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November 15, 2012

Dianne Hill, Clerk
York County Courthouse
45 Kennebunk Road
P. O. Box 160
Alfred, Maine 04002-0160

RE: Robert F. Almeder, et al. v. Town of Kennebunkport, et al.
Docket No. RE-09-111

Dear Ms. Hill:

Enclosed for filing in the above referenced case, please find the following document titled:

Plaintiffs' Opposition to Motions of Defendant Town of Kennebunkport, TMF Defendants, and State of Maine for Entry of Final Judgment Pursuant to Rule 54(B)

A copy of the enclosed was served via U. S. Mail post-prepaid upon all parties listed below.

Thank you for your assistance.

Sincerely,

Benjamin M. Leoni

BML/rar
Enclosure
Copy to (w/ encl.):
Amy K. Tchao, Esq./Brian Willing, Esq.
Gregg R. Frame, Esq. / André G. Duchette, Esq.
Paul Stern, Deputy Attorney General
Alexander M. and Judith A. Lachiatto, *pro se*
Richard J. and Margarete K.M. Driver, *pro se*
Christopher E. Pazar, Esq.

STATE OF MAINE
YORK, ss.

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

ROBERT F. ALMEDER et al.,	)	
	)	
Plaintiffs,	)	PLAINTIFFS' OPPOSITION TO MOTIONS OF DEFENDANT TOWN OF KENNEBUNKPORT, TMF DEFENDANTS, AND STATE OF MAINE FOR ENTRY OF FINAL JUDGMENT PURSUANT TO RULE 54(B)
v.	)	
TOWN OF KENNEBUNKPORT and ALL PERSONS WHO ARE UNASCERTAINED,	)	(Title to Real Estate Involved)
Defendants.	)	

INTRODUCTION

Plaintiffs share the parties' desire to expedite the appeal of this Court's partial judgment on the issues of easement by prescription and easement by custom. However, unless the Town of Kennebunkport (the "Town") agrees to stipulate to Plaintiffs' title, an appeal to the Law Court on the issue of a prescriptive easement is not ripe for review because this Court has yet to "declare" who owns the beach. This Court cannot base a final judgment on a conditional stipulation. If the Town stipulates to Plaintiffs' title to the low water mark and the TMF Defendants agree to dismiss their remaining easement claims, Plaintiffs will, of course, agree stipulate to an unconditional entry of final judgment.

The State, TMF Defendants, the Town (collectively the "moving parties"), Plaintiffs and this Court have long recognized the need for a bifurcated trial. To accommodate the parties' witnesses, all parties understood that the prescriptive easement trial would be held first, *de bene esse*, pending a final outcome as to title: Law Court precedent requires nothing less. In an effort to save a few months dedicated to trying title, moving parties would risk delaying final adjudication of the issues for years. Parties have already completed discovery and preparation as

to their title claims. Experts and documents have been prepared. Preliminary arguments have been made on summary judgment. All that is left is to present prima facie evidence to title at trial. The Court should therefore deny the motions by the Town, TMF Defendants, and the State.

DISCUSSION

A stipulation that is merely "conditional" cannot give rise to a judgment that is "final." Yet the moving parties seek such a result. The Town and TMF Defendants cannot have their cake and eat it too by "conditionally stipulating" to Plaintiffs' titles only so long as they prevail in the appeal to the Law Court, and simply revoke the stipulation if they lose.

Maine Rule of Civil Procedure 54(b)(1) allows for entry of final judgment as to one or more, but not all, claims in the unusual circumstances that "there is no just reason for delay and upon an express direction for the entry of judgment." M.R. Civ. P. 54(b)(1) (emphasis added). The language from this rule recognizes the "strong policy against piecemeal review of litigation." *Guida v. Turner*, 2004 ME 42, ¶ 9, 845 A.2d 1189, 1192 (citing *Fleet Nat'l Bank v. Gardiner Hillside Estates, Inc.*, 2002 ME 120, ¶ 10, 802 A.2d 408, 412). Furthermore, the Law Court will undertake its own review of a Rule 54(b) entry of judgment to decide whether the "facts of this case constitute such an unusual circumstance that the merits of an interlocutory appeal should be considered before all pending claims are resolved." *Id.* ¶ 10. If not, the Law Court will dismiss the appeal. *Id.* ¶ 11.

Moving parties correctly lay out factors that this Court and the Law Court must consider when reviewing the merits of a Rule 54 motion. However, the moving parties misapply and oversimplify these factors. The first factor focuses on the relationship of the adjudicated and unadjudicated claims, not simply the similarity in facts. Here, a final determination as to the title claims is a prerequisite to a final determination on the prescriptive easement claims. Even the

Town recognizes that "future development in the trial court would be necessary solely so that the aggrieved Plaintiffs and Parties in Interest could appeal the existing partial judgment." Town's Motion at 3 (emphasis in original). These two claims could not be more legally intertwined. For this reason alone, this Court should deny the moving parties' motions.

In an effort to save a few months, moving parties threaten to delay final adjudication of this case by years. Appeal now comes with the very real potential that the final outcome of this case is *delayed*, not expedited. Parties could proceed forward with the title trial now and have a decision soon, at which point an appeal of all the issues would be ripe for review and all claims heard by the Law Court together. Conversely, an appeal now on the prescriptive easement claims will not be fully heard and ruled on for close to a year. If this Court's partial judgment is overturned, all parties will return to this Court in 2013 or possibly 2014 and proceed to the title trial. If the Plaintiffs win their appeal on the prescriptive easement claims, this Court's involvement in this case will continue far beyond spring of 2013 and will be subject to yet a second review by the Law Court, delaying final adjudication of the claims in this case by years.

The Town claims that the legal questions on appeal "are not close but are clear." If the Town is so certain of this fact, they should drop their title claims and allow all parties to proceed to appeal on the prescriptive claims. Recent decisions in Lyons v. Baptist School, Weeks v. Krysa, Androkites v. White, and most recently in Weinstein v. Hurlbert all rested on whether the use of the property was sufficiently adverse to put the true owner on notice that their property rights were in jeopardy. In each of these cases, the trial court held that they were. However, despite the high degree of deference provided to trial court factual findings, each and every one of those decisions was overturned by the Law Court. Lyons, 2002 ME 137; Weeks, 2008 ME 120; Androkites, 2010 ME 133; Weinstein v. Hurlbert, 2012 ME 84.

Any potential economic "benefit" that could be realized if this Court's partial judgment is upheld are slight: it only avoids a title trial that would be heard within months. The Parties have already completed the majority of preparation for such a trial. However, if the Law Court overturns this Court's partial judgment, parties will have to endure the costs and delay of an additional and unnecessary appeal to the Law Court.

Finally, aside from the Law Court's seven-factor analysis for Rule 54(b) motions, the Town asserts that there is no "ripeness" issue related to the prescriptive claims, as held in *Flaherty v. Muther*, 2011 ME 32, ¶ 85 n.6, because any heirs to Plaintiffs' predecessors in title who "effected a severance" at some point "have been served by publication and joined by order of the Court." Town Motion at 4. However, under *Muther*, the Court must "declare" the true owners. *Muther*, 2011 ME 32, ¶ 85 n.6. A "conditional stipulation" is a far cry from a "formal statement, proclamation or announcement" that embodies a "declaration." Black's Law Dictionary, 182 (3 ed. Pocket Ed. 2006). While an unconditional stipulation by the parties in an action does serve to establish title for the purposes of ripeness, what the moving parties propose here is essentially a "conditional ripeness." There is no such thing. If the Town does not get its way on appeal, it will simply revoke its stipulation as to title.

Parties have expended substantial resources preparing for adjudication of their title claims. Experts have been prepared and are ready. If interlocutory appeal was granted and the Plaintiffs prevailed in the appeal, all parties would have to reeducate themselves and their experts as to the issues and expend additional resources simply getting back up to speed on the title issues. Furthermore, an interlocutory appeal places an additional burden on the experts themselves, whose participation in this trial will be extended far beyond what that parties anticipated and agreed to as part of a bifurcated trial. There is nothing to ensure that all

witnesses will still be available to testify one or two years down the road. This uncertainty alone cautions against an interlocutory appeal.

CONCLUSION

Every party to this litigation agreed to a bifurcated trial. It is time to move forward on the agreed—and necessary—step of determining Plaintiffs' titles in the beach. If this Court proceeds with the title trial as planned, the trial court portion of this matter will be concluded within a matter of months. Even if this court enters final judgment on the prescriptive claims, the Law Court will likely send it right back because the claims are not "ripe" for appeal and because the Law Court does not favor interlocutory appeals. However, even if the Law Court grants interlocutory appeal and the moving parties do not prevail, the Court will be forced to revisit this matter because moving parties refuse to fully drop their additional claims, despite acknowledging that they are not the real issues in dispute between the parties. A final judgment on prescriptive easement requires a final declaration as to title claims. Moving parties to this case have only offered a revocable stipulation rather than a final declaration. The Court should therefore deny the motions for interlocutory appeal filed by the Town, TMF Defendants, and the State pursuant to Rule 54(b) of the Maine Rules of Civil Procedure.

Dated: November 15, 2012

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