STATE OF MAINE
YORK, SS.

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

ROBERT F. ALMEDER et al.,
Plaintiffs,

v.

TOWN OF KENNEBUNKPORT et al.,
Defendants.

PLAINTIFFS' REPLY TO THE TOWN'S OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION

I. The Town cannot now survive Plaintiffs' Motion for Summary Judgment on Count I of the Town's counterclaim by asserting a new theory of title based upon an unidentified source or sources of title.

In their Motion for Reconsideration ("Motion"), Plaintiffs properly set out the precedent for the Town (as opposed to Plaintiffs) having the burden of proof on the Town's claim of title to the dry sand and intertidal zone of Goose Rocks Beach ("beach"). Summary judgment in the Plaintiffs' favor is proper when, as in this case, the Town has the burden of proof on the essential elements at trial and it is clear that the Plaintiffs would have been entitled to a judgment as a matter of law if the Town presented no more evidence than what was before the court at the hearing on the Motion for Summary Judgment. *Barnes v. Zappia*, 658 A.2d 1086, 1089 (Me. 1995). A judgment as a matter of law in Plaintiffs' favor is appropriate when any verdict or decision for the Town would be based on pure conjecture or speculation. *Id.* In order to survive Plaintiffs' Motion for Summary Judgment on Count I of the Town's counterclaim, the Town "must establish a prima facie case for each element of its cause of action." *Burdzel v. Sobus*, 2000 ME 84, ¶ 9, 750 A.2d 573, 576. Count I of the Town's counterclaim requires the Town initially to present *prima facie* evidence of title in itself and once that threshold is met, to then prove it has better title than Plaintiffs. Here, in the first instance, in its statement of material

facts and reply to Plaintiffs' statement of material facts, the Town failed to establish a "genuine issue of material fact" regarding its title to the beach.

The Town's *prima facie* evidence of title as expressed in its summary judgment pleadings was limited to one and only one document: the 1684 deed. The Town was unequivocal that the1684 deed, alone, served as its sole source of title and the sole source of title for any subsequent "conveyances" of title attributed to the Town. The Town's position was that the 1684 deed served as its source of title to all land, common and undivided included, and that it retained title to the beach as a remainder of un-conveyed lands from the 1684 conveyance. The Court expressly rejected that argument and the Town has not challenged the Court's legal conclusion. As explained more fully in the Motion, once the Court concluded that the Town's only claim to title to the beach—the 1684 deed—was not credible, the Court should have granted to Plaintiffs summary judgment on Count I of the Town's counterclaim. As a matter of fact and law, the Town simply failed to present *prima facie* evidence of title to the beach.

In response to the Motion, the Town seeks to avoid summary judgment on its title claim to the beach by asserting there may be other sources of title that it could present at a later date. The flaw in the Town's position is the Town never asserted or "implied" in the summary judgment record that its title was derived from any source or sources other than the 1684 deed.[1] Had a trial taken place based solely upon the material presented in the summary judgment pleadings, Plaintiffs would have been entitled to a judgment as a matter of law on the Town's title claim, as the Court could only find title in the Town based upon speculation and conjecture

[1] The only so-called "out-conveyances" attributed to the Town for the area in dispute, the beach, consists of three lay outs to John Emmons in 1777, Captain John Downing in 1720, and John Jeffrey in 1727. While the Court decided it did not need to address the legal effect of these documents in the context of the Town's title claim, the summary judgment record is clear that the Town's position regarding the source of these so-called Town "out-conveyances" and the Town's so-called right to convey rested in the 1684 deed. There was no evidence presented by the Town that its source of authority to convey came from any other grant of title, implied or otherwise.

that the Town derived title from some unidentifiable and unclaimed implied source. The Law Court in *Eaton v. Town of Wells* expressly rejected speculative representations of title as evidence of title, and instead *required evidence of an expressed grant* into the Town of Wells for the Town of Wells *to survive a motion for summary judgment* regarding its claim of title. 2000 ME 176, ¶¶s 16–18, 760 A.2d 232, 239–40. The Law Court's holding applies with similar effect here.

Contrary to the Town's present position raised in response to the Motion, the Town does not get a second chance to establish its source of title at a trial. The Town had the responsibility to produce *prima facie* evidence of its title as part of the summary judgment process. It relied solely on the 1684 deed as *prima facie* evidence. The Court held that the 1684 document was not a source of title and conveyed no interest in the beach to the Town. The Town cannot now survive summary judgment in Plaintiffs' favor on the Town's title count through its belated attempt to create a new theory of title based upon an unidentified source or sources of title.

II. Because Plaintiffs presented unambiguous evidence of title to the beach, and the Town failed to present any evidence of title to the beach, the Court should grant summary judgment to Plaintiffs on Count II of Plaintiffs' Complaint.

As stated in the Motion, this Court's determination that Plaintiffs were required to "conclusively" establish title to the beach was legally incorrect. Plaintiffs are only required in the first instance to establish *prima facie* evidence of title to the beach. Plaintiffs' quiet title action consists of numerous separate actions for quiet title for each individual property owned by each respective Plaintiff. Thus, this Court can look to Exhibit A, attached to Plaintiffs' Motion for Reconsideration, to determine which Plaintiffs have met their burden of establishing *prima facie* evidence of title. Given the absence of any viable competing claim by the Town or others, with respect to those titles mentioned in the Motion, other than with respect to Sherman,

Coughlin, and Celi,[2] the Court should have granted Plaintiffs' summary judgment on Count II of Plaintiffs' complaint.[3]

In its Opposition to the Motion, the Town correctly points out, and Plaintiffs agree, that Plaintiffs have the burden of proof to show title in themselves and cannot prevail by *only* showing no title in the Town. However, the Town declines to address *how much* title Plaintiffs must prove in a quiet title action. In a quiet title action, a plaintiff's burden to establish title is twofold. First, a plaintiff has the initial burden of proving *prima facie* evidence of title to the land he or she claims. Second, if a plaintiff meets this burden and a defendant has come forth with its own *prima facie* evidence of title, the plaintiff then has the burden of proving *better* title, not conclusive title but better title, than that of the defendant. If no defendant comes forth with *prima facie* evidence of title and a plaintiff has established *prima facie* evidence of title, a court *must* quiet title in favor of the plaintiff. *See Hann v. Merrill*, 305 A.2d 545, 554 (Me. 1973); Motion at 4–5. By concluding that the Town's "title" document, the 1684 deed, failed to convey any title to the Town, the Court necessarily found that that the Town failed to produce *prima facie* evidence of title. *See supra* Section I. As a result, Plaintiffs are not required to show "conclusive" or better title than the Town in order to prevail on their quiet title claim.

Maine case law clearly establishes that where a plaintiff can establish possession of a legal document or deed that grants title to the land claimed, a plaintiff has established *prima facie* evidence of title sufficient to prevail on a quiet title claim. *See, e.g., Sargent v. Coolidge*, 399 A.2d 1333, 1343 (Me. 1979) (no *prima facie* evidence of title in "quitclaim deeds that convey only the 'right, title and interest' of the grantor in land as distinguished from a deed of

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[2] Given the Court's conclusion that their deeds did not unambiguously include conveyance of the beach, and despite expert opinion by title attorney J. Gordon Scannell that they hold fee title to the beach, Plaintiffs' Motion did not seek reconsideration of that portion of the Court's decision with respect to Sherman, Coughlin, and Celi. Motion at 5-6, n. 4.

[3] The Town accidentally includes Count I of Plaintiffs' Counterclaims in its opposition.

conveyance, *quitclaim or otherwise, which conveys the land itself*")(emphasis added); *Ripley v. Trask*, 76 A. 951, 953 (Me. 1910) (quitclaim deed conveying title is sufficient *prima facie* evidence of title); *Blethen v. Dwinel*, 34 Me. 133, 134 (1852) (holding that a simple quitclaim deed to plaintiff of the premises was *prima facie* evidence of title); *Thompson v. Watson*, 14 Me. 316, 317 (1837) (holding that a mortgage deed by itself is sufficient evidence of title). Whether a deed is a quitclaim deed, a warranty deed, or otherwise is immaterial. So long as the deed is a deed of conveyance of the property at issue and the plaintiff is in lawful possession of that deed, a plaintiff has established *prima facie* evidence of title for the purposes of a quiet title action.[4]

Notwithstanding a few expressly acknowledged exceptions, Plaintiffs have met their burden of establishing unambiguous and uncontested *prima facie* evidence of title to the beach through the source deeds and resting deeds that clearly convey title to land that includes the beach. *See* Motion, Exhibit A (providing cross references to evidence in the record). Plaintiffs have also included various resting deeds as well as an expert opinion by title attorney J. Gordon Scannell ("Scannell") that clearly meets—and in most cases establishes far more than—*prima facie* evidence that Plaintiffs' titles include the beach. Since the Town has failed to put before the court any *prima facie* evidence of its title to the beach, Plaintiffs are not required to prove they have better title than the Town or prove their titles "conclusively."

The Town attempts to avoid summary judgment in favor of those Plaintiffs who have established *prima facie* evidence of title by focusing on a deed for one of the three individual Plaintiffs not subject to this Motion. *See* Town's Reply at 3 (referencing the deed of Carolyn Sherman). This red herring argument should be disregarded because Plaintiffs acknowledged for

[4] The Town attempts to distinguish between quitclaim deeds and warranty deeds and asserts that quitclaim deeds are not *prima facie* evidence of title. Reply at 4 n.4; 5. However, the case law is clear that quitclaim deeds are only insufficient to establish *prima facie* evidence when the quitclaim deed itself does not purport to convey title to land. *See, e.g., Coolidge*, 399 A.2d at 1343; *Tebbetts v. Estes*, 52 Me. 566, 569–70 (1864) (cited by *Rand v. Skillin*, 63 Me. 103, 104 (1873)).

purposes of the Motion they do not seek reconsideration with respect to the Court's decision on Sherman (despite that fact the Town never controverted Scannell's opinion that Sherman holds the fee to the beach). *See supra* note 2. The Town leaves unexplained how the Sherman deed prevents the Court from granting summary judgment to the rest of the Plaintiffs on their quiet title claims.

The Town skips ahead to attack the Almeder deed, which even if conveyed through a straw man, nonetheless unambiguously grants title to the low water mark. As discussed above, the deed establishes *prima facie* evidence of title. Whether a deed is a quitclaim, warranty or otherwise is immaterial. What is material is whether the deed is a deed of conveyance of the property at issue. The undisputed facts show the Almeder deed is a conveyance of land that includes the beach. Further, the plan referenced by the Town, if lot lines are measured out on the face of the earth, would clearly extend the Almeder's lot well into the intertidal zone. Finally, the Town ignores Scannell's uncontroverted opinion that the Almeder deed conveyed title to the beach. The Town's attack on the Almeder deed might be appropriate had the Town met its own burden of producing *prima facie* evidence of title, thus forcing this Court to determine which party had *better* title, but the attack cannot, and does not, disprove *prima facie* evidence, either with respect to Almeder, or more significantly the other Plaintiffs, with the exceptions noted.

The Town's last stand against the Motion is that it will provide more evidence at trial of Plaintiffs' insufficient chain of title, *see* Town's Reply at 5. As explained above, as part of the summary judgment process, the Town had the responsibility to come forward with its *prima facie* evidence to title, both on its own count and in opposition to Plaintiffs' *prima facie* evidence of title. Having failed at its attempt to do so, it cannot now argue that somehow it can show at trial better title to the beach than Plaintiffs.

To obtain a quiet title judgment, Plaintiffs are not required to provide "conclusive" evidence of title to the beach. Further, as Maine case law makes clear, Plaintiffs are not required to "put before the court the preceding chain of title to prove that those Plaintiffs and their predecessors in interest have been in possession under the presumed lost grant for a sufficient number of years." Order at 14–15. Instead, because the only evidence offered by the Town—the 1684 deed—cannot be considered *prima facie* evidence of title, Plaintiffs only burden was to produce *prima facie* evidence of title through an existing deed conveying the beach.[5] With the exception of the individual three Plaintiffs noted, the uncontested material facts show each Plaintiff has met this burden.

Conclusion.

Plaintiffs respectfully submit that in addressing Count I of the Town's claims, the Court made an error of law by shifting the burden to the Plaintiffs to show that the Town did not have title to the beach through a conveyance prior to, or other than, the 1684 deed. In a quiet title action, it is the Town's burden to establish *prima facie* evidence of title, and not the Plaintiffs' burden to conclusively show a lack of title or to disprove any implied or unidentified source of title. Since the Town failed to meet its burden, judgment should have been entered against the Town. Similarly (with the three exceptions noted) on Count II of Plaintiffs' claims, summary judgment in Plaintiffs' favor should have been entered quieting their titles to the beach.

[5] The Court also made an error of law by requiring Plaintiffs to prove title through a chain of title, including conveyances "from George Cleeves as agent for Alexander Rigby to their predecessors in title. . ." Order at 13. This evidence was presented in anticipation of showing better title than the Town, assuming this Court might rule that the 1684 document was a grant of title, which this Court held it was not. This is a show cause action. The Town attempted to show cause and failed. Plaintiffs have met their burden of providing *prima facie* evidence of title. Plaintiffs no longer have the burden of proving "conclusive" title through a chain of title or that ancient conveyances are sources of title.

Dated: January 9, 2012

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