THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case Number: 2018-0490

Mark DiMinico
Plaintiff-Appellee

v.

Centennial Estates Cooperative, Inc.
Defendant-Appellant

Rule 7 Appeal from Decision of the Rockingham County Superior Court

---

BRIEF OF DEFENDANT/APPELLANT, CENTENNIAL ESTATES COOPERATIVE, INC.

On the Brief:

Robert M. Shepard, Esquire, Bar No. 2326
SMITH-WEISS SHEPARD, P.C.
47 Factory Street
P.O. Box 388
Nashua, NH 03060
(603) 883-1571
rms@nhlaw-nashua.com

Oral Argument:

Robert M. Shepard, Esquire, Bar No. 2326

Table of Contents

Table of Authorities

Table of Cases

Table of Statutes and Other Authorities

Questions Presented For Review

1) Whether the court erred as a matter of law when it ruled that the Plaintiff's leasehold estate includes both the manufactured housing unit as well as the entirety of the surrounding lot.

2) Whether the court erred as a matter of law it granted the Plaintiff a right to a maintained view from his housing unit by ruling that the Defendant interfered with the Plaintiff's quiet enjoyment by making improvements to the neighboring lot.

3) Whether the court erred as a matter of law when it ordered the Defendant to pay remediation costs in the amount of $10,000.00 on property that the Defendant owns.

4) Whether the court overlooked or misapprehended a point of fact in ruling that the boundary lines of Lot 30 were not in dispute when the Defendant's witness, Mr. Wentworth, Assistant Building Inspector, testified that there are no boundaries between the lots.

Constitutional Provisions, Statutes, Ordinances, Rules, or Regulations Involved

RSA 477:44

> Application of Real Estate Laws. Buildings situation on land not belonging to the owners of the buildings shall be deemed real estate for purposes of transfer, whether voluntary or involuntary and shall be conveyed, mortgaged or leased, and shall be subjected to attachment, other liens, foreclosure and execution, in the same manner and with the same formality as real estate

RSA 477:44, II

> Manufactured housing, as defined by RSA 674:31, shall be deemed a building for the purposes of Paragraph I when such manufactured housing is placed on a site and tied into require utilities.

RSA 205-A:1, II, RSA 205-A:13-c, II, RSA 205-A:1, IV

> A manufactured housing park is defined as any parcel of land under single or common ownership or control, which contains, or is designed, laid out or adapted to accommodate two (2) or more manufactured houses.

RSA 205-A:2, RSA 205-A:2, I

> "Prohibition" and this statute refers to a person renting, leasing or otherwise occupying a space for manufactured housing in a manufactured housing park.

RSA 540-A:1, II, RSA 540-A:1, III

> "Prohibited Practices and Security Deposits." This statute defines a tenant as a person to whom a landlord rents or leases residential premises, including manufactured housing or a space in the manufactured housing park.

RSA 205-A:13-c, III

> Cooperative housing parks shall be subject to the provisions of RSA 205-A.

Statement of the Facts and the Case

Centennial Estates Cooperative, Inc. (sometimes hereinafter referred to as "the Cooperative") is a New Hampshire Consumer Cooperative formed pursuant to RSA Chapter

301-A by the tenants of the manufactured housing park in Derry, New Hampshire, formerly known as "Weber's Mobile Home Park". Transcript ("Tr.) pg. 141. The tenants of the manufactured housing park formed the Cooperative to purchase the park from its private owner. By a deed dated February 10, 2012 and recorded at the Rockingham County Registry of Deeds at Book 5287, Page 1515, Frederic (a/k/a Frederick) H. Weber, Jr. and Thomas W. Weber conveyed to Foxy Terrace Cooperative, Inc. a fifty-eight (58) unit mobile home park located on two (2) certain tracts or parcels of land situated in Derry, New Hampshire. Appendix ("Appx."), pg.1. The Foxy Terrace Cooperative, Inc. was the original name of the Cooperative that was later changed to Centennial Estates Cooperative, Inc. (Tr. 141) The deed into the Cooperative refers to a plan entitled "Land of F.E. & A.E. SanSoucie in Derry, NH" dated May 1966 and recorded in the Rockingham County Registry of Deeds as Plan 900. Although the deed into the Cooperative conveyed a fifty-eight (58) unit mobile home park, Plan 900 only shows forty-seven (47) mobile home sites. Appx. pg. 4. The parcels of land or tracts of land conveyed to the Cooperative consists of approximately 24.11 acres of land. There are two (2) entrances into the Centennial Estates manufactured housing park and there are four (4) streets within the park consisting of Spring Drive, Wayne Drive, Brenda Drive and Weber Circle.

Centennial Estates Cooperative, Inc. is a Consumer Cooperative, which is owned by its Members. In order to be a Member, a person must be an owner of a manufactured housing unit within the Cooperative, or a member of that owner's household. The Cooperative is governed by a Board of Directors, which is elected by the Membership. Each household has one (1) Membership vote. Appx. pg. 5. The Cooperative has adopted Bylaws and Community Rules and each Member is required to sign a Member Occupancy

Agreement and each Member is required to follow the Bylaws and the Community Rules. The homes within the community are owner occupied and each manufactured housing unit within the park is required to pay rent on a monthly basis (also sometimes referred to as a "carrying charge").

The Plaintiff, Mark DiMinico, purchased a manufactured housing unit that is located at 26 Wayne Drive, within the Centennial Estates Cooperative manufactured housing park. Mark DiMinico purchased this home by a Manufactured Housing Deed from Mark P. Arseneault dated September 12, 2012 and recorded at the Rockingham County Registry of Deeds on September 14, 2012 at Book 5356, Page 0433. Appx. pg. 22. The deed into Mark A. DiMinico (and Bianca E. DiMinico, daughter of Mark) states that the tract or parcel of land upon which the manufactured housing is situated, is owned by Foxy Terrace Co-op, Inc. The Manufactured Housing Warranty Deed identifies the specific manufactured housing unit purchased by Mr. DiMinico and his daughter. Mr. DiMinico and his daughter paid $3,600.00 for the manufactured housing unit. Tr. pg. 82.

The GIS Map for the Town of Derry shows eight (8) manufactured housing sites on one (1) side of Wayne Drive whereas Plan 900 shows seven (7) manufactured housing sites. Appx. pg. 26. Mark DiMinico is a Member of the Centennial Estates Cooperative, Inc. and he signed an Occupancy Agreement with the Foxy Terrace Cooperative, Inc. Appx. pg. 27. Article 1 of the Occupancy Agreement is entitled "Premises" and states as follows:

"The Corporation leases to the Member and the Member leases from the Corporation 26 Wayne Drive (hereinafter called "the lot") in the community."

The Cooperative held its Annual Membership Meeting on May 21, 2016. Tr. pg. 147. Mr. DiMinico was invited to attend the May 21, 2016 meeting, but declined to attend,

because of illness. Tr. pg. 111. At the May 21, 2016 Membership Meeting, the Membership agreed that Lot 27 on Wayne Drive would be developed, that a septic system would be installed, and the lot would be cleaned up in anticipation of putting a home on the lot. Appx. pg. 32. In the summer of 2016, the Cooperative started work on 27 Wayne Drive in preparation for a new manufactured housing unit. 27 Wayne Drive abuts 26 Wayne Drive, which is the DiMinico lot. The work on 27 Wayne Drive included cleaning up the site and preparing the site for installation of a pad for a manufactured housing unit, a new septic system, connection to the community well, and the installation of a trench for utilities. Tr. pgs. 153, 154, 155.

There are no defined boundary lines between 26 Wayne Drive and 27 Wayne Drive. Tr. pgs. 119, 157. Some of the work performed on 27 Wayne Drive may have over-flowed onto what would be identified as 26 Wayne Drive. Tr. pg. 157. There is a common utility pole, located behind Mr. DiMinico's home, that supplies the utilities for 26 and 27 Wayne Drive. A utility trench was dug connecting the utilities from the utility pole to the anticipated home on 27 Wayne Drive. Tr. pgs. 153, 154, 155.

On August 17, 2016 Mark DiMinico placed a service request (complaint) to the Town of Derry. Robert Wentworth, Assistant Building Inspector for the Town of Derry, investigated the complaint/service request and found that fill was brought into the site, but no wetlands were covered and that no actions were necessary. Appx. pg. 34. Robert Wentworth testified at his deposition that there are no boundaries between the sites or lots within the Centennial Estates Manufactured Housing Community. Appx. pg. 35. Mr. Wentworth further testified that the Cooperative obtained all necessary permits and approvals for the installation of a new mobile home on 27 Wayne Drive. Ultimately a

twenty-eight foot by forty-four foot (28' x 44') manufactured housing unit was placed on 27 Wayne Drive in the fall of 2017 and this home is now owned and occupied by new Members of the Cooperative.

On or about November 1, 2016 Mark DiMinico filed a Petition for Declarative and Injunctive Relief against Centennial Estates Cooperative, Inc. before the Rockingham County Superior Court. In his prayer for relief, Mr. DiMinico sought Orders from the Court compelling Centennial Estates Cooperative, Inc. to cease and desist from any further activity within the confines of Lot 30 without the express written permission of Mark DiMinico. Further, Mark DiMinico sought an Order from the Court compelling the Cooperative to remediate Lot 30 so that as nearly as possible it is restored to the condition it was in prior to the work being performed on Lot 30 by the direction of the Cooperative.

The Court had held a Bench Trial on this matter on December 22, 2017. By a Notice of Decision dated May 22, 2018, the Court entered a Final Order. Both parties filed Motions to Reconsider and the Court denied the Motions to Reconsider. This Appeal follows.

Summary of Argument

There is no support in the law or the facts of this case for the court's finding that the Plaintiff has a leasehold interest in the entirety of Lot 30, as depicted on Plan 900. The clear purpose of the Member Occupancy Agreement is to allow a Member to either place his or her manufactured housing unit on the lot in question or to continue to maintain his or her manufactured housing unit on the lot. The dimensions of the lots throughout the manufactured housing park owned by Centennial Estates Cooperative, Inc. are not defined by the Member Occupancy Agreement or by other documents for the Cooperative.

The Plaintiff does not have a right to a maintained view from his housing unit. The Plaintiff does not have the right to have a buffer on his lot, which the Plaintiff has perceived to provide privacy. A tenant or Member within the Cooperative has the exclusive right to the use and enjoyment of his or her lot, but this exclusive right is limited by the rights of the park owner to enter onto the lot to cut trees and to make improvements to the infrastructure of the manufactured housing park. The work of the Cooperative by digging the utility trench, cutting down trees and bringing fill for the utility trench and septic system for the adjoining lot in no way interfered with the quiet enjoyment of Mr. DiMinico's manufactured housing unit.

The court has ordered Centennial Estates Cooperative, Inc. to pay for the cost of remediation for its own land. There is no authority in the law for such an order. The court cannot order a park owner to repair/remediate its own land, unless the damage to the land interfered with the ability of the tenant to use his or her manufactured housing unit.

The court made an error when it stated that the boundaries of Lot 30, as depicted on Plan 900, were not in dispute. The boundaries of Lot 30 were clearly in dispute. There are not defined lot lines or lots throughout the manufactured housing park owned by the Centennial Estates Cooperative, Inc.

Argument

I. The trial court made an error of law when it ruled that the Plaintiff's leasehold estate includes both the manufactured housing unit as well as the entirety of the surrounding lot.

In its Final Order, the trial court granted the Plaintiff's request for declaratory relief. In making its Order, the court stated as follows: "The court declares that, pursuant to the

Member Occupancy Agreement entered into by the parties on September 12, 2012, Plaintiff Mark DiMinico has a leasehold interest in the entirety of Lot 30 as depicted on Plan 900, as recorded at the Rockingham County Registry of Deeds." Appx. pg. 4.

The court went on to state, as follows: "The court further declares that DiMinico's leasehold is subject to all of the terms and conditions set forth in the Member Occupancy Agreement, as well as the terms and conditions set forth in: (a) The Centennial Estates Cooperative, Inc. Community Rules, as may be amended from time to time, as provided for in the Member Occupancy Agreement; (b) The Centennial Estates Cooperative, Inc. Community Bylaws, as may be amended from time to time, as provided for in the Member Occupancy Agreement." Appx. pg. 27.

There is no support in the law or the facts of this case for the court's finding that the Plaintiff has a leasehold interest in the entirety of Lot 30, as depicted on Plan 900. The Member Occupancy does make mention of a lot, but does not describe the lot in any detail. Article 1 of the Member Occupancy Agreement states as follow: "Article 1 – Premises: The Corporation leases to the Member and the Member leases from the Corporation 26 Wayne Drive (hereinafter called "the Lot") in the community." Appx. pg. 27.

Article 2 of the Member Occupancy Agreement states as follows: "Article 2 – Term: Upon payment of the rental herein, and upon compliance with the other terms of this Agreement, the bylaws of the Corporation, and the Community Rules established by the Members, all as they may be amended from time to time, the Member shall have a perpetual right to occupy said Lot. If Member intends to terminate the Lease and Membership, Member shall provide 30 days written notice to the Corporation."

The Member Occupancy Agreement does not state that the Plaintiff, Mr. DiMinico,

has a leasehold interest in the entirety of Lot 30. In fact, Lot 30 and Plan 900 are not mentioned in the Member Occupancy Agreement.

The clear purpose of the Member Occupancy Agreement is to allow a Member to either place his or her manufactured housing unit on the lot in question or to continue to maintain his or her manufactured housing unit on the lot. The Community Rules do obligate the Member to upkeep their lot and to be responsible for the care, maintenance and snow removal of their own walk-ways and driveways. Appx. pg. 36. Section 3 of Community Rule IV. entitled "Sites", states as follows: "3) Yards are to be kept neat and free of debris. Lawns are to be kept trimmed and mowed. If a lot is neglected, the cooperative reserves the right to have the lot cleaned and paid for at the owner's expenses."

Section 7 of Rule IV. states as follows: "7) The use of the lot by the homeowner will not interfere with the cooperative's ability to perform any upkeep and maintenance of the community infrastructure. Ask before you dig or plan! DIGSAFE. Regulations apply."

The Community Rules do not define the dimensions of a lot for a Member or tenant within the Cooperative. The Community Rules specifically do not state that a Member has a leasehold interest in the entirety of the lot as described on Plan 900. The Community Rules do not state that a Member has a right to a view or any ownership interest in the trees and vegetation on the lot.

The court's reliance upon Plan 900 is misplaced. Plan 900 (Appx. pg. 4) is a 1962 subdivision plan of land into lots for a mobile home park that was recorded in May of 1966. Plan 900 shows forty-seven (47) lots. The deed into the Foxy Terrace Cooperative, Inc. (which later became Centennial Estates Cooperative, Inc.) from Frederic H. Weber, Jr. and Thomas W. Weber dated February 10, 2012 and recorded at Book 5287, Page 1515 at the

Rockingham County Registry of Deeds conveyed a fifty-eight (58) unit mobile home park located on two (2) certain tracts or parcels of land. Appx. pg. 1. For Wayne Drive, Plan 900 shows seven (7) lots consisting of Lots 30, 29, 27, 26, 23, 21 and 19 on the southern side of Wayne Drive. The GIS Plan for the Town of Derry (Appx. pg. 26) showed eight (8) lots on the southern side of Wayne Drive where Plan 900 shows seven (7) lots. Clearly, Plan 900 is not accurate and does not accurately depict what exists in the manufactured housing park owned by Centennial Estates. This is not a plan that can be relied upon by the court in making a determination that the Plaintiff has a leasehold right to the entirety of Lot 30 on Plan 900.

In the last paragraph on Page 8 of its Order, the court stated: "The legal maxim that all real estate is unique holds true with special force for DiMinico's leasehold." Brief ("Br."), pg. 31. The court was incorrect and perhaps confused when it made this statement. In this case, the real estate that is unique is not the lot or leasehold, but it is the manufactured housing unit owned by Mr. DiMinico.

The real estate that is owned by the Plaintiff, Mr. DiMinico, is his manufactured housing unit. RSA 477:44, I states as follows: "Application of Real Estate Laws. Buildings situation on land not belonging to the owners of the buildings shall be deemed real estate for purposes of transfer, whether voluntary or involuntary and shall be conveyed, mortgaged or leased, and shall be subjected to attachment, other liens, foreclosure and execution, in the same manner and with the same formality as real estate."

RSA 477:44, II states in part as follows: "Manufactured Housing. Manufactured housing, as defined by RSA 674:31, shall be deemed a building for the purposes of Paragraph I when such manufactured housing is placed on a site and tied into require

utilities."

Manufactured housing and manufactured housing communities (parks) are governed by a network of statutes within New Hampshire. The primary statute that governs manufactured housing communities is RSA Chapter 205-A, which is entitled "Regulation of Manufactured Housing Parks." A manufactured housing park is defined as any parcel of land under single or common ownership or control, which contains, or is designed, laid out or adapted to accommodate two (2) or more manufactured houses. (RSA 205-A:1, II) RSA 205-A:13-c, II states that "Cooperative housing parks shall be subject to the provisions of RSA 205-A."

A tenant is defined as any person who owns or occupies manufactured housing and pays rent or other consideration to place said manufactured housing in a manufactured housing park. (RSA 205-A:1, IV) In the Centennial Estates Cooperative, Inc., the tenant or Member is the owner of the manufactured housing unit that is placed on a lot that is owned by the Cooperative. Appx. pg. 5. The New Hampshire statutes do not specifically define the term "Lot" and does not describe the rights that a tenant has to his or her lot within a manufactured housing community. RSA 205-A:2 is entitled "Prohibition" and this statute refers to a person renting, leasing or otherwise occupying a space for manufactured housing in a manufactured housing park. (RSA 205-A:2, I) This particular statute clearly states what cannot occur within a manufactured housing community, but it does not specifically define a lot or the rights that a tenant has to his or her lot. The protections that are granted to tenants within a manufactured housing park by RSA 205-A involve the rights that the tenant has to use and live in his or her manufactured housing unit on a lot or site within the park.

RSA Chapter 540-A is entitled "Prohibited Practices and Security Deposits." This

statute defines a tenant as a person to whom a landlord rents or leases residential premises, including manufactured housing or a space in the manufactured housing park. (RSA 540-A:1, II) This statute defines "Premises" as the part of the landlord's property to which the tenant is entitled to exclusive access for living or storage as a result of the rental or lease agreement. (RSA 540-A:1, III)

When a person rents an apartment in an apartment building from a landlord, that person has the exclusive right to the use and enjoyment of that apartment. In a manufactured housing park, the premises is the manufactured housing unit and the immediate space underneath and surrounding the home. The tenant or Member has the exclusive right to occupy and use his or her manufactured housing unit, but he or she does not have the exclusive right to the use of his or her lot, to the exclusion of the Cooperative or the owner of the manufactured housing park.

There is no authority in New Hampshire law or in the Member Occupancy Agreement, the Community Rules or the Bylaws, for the court to have concluded that the Plaintiff has a leasehold interest in the entirety of Lot 30, as depicted on Plan 900. The law protects the tenant in his or quiet enjoyment of his or her manufactured housing unit, but the law does not grant the tenant the unlimited use of the lot on which his or her home is situated. The case that was before the trial court included a claim by Mr. DiMinico that the Cooperative interfered with his quiet enjoyment of his lot. There is no claim that the Cooperative interfered with the quiet enjoyment of Mr. DiMinico's manufactured housing unit.

It certainly would be possible for a tenant to be granted a leasehold interest in the entirety of his or her lot within a manufactured housing park. However, this is not the case

where such a leasehold interest was granted to the tenant. If there was a specific Lease Agreement that provided for certain rights of use within the lot, then the tenant could argue that he or she had a leasehold interest in the entirety of the lot. However, in this case, there is no such Lease Agreement.

II. The trial court made an error of law when it granted the Plaintiff a right to a maintained view from his housing unit by ruling that the Defendant interfered with the Plaintiff's quiet enjoyment by making improvements to the neighboring lot.

In making its Final Order in this matter, the court basically ruled that the Plaintiff had a right to a bucolic view. There is no authority in the law for such a ruling. In the last full paragraph on Page 9 of the Final Order, the court stated as follows: "Centennial decided that, as part of this project, it would also make extensive changes to DiMinico's lot. More specifically, Centennial removed the forested buffer on DiMinico's side of the boundary by uprooting all of the trees, removing all of the vegetation, and filling in the area with many truckloads and tons of boulders and dirt. DiMinico's bucolic view was replaced with a six foot wall of dirt approximately 12 feet from his bedroom window."

Centennial Estates Cooperative, Inc. is the owner of the land within the manufactured housing park. The tenants have an exclusive right to the use and enjoyment of their lot, however this exclusive right is limited by the rights of the park owner to enter onto the lot to cut trees and to make improvements to the infrastructure of the manufactured housing park. Rule IV. entitled "Sites", Section 7 states in part as follows: "7) Use of the lot by the homeowner will not interfere with the Cooperative's ability to perform any upkeep and maintenance of the community infrastructure." Appx. pg. 36.

The Cooperative entered onto Mr. DiMinico's lot to dig a utility trench from the telephone pole that was behind Mr. DiMinico's lot to the adjoining lot. This required the Cooperative to remove trees and to bring in fill so that a trench could be created. The Cooperative also needed to infringe upon the DiMinico lot to create a proper landing for the pad for the new home that was to be installed on the adjoining lot and to properly install a new septic system. There is no prohibition against this action found in RSA 205-A:2. The Cooperative could have done a better job in explaining what it was going to do with the adjoining lot to Mr. DiMinico, but this did not change the fact that the Cooperative had a right to enter onto Mr. DiMinico's lot and perform this infrastructure work.

The court cites no authority for its conclusion that the Plaintiff had a right to a bucolic view. In fact, there is no authority for this position. By concluding that the infrastructure work that was performed partially on the DiMinico lot interfered with Mr. DiMinico's quiet enjoyment, the court made an error of law.

The Plaintiff did not specifically bring an action against the Defendant in this case pursuant to RSA Chapter 540-A. In his prayer for relief, the Plaintiff requested an Order from the court that would compel the Cooperative to cease and desist from any further activity within the confines of Lot 30 without the express written permission of Mark DiMinico. In his prayer for relief, the Plaintiff did not make a specific reference to the quiet enjoyment of his lot.

The Plaintiff has a right to the quiet enjoyment of his home, which is the manufactured housing unit located at 26 Wayne Drive. The work of the Cooperative by digging the utility trench, cutting down trees and bringing in fill for the utility trench and the septic system for the adjoining lot in no way interfered with the quiet enjoyment of Mr. DiMinico's home.

The court has implied that by altering his view, this had interfered with Mr. DiMinico's quiet enjoyment of his home. Again, there is no support in the law for such a conclusion or implication. If the Cooperative had somehow restricted Mr. DiMinico's access to his manufactured housing unit or improperly locked him out of the manufactured housing unit, or shut off the utilities to the manufactured housing unit, then Mr. DiMinico would have had a claim against the Cooperative for interference with his quiet enjoyment of his home. No such activity occurred in this case.

RSA 205-A:13-c, III states as follows: "III. In the rental of any lot in a manufactured housing park there shall be an implied warranty of habitability whereby the park owner warrants, at the inception and throughout the tenancy, that, if provided by the owner: (a) There is a functioning water supply system which, if the source is provided by the owner, shall provide safe drinking water in accordance with the applicable standards established by the department of environmental services and quantities to meet ordinary household needs of the tenant. (b) There is a safely functioning sewerage disposal system, which shall be in accordance with the applicable standards as established by the department of environmental services, available to the tenant household."

By performing the work on the adjoining lot and partially on the lot occupied by Mr. DiMinico's home, the Cooperative did not interfere with the implied warranty of habitability.

Mr. DiMinico has claimed that the Cooperative interfered with his quiet enjoyment of his premises when it prepared the adjoining lot, 27 Wayne Drive, for a new manufactured housing unit. This claim is not supported by the law or the facts of this case. Mr. DiMinico continued to have full use and enjoyment of his manufactured housing unit located at 26

Wayne Drive. Tr. pg. 122. None of the statutory prohibitions described in RSA Chapter 540-A were committed by the Cooperative. At no time, did Mr. DiMinico lose the use of his premises, said premises being his manufactured housing unit. *Adams v. Woodlands of Nashua,* 151 N.H. 642 (2005)

III. The trial court made an error of law when it ordered the Defendant to pay remediation costs in the amount of $10,000.00 on property that the Defendant owns.

The trial court granted the Plaintiff's Request for Injunctive Relief and further ordered as follows: "THE REQUEST FOR INJUNCTIVE RELIEF IS GRANTED AS FOLLOWS: (a) Defendant Centennial Estates Cooperative, Inc. shall cooperate with Plaintiff Mark DiMinico to develop a plan for the partial restoration of the leased lot. This plan shall not require Defendant to spend more than $10,000.00 for the actual restoration work and related engineering. (Thus, the partial restoration plan will not include the full scope of the work proposed in the two estimates that the Plaintiff submitted at trial unless Plaintiff is willing to bear all but $10,000.00 of the cost.)"

The court has ordered Centennial Estates to pay for the cost of remediation for its own land. Once again, there is no authority in the law for such an Order. The Plaintiff cites the case of *Morris v. Ciborowski,* 113 N.H. 562 (1973). However, this case does not in fact support the Plaintiff's position. This is a trespass case, not involving a leasehold estate.

The court cannot order a park owner to repair/remediate its own land, unless the damage to the land interfered with the ability of the tenant to use his or her manufactured housing unit. Certainly, if there was damage to the manufactured housing unit or any outbuildings owned by the tenant, then the court could order the park owner to pay for these repairs. In

this case, there was no such damage. In the third full paragraph on Page 17 of the Final Order, the court stated in part as follows: "These authorized purposes certainly include the need to improve the abutting lot by installing electrical conduit, underground septic facilities, and a concrete pad. However, applying the preponderance of the evidence standard, this court cannot find that it was reasonably necessary to deforest and regrade DiMinico's lot to accomplish these authorized purposes." Br. Pg. 40.

By making this ruling, the court is substituting its discretion for that of the park owner. Again, there is no authority in the law for making such an Order. RSA 205-A:2 does not prohibit such action by the park owner. RSA Chapter 540-A does not prohibit such action by the park owner. The work performed by the Cooperative on the adjoining lot and partially on the DiMinico lot in no way interfered with the quiet enjoyment of the premises by Mr. DiMinico. The premises in this case is the manufactured housing unit and not the lot.

The court held no authority to order the Cooperative to remediate its own land. "As a general rule, every person has a right to subject his property to such uses as will, in his judgment, best subserve his intentions." *City of Franklin v. Durgee,* 171 N.H. 186 (1901)

IV. The trial court overlooked or misapprehended a point of fact in ruling that the boundary lines of Lot 30 were not in dispute when the Defendant's witness, Mr. Wentworth, Assistant Building Inspector, testified that there are no boundaries between the lots.

In its Final Order, the Court ruled as follows: "Because the boundaries of Lot 30, as depicted on Plan 900, are not presently in dispute, and because the lot has not been surveyed in connection with this action, the court does not further define the boundaries of the lot." Br. pg. 2.

The boundaries of Lot 30 were clearly in dispute. Plan 900 is not an accurate depiction of what exists within the manufactured housing park owned by the Cooperative. The court did not hear from any expert witnesses with regard to the boundaries as depicted by Plan 900. Mr. Wentworth, who is the Assistant Building Inspector, was not an expert witness. However, Mr. Wentworth testified at his deposition (said deposition was admitted as a full exhibit in this case) in a response from a question from Attorney Parnell, as follows: "There are no stake boundaries in the park." Tr. pg. 119

Mr. DiMinico submitted a drawing to the court that he claimed represented the lot lines for 26 Wayne Drive. Appx. pg. 47. The drawing shows a rock wall. Mr. DiMinico admitted during his testimony that on Plan 900 that there are no stone walls. Tr. pg. 88. Robert Belanger, who has lived in the Cooperative since 2008 (Tr. pg. 140) testified that he is the Operations Manager for the Cooperative. Tr. pg. 141. As the Operations Manager, Robert Belanger testified that he is in charge of infrastructure; plowing, septic systems; getting septic systems put in; getting them pumped; trash removal; setting up contracts with people; calling in plumbers; electricians; whatever is needed to be done in the park. Tr. pg. pg. 142. Mr. Belanger testified that nowhere through the park are there boundary markers. Tr. pg. 157. Mr. Belanger testified that there are no defined lots throughout the park. Tr. pg. 157.

John Regal testified that he lives at 49 Weber Circle and that he has lived in the park for thirty-seven and a half (37 ½) years. Tr. pg. 181. Mr. Regal testified that Plan 900 is not an accurate depiction of the lots that are in the park. Tr. pg. 182. Mr. Regal testified that during the years that he has lived within the park, new sites have been added. Tr. pg. 182. Mr. Regal testified that there are no boundary markers within the Centennial Estates community.

Tr. pg. 189.

Mr. DiMinico, as the Plaintiff in this case, had the burden of proving the boundary lines for his lot. Mr. DiMinico did not meet this burden. Despite the lack of clear boundary lines, the court ruled that Mr. DiMinico had a leasehold estate to the entirety of Lot 30 on Plan 900. This ruling is not supported by the facts of this case.

Conclusion

Mark DiMinico owns a manufactured housing unit, which is located at 26 Wayne Drive, within the manufactured housing park in Derry that is owned by the Cooperative. The manufactured housing unit is considered to be real estate. Mr. DiMinico does not own the lot at 26 Wayne Drive. The lot is owned by the Cooperative. Mr. DiMinico, through the Member Occupancy Agreement, Bylaws and Community Rules, has the right to locate his manufactured housing unit on Lot 26. The Cooperative designates the parking area or areas for the lot and the Community Rules defines the relative responsibilities for the lot between the owner of the manufactured housing unit and the Cooperative.

There are no defined lot lines within the manufactured housing park owned by the Cooperative. There are no written documents that give Mr. DiMinico the right to a view or the right to a privacy buffer. The Cooperative has the right to enter onto any lot within the manufactured housing park to improve or repair infrastructure or to cut down trees or to clear brush. The Cooperative does not need to obtain the permission of the owner of the manufactured housing unit before it enters onto the lot to perform work on the construction or repair of infrastructure or the removal of trees or brush.

The court committed an error of law when it ruled that Mr. DiMinico had a leasehold estate to the entirety of Lot 30 on Plan 900. Plan 900 is not an accurate depiction of what exists within the manufactured housing park owned by the Cooperative.

The trial court made an error of law when it ruled that Mr. DiMinico had a right to a bucolic view, a right to privacy and a right to a privacy buffer on his lot.

The trial court made an error law when it entered a Declaratory Judgment in favor of the Plaintiff against the Defendant. The Final Order of the trial court in this case must be reversed.

Oral Argument

The Plaintiffs/Appellants respectfully request oral argument of not more than 15 minutes.

Copy of the Decision Being Appealed

A copy of the decision below that is being appealed or reviewed is appended to this brief.

Certificate of Service

I hereby certify that the within Appellant Brief and the Appendix have been electronically filed this 8th day of March, 2019 and a copy of said Appellant Brief and Appendix has been electronically copied to William B. Parnell, Esquire, Attorney for the Plaintiff.

Robert M. Shepard – NH Bar #2326

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Rockingham Superior Court
Rockingham Cty Courthouse/PO Box 1258
Kingston NH 03848-1258

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

File Copy

Case Name: **Mark DiMinico v Centennial Estates Cooperative, Inc**
Case Number: **218-2016-CV-01205**

Enclosed please find a copy of the court's order of May 21, 2018 relative to:

Judgment

May 22, 2018

Maureen F. O'Neil
Clerk of Court

(595)

C: William B. Parnell, ESQ; Robert M. Shepard, ESQ; David Michael Stamatis, ESQ

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Rockingham, ss.

MARK DIMINICO

v.

CENTENNIAL ESTATES COOPERATIVE, INC.

218-2016-CV-1205

FINAL ORDER

The court held a bench trial in this action for declaratory and injunctive relief on December 22, 2017. The evidence included a view. After the trial, the parties filed requests for findings of fact and rulings of law as well as post-trial memoranda. The court now issues the following final order:

1. **Judgment is granted to plaintiff Mark Diminico**

2. **The request for declaratory relief is GRANTED as follows:**

   The court declares that, pursuant to the Member Occupancy Agreement entered into by the parties on September 12, 2012, plaintiff Mark Diminico has a leasehold interest in the entirety of Lot 30, as depicted on Plan 900, as recorded at the Rockingham County Registry of Deeds.

   Because the boundaries of Lot 30, as depicted on Plan 900, are not presently in dispute, and because the lot has not been surveyed in connection with this action, the court does not further define the boundaries of the lot.

   If a dispute later arises concerning the precise location of any boundary line, that would be a different cause of action for res judicata purposes.

The court further declares that Diminico's leasehold is subject to all of the terms and conditions set forth in the Member Occupancy Agreement, as well as the terms and conditions set forth in:

(a) the Centennial Estates Cooperative, Inc. Community Rules, as may be amended from time to time, as provided for in the Member Occupancy Agreement;

(b) the Centennial Estates Cooperative, Inc. Community Bylaws, as may be amended from time to time, as provided for in the Member Occupancy Agreement.

Pursuant to those instruments defendant Centennial Estates Cooperative, Inc. has the right to enter upon and physically alter the leased lot for all purposes expressly and impliedly set forth in the Community Rules, including but limited to:

(a) inspecting, planting, pruning, removing and replacing trees, as may be reasonably necessary to protect nearby structures from damage or as may be reasonably necessary to accomplish the purposes set forth in subparagraphs (b) through (g) below.

(b) inspecting, installing, maintaining, repairing and replacing underground utilities, underground water systems, underground sewer and septic systems, above-ground utility poles and overhead utilities;

(c) inspecting and improving storm water drainage, which may include the creation, repair or replacement of such vegetation, swales, berms and other improvements as may be necessary;

(d) making improvements to abutting lots, when it is physically necessary to use the leased lot as a temporary staging area;

(e) maintaining community roads and drives, as may be necessary for snow removal, repair and replacement;

(f) enforcing the Community Rules; and

(g) complying with local ordinances and state and federal law;

To the extent that the Member Occupancy Agreement, Community Rules and Bylaws vest defendant with discretion relating to defendant's entry onto and alteration of the leased lot, that discretion must be exercised consonant with the implied covenant of good faith and fair dealing.

3. The request for injunctive relief is GRANTED as follows:

(a) Defendant Centennial Estates Cooperative, Inc. shall cooperate with plaintiff Mark Diminico to develop a plan for the partial restoration of the leased lot.

This plan shall not require defendant to spend more than $10,000 for the actual restoration work and related engineering. (Thus, the partial restoration plan will not include the full scope of the work proposed in the two estimates that plaintiff submitted at trial unless plaintiff is willing to bear all but $10,000 of the cost).

Within fifteen days of the effective date of this order, the parties shall meet and confer in good faith regarding the development of the partial restoration plan.

Defendant shall obtain all necessary vendor estimates within forty-five days of meeting and conferring with plaintiff.

The parties shall then promptly meet and confer for a second time in an effort to agree upon a final plan.

If the parties cannot agree upon a final plan, either party may move for a judicial order setting forth the particulars of the restoration or partial restoration plan. If the court determines that the hearing was necessitated by the bad faith on the part of one of the parties, it may sanction that party and/or award attorneys' fees and costs in connection with the hearing. If the court determines that the hearing was necessitated by a good faith dispute, both parties will bear their own attorneys' fees and costs.

Restoration or partial restoration shall be completed with due diligence and speed, taking all circumstances, including weather, into account.

(b) Defendant Centennial Estates Cooperative, Inc., shall not expel plaintiff Mark Diminico from the cooperative or attempt to evict him from the manufactured home park for any of the conduct alleged in the complaint, so long as Diminico promptly restores the portion of his yard that was disturbed by his improper parking and so long as he parks only in the designated portion of his lot.

(c) Defendant Centennial Estates Cooperative, Inc., its officers, employees, agents, attorneys, successors, assigns and all persons and entities acting in concert with it are permanently enjoined and prohibited from retaliating against plaintiff Mark Diminico for asserting and litigating his leasehold rights under the Member Occupancy Agreement.

(d) Defendant Centennial Estates Cooperative, Inc., its officers, employees, agents, attorneys, successors, assigns and all persons and entities acting in concert with it are permanently prohibited and enjoined from further interfering with plaintiff Mark Diminico's quiet enjoyment of his leasehold.

(e) A willful violation of this injunction will be considered to be contempt of court.

4. The court rejects both parties' claims for attorneys' fees. Costs that are recoverable under Superior Court Rule 45(b) are awarded to the plaintiff Mark Diminico, who shall file a bill of costs within thirty days.

I. Facts

A. Orientation

Plaintiff Mark Diminico is a tenant in a cooperatively owned manufactured housing park. He claims that his landlord, i.e. the nonprofit consumer cooperative association that owns the park, defendant Centennial Estates Cooperative, Inc. ("Centennial"), violated his common law and statutory right to quiet enjoyment. See RSA 541-A:2; Crowley v. Frazier, 147 N.H. 387, 389 (2001). More particularly, Diminico claims that Centennial altered the dimensions, topography, drainage, landscaping and

vegetation of his lot, thereby substantially interfering with his beneficial use of his leasehold.

Centennial admits that it made significant changes to the land but it steadfastly denies that the land was part of Diminico's leasehold. Centennial maintains that Diminico leased nothing beyond the footprint of his manufactured home. Therefore, Centennial believes that it was entitled to regrade the area near Diminico's home in order to improve a neighboring home site.

With respect to the change in drainage, Centennial agrees that it has an obligation to prevent flooding in the area adjacent to Diminico's home. However, the parties dispute whether Centennial has met this obligation.

Finally, the parties dispute whether Diminico's right to quiet enjoyment entitles him to park vehicles in the "upper portion" of his lot. Diminico insists that he has such a right.

B. The Manufactured Housing Park And Diminico's Leased Lot

The Centennial Estates property is located on the east side of Route 28 Bypass (Londonderry Turnpike) in Derry, New Hampshire. The deed to the property refers to a "58-unit mobile home park." The deed also describes the property as that depicted on Plan 900 at the Rockingham County Registry of Deeds. Plan 900, however, is for a 47-unit development. The discrepancy in the number of units is explained by the fact that, over the years, some of the larger lots were divided into smaller lots. Currently there are 57 lots because two small lots were combined.

Plan 900 was approved by the Derry Planning Board in 1967. It is captioned as:

Subdivision of Land Into Lots
Mobile Park

Plan 900 includes a note, in large block letters that are the same size as the caption of the plan and located immediately above the caption, that "each lot cor. will have iron pipe," presumably to mark the lot's boundaries. The only other specifications on the plan are that (a) all roads are privately owned and (b) all street line intersections will have a radius of 25 feet. Accordingly, the court infers from Plan 900 that the Planning Board's approval was based on the specifications that:

-There would be 47 lots;

-Each lot would be as depicted on the plan; and

-The boundaries of each lot would be marked by iron pipe.

Cf. RSA 676:4-a, I(b) (allowing the Planning Board to revoke subdivision approval if a landowner establishes a use that fails to conform with the statements, plans or specifications upon which approval was based). The parties did not present any evidence as whether Planning Board approval was granted when the lot lines were rejiggered resulting, ultimately, in the present configuration of 57 lots.

All of the current lots are depicted in the Town of Derry's tax map. Centennial is taxed for all of the underlying real estate. Because all of the park's tenants own their manufactured homes and outbuildings they receive separate tax bills for these structures. See RSA 72:7-a, I.

Diminico and his daughter purchased a manufactured home in the Centennial Estates park in 2012.[1] The deed to the manufactured home states that the home is located on "Lot 30" of the park. The deed was signed both by the seller of the

[1]At the time, both the park and the cooperative were known as Foxy Terrace Co-op. The cooperative later changed its name to Centennial Estates Cooperative, Inc.

manufactured home (i.e. the previous tenant on Lot 30) and by Centennial's representative because Centennial has to consent to the sale.

Lot 30 is clearly depicted on Plan 900 and its boundaries have never changed. The parties do not dispute the boundaries of Lot 30 as depicted on the Plan. The parties also do not dispute that Diminico's home sits within these boundaries.

Lot 30 is also known as 26 Wayne Drive. When he purchased the manufactured home, Diminico also entered into a Member Occupancy Agreement with Centennial that clearly conveyed a leasehold interest in this specific lot:

> **Article 1- Premises:** The corporation leases to the Member and the Member leases from the Corporation 26 Wayne Drive (street address) (hereinafter called the "Lot") in the community.
>
> **Article 2-Term:** Upon payment of the rental herein, and upon compliance with the other terms of this agreement, the bylaws of the Corporation, and the Community Rules established by the Members, all as they may be amended from time to time, the Member shall have the perpetual right to occupy said Lot. If Member intends to terminate the lease and Membership, Member shall provide thirty (30) days' written notice to the corporation.

Despite the reference to a "perpetual" lease, the Occupancy Agreement allows Centennial to (a) change the rental amount upon sixty days' notice, (b) terminate the lease with eighteen months' notice if the property is to be put to a different use and (c) terminate the lease for other defaults, subject to an opportunity for cure. Both the "perpetual" lease term and the grounds for termination incorporate the protections that RSA Ch. 205-A provides for tenants of manufactured housing parks.

Diminico also signed a document acknowledging his receipt of the cooperative's Bylaws, Community Rules and Member Occupancy Agreement. This acknowledgment

stated that Diminico was applying for membership in the cooperative "for the lot located at 26 Wayne Dr. (street address)" (emphasis added).

The Community Rules, which were incorporated into the lease by reference, clarify that Diminico leased an identifiable "lot." For example, the Community Rules provide that, "All homeowners are liable for damages, injury or loss incurred in their homes and on their lot" (emphasis added). The same Community Rules state that "the homeowner is responsible for . . . Upkeep of their lot" (emphasis added). The Community Rules go on to warn that, "If a lot is neglected the cooperative reserves the right to have the lot cleaned and paid for at the owner's expense" (emphasis added). The Rules specifically admonish homeowners to keep their yards neat, their lawns mowed and their clotheslines restricted to the rear and side yards.

In contrast, the Community Rules make the cooperative responsible for "common areas," as well as for "trees," "underground utilities," "utility poles," "underground water and sewer systems," and "snowplowing of roads." Centennial's jurisdiction over "trees" bears particular mention. Centennial's president testified that Centennial is required to remove trees that are within ten feet of a manufactured home. Since the cooperative was formed it has removed almost 300 trees from the development.

C. The Dispute

The legal maxim that all real estate is unique holds true with special force for Diminico's leasehold. Lot 30 is a corner lot located at the very front of the park. It is protected from the park on three sides: To the South there is a small stand of trees lining the border of the park; To the West there is a long, grassy yard and a few trees separating the lot from Route 28 Bypass; To the North, the lot faces Wayne Drive, but it

does not directly face another trailer. Thus, from these three sides the lot hardly appears to be part of a large, 58 lot mobile home park.

Prior to the events that gave rise to this case, the fourth side of the lot (i.e. the east facing side) was completely shielded from the rest of the park. It was heavily wooded with mature trees and thick vegetation. Diminico's bedroom window faced this view and, as he looked out of that window he might as have well be gazing into conservation land for all that he could see.

In mid-August 2016, Centennial decided that it wanted to improve the lot that abuts the east side of Diminico's lot. The abutting lot was not tenanted at the time. The home that had been on the lot was no longer standing. In order to make the lot habitable and attractive to a new tenant, Centennial had to (a) dig a trench and install buried electrical conduit (because the old home was served by a wire running across the ground), (b) install a new septic system (because the old septic system could not even be located), (c) install fill over the septic system, (d) regrade the lot and (e) construct a concrete pad upon which a manufactured home could be placed.

Centennial decided that, as part of this project, it would also make extensive changes to Diminico's lot. More specifically, Centennial removed the forested buffer on Diminico's side of the boundary by uprooting all of the trees, removing all of the vegetation, and filling in the area with many truckloads and tons of boulders and dirt. Diminico's bucolic view was replaced with a six foot wall of dirt approximately 12 feet from his bedroom window.

Diminico was not home when this occurred because he was visiting his father for several days. Although the project had been discussed at Centennial's membership

meeting, Diminico had not attended the meeting due to illness. He was not consulted prior to the work. Therefore, the destruction of the eastern section of his lot came as a great and unwelcome surprise.

Diminico complained to Centennial's Board of Directors. He demanded that the Board honor the boundaries of his lot. The Board told Diminico that he had no leasehold rights with respect to his lawn, his yard or the wooded portion of Lot 30. More particularly, the Board took the position that Diminico leased only the footprint of his trailer. A Board member advised Diminico that if he did not like the changes to the area near his home, he was free to sell his home and leave.

Per the specification in Plan 900, the developer of the park placed iron boundary markers at each corner of Lot 30. The boundary markers that separated Diminico's lot from the abutting lot were lost when the area was regraded. Diminico replaced the lost markers with new boundary markers. Diminico's goal was to have Centennial restore his lot and limit its site work to the abutting lot.

Centennial did not respect the boundary markers, but instead ripped the markers down. Diminico continued to replace the boundary markers for approximately three weeks but each time that he did, Centennial removed them. The markers never lasted for more than one day.

The project drastically altered the drainage for storm water runoff. Diminico's home sits at the bottom a hill. Wayne drive runs downhill past Diminico's lot. Another road, Brenda Drive, slopes down and intersects Wayne Drive just above Diminico's lot. Until Centennial filled and regraded Diminico's lot, the storm water ran down a swale and did not cause any flooding. As a result of the regrading and deforesting of the lot,

storm water instead drained directly into Diminico's curtilage where it pooled and flooded his lawn and parking area.

In order to direct storm water away from Diminico's curtilage, Centennial constructed a berm and installed other improvements. However, these efforts were not successful. Then—two weeks prior to the court's view of the property—Centennial constructed a new berm and installed additional improvements to prevent flooding. The new drainage system was not tested by a storm water or snowmelt event prior to trial. Only time will tell if it will prevent continued the flooding of Diminico's curtilage

Centennial used the northeastern portion of Diminico's lot as a staging area when it constructed the concrete pad on the abutting lot. Diminico objected to this and he began to park his own trucks in this area of his lot. As a result, the lawn was marred by deep tire tracks. This was not a designated parking area and the Community Rules prohibit tenants from parking on their lawns.

Centennial then issued Diminico a notice of an expulsion hearing. The notice of the accused Diminico of (a) interfering with the development of the abutting lot by parking his vehicle on the lawn and (b) damaging the lawn. The notice indicated that Diminico would have to pay $250 for this damage. This court enjoined the expulsion hearing pending the final resolution of the case.

II. The Claims: Diminico Seeks Only Injunctive And Declaratory Relief; He Does Not Seek A Statutory Award Of Attorney's Fees

Diminico asks the court to (a) declare that his leasehold includes the entirety of Lot 30, as depicted on Plan 900 and (b) order Centennial to physically restore the topography and vegetation of the lot. Diminico also asks for an award of attorneys' fees and costs.

Diminico has not asked for compensatory damages. His complaint is captioned as a "Petition For Declaratory And Injunctive Relief" and the prayer in the complaint does not mention monetary damages. Diminico never sought to amend the complaint and he made no mention of monetary damages in his final pretrial statement.

Furthermore, Diminico did not present any evidence of actual damages. He did not present testimony concerning the diminution in the value of his leasehold or the diminution in the resale value of his manufactured home *in situ*. He did not claim any other economic loss. Thus, for example, he presented no evidence of flood damage to his yard, home or personality. He made no claim and presented no evidence of any consequential noneconomic harm.

Diminico grounded his claim for attorney's fees on (a) the fee-shifting provision of Centennial's Community Rules, which are incorporated into his lease and (b) the common law doctrine recognized in Harkeem v. Adams, 117 N.H. 687 (1977). Diminico never cited, let alone filed suit under RSA 540-A:4, which provides a statutory remedy for violation of the right of quiet enjoyment that includes reasonable attorneys' fees. The complaint does not refer to the statue. The final pretrial statement does not refer to the statute. Diminico's post-trial memorandum does not refer to the statute. Accordingly, in ruling on Diminico's request for attorneys' fees, the court will consider only the two grounds that Diminico relies on, i.e. (a) the fee-shifting provision of the Community Rules and (b) Harkeem.

III. Analysis

A. Quiet Enjoyment In General

Diminico claims that Centennial violated his right to the quiet enjoyment of his lot. The covenant of quiet enjoyment, as recognized by the common law, and as a codified with respect to manufactured housing park tenants by RSA 540-A:1 and 2, "obligates the landlord to refrain from interferences with the tenant's possession during the tenancy." Crowley v. Frazier, 147 N.H. 387, 389 (2001). See also, Echo Consulting Services v. North Conway Bank, 140 N.H. 566, 568 (1995). "A breach of the covenant of quiet enjoyment occurs when the landlord substantially interferes with the tenant's beneficial use or enjoyment of the premises." Crowley, 147 N.H. at 389; Echo Consulting, 140 N.H. at 571.

Diminico claims that Centennial breach the covenant of quiet enjoyment in two very different ways:

-First, he claims that Centennial substantially altered the topography and vegetation of his leasehold and effectively gave a portion of his leasehold to an abutting tenant; and

-Second, he claims that Centennial changed the drainage pattern of the park and caused storm water runoff to regularly flood his lot.

B. The Claim For Deforesting, Regrading And Effectively Changing The Dimensions Of The Lot

(1) Diminico's Leasehold Includes The Entirety Of Lot 30 On Plan 900

Diminico's claim regarding the deforestation and regrading of his lot requires the court to determine the scope of Diminico's leasehold. Diminico maintains that he leased the entirety of Lot 30, as depicted on Plan 900 and that Centennial had no right to enter

or alter his lot except as necessary to carry out its responsibilities under the parties lease. Centennial claims that it only leased Diminico the footprint of his trailer and that it had the right to deforest and change the topography of the land to benefit an adjoining home site.

In order to resolve this dispute, the court must construe the parties' written lease agreement. The interpretation of a lease is a question of law. Tulley v. Sheldon, 159 N.H. 269, 272 (2009); 190 Elm St. Realty v. Beaudoin, 151 N.H. 205, 206 (2004). Because a lease is a form of contract, the court applies the standard rules of contract interpretation. Tully, 159 N.H. at 272. Thus, the court must examine the language of the lease, reading it as a whole. Id.

In this case, the lease consists of the Member Occupancy Agreement as well as the two documents expressly incorporated therein, i.e. the Community Rules and the Bylaws. The court must read all of these documents together as a single whole. In doing so, the court will give the language used by the parties its plain and ordinary meaning unless a different meaning is apparent from the lease. Id. If the plain language of the lease is unambiguous, the court can look no further. If the language is ambiguous, the court may consider extrinsic evidence in an effort to determine the parties' intent at the time they entered the lease.

The court finds that the plain language of the lease unambiguously grants Diminico a leasehold interest in the entirety of Lot 30, as depicted in Plan 900. First of all, the Community Rules make repeated reference to Diminico's rights and responsibility for his entire lot.

-He may construct an accessory structure, but only after he gains Board approval based on a plan that shows the structure's "location on the lot."

-He is responsible for the upkeep of the entire "lot."

-He is liable for third party injuries that occur either in his home or anywhere on the "lot."

-He must mow his entire lawn and keep his entire yard free of debris.

-He must maintain and repair his own driveway.

-He is solely responsible for removing snow from his driveway and walkways.

None of this makes sense if Diminico did not rent a lot in the first place.

Of equal importance, the lease contains no language suggesting that Diminico leased only the footprint for his home. Presumably if that were the case, it would be expressly reflected in the lease. More particularly, one would expect that the lease would both (a) grant a license or right of way to reach the home and (b) expressly reserve Centennial's right to alter the area surrounding the home. Indeed, that would be the very heart of the parties' bargain. Yet it is absent from the lease.

Furthermore, the Community Rules grant Centennial only limited and narrowly drawn rights to enter and alter its tenant's lots. The Community Rules provide that Centennial has the right and concomitant obligation to (a) maintain underground and above-ground utilities, (b) maintain and remove trees and (d) enforce park rules. Additionally, it is beyond dispute that Centennial has the obligation to manage park wide storm water runoff. However, the Community Rules do not bestow upon Centennial a right to freely alter the landscape of its tenant's lots for the general betterment of the community or abutting tenants.

Finally, Diminico's lease identifies the leased premises with great specificity. The lease makes reference to a particular street address. That street address is mapped to Lot 30 as depicted on Plan 900. Plan 900 was approved by the Derry Planning Board and it is captioned as a subdivision into "lots" for manufactured housing park tenants. The approved plan requires iron boundary markers at the corner of each lot. Such iron markers were present when Diminico entered into the lease. The lot is depicted on the Town of Derry tax map and, even though it cannot be separately sold without an amendment to the subdivision plan, it is an identifiable lot. Indeed, the parties do not dispute the lot's borders.

For all of these reasons, it is clear that Diminico leased the entirety of Lot 30 and, further, that Centennial's residual rights to enter upon and alter the lot were limited to those purposes set forth in the Community Rules.

To be sure, there is no statutory prohibition against creating a mobile home park in which the park owner retains possession of the all of real estate except for the footprints of the tenants' homes. RSA Chapter 205-A, which regulates manufactured housing parks, does not require park owners to lease traditional lots to tenants. For the purpose of that Chapter, RSA 205-A:1, IV defines a tenant as a person who "owns or occupies manufactured housing and pays rent or other consideration to place said manufactured housing in a manufactured housing park." No doubt, some tenants would prefer to live in a park in which they are only responsible for their homes, while the landlord is responsible for everything else.

But this case does not turn on what is permitted under the statute. It turns on what the parties agreed to in the lease (i.e. the Member Occupancy Agreement, the Community Rules and the Bylaws). The lease is clear.

(2) Centennial Had No Right Under The Lease To Deforest And Regrade Diminico's Lot

Centennial has substantial authority under the lease to make changes to Diminico's lot. It can do so when trees threaten to damage any manufactured home or any underground or above-ground utility. It can do so to inspect, repair, replace or install utilities. It can do so to improve drainage. It can do so to enforce park rules. More generally, Centennial can enter the lot and alter the lot for purposes that are expressly or impliedly stated in the Member Occupancy Agreement, Community Rules and Bylaws.

These authorized purposes certainly include the need to improve the abutting lot by installing electrical conduit, underground septic facilities, and a concrete pad. However, applying the preponderance of the evidence standard, this court cannot find that it was reasonably necessary to deforest and regrade Diminico's lot to accomplish these authorized purposes. The court understands that fill was added to the abutting lot to cover a septic system and electrical conduit, but does not understand why the topography of Diminico's lot had to be altered to accomplish this. Why wouldn't a retaining wall or sloped border on the abutting lot suffice? What reasonable alternatives were considered? Indeed, what was Diminico's land actually used for?

Furthermore, (a) there was no evidence that any electrical conduit actually passed through Diminico's lot and (b) there was no evidence that Diminico's lot was needed serve as a staging area. No witness suggested that trucks could not park on

the abutting lot or along Wayne Drive. Indeed, it is not clear from the evidence whether the trucks could have been moved offsite once they were unloaded.

Furthermore, even if Centennial might have been able to make some alterations to Diminico's lot to serve these authorized purposes, it was not entitled to completely deforest and destroy the eastern portion of the lot. The parties' lease vests Centennial with substantial discretion, but Centennial must exercise this discretion in accordance with the implied covenant of good faith and fair dealing. See, e.g., Centronics Corp. v. Genicom Corp., 132 N.H. 133, 143 (1989):

> [U]nder an agreement that appears by word or silence to invest one party with a degree of discretion in performance sufficient to deprive another party of a substantial proportion of the agreement's value, the parties' intent to be bound by an enforceable contract raises an implied obligation of good faith to observe reasonable limits in exercising that discretion, consistent with the parties' purpose or purposes in contracting.

See also Livingston v. 18 Mile Point Drive, Ltd., 158 N.H. 619, 624 (2009); Great Lakes Aircraft Company, Inc. v. City of Claremont, 135 N.H. 270, 293 (1992); Milford-Bennington Railroad Co., Inc. v. Pan Am Railways, Inc., 695 F.3d 175, 179 (1st Cir. 2012) (discussing New Hampshire law); Restatement (Second) of Contracts, §205.

(3) Centennial Violated Diminico's Right To Quiet Enjoyment By Deforesting And Regrading His Lot

As noted above, a breach of the right to quiet enjoyment occurs when the landlord "substantially interferes with the tenant's beneficial use or enjoyment of the premises." Crowley, 147 N.H. at 389. Centennial's conduct clearly transgressed this standard.

Centennial effectively removed a portion of Diminico's lot and added it to the abutting lot. Centennial then told Diminico that he actually had no right to any portion of

his lot aside from the footprint of his home. It parked trucks on his lot to serve the abutting lot. It changed the topography of the lot.

More important, Centennial eliminated a heavily wooded buffer of approximately twenty feet that separated Diminico's lot from his abutter. That small area of woods gave Diminico's lot privacy and seclusion. It is what attracted Diminico to the lot in the first place. Centennial replaced the wooded buffer with a wall of dirt. This was a substantial interference with Diminico's use and enjoyment of his lot.

(4) Parking

Centennial did not violate Diminico's right to quiet enjoyment by prohibiting from parking outside of the designated parking area on his lot. Under the Community Rules, each lot has a designated parking area and tenants are expressly prohibited from parking on lawns.

The Community Rules make Diminico responsible for the upkeep of his lot. Therefore, he must repair any damage to the lawn that he caused by parking on it. The court viewed the lawn area in December, 2017. It is now May, 2018. The court does not know whether any damage remains.

(5) Declaratory Relief

Pursuant to RSA 491:22, the court issues the judicial declaration set forth in **bold font** on pages 1 through 3 of this order.

(6) Injunctive Relief

An injunction should issue only if the plaintiff proves (a) a risk of immediate and irreparable harm, (b) the lack of an adequate remedy at law and (c) that the balance of equities and hardships militate in favor of issuing the injunction. New Hampshire

Department of Environmental Service v. Mottolo, 155 N.H. 57, 63, 917 A.2d 1277, 1281 (2007); ATV Watch v. New Hampshire Department of Resources & Economic Development, 155 N.H. 434, 437 (2007); Murphy v. McQuade Realty, Inc., 122 N.H. 314, 316 (1982); Thurston Enterprises, Inc. v. Baldi, 128 N.H. 760, 766 (1986).

Diminico has proven all of these elements. It is clear that he has suffered and will continue to suffer irreparable harm in the absence of injunctive relief. His right to quiet enjoyment has been violated and can only be restored through an affirmative injunction.

Diminico lacks an adequate remedy at law. Although monetary damages are available for a breach of the right to quiet enjoyment, Diminico's right to the beneficial use and enjoyment of his property cannot be safeguarded through monetary damages alone. Every piece of land—including a leasehold in a manufactured home park—is unique. Only the physical restoration of the lot will make Diminico whole.

The balance of equity favors Diminico, but only to a point. Diminico proved that it would cost approximately $30,000 to restore his lot to the status quo ante. Such a project would require the removal of many truckloads of fill and the planting of many trees, including several large trees. Diminico's monthly rent is $555. Thus, the cost of a full remediation would be equal to 54 months (i.e. four and a half years) of rent. This would require each of the cooperatives 57 tenants to pay more than $500. That would be a heavy burden and it would be disproportionate to the value of Diminico's lot.

At the same time, a partial remediation could go a very long way towards restoring Diminico's seclusion and privacy and vegetation. Accordingly, the court believes that the balance of equities favors an affirmative injunction requiring a

partial remediation that costs Centennial no more than $10,000. The injunction set forth in **bold font** at pages 3 and 4 of this order.

The court finds that Diminico is also entitled to an affirmative injunction that protects him against retaliation for bringing this claim. Accordingly, the injunction prohibits Centennial from expelling Diminico based on the damage to his lawn, provided that he repair any remaining damage.

C. The Claim For Flooding The Lot

Diminico's claim for the flooding of his lot can be resolved summarily. Diminico does not seek compensatory damages for past flooding. His complaint seeks only forward looking declaratory and injunctive relief. For its part, Centennial does not dispute that it has an obligation to provide for adequate drainage of storm water runoff. Thus, there is no air between the parties as to the extent of Centennial's obligation.

The only question is whether the berm and improvements that were installed two weeks' prior to the court's view of the property are effective. This question could not be answered at trial because the new system had not yet been tested by a significant storm or snow melt. Accordingly, Diminico did not prove at trial that his lot is presently flooded so often and so severely as to violate his right to quiet enjoyment of his leasehold.

More important, Diminico has not demonstrated that any sort of forward looking judicial relief is necessary to goad Centennial into complying with its obligation to manage storm water runoff. Therefore, the court finds that (a) there is no present dispute between the parties requiring a judicial declaration with respect to the

prevention of flooding and (b) there is no present need for injunctive relief to prevent future flooding.

D. Attorneys' Fees

As noted above, Diminico did not file suit under RSA 540-A:4. Thus, he did not rely on the fee-shifting provision of that statute. More important, he never placed Centennial on notice that he was seeking statutory attorneys' fees. Therefore, Diminico is not entitled to an award of attorneys' fees under the statute.

The court rejects Diminico's claim that he is entitled to attorney's fees under the fee-shifting provision of the Community Rules. The Rules allow Centennial to recover fees when it is the prevailing party in litigation brought by either Centennial or a tenant. If this were all that the Rules said, it would invite the question of whether there is an implied reciprocal right to fee-shifting when the tenant is the prevailing party. However, the pellucid language of the Rules makes clear that fee-shifting is a one way street:

> In the event a legal action is commenced against the Cooperative by a homeowner and the Cooperative prevails in said action or the action is withdrawn by the homeowner, the homeowner shall be required to reimburse the Cooperative in defendant such action. **In no event shall the Cooperative be responsible for paying the homeowner's legal fees.** This is justified since the homeowner is a Member of the cooperative and a partial owner of the Cooperative.

(emphasis added). Thus, Diminico does not have a contractual right to attorneys' fees. Diminico has not provided this court with any caselaw, and the court has found none, that suggests this contractual arrangement is unenforceable.[2]

[2]By statute, certain types of contracts can only provide for reciprocal fee-shifting. See, e.g., RSA 361-C:2 (providing that any fee-shifting provision in certain consumer installment contracts must be reciprocal). This rule does not apply to a contract between a manufactured home park consumer cooperative and its members.

Diminico does not have a common law right to recover attorneys' fees under Harkeem v. Adams, 117 N.H. 687 (1977). This case involved a good faith dispute concerning the scope of Diminico's leasehold. Although Centennial's position did not win the day, it was certainly not frivolous. Indeed, while the court rejected Centennial's view of the lease, it stopped short of ordering the full remediation that Diminico requested.

May 21, 2018.

Andrew R. Schulman,
Presiding Justice