



matter in a designated pleading; and (3) the injustice or prejudice caused by the opposing party if the request is granted. Green v. City of St. Louis, 870 S.W.2d 794, 797 (Mo. banc 1994).

The Court finds that it would be a hardship on Plaintiffs if their motion for leave to file their Amended Petition was denied. The Court notes Plaintiffs' request was made to address the issue of Plaintiffs' standing to bring this action. The Court finds that the injustice or prejudice caused to Defendant by allowing Plaintiffs leave to amend is minimal. Accordingly, the Court will grant Plaintiffs leave to amend their Petition.

Defendant moves to dismiss the Petition because Plaintiffs lack standing to bring this action. In addition, Defendant argues that the Petition must be dismissed because Plaintiffs failed to join a necessary and indispensable party.

Defendant argues that Plaintiffs lack standing to bring claims on behalf of Raymon Condominium Association (RCA). This argument is based on allegations in the original Petition related to an agreement between Defendant and RCA. However, the Amended Petition does not include reference to such an agreement and states explicitly that it is based on the breach of an agreement between Plaintiffs and Defendant.

Defendant relies on 21 West v. Meadowgreen Trails, 913 S.W.2d 858 (Mo. App. E.D. 1995) in support of its standing argument. In 21 West the Missouri Court of Appeals found, in relevant part, that individual shareholders could not recover damages for injuries to a corporation. 913 S.W.2d at 871. In

the Amended Petition, Plaintiffs allege that they seek to recover damages that they personally sustained for breach of an agreement entered into between Plaintiffs and Defendant. The holding in 21 West does not apply herein.

The First Amended Petition references an agreement attached as Exhibit 1, however no such exhibit is part of the record. The Court believes this agreement is the same agreement referenced in the original Petition. The agreement attached to the original Petition states that it was submitted to RCA and Helen Becker by Defendant and states that it is entered into by the property owners and Defendant.

The Court believes the language related to property owners was intended to bind all of the owners of the property at issue and not just RCA. Plaintiffs claim to be property owners and may be able to recover for breach of the agreement. The Court cannot determine as a matter of law that Plaintiffs lack standing to bring their claims herein.

Defendant also argues in its Motion to Dismiss that this matter should be dismissed for failure to join RCA, a necessary party.

Where the court determines that a party not joined is necessary to an action, "the court shall order that the person be made a party." Rule 52.04(a). Only if the person not joined is determined to be indispensable and cannot be joined should the action be dismissed. Ward v. Bank Midwest, NA, 871 S.W.2d 649, 651 (Mo. App. W.D. 1994). A person is necessary to an action if

(1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been joined, the court shall order that the person be made a party.

Rule 52.04(a).

Dismissal is not the appropriate remedy for failure to join a necessary party. Rule 52.04(a). Under the current record, including oral argument at the hearing on this motion, the Court has determined that other parties are necessary to adjudicate this matter. These parties are necessary under Rule 52.04(a)(2)(i) and (ii) and the Court will order Plaintiffs to join all necessary parties in this action.

Plaintiffs claim that they own thirty-six percent of the common areas located at 5323 Pershing Avenue as "tenants in common with the two other owners." Plaintiffs contend that as such, no other property owners need to join in this matter.

"In a tenancy in common, each co-tenant owns a separate, fractional share of undivided property." Willits v. Peabody Coal Co., LLC, 332 S.W.3d 260, 264 (Mo. App. E.D. 2010). "Each co-tenant has the right to unilaterally alienate his interest through gift, sale, or encumbrance; to exclude third parties from the property; and to receive an appropriate portion of any income

derived from the property.'" Id.

Plaintiffs rely on Poetz v. Klamberg, 781 S.W.2d 253 (Mo. App. E.D. 1989) in support of their argument that no other property owners need to be joined. However, Poetz recognized that "[t]here may be circumstances where joinder of co-tenants would be required as for instance to prevent the potential of double recovery, where complete relief cannot be afforded without the presence of all co-tenants, or as a matter of judicial efficiency.'" 781 S.W.2d at 256.

The other owners of 5323 Pershing Avenue have an interest relating to the subject of this action. The Court is concerned that *res judicata* principles would preclude the other owners from relitigating the issue of Defendant's breach of contract should the Court find in Defendant's favor, or otherwise inhibit the other property owners from protecting their interests as stated in Rule 52.04(a)(2)(i). See Kesterson v. State Farm Fire & Cas. Co., 242 S.W.3d 712, 715-716 (Mo. banc 2008); See also Creative Walking, Inc. v. American States Ins. Co., 25 S.W.3d 682, 686 (Mo. App. E.D. 2000).

In addition, the Court is concerned that the ability of the other owners to recover damages from Defendant could be limited should the Court find for Plaintiffs and that Defendant might be subjected to "a substantial risk of incurring double, multiple, or otherwise inconsistent obligations" as stated in Rule 52.04(a)(2)(ii) if each property owner were to sue separately for the damages allegedly incurred herein.

Section 448.3-102 RSMo provides a condominium association with the power to "[i]nstitute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium.'" Accordingly, RCA can enter into this action on behalf of the other property owners herein to protect their interests. The Court finds that RCA is the only necessary party that must be joined to this action.

Accordingly, the Court will grant Defendant's Motion to Dismiss to the extent that it argues that RCA must be joined in this matter. Plaintiffs are ordered to join RCA in this matter or otherwise show that it need not be joined within thirty days of the date of this order. Failure to so join RCA may result in the dismissal of this lawsuit following an appropriate motion.

THEREFORE, it is Ordered and Decreed that Plaintiffs' Motion for Leave to File First Amended Petition is hereby GRANTED.

Defendant's Motion to Dismiss is GRANTED IN PART.

Plaintiffs are Ordered to amend their Petition within thirty days of the date of this Order to include all necessary parties.

Defendant's Motion to Dismiss is DENIED in all other respects.

SO ORDERED:

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Christopher McGraugh, Judge

Dated: \_\_\_\_\_

cc: Counsel of record