

AUG 21 2024

LISA A. HENDERSON
SAN JUAN COUNTY, WASHINGTON

**SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SAN JUAN COUNTY**

Kathryn C. Loring
Judge

Jane M. Severin
Court Administrator

August 21, 2024

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Re: *Farm to Market LLC v. Eastsound Water Users Association*, Cause No. 23-2-05153-28
Letter Decision on Cross Motions for Summary Judgment

Dear Counsel:

This case came before the Court on July 3, 2024, on cross motions for summary judgment. The Court took the matter under advisement and now issues this letter decision. For the reasons set forth below, the Court grants Defendant's Motion for Summary Judgment and denies Plaintiff's Motion for Summary Judgment. Plaintiff's Motion to Compel Answers to Interrogatories also is denied as moot. The Court encloses herewith a corresponding order.

A. Procedural Posture.

On November 8, 2023, Plaintiffs filed a Complaint for Violation of RCW 24.03A Washington Nonprofit Corporation Act ("the Complaint") and Motion for Temporary Restraining Order and Preliminary Injunction to stop the 2023 election for the Eastsound Water Users Association ("EWUA") Board of Directors. The Court denied Plaintiff's request for a temporary restraining order on November 9, 2023. Plaintiff did not subsequently request a preliminary injunction.

The Complaint alleged a single cause of action or "claim for relief" for violation of RCW 24.03A, the Washington Nonprofit Corporation Act. Complaint at 4. Specifically, the Complaint alleged that "Defendant EWUA's ballot for the Board of Directors Vote of 2023 does not conform to the terms of EWUA's bylaws for election of directors as required by RCW 24.03A. These deficiencies, include but are not limited to, failing to put up the correct number of director seats for a vote to members and failing to allow proper identification of members for their voting power, which are violations of Article VI, Section A(j) and Article V, Section C(s) of EWUA's bylaws." Complaint at 4, ¶18. The assertion regarding the incorrect number of directors to be elected is premised on the factual assertion that the ballots sent to EWUA members for the 2023

Board of Directors vote only directed members to vote for two candidates and should have provided for the election of three candidates because a third member of the Board of Directors was appointed in the prior year and the bylaws required the seat to be filled by election. Complaint at 3, ¶11.

On March 18, 2024, Plaintiff filed a Motion for Summary Judgment, asking the Court to award it the relief requested as a matter of law, to set aside the November 2023 EWUA Board of Directors election, order a new election to elect the three positions previously held by Rick Christmas, Mike Cleveland and Clyde Duke, and declare the decisions of the allegedly improperly constituted board ultra vires. Pl's Motion for Summary Judgment at 7-8. This motion was re-filed on April 16, 2024.

On May 7, 2024, Defendant EWUA filed Defendant's Motion for Summary Judgment, seeking dismissal of the Complaint in its entirety. Defendant asserts that: (1) Plaintiff lacks standing to bring the lawsuit; (2) even if able to bring suit, Plaintiff can establish no legal authority supporting its entitlement to the remedy it seeks to set aside the 2023 Board of Directors election in its entirety; and (3) EWUA acted within its discretion to cure the error of the election and substantially complied with the Bylaws. Def's Motion for Summary Judgment at 10-16. In reply, Defendant clarifies that even if Plaintiff does not lack standing to bring the lawsuit in its entirety, RCW 24.03A.150 bars Plaintiff from asserting that actions of the EWUA Board after the 2023 election are ultra vires. Def's Reply at 4.

B. Undisputed Material Facts.

It is undisputed that the October 2023 EWUA election notice and ballot only announced the election of two directors and only allowed members to vote for two candidates, while they should have provided for the election of three directors. Declaration of Jim Nelson in Support of Defendant's Motion for Summary Judgment ("Nelson Decl."), Exhibits B, C. The Official Ballot listed four candidates and directed members to put a check mark next to their top two choices. Nelson Decl., Ex. C. The voting cutoff was November 10, 2023, and the annual meeting announcing the winners was set for November 15, 2023. *Id.*

The letter that accompanied the ballot addressed how votes would be calculated for members who own multiple properties:

Members with Multiple Properties: If you own more than one property with Eastsound Water memberships, your vote will count for the number of memberships you own, If you have any questions about multiple properties, please reach out to the Eastsound Water staff at info@eastsoundwater.org, or call (360) 376-2127 during business hours. We will be happy to answer your questions.

Nelson Decl., Ex. C.

Plaintiff, through counsel, informed Defendant of the error in the ballot and instructions directing the selection of only two directors on the evening of November 8, 2023. Nelson Decl., ¶14. The Court denied Plaintiff's motion for a temporary restraining order to stop the election on November 9, 2023.

At the annual meeting on November 15, 2023, Defendant announced the results of the election that Teri Nigretto and Carol Anderson had been the top two vote getters and were elected to the two announced Board Director positions. The Board subsequently decided to appoint to the third Director vacancy that was incorrectly excluded from the ballot the person who had received the third most votes, Jim Cook.¹ Nelson Decl. ¶19. Because Mr. Cook was appointed, that position will be open for election in 2024.² EWUA Bylaws, Art. VI, Sec. A.j.

While Defendant EWUA asserts in the alternative that there are disputes of material fact that prohibit a grant of summary judgment in Plaintiff's favor, Plaintiff asserts no dispute of material fact on any issue. *See* Pl's Reply at 5.

C. Analysis.

1. Standard on Summary Judgment.

Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issue of material fact *and* that the moving party is entitled to judgment as a matter of law. CR 56(c). All facts submitted and reasonable inferences therefrom must be viewed in the light most favorable to the nonmoving party. *SentinelC3, Inc. v. Hunt*, 181 Wn. 2d 127, 140, 331 P.3d 40 (2014). To defeat a motion for summary judgment, a party must present more than ultimate facts or conclusory statements. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wash.2d 355, 359–60, 753 P.2d 517 (1988). Summary judgment is appropriate only if, on the facts submitted, reasonable minds could reach but one conclusion and the moving party is entitled to judgment as a matter of law. *SentinelC3, Inc.*, 181 Wn. 2d at 140.

2. Issues on Summary Judgment.

- a. Does Plaintiff lack standing or authority to bring this lawsuit?
- b. Even if Plaintiff has standing, does RCW 24.03A.150 bar Plaintiff from asserting that actions of the EWUA Board after the 2023 election are ultra vires?

¹ While there is a factual dispute about exactly when the Board appointed Mr. Cook to the third vacant position, I conclude that this factual dispute is not material to resolution of the case at summary judgment based on my reasoning and rulings herein.

² The EWUA Bylaws (revised February 2020) Article VI, Section A.b directs that the Board shall consist of seven directors. Complaint, Ex. A. The Board has authority to appoint a director to a vacated seat until the next election. EWUA Bylaws, Art. VI, Sec. A.j

- c. Even if Plaintiff has the right to challenge the election process, has Plaintiff established entitlement to the relief it seeks?
- d. Does Plaintiff's assertion at summary judgment of breach of contract otherwise entitle Plaintiff to the relief it seeks?
- e. Does Plaintiff's claim otherwise fail because the EWUA substantially complied with the Bylaws by appointing the third-highest vote getter to the third vacant position for the coming year, subject to election in 2024?

3. Does Plaintiff have standing to bring this action as an individual member where the result would be to overturn the election for all members?

Defendant first asserts that Plaintiff lacks standing to bring this action under RCW 24.03A.150 prohibiting member claims that the corporation lacked the authority to act or case law addressing the lack of authority for derivative actions on behalf of nonprofit corporations. Def's Motion for Summary Judgment at 12-13 (discussing *Lundberg ex rel. Orient Foundation v. Coleman*, 115 Wn. App. 172, 60 P.3d 595 (2002)). Plaintiff responds that they are not asserting that the EWUA's action to distribute an improper ballot was *ultra vires*; rather they seek to enforce their statutory and contractual right to vote for Directors. Pl's Response at 3-5. Likewise, Plaintiff asserts that they are not bringing a derivative action, despite the fact that the relief Plaintiff seeks would overturn the 2023 Board election for all members.

I agree with Plaintiff that neither RCW 24.03A.150 nor *Lundberg* applies here to deny Plaintiff standing. Plaintiff's claim to overturn the election does not squarely fall within RCW 24.03A.150, though that statute has not yet been subjected to case law interpreting it. Plaintiff also has not brought a derivative action on behalf of the EWUA.

4. Plaintiff's claims that actions by the "improperly constituted" Board are *ultra vires* are barred by RCW 24.03A.150.

Plaintiff asserts at summary judgment that because "the board was illegally constituted due to the improper election, their actions following the election were *ultra vires* and should be nullified." Pl's Motion for Summary Judgment at 7. Defendant asserts that even if Plaintiff has standing to bring this action generally, it does not have standing or authority to challenge the Board's actions as being *ultra vires* following the 2023 election, citing to RCW 24.03A.150. Def's Reply at 2, 4.

RCW 24.03A.150(1) states that: "[e]xcept as provided in subsection (2) of this section, the validity of corporate action may not be challenged on the ground that the nonprofit corporation lacks or lacked power to act." RCW 24.03A.150(2) provides that the power of a nonprofit corporation to act may be challenged (only) in a proceeding by the corporation, directly or through a fiduciary or legal representative, or in a proceeding by the attorney general under RCW 24.03A.936.

Based on the plain language of the statute, Plaintiff does not have standing or authority to assert that actions of the EWUA following the 2023 Board election are ultra vires or invalid because Plaintiff is not one of the entities or representatives entitled by law to bring such claim. Therefore, the Court will grant summary judgment on this issue and dismiss any such express or implied claim.

5. Is Defendant otherwise entitled to summary judgment dismissing Plaintiff's claims for failure to establish authority to the relief it seeks?

Defendant also asserts that the Washington Nonprofit Corporation Act, RCW 24.03A.340(a)(1), expressly limits the rights of members of a membership corporation to “only those rights, privileges, powers, or obligations specifically given or assigned to members in the articles, the bylaws, or RCW 24.03A.450,” and asserts that the EWUA Bylaws provide no specific right to challenge the election process. Def’s Motion for Summary Judgment at 14 (quoting RCW 24.03A.340). Yet, Plaintiff correctly points out that the EWUA Bylaws acknowledge a right of members to challenge Board action that fails to comply with required procedure, including by setting forth a limit of 90 days after minutes of a Board meeting are approved to challenge the validity of an action by the Board, and the provision for substantial compliance by the Board with procedural requirements.³ See Pl’s Response at 2.

Defendant also asserts that neither the EWUA Bylaws nor RCW 24.03A.450 provide a right to a specific election process or to demand specific relief of a new election in the face of an error in the election process. Def’s Motion for Summary Judgment at 14. I agree with Defendants in this regard.

RCW 24.03A.340(1) states that “members of a membership corporation have only those rights, privileges, powers, or obligations specifically given or assigned to members in the articles, the bylaws, or RCW 24.03A.450.” RCW 24.03A.450(1) provides a basic right to members to vote for directors: “[e]xcept as provided in the articles or bylaws, directors of a membership corporation are elected by a plurality of the votes cast by the members entitled to vote in the election at a meeting when a quorum is present.” RCW 24.03A.435 provides that: “[e]xcept as provided in the articles or bylaws, each member is entitled to one vote on each matter on which the articles or bylaws entitled the members . . . to vote.” RCW 24.03A.490(2) provides that the nonprofit corporation “shall be managed by or under the direction, and subject to the oversight, of the board of directors, subject only to any powers expressly reserved to the corporation’s membership or other persons in the articles or bylaws.”

³ Plaintiff also asserts that RCW 24.03A.966 provides a cause of action for members to challenge the Board’s action. Def’s Response at 2. Assuming, without deciding, that RCW 24.03A.966 permits a member to bring a challenge to an action impacting not only them, but all members of the Association, I conclude based on the undisputed evidence that Plaintiff failed to provide notice of the proceeding as required by RCW 24.03A.015 to every person Plaintiff should reasonably know would be affected by the proceeding, which is all members.

On the issue of voting, the EWUA Bylaws provide simply that: “[e]ach Membership Agreement in good standing shall be entitled to one vote.” EWUA Bylaws Art. V, Sec. C.a. The Bylaws also provide that at least two and not more than three Directors shall be elected at each annual meeting. EWUA Bylaws Art. VI, Sec. A.f. Further, they provide that the Board may appoint a replacement Director to fill a vacancy until the next annual meeting and election, at which time that seat must be subject to election by the membership to complete the unexpired term. EWUA Bylaws Art. VI, Sec. A.j. Finally, the Bylaws at Article VI, Section E.a provides vast authority and discretion to the Board: “[t]he Board shall direct the business of the Association and exercise all power and authority of every kind and nature not herein specifically denied or restricted.”

The Board has authority and discretion to manage the EWUA excepted as expressly provided to the members. This includes the election process. Neither the statute nor the EWUA Bylaws direct how the election should proceed, and neither the statute nor the Bylaws give individual members the right to challenge the Board’s election process or overturn the election in its entirety if a member disagrees.

Here, the members were entitled to cast one vote per membership agreement. The letter accompanying the ballots directed that one vote would be counted for each membership interest. While the ballots only informed the members that they were voting for two directors and only instructed them to choose two names from the list of four names, ultimately three directors were seated based on the plurality of votes cast by the members.

The process utilized did not violate the statute or Bylaws. But even if Plaintiff is correct that by not being informed that three Directors were being elected and by not being permitted to identify three choices Plaintiff was denied its right to vote, Plaintiff has not established that it is entitled to the relief it seeks; that is, to set aside the entire election and start over. Because the bylaws and statute give the Board the authority and discretion to decide how to proceed in this unforeseen event, Plaintiff is not entitled to demand a new election. I will grant Defendant summary judgment on this basis.

6. Does consideration of Plaintiff’s claim as a breach of contract yield a different result?

Plaintiff frames its claim in its Motion for Summary Judgment as a breach of contract claim, asserting that Defendant breached Plaintiff’s membership rights as provided by the EWUA Bylaws to elect a third Director in the 2023 Board election. Def’s Motion for Summary Judgment at 5-7. Defendant asserts that Plaintiff failed to plead a breach of contract claim in the Complaint and should not be permitted to argue such theory in support of summary judgment.⁴ Def’s Response at 8-9.

⁴ In response, Plaintiff also relies upon RCW 24.03A.966, which the Court addressed above and concluded that Plaintiff had failed to provide the required notice to all persons to be affected by the proceeding.

Interpreting the Complaint pursuant to Washington’s liberal “notice pleading” standard, which requires notice of the general nature of the claim and the ground upon which it rests, I conclude that the Complaint provides sufficient notice of a claim for breach of contract. *See, e.g., Dewey v. Tacoma School Dist. No. 10*, 95 Wn. App. 18, 23-24, 974 P.2d 847 (1999). Plaintiff’s Complaint alleges that the EWUA Bylaws define the Membership Agreement as a contractual agreement between the Association and Water Users. Complaint ¶5. Likewise, Paragraph 18 of the Complaint states that “Defendant EWUA’s ballot for the Board of Directors Vote of 2023 does not conform to the terms of EWUA’s bylaws for election of directors as required by RCW 24.03A.” Thus, Defendant generally was on notice of an alleged violation of the EWUA Bylaws. But framing the claim as a breach of contract does not yield a different conclusion or result.

Plaintiff has not established entitlement to the relief it seeks—setting aside the prior election and all subsequent Board decisions and completing a new election—under a theory of breach of the EWUA Bylaws. As addressed above, the EWUA Bylaws provide members with the right to vote on Board Directors at an annual meeting, but do not provide any details or requirements for the election process or the form of the ballot, nor what should happen if a Director position inadvertently is left off of the ballot. Both the EWUA Bylaws and the Washington Nonprofit Corporation Act give the Board authority and discretion in the absence of specific authority given to the members.

The cases relied upon by Plaintiff are factually distinguishable and do not support a different conclusion. None of the cases cited by Plaintiff involve application of the Washington Nonprofit Corporation Act. But more importantly, the claims addressed in those cases were for enforcement of a specific bylaw provision. *See Spokoiny v. Wash. State Youth Soccer Ass’n*, 128 Wn. App. 794, 799-801, 117 P.3d 1141 (2005) (enforcing express provisions of the Washington State Youth Soccer Association’s bylaws for an internal appeal process and recovery of attorney fees); *Garvey v. Seattle Tennis Club*, 60 Wn. App. 930, 931, 808 P.2d 1155 (1991) (analyzing a claim of breach of a bylaw requirement for a hearing prior to expulsion at the option of the member subject to expulsion). Again, here the EWUA Bylaws do not provide for any specific election process, ballot description, or remedy when a vacant position is inadvertently left off a ballot. There is no express bylaw provision or process to contractually enforce. Further, in *Garvey*, the Court of Appeals held that even though the board of the Seattle Tennis Club initially used the wrong process, it was entitled to cure the error, and the complaining member could not demand reinstatement in the face of the option to cure. *Garvey*, 60 Wn. App. at 934 (referencing authority that “a private club has the power to remedy procedural errors committed at initial proceedings in subsequent actions.”).

Here, the vote of the EWUA membership was the basis for filling the third Director vacancy. While members were not affirmatively told that three Directors were being elected or given the option to select three names, the plurality vote of the membership nonetheless was the basis for the selection, which occurred by Board appointment to the vacancy. Even though the process used here was not what was intended or contemplated by the Bylaws, the Bylaws do not provide a contractual right to the relief that Plaintiff seeks to overturn and redo the election.

7. Substantial Compliance.

In the alternative, to the extent that the election process violated Plaintiff's right to vote for the third vacant Board Director position, I conclude as a matter of law that the Board substantially complied with Plaintiff's right to vote and with any implied requirements for conducting the 2023 Board election pursuant to the EWUA Bylaws. Plaintiff has not put forth facts to support a dispute of material fact on this issue; rather, Plaintiff asserts essentially that the election must be redone and that there can be no substantial compliance or remedy short of a do-over.

The EWUA Bylaws state an intention to learn from mistakes and not waste time:

Article VI, Section B.c. The Association believes in the value of learning from mistakes and of moving forward from there. It is disinclined to waste its time and energy rehashing the past and laying blame on those who have been removed from the Board. To that end, a set of presumptions, limitations, and protections are established so that blame laying is reserved for those rare instances in which past actions have actually caused substantial impact on the Association accounts and Members.

Complaint, Ex. A.

Likewise, the EWUA Bylaws set forth presumptions for resolving procedural issues including substantial compliance:

Article VI, Section C. Presumptions, Required Showing, Limitation of Action.

a. The act or omission of a director is presumptively made in good faith, it being intended that the benefit of the doubt be extended to the act or omission of a director. A person asserting a claim that a director has acted in bad faith has the burden of proving the facts upon which the claim is made.

b. Except as otherwise provided, the Board's substantial compliance with a procedural requirement is deemed to have complied with the procedural requirement, so long as (i) the actions taken serve to give effect to the purpose(s) that the procedural requirement is intended to advance, and (ii) the person(s) challenging the action has not shown that the failure to strictly adhere to the applicable procedure has adversely impacted the exercise of a right(s) the procedure was intended to protect.

Complaint, Ex. A.

The interpretation of bylaws, like covenants, is a question of law based on the rules of contract interpretation. *Bangerter v. Hat Island Comm'y Ass'n*, 199 Wn.2d 183, 189, 504 P.3d 813

(2022); *Langan v. Valicopters, Inc.*, 88 Wn.2d 855, 858–59, 567 P.2d 218 (1977). The court’s goal is to determine the drafter’s intent. *Bangerter*, 199 Wn.2d at 189. Substantial compliance with a statute has been interpreted to mean that the “statute has been followed sufficiently so as to carry out the intent for which the statute was adopted.” *Lee v. Metro Parks Tacoma*, 183 Wn. App. 961, 968, 335 P.3d 1014, 1017 (2014) (citing *Banner Realty, Inc. v. Dep’t of Revenue*, 48 Wn. App. 274, 278, 738 P.2d 279 (1987)).

Here, the EWUA Bylaws expressly direct consideration of substantial compliance. The Bylaws would find substantial compliance so long as the actions taken serve to give effect to the purpose that the procedural requirement is intended to advance, and where the person who challenged the action has not shown that failure to strictly adhere to the applicable procedure has adversely impacted the exercise of the right that the procedure was intended to protect.

The EWUA Bylaws provide for no specific election or voting process. However, the Bylaws undisputedly are intended as a whole to provide members with the right to elect Board Directors, at the annual meeting with one vote per membership interest. The Bylaws also are intended to allow the Board to appoint Directors for up to one year where vacancies occur.

Defendant EWUA has moved for summary judgment based on substantial compliance. Plaintiff has put forth no evidence from which the Court could or would conclude that the process ultimately utilized by the Board to fill the third 2023 Director vacancy—which relied upon the plurality vote of members and appointed the third-highest vote getter, subject to election in 2024—adversely impacted the exercise of the members’ right to vote.

Assuming without deciding that the Bylaws require that the members get to vote on their choice for one name to fill each Director vacancy, I conclude as a matter of law that appointing the third highest vote getter to the members’ plurality voting for two names, and allowing the members to vote again on that position in the following year, substantially complies with the purpose of giving members the right to vote on each Director.⁵ This is particularly true here, where the EWUA was not aware of the error in the ballot until after the ballots had gone out and until shortly before voting was to conclude, and where Plaintiff has not shown any evidence that the procedure used adversely impacted the right that the procedure was intended to protect or that allowing the selection of three names would have yielded a different result.

⁵ One can imagine other scenarios where the Bylaws would not direct how an election should be handled that might result in additional Board appointments to vacancies. For example, if multiple Directors resign in a given year, there easily could be a situation where four or more positions might be up for election at an annual meeting pursuant to the Bylaws, which require those appointed to vacancies to be subject to election at the next annual meeting. Yet, the Bylaws also require that “not more than three (3) Directors shall be elected at each annual meeting.” Bylaws Art. VI, Sec. A.f. In such situation, compliance with one provision of the Bylaws would violate the prohibition on voting for not more than three Directors at one annual meeting. When a situation arises that is not covered by the Bylaws or statute, it is up to the Board to exercise its discretion in good faith to resolve the issue. The EWUA Bylaws specifically provide for the presumption of good faith and substantial compliance.

8. Remaining Issues.

(a) Voting multiple membership interests.

Plaintiff also has asserted that his right to cast one ballot per membership agreement was violated. Complaint ¶¶ 12, 18; Pl's Motion for Summary Judgment at 4. Defendant asserts that this is contrary to the undisputed evidence. Def's Motion for Summary Judgment at 7 n.2. Plaintiff may have abandoned this claim. But to the extent Plaintiff has not abandoned it, Plaintiff has not rebutted the undisputed evidence that the letter accompanying the ballot indicates that if members own more than one property with an Eastsound Water membership, one vote will be counted for each membership interest. Nelson Dec., Ex. C.

Plaintiff has put forth no admissible evidence that it was denied a vote for one of its properties with an EWUA membership. Rather, Plaintiff relies upon the general, unsupported assertion that members with multiple membership interests were not given the right to cast multiple votes because there was no space on the ballot to identify multiple membership interests or account numbers. Complaint ¶12. Because Defendant has moved for summary judgment to dismiss Plaintiff's Complaint in its entirety, Plaintiff cannot rely upon mere assertion but must come forth with admissible evidence to support his argument that one of its membership interests was disenfranchised. Plaintiff provides no such evidence. Therefore, the Court will grant summary judgment on this claim as well.

(b) Denial of Plaintiff's Motion for Summary Judgment.

For the same reasons, the Court will deny Plaintiff's cross Motion for Summary Judgment.


(c) Plaintiff's Motion to Compel Answers to Interrogatories is moot.

Plaintiff filed a Motion to Compel Answers to Interrogatories on July 15, 2024, which was heard on July 30, 2024. Counsel for both parties stipulated on the record that the Court could defer its decision on the motion to compel until it made a decision on the cross motions for summary judgment. As a result of the Court's decision herein to dismiss Plaintiff's Complaint on summary judgment, Plaintiff's motion to compel discovery responses is moot.

D. Conclusion.

For the reasons stated above, the Court grants Defendant's Motion for Summary Judgment and denies Plaintiff's Motion for Summary Judgment and issues the enclosed order.

Sincerely,


Kathryn C. Loring
Superior Court Judge