

STATE OF MICHIGAN
COURT OF APPEALS

JOHN RITZ,

Plaintiff-Appellant,

V

SANDYOAK VILLAGE ASSOCIATION,

Defendant-Appellee,

and

SANDYOAK VENTURE, INC.,

Defendant.

UNPUBLISHED

September 13, 2005

No. 254054

Roscommon Circuit Court

LC No. 97-008157-CZ

Before: Meter, P.J., and Murray and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right from the February 5, 2004, order of the Roscommon Circuit Court denying his request for costs and attorney fees. We affirm.

Plaintiff is a former board member of defendant Sandyoak Village Association,¹ which is responsible for the administration of Sandyoak Village, a recreational vehicle condominium park. The developer of the park was defendant Sandyoak Venture, Inc. A dispute arose among the board members over the assessments that Sandyoak Venture owed to the association. In December 1996, a majority of defendant's board of directors entered into an agreement with Sandyoak Venture, according to which the latter would pay the association \$12,000 a year for three years and transfer ownership of certain maintenance equipment to the association. Thereafter, Sandyoak Venture would not be required to pay the association any costs, except for metered utilities, on developer-owned units. Plaintiff, who was then a board member of defendant, cast the lone dissenting vote on this agreement.

¹ Because defendant Sandyoak Venture, Inc., is not participating in this appeal, references to the singular "defendant" in this opinion will refer to defendant Sandyoak Village Association.

Plaintiff and several other co-owners subsequently commenced this action to void the agreement. The trial court invalidated the agreement on the ground that the board exceeded its authority in the matter, because the agreement effected an amendment of the association's bylaws, which required the approval of a supermajority of the co-owners. The trial court retained jurisdiction over the question of an award of costs and attorney fees pending appeal. This Court affirmed the trial court's invalidation of the agreement. *Ritz v Sandyoak Venture, Inc*, unpublished opinion per curiam of the Court of Appeals, issued May 17, 2002 (Docket No. 228920), slip op at 3.

Having substantially prevailed on appeal, plaintiff returned to the trial court to request costs and attorney fees. Plaintiff's main theory of recovery was Article XXI of the association's bylaws, which provides, in pertinent part, as follows:

Every Director and officer of the Association shall be indemnified by the Association against all expenses and liabilities, including counsel fees, reasonably incurred by or imposed upon him in connection with any proceeding to which he may be a party or in which he may become involved by reason of his being or having been a Director or officer of the Association, whether or not he is a Director or officer at the time such expenses are incurred, except in such cases wherein the Director or officer is adjudged guilty of willful or wanton misconduct or gross negligence in the performance of his duties

The trial court expressed a tentative opinion that plaintiff's claim for attorney fees required a separate cause of action, but adjourned the matter to allow plaintiff's attorney to research the matter further. However, rather than immediately return to the trial court to continue the matter, plaintiff filed a separate action. The latter action was dismissed on the ground that jurisdiction over the matter was still retained as part of the earlier action. Plaintiff then renewed his motion in the earlier case. Finally reaching the merits of the issue, the trial court decided against awarding any costs or attorney fees, on the grounds that (1) Article XXI covered directors and officers only in a defensive role and (2) lacking the words "actual attorney fees," the provision could cover only statutory costs and fees, but there is no statutory provision for fee-shifting when an officer sues the board of directors that officer serves or has served.²

"Generally, attorney fees are not awardable absent a statute, rule, or contractual provision providing for the reimbursement of attorney fees." *Port Huron v Amoco Oil Co*, 229 Mich App 616, 637; 583 NW2d 215 (1998). Here, plaintiff claimed an entitlement to attorney fees solely

² Defendant also demands attorney fees in connection with a separate action he initiated, ostensibly on behalf of the association, while the earlier appeal in this case was pending. This involved affidavits of lien filed against many units owned by Sandyoak Venture, followed by a complaint seeking foreclosure and damages. Sandyoak Venture seized the opportunity to raise claims against plaintiff, for slander of title, tortious interference with a business expectancy, and civil conspiracy. However, issues in that case, LC No. 00-722219-CH, are not properly before this Court in the instant case. Moreover, as defendant acknowledges on appeal but plaintiff does not, all parties, including plaintiff, stipulated to dismiss that case "without costs."

on the basis of a contractual theory, relying on Article XXI of the association's bylaws.³ Contract interpretation presents a question of law, calling for review de novo. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002)

Plaintiff argues that the trial court erred in declaring that only statutory costs and fees are recoverable unless the contract specifies "actual attorney fees." We agree. The language of Article XXI, covering "*all* expenses and liabilities, including counsel fees, reasonably incurred" (emphasis added), is comprehensive in this respect, nowhere hinting that "all expenses" means "all expenses, except that attorney fees are provided only as set forth in other authority." The chosen wording clearly envisions actual reasonable attorney fees.

Plaintiff additionally argues that the trial court erred in interpreting that provision to cover directors and officers in legal proceedings only if they appear as defendants. Again, we agree.

Article XXI indemnifies an officer or director for expenses "in connection with any proceeding to which he may be a *party*" (emphasis added). The latter term, by its plain meaning, extends beyond "defendant" to "plaintiff," "petitioner," "respondent," "friend of the court," etc. Although an officer incurring personal legal expenses in connection with his or her status as an officer would normally do so as a defendant, it is conceivable that an officer might properly initiate, or join in a capacity other than as a defendant, an action for reasons directly relating to his or her official status. The trial court should have afforded the term "party" its commonplace, and thus broad, meaning.

However, the restriction of Article XXI to "[e]very Director and officer of the Association . . . in connection with any proceeding to which he may . . . become involved *by reason of his being or having been a Director or officer* of the Association" (emphasis added), is fatal to plaintiff's claim. This language plainly indicates that it is not sufficient that a party to a lawsuit happen to have or happen to have had the status of an officer or director; the person's participation in a proceeding must have come about directly as the result of such official responsibility. Contrary to plaintiff's protestations, he was not acting in his official capacity when he sued the association.

The caption of plaintiff's third-amended complaint lists plaintiff and several other persons "as individuals and on behalf of Sandyoak Village Association." The body of the complaint identifies all plaintiffs simply as "individual property owners and . . . co-owners in an

³ On appeal, plaintiff suggests that he is entitled to such reimbursement also under the common-law doctrines of "common fund" and "private attorney general." However, plaintiff neither shows where these alternative theories were presented below nor cites Michigan authorities to prove their validity or shed light on their application in this state. Generally, an issue is not properly preserved if it is not raised before, addressed, or decided by the trial court. *Polkton Charter Twp v Pellegrum*, 265 Mich App 88, 95; 693 NW2d 170 (2005). In light of these deficiencies of presentation, at trial and on appeal, we decline to consider these alternative theories or remand this case to allow plaintiff an opportunity to develop them belatedly.

RV Condominium Resort.” This was a co-owners’ action against the association, not an action by plaintiff in his capacity as an officer of the association. Further, the prayer for relief nowhere mentions attorney fees.

Moreover, Article XVII, § 3, of the bylaws states that “[t]he Board of Directors shall have the powers and duties necessary for the administration of the affairs of the Association” This language well confirms that an individual officer suing the board of directors is not thereby administering the affairs of the association.

This Court will not reverse when the trial court reaches the correct result regardless of the reasoning employed. *Zimmerman v Owens*, 221 Mich App 259, 264; 561 NW2d 475 (1997). Because plaintiff incurred legal expenses acting in his individual capacity, as a co-owner, and not as an officer administering the association’s business, the trial court reached the correct result in denying plaintiff’s request for costs or attorney fees pursuant to Article XXI.

Affirmed.

/s/ Patrick M. Meter
/s/ Christopher M. Murray
/s/ Bill Schuette