

STATE OF MICHIGAN
COURT OF APPEALS

DENICE GREER and CERTAIN MEMBERS OF
TEAMSTERS LOCAL 214,

Plaintiffs-Appellants,

v

DETROIT PUBLIC SCHOOLS, ROBERT C.
BOBB, and TEAMSTERS LOCAL 214,

Defendants-Appellees.

UNPUBLISHED
November 15, 2012

No. 304197
Wayne Circuit Court
LC No. 10-010019-CL

Before: MURPHY, C.J., and O'CONNELL and WHITBECK, JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court's order granting summary disposition in favor of defendants and the court's denial of their motion for reconsideration. Because we conclude that the record presents no material factual disputes and that defendants are entitled to summary disposition as a matter of law, we affirm.

This labor dispute arose from disagreements among the Detroit Public Schools (DPS), their in-house security officers, and the security officers' union. The security officers were covered by a 1999 collective bargaining agreement (CBA) that had an automatic renewal clause. As early as 2005, long-time DPS security officer Denice Greer believed that the union was becoming less inclined to enforce the CBA. In December 2009, DPS laid off 12 security officers and replaced them with private security officers employed by an outside entity. As a union steward, Greer determined that the layoffs violated the 1999 CBA, and she sought union intervention. According to Greer, the union declined to take any action concerning the layoff.

In July 2010, DPS notified its remaining security officers that DPS was outsourcing the security staffing and that the DPS officers' jobs would be terminated as of the following day. Within a week, the union notified DPS of grievances, in which the union contended that the terminations violated the layoff and just cause provisions of the CBA. In August 2010, the union filed a circuit court action for a preliminary injunction to preclude DPS from carrying out the terminations. Also in August 2010, Greer and the other plaintiffs filed the current action against DPS and the union, alleging a hybrid claim of breach of contract and breach of the duty of fair representation. The circuit court entered preliminary relief against DPS in both cases. This Court summarily reversed both cases. *Teamsters Local 214 v DPS*, unpublished order of the

Court of Appeals, issued August 30, 2010 (Docket No. 299804); *Greer et al v DPS et al*, unpublished order of the Court of Appeals, issued September 3, 2010 (Docket No 299965).

The parties in this action subsequently filed cross-motions for summary disposition on plaintiffs' underlying claim. The trial court granted defendants' motions upon finding that plaintiffs had failed to present evidence that the union had breached its duty of fair representation. Plaintiffs filed a motion for relief from that judgment, which the trial court denied.

Plaintiffs first argue on appeal that the record presents material factual disputes to preclude summary disposition. This Court reviews de novo the trial court's ruling on summary disposition. *Dancey v Travelers Prop Cas Co*, 288 Mich App 1, 7; 792 NW2d 372 (2010). "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). The Court considers the pleadings and the other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. *Dancey*, 288 Mich App at 7.

To withstand summary disposition on their hybrid claim, plaintiffs were required to present sufficient facts on both aspects of the claim, i.e., that DPS breached the collective bargaining agreement and that the union breached its duty of fair representation. See *Goolsby v Detroit*, 419 Mich 651, 665 n 6; 358 NW2d 856 (1984); *Knoke v East Jackson Pub Sch Dist*, 201 Mich App 480, 485; 506 NW2d 878 (1993). The union's duty of fair representation consisted of three responsibilities: "(1) 'to serve the interests of all members without hostility or discrimination . . . ;' (2) 'to exercise its discretion with complete good faith and honesty;' and (3) 'to avoid arbitrary conduct'." *Goolsby*, 419 Mich at 664, quoting *Vaca v Sipes*, 386 US 171 at 177; 87 S Ct 903; 17 L Ed 2d 842 (1967). A union breaches its fair representation duty if it fails to fulfill any one of the three responsibilities. *Goolsby*, 419 Mich at 664.

Plaintiffs argue that there is a question of fact concerning whether the 1999 CBA or an alleged 2007 CBA controlled the security officers' rights and whether the union failed to pursue the officers' rights under the 1999 CBA. We reject plaintiffs' argument for three reasons.

First, plaintiffs have not demonstrated any material difference between the alleged 2007 CBA and the 1999 CBA. The terms of the alleged 2007 CBA are apparently contained in a "Final Offer" from DPS to the union, dated April 30, 2007. The Final Offer identifies changes to the 1999 CBA Articles XIII and XVI, which are the discharge and layoff provisions, respectively. However, nothing in the Final Offer alters the 1999 CBA discharge and layoff provisions as those provisions apply to the terminations and the outsourcing decision at issue in this case. Given that there are no substantive differences between the alleged 2007 CBA and the 1999 CBA for purposes of this case, any dispute about which CBA controls was immaterial for purposes of summary disposition.

Second, plaintiffs' argument is based on the unsupported assertion that the union failed or refused to enforce the provisions of the 1999 CBA. However, plaintiffs presented no evidence that the union relied solely on the alleged 2007 CBA in the enforcement efforts. Contrary to

plaintiffs' assertion, the record demonstrates that the union relied on provisions in the 1999 CBA. In the arbitration proceeding arising from the union's grievances on the terminations, the union specifically stipulated that the 1999 CBA governed the terminations. The stipulation confirms that the union attempted to enforce the 1999 CBA.

Third, plaintiffs failed to present any evidence that the union acted in a hostile, discriminatory, or arbitrary manner. "A union has considerable discretion to decide which grievances shall be pressed to arbitration and which shall be settled, and must be permitted to assess each grievance with a view to individual merit." *Knoke*, 201 Mich App at 486. Plaintiff Greer attested that the union was generally hostile, but the attestation is insufficient to establish that the union breached its duties with regard to the layoffs or the terminations. A union's first concern is "the common good of the entire membership Having regard for the good of the general membership, the union is vested with discretion which permits it to weigh the burden upon contractual grievance machinery, the amount at stake, the likelihood of success, the cost, even the desirability of winning the award, against those considerations which affect the membership as a whole." *Lowe v Hotel & Restaurant Employees Union*, 389 Mich 123, 145-146; 205 NW2d 167 (1973). In this case, the record demonstrates that the union properly exercised its discretion and that the union addressed the terminations in at least three forums: internal grievances, a MERC action, and a circuit court suit for preliminary injunction against DPS.

None of the union's challenges to the terminations were successful. In the internal grievance, the arbitrator concluded that "the outsourcing of work previously performed by the security guards did not violate the parties' contract or the doctrine of good faith and fair dealing." In the MERC, the unfair labor practice charge was dismissed. *DPS v Teamsters Local 214*, 2012 MERC Lab Op (Case No. C10 G-175, May 22, 2012). In circuit court, the union obtained a preliminary injunction, but this Court summarily reversed. However, the union's lack of success does not indicate that its actions were hostile, discriminatory, or arbitrary. The union pursued appropriate actions in response to the 2010 terminations, and plaintiffs have presented nothing to establish that the union's actions breached its duty of fair representation.

We further note that plaintiffs and the union have each challenged DPS's outsourcing decision in various forums. All of these challenges have failed, in part because of a provision in the Public Relations Employment Act (PERA) that prohibits collective bargaining about subcontracting for noninstructional support services. See MCL 423.215(3)(f). We need not analyze the applicability of PERA in this case, because we conclude that the record contains no evidence that the union breached its duty of fair representation. The lack of evidence is fatal to plaintiffs' hybrid claim.

Plaintiffs next argue that the trial court erred by denying plaintiffs' motion for relief from the summary disposition. We review for abuse of discretion the trial court's ruling on a motion for relief from judgment. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 404; 651 NW2d 756 (2002).

Plaintiffs maintain that relief from the summary disposition was warranted on two grounds: (1) the scheduling order was unfair to plaintiffs; and (2) plaintiffs were prejudiced by the union's failure to serve the appendix of exhibits to the union's summary disposition motion.

Regarding the scheduling order, trial courts have authority to enter scheduling orders that establish deadlines for the filing of summary disposition motions. MCR 2.401(B)(2); *Kemerko Clawson LLC v RXIV Inc*, 269 Mich App 347, 351; 711 NW2d 801 (2005). Plaintiffs in this case filed an emergency motion to expedite the hearing on their motion for summary disposition and to shorten the time for responses to the motion. After consultation with the attorneys, the trial court entered a scheduling order that gave plaintiffs approximately two weeks to respond to summary disposition motions.

Plaintiffs contend that the union's motion for summary disposition came as a surprise, and that the scheduling order gave plaintiffs insufficient time to respond to the DPS and the union's motions. This contention is unpersuasive. Relief from judgment is available on the ground of surprise and on the ground of fraud, misrepresentation, or misconduct of an adverse party. MCR 2.612(C)(1)(a), (c). That plaintiffs' counsel was surprised by the union's motion does not warrant relief from the judgment, particularly when plaintiffs' counsel did not request an enlargement of time to respond to the union's motion. The record contains no statement from the union's counsel regarding whether the union would or would not be filing a summary disposition motion. Absent any indication of fraud or misrepresentation on the part of the union concerning its intent to file a summary disposition motion, neither plaintiffs' failure to anticipate the union's motion nor the shortened time for response warrants setting aside the trial court's summary disposition order.

For similar reasons, the union's failure to serve the appendix of exhibits does not warrant relief from judgment in this case. MCR 2.612(C)(1)(f) allows a trial court to set aside a judgment if the following three circumstances exist: "(1) the reason for setting aside the judgment must not fall under [MCR 2.612(C)(1)] subsections a through e, (2) the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside, and (3) extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice." *Heugel v Heugel*, 237 Mich App 471, 478-479; 603 NW2d 121 (1999). "Generally, relief is granted under subsection f only when the judgment was obtained by the improper conduct of the party in whose favor it was rendered." *Id.*

Having reviewed the record, we conclude that the union's failure to serve the appendix was not an extraordinary circumstance and that plaintiffs were not unduly prejudiced by the lack of service. The record indicates that plaintiffs either knew of the information contained in the union's appendix of exhibits or had received the exhibits from other sources. The appendix consisted of 13 documents, only one of which could have been unfamiliar to plaintiffs. That document, which was the union's amended unfair labor practice charge against DPS, was served upon plaintiffs as an exhibit to DPS's response to plaintiffs' summary disposition motion. Moreover, DPS and the union presented the same argument concerning the unfair labor practice charge, i.e., that the unfair labor charge was evidence of the union's fulfillment of its duty of fair representation. Given that plaintiffs had received the unfair labor charge from DPS and that DPS and the union made the same arguments regarding the document, plaintiffs were not unduly prejudiced by the union's failure to serve the document.

In addition, the trial court's rulings on the summary disposition motions would likely have been the same regardless of whether plaintiffs received proper service of the appendix. The fact that the union amended its unfair labor charge to address the terminations is not in dispute.

At best, earlier service of the union's appendix would have given plaintiffs additional time to formulate a legal argument; plaintiffs could not have demonstrated a factual dispute regarding whether the union filed the amended charge. Plaintiffs have provided no offer of proof or other suggestion of the manner in which proper service of the appendix would have altered their response to the union's motion. Because there is no factual dispute that the union filed the amended charge, plaintiffs have not demonstrated an extraordinary circumstance that warrants relief from the summary disposition. Accordingly, the trial court was within its discretion in denying plaintiffs' motion for relief from the summary disposition.

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ William C. Whitbeck