

STATE OF MAINE

BUSINESS AND CONSUMER COURT

Cumberland, ss.

TESTA'S, INC.

Plaintiff/Counterclaim Defendant

v.

Docket No. BCD RE-11-03 ✓

JACK COOPERSMITH and SHERRI COOPERSMITH,

Defendants/Counterclaim Plaintiffs

and

TOURMALINE KING, LLC and TOURMALINE QUEEN, LLC,

Defendants

and

THOMAS J. TESTA, JR., ANNA T. STRIEFEL
MLS PROPERTIES, LLC, and JOAN E. PURCELL

Parties-in-Interest

ORDER AFTER SITE VIEW AND HEARING

By agreement of the parties, the only remaining issue in this case involves the specific terms of the Defendants' easement over the Plaintiff's property for purposes of access to the Defendant's properties. After the Law Court mandate, the parties filed a Joint Motion for Clarification of that point.

Pursuant to a previously issued notice and by agreement of the parties, the court conducted a site view and a hearing June 30, 2015. At the hearing, Plaintiff and Defendants presented evidence in the form of sworn testimony and exhibits. After the close of evidence the court issued several oral rulings and set a schedule for further submissions by the

parties. This Order is to set forth that schedule and also to summarize the court's oral rulings for the benefit of counsel in preparing their submissions.

Procedural Posture

Because the Business and Consumer Court has issued what is now a final judgment by virtue of being affirmed on appeal, any "clarification" of the final judgment needs to be pursuant to Rule 60(b) of the Maine Rules of Civil Procedure. *See Bonner v. Emerson*, 2014 ME 135, ¶ 10, 105 A.3d 1023, 1026 (Rule 60(b) is the source of trial court's authority to modify final judgment). Although the parties' Joint Motion for Clarification does not mention Rule 60(b), the court will proceed on the basis that the Joint Motion for Clarification invokes the court's Rule 60(b) jurisdiction, and that the parties agree that Rule 60(b)(1) and/or 60(b)(6) authorize the court to issue an amendment to the judgment clarifying the location and scope of the easements. Any objection to the foregoing should be filed in writing within 10 days of this Order, or be deemed waived.

Format of Amended Judgment

The court further assumes that the end result of the present procedure will be at least an amendment to the final judgment, and also either a recordable abstract of the amendment or perhaps a separate recordable easement deed for each of the Defendants' two properties. The parties are requested to confer on what documents are involved and what form they should take.

Summary of Rulings

The following summarizes the court's oral rulings made at the close of the June 30, 2015 hearing:

- The easements appurtenant to Defendants' properties will allow vehicles operated by persons seeking access to Defendants' properties to travel over any portion of the Plaintiff's parking lot that is now or hereafter accessible to other users of the parking lot, except that no vehicle operated by a person going to Defendants'

properties will be permitted to park in any of the Plaintiffs' parking spaces, and vehicles leaving Defendants' property will exit only via the same way they entered, i.e. to Main Street.

- Nothing in the easements will limit the Plaintiff's right to change the parking lot either as to its configuration or its usage, provided however, that the Plaintiff will not reduce the travel way for vehicles to go to and from Defendants' properties below the following minimums:
 - a travel way 13 feet wide at the Main Street entrance to the parking lot
 - a 16 foot-wide rectangular travel way centered on and running lengthwise from the Main Street entrance westerly to the southwesterly corner of the 20-foot wide travel way described below
 - a 20-foot wide rectangular travel way running northerly from the westerly end of the above-described 16-foot wide travel way to the southerly edge of the building at the northwest corner of the parking lot. The easterly side of said 20-foot wide rectangular travel way abuts the 25 x 18 rectangle described in the following subparagraph.
 - a 25 foot by 18-foot rectangular area abutting the 20-foot wide travel way, with the longer sides abutting the 20-foot wide travel way on the west and the Defendants' property lines on the east. Defendants may determine where the 25 x 18 foot area is positioned along Defendants' westerly boundary lines.

The foregoing travel way sections are hereinafter collectively referred to as the "minimum travel way."

- No part of any parked vehicle shall be within or over the above-defined minimum travel way. (See below for potential limited exception for delivery vehicles).
- No vehicle parked on Defendants' property will protrude onto or over Plaintiff's property, and no vehicle parked on Plaintiff's property will protrude onto or over Defendants' property. This means that a vehicle parked on a party's property must be entirely on that party's property and may not overhang another party's property.

Further Potential Provisions

The court is considering the following additional provisions and invites the parties' further input:

- A provision to the effect that delivery vehicles that stop partly or entirely in the above-defined minimum travel way solely for the purpose of making a delivery to a party will not be deemed to be in violation of the easement as long as the delivery vehicle does not interfere with any other vehicles using that portion of the travel way. This means that vehicles making deliveries or pickups for any party could stop anywhere within the Defendants' above-defined minimum travel way as long as they did not block other parties or other users of the parking lot. Such a provision could

benefit all parties. Without it, vehicles making deliveries to the Plaintiff's property or the Defendants' properties would be required to stop entirely outside the minimum travel way. The court is open to setting time limits as well.

- A provision requiring the parties to notify each other of any violations
- A provision defining the terms under which the easement can be terminated, but requiring that termination is effective only if ordered by a court with jurisdiction
- A provision authorizing any party to obtain legal and equitable relief for a violation by another party
- The court encourages, but will not require, the parties to include an ADR procedure to be exhausted before any party invokes the aid of the court
- In addition, the documents need to contain standard appurtenant easement language,
- Eventually a metes and bounds description of the "minimum travel way" will be needed, to be included in the easement description and also depicted on a plan.

Schedule

The court adopts the following schedule for the parties' further submissions:

By July 22, 2015, Plaintiff will draft and submit to Defendant on behalf of Plaintiff and the parties-in-interest the document or documents that the Plaintiff will be asking the court to adopt.

By July 29, 2015, Defendants will draft and submit to Plaintiff and parties-in-interest the Defendants' response, along with a red-lined version of the Plaintiff's submittals, indicating the Defendants' deletions and additions. If the Plaintiff agrees with any changes made by Defendants, Plaintiff's counsel will endeavor to notify Defendants' counsel prior to August 5.

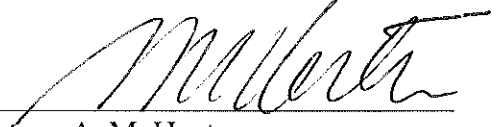
By August 5, 2015, all parties who wish to file proposed documents for the court's consideration will do so, including memoranda in support of a party's position on any disputed issue of fact or law.

The Clerk will schedule this case for oral argument on the parties' submissions on any available date after August 5, 2015. If all parties agree, the oral argument may be held in

Portland with any counsel who wishes able to participate telephonically. Otherwise, the oral argument will be at the court of origin in Ellsworth.

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

Dated July 1, 2015


A. M. Horton
Justice

Entered on the Docket: 7-2-15
Copies sent via Mail Electronically