

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, SS.

SUPERIOR COURT DEPARTMENT
CASE NO.

TOWN OF NORTH ATTLEBOROUGH,

Plaintiff,

v.

STEVEN R. BANKERT, DEUTSCHE BANK
NATIONAL TRUST COMPANY, as Trustee
for Morgan Stanley ABS Capital I Inc. Trust
2006-HE4, Mortgage Pass-Through
Certificates, Series 2006-HE4, and JOHN
DOES,

Defendants.

MEMORANDUM OF LAW IN SUPPORT
OF PLAINTIFF'S MOTION
FOR AUTHORIZATION OF
SUBSTITUTE SERVICE AND
ISSUANCE OF ORDER OF
NOTICE FOR PUBLICATION AS
TO JOHN DOE DEFENDANTS

Plaintiff Town of North Attleborough (the "Town") has commenced this action in order to seize and dispose of a 24-foot "pirate ship" floating structure (the "Float") through the Court's general equity powers pursuant to Gulda v. Second National Bank of Boston, 323 Mass. 100 (1948). Although Defendant Steven R. Bankert constructed the Float (without permit or authorization) on Town property over a decade ago, he claims not to have owned the Float since "early 2020." As described below, while the Town is prepared to serve Bankert with process in this action through the ordinary process set forth in Mass. R. Civ. P. 4(d)-(e),¹ the Town is unable to do the same for Defendants John Does, who are the potential owner(s) of the Float that Bankert has alluded to but refused to identify. In order to ensure that all parties-in-interest have notice of this quasi-in-rem action, the Town requests the Court to allow the Town to serve Defendants John

¹ The same is true with respect to Defendant Deutsche Bank National Trust Company, as Trustee for Morgan Stanley ABS Capital I Inc. Trust 2006-HE4, Mortgage Pass-Through Certificates, Series 2006-HE4 ("Deutsche Bank, as Trustee"), which is the current owner of the real property that is adjacent to the Town property in question where the Float is typically moored.

Does through substitute service, namely publication. This will allow any other owner(s) of the Float to come forward and join in this action, pursuant to which the Town seeks an injunctive order authorizing the Town to seize and dispose of the Float, with any expenses related thereto assessed to and paid by the current owner(s).

BACKGROUND

Falls Pond is a public body of water located in the Town on real estate owned by the Town. See Complaint ¶ 7. It is subject to the Town Conservation Commission's Rules and Regulations Governing Structures on Falls and Whiting's Ponds. Id. ¶ 7 & Exs. A-B. Up until at least 2020, Bankert owned the Float, which was moored on Falls Pond at a location adjacent to real property that Bankert then owned located at 42 Pratt Lane, North Attleborough, Massachusetts. Id. ¶ 8. The Float is not, in fact, a ship and, indeed, is not a seaworthy vessel. Id. ¶ 9. The Float has no means of propulsion, and the Massachusetts Department of Environmental Protection has refused to let Bankert register the Float as a boat or to issue a hull identification number for the Float. Id.

The Float—for which Bankert did not apply or obtain any permitting—is the subject of a decade-plus-long dispute between the Town and Bankert. See Complaint ¶ 10. On July 12, 2012, the Town's Conservation Commission—which has the authority to regulate activity on Falls Pond—issued Bankert a Notice of Violation in which Bankert was ordered to stop work on construction of the Float. Id. ¶ 11 & Ex. C. Bankert disregarded the Conservation Commission's Notice of Violation, leading to a hearing before the Conservation Commission in September 2012. Id. ¶ 12. At the hearing, Bankert represented to the Conservation Commission that he would remove the Float by October 31, 2012, but he did not do so. Id. ¶¶ 13-14.

On June 21, 2013, the Town's Conservation Commission issued Bankert a Violation Notice/Cease and Desist, in which the Commission's Conservation Agent informed Bankert that the Float violated the Commission's Rules and Regulations Governing Structures on Falls and

Whiting's Ponds and ordered Bankert to remove the Float from Falls Pond. See Complaint ¶ 15 & Ex. D. Bankert did not remove the Float from Falls Pond and the Commonwealth of Massachusetts took out an eight-count criminal complaint against Bankert in 2014, Case No. 1434CR001712. Id. ¶ 16. In January 2016, after the Commonwealth moved to decriminalize each count pursuant to G.L. c. 277, § 70C, and proceeded with a civil bench trial, the District Court Department of the Trial Court found Bankert in violation of the Town's regulations and found that Bankert had refused to comply with the orders of the Town's Conservation Commission. Id. ¶ 17 & Ex. E. Although the District Court concluded that it lacked equity jurisdiction to order the removal of the Float, the District Court "notified" Bankert "of his obligation to remove" the Float from Falls Pond and ordered him subject to a fine of \$100 per day for each day after February 7, 2016, that Bankert failed to comply. Id. Bankert did not remove the Float from Falls Pond, notwithstanding the District Court's order. Id. ¶ 18.

In May 2020, title to Bankert's property at 42 Pratt Lane transferred to Deutsche Bank, as Trustee pursuant to a foreclosure deed registered with the Bristol County North Registry of Deeds at book 25936, page 7. See Complaint ¶ 19. In the spring of 2023, the Float broke loose from its mooring adjacent to 42 Pratt Lane and began floating around Falls Pond. Id. ¶ 20. This was not the first time that the Float has broken loose of its mooring adjacent to 42 Pratt Lane, as noted in the District Court's January 2016 Decision and Order in Case No. 1434CR001712. Id. ¶ 21 & Ex. E. Moreover, in May 2016, the Float broke loose of its mooring and ran into a high hazard potential classification dam on Falls Pond, as referenced in a May 16, 2016 article of The Sun Chronicle and as reflected in the photograph below, which was published in The Sun Chronicle.² Id. ¶ 22.

² Available at https://www.thesunchronicle.com/news/local_news/falls-pond-pirate-ship-goes-adrift-lands-at-dam/article_cd958aae-41a2-5355-8b5e-d86c33b0834a.html (last visited Dec. 15, 2023).



On June 2, 2023, the Town’s Conservation Administrator sent Bankert a letter advising Bankert of the fact that the Float had broken loose and directing Bankert to remove the Float from Falls Pond. See Complaint ¶ 23 & Ex. F. According to a message that Bankert submitted to the Conservation Administrator through the Town website on or about June 6, 2023, in “early 2020”—around the time of the foreclosure of Bankert’s property at 42 Pratt Lane—Bankert ceased to own the Float. Id. ¶ 24. Bankert also represented that he would forward the Conservation Administrator’s June 2, 2023 letter to the purported new owner of the Float. Id. Despite claiming not to own the Float, Bankert also represented (incorrectly) that the Float had been moved approximately two weeks prior and that it was secure. Id. A screenshot of Bankert’s message (with his email address redacted) follows:

Contact Shannon Palmer

Your Name	Steven Bankert
Your Email Address	[REDACTED]
Subject	Your Letter
Message	<p>I received your letter today, It is dated last Friday and had a deadline of yesterday. I have not owned the pirate ship since early 2020. I will forward the letter to its owner. I disagree that the ship is loose on Falls Pond. It was moved about 2 weeks ago, it is secure and has not moved since. The police were mis-informed and it is posible you were mis-informed too. There in no safety or environmental issue. I had before and will again convey your desire to have the ship removed soon, I had expected it would have been between January and March but that, and other scheduled work, did not happen. Your letter may move things along.</p>
Attachments	<i>Field not completed.</i>

Despite repeated requests from the Town, Bankert has refused to identify the purported current owner(s) of the Float. See Complaint ¶ 25. On July 6, 2023, the Town sent Bankert a last and final order to remove the Float from Falls Pond or identify the current owner(s) of the Float within thirty (30) days. Id. ¶ 26 & Ex. G. Neither Bankert nor any other unidentified owner removed the Float from Falls Pond by August 7, 2023, as reflected in the picture below, which was taken on August 9, 2023. Id. ¶ 27.



As of the date of the Town’s Complaint, Bankert has not identified the current owner(s) of the Float. See Complaint ¶ 28. Bankert also has not paid the Town any portion of the \$100-per day fine assessed by the District Court for Bankert’s failure to remove the Float from Falls Pond by February 7, 2016. Id. ¶ 29. As reflected in the picture below, which was taken on November 13, 2023, the Float remains on Falls Pond. Id. ¶ 30.



The Float’s presence on Falls Pond poses a significant safety issue, especially when it is not moored. See Complaint ¶ 31. The Float presents a danger to the Town’s first responders in the event of an emergency on or near Falls Pond. Id. ¶ 32. The Float also presents a danger to the Town’s residents that use Falls Pond for recreation and/or live on property adjacent to Falls Pond. Id. ¶ 33. If the Float breaks loose again and penetrates the dam on Falls Pond, there is a significant likelihood that the Float will cause damage to person or property. Id. ¶ 34.

ARGUMENT

Under Gulda, a party may bring an action “quasi in rem” to determine the ownership of personal property and seek judicial authorization, through the Court’s general equity powers, to

seize and dispose of such property. See 323 Mass. at 104-105 (“The injunction against the bank was a sufficient seizure of the property to give jurisdiction to determine the rights of claimants in this specific property.”). As the Supreme Judicial Court explained, “[s]uch suits, although possessing many of the characteristics of proceedings in rem, involve the rights of all persons in so far as they assert any interests in the property which is the subject matter of the litigation.” Id. Thus, persons with such interests are entitled to notice of the action and must be served. Although parties known to the plaintiff may be served through traditional means,³ parties-in-interest unknown to the plaintiff pose a challenge.

In Gulda, the SJC provided a mechanism to solve this problem. The Court stated that in quasi-in-rem actions dealing with personal property, “service by publication or substituted service on nonresident persons having an interest in the property has been held sufficient to enable the court having jurisdiction over the subject matter to adjudicate the controversy.” Id. The Court continued, “Where there is an attachment of the property of a nonresident and he fails to appear after service by publication or some form of substituted service is made, the court has jurisdiction to render a judgment which is valid to the extent that it is satisfied by an application of the property attached.” Id. Although the Gulda Court was concerned with the issue of establishing jurisdiction over nonresident persons, the reasoning applies equally to persons of interest who are unknown, regardless of whether they are or are not Massachusetts residents. That is because quasi-in-rem actions do not seek to establish the personal liability of those who are not served through traditional means, but instead simply seeks to adjudicate the status of the subject personal property. See id.

Alternative service, such as substituted service through publication, is also contemplated by the Massachusetts Rules of Civil Procedure. Rule 4(d) permits the Court to issue an order of

³ For this reason, the Town intends to serve Defendants Bankert and Deutsche Bank, as Trustee through traditional means as set forth in Rule 4(d)-(e).

notice when traditional means of service on individuals or corporations are unsuccessful “after diligent search.” Mass. R. Civ. P. 4(d)(1). Of course, here the Town cannot attempt to have a diligent search made for the Defendants John Doe, as the Town does not know their identity or identities. The Town should not be forced under the circumstances, however, to wait to try to discover the identity or identifies of the person(s) Defendant Bankert claims now own the Float through the civil discovery process before obtaining an injunction from this Court to seize and dispose of the Float. The Float’s presence on Falls Pond has been a nuisance and a trespass for years and poses a safety hazard to the Town’s first responders and residents. If there truly are other owners that Bankert has refused to disclose to the Town (despite its repeated requests and in the face of the District Court’s order assessing Bankert a daily fine for his failure to remove the Float), publication of a legal notice of this action—in the form of an order of notice issued by this Court—should suffice to bring those parties to answer the Town’s Complaint and appear at the requested consolidated hearing on the merits if they wish to prevent the Town’s seizure and disposal of the Float.

CONCLUSION

For the foregoing reasons, the Court should allow the Town’s motion and authorize the Town to serve Defendants John Does through substitute service, by way of an order of notice that the Town can publish, and thus put the rest of the world—and specifically any other persons or entities that claim ownership of the Float—on notice of the Town’s request to this Court for authorization to seize and dispose of the Float.

Respectfully submitted,

TOWN OF NORTH ATTLEBOROUGH

By its attorneys,

A handwritten signature in blue ink, appearing to be 'B. L. Smerage', written over a horizontal line.

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Date: December 20, 2023

889527/NATL/0047