STATE OF VERMONT
WASHINGTON COUNTY, SS

BRENDA HEDGES,
Plaintiff,

vs.

Washington Superior Court
Docket No. 450-8-98

JAMES MORIARTY and
KATHLEEN MURPHY MORIARTY,
DAVID MAYETTE,
SUE ANN MAYETTE, and
ANY PERSONS CLAIMING AN INTEREST
IN A CERTAIN RIGHT OF WAY LOCATED
IN PROPERTY IN MIDDLESEX, VERMONT,.
Defendants.

NOTICE OF DECISION

This matter came before the court for hearing on September 18, 2000 and September 22, 2000. Plaintiff was present and represented by William L. Durrell, Esq. Defendants were present and represented by David Putter, Esq.

Background

The final hearing, on Count I of the Plaintiff's Complaint only, was held on December 13, 1999, pursuant to a stipulation of the parties. Findings and Conclusions with respect to Count I were delivered on the record on December 30, 1999. Count I was a claim for reformation of a deed from Plaintiff and her former husband to Defendants. Plaintiff sought to show that while the description of a reserved right of way in the deed was faulty and did not describe a right of way that could be located on the ground, the underlying purchase and sales agreement adequately described the right of way; and she asked the court to reform the deed to conform to the right of way described in the purchase and sales agreement. Defendant opposed the claim, and sought to show that the purchase and sales agreement described the right of way in a different location than the one claimed by Plaintiff. Surveyors for both parties agreed that the description of the right of way contained in the deed was faulty, as it did not describe a right of way that could be laid out on the ground. Each party sought judicial establishment of the right of way in a different location.

After hearing the evidence, and before delivering a decision, the court inquired of the parties whether, in the event the court did not find grounds for reformation as requested by

Plaintiff but found that there had been a mistake that was mutual,[1] either of them was seeking the remedy of rescission, since that is the normal remedy for mutual mistake. Both parties stated that they were not seeking rescission, and waived any claim to rescission as a remedy. The court clarified whether both parties were asking the court, in the event it found a mutual mistake, to exercise its equitable powers to establish the location of the right of way on the ground. Both parties confirmed that they were, and each asked the court to determine the location of the right of way to be where that party wanted it.

The court determined in its findings and conclusions that there had been a mutual mistake, and the court exercised its equitable powers, at the request of both parties, to determine the location of the right of way. The court selected the location advocated by the Plaintiff for the reasons set forth on the record.

An Order of Partial Judgment was entered on January 10, 2000, based on the decision of the court on Count I.

Subsequently, Defendants filed a Motion to Alter Judgment on Count I. Among other things, they argued that since the court was exercising equity jurisdiction in placing the right of way in the location advocated by the Plaintiff, Defendants should receive other relief on Count I to achieve equity between the parties. The court ruled on August 24, 2000 that at the continued hearing on the remaining claims in the case, both parties would have an opportunity to present evidence and argument on the issue of whether the court should add any additional terms of relief to the judgment in Count I in order to achieve equity between the parties.

Therefore, at the continued hearing on September 18, 2000 and September 22, 2000, the court took evidence pertaining to whether any additional terms should be included in the final judgment on Count I as a matter of equity as well as evidence pertaining to all remaining claims in the case. The findings and conclusions set forth below are in addition to those already delivered on the record, and are not intended to supplant or change the previous findings and conclusions.

Findings of Fact

1. When the Plaintiff and Mr. Hoblin listed the property for sale, they signed a listing agreement with the realtor in which they excluded from the sale a Tiffany-style lighting fixture located in the dining room. The lamp had sentimental value to Ms. Hedges, which is why she

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[1] Other findings and outcomes were also possible. Since the evidence suggested that mutual mistake was one possible outcome, however, and since the remedy for mutual mistake is normally rescission, which neither party apparently wanted, the court sought to clarify the parties' positions regarding what type of judicial relief they were seeking in the event that the outcome was a finding of mutual mistake.

wanted to exclude it from the sale. It was also unique and added a particular character and aesthetic value to the house. It was wired directly to the electrical system in the house, and affixed to the ceiling by two screws. When the purchase and sales agreement was signed by all parties, the lamp was not identified as being excluded from the sale. The purchase and sales agreement stated in paragraph 24 that the sale included all fixtures. The day before the closing, after Mr. Moriarty had completed his last pre-closing walk-through of the house, Ms. Hedges went to the house and removed the lamp by unscrewing the screws and disconnecting the wires. She replaced it with another lamp of the same general type, but without the character and style of the lamp she removed. At the closing, Mr. Moriarty learned of the removal, and claimed entitlement to the return of the lamp. Ms. Hedges said that she would not return it. She said that it was hers, and that the Defendants could choose not to go through with the closing, but she was not returning the lamp. She and Mr. Hoblin signed and initialed a Bill of Sale with respect to items of personal property that were included in the sale, and asked Mr. Moriarty to initial it. It excluded the lamp. He refused to initial the document. He proceeded with the closing, but at no time did he waive or relinquish Defendants' claim to the lamp. Kathleen Moriarty did not attend the closing.

2. The purchase price for the property was $180,000. This price included, in addition to the real property and fixtures, a specified list of personal property, including appliances, a wood stove, and a Kubota farm tractor with several attachments.

3. At the time of the closing in January 1996, Plaintiff and her then husband Mr. Hoblin delivered to Defendants a warranty deed. The deed stated in standard warranty deed language that the grantors warranted that the premises "are free from every encumbrance except as aforesaid ;" and that the grantors "hereby engage to WARRANT AND DEFEND the same against all lawful claims whatever." Specifically reserved on the prior page of the deed was the right of way at issue. The previous findings of the court specify the actions of both parties in failing to ascertain, prior to the closing, the impossibility of locating on the ground the right of way supposedly described by the deed language; that this constituted a mutual mistake between the parties; and that both parties were equally responsible for the mutual mistake.

4. The Moriartys moved into the property after the closing in January of 1996. They planned to undertake many improvements to the property, and they have in fact made significant improvements and greatly enhanced the aesthetic and economic value of the premises. One of the possible improvements they considered was to build a pond in the marshy area of the property. As a result of the court's judgment regarding the location of the right of way, they are now unlikely to do so, as the pond would be right next to the right of way and would therefore be lacking in privacy.

5. Ms. Hedges' planned to sell the 22 acre parcel[2] for which the reserved right of way

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2 Plaintiff became the sole owner of the retained parcel as the result of her divorce from Mr. Hoblin.

provided access. She listed it for sale, and in the summer and fall of 1997, prospective purchasers began crossing the Moriarty property. Many of them were confused about the location of the right of way and walked at various places on the Moriarty property trying to locate the right of way. At one point two people on a motorcycle said they were there to estimate the cost of building a road on the right of way, and they had been there before. At another point two people drove a truck across the Moriarty property in their attempt to drive on the right of way, leaving ruts which Mr. Moriarty repaired with a shovel. At some point, after the problem of the location of the right of way remained unsolved, Ms. Hedges stopped giving anyone permission to cross the Moriarty property at any location. The lack of final resolution of the right of way has prevented Ms. Hedges from being able to sell the property since the fall of 1997, when she originally intended to sell it.

6. Defendants' appraiser, Robert Durkin, a professional fee appraiser, testified that in his opinion, the value of the Moriarty property at the time of the purchase (excluding personal property) would have been $192,000 if the right of way had been located where Defendants wanted it, and $172,000 if it had been located where Plaintiff wanted it. He further testified that as of August 7, 2000, its value would have been $235,000 if the right of way was located where Defendants wanted it, and $210,000 with the location in the place the court has located it. He actually testified about the effect of the "change" of the right of way from where Defendants told him it had originally been located to where the court has ordered it, and he testified that the court's judgment on the location of the right of way "changed" the nature of the property and reduced its value by $20,000-30,000. Actually, the court did not "change" the location of the right of way, since it never existed in either location previously; its description was faulty and could not be laid out on the ground. His testimony about the effect of "change" is not pertinent, since there is no evidence about the value of the real estate as of the time of the purchase in the condition in which it actually existed, which was subject to a right of way but with a description so faulty that it could not be laid out on the ground. The court did not "change" the location of the right of way, but only determined where it would be, based on the request of both parties, to clear up an otherwise untenable situation. While the appraiser may have understood it as a change, that is because according to his understanding the deed at the time of purchase reserved a right of way where his clients thought it was, and not a right of way with a description so fatally defective that its location could not be determined.

7. Plaintiff's proposed expert, John Vickery, is a city assessor who holds a certificate to appraise residential property for municipal purposes. Essentially, this involves doing mass appraisals for property tax purposes, which is a different process than the fee appraisal process of valuing an individual property, which requires a different level of license. He testified that he did not do an appraisal, but prepared an opinion of value, which involves a less extensive level of work. He testified that he did not use the USPAP standards required of appraisers, that he had not previously done any appraisals of property in Middlesex, and that he arrived at his opinion of value and signed an affidavit with his opinion prior to ever seeing the property. He testified that the "change" in the right of way would have no effect on the market value of the property. His testimony does not make clear what date or circumstances he was using as the starting point for

defining a "change."[3] After his testimony, Defendants moved to strike his opinion testimony, and the court reserved ruling.

8. Plaintiff has filed a claim against the attorney who prepared the deed of conveyance on behalf of herself and Mr. Hoblin. In that suit she is seeking her attorneys' fees incurred in this case and the costs of correcting the right of way problem. She does not know what the outcome will be. She knows that in any event, even if she is able to recover in that suit her attorneys' fees in this case, she will not be able to recover her attorneys' fees in pursuing the legal malpractice claim against her former attorney. She acknowledged that her former husband Mr. Hoblin may also share some responsibility for the problem. She has not filed a claim against him.

9. Defendants have incurred attorneys' fees to date in this case in the amount of $22,166.10. For the most part, the services were reasonable and necessary, given the nature of the case. Defendants were required to defend a Plaintiff's Motion for Summary Judgment, which Plaintiff lost, and the Plaintiff was also not successful in her reformation claim at trial. However Defendants' claim for replevin is unrelated to the problem of the faulty right of way description. Also, some work undertaken after the Order of Partial Judgment was based on the faulty premise that the court "changed" the location of the right of way. There may have been such a change in Defendants' minds, but the evidence clearly established that the right of way described in the deed could not be laid out on the ground. Therefore it was never located where Defendants would like to think it was. This issue was determined by the court as of January 10, 2000, and Defendants' fees incurred in pursuit of damages based on their theory of diminution in value after that date were not reasonably incurred.

10. In addition to attorneys' fees, Defendants have incurred costs for an appraiser, surveyor, expert testimony from both, and other costs of suit, for a total of $3,154.00.

11. Plaintiff has incurred expenses for comparable purposes in this lawsuit. All or a part of those expenses may be recoverable as part of her claim against her former attorney, if indeed the claim can be proven. There is no testimony on the likely outcome of that claim.

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[3]For example, was his reference point the time of the purchase, as specified by Mr. Durkin, or was it some later time, such as when the parties discovered the problem? In addition, was he starting from a description of the property with a right of way described as the Defendants would like it to be understood, or from the actual situation, i.e., a description so fatally defective that it cannot be used at all?

Conclusions of Law

1. Defendants' Motion to Strike Appraiser Vickery's Valuation Testimony.

Based on the testimony of Defendants' expert, Mr. Durkin, the court agrees with Defendants that Mr. Vickery failed to observe professional appraiser standards. This failure demonstrates his lack of qualification as an expert and negates the value of his testimony in assisting the court, as trier of the facts, to understand the evidence or determine the facts in issue. See V.R.E. 702 . Accordingly, Defendants' motion to strike Mr. Vickery's testimony is GRANTED.

2. Count I -- Equitable Relief Based on Mutual Mistake -- Defendants' Motion to Alter

As described above, the court has previously ruled that as the result of a mutual mistake for which the parties bear equal fault, the location of the right of way could not, as a practical matter, be determined from the deed. At the parties' request, the court then determined the most practical and logical location for the right of way, and ordered that the right of way would be in that location. This location happened to be the one advocated by Plaintiff.

Following this determination, Defendants argued that since Plaintiff had obtained the result she desired even though the parties were equally at fault, Defendants should be entitled to some compensation to balance the equities. Although there had been no mention of this possibility prior to the court's decision on this issue, additional hearings on other issues were scheduled, and the court agreed to allow Defendants to present evidence in support of this argument when it heard the other issues.

Plaintiff objects to Defendants being able to seek additional relief on Count I on the grounds that the Defendants did not request money damages in its original pleading, including their counterclaim. The court reaffirms its prior ruling that it would consider evidence on whether the court, in order to provide a complete equitable remedy, should add additional terms to the equitable relief to be provided under Count I. The basis for this is the change that occurred at the hearing, when the court clarified whether either party sought rescission in the event the court found a mutual mistake. Both parties waived rescission, and both parties asked the court to provide equitable relief. Having done so, this opened up the possibility that additional terms, aside from the layout of the right of way, would be necessary in order to do equity between the parties. This would have been available to the Plaintiff as well, in the event that the court had located the right of way as advocated by the Defendants. Therefore, the court is essentially allowing the pleadings to be conformed to the evidence and the development of the case at trial, which the court has the discretion to do. See V.R.C.P. 15(b).

Having heard and considered the additional evidence, however, the court declines to award either party further compensation as part of its order of equitable relief, as no additional relief is warranted by the evidence. Defendants sought to introduce evidence of a reduction in

value as a result of the location of the right of way by the court. However, Defendants' evidence compared the value of their property with the right of way where Defendants wanted it to be to the value of the property with the right of way established by the court. This is not the proper comparison, since the right of way was never where Defendants wanted it to be. Instead, the proper starting point is the value of the Defendants' property subject to a right of way which is defined in the deed as an encumbrance but cannot be laid out on the ground. There is no evidence on such a value; but it may be inferred from the record evidence that the value would be no more than the value of the property with the right of way as established by the court.

The court has previously found that both parties were equally responsible for the unfortunate mutual mistake that brought this case about. The evidence also shows that both parties have suffered detrimental consequences. Defendants have spent a considerable amount of money and labor improving a property that will have a right of way located within view in a place they do not want it to be; but as previously found, they share equal responsibility with Plaintiff for this result. This is a risk they took when they purchased the property subject to an unsurveyed right of way, based on a purchase and sales agreement with an ambiguous description of the location of the right of way, and when they relied on an incomplete and inaccurate "eyeballing" of the possible location on the ground before proceeding to closing. Defendants have also suffered a reduction of their enjoyment of the property during the last few years since the problem has come to light and they have not known what the outcome would be. Again, they share responsibility with Plaintiff for this outcome. On the other hand, Defendants have also enjoyed the property with its excellent view unimpaired by a right of way for a period in excess of four years while the case has developed. This time period could be extended in the event of an appeal. In addition, the effect on Defendants of these detrimental consequences is mitigated by award of damages based on breach of the warranty deed.[4]

Plaintiff has also suffered adverse consequences. She has been unable to sell her parcel of land for a period of approximately three years to date due to the lack of resolution of the right of way problem. This has interfered fully with her ability to either use the property herself or sell it for the economic value it represents, since the property cannot be used or sold without road access. This time period could be extended in the event of an appeal. As previously found, she and the Defendants share equal responsibility for these consequences. She undertook a risk when she delivered a warranty deed subject to a reservation of a right of way without a survey or surveyor's description of the location of that right of way. While it is possible that she may be able to establish a claim against the attorney who represented her at closing, it is not clear that such a claim exists, and if it does, she will have to spend more money in attorneys' fees to pursue it. Thus, it cannot be considered to represent a fully viable source of compensation for all her

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4 Defendants point to their litigation costs and attorney fees as a detriment they have suffered. Because these costs and fees resulted not from the mutual mistake but instead from Plaintiff's provision of a deed with a description of a right of way so faulty it did not reserve from the conveyance a definable property right, these damages are addressed in the next section on breach of the warranty deed.

losses. In addition, she is responsible to Defendants for damages on their breach of warranty claim.

If the evidence showed that the court's location of the right of way on the ground had the effect of allocating the consequences of the mutual mistake unevenly between the parties, such that one party benefitted substantially more and the other suffered substantially more detriment, then, in order to issue an equitable order, the court would provide a remedy that attempted to equalize the detrimental consequences. See *Rancourt v. Verba*, 165 Vt. 225, 229-30 (1996). This is because the court has previously found that the parties were equally responsible for the mutual mistake, so the detrimental consequences should be distributed more or less equally. The facts show, however, that past and future detrimental consequences are falling on the parties in approximately equal proportions. The court cannot conclude that one party has been substantially more disadvantaged by the court's remedy than the other. Therefore, no additional relief is warranted on Count I beyond the equitable relief of establishing the right of way on the ground. Accordingly, Defendants' Motion to Alter the Judgment on Count I is DENIED.

3. Counterclaim Count I -- Breach of the Warranty Deed

Currently pending are Defendants' claim for damages based on breach of the warranty deed and Plaintiff's motion to dismiss this claim. The court deferred ruling on the motion to dismiss until conclusion of the evidence.

The court agrees with Plaintiff that the court's Order establishing the right of way location did not constitute a breach of the warranty against encumbrances. The right of way, even though described in a faulty manner, was referenced sufficiently to reserve from the conveyance a right of way, albeit at an undetermined location. It is undisputed that the parties knew that a right of way would exist at some location, and its existence was presumably taken into consideration in fixing the purchase price. Moreover, the court could not find any case in which the covenant to defend against a claimed encumbrance was applied to litigation between the grantor and grantee to construe or reform a faulty deed. This is logical, since the general approach to enforcing a covenant to defend is to provide notice to the grantor of the claim against the grantee's title, to allow the grantor to come in and defend it, see 20 Am. Jur. 2d *Covenants, Conditions, and Restrictions* § 47-- which, of course, makes no sense if the claimant against the grantee is the grantor herself. Compare, e.g., *Russ v. Steele*, 40 Vt. 310 (1868) (where third party brought suit against grantee and successfully alleged outstanding right of way, and grantor was notified of suit but refused to defend, covenant to warrant and defend was breached).

This does not dispose of Defendants' breach of warranty claim, however; for when a grantor conveys by warranty deed, she is also implicitly warranting that the language of the deed she is providing is not so faulty that it will result in litigation such as this. Cf. *Pareira v. Wehner*, 133 Vt. 74 (1974) (faulty description of property is breach of warranty in warranty deed and grantor who provides such a deed is liable for damages naturally resulting from the breach).

Plaintiff clearly breached this aspect of the warranty deed, and is therefore liable for damages flowing naturally from that breach. This breach occurred at the time the deed was delivered. Defendants have not proved that any diminution of value damages flowed from the fact of the faulty language, since there is no reason to infer that proper language would have described the right of way in the location Defendants desire. The court has already determined that even the description of the right of way in the underlying purchase and sales agreement did not describe the right of way in the location desired by Defendants. Nonetheless, Defendants' litigation costs and attorneys' fees (except those relating to the replevin claim only) do naturally flow from the breach, and Plaintiff is liable for those damages.

The court has reviewed the evidence on the litigation costs (Defendants' Exhibits AM - AQ) and attorneys' fees (Exhibit AR), and concludes that the portion of the attorneys' fees paid by Defendants and reasonably related to the Plaintiff's breach of the warranty deed is $22,166.10, and the portion of the litigation costs so related is $3,154.00.[5]

It follows that Plaintiff's Motion to Dismiss this count is DENIED, and judgment for Defendants should be entered on this count in the amount of Defendants' litigation costs and attorneys' fees, as stated herein, for a total of $25, 320.10.

4. Counterclaim Count II. -- Trespass

Defendants claim that Plaintiff's agents, i.e., her realtor and prospective purchasers of her property, entered Defendants' property at locations other than the right of way as described in the deed. Because there was never a determinable location of the right of way until it was established by order of this court, those who crossed Defendants' property at Plaintiff's direction were doing so without legal right as to any of the lands they crossed, and were therefore trespassing.

The evidence does not support an award of compensatory damages for any out of pocket expenses or loss in value, since none have been proven. On the other hand, there is an entitlement to damages for trespass. See *Powers v. Trustees of Caledonia County Grammar School*, 93 Vt. 220, 243 (1919) (where defendant trespassed but did not damage land, plaintiff is entitled to nominal damages). In this case, there was evidence that the trespass caused some minimal damage, even though Defendants were able to fix it fairly easily, and the trespass certainly disturbed Defendants' peace. The court therefore awards Defendants nominal damages of $50.00.

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5 Upon detailed review of the Defendants' attorneys' fees, the court discovered approximately $3,000 of the charges not reasonably related to the necessity to defend the grantor's suit. However, the bills total in excess of the amount paid to date by Defendants by $3,548.50. Therefore, the total amount of $22,166.10 claimed by Defendants is reasonable.

Judgment will be entered for Defendants on this count in the amount of $50.00.

5. Counterclaim Count V -- Replevin of lamp.

The lamp was a fixture, and under the purchase and sales agreement, Defendants' purchase included all fixtures. There was no exception for the lamp, despite the fact that Plaintiff had originally intended to except it from the sale as shown by the listing agreement between Plaintiff and the realtor. Whatever Plaintiff's original intention, the lamp was not excepted from the conveyance as defined in the purchase and sales agreement; and the court will not rewrite the parties' contract. As of the date of closing, Defendants were entitled to possession of the lamp. The fact that Plaintiff gave Defendants the choice of not proceeding with the closing if they insisted on the lamp is of no consequence. Defendants are entitled to it by the terms of the written purchase and sales agreement, as it was part of the property to which they had equitable title once the purchase and sales agreement was executed. See *Hemingway v. Shatney*, 152 Vt. 600, 602 (1989).

It follows that Defendants are entitled to replevin of the lamp, which was removed from the property during the period of Defendants' equitable ownership of the property. Plaintiff was not entitled to substitute a different lamp. Defendants are entitled to replevin of the specific lamp that was part of the real estate they contracted to purchase.

Judgment will be entered for Defendants on this count.

ORDER

For the foregoing reasons, IT IS HEREBY ORDERED:

1. Defendants' Motion to Alter or Amend is DENIED.

2. Defendants are awarded damages of $25,320.10 on their counterclaim for breach of warranty.

3. Defendants are awarded nominal damages of $50.00 on their counterclaim for trespass.

4. Plaintiff shall replevy the lamp to Defendants within five (5) days of this Order by delivery to Defendants' attorney's office.

Dated at Brattleboro, Vermont, this 15th day of November, 2000.

Mary Miles Teachout

Judge Mary Miles Teachout