

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

WESTERN DIVISION
C.A. No. 05-30241-MAP

WILLIAM J. FAWCETT,
Plaintiff,

v.

RYLAND E. ROBBINS and DENISE L.
ROBBINS,
Defendants.

**ROBBINS' MEMORANDUM IN SUPPORT OF HIS
MOTION FOR SUMMARY JUDGMENT**

Defendant Ryland E. Robbins for his Memorandum in Support of his Motion for Summary Judgment, states as follows:

Introduction

Among other claims, Plaintiff William Fawcett ("Fawcett") alleges that he received gifts of 3,226 and 1,286 shares in the Northeast Land Development Trust ("Northeast") from Ryland Robbins ("Robbins"). A gift requires proof of a present donative intent coupled with an actual or symbolic delivery of the property. Delivery is an essential requirement of any gift claim. Though Robbins denies any present intent to make a gift of the shares, he seeks summary judgment on the issue of lack of delivery only, which is fatal to Fawcett's gift claims. There was no delivery, and judgment should be entered that Robbins owns the shares in question.

FACTUAL BACKGROUND

The following is a summary of the facts set forth in Robbins' Statement of Undisputed Facts, filed contemporaneously with his Motion and this Memorandum:

Robbins was previously married to Mary Lou Robbins (“Mary Lou”) until her death on January 17, 2004. Mary Lou was the mother of William J. Fawcett (“Fawcett”) by a marriage previous to her marriage to Robbins. Since 1986, Mary Lou, Fawcett, and Robbins served as the three sole trustees of the Northeast Land Development Trust (“Northeast”). (Statement of Undisputed Facts [“SF”], ¶¶ 1-3).

Northeast was originally organized in 1969 by Robbins and his late parents, Williard S. Robbins and Grace B. Robbins. As described in its governing Declaration, ownership in Northeast is held in the form of shares, issued in the form of certificates and recorded on a register. Authority to manage and administer the business of Northeast is vested in trustees. (SF¶¶ 4, 5).

William Fawcett became Robbins’ step-son upon his marriage to his mother, Mary Lou. (SF¶6). As reflected in the Northeast share register, before Mary Lou Robbins’ death in January 2004, ownership of Northeast’s total of 12,606.4 shares were distributed as follows: (1) Mary Lou Robbins, with 3025 total shares, evidenced by certificate nos. 12 and 13, in the amounts of 25 and 3000 shares, respectively, and which issued on August 30, 1988 and April 1, 1992, respectively; (2) William Fawcett with 50 shares, by certificate no. 11, which issued August 30, 1988; and (3) Ryland Robbins with 9,531.4 shares, by certificate no. 7, for 1681.4 shares issued January 5, 1987, and certificate no. 14 for 7850 shares, issued April 1, 1992. (SF¶ 8).

For these transfers, on or about the issue dates indicated in the register, Robbins prepared and issued these certificates, including those to William Fawcett and to Mary Lou Robbins, and entered the issuance and transfer in the Northeast share register. (SF¶ 8).

In early May, 2005, Fawcett suggested to Robbins that he fly down from western Massachusetts to Florida to meet Robbins’ fiancé, and Robbins agreed. Robbins was to be

married in late May. At a meeting on May 5th, Fawcett, Northeast's accountant, and Robbins discussed a possible gift of Northeast shares to Fawcett. The accountant prepared a series of documents and letters, and Robbins signed them the next day, May 6. (SF¶ 10).

One of letters, dated May 6, 2005, states that Robbins intended to make a gift of 3,226 shares to Fawcett. Another, dated May 8, 2005, states that Robbins intended to make a gift of 1,286 shares to Fawcett. Two other letters, one for each block of shares, purported to offer the shares back to Northeast, in accordance with a right of first refusal belonging to Northeast under the Northeast Declaration. Two other documents purported to reflect a meeting of Northeast trustees (Fawcett and Robbins; Mary Lou Robbins had been the third before her death), declining the offer of the shares made in accordance with the right of first refusal. (SF¶ 11).

Though Robbins signed these documents, he did not prepare them. Nor did he propose the meeting at which they were generated; that had been set up by Fawcett. Nor was any meeting of the trustees actually called to order or held. (SF¶ 12).

To transfer shares of ownership in Northeast, in accordance with the Declaration, the certificates of the shares belonging to Robbins had to be cancelled and new certificates issued to Fawcett. In addition, the transfer had to be recorded on the Northeast share register. With respect to the shares claimed by Mr. Fawcett in this case, none of this has ever happened. (SF¶ 13).

After the initial transfer of 50 shares to Fawcett in 1988, embodied in Northeast share certificate no. 11, and as reflected on the share register, there has never been any delivery of Northeast share certificates from Robbins, or anyone else, to Fawcett. Since the 1988 transfer to Fawcett, Robbins has never cancelled any of his share certificates, or any portion, as part of a transfer to Fawcett or anyone acting for Fawcett. Since the 1988 transfer to Fawcett, Robbins

has never issued or re-issued any Northeast share certificates to Fawcett or anyone acting for Fawcett. Since the 1988 transfer to Fawcett, Robbins has never given any Northeast share certificates to Fawcett or anyone acting for Fawcett. Nor has anyone else, including Northeast, done any of these things. The only Northeast share transfer activity is reflected in Exhibit B to the Robbins Affidavit. (SF¶ 15).

Robbins has made no tax filings reflecting a gift of any of these shares. Robbins has not executed any assignment to Fawcett reflecting transfer of the shares. (SF¶ 16).

Before 2005, the formalities for the transfer of shares required by the Declaration were always observed when any Northeast shares changed hands. They were observed in 1988, when shares were transferred to Mary Lou Robbins and William Fawcett. When the shares of a fourth shareholder were bought back by Northeast in 1995, the transfer was recorded in the ledger and the certificates were taken back and cancelled by Robbins. (SF¶ 17).

ARGUMENT

Applicable Law

A present “gift” of shares in a real estate trust requires proof of an actual or symbolic delivery of the shares coupled with a present donative intent. Rock v. Rock, 309 Mass. 44, 46 (1941) (affirming lower court finding that there was no intent to make a present gift and no actual or symbolic delivery of real estate trust shares); see also Kobrosky v. Crystal, 332 Mass. 452, 460 (1955) (gift of property must be made in such manner as “completely to transfer the dominion and control of it in the lifetime of the donor”). “As a general rule, to sustain a transfer as a gift, there must be evidence of donative intent on the donor’s part, combined with evidence of delivery of the property to the donee, or someone acting on the donee’s behalf, in a manner

that surrenders dominion and control.” Edinburg v. Edinburg, 22 Mass. App. Ct. 199, 204 (1986).

“An intent to give is not a gift; nor is an executory agreement or promise without consideration a gift.” Gerry v. Howe, 130 Mass. 350, 351 (1881); Cardoza v. Leveroni, 233 Mass. 310, 313 (1919); see also, 38 Am. Jur 2d, Gifts, § 20 at 720 (“If anything remains to be done to accomplish a gift, the transaction constitutes merely an executory agreement to give, and the title to the property does not pass.”)

“There must be actual or constructive delivery of property to a donee in order to constitute a valid gift inter vivos. A mere intention to give, without delivery of the property, does not amount to a gift.” 38 Am. Jur 2d, Gifts, § 22 at 721. “Actual delivery is generally necessary for the consummation of a gift, whether inter vivos or causa mortis, when the subject of the gift is capable of manual delivery.” 38 Am. Jur 2d, Gifts, § 22 at 722. A gift is not consummate until put beyond recall. Com’r of Corps. & Taxn. v. Ayer, 323 Mass. 579, 583 (1949); see also 38 Am. Jur 2d, Gifts, § 22 at 721-22 (“The decisive factor in determining whether a gift has been adequately delivered is whether the putative donor has the power to reclaim the property.”)

In both Rock, 309 Mass. at 47, and Silverman v. A. & L. Heel Corp., 353 Mass. 108, 110 (1967), claims of ownership of corporate stock based on gift were denied based on the lack of delivery of the certificates. Id. In Rock, a father had signed the assignment forms on the back of share certificates and placed his name and his son’s name, an act which was witnessed in writing. See 309 Mass. at 45. He wrote several letters to the son concerning the shares and his intention that they would be the son’s upon his death. Id. He again wrote to notify the son that he had pledged control of the shares with the bank for a loan, but that if the son paid the note the shares

would be turned over to him. Id. at 46. He thereafter wrote that the shares had been indorsed to the son and that they were left in safety deposit box with a specific number. Id. Upon the death of the father the court found that based upon these facts that there was no gift of the shares. Id.

The court noted, among other factors, that: (1) there was no manual delivery of the shares, (2) the shares were always in the custody and possession of the father, except when they were pledged as collateral to the bank, (3) the father at no time had relinquished control of the shares (4) the father had dealt with the shares at all times as the sole owner. Id. at 46-50.

Likewise, in Silverman, the Massachusetts Supreme Judicial Court again found lack of a completed gift of shares in a company. 353 Mass. at 112. In Silverman, two stock certificates, one which allegedly gave the donee 49 shares in the company, arrived in the company mail at a time when the alleged donor was away. Id. at 109. The alleged donee asked the donor what to do with them, and the donor said to put them in his safe for safekeeping. Id. at 111. The two both signed the share certificates as officers of the corporation, and the alleged donee never saw them again. Id. The court held that the “circumstances of the delivery of the certificates to [the alleged donor]’s office and their subsequent placement in his safe display an absence of the completely executed delivery and transfer essential to a valid gift.” Id.; citing Simpkins v. Old Colony Trust Co., 254 Mass. 576, 581 (1926), Iantosca v. Iantosca, 324 Mass. 316, 321 (1949). The court ultimately affirmed the decree that the shares were not gifted. See 353 Mass. at 112.

Robbins Never Delivered the Share Certificates to Fawcett

To establish ownership of the shares, Fawcett must prove Robbins formed the present intent to make a gift, and that the intent combined with the requisite actual or constructive delivery of the shares by Robbins to Fawcett. On the undisputed facts, Fawcett cannot

demonstrate this showing because no actual or constructive delivery of the shares was ever made.

To transfer shares of ownership in Northeast in accordance with the Declaration, the certificates of the shares belonging to Ryland Robbins had to be cancelled, and replaced with new certificates issued to Fawcett. In addition, the transfer had to be recorded on the Northeast share register. With respect to the shares claimed by Fawcett, none of this ever happened.

Robbins has never indorsed any of his Northeast share certificates in any way to reflect a transfer to Fawcett. Since first issuing 50 shares to Fawcett in 1988, Robbins has never cancelled any of his Northeast share certificates as a part any transfer to Fawcett; he has never issued or re-issued any Northeast share certificates to Fawcett; and he has never given any Northeast certificates to Fawcett or anyone acting for Fawcett. The Northeast share register, Exhibit B to the Robbins Affidavit, accurately shows all transfers of Northeast shares and certificates. As reflected in the register, there has not been a transfer of Northeast shares since 1995.

At all times, the formalities required by the Northeast Declaration were observed when Northeast shares changed hands. When the shares of a fourth shareholder were bought back by Northeast in 1995, the transfer was recorded in the ledger and the certificates were taken back and cancelled by Ryland Robbins. Robbins has made no tax filings reflecting a gift of any of the shares at issue. Robbins has not executed any assignment to Fawcett reflecting transfer of the shares.

There Was No Constructive Delivery of the Shares

When the item to be delivered is tangible physical property there must be actual delivery, especially when such is easily accomplished. See Edinburg, 22 Mass. App. Ct. at 206.

Constructive delivery is a concept typically employed where a document or thing can act as a proxy for the property in question: instruments of title such as a vehicle's certificate of title, a deed for real estate, or keys to a safe deposit box. See generally, 38 Am. Jur 2d, Gifts, § 26-28 at 724-28. As an initial matter, a constructive delivery theory is not available --or necessary -- where the alleged gift property is ownership in a company which issues certificates for shares ownership. The certificates are the proxy for shares of company ownership, which is why their delivery is required to complete a gift. Here, the alleged gift was stock which was embodied in certificates, and the transfer of which is to be recorded on the books of the company. Actual delivery of the Northeast share certificates is necessary to pass title by gift. Fawcett must show actual delivery of the share certificates, which he can't do.

Even if the concept of constructive delivery had any application here, beyond the certificates themselves, there was never delivery of any document or thing that could be construed as constructive delivery by Robbins to Fawcett of the shares identified in the May 6 and May 8 letters. Nor are the May 6 and May 8 letters part of any kind of constructive delivery. They are not legal instruments at all, and have no legal affect to pass title. The letters and accompanying documents themselves cannot constitute constructive delivery; at best they speak only to intent. "A gift cannot be established by proof of a declaration by the donor that the property is being given to the claimant if there is no actual delivery." 38 Am. Jur 2d, Gifts, § 22 at 723. On the undisputed facts, constructive delivery does not apply or, if applicable, did not happen.

Summary Judgment is Appropriate

At issue on summary judgment is the question of delivery, which is a subject of fact equally accessible to both parties. The outcome will depend on proof from Robbins and Fawcett

as to whether delivery was made. Robbins submits that no delivery was made. Intent is not at issue. Fawcett may only defeat summary judgment by offering evidence that he received certificates of shares from Robbins. This he cannot do. For this reason, the material facts are not disputed and summary judgment is appropriate.

Conclusion

For all the foregoing reasons, the 4,512 shares in Northeast claimed by Fawcett are owned by Ryland Robbins, because no gift of these shares to Fawcett was ever completed. This court should issue a declaration accordingly.

DEFENDANT, RYLAND E. ROBBINS AND
DENISE L. ROBBINS

By: /s/ John E. Garber

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CERTIFICATE OF SERVICE

I, John E. Garber, Esq., hereby certify that on this 26th day of April, 2006, this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF). Further, a paper copy has been sent, via first class mail, to counsel for Plaintiff on this date.

Subscribed under penalties of perjury.

/s/ John E. Garber, Esq.

John E. Garber, Esq.