FILED BY CLERK
OCT 29 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

SHIRLEY RAE WEILER, Intervenor-Plaintiff/Appellee, v. TED GULICK, Defendant/Appellant.	)	2 CA-CV 2010-0060 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CV200600527

Honorable Charles A. Irwin, Judge

AFFIRMED

Ted Gulick
Wilcox
In Propria Persona

Snell & Wilmer, L.L.P.
By William N. Poorten, III and Joseph A. Kroeger
Tucson
Attorneys for Intervenor-Plaintiff/Appellee

E S P I N O S A, Judge.

¶1 Ted Gulick appeals the trial court's entry of partial summary judgment in favor of Yucca Hills Homeowners Association (YHHA), Roger and Vicki Dirling,

Robert and Marie Miller, and Shirley Weiler,[1] voiding a deed transferring to Gulick and his wife a well owned by YHHA.[2] We affirm.

Factual and Procedural History

¶2 When reviewing a grant of summary judgment, we view the facts in the light most favorable to the party opposing summary judgment.[3] *See Lowe v. Pima County*, 217 Ariz. 642, ¶ 29, 177 P.3d 1214, 1221 (App. 2008). The YHHA is a homeowners association whose sole purpose is to "own[] and operat[e] a water delivery system for the benefit of" of its members. In July 2006, the Dirlings and Millers sued the Gulicks, who were directors and officers of YHHA, and Joan Henry, its director and president, after Henry conveyed to the Gulicks YHHA's well. In their complaint, they challenged the legal effect of the quitclaim deed purporting to transfer the well to the Gulicks, asserting among other claims, fraud, racketeering, and breach of fiduciary duty,

---

[1]Although YHHA, the Dirlings, the Millers, and Weiler all participated in the litigation below, only Weiler is participating as a party on appeal. Anita Gulick also participated in the litigation below, but has failed to file a brief on appeal. To the extent Ted Gulick's briefs purport to represent her, such representation is inappropriate as he is a non-attorney representing himself and she did not sign the briefs. Accordingly, Anita Gulick is a non-party to this appeal and we summarily affirm the judgment against her.

[2]Gulick's notice of appeal pertains only to the trial court's August 4, 2009 entry of partial summary judgment. Nevertheless, in his opening brief, he presents a number of issues not related to this ruling. As Weiler correctly notes, we lack jurisdiction to address matters not contained in the notice of appeal. *See Wendling v. Sw. Sav. & Loan Ass'n*, 143 Ariz. 599, 601, 694 P.2d 1213, 1215 (App. 1984). Accordingly, we disregard these arguments.

[3]Weiler has requested that this court strike portions of Gulick's opening brief based on his failure to cite the record on appeal. Although we would be justified in doing so, *see* Ariz. R. Civ. App. P. 13(a)(4); *Gravel Res. of Ariz. v. Hills*, 217 Ariz. 33, ¶ 8, 170 P.3d 282, 285 (App. 2007), in our discretion, we decline. We draw all facts on appeal, however, from the record and Weiler's answering brief.

and sought punitive damages as well as a declaration that the quitclaim deed was void or voidable. Protracted litigation ensued for nearly three years, culminating in the intervention of YHHA and Weiler as plaintiffs as well as the revelation that Henry suffered from serious mental health problems that led to her being declared incompetent after she had recorded the quitclaim deed.[4]

¶3 In May 2009, YHHA filed its motion for summary judgment, contending the transfer to the Gulicks was invalid for lack of YHHA board authorization and lack of consideration; it also alleged the Gulicks had breached their fiduciary duties and were liable for compensatory and punitive damages. Following a hearing that the Gulicks did not attend,[5] the court granted YHHA partial summary judgment, concluding the transfer was invalid for lack of board authorization and that "the primary purpose [of YHHA] was being controverted by the transfer."[6] Following entry of the court's final judgment pursuant to Rule 54(b), Ariz. R. Civ. P., Gulick filed his notice of appeal and the

[4]The plaintiffs subsequently amended their complaint to allege the Gulicks had exploited Henry, a vulnerable person, in order to obtain the well. Henry, through her guardian, filed a cross-claim against the Gulicks in which she sought damages caused by their alleged exploitation, including her being named as a defendant in and forcing her to defend against the plaintiffs' lawsuit.

[5]The Gulicks had filed a motion for a continuance of this hearing, which the court denied, finding it both untimely and unsupported. Notwithstanding their failure to attend the hearing, Gulick claims the minute entry of this proceeding is somehow inaccurate.

[6]Finding disputed issues of material fact, the trial court denied summary judgment on YHHA's allegations that the transfer was without consideration and that the Gulicks had breached their fiduciary duties.

plaintiffs voluntarily dismissed with prejudice their remaining claims. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and -2101(B).

Discussion

¶4 "Summary judgment is appropriate 'if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.'" *Tarron v. Bowen Mach. & Fabric., Inc.*, 225 Ariz. 147, ¶ 15, 235 P.3d 1030, 1034 (2010), *quoting Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, ¶ 14, 38 P.3d 12, 20 (2002). Neither party has alleged any disputed facts relevant to the court's entry of summary judgment, and our review of the record reveals none. Accordingly, we consider only whether the court properly applied the law. *See In re Search Warrant No. 08 SW 1417*, 224 Ariz. 505, ¶ 7, 233 P.3d 618, 619 (App. 2010) (when facts undisputed, summary judgment reviewed for application of law). And we review its conclusions of law de novo. *See Premiere RV & Mini Storage LLC v. Maricopa County*, 222 Ariz. 440, ¶ 11, 215 P.3d 1121, 1124 (App. 2009).

Standing

¶5 As a preliminary matter, we address Gulick's contention that the summary judgment must be reversed because the Dirlings and Millers had no standing to sue on behalf of YHHA, having had their voting rights in the YHHA terminated before the well was transferred to the Gulicks. *See Baier v. Mayer Unified Sch. Dist.*, 224 Ariz. 433, ¶¶ 14-15, 232 P.3d 747, 752 (App. 2010) (standing to initiate action "threshold matter" on appeal). Although "[w]hether a party has standing to sue is a question of law we review de novo," *id.* ¶ 15, "[t]he issue of standing is not jurisdictional in Arizona but,

rather, 'solely a rule of judicial restraint,'" *City of Tucson v. Pima County*, 199 Ariz. 509, ¶ 11, 19 P.3d 650, 655 (App. 2001), *quoting City of Tucson v. Woods*, 191 Ariz. 523, 526 n.2, 959 P.2d 394, 397 n.2 (App. 1997). To have standing, a party needs only a "'direct stake' in the outcome of the case." *City of Tucson*, 199 Ariz. 509, ¶ 11, 19 P.3d at 655, *quoting Woods*, 191 Ariz. at 526, 959 P.2d at 397.

¶6 Gulick's standing argument lacks merit. Although only voting members of a corporation can maintain a derivative lawsuit, *see* A.R.S. § 10-3631(B), Gulick ignores that both Weiler, a voting member, and YHHA had intervened in the lawsuit. *See* A.R.S. § 10-304(B)(2) (corporation may directly challenge validity of its actions). YHHA sought the summary judgment from which Gulick now appeals and only Weiler is a party to the appeal. Moreover, even if the Millers' and the Dirlings' standing was necessary to maintain this appeal, we readily could conclude they had the requisite direct stake in the outcome of the case as owners of property dependent on the well. *See Funk v. Spalding*, 74 Ariz. 219, 223, 246 P.2d 184, 186 (1952) (action personal and not derivative when based on right belonging to or fraud affecting plaintiff directly).

Summary Judgment

¶7 Gulick disputes the trial court's conclusions that the transfer of the well was void as a matter of law because it was not authorized by YHHA's board of directors and was contradictory to the corporation's purpose, and, in any event, was not accomplished in a manner consistent with the requirements of YHHA's bylaws. Citing no authority and relying solely on his own interpretations of Title 10, A.R.S., and YHHA's Articles of Incorporation, Gulick maintains that, as directors of YHHA, the Gulicks and Henry had

unfettered power to authorize any action, including those that abrogated the purpose of the YHHA, and to disregard any procedures and requirements outlined in the Articles and Bylaws.

¶8 We may uphold the trial court's entry of summary judgment if it was correct for any reason supported by the record. *See Sanchez v. Tucson Orthopaedic Inst.*, 220 Ariz. 37, ¶ 7, 202 P.3d 502, 504 (App. 2008). Accordingly, to affirm the court's ruling, we need only confirm that any of the alternate bases on which it granted the motion for summary judgment was legally correct. *Id*. We do so based on the court's conclusion that the deed purporting to transfer the well to the Gulicks was invalid based on noncompliance with YHHA's bylaws. As Weiler points out, this fact "standing alone, is fatal to [Gulick's] appeal."

¶9 A corporation's activities are governed by its articles of incorporation and bylaws. *See* A.R.S. §§ 10-3140(6), (9); 10-206. And officers of the corporation must perform their duties in a manner consistent with the bylaws. *See* § 10-3140(9). YHHA's bylaws set forth procedures by which its officers may "execute and deliver any instrument in the name of and on behalf of the corporation." Specifically, officers may only execute such instruments upon authorization of the board of directors. Here, the quitclaim deed purporting to transfer the well from YHHA to the Gulicks was signed only by Henry and the record contains no evidence her action had been authorized by the

directors.[7] Therefore, this transfer clearly violated the YHHA's bylaws and therefore was void. *See Trico Elec. Coop., Inc. v. Corp. Comm'n of Ariz.*, 86 Ariz. 27, 37, 339 P.2d 1046, 1053 (1959) (actions outside scope of corporate authorization "ultra vires and void").

¶10 Gulick nevertheless maintains that a showing of board authorization of this transaction is unnecessary because the Gulicks were two of the three corporate directors and it would be illogical to presume they would not have authorized the transaction. However, even if we could so infer authorization of the transfer, that would not cure the defect in the quitclaim deed, which was signed by only one person in contravention of Article 5, Section 5 of the YHHA bylaws, which requires the signature of the president as well as the secretary "or any other proper officer of the corporation." Moreover, board authorization of such a transfer would be insufficient to validate it. Notwithstanding any effect of the transfer constituting a transaction by a director with a conflicting interest, *see* A.R.S. §§ 10-3860 through 10-3864, a board of directors has no authority to dispose of corporate assets not in the course of regular business without member approval and a public hearing. *See* A.R.S. § 10-11202(B), (H), (I). No reasonable person could conclude that this transaction was in the corporation's regular course of business given that the transfer of the well was contrary to the sole stated purpose of YHHA: to possess

[7]The trial court did not address the legal implications of Henry's actions in light of the fact that, after the deed was executed, she was found to be mentally incompetent and evidence in the record suggested that she was, in fact, incompetent at the time the deed was executed. Because we find the transfer invalid for lack of proper authorization, we similarly need not address this issue.

and maintain a well for the benefit of landowner members. Accordingly, approval of the voting members of YHHA and a public hearing would have been necessary. *See* § 10-11202(B), (H), (I); *see also Creed v. State Equip. & Supply, Inc.*, 84 Ariz. 152, 157-58, 325 P.2d 408, 411 (1958) (director of corporation may not use board dominance to liquidate assets for personal gain and to detriment of corporation); *Thayer v. Valley Bank*, 35 Ariz. 238, 243, 276 P. 526, 527 (1929) (directors cannot authorize sale that would "'have the effect of thwarting the purposes'" for which corporation was established), *quoting Lange v. Reservation Mining & Smelting Co.*, 93 P. 208, 209 (Wash. 1908).

Disposition

¶11 The trial court's entry of partial summary judgment is affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge