

STATE OF MAINE  
YORK, ss.

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

ROBERT F. and VIRGINIA S. )  
ALMEDER, et al., )  
 )  
Plaintiffs )  
 )  
v. )  
 )  
TOWN OF KENNEBUNKPORT, )  
TMF DEFENDANTS, STATE OF )  
MAINE, et al., )  
 )  
Defendants )

MEMORANDUM IN SUPPORT OF  
MOTION FOR ENTRY OF FINAL  
JUDGMENT PURSUANT TO  
M.R. CIV. P. 54(B)

INTRODUCTION

Defendant Town of Kennebunkport submits this memorandum in support of its motion made pursuant to M.R. Civ. P. 54(b) for an order entering final judgment on Counts IV and VI of the Town's counterclaim. The Court has ruled that the public has a right to use the entirety of Goose Rocks Beach for recreational purposes and the Plaintiffs have indicated that they plan to appeal that decision to the Maine Supreme Judicial Court. The purpose of this motion is to expedite the process of getting that issue to the Law Court so that the dispute between the Town and the Plaintiffs may be finally resolved without undue delay. Given the tumult that this action has caused in the Town of Kennebunkport, and the probability that permitting appeal of the core issues of the case at this point will obviate the need for any further trial days, there can be no doubt that there is no just reason for delaying a final decision in this matter, as Rule 54(b) requires. This Court should therefore grant the Town's motion.

## DISCUSSION

Rule 54(b) of the Maine Rules of Civil Procedure provides, in relevant part:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

The decision as to whether a matter should be certified under Rule 54(b) is left to the sound discretion of the trial court. *Dravo Corp. v. Regional Waste Sys., Inc.*, 632 A.2d 141, 142 (Me.1993). The court must, however, specifically explain why it finds that “no just reason for delay” exists. *Cole v. Peterson Realty, Inc.*, 432 A.2d 752, 757 (Me.1981). When deciding whether there is no just reason for a delay, the trial court should consider several factors:

- 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.

Here, consideration of those factors compels the conclusion that certification is warranted because it will permit the appellate court to consider the real issue in dispute between the parties – the extent to which the public has the right to use the beach – without requiring the trial court to first undergo a long drawn out title trial that will be not only expensive for the parties but also a drain on judicial resources. If – as is likely – the Law Court affirms this Court’s partial

judgment, it will never have to reach the issue of title because the Town will have stipulated to the Plaintiffs' title to the beach. It would only be if the Court's decision were reversed that the title issue would be important.

Indeed, an analysis of each of the factors articulated above weighs in favor of certification:

- (1) the adjudicated and unadjudicated claims rest on very different factual underpinnings;
- (2) no future development in the trial court could moot the need for review (indeed, in light of the Town's conditional stipulation, 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);
- (3) with the Town's conditional stipulation there is no likelihood that the Law Court will face the same issues – the existence of a prescriptive easement or easement by custom in this case – more than once: if the Law Court affirms this Court's partial judgment, the Town will have stipulated to the Plaintiffs' title to the beach thereby resolving all remaining issues in this case and obviating the need for any future trial days; and if the Law Court reverses this Court's decision, then the issues at trial and on appeal will be focused on title, not on the prescriptive easement/custom claims;
- (4) immediate appeal would expedite the trial court's work because the most likely outcome—that the trial court is upheld on appeal—would result by way of the Town's conditional stipulation to dismissal with prejudice of all the Town's remaining claims (and the stipulation to judgment for the Plaintiffs);
- (5) the 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*, making it likely

that the trial court will be upheld on appeal thus obviating the need for any future trial;

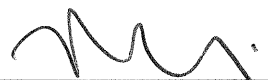
- (6) all parties would be better off economically by avoiding the need for a costly and time-consuming title trial when the primary dispute between the parties is whether the public has a right to use the beach; in particular, the seven Parties-in-Interest that asked to be bound by the Court's partial judgment as to prescription and custom do not have any further claims in the case; those parties should not be forced to wait for a time consuming title trial, and judicial economy weighs in favor of the court certifying the issue for all Plaintiffs as well; and
- (7) other miscellaneous factors weigh in favor of certification; the Town's fees and costs are borne by the public and the Town has no interest in pursuing its title claims if it is upheld on its prescriptive use and custom claims.

Furthermore, the issue of an unripe prescriptive easement claim because of an absence of joinder of the true owner does not exist here. In other cases, when a trial court has determined that no party in the case held title to a parcel of land, the Law Court has upheld the trial court's decision not to address a prescriptive easement claim in that parcel on ripeness grounds. See *Flaherty v. Muther*, 2011 ME 32, ¶85 n. 6; *Lamson v. Cote*, 2001 ME 109, ¶ 20, 775 A.2d 1134, 1139. That is not the case here, because the only possible owners of the disputed property are: 1) the Town, 2) the Plaintiffs or 3) the heirs of a predecessor in interest to the Plaintiffs who effected a severance at some time in the past. Because any heirs to Plaintiffs' predecessors in title have been served by publication and joined by order of the Court, all possible owners of the disputed property are parties to this case. Because the Court here found that the prescriptive easement ripened with the knowledge and acquiescence of the Plaintiffs and their predecessors in

title, the Law Court would be able to uphold the prescriptive easement and custom claims on appeal even if title is held by the heirs of a predecessor in interest to the Plaintiffs. Furthermore, because the Town has entered a conditional stipulation disclaiming title if its prescriptive easement is upheld, the fact that the Town could not acquire an easement over land that it already owns should not dissuade the Law Court from hearing the appeal.

In addition, Plaintiffs can have no legitimate grounds to object to this motion. It was the Plaintiffs who 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. Moreover, the Plaintiffs lose nothing because the Town's stipulation 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.

Dated: November 8, 2012



---

Melissa A. Hewey, Bar No. 3587  
Amy K. Tchao, Bar No. 7768  
Brian D. Willing, Bar No. 9112  
Attorneys for the Defendant Town of  
Kennebunkport

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