

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. ESCV2006-02328

WILLIAM M. LONERGAN, et al,)
)
Plaintiffs,)
v.)
)
JAMES W. FOLEY, et al.,)
FEOFFEEES OF THE GRAMMAR)
SCHOOL IN THE TOWN OF IPSWICH,)
)
Defendants,)
v.)
)
DISTRICT ATTORNEY FOR THE)
ESSEX DISTRICT, et al.,)
)
Additional Defendants)
in Counterclaim.)

FILED
IN THE SUPERIOR COURT
FOR THE COUNTY OF ESSEX

JUN 14 2007

John H. Danahy
CLERK

MEMORANDUM OF THE FEOFFEEES OF THE GRAMMAR SCHOOL IN THE TOWN
OF IPSWICH IN OPPOSITION TO THE MOTION TO DISMISS BY THE DISTRICT
ATTORNEY FOR THE EASTERN DISTRICT AND THE ATTORNEY GENERAL FOR
THE COMMONWEALTH OF MASSACHUSETTS

I. INTRODUCTION

The Feoffees of the Grammar School in the Town of Ipswich ("the Feoffees"), Defendants and Plaintiffs-in-Counterclaim, seek declaratory relief pursuant to G.L. c. 231A as to whether they are a "governmental body" for purposes of the Open Meeting Law (Count I of the Counterclaim) and the Uniform Procurement Act (Count II of the Counterclaim). The Feoffees named as additional parties in counterclaim the District Attorney for the Eastern District (the "DA") and the Attorney General for the Commonwealth of Massachusetts (the "AG") because they are interested parties by reason of their being the enforcement authorities under that law and that act.

The DA and AG have moved to dismiss Counts I and II of the counterclaim on the basis of lack of subject matter jurisdiction or, in the alternative, to sever those counts from the third count of the counterclaim which seeks monetary damages from parties other than the DA and AG. The Feoffees file this memorandum in opposition to the DA/AG's motion.

II. FACTS

For nearly three hundred fifty (350) years, the Feoffees have been charged with renting the land at Little Neck, Ipswich, Massachusetts which they hold in trust for the benefit of the Ipswich Public Schools. Most recently, the Feoffees have rented 167 lots to tenants who, by themselves or their predecessors, have constructed cottages on the lots.

In 2006, the Feoffees offered to the tenants, whom the Feoffees contend have historically occupied the lots as tenants at will,¹ a long-term lease. Some tenants have signed the proffered lease. A majority of the tenants have not and filed the present action. The primary issue between the Feoffees and the tenants is the right of the Feoffees to dispossess the tenants. The Feoffees intend to continue with eviction proceedings² against those who have not signed leases and, if successful, enter into leases with either the existing tenants, if they so elect, or with new lessees.

On December 11, 2006, the District Attorney for the Essex District opined in writing that the Feoffees were a "governmental body" and that the provisions of the Open Meeting Law, G.L. c. 39, §§23A-23C, applied to their meetings. That opinion triggered the question of whether the Feoffees were also a governmental body for purposes of the Uniform Procurement Act, G.L. c.

¹ The tenants resist that characterization.

² By stipulation between the Feoffees and the tenants, filed with this court, a copy of which stipulation is attached hereto and marked "A", the parties have agreed to put the issue of possession of the lots in question before this court in one action instead of by separate summary process actions against each tenant.

30B, §1 et seq., which, if applicable, would require the Feoffees to open to a public bid process the leasing of the Little Neck lots. See G.L. c. 30B, §16.

The Feoffees contend that they are not a governmental body for the purposes of either of those statutory schemes and have asked this court to so declare in Counts I and II of their counterclaim.³

III. ISSUE

Should the motion to dismiss be denied because the counterclaims of the Feoffees seek declarations of right, duty and status of the Feoffees in the context of actual controversies set forth in their pleadings?

IV. ARGUMENT

A. The Governing Statute

G.L. c. 231A, §1 says, in pertinent part, the following:

The supreme judicial court, the superior court, the land court and the probate courts, within their respective jurisdictions, may on appropriate proceedings make binding declarations of right, duty, status and other legal relations sought thereby, either before or after a breach or violation thereof has occurred in any case in which an actual controversy has arisen and is specifically set forth in the pleadings and whether any consequential judgment or relief is or could be claimed at law or in equity or not; and such proceeding shall not be open to objection on the ground that a merely declaratory judgment or decree is sought thereby and such declaration, when made, shall have the force and effect of a final judgment or decree and be reviewable as such; . . .

B. The Open Meeting Law

In light of the District Attorney's December 11, 2006 opinion, nothing more could happen for there to be an "actual controversy" as to whether the Open Meeting Law applies to the Feoffees, short of the Feoffees holding a closed meeting in the face of the District Attorney's

³ The Plaintiffs' complaint and the Feoffees answer and counterclaim are lengthy. Pertinent excerpts from them are attached hereto, respectively, as "B" and "C".

opinion. G.L. c. 231A, §1 specifically says that relief may be sought as to “right, duty, status . . . either before or after a breach or violation . . . has occurred.” (emphasis added). The Feoffees have prudently elected to have this court declare its status as a governmental body vel non before an alleged violation. That is precisely the purpose of G.L. c. 231A. “The purpose of this statute is to provide a plaintiff relief from uncertainty and insecurity with respect to rights, duties, status and other legal relations.” Sahli v. Bull HN Information Systems, Inc., 437 Mass. 696, 705 (2002). See also, G.L. c. 231A, §9.

G.L. c. 231A is especially appropriate, as here, for purposes of determining the applicability of a statute to a person or persons. “A salient purpose of G.L. c. 231A, as set forth in Section 9, is to remove, and to afford relief from, uncertainty and insecurity in the applicability of statutes.” Massachusetts Association of Tobacco Distributors v. State Tax Commission, 354 Mass. 85, 88-89 (1968).

The contention that the Feoffees should have pleaded “that they plan to meet in the future” (AG/DA Memorandum, p. 5) is, to put it politely, both wrong and an elevation of form over substance. The Feoffees specifically alleged their history with supporting exhibits, the District Attorney’s opinion, and the basis for their contention that the statute does not apply to them. It is self-evident that the Feoffees must meet to conduct business. To the extent an allegation of a proposed meeting is necessary, Chapter 5 of the Province Laws of 1765-66 (Exhibit C to the Feoffees’ Answer and Counterclaim) mandates that the Feoffees shall meet annually in March.

Justice Ronan wrote the following in discussing the meaning of an actual controversy in School Committee of Cambridge v. Supt. of Schools of Cambridge, 321 Mass. 516, 518 (1946)

One of the benefits of the declaratory procedure is that it does not require one to incur the risk of violating some term of a contract or of invading some right of the other, even if done in good faith, before he may have relief. . . . We think a pleading is sufficient if it sets forth a real dispute caused by the assertion by one party of a legal relation, status or right in which he has a definite interest, and the denial of such assertion by another party also having a definite interest in the subject matter, where the circumstances attending the dispute plainly indicate that unless the matter is adjusted such antagonistic claims will almost immediately and inevitably lead to litigation. (citations omitted)

The Feoffees have an obvious, definite interest in the applicability of the Open Meeting Law. So, too, does the District Attorney as the enforcer of the law: "The district attorney of the county in which the violation occurred shall enforce the provisions of this section." G.L. c. 39, §23B. The Feoffees need not risk violating the statute before seeking relief. The Feoffees' allegations plainly indicate the antagonistic claims of the parties. Declaratory relief is warranted.

C. The Uniform Procurement Act

The basis of the AG/DA's motion to dismiss Count II of the counterclaim seeking declaratory relief as to the Uniform Procurement Act is "[T]he 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." (AG/DA Memorandum, p. 6). That contention is shocking and shows a misreading, or a non-reading, of the Feoffees' Answer and Counterclaim.

The plaintiffs tenants seek in Count II of their complaint a declaratory judgment "with respect to the rights, obligations and duties of Defendants (the Feoffees), under the controlling legal grants, including the Legislative Acts and Resolves ("Governing Grants/Laws") and the rights of plaintiffs with respect to their continued use and occupancies of the lots. . . ." (Plaintiffs' Complaint, Par. 75).

The Plaintiffs complain about the proposed lease offered by the Feoffees to the tenants and the Feoffees alleged failure to negotiate a lease with the tenants in good faith. (Plaintiffs' Complaint, Pars. 49-54).

The Feoffees admitted in their answer that they offered a lease to the tenants (Feoffees' Answer, Pars. 49-54) and attached as a part of their answer the proposed lease (Exhibit F to the Feoffees' Answer and Counterclaim).

The Feoffees' counterclaim, at the section titled "Introduction and Overview," sets forth the following allegations: (1) they hold title to land at Little Neck for the benefit of the Ipswich Public Schools; (2) they rent lots of land at Little Neck to tenants who have built cottages thereon; (3) and they have proposed a lease to those tenants, some of whom signed the lease and some of whom filed this action. (Feoffees' Counterclaim, Pars. 2-9).

The Feoffees then specify the section of the Uniform Procurement Act implicated by the District Attorney's opinion that the Feoffees are a governmental body: "Requiring the Feoffees to abide by the provisions of G.L. c. 30B, §16, including, but not limited to, the offering of real estate for rent to the public by way of advertisement and requests for proposals, would be inconsistent with the powers of the Feoffees to rent and lease land as set forth in the special laws described above and attached hereto as Exhibits C, D and E." (Feoffees' Counterclaim, Par. 209).

G.L. c. 30B, §17(b) provides that a contract made in violation of Chapter 30B shall not be valid and §17(c) provides for a \$2,000 fine to be assessed against a violator. As set forth above, G.L. c. 231A provides a mechanism for determination of rights before the Feoffees enter into a contract which might be invalid and subject them to fines. The cases cited by the AG/DA prove the Feoffees' point. There was no actual controversy in Mahoney v. Attorney General, 346

Mass. 709, 715 (1964) (allegedly at issue was the authority of trustees to sell land) because, said the court, “[W]e know of no controversy or imminent litigation arising on the subject of these sales. We know of no pending or future sales.” Here, unlike Mahoney, there is an existing controversy over the authority of the Feoffees to enter into leases and they have recently signed, and continue to proffer, leases to existing tenants. Similarly, in Bonan v. Boston, 398 Mass. 315, 320 (1986), the court held there was no actual controversy alleged by plaintiffs challenging the validity of a portion of the Boston Zoning Code because the plaintiffs lacked “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.” It is beyond dispute that the Feoffees’ rights will be significantly affected by the determination of the applicability of the Uniform Procurement Act as they continue to lease their lots.

D. Joinder of counterclaim Counts I and II is mandatory

For the reasons set forth above, the District Attorney and Attorney General are wrong when they say that Counts I and II of the Feoffees’ counterclaim “have no relationship” to the underlying dispute between the tenants and Feoffees. The District Attorney and Attorney General are properly joined in this matter as necessary, not permissive parties. *See* Mass.R.Civ.P. 13(h) and 19 and G.L. c. 231A §8, *compare* Mass.R.Civ.P. 20. Mass.R.Civ.P. 19 requires joinder of a party if “in his absence complete relief cannot be accorded among those already parties.”

“[W]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.” G.L. c. 231A §8. As the enforcers of the relevant statutes, the District Attorney and Attorney General must be parties to any action

adjudicating the statutes' applicability or any resulting judgment will be merely academic and fail to afford complete relief to the existing parties.

E. Severance of Counts I and II is Inappropriate at This Time


The Feoffees submit that counterclaim counts I and II, which counts set forth only questions of law, are ripe for summary judgment. The Feoffees intend to serve a motion for summary judgment within the next sixty (60) days. An order of severance at the present time is of no practicality. If counterclaim Counts I and II are not decided on summary judgment and require a trial, the Feoffees would agree to sever those counts for trial to spare the District Attorney and Attorney General from expending the time and expense of participating in a full trial on the merits of the dispute between the tenants and Feoffees.

Joinder of the District Attorney and Attorney General being mandatory, severance of counterclaim Counts I and II, which counts can be adjudicated summary judgment, is not warranted at this time.

V. CONCLUSION

For the reasons set forth above, the Attorney General/District Attorney's motion should be denied.

Respectfully submitted,
Feoffees of the Grammar School
in the Town of Ipswich
By their attorney,



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