COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss. PROBATE AND FAMILY COURT
NO. ES09E0094QC

ALEXANDER B.C. MULHOLLAND, JR. et al., Plaintiffs,	)	
v.	)	Appeals Court No. 2012-J-0059
ATTORNEY GENERAL of the Commonwealth of Massachusetts, et al., Defendants.	)	

MEMORANDUM OF PLAINTIFFS FEOFFEES OF THE GRAMMAR SCHOOL IN THE TOWN OF IPSWICH IN OPPOSITION TO WOULD-BE INTERVENORS' MOTION TO STAY JUDGMENT

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

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I. INTRODUCTION

Douglas DeAngelis and thirteen other would-be intervenors (the "Applicants") appeal from a denial of their post-settlement motion to intervene and seek a stay of a Probate Court judgment dated December 23, 2011 and docketed on January 12, 2012 ("the Judgment") on the amended complaint of the Feoffees of the Grammar School in the Town of Ipswich ("the Feoffees") and the counterclaim of the Defendants Ipswich School Committee and the Superintendent of Schools (collectively, the "School Defendants"). The Feoffees hold title to land at Little Neck, Ipswich in trust for the benefit of the Ipswich Public Schools pursuant to a 1660 testamentary trust of William Payne, which land has been rented to 167 cottage owners. The Judgment, entered by agreement[1] and approved by the Court (Sahagian, J.) which had intimate knowledge of the facts and law of this case,[2] authorizes the

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[1] Contrary to the suggestion of the Applicants, all seven Feoffees, life Feoffees and Selectmen Feoffees, were in favor of the agreement for judgment ultimately reached in the Probate Court, just as all seven voted to settle the Superior Court litigation. Because judgment entered by agreement, no findings were necessary. Contrast Mass.R.Civ.P. 52(a) which requires findings in a case fully tried by the court.

[2] Settlement occurred after a view, argument on motions

settlement of a putative class action filed against the Feoffees by most of the cottage owners in the Essex Superior Court by a sale of Little Neck to the cottage owners for $29,150,000 plus payment to the Feoffees of back rent in the amount of $2,400,000.

The motion to stay should be denied, as it was denied by the trial court, because the Applicants cannot show a likelihood of success on their appeal of the denial of their motion to intervene and "[t]he sine qua non [of the stay pending appeal standard] is whether the [movants] are likely to succeed on the merits." Acevedo-Garcia v. Vera-Monroig, 296 F.3d 13, 16 (1st Cir. 2002), quoting Weaver v. Henderson, 984

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in limine, two days of trial testimony including that of Superintendent Korb, and the introduction of over 160 exhibits proffered by the Plaintiffs and School Defendants. The judge had previously studied most of those exhibits in connection with argument on the Feoffees' motion for partial summary judgment. Filed herewith as part of the supplemental record appendix is the Feoffees' memorandum in support of that motion, which memorandum, along with the summary judgment record and trial record, was incorporated by reference in the Feoffees' opposition to the Applicants' motion to intervene (Supp. A. 9, 189). That memorandum sets forth in detail the history of the Feoffees, their management of the land and the rental thereof to the cottage owners, the Superior Court action, the terms of settlement, the rationale for sale by creation of a condominium, the reasons settlement is in the best interest of the beneficiary, and the Probate Court's authority to order deviation, pursuant to G.L. c. 214, §10B, from the clause of the Payne trust which states that the land is not to be sold or wasted.

F.2d 11, 12 (1st Cir. 1993). The Applicants will fail on appeal for two independent reasons: (1) they lack standing as a matter of well-settled law where, as here, the Attorney General has the sole and exclusive authority to represent the public's beneficial interest in a charitable trust such as the Payne trust; and (2) they do not satisfy the criteria for intervention under Mass.R.Civ.P. 24(a)(2).[3]

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[3] The Applicants, as non-parties, have no right to appeal from the judgment and notice of such an appeal is a nullity. See Corbett v. Related Companies Northeast, Inc., 424 Mass. 714, 718-719 (1997). Therefore, the Feoffees need not establish that the Applicants have no likelihood of success on an appeal from that judgment. However, in light of the baseless, scandalous claims of the Applicants that the trial judge pre-judged the case, shirked her obligations, and forced the School Defendants into settlement, a brief refutation which touches on the merits is appropriate.

At all times the trial judge's conduct and comportment were exemplary. She pressured no one. See Joint Affidavit of Counsel for the Parties filed herewith. The judgment and agreement therefor is a reflection of the parties recognition that deviation was warranted so as to accomplish the dominant intent of William Payne which was to benefit the Ipswich Public Schools, an intent which has been substantially frustrated and impaired since 2006 and was in substantial danger of future impairment.

The Applicants cavalierly dismiss the exposure created by the Superior Court litigation, misrepresenting that the cottage owners have agreed to enter into long-term market rate leases (Memo, p.4) when the owners have said only that they are willing to pay a "fair rent" (Supp. A. 260), by which the cottage owners mean something far less than the "market rent" proffered by the Applicants' Webster

Pertinent facts and procedural history are set forth in the Argument.

II. ARGUMENT

A. The Applicants Have No Likelihood of Success on Appeal Because They Lack Standing.

Both the School Defendants and the Attorney General will be filing memoranda which detail the argument that only the Attorney General has the standing to protect the public's generalized interest in the administration and operation of charitable trusts.[4] G.L. c. 12, §8. See Garland v. The Beverly Hospital Corp., 48 Mass.App.Ct. 913, 914 (1999); accord, in the context of attempts to intervene, Dillaway v. Burton, 256 Mass. 568 (1926) and Burbank

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Collins.

In fact, the exposure is real. It is not for the Feoffees to tout the case of their opponents in the Superior Court action. Suffice to say that the Feoffees prudently and carefully considered, as part of their reasoning to seek deviation, the cottage owners' claims, as to which claims J. Owen Todd, Esq. was to offer expert testimony (Supp. A. 47), including the claim for unjust enrichment as discussed in Ward v. Perna, 69 Mass.App.Ct. 532, 540 (2007) which, if successful, would require the Feoffees to pay to an evicted owner the value of his or her cottage. In 2007-08, there were five cottage sales which averaged over $400,000. (Supp. A. 417) The Feoffees have no ability to pay such a price.

[4] The lower court so ruled, as evidenced by its endorsement on each of the Feoffees' motions to strike portions of the Applicants' affidavits: "No action as the proposed Intervenors lack standing." (Supp. A. 178)

v. Burbank, 152 Mass. 254 (1890).

B. The Applicants Have No Likelihood of Success on Appeal Because They Fail to Satisfy All of the Criteria for Intervention as of Right Under Mass.R.Civ.P. 24(a)(2).

1. The Criteria for Intervention

To intervene as a matter of right under Mass.R.Civ.P. 24(a)(2), the moving party must: (1) make timely application; (2) claim an interest relating to the property or transaction which is the subject of the action; (3) show that disposition of the action may impair or impede his ability to protect his interest unless he is able to intervene; and (4) demonstrate that his interest in the litigation is not adequately represented by existing parties. Bolden v. O'Connor Cafe of Worcester, Inc., 50 Mass.App.Ct. 56, 61 (2000). "The failure to satisfy any one of them (the criteria) dooms intervention." R&G Mortgage Corp. v. Federal Home Loan Mortgage Corp., 584 F.3d 1, 7 (1st Cir. 2009), quoting Pub. Serv. Co. of N.H. v. Patch, 136 F.3d 197, 204 (1st Cir. 1998)[5]. The trial judge "enjoys a full range of reasonable discretion in

[5] Where, as here, the state and federal rules on intervention are substantially the same, the adjudged construction of the federal rule is to be given to the Massachusetts rule, absent compelling reasons to the contrary. Rollins Environmental Services, Inc. v. Superior Court, 368 Mass. 174, 179-180 (1975).

evaluating whether the requirements for intervention have been satisfied. Determination of a motion to intervene will not be reversed absent an abuse of that discretion." Peabody Federation of Teachers, Local 1289 v. School Committee of Peabody, 28 Mass.App.Ct. 410, 413 (1990). In the instant case, the motion to intervene is untimely and the Applicants have no interest in the property and transaction which are the subjects of the action.

2. The Motion to Intervene Is Untimely[6]

In Peabody Fed'n, laid-off teacher Robbins claimed a right to intervene after an agreement for judgment between her employer and her union which she contended was adverse to her interest because she received less in back pay than she was due under a collective bargaining agreement. Noting that "[n]ot the least of the consequences of intervention and reopening the judgment would have been delay in the payment of back pay to the other entitled teachers" and that "[a]dditional legal expenses would be

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[6] For the reason referenced in Part A of the Argument, the Applicants would have been unsuccessful seeking to intervene at any time in the litigation because they have no standing to do so and nothing in the Feoffees' discussion of Rule 24(a)(2) is meant to suggest anything to the contrary.

incurred which would likely deplete the settlement pot," the Appeals Court concluded: "On the timeliness test alone, the judge, as a matter of discretion, might have denied the motion to intervene." Ibid. at 414.

The result in Peabody Fed'n is consistent with the proposition that an attempt to intervene after entry of judgment is seldom timely. "Among the things to consider are: (1) whether the applicant could have intervened earlier; (2) whether delayed intervention would prejudice the central parties in the action; and (3) the force of the applicant's particular need to intervene". Ibid. at 413.

All of those considerations argue against intervention in the instant case. The Applicants knew of this highly publicized case in October or November 2009. (Supp. A. 435) As early as January, 2011, they knew that their position that the Probate Court lacked the power to order deviation was not shared by any of the parties to the litigation[7]; nonetheless, while at

[7] Immediately prior to the summary judgment hearing on January 31, 2011, Attorney Mark Swirbalus addressed the court and asked the court to accept an amicus brief in behalf of a number of parents and residents of Ipswich. Included in that number was every one of the present Applicants. (R. 132) The Court accepted

all times represented by capable counsel, they made the decision not to seek to intervene. The Applicants' present suggestion that they were surprised by the School Defendants' decision to settle and sell Little Neck rings hollow, both because the School Defendants vacillated on approval of sale (Supp. A. 345-363), and because the Ipswich Town Meeting, on three separate occasions (May, 2010; October, 2010; and May 2011), expressly authorized the School Committee to negotiate a settlement of the Probate Court case with the Feoffees (Supp. A. 40-45), including the specific authority to negotiate "an acceptable, maximum sale price, or a market based land rent, in the event that the property is not sold." (Supp. A. 45) In light of the Applicants' extensive involvement in numerous town activities (R. 150), it is more than fair to conclude that they were well aware of Town Meeting's grant of settlement authority, including sale, to the School Committee.

The School Committee followed the procedures set

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the brief which urged that the Probate Court lacked the power to order deviation. The Court then inquired if any of the four parties to the action agreed with the position of the amici that the court lacked the power to order deviation. All of the parties stated their disagreement with that position. (Supp. A. 188)

out at Town Meeting for settlement and, prior to agreeing to settle, consulted with both the Finance Committee and the Board of Selectmen. (R. 276) The affidavit of Mr. DeAngelis establishes that he and his group, which included Applicants' present counsel on appeal, read a statement to the School Committee prior to its vote on settlement. (R. 199) The part of the statement quoted in the DeAngelis affidavit recognizes not only the power of the School Committee to settle by sale, but also contradicts any suggestion that the settlement was the result of improper collusion between the School Defendants and the Feoffees: "In summary, let me say that I do not, in any way, question your dedication to the Ipswich Public Schools, nor do I question your desire to do the right thing." (R. 199)

Delayed intervention would greatly and unfairly prejudice the central parties to the action who vigorously litigated this action for over two years before agreeing that settlement of the action was warranted for a variety of reasons, not the least of which was the cost of continued litigation suffered by the Ipswich Public Schools which were ultimately bearing the attorneys' fees of both the School

Defendants and the Feoffees. The settlement resulted from painstaking negotiations and presents a fair and reasonable outcome for the beneficiary.[8] Reopening this action now will not only cause extensive delay and cost significant legal fees; it will postpone the creation of the condominium, the sale of condominium units, and the flow of money to the schools from the proposed endowment fund. Delay also prolongs the exposure of the Feoffees on the issue of erosion. It is uncontroverted that Little Neck suffered extensive erosion damage in the "Patriots Day Northeaster" of 2007 (Supp. A. 365); the cost of repairs approaches $1,000,000 and the Feoffees do not have the economic ability to make the repairs. (Supp. A. 364-384) The Feoffees successfully shifted the burden of those repairs to the cottage owners as part of the Superior Court settlement agreement, but the agreement provides that any new erosion damage originating between date of settlement and date of recording of the master deed

[8] The settlement gave the School Defendants two major victories: a $3,000,000 economic benefit by recovery of $2,400,000 in back rent from non-lessees which also decreased by $600,000 a sales credit going to lessees so as to treat lessees, who had paid more rent than non-lessees during the Superior Court litigation, the same as non-lessees; and a reorganization of the feoffees including elimination of the four privately-selected life feoffees. (R. 336, 342)

is the responsibility of the Feoffees. (Supp. A. 286) Pursuant to the Probate Court Judgment, the Feoffees have until May 1, 2012 (R. 340) to record the master deed[9] and, absent delay caused by a stay, they will meet that deadline and terminate their exposure on the erosion problem. Here, as in United Nuclear Corp. v. Cannon, 696 F.2d 141, 143 (1st Cir. 1982), cited by the Applicants, and R&G Mortgage Corp., supra, the Applicants' motion should be denied as an untimely tactical attempt to thwart settlement, with any harm[10] to the Applicants amounting to a "self-imposed wound" and being greatly outweighed by the manifest harm which would be worked on the original parties. R&G Mortgage Corp., supra at 9. Here, as in Peabody Fed'n, on the timeliness test alone, denial of intervention would have been well within the discretion of the motion judge.

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[9] The Feoffees and their engineers and surveyors are in the middle of preparing condominium documents which include a description and a floor plan for each of the 167 cottages which will become units all as required by G.L. c. 183A. Interruption of that process will be expensive and wasteful and is just one example of the harm that will be caused by a stay.

[10] Without a protectable interest, as explained infra, the Applicants fail the third consideration as to timeliness: the required showing of a need to intervene.

3. The Applicants Have No Interest Under Rule 24(a)(2)

The property and transaction at issue in the instant action are the land at Little Neck and the settlement, by condominium creation and sale of units, of the Superior Court action. The Feoffees, as title holder and lessor of Little Neck and defendants in the Superior Court, have protectable interests. The Ipswich Public Schools, acting by and through the School Defendants who are the directors and managers of the beneficiary Ipswich Public Schools pursuant to G.L. c. 71, §§37 and 59 and custodians of distributed trust funds under G.L. c. 44, §53A, have a protectable, equitable interest in Little Neck. Even the cottage owners have both a leasehold/occupancy interest in the land as well as an equitable interest created by their purchase and sale agreements (Supp. A. 309), together with an interest in the Superior Court case as plaintiffs. In stark contrast, the Applicants do not claim, nor could they, a legal or equitable interest in the land or an interest in the Superior Court action or the condominium to be created. Neither the Applicants nor their children are the beneficiaries of the Trust. The Applicants'

children may attend and enjoy the schools, but they are not the schools.

Contrast the cases cited by the Applicants where intervention was allowed: Frostar Corp. v. Malloy, 77 Mass.App.Ct. 705 (2010)(title holders to realty allowed to intervene); B. Fernandez & Hnos, Inc. v. Kellogg USA, Inc., 440 F.3d 541 (1st Cir. 2006)(intervention allowed where contract rights may be affected); and Johnson Turf and Golf Management, Inc. v. City of Beverly, 60 Mass.App.Ct. 386, 390 (2004)(intervention allowed where municipal golf course operator had "a proprietary interest in having a fair shot at the management contract").

For an interest to rise to the level of protectability under Rule 24(a)(2), the interest must be sufficiently direct and immediate; it cannot be remote or contingent, tangential or collateral. See Bolden, supra 50 Mass.App.Ct. at 62. The Applicants' reliance on Massachusetts Federation of Teachers, AFT, AFL-CIO v. School Committee of Chelsea, 409 Mass. 203 (1991) is misplaced because there, unlike here, the quality of educational services was directly at issue: who was going to manage the school system, the Chelsea School Committee or Boston University?

The failure to meet either the timeliness or interest criterion is fatal to the Applicants' motion to intervene and their appeal has no likelihood of success.

D. The Requested Stay Would Cause Substantial Harm to All the Parties

The harm that will be suffered by both the School Defendants and the Feoffees by reason of a stay is similar to that discussed above on the issue of the untimeliness of the applicants' attempt to intervene: every day of delay in the implementation of the Judgment is another day of interest paid, at 6.75% per annum, on the $6,483,000 loan to the Feoffees to build a wastewater collection system[11] (Supp. A. 385, 393), deprives the School Defendants of much needed funds, and increases the likelihood that the Feoffees, and not the condominium association, will incur erosion remediation expense. The settlement agreement with the cottage owners provides that the Feoffees will offer purchase money financing to buyers. (Supp. A. 293) If implementation of the judgment is delayed, and interest rates rise, the Feoffees face making an increasing number of those loans. A major change in

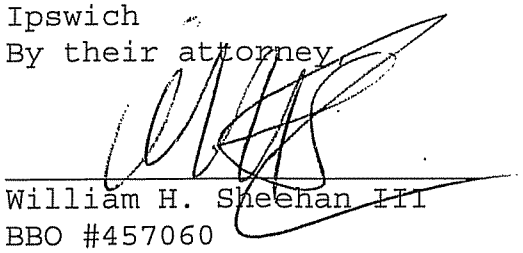
[11] Details of the system and the need therefor are in the Feoffees' summary judgment memorandum.

the financial markets could endanger the entire sale process, as occurred in early 2009, after the School Committee had voted for sale (Supp. A. 149, 350), casting the Feoffees and the cottage owners back to the Superior Court and the substantial costs and uncertain result therein. The Agreement for Judgment provides for a rent increase to non-lessees effective July 1, 2012 as a spur to accomplish sale swiftly and economically. A stay would prevent the parties from meeting that deadline and potentially lead to further litigation from the cottage owners. Although not parties to the litigation, the cottage owners would certainly be adversely affected by a stay by the delay in their purchasing their units. Those harms weigh against a stay, particularly where, as here, there is no personal harm to any of the Applicants and there is no likelihood that the Applicants will prevail on their attempt to intervene.

IV. CONCLUSION

For the reasons set forth above and in the Feoffees' opposition to motion to intervene filed in the lower court, and those contained in the memoranda of the School Defendants and the Attorney General, this Court should deny the Applicants' Motion to Stay.

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



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Dated: February 22, 2012

CERTIFICATE OF SERVICE

I, William H. Sheehan III, attorney for the Feoffees of the Grammar School in the Town of Ipswich, hereby certify that I have served a copy of the instant Memorandum of Plaintiffs Feoffees of the Grammar School in the Town of Ipswich in Opposition to Would-be Intervenors' Motion to Stay Judgment; together with Supplemental Record Appendix of the Feoffees of the Grammar School in the Town of Ipswich in Opposition to Motion to Stay Judgment; and Joint Affidavit of Counsel for the Parties upon all parties or counsel of record, by mailing the same, first class mail, postage prepaid, to the following attorneys:

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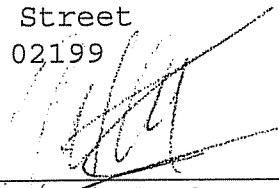

William H. Sheehan III

Dated: February 22, 2012