MOCK CLASS
SECTION 2
BRUCE A. MARKELL

CONGREGATION KADIMAH TORAS-MOSHE V. DELEO

Supreme Judicial Court of Massachusetts, 1989
405 Mass. 365, 540 N.E.2d 691

Before Liacos, C.J., and Wilkins, Abrams, Lynch and O'Connor, JJ.

LIACOS, Chief Justice.

Congregation Kadimah Toras-Moshe (Congregation), an Orthodox Jewish synagogue, commenced this action in the Superior Court to compel the administrator of an estate (estate) to fulfil the oral promise of the decedent to give the Congregation $25,000. The Superior Court transferred the case to the Boston Municipal Court, which rendered summary judgment for the estate. The case was then transferred back to the Superior Court, which also rendered summary judgment for the estate and dismissed the Congregation's complaint. We granted the Congregation's application for direct appellate review. We now affirm.

The facts are not contested. The decedent suffered a prolonged illness, throughout which he was visited by the Congregation's spiritual leader, Rabbi Abraham Halbfinger. During four or five of these visits, and in the presence of witnesses, the decedent made an oral promise to give the Congregation $25,000. The Congregation planned to use the $25,000 to transform a storage room in the synagogue into a library named after the decedent. The oral promise was never reduced to writing. The decedent died intestate in September, 1985. He had no children, but was survived by his wife.

The Congregation asserts that the decedent's oral promise is an enforceable contract under our case law, because the promise is allegedly supported either by consideration and bargain, or by reliance. See *Loranger Constr. Corp. v. E.F. Hauserman Co.,* 376 Mass. 757, 761, 763, 384 N.E.2d 176 (1978) (distinguishing consideration and bargain from reliance in the absence of consideration). We disagree.

The Superior Court judge determined that "[t]his was an oral gratuitous pledge, with no indication as to how the money should be used, or what [the Congregation] was required to do if anything in return for this promise." There was no legal benefit to the promisor nor detriment to the promisee, and thus no consideration. See *Marine Contractors Co. v. Hurley,* 365 Mass. 280, 286, 310 N.E.2d 915 (1974); *Gishen v. Dura Corp.,* 362 Mass. 177, 186, 285 N.E.2d 117 (1972) (moral obligation is not legal obligation). Furthermore, there is no evidence in the record that the Congregation's plans to name a library after the decedent induced him to make or to renew his promise. Contrast *Allegheny College v. National Chautauqua County Bank,* 246 N.Y. 369, 377-379, 159 N.E. 173 (1927)

(subscriber's promise became binding when charity implicitly promised to commemorate subscriber).

As to the lack of reliance, the judge stated that the Congregation's "allocation of $25,000 in its budget[,] for the purpose of renovating a storage room, is insufficient to find reliance or an enforceable obligation." We agree. The inclusion of the promised $25,000 in the budget, by itself, merely reduced to writing the Congregation's expectation that it would have additional funds. A hope or expectation, even though well founded, is not equivalent to either legal detriment or reliance.[12] *Hall v. Horton House Microwave, Inc.,* 24 Mass.App.Ct. 84, 94, 506 N.E.2d 178 (1987).

The Congregation cites several of our cases in which charitable subscriptions were enforced. These cases are distinguishable because they involved written, as distinguished from oral, promises and also involved substantial consideration or reliance. See, e.g., *Trustees of Amherst Academy v. Cowls,* 6 Pick. 427, 434 (1828) (subscribers to written agreement could not withdraw "after the execution or during the progress of the work which they themselves set in motion"); *Trustees of Farmington Academy v. Allen,* 14 Mass. 172, 176 (1817) (trustees justifiably "proceed[ed] to incur expense, on the faith of the defendant's subscription"). Conversely, in the case of *Cottage St. Methodist Episcopal Church v. Kendall,* 121 Mass. 528 1877), we refused to enforce a promise in favor of a charity where there was no showing of any consideration or reliance.

The Congregation asks us to abandon the requirement of consideration or reliance in the case of charitable subscriptions. The Congregation cites the Restatement (Second) of Contracts § 90 (1981), which provides, in subsection (2): "A charitable subscription ... is binding under Subsection (1) without proof that the promise induced action or forbearance." Subsection (1), as modified in pertinent part by subsection (2), provides: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person ... is binding if injustice can be avoided only by enforcement of the promise...."

Assuming without deciding that this court would apply § 90, we are of the opinion that in this case there is no injustice in declining to enforce the decedent's promise. Although § 90 dispenses with the absolute requirement of consideration or reliance, the official comments illustrate that these are relevant considerations. Restatement (Second) of Contracts, *supra* at § 90 comment f. The promise to the Congregation is entirely unsupported by consideration or reliance.[4] Furthermore,

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[2] "We do not use the expression 'promissory estoppel,' since it tends to confusion rather than clarity." *Loranger Constr. Corp. v. E.F. Hauserman Co.,* 376 Mass. 757, 761, 384 N.E.2d 176 (1978).

[4] We need not decide whether we would enforce an oral promise where there was a showing of consideration or reliance.

it is an oral promise sought to be enforced against an estate. To enforce such a promise would be against public policy.[5]

Judgment affirmed.

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RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981)

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

(2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.

Comments:

a. Relation to other rules. Obligations and remedies based on reliance are not peculiar to the law of contracts. This Section is often referred to in terms of "promissory estoppel," a phrase suggesting an extension of the doctrine of estoppel. Estoppel prevents a person from showing the truth contrary to a representation of fact made by him after another has relied on the representation. See Restatement, Second, Agency § 8B; Restatement, Second, Torts §§ 872, 894. Reliance is also a significant feature of numerous rules in the law of negligence, deceit and restitution. See, e.g., Restatement, Second, Agency §§ 354, 378; Restatement, Second, Torts §§ 323, 537; Restatement of Restitution § 55. In some cases those rules and this Section overlap; in others they provide analogies useful in determining the extent to which enforcement is necessary to avoid injustice.

It is fairly arguable that the enforcement of informal contracts in the action of assumpsit rested historically on justifiable reliance on a promise. Certainly reliance is one of the main bases for enforcement of the half-completed exchange, and the probability of reliance lends support to the enforcement of the executory exchange. See Comments to §§ 72, 75. This Section thus states a basic principle which often renders inquiry unnecessary as to the precise scope of the policy of enforcing bargains. Sections 87- 89 state particular applications of the same principle to

[5] The defendant argues that, if the decedent was aware of impending death, yet made no gift during life, then the promise is in the nature of a promise to make a will, which is unenforceable, by virtue of the Statute of Frauds. See G.L. c. 259, §§ 5, 5A (1986 ed.). Under the view we take, we need not consider this argument.

promises ancillary to bargains, and it also applies in a wide variety of non-commercial situations. See, e.g., § 94.

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f. Charitable subscriptions, marriage settlements, and other gifts. One of the functions of the doctrine of consideration is to deny enforcement to a promise to make a gift. Such a promise is ordinarily enforced by virtue of the promisee's reliance only if his conduct is foreseeable and reasonable and involves a definite and substantial change of position which would not have occurred if the promise had not been made. In some cases, however, other policies reinforce the promisee's claim. Thus the promisor might be unjustly enriched if he could reclaim the subject of the promised gift after the promisee has improved it.

Subsection (2) identifies two other classes of cases in which the promisee's claim is similarly reinforced. American courts have traditionally favored charitable subscriptions and marriage settlements, and have found consideration in many cases where the element of exchange was doubtful or nonexistent. Where recovery is rested on reliance in such cases, a probability of reliance is enough, and no effort is made to sort out mixed motives or to consider whether partial enforcement would be appropriate.