Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston,

In the case no. 05-P-1028

MARIA KITRAS & another, trustees,

vs.

CONSERVATION COMMISSION OF AQUINNAH & another.

Pending in the Superior

Court for the County of Essex

Ordered, that the following entry be made in the docket:

Order denying motion pursuant to Mass.R.Civ.P. 60(b), 365 Mass. 828 (1974), affirmed.

By the Court,

Ashley Thacher, Clerk

Date May 18, 2006.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

05-P-1028

MARIA KITRAS & another,[1] trustees,[2]

vs.

CONSERVATION COMMISSION OF AQUINNAH & another.[3]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

A consent judgment was entered in the Essex Superior Court based upon the parties' agreement for judgment in settlement of the plaintiffs' claims. As relevant, the agreement and ensuing judgment included provision for the defendant town Conservation Commission (ConsCom) to grant the plaintiffs a permit under the Aquinnah wetlands/water resource protection by-law that would enable the plaintiffs to engage in construction upon their lot in Aquinnah (set-off lot 232) within a designated wetlands area.

The permit was valid for a three-year period and was issued nunc pro tunc as of July 12, 2001. By its terms it expired on July 12, 2004. The agreement for judgment was signed on December 23, 2002, and the consent judgment was entered on the Superior Court docket on January 24, 2003, at that point leaving approximately eighteen months for the permit to run.

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[1] James J. DeCoulas.

[2] Of Gorda Realty Trust.

[3] Town of Aquinnah.

The plaintiffs have claimed that the time for them to utilize the permit was insufficient, due primarily to a pending administrative appeal by an abutter to set-off lot 232 before the State Division of Administrative Law Appeals (DALA), regarding the issuance by the Massachusetts Department of Environmental Protection of a superseding order of conditions under the State Wetlands Act, G. L. c. 131, § 40, to the plaintiffs on behalf of their lot.[4]

The plaintiffs took a roundabout course in their attempt to redress the problem within the permit's three-year time limit. They did not follow through upon their initial request to the ConsCom for a one-year extension of the permit. They failed to appear at a public meeting scheduled and duly noticed by the ConsCom to take up the request for an extension, nor did they seek reconsideration of the ConsCom's denial of the request. Instead, the plaintiffs filed a new complaint in a new venue, the Middlesex Superior Court, seeking to have the permit extended (or "tolled" while the abutter's appeal to DALA was pending). When that attempt failed (the complaint in Middlesex was dismissed on motion by the ConsCom), the plaintiffs returned to the same court

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[4] The issues surrounding the superseding order of conditions are integrally related to those that were before the ConsCom respecting the plaintiffs' request for a permit under the local wetlands by-law. The ConsCom joined the abutter in the appeal before DALA but then on agreement with the plaintiffs withdrew from that appeal.

that had entered the consent judgment and sought to vacate the judgment.

The plaintiffs filed a motion pursuant to Mass.R.Civ.P. 60(b)(5) or (6), 365 Mass. 828 (1974), to vacate the judgment insofar as it incorporated the provision respecting the three-year term of the wetlands permit. A judge of the Superior Court denied the motion, and the plaintiffs now appeal from the denial. We affirm.

Rule 60(b)(5) and (6) of the Massachusetts Rules of Civil Procedure, 365 Mass. 828 (1974), provide for relief where a previously entered judgment:

> "has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or . . . any other reason justifying relief from the operation of the judgment."

Relief under rule 60(b) is extraordinary; exceptional circumstances must be shown. Thibbitts v. Crowley, 405 Mass. 222, 226 (1989). Review of a judge's decision to grant or deny a request for postjudgment relief under rule 60(b)(5) or (6) is for abuse of discretion. Ross v. Ross, 385 Mass. 30, 33-34 (1982).

A court is especially loath to modify or vacate a consent judgment into which the parties freely entered. Thibbitts, supra. Language from Thibbitts on this point is instructive:

> "A consent judgment is essentially a settlement agreement that is entered as a judgment. [Citation omitted.] 'We are aware of no sound theory upon which it can be held that the

> court has jurisdiction to modify the terms of a valid existing contract which arose solely through the voluntary act of the parties.' [Citation omitted.] 'And when, as in this case, the [plaintiff] made a free, calculated and deliberate choice to submit to an agreed upon decree rather than seek a more favorable litigated judgment, [his] burden under Rule 60(b) is perhaps even more formidable than had [he] litigated and lost.' [Citation omitted.] Altering the material terms of such an agreement at the behest of one party, without the consent of the other, does violence to the other party's expectations and to the very concept of judgment by consent."

Id. at 226-227.

Thibbitts concerned a consent judgment in a dispute over a purchase and sale agreement for land. The parties agreed to perform the agreement and to close on a designated date and further agreed that time was of the essence. Their agreement was then enshrined in a consent judgment. Id. at 223. The closing date came and went, but the agreement went unperformed. The plaintiff accused the defendant of causing the problem, id. at 226, much as the plaintiffs here accuse the ConsCom of bad faith in issuing them a permit they could not use. The record tended to show, however, that the problem was attributable to the refusal of the plaintiff's bank to go forward with the transaction. Ibid. In any event, on motion by the plaintiff under rule 60(b)(5) or (6), the motion judge ordered the closing date extended by two weeks, an order that the Supreme Judicial Court reversed for the reasons appearing in the quotation above.

The language quoted from Thibbitts applies with particular force here. The plaintiffs agreed to receive a three-year permit

that specified the nunc pro tunc date of July 12, 2001. (The significance of that particular date is not made clear.) The permit's three-year life span is standard according to the ConsCom; permit holders can, and do, come back before the ConsCom to request an extension. That is something the plaintiffs failed to do.

On that basis alone -- failure to seek redress locally before resorting to the courts -- the Superior Court judge was justified in denying relief. The plaintiffs chose to forum shop, going first to Middlesex County with a new complaint and then, when that failed, returning to the Essex County Superior Court.[5] We see no abuse of discretion in denial of the motion.

The plaintiffs press the point that some courts have adopted a flexible approach to motions under rule 60(b)(5) to relieve a party from an alleged inequity in the operation of a judgment having continuing, prospective application (such as an injunction, a declaration, or a consent decree), requiring

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[5] Following the dismissal in January, 2005 of their complaint in Middlesex County, the plaintiffs apparently took a final stab for relief from the ConsCom by asking that the permit (which at that point already had expired) be tolled pending the abutter's appeal. The ConsCom denied the request (reasoning that an expired permit could not be tolled or revived), but invited the plaintiffs either to apply for a new permit or seek reconsideration of the ConsCom's earlier decision to deny a permit extension, a decision based primarily upon the plaintiffs' failure to appear before the ConsCom to press the request. The plaintiffs declined the invitation and instead filed the motion, the denial of which they now appeal.

ongoing court supervision or involvement. Plaintiffs' brief at 13-14, citing various Federal cases. But this is not a prospective judgment. The plaintiffs received the permit they long had sought. Once that happened, and the various other claims for relief had been resolved by agreement, the court's role was at an end. Thus, the plaintiffs' argument in favor of flexibility on rule 60(b)(5) motions misses the mark.

Accordingly, we affirm the judge's order denying the motion, but in so doing, we note that the pro se plaintiffs are not attorneys, yet purport to represent the interests of a trust of which they are the cotrustees. The trust's beneficiaries are not identified in the record. A pro se plaintiff who is not a licensed attorney may not represent in a Massachusetts court a corporation -- even a closely held corporation -- of which he is a principal. Varney Enterprises, Inc. v. WMF, Inc., 402 Mass. 79, 82 (1988). Driscoll v. T.R. White, Co., 441 Mass. 1009, 1010 (2004). We see no reason why the same rule should not apply to a trust, with the attendant fiduciary obligations of trustee to beneficiary (even assuming the cotrustees to be the sole beneficiaries). Where the identities of the trust beneficiaries are not known to us, we choose not to apply such a rule here, as that would cause the appeal to be dismissed.[6]

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[6] The United States District Court for the District of Massachusetts and the Court of Appeals for the First Circuit have both issued orders barring the plaintiffs from filing pleadings

We also have before us the plaintiffs' motion to supplement the appellate record with materials that were not before the Superior Court motion judge and the defendants' opposition thereto. The motion to supplement is denied. The materials are not accepted for the record.

Order denying motion pursuant to Mass.R.Civ.P. 60(b), 365 Mass. 828 (1974), affirmed.

By the Court (Rapoza, Brown & Grasso, JJ.),

Ashley Thorn

Clerk

Entered: May 18, 2006.

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in any case on behalf of any trust they control except through an attorney licensed by the court.