

FILED

IN THE IOWA DISTRICT COURT IN AND FOR SCOTT COUNTY

2013 DEC 10 PM 1:50

CLERK OF DISTRICT COURT
SCOTT COUNTY, IOWA

DEBRA J. STORK,)
SHERRY O'KEEFE,)
MICHELLE WEBER,)
KELLY GILHOOLY,)
and LISA TANK,)

Petitioners,)

v.)

GIRL SCOUTS OF EASTERN IOWA)
AND WESTERN ILLINOIS, INC.,)

Respondent.)

Case No. CVCV 122451

**RULING ON RESPONDENT'S
MOTION FOR SUMMARY
JUDGMENT**

On November 4, 2013, Respondent's Motion for Summary Judgment came before the court without oral argument. Petitioners are represented by attorneys Susan M. Hess and Philip F. Jensen. Respondent is represented by attorney Henry G. Neuman. The court has considered counsels' briefs, the parties' exhibits, and the applicable law, and now makes the following ruling:

FINDINGS OF FACT

The court finds the following facts are undisputed:

Respondent, Girl Scouts of Eastern Iowa and Western Illinois, Inc. (hereinafter "GSEIWI"), is a nonprofit corporation organized under the laws of the State of Iowa with its principal place of business in Bettendorf, Iowa. Petitioners are registered voting members of GSEIWI.

On February 5, 2013, GSEIWI announced to its members that its board of directors would vote on whether to approve a recommendation by GSEIWI's property committee to sell four tracts of land owned by GSEIWI: Camps Conestoga, Little Cloud, L-Kee-Ta, and Tahigwa. GSEIWI's board of directors planned to vote on the

property committee's recommendation on March 28, 2013 after considering feedback submitted by GSEIWI members at various town hall meetings throughout the region. The board subsequently postponed the meeting to April 11, 2013.

Due to member feedback from the town hall meetings, GSEIWI's property committee submitted a new recommendation to the board before the meeting on April 11, 2013. In its new report, GSEIWI's property committee recommended that GSEIWI redevelop Conestoga as its primary residential camp, sell the land at Little Cloud and L-Kee-Ta unnecessary for GSEIWI activities, and sell all property at Tahigwa.

On April 11, 2013, GSEIWI's board of directors decided to redevelop Conestoga into GSEIWI's primary residential camp, operate outdoor activity centers at Little Cloud, L-Kee-Ta, and Tahigwa, and sell any land at the four sites not utilized by those facilities.

CONCLUSIONS OF LAW

1. Summary Judgment Standard.

Summary judgment is appropriate only when the entire record, including pleadings, discovery and affidavits on file, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3). The burden of showing the nonexistence of a fact question rests with the moving party. *Estate of Harris v. Papa John's Pizza*, 679 N.W.2d 673, 677 (Iowa 2004). If reasonable minds may differ on the resolution of an issue, a genuine issue of material fact exists. *McIlravy v. N. River Ins. Co.*, 653 N.W.2d 323, 328 (Iowa 2002). A fact is "material" only when its determination might affect the outcome of the suit. *Fees v. Mutual Fire & Auto. Ins. Co.*, 490 N.W.2d 55, 57 (Iowa 1992).

In assessing whether summary judgment is warranted, the evidence is considered in a light most favorable to the party opposing the matter. *Crippen v. City of Cedar Rapids*, 618 N.W.2d 562, 565 (Iowa 2000). The nonmoving party is entitled to every legitimate inference that the evidence will bear in an effort to ascertain the existence of a fact question. *Id.*; see also *Fogel v. Trustees of Iowa College*, 446 N.W.2d 451, 454 (Iowa 1989). An inference is legitimate if it is "rational, reasonable, and otherwise permissible, under the governing substantive law." *McIlravy*, 653 N.W.2d at 318 (citations omitted). On the other hand, an inference is not legitimate if it is "based upon speculation or conjecture." *Id.* With these standards in mind, the court turns to consideration of Respondents' Motion for Summary Judgment.

2. Analysis.

On March 22, 2013, Petitioners filed a Petition for Declaratory Judgment and Motion for Temporary Injunction with the court, followed by an Amended Petition filed three days later. Petitioners subsequently withdrew their Motion for Temporary Injunction.

Count I of the Amended Petition requests a declaratory judgment from the court ruling that Petitioners are legally entitled to vote on GSEIWI's sale of land under Iowa Code § 504.1202. Count II of the Amended Petition alleges that GSEIWI's board of directors breached its fiduciary duties to its members by violating GSEIWI's bylaws and the Iowa Code. Under Count II, Petitioners request a declaratory judgment from the court ruling that: (1) GSEIWI must comply with Iowa Code § 504; (2) GSEIWI must give proper notice of its board meetings to its members; and (3) GSEIWI's members must be allowed to attend board meetings.

On September 13, 2013, GSEIWI moved for summary judgment. Under Count I, GSEIWI claims that Iowa Code § 504.1202 is inapplicable to the present case. Under Count II, GSEIWI asserts that its board of directors has not breached its fiduciary duties to Petitioners, and Petitioners have failed to request relief for any such breach of fiduciary duty. In the alternative, GSEIWI asks the court to dismiss the Petitioners' claims under Count I and II as moot because GSEIWI no longer has plans to sell the entirety of the camp properties. Petitioners resist GSEIWI's Motion for Summary Judgment.

Before determining whether a genuine issue of material fact exists in the present case, the court will determine whether there continues to be a justiciable controversy between the parties.

A. Justiciable Controversy.

GSEIWI asserts that Petitioners' claims under Count I and II are moot because GSEIWI no longer plans to sell the four camps in their entirety. Petitioners argue that GSEIWI could still sell all of its property under the approved property plan, or in the alternative, that the court should continue to hear the matter under the public interest exception.

"Courts of record within their respective jurisdictions shall declare rights, status, and other legal relations whether or not further relief is or could be claimed." Iowa R. Civ. P. 1.1101. "The court may refuse to render a declaratory judgment or decree where it would not, if rendered, terminate the uncertainty or controversy giving rise to the proceeding." Iowa R. Civ. P. 1.1105. A legal action is moot where it no longer presents a justiciable controversy and the issues in the case are nonexistent. *Iowa Mut. Ins. Co. v.*

McCarthy, 572 N.W.2d 537, 540 (Iowa 1997). In Iowa, the test for mootness is whether the court's decision would have force or practical legal effect on the underlying controversy. *Id.*

Voluntary cessation occurs where a party ends its own unlawful conduct once it has been sued. *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013). The United States Supreme Court has recognized that a party cannot automatically render a case moot through voluntary cessation, because the party could simply continue the unlawful conduct after the case is dismissed. *Id.* For a case to be moot through voluntary cessation, the party claiming the case is moot must show "that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 190 (2000)).

GSEIWI voluntarily stopped pursuing its plan to sell the four tracts of land in their entirety after it was sued by Petitioners. That act constitutes voluntary cessation by GSEIWI. Therefore, in order for this case to be found moot, GSEIWI must show that it is not reasonable to expect GSEIWI to pursue the sale of the four tracts of land in their entirety in the future. GSEIWI cannot show this. If the court were to find this case moot, it is reasonable to expect that GSEIWI could adopt a new property plan to sell all for tracts of land in their entirety tomorrow. Petitioners would then bring another lawsuit, and the parties would exist in repetitious cycle of litigation.

A decision from the court on the merits of this case in favor of Petitioners would prevent GSEIWI from selling all four tracts of land in their entirety in the future without a vote from its members. Such a decision would also compel GSEIWI to comply with

the provisions of § 504, provide adequate notice to its members of all future board meetings, and allow its members to attend future board meetings. In other words, the decision would have a practical legal effect on the underlying controversy between GSEIWI and Petitioners, and terminate any uncertainty about the applicability of the provisions of § 504 to this case. Accordingly, the court finds that Counts I and II of the Amended Petition are not moot, and a justiciable controversy exists between the parties.

Because the court has decided this case is not moot, it will not discuss the public interest exception issue raised by Petitioners.

B. Applicability of Iowa Code § 504.1202 - Count I.

Under Iowa Code § 504.1202, a nonprofit corporation may only sell all, or substantially all, of its property outside the ordinary course of business by authorization from its board, from persons whose approval is required under its articles, and from its members by “by two-thirds of the votes cast or a majority of the voting power, whichever is less.” Iowa Code § 504.1202(2).

Paragraphs 15 and 17 under Count I of the Amended Petition allege that GSEIWI’s plan to sell the four camps is an attempt by GSEIWI to sell substantially all of its property outside the usual course of its activities. Petitioners request that the court enter a declaratory judgment holding that Iowa Code § 504.1202 gives the members of GSEIWI the right to vote on any proposed sale of the four camps in their entirety.

In support of its Motion for Summary Judgment, GSEIWI argues that the sale of the four camps does not encompass substantially all of GSEIWI’s property and that the sale of real property is not outside the scope of GSEIWI’s usual activities.

i. Sale of Substantially All of the Corporate Property

As a preliminary matter, the court notes that both parties agree that this issue is a matter of first impression for Iowa courts. After doing its own independent research, the court agrees. However, the Iowa Practice Series section dedicated to for-profit corporate transactions states that “[s]hareholders of the corporation whose assets are being sold must approve the sale if the corporation would be left without any significant continuing business activity, generally defined to be twenty-five percent (25%) of its assets or income.” 6 Matthew G. Dore, *Iowa Practice Series, Business Organizations* § 35:1 (2013).

Due to the lack of relevant case law in Iowa, similar cases from other jurisdictions may be informative. *Butcher v. Girls Scouts of Tribal Trails Council, Inc.*, cited by both parties, closely mirrors the facts of the present case. See 779 N.E.2d 946, 947-48 (Ind. Ct. App. 2002). In *Butcher*, the Girl Scout Council attempted to sell a tract of land that made up approximately 27% to 44% of the organizations total assets. See *id.* at 947. Analyzing the phrase “all, or substantially all” under a statute very similar to Iowa Code § 504.1202, the court recognized “a generally accepted principle that a disposition of corporate assets may be considered ‘substantially all’ if either its quantitative or qualitative impact, or both, would fundamentally change the nature of the corporation.” *Id.* at 949. The court held that the sale of land in *Butcher* did not constitute “all, or substantially all” of the Council’s assets because the land was not the organization’s “largest, most significant, and single most valuable possession” nor would it “‘severely hamper’ the Council’s ability to carry out its mission.” *Id.* at 950.

Turning to the present case, GSEIWI’s first argument is that the four camps are

not substantially all of its property because the camps make up less than half of the organization's total assets. In support of that claim, GSEIWI submitted a sworn affidavit to the court from its CEO Diana Nelson briefly stating that fact. In addition, Exhibit 2 of GSEIWI's answer, which appears to be an accounting of GSEIWI's assets through an audit in September 2012, also shows that the property and equipment of the four camps make up approximately 29% of GSEIWI's total assets, and approximately 59% of its total property and equipment.

Petitioners focus on the 59% ratio rather than the 29% ratio, arguing that the court should disregard GSEIWI's cash assets because it is a nonprofit corporation. The court notes that Iowa Code § 504.1202 is entitled "Sale of *assets* other than in regular course of activities." Iowa Code § 504.1202 (emphasis added). No special designation is made between types of assets or types of nonprofit corporations. However, subsection 1 of that statute refers to "property" rather than "assets." Iowa Code § 504.1202(1).

The court finds that the plain meaning of the statute encompasses all corporate assets that can be sold, leased, exchanged, or disposed of. *See generally id.* The use of the term "property" in subsection 1 refers to all items owned by the corporation that can be sold, leased, exchanged, or disposed of, rather than to only real property and equipment. *See id.* Further, the court in *Butcher* analyzed Indiana's similarly worded statute as if it encompassed all of the organization's assets. *See* 779 N.W.2d at 950. Therefore, the court determines that the value of the four camping properties in relation to GSEIWI's total assets should be taken into account when analyzing the quantitative value of "all, or substantially all" of GSEIWI's property.

Petitioners also dispute the validity of the statistics provided to the court by

GSEIWI, arguing that Ms. Nelson's affidavit is bereft of financial information, and the submitted financial report is "bare-bones." On the other hand, Petitioners do not provide statistics contrary to those submitted by GSEIWI. Though Petitioners mere denial of the statistics' validity may not be enough to create a fact issue, they are correct in noting the insufficiency of the evidence provided to the court by GSEIWI. Ms. Nelson's assertion in her sworn affidavit is made in one sentence, without any attached supplemental financial support. This court finds Ms. Nelson's assertion is a conclusion, rather than an undisputed fact. In support of the court's finding, it notes the financial report in GSEIWI's answer is brief and vague and provides no itemized accounting of GSEIWI's assets. It was submitted to the court without explanation of the nature and manner of its preparation or the identity of its preparer. Therefore, viewing these statistics in the light most favorable to Petitioners, the court finds that there is a genuine issue of material fact as to what percentage of GSEIWI's assets is represented by the value of the four camps.

GSEIWI's second argument is qualitative rather than quantitative. GSEIWI asserts that the sale of the four camps would not fundamentally alter the existence or purpose of the organization. Article III of GSEIWI's articles of incorporation states that the purpose of GSEIWI is to "offer all girls ... an opportunity to participate in the Girl Scout program ... [and] to build girls of courage, confidence and character ... [and] to develop, manage and maintain Girl Scouting...." GSEIWI notes that camping is not mentioned, and asserts that the organization's purpose has been facilitated by a variety of other activities.

Petitioners argue that camping is an essential activity of the Girl Scout program,

and that camping has been perpetuated by various Girl Scout organizations over the last century as the heart and soul of the Girl Scout program.

The qualitative nature of the camping program in relation to the broader purpose and existence of GSEIWI is a fact-intensive inquiry that is ardently disputed by both parties. The court does not have sufficient evidence in front of it to determine the historical role of camping in relation to GSEIWI's purpose and existence. Viewing the evidence in the light most favorable to Petitioners, the court finds that a genuine issue of material fact exists on whether the sale of the four camps would fundamentally alter the purpose and existence of GSEIWI.

ii. Ordinary Course of Business.

GSEIWI argues that buying and selling real property is one method the organization uses to comply with its purpose, namely "to develop, manage and maintain Girl Scouting throughout the area of its jurisdiction...." GSEIWI cites Iowa Code § 504.302, which states, in part, that a nonprofit corporation has the power to sell all or any part of its property. GSEIWI also notes that its predecessor organizations have bought and sold land in the past. Thus, GSEIWI concludes, the buying and selling of land is an activity the organization ordinarily uses to further its charitable goals.

Alternatively, Petitioners argue that the buying and selling of real estate is not a specific stated purpose of the organization, and the current GSEIWI, in existence since 2007, has never bought or sold real property.

The court notes that just because a nonprofit corporation has the power to sell any or all parts of its property under Iowa Code § 504.302, doing so is not necessarily something in the ordinary course of the nonprofit's business. Neither party cites law

defining “ordinary course of business” under Iowa Code § 504.1202. The court will accordingly assign the phrase its plain meaning. Whether certain activities encompass the ordinary course of GSEIWI’s business is also a fact-intensive question. The court has almost no evidence in front of it regarding the history of activities undertaken by GSEIWI in fulfilling its stated purpose, nor does it have a complete transaction history of the real property bought and sold by GSEIWI and its predecessors. Therefore, viewing the evidence in the light most favorable to Petitioners, the court finds that a genuine issue of material fact exists as to whether buying and selling land is in the ordinary course of GSEIWI’s business. Summary judgment with respect to Count I must be denied.

C. Applicability of Iowa Code § 504 and Breach of Fiduciary Duty – Count II.

Count II of the Amended Petition alleges three activities that Petitioners believe constitute a breach of GSEIWI’s fiduciary duties of care and loyalty to its members. First, Petitioners allege that GSEIWI’s board of directors did not comply with Petitioners’ records request under Iowa Code § 504.1602. Second, Petitioners allege that GSEIWI’s board of directors did not provide adequate notice to its members of the board meeting scheduled for March 28, 2013 in violation of GSEIWI’s bylaws. Finally, Petitioners allege that GSEIWI’s board of directors prohibited its members from attending the board meeting scheduled for March 28, 2013. Under Count II, Petitioners request that the court declare that GSEIWI be required to: (1) comply with Iowa Code § 504; (2) send adequate notice of all future board meetings to members of GSEIWI; and (3) allow members of GSEIWI to attend all future board meetings. GSEIWI moves for summary judgment on all three issues.

i. Records Requests by Members.

In Paragraphs 28 through 32 of Count II of the Amended Petition, Petitioners assert that they requested a list of GSEIWI's members and each members' contact information from GSEIWI on February 12, 2013 and that GSEIWI did not comply with the request by February 27, 2013 in violation of Iowa Code § 504.1602. Specifically, in an affidavit submitted with Petitioners' resistance to GSEIWI's Motion for Summary Judgment, Ms. Stork states that GSEIWI provided a list of the names and addresses of its members to her without the members' email addresses or the physical addresses of GSEIWI's minor members.

A member is entitled to inspect and copy a membership list "at a reasonable time and reasonable location specified by the corporation...." Iowa Code § 504.1602(2). The membership list must include "the names and addresses of all members." Iowa Code § 504.1601(3). A corporation may respond within ten business days of a records request for a membership list with a written proposal offering a reasonable alternative. Iowa Code § 504.1602(6).

The court finds that GSEIWI complied with the provisions of Iowa Code § 504 discussed above. GSEIWI mailed the membership list including physical addresses to Ms. Stork and she received them on February 27, 2013. The statute does not require GSEIWI to provide email addresses, and does not specify whether the provided document should list members vertically or horizontally. Further, GSEIWI provided a reasonable alternative to Ms. Stork's request for the addresses of minor members by providing the minor members with a copy of Ms. Stork's special meeting request at GSEIWI's own expense. Therefore, the court finds that no genuine issue of material fact

exists on this issue.

ii. Adequate Notice of Board Meetings.

In paragraph 34 of the Amended Petition, Petitioners claim they did not receive notice of the time and place of the board meeting scheduled for March 28, 2013. GSEIWI asserts that adequate notice was provided in the announcement of the board of director's vote on the property committee's plan mailed to members on February 5, 2013. The meeting was also mentioned on GSEIWI's website, blog, and Facebook page, and in GSEIWI's magazine, which is mailed to all of its members.

Though Petitioners fail to respond to GSEIWI's assertions in their resistance, the court's independent review of GSEIWI's exhibits reveals some evidentiary inadequacies. First, according to its bylaws, GSEIWI is required give notice of board meetings to its members by mail, email, fax, or personal service. Thus, posting notice of the board meeting on GSEIWI's website, blog, and Facebook page is inadequate under its bylaws. Second, though Defendant's Exhibit 5, the affidavit from Ms. Nelson, states that notice was published in a magazine sent to all members, the relevant pages of the magazine have not been provided to the court by GSEIWI. Finally, Defendant's Exhibit 8, the letter to GSEIWI's members sent on February 5, 2013, does not state the time or place of the board meeting.

Therefore, the court finds that a genuine issue of material fact exists on whether GSEIWI has complied with its bylaws by giving adequate notice to its members of the time and place of its board meetings.

iii. Attendance of Board Meetings by Members.

In paragraphs 36 through 38 of the Amended Petition, Petitioners claim GSEIWI

has breached its fiduciary duty to its members by preventing its members from attending the board meeting scheduled for March 28, 2013, because member attendance is not prohibited in the organization's bylaws. GSEIWI responds that the organization has not allowed members in its board meetings in the past, and that Petitioners have not cited authority giving them the right to attend a board meeting.

It is apparent to the court that GSEIWI's bylaws are silent on this issue, and no GSEIWI member has ever attended a board meeting because no member has ever asked to do so. However, GSEIWI is correct in pointing out that no law or document governing GSEIWI entitles GSEIWI's members to attend meetings of its board of directors. Accordingly, the court finds that no genuine issue of material fact exists on this issue.

RULING

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Respondent's Motion for Summary Judgment is DENIED with respect to Count I and GRANTED in part and DENIED in part with respect to Count II as stated herein.

The Clerk shall e-mail a copy of this Ruling to counsel of record.

Costs for this motion, if any, are assessed against the Respondent.

Dated: December 10, 2013.



Marlita A. Greve
District Court Judge
Seventh Judicial District