

STATE OF MAINE

YORK, ss.

SUPERIOR COURT  
CIVIL ACTION  
DOCKET NO. RE-07-024

DONALD ROCHE, et al.,

Plaintiffs

v.

**ORDER**

DONALD L. GARBRECHT  
LAW LIBRARY  
JUL 18 2008

WILLIAM ELLIOTT, et al.,

Defendants

This case comes before the Court on Plaintiffs Donald Roche and Margaret Roche's (Plaintiffs) Motion to Reconsider pursuant to M.R. Civ. P. 59. Following hearing, the Motion is Denied.

#### **BACKGROUND**

Plaintiffs Donald Roche and Margaret Roche (Plaintiffs) move this Court to reconsider the March 7, 2008 Order denying their Cross-motion for Summary Judgment (Cross-motion) against any and all Defendants. The Defendants in this case are various neighbors (collectively "Defendants"). Some of the Defendants were represented by counsel, while others represented themselves. Defendants' responses to the motions varied. As stated below, these varying responses were not dispositive at summary judgment.

Both parties moved for summary judgment pursuant to Plaintiffs' claim that they have obtained title to a certain parcel of land by adverse possession or, alternately, by abandonment. Plaintiffs are residents of Massachusetts and owners of a property (Lot 2) located on Mousam Lake in Shapleigh, Maine. The perimeters of Lot 2 are

designated in the deed by reference to a 1938 plan entitled "Mousam Grove Extension" filed in the York County Registry of Deeds (1938 Plan). Def. SMF ¶ 3. The disputed parcel lies between Lots 2 and 3 (Disputed Parcel) and is designated on the 1938 Plan as a right-of-way.

Plaintiffs assert that the Court erred as a matter of law in denying summary judgment. Specifically, Plaintiffs assert that 1) the Court erred in not granting summary judgment against Defendants on the grounds that they failed to controvert critical statements; 2) the Court erred in not granting summary judgment against noticed Defendants who did not oppose Plaintiffs' Motions for Summary Judgment at all; 3) the Court erred in not granting summary judgment against Defendants outside the subdivision who provided no evidence of any colorable interest in the former right-of-way; and 4) the Court's failure to rule on the issue of acquiescence and/or abandonment of the easement was an omission that should be corrected by granting Plaintiffs' summary judgment against all the Defendants on the grounds of acquiescence and/or abandonment.

## **DISCUSSION**

### **I. Standard of Review**

Under the Maine Rules of Civil Procedure, "motions for reconsideration of an order shall not be filed unless required to bring to the court's attention an error, omission or new material that could not previously have been presented." M.R. Civ. P. 7(b)(5). "The court may in its discretion deny a motion for reconsideration without hearing and before opposition is filed." *Id.*

### **II. Did the Court Err in its Denial of Cross-motion?**

The Court denied Plaintiffs' Cross-motion because material facts were in dispute regarding whether Plaintiffs had established the elements of adverse possession.<sup>1</sup> Specifically, the exclusivity of use was disputed. (See Def. S.M.F. ¶¶ 8-14.)

**a. Failure to Oppose Cross-motion**

Plaintiffs assert that the Court erred in not granting summary judgment against Defendants on the grounds that Defendants failed to controvert critical statements of material fact contained in Plaintiffs' Cross-motion Statement of Material Facts. Plaintiffs' rest their argument on a plain reading of M.R. Civ. P. 56(h), which states in part:

[a] party opposing a motion for summary judgment shall submit with its opposition a separate, short and concise opposing statement. . . . Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted.

M.R. Civ. P. 56(h)(2) & (4). In this case, Defendants failed to oppose Plaintiffs' Cross-motion that was attached to Plaintiffs' Opposition to Defendants' Motion for Summary Judgment. Accordingly, Plaintiffs argue, the material facts submitted in the Cross-motion are deemed admitted because they have not been controverted.

The Court cannot agree with this interpretation of Rule 56. It would be illogical to conclude that a fact, already controverted, could become uncontroverted simply because an opposing party filed a cross-motion for summary judgment.

In this case, certain Defendants filed a Motion for Summary Judgment. That Motion contained a Statement of Material Facts as required under the Rules. Within that Statement of Material Facts, Defendants set forth in numbered paragraphs genuine

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<sup>1</sup> There is no dispute that, in order for the Plaintiffs to obtain title by adverse possession, they have the burden to show by a preponderance of the evidence that their "possession and use of the property were" actual, open visible, notorious, hostile, under claim of right, continuous, exclusive, and "of a duration exceeding the twenty-year limitations period." *Striefel v. Charles-Keyt-Leaman P'ship*, 1999 ME 111, ¶6, 733 A.2d 984, 989 (citations omitted).

issues of material fact supported by record citations to sworn affidavits of individuals who asserted a continued use of the Disputed Parcel. (See Def. S.M.F. ¶¶ 8-14.) Plaintiffs opposed those statements by submitting an opposing Statement of Material Facts set forth in numbered paragraphs supported by record citations to sworn affidavits of individuals who dispute use of the Disputed Parcel by anyone other than Plaintiffs. Accordingly, at least one element of Plaintiffs' claim of adverse possession (and abandonment for that matter) is in dispute. Summary judgment was not proper.

Plaintiffs point to two facts contained in their Cross-motion and assert that Defendants' failure to oppose these two facts is determinative. The Court agrees that, if any fact in Plaintiffs' Cross-motion Statement of Material Facts is both uncontested and material, it would be deemed admitted.

**i. Plaintiffs' Opposing Material Fact ¶ 15**

Opposing Material Fact ¶ 15 is supported by affidavit of Mr. Fiandaca, the owner of Lot 3 that also borders the Disputed Parcel. In his affidavit he states *inter alia* that he was forced to build a fence because "defendants in this litigation" were erroneously walking across his property and "didn't know where the right of way was." However, material facts are already in evidence that certain Defendants did correctly identify the Disputed Parcel and have used it continuously over the years. (See *e.g.* Def. S.M.F. ¶ 8.) This fact, if it is fact and not opinion, remains in dispute.

**ii. Plaintiffs' Opposing Material Fact ¶ 9**

Likewise Opposing Material Fact ¶ 9 is not determinative at summary judgment. Paragraph 9 asserts that none of the Defendants objected to a shed that blocks the Disputed Parcel. However, the fact that a shed has blocked Defendants access to the Disputed Parcel is in dispute. (See Def. S.M.F. ¶ 15.) Thus, whether or not Defendants objected to the shed is not a material fact.

**b. Defendants who Failed to Oppose Summary Judgment**

Plaintiffs further assert that the Court erred in not granting summary judgment against noticed Defendants who did not oppose Plaintiffs' Motions for Summary Judgment at all. The Court disagrees. Plaintiffs are asserting an affirmative right to title of land by adverse possession/abandonment. Accordingly, Plaintiffs have the burden to show by a preponderance of the evidence that their "possession and use of the property were" actual, open, visible, notorious, hostile, under claim of right, continuous, exclusive, and "of a duration exceeding the twenty-year limitations period." *Striefel*, 1999 ME 111, ¶6, 733 A.2d at 989. By granting summary judgment to Plaintiffs with respect to any Defendant the Court would be granting that right with respect to all Defendants.

**c. Defendants Outside the Subdivision**

Plaintiffs argue that the Court erred in not granting summary judgment against Defendants residing outside the subdivision who provided no evidence of any colorable interest in the former right-of-way. The interest of those parties, however, is not a material fact with respect to Plaintiffs' claim in adverse possession and/or abandonment except to the extent that they may have relinquished a potential right. Whether or not any Defendant has a right to use the Disputed Parcel, Plaintiffs retain the burden to affirmatively show each element of their adverse position claim in order to obtain a fee interest in the Disputed Parcel. Accordingly, as stated in subparagraph b, above, summary judgment is inappropriate against the Defendants residing outside the subdivision.<sup>2</sup>

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<sup>2</sup> The Court acknowledges that certain Defendants have brought counter-claims seeking a declaration of their rights to the Disputed Parcel, either by deeded right or prescriptive easement. (*See* Amended Answer and Counter Claim.) These assertions were not addressed at motion for summary judgment and thus not appropriate for resolution at this time.

**d. Plaintiffs' Supplemental Memorandum of Law in Support of Summary Judgment**

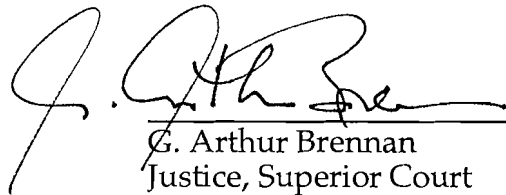
Finally, Plaintiffs argue that the Court erred when it failed to consider Plaintiffs' "Supplemental Memorandum of Law in Support of Summary Judgment." However, the Maine Rules of Court do not recognize a supplemental memorandum under Rule 56, accordingly, the Court did not err in not considering the memorandum. *See generally* M.R. Civ. P. 56.

Moreover the memorandum was not dispositive in support of Plaintiffs' Cross-motion. To prevail under an abandonment theory, the moving party must establish: 1) a history of non-use; and 2) an act or omission evincing a clear intent to abandon. *D'Angelo v. McNutt*, 2005 ME 51, ¶ 13, 868 A.2d 239, 244. The Court has already ascertained that the history of non-use by Defendants is a material fact in dispute. Accordingly, summary judgment on a theory of abandonment is inappropriate.

**CONCLUSION**

Motion to Reconsider is DENIED.

Dated: June ~~17~~<sup>24</sup>, 2008

  
G. Arthur Brennan  
Justice, Superior Court

SEE ATTACHED LIST FOR ATTORNEYS AND PRO SE DEFENDANTS.

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~~3/1/07~~ Vacated 9/24/07  
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SUPERIOR COURT

YORK, ss.

Docket No ALFSC-RE-2007-00024

DOCKET RECORD

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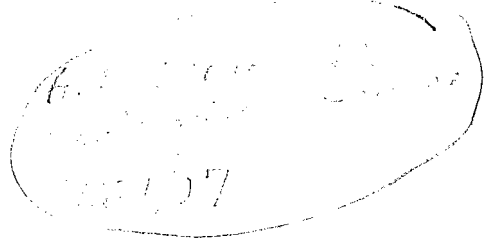
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Page 3 of 5 " " " " " " Printed on: 02/20/2007

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ONE HOME LOAN PLAZA Dismissed 7/17/07  
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~~SIGNATURE CREDIT UNION - DEFENDANT~~ Dismissed 7/17/07  
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