STATE OF MICHIGAN

COURT OF APPEALS

STACY CARROLL, Plaintiff-Appellant,	UNPUBLISHED January 12, 2016
v	No. 324140 Montmorency Circuit Court
MONTMORENCY COUNTY COMMISSION ON AGING, a Michigan Nonprofit Corporation, Defendant-Appellee.	LC No. 13-003389-CK

Before: BOONSTRA, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

Plaintiff appeals by right the April 29, 2014 opinion and order of the trial court granting defendant's second motion for summary disposition regarding Count I of her first amended complaint and the September 26, 2014 order granting summary disposition to defendant on plaintiff's remaining counts and awarding defendant reasonable attorney fees under an employment contract. Plaintiff also challenges the trial court's October 16, 2013 order denying defendant's first motion for summary disposition regarding Count I, to the extent that plaintiff contends the trial court should have granted summary disposition to her pursuant to MCR 2.116(I)(2). We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant Montmorency Commission on Aging (MCOA) is a Michigan non-profit corporation. Its bylaws require it to comply with Michigan's open meetings act (OMA), MCL 15.261 *et seq.* The parties agree that defendant's conduct is subject to the OMA. Defendant's bylaws also indicate that matters of procedure are governed by Robert's Rules of Order—Revised.

Plaintiff was hired as the Executive Director of defendant in 2002. The terms of plaintiff's employment were spelled out in a written employment contract. The contract provided for an annual salary, which by 2011 was $38,220 annually. Additionally, the contract indicated that the "Commission will provide Director with medical, and health benefits in accordance with the benefit plans established by Commission . . . . and will pay all premiums for coverage of Director." According to affidavits submitted to the trial court by plaintiff and John Williams, the former president of the MCOA Board of Directors (the Board), plaintiff and the Board had agreed that MCOA would, in lieu of paying the premiums directly to an insurer, make

monthly payments to plaintiff, as an insurance stipend, to help defer the cost of insurance if plaintiff chose to obtain it. Further, plaintiff and the Board agreed to defer those payments to a future date; according to plaintiff, that deferral would be until such time as she requested payment or her employment ended. However, defendant asserts that plaintiff offered her insurance stipend to Maureen Kent when Kent accepted employment with defendant in 2002, and that the Board agreed to transfer the stipend to her beginning in 2002.

The relationship between plaintiff and defendant eventually deteriorated, and at a regular meeting on April 21, 2011, the Board discussed, among other matters, plaintiff's termination. The minutes of that meeting reflect that the Board promptly moved to a closed session after the meeting was convened. The minutes contain the following statement:

> Section 7(1)OMA No motion or purpose was stated even though the majority of the Board thought it was to review Stacy Carroll's performance the closed section was directed to many other area [sic] and therefore the minutes of the Closed session became part of the Regular Meeting Minutes.

The minutes of the closed session, which lasted approximately 50 minutes, were placed into the regular meeting minutes. Plaintiff was not present for the closed session. After the regular session reconvened, a motion was made and seconded to terminate plaintiff from her executive director position. Plaintiff was present for this portion of the meeting; the minutes reflect that she "reviewed the nine (9) points she was to accomplish in the past sixty (60) days, which she believed she had met seven (7) out of the nine (9)." Discussion from other Board members was recorded. The minutes reflect the following votes:

Bob Pace	No
Ron Lounsbery	Yes
Mark Huston	Yes
Mary Lou N. Foster	Yes
Bert LaFleche	Yes
Jacky McKerchie	No

The minutes do not reflect the vote of Jim LeCureux, then the Chair of the Board. The minutes of the Board's next meeting, held on May 27, 2011, reflect that the Board voted to approve the minutes of the April 21, 2011 meeting.

Plaintiff filed suit against defendant on August 5, 2013. Her initial complaint alleged in Count I that she had not been appropriately terminated at the April 21, 2011 meeting, because, although the minutes did not reflect LeCureux's vote, he had voted against her termination; further, plaintiff contended that Lounsbery's vote was invalid as he had tendered his resignation to the Board in 2010 and his resignation had been accepted. Her complaint further alleged in Count II that she was owed her accrued health insurance stipend from the date of her hire. Counts III and IV related to a life insurance policy and plaintiff's alleged entitlement to reimbursement for certain expenses. Count V sought attorney fees payable under the employment contract, which states that the prevailing party in "any litigation, arbitration, or other proceeding" involving rights under the contract is entitled to a "reasonable sum" for

attorney fees incurred in that proceeding. The parties resolved Counts III and IV shortly after the filing and stipulated to their dismissal.

In lieu of an answer, defendant moved the trial court for summary disposition on Counts I, II, and V. With regard to Count I, defendant argued, based upon the minutes of the April 21, 2011 meeting, that even discounting Lounsbery's vote, the minutes showed a vote of 3-2 in favor of plaintiff's termination, and that the minutes reflected LeCureux's abstention from the vote. Defendant submitted, in support of its motion, an affidavit from Mary Lou Foster, the Recording Secretary for the Board. Foster attested that the April 21 minutes reflected that LeCureux had abstained from the vote to terminate plaintiff and that plaintiff's termination was thus proper under the bylaws. In response, plaintiff offered an affidavit from LeCureux, who attested that he had voted against plaintiff's termination and that the minutes were inaccurately recorded. Via supplemental brief, plaintiff not only asked the trial court to deny defendant's motion, but asked that it grant summary disposition to plaintiff on Count I pursuant to MCR 2.116(I)(2).

In its October 16, 2013 opinion and order, the trial court denied defendant's motion for summary disposition. It determined that Lounsbery's vote was indeed invalid, because Lounsbery's resignation from the Board had been accepted in 2010 and, although Lounsbery later attempted to rescind his resignation, his attempt to rejoin the Board was never approved by the Montmorency County Commissioners as required by defendant's bylaws, and thus he was not a sitting Board member at the time of the vote to terminate plaintiff's employment in 2013. It further determined that a factual issue existed surrounding LeCureux's vote. The trial court noted that, because Lounsbery was not a voting member of the Board, the Board lacked a quorum at the May 27, 2011 meeting where the April 21, 2011 meeting minutes were approved. There was thus no official record of the vote on plaintiff's termination, and parol evidence, such as the competing affidavits, was admissible to resolve the issue surrounding LeCureux's vote.

With regard to Count II, defendant argued that the statute of limitations barred at least part of plaintiff's claim. The trial court denied the motion pending additional discovery "to determine precisely when the limitations period began to run." As Count V, the claim for attorney fees under the employment contract, was derivative of the resolution of plaintiff's remaining counts, the trial court thus also impliedly denied summary disposition to defendant on that count. The trial court also denied plaintiff's request that she be granted summary disposition on Count I pursuant to MCR 2.116(I)(2).

Following the trial court's issuance of its October 16, 2013 opinion and order, the Board held a meeting on November 21, 2013. Bert LaFleche, a Board member, moved to approve the minutes of the April 21, 2011 meeting, stating his recollection that LeCureux had abstained from the vote on plaintiff's termination and that the minutes accurately reflected his abstention. The minutes were approved without changes or corrections by a 7-0 vote of the Board.

On January 20, 2014, defendant stipulated to allow plaintiff to amend her complaint. Plaintiff's amended complaint deleted the counts that had been resolved by agreement, and added a new Count III, alleging violations of the OMA. The alleged violations concerned the closed session held at the April 21, 2011 meeting prior to the vote on plaintiff's termination. Defendant filed an answer to the amended complaint, followed shortly by its second motion for summary disposition. After hearing defendant's motion, the trial court granted defendant

summary disposition on Count I, holding that the Board's November 21, 2013 approval of the minutes of the April 21, 2011 meeting rendered parol evidence inadmissible and that the minutes showed a 3-2 vote in favor of the motion to terminate plaintiff. With regard to Count II, the trial court held that the statute of limitations barred plaintiff's collection of funds accrued before August 2007. The trial court denied summary disposition on statute of limitations grounds regarding plaintiff's OMA claim.

On August 1, 2014, plaintiff moved the trial court for summary disposition regarding its remaining claims. Defendant responded that it was entitled to summary disposition on all of plaintiff's remaining claims under MCR 2.116(I)(2). In a September 26, 2014 order, the trial court granted defendant summary disposition on all of plaintiff's remaining claims. With regard to Count II, the trial court examined the employment contract and held that the unambiguous language of the contract only required defendant to pay for plaintiff's health insurance, and that the contract did not provide for a payment of a stipend in lieu of accepting payments for health insurance. Plaintiff admitted to being covered by her husband's policy throughout her employment as Executive Director; thus, the trial court reasoned, she never obtained health insurance for which defendant was required to pay, or at least never presented defendant with any unpaid bills or requests for reimbursement. Further, the employment contract contained an integration clause and was unambiguous; therefore the trial court did not need to rely on parol evidence, such as the affidavit of Williams, in its interpretation of contract language. The trial court concluded that no material issue of fact existed as to whether defendant had breached the contract in this regard.

With regard to plaintiff's OMA violation claim, the trial court held that invalidation of plaintiff's termination was not an appropriate remedy for any OMA violations that had occurred, because the Board had properly reenacted its decision by approving the April 21, 2011 meeting minutes at its November 21, 2013 meeting. Specifically, the trial court held that any OMA violations were procedural, not substantive; further, even if any of the violations were substantive, the rights of the public were not impaired and invalidation was thus an inappropriate remedy. Because the trial court determined that defendant was the prevailing party under the employment contract, it granted defendant attorney fees. This appeal followed.

II. DENIAL OF SUMMARY DISPOSITION TO PLAINTIFF ON COUNT I

Plaintiff argues that the trial court erred, in issuing its October 16, 2013 opinion and order, by failing to grant her summary disposition on Count I of her complaint. We disagree.

We review a trial court's decision on a motion for summary disposition de novo. *Moser v Detroit*, 284 Mich App 536, 538; 772 NW2d 823 (2009). Summary disposition is proper under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). We consider the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). All reasonable inferences are to be drawn in favor of the nonmovant. *Dextrom v Wexford County*, 287 Mich App 406, 415;

789 NW2d 211 (2010). If it appears that the opposing party is entitled to judgment, the court may render judgment in favor of the opposing party. MCR 2.116(I)(2); *Bd of Trustees of Policemen & Firemen Retirement Sys v Detroit*, 270 Mich App 74, 77-78; 714 NW2d 658 (2006). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

As discussed in Part III of this opinion, the trial court correctly held that an entity such as defendant "speaks only through its minutes and resolutions." *Tavener v Elk Rapids Rural Agr. Sch Dist*, 341 Mich 244, 251; 67 NW2d 136 (1954). "[W]here records are required to be kept," as defendant was required to keep records under the OMA, MCL 15.269(1), "their import cannot be altered or supplemented by parol testimony." *Id*. However, at the time of the first summary disposition hearing, the minutes of the April 21, 2011 meeting had not been validly approved by the Board due to a lack of quorum, and thus did not constitute an official statement of defendant. See MCL 450.2523 (actions of a nonprofit corporation board require, at a minimum, a vote of the majority of board members at a meeting at which a quorum is present). In the absence of an official statement from defendant concerning the vote on plaintiff's termination, the trial court was not precluded from considering the evidence offered by the parties, in the form of affidavits, in resolving this issue. Although plaintiff argues that the affidavit of LeCureux, asserting that he had voted against plaintiff's termination, was uncontroverted, in fact the record shows that defendant had offered the affidavit of Foster, which asserted that the minutes reflected that LeCureux had abstained from the vote, and that the minutes were "true and accurate." In light of these conflicting affidavits, the trial court did not err in declining to grant either party summary disposition on this issue at the October 13, 2013 hearing. *Allison*, 481 Mich at 425.

III. GRANT OF SUMMARY DISPOSITION TO DEFENDANT ON COUNT I

Plaintiff next argues that the trial court erred, in issuing its April 29, 2014 opinion and order, by granting summary disposition to defendant on Count I.[1] We disagree. Again, we review the trial court's grant of summary disposition de novo. *Moser*, 284 Mich App at 538.

By the time the hearing on defendant's second motion for summary disposition was held, the Board had approved the minutes of the April 21, 2011 meeting. The minutes thus represented the official action of defendant. See MCL 450.2523; *Tavener*, 341 Mich at 251. The trial court concluded that the approved minutes showed a 3-2 vote in favor of plaintiff's termination, discounting Lounsbery's vote as invalid. Plaintiff argues that the trial court erred in so concluding, because the minutes do not affirmatively indicate LeCureux's vote. Plaintiff asserts that this failure to indicate that LeCureux had abstained from voting was a violation of the OMA and defendant's bylaws, and further that it created an ambiguity that the trial court should have allowed parol evidence to resolve. We disagree with all of these assertions.

[1] On appeal, plaintiff does not challenge any of the trial court's rulings, including the ultimate grant of summary disposition, related to Count II of her complaint, which sought payment of funds allegedly owed to her as a health insurance stipend under the employment contract.

The OMA requires that "[e]ach public body shall keep minutes of each meeting showing the date, time, place, members present, members absent, any decisions made at a meeting open to the public, and the purpose or purposes for which a closed session is held. The minutes shall include all roll call votes taken at the meeting." MCL 15.269(1). The April 21, 2011 minutes meet this requirement. Further, defendant's bylaws state that "Except as otherwise specified in these By-Laws, all decisions at a meeting of the Commission shall be made by a majority vote of those present and voting." Although plaintiff alleges that the failure to affirmatively record members who abstain or otherwise do not vote in a roll call vote violates Robert's Rules of Order—Revised, see http://www.rulesonline.com/rror-08.htm (last accessed December 22, 2015), nothing in the OMA or defendant's By-Laws specifically requires that such a roll call procedure be used—further, we note that Robert's Rules of Order—Revised itself notes that the placement on the record of how each member voted, rather than merely recording whether the vote passed or failed, is "rarely useful in ordinary societies" and is not appropriate for use in all instances. *Id*.

Simply put, the minutes of the meeting reflect a majority vote in favor of plaintiff's termination, at a meeting in which there was a quorum. The evidence that plaintiff sought to have the trial court consider concerning LeCureux's vote is precisely the sort of evidence that, if considered, "would permit official records to be received as either partial or uncertain memorials." *Tavener*, 341 Mich at 252 (citation omitted).[2] We thus conclude that the trial court did not err in declining to consider this evidence in light of the official record. See also *Stevenson v Bay City*, 26 Mich 44, 47 (1872) ("That which is not established by the written records, fairly construed, cannot be shown to vary them.").[3] Further, although plaintiff asserts that the OMA requires that minutes be approved at the next meeting after they are taken, it actually provides that "[t]he public body shall make any corrections in the minutes at the next

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[2] We further note that LeCureux's affidavit indicates that he resigned before the Board's May 21, 2011 meeting, where the minutes were (albeit invalidly) approved. Thus, LeCureux never formally requested that the Board take any action to correct the allegedly erroneous vote, although his affidavit asserts that he attempted to inform the Board that his vote was inaccurately recorded several times, including at a September 2011 meeting. The record before this Court does not contain minutes from any meetings in September of 2011, although plaintiff did provide the trial court with a September 28, 2011 article in the Montmorency County Tribune that states that LeCureux "requested a copy of minutes from the last meeting he chaired because he heard the minutes are not factual," although the article does not make specific reference to the vote to terminate plaintiff.

[3] We note that the case of *City of Ecorse v People's Comm Hosp Auth*, 336 Mich 490, 504; 58 NW2d 159 (1953), is distinguishable from the instant case. In *Ecorse*, our Supreme Court stated that the trial court did not err in considering parol evidence in determining whether a quorum of the board of directors was present during a vote. *Id*. Such evidence was relevant to considering *whether* the action taken by the board was an official action. *Id*. Here, there was no question concerning the presence of a quorum or the authority of the Board to take the action of terminating plaintiff at the April 21, 2011 meeting; rather, plaintiff sought to have the trial court consider parol evidence to alter the official result of the vote.

meeting after the meeting to which the minutes refer." MCL 15.269(1). Here, no corrections were ever made to the minutes of the April 21 meeting; further, nothing in the OMA can be fairly read to indicate that a failure to correct minutes at the next meeting renders those minutes forever invalid.[4]

IV. OMA VIOLATIONS

Plaintiff next argues that the trial court erred in determining that any violations of the OMA committed by defendant did not warrant invalidation of defendant's termination of plaintiff, and in granting summary disposition to defendant on Count III of her amended complaint. We disagree. We review the trial court's ultimate grant of summary disposition de novo. *Moser*, 284 Mich App at 538. Resolution of this issue requires interpretation of the OMA, which is a question of law we review de novo. *Morrison v East Lansing*, 255 Mich App 505, 517; 660 NW2d 395 (2003). However, we review the trial court's decision whether to invalidate a decision made in violation of the OMA for an abuse of discretion. *Morrison v East Lansing*, 255 Mich App 505, 520; 660 NW2d 395 (2003), abrogated in part on other grounds *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125 (2014).

There are three types of relief available under the OMA. *Leemreis v Sherman Twp*, 273 Mich App 691, 704; 731 NW2d 787 (2007). A plaintiff may seek to compel compliance or enjoin further noncompliance with the OMA. MCL 15.271; *Leemreis*, 273 Mich App at 699. A plaintiff may seek actual and exemplary damages against a public official for intentional violations of the OMA. MCL 15.273(1); *Leemreis*, 273 Mich App at 700. Finally, a plaintiff may seek to have a decision of a public body invalidated on the grounds that it was not made in conformity with the OMA. MCL 15.270; *Leemreis*, 273 Mich App at 699.

Plaintiff's allegations of violations of the OMA principally concern the Board's discussion of her termination in a closed session at the beginning of the April 21 meeting, although plaintiff also asserts that the Board violated the OMA by failing to correct the April 21 meeting minutes at the next meeting. Plaintiff does not allege intentional violations of the OMA or seek to compel future compliance or enjoin noncompliance. Rather, plaintiff sought to have defendant's termination decision invalidated due to violation of the OMA. MCL 15.263 provides in relevant part:

> (1) All meetings of a public body shall be open to the public and shall be held in a place available to the general public. All persons shall be permitted to attend any meeting except as otherwise provided in this act. The right of a person to attend a meeting of a public body includes the right to tape-record, to videotape, to broadcast live on radio, and to telecast live on television the proceedings of a public body at a public meeting. The exercise of this right shall not be dependent

[4] The minutes of the April 21 meeting were not corrected to discount Lounsbery's vote, but they did not need to be because the original minutes already provided for this contingency: "The Chair addressed the issue of Ron Lounsbery's legitimacy to vote would be reviewed [sic] and if found inappropriate his vote would be disallowed."

> upon the prior approval of the public body. However, a public body may establish reasonable rules and regulations in order to minimize the possibility of disrupting the meeting.
>
> (2) All decisions of a public body shall be made at a meeting open to the public.
>
> (3) All deliberations of a public body constituting a quorum of its members shall take place at a meeting open to the public except as provided in this section and sections 7 and 8.

MCL 15.270(2) provides that a decision of a public body may be invalidated if any of the above sections are violated. *Esperance v Chesterfield Twp*, 89 Mich App 456, 462; 280 NW2d 559 (1979). However, MCL 15.270(5) states:

> In any case where an action has been initiated to invalidate a decision of a public body on the ground that it was not taken in conformity with the requirements of this act, the public body may, without being deemed to make any admission contrary to its interest, reenact the disputed decision in conformity with this act. A decision reenacted in this manner shall be effective from the date of reenactment and shall not be declared invalid by reason of a deficiency in the procedure used for its initial enactment.

"Thus, a deficiency in the procedure may not render a decision made during a session invalid if the public body duly reenacts and corrects the procedural omission." *Herald Co v Mich Tax Tribunal*, 258 Mich App 78, 90; 669 NW2d 862 (2003).

Here, the trial court found that any violations of the OMA at the April 21, 2011 meeting were procedural in nature, and that defendant validly reenacted the decision when it successfully approved the meeting minutes at its November 21, 2013 meeting. We agree that any violations of the OMA were procedural in nature; however, we find that defendant actually cured any violation during the April 21, 2011 meeting. The minutes of that meeting reflect that the Board realized that the closed session potentially violated the OMA; consequently, the Board placed the minutes of the closed session into the regular minutes. It then deliberated plaintiff's termination in an open meeting and made its decision by vote at an open meeting. We conclude that any violations of MCL 15.263 were thus cured almost immediately after the violations occurred. Although plaintiff was not able to participate in the closed session, the minutes of that session do not reflect that any firm decision was reached during that session, and plaintiff was given a chance to participate in the deliberations that did occur in the open meeting before the vote. Under these circumstances, the trial court did not abuse its discretion in determining that invalidation was an inappropriate remedy for any procedural violations of the OMA. *Morrison*, 255 Mich App at 404. With regard to the alleged failure to correct the minutes, this Court has specifically stated that "MCL 15.263 does not provide for invalidation premised on a procedural error in the keeping of the meeting minutes." *Willis v Deerfield Twp*, 257 Mich App 541, 553; 669 NW2d 279 (2003).

Plaintiff argues additionally that defendant violated the OMA in a substantive, not procedural, manner, and impaired the rights of the public by entering into a closed session for a

reason not permitted by the OMA, i.e., deliberating the termination of plaintiff in that closed session. MCL 15.268(a) does state that a closed session to consider the dismissal of a public officer, employee, staff member, or agent is only permissible if the person to be terminated requests a closed hearing. Nothing in the record indicates that plaintiff requested a closed hearing. However, as stated above, it appears the Board almost immediately recognized a potential OMA violation, and both deliberated and decided the issue of plaintiff's termination in an open hearing. Thus, although plaintiff and the public were excluded from a portion of the meeting in violation of the OMA, they were still given a reasonable opportunity to voice their concerns; ultimately the rights of the public were not impaired and the trial court did not err in declining to invalidate defendant's decision. *Morrison*, 255 Mich App at 404.

Finally, plaintiff states that, in any event, because the trial court held that defendant's decision was valid from the date of reenactment, the effective date of her termination was November 21, 2013, and that therefore she is due her back wages from April 21, 2011 forward. We disagree. First, we note that our review of the record indicates that the trial court stated that *if* any violations of the OMA occurred, they were nonetheless cured by defendant's approval of the minutes in November 2013. Our review of the record leads us to conclude that defendant in fact cured any violations of the OMA prior to its termination decision on April 21, 2011 and thus had no need to reenact that decision in order to avoid invalidation; this conclusion is not at odds with the trial court's statement that in any event the decision was unequivocally valid from November 21, 2013 onward. Further, plaintiff's request for damages in the form of back wages derived from Count I of her complaint, on which defendant had already been granted summary disposition. Finally, the OMA only provides for limited monetary damages for intentional violations of the OMA (which plaintiff did not allege); nothing in the OMA provides for monetary damages for the period between a procedurally defective decision and its reenactment, even assuming arguendo that such a time period elapsed here. MCL 15.273; see also MCL 15.270(5) (reenactment is not an admission of fault).

Because defendant fully prevailed in the litigation that arose out of the employment contract, the trial court did not err in awarding attorney fees and costs under the contract. See *Talmer Bank & Trust v Parikh*, 304 Mich App 373, 424; 848 NW2d 408, vacated in part on other grounds 497 Mich 857 (2014).

Affirmed. As the prevailing party, defendant may tax costs. MCR 7.219(A).

/s/ Mark T. Boonstra
/s/ David H. Sawyer
/s/ Jane E. Markey