RENDERED: NOVEMBER 20, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000136-MR
AND
NO. 2009-CA-000202-MR

EDWARD H. FLINT — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRV MAZE, JUDGE
ACTION NO. 07-CI-010558

COACH HOUSE, INC.; COACH HOUSE BOARD
OF DIRECTORS; IRVINE COHEN - PRESIDENT;
ARON SCHWARTZ - VICE PRESIDENT;
SHIRLEY SERGEANT - TREASURER;
NORMA SAVAGE - SECRETARY;
NANCY OSTERTAG - DIRECTOR;
LUCILLE BARRICKMAN - DIRECTOR;
FRANK SULLIVAN - DIRECTOR; AND
JANE DOE AND JOHN DOE — APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND DIXON, JUDGES; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: Edward H. Flint appeals from an opinion and order of the Jefferson Circuit Court which granted summary judgment to Coach House, Inc. and its board of directors. The appellees have cross-appealed from an order dismissing their counterclaim for costs and attorney's fees. Upon review, we affirm.

Flint is a condominium owner at the Coach House Condominiums in Jefferson County, Kentucky. In September 2007, Flint ran for election to one of four vacant positions on the condominium's Board of Directors. Six other candidates also ran for the positions. According to Flint, numerous owners had urged him to run, and he believed that he had received a sufficient number of votes to win easily. He was not elected, however, finishing last with a total of sixteen votes out of a pool of sixty-two votes. The election results were posted by name only and did not show how many votes each candidate received.

Flint wrote to the Board of Directors requesting a meeting in order to recount the ballots and review the election materials. He asked that the President, Secretary and Treasurer attend, as well as another unsuccessful candidate, Julia Fish, who, like Flint, believed that she had received enough votes to be elected. A meeting was set up, but only the Treasurer and Fish attended. Neither the President nor the Secretary, who had the ballots, attended the meeting. Flint wrote

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

a letter to all the condominium owners explaining what had happened. A meeting was finally arranged with the President and Treasurer in attendance, at which Flint was given an opportunity to review the election materials. Flint contends that the ballots he was given to examine were not the original ballots because they were not folded. According to Flint, voters would have folded their ballots at least once or twice because the election was by secret ballot.

Flint thereafter wrote repeatedly to the Board of Directors, requesting them to call a special meeting regarding the election. The Board did not respond to Flint or call such a meeting. Flint claims that the Board's refusal to act was in retaliation for an episode that occurred in 2004. In that year, he and several other condominium owners reviewed the Association's finances and minutes and found numerous violations of the Association by-laws and that a considerable amount of funds had been misspent. Flint reported his findings to the Commonwealth Attorney, who did not pursue criminal charges but advised the group to obtain a lawyer if they wished to pursue the matter. The group decided not to take any further action in order to "keep peace" in the building. Flint contends that the Board members have held his actions against him and therefore substituted ballots in the election in order to keep him from becoming a member of the Board.

Flint filed a complaint in Jefferson Circuit Court on October 24, 2007, alleging that he had been discriminated against and denied his rights, requesting that the election results be declared void, and new elections held, and that any

persons found guilty of vote tampering or obstruction be declared ineligible to run for office in the future.

The case was originally assigned to Judge Fred Cowan. Flint filed a motion to remove Judge Cowan, and the case was reassigned to Judge Kathleen Voor Montano in Division 10. Flint then informed Chief Judge James Shake that he was a close friend of some members of Judge Montano's family. Judge Montano thereafter recused herself, after noting that she had approved the filing of an amended complaint by Flint. Chief Judge James Shake issued an order which stated that the case was re-allotted to Division 7, and that the presiding judge of that division was authorized "to re-allot to Division 10 from her docket a like and similar case[.]" The case was accordingly reassigned to Judge Audra Eckerle in Division 7. Before the case could be submitted to Judge Eckerle on the defendants' motion for summary judgment, Judge Montano passed away. Judge Eckerle therefore re-allocated the case back to Division 10 in accordance with the Chief Judge's order. Senior Judge Ann Shake, who was then presiding in Division 10, entered an order granting summary judgment to the defendants on May 22, 2008.

Ultimately, Judge Irv Maze entered the final order denying Flint's claims and the appellees' counterclaims on January 9, 2009. This appeal and cross-appeal followed.

In reviewing a grant of summary judgment, our inquiry focuses on "whether the trial court correctly found that there were no genuine issues as to any

material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); Kentucky Rules of Civil Procedure (CR) 56.03. "[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 480 (Ky. 1991).

Flint's first argument is that the election was either incorrectly handled or the ballots are flawed or both. He contends that the deposition testimony of Joan Weyer, a voter registrar and counter, was dispositive on these points. Weyer admitted that eight of the proxy ballots cast at the election should not have been counted because they were not properly filled out. She also testified that there was no written procedure to govern voter registration. Flint further contends that the ballots which were presented by condominium President Irvine Cohen at his deposition on December 27, 2007, were not the same ballots he was originally given to review at the meeting arranged after the disputed election. He argues that continuing discovery of evidence and ultimately a jury trial are the only means to uncover the truth of what occurred.

As to the irregular proxies, the trial court observed that Flint had not presented any affirmative evidence that the outcome of the election would have been different if those eight proxies were not counted. Flint received sixteen votes out of a total of sixty-two cast. He would have needed an additional twenty votes

to have tied the lowest vote tally of the fourth Director elected, who received thirty-six votes. Flint has provided some calculations to demonstrate that the eight proxies would have had a decisive effect on the outcome. The affirmative evidence in the record shows, however, that the fourth-place candidate did receive thirty-six votes. "The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Lewis v. B & R Corp*., 56 S.W.3d 432, 436 (Ky. App. 2001). We agree with the trial court that Flint has had ample opportunity for further discovery and has not presented any affirmative evidence in support of his claim that the alleged irregularities in the voting had a decisive effect on his standing in the election.

As to Weyer's testimony that there was no written policy to govern the voting procedure, the trial court observed that Flint's allegations in this regard do not touch on the voting requirements outlined in the condominium by-laws, but rather "his allegations stem from unwritten and traditional practices. Based on the evidence of record, the Court cannot find, as a matter of law, that the Board breached any of [the] procedures outlined in the By-Law or Amendments thereto." As an owner, Flint was entitled to attempt to amend the by-laws to add written procedures governing voter registration, but the absence of such procedures does not create a valid cause of action against the appellees.

Flint's allegation that the ballots he was allowed to examine at the meeting he requested following the election are not the same ballots later attached as exhibits to Board President Irvine Cohen's deposition is completely unsupported by any evidence, as is his allegation that some or all of the appellees conspired to conceal the allegedly flawed election. If, as he states, numerous residents of the condominium complex informed him that they voted for him, it would have been a relatively easy matter to obtain statements or affidavits from at least some of them to that effect. "A party opposing a motion for summary judgment cannot rely merely on the unsupported allegations of his pleadings, but is required to present 'some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Godman v. City of Fort Wright*, 234 S.W.3d 362, 370 (Ky. App. 2007). Moreover, such a showing must be made in a timely fashion:

> The curtain must fall at some time upon the right of a litigant to make a showing that a genuine issue as to a material fact does exist. If this were not so, there could never be a summary judgment since "hope springs eternal in the human breast." The hope or bare belief, like Mr. Micawber's, that something will "turn up," cannot be made basis for showing that a genuine issue as to a material fact exists.

Neal v. Welker, 426 S.W.2d 476, 479-80 (Ky. 1968) (citation omitted).

Flint next argues that he was discriminated against and denied his rights as a condominium owner due to the appellees' breach of their statutory and fiduciary duties. As support for this argument, he relies on the following evidence: (1) that the Treasurer on two occasions reminded the Board of their duties pursuant

to KRS 273.161 through 273.323; (2) that the Board of Directors refused to take any action regarding the disputed election and refused to call a special meeting as requested by Flint, even though the President had the power to do so under the by-laws; (3) that the Board created a poisonous atmosphere at the condominium complex as evidenced by the fact that three of the letters which he had sent to residents outlining his grievances were returned to him, torn into pieces, and one with an anonymous note; (4) that the Board failed to take action after his complaints about the election in contravention of KRS 273.215 and their fiduciary duties.

The Treasurer's memoranda are not evidence of any wrongdoing. Similarly, the torn letters are not evidence of an actionable offense. As to the President's refusal to call a special meeting, he was not bound to do so under the by-laws, which are permissive rather than mandatory. The pertinent by-law states that "Special meetings of the Council **may be called** for any reasonable purpose, either by the President, or not less than twenty-five (25%) per cent of the unit owners, the notice for which shall specify the matters to be considered at such special meeting." (Emphasis supplied.) There is no indication that Flint even attempted to call a special meeting by mustering the support of twenty-five percent of the unit owners.

As to the alleged breach of statutory and fiduciary duties by the appellees, KRS 273.229 and KRS 273.215 impose similar duties on an officer or

director of a nonprofit corporation. The statutes provide that this individual must discharge his or her duties

> (a) In good faith;
>
> (b) On an informed basis; and
>
> (c) In a manner he honestly believes to be in the best interests of the corporation.

Flint has not offered any evidence that the appellees breached these duties. Although there was some delay in allowing him to examine the election ballots, he was not denied access to them. There is no indication that the appellees failed to act in a manner which they honestly believed to be in the best interests of the condominium. If the election was fraudulent, as Flint argues, some evidence from the electors whose ballots were falsified or miscounted was required to sustain this action. As we have noted, Flint has not provided any explanation why he was unable to obtain any affidavits or evidence from even a single one of the numerous individuals he claims voted for him.

Finally, Flint argues that the Chief Judge's actions in permitting Judge Eckerle to transfer his case back to Division 10 where his wife, Senior Judge Ann Shake, was then the presiding judge were unethical because counsel for the appellees had contributed to the Chief Judge's election campaign. Such contributions are not per se evidence of unethical behavior, however.

> [U]nder Kentucky's campaign election finance system, it is obvious, even expected, that lawyers will make most of the contributions to judicial candidates. In fact, Kentucky Bar Association Ethics Opinion E-277 states:

> EC 8-6 states that lawyers, because of their opportunity for personal observation and investigation, have a special responsibility to aid in the selection of those who are qualified for judicial office. This responsibility includes endorsements and *contributions* made by attorneys to campaigns.
>
> (internal quotation marks omitted)(emphasis added). E-277 also explains that "[l]awyers are under an affirmative duty to take an active role in selecting qualified judicial candidates both publicly and monetarily." Hundreds if not thousands of lawyers regularly contribute to judicial campaigns across the Commonwealth. Such conduct by an attorney representing a party is simply not improper and is an insufficient basis to demand a judge's recusal.

Dean v. Bondurant, 193 S.W.3d 744, 747-48 (Ky. 2006).

Furthermore, Chief Judge Shake's order allowing the case to be transferred back to Division 10 was fully within his powers and did not violate Rule 11 of the Thirtieth Circuit, which requires the random allotment of cases. The case was merely being returned to the original division after a replacement for Judge Montano was appointed. The return of the case to Division 10 was fully in keeping with the Rules of the Kentucky Supreme Court (SCR):

> [I]n addition to requiring random assignment of cases and keeping them with the original judge whenever possible, SCR 1.040 also provides that the "chief judge shall . . . [r]eassign cases from one judge to another as necessary or convenient" SCR 1.040(3)(d). . . . This is further supported by the General Assembly's grant of power under KRS 26A.040, which reads, "(1) Proceedings in any court having divisions shall be valid when prosecuted in any division thereof. (2) Any judge presiding over a division of a court mentioned in

> subsection (1) may hear and determine any case or question in any other division."

Cox v. Braden, 266 S.W.3d 792, 798 (Ky. 2008).

The appellees have cross-appealed, arguing that the trial court erred in denying their counterclaim for costs and attorney's fees against Flint. In explaining its decision, the trial court wrote as follows:

> It is obvious to the Court that the tone and tenor of the litigation reached a fever pitch in many stages of these proceedings. The present Court inherited this matter after it had been reviewed by four previous judges. This Court has reviewed all documents, briefs and heard recent arguments why the election for a position on the board of directors of the condominium association should be voided for the Coach House Condominium Council. The Court is of the opinion that Kentucky law has few exceptions to the principle that each party is responsible for his or her own attorney fees in litigation. The only exceptions that this Court is aware of in cases such as this is if the Court makes a judicial determination that a party has knowingly pursued a course of litigation that they knew was improper and pursued it anyway (i.e. in bad faith. This Court believes that it is too high of a hurdle to overcome in this present action and that as a matter of law attorney fees should not be assessed against either party. This Court believes that each party should be responsible for their own costs and attorney fees.

The appellees argue that Flint's conduct in these proceedings was indicative of bad faith, as evidenced by the lack of proof for any of his allegations. They further argue that even if the trial court was unwilling to draw a conclusion of bad faith immediately, it should have allowed the appellees the opportunity to present proof for their counterclaim. They point out that they have spent thousands of dollars in attorney's fees defending this action.

As the trial court correctly noted, attorney fees are generally not recoverable in the absence of "a specific contractual provision . . . or a fee-shifting statute[.]" *AIK Selective Self-Insurance Fund v. Minton*, 192 S.W.3d 415, 420 (Ky. 2006). Nonetheless, this Court has found no abuse of discretion when attorney's fees were awarded in a case where there was evidence of bad faith. See *Batson v. Clark*, 980 S.W.2d 566, 577 (Ky. App. 1998). "The allocation of court costs and attorney fees is entirely within the discretion of the trial court." *Tucker v. Hill*, 763 S.W.2d 144, 145 (Ky. App. 1988). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Bad faith is defined as "[d]ishonesty of belief or purpose[.]" BLACK'S LAW DICTIONARY 149 (8th ed. 2004). The trial court did not abuse its discretion in refusing to award attorney's fees and costs when it determined that Flint's actions simply did not rise to this level of misconduct.

The Opinion and Order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT/ CROSS-APPELLEE:	BRIEF FOR APPELLEE/ CROSS-APPELLANT:
Edward H. Flint, pro se Louisville, Kentucky	Dennis J. Stilger Louisville, Kentucky