

**The Roman Catholic Diocese of Brooklyn, N.Y. v
Christ the King Regional High School**

2014 NY Slip Op 32389(U)

August 21, 2014

Supreme Court, Queens County

Docket Number: 704996/2013

Judge: Marguerite A. Grays

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at the same location. Pursuant to the deed, the subject premises was granted and released to defendant “[to have and to hold] ... so long as the grantee continues the operation of a Roman Catholic High School upon the premises described herein, upon the cessation of which all right, title and interest herein conveyed shall revert to the grantor, or its successor.” The agreement executed simultaneously with the deed contained this same language creating a possibility of reverter. In addition, the agreement contained a separate provision stating that defendant “shall maintain and operate a Catholic high school in and upon the entire premises herein described and shall use the same for no other purpose not customarily or usually associated with such use.” A subsequent paragraph again provided that in the event defendant “shall, for any reason, cease so to operate said high school, title to the premises herein described shall automatically revert to [plaintiff] without further action on its part.”

Contrary to movant’s contention, this action does not seek a declaration that defendant is required to reconvey the subject property to plaintiff at this time. It is undisputed that defendant currently continues to operate a Catholic high school on the site. Rather, the complaint alleges that defendant has notified plaintiff that it considers the agreement unenforceable and no longer binding, and demands judgment declaring that defendant’s obligation under the 1976 agreement to reconvey the property to plaintiff in the event defendant ceases to operate a Catholic high school thereon is valid, enforceable and binding. The complaint also alleges that defendant breached the part of the agreement wherein it agreed to use the premises for no other purpose than the operation of a Catholic high school by leasing a substantial portion of the property to Middle Village Preparatory Charter School (MVP) for use as a non-sectarian charter middle school. On this basis, the complaint also seeks a judgment declaring that a lease of any portion of the property for a use other than as a Roman Catholic High School is a breach of contract.

On this motion, defendant contends that plaintiff’s causes of action are insufficient as a matter of law because the condition subsequent requiring the continued operation of a Catholic high school on the property and the possibility of reverter created thereby has been extinguished by operation of law due to plaintiff’s failure to record a declaration of intention to preserve the restriction within the time specified therefor in Real Property Law § 345. The initial declaration of intention necessary to preserve the condition subsequent and possibility of reverter created in 1976 was required to be recorded no more than 30 years thereafter. (Real Property Law § 345[4].)

Plaintiff concedes that it failed to record a declaration in accordance with section 345 and does not seek the recognition of any rights derived from the reverter set forth in the deed, which it implicitly admits has been extinguished, but argues that section 345 does not affect the possibility of reverter contained in the parties’ agreement. In support of its position that its first cause of action is, therefore, viable, plaintiff relies upon Real Property Law § 345(9).

Plaintiff also asserts that section 345 is not applicable to the provision in the agreement restricting the use of the property to the operation of a Catholic high school that is the subject of its second cause of action.

There is nothing in the language of section 345 which limits its effect to reverters found in deeds. Furthermore, the declaration necessary to preserve a restriction must include a reference “to the instrument creating the condition subsequent or special limitation by which the restriction is imposed” or, if there was no written instrument, “to the transaction by which it was created.” (Real Property Law § 345[3][e].) It must be inferred from this provision that section 345 encompasses conditions subsequent imposing restrictions on the use of land that create a possibility of reverter regardless of the manner in which they came into being. Subdivision 9 of section 345 does not except a possibility of reverter contained in an agreement between the parties from extinguishment. Pursuant to subdivision 9, the extinguishment of a condition subsequent and possibility of reverter created thereby shall not affect the power of any person “to enforce the same restriction by action for damages or for an injunction to the extent that it is also imposed by covenant, promise or negative easement.” This provision does not, as plaintiff contends, exclude a condition subsequent and possibility of reverter contained in an agreement rather than a deed from the extinguishment mandated by section 345 upon the failure to timely file a declaration of intention to preserve it, but merely allows for the enforcement of the restriction underlying the possibility of reverter by an action for damages or injunctive relief when that same restriction is also imposed by a separate covenant or promise.

Accordingly, the first cause of action is subject to dismissal as a matter of law, and the motion is granted to the extent that it is declared that the condition subsequent in the 1976 agreement that provides for a reverter should defendant not continue to operate a Catholic high school upon the premises has been extinguished pursuant to Real Property Law § 345 and defendant’s obligation under the agreement to reconvey the property to plaintiff in the event defendant ceases to operate a Catholic high school thereon is unenforceable.

In all other respects, the motion is denied. The facts alleged in the second cause of action state a cognizable cause of action (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]), and the documentary evidence offered by defendant does not conclusively establish a defense thereto as a matter of law. (*See Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002].) The provision in the 1976 agreement restricting defendant from using any portion of the premises for any purpose other than one customarily or usually associated with the operation of a Catholic high school creates a restriction on use without a reversionary right that is distinct from the condition subsequent and possibility of reverter obligating defendant to reconvey the property to plaintiff should defendant cease to operate a Catholic high school. (*Cf. Stonegate Family Holdings, Inc. v Revolutionary Trails,*

Inc., 73 AD3d 1257, 1259 [2010].) As such, the second cause of action is not barred by Real Property Law § 345.

Nor can it be said as a matter of law at this juncture that the doctrine of merger defeats the second cause of action. Claims arising from a contract of sale will be extinguished by the doctrine of merger once title to the property has closed and the deed has been delivered unless the parties evidenced their intent that a particular provision of the contract of sale would survive the delivery of the deed. (See *Bibbo v 31-30, LLC*, 105 AD3d 791 [2013]; *Novelty Crystal Corp. v PSA Institutional Partners, L.P.*, 49 AD3d 113, 115 [2008]; *Ka Foon Lo v Curis*, 29 AD3d 525, 526 [2006].) In view of the language of the agreement showing the parties' purposes in entering into the agreement, and considering that the obligation at issue could only be performed after the closing of title and that the agreement was executed the same date as the deed, the documentary evidence proffered does not demonstrate the absence of issues of fact as to whether the parties intended the use restriction to survive the closing.

The evidence is also insufficient to conclusively establish that plaintiff waived its right to enforce the use restriction or should be estopped from enforcing it due to its alleged failure to object to defendant's prior violations. Waiver, a voluntary abandonment or relinquishment of a known right, is a matter of intent, which must be proved. (See *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgmt., L.P.*, 7 NY3d 96, 104 [2006]; *Jespaul Garage Corp. v Presbyterian Hosp. in City of N.Y.*, 61 NY2d 442, 446 [1984].) In this instance, the record does not permit a departure from the general rule that the existence of an intent to forego a known right is a question of fact. (*Id.*) Estoppel requires evidence that a party justifiably relied on the other party's words or conduct to its disadvantage, being misled into acting by a belief that the other party would not seek enforcement of its rights. (See *Fundamental Portfolio Advisors, Inc.*, 7 NY3d at 106; *Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 184 [1982].) This essential element to the imposition of an estoppel preventing the enforcement of contractual rights is not satisfied merely by showing that plaintiff did not act to enforce the use restriction upon previous, different breaches thereof by defendant. (See *e.g. Garber v Stevens*, 94 AD3d 426, 427 [2012]; *EchoStar Satellite L.L.C. v ESPN, Inc.*, 79 AD3d 614, 617 [2010].)


Although the notice of motion herein does not seek dismissal based upon the statute of limitations (CPLR 3211[a][5]), the parties have fully addressed the issue and the court will consider it. Inasmuch as the remaining cause of action does not seek to recover possession of real property and is not founded upon a claim of reverter or breach of a condition subsequent, RPAPL 612 does not govern the time within which this cause of action had to be interposed. (*Cf. People v Avilas, Inc.*, 29 AD3d 764 [2006].) Rather, the controlling limitations period is the six-year statute of limitations applicable to contract actions.

(CPLR 213[2].) Where a contract contains a continuing obligation or provides for continuing performance over a period of time, a claim accrues each time the agreement is allegedly breached. (See *New York Cent. Mut. Fire Ins. Co. v Glider Oil Co., Inc.*, 90 AD3d 1638 [2011]; *Beller v William Penn Life Ins. Co. of N.Y.*, 8 AD3d 310 [2004]; see also *Stalis v Sugar Creek Stores, Inc.*, 295 AD2d 939 [2002].) Since plaintiff's second cause of action is predicated on defendant's alleged breach of its duty not to use the subject property for a purpose not related to the operation of a Catholic high school by leasing a portion thereof to MVP which occurred, by defendant's own accounting, no earlier than 2010, the second cause of action is not time-barred. (See *Meadowbrook Farms Homeowners Assn., Inc. v JZG Resources, Inc.*, 105 AD3d 820, 822 [2013].)

Defendant also failed to identify laches as a basis for dismissal in the notice of motion. In any event, the defense of laches is not among the defenses or other grounds recognized in CPLR 3211(a) as a proper predicate for a dismissal motion made pursuant to CPLR 3211.

Dated:

AUG 21 2015



J.S.C.