84

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.,
FEOFFEES OF THE GRAMMAR
SCHOOL IN THE TOWN OF IPSWICH,

Defendants and Plaintiffs-in-Counterclaim,

v.

DISTRICT ATTORNEY FOR THE
ESSEX DISTRICT, et al.,

Additional Defendants
in Counterclaim.

FILED
IN THE SUPERIOR COURT
FOR THE COUNTY OF ESSEX
JUN 2 3 2008
CLERK

OPPOSITION OF THE DEFENDANTS FEOFFEES OF THE GRAMMAR SCHOOL IN THE TOWN OF IPSWICH TO PLAINTIFFS' MOTION FOR PROTECTIVE ORDER WITH RESPECT TO DISCOVERY FROM ABSENT CLASS MEMBERS OF PUTATIVE CLASS AND STATEMENT OF REASONS THEREFOR (DEFENDANTS REQUEST A HEARING ON THE PLAINTIFFS' MOTION)

NOW come the Feoffees of the Grammar School in the Town of Ipswich ("Feoffees"), Defendants and Plaintiffs-in-Counterclaim, and state their opposition to the Plaintiffs' Motion for a Protective Order with Respect to Discovery from Absent Class Members of Putative Class and assigns as reasons therefor the following:

1. 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 and discovery has shown have occupied the lots as tenants at will, 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.

2. The Plaintiffs' motion is premised on this action being a class action. It has not been certified as a class action. The Plaintiffs, who filed the action in December, 2006, have not sought certification. All of the cases cited by the Plaintiffs in support of limiting discovery are cases in which the court had certified a class.

3. Until the Plaintiffs recently changed counsel, the Plaintiffs and the Defendants did not conduct the litigation as if it were a class action. The Defendants specifically named as additional defendants in counterclaim the tenants who have not signed leases. The tenants have replied to the counterclaim. Discovery has been taken by both sides on the issues presented by the counterclaim as well as issues raised by the complaint, all without objection until the Plaintiffs recently changed counsel and filed their motion for a protective order.

4. The Plaintiffs recognized the action was not a class action as evidenced by a stipulation filed with this court wherein the Plaintiffs' counsel enumerated those individuals who were bound by the stipulation. A copy of the stipulation, discussed in paragraph 5 below, is attached to this opposition at **Tab A**.

5. By said stipulation dated March 6, 2007, the individual tenants and the Defendants agreed that the central issue in this action – the Feoffees' right to possession against each of the tenants bound by the stipulation – would be adjudicated in this action as opposed to separate summary process actions. The issues as to possession were narrowed by the stipulation to two. First, were the Little Neck residents tenants at will as contended by the Defendants or

did they hold possession by some other right? If they were tenants at will, the parties have stipulated, at paragraph 3, that adequate notice has been given to the tenants to terminate those tenancies. Secondly, in the event the court determines the residents were tenants at will, whose tenancies have been terminated, is there some other basis for the tenants' continued possession of the lots on which their cottages are located?

6. The Defendants commenced discovery as to those two issues as well as other issues raised in the complaint and counterclaim by way of a notice of deposition which instructed the deponent to bring with him or her documents "which pertain in any way to the Feoffees or the use and occupancy of land on Little Neck, Ipswich by the deponent" and documents "evidencing, concerning or relating in any way to any representations the deponent claims were made by the Feoffees to the deponent or to any prior occupant of the lot occupied by the deponent." See the Notice of Deposition attached at Tab B.

7. The tenants selected for deposition by that notice were those for whom the Defendants did not have in their possession a signed acknowledgment from a tenant that he or she occupied the lot as a tenant of the Feoffees and agreed to pay both the ground rent charged by the Feoffees and the real estate taxes imposed against the lot and the cottage building. An example of the tenant acknowledgment form is attached at Tab C.

8. Unless the Plaintiffs agree that all residents are tenants of the Feoffees, discovery from each individual tenant who has not signed such an acknowledgment is necessary so as to determine the facts by which such a resident says he or she is not a tenant of the Feoffees.

9. In their complaint, the Plaintiffs take the position that, notwithstanding the written acknowledgment by many residents of their status as tenants, they are not tenants. Unless each of those tenants who has signed such an acknowledgement agrees that he or she is a tenant, discovery from each such tenant is necessary so as to determine the facts by which he or she seeks to avoid the acknowledgment. A second notice of deposition, the notice which is the subject of the Plaintiffs' motion for protective order, is directed to those who signed an acknowledgment of tenancy, as well as to those whose depositions were noticed in the first notice but whose depositions were postponed so as to accommodate the deponents or counsel. A copy of the second notice of deposition is attached at Tab D. It is of note that the two named Plaintiffs did not sign tenant acknowledgment forms, although the deposition of named Plaintiff William M. Lonergan revealed that his spouse acknowledged in writing to the Feoffees the Plaintiffs' status as tenants at will. See attached Tab E.

10. The second issue identified in the stipulation is the Plaintiffs' claim that, even if the residents are tenants, they are entitled to remain in possession following the admittedly proper termination of those tenancies. At paragraph 4 of their complaint, the Plaintiffs talk of reliance upon "promises and representations" of the Feoffees in the Plaintiffs' decisions to purchase their cottages. Presumably, it is those promises and representations on which the tenants will base their right to remain despite termination of their tenancies. Where, as here, the tenants purchased their homes at different times over a span of fifty years plus, some having purchased in the last few years and others having acquired their cottages from their parents or their parents' parents, any alleged promises and representations must be unique to each of the tenants. Therefore, discovery from each tenant is essential to learn of any alleged representations and promises, in stark contrast to a properly certified class action such as Aspinall v. Philip

Morris Companies, Inc., 20 Mass.L.Rptr. 303, 2005 WL 3629358, *1 (Mass.Super.Ct., November 22, 2005) where the same alleged misrepresentations contained on a package of cigarettes were made to all members of a certified class. Unless all parties to the stipulation agree not to base their right to possession on alleged promises and representations made to individual prospective purchasers, the depositions of the remaining tenants is proper and necessary.

11. The Plaintiffs now say, in their motion for protective order at page 7, that no resident has a significant monetary claim against the Feoffees. That is a welcome change of position from that taken by the Plaintiffs in their complaint at Count Ten wherein the Plaintiffs are looking to recover the "fair market value of Plaintiffs' homes" which, according to the complaint at paragraph 55, were "assessed, in fiscal year 2005, for nearly $20 million, collectively." (emphasis in original), implying that the fair market value was higher. By the Defendants' calculation, in that count alone, each tenant was looking to recover approximately $150,000. If the tenants are no longer pressing that claim or any other significant monetary claim, the Defendants can certainly agree that they need not inquire into alleged damages. If, however, the Plaintiffs press their damages claims, discovery from each tenant is appropriate because each has a very different claim. Some have purchased homes, but others have inherited homes. Some have improved homes, but others have not. Some may be able to move their homes, but other may not. What money, if any, has been expended based on statements of the Defendants? Discovery to date has properly focused on those issues.

12. Even though the three-part test developed by federal courts for evaluating discovery of absent members of a certified class is totally inapplicable to the instant case, the Defendants have conducted their discovery in good faith and have limited their questions to

eliciting relevant and material information. The best evidence of that good faith[1] is that there was never a dispute as to the noticing or taking of the first seventy depositions of the tenants. Those depositions were not taken, as stated by the Plaintiffs, as an "accommodation" to the Defendants, but because there was no valid basis on which to object to the depositions. The average deposition has taken one to one and one-half hours and has been taken at a date and time convenient for the deponent. Each deponent brought with him or her responsive documents. Discovery moved swiftly without any objection as to cost. In response to the interrogatories sent by the Defendants to the tenants, Plaintiffs' then counsel requested that, because the interrogatories were duplicative of the questions posed at depositions, tenants be excused from answering the interrogatories and the Defendants agreed, moving forward with depositions only.

13. The taking of depositions was suspended for months while the parties sought to settle their differences with the assistance of a mediator. A number of mediation sessions ensued. As both counsel were putting the finishing touches on a lease they were to bring to their clients, the Plaintiffs discharged their counsel and retained new counsel. Only then was the second deposition notice sent – not to coerce the tenants into signing a lease, but in recognition that settlement attempts had failed and discovery had to be renewed.

14. For the reasons set forth above and advanced at any oral argument, the Plaintiffs' motion for protective order should be denied.

[1] In contrast, the Defendants have been forced to file a motion for protective order against the taking of the deposition of the keeper of the records of the Wenham Police Department, the former employer of Feoffee James Foley, by which deposition the Plaintiffs are hoping to find that Mr. Foley left the police department for disciplinary reasons. Mr. Foley's service as a Wenham Police Officer has absolutely nothing to do with the allegations of the complaint or counterclaim and the deposition is certainly designed to embarrass Mr. Foley.

REQUEST FOR HEARING

The Defendants request a hearing on the Plaintiffs' Motion.

Respectfully submitted,
Feoffees of the Grammar School in the
Town of Ipswich
By its attorneys,

William H. Sheehan III, BBO #457060
Robin Stein, BBO #654829
MacLean Holloway Doherty
Ardiff & Morse, P.C.
8 Essex Center Drive
Peabody, MA 01960
(978) 774-7123

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