

STATE OF MICHIGAN
COURT OF APPEALS

WALLACE WELCH and MARGUERITE
WELCH,

UNPUBLISHED
December 4, 2003

Plaintiffs-Appellees/Cross-
Appellants,

v

No. 241064
Oakland Circuit Court
LC No. 01-031310-CZ

ROCKY TOP RIDGE CONDOMINIUM
ASSOCIATION, JOHN VUKOVICH, STEVEN
WHITE, RICK GOUR, KEVIN CARRIGAN, and
SHARON VIZZINI,

Defendants-Appellants/Cross-
Appellees.

Before: Murray, P.J. and Gage and Kelly, JJ.

PER CURIAM.

Defendants appeal as of right that portion of the trial court's order denying their request for costs and attorney fees. Plaintiffs cross appeal from that portion of the trial court's order granting summary disposition in favor of defendants. We affirm in part, vacate in part, and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. Basic Facts and Procedural History

Rocky Top Ridge Condominiums is a condominium development created by plaintiffs' construction company. In April 2001, plaintiffs filed suit against Rocky Top Ridge Condominium Association ("Association") and the Association president, alleging that the Association breached its fiduciary duty to enforce its bylaws by: (1) allowing a member to keep pets in excess of the number allowed by the bylaws; (2) permitting a garage sale; (3) failing to collect Association dues in a timely manner; and (4) waiving provisions of the bylaws. In their answer defendants stated that an effort to amend the Association bylaws was underway. Plaintiffs moved for injunctive relief seeking to preclude the Association from attempting to amend the bylaws, and also sought the appointment of an administrator to oversee the Association's business. The trial court denied the motion.

In September and October 2001, the Association held two special meetings pursuant to notice. The stated purpose of the special meetings was to consider and vote on proposed amendments to the bylaws. At the meetings, six proposed amendments passed by the requisite two-thirds majority of Association members. A licensed real estate appraiser retained by the Association reviewed the amendments and opined that the amendments would have no adverse effect on property values.

Plaintiffs filed a first amended complaint naming the Association and the members of its Board of Directors as defendants. They alleged that defendants breached their fiduciary duty in various ways, including failing to notify plaintiffs of Association meetings. Plaintiffs requested that the trial court enjoin defendants from violating the bylaws and declare invalid all actions taken by defendants, including the purported amendment of the bylaws.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiffs' request for injunctive relief was rendered moot by the recent amendments to the bylaws, that plaintiffs' claim that the Association failed to take action against a member was without merit because the Association operated under the business judgment rule and acted by amending the bylaws, and that plaintiffs' remaining claims, including that notice of the special meeting was not sent to all members, were without merit. Defendants requested costs and fees pursuant to MCL 559.207 and MCL 450.2493(1). In response, plaintiffs argued that the purported amendments to the bylaws were invalid because they did not receive notice of the second special meeting and because the amendments were not recorded in a proper manner. In addition, plaintiffs argued that defendants breached their fiduciary duty in numerous ways, that defendants could not invoke the business judgment rule to justify their actions because their actions were not authorized by statute or the bylaws, and that material issues of fact existed as to whether the amended bylaws were valid. The trial court granted defendants' motion for summary disposition, finding that no genuine issues of fact existed with respect to the issues raised by plaintiffs. The trial court, without explanation, declined to award defendants costs and fees.

II. Standard of Review

We review a trial court's decision on a motion for summary disposition *de novo*. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

III. Plaintiffs' Cross-Appeal

Plaintiffs argue that the trial court erred by granting defendants' motion for summary disposition. We disagree. Plaintiffs filed suit seeking to invalidate the amendments to the bylaws and to require the Association to enforce the original bylaws as written. The evidence showed that the Association properly amended the bylaws, and that the violations alleged by plaintiffs had been cured. Plaintiffs do not specify what damages they sustained as a result of the Association's failure to enforce the original bylaws, or to what relief they would be entitled had the trial court considered their claims and determined that the Association failed to enforce the original bylaws. The trial court correctly held that the amendment of the bylaws rendered plaintiffs' claim for equitable relief moot. See *Cohen v Riverside Park Place Condominium Ass'n, Inc (After Remand)*, 140 Mich App 564, 567-568; 365 NW2d 201 (1985).

Furthermore, the trial court correctly found that no issue of fact existed as to whether the bylaws were amended by the proper procedure. The undisputed evidence showed that the amendments to the bylaws were approved by at least two-thirds of the Association members as required by MCL 559.190(2). Furthermore, the undisputed evidence showed that notice of the second special meeting was mailed to all Association members at least ten days prior to the meeting as required by MCL 559.190(5). The statute does not require a showing that all Association members received the notice. Finally, the undisputed evidence showed that the Association eliminated the need to obtain mortgagee approval of the amendments to the bylaws by obtaining an opinion from a licensed real estate appraiser that the amendments would not materially alter the rights of the members or the value of the property. MCL 559.190(1). The trial court properly granted defendants' motion for summary disposition.

IV. Defendants' Appeal

MCL 559.207 provides that if in an action brought by a condominium association member against an association the association prevails, the association is entitled to recover the costs of the proceedings and reasonable attorney fees to the extent that the condominium documents so provide. MCL 450.2493(1) provides that if in an action brought in the right of the corporation the trial court finds that the action was brought without reasonable cause, the trial court may award the prevailing party costs and attorney fees.

Defendants argue that the trial court erred by declining to award them costs and fees under both MCL 559.207 and MCL 450.2493(1). We vacate that portion of the trial court's order denying defendants' request for costs and fees, and remand for further proceedings consistent with this opinion. MCL 559.207 provides that an association "shall recover" its costs and reasonable attorney fees in an action in which it prevails, if the condominium documents allow for such a recovery. Here, the Association bylaws provide that the Association is entitled to recover its costs, including a reasonable attorney fee, in an action in which it prevails. The trial court found in favor of defendants, but declined to award defendants costs and fees. On remand the trial court shall consider defendants' request for costs and fees pursuant to MCL 559.207 and MCL 450.2493(1), and shall issue an order stating the basis for its decision on the request.

Affirmed in part, vacated in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Hilda R. Gage
/s/ Kirsten Frank Kelly