2018 IL App (2d) 180244-U
No. 2-18-0244
Order filed December 17, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

DEERPATH CONSOLIDATED NEIGHBORHOOD ASSOCIATION,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellant,	)	
v.	)	No. 17-CH-1420
LAKE COUNTY BOARD OF REVIEW and MARTIN P. PAULSON, in his capacity as the Clerk of the Lake County Board of Review,	)	Honorable Luis A. Berrones,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Burke and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The order granting the defendants' motion to dismiss was reversed where the defendants did not, at this juncture, meet their burden to show that the plaintiff lacked standing to file a tax assessment appeal with the Lake County Board of Review.

¶ 2 Deerpath Consolidated Neighborhood Association (Deerpath) is a homeowner's association that operates pursuant to the Common Interest Community Association Act (765 ILCS 160/1-1 *et seq.* (2016)). Deerpath filed an appeal with the Lake County Board of Review (Board) to challenge the assessments of properties that were owned by Deerpath's respective

members. The Board dismissed the appeal as a "nullity." Martin P. Paulson, the clerk of the Board, took the position that Deerpath's counsel needed to be "authorized by each homeowner on whose behalf he is filing an appeal," as opposed to simply being authorized by Deerpath. Deerpath thereafter filed the instant action in the circuit court of Lake County against the Board and Paulson (collectively, defendants), seeking a declaratory judgment and other relief. The court dismissed Deerpath's complaint pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2016)). Deerpath appeals. For the reasons that follow, we reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 In June 2016, a representative of Deerpath signed a "verification of authority to represent owner(s) of real property before the Board of Review of Lake County, Illinois." According to that document, "[t]he undersigned person(s) hereby grants authority to David C. Dunkin/Erik J. VanderWeyden of Arnstein & Lehr LLP to represent them in the assessment hearing(s) before the Board of Review for the 2016 thru 2018 tax years." The document identified the permanent index numbers at issue as "07-07-107-029 ++ (various)," and the property address as 36883 N. Fernview Lane in Lake Villa, Illinois.

¶ 5 Sometime in July 2017, Deerpath, through its counsel, filed an appeal with the Board purporting to challenge the assessments of its members' individual properties. The documents that Deerpath submitted to the Board as part of that initial filing are not included in the record. On July 12, 2017, Paulson e-mailed an attorney at Arnstein & Lehr LLP (presumably Dunkin), questioning the firm's authority to file the appeal. That e-mail is mentioned by the parties but is not in the record.

¶ 6 Dunkin responded to Paulson's e-mail in a letter dated July 25, 2017. Dunkin claimed

that the circuit court of Lake County had ruled in an unrelated case—Inverness at Gregg's Landing Homeowner's Association v. Property Tax Appeal Board, No. 14-MR-2184 (Cir. Ct. Lake County) (*Inverness*)—that homeowner's associations may file group appeals at the direction of their boards. Dunkin acknowledged that section 16-55(c) of the Property Tax Code (35 ILCS 200/16-55(c) (West 2016)) authorized the Board to require proof of his firm's "authority to represent the taxpayer." He argued, however, that the June 2016 verification of authority that was signed by a representative of Deerpath complied with section 16-55(c).

¶ 7 On August 14, 2017, the Board sent a letter to Dunkin, signed by Paulson, dismissing the appeal. The Board noted that the properties at issue were "single family homes located on individual parcels of land that are located within [Deerpath]." The Board explained that the circuit court in *Inverness* had not actually ruled that a homeowner's association has standing to appeal on behalf of its individual members; instead, the court merely remanded that matter to the Property Tax Appeal Board to reevaluate the issue of standing. The Board concluded that Arnstein & Lehr LLP's capacity as Deerpath's counsel did "not authorize [it] to file an appeal on behalf of the single-family homeowners within [Deerpath] even if [Deerpath] authorized [it] to do so." In support of this position, the Board noted that section 10(c) of the Condominium Property Act (765 ILCS 605/10(c) (West 2016)) specifies that condominium associations may authorize, by a two-thirds vote of their governing boards, an attorney to file a tax appeal on behalf of all unit owners. The Board stressed that, unlike condominium associations, there was no statutory authority for homeowner's associations to file appeals on behalf of their members. Deerpath's counsel was thus required to obtain authorization from each individual homeowner on whose behalf the appeal was filed. As Deerpath's counsel failed to demonstrate that this had occurred, the Board determined that the appeal was filed without authority and was a "nullity."

¶ 8 On October 19, 2017, Deerpath filed the instant action in the circuit court. According to Deerpath, "no Illinois statute, regulation, or rule prohibits or precludes a homeowner's association organized under the Illinois Common Interest Community Association Act *** from (a) filing a tax appeal on behalf of its members [or] (b) authorizing an attorney to represent the homeowner's association in the tax appeal." In each of the four counts of the complaint, Deerpath asked for the Board to be ordered to vacate its order dismissing the appeal and to docket the matter. In count I, which was directed only against the Board, Deerpath sought a declaratory judgment that (1) the Board improperly enforced "an unpublished rule relating to standing of homeowner's associations to file tax appeals," (2) the Board lacked authority to dismiss Deerpath's appeal, and (3) Deerpath fully complied with section 16-55 of the Property Tax Code. In count II, which was likewise directed only against the Board, Deerpath sought a declaratory judgment that the same "unpublished rule" violated the equal protection clauses of the state and federal constitutions, insofar as there was no rational basis for treating homeowner's associations differently than condominium associations or for-profit corporations. In count III, which was directed against both defendants, Deerpath sought a permanent injunction prohibiting them from enforcing the "unpublished rule." In count IV, which was directed against both defendants, Deerpath sought a writ of *mandamus*.

¶ 9 Defendants jointly moved to dismiss the complaint pursuant to section 2-619.1 of the Code. They argued that counts I, III, and IV were subject to dismissal pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2016)), because Deerpath lacked standing to challenge the assessments of properties that it did not own and for which it did not pay taxes. Defendants maintained that this result was consistent with the applicable statutes and administrative regulations, as well as with the Board's own rules. Defendants believed that

certain differences between the Condominium Property Act and the Common Interest Community Association Act required the Board to treat condominium associations differently from homeowner's associations. Defendants also sought to dismiss count II of the complaint pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2016)). According to defendants, the complaint failed to state a claim for an equal protection violation, because it was "rational for the [Board] to follow the Illinois Property Tax Code and to limit standing accordingly."

¶ 10 In its response to the motion to dismiss, Deerpath argued *inter alia* that the applicable statutes, regulations, and rules did not dictate who has standing to file an assessment appeal. Deerpath instead proposed that "[c]ourts have greatly expanded the doctrine of standing over the years, finding in numerous cases that a legally protected interest may exist in a representative association or agent who exists to protect or assert the rights of a third party."

¶ 11 The court granted defendants' motion and dismissed the matter with prejudice. Deerpath filed a timely notice of appeal.

¶ 12 II. ANALYSIS

¶ 13 The parties dispute whether Deerpath, as a homeowner's association, had standing to file an assessment appeal on behalf of its members, where the appeal related to the members' privately-owned properties, as opposed to the common elements. We hold that defendants, at this juncture, have failed to meet their burden to demonstrate their right to have the present action dismissed.

¶ 14 "A motion to dismiss pursuant to section 2-615 of the Code challenges the sufficiency of the complaint based on defects that are apparent on its face, whereas a section 2-619 motion admits the sufficiency of the complaint but asserts other matters defeating the claim." *Reno v.*

Newport Township, 2018 IL App (2d) 170967, ¶ 15. Under either section, the court "must accept as true all well-pleaded facts, as well as any reasonable inferences that may arise from them." *Gorman-Dahm v. BMO Harris Bank, N.A.*, 2018 IL App (2d) 170082, ¶ 23. We review a dismissal order *de novo*. *Gorman-Dahm*, 2018 IL App (2d) 170082, ¶ 23.

¶ 15 "The standing doctrine ensures issues are raised by parties with a real interest in the controversy's outcome." *Illinois Ass'n of Realtors v. Stermer*, 2014 IL App (4th) 130079, ¶ 25. Courts must consider only those disputes which are "truly adversarial and capable of resolution by judicial decision," as opposed to cases that present hypothetical issues or generalized grievances. *Stermer*, 2014 IL App (4th) 130079, ¶ 25. To have standing, a party must demonstrate "some injury to a legally cognizable interest." *Village of Chatham v. County of Sangamon*, 216 Ill. 2d 402, 419 (2005). A plaintiff is not required to plead facts establishing its standing, so the defendant bears the burden to prove lack of standing as an affirmative defense. *Wexler v. Wirtz Corp.*, 211 Ill. 2d 18, 22 (2004). We are not bound by an administrative agency's conclusions as to whether a party before it had standing. *Kankakee County Board of Review v. Property Tax Appeal Board*, 316 Ill. App. 3d 148, 151 (2000).

¶ 16 The Property Tax Code allows a "taxpayer" to file an appeal with a board of review. 35 ILCS 200/16-30 (West 2016). Boards of review are authorized by statute to "make and publish reasonable rules for the guidance of persons doing business with them and for the orderly dispatch of business." 35 ILCS 200/9-5 (West 2016). As it relates to this case, the Board's rules allow "an owner of a Lake County property or [a] taxpayer of that subject property" to file an assessment appeal. 2017 Rules of the Lake County Board of Review, § II.A. Deerpath does not own the properties that were at issue in the assessment appeal, nor does it pay taxes on those properties. The question here is whether Deerpath nevertheless had standing to file an appeal on

behalf of its members, who are indeed property owners and taxpayers within the meaning of the Board's rule.

¶ 17 Illinois courts have not always been receptive to associations stepping into the shoes of their members. In *Underground Contractors Association v. City of Chicago*, 66 Ill. 2d 371, 377 (1977), for example, our supreme court explained that "an association's representational capacity alone is not enough to give it standing, absent a showing that it has a recognizable interest in the dispute, peculiar to itself and capable of being affected." See also *Spring Mill Townhomes Ass'n v. OSLA Financial Services, Inc.*, 124 Ill. App. 3d 774, 777 (1983) ("Under Illinois case law, absent a statutory grant of standing, a not-for-profit corporation in order to establish standing to sue on behalf of its members must allege and prove that it has suffered an injury in its individual capacity to a substantive legally protected interest."). In *Spring Mill*, the court determined that a townhome association lacked standing to pursue an action on behalf of its members against the developers for breach of an implied warranty of habitability, where the alleged breaches did not affect property to which the association itself held title. *Spring Mill*, 124 Ill. App. 3d at 778; but see *Briarcliffe West Townhouse Owners Ass'n v. Wiseman Construction Co.*, 118 Ill. App. 3d 163, 169 (1983) (homeowner's association had standing, as the representative of the individual owners, to bring a claim against a developer for breach of an implied warranty of habitability, where the breach affected the common areas to which the association held title).

¶ 18 Meanwhile, a "more expansive" view of associational standing developed in the federal courts. *Spring Mill*, 124 Ill. App. 3d at 778. In *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), the Supreme Court of the United States explained that

> "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."

In *Cable Television & Communications Association of Illinois v. Ameritech Corporation*, 288 Ill. App. 3d 354, 358-59 (1997), we "decline[d] to adopt the federal associational standing doctrine," reiterating that "an association's representative capacity alone is not enough to give it standing in an action for declaratory and injunctive relief."

¶ 19 Shortly after we decided *Cable Television & Communications Association*, our legislature amended the General Not for Profit Corporation Act of 1986 to embrace the federal doctrine of associational standing.[1] See Public Act 90-203 (eff. July 24, 1997). Section 103.10(b) of that act now provides:

> "Each corporation shall have power:
>
> ***
>
> (b) To sue and be sued, complain and defend, in its corporate name, and shall have standing to sue when one or more of its members would otherwise have standing to sue in his or her own right, providing the interests it seeks to protect are germane to the corporation's purposes, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." 805 ILCS 105/103.10(b) (West 2016).

Moreover, in 2005, our supreme court adopted the doctrine of associational standing, as articulated in *Hunt*, in the course of recognizing a labor union's right to file an administrative

[1] We note that Deerpath alleges in its complaint that it is a not-for-profit corporation.

review action on behalf of its members. *International Union of Operating Engineers, Local 148 v. Illinois Department of Employment Security*, 215 Ill. 2d 37, 51 (2005). According to the court, the doctrine "serves important functions in the vindication of the rights of members of associations and in the preservation of scarce judicial resources." *International Union*, 215 Ill. 2d at 50. The court explained that where an organization derives standing from its members pursuant to the *Hunt* test, the organization "need not meet the standing requirement independently." *International Union*, 215 Ill. 2d at 57.

¶ 20 In the trial court, Deerpath argued in its response to defendants' motion to dismiss that courts had "greatly expanded the doctrine of standing over the years, finding in numerous cases that a legally protected interest may exist in a representative association or agent who exists to protect or assert the rights of a third party." Unfortunately, the parties discussed older Illinois case law on the topic, so they did not address whether Deerpath had standing under the *Hunt* test. On appeal, Deerpath cites *International Union* and argues, albeit in an extremely cursory fashion, that the three prongs of the test are satisfied. Defendants do not respond to that particular argument or discuss *International Union* and *Hunt*.

¶ 21 The record does not provide the information that would be necessary for us to determine whether Deerpath had associational standing to pursue its assessment appeal before the Board. The first prong of the *Hunt* test is certainly satisfied, given that Deerpath's members would have had standing to personally challenge their own tax assessments. See 35 ILCS 200/16-30 (West 2016) (authorizing taxpayers to file applications with the Board). Moving to the second prong, however, we have no way of evaluating whether it is germane to Deerpath's purposes as an organization to dispute its members' tax assessments. The record does not contain Deerpath's governing documents, nor do we know how many members Deerpath has. The purpose of the

second prong of the *Hunt* test is to provide " 'assurance that the association's litigators will themselves have a stake in the resolution of the dispute, and thus be in a position to serve as the defendant's natural adversary.' " *International Union*, 215 Ill. 2d at 48 (quoting *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 555-56 (1996)). Given the parties' failure to develop a record on this issue in the trial court, we are not in a position to decide whether the interests protected by this requirement have been fulfilled.

¶ 22 Turning to the third prong of the test, we encounter the same problem. A case should not be dismissed based on the third prong of the *Hunt* test "unless it is clear that it would be impossible for [the plaintiff] to prevail without significant participation by its members." *Winnebago County Citizens for Controlled Growth v. County of Winnebago*, 383 Ill. App. 3d 735, 745 (2008). "[T]he analysis of whether significant participation by individual members is required necessarily must be made on a case-by-case basis, as it will differ depending on the facts of each case and the nature of the relief being sought." *Winnebago County Citizens*, 383 Ill. App. 3d at 743-44. The record does not include the documents that Deerpath initially submitted to the Board with its assessment appeal. Accordingly, we do not know whether Deerpath filed challenges relating to five of its members' properties or five hundred of its members' properties. Nor do we know whether the bases for the challenges were similar for each property or whether the challenges related to issues of fact or issues of law. We note that even if the challenges presented factual inquiries, associational standing is not limited to matters involving pure questions of law. *Winnebago County Citizens*, 383 Ill. App. 3d at 744. The Board's rules allow for assessment challenges based on many different circumstances. Examples include incorrect assessor data, lack of uniformity, a recent sale of the subject property, a change in fair cash value, or "matters of law." 2017 Rules of the Lake County Board of Review,

§ IV.A-E. The proof that accompanies an assessment dispute necessarily depends on the specific circumstances giving rise to the challenge. Lacking any information about the nature of the challenges at issue in Deerpath's assessment appeal, we cannot determine whether the relief requested would require significant participation by Deerpath's members.

¶ 23 In its appellant's brief, Deerpath argues that section 1-30(j) of the Common Interest Community Association Act (765 ILCS 160/1-30(j) (West 2016)) codified associational standing for homeowner's associations. According to that provision: "The board [of a common interest community association] shall have standing and capacity to act in a representative capacity in relation to matters involving the common areas or more than one unit, on behalf of the members or unit owners as their interests may appear." 765 ILCS 160/1-30(j) (West 2016); see also 765 ILCS 605/9.1(b) (West 2016) (containing a nearly identical provision in the Condominium Property Act). Defendants respond that Deerpath forfeited or waived this argument by failing to raise it in the trial court. Defendants also insist that Deerpath's assessment appeal did not involve either the common areas or more than one unit.

¶ 24 We reject defendants' contention that Deerpath forfeited or waived its right to rely on this statutory provision. Deerpath argued in the trial court that it had standing to file the assessment appeal on behalf of its members. Where the broader issue has been preserved, we are aware of no rule prohibiting a litigant from citing additional authority on appeal in support of its legal position. As explained above, however, we lack even the most basic information about the nature of Deerpath and its assessment appeal. The record thus is not conducive to determining whether Deerpath's appeal involved more than one unit for purposes of section 1-30(j) of the Common Interest Community Association Act.

¶ 25 Defendants cite a recently failed house bill as being "the clearest evidence of a

homeowner's association[']s] statutory prohibition from filing on behalf of its membership." That bill would have added the following provision as a new section of the Property Tax Code:

> "Upon authorization by a two-thirds vote of the members of the board of managers or by the affirmative vote of not less than a majority of unit owners at a meeting duly called for such purpose, or upon such greater vote as may be required by the declaration or by-laws, the board of managers acting on behalf of all owners in a common interest community association, as defined in the Common Interest Community Association Act, shall have the power to seek relief from or in connection with the assessment of any taxes, special assessments, or charges levied or imposed under this Code and to charge and collect all expenses incurred in connection therewith as common expenses." 99th Ill. Gen. Assem., House Bill 3479, 2015 Sess.

The provision would have substantially mirrored the language of section 10(c) of the Condominium Property Act (765 ILCS 605/10(c) (West 2016)). The bill never made it out of committee. "[T]he failure of a committee to act favorably on a proposed bill should not be relied upon, in the absence of an indication as to the reason for the failure, to ascertain legislative intent." *Maiter v. Chicago Board of Education*, 82 Ill. 2d 373, 385 (1980). The parties do not cite, and we were unable to find, any legislative history shedding light on the reasons that this particular bill failed. Thus, this failed legislation does not inform our analysis of Deerpath's standing in connection with the assessment appeal.

¶ 26 We reiterate that defendants had the burden of proving that Deerpath lacked standing to pursue its assessment appeal. See *International Union*, 215 Ill. 2d at 45. Moreover, the matter comes to us by way of a motion to dismiss, so we must draw all reasonable inferences in Deerpath's favor. *International Union*, 215 Ill. 2d at 45; *Winnebago County Citizens*, 383 Ill.

App. 3d at 745. On the record before us, we cannot rule out the possibility that Deerpath had associational standing to pursue its assessment appeal. Accordingly, at this juncture, defendants have not demonstrated their entitlement to the dismissal of counts I, III, and IV of the complaint. We express no opinion as to whether Deerpath was authorized under the doctrine of associational standing to pursue its assessment appeal. That issue may be addressed in the course of future proceedings in the trial court.

¶ 27 For similar reasons, defendants have not demonstrated their right to the dismissal of count II of the complaint, which alleged an equal protection violation. "The guarantee of equal protection requires that the government treat similarly situated individuals in a similar manner." *Jacobson v. Department of Public Aid*, 171 Ill. 2d 314, 322 (1996). Defendants argue that the Board had a rational basis for treating homeowner's associations differently from condominium associations for purposes of standing. That argument puts the cart before the horse, as the issue has not been settled as to whether Deerpath lacked standing.

¶ 28 III. CONCLUSION

¶ 29 For the reasons stated, we reverse the judgment of the circuit court of Lake County and remand the matter for further proceedings.

¶ 30 Reversed and remanded.