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SHELLY BREEDEN

BY

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 RESPONSE FOR DELAY OF ORDERS PENDING RULE 60
MOTION & RESPONSE AGAINST DEFENDANT'S ATTORNEY FEES & COSTS FOR
PROTECTIVE ORDER

Plaintiffs, as a GLA Director & member(s) of the GLA Landowners Association, per Rule 37 and Rule 54 hereby refute "Defendant's Submission of Attorney Fees and Costs...for Protective Order" and file this "Motion Response..." seeking relief as follows from September 14, 2015 Orders that err & fatally prejudice Plaintiffs' due process constitutional rights, which violated a prior contract between the GLA and Plaintiffs.

ARGUMENT

Sept. 2015 Orders lack authority and err (as mistake, inadvertence, neglect) for being contrary to Rule 37(a)(5)(A)(i) for reason a, b, c, and d cited below. (note: Motion Rule 26 says "Rule 37(a)(5) applies to the award of expenses.") Rule 37(a)(5)(A)(i) says "the

court must not order this [attorney fees] payment if:"

(i) the movant filed the motion before attempting in good faith to obtain the discovery without court action;

(ii) the opposing party's response or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

Defendants did not seek discovery, so part (i) does not apply. As for part (ii) and (iii) above, September 2015 Orders failed to find any sanctionable cause or evidence contrary to Plaintiffs affidavit that shows Plaintiffs response or objection to "formal discovery" was "justified" making an award of expenses unjust because:

- a) Per Rule 37 above, Plaintiffs' affidavit and motion reply both state their response or objection was justified as motion for Orders of "formal discovery" is an undue burden, since discovery was completed for this case, and Plaintiffs affidavit shows Orders "formal discovery" requirement is unnecessary to this case, thus Orders are an undue burden to require more discovery, & delays case adjudication fatally prejudices Plaintiffs case rights.
- b) Per Rule 37 above, Plaintiffs' affidavit and motion reply both state their response or objection was justified as motion for Orders of "formal discovery" requirement is in err (as mistake, inadvertence, neglect) since Orders without any stated cause required formal discovery to obtain GLA member documents (cited below) in violation of several state laws (below) and violation of a prior contracts with the GLA called 2012 Settlement Agreement (attached); which prior contract allows Plaintiffs to have all GLA documents "upon request;" which shows good cause per Rule 37 above.
- c) Also, Protective Orders requiring "formal discovery" for member documents, without any evidence arbitrarily and capriciously denies Plaintiffs' due process rights under state law §35-2-907 that says "a member is entitled to inspect and copy... any of the records of the corporation described in 35-2-906(5) if the member gives the corporation written notice"
- d) Also Protective Orders requiring "formal discovery" for member documents, without any evidence arbitrarily and capriciously denies Plaintiffs' contract rights under a prior 2012 settlement agreement; which Protective Orders and motion lack any evidence of any

discovery abuses whatsoever to justify violating this prior 2012 contract with Defendant GLA. Plaintiff affidavit shows, this “2012 settlement agreement (attached) part 1 & 2 was violated (by Orders) that says, “the GLA will provide O’Connells” (Plaintiffs) with “ a current GLA membership list” and “provide O’Connells with all documents as follows to which they are entitled pursuant to the Montana Non-Profit Corporation Act and GLA By-Laws upon request” as follows:

- * **All GLA receipts and expenditures for the last 2 years (including check details and cancelled checks) allowed per GLA Bylaw VI.I.**
- * **Minutes of all GLA meetings since Jan. 2014 (including email meeting minutes as "a record of all actions taken by the members or directors without a meeting, and a record of all actions taken by committees of the board of directors: authorized by 35-2-433(4)” and §35-2-906 & 907 & 2102 settlement agreement.**
- * **The records of all actions approved by the members for the past 2 years; authorized by §35-2-906 & 907 & 2102 settlement agreement..**
- * **Financial statements available to members for the past 3 years: per 35-2-911 & §35-2-906**
- * **List of the names and business or home addresses of GLAs current directors and officers; per §35-2-906 & 907**
- * **Yearly GLA membership list; including all available "authenticated electronic identification” authorized per §35-2-906 & 907 and per 2012 GLA/O’Connell settlement agreement.”**

*

These four reasons (a-d) above and attached affidavit in support all show Sep. 2015 Orders err (as mistake, inadvertence, neglect) and fatally prejudice Plaintiffs absent finding any sanctionable cause or evidence as Rule 37 above requires.

Citing Mt. Supreme Court Opinion regarding contract law ¶28-1-1502 MCA and Kenison v. Anderson, the court said: “novation...requires substitution of a new obligation between the same parties with intent to extinguish the old obligation” (Kenison v. Anderson (1928), 83 Mont. 430, 272 P.2d 679, (subpart 1)).

5) Plaintiff affidavit also shows Sept. 2015 Orders err (as mistake, inadvertence, neglect) and fatally prejudice Plaintiffs without cause for violating another state law ¶28-1-1502 MCA; because GLA offered no evidence of any novation, & since O’Connells obviously never agreed to any such novation, then Sept. 2015 Orders have no authority to “substitute a new obligation” for an old one by requiring O’Connells conduct “formal discovery” to obtain GLA member documents: which Orders have the effect and “intent to extinguish GLA’s old

obligation” under the 2012 settlement agreement. Thus GLA motion lacks authority to deny their contract obligation to provide “O’Connells with all documents” under Ch. 35 law and Bylaws.

- 6) Finally, Rule 37 allows attorney fees/costs only for “Specific Motions” “To Compel a Discovery Response.” Plaintiffs affidavit states, “Most Defendants’ motion issues for Protective Orders had nothing to do with discovery. So Defendants’ other motion issues can not invoke fees and costs associated with discovery per rule 26 & rule 37; which is why they should not and can not be applicable to any award of fees and cost. This makes Defendants award of attorney fees and costs for the entire motion unreasonable,” also because it is well established in Montana statues and high court opinions that judgments must be “reasonable attorney fees and costs.”

Plaintiffs affidavit states, “Brown’s unreasonable fees & costs submitted October 20, 2015 are contrary to local court rule 15 absent fees and costs being filed with the motion pleading; which fatally harmed Plaintiffs chances to defend against such fees & costs; especially since Orders are absent any finding of “undue burden.” This is more proof the Orders granting fees and costs are unreasonable, such such fees and costs were submitted AFTER being granted in violation of local rule 15. (Since Brown had been told about this rule last year, their attorney fees & costs should be DENIED)

Plaintiffs attached affidavit further states:

“Heringer & Cunningham affidavits do not specify what, if anything, generated the 34.9 hours and \$5112.50 motion costs and fees making it impossible for Plaintiffs to wholly confirm or deny if specific costs or fees are “reasonable” (For example they do not say which are costs and which are fees nor specifically how these fees/costs were generated absent any description or absent anything like “review of documents, communication with clients, research, drafting, and revising.”)

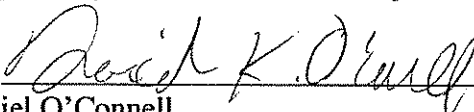
“Thus \$5112.5 amount total is NOT reasonable, because Plaintiffs affidavit also shows several other attorneys find \$2K to be a reasonable amount for Defendants’ motion, not \$5k. Plaintiffs thus object to Defendants \$5,112.50 motion claim; which is unreasonable and well above \$2,000 max. amount identified in affidavit as “reasonable” for one motion costs and fees. Therefore, only about 20% of Defendants’ motion pleadings for protective order had to do with “Discovery” invoking rule 26 & 37 fees and cost; so only about 20% or \$400 is applicable and “reasonable” to any award of motion fees and cost.”

Plaintiffs thus seek to revoke Orders granting "attorney fees and costs" as unreasonable for absence of any evidence or submission of reasonable fees/costs with the motion (as local rule 15 requires); also for lack of any "conclusions of law;" also for absence of sanction findings; and Orders failing to "find the facts specially" for such costs and fees" pursuant to these M.R.Civ.P. Rule 52 requirements.

CONCLUSION

Orders forcing O'Connells conduct "formal discovery" just to receive member documents violates numerous state law and violates prior 2012 contractual rights allowing GLA documents "upon request" or "written request." Sept. 2015 Orders simply have no good cause, no evidence of discovery abuse, no authority to nullify state laws above and prior contract obligations, and no evidence of reasonable attorney costs and fees prior to awarding them to Defendants; all of which shows Plaintiffs' counter-motion "response or objection was substantially justified" and these "circumstances make an award of [attorney] expenses unjust" pursuant to M.R.Civ.P. Rule 37. Plaintiffs therefore seek reversal of Orders, or else Plaintiffs seek delay of Orders per M.R.Civ.P. Rule 54 pending adjudication of a forthcoming Rule 60 Motion appeal of Orders.

Respectfully submitted this 4th day of October, 2015,

By: 
Daniel O'Connell

By: 
Valery O'Connell

Certificate of Service


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

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Plentywood, Mt. 59254

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By: 
Valery O'Connell