STATE OF MICHIGAN

COURT OF APPEALS

CONSTANCE BELL and LOCHMOOR'S HOMEOWNERS ASSOCIATION,

Plaintiffs-Appellants,

v

DARIN A. CHASE and PEMBROOK HOMES, LLC,

Defendants-Appellees.

UNPUBLISHED
February 11, 2021

No. 351801
Oakland Circuit Court
LC No. 2019-173834-CH

Before: FORT HOOD, P.J., and GADOLA and LETICA, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition to defendants under MCR 2.116(C)(8) and (10). Plaintiffs contend that the trial court erred by granting summary disposition without first considering whether defendants had met their burden of producing evidence in support of summary disposition. We affirm.

This case arises from plaintiffs' effort to prevent defendants from building new homes in the Lochmoor Cluster Development Condominium Project (Lochmoor) in Southfield, Michigan. Plaintiffs are Lochmoor's Homeowners Association, a nonprofit corporation created to administer, operate, manage, and maintain Lochmoor, and Constance Bell, a member of the homeowners association's board of directors. Defendant Darin A. Chase is the owner of Pembrook Homes, LLC, which owns 10 vacant lots in Lochmoor. Lochmoor was established by Lochmoor Homes, LLC, an entity that Lochmoor's master deed and bylaws refer to as the "Developer."

The bylaws provided that the Developer shall have the right of architectural control over development of residential dwellings in Lochmoor. Specifically, anyone seeking to build a residential dwelling in Lochmoor must submit an outline of the construction plans to the Developer, pay a $350 review fee to the Developer, post a $2,000 damage deposit with the Developer, and finally, obtain the Developer's written approval—all before beginning construction. The bylaws further specified that the Developer could, in its discretion, assign the right of architectural control to plaintiffs or anyone else of its choosing.

The record is bereft of any indication the Developer ever assigned its rights under the bylaws to plaintiffs.[1] Yet, plaintiffs' board of directors issued a resolution titled "First Amendment to Master Deed," in which it anointed itself "successor to the Developer" and ostensibly amended Lochmoor's bylaws. The amended version of the bylaws required anyone seeking to build new houses in Lochmoor to first acquire plaintiffs' approval, as opposed to the Developer's approval under the preamended bylaws.

Eight months later, plaintiffs filed a complaint alleging that defendants violated the amended bylaws by building new homes in Lochmoor without first obtaining plaintiffs' approval. To the complaint, plaintiffs attached a copy of the resolution purporting to amend the bylaws and a copy of the preamended bylaws. In answering the complaint, defendants did not deny they were building homes without plaintiffs' approval. Instead, defendants argued they had no duty to seek plaintiffs' approval because the newly amended bylaws were invalid and unenforceable, and therefore, the preamended bylaws still controlled. For that reason, defendants asserted, as an affirmative defense, that plaintiffs lacked standing to bring this lawsuit.

Defendants then moved for summary disposition under MCR 2.116(C)(8) and (10), arguing that plaintiffs lacked standing. Defendants asserted that the amended bylaws were invalid and unenforceable because plaintiffs never allowed the homeowners in Lochmoor to vote to approve the amended bylaws. In support, defendants produced an affidavit signed by Chase that stated plaintiffs had not given homeowners in Lochmoor the opportunity to vote on the amended bylaws. The trial court entered a scheduling order that required plaintiffs to respond on or before October 9, 2019, which provided them about two months to respond. By October 30, 2019, plaintiffs had still not responded or presented any evidence contesting defendants' motion for summary disposition.

The trial court granted defendants' motion for summary disposition under MCR 2.116(C)(8) and (10). The trial court concluded that (1) plaintiffs lacked standing and (2) their claims were unripe for litigation because, in amending their bylaws, plaintiffs had not followed the procedure specified in either the Michigan Condominium Act, MCL 559.101 *et seq.*, or the procedure specified in their bylaws and master deed.

On appeal, plaintiffs argue that the trial court erred by granting defendants' motion for summary disposition. We disagree.

To begin, we note that plaintiffs failed to preserve this issue for appeal. This Court has held that if "an issue is first presented in a motion for reconsideration, it is not properly preserved." *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009). Here, plaintiffs contested the trial court's decision to grant summary disposition only in a motion for reconsideration. Thus, plaintiffs did not preserve this issue for appeal. But because the issue plaintiffs raise involves a question of law and the record contains all the facts necessary for us to

[1] Indeed, at no time have plaintiffs alleged that the Developer assigned its rights to plaintiffs, and there is no evidence in the record to suggest this happened.

resolve this case properly, we exercise our discretion to consider the merits of the issue. See *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006).

We review a trial court's decision to grant summary disposition de novo. *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v Pontiac*, 309 Mich App 611, 617; 873 NW2d 783 (2015). Whether a party has standing is a question of law that we also review de novo. *Barclae v Zarb*, 300 Mich App 455, 467; 834 NW2d 100 (2013).

"A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Any written instrument on which a claim or defense is based and that is attached as an exhibit to a pleading qualifies as part of the "pleadings" for purposes of (C)(8). See MCR 2.113(C); *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007). A trial court should grant a motion under MCR 2.116(C)(8) only if a party's claims are " 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.' " *Maiden*, 461 Mich at 119, quoting *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992). When deciding a motion brought under MCR 2.116(C)(8), the trial court may consider only the pleadings. *Maiden*, 461 Mich at 119-120.

"A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim." *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013) (quotation marks and citation omitted). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In considering a motion under MCR 2.116(C)(10), this Court must examine "the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "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*, 469 Mich at 183.

The Michigan Condominium Act, MCL 559.101 *et seq.*, provides a cause of action for homeowners in a condominium project who have been aggrieved by another co-owner's failure to comply with the bylaws. See MCL 559.207 ("A co-owner may maintain an action against the association of co-owners and its officers and directors to compel these persons to enforce the terms and provisions of the condominium documents."); *Newport West Condo Ass'n v Veniar*, 134 Mich App 1, 13; 350 NW2d 818 (1984) ("Defendants are not without a remedy for violations by the association of the master deed, bylaws, or the Condominium Act. This remedy consists of legal action against the association . . . ."). MCL 559.165 states that "[e]ach unit co-owner, tenant, or nonco-owner occupant [of a condominium] shall comply with the master deed, bylaws, and rules and regulations of the condominium project and this act." See also *Tuscany Grove Ass'n v Peraino*, 311 Mich App 389, 393; 875 NW2d 234 (2015) ("Bylaws are attached to the master deed and, along with the other condominium documents, the bylaws dictate the rights and obligations of a co-owner in the condominium."). And MCL 559.215(1) states that "[a] person or association of co-owners adversely affected by . . . any provision of an agreement or a master deed may bring an action for relief in a court of competent jurisdiction."

The Michigan court rules provide a burden-shifting scheme for considering motions for summary disposition under MCR 2.116(C)(10). *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Under this scheme, the moving party bears the initial burden: the moving party must identify "the issues as to which [it] believes there is no genuine issue as to any material fact." MCR 2.116(G)(4). See also *Lowrey v LMPS & LMPJ*, 500 Mich 1, 9; 890 NW2d 344 (2016). The moving party must describe these issues with enough clarity and detail so that the nonmoving party knows of the need to respond. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). And the moving party must provide "[a]ffidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in [its] motion . . . ." MCR 2.116(G)(3).

Here, defendants moved for summary disposition on the basis of the affirmative defense that plaintiffs lacked standing. Because defendants bear the burden of proving an affirmative defense, defendants were required to provide affirmative evidence to support their motion. *Lima Twp v Bateson*, 302 Mich App 483, 495; 838 NW2d 898 (2013).

Defendants successfully carried their burden. In their motion for summary disposition, defendants clearly identified the issue over which they believed there was no dispute of material fact: plaintiffs' failure to properly amend their bylaws. Defendants supported this contention with an affidavit and documentary evidence. Defendants attached to the motion for summary disposition a preamendment copy of Lochmoor's governing bylaws and master deed, and a copy of plaintiffs' resolution in which plaintiffs purported to amend those bylaws. The preamended bylaws permit an amendment with "an affirmative vote of not less than 66-2/3% of all Co-owners."[2] Plaintiffs' board of directors may "propose" amendments, but nowhere do the bylaws state that the board of directors may unilaterally enact them. Yet, the resolution purportedly amending the bylaws suggests that a unanimous vote of the homeowners association board was sufficient to amend the bylaws. And while the resolution is silent regarding whether the board of directors took a vote of the homeowners in Lochmoor, defendants submitted a sworn affidavit that plaintiffs' bylaw amendment had not been approved by two-thirds of Lochmoor's homeowners. Simply put, defendants presented evidence that, if left unrebutted, would establish that plaintiffs had no legal right to recovery.

Because defendants successfully carried their burden, the burden shifted to plaintiffs to establish that a genuine issue of disputed material fact existed. *Quinto*, 451 Mich at 362. To establish a genuine issue of disputed material fact, the nonmoving party cannot rely on mere allegations or denials in his or her pleadings to establish a question of fact. *Id.* "A genuine issue

[2] As noted by defendants, in addition to the requirement in the bylaws, the Michigan Condominium Act also requires an affirmative two-thirds vote of all co-owners in a condominium project before bylaw amendments become enforceable. *Highfield Beach at Lake Mich v Sanderson*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 343968); slip op at 9, quoting MCL 559.190(2) (" '[T]he master deed, bylaws, and condominium subdivision plans may be amended, even if the amendment will materially alter or change the rights of the co-owners or mortgagees, with the consent of not less than 2/3 of the votes the co-owners or mortgagees.' ").

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*, 469 Mich at 183.

In this case, plaintiffs produced no evidence in response to defendants' motion for summary disposition. As a result, defendants' evidence went uncontested, and plaintiffs failed to show there was any genuine dispute of fact over whether they properly amended Lochmoor's bylaws. And, even assuming the record contained evidence demonstrating a material factual issue, the trial court had no duty to "scour the lower court record in search of a basis for denying the moving party's motion." *Barnard Mfg Co, Inc*, 285 Mich App at 378. Accordingly, defendants provided uncontested evidence that showed plaintiffs sought to enforce an illegitimate bylaw.

Because plaintiffs had no right to enforce this illegitimate bylaw, the trial court correctly concluded that plaintiffs lacked standing. To have standing to sue, a party must have either (1) a legal cause of action; or (2) "a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large . . . ." *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 359, 792 NW2d 686 (2010). In this case, defendants established that plaintiffs have no legal cause of action because, via their uncontested affidavit, defendants established that plaintiffs have no legal right to recover. See *Tull v WTF, Inc*, 268 Mich App 24, 33; 706 NW2d 439 (2005) ("[A] 'right' and a 'remedy' do not exist independently of a 'cause of action' because one cannot enforce a right or obtain a remedy without first having a cause of action."). Because no bylaw gave plaintiffs the right to architectural control, they had no right to demand that defendants seek their approval to build, and they suffered no injury when defendants did not do so. For the same reason, plaintiffs had no "substantial interest" at stake.

Viewing the record evidence in the light most favorable to plaintiffs as the nonmoving parties, plaintiffs had no viable cause of action as a matter of law. Whether this is because plaintiffs lacked standing, or because plaintiffs' claim was not ripe for litigation, the trial court came to the correct conclusion. Because the trial court properly granted summary disposition under MCR 2.116(10), we need not consider or decide whether its reliance on MCR 2.116(C)(8) was erroneous. See *Forest Hills Coop v City of Ann Arbor*, 305 Mich App 572, 615; 854 NW2d 172 (2014) ("This Court will not reverse a trial court's order of summary disposition when the right result was reached[.]").

Plaintiffs also contend that the trial court erred by failing to adequately explain on the record why it granted summary disposition. We reject this argument.

Initially, we note that a court speaks through its written orders, not its oral pronouncements. *In re Contempt of Henry*, 282 Mich App 656, 678; 765 NW2d 44 (2009). At the hearing on defendants' motion for summary disposition, the trial court stated that it adopted defendants' arguments and granted the motion for summary disposition. In our view, this was an adequate explanation. But, even if it was not, the trial court's subsequent written order explained summary disposition was granted because defendants established that plaintiffs failed to properly amend their bylaws, and, for that reason, plaintiffs lacked standing. Although the trial court's written explanation may have been brief, it was sufficient given that the trial court was under no duty to provide any explanation whatsoever. See MCR 2.517(A)(4) ("Findings of fact and conclusions of law are unnecessary in decisions on motions unless findings are required by a particular rule.");

Lud v Howard, 161 Mich App 603, 614; 411 NW2d 792 (1987) (holding that trial court need not state findings of fact and conclusions of law for its decision on a motion for summary disposition).

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

/s/ Karen M. Fort Hood
/s/ Michael F. Gadola
/s/ Anica Letica