

STATE OF NEW MEXICO
THIRTEENTH JUDICIAL DISTRICT
COUNTY OF VALENCIA

SOCORRO ELECTRIC COOPERATIVE, INC.,

Plaintiff,

v.

CHARLENE WEST, et al.,

No. D1314-CV-2010-0849

Judge: Mitchell

Defendants,

And

CHARLES WAGNER, individually and
on behalf of those similarly situated, et al.,
Cross Claim Plaintiff,

v.

SOCORRO ELECTRIC COOPERATIVE, INC.,
et al.,

Cross Claim Defendants.

MOTION TO DISMISS CLAIMS FOR LACK OF SUBJECT MATTER JURISDICTION
UNDER NEW MEXICO RURAL ELECTRIC COOPERATIVE ACT

Cross Claim Defendants Socorro Electric Cooperative, Inc. *et al*, by and through their counsel of record, Kennedy & Han, P.C., hereby bring this, Cross Claim Defendants' Motion to Dismiss Claims for Lack of Subject Matter Jurisdiction Under the New Mexico Rural Electric Cooperative Act.¹ As is discussed in detail below, the Cross Claim in the current matter violates the express pleading requirements established by the New Mexico Rural Electric Cooperative

¹ The current Motion is being filed concurrently with a Motion to Dismiss based on Lack of Standing, a Motion to Dismiss based on Failure to Properly Plead under Rule 1-009(b), a Motion to Dismiss for Failure to Join an Indispensible Party, and a Motion for Partial Summary Judgment as to Claims Based on Denial of Voting Rights. The Defendants hereby incorporate all statements of fact and arguments of law contained in these various Motions as if fully set forth herein.

Act (hereinafter “RECA”) which must be satisfied in order to vest subject matter jurisdiction in this Court and to overcome the immunity from suit established by RECA.

In addition to dismissing the Cross Claim in its entirety, Cross Claim Defendants request that the Court award reasonable attorney’s fees incurred during the litigation of this matter, as allowed by under RECA, §62-15-9(H).² In support of this Motion, Defendants state as follows:

I. Introduction.

On or about August 24, 2010, Plaintiff filed an unverified Cross Claim and Request for Class Action Certification in the current matter. The Cross Claim is brought against the Socorro Electric Cooperative, Inc. (hereinafter “Cooperative”) as an independent corporation, and against fourteen individuals. Thirteen of these individuals are current or past Trustees of the Cooperative, and one individual is a past general manager of the Cooperative.

Focusing strictly on the unverified Cross Claim, the pleading contains, in total, sixteen “counts,” each brought separately against each of the fifteen Defendants, creating a total of 240 separate claims which must now be litigated before this Court.³ None of these claims are plead with particularity. A review of the unverified Cross Claim in its entirety reveals that the pleading contains *no* particular factual pleadings upon which *any* claim could be made. Apart from recitations of portions of RECA, the Cooperative’s Bylaws, and properly filed IRS documents, the Cross Claim contains only general allegations and speculation as to hypothetical wrongdoing by the Defendants. Several fundamental accusations are brought on the basis of “information and belief,” with no factual support or information. See, eg, Cross Claim, at ¶38.

² For purposes of simplicity and ease of reading, Cross Claim Defendants are referred to throughout this Motion as “Defendants.” Cross Claim Plaintiff is similarly referred to only as “Plaintiff”.

³ Defendants recognize that at least two of the “counts” (ie, Counts 1 and 16) presented by Plaintiff contains no language indicating an actual cause of action. This fact, however, only adds to the confusion surrounding this Cross Claim.

These deficiencies in the Cross Claim are in direct violation of the explicit pleadings provisions of RECA.⁴ Because Plaintiff Wagner has failed to meet the basic pleadings requirements needed to invest this Court with subject matter jurisdiction in the current suit, each of the claims contained in Plaintiff's 16 "counts" should be dismissed based on the immunity from suit the New Mexico legislature has chosen to provide for of rural electric cooperatives and their trustees.

II. Standard of Review.

Defendants have brought the current Motion as a motion to dismiss under Rule 1-012(c), NMRA 2011. However, the issue addressed in the Motion focuses on the Court's lack of subject matter jurisdiction, which is typically addressed under Rule 1-012(B)(1). The distinction between motions brought under these two separate Rules is simply one of timing. Motions under Rule 1-012(c) for judgment on the pleadings are properly brought after the close of the pleadings. The standard of review remains the same in both situations. The Court is required to test the legal sufficiency of the plaintiff's claims, and not the factual allegations contained in the complaint, to determine if subject matter jurisdiction exists. *Healthsource, Inc. v. X-Ray Assoc. of New Mexico*, 2005-NMCA-097, ¶16. If, based on this analysis, the Court determines at any time during the litigation that it lacks subject matter jurisdiction, then the Court "shall dismiss the action." See, Rule 1-012(H)(3), NMRA 2011.

⁴ As is asserted in the various Motions filed concurrently with the instant Motion, Defendants argue that these pleading deficiencies are also in violation of of the Business Corporations Act, of New Mexico's Rules of Civil Procedure 1-009(b) and 1-023.1, and of the common law pleading requirements established by the business judgment rule.

Where entities or individuals are immune from suit, New Mexico courts lack subject matter jurisdiction to consider the suit. See, eg., *Martinez v. Pojoaque Gaming, Inc.*, 2011-NMCA-103.

III. Statements and Arguments of Law.

A. Jurisdictional Pleading Requirements of the Rural Electric Cooperative Act.

The Rural Electric Cooperative Act, §62-15-1, *et al.*, NMSA 1978, establishes specific requirements for the litigation of suits against electric cooperatives and their trustees. At §62-15-9(H), RECA clearly states that “*no action shall be brought* against a trustee as such or against the cooperative” unless three specific pleading requirements are satisfied. (Emphasis added.) These pleading requirements are:

- 1) That the plaintiff was a member of record of the cooperative at the time of the transaction complained of;
 - 2) That the complaint must be verified; and,
 - 3) That the complaint must allege with particularity the pre-litigation actions taken by the plaintiff to obtain the actions the plaintiff desires from the trustees, *and* the reasons for the plaintiff’s failure to obtain action or for not making the effort.
- RECA, §62-15-9(H), NMSA 1978. •

i. Immunity from Suit.

As stated above, the plain language of §62-15-9(H) provides that “*no action shall be brought*” unless and until certain explicit pleadings requirements are satisfied. Such language provides for more than a mere affirmative defense as to liability. The language of the subsection

establishes baseline requirements that must be satisfied before the Court can exercise jurisdiction in suits brought against a rural electric cooperative and/or its trustees. Where the pleading requirements are not satisfied, the Court lacks subject matter jurisdiction to consider the suit, and the cooperative and the trustees remain immune from suit.

Long established case law in New Mexico demonstrates that the legislature uses the “*no action shall be brought*” language when it intends to provide immunity from suit for certain classes of potential defendants. See, eg. *Galvan v. City of Albuquerque*, 87 NM 235, 236, 531 P.2d 1208, 1209 (N.M. 1975) (discussing sovereign immunity). For decades, courts around the United States have made this same determination, repeatedly holding that the use of the phrase “no action shall be brought” indicates a legislative intent to grant of immunity from suit to the particular class of defendants at issue. A sample of such cases includes: *Plummer v. Donald M. Drake Co.*, 212 Or. 430, 320 P.2d 245 (Or. 1958) (establishing employer immunity from suit in workers compensation matter); *Barnecut v. Seattle School Dist. No. 1*, 63 Wash. 905, 389 P.2d 904 (Wash. 1964) (discussing special immunity from tort liability for schools); *Geertz v. Ausonio*, 4 Cal.App.4th 1363 (Cal.App.6th Dist. 1992) (discussing contractors’ immunity from suit for construction defect claims); *Sampaio v. Inter-American Development Bank*, --- F.Supp.2d---, 2011 WL 3835662 (D.D.C. 2011) (discussing immunity from suit for international organizations). In each of these cases, immunity from suit was predicated on statutory language which established that “no action shall be brought” by certain individuals or without certain procedural safeguards.

The distinction between immunity from suit and a mere defense as to liability is critical in a matter of this nature. Immunity from suit allows for the swift, early dismissal of claims “without the costs of trial or the burdens of broad-reaching discovery.” See, *Mitchell v. Forsyth*,

472 U.S. 511, 526, 105 S.Ct. 2806, 2815 (1985) (discussing immunity from suit based on qualified immunity doctrine). These same concerns apply in the context of a rural electric cooperative, which is bound to operate in the best interests of its members. The presumption of immunity, combined with the explicit pleading requirements established in §62-15-9(H), ensures that potential disputes between the cooperative and the membership are first addressed by and through the normal operating procedures of the cooperative itself. This process provides the particular cooperative and its members with an opportunity to minimize litigation costs and escape the burdens of expansive discovery. Minimizing these costs necessarily lowers the overall cost of electricity for the individual members. By providing immunity from suit unless and until certain requirements have been met, the RECA also furthers the well established New Mexico public policy in favor of amicable settlement of claims without litigation. See, *Ratzlaff v. Seven-Bar Flying Serv., Inc.*, 98 N.M. 159, 646 P.2d 586³(Ct.App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982).

As to the relevant procedures which could be used to resolve the current dispute without resort to the Courts, these are established by the RECA and by the Bylaws of the relevant cooperative. Most simply, as a member of the Socorro Electric Cooperative's Board of Trustees, Plaintiff Wagner could bring his concerns directly before the Board. If the Board, for whatever reason, did not act on or resolve Plaintiff Wagner's concerns, then the RECA specifically allows for actions to be taken on initiative by the members, and without the approval of the Board of Trustees, by and through a petition process. See, RECA, §62-15-17, NMSA 2011, (Initiative by members). Use of the petition process *requires* the Board to act on and give effect to "any proposition embodied in a petition signed by not less than 10% of all members of the cooperative." *Id.*

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ii. *Pleading Deficiencies in Cross Claim in Violation of RECA.*

In the current matter, a review of the Cross Claim reveals that *none* of the statutory requirements established by §62-15-9(H) are satisfied. At ¶9, Plaintiff Wagner states that he will be fairly and adequately able to protect the interests of the proposed class, but he does not state that he was a member of record of the cooperative at the time of the transaction complained of, nor does he state with any particularity what time frame he is addressing.

Furthermore, Plaintiff Wagner affirmatively states to the Court that there are no conflicts between him and the class he seeks to represent. This is incorrect. As is more formally and explicitly discussed by the separate Motion to Dismiss for Failure to Join an Indispensible Party (filed concurrently with the instant Motion), Plaintiff Wagner is, and has been for approximately the past 6 years, a Trustee for the Socorro Electric Cooperative. As such, he has operated under the same rules and procedures discussed throughout his Cross Claim. While the Defendants have denied, and hereby continue to deny, any and all allegations of wrongdoing contained in the Cross Claim, it is self-evident that Mr. Wagner, as a Trustee of the Cooperative, has received compensation and health care coverage, has received per diem payments, and has made trips under the same re-imbursement policies as the other named Defendant/Trustees. Plaintiff Wagner owes the same duties and obligations to the Cooperative and to the membership as do all other Trustees. While pleading these matters is not required by RECA, the failure to present the Court with the basic, highly relevant information as to Wagner's status as a trustee informs goes directly to the third element of the analysis: actions made by the Plaintiff to obtain action from the Board.

As to the second element, it is undisputed that the Cross Claim is *not* verified. The Cross Claim is not titled as “Verified,” and no signed verification form is included with the pleading. Thus, the Cross Claim does not satisfy the second element of §62-15-9(H). While often viewed as a technical matter, failure to verify a pleading when such verification is required by statute is, in itself, sufficient and correct grounds for dismissal of a suit on the pleadings. See, *Hyde v. Bryan*, 24 N.M. 457, 174 N.M. 419 (1918).

Finally, the Cross Claim fails to provide *any* particular claims as to the actions Plaintiff Wagner has taken to have his concerns addressed by the Board of Trustees. Plaintiff Wagner has not provided the Defendants or this Court with *any* particularized statements as to his actions either as a Trustee or as an ordinary member of the cooperative. Plaintiff Wagner has provided no particularized statements as to why he has failed to obtain the actions he desires from the Cooperative and the Board. Plaintiff Wagner has not presented any particularized statements as to why he has failed to use the member initiative petition process to resolve his claims, and he has failed to present any particular statements as to why he is seeking class action status to litigate matters brought under the Declaratory Judgment Act, particularly when this Court, *in this very suit*, has previously determined that declarations made in relation to a single member of a cooperative will be binding as to all members. See, *Decision Regarding Applicability of Relief*, entered March 29, 2011.

Plaintiff Wagner has not complied with *any* of the explicit requirements of RECA. Rather than attempting to resolve his concerns without litigation by using clearly established statutory procedures and basic business procedures, he has chosen to bring his claims in a class action posture which necessarily increases the burdens of litigation as to time, cost and inconvenience.

Yet, at the same time, Plaintiff Wagner asserts that his suit is not intended to harm the Socorro Electric Cooperative. Such assertions test the Court's credulity.

iii. Discretion to Stay Lawsuit.

Even where the explicit standards of §62-15-9(H) are satisfied, and jurisdiction is properly vested, RECA provides the Court with the discretionary authority to stay the action as circumstances reasonably require, in order to permit the cooperative and the trustees to undertake an investigation into the allegations and the requested action.

Should the Court decline to dismiss the matter entirely based on Plaintiff's failure to properly plead his claims, Defendants request that the Court stay all proceedings in this matter until the Cooperative has the opportunity to determine the nature and timeframe of Mr. Wagner's particular claims, and to conduct a proper investigation into this matter.

B. Award of Attorney's Fees under RECA.

The plain language of §62-15-9(H) of RECA states that "[i]f the court finds the action was brought without reasonable cause, it may require the plaintiff to pay defendants the reasonable expenses, including counsel fees, incurred by them in the defense of such action...." The clear purpose of this provision is to prevent vexatious litigation and "strike suits" while protecting plaintiffs whose suits have a reasonable foundation." See, *White in re Banes Co. Derivative Action v. Banes Co.*, 116 N.M. 611, 615, 866 P.2d 339, 343 (N.M. 1993). In discussing the "reasonable cause" requirement, the New Mexico Supreme Court as determined that a trial court may properly consider, but may not solely rely on, a plaintiff's failure to comply with the pre-litigation requirements and pleading requirements in determining if litigation was

“groundless” and brought without reasonable cause. *Id.* at 616. The Court is also permitted to consider the timeliness of a defendant’s request for fees and expenses in relation to the overall course of motions practice. *Id.*

In the current matter, the facts and arguments of law presented in the current motion indicate a clear failure to comply with basic, clearly written statutory requirements needed to overcome the presumption of immunity against Cooperatives and their Trustees, and to invest this Court with subject matter jurisdiction to consider the proposed claims. Additionally, the same facts and arguments of law have demonstrated that Plaintiff Wagner has brought a vexatious lawsuit, which improperly makes unsubstantiated and egregious claims of fraud against each of the named Defendants. The current litigation therefore violates the primary policy behind each of these heightened pleading requirements, namely, to protect businesses and their directors, trustees and officers from generalized allegations of misbehavior which could tarnish their reputations and impose significant costs and other burdens on the business enterprise.

As to the timing of the current request for expenses and fees, Defendants have brought this request by and through their first dispositive motion. Unlike the defendant in *Banes Co.* discussed above, Defendants are expressly attempting to resolve the present litigation before either side incurs exorbitant attorney’s fees. An award of expenses and fees under these circumstances would be wholly within the Court’s discretion.

IV. Conclusion.

WHEREFORE, based on the statements of fact and law presented above, Defendants request the Court provide the following relief:

- 1) ORDER full dismissal of all claims for lack of subject matter jurisdiction and Defendant's immunity from suit, based on Plaintiff Wagner's failure to comply with the jurisdictional pleading requirements of the Rural Electric Cooperative Act; and,
- 2) ISSUE an affirmative finding that the current litigation was brought without reasonable cause and is groundless; and,
- 3) ORDER an award to all named Defendants of all reasonable expenses and attorney's fees they have incurred in the litigation of this matter, in an amount to be determined by the Court upon proper presentation of a cost bill by Defendants' counsel; and/or,
- 4) ORDER any such other and further relief as this Court finds to be in the interests of justice.

Respectfully submitted,

KENNEDY & HAN, P.C.

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CERTIFICATE OF SERVICE:

I certify that a copy of this
Motion was served by the Court's
electronic filing system to the following
counsel of record on this 25th day of January 2012.
Pro Se Litigants were served by 1st Class U.S. mail.

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