STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
DOCKET NO. Cum-21-208

Title to Real Estate is Involved

MARTINA M. SULLIVAN
APPELLANT/PLAINTIFF

v.

SAMUAL KILBOURN, Author "old road description"
OWEN HASKELL, Inc Land Surveying Company
SEBAGO TECHNICS, Land Surveying Com
NATHANIEL W. WHITE, et al South Freeport, Maine
APPELLEE/DEFENDANTS

ON APPEAL FROM MAINE SUPERIOR COURT

CUMBERLAND COUNTY

APPELLANT BRIEF

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October 6, 2021

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M.R. Civ.P. 9 (b)

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STATEMENT OF THE CASE

After an exhaustive investigation the plaintiff's title insurance company found and determined "negligence," liability and other malfeasance by Defendant Sebago Technics and others in the work preformed on a 2015 claim against the Sullivan property. Sebago Technics had a duty to act with care and failing to do so, violating a material breach of the parties' contract, "a legal duty requiring a party to take necessary action to prevent harm." Sebago also failed to respond to a Demand (as evidence provided in the court record) or agree to either mediation or arbitration as required by the contract thus waiving those rights and appropriately named here in this complaint.

When reviewing a motion to dismiss under Rule 12(b)(6), the Court "consider[s] the facts in the complaint as if they were admitted." *Bonney v. Stephens Mem'l Hosp., 2011 ME 46, ¶ 16, 17 A.3d 123.* The complaint is viewed "in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." Id. (quoting *Saunders v. Tisher, 2006 ME 94, ¶ 8, 902 A.2d 830*). "Dismissal is warranted when it appears beyond a doubt that the plaintiff is not entitled to relief under any set of facts that [it] might prove in support of [its] claim." Id.

Without witness testimony, under oath the court is unable to show it is more likely than not to determine "beyond a doubt that the plaintiff is not entitled to relief under any set of facts." Defendants' attorneys are not a substitute under any set of circumstances of justice or balanced reporters (witnesses) of

or for the impartial review required of the plaintiffs' complaint to make any reasonable determination or decided if the plaintiff is "entitled to relief." In fact defendants' attorneys were prejudicial to the plaintiffs' claims providing bias, unfair and untruthful statements to the Court, which is the subject of this appeal.

According to the Maine Rules of Civil Procedure a complaint is considered notification to the defendants and does not require all that is needs to be proven specifically in the complaint nor does it require specific evidence to prove the entire complaint at a hearing on the defendants' motion to dismiss.

STATEMENT OF THE FACTS

Defendant Owen Haskell, LLC altered a court order line description from a 2015 adverse possession case by removing the "old abandoned road area" from the trial court description in 2019 in an affidavit to this Court, which changes the entire claim all defendants, relied on here -"already decided." If already decided and true why change the description? The altering of the description also gives creditability to the new evidence the title insurance company discovered in 2018. Owen Haskell, surveyor John Schwanda was not the author of the description or the surveyor of record nor did he testified in the 2015 trial nor has he ever been deposed or testified but was the surveyor that altered the original court ordered documents and provided those changed court documents in an affidavit claiming the defense of "res judicata."

(Misstated in *J. Kennedy's Order (p. 2.)* this was the first filing of Sullivan claiming new evidence this is the 2nd not the 3rd,as reported in the Judge's Order.

"The heart of the parties' dispute and primary focus of the bench trial, was the determination of whether the Warren-Whites adversely possessed the southern half of an old abandoned road ("the abandoned road") that runs between the parties properties. At the outset of trial, the parties stipulated that except for claims of adverse possession or acquiescence, each party owned to the centerline of the abandoned road (Bench Tr 5:15-24 (Feb. 6, 2017)" *Appellant Sullivan Brief-Sparks December29, 2017 –*

"As further explained herein, the trial court properly concluded that Mr. and Mrs. Warren-White adversely possessed the southern half of the so-called Abandoned Road." *Appellee Brief Vaillancourt February 16, 2018.*

Courts balance "the benefits of efficient proceedings and finality and consistency of judgments with the dangers of unduly limiting the rights of litigants to have all of their claims heard on merits." *See (Riverwood Commercial Park v. Standard Oil Co., 729 N.W.2d 101, 107 (N.D. 2007). Creech, 281 S.W.3d at 381.* "That conclusion is consistent with the approach taken by other courts, which broadly recognize that res judicata is not "to be rigidly applied." Courts administer the doctrine "as fairness and justice require," bearing in mind that res judicata "should not be applied so rigidly as to * * * work an injustice." *See Riverwood*

Defendant Sam Kilbourn was the author of the now 2019 altered and changed 2015 "old road" court order line description. Mr. Kilbourn is not a surveyor and it was only discovered after the trial that Mr. Kilbourn authored the now misrepresented description, that information was wrongly

and intentionally hidden at trial. A default judgment request was filed with the Court after Mr. Kilbourn failed to take action timely after being served here with this Complaint, That default request was seemly just ignored by the Court.

We will affirm a Rule 12(b)(6) dismissal "only when it appears beyond doubt that a plaintiff is entitled to no relief under any set of facts that he might prove in support of his claim." *Bean v. Cummings, 2008 ME 18, ¶ 7, 939 A.2d 676*

"The legal sufficiency of a complaint challenged pursuant to M.R. Civ. P. 12(b)(6) is a question of law" and thus subject to de novo appellate review. *Marshall v. Town of Dexter, 2015 ME 135, ¶ 2, 125 A.3d 1141.*

The court order dated August 10, 2021 (*J Kennedy p2.*) on reconsideration prior to the filing of this appeal, states "no evidence" was presented. *See Richards v. Soucy, 610 A.2d 268, 270 (Me.1992* "not the sufficiency of the evidence the plaintiffs are able to present. Under modern pleading rules, the purpose of a complaint is to provide a defendant with notice of the claim or claims against him, and a motion to dismiss should be denied "if the pleading alleges facts that would entitle the plaintiff to relief upon some theory, or if it avers every essential element of recovery." Id. *146. In this case, because the plaintiffs have alleged that the defendants' conduct involved fraud, the provisions of M.R.Civ.P. 9(b) must also be considered in addressing the motion to dismiss. Rule 9(b) provides that when a claim of fraud is made, "the circumstances constituting fraud ... shall be stated with particularity" although the "[m]alice, intent, knowledge, and other condition

of mind of a person may be averred generally." *Richards v. Soucy, 610 A.2d 268, 270 (Me.1992)*

If the fraud claims were not addressed with enough "particularity" to satisfaction of the Court the plaintiff must be allowed to at least amend the complaint before dismissal.

ARGUMENT

In re Murchison, 349 U.S. 133, 136 (1955) "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." "Due process requires that the procedures by which laws are applied must be "evenhanded," so that individuals are not subjected to the arbitrary exercise of government power."

Defendants' claims of res judicata in order to justify a dismissal of the plaintiffs' complaint tying into a 2015 case, wasting a lot of paper, words and time hiding behind the doctrine which is prejudicial to the plaintiffs' complaint here without an opportunity to be properly and rightly be allowed to be heard and hear from witnesses, violates the court own rules and due process rights. *res judicata* cannot oppress or end claims that did not exist and which, therefore, could not possibly have been raised in a prior lawsuit. As unmoving as the Courts and the Defendants have been, here the complaint is not tied to the 2015 case other than for context.

Courts have ruled litigates cannot claim and hide behind the doctrine yet violate fairness principles. There are exceptions to the doctrine the defendants claimed here, which go unnoticed or are just ignored by the Courts. Defendants and certainly not the Court, can just pick what rules to follow and which ones not to.

The Law Firm of Thompson Bowie & Hatch, now representing defendant Owen Haskell, INC here, agreed to arbitrate or mediate the Sullivan and Sebago Technics agreement and were provided privileged information and documents with the understanding a conflict check had been completed.

Thompson Bowie & Hatch also agreed to arbitrate the Sullivan and Joyce agreement and privileged documents and discussions were also provided and now they represent the surveyor involved in both claims. This legitimate and concerning "conflict of interest" just goes unnoticed and again is ignored by the Courts. The Maine Bar Rules of Professional Conduct were violated and again just overlooked by the Court. How is this fair to a legal process?

Defendants misstate and exaggerate facts by claiming in these court filings of the Plaintiff's pleadings, writing - "6 as the court is well aware of" bring the court into the misrepresentation and false claims (defendants motion to dismiss) again prejudicing and misleading any fair or reasonable outcome while at the same time the Court adopts the misrepresentation as true and restates the distortion in the Courts own Orders. Sullivan has filed 2 lawsuits, one of which is here on appeal.

If the handling of the second case—or anything else—does cause a judge to develop some bias or prejudice, we expect that judge to recuse. (*See State v. Marden, 673 A.2d 1304, 1308 (Me. 1996)*) ("No judge should preside in a case in which he is not wholly free, disinterested, impartial and independent."

Defendants' W White, as discovered in 2018-2019, conspired with neighbor Joyce or perhaps earlier in the marking of boundaries shared by Sullivan, violating and questioning the validity of agreements with Joyce. This alleged unlawful scheme between the two could perhaps constitute charges of conspiracy. None of which was known or could have been known in 2015. The doctrine and defense of res judicata cannot possibility be used or seriously believed for every misdeed and on-going wrong alleged after the trial in the 2015 case.

Courts should not be complacent or inflexible in dealing with injustice or unfairness or turn a blind eye to misconduct or wrong doing because it is difficult. These are the very principles and ethics Courts and citizens rely on and the standard required. As such, neither should attorneys get a pass.

Bias or prejudice of an appellate judge can also deprive a litigant of due process. *See(Aetna Life Ins. Co. v. LaVoie, 475 U.S. 813 (1986)*

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our

system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison, 349 U.S. 133, 136 (1955)*

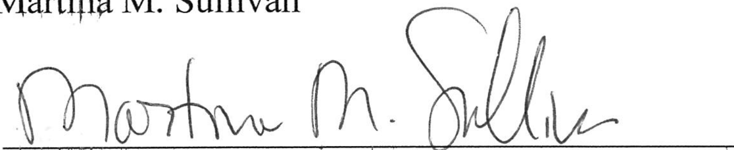
THE HISTORY OF THE DUE PROCESS CLAUSE SHOWS A PARTICULAR CONCERN FOR ENSURING UNBIASED DECISIONMAKERS

CONCLUSION

Wherefore, the Courts here have been reluctant and unfair in not allowing Sullivan an opportunity to challenged the defense claims of Defendants and given that, moves this Court to vacate and remand the trial courts decision on the Sullivan Complaint and allow to amend if necessary.

Dated October 6, 2021

Martina M. Sullivan



CERTIFICATION OF SERVICE

Martina M. Sullivan, hereby certify copies of Plaintiffs' Appeal Brief and Appendix was sent to the Defendants attorneys:

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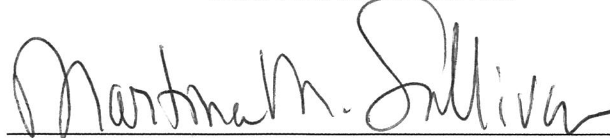

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