Sargeant and Vanhoesen v. Cook, No. 35-1-05 Rdcv (Teachout, J., Dec. 19, 2007)

STATE OF VERMONT
RUTLAND COUNTY

SARGEANT and VANHOESEN,	)	
Plaintiffs,	)	**Rutland Superior Court**
	)	**Docket No. 35-1-05 Rdcv**
v.	)	
	)	
EDWARD and IRENE COOK,	)	
Defendants.	)	
	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, and ORDER
Hearing on the Merits

This matter came before the court for a final hearing on October 10-11, 2007. Plaintiffs were present and represented by Attorneys Susan Murray and Kevin Brown. Defendant Edward Cook was present; both Defendants were represented by Attorney Robert McClallen.

This action follows a prior case in which the parties settled a boundary between their adjacent properties and made other agreements concerning land use and interpersonal contact. Their Stipulated Mediation Agreement was incorporated into a Final Order issued April 13, 2000 in Docket No. S 243-98 RcC. In the present case, both parties seek remedies for contempt/breach of contract for alleged violations of the prior agreement and order, and both seek damages and injunctive relief based on alleged trespass and nuisance conduct occurring subsequent to the 2000 Order.

Based on the evidence, the court makes the following Findings of Fact.

Findings of Fact

The Plaintiffs and Defendants live on adjacent properties in Cuttingsville in the Town of Shrewsbury. Both have residences fronting onto Route 103, with large open yards behind their residences. Their houses, which are both well maintained, are located side by side, separated only by the Plaintiffs' driveway. Opposite Route 103 is the Mill River. The land behind their houses, and surrounding land, is relatively flat, with small

gradient variations, and the land has a tendency to get wet during spring run-off and at other times of year when there is heavy rain. In 1973, the area flooded.

Defendants Edward J. Cook, Jr. and Irene Cook (hereinafter Cooks) are a married couple who have lived on their residential property since 1957. Mr. Cook is 90 years old. They raised their family there and lived there until approximately one month before the hearing, when they moved to a facility for health reasons. Mr. Cook owned and operated a nursery business over many years at other locations, but starting in 1971, he also used the back portion of their 3 ½ acres to store items related to the nursery business. In order to reach the back part of the land, he brought in gravel in 1971 and constructed a 'tractor road' leading to the back, a slightly elevated road running across the otherwise wet land.

In constructing the road, he put in one culvert under the tractor road. The majority of the Cook back land is slightly upgradient from the Plaintiffs' back land, and the culvert allowed water from the wet Cook back land to drain through the culvert toward a natural swale on the Plaintiffs' back land, which is slightly lower. The tractor road runs generally parallel to the boundary with the Plaintiffs, and the culvert under it is approximately 30 feet from, and perpendicular to, the Plaintiffs' boundary line.

The Cook back land was hayed by a farmer until 1994. Since then it has been mowed to keep it open. In the years after 1971, Mr. Cook occasionally opened up a small channel in the back land to facilitate drainage toward and through the culvert. When he did not do so, the channel he had last made tended to fill up with silt and vegetation, and ceased to direct water flow, leaving the surface water to move more slowly toward the swale on the down gradient land, and seep into the ground on the way.

Plaintiffs Fred Sargeant and John Van Hoesen (hereinafter S/VH) are a civil union couple who purchased their property in 1996. They planned to restore the 1840 Greek revival home and possibly develop it into a bed and breakfast, and they have done considerable restoration work and landscaping since their purchase. At the time they moved in, Mr. Cook had not reopened his back-land upgradient channel leading to the culvert for some time, so it had filled in, but water nonetheless traveled through the culvert under the tractor road, across the 30 feet, and onto S/VH back land.

Boundary issues and other misunderstandings developed quickly. Fred Sargeant, who was the one primarily involved in the landscaping work, built up a little bank, later called the "impoundment embankment," on the S/VH side of the then-unestablished boundary. Its purpose was apparently to block water coming from the Cook property. He also dug a small drainage channel along what he thought was the common boundary. Its purpose was to receive and redirect the water coming from the Cook culvert, which was otherwise on its way to the swale on the S/VH back land.

The first lawsuit was filed, and on May 6, 1998, the parties signed a Temporary Stipulation, whereby Mr. Sargeant removed and smoothed out the embankment in a manner approved by both parties' engineers. Sargeant and VanHoesen were permitted to

retain their drainage channel, and the Cooks were permitted to unplug and maintain the culvert under the tractor road and the area from the culvert to the common boundary.

The Temporary Stipulation was later incorporated into a Stipulated Mediation Agreement which was further incorporated into the Final Order of April 13, 2000, and some of its terms are at issue in this suit. At no time after the S/VH purchase and before the Final Order did Mr. Cook reopen the channel in the upgradient land area on the Cook back land. S/VH had thus not seen such conduct on the Cook property at the time of either the Temporary Stipulation or Stipulated Mediation Agreement.

S/VH Claims

At some point during the first litigation, the Cooks installed a new white fence along the boundary with S/VH in the vicinity of their houses, and at some later time, S/VH installed a board fence on their side of it, right next to it, that was taller. The unfinished side faced toward the Cooks' property.

After the Final Order, Mr. Cook reopened the channel on the Cook back land. This caused the rate of runoff from the Cook land upgradient of the culvert to increase. Water flowed at a faster rate through the culvert and onto the Plaintiffs' land. This was in clear violation of that portion of the Final Order appearing on Exhibit A that reads: "Cook retains right to unplug and maintain culvert from existing culvert to common boundary with Van Hoesen/Sargeant. Other actions to increase the rate of runoff from land upgradient of culvert will not be taken." The action of reopening the channel in the upgradient land clearly increased the rate of runoff from the upgradient Cook property onto the S/VH property over and above what it was either in May of 1998, when the Temporary Stipulation was reached, or in April of 2000, when its terms became a Final Order, or at any time during the ownership of S/VH.

This was an intentional act that was clearly in violation of the terms of the Order. Mr. Sargeant told the Cooks' daughter about it, in accordance with the terms of the Final Order specifying means of communication, but nothing was done.

The increased rate of runoff caused some water damage to the S/VH lawn, and Mr. Sargeant, as a result, regraded and reseeded some areas of the S/VH lawn. Mr. Sargeant testified that his damages included having to repair washouts, including the use of more wheelbarrels full of topsoil and more grass seed than he would otherwise have had to use. No quantified amount of damages were proved, although the court finds that S/VH were obligated to use materials to repair the damage from increased flow to some extent. It is not proved by a preponderance of the evidence, however, that all of the washouts that occurred were caused by the actions of the Cooks.

Sargeant and VanHoesen claim that Mr. Cook acted in other ways to increase the rate of runoff from the Cook land upgradient of the culvert. Specifically, they claim that Mr. Cook tamped down the upgradient wet land in places with his feet to promote runoff toward the S/VH land, that he created tractor ruts that had the effect of increasing the rate

of runoff, and that he made shovel holes along the boundary line, including across the boundary onto the S/VH land, in order to promote the rate of drainage onto the S/VH land. Sargeant and VanHoesen claim that the amount of runoff onto their land was less during the 2007 season than at any other time, which is the one season during which Mr. Cook did not carry on such activities.

The Plaintiffs have not proved these allegations by a preponderance of the evidence. While Mr. Sargeant saw Mr. Cook walking and making tamping movements on the Cook land, there is insufficient proof that such action increased the rate of runoff from what it otherwise would have been. The tractor ruts photographed by S/VH ran parallel to the tractor road, and on the opposite side from the S/VH property, and not in a downgradient direction, and while there is water in them in the photos, it appears to be standing water. While it is possible that the ruts increased the rate of runoff, it is not proved. The photographs of watery holes, together with the testimony, do not prove that Mr. Cook intentionally made holes to increase the rate of runoff. Plaintiffs have not met their burden of proof on this point. The fact that there was less runoff in 2007 is not sufficient proof because of the many other variables that could have contributed to such a result.

The Cook septic system is located behind the Cook residence, fairly close to the boundary with S/VH, and upgradient of the natural swale behind the S/VH house (which is on slightly higher ground than the S/VH land behind it). The septic system functioned without incident for the Cook family from the time it was installed in 1962 until 2004. That year, there was some backing up of the system into the house when the washing machine was used. The Cooks had it checked and some repairs were made, including the addition of a second dry well. Thereafter, the system consisted of a septic tank, two dry wells (one for black water and one for grey water), and a leach field. The Cooks did not experience any problems again until 2007.

In April of 2007, the Cooks observed standing water in the septic system area behind their house. On May 2, 2007, the dry well was dug up in the presence of the Cooks and engineers for both the Cooks and S/VH. Mr. Sargeant watched from the S/VH side, over the fence, and took pictures. The dry well was found to be completely full of water and muck. The water level was higher than the top of the trench and dry well. Repair work was done to the dry well, and since then, no standing water has been observed in the septic system area.

It is likely that the water table reaches a height above the level of the dry well every year between March and May, during the spring runoff period, and perhaps at other times of year as well, such as when there has been heavy rain. Recently adopted state waste water regulations would not allow this system to be permitted, but due to grandfathering written into the regulations, the Cooks are not required to replace the system. Nonetheless, it is a reasonable inference that waste water from the Cook residence rises to the top of the water table when the water level is above the septic system and flows downgradient without having been treated by the system, and that this occurs on a recurrent basis in spring and during heavy rainfall. There is a high likelihood

that untreated waste water moves from the area of the Cook septic system downgradient toward the swale behind the S/VH house, entering the S/VH property.

S/VH seek damages for polluted water that they allege flowed downgradient from the Cook septic system to the S/VH property in the spring and summer of 2007. The evidence does not prove that there actually was polluted water flowing onto the S/VH land in the spring or summer of 2007. Fred Sargeant believes that there probably was, and restricted his grandchildren's use of the back yard because he did not want them to have any exposure to polluted water, but no samples were taken and it is not proven that polluted water flowed to the S/VH property. Nonetheless, it is highly likely that future use of the septic system will result in the contamination of ground water in the area of the Cook septic system, and that contaminated water will intermingle with ground water and then flow downgradient onto S/VH land.

Sargeant and VanHoesen allege that the Cooks committed trespass when Mr. Cook clipped a hedge on the S/VH property that sent shoots or branches across the line, and that he clipped them not just to the property line but one foot back. The court finds that Mr. Cook did do this. He was entitled to clip growth on his side of the boundary line, and a short reasonable distance across the line (in order to avoid having to clip new growth every day or so), but clipping a full foot inside the line constituted trespass. He also committed trespass when he mowed under the boundary line fence all the way to the drainage channel on the S/VH property.

The Final Order prohibited communication between the Cooks and S/VH except according to specified methods. Mr. Cook has violated this provision in small ways in order to communicate hostility to S/VH, including using a lawnmower to blow grass onto Mr. Sargeant when Mr. Cook was gardening close to the property line, and running a lawnmower into the S/VH landscaping cloth and bark mulch on the S/VH side of the line.

Cook Claims

The Cooks allege that Plaintiffs have committed trespass by redirecting water from the S/VH property toward the septic system area on the Cook property. The evidence did not prove this claim.

The Cooks allege that Plaintiffs have breached the Mediated Stipulated Settlement Agreement and are in contempt of the Final Order by placing signs on their property. The evidence established that Mr. Sargeant placed signs on the S/VH boundary, directed toward the Cook property. These include a "No Trespassing" sign, and another sign that read, "Keep Out Ed. Stop your actions that lower the grade on our property." These signs are placed such that they are quite a prominent feature in the Cooks' immediate back yard, even though they are located on the S/VH side of the boundary line. They are communications that are prohibited under the terms of the stipulation and Final Order, and they interfere with the Cooks' quiet enjoyment of their property. Mr. Sargeant acknowledges that he placed the signs, and that he was attempting to "deliver a message."

His explanation is that he placed the signs "by necessity," but any violation of the agreement by the Cooks does not justify the necessity of such communications.

The court finds that the signs are deliberately annoying and provocative. The Cooks claim that they have an effect on the marketability of the Cook property, which is now for sale. No monetary damages for such effect have been proved. Nonetheless, the continued presence of the signs is highly likely to impact negatively on the Cooks' legitimate efforts to sell their property, and thus to interfere with their property rights.

Conclusions

Based on the foregoing Findings of Fact, the court concludes as follows:

1. Mr. Cook violated the stipulation and Final Order of April 2000 by reopening a pre-1996 drainage channel that had the effect of increasing the rate of groundwater runoff from the Cook property to the S/VH property. In doing this, he violated the Stipulated Mediation Agreement, and is in breach of contract. Plaintiffs did not prove compensatory damages in a specific amount. Nonetheless, S/VH are entitled to nominal damages of One Dollar.

2. Mr. Cook trespassed upon the S/VH property by mowing and clipping the S/VH hedge on S/VH property. S/VH are entitled to damages, but did not prove compensatory damages in a specific amount. S/VH are entitled to nominal damages of One Dollar.

3. The Final Order of 2000 included a specific prohibition against action of the Cooks to increase the rate of runoff. Mr. Cook was aware of it, and he had the ability to comply with the Order. He engaged in an intentional act in violation of the Final Order in attempting to reopen the channel to promote drainage in the Cook back yard. Thus, he is in contempt of the Final Order. The court awards Plaintiffs $500.00 as damages for contempt of court. While specific compensatory damages have not been proved, damages are needed in an amount sufficient to deter future such conduct, thereby protecting Plaintiffs' property rights.

4. Plaintiffs have not proved compensatory damages with respect to trespass of polluted waste water flowing downgradient from the Cook septic system to the S/VH land, but they have proved a high likelihood of that happening in the future on a recurrent basis. Therefore, the court will enjoin the Cooks from any use of their residence, including use by their heirs, executors, or assigns, unless and until a waste water treatment system is installed that is designed such that waste water will not be permitted to commingle with surface runoff during seasonal high water and flow downgradient onto the S/VH property.

5. Mr. Cook was aware of the terms of the Final Order that required communication to take place in a specified manner, and he had the ability to comply with

it. Nonetheless, he intentionally engaged in the conduct of expressing hostility to S/VH through his actions with the lawnmower, in contempt of the terms of the Final Order, with the effect of perpetuating a hostile relationship and interference with the S/VH quiet enjoyment of their property and the rights established by the Mediated Stipulation Agreement and Final Order. S/VH are entitled to damages for contempt in an amount significant enough to deter future such conduct. The court awards S/VH damages in the amount of $1,000.00.

6. Fred Sargeant was aware of the terms of the Final Order that required communication to take place in a specified manner, and he had the ability to comply with it. Nonetheless, he intentionally engaged in the conduct of placing aggravating signs along the boundary, with the effect of perpetuating a hostile relationship and interfering with the Cooks' quiet enjoyment of their property and the rights established by the Mediated Stipulation Agreement and Final Order. The Cooks are entitled to damages for contempt in an amount significant enough to deter future such conduct. The court awards the Cooks damages in the amount of $1,000.00 for contempt.

Order

Defendants' Motion for Judgment made orally at the close of Plaintiffs' evidence is denied, as Plaintiffs are entitled to damages and injunctive relief for the reasons set forth above.

Plaintiffs' attorney shall prepare a Judgment and Decree in accordance with the foregoing Findings of Fact and Conclusions that provides for:

1. Nominal damages to Plaintiffs of Two Dollars,
2. Compensatory damages to Plaintiffs in the amount of $500.00,
3. An injunction enjoining the Cooks from use of their residence as described above.

Dated at Rutland, Vermont this __ day of December, 2007.

_____
Mary Miles Teachout
Superior Court Judge