STATE OF MICHIGAN

COURT OF APPEALS

TUSCANY GROVE ASSOCIATION, Plaintiff-Appellant,	UNPUBLISHED June 24, 2014
v SERGIO GASPERONI, Defendant-Appellee.	No. 314663 Macomb Circuit Court LC No. 2012-003369-CH

Before: DONOFRIO, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM.

Plaintiff Tuscany Grove Association (the Association) filed suit against defendant Sergio Gasperoni for violating the condominium association's bylaws. Unfortunately, the Association itself violated the bylaws by filing suit without a vote by 66-2/3% of the owners to spend their association fees in this manner. The Association finally collected the requisite number of votes after the circuit court dismissed the action. Even then, the Association ignored the bylaw requirements for the content of the ballots. We make no judgment on the merits of the Association's underlying claims, but affirm the circuit court's dismissal of the complaint. If the Association wants to file suit against Gasperoni, it must gather supporting votes in the manner outlined in the bylaws and then bring a new action.

I. BACKGROUND

Tuscany Grove is a site condominium development in Shelby Township, in which Gasperoni owns a freestanding condo. In the spring of 2012, Gasperoni presented a backyard renovation project plan to the Tuscany Grove Association—the elected board of directors that manages the development's affairs. The plan included the installation of a pool and a pergola with a fence surrounding just that area. Under the Tuscany Grove Bylaws, which are part of the master deed, Gasperoni could undertake outdoor renovation projects only with Association approval. And the Association approved his plan.

Neighbors reported that Gasperoni's renovations were more far-reaching than those envisioned in the approved plans. This included the erection of a fence around the perimeter of Gasperoni's property, an installation expressly forbidden in the Bylaws, as well as a fireplace and a brick pizza oven inside the pergola. Gasperoni ignored the Association's orders to cease and desist.

On July 12, 2012, the Association filed suit against Gasperoni, seeking an injunction to stop Gasperoni's renovations and order removal of the offending installations.[1] The circuit court, Judge James Biernat presiding, initially granted a temporary restraining order (TRO), ordering Gasperoni to stop renovations. The TRO set an August 6, 2012 hearing date to consider a preliminary or permanent injunction. In response to the TRO, Gasperoni asserted that he was required to relocate his fence to the perimeter of his backyard because of township building code requirements, a point which the Association later rebutted with documentary evidence. Gasperoni claimed that he installed the fence without first securing Association permission because of safety concerns and had submitted the "as-built plans" to the Association for approval, without response.

On the morning of the August 6 hearing, Gasperoni filed a "supplemental response," arguing that the Association lacked standing to file suit. The Bylaws required a vote of 66-2/3% of the condominium owners before funds could be expended on litigation, Gasperoni contended. The Association retorted that Gasperoni's challenge was a "red herring[]" because other Bylaw provisions allowing the Association to pursue enforcement of the condominium documents "trumped" the vote requirement. The court extended the TRO for two weeks, prohibited further construction, and scheduled another hearing for August 21. It took the standing issue "under advisement" and ordered additional briefing within the week.

On August 13, 2013, Gasperoni filed a motion for summary disposition based on the Association's lack of standing. Gasperoni argued that Article II, § 3(c) of the Bylaws stated that the Association did "not have the Authority . . . to incur any expense or legal fees with respect to any litigation, without the prior approval, by affirmative vote, of not less than 66-2/3% of all Co-owners in value and in number."

The Association countered that the Michigan Condominium Act (MCA), MCL 559.101 *et seq.*, confers standing on associations to file suit on behalf of the owners and imposing a prerequisite voting condition would "permit[] a tyranny of the minority." The Association further argued that it is a nonprofit corporation and the statutes relating to such organizations demand that limitations on the filing of suit be included in the articles of incorporation, not the bylaws.

Apparently the August 21, 2012 hearing was conducted off the record by visiting judge Denis LeDuc. LeDuc denied Gasperoni's motion for summary disposition as premature. The visiting judge lifted the TRO and denied the Association's motion for a preliminary injunction, however, after which Gasperoni swiftly completed his renovation project.[2]

Thereafter, the Association filed a motion for reconsideration, and Gasperoni refiled his motion for summary disposition. Judge Biernat returned for the hearing on those motions. At

[1] Although the complaint is dated July 12, it alleges facts arising as late as July 25.

[2] The Association complains of the visiting judge's actions in its appellate brief's statement of facts. It does not raise any legal challenges on this ground on appeal.

the hearing, the court asked the Association if it had initiated a vote. The Association responded that it had not because no "condominium law firm in the state" would "give this [provision] any deference." The Association argued again that the provisions permitting the Association to file suit to enforce the bylaw restrictions on property owners must be deemed superior. The voting provision, the Association continued, was void as against public policy because it would permit individuals to amass a minority in support of nonconforming uses and avoid adherence to the agreed-upon restrictions.

On November 1, 2012, Judge Biernat granted Gasperoni's motion for summary disposition. The court ruled that the master deed and Bylaws were "in the nature of a contract between the condominium owners and the condominium association." The plain language of the Bylaws required the Association to get preapproval of 66-2/3% of the condominium owners before filing suit on their behalf. The Association had not done so and therefore was "without authority to bring this action on behalf of its members." The court thereby dismissed the claims.

In the following months, the Association sought reconsideration and to set aside the motion for summary disposition. It began collecting the required votes only after the case was summarily dismissed. The circuit court denied the Association's requests. The Association continued its pleas for reconsideration of the lower court's orders up to the eve of its claim of appeal, resulting in the circuit court's final denial being issued after the current appellate claim was filed.

II. STANDARD OF REVIEW

We review de novo a circuit court's ruling on a motion for summary disposition, *Anzaldua v Neogen Corp*, 292 Mich App 626, 629; 808 NW2d 804 (2011), and a ruling on a reconsideration motion for an abuse of discretion, *Herald Co, Inc v Tax Tribunal*, 258 Mich App 78, 82; 669 NW2d 862 (2003). Whether a party has standing is a legal question that we review de novo. *Manuel v Gill*, 481 Mich 637, 642; 753 NW2d 48 (2008).

Gasperoni sought summary disposition under both MCR 2.116(C)(8) and (10). Because the court considered documentary evidence beyond the pleadings, i.e., the Bylaws, we review the decision as if based on MCR 2.116(C)(10) alone. *Cuddington v United Health Services, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition "is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *McCoig Materials, LLC v Galui Const, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ." *Bronson Methodist Hosp v Auto-Owners Ins Co*, 295 Mich App 431, 441; 814 NW2d 670 (2012).

III. ANALYSIS

Under the plain language of the Bylaws, the Association "shall not have authority . . . to incur any expense or legal fees with respect to any litigation without the prior approval, by affirmative vote, of not less than 66-23% of all Co-Owners in value and in number." The

Bylaws are a contract binding the Association as well as the condominium owners and the Association did not follow their mandate. Accordingly, the circuit court correctly determined that the Association lacked the authority to file the current suit.

The MCA requires that the "administration of a condominium project . . . be governed by bylaws recorded as part of the master deed, or as provided in the master deed." MCL 559.153. The MCA creates a right of action in the condominium owners' association: "Failure to comply with any of the terms or provisions of the condominium documents, shall be grounds for relief, which may include without limitations, an action to recover sums due for damages, injunctive relief, foreclosure of lien if default in payment of assessment, or any combination thereof." MCL 559.206(a). The Tuscany Grove master deed provides that the Association has the power to take "[a]ny action required of or permitted to the Association . . . unless specifically reserved to its members by the Condominium Documents or the laws of the State of Michigan." "[C]ondominium documents" encompasses the Bylaws, according to the master deed.

The Association was formed as a nonprofit corporation. "The bylaws of a corporation . . . constitute a binding contract between the corporation and its shareholders." *Allied Supermarkets, Inc v Grocer's Dairy Co*, 45 Mich App 310, 315; 206 NW2d 490 (1973), aff'd 391 Mich 729 (1974). The Bylaws in the case are such a contract. And contractual language must be given its "ordinary and plain meaning if such would be apparent to a reader of the instrument." *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 367; 817 NW2d 504 (2012). Unambiguous contracts "are not open to judicial construction and must be *enforced as written*." *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005) (emphasis in original).

As noted, the plain language of the Bylaws denies the Association the authority to sue on the condo owners' behalf unless it obtains the approval of two-thirds of the owners before any litigation-related expense is incurred. The Bylaws except from the limitation litigation "to enforce collection of delinquent assessments." This exclusion implies that all other litigation is subject to this preapproval provision. See *Wayne Co v Wayne Co Retirement Comm*, 267 Mich App 230, 248; 704 NW2d 117 (2005) ("[T]he express mention of one thing implies the exclusion of another."). As the Association failed to comply with this contractual prerequisite to filing suit, it did not have the authority to act and the circuit court properly dismissed the complaint, and acted within its discretion in denying the Association's motions for reconsideration.

Moreover, even when the Association begrudgingly sought the necessary votes to file suit, it did not do so in conformance with the Bylaws. Article VIII of the Bylaws provides that votes are to be held at owner meetings. Pursuant to Article IX, § 8, in lieu of a meeting, the Association may circulate ballots to the owners for a vote. The ballots must contain certain information: (a) the number of votes necessary to reach a quorum, (b) the percentage of approval necessary to pass the action, and (c) the deadline for the ballots. The ballot circulated by the Association contains none of this information. Accordingly, even this belated attempt falls short.

Despite the plain contractual language, the Association challenges the litigation preapproval provision on sundry grounds in an attempt to excuse its noncompliance. "Obviously," the Association contends, "Article II, Section 3(c) of the Condominium Bylaws was either a scrivener's error, a bad miscalculation by an otherwise competent draftsman, or

simply a bad joke." Unfortunately for the Association, the provision is part of the Bylaws, is plain and unambiguous, and binds it as well as the condo owners.

The Association argues that the subject Bylaw provision conflicts with the Michigan Nonprofit Corporation Act, MCL 450.2101 *et seq.*, under which the Association was formed. MCL 450.2261 provides, in part:

> (1) A corporation, subject to any limitation provided in this act, in any other statute of this state, in its articles of incorporation, or otherwise by law, has the power in furtherance of its corporate purposes to do any of the following:
>
> * * *
>
> (b) Sue and be sued in all courts and participate in actions and proceedings judicial, administrative, arbitrative, or otherwise, in the same manner as a natural person.

The Association interprets this statute as requiring that a limitation on its power to sue be included specifically in the articles of incorporation and no other document. The prelitigation-approval provision in the Bylaws is a "limitation provided . . . otherwise by law," however. Specifically, MCL 559.153 of the MCA provides that "[t]he administration of a condominium project shall be governed by bylaws recorded as part of the master deed[.]" Therefore, the Bylaw provision does not conflict with MCL 450.2261.

The Association contends that the litigation preapproval provision conflicts with MCL 559.206(a) of the MCA. That statutory provision entitles an association to relief when an owner "[f]ail[s] to comply with any of the terms or provisions of the condominium documents." The relief entitled for such a violation includes injunctive relief. *Id.* Yet, nothing in the MCA precludes an association and its composite condominium owners from negotiating conditions for filing such suits. The Association believes that the provision should be read to "carv[e] out an exception for filing suit against anyone who fails to comply with 'any of the terms or provisions of the condominium documents.' " Such an exception likely would swallow the rule. In any event, we may not read such omitted language into this plain and unambiguous contractual provision. *Northline Excavating, Inc v Livingston Co*, 302 Mich App 621, 628; 839 NW2d 693 (2013).

The Association also asserts that requiring approval before filing suit to enforce condominium restrictions violates the general principles of the MCA. The Association discusses at length the need for uniformity in condominium developments and the accompanying need for strict enforcement powers. It highlights the fiduciary duty owed by the Association to the owners to ensure that uniformity is maintained through rule enforcement. The owners, however, have the freedom to contract. And someone in the drafting process decided it was important for the owners to have control over litigation spending.

The Association compares the Tuscany Grove Bylaws to other condominium development bylaws, emphasizing that the litigation preapproval condition is not a common provision. Assuming this is true, it is completely irrelevant. Parties are free to contract to uncommon or unusual terms, as long as the terms are not illegal. See *Wilkie v Auto-Owners Ins*

Co, 469 Mich 41, 51; 664 NW2d 776 (2003). Moreover, research shows that the current Bylaws are not alone in giving condo owners the power to limit an association's authority to file suit. *River Plaza Homeowner's Ass'n v Healey*, 389 Ill App 3d 268, 273-274; 904 NW2d 1102 (2009); *Peninsula Prop Owners Ass'n v Crescent Resources, Inc*, 171 NC App 89, 90; 614 SE2d 351 (2005).

The Association even avows that giving force to the litigation preapproval provision renders nugatory several other Bylaw provisions. Allowing the owners a voice and limiting some authority held by the Association is far from fatal to the contract, however.

The Association laments that a "superminority" of one-third of the owners could essentially amend the Bylaws by refusing the Association the authority to file suit to enforce the Bylaw restrictions. The judiciary has no way to force reformation of this contract, however, in the face of its plain and unambiguous language.

The Association contends that the prelitigation-approval provision "would deny [it] the right to even defend itself in any litigation brought by anyone for any purpose." This interpretation is incorrect. The provision does not preclude the Association from defending itself in the face of a lawsuit. Rather, it sets a condition under which the Association may act on behalf of the owners for the purpose of litigation. A vote could be conducted to spend money on a defense should the Association be sued, or the owners could choose to default, just like any other defendant is free to choose.

Finally, the Association argues that this Court should reverse the circuit court's March 22, 2013 order denying its motion to set aside the dismissal. The circuit court had already denied the Association's motion for reconsideration and did not abuse its discretion in that regard. In any event, the circuit court lacked jurisdiction to grant the Association additional relief in March 2013. The Association's February 2013 filing of a claim of appeal stripped the circuit court of its jurisdiction to modify its prior orders. MCR 7.208(A); *Lemmen v Lemmen*, 481 Mich 164, 165-166; 749 NW2d 255 (2008).

We affirm.

/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly