STATE OF MICHIGAN

COURT OF APPEALS

DEREK MYERSCOUGH,

Plaintiff-Appellant,

v

CHIPPEWA COUNTY BOARD OF COMMISSIONERS,

Defendant-Appellee.

UNPUBLISHED
October 20, 2009

No. 288076
Chippewa Circuit Court
LC No. 08-009739-CZ

Before: Hoekstra, P.J., and Bandstra and Servitto, JJ.

PER CURIAM.

In this action alleging violations of the Open Meetings Act (OMA), MCL 15.261 *et seq.*, plaintiff Derek Myerscough appeals as of right the trial court's order denying his motion for summary disposition and granting the summary disposition motion of defendant Chippewa County Board of Commissioners (the Board). Because we conclude that Myerscough has not shown that the trial court erred in determining that he did not have standing or that the trial court abused its discretion in denying injunctive relief, we affirm.

I. Facts and Procedural History

Myerscough, a resident of Chippewa County and the Sugar Island Township supervisor, attended the January 22, 2008 special meeting of the Board. According to the meeting agenda, the Board planned to discuss the proposed addition to the county jail. The agenda did not list a time for public comment.

At the meeting, the Board discussed the construction bids submitted by Gundlach Champion and DeVeres Construction for the jail addition. The bid submitted by DeVeres Construction was approximately $80,000 less than the bid submitted by Gundlach Champion. During the discussion, a commissioner made negative comments about DeVeres Construction. Dick Crittenden, a representative of DeVeres Construction, raised his hand to respond to the comments. Commissioner Earl Kay, chairman of the Board, informed Crittenden and the other members of the public in attendance that there would be no time for public comment. The Board then awarded the construction contract for the jail addition to Gundlach Champion. According to Myerscough, if the Board had allowed a time for public comment, he would have spoken. From comments he heard, Myerscough firmly believed that other members of the public would also have spoken.

The Board also held meetings on January 29 and 31, 2008. The public notice for the meetings, which was posted inside the county courthouse, stated that the "County Board" was holding meetings for "Administrator Interviews." The notice did not list an address or telephone number for the "County Board"; it also did not indicate a time for public comment at the meetings. Myerscough attended the January 29 and 31 meetings. At the January 29 meeting, there was no "call to order" or "adoption of agenda." At the January 31 meeting, Kay announced that there would be no time for public comment because the meeting was not a public meeting. According to Myerscough, if there had been a time for public comment, he would have spoken.

A few days after the January 29 meeting, Myerscough went to the county clerk's office to obtain a copy of the "official minutes" of the meeting. According to Myerscough, he was told by the county clerk that "official minutes" of the meeting did not exist because none were created.

The Board met again on February 13, 2008, and Myerscough attended the meeting. At the meeting, Kay announced that a time for public comment had been omitted from the agenda for the January 22 meeting, and he apologized for the omission. Kay asked if anyone who attended the January 22 meeting would like to make a comment. Myerscough did not make a comment. Kay also apologized for the Board not allowing public comment at "the [a]dministrator's interview session." He explained that legal counsel had informed the Board that the "interview session" had been a public meeting, "even though there was no call to order, roll call or minutes taken," and that public comment should have been allowed. Again, Kay asked whether anyone who attended the "interview session" would like to make a comment. Myerscough made no comment.[1]

On February 22, 2008, Myerscough sued the Board, claiming numerous violations of the OMA with respect to the January 22, 29, and 31 meetings. Regarding the January 22 meeting, Myerscough claimed that the Board violated the OMA when it did not allow for public comment. Regarding the January 29 meeting, Myerscough claimed that the meeting was not convened and administered in compliance with the OMA because (1) the notice did not comply with the OMA notice requirements, (2) there was no call to order, adoption of agenda, and adjournment of the meeting, and (3) there were no minutes made of the meeting. Regarding the January 31 meeting, Myerscough claimed that the Board violated the OMA when it declared that the OMA did not apply and that it would not allow a time for public comment. Myerscough requested the trial court to declare that on January 22, 29, and 31 2008, the Board held public meetings that violated the OMA, to award him costs and attorney fees, and to enjoin the Board from further violations of the OMA.

Myerscough then moved for summary disposition pursuant to MCR 2.116(C)(10). He claimed that, based on the uncontested facts, it was not debatable that the Board violated the OMA. First, contrary to MCL 15.263(5), the Board did not allow for public comment at the January 22 and 31 meetings. Second, contrary to MCL 15.264, the public notice for the January 29 and 31 meetings did not provide the Board's name, address, or telephone number. In

[1] Myerscough did comment at the February 13 meeting about the "buying of vehicles at EUP Transpo Authority."

addition, Myerscough stated that, because the notice was only posted inside the county courthouse, the public was only able to view the notice during certain hours, and, therefore, it was unlikely that members of the public who worked during the day were able to read the notice. According to Myerscough, there was a simple solution: to require the Board to post all notices on the inside of the courthouse's glass doors so that the notices could be read at any time. Third, contrary to MCL 15.269, the Board did not keep, or even create, "official minutes" of the January 29 meeting. Myerscough sought an order declaring that (1) the public notice posted by the Board for the January 29 and 31 meetings failed to comply with the notice requirements contained in the OMA, (2) the Board violated the OMA for refusing to allow public comment at the January 22 and 31 meetings, and (3) the Board violated the OMA for failing to ensure that minutes of the January 29 meeting were created and approved. Myerscough also claimed that an injunction prohibiting the Board from further violations of the OMA was necessary.

In response, the Board moved for summary disposition pursuant to MCR 2.116(I)(2). It claimed that even though MCL 15.271 authorized "a person" to file a civil action to compel compliance with the OMA, a person does not have standing to bring an OMA action unless the person can satisfy the three standing requirements articulated in *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004), including the requirement that the person suffered a particularized injury distinct from that of the public. The Board claimed that Myerscough did not suffer a particularized injury when it did not allow public comment at the January 22 and 31 meetings because all members of the public were denied the opportunity to make a public comment. It noted that Myerscough never identified what comments he would have made and that he chose not to make a comment when the Board offered the opportunity for public comment at the February 13 meeting. The Board also claimed that Myerscough failed to allege any injury to him based on the alleged defective notice because Myerscough attended the meetings. In addition, the Board claimed that Myerscough failed to allege any injury to him based on its failure to provide him with "official minutes." It explained that the county clerk prepared minutes of the January 29 and 31 meetings, and while it never approved the minutes, Myerscough never explained how he was injured by the Board's failure to approve the minutes.

In the alternative, the Board argued that, even if Myerscough did have standing, he was not entitled to injunctive relief. As evidenced by the minutes of the February 13, 2008 meeting, it was aware that it must accept public comment at all public meetings, and Myerscough did not set forth any facts to conclude that it would deliberately fail to comply with the requirement in the future. It also explained that there was no danger of irreparable harm if it did not post its notices in the manner requested by Myerscough because Myerscough did not present any evidence to suggest that any member of the public did not have the opportunity to read any posted notice. It further claimed that there was no real and imminent danger of irreparable harm for its alleged failure to create and approve minutes of the January 29, 2008 meeting. It explained that the county clerk created minutes of the meeting and that Myerscough, through counsel, received a copy of the minutes.[2]

[2] The minutes were attached to the Board's pretrial statement.

In response to the Board's claim that he was required to satisfy the standing requirements articulated in *Nat'l Wildlife Federation*, Myerscough asserted that the Board's argument contradicted the clear language of MCL 15.271, which clearly authorizes "a person" to bring an OMA action. In addition, Myerscough claimed that *Nat'l Wildlife Federation* was distinguishable because it involved environmental claims. Regardless, Myerscough claimed that he did suffer an injury in fact, the denial of the right to make a public comment, and that the Board acknowledged the injury when it gave him the opportunity to make a comment at the February 13 meeting.

The trial court granted summary disposition to the Board. It held that the standing requirements articulated in *Nat'l Wildlife Federation* applied to actions brought pursuant to the OMA. According to the trial court, Myerscough did not have standing to bring the claim that the Board violated the OMA for failing to provide public comment at the January 22 and 31 meetings. It reasoned that Myerscough did not suffer a particularized injury because all members of the public were denied the right to make a public comment. It also reasoned that, even if Myerscough did suffer a particularized injury, a favorable decision was not likely to redress the injury because the Board corrected its error of denying opportunities for public comment at the February 13 meeting and because the Board has conformed its practices to comply with the OMA. The trial court also held that Myerscough did not suffer any concrete and particularized injury due to any defect in the posted notice for the January 29 and 31 meetings because Myerscough had attended the meetings. It also noted that, while it would be preferable for the Board to post its notices on the inside of a glass pane near the doors of the courthouse, such action was not required by the OMA. The trial court further found that because the Board submitted a copy of the minutes of the January 29 meeting, Myerscough's claim that the Board failed to keep minutes of the meeting was without substance. Finally, the trial court held that, even if Myerscough had standing, Myerscough was not entitled to injunctive relief because there was no danger of irreparable injury.

II. Standards of Review

We review de novo a trial court's decision on a motion for summary disposition. *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 686; 762 NW2d 529 (2008). Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 687. A court may grant summary disposition to the opposing party under MCR 2.116(I)(2) if it determines that the opposing party, rather than the moving party, is entitled to judgment. *Washburn v Michailoff*, 240 Mich App 669, 672; 613 NW2d 405 (2000). We also review de novo the issue whether a party has standing. *Gyarmati v Bielfield*, 245 Mich App 602, 604; 629 NW2d 93 (2001).

We review a trial court's decision to deny injunctive relief for an abuse of discretion. *Taylor v Currie*, 277 Mich App 85, 93; 743 NW2d 571 (2007). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Id.*

III. Analysis

On appeal, Myerscough argues that because the OMA authorizes "a person" to file a civil action, the trial court erred in holding that he must satisfy the standing requirements articulated

in *Nat'l Wildlife Federation*. Myerscough further argues that, even if a person filing suit under the OMA is required to establish that he suffered an injury in fact, he did suffer a particularized injury when he was not allowed to speak at the January 22 and 31 meetings. Finally, Myerscough argues that the trial court erred in not granting injunctive relief.

A. Standing

Our Constitution vests the state's "judicial power" in the courts, Const 1963, art 6, § 1, and directs that the powers of the three branches of government be separate, Const 1963, art 3, § 2. *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 737; 629 NW2d 900 (2001). The doctrine of standing ensures that the judiciary does not usurp the tasks assigned to the executive and legislative branches. *Id.* at 735-737. In *Lee*, our Supreme Court adopted a three-part test, previously enunciated by the United States Supreme Court, that a person must meet to establish standing. *Id.* at 740.

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural" or 'hypothetical'." Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."
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> The party invoking . . . jurisdiction bears the burden of establishing these elements. [*Id.* at 739-740, quoting *Lujan v Defenders of Wildlife*, 504 US 555, 560-561; 112 S Ct 2130; 119 L Ed 2d 351 (1992).]

The three requirements "establish[] the 'irreducible constitutional minimum' of standing." *Id.* at 740, quoting *Lujan*, *supra* at 560.

Myerscough argues that because the Legislature has authorized any person to bring a civil action to compel a public body to comply with the OMA, the trial court erred in concluding that a person cannot bring such an action unless the person satisfies the standing requirements articulated in *Lee*. We disagree.

MCL 15.271(1) provides:

> If a public body is not complying with this act, the attorney general, prosecuting attorney of the county in which the public body serves, *or a person* may commence a civil action to compel compliance or to enjoin further noncompliance with this act." [Emphasis added].

If a statute is unambiguous, the Legislature is assumed to have intended the meaning expressed. *New Properties, Inc v George D Newpower, Jr, Inc*, 282 Mich App 120, 136; 762 NW2d 178 (2009). Giving the phrase "a person," its plain and ordinary meaning, *Wolfe-Haddad Estate v Oakland Co*, 272 Mich App 323, 325; 725 NW2d 80 (2006), we agree with Myerscough that the Legislature intended to authorize any person to commence a civil action to compel a public

body's compliance with the OMA or to enjoin further noncompliance. It is true that an unambiguous statute is to be enforced as written. *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 174; 730 NW2d 722 (2007).

However, the Legislature may not confer standing to persons who do not meet the three constitutional standing requirements articulated in *Lee*. *Miller v Allstate Ins Co*, 481 Mich 601, 607; 751 NW2d 463 (2008); *Rohde v Ann Arbor Pub Schools*, 479 Mich 336, 350; 737 NW2d 158 (2007); *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc*, 479 Mich 280, 302-303; 737 NW2d 447 (2007); *Nat'l Wildlife Federation*, *supra* at 612-628. The Legislature encroaches on the separation of powers when it attempts to confer standing to persons who do not meet the *Lee* standing requirements, *Miller*, *supra* at 607, and a statute is unconstitutional to the extent that it confers standing to persons who do not meet the *Lee* requirements, *Rohde*, *supra* at 340, 355. Accordingly, the trial court did not err in holding that Myerscough did not have standing to maintain the present action unless Myerscough could satisfy the *Lee* standing requirements.

Myerscough argues that the trial court erred in holding that he did not have to satisfy the *Lee* standing requirements because he suffered a particularized injury when he was not allowed to make a public comment at the January 22 and 31 meetings.[3] We agree that Myerscough suffered an injury particularized to him.

To have standing, a plaintiff must have suffered an "injury in fact." *Lee*, *supra* at 739. The injury must be "particularized" to the plaintiff, meaning that the plaintiff "suffered an injury distinct from that of the public generally." *Nat'l Wildlife Federation*, *supra* at 615.

MCL 15.263(5) provides that "[a] person shall be permitted to address a meeting of a public body under rules established and recorded by the public body. . . ." At the January 22 and 31 meetings, the Board, contrary to MCL 15.623(5), did not allow any members of the public who were at the meetings to speak. Myerscough attended both meetings and claims that, had the Board afforded the opportunity for public comment, he would have spoken. Accordingly, Myerscough suffered an injury—he was denied his right to address the Board at the January 22 and 31 meetings—and the injury was particularized to him. Although Crittenden and others who attended the meetings may have suffered the same injury, the injury was distinct from that suffered by the general public. The injury suffered by Myerscough was only suffered by those who attended the meetings and desired to make a public comment. The trial court erred in holding that Myerscough did not suffer an injury in fact.

However, the trial court also held that Myerscough did not have standing because Myerscough failed to satisfy the third standing requirement, that it is likely that his injury will be redressed by a favorable decision. Myerscough makes no argument on appeal that the trial court erred in reaching this conclusion. Accordingly, Myerscough has failed to establish that the trial

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[3] On appeal, Myerscough does not contest the trial court's holding that he did not suffer a concrete and particularized injury regarding the public notice for the January 29 and 31 meetings.

court erred in holding that he did not have standing to maintain the present action. See *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004) ("When an appellant fails to dispute the basis of the trial court's ruling, this Court . . . need not even consider granting plaintiffs the relief they seek.") (quotation and alteration omitted).

B. Injunctive Relief

Nonetheless, even if we were to conclude that Myerscough met the *Lee* standing requirements, we would not conclude that the trial court abused its discretion in denying his request for injunctive relief.

"Injunctive relief is an extraordinary remedy that courts normally grant only when (1) justice requires it, (2) there is no adequate remedy at law, and (3) there exists a real and imminent danger of irreparable injury." *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 106; 662 NW2d 387 (2003) (quotation omitted). Consequently, "[m]erely because a violation of the OMA has occurred does not automatically mean that an injunction must issue restraining the public body from using the violative procedure in the future." *Nicholas v Meridian Charter Twp Bd*, 239 Mich App 525, 533; 609 NW2d 574 (2000). Injunctive relief is not warranted where the public body has addressed its OMA violations and no similar incidents have occurred or where there is no reason to believe that the public body will deliberately fail to comply with the OMA in the future. *Id.* at 534.

Here, the Board is aware of the requirement that, pursuant to MCL 15.263(5), it must allow a time for public comment at its meetings. There is no evidence in the record establishing that, at any meeting subsequent to the February 13 meeting, the Board has not allowed an opportunity for public comment. There is also no evidence to suggest that the Board will deliberately fail to comply with MCL 15.263(5) at any time in the future. Under these circumstances, we would not conclude that the trial court abused its discretion in denying Myerscough's request for injunctive relief.[4]

Affirmed.

/s/ Joel P. Hoekstra
/s/ Richard A. Bandstra
/s/ Deborah A. Servitto

[4] Myerscough does not contest the trial court's holding that there was no substance to his claim that the Board did not keep minutes for the January 29 meeting. Accordingly, we do not address the propriety of the court's holding.