COURT OF APPEALS
DECISION
DATED AND FILED

January 30, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP315 **Cir. Ct. No. 2011SC358**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

JOYCE VETRONE,

PLAINTIFF-RESPONDENT,

V.

COOPERATIVE CARE, A WISCONSIN COOPERATIVE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waushara County: GUY D. DUTCHER, Judge. *Reversed and cause remanded*.

Before Lundsten, Sherman and Kloppenburg, JJ.[1]

[1] This case was converted from a one-judge appeal to a three-judge appeal pursuant to WIS. STAT. § 809.41(3).

¶1 SHERMAN, J. Cooperative Care appeals summary judgment in favor of Joyce Vetrone which provided that Vetrone is entitled to receive the balance of her equity in the cooperative in four equal installments. The circuit court concluded that Cooperative Care was obligated by its bylaws and its written policy in effect at the time Vetrone's membership terminated to repay Vetrone's equity in the cooperative over the course of five years and that a later amendment to the policy could not be applied retroactively to suspend such payments. We disagree and reverse.

BACKGROUND

¶2 Cooperative Care is a Wisconsin cooperative organized under Chapter 185 of the Wisconsin Statutes. According to its bylaws, "[t]he mission of Cooperative Care is to provide high quality home based care while providing fair wages and benefits to the people caring for the elderly and people with disabilities." The employees of the cooperative are both its members and its owners.

¶3 Vetrone was an employee member of Cooperative Care until October 2010, when she retired and her membership in the cooperative terminated. After withdrawing from membership, Vetrone requested redemption of her accumulated equity credit. The policy in effect at the time Vetrone withdrew her membership from the cooperative provided for a withdrawing member's equity to be redeemed in five equal, annual installments. Vetrone received a letter confirming that she would receive payment of her equity credit in five annual installments, as provided in the policy of Cooperative Care and, consistent with that policy, she timely received the first such installment. Following the first payment, Vetrone's equity balance in the cooperative was $5,983.42.

¶4 On April 20, 2011, following Vetrone's receipt of her first equity payment, the Cooperative Care board of directors amended the cooperative's policy on redemption of a terminating member's equity, adding to the existing policy the following language: "Payments may be deferred at the discretion of the board." Before the second installment of Vetrone's equity was due to be paid to Vetrone, the board, in accordance with the revised policy, suspended all payments on redemption of equity credit because of the cooperative's poor economic performance.

¶5 Vetrone sued Cooperative Care in circuit court for the remaining installments of her equity credit payments. Vetrone moved for summary judgment. The circuit court granted summary judgment to Vetrone, ordering Cooperative Care to pay Vetrone the remaining installments as they accrued. Cooperative Care appeals.

DISCUSSION

¶6 We review summary judgment de novo, applying the same standards as the circuit court. ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503. A party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2011-12).[2]

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶7 The question before us is whether the board of directors of Cooperative Care had the authority to suspend payment of Vetrone's equity credit. Put another way, the question is whether Vetrone had a contractual, or vested, right to continuation of the equity installment payments based upon Cooperative Care's policy in effect when she terminated her membership in the cooperative.

A. Cooperatives and Equity Credit Generally

¶8 Both parties correctly recognize that there is a paucity of case law in Wisconsin on the subject of the distribution of a part of the surplus from operations, or operating surplus, to members of a cooperative.[3] Consequently, we begin with a review of the nature of a cooperative and the role that such surplus plays in its financial structure.

¶9 A cooperative is a type of business organization. In Wisconsin, a cooperative is an association organized under Chapter 185 of the Wisconsin statutes. WIS. STAT. § 185.01(2). While § 185.02 provides that a cooperative may be organized for any lawful purpose, it has been said that "a cooperative society [is] run for the benefit of those who do business with it and not for the purpose of making [a] profit." ***Sunbeam Corp. v. Civil Serv. Emp. Coop. Ass'n***, 187 F.2d 768, 770 (3rd Cir. 1951).

¶10 As a consequence of being operated for "the benefit of those who do business with it," the annual net proceeds of the cooperative, which would

[3] The table of authorities in the appellant's brief-in-chief lists only one case, and that case addresses only the scope of review in summary judgment. The respondent's brief lists three cases in its table of authorities, one of which is likewise cited for a standard of review and none of which directly concern a cooperative association. The appellant's reply brief cites no cases.

otherwise be considered profit in a business corporation, "will ultimately be returned or distributed to its member (and in some cases nonmember) patrons, in proportion to the amount of business transacted by such patrons with the cooperative." Emmanuel Tipon, Annotation, *Co-operative Associations: Rights in Equity Credits or Patronage Dividends*, 50 A.L.R. 3rd 435, § 2 at 442 (1973). *See* WIS. STAT. § 185.45(3)(b).

¶11 The distribution of the net proceeds of a cooperative may be in "cash, credits, stock certificates of interest, revolving fund certificates, letters of advice, or other certificates or securities of the cooperative or of other associations … or in any combination thereof." WIS. STAT. § 185.45(5). This flexibility allows the cooperative "to provide or to retain capital for the co-operative and at the same time reflect the ownership interest of the patron in such retained capital," rather than depleting its capital. 50 A.L.R. 3rd 435, § 21(b) at 492.

¶12 The interest of a cooperative member in his or her share of the operating surplus goes by different names, but irrespective of whether it is called equity credit, patronage dividends or any other term, the net effect on the rights of the member is the same. *See* ***id.*** at 442. For simplicity, we will refer to a patron's share of the operating surplus as equity credit.

¶13 Under WIS. STAT. ch. 185, it is the board of directors of a cooperative that determines the "apportionment and distribution of proceeds." WIS. STAT. § 185.45. The board is given broad powers to determine whether an operating surplus exists and how it is to be allocated. In determining whether an operating surplus exists, the board deducts a number of expenses from total proceeds, including "[r]easonable and necessary reserves for depreciation,

depletion and obsolescence of physical property, doubtful accounts and other valuation reserves." Section 185.45(1)(e).

¶14 From the net amount so determined, the board may set aside amounts for education, officers and employees, and dividends to holders of capital stock. WIS. STAT. § 185.45(2). The balance remaining after these allocations is the amount available for distribution to members. Even then, however, the board has broad discretion in distribution to members.

¶15 Under WIS. STAT. § 185.45(3)(a), the board is given the power to set up "reasonable reserves for necessary purposes" unless "the articles or bylaws otherwise expressly provide." Further, under § 185.45(4), "[a]ny of the net proceeds may be credited to allocated or unallocated surplus or reserves of the cooperative" if "the articles or bylaws so provide."

¶16 As previously noted, the statute provides that the "distribution … of net proceeds … may be in cash, credits, stock, certificates of interest, revolving fund certificates, letters of advice, or other certificates or securities of the cooperative or of other associations, limited liability companies or corporations, in other property, or in any combination thereof." WIS. STAT. § 185.45(5). Nothing in § 185.45 requires that any particular portion of the net proceeds be paid in cash or that the equity credit be redeemed at any particular time, or indeed, at all. *See* §185.45.

B. Cooperative Care's Bylaws And Policy

¶17 With respect to the creation of equity credit, the bylaws of Cooperative Care carry out the mandate of WIS. STAT. § 185.45(3) and (4). They provide in relevant part:

> 6.3.1 *Capital reserves (retained capital equity).* The Board may create reasonable reserves for necessary purposes. Members leave a portion of net proceeds in the Co-op to help keep operations on a sound financial basis. The retained portion of the patronage refund is allocated to the member's equity account and paid out at a later date.[4]
>
> 6.3.2 *Patronage refunds.* All remaining funds shall be distributed and paid to members in accordance with the ratio of their patronage (labor performed) to the total patronage (labor performed by all members). The basis for patronage shall be that sum reported annually to the Internal Revenue Service by Cooperative Care as wages, tips, and other compensation subject to tax.

¶18 With respect to the redemption of equity credit for terminating members, the bylaws of Cooperative Care grant substantial discretion to the cooperative's board of directors. Consistent with WIS. STAT. § 185.45, there is no mandate regarding when, or even if, equity credit must be redeemed. The bylaws provide:

> 6.4.1 *Equity redemption for terminating members.* When a worker terminates membership, the equity held within the Co-op will be refunded, upon written request to the Board, *in accordance with Board policy on equity redemption.* (Emphasis added.)

¶19 Consistent with the mandate of bylaw 6.4.1, Cooperative Care's board of directors adopted the following policy, which was in effect on the day that Vetrone chose to retire. In relevant part, the policy provides:

> When your membership terminates, so does your financing responsibility to the co-op. When a member voluntarily or involuntarily terminates co-op membership, the retained equity will be paid out in cash, in equal installments, over a

[4] Note that the statement of policy in the second sentence of bylaw 6.3.1 enacts into the bylaws the very policy described above in Emmanuel Tipon, Annotation, *Co-operative Associations: Rights in Equity Credits or Patronage Dividends*, 50 A.L.R. 3rd 435, § 21(b) at 492 (1973). *See* ¶11 above.

> five year period. Upon the death of a member, any remaining retained equity will be fully paid in cash to the deceased's estate. No interest will be paid on retained equity.

¶20 In April 2011, Cooperative Care's board of directors amended the policy quoted in the preceding paragraph to provide:

> When your membership terminates, so does your financing responsibility to the co-op. When a member voluntarily or involuntarily terminates co-op membership, the retained equity will be paid out in cash, in equal installments, over a five year period, *dependent upon availability of funds*. *Payments may be deferred at the discretion of the board.* Upon the death of a member, any remaining retained equity will be fully paid in cash to the deceased's estate. No interest will be paid on retained equity. (Emphasis added to show the amendment.)

¶21 Vetrone argues that this change of policy cannot apply to her. She argues that bylaw 6.4.1 should be construed to read "[in accordance with Board] policy on equity redemption *in effect at the time of termination.*" Vetrone offers no authority for why the italicized language should be added to the plain language of the bylaw.[5]

¶22 Having been shown no authority for doing so, we decline to add language to the bylaw. Doing so in order to give the language of the bylaw its plain meaning is a leap in logic that we cannot follow. Instead, we will consider the statute, bylaws and case law to determine whether Vetrone has an interest in the redemption of her equity credit that became vested, or contractually owing to her, under the policy in effect on the date of her termination of membership.

[5] In fact, on the previous page of her appellate brief, Vetrone argues that the bylaws should be "considered to be … in [the] nature [of] a contract between the cooperative and its members." She then argues that in the absence of ambiguity, "the court is to construe it *as it stands*, giving effect to the plain meaning of the language used." (Emphasis added).

C. Vetrone's Right to Redemption of her Equity Credit

¶23 Although the relationship between a cooperative and its members with respect to equity credit has been variously described as one of principal and agent, trustor and trustee, or debtor and creditor, *see* 50 A.L.R. 3rd 435, § 2(a) at 443, the Wisconsin Supreme Court has held that the relationship in Wisconsin is not one of debtor and creditor. ***Pearson v. Clam Falls Coop. Dairy Ass'n***, 243 Wis. 369, 374, 10 N.W.2d 132 (1943).

¶24 In ***Clam Falls***, the supreme court explained that the establishment of equity credit is "within the discretion of the directors or the majority of the stockholders whether or not [equity credit] would be declared. They could have put this cash surplus into some other fund, but they chose to give the patrons a credit." ***Id***. at 374. Thus, as Vetrone herself seems to concede, any right that she has to redemption of her equity credit must lie in the contractual relationship between herself and Cooperative Care. Vetrone cites authority that the bylaws of a corporation are in the nature of a contract.[6] Actually, the cases that Vetrone cites state only that the rules of interpretation of contracts apply to interpretation of bylaws. Nonetheless, even if we assume without deciding that bylaws can confer contractual rights, the bylaws here do not confer the particular contractual rights that Vetrone claims to have.

¶25 Cooperative Care bylaws 6.3.1 and 6.3.2, which are quoted above in ¶17, allow the board of directors to allocate any part of the surplus to "reasonable reserves for necessary purposes." This grant of discretion, consistent with the

[6] ***Schoenburg v. Klapperich***, 239 Wis. 144, 300 N.W. 237 (1941); ***State ex rel. Siciliano v. Johnson***, 21 Wis. 2d 482, 124 N.W.2d 624 (1963).

supreme court's reasoning in ***Clam Falls,*** is broad enough to allow the board to utilize the entire surplus for what it determines in its discretion are "necessary purposes" and to allocate none to equity credit. *See* WIS. STAT. § 185.45(3). Thus, a member of Cooperative Care has no right under the law, nor under the bylaws of Cooperative Care, to the establishment of equity credit from the annual surplus.

¶26 On the other hand, under bylaw 6.4.1, which is quoted above in ¶18, a member of Cooperative Care has *some* right, or at least expectation, that equity credit will be redeemed after termination. However, that expectation, or right, is specifically made subject to "Board policy on equity redemption." Thus, the bylaw itself does not create a contractual right to redemption in any particular manner or timeframe, leaving that to the discretion, once again, of the board of directors. This is consistent with Wisconsin law, which does not impose upon the cooperative any obligation to redeem equity credit at any time, save, possibly, at dissolution of the cooperative. *See* WIS. STAT. § 185.71(2).

¶27 The question, then, is whether Vetrone otherwise has a right, either by contract or through vesting, that removes from the board of directors its discretion to alter its policy, as applied to Vetrone, once Vetrone terminated her membership and received the first equity payment under the then-existing policy.

¶28 With respect to the question of vesting, it is hard to see where such a right would come from. As we have explained, there is no right to redeem equity credit in any particular manner, except as provided by bylaws, which here place broad discretion in the board of directors. Vetrone does not develop an argument around such a right. Consequently, we need not discuss this possibility further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (an

argument that is insufficiently developed does not merit a response.) Nonetheless, we will.

¶29 Although Vetrone does not develop an argument about vesting, Cooperative Care, in an argument that can be construed as rejecting the possibility of vesting, considers in detail the sound public policy underlying the broad discretion of the board of directors with regard to redemption of equity credit. This public policy provides a basis for rejecting the notion that Cooperative Care's earlier policy on redemption of equity at termination does not limit that discretion, or, in essence, vest any rights in Vetrone. Vetrone simply replies that "this case is not about public policy." As we discuss below, Vetrone misses the point.

¶30 The core of Cooperative Care's argument is that "[t]he statutory mandate to the Board of Directors to manage the business and affairs of the cooperative imposes a continuing duty which is not completed or replaced by the adoption of policy. Policy changes as facts demand." The cooperative later adds that "the most basic understanding of the fiduciary duties of directors requires that decisions of a Board of Directors *not* impair the capital" of the cooperative.

¶31 In support of its position, Cooperative Care cites several sections of Wisconsin statutes, including WIS. STAT. § 185.37(1), which reads in pertinent part:

> **185.37 Liability of directors and members.** (1) Directors who negligently or in bad faith vote for any distribution of assets contrary to this chapter or the articles are jointly and severally liable to the cooperative for the value of assets distributed in excess of the amount which could have been distributed without violating this chapter or the articles.

¶32 Because holders of equity credit are not creditors, as ***Clam Falls*** makes clear, it is the duty of the board of directors, at its peril, to make certain that no redemption of equity credit impairs the rights of creditors to the assets of the cooperative. Creditors have a prior claim on the assets, including equity credit. *See* WIS. STAT. §§ 185.21(6) and 185.45(1). Thus, it is the fiduciary duty of the board of directors to not distribute any assets of the cooperative to redeem equity credit when it determines that the economic situation of the cooperative would be imperiled thereby. *See* ***Clam Falls***, 243 Wis. at 373.[7] Thus, no right to redeem equity credit may be based on a former policy of the board of directors, when intervening events support a board decision to change that policy in the exercise of its fiduciary duty.

¶33 As far as we can tell, the only remaining manner in which Vetrone might acquire a right to payment in the manner prescribed in the cooperative's policy in effect at the time of her retirement would be if the prior policy created the right under a doctrine such as promissory estoppel.

> To enforce a promise under the theory of promissory estoppel, a plaintiff must prove that the promise was one

[7] Several other states, having determined that there is no debtor-creditor relationship, have likewise reached the conclusion that equity credit was:

> not such an indebtedness on the part of the co-operative to the patron which could be collected at any time, but that such patronage credits constituted an interest of the patron in the co-operative which was contingent and not immediately payable, and that it became vested only when the board of directors of the co-operative, in the exercise of its sound discretion, determined that such payment could be made in cash without causing undue financial hardship to the co-operative.

50 A.L.R. 3rd 435, § 5(b) at 454 (citing ***Evanenko v. Farmers Union Elevator,*** 191 N.W.2d 258 (N.D., 1971)).

> that the promisor should reasonably have expected to induce either action or forbearance of a definite and substantial character by the plaintiff *and that the promise did induce either action or forbearance*. In addition, the plaintiff must prove that enforcement of the promise is necessary to avoid an injustice. The first two elements are questions for the fact finder. The third is a policy question to be decided by the court in the exercise of its discretion.

U. S. Oil Co., Inc. v. Midwest Auto Care Servs., Inc., 150 Wis. 2d 80, 89, 440 N.W.2d 825 (Ct. App 1989) (emphasis added). Vetrone has not asserted that she either acted or forbore to act based upon the existence of the policy. There are no facts from which it could be inferred that she decided to retire, for example, in reliance upon the expectation that she would receive the five annual payments.

¶34 Vetrone appears to rely upon a letter which she received from the executive director of Cooperative Care, which included the following language:

> As the Cooperative Care Board of Directors at the October 19, 2010 Board meeting, ended your membership with Cooperative Care effective that date and per your request, your retained equity will be paid out to you. You will receive five equal payments over each of the next five years per policy. Your retained equity as of December 31, 2009, is $7,460.33. Enclosed, please find a check in the amount of $1,492.07 (Check #118070). Payment installments 2 through 5 will be mailed out after each following year's Annual Meeting.

If Vetrone offers this letter as evidence of justifiable reliance, then her reliance on this as evidence of action or forbearance is misplaced, as the letter was written and sent after her retirement, as is clear from its terms.

¶35 Moreover, Vetrone does not otherwise persuade us that it makes sense to treat her retirement as an event that affects her right to equity payments vested prior to her retirement. According to Vetrone, the reason she has a right to equity credit payments is because she retired before the policy was changed. But

why should that timing matter? What if the Board had changed the policy after Vetrone had been a member for many years, but just prior to her retirement? Vetrone does not explain why she should have a greater right to the payments because the policy was changed just after her retirement, rather than just before.

¶36 In the end, Vetrone has provided neither argument nor authority that persuades us to limit the necessary discretion of the board of directors to decide when and how equity credit is redeemed, as provided in both Wisconsin statutes and the cooperative's bylaws. She has shown neither a vesting by action of law resulting from the policy in effect upon her retirement, nor has she shown a contract by estoppel based upon any action taken or forborne by her in reliance upon such policy.

CONCLUSION

¶37 We reverse the judgment of the circuit court and remand for further proceedings consistent herewith.

By the Court.—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.