Joyce v. Stevens, No. 565-11-05 Wrcv (Eaton, J., Mar. 11, 2009)

STATE OF VERMONT
WINDSOR COUNTY

MICHAEL JOYCE, GREG FAILLACI, and TOWN OF BARNARD	)	Windsor Superior Court
	)	Docket No. 565-11-05 Wrcv
v.	)	
IRA STEVENS, DONALD WHITNEY, JEAN WHITNEY, DAVID WHITNEY, SHEILA WHITNEY, GORDON WHITNEY, OLIVER SEIBERT, PETER BRAMHALL, MEADOWSEND TIMBERLANDS, INC., APPALACHIAN TRIAL CONFERENCE, and TOWN OF BRIDGEWATER	)	

DECISION
Defendants' Renewed Motion to Dismiss, filed May 30, 2007

This case presents the question of whether the Town of Bridgewater validly discontinued two public roads in separate actions taken in 1859 and 1920. The proceedings have foundered for nearly two years upon the determination of exactly who must be joined as an indispensable party. The court hopes that the following rulings will help advance the matter beyond its preliminary procedural stages and towards a final adjudication on the merits.

The complaint alleges that there were once two public roads that ran between the towns of Bridgewater and Barnard, but that Bridgewater discontinued its portions of the roads in two separate selectboard actions taken in 1859 and 1920. Plaintiffs claim that the discontinuances were void because the selectboard did not follow the statutory procedures for discontinuance of roads that run between two or more towns. See 19 V.S.A. § 771 (modern statute applicable to such discontinuances); *In re Bill*, 168 Vt. 439, 442 (1998) (explaining that discontinuances are void when selectboard failed to follow statutory procedure). It appears that the question of whether these roads were actually public prior to the purported discontinuances is also in dispute. The complaint seeks declaratory rulings that the two roads are in fact public roads, or in the alternative, that the individual plaintiffs have private rights-of-way over the roads.

The defendants listed in the above caption were named in the original complaint. It appears from the record that each of the individual defendants own land abutting the disputed roads in Bridgewater. (The towns of Bridgewater and Barnard have also been joined.) The present question before the court is whether any additional persons must be joined as parties before the litigation may go forward.

The issue of additional parties was first raised in November 2006. In response, the court ordered Plaintiffs to "submit a list of parties that ought to be joined." See *Decision Regarding Defendants' Motion to Dismiss* (DiMauro, J., Feb. 5, 2007). Plaintiffs have submitted two lists, but have opposed joinder of any additional persons.

The first list was filed by Plaintiffs' former attorney (Paul Gillies) in June 2007. It names five additional "landowners whose interests are affected" by the present litigation.[1] Although Attorney Gillies represented that the persons were "indispensable" to the present action, the list does not set forth any factual details regarding who these people are, what property they own, or what interests they might have in the present lawsuit. Plaintiffs have not filed a motion to join these five additional persons.

The second list was filed by Plaintiffs' current attorney (James Anderson) in June 2008. This list names property owners abutting the disputed roads in the towns of Bridgewater and Barnard. All of the persons listed as abutting property owners in Bridgewater are already named as Defendants in this action. Plaintiffs oppose joinder of the Barnard abutters.

Defendants now seek dismissal of the complaint under Vermont Civil Procedure Rule 19 based on Plaintiffs' alleged failure to join indispensable parties. Defendants assert that Plaintiffs should have joined (1) the persons named in the list filed by Attorney Gillies in June 2007; (2) the Barnard abutters, or those persons owning land abutting the disputed roads as they continue through Barnard; and (3) persons holding interests in the abutting properties that are less than fee interests, including, e.g., mortgage holders, lien holders, easement holders, and holders of development rights.

Motions to dismiss for failure to join a party require the court to make two separate determinations. The court must first decide whether the absence of a specific person prevents it from according complete relief among those already parties. V.R.C.P. 19(a); *Grassy Brook Village, Inc. v. Blazej, Inc.*, 140 Vt. 477, 481 (1981). There is no specific formula for calculating whether a specific non-party is indispensable to the case; consideration is given to the general policies of avoiding multiple litigation, providing parties with complete and effective relief in a single action, and protecting absent persons from the possible prejudicial effects of the judgment. 7 Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 1604; see also *Grassy Brook Village*, 140 Vt. at 481 (explaining that V.R.C.P. 19 is patterned after the federal rules). If any specific persons are identified under this standard, the court must order that the person be made a party.

[1] The additional persons are TRP-LOT Company; Vermont Land Trust; Daniel and Diane Atwood; Dennis, Kenneth & Kevin Cogswell; and Edward Jr. and Edward Morton.

The rule does not permit the court to order dismissal instead. V.R.C.P. 19(a); 7 Federal Practice and Procedure, *supra*, at § 1611.

The court may consider dismissal of the complaint only when a specific person has been identified as an indispensable party under Rule 19(a) but it is not "feasible" to join them in the action—such as when the person is not able to be found or when the court lacks personal jurisdiction over the person. 7 Federal Practice and Procedure, *supra*, at 1604. Even under those circumstances, dismissal is not automatic; rather, the court must determine "whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed." Consideration is given to the extent to which a judgment rendered in the person's absence would be prejudicial to either the person or those already parties, the extent to which the shaping of relief can lessen or avoid the possibility of prejudice, the extent to which an adequate judgment may be rendered in the person's absence, and whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder. V.R.C.P. 19(b); *Grassy Brook Village*, 140 Vt. at 481; *Pillsbury v. Town of Wheelock*, 130 Vt. 242, 245 (1972).

"The timing of this decision, coming before the litigation has crystallized into judgment, often requires a court to evaluate the range of possible judgments presented by a murky case. . . . It may be a fine line that separates the Rule 19 decision from mere speculation. To preserve the clarity of this line, and the considered judgment that should support Rule 19 decisions, the court must be presented with clear and concise grounds for determining the status of the absent party. The moving party bears the burden of advancing a cogent argument on why the absent party is needed to prevent inconsistent or inadequate judgments." *Grassy Brook Village*, 140 Vt. at 481.

The Rule 19 standard of review requires specificity, and does not permit the court to order the joinder of categories of persons, or to dismiss a case because categories of persons cannot be found. See, e.g., *Kelly v. Town of Barnard*, 155 Vt. 296, 304–05 (1990) (refusing to order joinder of property owners in declaratory judgment action involving public road where moving party did not explain who the individual owners were or how their interests would be affected by the declaration). With this standard of review in mind, the court turns to the arguments pertaining to the three categories of potential parties: (1) the persons named by the June 2007 list; (2) the Barnard abutters; and (3) holders of less-than-fee interests in the abutting properties.

Issue #1: The June 2007 List

The first question is whether the persons named in the June 2007 list must be joined. The factual record pertaining to these individuals is sparse. Plaintiffs have suggested that these persons own property on Jabez Hill Road, which is no longer at issue in this case. Otherwise, there is no information showing the court who these individuals and entities are, what properties they own, or what their interests are in the present case.

An interested person must be joined in a declaratory judgment action "when his existence and claim are evident." *Kelly*, 155 Vt. at 305 (quoting *Blanchard v. Naquin*,

428 So.2d 926, 928 (La. Ct. App. 1983)). The present factual record does not provide the court with a basis for understanding how the interests of these five persons would be affected by the requested relief. In other words, although Attorney Gillies represented that the five additional persons were indispensable, the court does not know why. The court must therefore conclude that the record does not show that these five additional persons are needed to prevent an inadequate judgment.

Issue #2: The Barnard Abutters

The second question is whether persons who own property abutting the roads as they continue through the Town of Barnard must be joined under Rule 19(a). To determine whether complete relief can be granted in the absence of such persons, the court looks to the text of the Declaratory Judgments Act, which provides that when declaratory relief is sought, "all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." 12 V.S.A. § 4721.

In this case, the relief requested is a declaration that two roads located within the Town of Bridgewater are open to the public. The court does not see how such a ruling affects the interests of property owners in Barnard. The Barnard portion of the roads are already open to the public, and the requested relief would not affect the legal status of the Barnard roads or the title to any properties in Barnard.

Defendants contend that the property owners in Barnard must be made parties to the case because the statute governing discontinuance of roads running between towns require each town to follow certain procedural steps before reaching a decision, including the provision of notice to "persons owning or interested in lands through which the highway may pass or abut." 19 V.S.A. § 709. The procedural requirements of § 709, however, merely define the persons who must be given notice of the municipal hearing before the selectboard decides whether to lay out or discontinue a public road in the first instance. It does not define who must be joined as an indispensable party to an action in superior court declaring whether a municipal action was valid. *Kelly*, 155 Vt. at 304 n.4; see also *McAdams v. Town of Barnard*, 2007 VT 61, ¶ 13, 182 Vt. 259 (explaining that declaratory judgment actions are "not the same as a discontinuance").

This makes sense because the present declaratory judgment action is not a discontinuance proceeding. It will not create or discontinue a road. It will declare only whether the discontinuances were valid or not—in other words, whether the roads have always been public.

Furthermore, the use of § 709 to define the category of indispensable parties would have absurd results. The statute requires towns contemplating discontinuance to provide written notice not only to "persons owning or interested in lands through which the highway may pass or abut" but also to the municipal planning board. Moreover, it requires the town to publish notices in the town clerk's office and in the local newspaper,

so that the general public may have notice of the hearing. It goes without saying that the general public is not an indispensable party to this action.

Finally, Defendants have not shown that any individual property owners in Barnard have interests in the case above and beyond the generalized arguments discussed above. The court is therefore not persuaded that any individual property owners in Barnard must be joined as parties to satisfy the requirements of either Rule 19(a) or 12 V.S.A. § 4721.

Issue #3: Holders of Non-Possessory Property Interests

The final question is whether persons who hold non-possessory interests in the properties abutting the roads in Bridgewater must be joined. The same analysis as above applies: to determine whether the absence of these interests would subject the parties to inconsistent judgments, the court must ask whether the holders of these interests "have or claim any interest which would be affected by the declaration." 12 V.S.A. § 4721.

The requested relief affects the fee owners of abutting properties, given the owners' settled and deeded expectations that certain ways are not open to the public. The declaration might affect the title to the properties (even though the present titles might be mistaken), and the abutting owners have a cognizable interest in obtaining a final determination of the issues presented. Cf. *Kelly*, 155 Vt. at 304–05. Moreover, the alternative requested relief is a private right-of-way over the abutting properties.

The record does not show, however, that the requested relief would categorically affect holders of non-possessory interests in the abutting properties. It is speculative to suggest that the requested declaration would impact the financial value of the properties in such a way as to impair the interests of lien holders and mortgagees, given that the range of potential rulings would not have the effect of creating any new roads or depriving any properties of access to a public road. There is no reason why the requested declaration would have more of an impact upon the financial interests of lien holders than any other property-based litigation, such as disputes regarding boundary lines, adverse possession, or the existence of a prescriptive easement. Neither has there been any showing that the mere existence of a public road would affect the legal status of any particular lien holder or mortgagee, or that the financial interests of lien holders will not be adequately represented by the fee owners themselves.

With respect to easement holders, there are no facts showing that any particular easements or rights-of-way would be affected by the requested declaration. The court is not aware of any easements that cross the disputed roads, or that would otherwise be directly affected by the legal status of the roads. To the extent that there has been a suggestion that a conservation easement exists on one of the abutting properties, there has been no showing why the interests of a conservation-easement holder would be affected by the requested relief.

For these reasons, the court is not persuaded that the general category of holders of non-possessory property interests must be joined as indispensable parties in this case, or that their interests will not be adequately protected by the fee owners of the property. The record does not establish a risk of duplicative litigation or inconsistent judgments. Cf. *In re St. Mary's Church Cell Tower*, 2006 VT 103, ¶ 3, 180 Vt. 396 (explaining that the doctrine of claim preclusion normally extends to parties in privity with the original litigants). In the absence of a demonstration that a particular individual has a specific interest in the abutting properties that will prevent the awarding of complete relief among the existing parties or subject the parties to the risk of inconsistent judgments, the court cannot conclude that the Rule 19 standard has been met. *Kelly*, 155 Vt. at 304–05; *Grassy Brook Village*, 140 Vt. at 481.

Conclusion

The parties have not presented the court with a factual basis sufficient to determine that Rule 19(a) requires the joinder of any persons who are not presently parties to the case. For these reasons, the motion to dismiss is denied.

In accordance with the discovery order filed in February 2008, the court will schedule a status conference forthwith. The parties must submit a new discovery schedule that requires that all discovery be completed, mediation held and the case ready for trial within twelve months.

ORDER

For the foregoing reasons, Defendant's Motion to Dismiss (MPR #5) is ***denied***. The court shall schedule a status conference forthwith. The parties shall submit a new ADR/discovery schedule by April 1, 2009.

Dated at Woodstock, Vermont this ____ day of March, 2009.

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Hon. Harold E. Eaton, Jr.
Presiding Judge