

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV03-533
REC - CWA - 5/28/2004

JULY 28 A 10:13

ELIZABETH AND JAMES ORSER and
SIDNEY L. STRATTON,

Plaintiffs

v.

ORDER

SUSAN CHASE and SCOTT VERRILL,

Defendants,

and

TOWN OF CUMBERLAND,

Party-in-Interest.

DONALD J. VERRETT
LAW OFFICE

JUL 9 2004

Susan Chase and Scott Verrill (collectively the Defendants) move this court to dismiss this action pursuant to M.R. Civ. P. 12(b)(5) and 12(b)(1). The Plaintiffs Elizabeth and James Orser (collectively the Orsers) oppose this motion.

This case deals with a dispute over the Defendants' right to build a driveway over a parcel of land known as the Bruce Hill Road Extension.

The Defendants argue that the court should dismiss the Orsers' claims because process was insufficient under Rule 12(b)(5). Here, a motion for a temporary restraining order was filed on October 1, 2003. The next day, the Defendants appeared through their counsel. The Defendants' counsel were provided with the complaint and other pleadings, and were ordered to complete their filings in opposition to the TRO by October 6, 2003. Negotiations between the parties continued throughout the next several months. On January 22, 2004, this court's clerk telephoned the plaintiffs' counsel, who responded with a letter dated January 22, 2004, explaining the plaintiffs'

position regarding service. On January 29, 2004, Defendants' attorney signed an acceptance of service which was filed on February 2, 2004.

"The purpose of timely service is to provide a court with assurance that the party being served has adequate notice and will not be prejudiced by having to defend a stale claim." Town of Ogunquit v. Dep't of Pub. Safety, 2001 ME 47, ¶11, 767 A.2d 291, 294. "A defect in service of process does not automatically create the type of prejudice requiring dismissal." Id. (quoting Jackson v. Borkowski, 627 A.2d 1010, 1012-13 (Me. 1993)). In no way were the Defendants prejudiced or caught by surprise, because they were involved in the entire negotiation process and were well familiar with the Plaintiffs' claims. Therefore, the Defendants' motion to dismiss for insufficiency of service of process is denied.

The Defendants also argue that the Orsers do not have standing. "To have standing, a party must have suffered an injury that is distinct from any harm suffered by the public-at-large." Delogu v. City of Portland, 2004 ME 18, n.1, ___ A.2d __; see also Madore v. Maine Land Use Regulation Comm'n, 1998 ME 178, ¶8, 715 A.2d 157, 160. "[S]tanding is a threshold issue bearing on the court's power to adjudicate disputes." Franklin Property Trust v. Foresite, Inc., 438 A.2d 218, 220 (Me. 1981).

"The court has discretion to determine what evidence is necessary to resolve the disputed facts" regarding a finding of personal jurisdiction or justiciability. Dorf v. Complastik Corp., 1999 ME 133, ¶15, 735 A.2d 984, 989. This court will look to affidavits, pleadings, or other documentary evidence to determine whether a party has standing. Id. If necessary, the court could hold a hearing to seek oral testimony. Id. Cf., Unisys Corp. v. Dep't of Labor, 600 A.2d 1019, 1023 (Conn. 1991) (stating that when jurisdictional facts are in dispute, the court should hold a hearing). The plaintiff cannot

rest on allegations but must set forth facts, in affidavits or otherwise, demonstrating standing. See Libertad v. Welch, 53 F.3d 428, 436 (1st Cir. 1995).

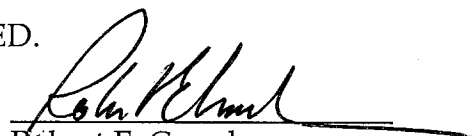
On the record presented, it is clear that the Orsers own property abutting the Bruce Hill Road Extension. It is the rights in the Bruce Hill Road Extension which are at issue in this case. At this preliminary stage of the proceedings, the court should resist the invitation of the parties to resolve the dispute on the merits by determining what rights the Orsers have in the disputed portion of the road.

The Orsers have demonstrated that they have standing because they have set forth sufficient facts in their pleadings and other documents to demonstrate that the harm that they claim to have suffered is distinct from the harm suffered by the public at large.

Therefore, the entry :

Defendants' motion to dismiss is DENIED.

Dated: May 28, 2004


Robert E. Crowley
Justice, Superior Court

ELIZABETH ORSER - PLAINTIFF

SUPERIOR COURT
CUMBERLAND, ss.
Docket No PORSC-CV-2003-00533

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Filing Document: COMPLAINT
 Filing Date: 10/01/2003

Minor Case Type: DECLARATORY JUDGMENT

Docket Events:

10/01/2003 FILING DOCUMENT - COMPLAINT FILED ON 10/01/2003
 VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND FOR DAMAGES, TITLE TO REAL
 ESTATE INVOLVED WITH EXHIBITS A,B AND C, FILED. (ST)