STATE OF VERMONT

SUPERIOR COURT Franklin Unit	CIVIL DIVISION Docket No. 233-7-16 Frcv
NORMA LUKE, Plaintiff v. STATE OF VERMONT, JANET NICHOLS, TOWN OF SHELDON, Defendants JANET NICHOLS, Third-Party Plaintiff v. A. GREGORY RAINVILLE, Third-Party Defendant	

DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This case arises out of a dispute over rights of access across a former railway line now owned by the State of Vermont to an otherwise land-locked parcel in the Town of Sheldon. Third-Party Defendant A. Gregory Rainville ("Rainville") originally conveyed the parcel to Third-Party Plaintiff Janet Nichols ("Nichols"), in the process warrantying the existence of easements across the railway line. Nichols in turn conveyed to Plaintiff Norma Luke ("Luke"), making the same warranties. When the State and the Town denied Luke's right of access, she sued them for a declaration of rights; she also sued Nichols on the warranty. Nichols, in turn, sued Rainville on his warranty. The claims in chief have now all been settled, leaving only the third-party claims for resolution, on cross-motions for summary judgment.

There is no dispute as to the facts material to any determination of liability. Rainville gave a warranty. Nichols in turn gave an identical warranty and was sued on it. When Nichols asked Rainville to make good on his warranty, and defend and indemnify her, he refused.

Rainville does not dispute these facts. Instead, in his Motion for Summary Judgment, Rainville argues only that "[a]s a result of the order of dismissal, there are no remaining claims

against Nichols. Accordingly, Nichols has no lawful claim against Rainville." Mot. for Summ. J., 2. While Rainville's factual premise may be accurate, his legal conclusion is not. As this court has previously observed, "[t]he covenant of warranty imparts not simply an obligation to indemnify against successful claims of paramount title; it is 'an assurance by the covenantor . . . that he will defend and protect the covenantee against the lawful claims of all persons thereafter asserted.' " *Luke v. State*, no. 233-7-16 Frcv, 2017 WL 7052187 at 9 (citing *Hull v. Fed. Land Bank of Springfield*, 134 Vt. 201, 203 (1976)). Here, while there may be nothing to indemnify, there clearly was something to defend. When Rainville did not defend, he breached the covenant of warranty.

Rainville next argues that "Vermont adheres to the American Rule with respect to the award of attorney's fees," which "ordinarily prohibits an award of attorney's fees absent a specific statutory provision or an agreement of the parties." Mot. for Summ. J., 2. When Nichols debunked this argument in her opposition and cross-motion, Rainville went further, arguing that "the original action filed by Norma Luke against Nichols was without merit and none of the allegations regarding title defects either could have been, nor have been proven against Rainville. Accordingly, Rainville committed no wrongful act upon which an award of attorney fees can be based." Opp'n to Nichols's Mot. for Summ. J., 1. Each of these arguments misses the mark.

Taking the second argument first, as noted above, it is well settled that a covenant of warranty is more than a simple covenant of quiet enjoyment. "It is a covenant to defend, not the possession merely, but the land and estate in it." *Williams v. Wetherbee*, 1826 WL 1197, 1 Aik. 233, 241 (1826). It matters not, as Rainville appears to suggest, that Luke's claims lacked merit; it is enough that they were "lawful." And this court's determination, in denying Rainville's Motion to Dismiss, that Luke had sufficiently stated a claim against Nichols amply establishes that those claims were "lawful." *Luke v. State*, no. 233-7-16 Frcv, 2017 WL 7052187 at 9 ("[Luke] need not have awaited an actual determination of liability before invoking her right to a defense of her title; nor must she await physical ouster from her claimed easement before seeking a declaration that [Nichols] (and, in turn, [Rainville]) is obligated to answer for any loss she sustains as a result.").

Second, it is equally well-settled "in Vermont that attorney's fees and litigation costs are recoverable by a purchaser of real property when a breach of a covenant for title by his vendor

involves him in litigation with a third party." *Albright v. Fish*, 138 Vt. 585, 591 (1980). This flows from a "long line of cases" holding that

> a party may recover for the damage he has sustained as a direct result of the breach and "for the damage he has sustained in consequence of the breach of the covenant, (including) such costs and expenses as he has fairly and in good faith incurred in attempting to maintain and defend his title."

Id. at 588 (internal citations omitted). Rainville's error here appears to lie in conflating a duty to indemnify with a duty to defend. As far as appears, Nichols ultimately incurred no liability to Luke; thus, as Rainville inferentially observes, there is nothing to indemnify. But as noted above, the covenant of warranty imparts an obligation not merely to indemnify, but to defend. And again, patently, Rainville breached this obligation.

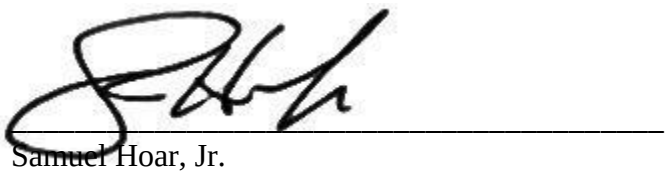
These observations compel the conclusion that Nichols is entitled to judgment as a matter of law on Rainville's liability for the attorney's fees and litigation costs she incurred in defending against Luke's claims. This conclusion, however, does not end the inquiry. Rainville asserts two defenses to damages. The first of these is easily disposed of. Rainville argues that Nichols failed to mitigate her damages by not purchasing title insurance. In other words, he suggests that she was bound to have anticipated his breach, and so to have procured a second line of defense in the event that the first line—his warranty—failed. While this may have been prudent, Rainville provides no authority for what appears to be a form of predictive or preemptive mitigation. Ordinarily, the duty to mitigate damages does not arise until there has been a breach. *Cf. Solomon v. Design Devel., Inc.*, 143 Vt. 128, 131 (1983) ("Absent a breach, the doctrine of mitigation of damages is inapplicable."). Pre-breach, Nichols might reasonably have assumed that taking a warranty deed was sufficient protection.

While the court therefore finds no merit in the mitigation argument, Rainville has sufficiently contested Nichols's right to recover the amount of attorney's fees and costs she claims. Taking the facts in his affidavit as true, Rainville offered assistance in explaining the easements that gave rise to the underlying dispute and resulting attorney's fees, but Nichols's attorney declined that offer. Rainville's Aff., ¶ 21. This is sufficient to create a genuine issue as to the reasonableness of Nichols's claimed fees and costs. Accordingly, denies summary judgment on this question.

ORDER

Rainville's Motion for Summary Judgment (MPR 10) is **denied**. Nichols's cross-motion (MPR 11) is **granted in part and denied in part**. Rainville is liable for Nichols's reasonable attorney's fees and costs in defending Luke's claims of defective title; the amount of those fees and costs remains for determination at trial. The clerk will set a status conference to determine the schedule and amount of time needed for that trial.

Electronically signed on January 14, 2019 at 02:07 PM pursuant to V.R.E.F. 7(d).



Samuel Hoar, Jr.
Superior Court Judge