Land Court of Massachusetts,
Department of the Trial Court, Barnstable County.
Janet K. MORGAN, Plaintiff
v.
IVAR A. JOZUS, individually and as Executor of the Estate of Marie F. Kerruish, Carol K. Jozus, The Town of Harwich, and the members of the Planning Board of The Town of Harwich in their individual capacities, Defendants.

No. 323880(CWT).
April 3, 2008.

DECISION

CHARLES W. TROMBLY, JR., Judge.

This action, filed on May 26, 2006, is the latest in a series of skirmishes between two sisters regarding the current legal status of real property in the town of Harwich which they inherited from their mother. Other litigation between the co-owners has been carried on in the Land Court, the Barnstable Probate and Family Court (two actions), the Connecticut Court of Probate, District of Portland, and the Appeals Court of the Commonwealth of Massachusetts. The issue in the present case is whether one of the lots inherited by the sisters, known as "the cottage parcel," was legally divided into two (2) separate lots, now numbered 12 and 16 Old Wharf Road, as delineated on a plan endorsed as not requiring approval by the Harwich Planning Board on September 20, 1988 and recorded at the Barnstable Registry of Deeds, Plan Index Book 458, Page 40.[1] Defendants aver that the board's endorsement was valid and proper, while plaintiff Janet K. Morgan contends that the endorsement and recording were void *ab initio* and without any legal effect.

Janet Morgan ("Plaintiff" or "Janet") filed this action on May 26, 2006 naming as defendants her sister Carol Jozus ("Carol"), Carol's husband Ivar A. Jozus ("Ivar"), individually and as executor of the estate of their mother Marie F. Kerruish, the Town of Harwich, and the members of the Harwich Planning Board (collectively, "the municipal defendants"). In her complaint, Janet contends that Ivar, in his fiduciary capacity, unlawfully caused to be prepared and submitted to the board two plans which divided parcels of land left to Janet and Carol by their mother. One of the plans submitted by Ivar divided land known as "the cottage parcel" into two lots and, after it was endorsed by the board, was recorded at the Barnstable County Registry of Deeds.[2] It is Janet's contention that Ivar, because he has never been an *owner* of the property, had no right to submit such a plan for endorsement by the planning board and that the board, for the same reason, had no right to endorse it. Plaintiff seeks to "return the cottage parcel to its original state" as *one* buildable lot, as it stood before the division effectuated by the "unauthorized and illegal" acts of Ivar in submitting and recording the plan. Carol and Ivar, on the other hand, contend that the division was legal, resulting in the cottage parcel being converted into two buildable lots.[3] A reduced copy of the disputed plan is attached.

A Case Management Conference was held on August 18, 2006. On that same date, the Court allowed the parties' joint motion asking that the case be assigned to the "fast track." A status conference was held on October 19, 2006. On October 20, 2006, Defendants Town of Harwich and the Harwich Planning Board filed a Motion for Judgment on the Pleadings and a Memorandum in Support thereof. Following another status conference on December 4, 2006, the motion was scheduled to be heard on February 21, 2007. On December 27, 2006, Plaintiff Janet Morgan filed a Motion for Summary Judgment, an opposition to the municipal defendants' motion for judgment on the pleadings, a memorandum in support of her motion and in opposition to the municipal defendants' motion, an appendix to the memorandum, and an affidavit by Darien K.S. Fleming, Esquire. Both motions were then scheduled to be heard on February 21, 2007.

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[1] All references to recorded deeds and plans relate to instruments recorded at the Barnstable Registry of Deeds unless otherwise indicated.

[2] As a result of Ivar's action, the property formerly known as "the cottage parcel" came to be known as 16 Old Wharf Road (containing a cottage) and 12 Old Wharf Road (a vacant lot).

[3] The second plan submitted to the board by Ivar concerned a parcel known as the "registered bog parcel."

Oppositions to plaintiff's motion for summary judgment, including appendices, were filed by the municipal defendants and by Ivar Jozus and Carol Jozus on January 25 and 26, 2007, respectively. The two motions were rescheduled at the request of the parties from February 21, 2007 to February 23, 2007, and were again rescheduled to April 3, 2007, at which time they were argued and taken under advisement.

Background

The following facts are not in dispute. Following the death of Marie F. Kerruish in Connecticut on March 27, 1986, legal title to the cottage parcel and other property owned by the decedent vested in her two daughters, Janet K. Morgan and Carol K. Jozus, as tenants in common. Since that time, there has never been any other owner of the cottage parcel. Ivar A. Jozus, the husband of Carol K. Jozus and an attorney in the state of Connecticut, was appointed Executor of the Estate of Marie F. Kerruish by the Connecticut Court of Probate, Portland Division and, in ancillary proceedings, by the Barnstable Probate Court.

At the time of Ms. Kerruish's death, her property in Massachusetts consisted of three parcels of land in Harwich:

a) Land on Old Wharf Road known as “the cottage parcel,” on which a cottage had been constructed (the “cottage parcel”); at this time, the parcel contained 51,667 square feet and had frontage of 261.19 feet along Julien Road, also known as Old Wharf Road;

b) Land off Deep Hole Road shown on Land Court Plan No. 10688-B (“the registered bog parcel”); and

c) Land off Deep Hole Road (“the unregistered bog parcel”).

On or about September 15, 1988, having become aware that zoning classifications, frontage requirements, and lot sizes in the town of Harwich were about to be changed, and realizing that the proposed changes might have an adverse effect on the zoning status of the various parcels, Ivar Jozus, as Executor of the Estate of Marie F. Kerruish, after consulting with Janet and Carol, filed with the Planning Board an Application for Determination that Plan Does Not Require Approval (“ANR application”). The plan submitted with the application, which divided *the cottage parcel* into two lots-one containing the cottage and one vacant-was endorsed by the Planning Board on September 20, 1988 and recorded at the Registry of Deeds shortly thereafter. The Town did, in fact, adopt the proposed zoning amendments. As a result, the two new lots, having been created prior to the town meeting vote, are both buildable lots and are not subject to the newly adopted amendments requiring that *each* contain 40,000 square feet and hundred fifty feet (150) of frontage. Janet, who opposed and still opposes the division, learned of the ANR endorsement and the recording of the plan in October, 1988, approximately one month *after* the plan was signed and recorded. She did not file an appeal of the board's action.

At approximately the same time as he submitted the plan of the cottage parcel, Ivar caused to be prepared and filed with the Planning Board a plan of the “registered bog parcel.” The ANR application was again signed only by Ivar in his capacity as Executor of the Estate of Marie Kerruish. He did not seek the *approval* of Janet to file the application, nor did he seek or obtain approval of his actions by the Barnstable or Connecticut Probate Courts. The board endorsed this plan as well and, on January 29, 1991, because this parcel is registered, a petition was filed in this court (Case No. 10688-S-1991-01(B)) in the names of *both* Janet K. Morgan and Carol K. Jozus seeking issuance of an order approving the new plan.[4] Morgan filed an objection to the petition and a motion to dismiss, stating that she did not believe the new plan was necessary and that she objected to it. In an order entered November 18, 2005, this court (Trombly, J.) granted the motion and dismissed the petition without objection by Carol.

[4] Prior to this time, in August, 1990, Janet and Carol caused a petition to be filed in this court seeking issuance of a certificate of title in their names following the death of their mother. On October 17, 1990, the Land Court cancelled the certificate of title which stood in the names of Mr. and Mrs. Kerruish and ordered that a new certificate, later numbered 121718, be issued in the names of Janet Morgan and Carol Jozus.

The present action relates to and seeks relief based on the allegedly unlawful division of only *the cottage parcel* into two lots. Janet asks the court to "undo" Ivar's actions, and to declare that the actions of Ivar and the board in submitting and endorsing the ANR plan of the cottage parcel are *void ab initio* because Ivar, the signer of the application, is not now and never has been an owner of that parcel, as allegedly required by law and by the rules and regulations of the Harwich Planning Board. The municipal defendants acknowledge that the plan was filed by Ivar and endorsed by the board, but contend that any appeal from the endorsement should have been filed within twenty days after the action of the board pursuant to G.L. c. 41, § 81BB. Carol and Ivar contend that Janet is guilty of laches, having waited eighteen years before filing this action. They further contend that the division of the cottage parcel into two buildable lots increased its value, and that this was the underlying reason for Janet bringing this action. Specifically, they point out that Janet has made it clear in a partition action in the Barnstable Probate Court that she would like to purchase the two lots presently composing the cottage parcel and that the purchase price would be lower (to her advantage) were the cottage parcel to be considered *one* buildable lot.[5] Janet also objects to the division because it has purportedly resulted in an increase in the real estate taxes assessed on the two lots.

Standard for Evaluating a Motion for Judgment on the Pleadings

Dismissal of a complaint under Mass. R. Civ. P. 12(c) is appropriate where the allegations in the complaint, and the reasonable inferences drawn therefrom in favor of the plaintiff, are taken as true, and the plaintiff *still* could prove no set of facts in support of her claim which would entitle her to relief. See *Coughlin v. Department of Correction,* 43 Mass.App.Ct. 809, 816 (1997). A dismissal under Rule 12(c) is particularly appropriate where the moving party challenges the court's jurisdiction over the plaintiff's claims. See *Foley v. Polaroid Corp.,* 381 Mass. 545, 548-549 (1980). If the pleadings demonstrate clearly on their face that the court lacks jurisdiction over the claims set forth by the plaintiff, dismissal of those claims is warranted. *Id.* The effect of a motion for judgment on the pleadings is "to challenge the legal sufficiency of the complaint." *Burlington v. District Attorney for the N. Dist.,* 381 Mass. 717 (1980). "If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56....". Mass. R. Civ. P. 12(c). In the present case, the court concludes that because matters outside the pleadings have been presented and considered, the municipal defendants' motion for judgment on the pleadings will be treated as a motion for summary judgment.

[5] See *Morgan v. Jozus,* 67 Mass.App.Ct. 17 (2006), FAR Denied 447 Mass. 1112 (2006) for a detailed analysis and discussion of the many issues involved in this litigation.

Summary judgment is appropriate when "pleadings, depositions, answers to interrogatories, and responses to requests for admission ... together with affidavits ... show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Mass. R. Civ. P. 56(c). The moving party bears the burden of proving the absence of controversy over material facts and that he or she deserves a judgment as a matter of law. See *Highlands Ins. Co. v. Aerovox, Inc.*, 424 Mass. 226, 232 (1997). The court makes all logically permissible inferences from the facts in favor of the non-moving party. See *Willitts v. Roman Catholic Archbishop of Boston*, 411 Mass. 202, 203 (1991). When appropriate, summary judgment can be entered against the moving party and in favor of the non-moving party. See Mass. R. Civ. P. 56(c). The present case is ripe for summary judgment because there are no genuine issues of material fact in dispute.

Discussion

There are two major issues in this action. The first, put forth by the plaintiff, is that Ivar, because he was *not* an owner of the subject property, did not have the authority to submit to the planning board and later cause to be recorded a plan which divided the cottage parcel into two buildable lots. The second major issue, put forth by the municipal defendants, is that even if he did not have the authority to do so (which they do not admit), the time for objecting to those events has long since expired and the case should be dismissed. I'll address these issues *seriatim.*

Was Ivar authorized to apply for and receive the ANR endorsement?

G.L. c. 41, § 81P, in relevant part, describes the "approval not required" process:

"*Any person* wishing to cause to be recorded a plan of land situated in a city or town in which the subdivision control law is in effect, who believes that his plan does not require approval under the subdivision control law, may submit his plan to the planning board of such city or town in the manner prescribed in section eighty-one T, and, if the board finds that the plan does not require such approval, it shall forthwith, without a public hearing, endorse thereon or cause to be endorsed thereon by a person authorized by it the words, 'approval under the subdivision control law not required'... Such endorsement shall not be withheld unless such plan shows a subdivision" (emphasis added).

The "approval not required" process is a relatively simple procedure. The plan is submitted to the planning board with the appropriate application form. Notice is given to the City or Town Clerk that the plan has been filed. The board then reviews the plan. If it determines that the plan shows a subdivision, the board denies endorsement and notifies the applicant and the town clerk of its decision within twenty-one (21) days. If the board decides to endorse the plan, it does so and returns it to the applicant for filing at the local registry of deeds. Notice is also given to the City or Town Clerk. Once an ANR plan has been endorsed by the planning board, the board is not free to rescind or modify that endorsement. It becomes final and conclusive on all parties.

Section III of the Town of Harwich Rules and Regulations Governing Subdivision of Land, in effect as of August 11, 1986, amended June 28, 1988, is very similar to the statutory provision concerning the filing and endorsement of ANR plans.[6] It provides that all approval-not-required plans "are to be signed by the owner of record, or *his authorized representative*. Proof of authorization shall be submitted" (emphasis added).

In the present case, Ivar Jozus submitted the ANR plan to the Harwich Planning Board along with an application signed by him. Under his signature, he had written "Est. of Marie F. Kerruish." The application was filed on Form 1, supplied by the Board, and stated that it was being filed by "the undersigned owners of all the land described herein" and shown on the plan. Plaintiff contends that Ivar was a "stranger" to the title of the cottage parcel, was not an owner, and that he was guilty of "forgery," "fraud," and "deceit" in signing and submitting the plan to the board. This court disagrees.

Ivar is a member of the Connecticut bar and signed the application as the Executor of his mother-in-law's estate. He was not claiming to be the *owner* of the land. Rather, by signing as executor, he was acting as "authorized representative" of the owners, one of whom was his wife, Carol Jozus. The evidence indicates that Ivar, after seeing a legal notice in the newspaper, realized that he had to act quickly if there was ever to be an opportunity to divide the cottage parcel and the "registered bog parcel." He, as an attorney, knew that he had certain responsibilities as executor, one of which was to preserve the value of the estate assets. He discussed the matter with both Janet and Carol, hired a registered land surveyor to prepare two plans, and filed them with the board. At no time did he claim to be the owner.

The Planning Board accepted and acted upon the applications in good faith. They contend that the "record owner" of the property was Marie F. Kerruish and that Ivar was acting as the authorized representative of her estate in his capacity as executor. The board members had no reason to believe otherwise. Even though it is technically true that title passes the moment the decedent dies, I know of no reason why local boards and authorities should be required to search other sources, such as Probate Courts, to verify that the signer had the authority to file the plan and application. This is especially true here, where Ms. Kerruish died in the state of Connecticut and her estate was being probated there. This is also true even though ancillary proceedings were ongoing in the Barnstable Probate Court at the time the ANR plan was endorsed. Records in the Probate Courts in Connecticut and Massachusetts both indicated that Ms. Kerruish had passed away, leaving the subject property to her two daughters, and that Ivar Jozus had been appointed executor by both courts. The board was justified in taking Ivar at his word that he was an authorized representative of the land owners, as permitted by the board's rules and regulations.

[6] Section 81Q of G.L. c. 41 authorizes local planning boards to adopt "reasonable rules and regulations." This court has held that for any rules adopted, there must be a rational and justifiable basis. They must be consistent with the statute, as they are in the present case.

Janet's other claims of damage

Janet claims she was harmed by the division of the cottage parcel because she wanted it to remain as one lot, in part because dividing it would lead to increased real estate taxes, and in part because the purchase price she would be required to pay would be higher were the set-off suggested in the partition proceedings to be carried out. She seeks an order compelling the town to repay to her the difference between the amount of taxes paid on the parcel assessed as two lots as opposed to the amount she would have had to pay were it to be considered only one lot. The court declines to issue such an order. The time for filing for an abatement under G.L. c. 59, § 59 is limited to ninety days. In addition, G.L. c. 60, § 98 restricts the time period during which an action can be brought to recover allegedly excessive taxes to three months after payment thereof. Clearly, Janet is precluded from seeking relief under those statutes due to the passage of time.

The ANR endorsement did *not* effect the title to the cottage parcel. Janet and Carol became owners when their mother passed away, even though *record ownership* remained in their mother, Marie F. Kerruish. The endorsement and recording of the plan did not have the effect of a deed. The certificate of title of the *registered* bog parcel has been changed and put into the names of Carol and Janet by the issuance of an order by this court pursuant to G.L. c. 185. Title to the *unregistered* parcels will be, or has been, changed by the probate proceedings. The ANR plan had no effect on record title. It merely changed the configuration of the cottage parcel, title to which had already passed by operation of law.

Are Janet's claims time-barred by laches and statutes of limitation?

The municipal defendants and the Jozus defendants contend that Janet's claims have been filed much too late, both because they are being raised long after applicable statutes of limitation have expired, and because she is guilty of laches. This court agrees.

Any challenge to the validity of the endorsement of an ANR plan, whether brought as a declaratory judgment action or as a claim for injunctive relief, is an appeal in the nature of *certiorari. Stefanick v. Planning Board of Uxbridge*, 39 Mass.App.Ct. 418, 425 (1995), FAR Denied 422 Mass. 1104 (1996). As a result, under the terms of G.L.c. 249, § 4, any such claim must be brought within sixty days of the endorsement of the plan. *Id.* The *Stefanick* Court noted that, “as a practical matter,” sixty days to claim a right of review from a plan's endorsement does not count very much because of the probability that one who might want to appeal wouldn't even know about the endorsement until it was too late. Nevertheless, the Court determined that it was a matter with which the legislature ought to deal, not the Court. In the present case, *eighteen years* passed before Morgan commenced this action. It is the opinion of this court that it is much too late. One cannot fashion a complaint as one seeking a “declaratory judgment” in order to avoid statutes of limitation underlying certain claims. *Iodice v. Newton*, 397 Mass. 329, 333 (1986); *Stefanick* 39 Mass.App.Ct. at 423.

Defendants also claim that Morgan's complaint is barred by the doctrine of laches. “It is well established that laches does not operate to bar a claim simply because the events which established rights in the plaintiff occurred long ago.” *West Broadway Task Force v. Boston Housing Authority*, 414 Mass. 394, 400 (1993). “Laches is not just mere delay, [however] it is delay that works disadvantage to another.” *A.W. Chesterton Co. v. Mass. Insurers Insolvency Fund*, 445 Mass. 502, 518 (2005). Whether laches has been established is a question of fact. The present action was commenced by Janet Morgan *eighteen years* after the ANR plan submitted to the planning board by Ivar was endorsed and recorded. Janet and Carol may not have known the intricacies of what Ivar was doing when he caused the plan to be prepared, endorsed and recorded. However, they both knew that he, in his capacity as executor, had become aware that the town was in the process of making changes to the zoning by-laws and that he considered it to be an “emergency” situation requiring that steps be taken immediately to protect the cottage parcel and the “registered bog parcel” from the zoning change.

In short, for the doctrine of “laches” to apply, there must be delay, “reasonable reliance,” and damage caused by the delay. Here, there was delay because Janet waited eighteen years before bringing this action. She did not file a notice of appeal, as she could have under the provisions of G.L. c.. 41, § 81BB. Carol and Ivar relied on the fact that the plan had been endorsed and recorded. As to damage suffered by them, they labored under the reasonable belief that the lot had been divided into two buildable lots, a matter which greatly increased its value. This court therefore concludes that the action (or rather “inaction”) on the part of Janet Morgan constitutes laches.

This dispute has been in litigation in various courts for several years. The Appeals Court has issued its decision, and the Supreme Judicial Court has denied an application for further appellate review. In the opinion of this court, the parties should return to the Barnstable Probate Court and conclude the partition proceedings.

One other matter deserves discussion. Ivar A. Jozus resigned as Executor of the Estate of Marie F. Kerruish in 1992. By Decree dated December 3, 1992, the Connecticut Probate Court accepted the resignation subject to the approval of his final administration account. A hearing on that account was held on March 16, 1993. After deferring a ruling on the account in the hope that the parties could resolve the ongoing dispute, Judge Richard J. Guliani of that Court entered a decision on March 15, 1995. In his decision, the Court found that Ivar had delayed paying certain taxes and had left some estate funds in non-interest paying accounts, thus costing the estate. The Court also found that Ivar improperly spent estate funds to divide the property in Massachusetts without first obtaining permission from the Probate Court or, at a minimum, first obtaining the assent of all of the heirs. The Court also found that the executor had been at fault in delaying the filing of ancillary probate proceedings in Massachusetts. As a result of these findings, the newly appointed administrator d.b.n.c.t.a of the estate was ordered to pay Janet Morgan $15,000 from the funds of the estate, Mr. Jozus was surcharged and ordered to reimburse the estate a total sum of $18,840.05, and his fee as executor was allowed to the extent of $6,000 and disallowed to the extent of $12,000.

Not surprisingly, the parties disagree as to the effect of Judge Guliani's order. Janet argues that the "improprieties" and "misconduct" of Ivar apply to and include his "unauthorized" efforts to have the Planning Board endorse the ANR plan. She reads Judge Guliani's decision as a ruling that Ivar's actions were illegal. This court does not interpret it that way. In the opinion of this court, Ivar's "transgressions," while unfortunate, do not amount to proof or evidence that he committed or was guilty of forgery, fraud, deceit, or any similar offense. Judge Guliani did not say that Ivar was wrong in obtaining the plan and having it endorsed. Rather, his decision seems to be based on the fact that Ivar spent estate funds without obtaining prior assent to his doing so from one or both Probate Courts, or from the two owners. I note that his Decision used the word "unauthorized" as opposed, for example, to "illegal" or "unlawful." I note also that Ivar's "punishment" was that his fee as executor was decreased and he was, in effect, required to reimburse the estate for the cost of the ANR plan.

Conclusion

I find and rule that the acts of Ivar A. Jozus, Executor of the Estate of Marie F. Kerruish, in effectuating the preparation, endorsement, and recording of the ANR plan which divided the cottage parcel into two lots were authorized, and that the Planning Board did not err in endorsing it. I also find and rule that the time during which Janet K. Morgan could have appealed from these acts pursuant to relevant statutes of limitations and the doctrine of *laches* has long since expired, as has the time during which she could have sought the return of purportedly excessive real estate taxes or sought reassessment of the property. Plaintiff's motion for summary judgment is therefore denied while the motion of the municipal defendants for judgment on the pleadings, construed by the court as a motion for summary judgment, is allowed.

Judgment to enter accordingly.

Mass.Land Ct.,2008.
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Not Reported in N.E.2d, 2008 WL 888452 (Mass.Land Ct.)