

STATE OF MAINE
YORK, ss.

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

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

Plaintiffs)

v.)

TOWN OF KENNEBUNKPORT and)
ALL PERSONS WHO ARE)
UNASCERTAINED,)

Defendants)

**DEFENDANT TOWN OF
KENNEBUNKPORT'S OPPOSITION
TO MOTION TO STRIKE
OBJECTION TO NOTICE OF
PUBLICATION AND REQUEST
FOR EXPEDITED HEARING**

Defendant Town of Kennebunkport (the "Town") hereby opposes Plaintiffs' Motion to Strike the Town's Objection to Plaintiffs' proposed Notice of Publication on the grounds that Plaintiffs have failed to comply with 14 M.R.S.A. §§ 6653-54 and Rule 4(g) of the Maine Rules of Civil Procedure and, as discussed in the Town's original Objection, the proposed Notice of Publication is inadequate for purposes of service on persons who have an interest in Goose Rocks Beach and are clearly ascertainable.

As discussed at length in the Town's original Objection, 23 beachfront property owners at Goose Rocks Beach (out of approximately 88) brought this declaratory judgment/quiet title action claiming that they own all but 200 (or so) yards of Goose Rocks Beach. In their Complaint, they seek to exclude the general public, and others, from using Goose Rocks Beach for recreational purposes. Plaintiffs have sued the Town and "all persons who are unascertained, not in being, unknown or out of the State, heirs or

legal representatives of such unascertained persons, or such persons as shall become heirs, devisees or appointees of such unascertained persons who claim the right to use or title in Plaintiffs' Property other than those persons claiming ownership or easement by, through, or under and instrument recorded in the York County Registry of Deeds.”

Maine law provides that service in an action such as the one brought by Plaintiffs “shall be made as in other actions on all supposed known claimants residing either in the State or outside the State, and notice to persons who are unascertained, not in being or unknown shall be given by publication as in other actions where publication is required, unless the court on motion permits posting in such public places as the court may direct in lieu of all or part of the publication ordinarily required. 14 M.R.S.A. § 6653 (emphasis added). Pursuant to Rule 4(g), “[t]he court, on motion upon showing that service cannot with due diligence be made by another prescribed method, shall order service by publication...” Me.R.Civ.P 4(g) (emphasis added).

Plaintiffs have failed to properly serve the “known claimants residing either in the State or outside the State” and notify them of the lawsuit that they have filed against the Town of Kennebunkport seeking to prohibit recreational use of almost all of Goose Rocks Beach by the public and others. There are approximately 65 beachfront property owners at Goose Rocks Beach in addition to the 23 Plaintiffs, and many back lot owners, who claim an interest in Goose Rocks Beach and who are readily ascertainable. In addition, there are numerous other persons and entities that may also claim an interest in Goose Rocks Beach, including but not limited to the Goose Rocks Beach Association, the

Kennebunkport Conservation Trust, the Tides Inn by the Sea. Plaintiffs have failed to properly notify or serve any of these readily identifiable persons and entities, who may have an interest in Goose Rocks Beach, of their lawsuit.¹

Second, Plaintiffs have failed to file a motion for service by publication in accordance with Rule 4(g). Instead, they have simply filed a notice of publication with the Court in hopes of avoiding any input from the Court on the merits of service by publication. Rule 4(g), however, requires that Plaintiffs file a motion, thereby giving the Court an opportunity to determine whether service “cannot with due diligence be made,” including service on those persons and entities discussed above who claim an interest in Goose Rocks Beach and who are readily ascertainable, and whether the Journal Tribune is, for example, the most appropriate publication to publish the Court’s order for service by publication to notify the general public, and such persons and entities who truly are not ascertainable, of Plaintiff’s lawsuit.²

¹ Rule 19 requires the joinder of all parties necessary for just adjudication if “(1) in the person’s absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person’s absence may (i) as a practical matter impair or impede the person’s ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.” Here, Plaintiffs are apparently seeking to avoid the requirements of Rule 19 through service by publication of “all persons who are unascertained, etc...” Although service by publication may be sufficient in this case to notify the general public, and such persons and entities who are in fact unascertainable, of Plaintiffs’ lawsuit, service by publication is inadequate under Rule 4, and Rule 19, for purposes of notifying persons and entities who are readily ascertainable and have a clear interest in Goose Rocks Beach. Plaintiffs should, therefore, be required to properly notify any such persons who are readily identifiable, can “with due diligence” be served, and have or claim an interest in Goose Rocks Beach.

² Although the Journal Tribune is York County’s only daily newspaper, it is probably not the publication that is most widely distributed in Kennebunkport and Goose Rocks Beach. Because Plaintiffs waited until October to file their lawsuit when many Goose Rocks Beach property owners have left the State for the winter, and they are now publishing their proposed notice of the lawsuit in the Journal Tribune instead of

By moving to strike the Town's Objection to the proposed Notice of Publication, it appears that Plaintiffs have no interest in notifying all of the "known claimants residing either in the State or outside the State" of their lawsuit, including but not limited to all of the other beachfront property owners at Goose Rocks Beach and any back lot owners, or others, who may have an interest in Goose Rocks Beach. Instead of notifying these readily identifiable individuals and entities directly, Plaintiffs would rather rely on the notice published in the Journal Tribune in the middle of winter when many Goose Rocks Beach residents have left the State of Maine for the season. The Town has, therefore, requested an expedited hearing to address the issue of service and notification of all persons and entities who claim an interest in Goose Rocks Beach, including those persons and entities who are readily ascertainable who have not yet been properly notified.

In the Moody Beach (*Bell v. Town of Wells*, 510 A.2d 509 (Me. 1986)) and Wells Beach (*Eaton v. Town of Wells*, 2000 ME 176, 760 A.2d 232) cases, the courts carefully considered how to deal with the notification of any parties who might have an interest in the beach. For example, in the case of *Bell v. Town of Wells*, the Court appointed a guardian *ad litem* pursuant to 14 M.R.S.A. § 6654 to represent all of the unnamed, or unknown, defendants who were not served. *See id.* at 510. Similarly, the Court could consider whether to appoint a guardian *ad litem* here.

the York County Coast Star, Portsmouth Herald, Portland Press Herald or other more widely circulated publications, many Goose Rocks Beach property owners may not receive notice of the pending lawsuit, even though such persons and entities are readily ascertainable through the Registry of Deeds, Town records and Post Office records. The likely consequence of the timing of Plaintiffs' lawsuit, and the publication that they have chosen is that many persons and entities who claim an interest in Goose Rocks Beach will not receive notice of this lawsuit.

In the case of *Eaton v. Town of Wells*, the Law Court found that the proposed notice of publication (like Plaintiffs' proposed notification here) was inadequate to bind certain beachfront property not specifically named in the action because such persons "were identifiable and ascertainable." *Eaton v. Town of Wells*, 2000 ME 176, ¶ 47, 760 A.2d at 248. Because such interested parties were not included in the action and were not bound by the Law Court's decision, the parties to the Wells Beach case were at "risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest," which raises the issues proscribed by Rule 19. *See supra* note 1.

It is clear from the Wells Beach and Moody Beach cases that the issue of who should be made a party to the action, and how they should be notified, is an extremely important component of the action. The Town is seeking an expedited hearing with the Court to address these issues, and filed its objection to the notice of publication to put these issues before the Court's consideration.

Finally, in their Motion to Strike, Plaintiffs have mischaracterized the communications with counsel for the Town relating to proposed Notice of Publication before it was filed with the Court. Counsel for the Town specifically stated in correspondence with Plaintiffs' counsel as follows:

Although I think we both understand each other's positions, I am e-mailing again just to be certain. The Town does not object to publishing the notice that you have drafted in the manner that you are proposing to publish it, but it is the Town's position that any such notice (by publication) would not be effective for purposes of providing notice of the action to beach front property owners who are not named in the complaint, back lot owners who have deeded or prescriptive rights to the beach and others who may have an interest in the beach and are readily ascertainable.

A copy of counsel's November 4, 2009 correspondence is attached hereto as Exhibit A. As the correspondence shows, the Town's position has remained consistent throughout and its position is that all parties who are ascertainable and have an interest in Goose Rocks Beach should be properly notified of this action, and the Town is mystified at Plaintiffs' efforts to avoid meaningful consideration of the proposed Notice of Publication by the Court, as well as their apparent efforts to prevent parties who may have an interest in Goose Rocks Beach from participating in this case.

WHEREFORE, Defendant Town of Kennebunkport respectfully requests that the Motion to Strike the Objection to Plaintiffs' Notice of Publication be denied, and further requests an expedited hearing with the Court on the issues of notice to interested parties and joinder of interested parties. In the alternative, Defendant Town of Kennebunkport respectfully requests that the Court dismiss Plaintiffs' Complaint in accordance with Rule 19(b) for failure to join parties necessary for just adjudication and enter such other and further relief as justice may require.

Dated: January ____, 2010



Amy K. Tchao, Bar No. 7769
Brian D. Willing, Bar No. 9112
Melissa A. Hewey, Bar No. 3587

Drummond Woodsum
84 Marginal Way, Suite 600
Portland, ME 04101-2480
207-772-1941

Brian Willing

From: Brian Willing
Sent: Wednesday, November 04, 2009 12:46 PM
To: 'Susan Schorr'; Pete Thaxter
Cc: Amy Tchao; Melissa Hewey
Subject: RE: Almeder v. Town of Kennebunkport--update

Hi Susan:

Although I think we both understand each other's positions, I am e-mailing again just to be certain. The Town does not object to publishing the notice that you have drafted in the manner that you are proposing to publish it, but it is the Town's position that any such notice (by publication) would not be effective for purposes of providing notice of the action to beach front property owners who are not named in the complaint, back lot owners who have deeded or prescriptive rights to the beach and others who may have an interest in the beach and are readily ascertainable.

Brian

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From: Susan Schorr [<mailto:sschorr@curtisthaxter.com>]
Sent: Wednesday, November 04, 2009 11:09 AM
To: Brian Willing; Pete Thaxter
Cc: Amy Tchao; Melissa Hewey
Subject: RE: Almeder v. Town of Kennebunkport--update

Hi Brian:

Thank you for not objecting to the publication notice as drafted. We do, however, disagree with regard to whether or not our proposed notice and publication methodology will be effective--we are following the statute and rules and will publish as we believe we are required to do. Our purpose for contacting you now was to try to make sure you were in agreement with our methodology prior to publication--if you have other publication methods to suggest beyond the York County newspaper and the Town website, please let me know.

Many thanks,

Susan E. Schorr, Esq.
sschorr@curtisthaxter.com

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From: Brian Willing [mailto:BWilling@dwmlaw.com]
Sent: Wednesday, November 04, 2009 10:14 AM
To: Susan Schorr; Pete Thaxter
Cc: Amy Tchao; Melissa Hewey
Subject: RE: Almeder v. Town of Kennebunkport--update

Hi Susan:

We do not object to the publication of the notice of the lawsuit that you have drafted, but we doubt that it will be effective, especially as to the beach front property owners who are not named in the complaint, back lot owners who have deeded or prescriptive rights to the beach and others who may have an interest in the beach and are readily ascertainable.

Brian

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From: Susan Schorr [mailto:SSchorr@curtisthaxter.com]
Sent: Wednesday, November 04, 2009 9:07 AM
To: Melissa Hewey; Amy Tchao

Cc: Pete Thaxter
Subject: Almeder v. Town of Kennebunkport--update

Hi Melissa and Amy,

I inadvertently left off these plaintiffs off from the Notice of Publication I emailed yesterday:

Edwina D. Hastings, Trustee of the Edwina D. Hastings Revocable Trust	Leslie A. Josselyn-Rose, Trustee of the LAJR Trust
<u>Property:</u> 221 Kings Highway. Deed recorded York Registry of Deeds, Book 14999, Page 766.	<u>Property:</u> 251 Kings Highway. Deed recorded York Registry of Deeds, Book 15587, Page 491.

Sorry for the oversight--it was a row in the chart of plaintiffs that I somehow deleted.

All the best,
Susan E. Schorr, Esq.
sschorr@curtisthaxter.com

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