

CHRISTOPHER DAVID MCKEON

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IN THE

Plaintiff

*

CIRCUIT COURT

v.

*

FOR

CHARING CROSS TOWNHOUSE
CONDOMINIUM, INC., et al.

*

ANNE ARUNDEL COUNTY

Defendants

*

*

Civil Action No: C-08-132379

* * * * *

DEFENDANT CAROL FRANKHOUSER'S MOTION TO DISMISS COMPLAINT

Defendant, Carol Frankhouser ("Frankhouser"), by and through her undersigned counsel, hereby moves to dismiss Plaintiff's Complaint pursuant to Maryland Rule 2-305, and states as follows:

1. This action was filed by Plaintiff, *pro se*, who serves as the Vice President to the Condominium's Board of Directors. Plaintiff filed this action against the Condominium for alleged violations of the Condominium's Bylaws. In this action, Plaintiff seeks equitable and injunctive relief to prevent the Board of Directors from communicating via email and by telephone, for election violations that possibly occurred a number of years ago, for bad faith and for other vague reasons.

2. For reasons more fully explained in her Memorandum in Support of Motion to Dismiss, Plaintiff failed to state a legally recognized cause of action against any Defendant and failed to properly alleged sufficient facts to support any cause of action against any Defendant.

3. For the reasons more fully explained in her Memorandum in Support of Motion for Summary Judgment, Plaintiff's Complaint should be dismissed.

4. Defendant Frankhouser requests a hearing on her Motion.

WHEREFORE, Defendant Frankhouser requests this Court:

- A. Grant Defendant Frankhouser's Motion to Dismiss;
- B. Dismiss Plaintiff's Complaint as to all Defendants;
- C. Hold a hearing on Defendant Frankhouser's Motion to Dismiss; and
- C. Grant Defendant Frankhouser all further and necessary relief

Respectfully submitted,




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Attorneys for Defendant
Charing Cross Townhouse Condominium, Inc.

Certificate of Service

I hereby certify that on this 25th day of August 2008, copies of the foregoing Motion to Dismiss, Memorandum in Support of Motion to Dismiss and proposed order were sent via first class mail, postage prepaid, to:

Christopher McKeon
1120 Soho Court
Crofton, Maryland 21114



Owen J. Curley

CHRISTOPHER DAVID MCKEON

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ORDER

The Court, having considered Defendant Carol Frankhouser's Motion to Dismiss, it is
this ____ day of _____ 2008:

ORDERED, that Defendant Carol Frankhouser's Motion to Dismiss is **granted**;

IT IS FURTHER ORDERED, that the Complaint in this case is hereby dismissed as to
all Defendants.

Judge

CHRISTOPHER DAVID MCKEON

*

IN THE

Plaintiff

*

CIRCUIT COURT

v.

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FOR

CHARING CROSS TOWNHOUSE
CONDOMINIUM, INC., et al.

*

ANNE ARUNDEL COUNTY

Defendants

*

*

Civil Action No: C-08-132379

* * * * *

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Defendant, Carol Frankhouser (“Frankhouser”), by and through her undersigned counsel, hereby moves to dismiss Plaintiff’s Complaint pursuant to Maryland Rule 2-305, files this Memorandum in Support of her Motion to Dismiss Plaintiff’s Complaint and states as follows:

This action was filed by Plaintiff, *pro se*, who serves as the Vice President to the Condominium’s Board of Directors. Plaintiff filed this action against the Condominium for alleged violations of the Condominium’s Bylaws. In this action, Plaintiff seeks equitable and injunctive relief to prevent the Board of Directors from communicating via email and by telephone, for election violations that possibly occurred a number of years ago, for bad faith and for other vague reasons.

As will now be explained, Plaintiff’s Complaint does not contain any causes of action recognized in Maryland, and does not contain sufficient facts to support any potential cause of action recognized in Maryland. For this reason, this Court should dismiss Plaintiffs’ Complaint.

Standard for Motion to Dismiss

In Maryland, a pleading must set forth a claim for relief which includes a clear statement of the facts necessary to constitute a cause of action and a demand for judgment for relief sought.

Md. Rule 2-305. When reviewing a motion to dismiss a complaint for failure to state a claim upon which relief can be granted, a court must "assume the truth of all well-pleaded facts and allegations in the complaint, as well as all inferences that can reasonably be drawn from them." *Morris v. Osmose Wood Preserving*, 340 Md. 519, 531 (1995). The standard by which a court reviewing a complaint for legally sufficient facts is "in considering the legal sufficiency of [a] complaint to allege a cause of action . . . we must assume the truth of all relevant and material facts that are well pleaded and all inferences which can be reasonably drawn from those pleadings." *Sharrow v. State Farm Mutual Ins. Co.*, 306 Md. 754, 768 (1986). "Moreover, in determining whether a petitioner has alleged claims upon which relief can be granted, "[t]here . . . a big difference between that which is necessary to prove the [commission of a tort] and that which is necessary merely to allege [its commission] . . . and, when that is the issue, the court's decision does not pass on the merits of the claims; it merely determines the plaintiff's right to bring the action." *Lloyd v. GMC Corp.*, 397 Md. 108, 121-122 (2007) (citing *Sharrow v. State Farm Mutual Ins. Co.*, 306 Md. at 770 and *Figueiredo-Torres v. Nickel*, 321 Md. 642, 647 (1991)). Finally, the court must view all well-pleaded facts and the inferences from those facts in a light most favorable to the non-moving party. *Lloyd*, 397 Md. at 122.

Under Maryland Rule 2-322(b)(2), a defendant may seek a dismissal on the ground that the complaint fails "to state a claim upon which relief can be granted." When moving to dismiss a defendant is asserting that, even if the allegations of the complaint are true, the plaintiff is not entitled to relief as a matter of law. *Hrehorovich v. Harbor Hosp. Ctr.*, 93 Md. App. 772, 784 (1992). Thus, in considering a motion to dismiss for failure to state a claim, the court examines only the sufficiency of the pleading. *Id.* "The grant of a motion to dismiss is proper if the complaint does not disclose, on its face, a legally sufficient cause of action." *Id.* at 785.

Argument

I. The Complaint fails to state sufficient facts to support a cause of action or the requested relief.

While Maryland Courts do not require technical forms of pleading, the pleading still must contain sufficient facts as may be necessary to show that the plaintiff is entitled to relief. *See* Maryland Rule 2-305. The purpose of the pleading rules is to ensure "that parties ... may be mutually apprised of the matters in controversy between them." *Pearce v. Watkins*, 68 Md. 534, 538 (1888). In *Scott v. Jenkins*, 345 Md. 21, 27 (1997), the Court of Appeals outlined the policy of pleading rules in Maryland pleading plays four distinct roles in our system of jurisprudence: it (1) provides notice to the parties as to the nature of the claim or defense; (2) states the facts upon which the claim or defense allegedly exists; (3) defines the boundaries of litigation; and (4) provides for the speedy resolution of frivolous claims and defenses. *Scott v. Jenkins*, 345 Md. 21, 27 (1997).

These pleading rules apply to Complaints that seek equitable relief. *LaSalle Bank, N.A. v. Reeves*, 173 Md. App. 392, 412-413 (2007). Accordingly, all pleadings should allege in clear language every element necessary to entitle the complainants to equitable relief. *Bartlett v. Dep't of Transp.*, 40 Md. App. 47, 52 (1978).

In this case, Plaintiff fails to include sufficient facts to support his requested relief. In the Complaint, Plaintiff include a reference to a variety of "unlawful acts," "violations of the law" and "improper actions" committed by the Defendants, however, Plaintiff fails to identify any specific incident to which he refers and which forms the basis of his Complaint. Complaint, ¶21, 25, and 27. Plaintiff does not attribute any of these vague references of misconduct to any particular Defendant. *See* Complaint, ¶ 7. Further, Plaintiff fails to allege any dates, specific facts surrounding any of the alleged misconduct or any specific fact that would enable Defendant

Frankhouser to even formulate any response to the allegations in the Complaint. Instead, Plaintiff relies upon discovery to “show that in numerous and routine instances” Defendants committed some wrong acts. Complaint, ¶27. In short, Plaintiff’s Complaint does not contain any single fact to support any allegations that Defendants, including Defendant Frankhouser, did anything actionable.

Similarly, Plaintiff’s requested relief is not supported by any facts contained in the Complaint. Plaintiff requests the Court remove individual Defendants from the Board of Directors, but Plaintiff does not state what provisions of the “governing laws” those Defendants violated, or even identify the “governing law.” *See* Complaint, ¶G. Similarly, Plaintiff requests that this Court enjoin the Defendants from meeting to conduct any business in pursuit of governing the Condominium; however, Plaintiff fails to offer or even give one explanation as to why the Court should grant this extraordinary relief. *See* Complaint, ¶A. Plaintiff requests that the Court order Defendants to produce meeting minutes; however, Plaintiff does not allege that the minutes have been requested and refused. *See* Complaint, ¶ 3, 10. Finally, Plaintiff requests that the Court “grant summary judgment” on all counts, but fails to allege any facts that would support this action. *See* Complaint, ¶ 13.

II. Plaintiff’s Count I – “Ultra Vires Acts” Should Be Dismissed

Plaintiff’s Complaint, which raises as its first count a claim of “Ultra Vires,” should be dismissed for two main reasons. First, “Ultra Vires” is not a cause of action upon which relief can be granted in Maryland; rather, it is an affirmative defense. Second, even if Plaintiff’s count of “Ultra Vires” could be considered to raise a cause of action recognized by the Maryland courts, the Court of Special Appeal has specifically instructed that, as by-laws are essentially

separate and distinct from, and form no part of, a corporation's charter, by-laws cannot make an *ultra vires* act.

A. The Amended Complaint Should be Dismissed Because the Count I Does Not Articulate a Recognized Cause of Action.

Initially, Maryland jurisprudence does not feature a recognized cause of action called “*Ultra Vires*.” While Maryland Rules governing pleadings do offer some insight into the significance of “*ultra vires*” acts, “*ultra vires*” is addressed as an affirmative defense, not a claim for relief. Maryland Rule 2-323(g)(16) specifically identifies “*ultra vires*” as an affirmative defense which must be asserted in an answer to a complaint, lest it become waived by the answering defendant. Likewise, West’s Maryland Law Encyclopedia, Volume 18 – Pleading § 21 lists “*ultra vires*” as an affirmative defense which must be raised upon a defendant’s first pleading or it will be vulnerable to waiver.

In this same way, the Annotated Code of Maryland – Corporations and Associations § 1-403 addresses the “Defense of *ultra vires*.” That Code section explains that the general rule of the defense is that “[u]nless a lack of power or capacity is asserted in a proceeding described in this section, an act of a corporation or a transfer of real or personal property by or to the corporation is not invalid or unenforceable solely because the corporation lacked the power or capacity to take the action.” See *O'Donnell v. Sardegna*, 646 A.2d 398, 406, 336 Md. 18, 34 (1994) (discussing defense of *ultra vires*). As Complaint’s Count I raises the claim of “*ultra vires*,” which is not a recognized cause of action, Count I should be dismissed.

B. Even if ‘Ultra Vires’ Could Be Considered a Recognized Cause of Action, Maryland Courts Have Plainly Held that Bylaws Cannot Make an *Ultra Vires* Act.

Even if a count captioned “*Ultra Vires*” could be considered to raise a cognizable cause of action, that would not be sufficient to save Count I of the Complaint because the facts of this case, even when viewed in the light most favorable to Plaintiff, do not support a claim upon which relief can be granted. The Complaint vaguely alleges that Defendants did not act in accordance with the Bylaws of the Condominium and thus, Plaintiff plead, this Court should grant him equitable relief. However, it is beyond question that Maryland Courts have held that an alleged violation of corporate by-laws does not constitute an *ultra vires* act. Thus, the facts surrounding the alleged infraction cannot establish an actionable *ultra vires* act and Count I of the Complaint should be dismissed.

The Maryland Court of Appeals has defined “*ultra vires*” as “denoting some act or transaction on the part of a corporation which, although not unlawful or contrary to public policy if done or executed by an individual, is yet beyond the legitimate powers of the corporation as they are defined by the statutes under which it is formed or which is applicable to it, by its charter or incorporation paper.” *City of Frederick v. Pickett*, 897 A.2d 228, 233, 392 Md. 411, 420 (2006) (citing, *Pennsylvania R. Co. v. Minis*, 120 Md. 461, 488, 87 A. 1062, 1072 (1913)). The definition of *ultra vires* bears no relevance to a corporation’s by-laws, which remain distinct from a corporate charter. Thus, one cannot commit an *ultra vires* act merely by an alleged infraction of corporate by-laws.

“An *ultra vires* act ‘is one not within the express or implied powers of the corporation as fixed by its charter, the statutes, or the common law.’ W. Fletcher, *Cyclopedia of the Law of Private Corporations*, § 3399 (rev. perm. ed. 1978). As by-laws ‘are essentially separate and distinct from, and form no part of, the corporation’s charter.’ *id.* at § 4167 (rev. perm. ed. 1966), ‘[b]y-laws cannot make

an act *ultra vires*’ *Id.* at § 3436 (rev. perm. ed. 1978).”
Greenbelt Homes, Inc. v. Nyman Realty, Inc., 426 A.2d 394, 403 ftnt. 4, 48 Md. App. 42,
57 (1981).

Here, the Count I alleges infractions of the Condominium By-laws, and sets forth selected excerpts from same. However an alleged infraction of corporate by-laws, without more, is insufficient to rise to the level of an *ultra vires* act according to Maryland jurisprudence. Even if ‘*Ultra Vires*’ could be considered a recognized cause of action in the Maryland courts, the facts of this matter could never support any such claim.

II. Count II through XI Should Be Dismissed Because They Fail to State a Cause of Action.

Count II through XI of the Complaint should be dismissed because none of these counts present a recognized cause of action in Maryland. As will now be explained, each of these counts fails to properly plead a cause of action against the Defendants:

A. Count II “Abandonment of Fiduciary Duty”: There is not a cause of action in Maryland for “abandonment of fiduciary duty.” Count II does not claim that Defendants breached their duty, thus committing negligence, or acted in a manner to breach their fiduciary duty. *See* Complaint, ¶24 and 25. Further, Plaintiff does not cite to one instance where Defendants abandoned their fiduciary duties. *Id.* Thus, Count II alleges a cause of action not recognized by Maryland courts and is not supported by the facts plead. Accordingly, Count II should be dismissed.

B. Count III “Elections and Terms of Office”: There is not a cause of action in Maryland for “elections and terms of office.” Count III does not claim that Defendants breached any particular By-law or failed to hold elections, but rather makes vague references to voting and voting procedures. *See* Complaint, ¶27 and 28. Further, Plaintiff does not cite to one instance

where an improper election occurred. *Id.* Thus, Count III alleges a cause of action not recognized by Maryland courts and is not supported by the facts plead Accordingly, Count III should be dismissed.

C. Count IV “Vacancies and Removal of Directors”: There is not a cause of action in Maryland for “vacancies and removal of directors.” Plaintiff does include two references in Count IV of “misinforming directors” and removal of a director by a majority vote; however, Plaintiff fails to allege that those incidents violated the By-laws or were in any way improper. Further, the two incidents cited by Plaintiff did not involve the Plaintiff, and so, Plaintiff obviously lacks standing to bring any claim. Accordingly, Count IV should be dismissed.

D. Count V “ Open Meetings”: There is not a cause of action in Maryland for “open meetings.” In Count V, Plaintiff appears to argue that the Board of Directors cannot conduct closed meetings; however, the Maryland Condominium Act specifically permits a condominium’s board of directors to conduct closed meetings. Md. REAL PROPERTY Code Ann. § 11-109.1 (2008). Accordingly, Count V should be dismissed.

E. Count VI “Calling Unauthorized Meetings”: There is not a cause of action in Maryland for “calling unauthorized meetings.” In Count VI, Plaintiff appears to argue that Defendants improperly rescheduled a meeting of the Board of Directors; however, Plaintiff fails to identify which By-law, if any, was violated by this rescheduling of a regular Board meeting. See Complaint, ¶¶ 36 and 37. Accordingly, Count VI should be dismissed.

F. Count VII “Voting by Email, Telephone and Private Conversations”: There is not a cause of action in Maryland for “voting by email, telephone and private conversations.” In Count VII, Plaintiff appears to argue that voting on any Condominium business must take place only by a vote with voters being physically present. The Maryland Condominium Act allows for

the electronic transmission of notice, as well as the electronic transmission of votes or proxies. *See* Md. REAL PROPERTY Code Ann. § 11-139.1, 139.2 (2008). Accordingly, Count VII should be dismissed.

G. Count VIII “Director Terms of Office”: There is not a cause of action in Maryland for “director terms of office.” In Count VIII, Plaintiff appears to argue that a member of the Board of Directors was improperly removed, but Plaintiff fails to identify which By-law, if any, was violated by this action, or even how that By-law was violated. *See* Complaint, ¶ 42 and 43. Accordingly, Count VIII should be dismissed.

H. Count IX “Record Keeping”: There is not a cause of action in Maryland for “record keeping.” In Count IX, Plaintiff appears to argue that Defendants failed to maintain records, but then admits that Defendants maintained records; Count IX simply does not make any sense. *See* Complaint, ¶45-47. Accordingly, Count IX should be dismissed.

I. Count X “Petition to Audit”: It is undisputed that the Maryland Condominium Act provides for an audit on request of at least 5 percent of the units. Md. REAL PROPERTY Code Ann. § 11-116 (2008). In Count X, Plaintiff failed to state whether 5 percent of the units requested such an audit be conducted. Instead, it appears that petitioners removed their names from the audit petition, which apparently resulted in less than 5 percent of the units requesting an audit. *See* Complaint, ¶49. Accordingly, Count X should be dismissed.

J. Count XI “Rules and Regulations and Covenant Enforcement”: There is not a cause of action in Maryland for “rules and regulations and covenant enforcement.” In Count XI, Plaintiff appears to argue that certain actions taken by the Board with respect to enforcement of the By-laws was improper; however, Plaintiff fails to identify any specific action and fails to

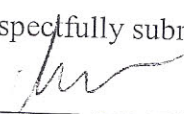
include identify by By-law, if any, were violated. See Complaint, ¶51 and 52. Accordingly, Count XI should be dismissed.

K. Count XII “Actions in Bad Faith”: Defendant believes that Plaintiff is actually referring to Md. INSURANCE Code Ann. § 27-303 (2008), the Maryland’s “failure to act in good faith statute.” Those provisions of the Insurance Article simply do not apply to this situation, as that statute governs civil complaints filed by an insured against its property and casualty insurance provider. See Md. INSURANCE Code Ann. § 27-303 (2008), *et seq.* Other than this statute, Maryland does not have a “bad faith” cause of action. Accordingly, Count XII should be dismissed.

Conclusion

For the reasons stated above, Plaintiff’s Complaint should be dismissed. Plaintiff failed to articulate sufficient facts to make a *prima facie* case against any Defendant. Most of Plaintiff’s causes of action are not recognized in Maryland and many of Plaintiff’s causes of action are barred by statute. In short, Plaintiff’s Complaint is simply insufficient to maintain any legal action against any Defendant.

Respectfully submitted,



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