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IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION

ROBERT B. FERGUSON, JR.,)
)
 Plaintiff,)
)
 vs.)
)
 CREMATION SOCIETY, INC., v/d/b/a)
 CREMATION SOCIETY OF)
 PENNSYLVANIA AND and AUER)
 MEMORIAL HOME AND CREMATION)
 SERVICES, INC.,)
)
 Defendants.)

No. 5363 of 2004

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OPINION OF THE COURT

Before the Court is the motion for summary judgment of Robert B. Ferguson, Jr. (Plaintiff). After hearing oral argument in this matter, and upon consideration of the memoranda of the parties, the Court enters the following:

Background

Cremation Society Inc., v/d/b/a Cremation Society of Pennsylvania (Cremation Society), was incorporated in Pennsylvania in or about 1981. Cremation Society contracted with individuals, primarily on a "pre-need" basis, to provide the following services to its clients: (1) refrigeration and transportation of deceased persons; (2) cremation of deceased persons; (3) notice to the Social Security Administration and Veterans Administration; (4) assistance in placing obituaries; (5) obtaining death certificates; (6) completion of federal and state forms and permits; (7) the sale of urns or other containers for cremated human remains; and (8) the scattering and/or mailing of human remains. The record shows that, between 1991 and 2004,

Cremation Society entered into more than 8,000 pre-paid cremation contracts, which are structured as irrevocable trusts.

Cremation Society is not licensed as a funeral director pursuant to the Funeral Director Law (Law), Act of January 14, 1952, P.L. (1951) 1898, as amended 63 P.S. §§ 479.1 – 479.20. However, in 2004, Cremation Society entered into a relationship with a corporate entity known as Auer Memorial Home and Cremation Services, Inc. (Auer). Auer was formed in 2004 by a licensed funeral director, and the corporate name is registered with the Bureau of Professional and Occupation Affairs, State Board of Funeral Directors. (Board)

On July 20, 2004, Plaintiff filed a complaint, averring that Cremation Society was illegally operating as an unlicensed funeral director in Westmoreland County and throughout the Commonwealth. Plaintiff sought to enjoin Cremation Society from engaging in the practice of funeral directing and advertising its services, as well as a declaration that the pre-need cremation contracts are illegal and monies paid must be refunded to the buyers. Furthermore, Plaintiff, who is a licensed funeral director, filed the complaint in accordance with Section 12(b) of the Law, 63 P.S. §479.12, which authorizes funeral director associations and interested persons to file an action in equity and “obtain an injunction to prevent the illegal operation of a person, firm, corporation or establishment in violation of the law or the regulations of the board.”

Plaintiff subsequently moved for summary judgment, and the Court heard argument on August 30, 2007.

Issues

Plaintiff contends that Cremation Society is (1) engaged in the practice of funeral directing as defined by the Law, and (2) that Cremation Society’s business activities are not protected by the Future Interment Act (FIA), Act of August 14, 1963, P.L. 1059, 63 P.S. §§480.1

- 480.11, which permits contracts for the sale of personal property and services not to be performed until death of a person at a future time.

In response, Cremation Society contends (1) that it did not violate the Law by servicing its customers, (2) Plaintiff's remedy is limited to prospective injunctive relief, (3) Plaintiff lacks standing to challenge the irrevocable trust contracts, (4) Plaintiff barred by the doctrine of laches, and (5) equity does not require the Court to void or rescind all of the irrevocable trust agreements executed by its customers.

Discussion

When deciding a motion for summary judgment, the record is viewed in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Toy v. Metropolitan Life Insurance Co., 863 A.2d 1 (Pa. Super. 2004). Summary judgment will be granted only in those cases that are clear and free from doubt, and it is improper to grant summary judgment where genuine questions of material fact exist. McNeal v. Eaton Corp., 806 A.2d 899 (Pa. Super. 2002).

A. Laches

The Court begins by considering the threshold issue of laches, which impacts on Plaintiff's right to pursue the instant action. Specifically, Cremation Society argues that Plaintiff has been aware of its activities since the early 1980s, and yet did not take any action until 1999, when he filed an administrative complaint with the Board. Plaintiff's lack of due diligence, Cremation Society asserts, has caused it prejudice because it continued over a period of two

decades to create irrevocable trust agreements with its customers. After review, the Court disagrees.

The equitable doctrine of laches bars relief when the complaining party is guilty of a lack of due diligence in failing to promptly institute the action to the prejudice of another. Sprague v. Casey, 520 Pa. 38, 550 A.2d 184 (1988). The question of laches is one of fact and is determined by examining the circumstances of each case. Id. Laches is not imputed to a party from the mere lapse of time alone, but rather it is an implied waiver, arising from knowledge of existing conditions, and acquiescence in them. Pehlert v. Neff, 31 A.2d 446 (Pa. Super. 1943).

Here, Cremation Society correctly states in its brief that, prior to the Commonwealth Court's decision in Cornerstone Family Services, Inc. v. Bureau of Professional and Occupational Affairs, 802 A.2d 37 (Pa. Cmwlth. 2002) (Cornerstone I), "there existed *great uncertainty in the law* as concerns the definition of 'funeral services' or 'practicing funeral director,' as such terms were not defined clearly by statute or case law." (Brief of Cremation Society, Pg. 9.) (Emphasis added.) Because the nebulous state of the law impacted upon the decisions of both Plaintiff and Defendant, the Court concludes that Plaintiff's failure to file a complaint in equity in the 1980s or 1990s does not evidence lack of due diligence. Cremation Society cannot claim that Plaintiff had a better, more comprehensive understanding of the law that it had, or, for that matter, the Board had. Moreover, Plaintiff brought this action within a reasonable time after the Commonwealth Court clarified the law in 2002, and the Court observes that Plaintiff filed the instant complaint approximately six months after our Supreme Court affirmed Cornerstone I. Cornerstone Family Services, Inc. v. Bureau of Professional and Occupational Affairs, 577 Pa. 136, 842 A.2d 918 (2004) (Cornerstone II).

Regarding prejudice, the undisputed facts show that Cremation Society did business and entered into contracts with customers in spite of its admitted uncertainty about the legality of its enterprise. The Court recognizes that Cremation Society asserts that it communicated with

Board and was not informed that a license was required or that its business was illegal. However, nothing in the record indicates that the Board, prior to 2002, promulgated a regulation, a policy statement, or entered an adjudication governing this issue. Hence, any prejudice here stemmed from Cremation Society's decision to operate its business for decades in the penumbra of the law, and not from the inaction of Plaintiff.

B. The Legality of the Cremation Society's Business

Plaintiff contends that Cremation Society has illegally engaged in the practice of funeral directing as defined by the Law, and that Cremation Society's business activities are not protected by the FIA.

In Cornerstone I, the Commonwealth Court held that providing cremation services constitutes funeral directing under the Law. The Court explained:

The Directors and Bureau respond that the Law in this case expressly limits the authority of crematories and cemeteries and defines the practice of funeral directing in such a way as to include cremation. Specifically, Section 2 of the Funeral Law, 63 P.S. § 479.2 defines a funeral director as "any person engaged in the profession of a funeral director or in the care and disposition of the human dead, or in the practice of disinfecting and preparing by embalming the human dead for the funeral service, burial or cremation, or the supervising of burial, transportation or disposal of deceased human bodies." (Emphasis added.) The term funeral director also includes "a person who makes arrangement for funeral service." Id. (Emphasis added.) However, 'employees of any crematory whose duties extend no further' are not subject to discipline as having practiced without benefit of licensure, Section 13(a)(1) of the Funeral Law, 63 P.S. § 479.13(a)(1).

We agree that the services purportedly provided by Cornerstone, which include the care and disposition of the human dead fall within the definition of funeral director. Cornerstone argues nonetheless that the statutory definition of a funeral

director includes embalming and because it does not engage in such a practice it does not fit the definition of funeral director. We observe however that a funeral director need not be in the practice of embalming. Rather a funeral director is an individual who is engaged in the disposition of bodies or in the practice of embalming, or supervises the burial or disposal of bodies. Thus, although Cornerstone is not engaged in embalming, the services it provides fit within the definition of funeral director. Because Cornerstone is in the business of disposing of human bodies, supervising burial, transporting, and selling goods and services related to cremation, it is by definition engaged in funeral directing and therefore subject to the Law.

Cornerstone I, 802 A.2d at 40-41 (emphasis in the original). Accord Pre-Need Family Services Eastern Region v. Bureau of Professional and Occupation Affairs, 904 A.2d 996 (Pa. Cmwlth. 2006). The Supreme Court entered a *per curiam* order in Cornerstone II that affirmed the Commonwealth Court's decision.

Furthermore, the Cornerstone I Court held that the FIA did not supersede or obviate the Law. While the FIA allows unlicensed individuals to sell merchandise, the statute does not permit an unlicensed person to "step into the shoes of a funeral director." *Id.*, 802 A.2d at 41.

Applying Cornerstone I to the instant case, the Court concludes that record demonstrates that Cremation Society, acting without a funeral director's license, engaged in activity that constitutes the practice of funeral directing. There is no dispute that Cremation Society, among other things, refrigerated and transported of deceased persons, arranged for the cremation of deceased persons, notice to the Social Security Administration and Veterans Administration, assisted in placing obituaries, obtained death certificates, completed government forms, sold urns or other containers for cremated human remains, and scattered and/or mailed of human remains. In fact, Cremation Society admitted that it performed such activities in its answer to Plaintiff's motion for summary judgment. ("Defendant Response to Plaintiff's Motion for Summary Judgment," Pgs. 4-5.) Cremation Society also admitted in its response to the motion for summary judgment it provided "complete cremation packages" that included, among other

things, removal of the body, cremation of the body, notice to government agencies, death certificates, and obituaries. See Pre-Need Family Services (sale of "cremation packages" that included pick-up and removal of the dead, storage of the body, placement of remains in a container, and completion of paperwork constituted the practice of funeral directing).

Moreover, while Cremation Society may have believed that it was legally providing services to its members under the auspices of the FIA, the FIA does not authorize Cremation Society to perform the services of a funeral director without the appropriate license. Cornerstone I

Cornerstone I is a statutory interpretation case, and a court's interpretation of a statute is considered to have been the law from the date of its enactment, despite contrary intervening holdings. Holland v. General Accident, Fire & Life Assurance Corp., 489 A.2d 238 (Pa. Super. 1985); Lady Jane Collieries, Inc. v. Workmen's Compensation Appeal Bd. (Gill), 473 A.2d 1147 (Pa. Cmwlth. 1983). Hence, the holding in Cornerstone I is controlling with regard to all the activities of Cremation Society since it was founded in 1981.

However, Cremation Society argues that it changed its manner of doing business in 2004 following the Cornerstone I and Cornerstone II. In particular, Cremation Society asserts that oversight of cremation arrangements was transferred in 2004 to Auer, a licensed funeral establishment with a licensed funeral director, who then performed all funeral-related services. The services, according to Cremation Society, provided by a licensed entity at the same price and the same level of quality as originally negotiated by the member. Cremation Society also claims that it has ceased soliciting or accepting any new pre-need contracts from its member. In addition, after 2002, Cremation Society changed its manner of handling irrevocable trusts to provide that 100% of the member's pre-need payments were placed into trust. Previously, Cremation Society retained 30% of said payments for itself and then placed 70% of the money into a trust for the member.

Accordingly, the Court finds that, with regard to the closed period of time between 1981 and 2004, there is no question of material fact regarding the nature of Cremation Society's services. During that discrete time period, the Court concludes as a matter of law that Cremation Society was practicing as a funeral director without a license. Plaintiff is hereby granted partial summary judgment on that question.

However, the Court finds that there are material questions of fact regarding whether Cremation Society changed its manner of doing business in 2004 and is now in compliance with the Law. Summary judgment cannot be granted for the period from 2004 to present.

C. Remedy Issues

Cremation Society raises three issues concerning the nature and scope of the remedies available to this Court: (1) Plaintiff's remedy is limited to prospective injunctive relief; (2) Plaintiff lacks standing to challenge the irrevocable trust contracts; and (3) equity does not require the Court to void or rescind all of the irrevocable trust agreements executed by its customers.

The remedy issues are not yet ripe for decision. There are questions of fact regarding Cremation Society's current business practices, which will need to be resolved at a future hearing. Moreover, the question of the appropriate remedy, particularly in light of the numerous extant consumer contracts, is best deferred until after a hearing on that issue.

Conclusion

Accordingly, Plaintiff's motion for summary judgment is granted insofar as the Court determined that Cremation Society was operating as an unlicensed funeral director during the

closed period of time from 1981 through 2004. The motion for summary judgment is denied in all other respects.

BY THE COURT:

Sept. 20, 2007
Date



William J. Ober, J.

Attest:

Prothonotary

CC: James S. Lederach, Esquire
Marc W. Witzig, Esquire