

STATE OF MAINE
YORK, s.s.

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

ROBERT F. ALMEDER et al.,)	
)	
Plaintiffs,)	PLAINTIFFS' OPPOSITION TO
)	STATE OF MAINE'S MOTION FOR
v.)	LEAVE TO INTERVENE AS
)	DEFENDANT
TOWN OF KENNEBUNKPORT et)	
al.,)	
)	(Title to Real Estate Involved)
Defendants.)	

I. INTRODUCTION

Because proposed intervenor the State of Maine through the Office of the Attorney General (“AG”) has failed to even address the requirements for intervention as set forth in Rule 24 of the Maine Rules of Civil Procedure, the AG’s motion must be denied. That the AG’s office has a long standing and professed “strong interest” in seeking to overturn the Law Court’s decision in Bell v. Town of Wells, 557 A.2d 168 (Me. 1989) (“Bell II”) decided over 20 years ago, a decision in which the court rejected the AG’s position that 350 years of common law should be rewritten to expand the rights of the public in private property located in the intertidal zone beyond fishing, fowling and navigation, is not a basis to permit intervention as a party under Rule 24. In fact, other than to cite to Rule 24 in its opening paragraph, the AG never mentions the rule again nor discusses any of the requirements that must be met for intervention. The AG cites no authority to support its remarkable view that intervention should be granted when the proposed intervenor’s interest is simply to overturn a decision it lost 20 years ago.

Whether in public or private practice, a lawyer’s hardened view that the Law Court wrongfully decided a case he argued has never been a basis to permit intervention

under Rule 24. The Maine Rules of Civil Procedure apply with equal force to the AG. Accordingly, because the AG has not even argued it has met the requirements for intervention under Rule 24, the AG's motion to intervene as a party must be denied. Plaintiffs do not oppose permitting the AG as an amicus curiae to file memoranda on the issue already decided in Bell II – that the rights of the public at large to use the privately held intertidal zone are limited to fishing, fowling and navigation.

II. LEGAL ANALYSIS

A. The AG is not entitled to intervention under Rule 24(a).

Maine Rules of Civil Procedure Rule 24(a) provides as follows:

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.¹

Maine Rule 24(a)(2) is identical to Rule 24(a)(2) of the Federal Rules of Civil Procedure. In construing Rule 24(a)(2) of the Federal Rules of Civil Procedure, the First Circuit has identified four requirements the proposed intervenor must meet before intervention will be permitted:

(1) a timely application for intervention; (2) a demonstrated interest relating to the property or transaction that forms the basis of the ongoing action; (3) a satisfactory showing that the disposition of the action threatens to create a practical impairment or impediment to its ability to protect that interest; and (4) a satisfactory showing that existing parties inadequately represent its interest.

¹ With respect Rule 24(a)(1), the AG has not argued that a statute exists which confers on the AG an unconditional right to intervene in this action. Having not made the argument in its motion, the AG must be deemed to have waived the point.

Public Serv. Co. of N.H. v. Patch, 136 F.3d 197, 204 (1st Cir. 1998). Intervention is proper only if all four requirements are satisfied. Id. See also Int'l Paper Co. v. Town of Jay, 887 F.2d 338, 345 (1st Cir. 1989) (affirming trial court's denial of AG's motion to intervene where despite the AG's desire for party status to "protect its interest in the interpretation of [Maine's] environmental laws" the AG failed to satisfy all four of the requirements of Rule 24(a)). The AG makes no effort to even argue that it has satisfied all four conditions. Having failed to even address the argument that it has met all four requirements, the AG must be deemed to have waived any contention that it in fact has satisfied the four required elements of Rule 24.

(i) Interest of Prospective Intervenor.

The First Circuit has said that there is "no precise and authoritative definition of the interest required to sustain a right to intervene." Conservation Law Found., Inc. v. Mosbacher, 966 F.2d 39, 42 (1st Cir. 1992). However, "the intervenor's claims must bear a 'sufficiently close relationship' to the dispute between the original litigants" and "the interest must be direct, not contingent." Id. (citing Traveler's Indemnity Co. v. Dingwell, 884 F.2d 629, 638 (1st Cir. 1989)). An "undifferentiated, generalized interest in the outcome of an ongoing action is too porous a foundation on which to premise intervention as of right." Patch, 136 F.3d at 205.

In its motion, the AG does not claim an interest relating to the property that forms the basis of the ongoing action. The AG does not assert any claims against the plaintiffs. All it claims through an affirmative defense are rights that the court in Bell II said have not existed for 350 years and still do not exist, with the result that the AG raises the issue again in this action in order to relitigate it. However, unless and until Bell II is

overturned, Bell II stands as the law of the State and as a party to Bell II the AG is bound by the decision. Unlike the Town who has claimed various property interests in the property at issue in this case, the AG has made no such claim. The AG's "wish[] to present the issue again to the Law Court" does not provide any basis to permit intervention in this dispute; otherwise any party jilted by a Law Court decision will simply seek to intervene like a hitchhiker in any subsequent action where the issue can be raised so as to have a vehicle through which to relitigate and appeal.² That interest of the AG does not rise to the level of sharing a claim or defense with the existing parties; the AG has already had its claim adjudicated. Accordingly, the AG cannot satisfy the second prong of the test.

- (ii) **Disposition of this action does not threaten to create a practical impairment or impediment to the AG's ability to protect its generalized interest.**

Twenty years ago the Law Court held that under the Colonial Ordinance (which was incorporated into Maine's common law in 1821), with respect to the privately owned intertidal zone, the public does not have the right, short of a taking with compensation, to use the intertidal zone property for recreational activities. Bell II. The Law Court rejected the AG's claimed "public interest" in the use of privately held ocean front property for recreational uses. Since that "public interest" never existed, the AG cannot possibly claim it will be impaired or impeded from protecting any interest if intervention is denied. That the AG wants to change the law as opposed to enforce the law, so as to create a "public interest" that the Law Court said in Bell II does not exist simply does not impair the AG's ability to protect that "interest" if it is not a party to this case. The AG

² If the AG is permitted to intervene, ocean front property owners, including those on Moody Beach who prevailed in Bell II, may be forced to intervene even though like the AG they have no claim, a result that will clearly prejudice the parties to this action.

can seek leave to file a brief with this Court as amicus curiae and do the same if this case is appealed to the Law Court. In other words, the AG can fully promote its interest in changing the law (as opposed to ensuring that the law is enforced) without becoming a party to this action.

(iii) **Adequacy of Representation.**

The AG cannot show that the existing party – the Town of Kennebunkport (“Town”) – will inadequately represent the State’s interest. As the First Circuit observed, where the goals of the applicants are the same as those as the plaintiff or defendant, there is a presumption of adequate representation that must be rebutted by the prospective intervenor. Daggett v. Comm’n on Governmental Ethics and Election Practices, 172 F.3d 104, 111 (1st Cir. 1999).

The AG has not demonstrated any difference from its goals and the Town’s goals. The Town has raised in its counterclaim the claim that the public has the right to use the privately held beach for recreational uses, thereby raising the issue decided by Bell II. There is no suggestion that there is any difference between the AG’s “wish” to overturn Bell II and the Town’s goal to see members of the public use private property for recreational uses. The Town’s legal team is from one of Maine’s largest and most well respected firms. See <http://www.dwmlaw.com/about.php> (last visited Jan. 13, 2010). There is no suggestion that the Town’s counsel lacks the expertise to assert the grounds necessary to preserve for any appeal an attack on Bell II, despite the doctrine of stare decisis.³ There is no suggestion the Town cannot present whatever arguments the AG

³ As explained in a recent concurrence and dissent by Justice Alexander, joined by Chief Justice Saufley, he observed: “Stare decisis, the practice of appellate courts respecting their own past precedent in interpreting the law, and applying that precedent in the present to resolve similar questions of law, is a staple of appellate decision-making.... Stare decisis helps to assure that an appellate judge’s view that a

wishes to present. To the extent necessary, the Town's counsel may consult with, and be aided by, the State. (Plaintiffs have been advised that the Town's counsel is already working with the AG's assistance.) Int'l Paper Co. v. Town of Jay, 887 F.2d at 345 (stating the AG had failed to rebut the presumption of adequate representation by the Town of Jay when the AG made no showing of any significant difference between the AG's position and the Town's position and made no claim that the Town was inadequately represented and could not present the issues for consideration); Moosehead Sanitary Dist. v. S.G. Phillips Corp., 610 F.2d 49, 54 (1st Cir. 1979)(denying AG's motion for intervention for failure to show inadequate existing representation, stating that to overcome the presumption of adequate representation, the applicant "ordinarily must demonstrate adversity of interest, collusion, or nonfeasance"). In short, the AG has not and cannot rebut the presumption of adequate representation by the Town and therefore cannot satisfy the fourth prong of the Rule 24(a)(2) test.

B. The AG is not entitled to intervention under Rule 24(b).

Maine Rules of Civil Procedure Rule 24(b) provides as follows:

Upon timely application anyone may be permitted to intervene in an action when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

prior decision may have been wrongly decided is, standing alone, insufficient to justify overruling the decision." Dyer v. Maine Drilling & Blasting, Inc., 2009 ME 126 ¶¶ 45, 46, 2009 Me. LEXIS 129.

The first and third sentences of the rule are in substance identical to Rule 24(b) of the Federal Rules of Civil Procedure.⁴ In construing the federal rule, the First Circuit has stated:

Absent intervention of right under Rule 24(a), permissive intervention is allowable under Fed. R. Civ. P. 24(b) if it is determined that (1) the applicant's claim or defense and the main action have a question of law or fact in common, (2) the applicant's interests are not adequately represented by an existing party, and (3) intervention would not result in undue delay or prejudice to the original parties.

Thompson v. Malkemus, 965 F.2d 1136, 1142, n.10 (1st Cir. 1992)(quotations and citations omitted); Ruthhardt v. Ashcroft, 164 F. Supp. 2d 232, 247 (D. Mass. 2001).

The AG does not argue that it has met the standard for intervention under Rule 24(b) and therefore it must be deemed to have waived such a contention.⁵ Unlike the defendants, the AG has not asserted any counterclaims against the plaintiffs. Federal courts have held that when the government seeks permissive intervention only to raise issues that have already been litigated and decided, intervention should be denied. See, e.g., Adarand Constructors, Inc. v. Romer, 174 F.R.D. 100, 104 (D. Colo. 1997); Resolution Trust Corp. v. City of Boston, 150 F.R.D. 449, 454-55 (D. Mass. 1993). The issue the AG wishes to litigate has already been litigated and decided in Bell II.

With respect to the second prong, and as explained above, the AG has not and cannot show that its interests are not adequately represented by the Town's able counsel. Third, as the AG has not even addressed the standards, it has made no showing that its intervention will not result in undue delay or prejudice to the original parties.

⁴ The AG makes no claim that the second sentence of Rule 24(b) is applicable.

⁵ Rule 7(b)(1) states that motions "shall state with particularity the grounds thereof." See In re One Bancorp Sec. Litig., 134 F.R.D. 4, 10 n.5 (D. Me. 1991)(court refuses to address an argument raised for the first time in a reply memorandum).

Finally, courts have routinely denied permissive intervention under Rule 24(b) when the proposed intervenor shows there is little that the applicant would contribute to the case that it cannot otherwise contribute through amicus curiae status. See, e.g., Massachusetts Food Assoc. v. Sullivan, 184 F.R.D. 217, 225 (D. Mass. 1999); Resolution Trust Corp. v. City of Boston, 150 F.R.D. at 455 (denying the Commonwealth permissive intervention and allowing instead the opportunity to file amicus briefs on the legal issue of concern to the proposed intervenor); Brewer v. Republic Steel Corp., 513 F.2d 1222, 1224-25 (6th Cir. 1975). Accordingly, even if the AG had argued it meets Rule 24(a) and (b) standards for intervention, the AG's request must be denied.

D. The Law Court's decision in *Bell v. Town of Wells*, 510 A.2d 509 (Me. 1986) does not confer a special status on the AG so as to preclude the application of Rule 24 to the AG's motion.

Rather than address whether it has met the Rule 24 standards, the AG asserts that under Bell v. Town of Wells, 510 A.2d 509 (Me. 1986) (“Bell I”) the AG “can” participate as a party defendant “because the rights of the public will be resolved in the present suit.” AG’s M. Intervene ¶ 4. The AG ignores that the rights of the public under the Colonial Ordinance were resolved in Bell II.

Moreover, Bell I did not hold that Rule 24 was not the applicable standard to determine whether a proposed intervenor’s motion should be granted. Nothing in Bell I serves as a justification for the AG’s bypassing the requirements of Rule 24. In Bell I the plaintiffs sought a determination that the public had only the right to use the privately owned intertidal zone for fishing, fowling and navigation and not for recreational purposes. The State was named as a defendant. The AG subsequently claimed it held a property interest in the intertidal zone and based on that claimed property interest, asserted that plaintiffs’ claims were barred by the doctrine of sovereign immunity.

Because the AG had raised the affirmative defense that the public enjoys recreational rights over plaintiffs' private property, according to the AG, plaintiffs were barred from even seeking a court determination of the nature of the public rights. Bell I at 511.

In Bell I the Law Court rejected the AG's argument that when "the State asserts an interest, of whatever nature, in property, it may prevent a quiet title action by intervening in the litigation and raising the bar of sovereign immunity." Id. The court held that the State did not hold or own any property interest in the intertidal zone, but instead "the public at large 'owns' or 'holds' this public easement." Id. at 517. The court characterized the AG's position as a "radical assault on the stability of title to real property within this State and the availability of legal remedies to defend it." Id. at 518. The court noted that the Town had standing to assert the rights of the public and observed that the court had "permitted a great variety of actions involving claims to title or possession of the intertidal zone to proceed in the State's absence, including most notably at least two quiet title actions." Id. at 517.

Keeping in mind that the AG was already a party to the case, at the end of the opinion, the court observed that while the AG was not an indispensable party (which negated the ability of the AG to raise sovereign immunity as a bar to an adjudication of the nature of public rights over privately owned property) it saw "no reason to prevent the Attorney General's remaining in the case to represent the public interest in Moody Beach." Bell I at 519. The issue whether the AG should be permitted to intervene under Rule 24 was not before the court again because the AG was already a party.

Once the AG's "radical" effort to prevent even an adjudication of whether the public had the right to use privately owned intertidal property for recreational use was rejected, three years later, in Bell II, the Law Court likewise rejected the AG's position

and held that that the public has no such right under the Colonial Ordinance. Rather than attempt to enforce the law, in instances since Bell II was decided where parties have disputed the Colonial Ordinance limitations, the AG has sought to intervene solely to advance its agenda to return to the Law Court with the hope that four members of the present court will embrace the AG's position rejected in Bell II. While the day of return may come, the reality is the AG can have its day and say without intervening in this case. The AG has no claim in this case. Through amicus curiae status, the AG can file memoranda and briefs on whether Bell II should be overturned.⁶ The AG's claim that its participation "will make this matter more efficient and less-costly to both the Town and the Court," is without any foundation. Noticeably the AG does not claim its participation will be more efficient and cost the plaintiffs less.

The AG's single minded focus on overturning Bell II, would, if the AG is granted party status, impede the ability of the parties in this case to arrive at any consensual resolution at mediation or otherwise. As the AG's motion evidences, when it comes to Bell II, the AG is all about reversing that case. That narrow approach significantly delays and impedes the ability of parties through either mandatory ADR or judicial settlement conference to reach a resolution.

III. CONCLUSION

For all of the above reasons, the State's motion should be denied.

⁶ Granting the AG an amicus curiae status can accommodate the AG's wishes without prejudicing the existing parties. Plaintiffs do not oppose granting the AG amicus status so it may file memoranda and briefs on the dispositive issue it seeks to raise, whether Bell II was wrongfully decided. The AG amicus status should not extend to any additional powers such as the right to call witnesses, cross-examine, conduct discovery or initiate motions.

Dated: January 14, 2010



Sidney St. F. Thaxter, Bar No. 1301

David P. Silk, Bar No. 3136

CURTIS THAXTER STEVENS

BRODER & MICOLEAU LLC

One Canal Plaza / P.O. Box 7320

Portland, Maine 04112-7320

(207) 774-9000

Attorneys for plaintiffs