COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
LAND COURT DEPARTMENT

CHARLES E. SCHISSEL, SUSAN E. FOGERTY and JEAN M. SCHISSEL, trustees of the Humphrey 336 Realty Trust v. DONALD HAUSE, DANIEL DOHERTY, MARC KORNITSKY, HARRY PASS, ANDREW ROSE, DAMON SELIGSON and PETER SPELLIOS as members of the Swampscott Zoning Board of Appeals, MILTON S. FISTEL and LINDA F. FISTEL

20 LCR 574

MISC 09-414355

ESSEX, ss.

November 13, 2012

Long, J.

MEMORANDUM AND ORDER ON THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

Introduction

Plaintiffs Charles Schissel, Susan Fogerty and Jean Schissel as trustees of the Humphrey 336 Realty Trust ("the Schissels") received a building permit for the construction of a two-unit condominium on their land in Swampscott. Defendants Milton and Linda Fistel ("the Fistels") timely appealed that permit to the zoning board of appeals, seeking its revocation. The Board, because of procedural mis-steps, failed to act on the appeal in timely fashion. The Fistels then filed a notice of constructive allowance of their appeal pursuant to G.L. c. 40A, §15 and the Schissels brought this G.L. c. 40A, §17 action (1) challenging the validity of that notice (i.e., whether there was, in fact, a "constructive allowance" resulting in the revocation of their permit), and (2) if the constructive allowance had revoked their permit, seeking to overturn that revocation.

The judge previously assigned to this case (Trombly, J., now retired) split its issues into two phases. The first addressed the validity of the notice of constructive allowance. By decision dated January 20, 2011, Judge Trombly ruled that the Fistels' appeal to the Board had constructively been allowed as a consequence of the Board's inaction, [Note 1] thus revoking the building permit. This left the second part of the case, "whether the building permit granted to the Schissels should be upheld on the merits." Schissel v. Hause, 19 LCR at 40.

Under the terms of the court-approved Agreement for Judgment entered in a previous case involving the Schissels' land (Chadwell v. Latronica, Land Court Case No. 05 MISC. 309084 (CWT)) ("the Judgment"), whether the building permit stands or falls depends upon whether a "proper and complete" application was made by February 23, 2009 within the meaning of that Judgment. It is undisputed that an application was made prior to that date. The parties differ, however, on whether it was "proper and complete." The Fistels argue that the application was not "complete" because other approvals were necessary before the building permit could issue (a site plan special permit and, perhaps, an approval from the conservation commission) and those approvals had not been obtained prior to February 23. The Schissels make two arguments in response: first, that the absence of these other approvals did not make the building permit application improper or incomplete, only its issuance contingent on obtaining them, and second, that the need for these other approvals was mooted by subsequent revisions to the originally-submitted plans, the building inspector's acceptance of these revisions as part of the original application, and his ultimate allowance of that application based on these revisions. The Fistels counter by arguing that the revisions were too extensive to be considered a part of the original application, and the building inspector's determination to the contrary was erroneous.

The parties have cross-moved for summary judgment. For the reasons set forth below, the Schissels' motion for summary judgment is ALLOWED, the Fistels' DENIED, and this matter remanded to the building inspector with instructions to re-issue the building permit.

Analysis

Summary judgment may be granted when "the evidence, viewed in the light most favorable to the losing party, establishes all material facts and entitles the successful party to a judgment as a matter of law." Targus Group Internat'l Inc. v. Sherman, 76 Mass. App. Ct. 421 , 428 (2010). Accordingly, the facts set forth below are either not in genuine dispute or taken in the light most favorable to the Fistels. [Note 2]

This case has its origin in the Chadwell action referenced above. Chadwell was filed in Land Court on May 2, 2005 by the owners of ten parcels in Swampscott (including the land now owned by the Schissels) who had applied for and been denied building permits for those parcels. In Chadwell, those owners sought a determination that the parcels were "grandfathered" from the town's newly amended zoning bylaw. The case was resolved by an Agreement for Judgment, approved and entered as a judgment of the court on August 22, 2006 with a subsequent amendment on October 19, 2009 to correct an internal inconsistency ("the Judgment"). Briefly stated, the Judgment provided that the parcels would be eligible for building permits if, but only if, a "proper and complete" application was made within nine months from the date the court entered that judgment (i.e., on or before May 22, 2007) or, for parcels conveyed within that nine month period, within thirty months after the August 22, 2006 date (i.e., on or before February 23, 2009). [Note 3]

The McNeils, who owned what is now the Schissel land at the time the Judgment was entered, conveyed that land to the Schissels on May 16, 2007, just within the nine-month deadline. On February 12, 2009, shortly before the thirty-month deadline expired on February 23, 2009, the Schissels filed an application for a building permit with the Swampscott Building Department. The initial set of plans submitted with that application showed a two-family residence with a gross total square footage of 6,282 square feet.

The bylaw provisions in effect at that time required applicants to undergo a site plan review and obtain a site plan special permit for any new construction of a single or two family residence that exceeded 5,000 square feet of gross floor area. [Note 4] Bylaw, Article V, §5.4.2.0. The Schissels never applied for a site plan special permit. There were also two more issues: the attic shown in the plans may have constituted an illegal third floor, [Note 5] and the building location may have been within 100 feet of the mean high water mark of Swampscott Harbor, requiring the filing of a notice of intent with the Conservation Commission.

To moot these issues, on April 17, 2009, approximately two months after their building permit application was filed, the Schissels submitted a second, revised set of plans, this time depicting 4,982 feet of "Total Livable Sq. Ft.", no third floor, and locating the building outside the 100 foot buffer zone. The Fistels claim that the actual square footage still exceeded 5,000, thus still requiring a site plan special permit, and it is undisputed that at the time the Schissels submitted this second set of plans, zoning amendments were pending before the Town Meeting which reduced the threshold square footage calculation for site plan special permit review from 5,000 square feet to 3,000 square feet. To moot these issues, the Schissels then submitted a third set of plans on April 29, 2009, this time for a two unit residence with a gross floor area calculation of 2,988 square feet. On May 7, 2009, the Swampscott building inspector issued a building permit to the Schissels for the "construction of a two unit condo with garage" in accordance with these plans. The permit number corresponded to the number on the Schissels' February 12, 2009 application.

The Fistels appealed the building permit to the Swampscott Zoning Board of Appeals on June 1, 2009. A hearing on the appeal was scheduled for June 24, 2009, but a notice of the hearing had never been sent to the Schissels. The Fistels' attorney signed an Agreement for Extension of Time, and the hearing was continued until September 23, 2009. On September 29, another error was discovered; the legal notice of the rescheduled hearing had never been published in the local newspaper, as was required. On October 1, 2009, the Fistels' attorney signed a second Agreement for Extension of Time to October 28, 2009 reserving, however, their right to file a notice of constructive allowance of their appeal. The Fistels filed such a notice with the Town Clerk on October 6, 2009, alleging that the Board had failed to act on their appeal within the time limits set by G.L. c. 40A § 15 and, as a result, their appeal was constructively granted.

The Schissels filed the present case on October 19, 2009, challenging the Notice of Constructive Approval that had been filed with the Town Clerk and further alleging that the building permit had been lawfully issued. The Fistels filed an Answer and Counterclaim on November 9, 2009 claiming that the Schissels' proposed two unit condominium would interfere with their view of Swampscott Harbor and Fisherman's Beach and thereby devalue their property. On December 2, 2009, the Schissels filed a Motion to Dismiss the Fistels as parties in the action and to dismiss their counterclaim, alleging that the Fistels lacked standing because views were not protected interests under the Swampscott Zoning By-law.

On November 9, 2009, the Fistels filed their own action in this court, Case No. 09 MISC. 415712 (CWT), seeking a declaration that the Judgment in Chadwell had been obtained by fraud and/or negligent misrepresentation and that the court did not have power to grant the relief provided in that Judgment because it was a "variance." They also claimed due process violations under Massachusetts and federal

law. The Schissels and the Town moved to dismiss the Fistels' complaint based on lack of subject matter jurisdiction, lack of standing, and failure to state a claim upon which relief could be granted, which was allowed. See Schissel, 19 LCR at 39. In connection with that ruling, the court (Trombly, J.) found that the Fistels lacked standing to bring their action because their alleged aggrievement — an impairment of their views of the harbor — was not an interest protected by the Swampscott Zoning Bylaw. Id. at 40. The other counts in the Fistel complaint were dismissed because they were actions in tort, and the court lacked subject matter jurisdiction to hear those claims. Id. Case No. 09 MISC. 415712 (CWT) was thus dismissed in its entirety.

With respect to this action, Judge Trombly concluded that the Fistels' claim regarding the constructive approval of their appeal of the building permit must be upheld. The court reasoned that the first agreement between the parties to extend the time for the hearing allowed the Board additional time to act on the appeal until September 23, 2009. The second agreement, however, did not extend the time for the Board to act because the Fistels specifically reserved their rights to file a notice of constructive approval. In consequence, the Schissels' building permit was revoked. The Schissels, however, had timely and properly appealed that revocation to this court, leaving for determination the issue of "whether the building permit granted to the Schissels should be upheld on the merits." Schissel, 19 LCR at 40.

Whether the building permit "should be upheld on the merits" is determined by interpreting and applying the Judgment in the Chadwell case. The Judgment must be interpreted in accordance with the plain meaning of its words (here, as the Judgment states, defined in reference to "the Zoning and Rules and Regulations of the Town of Swampscott and the Building Code of the Commonwealth of Massachusetts for a Building Permit"), [Note 6] and, because the Judgment is based on the agreement of the parties in the Chadwell case, to give effect to what those parties are fairly presumed to have intended at that time. See Clark v. State St. Trust Co., 270 Mass. 140 , 152-153 (1930). "The interpretation of a contested written contract is a question of law ordinarily appropriate for disposition by summary judgment," Targus, 76 Mass. App. Ct. at 428, and "[e]vidence may be reviewed that elucidates the meaning of a contract term," Mass. Mun. Wholesale Electric Co. v. Springfield, 49 Mass. App. Ct. 108 , 111 (2000).

The Fistels contend that the building permit is invalid because the Schissels did not submit a "proper and complete" application within the time frame required by the Judgment. In the Fistels' view, to have met that test, the application should have included a previously-approved site plan special permit, an appropriate order from the Conservation Commission, and been one-floor less by no later than February 23, 2009. The subsequent revisions "mooting" those issues, they argue, should not be considered as part of the original application. I disagree. Both the language and attendant circumstances of the Judgment show that (1) only a building permit application was required by February 23, 2009, (2) the Judgment did not require that all conceivably necessary approvals be in place by that date, and (3) the building inspector's ruling that the revisions were properly deemed "part of the original application" and mooted the need for any other approvals was within the scope of his allowable discretion.

I begin with the language of the Judgment, which required a submittal "in keeping with the Zoning and Rules and Regulations of the Town of Swampscott and the Building Code of the Commonwealth of Massachusetts *for a Building Permit.*" (emphasis added). A building permit

application does not require the simultaneous inclusion of all other approvals (although its issuance may be contingent on those approvals), and the Building Code specifically recognizes that applications may be revised during the application process, including the obtaining (or, as here, the mooting) of other approvals.

Under the State Building Code, 780 CMR 5110.4, a building permit application must be submitted on either a "uniform building permit application [form as] contained in Appendix 780 CMR 120.P or on a form that has been approved by the BBRS for such purpose," and the application must be accompanied by the requisite fee as determined by the municipality. See Form of Application, 780 CMR 5110.4 (Mass. Building Code 7th Ed.). [Note 7] The Building Code also requires the applicant to submit "three sets of construction documents" with the application that provide a number of details about the project. See Construction Documents, 780 CMR 5110.7 (Mass. Building Code 7th Ed.). [Note 8] The failure to include the necessary construction documents "shall result in denial of the permit." Id.

The Schissels' February 12, 2009 application satisfied these criteria. They completed the standard Swampscott Building Permit Application, which provided a description of the work they planned to do on their property. They paid the requisite filing fee of $7,500, which was calculated according the fee schedule set by the town ($12.00 per $1,000 total cost of the job). And finally, they submitted the necessary construction plans as required by the State Building Code. As discussed below, the fact that these plans were later modified is irrelevant. The overall project remained the same — the construction of a two-unit residential structure, downsized by the revisions — and the Building Code specifically contemplates that such changes may occur and considers them part of the same application. See Amendments to Application, 780 CMR 5110.8 (Mass. Building Code 7th Ed.).

The Fistels' argument that the building permit application was not "complete" because it did not include all approvals necessary for the ultimate issuance of the building permit (e.g., a site plan special permit; conservation commission review) incorrectly conflates "application" and "issuance." Such "other approvals" are not part of the building permit application itself (the contents of which were described above) but rather conditions for the issuance of the permit. The Swampscott Building Department's Procedures and Requirements for Permitting Form includes, at item 7, the requirement that the applicant submit prior to issuance of the permit "any approval as granted by any authority having jurisdiction, such as but not limited to, Conservation Commission, Zoning Board of Appeals, Planning Board, Board of Health." But this form does not require these approvals to be submitted simultaneously with a building permit application or, indeed, at any time prior to issuance of the permit. [Note 9] There is also nothing in the State Building Code that requires special approvals to be submitted along with a building permit application. All the Building Code requires is a completed application form, the fee, and three sets of detailed construction documents.

The Judgment makes the distinction clear. It only requires a submittal by the deadlines it established. Why is this? First, at the time a building permit application is made, there is no way to be sure that all "other approvals" have been identified, much less secured. The building inspector may take a different view than the applicant of what approvals the zoning code and other applicable regulations require, and send the applicant back to acquire them. Second, an applicant has no control over the timing of such approvals. They are subject to the

decisions of the relevant boards, and may take considerable time to obtain. Recall the short deadlines set by the Judgment (nine months, if the applicant was the original landowner). With the waterfront property at issue here, the parties could not be sure, and thus could not have intended, that all necessary approvals, from all relevant boards, would be identified, applied for, and obtained within those nine months. Had the Judgment required that all other necessary approvals and permits be obtained and included with the building permit application, it would have said so in either just those words or their unambiguous equivalent. Instead, it only required submittal of a building permit application, ensuring that the process had begun but intentionally not imposing an unrealistic deadline for completion.

More importantly, as noted above, the State Building Code recognizes that changes often occur in permit applications before their ultimate issuance. This is an expected part of the normal process. Thus, as the code provides:

Subject to the limitations of 780 CMR 5110.9, amendments to a plan, application, or other records, accompanying the same shall be filed prior to the commencement of the work for which the amendment to the permit is sought or issued. Such amendments shall be deemed part of the original application and shall be submitted in accordance with 780 CMR 5110.1

See Amendments to Application, 780 CMR 5110.8 (Mass. Building Code 7th Ed.). Note that the only limitation on amendments is the one set by 780 CMR 5110.9. Under that provision, a permit application is deemed abandoned after six months unless it is "diligently prosecuted." There is nothing in the Building Code that restricts the scope of amendment, and the amendments at issue here occurred long before that six month period expired. Even if some amendments may be so extreme that they no longer can reasonably be seen as part of the original application (changing a one or two-unit residence to a multi-unit apartment building or a commercial structure might be an example), that is not what happened here. Instead, a two-unit residence remained a two-unit residence and, in fact, was considerably downsized to reduce its impacts. By any objective measure, the project remained the same. Most importantly, this was the conclusion reached by the building inspector. As set forth above, it was (and is) the opinion of the Swampscott building inspector that the Schissels submitted an "application and plans [that] were complete and conformed to the requirements of the Massachusetts State Building Code and the Swampscott Zoning By-law" and that their subsequent plans "were deemed to have been part of the original application pursuant to 780 CMR 5110.8." See Affidavit of J. Alan Hezekiah at ¶¶ 2, 5 (March 29, 2011). No facts have been presented that would allow this court to reach a conclusion different from that of the local building inspector, and deference to that judgment is appropriate. See Britton v. Zoning Bd. Of Appeals of Gloucester, 59 Mass. App. Ct. 68 , 77 (2003).

I reject the Fistels' argument that the Schissels' original application was made in bad faith and the building permit should be rejected for that reason. First, I see nothing to indicate "bad faith." To the contrary, the Schissels voluntarily downsized their building, lessening its impacts. Second, as set forth above, the Schissels acted in complete compliance with the Judgment and the grandfathered provisions of the zoning code. No special relief was sought. The Fistels' citation of Carstensen v. Zoning Bd. of Appeals of Cambridge, 11 Mass. App. Ct. 348 (1981) and Cardin v. Worcester, 1994 WL 879503 (Mass. Sup. Ct.) is thus misconceived. Carstensen and Cardin concerned modifications to building permits that had already issued, not an application for a building permit. See Carstensen, 11 Mass. App. Ct. at 354 (discussing

permit already issued); Cardin, 1994 WL 879503 at *1 (non-complying building permits issued on May 22, 1987). Here, the issue is whether the Schissels' subsequent plans related back to the original application. The State Building Code, 780 CMR 5110.8 regarding amendments to an application, is directly most relevant, and that regulation allows amendments to relate back to the original application so long as they are submitted within six months (or so long as the permit is being "diligently prosecuted," whichever is later) and "prior to the commencement of the work for which the amendment to the permit is sought…." The court need not, therefore, reach the issue of the Schissels' good faith. It is true they submitted their application for a building permit close to the deadline, but the detailed construction plans that accompanied the application plus the payment of a substantial application fee demonstrates they had given close consideration to the development of their property in the months before February 2009. The Schissels were not just sitting on their hands while the months went by, and they did not, as the Fistels' contend, submit just "any plan" in the hopes of complying with the Judgment before the clock ran out.

Conclusion

For the reasons set forth above, the plaintiffs' motion for summary judgment is ALLOWED and the defendants' is DENIED. Judgment shall enter accordingly.

SO ORDERED.

By the court (Long, J.)

FOOTNOTES

[Note 1] "Inaction" is perhaps a misleading word. The Board was prepared to address the merits of the building permit but could not do so because of defective notice of the hearing. See Schissel v. Hause, 19 LCR 38 , 38 (2011).

[Note 2] A party opposing summary judgment may not rely on unsupported allegations or conclusory statements; only "specific facts showing that there is a genuine issue for trial," proved by admissible evidence. Mass. R. Civ. P. 56(e). A fact is genuinely in dispute only if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby Inc., 477 U.S. 242, 247-48 (1986). Material facts are those that might affect the outcome of the case under the governing law. Anderson, 477 U.S. at 248. See also Mulvihill v. The Top-Flite Golf Co., 335 F.3rd 15, 19 (1st Cir. 2003); Hogan v. Riemer, 35 Mass. App. Ct. 360 , 364 (1993). "Even in cases where elusive concepts such as motive and intent are at issue, summary judgment may be appropriate if the non-moving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990).

[Note 3] February 22, 2009 was a Sunday. The thirty-month deadline thus expired the next business day (February 23). G.L. c. 4, §9.

The full text of the relevant paragraphs in the Judgment as amended is as follows:

2. The Agreement for Judgment relates to the ten (10) properties listed in Exhibit A (and their current owners). The Town of Swampscott and the Building Inspector will create a file for each property in question, which may be transferred for the purpose of establishing separate ownership, with the ability for the property owner of said parcel of land to qualify for a Building Permit, provided a proper and complete submittal is made in keeping with the Zoning and Rules and Regulations of the Town of Swampscott and the Building Code of the Commonwealth of Massachusetts for a Building Permit, and, further provided said application or any transfer is made within a nine (9) month period from the date the Court enters this Agreement for Judgment with respect to the Plaintiffs herein or that said application is made within a thirty (30) month period from the date the Court enters this Agreement for Judgment with respect to any transferee from any Plaintiff, which was made within the nine (9) month period….

…

5. It is agreed that should the Plaintiffs hereto, or their transferee(s) fail to apply for the necessary Building Permit for the parcel of land in question in order to build a dwelling within the nine (9) month period from the date the Court enters this agreement for Judgment, or should any transferee from any Plaintiff, which transfer was made within the nine (9) month period, fail to apply for the necessary Building Permit for the parcel of land in question in order to build a dwelling within a thirty (30) month period from the date the court enters this Agreement for Judgment, said Plaintiff or transferee will lose the protection afforded by this Agreement for Judgment, and said parcel shall become unbuildable and merge with the respective adjoining parcel of land in keeping with the provisions of the Massachusetts General Laws, Chapter 40A, Section 6, and that said Plaintiffs and taking title through or from them will be forever barred from pursuing any action with the Town of Swampscott for relief from the then applicable Zoning By-Law to establish the parcel of land as a separate buildable lot unmerged from their respective adjoining parcel.

[Note 4] Gross floor area is defined in the bylaw as “the total square feet of floor space within the outside dimensions of a building including each floor level, without deduction for hallways, stairs, closets, thickness of walls, columns, or other features, including floor area of attic containing 7’3” or greater in height as measured perpendicular from the floor to the underside of the rafters, but excluding basement/cellar if more than fifty (50%) percent of height of basement/cellar is below the finished grade of the ground adjoining the basement/cellar.” Town of Swampscott Zoning By-Law, Article VI, Definitions at 97.

[Note 5] The property is located in a Residence A3 zoning district, which permits residences to have “2.5 stories but not in excess of 35 feet.” The zoning bylaw defines a half story as “a story which is comprised of fifty (50) percent or less of the square footage on the floor below.” Town of Swampscott Zoning By-Law, Article VI, Definitions at p. 102. The plans showed an attic of 1,505 square feet and a second floor, below the attic, of 2,305 square feet.

[Note 6] The Fistels’ use of dictionary definitions is thus inapposite.

[Note 7] The 7th edition of Massachusetts Building Code applicable to one and two family dwellings expired on August 4, 2011. Because the 7th edition was in effect during the time when the Schissels applied for a building permit, all quotations and citations in this decision are from the 7th edition of the Code.

[Note 8] 780 CMR 5110.7 requires that construction documents include: (1) Site plan; (2) Foundation plan and details; (3) Floor plans (including basement and attic levels, if applicable); floor plans shall include location of all required fire protection systems and heating systems storage areas; (4) Exterior building elevations; (5) Framing plans and/or building section(s) adequately depicting structural systems; (6) Schedules, legends and/or details adequately depicting doors, windows and related material installations; and (7) Energy conservation information.

[Note 9] See Affidavit of Swampscott Building Inspector J. Alan Hezekiah at ¶2 (Mar. 29, 2011), in which he stated that the Schissels' February 12, 2009 application was "complete and conformed to the requirements of the Massachusetts State Building Code and the Swampscott Zoning By-Law" but, because the proposed residence was over 5,000 square feet, the Schissels "would have been required to obtain Site Plan approval" before the permit would issue. I deny the Fistels' motion to strike the Hezekiah affidavit since his review and conclusions regarding the building permit application in his capacity as the town's building inspector are both relevant and entitled to a measure of deference. See discussion below.
