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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1265**

KGK, LLC,
Appellant,

vs.

731 Bielenberg Association,
Respondent.

**Filed April 8, 2019
Affirmed
Kirk, Judge***

Washington County District Court
File No. 82-CV-17-3612

Chad D. Lemmons, Kelly and Lemmons, P.A., St. Paul, Minnesota (for appellant)

Marnie E. Fearon, Amanda M. Sicoli, Gray, Plant, Mooty, Mooty & Bennett, P.A.,
Minneapolis, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Florey, Judge; and Kirk,
Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

KIRK, Judge

In this appeal from summary judgment, appellant condominium owner argues that the district court erred by dismissing its claims against respondent condominium association for (1) refund of amounts appellant paid to another condominium owner in 2013 through 2015 to reimburse that owner for appellant's share of association expenses, (2) refund of appellant's share of association expenses for 2016 through 2017 based on alleged defects in respondent's board, and (3) breach of fiduciary duty by one of respondent's board members, a non-party. We affirm.

FACTS

Respondent 731 Bielenberg is a three-unit non-residential condominium created by LP Properties, LLC in 2012. LP Properties owns one unit and has an 86.78% interest in respondent. Appellant KGK, LLC owns the other two units and has a 13.22% total interest in the association.

The association is supposed to levy annual proportional assessments against its members to cover common expenses. It did not do so in 2013 through 2015. Instead, LP Properties paid the association's expenses and billed KGK for its 13.22% share. KGK paid those bills, totaling \$19,510.39, through December 2015.

Around that time, a dispute arose between KGK and the association. KGK announced that it would withdraw from the association "as of January 2016" and would not attend any meeting concerning the condominium. Beginning in 2016, the association

established an annual budget and levied assessments; KGK refused to pay. Likewise, in 2017, the association levied assessments and KGK declined to pay.

In June 2017, the association served a notice of lien foreclosure on KGK. In response, KGK initiated this action against the association (1) seeking a declaratory judgment that the association violated the annual-budget requirements of Minn. Stat. § 515B.3-1151 (2018); (2) claiming that Lawrence Hall, one of the association's board members and principal of LP Properties, breached his fiduciary duty to the association by retaining the management services of his company Hall Enterprises, Inc.; (3) claiming that the association violated the meeting-notice requirements of Minn. Stat. § 515B.3-108(b) (2018); and (4) claiming that the association refused to provide its financial records for KGK's review and seeking an accounting of the association's "transactions." KGK also sought to enjoin the foreclosure sale of its units and requested a temporary injunction.

The district court denied the temporary injunction, and KGK paid \$44,805.50 to the association to cancel the foreclosure sale.

In early 2018, KGK amended its complaint, adding two claims: (5) seeking as additional relief for the association's alleged violation of annual-budget requirements "a refund" of the funds KGK paid to LP Properties in 2013 through 2015; and (6) claiming that the association's board was illegally constituted in violation of Minn. Stat. § 515B.3-103 (2018) for 2016 through 2017, and seeking a refund of common expenses for those years.

The association moved for summary judgment. The district court granted the motion, dismissing all claims against the association, including KGK's argument (not

formally pleaded) that the association’s management contract is invalid because it is with a company that Hall owns and not in the association’s best interests. KGK appeals.¹

DECISION

On appeal from summary judgment, we review “de novo whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment.” *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010) (citation omitted). Interpretation of a statute is a legal question that we review de novo. *Lewis-Miller v. Ross*, 710 N.W.2d 565, 568 (Minn. 2006).

We first consider KGK’s claim (count 5) that it is entitled to a refund from the association for amounts it paid to LP Properties during the three years that the association failed to levy common-expense assessments as required under Minn. Stat. § 515B.3-1151(a). KGK is correct that when an association fails to approve an annual common-expense budget and levy assessments of those expenses against unit owners, the responsibility to pay common expenses falls to the declarant²—here, LP Properties. Minn. Stat. § 515B.3-1151(a)(1). But even if LP Properties was solely responsible for those years’ common expenses, nothing in the language of Minn. Stat. § 515B.3-1151 precludes LP Properties from seeking proportional reimbursement from KGK as a fellow unit owner. And even if such a prohibition could be inferred from the statute, the amount that KGK

¹ KGK does not challenge the dismissal of its claims for a declaratory judgment (count 1), that the association violated notice requirements (count 3), or for an accounting (count 4).

² The “declarant” is the entity that created the condominium. Minn. Stat. § 515B.1-103(15) (2018).

paid to LP Properties does not “represent a debt” that the association owes to KGK, as KGK asserts, but a potential claim against LP Properties. The district court did not err by dismissing this claim.

We next consider KGK’s claim (count 6) that it is entitled to a refund from the association for its share of association expenses during the two years in which LP Properties improperly maintained control of the association’s board in violation of Minn. Stat. § 515B.3-103.³ A declarant may control the membership of the condominium association board of directors for the first three years after it creates the condominium and sells units to other owners. Minn. Stat. § 515B.3-103(a), (c). At the end of that period, the board must call a meeting at which all unit owners, including the declarant, vote for a new board. *Id.*(d)(1), (e). Thereafter, a majority of the board must be unit owners or their designees “other than a declarant or an affiliate of the declarant,” unless “otherwise approved” by the majority of non-declarant unit owners. *Id.*(e)(1).

It is undisputed that, in 2016 and 2017, the association’s board was composed entirely of LP Properties’ affiliates. It also is undisputed that KGK did not avail itself of the statutory remedy for an association’s failure to call a vote and change board membership. *See* Minn. Stat. § 515B.3-103(d) (3) (providing that unit owners other than the declarant may cause the requisite meeting to be called). In fact, KGK expressly

³ In support of this claim, KGK suggests there is a genuine issue of material fact as to whether the association actually approved a common-expense budget for 2016 and 2017 because the board members did so at an owners’ meeting rather than a separate meeting of the same individuals designated as a board meeting. But any question of fact regarding whether the board actually approved a budget is immaterial to the claim that KGK actually pleaded—that the board was invalidly constituted and its budget consequently invalid.

declined to participate in any association matters for those years. Regardless, KGK identifies no authority, in Minn. Stat. § 515B.3-103 or elsewhere, that provides that an association board that remains in declarant control beyond the three-year mark is necessarily invalid or its actions subject to retroactive invalidation. To the contrary, the language of the statute strongly favors preserving a board's decisions despite procedural irregularities. See Minn. Stat. § 515B.3-103 (providing that failure to give required notice "shall not invalidate the board meeting or any action taken at the meeting"). The district court did not err by dismissing KGK's claim for a refund of common expenses based on irregularities in the association's board membership.

Finally, we turn to KGK's claim (count 2) that Hall breached the fiduciary duty that he and other declarant-appointed board members owed to unit owners under Minn. Stat. § 515B.3-103(a). As pleaded, that claim alleges that Hall improperly participated in the board decision to retain and pay for the management services of his other company, Hall Enterprises. But Hall is not a party to this action, and KGK cannot recover from the association for Hall's alleged misconduct. Nor can KGK invalidate the association's contract with Hall's company, as it now requests as relief, because it failed to give notice of such a claim in any of the multiple versions of its complaint. See *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 602 (Minn. 2014) (stating that pleading must "give fair notice to the adverse party of the *incident* giving rise to the suit with sufficient clarity to disclose the pleader's theory upon which his claim for relief is based" (quotation omitted)).

Affirmed.