

STATE OF MAINE
YORK, ss.

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

ROBERT F. ALMEDER et al.,)	
)	
Plaintiffs,)	
)	REPLY TO DEFENDANTS RICHARD
v.)	J. DRIVER AND MARGARETE K. M.
)	DRIVER'S OBJECTION TO
TOWN OF KENNEBUNKPORT and)	PLAINTIFFS' MOTION TO DISMISS
ALL PERSONS WHO ARE)	and MOTION TO STRIKE
UNASCERTAINED,)	
)	
Defendants.)	(Title to Real Estate Involved)

The Objection of Defendants Richard J. Driver and Margarete K. M. Driver (collectively, "Driver") to Plaintiffs' Motion to Dismiss and Motion to Strike Affirmative Defenses ("Objection") neither refutes any of the legal arguments advanced by the plaintiffs in their underlying motion to dismiss/motion to strike, nor supports any particularized claims Driver asserts in this lawsuit that are distinct from those made by defendant Town of Kennebunkport ("Town"). For these reasons and as set forth *more* fully below, the plaintiffs' motion to dismiss and motion to strike against the Driver defendants should be granted.

First, Driver asserts that because plaintiffs have not moved to dismiss the fee simple count of the Town and other defendants' counterclaim, the plaintiffs have improperly "singled out" Driver, for seeking to dismiss the fee simple count of *their* counterclaim. Plaintiffs are not obligated to respond in lock step to each pleading filed in

this case. Indeed, the plaintiffs have sought to tailor their responses as warranted to each pleading filed.¹

With regard to the Driver fee simple claim², plaintiffs reiterate that in order for Driver, as individuals, to file such a claim, they need to at least plead all the elements of a fee simple claim, first and foremost, that *their own* title to the plaintiffs' properties at Goose Rocks Beach ("Beach") is superior to the plaintiffs' title to the *plaintiffs'* properties at the Beach. 14 M.R.S. §§ 6651 et seq. Driver must demonstrate an uninterrupted *possessory* interest in the Beach for at least four years or claim an estate of freehold therein or an unexpired term of not less than 10 years. Id. Driver has not pled that they have such a possessory interest in the Beach and for that reason alone, they have not complied with the requisites of the quiet title statute and therefore cannot benefit from that remedy. Id. Though the plaintiffs dispute it, the Town at least has made a claim that, through an alleged historical chain of title, the Town has a fee simple claim to all of the plaintiffs' properties. Driver has made no such claim for themselves to plaintiffs' properties, and as such plaintiffs' motion to dismiss the Driver fee simple claim should be granted.

Secondly, the Town, as the municipality where the Beach is located, is the *proper* party to assert rights on behalf of the general public. Driver is not properly situated to assert rights on behalf of the public, but only on their own behalf. Plaintiffs agree that any resolution of this fee simple claim between plaintiffs and the Town might necessarily implicate rights that the general public, through the Town, has in the Beach, and as

¹ Plaintiffs would contend that defendants Harris and Lachiato's claims for fee simple are also without merit and should be dismissed.

² In making a "fee simple" claim, plaintiffs assume that Driver wishes to assert an action for quiet title, and as such must follow the requirements of 14 M.R.S. §§ 6651 et seq or that they wish to assert their own title, but they have not alleged an ownership claim of their own.

members of the general public, including Driver, might be allowed by the Town to use the beach. The only basis, however, for Driver's counterclaims in this suit are *their own* individual claims. Without asserting a fee simple claim that applies to just them and whether their own title to plaintiffs' properties is superior to plaintiffs' title, the fee simple count of their counterclaim should be dismissed.

Next, Driver insinuates that plaintiffs may not have standing to have brought their fee simple and declaratory judgment claims because the ownership of their properties may have been "manufactured" or the property descriptions in their deeds "miraculously expanded" to include the Beach. As Plaintiffs seeking to quiet title to their property, Plaintiffs clearly have standing and Driver has cited no case law or argument to the contrary.

With regard to its affirmative defenses citing the public trust doctrine and custom, Driver contends that the Law Court's decision in Bell v. Wells, 557 A.2d 168 (Me. 1989) ("Bell II") is an "anomaly" and therefore should be accorded no precedential value. Objection at 4³. Characterizations of the Law Court's Bell II decision aside, Bell II is the law of Maine and Maine law recognizes neither the public trust doctrine nor custom as valid means by which the public can acquire general recreational rights to the intertidal zone. The law of Maine restricts the public's right to the intertidal zone to fishing, fowling and navigation. Driver's invocation of the Public Trust in Intertidal Land Act to bolster their argument, a piece of legislation specifically found to be an unconstitutional taking of private property in Bell II, is inapposite. Bell II, 557 A.2d at 177. As the public

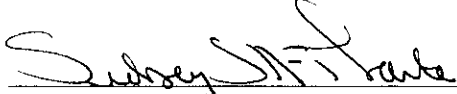
³ Bell II and Bell I are hardly anomalies since they merely confirm over 350 years of clear and consistent precedent.

cannot acquire rights to the intertidal zone by operation of the public trust doctrine or custom, Driver's affirmative defenses 7 and 9 should be stricken.

Finally, that the plaintiffs have not been assessed and are allegedly not paying taxes on their Beach property (Objection at 6) is once again, not an argument Driver is properly situated to advance. Neither is the Town, as plaintiffs have pointed out in their motion to dismiss filed against the Town. If the Town believes that plaintiffs' properties are inaccurately assessed for the purposes of payment of property taxes, the Town must avail itself of the statutory mechanism for assessing those taxes. Driver, as individuals, have no standing to assess taxes against plaintiffs, and requesting this Court to assess taxes against plaintiffs is a complete misreading of how property tax regulations function in Maine. For these reasons, affirmative defense 16 should be stricken.

For all the reasons set forth herein, and for the reasons set forth in their motion to dismiss and motion to strike, the plaintiffs respectfully request that this Court grant plaintiffs' motion.

Dated: March 29, 2010


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