

**VILLAGE BOARD****April 18, 2019****President**

Frank DeSimone

Board of TrusteesRosa Carmona
Ann Franz
Agnieszka "Annie" Jaworska
Melanie Lomax
Nicholas Panicola Jr
Armandina Perez**Village Clerk**
Nancy Quinn**Village Manager**
Evan K. Summers**Mr. James Brill**
White Pines Community Alliance**Re: April 11, 2019 FOIA Request****Dear Mr. Brill:**

I am pleased to help you with your April 11, 2019 Freedom of Information Act ("FOIA"). The Village of Bensenville received your request on April 11, 2019. You requested copies of the items indicated below:

"Any document submitted to the Circuit Court of the Eighteenth Judicial Circuit in the matter of Gina Mellenthin vs Frank DeSimone, Case #2018CH001065 between the dates of March 20, 2019 and to this present date."

After a search of Village files, the following information was found responsive to your request:

- 1) Circuit Court of the Eighteenth Judicial Circuit County of DuPage Case No. 2018CH001065 Filed April 11, 2019. (13 pgs.)

These are all the records found responsive to your request.

Do not hesitate to contact me if you have any questions or concerns in connection with this response.

Very truly yours,



Corey Williamsen
Freedom of Information Officer
Village of Bensenville

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL
CIRCUIT COUNTY OF DU PAGE

Chris Kachiroubas
e-filed in the 18th Judicial Circuit Court
***** DuPage County *****
TRAN# : 170431203132/(4502451)
2018CH001065
FILEDATE : 04/11/2019
Date Submitted : 04/11/2019 02:27 PM
Date Accepted : 04/11/2019 03:44 PM
FAY,JOAN

Gina Mellenthin, Kurt Igleman,)
Celeste Shaw, Phil Adcock, and)
Garry Gardner)
)
 Plaintiffs,)
)
 vs.) Case No. 2018 CH 001065
)
 Frank DeSimone, Rosa Carmona,)
 Ann Franz, Agnieszka Jaworska,)
 McLane Lomax, Nicholas Panicola, Jr.,)
 and Armando Perez,)
)
 Defendants.)

**DEFENDANTS' SECTION 2-615 AND 2-619
MOTIONS TO DISMISS PLAINTIFFS' AMENDED COMPLAINT**

Defendants, Frank DeSimone, Rosa Carmona, Ann Franz, Agnieszka Jaworska, McLane Lomax, Nicholas Panicola, Jr., and Armando Perez, through their attorneys, Montana and Welch, LLC, present the following as their motion to dismiss Plaintiffs' Amended Complaint pursuant to Section 2-615 and Section 2-619 of the *Code of Civil Procedure*, 735 ILCS 5/2-615 and 2-619.

I. Plaintiffs' Allegations¹

Plaintiffs allege that they are all similarly situated Plaintiffs and are all unincorporated owners within the Village of Bensenville. (Amended Complaint, ¶ 13). Plaintiffs contend that the Village is in charge of their water service. (Amended Complaint, ¶ 14). Plaintiffs assert that they cannot vote for the Village's representatives and trustees. (Amended Complaint, ¶ 15). Plaintiffs state that they have been contributing funds through their water bill to a capital fund called

¹ By citing to and arguing regarding Plaintiffs' pled facts in this Motion, Defendants in no way admit that these facts are true. Plaintiffs' pled facts are contested and Defendants reserve the right to deny them in an answer should their Motion not be granted.

“Unincorporated Utility Fund” for capital improvements to their water system. (Amended Complaint, ¶ 16).

Plaintiffs, citing to an undated exhibit for which no foundation is provided, plead that the Unincorporated Utility Fund is an account “for deposits made by the unincorporated water and sewer utility users with the intent of providing various water and sewer system improvements that would directly benefit those depositors.” (Amended Complaint, ¶ 17, citing Ex. A). Plaintiffs allege that the “Village of Bensenville trustees and representatives are supposed to put the funds received from the unincorporated owners into the Unincorporated Utility Fund.” (Amended Complaint, ¶ 18).

Plaintiffs plead that while there was \$912,081 in the Unincorporated Utility Fund as of the end of 2017, no monies were attributed by the Village to the Unincorporated Utility Fund from at least 2013 through 2017. (Amended Complaint, ¶ 19-21, citing Ex. B). All told, there would be an additional \$300,000 in the Unincorporated Utility Fund but for the zero contribution during these years, Plaintiffs allege. (Amended Complaint, ¶ 22-23).

Plaintiffs argue that the above pled facts establish a claim that the individual Village Trustees and Village President breached a fiduciary duty of care, loyalty, good faith, and independence that the Defendants (the current Trustees of the Village Board and the Village President) owed to them. Though they acknowledge that there was nearly \$1 million in the Unincorporated Utility Fund as of the end of 2017, they still claim that they “have and will continue to suffer irreparable injury in that the moneys that have been paid to the Unincorporated Utility Fund have disappeared.” (Amended Complaint, ¶ 27).

Plaintiffs conclude that “[u]nless enjoined by this Court, the Defendants will continue to breach their fiduciary duties owed to Plaintiffs to the irreparable harm of Plaintiffs and will

continue to do so until Defendants conform with the intention of the Unincorporated Utility Fund.” (Amended Complaint, ¶ 29).

Plaintiffs are asking this Court to issue an injunction against Defendants requiring a “full accounting and a return of the funds to the Unincorporated Utility Fund.” (Amended Complaint, Prayer for Relief). For the reasons which will be discussed below, Plaintiffs’ Amended Complaint should be dismissed.

II. Discussion

A. Plaintiffs Lack Standing to Bring this Action

Lack of standing is an affirmative matter which may be raised in a motion to dismiss pursuant to Section 2-619(a)(9) of the Code of Civil Procedure. 735 ILCS 5/2-619(a)(9). *Winnebago County Citizens for Controlled Growth v. County of Winnebago*, 383 Ill. App. 3d 735, 739 (2nd Dist. 2008). Plaintiffs bring the Amended Complaint in their individual capacities seeking to affect the rights of the other unincorporated property owners who receive water service from the Village.

Plaintiffs do not allege that they have any representational relationship with these residents (past and present), nor do they plead any facts which, if taken as true, would allow them to represent and affect the interests of all of these property owners. They do not allege any of the elements required to bring a class action pursuant to Section 2-801 of the Illinois Code of Civil Procedure. Moreover, Plaintiff Garry Gardner has not paid the Village for any water and sewer services at any point in time, including between 2013-17. (**Exhibit A**, Affidavit of Village Manager Evan K. Summers, ¶ 2).

Plaintiffs’ Amended Complaint should be dismissed pursuant to Section 2-619(a)(9) because Plaintiffs do not have standing to sue on behalf of all unincorporated property owners who

receive water service from the Village, or to bring this matter as a class action under the facts as alleged.

B. The Individual Trustees and Board President are not Proper Defendants

Plaintiffs have sued the Village of Bensenville's President (Frank DeSimone) and the Village's Trustees (Rosa Carmona, Ann Franz, Angnieszka Jawoska, McLane Lomax, Nicholas Panicola, Jr. and Armando Perez) as individual Defendants.

Plaintiffs are seeking a "full accounting and a return of the funds to the Unincorporated Utility Fund." (Amended Complaint, Prayer for Relief). This relief would require official action on the part of the Village. When suit is brought to enjoin a public official from taking some action, the public official must be sued in his official capacity and not his individual capacity. A decree against a public official in his individual capacity does not bind him in his official capacity. *McMechan v. Yenter*, 301 Ill. 508, 512 (1922). See also Moser v. Highway Commissioner of Town of Urbana, 114 Ill.App.3d 137, 141 (4th Dist. 1983).

Plaintiffs have not named the Defendants in their official capacities, which results in this Court having no jurisdiction to bind them in their official capacities. Because an injunction issued against Defendants in their individual capacities would accomplish nothing, it is proper to dismiss Plaintiffs' Amended Complaint under 2-615 as Defendants are not proper defendants.

Furthermore, Plaintiffs contend that the alleged breaches of duty occurred between 2013 and 2017. (Amended Complaint, ¶ 19-21, citing Ex. B). Four of the Defendants (Franz, Lomax, Panicola, and Perez) did not take office until May 2017. (Ex. A, Summers Aff. ¶ 3). And the other three Defendants (DeSimone, Carmona and Jaworska) took office in May 2015. *Id.* So none of the Defendants held their offices when the alleged breach of fiduciary duty allegedly began in 2013, and Plaintiffs have failed to specify any action that the Defendants took individually, so it cannot

be determined from the pleading when the specific breaches of fiduciary duty occurred or who committed those breaches. *Id.* This is another ground to dismiss the Amended Complaint, pursuant to Section 2-615 and 2-619(a)(9).

C. Plaintiffs do not Plead the Elements Necessary for the Issuance of an Injunction

1. Plaintiffs Fail to Plead a Clear, Protectable Interest and an Irreparable Injury

Plaintiffs' Amended Complaint seeks injunctive relief. (Amended Complaint ¶ 29). “[I]n order to be entitled to permanent injunctive relief, a party “must show that he possesses a clear, protectable interest for which there is no adequate remedy at law and that irreparable injury will result if the relief is not granted.” *C.J. v. Dep’t of Human Servs.*, 331 Ill. App. 3d 871, 891 (1st Dist. 2002)).

As to a clear, protectible interest, Plaintiffs have not cited to any authority establishing that they have standing to bring legal action to impact the alleged Unincorporated Utility Fund as a whole, or authority that they have standing to bring this claim on behalf of all unincorporated property owners who ever paid into the Unincorporated Utility Fund. As to irreparable injury, Plaintiffs generally allege that “[u]nless enjoined by this Court, the Defendants will continue to breach their fiduciary duties owed to Plaintiffs to the irreparable harm of Plaintiffs and will continue to do so until Defendants conform with the intention of the Unincorporated Utility Fund.” (Amended Complaint ¶ 29). This is a conclusory allegation, which is not sufficient to establish an irreparable injury. *Larkin v. Howlett*, 19 Ill. App. 3d 343, 345 (4th Dist 1974).

Nor can any injury be inferred from Plaintiffs' pled facts. Plaintiffs contend that there was nearly \$1 million in the Unincorporated Utility Fund as of the end of 2017. (Amended Complaint, ¶ 20). If there was nearly \$1 million in the Unincorporated Utility Fund as of the end of 2017, and

no allegation that the Village was unable to make any specific capital improvement due to the alleged reduction in funds, no injury can be read from Plaintiffs' Amended Complaint.

Further, “[i]t is a well-established rule that, if a party's injury can be adequately compensated through money damages, then it has an adequate remedy at law and does not need the extraordinary remedy of injunctive relief.” *Lumbermen's Mut. Cas. Co. v. Sykes*, 384 Ill. App. 3d 207, 230–31 (1st Dist. 2008). “It is only when money is insufficient to compensate the injury, or when the injury cannot be properly quantified in terms of money, that injunctive relief is necessary.” *Id.* at 231.

Plaintiffs are alleging that a specific sum of money - \$300,000 – was not put into the fund. Even if Plaintiffs had standing, even if they pled facts establishing that Defendants had and then breached a fiduciary duty to them, and even if they pled that they suffered a specific injury as a result of that breach, monetary damages would be sufficient to compensate them for their injuries. So they cannot sustain a claim for injunctive relief. Plaintiffs' Amended Complaint should be dismissed under Section 2-615 for these reasons.

2. Plaintiffs do not Adequately Plead a Breach of Fiduciary Duty Claim

“When granting permanent injunctive relief, the trial court, by definition, necessarily decides the plaintiffs' success on the merits of the case.” *Sparks v. Gray*, 334 Ill. App. 3d 390, 395 (5th Dist. 2002). Plaintiffs' Amended Complaint is predicated on a breach of fiduciary duty. To prevail on a claim of breach of fiduciary duty, “the plaintiff must show that: 1) there existed a fiduciary duty; 2) that duty was breached; and 3) an injury resulted from the breach.” *In re Edgewater Med. Ctr.*, 373 B.R. 845, 858 (Bankr. N.D. Ill. 2007) (citing *Petri v. Gatlin*, 997 F.Supp. 956, 977 (N.D.Ill.1997)).

Plaintiffs allege that from “at least 2013 through 2017, the receivables are \$0 that have been attributed by the Village of Bensenville to the Unincorporated Utility Fund” and that “Village of Bensenville trustees and representatives are supposed to put the funds received from the unincorporated owners in to the Unincorporated Utility Fund” but have not been doing this. (Amended Complaint, ¶¶ 18-19, 21).

These conclusory allegations are not sufficient to plead a claim for breach of fiduciary duty against Defendants. As an initial matter, Plaintiffs do not plead facts establishing that Defendants owed them a fiduciary duty to deposit the funds received from the unincorporated owners into the Unincorporated Utility Fund. Plaintiffs attach an exhibit to their Amended Complaint which purports to define the “Unincorporated Utility Fund.” (Amended Complaint, Exhibit A). But this undated and unauthenticated document says nothing about any obligation on the part of the Board President or Trustees to deposit money into this fund. And Plaintiffs do not plead facts establishing that the funds were in any way misused by any of the Defendants.

The lack of factual detail about what Defendants allegedly did wrong here is significant given the fact that none of the Defendants were in office in 2013, the time the alleged breaches began. In fact, four of the seven Defendants did not take office until May 2017, which is at the very end of the time period at issue in the Amended Complaint.

Plaintiffs have not pled facts showing that they have suffered any injury as a result of the alleged breaches. So even if, arguendo, the Defendants (individually) owed Plaintiffs a fiduciary duty to put the funds received from the unincorporated owners in to the Unincorporated Utility Fund and nowhere else, and even if, arguendo, they breached that duty, Plaintiffs have not pled any facts showing that they were injured by this.

In short, Plaintiffs fail to plead a valid breach of fiduciary duty claim. This is grounds to dismiss Plaintiffs' Amended Complaint under Section 2-615.

III. Conclusion

For the foregoing reasons, Defendants Frank DeSimone, Rosa Carmona, Ann Franz, Agnieszka Jaworska, McLane Lomax, Nicholas Panicola, Jr., and Armando Perez, in their individual capacities, request that this court dismiss Plaintiffs' Amended Complaint, and grant any further relief deemed just.

Respectfully submitted,

MONTANA & WELCH, LLC.

By: /s/ Richard F. Bruen

One of the attorneys for the Defendants, Frank DiSimone, Rosa Carmona, Ann Franz, Agnieszka Jaworska, McLane Lomax, Nicholas Panicola, Jr., and Armando Perez

Richard F. Bruen, Jr.
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(708) 448-7005
rbruен@montanawelch.com
Attorney Code 308878

STATE OF ILLINOIS

UNITED STATES OF AMERICA
IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT

COUNTY OF DU PAGE

Gina Mellenthin, et al.

Plaintiff,

v.

Frank DeSimone, et al.

Defendant,

2018 CH 001065

Case Number

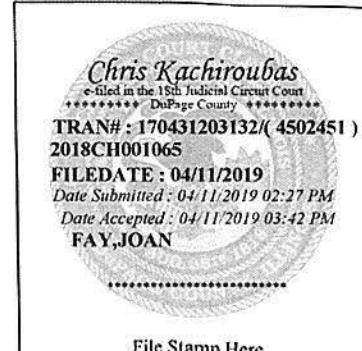


EXHIBIT COVER SHEET

EXHIBIT NAME: Exhibit A, Affidavit of Village Manager Evan K. Summers**TITLE OF DOCUMENT THIS EXHIBIT BELONGS WITH:**

Defendants' Section 2-615 and 2-619 Motions to Dismiss Plaintiffs' Amended Complaint

Document File Date: April 11, 2019*(The file date of the document this exhibit belongs with)*Defendants, Frank DiSimone, Rosa Carmona, Ann Franz,
Agnieszka Jaworska, McLane Lomax, Nicholas Panicola, Jr., and**EXHIBIT FILED ON BEHALF OF:** Armando Perez*(Case Party Name)*

Submitted by: Richard F. Bruen, Jr., Montana & Welch, LLC

Name: Richard F. Bruen, Jr. Pro Se

DuPage Attorney Number: 308878

Attorney for: Defendants

Address: 11950 S. Harlem Avenue, Suite 102

City/State/Zip: Palos Heights, IL 60463

Telephone Number: (708) 448-7005

Email: rbruен@montanawelch.com

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL
CIRCUIT COUNTY OF DU PAGE

Gina Mellenthin, et al.

)

)

Plaintiff,

)

)

vs.

)

Case No. 2018 CH 001065

)

Frank DeSimone, Rosa Carmona,

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Ann Franz, Agnieszka Jaworska,

)

McLane Lomax, Nicholas Panicola, Jr.,

)

and Armando Perez,

)

)

Defendants.

)



AFFIDAVIT OF EVAN K. SUMMERS

I, Evan K. Summers, do hereby swear and affirm as follows pursuant to Illinois Supreme Court Rule 191:

1. I am the Village Manager for the Village of Bensenville. If called to testify in this matter, I would testify consistently with this Affidavit.

2. I have searched the Village's records and could not find any record of a water or sewer customer named Garry Gardner, nor could I find any record showing that the Village charged anyone named Garry Gardner for water or sewer services, in an unincorporated area or otherwise, from January 1, 2013 through December 31, 2017.

3. As to the individual Defendants in this action, their history as elected officials of the Village of Bensenville is as follows:

- a. Frank DeSimone – Was elected to the Village Board of Trustees in May 2015. Was elected as Village President in May 2017;
- b. Rosa Carmona – Was elected to the Village Board of Trustees in May 2015;
- c. Ann Franz – Was elected to the Village Board of Trustees in May 2017;
- d. Agnieszka Jaworska – Was elected to the Village Board of Trustees in May 2015;
- e. McLane Lomax – Was elected to the Village Board of Trustees in May 2017;
- f. Nicholas Panicola, Jr. – Was appointed to the Village Board of Trustees in May 2017; and,
- g. Armando Perez – Was elected to the Village Board of Trustees in May 2017.

None of these individuals served on the Village Board of Trustees prior to the dates stated above.

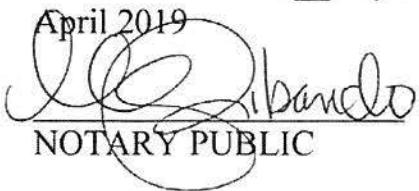
FURTHER AFFIANT SAYETH NOT



Evan K. Summers

SUBSCRIBED and SWORN to
Before me on this 10 day of

April 2019



Mary F. Ribando
NOTARY PUBLIC



IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL
CIRCUIT COUNTY OF DU PAGE

Gina Mellenthin, Kurt Igleman,)
Celeste Shaw, Phil Adcock, and)
Garry Gardner)
Plaintiffs,)
vs.)
Frank DeSimone, Rosa Carmona,)
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McLane Lomax, Nicholas Panicola, Jr.,)
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FAY,JOAN

NOTICE OF MOTION

To: Keith H. Werwas
Matton and Werwas, P.C.
134 N. LaSalle Street, Suite 1040
Chicago, IL 60602
kwerwas@mattonandwerwas.com

PLEASE TAKE NOTICE that on June 6, 2019, at 9:30 a.m. or as soon thereafter as counsel may be heard, we shall appear before the Honorable Judge Bonnie M. Wheaton or any judge sitting in her stead, in Room 2007 of the Circuit Court of DuPage County, DuPage County Judicial Center, 505 North County Farm Road, Wheaton, Illinois 60187 and then and there shall present the attached ***Defendants' Section 2-615 and 2-619 Motions to Dismiss Plaintiffs' Amended Complaint***, a copy of which is attached hereto.

MONTANA & WELCH, LLC.

By: s/ Richard F. Bruen
One of the attorneys for the Defendants

Richard F. Bruen, Jr. (Attorney Code 308878)
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PROOF OF SERVICE

I, the undersigned, an attorney, on oath state, that on April 11, 2019, I caused a copy of this ***Notice of Motion*** and the foregoing ***Defendants' Section 2-615 and 2-619 Motions to Dismiss Plaintiffs' Amended Complaint*** to be served on the above-listed party by placing same in a properly addressed, postage prepaid envelope and depositing same in the U.S. Mail at Palos Heights, Illinois 60463 before 5:00 p.m. and via email.

/s/ Richard F. Bruen

Richard F. Bruen, Jr. (Attorney Code 308878)
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