THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2018-0490

Mark DiMinico,
Plaintiff-Appellee

v.

Centennial Estates Cooperative, Inc.,
Defendant-Appellant

RULE 7 APPEAL FROM A DECISION OF THE
ROCKINGHAM COUNTY SUPERIOR COURT

BRIEF OF THE PLAINTIFF-APPELLEE, MARK DIMINICO

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I. QUESTION PRESENTED FOR REVIEW

Pursuant to New Hampshire Supreme Court Rule 16(4)(a), the Cross-Appellant adds the following questions presented for review arising from cross-appeal:

1) Did the Superior Court make an unsustainable exercise of discretion by ordering the Defendant to pay remediation costs in the amount of $10,000.00 on the Plaintiff's "unique" leasehold when the evidence was uncontested at trial that the cost of mediation would be at the very least three times that amount?

2) Did the Superior Court make an error of law by ruling that the Plaintiff was not entitled to attorneys' fees either through RSA 540-A:4, IX for a violation of RSA 540-A:2 or under *Harkeem v. Adams*, 117 N.H. 687 (1977)?

II. CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCE, RULES OR REGULATIONS INVOLVED

Pursuant to New Hampshire Supreme Court Rule 16(4)(a), the Cross-Appellant adds the following statutes arising from cross-appeal:

1) **RSA 205-A:9 – RSA 540 Applicable Where Not Inconsistent**

The provisions of RSA 540 shall apply to tenancies in manufactured housing parks except where such application would produce a result inconsistent with or contrary to the provisions of this chapter.

2) **RSA 540-A:2 – General Prohibition**

No landlord shall willfully violate a tenant's right to quiet enjoyment of his tenancy or attempt to circumvent lawful procedures for eviction pursuant to RSA 540. No tenant shall willfully damage the property of the landlord or prevent completion of necessary repairs or willfully deny tenants their right to quiet enjoyment of their tenancies.

3) **RSA 540-A:4, IX(a) - Remedies**

(a) Any landlord or tenant who violates RSA 540-A:2 or any provision of RSA 540-A:3 shall be subject to the civil remedies set forth in RSA 358-A:10 for the initial violation, including costs and reasonable attorney's fees incurred in the proceedings. Each day that a violation continues after issuance of a temporary order shall constitute a separate violation.

III. STATEMENT OF THE FACTS

A. Background

Mark DiMinico is a tenant in a cooperatively owned manufactured housing park (hereinafter sometimes referred to as "the park") located on Route 28 Bypass in Derry, New Hampshire. (Appendix "App." at 22-25; 27-31). The park consists of two conjoined parcels of land (approximately 24.11 acres), with two entrances, and four streets, including Wayne Drive. Centennial Estates Cooperative, Inc. (hereinafter referred as "the Cooperative") is a landlord cooperative association that owns the park. (*Id*. at 1-4).

Mr. DiMinico, purchased a manufactured housing unit located at 26 Wayne Drive with his daughter Bianca on September 12, 2012. (*Id*. at 22-25). The deed was recorded at the Rockingham County Registry of Deeds on September 14, 2012 at Book 5356, Page 0433. Appx. pg. 22. (*Id.*). The Cooperative owns the land where's Mr. DiMinico's unit is placed. (*Id.*). The manufactured housing unit is said to be situated at "By-Pass 28, Lot #30". (*Id.*).

The Cooperative acquired the park on February 10, 2012. (*Id*. at 1-3). The deed is registered in at the Rockingham County Registry of Deeds at Book 5287, Page 1515. (*Id.*). The property has changed over the years, as the deed refers to both a "fifty-eight (58) unit mobile home park" and to the Plan 900 located at the Rockingham County Registry of Deeds. (*Id.*). Plan 900 refers to a 47-unit development circa 1966. (*Id*. at 4). Over time, some of the larger lots were subdivided to make smaller lots. See (*Id*. at 26); see also (Transcript "Tr." at 182–86). To wit, the tax map for the Town of Derry shows eight (8) manufactured housing lots on one (1) side of Wayne Drive whereas Plan 900 shows seven (7) manufactured housing lots. Compare (App. at 26) with (App. at 4). Plan 900 contains Lot 30 located on Wayne Drive. (*Id*. at 4). The boundaries of Lot 30 are the same on the tax map and the Plan 900 map. Compare (*Id*. at 26) with (*Id*. at 4); see also (Tr. at 195-96).[1]

[1] Presently, Lot 30 is now Lot 26 (Mr. DiMinico's lot); Lot 29 and is now Lot 27 (the abutting lot). Compare (App. at 4) with (App. at 47); see (Tr. at 195-96). However, this Brief shall refer to Mr. DiMinico's lot as Lot 30, and the abutting lot as Lot 27. However, the witnesses differed on how they described and differentiated the two lots at trial.

The Cooperative developed and drafted a Member Occupancy Agreement (hereinafter referred to as "MOA"), Bylaws and Community Rules for each member. (App. at 5-21; 27-31; 36-46). Any owner of a manufactured housing unit within the park is a member of the Cooperative. (*Id*. at 6). Each member is required to sign the MOA requiring each member to follow the MOA, Bylaws, and the Community Rules. (*Id*. at 27). The MOA, Bylaws and Community rules serve as the lease for each member (hereinafter sometimes collectively referred to as "the lease" or "the lease agreement"). (*Id*.) Pursuant to Article 3 of the MOA, each manufactured housing unit is required to pay rent on a monthly basis to the Cooperative. (*Id*. at 28). Rent entitles a Member to a "Lot". (*Id*. at 27-28). "Lot" is not a defined term in the lease. See (*Id*. at 5-21; 27-31; 36-46). Article 1 of the Occupancy Agreement is entitled "Premises". (*Id*. at 27). According to the lease, the Cooperative leased Mr. DiMinico a premises at "26 Wayne Drive (hereinafter called the 'Lot') in the Community (street address)." (*Id*.).

The Community Rules set forth the responsibilities of the Cooperative and Mr. DiMinico. See (*Id*. at 36-46). Mr. DiMinico is responsible for "upkeep of [his] lot", "care, maintenance and snow removal of [his] own walk-ways and driveways". (*Id*. at 39). He is also required to mow his "entire lawn and keep it free from debris". (*Id*. at 43). In addition, he liable for any third-party injuries the occur in his home or on the "lot". (*Id*. at 39). Further, he is permitted to add accessory structures upon approval based on a plan that demonstrates the structure will be on the "lot". (*Id*. at 42). The Cooperative is expected to maintain the underground and above ground utilities, maintenance of common areas and trees, and enforcing the community rules. (*Id*. at 39). The Cooperative reserves a right to take necessary action on any lot related to "upkeep and maintenance of the community infrastructure". (*Id*. at 43).

Lot 30 made a strong impression on Mr. DiMinico. (Tr. at 9-10; 21-23; 122). The property was a larger, corner lot beset by thick vegetation and many large adult trees behind the unit. (*Id*. at 9-10; 21-23). The portion of Lot 30 facing Wayne Drive was marked by a metal post. (*Id*. at 17-18). Lot 30 also had a stone wall that ran along its western edge, turning along the lot's border to the east to separate the abutting lot (known

as Lot 27). (*Id*. at 14-17). A small pool of standing water and swale existed on the southern portion of property for water runoff that acted akin to a small pond in the summertime. (*Id*. at 34-35). Mr. DiMinico testified to the solitary nature of the lot and the privacy that he enjoyed there. (*Id*. at 9-10; 21-23; 51-52; 122). His bedroom faced the trees and vegetation. (*Id*. at 10; 51-52; 62-63). He specifically bought the manufactured house on Lot 30, and rented Lot 30, because of the idyllic and secluded nature of the Lot. (*Id*. at 9-10; 14; 21-23; 51-52; 122). Mr. DiMinico put significant time into the rehabilitation of his unit and work on his lot. (*Id*. at 8-9; 84).

At all times, Mr. DiMinico believed that he owned a lease to the entire lot located at 26 Wayne Drive. The Cooperative believed that he owned a lease to the cement "pad" located at 26 Wayne Drive. There is no language in the lease that would suggest Mr. DiMinico's lease is solely restricted to the footprint of his property.

B. Current Dispute

The Cooperative held its annual Membership Meeting on May 21, 2016. (App. at 32-33). Mr. DiMinico could not attend due to illness, but he previously attended each and every other meeting held by the Cooperative. (Tr. at 111-12). At the 2016 Membership Meeting, the Cooperative decided that work would be done to Lot 27. (App. at 33). Lot 27 abuts 26 Wayne Drive. (App. at 4). The work required included the digging of a trench for an electrical conduit, install new septic system, install fill over the new septic, regrade and clear the lot to allow a concrete pad to place the new manufactured home. (Tr. at 152-54). This work started around August of 2016 while Mr. DiMinico visited his step-father. (*Id*. at 26). Mr. DiMinico was not informed this work was going to be done. (*Id*. at 25; 29). Mr. DiMinico was not consulted regarding the amount of work that needed to be done. (*Id*.). The Cooperative removed the entirety of the heavily forested buffer along Mr. DiMinico's property boundary with Lot 27. (*Id*. at 25-27; 34-35; 50-51; 59; 60; 108; 134-135); see e.g. (Plaintiff-Appellee Appendix "P.App" at 3-4; 19).[2] The Cooperative removed all of the trees and vegetation, and installed a six (6) foot wall of

[2] For all photos recollecting the state of the lot and the damage done to it see generally (P.App at 2-50).

dirt and boulders in its place. (*Id.*) The drainage of Lot 30 was drastically affected by these changes. (Tr. at 47-48). In short, the changes destroyed Lot 30's bucolic view and caused runoff to pool on the curtilage of Lot 30. No reason was provided as to why these specific changes to Lot 30 needed to occur to accomplished the work required on Lot 27.

Mr. DiMinico complained to the Cooperative's Board of Directors regarding the nature and extent of the work completed. In response, the Board told Mr. DiMinico that he had no leasehold rights to his lawn, yarded or any portion of his lot. See, e.g., (*Id.* at 156; 166; 191-92). In short, because the Cooperative believed Mr. DiMinico had no rights to the land, and if he did not like the changes, he could leave. (*Id.* at 28; 32). The Board believed Mr. DiMinico was entitled to only the use of his home on the "pad" or footprint provided by the lot. Mr. DiMinico testified that there were clear boundary markers that existed before the work was completed by the Cooperative. (*Id.* at 14-19). When he returned home from his trip, the boundary markers were gone. (*Id.* at 29-32). Mr. DiMinico tried to reinstall those boundary markers for three weeks. (*Id.* at 31). The Cooperative would remove the markers in less than one day. (*Id.* at 31; 157-58).

As the work continued, the Cooperative used the northern portion Mr. DiMinico's lot as a staging area for the work on Lot 27. (*Id.* at 45-47); see, e.g. (P.App. at 37; 43-45). Mr. DiMinico parked his vehicle in the northern portion of his lot to prevent any further damage to his lot by preventing the work trucks from parking on his property, tearing up the grass. (Tr. at 156-57). As a result, the Cooperative threatened Mr. DiMinico with expulsion from the park. (*Id.* at 39-40). On or about November 14, 2016 Mr. DiMinico filed a Petition for Declarative and Injunctive Relief against the Cooperative in the Rockingham County Superior Court (hereinafter as "Trial Court") to enjoin the expulsion action, any further changes to his lot, restore his lot to the condition it was in, and reimburse him for his attorney's fees and costs. (P.App. at 53-54).

The Trial Court held a Bench Trial on December 22, 2017, and issued a Final Order of Injunctive Relief on May 22, 2018. Both parties filed Motions to Reconsider and the Court denied the parties respective motions. The parties' respective appeals followed.

IV. SUMMARY OF THE ARGUMENT

The Cooperative is subject to *contra perferentum*, holding the draftor of a lease responsible for the language therein. The lease drafted by the Cooperative provided Mr. DiMinico "a lot". The lot was of a specific nature and defined as 26 Wayne Drive in the lease. Mr. DiMinico's deed to his manufactured housing unit specifically stated the unit was situated at Lot 30. Lot 30, as recorded in Plan 900 at the Rockingham County Registry of Deeds, reflected Mr. DiMinico's recollection of the property's boundaries at the time of the lease signing. These boundaries have not changed. Mr. DiMinico entered into the lease and purchased the home at 26 Wayne Drive because of the features of Lot 30. The Cooperative owns the land and drafted the lease. To wit, the lease provided Mr. DiMinico a lease to the premises as defined as 26 Wayne Drive or "lot". The lease left Mr. DiMincio responsible for the maintenance, upkeep, and third-party liabilities for the "lot". Therefore, Mr. DiMinico leased the plot/lot of land known as 26 Wayne Drive as defined by the borders recorded at the Rocking County Registry of Deeds.

The Cooperative had the right to enter the lot to do necessary maintenance. The Cooperative's right to entry was a contractual right. Such the right was subject to the implied covenant of good faith and fair dealing. Completing any necessary maintenance was a completely discretionary right under the lease. Undoubtedly, the Cooperative had the right to alter Lot 27. However, the Cooperative changed the entire nature of Mr. DiMinico's lot by removing wide swaths of tree and other shrubbery, leaving him with a massive mound of dirt behind his property. The Cooperative could not demonstrate why the changes to Mr. DiMinico's lot were necessary. Indeed, the Cooperative has no basis to remove all of the trees and vegetation with a six (6) foot wall of dirt and boulders.

The changes to Mr. DiMinico's leasehold were fundamental. New Hampshire recognizes a tenant's right to quiet enjoyment to the distinct properties of land. This common law right expands to the statutory right provided to the quiet enjoyment of leased property under RSA 540-A:2. As Mr. DiMinico possessed no permanent right to the real estate, and the damage was done to the real estate, he could not be monetary

compensated for his loss. The Trial Court correctly found that the only equitable remedy available at law was through injunctive relief to make the Cooperative provide remediation of the land for the duration of Mr. DiMinico's lease. This part of the Court's decision should be affirmed.

However, despite hearing uncontroverted evidence on the cost of remediation, the Court lowered the remediation expense by $20,000.00. There was no objective basis to lower the remediation cost by this amount. In addition, despite finding the Cooperative violated the covenant of good faith and fair dealing, and deciding this matter under RSA 540-A, the Court declined to award attorney's fees. These parts of the Court's ruling should be remanded as a misapplication of the law and abuse of discretion.

V. ARGUMENT

A. Mr. DiMinico's Manufactured Housing Leasehold Estate Includes the Entire Lot

1. Legal Standard

A lease is "any agreement that give rise to a relationship between landlord and tenant". BLACK'S LAW DICTIONARY 1035 (2ND ED. 1968). A leasehold is "an estate in realty held under a lease," typically formed for a number of years. *Id*. at 1036. The determination of the specific nature of the leasehold is a matter of contract interpretation of the lease and a question of law. *Tulley v. Sheldon*, 159 N.H. 269, 272 (2009). The Court must construe the entire language of the lease, reading it as a whole. *Id.* The Court will provide the language used in the lease their common meanings as understood by reasonable people. *Id*.

New Hampshire has historically recognized a leaseholder's right to the particular nature of the land as granted by the lease. The Supreme Court has long recognized that tenants to land possess a right to the possession of the land and an enjoyment of the properties or distinct nature of that land (e.g. shade, privacy, etc.). *Wood v. Griffin*, 46 N.H. 230, 239 (1865). These rights are abrogated by the lease terms or law. See RSA 540-A:2 (defining a tenant right's to quiet enjoyment based on the terms of the tenancy and the law of RSA 540-A).

Finally, a "landlord-tenant relationship exists only with respect to a space that is intended to have a fixed location for the duration of the lease". RESTATEMENT (SECOND) OF PROPERTY: LANDLORD & TENANT, §1.1 (1997). Several states have legislatively defined the leased space provided to a tenant from the manufactured housing park owner. Many states have legislatively defined the leased space as the entire lot (See e.g., MAINE REVISED STATUTES §9091(5) (2019); and 25 DELAWARE CODE §7003(14) (2019)). Other states have more limited, but still nebulous definitions allowing space for buildings and accessory buildings. (See e.g., COLORADO REVISED STATUTES 38-12-201.5(4) (2019)) Further, other states have left it up to the lease parties to determine by their lease

agreement. (See e.g., TEXAS PROPERTY CODE §94.001(6) (2019); and 765 ILLINOIS COMPILED STATUTES 745/11(a) (2019)) New Hampshire's legislature has not answered this question. (See RSA 205-A:1) Therefore, each manufactured housing tenant's leasehold is described by the lease granted to each tenant. See *Tulley*, 159 N.H. at 272.

2. The Plaintiff's Leasehold Estate Included the Entire Lot Because the Lot was Defined at the Registry of Deeds

Without a statutory definition, or defined term in the lease, the Court properly defined the term "lot" in the lease. See Final Order, p. 13-17. The parties' lease agreement consists of the MOA, the Community Rules, and the Community Bylaws. The parties' lease agreement only mentions a "lot," without defining any metes and bounds, defining characteristics, or description of that "lot". However, the lease agreement does note that Mr. DiMinico has a particular "premises" located at the street address of 26 Wayne Drive.

Mr. DiMinico testified that before he entered into the lease, he specifically viewed the property. At trial, he described the metal stake and stone walls that were located on the property at the time of his purchase that existed for a majority of his tenancy. He believed these objects marked the border of his lot, and recollected that these markers corresponded with Lot 30 on Plan 900 as recorded with the Rockingham County Registry of Deeds. In addition, Mr. DiMinico's deed specifically mentions "Lot 30". While the Lot and Plan are not mentioned in the lease, Mr. DiMinico believed that in light of the physical boundaries of the lot, his deed, the recorded plan, the lease, and no definition that would change his belief in the lease itself, that he leased the entirety of Lot 30.

Importantly, the lease includes an explanation as to Mr. DiMinico's responsibilities. Mr. DiMinico responsibilities include: maintenance and upkeep of the entire "lot", liability for third-party injuries that occur on the "lot", mowing the lawn and keeping his yard free of debris, maintaining and repairing the driveway, and removing snow from driveway and walkways. Mr. DiMinico may also place a structure on the "lot" but only if he can prove that it the structure will be "located on the lot". The Court

properly found that none of these responsibilities "make sense if DiMinico did not rent a lot in the first place". Final Order, p. 15. This finding especially makes sense in light of the fact that the Cooperative only had a limited right to enter and make necessary changes to the property for necessary maintenance.

Critically, there is no statute or case law that prevents the Court from making this finding. The question the Court was left with was: what was Mr. DiMinico leasing? It is true there is no statement that his leasehold extends to certain boundaries, it is also true that there is no statement that limits Mr. DiMinico's boundaries. As such, this is a clear case of contract interpretation. This case could have been easily avoided by any number of clear terms that stated that Mr. DiMinico was only entitled to his "cement pad", or by defining the term lot, or by having the Cooperative take more responsibility for maintenance of the property, or by providing the Cooperative the absolute right to make any changes to the land it saw fit. The Cooperative provided all responsibility for upkeep and care of the lot to Mr. DiMinico, and limited its own right to enter property it owned. Therefore, the Court found that Mr. DiMinico was justified in belief that the entire lot was leased to him. *Id.*, at p. 13 -17.

The Cooperative cites to the manufactured housing and landlord-tenant statutes are unavailing because the argument plainly ignores the Cooperative's lease. The Cooperative attempts to make illegal leaps in the statutes that are not found in their plain language. In sum, the Cooperative's argument follows that due to the exact definition of a mobile home under RSA 477:44, II, Mr. DiMinico's property rights only extend to his home, so the Cooperative never could have intended to lease anything other than the cement pad located on Lot 30. To buttress their argument, they equate a "lot" to the "premises" of an apartment under RSA 540-A:1, III. However, that interpretation cannot be accurate.

Upon review of the plain language of the lease, Mr. DiMinico's lease provided him a right to the "premises" of 26 Wayne Drive. Mr. DiMinico already owned his home, so it is clear what he was leasing. To a reasonable person, a street address is not plainly the small amount of land on which the home made reside, but the entirety of the land. A

leasehold is plainly created by a lease. The lease has specific terms. The Cooperative drafted the lease. The lease grants Mr. DiMinico broad responsibility for upkeep of the entire property and limits the fee owner's rights to enter and change the property. The lease is subject to *contra proferentem*, where the draftor is held accountable for the language of the document. *Tulley*, 159 N.H. at 272 (ascribing common meaning as understood by reasonable people toward lease contract language); see BLACK'S LAW DICTIONARY 393 (2ND ED. 1968).

The Cooperative had the ability to determine the amount of control that it possessed; it could have restricted Mr. DiMinico to just his cement pad. Instead, the Cooperative used the word "lot". A reasonable person would understand that "lot" concerns the entirety of a lot of land. Furthermore, there was neither a contractual or statutory basis for the Cooperative to believe it had sole right to do whatever it wanted to the land. The Court's decision is well-founded, well-detailed and must be affirmed.

B. All Tenants are Entitled to Quiet Enjoyment Under RSA 540-A:2; Remediation for a Violation of Quiet Enjoyment is Appropriate for a Leasehold to Land

1. Legal Standard

i. Quiet Enjoyment of a Leased Property

Owners of manufactured housing are generally tenants under RSA 205-A. RSA 205-A's statutory framework governs manufactured housing parks. RSA 205-A:9 allows the Court to apply New Hampshire's landlord-tenant statutory framework under RSA 540 so long as there are no inconsistencies. RSA 540 specifically covers actions against tenants, RSA 540-A specific covers prohibited practices of landlords and tenants. RSA 540-A:1 and RSA 540-A:2 prohibits a landlord from "willfully violating a tenant's right to quiet enjoyment of his tenancy". *Crowley v. Frazier*, 147 N.H. 387, 389 (2001). The Supreme Court has interpreted the plain meaning of the tenant's right to quiet enjoyment under RSA 540-A:2 as "obligat[ing] a landlord to refrain from interferences with the tenant possession during the tenancy". *Adams v. Woodlands of Nashua*, 151 N.H. 640,

641 (2005); see *Echo Consulting Services v. North Conway Bank*, 140 N.H. 566, 571 (1995). Further, the Court has held that "[a] breach of the covenant of quiet enjoyment occurs when the landlord substantially interferes with the tenant beneficial use of enjoyment of the premises." *Echo Consulting Services*, 140 N.H. at 571.

ii. Beneficial Use of Enjoyment of the Premises is Undefined

Beneficial use of enjoyment of the premises is an undefined term in the landlord-tenant statutory construction. However, the Court has specifically construed the language of RSA 540-A:2 to require a finding that the tenant loses a "use" of "the premises". *Crowley*, 147 N.H. at 389–90. The Court must review the lease to determine the definition of what constitutes "the premises". See RSA 540-A:1 (defining premises as "part of the landlord's property to which the tenant's entitled exclusive access for living or storage as a result of the rental or lease agreement"). RSA 205-A:1 does not define what area a manufactured housing park tenant is entitled to possess.

iii. Remediation from Injunctive Relief is Appropriate for a Leasehold

A manufactured housing owner is the owner of two things: 1) their manufactured house and 2) a defined leasehold. A leasehold arises from a contract that determines the tenant's possessory interests and uses of the land therein as governed by a parties' lease agreement. See BLACK'S LAW DICTIONARY 1036 (2ND ED. 1968). When the landlord violates possessory owner's interest in the land and the uses therein, the lessee is entitled, as the present owner of the land, to damages for trespass upon that interest for which he is entitled to claim damages and seek a restorative remedy to his leasehold. *Hahn v. Hemenway*, 96 N.H. 214, 215–16 (1950); see *Wood*, 46 N.H. at 239.

When damage is done to real property, the only compensation is remediation. See *Delay Mfg. Co. v. Carey*, 91 N.H. 44, 46 (1940). In New Hampshire, "replacement cost is allowable as a measure of damages instead of the value of the land before and after the harm where…there is substantial evidence of the owner's personal residential and

recreational use of the land." *Morris v. Ciborowski*, 113 N.H. 563, 566 (1973); see also RSA 358-A:10; RESTATEMENT (SECOND) OF TORTS §927 (1979). This is particularly the case when the action is done in a "wanton, malicious, or oppressive" manner. *Vratsenes v. N.H. Auto, Inc.*, 112 N.H. 71, 73 (1972).

Injunctions are issued only when "there is an immediate danger of irreparable harm to the party seeking injunctive relief, and there is no adequate remedy at law." *N.H. Dep't of Envtl. Servs. v. Mottolo,* 155 N.H. 57, 63 (2007). The Trial Court may grant injunction "after consideration of the facts and established principles of equity." *Thompson v. N.H. Bd. of Medicine*, 143 N.H. 107, 109 (1998). The Supreme Court will uphold an injunction "absent an error of law, an unsustainable exercise of discretion, or clearly erroneous findings of fact." *Id.*

2. DiMinico's Lease Entitled Him to a Certain Quality of Leasehold; the Cooperative Unreasonably Trespassed on that Right in Bad Faith

Manufactured housing parks are a unique leasehold as a manufactured housing tenant's premises is not defined in the statute. Therefore, the Trial Court referred to the party's lease as a matter of contract interpretation. In this case, the lease is for a "lot" only defined as the premises of 26 Wayne Drive. As such the lease is for a lot/plot of land because 26 Wayne Drive is recorded as Lot 30 in Plan 900 for the manufactured housing park. (App. at 4). Mr. DiMinico's unit deed also references Lot 30. (*Id*. at 22-25). While Plan 900 no longer currently reflects the nature of the whole park, the Plan accurately reflects Mr. DiMinico's recollection of his understanding of his property lines at the time he entered into the lease and refurbished his home. (Tr. at 14-18; 21-23).

Mr. DiMinico's testimony was clear that he specifically chose Lot 30 because there was substantially private and natural aspect to the land due to the trees and foliage. (*Id*. at 9-10; 14; 21-23; 51-52; 122). The parties' lease specifically leaves Mr. DiMinico responsible for routine maintenance and upkeep of the entire lot. See generally, (App. at 36-46). The lease also restricts the Cooperative on the type of work they can perform on his lot for the duration of the lease. (*Id.*). Again, as a matter of contract, if the Cooperative wanted to restrict Mr. DiMinico's lease to only the land on which he places

his manufactured home, it could have easily done so. Therefore, *contra proferentem* applies.

The applicable statutes do not place such a restriction on Mr. DiMinico's legal rights or his reasonable expectations. In fact, the lease only gives the right to encroach on his property to complete necessary work. At trial, the Cooperative indicated what worked needed to be done on an abutting lot. This work was permitted under the lease. As the Court found, under the lease the Cooperative could improve the abutting lot by "cover[ing] a septic system and electrical conduit." Final Order, p. 17. However, the Court continued that it:

> "[did] 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 sufficed? What reasonable alternatives were considered? Indeed, what was DiMinico's land actually used for?" *Id*.

The lease guaranteed a certain kind of lot to Mr. DiMinico. The Cooperative could alter his lot as necessary, so long as it was in accordance with the terms of the lease. If Mr. DiMinico moved, the Cooperative could alter the lot in whatever manner they wished. The lease matters; the Cooperative, despite its belief, was not provide carte blanche to do whatever it wanted with Mr. DiMinico's lot. In sum, the lease allowed the Cooperative to improve Lot 27, but the actual work performed by the Cooperative was abusive.

Critically, the Cooperative was not able to elucidate to the Court why the amount of work on Mr. DiMinico's lot was necessary to the point where it completely changed the nature of the lot Mr. DiMinico leased. Contracts with discretional terms are subject to the implied covenant of good faith and fair dealing. *Centronics Corp. v. Genicom Corp* 132 N.H. 133, 143–44 (1989). As the Supreme Court has stated that good faith and fair dealing occurs in three instances of contract cases:

> "…those dealing with standards of conduct in contract formation, with termination of at-will employment contracts, and with limits on discretion in contractual performance..." *Id*. at 139.

Mr Diminico's case concerns the third instance. The Supreme Court has further defined good faith in limits on discretion to mean:

> "…under 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." *Id*. at 143.

The Cooperative provided no good faith reason to change the features of Mr. DiMinico's lot. The Court was right to find Cooperative's actions violated the implied covenant of good faith.

As such, the unwarranted, substantial changes the topographical features of the leased lot, constitutes a breach of contract. See *Id*. This breach of contract equates to violation of Mr. DiMinico's quiet enjoyment on his leasehold of land. See *Adams*, 151 N.H. at 641; *Crowley v. Frazier*, 147 N.H. at 389; *Echo Consulting Services v. North Conway Bank*, 140 N.H. at 571. A violation to the quiet enjoyment to a leasehold of land is a trespass on Mr. DiMinico's leasehold interest of topographical features he once enjoyed. *Hahn*, 96 N.H. at 215–16; see *Wood*, 46 N.H. at 239. As Mr. DiMinico testified, he specifically selected this lot for the features of the lot, and nothing in the lease agreement provided to him would have reasonably demonstrated that he was entitled to anything less than the land known as 26 Wayne Drive. See (Tr. at 9-10; 14; 21-23; 51-52; 122). As the Court found, the changes the Cooperative made "effectively removed a potion of DiMinico's lot and added it to the abutting lot." Final Order, p. 18. By removing the "heavily wooded buffer" that served as a key feature of the lot enjoyed by the leaseholder with no just cause, the Court properly held that it was a violation of Mr. DiMinico's quiet enjoyment. As the Court found, "[the heavily wooded buffer] is what attracted DiMinico to the lot in the first place." *Id*., at p. 19.

Therefore, the Trial Court properly ordered the Cooperative to complete remediation of Mr. DiMinico's lot through a permanent injunction. Mr. DiMinico lacked

an adequate remedy at law. This matter arose because of Mr. DiMinico's request for a preliminary injunction for his lease. (P.App. at 51). The final orders awarded permanent injunctive relief in accordance with the standard set forth in *Mottolo*, 155 N.H. at 63. [3] Indeed, the Court correctly found that "[e]very piece of land—including a leasehold in a manufactured home park—is unique." Final Order, p. 20. When a piece of property is trespassed upon under a lease for land subject to a tenant's right to quiet enjoyment, the Court is within its rights to order remediation. See *Hahn*, 96 N.H. at 215–16; *Wood*, 46 N.H. at 239.

Critically, there was and is no other relief that the can be provided to Mr. DiMinico; this is why Mr. DiMinico requested injunctive relief. The lot of land leased to Mr. DiMinico was already drastically changed by the Cooperative. Mr. DiMinico believed the Cooperative breached his quiet enjoyment by failing to act in good faith under the lease. The Court found the Cooperative failed to act in good faith. Final Order, p. 18. Mr. DiMinico does not own his lot or possess any reversionary interest in the lot. There is no monetary figure that will allow Mr. DiMinico to restore the land to its previous state because he does not own his leased lot. As the Court put, "[o]nly the physical restoration of the lot will make DiMinico whole." *Id*., at p. 20. The only party that can restore the lot is the Cooperative.

The Trial Court's injunctive relief arises from its equity powers. *Id*. In making equity determinations:

> "[a] court of equity will order to be done that which in fairness and good conscience ought to be or should have been done. It is the practice of courts of equity…to administer all relief which the nature of the case and facts demand." *Chase v. Ameriquest Mortgage Co.*, 155 N.H. 19, 24 (2007).

Here, the Trial Court acted in fairness and good conscious. The Trial Court was presented with facts that allowed it to order remediation in injunctive relief. Mr. DiMinico is utterly powerless to change the affected real property. The Cooperative acted in bad faith. RSA

[3] The Trial Court summarized that an injunction can "issue only if [DiMinico] proves (a) a risk of immediate and irreparable harm, (b) the lack of adequate remedy at law and (c) that the balance of equities and hardships militate in favor of issuing the injunction." Final Order, p. 19.

540-A:2 provides tenants quiet enjoyment. The case law permits the Trial Court 1) to find trespass for the owner of a leasehold, and 2) order remediation as a remedy for trespass on real property. See generally, *Adams*, 151 N.H. at 641; *Crowley v. Frazier*, 147 N.H. at 389; *Echo Consulting Services v. North Conway Bank*, 140 N.H. at 571; *Hahn*, 96 N.H. at 215–16; *Wood*, 46 N.H. at 239. Therefore, the Trial Court's injunctive relief must be affirmed.

3. Trial Court Incorrectly Applied its Equity Powers on Damages.

The Trial Court determined at trial that the Cooperative's actions violated Mr. DiMinico's right to quiet enjoyment. Specifically, the Cooperative was wrong to alter Mr. DiMinico's lot to the extent it did and only the physical restoration of the lot would make Mr. DiMinico whole. Final Order, p. 20. In its Order, the Trial Court determined that under the facts as presented at trial, an appropriate figure for remediation of Petitioner's lot was $10,000. *Id.*, at p. 21.

However, the uncontroverted evidence produced at trial, through expert testimony, was that the cost of remediation was $30,000. As the Trial Court found, "DiMinico proved that it would cost approximately $30,000 to restore his lot to the status quo ante." *Id*., at Page 20. The Court acknowledged in its Order that the $10,000 was insufficient to remediate the harm done by the Cooperative by finding for a "partial remediation". *Id*. The Trial Court bases its decision as one of equity. *Id*. This is an unsustainable exercise of discretion.

The New Hampshire Supreme Court will review a record to determine whether there was an "objective basis" to sustain the Court's discretionary judgment. *State v. Lambert*, 147 N.H. 295, 296 (2001). The party asserting that a trial court order is unsustainable "must demonstrate that the ruling was unreasonable or untenable to the prejudice of his case." *Foley v. Wheelock*, 157 N.H. 329, 332 (2008). An award that is insufficient to fully remediate "unique" property is unreasonable in light of the Trial Court's finding that the actions of the Cooperative violated the Mr. DiMinico's right to quiet enjoyment. See Final Order, p. 20.

Where the evidence at trial was uncontested as to the potential cost of remediation, the Trial Court so finds the cost uncontested, and where the Trial Court then ordered payment of less than the full cost of mediation, the court is obligated to include in the decision the objective basis for the reduction. The Trial Court did not do so here, and failure to do so is an abuse of discretion. Moreover, the Trial Court did not establish an objective basis from which it determined that $10,000.00 could successful "partially" remediate the leasehold. See Final Order, p. 20-21. As such, the Court's Order is a misapplication of applicable law through an inappropriate use of discretion given the finding of the Cooperative's violation of the Mr. DiMinico's right to quiet enjoyment and uncontroverted finding that remediation would cost $30,000.

C. Mr. DiMinico is Entitled to Attorney's Fees

1. Legal Standard

Generally, New Hampshire requires parties pay their own attorney's fees. *In the Matter of Mallett & Mallett*, 163 N.H. 202, 211 (2012). The idea behind this principle is that "no person should be penalized for merely defending or prosecuting a lawsuit." *Harkeem v. Adams*, 117 N.H. 687, 690 (1977). Still, the Court does provide exceptions to this general rule in the following instances: when fees are authorized by statute, agreement of the parties, or an established judicial exception via case law. See *In the Matter of Mason & Mason*, 164 N.H. 391, 398 (2012).

One such judicial exception is when the party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons, where the litigant's conduct can be characterized as unreasonably obdurate or obstinate, and where it should have been unnecessary for the successful party to have brought the action." *Harkeem*, 117 N.H. at 691 (quotation and citations omitted). However, this Court has specifically found that "before a *Harkeem* exception may be carved out, it must be supported by a specific finding of bad faith, such as obstinate, unjust, vexatious, wanton or oppressive conduct." *Pugliese v. Town of Northwood*, 119 N.H. 743, 752 (1979).

2. The Trial Court Incorrectly Failed to Award Mr. DiMinico Attorney's Fees.

i. Attorney's Fees Should Have Been Awarded for Bad Faith

This matter arose because Mr. DiMinico believed that the Cooperative acted in bad faith. The facts adduced at trial establish that the Mr. DiMinico had clear rights in a leasehold to 26 Wayne Drive. Mr. DiMinico testified that he attempted to resolve the issue with the Cooperative's board. However, the board responded by acting in extreme bad faith. The Cooperative's actions included attempting to restrict access to parts of leasehold, destruction of his leasehold interest in bad faith and ripping up boundary monuments placed by Mr. DiMinico after the original markers were destroyed. See, e.g. (Tr. at 25-32; 45-47; 157-58). Mr. DiMinico established at trial that the Trial Court's preliminary injunctive order was disregarded by the Cooperative as the Cooperative continued to access and alter the abutting property to the detriment of his leasehold.

Significantly, the Trial Court implicitly found that the Cooperative acted in bad faith. See Final Orders at 18-19. To wit, the Trial Court found that the Cooperative violated the implied covenant of good faith and fair dealing by removing the heavily wooded buffer around Mr. DiMinico's lot without good cause. A breach of the covenant of good faith and fair dealing is a lynchpin of the Trial Court's permanent injunctive relief. While the Cooperative was provided the right to necessarily later Mr. DiMincio's property to remodel Lot 27 under the lease, the extent to which they acted was at issue. No one contested the Cooperative's ownership rights or ability to do necessary repairs under the lease. At issue was whether the specific actions taken by the Cooperative were within reason under the parties' lease. The Trial Court found that such actions were violative of the implied covenant of good faith and fair dealing. Therefore, the Trial Court implicitly found the Cooperative acted in bad faith in light of their rights provided to it under the lease.

The fact of the matter is the Court found that the lease was not only clear on the lot Mr. DiMinico leased, but that the Cooperative acted in bad faith in executing their responsibilities under that lease for that lot. At trial, it was conclusively shown that the Cooperative did not comply with the Trial Court's preliminary injunctive relief. *Pugliese* and *Harkeem* allow the Court to find for attorney's fees. The holding of *Harkeem* extends beyond denying fees for good faith legal disputes, the Court is supposed to consider the parties' actions as well. To wit, a "good-faith legal dispute" does not overcome the Court's findings of "a clearly defined and established right and the opposing party [acting] in bad faith. *Harkeem*, 117 N.H. at 691. The Cooperative acted in bad faith; the Trial Court should have awarded attorney's fees.

ii. Attorney's Fees Should Have Been Awarded Pursuant to RSA 540-A

The very nature of a violation quiet enjoyment claim in a landlord-tenant dispute evokes RSA 540-A. Critically, the Trial Court found that the Cooperative violated Mr. DiMinico's right to quiet enjoyment under RSA 540-A:2. However, the court determined that since RSA 540-A was not specifically pled in the initial request for injunction or at pre-trial, it could not award attorney fees pursuant to that statute. Final Order Page 12 and 22. This was an incorrect application of law.

In *Gilman v County of Cheshire*, 126 N.H. 445, 450 (1985) the Supreme Court determined that because the Plaintiff in that case asserted actions that if proven were violative of RSA 275:53, fees could be awarded, even though the statute was never specifically referenced nor any claim brought under RSA 275:53 because the factual allegations sufficiently fell under the statute. Similarly, even though Mr. DiMinico did not cite to the pertinent part of RSA 540-A:4, IX, which allows for the recovery of attorney's fees in the event of a quiet enjoyment violation, the Court clearly decided the case under RSA 540-A.

Further, the right to quiet enjoyment for tenants in landlord-tenant actions are exclusively brought pursuant to RSA 540-A:2. In the pleadings in this matter, Mr.

DiMinico asserted facts and used legal terms that constituted interference with his right to quiet enjoyment. For example, the Petitioner's Petition for Declarative Relief notes such facts in Paragraph's 11-19 that would demonstrate an attempt to state a cause of action under 540-A:2 for a violation of his right to quiet enjoyment. (P.App. at 52-53). To wit, the Plaintiff uses such phrases as "substantially altered the characteristics of lot 30", "negatively impacting the privacy" and chronologically establishes a course of action taken by the Respondent landlord to interfere with such privacy and quiet enjoyment of land. (*Id*. at 52-53).

In later pleadings, specifically Mr. DiMinico's Pre-Trial statement, under Contested Issues of Fact, he listed "damages sustained to the Plaintiff's leasehold and the Plaintiff's entitlement to attorney's fees". (*Id*. at 55-56). In the Specific Claims of Liability of the Pre-Trial statement, Mr. DiMinico specifically noted "the Defendant unlawfully encroached on the leasehold of the Plaintiff substantially altering the leasehold and interfering with the Plaintiff's quiet enjoyment thereof." (*Id.*). Moreover, Mr. DiMinico's Objection to Motion in Limine references the Cooperative as "the landlord cooperative" in at least five instances and states "[t]he Plaintiff is entitled to the quiet enjoyment of his leasehold." (emphasis added). (*Id*. at 63-64). Mr. DiMincio also submitted Findings of Fact and Rulings of Law that specifically mentioned RSA 540-A:2 and quiet enjoyment. (*Id*. at 75-77).

Importantly, the Cooperative knew that Mr. DiMinico was making a claim under RSA 540-A:2. In the Cooperative's Preliminary Injunction Memorandum of Law, the Cooperative identifies Mr. DiMinico as a "tenant", notes, "[i]n addition to RSA Chapters 205 and 540, 540-A, 301-A and 293-A apply to manufactured housing communities", and highlights, "it cannot be argued that his right to quiet enjoinment [sic] was interfered by the work performed by the Cooperative." See (*Id*. at 82; 84-85, 87). In addition, the Cooperative identified Mr. DiMinico as the "lessee/tenant" in Paragraph 15 of its Motion in Limine. (*Id*. at 59-60).

In sum, both parties to this matter were aware that RSA 540-A applied, both parties considered this matter to be a quiet enjoyment action, Mr. DiMinico clearly

sought attorney's fees as it related to that claim, and the factual allegations either specifically note, or by imply by factual reference, the application of RSA 540-A. Most importantly, the Court decided this case on the basis of RSA 540-A. As such, in accordance with the holding of *Gilman*, attorney's fees should be awarded in accordance with RSA 540-A:4. A failure to award of attorney fees under 540-A would an incorrect application of the law.

VI. CONCLUSION

WHEREFORE, the Mr. DiMinico respectfully prays that this Honorable Court:

A. Affirms the Trial Court's Injunctive Relief; but

B. Remands for a recalculation of the cost of remediation; and

C. Remands for findings of attorney's fees.

Respectfully submitted,
Mark DiMinico
By his Attorneys
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Date: April 26, 2019

By: /s/ David M. Stamatis
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CERTIFICATE OF SERVICE

I hereby certify that the within Brief of the Plaintiff-Appellee has been electronically filed this 26th day of April, 2019 and a copy of said Brief of the Plaintiff-Appellee has been electronically copied to Robert M. Shepard, Esquire, Attorney for the Defendant.

Date: April 26, 2019

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