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NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2012-CA-001176-MR

LARRY SMITH AND  
TIMBERPEG CONSTRUCTION, LTD

APPELLANTS

v. APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE DAVID H. JERNIGAN, SPECIAL JUDGE  
ACTION NO. 06-CI-01764

BUILDERS ASSOCIATION OF  
SOUTH CENTRAL KENTUCKY  
AND MIKE BREEN

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CAPERTON, COMBS, AND LAMBERT, JUDGES.

COMBS, JUDGE: Larry Smith, d/b/a Timberpeg Construction, LTD, appeals from summary judgments of the Warren Circuit Court upholding his expulsion from the Builders Association of South Central Kentucky and dismissing his action against Mike Breen, president of Covington Grove Homeowners Association, Inc.,

in Bowling Green. After our review, we conclude that Smith's expulsion as a member of the association in accordance with its bylaws did not deprive him of due process nor did it violate principles of fundamental fairness. Consequently, the dismissal of the tort action asserted against Breen was not erroneous. We affirm the summary judgments.

On August 1, 1993, Larry Smith became a member of the Builders Association of South Central Kentucky ("Builders Association"), a private group established to promote home ownership and the independent businesses of its members. Smith was classified as a "registered builder" with the Builders Association, a designation that indicated that he had met a set of criteria and standards not specifically required of other builders in the community. Smith's election to membership in the Builders Association also meant automatic membership in the National Association of Home Builders and in the Home Builders Association of Kentucky, organizations with goals similar to those of the local Builders Association. Smith's membership in a builder's trade association qualified him to build homes in Covington Grove, a gated community in Bowling Green.

In 2004, Smith undertook construction of a house for Jeff and Martha Jenkins in Covington Grove. In December 2004, when the house was substantially complete, the Jenkinse wrote to Smith regarding several construction issues that concerned them. Their independent home inspection, conducted in January 2005, confirmed a number of construction defects. In February, the Jenkinse contacted

the Bowling Green - Warren County Contractors Licensing Board to advise that they were having difficulty working with Smith. They also contacted the Better Business Bureau and the Consumer Protection Division of the Attorney General's Office. Finally, on April 14, 2005, the Jenkinses contacted the Builders Association to express their dissatisfaction with Smith/Timberpeg's work.

The Builders Association manages homeowners' complaints against its member builders using a written conciliation procedure. The conciliation procedure requires the Builders Association to notify a builder that the homeowners are dissatisfied. The Association gave notice to Smith consistent with its procedure.

After receiving notice of the Jenkinses' complaint, Smith had fourteen days to respond to their concerns. However, matters were not resolved between Smith and the Jenkinses during this "cooling-off" period. Consequently, a written complaint form completed by the Jenkinses was issued to Smith pursuant to the provisions of the conciliation procedure on May 6, 2005.

Smith/Timberpeg's work was the subject of several complaints made to the Builders Association around this time. After the Jenkinses initiated the conciliation process, the Association's registered-builder committee voted unanimously (on July 7, 2005) to recommend to the Association's board of directors that Smith be expelled from the group pursuant to Article I, Section 4 of its bylaws. This provision authorizes the board of directors to expel any registered builder member if, in the board's opinion, it is in the Builders Association's best

interest to do so. The will of the board to expel a member is shown by a vote of two-thirds of the board in favor of such action. Smith was not made aware of the committee's decision to recommend to the board (at its August 2005 meeting) that he be expelled from the Builders Association.<sup>1</sup> The board received the recommendation but did not act on it immediately.

Meanwhile, the parties continued to attempt to resolve their differences through the Builders Association's conciliation process. Pursuant to the conciliation procedure, an inspection committee was organized. The inspection committee inspected the Jenkinses' home and made certain recommendations for resolution of the parties' differences.

On July 27, 2005, the registered-builder committee notified the Jenkinses and Smith of the findings and recommendations of the inspection committee. A specific plan of action was outlined in the recommendations. The property was reinspected on October 3, 2005.

By letter dated October 10, 2005, the Association's president notified Smith that he had been suspended from the organization for a period of 30 days *pursuant to the recommendation of the inspection committee made in accordance with the provisions of the conciliation procedure*. The letter advised Smith that the committee would recommend to the board of directors that he be expelled from the Builders Association if he failed to complete the work at the Jenkinses' home in a

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<sup>1</sup> Because Smith was no longer a member in good standing, the committee also recommended withdrawal of one of his houses from display in the Builders Association's annual Parade of Homes.

timely fashion and in accordance with the residential construction performance guidelines established by the National Association of Home Builders.

The written conciliation procedure adopted by the Builders Association provided for an appeal of a decision recommending suspension or expulsion to be made within fourteen days of the decision. Therefore, Smith sent a letter dated October 14, 2005, to the board president and to the registered-builders committee chairman requesting a meeting. However, there is no indication that a meeting was held.

The committee's agenda for the meeting held on October 25, 2005, indicated that the conciliation process between Smith and the Jenkinses was still ongoing. On November 1, 2005, the Jenkinses executed what amounted to a settlement agreement proposed by the registered-builders subcommittee. The Jenkinses agreed that because particular items remained incomplete or had been completed by the builder in an unsatisfactory manner, they would be refunded \$750.00 of the \$5,000 that had been placed in escrow pending resolution of the dispute. The remaining \$4,250 was released to Smith/Timberpeg. Prior to November 2, 2005, Smith indicated that he would also execute the agreement; he did so on November 4, 2005.

The subcommittee concluded that numerous disputed items at the Jenkinses home had been left incomplete or had been completed in an unsatisfactory manner. Pursuant to the requirements of the conciliation procedure, the registered-builders committee recommended to the board of directors that Smith be expelled.

Although the conciliation procedure provided a mechanism to appeal this decision, Smith did not request a hearing before the registered-builders committee and/or the Builders Association's board of directors.

On November 3, 2005, the board of directors acted and unanimously approved Smith's expulsion from the Builders Association. According to an executive officer, the board's vote was based upon the July 7, 2005, recommendation of the registered-builders committee pursuant to Article I, Section 4 of the Builders Association's bylaws.

On November 8, 2005, Smith resigned his membership as a registered builder of the Builders Association. In correspondence post-marked November 12, 2005, Smith was advised by the Builders Association that he had been expelled under the provisions of Article I, Section 4 of its bylaws.

On October 26, 2006, Smith corresponded with the Builders Association. In his letter, Smith purported to rescind the resignation that he had tendered nearly a year before. Several weeks later, Smith filed a civil action against the Builders Association and Mike Breen in Warren Circuit Court. Smith alleged that the Builders Association had defamed and wrongfully expelled him. He alleged that Mike Breen: had wrongfully interfered with the Builders Association's conciliation process; had assisted the Jenkinses in lodging complaints against him with other entities; had acted in concert with the Builders Association to defame him; and had wrongfully published confidential documents regarding the status of his membership in the Builders Association. Smith sought compensatory and

punitive damages, but he did not pray for reinstatement. The Builders Association and Breen denied the allegations in their respective answers. An extended period of discovery ensued.

On March 13, 2012, the Warren Circuit Court conducted a hearing on the motion for summary judgment filed by the Builders Association. On April 27, 2012, it conducted a separate hearing on the motion for summary judgment filed by Breen. Separate orders granting the motions for summary judgment were entered on April 17, 2012, and June 4, 2012. This appeal followed.

We review a trial court's decision to grant summary judgment *de novo*. *Blevins v. Moran*, 12 S.W.3d 698 (Ky. App. 2000). The judgment should be granted only where the pleadings, discovery, admissions, stipulations, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Kentucky Rule[s] of Civil Procedure (CR) 56.03.

Smith contends that the trial court erred by dismissing his action against both the Builders Association and Breen. He argues that there were unresolved, genuine issues of material fact concerning: the alleged defects in the home's construction; the alleged grounds upon which he was suspended and expelled; the publication of his expulsion letter; the accuracy of the board's minutes with respect to the vote to expel; the extent of Breen's involvement in the conciliation process; the board's failure to comply with its bylaws; and the motives of the board's president and of the chairman of the registered-builders committee. He also

contends that the trial court erred by deciding as a matter of law that he was not entitled to a fundamentally fair procedure throughout the expulsion proceedings. Finally, Smith contends that the trial court erred by granting summary judgment in favor of Breen because he allegedly acted in concert with the Builders Association to defame him. We have reviewed these assertions and we disagree with each of them.

The trial court concluded that judicial review of the conduct of the Builders Association in this case is limited to the enforcement of the group's own rules. It did not err in that conclusion. It also determined that even where some factual issues remain unresolved, they were immaterial because of its conclusion that due process and/or concepts of fundamental fairness did not require the Builders Association to have done anything more than to put the issue to a vote by the board before expelling Smith from the organization. We find no error in that determination.

The requirements of due process have been held to apply to organizations that have the power to adjudicate the property rights of its members. However, those requirements do not generally apply to voluntary, private organizations. *Hartung v. Audubon County Club, Inc.*, 785 S.W.2d 501, 503 (1990), provides as follows:

As we view the law, a voluntary private club has an unfettered right to chose [*sic*] its own members. Neither due process nor concepts of fundamental fairness require that one be bound to associate with others against his will.... 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....

In the case *sub judice*, Hartung was offered all benefit of the rules governing his relationship with the club... The fact is, the bylaws provide only for notice and opportunity to be heard before actual termination of membership. Clearly, Hartung was afforded full benefit of this procedure.

Before the trial court, Smith argued that the Builders Association was a quasi-public body; but he failed to support that contention with persuasive evidence. He claimed that members of the public often confused the Builders Association with the Bowling Green-Warren County Licensing Board. That bit of speculation is insufficient to show that he was deprived of any property right whatsoever. He asserted that he lost opportunities to participate in the Builders Association's Parade of Homes event, the group's instructional programs, and discounted insurance rates. However, he has demonstrated no actual economic loss as a result of his expulsion. Under the circumstances, the trial court correctly concluded that the Builders Association was not bound by principles of due process to afford Smith a trial-type proceeding before voting to expel him from its membership.

The court concluded that the Builders Association had substantially complied with its bylaws in terminating Smith's membership, and it was correct in so concluding. According to its bylaws, a central objective of the Builders Association is to maintain the public's trust in its community of builders. In

support of this objective, the association enacted a code of ethics according to which members agreed to provide well designed and well constructed homes to their customers and to be honest in their business relationships. To implement its broadly worded code of ethics, the Builders Association granted to its board of directors sweeping power to expel any member on the basis that it was in the best interests of the association to do so. The board of directors indicated to Smith that it had voted unanimously to expel him on that basis and in accordance with the procedure enacted in the organization's bylaws. Smith has no basis to defeat the organization's motion for summary judgment because the record indicates that the board abided substantially by its enacted procedures. See *Audubon County Club, supra*.

We also disagree with Smith's contention that his claim against the Builders Association can be premised on a violation of *Roberts Rules of Order*. He is correct that the provisions of *Roberts Rules* were duly enacted by reference in Article XII, Section 1 of the organization's bylaws. However, this Article merely establishes the parliamentary protocol to be used by the Builders Association during board meetings to insure decorum and efficiency. This Article did not vest Smith with a property interest in his membership, nor did it entitle him to any procedure beyond that expressly provided for by Article I, Section 4 of the bylaws concerning the manner in which a member might be suspended, expelled or reinstated to the Builders Association.

We conclude that the board of directors substantially complied with its bylaws in terminating Smith's membership and that he was not entitled to any constitutional due process protections. Therefore, we affirm the trial court's summary judgment in favor of the Builders Association.

With respect to Smith's appeal of the summary judgment in favor of Breen, we note that he has failed to provide any reference whatsoever to the record or citations to the law in support of his position. Instead, his entire argument consists of a single statement indicating that the judgment in favor of Breen should be vacated if the judgment in favor of the Builders Association is vacated. Thus, no further analysis is required.

We affirm the summary judgment of the Warren Circuit Court.

ALL CONCUR.

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