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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-62

No. COA21-57

Filed 1 February 2022

Mecklenburg County, No. 19 CVS 829

DAVID A. ALMASON, Plaintiff,

v.

SOUTHGATE ON FAIRVIEW CONDOMINIUM ASSOCIATION, INC., a North Carolina non-profit corporation, WILLIAM DOUGLAS MANAGEMENT, INC., a North Carolina corporation, and KARREN L. WOERNER, individually and as an Officer and Director of SOUTHGATE ON FAIRVIEW CONDOMINIUM ASSOCIATION, INC., Defendants.

Appeal by Plaintiff from Order entered 24 February 2020 by Judge Jesse B. Caldwell, III, in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 November 2021.

Miller Bowles Cushing, PLLC, by Nicholas L. Cushing, for plaintiff-appellant.

Gallivan, White & Boyd, P.A., by James M. Dedman, IV, and Caroline B. Barrineau, for defendants-appellees.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 David A. Almason (Plaintiff) appeals from an Order Granting in part and Denying in part Southgate on Fairview Condominium Association, Inc.'s (Association), William Douglas Management, Inc.'s (William Douglas), and Karren L. Woerner's (Woerner) (collectively Defendants) Motion for Summary Judgment in Plaintiff's case seeking declaratory judgment, alleging negligence, and requesting records related to Defendants' preparation and ratification of the Association's original 2019 budget. The Record tends to reflect the following:

¶ 2 The Association is a condominium homeowner's association incorporated under the North Carolina Non-Profit Corporation Act, N.C. Gen. Stat. Ch. 55A, and Condominium Act, N.C. Gen. Stat. Ch. 47C. Defendant, as an owner, is a mandatory association member. Woerner is the president of the Association's Board of Directors (Board). On 14 November 2018, the Association sent all owners a proposed budget for 2019 and a notice of a budget meeting to be held on 3 December 2018. Plaintiff sent the Association a request for records on 21 November 2018 for the purpose of reviewing the proposed 2019 budget. The request sought: Association monthly financial and bank account records from 2018; Board meeting minutes from May to October 2018; minutes from the Board's 2018 executive sessions if any; and recommendations on repairing or replacing hallway lighting, with estimates if any.

¶ 3 The budget meeting took place on 3 December 2018. Thirteen members attended the meeting. Plaintiff, along with his attorney, was present at the meeting.

At the outset, the Association's attorney asked Plaintiff if he had any proxy votes objecting to the proposed 2019 budget. Plaintiff did not have any proxies. Woerner then stated that the proposed 2019 budget was ratified. On 13 December 2018, Plaintiff sent the Association a follow up to his 21 November records request asserting that Plaintiff had still not received certain records he requested.

¶ 4 Plaintiff filed a Verified Complaint in Mecklenburg County Superior Court containing seven causes of action against Defendants on 15 January 2019. Plaintiff's first cause of action sought declaratory judgment declaring the 2019 budget "null and void" because it was not properly ratified according to the Association's Bylaws (Bylaws) and contained material misrepresentations, and that Plaintiff be "allowed to attend Executive Committee meetings on a regular basis." Plaintiff's second and third causes of action alleged breach of fiduciary duty and constructive fraud against Woerner specifically, both individually and as the Association's officer and director. Plaintiff's fourth claim for negligence alleged Defendants breached their duty of care to Plaintiff in preparing the 2019 budget. Plaintiff's fifth claim alleged Defendants failed to provide Plaintiff with all of the records he requested in violation of the Bylaws and governing statutes. His sixth claim was for injunctive relief restraining Defendants from "billing the Plaintiff according to his new obligation under the 2019 budget." Finally, Plaintiff sought attorneys' fees for Defendants' alleged violations of the Condominium Act.

¶ 5 On 18 January 2019, the Board sent notice of rules applicable to Board meetings including: each owner would be permitted to attend three Board meetings between the Board's annual meetings; no more than four owners could speak per meeting; each owner would be permitted to speak for fifteen minutes at any meeting and could only attend the portion of the meeting at which the owner was speaking; and the meetings could not be recorded. On 4 February 2019, Plaintiff filed a Verified Amended Complaint alleging the Board's rules for Board meetings were "arbitrary and unreasonable" and sought declaratory judgment declaring the rules "null and void." Defendants filed their Answer to Plaintiff's Verified Complaint and Verified Amended and Supplemented Complaint on 29 April 2019.

¶ 6 In response to Defendants' first set of interrogatories, Plaintiff stated he had yet to receive Board meeting minutes from June, July, and September 2018 and no executive meeting minutes from 2018 or 2019. On 20 December 2019, Defendants filed their Motion for Summary Judgment on all of Plaintiff's claims. A hearing on Defendants' Motion for Summary Judgment was held on 17 January 2020 in Mecklenburg County Superior Court. On 24 February 2020, the trial court entered its Order Granting in part and Denying in part Defendants' Motion for Summary Judgment dismissing with prejudice Plaintiff's declaratory judgment, negligence, and records request claims. The trial court denied Defendants' Motion on the issues of

breach of fiduciary duty and constructive fraud against Woerner and the Association.

The trial court's Order did not address attorneys' fees.

¶ 7 The same day, Plaintiff's breach of fiduciary duty and constructive fraud claims came on for trial. The jury returned a verdict in Defendants' favor, and the trial court entered Judgment dismissing Plaintiff's remaining claims on 8 July 2020. Plaintiff filed written Notice of Appeal from the trial court's Order Granting in part and Denying in part Defendants' Motion for Summary Judgment to this Court on 6 August 2020.

Issues

¶ 8 The issues on appeal are whether the trial court erred in granting Defendants summary judgment regarding Plaintiff's: (I) request for declaratory judgment declaring: (A) the Association's original 2019 budget null and void, (B) that the Board violated the Bylaws' open meetings provisions, and (C) the attendance policies for Board meetings null and void; (II) negligence claim; and (III) records request claim.¹

Standard of Review

¶ 9 "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

¹ Plaintiff also argues the trial court erred in granting Defendants summary judgment on his claim for attorneys' fees. The trial court's Order does not address attorneys' fees, and we note that no such fees would have been appropriate as Plaintiff did not prevail on any of his claims. Moreover, Plaintiff makes no argument on appeal regarding the trial court granting Defendants' Motion for Summary Judgment on the issue of injunctive relief. Consequently, Plaintiff has abandoned that issue.

show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2019). “Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that ‘there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.’ ” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)). A “trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact. Moreover, all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion.” *Forbis*, 361 N.C. at 524, 649 S.E.2d at 385 (citation and quotation marks omitted). However,

when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest on mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

N.C. Gen. Stat. § 1A-1, Rule 56(e) (2019).

Analysis

I. Declaratory Judgment

A. 2019 Budget Ratification

¶ 10 Plaintiff first argues the trial court erred in granting Defendants summary judgment as to Plaintiff’s request the trial court declare the 2019 budget null and

void because the Board did not comply with the Bylaws in ratifying the budget. Specifically, Plaintiff contends the 2019 budget was ratified without a motion, second, or vote of the members. Moreover, Plaintiff argues Woerner's statement at the budget meeting that the budget was ratified because there was not a majority of all members even present shows the budget was not ratified in accordance with the Bylaws. Defendants contend the Condominium Act does not require a quorum of members at budget meetings, but does state that a budget is ratified unless a majority of all members vote to reject the proposed budget. N.C. Gen. Stat. § 47C-3-103(c) (2019).

¶ 11 However, the Bylaws state “there shall be no requirement that a quorum be present . . . the proposed budget shall be deemed ratified unless at that Meeting a majority of all the Owners present and entitled to cast a vote reject the budget.” Even assuming the Bylaws control in this circumstance, the proposed budget would have been ratified *unless* a majority of the owners present voted to reject the proposed budget. Plaintiff has not presented any evidence an owner moved to vote on the budget or that a majority of the members present would have voted to reject the proposed budget. The meeting minutes from the 2019 budget meeting state thirteen of forty-seven members were present at the meeting. Moreover, the minutes indicate the Board asked Plaintiff if he had any proxy votes to add to his personal objection to the proposed budget. Plaintiff indicated he did not. Even if Plaintiff had moved to vote on the proposed budget, he has presented no evidence any member would have

seconded the motion or that any of the members present would have objected to the budget. Thus, under both the Bylaws and N.C. Gen. Stat. § 47C-3-103(c), the proposed budget was properly ratified. Therefore, the trial court did not err in granting Defendants summary judgment.

B. Board Meetings as Open Meetings under the Bylaws

¶ 12 Next, Plaintiff argues the trial court erred in granting Defendants summary judgment because there was at least an issue of material fact as to whether the Board was violating the Bylaws by not holding open meetings. Specifically, Plaintiff contends the Board did not comply with Section 5.10 of the Bylaws governing Board meetings. Section 5.10(A) states: “Regular meetings shall be held, without notice, at such hour and address as may be fixed from time to time” Section 5.10(F) requires: “At regular intervals, the Executive Board shall provide Owners an opportunity to attend a portion of [an] Executive Board meeting and to speak to the Executive Board about their issues and concerns.” Plaintiff argues that, because the Board “ignored” his 18 December 2018 request to address the Board, the Board violated Section 5.10(F) requiring the Board allow members to attend a “portion” of meetings at “regular” intervals.

¶ 13 However, Plaintiff does not explain how even this ignored request supports his contention. The Bylaws do not require the Board to allow members to attend a certain number of meetings; thus, a “regular interval” could mean attendance at one Board

meeting between annual meetings. In fact, Plaintiff states in his Complaint he attended a June 2018 meeting. Moreover, Plaintiff offers no evidence he was not allowed to attend any other meetings in 2018. Therefore, to the extent the Bylaws require Board meetings to be open meetings, the Board was holding its meetings according to the Bylaws by allowing Plaintiff to attend. Consequently, the trial court did not err in granting Defendants summary judgment.

C. Authority for Attendance Policies

¶ 14 Finally, with respect to declaratory judgment, Plaintiff argues the trial court erred in granting Defendants summary judgment as to the Board's attendance policies for Board meetings. Specifically, Plaintiff contends there could be, at least, "conflicting interpretations" of the Bylaws and the Board's authority to enact such rules. We note that Section 5.10(F) of the Bylaws and N.C. Gen. Stat. § 47C-3-108(b) both require the Board to:

At regular intervals, . . . provide unit owners an opportunity to attend a portion of an executive board meeting and to speak to the executive board about their issues and concerns. The executive board may place reasonable restrictions on the number of persons who speak on each side of an issue and may place reasonable time restrictions on persons who speak.

N.C. Gen. Stat. § 47C-3-108(b) (2019).

¶ 15 Here, the Board notified owners of attendance policies for Board meetings limiting owners' attendance to three meetings between annual Board meetings,

restricting owners to fifteen minutes of time to speak to the Board, limiting owners' presence at a meeting to only the time an owner was present to speak to the Board, and prohibiting anyone from recording Board meetings. First, we note Plaintiff's argument there could be different interpretations of the Bylaws and statute show the question here is a question of law and not a factual dispute. There is no dispute as to what the attendance policies say and what the Bylaws and statute say. Therefore, this issue was properly disposed of through summary judgment. *Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576.

¶ 16 Moreover, even as a matter of law, Plaintiff's arguments fail. The Bylaws state that owners must be allowed to attend Board meetings "at regular intervals" but do not prescribe appropriate intervals. Thus, again, under the Bylaws, the Board could allow owners to attend only one or two Board meetings between annual Board meetings. The Bylaws also require the Board to allow owners to attend only "a portion" of any Board meeting. Again, the Bylaws do not prescribe an appropriate portion of such a Board meeting. Plaintiff argues a fifteen-minute limit is arbitrary because some issues might require more time; however, under Plaintiff's theory, any time limitation would be arbitrary. Thus, the Board's attendance policies facially complied with the Bylaws and statute.

¶ 17 However, Plaintiff contends the Board's policy prohibiting people from recording Board meetings violated the Bylaws because there is no express authority

for the Board to enact such a rule in the Bylaws. Indeed, the Bylaws do not expressly address the Board's authority over such an issue. But, Plaintiff points to no provision that limits the Board's authority on this issue. Plaintiff argues the Board must conduct its meetings according to Robert's Rules of Order under the Bylaws and the statutes. Section 72 of Robert's Rules of Order states: "A deliberative assembly has the inherent right to make and enforce its own laws and punish an offender"² Thus, it follows that the Board had the inherent authority to enact and enforce rules for its meetings and that those rules would apply to owners attending those meetings. Here, Plaintiff has made no showing the Board's policy was in violation of its Bylaws. Therefore, the trial court did not err in granting summary judgment in Defendants' favor on this issue. Consequently, the trial court did not err in granting Defendants summary judgment as to any of Plaintiff's declaratory judgment claims.

II. Negligence

¶ 18 Plaintiff further argues the trial court erred in granting summary judgment in Defendants' favor on Plaintiff's negligence claim. Specifically, Plaintiff argues Defendants had "a duty of care with regard to the preparation of the 2019 budget" and that "Defendants breached their duty of due care to the Plaintiff in the preparation of the 2019 budget" because the proposed budget "contained numerous,

² Robert's Rules of Order, Art. XIII, § 72, <http://www.rulesonline.com/rro-13.htm> (last visited 29 November 2021).

grievous errors and omissions, and material misrepresentations to the Association members.” Plaintiff claims his injury, as a 2.477% stakeholder in the Association, is an alleged \$59,000 budget shortfall resulting from Defendants’ alleged under-collection in the 2019 budget affecting all subsequent budgets.

¶ 19 Even assuming Defendants breached their duty as Plaintiff alleged, Plaintiff presents no evidence of any real damages he suffered as a result. Plaintiff seemingly alleges his damages are future assessments making up for the \$59,000 budget shortfall created by the 2019 budget of which Plaintiff would be responsible for 2.447%. However, had the 2019 budget collected assessments such that no such shortfall existed, Plaintiff would still be responsible for 2.447% of the \$59,000 required to avoid a shortfall under an appropriate budget according to Plaintiff. Thus, whether through a later correction of the alleged shortfall in the 2019 budget or through assessments in a budget Plaintiff would deem proper, Plaintiff would pay the same amount to correct for Defendants’ alleged misrepresentations. Therefore, Plaintiff has not produced evidence he suffered particular damages as a result of the 2019 budget; indeed, Plaintiff points to no authority supporting his claim that such damages are actionable. *See Hawkins v. Hawkins*, 101 N.C. App. 529, 532, 400 S.E.2d 472, 474-75 (1991) (“We define actual damage to mean some actual loss, hurt or harm resulting from the illegal invasion of a legal right.”); *see also Iadanza v. Harper*, 169 N.C. App. 776, 779, 611 S.E.2d 217, 221 (2005) (“General damages . . . include such

matters as mental or physical pain and suffering, inconvenience, or loss of enjoyment which cannot be definitively measured in monetary terms[.] . . . [S]pecial damages are usually synonymous with pecuniary loss. Medical and hospital expenses, as well as loss of earnings . . . are regarded as special damages” (citation and quotation marks omitted)). Consequently, the trial court did not err in granting summary judgment in Defendants’ favor on this issue.

III. Records Request

¶ 20 Last, Defendant argues the trial court erred in granting Defendants summary judgment on his records request claim because “an issue of fact exists” as to whether Plaintiff received certain records he requested. N.C. Gen. Stat. § 47C-3-118(a) provides:

The association shall keep financial records sufficiently detailed to enable the association to comply with this chapter. All financial and other records, including records of meetings of the association and executive board, shall be made reasonably available for examination by any unit owner . . . as required by Chapter 55A of the General Statutes If the bylaws do not specify particular records to be maintained, the association shall keep accurate records of all cash receipts and expenditures and all assets and liabilities.

N.C. Gen. Stat. § 47C-3-118(a) (2019). Section 5.13(G) of the Bylaws requires the Association to keep “detailed, accurate records of the receipts and expenditures of the Association” and to obtain “annual audits of the financial records of the Association” and make those records “available for examination by all Owners or their duly

authorized agents or attorneys, at convenient hours on working days.” Subsection H requires the Board to keep “a complete record of the minutes of all meetings of the Executive Board and Membership” Section 10.5 requires all “financial and other records, including records of meetings of the Owners and Executive Board” be made available to any owner and owner’s agent during reasonable working hours.

¶ 21 On 21 November 2018, Plaintiff sent the Association a written request to inspect certain Association records including: monthly financial and bank account records from 2018; Board meeting minutes from May to October 2018; executive session minutes if any; and recommendations on repairing or replacing hallway lighting, with estimates if any. On 13 December 2018, Plaintiff sent a follow up letter stating he had yet to receive certain monthly financial records and meeting minutes from June, July, September, and October 2018 Board meetings. The letter also stated Plaintiff had received a “Hallway Lighting Report.” During discovery, in Plaintiff’s Second Supplemental Response to Defendants’ interrogatories, Plaintiff stated the only documents he had yet to receive were: Board meeting minutes from June, July, and September 2018; any executive session minutes for 2018 and 2019; and recommendations in response to the “Hallway Lighting Report.”

¶ 22 However, in an affidavit submitted in opposition to Defendants’ Motion for Summary Judgment, Plaintiff stated he had not received any meeting minutes for June, July, August, September, or October 2018. Plaintiff asserted, because the

Association was dealing with water intrusion issues, the Board “was meeting regularly” and it “is not credible that no minutes exist for these months.” Plaintiff further stated he had received only one proposal to repair the hallway lighting but that in “exercising due diligence, I believe the Board would have received more than one proposal.” Defendants submitted an affidavit from Elizabeth Manton (Manton), a property manager with William Douglas, in support of their Motion for Summary Judgment. Manton stated the Board does not record minutes of executive session meetings and that Plaintiff had been provided the minutes from the Board’s May, August, and October 2018 meetings. Manton testified the Board did not meet in June, July, or September 2018.

¶ 23 Plaintiff has presented no evidence that such records actually exist to contradict Manton’s testimony the Board does not keep such minutes. Moreover, Plaintiff’s assertions that he believes the Board met in June, July, and September of 2018 and that there had to have been more than one proposal to repair the hallway lighting do not create a genuine issue of material fact to counter Manton’s testimony the Board did not meet in those months and all such records, to her knowledge, had been provided to Plaintiff because Plaintiff has not presented any evidence records beyond those provided actually exist. *See Waddle v. Sparks*, 331 N.C. 73, 82, 414 S.E.2d 22, 26 (1992) (“By making a motion for summary judgment, a defendant may force a plaintiff to produce a forecast of evidence demonstrating that the plaintiff will

be able to make out at least a prima facie case at trial.” (citation omitted)). Therefore, the trial court did not err in granting Defendants’ Motion for Summary Judgment on this issue.

Conclusion

¶ 24 Accordingly, we affirm the trial court’s Order Granting in part and Denying in part Defendants’ Motion for Summary Judgment.

AFFIRMED.

Chief Judge STROUD and Judge GORE concur.

Report per Rule 30(e).