

STATE OF MAINE
CUMBERLAND, ss.

STATE OF MAINE
CUMBERLAND, SS
CLERK'S OFFICE

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-02-49 ✓

TEH-CUM-5/3/2004

2004 MAR -3 A 9:36

FRANK BLANCHARD JR., Personal
Representative of The Estate of Frank
Blanchard Sr.,

Plaintiff

v.

DONALD L. GARRETT
LAW FIRM

MAY 12 2004

INHABITANTS OF THE
TOWN OF FALMOUTH,
PHILOMENA RUSSO,
TOWER SPECIALISTS, INC.,
PAUL STROUT and
JACQUELINE C. SULLIVAN

Defendants.

and

DECISION AND ORDER ON
PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
AND RULE 80B APPEAL

PHILOMENA RUSSO,

Third Party Plaintiff

v.

ROBERT M. MALIA and JULIE A. MALIA,

Third Party Defendants.

This matter is before the court on the 80B appeal of the plaintiff Estate of Frank Blanchard, Sr. from the decision of the Falmouth Planning Board ("Board"), as set forth in Counts I and II of his amended complaint, and on the plaintiff's motion for partial summary judgment on those same counts.

The court dismisses the plaintiff's 80B appeal in Counts I and II for failure to file the record of the subject proceedings before the Board, or an acceptable substitute for the record, as required by M. R. Civ. P.

80B(e). See M. R. Civ. P. 80B(h); *Time Enough, Inc. v. Town of Standish*, 670 A.2d 918, 920 (1996) (holding that in the absence of a record the Superior Court may dismiss action); 2 Field, McKusick & Wroth, *Maine Civil Practice* § 80B.4a at 574 (2d ed. Supp. 1981) (stating that failure of the plaintiff to get the record before the court “will result in dismissal of his 80B action for want of prosecution”).¹ The court concludes that such a filing is necessary under the Rules even where the defendants have filed answers admitting critical allegations in the amended complaint.

In view of the foregoing dismissal, the plaintiff’s motion for partial summary judgment as to Counts I and II is moot and must be denied. Even if that motion is still viable, it must be denied because the plaintiff has not filed a statement of material facts as required by M. R. Civ. P. 56(h)(1), nor has it offered any affidavits, pleadings, depositions, admissions, or answers to interrogatories showing that there is no genuine issue as to any material fact as required by M. R. Civ. P. 56(c). These procedural defects are fatal to the plaintiff’s summary judgment motion, and are not cured by the defendants’ admissions in their answers to the amended complaint. See *Levine v. R.B.K. Caly Corp.*, 2001 ME 77, ¶ 9, 770 A.2d 653, 656 (holding that a party’s failure to file a proper statement of material facts is fatal to its motion for summary judgment); *Dumont v. Fleet Bank of Maine*, 2000 ME 197, ¶ 13, 760 A.2d

¹ The plaintiff did not request an enlargement of time to file the record or stipulations as to the record. The court may extend Rule 80B time limits for good cause pursuant to a motion for a time extension made prior to the filing deadline. M.R. Civ. P. 80B(g). Such motions made *after* the deadlines are governed instead by Rule 6(b)(2), which provides for enlargement of time periods upon a showing of excusable neglect. *Haskell v. Phinney*, 460 A.2d 1354, 1359-60 (Me. 1983).

1049, 1053-54 (holding courts are neither required to independently search a record to find support for facts offered by a party).

DECISION

Pursuant to M.R. Civ. P. 79(a), the Clerk is directed to enter this Decision and Order on the Civil Docket by a notation incorporating it by reference and the entry is

Plaintiff's appeal from the decision of the Falmouth Planning Board is DISMISSED; and

Plaintiff's Motion For Partial Summary Judgment on Counts I and II of Plaintiff's Complaint is moot and, therefore, DENIED.

Dated: March 3, 2004



Justice, Superior Court

Date Filed 9-5-02 CUMBERLAND County Docket No. AP02-49

Action 80B APPEAL

FRANK BLANCHARD, PERS. REP. OF THE
ESTATE OF FRANK BLANCHARD

INH. OF THE TOWN OF FALMOUTH
PHILOMENA RUSSO

ROBERT MALIA AND JULIE MALIA (3RD Party)
TOWER SPECIALISTS INC.
PAUL STROUT
JACQUELINE C. SULLIVAN

vs.

Plaintiff's Attorney
James Mitchell, Esq.
86 Winthrop Street
Augusta ME 04330

Defendant's Attorney

BONNIE MARTINOLICH, Esq (Ruso)
PO BOX 9546
PORTLAND, ME 04112

Def.'s Attorney *(P. & J. Malia)*
Sally Daggett, Esq. (R. & J. Malia)
P.O. Box 4510 (3rd Party)
Portland, ME 04112-4510

WILLIAM PLOUFFE, ESQ (Falmouth)
PO BOX 9781
PORTLAND, ME 04104

Date of
Entry

Jennifer Archer Esq. (Tower Sp/
PO Box 597 Strout)
Portland ME 04112

ROY PIERCE, ESQ 791-3000
PO BOX 9546 PETER RODWAY, ESQ.
Portland, ME 04112 P.O. BOX 874 (Sullivan)
PORTLAND, MAINE
04104
77-8449

2002 Sept. 6	Received 9-5-02. Complaint Rule 80B and Rule 80A Quite Title with Exhibits 1-4 filed.
" "	Summary sheet filed.
" "	On 9-6-02. Briefing schedule mailed. Plaintiff's brief due 10-16-02.
Sept 25	Received 9-25-02: Acceptance of Service of Summons and Complaint by William Plouffe, Esq, on behalf of the Town of Falmouth, filed.
" "	Acceptance of Service of Summons and Complaint by Bonnie Martinolich, Esq., on behalf of Philomena Russo, filed.
Oct. 1	Received 10-01-02. Defendant, Town of Falmouth's, Answer filed.
Oct 9	Received 10-9-02: Summary Sheet filed. Answer, Affirmative Defenses, and Counterclaim of Defendant Philomena T. Russo, with Exhibit A thru E filed.
" "	Defendant ThirdParty Plaintiff, Philomena T Russo, Complaint and Request for Declaratory Relief, with Exhibits A thru E filed. Summary Sheet filed.
Oct. 17	Received 10-15-02: Plaintiff's motion for Extension of Time to File a Brief filed.
Oct. 23	Received 10-23-02. Plaintiff's Frank Blanchard's Answer to Philomena Russo's Counterclaim filed.
Oct 23	On 10-23-02: As to Plaintiff's Motion for Extension of Time to File a Brief: For good cause shown and without opposition, plaintiff is granted until December 6, 2002 in which to file his 80B brief and a response to the pending counter- claim. continued to next page

Date of Entry	
2002 Oct 23	continued from previous page..... On 10-23-02 copies mailed to Roy Pierce, William Plouffe, Bonnie Martinolich, and James Mitchell, Esqs.
Nov. 1	Received 11-1-02. Summons filed showing officer's return of service on 10-29-02 upon 3rd Party Defendant Julia Malia to Robert Malia, husband.
" "	Summons filed showing officer's return of service on 10-29-02 upon 3rd Party Defendant Robert Malia.
Nov. 15	Received 11-15-02: Third-Party Defendant Robert M. Malia's Motion for An Enlargement of time to File Answer filed.
Nov. 18	Received 11-18-02: Plaintiff's Second Motion for Extension of Time to File A Brief (With Incorporated Memorandum) file.d
Nov. 18	Received 11-18-02: Third-Party Defendant Julie A. Malia's Motion for Enlargement of Time to File Answer filed.
Nov. 18	On 11-18-02: As to Plaintiff's Second Motion for Extension of Time To File A Brief: For good cause shown and without opposition, Plaintiff is granted until 12/27/02 by which to file his 80B brief and response to the pending counterclaim. On 11-18-02 Copies mailed to Roy Pierce, William Plouffe, Bonnie Martinolich and James Mitchell, Esqs.
Nov. 21	Received 11-19-02: Order on Third-Party Defendant Robert M. Malia's Motion for An Enlargement of Time to File Answer filed. (Humphrey, J.). The Court hereby GRANTS the motion. Third-Party Defendant's Answer to the Third-Party Complaint shall be filed no later than November 25, 2002. On 11-22-02 Copies mailed to Roy Pierce, William Plouffe, Bonnie Martinolich and James Mitchell, Esqs.
Nov. 21	Received 11-21-02: Order on Third-Party Defendant Julie A. Malia's Motion for an Enlargement of Time to File Answer filed. (Humphrey, J.). The Court hereby GRANTS the motion. Third-Party Defendant's Answer to the Third-Party Complaint shall be filed no later than November 25, 2002. On 11-22-02 Copies mailed to Bonnie Martinolich, William Plouffe, Roy Pierce, Esqs.
Nov. 26	Received 11-25-02. Third-Party Defendants Robert M. Malia and Julie A. Malia's Answer and Rule 14(a) Claims with attached exhibits 1-7a filed.
" "	Summary Sheet filed.
Dec. 13	Received 12-13-02. Plaintiff Frank Blanchard, Jr.'s Answer to Rule 14(a) Claims of Third-Party Defendants Robert M. Malia and Julie A. Malis in Plaintiff's Capacity as Personal Representative filed.
Dec. 17	Received 12-13-02: Third-Party Plaintiff and Third-Party Defendants Motion for Enlargement of Time filed.

Date of Entry	Docket No. AP-02-49
2002 Dec. 17	<p>On 12-17-02: As to Third-Party Plaintiffs, Philomema T. Russo and Ronald P. Russo, Sr. Motion for Enlargement of time: It is hereby ORDERED that Philomena T. Russo and Ronald P. Russo, Sr's Motion for Enlargement of Time is GRANTED. The Russos shall file their response to the Malia's Rule 14(a) Claims on or before December 23, 2002. (Humphrey, J.). On 12-17-02 Copies mailed to James Mitchell, Sally Daggett, Bonnie Martinolich, William Plouffe, Roy Pierce, Esqs.</p>
Dec. 23	<p>Received 12-23-02. Third party plaintiffs, Philomena T. and Ronald P. Russo Sr's, Response to Rule 14(a) Claims of Robert M. and Julie A. Malia filed.</p>
Dec. 27	<p>Received 12-27-02: Plaintiff's Third Motion for Extension of Time to file a brief with incorporated Memorandum filed.</p>
Dec. 30	<p>On 12-30-02 returned Plaintiff's Third Motion for Extension of Time to file brief with incorporated Memorandum, (No signature on pleading).</p>
Dec. 30	<p>Received 12-27-02: Letter from Roy Pierce, Esq. advising that Defendant, Philomema Russo has no objection to Plaintiff's Third Motion for Extension of Time to File a Brief filed.</p>
2003 Jan. 3	<p>Received 12-31-02: Plaintiff's Third Motion for Extension of Time to File a Brief with Incorporated Memorandum filed.</p>
Jan 7	<p>Received 1-7-03: Letter from Third Party Defendants stating no opposition to Plaintiffs Third Motion for Extension of Time, filed.</p>
Jan. 10	<p>On 01-06-03: As to Plaintiff's Third Motion for Extension of Time to File A brief: For good cause shown, plaintiff is granted until January 31, 2003 in which to file his 80B brief. (Humphrey, J.). On 01-10-03 Copies mailed to James Mitchell, Sally Daggett, Bonnie Martinolich, William Plouffe, and Roy Pierce, Esqs.</p>
Jan. 31	<p>Received 01-31-03: Plaintiff's Fourth Motion for Extension of Time to File a Brief filed.</p>
Feb. 3	<p>On 01-31-03: As to Plaintiff's Fourth Motion for Extension of Time to File a Brief: For good cause shown, plaintiff is granted until March 28, 2003 in which to file his 80B brief. (Humphrey, J.). On 02-03-03 Copies mailed to James Mitchell, Sally Daggett, Bonnie Martinolich, William Plouffe and Roy Pierce, Esqs.</p>
Feb. 3	<p>Received 01-30-03: Acceptance of Service on behalf of Frank B. Blanchard, Jr. on January 2 2003 to James Mitchell, Esq.</p>
Feb. 10	<p>Received 02-10-03: Original return of service served on Defendant, Donna E. Legary on 02-04-03 to Michael Legary, Husband.</p>

Date of
Entry

Docket No. AP-02-49

2003
Feb. 19 Received 02-18-03:
Plaintiff, Frank Blanchard Jr., Personal Representative of The
Estate of Frank Blanchard Sr., Late of Falmouth, Cumberland Motion
to Amend Answer as Personal Representative with Incorporated Memorandum
filed.

" " Plaintiff, Frank Blanchard, Jr's Answer to Rule 14(a) Claims of Third-Party
Defendants, Robert M. Malia and Julia A. Malia in his individual Capacity,
and Also Donna Legary's Answer filed.

Mar. 27 Received 03-27-03:
Plaintiff's Unopposed Fifth Motion for Extension of Time to File a
Brief (With Inc. Memorandum) filed.

Apr. 9 On 04-08-03:
As to Plaintiff's Unopposed Fifth Motion for Extension of Time to File
a Brief: For good Cause shown, plaintiff is granted until June 28, 2003
in which to file his 80B brief.(Humphrey, J.).
On 04-09-03 copies mailed to James Mitchell, Sally Daggett, Bonnie
Martinolich, William Plouffe and Roy Pierce, Esqs.

Apr. 8 On 04-08-03:
As to Frank Blanchard, Jr's Motion to Amend Answer as Personal Representative
with incorporated Memorandum: For good Cause shown, upon motion of Frank B.
Blanchard, Jr. and after hearing or opportunity therefor, the answer of
Frank B. Blanchard, Jr. as personal representative of the estate of Frank B.
Blanchard is amended so that is now DENIES the allegations in paragraph 45
of the Rule 14(a) pleading by Robert and Julia Malia.(Humphrey, J.).
On 04-09-03 copies mailed to James Mitchell, Sally Daggett, Bonnie
Martinolich, William Plouffe and Roy Pierce, Esqs.

Jul. 1 Received 06-30-03:
Plaintiff's Sixth Motion for Extension of Time to File A Brief
filed.

July 30 On 07-29-03: (Humphrey, J.).
Court Findings or Rulings: The entry will be: Atty. James Mitchell,
Esq. to prepare Order to following deadlines: (a) 45 days to file a
motions to add parties. (b) 45 days to file scheduling Order. (c) 60
days to file Plaintiff's 80B Brief.
On 07-30-03 Copies mailed to James Mitchell, Sally Daggett, Bonnie
Martinolich, Frank Frame and Roy Pierce, Esqs.

Aug. 4 Received 07-31-03:
Order filed. (Humphrey, J.).
The Court finds 1. That the parties believe there is a reasonable chance
that this matter will settle but that settlement rests upon actions to be
taken by one or more potential parties to the litigation who have not been
joined as parties;2. That only a short further extension is reasonable to
allow these negotiations to be consummated; and Orders that: 1. The
motion to extend the time for plaintiff to file 80B brief is GRANTED and
the time to file the brief is set for not later than sixty days from the
date of this order; 2. All motions to add additional parties shall be
filed on or before the 45th day following the date of this order; 3. A
scheduling order shall issue on or after the 46th day following the date
of this order or on or after the date on which any timely motion to add
an additional party has been granted, whichever comes later. SO ORDERED.
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