

plaintiffs' efforts in this regard, approximately 25% of the property owners along the Beach chose to participate in this suit. The named defendant in the complaint is the Town, but defendants to this suit also include all persons who are unascertained, not in being, unknown or out of the State, heirs or legal representatives of such unascertained persons, or such persons as shall become heirs, devisees or appointees of such unascertained persons who claim the right to use or title in plaintiffs' property (as defined in the complaint) other than persons claiming ownership or easement by, through, or under an instrument recorded in the York County Registry of Deeds ("unascertained defendants").

In an action for quiet title, service must be made on both "known claimants" and unascertained defendants. 14 M.R.S. § 6653. The only "known claimant" in this action is the Town, as that is the only person or entity that has declared it has a possessory and/or fee interest to the Beach that is in conflict with the plaintiffs' fee interests in the Beach.

In order to reach the unascertained defendants, section 6653 requires service "by publication as in other actions where publication is required." Plaintiffs duly researched how service by publication is made in other actions where publication is required and conveyed that research to the Town's counsel. Counsel for plaintiffs also suggested that in this electronic age, in addition to publishing the notice in the local York County newspaper, the Town should consider posting the complaint on its website.

Plaintiffs subsequently contacted the *Journal Tribune* on November 17, 2009 and arranged for the notice of publication to be published for three consecutive weeks. See Affidavit of Publication attached hereto and made a part hereof as Exhibit A. Publication in the *Journal Tribune* was completed on November 20, 27, and December 4, 2009. The

Town, on its own initiative, not only posted the complaint on its website, but added a prominent link on the “Welcome to Kennebunkport” introductory web page that sends visitors to another website, maintained by the Town, advocating its position in this lawsuit.¹ Despite these effective means of publication resulting in the completion of service upon the unascertained defendants, the Town filed its Objection on December 7, 2009.

Shortly after the complaint was filed, plaintiffs’ counsel heard from Durward Parkinson, Esq., who is representing a group of approximately six defendants who will be filing an answer to plaintiffs’ complaint by January 8, 2010 (with no need to file a motion to intervene as his clients comprise members of the class of unascertained defendants and are thus named as parties to the case). Since plaintiffs’ notice of publication appeared in the *Journal Tribune*, plaintiffs’ counsel has been contacted by Neal Weinstein, an attorney representing a group of surfers who wish to participate in this action, and attorney Thomas R. McNaboe, who represents Sharon Eon-Harris and John Michie Harris, people who own and rent their home for use by others on the Beach and have just filed a motion to intervene in this action.

LEGAL ARGUMENT

Plaintiffs have followed the directives of both 14 M.R.S. § 6653 and Rule 4 of the Maine Rules of Civil Procedure in order to serve the known claimant of possessory rights to the Beach and any unascertained persons who might wish to participate in this lawsuit for quiet title to plaintiffs’ properties on the Beach. In doing so, plaintiffs have sought to ensure that all persons with an interest in this suit have been served with the complaint and thus given notice, as fundamental tenets of due process

¹ http://www.kennebunkportme.gov/Public_Documents/index (last visited on December 15, 2009).

require. Plaintiffs engaged in a concerted outreach effort prior to filing suit to ascertain who would like to join in the litigation; indeed while not all neighbors supported plaintiffs' filing of this suit, the neighbors who chose not to participate were free to do so and should not be compelled to join in this litigation due to some misapplication of the statutes and rules governing notice for an action to quiet title.

A. Plaintiffs service by publication comports with the requirements of 14 M.R.S. § 6653.

Under the quiet title statute, the plaintiffs' obligation is to serve both those defendants who are "supposed known claimants residing either in the State or outside the State" in addition to the unascertained defendants as described *supra*. 14 M.R.S. § 6653. First, the Town asserts that plaintiffs have done an inadequate job of serving those known claimants by publishing notice of this suit in the local newspaper and advocating for the publication of this suit on the Town's website (which the Town has done). Indeed, the only known claimant in this suit is the Town itself, and the plaintiffs thereby named the Town as a defendant and adequately served the Town with the complaint. It is the Town, by its actions in encouraging use of plaintiffs' Beach properties by the general public for recreational purposes and in failing to act to keep trespassers off plaintiffs' Beach property that has claimed a right to the Beach. No one else, prior to this suit, asserted such a claim to the Beach and thus there were no other "known claimants" to plaintiffs' properties.

In addition, the Town claims that the State of Maine has a significant interest in this suit and has not been properly served or notified of this complaint. Objection at 2. However, in the analogous case, Bell v. Wells, 510 A.2d 509 (Me. 1986), the Law Court specifically found that the State was not an indispensable party to litigation concerning

the scope of the public easement at Moody Beach in Wells, Maine. Id. at 518. Because the present case involves a nearly identical issue, this Court should also find that the State has neither a fee interest in the Beach nor is the State a trustee of any public easement at the Beach, and thus the plaintiffs are justified in their decision not to serve their complaint on the State as a “known claimant.” Id. at 516, 517.

With regard to service of unascertained persons, plaintiffs conducted an exhaustive review of Maine statutes requiring service on potential interested parties and shared that information with counsel for the Town.² Plaintiffs consulted with counsel for the Town specifically to learn whether the Town would object to the method of service by publication that plaintiffs determined comported with 14 M.R.S. § 6653 and plaintiffs were informed that the Town did not object. Plaintiffs went through the exercise of communicating with counsel for the Town prior to publication in order to avoid wasting judicial resources on a motion concerning publication, which is not a requirement of the quiet title statute. Apparently plaintiffs’ efforts were in vain. Plaintiffs were not trying to avoid input from this Court regarding service but were rather making a good faith effort to adhere to the requirements of service outlined in 14 M.R.S. § 6653. The Town’s Objection thus comes not only as a surprise to plaintiffs, but is inappropriately pled as plaintiffs purposefully did not file a motion for publication with this Court to which the Town could then object.

² For ease of reference, other statutes requiring service by publication include: 5 M.R.S. § 8053(5) (Administrative Procedures Act/Rulemaking/Publication); 5 M.R.S. § 9051-A(3) (Administrative Procedures Act/Adjudicatory Proceedings/Notice of environmental agency adjudicatory proceedings); 5 M.R.S. § 9052(3) (Administrative Procedures Act/Adjudicatory Proceedings/Notice/Notice to the Public); 23 M.R.S. § 3602 (Highways/ Assessment on abutting owners/ Notice to owners); and 35-A M.R.S. § 6504(1)(B) (Property Taken for Public Use and Assessment of Damages/Petitions to county commissioner; notice to adverse party).

The Town's assertion that plaintiffs' service by publication has been ineffective is also not born out by the facts of this case. Just two weeks ago, plaintiffs' counsel was contacted by an attorney representing a group of surfers who indicated that he would be filing an answer to the complaint to represent this group of unascertained defendants. While little is known about this group of defendants (who intend to file an answer by January 8, 2010), presumably it is not comprised of only property owners along the Beach and could not have been easily identified by the plaintiffs. In addition, two people who own and rent out a house near the Beach have filed a motion to intervene (which plaintiffs do not intend to oppose), further confirming that plaintiffs' efforts at effecting service by publication have been successful. These persons' desire to participate in the suit thus belies the Town's claim that service by publication has been ineffective. Additionally, Maine newspapers have published editorials and letters to the editor since the filing of the suit, further demonstrating that the public at large (and thus unascertained defendants) is aware of the suit.³

B. Plaintiffs service by publication comports with the requirements of Rule 4(g) of the Maine Rules of Civil Procedure.

In addition to adhering to the service requirements found in the quiet title statute, 14 M.R.S. § 6653, plaintiffs also took heed of the service requirements recited in M. R. Civ. P. 4(g) which covers service by publication. In contrast to the assertion made by the Town, Rule 4(g)(1) does not mandate that service by publication only be made upon motion to the court; rather, the entire text of Rule 4(g)(1) reads:

³ See e.g. Chris Paulu, Editorial, *When Is A Suit Actually an Unsuitable Solution*, PORTLAND PRESS HERALD/MAINE SUNDAY TELEGRAM, Nov. 19 2009, <http://pressherald.maintoday.com/story.php?ac=PHedi&id=296983> (last visited Dec. 17, 2009); Bill Case, Letter to the Editor, KENNEBUNK POST, Nov. 25, 2009, <http://blog.kennebunkpost.com/2009/11/25/letter-reader-believes-beach-lawsuit-will-be-costly-printed-nov-27-2009.aspx> (last visited Dec. 17, 2009).

When Service May be Made. The court, on motion made upon a showing that service cannot with due diligence be made by another prescribed method, shall order service by publication in an action described in subdivision (f) of this rule, *unless a statute provides another method of notice*, or when the person to be served is one described in subdivision (e) of this rule. (emphasis added).

In this case, a statute does provide another method of notice: the quiet title law states that service be made “as in other actions.” 14 M.R.S. § 6653. Plaintiffs thus complied with the requirements of M. R. Civ. P. 4(g) in serving both known and unascertained defendants by publication, as 14 M.R.S. § 6653 permits just such a method of service by directing that service be effected as in other actions.

Rule 4(g)(3) describes the timeframes for service by publication and indicates that the proper way to notify the court that service by publication has been made is through an affidavit. The affidavit at Exhibit A confirms that plaintiffs arranged for notice by publication in the *Journal Tribune* beginning on November 20, 2009 and continuing for two subsequent weeks, thus fulfilling the mandate of Rule 4(g)(3).

The Town undercuts its own protests regarding the effectiveness of plaintiffs’ service by publication pursuant to Rule 4 when it acknowledges, “...service by publication may be sufficient to notify persons and entities who are in fact unascertainable...” as it states in its Objection. See Objection at 3, n.1. In adhering to the requirements of Rule 4, plaintiffs have provided sufficient notice to unascertained persons and entities who wish to participate in this suit.

C. Plaintiffs are not required to join other parties to this suit pursuant to M. R. Civ. P. 19.

The Town seeks to bootstrap an argument on joinder to its plea that plaintiffs have not adequately served all known claimants or unascertained defendants, parenthetically

requesting this Court to dismiss plaintiffs' complaint based on lack of joinder pursuant to M. R. Civ. P. 19(b). But just as plaintiffs were only required to serve the known claimant to their Beach properties, namely the Town, and any unascertained persons as discussed in more depth *supra*, plaintiffs are not required to join any and all other property owners along the Beach. While neighbors on the Beach may be curious as to the outcome of this suit, their absence from this litigation will not prevent "complete relief" from being accorded to the parties, will not impede their ability to protect their interests, nor impose upon them inconsistent obligations by reason of the claimed interests of the plaintiffs. See M. R. Civ. P. 19. Indeed, prior to filing this suit, the plaintiffs were scrupulous in contacting their Beach neighbors to determine who would like to join in this matter. The fact that there are 23 plaintiffs in this case speaks to the outreach effort plaintiffs made in advance of filing suit. Neighbors who were given the opportunity to participate in this action and chose not to do so should not be forced to participate in litigation to satisfy the Town's notion of what constitutes adequate notice of this suit.

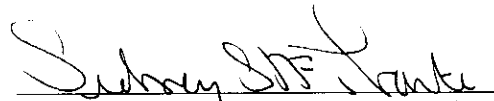
This action to quiet title aims to settle a dispute between parties who claim a possessory interest in the Beach. The Town is the only known claimant to make such a claim and it has been named in the suit. In so far as the Town purports to speak for the general public, plaintiffs have adequately noticed this suit by publication to alert any unspecified or unascertained persons. Just as plaintiffs are not required to serve every property owner in Kennebunkport, Maine who may have walked the Beach at some point in his or her life, so, too, are plaintiffs not required to join every such property owner to this action.

Finally, the Town's request that the plaintiffs' complaint be dismissed, couched in the concluding sentences of its Objection, is patently inappropriate as its request is not contained in a properly noticed motion nor supported by a memorandum of law. Such a casual request to the court, contained in an otherwise impertinent pleading, should be stricken, together with the entire Objection, pursuant to Rule 12(f).

CONCLUSION

For the reasons stated above, plaintiffs respectfully request that this Court strike the Objection. Plaintiffs further request a judicial conference to address the issue of service by publication and the Town's suggestion that a guardian ad litem be appointed to represent the unascertained defendants. An expedited hearing on this matter is, however, not necessary as no one has been prejudiced by plaintiffs' service by publication.

Dated: December 17, 2009



Sidney St. F. Thaxter, Bar No. 1301
David P. Silk, Bar No. 3136
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(207) 774-9000

Attorneys for plaintiffs

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.

Journal Tribune

457 Alfred Street, P.O. Box 627, Biddeford, ME 04005

(207) 282-1535

TO WHOM IT MAY CONCERN:

State of Maine

County of York

Before this day personally appeared, Jackie Miles who being Duly Sworn, deposes and says that this is to certify that on November 20, 27 and December 4th, 2009 we inserted in the Journal Tribune, a Daily newspaper circulated in York County,

NOTICE TO PERSONS WHO ARE UNASCERTAINED AND TO THE GENERAL PUBLIC
ROBERT F. ALMEDER ET AL. V. TOWN OF KENNEBUNKPORT

DOCKET NO.: ALFSC-RE-2009-00111

JM
JM/JACKIE MILES
12/04/2009

Employee, Journal Tribune

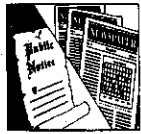
Sworn to and subscribed before me this 8th day of December A.D.,
2009.

Sharon J. Binette
Notary Public, State of Maine

Sharon J. Binette
Notary Public, Maine
My Commission Expires October 10, 2011



Journal Tribune CLASSIFIED



PUBLIC NOTICES

NOTICE OF PUBLIC SALE
Notice is hereby given that in accordance with the Judgment of Foreclosure and Sale entered August 4, 2009 in the action entitled The Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage Funding Trust 2005-3...

PUBLIC NOTICES

a subsequent sale is requested. Additional terms will be announced at the public sale. Deutsche Bank National Trust Company, as Trustee under NovaStar Mortgage Funding Trust, Series 2006-4...

PUBLIC NOTICES

and place stated in this notice, no sale shall be deemed to have occurred and all rights to rescind a subsequent sale are reserved. Additional terms will be announced at the public sale. HSBC Bank USA, N.A., as Trustee for the registered holders of Renaissance Equity Loan Asset-Backed Certificates, Series 2007-3...

PUBLIC NOTICES

claiming ownership or interest by, through or under an instrument recorded in the York County Registry of Deeds. The complaint seeks a declaratory judgment under 14 M.R.S. § 5951-5963 and to quiet title pursuant to 14 M.R.S. § 6651-6653 in order to remove any cloud of apprehension over plaintiff's title to their respective properties...

NOTICE OF PUBLIC SALE

Notice is hereby given that in accordance with the Judgment of Foreclosure and Sale entered August 12, 2009 in the action entitled Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2006-8 v. PURSUIT, et al. 14 M.R.S. § 8953-8959, PLEASE TAKE NOTICE that on November 27, 2009 at 10:00 AM at the Court of the Clerk of the York County Superior Court, Alfred, Maine, Docket No. ALFSC-RE2009-00111, Robert F. Almeida et al. v. Town of Kennebunkport. The plaintiffs in the lawsuit are as follows: Robert F. Almeida and Virginia S. Almeida, Trustees of the Alexander Living Trust, 113 Kings Highway, York County, Maine 04090...

NOTICE TO PERSONS WHO ARE UNASCERTAINED AND TO THE GENERAL PUBLIC

PLEASE TAKE NOTICE that on November 27, 2009 at 10:00 AM at the Court of the Clerk of the York County Superior Court, Alfred, Maine, Docket No. ALFSC-RE2009-00111, Robert F. Almeida et al. v. Town of Kennebunkport. The plaintiffs in the lawsuit are as follows: Robert F. Almeida and Virginia S. Almeida, Trustees of the Alexander Living Trust, 113 Kings Highway, York County, Maine 04090...

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Notice is hereby given that in accordance with the Judgment of Foreclosure and Sale entered August 12, 2009 in the action entitled American Home Mortgage Servicing, Inc. v. Jason Reichart, by the Maine District Court, Springvale, Docket No. RE-09-109, wherein the Court adjudged the foreclosure of a mortgage granted by Jason Reichart to Mortgage Electronic Registration Systems, Inc., as nominee for American Brokers Conducted in the York County Registry of Deeds in Book 15110, Page 709, the period of redemption having expired...

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PUBLIC NOTICES

Meeting
Biddisford-Saco-OOB Transit Committee
4:30 PM
December 2, 2009
Council Chambers
Saco City Hall
300 Main Street
Saco, Maine
(11/27/09)

170 AUTO

JUNK CAR LATE MODEL PLEASE CALL
TONS OF REMOVAL FOR CARS

320 HELP

Are you seen Want to make a Entry deposit If you say you working will apply for a 16 position in an residential / cooling separa- Call 282-2092

66 Announcements

Alcoholics Anonymous www.samhsa.org 1-800-737-6237

PLEASE READ YOUR AD

The Journal Tribune makes every effort to avoid errors in advertisements. Each ad is carefully checked and proofread, but when you handle thousands of ads, mistakes do slip through. We ask, therefore, that you read your ad and if you find an error, report it to our Classified Department immediately by calling 282-1659 or 1-888-426-1535 before 12 noon so that we may make any corrections as soon as possible. We regret that we will not be responsible for more than three (3) incorrect insertions and only for that portion of the ad that was been rendered valueless by such an error.

1110 AUTO/MOBILES FOR SALE

1993 Black Regal everyday driver for 15 years, good stock, runs well, \$150,000 or best offer, 284-8433

2006 Cadillac, DTS, mint condition, loaded, under warranty, below stock \$21,000. Call 282-8377

DODGE Neon 1998 \$1100; 1996 Ford Taurus \$1800; 1987 Chevrolet \$1000; 1987 Ford Mustang \$2200; 1997 Mercury Sable station wagon, loaded \$1200; 1997 Ford \$550; 1998 Dodge Caravan \$1800; 1995 Ford Ranger Splash 4x4 \$2200; 1998 Dodge Caravan good motor and tranny \$600; Lear 3 door 4' work truck cap \$400. 247-9190.

120 TRUCKS FOR SALE

1995 Chevy 3500, heavy duty, 16' cargo van/put out ramp, 127K highway miles. 228-4241

170 WANTED AUTOMOTIVE

CARS HAULED FREE JIMS AUTO SALVAGE 207-894-2458

90 HAPPY ADS 90 HA

You are still the cutest and smartest son and brother anyone could ever have! Happy 70th Tom! Love, Ma, Donna, Diane & Jill

180 BUSINESS SERVICES OFFERED 180 B

CLEANING OFFICE/HOME cleaning 12 years experience. Bidco/Seco area. 283-1290

EXCAVATION

Complete excavation, call Paul Landersburg, call at 282-8306

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SUSPENDED CEILING EXPERT commercial/residential, fully insured. 806-9345

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BAITENDER

18 hour Call 282-2092

PERSONAL

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LOBSTER

best menu drive in Kennebunkport, call 282-2092

MAINE STAFF

4834 Elm St Portland, ME 04101

PERSONAL

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