Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston,

In the case no. 04-P-872

MASSACHUSETTS TRUSTEES FOR ARMED SERVICES WORK, INC.

vs.

INTERNATIONAL COMMITTEE OF YOUNG MEN'S CHRISTIAN ASSOCIATIONS, INC.

Pending in the Land Court

Ordered, that the following entry be made in the docket:

Judgment affirmed.

By the Court,

Joseph F. Stanton Asst. Clerk

Date January 10, 2006.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

04-P-872

MASSACHUSETTS TRUSTEES FOR ARMED SERVICES WORK, INC.[1]

vs.

INTERNATIONAL COMMITTEE OF YOUNG MEN'S CHRISTIAN ASSOCIATIONS, INC.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff corporation, Massachusetts Trustees for Armed Services Work, Inc. (plaintiff), presently holds title to a building situated on Second Avenue in the Charlestown section of Boston. The plaintiff also holds a lease interest in the underlying real estate locus. Claiming that an unrecorded agreement signed in 1917 (1917 agreement) with the defendant, International Committee of Young Men's Christian Associations, Inc. (YMCA), constitutes a deed restriction affecting the locus, the plaintiff brought a complaint (as amended) in the Land Court to remove the alleged restriction, to quiet title, and for a declaration of rights.

A Land Court judge allowed the YMCA's motion to dismiss the complaint under Mass.R.Civ.P. 12(b)(1) and (6), 365 Mass. 754 (1974). He ruled that the 1917 agreement is not a restriction as

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[1] Formerly known as the Massachusetts Trustees of the International Committee of Young Men's Christian Associations for Army and Navy Work, Inc.

[2] Doing business as YMCA of the USA.

defined by G. L. c. 184, § 26; the agreement does not affect title to the locus; a 1984 taking by the city of a different parcel neither extinguished the 1917 agreement nor placed a cloud on the title to the locus; and declaratory relief was unnecessary. The judge denied the plaintiff's motion to amend the complaint to add counts alleging a deed restriction under G. L. c. 184, § 23 (rather than under § 28), and ruled that the 1917 agreement was not barred by the Statute of Frauds, G. L. c. 259, § 1. The plaintiff appealed.[3] We affirm.

In reviewing the judge's ruling on the motion to dismiss under rule 12(b)(6), we accept as true the factual allegations in the complaint, as well as all reasonable inferences we may draw from them in favor of the plaintiff. However, we do not accept the plainitff's legal conclusions "cast in the form of factual allegations." Schaer v. Brandeis Univ., 432 Mass. 474, 477 (2000).

By deed dated June 28, 1917, recorded in the Suffolk County registry of deeds at book 4041, page 293, the plaintiff acquired in fee the real estate located at 32 City Square in Charlestown (City Square property). On September 20, 1917, the plaintiff and the YMCA entered into the 1917 agreement (A. 17-18), which provides in pertinent part:

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[3] The plaintiff does not press its claim for declaratory relief on appeal, and thus we do not address it.

> "First: . . . [T]he . . . Trustees hereby agree, in consideration of the agreements of the [YMCA] hereinafter contained:
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> ". . .
>
> "(b) To convey all its property real and personal to the [YMCA], in case the [YMCA] adopts a formal resolution declaring that in its judgment such property is not being used in conformity with the purposes contemplated in the Agreement of Association of the [plaintiff], and demands such a conveyance in writing, with a copy of such resolution annexed."

Under the 1917 agreement, the YMCA agreed to indemnify the plaintiff "for all expenditures made and debts incurred in accordance with the annual budgets approved as aforesaid, and for any additional expenditures made and debts incurred with the approval of the [YMCA], to the extent that such expenditures and debts exceed the operating receipts (including charitable subscriptions) of the [plaintiff]." The YMCA also agreed to accept conveyance of all real and personal property belonging to the plaintiff "[i]n case the plaintiff decide[s] that the purposes of [its] incorporation can better be carried on by the [YMCA]."

Neither party recorded the 1917 agreement. Thereafter, for over sixty-five years, consistent with its charter, the plaintiff operated the City Square property for the primary benefit of United States military enlisted personnel and, on an annual, voluntary basis, as a member organization of the YMCA (A. 180).

On May 3, 1984, the Massachusetts Highway Department took by

eminent domain the fee in the City Square property (1984 taking). After vacating the City Square property, the plaintiff conducted business out of a building in South Boston from 1986 to 1992. In 2001, the plaintiff entered into a joint venture to develop a new building for their operations on the locus, situated within the Charlestown Navy Yard. The Boston Redevelopment Authority (BRA), owner of the fee, entered into a ground lease of the locus with the joint venturers, who built the new building. The plaintiff holds title to all improvements on the locus, including the new building. By assignment of rights obtained in 1993, the plaintiff also is the sole party in interest in the ground lease, although title to the fee remains in the BRA.

By letter dated May 17, 2002, the YMCA notified the plaintiff that the YMCA was terminating the plaintiff's status as a member organization. As of January 1, 2003, the plaintiff was no longer affiliated with the YMCA. The plaintiff continued to operate the new building on the locus under the name "Constitution Inn." By letter dated March 25, 2003, the YMCA, purporting to exercise its rights under the 1917 agreement, demanded that the plaintiff "convey its 'property real and personal' to [the YMCA] forthwith." This action followed.

1. Deed restriction. The 1917 agreement does not indicate any appurtenant real property which conceivably is benefitted thereby. See Eno & Hovey, Real Estate Law § 13.9, at 425-427

(4th ed. 2004). Moreover, there is no indication that the YMCA owned at the time of the 1917 agreement, or owns presently, any land which is benefitted by the alleged restriction. The benefit is thus personal to the YMCA and does not run with the land.[4] See Garland v. Rosenshein, 420 Mass. 319, 321-322 (1995). For that reason, if no other, we agree with the judge's ruling that the 1917 agreement does not constitute a restriction on land within the scope of G. L. c. 184, § 28, because it does not run with the land as required under G. L. c. 184, § 26. See Well-Built Homes, Inc. v. Shuster, 64 Mass. App. Ct. 619, 626-627 (2005). Cf. Dunphy v. Commonwealth, 368 Mass. 376, 384 (1975) (sections 26 and 28 not applicable to creation of public charitable trust).[5]

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[4] We are in substantial agreement with the YMCA's assertion (Def. Br. 9) that, absent any evidence to the contrary, the purpose of the 1917 agreement was "to bind the [plaintiff] to fulfill [its] corporate and charitable purpose, not to benefit any neighboring land." See note 5, infra. The plaintiff contends that the judge erred by failing to consider extrinsic evidence of the parties' intent respecting the 1917 agreement, although it fails to identify such evidence. This argument does not appear in the plaintiff's filings below and was not referred to by the Land Court judge. We do not consider it. See Bergh v. Hines, 44 Mass. App. Ct. 590, 591 n.6 (1998).

[5] General Laws c. 184, § 26, as appearing in St. 1990, c. 520, § 2, provides, in pertinent part: "All restrictions on the use of land . . . which run with the land subject thereto and are imposed by covenant, agreement, or otherwise, whether or not stated in the form of a condition, in any deed, will or other instrument executed by or on behalf of the owner of the land or in any order of taking shall be subject to this section and sections twenty-seven to thirty, inclusive . . . ." The judge ruled, and the plaintiff agrees (Pl. Br. at 16), that pertinent

2. Other issues. For substantially the reasons stated by the judge, we agree that the 1984 taking by eminent domain of the City Square property neither constitutes a cloud on the interest the plaintiff subsequently acquired and presently holds in the locus, nor extinguishes the YMCA's contractual rights under the 1917 agreement. The judge was not asked to, and did not, determine the scope of those rights, as to which we express no opinion.

To the extent that it is properly before us in this appeal,[6] we also agree with the judge's ruling that the 1917 agreement sufficiently identified the plaintiff's real estate subject to that agreement ("all its property real and personal") so as to satisfy the Statute of Frauds, see Danforth v. Chandler, 237 Mass. 518, 522 (1921), and that amendment of the complaint to raise the issue would be futile, see Thermo Electron Corp. v.

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sections of G. L. c. 184, §§ 23 and 26-30 must be read together, here, specifically, §§ 26 and 28. See Stop & Shop Supermarket Co. v. Urstadt Biddle Properties, Inc., 433 Mass. 285, 288 (2001); Jones v. Murphy, 60 Mass. App. Ct. 1, 3 (2003). To the extent that the plaintiff now makes any discrete argument under § 23, it fails for similar reasons. Although the plaintiff in its brief makes passing reference to the notion of an equitable servitude, it makes no argument of substance on the point and we do not consider it. Mass.R.A.P. 16(a)(4), as amended, 367 Mass. 921 (1975).

[6] The plaintiff makes no express argument that the judge erred in denying the motion to amend. See Mass.R.A.P. 16(a)(4).

Waste Mgmt. Holdings, Inc., 63 Mass. App. Ct. 195, 203 (2005).

Judgment affirmed.

By the Court (Lenk, Beck & McHugh, JJ.),

Assistant Clerk

Entered: January 10, 2006.