

DISTRICT COURT, COUNTY OF JEFFERSON STATE OF COLORADO 100 Jefferson County Parkway Golden, Colorado 80401	DATE FILED: November 30, 2023 4:37 PM CASE NUMBER: 2021CV112 ▲ COURT USE ONLY ▲
Plaintiff: LESLIE ROBIN STEVENS AS TRUSTEE OF HUNTER’S LIVING TRUST, v. Defendants: BRANDYCHASE II HOA INC. ET AL.	Case No. 21CV112 Division: 1 Courtroom: 540
ORDER ON REMAND	

THIS MATTER is before the Court on Remand from the Court of Appeals, issued on June 8, 2023. The Court having reviewed the order, the record, and the Court’s own file, **FINDS** and **ORDERS** as follows:

I. FINDINGS OF FACT

For the purposes of this Court’s Order on Remand, the following relevant facts are as follows. This case stems from a dispute concerning election of a homeowner’s association (hereafter “HOA”) board and alleged breaches of that HOA’s policies, the Colorado Common Interest Ownership Act (hereafter “CCIOA”), and the Colorado Nonprofit Corporation Act (hereafter “Nonprofit Act”). Plaintiff, Leslie Stevens, is the owner of a condominium, in the Brandychase II community (hereafter “Community”). Defendant BrandyChase II HOA (hereafter “BC-HOA”) is the HOA for the Community. Defendant Antares Property Services, Inc. d/b/a Associa (hereafter “Associa”) is the community association manager for the Community. This case has an extensive history, much of which has been detailed in this Court’s Order re: Cross

Motions for Summary Judgment, issued on January 1, 2022, and Order re: Cross Motions for Summary Judgment, issued on May 24, 2022. (hereafter “May 24, 2022, Order”).

In late 2020, BC-HOA sought to ratify its 2021 budget and elect its new board in compliance with its Articles of Incorporation, Condominium Declaration and Bylaws. In light thereof, BC-HOA scheduled its “Annual and Budget Ratification Meeting” on November 12, 2020. Because of the COVID-19 pandemic, BC-HOA informed its fifty-nine (59) members that its Annual and Budget Ratification Meeting would be held virtually via ZOOM; members received a meeting packet that included (1) a notice of the annual and budget ratification meeting; (2) a 2021 budget summary report; (3) an agenda; (4) a proxy form; and (5) a written ballot. The notice set forth the twofold purpose of the meeting; ratify the 2021 budget and, by way of written ballot, elect five people to serve on the HOA Board of Directors. For the purposes of clarification, members were provided proxy forms in order to achieve quorum, and thereby validify BC-HOA’s budget ratification, and not for the purposes of voting. On the date of BC-HOA’s Annual and Budget Ratification Meeting, Plaintiff emailed Karla Strader, Associa’s Senior Community Association Manager, notice and copies of collected election votes as well as proxy votes against budget ratification. In response, Ms. Strader informed Plaintiff that her submissions were invalid as the board elections were being tallied by written ballots and the issued proxy forms were provided for the purposes of quorum, and not for voting regarding budget ratification.

Following its November 12, 2020, meeting, BC-HOA determined it had not achieved a quorum for the election and therefore none of the listed or write-in candidates had been elected. As a result, BC-HOA scheduled a special, online election for March 9, 2021. To assist in the administration of an online election, BC-HOA enlisted Vote HOA, a third party that specializes in facilitating HOA elections. To raise awareness of the upcoming, special election, BC-HOA

emailed notices to its members with known email addresses; the notice, which referred to a “Board Member election,” included a website address allowing access an online ballot. With respect to the twenty-one members with no known email address, BC-HOA sent a letter by United States mail on March 1, 2021, requesting the owner’s email address. This letter did not include a written ballot nor the website address for the online ballot. Neither the email notice nor the mailed letter included a proxy form in the event an owner wanted to designate someone else to vote on their behalf. On March 9 at 5:31 p.m., BC-HOA announced that it had received sufficient votes to establish a quorum for the election, and that a board had been elected.

Following the March 9, 2021, election, Plaintiff, believing she had previously won a seat on the BC-HOA, as a result of her November 12, 2020, submission of collected voting and proxy forms, sought to call a special meeting of Community members to remove the elected board from office, set to occur via Zoom on May 4, 2021. Plaintiff sent notice of the May 4, 2021, special meeting to members, along with ballot and proxy forms. Plaintiff oversaw the administration of the May 4, 2021, special meeting, conducted via Zoom, with an option to participate telephonically. During the meeting, Plaintiff took a screenshot of the Zoom participants, capturing forty-three (43) attendees, ten (10) less than the required fifty-three (53) to achieve quorum. Regardless, following the May 4, 2021, special meeting, Plaintiff asserted to the BC-HOA that she had been elected President thereof. Plaintiff later filed suit seeking, in part, declaratory judgement in her favor as to her allegation that BC-HOA’s March 2021 election violated the CCIOA and Nonprofit Act and is thereby invalid.

II. CONCLUSIONS OF LAW

Based on the findings above, the Court makes the following conclusions of law as it pertains to Plaintiff’s claims and BC-HOA’s counterclaims.

A. Plaintiff's Claims

1. Breach of Contract and CCIOA

On June 8, 2023, the Court of Appeals reversed this Court's ruling. This Court now issues ruling consistent with the Court of Appeals' remand.

Legal Standard

The Court may enter declaratory judgment when (1) the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. *Zab, Inc. v. Berenergy Corp.*, 136 P.3d 252 (Colo. 2006). Any person interested under a contract or whose rights are affected by a contract may request declaratory judgment. C.R.C.P 75(b).

Any U.S. Citizen, over the age of eighteen (18), who has resided in the state of Colorado for at least twenty-two (22) days, has the right to vote in elections. CO ST Art. 7, § 1. The right to vote is considered fundamental because it is ultimately "preservative of all rights." *In re Hickenlooper*, 2013 CO 62, ¶ 13, 312 P.3d 153, 157. Under the CCIOA, members of a common interest community, *i.e.*, unit property owners, have the right to vote on any matter affecting the common interest community. C.R.S. § 38-33.3-310. Such members have a right to cast their vote by proxy. C.R.S. § 38-33.3-310(2)(a); *see also* C.R.S. § 7-127-203. Further, members must be provided fair and reasonable notice of annual, regular and special meetings, including special elections, no fewer than ten days before the meeting date. C.R.S. § 7-127-104(3)(a). Unless provided for otherwise in applicable bylaws, every member entitled to vote must be provided with a written ballot. C.R.S. § 7-127(1). To invalidate the results of a past election, it must be shown that the true will of the voting public was not reflected in the results, or that statutory requirements were not substantially complied with by those responsible for calling, scheduling

and conducting an election. *Wilde v. City of Wheat Ridge*, 967 P.2d 213 (Colo. App. 1998); *Crowe v. Wheeler*, 439 P.2d 50 (Colo. 1968).

Analysis

BC-HOA's administration of its March 2021 election runs afoul of Coloradans' fundamental right to vote. *In re Hickenlooper*, 2013 CO 62, ¶ 13, 312 P.3d 153, 157. This is because BC-HOA failed to provide its members with (1) written ballots; (2) fair and reasonable notice of the March 9, 2021, election deadline; and (3) an ability to vote by proxy. This Court will address each failure in turn.

a. BC-HOA's Failure to Provide Eligible Members with Written Ballots for its March 9, 2021, Special Election

Barring bylaws to the contrary, BC-HOA had a statutory obligation to provide its fifty-nine (59) voting eligible members with fifty-nine (59) written ballots for its March 9, 2021, election. C.R.S. § 7-127(1). BC-HOA's bylaws, adopted on October 26, 1979, provide no exemption for the dutiful administration of written ballots to eligible voters. While Kimberly Miller, BC-HOA's President, testified at trial that, around the time of the March 9, 2021, election, the Board of Directors was contemplating revising BC-HOA's mailed balloting process, such contemplation does not excuse BC-HOA from its statutory duty to provide eligible voters with written ballots. Whether BC-HOA ultimately amends its bylaws to exempt itself from complying with CCIOA's written ballot requirements is not for this Court to consider. While BC-HOA is free to encourage its membership to engage with the voting process, it is not free to eliminate written ballots in favor of electronic ones. While COVID-19 certainly presented logistical challenges to in-person voting, this Court does not find that the pandemic excused BC-HOA of its

duty to provide written ballots to eligible voters; on the contrary, voting by mail became the country's primary form of voting during the pandemic.

b. BC-HOA's Failure to Provide Eligible Members with Fair and Reasonable Notice of the March 9, 2021 Ballots for its March 9, 2021, Special Election

BC-HOA had the option of providing its members with fair and reasonable notice of the March 9, 2021, deadline through a host of various mediums; mail, e-mail, text messaging, and on and on. Regardless of the medium, BC-HOA had to provide fair and reasonable notice of the March 9, 2021, deadline to eligible voters, no later than February 27, 2021, at 5:00 PM. C.R.S. § 7-127-104(3)(a). At trial, BC-HOA President Miller testified that mailers were sent out to twenty-one (21) eligible voters without known email addresses on March 1 and March 4, 2021; these mailers did not contain a link to the online ballot, written ballot or proxy form. BC-HOA President Miller also testified that notices were placed in mailboxes, but she could not produce records for those notices. It is unclear from the record when these mailbox notices were purportedly sent out. However, what is clear from the record is that thirty-seven (37) percent of BC-HOA's eligible voting body was not provided fair and reasonable notice of the March 9, 2021, deadline. This Court rejects BC-HOA's argument that its failure to provide fair and reasonable notice is immaterial as the affected percentage of the eligible voting body was the minority percentage. Such an argument runs afoul of Coloradans' fundamental right to vote. *In re Hickenlooper*, 2013 CO 62, ¶ 13, 312 P.3d 153, 157.

c. BC-HOA's Failure to Provide Eligible Members with Fair and Reasonable Notice of the March 9, 2021 Ballots for its March 9, 2021, Special Election

Just as BC-HOA was required to provide fifty-nine (59) written ballots, it was also required to provide fifty-nine (59) proxy voting forms. C.R.S. § 38-33.3-310(2)(a); *see also* C.R.S. § 7-

127-203. Despite providing thirty-one (31) eligible voters with emails containing links to submit electronic ballots, BC-HOA did not provide links to submit electronic proxy forms, or instructions on how to submit paper proxy forms, for the March 9, 2021, election. Further, as mentioned above, BC-HOA failed to provide an additional twenty-one (21) eligible voters with any form of proxy voting, electronic or otherwise. There is nothing in the record to suggest that BC-HOA made any attempts whatsoever to provide any of its fifty-nine (59) eligible voters with proxy voting forms, electronic or otherwise, for the March 9, 2021, election. BC-HOA's wholesale failure to provide one hundred (100) percent of its eligible voters an ability to vote by proxy is an inexcusable violation of their right to vote by proxy, and by extension, their fundamental right to vote. BC-HOA, in its *Trial Brief*, filed on March 8, 2022, asserts that "practically speaking, the ease of ability to vote at any time electronically seems to eliminate the need for proxy voting." Whether BC-HOA believes modes of electronic communication eliminate the need for proxy voting has no bearing on whether Coloradans have a right to vote by proxy; they do.

2. Breach of Covenant of Good Faith and Fair Dealing

The Court reaffirms and maintains its ruling that BC-HOA has not violated its obligation to act in good faith by bringing forth an argument that is founded in law and thereby finds against Plaintiff and in favor of BC-HOA.

B. Defendant's Counterclaims

1. BC-HOA's Counterclaim for Declaratory Judgement

The Court reaffirms and maintains its ruling entering declaratory judgment that Plaintiff was not validly elected to the Board and thereby finds against Plaintiff and in favor of BC-HOA.

2. BC-HOA's Counterclaim for Breach of Contract and CCIOA

The Court reaffirms and maintains its ruling that the administration of the May 4, 2021, special meeting & election violated the CCIOA and thereby finds against Plaintiff and in favor of BC-HOA.

3. BC-HOA's Counterclaim of Breach of Implied Covenant of Good Faith and Fair Dealing

The Court reaffirms and maintains its ruling that Plaintiff did not breach an implied covenant of good faith and fair dealing and finds against BC-HOA and in favor of Plaintiff.

4. BC-HOA's Counterclaim of Civil Conspiracy

The Court reaffirms and maintains its ruling that there was no civil conspiracy on the part of the Plaintiff and thereby finds against BC-HOA and in favor of Plaintiff.

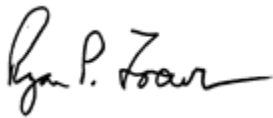
III. CONCLUSION

For the reasons stated above, this Court reaffirms and maintains its ruling that (i) BC-HOA has not violated its obligation to act in good faith by bringing forth an argument that is founded in law and thereby finds against Plaintiff and in favor of BC-HOA, on Plaintiff's Claim of Breach of Covenant of Good Faith and Fair Dealing; (ii) Plaintiff was not validly elected to the Board and thereby finds against Plaintiff and in favor of BC-HOA, on BC-HOA's Counterclaim for Declaratory Judgment; (iii) that Plaintiff was not validly elected to the Board and thereby finds against Plaintiff and in favor of BC-HOA, on BC-HOA's Counterclaim for Breach of Contract and CCIOA; (iv) Plaintiff did not breach an implied covenant of good faith and fair dealing and finds against BC-HOA and in favor of Plaintiff, on BC-HOA's Counterclaim of Breach of Implied Covenant of Good Faith and Fair Dealing; and (v) there was no civil conspiracy on the part of the Plaintiff and thereby finds against BC-HOA and in favor of Plaintiff, on BC-HOA's Counterclaim of Civil Conspiracy.

Further, consistent with the Court of Appeals' Remand, this Court now rules that BC-HOA's administration of the March 9, 2021, election was invalid, and therefore finds against BC-HOA and in favor of Plaintiff, on the latter's Claim of Breach of Contract and CCIOA. Thus, this Court awards Plaintiff declaratory relief as to her allegation that BC-HOA's March 9, 2021, election was invalid. The election results thereof are hereby invalidated.

SO ORDERED, November 30, 2023.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Ryan P. Loewer". The signature is written in a cursive style with a long horizontal stroke at the end.

Ryan P. Loewer
District Court Judge