

STATE OF MICHIGAN
COURT OF APPEALS

SHALBHADRA BAFNA,

Plaintiff-Appellee,

v

ECHO VALLEY CONDOMINIUM
ASSOCIATION,

Defendant-Appellant.

UNPUBLISHED
October 28, 2021

No. 353785
Oakland County Circuit
LC No. 2019-176357-CZ

Before: GADOLA, P.J., and JANSEN and O’BRIEN, JJ.

O’BRIEN, J. (*dissenting*)

The majority concludes that when a member of a nonprofit corporation files a complaint to compel the inspection of records¹ of the corporation under MCL 450.2487 of the Nonprofit Corporation Act, MCL 450.2103 *et seq.*, court review of whether the member-plaintiff stated a proper purpose for his or her records-inspection request² considers not only the request, but any documents that the member filed in support of his or her litigation, such as the complaint to compel. I disagree, and would hold that court review of whether a member-plaintiff stated a proper purpose for his or her records-inspection request should be limited to the request itself. This approach is supported by statute and, in my opinion, is more sensible. When a corporation rejects a member’s record-inspection request, it considers only what is in front of it—the member’s request. It makes little sense to permit a court to conclude that the corporation-defendant should have granted the member-plaintiff’s record-inspection request on the basis of information that the corporation-defendant did not possess at the time it denied the request. Even more concerning, allowing a

¹ This opinion uses the term “complaint to compel” to refer to the complaint that a member of a nonprofit corporation must file in circuit court under MCL 450.2487(3) to compel a nonprofit corporation to grant the member’s request to inspect records that the corporation previously denied.

² This opinion uses the term “record-inspection request” to refer to a request to inspect a nonprofit corporation’s records pursuant to MCL 450.2487(2).

member-plaintiff to supplement an otherwise deficient record-inspection request after litigation begins may leave a corporation-defendant on the hook for the member-plaintiff's costs, including attorney fees, even if the corporation-defendant's decision to reject the request was proper at the time it was made.

Here, the trial court did not limit its review to whether plaintiff, a member of defendant, stated a proper purpose for his record-inspection requests to plaintiff's requests themselves. Instead, the court concluded that, regardless whether plaintiff stated a proper purpose for inspecting the records in his record-inspection requests, plaintiff's complaint to compel stated a proper purpose for inspection. I would conclude that this was error, and would accordingly vacate the trial court's order and remand for the court to determine whether plaintiff stated a proper purpose for his record-inspection requests in the requests themselves. I therefore respectfully dissent from the majority's decision to affirm.

I. THE MAJORITY'S RELIANCE ON *NORTH OAKLAND*

The majority concludes that court review of whether a plaintiff stated a proper purpose for a record-inspection request need not be limited to the request itself in light of this Court's opinion addressing a different, though substantially similar, statute in *North Oakland Co Bd of Realtors v Realcomp, Inc*, 226 Mich App 54; 572 NW2d 240 (1997). The majority is correct that in *North Oakland*, this Court concluded that the plaintiff stated a proper purpose for its requests on the basis of an affidavit submitted after the "plaintiff's original demand letter dated November 1, 1994[.]" *Id.* at 242-243. However, this Court in *North Oakland* did not address the question raised by defendant in this case—whether it is proper for a court to consider statements made after the start of litigation (such as allegations in a complaint to compel inspection) when determining whether a member stated a proper purpose for his or her record-inspection request. Instead, the *North Oakland* Court simply assumed that doing so was proper. Our Supreme Court recently reiterated "that a point of law 'assumed without consideration is of course not decided.'" *Rott v Rott*, ___ Mich ___, ___ n 3; ___ NW2d ___ (Docket No. 161051); slip op at 10 n 3, quoting *Allen v Duffy*, 43 Mich 1, 11; 4 NW 427 (1880). Because the *North Oakland* Court "assumed without consideration" the issue raised by defendant in this case, I would not consider *North Oakland* as having any precedential value with respect to the issue. See *id.* See also *People v Douglas (On Remand)*, 191 Mich App 660, 662; 478 NW2d 737 (1991) ("[D]efendant's reliance on *People v Phelon*, 173 Mich App 157; 433 NW2d 384 (1988), is misplaced, because in *Phelon* a panel of this Court assumed, but did not decide, that the sentencing guidelines applied to safe breaking. *Phelon* has no precedential value with respect to the issue before us.").

II. MCL 450.2487

I believe that a proper resolution of whether a court can consider allegations in a complaint to compel inspection when determining whether a member-plaintiff stated a proper purpose for his or her record-inspection request requires interpreting the relevant statute—MCL 450.2487. "In reviewing questions of statutory interpretation, we must discern and give effect to the Legislature's intent." *Farris v McKaig*, 324 Mich App 349, 353; 920 NW2d 377 (2018). "To do so, we begin by examining the most reliable evidence of that intent, the language of the statute itself." *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013). If the language of the statute is unambiguous, the statute is enforced as written. *Id.*

MCL 450.2487(2) provides how a shareholder or member must make a record-inspection request, stating in relevant part:

Any shareholder or member of record of a corporation that is organized on a stock or membership basis, in person or by attorney or other agent, may during regular business hours inspect for any proper purpose the corporation's stock ledger, a list of its shareholders or members, and its other books and records, if the shareholder or member gives the corporation written demand describing with reasonable particularity the purpose of the inspection and the records the shareholder or member desires to inspect, and the records sought are directly connected with the purpose. . . . A shareholder or member must deliver a demand under this subsection to the corporation at its registered office in this state or at its principal place of business.

As relevant to this case, MCL 450.2487(2) only requires that a record-inspection request be “written” and delivered “to the corporation at its registered office in this state or at its principal place of business.” As recognized by the majority, a complaint could theoretically satisfy these requirements. And if a complaint to compel can serve as a record-inspection request, then defendant's argument that the trial court erred by considering plaintiff's complaint to compel—and not just his record-inspection requests—would fail because there would be no statutory basis to distinguish the two.

However, reading the rest of MCL 450.2487 forecloses any conclusion that a complaint to compel can serve as a record-inspection request. It is well established that “[w]hen considering the correct interpretation [of a statute], the statute must be read as a whole.” *Michigan Properties, LLC v Meridian Twp*, 491 Mich 518, 528; 817 NW2d 548 (2012). MCL 450.2487(3) provides the process for how a member can compel a corporation to allow the member to inspect records after the member submits a record-inspection request. Namely, MCL 450.2487(3) establishes that a member whose record-inspection request was not reasonably complied with can file a complaint to compel inspection, stating in relevant part:

If a corporation does not permit an inspection required under subsection (2) within 5 business days after a demand is received under subsection (2), or imposes unreasonable conditions on the inspection, the shareholder or member may apply to the circuit court for the county in which the principal place of business or registered office of the corporation is located for an order to compel the inspection. [MCL 450.2487(3).]

MCL 450.2487(3) makes clear that a complaint to compel inspection cannot serve as the record-inspection request. The complaint to compel can only be filed *after* a corporation either does not permit the inspection within five business days or imposes unreasonable conditions on the inspection. Clearly then, the record-inspection request must be submitted before the complaint to compel is filed. If not, then the conditions precedent required under MCL 450.2487(3) for filing a complaint to compel could not have been satisfied. Thus, a complaint to compel is distinct from, and cannot serve as, a record-inspection request.

The question then becomes whether a court is required to limit its review of whether a member-plaintiff stated a proper purpose in his or her record-inspection request, or if a court can consider litigation filings, like a complaint to compel inspection, to make that determination. MCL 450.2487(3) provides the basis on which a plaintiff-member may be entitled to relief, and as relevant to this case states:

If the shareholder or member seeks to inspect the books and records other than its stock ledger or list of shareholders or members, the shareholder or member must establish that the shareholder or member has complied with this section concerning the form and manner of making demand for inspection of the documents, that the inspection is for a proper purpose, and that the documents sought are directly connected with the purpose.

Subsection (2) provides “the form and manner of making demand for inspection” when it states, as pertinent to this case, that the demand must describe “with reasonable particularity the purpose of the inspection” MCL 450.2487(2). MCL 450.2487(3)’s requirement that the member must establish that he or she complied with subsection (2) in order to prevail in an action to compel inspection, combined with MCL 450.2487(2)’s requirement that a request describe “with reasonable particularity the purpose of the inspection,” leads me to conclude that a court is limited to reviewing the record-inspection request when determining whether a proper purpose was stated. The subsequent determination required under MCL 450.2487(3)—“that the inspection is for a proper purpose”—is an evaluation of the purpose that was stated “with reasonable particularity” in the record-inspection request. Accordingly, I would conclude that court review of whether a member-plaintiff stated a proper purpose for inspecting records is limited to the record-inspection request itself.

Besides this conclusion finding support in the statute, it is, in my opinion, the most reasonable approach, particularly in light of MCL 450.2487(5), which states:

If the court orders inspection of the records demanded under subsection (3) or (4), it shall also order the corporation to pay the shareholder’s, member’s, or director’s costs, including reasonable attorney fees, incurred to obtain the order unless the corporation proves that it failed to permit the inspection in good faith because it had a reasonable basis to doubt the right of the shareholder, member, or director to inspect the records demanded.

Under this subsection, if a member-plaintiff prevails in an action to compel inspection, a corporation-defendant is *required* to pay the member-plaintiff’s costs, including attorney fees, unless the corporation-defendant can prove that it is entitled to the exception in the statute.

Under my proposed interpretation of MCL 450.2487, subsection (5) makes sense. A member-plaintiff would submit a record-inspection request with a stated purpose that the member-plaintiff believes to be proper; if the corporation-defendant rejects the request for failing to state a proper purpose, the member-plaintiff pursues an action in circuit court, submitting the same request to the court for review; the court then determines whether the corporation-defendant was correct in denying the request. If the corporation-defendant was wrong in denying the request, the member-plaintiff would be entitled to attorney fees absent a showing by the corporation-defendant

that “it failed to permit the inspection in good faith because it had a reasonable basis to doubt the right of the shareholder, member, or director to inspect the records demanded.” MCL 450.2487(5).

In contrast, under the majority’s interpretation, the member-plaintiff can submit an inspection request to the corporation-defendant, and if the corporation-defendant denies the request for failing to state a proper purpose, the member-plaintiff can file an action in circuit court, and in so doing supplement new reasons for the requests. If the court then determines that those supplemented reasons state a proper purpose irrespective of the reasons given in the initial record-inspection request, the corporation-defendant owes the member-plaintiff’s costs, including attorney fees, unless it can convince the court that it meets the exception in MCL 450.2487(5). In other words, the corporation-defendant would have the burden of proving that it meets the exception in MCL 450.2487(5), even if the corporation-defendant did not improperly reject the record-inspection request. Such a situation could be avoided if the statute was read as I believe it should be—as requiring a court to limit its review of whether a member-plaintiff stated a proper purpose for his or her record-inspection request to the request itself.

On a final note, the majority disfavors this approach because the member-plaintiff would have to go “back to the drawing board” and renew his or her request rather than having it resolved by the court immediately. But going “back to the drawing board” means that the member-plaintiff would only have to wait 5 days before renewing his or her complaint in circuit court, as that is how much time a corporation-defendant would have to respond to the request. See MCL 450.2487(3). In those five days, the corporation-defendant would have the opportunity to decide whether any of the member-plaintiff’s newly stated reasons for the request state a proper purpose in the first instance, rather than giving that initial determination to a court. Further, while the majority is correct that a corporation-defendant could still deny a member-plaintiff’s record-inspection request, the statute has a deterrence mechanism to ensure that a corporation-defendant does not act in bad faith to deny a renewed request that states a proper purpose—the mandatory attorney fees in MCL 450.2487(5).

III. APPLICATION

In this case, the trial court clearly did not limit its considerations to what plaintiff stated in his record-inspection requests. The trial court only recited plaintiff’s complaint,³ and in discussing how plaintiff stated a proper purpose for his requests, the trial court never identified a request that plaintiff made to defendant that recited a proper purpose before plaintiff filed his complaint to

³ This was proper to the extent that the trial court was considering whether defendant was entitled to summary disposition under MCR 2.116(C)(8). However, the trial court ultimately granted summary disposition to plaintiff, which, in my opinion, plaintiff would only be entitled to if he had made a proper record-inspection request before filing his complaint to compel.

compel. I would therefore remand for the trial court to determine whether plaintiff stated a proper purpose in his record-inspection requests themselves.⁴

/s/ Colleen A. O'Brien

⁴ The trial court, like the majority, declined to decide whether MCL 559.157 of the Condominium Act, MCL 559.101 *et seq.* controlled over MCL 450.2487 because the lower court, like the majority, concluded that plaintiff satisfied the more stringent requirements of MCL 450.2487. I offer no opinion on whether MCL 559.157 should control this matter, and would leave that for the trial court to decide on remand.