STATE OF MICHIGAN

COURT OF APPEALS

GEORGE K. BAUGHMAN, THEODORE BILAN, GILBERT P. BURFORD, JOHN M. DILLON, GEORGE W. LAWLEY, ROBERT H. LEIDAL, EDWARD A. LONIEWSKI, MAGGIE MARTIN, TRUMAN STRONG, GERALD SWIACKI, and THOMAS L. MEADE,

Plaintiffs,

and

KENNETH J. FIOTT, PAUL FORTUNA, KENNETH W. GETSINGER, DENIS J. HURLEY, EDWARD INGALLS, WILLIAM KANDILIAN, ROBERT M. KOCHEVAR, EDWARD M. KNIGHT, JACK W. LIND, W.B. MILLIKEN, JOHN G. NATSIS, ROBERT L. NOWICKI, WALTER B. PETERMAN, JR., ART SCHMINA, and LOUIS J. SPAGNUOLO,

Plaintiffs-Appellants

v

WESTERN GOLF & COUNTRY CLUB, INC., JIM BROWNE, JOE D'AGOSTINO, FRANK GUERRO, KEN JUROFF, TIM LAFFERTY, GARY LOCKWOOD, GLENN LUKACS, KEVIN MALONE, RICK SHAFFNER, RUSSELL D'ANGELO, JIM EATHORNE, TERRY GLISSMAN, DEAN KOULARAS, DAN LONGEWAY, MICHAEL A. MAZZONI, RONALD P. RASHID, KIM RHODABACK, MIKE SOUTHERLAND, and DAVID J. WRIGHT,

Defendants-Appellees.

UNPUBLISHED
June 9, 2009

No. 279425
Wayne Circuit Court
LC No. 06-624794-CZ

Before: Zahra, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Plaintiffs-appellants (plaintiffs) appeal as of right from the trial court's order granting their motion for partial summary disposition in favor of defendants under MCR 2.116(I)(2), granting defendants' counter-motion for partial summary disposition under MCR 2.116(C)(10), and entering judgment in favor defendants. We affirm.

Plaintiffs in this case are "Life members" of Western Golf & Country Club, Inc. (WGCC), a nonprofit corporation organized "to operate as a private social club for the recreational and social benefit of its members." Defendants are the corporation itself and 19 current and former directors of WGCC (the directors). The directors are all "Class A" members of the club. Life members are not permitted to be directors under the WGCC bylaws. Plaintiffs brought this action against defendants in response to the board of directors' increase of Life members' dues.

A decision to grant a motion for summary disposition is reviewed de novo on appeal. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005). When reviewing a motion for summary disposition under MCR 2.116(C)(10), this Court must consider the record in the same manner as the trial court. *Hines*, *supra* at 437. Any court considering such a motion must consider all the pleadings and the evidence in the light most favorable to the nonmoving party. *Id*. A court may not weigh the evidence or make factual findings. *Id*. The motion tests whether there exists a genuine issue of material fact, and if there is a material conflict in the evidence before the court, summary disposition is improper. *Id*. If the nonmoving party is entitled to judgment as a matter of law, the court may enter judgment in favor of that party. MCR 2.116(I)(2); *Owczarek v State of Michigan*, 276 Mich App 602, 609; 742 NW2d 380 (2007).

Plaintiffs first argue that the directors breached their fiduciary duties to plaintiffs. We disagree.

Plaintiffs contend that the directors did not act in a disinterested fashion when they raised the dues of Life members at a greater rate than for Class A members. It is true that this change benefited the directors because they are all Class A members. The pertinent question, however, is whether the increase constituted a breach of the directors' duty of loyalty.

As mentioned in *Wallad v Access BIDCO, Inc*, 236 Mich App 303, 307; 600 NW2d 664 (1999), a fiduciary duty generally requires one to "act for someone else's benefit, while subordinating one's personal interests to that of the other person" (internal citation, quotation marks, and emphasis omitted). In addition, a fiduciary owes its principal a duty of good faith, loyalty, and avoidance of self-dealing. *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 49; 698 NW2d 900 (2005). Further, the Nonprofit Corporation Act (NPCA), MCL 450.2101 *et seq*., specifically requires directors to act in good faith, and "with that degree of diligence, care, and skill which an ordinarily prudent person would exercise under similar circumstances in a like position." MCL 450.2541(1).

Plaintiffs argue that the change in dues "radically and disproportionately" shifted the financial burden of the club toward Life members and that the directors sought to place the entire

burden of the club's financial problems on the Life members. Traditionally, Life members paid no dues. In the last decade, however, Life members began paying ten percent of the amount that Class A members pay. In 2005, Life members' dues increased to 50 percent of the amount that Class A members pay. Further, the new WGCC bylaws provide no cap on Life members' dues. While this represents a significant increase in the Life members' financial responsibility, their dues remain only one-half of the amount that Class A members pay. Further, defendants presented evidence that WGCC has been experiencing financial difficulties. In an effort to keep WGCC financially viable, the board, in addition to raising dues for Life members, has eliminated staff positions at the club and raised swimming and golf fees. Class A dues have also been increased in relatively recent years.[1] Plaintiffs have not demonstrated any intention on the part of the directors to unfairly target Life members in its financial restructuring plans. Plaintiffs must demonstrate something more than the opportunity to act in an overly interested fashion in order to show a breach of the duty of loyalty. See, e.g., *Rose v National Auction Group*, 466 Mich 453, 470; 646 NW2d 455 (2002) ("[i]t is not enough to create a genuine issue of material fact to provide conclusory statements that a duty was breached").

Plaintiffs also allege that the directors breached their duty of care and good faith by failing to consult with outside, impartial advisors with respect to the financial restructuring. Plaintiffs cite MCL 450.2541(1), which states:

> In discharging the duties, a director or an officer, when acting in good faith, may rely upon the opinion of counsel for the corporation, upon the report of an independent appraiser selected with reasonable care by the board, or upon financial statements of the corporation represented to the director or officer as correct . . . .

The plain statutory language merely describes the methods for obtaining relevant information that a director or officer *may rely on* when discharging his or her duties. There is no requirement that such a person rely on any or all of these suggested sources. Moreover, the board *did* rely on the "financial statements of the corporation" when making its decisions, as evidenced in the minutes of the board meetings around this time.

Plaintiffs also argue that the trial court's conclusions with respect to this issue were erroneous and not properly based on the evidence. As noted earlier, this Court reviews the trial court's decision regarding a motion for summary disposition *de novo*. *Hines*, *supra* at 437. Thus, we decline to examine the trial court's methods for reaching its conclusions. We conclude that plaintiffs failed to raise a genuine issue of material fact regarding whether the directors breached their fiduciary duties to plaintiffs.

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[1] Plaintiffs state in their appellate brief that "the board did not increase its own *Class A* dues at all from 2005 through 2006." However, we note that the first amended complaint indicates that Class A dues were increased "by 30%" from 2000 through 2006. At another point in their appellate brief, plaintiffs state that the board "increased (its own) *Class A* dues by less than 5% from 2004 through 2006 . . . ." The fact remains that Class A dues have indeed been raised in relatively recent years.

Plaintiffs next argue that WGCC violated the "equal rights" provision of the NPCA. However, as defendants note, plaintiffs' argument does not clearly correspond to a claim in their complaint. Plaintiffs do not address below or on appeal which count of their complaint would be resolved by a discussion of this issue. Under these circumstances, we find no basis for appellate relief.

Plaintiffs next argue that WGCC violated the Michigan Consumer Protection Act (CPA), MCL 445.901 *et seq*. We disagree.

Plaintiffs contend that WGCC is a business and the Life members are its consumers, stating, "That nonprofit golf and country clubs are covered by [the CPA] is clear from its express terms as well as by analogy to other states' interpretation of similar consumer protection legislation." Plaintiffs do not, however, indicate which "express terms" of the CPA provide such coverage. The CPA is designed to protect against unfair practices in "trade and commerce[.]" MCL 445.903(1); *Liss v Lewiston-Richards, Inc*, 478 Mich 203, 208; 732 NW2d 514 (2007). "'Trade or commerce' means the conduct of a business providing goods, property, or service[s] . . . ." MCL 445.902(g). "Business" is defined, in general, as "a commercial enterprise carried on for profit . . . ." Black's Law Dictionary (8th Ed). Thus, because WGCC is organized as a *nonprofit* organization, plaintiffs must provide more than the conclusory statement that it is "clear from . . . express terms" "[t]hat nonprofit golf and country clubs are covered by [the CPA]" to establish that their relationship with WGCC is governed by the CPA.

Plaintiffs cite case law from a Montana trial court in support of their argument. Plaintiffs' reliance on this case is misplaced because it is not binding on this Court and because it does not deal with the language of Michigan's CPA.

Plaintiffs next argue that the directors' actions violated WGCC's bylaws by imposing a de facto assessment on Life members. Assessments are "for the purpose of improving, operating and maintaining the Club," authorized "from time to time not to exceed the aggregate sum of [$250,000]." Under the bylaws, Life members are not required to pay assessments. Plaintiffs argue that the increase in dues, in the absence of real financial straits, amounted to an assessment on Life members. We disagree.

Defendants presented evidence that the board contemplated a deficit of $400,000 for 2006 and was attempting to restructure the club to eliminate this deficit. Plaintiffs aver that "[a]ny 'crisis' . . . may be of defendants' making." However, there is no basis provided for this conclusory statement. Plaintiffs acknowledge defendants' claims of financial difficulties but dismiss them out of hand without any evidence that the claims are actually unfounded. Plaintiffs provide no evidence of their own regarding the financial circumstances of the club and do not indicate the capital improvement for which the purported assessments were intended. Plaintiffs must make more than conclusory allegations in order to obtain appellate relief. See *Rose, supra* at 470.

Finally, plaintiffs argue that defendants are judicially estopped from raising Life members' dues because WGCC is bound by its assertions in previous litigation. We disagree.

The doctrine of judicial estoppel prevents a party from asserting a position in litigation that is "wholly inconsistent" with a position that was "successfully and unequivocally asserted in

a prior proceeding[.]" *Paschke v Retool Industries*, 445 Mich 502, 509-510; 519 NW2d 441 (1994) (internal citation, quotation marks, and emphasis omitted). A party's earlier position is successful if the court accepted it as true. *Id*. at 510. Application of the doctrine is intended to prevent litigants from playing "fast and loose" with the legal system. *Id*. at 509.

Plaintiffs contend that a consent judgment between WGCC and Theodore Panaretos, another Life member of the club, in which WGCC agreed to cap Life members' dues ought to bind WGCC's later actions. However, the doctrine of judicial estoppel applies only to assertions in litigation, *id*. at 509, and we decline to characterize the consent judgment as an "assertion." Further, later litigation has already established that the consent judgment was enforceable only by Panaretos, who is not a party here, so defendants' actions were not inconsistent with the consent judgment.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter