THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. **SUPERIOR COURT**

Kevin and Susan Coco

v.

Doris (Therriault) Jaskunas

No. 04-C-658

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

The plaintiffs, Kevin and Susan Coco (the "Cocos"), have filed an action against the defendant, Doris Jaskunas ("Jaskunas"), seeking damages or relief stemming from an adverse claim and an action to quiet title advanced by abutting property owners, Richard and Paula Porter (the "Porters"), to include attorney's fees incurred in this action. The Cocos have moved for summary judgment, to which Jaskunas has objected. Jaskunas has filed a cross-motion for summary judgment.

The Court held a telephonic hearing on March 14, 2008, and thereafter received additional legal memoranda, and documentation concerning attorney's fees and costs breakdowns. After review of the parties' arguments, the submissions, the pertinent facts, and the applicable law, the Court **GRANTS** both motions for summary judgment in part and **DENIES** them in part.

BACKGROUND

In 1957, Bessie Healey ("Healey") obtained a vacant lot in Fremont (the "property"), described as "five acres Clough Land," through a Tax Collector Deed. On May 19, 1972, Healey sold the property, with a more specific description, and

constituting a purported five acres more or less, to C. Larry Therriault ("Therriault") and his wife, Jaskunas.

In April 1982, Therriault and Jaskunas filed a petition to quiet the property's title. At the time, Charles A. Willey owned the adjacent property (the "adjacent property"). The Guardian ad Litem (the "GAL") who had been appointed in the quiet title action concluded, after an independent investigation, "that if there are any parties that could conceivably have any interest in any portion of the property other than those named in the Petition, it would be the present owners of the 23 acre parcel abutting the subject property since it appears that the subject premises were [*sic*] increased in size over the years by subtraction from this adjoining parcel." See Pl.'s Mot. for Summ. J., App. at 5. The GAL requested that notice be sent to Mr. Willey and his wife and he indicated that, after such notice is provided, he would report to the court, among other things, that he had been unable to find any "parties in interest other than those named in the Petition." Id. Therriault and Jaskunas did cause a letter to be sent to Mr. and Mrs. Willey addressed, however, to their land in Fremont, the adjacent property, to inform them of the action to quiet title. This Fremont land, however, was undeveloped, and the Willeys actually lived in Epping. They may not have received the letter. The petition to quiet title, nevertheless, was granted in December 1982.

On April 19, 1986, Therriault and Jaskunas sold the property to the Cocos for Eleven Thousand Dollars ($11,000.00) through a deed with warranty covenants which contained the same description of the property as was in the deed Healey had provided to them. On June 9, 2003, the Porters, who came to purchase the adjacent

property from the Willey family, brought an action against the Cocos to quiet title to about 2.2 acres of the Cocos' claimed property. Although the Cocos requested that Jaskunas defend the action, as per the warranty covenants in the pertinent deed, she did not, and the Cocos defended the action at their own expense. On August 2, 2004, the Cocos filed this present action against Jaskunas.[1]

On September 7, 2005, this Court granted summary judgment in favor of the Cocos in Porters' action to quiet title on the basis of res judicata arising from Jaskunas' 1982 action to quiet title. Porter v. Coco, Rockingham Cty. Super. Ct., No. 03-E-0320 (Sept. 7, 2005) (Morrill, J.). Jaskunas thereafter filed a motion to dismiss the Cocos' claim here, arguing that because the Porters' action against the Cocos had been dismissed, it constituted an unlawful or unfounded claim as to which the warranty covenants did not require her to defend or bear any liability. The Court agreed, and held that the warranty deed rendered Jaskunas liable for lawful claims only, not the dismissed "unfounded" Porter claim, and, therefore, Jaskunas was not required to reimburse the Cocos. Coco v. Jaskunis, Rockingham Cty. Super. Ct., No. 04-C-0658 (November 1, 2005) (Morrill, J.).

On appeal, however, the Supreme Court reversed the trial court's summary judgment ruling in the Porters' action to quiet title against the Cocos, and remanded the case for further proceedings. Porter, 154 N.H. at 359. In so doing, the Supreme Court explained that RSA 498:5-a, which sets standards for bringing petitions to quiet title, mandates that the petition name persons who may claim an adverse interest in the property. Id. at 357. The Court held that because the Willeys were not named as defendants in the action to quiet title, but "were persons known to

[1] Therriault is not a defendant in this matter because he died after the Cocos acquired the property.

have a potential interest in a portion of the property and further, that the nature of their claim was known[,]" the petition failed to meet the express requirements of RSA 498:5-a and the court did not have jurisdiction over the Willeys or their successors to the adjacent property. Id. at 357, 358. This decision thus recognized that the Porters retained the opportunity, notwithstanding Jaskunas' 1982 decree, to proceed as they were doing. Id. at 358. In light of its holding in Porter, the Supreme Court also vacated this Court's dismissal of this case and remanded the matter for further proceedings.

On April 25, 2007, the Porters and the Cocos reached a non-monetary settlement agreement in the petition to quiet title action, which divided the disputed land between them. The settlement was reached at the time the case was about to be tried. The Court had encouraged the parties to continue efforts to obtain a settlement. Jaskunas and her counsel were present in the court house at that time, were kept abreast of settlement progress, and participated at one point in seeking to achieve overall settlement of all matters. The Court approved the settlement on April 26, 2007.

The Cocos here assert that the warranty deed they received from Jaskunas and her now deceased husband required, by virtue of the pertinent warranty covenants, that she assume, upon notice and request, the defense in the Porter case. The Cocos further assert that although they informed Jaskunas as early as November of 2002 that the Porters claimed an interest in the property and that they looked to her to assume the defense, Jaskunas failed to come forward and defend the title to the property. They assert that Jaskunas breached the pertinent warranty

covenants and is responsible to pay their reasonable costs and litigation expenses in defending the title of the property in regard to the Porters' adverse claim and, as well, their fees and costs here.[2] Furthermore, the Cocos argue that their eventual settlement with the Porters does not in any manner adversely affect their present claim.

Jaskunas, for her part, avers that she has not breached warranty covenants contained in the deed because the Cocos have not been actually or constructively evicted, nor denied their possession of the property. Additionally, Jaskunas cites Eaton v. Clarke, 80 N.H. 577 (1923), and RSA 477:27 (2007), urging that a grantor is not required to defend against, or bear any form of liability for, anything less than a lawful or founded claim. Jaskunas asserts that the settlement agreement between the Cocos and the Porters operates to prevent the Court from determining that the underlying action was founded or lawful, and Jaskunas is not, in these circumstances, required to pay the fees and costs here sought. Finally, Jaskunas asserts that even if she breached warranty covenants and is thus liable for possible damages, she is not responsible for the Cocos' legal fees and litigation expenses under RSA 477:27. Jaskunas claims instead that the appropriate measure of damages is limited to the difference between the value of the property as conveyed and the value of the remaining property, as it would have been valued in 1986, when it was conveyed.

[2] The Cocos do not, in their summary judgment papers, assert any claim for damages or relief other than one for costs and attorney's fees incurred in making a defense respecting the Porters' adverse claim and for fees and costs here. The Court concludes that no other damages or relief are here being sought.

SUMMARY JUDGMENT STANDARD

In order to prevail on summary judgment, the moving party must "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III (1997). A fact is "material" if it affects the outcome of the litigation. Horse Pond Fish & Game Club v. Cormier, 133 N.H. 648, 653 (1990). In deciding a motion for summary judgment, "the court must consider the evidence in the light most favorable to the party opposing the motion and take all reasonable inferences from the evidence in that party's favor." Barnsley v. Empire Mortgage Ltd. Partnership V, 142 N.H. 721, 723 (1998) (quotation omitted). The non-moving party "may not rest upon mere allegations or denials of his pleadings, but [the] response . . . must set forth specific facts showing that there is a genuine issue for trial." RSA 491:8-a, IV (1997). "To the extent that the non-moving party either ignores or does not dispute facts set forth in the moving party's affidavits, they are deemed admitted for the purposes of the motion." New Hampshire Division of Human Services v. Allard, 141 N.H. 672, 674 (1997).

DISCUSSION

Though she concedes she conveyed, with her now deceased husband, the property to the Cocos with the standard warranty covenants, including those pertaining to title and defense, and though she concedes that she was timely and properly noticed by the Cocos regarding the Porters' adverse claim and requested by them to assume the defense as to that claim, Jaskunas nonetheless asserts that she bears no responsibility for the Cocos' reasonable attorney's fees and other litigation expenses in dealing with the Porters' claim, or this case.

Jaskunas avers that, even if she pertinently breached covenants of warranty, RSA 477:27 does not allow for recovery by the Cocos of any attorney's fees and costs. This position lacks merit. It has long been generally established in New Hampshire that "[w]hen the [covenantor] has notice and fails to defend a suit against a covenantee by a third party, the expenses incurred in defending the suit . . .may be added to damages awarded the covenantee." 17 N.H.B.J. 1, 12 (1975) (citing Winnipiseogee Paper Co v. Eaton, 65 N.H. 13 (1888)); see Drew v. Towle, 30 N.H. 531, 538 (1855) ("the reasonable costs attending the litigation to test the title . . . [are] . . . proper item[s] to be recovered in an action of covenant, in addition to the consideration paid"); Kennison v. Taylor, 18 N.H. 220, 221 (1846).

Jaskunas further asserts that she is not liable for the fees and costs inasmuch as she is not responsible for unfounded or not "lawful" claims, or claims that do not result in any eviction or denial of possession. As to her argument in regard to unfounded claims, Jaskunas cites the Eaton v. Clarke case; and, as to her argument regarding the need for an eviction or possession denial, she cites Ensign v. Colt, 75 Conn. 111 (1902). Neither of these cases, however, support Jaskunas' position here.

To be sure, in Eaton the New Hampshire Supreme Court held that where a grantee of real property successfully defends against an adverse claim, and where he did not provide the grantor who had given warranty covenants with any prior notice of the adverse claim, he is not entitled to recover the expenses he incurred in defending against the unfounded claim. Eaton, 80 N.H. at 578. In so ruling, the Court observed that if the grantee "had . . . notified those who were bound to make

the warranty good that such a claim was being prosecuted, and had asked them to assume the defense because of their liability upon the warranty, [the grantee] would have been relieved from all further duty to them in the premises . . . [,that] [t]he peril of an ultimate liability resulting from permitting a false claim to go by default could have been transferred to those liable upon the warranty but only by a seasonable notice to defend against it." Id. (citations omitted). Because, however, the grantee had "elected to conduct a defence [sic] himself, and having defeated the claim . . . he has no cause of complaint against [the grantor]." Id. at 579. Here however, and unlike the governing circumstances in Eaton, the Cocos, as grantees, did not prevail against the Porters, but, instead, resolved the adverse claim through a settlement under which the Porters obtained a significant portion of the disputed property--property that had been warranted by Jaskunas in favor of the Cocos. Eaton is thus not controlling here.

Nor may it fairly be said, assuming that the Porter settlement is deemed to not extinguish the Cocos' rights here, that the Porter action did not conclude with the Cocos' eviction from a good portion of the warranted property. Here, under the terms of the court-approved settlement, the Cocos surrendered a portion of their property to the Porters, and therefore, were ejected from that portion of their property. While it is true that in the Ensign v. Colt case it was recognized that to obtain relief for breach of a warranty covenant there needs to be some form of eviction, or denial of possession, or deprivation of beneficial enjoyment of a part of a premises, here the consequences of the settlement (again assuming it does not extinguish the Cocos' rights to proceed here) operates as a form of partial eviction or ejectment. See

Garcia v. Herrera, 959 P.2d 533, 537 (N.M. Ct. App. 1998) (a grantee's settlement with a third party, which the court found to be "reasonable," deemed to operate to eject the grantee from one half of the property in question, by virtue of "superior title," so as to allow the grantee to bring an action for breach of warranty covenants).

This case thus turns on whether the pertinent settlement reached in the Porter litigation allows the Cocos to recover their reasonable fees and costs, or whether it operates to extinguish any such recovery possibilities. The New Hampshire Supreme Court does not appear to have yet squarely dealt with a case like this one involving deed warranty covenants, settlement of an adverse claim, proper notice to assume the defense, and failure to do this. In Morrissette v. Sears, Roebuck & Company, 114 N.H. 384,387 (1974), however, the Court held, in a third party action arising from a personal injury case and implicating a breach of warranty claim, that "[w]hile a prejudgment payment in settlement does not extinguish a right of indemnity[,] the third-party plaintiff must show that the settlement was made under legal compulsion, rather than as a mere volunteer[.]" The Court, in that regard, further held that where an indemnitee gives an indemnitor notice and effective opportunity to defend the underlying action and deal with settlement possibilities, and the indemnitor fails to assume the defense and/or avail itself of opportunities to pursue settlement, if the indemnitee then ultimately settles the underlying case under legal compulsion and looks for recovery against the indemnitor, the indemnitee "will only be required to show potential liability to the original plaintiff in order to support his claim over against the indemnitor." Morrissette, 114 N.H. at 389 (quotations and citation omitted). The Supreme Court thus declined to hold that, in

such circumstances, that is, where the indemnitor was "afforded the alternative of participating in the settlement or conducting the defense," the indemnitee would need to prove actual liability to the original plaintiff as it did not want to discourage settlement. Id. at 388.

Morrissette's sensitivity to fostering settlement is reflected as well in the New Mexico Court of Appeals' decision in Garcia. There, like here, a grantee sought to have the grantor assume the defense of an adverse claim, the grantor declined to do so, the grantee went on to settle the adverse claim resulting in a partial loss of the disputed property, and then sued the grantor for damages, including attorney's fees and costs. In ruling in favor of the grantee, the Court in Garcia held that where the settlement was a "reasonable one based on the evidence," the resolved adverse claim would be deemed a "lawful" one, allowing recovery in a breach of covenants of warranty action. Garcia, 959 P.2d at 537. Similarly to our Supreme Court's ruling in Morrissette with regard to an "indemnitee's" burden, the Garcia court thus declined to insist that a grantee, in the circumstances there presented, needed to "fully litigate the title prior to making a claim for breach of warranty." Id.

Consistent with Morrissette and Garcia, the Court proceeds here to examine the Porter settlement to determine its reasonableness. In this regard, the Court observes at the outset that Jaskunas was requested to assume the defense, which she declined to do, but she nonetheless participated to some degree in the settlement negotiations.

The settlement was reached on the eve of trial after considerable litigation. The property dispute arose from a complicated and, to some degree, unclear chain

of title history going back to about the mid part of the nineteenth century. Both the Cocos' deed and the Porters' deed contain descriptions that included the disputed land. See Porter, 154 N.H. at 358. The Porters had had their property surveyed in 2002, and this survey indicated that the disputed property constituted part of their property. The Cocos had contrary proofs to support their position.

To be sure, the Cocos vigorously litigated the Porters' claim, and took the position it lacked merit. They indeed succeeded in getting the Superior Court to grant them summary judgment on res judicata grounds only to have this reversed by the Supreme Court. Yet, the record shows that both the Porters and the Cocos had colorable or defensible positions. The case posed uncertainties for both sides. The Cocos' decision to settle as they did, with court approval on the eve of trial, was reasonable, oriented to resolve a legitimate property dispute in a compromise fashion. This reasonable settlement, which was plainly entered into under legal compulsion, renders the Porters' adverse claim, for purposes of RSA 477:2, a "lawful" claim. Accordingly, Jaskunas bears liability, under the pertinent covenants of warranty, for the Cocos' consequent reasonable attorney's fees and costs related to the Porters' claim.

DAMAGES

As modified in their itemization of attorney's fees and costs attached to their Supplemental Memorandum of Law in Support of Motion for Attorney Fees, dated March 27, 2008 ("Pl.'s Supp. Memo."), the Cocos present evidence of attorney's fees and costs totaling $47,924.89. They advance that $41,775.89 of this total relates to the Porters' adverse claim, and $6149.00 stems from the present case.

Jaskunas has not directly challenged the reasonableness or appropriateness of the fees and costs the Cocos actually advance. She does, however, assert that no proper basis exists for allowing the recovery of attorney's fees coming from the present case. For their part, the Cocos assert that to not award them attorney's fees "associated with the enforcement of the warranty covenant . . ." would result in their being provided "incomplete relief." See Pl.'s Supp. Memo. at 2.

The Cocos cite Morse v. Ford, 118 N.H. 280 (1978) in support of their position. In that case, the Supreme Court upheld an award of attorney's fees in favor of an indemnitee in an action for indemnification, and stated: "[o]ur cases have held that attorney's fees are proper when an indemnitor is primarily responsible for the injury to the third party." Id. at 281. Yet, in a later case, Merrimack School Dist. v. Nat'l School Bus Serv., 140 N.H. 9 (1995) the Supreme Court, without reference to its decision in Morse, affirmed a Superior Court decision not to award attorney's fees incurred to enforce pertinent indemnity rights, but only to permit recovery of fees resulting from the defense of the underlying case. Id. at 14-15. In so doing, the Supreme Court appears to have recognized that, as a general matter, the allowance of attorney's fees in indemnity matters does not extend to those incurred in establishing an indemnity entitlement.

The Cocos argue that the Morse case is particularly applicable because Jaskunas was at fault in failing properly to include the Porters' predecessor in title in the 1982 Quiet Title action. Jaskunas, however, did not create the title problem or issue that underlay the pertinent property dispute that came to be resolved by settlement in the Porter case.

The Cocos also cite ABC Builders v. American Mut. Ins. Co., 139 N.H. 746 (1995), but their reliance on this case is misplaced. While it is true that the Supreme Court there ruled that where an insurer fails to defend a cause of action that would fall under the pertinent policy, "if proved true," the insurer would be obligated to "reimburse its insured for the defense of a claim when it refuses to defend, including costs and attorney's fees incurred in an action to determine coverage," id. at 751, the Court carefully referenced RSA 491:22-b as the authority allowing for the recovery of the costs and fees associated with the "action to determine coverage." Here, there exists no like statutory authority.

The great weight of authority this Court has reviewed holds that attorney's fees incurred, as here, in an action to enforce or establish warranty-related rights are not recoverable as damages for breach of warranty covenants. See e.g. Bedard v. Martin, 100 P.3d 584, 591 (Colo. App. 2004); Rieddle v. Bucker, 629 N.E. 2d 860, 864-65 (Ind. App. 1 Dist. 1994); Rauscher v. Albert, 495 N.E.2d 149,154 (Ill. App. 5 Dist. 1986). This Court deems this authority, which is consistent with our Supreme Court's ruling in the Merrimack School Dist. case, to be persuasive.

The Cocos also argue, citing Harkeen v. Adams, 117 N.H. 687, 690-91 (1977), that they are entitled to their attorney's fees in this action as they were constrained, by virtue of Jaskunas' claimed bad faith, "to seek judicial assistance to secure a clearly defined and established right, which should have been freely enjoyed without such intervention . . . ." The Court disagrees. Jaskunas did not act here in such a way as to entitle the Cocos to an award of attorney's fees on that basis.

Accordingly, the Court concludes that the Cocos are here entitled to a judgment in the amount of $41,775.89, not the full amount they advance. As explained above, both motions for summary judgment are thus **GRANTED** in part and **DENIED** in part, the effect being that judgment is granted to the Cocos in the amount of $41,775.89.

So **ORDERED**.

Date: April 8, 2008

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JOHN M. LEWIS
PRESIDING JUSTICE