

COMMONWEALTH OF MASSACHUSETTS
Land Court
Department of the Trial Court
Miscellaneous Case No. 238738

(SEAL)

MARIA A. KITRAS, as TRUSTEE,¹ & others,²
Plaintiffs

vs.

TOWN OF AQUINNAH & others,³
Defendants .

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**ORDER ON MOTION TO AMEND SEEKING TO FILE Decoulos & Decoulos
THIRD AMENDED VERIFIED COMPLAINT
AND
ORDER DECLARING MOOT BARON'S LAND TRUST MOTION
TO SUBSTITUTE OR FOR LEAVE TO INTERVENE**

This cause came to be heard on Plaintiffs' Motion to Amend Complaint (motion to amend) filed on January 24, 2007, by Maria A. Kitras (Kitras), as she is trustee of Bear Realty Trust, Bear II Realty Trust and Gorda Realty Trust; James J. Decoulos (Decoulos), as he is the trustee of Bear II Realty Trust and Gorda Realty Trust; and Mark D. Harding, Sheila H. Besse, and Charles D. Harding, Jr., as trustees of Eleanor P. Harding Realty Trust (collectively, plaintiffs). The motion to

¹of Bear Realty Trust, Bear II Realty Trust, and Gorda Realty Trust.

²James J. Decoulos, as co-trustee of Gorda Realty Trust and Bear II Realty Trust; Mark D. Harding, Sheila H. Besse and Charles D. Harding, Jr., as trustees of Eleanor P. Harding Realty Trust.

³Benjamin L. Hall, Jr., as trustee of Gossamer Wing Realty Trust; David Wice; Betsy Wice; Susan Smith; Russell Smith; Vineyard Conservation Society, Inc.; Caroline Kennedy; Caroline Kennedy and Edward Schlossberg, as they are guardians of Rose Kennedy Schlossberg, Tatiana Celia Kennedy Schlossberg, and John Bouvier Kennedy Schlossberg; George B. Brush, as trustee of Toad Rock Realty Trust; South Shore Beach, Inc.; Leonard F. Vanderhoop, Jr.; Joanne Fruchtman a/k/a JoAnn Fruchtman; Jack Fruchtman; Peter Ochs; Hope E. Horgan; Helen S. James; Donald Taylor; Moshup Trail II Limited Partnership; Richard Hoyle; Charles E. Derby; Shirley A. Jardin; persons unknown or unascertained being the heirs of Wallace E. Francis; Jeffrey Madison, as trustee of Tacknash Realty Trust; Estate of Edwin D. Vanderhoop; John A. Wiener; Sally D. Wiener; Patrick J. Evans; Scott Harrison; Julie B. Hoyle; Carmella Stephens, as trustee of Deer Meadow Realty Trust; Stella Winifred Hopkins a/k/a Winifred S. Hopkins; persons unknown or unascertained being the heirs of Esther Howwasswee; persons unknown or unascertained being the heirs of Savannah F. Cooper; Heidi B. Stutz; Michael W. Stutz; Hamilton Cammann; Mary Elizabeth Pratt; persons unknown or unascertained being the heirs of Amos Smalley; June Noble; Richard Sullivan; Sarah Saltonstall; Steven Yaffe; Thomas Seeman; Lawrence B. Evans; Beverly A. Evans; Estate of William Vanderhoop; Kevin Craig; Cynthia Craig; Flavia Stutz; Robert Stutz; Selma Greenberg; William Greenberg; Wilma Greenberg; Alexandra Whitcomb; Rolph Lumley; Aurilla Fabio; other persons unknown or unascertained; United States of America, as trustee for the Wampanoag Tribe of Gay Head; Martha's Vineyard Land Bank Commission; and the Commonwealth of Massachusetts acting through its Executive Office of Environmental Affairs.

amend seeks to replace Second Amended Verified Complaint with Third Amended Verified Complaint.

On February 7, 2007, Brian M. Hall, trustee of Baron's Land Trust (BLT), filed a motion to substitute or for leave to intervene relating to Lot 177 (BLT motion) together with a supporting memorandum. BLT alleges it is the successor in interest to Esther Howwasswee as the owner of Lot 177. The heirs of Esther Howwasswee are currently named as parties defendant in the instant action.

This court (Lombardi, J.) heard oral argument on the motion to amend and the BLT motion on February 15, 2007.⁴ Plaintiffs were directed to submit a revised Third Amended Verified Complaint to correct certain typographical errors and to clarify the ownership of certain lots at issue. At the conclusion of the hearing, this court took the motion to amend and the BLT motion under advisement.

Subsequent to the hearing, Kitras and Decoulos submitted a revised Third Amended Verified Complaint dated March 12, 2007 (March 2007 complaint) in response to the directive given by this court.⁵ The March 2007 complaint contains two principal revisions.

First, plaintiffs have addressed the issue of which parties need be named as defendants. The March 2007 complaint (a) deletes a number of defendants named in the Second Amended

⁴During the hearing, Kitras and Decoulos stated their intention to file a motion to consolidate the instant action with Frangos v. Aquinnah, Miscellaneous Case No.299511. This court informed Kitras and Decoulos that, following their service of the motion to consolidate and notice to parties of their opportunity to file responses, a ruling would issue on the papers submitted. Kitras and Decoulos filed the motion to consolidate on March 9, 2007. The cover letter to that motion indicated that all parties were informed that they had until March 31, 2007, to file any response to this motion. Accordingly, this court will issue a ruling on the motion to consolidate after April 2, 2007.

⁵In the cover letter dated March 13, 2007 (March 13 cover letter), accompanying the March 2007 complaint, counsel for Kitras and Decoulos claimed that this court never ruled on a motion to substitute that was argued on December 21, 2004. It appears that counsel mailed the March 13 cover letter prior to receiving a letter of the same date sent to him by a session clerk. The session clerk's letter enclosed copies of the motion to substitute as allowed by this court on January 6, 2005, and a letter to all parties dated January 6, 2005, informing them that the motion to substitute had been allowed.

Verified Complaint and (b) adds as a defendant the BLT trust.

This court hereby allows the motion to amend as it seeks to name only those persons and entities that are necessary party defendants in the instant action. All those so named in the March 2007 complaint, except for the BLT trust, are currently defendants. Consequently, all defendants listed in the Second Amended Verified Complaint, but not named in the March 2007 complaint, are no longer parties in the case at bar. With the inclusion of BLT as a defendant under the March 2007 complaint, this court rules that the BLT motion is moot.

Second, the March 2007 complaint proposes to add a third count, a claim of nuisance against the Town of Aquinnah. Count Three alleges that the construction of Moshup Trail prevents the natural flow of surface water from plaintiffs' lots to the Atlantic Ocean.⁶ Although not identifying the party responsible for the road construction approximately fifty years ago, plaintiffs allege that the Town of Aquinnah has created a private nuisance on the lots owned by plaintiffs by failing to install a conduit to drain surface water.

Without commenting on the timeliness of this claim, this court finds and rules that such a tort claim is outside of its subject matter jurisdiction as set forth in G. L. c. 185, § 1, et seq. "Whenever it appears by suggestion of a party or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Mass. R. Civ. P. 12 (h) (3). See The Nature Church v. Board of Assessors of Belchertown, 348 Mass. 811, 812 (1981).

Accordingly, the motion to amend is denied as it seeks to add Count Three. Paragraphs 55 through 57 of Count Three and paragraphs 1 through 3 under the section entitled "Request for Relief as to Count Three" are hereby stricken from the March 2007 complaint.

As modified by this order, the March 2007 complaint shall be entered on the docket of this action. Unless a party accepts service otherwise, plaintiffs shall serve all defendants by first class certified mail, return receipt requested, with a copy of the March 2007 complaint deleting the

⁶During the hearing, the parties informed this court that the construction at issue occurred in the 1950s.

paragraphs specified above based upon Count Three. Each defendant shall plead in response to the March 2007 complaint as modified by this order within twenty days after being served in accordance with this order. See Mass. R. Civ. P. 15 (a).



So ordered.

By the Court. (Lombardi, J.)

Attest:

Deborah J. Patterson
Recorder.

Dated: March 29, 2007

A TRUE COPY
ATTEST:

Deborah J. Patterson
RECORDER