

STATE OF MAINE  
YORK, ss.

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

ROBERT F. ALMEDER et al.,

Plaintiffs,

v.

SHARON ANN EON-HARRIS AND  
JOHN MICHIE HARRIS, TOWN OF  
KENNEBUNKPORT and ALL  
PERSONS WHO ARE  
UNASCERTAINED,

Defendants.

)  
) **MOTION TO DISMISS**  
) **INTERVENORS/DEFENDANTS HARRIS'**  
) **COUNTS III, V, VI, VII, VIII, X, XI, AND**  
) **XII OF THEIR COUNTERCLAIM**  
) **PURSUANT TO MAINE RULE OF CIVIL**  
) **PROCEDURE 12(b)(6); MOTION TO**  
) **STRIKE AFFIRMATIVE DEFENSES 2, 7,**  
) **9, 15, AND 16 AND A PORTION OF**  
) **INTERVENORS/DEFENDANTS HARRIS'**  
) **PRAYER FOR RELIEF PURSUANT TO**  
) **MAINE RULE OF CIVIL PROCEDURE**  
) **12(f); and REQUEST FOR RULE 11**  
) **SANCTIONS 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 III (Acquiescence), V (Dedication and Acceptance), VI (Custom), VII (Easement), VIII (Implied/Quasi Easement) X (Harassment), XI (Interference with Economic Advantage), and XII (Loss of Property Value) of defendants Sharon Ann Eon-Harris and John Michie Harris' (collectively, "Harris") counterclaim; and pursuant to Maine Rule of Civil Procedure 12(f), move this Court to strike (a) the Harris' affirmative defense 2 premised on the notion that some or all of the plaintiffs lack standing; (b) the Harris' affirmative defense 7 premised on the applicability of the public trust doctrine; (c) the Harris' affirmative defense 9 to the extent it is premised on the contention that the Harris' can acquire fee and/or easement rights by custom; (d) the Harris' affirmative defense 15 which alleges lack of consideration, as this suit does not involve a breach of contract claim; (e) the Harris' 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 Harris’ prayer for relief pursuant to 14 M.R.S. §§ 6651 et seq. recited in each count of its counterclaim; and (g) the Harris’ request for costs and attorney’s fees recited in Counts I-VIII of its counterclaim.

As an introductory proposition, the plaintiffs posit that the Harris’ 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 Harris’ 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 Harris confuse and complicate what perhaps may be an attempt to plead their individual claims with the Town’s claims. In so far as the Harris’ 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.

With regard to the Harris’ claims that are theirs alone (counts X (Harassment), XI (Interference with Economic Advantage), and XII (Loss of Property Value)), these are either not causes of action recognized in Maine or are improperly pled, and therefore do not state a claim upon which relief should be granted and should be dismissed.

The Harris’ affirmative defenses premised on custom 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 Harris’ have not properly pled the

---

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

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 for their request for costs and attorney's fees. The Harris' affirmative defense premised on the plaintiffs' lack of standing is preposterous as is their affirmative defense that a lack of consideration applies in this matter; therefore these affirmative defenses should be stricken as well. The Harris' 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. Finally, due to the lack of good ground of many elements of the Harris' counterclaim and affirmative defenses, plaintiffs request Rule 11 sanctions be levied against the Harris for asserting these causes of action, as discussed more fully *infra*.

### **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.

By contrast, the Harris defendants assert that they have acquired fee simple title to the Beach by deed, adverse possession, prescription, or acquiescence, but these assertions, recited as fact, are legal conclusions, (that are bootstrapped from the Town’s counterclaim). The Harris’ only asserted claim of ownership pertains to counts XI and XII to their counterclaim, where, in paragraph 53, they claim to own rental property on Goose Rocks Beach.<sup>2</sup> As this fact is relevant to the last two counts of the counterclaim, which must be dismissed for failure to state a claim upon which relief can be granted, discussed in more detail *infra*, the foundation of the remainder of the Harris’ counterclaim is on shaky ground indeed. With no asserted property right in the Beach, it is arguably the Harris’, as individual defendants in this case, who may lack standing to pursue their claims.

### **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

---

<sup>2</sup> Upon information and belief, the Harris property is in fact several blocks from the Beach and while in the vicinity of the Beach cannot be truthfully labeled as on the Beach. It is of note that the Harris’ themselves do not identify the location of their property in their answer and counterclaim.

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 Harris’ 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 Harris’.**

The Harris’ 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 Harris’ themselves have experienced. The Harris’ 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 Harris’ 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>3</sup>

---

<sup>3</sup> To state a claim the Harris’ 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).

Without making any allegations as to how they have individually developed this claim, the Harris' 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 Harris' claim to title to the Beach is not premised on a boundary dispute with the plaintiffs, but rather on the premise that the Harris' have established possession to the Beach to a clearly marked visible line. Defendant Harris' 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." Not only is it unclear from the Harris' counterclaim where their own property lies in relation to the Beach, it is also unclear where their property lies in relation to any of the plaintiffs' properties—there is certainly no "monument, fence or the like" referenced in the Harris counterclaim that marks a visible property line at the Beach, indicating where they believe their property lies. 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 Harris' 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 Harris' 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 Harris' have not pled that they have provided the required actual or constructive notice to any of the plaintiffs indicating that the Harris' claim possession of any of the plaintiffs' Beach property in advance of this suit. The Harris', either directly or through their tenants, may have recreated on portions of the Beach and been told that they do not have a right to do so, but recreating on the Beach is hardly the same as putting any of the plaintiffs on actual or constructive notice that the Harris' claimed a possessory interest in the Beach. Similarly, if any of the plaintiffs, as alleged by the Harris' in Count X of their counterclaim (but not in Count III), told the Harris' or their tenants that they were trespassing and not permitted on their Beach property, this type of conduct would be the opposite of acquiescing to the use of the plaintiffs' Beach property.

Finally, the Harris' allege no conduct on the part of the plaintiffs evidencing that the plaintiffs acquiesced for a long period of years to the Harris' (or their tenants) 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 Harris' use or possession of their property, it is impossible to determine from the counterclaim whether a “long period of years” is involved. The counterclaim does not state when the Harris' acquired their property or where

their property is located. 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 Harris’ counterclaim should be dismissed.

**II. The Harris’ 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 Harris’ 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. at ¶ 24), but on the other hand, assert that the Harris’, the Town and/or the public accepted the dedication of the Beach by the plaintiffs (Defs.’ Countercl. at ¶ 25). The Harris’, 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 Town or the public is redundant of the Town’s pleading. Further, in Count V, the Harris’ 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 Harris’ 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 Harris’) 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 Harris’, that the Harris’, the Town 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 Harris’. Because the Harris’ 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 Harris’ Count VI is duplicative of the Town’s , Count VI of the Harris’ Counterclaim alleges that Harris’, the Town and/or the public have “acquired rights in Goose Rocks Beach by custom by virtue of the use of the beach by the Defendants, 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. The Harris’ seek a declaration that based on custom, they, the Town “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, the Town of Kennebunkport 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 Harris’ Count VI must be dismissed and affirmative defense 9 must be stricken.

The Harris’ 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 Harris’ counterclaim fails to state a claim upon which relief can be granted. For similar reasons, the Harris’ 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 Harris’ 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 Harris’ 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 Harris' must show that the plaintiffs' intended to grant a quasi-easement to their properties to them (as in the rest of their pleadings, the Harris' 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. at ¶ 38), or "circumstances at the time of the conveyance of the lots located adjacent to, and in the vicinity of" the Beach (Defs.' Countercl. at ¶ 42), the Harris' 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.<sup>4</sup> Even assuming those (unalleged) facts to be true, the Harris' 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 Harris' 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 Harris' 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 Harris' 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.

---

<sup>4</sup> Again, upon information and belief the Harris lot is several blocks from the Beach on the other side of Kings Highway and they do own a lot in a subdivision which references any or all of the plaintiffs' lots.

**V. The Harris' have not alleged a cause of action for harassment.**

The behavior that the Harris' allege constitutes harassment by the plaintiffs does not meet the statutory definition of the term, nor does the conclusory statement that the Harris' "suffered damages" as a result of purported harassment by the plaintiffs. Count X of the Harris' counterclaim thus does not meet the notice pleading requirements of M. R. Civ. P. 8(a) by setting out a short and plain statement showing that the Harris' are entitled to relief. Cf. Staples v. Michaud, 2003 ME 133, ¶¶ 9, 10, 836 A.2d 1288, 1291.

In the civil context, harassment is defined as:

- A. Three or more acts of intimidation, confrontation, physical force or the threat of physical force directed against any person, family or business that are made with the intention of causing fear, intimidation or damage to property and that do in fact cause fear, intimidation or damage to property;
- B. Three or more acts that are made with the intent to deter the free exercise or enjoyment of any rights or privileges secured by the Constitution of Maine or the United States Constitution; or
- C. A single act or course of conduct constituting a violation of section 4681; Title 17, section 2931; or Title 17-A, sections 201, 202, 203, 204, 207, 208, 209, 210, 210-A, 211, 253, 301, 302, 303, 506-A, 511, 556, 802, 805 or 806.

This definition does not include any act protected by law.

5 M.R.S. § 4651(2).

Based on the vague allegations of the Harris', it is unclear if they are trying to assert that the plaintiffs' (all 23 of them or any particular one) reporting them as trespassers to the police and telling them that they had no rights to be on the plaintiffs' Beach property constitute acts of "intimidation, confrontation...made with the intention of causing fear [or] intimidation" or "made with the intent to deter the free exercise or enjoyment" of their constitutional rights. Defs.' Countercl. at ¶ 50; 5 M.R.S. § 4651(2)(A) and (B). Under either scenario, the Harris' fail to allege that there were three or more such acts performed by the plaintiffs, nor do they allege

that there was an intent by the unnamed plaintiffs to cause fear, intimidation or deter the Harris' from enjoying any constitutional right. See Smith v. Welch, 645 A.2d 1130, 1132-33 (Me. 1994).

Assuming the allegations in the counterclaim to be true, and that some or all of the plaintiffs reported the Harris' to the police and told them they had no right to be on plaintiffs' property, these acts by the plaintiff would be protected by law as these acts in and of themselves are not unlawful. 5 M.R.S. § 4651(2)(C); see Wiley v. Wiley, 2006 ME 45, ¶ 10, 896 A.2d 263, 265. Without demonstrating three or more instances of purported harassment by a particular plaintiff or the intent of the plaintiffs to harass the Harris', Count X of the Harris' counterclaim must be dismissed for failing to state a claim upon which relief can be granted.

**VI. The Harris' have not alleged a cause of action for tortious interference with economic advantage.**

In Count XI of their counterclaim, the Harris' allege "interference with economic advantage," which in and of itself is not a cause of action in Maine; rather "tortious interference with economic advantage" is recognized as a cause of action in Maine, but the Harris' fail to plead its elements and thus this count of its counterclaim should also be dismissed for failing to state a claim upon which relief can be granted.

Tortious interference with economic advantage only applies when one party has a contractual or other prospective economic relationship with a third party, and through fraud or intimidation, the defendant interferes with that economic relationship damaging the plaintiff's economic interests. See Rutland v. Mullen, 2002 ME 98, ¶ 13, 798 A.2d 1104, 1110. Here, the Harris' allege that the plaintiffs' actions will cause the defendants to incur damages resulting from the lost value of rental property (Defs.' Countercl. at ¶ 53), asserting that the Harris' have an economic (or contractual—it is not clear from their pleading) relationship with tenants who

rent their property somewhere in the vicinity of the Beach. As with many aspects of the Harris' counterclaim, the pleading of this count is vague and ill-formed: one cannot determine if the Harris' are asserting that they have a contractual relationship with their tenants that has been breached as result of plaintiffs' actions, or whether the Harris' have some sort of other prospective economic advantage with which the plaintiffs' actions have interfered.

In either case, nowhere do the Harris' assert that the plaintiffs, through fraud or intimidation, have interfered with the Harris' contractual or other economic relationship with their tenants. See Sprague Energy Corp. v. Massey Coal Sales Co., 2006 U.S. Dist. LEXIS 10582, \*21. Indeed, the Law Court has made a point of stating that the element of fraud or intimidation has been central to this cause of action for over 100 years: "The presence of fraud or intimidation is critical to a claim of tortious interference because it distinguishes unlawful conduct from conduct inherent in a healthy competitive economic environment." Rutland v. Mullen, 2002 ME at ¶ 13, n.5, 798 A.2d at 1110.

In overturning the Superior Court's ruling in favor of Rutland's tortious interference with economic advantage claim and the involvement of fraud, the Law Court stated that the Mullens' "assertion of a legal right...is by itself insufficient as a matter of law to support a finding of interference by fraud. The Mullens cannot be said to have engaged in fraud simply because their claim of right was later proven invalid, nor did Rutland at any time rely on the Mullens' claim." Id. at ¶ 15, 798 A.2d at 1111. Rather, to prove fraud, the moving party must claim that a person made a false representation of a material fact with the knowledge of its falsity or in reckless disregard of whether it is true or false, for the purpose of inducing another to act or to refrain from acting in reliance on it and that a third party justifiably relies on the representation as true and acts upon it damaging the plaintiff. Id. at ¶ 14, 798 A.2d at 1111. Fraud has no place in this

lawsuit involving the Beach and the Harris' have not alleged any fraudulent behavior on the part of the plaintiffs.

With regard to the intimidation prong of tortious interference with economic advantage, some element of coercion or extortion is necessary to prove this element of the claim. *Id.* at ¶ 16, 798 A.2d at 1111. The Law Court stated, "Again, a person who claims to have, or threatens to lawfully protect, a property right that the person believes exists cannot be said to have intended to deceive or to have unlawfully coerced or extorted another simply because that right is later proven invalid." *Rutland v. Mullen*, 2002 ME at ¶ 16, 798 A.2d at 1111

Similarly, the actions of the plaintiffs concerning the dispute at the Beach mirror those of the Mullens, namely that the plaintiffs have asserted their rights to what they believe to be their property. Such an assertion constitutes neither fraud nor intimidation, and thus the second prong of the tortious interference with economic advantage cause of action is not properly alleged in the Harris' counterclaim. For this reason, Count XI of the counterclaim must be dismissed for failure to state a claim upon which relief can be granted and because these claims lack any good ground to support them, pursuant to Rule 11 of the Maine Rules of Civil Procedure the plaintiffs request that the Court award the plaintiffs their attorney's fees and costs involved in prosecuting this section of this motion.

**VII. "Loss of property value" is not itself a cause of action.**

There is no cause of action in Maine for "loss of property value" and as such Count XII of the Harris' counterclaim must be dismissed for failure to state a claim upon which relief may be granted. "Loss of property value" may be asserted as an element of damages, but it is not in itself a cause of action. See e.g. *Marchesseault v. Jackson*, 611 A.2d 95, 97 (Me. 1992) (upholding award of damages due to "diminution of fair market value of the house" due to

construction problems); Advanced Constr. Corp. v. Sanzaro, 2006 Me. Super. LEXIS 139, \*4-5 (reduction in property value is the “nature and extent of the loss that might be charged to the defendant”). Because this claim also lacks good ground, plaintiffs request attorneys’ fees and costs in prosecuting this section of this motion.

**VIII. The affirmative defenses concerning standing, the public trust doctrine, lack of consideration and failure to pay taxes should be stricken and Rule 11 sanctions awarded as there are no good grounds to assert these affirmative defenses.**

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 Harris’ 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 Harris’ 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 Harris’ affirmative defense 7 should be stricken.

Perhaps more baffling, is the Harris’ 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 Harris’ affirmative defense 16 alleging that the plaintiffs have failed to pay property taxes on their Beach property. The Harris’ are not a municipality, and their standing to assert such a defense is inapposite. As such, the Harris’ 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”).

Because there are no good grounds to assert these affirmative defenses, plaintiffs request this court grant Rule 11 sanctions against defendants Harris for asserting them.

**IX. 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 Harris’ have not alleged it seeks to quiet title to plaintiffs’ properties on the Beach.**

The Harris’ 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 counts I-VIII 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 Harris’ 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 Harris' 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 Harris' 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. at ¶ 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 Harris 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 Harris' relief pursuant to the quiet title statute in their counterclaims cannot substitute for the service and notice requirements of section 6653. The Harris' 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 Harris' 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 counts I-VIII of their counterclaim must be stricken.

**X. 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.**

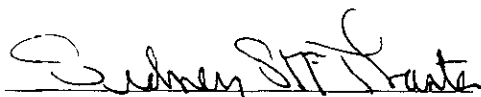
Maine follows the "American Rule" with regard to the entitlement of attorney's fees in an action, which states that a court may award attorney fees based on the contractual agreement of the parties, clear statutory authority, or the court's inherent authority to sanction egregious conduct. Baker v. Manter, 2001 ME 26, ¶ 17, 765 A.2d 583, 586. In this action, the Harris' have not alleged and cannot allege that the Harris' and the plaintiffs have any contractual relationship, nor have the Harris' cited to any statutory authority that permits the recovery of attorneys' fees, should the Harris' prevail on its counterclaim. Finally, the Harris' 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 Harris' request for attorneys' fees in Counts I-VIII 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, VIII, X, XII and XII of defendant Harris' counterclaims pursuant to M. R. Civ. P. 12(b)(6); strike the Harris' 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); strike the Harris' prayer for relief as to quiet title and attorney's costs and fees, pursuant to M. R. Civ. P. 12(f); and award plaintiffs sanction pursuant to Rule 11 for having to move to dismiss Counts

XI and XII of the Harris' counterclaim and moving to strike affirmative defenses 2, 7, 9, 15, and 16.

Dated: January 22, 2010



Sidney St. F. Thaxter, Bar No. 1301  
David P. Silk, Bar No. 3136  
Susan E. Schorr, Bar No. 9865  
CURTIS THAXTER STEVENS BRODER  
& MICOLEAU LLC  
One Canal Plaza / P.O. Box 7320  
Portland, Maine 04112-7320  
(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.

STATE OF MAINE  
YORK, ss.

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

ROBERT F. ALMEDER et al.,

Plaintiffs,

v.

SHARON ANN EON-HARRIS AND  
JOHN MICHIE HARRIS, TOWN OF  
KENNEBUNKPORT and ALL  
PERSONS WHO ARE  
UNASCERTAINED,

Defendants.

ORDER

(Title to Real Estate Involved)

On plaintiffs' motion to dismiss, motion to strike and motion for sanctions, after hearing, and after review of the written submissions submitted by plaintiffs and defendants Sharon Ann Eon-Harris and John Michie Harris ("Harris"), this Court grants said motions.

The court finds that the Harris' 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 Harris' alleged any time frame in which plaintiffs' purportedly acquiesced to the possession of their properties on Goose Rocks Beach ("Beach") to the Harris defendants. Count III of the Harris counterclaim is hereby dismissed for failure to state a claim upon which relief can be granted.

The court finds that the Harris' 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 Harris 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 Harris' 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 Harris' affirmative defense 9, also based on "custom," is stricken.

The court finds that the Harris' have not properly asserted claims for easement, implied easement or quasi easement in Counts VII and VIII of their counterclaim. The Harris' 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 Harris' counterclaim must be dismissed for failure to state a claim upon which relief can be granted.

The court finds that the Harris have not set forth three or more instances of purported harassment by the plaintiffs, nor have the Harris' alleged that the plaintiffs intended to harass the Harris; further, the unspecified plaintiffs' demands that the Harris' or their tenants leave the plaintiffs' properties and the plaintiffs' calling the police and

accusing the Harris' and/or their tenants of trespassing are lawful acts and do not constitute harassment. Count X of the Harris' counterclaim is therefore dismissed for failure to state a claim upon which relief can be granted.

The court finds that there is no cause of action for "interference with economic advantage" and that the Harris have not set forth the requisite elements of tortious interference with economic advantage as the Harris' have not alleged that the plaintiffs through fraud or intimidation interfered with a contractual or economic relationship that the Harris' may have with a third party. Count XI of the Harris' counterclaim is therefore dismissed for failure to state a claim upon which relief can be granted.

The court finds that there is no cause of action for "loss of property value" and therefore Count XII of the Harris' counterclaim is 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 Harris' 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 Harris' 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 its repeated prayer for relief pursuant to 14 M.R.S. §§ 6651 et seq. in Counts I-VIII of their counterclaim is stricken pursuant to M. R. Civ. P. 12(f).

The Harris' request for costs and attorney's fees recited in Counts I-VIII of their counterclaim should also be stricken pursuant to M. R. Civ. P. 12(f) as the Harris' 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.

Pursuant to M. R. Civ. P. 11, because there was no good faith grounds for the Harris' to bring Counts X-XII of their counterclaim and assert affirmative defenses 2, 7, 9, 15 and 16, plaintiffs' request concerning their attorney's fees and costs associated with the filing of this motion concerning these counts and affirmative defenses of defendant's counterclaim and affirmative defense 16 is granted.

Within ten (10) days of the date of this Order, plaintiffs shall submit an affidavit setting forth the attorney's fees and costs associated with filing their motion to dismiss Count X-XII of the Harris' counterclaim and motion to strike affirmative defenses 2, 7, 9, 15 and 16. Defendants Harris will then have ten (10) days from the filing thereof to challenge the reasonableness of the fees and costs; then, based on the written submissions and without further hearing, the court will decide what amount to award. Any amount awarded shall be paid by the Harris' within twenty (20) days of the issuance of the order.

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