

STATE OF MAINE  
YORK, ss.

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

ROBERT F. ALMEDER et al.,

Plaintiffs,

v.

ALEXANDER M. LACHIATTO AND  
JUDITH A. LACHIATTO, TOWN OF  
KENNEBUNKPORT and ALL  
PERSONS WHO ARE  
UNASCERTAINED,

Defendants.

)  
)  
) **MOTION TO DISMISS DEFENDANTS**  
) **LACHIATTOS' COUNTS III, V, VI, VII,**  
) **AND VIII OF THEIR COUNTERCLAIM**  
) **PURSUANT TO MAINE RULE OF CIVIL**  
) **PROCEDURE 12(b)(6); and MOTION TO**  
) **STRIKE AFFIRMATIVE DEFENSES 2, 7,**  
) **9, 15, AND 16 AND A PORTION OF**  
) **DEFENDANTS LACHIATTOS' PRAYER**  
) **FOR RELIEF PURSUANT TO MAINE**  
) **RULE OF CIVIL PROCEDURE 12(f)**  
)  
) **(Title to Real Estate Involved)**  
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### INTRODUCTION

Plaintiffs Robert F. Almeder, et al., pursuant to Maine Rule of Civil Procedure 12(b)(6) move this Court to dismiss Counts III (Acquiescence), V (Dedication and Acceptance), VI (Custom), VII (Easement) and VIII (Implied/Quasi Easement) of defendants Alexander M. Lachiatto and Judith A. Lachiatto's (collectively, "Lachiatto") counterclaim; and pursuant to Maine Rule of Civil Procedure 12(f), move this Court to strike (a) the Lachiattos' affirmative defense 2 premised on the notion that some or all of the plaintiffs lack standing; (b) the Lachiattos' affirmative defense 7 premised on the applicability of the public trust doctrine; (c) the Lachiattos' affirmative defense 9 to the extent it is premised on the contention that the Lachiattos' can acquire fee and/or easement rights by custom; (d) the Lachiattos' affirmative defense 15 which alleges lack of consideration, as this suit does not involve a breach of contract claim; (e) the Lachiattos' affirmative defense 16 which suggests that as a defense "[p]laintiffs,

and/or their predecessors in title, have failed to pay property taxes on all or any portion of Goose Rocks Beach”; (f) the Lachiattos’ prayer for relief pursuant to 14 M.R.S. §§ 6651 et seq. recited in each count of its counterclaim; and (g) the Lachiattos’ request for costs and attorney’s fees recited in count of its counterclaim.

As an introductory proposition, the plaintiffs posit that the Lachiattos’ counterclaim blithely reproduces, almost in its entirety, the Town of Kennebunkport’s (“Town”) counterclaim, while doing little to tailor the Town’s counterclaim to the individual and specific circumstances of the Lachiattos’ experience at Goose Rocks Beach (“Beach”). The problem with this “cut and paste” method of pleading is that it is vague, unspecific, and does not meet notice pleading requirements.<sup>1</sup> Therefore, many counts fail to state claims upon which relief can be granted. Defendants Lachiatto confuse and complicate what perhaps may be an attempt to plead their individual claims with the Town’s claims. In so far as the Lachiattos’ counterclaim and prayer for relief are reproductions of the Town’s pleading, the plaintiffs reiterate and reproduce the arguments they made in their motion to dismiss/motion to strike filed against the Town on or about December 11, 2009.

The Lachiattos’ affirmative defenses premised on custom and failure to pay taxes must be stricken for the same reasons governing the dismissal of these counts of the counterclaim, namely these are defenses not recognized by Maine law. In addition, the Lachiattos’ have not properly pled the elements required to sustain an action in quiet title, and thus their repeated prayer for relief pursuant to 14 M.R.S. §§ 6651 et seq. should be stricken, together with their request for costs and attorney’s fees. The Lachiattos’ affirmative defense premised on the plaintiffs’ lack of standing is preposterous as is their affirmative defense that a lack of

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<sup>1</sup> Rule 8(a) of the Maine Rules of Civil Procedure requires a pleading to contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”

consideration applies in this matter; therefore these affirmative defenses should be stricken as well. The Lachiattos' also fail to comprehend the applicability (or lack thereof) of the public trust doctrine to this matter, and thus their affirmative defense premised on it should be stricken.

### **BACKGROUND**

As recited in plaintiffs' motion to dismiss filed December 11, 2009, Goose Rocks Beach located in Kennebunkport, Maine is approximately two miles long. With the exception of certain parcels owned by the Kennebunkport Conservation Trust and the Town, which grants access to their respective beach parcels to the general public, the Beach is owned by individual property owners including the plaintiffs to this action. Through their complaint, plaintiffs claim they own the real property that includes the Beach with titles to their property duly recorded in the York County Registry of Deeds. See Complaint ¶ 1, Exhibits 1-23. Plaintiffs allege that their deeds all recite that their property runs to the Atlantic Ocean, to the sea, to the ocean, or to the "low water mark" of the Atlantic Ocean. Id. ¶ 2, Exhibits 1-23.

Collectively, plaintiffs or their predecessors in interest allege to have owned property that constitutes the Beach for at least four years, though many of the plaintiffs assert they can trace their interest in their Beach property back multiple generations. Plaintiffs allege this ownership interest consists of title in fee simple absolute to both the portion of the Beach subject to the ebb and flow of the tides, or "Intertidal Property," in addition to the portion of the Beach that abuts the mean high water mark and extends to plaintiffs' landscaped property above the Beach, or plaintiffs' "Upland Property." Plaintiffs' state that their ownership of the Intertidal Property is subject to the public's right to fish, fowl and navigate thereon as established by the Colonial Ordinance of 1641-47.

## 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. **Count III (Acquiescence) of the Lachiattos’ counterclaim alleges no specific boundary line to describe the property at issue or period of time during which the plaintiffs supposedly acquiesced to its possession by the Lachiattos.**

The Lachiattos’ pleading in Count III sets the stage for the remaining counts of their counterclaim that mimic the Town’s counterclaim but fail to delineate any elements that the Lachiattos themselves have experienced. The Lachiattos’ claim of title by acquiescence

demonstrates the ease with which computer programs may allow “cutting and pasting” of the words of others; but without tailoring those words to the Lachiattos’ own experience, their claim of title by acquiescence necessarily fails, as they do not allege any particularized facts that apply only to them and not to the Town and general public, as already pled in the Town’s counterclaim.<sup>2</sup> Without making any allegations as to how they have individually developed this claim, the Lachiattos make a boundary claim using the term “acquiescence” which is one of the elements of a prescriptive easement claim.

The Law Court has stated that:

To prove that title or a boundary line is established by acquiescence, a plaintiff must prove four elements by clear and convincing evidence: (1) possession up to a visible line marked clearly by monuments, fences or the like; (2) actual or constructive notice of the possession to the adjoining landowner; (3) conduct by the adjoining landowner from which recognition and acquiescence, not induced by fraud or mistake, may be fairly inferred; and (4) acquiescence for a long period of years, such that the policy behind the doctrine of acquiescence--that a boundary consented to and accepted by the parties for a long period of years should become permanent--is well served by recognizing the boundary.

Hamlin v. Niedner, 2008 ME 130, ¶ 7, 955 A.2d 251, 254. See also Crosby v. Baizley, 642 A.2d 150, 154 (Me. 1994).

At the outset, the Lachiattos’ claim to title to the Beach is not premised on a boundary dispute with the plaintiffs<sup>3</sup>, but rather on the premise that the Lachiattos’ have established possession to the Beach to a clearly marked visible line. Defendant Lachiattos’ Counterclaim at ¶ 15. This broad claim cannot meet the first prong of the acquiescence analysis, as that requires a showing of possession “up to a visible line marked clearly by monuments, fences or the like.”

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<sup>2</sup> To state a claim the Lachiattos must have a particularized claim that is different from that of the general public. Nergaard v. Town of Westport Island, 2009 ME 56, ¶ 18, 973 A.2d 735, 740 (“A person suffers a particularized injury only when that person suffers injury or harm that is ‘in fact distinct from the harm experienced by the public at large’”(citation omitted).

<sup>3</sup> According to the deed referenced in Paragraph A of the Lachiattos’ counterclaim, their property lies several blocks away from the Beach and all of plaintiffs’ properties.

There is no “monument, fence or the like” referenced in the Lachiatto counterclaim that marks a visible property line at the Beach, indicating where they believe their property lies in relation to the plaintiffs’ properties. See Crosby v. Baizley, 642 A.2d at 154 (equating “‘or the like’ with ‘some other structure commonly used to indicate a boundary line.’”). Without the description of any structure or monument indicating where the Lachiattos believe their property to be, the plaintiffs are not in any position to have acquiesced to the use or possession of that property. See Hamlin v. Niedner, 2008 ME at ¶ 9, 955 A.2d at 254; Dowley v. Morency, 1999 ME 137, ¶ 17, 737 A.2d 1061, 1067. As the Lachiattos fail to allege any facts that support this first element of title by acquiescence, their claim must be dismissed on this basis alone, as all four elements must exist to assert this cause of action. Crosby v. Baizley, 642 A.2d at 154 n.4 (“Because we conclude that as a matter of law, the first element of the doctrine of boundary by acquiescence has not been met, we need not discuss whether the other three elements have been proven”).

Secondly, the Lachiattos have not pled that they have provided the required actual or constructive notice to any of the plaintiffs indicating that the Lachiattos claim possession of any of the plaintiffs’ Beach property in advance of this suit. The Lachiattos may have recreated on portions of the Beach, but recreating on the Beach is hardly the same as putting any of the plaintiffs on actual or constructive notice that the Lachiattos claimed a possessory interest in the Beach.

Finally, the Lachiattos allege no conduct on the part of the plaintiffs evidencing that the plaintiffs acquiesced for a long period of years to the Lachiattos’ use let alone possession of the plaintiffs’ Beach property. Without a description of specific properties and dates during which the plaintiffs supposedly acquiesced to the Lachiattos’ use or possession of their property, it is impossible to determine from the counterclaim whether a “long period of years” is involved.

Indeed no specifics of any kind are alleged in Count III, making the pleading of this count a prime example of the poor result that comes from “cut and paste” drafting. For these reasons, Count III of the Lachiattos’ counterclaim should be dismissed.

**II. The Lachiattos’ counterclaim at Count V (Dedication and Acceptance) fails because there was no affirmative dedication of plaintiffs’ property to the Town nor an affirmative acceptance of the plaintiffs’ properties by the Town.**

The Lachiattos’ assertion of a claim of dedication and acceptance again demonstrates how awkwardly their counterclaim is drafted, as, on the one hand, they assert that the plaintiffs dedicated the Beach to “exclusive public use” (Defs.’ Countercl. ¶ 24), but on the other hand, assert that the Lachiattos and/or the public accepted the dedication of the Beach by the plaintiffs (Defs.’ Countercl. ¶ 25). The Lachiattos, as individuals, are not in a position to legally assert a claim of dedication and acceptance on their own behalf, and their assertion of such a claim on behalf of the public is redundant of the Town’s pleading. Further, in Count V, the Lachiattos do not describe any affirmative act of the plaintiffs that would constitute such a dedication, nor any individual act of their own (or the Town’s) that would constitute a valid acceptance of such a dedication. Dedication and acceptance is thus not adequately pled and Count V of the counterclaim must be dismissed.

For well over a century, the vast majority of Maine cases that have dealt with dedication and acceptance apply the doctrine to the creation (or not) of a public way or road. See, e.g. Stickney v. Saco, 2001 ME 69, 770 A.2d 592; Longley v. Knapp, 1998 ME 142, 713 A.2d 939; King v. Town of Monmouth, 1997 ME 151, 697 A.2d 837; Browne v. Bowdoinham, 71 Me. 144 (Me. 1880); White v. Bradley, 66 Me. 254 (Me. 1876). As a threshold matter, “[t]o prove dedication, it must be clear that the grantor intended to dedicate the land in question for a *public* purpose.” Town of Kittery v. MacKenzie, 2001 ME 170, ¶ 10, 785 A.2d 1251, 1254 (emphasis

added). Dedication is further evidenced by “the intentional appropriation of land *by the owner* to some proper public use, reserving for himself no rights therein inconsistent with the full exercise and enjoyment of such use.” Comber v. Dennistown, 398 A.2d 376, 378 (Me. 1979)(emphasis in original)(citation omitted). The Law Court has also stated, “[t]here must be a clear intent to so dedicate. Mere acquiescence by the owner in occasional and varying use by the public is not sufficient to establish dedication.” Vachon v. Town of Lisbon, 295 A.2d 255, 259 (Me. 1972). The Lachiattos plead no facts consistent with the Law Court’s definition of dedication, namely that the plaintiffs affirmatively intended to dedicate their Beach properties to the public. The fact (as pled by the Lachiattos) that the plaintiffs “nor their predecessors in title, took no action inconsistent with the dedication to public use” (Defs.’ Countercl. at ¶ 26) is hardly the type of intentional act that Maine courts have held is required for a dedication of property to a municipality. See id.

The second prong of this claim, acceptance, requires “some affirmative act” by the *public*. Town of Kittery v. MacKenzie, 2001 ME at ¶ 10, 785 A.2d at 1254. Courts have found that a vote by a town to accept dedicated land, the deeded fee interest in a parcel to a town, and/or the entering into a lease with a building authority by a town which specifically references the deeded parcel may all indicate that the public has properly accepted a dedicated parcel of land. See Comber v. Dennistown, 398 A.2d at 378; Vachon v. Town of Lisbon, 295 A.2d at 261. Courts have not found that a town’s maintaining of a road by snowplowing and trimming brush (Town of Kittery v. MacKenzie, 2001 ME at ¶ 4, 785 A.2d at 1253) or adding gravel to a road and installing lighting (Comber v. Dennistown, 398 A.2d at 378) rose to the level of acts that would constitute acceptance, even if done over a period of 20 years. Id. Similarly, the facts asserted by the Lachiattos, that the Lachiattos and/or the public have maintained the Beach,

constructed a sea wall, harvested seaweed, built sand castles and flew kites do not meet the standard of an “affirmative act” by the public that would constitute acceptance of the Beach by the public, the Town or the Lachiattos. Because the Lachiattos have not adequately pled the elements of dedication and acceptance in their counterclaim, Count V must be dismissed for failure to state a claim upon which relief can be granted.

**III. Count VI (Custom) is not a recognized doctrine in Maine.**

As recited in its motion to dismiss against the Town, also applicable here as the Lachiattos’ Count VI is duplicative of the Town’s, Count VI of the Lachiattos’ Counterclaim alleges that Lachiattos and/or the public have “acquired rights in Goose Rocks Beach by custom by virtue of the use of the beach by the Town of Kennebunkport, and/or the public for so long as the memory of man runneth not to the contrary” and that such use has been “peaceable and free from dispute.” Defs.’ Countercl. at ¶¶ 31, 32. The Lachiattos seek a declaration that based on custom, they “and/or the public, have acquired rights in Goose Rocks Beach by custom for fishing, fowling, navigation and general recreational and amusement purposes as aforesaid and further declare that Defendants and/or the public, hold an easement by custom on and over Goose Rocks Beach for said purposes.” Because Maine law does not recognize the acquisition of fee or easement interests by custom, the Lachiattos’ Count VI must be dismissed and affirmative defense 9 must be stricken.

The Lachiattos ignore the fact that in Bell v. Town of Wells, 557 A.2d 168 (Me. 1989), 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 [easements 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, Count VI of the Lachiattos’ counterclaim fails to state a claim upon which relief can be granted. For similar reasons, the Lachiattos’ affirmative defense 9 must also be stricken.

**IV. Counts VII (Easement) and VIII (Implied/Quasi Easement) fail to plead the requisite elements of an implied easement, quasi easement, or the applicability of the public trust doctrine.**

The Lachiattos’ claim of rights to the Beach via “easement”—whether through an implied easement, quasi easement, or the public trust doctrine must fail for a lack of sufficiency of the pleadings, as the Lachiattos do not assert the requisite elements for these types of easements to the Beach on either their behalf, the Town’s or the public’s.

The concepts of an implied easement and a quasi-easement are linked in that in order to obtain one form of an implied easement, the Lachiattos' must show that the plaintiffs' intended to grant a quasi-easement to their properties to them (as in the rest of their pleadings, the Lachiattos assert no facts individual to their claim to the plaintiffs' properties that is any different from the claims asserted by the Town). There are two types of implied easement: the first, an easement created by necessity, does not apply to this case and thus will not be dwelt on here.

[The] second type of implied easement may be created when a common grantor severs real estate, conveying part of it and retaining the balance (or conveying it to a third person), and the circumstances at the time of the conveyance denote the grantor's intent to subject the (the servient estate) to an easement benefiting the retained land (the dominant estate). In order for such an implied easement to be recognized (1) the property when in single ownership [must have been] openly used in a manner constituting a "quasi-easement," (defined...) as existing conditions on the retained land that are apparent and observable and the retention of which would clearly benefit the land conveyed; (2) the common grantor, who severed unity of title, must have manifested an intent that the quasi-easement should continue as a true easement, to burden the retained land and to benefit the conveyed land; and (3) the owners of the conveyed land must have continued to use what had been a quasi-easement as a true easement.

Frederick v. Consolidated Waste Services, Inc., 573 A.2d 387, 389 (Me. 1990)(citations omitted). In addition, the "test of an implied easement can be applied to determine whether the retained land or the conveyed land is burdened by the alleged easement."

Connolly v. Me. Cent. R.R. Co., 2009 ME 43, ¶ 8, n.1, 969 A.2d 919, 922.

Other than alleging that "certain plans" were recorded and that the sale of lots made reference to those plans (Defs.' Countercl. ¶ 38), or "circumstances at the time of the conveyance of the lots located adjacent to, and in the vicinity of" the Beach (Defs.' Countercl. ¶ 42), the Lachiattos do not come close to setting forth any factual basis for the plaintiffs (or their predecessors in interest) of having severed an original land grant and meaning for the remainder to be burdened by any type of easement at all. Even assuming those (unalleged) facts to be true, the Lachiattos' claim of an implied easement must fail because they cannot show, nor have they

pled the underlying requirements of a quasi-easement, namely that the original grantor of the Beach (whomever that may be) manifested an intent for the quasi-easement to flourish into a true easement. See id.; see also Northland Realty, LLC v. Crawford, 2008 ME 92, ¶ 13, 953 A.2d 359, 363-64 (“the creation of an implied easement by a prior quasi-easement depends on both a preexisting use of the land and the intent of the grantor at the time of conveyance”). Without asserting any facts to support the notion that the original grantor of the Beach intended for a public recreational easement (or a public easement of any kind) to exist, the Lachiattos cannot justifiably plead that they have an implied easement “created by, or arising from, a prior quasi-easement.” See id., 2008 ME at ¶12, 953 A.2d at 363.

With regard to the easement claim asserted in paragraph 36 of the Lachiattos’ counterclaim, they recite the elements of an easement by prescription, and as such this paragraph is duplicative of elements asserted in Count IV and should be stricken from Count VII of the counterclaim.

Finally, with regard to the Lachiattos’ assertion that they, the Town or the public has acquired an easement by virtue of the “public trust doctrine,” the only easement that the public legally has over the intertidal zone is that recognized by the Colonial Ordinance, to fish, fowl and navigate. See Bell v. Wells, 557 A.2d at 173. The Public Trust doctrine does not have any application to the intertidal zone or any other portion of the Beach.

**V. The affirmative defenses concerning standing, the public trust doctrine, lack of consideration and failure to pay taxes should be stricken.**

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 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 Lachiattos' 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 this reason, affirmative defense 2 should be stricken.

In affirmative defense 7, the Lachiattos assert that plaintiffs' claims are barred by the public trust doctrine. The assertion of this defense is a fundamental misunderstanding of the plaintiffs' claims in this case. The plaintiffs do not assert that the public does not have an easement conferring the right to fish, fowl and navigate in the intertidal zone; it is rather the scope of that easement that is at issue in this case. See Bell v. Town of Wells, 510, A.2d 509, 517 (Me. 1986) ("plaintiffs do not seek to have the public easement in the intertidal zone extinguished, but to have its scope and nature declared"). The Lachiattos' affirmative defense 7 should be stricken.

Perhaps more baffling, is the Lachiattos' affirmative defense 15 concerning "lack of consideration or failure of consideration." 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 this affirmative defense should be stricken.

Equally puzzling and inappropriate is the Lachiattos' affirmative defense 16 alleging that the plaintiffs have failed to pay property taxes on their Beach property. The Lachiattos are not a

municipality, and their standing to assert such a defense is inapposite. As such, the Lachiattos 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”).

**VI. Defendant’s prayer for relief for the court to rule that its counterclaims be declared pursuant to 14 M.R.S. §§ 6651 et seq. should be stricken as the Lachiattos have not alleged it seeks to quiet title to plaintiffs’ properties on the Beach.**

The Lachiattos have failed to state a quiet title claim pursuant to 14 M.R.S. §§ 6651 et seq. and therefore their seeking that remedy in their prayer for relief to each count of their counterclaim is inappropriate and should be stricken pursuant to M. R. Civ. P. 12(f). Unlike the Town which at least asserted a fee simple title interest in the Beach in its counterclaim, the Lachiattos do not even allege that fee simple title has resided with them for any period of time. 14 M.R.S. §§ 6651 et seq. To begin, the Lachiattos 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. The Lachiattos have 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. Their conclusory statement that they have acquired title by deed, adverse possession, prescription or acquiescence (Defs.’ Countercl. ¶ 8) is not a factual predicate upon which a claim for quiet title can be asserted but rather a legal conclusion that cannot be assumed as true for the basis of a prayer for relief as part of a counterclaim.

In addition, the Lachiattos have not complied with the other requirements of the quiet title statute, namely serving their claim on all supposed known claimants and providing notice by

publication to claimants that may be unascertained pursuant to 14 M.R.S. § 6653. A request for this court to grant the Lachiattos relief pursuant to the quiet title statute in their counterclaim cannot substitute for the service and notice requirements of section 6653. The Lachiattos' counterclaim, while served on the plaintiffs in this action through counsel, is not served on "any persons who are unascertained, not in being, unknown" by virtue of being served on plaintiffs and being filed with the court. Id. Courts have found that the quiet title statute requires more in terms of service, indeed due diligence to serve those with a likely interest in the litigation and only after such diligence has been exhausted, service by publication. See e.g., Phillips v. Johnson, 2003 ME 127, ¶ 23, 834 A.2d 938, 945.

The Lachiattos have failed to plead a possessory interest in the Beach for at least four years, have failed to adequately serve and notice an action for quiet title, and recite no specific count for quiet title; therefore, they cannot avail themselves of the remedy of quiet title and their repeated request for the same in their prayers for relief in all counts of their counterclaim must be stricken.

**VII. Defendant's prayer for relief for an award of attorney's fees and costs should be stricken as there is no contractual, statutory or other basis for an award of attorney's fees and costs in this matter.**

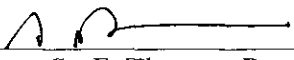
Maine follows the "American Rule" with regard to the entitlement of attorney's fees in an action, which states that a court may award attorney's fees based on the contractual agreement of the parties, clear statutory authority, or the court's inherent authority to sanction egregious conduct. Baker v. Manter, 2001 ME 26, ¶ 17, 765 A.2d 583, 586. In this action, the Lachiattos have not alleged and cannot allege that the Lachiattos and the plaintiffs have any contractual relationship, nor have the Lachiattos cited to any statutory authority that permits the recovery of attorney's fees, should the Lachiattos prevail on its counterclaim. Finally, the Lachiattos have

not asserted and cannot assert any egregious conduct on the part of the plaintiffs, who are putting forth by their claims, a good faith request that this court grant them quiet title to their Beach properties. For these basic reasons, the Lachiattos' request for attorney's fees in all counts of their counterclaim must be stricken pursuant to M. R. Civ. P. 12(f).

**CONCLUSION**

For all of the reasons set forth above, plaintiffs request this court dismiss Counts III, V, VI, VII and VIII of defendant Lachiattos' counterclaim pursuant to M. R. Civ. P. 12(b)(6); strike the Lachiattos' 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 Lachiattos' prayer for relief as to quiet title and attorney's costs and fees, pursuant to M. R. Civ. P. 12(f).

Dated: February 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.

STATE OF MAINE  
YORK, ss.

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

ROBERT F. ALMEDER et al., )

Plaintiffs, )

v. )

ALEXANDER M. LACHIATTO )  
AND JUDITH A. LACHIATTO, )  
TOWN OF KENNEBUNKPORT and )  
ALL PERSONS WHO ARE )  
UNASCERTAINED, )

Defendants. )

ORDER

(Title to Real Estate Involved)

On plaintiffs' motion to dismiss and motion to strike, after hearing, and after review of the written submissions submitted by plaintiffs and of defendants Alexander M. Lachiatto and Judith A. Lachiatto ("Lachiatto"), this Court grants said motions.

The court finds that the Lachiattos have not adequately pled the elements of acquiescence with regard to possession up to a visible line marked clearly by monuments, fences or the like, nor have the Lachiattos alleged any time frame in which plaintiffs' purportedly acquiesced to the possession of their properties on Goose Rocks Beach ("Beach") to the Lachiatto defendants. Count III of the Lachiattos' counterclaim is hereby dismissed for failure to state a claim upon which relief can be granted.

The court finds that the Lachiattos have not adequately pled the elements of dedication and acceptance, finding no allegation that of the intent of the plaintiffs to dedicate their properties that include the intertidal zone to the public, nor an allegation of

an affirmative act on the part of the public to accept such a dedication. Count V of the Lachiattos' counterclaim is hereby dismissed for failure to state a claim upon which relief can be granted.

The court finds that Maine does not recognize "custom" as a basis for the creation of any fee or easement rights in real property. Bell v. Wells, 557 A.2d 168, 179 (Me. 1989). Therefore, the Lachiattos' claim through Count VI of its counterclaim that it has acquired a fee interest or easement by custom on and over the Beach fails to state a claim upon which relief can be granted and is hereby dismissed. The Lachiattos' affirmative defense 9, also based on "custom," is stricken.

The court finds that the Lachiattos have not properly asserted claims for easement, implied easement or quasi easement in Counts VII and VIII of their counterclaim. The Lachiattos have alleged no basis for the plaintiffs or an unknown, original grantor's intent to create a quasi easement meant to flourish into a full easement; therefore, the assertion of an implied easement necessarily fails and Counts VII and VIII of the Lachiattos' counterclaim must be dismissed for failure to state a claim upon which relief can be granted.

The court finds that the affirmative defenses of standing, the assertion of the public trust doctrine, and lack of consideration have no applicability to this action and they are therefore stricken. The Lachiattos' affirmative defense regarding the non-payment of property taxes is not a defense they are properly situated to assert, and that affirmative defense is also stricken.

The court further finds that the Lachiattos have not properly pled the elements required to sustain an action in quiet title, nor served any potential or unascertained

defendants as required by 14 M.R.S. § 6653, and thus their repeated prayer for relief pursuant to 14 M.R.S. §§ 6651 et seq. in each count of their counterclaim is stricken pursuant to M. R. Civ. P. 12(f).

The Lachiattos' request for costs and attorney's fees recited in all counts of their counterclaim should also be stricken pursuant to M. R. Civ. P. 12(f) as the Lachiattos 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 complaint against the Town of Kennebunkport.

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

IT IS SO ORDERED.

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

\_\_\_\_\_  
Justice, Superior Court