STATE OF MAINE
YORK, ss.

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

ROBERT F. ALMEDER and VIRGINIA S. ALMEDER, et al.,

Plaintiffs,

v.

TOWN OF KENNEBUNKPORT and ALL PERSONS WHO ARE UNASCERTAINED,

Defendants.

MOTION TO DISMISS COUNTS VI (CUSTOM) AND IX (OFFSET TAXES) PURSUANT TO MAINE RULE OF CIVIL PROCEDURE 12(b)(6); MOTION TO STRIKE AFFIRMATIVE DEFENSES 9, 12 AND 16 AND A PORTION OF DEFENDANT'S PRAYER FOR RELIEF PURSUANT TO MAINE RULE OF CIVIL PROCEDURE 12(f); AND REQUEST FOR SANCTIONS PURSUANT TO MAINE RULE OF CIVIL PROCEDURE 11 WITH INCORPORATED MEMORANDUM OF LAW

(Title to Real Estate Involved)

INTRODUCTION

Plaintiffs Robert F. Almeder, et al., pursuant to Maine Rule of Civil Procedure 12(b)(6) move this Court to dismiss Counts VI (Custom) and IX (Offset Taxes) of defendant Town of Kennebunkport's ("Town") counterclaim; and pursuant to Maine Rule of Civil Procedure 12(f), move this Court to strike (a) the Town's affirmative defense 9 to the extent it is premised on the contention that the Town can acquire fee and/or easement rights by custom; (b) the Town's affirmative defense 12 to the extent it is premised on the contention that the plaintiffs "abandoned any and all right, title and interest in Goose Rocks Beach"; (c) the Town's 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"; (d) the Town's prayer for relief pursuant to 14 M.R.S. §§ 6651 et seq. recited in each count of its counterclaim; and (e) the Town's request for costs and attorney's fees recited in Counts I-VIII of its counterclaim. Pursuant to Rule 11 of the Maine Rule of Civil Procedure, plaintiffs also seek an order awarding them their fees and costs in connection with the filing of this motion for the dismissal of Count IX of defendant's counterclaim.

Maine does not recognize "custom" as a basis for the creation of any fee or easement rights in real property. Therefore, the Town's claim through Count VI of its counterclaim that it has acquired a fee interest or easement by custom on and over the Goose Rocks Beach ("Beach") fails to state a claim upon which relief can be granted. Further, the Town fails to state a claim upon which relief can be granted through Count IX of its counterclaim, which asserts that by the alleged non-payment of property taxes for the Beach, plaintiffs have abandoned the Beach to the Town so that title now "resides" with the Town, or in the alternative, the court should order plaintiffs to pay "back taxes." The Town's affirmative defenses premised on, custom, abandonment, and failure to pay taxes must be stricken for the same reasons governing the dismissal of these counterclaims, namely these are defenses not recognized by Maine law. In addition, the Town has not properly pled the elements required to sustain an action in quiet title, and thus its repeated prayer for relief pursuant to 14 M.R.S. §§ 6651 et seq. should be stricken, together for its request for costs and attorney's fees.

BACKGROUND

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 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. They claim that neither the general public nor the Town have any recorded fee interest in plaintiffs' properties on the Beach, neither an outright fee nor an easement of any kind.[1]

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[1] Indeed, the Kennebunkport Comprehensive Plan ("Comprehensive Plan"), amended as recently as June 9, 2009, at Chapter X: Recreational and Cultural Resources, Section 2, Privately-Owned Facilities Open to the Public, referring to Goose Rocks Beach, states as follows:

> [p]rivate and municipal ownership; sticker parking; right of way via five town-owned lots with frontage; approximately two mile beach; swimming, scenic views; sailboating, jogging; bird watching; cross country skiing in winter. *Although the privately-owned areas of the beach are not open to recreational use* other than walking, the public beach receives heavy use.

Among the Town's counterclaims are Count VI (Custom) and Count IX (Offset Taxes), both also asserted as affirmative defenses in addition to the affirmative defense of abandonment, which with this motion, plaintiffs seek to dismiss and strike. Additionally, through its prayer for relief in each count of its counterclaim, the Town requests the court to declare that title to the Beach resides with it pursuant to Maine's quiet title statute, 14 M.R.S. §§ 6651 et seq.; however, the Town has not alleged the statutorily required facts in its counterclaim to support such a declaration, and plaintiffs therefore request the court strike that element of its prayer for relief, together with its repeated request for attorney's fees and costs as in all counts of its counterclaim.

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

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The Comprehensive Plan also states: "Most of Goose Rocks Beach is privately owned; the public portion of the beach is very popular. Most of the undeveloped lots are owned by the Kennebunkport Conservation Trust. Access to the beach is provided by several rights-of-way extending between the beach and Kings Highway, which runs parallel to the shore. Rights-of-way to the beach are marked with signs." Id. Chapter IV, Section I(c)(E).
http://www.town.kennebunkport.me.us/Public_Documents/KennebunkportME_Comp/Comprehensive%20 Plan (last visited Dec. 10, 2009).

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 VI (Custom) of defendant's counterclaim fails to state a claim upon which relief can be granted and therefore must be dismissed; and because custom is not a recognized doctrine in Maine, its use as an affirmative defense must be stricken.

In Count VI of its counterclaim, the Town alleges that it and/or the public "has 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." Defendant Town of Kennebunkport's Counterclaim, ¶¶ 31, 32. The Town seeks a declaration that based on custom, the Town "and/or the public, has 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 purpose." Because Maine law does not recognize the acquisition of fee or easement interests by custom, the Town's Count VI must be dismissed and affirmative defense 9 which states "[p]laintiffs' claims are barred because [d]efendant, or the public, has acquired an easement in Goose Rocks Beach by ... custom" must be stricken.

In Bell v. Town of Wells, 557 A.2d 168 (Me. 1989), the Law Court made clear that the doctrine of custom does not exist in Maine. In that case, the Law Court reviewed a Superior Court decision whereby the trial court had concluded that the doctrine of local custom is applicable in Maine so as to permit the public to acquire easement rights on private property. Because the trial court ruled that those claiming an easement by custom had failed to prove their case, and because those factual findings were supported in the record, the Law Court did not actually decide whether the doctrine of custom could be used to establish easement rights over private property. But in addressing the issue, the Law Court made clear that Maine does not recognize such a cause of action.

The Law Court stated:

> 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.

Since 1989 when Bell v. Town of Wells was decided, there have been no reported cases in Maine that have recognized a cause of action for easement by custom. In fact as recently as 2000, the Law Court considered the public's right to an easement for recreational purposes over 150 acres in Aroostook County, and despite testimony that the public had used the land for recreational purposes well beyond the 20 years necessary for the vesting of a prescriptive easement, denied the existence of a public, prescriptive easement. Lyons v. Baptist School of Christian Training, 2002 ME 137 , ¶¶ 16, 31, 804 A.2d 364, 369, 373.

In Lyons, the Law Court stated that to establishing a prescriptive easement over private property, the public must prove "(1) continuous use; (2) by people who are not separable from the public generally; (3) for at least twenty years; (4) under a claim of right adverse to the owner; (5) with the owner's knowledge and acquiescence; or (6) a use so open, notorious, visible, and uninterrupted that knowledge and acquiescence will be presumed." Id. ¶ 15, 804 A.2d at 369. The Law Court reasoned that, "[u]nder our precedents, public recreational uses of unposted open fields or woodlands and the ways through them are presumed permissive," thereby negating the need for the defending property owner to have affirmatively granted permission for public use in order to defeat the adversity prong of the prescriptive easement. Id. ¶ 19, 804 A.2d at 370. "In a consistent line of cases this court has declined to hold that the mere use by the general public of wild and uncultivated land as a route for hauling seaweed, for hunting, or for mere pleasure or recreation, is sufficient to show the adverse [[sic] use essential to create a prescriptive easement." Id. ¶ 20, 804 A.2d at 370. See also Town of Manchester v. Augusta Country Club, 477 A.2d 1124, 1130 (Me. 1984)("Maine stands with the

minority, however, with regard to creation of public recreation easements by prescription in wild and uncultivated land, applying the rule that such open and continuous use raises a rebuttable presumption that the use was permissive."); Kennebunkport v. Forrester, 391 A.2d 831, 833 (Me. 1978).

Post Bell, the significance of Lyons is that nowhere in its analysis does the Law Court mention the concept of custom as being at all germane to whether the public should be granted a prescriptive easement over a wooded lot in Aroostook County, historically used for recreational purposes. Indeed the "custom" or tradition in that area, as testified by several of the plaintiffs and reported in that case, was for the public to hunt, snowmobile, or otherwise recreate in the woods without the explicit permission of the Baptist School of Christian Training, the fee owner of the wooded lot. In the words of one witness in that case, "I've hunted and fished and traveled...and I never yet have been told to leave a piece of property, …nor have I asked permission… Its [sic] just the way we are, I guess, and I think its [sic] a great way to be." Lyons v. Baptist School of Christian Training, 2002 ME 137, ¶ 10, 804 A.2d at 368. This "great way to be," indeed over a period of decades, was not viewed by the court as creating a public easement by custom for use of the woods.

In sum, the teaching in Bell and its explicit recognition that in an early case, Piper v. Voorhees, the court had cited to and quoted "with approval the leading Connecticut case rejecting the doctrine"[2] of custom to acquire easement rights over private property, show that no cause of action exists in Maine for the acquisition of an easement over private property by custom. With regard to the Beach, the proper way for the Town to

[2] Bell v. Town of Wells, 557 A.2d at 179.

assert its claim for use of private property is through a prescriptive easement claim (as done in Count IV of its counterclaim), which is a claim recognized by the courts in Maine. See Town of Manchester v. Augusta Country Club, 477 A.2d at 1129. Count VI of the Town's counterclaim must therefore be dismissed for failure to state a claim upon which relief can be granted and its affirmative defense 9 must be stricken.

II. Count IX (Offset Taxes) of defendant's counterclaim fails to state a claim upon which relief can be granted and lacks any good faith basis and thus its affirmative defense based on the same premise must also be stricken from its pleadings.

Assuming the factual allegations to be true, defendant's claims in Count IX are that plaintiffs and plaintiffs' predecessors in title failed to pay real property taxes to the Town on all or any portion of the Beach at any time since purportedly acquiring ownership of the Beach. Def.'s Countercl., ¶ 47. From this fact, defendants assert that plaintiffs' failure to pay such taxes constitutes an intent to abandon the Beach to the Town and the public. Id. ¶ 48. For relief, defendant requests that based on the abandonment, the court declare under 14 M.R.S. §§ 5951 et seq. and 14 M.R.S. §§ 6651 et seq., title to the Beach property resides in the Town and/or public, or in the alternative, in the event that title resides with plaintiffs, to "order the plaintiffs pay back property taxes on Goose Rocks Beach."

As set forth below, Count IX of defendant's counterclaim fails to state a claim upon which relief can be granted. The Law Court has consistently held that title to property cannot be lost based on abandonment. Moreover, this Court has no authority to assess, levy and collect real property taxes. Maine statutes place that authority with assessors and tax collectors subject to the conditions set forth in Title 36. Because the claims stated in Count IX lack any "good ground" to support them, pursuant to Rule 11

of the Maine Rules of Civil Procedure, plaintiffs request that this Court award plaintiffs their reasonable legal fees and expenses incurred in moving to dismiss the defendant's claims as stated in Count IX.

A. Abandonment.

Just over 10 years ago, the Law Court reaffirmed the long-standing common law rule that title to real property cannot be lost due to so-called abandonment. In Town of Sedgewick v. Butler, 1998 ME 280, ¶ 6, 722 A.2d 357, 358, the Law Court rejected the claim that a town had lost title to property through the common law doctrine of abandonment. The court stated "'[t]he common law rule . . . is that a perfect legal title cannot be lost by abandonment" (quoting Picken v. Richardson, 146 Me. 29, 36, 77 A.2d 191, 194 (1950)). The court stated that "doctrines of abandonment" are inapplicable to title to real property.

In Picken v. Richardson, the Law Court conducted an extensive review of legal authorities and reported decisions to answer the question of whether "the holder of good record title in fee simple [can] abandon that title." Id. at 33, 77 A.2d at 193. The court stated that "the great weight of authority [is] that a good legal fee simple title cannot be lost by abandonment... except through adverse possession taken by another and held for the period of the Statute of Limitations." Id. at 33-34, 193. Among other authorities examined, the Law Court discussed a 1937 decision by the Massachusetts Supreme Judicial Court which contained "exhaustive research" on the issue and which arrived at the same conclusion as the Law Court. Id. at 34-35, 77 A.2d at 194 (citing Dyer v. Siano, 298 Mass. 537, 11 N.E. 2d 451 (1937)). The Law Court also cited to two earlier Maine cases, School District No. 4 v. Benson, 31 Me. 381, 384, 385 (1850) and Phinney

v. Gardiner, 121 Me. 44, 46, 47, 115 A. 523, 525 (1921) that held that the doctrine of abandonment has no applicability to fee ownership.

In Phinney, the Law Court stated:

> There is no opportunity for the application of the doctrine of abandonment in the case at bar. The characteristic element of abandonment is the voluntary relinquishment of ownership, whereby the thing so dealt with ceases to be the property of any person and becomes the subject of appropriation by the first taker. The term is used in connection with personal property, inchoate and equitable rights, and incorporeal hereditaments, but at common law a perfect legal title to a corporeal hereditament cannot, it would seem, be lost by abandonment... Its very essence is inconsistent with the attributes of real estate.

Id. at 46-47, 115 A. at 524 (citations and quotations omitted).

Accordingly, Maine law is well established and clear that title to real property cannot be lost and acquired by others based on the doctrine of abandonment. Defendant's Count IX must be dismissed and affirmative defense 12 stricken because there is no cause of action for one to acquire title to real property held by another through abandonment, regardless of how the abandonment may be evidenced. Further, given the Law Court's consistent decisions from 1850 through 1998, no "good grounds" exist to support the assertion of the claim. Rule 11 sanctions should therefore be imposed so plaintiffs can recover their fees for having to seek dismissal of Count IX of defendant's counterclaim.

Moreover, Maine statutory law is quite clear as to the steps a municipality must take to foreclose on real property as a result of the nonpayment of real estate taxes. See 36 M.R.S. § 942 et seq. It is frivolous for the defendant to assert that a municipality can acquire title to real estate for the nonpayment of real estate taxes without complying with

the statutory provisions regarding municipal tax liens, notices and the filing thereof. These provisions are not only required by Maine statutes but also mandated by the Due Process Clause of the Fourteenth Amendment and applicable to the States. See Jones v. Flowers, 547 U.S. 220, 223 (2006) ("Before a State may take property and sell it for unpaid taxes, the Due Process Clause of the Fourteenth Amendment requires the government to provide the owner 'notice and opportunity for hearing appropriate to the nature of the case.'" (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)).

B. Payment of Back Taxes.

The Town also requests in Count IX that if it is unsuccessful in establishing title in either the Town or the public's name through the doctrine of abandonment arising out of the nonpayment of taxes, it seeks an order from this Court requiring plaintiffs to pay "back property taxes". The court has no authority to order a property owner to pay "back property taxes". To suggest otherwise is clearly frivolous.

The Maine Legislature has established in Title 36 the methods by which a municipality can assess, levy and collect real property taxes. Nowhere in Title 36 has the court been given the authority to determine, assess, levy and collect real property taxes.

Briefly, 36 M.R.S. §§ 501 et seq. sets forth the authority and process by which a municipality can assess real property taxes. Title 36 M.R.S. §§ 701 et seq. sets forth the responsibilities of the assessor and the means by which the assessor develops a list of estates to be taxed which then constitutes the list used for the commitment of taxes. 36 M.R.S. § 709. In instances when "any estates liable to taxation have been omitted from assessments," 36 M.R.S. § 713 sets forth the process by which an assessor can make

a supplemental assessment. By the terms of section 713, supplemental assessments can only be issued within three years of the last assessment date. Notably, there is no basis on which *the court* can issue supplemental assessments. The statute leaves it to the assessors to do so and limits their ability to reach back within three years of the last assessment date.

Title 36 M.R.S.A. §§ 751 et seq. sets forth the means by which real property taxes are committed to and collected by the tax collector. Title 36 M.R.S.A. §§ 841 et seq. sets forth the means by which a real property owner can challenge any assessment including supplemental assessments. Title 36 M.R.S §§ 1071 et seq. sets forth the procedure a municipality must follow to foreclose on real property for non-payment of property taxes.

Title 36 M.R.S. § 1032 permits an action to be brought in the name of the municipality when the municipal officers of the municipality have first "in writing" directed "a civil action be commenced ... against the party liable." To state a claim under section 1032, it is necessary to allege the municipal officers have directed in writing that the action be brought to recover the taxes. Town of Athens v. Whittier, 122 Me. 86, 118 A. 1103 (1922)(town required to allege there was a tax duly assessed on taxable property of the defendant and the selectmen had issued written order that the action be commenced).

This statutory framework shows without doubt there is absolutely no basis for the Town to request as part of its relief in Count IX that, to the extent it fails to establish that title has devolved to the Town as a result of plaintiffs' abandonment, the court otherwise should "order that plaintiffs pay back property taxes on Goose Rocks Beach." The court has no authority to set values, commit taxes, determine interest owed on taxes when

assessed, or hear abatement challenges. Moreover, absent an allegation that the Town actually assessed a property tax and the municipal officers authorized in writing the filing of the action to collect the taxes, the Town has not stated a claim for relief under 36 M.R.S. § 1032.

Since there are absolutely no good grounds for either of defendant's claims stated in Count IX, Rule 11 dictates that this Court should order the Town to pay plaintiffs' reasonable legal fees and costs incurred in bringing this motion to the court. To rule otherwise contravenes Rule 1 of the Maine Rules of Civil Procedure which requires that the rules be "construed to secure the just, speedy and inexpensive determination of every action."

III. 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 Town has not alleged it seeks to quiet title of plaintiffs' properties on Goose Rocks Beach.

The Town has failed to state a quiet title claim pursuant to 14 M.R.S. §§ 6651 et seq. and therefore its seeking that remedy in its prayer for relief to each count of its counterclaim is inappropriate and should be stricken pursuant to M. R. Civ. P. 12(f).

Though the Town has alleged that it has had a fee simple title interest in the Beach for over 100 years (Def.'s Countercl. at ¶ 2), that is not enough to assert a cause of action pursuant to Maine's quiet title statute. 14 M.R.S. §§ 6651 et seq. To begin, the Town 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 Town has not pled that it has such a possessory interest in the Beach and for that reason alone, it has not complied with the requisites of the quiet title statute and therefore cannot benefit from that remedy. Id.

In addition, the Town has not complied with the other requirements of the quiet title statute, namely serving its 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 Town relief pursuant to the quiet title statute in its counterclaims cannot substitute for the service and notice requirements of section 6653. The Town's counterclaims, while served on the plaintiffs in this action through counsel, are 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 Town has failed to plead a possessory interest in the Beach for at least four years, has failed to adequately serve and notice an action for quiet title, and recites no specific count for quiet title; therefore, it cannot avail itself of the remedy of quiet title and its repeated request for the same in its prayers for relief in each count of its counterclaim must be stricken.

IV. 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 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.

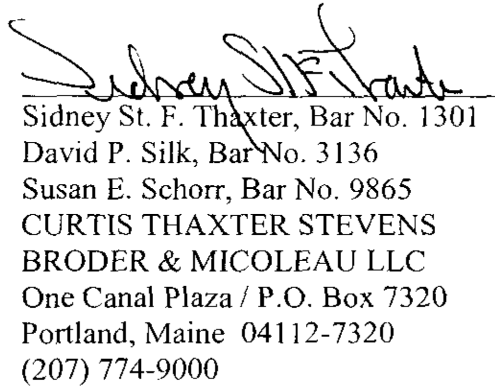
In this action, the Town has not alleged that the Town and the plaintiffs have any contractual relationship, thus the first prong of the American Rule is inapposite. Further, in its counterclaim the Town has not cited to any statutory authority that permits the recovery of attorneys' fees, should the Town prevail on its counterclaim. Finally, the Town has not asserted 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 Town's request for attorneys' fees in all but the final count of its 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 VI and IX of defendant Town of Kennebunkport's counterclaims pursuant to M. R. Civ. P. 12(b)(6); strike the Town's affirmative defenses of custom, abandonment and failure to pay taxes pursuant to M. R. Civ. P. 12(f); and strike the Town's prayer for relief as to quiet title and attorney's costs and fees, pursuant to M. R. Civ. P. 12(f). Finally, pursuant to Rule11, plaintiffs request that their attorney's fees and costs associated with the filing

of this motion concerning Count IX (Offset Taxes) of defendant's counterclaim and affirmative defense be assessed against the Town.

Dated: December 11, 2009



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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.