

IN THE TWELFTH JUDICIAL CIRCUIT COURT
IN AND FOR MANATEE COUNTY, FLORIDA

MARY LOU SMITH, et al.,

Plaintiffs,

v.

Case No. 2008-CA-11315

TRAILER ESTATES PARK AND
RECREATION DISTRICT, et al.,

Defendants.

**DEFENDANT JANET JONES’
ALTERNATIVE MOTION TO DISMISS AND STRIKE**

Defendant Janet Jones files this motion as an alternative to the Answer she filed concurrently to this motion. Ms. Jones understands that it is procedurally improper to file both a motion to dismiss and an answer. However, the Court prospectively required the Defendants to answer even though the Plaintiffs had not yet then filed their Third Amended Complaint, and Ms. Jones is concerned if she filed an Answer without also filing this motion that she would have been deemed to waive this issue.

Ms. Jones does not waive her position that Plaintiffs Third Amended Complaint is flawed and must be dismissed.

Motion to Dismiss

1. Plaintiffs’ Third Amended Complaint sounds in four counts, but only counts 1, 3, and 4 are directed at Ms. Jones. Moreover, Plaintiffs do *not* allege any Public Record violations against Ms. Jones.

2. Count 1. The following allegations must be dismissed for failing to state a cause of action:

a. Paragraph 37(g). Plaintiffs allege that Ms. Jones spoke with other board member *after* Mr. Feathergill had already been appointed to the Board of Trustees. Accordingly, that conversation cannot be a Sunshine Law violation as a matter of law because the board action on Mr. Feathergill's appointment had *previously* occurred.

b. Paragraph 37(x). Plaintiffs allege that Ms. Jones acted on her own – without consulting any other trustee – in determining that public comments at meetings will be 3 minutes. Plaintiffs in this paragraph really are claiming that Ms. Jones' action as Chairman of the Board of Trustees was *ultra vires*, which is improper in a Sunshine Law case. For there to be a Sunshine Law violation, there must be a communication between two or more trustees. Here, Plaintiffs pleading makes clear that Ms. Jones acted on her own.

c. Paragraph 37(y). Plaintiffs allege that Ms. Jones spoke with two other trustees on the issue of whether OSHA laws apply to Trailer Estates. That matter, however, is a legal determination. There was no policy decision for the Board of Trustees to make as to whether OSHA law apply – they either OSHA laws apply or they do not, regardless of what Trailer Estates does. Even assuming that conversation occurred, as we must on a motion to dismiss, such discussion could not as a matter of law been something that was then reasonably foreseeable to come before the trustees for decision. Accordingly, this cannot be a Sunshine Law violation.

d. Paragraph 37(ss). Plaintiffs allege that Ms. Jones spoke with another trustee on the issue of whether section 849.01, Florida Statutes (gambling), applies to Trailer

Estates. This is a legal determination not for the Board of Trustees to decide as a matter of policy. For the same reasons any alleged OSHA discussion cannot be a Sunshine Law violation, this alleged conversation cannot be a violation.

e. Paragraph 37(zz). Plaintiffs allege that Ms. Jones spoke with another trustee on the issue of whether certain videos were public records. Again, this is a legal determination not for the Board of Trustees to decide as a matter of policy. For the same reasons applicable to the purported OSHA and section 849.01 matters, a discussion whether certain videos are public records cannot be a violation.

f. Paragraph 44 fails to state a cause of action because it fails to give notice as to whether it is directed at Ms. Jones, whom the alleged liaison was, and when this alleged liaison performed the improper actions.

3. Count 3. Count 3 seeks a writ of mandamus issue against Ms. Jones. This count must be dismissed – or more appropriately, an order to show cause should not issue. First, Plaintiffs failed to comply with the procedure for writ of mandamus. Second, Plaintiffs impermissibly mix Sunshine Law and Public Record allegations into the same count. Third, Plaintiffs fail to identify any indisputable ministerial, non-discretionary duty that Ms. Jones is by law required to perform. See Smith v. State, 696 So. 2d 814, 815-16 (Fla. 2d DCA 1997). Mandamus is a common law remedy to compel a person in an official capacity to *perform* an indisputable ministerial duty required by law. Plaintiffs must establish a clear legal right, an indisputable legal duty, and no adequate remedy at law. Plaintiffs have not done so

4. Count 4. Count 4 seeks an injunction against multiple parties for multiple reasons. Plaintiffs again impermissibly lumped together Sunshine Law and Public Record

allegations. This count must be dismissed.

**Motion to Strike or Alternative Motion
to Preclude Plaintiffs from Proceeding on Certain Allegations**

5. During the hearing on September 3, 2009, the Court directed Plaintiffs to allege, as to each claimed violation, the trustees who purportedly were involved, when the purported communication occurred, and the subject matter of the communication.

6. Plaintiffs complied with the Court's ruling as to certain allegations. Plaintiffs failed to comply as to other allegations. This motion addresses only those allegations identified below where Plaintiffs failed to comply with the Court's directive. As just one example of Plaintiffs' continued failure to give adequate notice of their allegations against Ms. Jones, paragraph 37(q) provides:

During November 2005 through 2009, Board members attended ARC meetings wherein they discussed the denial of permits and these meetings were not advertised as board meeting.

This allegation suffers from the same problems Ms. Jones complained of in her original Motion to Strike directed at the Amended Complaint and her Motion to Strike Plaintiffs' Second Amended Complaint: it fails to inform Ms. Jones if she is a target of this allegation, and if yes, when and with whom did she allegedly violate the Sunshine Law? This allegation also sets forth a four year window within which Plaintiffs are reserving to themselves the ability to surprise Ms. Jones (and the other Defendants) at trial. The Court should put a stop to Plaintiffs' indefinite pleading that violates Ms. Jones' due process rights.

7. Accordingly, Ms. Jones seeks an order striking those paragraphs from the Third Amended Complaint for Plaintiffs' failure to abide by the Court's order. Alternatively, Ms.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by electronic mail and First Class U.S. Mail this 10th day of September, 2009, to:

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