

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3459-12T1

ROBERT J. PASSERO,

Plaintiff-Appellant,

v.

THE NORTH JERSEY COUNTRY
CLUB, INC.,

Defendant-Respondent.

Submitted April 8, 2014 – Decided June 4, 2014

Before Judges Messano and Lisa.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-7580-12.

Sunshine, Atkins, Minassian, Tafuri, D'Amato, Beane & Buckner, P.A., attorneys for appellant (Kenneth F. D'Amato, of counsel and on the briefs).

Foster & Mazzie, L.L.C., attorneys for respondent (Mario A. Batelli, on the brief).

PER CURIAM

After twenty years of membership in defendant The North Jersey Country Club, Inc. (the Club), plaintiff resigned in December 2011. Along with his letter of resignation, plaintiff surrendered the \$14,900 debenture bond, which he had been

required to purchase from the Club twenty years earlier as a condition of his membership, for redemption. Neither the bond nor any provision in the Club's constitution or by-laws expressly state the time when payment is due on a surrendered bond. The Club declined to make immediate payment and instead placed plaintiff's name on a list of bondholders awaiting redemption. In light of the number of other bondholders awaiting redemption who were ahead of plaintiff and the rate at which redemptions were being made, it appeared that it would take several years for plaintiff to be paid.

Plaintiff initiated this litigation in August 2012, contending that payment was due immediately upon surrender of his bond. The Club contended that its Board of Governors (Board) had adopted a "pattern and practice" many years earlier because of significant changes in the financial structure and circumstances of the Club. Under this policy, payment on bonds surrendered for redemption by resigning members was made on a deferred basis as funds permitted from year-to-year. The Club argued that the adoption of this policy, which was not in writing and did not constitute a formal amendment to the constitution or by-laws, nevertheless fell within the broad general powers of the Board, that it had been in effect for many years without challenge, and that plaintiff was bound by it.

After completion of discovery, the parties cross-moved for summary judgment. After hearing oral argument on March 8, 2013, the court issued orders on that date denying plaintiff's motion and granting the Club's motion. In a written statement of reasons, the court concluded that because the controlling documents were silent as to time of payment, payment should be due within a reasonable time. The court concluded that, as a matter of law, the estimated time when plaintiff would be paid was "not . . . unreasonable," thus entitling the Club to summary judgment.

Plaintiff argues on appeal that the bond and constitution are not actually silent as to terms of payment, but expressly or impliedly state that payment is due upon surrender. Plaintiff further argues that, if those documents are silent, well-settled principles of contract law require that payment was due immediately upon surrender. Alternatively, plaintiff argues that if some rule of reasonableness is determinative, the trial court impermissibly engaged in fact-finding and, in doing so, considered "evidence" not contained in the record and failed to consider all relevant circumstances in concluding that, as a matter of law, the Club's payment policy was reasonable.

The Club argues that the controlling documents are indeed silent as to time of payment, that the Board's practice is

authorized by the Club's constitution, and that the trial court's findings were supported by the record.

We conclude that the trial court erred in its analysis. Although the Board possessed the broad authority to establish a deferred payment policy, the policy must withstand the test of reasonableness, considering all relevant factors. That determination is not so one-sided, in either direction, that it can be resolved as a matter of law. Accordingly, that determination must be made by a jury, and both summary judgment motions should have been denied. We therefore affirm the denial of plaintiff's motion and reverse the granting of the Club's motion.

I.

Plaintiff joined the Club in January 1991 as a Class A member. As a condition of membership, he was required to pay the Club \$14,900 in exchange for a non-negotiable debenture bond. The bond provides that it is transferrable only upon termination of membership, "and then only with the approval of the [Board], to said Club or to a member of the same class of membership thereof not then a holder of a like bond"

The bond further provides:

This bond is issued and accepted subject, at all times and from time to time, to the operation of the by-laws and rules of said Club applicable thereto, and of such

amendments or changes in said by-laws as may be hereafter made in the manner now or hereafter permitted or required by said by-laws or rules.

The by-laws contain no provisions relevant to resignation by members or redemption of bonds. The by-laws generally provide for the establishment of various committees, some of which are charged with the responsibility to make recommendations to the Board and to propose to the Board, for its approval, certain ground rules, guest rules, and rules governing play on the golf course. These rules shall be posted in the clubhouse and locker rooms for the information of members, but not incorporated into the by-laws, because such rules are changed from time to time.

The constitution contains a resignation section at Article 8, Section 3, which provides, in relevant part, that when a Class A member resigns "the member's debenture bond must be surrendered to the Club for redemption at its face amount less any indebtedness due the Club before the resignation can be acted upon."

Article 2, Section 1 of the constitution provides that "[t]he authority and government of the Club shall be vested in [the Board]."

Article 3 of the constitution provides, in relevant part:

The [Board] shall have the general control of the Club and manage its business. They make such rules in addition to those contained in the By-Laws as may be deemed necessary, authorized [sic] expenditures for the proper operation of the Club, and audit all bills through appropriate committees.

. . . .

The Board shall have sole authority and responsibility for determining Club policy as it relates to all matters affecting the general welfare of the Club.

Discovery materials revealed that, as of September 1, 2012, within one month of plaintiff's filing of his complaint, the list of bondholders awaiting redemption contained sixty-six names.¹ Plaintiff was listed as number forty-five. Ahead of him were two individuals who had resigned in July 2008 and January 2009, and who had thus been waiting about three to four years for reimbursement. The others who preceded plaintiff had resigned beginning in January 2010 through plaintiff's December 2011 resignation. At oral argument, the Club's counsel represented to the court, without any supporting evidence, that it was currently on approximately a two-and-one-half year payment schedule.

In its interrogatory answers, the Club explained the reason for the current policy, and how and when it was adopted. When

¹ All names except plaintiff's have been redacted.

plaintiff joined the Club, bond redemption was accomplished on a "one in, one out" basis, by which a resigning member would receive reimbursement of a tendered bond when a new member was admitted and posted a new bond. According to a certification of the Club's president, this policy changed in January 1998 because the Club (similar to other North Jersey country clubs) experienced declining membership and was forced to reduce its bond requirement to \$10,000, followed by a decrease in January 1999 to \$5,000.

The "one in, one out" redemption policy could not be sustained under these circumstances. Instead, the Club began utilizing a portion of initiation fees and net operating profits each year to redeem bonds, which were placed on a waiting list in the order of their surrender.² The Club contended that the reduction in bond amounts was required "to stabilize dues and promote influx in membership so as to maintain the membership rol[l] as inevitably, a number of members resign every year based upon age, health concerns or other personal reasons." In 2007, the Club reduced the bond amount to \$1.00 and increased

² During the ensuing years, the Club gave priority to two resigning members due to financial hardship and paid them immediately. Additionally, and inexplicably, the Club made immediate payment to a member who was expelled for cause, even though the terms of the bonds and the relevant provisions in the constitution provide that under such circumstances the bond would be forfeited.

initiation fees. This was done "to stabilize members' yearly dues as a declining membership rol[1] would have caused an increase[] in yearly dues to maintain the [C]lub."

The Club furnished financial information in response to discovery requests, which revealed that the following annual payments were applied toward bond reimbursement: \$192,200 (2006); \$168,950 (2007); \$264,450 (2008); \$47,250 (2009); \$219,041 (2010); \$125,726 (2011); and \$163,682 (2012). In all years from 2006 through 2011, the reimbursements were made from operating profits. The 2012 amount included about \$31,000 from surplus.

As we have stated, the policy adopted by the Board is not in writing and, even as described in discovery requests, is not specific in many respects. The policy can be summarized as one in which the Board determines on a year-to-year basis what portion of the Club's operating profits should be allocated to payment of bonds awaiting redemption and, if the Board chooses, it may also allocate some portion of surplus. The policy does not specify any outer time limit for payment, nor does it specify, for example, that if specific goals for the number of bonds to be redeemed each year are not met, actions will be taken to provide additional funds for that purpose. Such actions could include, for example, increasing initiation fees

and dues, imposing an assessment against members, foregoing other desired spending, borrowing funds, or allocating a greater portion of surplus.

Notably, the Club's financial records reveal that in September 2012, one month after plaintiff filed this lawsuit and when plaintiff was listed as number forty-five of those awaiting payment, the Club borrowed \$6,500,000 to perform club renovations.³

Based upon this record, the trial court rejected plaintiff's argument that the controlling documents either expressly or impliedly provided for the time when payment was due on a bond surrendered for redemption. The court concluded that time of payment was a "missing term" in the agreement between the parties, and in those circumstances a reasonable time for performance (i.e. payment) should be judicially imposed. The court explained it this way:

In this case, Plaintiff and [the Club] entered into a contract whereby the Plaintiff essentially gave an interest free loan to the Club in the form of a bond. The contract terms are not specific regarding the repayment of the funds to the Plaintiff. The Plaintiff cannot point to any specific language in the Bond or the By-Laws of the Club that specifically states a timeframe for payment on the bond. The Court cannot

³ Some portion of this loan amount was used to retire existing debt.

create a better agreement for the parties than was bargained for. The [Plaintiff] merely argues that he "has waited long enough" to be paid. However, this is not a persuasive argument in fact or law. While the Plaintiff having to wait to receive his monies may not seem "fair", the Court cannot insert payment terms into the parties['] agreement that simply do not exist.

The court further noted that while "there is no written policy setting forth the Club's bond redemption policy, the redemption of the Bond is always subject to the rules of the Club." The court emphasized that the Club "does not take the position that it does not owe the Plaintiff the funds that are demanded." The court then made the critical finding that, based on the Club's representation that it was paying out the bonds within two-and-a-half years of their surrender, that was not an unreasonable time, noting that "[t]he statute of limitations in New Jersey for recovery upon a contractual claim or liability is six years pursuant to N.J.S.A. 2A:14-1."

The court therefore concluded that "Plaintiff is not entitled to a money judgment at this time, although the obligation of [the Club] to redeem the bond within a reasonable time in accordance with its current practice has been established as a matter of law." The court accordingly held that "the cause of action has not yet accrued and the dismissal is without prejudice." This appeal followed.

II.

The standard of review by which we must analyze the issues before us is well-settled. Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment . . . as a matter of law." R. 4:46-2(c). The appropriate inquiry must determine "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 533 (1995) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)). The court must review the evidence presented "in the light most favorable to the non-moving party." Id. at 540.

Our review of summary judgment orders is de novo, using the same standards applied by trial courts. W.J.A. v. D.A., 210 N.J. 229, 237-38 (2012). We accord no special deference to the trial court's assessment of the record, because the trial court's decision amounts to a ruling on a question of law rather than a determination of the credibility of testimony rendered in

court. See Manalapan Realty, L.P. v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995). Further, a trial court's interpretation of the meaning of a contract is also a matter of law, subject to de novo review. Fastenberg v. Prudential Ins. Co. of Am., 309 N.J. Super. 415, 420 (App. Div. 1998).

As he argued before the trial court, plaintiff first argues before us that the terms of the bond and the Club's constitution "clearly and unambiguously establish plaintiff's right to payment on his surrendered bond." He reasons that because he was required to tender the bond for redemption in order for the Club to consider and act upon his resignation, he was required to relinquish the evidence of the Club's indebtedness to him, thereby severing all ties and requiring immediate payment. In plaintiff's view, the term "redemption" by definition requires immediate payment. Alternatively, he argues that immediate payment was clearly implied.

However, as the Club points out, Article 8, Section 3 of the constitution merely requires that bonds be surrendered for redemption upon resignation, but does not state the manner or time when redemption must be made. Therefore, the Club argues that the controlling documents contain neither an express or implied time-of-payment provision.

On this point, we agree with the Club. This is especially so in light of three circumstances. First, in a broad sense, there was always an unwritten deferred payment policy, for even under the "one in, one out" arrangement, payment to the retiring member was not immediate. Second, the current policy was in effect for most of the years during which plaintiff was a member of the Club, and he was at least on constructive notice (if not actual notice) of the policy. Yet, he continued to remain a member without voicing (as far as this record reveals) any objection or seeking to cause the policy to be abrogated or modified. Third, the bond, by its terms, is subject to the by-laws and rules of the Club and any amendments or changes in those by-laws or rules. While we recognize that no formal amendment was made, plaintiff was on notice that any provisions he deemed to exist were not immutable from the date the bond was issued, but were always subject to change.

In this case, that change came by virtue of an unwritten policy and practice adopted by the Board which remained in effect without apparent opposition for well over a decade before this litigation. That policy, according to the Board, falls within its broad authority under Article 3 of the constitution to exercise "general control of the Club and manage its business," and to "make such rules in addition to those

contained in the By-Laws as may be deemed necessary"

That constitutional provision also vests in the Board the "sole authority and responsibility for determining Club policy as it relates to all matters affecting the general welfare of the Club." We agree with the Club that these provisions provided ample authority for the Board to enact the policy in dispute.

Plaintiff urges us to conduct our analysis by strictly construing settled principles of contract law. The starting point of those principles holds that "[w]hen the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court." Restatement (Second) of Contracts § 204 (1981); see also Model Jury Charge (Civil), 4.20, "Time of Performance Where Contract is Silent" (1971) ("When a contract is silent as to the time within which a promise is to be performed, the law will require it to be performed within a 'reasonable time.'").

However, the court is not to supply a reasonable time for performance where the required performance is the payment of money. Rather, "where no time for payment is expressed in a promissory note or other instrument for the payment of money, the law adjudges that the parties meant that the money should be

payable immediately." City of Camden v. S. Jersey Port Comm'n, 2 N.J. Super. 278, 299 (Ch. Div. 1949) (emphasis added) (citing Agens v. Agens, 50 N.J. Eq. 566 (Ch. 1892)), aff'd and modified on other grounds, 4 N.J. 357 (1950). The commentary to the applicable model jury charge, addressed above, echoes this principle, and states that "[t]his charge [requiring performance within a 'reasonable time'] is intended to be used where performance promised is something other than the payment of money." Model (Civil) Jury Charge, 4.20, "Time of Performance Where Contract is Silent" (1971) (emphasis added).

The Club concedes that the strict application of contract principles would preclude insertion of a "reasonable time" for payment where time for payment is the missing term. We agree, and in applying a contrary principle, the trial court erred.

The Club argues that those narrow principles of contract law are not controlling in this context. In this regard, we also agree with the Club. This is not a straight commercial contract between strangers. Plaintiff, and all other members during the time frame in which he achieved Club membership, were required as a precondition of membership to purchase a debenture bond in the form submitted by the Club. This was not a commercial loan, but a condition of membership in a private club which granted plaintiff all of the rights and privileges of a

Class A member, which he enjoyed for the next twenty years. The rights and obligations of the parties in these circumstances requires a deeper analysis, including principles of the business judgment rule.

In formulating the deferred payment policy, the Board did not act surreptitiously or arbitrarily. It acted pursuant to its well-founded belief that it possessed the authority for such a rule by virtue of the constitutional provisions we have mentioned. Members have acquiesced for well over a decade. The Board deemed it a necessary policy in order to stabilize the Club's finances and membership rolls.

"The business judgment rule has its roots in corporate law as a means of shielding internal business decisions from second-guessing by the courts." Green Party v. Hartz Mountain Indus., Inc., 164 N.J. 127, 147 (2000) (citing Courts at Beachgate v. Bird, 226 N.J. Super. 631, 641 (Ch. Div. 1988)). "Under the rule, when business judgments are made in good faith based on reasonable business knowledge, the decision makers are immune from liability from actions brought by others who have an interest in the business entity." Ibid. (citing Sarner v. Sarner, 62 N.J. Super. 41, 60 (App. Div. 1960)). "The business judgment rule generally asks (1) whether the actions were authorized by statute or charter, and if so, (2) whether the

action is fraudulent, self-dealing or unconscionable." Ibid. (citations omitted). As we have stated, adoption of the policy was authorized by the Club's constitution. And, there is nothing in the record to suggest fraud, self-dealing or unconscionability.

In Sarner, Judge Conford explained that "[c]ourts will not interfere with the internal government of business corporations where there are honest differences of opinion concerning management between different factions in interest." Sarner, supra, 62 N.J. Super. at 60 (citations omitted). Likewise, New Jersey courts have held that "[p]rivate associations must have considerable latitude in rule-making in order to accomplish their objectives and their private law generally is binding on those who wish to remain members." Higgins v. Am. Socy of Clinical Pathologists, 51 N.J. 191, 202 (1968). In this case, finalizing the resignation process through the redemption of a bond posted as a condition of membership constituted activity inextricably associated with membership status and falls within this principle.

In Falcone v. Middlesex County Medical Society, 34 N.J. 582, 593-94 (1961), Justice Jacobs, writing for a unanimous Court, and quoting from a California Supreme Court decision, pointed out that the degree of reluctance courts should observe

in meddling with internal policies of private associations should vary in inverse proportion to the public-versus-private nature of those associations:

In James v. Marinship Corporation, [25 Cal. 2d 721, 731 (Sup. Ct. 1944)], the California Supreme Court sustained an order which restrained interference with the employment of the plaintiff where the union had a closed shop agreement with his employer but declined to admit the plaintiff to membership in the union because he was a Negro; in the course of his opinion for the court, Chief Justice Gibson expressed the following views which have pertinence here:

"Where a union has, as in this case, attained a monopoly of the supply of labor by means of closed shop agreements and other forms of collective labor action, such a union occupies a quasi public position similar to that of a public service business and it has certain corresponding obligations. It may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal associations. Its asserted right to choose its own members does not merely relate to social relations; it affects the fundamental right to work for a living."

[(emphasis added) (citations omitted).]

We are dealing here with a country club, a private association, and neither the nature of the association, nor the dispute involved in this case, implicate any public interest or

concern. Under these circumstances, courts should be extremely reluctant to interfere with internal disputes.

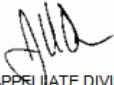
This analysis, however, does not lead to a conclusion that the Board is vested with unfettered authority to pay the legitimate debt it owes plaintiff under a policy that is not reasonable under all relevant circumstances. The discretion that accompanies the Board's authority cannot be exercised in a manner that is unfair to a former member, who is now a bona fide creditor. In determining that the policy was "not . . . unreasonable" as a matter of law based upon the motion record, the trial court engaged in impermissible fact-finding on the crucial issue in the case. Whether the policy is reasonable, under all relevant circumstances, is a material fact in dispute, which is not so one-sided based upon the motion record, that judgment should be entered in favor of the Club as a matter of law.

Indeed, as we have pointed out, valid arguments exist that might tend to cast the policy in an unreasonable light. Is it reasonably sufficient for the Club to take a laissez faire, take-it-as-it-comes approach, seeing how much money is available from annual net operating profits to pay off these loans? Should the rule of reasonableness require the Club to take a more proactive approach by, for example, setting an outer limit

of perhaps one or two years for payment once a member resigns? There must be a balance struck between the right of a retiring member to obtain repayment of his or her interest-free loan and the legitimate needs of the Club to maintain viability and sustainability in its operation. Whether the Club is doing enough to meet that standard is an issue that must be decided by a jury.

Accordingly, the order denying plaintiff's summary judgment motion is affirmed, the order granting the Club's motion for summary judgment is reversed, and the matter is remanded for further proceedings.

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


CLERK OF THE APPELLATE DIVISION