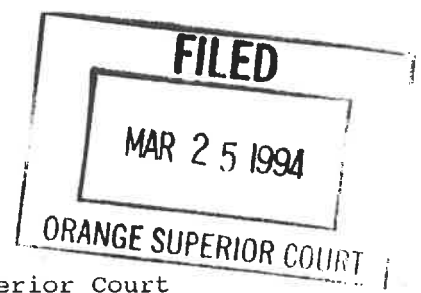


STATE OF VERMONT
ORANGE COUNTY, SS



Edwin Mullenbrock and
Lois Mullenbrock

Orange Superior Court

v.

John Czalpinski and
Patricia Czalpinski

Docket No. S 52-93 OeC

Entry Order re:

Plaintiffs' Motion to Amend and Defendants' Motion to Dismiss

This action centers around a dispute regarding the parties' relative rights and obligations in regard to an area including and surrounding a portion of former Town Highway 21, now a trail, located in the Town of Newbury. Plaintiffs sought damages resulting from changes to the trail by defendants, which plaintiffs alleged caused water damage to their property. Defendants counterclaimed, asserting that plaintiffs had wrongfully encroached upon the former highway in a manner which interfered with defendants' access to their property. In addition, defendants have filed several petitions directly with the Town of Newbury. In these petitions, defendants sought to have the Town take certain actions against the plaintiffs. Defendants' first petition sought relief similar to defendants' counterclaim in this matter (which has been voluntarily dismissed). Defendants' most recent petition asked the Town to compel plaintiffs to remove a fence which plaintiffs had placed in or near the right of way of Former Town Highway 21.

Plaintiffs now seek to amend their complaint in two ways. First, they seek to amend the complaint to provide greater specificity as to the damage which they claim that they sustained as a result of the defendants' actions. In other words, this proposed amendment merely clarifies the nature of an already existing claim.

Plaintiffs' second proposed amendment to their complaint asserts a new

claim against defendants. Plaintiffs assert that defendants' most recent petition to the Town of Newbury was brought "without substantial basis." On this ground, plaintiffs assert that they are entitled to recoupment of the attorney's fees which they have incurred or will incur in responding to that petition.

The court first considers the plaintiffs' proposed amendments to Count I. Defendants have submitted an amended answer which addresses plaintiffs' proposed amendments to Count I of their complaint. Defendants have not indicated that they have any opposition to these amendments.

Absent unusual or unreasonable circumstances, a court should be indulgent in allowing the amendment of pleadings, in order to encourage and expedite the resolution of matters on their actual merits. Lillicrap v. Martin, 156 Vt. 165, 170-71 (1989). "Whether an amendment should be permitted is an issue addressed to the sound discretion of the trial court." Lillicrap, 156 Vt. at 170. Plaintiffs' proposed amendment to Count I of their complaint merely clarifies the factual nature and extent of their claimed damages. Defendants have not voiced any opposition to this amendment. Accordingly, the court, in the exercise of its discretion, concludes that an allowance of the amendment to Count I is appropriate.

The court turns next to the plaintiffs' proposed Count II. This is a new cause of action which involves factual assertions and legal claims different from those contained in plaintiffs' original complaint. Plaintiffs assert that the defendants filed a petition with the Town, which sought to have the Town force plaintiffs to remove a fence which defendants claimed was located within the right of way of the trail which constitutes former Town Highway 21. Plaintiffs maintain that the fence is located on their own property and so

insist that defendants' petition to the Town was brought without substantial basis. Plaintiffs claim that they are therefore statutorily entitled to attorney's fees, by virtue of 19 V.S.A. §1105.

Defendants have responded to plaintiffs' proposed Count II by moving for its dismissal, on the ground that it fails to state a claim upon which relief may be granted. Though defendants have not formally entered their opposition to plaintiff's motion to amend their complaint to include this Count, the court will proceed to analyze defendants' motion to dismiss as if it were in fact submitted as a memorandum in opposition to plaintiff's attempt to add this new claim.

19 V.S.A. §1105 provides, in pertinent part:

A person... who places or causes to be placed an obstruction or encroachment in a public highway or trail, so as to impede or prevent public travel... shall be fined not more than \$1,000 plus the actual costs of repairing the damage and a reasonable attorney's fee, to be recovered in a civil action in the name of the town or state. If the court finds that an action under this section was brought without substantial basis, the court may award a reasonable attorney's fee against the person bringing the action.

In other words, this section creates a private right of action by which a individual can vindicate the general public's interest in preventing obstructions on or damage to public roads and trails. It also creates a penalty against any person who brings a frivolous suit under its provisions.

Plaintiffs' proposed Count II appears to either assume or argue that defendants' petition to the Town regarding plaintiffs' fence was brought under this section. However, the court notes that §1105, by its own explicit terms, refers solely to a "civil action." 19 V.S.A. §1005. "An action is a demand of right in a court of justice. A civil action is a like demand by a person of a civil right." State v. One Bottle of Brandy, 43 Vt. 297, 298 (1871).

Similarly:

The words 'suit' and "civil cause"... must be construed to include only actions which are commenced in a court of justice.... These words do not include proceedings before a board whose functions are merely administrative..., although it may possess so much of the judicial function as may be involved in making inquiry...."

City of Burlington v. Burlington Traction Co., 70 Vt. 491, 496-97 (1898).

Thus, the term "civil action" does not encompass a petition to a Town board.

Where the meaning of a statute is clear from its plain terms, it must be enforced according to those terms: "Where the Legislature 'meant what [it] said and said what [it] meant,' we must be true to the statute's intent."

Burlington Electric Dept. v. Dept. of Taxes, 154 Vt. 332, 336 (1990) (citation omitted). As 19 V.S.A. §1105 uses the term "civil action," and as that term applies only to a formal action before a court, its provisions for the recovery of attorney's fees do not encompass a petition filed with a Town board.

"Vermont generally follows the 'American Rule' with respect to attorneys' fees... and generally does not award fees absent statutory authority or a contractual obligation." Vt. Women's Health Center v. Operation Rescue, 159 Vt. 141, 150 (1992). As 19 V.S.A. §1105 does not apply to the petition filed by defendants, it furnishes no legal basis for plaintiffs to recover attorney's fees, even if plaintiffs could ultimately prove that the petition was brought without substantial basis.

Though a court should be indulgent in allowing amendment of the pleadings, it need not do so when the proposed amendment would be futile as a matter of law. See discussion in Perkins v. Windsor Hospital Corp., 142 Vt. 305 at 313 (1982). Thus plaintiffs' proposed Count II would indeed be futile, as plaintiffs have set forth no authority which would suggest a basis for any deviation from the "American Rule" in regard to their right to recover attorney's fees expended in response to defendants' petition to the Town board.

Order

Plaintiffs' motion to amend their complaint is hereby GRANTED IN PART, in that plaintiffs' are allowed leave to amend their complaint to include greater factual specificity as to the damages allegedly caused to their property as a result of the defendants' actions.

Plaintiffs' motion to amend their complaint is OTHERWISE DENIED, in that plaintiffs have demonstrated no valid legal basis for their claim that they are entitled to recover attorney's fees expended in response to defendants' petitions to the Newbury Select Board.

Dated this 25th day of March, 1994, at Chelsea, Vermont.

Mary Miles Teachout
Mary Miles Teachout
Presiding Judge