

RENDERED: NOVEMBER 10, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001926-MR

STEPHEN H. FENLEY
AND DAVID FENLEY

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCH PERRY, JUDGE
ACTION NO. 10-CI-004658

KAMP KAIN TUCK, INC., A
KENTUCKY NONPROFIT
CORPORATION; DON ASBURY;
NORMAN BERRY; WILLIAM
BURBANK, III; JOE DAVIS;
PATRICK FLYNN; MICHAEL
GREENWELL; MERRITT MARCUS;
BEN PETER; TOM REICHARD;
PAUL TOWNSEND; JIM
WALKER; AND BILL YOUNG

APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; ACREE AND VANMETER, JUDGES.

TAYLOR, CHIEF JUDGE: Stephen H. Fenley and David Fenley bring this appeal from an October 6, 2010, summary judgment of the Jefferson Circuit Court dismissing their direct and derivative claims against Kamp Kaintuck, Inc., a Kentucky Nonprofit Corporation, Don Asbury, Norman Berry, William Burbank, III, Joe Davis, Patrick Flynn, Michael Greenwell, Merritt Marcus, Ben Peter, Tom Reichard, Paul Townsend, Jim Walker, and Bill Young (collectively referred to as appellees). We affirm.

Kamp Kaintuck, Inc., (KKI) is incorporated as a nonprofit corporation under applicable Kentucky law. KKI was registered as a voluntary private club or association and operated a fishing camp for the use of its members. Appellants were “active” members of KKI; however, their memberships were terminated by vote of the Board of Directors of KKI (Board) in May 2010.

Appellants then filed a complaint against KKI, members of the Board, and officers of KKI in the Jefferson Circuit Court. Appellants alleged numerous causes of action, including breach of fiduciary duty and breach of various statutory duties. By summary judgment, the circuit court dismissed appellants’ complaint in its entirety, thus precipitating this appeal.

Appellants contend that the circuit court erroneously rendered summary judgment dismissing their claims against appellees. For the reasons hereinafter discussed, we disagree.

Because the circuit court rendered summary judgment, we must determine whether there existed material issues of fact and whether movant was

entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). In so doing, all facts and inferences therefrom are to be viewed in a light most favorable to the nonmoving party. *Id.*

At the outset, before addressing the merits of this case, it is pertinent for us to review the procedural posture of this case. Shortly after the complaint was filed in this action, both KKI and its individual board members and officers filed motions to dismiss in the circuit court pursuant to CR 12.02. In the subsequent responses and replies filed by the parties, matters outside of the pleadings were presented to the circuit court for consideration. Pursuant to CR 12.02, the motions to dismiss were then properly treated by the circuit court as motions for summary judgment under CR 56. Included in the matters submitted to the circuit court for consideration was the affidavit of Tom Reichard, the President of KKI, in support of the respective motions. It is worthy of note that appellants did not submit a response or rebuttal affidavit to Reichard's as permitted under CR 56.03. Appellants have argued that there was no necessity to file a response or opposing affidavit because the complaint filed in this action was "verified." However, upon close review of the complaint, the Court notes that the complaint was signed by both appellants to this action, Stephen H. Fenley and David Fenley. The Court notes that the bare signatures of appellants do not constitute a sworn statement or affidavit as defined in CR 43.13. As noted therein, affidavits permitted under the Civil Rules must be sworn to or affirmed before an officer

authorized to take depositions by Civil Rule 28. Appellants' verification was not a sworn statement. Accordingly, this Court has not treated the "verified" complaint filed in this action as an affidavit or sworn statement that is a sufficient response to the affidavit of Tom Reichard considered by the circuit court in granting summary judgment in this action.¹

We now address the issues raised in this appeal. In their complaint, appellants essentially asserted the following claims:

- (1) wrongful termination of their memberships in KKI by Board members;
- (2) various common law and statutory breaches of the standard of care by KKI board members and officers;
- (3) an accounting of KKI assets; and
- (4) liquidation of KKI.

We address each seriatim and begin our analysis with the issue of whether appellants' memberships were improperly terminated by the Board.

In this Commonwealth, it is recognized that a private club or association possesses the "unfettered right to chose [sic] its own members." *Hartung v. Audubon Country Club, Inc.*, 785 S.W.2d 501, 503 (Ky. App. 1990).

Consequently, the role of the judiciary in reviewing the expulsion of a club member is generally limited to a determination of whether the club's bylaws were violated:

¹ Verification is defined in *Black's Law Dictionary* 1556 (7th ed. 1999) as "a formal declaration made in the presence of an authorized officer, such as a notary public, by which one swears to the truth of the statements in the document."

Membership creates an at-will relationship between the participating member and the association. The rules and regulations of the club expressed in the charter and bylaws govern membership, and the club is the final arbiter of all matters relating to the club-member relationship. Judicial review is limited to enforcement of the organization's own rules.

Id. at 503 (citations omitted); *see also* 14A C.J.S. *Clubs* § 14 (2011).

In this case, the record indicates that appellants were “active members of KKI.” According to KKI’s bylaws, all active members “must attend Kamp once every three years.” Section 2.A. It is undisputed that appellants did not attend Kamp once in three years and, thus, violated this requirement of Section 2.A of the bylaws. As reflected in the Board’s minutes as confirmed by the sworn affidavit of KKI President, Tom Reichard, appellants were expelled as active members for such violation of the bylaws:

The matter of the lack of by-law compliance by Stephen and David Fenley, relative to kamp and regular meeting attendance requirements, was discussed. After serious discussion it was moved, seconded, and unanimously approved to return their dues and to inform them of their termination from Kamp Kaintuck. . . .

We can discern no violation of KKI’s bylaws by the Board in its termination of appellants’ memberships. In fact, the expulsion of appellants as members directly resulted from their violations of Section 2.A of the bylaws. Consequently, the Board’s action was supported by evidence and the bylaws of KKI. We, thus, conclude that the expulsion was reasonable in light of appellants’ violation of KKI’s bylaws. *See* 14A C.J.S. *Clubs* § 14 (2011).

We next address appellants' claim related to appellees' breach of various duties. In their complaint, appellants alleged that appellees breached their fiduciary duties owed to members and breached their respective statutory duties under Kentucky Revised Statutes (KRS) 273.215 and KRS 273.229. It is generally understood that the common-law fiduciary duty owed by members of the board of directors or officers of a corporation runs directly to the corporation and the shareholders/members as a whole. 18B Am. Jur. 2d *Corporations* § 1462 (2011). Hence, a board member or officer owes no common-law fiduciary duty directly to an individual shareholder/member. *Id.* Likewise, the duties imposed upon a board member or officer under KRS 273.215 and KRS 273.229 are owed directly to the corporation and not to an individual shareholder/member. Under either the common-law fiduciary duty or the statutory duties in KRS 273.215 and 273.229, a derivative action must be maintained by a shareholder/member seeking redress for violations thereunder.

In their complaint, appellants attempted to bring a derivative action on behalf of the corporation. However, at the time the complaint was filed, none of appellants were members of KKI. We are convinced that continuing membership in a nonprofit corporation is an absolute requisite to maintaining a derivative action. As held in *Bacigalupo v. Kohlhepp*, 240 S.W.3d 155, 157 (Ky. App. 2007), “continuous ownership by a shareholder . . . [is] a necessity in order to retain standing to prosecute a derivative action.” Although *Bacigalupo* involved a for-profit corporation, we view any distinction as *de minimis* and believe a variant of

the “continuous ownership rule” is applicable in a derivative action involving a nonprofit corporation.² Because it is undisputed that appellants were not members of KKI at the time of filing the complaint, they may not institute a derivative action on behalf of KKI and, hence, have no standing to allege breach of the common-law fiduciary duty or statutory duties by appellees.

Appellants also seek an accounting of KKI assets. Absent a statutory authorization for an accounting, an action for an accounting is generally equitable in nature and is usually founded upon the existence of a fiduciary relationship between the parties. 1 Am. Jur. 2d *Accounts and Accounting* § 52 (2011). In this case, we can discern no basis to support appellants’ action for an accounting of KKI. Appellants are no longer members of KKI, and they have raised no viable claim against appellees. See 1 Am. Jur. 2d *Accounts and Accounting* § 54 (2011). And, since they are not members of KKI, appellants may not inspect the books and records of KKI under KRS 273.233. Therefore, we do not believe appellants possess a cause of action for an accounting against appellants.

Appellants also seek to liquidate KKI. Pursuant to KRS 273.330, a nonprofit corporation may be liquidated upon an action initiated by a member, a creditor, the corporation itself, or the attorney general. Because appellants are not members, creditors, the corporation, or the attorney general, they lack standing to seek liquidation of KKI pursuant to the statutory mandate.

² Herein, we state no opinion upon whether a derivative action exists on behalf of a nonprofit corporation by a member in good standing. Considering our resolution, we view this question as moot.

In sum, we are of the opinion that no material issues of fact exist and that appellees were entitled to judgment as a matter of law. We conclude the circuit court properly rendered summary judgment dismissing appellants' complaint against appellees.

For the foregoing reasons, the summary judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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ORAL ARGUMENT FOR
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KAIN TUCK, INC.:

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BRIEF FOR APPELLEES DON
ASBURY, NORMAN BERRY,
WILLIAM BURBANK, III, JOE
DAVIS, PATRICK FLYNN,
MICHAEL GREENWELL,
MARRITT MARCUS, BEN PETER,
TOM REICHARD, PAUL
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ORAL ARGUMENT FOR
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