



12 South Center Street
Bensenville, IL 60106

Office: 630.350.3404
Fax: 630.350.3438
www.bensenville.il.us

VILLAGE BOARD

President
Frank DeSimone

Board of Trustees
Pasa Carmona
Ann Franz
Marie T. Frey
McLane Lomas
Nicholas Panicola Jr.
Armando Perez

Village Clerk
Nancy Quinn

Village Manager
Evan K. Summers

October 1, 2019

Mr. James Brill
White Pines Community Alliance

Re: September 30, 2019 FOIA Request

Dear Mr. Brill:

I am pleased to help you with your September 30, 2019 Freedom of Information Act ("FOIA"). The Village of Bensenville received your request on September 30, 2019. You requested copies of the items indicated below:

"A copy of any court filings made by Bensenville Attorneys within the last seven days regarding the Mellenthin lawsuit against the Village."


After a search of Village files, the following information was found responsive to your request:

- 1) Defendant's Section 2-615 and 2-619 Motions to Dismiss Plaintiffs' Second Amendment Complaint for DuPage Circuit Court Case No. 18CH1065. (10 pgs.)

These are all the records found responsive to your request.

Do not hesitate to contact me if you have any questions or concerns in connection with this response.

Very truly yours,


Corey Williamsen
Freedom of Information Officer
Village of Bensenville

Chris Kachiroubas
e-filed in the 18th Judicial Circuit Court
Al DuPage County

ENVELOPE: 6772272
2018CH001065
FILEDATE: 9/30/2019 3:56 PM
Date Submitted: 9/30/2019 3:56 PM
Date Accepted: 9/30/2019 4:01 PM
KB

No. 18 CH 1065

$$\begin{pmatrix} \cdot \\ \cdot \\ \cdot \\ \cdot \\ \cdot \end{pmatrix}$$

DEFENDANT'S SECTION 2-615 AND 2-619

I. Overview

Four additional Plaintiffs then joined the action (including one who did not even receive water service from the Village) and obtained legal counsel, who filed an Amended Complaint. This pleading alleged that the individual Village Trustees and President had breached a fiduciary duty to the Plaintiffs by not putting \$300,000 into the Unincorporated Utility Fund between 2013

and 2017. The Court dismissed this First Amended Complaint on August 5, 2019, concluding that Plaintiffs did not state a breach of fiduciary duty claim. In particular, the Court pointed to the fact that Plaintiffs had failed to cite to an ordinance establishing a formula or amount that the Village was required to put into the Unincorporated Utility Fund, or plead any facts establishing that the amounts to be put into the Fund were not discretionary.

With the Second Amended Complaint, Plaintiffs still do not provide any facts, or exhibits, which establish that the amounts to be placed into the Unincorporated Utility Fund were not discretionary, or that the Village violated any ordinance with respect to the Fund. For these reasons, and others which will be discussed more fully below, Plaintiffs' Second Amended Complaint should be dismissed.

II. Plaintiffs' Pled Facts¹

Plaintiffs allege that they are all similarly situated Plaintiffs and are all unincorporated owners within the Village of Bensenville. (Second Amended Complaint, ¶ 6). Plaintiffs contend that the Village is in charge of their water service. (Second Amended Complaint, ¶ 7). Plaintiffs state that they have been contributing funds through their water bill to a capital fund called "Unincorporated Utility Fund" for capital improvements to their water system. (Second Amended Complaint, ¶ 9).

Plaintiffs plead that the Unincorporated Utility Fund is an account which "was established in the 1980s to finance major capital improvements to the water system exclusively in unincorporated areas." (Second Amended Complaint, ¶ 10, citing Ex. A). Plaintiffs allege that the "Unincorporated Utility Fund is defined as 'accounts for deposits made by the unincorporated

¹ By citing to and arguing regarding Plaintiffs' pled facts in this Motion, the Village in no way admits that these facts are true. Plaintiffs' pled facts are contested and the Village reserves the right to deny them in an answer should its Motion not be granted.

water and sewer utility users with the intent of providing various water and sewer system improvements that would directly benefit those depositors.” (Second Amended Complaint, ¶ 11, citing Ex. B).

According to Plaintiffs, the amounts paid into the Unincorporated Utility Fund are set forth via ordinance but Plaintiffs also contend that the Village “refuses to answer questions regarding the water rates and formulas from inception through today.” (Second Amended Complaint, ¶ 12-13, citing Ex. C-D).

Plaintiffs allege that the “Village of Bensenville trustees and representatives are supposed to put the funds received from the unincorporated owners into the Unincorporated Utility Fund.” (Second Amended Complaint, ¶ 14). Plaintiffs allege the Village’s “trustees and representatives have not been putting the funds received from the unincorporated owners into the Unincorporated Utility Fund.” (Second Amended Complaint, ¶ 15, citing Group Ex. E).

Plaintiffs plead that while there was \$912,081 in the Unincorporated Utility Fund as of the end of 2017, no monies were attributed by the Village to the Unincorporated Utility Fund from at least 2013 through 2017. (Second Amended Complaint, ¶ 17-18, citing Group Ex. E). All told, there would be an additional \$300,000 in the Unincorporated Utility Fund but for the zero contribution during these years, Plaintiffs allege. (Second Amended Complaint, ¶ 18-19). Though Plaintiffs acknowledge that there was nearly \$1 million in the Unincorporated Utility Fund as of the end of 2017, they still claim that they “have and will continue to suffer irreparable injury in that the moneys that have been paid to the Unincorporated Utility Fund have disappeared.” (Second Amended Complaint, ¶ 23). Plaintiffs bring claims for breach of fiduciary duty (Count I), breach of contract (Count II), and unjust enrichment (Count III).

II. Plaintiffs Lack Standing to Bring this Action (All Claims)

Lack of standing is an affirmative matter which may be raised in a motion to dismiss pursuant to Section 2-619(a)(9) of the Code of Civil Procedure. Plaintiffs bring the Second Amended Complaint in their individual capacities seeking to affect the rights of unincorporated property owners who receive or have received water service from the Village since the 1980s.

Plaintiffs do not allege that they have any representational relationship with these individuals, nor plead any facts which would allow them to represent and affect the interests of these individuals. They do not allege any of the elements required to bring a class action pursuant to Section 2-801 of the Illinois Code of Civil Procedure. Plaintiffs' Second Amended Complaint should be dismissed in its entirety pursuant to Section 2-619(a)(9) for these reasons.

III. Breach of Fiduciary Duty Claim (Count I)

A. Plaintiffs Lack a Clear Protectable Interest

Plaintiffs contend in Count I that the Village breached a fiduciary duty to them by not attributing \$300,000 to the Unincorporated Utility Fund between 2013 and 2017 and they seek an injunction against the Village to force the Village to deposit this sum. "[I]n order to be entitled to permanent injunctive relief, a party "must show that he possesses a clear, protectable interest for which there is no adequate remedy at law." *C.J. v. Dep't of Human Servs.*, 331 Ill. App. 3d 871, 891 (1st Dist. 2002)).

Plaintiffs have not cited to any authority establishing that they have standing to represent past and present unincorporated property owners. Nor have they cited any injury particular as to them. Plaintiffs lack a clear protectable interest in the context of the relief they are seeking. This is grounds to dismiss Count I pursuant to Section 2-615.

B. Plaintiffs Do not Plead an Irreparable Injury

Plaintiffs must also establish that an irreparable injury will result if the relief is not granted in order to prevail on their claim for injunctive relief. *C.J.*, 331 Ill.App.3d at 891. Plaintiffs generally allege that “[u]nless enjoined by this Court, the Defendant will continue to breach its fiduciary duties owed to Plaintiffs to the irreparable harm of Plaintiffs and will continue to do so until Defendant conforms with the intention of the Unincorporated Utility Fund.” (Second Amended Complaint ¶ 25).

This conclusory allegation is not sufficient to establish an irreparable injury. Plaintiffs contend that there was nearly \$1 million in the Unincorporated Utility Fund as of the end of 2017. (Second Amended Complaint, ¶ 16). If there was nearly \$1 million in the Unincorporated Utility Fund as of the end of 2017, and no allegation that the Village is or was unable to make any specific capital improvement due to the alleged reduction in funds, no injury can be inferred from Plaintiffs’ pled facts.

Further, “[i]t is a well-established rule that, if a party’s injury can be adequately compensated through money damages, then it has an adequate remedy at law and does not need the extraordinary remedy of injunctive relief.” *Lumbermen’s Mut. Cas. Co. v. Sykes*, 384 Ill. App. 3d 207, 230–31 (1st Dist. 2008). Plaintiffs are alleging that a specific sum of money was not put into the fund. (Second Amended Complaint ¶ 18, 24). Plaintiffs directly admit that their alleged irreparable injury is purely monetary. (Second Amended Complaint ¶ 23). Even if Plaintiffs established the other elements of injunctive relief, which they do not, monetary damages would be sufficient to compensate them for their injuries. This too is grounds to dismiss Count I under Section 2-615.

C. Plaintiffs are not Likely to Succeed on the Merits

“When granting permanent injunctive relief, the trial court, by definition, necessarily decides the plaintiffs’ success on the merits of the case.” *Sparks v. Gray*, 334 Ill. App. 3d 390, 395 (5th Dist. 2002). To prevail on a claim of breach of fiduciary duty, “the plaintiff must show that: 1) there existed a fiduciary duty; 2) that duty was breached; and 3) an injury resulted from the breach.” *In re Edgewater Med. Ctr.*, 373 B.R. 845, 858 (Bankr. N.D. Ill. 2007) (citing *Petri v. Gatlin*, 997 F.Supp. 956, 977 (N.D.Ill.1997)).

Plaintiffs attach two exhibits to their Second Amended Complaint which purport to define the “Unincorporated Utility Fund.” Exhibit A is a July 16, 1996 letter and an August 27, 1997 letter from Michael S. Allison, the Village Manager from that time period. The letters state that the Village had collected a surcharge on water and sewer since the 1980s to finance major capital improvements to the water system in unincorporated areas. (Second Amended Complaint, Ex. A). The July 1996 letter appears to seek to quell fears by some unincorporated residents that the funds were being used to repair or replace fire hydrants or to repair water main breaks or valve problems. *Id.* The August 1997 letter addresses a concern that the Village was contemplating extending water lines to encourage annexation. *Id.*

The letters are hearsay and lack foundation and thus should not be considered as part of Plaintiffs’ pled allegations. Moreover, the letters establish no duty on the part of the Village to use the Unincorporated Utility Fund to finance major capital improvements to the water system exclusively in unincorporated areas, because the Village Manager’s representations without Village Board authority are not binding. See *Lindhl v. City of Des Plaines*, 210 Ill. App. 3d 281, 294 (1st Dist. 1991) (oral promise by supervisor held not enforceable).

Even if Exhibit A did create such a duty, the breach of fiduciary duty Plaintiffs allege is that the Village allegedly put no money into the Unincorporated Utility Fund from 2013 to the present. (Second Amended Complaint ¶¶ 17-18, 24). The letters do not state that all water surcharges paid by unincorporated residents, or a given percentage, would go into the Unincorporated Utility Fund. Rather, they state what the funds were being used for during that particular time period.

Exhibit B does not support Plaintiffs' breach of fiduciary claim either. This undated and unauthenticated document defines an Unincorporated Utility Fund as a then-active non-major Special Revenue Fund. Exhibit B says nothing about any obligations on the part of the Village to deposit any given amount into the fund.

Plaintiffs attach Village Ordinance No. 30-2014 as Group Exhibit C. This ordinance sets forth water rates within or outside corporate limits, and capital recovery charges, but there is nothing in the ordinance which requires that the Village pay a certain amount into an Unincorporated Utility Fund, or which even references that fund. The ordinance was also passed on August 1, 2014. If the alleged breaches occurred starting in 2013, and if the Unincorporated Utility Fund began in the 1980s, then the ordinance is not germane to the alleged breaches of fiduciary duty. If anything, the ordinance may defeat Plaintiffs' claims, since the ordinance holds that it repeals all ordinance in conflict with it. (Second Amended Complaint, Group Exhibit C at 9).

Notwithstanding these issues, Plaintiffs have not pled facts showing that they have suffered any injury as a result of the alleged breaches, nor can they given that they plead that there was nearly \$1 million in the Fund as of the end of 2017 and there is no allegation of any project that

the Village could not complete as a result of the alleged breach of duty. Count I of Plaintiffs' Second Amended Complaint should be dismissed under Section 2-615.

IV. Breach of Contract Claim (Count II)

Plaintiffs contend in Count II that because they were required to pay into the Unincorporated Utility Fund by the Village, a contract was formed with each of them, and that this contract was breached by the "misallocation" of the \$300,000. In order to plead a cause of action for breach of contract, a plaintiff must allege: (1) the existence of a valid and enforceable contract; (2) substantial performance by the plaintiff; (3) a breach by the defendant; and (4) resultant damages. *W.W. Vincent & Co. v. First Colony Life Ins. Co.*, 351 Ill. App. 3d 752, 759 (1st Dist. 2004).

The "presumption is that a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Fumarolo v. Chicago Bd. Educ.*, 142 Ill.2d 54, 104 (1990) (citing *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 466 (1985)).² "A party who asserts that a State law creates contractual rights has the burden of overcoming the presumption that a contract does not arise out of a legislative enactment." *Id.* "In determining whether a statute was intended to create a contractual relationship between the State and the affected party, the court must examine the language of the statute." *Id.*

Here, we do not have an ordinance for the Court to examine. All Plaintiffs include with their Second Amended Complaint are the two Exhibit A letters from a long-ago Village Manager which do not discuss the Village's obligations, if any, to deposit monies in the Unincorporated Utility Fund; the undated and unauthenticated Exhibit B which defines an Unincorporated Utility

² See *Boswell v. City of Chicago*, 2016 IL App (1st) 150871, ¶ 19, 69 N.E.3d 379, 383 (applying *Fumarolo* to a municipal ordinance).

Fund as a non-major Special Revenue Fund; and Exhibit C, a 2014 ordinance which was passed after the Unincorporated Utility Fund was established and after the alleged breaches allegedly began in 2013 and which makes no reference to an Unincorporated Utility Fund. None of these items, nor anything stated in the Second Amended Complaint, meets Plaintiffs' burden of overcoming the presumption that a contract did not arise out of the Unincorporated Utility Fund.

Plaintiffs have not pled the other elements of breach of contract either. While Plaintiffs claim that they paid "their share" into the Unincorporated Utility Fund, they do not plead what that share was. Rather, Plaintiffs seek to recover the entire \$300,000 which they alleged was not deposited into the Fund. (Second Amended Complaint ¶ 31). As was discussed above, Plaintiffs do not have standing to bring this lawsuit on behalf of all of the past and present unincorporated property owners who receive water from the Village. Count II of Plaintiffs' Second Amended Complaint should be dismissed under Section 2-615.

V. Unjust Enrichment Claim (Count III)

Plaintiffs contend in Count III that because they were required to pay into the Unincorporated Utility Fund by the Village, an "agreement" was formed with each of them, and that this "agreement" was breached by the "misallocation" of the \$300,000. "To state a claim for unjust enrichment, a plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience." *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 25, 983 N.E.2d 1044, 1052 (internal citations omitted).

Unjust enrichment is "inapplicable where an express contract, oral or written, governs the parties' relationship. *Id.* "[A]lthough a plaintiff may plead claims alternatively based

on express contract and an unjust enrichment, the unjust enrichment claim cannot include allegations of an express contract.” *Id.*

The only difference between Plaintiffs’ breach of contract claim and their unjust enrichment claim is that Plaintiffs substituted the word “agreement” for the word “contract” in the latter. It is thus clear that Plaintiffs base Count III on the exact same invalid “contract” that they base Count II on. Count III is clearly an attempt to circumvent Illinois law regarding contractual rights in legislative enactments.

That aside, there are no facts pled establishing an unjust enrichment claim. while Plaintiffs allege that \$300,000 was not put into the Unincorporated Utility Fund between 2013 and the present, Plaintiffs plead no unlawful or improper conduct on the part of the Village, or how the Village was unjustly enriched by the \$300,000. In fact, Plaintiffs do not state what happened to this money at all. They just plead that it “disappeared.” Count III should be dismissed pursuant to Section 2-615.

VI. Conclusion

For the foregoing reasons, Defendant Village of Bensenville requests that this Court dismiss Plaintiffs’ Second Amended Complaint, and grant any further relief deemed just.

Respectfully submitted,

VILLAGE OF BENSENVILLE, Defendant.

By: /s/ Richard F. Bruen
One of its Attorneys

Richard F. Bruen, Jr.
MONTANA & WELCH, LLC
11950 S. Harlem Avenue – Suite 102
Palos Heights, IL 60463
(708) 448-7005
rbruen@montanawelch.com
Attorney Code 308878