



## STANDARD OF REVIEW

When reviewing a motion to dismiss pursuant to Rule 12(b)(6) of the Maine Rule of Civil Procedure, the court examines the complaint in the light most favorable to the [counterclaim] plaintiff to ascertain whether it properly sets forth elements of a cause of action. Livonia v. Town of Rome, 1998 ME 39, ¶ 5, 707 A.2d 83, 85. Dismissal is warranted when it appears beyond a doubt that the [counterclaim] plaintiff is not entitled to relief under any set of facts that he might prove in support of his claim. Johanson v. Dunnington, 2001 ME 169, ¶ 5, 785 A.2d 1244, 1246.

Under Rule 12(f) of the Maine Rules of Civil Procedure, “the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.’ Generally speaking, ‘the purpose of Rule 12(f) is to provide the means for testing the legal sufficiency of a defense.’ 1 Field, McKusick & Wroth, Maine Civil Practice § 12.17, at 255 (2d ed. 1970).” Casco Northern Bank v. Fallon, 1986 Me. Super. LEXIS 97, \*3 (Lipez, J.). In addition, “while for the purposes of such motions, the pleaded facts must be accepted as true, the motions do not admit mere conclusions of law, nor conclusions of fact or of law and fact.” Trafton v. Doane, 1987 Me. Super. LEXIS 4, \*5 (Brody, J.) (also citing 1 Field, McKusick & Wroth, Maine Civil Practice § 12.17, at 255 n.43 (2d ed. 1970)).

## LEGAL ANALYSIS

- I. The Driver’s claim for fee simple should be dismissed as the Driver’s lack standing to assert the claim and they fail to state a claim upon which relief can be granted.**

Driver asserts, mimicking the Town’s counterclaim, that title to the Beach resides with the Town and/or the public by virtue of 17th century royal land grants. However, glaringly absent from Driver’s assertion is that they themselves have any claim of title to the Beach at all,

let alone title that would in any way be superior to the plaintiffs' titles. Driver therefore lacks any allegation that title to the Beach should reside with them, nor is it clear how they, as individuals who hold property several blocks away from the Beach, have standing to assert a fee simple claim on behalf of the Town and/or the public.<sup>1</sup>

Plaintiffs do not dispute that the Town has standing to pursue a claim for a public easement to the intertidal zone. See Bell v. Wells, 510 A.2d 509, 517 (Me. 1986) (“Bell I”). Plaintiffs also do not dispute that a defense to a quiet title action could be the assertion of a public easement claim by an individual. Id.; see also Lyons v. Baptist Sch. of Christian Training, 2002 ME 137, ¶ 22, 804 A.2d 364, 371. However, the posture that the Driver defendants assume in their counterclaim is neither of these; rather, they are, as counterclaim plaintiffs, stating a fee simple claim, not on their own behalf but on behalf of the Town.<sup>2</sup> The plaintiffs point out this distinction not to engage in word play, but to demonstrate the danger, once again, of defendants' appropriating the pleadings of the Town as their own without any legal or indeed logical basis for doing so. A claim in fee simple is quite distinct from a claim for a prescriptive easement, the latter of which plaintiffs maintain is the only viable claim that the Drivers (or indeed the Town or any other defendants) may plausibly assert against the plaintiffs in this case.

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<sup>1</sup> Contrary to the deed reference recited in Paragraph A of their Answer, Defenses and Counterclaim, title to the Driver's property “at Goose Rocks Beach” resides in Margarete K. M. Driver's name only. On October 30, 2009, via warranty deed, Richard J. Driver conveyed his interest in the Driver property referenced in Paragraph A to Margarete K. M. Driver. See Book 15753, Page 556, recorded in the York County Registry of Deeds on November 3, 2009. This information does not change the analysis in this motion but plaintiffs bring this information to the court's attention for the sake of accuracy.

<sup>2</sup> Plaintiffs will address the Town's fee simple claim set forth in Count I of its counterclaim in another pleading, as the factual and legal basis of that claim is the subject of discovery now being conducted between plaintiffs and the Town.

**II. The court should strike the affirmative defenses of, standing, the public trust doctrine, custom, lack of consideration, and failure to pay taxes.**

**A. Standing**

In an effort to be efficient and provide all potential defendants with adequate notice of plaintiffs' property interests in the Beach, plaintiffs' complaint in paragraphs 5-27 incorporated copies of all the plaintiffs' deeds relevant to their respective Beach property. Each plaintiff's respective deed or that of their predecessor in title recite that plaintiffs' Beach property runs to the Atlantic Ocean, to the sea, to the ocean, or to the "low water mark" of the Atlantic Ocean. The Driver's raising of the defense of standing demonstrates an utter lack of understanding of the legal process. See Franklin Property Trust v. Foresite, Inc., 438 A.2d 218, 221 (Me. 1981) (stating that in a quiet title action a plaintiff has standing when it "assert[s] a personal stake in the outcome of the litigation and present[s] a real and substantial controversy touching on the legal relations of parties with adverse legal interests"). For their part, the Driver's deed, referenced in their answer and counterclaim, indicates ownership of property several blocks away from the Beach. As discussed, the Driver defendants may have standing to assert an affirmative defense of a public easement over the Beach and plaintiffs do not dispute their standing to raise *that* claim; however, the Driver defendants can allege no factual basis to dispute that plaintiffs' have deeds that record title to the Beach, as recited in their complaint. For this reason, the court should strike affirmative defense 2.

**B. The Public Trust Doctrine**

Driver's persistence in asserting an affirmative defense of the "public trust doctrine" should be stricken as there are no good grounds to posit such an affirmative defense, nor are the Drivers, as individuals, in a position to assert it. Generically, the public trust doctrine seeks to protect for public use all navigable waters and lands below those waters, up to and including the

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high water mark. COASTAL STATES ORGANIZATION, INC., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK, 13 (1997). Yet each state with coastline has seen fit to tailor the public trust doctrine, recognizing private rights in trust lands, thus diminishing the public's rights to those lands. *Id.*

In Maine, land covered by the public trust doctrine is narrowed as stated by the Law Court: "in 1820, the Maine Constitution both confirmed the grant of the intertidal land in fee to the upland owners and took over as the law of Maine the reserved public easement limited to fishing, fowling and navigation." *Bell v. Wells*, 557 A.2d 168, 176 (Me. 1989) (*Bell II*). Thus, in Maine, the public trust doctrine runs head long into the Colonial Ordinance, which reserves for the public an easement over the intertidal zone (which includes shore front property up to the high water mark) for fishing, fowling, and navigation only. *Id.* The holdings in *Bell I* (*Bell v. Town of Wells*, 510 A.2d 509, 517 (Me. 1986)) and *Bell II* make clear that the public trust doctrine has no applicability to the intertidal zone or to the plaintiffs' upland property.

Along these lines, the plaintiffs have opposed the State's intervention in this case because it seeks to enlarge the public rights under this doctrine where the Law Court has already stated that no such rights exist. The Town has also included an affirmative defense premised on the public's right to recreate on the Beach pursuant to the public trust doctrine. Just as plaintiffs have fought the State's intervention and the Town's affirmative public trust doctrine affirmative defense, plaintiffs also posit that the Drivers should be prevented from asserting this affirmative defense when the Law Court has already spoken on this issue, indicating there is no public right to the intertidal zone beyond that laid out in the Colonial Ordinance.

### **C. Custom**

Because Maine law does not recognize the acquisition of fee or easement interests by custom, Driver's affirmative defense 9 alleging that "[d]efendants, or the public, have acquired

an easement in Goose Rocks Beach by prescription, custom and/or use, or otherwise” must be stricken.

The Drivers ignore the fact that in Bell II the Law Court did not recognize the doctrine of custom. The Law Court quoted from an earlier Maine case where the doctrine of custom was not recognized. Id. at 179 (citing Piper v. Voorhees, 130 Me. 305, 311, 155 A. 556, 559 (1931)).

While the Law Court did not reach the issue of whether the doctrine should be recognized, any fair reading of the opinion shows the court was not about to overrule Piper.

We affirm the judgments of the Superior Court, but we do not find it necessary to decide whether the court was correct in holding that under the common law of Maine the public may acquire by local custom an easement over privately owned land. Very few American states recognize the English doctrine of public easements by local custom. See 3 Powell on Real Property P 414[9] (1986 & Supp. 1988). The Maine case that discusses such easements in some detail, Piper v. Voorhees, 130 Me. 305, 311, 155 A. 556, 559 (1931), cites with approval the leading Connecticut case rejecting the doctrine, Graham v. Walker, 78 Conn. 130, 133-34, 61 A. 98, 99 (1905). That latter case had held:

We are of opinion that such rules of the English common law as gave [casements by local custom] sanction were unadapted to the conditions of political society existing here, and have never been in force in Connecticut.

The inclusion of “custom” in 14 M.R.S.A. §§ 812 and 812-A (1980), providing a means for preventing the acquisition of easements by “custom, use or otherwise,” is explainable as merely a legislative exercise in overabundant caution. There is a serious question whether application of the local custom doctrine to conditions prevailing in Maine near the end of the 20th century is necessarily consistent with the desired stability and certainty of real estate titles.

Id. at 179.

Until the Law Court decides to overrule Piper, the doctrine of local custom to acquire an easement over private property does not exist in Maine. Accordingly, the court should strike the Driver’s affirmative defense 9.

**D. Lack of Consideration**

Driver's affirmative defense 15 concerning "lack of consideration or failure of consideration" is completely without merit. Suffice it to say that the plaintiffs have not brought a breach of contract, *quantum meruit* or unjust enrichment claim or any other claim where a lack of consideration would be a relevant affirmative defense, and for that reason the court should strike this affirmative defense.

**E. Failure to Pay Taxes**

Equally puzzling and inappropriate is Driver's affirmative defense 16 alleging that the plaintiffs have failed to pay property taxes on their Beach property. The Drivers are not a municipality, and their standing to assert such a defense is inapposite. As such, the Drivers are in no position to assert that the Town of Kennebunkport actually assessed the plaintiffs with a property tax and the municipal officers authorized in writing the filing of the action to collect the taxes under 36 M.R.S. § 1032. Fitzgerald v. City of Bangor, 1999 ME 50, ¶ 13, 726 A.2d 1253, 1256 (government has the "fundamental sovereign power to tax its citizens"). Accordingly, the court should strike affirmative defense 16.

**III. There is no basis for the awarding of attorney's fees and costs in this matter so the court should strike Driver's request for them in the prayer for relief.**

Driver has no grounds to insist on asserting their right to seek attorney's fees and costs as part of their prayer for relief. Maine follows the "American Rule" with regard to the entitlement of attorney's fees in an action, which states that a court may award attorney fees based on the following:

(1) the contractual agreement of the parties, see McTeague v. Dep't of Transp., 2000 ME 183, ¶ 11, 760 A.2d 619, 622;

(2) clear statutory authority, Goodwin v. Sch. Admin. Dist. No. 35, 1998 ME 263, ¶ 13, 721 A.2d 642, 646; or

(3) the court's inherent authority to sanction egregious conduct in a judicial proceeding, Linscott v. Foy, 1998 ME 206, ¶¶ 16-18, 716 A.2d 1017, 1021-22 (“courts should exercise the inherent authority to award attorney fees as a sanction only in the most extraordinary circumstances”).

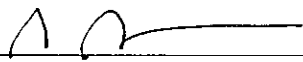
Baker v. Manter, 2001 ME 26, ¶ 17, 765 A.2d 583, 586.

There is no generic ability in Maine to “reserve the right” to seek attorney’s fees just because some set of facts may present themselves which may call for their award as a lawsuit matures. In this action, there is no statute or contract that would mandate the awarding of attorney’s fees. Should conduct of the plaintiffs warrant the court to sanction plaintiffs by awarding attorney’s fees and costs to the Drivers, the court has the “inherent authority” to do so, and thus Driver’s repeated request for attorney’s fees and costs in their prayer for relief should be stricken.

#### CONCLUSION

For all of the reasons set forth above, plaintiffs request this court dismiss Count I of defendant Driver’s counterclaim pursuant to M. R. Civ. P. 12(b)(6); strike the Driver’s affirmative defenses of standing (2), public trust doctrine (7), custom (9), lack of consideration (15) and failure to pay taxes (16) pursuant to M. R. Civ. P. 12(f); and strike the Driver’s prayer for relief as to attorney’s costs and fees, pursuant to M. R. Civ. P. 12(f).

Dated: March 2, 2010

  
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**NOTICE**

Pursuant to Rule 7 of the Maine Rules of Civil Procedure, opposition to this Motion must be filed not later than 21 days after the filing of the Motion, unless another time is provided by the Rules of Court. Failure to file a timely objection will be deemed a waiver of all objections to this Motion which may be granted without further notice or hearing.



relief for fee simple to the plaintiffs' properties under any set of facts as alleged or upon which they might prove in support of the claim. Therefore, Count I of the Driver defendants' counterclaim is hereby dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

The court finds that the affirmative defenses of standing, public trust doctrine, custom, lack of consideration, and failure to pay taxes have no applicability to this action and, therefore, the Court strikes the Driver defendants' affirmative defenses from their answer to plaintiffs' complaint as follows:

Defense No. 2: "Some, or all, of Plaintiffs have no right, title or interest in the property in dispute, specifically the intertidal zone and the high dry sand between the intertidal zone and certain properties abutting Goose Rocks Beach in Kennebunkport, Maine including, but not limited to Plaintiffs' properties ("Goose Rocks Beach") and therefore, lack standing."

Defense No. 7: "Plaintiffs' claims are barred to the extent that the public trust doctrine includes the right of the public to use Goose Rocks Beach for recreational and amusement purposes including, but not limited to, swimming, sunbathing, walking, running, playing, kite flying, sandcastle building, sailing, windsurfing, kayaking, canoeing and other recreational activities, or otherwise generally using the beach in an unfettered manner for recreational and amusement purposes."

Defense No. 9 is stricken to the extent Defense No. 9 is premised on the contention that defendants Richard J. Driver and Margarete K.M. Driver "have acquired an easement in Goose rocks Beach" by "custom."

Defense No. 15: "Plaintiffs' claims are barred by lack of consideration or the failure of consideration."

Defense No. 16: "Plaintiffs, and/or their predecessors in title, have failed to pay property taxes on all or any portion of Goose Rocks Beach."

The Court finds there is no basis for the Driver defendants to assert a request for costs and attorney's fees as part of their prayer for relief of Count II. The Driver defendants' assert neither a contractual or statutory provision that would allow the awarding of attorney's fees and costs in this action, nor have the plaintiffs behaved in an egregious fashion in bringing their underlying complaint against the Town of Kennebunkport. Therefore, the Court strikes that part of the Driver defendants' prayer to Count II in which they seek costs and attorneys' fees.

IT IS SO ORDERED. The clerk is directed to incorporate this Order into the docket by reference. M. R. Civ. P. 79(a).

Dated: \_\_\_\_\_

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Justice, Superior Court