

JAN 21 2003

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-02-570
REC-CUM-1/21/2003

STATE OF MAINE
CUMBERLAND, ss.

RECEIVED

G.M.G.,
Plaintiff,

v.

FIUP REALTY CO., INC.,
Defendant.

ORDER ON FIUP REALTY CO., INC.'s
MOTION TO DISMISS

DONALD L. GAREBRECHT
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FEB 12 2003

FACTUAL BACKGROUND

Defendant FIUP Realty Co., Inc.'s (FIUP's) Motion to Dismiss Plaintiff G.M.G.'s Complaint because it failed to join Key Bank National Association (Key Bank), an indispensable party to the lawsuit is before the court.¹

In December 1977, G.M.G.'s predecessor-in-interest, Herbert Ginn (Ginn), granted an easement to Maine National Bank (MNB). Compl. ¶ 6. This easement provided that MNB and its successors and assigns could connect with and use the storm water drainage system at the Maine Mall Plaza Shopping Center. Id. ¶ 7. The easement agreement (agreement) provided that the grantee was to pay Ginn \$1000 annually in consideration for the use of the drainage system. Id. ¶ 8. The easement was properly recorded in the Cumberland County Registry of Deeds. Id.

¹ Although filed as a motion to dismiss, Defendant conceded at oral argument that dismissal is not required if the court finds that Key Bank should be joined. Larrabee v. Town of Knox, 2000 ME 15, ¶ 10, 744 A.2d 544 (holding when a party is "subject to service of process" it is unnecessary to reach the question of whether the action should proceed)(citations omitted). An action will only be dismissed if the court determines that the party to be joined is "indispensable" and cannot be joined. Id. (emphasis added). See also Caron v. City of Auburn, 567 A.2d 66, 68 (Me.1989).

M.R. Civ. P. 19(a) states as follows:

(a) **Persons to Be Joined if Feasible.** A person who is subject to service of process shall be joined as a party in the action 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. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant.

On December 18, 1992, Fleet Bank of Maine, a successor-in-interest to MNB, conveyed the parcel of land to the Defendant. Id. ¶ 9. Defendant purchased the parcel subject to all of the terms of the Ginn easement; this transaction was also properly recorded. Id. ¶ 10. Since the Defendant's purchase from Fleet Bank of Maine, the Defendant has been using the drainage system and has made no payments to the Plaintiff. Id. ¶¶ 11, 13, 17. Defendant conveyed a portion of the parcel to Key Bank. Key Bank also has the right to use the drainage system.

Defendant seeks to compel Plaintiff to join Key Bank National Association, an indispensable party to the lawsuit, because Key Bank's rights and duties under the easement are at issue.

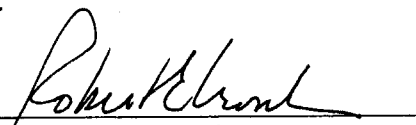
DISCUSSION

Joinder is required in the present case under Rule 19(a)(2) because if this court were to grant the declaratory relief Plaintiff seeks and declare the easement agreement void, Key Bank may lose its drainage rights. M.R. Civ. P. 19(a)(2). At oral argument, counsel for the Plaintiff admitted that he did not know whether Key Bank's drainage would be affected by a termination of Defendant's rights to drainage. Because it is clear that Key Bank's rights may be affected if the relief sought by Plaintiff is granted, the Plaintiff is ordered to join Key Bank National Association as a Defendant within thirty days.

The entry is

Defendant's Motion to Dismiss is DENIED;
Plaintiff is ORDERED to join Key Bank National Association within thirty days; and
the deadlines pertaining to ADR Conference, indicated on the November 21, 2002 Scheduling Order, are extended thirty days, all other deadlines remain unchanged.

Dated at Portland, Maine this 21st day of January, 2003.


Robert E. Crowley
Justice, Superior Court

G.M.G. - PLAINTIFF

SUPERIOR COURT
CUMBERLAND, ss.
Docket No PORSC-CV-2002-00570

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DOCKET RECORD

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vs
FIUP REALTY CO., INC. - DEFENDANT

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Filing Document: COMPLAINT
Filing Date: 11/07/2002

Minor Case Type: DECLARATORY JUDGMENT

Docket Events:

11/07/2002 FILING DOCUMENT - COMPLAINT FILED ON 11/07/2002
DECLARATORY JUDGMENT AND MONETARY RELIEF

11/07/2002 Party(s): G.M.G.
ATTORNEY - RETAINED ENTERED ON 11/07/2002
Plaintiff's Attorney: PETER RUBIN

11/18/2002 Party(s): FIUP REALTY CO., INC.
RESPONSIVE PLEADING - ANSWER FILED ON 11/18/2002

11/18/2002 Party(s): FIUP REALTY CO., INC.
ATTORNEY - RETAINED ENTERED ON 11/18/2002
Defendant's Attorney: KEVIN LIBBY

11/18/2002 Party(s): FIUP REALTY CO., INC.
MOTION - MOTION TO DISMISS FILED ON 11/18/2002
WITH EXHIBIT 1, REQUEST FOR HEARING AND PROPOSED ORDER

11/20/2002 ASSIGNMENT - SINGLE JUDGE/JUSTICE ASSIGNED TO JUSTICE ON 11/20/2002
ROBERT E CROWLEY , JUSTICE

11/21/2002 ORDER - SCHEDULING ORDER ENTERED ON 11/21/2002
ROBERT E CROWLEY , JUSTICE
DISCOVERY DEADLINE IS JULY 21, 2003. PARTIES TO SELECT ADR PROCESS AND NEUTRAL. COPIES