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Re: Providence Creek Academy Charter School, Inc. v.
Saint Joseph's at Providence Creek, et al.
C.A. No. 1210-K
Date Submitted: October 28, 2005

Dear Counsel:

Defendant Saint Joseph's at Providence Creek has moved, under 25 *Del.C.* § 1608, for cancellation of the notice of *lis pendens* lodged by Plaintiff Providence Creek Academy Charter School, Inc. against 300 acres of land it owns near Clayton, Delaware. The Plaintiff contends that it is a joint venturer with the

Defendant and, because of that status, has rights in those lands in the nature of a resulting trust. It contends that the lands should be equitably divided.

The Court's inquiry is whether, based on the affidavits before it, there is a probability that final judgment will be entered in favor of the Plaintiff. The burden of demonstrating such probability is on the Plaintiff.[1]

The Defendant also contends that the notice of *lis pendens* is deficient under 25 *Del.C.* § 1601(a)(3) because it does not provide a sufficient legal description to identify the property affected. The notice identifies a 300-acres parcel by tax map number and by deed reference with a copy of the deed attached. The property subject to the notice is clearly identified. The core of Defendant's argument is that the Plaintiff has no claim at all to much of the lands; that as to those lands as to which there may be some dispute, they are but a minor fraction of the overall tract and, as to those lands, there is simply no probability of success.

The Court has addressed the Plaintiff's claims in the context of denying a motion to dismiss the complaint.[2] Although sufficient to survive—barely as the

[1] 25 *Del.C.* § 1608. *See, e.g., River Enters., L.L.C. v. Tamari Properties, L.L.C.*, 2005 WL 356823 (Del. Ch. Feb. 15, 2005).
[2] 2005 WL 2266490 (Del. Ch. Sept. 9, 2005). The letter opinion describes the nature of the dispute in greater detail.

letter opinion fairly reflects—the Complaint here, as amplified by several affidavits, fails to demonstrate a probability or likelihood of success.

In order to prevail, the Plaintiff must ultimately be able to show the existence of a joint venture between it and the Defendant. The relationship between the parties was established by a written lease that has been amended almost twenty times.[3] At the outset, the parties expressly recited that they were not engaged in a joint venture.[4] None of the numerous amendments suggests a joint venture. All refer to the parties as landlord and tenant. If there were a joint venture, one would anticipate that the extensive documentation would somehow reflect the change in status. Moreover, none of the Defendant's actions as landlord is necessarily inconsistent with that status. Landlords are frequently supportive of tenants; sometimes, they pursue the same objectives, an event even more likely here because the parties are charitable organizations that share a common goal. Charities sharing common goals do not simply become joint venturers because they have acted in concert in furthering a common purpose.

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[3] Defs.' Opening Br. in Supp. of Their Mot. to Dismiss, Ex. A ("Lease Agreement").
[4] *Id*. at 16. Section X(4) of the Lease states: "No Partnership. Landlord does not in any way or for any purpose, become a partner of Tenant in conduct of its business, or otherwise, or joint venturer or a member of a joint enterprise with Tenant." *Id*.

At issue is title to a large and valuable tract of land. Plaintiff's efforts to acquire title to, or an interest in, the lands implicates the statute of frauds. As noted, not only is there no writing supporting the Plaintiff's claim to the existence of a joint venture or the contribution by Defendant of the real estate to the joint venture, but the writings, as they exist in a fairly extensive fashion, are inconsistent with the notion of a joint venture.

There are, to be sure, various statements, some in writing, which could be viewed as consistent with the existence of a joint venture. They are, however, informal and, in large part, aspirational. For example, a grand development plan with a layout for substantial future construction was prepared by an engineering firm.[5] It was never adopted by Defendant and is best viewed, on the present record, as an indication of what might have been, not what the Defendant has committed to develop. More specifically, it does not provide a basis for determining that the subject real estate has been dedicated to a joint venture.[6]

The Plaintiff has submitted an excerpt from an October 28, 2002, board meeting that suggests a merger of "[Plaintiff] Providence Creek Academy into the

[5] *See* Aff. of David Evans and Ex. A annexed thereto.
[6] The Plaintiff has offered no grounds to support the placing of a notice of *lis pendens* against the entire 300-acre tract. Even if the Plaintiff had met its burden under 25 *Del.C.* § 1608 as to some of the Defendant's lands, it would still be necessary to reduce the area subject to the notice.

existing organization of [Defendant] Saint Joseph's Project Foundation."[7] The minutes, by themselves, demonstrate little. If anything, they would suggest that control of the school was ceded to one of the Defendants in this action, thereby raising an interesting question as to the Plaintiff's capacity to pursue this action.

This dispute is indeed an unfortunate one. I accept that there are individuals on Plaintiff's side of this dispute who honestly believe that they have been betrayed; that their shared dreams have been frustrated. The parties had counsel; they have a written agreement; they have amended it many times; the writings simply do not support the Plaintiff's claim. The extrinsic facts are, at best from the Plaintiff's standpoint, ambiguous. Even though this matter involves charities, the Court cannot change the law of real estate, the law of contracts, and the statute of frauds to facilitate Plaintiff's goals, however admirable they may be.

Accordingly, the notice of *lis pendens* will be canceled. An order to that effect will be entered.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

[7] Letter of John S. Grady, Esq., dated October 26, 2005 (attachment).