NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3257-10T2

PATRICIA HAYES, LARRY BOROWEC,
and SUSAN BERNTHEISEL,

Plaintiffs-Appellants,

v.

RALPH LEEK, DONNA LEEK, GENNARO
R. SCHIAVO, JR., BRENT LILLISTON,
SWEETWATER HAVEN ASSOCIATION
(formed on May 14, 1979),
SWEETWATER HAVEN ASSOCIATION and
SWEETWATER HAVEN ASSOCIATION
(formed on November 4, 2008),

Defendants-Respondents.

Argued December 21, 2011 – Decided April 27, 2012

Before Judges Cuff, Waugh, and St. John.

On appeal from the Superior Court of New Jersey, Chancery Division, Atlantic County, Docket No. C-0040-09.

Howard E. Drucks argued the cause for appellants (Cooper Levenson April Niedelman & Wagenheim, P.A., attorneys; Fredric L. Shenkman, of counsel and on the briefs; Mr. Drucks, on the brief).

Samuel J. McNulty argued the cause for the respondents (Hueston McNulty, P.C., attorneys; Mr. McNulty, of counsel and on the brief; John F. Gaffney and Stephen H. Shaw, on the brief).

David C. Patterson argued the cause for respondents Ralph Leek and Donna Leek (Maressa Patterson, LLC, attorneys; Mr. Patterson, of counsel and on the brief).

PER CURIAM

Plaintiffs Patricia Hayes, Larry Borowec, and Susan Berntheisel appeal the January 24, 2011 order of the General Equity Part granting summary judgment to defendants Ralph and Donna Leek (the Leeks), as well as defendants Gennaro R. Schiavo, Jr. and Brent Lilliston, as trustees of Sweetwater Haven Association, Inc. and Sweetwater Haven Association, Sweetwater Haven Association, Inc.[1] We affirm for reasons other than those relied upon by the trial judge, but remand for revision of the judgment consistent with this opinion.

I.

We discern the following facts and procedural history from the record on appeal.

A.

Each plaintiff resides in the community known as Sweetwater Haven which is located in Mullica Township. Sweetwater Haven consists primarily of thirty-four properties, each of which has access to the Mullica River via the Mullica Canal and waterways

[1] Sweetwater Haven Association, Inc. and Sweetwater Haven Association, Sweetwater Haven Association, Inc., are separate entities named as defendants, as will be explained in more detail below.

located within Sweetwater Haven. There is also a "common element," which includes the waterways, owned by Sweetwater Haven's homeowners association, the identity of which is a key issue in the appeal. Schiavo and Lilliston also reside in Sweetwater Haven. Although the Leeks own property in Sweetwater Haven, they reside on an adjacent property.

Sweetwater Haven had its origins in 1956, when Michael Tomaski purchased the land on which it is now located, as part of a larger parcel of land. He subsequently received approval for a subdivision of his property. In 1963, Tomaski obtained a riparian grant from the predecessor of the New Jersey Department of Environmental Protection (Department). The grant covered the portion of the subdivision in which the Mullica Canal meets the Mullica River. It allowed ingress and egress to what is now Sweetwater Haven's internal waterways, but only with the Department's specific permission.

In December 1963 and January 1964, Tomaski sold portions of the subdivision to John E. Leek, Jr., and Donald J.C. Leek. They formed the Sweetwater Development Corporation (SDC), which subsequently acquired title to the property.

In February 1965, SDC entered into an agreement with Mullica Township, which designated a portion of the property as Sweetwater Haven and provided for its division into lots,

canals, and streets. In 1969, the Department granted the SDC the right to use Sweetwater Haven's internal waterways for ingress and egress pursuant to the riparian grant.

In 1979, Sweetwater Haven Association, Inc. (Association I), was formed pursuant to the New Jersey Business Corporation Act (BCA), N.J.S.A. 14A:1-1 to 7-18. Shortly thereafter, SDC filed protective and restrictive covenants, which bound it, its successors and assigns, including each lot within Sweetwater Haven. The restrictions and covenants were intended to run with the land and "remain in full force and effect forever." In relevant part, the restrictions and covenants prevented construction of bulkheads without the written approval of Association I.

In 1988, Association I and SDC filed a certificate of merger, making Association I the surviving entity. According to the merger, Association I assumed all rights, liabilities, restrictions, and assets of both merged entities. The certification of merger between SDC and Association I speaks in terms of shares of stock, indicating that there were ten outstanding, while Association I's by-laws speaks in terms of members, who are the property owners in Sweetwater Haven. Under the by-laws the members elect the board of trustees and otherwise perform the function of stockholders of Association I.

It is clear from the record that, over the years, Association I has treated the members as stockholders for corporate purposes.

With regard to dissolution of Association I, the by-laws provided the following:

> Section I PROCEDURE
>
> In the event it shall be deemed advisable and for the benefit of the members of the Association that the Association should be dissolved, the procedures concerning dissolution, as set forth in Title 14 of the Revised Statutes of the State of New Jersey shall be followed.
>
> Section II
>
> In the event of dissolution, the Assets of the Association after the payment of all debts, including mortgage and other encumbrances, shall be distributed to the members of the Association in the same proportion as their respective undivided interests in the Common Elements.
>
> Section III
>
> In no event shall the Association be dissolved if to do so would leave no entity to administer and manage the Association's Common Element.

In 2007, acting on the advice of Association I's accountant, Lilliston, Ralph Leek, and Schiavo, as trustees of Association I, decided to dissolve the association and create a new entity that the trustees believed would reduce the expenses incurred by the homeowners. In a letter dated June 25, 2007, the accountant informed Donna Leek, Association I's treasurer,

that his firm was "currently in the process of dissolving the existing [Form] 1120 corporation. We will be setting up a new corporation specifically for homeowner's associations. This is known as [a Form] 1120-H." The letter, however, refers to federal income tax provisions, rather than types of corporations allowed under New Jersey law. Nevertheless, it appears that the accountant believed that a change in corporate form was required to take advantage of the federal tax provisions.

On August 22, purportedly in accordance with N.J.S.A. 14A:12-3, the accountant filed a certificate of dissolution without a meeting of shareholders, in order to dissolve Association I. He apparently believed that, by dissolving the corporation, Association I would be transformed into the type of corporate entity required for filing a Form 1120-H for federal tax purposes without the necessity of further action, such as creating a successor New Jersey corporation.

The trustees of Association I continued to hold meetings, collect fees, and conduct other business. They subsequently received a new IRS Employer Identification Number (EIN) for use by a Form 1120-H entity and a tax clearance certification from the New Jersey Division of Taxation. It appears that receipt of those documents, particularly the EIN, confirmed the trustees in their belief that there was now a replacement entity. As a

result, no action was taken to create a new corporation, nor was any action taken to transfer assets to the supposed new entity.

In September 2007, Association I's attorney discovered that it had been dissolved without being reincorporated. He brought the issue to the attention of the trustees, but no action was taken to create a new corporate entity.

On October 20, 2008, the Leeks received a permit from the Department to build a bulkhead, pier, and recreational docks (improvements) in the Mullica Canal. The improvements were to be located on and along the Leeks' property adjacent to, but not in, Sweetwater Haven.

On October 28, the individual defendants, who apparently believed they were acting on behalf of the non-existent new entity, entered into an agreement with the Leeks allowing them to build the proposed improvements. That approval was necessary because the property on which the improvements were to be built, although not in Sweetwater Haven, had previously been owned by SDC and was subject to its deed restrictions. The agreement required the Leeks to pay an annual fee equivalent to the annual dues paid by a member of the homeowners association.

On November 4, Schiavo filed a certificate of incorporation for a new corporation to be known as Sweetwater Haven Association, Inc. (Association II). This corporation was

created pursuant to the BCA, as was Association I. The certificate named Schiavo, Lilliston, and Ralph Leek as trustees. Association II did not adopt new by-laws, but operated under the existing by-laws of Association I. There was never a formal transfer of Association I's assets to Association II.

B.

Plaintiffs commenced the present action in May 2009, and applied for temporary injunctive relief. They sought to enjoin the Leeks from taking action pursuant to either the permit issued by the Department or the agreement between them and Association I. They also sought relief enjoining further actions by the trustees or either of the associations, pending an accounting and the further order of the court. After several conferences, the General Equity judge entered a consent order on July 13, 2009. The order reflected the parties' agreement to mediate their differences and to maintain the status quo.

After mediation proved unsuccessful, the defendants filed answers and the parties engaged in discovery. In October and November 2010, the parties filed cross-motions for summary judgment. Following oral argument on December 16, the judge issued an oral opinion and filed an implementing order. The judge dismissed all of plaintiffs' claims, with one exception.

He determined to "reform" the corporate documents so that the creation of Association II would be deemed to have occurred as of the date of the dissolution of Association I in August 2007. He required Association II to convene an organizational meeting on January 13, 2011, at which time the members were to elect trustees, who would then designate officers. The new board of trustees was authorized to consider whether to ratify the agreement between the Leeks and Association I. Determination of the Leeks' ability to build the improvements allowed by the Department's permit was deferred until the completion of the organizational meeting.

The organizational meeting was held on January 13. Thirty-four votes, one for each property, were represented in person or by proxy. The newly elected board of trustees, which included Schiavo and Lilliston, ratified the agreement with the Leeks.

On January 24, the judge heard further argument, after which he delivered another oral decision and entered judgment dismissing plaintiff's amended complaint with prejudice. This appeal followed.

II.

On appeal, plaintiffs argue that the judge erred as a matter of law in applying the equitable remedy of reformation by ordering that Association II should be deemed, nunc pro tunc, to

have been created upon the dissolution of Association I. Because the delay in creating a successor corporation was the result of the negligent and dilatory conduct of the defendant trustees, plaintiffs argue they were not entitled to the benefit of an equitable remedy.

A.

It is well-established that our review of a trial judge's conclusions of law is de novo. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) ("A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference."). Consequently, we review a grant of summary judgment de novo, applying the same standard as the trial court under Rule 4:46-2(c). Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 539-40 (1995); Chance v. McCann, 405 N.J. Super. 547, 563 (App. Div. 2009) (citing Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007)).

Plaintiffs' brief characterizes the reasons for the delay in creating the successor entity as unknown facts, suggesting that they are disputed facts precluding summary judgment in favor of defendants. However, their brief subsequently asserts that the "contextual facts should not have been litigated." In addition, plaintiffs' statement of undisputed facts, which was

submitted in support of their application for summary judgment, asserts that the individual defendants assumed, mistakenly, that a new corporation was created automatically. Consequently, we are satisfied that there are no genuine issues of material fact, and that the disposition of this case turns on purely legal issues.

B.

The key issue in this appeal is whether and when Association I was dissolved and when Association II came into being. The significance of that issue is based upon plaintiffs' argument that, because Association I ceased to exist upon the filing of the certification of dissolution, all of its assets and rights devolved to the individual Sweetwater Haven homeowners pursuant to Article X, Section II of the by-laws.

Plaintiffs argue that, once it was dissolved, Association I had no authority to enter into the agreement with the Leeks. Instead, they argue that the authority to do so was vested in the homeowners upon the filing of the notice of dissolution. And, because the homeowners never transferred the assets and rights to Association II, that entity did not have authority to ratify the agreement. We note, however, that N.J.S.A. 14A:12-9(1)(a) provides that a dissolved corporation's corporate existence continues for purposes of winding up its affairs; and

that N.J.S.A. 14A:12-16 provides for the stockholders of a dissolved corporation to receive any remaining assets only after its business has been wound up, rather than upon filing of the certificate of dissolution.

The trial judge's resolution of the case was to reform the corporate filings, so that Association I was deemed to have been dissolved on August 22, 2007, and Association II was deemed to have come into existence on that date, despite the fact that the actual corporate filing took place on November 4, 2008. That was not necessarily an inappropriate result, especially in light of the provision in Article X, Section III of the by-laws that "[i]n no event shall the Association be dissolved if to do so would leave no entity to administer and manage the Association's Common Element." Clearly, the by-laws did not contemplate a hiatus in governance, such as that suggested by plaintiffs.

Nevertheless, we reach a different result, having concluded that Association I was never actually dissolved because the accountant's filings did not comply with the dissolution provisions of the BCA. Consequently, we need not address plaintiffs' arguments concerning the nunc pro tunc dating of the creation of Association II.

N.J.S.A. 14A:12-1(1) outlines the methods by which a corporation can be dissolved. The only methods applicable under

the circumstances of this case are those listed in N.J.S.A. 14A:12-1(1)(c), which requires action by the written consent of all shareholders as set forth in N.J.S.A. 14A:12-3, or N.J.S.A. 14A:12-1(1)(d), which requires action by the board, followed by shareholder approval at a subsequent meeting, as set forth in N.J.S.A. 14A:12-4. The procedures of N.J.S.A. 14A:12-1(1)(d) and N.J.S.A. 14A:12-4 were not followed.[2]

The notice of dissolution filed by the accountant in August 2007 purported to be a dissolution without a shareholders meeting pursuant to N.J.S.A. 14A:12-1(1)(c) and N.J.S.A. 14A:12-3. However, the provisions of the latter statute were not followed, in that there was no signed approval by all members, nor is there anything in the record to suggest that such written approval was ever obtained. Consequently, the dissolution was ineffective and the board that approved the agreement between Association I and the Leeks had full authority to do so.

III.

We conclude, therefore, that Association I was not dissolved in 2007 and, in fact, still exists. The board's approval of the agreement with the Leeks for the improvements at issue was a valid exercise of its authority. Because an appeal

[2] The proposed dissolution was mentioned at a membership meeting in June 2007, but approval was neither sought nor given by the members at that meeting.

is taken from a court's ruling rather than the reasons for the ruling, we may rely on grounds other than those upon which the trial judge relied. See State v. Maples, 346 N.J. Super. 408, 417 (App. Div. 2002) (citations omitted); State v. Deluca, 325 N.J. Super. 376, 389 (App. Div. 1999) (citations omitted), aff'd as modified, 168 N.J. 626 (2001).

Because Association I was never dissolved, there was no need for the creation of Association II, which was essentially the same entity. Consequently, we vacate paragraphs three and four of the judgment, which are premised upon an actual dissolution of Association I. We remand to the General Equity Part for the entry of a revised judgment providing (1) that Association I continues to exist, (2) that Association II is a nullity, and (3) that all actions taken in the name of Association II shall be deemed to have been actions of Association I. The remaining provisions of the judgment on appeal are affirmed.

Affirmed in part; vacated in part; and remanded for revision of the final judgment consistent with this opinion.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION