on alleged intentional, vexation and wanton behavior with regard to their conduct toward GSVPOA.

3. The arguments set forth in the Motion primarily focus upon the breach of fiduciary duty claims asserted against Elmer Coppoolse, James Miller and R. Elaine Butler (the "Fiduciary Defendants").¹

4. Conversely, the claims asserted against the Moving Defendants are premised upon contractual relationships with GSVPOA, not a fiduciary duty.

5. The Moving Defendants do not allege that Mr. Tienert, Dr. Jarrett or Justice Holdings have an interest in the contracts that form the basis of GSVPOA's claims against them. The Court notes that Defendants Coppoolse, Miller, and Butler did not join in the Moving Defendants' motion or otherwise move for Tienert or Jarrett to be joined in the instant civil action.

6. Thus, complete relief can be accorded by this Court with regard to the accounting and breach of contract claims asserted against the Moving Defendants among those parties to this action.

7. Therefore, Mr. Teinert, Dr. Jarrett and Justice Holdings are not necessary parties to the accounting and breach of contract claims asserted against the Moving Defendants.

¹ Under the Uniform Common Interest Ownership Act, W. Va. Code §§ 36B-1-101 *et seq.* ("UCIOA"), members of an executive board appointed by the declarant have a duty to exercise the care required of fiduciaries of the unit owners and to act in good faith in the performance of their duties. *See* W. Va. Code § 36B-3-103(a); *Id.* at § 36B-1-112. Generally speaking, "[a] person, who occupies any fiduciary relation to another, is bound not to exercise for his own benefit and to the prejudice of the party, to whom he stands in such relation, any of the powers or rights, or any knowledge or advantage of any description, which he derives from such confidential relation." Syl. Pt. 1, *Newcomb v. Brooks*, 16 W. Va. 32 (1879).

8. The Moving Defendants also assert that Justice Holdings is a required party to this civil action because challenging the Justice Note is “a substantial part of this civil action.” (Motion, ¶ 19).

9. A cursory review of the Amended Complaint disproves this assertion. The only issue before this Court with regard to the Justice Note is whether the Fiduciary Defendants breached their statutory duties to GSVPOA and its members based upon their decisions and actions regarding the Justice Note. *See* Amended Complaint, ¶ 112. The Court considers and notes that instead, the validity of the Justice Note is being challenged and addressed in a separate, unrelated civil action, Raleigh County Civil Action No. 19-C-481P. *See* Pl’s Resp., p. 6. The Court further notes that the Moving Defendants are not parties to the Note. *Id.* at 5. The Court does not find Defendants’ argument that the Justice Note is a “substantial part of this civil action” persuasive.

10. The Fiduciary Defendants’ conduct in amending and enforcing the Justice Note is referenced in the Amended Complaint as an instance in which these defendants purportedly breached their fiduciary duties to GSVPOA.

11. The Moving Defendants do not allege that they have an interest in the Justice Note.

12. Rather, the claims against EMCO and GSR are premised upon entirely different contracts with GSVPOA.

13. Further, the claims between GSVPOA, EMCO and GSR do not involve or affect Justice Holdings.

14. As such, the Moving Defendants have failed to carry their burden under Rule 19 to demonstrate that the absent parties are necessary or indispensable to this case (*i.e.*, the Moving

Defendants failed to assert any interest that would be affected by the joinder or absence of Mr. Teinert, Dr. Jarrett or Justice Holdings).

Therefore, it is hereby ADJUDGED, ORDERED and DECREED that the *Motion by EMCO Glade Springs Hospitality, LLC and GSR, LLC to Dismiss or to Join Parties* is hereby DENIED.

The Clerk of this Court shall enter the foregoing and forward attested copies hereof to all counsel, to any pro see parties of record, and to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia 25401.

ENTERED this 23rd day of January 2020.


Honorable Jennifer P. Dent
Judge of the West Virginia Business
Court Division

Order Prepared and Submitted by (with changes by the Court):

By: _____
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The foregoing is a true copy of an order
entered in this office on the 22 day
of Jan., 20 20.
PAUL H. FLANAGAN, Circuit Clerk of Raleigh Co., WV
By: Paul H. Flanagan Deputy