



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

FREDERICK JENSEN AND)
SONS, INC.,)

Petitioner,)

v.)

C.A. No. 2196-S

PAULINE R. MUSTARD, and)
JANE DODD, as attorney in fact)
for Pauline R. Mustard,)

Respondents.)

MASTER'S REPORT:
(Motion for Attorneys Fees)

Submitted Date: November 20, 2003

Draft Report: November 25, 2003

Final Report: March 30, 1004

Cynthia J. Longobardi, Esquire, Hudson, Jones, Jaywork & Fisher, Dover, Delaware;
Attorney for Petitioner.

Eugene J. Bayard, Esquire and David C. Hutt, Esquire, Wilson, Halbrook & Bayard,
Georgetown, Delaware; Attorneys for Respondents.

GLASSCOCK, Master

This litigation has involved the petitioner's successful attempt to establish that an easement of necessity exists between its property and a public highway, across the lands of the respondent.¹ Having established the easement, the petitioner now seeks an award of attorney's fees. As petitioner concedes, this court follows the American rule on fees and costs, under which attorney's fees and other litigation costs must be borne by the party which has incurred them, absent some statutory or special equitable exception. The petitioner seeks fees here under the "bad faith" exception to the American rule, under which, in egregious circumstances, this court will shift fees from one litigant onto another, where the other has exhibited bad faith in the conduct of the litigation or in the behavior which gave rise to the litigation. *See Judge v. City of Rehoboth*, Del. Ch., No. 1613, Chandler, V.C. (April 29, 1994)(Mem. Op.) at 2. The petitioner claims that the respondent has exhibited such bad faith here, made manifest in two ways.

First, the petitioner contends that this case was so clear-cut in its factual and legal facets that no rational actor, in good faith, could have opposed the relief sought. The petitioner points to the fact that in correspondence counsel for the respondent, prior to the litigation, stated that he was "inclined to agree" that the petitioner was entitled to a right-of-way across the respondent's property. The petitioner also emphasises what it describes as the respondent's lack of seriousness in her preparation for the hearing in this

¹I refer to "the respondent" in the singular, although the petition names both Pauline R. Mustard and her daughter, Jane Dodd. Ms. Mustard owns the property in question; Ms. Dodd is joined only in her capacity as attorney-in-fact for her mother.

matter, together with the fact that the petitioner ultimately prevailed, as demonstrative of the respondent's bad faith. Having presided over the hearing in this matter, however, it is clear to me that, while the issue of the existence of an easement was ultimately resolved in favor of the petitioner, that issue was hotly, competently and appropriately contested by counsel for the respondent. There is nothing in the conduct of this suit which indicates to me that the respondent's efforts were directed, not in an unsuccessful attempt to prevail in this matter, but rather in an attempt to stall or evade a judgment, or otherwise act in bad faith.

The petitioner also claims that the respondent exhibited bad faith in a failure to disclose the true owner of the servient property. The petitioner argues that this failure led to the necessity for an additional hearing, attorneys fees incurred in connection with which should be borne by the respondent. I find that this contention is also without merit, for the reasons that follow. The respondent in this case is Pauline R. Mustard.² Ms. Mustard was the owner of a single parcel which I have found to be burdened by an easement in favor of the petitioner. At the time of the hearing to determine whether an easement of necessity existed, the respondent's counsel represented to me that the respondent's parcel had been divided into several lots, which Ms. Mustard had then distributed to family members. I indicated that those individuals would have to be afforded an opportunity to appear and that they could do so at the second phase of this

²See note 1, supra.

matter: a hearing on the location and scope of the easement found to exist at the conclusion of the first hearing.

By the time of the second hearing, counsel for the respondent had determined that, while the servient tenement had indeed been subdivided, it had *not* been distributed to family members and, in fact, was still held entirely by Mrs. Mustard. Therefore, there were no necessary parties who needed to be afforded an opportunity to appear in order for a complete judgment to be rendered in this matter.

The petitioner argues that the mistaken position taken by counsel for the respondent as to the ownership of the subdivided servient tenement caused additional litigation costs to accrue to the petitioner, and also argues (at least implicitly) that this misrepresentation as to ownership of the servient parcel was the product of bad faith. Accordingly, the petitioner seeks fees.

To the extent that it is petitioner's position that the second hearing was required solely because of the confusion as to the ownership of the servient parcel, the petitioner is incorrect. That hearing was required to afford the petitioner an opportunity to satisfy its burden of establishing the scope of the easement which it had demonstrated at the first hearing. I am at a loss, therefore, as to what litigation costs can have been incurred as a result of the error of counsel for respondent as to the ownership of the servient parcel, which was corrected by the time of the second hearing. More fundamentally, nothing in the record suggests that counsel's mistake as to ownership of the subdivided units of the

servient parcel was anything other than an innocent mistake; indicates that any advantage as a result of counsel's misstatement accrued to the respondent; or otherwise demonstrates bad faith on the part of the respondent or her counsel.

Having failed to demonstrate any ground for an exception to the general rule of this Court that each party must bear its own litigation costs, the petitioner's motion must be denied.

/s/ Sam Glasscock, III
Master in Chancery

efiled