

**U.S. BANKRUPTCY COURT  
District of South Carolina**

Case Number: **20-02092-hb**

Adversary Proceeding Number: **20-80049-hb**

**ORDER GRANTING IN PART, AND DENYING IN PART, MOTIONS TO DISMISS  
COUNTERCLAIMS**

The relief set forth on the following pages, for a total of 14 pages including this page, is hereby ORDERED.

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**FILED BY THE COURT  
12/04/2020**



Entered: 12/04/2020

Chief US Bankruptcy Judge  
District of South Carolina

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH CAROLINA**

In re,  Foxwood Hills Property Owners Association, Inc.,  Debtor(s).	C/A No. 20-02092-HB  Adv. Pro. No. 20-80049-HB  Chapter 11
Foxwood Hills Property Owners Association, Inc.,  Plaintiff(s),  v.  783-C, LLC <i>et al.</i>  Defendant(s).	<b>ORDER GRANTING IN PART, AND DENYING IN PART, MOTIONS TO DISMISS COUNTERCLAIMS</b>

**THIS MATTER** came before the Court to consider the Motions of Plaintiff Foxwood Hills Property Owners Association, Inc. (the “Association”) to Dismiss Counterclaims filed by defendants Brent Knerr,<sup>1</sup> Ned G. Holbrooks,<sup>2</sup> Bobbie J. Turner,<sup>3</sup> and the numerous defendants named in the attached list.<sup>4</sup> The Association names thousands of parties in this adversary proceeding and this Order involves only this stated subset of defendants, hereinafter referred to collectively as “Counterclaimants.”

**FACTUAL ALLEGATIONS AND PROCEDURAL HISTORY**

The Association is the property owners’ association for a residential development known as Foxwood Hills (the “Community”) located on Lake Hartwell in Oconee County, South Carolina. The Association filed a petition for voluntary Chapter 11 relief on May 8, 2020. On July 13, 2020,

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<sup>1</sup> ECF Nos. 64 & 81.

<sup>2</sup> ECF Nos. 77 & 82.

<sup>3</sup> ECF Nos. 100 & 130.

<sup>4</sup> ECF Nos. 50 & 78. An Amended Answer was filed after the Association’s Motion to Dismiss. (ECF No. 49, filed Oct. 7, 2020). Thereafter, the Association renewed and restated its Motion to Dismiss. (ECF No. 65, filed Oct. 21, 2020).

it filed this adversary proceeding naming as defendants the property owners of record of approximately 4,100 lots within the Community. An Amended Complaint was filed on July 23, 2020 to add as defendants fifty-five (55) individuals who recently became lot owners in the Community. The Amended Complaint alleges this Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157 and Local Civil Rule 83.IX.01 (D.S.C.), this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and venue is proper in this district pursuant to 28 U.S.C. § 1409(a).

This adversary proceeding seeks to resolve controversies regarding membership in the Association, voting rights, and the amount and calculation of the fees, dues, and assessments payable to the Association by the parties named. Pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*, the Association seeks a declaratory judgment based on equitable grounds for relief that defendants are members of the Association with equal voting rights and are required to pay budget-based dues, fees, and assessments. The Amended Complaint also asserts the various covenants and restrictions on certain deeds and recorded real property filings did not address membership in the Association and failed to contemplate an adequate source of funding for the privately maintained roads and amenities of the Community. The Association alleges the requested equitable relief is needed because enforcing these various restrictions, some of which have not been followed or enforced for decades, would cause a great wrong and leave the Association insolvent and inoperable. Therefore, the Association requests the covenants and restrictions be rescinded/cancelled or reformed to provide that all property owners within the Community are members of the Association, subject to its bylaws, and must pay budget-based dues, fees, and assessments.

In their pleadings, Counterclaimants allege they are members of various sections of the Community, they have different documents that purport to grant certain rights and restrictions within the applicable section, and they are not treated the same by these documents or the Association. Counterclaimants assert claims<sup>5</sup> for declaratory judgments under 28 U.S.C. § 2201, requesting the Court: (1) establish the rights and legal relations between the parties (“Rights Claim”); (2) declare which set of documents are valid and binding on the members of the Association, if any (“Binding Documents Claim”); (3) pursuant to S.C. Code Ann. § 33-31-160, order a special meeting be held for the members to decide whether to dissolve the Association, which sections of the Community will be a part of the Association, or elect a new board of directors of the Association (collectively, “Special Meeting Claim”); and (4) determine the Association does not have the authority to use “budget-based dues, fees, and assessments” and must follow the governing documents declared valid by the Court (“Calculating Fees Claim”). Knerr asserted additional counterclaims requesting the Court declare he is not a member of the Association, nor are any members of the Hatteras Section of the Community (“Knerr Membership Claim”), and establish there is no valid contract between the property owners (“Knerr Contract Claim”).<sup>6</sup>

Holbrooks’ Answer was filed 65 days after service of the Summons and Amended Complaint, but before any entry of default.<sup>7</sup> A motion for default judgment was filed on October 13, 2020, which included him among approximately 2,900 defendants who failed to respond to the Amended Complaint.<sup>8</sup> Holbrooks’ attorney filed a notice of appearance and Answer two days later and no default was entered against him.

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<sup>5</sup> Although Counterclaimants assert only one counterclaim for a declaratory judgment, it includes several requests for relief. For ease of reference, the Court will consider each request for relief as a separate and individual counterclaim.

<sup>6</sup> ECF No. 46, filed Oct. 7, 2020.

<sup>7</sup> ECF No. 55, filed Oct. 15, 2020.

<sup>8</sup> ECF No. 53.

The Association's Motions assert the Rights Claim, Binding Documents Claim, Calculating Fees Claim, and Knerr Membership Claim should be dismissed pursuant to Rule 12(b)(6) because the declaratory relief requested is duplicative and redundant. It argues dismissal is appropriate because these counterclaims request the inverse of the relief sought in the Association's original claim. The Association also asserts the Special Meeting Claim and Knerr Contract Claim should be dismissed under Rule 12(b)(6) for failure to plead sufficient factual allegations and Rule 12(b)(7) for failure to join indispensable parties. Further, the Association argues Holbrooks' Counterclaims should be dismissed as untimely.

## **DISCUSSION**

### **I. STANDARD OF REVIEW**

Rule 12(b)(6) provides a motion may be dismissed for failure to state a claim upon which relief can be granted. A motion to dismiss pursuant to Rule 12(b)(6) tests the sufficiency of the complaint without resolving contests of fact or the merits of a claim. *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992), *cert. denied*, 510 U.S. 828 (1993). Thus, the Court's inquiry is limited to determining whether the allegations constitute "a short and plain statement of the claim showing the pleader is entitled to relief" pursuant to Rule 8(a)(2).

To survive a motion to dismiss, factual allegations in the complaint must be sufficient to "raise a right to relief above a speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Consequently, a complaint will survive if it contains "enough facts to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). A claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."

*Id.* (quoting *Twombly*, 550 U.S. at 556). The Court must draw all reasonable factual inferences in favor of the plaintiff. *Priority Auto Grp., Inc. v. Ford Motor Co.*, 757 F.3d 137, 139 (4th Cir. 2014).

Under a Rule 12(b)(6) analysis, the Court must separate facts from legal conclusions, as mere conclusions are not entitled to a presumption of truth. *Iqbal*, 556 U.S. at 678. Importantly, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* However, well-pleaded factual allegations are entitled to a presumption of truth and the Court should determine whether the allegations plausibly give rise to an entitlement to relief. *Id.* at 679.

## **II. DUPLICATIVE COUNTERCLAIMS**

The Declaratory Judgment Act provides:

In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a). The statute is meant “to afford a speedy and inexpensive method of adjudicating legal disputes without invoking the coercive remedies of the old procedure, and to settle legal rights and remove uncertainty and insecurity from legal relationships without awaiting a violation of the rights or a disturbance of the relationships.” *Aetna Cas. & Sur. Co. v. Quarles*, 92 F.2d 321, 325 (4th Cir. 1937).

Whether the remedy shall be accorded one who petitions for it is a matter resting in the sound discretion of the trial court, to be reasonably exercised in furtherance of the purposes of the statute. It should not be accorded, however, to try a controversy by piecemeal, or to try particular issues without settling the entire controversy, or to interfere with an action which has already been instituted.

*Id.*

Pursuant to this discretion, the Court may dismiss a declaratory counterclaim that is the “mirror image” of causes of action asserted in the complaint. *Biltmore Co. v. NU U, Inc.*, C/A No.

1:15-CV-00288-MR, 2016 WL 7494474, at \*2 (W.D.N.C. Dec. 30, 2016) (citations omitted). “[W]hen the request for declaratory relief brings into question issues that already have been presented in plaintiff’s complaint and defendant’s answer to the original claim, courts often exercise their discretion to dismiss the counterclaim on the ground that it is redundant and a decision on the merits of plaintiff’s claim will render the request for a declaratory judgment moot.” *Boone v. MountainMade Found.*, 684 F. Supp. 2d 1, 12 (D.D.C. 2010) (quoting *Waller v. DB3 Holdings, Inc.*, C/A No. CIV.A.3:07-CV-0491-D, 2008 WL 373155, at \*1 (N.D. Tex. Feb. 12, 2008)). “[T]here must be some useful purpose to be achieved in deciding a controversy that a party seeks to have resolved through a declaratory judgment claim.” *Id.* (quoting *Pub. Serv. Comm’n of Utah v. Wycoff, Co., Inc.*, 344 U.S. 237, 240 (1952)). “[A] counterclaim is not duplicative or redundant if it asserts an independent case or controversy that survives dismissal of the plaintiff’s claim.” *Marvel Worldwide, Inc. v. Kirby*, 756 F. Supp. 2d 461, 467 (S.D.N.Y. 2010).

Reviewing the allegations of the counterclaims, the Court does not find the Rights Claim, Binding Documents Claim, and Knerr Membership Claim are duplicative and seek relief already requested in the Association’s original claims. Depending on how the facts develop, there are possible outcomes where the Court’s ruling on the Association’s claim does not dispose of the relief requested by Counterclaimants. For example, the Court may deny the Association’s request that it use budget-based dues, fees, and assessments, but also determine which covenants, restrictions, and recorded documents are applicable (e.g., the Binding Documents Claim). Similarly, the Court may deny the request that all property owners be declared members of the Association, but still determine other rights among the parties (e.g., Rights Claim). Conversely, it could grant the Association’s relief but still determine Knerr is not a member of the Association (e.g., Knerr Membership Claim). While these counterclaims may overlap factually and legally

with the Association's claims, some useful purpose may be achieved in ruling on them and they assert independent cases or controversies that may survive dismissal of the Association's claims. *See id.* Consequently, foreclosing on Counterclaimants' right to seek this relief is inappropriate at this stage of the litigation and the request for dismissal must be denied.

However, Counterclaimants' Calculating Fees Claim should be dismissed as duplicative and a mirror of the Association's claims. This counterclaim requests the Court declare the Association unable to use budget-based dues, fees, and assessments and follow the governing documents declared valid by the Court. This is the inverse of the Association's claims that Counterclaimants pay budget-based dues, fees, and assessments and the covenants and restrictions be rescinded or reformed. Therefore, the Calculating Fees Claim is redundant, would not survive a dismissal of the Association's mirroring claim, and must be dismissed pursuant to Rule 12(b)(6).

### **III. S.C. CODE § 33-31-160**

The South Carolina Nonprofit Corporation Act, S.C. Code Ann. § 33-31-101 *et seq.*, allows an organization to seek judicial relief to call a meeting or transact business:

If for any reason it is impractical or impossible for a corporation to call or conduct a meeting of its members, delegates, or directors, or otherwise obtain their consent, in the manner prescribed by its articles, bylaws, or this chapter, then upon petition of a director, officer, delegate, member, or the Attorney General, the court of common pleas for the county in which the principal office designated on the last filed notice of change of principal office, articles, or application for authority to transact business is located, or if none within South Carolina, then the Richland County Court of Common Pleas, may order that such a meeting be called or that a written ballot or other form of obtaining the vote of members, delegates, or directors be authored, in such a manner as the court finds fair and equitable under the circumstances.

S.C. Code Ann. § 33-31-160(a). It is based on the Revised Model Nonprofit Corporation Act and, with respect to § 1.60 (the counterpart of § 33-31-160), the Official Comment states it:

provides an escape valve allowing nonprofit corporations to conduct meetings or obtain the consent of members, delegates or directors when it is otherwise impractical or impossible to do so . . . The section allows directors . . . to petition

*the appropriate court* for an order allowing the members or directors to vote or hold a meeting even if the order dispenses with requirements of the Model Act, the articles or bylaws concerning voting or holding meetings . . .

Revised Model Nonprofit Corporation Act § 1.60, Official Comment at 45-46 (1987) (emphasis added).

The Association asserts the counterclaim seeking relief pursuant to S.C. Code Ann. § 33-31-160, does not include specific factual allegations detailing how it is impractical or impossible for Counterclaimants to call or conduct a special meeting of its members. This bankruptcy case and adversary proceeding were initiated to determine the rights of and membership in the Association, affecting all property owners within the Community. That indicates dysfunction among the Association's administration and its members to hold meetings to determine issues regarding the scope of the Association's governance without judicial interference. Nevertheless, another issue warrants dismissal of the Special Meeting Claim.

This Court, like all federal courts, has limited jurisdiction. *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995); *Educ. Credit Mgmt. Corp. v. Kirkland (In re Kirkland)*, 600 F.3d 310, 315 (4th Cir. 2010). "The bankruptcy court derives its jurisdiction from the district court." *Valley Historic Ltd. P'ship v. Bank of N.Y.*, 486 F.3d 831, 839 n.3 (4th Cir. 2007) (citing 28 U.S.C. § 157(a), (b)(1)). The district court's subject matter jurisdiction over bankruptcy cases is statutorily demarcated by 28 U.S.C. § 1334, which provides "[t]he district courts shall have original and exclusive jurisdiction of all cases under title 11," and "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(a), (b). "Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred

to the bankruptcy judges for the district.” 28 U.S.C. § 157(a). This District has so provided in its Local Rules. *See* Local Civil Rule 83.IX.01 (D.S.C.).

Even though this Court’s jurisdiction is limited to proceedings arising in, under, or related to a bankruptcy case, often times “bankruptcy cases involve federal statutes and federal questions,” and the “bankruptcy court may . . . face situations in which the applicable federal law incorporates matters which are the subject of state law. It is clear that a federal court in such cases must apply state law to the underlying substantive state law questions.” *In re Merritt Dredging Co., Inc.*, 839 F.2d 203, 205 (4th Cir. 1988).

However, the state law at issue here specifically provides only “the court of common pleas for the county in which the principal office designated . . . or if none within South Carolina, then the Richland County Court of Common Pleas,” may order that a meeting of the members be called. S.C. Code Ann. § 33-31-160(a). The Court is not being asked to apply state law, but rather to exercise its jurisdiction according to a state law that provides the contrary. The Court cannot ignore the plain language of the statute and act where it is not authorized to do so. Accordingly, the Special Meeting Claim is dismissed and the Court need not address whether dismissal of this counterclaim is appropriate under Rule 12(b)(7).<sup>9</sup>

#### **IV. KNERR CONTRACT CLAIM**

The Association asserts Knerr’s Contract Claim, which seeks a declaratory judgment that there is no valid contract between property owners, must be dismissed pursuant to Rule 12(b)(7) because he failed to direct this claim to all property owners, precluding them of the opportunity to respond. Under Rule 12(b)(7), a party may move to dismiss for “failure to join a party under Rule 19.” Rule 19(a) sets forth a two-step inquiry for courts to determine whether a party is “necessary”

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<sup>9</sup> The Court notes that dismissal of this counterclaim does not impede Counterclaimants’ ability to seek relief to pursue its claim under S.C. Code Ann. § 33-31-160 in the appropriate forum.

and “indispensable.” *Home Buyers Warranty Corp. v. Hanna*, 750 F.3d 427, 433 (4th Cir. 2014).

Under Rule 19(a), a person or party must be joined in an action when:

- (A) in that person’s absence, the court cannot accord complete relief among existing parties; or
- (B) that person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person’s absence may:
  - (i) as a practical matter impair or impede the person’s ability to protect the interest; or
  - (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a). The burden is on the party raising the defense to “show that the person who was not joined is needed for a just adjudication.” *Am. Gen. Life & Acc. Ins. Co. v. Wood*, 429 F.3d 83, 92 (4th Cir. 2005) (internal citations omitted). If the absent party is necessary, it will be ordered into the action. *Owens-Illinois, Inc. v. Meade*, 186 F. 3d 435, 440 (4th Cir. 1999). If the absent party cannot be joined, the court proceeds to the second step and must determine “whether the proceeding can continue in its absence, or whether it is indispensable pursuant to Rule 19(b) and the action must be dismissed.” *Id.*

Nevertheless, “Courts are loath to dismiss cases based on nonjoinder of a party, so dismissal will be ordered only when the resulting defect cannot be remedied and prejudice or inefficiency will certainly result.” *Id.* at 441. “Rule 19 is not to be applied as a ‘procedural formula.’ Rather, decisions ‘whether to dismiss must be made pragmatically, in the context of the substance of each case.’” *Friends of DeReef Park v. Nat’l Park Serv.*, C/A No. 2:13-CV-03453-DCN, 2015 WL 12807800, at \*7 (D.S.C. May 27, 2015) (quoting *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 120 n.16 (1968)); see also *In re Derivium Capital, LLC*, 380 B.R. 407, 427 (Bankr. D.S.C. 2006) (“Dismissal is a drastic remedy and though Fed. R. Civ. P. 19 is framed as a multi-part test, the Court should proceed pragmatically based upon the facts of the case.”).

Knerr may not ultimately prevail on this counterclaim if the intent is to bind others not joined in this action. However, to the extent the Knerr Contract Claim requests adjudication of the nature of any contract between Knerr and those properly joined, Plaintiff has failed to show that it should be dismissed at this early stage in the litigation. Therefore, the Court denies the Association's request to dismiss the Knerr Contract Claim under Rules 12(b)(7) and 19(a).

#### **V. HOLBROOKS' COUNTERCLAIMS**

Holbrooks filed his Answer and counterclaims after the applicable deadline and the Association requests dismissal for this reason. However, no entry of default has been made against Holbrooks and he made an appearance. The Association cites no authority supporting this request nor has it shown any reason to dismiss his counterclaims other than the arguments addressed above.

#### **CONCLUSION**

Based on the foregoing, and after careful consideration of the allegations of the counterclaims and applying applicable authorities and pleading standards,

**IT IS, HEREBY, ORDERED** that Plaintiff Foxwood Hills Property Owners Association, Inc.'s Motions to Dismiss are granted in part and the following counterclaims for a declaratory judgment under 28 U.S.C. § 2201 are hereby dismissed pursuant to Rule 12(b)(6):

1. the Calculating Fees Claim, requesting the Court determine the Association does not have the authority to use "budget-based dues, fees, and assessments" and must follow the governing documents declared valid by the Court; and
2. the Special Meeting Claim seeking an order pursuant to S.C. Code Ann. § 33-31-160 that a special meeting be held for the members of the Association to decide whether to dissolve the Association, which sections of the Community will be a part of the Association, or elect a new board of directors of the Association.

**IT IS FURTHER ORDERED** that the Motions to Dismiss are denied as to all the remaining counterclaims (Rights Claim, Binding Documents Claim, Knerr Membership Claim, and Knerr Contract Claim). Pursuant to Bankruptcy Rule 7012(a), the Association shall file a response to the remaining counterclaims within fourteen (14) days from entry of this Order.

**AND IT IS SO ORDERED.**

List of defendants:

1. Anders, Charles
2. Axberg, Jason W.
3. Axberg, Kim
4. Belge, Amanda M.
5. Belge, Arthur, L.
6. Brown, Crystal
7. Clark, Kimberly B.
8. Clark, Robert D.
9. Cook, Mary M.
10. Cook, William
11. D'Antonio, Michael Jr.
12. Feagley, Lorene E.
13. Feagley, Rex
14. Ferrandino, Deborah
15. Ferrandino, Rod
16. Fowler, Mary Ann
17. Frost, Richard W.
18. Frost, Shirley A.
19. Gamber, C. Douglas
20. Gamber, Judy K.
21. Gonzalez, Luis C.
22. Gray, Melissa, R.
23. Gray, Richard W.
24. Griffith, Cynthia
25. Griffith, David
26. Grim, Ellen
27. Guthrie, Gigi
28. Guthrie, James Alan
29. Hadley, Ronald P.
30. Haff, Lawrence S.
31. Halbman, Virginia, L.
32. Hall, James P. II
33. Heller, Thomas J.
34. Hicks, Shelley K.
35. Hicks, Stephen M.
36. Holbrooks, Lisa
37. Hubbart, Jack L.
38. Hubbart, Tonuya
39. Humes, Donald
40. Humes, Rita
41. Kemp, Alice
42. Kingeter, Robin E.
43. Lange, Debra L.
44. Lemmon, Donna
45. Lozada, Antonio
46. Malone, Janet I.
47. Manley, Mona L.
48. Martin, Christopher
49. Martin, Crystal M.
50. Masters, Jed W.
51. McCulloch, Christine M.
52. McCulloch, Scott
53. McMillan, Hugh C. III
54. McMillan, Virginia
55. Means, Daniel
56. Miller, Rhonda
57. Miller, Thomas L.
58. Parker, Jacqueline
59. Parker, James
60. Patterson, Jody M.
61. Poole, Martha
62. Presnell, Richard
63. Reid, Dennis W.
64. Robinson, Darrel
65. Romer, Sandie Fee
66. Sadie Investments
67. Stasney, Michael
68. Stasney, Sandra G.
69. Stegman, Charles L.
70. Tesner, Joe L.
71. Tesner, Thelma B.
72. Thompson, Michael
73. Torri, Linda
74. Torri, Thomas J. Jr.
75. Turner, Gwendolyn
76. Upchurch, Joe
77. Upchurch, Peggy
78. VanEerd, Debra H.
79. VanEerd, Martin F.
80. Vitale, Leila
81. Vitale, Vito
82. Williams, Donna C.
83. Worley, Tina R.
84. Wymer, John M.