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IN THE UTAH COURT OF APPEALS

EMIGRATION CANYON HOME
OWNERS ASSOCIATION,

Appellant,

v.

KENT L. JONES, Utah State Engineer
and EMIGRATION IMPROVEMENT
DISTRICT, a Utah Special Service
District

Appellees

**OPPOSITION TO MOTION TO
SUBSTITUTE PARTY AND TO DISMISS
APPEAL**

Case No. 20200295-CA

Trial Court Case No. 190901675

Pursuant to Rule 23 of the Utah Rules of Appellate Procedure, Appellant Emigration Canyon Home Owners Association (hereinafter “**ECHO**”) hereby submits this Opposition to Motion to Substitute Party and to Dismiss Appeal submitted by Eric Hawkes, Jennifer Hawkes, and Simplifi Company (hereinafter “**Moving Parties**”). Appellant requests that this Court deny Moving Parties’ Motion. The grounds for this request are set forth herein:

BRIEF STATEMENTS OF FACTS

The factual grounds for this Opposition are as follows:

1. This Appeal stems from a Petition for De Novo Judicial Review of Informal Adjudicative Proceeding filed by ECHO on February 25, 2019 (hereinafter “**Petition**”).

2. In brief, the Petition requested equitable relief in the form of an order denying the Emigration Improvement District's Permanent Change Application Number 57-7796 (a44045) and Number 57-7711 (a44046).

3. The only monetary request was for the attorney's fees in connection with pursuing the action.

4. In Case No. 200905074, Mark Christopher Tracy ("Mr. Tracy") filed a Petition for Judicial Review of Denied Request for Disclosure of Public Records, Injunction for Violations of the Government Records Access and Management Act, Award of Attorney Fees and Cost against Moving Parties as the Public Records Office of Emigration Improvement District ("EID" aka Emigration Canyon Improvement District aka ECID).

5. Like the action leading to this appeal, the only monetary relief requested was the attorney's fees associated with bringing the claim, otherwise, Appellant sought equitable and injunctive relief.

6. In this case, Trial Court Case No. 190901675, Judge Su Chon issued a finding that ECHO "is an unincorporated association" and *not* a dba of Mr. Tracy under the law which required ECHO to be represented by counsel for this claim. *See Order*, attached as Exhibit A.

7. The Writ of Execution provided by Moving Parties states that the judgment debtor under the Writ of Execution is "Mark Christopher Tracy" and not ECHO. *See Exhibit A to Moving Parties' Motion*, p. 3.

8. The Certificate of Sale also lists the Cause of Action's petitioner as ECHO, and not Mr. Tracy. *Id.*

9. Mr. Tracy also still has the right to appeal the decision denying his Petition for Extraordinary Relief and Motion for Emergency Relief and intends to do so.

10. The alleged sale of the claim was executed on November 10, 2021.

ARGUMENT

Rule 38(c) of the Utah Rules of Appellate Procedure states that "[i]f substitution of a party is appropriate for any [reason other than death or incompetency], the court may substitute the party upon good cause shown." Utah R. App. P. 38(c). The language of this rule indicates that a motion to substitute parties is permissive, not mandatory, and this Court is not required to grant the substitution. Here, there is no good cause to substitute the parties because there are valid issues surrounding the acquisition and execution of the Writ, whether Moving Parties own the claim, whether Moving Parties can appropriately be substituted in, and public policy considerations.

First, Moving Parties have not acquired ECHO's right to appeal. The Writ of Execution and Certificate of Sale provided by Moving Parties states that the judgment debtor is "Mark Christopher Tracy." See Exhibit A to Moving Parties' Motion, p. 3. The Certificate of Sale also lists the Cause of Action's petitioner as ECHO, and not Mr. Tracy. *Id.* In this claim, the Appellant is *not* Mr. Tracy personally, but the unincorporated association referred to as ECHO. Indeed, in Judge Chon's Order, she stated that "the parties understood that Mr. Tracy **and** ECHO were appearing on their behalf." See Ex. A, p. 7 (emphasis added). ECHO, the unincorporated association, still maintains its right to appeal on behalf of the individuals who are allegedly¹ part

¹ In the evidentiary hearing before Su Chon on December 12, 2021, the legal counsel to Real Parties of Interest Jeremy R. Cook, Esq. ("Utah Attorney Cook") argued, and the district court agreed, that ECHO is not a dba entity of Mr. Tracy but rather an unincorporated association of

of the association. It cannot be said that Moving Parties purchased ECHO's right to appeal. Substituting ECHO out for Moving Parties would violate the rights of purported third parties to this appeal and there is no good cause for doing so.

Second, even if it can be shown that the ECHO's appeal right was sold to Moving Parties, Moving Parties cannot be substituted for ECHO. This Court previously vacated its own order substituting parties on the basis that the parties had no identity of interest, the lack of monetary value of the underlying claim, and because equity demanded the court vacate its previous decision. *Pugh v. Dozzo-Hughes*, 2005 UT App 203, ¶¶ 14-16. Here, Moving Parties have no identity of interest with ECHO. Moving Parties in fact align with the Appellees, as evidence by Moving Parties' assertion that they have already stipulated to the dismissal of this appeal should this Court grant their Motion. These interests are materially adverse to ECHO, as evidence by the stipulation that the dismissal be with prejudice. ECHO's underlying claim is also one in equity and has no real monetary value, as ECHO only sought review and denial of an administrative order. It is clear that substitution is improper in an action acquired at a forced execution sale when the purchaser has no identity of interest with the original party and substitution of the purchaser serves on adversely affect that party. Therefore, as in *Pugh*, equity demands that Moving Parties' Motion be denied. *See Pugh*, 2005 UT App at ¶ 16 ("Equity demands that we vacate our prior substitution of parties order.").

Finally, there is a substantial public policy in denying Moving Parties' request for substitution and its motion to dismiss. In situations like this one, where an adverse party purchases

water right protestants. In the application for Writ of Execution, Utah Attorney Cook however listed the present cause of action and appeal as "personal property" of the judgement debtor Mr. Tracy and not ECHO.

a claimants cause of action and right to appeal, Utah courts have ruled that public policy considerations must first determine whether such substitution of parties should be permitted. *See Alarm Prot. Tech., LLC v. Crandall*, 2021 UT 26, ¶¶ 52-55 (concurring). In 2013, the Utah Supreme Court noted that it “would not uphold such a sale without first undertaking a careful review of the constitutional and other implications of allowing judgment creditors to execute on judgment debtors' appellate rights.” *ASC Utah, Inc. v. Wolf Mt. Resorts, L.C.*, 2013 UT 24, ¶ 9, fn. 2. At the federal level (though applying Utah law), the Tenth Circuit upheld a ruling that a plaintiff no longer had standing to pursue a causes action purchased by the defendant. *See RMA Ventures California v. SunAmerica Life Insurance Co.*, 576 F.3d 1070 (10th Cir. 2009). Firstly, unlike the present case, the Tenth Circuit confined its ruling by acknowledging that the Plaintiff had waived its right to challenge Defendant’s purchase the cause of action by failing to appeal the district court's denial of Plaintiff's motion to stay or quash the execution sale and remarked that “the circumstances of this case present a degree of discomfort.” *Id.* at 1075.

In a separate concurring opinion, Judge Lucero described the reasoning for the discomfort:

It is with considerable understatement that the majority acknowledges the "degree of discomfort" presented by this case. . . . By executing on a subsidiary judgment, SunAmerica has extinguished RMA's right to appeal the very merits determination that served as the predicate for the subsidiary judgment in the first place. If we were to reach the merits and reverse the district court's decision, however, there is little doubt that RMA would be entitled to relief from the subsidiary attorneys' fee judgment. . . . RMA will not have the opportunity to pursue its merits appeal As a matter of public policy, I doubt the wisdom of a rule that readily places the right to appeal on an auction block. More troublesome still is a rule permitting a defendant to purchase its opponent's appellate rights, thereby extinguishing a plaintiff's claim. "[A defendant] obviously has no intention to litigate a claim against itself." Today's decision thus incentivizes Utah defendants to attempt an end run around merits determinations by purchasing a plaintiff's right to appeal. This incentive is at its zenith when it is most offensive—in those cases in which a defendant believes it would likely lose the merits appeal.

Id. at 1076-77 (Lucero, J., concurring) (fourth alteration in original). In her concurrence for the Utah Court of Appeals, Justice Petersen noted:

Even so, the facts here and in other cases make it difficult to deny the collateral damage done to justice. Here, the very entity that Appellants accuse of injuring them is able to take over their civil cases and terminate them. . . .

Clearly, permitting judgment creditors to execute upon claims in which they are defendants can result in severe collateral damage to the legal process and the presumption that claims should be fairly adjudicated on the merits. Our rules currently permit this. But we should consider whether our rules should permit such a practice. Judgment creditors like APT have the legal right to a sum of money. We have civil rules to assist them in collecting that money. But the right to collect a sum certain does not include the right to immunity from suit or dismissal of an otherwise valid legal claim against the creditor. We should consider whether our civil rules could be modified to address this situation in a way that still assists creditors in collecting on judgments, but better protects the legal process from unnecessary harm.

Crandall, 2021 UT at ¶¶ 52, 55.

As stated above, this Court is under no obligation or requirement to substitute the parties. Moving Parties failed to cite to any good cause outside of a Writ exercised upon an individual, and not ECHO, the unincorporated association. Although Moving Parties are not actual defendants in this particular claim, they are in others, and there is no doubt they are adversarial and intend to deprive ECHO of its right to represent its purported members and continue pursuit of its claims against the jurisdiction of the Utah Third District to issue a Writ of Execution and Certificate of Sale germane to the present motion.

Dated this 2nd day of December 2021,

STAVROS LAW P.C.

/s/ Andrew Fox
Andrew Fox
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on December 2, 2021, I filed and served the foregoing using electronic mail to this Court and the following:

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/s/ Andrew Fox

EXHIBIT A

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

EMIGRATION CANYON HOME
OWNERS ASSOCIATION,

Petitioner,

vs.

KENT L. JONES, Division Director of the
Utah State Division of Water Rights, and
EMIGRATION IMPROVEMENT
DISTRICT,

Respondents.

**MEMORANDUM DECISION, FINDINGS
OF FACTS AND CONCLUSIONS OF
LAW AND ORDER**

Case No. 190901675

Judge Su Chon

This matter is before the Court on the Utah Court of Appeals' July 16, 2020 Order of remand for this Court to determine whether Petitioner Emigration Canyon Home Owners Association ("ECHO") is an "unincorporated association" which must obtain counsel, or whether ECHO is simply a DBA of Mark Christopher Tracy who may represent ECHO pro se. *See Graham v. Davis Cty. Solid Waste Mgmt. & Energy Recovery Special Serv. Dist.*, 1999 UT App 136, ¶ 14, 979 P.2d 363 (noting the "well-established rule that an unincorporated association, like a corporate entity, may not be represented by a nonlawyer."). The Court enters the following Memorandum Decision, Findings of Fact and Conclusions of Law based on the evidence heard before the Court.¹

¹ The Court was notified on June 11, 2021 that this decision was not uploaded to the docket. The Court recalls that it had given this ruling to a staff member that is no longer with the courts. The Court does not know what happened and reissues this ruling today. We apologize for the delay.

FINDINGS OF FACTS:

1. Mark Christopher Tracy is currently a resident of Salt Lake County, Utah.
2. He used to own real property in Emigration Canyon, and now owns a separate water right located therein.
3. Mr. Tracy is currently the owner of a DBA called Emigration Canyon Homeowners Association ("ECHO"). He registered this DBA with the Division of Corporations and Commercial Code on May 23, 2018. See Exhibit 4.
4. Mr. Tracy initially started ECHO in January 2014 while he was an owner of real property in Emigration Canyon.
5. He noticed issues involving Emigration Improvement District (EID) and notices that were sent out as well as the Minutes of the Trustees' meetings. Mr. Tracy thought that there was something wrong going on and he created ECHO at that time.
6. Mr. Tracy began communicating with other residents about EID.
7. He started receiving documents from Jack Plumb and Sam Plumb regarding EID's meetings. Sam Plumb provided copies of documents and transcribed his own minutes of the EID meetings.
8. Mr. Tracy also obtained documents from Joanne Edwards and other people in the community.
9. Mr. Tracy and Trevor Irons were both residents of Emigration Canyon. Mr. Irons helped Mr. Tracy to create the ECHO website. Mr. Irons was not paid for his services. Mr. Irons also did research for Mr. Tracy, reviewed hydrological reports and provided him with additional information. Mr. Irons has since sold his property and is no longer a resident.

10. Mr. Tracy also filed seven (7) informational complaints with the State Auditor's Office with respect to EID.

11. In 2014, ECHO and Mr. Tracy sent out a letter with a postcard asking people to communicate with them and join the association. Mr. Tracy claimed that the association was never formed.

12. However, the exhibits provided to the Court indicate otherwise. The association appear to have been formed sometime in 2014. And there were email correspondences to various persons within the Emigration Canyon community informing them of the association. See Exhibit 2 and Exhibit 6.

13. Exhibit 6 is an email dated October 18, 2018, that ECHO Association sent to the attorney representing them in the federal case as well as to certain reporters. The email letter indicated that there was open enrollment into the association and it provided membership guides as well an application to complete to join the association. ECHO through Mr. Tracy held a meeting to discuss joining the association for any persons who had issue with the EID. Mr. Tracy testified that no one joined. Mr. Tracy stated that people were afraid of the EID and that they did not want to come forward.

14. In Exhibit 5, there is an email from Patrick Hogle to Ms. Wilhelmsen, the Water Rights Engineer for the State of Utah, and informed her that ECHO Association was representing Tierra Investments, LLC. Mr. Hogle indicated that he was the managing member of this entity.

15. Also, in Exhibit 5 is an email to Ms. Wilhelmsen from ECHO Association indicating that ECHO Association was going to speak for Tierra Investments, LLC, Jack Samuel Plum, Jamie White, Karen Penske, Margot McCallum, Michael Terry, Patricia

Sheya, Robert J. Reed, IV, and Michael Martin. Mr. Tracy testified that he was only trying to consolidate the time that the parties each had to allow them more time to speak. However, looking at the plain language of that email, it appears that these persons' intended for ECHO Association to represent them to protest the Water Right at issue.

16. There is an email in Exhibit 7 between Michael Terry and ECHO Association where ECHO Association removed Mr. Terry from their membership lists. They seemed to have a disagreement. However, Exhibit 5 indicates that ECHO Association was representing Michael Terry as referenced in both Exhibit 5 and Exhibit 7.

17. Mr. Tracy also created a bank account through Bank of America in which he listed himself as Mark Christopher Tracy, sole prop DBA Emigration Canyon Homeowners Association. On April 5, 2019, ECHO and Mr. Tracy received a check for \$25,000 paid by Patrick Hogle. On April 12, 2019, those funds were transferred to Christensen & Jensen for payment of legal fees. See Exhibit 11.

18. Mr. Tracy also received donations from people indicating that it was for ECHO Association. See Exhibits 13 and 14.

19. Mr. Tracy now claims that he is the sole person involved in ECHO. He states that he is only arguing his Water Right that he owns.

20. Exhibit 2 shows a letter that was sent to a Doctor Gilbert. The letter dated June 12, 2015, stated the following: "As previously announced, the above association has been formed to protect the interest of property owners within Emigration Canyon." The letter notified the property owner that the organization had changed their name to

ECHO. The letter also stated and provided information regarding the Qui Tam action against EID for improper assessments of property taxes, fire hydrant rental fees, improper inducement of water connection and standby contracts, incorrect billing, improper use of property tax revenue, failure to report iron, bacterial contamination in drinking water supply by EID.

21. As noted in Exhibit 6, the letter to Emigration Canyon property owners stated that they were holding a membership meeting and would welcome questions regarding actions being taken against EID. The guide to ECHO Association membership benefits is two-pages long, and it talks about litigating against EID, some of these issues regarding water depletion and the permit change application. Also contained in Exhibit 6 is the ECHO Association membership fees. It lists that current ECHO Association members for \$1 and then gives other amounts in the thousands for membership, depending on the type of property. Mr. Tracy stated that no one had paid these fees. However, he was unable to explain the \$25,000 payment that he received from Patrick Hogle, and he admitted that he had used that money to pay the attorney fees.

CONCLUSIONS OF LAW:

The Court has jurisdiction over this matter and the parties and incorporates its legal analysis below.

ANALYSIS:

Graham cites Rule 17(d), Utah Rules of Civil Procedure, defining what makes an unincorporated association: "When two or more persons associated in any business either as a joint-stock company, a partnership or *other association, not a corporation,*

transact such business under a common name, whether it comprises the names of such associates or not, they may sue or be sued by such common name." *Id.* at ¶ 12.

Graham also states:

In this case, the Committee, as an unincorporated, voluntary environmental watch-dog association, falls within the purview of the "other association" language of Rule 17(d). Although Utah courts have not articulated a test to determine when a party is transacting business for purposes of Rule 17(d), we note that the Committee, apparently acting under a common name for several years in monitoring and working to improve air quality in Davis County, was likely engaged in transacting business.

Id. (citations omitted). *Graham* cites to other cases regarding incorporated associations, one of which noted that Rule 17(d) contemplates two factors: "(i) parties transacting business, and (ii) transacting such business *under a common name.*" *Hebertson v. Willowcreek Plaza*, 923 P.2d 1389, 1392 (Utah 1996) (emphasis in original). The Utah Court of Appeals has noted,

In fact, no Utah statutes or cases have defined what constitutes transacting business under a common name pursuant to Rule 17(d). However, for jurisdictional purposes, non resident corporations are considered to be doing business in Utah if they negotiate and enter into contracts within the state. Other factors in determining whether an entity is doing business in the state and thus is subject to its jurisdiction include: (1) whether there are local offices in the state; (2) the presence of employees in the state; (3) how the business holds itself out to the public; (4) the presence of real or personal property in the state. Thus, if two or more entities together negotiate and enter into contracts, have offices, hire employees, or own property in this state, they are within the jurisdiction of Utah courts. If they also transact such business under a *common name*, then, pursuant to Rule 17(d), those entities could be subject to suit under that name.

Hebertson v. Willowcreek Plaza, 895 P.2d 839, 840–41 (Utah Ct. App. 1995) (citations omitted). Another court cited in *Graham* had found an unincorporated association

based on the following: the membership was too large to feasibly join all defendants, there were officers and an organization, accumulation of funds, it had chosen a name under which to do business, it held itself out as capable of contracting in that name, and it was engaged in business under that name. *Askew v. Joachim Mem'l Home*, 234 N.W.2d 226, 236 (N.D. 1975).

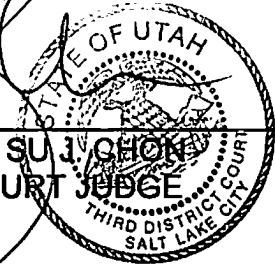
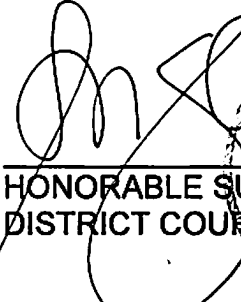
Mr. Tracy argues that he is a DBA as evidenced by the DBA registration and the bank account and therefore able to represent himself. However, the Court must consider whether the parties were transacting business under a common name and transacting business under a common name. The Court finds that both factors are met that ECHO was an unincorporated association. ECHO recruited people to join the association and to help with their efforts. The Plumbs provided minutes, transcripts and other information to ECHO to further the cause. Mr. Irons did research, created a website for ECHO and reviewed reports to aid Mr. Tracy. He was also engaged in the work that ECHO was involved in.

Mr. Tracy admits that ECHO did try to recruit other property owners to join their group, but he denies that anyone joined ECHO. ECHO held informational meetings, and perhaps from those meetings, Mr. Tracy may have received no response. However, there are third party emails to the state that demonstrate that ECHO was representing individual property owners at the State Engineer's hearing. The plain language of those emails indicate that the parties understood that Mr. Tracy and ECHO were appearing on their behalf. Mr. Tracy on behalf of ECHO used the allotted time to address all of the interested parties' concerns regarding the change application. Additionally, the bank statements show that other property owners were donating money ECHO and those

funds were deposited into the ECHO bank account. Mr. Tracy applied those donations to the payment of the incurred attorney's fees with his prior counsel. For all of those reasons, it appears that ECHO is an unincorporated association under the caselaw. The Court orders that ECHO is required to have an attorney represent ECHO in these matters. No further order is needed.

DATED this 21st day of January, 2021.

REISSUED this 11th June, 2021.



HONORABLE SUSAN J. CHON
DISTRICT COURT JUDGE

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 190901675 by the method and on the date specified.

EMAIL: EMIGRATION CANYON HOME OWNERS MARK.TRACY72@GMAIL.COM

EMAIL: JEREMY COOK JCOOK@CK.LAW

EMAIL: NORMAN JOHNSON NORMANJOHNSON@AGUTAH.GOV

EMAIL: JULIE VALDES JVALDES@AGUTAH.GOV

06/11/2021

/s/ LYNETT MCKINNEY

Date: _____

Signature