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14 MILT JOHNS

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

JAN 06 2011

ALAN CARLSON, Clerk of the Court

A. Carlson
BY *F. IBARRA*

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 FOR THE COUNTY OF ORANGE

13 CENTRAL JUSTICE CENTER

BY FAX

14 THIRD LAGUNA HILLS MUTUAL, a
15 California non profit corporation,

16 Plaintiff,

17 v.

18 PROFESSIONAL COMMUNITY
19 MANAGEMENT, INC., a California
20 Corporation, also known as PCM; MILT JOHNS,
21 an individual; JANET PRICE, an individual; and
22 DOES 1 to 20, inclusive,

23 Defendants.

CASE NO. 30-2010-00380231-CU-BT-CJC

CIVIL - UNLIMITED

Assigned for All Purposes to:
Hon. Kirk H. Nakamura
Dept. C-8

**DEFENDANT MILT JOHNS' REPLY IN
SUPPORT OF DEMURRER TO PLAINTIFF
THIRD LAGUNA HILLS MUTUAL'S FIRST
AMENDED COMPLAINT**

Date: January 13, 2011
Time: 2:00 p.m.
Dept.: C-8

Action Filed: June 10, 2010
Trial Date: None Set

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 Plaintiff Third Laguna Hills Mutual's ("Plaintiff") Opposition to Defendants Professional
5 Community Management ("PCM") and Janet Price's Demurrer to First Amended Complaint
6 ("Opposition") fails to address the core deficiencies raised by Defendants PCM and Price in their
7 Demurrer and in Milt Johns' ("Defendant Johns") Joinder to that Demurrer.¹ In particular, Plaintiff
8 fails to provide compelling authority supporting how it can maintain a cause of action for elder abuse
9 based on allegations that the Defendants purportedly took money from the corporation, not from any
10 individual elder. In addition, while Plaintiff relies on California Civil Code section 1368.3 to confer
11 standing, Plaintiff presents no compelling argument for how Plaintiff's Bylaws or CC&Rs, or the
12 Management Agreements between Third Laguna Hills Mutual and PCM actually confer standing on
13 Plaintiff or otherwise vitiate the statutory requirements of the elder abuse laws. In short, Plaintiff is
14 attempting to improperly bootstrap an elder abuse claim onto what amounts to, at best, a breach of
15 contract claim. Accordingly, Defendants' Demurrer should be sustained and Plaintiff's elder abuse
16 claim dismissed with prejudice.

17 **II.**

18 **ARGUMENT**

19 **A. Neither Plaintiff Nor Any Individual Elder Has Standing To Pursue An Elder**
20 **Abuse Claim Against Defendants Under The Facts Alleged**

21 Plaintiff's Opposition fails to directly address the most fatal flaw in its elder abuse claim –
22 namely that the money purportedly taken by the Defendants was that of a corporation, not any
23 individual elder. Simply put, in order to maintain a claim for elder abuse, Plaintiff must demonstrate
24 that the Defendants took money belonging to "an elder or dependent adult." *See* Cal. Welf. & Inst.

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26
27 ¹ On December 16, 2010, Defendant Johns filed a Joinder in the Demurrer of PCM and Price,
28 consistent with the Order on Stipulation for Second Extension of Time for Defendant Milt
Johns to File a Response to Plaintiff's First Amended Complaint, entered on December 9,
2010.

1 Code § 15610.30(a). Here, Plaintiff alleges that the money purportedly taken by Defendants
2 belonged to Third Laguna Hills Mutual, not any individual elder. FAC at 3:23, 11:1-3. Because
3 Plaintiff is not an "elder," it has no standing to sue for financial elder abuse.

4 In addition, because the money purportedly taken does not belong to any individual elder, but
5 rather to the corporation, Plaintiff cannot maintain its elder abuse claim in a representative capacity
6 either. *See, e.g., Property Owners of Whispering Palms, Inc. v. Newport Pacific, Inc.*, 132 Cal. App.
7 4th 666, 672-673 (2005) ("an association has standing to bring suit on behalf of its members when . .
8 . *its members would otherwise have standing to sue in their own right . . .*") (Emphasis added).
9 Here, the individual elders do not have standing to sue "in their own right" because the money
10 allegedly taken does not belong to them individually.

11 Instead of directly addressing this fatal flaw in its elder abuse claim, Plaintiff asks the Court to
12 grant it standing based on *Estate of Lowrie*, 118 Cal. App. 4th 220 (2004). Plaintiff argues that
13 *Estate of Lowrie* gives the Court broad authority to grant standing even where the required *statutory*
14 elements of an elder abuse claim are not met. Plaintiff's argument lacks merit.

15 *Estate of Lowrie* addressed standing in the context of section 15657.3 of the Welfare and
16 Institutions Code. Through section 15657.3, the legislature sought to grant standing to personal
17 representatives or successors of a *deceased* elder or dependent adult. *See id.* at 833. *Estate of Lowrie*
18 addressed whether, under section 15657.3, the legislature intended to confer standing on the
19 beneficiary of the trust of the decedent as a "successor representative" of the decedent's estate under
20 section 15657.3. In that particular scenario and under that particular standing statute, the court found
21 that the beneficiary had standing to pursue an elder abuse claim. *Estate of Lowrie* does not, as
22 Plaintiff suggests, grant the Court broad authority to confer standing outside the statutory elder abuse
23 scheme imposed by the Legislature – which is precisely what Plaintiff is asking the Court to do here.

24 Notably, if the Court were to accept Plaintiff's argument it would lead to untenable results.
25 For example, if courts were allowed to confer standing even when the statutory requirements of an
26 elder abuse claim are not met, it would result in courts taking on a quasi-legislative role – a role that
27 is not constitutionally appropriate. Moreover, such precedent would create an unmanageable
28 situation whereby nearly any third party, who alleges even an attenuated connection to an elder, could

1 potentially bring and maintain a claim for elder abuse depending on whether the court, not the
2 legislature, thought it proper to confer standing. That is not good policy and not a proposition
3 supported by the court in *Estate of Lowrie*.

4 In short, Plaintiff has failed to allege a key element of its *statutory* elder abuse claim, namely
5 that the Defendants purportedly took money from an individual elder (as opposed to a corporation).
6 As such, Plaintiff has not and cannot state a claim for financial elder abuse and Defendants' Demurrer
7 should be sustained.

8 **B. Plaintiff's Amended Allegations Do Nothing To Remedy The Flaw In Its Elder**
9 **Abuse Claim**

10 In a last-ditched effort to create standing where none exists, Plaintiff contends it has standing
11 pursuant to California Civil Code section 1368.3 to enforce governing documents including the
12 association's Bylaws, CC&Rs and the Management Agreements between Plaintiff and PCM.
13 Plaintiff's argument that section 1368.3 supports Plaintiff's standing in this case, however, lacks
14 merit.

15 First, none of the Defendants, including Defendant Johns, are parties to or contractually
16 bound by the Bylaws and/or CC&Rs. Moreover, none of the Defendants are members of Third
17 Laguna Hills Mutual. Plaintiff cannot assert a claim for enforcement of the Bylaws and CC&Rs
18 against third parties. *See, e.g.*, 12 Witkin, Summary of California Law 10th (2005) Real Prop., § 105
19 ("association and homeowner may enforce governing documents against each other"); Cal. Civ. Code
20 § 1354 (documents "may be enforced by the association against an owner of a separate interest or by
21 an owner of a separate interest against the association.").

22 Second, as to the Management Agreements, there is no language or authority cited by Plaintiff
23 for the proposition that the Management Agreements grant Plaintiff standing to pursue statutory elder
24 abuse claims against Defendants. If the Court were to construe the broad language cited by Plaintiff
25 as *carte blanche* for Plaintiff to bring any type of tort claim against Defendants, then the Court would
26 be opening a pandora's box of potential lawsuits. Indeed, Plaintiff's broad reading of the phrase
27 "enforcement of governing documents" would essentially grant associations standing to bring any
28 claim on behalf of its members against third parties, no matter how attenuated, so long as it could

1 establish some link or argument as to how the claim was seeking enforcement of documents relating
2 to the governance of the association. That is not the intent of section 1368.3, which deals with claims
3 relating to management and maintenance of the common areas or separate interests. Plaintiff has
4 cited nothing which suggests that section 1368.3 was intended to grant associations broad standing to
5 institute potential tort claims where they would otherwise lack standing.

6 Finally, to the extent Plaintiff has any claims based on the Bylaws, CC&Rs or Management
7 Agreement, they are in the nature of breach of contract, and cannot and do not create a claim for the
8 tort of elder abuse. This is particularly true considering that Plaintiff is seeking to enforce rights
9 created solely through its contract with PCM relating to the management of the corporation's funds.
10 In that regard, Plaintiff already has a claim for breach of contract against PCM relating to the
11 Management Agreements. Plaintiff simply cannot bootstrap a tort claim onto its breach of contract
12 claim – particularly one that fails to comply with the mandates of the elder abuse statutes. *See, e.g.,*
13 *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal 4th 503, 515 ("Conduct amounting to a
14 breach of contract becomes tortious only when it also violates an independent duty arising from
15 principles of tort law."); Cal. Welf. & Inst. Code § 15610.30(a) (claim for financial elder abuse where
16 money taken from "an elder or dependent adult"); Cal. Judicial Council Civil Jury Instructions 3100,
17 Directions for Use ("This instruction may be given in cases brought under the Elder Abuse and
18 Dependent Adult Civil Protection Act by *the victim of elder financial abuse, or by the survivors of*
19 *the victim.*") (Emphasis added).

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III.

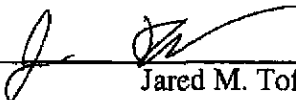
CONCLUSION

Plaintiff has failed to demonstrate that it can properly allege a claim for elder abuse. Because Plaintiff has confirmed that the funds allegedly taken by Defendants were funds of the corporation, and not an individual elder, it is clear that Plaintiff cannot assert a claim for financial elder abuse. As a result, Defendant Johns respectfully requests that the Court sustain Defendants' Demurrer without leave to amend.

DATED: January 6, 2011

LAW OFFICES OF DARREN J. CAMPBELL, APC
DARREN J. CAMPBELL

FINLAYSON WILLIAMS TOFFER
ROOSEVELT & LILLY LLP
JARED M. TOFFER

By:  _____
Jared M. Toffer

Attorneys for Defendant
MILT JOHNS

1 **CERTIFICATE OF SERVICE**

2 I am employed in the County of Orange, State of California; I am over the age of eighteen years and
3 am not a party to this action; my business address is 15615 Alton Parkway, Suite 250, Irvine, California
92618, in said County and State. On **January 6, 2011**, I served the following document(s):

4 **DEFENDANT MILT JOHNS' REPLY IN SUPPORT OF DEMURRER TO PLAINTIFF THIRD**
5 **LAGUNA HILLS MUTUAL'S FIRST AMENDED COMPLAINT**

6 on the parties stated below by the following means of service:

7 **Counsel for Plaintiff:**

8 **Jeffrey M. Cohon, Esq.**
9 **Henry Nicholls, Esq.**
10 **John T. McDowell, Esq.**
11 **COHON & POLLAK, LLP**
12 **1999 Avenue of the Stars, Suite 1100**
13 **Los Angeles, CA 90067**
14 **Facsimile: 310.231.4610**

7 **Counsel for Defendants Professional Community**

8 **Management and Janet Price:**
9 **Paul E. Van Hoomissen, Esq.**
10 **Jeff J. Astarabadi, Esq.**
11 **MUCH SHELIST DENENBERG AMENT &**
12 **RUBENSTEIN, P.C.**
13 **2 Park Plaza, Suite 1075**
14 **Irvine, CA 92614**
15 **Facsimile: 949.385.5355**

16 _____ (U.S. MAIL): I placed a true copy of the above-mentioned document(s) in a sealed envelope
17 addressed as indicated above, on the above-mentioned date. I am familiar with the firm's practice of collection
18 and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in
19 the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if the
20 postal cancellation date or postage meter date is more than one day after date of deposit for mailing in the
21 affidavit.

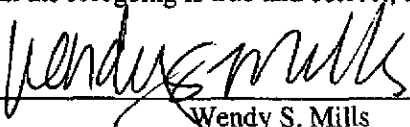
22 (OVERNIGHT MAIL): I placed a true copy of the above mentioned document(s) in a sealed
23 overnight envelope or package with delivery fees paid or provided for, addressed to the person(s) as indicated
24 above, on the above-mentioned date, and I deposited same in a box or other facility regularly maintained by
25 that overnight delivery service or delivered same to an authorized courier or driver authorized by the overnight
26 delivery service to receive documents.

27 _____ (FACSIMILE): I caused the above-mentioned document(s) to be transmitted by facsimile machine to
28 the parties and numbers indicated above, on the above-mentioned date, pursuant to Rule 2.306. The facsimile
machine I used complied with Rule 2.306 and no error was reported by the machine. Pursuant to Rule 2.306, I
caused the machine to print a transmission record of the transmission, a copy of which is maintained by this
office.

_____ (PERSONAL SERVICE): I provided a true copy of the above-mentioned document(s) to a messenger
for personal delivery to each person named above, at the address(es) shown above, before 5:00 p.m. on the
above-mentioned date.

_____ (ELECTRONIC MAIL): I caused the above-mentioned document(s) to be transmitted electronically
to the e-mail address of the addressees indicated above. I am readily familiar with this firm's Microsoft
Outlook electronic mail system and each such document was duly served electronically on the above-
mentioned date, and the transmission was reported as complete and without error.

I am employed in the office of Jared M. Toffer, a member of the bar of this Court, and the foregoing
document(s) was/were printed on recycled paper. I declare under penalty of perjury under the laws of the
State of California and the United States of America that the foregoing is true and correct, and that this
declaration was executed on **January 6, 2011**.



Wendy S. Mills