STATE OF MICHIGAN

IN THE 14TH CIRCUIT COURT

2016-004733-CB
CCR-CJO
NOT PROPOSED

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WHITE LAKE AMBULANCE AUTHORITY,
Plaintiff,

v

FRUITLAND TOWNSHIP
Defendant,
_____/

HON. TIMOTHY G. HICKS

File No. 16-004733-CB

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JUDGMENT AFTER BENCH TRIAL

INTRODUCTION

The court enters this judgment after a bench trial on February 7 and 8, 2018, and after examining the parties' post hearing briefs. The court thanks and commends the attorneys for their excellent work.

This is but the latest of several files involving the White Lake Ambulance Authority ("WLAA," or "the Authority") that this judge has managed. The court has confined its work on this opinion to the record developed in this case, but reaching the right outcome requires facing some unpleasant facts.

The "bottom line" is that six of the seven members of the WLAA paid "deficit assessments" or otherwise injected money into the WLAA to help to resolve its financial distress from previous years. Fruitland alone has not, and argues there are valid

reasons which excuse it from this liability. In the end, the court generally rejects these arguments, and will enter a judgment in favor of the Authority. The court enters judgment primarily on the Authority's breach of contract theories.

FACTS

The court presents its findings of fact in the following narrative. Because this narrative includes the court's decisions about disputed issues of fact, the court starts this section with its assessment of the credibility of the primary witnesses who testified at trial.

Witness Evaluation

Four witnesses testified. The Authority called Teresa Vanderleest, its self-employed bookkeeper, and Jonathon Degen, the current WLAA director. The Township called Scott Huebler and Jan Deur. All but Degen offered a combination of lay and expert testimony.

Huebler is the Whitehall City Manager. The City of Whitehall was a charter member of the WLAA but has since, following Fruitland, withdrawn from it. He was poised, offered testimony favoring both sides, and without argument, obfuscation, or bias. Huebler was one of the best witnesses this judge has seen, in any proceeding, in some time.

Vanderleest was in a difficult spot. She was an independent contractor brought on board in January of 2013. She has served since then, certainly among the worst of times for WLAA. At trial, she was the person trying to explain or defend WLAA's actions (or non-actions) during these trying times.

Additionally, other folks were involved in WLAA's financial affairs as well. Vanderleest said former director Jean Dresen sent the "deficit invoices," but Huebler was the finance director for the WLAA Board. Vanderleest discovered the problem with the employees 457 contributions, which was created by WLAA's accounting firm. Eventually, she worked with the Finance Committee of three (Huebler, Deur, and Montague City Manager John French) established in December of 2014.

Deur was probably in even a more difficult position. He is a CPA, and was a Fruitland Township Trustee from 2008-2016. He is retired from a successful business career, and was a member of the WLAA Finance Committee formed in the most difficult days for WLAA.

Much of his testimony was helpful, but he was sometimes asked questions that essentially allowed him to provide his opinion about the outcome of the case. He prefaced his answers with "as a Fruitland Township taxpayer, I feel..." Those questions, and that testimony, was less helpful. It also revealed a bias that undercut the value of his testimony.

The Court's Findings on the Disputed Facts

WLAA is an emergency services authority in Muskegon County, organized pursuant to Public Act 57 of 1988, MCL 124.601, *et. seq.* At all times relevant to this litigation, the Authority operated pursuant to its Amended Restated Articles of Incorporation ("the Articles"). (Exhibit 2). Fruitland Township (Fruitland Township, or "the Township") was a member municipality of the White Lake Ambulance Authority with a representative on the Authority's Board. (Exhibit 2, p. 3-4).

The Articles provide that the Authority should be financed in three ways: (1) assessment of charges to persons who use the services of the Authority (exhibit 2, p 2.); (2) a tax levy approved by a majority of the registered electors residing within the Authority's boundaries (exhibit 2, p. 2); and (3) contributions from the member municipalities (exhibit 2, p. 2 and 5).

The Authority's director, through most of the time period in question, was Jean Dresen. Vanderleest testified that Dresen was incompetent. Dresen hired her daughter as her assistant. Both were both later discharged. (Exhibit I).

Fruitland Township, primarily through its Supervisor, Sam St. Amour, began to raise many questions about the management of the Authority. For example, even though WLAA secured a line of credit from PNC bank, there are no records evidencing any board approval for that. There were other reasons for concern.

WLAA failed to make the required contributions to its employees' section 457 retirement accounts. It attributed this to the actions of its accountants. This was discussed at the WLAA meeting on September 24, 2014, (exhibit 12) while Fruitland was still a member of the authority. Vanderleest testified that she informed both the previous Finance Committee (Steve Sikkenga, Lisa Kiel, Don Studevan) and the new one (Scott Huebler, Jan Deur, John French, formed in December of 2014) of this development. However, a final decision about how to handle this did not occur until late in 2015, after Fruitland left the Authority.

During its September 24 meeting (exhibit 12) WLAA also voted to send "deficit billings" to its members to cover the deficits. It sent them. Huebler testified at trial that he used 31% as the number in calculating assessments. All members but Fruitland

paid the assessments. At this same meeting, St. Amour asked for the appointment of a forensic auditor to assess WLAA's finances. One, Karl Haiser, was retained. (Exhibits 15 and 16).

WLAA received a letter (exhibit 8) from the Office of Inspector General on September 25, 2015, challenging billings it made between January 14, 2010 and April 14, 2015. Some of these billings occurred after Dresen's discharge. Fruitland was a member of the WLAA during the time of the billings. However, the letter was received after the Township withdrew.

WLAA's counsel notified Fruitland's. (Exhibit 20). He demurred, saying, in diplomatic language, that Fruitland had no responsibility for the debt. The Authority subsequently negotiated a settlement of the DHS claim in the amount of $113, 635.08.

The employee 457 contributions issue was also not resolved until after Fruitland withdrew from the Authority. There was a valid argument that WLAA's liability for these non-payments was less if it asserted a defense that the statute of limitations applied. Deur took this position in his trial testimony. However, WLAA approved a motion by Huebler, seconded by French, in October of 2015, to "do the right thing" and paid the entire amount.

The Authority, in about January of 2015, hired a Certified Public Accountant Karl Haiser to examine its financial records. (Exhibits 15-16). He found no evidence of criminal, or at least larcenous, behavior. He also said that the Authority accounts payable "were not paid due to a lack of operating cash in the Authority banking accounts as of November 28, 2014."

The Fruitland Township Board, by its Resolution 2015-18, withdrew from its membership in the WLAA, effective 12:00 a.m. on August 1, 2015. (Exhibit 3). The Authority's fiscal year runs from July 1 to June 30, which meant that Fruitland Township withdrew one month into the Authority's 2016 Fiscal Year.

Jonathon Degen testified that WLAA provided the same services to Fruitland, during the times in question, that it provided to the other member units. He said that they still provide service when ProMed Ambulance needs assistance.

Fruitland Township residents approved a tax levy to provide funding for the Authority, which was collected in the winter tax cycle, with the last levy being collected after the Township withdrew from the Authority.

The Authority claims that its **total** debts and liabilities, as of the date of Fruitland Township's withdrawal, were $468,255.49. Those debts included the following:

PNC Line of Credit	$68,424.00
Ambulance lease/purchase agreement	$51,582.00
Amount owed to employees' 457 (b) retirement accounts	$173,204.45
Amount overpaid by the Department of Health and Human Services, including penalty and interest	$113,635.08
Deficit for the month of July 31, 2015	$61,409.96
Total	$468,255.49

ANALYSIS AND DECISION

This court's analysis can be best be understood if it first separates the relevant issues from those not relevant to resolving the **legal** issues in this contentious dispute.

A. Issues not Relevant to the Legal Analysis

There is no dispute that the Authority was a badly functioning enterprise between about 2013 and 2015. This resulted from a combination of factors. Its director had serious weaknesses, and ended up facing criminal charges. (Exhibit I). It received bad advice from its accounting firm, and it, at one point, sent billings which were (at least) badly flawed in the eyes of the federal authorities. These things all contributed to a woeful economic state. Whitehall City Manager Scott Huebler called its financial condition "deplorable." Vanderleest testified that even its leased building was in sad shape, with mold, and wall heater units that did not work.

It is also clear that, among the seven member units, Fruitland was the first to identify and call attention to many of these problems. The Township can justly claim to have been correct in bringing these issues to the forefront.

Third, and not surprisingly, personality disputes eventually complicated both the Authority's functioning and the divorce proceedings attendant to Fruitland's withdrawal from the Authority.

But none of these things are relevant to resolving the remaining **financial** issues.

B. "The Big Picture"

There are three separate provisions which address the financial relationships between the Authority and its members. Two, one in the Articles and a parallel provision found at MCL 124.611, are similar and apply to members *withdrawing* from the Authority. The third one is found in Article III and addresses how the Authority is to manage a situation where it is *running a deficit*.

Fruitland's position is fundamentally flawed because it focuses primarily on the deficit funding paragraph, and generally ignores the two provisions relating to withdrawing members. These address separate and independent concerns.

The court addresses the operating deficit first.

Fruitland Claims WLAA Did Not Experience a Deficit in its Operating Budget

The third applicable provision, located in Article III, applies when there is a deficit. Article III in the Amended/Restated Articles requires member units to satisfy "**any deficit** in the operating expense budget." This clause is mandatory, not optional. Fruitland argues that the provision does not apply because WLAA had no such deficit.

There is some evidence, to be sure, in support. Exhibit J, an August 27, 2015 (about 30 days after Fruitland withdrew) email from Huebler to French and Deur, offers support for both sides. It says:

> The 2015 audited revenues, expenses, and changes in net position at year end was a POSITIVE $190,941. By accounting standards, we did not even have a deficit. Even if we subtract the $164,194 member contributions, we end up with a net $26,747. Now we all know we were on deaths (sic) bed through most of last year and these numbers are a product in time with a big boost from the tax collections and past due fees for services.
>
> The question is-without a deficit, how do we collect anything from Fruitland Township?
>
> I would even argue that the rest of us are due a refund or perhaps a credit on any future payments...

So his conclusion was there was no deficit **at that time**, but that WLAA was on its "death bed" for most of last year. But the recovery was attributable, at least in part, to the member contributions.

This is Fruitland's best evidence. It also cites extensively to parts of both Vanderleest's and Deur's testimony. Deur says much of WLAA's accounting is

inconsistent with generally accepted accounting principles ("GAAP"). He distinguishes between operating deficits and cash flow. He concedes that WLAA had cash flow deficits, but not operating budget deficits. He says WLAA was solvent if it had $25,000 in the bank- "non-profits are not supposed to make money" -when Huebler said the correct number was approximately $125,000. Huebler said a balance of $26,000 was "far too low."

Hindsight is always 20/20. Much of Fruitland's presentation is akin to a frustrated football fan arguing this his team "actually" won the game because of its superior statistics, when the scoreboard says otherwise.

The court is not persuaded by the Township's argument for these reasons.

First, WLAA's **later** recovery shows that the efforts to right the WLAA financial ship were paying off. It also included the significant contributions from the other members. However, this does not negate or dispel the *earlier* financial distress.

Second, the great weight of the testimony is that WLAA was near insolvency during late 2014 and early 2015. Huebler testified that its financial condition was deplorable and that it had less than $100 in two bank accounts. He said it had far less in reserves than it should have. His August 10, 2015 email (exhibit 17), titled "Budget Ugly,"[1] said WLAA had $311,000 in debt for various reasons.

Deur agreed that the authority had "severe financial issues." He believed it was close to insolvency when he joined the Finance Committee in December of 2014. At trial, Deur seemed to suggest that the $164,000 in member contributions were not necessary, but he offered no other viable plan to stave off insolvency.

[1] This also demonstrates the fragile nature of WLAA's finances. This is *only two weeks* before his email acknowledging some degree of success.

Huebler, who had no vested interest in WLAA's continued existence, determined that the member units, including his own City of Whitehall, needed to be invoiced for their share, to make up the deficit. He likely never would have done that (who wants to deliver such bad news?) unless he believed that WLAA needed the money. Independent accountant Haiser attested to the lack of operating cash in November of 2014.

Finally, the Township's own resolution for withdrawal from the Authority, dated June 22, 2015 (exhibit 3), says (this judge is dealing with a bad copy) "the Authority's auditor reported operating losses in the amount of $633,750 from the 2011 fiscal year until the end of the 2015 fiscal year." Thus, the Township itself accepted the reports of WLAA's dire financial condition, and relied upon them in making its decision to withdraw.

In short, **none** of the persons involved with the WLAA questioned its financial distress **at the time.** WLAA has established that it had deficits in its operating expense budget, however flawed its management team was. Article III requires the members to satisfy deficits in the operating budget. All the others did. Fruitland has failed to establish a valid reason why it should escape such obligation. It has breached its contract.

*The Other Two Provisions- Regarding **Withdrawal** of Members*

Both state law and the Amended Restated Articles of Incorporation clearly preserve the financial obligations of any withdrawing member. The language is fairly similar.

MCL 124.611 says:

> A municipality that withdraws from an authority shall remain liable for a proportion of the ***debts and liabilities of the authority incurred while the municipality was a part of the authority***. The proportion of the authority's debts for which a municipality is liable under this subsection shall be determined by dividing the state equalized value of the real property in the municipality by the state equalized value of all real property in the authority at the time of withdrawal. (Bold added.)

The Amended Restated Articles say essentially the same thing:

> A member unit which withdraws from the Authority shall remain liable for a proportion of the ***debts and liabilities of the Authority incurred while the unit was part of the Authority.*** The proportion of the Authority's debts for which a unit is liable under this subsection shall be determined by dividing the population of the unit by the total population of all the member units in the Authority according to the last census. (Exhibit 2, p.10, emphasis added by this writer.)

There are several aspects of this that merit emphasis.

First, the provision is found not just in the Articles, but also in state law. Second, this tandem of provisions speaks specifically to withdrawing members, so it addresses the specific situation found here. *Third, there is nothing in these two paragraphs which requires a finding of deficits or financial distress.* It simply preserves the liability of withdrawing members for the Authority's debts and liabilities incurred while Fruitland was a member.

Fourth, Fruitland's 30 page post-trial Summation, otherwise well-done, is virtually silent on the applicability of these two sections. It focuses the vast majority of its argument on the deficit question, which simply does not apply in the "withdrawing member" context.

MCL 124.611(4) says that Fruitland, the withdrawing member, remains liable for its share of the **debts** and **liabilities** WLAA incurred while Fruitland was a member. The statute is simple and clear- it does not say "*wisely* incurred," "authorized," "authorized in writing," or distinguish between secured or unsecured debt. It does not contain any conditions or exclude certain types or classes of debt. Just "debts" and "liabilities." It is not dependent upon a finding of deficits or distress.

Consider the chaos that would ensue if the seven members could each condition or select which types of obligations they would pay and which they would decline. How could any organization function? But in this case, Fruitland essentially claims this right, after the debt has been incurred. It will not pay its share of the PNC line of credit because it was allegedly procured *ultra vires.* It will not pay its share of the DHS settlement because it was not "booked" until after withdrawal. Neither the statute nor the Articles of Incorporation give it that right.

C. Discussion of Specific Debts

The PNC line of credit. Fruitland says this WLAA action was *ultra vires* and, thus, it should not have to pay it. The parties cite, primarily, *Hatch v Maple Valley Tp Unit School,* 310 Mich 516,526 17 NW2d 735 (1944) and *Hanslovsky v Twp of Leland,* 281 Mich 652; 275 NW2d 720 (1937). The distinction made in these cases is between essentially lawful acts where the municipality acted in error or did it incorrectly *(Hatch)* versus those where the local governmental unit had no power to act in the first instance. *(Hanslovsky)*

Fruitland, the party asserting this defense, has the burden of proving it. *Hatch,* 310 Mich 525. It has failed to do so.

WLAA had the power to procure loans from private agencies pursuant to MCL 124.609(c).[2] It appears to have done so improperly. There is no evidence, at trial, about

[2] WLAA also cites MCL 141.2405 for the authority that "a municipality" can issue securities, among other things. However, it incorrectly cites the definition of municipality in MCL 141.2103(m). It neglects to mention the last sentence in that paragraph:

(m) "Municipality" means a county, township, city, village, school district, intermediate school district, community college district, metropolitan district, port district, drainage district, district library, or another governmental authority or agency in this state that has the power to issue a security. *Municipality does*

any proper authorization. There are no records evidencing such. WLAA had the power, but did it incorrectly. However, neither is there any testimony that these funds were misspent or used for anything except proper WLAA purposes.

The *Hatch* court addressed this situation at 310 Mich 526-7:

> It does not necessarily follow that contracts of a municipal corporation for road purposes were necessarily *ultra vires* as to the corporation itself because its agents or officers did not observe prescribed statutory procedure and limitations imposed upon them, especially where the benefits thereof were received, retained, and enjoyed by the corporation as such, and not by its officers.

This is the situation we have here. Fruitland benefited from this line of credit, however flawed the process by which it was obtained.

The PNC debt was disclosed and incurred while Fruitland was a member (Exhibit 12, minutes of September 24, 2014 meeting). Vanderleest testified that she discovered it and discussed it with both Finance Committees, including the one on which Deur served starting in December, 2014. Huebler testified that he "knew all about it" and so did Fruitland's representatives. Its proceeds were used to benefit WLAA members, including Fruitland.

Fruitland's summation argues that, since its millage money was used to pay down some of the balance after it withdrew, the correct balance is lower than what was owed as of June 30, 2016. This amount is $60,318. Deur says this is what accounting principles require.

But this is not what the parties' contract, or the law, says. Under this circumstance, Fruitland remains liable.

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not include this state or ***any authority,*** *agency, fund, commission, board, or department of this state.* (Emphasis added)

A complete reading of the statute suggests that it provides no authority for the line of credit.

Ambulance lease/purchase agreement. The Township does not seriously question the existence of the debt, only its amount. That contention was correct. At trial, Vanderleest admitted that the right number was $50,483.70.

Fruitland, arguing that the total is lower, makes the same "credit" argument as it made above. Deur testified (partial transcript, p. 55): "[i]n my opinion it would be very unfair to the taxpayers of Fruitland Township to have to pay yet again for those expenses." This argument does not consider fairness to the other six members. It also asks the court to ignore or avoid the contractual and statutory language.

Amount owed to employees on the 457 retirement accounts. This debt arose and "was incurred" while Fruitland was a member of the WLAA, but there are nuances which make this a harder decision. First, there were legitimate differences about the amount of the debt- to assert the statute of limitations or not? Second, this decision was not made[3] until late in 2015, after Fruitland withdrew from the Authority. It had no representatives at that time and did not participate in the vote.

WLAA argues (post-trial brief, p. 10) that Fruitland (1) knew about the issue and (2) could have attended the Authority's meetings when the question was decided. They are open to the public.

This is a close call, but common sense supports a conclusion that, given its position about the DHS debt ("we are choosing not to participate," in so many words) earlier that same month, the Township would also have eschewed any participation in resolving the employee/457 matter later that same month. For that reason, the court

[3] This contrasts to the DHS debt, which Fruitland knew about and then waived any participation in the settlement negotiations.

determines this to also be a valid charge because the debt was incurred while the Township was a member.

Overcharges assessed by DHS. The OIG letter clearly establishes that this liability was incurred while Fruitland was a member of the WLAA. The statute and Articles provision only require that.

Fruitland contends that it is not liable because the debt was not "booked" until after its withdrawal. This adds requirements not found in either the parties' contract (the Amended Restated Articles) or the law. And it specifically declined to participate in the settlement discussions. This is a valid charge against the Township.

The deficit for (only) July 2015. Because this appeared to be a very expensive month, it attracted this judge's attention.

The timing of its withdrawal was totally in the Township's discretion. Unfortunately, July of 2015 was both the first month in the new fiscal year and the last month Fruitland was a part of the Authority, so any assessment of debts and liabilities is limited to that one month.

Vanderleest testified that July was traditionally an expensive month because WLAA paid its employees for their unused vacation days and also paid out "position stipends." She also said they sent no invoices to other member units.

Much of Fruitland's challenge to this month is incorporated into the deficit discussion above. After that, it is primarily a proof problem for the Township. It offers little to challenge the Profit & Loss statement (exhibit 11) offered by WLAA. Huebler did testify that exhibit 11 was not reliable for determining any *deficits*. But deficits are not relevant, as discussed above, to the "withdrawing member" analysis.

Huebler suggested exhibit V, the Independent Auditor's Report prepared by Vredeveld Haefner LLC for the fiscal year ending June 30, 2016 as a better instrument, but that suggested no way to apportion the monies to just the month of July.

Faced with two imperfect choices, the court finds that the profit and loss statement for the month is a valid summary of the "debts and liabilities of the authority incurred while the municipality was a part of the authority." This is all the law requires.

D. Which Percentage Applies?

Two possible equations exist to determine the proportion of the debt for which the Township is liable. The statutory formula, found at MCL 124.611, assesses **property**- the percentage of the Authority's state equalized property value that is located in the Township. That yields the number of 39%. The formula in the Article considers **population** and results in the number of 31%.

The parties' Articles are a contract. Courts presume the legality, validity and enforceability of contracts. *Cruz v State Farm Mut Automobile Ins Co*, 466 Mich 588; 648 NW2d 591 (2002). They agreed to the population formula, which amounts to 31% now. There is no evidence about those negotiations, but it seems logical that the system was considered and approved by the members because it is an important point impacting the members' finances.

WLAA is correct when it contends that the parties cannot make a contract which violates or is ***in conflict with*** state law. However, the Michigan Supreme Court, in a close decision, held that parties can contract to vary, for example, the statutory statute of limitations period. *Rory v Continental Ins Co,* 473 Mich 457; 703 NW2d 23 (2005).

The court does not view this contract provision to be *in conflict with* state law, especially where the contracted formula is less than the other formula might be. There are also estoppel and fairness principles which inure against the Authority. Huebler previously used 31% in calculating the deficit assessments to each member. For these reasons, the court holds the Articles control and the correct percentage is 31%.

E. The Alleged Millage Offset

The court has dealt with this argument to some extent above as it relates to the PNC line of credit and the ambulance lease. It deals with it more generally now.

Fruitland supports its position primarily with Deur's testimony that a credit was consistent with GAAP and CPA principles. But this was another area where Deur's interest as a Fruitland Township taxpayer overshadowed his expert witness testimony.

The Township points the court toward no statute or case law providing for such an offset. Rather, MCL 126.611, the same statute which specifies the responsibilities of the withdrawing members, also speaks to the millage situation: MCR 124.611(2) says:

> (2) A municipality that withdraws from an authority shall continue to be subject to any tax levied in its jurisdiction under section 12 for the duration of the period of that tax as determined pursuant to section 12(3).

The Articles, on page 10, contain similar language. The Articles also provide that a withdrawing member forfeits any equity it has in the capital assets of the Authority. The Township's position is without legal support and the court, accordingly, rejects it.

It must be remembered that it was the Township that, at all times, controlled the timing of its withdrawal from the WLAA. To the extent that there might have been a better or different time to do so, that it within the Township's control.

CONCLUSION

Fruitland has both breached the contract and failed to comply with the applicable state law. Applicable provisions in both their contract (the Amended Restated Articles of Incorporation) and state law prescribe how to manage their separation. In essence, the parties virtually have a pre-nuptial agreement which specifies what happens if and when they separate. Deviating from that plan is neither necessary nor encouraged.

Fruitland is liable for 31% of the following sums:

PNC Line of Credit	$68,424.00
Ambulance lease/purchase agreement	$50,483.70
Amount owed to employees' 457 (b) retirement accounts	$173,204.45
Amount overpaid/settlement with DHS	$113,635.08
Deficit for the month of July 31, 2015	$61,409.96
Total	$467,157.19

This opinion and order attempts simply to resolve the financial issues, and specifically does not address the remaining political and community issues attendant to these turbulent years for WLAA.

This will likely be an unsatisfying result for many, but hopefully this might be the end, however imperfect, of the legal struggles. The court certainly encourages the affected parties to move on to better days.

WLAA must submit a judgment and any other orders to the court within 14 days. That document should be a final order which closes this file.

IT IS SO ORDERED

Date: March 30, 2018

Timothy G. Hicks, P35198
Circuit Judge

CERTIFICATE OF MAILING

I hereby certify that on the 30th day of March, 2018, I personally mailed copies of this order to the parties above named at their respective addresses, by ordinary mail.

Brenda Severeid, Circuit Court
Legal & Scheduling Secretary