

79 Mass.App.Ct. 1120

Unpublished Disposition

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Appeals Court of Massachusetts.

John M. KOSTICK

v.

FORT HILL COMMUNITY¹ & others.²

No. 10-P-1294.

|

May 23, 2011.

By the Court (MILLS, BROWN & WOLOHOJIAN, JJ.).

*MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28*

*1 The plaintiff, John M. Kostick, brought a Superior Court action for breach of trust, breach of fiduciary duty, an accounting, and a declaratory judgment against the Fort Hill Community (Fort Hill), the United Illuminating Realty Trust (the trust), and several trustees (collectively, the defendants). On the defendants' motion, the judge dismissed Kostick's complaint pursuant to [Mass.R.Civ.P. 12\(b\)\(6\)](#), 365 Mass. 754 (1974). Kostick appeals. We reverse and remand.

1. *Background.* We recite the facts as pleaded by Kostick.³ Fort Hill is a commune founded in the 1960's by Melvin Lyman. In 1969, Lyman and four others established the trust. Since then, Fort Hill has engaged in several high-

yield real estate development projects, earning substantial revenue. The trust controls and manages these proceeds.

At all relevant times, the trust was governed by the December, 1970, restated declaration of trust (the declaration).⁴ The declaration names all Fort Hill members as equal beneficiaries and commands the trustees to "pay to the beneficiaries the net income or such portion as the trustees shall deem advisable." Fort Hill members remain so "unless said member either ceases living with the other members of [Fort Hill] ... or unless said member is deprived of membership by a four-fifths (4/5) vote of the Trustees then in office." A person who ceases to be a Fort Hill member through either of these two mechanisms is "not ... entitled to any compensation or share of the trust assets upon ceasing to be a member and beneficiary hereunder."

Kostick became a Fort Hill member in or about 1971. He lived in Fort Hill until 1993. As changes in the Fort Hill community dynamic began to disturb Kostick, he challenged Fort Hill's leadership. His relationship with the trustees and other leaders deteriorated. Kostick left the Fort Hill premises involuntarily and without a four-fifths vote of the trustees to expel him.⁵

Sometime in 2007 or 2008, other Fort Hill members received distributions from the trust. On or about November 25, 2008, Kostick made demand for his beneficial interest in the trust. The trustees rejected his demand on or about December 18, 2008. Kostick filed this action in Superior Court on February 12, 2009. On motion of the defendants, the judge dismissed Kostick's complaint pursuant to [rule 12\(b\)\(6\)](#). In a thoughtful memorandum of decision, the judge reasoned that Kostick was no longer a Fort Hill member and, even if he were, the declaration's terms do not entitle members to an aliquot share of the trust.

Between the judge's decision to dismiss Kostick's complaint and the entry of judgment, Kostick moved to amend and presented a proposed amended complaint. Judgment then entered on September 28, 2009. Upon a postjudgment motion, the judge reopened the matter, considered the proposed amendments, and denied the motion. In a second thoughtful memorandum of decision, the judge reasoned that the amended complaint, although successfully pleading facts showing an involuntary departure from Fort Hill, nevertheless failed to state a

claim both because the declaration's terms created no right to an aliquot share and because the statute of limitations, which began running when Fort Hill ejected Kostick, barred his claims. Judgment subsequently “re-entered,” and this appeal followed.

*2 2. *Standard of review.* We review de novo the allowance of a motion to dismiss under [rule 12\(b\)\(6\)](#). *Okerman v. VA Software Corp.*, 69 Mass.App.Ct. 771, 774 (2007). To survive such a motion, a plaintiff must plead factual “allegations plausibly suggesting (not merely consistent with) an entitlement to relief.” *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (citation omitted).

3. *Discussion.* a. *Statute of limitations.* Kostick argues that his claims are not barred by the statute of limitations, [G.L. c. 260, § 2A](#). We agree.

“[A] cause of action [arising out of a breach of trust or fiduciary duty] does not accrue until the trustee repudiates the trust *and* the beneficiary has actual knowledge of that repudiation.” *Demoulas v. Demoulas Super Mkts., Inc.*, 424 Mass. 501, 518 (1997). Here, Kostick pleaded that, because he left Fort Hill involuntarily and without the trustees removing him from Fort Hill as prescribed by the declaration, he remained a Fort Hill member when he made demand for his beneficial interest in the trust in November, 2008. Taking these facts as true, as we must, the trustees did not repudiate the trust as to Kostick until they rejected his demand in December, 2008. Kostick therefore timely brought his claims.

b. *Right to trust share.* Kostick argues that the declaration entitles him to compensation in some form to be determined after further proceedings. We agree. Because

Kostick adequately pleaded that he remained a Fort Hill member until the trustees rejected his demand for his beneficial interest in December, 2008, his right to a beneficial interest and the composition of such an interest⁶ are matters for discovery and further litigation, not a basis for [rule 12\(b\)\(6\)](#) dismissal.

c. *Motion to amend complaint.* We construe the judge's decision to deny Kostick's motion to amend as based on the perceived futility of the amendment. Because we conclude that Kostick's original complaint adequately stated a cause of action, it follows that the more detailed proposed amended complaint also stated a claim and that the amendment was not futile.

d. *Declaratory judgment.* Although the September 28, 2009, judgment included a declaration that Kostick was not entitled to an aliquot share of the trust, a declaration of the rights of the parties was not included in the “reentry” of judgment, entered on the docket on April 12, 2010.⁷ To the extent that a declaratory judgment is in place, it also cannot stand.

4. *Conclusion.* We reverse the “reentry” of judgment entered on April 12, 2010. We also reverse the order denying Kostick's motion to amend and a new order shall enter allowing the motion. The matter is remanded for further consistent proceedings.

So ordered.

All Citations

79 Mass.App.Ct. 1120, 947 N.E.2d 109 (Table), 2011 WL 1938316

Footnotes

- 1 Also known as Fort Hill Associates and the United Illuminating Community.
- 2 The United Illuminating Realty Trust, and Jessie Benton, George Peper, Richard Guerin, Joseph Goldfarb, Mark Spector, Geoffrey Dewan, James Kweskin, and Kathryn Guerin, in their capacities as trustees of the United Illuminating Realty Trust.
- 3 As discussed, *infra*, Kostick proposed to amend his complaint after the judge allowed the defendants' motion, but before entry of final judgment. We consider the facts pleaded in the original complaint, except as indicated.
- 4 The judge properly considered the declaration on the defendants' motion. See *Schaer v. Brandeis Univ.*, 432 Mass. 474, 477 (2000).
- 5 Kostick pleaded more detailed factual allegations about the circumstances of his departure in his proposed amended complaint. In particular, he pleaded that one night in 1993, some Fort Hill members, led by one of the trustees at that

time, awakened Kostick and ordered him to leave, and that another trustee locked Kostick out of his residence area and prevented him from removing his personal effects.

6 The judge concluded that the declaration entitles Kostick to income and residential benefits. Because Kostick pleaded sufficient facts to establish an entitlement to such benefits, he may maintain this action even if it subsequently is determined that the declaration does not entitle him to an aliquot share of the trust assets.

7 The judge, however, stated in his memorandum that the “prior declaration” is to be “re-entered.”

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