COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 2022-P-0314

ELIZABETH REILLY, CAROL J. HALL, DONALD HALL, HILARY SMITH, DAVID SMITH, MEGAN FLEMING, STEPHANIE A. MCCALLUM, JASON A. BEARD, AMY BEARD, SHANNON W. FLEMING, and JANICE DOYLE.

Plaintiffs/Appellants

v.

TOWN OF HOPEDALE, LOUIS J. ARCUDI, III, BRIAN R. KEYES, GRAFTON & UPTON RAILROAD COMPANY, JON DELLI PRISCOLI, MICHAEL MILANOSKI, and ONE HUNDRED FORTY REALTY TRUST

Defendants/Appellees

On Appeal from a Judgment of the Worcester Superior Court, Civil Action No.2185-00238

REPLY BRIEF FOR THE PLAINTIFFS/APPELLANTS

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July 7, 2022

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ARGUMENT

I. THE SETTLEMENT AGREEMENT'S WAIVER OF THE TOWN'S OPTION IS INEFFECTIVE DUE TO LACK OF AUTHORITY AND FAILURE OF CONSIDERATION

The key facts remain. The Railroad flagrantly violated G.L. c. 61, § 8 by purchasing the beneficial interest in the 130 acres of Forestland with the intent to develop them and began clearing them without affording the Town its statutory right of first refusal and Option to acquire all of the Forestland. RAII/194. When the Town sought to enjoin the clearing, the Railroad ramped up litigation costs and complexity by filing an action with the federal Surface Transportation Board ("STB") claiming federal preemption; a year-and-a-half later, the STB ruled in another case brought by the Railroad involving property in Hopedale that property rights under state law are to be determined by state courts, showing that the Railroad's preemption threat was utterly hollow. See STB Order November 3, 2021, Add/20. But the Railroad's illegal and intimidating tactics pushed the Select Board to enter into the Settlement Agreement, without Town Meeting approval and over the objection of the Citizens.

The Settlement Agreement purported to waive the Town's c. 61 Option, but the Select Board lacked necessary authority from Town Meeting and the waiver of the Option is therefore ineffective. The Citizens requested a declaratory judgment under Count II of their Superior Court Complaint and Prayer for Relief that the waiver was ineffective. RAI/033-034; RAI/036. The Superior Court declined to issue such judgment, despite its finding that the Town lacked authority to expend funds under the Settlement Agreement and its judgment enjoining the Town from purchasing only 40 of the 130 acres of Forestland under the Settlement Agreement. The Town agrees that the Settlement Agreement, including the waiver of the Option, is ineffective. Town Brief, Dkt. #18 at 17.

The Superior Court enjoined the Railroad's destruction of the Forestland for 60 days after entry of judgment but did not continue the injunction pending this appeal. Consequently, the Railroad continues to illegally clear thousands of trees from the Forestland, denuding the landscape and causing irreparable harm to the Town's wetlands and water supplies. See aerial images of destruction as of July 12, 2022, Add/24-27. Thus, it is imperative that this

Court declare the waiver of the Option ineffective so that the Citizens and the Town may pursue injunctive relief before the Forestland is completely destroyed.

The Town's lack of authority to purchase only 40 of the 130 acres renders the Settlement Agreement ineffective. The Railroad offers no serious argument to the contrary. Its suggestion (Railroad Brief, Dkt. #16 at n. 15) that acquisition of the 40 acres was merely an option available to the Town, which if not exercised would leave the Settlement Agreement intact and effective, is plainly wrong. The acquisition of the 40 acres was the crux of the Agreement, the essential quid pro quo for the Town's waiver of its c. 61 Option. In exchange for the waiver, the Town would have the uncontested right to acquire the 40 acres. But without authority to acquire those 40 acres, the Settlement Agreement fails in its entirety, both for lack of authority and failure of consideration. Citizens' Brief, Dkt. #7 at 29-36; Abrams v. Bd. of Selectmen of Sudbury, Mass. App. Ct., No. 09-P-1226, at *2 (May 3, 2010) (Rule 1:28 Opinion).

The Railroad's alternative suggestion (Railroad Brief, Dkt. #16 at 42) that the validity of the Settlement Agreement was not before the trial court is

similarly misplaced. Indeed, the trial court itself repeatedly referred to the Settlement Agreement as "ineffective." See Citizens' Brief, Dkt. #7, at Add/61, 62-64, 65, 68. Count II of the Complaint and the Prayer for Relief specifically requested a declaration that the Town's waiver of the Option under the Settlement Agreement was invalid and unenforceable. RAI/033-034; RAI/036.

There is no good reason why the parties should have to commence a third lawsuit to obtain a definitive ruling that the waiver of the Option is invalid and unenforceable when the facts are undisputed, the matter has been fully briefed, and the ongoing irreparable harm urgently requires a decision.[1] Accordingly, this Court should issue a declaratory

[1] The Town, in agreement with the Citizens and the Superior Court, takes the correct position that the Settlement Agreement is not effective nor is it enforceable, including the waiver provision. See Town Brief, Dkt. #18 at 10, 11, 17, 18, 21. By contrast, the Railroad maintains that despite judgment that the Select Board lacks authority for its key provision, the Settlement Agreement is otherwise in full force and effect. See Railroad Brief, Dkt. #16 at 40-42. The Town and the Railroad, the parties to the disputed Settlement Agreement, cannot both be right. Thus, the Citizens respectfully disagree with the Town that the ineffectiveness of the Settlement Agreement and waiver provision are not ripe for a declaratory order to that effect.

judgment that the Settlement Agreement, including the purported waiver of the Option, is ineffective and invalid.

II. THE CITIZENS HAVE STANDING TO OBTAIN A DECLARATION THAT THE WAIVER OF THE OPTION UNDER THE UNAUTHORIZED SETTLEMENT AGREEMENT IS INEFFECTIVE AND INVALID DUE TO LACK OF AUTHORITY AND FAILURE OF CONSIDERATION

A. The Citizens Have Standing Under c. 40, § 53

The Railroad concedes that the Citizens have standing under c. 40, § 53 to restrain purchase of the 40 acres of Forestland under the Settlement Agreement but maintains that such standing does not extend to enforcement of the Town's Option. See Railroad Brief, Dkt. #17 at 26. This argument is a red herring. The Citizens are not arguing that they have standing under c. 40, § 53 to require the Town to exercise the Option. Rather, the Citizens are arguing that they have standing to obtain a declaratory judgment that as the result of the lack of authority to purchase the 40 acres of Forestland, the Town lacks authority to waive and release the Option under the Settlement Agreement. Such a declaratory judgment would allow the Town to renew its efforts to enforce the Option, because the waiver and release of it would be ineffective. This is essentially the relief issued by the Superior Court

under Count I; however, due to the Railroad's recalcitrance, it must be issued under Count II as well to bind the Railroad. This is the error that the Citizens ask this Court to correct.

The Railroad seeks to cleave the expenditure of funds under the Settlement Agreement from the remainder of its provisions including the waiver of the Option, and argues that since the expenditure of funds issue has been "completed", the Citizens have no standing to challenge the remainder of the transaction. The Railroad's reliance on Spear v. Boston, 345 Mass. 744 (1963), is inapposite. There, the plaintiff taxpayers' request for injunctive relief was moot because the contract at issue had expired and no further payments were to be made under it. The Court denied the plaintiff taxpayers' request for recovery of monies already spent because c. 40, § 53 does not apply to completed transactions. Here, by contrast, injunctive relief is not moot because the transaction involving expenditure of funds to acquire the 40 acres of Forestland is still very much in play; indeed, the Railroad is relying on the waiver of the Option as a defense to its ongoing destruction of the Forestland. There is no completed expenditure of

funds that the Citizens are attempting to claw back. Rather, there is an undeniable expenditure of municipal funds that has not yet occurred and that is inextricably intertwined with other aspects of the transaction. In these circumstances, the Citizens have standing to request declaratory relief regarding the Settlement Agreement including its waiver of the Option. Oliver v. Town of Mattapoisett, 17 Mass. App. Ct. 286, 287-288 (1983).

B. The Citizens Have Standing Under c. 231A

The Railroad argues that the Citizens lack standing to obtain a declaratory judgment under c. 231A because they have suffered no injury, citing Ten Persons of the Commonwealth v. Fellsway Dev. LLC, 460 Mass. 366 (2011). However, the alleged consequences of a statutory violation in Fellsway were "inchoate and nonparticularized". Svc. Emps. Int'l Union, Local 509 v. Dept. of Mental Health, 469 Mass. 323, 331-332 (2014), S.C., 476 Mass. 51 (2016) ("Local 509"). In Local 509, on the other hand, the loss of jobs and the union's inability to represent those who lost jobs were "deprivations constitut[ing] cognizable injury for purposes of the declaratory judgment statute." Id. at 332.

The injuries suffered here by the Citizens as the result of the illegal Settlement Agreement are certainly real, concrete, and ongoing. The illegal expenditure of municipal funds is a real injury. More importantly, the loss of thousands of trees from Forestland that the Railroad has no right to destroy is a cognizable injury that cannot be ignored. This injury is being repeated each day as more trees fall. Add/24-27. These injuries fall within the zone of interests of c. 61, i.e., conservation and preservation of forestland. New England Forestry Found., Inc. v. Bd. of Assessors of Hawley, 468 Mass. 138, 144 (2014). The Citizens have standing under c. 231A to obtain a declaration that the waiver of the Option under the Settlement Agreement is invalid and therefore that the Town retains the ability to protect the Forestland that is being destroyed by the Railroad each and every day that this appeal remains pending.

III. THE WAIVER OF THE OPTION IS AN ILLEGAL ASSIGNMENT OF DEVELOPMENT RIGHTS TO A FOR-PROFIT ENTITY IN VIOLATION OF C. 61, § 8

The Railroad glosses over the undisputed facts that the substantive effect of the Settlement Agreement was to transfer to the Railroad, a for-profit third party, rights to develop the Forestland

that under c. 61, § 8 may be transferred only to non-profit entities who agree to conserve 70% of the Forestland. The Railroad's principal argument is that if the Settlement Agreement were viewed as an assignment in violation of the statute, then every instance where a municipality elects not to exercise its statutory option would also constitute an illegal assignment. This is a false comparison. In the usual circumstance where a municipality elects not to exercise its statutory option, the property owner may transfer its rights to a for-profit third-party developer. This is vastly different than a municipality transferring its c. 61 rights directly to the third-party developer, in exchange for money or other consideration. The statute allows such direct transfers only to non-profit entities. The municipality remains free to exercise its right of first refusal, acquire the property, and then sell some of the land or development rights to a third party, provided necessary municipal approvals are obtained. But direct assignments to third party for-profit developers remain prohibited by c. 61, § 8, and that is exactly what happened here. The Railroad illegally acquired development rights to the land via

a waiver in its favor under the Settlement Agreement, which stripped of its clothes is nothing more than an assignment to a for-profit entity which has made no commitment to conserving any of the Forestland. Indeed, the Railroad has proceeded with the wholesale destruction of the Forestland.

The Railroad's argument also ignores that it purchased the beneficial interest in the Forestland illegally, and is therefore properly treated as a third party whose rights in the land derive only from the illegal Settlement Agreement. The Railroad makes no attempt to address the cases cited by the Citizens showing that the waiver of the Option in favor of the Railroad under the Settlement Agreement is in effect an illegal assignment of the Option to the Railroad.

IV. THE CITIZENS HAVE STANDING TO CHALLENGE THE ILLEGAL ASSIGNMENT

A. The Citizens Have Standing Under c. 40, § 53

The Railroad does not make any argument that the Citizens lack standing under c. 40, § 53 to obtain a declaration that the Settlement Agreement is an illegal assignment. Because the Settlement Agreement provides for unauthorized expenditures, the Citizens have standing to challenge it and the other provisions

of the Settlement Agreement that are contrary to law. Oliver, 17 Mass. App. Ct. at 287-288.

B. The Citizens Have Standing Under c. 231A

Nor does the Railroad make any argument that the Citizens lack standing under c. 231A to obtain a declaratory judgment that the Settlement Agreement is an illegal assignment. As stated, the Citizens have suffered injuries through illegal expenditure of tax monies and loss of Forestland. The statute was intended to conserve Forestland. New England, 468 Mass. at 144. If the Citizens do not have standing to challenge illegal assignments under the statute, then no one will be able to challenge them, as the Select Board is not going to sue itself. The Citizens have standing under c. 231A to obtain a ruling regarding the statutory prohibition on assignment of c. 61 rights to for-profit entities as it directly affects the public's rights in Forestland that the statute is intended to protect. Local 509, 469 Mass. at 332.

C. The Citizens Have Standing Via Mandamus

Where a government entity exceeds its statutory authority with respect to public rights in land, citizens may challenge its actions via mandamus. Gould v. Greylock Rsr. Comm'n, 350 Mass. 410, 427

(1966). The Railroad does not dispute this. Rather the Railroad argues that the Citizens waived this claim by not including the word "mandamus" in Count II of the Complaint. However, the Citizens and the Railroad briefed mandamus issues throughout the action below, and it is too late for the Railroad to try to foreclose the issue by claiming waiver.

The Railroad falls back on the principle that mandamus is not available to compel exercise of discretionary functions. Railroad Brief, Dkt #17 at 43. But that is not what the Citizens are seeking. Again, the Citizens are not seeking to compel the Town to exercise its Option to acquire the property, which is a discretionary decision. Rather, the Citizens are seeking an order that the Settlement Agreement violates the anti-assignment provisions of c. 61, § 8. This falls squarely within mandamus relief that is available to protect public rights in land. Gould, 350 Mass. at 427; Nickols v. Comm's of Middlesex Cnty., 341 Mass. 13, 26-27 (1960).

V. THE LAND COURT ACTION DID NOT ADJUDICATE THAT THE TOWN HAS NO ENFORCEABLE C. 61 RIGHTS

The Town's dismissal of the Land Court appeal does not bar the relief sought by the Citizens in this

case. Indeed, the Land Court appeal was dismissed voluntarily because the Town believed, based on the Land Court's and the Single Justice's rulings, that further rulings regarding the enforceability of the Settlement Agreement were needed before the Stipulation of Dismissal filed pursuant to it could be vacated under Mass. R. Civ P. 60(b). The Land Court found that the Settlement Agreement was not before it and that the Superior Court's finding that the Settlement Agreement was ineffective was narrow and did not rescind the contract. That is why the Citizens are before this Court--to obtain a ruling that the Settlement Agreement including its waiver of the Option is indeed ineffective and invalid, such that the Stipulation of Dismissal in Land Court can be vacated. The Town's dismissal of the Land Court appeal does not preclude this relief; to the contrary, the Land Court's decision made clear that this relief was, in the Land Court's view, necessary before it could consider vacating the Stipulation of Dismissal.[2]

[2] This alone countenances this Court to correct now the error of the Superior Court in its failure to enter a declaratory order that the Town retains its Option and that the Settlement Agreement is ineffective and unenforceable. The parties should not be required to commence a third action.

CONCLUSION

For the foregoing reasons, the decision of the Superior Court should be reversed, and a declaratory judgment should enter in favor of Plaintiffs on Count II that the Settlement Agreement is ineffective, unenforceable and void.

CERTIFICATE OF SERVICE

I, David E. Lurie, counsel to the Appellants Hopedale Citizens, hereby certify that on this 7th day of July, 2022, I caused a true and accurate copy of the Reply Brief of the Appellants to be served by the Massachusetts eFile system upon counsel for each Appellee.

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CERTIFICATE OF COMPLIANCE WITH MASS. R. APP. P. 16(k)

Harley C. Racer, counsel of record for the Appellants, Hopedale Citizens hereby certifies, pursuant to Mass. R. App. P. 16(k), that the Reply Brief of the Appellants complies with all applicable rules of court concerning the filing of briefs, including Mass. R. App. P. 16(a)(1),(3),(4),(9),(11)-(15).

/s/Harley C. Racer

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ADDENDUM

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SERVICE DATE – NOVEMBER 3, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36518

GRAFTON AND UPTON RAILROAD COMPANY—
PETITION FOR DECLARATORY ORDER

Decided: November 3, 2021

On May 13, 2021, Grafton and Upton Railroad Company (Grafton & Upton), a Class III rail carrier, filed a petition for declaratory order asking the Board to find any state or local law that would prevent Grafton & Upton from closing two private grade crossings (the Crossings) across its line in the Town of Hopedale, Mass. (the Line), to be preempted pursuant to 49 U.S.C. § 10501. (Pet. 2.)

Grafton & Upton states that it removed the Crossings in connection with certain upgrades it made to its track on either side of a railroad bridge near its yard in Hopedale. (Id. at 5.) It argues that restoration of the Crossings would unreasonably interfere with its "existing and future rail operations" and raise safety concerns.[1] (Id. at 2.) Therefore, Grafton & Upton submits that any effort by Hopedale Properties, LLC (Hopedale Properties), whose property is bisected by Grafton & Upton's line, to rely on state and local laws to prevent Grafton & Upton from closing the Crossings should be preempted pursuant to 49 U.S.C. § 10501. (Pet. 2.)

Hopedale Properties replied on July 16, 2021, arguing that it holds an easement over Grafton & Upton's right-of-way that gives it the right to maintain the Crossings that Grafton &

[1] Grafton & Upton states that it maintains and operates the Hopedale yard and is improving it to handle an increased volume of rail business resulting from a recent lease agreement with CSX Transportation, Inc. (CSXT), pursuant to which Grafton & Upton will operate an 8.4-mile section of CSXT's line. (Pet. 3-4); see also Grafton & Upton R.R.—Acquis. & Operation Exemption—CSX Transp., Inc., FD 36444 (Oct. 14, 2020). Further, Grafton & Upton states that, as part of these improvements, it has focused on improving the Line on either side of the railroad bridge that crosses the Mill River. (Pet. 4.) It represents that it will no longer be possible to keep the Crossings open because of the engineering standards required for track within 100 feet of a railroad bridge. (Id. at 5.) Grafton & Upton also states that closing the Crossings will reduce the risk of injury to pedestrians, (id. at 6), eliminate the need to provide flagging protection, (id. at 5), and allow Grafton & Upton to perform brake tests on its trains without having to separate the trains into different sections. (Id.) Because of these operational and safety concerns that Grafton & Upton alleges would result from restoring the Crossings in their previous locations, Grafton & Upton argues that any state action that would require it to restore the Crossings should be preempted by 49 U.S.C. § 10501.

Upton removed. (Hopedale Props. Reply 4.) Hopedale Properties represents that the right-of-way was conveyed to Grafton & Upton by a predecessor to Hopedale Properties subject to the easement. (Id. at 2, 4.) Hopedale Properties alleges that, by removing the Crossings, Grafton & Upton violated Hopedale Properties' rights pursuant to that easement.[2] (Id. at 5.) Hopedale Properties argues that the Board should deny the Petition and allow the parties to resolve their property dispute in a related state court proceeding, (see id. at 1-2, 8) in which Hopedale Properties and two other entities filed a complaint in Massachusetts Superior Court, Worcester County, seeking, among other things, the restoration of the Crossings. (See id., Ex. A.) In that complaint, Hopedale Properties presented to the court its argument that Grafton & Upton violated Hopedale Properties' rights pursuant to the easement when it removed the Crossings and by refusing to restore them. (Id., Ex. A, at 16-17.)

On July 28, 2021, Grafton & Upton filed a response to Hopedale Properties' Reply, asserting that it was unaware of the easement cited by Hopedale Properties but arguing that, regardless of the easement, the record makes clear that restoration of the Crossings would create an unreasonable burden on rail transportation and, therefore, any state action that would require Grafton & Upton to restore the Crossings should be preempted. (Grafton & Upton Reply 6-7.)

Hopedale Properties filed a sur-reply on September 7, 2021,[3] arguing that Grafton & Upton's knowledge of the easement is immaterial to the dispute. (Hopedale Props. Sur-Reply 1-2.) Moreover, Hopedale Properties maintains that Grafton & Upton "has failed to show that it has suffered any interference, let alone substantial impediments, to its operations." (Id. at 3.) Hopedale Properties reiterates its request that the Board deny the Petition and allow the state court to decide the parties' dispute in the related state court action.

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Ord. Proc., 5 I.C.C.2d 675 (1989). For the reasons explained below, this proceeding will be held in abeyance pending resolution of the ongoing state court litigation.

Grafton & Upton seeks a declaration from the Board that any state or local law that would prevent Grafton & Upton from permanently closing the Crossings are preempted by

[2] According to Hopedale, "the only direct way to access" several of the parcels of its property is by use of the private grade crossing northwest of the Mill River. (Hopedale Props. Reply 3.) And the "only way to access" two other parcels from the rest of the Property is by using the private grade crossing just east of the Mill River. (Id.)

[3] Under 49 C.F.R. § 1104.13(c), a reply to a reply is not permitted; however, in the interest of a complete record, Grafton & Upton's reply and Hopedale Properties' sur-reply will be accepted into the record. See City of Alexandria, Va.—Pet. for Declaratory Ord., FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing reply to reply "[i]n the interest of compiling a full record").

49 U.S.C. § 10501(b). However, resolution of this dispute appears to be contingent upon the interpretation of an easement that Hopedale Properties allegedly has over Grafton & Upton's right-of-way. As the Board has explained, a court is typically the more appropriate forum for interpreting contracts and resolving state property law disputes. See, e.g., V&S Ry.—Pet. for Declaratory Ord.—R.R. Operations in Hutchinson, Kan., FD 35459 (STB served July 12, 2012) (question about property rights should be decided by the district court applying state property and contract law); Allegheny Valley R.R.—Pet. for Declaratory Ord.—William Fiore, FD 35388 (STB served Apr. 25, 2011) (questions concerning size, location, and nature of property rights are best addressed by a state court). Here, what rights Hopedale Properties has, if any, with regard to the Crossings pursuant to the claimed easement is before the Superior Court of the Commonwealth of Massachusetts, Worcester County. (Hopedale Props. Reply 1.) And the court is the more appropriate forum to decide that issue.

While Hopedale Properties has asked that Grafton & Upton's petition for declaratory order be denied, the proceeding instead will be held in abeyance. Abeyance is appropriate where it would promote efficiency and not be fundamentally unfair to any party. E.g., N. Am. Freight Car Ass'n v. Union Pac. R.R., NOR 42144 et al., slip op. at 3 (STB served Mar. 31, 2017). Abeyance would promote efficiency here because resolution by the state court of the parties' rights under the easement could moot the need for the declaratory order, or, at the least, would inform the preemption analysis.[4]

Abeyance would not be fundamentally unfair to any party here because obtaining answers to the state property law issues and contractual questions would allow a more complete and accurate adjudication of the preemption dispute between the parties. Accordingly, this proceeding will be held in abeyance pending a decision from the state court. To ensure that the Board remains informed regarding the progress of the state court litigation, the parties will be directed to submit any decision by the court regarding the merits of any of the claims in the case (or any other decision relevant to this proceeding) within 5 days of its issuance.

It is ordered:

1. Grafton & Upton's reply and Hopedale Properties' sur-reply are accepted into the record.

2. The proceeding is held in abeyance pending further Board order.

3. The parties are directed to submit any merits decision or any other relevant decision by the court within 5 days of its issuance.

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[4] Furthermore, issues involving federal preemption under § 10501(b) can be decided either by the Board or the courts in the first instance as "both the Board and the courts have concurrent jurisdiction to determine preemption." Brookhaven Rail Terminal—Pet. For Declaratory Ord., FD 35819, slip op. at 4 (STB served Aug. 28, 2014). Given the confluence of issues here—state property law, safety standards, and preemption—the state court may decide to address all of the issues together itself or refer the preemption issue back to the Board.

4. This decision is effective on its service date.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.


Lon: -71°-33'-53"
Lat: 042°08'49"
Date: Jun 12, 2022


Lon: -71°-33'-57"
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Date: Jun 12, 2022


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Date: Jun 12, 2022


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Date: Jun 12, 2022

76 Mass.App.Ct. 1128
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

Laura B. ABRAMS, trustee,[1]

v.

BOARD OF SELECTMEN OF SUDBURY & another.[2]

No. 09–P–1226.

May 3, 2010.

By the Court (LENK, GRASSO & BERRY, JJ.).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

*1 The board of selectmen of Sudbury (board) and the town of Sudbury (town) appeal from a judgment in favor of Laura B. Abrams, trustee of the CAS and JOC Trusts (trusts) that (1) declared void a settlement agreement[3] between the trusts and the board in the original Land Court action (the original action), and (2) ordered the town to reconvey land (the cemetery parcel) that had been conveyed to the town as part of the settlement agreement. A Superior Court judge reasoned that the consideration for the settlement agreement failed when a Land Court judge in a different action (the taxpayer action)[4] ordered the parties to the settlement agreement to execute a new agricultural preservation restriction (APR) identical in form to an APR declared invalid in the settlement agreement and the judgment in the original action. On appeal, the board and town argue that (1) the Superior Court lacked subject matter jurisdiction, (2) issue preclusion and claim preclusion bar this action by the trusts, and (3) rescission is inappropriate because the settlement agreement is valid and supported by consideration.

We affirm substantially for the reasons set forth in the Superior Court judge's well reasoned memoranda.[5]

1. *Background.* Subsequent to the purchase of two parcels of land in Sudbury that were burdened with an APR, the trusts instituted the original action in the Land Court to declare the APR invalid. The trusts and the board entered into a comprehensive settlement agreement whereby the APR would be declared invalid and released and the JOC Trust would convey, inter alia, the cemetery parcel to the town. Pursuant to the settlement agreement, a Land Court judge entered a judgment in the original action that declared the APR invalid. Shortly thereafter, a group of neighbors filed the taxpayer action to enforce the APR. The judge in the taxpayer action granted summary judgment to the taxpayers and ordered the parties to the settlement agreement to execute a new APR identical in form to the original APR. The judge reasoned that the attempted invalidation of the APR was without legal effect because the planning board had not provided the authorization to invalidate the APR required by G.L. c. 41, § 81W. We affirmed. See *Daly v. McCarthy*, 63 Mass.App.Ct. 1103 (2005).

The trusts then instituted this declaratory action. A Superior Court judge declared that a failure of consideration rendered the settlement agreement null and void and ordered the town to reconvey the cemetery parcel. This appeal followed.

2. *Discussion.* In granting summary judgment to the trusts, the Superior Court judge concluded that the trusts' action for rescission of a contract presented an actual case or controversy within the subject matter jurisdiction of the Superior Court. The judge rejected the town's and board's contention that the only relief available to the trusts was to request relief from the judgment entered in the original action in the Land Court pursuant to Mass.R.Civ.P. 60(b), 365 Mass. 828 (1974). He did not view the instant action as a collateral attack on the judgment in the original action because that action only adjudged the APR to be invalid against the trust property. It did not implicate the conveyance of the cemetery parcel to the town. Even were that not so, the judge reasoned, the instant case is the sort of extraordinary circumstance that would warrant relief from judgment in an independent action because the reinstatement of the APR as a result of the taxpayer action resulted in a failure of the consideration for conveyance of the cemetery parcel to the town. See Mass.R.Civ.P. 60(b); *Owens v. Mukendi*, 448 Mass. 66, 71–73 (2006).

*2 We agree with the judge that the clear intent of the settlement agreement was not merely that the litigation come to an end, but that the APR should cease to have legal effect, in exchange for which the JOC Trust would convey the cemetery parcel to the town.[6] See *Shane v. Winter Hill Fed. Sav. & Loan Assn.*, 397 Mass. 479, 483 (1986). The consideration

for the settlement agreement failed when the original APR was reimposed in consequence of the decision in *Daly v. McCarthy, supra.*

Rescission of a contract due to failure of consideration is appropriate "where the failure of consideration amounts to an abrogation of the contract, or goes to the essence of it, or takes away its foundation." *Worcester Heritage Soc., Inc. v. Trussell,* 31 Mass.App.Ct. 343, 345 (1991), quoting from *DeAngelis v. Palladino,* 318 Mass. 251, 257 (1945). The release of the APR was the essence and foundation of the settlement agreement, and the failure of that consideration warranted rescission of the settlement agreement and reconveyance of the cemetery property.[7]

For substantially the reasons relied upon by the Superior Court judge, we also reject the contention that the doctrines of issue preclusion or claim preclusion bar this action by the trusts. See *Kobrin v. Board of Registration in Med.,* 444 Mass. 837, 843–844 (2005). Issue preclusion does not apply because the issue in the taxpayer action was whether the APR bound the property notwithstanding the settlement agreement, not whether the settlement agreement was void or voidable. Likewise, claim preclusion or claim splitting is not a bar. To the extent that the trusts might have sought rescission and reconveyance by way of a cross claim against the town in the taxpayer action, they were not required to do so. See Mass.R.Civ.P. 13(g), 365 Mass. 758 (1974). Unlike a compulsory counterclaim, which must be asserted, a cross claim is permissive, and the failure to assert the same does not forfeit the right to commence an independent action.

Judgment affirmed.

All Citations

76 Mass.App.Ct. 1128, 925 N.E.2d 574 (Table), 2010 WL 1740435

Footnotes

1 Of the CAS Trust and the JOC Trust.

2 Town of Sudbury.

3 The settlement agreement resolved an action in the Land Court between the trusts and the board regarding whether an agricultural preservation restriction (APR) applied to certain parcels of land owned by the trusts.

4 The taxpayer action involved separate suits in the Land Court and the Superior Court to enforce the terms of the APR pursuant to G .L. c. 214, § 3(10), and G.L. c. 41, § 81Y. The cases were consolidated, and a judge of the Land Court sat by interdepartmental assignment as a judge of both courts.

5 One memorandum denied the town's and board's motion to dismiss; another granted the trusts' motion for summary judgment.

6 The settlement agreement provides that "the Court shall order the release of the APR as not having been executed pursuant to the provisions G.L. c. 184, § 32 and is therefore invalid.... The Judgment ... shall operate to release the Agricultural Preservation Restriction."

7 Because failure of consideration voids the settlement agreement, we need not address whether (1) the board had the authority to execute the agreement; (2) there was a mutual mistake of fact; and (3) there was a breach of warranty.

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