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MONTANA SIXTH JUDICIAL DISTRICT, PARK COUNTY, MONTANA

DANIEL K. O"CONNELL (a director of the Glastonbury Landowner's Assoc. Inc., VALERY A. O'OCONNELL (for and on behalf of the landowners & the many members of the Glastonbury Landowners Association, Plaintiff, vs. RICHARD BOLEN, LAURA BOISE, JANET NACLERIO, SHERIDAN STENBERG, ALYSSA ALLEN, GERALD DUBIEL, RICH SPALLONE, & WILLIAM SMITH (all Directors of the Glastonbury Landowners Association,) & THE GLASTONBURY LANDOWNERS BOARD OF DIRECTORS Defendants.	Cause No. DV-11-114 RESPONSE REGARDING DISMISSAL OF COUNTERCLAIM AND EXTENSION TO ANSWER AND RULE 60(B) MOTION

The Defendant Individually named Board of Directors (Board) requests that the Court deny Plaintiffs Daniel and Valery O'Connell's (the O'Connells) request to set aside the Court's ruling on the Board's motion to file a counterclaim. Not only was the Court well within its right to grant the motion pursuant to Uniform District Court Rules, Rule 2(b). Furthermore, the motion was well taken because it is the very beginning of this law suit (i.e. filing of the complaint took place a little over a month before the motion was filed) and the Court may, upon its own judgment, allow a counterclaim to be filed.

ARGUMENT

A. The Board's Counterclaim was Timely Because it Matured After the Complaint was Filed.

According to M.R.Civ.P., Rule 13(e), the "Court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading." The reason for this is simple. If the claim arises after an initial pleading is filed, then it could be filed in a separate lawsuit. However, the doctrine of judicial economy would dictate that instead of multiple filings, if the claim relates to the original complaint, then they should be filed in the same case. That is what occurred here.

The O'Connells seem to argue that the Court should use M.R.Civ.P., Rule 15, instead of Rule 13 to determine whether to allow the counterclaim. Rule 15 states that an answer and counterclaim must be filed within 21 days of the Complaint. However, the more specific language of Rule 13 specifically carves out an exception to this general rule.

Montana law is quiet clear regarding how to interpret the clear language of a statute. We interpret a statute first by looking to its plain language. *State v. Letasky,* 2007 MT 51, ¶ 11, 336 Mont. 178, 152 P.3d 1288. We construe a statute by reading and interpreting the statute as a whole, "without isolating specific terms from the context in which they are used by the Legislature." *City of Great Falls v. Morris,* 2006 MT 93, ¶ 19, 332 Mont. 85, ¶ 19, 134 P.3d 692 (citation omitted). The Court will not interpret the statute further if the language is clear and unambiguous. *Letasky,* ¶ 11. The Court looks to legislative intent if the language is not clear and unambiguous, and give effect to the legislative will. *Letasky,* ¶ 11. Statutory construction should not lead to absurd results if a reasonable interpretation can avoid it. *Letasky,* ¶ 11. We must

harmonize statutes relating to the same subject, as much as possible, giving effect to each. *Yellowstone Federal Credit Union v. Daniels,* 2008 MT 111, ¶ 18, 342 Mont. 451, 181 P.3d 595.

In this case, the O'Connells mistakenly rely on an "April 26, 2011" court order which abrogated M.R.Civ.P., Rule 13(f). They seem to argue that the Court should entirely disregarding Rule 13(e) simply because the Court made some sort of comment regarding a different statute.

After some research, it is apparent that the O'Connells were referring to the Committee Notes which are part of the statute. As this Court is aware, the Montana Rules of Civil Procedure were overhauled by the Montana Supreme Court in order to be more consistent with the Federal Rules (See Committee Notes, M.R.Civ.P., Rule 13.) As the Court can see from the Notes themselves, because of the amendments, Rule 13(f) was no longer consistent with Rule 15. Therefore, it was "abrogated." Rule 13(e) was left in place. Therefore, it is clear that the Montana Supreme Court intended that a Court may allow a counterclaim so long as it arose after the answer. In this case, it did.

The O'Connells have recently asserted that they will continue to file complaint after complaint until they "bankrupt the Association." The Board has followed up on this threat and found that the O'Connells do seem to intend to do exactly that. This research occurred after the answer was filed. In reality, a claim for vexatious litigation has a moving date as to when it matures. It is difficult to determine when it finally arises. Is it after three baseless filings in one year? Six? The Board did its best in attempting to bring this claim only when it was obvious that the O'Connells do intend to continue to file baseless complaints against the Board. As soon as the Board felt that this counterclaim was justified, and the Board would not be wasting the

Court's time with such a counterclaim, it filed the counterclaim. Therefore, the Board filed the counterclaim as soon as it was ripe.

The O'Connells also argue that the Board's counterclaim did not arise out of the actions plead in the Complaint. Therefore, it should not be allowed. The O'Connells are correct in that the counterclaim does not directly relate to the claims in the Complaint. It has nothing to do with the Erickson claim, the Minnick management claim, the claim that the Board is allocating funds incorrectly, etc. Instead, this is a permissive counterclaim pursuant to M.R.Civ.P., Rule 13(b). "A pleading may state as a counterclaim against an opposing party any claim that is not compulsory."

In general, Board's counterclaim is related to the new complaint. The new complaint contains multiple claims that are already being litigated in the O'Connells' other actions. Therefore, the Complaint itself is duplicative litigation which one of the factors that show a vexatious litigant. Furthermore, the Complaint has no merit and, as a motion for summary judgment will show, no basis in the plain language of the governing documents. Therefore, it is a perfect example out of the many examples the Court has that the O'Connells are vexatious litigants. Therefore, this counterclaim is a permissive counterclaim pursuant to M.R.Civ.P., Rule 13(b).

B. The Board's Counterclaim was not a Compulsory Counterclaim, it is a Permissive Counterclaim and Furthermore, it Matured After the Complaint was Filed.

Any type of counterclaim may be allowed by the Court, even if it does not relate to the original Complaint. Furthermore, a claim that directly relates to the Complaint may be filed it is arises after the time for filing the answer runs. In this case, the O'Connells have essentially

raised a number of breach of contract claims relating to the governing documents of the Association. Therefore, the transaction that the Court is dealing with in the Complaint are these alleged breach of contract claims.

Compulsory counterclaims are governed by M.R. Civ. P. 13(a) which states in pertinent part, "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." According to the Montana Supreme Court, the purpose of Rule 13 is to "avoid a multiplicity of suits by requiring the parties to adjust, in one action, their various differences growing out of any given transaction." "If a ... counterclaim is compulsory it must be pleaded ... [or it] will be barred." *Farmers Co-op. Ass'n v. Amsden, LLC*, 2007 MT 287,¶13, 339 Mont. 452, 456, 171 P.3d 684, 687

This case is much like *Espy v. Quinlan,* 2000 MT 193, 300 Mont. 441, 448, 4 P.3d 1212, 1217. In that case, the Plaintiff brought a case regarding a ditch easement. The Defendant counterclaimed regarding interference with the road easement that was also on the property. In this case the District Court concluded as follows:

> Here, the counterclaim involved interference with a road easement. It had nothing to do with the ditch easement and was not brought to enforce the provisions of § 70-17-112. The plaintiff, therefore, prevailed on all claims brought pursuant to § 70-17-112 and is entitled to his reasonable attorney's fees and costs.

Espy, ¶ 28. Therefore, the Court found that the claim regarding the road easement was a permissive easement.

Much like the claim in *Espy*, the Board's counterclaim is permissive in nature. As stated above, it does not arise out of any of the breach of contract claims or any of the actions that led to those claims. For example, if the counterclaim had been for Daniel O'Connell's own breach of

contract while serving on the Board during the Erickson variance request, then the counterclaim would be compulsory. Instead, it arises out of the multitude of baseless cases filed by the O'Connells against the Board, the Association and the Individually Named Members of the Board. Furthermore, it arises out of statements made by the O'Connells that they intended to continue to file case after case, until they bankrupted the Board. The Board then did its due diligence and concluded this was the appropriate time to file a vexatious litigation claim (which could have been filed separately.) Therefore, since the vexatious litigation claim does not arise out of the individual breach of contract claims (and in fact has nothing to do with the breach of any contract) it is a permissive claim. Even the O'Connell's admit this on page 6, section 4 of their motion. "Nothing in the 2013 amended complaint had anything to do with the counterclaim..." Therefore, all parties agree this is a permissive counterclaim which is allowed under M.R.Civ.P., Rule 13(b).

Even if it was not a permissive claim, it may be filed if the claim matures after the filing of the answer. The Board was not convinced of the O'Connell's intentions to continue to litigate until shortly after the answer was filed. Therefore, the counterclaim matured after the filing of the answer. It is allowed under M.R.Civ.P., Rule 13(e).

C. The Statement Regarding Why Ms. Griffith was Separately Representing the Board is Simply a Statement to the Court pursuant to Montana's Rules of Professional Conduct, Rule 1.2(c), that Ms. Griffith is Appearing in a Limited Capacity and the Reason for the Limitation.

According to the Montana Rules of Professional Responsibility, an attorney may represent a client in a limited capacity. M.R.Pro.C., Rule 1.2(c). Typically, if the attorney will be appearing on a limited basis in court, it is the attorney's duty to notify the Court and other

parties of the representation and the scope of representation so that the parties and Court know when to send documents and correspond with the limited scope attorney. In this case, Ms. Griffith did exactly that.

The O'Connells argue that somehow this was an implication that the Court does not have jurisdiction over the Board. Of course the Court has jurisdiction over the Board, just as it does the O'Connells.

The O'Connells also argue that somehow this limited scope is contrary to M.R.Civ.P., 19(b). (At least, the Board assumes it was M.R.Civ.P. as the O'Connells forgot to cite the entire rule.) M.R.Civ.P. 19(b) specifically deals with joining parties not yet named in the action. That is not the case here. Here, it was not appropriate for other counsel to represent the Board in the counterclaim, so the Board hired Ms. Griffith to present their counterclaim. Therefore, no joining was necessary.

D. The Counterclaim should not be Dismissed because it Does State a Claim Upon Which Relief Can Be Granted.

The Board had alleged a well-founded claim of vexatious litigation. "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." *Reidelbach v. Burlington Northern and Santa Fe Ry. Co.*, 2002 MT 289, ¶ 14, 312 Mont. 498, 60 P.3d 418. When considering a motion to dismiss under M.R. Civ. P. 12(b)(6), all well pleaded allegations and facts in the complaint are admitted and taken as true, and the complaint is construed in a light most favorable to the plaintiff. *Sinclair v. Burlington N. & Santa Fe Ry. Co.*, 2008 MT 424, ¶25, 347 Mont. 395, 200 P.3d 46.

O'Connells argue that as of today, none of the multitude of cases that they have filed has proven to be "frivolous," "vexatious" or "meritless." This is true. However, vexatious litigation claims typically do not mature after the resolution of the case. If the litigation is vexatious, typically the party discovers it in the process of review the case and the reasoning behind filing it or with a full analysis of the factual and legal basis of the case. Therefore, vexatious litigation claims are almost always filed as a counterclaim when discovered. Not after a case is resolved. Therefore, the timing of the filing is proper.

While the O'Connells state that the counterclaim is entirely based on future potential filings by the O'Connells, that is not the case. The counterclaim alleges that all of the now filed claims are vexatious. Also, the threat of future claims show that the injunction is necessary. If one were to take each claim in each complaint as separate (for example, one case involved a breach of contract claim regarding voting tallies and a separate breach of contract claim regarding hiring a property manager), then the O'Connells have filed anywhere between seven and thirteen separate "cases" against the Board over the last two years. This is, in part, the basis for filing the vexatious litigation claim against the O'Connells.

If the Court takes the Board's allegations that all of the O'Connells claims are vexatious, frivolous and/or meritless and that there is threat of future litigation as true, then the Board has stated a claim for which the Board is entitled to relief. Therefore, the Court should not dismiss the counterclaim.

The O'Connells also mention that "Title 27" is implicated, Title 27 only provides relief to maintain the status quo. This is true of temporary injunctions. However, the Board is not asking for a temporary injunction. The Court is asking for the equitable relief, granted by many courts in this situation, of requiring that the Court review any complaint filed to ensure it is not

frivolous before allowing it to be filed. In fact, the Montana Supreme Court itself did this in *Grenz v. Fire & Cas. of Connecticut*, 2001 MT 8, 304 Mont. 83, 18 P.3d 994. In that case, the Court told Grentz he could not file any appeals until he paid some fines.

CONCLUSION

The Court should find that the counterclaim should not be dismissed. Not only did the claim ripen after the answer was filed, it is a permissive claim. Therefore, it did not need to be filed along with the answer. Furthermore, Ms. Griffith's notice regarding her limited representation does not trigger M.R.Civ.P., Rule 19 as no party was joined. The Court should also find that with regards to the counterclaim, the Board has stated a claim upon which they can be granted relief.

Respectfully submitted this 13 day of May, 2013.

By _____
Alanah Griffith, Attorney of Limited Scope for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 14 day of May, 2013, a true and correct copy of the foregoing, was mailed, postage prepaid, to the following counsel of record:

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