

STATE OF NORTH CAROLINA
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
22 CVS 11238

HENRY ATKINSON and JANE
ATKINSON,

Plaintiffs,

v.

LEXINGTON COMMUNITY
ASSOCIATION, INC.,

Defendant/
Third-Party
Plaintiff,

v.

DARRIN L. RANKIN; HORACE
BRYAN; and BRYAN AND
ASSOCIATES REAL ESTATE, LLC,

Third-Party
Defendants.

**ORDER AND OPINION ON
THIRD-PARTY DEFENDANT DARRIN
L. RANKIN'S MOTION FOR PARTIAL
JUDGMENT ON THE PLEADINGS**

Law Firm Carolinas, by Harmony W. Taylor, and Clawson and Staubes, LLC, by Jeremy S. Foster, for Third-Party Plaintiff Lexington Community Association, Inc.

Villmer Caudill, PLLC, by Bo Caudill, for Third-Party Defendant Darrin L. Rankin.

Dickie, McCamey & Chilcote, P.C., by Garry Davis, Michele Eagle, and Bridget Baranyai, for Third-Party Defendants Horace Bryan and Bryan and Associates Real Estate, LLC.

Conrad, Judge.

1. In February 2022, Henry and Jane Atkinson signed a contract to buy a home owned by Lexington Community Association, Inc. ("Association"). When the sale fell through, the Atkinsons sued the Association to recover their earnest money and diligence costs. This simple claim for breach of contract had a cascade effect. The

Association blamed the failed sale on its president, Darrin Rankin, and asserted third-party claims against him and the real estate agents that he hired to list the home. Rankin, in turn, blamed the Association's lawyers for failing to clear title to the property and asserted a so-called "fourth-party claim" for malpractice against them. He also counterclaimed against the Association.

2. Much of this free-for-all has sorted itself out. The Atkinsons are no longer in the case, having settled with the Association. (*See* ECF No. 71.) Rankin, too, has settled his claim against the Association's lawyers. (*See* ECF No. 66.) But the litigation between the Association and Rankin goes on, and their claims and counterclaims are the subject of this dispute.

3. The Association tells a story of a board member gone rogue. As alleged, the home that the Atkinsons tried to buy was a rental property, which the Association leased to tenants and had no plans to sell. Without board approval, Rankin canceled the lease and put the home up for sale. The Association believes that he did so for personal gain. Rankin, who works as a real estate agent, hired his employer and a colleague to handle the listing and supposedly arranged to take part of the commission for himself. Later, when the Atkinsons backed out because the Association could not convey clear title, Rankin refused to return their earnest money. Based on these allegations, the Association claims that Rankin engaged in self-dealing and breached his fiduciary duties. (*See* Ass'n Third-Party Compl. ¶¶ 11–14, 16–18, 23–26, 40, 42, 46, ECF No. 4.)

4. Rankin insists that the Association never should have sued him, both because its allegations are false and because it had no authority to do so under its governing declaration. The Association's accusations, he alleges, have ruined his reputation. He asserts counterclaims for defamation, breach of contract, and declaratory judgment. (See Rankin Countercl. ¶¶ 14, 15, 18, 23, 24, ECF No. 13.)

5. After the Association replied to the counterclaims, Rankin moved for partial judgment on the pleadings under Rule 12(c) of the North Carolina Rules of Civil Procedure. (See ECF No. 54.) His motion, which is fully briefed, is limited to the Association's third-party claims and his counterclaim for declaratory judgment. The Court held a hearing on 15 May 2023. The motion is ripe for disposition.

6. "A motion for judgment on the pleadings is the proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Ragsdale v. Kennedy*, 286 N.C. 130, 137 (1974). The Court may "consider documents which are the subject of a plaintiff's complaint and to which the complaint specifically refers even though they are presented by the defendant." *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 204 (2007) (citation and quotation marks omitted).

7. The premise of Rankin's motion is that the Association lacked authority to sue him. He points to a provision in the declaration that gives the Association's members a say in deciding whether to sue. The provision states broadly that "[n]o judicial or administrative proceeding shall be commenced or prosecuted by the Association unless approved by" 75% of its members, but it goes on to exempt a few

types of proceedings, including “actions brought by the Association to enforce the provisions of [the] Declaration” and “counterclaims brought by the Association in proceedings instituted against it.” (Decl. Art. XII § 17, ECF No. 13.1.) Because the Association admits that it did not ask for or get member approval before filing its third-party complaint, (*see* Ans. to Countercl. ¶ 14, ECF No. 43), Rankin contends that it failed to comply with the declaration.

8. If Rankin is right that the Association needed to get member approval, then its failure to do so is a complete bar to its claims against him. Our Supreme Court has held that “a defendant who is a stranger to” a homeowners’ association may not “invoke the association’s own internal governance procedures as an absolute defense to” claims asserted “by the association against that defendant.” *Willowmere Cmty. Ass’n v. City of Charlotte*, 370 N.C. 553, 561 (2018). But a *member* of the association (such as Rankin) is “entitled to raise the association’s failure to comply with” a provision requiring presuit membership approval “as a bar to the plaintiff’s suit.” *Id.* at 560; *see also Homestead at Mills River Prop. Owners Ass’n v. Hyder*, 2018 N.C. App. LEXIS 622, at *24 (N.C. Ct. App. June 19, 2018) (unpublished) (“[A] member of an association being sued by that association may assert a lack of standing based on the association’s alleged violation of provisions in its own articles of incorporation specifically governing the association’s ability to sue.”); *Peninsula Prop. Owner Ass’n v. Crescent Res., LLC*, 171 N.C. App. 89, 97 (2005) (“Without the required vote, the [plaintiff association] lacked the authority to commence legal proceedings against [the defendant member] and does not possess standing.”).

9. The Association maintains that it had the authority to assert claims against Rankin without a member vote. It reads the declaration to require member approval only when it intends to start a new lawsuit from scratch. Because the Atkinsons started this action, it contends, the declaration's presuit requirements simply don't apply.

10. This is a misreading of the declaration. Member approval is required in any "proceeding . . . commenced or prosecuted" by the Association. (Decl. Art. XII § 17.) Yes, this includes starting a brand-new lawsuit. But it is also broad enough to cover claims asserted and pursued by the Association in lawsuits in which it is a defendant. Why else would the declaration exempt "counterclaims brought by the Association in proceedings instituted against it"? (Decl. Art. XII § 17.)

11. Moreover, the word "proceeding" is a well-defined legal term that means "[a]n act or step that is part of a larger action." *Proceeding*, Black's Law Dictionary (10th ed. 2014). Naturally, that includes a third-party proceeding in which a defendant (the Association) serves a summons and complaint on someone (Rankin) who is "not a party to the action" as originally filed. N.C. R. Civ. P. 14(a). Before the Association filed its third-party complaint, Rankin was not a party, and no proceeding against him existed. The Atkinsons may have started this action, but it was the Association that "commenced" the "proceeding" against Rankin.

12. The Association objects that it would be impractical to get member approval before filing a third-party complaint due to the time constraints set by the Rules of Civil Procedure. Even if that were true, practical difficulties could not override the

plain, unambiguous language of the declaration. *See Atl. & E. Carolina Ry. Co. v. Wheatly Oil Co.*, 163 N.C. App. 748, 752 (2004) (“When the language of a written contract is plain and unambiguous, the contract must be interpreted as written and the parties are bound by its terms.” (citation and quotation marks omitted)). In any event, the concern is overblown. A defendant has 30 days to answer a complaint and another 45 days to file a third-party complaint after its answer, plus the ability to ask for an extension if needed. *See* N.C. R. Civ. P. 12(a)(1), 14(a). There is plenty of time to seek member approval.

13. As a fallback, the Association contends that its claims against Rankin are exempt from the membership-approval requirement. No exemption applies, though. The only candidate is the exemption for claims “to enforce the provisions of [the] Declaration.” (Decl. Art. XII § 17.) But the claims against Rankin, which are for breach of fiduciary duty, do not fit. Although the Association’s *bylaws* have provisions dealing with duties owed by officers and directors, the *declaration* does not. Without citation, the Association argues that the bylaws are part of the declaration so that a claim to enforce the bylaws is a claim to enforce the declaration. That interpretation finds no support in the text. When the declaration means to refer to the bylaws, it does so expressly. (*See, e.g.*, Decl. Art. IV § 6; Art. XII §§ 1, 11, 16, 18, 19.) Reading “Declaration” to mean “Declaration and Bylaws” would render the express references to the bylaws superfluous and, worse yet, could introduce conflicts where none exist. (*Compare* Decl. Art. XII § 4 (establishing rules for amending “this Declaration”), *with* Bylaws Art. VI § 4 (establishing distinct rules for amending “these Bylaws”).)

14. None of the Association's other arguments has merit. It points to a statute that authorizes it to "[i]nstitute . . . litigation . . . on matters affecting the planned community" and argues that the statute trumps the declaration. N.C.G.S. § 47F-3-102(4). This gets things backward: the declaration trumps the statute, not the other way around. *See id.* § 47F-3-102 (stating that the statute controls "[u]nless the articles of incorporation or the declaration expressly provides to the contrary"). The declaration's limitation on the Association's ability to sue is a valid and enforceable departure from the statutory default. *See Peninsula Prop. Owner Ass'n*, 171 N.C. App. at 97.

15. Next, the Association's reliance on the doctrine of judicial estoppel is far off base. It has not come close to showing that Rankin has taken "clearly inconsistent" positions on a question of fact. Nor has it shown that this Court or any other court has accepted a position that Rankin took at an earlier time such that accepting his current position would threaten "judicial integrity" or lead to "inconsistent court determinations." *Whitacre P'ship v. BioSignia, Inc.*, 358 N.C. 1, 29 (2004) (citation and quotation marks omitted).

16. And finally, no issues of fact stand in the way of a decision. The declaration is unambiguous, making its interpretation a question of law. *See, e.g., Schenkel & Shultz, Inc. v. Hermon F. Fox & Assocs. P.C.*, 362 N.C. 269, 273 (2008). Likewise, the Association's admission that it did not ask for or get member approval before suing Rankin has "conclusively established" its failure to comply with the declaration.

Champion v. Waller, 268 N.C. 426, 428 (1966). Whether fact disputes exist as to the merits of the Association's claims is beside the point.

17. In sum, the declaration required the Association to obtain membership approval before asserting third-party claims against Rankin. The Association did not; its claims are therefore barred. The Court grants Rankin's motion for judgment on the pleadings with respect to all claims asserted against him. Because the Association could obtain member approval in the future and file a new lawsuit, the Court dismisses its claims against Rankin without prejudice.

18. Having dismissed the Association's claims, the Court concludes that Rankin's claim for declaratory judgment is moot. He asks the Court to "enter a judgment declaring the filing and prosecution of the Association's Third-Party Complaint to be in breach of the Declaration and *ultra vires*" and to issue an injunction requiring the Association to dismiss its claims. (Rankin Countercl. ¶ 15.) Because Rankin has received complete relief through the dismissal of the third-party claims, there is no longer any genuine controversy, and a declaratory judgment would serve no "useful purpose in clarifying and settling the legal relations at issue." *Calabria v. N.C. State Bd. of Elections*, 198 N.C. App. 550, 554 (2009) (citation and quotation marks omitted).

19. For these reasons, the Court **GRANTS in part** and **DENIES in part** the motion for judgment on the pleadings as follows:

- a. The Court **DISMISSES** without prejudice the Association's claims against Rankin.

b. The Court **DENIES** Rankin's motion as to his counterclaim for declaratory judgment and **DISMISSES** that counterclaim without prejudice as moot.

20. In addition, the Court dissolves the stay of discovery entered in May 2023. (See ECF No. 70.) Within fourteen days from the date of this Order, the parties shall jointly file a revised case management report and an amended proposed case management order.

SO ORDERED, this the 16th day of August, 2023.

/s/ Adam M. Conrad
Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases