

JUL 12, 2024 01:11 PM

IN THE SUPERIOR COURT OF PICKENS COUNTY
STATE OF GEORGIA


Jennifer E. Jordan, Clerk
Pickens County, Georgia

SHAUN BUTCHER,

Plaintiff,

v.

BIG CANOE PROPERTY OWNERS
ASSOCIATION, INC.,

Defendant.

Civil Action No. _____

**VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT, DAMAGES AND
INJUNCTION**

COMES NOW Plaintiff, Shaun Butcher, and files this Complaint for Declaratory
Judgment, Damages and Injunction, and shows this Court as follows:

1.

Plaintiff, Shaun Butcher, is the owner of property known as Lot 7014 of the Toland Mountain
Neighborhood of Big Canoe Subdivision, Jasper, Pickens County, Georgia ("Property").

2.

Defendant, Big Canoe Property Owners Association, Inc. ("the Association"), is a Georgia
Non-Profit Corporation organized to manage the properties located in Big Canoe Subdivision.
Defendant can be served through its registered agent, Scott Auer, at its registered address of 12
Wolfscratch Drive, 10586 Big Canoe, Jasper, Pickens County, Georgia 30143.

3.

Jurisdiction and venue are proper in this Court.

4.

The Big Canoe Subdivision is subject to the Amended and Restated General Declaration of Covenants and Restrictions of the Big Canoe Property Owners' Association and the Big Canoe Company, recorded at Deed Book 139, page 390, Pickens County, Georgia records, which Declaration, as amended, gives Defendant certain rights and obligations in management of the Big Canoe Subdivision.

5.

Prior to purchasing the Property, Plaintiff met with representatives of Defendant at the Property and discussed future vista pruning of trees on the Property, and Plaintiff was advised such pruning would be possible but an application would have to be filed for approval with Defendant.

6.

At the time of the meeting with representatives of Defendant and before purchasing the Property, Plaintiff observed and noted a number of trees that had been felled on the Property, some of which remained on the ground and some of which were evident by stumps left in the ground.

7.

Plaintiff purchased the Property in December 2022, and the limited warranty deed for the Property is recorded at Deed Book 1351, page 307, aforesaid records.

8.

In the spring of 2023, Plaintiff submitted to Defendant an application for approval of two different items that required prior approval by Defendant. The first item was a reconfiguration of the driveway, and the second item was to vista prune trees on the property. As part of the application, a survey of the Property was submitted that showed in clear red lettering the proposed

reconfiguration of the driveway and “Vista prune top limbs for view” at the rear of the Property.

9.

Defendant responded to the application with questions about the driveway location and requested additional information about the driveway changes. Communications were exchanged between Plaintiff and Defendant that identified set backs, relocation, and two trees adjacent to the driveway that would have to be removed to accomplish the relocation.

10.

Defendant never communicated that any additional information was required for the vista pruning as shown on the application submitted.

11.

On July 18, 2023, Plaintiff obtained a text proposal from Woodchuck Tree Service, LLC, to remove the two trees adjacent to the driveway and to handle the vista pruning.

12.

Although the tree work was originally scheduled for the end of July, Plaintiff had not yet received formal approval from Defendant, and Plaintiff advised Woodchuck Tree Service, LLC, that he had to postpone the tree work stating: “My HOA hasn’t approved yet so . . . can we push back 1 week to 8/1 . . .”

13.

Plaintiff serves as chair of the Architectural Review Committee in the association where his principal residence is located, so he was aware of the need and took steps to be certain he had approval from Defendant before proceeding with any work.

14.

On July 25, 2023, Plaintiff e-mailed Treena Parish, the designated employee and contact for Defendant, responding to a request from Parish for additional information, and included in the e-mail “Please confirm so we can move forward.”

15.

Parish responded with a request for an additional drawing showing pins along the 10 foot buffer adjacent to the driveway, and Plaintiff provided an additional copy of a survey that had been previously submitted.

16.

On July 31, 2023, Plaintiff sent an additional e-mail to Parish stating “Contractors are coming tomorrow. Should I push them off again??”

17.

At 8:35 am on August 1, 2023, Parish e-mailed Defendant: “I reviewed the property line placement and everything appears to be good now. Please send back the proposed plan so I can process it accordingly.”

18.

Plaintiff subsequently received by mail a printed “Architectural & Environmental Control Approval Form” dated August 1, 2023, with enclosures.

19.

Included in the envelope with the Approval Form were two surveys submitted by Plaintiff, including the survey that showed both the driveway modification and the “Vista prune” language, all in red letters.

20.

The second survey was a partial copy of the larger survey showing the same red letter notations in Plaintiff's handwriting and bearing an additional large red stamp showing approval by Defendant.

21.

The only notation on the Approval Form under "Comments and Conditions" was: "Your request is to modify your driveway is [sic] approved as noted." There were no other notes on the Approval Form or the enclosed surveys.

22.

As Plaintiff had submitted a single application for both the driveway and vista pruning, as there had been no questions from Defendant about the vista pruning, and as there were no conditions or questions "noted" on the survey enclosed or the Approval Form about the vista pruning, Plaintiff reasonable assumed that the vista pruning included in the original application had been approved.

23.

Plaintiff advised Defendant and neighboring lot owners when the work, including vista pruning, would take place.

24.

Only after the approval by Defendant did Plaintiff allow Woodchuck Tree Service, LLC, to come onto the Property, and Woodchuck cut down only the two trees adjacent to the driveway and they vista cut trees in the area shown on the survey submitted with the application.

25.

Neither Parish nor any representative of the Defendant came to the Property while the work was being done, although they had been advised of the schedule.

26.

Neither Parish nor any representative of the Defendant personally observed trees being cut on the Property or trees purportedly being cut on other lots.

27.

Plaintiff subsequently received a letter from Parish dated August 23, 2023, over two weeks after all work had been completed on the Property, advising Plaintiff that the Defendant was assessing a fine against Plaintiff for \$69,000 based on allegations that Plaintiff had, without permission, cut down twenty eight (28) trees on the Property or adjacent lots, and had vista pruned thirty seven (37) trees on the Property or adjacent lots.

28.

Prior to August 23, 2023, neither Parish nor any other representative of Defendant advised Plaintiff, after Plaintiff's submission for approval of "Vista prune top limbs for view," that any further application was required or that there were any additional requirements, other than approval of the original application, before vista pruning could commence.

29.

As Plaintiff knew that only two trees had been cut and cut with permission, that he had applied and been approved for vista pruning, and that no trees had been cut or pruned on adjoining lots, Plaintiff asked Parish what evidence there was that the allegations were accurate. The only response from Parish was: "We took pictures of stumps with chips/shavings still there so they

appeared fresh.”

30.

Parish provided to Plaintiff via e-mail pictures of tree stumps which clearly showed, based on weathering and deterioration, that the stumps resulted from tree cutting before Plaintiff even owned the Property and clearly had not been done within the previous few weeks.

31.

Parish did not identify where or when each picture was taken, nor did Parish provide any plat or map indicating the location of each of the stumps pictured, so there was no way for Plaintiff to verify or refute the pictures provided as supposed evidence of violations by Plaintiff.

32.

Under the terms of the Declaration and other governing documents, Plaintiff appealed the fines, following Defendant’s published procedures, as he knew the allegations to be false.

33.

After an appeal hearing before the Architectural and Environmental Control Committee on December 21, 2023, Plaintiff was notified that fines had been reduced to \$46,000, with \$16,000 based on thirty two (32) trees vista pruned on the Property and \$30,000 on ten (10) trees allegedly cut or pruned on adjoining lots.

34.

Plaintiff then appealed the decision of the Architectural and Environmental Control Committee to the Board of Directors of Defendant.

35.

The Board of Directors granted the request for an appeal, and a hearing was held, via Zoom, on April 15, 2024.

36.

At the second appeal hearing, Plaintiff presented evidence that Woodchuck Tree Services had cut and been paid for felling only two trees, and Plaintiff presented copies of the plats submitted to Parish prior to any work showing, in red letters, "Vista prune" at the rear of the lot, those being the same plats that Parish had returned to Plaintiff with the Approval Form.

37.

Neither the Architectural and Environmental Control Committee nor Parish presented any evidence before Plaintiff and his counsel were dismissed from the hearing.

38.

On April 25, 2024, counsel for Defendant wrote to Plaintiff's counsel that the Board of Directors had upheld the \$46,000 in fines and demanded payment of that sum.

39.

In demonstration of the lack of competent evidence to support the fines, the letter from Defendant's counsel even stated: "upon further investigation of your client's Lot after your client's hearing, it was determined that there were more than ten (10) trees cut down on said Lot **by your client's contractor.**"

40.

The assertion that Defendant could determine by an inspection in April 2024 that a particular tree was cut specifically by Plaintiff's contractor eight months earlier, and not by some other party

at some other time, is not credible.

41.

As shown in the Affidavit attached hereto as Exhibit "A", the only two trees cut down by Plaintiff's contractor were the two trees adjacent to the driveway on the Property, and no trees were cut down or pruned on adjacent property.

42.

Plaintiff did not personally cut down any trees on other lots, and Plaintiff did not hire any contractors to cut down trees on other lots.

43.

When Plaintiff asked for evidence, prior to the appeal hearings, of the trees allegedly cut by Plaintiff, Defendant produced no evidence other than the pictures of tree stumps, and no evidence was provided that the trees associated with those stumps were cut by Plaintiff or Plaintiff's contractors.

44.

At the appeal hearings, Defendant provided no evidence or witnesses to actions by Plaintiff or Plaintiff's contractors to substantiate the claims that trees beyond the two adjacent to the driveway of the Property were felled.

45.

Plaintiff has exhausted all administrative or contractual remedies provided in the Declaration or in Defendant's governing documents prior to filing this action.

46.

Defendant maintains that Plaintiff is in arrears in amounts owed to Defendant due to the improper and unsupported fines.

47.

Other than the improper and unsupported fines, Plaintiff is current in all amounts charged to Plaintiff by Defendant.

48.

Because of the improper and unsupported fines on Plaintiff's account, Defendant has or has threatened to limit Plaintiff's access to the Property by disabling remote entry devices.

49.

Because of the improper and unsupported fines on Plaintiff's account, Defendant has or has threatened to file a lien against the Property and against Plaintiff on the public records of Pickens County.

50.

Because of the improper and unsupported fines on Plaintiff's account, Defendant has or has threatened to limit Plaintiff's access to the common properties in Big Canoe.

51.

The actions of Defendant were in bad faith and malicious.

52.

The actions of Defendant were an illegal vexatious effort to supplement income of Defendant without authority.

53.

The actions of Defendant deprived Plaintiff of due process prior to imposing fines on Plaintiff.

54.

The fines were imposed by Defendant for cutting trees where the only evidence produced was pictures of tree stumps from unidentified locations and with no evidence that Plaintiff had actually cut the trees pictured.

55.

The actions of Defendant have deprived Plaintiff of the full use of the Property.

56.

The actions of Defendant are an illegal attempt to extort money from Plaintiff to cover up failures by employees of Defendant to address the application filed by Plaintiff for approval of the vista pruning in accord with Defendant's own procedures.

57.

Defendant, rather than Plaintiff, is the party charged with enforcing policies of Defendant, and failure of Defendant's employee, Parish, to apply and enforce policies of Defendant is not chargeable to Plaintiff.

58.

Defendant's actions have been stubbornly litigious and have caused damage to Plaintiff that is compensable pursuant to O.C.G.A. § 13-6-11.

COUNT I - DECLARATORY JUDGMENT

59.

Paragraphs 1 to 58 are incorporated herein by this reference.

60.

As required for a declaratory judgment action by O.C.G.A. §9-4-1, there is uncertainty and insecurity with respect to the rights the parties as to the rights of Plaintiff and the ability of Defendant to impose sanctions on Plaintiff.

61.

As required by O.C.G.A. §9-4-2, there is a case of actual controversy between the parties regarding the alleged cutting down of trees and fines asserted against Plaintiff, and Plaintiff hereby petitions this court for a declaratory judgment to declare the rights of the parties.

62.

Further, pursuant to O.C.G.A. §9-4-3, in order to maintain the status quo pending adjudication of the question at issue and preserve equitable rights, this court should grant an injunction, preventing the Defendant from taking punitive actions against Plaintiff, as irreparable harm would occur to the Plaintiff if Plaintiff was denied full use of the Property pending action, particularly if the court ultimately ruled in Plaintiff's favor in the declaratory judgment, and there is no adequate remedy at law.

COUNT II - FRAUD

63.

Paragraphs 1 to 62 are incorporated herein by this reference.

64.

Defendant falsely claimed, without evidence, that Plaintiff had cut trees on the property of others.

65.

Defendant knew that it had no evidence that Plaintiff cut trees on other property and chose to rely only on reports by an employee that Defendant knew had not witnessed any cutting of trees by Plaintiff.

66.

Defendant adopted the unsupported claims of cutting trees on other property by Plaintiff with the intent to extort money from Plaintiff in the guise of fines for the alleged tree cutting.

67.

Plaintiff justifiably relied on the provisions in the Declaration to allow him to successfully appeal the false claims and fines assessed without evidence and without due process, but Defendant rebuffed those efforts and persisted in accruing penalties and sanctions against Defendant.

68.

Plaintiff has been damaged financially and otherwise by the failure of Defendant to require actual evidence of any violation by Plaintiff before demanding monetary payments by Plaintiff.

69.

Defendant's actions constitute actionable fraud which entitles Plaintiff to an award of damages against the Defendant in an amount to be proven at trial.

COUNT III - INTERLOCUTORY INJUNCTION

70.

Paragraphs 1 to 69 are incorporated herein by reference.

71.

Pursuant to O.C.G.A. §9-11-65(a) it is clear from the specific facts referenced above in this Verified Complaint that Plaintiff should be granted an Interlocutory Injunction having shown: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that the threatened injury to the Plaintiff outweighs the potential harm to the Defendant; and (4) that the injunction will not disserve the public interest.

72.

Further, pursuant to O.C.G.A. §9-11-65(a), in order to maintain the status quo pending adjudication of the question at issue and preserve equitable rights, this court should grant an Interlocutory Injunction, preventing Defendant from limiting Plaintiff's access to and use of the Property, as irreparable harm would occur to the Plaintiff if such access and use was limited during this pending action, and there is no adequate remedy at law.

COUNT IV - PERMANENT INJUNCTION

73.

Paragraphs 1 to 72 are incorporated herein by reference.

74.

Pursuant to O.C.G.A. §9-11-65 it is clear from the specific facts referenced above in this Verified Complaint that Plaintiff should be granted a Permanent Injunction.

75.

Further, pursuant to O.C.G.A. §9-11-65, this court should grant a Permanent Injunction, preventing the Defendants from limiting access to the Property, whereas there is no adequate remedy at law.

COUNT V - ATTORNEY'S FEES

76.

Paragraphs 1 to 75 are incorporated herein by reference.

77.

Defendant's actions have been in bad faith and have intentionally caused Plaintiff unnecessary cost and expense to remove the unauthorized and unsubstantiated fines from Plaintiff's account.

78.

Defendant's refusal to acknowledge the total absence of credible evidence of Plaintiff cutting trees on other property, and then assessing fines on that basis, has been in bad faith and malicious, causing Plaintiff unnecessary cost and expense.

79.

As a result of Defendants' actions, Plaintiff is entitled to an award of his costs and expenses pursuant to O.C.G.A. § 13-6-11.

80.

Defendant violated the Covenants in the Declaration by seeking to utilize the Declaration to impose fines on Plaintiff for alleged violations that Plaintiff did not commit.

Pursuant to Article IX, section 4 of the Declaration, Plaintiff is entitled to recover his reasonable attorney's fees as part of this action.

WHEREFORE, Plaintiff prays

1. That this Court enter a Declaratory Judgment in favor of Plaintiff, and against Defendants, declaring that the fines posted to Plaintiff's account were improper, illegal, and must be removed;
 2. That this Court award damages for the fraud by Defendant in an amount to be proven at trial;
 3. That this Court enter an Interlocutory Injunction against Defendants;
 4. That this Court enter a Permanent Injunction against Defendants;
 5. That this Court award Plaintiff their attorney's fees and costs for this litigation pursuant to O.C.G.A. § 13-6-11 and pursuant to the Declaration.
- For such other relief as the Court deems just and proper.

This 12th day of July, 2024.

/s/ Randall M. Lipshutz

Randall M. Lipshutz
Ga. Bar No. 453750
Steven Luper
Ga. Bar No. 461360
Attorneys for Plaintiff

Lipshutz Greenblatt LLC
100 Crescent Centre Parkway, Suite 200
Tucker, GA 30084
404-688-2300
rmlgk@aol.com

AFFIDAVIT CONCERNING BIG CANOE LOT 7014

The undersigned, after being duly sworn before the undersigned notary public, states under oath as follows:

1.

My name is Joaquín Hernandez Montero. I am over the age of 18 and suffer from no disabilities that would prevent me from providing this affidavit. This affidavit is given from personal knowledge. I authorize use of this Affidavit for all purposes authorized by law.

2.

I am the owner and registered agent for Woodchuck Tree Service, LLC., a Georgia Limited Liability Company in good standing with the Georgia Secretary of State.

3.

On or about July 18, 2023, I visited Lot 7014 in Big Canoe at the request of Shaun Butcher, owner of said Lot. My visit was for the purpose of evaluating tree work to be done on the Lot for vista pruning and to remove two trees adjacent to a driveway being modified on the Lot.

4.

At the time of my visit, I identified the two trees adjacent to said driveway that would have to be removed, and I identified trees on the Lot to be vista pruned.

5.

At the time of my initial visit, I observed numerous trees that had previously been felled and remained on the ground both on Lot 7014 and on Lots adjacent to Lot 7014.

6.

I initially scheduled the tree work on the Lot for July 20, 2023, but was asked to postpone that

date by Shaun Butcher until he obtained approval from Big Canoe to proceed with the work,.

7.

On July 31, 2023, I was advised by Shaun Butcher that I could proceed with the tree work on August 1, 2023, and August 1, 2023, was the day I and my employees were on the Lot conducting the scheduled work.

8.

While Woodchuck Tree Service LLC was on the property, we cut down only two trees, both of which were adjacent to the driveway. No other trees were downed or felled by us either on Lot 7014 or on adjacent property. We also vista pruned a number of trees at the rear of the Lot.

9.

I received payment from Butcher for the \$3,600 quoted for removal of two trees and for vista pruning, plus a \$100 tip.

10.


If additional trees had been downed by Woodchuck Tree Service LLC, the charges would have been higher based on the additional trees downed, but no additional trees were downed by our company on or in the area of Lot 7014 either on August 1, 2023, or on any other date.

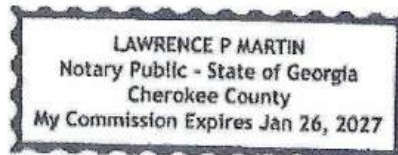
Further, Affiant sayeth not.



Joaquín Hernández Montero

Sworn to and subscribed before me
this 3rd day of May, 2024


Notary Public



IN THE SUPERIOR COURT OF PICKENS COUNTY
STATE OF GEORGIA

SHAUN BUTCHER,

Plaintiff,

v.

BIG CANOE PROPERTY OWNERS
ASSOCIATION, INC.,

Defendant.


Civil Action No. _____

VERIFICATION


Personally appeared before me, the undersigned authority duly qualified to administer oaths, Shaun Butcher, who, first being duly sworn, deposes and states on oath that the allegations stated in the above styled matter are true and accurate to the best of his knowledge and belief.

Sworn to and subscribed before me this

10th day of July, 2024.



Notary Public



Shaun Butcher

KARAN AMIN
NOTARY PUBLIC
Forsyth County
State of Georgia
My Comm. Expires Nov. 30, 2026