

STATE OF MAINE
YORK, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. RE-09-111

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

Plaintiffs

v.

TOWN OF KENNEBUNKPORT and
ALL PERSONS WHO ARE
UNASCERTAINED

Defendants

**OBJECTION OF DEFENDANT
TOWN OF KENNEBUNKPORT
TO NOTICE OF PUBLICATION
AND REQUEST FOR
EXPEDITED HEARING**

Defendant Town of Kennebunkport (the “Town”) hereby objects to Plaintiffs’ Notice of Publication to Persons Who Are Unascertained and to the General Public on the grounds that Plaintiffs have failed to comply with 14 M.R.S.A. §§ 6653-56 and Rule 4(g) of the Maine Rules of Civil Procedure, and the proposed Notice of Publication is also inadequate for purposes of notifying, and serving, those persons who have an interest in Goose Rocks Beach and are clearly ascertainable. The Town further states as follows:

This quiet title action involves claims brought by 23 (out of approximately 88) beachfront property owners at Goose Rocks Beach in Kennebunkport, Maine seeking a declaration that they own all but 200 (or so) yards of Goose Rocks Beach and, furthermore, that they have the right to exclude the general public, and others, from using Goose Rocks Beach for recreational purposes. Plaintiffs have sued the Town and “all persons who are unascertained, not in being, unknown or out of the State, heirs or legal representatives of such unascertained persons, or such persons as shall become heirs, devisees or appointees of such unascertained persons who claim the right to use or title in Plaintiffs’ Property other than those persons claiming ownership or easement by,

through, or under and instrument recorded in the York County Registry of Deeds.”

Maine law provides that service in an action such as the one brought by Plaintiffs “shall be made as in other actions on all supposed known claimants residing either in the State or outside the State, and notice to persons who are unascertained, not in being or unknown shall be given by publication as in other actions where publication is required, unless the court on motion permits posting in such public places as the court may direct in lieu of all or part of the publication ordinarily required. 14 M.R.S.A. § 6653 (emphasis added). Pursuant to Rule 4(g), “[t]he court, on motion upon showing that service cannot with due diligence be made by another prescribed method, shall order service by publication...” Me.R.Civ.P 4(g) (emphasis added).

Plaintiffs have failed to properly serve the “known claimants residing either in the State or outside the State,” as required by 14 M.R.S.A. § 6653, and failed to notify them of the lawsuit they filed against the Town to prohibit recreational use of almost all of Goose Rocks Beach by the public and others. There are approximately 65 beachfront property owners at Goose Rocks Beach in addition to the 23 Plaintiffs, and many more back lot owners, who claim an interest in Goose Rocks Beach and who are readily ascertainable. In addition, the State of Maine has a significant interest in protecting the general public’s rights in the intertidal zone, but has not been properly served or notified of this lawsuit, and there are numerous other persons and entities that may also claim an interest in Goose Rocks Beach, including but not limited to the Goose Rocks Beach Association, the Kennebunkport Conservation Trust, the Tides Inn by the Sea and others. Plaintiffs have failed to properly notify or serve any of these readily identifiable persons and entities, who may have an interest in Goose Rocks Beach, of their lawsuit.¹

¹ Rule 19 requires the joinder of all parties necessary for just adjudication if “(1) in the person’s absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person’s absence may (i) as a practical matter impair or impede the person’s ability to protect that interest or (ii) leave any of the persons already parties subject to

Second, Plaintiffs have failed to file a motion for service by publication in accordance with Rule 4(g). Instead, they have simply filed a notice of publication with the Court in an attempt to avoid any input from the Court on the merits of the proposed service by publication. Rule 4(g), however, requires that Plaintiffs file a motion, thereby giving the Court an opportunity to determine whether service “cannot with due diligence be made,” including service on those persons and entities discussed above who claim an interest in Goose Rocks Beach and who are readily ascertainable, and whether the Journal Tribune is, for example, the most appropriate publication to publish the Court’s order for service by publication to notify the general public, and such persons and entities who truly are not ascertainable, of Plaintiff’s lawsuit.²

Finally, it is worth noting that, in the case of *Bell v. Town of Wells*, 510 A.2d 509, 510 (Me. 1986), which relates to the public’s right, title and interest in Moody Beach and is the case upon which Plaintiffs so heavily rely in bringing this lawsuit against the Town, “the court appointed a guardian *ad litem* to represent unnamed or unknown defendants not actually served with process” in accordance with 14 M.R.S.A. §§ 6654, 6656. Likewise, the Court should consider whether to appoint a guardian *ad litem* in this case. Section 6656 specifically provides

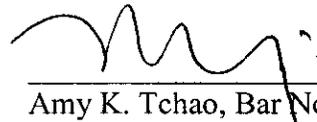
a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.” Here, Plaintiffs are apparently seeking to avoid the requirements of Rule 19 through service by publication of “all persons who are unascertained, etc...” Although service by publication may be sufficient to notify persons and entities who are in fact unascertainable, service by publication is inadequate under Rule 4, and Rule 19, for purposes of notifying persons and entities who are readily ascertainable and have a clear interest in Goose Rocks Beach. Plaintiffs should, therefore, be required to properly notify any such persons who are readily identifiable, can “with due diligence” be served, and have or claim an interest in Goose Rocks Beach.

² Although the Journal Tribune is York County’s only daily newspaper, it is likely not the publication that is most widely distributed in Kennebunkport and Goose Rocks Beach. In this case, Plaintiffs waited until October to file their lawsuit when many out-of-state, Goose Rocks Beach property owners have left for the winter, and Plaintiffs are now publishing their proposed notice of the lawsuit in the Journal Tribune instead of the York County Coast Star, Portsmouth Herald, Portland Press Herald or other more widely circulated publications. As a result, many Goose Rocks Beach property owners may not receive notice of the pending lawsuit, even though such persons and entities are readily ascertainable through the Registry of Deeds, Town records and Post Office records. The likely consequence of the timing of this lawsuit, the relatively small circulation of the publication Plaintiffs have chosen, and the fact that many Goose Rocks Beach property owners reside out of state during the non-summer months, is that many persons and entities who claim an interest in Goose Rocks Beach will not receive notice of this lawsuit.

that, if “the court finds that there are or may be defendants who have not been actually served with process and who have not appeared in the action, it may of its own motion, or on the representation of any party, appoint an agent, guardian *ad litem* or next friend for any such defendant, and if any such defendants have or may have conflicting interests, it may appoint different agents, guardians *ad litem* or next friends to represent them.” 14 M.R.S.A. § 6656.

WHEREFORE, Defendant Town of Kennebunkport respectfully requests that the Court strike and/or rescind Plaintiffs’ Notice of Publication to Persons Who Are Unascertained and to the General Public and further requests that a hearing be held at the Court’s earliest convenience to address the issue of service and notification of all persons and entities who claim an interest in Goose Rocks Beach, including those persons and entities who are ascertainable and those who are not ascertainable. In the alternative, the Defendants respectfully request that the Court dismiss Plaintiffs’ Complaint in accordance with Rule 19(b) for failure to join parties necessary for just adjudication and enter such other and further relief as justice may require.

Dated: December 7, 2009



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