

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

HOULTON BAND OF MALISEET INDIANS,  
et al.,

Plaintiffs

v.

Civil No. 99-202-B-S

TOWN OF HOULTON,

Defendant

GENE CARTER, District Judge

**MEMORANDUM OF DECISION AND ORDER**

This action against Defendant, the Town of Houlton (“the Town”), began when Plaintiffs, the Houlton Band of Maliseet Indians (“the Band”) and the Houlton Band of Maliseet Indians Tribal Housing Authority (“the Authority”), filed a Complaint in this Court on September 1, 1999, seeking declaratory and injunctive relief. *See* Complaint (Docket No. 1). The dispute between Plaintiffs and Defendant pertains to existing and proposed units of low income housing located on a parcel of land known as the Longstaff parcel. In Count I, both Plaintiffs sought a declaration from the Court that they had properly calculated payments in lieu of taxes (PILOTs) owed to the Town for the years 1992 to 1998, that the method they used and continue to use to calculate their PILOTs is proper, and that improvements to the Longstaff parcel in the form of low income housing units are exempt from taxation and are to be excluded from the assessed value determination of the Band’s land. Count II, brought solely by the Housing Authority, alleges that the Town has violated provisions of the Fair Housing Act, 42 U.S.C. §§ 3604 and 3617, by

refusing to enter into a cooperation agreement that the Authority needs in order to receive federal funding for the construction of thirty-five units of low income housing. The Town subsequently filed a counterclaim for \$ 388,261.70 against the Band, alleging that this figure represented the amount of past due PILOTs.

On August 22, 2000, the Court issued a Memorandum of Decision and Order (Docket No. 16) pertaining to the parties' cross-motions for summary judgment. In that order, the Court granted partial summary judgment in favor of the Band with regard to Count I and dismissed, without prejudice, the Town's counterclaim.<sup>1</sup> The case was subsequently placed on Judge Singal's December 11, 2000 nonjury trial list. *See* Report of Final Pretrial Conference and Order (Docket No. 21) ¶ 5. At the pretrial conference, the Town indicated that it anticipated filing a motion for reconsideration of the Court's August 22, 2000, Memorandum of Decision and Order; it was given until November 1, 2000, to do so. *See id.* ¶ 3. It subsequently filed two unopposed motions to extend the deadline for submission of its briefs (Docket Nos. 22, 23), and the Court granted both of these motions. On November 13, 2000, the Town filed a Motion to Clarify or Withdraw the Court's August 22, 2000 Order and Incorporated Memorandum of Law in Support ("Motion to Clarify or Withdraw") (Docket No. 24) and a Motion to Amend to Assert Counterclaim and/or to Clarify the Court's Dismissal, Without Prejudice, of Defendant's Counterclaim and Incorporated Memorandum of Law in Support ("Motion to Amend or Clarify") (Docket No. 25).<sup>2</sup> For the reasons that follow, the Court will deny both motions.

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<sup>1</sup> As explained in the Court's August 22, 2000, Memorandum of Decision and Order, the amount of the Town's counterclaim increased to \$458,471.31 by the date on which the Town filed its Motion for Summary Judgment. *See* August 22, 2000, Memorandum of Decision and Order at 2 n.2.

<sup>2</sup> Although this case has been assigned to Judge Singal, I issued the Memorandum of Decision and Order to which the cross motions pertain and will, therefore, resolve these motions.

## DISCUSSION

Defendant's Motion to Clarify or Withdraw and Motion to Amend or Clarify contain overlapping and contingent arguments; the Court will therefore consider these motions in tandem. In the two motions, Defendant essentially requests the Court to take three actions: withdraw its August 22, 2000, Memorandum of Decision and Order; grant Defendant leave to amend its counterclaim in the event that the Court does withdraw its order; and, in the event that the Court does not withdraw its order, clarify the order by explaining what issues remain open to subsequent litigation. The Court will consider each of these requests in turn.

### **A. Defendant's Motion to Withdraw the August 22, 2000, Memorandum of Decision and Order**

Defendant makes several arguments in support of its motion that the Court withdraw its August 22, 2000, Memorandum of Decision and Order. First, Defendant asserts that, subsequent to the Court's resolution of the parties' cross-motions for summary judgment, a United States Department of Housing and Urban Development ("HUD") official, Mr. Mohammed Rahmah, testified at his deposition that the Band represented to HUD that it had an agreement with the Town regarding the payment of PILOTs on any building to be constructed on the Longstaff parcel. Defendant maintains that this evidence supports the contractual argument rejected by the Court in its August 22, 2000, Memorandum of Decision and Order, will be introduced at trial as part of Defendant's defense to the Housing Authority's Fair Housing Act claim, and may result in a factual finding and legal conclusion that contradict the factual and legal bases on which the Court resolved the Band's motion for summary judgment. Defendant asserts that, in light of these possibilities, the interests of justice will be served by the Court's withdrawal of its order. Defendant also argues that the Court should withdraw its August 22, 2000, Memorandum of Decision and Order because

the Band is a beneficial owner of the housing units; because the Court's order did not address the Town's argument that the Band has a statutory obligation to pay PILOTs on the housing units; and because Plaintiffs failed to assert in their original pleadings two of the grounds on which the Court based its decision, waiver and the statute of frauds.

Plaintiffs respond that Defendant's motion is in fact a motion for reconsideration and urge the Court to evaluate it in light of the factors identified by this Court and the Court of Appeals for the First Circuit as relevant to motions for reconsideration.<sup>3</sup> In its discussion of these factors, Plaintiffs highlight the following: Defendant never filed an opposition statement of material facts pursuant to Local Rule 56(e) and never filed a reply to Plaintiffs' Opposition to Defendant's Motion for Summary Judgment and Incorporated Memorandum of Law ("Plaintiff's Opposition Motion for Summary Judgment") (Docket No. 15); Defendant filed its Motion to Withdraw or Clarify and its Motion to Clarify or Amend thirty-four weeks after the due date for its opposition motion, twelve weeks after the issuance of the Court's order, and four weeks before the expected trial date; although Defendant invokes new evidence in support of its motion, Defendant never conducted any discovery prior to summary judgment, could have discovered this evidence before the Court's resolution of the summary judgment motions, and indicated that it anticipated filing a motion for reconsideration even before it learned of this evidence; and the Court's granting of

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<sup>3</sup> Plaintiffs cite the following seven factors as relevant to such motions:

- (1) the nature of the case, (2) the degree of tardiness, (3) the reasons underlying the tardiness, (4) the character of the omission, (5) the existence *vel non* of cognizable prejudice to the nonmovant of the omission, (6) the effect of granting (or denying) the motion on the administration of justice, and (7) whether the belated filing would, in any event, be more than an empty exercise.

Plaintiffs' Opposition to the Motion to Clarify or Withdraw the Court's August 22, 2000 Order and Incorporated Memorandum of Law (Docket No. 29) (quoting *Rolec, Inc. v. Zevetchin*, 155 F.R.D. 5, 7 (D. Me. 1994); *United States v. Roberts*, 978 F.2d 17, 21-22 (1<sup>st</sup> Cir. 1992)). Defendants maintain that the First Circuit has described these factors as "merely illustrative," but does not oppose evaluating their motion to withdraw in light of these factors. Defendant's Reply Memorandum in Support of Its Motion to Clarify or Withdraw the Court's August 22, 2000 Order (Docket No. 31) at 1 (quoting *Roberts*, 978 F.2d at 21-22).

Defendant's motion to withdraw would effectively bring the Band back into the litigation, which would harm both the Band and the Housing Authority.

With regard to Defendant's substantive arguments for reconsideration, Plaintiffs contend that Defendant has mischaracterized Mr. Rahmah's testimony, that Defendant cannot now raise a beneficial ownership argument because it failed to do so in its summary judgment motion, and that the Court presumably considered and rejected Defendant's statutory argument. Plaintiffs also contend that, although they did not plead waiver or statute of frauds in their Complaint or Answer to Defendant's Counterclaim, they have fulfilled the notice policy behind Rule 8(c)'s affirmative defense pleading requirement for both of these defenses. Plaintiffs maintain that the Court's reasoning with regard to the waiver defense rested on the decision in *Houlton Band of Maliseet Indians v. Town of Houlton*, 950 F. Supp. 408 (D. Me. 1996) ("*Houlton I*"), and that their reference to *Houlton I* in Count I of their Complaint effectively put the Defendants on notice of *Houlton I*'s applicability to the instant case. Plaintiffs also maintain that they placed Defendant on notice of their statute of frauds defense through the pleading of their fourth affirmative defense, the fifth allegation in their Statement of Material Facts (Docket No. 9) in support of their summary judgment motion, and their explicit invocation of the defense in their Opposition Motion for Summary Judgment. Plaintiffs argue that Defendant thus had, but declined, the opportunity to address these defenses.

None of Defendant's arguments persuade the Court to withdraw its August 22, 2000, Memorandum of Decision and Order. Defendant did not raise the beneficial ownership argument at the summary judgment phase of this case, and the Court will, therefore, not consider it in assessing the propriety of its order resolving the parties' summary judgment motions. *See United States ex. rel. S. Praver & Co. v. Verrill & Dana*, 962 F. Supp. 206, 208 n.2 (D. Me. 1997).

Defendant's argument that the Court did not address its statutory argument in the order is without merit. In its motion for summary judgment, Defendant raised this statutory argument, urging the Court to adopt its construction of 30 M.R.S.A. §§ 6208(2), 6203(3), and 36 M.R.S.A. § 551. *See* Opposition to Plaintiffs' Motion for Summary Judgment and Motion for Summary Judgment with Incorporated Memorandum (Docket No. 12) at 5-6. Plaintiffs responded that the Court should instead rely on 30-A M.R.S.A. § 4724(4), 42 U.S.C. § 1437d, and 25 U.S.C. § 4111 to conclude that the Housing Authority rather than the Band owes PILOTs on improvements. *See* Plaintiffs' Opposition Motion for Summary Judgment at 6. The Court's August 22, 2000, Memorandum of Decision and Order relied on 30-A M.R.S.A. § 4274(4) to conclude that "the Authority, not the Band, is responsible for making PILOTs on the improvements that it owns on the Longstaff parcel." August 22, 2000, Memorandum of Decision and Order at 7. Thus, the Court considered and implicitly rejected Defendant's statutory argument.

The new evidence that Defendant invokes in support of its motion to withdraw consists of a number of statements made by a HUD official indicating that, while applying for HUD funding, the Band represented to HUD that it had a cooperation agreement with the Town for the payment of PILOTs on the land and the improvements to the land. *See* Motion to Amend or Clarify at 4 (citing Rahmah Dep. at 36, 51, 68, 75). This HUD official also testified that he remembered reviewing a document sent by the Band to HUD with the representation that this document constituted a cooperation agreement between the Band and the Town. *See* Defendant's Reply Memorandum in Support of Its Motion to Clarify or Withdraw the Court's August 22, 2000, Memorandum of Decision and Order at 5 (citing Rahmah Dep. at 74-75). This testimony indicated that the official lacked a specific recollection of the contents of the agreement, but "vaguely remembered" "some language" regarding PILOTs and that he thought that "[t]here might have been some

language in there.”” *Id.* Although Defendant cites a number of state and federal cases indicating that the Court has broad discretion to withdraw interlocutory orders before the resolution of a case, the evidence submitted by Defendant neither compels nor inspires the Court to do so in this case. First, the Court’s review of the evidence leads it conclude that Mr. Rahmah’s testimony falls significantly short of undermining the Court’s determination as to the lack of evidence of the Band’s agreement to the conditions asserted by the Town. Mr. Rahmah’s testimony reveals only that the Band represented that it had some cooperation agreement with the town, not necessarily the agreement that the Town claims. Moreover, Mr. Rahmah has also testified to HUD’s subsequent determination that a cooperation agreement did not exist. *See* Motion to Amend or Clarify at 4 (citing Rahmah Dep. at 33, 53). Mr. Rahmah’s admittedly vague recollection of some language regarding PILOTs on improvements fails to convince the Court of the possibility of an error in its findings. Furthermore, Defendant failed to produce this evidence to the Court for consideration at summary judgment; in light of Defendant’s decision not to conduct any depositions in its development of its factual record for summary judgment, to follow Local Rule 56(c)’s procedure for responding to Plaintiffs’ statement of material facts, or to avail itself of Rule 56(f)’s allowance for continuance, the Court has no inclination to alter or invalidate the factual record upon which it based its August 22, 2000, Memorandum of Decision and Order. Nor is the Court concerned at this point in the proceedings about the possibility of contradictory conclusions; the trial judge remains free to reconsider the issues raised with regard to Mr. Rahmah’s testimony after hearing the evidence he deems admissible to the Authority’s Title VIII claim.

The Court now turns to Defendant’s argument that it should withdraw its August 22, 2000, Memorandum of Decision and Order because the Court improperly based its rejection of Defendant’s contractual argument on the grounds of waiver and the statute of frauds, affirmative

defenses that were not pleaded by Plaintiffs. Defendant invokes Rule 8(c) in support of its motion. As a preliminary matter, the Court notes that waiver and statute of frauds constitute only two of the four lines of reasoning on which the Court determined that the Band does not owe PILOTs on the improvements; the Court also concluded that the Band had not agreed to the condition that it pay PILOTs on improvements and that the Housing Authority had a statutory obligation to pay PILOTs on the units. Regardless, the Court concludes that Rule 8(c) does not require that it withdraw its reasoning with regard to waiver or the statute of frauds.

Rule 8(c) requires a party to “set forth affirmatively” a number of affirmative defenses, including waiver and the statute of frauds, “[i]n pleading to a preceding pleading.” FED. R. CIV. P. 8(c). Although failure to assert the affirmative defenses delineated in Rule 8(c) will generally result in a waiver of the defenses, “it is settled that ‘[w]hen there is no prejudice and when fairness dictates, the strictures of [the raise or waive] rule may be relaxed.’” *Conjugal Partnership v. Conjugal Partnership*, 22 F.3d 391, 400 (1<sup>st</sup> Cir. 1994) (citing *Jakobsen v. Massachusetts Port Authority*, 520 F.2d 810, 813 (1<sup>st</sup> Cir. 1975)). This case presents somewhat of a procedural anomaly of treating waiver and the statute of frauds as Rule 8(c) affirmative defenses. The waiver and statute of frauds defenses relate to Defendant’s assertion of the existence of a contract, an argument that itself was invoked as a defense to Plaintiffs’ claim for declaratory relief and was not clearly presented to the Court or Plaintiffs until Defendant filed its Opposition to Plaintiffs’ Motion for Summary Judgment and Motion for Summary Judgment with Incorporated Memorandum of Law.<sup>4</sup> Plaintiffs’ timely response to Defendant’s motion invoked the statute of frauds. *See* Plaintiffs’ Opposition Motion for Summary Judgment at 3-4. Defendant filed no reply to this argument. Although the defense of waiver did not appear in any of Plaintiffs’

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<sup>4</sup> The Defendant’s Counterclaim did not explicitly set forth a contractual argument in that it did not allege the existence of a contract or the Band’s agreement to the conditions precedent. *See* Counterclaim (Docket No. 2).

arguments, Plaintiffs indicated in their Complaint that they intended to rely on the Court's holding in *Houlton I* in advancing Count I. See Complaint ¶¶ 9-10, 19. The determination that Defendant may have waived any conditions precedent in the execution of its grant was explicitly relied on by the Court in *Houlton I*. See *Houlton I*, 950 F. Supp. at 411. These circumstances lead the court to conclude that, although Plaintiffs did not plead waiver or the statute of frauds, Defendant was effectively placed on notice of these arguments and did not experience prejudice from their consideration by the Court.

**B. Defendant's Motion to Amend Its Counterclaim**

Defendant's motion to reassert and amend its counterclaim is contingent on the Court's granting of its motion to withdraw the August 22, 2000, Memorandum of Decision and Order. Because the Court has denied Defendant's motion to withdraw, the Court, therefore, need not determine whether Defendant has failed to show that justice requires leave to amend or to establish good cause to amend after the Court's scheduling order, as Plaintiffs contend. See FED. R. CIV. P. 15(a), 16(b). Defendant's counterclaim will remain dismissed.

**C. Defendant's Motion to Clarify**

Defendant has also requested that, should the Court deny Defendant's motion to withdraw its August 22, 2000, Memorandum of Decision and Order, the Court clarify whether the order allows Defendant to bring a separate action to determine the amount of money owed by the Band and the Housing Authority, and whether the Town would be precluded in this action from setting forth its argument regarding the statutory basis for the Band's alleged duty to pay taxes or PILOTs on the improvements. Plaintiffs oppose the motion for clarification, maintaining that the Court's August 22, 2000, Memorandum of Decision and Order decisively disposed of the issues with regard to Count I, requires no further clarification, and rejected Defendant's statutory argument.

Because the Court has denied Defendant's motion to withdraw, the Court will consider Defendant's motion to clarify.

Review of its August 22, 2000, Memorandum of Decision and Order has led the Court to agree with Plaintiffs. The order explicitly dismisses Defendant's counterclaim without prejudice and clearly states that "the Town can come back to this Court to request judgment against the Band or the Authority if either of those parties fail to make the PILOTs that it owes." See August 22, 2000, Memorandum of Decision and Order at 7. The Court sees no need or way, in light of this unequivocal language, to clarify the wording of its order.<sup>5</sup> As discussed above, the Court's order rejected Defendant's statutory argument by holding that the Housing Authority has a statutory duty to pay taxes pursuant to 30-A M.R.S.A. § 4724(4). Should Defendant elect to bring a subsequent action to collect PILOTs from the Band or the Housing Authority, it will be up to that Court to determine whether the issues raised in that action will have been precluded by the present case.

### CONCLUSION

Because the Court's August 22, 2000, Memorandum of Decision and Order clearly and completely disposed of the issues presented by the parties in their cross-motions for summary judgment and because Defendant has failed to present any evidence or arguments to the Court that

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<sup>5</sup> If anything, the order possibly leaves open the question as to whether Defendant may seek declaratory relief in a subsequent action, or whether it must proceed to calculate and attempt to collect payments before bringing an action in the Court. Plaintiffs' Opposition to the Motion to Amend to Assert Counterclaim and/or to Clarify the Court's Dismissal, Without Prejudice, of Defendant's Counterclaim and Incorporated Memorandum of Law (Docket No. 30) and Defendant's reply memorandum both contain arguments as to whether the Court should declare the amount of payments due in *this* action. Although the Court's partial granting of the motions for summary judgment in favor of Plaintiffs with regard to Count I did not include all aspects of the declaratory relief sought by Plaintiffs, Plaintiffs have indicated that they do not intend to proceed with the other aspects of their declaratory judgment action, namely, the amount of PILOTs owed by Plaintiffs. Defendant asserts that it did not know that Plaintiffs did not plan to pursue the remainder of Count I until October 17, 2000, three weeks before the filing of the instant motions, and argue that waiting to resolve these issues in a separate action is a waste of resources and time. Despite these arguments, Defendant has not itself moved to assert what was Plaintiffs' now withdrawn claim for declaratory relief. Therefore, given the Court's decision herein, the issue of the appropriateness of declaratory relief is not before the Court.

require or persuade it to withdraw its August 22, 2000, Memorandum of Decision and Order, the Court will deny Defendant's Motion to Clarify or Withdraw and Motion to Amend or Clarify.

Accordingly, the Court **ORDERS** that the Motion to Clarify or Withdraw and the Motion to Amend or Clarify of Defendant the Town of Houlton be, and it is hereby, **DENIED**.

GENE CARTER  
District Judge

Dated at Portland, Maine this 23rd day of February, 2001.

MALISEET INDIANS, HOULTON BAND  
OF  
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MALISEET INDIANS, HOULTON BAND  
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BAND OF  
    counter-defendant

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