

STATE OF MICHIGAN
COURT OF APPEALS

RAYMOND E. BASHAM, STATE
REPRESENTATIVE,

Plaintiff-Appellee,

v

BOARD OF TRUSTEES OF THE POLICEMEN
AND FIREMEN RETIREMENT SYSTEM OF
THE CITY OF DETROIT,

Defendant,

and

ENVIRONMENTAL DISPOSAL SYSTEMS, INC.,

Intervenor-Appellant.

UNPUBLISHED
July 15, 2004

No. 250765
Wayne Circuit Court
LC No. 01-142790-AZ

RAYMOND E. BASHAM, STATE
REPRESENTATIVE,

Plaintiff-Appellee,

v

BOARD OF TRUSTEES OF THE POLICEMEN
AND FIREMEN RETIREMENT SYSTEM OF
THE CITY OF DETROIT,

Defendant-Appellant,

and

ENVIRONMENTAL DISPOSAL SYSTEMS, INC.,

Intervenor.

No. 250767
Wayne Circuit Court
LC No. 01-142790-AZ

Before: Murphy, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant Board of Trustees of the Policemen and Firemen Retirement System of the City of Detroit (“Retirement System”) and Intervenor Environmental Disposal Systems, Inc. (“EDS”), both appeal as of right in this consolidated appeal the partial grant of summary disposition in favor of plaintiff State Representative Raymond E. Basham, regarding the disclosure of documents pertaining to investment by Retirement System in EDS pursuant to plaintiff’s Freedom of Information Act (“FOIA”)¹ request. Specifically, Retirement System and EDS argue that the trial court erred in ordering the release of documents to plaintiff containing financial and proprietary information exempt from disclosure pursuant to MCL 38.1140/. We affirm the ordered release of the videotape prospectus. However, as it is still disputed whether the tax returns or the proprietary information contained in the draw requests were previously disclosed, we remand to allow the trial court to make specific findings of fact regarding those disputed documents.

I. Facts

In February of 2001, plaintiff submitted a FOIA request to Retirement System to inspect documents pertaining to an investment with EDS. Retirement System granted plaintiff’s request in part. Plaintiff appealed the partial denial to Retirement System and resubmitted the request, the denial of which led to the current lawsuit. Retirement System contended that it was not a public body pursuant to the FOIA as it owed a fiduciary duty to its beneficiaries alone and was primarily privately funded by the contributions of its members. Retirement System also contended that the requested documents were exempt from disclosure pursuant to the Public Employee Retirement System Investment Act (“PERSIA”),² as they represented financial or propriety information as envisioned in MCL 38.1140/. EDS was permitted to intervene to protect its interest in the confidentiality of the documents.

Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(10) seeking a determination that Retirement System is a public body as defined by MCL 15.232(d) and the disclosure of the requested documents. Following an in camera inspection of the documents, the trial court granted plaintiff’s motion in part, finding Retirement System to be a public body and ordering the disclosure of forty-four of the withheld documents that did not meet the statutory definition of financial and proprietary information. The trial court ordered the disclosure of tax returns and other documents that had been previously disclosed to plaintiff.³ Retirement System was also ordered to disclose “records for request for draws of funds on behalf of” EDS from Retirement System as these draws “were of a nature ordinarily disclosed outside of the investor-investee relationship” and “were likely to be disclosed in the aggregate of the annual financial statement.”⁴ The trial court also ordered the disclosure of a videotape prospectus without

¹ MCL 15.231 *et. seq.*

² MCL 38.1132 *et seq.*

³ Opinion and Order of the Court, May 19, 2003, p 4. EDS denies that its tax returns were disclosed to plaintiff.

⁴ *Id.*

indicating its reason for the record.⁵ After the trial court denied Retirement System and EDS's request for reconsideration, both filed claims of appeal which have been consolidated.

II. Legal Analysis

This Court reviews a trial court's determination regarding a motion for summary disposition de novo.⁶ A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim.⁷ "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in the light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists."⁸ Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law."⁹ Whether a statutory FOIA exception applies to preclude disclosure of a public record is a mixed question of fact and law.¹⁰ We review a trial court's findings of fact for clear error and conclusions of law de novo.¹¹

This Court has previously found Retirement System to be a public body. In *Detroit News, Inc v Policemen & Firemen Retirement System of the City of Detroit*, this Court found that Retirement System "is a municipally chartered pension system whose purpose is to provide retirement allowances and death benefits for policemen and firemen."¹² This finding is consistent with the statutory definition of a public body.¹³ Despite being provided the opportunity by the trial court, neither Retirement System nor EDS presented evidence to dispute that Retirement System was created by state or local authority. As Retirement System and EDS failed to "set forth specific facts at the time of the motion showing a genuine issue for trial,"¹⁴

⁵ *Id.* at 5.

⁶ *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

⁷ *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).

⁸ *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).

⁹ *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

¹⁰ *Detroit News, Inc v Policemen & Firemen Retirement System of the City of Detroit*, 252 Mich App 59, 67; 651 NW2d 127 (2002), citing *Messenger v Dep't of Consumer & Industry Services*, 238 Mich App 524, 530-531; 606 NW2d 38 (1999).

¹¹ MCR 2.613(C); *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

¹² *Detroit News, Inc*, *supra* at 69, citing *Woods v Bd of Trustees of the Policemen & Firemen Retirement System of the City of Detroit*, 108 Mich App 38, 40; 310 NW2d 39 (1981).

¹³ The statutory definition of public body includes "Any other body which is created by state or local authority or which is primarily funded by or through state or local authority." MCL 15.232(d)(iv).

¹⁴ MCR 2.116(G)(4); *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

the trial court correctly ruled, based on its origination through the city of Detroit charter, that Retirement System is a public body pursuant to MCL 15.232(d)(iv).

As a public body, Retirement System's records are presumptively subject to FOIA disclosure. "[T]he FOIA is a prodisclosure statute, and the exemptions . . . are narrowly construed."¹⁵ A public body must disclose all public records that are not specifically exempt under the Act.¹⁶ A public body may also withhold records specifically exempted from disclosure by other statutes.¹⁷ If a public body declines to disclose a requested document, the public body bears the burden of proof that the refusal to produce was justified.¹⁸ At issue in this case is whether the documents ordered to be disclosed are exempt financial and proprietary information pursuant to MCL 38.1140l.

MCL 38.1140l provides:

(1) A record or portion of a record, material, or other data received, prepared, used, or retained by an investment fiduciary in connection with the investment of assets of a system that relates to financial or proprietary information pertaining to a portfolio company in real estate or alternative investments in which the investment fiduciary has invested or has considered an investment that is considered by the portfolio company and acknowledged by the investment fiduciary as confidential; or that relates to financial or proprietary information whether prepared by or for the investment fiduciary regarding loans and assets directly owned by the investment fiduciary and acknowledged by the investment fiduciary as confidential is not subject to the disclosure requirements of the freedom of information act, Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws.

(2) A document to which the investment fiduciary is a party evidencing an investment is not considered financial or proprietary information that may be exempt from disclosure pursuant to subsection (1).

(3) As used in this section, "financial or proprietary information" means information that has not been publicly disseminated or that is unavailable from other sources, the release of which might cause the portfolio company or the investment fiduciary significant competitive harm. Financial or proprietary information includes but is not limited to financial performance data and

¹⁵ *Herald Co v Bay City*, 463 Mich 111, 119; 614 NW2d 873 (2000).

¹⁶ MCL 15.233(1).

¹⁷ *Detroit News, Inc*, *supra* at 72, quoting MCL 15.243(1)(d).

¹⁸ *Connoisseur Communication of Flint, LP v Univ of Michigan*, 230 Mich App 732, 734; 584 NW2d 647 (1998).

projections, financial statements, list of coinvestors and their level of investment, product and market data, rent rolls, and leases.^[19]

MCL 38.1140l was enacted in 1996,²⁰ as part of the Legislature's plan to update the capabilities of public retirement systems to invest in a modern market.²¹ The investment opportunities of public retirement systems were broadened. The Legislature enacted the FOIA-exemption provision to protect the confidential documents of private entities dealing with public systems to encourage such transactions.²²

The Board of Trustees is the investment fiduciary for the Retirement System. EDS expected the information it shared with Retirement System in connection with the current investment to remain confidential, an understanding shared by the Board of Trustees. Furthermore, we concur that the revelation of such information might place EDS or the Retirement System at a competitive disadvantage.

We first note that the trial court properly ordered the disclosure of the video prospectus. Although the trial court failed to indicate the specific reason for ordering the disclosure of this document for the record,²³ a prospectus simply does not meet the statutory definition of exempt financial or proprietary information. A prospectus is a *published* document regarding the *public* sale of stock.²⁴ It is "[t]he principal document of a registration statement required by law to be furnished an investor prior to any purchase."²⁵ A prospectus is by definition, therefore, a document that has been publicly disseminated. Furthermore, EDS and the Retirement System conceded at oral arguments that the video prospectus is not exempt from disclosure.

Our concern lies with the ordered release of documents which are, potentially, protected proprietary information. EDS's tax returns and the draw requests contain financial and proprietary information, the disclosure of which could cause EDS or the Retirement System competitive harm. Although the trial court noted that the tax returns had already been disclosed to plaintiff, EDS still denies this fact. Furthermore, it is unclear from the record that the information provided in the draw requests is actually available from another source. The draw requests contain specific information regarding the source of funds. However, the annual report appears only to release the aggregate amount of draws requested by EDS.

¹⁹ MCL 38.1140l.

²⁰ 1965 PA 314, § 21, as added by 1996 PA 485.

²¹ See House Legislative Analysis, HB 5925, January 9, 1997.

²² See *id.* at 5-7.

²³ See *Post-Newsweek Stations, Michigan, Inc v Detroit*, 179 Mich App 331, 335; 445 NW2d 529 (1989).

²⁴ Black's Law Dictionary (6th ed).

²⁵ *Id.*

Because of the potential release of confidential proprietary information, we remand to the trial court to make very specific findings of fact regarding the disputed tax returns and draw requests. If the trial court determines upon further review that a document has not been previously released, it must exempt that document from disclosure. However, we affirm the ordered release of the videotape prospectus. We retain jurisdiction.

/s/ William B. Murphy

/s/ Kathleen Jansen

/s/ Jessica R. Cooper