

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS & CONSUMER DOCKET
DOCKET NO. BCD-REA-2021-04

DEBRA MORGAN, et al.,)
)
)
 Plaintiffs and)
 Counterclaim Defendants,)
)
 v.)
)
 ERIK SCOTT TOWNSEND,)
)
)
 Defendant and)
 Counterclaim Plaintiff.)

**ORDER DENYING DEFENDANT'S
MOTION FOR LEAVE TO AMEND
PLEADING**

INTRODUCTION

Before the Court is Defendant Erik Scott Townsend’s August 16, 2021 Motion to for Leave to Amend his answer, counterclaim, and third-party complaint. The Court heard oral arguments on October 12, 2021 in which both parties appeared through counsel. For the reasons discussed below, the Court denies the Motion for Leave to Amend.

PROCEDURAL HISTORY

Plaintiffs Debra Morgan, et al. (“Plaintiffs”) brought a Declaratory Judgment action against Townsend on June 19, 2020, amended on July 29, 2020, for breach of certain restrictive covenants pertaining to his property. Townsend counterclaimed against Plaintiffs, seeking a determination that the deed restrictions equally apply to their properties, and on March 30, 2021 filed a Third-Party Complaint against ten other owners of property subject to the restrictive covenants. On July 1 and July 15, 2021, several of the Third-Party Defendants moved in two separate motions to dismiss the complaint against them for lack of a justiciable controversy, for being improper third-party defendants under M.R. Civ. P. 14, and for not being subject to joinder under M.R. Civ. P. 19. On July 23, 2021, Plaintiffs filed a Second Amended Complaint which included a prayer for a

permanent injunction enjoining Townsend from using buildings on his property in ways which violate the restrictive covenants. The Court granted the Motions to Dismiss the Third-Party Defendants on August 23, 2021.

In response to the Second Amended Complaint, Townsend now moves to amend his answer, counterclaim, and third-party complaint “to explicitly add an affirmative claim that he has prescriptive rights against all parties to keep and maintain both the Main House and the Guest Cottage on his property.” According to Townsend, adding the new affirmative claim would necessitate drawing the dismissed Third-Party Defendants back into the dispute. Plaintiffs and the erstwhile Third-Party Defendants oppose the motion. For the reasons discussed below, the Court denies the Motion.

ANALYSIS

Motions to amend under Rule 15 are “committed to the sound discretion of the trial court.” *Bangor Motor Co. v. Chapman*, 452 A.2d 389, 392 (Me. 1982). Leave to amend “shall be freely given when justice so requires.” M.R. Civ. P. 15(a). “Ordinarily, a trial court should rule on a motion for leave to amend before acting on another motion, such as a motion to dismiss, that could be dispositive of the original complaint.” *Paul v. Town of Liberty*, 2016 ME 173, ¶ 7, 151 A.3d 924. The purpose of Rule 15 is to achieve the goal of Rule 1, which is the “just, speedy and inexpensive determination of every action.” *Chapman*, 452 A.2d at 392. Consequently, “[a] motion to amend may be denied based on one or more of the following grounds: undue delay, bad faith, undue prejudice, or futility of amendment.” *Montgomery v. Eaton Peabody, LLP*, 2016 ME 44, ¶ 13, 135 A.3d 106. Likewise, when “a proposed amended [pleading] would be subject to a motion to dismiss, the court is well within its discretion in denying leave to amend.” *Glynn v. City of South Portland*, 640 A.2d 1065, 1067 (Me. 1994).

Townsend's proposed new affirmative claim posits that he has a prescriptive right to violate the restrictive covenant because he has effectively extinguished the restrictive covenant. Without any express foundation in state law, Townsend crafts the following chain of logic for the Court to follow: (i) an affirmative easement can be prescriptively terminated by adverse possession, *Dupuis v. Ellingwood*, 2017 ME 69, ¶ 9, 770 A.2d 591; (ii) negative easements and restrictive covenants are effectively indistinguishable, Restatement (Third) of Property: Servitudes § 1.2 (Am. Law Inst. 2000); (iii) a restrictive covenant in a deed may thus also be prescriptively terminated, *DeJean v. Grosz*, 645 F. App'x 754, 759 (10th Cir. 2016). *See also Cates v. Smith*, 636 A.2d 986, 988 (Me. 1994) (outlining elements of adverse possession). Setting aside the unfounded jump in logic equating affirmative and negative easements, this novel argument does not find support in Maine law, which has outlined only narrow situations in which restrictive covenants may be extinguished. *See, e.g., Day v. McEwen*, 385 A.2d 790, 793 (Me. 1978) (unreasonableness in scope and duration and lack of clarity in definition); *Midcoast Cohousing Land Acquisition, LLC v. Riverhouse Tr.*, 2008 ME 70, ¶ 8, 946 A.2d 421 (imposition of covenant by stranger to deed); *Bates Mfg. Co. v. Franklin Co.*, 218 A.2d 366, 368 (Me. 1966) (radical and permanent change in character of vicinity of restricted land resulting in unjustness of enforcement). Though ambiguities in deed restrictions will be resolved in favor of unrestricted use, clearly expressed restrictions, such as those pertinent to the instant case, will be enforced. *Naiman v. Bilodeau*, 225 A.2d 758, 759 (Me. 1967). Moreover, extending the law to recognize extinguishment of restrictive covenants by prescription would critically weaken the concept of such covenants, upon which bona fide purchasers frequently rely.

Even were the proposed claim to prescriptive termination available, it would still fail as futile in the instant case. Plaintiffs clarified in oral arguments that they are not seeking the

demolition or removal of any structure on Townsend's property—merely a permanent injunction enforcing the restrictive covenants as to the use of those structures. The alleged use of the structures for short-term rentals, in violation of the restrictive covenant, only began in 2019—far too recent for prescriptive rights to attach under any theory. Plaintiffs do not challenge Townsend's right to possess and use the two buildings on his property, provided such use complies with the restrictive covenants. Thus, Townsend's proposed claim for prescriptive termination is unnecessary and unavailing on the facts.

The Court is conscious of the generous standard for allowing motions to amend when justice so requires. *See* M.R. Civ. P. 15(a). Here, however, justice does not so require. First, Townsend's claims based on a theory of prescriptive rights are futile because they would be subject to a motion to dismiss. Second, it would be manifestly unjust to lasso the Third-Party Defendants back into the suit mere months after they had been released, particularly where the only claim against them is futile. Third, Townsend's claims and defenses relating to the removal of structures are moot because no party is seeking such removal.

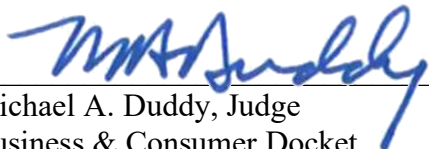
CONCLUSION

Based on the foregoing, Townsend's Motion is Denied.

SO ORDERED.

Pursuant to M.R. Civ. P. 79(a), the clerk is hereby requested to incorporate this order by reference on the docket.

Date: **10/27/2021**



Michael A. Duddy, Judge
Business & Consumer Docket

Entered on the docket: 10/27/2021