COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
C.A. NO. 06-02328-D

WILLIAM M. LONERGAN and DIANE WHITNEY-WALLACE, On Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

v.

JAMES W. FOLEY, et al.,
FEOFFEES OF THE GRAMMAR SCHOOL IN THE TOWN OF IPSWICH,

Defendants,

v.

DISTRICT ATTORNEY FOR THE ESSEX DISTRICT and ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS,

Additional Defendants in Counterclaim.

FILED
IN THE SUPERIOR COURT
FOR THE COUNTY OF ESSEX
JUN 14 2007
CLERK

COUNTERCLAIM DEFENDANTS' MOTION TO DISMISS UNDER MASS. R. CIV. P. 12(b)(1) FOR LACK OF JURISDICTION OR IN THE ALTERNATIVE TO SEVER COUNTERCLAIMS

The District Attorney for the Essex District and the Attorney General for the Commonwealth move to dismiss Counts I and II of defendants' counterclaim under Mass. R. Civ. P. 12(b)(1) for lack of jurisdiction or, alternatively, to sever the Counts under Rule 21 or Rules 20(b) and 42(b). The grounds for this motion are set forth in the attached memorandum of law.

Respectfully submitted,

DISTRICT ATTORNEY FOR THE ESSEX DISTRICT and ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS,

By their attorney,

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Date: April 17, 2007

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COUNTERCLAIM DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS UNDER MASS. R. CIV. P. 12(b)(1) FOR LACK OF JURISDICTION OR IN THE ALTERNATIVE TO SEVER COUNTERCLAIMS

In this putative class action, plaintiffs William M. Lonergan and Diane Whitney-Wallace sued the defendants, the Feoffees of the Grammar School in the Town of Ipswich ("Feoffees"), over a dispute concerning use of land in Ipswich. The Feoffees have in turn brought counterclaims against

third parties, the District Attorney for the Essex District ("District Attorney")[1] and the Attorney General for the Commonwealth ("Attorney General"), seeking declarations that the Feoffees are not a governmental body within the meaning of the Open Meeting Law, G.L. c. 39, §§ 23A-23C, and the Uniform Procurement Act, G.L. c. 30B, § 1, et seq. As explained below, however, the Feoffees' counterclaims fail to set forth an "actual controversy" as required under the Declaratory Judgment Act, G.L. c. 231A, and should therefore be dismissed for lack of subject-matter jurisdiction under Mass. R. Civ. P. 12(b)(1). In the alternative the District Attorney and the Attorney General request that the Court sever the counterclaims under Rule 21 because they have no relationship to the underlying dispute between the Feoffees and the plaintiffs, or under Rules 20(b) and 42(b) because severing the counterclaims would promote the interests of just and speedy adjudication.

BACKGROUND

In December 2006 plaintiffs William M. Lonergan and Diane Whitney-Wallace filed a class-action complaint seeking to prevent the Feoffees from "interfering with Plaintiffs' property and other rights, following [the Feoffees'] refusal to extend the arrangement whereby Plaintiffs and their predecessors in interest have used and occupied individual lots at Little Neck in Ipswich . . . for over 100 years and on which Plaintiffs and their predecessors in interest have constructed their homes, which they own, exclusively, and have used and enjoyed for over 100 years." Class Action Compl. & Jury Demand ("Compl.") ¶ 1. The complaint raises numerous statutory and common-law claims, all relating to the Feoffees' alleged interference with plaintiffs' use and enjoyment of, and their ownership interests

[1] The proper title is District Attorney for the Eastern District.

in, their homes. See id. ¶¶ 68-108. The complaint does not name either the District Attorney or the Attorney General as defendants, nor does it mention, let alone raise any claim under, the Open Meeting Law, G.L. c. 39, §§ 23A-23C, or the Uniform Procurement Act, G.L. c. 30B, § 1, et seq. See generally Compl.

In response to the complaint, the Feoffees filed an answer and raised a counterclaim in three counts. See Answer & Counterclaim & Jury Demand of the Defendants Feoffees ("Ans. & Counterclaim") ¶¶ 194-219. Count I of the counterclaim seeks a declaratory judgment that the Feoffees are not a "governmental body" under the Open Meeting Law. Id. ¶¶ 194-205. As the defendant to Count I, the Feoffees name the District Attorney "insofar as he is an interested party on so much of the Feoffees' counterclaim as seeks a declaration that the provisions of G.L. c. 39, §§ 23A-23C, the so-called Open Meeting Law, are inapplicable to the Feoffees." Id. ¶ 9. In Count II the Feoffees seek the same declaratory relief with regard to the Uniform Procurement Act, naming the Attorney General as defendant "insofar as [s]he is an interested party on so much of the Feoffees' counterclaim as seeks a declaration that the Feoffees are not a governmental body for purposes of G.L. c. 30B, the Uniform Procurement Act, and as to the aforesaid count concerning the Open Meeting Law." Id. ¶¶ 9, 206-12. Finally, in Count III, the Feoffees seek damages against the plaintiffs and other tenants of the land in dispute, claiming that they owe the Feoffees millions of dollars for costs associated with the installation of a centralized wastewater collection system. Id. ¶¶ 213-19.

The counterclaim's rendition of "Facts Common to Counts I and II" is devoted entirely to a general discussion of the "History of the Feoffees." See id. ¶¶ 175-93. Nowhere in that discussion, or elsewhere in their 47-page pleading, do the Feoffees allege any facts showing how Counts I and II

relate to the Feoffees' underlying dispute with the plaintiffs. See generally id. In support of their claim of an actual controversy, the Feoffees allege only that "[o]n December 11, 2006, the District Attorney opined in writing that the Feoffees are a governmental body and that the provisions of the Open Meeting Law apply to them." Id. ¶ 202. Based on this allegation, the Feoffees claim that "[a]n actual controversy has arisen as to whether the Feoffees are a governmental body and as to whether the provisions of the Open Meeting Law apply to them." Id. ¶ 204. Similarly, the Feoffees conclude that "[b]y reason of the aforesaid opinion of the District Attorney that the Feoffees are a governmental body, an actual controversy has arisen as to whether the Feoffees are a governmental body and as to whether the provisions of the Uniform Procurement Act apply to them." Id. ¶ 210.

ARGUMENT

I. COUNTS I AND II OF THE COUNTERCLAIM SHOULD BE DISMISSED FOR LACK OF AN "ACTUAL CONTROVERSY."

A jurisdictional prerequisite to relief under the Declaratory Judgment Act is the existence of an "actual controversy," which must be "specifically set forth in the pleadings." G.L. c. 231A, § 1; see Wooten v. Crayton, 66 Mass. App. Ct. 187, 190 n.6 (2006) (burden is on pleader to "prov[e] jurisdictional facts to support each of [his] claims"). The purpose of this requirement is to ensure that the court resolves "real, not hypothetical, controversies" by issuing only those declarations that "have an immediate impact on the rights of the parties." Galipault v. Wash Rock Investments, LLC, 65 Mass. App. Ct. 73, 84 (2005). Thus, "[i]t is not sufficient for the purposes of establishing an actual controversy for a plaintiff simply to find a defendant who disagrees on some point of law." Bonan v. City of Boston, 398 Mass. 315, 320 (1986). Rather, a party seeking a declaratory judgment must

show that he has "a definite interest in the matters in contention in the sense that his rights will be significantly affected by a resolution of the contested point." Id.

Here, the Feoffees' only allegation in support of their claim of an actual controversy with the District Attorney is that "[o]n December 11, 2006, the District Attorney opined in writing that the Feoffees are a governmental body and that the provisions of the Open Meeting Law apply to them." Ans. & Counterclaim ¶ 202. This allegation is insufficient to justify declaratory relief. An actual controversy does not exist simply because the Feoffees and the District Attorney may have differing interpretations of the Open Meeting Law. Bonan, 398 Mass. at 320. Instead, the Feoffees must allege facts showing that the District Attorney's opinion has "an immediate and significant effect" on their rights, id., and they have failed to meet that burden. The Feoffees do not allege, for instance, that they plan to meet in the future, that their meeting is imminent, what the substance of their deliberations will be, or how they will be harmed if those deliberations are opened to the public. Nor do they allege that there is any imminent threat that the District Attorney or any other party will file suit against them to enforce the Open Meeting Law. See G.L. c. 39, § 23B (order to enforce Open Meeting Law "may be sought by complaint of three or more registered voters, by the attorney general, or by the district attorney of the county in which the city or town is located"). In short, based on the allegations in the pleading, the Feoffees have failed to show how the District Attorney's opinion has harmed or affected their rights in any way. Accordingly, this Court should dismiss Count I of the counterclaim for lack of an actual controversy. See Electronics Corp. of America v. City Council of Cambridge, 348 Mass. 563, 567-68 (1965) (declaratory judgment action challenging agency's determination that area was "appropriate" for urban renewal was premature, where "[w]hat, if any public project may emerge [was]

. . . wholly speculative"); Mahoney v. Attorney General, 346 Mass. 709, 715 (1964) (no "actual controversy" existed in declaratory judgment action challenging portion of a statute relating to power of trustees to make sales of real estate, where complaint did not allege any "pending or future sales"); Massachusetts-American Water Co. v. Grafton Water Dist. (No. 2), 36 Mass. App. Ct. 947, 948 (1994) (rescript) (declaration as to constitutionality of statute would be premature where statute had not yet been applied, and so court would have to "render an opinion in the absence of a factual record indicating which, if any, of the challenged provisions . . . have been applied and whether such application will inevitably lead to litigation").

The Feoffees' claim of an actual controversy with the Attorney General under the Uniform Procurement Act, G.L. c. 30B § 1, et seq., is even more tenuous. The Feoffees do not allege or explain what act of "procurement" they have taken, or plan to take, that would potentially trigger the requirements of the statute. Instead, the Feoffees' sole allegation in this regard is that "[b]y reason of the aforesaid opinion of the District Attorney that the Feoffees are a governmental body, an actual controversy has arisen as to whether the Feoffees are a governmental body and as to whether the provisions of the Uniform Procurement Act apply to them." Ans. & Counterclaim ¶ 210. What the Feoffees do not explain is how the District Attorney's opinion regarding the Open Meeting Law has any effect—let alone "an immediate and significant effect," Bonan, 398 Mass. at 320—on their rights or obligations under the Uniform Procurement Act, an entirely separate statute. The provisions of the Uniform Procurement Act may be enforced by the Inspector General via a civil action if authorized by the Attorney General. See G.L. c. 30B, § 17. The Feoffees do not allege, however, that either the Inspector General or the Attorney General has taken any action under this provision. Indeed, there is

no allegation in the pleading that the Inspector General or the Attorney General has taken any action whatsoever. Thus, again, the Feoffees have failed to allege facts demonstrating that their rights have been harmed or affected, and so Count II of the counterclaim should also be dismissed for lack of an actual controversy.

II. COUNTS I AND II OF THE COUNTERCLAIM SHOULD BE SEVERED.

A. Counts I and II Should Be Severed Under Mass. R. Civ. P. 21 Because They Have No Relationship to the Underlying Dispute Between the Feoffees and the Plaintiffs.

If this Court were to decline to dismiss Counts I and II of the counterclaim for lack of jurisdiction, the District Attorney and the Attorney General request that the Court sever the Counts under Mass. R. Civ. P. 21. That Rule governs misjoinder of parties and provides that "[p]arties may be dropped . . . by order of the court . . . at any stage of the action and on such terms as are just." Mass. R. Civ. P. 21. The Rule further provides that "[a]ny claim against a party may be severed and proceeded with separately." Id.

Here, it appears that the Feoffees seek to join the District Attorney and the Attorney General under Rule 20, which governs permissive joinder. See Ans. & Counterclaim ¶¶ 9, 11-12; Mass. R. Civ. P. Rule 13(h) ("[p]ersons other than those made parties to the original action may be made parties to a counterclaim . . . in accordance with the provisions of Rule 19 and 20"). Rule 20, however, allows joinder of parties in one action only if they assert, or there is asserted against them, "any right to relief arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action." Mass. R. Civ. P. 20(a); see Catalogna v. Copley Pharm., Inc., No. 94-6662, 1995 WL 510145, at *2 (Mass. Super. Aug. 11,

1995). This requirement is not met in this case. As mentioned, this action concerns a dispute between the plaintiffs and the Feoffees over use of land in Ipswich. The Feoffees allege no facts showing how Counts I and II of their counterclaim relate in any way to that dispute. For this reason the Court should sever the Counts under Rule 21 and allow them to proceed separately.

B. **In the Alternative Counts I and II Should Be Severed Under Mass. R. Civ. P. 20(b) and 42(b) in the Interests of Convenience of Adjudication, Expedition, and Economy.**

This Court has the discretion to "deal with the exigencies of litigation by separating parties, claims, and issues in order 'to secure the just, speedy, and inexpensive determination of every action.'" Roddy & McNulty Ins. Agency, Inc. v. A.A. Proctor & Co., 16 Mass. App. Ct. 525, 529 (1983) (quoting Mass. R. Civ. P. 1). To that end Rule 20(b) specifically empowers the Court to "make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice." Similarly, Rule 42(b) allows the Court, "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy," to "order a separate trial . . . of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues." Rule 42(b) is "devoted to the convenience of adjudication, the avoidance of prejudice and the interests of expedition and economy as dictated by the characteristics and elements of proof of the claims themselves." Roddy & McNulty Ins. Agency, 16 Mass. App. Ct. at 528; see Ruggles Center, L.L.C. v. Beacon Constr. Co., No. 96-637-E, 1997 WL 211819, at *2 (Mass. Super. 1997).

Here, the "characteristics and elements of proof" of Counts I and II of the Feoffees' counterclaim dictate that the Counts be severed in the interests of convenience, expedition, and economy. Roddy & McNulty Ins. Agency, 16 Mass. App. Ct. at 528. As discussed, Counts I and II do not present an actual controversy; even if they did, however, they would involve the discrete legal issue of whether the Feoffees are a governmental body under the Open Meeting Law and the Uniform Procurement Act. In contrast the underlying case between the Feoffees and the plaintiffs appears to involve numerous questions of disputed fact and numerous statutory and common-law claims relating to the Feoffees' alleged interference with the plaintiffs' property rights. See generally Compl.; Ans. & Counterclaim. The Feoffees have also brought a counterclaim against the plaintiffs seeking millions of dollars in damages. See Ans. & Counterclaim ¶¶ 213-19. There is no just reason to embroil the District Attorney and the Attorney General in this complicated dispute, where the claims against them have no relationship to the underlying issues and where the claims raise a discrete legal issue that could be adjudicated promptly in a separate proceeding. Accordingly, this Court should sever Counts I and II of the Feoffees' counterclaim under Rules 20(b) and 42(b).

CONCLUSION

For all the above reasons, this Court should dismiss Counts I and II of the Feoffees' counterclaim for lack of subject-matter jurisdiction under Mass. R. Civ. P. 12(b)(1). In the alternative the Court should sever the Counts under Rule 21 or under Rules 20(b) and 42(b).

Respectfully submitted,

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Date: April 17, 2007