

STATE OF MAINE  
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET  
Location: West Bath  
Docket No. BCD-WB-08-47

Ronald Fitch

Plaintiff,

v.

**DECISION AND ORDER**  
(Motion to Dismiss)

Diamond Cove Homeowners  
Association, et al.,

Defendants

This matter is before the Court on the motion to dismiss of Defendants Roger Blatty, John Burge, Philip Guarino, Richard McGoldrick, Richard Molyneux, and Robert Whelan (hereinafter, "individual Defendants").

**Factual Background**

According to Plaintiff's Complaint, Plaintiff Ronald Fitch resides in Portland and owns residential property in the Diamond Cove subdivision on Great Diamond Island. Plaintiff's property is part of a development known as "Diamond Cove," which was created under a General Declaration of Covenants and Restrictions dated September 27, 1989 and subsequently amended in 1993, 1994, 1999 and 2001 (the Declaration).

Defendant Diamond Cove Homeowners Association (the Association) is a non-profit corporation authorized to do business in Maine and serves as the homeowners' association for the Diamond Cove development created by the Declaration. The individual Defendants are members of the Diamond Cove Homeowners Association's Board of Directors (the Board). The Association and the Board are governed by the Association's Bylaws and the Declaration.

In a private agreement with Party-in-Interest Maine Audubon and others, the Association agreed that “no motor vehicles of any kind,” except emergency vehicles and “taxis,” would pass from Association property to the southern part of Diamond Island. Plaintiff further alleges that in accordance with a Site Location Order issued by the Maine Department of Environmental Protection, a state owned pier would be located at the south end of the Island, and that access to the Diamond Cove portion of the Island would be restricted to Diamond Cove residents. The Order also provided that a “barge landing area” located on the western shoreline would be an open space recreational area.

The barge landing area is owned in common by the Association and has been used to facilitate the development of the Diamond Cove area. According to Plaintiff, under the Development Plan for Diamond Cove, the barge landing area could appropriately be used for the development and construction of residential units in the first phase of development (Phase I), but in the second phase (Phase II), “the barge landing was to be designated ‘Open Space Recreation Area’ and the means of vehicle loading and service was to be a floating pier which did not impact the open space area.”

Plaintiff asserts that when he purchased his property on Diamond Cove, “he selected the lot adjacent to the barge landing because it was a beach and it was designated open space recreational use when Phase II of the development commenced.” Plaintiff maintains that he relied on the representation regarding the designation of open space use and on the representation “that the traffic would be only as to Diamond Cove and then only via the floating dock/pier . . .” At the time Plaintiff purchased his property, the barge landing was used primarily to facilitate Phase I, and the primary entrance to Great Diamond Island was on the southerly side of the Island.

Plaintiff alleges that in connection with the Development Plan for Diamond Cove, the Association was required to build a floating dock/pier to “serve as the egress and entrance for all traffic from waterside once the initial development of Phase I was completed.” Although a floating dock was installed prior to Phase II, Plaintiff contends that it is incomplete and not suitable for barge traffic.

Plaintiff alleges that as a consequence, there has been increased use of the barge landing and increased public access to Diamond Cove, which have resulted in harm to Plaintiff.

Plaintiff has filed this action to redress his alleged harm. Plaintiff's Complaint is comprised of the following counts: (Count I) Declaratory Relief; (Count II) Breach of Fiduciary Duty; (Count III) Trespass; and (Count IV) Nuisance. Pursuant to M.R. Civ. P. 12(b)(6), the individual Defendants have moved to dismiss all claims filed against them in their individual capacities.

## Discussion

### **I. Standard of Review**

A motion to dismiss pursuant to M.R. Civ. P. 12(b)(6) "tests the legal sufficiency of the complaint and, on such a challenge, 'the material allegations of the complaint must be taken as admitted.'" *Shaw v. Southern Aroostook Comm. Sch. Dist.*, 683 A.2d 502, 503 (Me. 1996) (quoting *McAfee v. Cole*, 637 A.2d 463, 465 (Me.1994)). When reviewing a motion to dismiss, the court examines "the complaint 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.* A dismissal under M.R. Civ. P. 12(b)(6) will be granted only "when it appears beyond a doubt that the plaintiff is entitled to no relief under any set of facts that he might prove in support of his claim." *Id.* (quoting *Hall v. Bd. of Env'tl. Prot.*, 498 A.2d 260, 266 (Me. 1985)). "The legal sufficiency of a complaint challenged pursuant to M.R. Civ. P. 12(b)(6) is a question of law." *Bean v. Cummings*, 2008 ME 18, ¶7, 2008 ME 18, 939 A.2d 676, 679 (citations and internal quotation marks omitted).

### **II. Statutory Immunity**

Defendants argue in part that dismissal is appropriate because they are immune from suit under 14 M.R.S. § 158-A(2). Section 158-A grants immunity to the officers, directors and volunteers of non-profit organizations as follows:

2. IMMUNITY. A director, officer or volunteer is immune from civil liability for personal injury, death or property damage, including any monetary loss:

- A. When the cause of action sounds in negligence and arises from an act or omission by the director, officer or volunteer which occurs within the course and scope of the activities of the charitable organization in which the director, officer or volunteer serves; or
- B. Arising from any act or omission, not personal to the director, officer or volunteer, which occurs within the course and scope of the activities of the charitable organization in which the director, officer or volunteer serves.

*Id.*

The parties do not dispute that the Association is a nonprofit organization and that the individual Defendants are directors of the Association. In fact, Plaintiff concedes that the individual Defendants are immune from liability to the extent that Plaintiff alleges negligent conduct on the part of Defendants. As to the remaining claims, Plaintiff contends that Defendants are not immune from liability because the claims do not sound in negligence, are personal to each of the individual Defendants, and occurred outside the scope of the Association's activities.

### **III. Count I: Declaratory Relief**

In Count I, Plaintiff requests that the Court determine (1) that the barge landing area is an Open Space Recreational Area that is presently being misused to Plaintiff's detriment; (2) that the Association is required to construct a floating dock/pier and has failed to do so; (3) that use of the floating dock/pier must be limited to Diamond Cove residents and City of Portland emergency vehicles; (4) that non-Diamond Cove residents are prohibited from traveling in Diamond Cove with their vehicles;<sup>1</sup> (5) that motor vehicles other than emergency vehicles are prohibited from the Diamond Cove side of the Island; and (6) that the Defendants have not complied with certain obligations imposed under the Board's by-laws and certain development plans.

Preliminarily, the Court notes that Section 158-A does not apply to Plaintiff's claim for declaratory and injunctive relief. By its express terms, Section 158-A grants immunity "from civil

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<sup>1</sup> In Count I, Plaintiff also appears to request injunctive relief prohibiting certain conduct on the part of non-Diamond Cove residents and the Association. *See* Pl.'s Compl. at 26-27.

liability . . . including any monetary loss” and, therefore, is not a defense to claims for injunctive or declaratory relief. See 14 M.R.S. § 158-A; and *Andrews v. Dept. of Env'tl. Prot.*, 1998 ME 198 ¶ 19, 16 A.2d 212, 219 (explaining that individual defendants may not claim qualified immunity under 42 U.S.C. § 1983 as a defense to claims for declaratory and injunctive relief); and *Lugo v. Alvarado*, 819 F.2d 5, 7 (1st Cir. 1987) (stating that “a defense of qualified immunity is totally immaterial” to a claim for injunctive relief).

Whether the individual Defendants are entitled to dismissal of Count I thus depends upon whether Plaintiff asserts a substantive claim upon which relief can be granted. After a review of Plaintiff's Complaint, the Court is convinced that Count I sufficiently states a claim against the individual Defendants for declaratory and/or injunctive relief. Although Plaintiff's claims focus primarily on the meaning of the Association's Bylaws, the Declaration, and various other documents alleged to govern the use of Diamond Cove and the barge area, Plaintiff also seeks to address certain conduct of the individual Defendants, including the extent to which that conduct is in violation of the governing documents. Based on these allegations, Plaintiff has sufficiently pled a claim for declaratory relief against the individual Defendants.

#### **IV. Count II: Breach of Fiduciary Duty**

In Count II, Plaintiff alleges that the individual Defendants breached a fiduciary duty to Plaintiff. Unlike Count I, in which Plaintiff requests declaratory relief, in Count II, Plaintiff seeks monetary damages. Consequently, the immunity afforded by 14 M.R.S. § 158-A(2)(B) is potentially applicable. While Plaintiff's claim in Count II arguably falls within the scope of Section 158-A(2)(B), the Court concludes that the alleged acts or omissions are sufficiently personal to the individual Defendants to avoid application of that statute at this stage of the proceedings.

In Count II, Plaintiff alleges that the Board and the individual Defendants “owed [Plaintiff] a fiduciary duty to protect, preserve and defend the open space recreational areas, [Plaintiff]'s interests and to follow the requirements of the Development Plan of Phase II.” According to Plaintiff, the

Defendants breached their duty to him by: (1) failing “to designate[] the barge landing area as an Open Space Recreational Area and to enforce the covenants against its use inconsistent with Open Space Recreational uses; (2) permitting the floating dock/pier [to fall] into disrepair” thereby causing traffic to “switch to the barge landing;” and (3) permitting pedestrian and motor vehicle traffic to travel back and forth between Diamond Cove and the southerly portion of the Island despite prohibitions against such traffic flow. These allegations suggest intentional conduct on behalf of and personal to the individual Defendants, which, if proven, would be outside the scope of the immunity afforded by Section 158-A.

The Court must next consider Defendants’ claim that Count II should nevertheless be dismissed because Plaintiff has failed to demonstrate that the individual Defendants owed him a fiduciary duty. In other words, the Court must determine whether in Count II Plaintiff has failed to state a claim for breach of fiduciary duty.

The Law Court has previously explained that a plaintiff wishing to withstand a motion to dismiss a claim for breach of fiduciary duty “must set forth specific facts constituting the alleged relationship with sufficient particularity to enable the court to determine whether, if true, such facts could give rise to a fiduciary relationship.” *Fortin v. The Roman Catholic Bishop of Portland*, 2005 ME 57, ¶ 26, 871 A.2d 1208, 1218. Moreover, “[t]he question of whether one party owes a fiduciary or other duty of due care to another is a question of law.” *Id.* ¶ 35, 871 A.2d at 1220 (citing *McPherson v. McPherson*, 1998 ME 141, ¶ 8, 712 A.2d 1043, 1045).

Plaintiff’s Complaint identifies the source of the duty allegedly owed to him by the individual Defendants only in the most perfunctory manner. In his Complaint, Plaintiff maintains that the duty allegedly owed to him arises out of the “condo act and Declaration.” Defendants, for their part, suggest that Plaintiff’s claim is governed by 13-B M.R.S. § 717(1), which codifies the fiduciary duties owed by directors of nonprofit organizations. *See, Seacoast Hangar Condo. II Ass’n v. Martel*, 2001 ME 112, ¶ 19, 775 A.2d 1166, 1171 (citing 13-B M.R.S.A. § 716 (1981)).

Section 717(1) provides that:

A director (of a nonprofit organization) shall discharge the director's duties: A. In good faith; B. With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and C. In a manner the director reasonably believes to be in the best interests of the corporation.

*Id.* On its face, the language of Section 717 does not appear to impose a fiduciary duty upon directors of nonprofit organizations that extends to members of the organization. Instead, section 717 appears to limit the directors' duty to the organization itself. This interpretation is particularly persuasive given that the Legislature has expressly provided that the duties owed by *officers* of nonprofit organizations flow to the members of the organization as well as to the organization itself.<sup>2</sup> The fact that the Legislature distinguished between the duties owed by directors and the duties owed by officers supports Defendants' argument that a director of a nonprofit organizations does not owe a fiduciary duty to individual members of the organization. Section 717 does not, therefore, impose upon the individual Defendants a fiduciary obligation to Plaintiff.

Nevertheless, as pled, Count II, does not rely on Section 717, nor must the basis for Plaintiff's claim be limited to Section 717. Instead, Plaintiff alleges that the Declaration and the Condominium Act give rise to a fiduciary duty. While Plaintiff does not further specify which provision in the Condominium Act imposes the duty upon which he relies, 33 M.R.S. § 1601-113 imposes an "obligation of good faith" in the performance of every duty or contract governed by the Maine Condominium Act. Further, under the Act members of a Declarant-appointed association may be said to owe fiduciary

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<sup>2</sup> 13-B M.R.S. § 720 provides, in relevant part:

General standards for officers.

1. DISCRETIONARY AUTHORITY. An officer of a corporation with discretionary authority shall discharge that officer's duties under that authority: A. In good faith; B. With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and C. In a manner the officer reasonably believes to be in the best interests of the corporation and *its members*.

13-B M.R.S. § 720(1) (emphasis added).

duties to members of the association.<sup>3</sup> Although the Court recognizes that there are limits to the duties articulated in Section 1603-103(a), the Court cannot conclude at this stage of the proceedings, when viewing the allegations in the light most favorable to the Plaintiff, that Plaintiff has failed to state a claim upon which relief may be granted.

#### V. Count III: Trespass to Land

Under Maine law, “[a] person is liable for common law trespass ‘irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally enters land in the possession of the other, or causes a thing or a third person to do so.’” *Medeika v. Watts*, 2008 ME 163, ¶ 5 957 A.2d 980, 982 (quoting RESTATEMENT (SECOND) OF TORTS § 158(a) (1965)). In this case, Plaintiff does not allege that the individual Defendants personally entered his land. Rather, Plaintiff contends that the Defendants “allowed the continued use of the barge landing, increased the scope and nature of its use,” and “willfully permitted the use of the barge landing for inter-island traffic . . . and use for large construction vehicles.”<sup>4</sup> Plaintiff further asserts that “[c]ontinued use of the barge landing is an unauthorized entry onto Fitch’s protected property interest and constitutes trespass.”

While a plaintiff can recover against one who merely authorizes a trespass but does not himself make entry onto the plaintiff’s land, that general principle does not take into account the immunity afforded by 14 M.R.S. § 158-A. In addressing the immunity issue, Plaintiff maintains that Count III is personal to each of the individual Defendants such that Section 158-A(2) does not apply. The Court disagrees. A review of Plaintiff’s Complaint reveals that Count III arises out of conduct undertaken by the individual Defendants in connection with their Board membership.<sup>5</sup>

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<sup>3</sup> See 33 M.R.S. § 1603-103(a); and *Blanchard v. PHP Props., Inc.*, 2005 Me. Super. LEXIS 17 (Brennan, J.) (explaining that, under Section 1603-103(a) “the declarant and its appointees to the association are held ‘to a higher standard of care than unit-owner elected directors.’”) (quoting 8 RICHARD POWELL, POWELL ON REAL PROPERTY § 54A.04 (2000)).

<sup>4</sup> Plaintiff also alleges that 14 M.R.S. § 7552 “provides additional statutory damages for the injuries to [Plaintiff’s] property[.]” 14 M.R.S. § 7552 is Maine’s so-called “timber trespass” statute and prohibits the removal, destruction or disturbance of forest and agricultural products owned by another as well as the removal, disturbance or destruction of boundary markers on public or private land. *See id.*

<sup>5</sup> See e.g. Pl.’s Compl. at ¶ 71D (“As recently as July 2008 the *Board* had invited the City of Portland and its commercial associates to examine the barge landing . . . The *Board* told the City of Portland representatives that they could use the barge



Plaintiff also cites the Law Court's holding in *Picher v. The Roman Catholic Bishop of Portland*, 2009 ME 67, 974 A.2d 286, in an effort to avoid dismissal. In particular, Plaintiff contends that *Picher* removes all intentional torts from the protection afforded by Section 158-A. Simply stated, Plaintiff's argument fails. First, the Law Court's opinion in *Picher* involved the application of and interpretation of 14 M.R.S. § 158, not Section 158-A. In addition, although the Law Court concluded that the charitable immunity recognized by Section 158 did not extend to intentional torts, the Court's holding was based upon its conclusion that Section 158 was ambiguous. *See id.* 2009 ME 67, ¶ 25, 974 A.2d at 294. The Law Court wrote that "Section 158 does not clearly and unambiguously express legislative intent to expand the scope of the common law doctrine of charitable immunity" to intentional torts.<sup>6</sup> In light of the ambiguity of the statute, the Law Court then examined the legislative history in order to determine the Legislature's intent in drafting Section 158, and concluded that "Section 158 is . . . properly interpreted solely as a limitation on charitable immunity, not an expansion of it." *Id.*

In this case, Defendants have invoked the protection of Section 158-A, not Section 158. Unlike the statute at issue in *Picher*, the language of Section 158-A clearly and unambiguously extends the immunity afforded to nonprofit organizations to torts other than those sounding in negligence. *See* 14 M.R.S. § 158-A(2). In light of the Legislature's clear and unambiguous intent to extend immunity to intentional torts otherwise falling within the scope of Section 158-A, the Court concludes that *Picher* is not applicable to this case and Section 158-A does in fact render the individual Defendants immune from liability under Plaintiff's Count III.

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landing as much as they wanted"); and ¶ 75 ("The Diamond Cove Board has approve[d] a "Diamond Cove Traffic Management Plan" . . . permitt[ing] the use of the landing for non-Diamond Cove construction projects . . ."). Although Plaintiff alleges that the Board and the *individual Defendants* have "indicated a willingness to permit continued" or expanded use of the barge, etc. a willingness to permit does not constitute an actual entry, or permission actually given.

<sup>6</sup> Section 158 provides: "A charitable organization shall be considered to have waived its immunity from liability for negligence or any other tort during the period a policy of insurance is effective . . ." 14 M.R.S. § 158.

## **VI. Count IV: Nuisance**

In Count IV, Plaintiff alleges that Defendants' failure to enforce certain limitations on the use of the barge landing area and failure to restrict traffic in the Diamond Cove area created a nuisance resulting in harm to him. Under Maine law,

a landowner is liable for a nuisance created by the activity of a third party on the land if (1) the possessor knows or has reason to know that the activity is being carried on and that it is causing or will involve an unreasonable risk of causing the nuisance, and (2) the possessor consents to the activity or fails to exercise reasonable care to prevent the nuisance.

*Eaton v. Cormier*, 2000 ME 65, ¶ 7, 748 A.2d 1006, 1008 (citations omitted). *See also* RESTATEMENT (SECOND) OF TORTS § 838 (1979).

As with Count III, Plaintiff's nuisance claim is based solely upon conduct central to the individual Defendants' Board activities. This is particularly true insofar as a necessary element for a nuisance claim premised on the conduct of a third-party is that the defendant be a "landowner" or "possessor" of the property. In this case, the only source of the individual Defendants' ownership or status as a "possessor" is in their role on the Board. Accordingly, Plaintiff has failed to allege a nuisance claim that is sufficiently personal to the individual Defendants to avoid application of the immunity afforded by 14 M.R.S. § 158-A(2)(B).

### Conclusion

Based on the foregoing analysis, the Court orders:

1. To the extent that Plaintiff's Complaint seeks to recover for the alleged negligence of the individual Defendants, the Court grants Defendants' motion to dismiss. The Court, therefore, dismisses Plaintiff's claims asserting negligence against the individual Defendants.
2. The Court grants the individual Defendants' motion to dismiss Count III of the Complaint. The Court, therefore, dismisses Count III of the Complaint against the individual Defendants.
3. The Court grants the individual Defendants' motion to dismiss Count IV of the Complaint. The Court, therefore, dismisses Count IV of the Complaint against the individual Defendants.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Order into the docket by reference.

Date: 11/16/09

  
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