STATE OF MAINE

Sagadahoc, ss.

SUPERIOR COURT

AMH - SAG 7/3/2012

PARKER NECK ASSOCIATION, INC.

Plaintiff,

v.

ROBERT D. SPICKLER and
OLIVE S. SPICKLER

Defendants

Docket No. SAGSC-CV-11-13

DECISION AND JUDGMENT

The Plaintiff, Parker Neck Association, Inc. ("Parker Neck" or "Plaintiff") brings this Motion for Summary Judgment on its Complaint and on the Counterclaim of Defendants Robert D. and Olive S. Spickler. The motion has been fully briefed by each party and oral argument was held May 29, 2012.

Statements of Material Fact and Objections

After consideration of the "Plaintiff's Statement of Material Facts" and Defendants' "Additional Statements of Material Facts" and the objections, denials and qualifications of each statement, the court finds the following facts are not in dispute.

At all relevant times, Defendant Robert D. Spickler was an officer and shareholder of R.D. Realty Corporation ("R.D"). (Defs. Add'l. SMF ¶ 1.) R.D. developed and marketed approximately 300 acres of real estate in the Town of Phippsburg, Maine, known as "Parker's Neck" or "Parker Head Neck" (the "Subdivision"). (Defs. Add'l SMF ¶ 1.) The plan of the Subdivision was prepared, recorded, and disseminated by R.D. in or about 1973. (Defs. Add'l SMF ¶ 2.) The original covenants governing the Subdivision were recorded at Book 393, Page

320 in early September 1973 and supplemental covenants were recorded at Book 393, Page 886 in October 1973. (Defs. Add'l SMF ¶4; Pl. SMF ¶ 10.) The original covenants contain two relevant provisions.[1] First:

> Commercial Establishments: No commercial establishments will be allowed, (including, but not limited to, restaurants, inns, rooming houses, shops, gas stations, auto repair shops, general repair shops and services, clubs or industry.) One club house may be built by R. D. Realty Corporation for residents only within the "Common" set aside for yacht club and/or beach club.

(Spickler Aff. Ex. A.) Second: "Common: All property owners shall have access to and use of that area designated as the 'Common', providing full observance of all 'Rules and Regulations' is maintained." (Spickler Aff. Ex. A.)

In 1974, R.D. prepared a sales brochure for the Subdivision. (Defs. Add'l SMF ¶ 9.) This brochure states that the Subdivision "offers a first class private marina and boat facility capable of accommodating fifty of the largest yachts as well as the smallest skiffs and slips deeded to each resident." (Defs. Add'l SMF ¶ 10.) In another section, the brochure again states, "all lots have deeded right [sic] to common waterfront and planned boat facilities." (Defs. Add'l SMF ¶ 11.) This brochure also features a drawing showing the yacht club facility and contains a map of the Subdivision designating the yacht club and marina at the southwestern tip of the property. (Defs. Add'l SMF ¶¶ 12, 13.) R.D. discussed the planned marina in detail with all lot purchasers and potential purchasers, including members of the Linscott family. (Defs. Add'l SMF ¶ 14.)

In or about 1975, R.D. sold a portion of the Subdivision to Freeman Linscott and/or members of his family. (Defs. Add'l SMF ¶ 16.) In December 1976, R.D. entered into a

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[1] The Defendants attempt to characterize these two covenants in the Defendants' Additional Statements of Material Fact, paragraphs 5 and 6. The role of statements of material facts is not to "[purport] to describe the substance or to interpret the contents of documents." *Orient v. Dwyer*, 490 A.2d 660, 662 (Me. 1985). The interpretation of these two relevant provisions is a legal issue.

Memorandum of Agreement with Freeman Linscott, recorded in Book 458, Page 175, which states in part:

> R. D. Realty Corporation or its successors shall be obliged to offer any recreational or social facilities (such as boat slips, golf course, swimming pool or clubhouse) established for the common usage of purchasers of lots from R.D. Realty Corporation's land to purchasers of lots from the Linscott land on equal terms.

(Defs. Add'l SMF ¶¶17, 18; Pl. Reply to Add'l SMF ¶ 18.) In 1976-1977, R.D. and the Linscott family executed amended restrictions and covenants governing the Subdivision that were recorded in the Sagadahoc County Registry of Deeds at Book 456, Page 31. (Defs. Add'l SMF ¶ 19.) These amended restrictions and covenants contain a provision very similar to what was in the original covenants that states:

> No commercial establishments, whatsoever will be allowed...Excepting club houses and other structures, including [a] restaurant for residents and guest [sic] only may be built by R. D. Realty Corporation within the "Commons" set aside for yacht club and/or beach club and golf club.

(Pl. Reply Add'l SMF ¶ 20.) This document also states,

> R.D. Realty Corporation shall reserve the right to change or modify these covenants and restrictions by amendment hereto but no such change or modification shall have retroactive effect or shall otherwise in any substantial way change the character of the subdivision or otherwise affect any other lot previously sold....

(Defs. Add'l SMF ¶ 21.)

In 1986, R.D. conveyed its remaining interest in the area known as Parker Head Southwest to members of the Linscott family, including the area known as the "Commons" which was transferred to Dorothy Linscott by deed recorded in the Sagadahoc County Registry of Deeds at Book 746, Page 99. (Pl. SMF ¶ 11, Exs. 7, 8, 9.) R.D. also recorded an Assignment of Rights to Dorothy Linscott. (Pl. SMF ¶ 11, Ex. 10.) That assignment contains a paragraph stating:

> It is the purpose of this Assignment together with the three Quit Claim Deeds given by R.D. Realty Corporation to Craig Linscott, Dorothy Linscott and Michael Linscott...to eliminate R. D. Realty Corporation from all interest

> whatsoever with respect to restrictive covenants and rights of enforcement or administration as such restrictive covenants may be recorded or otherwise affecting any land within the limits of the Subdivision known as Parker Head Southwest, Plan Book 11, Page 51, as aforesaid, while preserving those rights which remain necessary until the formation of the Lot Owners Association, as contemplated by said amended restrictions.

(Pl. Ex. 10.)

Before R.D. assigned these rights to Dorothy Linscott, Mr. Spickler discussed with her, in detail, the obligation to construct the marina. (Defs. Add'l SMF ¶ 26.) Ms. Linscott indicated that she understood; neither she, nor any member of her family, ever indicated that as R.D.'s successors they were not bound to construct the marina. (Defs. Add'l SMF ¶ 27.)

The deed to Michael Linscott, recorded in Book 746, Page 103 of the Sagadahoc County Registry of Deeds, conveyed, among other lots, Lot 7M. (Pl. Ex. 9.) This deed also states:

> It is the purpose of this Quit Claim Deed to release any and all rights which the Grantor may have with respect to any and all restrictive covenants which may be recorded in the Sagadahoc County Registry of Deeds...It is intended by this conveyance that all restrictive covenants shall merge with the fee ownership of the above described premises, to be restated by the Grantee in any conveyances made by the Grantee hereafter of any of the aforesaid lots or property...The operation and effect of this deed shall be subject, however, to the Assignment of rights by R.D. Realty Corporation to Dorothy M. Linscott...

(Pl. Ex. 9.)

Lot 7M was then conveyed from Bernard Shub[2] to Lauren O. Spickler by deed dated July 1, 1988 and recorded at Book 934, Page 103. (Pl. SMF ¶ 5.) This deed conveyed Lot 7M subject to certain restrictive covenants, stated to "run with the land and be binding upon the Grantee, her heirs and assigns, according to the terms thereof," set forth in Exhibit A attached to the deed. (Pl. SMF ¶ 6.) Paragraph 11 of these restrictive covenants states:

> Lot Owners Association: All owners of lots in the Subdivision shall automatically become members of the combined Subdivision Association of Parker Head-Southwest and Parker Head Colony, with such rights, privileges and responsibilities as are specifically set forth in the By-laws of that organization.

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[2] The Statements of Material fact do not disclose the chain of title leading to Mr. Shub's ownership of Lot 7M.

(Pl. SMF ¶ 7, Ex 3.)

Lot 7M was then conveyed to Defendants Robert D. and Olive S. Spickler by deed from Lauren O. Spickler dated October 8, 1991 and recorded on April 4, 2005 in Book 2545, Page 315. (Pl. SMF ¶ 3, Ex. 1.)[3] This deed does not make any reference to the restrictive covenants. (Pl. Ex. 1.) This lot is a house lot and the Defendants have occupied it since the time of purchase. (Defs. Add'l SMF ¶ 28.) The Defendants claim that this purchase was made in reliance on the "covenant...to construct the marina in the common area." (Defs. Add'l SMF ¶ 29.)

The Parker Neck Association (the "Association") is a non-profit corporation existing under the laws of the State of Maine and was incorporated on February 23, 1989. (Pl. SMF ¶ 1.) The Association maintains written and recorded By-laws. (Pl. SMF ¶ 8.) These By-laws grant to the Association the power to assess, collect, and enforce the collection of dues and assessments from each lot owner and to charge interest, fees and costs for enforcement and to file liens against the respective owner's lot for failure to pay dues. (Pl. SMF ¶ 8.)

The Association alleges that the Defendants are subject to these By-laws because of the restrictive covenant contained in their chain of title and that the Defendants have failed to make dues payments. (Compl. ¶¶ 5, 8.) The Association's records reflect that the Defendants have made only one payment towards applicable dues and assessments from 2006 through 2011. (Pl. Reply to Add'l SMF ¶ 32; Supp. Nash Aff. ¶ 9, Ex. GNSA 1.) There is a genuine issue of material fact as to the amount owed.

[3] The lot has since been conveyed by quitclaim deed from both Defendants to Robert D. Spickler alone on March 28, 2011. (Pl. SMF ¶ 4.)

Discussion

1. Summary Judgment Standard

Summary judgment should be granted if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. M.R. Civ. P. 56(c). In considering a motion for summary judgment, the court should view the facts in the light most favorable to the non-moving party, and the court is required to consider only the portions of the record referred to and the material facts set forth in the parties' Rule 56(h) statements. *E.g., Johnson v. McNeil*, 2002 ME 99, ¶ 8, 800 A.2d 702. The parties' Rule 56(h) statements must be adequately supported by a record citation setting forth the facts as would be admissible at trial. If statements are not adequately supported, the court may disregard them. M.R. Civ. P. 56(h)(4). Rule 56(h) requires a party that is opposing a motion for summary judgment to support any qualifications or denials of the moving party's statement of material facts with record citations. *Levine v. R.B.K. Caly Corp.*, 2001 ME 77, ¶ 6, 770 A.2d 653. The Law Court has noted recently that "strict adherence" to the requirements of the rule is necessary. *Cach, LLC v. Kulas*, 2011 ME 70, ¶ 12, 21 A.3d 1015.

2. Complaint

The Plaintiff brings one count in its Complaint, alleging breach of the Defendants' obligation to pay dues and assessments according to the Association's By-laws. It alleges failure to pay over the course of 2006 through 2011 and seeks $4,273.52 (as of December 31, 2011). The Plaintiff argues that the Defendants are subject to the Association's By-laws by virtue of ownership of a lot in the Subdivision and that the By-laws authorize the board to assess dues and assessments, which is a reasonable and therefore enforceable contractual provision. (Pl. Mot. 5-7.)

The Defendants' opposition relies primarily on the technical failures of the Plaintiff's motion but also disputes that they owe the amount of money sought, thereby raising an issue of material fact. (*Id.* at 4.)

The construction of a deed is a question of law. *Pettee v. Young*, 2001 ME 156, ¶ 8, 783 A.2d 637. The court must give the words their general and ordinary meaning and attempt to construe the language by only looking within the four corners of the document. *Id.* Only if the plain language of the deed creates an ambiguity may the court consider extrinsic evidence of the parties' intent. *Id.* This standard also applies when construing a restrictive covenant. *Silsby v. Belch*, 2008 ME 104, ¶ 7, 952 A.2d 218. Ordinarily, the determination as to whether a restrictive covenant runs with the land is determined by interpreting the written instrument. *Friedlander v. Hiram Ricker & Sons, Inc.*, 485 A.2d 964, 967 (1984). A restrictive covenant that runs with the land is binding on assignees. *Foxcroft v. Mallet*, 45 U.S. 353, 357 (1846).

The bylaws of a private organization are a valid enforceable contract between members of the association provided that they are not unreasonable nor contrary to public policy or statutory or constitutional requirements. *Gashgai v. Maine Med. Ass'n* 350, A.2d 571, 575, (1976) (*citing Libby v. Perry*, 311 A.3d 527 (Me. 1973)). Similar to a deed, a contract is interpreted based on the plain language used and, only if a term is susceptible to more than one meaning, and is thus ambiguous, may the court resort to extrinsic evidence to prove the meaning of the contract terms. *Camden Nat'l Bank v. S.S. Navigation Co.*, 2010 ME 29, ¶ 16, 991 A.2d 800.

The "Amended and Restated Bylaws of Parker Neck Association," dated January 2, 2008, grant to the Board of Directors the power to levy, assess and collect dues or assessments that are used for the purpose of promoting the health, safety, and welfare of the members of the association, including special assessments. (Pl. Ex. 4 at §§ 7.3 – 7.5.) These bylaws also give

the Board of Directors the authority to enforce the terms of the bylaws. (*Id.* at § 8.1.) These bylaws are not unreasonable nor contrary to any public purpose or statutory or constitutional requirement. They are therefore enforceable.

The Defendants acquired their title in lot 7M by virtue of a quitclaim deed from Lauren O. Spickler and are deemed to have constructive notice of any rights or responsibilities created in their chain of title. The plain language of the deed into Lauren Spickler makes the restrictive covenants binding on Lauren Spickler and her assigns. The Defendants have raised no issue of material fact to dispute the prior deed in their chain of title. Thus, the Plaintiff has demonstrated that the Defendants are subject to the By-laws of the "Subdivision Association of Parker Head-Southwest and Parker Head Colony." Although the Plaintiffs have not connected "Parker Neck Association," which was not incorporated until February 1989, with the "Subdivision Association of Parker Head-Southwest and Parker Head Colony," through a properly supported Statement of Material Fact, the Defendants conceded at oral argument that they are subject to the Parker Neck Association's imposition of dues and assessments.

Based on this concession, the Plaintiff has established the Defendants' liability for dues and assessments. However, construing the facts in the light most favorable to the non-moving party, the parties have generated a genuine issue of material fact on the amounts currently due. (*See* Defs. Add'l SMF ¶ 32; Pl. Reply SMF ¶ 32.)

3. Counterclaim

The Defendants brought a one count Counterclaim asserting a breach of contract claim arising from the Association's failure to construct a marina on the "common" land in the subdivision, which has allegedly decreased the market value of the Defendants' lot and deprived Mr. Spickler of the enjoyment of his hobby of boating.

The Plaintiff argues that the obligation to construct a marina never matured but, rather, the language that the Defendants point to was permissive and too vague to create a binding, enforceable obligation. (Pl. Mot. 7-9.) The Plaintiff then puts forward a series of arguments in the alternative, provided that the court were to find that there was indeed an obligation, arguing that the obligation was released by subsequent agreements, deeds, and assignments of rights. (*Id.* at 9.) If not released, the Plaintiff argues that it was the developer, not the Association who holds that obligation. (*Id.* at 9-10.) If the court finds that the Association carries the obligation, the Plaintiff argues that the covenant creating this obligation conflicts with a later covenant prohibiting any substantial change the character of the subdivision. (*Id.* at 10.) Lastly, the Plaintiff argues that it is entitled to prevail on statute of limitations, laches, waiver, release, acquiescence, ratification and/or ripeness doctrines. (*Id.* at 11-13.)

The Defendants again rely on the deficiencies of the Plaintiff's Statement of Material Facts. (Defs. Opp. 4.) With respect to the merits, the Defendants argue that they have shown that the language of the covenants impose an affirmative obligation to construct a marina and that even though the term "may" is used, in this context, it should be interpreted as being obligatory. (*Id.* at 4-5.) At the least, the use of the term "may" creates an ambiguity that allows the court to consider extrinsic parol evidence that the developer intended that the construction of the marina be mandatory and run with the land. (*Id.* at 5-6.) Next, the Defendants argue that the obligation could not have been "released" because it is a covenant that "runs with the land" and that the covenant prohibiting "substantial change" works in their favor because the marina was a central component of the Subdivision. (*Id.* at 6-7.) Finally, the Defendants argue against the affirmative defenses raised. (*Id.* at 7.) They state that the statute of limitations does not apply because this is an ongoing obligation of the Association and, because there is no deadline for construction in the covenant, the limitations period has not begun to run. Also,

they state that laches is inapplicable here because they are not seeking equitable relief and the Plaintiff has not demonstrated prejudice.

In order for a contract to be formed the parties must have a meeting of the minds as to the obligations of the agreement and those obligations must be sufficiently definite to allow the court to determine the legal liabilities of each party. *Corthell v. Summit Thread Co.*, 132 ME 94, 99 (1933). When there is a missing term in an agreement the court may supply a reasonable term, however, in certain cases, the fact of a missing term indicates a lack of assent to be bound. *Fitzgerald v. Hutchins*, 2009 ME 115, ¶ 19, 983 A.2d 382. Furthermore, under Maine law, a reservation clause granting one party an unlimited right to determine the nature and extent of his performance renders a promise illusory. *Millien v. Colby College*, 2005 ME 66, ¶ 9, 874 A.2d 397.

The court must interpret the language of contracts and deeds according to the plain language used and may only consider extrinsic evidence if the language used creates an ambiguity. *Pettee v. Young*, 2001 ME 156, ¶ 8, 783 A.2d 637; *Camden Nat'l Bank v. S.S. Navigation Co.*, 2010 ME 29, ¶ 16, 991 A.2d 800. Courts have consistently recognized that the term "may" is permissive and discretionary. *Gaeth v. Deacon*, 2009 ME 9, ¶ 17, 964 A.2d 621; *Lowry v. Comm'r*, 231 F. Supp. 981, 984-85 (D. Or. 2001). In certain narrow circumstances, namely when used to impose a public duty on a public official in doing something for the public good in which the public has an interest in the exercise of the power, the term "may" will be interpreted to be mandatory rather than permissive. *Schwanda v. Bonny*, 418 A.2d 163, 167 (Me. 1980).

"The sale of lots by reference to a plan conveys to the grantees and their successors the right to use the streets and other areas set aside on the plan." *Chase v. Eastman*, 563 A.2d 1099, 1102 n.2 (Me. 1989). "The object of the principle is, not to create public rights, but to secure to

persons purchasing lots under such circumstances those benefits, the promise of which, it is reasonable to infer, has induced them to buy portions of a tract laid out on the plan indicated." *Callahan v. Ganneston Park Dev. Corp.*, 245 A.2d 274, 278 (1968) (*quoting Lennig v. Ocean City Ass'n*, 7 A. 491 (N.J. 1886)). The right created is an "easement by implication based upon estoppel." *Id.* at 278. This doctrine is typically invoked with regard to rights of way depicted on a plan but does also apply to other areas designated. In *Ute Park Summer Homes Ass'n v. Maxwell Land Grant*, 427 P.2d 249 (N.M. 1967), the developer had designated an area on the plan as "golf course" but then sought to sell that lot without restriction as to use after inducing other purchasers with the plan. The court held that the lot owners had a legally enforceable right in the property to be kept as open space for the use and enjoyment of the purchasers.

The Defendants claim that the Association has an obligation to build a marina and that by not having done so it has breached that obligation. The Defendants point to the recorded plan,* the recorded covenants, and the sales brochure as the basis for this obligation. (*See* Counterclaim ¶¶ 2-5.)

However, the court is not persuaded that any and all of those materials established any affirmative obligation on the part of R.D. to construct the marina. First, the original covenants, recorded in Book 393, Page 320 in 1973, made between R.D. and its grantees, do not obligate the developer to construct a marina, yacht club, or beach club. The Defendants point to the phrase "One club house may be built by R.D. Realty Corporation for residents only within the 'Common' set aside for yacht club and/or beach club" and argue that the implication of this language is that the "Common" was set aside specifically for the purpose of building a club house for a yacht club and that R.D. intended to make the construction of the boathouse/marina a mandatory obligation of R.D. and its successors. (*See* Defs. Add'l SMF ¶¶

* The Plaintiff's motion does not focus on this argument but in order to defeat the Counterclaim at summary judgment this argument must be considered.

5-8.)[5] By reading this clause in the context of the whole document it becomes clear that this phrase is merely permissive because it is included as an exception to a general prohibition of commercial establishments. No ambiguity is created and there is no reason to interpret the word "may" in this context to be anything other than permissive language.

In the Defendants' Additional Statements of Material Fact, the Defendants also point to the Memorandum of Agreement, executed in 1976 and recorded at Book 458, Page 175, as evidence of the developer's obligation to provide boating facilities. (Def. Add'l SMF ¶ 18.) Again, when read in the context of the agreement, this statement referred to in paragraph 18, simply states that R.D "shall be obliged to offer any recreational or social facilities (such as boat slips, golf course, swimming pool or clubhouse)" on the same terms to both to purchasers of lots from R.D. Realty's land and to purchasers of lots from the Linscotts. This language is still permissive as to the actual construction and is also evidence that a marina was not specifically promised because the language of the covenant has transformed from "a yacht club or beach club" to "boat slips, golf course, swimming pool or clubhouse."

Second, the sales brochure cannot be the basis for any contractual obligation (even if the Defendants could prove that the Association has taken on the obligations of the developer) because the brochure contains a reservation clause making any promises contained therein "subject to alteration or withdrawal at the option of R. D. Realty Corp. at any time." (Pl. Reply SMF ¶ 10.) This reservation of an unlimited right to change the extent or nature of performance makes any promise contained therein illusory and non-binding.

Neither the terms of the recorded covenants not the terms of the sale brochure may be altered by any statement Mr. Spickler made to the Linscotts regarding any obligation to construct a marina because the terms of those documents are unambiguous. The court cannot

[5] These conclusory statements are considered as to the Defendants' argument and are not given any weight in the determination of material facts.

consider parol evidence when a document's terms are not reasonably subject to more than one interpretation.

Third, although the Defendants acquired title to their land in the Subdivision through a deed that conveys the lot by reference to a recorded plan and that plan allegedly contains an area designated as "Common" and depicts a marina for the use of all owners, this at most[6] creates a private easement right in the Defendants to use that land in accordance with the reservation in the plan. That is, the developer would be prohibited from developing that land or conveying it without use restrictions in accordance with the description on the plan. However, this does not create an affirmative obligation on the developer to actually construct the amenity.

The record thus conclusively establishes that no obligation to construct a marina ever arose from any of the mechanisms alleged by the Defendants. Because no obligation to construct the marina has arisen, it is unnecessary to determine whether that obligation was released or passed on to the Plaintiff.

IT IS ORDERED AS FOLLOWS:

(1) The Plaintiff's Motion for Summary Judgment on the Complaint is GRANTED in part. The Plaintiff has established that the Defendants are subject to the By-laws of the Parker Neck Association and that those By-laws permit the Association to impose dues and assessments on members. The remaining issue in the Complaint is the amount, if any, of dues and assessments owed by the Defendants;

(2) The Plaintiff's Motion for Summary Judgment on the Counterclaim is GRANTED. Judgment on the Counterclaim will be granted to the Plaintiff.

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[6] The court does not decide this issue because the plan was not submitted in the record.

(3) The Clerk shall schedule a conference of counsel regarding the remaining aspects of this case.

Pursuant to M.R. Civ. P. 79(a), the Clerk is hereby directed to incorporate this order by reference in the docket.

DATE: 3 July 2012

A. M. Horton
Justice, Superior Court

PARKER NECK ASSOCIATION, INC - PLAINTIFF

Attorney for: PARKER NECK ASSOCIATION, INC
DAVID A SINCLAIR - RETAINED
LAW OFFICE OF DAVID A SINCLAIR PA
746 HIGH STREET
BATH ME 04530

SUPERIOR COURT
SAGADAHOC, ss.
Docket No BATSC-CV-2011-00013

DOCKET RECORD

vs
ROBERT D SPICKLER - DEFENDANT
25 ROCK LEDGE DRIVE
PHIPPSBURG ME 04562
Attorney for: ROBERT D SPICKLER
DAVID M HIRSHON - RETAINED
HIRSHON LAW GROUP PC
208 FORE STREET
PORTLAND ME 04101

OLIVE S SPICKLER - DEFENDANT
25 ROCK LEDGE DRIVE
PHIPPSBURG ME 04562
Attorney for: OLIVE S SPICKLER
DAVID M HIRSHON - RETAINED
HIRSHON LAW GROUP PC
208 FORE STREET
PORTLAND ME 04101

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Minor Case Type: CONTRACT

Docket Events: