

STATE OF MAINE

YORK, ss.

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

ROBERT F. ALMEDER, et al.,

Plaintiffs

v.

TOWN OF KENNEBUNKPORT and
ALL PERSONS WHO ARE
UNASCERTAINED,

Defendants

DECISION AND ORDER ON PLAINTIFFS' MOTION FOR RECONSIDERATION

This court issued its Decision and Order on Motions for Summary Judgment on December 22, 2011, in part denying the Plaintiffs' Motion for Summary Judgment on Count I of the Town of Kennebunkport's Counterclaim and Motion for Summary Judgment on Counts I and II of the Complaint. The Plaintiffs moved for reconsideration, under M.R. Civ. P. 7(b)(5), on January 3, 2012. The Town of Kennebunkport filed an Opposition to the Plaintiffs' Motion for Reconsideration on January 4, 2012. The Plaintiffs' motion argues that the court erroneously shifted the burden of proof from the Defendant Town to the Plaintiffs with respect to the Town's Counterclaim Count I and erroneously required the Plaintiffs to conclusively prove their title before granting judgment on Count II (quiet title) of the Complaint. The motion will be decided on the basis of the filings without hearing.

1. Denial of Plaintiffs' Motion for Summary Judgment on Count I of the Town's Counterclaim

The court agrees that it would be an unfair burden to require the Plaintiffs to disprove every possible argument that the Town could have asserted in its claim for fee simple ownership of Goose Rocks Beach. That is not what the court required. The essence of the Town's argument was that the high dry sand and intertidal zone of Goose Rocks Beach were never conveyed into private hands and became part of the common and undivided lands early in the Town's history. The summary judgment record contains evidence that implies that title to the so-called common and undivided lands was vested in the Town at some point after Massachusetts Bay Colony purchased the remainder of the Gorges Patent. Even though the court found that the Town failed to prove as a matter of law that the 1684 deed is the document that conveyed that interest, the implication that title to the common and undivided lands was vested in the Town raises a genuine issue of material fact to be resolved at trial.

Plaintiffs' argument was premised not only on the assertion that the 1684 deed did not convey title to the Town, but also on the assertion that title the flats was vested in private hands and, therefore, not a part of the common and undivided lands so that if and when those lands were transferred to the Town, they did not include the high dry sand or intertidal zone. The Plaintiffs failed to prove this part of their argument. Therefore, the court concluded that the Town continues to have a cause of action to prove fee title to the flats because it has asserted a genuine issue of material fact as to title and that there remains a question as to whether the 1640s/1650s deeds conveyed the beach. Therefore, the Plaintiffs are not entitled to judgment as a matter of law and the Motion to Reconsider the Plaintiff's Motion for Summary Judgment on Count I of the Town's Counterclaim is Denied.

2. Denial of Plaintiffs' Motion for Summary Judgment on Count II of the Complaint

The Plaintiffs move for reconsideration on the court's denial of their motion for summary judgment only with regard to Count II, the action for quiet title under 14 M.R.S. §§ 6651-6663¹, and not the declaratory judgment count. The Law Court has noted in several instances that the statutory scheme creating the cause of action for quiet title does not eliminate any of the procedural complexity that existed under the old common law writs. See e.g. *Chickering v. Yates*, 420 A.2d 1219, 1222 (Me. 1980); *Hodgdon v. Campbell*, 411 A.2d 667, 669 (Me. 1980). The Law Court has also noted the value of the Declaratory Judgment Act, 14 M.R.S. §§ 5951-5963, for bringing actions to try title in the Maine courts. *Hodgdon*, 411 A.2d at 669. By proceeding under the Declaratory Judgment Act, rather than under the quiet title statute, the plaintiff can avoid the procedural complexities and pitfalls that are prevalent in a quiet title action.

The court has treated this action as one for declaratory judgment rather than one exclusively under the quiet title statute. *Hansen v. Weller*, 2008 Me. Unpub. LEXIS 97, *2. Accordingly, the court has not required the Plaintiffs to prove the jurisdictional elements of the quiet title cause of action and the court is proceeding to ultimately determine the rights of the parties rather than concluding, as the quiet title statute would require, whether or not the defendant should be compelled to try title under one of the other methods of trying title in Maine. Therefore, the court believes that it is improper to move for reconsideration on the quiet title count alone.

Treating the motion as one for reconsideration on the declaratory judgment action, the court also denies the motion. The parties agree that a plaintiff cannot prevail on the

¹ The section range that the Plaintiffs designate actually describes several causes of action. An action at law for quiet title is contained in sections 6651-6654. Sections 6655-6658 contain an action for quiet title in equity. Sections 6659-6661 describe a cause of action by abutters to a discontinued road or way and section 6663 has been repealed. It appears as though the Plaintiffs have actually pursued an action for quiet title in equity because of the need to include unascertained people as defendants.

weakness of the defendant's title but instead must rely on the strength of their own title. See e.g. *Sargent v. Coolidge*, 399 A.2d 1333, 1342 (Me. 1979); *Blance v. Alley*, 330 A.2d 796, 798 (Me. 1975). A plaintiff may show prima facie evidence of title to the disputed property by producing a warranty deed or a quitclaim deed from a predecessor of the quitclaim deed who obtained title by a warranty deed or was in actual possession. *Sargent v. Coolidge*, 399 A.2d 1333, 1343 (Me. 1979). A deed that only conveys the grantor's "right, title and interest" in the land is not a grant of land or of a particular estate and is not prima facie evidence of title. *Id.*

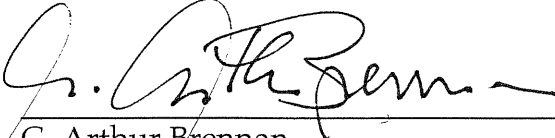
The Plaintiffs admit that Plaintiffs Sherman, Coughlin, and Celi have not produced prima facie evidence of title. (Mot. Reconsideration 5, n.4.) However, the Plaintiffs submit that 23 of the Plaintiffs have "deeds [that] clearly reference that they extend to the ocean." (*Id.*) The Plaintiffs also state that although the Gray and Hastings Plaintiffs deeds only reference prior deeds, those prior deeds clearly reference to the ocean. (*Id.*) Further, the Plaintiffs state that the Town has not contested the claims of the Temerlin and Dwelley Plaintiffs. (*Id.*)

First, the Town did properly dispute the claims of Temerlin and Dwelley. (*See* Consol. Reply. 2, n.2.) Second, the deeds submitted in Exhibit B to the Plaintiffs' motion, providing the metes and bounds descriptions of the Gray and Hastings Plaintiffs' properties, were not in the summary judgment record for the court to consider when making its decision. Lastly, the documents submitted to the court in support of the Joint Statement of Material Facts attached to the Affidavit of Gordon Scannell, Jr. do not show prima facie evidence of title for most of the Plaintiffs. The court notes, but withholds judgment, that a few of the Plaintiffs' current deeds appear to actually provide prima facie evidence of title (including Asplundh, Flynn, Gerrish, O'Connor/Leahey, Raines, Sandifer, Scribner, and Paley). However, because the Town

still has a viable claim, establishing prima facie evidence of title alone does not entitle the Plaintiffs to judgment as a matter of law.

The Plaintiffs' Motion for Reconsideration is DENIED.

DATE: 1/18/12



G. Arthur Brennan
Justice, Superior Court, Active Retired