



COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
LAND COURT DEPARTMENT

CHARLES M. SCHISSEL, SUSAN E. FOGARTY, and JEAN M. SCHISSEL, TRUSTEES OF THE HUMPHREY 336 REALTY v. DONALD HAUSE, DANIEL DOHERTY, MARC KORNITSKY, HARRY PASS, ANDREW ROSE, DAMON SELIGSON, and PETER SPELIOS, as they are members of the TOWN OF SWAMPSCOTT ZONING BOARD OF APPEALS, and MILTON S. FISTEL and LINDA F. FISTEL

19 LCR 38

MISC 09-414355

ESSEX, ss.

January 20, 2011

Trombly, J.

DECISION

With:

- **MISC 09-415712** : MILTON S. FISTEL and LINDA F. FISTEL v. PAUL J. McNEIL, MAUREEN K. McNEIL, and SUSAN F. FOGARTY, JEAN M. SCHISSEL and CHARLES E. SCHISSEL, TRUSTEES OF THE HUMPHREY 336 REALTY TRUST, J. ALAN HEZEKIAK, Inspector of Buildings for the Town of Swampscott, and the TOWN OF SWAMPSCOTT

These cases are the progeny of Land Court Case No. 05 MISC 309084, Chadwell et al v. Latronica et al. That action, filed on May 2, 2005, arose out of confusion and disagreement as to whether the owners of ten specific parcels of land in Swampscott were subject to the town's newly amended zoning by-law, or whether their use of their property was "grandfathered" such that their land was governed by the zoning by-law in effect prior to the amendment. The complaint alleged that the building inspector first denied plaintiffs a building permit but then changed his mind and agreed to issue permits for the "grandfathered" lots. However, by the time he decided to issue the permits, there was not enough time to process the applications before May 2, 2005, when the amended Bylaw would take effect. An Agreement for Judgment, signed by counsel for Plaintiffs and the Town, was filed and approved by this Court (Trombly, J.) on August 22, 2006, whereby all Plaintiffs, including Paul J. McNeil and Maureen K. McNeil, were given up to thirty (30) months to apply for and receive a building permit for their

respective lots. An Amended Agreement, providing for additional time to obtain the building permits, was filed and again approved by the Court, (Trombly, J.) on October 19, 2009.

On or about November 9, 2009, Milton S. Fistel and Linda F. Fistel, owners of land abutting the land formerly owned by the McNeils, and now owned by the Trustees of the Humphrey 336 Realty Trust, filed a motion seeking to intervene in Case No. 309084 in order to file objections to the two Agreements for Judgment. The motion was argued before the Court on May 6, 2010 and denied in an Order dated June 1, 2010. A motion seeking reconsideration of that Order was denied October 1, 2010. The Fistels did not take an appeal of either denial.

In the meantime, on May 7, 2009, the Building Inspector of Swampscott issued a building permit for the premises at 336 Humphrey Street, the former McNeil property, to the current owners, Charles M. Schissel, Susan E. Fogerty, and Jean M. Schissel, Trustees of the Humphrey 336 Realty Trust ("the Schissels"). The Schissels had applied for and been issued a permit allowing them to build a two-unit condominium with garage on the lot. On June 1, 2009, Milton S. Fistel and Linda F. Fistel ("the Fistels") filed an appeal with the Swampscott Zoning Board of Appeals requesting that the building permit be rescinded. A hearing on the appeal was scheduled by the Board for June 24, 2009. At the beginning of the hearing that evening, it was determined that notice of the hearing had not been sent to the Schissels, as required by law. The Fistels' attorney, Andrew Epstein, requested that the hearing be continued until September 23, 2009 and signed an Agreement for Extension of Time. However, that Agreement was not signed by the Board and was not filed with the Town Clerk until October 5, 2009. On September 23, 2009, the new rescheduled date, another "snafu" was discovered, namely, that the legal notice of the rescheduled hearing had not been published, as required, in the local newspaper. Again, the hearing was not held.

On October 1, 2009, Attorney Epstein signed a second Agreement for Extension to October 28, 2009 in which he reserved his rights to file a notice of constructive allowance. This Agreement for Extension of Time was also filed with the Town Clerk on October 5, 2009. The next day, on October 6, 2009, the Fistels filed their Notice of Constructive Allowance with the Town Clerk, alleging that the Board had failed to act on their appeal within one hundred (100) days after the filing thereof or within the time agreed to in writing, and that their appeal from the issuance of the building permit was therefore granted.

The Schissels filed Case No. 09 MISC 414355 on October 19, 2009, appealing the Notice of Constructive Approval which had been filed with the Town Clerk by the Fistels. Named as Defendants in that action were the Fistels and the Board. In their complaint, the Schissels alleged that to the extent the Notice constituted a Decision of the Board, it exceeded their authority, contained no findings of fact, and was therefore insufficient to warrant rescission of the building permit. The Schissels, in their action, also contended that the building permit was, in fact, lawful, that the Notice was procedurally defective, and that it was filed solely to harass and delay the Plaintiffs. They further contested the standing of the Fistels to appeal the issuance of the building permit.

The Fistels, on November 9, 2009, filed an Answer and Counterclaim to the Schissel complaint, along with a Motion to Join Parties pursuant to Mass. R. Civ. P. 19(a), claiming they will be damaged if the Schissels are permitted to construct the two unit condominium

because, they contend, the new construction will block their view of Swampscott Harbor and Fisherman's Beach, thereby decreasing the value of their abutting residence. The Schissels filed a Motion to Dismiss on December 2, 2009, seeking dismissal of the Fistels as parties and of their (the Fistels') counterclaim, contending that the Fistels lack standing, and because the Fistels are not aggrieved parties within the meaning of the statutes. They pointed out also that views are not protected interests under the Swampscott zoning by-laws. [\[Note 1\]](#)

The third case in this trilogy, Case No. 09 MISC 415712, was filed by the Fistels on November 9, 2009, seeking declaratory judgment and asking the Court to rule that the Agreements for Judgment negotiated by the parties and approved by the Court in Case No. 05 MISC 309084 were procured by fraud and/or negligent misrepresentation and that neither the Town nor this Court had the power to grant the relief that was agreed to because it constituted a "variance" which was not within the power of this Court to grant. The Fistels also claim that their rights to due process, including procedural due process guaranteed by the United States and Massachusetts Constitutions, have been violated. The Schissels and the Town have filed Motions to Dismiss the Fistel complaint based on lack of subject matter jurisdiction, lack of standing, and because the complaint fails to state a claim upon which relief can be granted.

At a motion session on August 10, 2010, the various motions were argued and taken under advisement in all three cases. As noted earlier, the Court had previously denied the Fistels' Motion to intervene in Case No. 309084 on June 1, 2010. Following the arguments on the several motions on August 10, 2010, the Fistels' motion seeking reconsideration of that action was denied in an Order entered October 1, 2010. [\[Note 2\]](#)

Motions to Dismiss the Fistel Complaint (Case No. 09 MISC 415712)

Milton S. Fistel and Linda F. Fistel brought this action on November 9, 2009 against the McNeils, the Schissels, the Town of Swampscott and its Building Inspector. In their nine count complaint, the Plaintiffs contend that John and Paul McNeil, and their respective wives, in violation of the then-existing Swampscott zoning by-laws, were allowed to construct a two-family dwelling on undersized lots. The Fistels contend that the McNeils were later among the Plaintiffs in the case brought by them and nine other land-owners claiming to be the owners of "undersized and grandfathered" parcels and seeking a ruling protecting them from a change in the Bylaw. In essence, the Fistels argue that the McNeils should not have received the benefit of the two Agreements for Judgment in the Chadwell case (#309084) because they were guilty of fraud and of making misrepresentations to the Court.

Both the McNeils and the Schissels have filed motions seeking dismissal of the Fistel complaint on grounds that the action sounds in tort and should be dismissed pursuant to Mass. R. Civ. P. 12(b)(1) and (6) for lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, and for lack of standing. They contend also that the Fistel action should be dismissed because it was not commenced within the three year statute of limitations pursuant to G. L. c. 260, § 2A.

As it was formerly stated, a Court should not dismiss a claim pursuant to Mass. R. Civ. P. 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957);

Nader v. Citron, [372 Mass. 96](#) , 98 (1977); accord Sullivan v. Chief Justice for Admin. and Mgmt. Of the Trial Court, [448 Mass. 15](#) , 21 (2006)(citing Spinner v. Nutt, [417 Mass. 549](#) , 550 (1994)). More recently, it has been held that “in order to withstand a motion to dismiss brought under Mass. R. Civ. P. 12(b)(6), the complaint must contain enough factual allegations ‘to raise a right to relief above the speculative level...[based] on the assumption that all the allegations in the complaint are true.’” Iannacchino v. Ford Motor Co., [451 Mass. 623](#) ,636 (2008) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). In considering a motion to dismiss, the court takes the allegations made in the complaint and the inferences that may be drawn therefrom as true. Nader, 372 Mass. at 98 (and cases cited); Iannacchino at 636.

However, plaintiff must allege facts sufficient “enough to raise a right to relief above the speculative level...[based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact)...” Iannacchino v. Ford Motor Co., [451 Mass. 623](#) , 636 (2008)(quoting Bell Atl Corp. v. Twombly, 127 S. Ct. 1955, 1964-65 (2007)). While plaintiff is not required to detail factual allegations, the plain statement must “possess enough heft to ‘sho[w] that the pleader is entitled to relief.’” Id. (quoting Bell Atl. Corp., 127 S. Ct. at 1966).

In the present case, Defendants seek dismissal of the case because they contend that the Fistles fail to identify any interests that are protected by the Swampscott zoning by-law and that they therefore are not aggrieved and lack standing to bring and prosecute this action. Specifically, Defendants point out that Fistles’ allegation of aggrievement is that their view of the harbor will be interfered with by the proposed new construction, resulting in a decrease in value of their property. The McNeils and Schissels argue that views and view easements are not protected interests under the Swampscott Zoning Bylaw. While admitting that the Fistles, as abutters, are entitled to a presumption of standing, they stress that the presumption is rebuttable pursuant to G. L. c. 40A and that once that presumption is challenged, the Fistles have the burden of proving that they are aggrieved parties and that they have suffered damage. Defendants contend, therefore, that the case must be dismissed because the Fistles have not, and cannot, meet their burden. The alleged loss of value is derivative of the claimed loss of the Fistles’ view. It is therefore insufficient to confer standing. This court agrees.

The remaining Counts of the Fistles’ complaint must also be dismissed. Many of the counts sound in tort, over which this court does not have subject matter jurisdiction. Among these are issues relating to fraud and negligent misrepresentation, neither of which is designated in G. L. c. 185, § 1 as being within either the exclusive or concurrent jurisdiction of the Land Court. In addition, this Court has already denied the Fistles’ motion seeking to vacate the Agreement for Judgment and Amended Agreement for Judgment entered in the Chadwell case (05 MISC 309084) for the reasons set forth in the Orders entered in that case. The Fistles are attempting to attack in their complaint a judgment made in an earlier separate action. This they cannot do, especially since they have already tried unsuccessfully to do so in the Chadwell case itself. Decrees and judgments of this Court cannot be collaterally attacked in another court or by commencing another action in this court. Bell v. Eames, [310 Mass. 642](#) (1942). The remedy available to the Fistles was an appeal of this courts denial of either the motion to intervene or the motion for reconsideration. As noted above, no appeal was taken. [\[Note 3\]](#) For the reasons set forth herein, the Fistles’ complaint in Case No. 09 MISC 415712 must be and is hereby dismissed.

Motions Pertaining to the Fistels' claim of constructive approval of their appeal.

The Fistels contend that their appeal from the granting of the building permit to the Schissel defendants was constructively approved by the Zoning Board of Appeals when it failed to act on their appeal within the one-hundred day period allowed by G. L. c. 40A, § 15. In their Notice of Constructive Approval, filed with the Swampscott Town Clerk on October 6, 2009, they state that the Board failed to act on their application "within one hundred days after the date of filing of an appeal (June 1, 2009) or the extended time agreed to in writing between the applicant and the board of appeals (September 23, 2009)," that the notice is being filed within fourteen days from the expiration of the one hundred days or agreed extension thereof, and that they have so notified all parties in interest as defined in G. L. c. 40A, § 11 informing them that any appeal from their action must be filed within twenty-days after the date on which the notice was filed with the Town Clerk. The Schissels filed Case No. 09 MISC 414355 appealing the Notice on October 19, 2009, clearly within the twenty days within which they were allowed to do so. Named as defendants in the case were the members of the Board and the Fistels.

Section 15 of G. L. c. 40A provides:

The decision of the board shall be made within one hundred days after the date of the filing of the appeal, application or petition, except in regard to special permits, as provided for in section nine. . . . Failure by the board to act within said one hundred days or extended time, if applicable, shall be deemed to be the grant of the appeal, application or petition.

This court finds that the Fistels' claim of constructive appeal of their appeal must be upheld. Pursuant to G. L. c. 40A, § 15 the Board was required to take action on the Fistels' appeal within one hundred days of June 1, 2009, unless there were agreements to extend that time period. As noted earlier, there were agreements between the parties. Initially, the parties agreed to "extend the time for the public hearing and/or final action" on the Fistels' appeal to September 23, 2009. The parties then agreed to a second extension to October 28, 2009. However, in this agreement the Fistels' reserved their rights to file a notice of constructive grant within fourteen days of the original extension date of September 23, 2009. Therefore, this second agreement did not have the effect of extending the Board's time to act; rather it had the effect of merely extending the date of the public hearing. As a result of these two agreements, the Board had until September 23, 2009 to act on the Fistels' appeal. Pursuant to G. L. c. 40A, § 15, the Fistels had fourteen days from that date to file a notice of constructive grant with the town clerk. As noted above, the Fistels filed their notice of constructive grant on October 6, 2009, within fourteen days of September 23, 2009. Therefore, the Fistels' notice of constructive grant was properly filed and must be upheld by this court and the Schissels' count challenging that notice must be dismissed.

Accordingly, and for the reasons set forth herein, case 09 MISC 415712 hereby is DISMISSED and Count I of case 09 MISC 414355 hereby is DISMISSED. Although the count challenging the notice of constructive has been dismissed, this court must still determine whether the building permit granted to the Schissels should be upheld on the merits. A telephone status conference is scheduled for February 2, 2011 at 9:30 a.m. to discuss how case number 09 MISC 414355 will proceed in light of this decision.

Charles W. Trombly, Jr.

Justice

Dated: January 20, 2011

FOOTNOTES

[\[Note 1\]](#) It is ironic that the Schissels now seek to strike the Fistels as Defendants in a case which the Schissels themselves commenced, and in which they named the Fistels as parties.

[\[Note 2\]](#) Also argued on August 10, 2010 was the Fistels' Motion to Consolidate the three cases on grounds that they are intricately related and the Town's Motion for Summary Judgment as to Count IX of the Fistels' complaint. Due to this court's disposition of the motion to dismiss the Fistels' complaint, the court need not act on either the motion to consolidate or the motion for summary judgment.

[\[Note 3\]](#) Defendants also point out that any of the so-called "irregularities" claimed by the Fistels to have occurred, such as fraud and negligent misrepresentation, took place prior to 2006, at which time the Agreement for Judgment was filed and approved. Since this was more than three years ago, the Fistels' proper remedy, the filing of a motion for relief from judgment pursuant to Mass. R. Civ. P. 60(b), should have occurred within the one year allowed by that Rule. Since it was not so filed, it is now time-barred. Along the same lines, any assertions by the Fistels that the McNeils and/or the Schissels were guilty of tortious conduct may be barred by the three year statute of limitations set forth in G. L. c. 260, § 2A.

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