

STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-12-22 & 23
JAW - cum - 6/12/2013

me!

PAUL R. SMITH,
Plaintiff/Counterclaim Defendant
PATRICK AND SUSAN SMITH,
Plaintiff/Counterclaim Defendant

v.

TOWN OF GORHAM,
Defendant/Counterclaim Plaintiff
Third-Party Plaintiff

DECISION AND ORDER

v.

C & C FAMILY LLC,
Third-Party Defendant

STATE OF MAINE
Cumberland ss. Clerk's Office
JUN 12 2013
RECEIVED

On November 1, 2012, Plaintiff's/ Counterclaim Defendants Paul Smith ("Paul) and Patrick and Susan Smith ("Patrick and Susan") moved to dismiss the Counterclaim and Third Party Complaint of Defendant/Counterclaim Plaintiff the Town of Gorham (the "Town").

BACKGROUND

On April 11, 2012, Plaintiff's Patrick and Susan Smith brought an action against the Town, challenging the Town's taking of Phinney Street Extension in the Town of Gorham by eminent domain. Plaintiff Paul Smith filed a similar complaint on April 12, 2012, and the two actions were consolidated by the Court on May 30, 2012. As alleged in their complaints, Plaintiff's are the owners of all properties situated on the westerly side of Phinney Street Extension. However, another property owner on Phinney Street

Extension, C & C Family LLC (C&C), owns all of the property on the easterly side of the road. C & C was not a named party in either Plaintiff's action.

On August 15, 2012 the parties engaged in mediation as required by M.R. Civ. P. 16B and the Courts standard scheduling order. According to the Town's Response to the Plaintiff's Motion, the Town raised the issue that C&C, as an owner of property on Phinney Street Extension, is an interested party and should be included in the litigation. However, it was decided during mediation that the Town would wait to join C&C as a third-party defendant until Plaintiffs had the opportunity to negotiate a final resolution with C&C and avoid the need for the current litigation. According to the Town, all parties agreed that if negotiations failed with C&C, the Town would amend its answer to add a Counterclaim and bring a Third Party Complaint Against C&C. In an effort to allow time for the negotiations, the deadline for the amending pleadings had to be extended.

Accordingly, on August 16, 2012, the Town filed a Consented-to Motion to Amend the Scheduling Order to enlarge the deadline for joining parties and amending pleadings was enlarged to October 12, 2012. According to the Town, on or about October 12, 2012 the Town Attorney attempted to contact counsel of both Plaintiff's to determine the status of negotiations with the owners of C&C, but was unsuccessful in reaching either one of them. Not wanting to hamper the negotiations the Town "was hesitant to file its Counterclaim and Third-Party Complaint against C&C for fear of thwarting Plaintiffs' attempts to resolve this matter short of trial and to prevent the unnecessary expenditure of time and money in the event negotiations might be successful. (Def. Resp. at 3).

On October 17, 2012 counsel for Plaintiff Paul Smith sent an e-mail to the Town Attorney, in which she apologized for failing to respond to his recent calls and advised that the owners of C&C were “not interested” in any negotiations relating to this matter. On October 19, 2012, the Town Attorney responded by e-mail to both attorneys that he would be filing a Counterclaim against their clients and a Third-Party Complaint against C&C. No objection to the filing was made by either party until the filing of the pending motion to dismiss.

On October 22, 2012, the Town filed a Counterclaim and Third-Party Complaint, seeking declaratory relief as follows: (1) a declaration that Phinney Street Extension is a town way through the statutory method of laying out and taking; (2) in the alternative, a declaration that Phinney Street Extension is a town way by prescription; (3) a declaration that Phinney Street Extension has never been formally discontinued nor lost by abandonment; and (4) a declaration that the Town is entitled to enter Phinney Street Extension for any and all purpose, including the performance of maintenance. As noted above, Plaintiffs filed the pending motion to dismiss the Counterclaim and Third-Party Complaint on November 1, 2012.

DISCUSSION

I. Defendant's 10- Day Delay in Filing of Its Counterclaim

Maine Rule of Civil procedure 12(a) and (b) require a party to present nearly all their defenses in a responsive pleading that is to be served with 20 days of service of the complaint. “With the exceptions listed in Rule 12(h), a defense or objection not made at this state may be asserted later only if, under the circumstances, amendment by leave of

when Plaintiff Paul Smith's attorney responded by e-mail advising that the negotiations had failed. Not anticipating any objection to their filing, the Town did not see the need to request leave from the court to file the counterclaim late. *See* M.R. Civ. P. 15(a) ("leave shall be freely given when justice so requires"); *Kelly v. Michaud's Ins. Agency*, 651 A.2d 345, 347 (Me. 1994)("[T]his mandate means that if the moving party is not acting in bad faith or for delay, the motion will be granted in the absence of undue prejudice.") Defendant concedes that while undue prejudice may constitute cause for denying leave to amend a pleading, the only prejudice alleged by Plaintiffs is that they were unable to prepare arguments relating to the Town's claims of prescription prior to mediation. However, the Town raised the issue of prescription in its mediation statement filed in advance of the conference. Therefore the Defendant contends that there is nothing amounting to "undue prejudice" that would justify dismissal of the Counterclaim and Third-Party Complaint on technical grounds.

The Court agrees that there is no undue prejudice shown if the amendment is allowed. Further there is good cause to grant leave to file late the counterclaim.

II. *Plaintiffs' Objection to the Town's Third-Party Complaint against C&C Family LLC*

Plaintiff's acknowledge, leave of the Court is not required in order to bring a third-party complaint, and Rule 14 Provides that a third-Party complaint may be brought at any time. *See* M.R. Civ. P 14(a) ("At any time after commencement of the action a defendant as a third-party plaintiff may cause to be served a summons and complaint upon a person not a party to the action who is or may be liable to such third-party plaintiff for part or all of the plaintiffs' claim against the third-party plaintiff.")

Plaintiffs direct the Court to two reasons why the Town's Third-Party Complaint should be dismissed. First, Plaintiff's assert that C&C is not liable to the Town for anything. The Town contends that if they are to make out a claim that Phinney Street Extension has become a town way by prescriptive use, the Town would need to include in that action all owners of property on the road (i.e., Plaintiffs and C&C), and, at the time the town filed the Third-Party Complaint, C&C was not a party to the action.

The second ground for dismissing the Third-Party Complaint, asserted by Plaintiffs, is that they have been unduly prejudiced "because [the Third-Party Complaint] exacerbates legal costs by interposing both a new claim and a new party that could not be included at the mediation that was held over two months ago." (Pls.' Mot. ¶6.)

The Town argues that the Plaintiffs fail to show what additional legal costs they would incur as a consequence of adding a necessary party, and even if they were able to show additional costs, "it is unclear how that constitutes undue 'prejudice' to Plaintiffs."

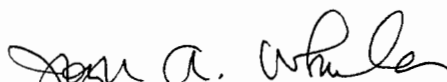
In Plaintiffs' Joint Reply they argue that their Complaint challenges the validity of the Town's purported taking of Phinney Street Extension. Plaintiffs argue that the Court can afford complete relief, *i.e.*, a decision as to whether the Town's alleged taking was properly executed, without joining C&C to this action and without impairing C&C's rights in any manner.

The Court finds no undue prejudice and no good grounds to keep C & C out of this litigation. Rather, there are good grounds to include C & C. Accordingly, the Third-Party Complaint is allowed.

DECISION

The court dismisses Plaintiffs' Motion to Dismiss Counterclaim and Third-Party Complaint and Grants leave to file the Counterclaim and Third-Party Complaint.

Date: June 12, 2013



Joyce A. Wheeler, Justice

Sarah McDaniel Esq-Paul R Smith
Theodore Small Esq-Patrick and Susan
Smith
William Dale Esq-Town of Gorham
Brian Willing Esq-C & C Family LLC