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IN THE
COURT OF APPEALS OF INDIANA

LORI ENGLE, KURT VOGEL, and DAVID HUELSTER, on their own behalf and on behalf of other concerned homeowners of Foxcliff Estates South,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 55A01-0702-CV-93
FOXCLIFF ESTATES SOUTH HOMEOWNERS ASSOCIATION, INC.,	)	
Appellee-Defendant.	)	

APPEAL FROM THE MORGAN SUPERIOR COURT
The Honorable Christopher L. Burnham, Judge
Cause No. 55D02-0609-PL-328

December 12, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Lori Engle, Kurt Vogel, and David Huelster, on their behalf and on behalf of other homeowners of Foxcliff Estates South ("the Homeowners") appeal the trial court's grant of judgment on the pleadings in their action for a mandatory injunction against Foxcliff Estates South Homeowners Association, Inc. ("the HOA"). They raise three issues, which we consolidate and restate as:

I. Whether the trial court erred when it denied the Homeowners' request to treat the HOA's motion for judgment on the pleadings as a Trial Rule 12(B)(6) motion for failure to state a claim upon which relief may be granted; and

II. Whether the Indiana Not-for-Profit Act overrides certain provisions of the HOA's Articles of Incorporation and By-Laws with respect to removing and replacing members of the Board of Directors.

We affirm.

FACTS AND PROCEDURAL HISTORY

The HOA is a neighborhood homeowners association for Foxcliff Estates South, a residential community located in Martinsville, Indiana. The HOA is organized as a not-for-profit corporation under the statutes of Indiana. The Homeowners own real estate within Foxcliff Estates South, and by virtue of their ownership, they are members of the HOA. The HOA is governed by its Articles of Incorporation and its Amended and Restated By-Laws. Article III, Section 3.2 of the By-Laws provides that a special meeting of the members of the HOA may be called by a petition in writing signed by not less than one-tenth of all members authorized to vote with respect to the subject matter to be discussed at such special meeting. *Appellants' App*. at 72.

On April 19, 2006, the Homeowners presented a written demand for a special meeting to the HOA. The written demand was accompanied by a petition signed by the owners of one hundred lots within Foxcliff Estates South, demanding a special meeting of the HOA for the purpose of voting on the removal of five named directors of the HOA and an election to replace any removed directors. After receiving the Homeowners' demand, the HOA replied, agreeing to hold a special meeting as requested, but disagreeing that the Homeowners had any authority to vote for removal of the directors of the HOA at the special meeting.

On September 12, 2006, the Homeowners filed a "Petition for Mandatory Injunction," which requested the trial court to order the HOA to hold a special meeting for the purpose of removing the existing HOA Board of Directors and replacing any directors removed. The HOA filed a motion for judgment on the pleadings, and after a hearing, the trial court entered a ruling granting the Homeowners' request for a special meeting, but denying that it could be held for the purpose of removing the directors and replacing any directors who were removed. *See Appellants' App*. at 5-9. The Homeowners now appeal.

DISCUSSION AND DECISION

I. Treatment of Motion

The Homeowners argue that the trial court erred when it denied their request to treat the HOA's motion for judgment on the pleading as a Trial Rule 12(B)(6) motion for failure to state a claim upon which relief may be granted. They contend that when the HOA filed its answer and affirmative defenses, it included a defense that, "Plaintiffs' Petition fails to state a claim for which relief may be granted," *Appellants' App*. at 104, which was a 12(B)(6) defense. Because the HOA's motion for judgment on the pleadings pursuant to Trial Rule

12(C) was filed only six days after its 12(B)(6) defense, the Homeowners claim that it should have been treated the same as if the 12(B)(6) defense was raised within the 12(C) motion, and the trial court should have afforded the Homeowners ten days to replead their complaint.

Trial Rule 12(H) allows a defendant to raise a defense of failure to state a claim upon which relief may be granted "in any pleading permitted . . . or by motion for judgment in the pleadings, or at the trial on the merits." In *Gregory & Appel, Inc. v. Duck*, 459 N.E.2d 46 (Ind. Ct. App. 1984), this court rejected a claim that a 12(C) motion must necessarily be treated as a 12(B)(6) motion where the responsive pleading did not raise failure to state a claim upon which relief may be granted as a defense. *Id*. at 49. We did not agree that "a 12(C) motion which does not address the sufficiency of the complaint must, nonetheless, be treated as a 12(B)(6) motion." *Id*. However, we held that, when a 12(B)(6) defense is raised by a 12(C) motion for judgment on the pleadings, the trial court must treat the motion as a 12(B)(6) motion for failure to state a claim upon which relief may be granted and allow the non-moving party ten days to amend their complaint as a matter of right. *Id*.

Here, on November 8, 2006, the HOA filed its answer, which contained a 12(B)(6) defense of failure to state a claim upon which relief may be granted. Six days later, it filed a judgment on pleadings pursuant to Trial Rule 12(C), which did not challenge the sufficiency of the Homeowners' complaint. Therefore, the HOA's 12(C) motion was not required to be treated as a 12(B)(6) motion, and the Homeowners were not entitled to amend their complaint as a matter of right. The trial court did not err in refusing to treat the HOA's motion for judgment on the pleadings as a 12(B)(6) motion.

II. Removal of Directors

A motion for judgment on the pleadings pursuant to Indiana Trial Rule 12(C) attacks the legal sufficiency of the pleadings. *Fox Dev., Inc. v. England*, 837 N.E.2d 161, 165 (Ind. Ct. App. 2005). "The test to be applied when ruling on a Rule 12(C) motion is whether, in the light most favorable to the non-moving party and with every intendment regarded in his favor, the complaint is sufficient to constitute any valid claim." *Id*. We may only look at the pleadings, with all well-pleaded material facts alleged in the complaint taken as admitted, supplemented by any facts of which the court will take judicial notice. *Id.* We review the trial court's decision *de novo*, and we will affirm its grant of judgment on the pleadings "when it is clear from the face of the pleadings that one of the parties cannot in any way succeed under the operative facts and allegations made therein." *Id*.

The Homeowners argue that the Indiana Not-for-Profit Act creates a clear policy as to how directors in an Indiana not-for-profit corporation must be removed, which is that directors elected by the members of such corporations must be removed by the members unless otherwise provided. They contend that directors elected by the members may be removed by the directors only for specific reasons stated in the Articles of Incorporation or By-Laws, and that the HOA's Articles of Incorporation and By-Laws contain no such provision. Therefore, they believe that, under the Indiana Not-for-Profit Act and the HOA's Articles of Incorporation and By-Laws, directors may be removed by the members, and a special meeting may be held for such purpose.

IC 23-17-12-8 governs the removal of directors of a not-for-profit corporation by its members.[1] It provides that, "[m]embers may remove a director elected by the members with or without cause *unless articles of incorporation provide otherwise*." IC 23-17-12-8(a) (emphasis added). Thus, the statute constitutes a default provision that is only applicable if the Articles of Incorporation of a not-for-profit corporation do not contain contrary removal provisions. If the not-for-profit corporation chooses to provide a different method for removal of directors, it can do so through its Articles of Incorporation.

Here, Article VI, Section 6.4 of the HOA's Articles of Incorporation states:

> Removal. Any director, except for the representative designated by Newcorp pursuant to Section 6.1, may be removed with cause by the board of directors whenever three-quarters of the remaining members of such board shall vote in favor of such removal.

Appellants' App. at 62. This provision is not ambiguous and clearly constitutes a contrary provision that replaces or limits the statutory power of the members to remove a not-for-profit corporation's directors. Therefore, the HOA's Articles of Incorporation do provide a different method for the removal of directors, and IC 23-17-12-8(a) is not applicable.

This conclusion is consistent with a recent decision of this court. In *Heritage Lake Prop. Owners Ass'n, Inc. v. York*, 859 N.E.2d 763 (Ind. Ct. App. 2007), a not-for-profit corporation's by-laws granted its directors the power to remove other directors, but its articles of incorporation contained no provision regarding the removal of directors by other directors or otherwise limiting the right given to members under IC 23-17-12-8(a). *Id*. at

[1] The Homeowners contend that other statutory sections also apply to the right of members to remove directors who had been elected by members of the corporation. They believe that IC 23-17-12-9, IC 23-17-12-10, and IC 23-17-3-3 support their contention that only members may remove the directors of a not-for-

764. On appeal, this court rejected the homeowners association's argument that the language in its by-laws should be construed as denying the right given to the members under the statute and held that "because this provision exists only in a corporation's bylaws – and not in the Articles – such a provision cannot be construed as replacing or limiting the statutory power of the members to remove a corporation's directors." *Id*. at 766. It was additionally concluded, that "any provision to limit the power of members to remove directors elected by the members must be contained in the Articles as set forth in Indiana Code section 23-17-12-8(a)." *Id*.

Here, unlike *Heritage Lake*, the provision limiting or replacing the members' statutory right to remove directors in the present case was contained in the Articles of Incorporation. We conclude that because the Articles of Incorporation contained a different method for removing directors, IC 23-27-12-8(a) does not apply. The trial court did not err in granting the HOA's motion for judgment on the pleadings.

Affirmed.

ROBB, J., and BARNES, J., concur.

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profit corporation. These other statutes and sections relied on by the Homeowners are irrelevant, and only IC 23-17-12-8(a) is relevant to this inquiry.