

PHILADELPHIA COURT OF COMMON PLEAS
ORPHANS' COURT DIVISION

Southern Tabernacle Missionary Baptist Church,
a Non Profit Corporation
O.C. No. 1841 NP of 2009
Control No. 093128

O P I N I O N

Introduction

The preliminary objections to a petition filed by Metro Impact, LLC raise the issue of Metro's standing to assert the principles of *cy pres* as a basis for rescinding two deeds for the sale of real property formerly owned by a church. For the reasons set forth below, Metro lacked standing to assert *cy pres* to advance its own distinct interests. The facts that emerged in the pleadings, however, may set forth an alternative legal basis for standing. The petitioner will therefore be given 20 days to file an amended petition.

Factual Background

Metro Impact, LLC ("Metro") filed a petition seeking to set aside the sale of two vacant lots to StradaUSA, LLC ("StradaUSA") on the grounds that the grantors' could not convey good title to these properties that had formerly been owned by the Southern Tabernacle Missionary Baptist Church ("Southern Tabernacle Church"). The two lots at issue are located at 1000 and 1002 South Nineteenth Street in Philadelphia. They were conveyed to StradaUSA by two deeds dated May 15, 2009 for the total price of \$120,000.¹ Metro seeks to rescind these deeds by invoking 20 Pa.C.S. § 7740.3 and the principle of *cy pres*. Metro argues that "[p]ursuant to title 20 Pa.C.S.A. Section 7740.3 (formerly Section 6100) the proceeds of sale of the two vacant lots

¹ Metro 12/2/09 Petition, ¶ 7.

formerly owned by Southern Tabernacle Missionary Baptist Church should be distributed for a charitable purpose in accordance with the doctrine of *cy pres* by order of this Honorable Court in a manner as nearly as possible to fulfill the charitable intention of the original grantor, Clara Molish.”² Metro states that it has informed the office of the Attorney General of its status as “an interested party” and attached letters by its counsel to the Attorney General. Significantly, however, Metro did not attach any letters or responses by the Attorney General.³ Moreover, according to the docket, the Attorney General has not taken any formal action in response to Metro’s petition.

As respondents, Metro named the purchaser of the property, StradaUSA, as well as Southern Tabernacle Church, stating that it “was formerly a nonprofit charitable organization located at 1000 and 1002 South Nineteenth Street”⁴ but acknowledging that “it ceased to exist many years ago.”⁵ Metro also named as respondents the three individuals listed as grantors on two May 15, 2009 deeds as the trustees for Southern Tabernacle Missionary Church: Lillian Perrin-Brodie, Raymond Barber and Sharon Barber.⁶ These three individuals, Metro asserts, presumed to be acting either as successor trustees of the church or as heirs to the original, but

² Metro 12/2/09 Petition, ¶ 14. Although Metro invokes the “charitable intention” of Clara Molish, it did not attach a copy of the August 3, 1964 deed by which she conveyed the 1000 South 19th Street lot to Aaron Barber, Reverend Bennett C. Hodges and Romey Barber, all of whom are now deceased. *Id.*, ¶ 3. Presumably, it is this deed that expresses the “charitable intentions” invoked by Metro, but the exact expression of that intent cannot be determined from the petition alone.

³ *See* Metro 12/2/09 Petition, ¶ 11. In fact, Metro actively sought to encourage the Attorney General’s office to take action in this case. By letter dated September 15, 2009, for instance, Metro advised the “Office of the Attorney General that Metro Impact, LLC will offer \$150,000 for the two lots with the understanding that the Attorney General will proceed, in accordance with the applicable law to set aside the May 15, 2009 deeds and take such action as may be appropriate to administer both properties pursuant to the doctrines of *cy pres*. Metro 12/2/09 Petition, Ex. F. A day later, Metro increased its offer purchase the property for \$190,000. *Id.*, Ex. G.

⁴ Metro 12/2/09 Petition ¶2

⁵ Metro 12/2/09 Petition ¶¶ 2 & 7.

⁶ Metro 12/2/09 Petition, ¶3 and Ex. B. Lopez Thompson, who owned a real estate company, Brass Key Realty, was also named as a respondent for his role in “conspiring” for the sale of the properties. Metro 12/2/09 Petition, ¶9.

now deceased, church trustees.⁷ The original church trustees were Aaron Barber, Reverend Bennett Hodges and Romey Barber. These three initial church trustees, Metro alleges, had been named as grantees to 1000 South Nineteenth Street by a deed dated August 3, 1964 from Clara Molish.⁸ According to Metro, the property at 1002 South Nineteenth Street was granted to Lillian Perrin, Raymond Barber and James Pitts, as trustees of the Southern Tabernacle Church, by a deed dated August 23, 1976 from Romey L. Barber and his wife Daisy.⁹

Metro did not attach a copy of either the 1964 or 1976 deeds. It did, however, attach copies of the two May 15, 2009 deeds it seeks to rescind. The May 15 2009 deeds list as grantors “Lillian Perrin-Brodie, Raymond Barber and Sharon Barber, TRUSTEES FOR SOUTH TABERNACLE MISSIONARY BAPTIST CHURCH” while StradaUSA, LLC is listed as the grantee.¹⁰

The respondents StradaUSA, Sharon Barber and Lillian M. Perrin responded to Metro’s petition by filing preliminary objections that Metro lacks standing to assert claims seeking to enforce the doctrine *cy pres* or to enforce the charitable intentions of the original grantor.¹¹

Sharon Barber’s response in addition fleshed out the factual context of this dispute with the following history of the church:

Southern Tabernacle Missionary Baptist, Church was formed by Aaron Barber, Reverend Bennet C. Hodges and Romey L. Barber in the early 1960s and operated as a church in Philadelphia at 1000-1002 South 19th Street, Philadelphia. From that time to the early 1990s, it hosted a modest congregation and was served by its pastor, Romey L. Barber. Romey Barber was the father of seven children, three of whom are named respondents herein: Sharon Barber, Raymond Barber and Lillian M. Perrin. The church operated until 1991 when the building began to collapse during a service. The watchful Reverend Barber was successful in leading the congregation but was in the building when it collapsed on him. Although no others were hurt,

⁷ Metro 12/2/09 Petition, ¶ 3 (as successor trustees) and ¶ 4 (as heirs at law).

⁸ Metro 12/2/09 Petition ¶4.

⁹ Metro 12/2/09 Petition, ¶5.

¹⁰ See Metro 12/2/09 Petition, Exs. A & B.

¹¹ See, e.g., 1/25/10 StradaUSA Preliminary Objections, ¶¶ 5-6 & 16 and Memorandum at 4.

Reverend Barber was taken to the hospital where he received extensive medical treatment. Following the disaster, he no longer held services at the church and died some five years later, in part, as a result of the injuries he sustained during the collapse. His wife of some fifty-eight years, Daisy Barber, died in 1996. The rubble from the collapsed buildings was eventually removed by the City of Philadelphia and the properties remain undeveloped to this day.¹²

After the deaths of Reverend Barber, and his wife Daisy, their children received offers from third parties who wished to purchase the vacant lots. As Sharon Barber recalls:

At some point recently the 5 heirs of Reverend and Daisy Barber received interest by third parties in the purchase of properties. An agreement of sale was entered between Metro Impact, LLC and others but was never consummated. Shortly thereafter, the heirs procured another party StradaUSA, LLC, who purchased the property. Metro now brings this action before the court.¹³

In its initial petition, Metro made no mention of any contract between it and the respondents for the purchase of the two lots.¹⁴ But as the pleadings evolved, Metro invoked a June 10, 2008 “Agreement to Sell Real Estate” between Sharon Barber, Administrator of the Estate of Daisy Barber, on behalf of Southern Tabernacle Missionary Baptist Church, and Metro Import, LLC. Initially, Metro referred dismissively to the agreement in its answer to Lillian Perrin’s preliminary objections. It stated that when its counsel, Jack Bernard, was first informed of an agreement of sale Sharon Barber had “purported” to execute to sell both lots to a representative (Kirby Ames) of Metro, Mr. Bernard “informed Ms. Barber that in my opinion the Estate of Daisy Barber and the surviving trustees Ms. Perrin and Raymond Barber could not sell and certainly could not convey title to these two vacant lots, based on information provided by Ms. Barber that the Southern Tabernacle Church ceased to exist about twenty years ago....”¹⁵ By the time Metro responded to Sharon Barber’s preliminary objections nearly 2 weeks later, it began invoking the June 10, 2008 agreement as converting Metro’s interest into that of an

¹² 1/26/10 Sharon Barber Preliminary Objection, Memorandum at 1-2.

¹³ 1/26/10 Sharon Barber Preliminary Objections, Memorandum at 2.

¹⁴ Metro did, however, attach a copy of a June 10, 2008 agreement to sell real estate to its petition.

¹⁵ Metro 2/3/10 Answer to Lillian Perrin’s Preliminary Objections, Memorandum at 2.

equitable owner with a right to seek specific performance of its contract.¹⁶ None of these allegations regarding Metro's June 8, 2008 agreement, however, appear in Metro's petition.

Legal Analysis

Standing is an essential, threshold requirement for seeking judicial resolution of a dispute. Under Pennsylvania law, "the core concept of standing is that a person who is not adversely affected in any way by the matter he seeks to challenge is not aggrieved thereby and has no standing to obtain a judicial resolution of his challenge." Fumo v. City of Philadelphia, 601 Pa. 322, 336-37, 972 A.2d 487, 496 (2009)(citations omitted). In other words, standing "requires a party to have a substantial interest in the subject matter of the litigation; the interest must be direct; and the interest must be immediate and not a remote consequence." In re: Trust of Green, 2001 Pa. Super. 186, 779 A.2d 1152, 1157 (2001).

In its petition, Metro seeks to rescind two deeds conveying real property to StradaUSA based on the principle of *cy pres*. More specifically, Metro asserts that "[p]ursuant to Title 20 Pa.C.S.A. §7740.3 (formerly 6110), the proceeds of the sale of the two vacant lots formerly owned by Southern Tabernacle Missionary Church should be distributed for a charitable purpose in accordance with the doctrine of *cy pres* by order of this Honorable Court in a manner as nearly as possible to fulfill the charitable intention of the original grantor, Clara Molish."¹⁷ Metro offers two grounds for setting aside the transactions: (1) Sharon Barber, one of the trustees who signed the deeds, was not qualified to act on behalf of the church¹⁸, and; (2) the Church and its officers and trustees are not longer in existence.¹⁹

¹⁶ Metro 2/17/10 Answer to Sharon Barber's Preliminary Objections, Memorandum at 4.

¹⁷ Metro 12/2/09 Petition, ¶ 14 (emphasis added).

¹⁸ Metro 12/2/09 Petition, ¶¶ 8-9.

¹⁹ Metro 12/2/09 Petition, ¶9.

In essence, Metro is seeking to enforce the grantor’s charitable purpose by invoking the doctrine of *cy pres*. Pennsylvania courts, however, recognize only three categories of individuals or entities who can enforce the terms of a charitable trust: “the Attorney General, a member of the charitable organization, or someone having a special interest in the trust.” In re: Milton Hershey School, 590 Pa. 35, 42, 911 A.2d 1258, 1262 (2006). Metro’s petition acknowledges the critical role of the Attorney General in this matter by stating that it notified the Attorney General of its claim. The Attorney General, however, has neither responded to Metro’s petition nor sought to actively intervene. Although Metro suggests the Attorney General has consented to its petition—without providing any support for this claim—such consent by the Attorney General would not bestow standing on Metro. See, e.g. Wiegand v. The Barnes Foundation, 374 Pa. 149, 157, 97 A.2d 81, 84 (1953)(although Attorney General consented to action by newspaper writer who sought to compel officers and trustees to carry out the purpose of the Barnes Foundation, petitioner lacked standing).

Metro likewise does not fall within the second category for standing since it did not allege that it was a member of the Southern Tabernacle Church or the nonprofit corporation. Such a person or entity would have the requisite direct interest in enforcing the charitable intent that is the essence of standing.

Finally, Metro failed to establish any special interest that would endow it with standing to rescind the conveyance and two deeds on the basis of *cy pres*. A case focusing squarely on the requirements for standing where the doctrine of *cy pres* is at issue is Nevil Estate, 414 Pa. 122, 199 A.2d 419 (1964). In Nevil, the *cy pres* issue arose when trustees for a charitable trust whose settlor sought to establish an “asylum for the deaf, dumb or blind” filed an account concluding that the establishment of such an asylum was neither practical nor financially possible. The

trustees therefore recommended that the income go instead to two pre-existing schools for the blind and the deaf. The Pennsylvania Society for the Advancement of the Deaf, as an agency devoted to aiding the blind and the deaf, subsequently sought notice of the audit where the *cy pres* issue was to be raised.

The court, however, ruled that the Society lacked the requisite standing. Id., 414 Pa. at 127, 199 A.2d at 422. “The Society,” the Nevil court concluded, “has no standing or status as would entitle it either to notice of the audit or to challenge in any manner an order or decree rendered in proceedings concerned with this charitable trust.” Id., 414 Pa. at 129, 199 A.2d at 423. Even though the society as an agency devoted to aiding the blind and deaf might have been a potential distributee of trust assets through the application of *cy pres*, the court concluded it lacked standing since it had no interest distinct from the public generally. Its conclusion that the attorney general—rather than private individuals with no special interest in the charitable trust—should be responsible for its public supervision is based “on sound reason and authority.” Because the public is the object of a charitable trust, the court reasoned, “private parties have insufficient financial interest in charitable trusts to oversee their enforcement. Consequently, the Commonwealth itself must perform this function if charitable trusts are to be properly supervised.” Likewise, Metro lacks standing as to the application of *cy pres* in matters involving the enforcement of the grantor’s intention regarding disposition of the church’s assets to third parties. See generally In re Pruner’s Estate. 390 Pa. 529, 136 A2d 107 (1957)(the attorney general is an indispensable party in an action to enforce *cy pres*).

In its answers to the preliminary objections, Metro attempts to establish its special interest and standing by invoking its June 10, 2008 agreement to purchase the two lots at issue. Although it notes that its counsel was skeptical of Sharon Barber’s ability to convey valid title to

the two properties, Metro asserts that as a party to that June 10, 2008 agreement Metro “would be an equitable owner of the two lots, if the seller had anything to sell.”²⁰ It then leaps to the unrelated conclusion that this special interest would give Metro standing to demand that “[t]he court will carry out the donor’s intent and will award the fund to the charity which most resembles the one the donor intended to benefit, when the latter no longer exists.”²¹ Metro’s attempted leap from its own pecuniary interests in the two lots to enforcement of the grantor’s charitable intentions by applying *cy pres* principles to rescind the prior conveyances is in direct contradiction to the analysis in Nevil’s Estate and must be rejected.

But while Metro’s argument that it has standing to assert a claim based on *cy pres* fails, there may be some other legal basis for Metro’s standing premised on the facts that emerged in Metro’s answers to the preliminary objections. The exact contours of this claim are as yet undefined. But Metro shall be given an opportunity to file an amended petition. It is well established that “when there is some reasonable possibility that amendment can be accomplished successfully,” the petitioner shall be granted an opportunity to file an amended petition. Siegle v. U.S. Steele Corp., 302 Pa. Super. 404, 406, 448 A.2d 1104, 1104 (1982).

Metro therefore shall be granted leave to amend its petition within 20 days.

²⁰ 2/3/10 Metro Answer to the Preliminary Objections of Lillian Perrin, Memorandum at 3. In a later response to the preliminary objections of StradaUSA, Metro takes the argument further to insist its June 10, 2008 Agreement of Sale was enforceable: “The conveyance of these lots by the former church to avoid the doctrine of *cy pres*, by and of itself, would not confer standing upon Metro Impact to challenge the conveyance, but for the fact that Metro Impact had entered into an enforceable agreement to purchase the property from the Church, lawfully, requesting intervention by the Charitable Trusts and Organizations Division Section of the Commonwealth Attorney General.” 2/17/10 Metro reply to StradaUSA Preliminary Objections at 4. Metro emphasizes, as well, that the June 10, 2008 agreement stated that it would remain in force for the period required to resolve the title issues. 2/17/10 Metro Brief in response to Sharon Barber Preliminary Objections at 2. StradaUSA argues, however that even if the contract was enforceable it would not provide a legal basis for invoking *cy pres*, though it might support an action to enforce the contract. 2/26/10 StradaUSA reply to Metro’s Answer at 3. Sharon Barber, in contrast, characterizes the June 10, 2008 agreement as “unconsummated.” 1/26/10 Sharon Barber Preliminary Objections, ¶ 7.

²¹ 2/3/10 Metro Answer to Preliminary Objections of Lillian Perrin, Memorandum at 4. See also id. at 3.

Date: _____

BY THE COURT:

John W. Herron, J.