STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
Law Docket No. YOR-12-599

ROBERT F. ALMEDER and
VIRGINIA S. ALMEDER, et al.,

Plaintiffs

v.

TOWN OF KENNEBUNKPORT, et al.,

Defendants

APPELLEE TOWN OF KENNEBUNKPORT'S RESPONSE TO APPELLANTS' MOTION TO DISMISS APPEAL AND ALL CROSS APPEALS

It is unusual for appellants to move to dismiss their own appeal, and Appellee Town of Kennebunkport (the "Town") would have no objection to the dismissal of all appeals and cross-appeals, as requested by Appellants Robert F. Almeder *et al.* ("Appellants"), to the extent that it would terminate this litigation and the October 16, 2012 judgment of the York Superior Court would become final. However, to the extent that Appellants are not in fact seeking to dismiss their appeal, but are instead prematurely seeking a decision in their favor on the merits on their appeal from the Superior Court's November 29, 2012 Order, the Town hereby opposes the requested relief as inappropriate under M. R. App. P. 10.

I. RELEVANT BACKGROUND

This lawsuit arises out of the disputed ownership and use rights of a two mile stretch of sandy beach in Kennebunkport, Maine known as Goose Rocks Beach. In October 2009, a minority of the owners of beachfront property at Goose Rocks Beach (the "Plaintiffs"), brought a quiet title action against the Town and all persons unascertained who may claim rights to Goose

Rocks Beach. The Town filed a counterclaim asserting fee ownership of Goose Rocks Beach under theories of (1) record title, (2) adverse possession and (3) boundary by acquiescence, and it also asserted public use rights under theories of (4) prescription, (5) dedication and acceptance, (6) custom, (7) implied or quasi-easements and (8) the public trust doctrine. By order of the Superior Court, the non-plaintiff beachfront owners were eventually joined to the lawsuit as parties-in-interest, the State of Maine was permitted to intervene and assert rights under the public trust doctrine, and the owners of certain backlot properties in the Goose Rocks zone were permitted, as a class, to join the lawsuit and pursue counterclaims of private easement by prescription, implication and estoppel. Cross-motions for summary judgment on the issue of record title to Goose Rocks Beach were filed by the Town and Plaintiffs and were denied by the Superior Court on December 22, 2011.

Prior to trial, the Plaintiffs urged the Court to try the easement and custom claims first because, they claimed, a decision on those claims might obviate the need for a title trial. The Town did not object when, "for the convenience of the parties, and in particular, many of the Plaintiffs who are summertime residents of the area, the Court scheduled issues relating to prescriptive easement and custom for trial before the issues of title were resolved." Order on Town's 54(b) Motion at 1 (November 29, 2012).

Also prior to trial, and as the result of an intensive judicially-assisted settlement process overseen by Justice Andrew M. Horton that extended throughout the summer and onto the eve of trial, an agreement was reached between the Town, the backlot owners, and the majority of beachfront owners (but none of the Plaintiffs) regarding ownership and use rights of more than 55% of the total beachfront lots at Goose Rocks Beach and more than 85% of the beach not

claimed by Plaintiffs. The agreement was entered on the docket as a stipulated judgment in this litigation on September 27, 2012.

The Superior Court subsequently presided over a three week trial regarding the high dry sand and intertidal portions of Goose Rocks Beach claimed by Plaintiffs and seven other beachfront owners joined as parties-in-interest who did not sign the stipulated judgment and expressly elected to be bound by the Superior Court's judgment prior to trial, *see* Partial Judgment at 3-4 (October 16, 2012). Following trial, in which sixty-six witnesses testified and numerous documentary exhibits were accepted into evidence, a Partial Judgment was entered on October 16, 2012, finding an easement for general recreational purposes in favor of the public under theories of prescription and custom; finding an easement for general recreational purposes in favor of the backlot owners under the theory of prescription; and finding in part in favor of, and in part against, the State of Maine on its public trust claims.

On November 29, 2012, the Superior Court entered final judgment on those claims, and expressly "incorporated into the final judgment" a stipulation by the Town, conditioned on the public recreational easement not being overturned on appeal, that "all of the Town's remaining claims be dismissed with prejudice and that the Plaintiffs have title extending to the low water mark of property described in deeds attached to the Complaint, Amended Complaint, and Joinders filed by the Plaintiffs in this matter." A similar stipulation dismissing all remaining claims of the backlot owners was also incorporated into a final judgment on November 29, 2012, and the State had no remaining claims after the October 16, 2012 Judgment.

The effect of incorporating the stipulations into the final judgment entered on November 29, 2012 is that all claims in the lawsuit have been resolved in their entirety by order of the Superior Court as of November 29, 2012, conditioned on the recreational easement found in

favor the public and backlot owners not being overturned on appeal. The Plaintiffs (and the seven Parties-in-Interest who agreed to be bound by the Court's judgment); timely filed a Notice of Appeal on December 19, 2012, appealing from the November 19, 2009 orders, the October 16, 2012 Partial Judgment, as well as the December 22, 2011 Decision and Order on Motions for Summary Judgment and an August 17, 2010 Order.

Because the Plaintiffs included in their Notice of Appeal, the 2011 Decision and Order on Motions for Summary Judgment (which denied the cross-motions for Summary Judgment filed by the Town and the Plaintiffs on the issue of record title), the Town was concerned that Plaintiffs might be intending to argue that the Law Court should overturn the public recreational easement on appeal (which, if successful, would trigger a remand to the Superior Court to decide the title claims that were conditionally resolved in the November 29, 2012 Orders), but then simultaneously argue that the Law Court should also reverse the Superior Court's denial of their motion for summary judgment on the issue of record title rather than remand for trial on title. Because of this concern, the Town filed a notice of cross appeal on January 2, 2013, which expressly stated that "The Town is filing this notice of cross-appeal out of an excess of caution to preserve its right of appeal on the Court's December 22, 2011 Decision and Order and denial of the Town's Motion for Summary Judgment. The Town believes, however, that Plaintiffs' appeal of the Court's December 22, 2011 Decision and Order, which is not a final judgment, is an interlocutory appeal and should be dismissed."

The Town asserts that the title issues are not properly before this Court on appeal. Instead, as previously noted, the title issues have been resolved by the November 29, 2012 Order of the Superior Court.

Notwithstanding that the Appellants filed this appeal, they now seek to dismiss their own appeal in its entirety. In addition to dismissal of their appeal, however, and notwithstanding that a briefing schedule has yet to be issued regarding Appellants' appeal of the November 29, 2012 Orders, Appellants seek to vacate those November 29, 2012 Orders (thereby effectively seeking a decision on the merits of that portion of their appeal).

II. ARGUMENT

The Maine Rules of Appellate Procedure provide that "[u]nless another form is prescribed by these rules, an application to the Law Court for an order or other relief shall be by motion ... and shall set forth the order or relief sought." M.R. App. P. 10(a). For the relief requested here by Appellants, however, "another form is prescribed by the rules," so their request by motion is inappropriate. "Review of a judgment, order or ruling of ... the Superior Court ... shall be by appeal." M.R. App. P. 2(a). Furthermore, while the Law Court generally has broad discretion to suspend its rules, that discretion is more limited with regard to the Rule 2 requirement that review of a judgment, order or ruling of the Superior Court be obtained by appeal rather than by motion. *See* M.R. App. P. 14(c) ("In the interest of expediting decision upon any matter, or for other good cause shown, the Law Court may modify or suspend any of the requirements or provisions of these Rules, except those of Rule 2 and those of Rule 14(b), on application of a party or on its own motion, and may order proceedings in accordance with its direction.") (emphasis added). Finally, when resolution of a motion requires the Law Court to also analyze the underlying merits of the appeal, the Court will Order that the motion be heard with the merits of the appeal. *See, e.g. Forest Ecology Network v. Land Use Regulation Comm'n*, 2012 ME 36, ¶ 13, 39 A.3d 74, 80.

A. The Trial Court Properly Considered the Rule 54(b) Factors for Certification

This Court "review[s] the partial final judgment certification for an abuse of discretion." *Wells Fargo Home Mortgage, Inc. v. Spaulding*, 2007 ME 116, ¶ 13, 930 A.2d 1025, 1028. In order to facilitate review by this Court, the trial Court is required to make "specific findings and [a] reasoned statement" after considering several factors, including:

- The relationship of the adjudicated and unadjudicated claims;
- The possibility that the need for review may be mooted by future developments in the trial court;
- The chance that the same issues will be presented to [the appellate court] more than once;
- The extent to which an immediate appeal might expedite or delay the trial court's work;
- The nature of the legal questions presented as close or clear;
- The economic effects of both the appeal and any delays on all of the parties, including the parties to appeal and other parties awaiting adjudication of unresolved claims; and
- Miscellaneous factors such as solvency considerations, the res judicata or collateral estoppel effect of a final judgment and the like.

Chase Home Finance LLC v. Higgins, 2008 ME 96, ¶10, 953 A.2d 1131, 1134. It is only "[i]n the absence of any argument on the matter from [a moving party] or any language in the order that the court signed describing how Rule 54(b)(1) applied," that this Court directly "examine[s] the nature of the [remaining] counterclaim[s] to determine whether the certification of the judgment as final was justified." *Id.* at ¶11, 953 A.2d at 1134.

Here, the Superior Court properly considered all of those factors and issued specific findings and a reasoned statement explaining that certification was proper on the particular facts and procedural posture of this case. The Superior Court determined that the effect of incorporating the conditional stipulations into the final judgments entered on November 29, 2012 is that all claims in the lawsuit have been resolved in their entirety by order of the Superior Court as of November 29, 2012, conditioned on the recreational easement found in favor the public and

backlot owners not being overturned on appeal. The Superior Court expressly noted that this puts the Appellants "in the same position on appeal that they would be in if they tried – and won – all of the title claims." *See* Order granting Town's 54(b) motion entered November 29, 2012 at 5. This determination was not an abuse of discretion.

Furthermore, the three M. R. Civ. P. 54(b) motions were fully briefed and argued at the Superior Court level. However, because Appellants now seek review of the Superior Court's Order by motion prior to the appellate record being certified pursuant to M.R. App. P. 7(a), this Court does not yet have access to a complete record of that briefing and the evidence upon which the Superior Court relied in making its decision.

B. The Nature of the *Chase Home Finance* Factors Does Not Permit Review of the 54(b) Certification Independent of the Merits

The factors outlined in *Chase Home Finance LLC*, to be considered by the Superior Court are not independent requirements that must each be separately met. Instead, the Superior Court must weigh the totality of the factors and make a "reasoned statement" regarding their application. *Chase Home Finance LLC*, 2008 ME 96, ¶10, 953 A.2d at 1134. Here, the Superior Court actually found that each and all of those factors weighed in favor of certification.

One of those factors is "[t]he nature of the legal question as close or clear." *Id.* This factor requires the Law Court to also analyze the underlying merits as "close or clear," so it is appropriate for the Court to Order that the motion be heard with the merits of the appeal. *See, e.g. Forest Ecology Network*, 2012 ME 36, ¶ 13, 39 A.3d at 80.

Maine Law is very clear regarding public prescriptive easements for general recreation over a beach. *See Eaton v. Town of Wells*, 2000 ME 176, ¶¶ 32-42, 760 A.2d 232, 244-47; *Bell v. Town of Wells*, 1987 Me. Super. LEXIS 256 at *41-42 (Me. Sup. Ct., York Cty, Sept. 14, 1987) (Brodrick, J.); *see also Lyons v. Baptist Sch. of Christian Training*, 2002 ME 137, ¶ 28,

804 A.2d 364, 373. Here, the Superior Court expressly found that "[t]he legal questions on appeal are not close but are clear because the case as decided is on all fours with the controlling precedent of *Eaton v. Town of Wells*, and the test for setting aside a Court's findings of fact is "clear error." *Eaton*, 2000 ME 176, ¶ 33, 760 A.2d 232, 244, making it likely that the trial court will be upheld on appeal, thereby obviating the need for any future title trial." Furthermore, the Superior Court concluded that "The Plaintiffs lose nothing because the Town's Conditional Stipulation [expressly incorporated into the judgment] puts them in the same position on appeal that they would be in if they tried – and won – all of the title claims. Accordingly, it is in the best interests of all involved that the Partial Judgment be certified."

Ending the litigation in its entirety clearly furthers the rationale of the final judgment rule and the purposes of Rule 54(b). The above factors alone are sufficient to find no abuse of discretion in the Rule 54(b) certification. However, even if the Law Court were to decide the Superior Court somehow did abuse its discretion, it would clearly be aided in having a complete appellate record, and full briefing on the merits, in making that determination.

C. This Appeal Will Not Result in a Moot or Advisory Decision

Appellants inexplicably declare that "if this Court rules against the Appellants, there will be a trial on appellants' title claim." *Appellants Motion to Dismiss* at 14. It is difficult to see how this can happen when the Superior Court has already (albeit conditioned on this Court ruling against the Appellants) entered judgment dismissing the claims of all Defendants and finding in Plaintiffs' favor. Apparently, Appellants are insisting on a right to litigate the issue of title even though the Superior Court has already declared them the winner. Furthermore, Appellants argue that the Superior Court's final judgment, which by incorporation of the Town's stipulation (conditioned on the judgment not being reversed on appeal) dismisses all remaining claims

against Plaintiffs and finds in their favor on all of their claims, must fail because "an agreement between one party and the court cannot render meaningless another party' claims." *Appellants Motion to Dismiss* at 17. Although it is true that no party can unilaterally terminate another party's claims by stipulation, the Superior Court can, and did (over Plaintiffs' objection), enter an Order that in the words of the Superior Court "puts [the Plaintiffs] in the same position ... that they would be in if they tried – and won – all [remaining] claims."

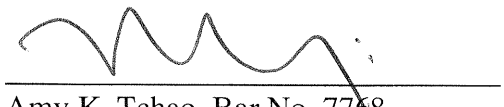
Everybody wants this litigation to be over. Even the Superior Court noted in its certification that "as the evidence at trial established, the ongoing nature of this litigation is divisive to the community which will be well served by an expedited resolution." The Parties argued, and the Superior Court agreed, that the most efficient way for that to happen was for the Superior Court to certify the judgment, incorporating an order conditionally dismissing and deciding all remaining claims, because the most likely outcome would be that the Law Court upholds the public recreational easement on appeal and the entire case is finished. That was a reasoned determination of the Superior Court, and not an abuse of discretion.

III. CONCLUSION

Appellants have not provided "good cause" within the meaning of Rule 14(c), to justify departure from the requirement under the Rule 2(a) that reversal of a judgment or order of the Superior Court should be had by appeal (on the briefs) rather than by motion under Rule 10.

For all of the reasons discussed above, and the reasons articulated by the Superior Court in its November 29, 2012 orders, this Court should deny Appellants' request that the Superior Court's November 29, 2012 orders be reversed.

Dated: February 11, 2013



Amy K. Tchao, Bar No. 7768
Brian D. Willing, Bar No. 9112
David M. Kallin, Bar No. 4558
Attorneys for the Appellee Town of Kennebunkport

Drummond Woodsum & MacMahon
84 Marginal Way, Suite 600
Portland, Maine 04101
(207) 772-1941

CERTIFICATE OF SERVICE

I, Brian D. Willing, hereby certify that I have this 11th day of February, 2013, caused two copies of the foregoing Appellee Town of Kennebunkport's Response To Appellants' Motion To Dismiss Appeal And All Cross Appeals to be served on counsel for the parties listed below, by depositing the same in the United States mail, first-class postage prepaid, addressed as follows:

Sidney Thaxter, Esq.
Benjamin Leoni, Esq.
Curtis Thaxter
One Canal Plaza, Suite 1000
Portland, ME 04101

Christopher E. Pazar, Esq.
Drummond & Drummond
One Monument Way
Portland, ME 04101

Alexander & Judith Lachiatto
12 Bel Air Avenue
Kennebunkport, ME 04046

Richard & Margarete K.M. Driver
6 Marshview Circle
Kennebunkport, ME 04046

Alan Shepard, Esq.
Shepard & Read
93 Main Street
Kennebunk, ME 04043-7086

Nicholas Strater, Esq.
Strater & Strater PA
P.O. Box 69
York, ME 03909

William Leete, Esq.
Leete & Lemieux
P.O. Box 7740
Portland, Maine 04112

Paul Stern, Esq.
Office Of The Attorney General
6 State House Station
Augusta, ME 04333-0006

Neal L. Weinstein, Esq.
Law Offices of Neal L. Weinstein
P.O. Box 660
Old Orchard Beach, ME 04064

Gregg R. Frame, Esq.
Andre Duchette, Esq.
Taylor, McCormack & Frame, LLC
30 Milk Street, Suite 103
Portland, ME 04101

Robert E. Danielson, Esq.
2 Canal Plaza, STE 401
P.O. Box 545
Portland, ME 04112-0545

Dated: February 11, 2013

Brian D. Willing, Bar No. 9112