

STATE OF MAINE
YORK, ss.

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

ROBERT F. ALMEDER et al.,)	
)	
Plaintiffs,)	PLAINTIFFS' REPLY TO
)	DEFENDANT TOWN OF
v.)	KENNEBUNKPORT'S OPPOSITION
)	TO PLAINTIFFS' MOTION TO
TOWN OF KENNEBUNKPORT et)	DISMISS/MOTION TO STRIKE AND
al.,)	REQUEST FOR SANCTIONS
)	
Defendants.)	
)	(Title to Real Estate Involved)

INTRODUCTION

The defendant Town of Kennebunkport ("Town") fails to show that Maine law recognizes a cause of action for an easement by custom, loss of fee title to another by abandonment or that this Court can order payment of property taxes that have never been assessed. Nor has the Town successfully demonstrated any viable reason for asking for relief under the quiet title statute or for attorneys' fees. For these reasons, plaintiffs' motion to dismiss Counts VI and IX of the Town's counterclaim and strike affirmative defenses 9, 12, and 16 should be granted and sanctions as requested for the assertion of the claims in Count IX should be awarded.

LEGAL ARGUMENT

A. The Town has not pled an action for quiet title and as such its prayer for relief asserting such a remedy must be stricken.

The Town points to several instances in its counterclaim where it asserts a possessory interest in Goose Rocks Beach ("Beach"), but disparate assertions that it has such an interest, spread over several of counts of its counterclaim, does not constitute the proper pleading of an action in quiet title pursuant to Maine law, 14 M.R.S. §§ 6651 et

seq., which has its own distinct requirements. It should not be up to the court or the plaintiffs to piece together the elements of an inartfully pled claim and thereby deduce what the Town is asserting; nor should the Town reap the benefits of its own careless pleading and then claim that it is entitled to a form of relief for which it has not adequately laid the foundation.

In order to assert a claim pursuant to 14 M.R.S. §§ 6651 et seq., the Town must meet the same requirements as the plaintiffs. The Town must assert that it has an uninterrupted possessory interest in the Beach for at least four years, it must serve its claim on all supposed known claimants, and provide notice to claimants that may be unascertained pursuant to 14 M.R.S. § 6653. The Town's proffer to amend its answer and counterclaim (Defendant Town of Kennebunkport's Opposition at 3) is an implicit if not explicit admission that its original counterclaim did not adequately plead these elements of a quiet title action.

Plaintiffs' insistence on proper pleading of this action is not an academic exercise nor a veiled attempt to counter the Town's objection to plaintiffs' own service under the quiet title action, which will be addressed in a companion pleading. Rather, the plaintiffs have, in their two count complaint, properly pled and noticed a claim for quiet title by publishing a notice of its complaint pursuant to the requirements of section 6653. The Town has not similarly satisfied the requirements of the quiet title statute¹ and its argument that a request for hearing with this Court satisfies the notice requirements of the quiet title statute or the Maine Rules of Civil Procedure is unavailing. The Town has

¹ The Town cannot reasonably claim to have been in possession of the Beach for more than four years as it does in its counterclaim since the Town's Comprehensive Plan, cited in plaintiffs' complaint (at ¶ 37), and which the Town acknowledged in its answer speaks for itself, plainly references the fact that the Beach is private.

asked for a hearing with this Court regarding the *plaintiffs'* notification of unascertained defendants in this case, not on its own behalf to address whether the Town has properly noticed its own claim for an action sounding in quiet title, as it has not pled such a cause of action. The Town's repeated request for a remedy pursuant to the quiet title statute should therefore be stricken.

B. Since custom has never been a recognized doctrine in Maine, Count VI of the Town's counterclaim fails to state a claim upon which relief can be granted.

The Town argues that in "Count VI of its counterclaim, [it] specifically relied on the Law Court's decision in Bell v. Town of Wells" to assert its counterclaim. Def.'s Opp. at 5. The Town ignores 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.

Accordingly, it is not as the Town suggests the plaintiffs who have “completely misinterpret[ed]” Bell. Def.’s Opp. at 4. 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 Town’s counterclaim fails to state a claim upon which relief can be granted. For similar reasons, the Town’s affirmative defense 9 must also be stricken.

C. Count IX fails to state a claim upon which relief can be granted and lacks any good faith basis.

It is frivolous for the Town to assert as it does in Count IX that this Court can declare that title to the Beach “resides” in the Town because the plaintiffs have abandoned their fee ownership by not paying taxes to the Town, taxes the Town now concedes it never assessed on the plaintiffs. The Town’s claim is utterly lacking any “good ground.” There are a long line of cases that hold fee ownership interests cannot be abandoned.² The Town ignores these cases and instead seeks to justify its claim that Maine law recognizes that a party can abandon their fee interests by directing the court to Canadian National Railway v. Sprague, 609 A.2d 1175 (Me. 1992). A simple

² Town of Sedgewick v. Butler, 198 ME 280, ¶6, 722 A.2d 357, 358; Picken v. Richardson, 146 Me. 29, 36, 77 A.2d 191, 194 (1950); Phinney v. Gardiner, 121 Me. 44, 46, 47, 155 A. 523, 525 (1921); School District No. 4 v. Benson, 31 Me. 381, 384, 385 (1850).

examination of Sprague reveals that the Town's reliance on Sprague to show "good ground" for its claim that a fee interest can be lost by abandonment is totally misplaced.

Sprague dealt with the issue of the standard to be used to determine when an easement by grant – not a fee interest – could be abandoned. Id. at 1179.³ No reasonable advocate can read Sprague to have any connection to whether a fee interest can be lost through abandonment. Moreover, lest there be any doubt, Sprague was decided in 1992 (the Town omits the date of the decision). The most recent Law Court decision affirming the long standing common law rule that a fee interest cannot be lost through abandonment – Town of Sedgewick v. Butler, 1998 ME 280, ¶ 6, 722 A.2d 357, 358 – was decided in 1998, six years after Sprague. As noted earlier, in Butler, 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)) and that "doctrines of abandonment" are inapplicable to title to fee interests. Id. The court cited a litany of cases in Maine going back over 100 years so holding.

Accordingly there are no good grounds for the Town's assertion of a claim that it can acquire plaintiffs' fee interest in the Beach through abandonment. The claim has constantly been rejected in Maine. That another party in another case made the same claim in a pleading does not serve as a justification for counsel in this case to avoid ensuring that there is a "good ground" to bring the claim before signing the pleading.

With regard to the "offset taxes" issue, there is also absolutely no good ground for the Town's claim that this Court has the inherent authority to order plaintiffs to pay back

³ In Sprague, the Law Court reviewed recent cases that addressed abandonment of an easement acquired by grant, cases which in turn relied on an "inconsistent" opinion rendered by the Law Court a century ago. In clarifying the modern doctrine in Maine, the Law Court stated that to prove abandonment of an easement by grant, "a party must show 1) a history of nonuse coupled with an act or omission evincing a clear intent to abandon, or 2) adverse possession by the servient estate." Id.

taxes when those taxes have never been assessed and committed. The Town acknowledges that the taxes it is requesting the court to order plaintiffs to pay have never been assessed. Def.'s Opp. at 9. While the Town has the limited authority to go back three years when "any estates liable to taxation have been omitted from assessments," 36 M.R.S. § 713, nowhere is the court given the authority to make a retroactive "award" (which in reality must be considered an assessment). The Town has not exercised its limited authority and cannot avail itself of the statutory process to collect a money judgment award for unpaid taxes.⁴

Ignoring these statutes, without citing to any legal authority, the Town makes the naked assertion that if plaintiffs do own the Beach, "it would be within the inherent authority of the Court to require that Plaintiffs pay back taxes." Def.'s Opp. at 9. Then the Town says in footnote 9 that it is not asking the court to actually "assess" taxes (the Town does not address how the taxes are going to be determined but without an assessment of value and commitment of the mil rate to the value, it is impossible to determine the amount of tax) but instead wants the court to "declare that Plaintiffs owe taxes and assess damages for the failure of Plaintiffs to pay taxes" that have not ever been assessed on them. *Id.* at n. 5. The damages to be determined are the amount of the unassessed taxes that no one is apparently going to determine, neither the court nor the Town itself, which in any event is limited to going back only three years. Without any statutory or indeed rational basis, it is more than readily apparent that the Town's claim

⁴ 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). The Town concedes its claim is not based on this statute.

for an award of back taxes is pure fiction and lacks any good ground. That the Town apparently copied the claim from a complaint filed by another party in another case does not relieve counsel from their Rule 11 obligations in this case.

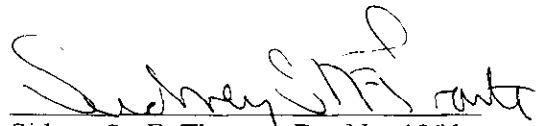
D. The Town asserts no valid basis for a request for costs and attorney's fees in its prayer for relief and therefore this prayer for relief should be stricken.

As the Town itself acknowledges, the American Rule with regard to the awarding of costs and attorney's fees applies in Maine. So, too, does the court retain the discretion to award costs and attorney's fees. The Town's repetitive assertion of its right to costs and attorney's fees in this action is thus inappropriate and should be stricken, when neither a contractual provision nor a statute permitting their recovery are relevant to this action. The Town argues that because it is early days in this suit and it is therefore unclear whether "circumstances will arise justifying the award of costs and attorney's fees" (Def.'s Opp. at 11) the Town itself is justified in asking for costs and attorney's fees in its prayer for relief. If and when the Town amends its pleadings to include a claim that would give rise to an award of attorneys' fees, it can make the claim. Until then, since there is presently no basis for the request, the request should be stricken.

CONCLUSION

For all of the reasons recited above and in their original motion to dismiss and motion to strike, plaintiffs respectfully request this Court grant its motion to dismiss Counts VI and IX of the Town's counterclaim and affirmative defenses 9, 12, and 16 asserted with its answer and award sanctions for the assertions of the claims stated in Count IX of the counterclaim.

Dated: January 22, 2010


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