

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY 7 PM 3:52

RICHARD PHAY TU, M.D.,

THAO PHUONG DANG, M.D.,

LAN CHAU TU, M.D.,

NU THI DANG, D.D.S.,

and

TRAM BUI, RPh

Plaintiffs,

v.

Case No. 2009-18307

VIETNAMESE MEDICAL SOCIETY
OF NORTHEAST AMERICA,

VINH DUC NGUYEN, M.D.,

SANG VAN TRAN, M.D.,

LOC BICH NGUYEN, D.D.S.,

ANH HUU PHAM, D.D.S.,

and

TRUONG SON VAN, M.D.,

Defendants.

DEMURRER

COMES NOW the Defendant, Vietnamese Medical Society of Northeast America (the “VMSNA”), by counsel, and in response to Plaintiffs’ Amended Complaint (the “Complaint”), files this Demurrer pursuant to §8.01-273 and in support thereof, respectfully states as follows:

GROUND FOR DEMURRER

I. Plaintiffs have failed to state a cause of action.

- a. Plaintiffs’ Complaint which contains only one enumerated count entitled “Count I - Declaratory Judgment”, if taken as true for the purpose of demurrer, fails to allege facts

sufficient to establish a cause of action against the Defendants for the granting of a Declaratory Judgment or any other cause of action.

II. Plaintiffs' Complaint does not state facts upon which the relief requested may be granted.

a. The injunctive relief requested by Plaintiffs is expressly prohibited by Va.

Code § 8.01-189. Plaintiffs' Complaint which contains only one enumerated count entitled "Count I -Declaratory Judgment", if taken as true for the purpose of demurrer, does not state facts upon which the relief requested may be granted. Virginia Code Section 8.01-189 provides:

§ 8.01-189. Injunction.

The pendency of any action at law or suit in equity brought merely to obtain a declaration of rights or a determination of a question of construction shall not be sufficient grounds for the granting of any injunction.

Plaintiffs indicate in their Civil Case Coversheet filed with this Court that the "Nature of Complaint" is both "Declaratory Judgment" and "Injunction".

The Merriam-Webster Dictionary defines "injunction" as:

1 : the act or an instance of enjoining

2 : a writ granted by a court of equity whereby one is required to do or to refrain from doing a specified act

Plaintiffs' requests for relief include four (4) substantive prayers as well as a request for "attorneys fees", "costs of suit" and "other and further relief as the court deems proper". All four substantive prayers, including subparts, consist entirely of requests for injunctions, as defined above, in which Defendants would be "*required to do or refrain from doing a specified act*" (Merriam-Webster, injunction, para. 2), specifically (with emphasis added):

"WHEREFORE, Plaintiffs pray judgment against each of the Defendants, as follows:

1. For an order **requiring the Defendants to show cause, if any they have, why they should not be enjoined as hereinafter set forth, during the pendency of this action;**

2. For a temporary **restraining order, a preliminary injunction, and a permanent injunction, enjoining all the Defendants, and each of them, and their agents, servants, and employees, and all persons acting under, in concert with, or for them:**

A. **From having any person/persons assume or continue to direct or control the office of President of the VMSNA in that the term of office of the previous President has ended;**

B. **To enjoin any person/person who was elected or ran as a candidate from taking and continuing to act in the role of the current office held until the validation or invalidation of election results;**

C. **That the Defendants cease all actions they are taking in their current capacities with the VMSNA until this Court had made a final ruling on the merits of the Plaintiffs claims in this action;**

3. For a Declaratory Judgment **ordering the Election Committee chair to report back to the members of the VMSNA and this Court with a report either validating or invalidating the December 2008 election based on the investigation and findings of the Election Committee;**

4. **If the Election Committee chair invalidates the December 2008 election to Order a new election be held forthwith to be monitored by a neutral moderator appointed by this Court;**

Plaintiffs have clearly brought an action at law “merely to obtain a declaration of rights” and the sole form of substantive relief requested is in the nature and form of injunctions. Accordingly, Va. Code §8.01-189 expressly prohibits such relief based on the allegations of Plaintiffs’ Count I seeking a Declaratory Judgment, and therefore the Complaint does not state facts upon which the requested relief may be granted.

b. Plaintiffs Complaint does not state facts upon which the requested attorneys fees and costs may be granted. Plaintiffs in paragraphs 5 and 6 of their prayer for relief request that they be granted their “attorney fees herein incurred” and “costs of suit herein incurred”, respectively. In support of their position, Defendant relies upon Russell County

Dept v. O'Quinn, 523 S.E.2d 492, 493, 259 Va. 139 (Va., 2000) in which our Supreme Court ruled:

“ The plain language contained in Code § 8.01-191 requires that the courts interpret and administer the Virginia Declaratory Judgment Act “with a view to making the courts more serviceable to the people.” This statute, however, does not authorize a court to make an award of attorney's fees. We have repeatedly stated that the "general rule in this Commonwealth is that in the absence of a statute or contract to the contrary, a court may not award attorney's fees to the prevailing party." Prospect Development Co. v. Bershader, 258 Va. 75, 92, 515 S.E.2d 291, 300 (1999); accord Gilmore v. Basic Industries, Inc., 233 Va. 485, 490, 357 S.E.2d 514, 517 (1987).”

Va. Code § 8.01-191 does not authorize an award of attorney’s fees, nor have Plaintiffs alleged the existence of any contract to that effect, therefore, Plaintiffs’ Complaint does not state facts upon which the requested relief may be granted.

III. This Court lacks subject matter jurisdiction under the Declaratory Judgment Act.

a. Plaintiffs have failed to state facts that establish subject matter jurisdiction pursuant to § 8.01-184. Plaintiffs’ reliance on §8.01-184 to invoke subject matter jurisdiction is misplaced. The allegations set forth in Plaintiffs’ Complaint as “Count I – Declaratory Judgment”, do not constitute a matter that is within the jurisdiction of this Court.

In the instant case, Plaintiffs allege in their Complaint that “This is an actual controversy between the parties.” (Compl. at para. 24) Plaintiffs then proceed to invoke subject matter jurisdiction by alleging that “[t]his Court has jurisdiction under Virginia Code Section 8.01-184 to resolve the dispute by determining whether the Election Committee should take action.” (Compl. at para. 25)

“Under the Declaratory Judgment Act, Code §§ 8.01-184 through -191, circuit courts have the authority to make ‘binding adjudications of right’ in cases of ‘actual controversy’ when

there is ‘antagonistic assertion and denial of right.’” USAA Cas. Ins. Co. v. Randolph, 255 Va. 342, 345, 497 S.E.2d 744, 746 (1998) (quoting Code § 8.01-184). Defendants contend that there is no “actual controversy” as alleged by Plaintiffs and that there has been no “antagonistic assertion and denial” of rights held by Plaintiffs.

“The intent of the declaratory judgment statutes is not to give parties greater rights than those which they previously possessed, but to permit the declaration of those rights before they mature. In other words, the intent of the act is to have courts render declaratory judgments which may guide parties in their future conduct in relation to each other, thereby relieving them from the risk of taking undirected action incident to their rights, which action, without direction, would jeopardize their interests. This is with a view rather to avoid litigation than in aid of it...” Liberty Mut. Ins. Co. v. Bishop, 211 Va. 414, 421, 177 S.E.2d 519, 524 (1970)

“... [T]he power to make a declaratory judgment is a discretionary one and must be exercised with care and caution. It will not as a rule be exercised where some other mode of proceeding is provided.” Id.

Defendants contend that the holding in Miller v. Jenkins, 678 S.E.2d 268, 54 Va. App. 282 (Va. App., 2009) is guiding as to a number of precedents set forth by our Supreme Court:

“In Randolph, our Supreme Court addressed the appropriateness of declaratory judgment where other remedies are available. The Supreme Court held that an action for declaratory judgment was inappropriate because Randolph's ‘case involves claims and rights that had accrued and matured when the bill of complaint was filed.’ Randolph, 255 Va. at 347, 497 S.E.2d at 747.

The Court explained, ‘declaratory judgment did not lie because other remedies were available to Randolph, namely, a claim for workers' compensation benefits or an action at law.’ Id.”

Jenkins, 54 Va. App. 282 at 289.

For their allegation as to damages, Plaintiffs have alleged that Defendants “will cause great and irreparable injury members of the VMSNA in that they will continue to not have any legitimate acting officer for the office of President, Treasurer, and Secretary, will have used and will continue to use the money from the VMSNA bank account for various activities against the wishes of the members and without authority and will continue to cause division and fracture in the organization.”

Defendants limit their argument to the issue of the use of funds from the Corporate bank account as Defendants do not view “division and fracture in the organization” as an actionable harm. Firstly, Plaintiffs do not have standing to bring an action against the Corporation for waste of funds or breach of fiduciary duty. Those are actions properly brought by the Corporation in a direct or derivative action against a director who is bound by such a fiduciary duty, and not individual members in their individual capacities. Therein lies the Plaintiffs’ other remedies available to them in the event such waste or mismanagement of funds should occur. Plaintiffs have not alleged any actual waste or mismanagement of funds nor even the likelihood of such waste, but merely the possibility that funds could be disbursed against the members’ wishes.

Defendants further rely upon our Supreme Court’s ruling in Williams v. Southern Bank of Norfolk, 203 Va. 657, 125 S.E.2d 803 (Va., 1962) to support their contention that the Plaintiffs are requesting a declaratory judgment as to a disputed fact which would be determinative of issues and not a determination of rights, and therefore their allegations are not proper for a declaratory judgment action:

“Where a declaratory judgment as to a disputed fact would be determinative of issues, rather than a construction of definite stated rights, status, and other relations, commonly expressed in written instruments, the case is not one for declaratory judgment.’ 16 Am. Jur., Declaratory Judgments, § 20, pages 294, 295.

The petition of Bank does not ask for the construction of definite rights expressed in written instruments or statutes. It alleges no controversy between the parties as to the right of Bank to make a defense at law, based on the facts stated therein, to the threatened tort actions. The answer of appellant challenges the verity of the allegations of fact. The only controversy is, therefore, one of disputed fact, that is, whether Bank made a full, correct and honest disclosure of all the material facts within its knowledge to its counsel and the Commonwealth's Attorney. The determination of that issue rather than an adjudication of the rights of the parties was the real object of the proceeding, as shown by the allegations of the petition, the prayer thereof, and the conclusion reached by the chancellor.” Williams, 203 Va. 657 at 663.

Defendants contend that the holding and analysis of Williams is apposite to the instant case in that Plaintiffs are not seeking a construction of definite rights expressed in written instruments or statutes but instead are seeking adjudication of disputed facts of events that occurred in the past. Accordingly, the Plaintiffs’ allegations are not within the purview of a declaratory judgment as contemplated by the Declaratory Judgment Act.

Defendants further argue that “whether the Election Committee **should take action**” (Compl. at para. 25, emphasis added) is not within the “binding adjudications of right” contemplated by Va. Code §8.01-184 and is not consonant with the holding in Williams, therefore it is not within the subject matter jurisdiction of this Court.

Whether an Election Committee appointed by a Corporation to oversee an election that has already occurred “should take action” is a matter left to the sound business judgment and discretion of the Corporation’s agents, officers, directors and the Election Committee members themselves, one of whom is a named Plaintiff. Defendants further contend that to the extent that the individual named Plaintiff who sat on the Election Committee in question did not carry out their duties with regard to the election procedures, it is they who could be liable to the Corporation for breach of their duties and not vice versa.

Va. Code §8.01-184 does not empower the Court to make binding adjudications of choices, but rather “binding adjudications of right.” Whether the Election Committee has the “right” to take action pursuant to the By-laws or statute, might be within the jurisdiction afforded this Court by the Declaratory Judgment Act, but Plaintiffs have not alleged any such set of facts. Further, Plaintiffs have alleged no basis for subject matter jurisdiction other than §8.01-184 of the Declaratory Judgment Act.

CONCLUSION

Based on the foregoing grounds, the Defendant, Vietnamese Medical Society of Northeast America, having set forth its Demurrer in response to Plaintiffs’ Complaint, prays that this Court enter an Order dismissing Plaintiffs’ Complaint against Defendants.

Vietnamese Medical Society of Northeast America

By Counsel



Richard H. Nguyen, Esq. (VSB # 66677)
6402 Arlington Blvd. Suite 371
Falls Church, VA 22042
(703)534-0805 tel
(703)534-3047 fax
Counsel for Defendant, Vietnamese Medical
Society of Northeast America

CERTIFICATE OF SERVICE

I hereby certify that on this the 7th day of June, 2010, a true and accurate copy of the foregoing Demurrer was sent via first class mail, postage prepaid and facsimile to:

J. Chapman Petersen, Esq.,
Jason F. Zellman, Esq.
SUROVELL MARKLE ISAACS & LEVY PLC
4010 University Drive, 2nd Floor
Fairfax, VA 22030
Facsimile 703.591.9285



Richard H. Nguyen