STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

GINO PETITTA and MARLENE ANN PETITTA,
on behalf of themselves, and others similarly situated,

Plaintiffs,

vs. Case No. 2014-620-CH

LOTTIVUE HOMEOWNERS IMPROVEMENT ASSOCIATION, a Michigan Nonprofit Corporation, JIM RIEHL, CHARLIE ALBRIGHT, CYNTHIA SHELLIE, DAVE DUDEK, and MARK OTT, jointly and severally,

Defendants.
_____/

OPINION AND ORDER

Defendants have jointly filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Plaintiffs have filed a response and request that the motion be denied.

Factual and Procedural Background

In 1956 the Lottivue Subdivision (the "Subdivision") was created. The Subdivision was developed in 9 sections, with the first being recorded with the Macomb County Register of Deeds on August 29, 1956 and the last on April 2, 1996. The Lottivue Homeowners Improvement Association (the "Association") was created on December 2, 1958.

The Association's original articles of incorporation (the "Articles") provide that the Association's purpose is:

> "To preserve and protect the mutual rights of owners of real property located in Lottivue Subdivision, which have been platted into Lots 1 through 43, being part of a Fractional Section 23, and Private Claim 342, Town 3 North, Range 14 East, Chesterfield Township, Macomb County, Michigan, according to the plat thereof recorded in Liber 37 of Plats, Page 18, Macomb County records….."

Lots 1 through 43 represent section 1 of the Subdivision. On May 2, 1966, the Articles were amended to include lots 45 through 66, which represent section 2 of the Subdivision. While the Subdivision continued to grow as more sections were developed, the Articles were not amended to include section 3-9.

On December 2, 1958, the Association adopted bylaws that stated that the members of the association are the owners of the lots located in section 1. However, the bylaws were not amended when the other section were added to the Subdivision.

On December 19, 1997, Plaintiffs purchased lot 174, which is located in section 9 of the Subdivision. At the time of closing, Plaintiff executed an acknowledgement that provided that section 9 of the Subdivision had "a homeowners association" and that as an owner of a property within section 9 they would be liable for any assessment fees levied by the association (the "Acknowledgment"). Since purchasing their property, Plaintiffs have paid all but a few of their association dues.

On February 10, 2014, the Association's board issued a notification to all of the homeowners within the Subdivision. The notification informed the homeowners that the Association's bylaws and Articles had not been updated since 1958 and 1961 respectively and that amended versions of both documents would be prepared and filed.

On February 19, 2014, Plaintiffs filed their complaint in this matter. In their complaint, Plaintiffs state claims against the Association and its board of directors for: Count I- Injunctive Relief and Count II- Conversion of Dues, Fees and Assessments in Violation of MCL 600.2919a. Plaintiffs' claims are based on their assertion that Defendants have secured funds from them and other "nonmembers" under the false pretenses that they are members of the Association, and that the dues have not been used for their benefit.

On March 24, 2014, Defendants filed their instant motion for summary disposition. Plaintiffs have filed a response and request that the motion be denied. Plaintiffs and Defendants have also each filed a reply in support of their positions.

Standards of Review

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party has failed to state a claim upon which relief may be granted. *Radtke v Everett*, 442 Mich 368, 373-374; 501 NW2d 155 (1993). A motion under MCR 2.116(C)(10), on the other hand, tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

Arguments and Analysis

In support of their motion, Defendants contend that Plaintiffs are barred from obtaining injunctive relief and from recovering on their conversion claims based on the doctrine of equitable estoppel. Equitable estoppel may arise where (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts." *Lakeside Oakland Development, LC v H & J Beef Co,* 249 Mich App 517, 527; 644 NW2d 765 (2002).

With respect to the first element, Defendants contend that by executing the Acknowledgment, Plaintiffs agreed that there was a homeowners association for their home. Indeed, by executing the Acknowledgment, Plaintiffs conceded that there was a homeowners association and promised to pay any assessments imposed by the association. While the Acknowledgement does not specifically reference the Association, it appears undisputed that the only homeowners association in existence for any of the 9 sections at the time the Acknowledgment was executed was the Association. Moreover, Plaintiffs induced the Association to believe that they would continue to pay the dues assessed by satisfying the vast majority of their obligations for the last 16 years.

With regards to the second element, Defendants contend that they have relied on Plaintiff's promise/acknowledgement by providing various services that have benefitted the Subdivision. Specifically, Defendants assert that the Association has repeatedly dredged and applied weed control to the canals that many of the Subdivision's homes utilize, installed a buoy system for the canals, plowed snow from the streets of the Subdivision, and maintained the Subdivision's common areas and some properties adjoining the Subdivision. In their brief, Plaintiffs contend that they do not utilize the canals and are therefore not benefitted by the Association's services. While Plaintiffs may not own or otherwise use a boat in the canals, thereby minimizing Plaintiffs' benefit of the dredging and buoys, it is undisputed that their home is located on one of the canals. Accordingly, not only have Plaintiffs likely benefitted from the Association's de-weeding activities as their view of the canal is enhanced by the absence of weeds, the value of their home has almost certainly been enhanced by having access to a canal that has been dredged for boats. In addition, Plaintiffs do not dispute that the Association has provided the other above-referenced services for all of the sections of the Subdivision. Based on

the numerous services provided by the Association for all of the Subdivision's residents, the Court is convinced that Defendants have relied on Plaintiffs' representations in the Acknowledgment and payments over the last 16 years.

In order to satisfy the third element, Defendant must establish that they would be prejudiced if Plaintiffs are allowed to deny their membership in the Association. *Lakeside, supra*. In this matter, Plaintiffs, as residents of the Subdivision, have enjoyed the benefits of at least the majority of the Associations services for the last 16 years. If the Court were to allow Plaintiffs to deny that they are members of the Association and recover the amounts they have paid in dues not only would Plaintiffs have received the services for free, they would continue to enjoy the services the other residents, through their dues, are providing. Consequently, the Court is convinced that Defendants, as well as the other residents of the Subdivision, would be prejudiced if Plaintiffs are permitted to deny their membership status. Accordingly, the third element is satisfied. As a result, the Court is satisfied that all three elements of equitable estoppel are present in this case; therefore Defendants' motion for summary disposition must be granted.

Additionally, the Court is satisfied that Plaintiffs', as members of the Association, have methods of recourse available to them in the event that the Association is engaging in activities that do not benefit the majority of the Subdivision's residents. Specifically, the Board of Directors is re-elected each year. Plaintiffs, as members of the Association, are entitled to run/ vote in the election. If the Plaintiffs are not satisfied with the current directors' performance and decision(s), they should exercise their right to vote for individuals who share their priorities. Moreover, they are empowered to use the means available to them to convince their fellow members to vote for different individuals by highlighting the current board's deficiencies. While

the Court acknowledges that Mr. Petitta has unsuccessfully ran for a position on the board on two occasions, it is undisputed that he may continue to seek a position on the board and/or make efforts to have others he supports seek a position. For these reasons, the Court is convinced that Plaintiffs, as well as the other members of the Association, have access to a democratic method by which they can seek change if they so desire.

Conclusion

For the reasons set forth above, Defendants' joint motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) is GRANTED. This Opinion and Order resolves the last pending claim and CLOSES the case. *See* MCR 2.602(A)(3),

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: May 30, 2014

JCF/sr

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