18-P-818 Appeals Court

ZARINA BRAXTON, trustee,[1] vs. CITY OF BOSTON.

No. 18-P-818.

Suffolk. July 12, 2019. - December 16, 2019.

Present: Henry, Sacks, & Ditkoff, JJ.

Unauthorized Practice of Law. Trust. Practice, Civil, Notice of appeal, Dismissal, Standing, Party pro se. Easement. Real Property, Easement.

Civil action commenced in the Land Court Department on June 9, 2017.

The case was heard by Michael D. Vhay, J., and a motion for relief from judgment was considered by him.

The case was submitted on briefs.
Donald C. Kupperstein for the plaintiff.
George T. Bahnan, Assistant Corporation Counsel, for the defendant.

DITKOFF, J. The plaintiff, Zarina Braxton, as trustee of the Twenty Seven Walnut Street Realty Trust (trust),[2] filed a

[1] Of the Twenty Seven Walnut Street Realty Trust.

[2] The record before us does not reflect whether the trust is a nominee trust. See Goodwill Enters., Inc. v. Kavanagh, 95

notice of appeal pro se from a judgment issued by a Land Court judge in favor of the defendant, the city of Boston (city), dismissing her complaint claiming that the trust enjoyed a prescriptive easement over a parcel of land owned by the city. She also filed a notice of appeal pro se from the order denying her motion for relief from that judgment. We conclude that the trustee, who is not an attorney and is not a beneficiary of the trust, may not represent the trust in court pro se. Nonetheless, we conclude that a notice of appeal filed by such a trustee pro se provides us with authority to entertain the appeal, provided that counsel promptly assumes prosecution of the appeal. As counsel filed all pleadings and the brief in this court, we have the authority to adjudicate the appeal. Concluding that the judge properly dismissed the trust's complaint with prejudice, we affirm the judgment and the order denying the motion for relief from judgment.

1. Background. Represented by counsel, the trust filed a complaint alleging that property located at 27 Walnut Street in the Hyde Park section of the city (property) was entitled to a prescriptive easement over a portion of the city's adjoining

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Mass. App. Ct. 856, 858 (2019) (describing features of nominee trust). Nothing here turns on that question.

parcel.[3] The city moved to dismiss the trust's complaint for lack of standing, alleging that the trust did not actually own the property. The trust presented a notarized, recorded deed purporting to show a transfer of title to the trust's predecessor in the chain of title, and the city responded with an affidavit from the person who purportedly signed the deed, denying ever doing so. At trial, after hearing from the notary that the transaction was not in her log book and did not appear to be her work, the judge concluded that the deed in question was forged and therefore void. Moreover, the judge found that the trust's attorney, Donald Kupperstein, was aware that the deed was forged and, in fact, apparently drafted the forged deed himself. The judge issued a judgment in favor of the city, dismissed the plaintiff's complaint with prejudice, declared that the forged deed did not convey title to the property, and ordered that an attested copy of his order be recorded at the registry of deeds.[4]

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[3] Because the city's parcel was seized in a tax taking, it is possible that it is not protected from prescription by G. L. c. 260, § 31. See generally 1148 Davol Street LLC v. Mill One LLC, 86 Mass. App. Ct. 748, 752-753 & n.7 (2014) (describing law concerning prescriptive rights over land owned by municipalities). The Land Court judge did not reach this issue, and neither do we.

[4] The judge also informed the Board of Bar Overseers and the district attorney's office of these findings.

Attorney Kupperstein did not withdraw from the case but nonetheless made no further filing in the Land Court. Instead, the trustee filed pro se a notice of appeal. The trustee simultaneously filed pro se a motion for relief from judgment pursuant to Mass. R. Civ. P. 60 (b) (4), 365 Mass. 828 (1974).[5] The judge denied the motion without prejudice, on the ground that the trustee, who was not an attorney, could not represent the trust. Three days later, a new attorney filed a notice of appearance in the Land Court on behalf of the trust. Nonetheless, three days after that, the trustee filed pro se a notice of appeal from the denial of the motion. Unlike her notice of appeal from the judgment, this notice stated that the "[t]rust shall be represented by counsel in the appeal."[6]

The Land Court's notice of assembly of the record properly listed both of the trust's attorneys, as neither had withdrawn.

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[5] The rule 60 (b) motion was not served within ten days and thus neither extended the time to file a notice of appeal nor rendered the notice of appeal ineffective. Mass. R. A. P. 4 (a), as amended, 464 Mass. 1601 (2013). The motion was filed in April 2018. The Massachusetts Rules of Appellate Procedure were wholly revised, effective March 1, 2019. See Reporter's Notes to Rule 1, Mass. Ann. Laws Court Rules, Rules of Appellate Procedure, at 466 (LexisNexis 2019). The substantive requirements of Mass. R. A. P. 4 (a) are unchanged. See Mass. R. A. P. 4 (a), as appearing in 481 Mass. 1606 (2019).

[6] The second notice of appeal neither was dated nor included a certificate of service. Accordingly, we do not know whether it was drafted and mailed to the court before new counsel appeared.

It also listed the pro se trustee, presumably because she had filed the two notices of appeal pro se. The trustee promptly paid the docketing fee, and our clerk's office identified both attorneys as active counsel of record for the trust.[7] Within two weeks of entry of the appeal, Attorney Kupperstein filed the docketing statement. He timely filed a motion to enlarge the time to file a brief, the brief, and the appendix.[8]

2. Notice of appeal. a. Representation of a trust. "Plainly the commencement and prosecution for another of legal proceedings in court, and the advocacy for another of a cause before a court . . . are reserved exclusively for members of the bar." LAS Collection Mgt. v. Pagan, 447 Mass. 847, 849-850 (2006), quoting Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 183 (1943). "There is no injustice in allowing natural persons to appear pro se, while requiring persons who accept the advantages of incorporation to bear the burden of hiring counsel to sue or defend in court." Varney Enters., Inc. v. WMF, Inc., 402 Mass.

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[7] These events occurred in May and June 2018, before the 2019 amendments to the Massachusetts Rules of Appellate Procedure. Rule 10 (d) of the Massachusetts Rules of Appellate Procedure, as appearing in 481 Mass. 1620 (2019), now specifies that, "[i]n all cases, any counsel who does not intend to continue representing a client on appeal, for any reason, should file a motion to withdraw his or her appearance in the lower court as soon as is practicable."

[8] The case was scheduled the case for oral argument, but both parties waived argument.

79, 82 (1988). Accordingly, no individual may represent corporations or "other parties in civil actions . . . without a license to practice law." Burnham v. Justices of the Superior Court, 439 Mass. 1018, 1018 (2003). Similarly, only an attorney may represent limited liability companies in court, because "limited liability companies, like Massachusetts business corporations, are legal entities with the rights to sue and be sued separate and apart from their shareholders and members." Dickey v. Inspectional Servs. Dep't of Boston, 482 Mass. 1003, 1004 (2019).

The same reasoning applies to trusts. A trust is a legal entity with separate rights and responsibilities, and individuals who accept the advantages of the trust form must bear the burdens of that form as well. Otherwise, any nonattorney could evade the restrictions on the practice of law merely by having the locus of a cause of action transferred to a trust and then becoming a trustee of that trust. The Supreme Judicial Court, however, has held that one "cannot change this well-established rule by contract." Driscoll v. T.R. White Co., 441 Mass. 1009, 1010 (2004). Accordingly, the Supreme Judicial Court has "caution[ed] [trustees] against acting without an attorney in legal proceedings involving the real estate trusts." Kitras v. Zoning Adm'r of Aquinnah, 453 Mass. 245, 250 n.14 (2009). Following that caution, we hold that a nonattorney

trustee who is not a beneficiary may not represent a trust in legal proceedings.[9]

b. Consequence of a notice of appeal for a trust filed pro se. Having determined that the nonattorney trustee was not permitted to represent the trust, we are faced with the question whether the notice of appeal, filed pro se by the trustee, was adequate to provide us with subject matter jurisdiction. In the analogous context of notices of appeal filed pro se by nonattorney corporate officers, the vast majority of courts to have considered the issue adhere to the rule "that a corporate officer may sign and file a notice of appeal on behalf of the corporation, as long as the corporation then promptly retains counsel to take up the cudgels and prosecute the appeal." Instituto de Educacion Universal Corp. v. United States Dep't of Educ., 209 F.3d 18, 22 (1st Cir. 2000). Accord Harrison v. Wahatoyas, L.L.C., 253 F.3d 552, 557 (10th Cir. 2001); Bigelow v. Brady, 179 F.3d 1164, 1165-1166 (9th Cir. 1999); K.M.A., Inc. v. General Motors Acceptance Corp., 652 F.2d 398, 399 (5th Cir. Unit B July 1981); Boydston v. Strole Dev. Co., 193 Ariz. 47, 50-51 (1998); Mill Harbour Condominium Owner's Ass'n v.

[9] The Supreme Judicial Court has left open the possibility that the rule might be different if the trustee is a beneficiary of the trust. Kitras, 453 Mass. at 250 n.14. We need not tarry over that wrinkle, as the trustee here testified that she was not a beneficiary of the trust.

Marshall, 53 V.I. 581, 583 n.3 (2010).[10] "[A]ll subsequent motions and pleadings must be filed by counsel." D-Beam Ltd. Partnership v. Roller Derby Skates, Inc., 366 F.3d 972, 974 (9th Cir. 2004).[11]

Various reasons have been given for this lenient rule. Some courts have pointed out that "appeal periods are notoriously brief" such that "a corporate litigant whose counsel dies, becomes disabled, or withdraws at an inopportune time would be powerless to perfect an appeal." Instituto de Educacion Universal Corp., 209 F.3d at 22. Some courts rely on the distinction between a substantive pleading and "the essentially ministerial action involved in the filing of a notice of appeal." Id. Accord Harrison, 253 F.3d at 557; Bigelow, 179 F.3d at 1165. Other courts stress "the emphasis placed on flexibility and substance rather than form in the appellate rules." K.M.A., Inc., 652 F.2d at 399. The most

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[10] To be sure, the rule is not unanimous. See Midwest Home Sav. & Loan Ass'n v. Ridgewood, Inc., 123 Ill. App. 3d 1001, 1005 (1984). Cf. Telepower Communications, Inc. v. LTI Vehicle Leasing Corp., 658 So. 2d 1026, 1027 (Fla. Dist. Ct. App. 1995) (describing split among Florida appellate districts).

[11] It is worth noting that, where a case involves both corporate claims and personal claims of a corporate officer, courts presume that a notice of appeal filed pro se by the corporate officer appeals only the corporate officer's personal claims, unless the notice of appeal expressly states otherwise. See, e.g., Nocula v. UGS Corp., 520 F.3d 719, 725 (7th Cir. 2008); D-Beam Ltd. Partnership, 366 F.3d at 974.

persuasive to us, however, is the desire to avoid "the ironic result of prejudicing the constituents of the corporation, the very people sought to be protected by the rule against the unauthorized practice of law." Save Our Creeks v. Brooklyn Park, 682 N.W.2d 639, 645 (Minn. Ct. App. 2004), quoting Szteinbaum v. Kaes Inversiones y Valores, C.A., 476 So. 2d 247, 250 (Fla. Dist. Ct. App. 1985).

Although the question has never been squarely addressed in Massachusetts, we find some support for the majority rule in our cases. In Kitras, 453 Mass. at 250 n.14, the Supreme Judicial Court found the question whether it was improper for a real estate trust to be represented on appeal by a pro se trustee moot "[g]iven that the plaintiffs now are represented by counsel." That suggests that an improper pro se initiation of an appeal may be cured by the prompt retention of counsel or, as here, by the prosecution of the appeal by existing counsel of record notwithstanding the fact that counsel did not file the notice of appeal.[12]

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[12] In Lee v. Mt. Ivy Press, L.P., 63 Mass. App. Ct. 538, 560 (2005), we declined to address the appellate claims of a limited partnership where the notice of appeal had been filed by a nonattorney partner. There, however, the trial court had struck the notice of appeal, and the partnership (although represented by counsel) failed to brief the propriety of striking the notice of appeal. Id. at 559-560. Our decision, premised explicitly on waiver through failure to brief the issue, id. at 560, was not a substantive decision on the viability of such notices of appeal.

Accordingly, we adopt the majority rule and hold that a notice of appeal filed by a pro se trustee or corporate officer on behalf of a trust, corporation, or similar legal entity is adequate to allow an appeal to proceed in this court, so long as an attorney promptly files an appearance and prosecutes the appeal or existing counsel of record prosecutes the appeal. In the future, should (unlike here) an unrepresented trustee, corporate officer, or officer of a similar legal entity file a notice of appeal pro se, the clerk of our court should (and trial court clerks may) issue an order to the unrepresented party allowing the party thirty days, or some additional reasonable time to be determined by the court, to obtain counsel, and the appeal should be dismissed by a panel (or trial court judge) if counsel does not appear within that time. See Lewis v. Lenc-Smith Mfg. Co., 784 F.2d 829, 831 (7th Cir. 1986); K.M.A., Inc., 652 F.2d at 399.

Here, the trustee was without authority to file the notice of appeal pro se. Nonetheless, existing counsel promptly resumed representation of the trust in this case, and all pleadings and the brief and appendix were filed by counsel. As such, the appeal is properly before us.

3. Standing to bring a prescriptive easement claim. The trust raises no appellate issue concerning the Land Court judge's finding that the trust lacked an ownership interest in

the property. Rather, the trust argues only that the judge should have dismissed the trust's claim without prejudice, instead of with prejudice. We disagree.

Courts in the Commonwealth always "have both the power and the obligation to resolve questions of subject matter jurisdiction whenever they become apparent." Adoption of Anisha, 89 Mass. App. Ct. 822, 827 n.6 (2016), quoting Nature Church v. Assessors of Belchertown, 384 Mass. 811, 812 (1981). "Subject matter jurisdiction cannot be conferred by consent, conduct or waiver." Rental Prop. Mgt. Servs. v. Hatcher, 479 Mass. 542, 547 (2018), quoting Litton Business Sys., Inc. v. Commissioner of Revenue, 383 Mass. 619, 622 (1981).

"Because '[t]he issue of "standing" is closely related to the question whether an "actual controversy" exists, . . . we have treated it as an issue of subject matter jurisdiction.'" Phone Recovery Servs., LLC v. Verizon of New England, Inc., 480 Mass. 224, 227 (2018), quoting Doe v. Governor, 381 Mass. 702, 705 (1980). "Although dismissals for lack of subject matter jurisdiction are ordinarily without prejudice because they typically do not involve an adjudication on the merits, in cases where a lack of standing is also fatal to the merits of the plaintiff's claim, as here, dismissal must be with prejudice." Rental Prop. Mgt Servs., 479 Mass. at 547 (affirming dismissal with prejudice of summary process action where plaintiff did not

own or lease property). Accord Abate v. Fremont Inv. & Loan, 470 Mass. 821, 828, 836 (2015) (where court lacked subject matter jurisdiction over plaintiff's try title action because plaintiff had no record title, "dismissal with prejudice was proper").

The trust's claim relied on asserting the rights associated with the property over the city's abutting lot. An easement can be claimed as an appurtenance by prescription when the "use permitted by the easement must be such as really to benefit its owner as the possessor of that tract of land." Denardo v. Stanton, 74 Mass. App. Ct. 358, 361 (2009), quoting Restatement of Property § 453 & comment b (1944). The Land Court judge found that the trust was not the owner and, therefore, had no rights in the property. Because the trust's lack of standing is fatal to its claim on the merits, the judge properly dismissed the claim with prejudice.

4. Conclusion. The judgment and the order denying the motion for relief from judgment are affirmed.

So ordered.