

STATE OF NORTH CAROLINA


IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

BUNCOMBE COUNTY

FILED

21 CVS 1182

**THE SOCIETY FOR THE HISTORICAL
PRESERVATION OF THE TWENTY-
SIXTH NORTH CAROLINA TROOPS,
INC.,**

APR 30 P 12:19
BUNCOMBE COUNTY, C.S.C.
BY 

Plaintiff,

vs.

ORDER

**CITY OF ASHEVILLE, NORTH
CAROLINA, and BUNCOMBE COUNTY,
NORTH CAROLINA,**

Defendants.

THIS MATTER coming on for hearing duly noticed and calendared, and being heard on April 12, 2021, before the Honorable Alan Z. Thornburg, Superior Court Judge presiding upon Defendant City of Asheville's (hereinafter "Defendant City") Motion to Dismiss Plaintiff's Complaint and Motion for Award of Attorney's Fees Pursuant to N.C.G.S. § 6-21.5, filed on March 29, 2021, as well as Plaintiff Society for the Historical Preservation of the Twenty-Sixth North Carolina Troops, Inc.'s (hereinafter "Plaintiff 26th NC") Motion for a Stay of Proceedings, submitted on April 9, 2021.

In this litigation, Plaintiff 26th NC has asserted in its Complaint claims for breach of contract, temporary restraining order and preliminary injunction, and declaratory judgment arising from Defendants' stated intention to remove the Zebulon Baird Vance Monument from City property in Downtown Asheville. Plaintiff's motion for a temporary restraining order was denied on March 29, 2021, and the North Carolina Historical Commission denied Plaintiff's

petition to preserve the Vance Monument on March 30, 2021. Presently, Plaintiff seeks a stay of the proceedings pending the Supreme Court of North Carolina's decision in *United Daughters of the Confederacy, North Carolina Division, Inc. v. City of Winston-Salem, et al.*, ___ N.C. App. ___, 853 S.E.2d 216, (2020), which was appealed to that court based on the Honorable John M. Tyson's dissent. Defendant City's Motion to Dismiss asserts that Plaintiff's breach of contract allegation fails to state claim upon which relief can be granted pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Moreover, pursuant to Rule 12(b)(1) and 12(b)(6), Defendant asserts that the remainder of the claims must be dismissed because Plaintiff lacks standing—depriving this Court of jurisdiction.

“If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim.” *Estate of Apple v. Commercial Courier Express, Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005). In North Carolina, individuals that are “injuriously affected” in their “persons, property, or constitutional rights” have standing to challenge a statute, municipal ordinance, policy, or action. *Goldston v. State*, 361 N.C. 26, 35, 637 S.E.2d 876, 882 (2006) (quoting *Piedmont Canteen Serv., Inc. v. Johnson*, 365 N.C. 155, 166, 123 S.E.2d 582, 589 (1962)). Furthermore, “a declaratory judgment action must involve an actual controversy between the parties,” but “plaintiffs are not required to allege or prove that a traditional cause of action exists against defendant[s] in order to establish an actual controversy.” *Id.* at 33, 637 S.E.2d at 881 (citations omitted). “[A] declaratory judgment should issue (1) when [it] will serve a useful purpose in clarifying and settling the legal relations at issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding.” *Id.* (quoting *Augur v. Augur*, 356 N.C. 582, 588, 573 S.E.2d 125, 130 (2002)) (citations omitted) (alterations in original). Representational standing is also possible for an association filing suit on behalf of members if “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 130, 388 S.E.2d 538, 555 (1990) (quoting *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977)).

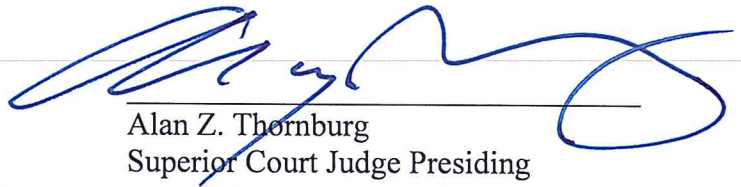
When faced with a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6), the “question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not.” *Crouse v. Mineo*, 189 N.C. App. 232, 237, 658 S.E.2d 33, 36 (2008). Further, “the complaint is to be liberally construed, and the court should not dismiss the complaint ‘unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief.’” *Holloman v. Harrelson*, 149 N.C. App. 861, 864, 561 S.E.2d 351, 353 (2012) (quoting *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987)). But “[d]ismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff’s claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff’s claim.” *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002).

After considering the pleadings, the parties’ submissions, the arguments of counsel, and the record, the Court concludes that, in the event that Plaintiff has properly alleged the existence of a valid contract, the obligations of any potential agreement have been fulfilled; therefore, Plaintiff has failed to sufficiently allege a breach of contract claim. Regarding Plaintiff’s Motion for a Stay of Proceedings, the Court determines, in its discretion, that a stay is not appropriate here because—without potential ownership or any other enforceable interest in the statue at issue—Plaintiff 26th NC’s claims are not sufficiently apposite to those pending before the Supreme Court of North Carolina to warrant a delay in the proceedings. Moreover, the Court concludes that Plaintiff 26th NC lacks standing to bring its remaining claims. Plaintiff organization and its individual members are not injuriously affected in their persons, property or constitutional rights in a manner to create an actual controversy and standing in this matter. Therefore, the Court concludes that it lacks jurisdiction over Plaintiff 26th NC’s remaining claims. As a final matter, the Court finds that there was not “a complete absence of a justiciable issue of either law or fact raised by” Plaintiff’s pleading and concludes that an award of reasonable attorney’s fees is not proper here.

For the foregoing reasons, it is hereby ORDERED, ADJUDGED, AND DECREED that:

1. Plaintiff's Motion for a Stay of Proceedings is DENIED.
2. Defendant City's Motion to Dismiss Plaintiff's Complaint is GRANTED.
3. Defendant City's Motion for Award of Attorney's Fees is DENIED.

So Ordered, this the 30th day of April, 2021.



Alan Z. Thornburg
Superior Court Judge Presiding