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NO. COA07-111

NORTH CAROLINA COURT OF APPEALS

Filed: 16 October 2007

STATE OF NORTH CAROLINA EX REL.,  
RONALD L. NEWTON, DEBORAH S.  
NEWTON, IRMA LANE, BARBARA  
WALKER, PETER STANFORD,  
RONALD SCARBOROUGH, NIKEASHA  
NUNN, and AUSTINE LONG,

Plaintiffs,

v.

**Court of Appeals**

Durham County  
No. 04 CVS 3393

J. C. SCARBOROUGH, III,  
ROSEMOND COX, ROBERT  
MCADAMS, EUNICE STEWART,  
MARIAN THORNE, JOSEPHINE  
STRAYHORNE, and EUGENE EAVES

Defendants.

**Slip Opinion**

Appeal by plaintiffs from judgment entered 9 August 2006 by Judge W. Osmond Smith, III in Superior Court, Durham County. Heard in the Court of Appeals 28 August 2007.

*Manning Fulton & Skinner, P.A., by Michael S. Harrell and David B. Efird, for plaintiffs-appellants.*

*The Banks Law Firm, P.A., by John Roseboro, for defendants-appellees.*

WYNN, Judge.

When the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the findings of fact and whether the conclusions of law were proper

in light of such facts.<sup>1</sup> Here, Plaintiffs contend that the conclusions of law are not supported by sufficient findings of fact. We disagree, and therefore affirm the trial court's conclusions of law, which we hold are supported by the unchallenged findings of fact.

This matter involves a dispute to determine the lawful members of the Board of Trustees of Daisy E. Scarborough Home, Inc., ("Scarborough Home") a community service nonprofit corporation in Durham County. On 23 June 2004, Plaintiffs Ronald Newton, Deborah Newton, Irma Lane, and Barbara Walker ("Plaintiffs") brought an action for *quo warranto*<sup>2</sup> and two alternative claims of relief pursuant to N.C. Gen. Stat. §§ 55A-1-60 and 55A-8-10 against Defendants J. C. Scarborough, III; Rosemond Cox; Robert McAdams; Vivian Patterson; Alex Riveria; Eunice Stewart; Josephine Strayhorne; Herbert Tatum; and Marian Thorne. However, on 13 April 2005, the trial court dismissed Plaintiffs' claim with prejudice under N.C. Gen. Stat. § 55A-8-10, for failure to state a claim. Moreover, after a flurry of pretrial pleadings including answers, counterclaims, and motions, the only Defendants remaining in the action at trial were Scarborough, Cox, McAdams, Stewart, Thorne, Strayhorne, and Eugene Eaves, whom the trial court allowed to be joined as a necessary party.

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<sup>1</sup>*Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992).

<sup>2</sup> Pursuant to N.C. Gen. Stat. § 1-516, the Attorney General allowed Plaintiffs to bring the *quo warranto* action.

Following a bench trial, the trial court concluded in its 9 August 2006 order that:

15. As of the date of trial, neither defendants nor plaintiff Ronald Newton were terminated from the board of trustees in accordance with the terms of Article I paragraph 1 of the 1938 bylaws.

16. Neither defendants nor plaintiff Ronald Newton resigned from the board of trustees pursuant to the terms of Article I paragraph 5 of the 1938 bylaws.

17. As of the date of trial, neither defendants nor plaintiff Ronald Newton were removed from the board of trustees in accordance with the N.C. Gen. Stat. §§ 55A-8-08, 55A-8-09.

18. Neither defendants' nor plaintiff Ronald Newton's terms as trustees expired under N.C. Gen. Stat. § 55A-8-05.

19. Neither defendants nor plaintiff Ronald Newton resigned from the board of trustees pursuant to N.C. Gen. Stat. § 55A-8-07.

20. The Nonprofit Corporation Act - Chapter 55A of the N C. General Statutes - contains no provision that terminates a trustee's membership to the board of trustees for missing board meetings.

21. All of the defendants should be declared members of the board of trustees of Scarborough Home.

22. Plaintiff Ronald Newton should be declared a member of the board of trustees of Scarborough Home.

23. All of the defendants remained members of the board of trustees at the time plaintiffs purportedly reorganized Scarborough Home. As members of the board of trustees, the defendants were entitled to participate in any purported reorganization, including the election or appointment of trustees.

24. Plaintiffs had no authority to elect or appoint trustees, or otherwise act as the board of trustees of Scarborough Home.

25. Deborah Newton, Brenda Scarborough, Irma Lane, Barbara Walker, Peter Stanford, Ronald Scarborough, Austine Long, and Nikeasha Nunn were not properly elected, designated, or appointed and qualified to succeed any of the defendants as members of the board of trustees.

26. The following plaintiffs are not and have never been members of the board of trustees: Deborah Newton, Brenda Scarborough, Irma Lane, Barbara Walker, Peter Stanford, Ronald Scarborough, Austine Long, and Nikeasha Nunn.

27. Plaintiffs Brenda Scarborough, Irma Lane, Barbara Walker, Peter Stanford, Ronald Scarborough, Austine Long, and Nikeasha Nunn are guilty of usurping and intruding into, and unlawfully holding and exercising the offices of trustees of Scarborough Home.

28. The defendants are not guilty of usurping, intruding into, or unlawfully holding or exercising any office in Scarborough Home.

29. Judgment pursuant to N.C. Gen Stat. § 1-527 should be entered in favor of the defendants against all the plaintiffs except plaintiff Ronald Newton.

30. N.C. Gen. Stat. § 6-20 allows the court, in its discretion, to tax the costs of this action to plaintiffs.

31. The defendants incurred reasonable costs for service of subpoenas herein in an amount in excess of \$50.00.

32. In the Court's discretion costs incurred by the defendant in the amount of \$50.00 should be taxed to all of the plaintiffs except for plaintiff Ronald Newton.

33. Judicial relief is not appropriate under § 55A-1-60.

Accordingly, the trial court ordered:

34. The following persons are members of the board of trustees of Daisy E. Scarborough Home, Inc.: J.C. Scarborough, III; Rosemond Cox; Robert McAdams; Eunice Stewart; Marian Thorne; Josephine Strayhorne; Eugene Eaves; and Ronald L. Newton.

35. That the following persons are not and have never been members of the board of trustees of Daisy E. Scarborough Home, Inc.: Deborah S. Newton, Irma Lane, Barbara Walker, Peter Stanford, Ronald Scarborough, Austine Long, and Nikeasha Nunn.

36. Pursuant to N.C. Gen. Stat. § 1-527, Deborah S. Newton, Irma Lane, Barbara Walker, Peter Stanford, Ronald Scarborough, Austine Long, and Nikeasha Nunn are excluded from the offices of trustees of Daisy E. Scarborough Home, Inc.

37. The costs for service of trial subpoenas in the amount of \$50.00 are jointly and severally taxed to Deborah S. Newton, Irma Lane, Barbara Walker, Peter Stanford, Ronald Scarborough, Austine Long, and Nikeasha Nunn.

38. That plaintiffs shall immediately provide the board of trustees with all records of Daisy E. Scarborough Home, Inc.'s financial and business affairs that are within plaintiffs' custody, possession, or control.

39. That plaintiffs shall immediately relinquish control of Daisy E. Scarborough Home, Inc.'s property to the board of trustees.

Plaintiffs appeal to this Court from the 13 April 2005 order and 9 August 2006 judgment, contending that the trial court erred by: (I) making conclusions of law numbers fifteen, sixteen, seventeen, eighteen, twenty, and twenty-one, because they were not supported by the findings of fact, and (II) dismissing Plaintiffs' claim under N.C. Gen. Stat. § 55A-8-10 for failure to state a claim.

I.

Plaintiffs first contend that the trial court erred by its conclusions of law fifteen, sixteen, seventeen, eighteen, twenty, and twenty-one. We disagree.

"It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992). If supported by competent evidence, the trial court's findings of fact are conclusive on appeal. *Finch v. Wachovia Bank & Tr. Co.*, 156 N.C. App. 343, 347, 577 S.E.2d 306, 308-09 (2003). "Conclusions of law drawn by the trial court from its findings of fact are reviewable de novo on appeal." *Food Town Stores v. City of Salisbury*, 300 N.C. 21, 26, 265 S.E.2d 123, 127 (1980).

Plaintiffs have not assigned error to any of the trial court's findings of fact. Therefore, the trial court's findings of fact are binding on appeal. The sole question for this Court is whether the trial court's findings of fact support its conclusions of law. *State v. Cheek*, 351 N.C. 48, 63, 520 S.E.2d 545, 554 (1999), cert. denied, 530 U.S. 1245, 147 L. Ed. 2d 965 (2000).

The trial court made the following findings of fact, which are unchallenged by Plaintiffs:

1. The following defendants were appointed to the board of trustees of Daisy E. Scarborough Home, Inc. ("Scarborough Home"): J.C. Scarborough, III; Rosemond Cox, Robert McAdams;

Marian Thorne; Josephine Strayhorne; and Eunice Stewart. The board of trustees elected defendant Eugene Eaves onto the board.

2. Plaintiff Ronald Newton was appointed to the board of trustees.

3. Under its 1938 bylaws, Scarborough Home's business and property are managed by a board of trustees. Article I paragraph 1 of the bylaws provides the following regarding the duration of trustees' terms: "Trustees shall serve for an unlimited term or until, by a vote of a majority of the entire board membership at a regular meeting, their term is terminated."

4. Article I paragraph 5 of the 1938 bylaws provides that un-excused absences from a specified number of regular board meetings shall be construed as a resignation:

Attendance of all Board members at all regular meeting of the Board shall be deemed desirable and absence from two consecutive regular meetings, without reasonable excuse approved by a majority of the entire board membership, shall be construed as a resignation from the Board.

5. The 1938 bylaws were misplaced for many years. The former Director of The Scarborough Nursery School, Myra Scott, located the certified bylaws. The certified bylaws that were presented to the Court have a raised notary seal.

6. Ms. Scott located the 1938 bylaws among archival documents that were present in Ms. Scott's office at The Scarborough Nursery School at the time Ms. Scott succeeded Clydie Scarborough as the school's Director. The office where Ms. Scott located the bylaws used to be Clydie Scarborough's office. Clydie Scarborough served as a member of the board of trustees of Scarborough Home. The board of trustees held board meetings at The Scarborough Nursery School.

7. No lawfully-constituted board of trustees ever construed any of defendants' or plaintiff

Ronald Newton's absences from board meetings as resignations.

8. None of the defendants who were appointed to the board of trustees were ever removed from the board by the person who appointed them.

9. The board of trustees never voted to remove Eugene Eaves or any other defendant from the board of trustees.

10. None of the defendants ever communicated a resignation from the board of trustees to anyone.

11. Plaintiff Ronald Newton was not removed from the board of trustees by the person who appointed him. Nor did he communicate a resignation from the board to anyone. As of the date of trial, the board of trustees had not voted to terminate his board membership.

12. Plaintiffs purportedly reorganized Scarborough Home. This purported reorganization was not pursuant to a decree or order of any court.

13. Plaintiffs' purported reorganization included, among other things, the appointment or election of the following plaintiffs to the board of trustees: Deborah Newton, Brenda Scarborough, Irma Lane, Barbara Walker, Peter Stanford, Ronald Scarborough, Austine Long, and Nikeasha Nunn. None of the defendants were involved in the appointment or election of any of these plaintiffs to the board of trustees. None of the defendants were involved in the plaintiffs' purported reorganization of Scarborough Home.

14. Defendants incurred costs in excess of \$50.00 to serve trial subpoenas via a private process server.

Regarding Plaintiffs' challenge to conclusions of law numbers fifteen, sixteen, seventeen, and twenty, specifically conclusion of law fifteen, Plaintiffs contend that to support the conclusion of law, the trial court was required to make a finding of fact "that



Defendants did not miss two consecutive meetings or that the bylaws were not controlling." Without such findings, Plaintiffs aver that the conclusions that "neither defendants nor plaintiff Ronald Newton were terminated from the board of trustees in accordance with the terms of Article I paragraph 1 of the 1938 bylaws" and "[n]either defendants nor plaintiff Ronald Newton resigned from the board of trustees pursuant to the terms of Article I paragraph 5 of the 1938 bylaws," are not supported by the findings of fact.

However, as Defendants correctly point out, finding of fact number seven indeed supports this conclusion of law. Furthermore, Plaintiffs' assessment that the "provision does not give discretion to board members to passively waive the bylaw provisions," misses the point that absences must be "unexcused" for the provision to apply.

Additionally, Plaintiffs refer to the Nonprofit Corporation Act, which states that "the articles of incorporation or bylaws may provide that directors appointed after the effective date of such provision shall be removed automatically for missing a specified number of board meetings." (quoting N.C. Gen. Stat. § 55A-8-09(c) (2005)) (emphasis in original). However, this statute only allows for an organization's bylaws to provide for automatic resignation of "designated or appointed directors" for missing a specific number of meetings. The statute, by itself, does not provide for automatic removal as relief.

Moreover, Plaintiffs' contention that conclusion of law number eighteen is erroneous because a director's term is limited to one

year, is without merit. Although the Nonprofit Corporation Act provides for limitation of terms of the board of directors,<sup>3</sup> see N.C. Gen. Stat. § 55A-8-05(a), the 1938 bylaws allow for members to serve for "an unlimited term or until, by a vote of a majority of the entire board membership at a regular meeting, their term is terminated."

We also note that it is inconsistent for Plaintiffs to argue that Article I, paragraph 5 of the bylaws applies to eliminate Defendants from the board due to absences, and, on the other hand, argue that Article I, paragraph 1 of the bylaws implicitly does not apply because the Nonprofit Corporation Act applies. Evidence that the bylaws provide for unlimited terms and a specific method for terminating a trustees' membership from the board supports the trial court's determination that neither Defendants' nor Plaintiff Ron Newton's terms with the Board of Trustees expired by operation of the statute. Accordingly, this assignment is overruled.

## II.

In their final argument, Plaintiffs contend that the trial court erred by dismissing their claim under N.C. Gen. Stat. § 55A-8-10, for failure to state a claim. Having determined that the trial court did not err in its determination that Defendants were members

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<sup>3</sup>The Nonprofit Corporation Act defines "board of directors" as a "group of natural persons vested by the corporation with the management of its affairs whether or not the group is designated as directors in the articles of incorporation or bylaws." N.C. Gen. Stat. § 55A-1-40 (2005). Although the bylaws refer to this body as the Board of Trustees, it is clear from their duties that this body is "vested by the corporation [to manage] its affairs." *Id.*

of the Board of Trustees of Scarborough Home, the issue of whether they "engaged in fraudulent or dishonest conduct, or have engaged in gross abuses of authority and discretion, in holding themselves out as members of the board of directors of Scarborough Home," is now moot.

Affirmed.

Judges HUNTER and BRYANT concur.

Report per Rule 30(e).