

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. MARY M. WERNER
Justice of the Supreme Court

MOTION DATE 6/10/04
ADJ. DATE 7/15/04
Mot. Seq. #001 - MD
Mot. Seq. #002 - XMotD

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JOSEPH A. SCALISE, EVELYN SCALISE and	:	JERRY G. BERKA, P.C.
JOSEPH C. SCALISE,	:	Attorney for Plaintiffs
	:	2115 Union Boulevard
Plaintiffs,	:	Bay Shore, New York 11706
	:	
- against -	:	BARRY V. PITTMAN, ESQ.
	:	Attorney for Defendants
	:	26 Saxon Avenue, P.O. Box 5647
OAK ISLAND BEACH ASSOCIATION, INC.,	:	Bay Shore, New York 11706-0455
JAMES HARDING, GUSTAV COLETTI,	:	
PATRICIA WALSH, SUZANNE BOEHMCKE,	:	
JOHN BRUNKARD, ARNIE LANZILLOTTA,	:	
and ELEANOR CANNING,	:	
	:	
Defendants.	:	
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Upon the following papers numbered 1 to 26 read on this motion for declaratory and injunctive relief; cross motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1-4 ; Notice of Cross Motion and supporting papers 5-13 ; Answering Affidavits and supporting papers 14-20 ; Replying Affidavits and supporting papers 21-26 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiffs for an order enjoining and restraining defendants from taking any steps or actions during the pendency of this action to expel or suspend them from the Oak Island Beach Association Inc., declaring Article III, Section 4 and Article IX, Section 3 of the by-laws of the Oak Island Beach Association Inc., to be unconstitutional and violative of due process as applied to plaintiffs, and further declaring said by-laws to be void, ineffective, unjust, and violative of plaintiffs' civil rights, not binding on plaintiffs, and an attempt to take plaintiffs' property without due process of law, is denied; and it is further

ORDERED that the cross motion by defendants for an order dismissing the complaint pursuant to CPLR 3211(a)(2) and (7) is granted to the extent of dismissing so much of plaintiffs' first cause of

action as is for judgment declaring that the subject by-laws may not constitutionally be applied to them and dismissing plaintiffs' second and third causes of action in their entirety, and is otherwise denied.

The plaintiffs are members of the Oak Island Beach Association. Since 1971, Joseph A. Scalise and his wife, Evelyn Scalise, have resided at 39 The Bayou, Oak Beach, New York pursuant to a sublease¹ between the Association, as landlord, and Joseph A. Scalise and Evelyn Scalise, as tenants. Their son, Joseph C. Scalise, has resided at 38 The Bayou, Oak Beach, New York since 1998, likewise pursuant to a sublease. Although the individual defendants are not specifically identified in the record, it appears that some or all of them are members of the Association's Board of Directors.

On or about May 13, 2004, the plaintiffs received letters from the Association advising them that, pursuant to Article III, Section 4 and Article IX, Section 3 of the Association's by-laws, the Board of Directors was to conduct a hearing at its May 26, 2004 meeting to determine whether they should be expelled or suspended from the Association for failure to comply with the by-laws or with the terms of their respective leases, and specifying the plaintiffs' actions allegedly constituting "improper or objectionable conduct" in violation of paragraph 39 of their respective subleases. Article III, Section 4 provides:

Any member of the Association who fails to comply with the charter, By-Laws, rules and regulations of the Association, or with any of the provisions of his lease with the Association, may be expelled or suspended by a majority vote of the Directors present at any Board of Directors meeting, provided the member has been notified in writing of the charges against him and is given the right to be present at such meeting and to present a defense.

A member so expelled or suspended shall have the right, by notice in writing delivered to the Secretary of the Association within 10 days of notification of the Board of Directors action, to appeal such expulsion or suspension to the next meeting of the members of the Association, and, at such meeting, the membership may sustain or overrule such expulsion or suspension by majority vote of those present. If no meeting of the membership is scheduled within sixty days of the delivery of such notice of appeal, a special meeting of the membership to consider such appeal will be called as soon as practicable.

The status of a member who has filed such notice of appeal shall remain unchanged until such appeal is acted upon by the membership.

¹ The Town of Babylon is the owner of the land. Pursuant to paragraph 26 of the August 14, 1990 renewal of the master lease between the Town and the Association, "so long as [the Association] is the Tenant hereunder and the Sublandlord of the Subleases, each and every renewed and restated Sublease shall be subject in all respects to the terms and conditions of the By-Laws of [the Association] and its Rules and Regulations, as the same exist from time to time."

If a member is expelled and no appeal to the membership is taken, or the membership rejects such appeal, the member and his spouse, if his spouse is a party to the sublease, shall surrender their sublease and all rights thereunder to the Association.

Unless such expelled member is prohibited from removing his buildings and other property from the leasehold by the terms of his sublease or these By-Laws, or such expelled member is indebted to the Association, he shall have the right within twelve months after such expulsion to remove such buildings and property from the premises, or to sell them to a person who has been approved for membership in the Association by the Admissions Committee.

Article IX, Section 3 provides:

The Board of Directors has the right to take away the privileges of any member who fails to live up to the terms of his lease with the Association, the Charter, the By-Laws, or the Rules and Regulations now in force or adopted at any future time.

A member whose privileges are so removed shall have the right, by notice in writing delivered to the Secretary of the Association within 10 days of notification of the Board of Directors action, to appeal such action to the next meeting of the Association, and, at such meeting, the membership may sustain or overrule the Board's action by majority vote of those present. If no meeting of the membership is scheduled within sixty days of the delivery of such notice of appeal, a special meeting of the membership to consider such appeal will be called as soon as practicable.

The status of a member who has filed such a notice of appeal shall remain unchanged until such appeal is acted upon by the membership.

The plaintiffs promptly commenced this action and moved by order to show cause for declaratory and injunctive relief. By order dated May 24, 2004, this Court (Blydenburgh, J.) granted the order to show cause enjoining the defendants, pending the determination of the motion, from taking any steps or actions to expel or suspend them from the Association.

The plaintiffs allege three separate causes of action in their complaint. In their first cause of action for declaratory and injunctive relief, the plaintiffs allege, *inter alia*, that the defendants' proposed actions are an attempt to take the plaintiffs' real property without due process of law, that the subject by-laws are unreasonably broad, illegal, extensive, vague, invalid, and ambiguous, and that the Association is without authority to expel or suspend the plaintiffs. The plaintiffs seek the entry of judgment declaring the subject by-laws unconstitutional and void as applied to them, and permanently enjoining the defendants from proceeding against them on charges alleging violations of those by-laws. In their second and third causes of action, the plaintiffs seek to recover damages in the amount of \$2.5 million resulting from the defendants' concerted campaign of harassment, intimidation, slander, discrimination, and vindictiveness designed to force the plaintiffs to leave their residences at Oak Beach, to defeat their

contract and property rights, and to injure their reputations in the community.²

The plaintiffs' motion for declaratory and injunctive relief is now before the Court. The plaintiffs contend in support of the motion that each allegation set forth in the May 13, 2004 letters is fabricated, that for several years they have been the subject of repeated acts of discrimination, harassment, and vindictiveness by members of the Board, and that the Board's current attempt to expel or suspend them is politically motivated because Joseph A. Scalise intends to seek election to the Board of Directors later this year. The plaintiffs also contend that if the contested by-laws and the contemplated actions of the Board of Directors are allowed to stand, they will lose their residences, each of which is worth more than \$2 million. The defendants counter that it is the plaintiffs who have "terrorized" members of the Association for the past several years by menacing and threatening them, endangering them by use of an automobile, spitting on them, and other "outrageous and offensive acts." The defendants further claim that the plaintiffs' request for injunctive relief is premature because it does not appear that any harm which the plaintiffs may suffer as a result of the Board's action is irreparable.

The defendants also cross-move for an order dismissing the complaint pursuant to CPLR 3211(a)(2) and (7). With respect to the first cause of action, the defendants contend that this Court lacks subject matter jurisdiction under *40 W. 67th St. v Pullman* (100 NY2d 147, 760 NYS2d 745 [2003]) and, further, that the matter is not ripe for judicial intervention. As for the second and third causes of action, the defendants assert that the plaintiffs have failed to plead the elements of a cause of action for intentional infliction of emotional harm and that a claim for civil conspiracy does not state a cognizable basis for relief.

Since a dismissal of the complaint would render the plaintiffs' motion academic, the Court will first address the defendants' cross motion to dismiss the complaint.

With respect to the plaintiffs' first cause of action, the defendants' cross motion is granted to the extent the plaintiffs seek judgment declaring that the subject by-laws may not constitutionally be applied to them. In accordance with the by-laws, even if Board voted to expel or suspend the plaintiffs, they would be entitled to appeal the Board's decision to the membership and, if the membership then rejected the appeal, they would still have 12 months within which to find an acceptable buyer for the property. Since the harm which the plaintiffs anticipate, i.e., the loss of their property rights, "may be prevented or significantly ameliorated by further administrative action or by steps available to the [plaintiffs]" (*Church of St. Paul & St. Andrew v Barwick*, 67 NY2d 510, 520, 505 NYS2d 24, 30, *cert denied* 479 US 985, 107 S Ct 574 [1986]), their constitutional challenge presents no justiciable controversy

² Although the plaintiffs do not precisely identify the torts pleaded, the second cause of action, which alleges various psychological injuries resulting from the defendants' conduct, may be analogized to a claim for intentional infliction of emotional harm, while the third cause of action suggests a claim for civil conspiracy to commit a tort (*see generally, Singer v Jefferies & Co.*, 160 AD2d 216, 553 NYS2d 346 [1990]). Furthermore, notwithstanding the plaintiffs' claims that the defendants' actions represent a calculated attempt to destroy "the impeccable reputation that the plaintiffs enjoy in the community," they do not allege that their reputation has, in fact, been injured.

warranting declaratory relief (*see also, Matter of New York State Inspection, Sec. & Law Enforcement Empls. v Cuomo*, 64 NY2d 233, 485 NYS2d 719 [1984] [noting that nonjusticiability implicates a court's subject matter jurisdiction]). The Court otherwise rejects the defendants' claim that the matter is not ripe for judicial review, particularly insofar as the plaintiffs seek injunctive relief. The Court further finds the defendants' reference to *40 W. 67th St. v Pullman* (*supra*) unavailing. There, the issue before the Court of Appeals was the proper standard of review to be applied when the governing board of a residential community exercises its contractual right to terminate a tenancy based on the tenant's "objectionable" conduct. This matter, by contrast, does not involve judicial review of board action; in any event, the fact that the standard of review of board action is a severely limited one, prohibiting judicial inquiry so long as the action was taken in good faith and in legitimate furtherance of corporate purposes, does not mean that courts are without subject matter jurisdiction to review such action.³

The defendants' cross motion is also granted to the extent it seeks dismissal of the plaintiffs' second and third causes of action. The plaintiffs' second cause of action is framed in terms of a claim for intentional infliction of emotional distress. In their complaint, as supplemented by their affidavits in opposition to the motion to dismiss (*see, Cron v Hargro Fabrics*, 91 NY2d 362, 670 NYS2d 973 [1998]), the plaintiffs allege that in 2001, defendant Coletti, then President of the Board, sent an "insulting" letter questioning why the plaintiffs would want to live in a community where they didn't like anyone; that in January 2002, the Board posted a notice of expulsion on the bulletin board which was "very embarrassing" to them; that the plaintiffs were subsequently suspended from all Association committees; that they have been threatened with physical harm by Coletti and other residents; that Coletti has told them that one day they will be "very sorry" they ever "messed with" him and that he knows "a lot of people" who can "take care" of them; that Coletti has stated to numerous residents his desire to expel the plaintiffs from the Association and drive them from the community; that defendant Harding has informed the plaintiffs that he does not like them, that they should not be living at Oak Beach, and that he would support any action Coletti wanted to take against them; that they have been falsely accused of writing anonymous, threatening letters to members of the Board and committing other criminal acts against their neighbors; that they have received no mailings from the Association for the past several years; and that the current attempt to have them expelled or suspended is based on false and scurrilous charges and is wholly without foundation.

To survive a motion to dismiss, plaintiff's allegations must satisfy the rule set out in Restatement of Torts, Second, which we adopted in *Fischer v Maloney* (43 NY2d 553, 557), that: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress" (§ 46, subd [1]). Comment *d* to that section notes that: "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."

³ Quite the reverse is true. Whenever a standard of judicial review is articulated, it is implicit that subject matter jurisdiction exists (*cf., Chin v New York State Bd. of Law Examiners*, 118 Misc 2d 740, 461 NYS2d 211 [1983]).

(*Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303, 461 NYS2d 232, 236 [1983]). The Court finds that the tortious conduct alleged does not rise to the level of extreme and outrageous conduct necessary to permit recovery under this strict standard (*see generally, Howell v New York Post Co.*, 81 NY2d 115, 596 NYS2d 350 [1993]; Comment, 2 PJI 3:6, at 55-63 [2d ed 2004]). The pleading of a conspiracy, moreover, “may be made only to connect the actions of the individual defendants with an actionable injury and to establish that these acts flow from a common scheme or plan” (*Smukler v 12 Lofts Realty*, 156 AD2d 161, 163-164, 548 NYS2d 437, 439 [1989], *lv denied* 76 NY2d 701, 557 NYS2d 878 [1990]). Absent a valid claim for intentional infliction of emotional distress, the cause of action for conspiracy cannot stand (*see, Sokol v Addison*, 293 AD2d 600, 742 NYS2d 311 [2002]).

Finally, the plaintiffs’ motion for declaratory and injunctive relief, though not academic, is denied. The Court notes that the request for declaratory relief is tantamount to a motion for partial summary judgment on the first cause of action. Since a motion for summary judgment cannot be made until after issue is joined (*see, CPLR 3212[a]*), the request for such relief must be denied as premature (*see, Matter of Rine v Higgins*, 244 AD2d 963, 665 NYS2d 165 [1997]). As for the injunctive relief sought, even were this Court to find that the plaintiffs demonstrated a likelihood of success on the merits, they have failed to show that they would suffer irreparable injury without a preliminary injunction (*see, e.g., Popack v Rice*, 261 AD2d 463, 687 NYS2d 297 [1999]).

Dated: 9/13/04 *Jonathan M. Klein*
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION