

STATE OF MAINE
YORK, ss.

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

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| ROBERT F. ALMEDER et al., |) | |
| |) | |
| |) | |
| Plaintiffs, |) | |
| |) | PLAINTIFFS' REPLY TO |
| v. |) | DEFENDANTS HARRIS' OBJECTION |
| |) | TO PLAINTIFFS' MOTION TO |
| TOWN OF KENNEBUNKPORT and |) | DISMISS, MOTION TO STRIKE AND |
| ALL PERSONS WHO ARE |) | MOTION FOR SANCTIONS |
| UNASCERTAINED, |) | |
| |) | (Title to Real Estate Involved) |
| Defendants. |) | |
| |) | |
| |) | |

The Objection of Defendants Sharon Ann Eon-Harris and John Michie Harris (collectively, the "Harris") to Plaintiffs' Motion to Dismiss, Motion to Strike Affirmative Defenses and For Sanctions ("Objection") neither refutes any of the legal arguments advanced by the plaintiffs in their underlying motion to dismiss, nor supports any particularized claims the Harris' assert in this lawsuit that are distinct from those made by defendant Town of Kennebunkport ("Town"). For these reasons and as set forth *more fully* below, the plaintiffs' motion to dismiss, motion to strike, and motion for sanctions against the Harris defendants should be granted.

First, as they did in their counterclaim, the Harris' continue to rely on the pleadings of the Town, incorporating the Town's factual basis and legal arguments in support of *the Town's* claims as recited in Count III (Acquiescence), Count V (Dedication and Acceptance), Count VI (Custom), Count VII (Easement) and Count VIII (Quasi/Implied Easement) of the Town's counterclaim. The problem with the Harris'

approach is that the Harris', as individuals presumably having an interest in property somewhere in the vicinity of Goose Rocks Beach (though the location of that property has yet to be identified in their pleadings), fail to assert any facts particular to them to support these counts of their counterclaim. The Town, as a municipality, has put forth a counterclaim on its own behalf and that of the public. As a member of the public, the Harris' interests are thus adequately represented by the Town in this matter.¹ Moreover, as a general rule, a litigant "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Warth v. Seldin, 422 U.S. 490, 499 (U.S. 1975). By copying verbatim the Town's counterclaim, and then incorporating the Town's responsive pleading to plaintiffs' motion to dismiss filed against the *Town*, the Harris' perpetuate the impression that, standing alone, they have no basis to assert any *individual* claims that might pertain only to them, and not to the general public associated with counts III-VIII of their counterclaim.² By contrast, the plaintiffs are justified in incorporating *their own* pleadings against other parties in this action in their motion to dismiss some of the Harris' claims because the plaintiffs' factual and legal predicates are the same against the parties who have to date entered appearances in this matter.

¹ To be clear, the plaintiffs do not mean to discourage broad participation by those parties asserting a valid property interest in Goose Rocks Beach; rather, the plaintiffs posit that the asserting of claims duplicative of the Town's (which purports to speak for the public) by multiple defendants, who do not assert individualized claims, only serves to weigh this suit down with unnecessary pleadings.

² See Lindemann v. Comm'n on Governmental Ethics & Election Practices, 2008 ME 187, ¶ 15, 961 A.2d 538, 543 ("In limited circumstances, we have allowed individual members of the public to vindicate public rights in a judicial forum. For example, we recognized standing for citizens asserting a political right shared by the public at large, when a 'particularized interest' was demonstrated. Even in these circumstances, we still require a 'particularized injury' or 'direct and personal injury.'" (citations omitted).

Next, the Harris' suggest that their claims in Counts X (Harassment), XI (Interference with Economic Advantage) and XII (Loss of Property Value)³ should stand until the summary judgment or trial phase of this case and that these claims are adequately pled to withstand a motion for dismissal. However, plaintiffs point out that even fairly liberal notice pleading requirements do not provide an excuse to fail to properly plead a cause of action or facts to support a claim. See Champagne v. Mid-Maine Medical Center, 1998 ME 87, ¶ 18; 711 A.2d 842, 848 (in dismissing claims for invasion of privacy and battery, the court applies notice pleading requirements and states, “[n]either notice of claim averred the essential elements for invasion of privacy or for battery, nor did they supply adequate factual information to disclose the basis of an invasion of privacy or battery claim”).

The Harris' have not pled all the elements of harassment because they have not outlined three or more incidents of allegedly harassing behavior on the part of the plaintiffs, nor have they identified which of the plaintiffs purportedly engaged in harassment. 5 M.R.S. § 4651(2). With these basic factual underpinnings of their claim for harassment absent, the plaintiffs cannot be deemed to be adequately on notice as to the harassment claim.

Similarly, the Harris' have not adequately pled the elements of tortious interference with economic advantage because it is simply not clear from their counterclaim which economic relationship the plaintiffs have purportedly interfered with, nor have the Harris' alleged any fraud or intimidation on the part of the plaintiffs—essential elements of such a claim. See Sprague Energy Corp. v. Massey Coal Sales Co.,

³ Count XI has been re-named by the Harris' as “Interference with Advantageous Economic Relationship” and Count XII has been re-named “Loss of Value of Real Estate” in the Harris' “Objection,” but plaintiffs arguments as to the insufficiency of these pleadings remain valid, despite this change in nomenclature.

2006 U.S. Dist. LEXIS 10582, *21; Rutland v. Mullen, 2002 ME 98, ¶ 13, 798 A.2d 1104, 1110. Without these basic legal and factual assertions in their counterclaim, the plaintiffs cannot meaningfully respond.

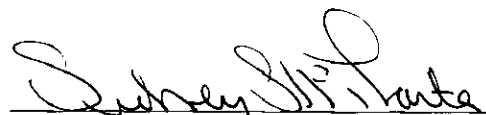
Along the same vein, “Loss of Property Value” is not itself a cause of action, and no amount of factual development by the Harris’ can change that circumstance. Thus, in Counts X-XII of their counterclaim, the Harris’ fail to satisfy notice pleading requirements, as the plaintiffs are not adequately apprised of the nature of the allegations made against them. See Town of Stonington v. Galilean Gospel Temple, 1999 ME 2, ¶ 14, 722 A.2d 1269, 1272.

With regard to plaintiffs’ motion to strike the affirmative defenses of standing, applicability of the public trust doctrine, custom, lack of consideration and failure to pay property taxes; and the motion to strike the prayer for relief concerning relief pursuant to the quiet title statute, 14 M.R.S. §§ 6651 et seq. and attorney’s fees and costs, the Harris’ offer no argument other than to say that the plaintiffs’ arguments are “simply rhetorical.” Objection at ¶ 3. This lack of refutation of plaintiffs’ arguments on these points amounts to no argument or rational basis at all for the Harris’ to assert these affirmative defenses. Plaintiffs do agree with the Harris’ contention that “title of plaintiffs is a central issue in this case” (Objection at ¶ 3); however, the Harris’ title is also central to their defense and counterclaim, and yet they have not alleged any facts identifying their property in relation to Goose Rocks Beach, let alone any facts describing their title to such property. Combined with the lack of specificity in their counterclaim or any attempt to individualize their claims, plaintiffs’ motion to strike these affirmative defenses and prayers for relief should be granted.

Finally, with respect to plaintiffs' request for sanctions, this request is not made with regard to the Harris' counterclaim as a whole, but rather to the frivolously pled aspects of the counterclaim (namely Counts X-XII, affirmative defenses 2, 7, 9, 15, and 16, and the prayer for relief for attorney's fees and costs) that the plaintiffs had to unnecessarily spend their own resources to defend. The plaintiffs have not suggested that the Harris' do not have a "real" claim; rather, the plaintiffs carefully pointed out where the Harris' pleading was not made on any good grounds. Under Rule 11, a lawyer (or any party) must not sign a pleading unless he or she believes it is premised on "good ground[s]." M. R. Civ. P. 11(a).

To plaintiffs, it seems patently obvious that the Harris' imported the Town's counterclaim, affirmative defenses, and prayers for relief as their own without bothering to tailor the pleadings to the Harris' own situation, in addition to adding in claims that either are not valid causes of action in Maine or were poorly drafted such that plaintiffs are not on adequate notice of the claim. For all the reasons set forth herein, and for the reasons set forth in their motion to dismiss, motion to strike, and motion for sanctions, the plaintiffs respectfully request that this Court grant plaintiffs' motion.

Dated: February 17, 2010


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