

FILED DATE: 11/21/2019 4:13 PM 2013CH23386

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

FILED
11/21/2019 4:13 PM
DOROTHY BROWN
CIRCUIT CLERK
COOK COUNTY, IL
2013CH23386

**TOWNSHIP TRUSTEES OF SCHOOLS)
TOWNSHIP 38 NORTH, RANGE 12)
EAST,)**

7467997

Plaintiff,

No. 13 CH 23386

vs.

**Hon. Thomas R. Mulroy
Commercial Calendar I**

**LYONS TOWNSHIP HIGH SCHOOL)
DISTRICT NO. 204,)**

Defendant.

**PLAINTIFF’S MOTION TO DISMISS
DEFENDANT’S “CONSOLIDATED COUNTERCLAIM”**

Plaintiff, Township Trustees of Schools Township 38 North, Range 12 East (the “Trustees”), by their undersigned counsel, THE QUINLAN LAW FIRM, LLC, and MILLER, CANFIELD, PADDOCK & STONE, PLC, and pursuant to 735 ILCS 5/2-619.1, moves to dismiss the “Consolidated Counterclaim” filed by Defendant, Lyons Township High School District No. 204 (“LT”). In support of this Motion, the Trustees state as follows:

I. INTRODUCTION

LT’s new “Consolidated Counterclaim” should be dismissed under 735 ILCS 5/2-619.1. First, Count I should be dismissed pursuant to Section 2-615, because LT fails to state any cause of action upon which to base its purported claim for a setoff.

Second, Count II should be dismissed under Section 2-615, because LT fails to allege that the Trustees owe LT a fiduciary duty and, to the contrary, the Trustees do not owe LT a fiduciary duty. The Trustees are statutorily charged with certain ministerial duties, but LT does not allege violations of those duties. As to discretionary (*i.e.*, non-ministerial) duties, the Trustees, elected

by and responsible to the voters of Lyons Township, have discretion to make business decisions in furtherance of their public office. Their discretion is subject only to challenge for fraud, corruption, oppression or gross injustice. LT alleges none of these things.

Further, if this Court were to find that the Trustees had and breached fiduciary obligations, such a ruling would materially impact the function of the Treasurer's office, which provides services for *all* of the districts in Lyons Township – not just LT. This Court's rulings would materially affect how the Treasurer serves the other districts within Lyons Township. Under Section 2-615, LT should either be required to add those other districts as necessary parties, or Count II should be dismissed.

Moreover, in drafting the School Code, the General Assembly did not expressly impose upon the Trustees a fiduciary duty. The Trustees are an elected body politic. A decision to impose a fiduciary duty upon an elected public body is a political question that should be left to the General Assembly, this question is not justiciable in this Court, and so dismissal under Section 2-619(a)(1) is also warranted.

The declaratory relief LT seeks in Count III also runs afoul of both Section 2-615 and Section 2-619. The declaratory relief is vague and would not terminate, with finality and precision, any controversy between the parties. It thereby fails to state a claim under Section 2-615. Moreover, some of the declaratory relief LT seeks is not ripe, and so is non-justiciable and subject to dismissal under Section 2-19(a)(1). Other relief invites this Court not to interpret, but rather draft new language for, the School Code. Legislating the Trustees discretionary business decisions is best left to the legislative branch of the State, and these matters are also non-justiciable political questions subject to dismissal under Section 2-619(a)(1). Even if this Court

finds they are justiciable, however, this Court should nonetheless exercise its discretion and decline to entertain the declaratory relief LT proposes.

II. COUNT I SHOULD BE DISMISSED UNDER SECTION 2-615 BECAUSE IT DOES NOT STATE A CAUSE OF ACTION

LT admits that the School Code mandates that LT “shall pay” its annual pro rata share of the Treasurer’s expenses, that the School Code dictates how that share is to be calculated, and that this obligation is “mandatory and not optional.” (LT’s Answer, ¶¶ 25-28.) Despite this, it is undisputed LT did not pay its pro rata share in full for FY 2001-2018. Further, as alleged in Count I, LT purports to modify the School Code and claim a right of setoff against its mandated pro rata share for FY 2000-2012.

This is based upon memorandums that were prepared annually by LT and directed to former Treasurer Robert Healy (attached to LT’s Consolidated Counterclaim as Exhibits A and B). These memorandums propose to offset the amount LT owed for its annual pro rata share with the salaries and benefits of certain LT employees. Although LT alleges that the Trustees voted to “approve” the first memorandum in March 2000 (LT’s Exhibit A)¹, LT does not allege that the Trustees voted to approve any of the other memoranda for FY 2001-2012 (those attached as LT’s Exhibit B).²

In addition to the setoff being contrary to the School Code, LT misunderstands the nature of a setoff. A setoff is not itself a cause of action, but rather a procedural mechanism, through which a defendant may assert a cause of action “based upon a transaction extrinsic to that which

¹ See ¶26. Although this allegation must be accepted as true for purposes of a Section 2-615 motion, LT’s allegation is disingenuous. The minutes show there was not a vote to “accept” LT’s memorandum, not to “approve” a contract with LT.

² This Court’s ruling on the statute of limitations removed FY 2000-2007 from this lawsuit, leaving only those claims for FY 2008-2018. LT asserts only a setoff with respect to FY 2002-2012; LT does not assert a setoff for FY 2013-2018.

is the basis of plaintiff's cause of action. *Lake County Grading Co. of Libertyville v. Advance Mech. Contractors, Inc.*, 275 Ill. App. 3d 452, 461-62 (2nd Dist. 1995). Count I fails to state a cause of action, because LT asserts only a right of setoff, without alleging an underlying cause of action. Moreover, LT does not plead any damages it has suffered from any possible cause of action that might exist. LT just asserts that LT is not liable for LT's pro rata share under the School Code, which is not an affirmative claim, but just a counter-argument as to why LT believes it is not liable. For this reason, Count I should be dismissed under Section 2-615 for failure to state a claim.

III. COUNT II SHOULD BE DISMISSED BECAUSE LT DOES NOT PROPERLY ALLEGE THE TRUSTEES OWE A FIDUCIARY DUTY

A. Dismissal Under Section 2-615.

The Trustees are a body politic comprised of three elected trustees, elected by and responsible to the voters of Lyons Township as a whole. 105 ILCS 5/5-2. The Trustees appoint a Treasurer. 105 ILCS 5/8-1. Together, they manage the financial business of the school districts in Lyons Township. The Trustees (as a body politic) – not the individual trustees or the Treasurer – is the only party other than LT in this lawsuit. Accordingly, when LT alleges in its Consolidated Counterclaim that the “TTO” owes it a fiduciary duty, LT is necessarily alleging that the Trustees, an elected body politic, owe LT a fiduciary duty.

The Trustees are answerable to the voters who elected them, and the Treasurer is answerable to the Trustees, but the Trustees, as an elected body politic, do not owe a common-law fiduciary duty to LT. The political process provides a solution if LT wants the Trustees run in a different manner – elect different people. The Trustees are a body politic responsible to *all* of the voters within Lyons Township, not just the subset of voters that elects LT's Board of

Education, and the Trustees have a greater responsibility than just making business decisions with an eye towards what is best for LT.

In drafting the School Code, the General Assembly imposed certain statutory, ministerial, duties upon the Trustees. LT has not alleged that the Trustees have failed to perform any ministerial duties. The Trustees, like all elected officials, are required to make non-ministerial (discretionary) decisions on how to run their body politic. These include making decisions on how to handle the financial business of the school districts who educate the children of the voters who elected them.

LT's claims focus on these discretionary decisions. Such decisions, which are intended to best serve the voters to whom the officials are responsible, are subject to judicial review only where "fraud, corruption, oppression or gross injustice is shown...." *Board of Educ. v. Board of Educ.*, 112 Ill. App. 3d 212, 219 (1st Dist. 1983).³ LT has not alleged that any of the Trustees' business decisions it challenges in Count II, all of which are discretionary in nature, involve fraud, corruption, oppression or gross injustice.

Instead of alleging the Trustees exceeded their discretionary authority, LT wishes to challenge the Trustees by alleging the Trustees owed and breached a fiduciary duty. The School Code, however, nowhere states that the Trustees owe LT a fiduciary duty. Presumably, if the General Assembly wanted to impose upon the Trustees such a duty, the General Assembly would have been able to draft language stating as much. The elected trustees and the Treasurer have *statutory* obligations, to be sure.

³ This is similar to the business judgment rule, which provides that courts should not substitute their own judgment for the business decisions of corporate directors, absent bad faith, fraud, illegality or gross overreaching. *Stamp v. Touche Ross & Co.*, 263 Ill. App. 3d 1010, 1015-16 (1st Dist. 1993).

For example, Section 5/8-5 of the School Code instructs the Treasurer how to maintain his financial accounts, including that he keep them “in the manner directed by the State Board of Education, the regional superintendent of schools or the trustees of schools....” 105 ILCS 5/8-5. Section 5/8-6 instructs the Treasurer to “keep in a cash book separate cash balances...and extend the balances and the aggregate cash balance for all funds balance at least monthly.” 105 ILCS 5/8-6. These are statutory, not fiduciary, duties. The specific way that the Treasurer implements these duties are, and should be, left to the discretion of the body politic.

LT challenges such minutiae as the *timing* of interest allocations. LT alleges that the Trustees fail to distribute every penny of investment income on a quarterly basis, because of “a supposedly prudent business practice that protects the parties against fluctuations in investment values.” (¶ 58.) LT does not allege that the School Code dictates the minutiae of when interest must be allocated, or that the Trustees cannot engage in a “prudent business practice” of allocating less than every penny on a quarterly basis (even if LT disagrees with the practice). These types of business practices are left to the Trustees’ discretion and LT has not alleged that such practices are the product of fraud, corruption, oppression or gross injustice.

LT also asserts the Trustees incurred unreasonable attorneys’ fees (¶ 86), that the Trustees applied insurance recoveries to credit LT’s pro rata share (¶¶ 52-53), and that the Trustees pledges a CD as collateral for a bank loan made to another district (¶¶ 74-76), but LT does not allege any of these actions involve fraud, corruption, oppression or gross injustice.

This leads to a further basis to dismiss LT’s claim for breach of fiduciary duty. If LT were correct that the Trustees owed LT a fiduciary duty, logic dictates that the Trustees would owe that duty to *all of the other school districts* in Lyons Township. The Trustees would not have an obligation to make decisions about what is in *LT’s* best interest, but what is in the best

interests of all of the school districts taken together. Those other districts are, therefore, necessary parties.

A necessary party is “one whose presence in a lawsuit is required for any of three reasons: (1) to protect an interest which the absentee has in the subject matter which would be materially affected by a judgment entered in his absence; (2) to reach a decision to protect the interests of those who are before the court; or (3) to enable the court to make a complete determination of the controversy.” *Lah v. Chicago Title Land Tr. Co.*, 379 Ill. App. 3d 933, 940 (1st Dist. 2008). The other districts are necessary parties to Count II.

For example, West 40 is not going to complain that the Trustees breached a fiduciary duty by helping West 40 get a bank loan – of the dozen districts, only LT is complaining about that transaction. Accordingly, LT should either be directed to name the other school districts, or Count II should be dismissed. *See* 735 ILCS 5/2-615 (“The motion shall point out specifically the defects complained of, and shall ask for appropriate relief, such as...that the action be dismissed...or that necessary parties be added....”) LT has failed to allege the existence of a fiduciary duty and instead has only questioned the Trustees discretionary acts, and thus fails to state a claim under Section 2-615.

B. Dismissal Under Section 2-619.

The Trustees submit that the decision whether to impose a fiduciary duty upon an elected body politic is best left to the branch of government that drafted the School Code, thereby creating the body politic. So, the matter is not justiciable, as argued above. Dismissal is therefore additionally proper under Section 2-619(a)(1). *Moore v. Grafton Twp. Bd. of Trustees*, 2011 IL App (2d) 110499, ¶ 5.

IV. COUNT III SHOULD BE DISMISSED BECAUSE THE DECLARATORY RELIEF SOUGHT IS VAGUE AND BECAUSE LT HAS FAILED TO JOIN NECESSARY PARTIES; ALTERNATIVELY, COUNT III SEEKS NON-JUSTICIABLE RELIEF

In Count III, LT seeks broad declaratory relief, enumerated in LT's prayer for relief as declarations (a) through (g). Numerous problems with these declarations exist, cardinally that they are so vague that they would only lead to more litigation.

A. LT's Declaratory Relief Would Not Settle And Fix Any Controversy and LT Has Not Joined Necessary Parties (Section 2-615).

The purpose of a declaratory judgment is to "settle and fix rights of the parties." *Kaybill Corp. v. Cherne*, 24 Ill. App. 3d 309, 315 (1st Dist. 1974). Any declaratory judgment must "finally and effectively decide the rights of parties on the issues presented and terminate the *entire controversy* between them...." *Id.* (emphasis added). The judgment must "represent the ultimate and precise determination" of the issue presented. *Id.* LT's purported declarations fall short of this standard because they are too vague and would only lead to more litigation, and so they fail to state a cause of action for declaratory relief under Section 2-615.

In declarations (a) and (b), LT seeks judgment that the Trustees "must separately account for all funds belonging to LT and credit LT's account with the full amount of LT's holdings and interests," but "without any reduction for claimed investment-related expenses."

Section 8-7 of the School Code states that the Treasurer is permitted to "combine moneys" from the districts for investment purposes and that when the Treasurer does so, "the moneys combined for such purposes shall be accounted for separately in all respects...." 105 ILCS 5/8-7.

The School Code limits the types of investments the Treasurer may make. The Treasurer may invest in bonds, for example. 105 ILCS 5/8-8. The School Code requires the Treasurer to be

a CPA or a Certified Chief Business Official, but the School Code does not require that the Treasurer be a securities dealer or investment advisor. 105 ILCS 5/8-1(e). The School Code contemplates the Treasurer will have a need to hire investment advisors, however, because it expressly authorizes him to enter into agreements regarding investments. 104 ILCS 5/8-7.

Given the above, there is no need for this Court to enter a declaratory judgment that, when the Treasurer combine districts funds for investment purposes, he must account for those funds separately – the School Code already declares that and LT does not allege that this is not done. LT also requests a declaration that the Trustees have an obligation to “credit LT with the full amount of its investment earnings.” What does this mean? Does the Treasurer have to use an accrual or cash basis? Does the Treasurer need to make this credit even for income that has been recognized but not yet realized? Does this have to be done daily? And in what way has the Treasurer not done this?

LT also asks for a declaration that the Trustees cannot incur investment related fees. However, there is no basis upon which this Court could logically conclude that the School Code expressly authorizes the Treasurer to hire investment advisors – but that the Treasurer can only hire them if they work for free. This requested relief is vague, would not finally and precisely terminate any dispute, and would only lead to further legal proceedings about whether the Treasurer’s actual practices are adequate.

Requested declarations (c), (d), (e) and (g) all related to the Treasurer’s computation of the pro rata share of his expenses and LT’s refusal to pay that share.

With respect to declaratory relief (c), the School Code requires that the Treasurer incur expenses and then allocate his expenses among all the districts according to their pro rata share. 105 ILCS 5/8-4. Some of these expenses include the Trustees’ legal fees (the subject of

declaratory relief (g)). During the fiscal year, however, the Treasurer must have some way of paying for its expenses in the first instance. Both parties agree that the Trustees and Treasurer do not have a tax base or any source of revenue other than each district paying its pro rata bill. During the year, therefore, the Treasurer uses the districts' funds to pay these expenses, and then bills the total amount spent to each district according to their pro rata share.

LT refuses to pay its pro rata bill, however, and so this creates a deficit in the fund balance held for all districts. LT asks for a judgment that the Treasurer's practice described above is "improper, and the [Trustees] must repay [their] borrowing by crediting LT's accounts with LT's pro rata share of [any deficit]." This declaratory relief is also too vague, as LT asks this Court to declare the Treasurer's business practice is "improper." How does this Court evaluate what is "improper?"

In declaratory relief (d), LT wants this Court to declare that not even \$1.00 of the deficit can be allocated to LT. But how the Trustees allocate the deficit will materially affect all of the school districts. If this Court determines that the deficit cannot be allocated to LT, the other school districts will each be allocated a greater share of the deficit. The Trustees do not have a tax base or any other source of revenue, so the Trustees cannot pay down the deficit on their own. The other districts are necessary parties to any lawsuit the result of which will be to increase their share of the deficit.

In request (e), LT asks this Court for a declaration that the Trustees have no right to "make unilateral withdrawals, adjustments, ledger entries, disbursements, or other reductions to the amounts of LT's funds...." The Trustees manage hundreds of millions of dollars belonging to the school districts and regularly make "unilateral" adjustments or ledger entries. Is LT contending that before this is done the Trustees must instruct the Treasurer to obtain LT's

permission to make bookkeeping entries, the entry of which are entrusted to the Treasurer in the first instance? (See, *e.g.*, 105 ILCS 5/8-5.) If the Treasurer accidentally types “100000” instead of “10000” on an Excel spreadsheet, can the Treasurer correct this, or would that constitute a “unilateral adjustment?”

LT is not asking this Court to interpret any particular language from the School Code, but rather add its own requirement that the Treasurer must check with LT before making bookkeeping entries. If the General Assembly saw fit to include such a requirement in the School Code, the General Assembly would have drafted that requirement itself.

Declaratory relief (f) relates to another entity, West 40, that provides support services to other districts within Lyons Township. West 40 does not have a tax base and depends upon the State to provide its funds. Due to well-publicized budget issues the State was not timely providing funds and so West 40 did not have enough money to keep its doors open. West 40’s closure would have adversely affected every school district in Lyons Township.

So West 40 sought out a loan. West 40 provided documents to the bank establishing that the State funding was just a matter of time, but the bank required collateral, and so the Treasurer purchased a CD and pledged it as collateral for West 40’s loan. This enabled West 40 to keep its doors open. West 40 is repaying the loan and the CD continues to produce interest that is allocated to all of the districts – including LT.

LT wants a declaratory judgment, however, that the Treasurer’s pledge of this collateral “was unauthorized and improper....” Again, how does this Court judge what is “improper?” West 40 almost certainly found this transaction “proper.” Further what language of the School Code does LT rely upon in support of its position that the Treasurer must obtain LT’s

authorization before purchasing a CD? What statutory language is this Court being asked to interpret?

For all of these reasons, LT's requested declarations are too vague to state a claim for declaratory relief under Section 2-615 – but another problem exists: LT has not joined the other school districts (including West 40) to its lawsuit. *See Lah*, 379 Ill. App. 3d at 940 (a necessary party is one whose interests would be materially affected by a court's holding).

For example, if the Trustees are required to inform the bank that the pledge of collateral for West 40's loan was "unauthorized and improper," West 40's loan will certainly be impacted. Given this, West 40 is a necessary party to Count III because its ability to operate will be materially affected by the declaratory relief LT seeks.

B. LT's Declaratory Relief Is Not Justiciable (Section 2-619).

LT's declaratory relief (d) and (e) involve future events that may, or may not, happen. Because the Trustees have not made a decision as to how they will allocate the deficit in the event they lose this lawsuit (something itself that is contingent upon future events), any declaration requiring the Trustees to allocate the deficit to all of the other districts except LT is not yet ripe for adjudication. Likewise, declaratory relief (e), which seeks to prohibit the Trustees from making future "unilateral" adjustment or ledger entries, involves entries that have not yet been made and may never need to be made. This Court should dismiss these aspects of LT's requested declaratory relief because they are not justiciable under Section 2-619(a)(1). *See Byer Clinic & Chiropractic, Ltd. v. State Farm Fire & Cas. Co.*, 2013 IL App (1st) 113038, ¶ 24 (explaining that a dispute which is ripe is not justiciable).

Another aspect of the non-justiciability of LT's relief is that it involves political questions better left for the General Assembly to address. LT is grotesquely unhappy with the Trustees and

the Treasurer, but restructuring a body politic is not the province of the courts; rather, it should be left to the General Assembly, which created the body politic in the first instance.

Certainly, LT will argue that courts are charged with interpreting statutory language on a regular basis – but LT is not asking this Court to interpret some ambiguous wording, but rather decide more fundamental issues. For example, the School Code requires the Treasurer to incur expenses and then bill those expenses to each district according to their pro rata share. (See 105 ILCS 5/8-4.) But the Treasurer requires funds to pay the expenses in the first instance. As explained above, because the Trustees do not have a tax base, they utilize the districts’ funds and until they are repaid this is reflected in the structural deficit.

LT wants this Court to declare that under the School Code this process is “improper.” Putting aside the vagueness of that request, the School Code certainly does not prohibit this practice – LT does not point to any ministerial obligation the Trustees have refused to perform. But if this Court determines the current practice cannot continue, it would result in the Treasurer being unable to fund his office and perform his statutorily-required duties. This is not hyperbole. Perhaps LT would care to offer another idea how, without violating Section 5/8-4 of the School Code, the Treasurers should pay its expenses during the fiscal year?

If the Treasurer had to suspend operations that would mean that every single school district (even LT) would be unable pay their teachers, since the Treasurer is person who signs their paychecks. Regardless, LT is again attempting to use this Court to address a political question that is better left for the General Assembly to answer. *See Moore v. Grafton Twp. Bd. of Trustees*, 2011 IL App (2d) 110499, ¶ 5 (non-justiciable disputes include political questions to be addressed by the political bodies of the State).

Even if this Court were to determine that LT's declaratory relief does not involve the types of "political questions" that require dismissal under Section 2-619(a)(1), this Court ultimately has discretion whether to declaratory relief in the first instance, and this Court should certainly decline to enter declaratory judgments that can be addressed through the political process and will not require this Court to do far more than merely interpret statutory language. *See Marlow v. American Suzuki Motor Corp.*, 222 Ill. App. 3d 722, 728 (1st Dist. 1991).

IV. CONCLUSION

For the reasons stated herein, the Trustees respectfully request that the Consolidated Counterclaim be dismissed as argued in this Motion, or that LT be ordered to add necessary parties to this lawsuit as argued herein, and that this Court grant any such further relief as may be appropriate.

Respectfully submitted,

LYONS TOWNSHIP TRUSTEES OF SCHOOLS
TOWNSHIP 38 NORTH, RANGE 12 EAST

By: /s/ Barry P. Kaltenbach
One of its attorneys.

William J. Quinlan
wjq@quinlanfirm.com
Gerald E. Kubasiak
gekubasiak@quinlanfirm.com
Gretchen M. Kubasiak
gmkubasiak@quinlawfirm.com
The Quinlan Law Firm, LLC
231 S. Wacker Drive, Suite 6142
Chicago, Illinois 60606
(312) 212-8204
Firm No. 43429

Barry P. Kaltenbach
kaltenbach@millercanfield.com
Miller, Canfield, Paddock & Stone, P.L.C.
225 West Washington, Suite 2600
Chicago, Illinois 60606
(312) 460-4200
Firm No. 44233

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2019, I electronically filed **PLAINTIFF'S MOTION TO DISMISS DEFENDANT'S "CONSOLIDATED COUNTERCLAIM"** with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

/s/Barry P. Kaltenbach