

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

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

vs.

TOWN OF AQUINNAH & others,³
Defendants

3017
RECEIVED

AUG 15 2006

Decoulos & Decoulos

ORDER ALLOWING MOTION TO BIFURCATE

Pursuant to Mass. R. Civ. P. 54 (b), this court (Lombardi, J.) directed the entry of judgment (Rule 54 (b) judgment) on August 21, 2003. A number of parties filed and argued various motions following the Rule 54 (b) judgment. In particular, one motion led to this court issuing an order on December 22, 2003, which denied a motion to reconsider or correct the June 4, 2001 decision of the court (Green, J.) and the Rule 54 (b) judgment. Thereafter, four notices of appeal entered on the docket during January 2004.

The Appeals Court heard oral argument on April 11, 2005, and issued its decision on

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; Victoria Brown; Gardner Brown, Jr; Mark Harding and Eleanor P. Harding, as trustee of Eleanor P. Harding 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; and the United States of America, as trustee for the Wampanoag Tribe of Gay Head.

August 18, 2005. Kitras v. Aquinnah, 64 Mass. App. Ct. 285, further appellate review denied, 445 Mass. 1109 (2005).⁴ The Kitras court reversed the Rule 54 (b) judgment, vacated the order of December 22, 2003, and remanded the case to this court for further proceedings consistent with the opinion of the court. Id. at 301.

On or about March 6, 2006, Vineyard Conservation Society, Inc. (VCS) submitted a request for a status conference. At a status conference held on April 25, 2006, VCS moved orally to bifurcate the further proceedings in the case at bar. This court established a deadlines by which VCS would file and serve a written motion and any other party could submit a responsive filing.

Accordingly, VCS filed on May 31, 2006, Motion to Bifurcate Proceedings (bifurcation motion). The following filings entered on the docket: (a) Joinder in Motion to Bifurcate by Caroline Kennedy on June 14, 2006; (b) Joiner [sic] in Motion to Bifurcate by Jack Fruchtman, Jr. and JoAnn Fruchtman on June 19, 2006; (c) Town of Aquinnah's Joinder in Motion to Bifurcate Proceedings by Vineyard Conservation Society, Inc. on June 23, 2006; (d) Defendant Gossamer Wing Realty Trust & Baron Land Trust Opposition to the Motion of Defendant Vineyard Conservation Society to Bi-Furcate [sic] the Issue of Intent to Create an Easement by Necessity on June 30, 2006; (e) David H. Wice and Betsy W. Wice's Joinder in Motion to Bifurcate Proceedings Filed by Vineyard Conservation Society, Inc. on June 30, 2006; and (f) Memorandum of Plaintiff, Maria A. Kitras, Trustee to Support Postponement of Bifurcation Order (Kitras memorandum) on July 3, 2006.

This court will first consider the Kitras memorandum. While not submitting a motion, Kitras "requests that the Court postpone the bifurcation and consider assigning this case to a Tracking Order" under Standing Order 1-04. Additionally, Kitras notes that the Town of Aquinnah

⁴In denying the application for further appellate review (FAR application), the Court issued an order stating that "[i]n the event the plaintiffs again seek to join the Tribe in the Land Court, the defendants can relitigate the question of delay in the plaintiffs' attempts to join the Tribe." While not part of the published disposition of the FAR application, the above quoted order appears on the Kitras docket maintained by the Court.

joined in support of the bifurcation motion and states that “[a]lthough it is not specifically requested, it appears that the Town of Aquinnah may, in the future, want to include the ‘Aquinnah District of Planning Concern’ as a necessary party.”

The instant action commenced on May 20, 1997, long before the effective date of Standing Order 1-04, i.e. October 4, 2004. This court finds that the most prudent and efficient approach to advance the case after nine years of litigation is to rule on the pending bifurcation motion without further delay. Thus, the request contained in the Kitras memorandum is DENIED.

The bifurcation motion seeks to have this court first consider whether an easement was intended at the time of the setoff in the 1870s and, if so, then to determine the location of such an easement. VCS contends that

“[b]ecause of the effort and expense involved in adjudicating the location of any easement, which would not be necessary if this Court finds that there was no intent to create an easement, it would be a more efficient use of the Court’s and the parties’ time and resources to resolve that issue first.”

In opposition to the bifurcation motion, Benjamin L. Hall, Jr. (Hall), as trustee of Gossamer Wing Realty Trust and Baron Land Trust, argues that “the first order of business” should be a determination as to what lots and what parties remain interested in the case. Hall correctly observes that the uncertainty as to lots and parties was a matter worthy of note by the Kitras court. See id. at 289-290.

This court, however, disagrees with the Hall argument. With the number of individuals and entities actively participating in the case at bar, this court finds that it has before it those parties necessary to present pertinent evidence and to argue the question of law concerning the existence vel non of certain easements. The adversarial process will be well-served by the present parties and their advocates.

The question of what lots and what parties were implicated by a claim of possible easements did not deter the Appeals Court from deciding certain legal issues. The Kitras court proceeded as if all persons and lots were properly before it “[i]n the interest of expediency and

because our decision today does not depend upon it” Id. at 290. In considering the bifurcation motion, this court finds that it is appropriate to apply that same reasoning as the Kitras court.

In their filing, David H. Wice and Betsy W. Wice argue cogently in favor of the bifurcation motion: “Before Defendants are put to the additional effort and expense of preparing documentation and retaining counsel, surveyors, engineers and historians to address the issues of where the unestablished easement or easements might be located, the Court should address the issue of whether or not there is any easement at all.” (emphasis in original). This court agrees with that approach.

In issuing its decision, the court “assumed, for lots numbered 189 or 190 and above, the intent to create easements [T]he assumption may ultimately be found to be factually correct, but this is not inevitable.” Id. at 298. The first task for this court, therefore, is to decide whether there is a factual or legal basis for that assumption.

Should this court find, after full briefing and argument, that the requisite intent was present in 1878 to create one or more easements by necessity, it will then be timely to identify the universe of lot owners that might be affected by such easements. Once additional persons, if any, have been joined as necessary parties, this court will proceed with the second phase of the proceedings to determine the location of those easements.

Based upon the foregoing, this court **ALLOWS** the bifurcation motion. The parties must now decide upon the procedural route to follow on the question of the existence of easements. This court recognizes the general rule that “[w]hen intent is at the core of a controversy, summary judgment seldom lies.” Madden v. Estin, 28 Mass. App. Ct. 392, 395 (1990). See Brunner v. Stone & Webster Eng’g Corp., 413 Mass. 698, 705 (1992). See also Flesner v. Technical Communications Corp., 410 Mass. 805, 809 (1991). “That is not to say, however, that, in such cases, summary judgment is always inappropriate.” Brunner, 413 Mass. at 705.

Here, the question of intent pertains to a state of mind surround events that occurred

over 125 years ago. Suffice it to say that no witness would be competent to provide direct testimony as to the intent of the parties to the setoff of lots in 1878. This court, however, does not know whether the parties wish to call witnesses to present other evidence to support their arguments. Accordingly, it is left to the parties to decide whether to bring a motion under Mass. R. Civ. P. 56 or whether to file a request for a pretrial conference.⁵

Regardless of the route taken, the parties must be mindful of the well-established standard articulated by the Kitras court: “[I]t is the proponents’ burden to prove the existence of an implied easement. Cheever v. Graves, 32 Mass. App. Ct. 601, 607, 609 (1992).” Kitras, 64 Mass. App. Ct. at 300. See Mt. Holyoke Realty Corp. v. Holyoke Realty Corp., 284 Mass. 100, 105 (1933) (holding burden of proving intent to create easement unexpressed in deed upon the party asserting right). See also Swensen v. Marino, 306 Mass. 582, 583 (1940).



So ordered.

By the Court. (Lombardi, J.)

Attest:

Dated: August 14, 2006

Deborah J. Patterson
Recorder

A TRUE COPY
ATTEST:


RECORDER

⁵All dispositive motions are now governed by Rule 4 of the Rules of the Land Court (2005).