JUN 03 2013

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PARK COUNTY CLERK
OF DISTRICT COURT
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2013 MAY 31 PM 12 57

FILED
BY WENDY TUREK
DEPUTY

MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY

Daniel K. O'Connell & Valery A. O'Connell & on behalf of themselves as members of Glastonbury Landowners Association.

Plaintiff(s),

v.

Glastonbury Landowners Association, Inc. & current GLA Board of Directors

Defendant(s)

Cause No. DV-11-114

PLAINTIFFS MOTION(s) REPLY RE; DISMISSAL OF COUNTERCLAIM 12(b)(6) MOTION & 60(b) MOTION

Plaintiffs hereby file this timely reply to Defendants motion response. On May 17th, Plaintiffs received Defendants motion "Response Regarding Dismissal of Counterclaim And Extension to Answer And Rule 60(B) Motion" & Rule 12(b)(6). This pleading postmarked May 15th, indicates the Certificate of Service was incorrectly marked the 14th.

Defendants did not oppose Plaintiffs' motion for extension of time to answer the counterclaim. Also Defendants council joiner motion from 2012 was granted in 2012 by the court contrary to their motion response pg. 7 that said, "no joining was necessary." Thus a joiner is required.

Regarding Plaintiffs' Rule 12(b)(6) motion, it is warranted asking to dismiss that counterclaim for failure to state a claim upon which relief can be granted: which relief (to enjoin

Plaintiffs from "filing civil litigation without prior court permission") **is unconstitutional, absent authority and absent any factual or legal basis or evidence.** Plaintiffs' Rule 60(b) motion is also warranted to reverse this court's April 17th Orders (that granted counterclaim filing the same day it was submitted); such Orders failed to allow opposing pleadings on the counterclaim motion (as contrary to U.D.C.R., Rule 2(a)); and thereby harmed and unjustly biased & prejudiced Plaintiffs' rights to oppose & overcome that counterclaim motion. The April 17th Orders are also contrary to M.R.Civ.P., Rule 13(b) &(E) and Rule 15(a)(1)(B) because the counterclaim did not mature at any time, thus the counterclaim was NOT "well-founded" but unjustly brought as frivolous and vexatious.

In fact, claims for relief are not based on a hypothetical claim for relief as the Defendants admitted was the case for the counterclaim; on pg. 8 of their motion response; Defendants state, "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 [frivolous] litigation as true, then the Board has stated a claim ...entitled to relief." Defendants then on pg. 8 contradict this their counterclaim saying, "O'Connells argue as of today, none of the multitude of cases that they have filed has proven to be "frivolous" "vexatious" or "meritless." This is true," says Defendants.

FACTUAL ARGUMENTS AND BRIEF

Rule 11, M.R.Civ.P., allows a court to impose sanctions on the "signer" of a pleading, motion or other paper which is 'not well grounded in fact or warranted by law, or which the signer has interposed for an improper purpose such as harassment, delay or increase in the cost of litigation.' "Sanctions are proper only where a suit is totally frivolous or appears to have been brought for an improper purpose." See *Smith v. Barrett* (1990), 242 Mont. 37, 43, 788 P.2d 324, 328.

A. Plaintiffs have not yet asked for sanctions against Defendants counterclaim. Defendants should withdraw their suit or face a motion for sanctions, because this Rule 11, M.R.Civ.P., (above) applies to the counterclaim which is not grounded in fact, not warranted under existing

law or a modification of law, was brought by the GLA for an improper purpose to harass or deny members right to defend their property "without denial or delay," caused unnecessary delay, needlessly increased the cost of litigation & maintained without reasonable cause as follows:

B. Plaintiffs' Rule 12(b)(6) motion: Defendants counterclaim alleged that Plaintiffs 4 complaints filed against Defendants are "frivolous" "baseless" thus "vexatious." However, Defendants motion response on pg. 8 contradicts this allegation as cited above. Defendants can not allege this claim after now admitting this claim was NOT found to be true by a court of law. **Defendants should thus withdraw their suit or face a motion for sanctions.**

Defendants motion response pg. 8 says, "If one were to take each claim in each [Plaintiff] complaint as seperate..., then 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."

This Defendant statement above is an absurdity, since cases are not numbered by the number of claims therein. Again only four cases were filed against Defendants which Defendants admit none were found vexatous. Yet, this absurdity was the basis for Defendants counterclaim.

"Defendants motion response pg. 8 says, "the threat of future claims shows that the injunction is necessary." Defendants motion response pg. 6 says the counterclaim, "arises out of the multitude of baseless cases filed by the O'Connells... Furthermore, it arises out of statements made by the O'Connells that they intended to file case after case, until they bankrupted the Board." Not so.

From case DV-12-220, Plaintiffs (Feb. 24, 2013) affidavit at ¶ d refuted ever threatening the Board, much less "bankrupt the Board" or GLA. Nor would O'Connells ever say this, because O'Connells have repeatedly said that without the GLA, members would be at the mercy of the county to maintain GLA roads and more, which county roads are some of the worst roads.

Defendants motion response pg. 6 also said, the complaint arises out of statements made by the O'Connells that they intend to file... until they bankrupt the Board" and "the board was not convinced of the O'Connell's intentions to continue to litigate until shortly after the answer was filed [March 18th]. Therefore the counterclaim matured after the filing of the answer."

This Defendants response above is perplexing and impossible considering the fact that O'Connells had been out of state since January and only returned in May, just 6 days before the counterclaim was filed. The O'Connells made no statements to the Board since last year, and any such claims about what the O'Connells may have said was NOT said by the O'Connells. Other than one email (Exhibit AA attached regarding GLA's billing error), Plaintiffs-the O'Connells have had no direct contact at all with the GLA Board since Dec. 2012. Which means that the Board's counterclaim is a falsity or hearsay, not first hand reports as rules of evidence requires.

Again, there has been NO finding by the court of "frivolous" 'vexatious" or "baseless" claims by Plaintiffs, for which counterclaim was made absent any court finding. Defendants counterclaim requesting injunctive relief thus fails to demonstrate either irreparable harm as required under Title 27; nor a likelihood of succeeding on the merits, as the counterclaim fails to present any evidence suggesting the presence of "frivolous" "vexatious" "baseless" complaints.

Plouffe v. State, 2003 MT 62, ¶ 8, 314 Mont. 413, ¶ 8, 66 P.3d 316, ¶ A court should not dismiss a complaint for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Plouffe v. State*, 2003 MT 62, ¶ 8, 314 Mont. 413, ¶ 8, 66 P.3d 316, ¶8. The district court's determination that a complaint failed to state a claim is a conclusion of law. *Plouffe*, ¶ 8.

"A complaint must state something more than facts which, at the most, would breed only a suspicion that plaintiffs have a right to relief. Liberality does not go so far as to excuse omission of that which is material and necessary in order to entitle relief."*Maney v. Louisiana Pacific Corp.*, 2000 MT 366, ¶ 28, 303 Mont. 398, ¶ 28, 15 P.3d 962, ¶ 28.

Defendants counterclaim does not meet this criteria in these high court rulings above, since the counterclaim is absent any facts, and void of that which is material and necessary to

demonstrate that they're entitled to relief; also void of any facts whatsoever that would sustain a claim or suspicion of such claim of *"frivolous" "baseless" or "vexatious"* complaints by Plaintiffs. The facts show this claim is merely a hypothetical claim, which hypothesis is the sole basis of Defendants counterclaim (¶ 31) relief: to enjoin or restrain Plaintiff/members from "filing civil litigation without prior court permission" thereby to somehow prevent **FUTURE** "frivolous" lawsuits.

Defendants response pg. 9 says authority is "granted within many courts" for the counterclaim relief (to enjoin Plaintiffs from "filing civil litigation without prior court permission") and "in Montana within *Grenz v. Fire & Cas. of Connecticut,* 2001 MT.8, 304 Mont.83, 18 P.3d 994. ... [because] Grentz could not file any appeals until he paid some fines." But this Grenz case ruling only had to do with limiting frivolous **appeals** until fines were paid, thus this case has nothing to do with the case at hand to limit complaint filings.

Montana has no legal authorities in place to prevent filings of frivolous complaints for non-state claims; nor does any other state without prior determination by a court that such claims were "frivolous." This is key, because none of Plaintiffs pleadings have ever been determined as unjustly filed or "frivolous." Such conclusion is considered to be a serious measure and rarely occurs even in the four states having such rules; such as California Code of Civil Procedure, § 391(b) '*requiring at least 5 of the pro se litigant cases over a 7 year period to be finally determined adverse and unjustly filed against the Defendant and based upon the same or substantially similar facts, transaction, or occurrence.*'

Contrary to this California law and opinion, none of Plaintiffs 4 case pleadings have ever been determined as unjustly filed or"baseless" or "frivolous," and Plaintiffs 4 cases against Defendants do not involve the same subject matter or same claims. Defendants motion response is in error to say Plaintiffs 4 complaints & claims are the same just because the complaints are

breach of contract claims relating to governing documents. In fact, Defendants motion response pg. 8 admits they are "separate claims." Also, all 4 complaint claims filed against Defendants vary based on unique and separate Defendant actions, separate contract violations that matured at separate times after each of the previous cases were answered, thus necessitating filing new cases as the claims matured; and only after the GLA Defendant Board repeatedly refused to self-correct their multiple contract violations and abuse of authority.

Thus even under strict California law (above), Defendants counterclaim would be dismissed; wherefore Defendants countersuit alleging Plaintiff cases are "frivolous" "baseless" claims is itself a frivolous or vexatious claim, since such claim was brought without sufficient grounds for winning as contrary to the established facts of Plaintiffs cases, as follows:

1. the Supreme Court ruled that this case at hand had merit, 2. the DV-11-193 case was settled out of court denying Defendants counterclaim; 3. Plaintiffs also won all their claims for relief in that case (193); 4. within two other remaining cases, DV-12-164 and DV-12-220, Defendants gave no defense regarding any "frivolous" claims therein; 5. and defendants failed to dismiss those cases or failed to file a motion to dismiss; 6. also absent affidavit, Defendant's counterclaim falsely asserts Plaintiffs threatened future suits thereby to "bankrupt the GLA."*

(*Note: The O'Connells never said this since they were out of state proving this to be hearsay and **should be stricken from the record**. See case DV-12-220 affidavit (¶ d).)

Justice so requires GRANTING Plaintiffs' Rule 12(b)(6) motion to dismiss the counterclaim/motion as unconstitutional, absent authority nor material facts/evidence, as follows:

1. Defendant's counterclaim is absent any supporting legal basis; 2. counterclaim gives no affidavit nor facts in support, 3. the counterclaim denies Plaintiffs' constitutional rights (Mt. Article II, part 3 -- right to protect property and defend liberties & Art. II, part 16 -- right to administrative justice ... "without denial or delay"); which is Plaintiffs' compulsory right & clearly not a claim upon which relief can be granted; 4. its absent any claims for which relief can be granted because Montana has no legal authorities in place to prevent <u>filings</u> of frivolous civil complaints: and the counterclaim (to enjoin Plaintiffs from "filing civil litigation without prior court permission") is unconstitutional, & contrary to established facts of Plaintiffs cases (above).

C. **Plaintiffs' Rule 60 motion:** Defendant's answer (pg.1 opposing this rule 60 motion) mistakenly claims that courts authority to grant the counterclaim motion was found under U.D.C.R., Rule 2(b) having to do with "Failure to File Briefs." This Rule 2(b) clearly is not applicable here, because the April 17th Order granted the counterclaim motion the same day it was filed BEFORE any opposing answer brief could be filed by Plaintiffs.

Instead, the Orders failed to allow opposing pleadings on the counterclaim motion, as contrary to U.D.C.R., Rule 2(a); and thereby harmed and unjustly biased & prejudiced Plaintiffs' rights to oppose & overcome that counterclaim motion.

Defendant's answer (pg.2) also mistakenly claims that courts authority to grant the counterclaim motion was found under M.R.Civ.P., Rule 13(e) that says:

M.R.Civ.P., Rule 13(e) "**Counterclaim Maturing or Acquired after Pleading.** 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."

Plaintiffs arguments show that pursuant to MT. Supreme Court Order (April 26, 2011) Committee Notes, "Abrogation of Rule 13(f) establishes Rule 15 as the sole rule governing amendment of a pleading to add a counterclaim" which means Rule 15 governs or limits Rule 13, not to wholly eliminate it as Defendants falsely claimed (pg.3).

In fact as Plaintiffs motion said, the counterclaim is contrary to Rule 13(e) above, because the counterclaim did NOT mature after the Amended Complaint filed March 18th. This is because the counterclaim can not mature, unless one of the four Plaintiff complaints in question was previously proven "frivolous" which never happened. So lacking material facts of any previous "frivolous" cases, Defendants counterclaim is thus not mature; and based solely on inadmissible hearsay and on a hypothetical claim for relief as the Defendants admitted (pg. 8).

There is simply no proof of any "frivolous" cases or pleadings regarding Plaintiffs 4 cases against the GLA. Therefore Justice so requires GRANTING Plaintiffs' Rule 60(b) motion to reverse this court's April 17th Orders;

1. that unjustly granted the counterclaim motion filing the same day it was submitted; 2. and such Orders failed to allow opposing pleadings on the counterclaim motion; 3. as contrary to U.D.C.R., Rule 2(a)); 4. and thereby harmed, unjustly biased & prejudiced Plaintiffs' rights to oppose & overcome that counterclaim motion; 5. the April 17th Orders are also contrary to Rule 15(a)(2) as unjust and contrary to M.R.Civ.P., Rule 13(b) &(E) because the counterclaim did not mature AFTER the answer to the counterclaim, because there are no previous "frivolous" cases and based solely on a myth as hearsay.

Plaintiffs' Rule 12(b)(6) motion* and Rule 60 motion are thus warranted to dismiss that unconstitutional, frivolous, vexatious, unripe counterclaim being absent any material facts, evidence or authority, & based on a hypothetical claim for relief which relief can not be granted.

(* Defendants counterclaim failed to present any evidence which suggested the presence of "vexatious or frivolous" complaints, thus matters outside these pleadings need not be considered to grant Plaintiffs Rule 12(b)(6) motion.)

Respectfully submitted this 31st day of May, 2013.

Signed: Signed:

Daniel O'Connell Valery O'Connell

Certificate of Service

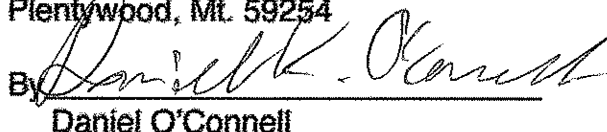
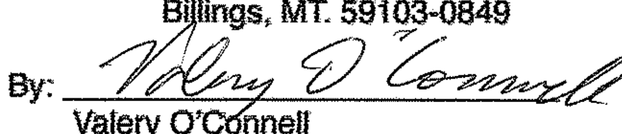
A true and correct copy of forgoing document(s) were sent to the following parties via first class mail on this same day to:

hand deliver:
Sixth Judicial District Clerk of Court
414 E. Callender St.
Livingston, Mt. 59047

Alanah Griffith
1184 N. 15th St. Suite #4
Bozeman, Mt. 59715

Hon. Judge David Cybulski
573 Shippe Canyon Rd.
Plentywood, Mt. 59254

Brown Law Firm, P.C.
315 N. 24th St. (PO Drawer 849)
Billings, MT. 59103-0849

By:  By: 

Daniel O'Connell Valery O'Connell

"Exhibit AA"

Daniel OConnell <dko@mac.com>

April 18, 2013 10:44 PM

To: GLA Board

Cc: GLA secretaries, Charlene Murphy <Charlene@wispwest.net>, Minnick Management inc sminnickmanagement@inbox.com

Assessment billing errors effecting many landowners

Dear GLA Board,

The GLA assessment billing statements sent out to several landowners on or about April 12, 2013 was apparently billed incorrectly.

Finance charges assessed for late payments should be billed **only** for the quarterly assessment amount due, which is from Jan. through March pursuant to GLA Covenant 11.03 below. However, the GLA sent out billing statements that charged incorrect finance charges on the entire annual assessment amount, instead of the quarterly assessment amount. In other words, landowners have the option to pay quarterly assessments, so only the unpaid quarterly assessment amount can be charged finance/interest charges.

For example, our assessment bill shows an **$18.18** finance charge from Jan. through March, 2013 and another interest charge of **$7.48** for a total of **$25.66** from Jan. through March 2013. **This amount should be $8.78** not $25.66. $25.66 finance charges do not reflect 1.5% interest and 5% of the quarterly assessment shown below for Jan.-March:

Annual assessment total $572 (minus $30 balance forward) -------------- $542

Quarterly assessment Jan.-March (1/4th of $542) ---------------------- $135

5% finance charges on unpaid quarterly assessment (5% of $135) ----- $6.75

1.5% interest charge on unpaid quarterly assessment(1.5% of $135) -- $2.03

Please correct our billing statement to reflect $8.78 finance/interest charges above. Statements sent out this April to other landowners for unpaid assessments should likewise be corrected to reflect finance/interest charges based on quarterly assessment amounts, not based on the annual amount.

Sincerely,
Val O'Connell
PO Box 77
Emigrant, MT. 59027

P.S. Also we still have not received GLA receipts and expenditure reports (and check details) for the last 2 years nor GLA meeting minutes; which we have repeatedly requested (now part of lawsuit DV-11-114). Please mail us copies of such requested documents immediately.

GLA Covenant 11.03. Annual Community Assessment. Each Landowner shall pay an annual community assessment (the "annual assessment") to the Association ... The annual assessment shall be payable either annually on or before January 31 or quarterly in four equal increments on or before January 31, April 30, July 31 and October 31 of each year.

11.06. Effect of Nonpayment of Assessment. If any assessment is not paid by midnight on the date when due, then such assessment shall become delinquent and shall, together with any interest thereon, become a continuing lien on the parcel which shall run with the land, if the assessment

Richard Bolen

April 22, 2013 11:46 AM

To: Daniel O'Connell

Hide Details

Cc: Sheridan Stenberg , Alyssa Allen

Re: Assessment billing errors effecting many landowners

Dear Daniel and Valerie:

Re: Interest charges for arrearages

In reply to your request for review of the interest charges, please be advised that the charges will be recalculated to reflect a quarterly, rather than an annual basis.

Our calculations had been base on the "or" in the Covenants where it is stated that the assessment shall be paid annually <u>or</u> quarterly. The thinking was that a person elected quarterly payments by paying the first quarterly payment. In the absence of an election, the assessment remained annual.

Upon further review and reflection, it is conceded that the interpretation was subject to confusion so the decision has been made to employ only one interpretation and that is that the interest and penalty will be assessed quarterly for everyone. You will, therefore, receive a new bill.

Your request for documents relating to lawsuit DV-11-114 have been forwarded to our attorneys for reply.

I trust this adequately answers your request.

Very truly yours,

Richard Bolen,

President

See More from Daniel OConnell