

VIRGINIA: IN THE CIRCUIT COURT OF ALBEMARLE COUNTY

JOHN H. BIRDSALL,

HARRY BURN,

REYNOLDS COWLES,

LANDON HILLIARD,

KIWI HILLIARD,

JOHN G. MACFARLANE, III

DUDLEY MACFARLANE,

and

JACK SANFORD, JR.

Plaintiffs

v.

Case No. CL17000001-00

FOXFIELD RACING ASSOCIATION, INC.

and

THOMAS J. DICK,

**MOTION TO DISMISS COUNT II OF THE PLAINTIFFS AMENDED
COMPLAINT FOR LACK OF STANDING AND LACK OF SUBJECT MATTER
JURISDICTION**

Defendants Foxfield Racing Association, a Virginia nonstock corporation, and Thomas J. Dick the corporation's sole director, by counsel, and state the following for their Motion to Dismiss Count II of the Amended Complaint of the Plaintiffs, which claims that there was a trust created in the Will of Mariann S. De Tejada and that the alleged trust is controlled by the Virginia Uniform Trust Code which has been violated:

Introduction

Defendants incorporate and adopt the Introduction and relevant facts set out in its Motion To Dismiss Count I of the Plaintiffs Amended Complaint.

Argument

I. Plaintiffs' entire claim rests upon the erroneous assumption that the Will did in fact create a trust and that there are beneficiaries of the alleged trust.

Their assumption is incorrect. The Will did not create a trust and it did not identify beneficiaries but instead it clearly and unequivocally left specific bequests and the residuary estate to the nonstock corporation Foxfield Racing Association which had been created by the testatrix for the purpose of promoting steeple chase racing approximately eight years before her death. Absent a trust the Plaintiffs lack standing to assert any claim against Foxfield Racing Association or Thomas J. Dick its sole director.

II. Plaintiffs have assumed that they are authorized to bring an action under the Virginia Uniform Trust Code and that assumption is incorrect.

Plaintiffs are not trustees or settlors of a trust with standing and their status as neighbors and attendees of the Foxfield Races does not make them beneficiaries of any trust if one existed nor does it give them standing to file the Complaint herein.

III. Even if the Plaintiffs did not lack standing, Foxfield Racing Association was chartered as a nonstock corporation and it remains a nonstock corporation currently and is governed exclusively by the Virginia Nonstock Corporation Act.

The Plaintiffs attempt to characterize Foxfield Racing Association as a trustee holding property it owns in trust and thereby subject it to the provisions of the Virginia Uniform Trust Act is a tactic that has been litigated before in the Commonwealth and their reasoning and that approach have been rejected by the Virginia Supreme Court. In the decision of Dodge, et al. v. Trustees Of Randolph-Macon Woman's College, 661 S.E. 2d 805, 276 Va. 10 (2008) the Virginia Supreme Court upheld the trial court decision to sustain the defendant college's demurrer because the charitable corporation in dispute was not subject to the Virginia Uniform Trust Code despite language in a will which clearly showed the testator's desire to set up a girl's school in perpetuity. In discussing the non-applicability of the Uniform Trust Code to the nonstock corporation the Supreme Court opined that "This statute does not authorize a circuit court to declare by judicial fiat that a nonstock charitable corporation is a trust." Because Foxfield Racing Association has been chartered as a nonstock corporation and is not a charitable corporation receiving charitable donations as Randolph-Macon was in Dodge it follows, *a fortiori*, that it falls within the protection of the ruling in Dodge. The Plaintiffs claim for relief under the VUTC fails as a matter of law.

IV. This Court lacks subject matter jurisdiction over the issues before it.

In Commonwealth of Virginia v. The JOCO Foundation, et al. 558S.E. 2d 280, 263 Va. 151(2002) the Virginia Supreme Court held, in circumstances more compelling than the facts before us in this case, that "... the circuit court lacks subject matter jurisdiction over this suit." p. 287 . Thus, even if the Plaintiffs had standing to bring any of their several claims, and there is no standing, this court should not intervene in the corporate governance of Foxfield Racing Association a nonstock corporation which is controlled by Virginia's corporate law, not the law of trusts, because it lacks subject matter jurisdiction.

Conclusion

The Plaintiffs do not have standing to bring an action as the alleged beneficiaries of any trust under the Virginia Uniform Trust Code because a trust was never established by Tejada's Will. Even if Plaintiffs could bring such an action, Foxfield Racing Association is a corporation which is governed by the Nonstock Corporation Act. Foxfield Racing Association is not a trust or trustee and it is not subject to the VUTC.

WHEREFORE, Defendants respectfully request that the Court: (1) dismiss Count II of the Plaintiffs Amended Complaint against the Defendants with prejudice; and (2) grant such further relief as this Court deems proper and just .

FOXFIELD RACING ASSOCIATION and
THOMAS J. DICK sole director

Counsel for Defendants

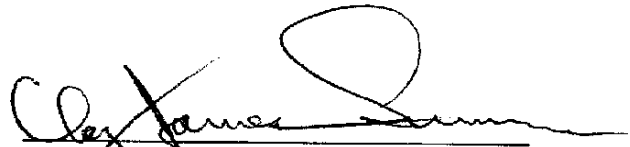


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CERTIFICATE

I hereby certify that I sent by first class mail postage prepaid a true copy of the foregoing Answer and Affirmative Defenses this 8th day of February 2017 to:

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