

STATE OF MAINE
CUMBERLAND, ss

BUSINESS AND CONSUMER COURT
BCD-RE-19-14

RANDY SLAGER,

Plaintiff

v.

**COMBINED ORDER ON PLAINTIFF’S MOTION
TO COMPEL INSPECTION AND DEFENDANTS’
MOTION TO STAY**

LORI L. BELL and
JOHN SCANNELL,

Defendants

Before the Court are two motions: Plaintiff’s Motion to Compel Inspection dated May 6, 2020 and Defendants’ Motion to Stay dated May 8, 2020. The parties have adjoining residences on Ocean Avenue Kennebunkport and are involved in litigation before the Town, the York County Superior Court, and this Court. The Court recently conferred telephonically with counsel to discuss the status of the municipal appeals and information it had mistakenly received that the Superior Court matter had been “stayed.” In fact, the Court was simply awaiting this Court’s decision on the Plaintiff’s Application to transfer the Superior Court Rule 80B case to this Court. That application had been objected to by the Town who is not a party in the above-captioned matter, and the Court rejected that application.

Plaintiffs seek an Order under Rules 7, 26, 34, and 37 of the Maine Rules of Civil Procedure to enter upon Defendants’ property so that his agents and/or contractors can inspect the construction of retaining walls to see if they were built to code and to generally accepted

engineering standards in pursuit of the claims for Nuisance and Trespass still pending in this Court. Defendants seek an Order staying those claims and assert that the alleged violations of the Town's land use ordinance and/or permits – which Plaintiff claims are pertinent to their Nuisance claim - present essentially the same allegations made to the Town in administrative proceedings.

The Plaintiff is represented by Attorneys Alan R. Atkins, Fulton Rice and David Lourie. Defendants are represented by Attorney Daniel L. Rosenthal. The Court has reviewed the parties' motions and for reasons stated grants the motion to stay in part, and denies the motion for entry and inspection without prejudice.

Motion to Stay

The Defendants assert that the doctrine of primary jurisdiction and exhaustion of administrative remedies require that the case before this Court be stayed until Plaintiff's appeals of a number of municipal decisions are resolved. Plaintiff asserts that under federal law "extreme circumstances" must be present before this Court should do anything to further delay this matter. In addition, Plaintiff emphasizes that the case before this Court are claims for nuisance and trespass, although the alleged violations of the Town Ordinance and safety standards have been offered by Plaintiff as evidence in this matter that the Defendants' retaining walls present dangers that amount to nuisance. The Court agrees that there is significant overlap in the allegations made by Plaintiff in this matter and in the municipal proceedings. The Court would further note that administrative proceedings are still ongoing, and that only one appeal has made its way to Superior Court as of the date of this Order.

The Court concludes after review of the history of this litigation in this Court, in the York Superior Court, and as the Court currently understands the proceedings still underway before the Town of Kennebunkport, that a stay of the Nuisance and Trespass claims that remain pending in this Court should be granted. The Court agrees that the overlap between at least the nuisance claim and the safety and code violations alleged before the Town is so significant as to be almost complete. The Court's only hesitation in granting a stay is that the Business and Consumer Court has as one of its goals the prompt resolution of cases. However, that concern is outweighed here by the overlap in factual and legal allegations, and the likelihood that the Plaintiff could obtain much if not all of the relief he seeks should he prevail in the administrative proceedings before the Town and the York County Superior Court. And importantly, the Town of Kennebunkport has significant interests in the administrative and Superior Court proceedings, and its role in this contentious dispute cannot fairly be addressed here as this case is currently configured. While Plaintiff suggested that he might consider bringing the Town into this case, the Court expects that would be vigorously opposed by the Town and the Defendants, and could result in further delays and unnecessary expenditure of judicial and litigation resources.

The Court will not, however, grant an open-ended stay as Defendants request. Instead, the Court will stay this matter until September 11, 2020. On or before that date, the parties shall file with the Court a letter updating the Court on the status of any matter that remains pending before the Town of Kennebunkport, or before the York County Superior Court. The Court will then consider whether to extend the stay or to issue an amended Scheduling Order permitting this matter to move forward.

Motion to Compel Inspection

In this Motion, Plaintiff asks the Court to permit his agents and contractors to enter upon Defendants' property and inspect construction done pursuant to certain permits issued by the Town. In support of this request, Plaintiff relies upon the recommendation of his structural engineering expert, David Price, who indicates a willingness and ability to determine if the construction was done in accordance with engineering standards and Town ordinances. Plaintiff claims that the construction poses a real threat to the safety of the Plaintiff and the general public. The safety issue is portrayed, in part, as whether the retaining walls in question bear on ledge. If it does not, according to Mr. Price, it is subject to "stability failure." [Plaintiff's Motion, pg. 2]. While Plaintiff states that any such inspection would be done at Plaintiff's cost and that the Plaintiff would "restore Defendants' property to the same condition it was prior to the inspections" Defendants characterize the proposal as Plaintiff planning to "roll a backhoe onto Defendants' land and tear apart expensive retaining walls..." [Defendants' Opposition, pg. 1]. Perhaps in recognition of this argument, Plaintiff's Reply scales back the inspection request "in order to minimize the burden of the inspection on Defendants and focus on those portions of Defendant's construction which most impact Plaintiff's property." [Plaintiff's Reply, pg. 1] However, Plaintiff still asks for "excavation underneath and around the base of Wall A11" and "testing and inspection of Wall A11 at critical points" to ascertain the structural design of all the materials used to construct and support it." *Id.* pg. 2.

The Court is also aware that the Town of Kennebunkport has inspected this same construction to determine if it complies with ordinances and/or presents safety issues. It also

seems apparent that the adequacy of the Town's efforts is the subject of contention and litigation before the Town and perhaps the York Superior Court.

The Court concludes that the Plaintiff has failed to explain how "excavation" (to use his term) is required for the kind of "inspection and measuring, surveying, photographing, testing, or sampling" that is envisioned under Rule 34 for entry upon another person's property. In addition, the Plaintiff seems to concede that this excavation, as well as the testing and inspection of the wall "at critical points" could in fact damage the wall - otherwise the Plaintiff would not likely propose that he pay to "repair" any such damage. More fundamentally, the Plaintiff has failed to convince the Court that there is any immediate or urgent need to for the Court to order such a significant intrusion upon his neighbor's property at this time. It would seem more prudent to take this issue up again when the parties confer with the Court in mid-September, if the Plaintiff wishes to pursue it at that time. By then the administrative process will be much further along, and hopefully the validity of the Town's own inspections of the same property would have been validated, or not, by the York Superior Court.

The entry will be: Defendants' Motion to Stay is granted in part. Plaintiff's Motion to Compel Inspection is denied without prejudice. This Order may noted on the docket by reference pursuant to Rule 79(a) of the Maine Rules of Civil Procedure.

July 9, 2020 _____
DATE

_____/S_____
M. Michaela Murphy
SUPERIOR COURT JUSTICE