

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY
STATE OF MISSOURI**

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|--------------------------------|-----------------------|
| JEFFERSON COUNTY RAINTREE) | |
| COUNTRY CLUB, LLC,) | |
|) | |
| Plaintiff,) | |
| v.) | Case No. 18JE-AC00739 |
|) | |
| BLACK HOLE, LLC and) | Division 12 |
| RAINTREE PLANTATION PROPERTY) | |
| OWNERS ASSOCIATION, INC.,) | |
|) | |
| Defendants.) | |

**DEFENDANTS’ SUPPLEMENTAL MEMORANDUM AND SUGGESTIONS
IN OPPOSITION TO PLAINTIFF’S MOTIONS TO DISMISS**

COMES NOW Defendants/Counterclaimants, Raintree Plantation Property Owners Association, Inc. (“RPOA”) and Black Hole, LLC (“BHLLC”), by and through the undersigned counsel, and in opposition to the Motions to Dismiss by Plaintiff/Counterclaim Defendant Jefferson County Raintree Country Club, LLC (“JCRCC”), state as follows:

I. Introduction.

This matter is before the Court on JCRCC’s two motions to dismiss the Counterclaims by RPOA and BHLLC.¹ JCRCC filed its Second Amended Petition on or about October 17, 2018. Defendants separately filed Answers, Affirmative Defenses and Counterclaims on or about November 8, 2018. Both counterclaims state causes of action for unjust enrichment and prima facie tort related to JCRCC’s unreasonable increase in mandatory golf course dues and simultaneous reduction in available country club amenities since 2014. JCRCC moved for dismissal of the counterclaims and its motions were heard and taken under advisement on

¹ The Court also has pending before it RPOA’s Motion to Consolidate this matter with Case No. 15JE-CC00809. For clarity, ROPA’s supplemental materials in support of its Motion to Consolidate is filed as a separate memorandum.

December 11, 2018. Following hearing, the Court granted Defendants leave to file supplemental materials such as this in support of its counterclaims.

JCRCC asserts that both Defendants' counterclaims fail as a matter of law to state claims for unjust enrichment, arguing that JCRCC has not received or recognized any benefit upon which a claim for unjust enrichment can be founded. JCRCC also asserts that Defendants have failed to adequately plead causes of action for prima facie tort, or alternatively, that the prima facie tort claims are barred by the economic loss doctrine. JCRCC is incorrect on all points. Defendants have plead facts sufficient to establish that JCRCC has received a benefit at Defendants' expense in the form of exponentially increasing mandatory country club dues, and that the retention of this benefit is inequitable in light of JCRCC's simultaneous reduction of available amenities at the country club. Because JCRCC profits through its imposition of dues charged to members of RPOA and to BHLLC, while providing nothing of value in return, Defendants may properly maintain a cause of action for unjust enrichment. In addition, Defendants have plead facts sufficient to establish all essential elements of prima facie tort. Finally, the economic loss doctrine is inapplicable in this case.

II. Motion to Dismiss Standard.

A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the pleadings. *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993). It assumes that all the averments are true, and liberally grants to the pleading party all reasonable inferences to be drawn therefrom. *Id.* (citing *Sullivan v. Carlisle*, 851 S.W.2d 510, 512 (Mo. banc 1993)). "No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the

facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.” *Nazeri*, 860 S.W.2d at 306.

III. Defendants have adequately stated causes of action for unjust enrichment.

The essential elements of unjust enrichment are: “(1) that the defendant was enriched by the receipt of a benefit; (2) that the enrichment was at the expense of the plaintiff; and (3) that it would be unjust to allow the defendant to retain the benefit.” *Executive Board of the Missouri Baptist Convention v. Windermere Baptist Conference Center*, 280 S.W.678, 697 (Mo. App. 2009) (quoting *Miller v. Horn*, 254 S.W.3d 920, 924 (Mo. App. 2008)); see also *S & J, Inc. v. McLoud & Co.*, 108 S.W.3d 765, 768 (Mo. App. 2003). The essence of unjust enrichment is that the defendant has received a benefit that it would be inequitable for him to retain. *Pitman v. City of Columbia*, 309 S.W.3d 395, 402 (Mo. App. 2010) (citing *Koepke Const., Inc. v. Woodsage Const. Co.*, 944 S.W.2d 508, 515 (Mo. App. 1992).

In this case, JCRCC asserts that it has a right to collect sums from the owners of lots in Sections 20 – 25 of Raintree Plantation Subdivision because such owners are “deemed social members” of Raintree Country Club and owe mandatory dues in exchange for the privilege of their membership status. Similar to a mortgage interest, this right to collect dues is freely assignable and has real value (evidenced by Exhibit 4 to JCRCC’s Second Amended Petition). The right to collect dues which JCRCC has taken by assignment is unquestionably a benefit that it has received.

JCRCC’s complaint that it has not received a benefit from RPOA or BHLLC because it has not received payment is completely irrelevant. JCRCC asserts that it has a right to enforce the provisions of paragraph 3f of the Subdivision Indentures with respect to its collection of dues. If JCRCC’s assertion is correct, it presently has the authority to enforce a special lien

against the lots owned by BHLLC, and to foreclose this lien without the necessity of pursuing a collections suit (see Exhibit 2 to JCRCC's Second Amended Petition at ¶ 3f). The fact that JCRCC has elected to forego its lien option, and to instead proceed with litigation, does not negate the fact that it currently possesses something of value with respect to the lots owned by BHLLC. This is a benefit which JCRCC has accepted and retained. Thus, Defendants satisfy the first element of unjust enrichment.

The benefit conferred upon JCRCC has come at the expense of both RPOA and BHLLC. The obligation to pay dues is incurred through ownership of lots in Sections 20 - 25 under the terms of the Subdivision's Amended Covenants and Restrictions. The fact of ownership itself creates a personal obligation for an owner to pay assessments and dues. Lots in Sections 20 – 25 are burdened and encumbered by JCRCC's collection rights through the Subdivision Indentures. Not only does this encumbrance create a personal indebtedness for the owner, but the encumbrance also runs with the land, is binding upon the heirs, grantees and successors of present owners, and cannot be discharged except by JCRCC itself. As a result, the benefit of collection rights conferred upon JCRCC necessarily comes at the expense of lot owners in Sections 20 - 25, including BHLLC and its owner, RPOA.

JCRCC argues that Defendants' claims for unjust enrichment fail because the benefit was not conferred upon it by RPOA or by BHLLC, but was conferred instead by its assignor, DKAAT Properties, LLC. However, this is a faulty argument. While Missouri courts are reluctant to extend the principle of unjust enrichment to passive third parties, the courts have found that unjust enrichment can properly be maintained by a plaintiff who was not a party to the transfer of the benefit. See *Blue Cross Health Services, Inc. v. Sauer*, 800 S.W.2d 72, 76 (Mo.

App. 1990); see also *Graves v. Berkowitz*, 15 S.W.3d 59, 63 (Mo. App. 2000) (discussing *Webcon Group, Inc. v. S.M. Properties*, 1 S.W.3d 538 (Mo. App. 1999)).

In this case RPOA and BHLLC are far more than mere passive third parties with respect to the assignment of the collection rights from DKAAT to JCRCC. BHLLC owns real estate subject to mandatory dues and has directly incurred obligations by virtue of its ownership of the property. JCRCC has received rights over the property owned by BHLLC and by extension RPOA. Because Defendants have adequately plead facts supporting the first two elements of unjust enrichment, the inquiry should then rest on whether the retention by JCRCC of the benefit of collection rights is unjust. That answer is squarely in the affirmative.

Implicit in the right to collect mandatory dues is the obligation that the golf course provide a service to the social members. RPOA and BHLLC have plead that JCRCC has reduced the available country club amenities since it took ownership, while simultaneously increasing the mandatory dues it charges members. The reduction in services and increase in dues has been to such an extreme amount that JCRCC has not only caused the country club to cease being of any benefit to the lot owners, but it is now detrimental to owners in the Subdivision. Lots in Sections 20 – 25 carrying the burden of mandatory dues have lost significant value since JCRCC took ownership of the golf club, to the point that a number of unimproved lots cannot be sold. That JCRCC continues to impose an ever-increasing burden upon the owners in Sections 20 – 25 while providing nothing of value in return is the very essence of inequity.

IV. Defendants have adequately plead causes of action for prima facie tort.

An action for prima facie tort permits recovery for cases in which a lawful act is done with the purpose of injuring another. *Porter v. Crawford & Co.*, 611 S.W.2d 265, 268 (Mo. App.

1980). The elements are: (1) an intentional act by the defendant; (2) an intent to cause injury to the plaintiff by doing the act; (3) injury caused by the act; and (4) absence of justification, or a patently insufficient justification, for the defendant's act. *Id.*

In this case, Defendants have affirmatively plead: (1) that JCRCC has intentionally increased mandatory dues charged for lots from \$225.00 to \$892.00 since 2015; (2) that JCRCC has intentionally reduced the amenities available at the country club and has permitted portions of the country club to fall into disrepair; (3) that Defendants have been injured by JCRCC in that the increase in dues and reduction in amenities has caused lots in Sections 20 – 25 to lose nearly all value while JCRCC continues to demand and to sue for collection of dues; (4) that JCRCC's actions were intentional and were done for the purpose of injuring Defendants by unfairly profiting from the mandatory dues with knowledge of the loss of value; and (5) that JCRCC had no justification for its actions.

For purposes of a motion to dismiss, each of these allegations are taken as true. The result is that both BHLLC and RPOA have stated facts which support each essential element of a cause of action for prima facie tort. The factual allegation that JCRCC intends to unfairly profit from the increase in mandatory dues and reduction in amenities satisfies the requirement of pleading absence of justification, or insufficiency of justification, to support a claim of prima facie tort.

In addition, JCRCC argues in the alternative that Defendants' prima facie tort claims are barred under the economic loss doctrine. However, that principle is inapplicable in this case. The economic loss doctrine serves as a bar from plaintiffs recovering in tort for economic losses that are contractual in nature. *Autry Morlan Chevrolet Cadillac, Inc. v. RJF Agencies, Inc.*, 332 S.W.3d 184, 192 (Mo. App. 2010). The common thread in cases in which the economic loss

doctrine has been held to prevent a plaintiff's recovery in tort "is the effort to impose tort liability on the builder of a home, or to recover in tort for the failure of a product which is believed to be defective. *Id.* An action in tort can nonetheless be maintained in circumstances in which the party sues for breach of a duty recognized by the law as arising from the relationship or status the parties have created. *Id.* (quoting *Business Men's Assurance Co. of America v. Graham*, 891 S.W.2d 438, 453 (Mo. App. 1994).

Here, there is no contract between JCRCC and any owner of lots in Sections 20 – 25 of Raintree. JCRCC is a downstream assignee of the benefits of mandatory dues created by the Subdivision Indentures. It is significant that no actual contract exists, as there is at present no defined standard of operation to which JCRCC is held. Simply put, it is possible that JCRCC could elect to shutter the country club altogether and still maintain its collection efforts against the Subdivision owners. Part of RPOA's petition against JCRCC in Case No. 15JE-CC00809 is a count seeking declaratory relief that JCRCC owes a type of fiduciary responsibility to the Subdivision owners.

Nonetheless, this is not a case involving a defective product or a defective building. The injury suffered by Defendants is not contractual in nature and the economic loss doctrine is simply inapplicable in this context.

WHEREFORE for the foregoing reasons, Defendants respectfully pray that the Court deny Plaintiff's motions to dismiss and for any such other and further relief as the Court may deem just and proper under the circumstances.

Respectfully Submitted

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was sent via the Court's electronic filing system on January 2, 2019 to all counsel of record in this matter.

_____/s/Erik C. Zorumski