

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-014954

07/03/2012

HONORABLE ARTHUR T. ANDERSON

CLERK OF THE COURT
L. Nixon
Deputy

PATSY O TREJO, et al.

STEVEN W CHEIFETZ

v.

SUNLAND VILLAGE COMMUNITY
ASSOCIATION

JASON E SMITH

DONALD A WALL

RULING

The following motions were taken under advisement following oral argument held on April 20, 2012: Plaintiffs' (Patsy O. Trejo and Patricia A. Stein) Motion for Summary Judgment, Defendant, Sunland Village Community Association's ("Sunland") Response to Motion for Summary Judgment, and Plaintiff, Patricia A. Stein's ("Stein") Reply in Support of Plaintiffs' Motion for Summary Judgment. Patsy O. Trejo and Patricia Stein filed their Motion for Summary Judgment jointly, however, between that filing and Plaintiff Stein's Reply, Plaintiff Trejo filed for bankruptcy. Therefore, the Court considers the briefing as to Plaintiff Stein and the Motion for Summary Judgment is stayed as to Plaintiff Trejo. Having considered the briefing and arguments of counsel, the Court issues the following rulings.

I.

Pursuant to Ariz. R. Civ. P. 56, Stein moves the Court to grant summary judgment against Sunland indemnifying her for the legal expenses she incurred in responding to Sunland's removal of Stein from the Sunland Board of Directors ("Board").

Stein was appointed to the Board by a majority vote on April 29, 2011. Stein did not attend the Board meeting in which she was appointed. Rather, the Board members telephoned

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Stein the night of the meeting and asked if she would accept the appointment. Stein, a former three-time Board member, was at first reluctant but accepted the nomination provided the Board followed Sunland's bylaws in regard to her appointment. Several days after the election, two Board members retained Sunland counsel to write Stein a letter challenging Stein's appointment procedure and demanding that she step down as a Board member. Sunland counsel threatened legal action if Stein did not resign within one day.

Stein emailed Sunland's counsel asking why she was being threatened with legal action and requested that Sunland provide her with counsel to evaluate the situation. Sunland's counsel replied that his firm did not represent Stein and that she should get her own counsel. Sunland's bylaws provide that the "[a]ssociation shall defend and save each director and officer harmless from all costs, damages, expenses and fees, including attorneys' fees, resulting from any act, omission, error or negligence of such officer or director, except that which results from gross negligence or from willful misconduct." (Motion for Summary Judgment at 5).

Sunland filed a lawsuit and petition for a temporary restraining order against Stein to challenge her appointment, arguing that the meeting at which Stein was elected was improperly called and noticed. Stein then had to hire her own attorney in order to, amongst other things, send requests that Sunland provide her with counsel as per the bylaws, but Sunland denied those requests. Stein, running out of money to pay her attorney, resigned a few days later.

Stein argues that because she was appointed as a Board member, under the bylaws, Sunland is required to indemnify her for attorney's fees incurred defending herself against Sunland's lawsuit. Stein argues that even if the election process was flawed, she was still a *de facto* Board member and is entitled to invoke the provisions of the bylaws. Sunland contends that Stein was never a Board member because the appointment process was invalid under the bylaws and, therefore, Stein was never entitled to invoke the provision of the bylaws that states that Sunland is required to provide her an attorney. Sunland additionally argues that even if Stein was a *de facto* Board member, her actions in resisting Sunland's demand that she resign constituted gross negligence and willful misconduct and, therefore, her actions are not entitled to indemnification under the bylaws.

II.

Arizona Rule of Civil Procedure 56 provides for summary judgment in favor of the movant "if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). Therefore, "under Rule 56(c), the moving party must come forward with evidence it believes demonstrates the absence of a genuine issue of material fact and must explain why summary judgment should

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be entered in its favor.” *National Bank of Arizona v. Thurston*, 218 Ariz. 112, 115, 180 P.3d 977, 980 (App. 2008). Additionally, if the opposing party cannot respond to the motion for summary judgment by showing evidence that creates a genuine issue of fact on the element in question, the motion for summary judgment should be granted. *Orme School v. Reeves*, 166 Ariz. 301, 310, 802 P.2d 1000, 1009 (1990).

When there are questions surrounding the appointment of an officer, the officer is an “officer *de facto*.” Black’s Law Dictionary defines an officer *de facto* as, “one who is acting under color of right and with apparent authority, but who is not legally a corporate officer.” *Black’s Law Dictionary* 1118 (8th ed. 1999). Arizona law defines an officer *de facto* as one whose election or appointment was void because the officer was not eligible, there was a want of power in the electing body, or by some other defect or irregularity. *New Sun Business Park, LLC v. Yuma County*, 221 Ariz. 43, 48, 209 P.3d 179, 184 (2009). The logic behind this principle is that the public has an interest in the continuous exercise of official duty, and the necessities thereof, and cannot wait until a resolution of the conflicting official’s appointment. *Id.* Under Arizona law, there is no distinction between the acts of an officer *de jure* and an officer *de facto*. *Pass v. Stephens*, 22 Ariz. 461, 469, 198 P. 712, 715 (1921).

To establish gross negligence or willful misconduct, a party must show the existence of conduct that is a different kind of offense than ordinary negligence. *Kemp v. Pinal County*, 13 Ariz. App. 121, 124-25, 474 P.2d 840, 843-44 (1970). “Gross or wanton or willful misconduct is different from ordinary negligence in quality and not degree. A person can be very negligent and still not be guilty of gross negligence.” *Id.* While “[g]ross negligence is generally a question of fact that is determined by a jury,” a trial court may resolve the issue as a matter of law if the party with the burden of proof “fails to produce evidence that is ‘more than slight and [that does] not border on conjecture’ such that a reasonable trier of fact could find gross negligence.” *Armenta v. City of Casa Grande*, 205 Ariz. 367, 373, 71 P.3d 359, 365 (App. 2003), citing *Walls v. Arizona Dep’t of Pub. Safety*, 170 Ariz. 591, 595, 826 P.2d 1217, 1221 (App.1991); see also *Badia v. City of Casa Grande*, 195 Ariz. 349, 988 P.2d 134 (App.1999).

III.

The Court finds that Stein has stated sufficient facts to demonstrate the absence of a genuine issue of material fact and is entitled to summary judgment. Stein, after accepting her appointment to the Board, was protected by the indemnification provision of the Sunland bylaws, whether or not the election was legitimate. If her appointment was invalid, Stein still operated as a *de facto* Board member until she was removed by a proper action by the Board. Therefore, Sunland was required to provide Stein with counsel when legal action was threatened and eventually taken by Sunland’s other Board members. Stein acted in good faith, particularly

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because she accepted the appointment on the condition that the appointment process follow the bylaws.

Sunland's contention that Stein was never a Board member because the appointment process violated the bylaws is misguided. The fact that Sunland felt the need to hire counsel to demand Stein's resignation and eventually took legal action to remove her is evidence that the Board had indeed appointed Stein to the Board. The appointment might not have followed the bylaws, but Stein still operated as a *de facto* Board member and was entitled to counsel when the conflict arose.

Furthermore, Sunland's argument that Stein's actions were grossly negligent or willful misconduct fails as a matter of law. Stein specifically requested that proper steps be taken to appoint her following the guidelines stated in the bylaws. Her request for the assistance of counsel to fight her removal was, therefore, not grossly negligent or willful misconduct. Stein had every right to challenge her removal and was entitled to an attorney by the bylaws.

Based on the foregoing, the Court finds no dispute of material fact that would preclude the entry of judgment as a matter of law for Stein. Following a *China Doll* submission by Stein's counsel, the Court shall consider an award of reasonable attorneys' fees.

IT IS ORDERED granting Stein's Motion for Summary Judgment.

IT IS FURTHER ORDERED that Stein is entitled to reasonable attorneys' fees and costs.

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.