

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1079

Filed: 19 May 2015

Rutherford County, No. 14 CVS 711

130 OF CHATHAM, LLC, as a member of Rutherford Electric Membership Corporation, Plaintiff,

v.

RUTHERFORD ELECTRIC MEMBERSHIP CORPORATION, Defendant.

Appeal by Defendant from orders entered 28 July 2014 by Judge Alan Z. Thornburg in Rutherford County Superior Court. Heard in the Court of Appeals 4 March 2015.

Roberts & Stevens, P.A., by Ann-Patton Hornthal and William Clarke, for Plaintiff.

Parker Poe Adams & Bernstein, LLP, by Michael G. Adams, Benjamin Sullivan, and Morgan H. Rogers, for Defendant.

STEPHENS, Judge.

Defendant Rutherford Electric Membership Corporation (“Rutherford”) appeals from the trial court’s order allowing Plaintiff 130 of Chatham (“Chatham”) to inspect and copy its membership list and other corporate records. After careful consideration, we hold that because it is moot, this appeal must be dismissed.

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Facts and Procedural History

Rutherford is an electric membership corporation (“EMC”) organized under Chapter 117 of our General Statutes that owns and operates an electric distribution system for members in its service area, which covers all or portions of 10 counties in western North Carolina. Chatham owns over 18,000 acres of property in Rutherford’s service area, is a member of Rutherford in good standing, and receives electricity from Rutherford at two accounts in McDowell and Burke counties. These parties have been feuding for several years, with their dispute arising from Rutherford’s efforts to build a power line across an undeveloped tract of Chatham’s property that separates two of Rutherford’s electrical substations. When Chatham refused to sell Rutherford an easement, Rutherford initiated condemnation proceedings pursuant to Chapter 40A of our General Statutes. *See Rutherford Elec. Membership Corp. v. 130 of Chatham, LLC*, __ N.C. App. __, 763 S.E.2d 296 (2014), *appeal dismissed and disc. review denied*, __ N.C. __, 769 S.E.2d 192 (2015). The present litigation arises from Chatham’s request, as a member of Rutherford acting pursuant to the North Carolina Nonprofit Act and sections 55A-16-02 and -04 of our General Statutes, to inspect Rutherford’s membership list and other corporate records in order to participate in the nomination and election of directors to Rutherford’s board of directors.

On 12 May 2014, Chatham submitted a written request to inspect and copy Rutherford’s membership list and other corporate records pursuant to N.C. Gen. Stat.

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§ 55A-16-02. On 15 May 2014, Rutherford’s counsel notified Chatham that its request would be denied unless it utilized one of Rutherford’s “Member Information Request” forms, and so on 16 May 2014, Chatham resubmitted its request using the required form. On 20 June 2014, Rutherford provided a 363-page response to Chatham’s request, 238 pages of which consisted of old newsletters mailed to Rutherford’s members. This response did not include Rutherford’s membership list, omitted several additional categories of requested corporate records, and provided incomplete or heavily redacted records pertaining to Chatham’s other requests.

On 30 June 2014, Chatham submitted another written request to inspect and copy Rutherford’s corporate documents, focusing largely on the membership list and other records not included to Rutherford’s initial response. This time, Chatham stated that its request was made in good faith and that the documents requested were “directly connected with the purpose of informing [Chatham] about the entity of which it is a member” and “directly connected to [Chatham’s] desire to participate in the nomination of directors to [Rutherford’s] board of directors, the election of directors, the service of current directors and their tenure, the annual meeting in the fall of 2014 and to evaluate nominees to the board of directors.” The request also notified Rutherford that Chatham’s authorized representatives and agents planned to visit Rutherford’s corporate office to inspect and copy the requested documents on 9 July 2014. On 8 July 2014, Rutherford’s counsel replied to Chatham with a

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supplemental response to Chatham's 12 and 16 May 2014 Member Information Requests but also stated that Rutherford could not respond to Chatham's 30 June 2014 member information request by 9 July 2014 and would instead respond by 25 July 2014. Rutherford's 8 July 2014 response did not include its membership list, but did contain a redacted version of Rutherford's Board Policy M-12. Policy M-12 provides in pertinent part that Rutherford's responses to Member Information Requests are determined by Rutherford's general manager and its corporate attorney "based on their belief that (1) the information requested and the purpose for which it is requested are materially germane to the requesting person's status and interests as a member of [Rutherford] and (2) furnishing the requested information will not be adverse to [Rutherford's] best interests." Policy M-12 also provides that information regarding Rutherford's membership list and the minutes from its board meetings "will not be furnished except pursuant to a court order."

On 11 July 2014, Chatham filed a verified complaint in Rutherford County Superior Court alleging that its Member Information Requests fully complied with Chapter 55A's requirements but that Rutherford had refused to allow Chatham to inspect and copy its records and that the statutorily allotted time for complying with Chatham's request had expired. As relief, Chatham sought an order to permit immediate inspection and copying of Rutherford's membership list and other previously requested corporate records on an expedited basis pursuant to N.C. Gen.

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Stat. § 55A-16-04.¹ Alternatively, Chatham petitioned for a writ of *mandamus* and a mandatory injunction requiring production of Rutherford's records and also requested a stay of Rutherford's board election deadlines and annual meeting. That same day, Chatham filed its Notice of Hearing for 21 July 2014 in McDowell County Superior Court² and provided Rutherford's counsel with courtesy copies of its pleadings, although it did not formally serve Rutherford until 30 July 2014.

On 15 July 2014, Rutherford filed a Notice of Designation of this case as a mandatory complex business case under section 7A-45.4 of our General Statutes. That same day, with Chatham's consent, then-Chief Justice Sarah Parker of the North Carolina Supreme Court designated this case as a mandatory complex business case and ordered it to be assigned to the North Carolina Business Court.

On 21 July 2014, a hearing on Chatham's verified complaint was held in McDowell County Superior Court with Judge Alan Z. Thornburg presiding. Before the hearing, Rutherford filed a motion to dismiss the action for lack of subject matter jurisdiction and improper venue or, alternatively, to transfer venue to Rutherford County. In support of its motion, Rutherford argued that: (1) given its status as an

¹ In addition, Chatham's complaint alleged a similar cause of action under Chapter 55 of our General Statutes. While we express no opinion on the ultimate outcome of this case, we agree with the trial court that Chapter 55, which governs for-profit corporations, is inapplicable here to Rutherford.

² Although this action was filed in Rutherford County, there were no sessions of superior court scheduled there until August 2014, so Chatham sought to take advantage of local rules that would allow the case to be heard in McDowell County, which is in the same judicial district as Rutherford County.

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EMC, the action should be governed not by Chapter 55A of our General Statutes but instead by Chapter 117, which establishes the North Carolina Rural Electrification Authority and grants broad discretionary authority to the boards of directors of rural electric membership corporations, including the power to regulate the election of board members and the power to establish procedures for handling member requests for information; (2) even if Chapter 55A did apply, McDowell County was an improper venue because claims premised on Chapter 55A must be heard in the county where the corporation's principal place of business is located, *see* N.C. Gen. Stat. § 55A-16-04 (2013), and Rutherford's principal place of business is located in Rutherford County; (3) Rutherford had already provided Chatham with all the records it was entitled to inspect under Chapter 55A; (4) regardless of Chatham's purported reasons, in light of the prior history of litigation between the parties, Chatham's inspection request amounted to an impermissible fishing expedition, and thus Rutherford had acted in accordance with Chapter 55A in denying that request because it was not made for a proper purpose; and (5) it was improper for the matter to proceed any further because Rutherford had not been formally served, had effectively received only four days' notice of the hearing, and the matter had already been designated to the Business Court. For its part, Chatham insisted that: (1) Rutherford had not yet provided its membership list and other requested documents covered by Chapter 55A; (2) due to recent changes to Rutherford's policies for electing directors and rapidly

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approaching related deadlines, Chatham urgently needed the membership list in order to collect the signatures required for nominating directors and collecting proxies before the elections scheduled for Rutherford's annual meeting in October 2014; and (3) in light of Policy M-12's express requirement of a court order, Chatham had no other option apart from the present lawsuit for obtaining relief and, although Chapter 55A's plain language requires such a suit to be *filed* in the county of Rutherford's principal place of business, it is silent as to where the hearing should be held. Since there were no sessions of Superior Court scheduled in Rutherford County until August, and given the aforementioned rapidly approaching election deadlines, Chatham sought to take advantage of local rules that would allow the case to be heard in McDowell County, which is in the same judicial district as Rutherford County. At the close of the hearing, and in a subsequent written order, Judge Thornburg denied Rutherford's motion to dismiss but granted its motion to transfer venue and instructed the parties to appear in Rutherford County Superior Court on 24 July 2014.

On 23 July 2014, the Business Court assigned the case to the Honorable Louis A. Bledsoe III. That same day, Rutherford filed a motion to continue the next day's scheduled hearing in Rutherford County so that the matter could be heard and decided in accordance with the Business Court's rules and procedures. Later that same day, Judge Bledsoe's law clerk sent an email to the parties stating:

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Because the pending matters before Judge Thornburg in the above case were heard and calendared for further hearing prior to the designation of the case to the Business Court, it is the policy of the Business Court that Judge Thornburg can decide whether to go forward with the hearing and rule on the matters pending before him at the time of designation.

On 24 July 2014, Rutherford filed a demand for a jury trial. That same day, Judge Thornburg presided over a hearing held in Rutherford County Superior Court regarding Chatham's request for an order to permit inspection and copying of Rutherford's membership list and other corporate records. In support of its motion for a continuance, Rutherford argued that: (1) N.C. Gen. Stat. § 7A-45.4 required all further proceedings in the matter to be held before the Business Court; and (2) N.C. Gen. Stat. § 55A-16-04 provides two distinct procedures for inspection requests, and although the statute allows a court to summarily order inspection of certain types of records, it expressly requires that requests involving membership lists be determined on an expedited basis governed by our Rules of Civil Procedure, but in this case Rutherford had not yet been given an opportunity to file an answer to Chatham's complaint or conduct discovery into whether Chatham's request had been made in good faith for a proper purpose. After Judge Thornburg denied Rutherford's motion, Rutherford again accused Chatham of attempting to exploit Chapter 55A to launch an impermissible fishing expedition and also argued that Chatham had not shown that the records it sought were directly connected to its request for the entire

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membership list, which Rutherford reasoned was overbroad because only two of its three districts were scheduled to elect directors at the annual meeting in October. Rutherford also emphasized privacy concerns for its members' personal information. For its part, Chatham countered that: (1) it only intended to use Rutherford's membership list for the proper purpose of participating in nominating and electing directors; (2) it was necessary to obtain the entire membership list because Rutherford's policies require that director nominations be supported by signatures from at least 1% of its estimated 67,500 members, but only one of those signatures can come from each household and it can only be the signature of the person first named on the member account; and (3) Rutherford's argument about maintaining its members' privacy was critically undermined by its own practice of regularly publishing their names and personal information in its newsletters. At the close of the hearing, Judge Thornburg announced that he would grant Chatham's request for an order permitting inspection and copying of Rutherford's membership list and other corporate records. When Rutherford's counsel inquired about the possibility of obtaining a stay pending appeal, the parties agreed that given the case's designation as a mandatory complex business case and assignment to Judge Bledsoe, the Business Court had jurisdiction over that request and any other motions going forward.

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In a subsequent written order signed and filed on 28 July 2014, Judge Thornburg denied Chatham's motions for a writ of *mandamus*, a mandatory injunction, and a stay of Rutherford's board election deadlines, but concluded that Chatham had complied with all the statutory requirements for requesting inspection and copying of Rutherford's records on an expedited basis under Chapter 55A and therefore ordered Rutherford to provide Chatham with its membership list and a sample ballot for its director elections by 1 August 2014, and with all other requested records by 23 August 2014, but expressly limited Chatham's use of all records to the purposes set forth in its requests. However, the order denied Chatham's request that Rutherford pay its litigation costs, concluding instead that Rutherford had refused Chatham's request in good faith "because it had [a] reasonable basis for doubt" about Chatham's right to inspect the records requested. That same day, Rutherford filed notice of appeal to this Court and also filed an emergency motion to establish bond for a Section 1-290 stay, or a stay pending appeal. On 30 July 2014, Judge Bledsoe presided over a hearing which the parties joined by teleconference, during which Rutherford's counsel complained that "[a]s a practical matter, if you don't give a stay, any victory we get on appeal is the classic Pyrrhic victory, meaning that wow, it feels good, we get an order, but it accomplishes nothing." Nevertheless, Judge Bledsoe denied Rutherford's motion in a written order and opinion entered 31 July 2014.

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Rutherford ultimately complied with Judge Thornburg's order to allow Chatham to inspect its membership list and other corporate records, and now on appeal seeks to challenge: (1) the trial court's holding that Chatham's Member Information Request was governed by Chapter 55A of our General Statutes rather than Chapter 117; (2) the trial court's determination that Chatham requested the membership list for a proper purpose; (3) the trial court's jurisdiction to enter any order in this matter after it had already been designated to the Business Court and assigned to Judge Bledsoe; and (4) a litany of purported procedural errors including the denial of any opportunity to conduct discovery and the denial of Rutherford's demand for a jury trial.

Analysis

Several of Rutherford's arguments to this Court appear to raise issues of first impression, but before proceeding to their merits, we must determine whether this appeal is properly before us. Because we find that the issues argued on appeal are moot, we dismiss Rutherford's appeal.

As a general matter, a case is moot when "a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison Cnty. Realtors Ass'n, Inc.*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) (citing *Black's Law Dictionary* 1008 (6th ed. 1990)). Thus, "[w]henEVER during the course of litigation it develops that the relief sought has been

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granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain an action merely to determine abstract propositions of law.” *Simeon v. Hardin*, 339 N.C. 358, 370, 451 S.E.2d 858, 866 (1994) (citation omitted). “If the issues before the court become moot at any time during the course of the proceedings, the usual response is to dismiss the action.” *Id.* (citation omitted).

In the present case, Rutherford has already complied with Judge Thornburg’s order to allow Chatham to inspect and copy its membership list and other corporate records, and the October 2014 director elections that Chatham sought to use this information to participate in have already occurred. Under these circumstances, it is difficult to discern how any relief we could provide would remedy the alleged errors of which Rutherford now complains. Thus, even if we agreed with Rutherford’s arguments that it should never have been required to allow Chatham to inspect and copy its records, because Chatham has already inspected and copied Rutherford’s records, this issue is moot. *See, e.g., Boney Publishers, Inc. v. Burlington City Council*, 151 N.C. App. 651, 654, 566 S.E.2d 701, 703 (“This appeal is technically moot because the information sought by [the] plaintiff has been fully disclosed.”), *disc. review denied*, 356 N.C. 433, 571 S.E.2d 221 (2002).

Our determination that the issues brought forth in an appeal are moot does not end our inquiry, however, because “[e]ven if moot . . . [an appellate court] may, if

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it chooses, consider a question that involves a matter of public interest, is of general importance, and deserves prompt resolution.” *N.C. State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989) (citations omitted). We may also consider a moot issue on appeal pursuant to other established exceptions to the mootness doctrine. Most relevant here, cases which are “capable of repetition, yet evading review may present an exception to the mootness doctrine.” *Boney Publishers, Inc.*, 151 N.C. App. at 654, 566 S.E.2d at 703 (citations and internal quotation marks omitted). In order for this exception to apply, there are two required elements: “(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.” *Id.* at 654, 566 S.E.2d at 703-04 (citation omitted).

Here, in its appellant brief, Rutherford offered no argument regarding our mootness doctrine or the exceptions. When asked during oral arguments why this case is not moot, Rutherford focused on the “capable of repetition yet evading review” exception’s first element, arguing that this case evades review because of the relatively brief amount of time that elapsed between Chatham’s Member Information request and the trial court’s order granting that request as compared to the average duration of an appeal to this Court. As to the exception’s second element, Rutherford also complained that without an opinion from this Court correcting the trial court’s

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errors, Chatham will be free to engage in future fishing expeditions by exploiting the wrongly decided precedent established in Judge Thornburg's order. For its part, Chatham suggested in its appellee brief that this Court should ignore any mootness concerns based on our recent decision in *In re A.N.B.*, __ N.C. App. __, __, 754 S.E.2d 442, 445 (2014) (allowing review of an expired order continuing voluntary admission of a juvenile to a secure inpatient psychiatric treatment facility because this Court has a duty to address otherwise moot cases that raise questions involving matters of public interest and because the harm complained of was capable of repetition yet evading review). Chatham argues further that we should affirm Judge Thornburg's order because Rutherford's refusal to respect its member's inspection rights "is likely to occur again given the annual election of directors from the 10 county region and the substantial public interest in this nonprofit's activities affecting thousands of members and electricity recipients."

After careful consideration, we conclude that neither the public interest exception nor the "capable of repetition yet evading review" exception applies in this case. We are not persuaded by Chatham's assertion that the public interest exception should apply here, given that there is no evidence in the record that this litigation represents anything other than the latest episode in an ongoing private dispute between Chatham and Rutherford. We are similarly unpersuaded that this case satisfies either element of the "capable of repetition yet evading review" exception.

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As to the “capable of repetition yet evading review” exception’s first element, Rutherford’s concerns about the short duration of this litigation evading review in future cases are unfounded because if Rutherford ever again finds itself in a similar position, it can take steps that it failed to take in the present case—such as, for example, seeking a declaratory judgment of the parties’ rights from the trial court—in order to ensure that next time, there will be a live controversy remaining for our review. As to the second element, while Chatham bases its argument that this case is capable of repetition on the fact that Rutherford’s directors are elected annually, its argument ignores the fact that as a result of having prevailed below, Chatham already has copies of Rutherford’s membership list and corporate records, thereby substantially mitigating, if not totally obviating, any future need for it to file additional Member Information Requests in order to participate in Rutherford’s director elections. By the same logic, Rutherford’s argument that this case is capable of repetition also fails, because if Chatham already has Rutherford’s membership list and corporate records, it seems unlikely that a court would find Chatham had a proper purpose under Chapter 55A to request them again, and we therefore conclude that there is no “reasonable expectation that [Rutherford] would be subjected to the same action again.” *Boney Publishers Inc.*, 151 N.C. App. at 654, 566 S.E.2d at 703-04 (citation omitted). Moreover, although Rutherford’s appeal presents this Court with several issues of first impression, we do not believe that the procedural history

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of this case—marred as it is by irregularities if not outright errors—presents a fitting vehicle for such determinations, and we therefore decline to exercise our discretion in order to reach them. Accordingly, Rutherford’s appeal is

DISMISSED.

Judges HUNTER, JR., and TYSON concur.