

another election on December 14, 2017. Prior to the December 14, 2017 election, Plaintiff alleges Defendant approved five additional members to be exempt from the Bylaws requirements and vote. At the December 14, 2017 election both Casey Lowmiller and Albert Morrison, III won their respective positions, which they still hold. Plaintiff alleges that Board President, Daniel Cupp, stated at the January 2, 2018 meeting that the “executive session that took place off SWFD campus was an organizational meeting to cause the continuation of the meeting on December 14, 2017.”

On February 20, 2018, Plaintiff filed an Action for Declaratory Judgment. Defendant then filed Preliminary Objections on March 26, 2018, which were rendered moot by Plaintiff’s filing of this Amended Action for Declaratory Judgment filed April 9, 2018. On May 8, 2018, parties agreed that no responsive pleadings need be filed until the resolution of In Re: *Independent Fire Company No. 1*, No. 17-0473 in front of this Court. That matter was concluded by this Court’s Order and Opinion on October 5, 2018.² On October 11, 2018, Plaintiff sent Defendant a 10-day notice of default judgment, which Defendant responded by filing Preliminary Objections to Plaintiff’s Amended Complaint on October 17, 2018. This Court scheduled a hearing on December 4, 2018, which both parties submitted briefing. The Court, at the agreement of the parties, held the issue in abeyance while parties attempted to seek resolution. On May 30, 2019 the parties informed the Court resolution would not be occurring and the preliminary objections needed to be ruled upon.

² Matter is currently on appeal in front of the Pennsylvania Commonwealth Court. See In re *Independent Fire Company No. 1*, 1489 CD 2018.

Discussion

Defendant filed preliminary objections in the present action. When determining preliminary objections this Court is required to:

accept as true the well-pled averments set forth in the . . . complaint, and all inferences reasonably deducible therefrom. Moreover, the [C]ourt need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion. In order to sustain preliminary objections, it must appear with certainty that the law will not permit recovery, and, where any doubt exists as to whether the preliminary objections should be sustained, the doubt must be resolved in favor of overruling the preliminary objections.

Pa. State Lodge, Fraternal Order of Police v. Dep't of Conservation & Natural Res., 909 A.2d 413, 415-16 (Pa. Cmwlth 2006), *aff'd*, 924 A.2d 1203 (Pa. 2007).

Sunshine Act Violation

Plaintiff claims in Count I of his Amended Action for Declaratory Judgment that Defendant violated multiple sections of the Sunshine Act at its December 5, 2017 offsite meeting: by not falling within one of the recognized exceptions to an open meeting enumerated in 65 Pa. C.S. § 707; by not properly announcing the meeting and its purpose in violation of 65 Pa. C.S. § 708(b); and by deliberating and taking official action in violation of 65 Pa. C.S. § 704. Defendant, in his Preliminary Objections, claims Plaintiff's pleadings are legal insufficient under Pa. R. Civ. P. 1028(a)(4), because Plaintiff filed his complaint outside the applicable statute of limitations. Plaintiff responded through his brief that this Court must dismiss Defendant's preliminary objection with prejudice, because a defense of statute of limitations is procedurally impermissible in preliminary objections in Pennsylvania.

Generally, Plaintiff is correct that a defendant may not raise a defense of statute of limitations in preliminary objections. Typically "[t]he defense of the bar of a statute of frauds or *statute of limitations* can be asserted only in a responsive pleading as new matter under Rule

1030.” Pa. R. Civ. P. 1028(a)(4) Note (emphasis added). “[A] statute of limitations affirmative defense cannot be raised in preliminary objections in the nature of a demurrer, unless the particular statute of limitations is nonwaivable.” *Devine v. Hutt*, 863 A.2d 1160, 1167 (Pa. Super. 2004). The Sunshine Act’s statutory limitation under 65 Pa. C.S. § 713 is such a nonwaivable claim. *Day v. Civil Serv. Comm’n of Borough of Carlisle*, 931 A.2d 646, 652 (Pa. 2007). Additionally it is an issue which the Court may consider *sua sponte*, because without such the Court has no jurisdiction to hear the underlying merits of the claim. *Id.* at 651-52. Under 65 Pa. C.S. § 713, a plaintiff shall file a complaint “within 30 days from the date of a meeting which is open, or within 30 days from the discovery of any action that occurred at a meeting which was not open at which this chapter was violated.”

Plaintiff argues that counsel was consulted on December 26, 2017 regarding “suspicion” of a violation and that counsel did not complete adequate research and evaluation of the evidence until January 24, 2018. Plaintiff contends this is the date the thirty days should begin to run. This is not a proper understanding of the statute. The actions Plaintiff alleges violated the act were the voiding of the December 4, 2017 voting results, the holding of the December 5, 2017 meeting, and not giving notice of the December 5, 2107 meeting. By his own admission Plaintiff discovered that these actions occurred at the January 2, 2018 meeting, when Board President, Daniel Cupp, stated that the “executive session that took place off SWFD campus was an organizational meeting to cause the continuation of the meeting on December 14, 2017.” The Act does not permit a plaintiff to have thirty days from the complete preliminary investigation of a claim, but rather from the discovery of a potential violation, therefore Defendant’s Preliminary Objection to Count I is sustained.

Breach of Fiduciary Duty

Plaintiff brings a claim against Defendant under Count III for Breach of Fiduciary Duty. He claims that Defendant violated the fiduciary duties of care, loyalty, and obedience. First, Defendant preliminarily objects stating Plaintiff lacks capacity to sue for breach of fiduciary duties. Defendant's contention is incorrect and therefore his preliminary objection must be denied.

Defendant cites 15 Pa. C.S. §§ 5717, 5782 referring to who may bring an action for a breach of duty by a board of directors and derivative actions, respectively. 15 Pa. C.S. § 5717 states action brought against a board of directors "may not be enforced directly by a member or by any other person or group," but Pennsylvania courts have found the sole exception to be individuals pursuing their own rights under 15 Pa. C.S. § 5793(a). *White v. Associates in Counseling and Child Guidance, Inc.*, 767 A.2d 638, 643 (Pa. Cmwlth 2001). When an action is filed by "any person aggrieved by any corporate action, the court may hear and determine the validity of the corporate action." 15 Pa. C.S. § 5793(a). Corporate action is specifically defined as "[t]he election, appointment, designation or other selection and the suspension, removal or expulsion of members, directors, members of an other body or officers of a nonprofit corporation." 15 Pa. C.S. § 5791(a)(1). Therefore, Plaintiff has the capacity to challenge the corporate action of the election in which he alleges he was previously selected for the vacant director's position.

Defendant additionally raises two other preliminary objections to Plaintiff's claim for breach of fiduciary duty: (1) Failure to allege a legal cause of action and (2) Failure to sufficiently plead a cause of action. The fiduciary duties applicable to this action are clearly

outlined under Pennsylvania law. *See* 15 Pa. C.S. §§ 5711-5717. Defendant’s duty of care is statutorily defined as:

(a) Directors.--A director of a nonprofit corporation shall stand in a fiduciary relation to the corporation and shall perform his duties as a director, including his duties as a member of any committee of the board upon which he may serve, in good faith, in a manner he reasonably believes to be in the best interests of the corporation and with such care, including reasonable inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances.

15 Pa. C.S. § 7512(a).

The duty of care “requires a party to act with the utmost good faith.” *Commonwealth by Kane v. New Foundations, Inc.*, 182 A.3d 1059, 1067 (Pa. Cmwlth 2018). A director “must act with scrupulous fairness and good faith in his dealings with the other and refrain from using his position to the other's detriment and his own advantage.” *Young v. Kaye*, 279 A.2d 759, 763 (Pa. 1971). In addition to the duty of care, a director has duties of loyalty and obedience. *Commonwealth by Kane*, 182 A.3d at 1067. “The duty of loyalty requires that corporate directors devote themselves to corporate affairs with a view to promote the common interests and not only their own, and that they cannot directly or indirectly utilize their position to obtain any personal profit or advantage.” *Id.* Violations occur in the presence of “fraud or self-dealing or other misconduct or malfeasance.” *Cuker v. Mikalauskas*, 692 A.2d 1042, 1046 (Pa. 1997). The duty of obedience “capture[s] the idea that a director is under an obligation to ensure that the corporation acts within its proper purpose and mission.” Thomas Lee Hazen & Lisa Love Hazen, *Punctilios and Nonprofit Corporate Governance—A Comprehensive Look at Nonprofit Directors’ Fiduciary Duties*, 14 U. PA. J. Bus. L. 347, 386-87 (2012). Under Pennsylvania law dealing with nonprofit directors, the duty of obedience has only been recently applied to appropriation of funds under 15 Pa. C.S. § 5545. *See Commonwealth by Kane*, 182 A.3d at 1068.

Defendant argues Plaintiff's claim for breach of fiduciary duty has an insufficient legal basis to support his claim, because the claim resonates in contract law and is not a tort action, such a breach of fiduciary duty. This Court disagrees with Defendant's analysis. Defendant relies on *Commonwealth v. Gorski*, which stated that "[w]here a duty of good faith arises, it arises under the law of contracts, not under the law of torts." 812 A.2d 683, 710 (Pa. Super. 2002) (quoting *Creeger Brick v. Mid-State Bank*, 560 A.2d 151, 153 (Pa. Super. 1989)). The portion which Defendant cites discusses that there is no common law action in tort "solely for bad faith" and therefore when the duty arises it arises in the context of contractual principals. *Gorski*, 812 A.2d at 710 (internal citation omitted). Plaintiff is not raising a general "bad faith" claim as discussed in the cited portion of *Gorski*. The Court in *Gorski* found the proper analysis based on the pleadings of the plaintiff was under a breach of fiduciary duties. *Gorski*, 812 A.2d at 711-12. A similar claim is raised here by Plaintiff and is additionally properly labeled as a breach of fiduciary duties. This Court therefore agrees with Plaintiff that claims for a breach of the duty of care, loyalty, and obedience are legally cognizable claims.

Defendant next argues that Plaintiff's cause of action for breach of fiduciary duty is factually insufficient. Specifically, Defendant claims that Plaintiff has failed to properly allege a breach of the duty of loyalty and secondly has failed to identify and raise allegations against four of the five board members specifically. This Court again disagrees and believes Plaintiff has at least shown enough to survive preliminary objections by alleging Defendant acted in a way to constitute "fraud or self-dealing or other misconduct or malfeasance." *Cuker*, 692 A.2d 1042, 1046 (Pa. 1997). Additionally, the meeting and actions at issue, alleged to have been accomplished, were accomplished by the entire board of directors and not a single director, therefore Defendant's claim only one director is specified is meritless. This Court also notes that

although not specifically raised and not fatal to a claim for a breach of fiduciary duties as a whole, the claim that Defendant breached its duty of obedience is non-existent in Plaintiff's pleading as it is recognized under Pennsylvania law. Plaintiff's paragraph in his Amended Complaint stating "Board has violated its duty of obedience to the Department by acting in violation of the bylaws, as detailed in Count II above" is sufficiently covered in Count II and will not be allowed to be readdressed and reargued under a claim of a breach of a duty of obedience.

Conclusion

The accompanying order shall address each of Defendant's preliminary objections as well as any dispositions of Plaintiff's claims.

ORDER

AND NOW, this 13th day of June, 2019, based upon the foregoing Opinion, the Court rules on the following Preliminary Objections:

1. Defendant's Preliminary Objection that Plaintiff's Count I is legally insufficient as the statute of limitations has run is **SUSTAINED**. Therefore, Plaintiff's Count I is **DISMISSED**.
2. Defendant's Preliminary Objection that Plaintiff lacks the capacity to sue for Count III is **OVERRULED**.
3. Defendant's Preliminary Objection that Plaintiff has failed to state a legal claim upon which relief may be granted in Count III is **OVERRULED**.
4. Defendant's Preliminary Objection that Plaintiff's pleadings were insufficiently specific and therefore failed to state a factual claim upon which relief could be granted for Count III is **OVERRULED**.

5. Based upon the above rulings on Defendant's Preliminary Objections, Defendant's request to dismiss Plaintiff's Count III is **DENIED**.

By the Court,

Nancy L. Butts, President Judge

xc: Christopher Kenyon, Esquire
W. Jeffrey Yates, Esquire

NLB/kp