

STATE OF VERMONT
WINDSOR COUNTY, SS

Avery Austin
Scott Darrell
Plaintiffs

v.

Jonathan Bynorth, Sr.
Myra Bynorth
Defendants

SUPERIOR COURT
Docket No. 98-2-04 Wrcv

DECISION ON MOTION FOR CONTEMPT AND INJUNCTIVE RELIEF

The above-captioned matter came on for hearing on the issues of contempt, damages, and injunctive relief on September 30, 2009, and October 6, 2009. Plaintiff Scott Darrell was present and represented by attorney Richard Bowen, Esq. Defendants Jonathan Bynorth, Sr., and Myra Bynorth were present and represented by their attorney Carl Hanson, Esq. The hearing followed this court's prior decision of September 15, 2009, addressing other pending matters.

This is the latest episode in a long-running dispute between the owners of two neighboring properties in Springfield, Vermont. The case started out as an action by Avery Austin to enforce his right of travel over a right-of-way running between his property and Spencer Hollow Road. In that action, Mr. Austin sought to enjoin the Bynorths from blocking access to the right of way. The case was not brought as an action to quiet title or to establish with more particularity the scope or extent of the right of way.

In September 2004, this court (DiMauro, J.) found that a right of way "approximately 25 feet wide and approximately one-third of a mile long" ran between Spencer Hollow Road and the Austin property across lands belonging to the Bynorths. In that proceeding, Mr. Bynorth acknowledged that the existing path of travel was visible.

This court further found that the Bynorths had erected barriers and prevented Mr. Austin from using the right of way. The court accordingly awarded damages and ordered the Bynorths to remove trees, brush, dirt mounds, chicken wire, and other described items from the right of way. The court further ordered the Bynorths to permit unmolested and free travel across the length of the right of way.

In February 2005, this court (DiMauro, J.) held the Bynorths in contempt for willfully failing to comply with the earlier order for injunctive relief. The findings indicate that the contemptuous conduct involved placing more obstructions within the right of way and in merely pushing some obstructions to the side of the road rather than

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NOV 24 2009

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completely outside the right of way. The court ordered that the "25 foot right of way" be "restored to its prior location."

A second contempt motion was heard in March 2005, and resulted in a finding that gave the Bynorths additional time (until mid-April 2005) to comply with the previous order. The Bynorths were not held in contempt at that time.

A third motion for contempt was heard in May 2005. At that time, the Bynorths were again held to be in contempt based upon Mr. Bynorth's actions in blocking the right of way with a backhoe and damaging a culvert.

A fourth motion for contempt was heard in December 2005, but the court (Cohen, J.) did not make a finding of contempt.

Mr. Austin then sold his property to Mr. Darrell in September 2008. Since that time, the problems concerning the right of way have continued. In the present motion for contempt, Mr. Darrell complains that Mr. Bynorth has blocked the right of way with piles of dirt, rocks, and a backhoe. Mr. Bynorth has also allegedly dug ditches or water bars across the road.

Based upon the credible evidence presented at the hearings, the court finds by clear and convincing evidence that Mr. Bynorth violated the terms of the prior court orders by (1) piling rocks in the right of way so as to block it; (2) parking his backhoe across the road so as to block it; and (3) piling logs and other objects as close to the existing road as possible and within a distance of 12'6" from the center of the existing road. The court further finds that the actions were done in an obvious attempt to flaunt the court's prior orders and to intimidate Mr. Darrell and any others using the right of way.

The terms of the prior court orders were clear, and Mr. Bynorth's claims that he did not understand what was meant by the orders or the right of way are not persuasive. The lengthy procedural history in this case has provided Mr. Bynorth with ample notice of the existence of the right of way and his obligation to permit free and unobstructed travel. *Vermont Women's Health Center v. Operation Rescue*, 159 Vt. 141, 147-49 (1992). Moreover, even though this case did not begin as a quiet title action between these parties, all the parties are on notice of the court's prior finding of a 25-foot-wide right of way. That finding has long since become the law of the case. See *Coty v. Ramsey Assocs., Inc.*, 154 Vt. 168, 171 (1990) (defining doctrine). In the absence of any other finding or deed description, the right of way is 12'6" on either side of the center line of the existing road from Spencer Hollow across the Bynorth lands.

In short, the Bynorths bought their property in 2003, which was some fifty years after Mr. Austin began using the right of way between his property and Spencer Hollow Road. The Bynorths cannot now, through intimidation and harassment, impede the use of the right of way which existed long before they were owners of the servient estate. Having knowingly purchased property burdened by a right of way, they must honor it.

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NOV 24 2009

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For the foregoing reasons, the court finds by clear and convincing evidence that the Bynorths are in civil contempt. The court thus turns to the damages claimed by Mr. Darrell, having in mind that the relief granted in civil contempt proceedings "often takes the form of a fine in the amount of the damage sustained by plaintiff and an award of costs and attorney's fees." 11A Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 2960.

Upgrades made to another right of way. Mr. Darrell seeks compensation for repairs he made to another right of way running between his property and Paddock Road. He claims that these upgrades were made necessary by the intimidation of the Bynorths. However, if the intimidation made the Spencer Hollow right of way inaccessible, the remedy was to seek enforcement of earlier court orders as has been done repeatedly in the past. The court cannot impose a fine based upon Mr. Darrell's choice to upgrade another right of way so as to avoid confrontation with the Bynorths.

Upgrades made to the Spencer Hollow right of way. Mr. Darrell seeks compensation for work that was performed on the right of way, including removal of silt and replacement with gravel. Mr. Darrell claims that the repairs were necessary because Mr. Bynorth's actions caused the road to become clogged with silt. The evidence presented, however, showed that the aforementioned work represented a considerable improvement of the right of way over what has existed for a very long period of time. Whatever silt may have come onto the right of way as a result of Mr. Bynorth's actions was not proven to have materially affected the quality of the road.

Tractor use in the right of way. There was evidence that Mr. Bynorth operated his tractor within the right of way, and Mr. Darrell seeks compensation for the damage that the tractor allegedly caused. However, there was no evidence that any damage was out of the ordinary or that the tractor use constituted an unusual or improper use of the right of way. Accordingly, the court will not award compensation for sums representing the repair of the right of way.

Repairs for sidewalk. Mr. Darrell seeks damages for repair of a sidewalk that was allegedly damaged by Mr. Bynorth's tractor. The evidence showed, however, that the sidewalk was not new. It is impossible based upon the evidence presented for the court to determine what damage may have been caused by Mr. Bynorth's tractor and what damage already existed as a result of ordinary aging. Moreover, any replacement would be an improvement over the existing conditions even without regard to any damage caused by the tractor. Thus, any damages award based on this claim would be speculative and unsupported by the evidence.

Damage to vehicles. Mr. Darrell claims that water bars in the road have damaged vehicles belonging to both himself and his fiancée. However, with respect to the fiancée, she is not a party to this action and damage to her vehicle is not recoverable here. Moreover, with respect to the damage to Mr. Darrell's truck, the court finds that it was occasioned by Mr. Darrell's failure to observe the water bar in the road. Even though the

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NOV 24 2009

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bar had been dug by Mr. Bynorth, it was incumbent upon Mr. Darrell to observe the existing conditions in the road. Had he seen the water bar, the damage to the truck would have been avoided. See 12 V.S.A. § 1036 (explaining comparative negligence). Based upon the evidence presented, therefore, the court declines to award damages for vehicle repairs.

Excessive water bars. The clear and convincing evidence showed that Mr. Bynorth has been digging water bars across the right of way, and that there are perhaps as many as fifteen in number. Mr. Bynorth claims that the bars serve the purpose of providing drainage, but the court finds that the real purpose of the bars was to impede use of the right of way either by slowing traffic or discouraging traffic altogether. The court also finds that the culvert placed by Mr. Darrell should be sufficient to deal with the necessary drainage. Should another culvert be necessary, in the absence of any other agreement between the parties, either party may place one or more culverts. Such work must be done expeditiously, however, so as not to interfere with the use of the right of way.

Mr. Darrell may also remove water bars and grade the road when and as he wishes. The Bynorths shall not construct or place any more water bars within the Spencer Hollow right of way.

Other debris. The photographic evidence clearly showed that Mr. Bynorth has planted trees and piled rocks, logs, and other items within the right of way, in direct violation of the express terms of earlier orders of the court. **These items shall be removed by Bynorth immediately so as to keep clear a 25' right of way (12'6" on either side of the centerline) as it crosses the lands of Bynorth. In order to ensure compliance, the court will schedule and conduct a site visit as soon as possible after ten days from the issuance of this order. Should the court find trees, rocks, piles of dirt, logs, or other items not naturally occurring within the 25' right of way, a mittimus shall issue for Jonathan Bynorth's arrest and he shall be incarcerated until all such obstructions are removed by Bynorth.**

This obligation is continuing in nature. In the event of further allegations of impediment or obstruction of the right of way by Bynorth by filed affidavit, the court will again inspect the site. Should the court find impediments or obstructions at that time, the court will issue another mittimus for the incarceration of Jonathan Bynorth until such impediments or obstructions are removed by Bynorth.

Costs and Attorneys' Fees. The need for the filing of yet another motion for contempt was occasioned by the willful and deliberate actions of the defendants. Plaintiff shall accordingly be awarded his filing fees, service fees, and reasonable attorney's fees for the filing and preparation of the contempt motion and attendance at the two hearings on this motion. See *Vermont Women's Health Center*, 159 Vt. at 150 (explaining that costs and attorneys' fees "are ordinarily awarded in contempt actions as part of the compensation due complainants for defendants' actions, which have put the complainants in the position of having to seek the assistance of the courts to enforce a judgment").

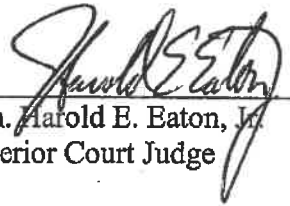
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An affidavit of attorney's fees shall be submitted within ten days. If no objection as to amount is made within five days after submission, it will be approved by the court if found reasonable. Once approved, payment must be made within 30 days. If not paid, a show-cause hearing shall be scheduled at which time the Bynorths will be required to show an inability to pay or face incarceration until compliance. *Spabile v. Hunt*, 134 Vt. 332, 335 (1976).

ORDER

Plaintiff's Motions for Contempt and for Injunctive Relief and Damages (MPR #17 and MPR #18) are **granted**. Plaintiff's counsel shall submit a proposed order consistent with the findings and conclusions herein within seven days.

Dated at Woodstock, Vermont this 24 day of November, 2009.


Hon. Harold E. Eaton, Jr.
Superior Court Judge

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