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99 Md. 315, 57 A. 661

Court of Appeals of Maryland.
CALLAWAY et al.
v.
MAYOR AND **CITY COUNCIL** OF **BALTIMORE**.
April 12, 1904.

Appeal from Circuit Court of Baltimore City; George M. Sharp, Judge.

Suit by Frank H. Callaway and others against the mayor and city council of Baltimore. From an order of the circuit court refusing to grant an injunction restraining action under an ordinance, complainants appeal. Affirmed.

West Headnotes

Injunction 212 ⚿35
212k35 Most Cited Cases
(Formerly 212k35(1))
Acts 1902, p. 445, c. 333, authorized the mayor and council of the city of Baltimore to create a loan for the purpose of extending the water service and constructing a reservoir, and thereafter an ordinance of estimates authorized the use of a certain portion of the water loan for the purchase of land for a new reservoir, and the city contracted with the owners of land to purchase the same for the reservoir. Subsequently an ordinance was passed repealing the mentioned portion of the ordinance of estimates, and the vendees in the contract sued for an injunction restraining the city from enforcing the repealing ordinance until the determination of an appeal from an order setting aside the sale of the land to the complainants by certain trustees. Held, that complainants were not entitled to the injunction, it appearing that their only title to the land was an equitable one, acquired under a sale by trustees, which title had been extinguished by an order setting aside the sale.

Municipal Corporations 268 ⚿887
268k887 Most Cited Cases
Baltimore City charter provides that "in case of any surplus arising in any fiscal year by reason of an excess of income received from the estimated revenue over the expenditure for such year the said surplus shall be passed to the commissioners of finance to be credited to the general sinking fund." Subsequent to the statute creating the charter, Acts 1902, p. 445, c. 333, was passed, authorizing the city to create a loan for the purpose of extending the water service, and pursuant to the latter statute an ordinance of estimates appropriated a portion of the loan for the purchase of land for the acquisition of a reservoir, and thereafter another ordinance was passed repealing that portion of the ordinance of estimates. Held, that the repealing ordinance did not have the effect, together with the provision of the charter, of causing the amount appropriated by the ordinance for the purpose of a reservoir to pass into the general sinking fund, and become lost to the purposes of the water service.

Argued before McSHERRY, C.J., and FOWLER, BRISCOE, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

Thomas G. Hayes and Edgar H. Gans, for appellants.
W. Cabell Bruce and Albert C. Ritchie, for appellee.

SCHMUCKER, J.
This is an appeal from an order of the circuit court of Baltimore City refusing to grant an injunction, upon an application made to it by the appellants, on the bill of complaint and exhibits appearing in the record. The appeal therefore presents the question of the sufficiency of the appellants' case as made out by their bill and exhibits. The material facts therein set out are as follows: The mayor and city council of Baltimore, in pursuance of the authority conferred on it by chapter 333, p. 445, of the Acts of 1902, passed an ordinance to

create a loan of not exceeding $1,000,000, maturing in 1943, and to issue its stock therefor from time to time as required, for the purpose of extending its water service and constructing an additional reservoir. The loan was submitted to and approved by a popular vote at the election of November 4, 1902. The city is duly authorized by its charter to purchase or acquire, either directly or through its duly authorized agents, lands suitable for its water service. The ordinance of estimates for the year 1903, as framed by the board of estimates and passed by the city council and approved by the mayor on December 8, 1902, contained under the head of "Water Board" an item of appropriation as follows: "To be taken from the water 1943 loan for the purchase of land or the acquisition by condemnation or otherwise by the mayor, comptroller and water engineer, lot for a new reservoir and for cost of construction three hundred and fifty thousand ($350,000) dollars." On March 16, 1903, the mayor and comptroller, purporting to act in execution of the power conferred by the ordinance of estimates, entered into a contract with the appellants to purchase from them for $2,000 per acre a tract of 114 acres of land, with certain rights of way, hereinafter designated as the "Callaway Site," lying in the suburbs of Baltimore, as a site for the new reservoir. The bill alleges that the water ***662** engineer, who refused to unite in making the contract, participated with the other two agents of the city-i.e., the mayor and comptroller-in examining various proposed sites for the reservoir, and that "the said three agents" met together after due notice, and discussed the availability of the respective proposed sites, and the mayor and comptroller, who constituted a majority of the three, by a formal vote selected the Callaway site, and subsequently signed the contract for its purchase. This contract, which consists of an offer on the part of the vendors to sell and an acceptance of the offer on behalf of the city signed by the mayor and comptroller, is filed with the bill as an exhibit. Without incumbering this opinion with the full text of the several papers constituting the contract, we state their salient features. The offer to sell was made by the appellant Callaway in his own right as to 92 acres, as the agent of George R. Vickers, Jr., trustee in the case of Vickers v. Vickers in the circuit court of Baltimore City, as to 12 acres, and as the agent of the North Baltimore Land Company as to the remaining 10 acres. Callaway had but an equitable title to the 92 acres, under an option from Fielder C. Slingluff et al., trustees in the case of Slingluff v. Slingluff, pending in the said circuit court. He subsequently accepted this option, and a sale of the 92 acres to him was reported by the trustees to the circuit court in that case, but the court sustained certain exceptions which were filed to the ratification of the sale, and set it aside. Callaway took an appeal to this court from the order setting aside the sale to him, which has not yet been heard. The city excepted to the ratification by the circuit court of the sale to it of the 12 acres by Vickers, trustee, and its exceptions are still pending in that court and undisposed of. The acceptance on the part of the city, signed by two of its three agents, was made upon the condition that the land was to be conveyed to it by a title good and marketable to the satisfaction of the city law department, which was to have a reasonable time to examine the title. The bill avers that the law department of the city examined the title, and made "its report to the defendant, in which report the said law department stated that the appellants were able to give a fee-simple title to the property free of all incumbrances," but no copy of the report appears in the bill or among the exhibits. On June 8, 1903, the personnel of the greater portion of the city officials having undergone a change, an ordinance was introduced into the city council, which was subsequently passed, repealing so much of the ordinance of estimates for 1903 as appropriated the $350,000 to be taken from the water loan for the purchase by the mayor, comptroller, and water engineer of a reservoir site and the erection of a reservoir. On

July 20, 1903, the mayor and comptroller sent a written communication to Callaway on behalf of the city, refusing to recognize or be bound by the alleged contract of May 16, 1903, to purchase the Callaway site, alleging, among other things, as reasons for their action, that the city solicitor had rendered an opinion that the title to that land was not good and marketable and in fee simple to the satisfaction of the city law officers, and could not be made so. The bill alleges that the land composing the Callaway site is in all respects admirably adapted to the purposes of a reservoir for the supply of water to the city, and that the price of $2,000 per acre, at which it was sold to the city, was a reasonable one, and did not exceed its market value, and that the mayor and comptroller had acted in good faith in making the alleged contract for its purchase, and that the contract is fair, just, mutual, and reasonable. It is further alleged that the appellants are ready and willing to convey the property to the city as soon as relieved from the obstruction created by the exceptions aforesaid. The bill insists that the said repealing ordinance is void, and in violation of section 36 of the city's charter, and also of article 1, § 10, of the federal Constitution which forbids any state to pass any law impairing the validity of contracts. It further insists that, if the ordinance be upheld, the $228,000 to be paid for the Callaway site under the contract will, by the provisions of the charter, be diverted into the sinking fund of the city, and will not be available for the payment of the purchase money to fall due under the contract, and the appellants will thereby be deprived of any power to compel a performance of the contract, and irreparable injury will be inflicted on them, and their contractual rights will be destroyed. It then prays for an injunction restraining the city and its officials from enforcing or doing anything under the said repealing ordinance until the determination of the appeal from the order of the circuit court setting aside the sale of the 92 acres to Callaway in the Slingluff case and the decision of the exceptions pending in the Vickers case, and that the repealing ordinance be declared void, and for further relief.

It will thus be seen that the substance of the case set up by the bill is that the city made a binding contract for the purchase of the reservoir site from the appellants, which it now repudiates and refuses to perform, and that the appellants are entitled to enforce its performance, but cannot, at this time, institute proceedings for that purpose, because of the exceptions filed to the ratification of the sales in the Slingluff and Vickers cases. It is insisted that, unless the city be restrained from treating the repealing ordinance as valid and enforcing it, the $228,000 intended to be applied to paying for the reservoir site will, under the operation of the city's charter, be covered into its general sinking fund, and the appellants will be prevented from the effectual enforcement of their contract, and will suffer irreparable injury in that respect.

It is well settled that, in order to lay a proper foundation for an injunction to prevent***663** an irreparable injury to some right, the bill must set forth a plain right, as well as a probable danger that the right will be defeated without the intervention of the court. Salmon v. Claggett, 3 Bl. 161, 162; Co. Com'rs v. Franklin Coal Co., 45 Md. 473; Whalen v. Delashmutt, 59 Md. 253; Truly v. Wanzer, 5 How. 141, 12 L.Ed. 88; D.L. & W.R.R. v. Cent. Stock Yards (N.J.Ch.) 17 Atl. 146, 6 L.R.A. 861; Outcalt v. Helme, 42 N.J.Eq. 665, 4 Atl. 669, 9 Atl. 683; Miller's Equity, § 580; Am. & Eng.Encyc. (2d Ed.) vol. 16, p. 358, and cases there cited. Even when the application to the court of equity is only to protect a legal right until it can be established in some other proceeding, the application being founded on the existence of the right the bill must show a fair prima facie case in support of the right. Whalen v. Delashmutt, supra. The right which is fundamental to the whole case of the present appellants, and the one in respect to which they assert the danger of irreparable injury,

is the right to compel the city to perform its contract by taking and paying for the reservoir site. Their bill therefore, in order to entitle them to maintain their suit, should present at least such a prima facie case as would, if established by proof, authorize a court of equity to enforce the contract. The bill does not, in our opinion, measure up to the requirements of the law in that respect. Not only are the appellants, upon their own showing, not now entitled to maintain a bill for the specific performance of the contract, but it does not appear with prima facie force that they ever will be. The only title which any of them had to 92 of the 114 acres constituting the reservoir site was the equitable title thereto of Callaway, acquired under the sale to him by Fielder C. Slingluff et al., trustees. That title has been extinguished by an order of the circuit court setting aside the sale, passed after the filing of exceptions and the taking of testimony thereon and an argument of counsel. It is true we are informed that an appeal has been taken from that order of court, but, until the order has been reversed, it must be presumed to be correct in a collateral proceeding like the one now before us. Unless a vendor can show a title free from reasonable doubt to the land sold, he cannot compel his vendee to take and pay for it. Sharp St. Station v. Rother, 83 Md. 295, 34 Atl. 843; Emmert v. Stouffer, 64 Md. 543, 3 Atl. 293, 6 Atl. 177; Newbold v. Peabody Heights Co., 70 Md. 493, 17 Atl. 372, 3 L.R.A. 579; Gill v. Wells, 59 Md. 492; Owings v. Baldwin, 8 Gill, 337. The appellants not having shown by their bill such a clear prima facie right as is required of one who asks a court of equity to protect his right by injunction, the learned judge below committed no error in passing the order appealed from.

As it does not yet appear that the appellants will ever be entitled to institute proceedings in any form for the enforcement of the contract in question, we abstain from expressing at this time any opinion upon the validity of the contract or of the repealing ordinance. Inasmuch, however, as the appellants insist that, if the repealing ordinance be not declared void, the $228,000 out of the loan of 1943, intended to be used in payment for the reservoir site, will, by operation of the city charter, be covered into the general sinking fund, and lost to the purposes of the municipal water service, we will give expression to our views upon that subject to avoid future embarrassment in dealing with the proceeds of the loan. We do not think that the provision contained in the Baltimore City charter, by which the unexpended balance of the city's income remaining on hand at the end of each fiscal year is covered into the sinking fund, will operate upon this $228,000. That provision of the charter appears in section 36, and is as follows: “In case of any surplus arising in any fiscal year by reason of an excess of income received from the estimated revenue over the expenditures for such year the said surplus shall be passed to the commissioners of finance to be credited to the general sinking fund.” There is nothing in the record to lead us to infer that the city has as yet sold the authorized stock to raise the $228,000 to pay for the new reservoir site, or that it has in hand any of the money for that purpose. In fact, the counsel for the respective parties to the suit inform us that only the trifling sum of $141.90 of the stock for the purchase and construction of the reservoir has been sold, and that the proceeds of that sale have been expended in the purchase of boring tools to test the soil of intended reservoir sites. Certainly the city could not, by reason of the presence in the charter of the clause under consideration, be required to sell the stock, whose issue is restricted by the legislation authorizing it to the uses therein specified, and divert the proceeds of its sale from those specified uses by turning the money over to the general sinking fund. Even if the stock had been already sold, and its proceeds thus dedicated by law to a special use were in the hands of the comptroller or other financial agent of the city, it would be an unwarrantable diversion of that money to turn it

into the sinking fund. We do not think that the proceeds of a loan thus dedicated by the statute authorizing its issue to a particular municipal use comes within the description of "estimated revenue," as used in the section referred to. Much less could it be said that the future proceeds of stock of the character above described, that has not yet been issued or sold, falls within the description of "estimated revenue," as used in that section. It is further to be observed that the act of 1902, which specifies and limits the purposes to which the proceeds of this loan must be applied, was passed subsequently to the act creating the new charter of Baltimore City.

For the reasons appearing in this opinion ***664** the order appealed from must be affirmed, and the bill dismissed.

Order affirmed, with costs, and bill dismissed.

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