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Hopkins and Davenport v. Pen-Mar Club

RAYMOND HOPKINS, JR. and DHIMITRA S. DAVENPORT, Plaintiffs,
v. THE PEN-MAR CLUB, a/k/a THE PEN-MAR CLUB, INC., Defendant

Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Fulton County Branch
Civil Action — Law, No. 90 of 2003-C

Expulsion from membership in nonprofit corporation; Due process; Motion for summary judgment granted

1. No member shall be expelled from any nonprofit corporation without notice, trial and conviction, the form of which shall be prescribed by the corporation's bylaws. Pennsylvania Nonprofit Corporation Law, 15 Pa.C.S.A. §5766(b).

2. Plaintiffs received sufficient notice of their impending expulsion from a nonprofit corporation such that due process was satisfied.

3. The membership meeting which resulted in plaintiffs' final expulsion by a two-thirds majority vote as required under the bylaws and which affirmed a previous summary expulsion vote by the board of directors was sufficient to constitute a "trial" under §5766(b).

4. Plaintiffs were not expelled in a manner which violated the corporation's bylaws and even if the bylaws were not perfectly followed in each and every technical aspect, plaintiffs waived several opportunities to seek relief.

Appearances:

J. McDowell Sharpe, Esquire, *Counsel for Plaintiffs*

Travis Kendall, Esquire, and Rees Griffiths, Esquire, *Counsel for Defendant*

OPINION

Herman, J., June 30, 2008

Introduction

The plaintiffs filed a complaint in the Fulton County branch of this Court on April 23, 2003. The action arises out of the plaintiffs' expulsion from membership in a private nude recreation club located in Warfordsburg, Fulton County. The plaintiffs allege the defendant's board of directors expelled them from the club in a manner contrary to the club's constitution and by-laws, as well as the Pennsylvania Nonprofit Corporation Law of 1988, 15 Pa.C.S.A. §5101 et seq. They seek various remedies, some in the alternative, including reinstatement as club members, removal of the directors, the appointment of a custodian or receiver pendente lite and the eventual dissolution of the club. Before the court are the defendant's motion for summary judgment and the plaintiffs' motion for partial summary judgment.

Factual Background[1]

Pen-Mar is a nudist colony which is an incorporated nonprofit entity formed under the laws of this Commonwealth. The club is dedicated to the practice of "nudism as a health and recreational measure" and is open to any person who is "sincere in his or her appreciation of the expressed ideals of the nudist movement."[2] The club seeks to promote an environment of "peaceful, nature-loving, and law-abiding persons" and rejects the notion that nudist colonies are places of sexual licentiousness.[3] Pen-Mar is generally affiliated with the American Association for Nude Recreation (AANR) and the Eastern Sunbathing Association (ESA) but neither of those organizations formally governs Pen-Mar's operations.

The club is situated on 67 acres with premises improved by a swimming pool, clubhouse and recreational facilities shared by all members. Members rent lots for the season which runs from May until October. They may use trailers and small mobile homes on the lots as residences. The lots measure 30 by 50 feet and are close together, promoting a communal and fraternal lifestyle. Members refer to each other by truncated versions of their names in order to protect the privacy of all concerned. Although the club imposes few formal rules on its members, it does prohibit conduct which jeopardizes "the good name and reputation of the organization as whole, or of any of its members" and has the power to summarily expel an offending member subject to that member's right to demand a hearing before the entire membership.[4]

The plaintiffs are former long-time members of Pen-Mar who leased a lot on the club's premises, placed a camper there and sometimes lived there during the summers. One of their neighbors was Chitta N. who is another long-time club member. Chitta N. asked Hopkins sometime late in April 2001 if he intended to move a mound of crush stones which the plaintiffs had placed in a location which Chitta N. believed impeded access to his property. Chitta N. also spoke to two board members about the stones. Chitta N. had previously discussed the stones with Hopkins and/or Davenport in the fall of 2000 when the stones first appeared.

Chitta N. found a handwritten letter on the driver's seat of his car addressed to him and signed by "D" shortly thereafter. Davenport was the author of the letter and in it she complained to Chitta N. about the condition of a shed on his property. The letter contained language which Chitta N. considered profane and threatening.[5] Chitta N. showed Davenport's letter to the club president, Larry J. At Larry J.'s request Chitta N. submitted a formal written complaint to the board about the stones and Davenport's letter.[6]

Board secretary Barb E. sent identical copies of a letter to Davenport and to Chitta N. on or about May 1, 2001 about the dispute between them and asked them to attend a special board meeting on May 5, 2001 at Larry J.'s residence for the purpose of resolving the matter. The letter asked Davenport and Chitta N. to call her if they could not attend the meeting.[7] Davenport spoke by phone to Barb E. on May 1st to say she would not be

attending the May 5th meeting. The record is unclear as to why Davenport did not attend and why she did not provide the board with her position in writing as apparently was requested by Barb E.[8] Chitta N. did come to the meeting.

Other club members moved the pile of stones at the board's request in an effort to diffuse tensions between Davenport and Chitta N. Board president Larry J. sent an identical letter to Chitta N. and to Davenport on or about May 7, 2001 which indicated the stones were moved by club members and that the board had discussed with Chitta N. the condition of his shed. The letter expressed hope the matter had been resolved, encouraged the recipients to enjoy the facilities during the upcoming season, warned against future threats toward each other and indicated any further disputes would have to be approached in a more serious manner. The letter asked them to contact a board member if there was a future need for intervention. The letter did not assign blame to either member.[9] Neither Davenport nor Hopkins received a copy of Chitta N.'s May 5, 2001 written complaint to the board until a general membership meeting on September 23, 2001.

The conflict between Davenport and Chitta N. was discussed at a regular board meeting held on May 26, 2001. The board decided to take no further action but to let the matter rest for a while.[10] According to the defendant the board nevertheless tried several times to arrange for Davenport and Chitta N. to meet and also tried several times to discuss the matter with Davenport but it was not successful in this effort. The record is unclear as to exactly when within the late April – late May 2001 time frame the board made these attempts or whether the board called Davenport, she called the board or both.[11]

Davenport responded to the board's May 7, 2001 letter with a lengthy letter dated June 2001 in which she gave her version of the origin and tone of the conflict between herself and Chitta N. She believed it was inappropriate for Chitta N. to have shown her note (the one she left in Chitta N.'s car) to the board. She also alleged Chitta N. had committed lewd acts in the past and she questioned the club's reputation, asked for an apology from the board and demanded it rescind its letter of May 7, 2001.[12]

The board met on June 30, 2001 to discuss Davenport's note to Chitta N. from April 2001 and her June 2001 letter to the board. The board found her April 2001 note to Chitta N. contained language which violated the club's bylaws, specifically Article VIII, §1A which states:

> Members…are required to abide by the rules and regulations of the club and shall conduct themselves at all times in a manner which will command the respect and friendship of [law enforcement agencies] and of the nudist movement in general…[The club is to be] composed of peaceful, nature-loving, and law-abiding persons. Any member…jeopardizing the good name and reputation of the organization as a whole, or of any of its members, shall be subject to summary expulsion.

The board decided to neither apologize nor rescind its May 7, 2001 letter. The board also dismissed Davenport's allegations against Chitta N. as unfounded and malicious and considered the entire matter closed. Davenport was notified of the board's decision by a letter dated June 30, 2001.[13]

The board took no further formal action during July and August of 2001. According to the plaintiffs, however, the contents of her letter to the board had been disclosed to the general membership, making the conflict with Chitta N. and with the board a topic of gossip at the club that summer. The plaintiffs themselves also continued to discuss complaints about Chitta N.'s behavior with board members throughout that summer.[14] Davenport then wrote a letter to one of the board members on September 16, 2001, Ray G., in which she expressed frustration with the board's decision regarding Chitta N. and renewed her complaints about him including calling

him "a pervert, a whiner, and not a true nudist."[15]

The plaintiffs attended a full membership meeting on September 23, 2001. It was then they first received a copy of Chitta N.'s May 5, 2001 letter-complaint about them to the board. According to the plaintiffs club president Larry J. objected to them receiving a copy of Chitta N.'s letter. Chitta N. himself was not at the meeting. Both Davenport and Hopkins held the floor for several minutes and voiced their concerns about the dispute. The plaintiffs assert that club officers refused to acknowledge the validity of the plaintiffs' complaints and even tried not to acknowledge their presence. Tensions mounted and several members left the meeting before it was over. The plaintiffs did not then nor did they ever ask the board to take any particular action with regard to Chitta N. They didn't ask that he be expelled, disciplined or warned.[16]

Davenport sent a letter dated September 24, 2001 to the board in which she repeated her complaints about the handling of her dispute with Chitta N. and added new ones. She indicated she and her husband would feel compelled to take legal action if their complaints were not addressed before the next general membership meeting on October 28, 2001. She also attached a copy of a letter she received from an attorney she had consulted about the matter. In responding to her inquiry the attorney repeated (or at the least rephrased) some of her allegations of Chitta N.'s improper conduct. Davenport mailed a copy of her letter to officials at AANR-EAS.[17] She maintains she sent her letter to those officials in a sealed manner to be opened only after her subsequent verbal phone instruction.

The board held an emergency meeting on October 13, 2001 to discuss Davenport's September 24, 2001 letter. The board voted unanimously to expel the plaintiffs from the club pursuant to Article VIII, §1A of the bylaws which allow summary expulsion of any member who jeopardizes the club's good name and reputation.[18] The board acknowledged in their October 13th letter that the plaintiffs had property on club premises and that their lot lease would expire on March 31, 2002. It warned the plaintiffs they must remove their property by that date and that after October 13th they must be accompanied by a board agent while on club premises. The board notified the plaintiffs that copies of its October 13th letter would be sent to all persons and organizations which had been copied by the plaintiffs themselves when they contacted the AANR-EAS. The board then served the plaintiffs with its October 13th letter. One reason given for the expulsion was the plaintiffs had sent a copy of the September 24th letter to the AANR-EAS which the board believed needlessly compromised the privacy of the club's members and made the club appear to be the locus of unsavory conflict or incivility.

The plaintiffs then sent a letter to the AANR-EAS dated October 24, 2001 informing it of their expulsion from Pen-Mar and requesting intervention. Another letter was sent on October 25, 2001 along with photos taken during the initial conflict over the shed, the parking situation and the stone pile. The plaintiffs also wrote to their local counsel on October 26, 2001 about what they believed were physical threats made against them and also wrote to the county sheriff about those purported threats. The plaintiffs addressed a letter to the Pen-Mar board and the club membership dated October 27, 2001 formally protesting their expulsion and requesting modification or rescission of the board's decision. The letter asserted their plans to use the club during their impending retirement had been disrupted and they were concerned their expulsion would undermine their ability to use other affiliated nudist clubs. The plaintiffs did not specifically ask for a full hearing before the entire membership in order to address their status as members, as was their right under Article III, §8B(4). However, it was apparently the plaintiffs' expectation that their letter of October 27th would be presented to the full membership at the October 28, 2001 meeting in lieu of their presence insofar as they believed their expulsion barred them from personally attending.[19]

A board meeting was held on October 27, 2001. The board decided to show the full membership all the letters between the plaintiffs and the board about the dispute with Chitta N. However the membership would not vote on expulsion until the board knew the results of the AANR-EAS investigation. The board found no reason to reprimand Chitta N. because in the board's view he had complied with the board's request to clean up his lot including the shed in an attempt to diffuse the situation with the plaintiffs. Club president Larry J. showed the other board members at this meeting a photograph Christmas card of Davenport which she had previously sent to him of herself doing a cartwheel in the nude on a beach. Larry J. apparently found the card offensive. Other members of the board talked about having seen Davenport at the club pool displaying her genitals inappropriately though no specific dates were given for those incidents.[20]

After the October 28, 2001 membership meeting, club member Donna B. filed a complaint with the AANR-EAS indicating her belief the Pen-Mar board had been too harsh in expelling the plaintiffs and had not followed club bylaws in doing so.[21] The AANR-EAS responded to Donna B. in a letter dated January 9, 2002. That body decided after reviewing various documents and complaints to take no action and make no recommendation aside from urging the plaintiffs and the club to put the matter behind them.[22]

The next regular club membership meeting took place on March 23, 2002. At Donna B.'s request the board read to the membership the contents of various letters from the AANR-EAS and others concerning the dispute between the plaintiffs, Chitta N. and the board. The members decided a vote would be taken at the next regular membership meeting on April 28, 2002 as to whether to override the board's decision to expel the plaintiffs.[23] Secretary Barb E. sent the plaintiffs an email notice from Larry J. on April 3, 2002. The email indicated the date, time and place of the meeting at which the plaintiffs would be given 5 minutes to present their side to the membership followed by Larry J. having 5 minutes to present the board's side. No discussion among the membership was to take place. Instead the presentations would be immediately followed by a yes or no ballot. [24] These rules for the meeting had been established by the members who appeared at the March 23rd meeting.

The plaintiffs did not attend the April 28th meeting. They assert they could not attend because they were dealing with a family emergency out of the area.[25] The minutes of the meeting indicate Larry read a statement to the members which gave the board's reasons for expelling the plaintiffs, specifically their September 24, 2001 letter and publication of that letter outside the club.[26] The membership voted 36-14 to uphold the expulsion and this met the two-thirds majority vote requirement for expulsion under Article III, §8B. The plaintiffs were sent a letter dated April 28, 2002 informing them the members had voted to uphold the boar

d's decision to expel 36 to 14. A copy of the April 28th letter was sent to AANR-EAS.[27]

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Legal Claims and Background

The plaintiffs allege their expulsion from the club violated due process requirements of the Nonprofit Corporation Law: "No member shall be expelled from any nonprofit corporation without notice, trial and conviction, the form of which shall be prescribed by the bylaws." §5766(b)(1). Part and parcel of this allegation is the club's bylaws themselves violated the statute because they did not provide due process to members with regard to notice, trial and conviction.[28] The plaintiffs also contend the board violated the club's own bylaws. In essence they allege their expulsion was the result of personal animosity by certain board members who made slanderous accusations against them in an effort to induce other board members to vote in favor of expulsion. They contend the board

leadership deliberately manipulated the meeting and voting process so as to ensure their expulsion, used the club's newsletter to falsely accuse them of criminal acts against the club and reneged on its agreement to follow the mediation procedures recommended by the AANR-EAS. The plaintiffs seek summary judgment on their claim they are entitled to relief in the nature of reinstatement of their membership.

The defendant urges the court to dismiss the complaint in its entirety including all alternate forms of relief sought therein. The defendant maintains it followed the club's bylaws and those bylaws comport sufficiently with the statutory requirements for notice, trial and conviction. The defendant also contends requiring the club to reinstate the plaintiffs (or granting any of the alternate remedies which they seek) would violate the club's constitutional right to freedom of association and the plaintiffs cannot prevail as a matter of law on their proposed remedies to have the board of directors removed and/or the club liquidated. The applicable by-laws provide as follows:

Article VIII, §1A:

> Members…are required to abide by the rules and regulations of the club and shall conduct themselves at all times in a manner which will command the respect and friendship of [law enforcement agencies] and of the nudist movement in general…[The club is to be] composed of peaceful, nature-loving, and law-abiding persons. Any member…jeopardizing the good name and reputation of the organization as a whole, or of any of its members, shall be subject to summary expulsion.

Article III, §8B:

> Membership may be suspended or terminated by action of the Board of Directors or by a two-thirds majority vote of the members present and voting at a general membership meeting after the following procedures have been followed.
>
> 1. Any member having a complaint about any other member shall bring their complaint to the attention of any Board member, either in writing or verbally. If the complaint is made verbally, the complaining member shall submit the same complaint in writing to the Board in a timely manner.
>
> 2. At its discretion, the Board may appoint a committee to investigate the complaint or may investigate the complaint itself…Within 30 days of the completion of the investigation, a written report of the findings thereof shall be submitted to the Board. The report shall include a recommendation of proposed action, which shall not be binding on the Board.
>
> 3. The Board shall then discuss the recommendation and proposal with the complainant and the member against whom the complaint was lodged. If the member against whom the complaint was lodged agrees with the recommendation, the recommended action shall be imposed without disclosure to the general membership.
>
> 4. If the member against whom the complaint was lodged does not agree with the recommended discipline, that member shall have the right to bring the matter before the membership for a vote at the next regularly scheduled general membership meeting. Such a vote shall be final and binding upon the club.

The court should grant a motion for summary judgment only when the record clearly shows there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. The moving party has the

burden of showing there are no such issues and the court views the record in the light most favorable to the non-moving party. Summary judgment is warranted only when the uncontroverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record and the affidavits show that the facts are so clear that reasonable minds cannot differ as to the merits of the claims. Pa.R.C.P. 1035.2; Roche v. Ugly Duckling Car Sales, Inc., 879 A.2d 785 (Pa.Super. 2005).

Discussion

Due Process

(i) Notice

The first issue is whether the uncontroverted facts of record show the defendant denied the plaintiffs due process and expelled them from the club in an unlawful manner, specifically whether the plaintiffs received sufficient notice of their impending expulsion.[29]

The plaintiffs point to the formal complaint which Chitta N. filed against them dated May 5, 2001. This was the letter Chitta N. filed at Larry J.'s request concerning the pile of stones. According to the plaintiffs the board addressed that complaint and finally resolved that matter on June 30, 2001 through its letter addressed to Chitta N. and the plaintiffs in which it asked the neighbors to refrain from verbal threats against each other and to put aside their differences. The plaintiffs then promptly filed their own complaint against Chitta N. which they claim the board did not address. No other formal complaint was brought against the plaintiffs despite the fact that Chitta N.'s original complaint became the topic of informal discussion among the club membership during the summer.

The plaintiffs maintain they first learned of the specific contents of Chitta N.'s letter-complaint at the general membership meeting on September 23, 2001. They then wrote a letter of protest to the board dated September 24, 2001 and sent a copy of their letter to the ANNR-EAS. Because the plaintiffs copied the letter to the ANNR-EAS the board held an emergency meeting on October 13, 2001 at which it summarily expelled the plaintiffs under Article VIII, §1A. The plaintiffs object because no formal complaint was generated after June 30, 2001, no advance notice was given to them the board was to consider summary expulsion at its October 13, 2001 meeting and they were expelled based on innuendo which they had no chance to address. For example the plaintiffs cite to the deposition of one of the board members at the time, William M., who testified to discussions at the October 13th meeting about the plaintiffs allegedly having accused the club or its members of being "swingers." Larry J. confirmed in his deposition this was indeed a topic of conversation at the October 13th meeting. The plaintiffs first learned of the board's expulsion vote by a letter which they allege was simply a fait accompli.

The record shows there were numerous letters and informal discussions between the plaintiffs, members of the board and/or Chitta N. between May of 2001 and October 2001. There is evidence the plaintiffs were given the opportunity to meet with the board and Chitta N. even though the timing of those opportunities is a matter of disagreement. Although the plaintiffs maintain the initial Chitta N. complaint was "resolved" by June 30, 2001, there were still letters being written by the plaintiffs to the board and the plaintiffs themselves participated in informal discussions with other members during that summer. Part of the reason the plaintiffs allege the board was biased against them was that the board appeared not to act on their own complaints against Chitta N.

However the record shows the board did speak to Chitta N. about the plaintiffs' complaints about his shed and his allegedly lewd conduct at the clubhouse and these were at least partly remedied. Furthermore pursuant to Article III, §8B(4) the plaintiffs had the right to contest the board's October 13, 2001 decision and to ask a hearing to be convened before the full membership. The plaintiffs did not exercise this right at any time after the board's decision of October 13th. We note Hopkins is a former board member who was familiar with the club's bylaws including those permitting summary expulsion. He testified at his deposition to recalling a summary expulsion of a member in 1992 or 1993 and he had no objection to the procedure at that time.[30]

Due process requires that a party be given notice of a hearing in a manner which is reasonably calculated to inform the party of the pending action. The proper form of that notice depends on what is reasonable under the circumstances. Commonwealth v. Good Times Sales Co., 423 A.2d 451 (Pa.Cmwlth. 1980), citing Pennsylvania Coal Mining Association v. Insurance Dept., 370 A.2d 685 (Pa. 1977). Notice requirements under the Nonprofit Corporation Law are relatively modest and flexible. "No member shall be expelled from any nonprofit corporation without notice, trial and conviction, the form of which shall be prescribed by the bylaws." §5766(b). Mail is an acceptable form of service which is effective upon deposit of the mail, not actual receipt.

> Whenever traditional notice is required to be given to any person under the provisions of this subpart or by the articles or bylaws of any nonprofit corporation, it may be given to the person either personally or by sending a copy thereof by first class or express mail, postage prepaid, or by telegram…to his address…appearing on the books of the corporation…If the notice is sent by mail, telegraph or courier service, it shall be deemed to have been given to the person entitled thereto when deposited in the United States mail or with a telegraph office or courier service for delivery to that person…A notice of meeting shall specify the place, day and hour of the meeting and any other information required by any other provision of this subpart.

§5702(a). If expulsion is to be addressed at a general membership meeting "written notice of every meeting of the members shall be given by, or at the direction of, the secretary or other authorized person to each member of record entitled to vote at the meeting at least…five days prior to the day named for the meeting…" §5704. If expulsion is to be addressed by a body other than the general membership, such as the board,

> [r]egular meetings of the board of directors…may be held upon such notice, if any, as the bylaws may prescribe. Unless otherwise provided in the bylaws, written notice of every special meeting of the board of directors…shall be given to each director…at least five days before the date named for the meeting.

§5703(b).

At the March 23, 2002 meeting at least a majority of the 51 members present endorsed the procedure which was to take place at the next membership meeting on April 28, 2002. The record clearly shows the board notified the plaintiffs of the decision to vote on the expulsion before the full membership and the place where the vote was to occur. The board's letter dated April 3, 2002 specifically notified the plaintiffs as follows: "It has been requested by a club member to hold a membership vote concerning the board's decision to expel you from the Pen Mar Club…" The letter was sent at the latest on April 8, 2002 to a post office box which was one of the four addresses for the plaintiffs appearing on the club's records. April 8th was clearly more than five days before the April 28th expulsion meeting.[31]

The plaintiffs concede the form and manner of notice required under the statute is less technical than what is required in the context of judicial proceedings. What they argue is they received no **specific notice of the**

actual substance of any pending formal charges against them before the September 23, 2001 membership meeting and received no notice the board was to consider and vote on their summary expulsion at the October 13, 2001 board meeting. Both parties concede there is a dearth of dispositive case law on what constitutes adequate notice and trial under §5766(b). The available case law is nevertheless worth examining because of the guidance it offers.

In Kennedy v. Electric Heights Housing Association, 433 A.2d 639 (Pa.Cmwlth. 1981) the plaintiff received a letter advising him that complaints against him were to be discussed at the next board meeting. The specific charges were set forth though he was not informed of the date and location of the meeting. The board voted to expel him from the housing association and they notified him of this. The bylaws gave him the right to a board hearing but he chose to put the matter directly to the full membership, an option also provided for in the bylaws. Evidence was presented and he was permitted to cross-examine the complainant, after which the membership voted to expel. The court found due process was satisfied by these procedures. He had received notice of the specific charges against him, chose not to have a hearing before the board but to take the matter directly to the full membership and at the membership hearing he had an opportunity to present all his evidence and cross-examine witnesses.

The plaintiffs contrast Kennedy with the case at bar insofar as Kennedy was told in advance of the specific charges against him whereas the plaintiffs here allegedly were not told about any pending charges before they arrived at the September 23, 2001 membership meeting and saw Chitta N.'s May 5, 2001 complaint for the first time. What the plaintiffs overlook is that several aspects of the dispute between themselves and Chitta N. were frequently (even if only informally) discussed among the plaintiffs and other members of the club throughout the spring, summer and early autumn and at least some of this discussion was at the plaintiffs' initiation. The plaintiffs also overlook the fact that at the September 23, 2001 meeting they held the floor to the exclusion of all other persons present and directly addressed the membership for a substantial period of time. Simply because no formal written complaint was pending against them after June 30, 2001 does not require the court to find they had insufficient notice as a matter of law concerning the nature of the dispute between themselves, Chitta N. and the board. Furthermore we disagree they were denied basic due process under §5766 because the board did not inform them in advance of its intention to consider their summary expulsion on October 13th. The relevant time period for determination of the sufficiency of due process is not the time between June 30, 2001 and October 13, 2001. The need for due process is triggered by the board's summary expulsion of October 13, 2001. While the provisions of the bylaws allowing for summary expulsion may not have satisfied §5766(b) requirements of notice, trial and conviction, the events which followed, beginning with the letter of October 13, 2001 and concluding with the proceedings of March 23, 2002 and April 28, 2002, supplied all of those requirements.

(ii) Trial

The plaintiffs assert they are entitled to summary judgment on the question of whether they received was a "trial" under the sense contemplated by §5766 and interpretive case authority. The plaintiffs also contend they didn't know the particular charges against them, no charges were even then pending and five minutes was an insufficient period of time in which to respond in any event. They argue the April 28th membership meeting was nothing more than a sham in the sense the outcome was a fait accompli attributable to the board's bias against them. They point to the depositions of two members of the board of directors at the time (then-president Larry J. and

Barb E.) who admitted no trial took place at the April 28th meeting because there was no judge, no jury and no formalized courtroom procedures utilized. Rather the board was given five minutes to present its position and the plaintiffs were given the same amount of time to respond.[32] No questioning or discussion was to be held and the membership was then to vote to either uphold the board's October 13, 2001 decision to summarily expel the plaintiffs or whether to nullify that board decision.

In Biondi v. Banner Food Stores Association, 8 Pa. D & C 2d 314 (1956) the board of an association of retail food grocers expelled the plaintiff and he sought reinstatement. A complaint was made against him and he was notified by mail of the charges and that the board was to meet at a specific date to consider his expulsion. The particular charges appeared in the notice. He came to the board meeting but his attorney was not allowed to participate, so the plaintiff left and did not participate in the hearing. After being given several days to reconsider his stance he chose not to appear at a second meeting and the board then voted to expel him. The court found this process reasonably complied with the statutory requirement for notice and trial. His attorney's exclusion from the first meeting did not render the hearing process fatally defective.

Biondi embodies the general idea that due process in the context of the Nonprofit Corporation Law does not require the same level of formality as is necessary in court proceedings. The member must have notice of the charges and an opportunity to examine evidence and present his position at a hearing of some kind pursuant to bylaw. Any reasonable approach should be upheld. If a member is given an opportunity to attend and refuses to or he leaves prematurely his later assertion that his expulsion was illegal will not be given much weight.

It is clear the plaintiffs did not take full advantage of the chance to meet with the board before October 13, 2001 nor did they ask for a full membership vote after learning of the board's decision. Additionally their failure to attend the April 28, 2002 membership meeting, to send a representative in their stead or to even protest in advance the procedures to be followed at that meeting constituted a waiver of their opportunity to voice their views to the membership.

In Randolph v. Spruce Cabin Camp Association, 11 Pa. D & C 3d 71 (1979) the plaintiff alleged he had been illegally expelled from a private non-profit association. He received notice of a special meeting to discuss inactive members, delinquent members and proposed new bylaws. A motion was made at the hearing to expel him because he was alleged to be an inactive member. The court held the notice he received was clearly deficient because it did not inform him of any charge or basis to expel him or that such action was contemplated and the proceeding which took place was not a "trial" or hearing in any sense. Randolph does not support the plaintiffs' motion because Davenport and Hopkins received sufficient advance notice that the full membership was to vote on their expulsion on April 28th. Clearly the topic at issue was the board's prior decision to expel them and the full membership was to vote on the matter after hearing equally from the board and the plaintiffs. Also there is nothing in the record showing the plaintiffs protested the procedure to be followed at the April 28th meeting.

We have also considered Raynovic v. Vrlinic, 6 A.2d 288 (Pa. 1939). The plaintiff there was a member of the Serb National Federation which sent him a notice of charges against him to be considered at an expulsion hearing. English and Serbian were the organization's two official languages. The plaintiff appeared at the hearing with an attorney who spoke English and demanded the hearing be conducted in English. The board refused and conducted the hearing in Serbian. Several board members had trouble with English, most of the relevant documents were in Serbian and the plaintiff himself was more familiar with Serbian. The plaintiff left the hearing upon counsel's advice, the hearing was conducted in his absence and the board expelled him at the end of the hearing. The association's bylaws gave the plaintiff the right to have counsel at board hearings who could be any

literate member of the Federation. The court held that "counsel" need not refer to an attorney-at-law but merely someone in the Federation and that trial procedures in such associations do not have to be conducted under rules applicable to court trials. The plaintiff walked out of the hearing at his own risk and had to accept the consequences of the board going forward without him.

We find the record is clear the plaintiffs were afforded the requisite statutory due process rights of notice and hearing but chose to sit on their rights at key junctures. They failed to request a membership meeting to address the board's handling of Chitta N.'s complaint. They failed to request a membership meeting to address the board's alleged refusal to address the plaintiffs' complaints against Chitta N. The plaintiffs failed to request a membership meeting after the contentious one of September 23, 2001. They did not then nor ever specifically ask the board to take any particular action against Chitta N. They failed to ask for review of their October 13, 2001 summary expulsion. At least a majority of the members present at the March 23, 2002 meeting endorsed the procedure to be followed at the April 28, 2002 membership meeting. The plaintiffs did not protest that procedure in advance. They did not ask for an opportunity to present information or witness testimony, nor did they ask for more time at the meeting. They did not attend the April 28th meeting nor did they send anyone to speak to the membership in their stead. They completely failed to take advantage of this opportunity to present their views. The two-thirds membership vote to uphold the summary expulsion was a foreseeable consequence of the plaintiffs' failure to take advantage of this opportunity to present their position. The record wholly supports our conclusion the plaintiffs waived their right to object to their summary expulsion and to the membership's vote on the grounds that either procedure violated fundamental due process as provided in the statute.

Violations of the Bylaws

The second issue is whether the defendant violated its own bylaws in expelling the plaintiffs, specifically Article III, §8B. This Article requires a written complaint, an investigation, discussion with the complaining member and the person complained about, and the possibility the member will not accept the proposed discipline and will instead ask for a full membership vote. The plaintiffs stress that the only complaint which was filed against them was Chitta N.'s letter of May 5, 2001. The board resolved his complaint by letter addressed to both Chitta N. and Davenport on May 7, 2001 which Chitta N. accepted but did not satisfy Davenport insofar as she responded with a complaint of her own against Chitta N.:

> Contrary to Pen-Mar's position now, [the plaintiffs'] termination had nothing to do with Chitta N.'s complaint – it had been closed [or "resolved"] on June 30, 2001. There had been no new complaint filed, investigation commenced, written report, recommendation or meeting with the plaintiffs as required by the bylaws. Instead, in response to a restated complaint **by Hopkins**, the board summarily expelled them. The [plaintiffs] were never given the right or opportunity to bypass the board and to take the issue to the whole membership under Article III, §8B(4). Only later, after the board had already controlled the information and contaminated any opportunity for a fair trial, did the matter come before the membership.

(Plaintiffs' brief, pp. 16-17).

The plaintiffs cite Pennypack Woods Home Ownership Association v. Dahlberg, 408 A.2d 201 (Pa.Cmwlth. 1979) in which a housing association revoked the plaintiff's membership and his right to occupy his dwelling unit. The matter began when the board wrote to the plaintiff on October 16, 1972 notifying him that it was filing

formal charges against him based on his sons' misconduct on September 30, 1972, that he had 30 days to demand a hearing and if he did not demand a hearing the board would render a decision at the next board meeting. The behavior of the plaintiff's sons was discussed at two later board meetings. The plaintiff was present at those meetings though some discussion continued after he left the second meeting about whether his rental fee should be increased for a few months. The board voted at an April 10, 1973 meeting to take this action which resulted in the plaintiff underpaying his rent. The underpayment and also some of his sons' more recent misconducts were discussed at a May 22, 1973 board meeting. The board chairman was told at a July 31, 1973 board meeting about the underpayment and the misconducts. This led to a vote to revoke the plaintiff's housing rights. The plaintiff was not present at the May 22nd and July 31st meetings and had not received notice that **any** action would be taken against him at that later meeting.

The court held the board violated its own bylaws which required the filing of a petition **by a member** of the association charging misconduct, notice and a right to attend a board hearing. The board followed the bylaws as to the September 30, 1972 incident but no formal complaint was ever filed as to any alleged misconduct which happened after that and no complaint was ever filed as a result of the plaintiff's failure to pay the higher rental fee. Because the plaintiff's ejectment from the housing unit was based on the post-September 30th incident and the underpayment, the court could not ignore the board's failure to follow the bylaws.

The plaintiffs rely on Pennypack to support their argument they were expelled without formal written charges pending against them as of October 13, 2001 and/or April 28, 2002 despite the fact that the letter served by the board on October 13, 2001 contained all the requirements of due process under the Nonprofit Corporation Law and pertinent case law. That letter indicated the action taken by the board and the grounds on which it was based. Notwithstanding the characterization of the board's action as summary expulsion under the bylaws, the letter served as a complaint for the upcoming trial to be held before the full membership on April 28, 2002.

In addition the plaintiffs' position is unclear and even contradictory. On the one hand they allege the board completely ignored their complaints about Chitta N. but they also concede the board did in fact speak to Chitta N. at some point about those complaints as part of their investigation after which the board wrote the plaintiffs a letter dated June 30, 2001 in which it declared her complaint against Chitta N. unfounded and that they considered the matter closed. The record clearly shows the board did do an investigation which entailed many discussions with Davenport in person, by phone and in written correspondence between the plaintiffs (mostly Davenport) and board president Larry J., secretary Barb E. and/or board member Ray G. Also as discussed in the previous section the record does not support the plaintiffs' assertion they "were never given the right or opportunity to bypass the board." On the contrary the plaintiffs had many opportunities to take their complaints against Chitta N. and against the board itself directly to the membership but repeatedly wasted those opportunities and therefore waived their right to now challenge their expulsion on the grounds the defendant did not follow its own bylaws.

Remaining Issues

Defendant's Constitutional Rights

As part of its motion for summary judgment the defendant argues that to grant the plaintiffs reinstatement or any of their other proposed remedies would violate the club's fundamental constitutional right to freedom of association, specifically "a rigid interpretation of the statutory due process guidelines for private non-profit

corporations would threaten the expressive mission of Pen-Mar and also thereby also threaten the constitutional validity of those statutes." Boy Scouts of America v. Dale, 530 U.S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000)(the First Amendment prohibits a state from forcing the Boy Scouts to retain an openly homosexual person as a member and scout master). "Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express. Thus, freedom of association… plainly presupposes freedom not to associate." Id. at 648. We need not address this argument on its merits because we have already found the defendant is entitled to summary judgment for the reasons discussed above.

Plaintiffs' Requested Remedies

Another component of the defendant's motion challenges the plaintiffs' entitlement to certain remedies in the event the court either granted the plaintiffs' motion for partial summary judgment or eventually ruled in the plaintiffs' favor at trial. Those remedies were the removal of the board of directors pursuant to §5726(c), and/or appointment of a custodian, a receiver pendente lite and/or a liquidating receiver who would dissolve the club pursuant to §5764 and §5981. It is unnecessary for the court to address this component of the defendant's motion because we have already ruled the defendant is entitled to have the plaintiffs' case dismissed in its entirety.

ORDER OF COURT

Now this 30th day of June 2008, the court grants the defendant's motion for summary judgment and denies the plaintiffs' motion for partial summary judgment.

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[1] The parties generated extensive discovery and there is much disagreement about certain facts and the sequence of certain events which have led to this litigation. Nevertheless we present a general outline of the chronology of the dispute without wholly adopting either party's version of the facts. The plaintiffs as husband and wife have expressly endorsed the other's actions during the course of this conflict.

[2] Bylaws, Article III, §1.

[3] Bylaws, Article VIII, §1A.

[4] Id.

[5]Appendix to the defendant's motion for summary judgment, hereafter "defendant's appendix," tab #9.

[6] Defendant's appendix, tabs #8 and #29.

[7] Defendant's appendix, tab #10.

[8] Defendant's appendix, tabs #12 and #13.

[9] Defendant's appendix, tab #11.

[10] Defendant's appendix, tab #12.

[11] Plaintiffs' appendix to the motion for partial summary judgment, tab #2; defendant's appendix, tabs #13 and #14.

[12] Defendant's appendix, tabs #15 and #16.

[13] Defendant's appendix, tabs #19 and #20.

[14] Plaintiffs' appendix, tab #1.

[15] Defendant's appendix, tab #21.

[16] Defendant's appendix, tabs #2 and #3.

[17] Defendant's appendix, tab #4.

[18] Defendant's appendix, tabs #6, #22 and #23.

[19] Defendant's appendix, tab #24.

[20]Defendant's appendix, tab #17; plaintiffs' appendix, tab #4.

[21] Defendant's appendix, tab #25.

[22] Defendant's appendix, tab #35.

[23] Defendant's appendix, tab #7.

[24] Defendant's appendix, tab #26.

[25] Plaintiffs' appendix, tab #1.

[26] Defendant's appendix, tab #34; plaintiffs' appendix, tab #2.

[27] Defendant's appendix, tab #27.

[28] The club's constitution and by-laws were effective through September 6, 2001 and have since been periodically amended.

[29] For purposes of this discussion, this court will use the word "expulsion" instead of "conviction" when applying the relevant statutory provisions of the Nonprofit Corporation Law.

[30] Defendant's appendix, tab #2.

[31] Defendant's appendix, tabs #7, #26, #30 and #31.

[32] Plaintiffs' appendix, tabs #2 and #5.