IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION SIX

SUSTAINABLE RAIL INTERNATIONAL, INC.

Plaintiff,

vs.

TOPEKA CHILDREN and SANTA FE RAILROAD, INC., et al.

Defendant,

Case No. 2014-CV-500

MEMORANDUM DECISION AND ORDER

This matter comes before the court on Plaintiff's Motion for Summary Judgment; Defendant Topeka Children & Santa Fe Railroad, Inc.'s Motion for Summary Judgment; and the Defendant City of Topeka's Motion for Summary Judgment. All of the motions have responses and replies as are necessary and the court finds the matter is ready for determination. After careful consideration of the evidence and relevant law the court finds as follows:

NATURE OF THE CASE

This matter comes before the court on plaintiff's motion for declaratory judgment. The plaintiff opines that the defendant Topeka Children & Santa Fe Railroad Inc. (TCSFR) claimed an absolute ownership interest in the steam locomotive commonly known as the Atchison, Topeka & Santa Fe Locomotive #3463 (Locomotive). Subsequently, it claims TCSFR changed its position to allege the City of Topeka owns the Locomotive but TCSFR is a Trustee of an alleged Charitable trust with the locomotive being the corpus of the trust. TCSFR seeks a declaration that the City of Topeka is the owner by way of a gift of a Charitable trust and that it is the trustee. Additionally, TCSFR seeks to be declared trustee by and through the application of the cypress doctrine.

The City of Topeka claims ownership of the Locomotive and denies interest in the property by any other entity.

The court has bifurcated the proceeds to determine the standing of the parties to make their claims and that argument is the subject of the motions for summary judgment.

FINDINGS OF FACTS

1. In 1956, the Atchison, Topeka & Santa Fe Railway Company donated and transferred the Atchison, Topeka & Santa Fe Railway Locomotive No. 3463 (hereinafter "the Locomotive") to the City of Topeka (hereinafter "the City") via bill of sale, dated June 11, 1956.
2. The Bill of Sale is the sole written instrument by which the ATSF #3643 was transferred and donated to the City.
3. In 1956, the standard industry practice for the disposal of obsolete trains was to donate the train to a suitable donee, or alternatively, to destroy the train.
4. The Bill of Sale that transferred and donated the Locomotive to the City provides, the following condition: "By the acceptance hereof and of said locomotive and tender the City agrees that it will keep said locomotive and tender in a clean, attractive and sightly condition so that the same shall not at any time be or become unsightly or dilapidated in appearance."
5. The City has not entered into any agreement with another individual or entity authorizing or expressly granting permission to such entity or individual to care for, maintain, repair, conserve, or restore the Locomotive.
6. The City has not entered into any agreement with another individual or entity thereby appointing, designating, or authorizing such individual or entity to act or serve as the de facto or implied trustee or caretaker of the Locomotive.
7. On November 7, 2011, Plaintiff entered into a Purchase and Sale of Assets Agreement Purporting to purchase the Locomotive from Railroad Heritage, Inc., d/b/a the Great Overland Station.
8. On November 20, 2012, Plaintiff and Railroad Heritage, Inc., d/b/a the Great Overland Station executed a Purchase and Sale of Assets Agreement Closing Document purportedly finalizing Plaintiff's purchase of the Locomotive from Railroad Heritage, Inc.

9. The City has no correspondence, emails, notes, memorandums, forms, documents, written communications, or any other documents in its custody or control that show or refer to any transfer of ownership, title, or interest in the Locomotive from the City of Topeka, to Railroad Heritage, Inc.
10. The City states there are no documents that show receipt or acquisition of the Locomotive by Railroad Heritage, Inc.
11. The City states it has no documents that support Plaintiff's assertion that "locomotive 3463 had been acquired from the City of Topeka, Kansas" as set forth in the affidavit of Robert St. John, which is attached and incorporated into Plaintiff's petition as Exhibit A.
12. The City has no documents in its custody or control that references the transfer of ownership or the transfer of any right, title or interest in the Locomotive from the City to any individual or entity prior to 2011.
13. In the Purchase and Sale of Assets Agreement from RHI to CSR, agreement number 6 states, in part:

> "Prior to Closing [Railroad Heritage, Inc.] shall render to [Plaintiff] . . . [a]ll such bills of sale, endorsements, assignments and other instruments of conveyance and transfer that are available to [Railroad Heritage, Inc.] and [Plaintiff] shall inspect such documents and determine the sufficiency of title with respect to the ownership of the Locomotive and Parts. [Railroad Heritage, Inc.] makes no warranties with respect to sufficiency of title of the Locomotive, but will use its Bill of Sale transferring the ownership rights of [Railroad Heritage, Inc.] in the Locomotive to [Plaintiff.]"

14. This Court issued a subpoena to Railroad Heritage, Inc. on June 5, 2015. Railroad Heritage, Inc., responded on June 26, 2015. The responsive documents do not contain any evidence that indicates the City transferred any right, title or interest in the Locomotive to Railroad Heritage, Inc.
15. TCSFR is not named, designated or otherwise referenced in the Bill of Sale between the City and the AT & SF Railroad.
16. TCSFR was not appointed, designated or otherwise referenced in the Bill of sale between the City and the AT & SF Railroad.
17. TCSFR was not appointed, designated or otherwise made a trustee of the ATSF #3463, and/or any charitable trust relating to the ATSF #3463, in the Bill of Sale.
18. Despite the fact that TCSFR does not have, and has never had, an ownership interest in

the ATSF #3463 or legal title to the ATSF #3463, from April 8, 2013, until the initiation of this lawsuit by SRI, TCSFR publicly and repeatedly claimed ownership of the ATSF #3463.

19. TCSFR filed Form RN 53-24, "Not-For-Profit Corporation Certificate of Reinstatement," with the Kansas Secretary of State's office on or about September 9, 2013.
20. Jerry G. Petrel signed Form RN 53-24, "Not-For-Profit Corporation Certificate of Reinstatement," on behalf of TCSFR, stating that "I declare under penalty of perjury pursuant to the laws of the State of Kansas that the foregoing is true and correct and that I have remitted the required fee."
21. Contemporaneous to its filing of Form RN 53-24 with the Kansas Secretary of State, TCSFR also filed Form NP 50, "Not-For-Profit Corporation Annual Report" for the years 2008, 2009, 2010, 2011 and 2012, on or about September 9, 2013.
22. Jerry G. Petrel signed the 2008 – 2012 Form NP 50, "Not-For-Profit Corporation Annual Report" on behalf of TCSFR, stating in each respective annual report that "I declare under penalty of perjury pursuant to the laws of the State of Kansas that the foregoing is true and correct and that I have remitted the required fee."
23. On or about June 14, 2014, TCSFR filed Form NP 50, "Not-For-Profit Corporation Annual Report" for the year 2013, with the Kansas Secretary of State.
24. Jerry G. Petrel electronically signed the 2013 Form NP 50, "Not-For-Profit Corporation Annual Report" on behalf of TCSFR, stating in that "I declare under penalty of perjury pursuant to the laws of the State of Kansas that the foregoing is true and correct."
25. On or about July 2, 2015, TCSFR filed Form NP 50, "Not-For-Profit Corporation Annual Report" for the year 2014, with the Kansas Secretary of State.
26. Jerry G. Petrel electronically signed the 2014 Form NP 50, "Not-For-Profit Corporation Annual Report" on behalf of TCSFR, stating in that "I declare under penalty of perjury pursuant to the laws of the State of Kansas that the foregoing is true and correct and that I have remitted the required fee."
27. By and through its annual reports for the years 2008 – 2014, TCSFR verified under oath that TCSFR has had zero (0) shares of capital stock issued since the year 2008.

STANDARD OF REVIEW

The Kansas rules regarding summary judgment are well known. A court may enter summary judgment "when the pleadings, depositions, answers to interrogatories, and admissions on filed, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Thoroughbred Associates, L.L.C. v. Kansas City Royalty Co., L.L.C.*, 297 Kan. 1193, 1204, 308 P.3d 1238 (2013) (quoting *Shamberg, Johnson & Bergman, Chtd. v. Oliver*, 289 Kan. 891, 900, 220 P.3d 333 (2009)). Before granting summary judgment, a court must "resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought." *Thoughbred Associates*, 297 Kan. at 1204 (quoting *Oliver*, 289 Kan. at 900). To stave off a motion for summary judgment, the nonmoving party must present evidence to establish a dispute as to a material fact; the facts involved in this dispute "must be material to the conclusive issues in the case." 297 Kan. at 1204 (quoting 289 Kan. at 900). In other words, the nonmoving party "cannot evade summary judgment on the mere hope that something may develop at trial." *Essmiller v Southwestern Bell Tel. Co.*, 215 Kan. 74, 77, 524 P.2d 767 (1974).

Summary judgment must be denied, however, where reasonable minds could differ as to the conclusions drawn from the evidence. *Thoroughbred Associates*, 297 Kan. at 1204. That said, when the nonmoving party fails to

> make a showing sufficient to establish the existence of an element essential to that party's case . . . there can be 'no genuine issue as to any material fact,' because a 'complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.'

Eudora Dev. Co. of Kansas v. City of Eudora, 276 Kan. 626, 631-32, 78 P.3d 437 (2003) (quoting the district court decision in the instant case) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

CONCLUSIONS OF LAW

A. The defendant City of Topeka claims that neither the plaintiff nor TCSFR have a valid interest in the Locomotive. It is its position that neither party have sufficient interest in the locomotive to meet the requirements of K.S.A. 60-1704.

1. Plaintiff's purported interest in the Locomotive is not insufficient at the summary judgment stage of this proceeding.

The plaintiff claims an ownership interest in the locomotive based upon the agreements between the plaintiff and Railroad Heritage, Inc. That agreement allegedly transferred all right title and possession of the locomotive from Railroad Heritage, Inc. to plaintiff. The City contends that Railroad Heritage, Inc., never obtained ownership, possession or legal title to the locomotive to transfer.

As pointed out by the plaintiff, under Kansas law, the necessary elements to establish a valid gift inter vivos of personal property are: "(1) an intention to make a gift; (2) a delivery by the donor to the donee; and (3) acceptance by the donee." *Hudson v Tucker*, 188 Kan. 202, 211, 361 P.2d 878 (1961). Whether or not a gift inter vivos of personal property was made is always a question of fact, as the elements of intent, delivery and acceptance are each usually individual questions of fact. *Hudson Id.* The question of if the City agreed through its agents that Topeka Railroad Days, Inc. owned the Locomotive, when viewed in light most favorable to the plaintiff prevents the court from granting summary judgment on this issue.

2. At the summary judgment stage of litigation the defendant's argument of standing of the plaintiff fails.

"Standing is a party's right to make a legal claim or seek judicial enforcement of a duty or right." *Bd. Of County Comm'rs. of County of Sumner v. City of Mulvane*, 43 Kan. App. 2d 500, 506, 227 P.3d 997 (2010) (citing Black's Law Dictionary, p. 1536 (9th ed. 2009)). As here, where standing is claimed by specific statute, *i.e.*, K.S.A. § 60-1002(a) and K.S.A. § 60-1704, a court must first determine whether the party meets the statutory standing requirements. *Hudson* at 507. (citing *Board of Sumner County Comm'rs. V. Bremby*, 286 Kan. 745, 750, 189 P.3d 494 (2008)). If a party satisfies the statutory requirements, then a court must determine whether a party meets the traditional tests for standing. *Id. See also Friends of Bethany Place, Inc. v. City of Topeka*, 297 Kan. 1112, 1121 – 1122, 307 P.3d 1255 (2013).

In addition to the traditional elements of standing, i.e., cognizable injury and a causal relationship between the alleged injury and requested relief, Kansas law requires a party to have personally suffered some actual or threatened injury distinct from the general public. *Friends of Bethany Place, Inc. v. City of Topeka*, 297 Kan. at 1126-27; *Linsea v. Board of Chase County*

Commr's., 12 Kan. App. 2d 657, 660, 753 P.3d 1292 (1988). Stated another way, Kansas law requires the traditional showing of; (1) an injury in fact, which is concrete and particularized, actual and imminent, and not conjectural or hypothetical; (2) an injury which is fairly traceable to the challenged conduct; and (3) the likelihood that a specific alleged injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 – 561, 112 S. Ct. 2130 (1992).

The plaintiff has made the claim that it purchased the Locomotive. Viewing the facts most favorable to the plaintiff that position is at least possible. If the purported sale took place and the plaintiff is denied its right to the Locomotive, an injury in fact has occurred; the injury is fairly traceable to the challenged contract; and the alleged injury is likely to be redressed by a favorable decision. The injury would be cognizable and a causal relationship between the alleged injury and requested relief exists. Viewing the facts in a light most favorable to the plaintiff the plaintiff has a right to make a legal claim and to seek judicial enforcement of that right.

As this court has indicated previously, the question of ownership is at the heart of this action. The plaintiff and Railroad Heritage, Inc., entered in to a purchase and sale of assets agreement in which plaintiff purportedly purchased the Locomotive. While the City has no written record of such a transfer to Railroad Heritage, Inc., facts are in dispute as to a verbal transfer of this Locomotive. The facts taken in light most favorable to the plaintiff place, possession and ownership of the Locomotive clearly in dispute. The position that the plaintiff cannot prove ownership, which is disputed, and therefore does not have standing, cannot be supported at this stage of the litigation.

The court denies the defendant City of Topeka's motion for summary judgment with respect to SRI's standing to pursue its affirmative claims.

The defendant TCSFR Inc. presents many of the same arguments as defendant City of Topeka in its motion for summary judgment. The court makes the same findings as to these arguments. TCSFR also makes additional arguments that must be addressed.

3. Plaintiff does not claim ownership by adverse possession:

TCSFR claims adverse possession is not applicable in this case. It suggests RHI. claims right to the Locomotive by adverse possession. Under Kansas law, "[t]he general rule is that one cannot maintain an action to quiet title to real property who does not have possession

thereof or title thereto." *Penn Mutual Life Insurance* Co. v. Titel, 153 Kan. 530, Syl. ¶ 1, 111 P.2d 1116 (1941). *See also Ford v. Sewell*, 188 Kan. 767, 771, 366 P.2d 285 (1961) ("One of the jurisdictional facts necessary to a quiet title action is that the plaintiff have actual possession . . .") *Dubowy v. Baier*, 856 F.Supp. 1491, 1495 (D. Kan. 1994) (noting that an instrument purporting to convey an interest in property is necessary to maintain to quiet title action). See also 9 Plaintiff's Proof Prima Facie Case § 9:26 (West 2015) (identifying two jurisdictional factual predicates in quiet title action: "(1) that he or she is in fact in possession of the disputed property, and (2) that he or she holds a record title to it"). The required interest for standing purposes is that which would enable acquiring an interest created by the court's judgment or decree. 74 C.J.S. Quieting Title § 68. It seems these same holdings should apply to personal property.

The plaintiff claims it has possession of the property. Its position is that the City of Topeka transferred or donated the locomotive to TRD, RHI's predecessor. It supports that position by outlining the requirements to transfer or donate personal property. Those are: "(1) an intention to make a gift; (2) a delivery by the donor to the done; and (3) acceptance by the done." *Hudson* at 211. The plaintiff's position is that all of these requirements were met and therefore, the transfer to RHI from the City and the subsequent transfer to the plaintiff support the plaintiff's ownership right. It is not a question of adverse possession. As previously stated, viewing the facts in a light most favorable to the plaintiff the defendant TCSFR's position on adverse possession must fail.

4. At this stage of the litigation the court does not find the locomotive is a fixed asset.

The defendants have failed to satisfactorily support the position that the locomotive is a fixed asset. To do so the defendants have to show this court the alleged ordinances supporting their position were in effect in 1992. At this point insufficient evidence as required by K.S.A. 409(b) and (c) has been provided to allow this court to take judicial notice. Further, at this point a genuine issue of fact exists as to the exact nature of character of the Locomotive as it relates to any ordinance. The court denies the defendant's position that the Locomotive is a fixed asset.

The court denies the defendant, City of Topeka and the defendant, TCFR's motion for summary judgment as to SRI.

B. Plaintiff's Motion for Summary Judgment regarding Bifurcated standing issue.

1. TCSFR has no standing to assert its declaratory judgment counterclaims.

"Standing is a party's right to make a legal claim or seek judicial enforcement of a duty or right." *Bd. of Cnty. Comm'rs of Cnty. Of Sumner v. City of Mulvane*, 43 Kan. App. 2d 500, 506, 227 P.3d 997 (2010) (citing Black's Law Dictionary, p. 1536 (9th ed. 2009)). In addition to the traditional elements of standing, i.e., cognizable injury and a causal relationship between the alleged injury and requested relief, Kansas law requires a party to have personally suffered some actual or threatened injury distinct from the general public. *Friends of Bethany Place, Inc. v. City of Topeka*, 297 Kan. 1112, 1126-27, 307 P.3d 1255, 1265 (2013); *Linsea v. Board of Chase County Commr's.*, 12 Kan. App. 2d 657, 660, 753 P.3d 1292 (1988). Stated another way, Kansas law requires the traditional showing of: (1) an injury in fact, which is concrete and particularized, actual and imminent, and not conjectural or hypothetical; (2) an injury which is fairly traceable to the challenged conduct; and (3) the likelihood that a specific alleged injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 – 561, 112 S. Ct. 2130 (1991).

The traditional standing requirement of a case or controversy is not lessened or otherwise altered where a party proceeds under the declaratory judgment statutes. "Before an action may be maintained under the declaratory judgment statute (K.S.A. 60-1701), an actual controversy must exist between the proper parties." *KAKE-TV & Radio, Inc. v. City of Wichita*, 213 Kan. 537, 539-40, 516 P.2d 929 (1973) (citing Fairfax Drainage District v. City of Kansas City, 190 Kan. 308, 374 P.2nd 35 (1962)). The Supreme Court in *KAKE-TV & Radio, Inc.* stressed the importance of "suitable adverse parties" and a "judiciable controversy" so that (1) all appropriate issues can be raised and (2) to avoid multiplicity of litigation. *Id.* (*citing Johnson County Sports Authority v. Shanahan*, 210 Kan. 253, 499 P.2d 1090, 1096 (1972)).

TCSFR has provided no facts as further outlined below, that can be used to support their position that they have any claim to the Locomotive. Therefore, no actual controversy exists between TCSFR, the plaintiff or the City.

2. TCSFR was not appointed designated or otherwise made a trustee of the Bill of Sale.

In this case, it is uncontroverted that the Locomotive was transferred and donated to the City by ATSF, by and through the Bill of Sale. It is further uncontroverted that the Bill of Sale is the sole written instrument, and mechanism of any kind, by which the Locomotive was

transferred and donated to the City. The Bill of Sale is unequivocal in its transfer of legal title to the City. The Bill of Sale transfers and donates the Locomotive to the City "for and in consideration of the sum of One Dollar ($1.00)."

The Bill of Sale also contains the condition that the City of Topeka "agrees that it will keep said locomotive and tender in a clean, attractive and slightly condition so that the same shall not at any time be or become unsightly or dilapidated in appearance." [Id.]. The Bill of Sale does not convey legal title to TCSFR, confers no interest upon TCSFR, provides no authority to TCSFR, places no condition upon TCSFR, and does not name or otherwise reference TCSFR.

In this case, whether TCSFR has standing to pursue its claims is a two-part inquiry. First, TCSFR must have standing under the statutes forming the bases of its counterclaims, i.e., the quiet title statute, K.S.A. § 60-1002(a), declaratory judgment statute, K.S.A. § 60-1704, and cy pres statute, K.S.A. § 58a-413. *See Board of Sumner County Comm'rs. v. Bremby*, 286 Kan. 745, 761, 189 P.3d 494 (2008). Second, TCSFR must also meet the traditional standing requirements under Kansas law with respect to each counterclaim. *Id.* TCSFR fails to satisfy either part of the standing inquiry.

TCSFR fails to show an interest under K.S.A. § 60-1002(a) by and through which it could have standing to seek a declaration that the City is the owner of the Locomotive. Under Kansas law, "[t]he general rule is that one cannot maintain an action to quiet title to real property who does not have possession thereof or title thereto." *Penn Mutual Life Insurance Co. v. Tittel*, 153 Kan. 530, Syl. ¶ 1, 111 P.2d 1116 (1941). TCSFR originally claimed ownership of the Locomotive but has subsequently, changed that claim to be trustee of an alleged charitable trust. Trustee, as a legal title holder to trust property would have standing to initiate a quiet title action. Unfortunately, the Bill of Sale exclusively dictates the terms of an alleged trust and it makes mention of only the City and not TCSFR. Further, it does not have a mechanism or provision wherein, the City can transfer its position of trustee, even if a trust has been created, to any other entity. This court interprets the legal effect of written instruments as a matter of law and no trustee language is found in the Bill of Sale. *See Shamberg, Johnson & Bergman, Chtd. v. Oliver*, 289 Kan. 891, 220 P.3d 333(2009). *In re Humis Estate*, 6 Kan. App. 2d 771,634 P.2d 1152 (1981).

Even if this court found some type of charitable trust in the Bill of Sale, TCSFR has not

provided admissible facts to support its claim that it was appointed or designated as trustee. TCSFR admits it has no written instrument or document appointing it as trustee. TCSFR alleges a verbal agreement between the City and TCSFR to obtain and maintain the Locomotive. However, it provides this court with no evidence of the alleged verbal agreement that would be admissible in court.

TCSFR has not demonstrated any form of harm distinguishable from that of the citizens of Topeka. A key feature of standing is whether or not an individual has articulated a personal injury or threatened injury particular to and distinct from that of the citizens of *Topeka, Friends of Bethany Place, Inc.* 297 Kan. 1112, 1126-1127. Absent an articulable special injury, TCSFR has no standing to assert its declaratory judgment counterclaims.

> A suit can be maintained for the enforcement of a charitable trust by Attorney General or other public officer, or by a co-trustee, or by a person who has a special interest in the enforcement of the charitable trust, *but not by persons who have no special interest* or by the settlor or his heirs, personal representatives or next of kin.
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> . . . . . .
>
> *d. Person having no special interest.* A suit for the enforcement of charitable trust cannot be maintained by persons who have no special interest in the enforcement of the trust. The mere fact that as members of the public they benefit from the enforcement of the trust is not a sufficient ground to entitle them to sue, since a suit on their behalf can be maintained by the Attorney General.
>
> A person who is employed by the trustees to render services in the administration of the trust has no such special interest as to entitle him to maintain a suit for the enforcement of the trust.

Restatement (First) of Trusts, § 391 at Cmt. D (1959); Restatement (Second) of Trusts, § 391 at Cmt. D (1959) (Emphasis Added). But see K.S.A. § 58a-405(c) (modifying the Restatement rule to provide the trust settlor with standing to maintain an action to enforce a charitable trust).

TCSFR claims that it "has individual Shareholders that contributed financially that will be harmed differently than the Citizens of the City of Topeka." The undisputed facts show TCSFR stock was ceremonial and provided no equity in TCSFR to its stockholders and imposed no corresponding liability. As a result of a lack of obligation to pay by shareholders or repay by

TCSFR the shareholders have no pecuniary interest in the Locomotive. Even if such an interest could be found TCSFR has verified that no stock has been issued. It is impossible for TCSFR shareholders to suffer personal injury different from other citizen of Topeka, if there are no shareholders.

TCSFR proceeds under general statutes, in this case, which create no special interest in TCSFR. TCSFR fails to show facts which create a special injury distinct from any other citizen of the City of Topeka, TCSFR simply claims its interest is enjoying and guarding the historical value of the Locomotive and ensuring that the children of Topeka also enjoy the Locomotive. Under these facts – which are the only facts provided by TCSFR in support of its standing claim – TCSFR identifies no interest or injury which is personal to TCSFR and does not distinguish its stated interest or injury from the citizenry of the City of Topeka, the alleged general beneficiaries in this case. It is therefore clear that TCSFR does not have standing as a matter of law.

3. TCSFR's Cy Pres claim fails as a Matter of Law.

Under the cy pres doctrine, there must be a charitable trust established with general charitable intent, which is or becomes illegal, impossible or impracticable of fulfillment, with no alternative plan in the event the charitable trust becomes illegal, impossible or impracticable. See K.S.A. § 58a-413 and K.S.A. § 59-22a01(a). *In re Estate of Coleman*, 2 Kan. App. 2d 567, 574, 584 P.2d 1255 (1978) "The doctrine of cy-pres permits a court to implement a testator's intent to save a gift to charity by substituting beneficiaries when the named charitable beneficiary is unable to take the gift." *In the Matter of Estate of Crawshaw*, 249 Kan. at 396 (quoting *In re Estate of Coleman*, 2 Kan. App. 2d at 574). For purposes of this motion for summary judgment, even if the court finds the Bill of Sale is a trust, cy pres is not appropriate. The City of Topeka's citizens are able to take and maintain the Locomotive under the charitable trust. Therefore, under the facts of this case the general charitable intent has not become illegal, impossible or impracticable.

4. TCSFR does not have standing to assert its counterclaims by virtue of TCSFR being named a defendant in this lawsuit.

TCSFR asserts that by virtue of being named a defendant in this action, it has standing to assert its counterclaims. The cases TCSFR cite in support of its standing theory – that by virtue of being sued a party has standing to assert any counterclaim it desires – are not on point and

wholly distinguishable. *City of Topeka v. Imming*, 51 Kan. App. 2d 247, 344 P.3d 957 (2015) and *Crone v. Nuss*, 46 Kan. App. 2d 436, 263 P.3d 809 (2011) do not stand for the proposition that a defendant has standing to assert any counterclaim it wishes, because the defendant was sued. In *Imming,* the City filed the initial declaratory judgment action against *Imming*, and *Imming* counterclaimed for mandamus. *Imming*, 51 Kan. App. 2d at 250 – 251. The Court of Appeals found that by virtue of original Defendant *Imming* filing its counterclaim, the original Plaintiff City of Topeka had standing to defend the *Imming* mandamus counterclaim. *Id.* at 252. In *Crone*, no counterclaims were presented. The Court of Appeals simply found that the defendants, as alleged by *Crone*, consistently maintained that they owned the property at issue. 46 Kan. App. 2d at 451 – 452. Thus, the Court of Appeals found no issue as to the defendants' right to defend its ownership. *Id.*

Neither of the situations addressed in *Imming* or *Crone* are present in this case. TCSFR was named as a defendant in SRI's quiet title action, due to its repeated claims to be the absolute owner of the Locomotive which it now denies. TCSFR then asserted counterclaims. *Imming* does not stand for the proposition that a defendant's counterclaim gives a plaintiff standing to assert its original affirmative claim, but even if it did, this is not TCSFR's situation. TCSFR is the party who has asserted counterclaims in response to SRI's initiation of this lawsuit. *Crone* involved no counterclaims and is limited to the basic principle that a defendant in a quiet title action, who maintains an adverse claim of ownership, has standing to defend it its ownership claim. TCSFR must establish independent standing to bring its counterclaims, and for the reasons set forth herein, has failed to do so.

5. TCSFR's claim that K.S.A. 60-256(f) precludes summary judgment is without merit.

K.S.A. § 60-256(f) "contemplates situations in which a district court may 'refuse' a summary judgment motion or 'order a continuance to permit affidavits to be obtained or deposition to be taken or discovery to be had,' when a nonmoving party has so far been unable to marshal evidence to support its position." *Troutman v. Curtis*, 286 Kan. 452, 458, 185 P.3d 930 (2008). This Court ordered bifurcated discovery for the purposed of briefing the standing issue. TCSFR agreed to the duration of the discovery period and sought no extension of the same. In addition to TCSFR having over one (1) year since the filing of its answer on June 18, 2014, to obtain evidentiary support for its claim of trusteeship or any other adequate interest or injury,

TCSFR has had ample time in discovery to attempt to support its counterclaims. TCSFR has failed to not produce any evidence regarding its trustee status or interest in discovery. Given that discovery on standing has closed and TCSFR continues to fail to show anything which might support its theories, there is no basis for application of K.S.A. § 60-256(f).

CONCLUSION

For the reasons stated above, the court Denies the Defendant, City of Topeka's Motion for Summary Judgment as to the Plaintiff, Denies the Defendant, TCSFR's Motion for Summary Judgment as to Plaintiff and Grants the Plaintiff's Motion for Summary Judgment as to the Defendant, TCSFR's standing in the case.

This Memorandum Decision and Order shall constitute the Court's entry of judgment when filed with the Clerk of this Court. No further journal entry is required.

Dated this 29th day of March, 2017.

Hon. Larry D. Hendricks
District Judge

CERTIFICATE OF MAILING

I hereby certify that a copy of the above and foregoing **MEMORANDUM DECISION AND ORDER** was mailed, hand delivered, or placed in the pick-up bin this 29th day of March, 2017, to the following:

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