

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

NANDI SEKOU, MARTIAL WEBSTER, and TERRENCE JOSEPH, as members of the VIRGIN ISLANDS BOARD OF EDUCATION, on their own behalf and on behalf of the VIRGIN ISLANDS BOARD OF EDUCATION, Plaintiffs,	)	
	)	
v.	)	SX-17-CV-001
	)	
MARY MOORHEAD, JUDY GOMEZ, And JENNIFER JONES, ESQ., Defendants.	)	ACTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY and PERMANENT INJUNCTION, and DECLARATORY RELEIF, DAMAGES
	)	

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court following a July 28, 2017 hearing on several pending motions,¹ including Defendant Jennifer Jones' Motion for Summary Judgment (Motion). Jones' Motion was originally filed on January 31, 2017 as a Motion to Dismiss. Defendant Judy Gomez joined in Jones' Motion by Notice filed February 22, 2017, supplemented by Supplemental Memorandum of Law in Support, filed February 27, 2017. *Pro se* Defendant Mary Moorhead also joined in the Motion by letter to the Court, received March 28, 2017. Separately, on February 23, 2017, Defendant Moorhead filed a letter of that date, designated "motion for dismissal" (Moorhead Motion), to which Plaintiffs have not responded. By Order entered February 3, 2017, Plaintiffs were required to file their response to Jones' Motion to Dismiss no later than February 21, 2017.

¹ At the hearing, the Court granted the following: 1) Plaintiffs' Motion for Enlargement of Time to File Responses to Defendant Gomez's Pleadings, filed March, 6, 2017; 2) Plaintiffs' Motion for Enlargement of Time to File Reply, filed April 24, 2017; 3) Plaintiffs' Motion for Three Day Enlargement of Time, filed May 3, 2017. The Court also denied the following: 1) Defendant Gomez's Motion for Leave to File Surreply, filed May 9, 2017; 2) Plaintiffs' Motion to Strike Department of Justice's Motion for Leave to File Surreply and Plaintiff's Motion for Sanctions, filed May 12, 2017; 3) Plaintiffs' Motion to Supplement Plaintiffs' Opposition to Defendant Jones' Converted Motion for Summary Judgment, filed June 27, 2017; 4) Plaintiffs' Motion to Disqualify the Department of Justice from Representing Judy Gomez in the Instant Case, filed March 24, 2017; 5) Plaintiffs' Motion to Stay Further Proceedings on the Merits, filed March 23, 2017; 6) Plaintiffs' Motion for an Evidentiary Hearing on Plaintiffs' Motion to Disqualify, filed April 18, 2017; 7) Plaintiffs' Motion to Strike Pleadings filed by Department of Justice on behalf of Defendant Judy Gomez, filed May 1, 2017; 8) Plaintiffs' Motion to Enter Disqualification of the Department of Justice as a Sanction, filed July 27, 2017.

Instead, on February 21, 2017, Plaintiffs filed their Motion to Strike, arguing that Jones' Motion to Dismiss improperly relied on matters outside the pleadings. As the Court noted in its March 2, 2017 Order denying the Motion to Strike, Plaintiffs failed to present any factual or legal basis for striking Jones' Motion, but rather presented grounds for converting the Motion to Dismiss into a Motion for Summary Judgment. Accordingly, the Court converted the Motion and ordered Plaintiff to file a substantive response within twenty-one days. Instead however, Plaintiffs filed, on the date such response was due, their Motion to Stay Further Proceedings, followed the next day by their Motion to Disqualify. The Court issued a third order, entered May 22, 2017, again requiring that Plaintiffs submit their substantive response to Jones' Motion. Plaintiffs' Opposition to Converted Motion for Summary Judgment was filed on June 16, 2017. Jones filed her Reply on June 29, 2017.

Background

Because the matter presently before the Court is derivative of the previous action brought by the same Plaintiffs against Moorhead and Gomez, among others, a brief review of the history of the underlying action is necessary. On February 18, 2016, Plaintiffs filed an action, designated Case No. SX-16-CV-71 (2016 action), alleging that after the technical conclusion of a regularly scheduled Virgin Islands Board of Education (Board) meeting held January 15-16, 2016, the defendants, acting in concert, voted to remove Nandi Sekou and Terrence Joseph as Chair and Vice-Chair of the Board, respectively, in violation of a provision of the Board's Bylaws requiring that all matters to be considered at Board meetings must be included in the official, publicly circulated agenda for that meeting no later than three days in advance. Furthermore, the plaintiffs alleged that following the illegitimate election, the defendants, and Mary Moorhead in particular, had abused their authority by inappropriately interfering with the daily operations of the agency.

By Order entered February 19, 2016, the Court granted the plaintiffs' Motion for Temporary Restraining Order in the 2016 action, and enjoined the defendants from entering into any contracts, taking other action binding upon the Board of Education, or directing the daily management of the office and employees of the Board of Education.

Pursuant to an agreement between the parties, by Order entered March 4, 2016, the Court continued the hearing on Plaintiffs' Motion for Preliminary Injunction scheduled that same day, and extended the Temporary Restraining Order pending a regularly scheduled meeting of the Board to be held March 18, 2016, to vote on the removal of the Chair and Vice-Chair and, if necessary, to elect a new Chair and Vice-Chair. At that meeting on March 18, 2016 — conducted with proper notice of the agenda as required by its Bylaws — the Board voted to remove Plaintiffs Sekou and Joseph from the positions of Chair and Vice-Chair. At that same meeting, Defendant Moorhead was elected to the position of Chair and Defendant Gomez was elected to the position of Vice-Chair. Plaintiffs themselves confirmed that at the Board's March 18, 2016 meeting "all five Defendants [constituting a majority of the Board] voted to remove Plaintiff Nandi Sekou as Chair and Plaintiff Terrence Joseph as Vice-Chair." Finding that the removal of Sekou and Joseph, and subsequent election of Moorhead and Gomez at the March 18, 2016 meeting of the Board were valid and effective under the Bylaws of the Board and pursuant to the applicable provisions of Title 3 V.I.C. §§ 97-98,² and noting that the legitimacy of the meeting was not contested by the plaintiffs, the Court dismissed the complaint as moot. Plaintiffs timely filed their notice of appeal of the 2016 action on June 23, 2016. The appeal was ultimately dismissed for want of timely prosecution by Order of the Supreme Court filed August 9, 2016.

² "The members of the Board shall elect a Chairman and Vice-Chairman from among its number at the first meeting after each [general] election. A Chairman or a Vice-Chairman may be replaced by the members of the Board." 3 V.I.C. § 97(e). "The Board shall adopt rules and regulations for the conduct of its proceedings." 3 V.I.C. § 98(c).

On January 3, 2017, Plaintiffs filed their three count Verified Complaint (Complaint) in this matter. Count I alleges that Defendants Moorhead and Gomez refused to timely call a meeting for the election of new Board officers following the 2016 general election in violation of 3 V.I.C. § 98(a), and seeks declaration of the same in addition to a temporary restraining order compelling the Board to hold such a meeting between January 9 and January 13, 2017 rather than on January 21, 2017, as had been scheduled by Defendants. Complaint ¶¶ 51-2. In Count II, Plaintiffs allege that Defendant Jennifer Jones' representation of the defendants in the 2016 action, including Moorhead and Gomez, was unauthorized and improper. Accordingly, Plaintiffs seek an accounting and disgorgement of all monies paid to Jones in connection with that representation. *Id.* ¶¶ 57-8. In Count III, Plaintiffs allege that they "paid considerable monies and incurred substantial obligations to retain private counsel to vindicate their rights, and those of the Board, in the prior litigation, and they were successful in their efforts, and in that vindication, by obtaining a TRO and an Order Extending the TRO." Plaintiffs further assert that "Defendants, by their actions, and by their outrageous, *ultra vires*, and unauthorized defense of the prior litigation... caused Plaintiffs to expend their personal funds to bring the prior action to vindicate their rights, and those of the Board, thereby damaging Plaintiffs," and seek compensatory, consequential, and punitive damages from all Defendants on that basis.³

Discussion

Summary judgment may be granted where a party demonstrates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.I. R. Civ. P. 56(a). "A party is entitled to judgment as a matter of law when, in considering all of the

³ The Complaint reads "Count III: As to Both Defendants" despite there being three named Defendants. At the hearing on July 28, 2017, Plaintiffs clarified that Count III is meant to apply to all Defendants.

evidence, accepting the nonmoving party's evidence as true, and drawing all reasonable inferences in favor of the nonmoving party, the court concludes that a reasonable jury could only enter judgment in favor of the moving party." *Antilles School, Inc. v. Lembach*, 2016 V.I. Supreme LEXIS 7, at *6-7 (V.I. 2016). The nonmoving party in responding to a motion for summary judgment has the burden to "set out specific facts showing a genuine issue for trial." *Williams v. United Corp.*, 50 V.I. 191, 194-95 (V.I. 2008). A dispute is genuine if the evidence is such that a reasonable trier of fact could return a verdict for the nonmoving party. *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 391-92 (V.I. 2014).

Count II- Accounting and Disgorgement

In her Motion for Summary Judgment, Defendant Jones argues that Plaintiffs lack both the authority and the standing to bring this action "on behalf of the Board" to force the disgorgement of monies paid to Jones by the Board in connection with her representation of the five Board member defendants in SX-16-CV-071. Jones' Motion dedicates four full pages to outlining this argument, yet Plaintiffs' Opposition almost entirely fails to address the issue of standing. Plaintiffs claim that Jones' standing argument is frivolous for two reasons. The first asserts that "with respect to the declaratory and injunctive relief sought [in Count I], the 3 Plaintiffs herein are in precisely the same situation as they were in the 2016 case, where the Court entered a TRO in their favor, and then extended and enlarged it..." Opposition, at 6. The second contends that "with respect to damages [sought in Count III], Nandi Sekou spent a very considerable amount of money in prosecuting the 2016 case, and the other 2 Plaintiffs incurred substantial financial obligations as well." *Id.* at 7.

Plaintiffs' first response, repeated frequently by counsel in various contexts at the July 28, 2017 hearing, is meritless. Any findings of fact or conclusions of law reached by the Court in the

process of issuing the Temporary Restraining Order in the 2016 action were, by nature, provisional and issued *ex parte* in an expedited fashion in order to preserve the *status quo* between the parties. Assertions by counsel that the issuance and extension of such preliminary rulings constitute the equivalent of a final judgment in favor of Plaintiffs on behalf of the Board, thus precluding subsequent review of issues or claims presented therein, are frivolous and without merit. *Appleyard v. Governor Juan F. Luis Hospital & Medical Center*, 61 V.I. 578, 588 (V.I. 2014) (citing *Yusuf v. Hamed*, 59 V.I. 841, 853 (V.I. 2013) (collecting cases)) (“[The] contention that the Superior Court could not deviate from its earlier temporary restraining order findings is without merit. It is well-established that factual findings and conclusions of law made when considering a preliminary matter, such as a motion for a temporary restraining order, are not in any way binding on the court in subsequent proceedings in the same case.”) Plaintiffs’ second argument, by its own terms, applies only to Plaintiffs’ claims for damages. As Plaintiffs present only one claim for damages in their Complaint—Count III for monies expended in prosecuting the 2016 action—Plaintiffs’ Opposition entirely fails to mention or address the issues of authority and standing with respect to Count II.

Authority or capacity to sue is a concept related to, yet separate and distinct from the issue of standing. Standing, in the Virgin Islands, is a doctrine of judicial restraint “reflecting the need of all courts to control the presentation of claims in the litigation to assure full and fair exploration of the issues raised.” *Benjamin v. AIG Ins. Co. of Puerto Rico*, 56 V.I. 558, 564-65 (V.I. 2012). Capacity, by contrast, concerns a litigant’s very power to appear and bring its claims before a court. The capacity, or the lack of capacity, to sue and be sued sometimes derives solely from the status of the litigant, as in the case of a minor, or an adjudicated incompetent. Another species of issues relative to a party’s capacity to sue arises in the context of artificial entities.

Corporations, for instance, are creatures of statute and therefore require statutory authority to sue and be sued. *See* 13 V.I.C. § 32(2). Similarly, various species of unincorporated associations, such as condominium associations, which would otherwise lack the capacity to sue, are granted the power to sue and be sued on behalf of condominium owners under certain conditions by explicit statutory authorization. *See Anthony v. Indep. Ins. Advisors, Inc.*, 56 V.I. 516, 532 (V.I. 2012) (“Section 926 [of Title 28, Virgin Islands Code] gives the Association, despite generally being an unincorporated entity that would not otherwise have the capacity to sue, a limited capacity to sue and be sued on behalf of the owners...”).

Section 21(a)(8) of Title 17 Virgin Islands Code provides that the Virgin Islands Board of Education, established as an independent agency of the Government of the Virgin Islands pursuant to 3 V.I.C. § 97(a), has the authority to “bring court proceedings for enforcement of rights and the collection of accounts...” In turn, “[t]he business which the Board is authorized to transact shall be done at regular or special meetings at which not less than five members are present, *and no act shall be valid unless voted for by an affirmative vote of a majority of the members present*, and a true record made of such votes.” 3 V.I.C. § 98(b). Furthermore, § 97 of Title 3 reiterates the same principle: that “[n]o official action may be taken by a Board unless... by affirmative vote of a majority of its members present.”

Notably, with the exception of limited administrative powers explicitly granted to the Chairman of the Board, the relevant statutes confer no power or authority whatsoever upon individual members of the Board. Rather, the statutory scheme makes clear in multiple provisions that the Board may exercise its enumerated powers only by the majority vote of a quorum of its members. Necessarily then, the power to bring suit on behalf of the Board pursuant to 17 V.I.C. § 21(a)(8) may only be delegated to individual Board members by majority vote.

In Count II of their Complaint, Plaintiffs assert that they, *on behalf of the Board*, are entitled to an accounting and disgorgement of all public monies paid to Defendant Jones in connection with her representation of the defendants in the 2016 action. Complaint ¶ 58. However, Plaintiffs have failed to demonstrate, or even allege, that they were ever authorized, by a majority vote of the Board, to bring this or any other action on its behalf. Accordingly, on its own terms, Plaintiffs' claim for accounting and disgorgement against Defendant Jones must fail as there exists no genuine dispute of material fact on this issue and Defendant Jones is entitled to judgment as a matter of law.

Count II also claims that Plaintiffs, as individual members of the Board, are entitled "to copies of all statements for services issued by Defendant Jones, in connection with the prior litigation, and an accounting of all public funds received by her." *Id.* at ¶ 57. Although Plaintiffs may have an implied right to review records of business conducted by the Board in order to make fully informed decisions in exercising their individual power to vote concerning the business of the Board,⁴ such a right would extend only to a review of records in the possession of the Board of Education. Plaintiffs have failed to present any argument or authority in support of the position that such a right exists at all, let alone that such a right would extend to demands by individual Board members to review records of third parties, such as Defendant Jones, who conducted business with the Board. Plaintiffs have entirely failed to address Defendants' arguments concerning either authority or standing, and the Court will not independently find that any basis for such authority or standing exists. Accordingly, Plaintiffs have failed to demonstrate the

⁴ See, e.g., *Silver v. Pataki*, 96 N.Y.2d 532, 537 (2001) (noting that legislators, by virtue of their power to consider and vote on legislation, have an implied right to challenge in court any action that frustrates or nullifies this power).

existence of any dispute of material fact, and judgment is appropriate as a matter of law. Therefore, Defendant Jones' Motion will be granted as to Count II.⁵

Count III- Costs and Attorney's Fees

In her Supplemental Memorandum of Law in Support of Defendant Gomez's Motion to Dismiss, filed February 27, 2017, Defendant Gomez contends that Count III of the Complaint must be dismissed as it represents nothing more than an attempt to collect costs and attorney fees incurred in the prosecution of the 2016 action in circumvention of the rules governing the award of costs and attorney's fees provided in 5 V.I.C. § 541. Plaintiffs filed no response to Defendant Gomez's Supplemental Memorandum. Additionally, despite the fact that Gomez's Supplemental Memorandum was incorporated into Defendant Jones' converted Motion for Summary Judgment by virtue of Gomez's February 22, 2017 Notice of Joinder, Plaintiffs also failed to address the argument presented in the Supplemental Memorandum in their June 16, 2017 Opposition.

Count III alleges that Plaintiffs are entitled to recover as damages the "considerable monies" paid "to retain private counsel to vindicate their rights, and those of the Board" in their prosecution of the 2016 action. Complaint ¶ 60. Plaintiffs claim that they were "successful in their efforts" in the previous litigation "by obtaining a TRO and an Order Extending the TRO. *Id.* As discussed above, Plaintiffs' frequent reliance on the Court's preliminary findings and conclusions presented in the Temporary Restraining Order is grossly misplaced. Similarly, Plaintiffs' implication that they should somehow be considered the prevailing party in the previous litigation and therefore be awarded their costs and attorney's fees misrepresents both the facts and the

⁵ In their Opposition, Plaintiffs contend that there exist several disputed issues of material fact as to whether Jones' representation of the defendants in the 2016 action was properly authorized under her contract with the Board. Opposition, at 4. However, these issues concerning the merits of Plaintiffs' claim are relevant and material only if Plaintiffs establish that they possess both the standing and authority to bring their claim. As Plaintiffs have failed to demonstrate, or even present argument concerning either their authority or standing, the existence of disputes concerning the merits of Plaintiffs' claim does not preclude entry of summary judgment.

relevant law. Plaintiffs cannot be considered the prevailing party in the 2016 action, as their case was dismissed as moot following a procedurally compliant meeting and vote of the Board electing a new chair and vice chair, conducted by mutual agreement of the parties.

Even if Plaintiffs had prevailed in the previous litigation, however, Count III constitutes nothing more than a motion for costs and fees incurred in that action, filed grossly out of time. When Plaintiffs' counsel was asked at the July 28, 2017 hearing how this claim could be construed as anything other than an untimely motion for costs and attorney's fees in the 2016 action, counsel responded only that the Court, by asking such a question, was improperly assuming that such a cause of action for costs and fees does not exist. This apparent attempt to shift the burden to Defendants or to the Court itself to affirmatively disprove the existence of this purported cause of action constitutes an abrogation of Plaintiffs' obligation to prove their claims. If Plaintiffs seek to present a cause of action not previously recognized in the Virgin Islands or, in this instance, in any other jurisdiction, they must present either a good faith argument for the extension of existing law or the creation of new law in accordance with V.I. R. Civ. P. 11(b)(2), or an argument for the adoption of extra-jurisdictional common law pursuant to the Supreme Court's decisions in *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011) and *Gov't of the Virgin Islands v. Connor*, 60 V.I. 597 (V.I. 2014).

It would seem doubtful that such a proposed common law cause of action could represent the best rule of law for the Virgin Islands when the Legislature has already provided a statutory scheme for the award of costs and fees in 5 V.I.C. § 541 et seq., thereby occupying the field on this issue. However, as Plaintiffs have failed to either demonstrate the existence of such a cause of action in this or any jurisdiction, or to present any argument for the creation of new law, the Court need not resolve whether such a cause of action would be preempted by the statute. In the absence

of any relevant argument, the Court finds that Count III of Plaintiffs' Complaint fails to present a cognizable cause of action and constitutes nothing more than an untimely motion for costs and fees in the 2016 action, which under either V.I. R. Civ. P. 54(d) or the formerly applicable Superior Court Rule 36, should have been filed within thirty days of the entry of final judgment in that matter. Because Plaintiffs' Count III fails to present a cognizable cause of action, there can be no disputes of material fact and Defendants are entitled to judgment as a matter of law. Therefore Defendants' Motion for Summary Judgment will be granted as to Count III.

Count I- Declaratory and Injunctive Relief

Count I of Plaintiffs' Complaint is not discussed in either Defendant Jones' Motion — as Count I is not applicable to Jones — or Defendant Gomez's Supplement thereto because, as became clear at the July 28, 2017 hearing, all parties involved, including the Court, were operating under the impression that the explicit withdrawal of Plaintiffs' request for injunctive relief by Plaintiffs' Informative Motion, filed February 2, 2017, served either as a notice of voluntary dismissal, or at least, a formal recognition that Count I had become moot. Thus, Plaintiffs' Count I is not properly the subject of the pending converted Motion for Summary Judgment. However, the February 23, 2017 letter constituting the Moorhead Motion seeking dismissal, explicitly raised the issue of mootness as to Count I. Plaintiffs have filed no response to the Moorhead Motion which remains pending. However, as the Moorhead Motion did not include a certificate of service, it is not clear that Plaintiffs were ever served with a copy of the Moorhead Motion. Plaintiffs will be granted a period of time within which to file a response, which will be extended to 28 days in light of the hardship recently inflicted upon the District of St. Thomas and St. John by Hurricane Irma.

Therefore, on the basis of the foregoing, it is hereby

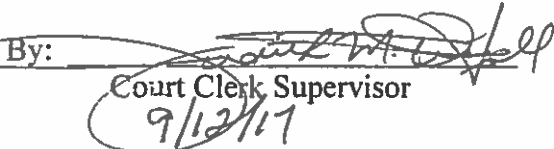
ORDERED that Defendant Jones' converted Motion for Summary Judgment, including the incorporated Supplemental Memorandum of Defendant Gomez, is GRANTED and Counts II and III of Plaintiffs' Complaint are DISMISSED. It is further

ORDERED that Plaintiffs are granted twenty-eight (28) days from the date of entry of this Order within which to respond to Defendant Moorhead's February 23, 2017 letter "motion for dismissal" as to Count I, a copy of which, with exhibits, shall be served upon all parties together with this Order.

DATED: September 12, 2017.

ATTEST:

ESTRELLA GEORGE
Clerk of the Court

By: 

Court Clerk Supervisor

9/12/17

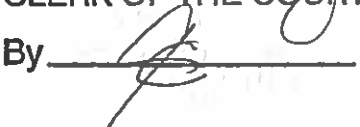
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DOUGLAS A. BRADY, JUDGE

CERTIFIED TO BE A TRUE COPY
This 12th day of SEPT 2017


CLERK OF THE COURT

By  Court Clerk