

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)

TMF DEFENDANTS' MOTION
CONCERNING COUNTERCLAIMS
AGAINST NON-PLAINTIFF
BEACHFRONT OWNERS
WITH INCORPORATED
MEMORANDUM OF LAW

There is no dispute that the TMF Defendants can and will present evidence at trial in support of their Counterclaim for Prescriptive Easement against the Plaintiffs. At the August 2, 2012, trial management conference, the Court requested a memorandum regarding the impact of the TMF Defendants' claims, specifically TMF Defendants' Counterclaim for Prescriptive Easement, against *non-Plaintiff* beachfront owners. This Motion is in response to that request. The procedural history of this case makes clear that the TMF Defendants have prescriptive easement claims against non-Plaintiff beachfront owners, have conducted discovery regarding those claims, and should be permitted to present evidence on those claims at trial.

Procedural History

On October 23, 2009, Plaintiffs filed their Complaint against the Town of Kennebunkport and "all unascertained persons" who claim the right to use Goose Rocks Beach. Plaintiffs provided notice to such "unascertained persons," without an Order from the Court, by publishing their Complaint in the Biddeford Journal Tribune. In their Complaint, the Plaintiffs claimed that

anyone using Goose Rocks Beach in front of their property was trespassing and had no right to engage in recreation.

On June 4, 2010, the TMF Defendants filed a Motion to Intervene, Answer and Counterclaims with respect to the Plaintiffs' Complaint. In its August 17, 2010 Order, the Court granted the TMF Defendants permission to participate in discovery *de bene esse*. Despite several attempts by the Plaintiffs to have the TMF Defendants dismissed from participating in this case, the Court ultimately ruled on December 22, 2011 that "if the claimants are not permitted to bring this claim, they will be deprived of their individual and/or collective interest in the beach, which is distinct from the public's interest in the beach." Decision and Order on Motions for Summary Judgment at 17. It was not until this ruling that the TMF Defendants had a clear understanding with respect to their involvement as a party to the litigation.

The question before the Court is whether or not the TMF Defendants counterclaims run only to the Plaintiffs' property or extend to the use of the entire beach, which covers non-Plaintiff beachfront owners¹ and Parties-in-Interest.

Extension of Claims as to Non-Plaintiff Beachfront Owners

Because of the various issues with service and the Court's concern about creating a "checkerboard of uncertainty" regarding the rights to use Goose Rocks Beach, the Court entered a Rule 19 Order to join all beachfront owners on August 17, 2010. Rule 19 provides that "a person who is subject to service of process shall be joined as a party in the action 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 impeded the person's ability to protect that interest or (ii) leave any of the person already parties subject to

¹ Designated as Defendants pursuant to M.R. Civ. P. 19.

a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest...If the person should join as a plaintiff but refuses to do so, the person may be made a defendant.” M.R. Civ. P. 19(a) (2012). Pursuant to Rule 13, “[p]ersons other than those made parties to the original action may be made parties to a counterclaim in accordance with the provisions of Rule 19...” M.R. Civ. P. 13(h) (2012).

On August 20, 2010, the Court issued an Order for Service of Process and Service by Publication. This Order, which was ultimately served upon all beachfront owners, including some TMF Defendants who are also beachfront owners, sufficiently notified beachfront owners of the case and the fact that many other individuals, corporations and trusts sought to intervene in the proceedings. In addition, defendants to the lawsuit included the Lachiattos, Drivers and Harrises, all of whom made similar prescriptive easement claims as the TMF Defendants.² The notice was clear as to who the Defendants in the case were. To the extent that beachfront owners did not join as Plaintiffs they were joined as Defendants and by the nature of the pleadings these individuals did not object to the use claims made by the TMF Defendants and other *pro se* litigants recreating on Goose Rocks Beach. Indeed, the beach use patterns made by TMF Defendants are likely similar to those of non-Plaintiff beachfront owners who also use the entirety of Goose Rocks Beach for recreational purposes. See e.g. Exhibit A to August 20, 2012 Order for Service of Process and Service by Publication requiring only opposition to the claims of the plaintiffs.

As a result of the reissuance of Notice and the Order of the Court, the TMF Defendants refiled their Answer on October 27, 2010. Because beachfront owners were joined in the suit,

² John Michie Harris and Sharon Eon-Harris joined as TMF Defendants. The Lachiatto and Driver individual claims were dismissed, but the Court stated in its December 22, 2011 Decision and Order on Motions for Summary Judgment, at 22, that “to the extent that the Lachiatto and Driver defendants are part of the class defined as those owning property in the Goose Rocks Zone, they may continue to pursue the claim of prescriptive easement as members of a class of people.”

and because those not joining as Plaintiffs were entered as Defendants, there was no need to file a cross-claim or any other claim against these beachfront owners. They were not making a claim to exclude TMF Defendants from using Goose Rocks Beach for recreational purposes. Furthermore, the TMF Defendants' claims for prescriptive easement were no different than the Town's counterclaim for prescriptive easement. To say that the Town's claims run to the entirety of Goose Rocks Beach but the TMF Defendants' claims do not is incongruent. Any party seeking to participate in this case and deny TMF Defendants the right to use the beach could have joined as a Plaintiff and ostensibly the TMF Defendants' claims would run against them.

It was not until January 5, 2011 that the Court issued another order, effectively creating a third category of parties-in-interest, but even these individuals that filed did not join in the Plaintiffs' complaint and simply objected to the Town's title claim. Additionally, in the Court's subsequent Orders it was telling that it spoke with respect to the use of the beach as a whole. See e.g. December 22, 2011 Decision and Order on Motions for Summary Judgment, dismissing the TMF Defendants' individual claims as to each lot stating that "[a]s distinguished from *Flaherty*, this case requires the court to determine if the beach owners should have been on notice of a class easement as opposed to a public prescriptive easement." at 21. It is clear by the subsequent decisions of the Court that it is seeking to avoid the very "checkerboard of uncertainty" that it alluded to early on in this case.

Conclusion

Based on the foregoing, the TMF Defendants' claims for prescriptive easement should run to the entirety of Goose Rocks Beach. With respect to any non-Plaintiff beachfront owner or Party-in-interest that now seeks to object to the TMF Defendants' claims, they did not join the Plaintiffs in the time allotted and they did not timely file an Answer relative to the TMF

Defendants or any other Defendants' counterclaims, and as such, default judgment should be entered against them.

DATED: August 8, 2012



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NOTICE OF DEFAULT

ALL MATTERS IN OPPOSITION TO THIS MOTION MUST BE FILED NOT LATER THAN AUGUST 16, 2012, AFTER THE SERVICE OF THIS MOTION UPON YOU UNLESS ANOTHER TIME IS PROVIDED BY MAINE RULES OF CIVIL PROCEDURE OR SET BY THE COURT. FAILURE TO FILE TIMELY OPPOSITION WILL BE DEEMED A WAIVER OF ALL OBJECTIONS TO THIS MOTION WHICH MAY BE GRANTED WITHOUT FURTHER NOTICE OR HEARING.