STATE OF MICHIGAN

COURT OF APPEALS

G. P. GRAHAM CONSTRUCTION COMPANY,

Plaintiff-Appellant,

v

CHESANING UNION SCHOOLS,

Defendant-Appellee.

UNPUBLISHED
May 7, 2002

No. 226066
Saginaw Circuit Court
LC No. 99-030040-NZ

Before: Gage, P.J., and Hoekstra and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant in this action arising from defendant's failure to award a construction contract for additions and improvements to its properties to plaintiff, a non-union contractor whose bid for the project was the lowest. We affirm in part, reverse in part, and remand.

In its complaint, plaintiff alleged violations of public policy, due process, freedom of association, and equal protection, and requested that the court exercise its equitable jurisdiction to award plaintiff restitution. Plaintiff requested relief in the form of economic damages. In response to plaintiff's complaint, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(7) and (8),[1] claiming that plaintiff lacked standing and that the lawsuit was untimely. After a hearing, the trial court granted summary disposition in favor of defendant on the basis that plaintiff had no standing to sue and that even if defendant denied plaintiff the construction contract because of plaintiff's non-union status, defendant was entitled to do so. This appeal ensued.

We first address plaintiff's argument that the trial court erred in dismissing plaintiff's suit for lack of standing. We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Likewise, we review de novo whether a party has standing to sue. *Gyarmati v Bielfield*, 245 Mich App 602, 604; 629 NW2d 93 (2001). In *McHone v Sosnowski*,, 239 Mich App 674, 676; 609 NW2d 844 (2000), when addressing standing, we explained:

[1] Defendant states in its appellate brief that its motion for summary disposition with respect to the standing issue was mislabeled and should have stated that the motion was pursuant to MCR 2.116(C)(5) and (8).

> Review of a determination regarding a motion under MCR 2.116(C)(5), which asserts a party's lack of capacity to sue, requires consideration of "the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties." *Wortelboer v Benzie Co*, 212 Mich App 208, 213; 537 NW2d 603 (1995). By comparison, a motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim as pleaded. All factual allegations and reasonable inferences supporting the claim are taken as true. "The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *Kuhn v Secretary of State*, 228 Mich App 319, 324; 579 NW2d 101 (1998). Consequently, this Court's review de novo of the instant question requires drawing all inferences in the light most favorable to plaintiff, and then determining if plaintiff either pleaded or established facts that would give him standing to sue.

Here, plaintiff argues that the trial court erred in dismissing its public policy claim because Michigan's public policy provides redress to aggrieved parties for violations of the competitive bidding process. Although plaintiff asserts that it did not bring its public policy claim under MCL 380.1267, it acknowledges that the public policy at issue in this case is grounded in the competitive bidding processes made applicable to defendant through that statute. Under Michigan law, disappointed bidders may not maintain an action because of a defendant's refusal to accept the plaintiff's bid. *Talbot Paving Co v City of Detroit*, 109 Mich 657, 661-662; 67 NW 979 (1896). It is well settled that the rationale for this rule is that competitive bidding is designed for the benefit of taxpayers, and not for the benefit or enrichment of the bidders. *Lasky v City of Bad Axe*, 352 Mich 272, 276; 89 NW2d 520 (1958). Plaintiff attempts to distinguish the present case from cases interpreting the competitive bidding process made applicable through statutes by bringing its claim as a violation of public policy rather than bringing a claim under the statute. Regardless of how plaintiff sets forth its claim, the public policy behind the competitive bidding process is to protect the taxpayers, not the disappointed bidders; thus, plaintiff lacks standing to sue. Consequently, the trial court properly granted summary disposition on plaintiff's public policy claim.

Plaintiff also argues that the trial court erred in dismissing its constitutional claims.[2] Constitutional issues are reviewed de novo on appeal. *Wayne Co Chief Executive v Governor*, 230 Mich App 258, 263; 583 NW2d 512 (1998); see also *In re PAP*, 247 Mich App 148, 152; 640 NW2d 880 (2001) (constitutional due process concerns require de novo review); *Citizens for Uniform Taxation v Northport Public School Dist*, 239 Mich App 284, 289; 608 NW2d 480 (2000) (constitutional issue regarding equal protection reviewed de novo).

As previously noted in *McHone, supra*, in evaluating a motion under MCR 2.16(C)(8), a court considers only the pleadings, accepting all well-pleaded factual allegations as true and construing them in a light most favorable to the nonmovant. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *McHone, supra*. Summary disposition is appropriate under this subsection "only where the claims alleged are 'so clearly unenforceable as a matter of law that

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[2] In its response to defendant's motion for summary disposition, plaintiff indicated that its constitutional claims are under the Michigan Constitution.

no factual development could possibly justify recovery.'" *Maiden, supra*, quoting *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

We first address plaintiff's claim of violation of due process. No person may be deprived of life, liberty or property without due process of law. Const 1963, art 1, § 17. To invoke due process protections, the state action must deprive a person of life, liberty, or property. *City of St Louis v Michigan Underground Storage Tank Financial Assurance Policy Bd*, 215 Mich App 69, 74; 544 NW2d 705 (1996). To merit due process analysis, plaintiff must have a legally protected interest at stake. *Wortelboer v Benzie County*, 212 Mich App 208, 218; 537 NW2d 603 (1995); see *Lujan v Defenders of Wildlife*, 504 US 555, 560-561; 112 S Ct 2130; 119 L Ed 2d 351 (1992) (elements of standing); *Trout Unlimited, Muskegon-White River Chapter v City of White Cloud*, 195 Mich App 343, 348; 489 NW2d 188 (1992). There must be more than an abstract need, desire, or unilateral expectation of the interest; there must be a legitimate claim of entitlement to it. *Northwestern National Casualty Co v Comm'r of Ins*, 231 Mich App 483, 491-492; 586 NW2d 563 (1998). A vested right is one of which a person could not be deprived without injustice. *Detroit v Walker*, 445 Mich 682, 699; 520 NW2d 135 (1994).

In the present case, plaintiff argues that "because Michigan maintains a public policy requiring public works projects awarded under competitive bidding statutes to be awarded to the lowest responsible bidder, [defendant] became obligated through the application of that public policy to award the contract to [plaintiff] at the time it decided to award the project," and this obligation created a property interest for plaintiff in the award. We find plaintiff's premise faulty. As we have acknowledged above, the public policy behind the competitive bidding process is to protect the taxpayers, not the disappointed bidders, *Talbot, supra*; *Lasky, supra*. Thus, no property interest arises.

We also find without merit plaintiff's freedom of association claim. The right of freedom of association is derivative of the free speech right. *Michigan State AFL-CIO v Employment Relations Comm*, 453 Mich 362, 370; 551 NW2d 165 (1996). If a government regulation impedes an individual's attempt to join an organization, it may implicate the individual's freedom of association rights. *Id*. at 371. "The essential right protected under the freedom of association doctrine is the right to join together in a group of like-minded individuals and exercise free speech rights." *Id*. Here, the failure to award the construction contract to a non-union bidder did not effect this right, *id*., nor did it require an exaction from any individual, coerce any belief, or require plaintiff's employees to become unionized. *Lyng v Int'l Union, United Automobile Aerospace & Agricultural Implement Workers of America, UAW*, 485 US 360, 366, 369; 108 S Ct 1184; 99 L Ed 2d 380 (1988); *Hoke Co, Inc v Tennessee Valley Authority*, 854 F2d 820, 828 (CA 6, 1988). Thus, freedom of association is not implicated in the present circumstances.

Plaintiff also argues that the trial court erred in granting summary disposition on its equal protection claim because it conducted no analysis. According to plaintiff, the trial court should have utilized the rational basis test to determine whether plaintiff was denied equal protection.

The Michigan constitution guarantees equal protection of the law. Const 1963, art 1, § 2. The equal protection guarantee requires that persons under similar circumstances be treated alike; it does not require that persons under different circumstances be treated the same. *Proctor v White Lake Twp Police Dep't*, 248 Mich App 457, 468-469; 639 NW2d 332 (2001). In *Hoke*,

supra, a case involving the award of a contract to supply coal, the Sixth Circuit found that the defendant's decision to award a contract to a union contractor met the rational basis test and thus withstood the plaintiff's equal protection challenge. The Sixth Circuit further noted:

> We want to state in the strongest possible terms, however, that we are not ruling that a decision to favor union contractors under different circumstances would necessarily pass muster. The circumstances that allow us to conclude here that there exists a rational basis for [the defendant]'s decision not to award the contract to [plaintiff] include the recurrence of the violence against non-union contractors, the fact that the reduced coal needs of [the defendant] resulted in an award to only one supplier with the obvious consequence that interruptions of deliveries from only one supplier would be more critical, and the fact that the award did not result in greater cost to [the defendant] but, rather, lower costs. It would be the most serious of misinterpretations to read this opinion as a carte blanche authorization to favor union contractors in the award of bids for public contracts without the presence of other relevant extenuating circumstances. [*Id.* at 829.]

Here, defendant's motion for summary disposition sought dismissal on standing and on the untimeliness of the lawsuit. At oral argument, defendant argued that even if plaintiff had standing, plaintiff's allegations fall as a matter of law. Defendant admitted solely for purposes of the motion that plaintiff did not receive the contract because it was non-union. Significantly, defendant characterized plaintiff's allegations that it admitted as true for purposes of argument as defendant's "pro-union animus." Thus, under these circumstances, defendant did not indicate a reasoned preference for union contractors, but utilized a term commonly used to indicate purposeful discrimination. Further, at oral argument plaintiff sought to address the standing issue, and to postpone resolution of its substantive equal protection claim until discovery was completed. Thus, the rational basis aspect of the case has not been developed in the trial court. Under these circumstances, where defendant has admitted animus, where the record is unclear concerning whether the parties sought to address anything other than standing and timeliness at the hearing, and where we only can assume from the record before us that the trial court conducted no rational basis analysis even in light of the admitted animus, we conclude that summary disposition was premature. Accordingly, we reverse the grant of summary disposition on the equal protection claim and remand to the trial court for further proceedings.

Finally, plaintiff argues that the trial court erred in dismissing its equitable claim for restitution. Plaintiff claims it has stated a viable claim based on a quasi-contract and can recover under the equitable doctrine of unjust enrichment.

Again, the public policy on which the competitive bidding process rests is to benefit the taxpaying public, not rejected bidders. Here, it appears that plaintiff is seeking to invoke equity to recover damages from the very taxpayers that public policy seeks to protect. Because the public policy behind the competitive bidding process is aimed at protecting the taxpayers, and because plaintiff was never entitled to the award of the contract, plaintiff failed to plead a claim for restitution. Cf *Shapiro v Steinberg*, 176 Mich App 683, 687; 440 NW2d 9 (1989) ("It is well established that the courts of this state will not enforce, either in law or in equity, a contract that violates a statute or one that is contrary to public policy."). To the extent that plaintiff argues unjust enrichment, we find that theory inapplicable in the present circumstances. See MCL

380.1267(5) (bids opened at the same time; board may reject any or all bids). The trial court did not err in granting summary disposition in favor of defendant on plaintiff's restitution claim.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Joel P. Hoekstra