

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER COURT
DOCKET NO. BCD-RE-19-09

KINDERHAUS NORTH LLC,
PRIME PROPERTIES ME LLC,
KAREN and BRIAN FULLERTON,

Plaintiffs/
Counterclaim Defendants,

v.

KARL and STEPHANIE R. NICOLAS,

Defendants/
Counterclaim Plaintiffs.

KINDERHAUS NORTH LLC,
PRIME PROPERTIES ME LLC,
KAREN and BRIAN FULLERTON,

Third-Party Plaintiffs,

v.

H. ALLEN RYAN and DIANNE E.
RYAN,

Third-Party Defendants.

ORDER ON PLAINTIFFS’
MOTIONS IN LIMINE
REGARDING BURDENS OF
PROOF and ORDER OF
PRESENTATION

In advance of the Bench trial, Plaintiffs/Counterclaim Defendants (“Plaintiffs”) have filed a Motion in Limine to Establish Burdens of Proof at Trial, and a Motion in Limine to Establish Order of Presentation for Trial. The Motions are interrelated. In essence, Plaintiffs argue that as a matter of law they have already satisfied their initial burden of proof on the three remaining counts of their Complaint; that as a matter of law the burden of proof on Plaintiffs’ counts shifts to Defendants/Counterclaim Plaintiffs (“Defendants”); and therefore Defendants should put on

their entire case first. The Court RESERVES on the substantive burdens of proof argument, and DENIES Plaintiffs' motion to require Defendants to put on their case first.

Before discussing the burdens of proof argument, the Court notes that it is proceeding narrowly and deciding as little as necessary at this stage of the proceeding, so as not to prematurely coop arguments that might better be made in post-trial briefs. The case has already been the subject of extensive prior motion practice, and the Court is reluctant to now decide the burdens of proof argument purely as a matter of law, without factual context. The primary purpose of deciding a Motion in Limine in advance of trial is to give counsel guidance on whether and how evidence may come in at trial. Where, as here, the case will be decided by a Bench trial, the goal is usually to ensure that all the evidence potentially necessary to decide the case is admitted. Counsel can then use the evidence to make their arguments in post-trial briefs. With that in mind, the Court responds to the issues presented in the Motions in Limine as follows:

Plaintiffs have three counts remaining for trial. Counts II and VII seek a declaratory judgment regarding whether installation of gravel and paving are within the scope of the respective easements in dispute. In support of their argument that Defendants bear the burden of proof on these counts, Plaintiffs rely on *Stanton v. Strong*, 2012 ME 48, 40 A.3d 1013, and *Mill Pond Condo. Ass'n v. Manalio*, 2006 ME 135, 910 A.2d 392. However, these cases appear to be inapposite, since they have more to do with access than disturbing the soil. The more applicable case appears to be *Davis v. Bruk*, 411 A.2d 660 (Me. 1980), in which the owner of the dominant estate has the burden of proof. But even if *Stanton* and *Mill Pond* are the controlling cases, the Court perceives no burden shifting in those cases. To the contrary, the *Stanton* Court found the plaintiff met his burden of proof, which seems to suggest the plaintiff retained the burden of proof.

Plaintiffs' Court VIII seeks injunctive relief like that sought in *Stanton*, and for the same reasons Plaintiffs retain the burden of proof.

The Court points out that it is not at this juncture deciding the substantive content of Plaintiff's burden of proof. It may be that Plaintiffs' burden of proof is minimal, and as discussed above the Court is reserving on the substantive component of the burden of proof argument. The parties can make their arguments in their post-trial briefs. Proceeding in a narrow fashion, and based on the cases brought to the Court's attention, the Court is merely determining that the burden of proof does not appear as a matter of law to immediately shift to Defendants, such that Defendants should be required to put on their case first.

Defendants retain the burden of proof on their three counterclaims, and Plaintiffs bear the burden of proof as to any affirmative defenses to those counterclaims.

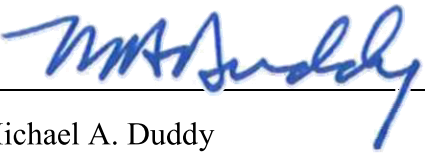
Admittedly, the burdens of proof have significant overlap, given the similarity of the claims. The key at trial will be to ensure Plaintiffs and Defendants have every opportunity to admit into evidence the facts they each need to argue that their respective burdens of proof are satisfied. Given the discussion set forth above, Plaintiffs will put on their case first (however minimal they may believe it is), followed by Defendants' case. Thereafter, Plaintiffs will have an opportunity to put on any evidence they believe is necessary to respond to Defendants' case, and any evidence that may be necessary to complete the burden of proof on their own case. Defendants will then have the same opportunity. The Court will thereafter permit any party to put on rebuttal evidence. In this fashion, all parties will have ample opportunity to create the evidentiary record they believe is necessary to support their cases and defenses.

Accordingly, the Court RESERVES on the substantive component of Plaintiffs' Motion in Limine to Establish Burdens of Proof at Trial, and DENIES Plaintiffs' Motion in Limine to Establish Order of Presentation for trial.

So Ordered.

Pursuant to M.R. Civ. P. 79(a), the Clerk is instructed to incorporate this Order by reference on the docket for this case.

Dated: March 10, 20



Michael A. Duddy
Judge, Business and Consumer Docket