

STATE OF VERMONT
WINDSOR COUNTY, SS.

WINDSOR SUPERIOR COURT
Docket No. S206-91 WrC

JEREMIAH EVARTS and
JOHN D. EVARTS,
Plaintiffs

v.

PRESCOTT EVARTS, JR. and
ALEXANDER L. EVARTS,
Defendants

FINDINGS AND CONCLUSIONS AND ORDER

This matter came before the Court on October 28, 1996 for a hearing on the Motion of Defendant Alexander Evarts for Relief from the Stipulation and Order dated April 15, 1993. Jeremiah Evarts was present and represented by his attorney Leslie Black, Esq., who also represents John Evarts who was not present. Alexander Evarts, Esq., was present and represented himself. Prescott Evarts, Jr. was present and represented himself. Based on the evidence admitted and the record, the Court issues the following Findings and Conclusions and Order.

Findings of Fact

1. The parties to this partition action all own fractional interests in family property over which they have been in litigation for a long time. The specific subject of this Motion is a parcel of land of approximately 100 acres located in Windsor, Vermont. It consists of a lake of

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approximately 47 acres, approximately 40 acres of wetland, and 14 acres of field. It contains one of the largest aquifers in Vermont, and may have potential for commercial development due to the size of the water supply it offers.

2. In 1993, the parties reached a stipulation concerning disposition of the property, which they signed and filed with the Court on April 15, 1993. One of the terms was that the partition action would be held in abeyance and the Court would take no further action except to enforce the terms of the agreement. The stipulation contained detailed provisions for attempting to sell the property to an identified interested person for \$5,000,000, or an alternative plan to enter into a contract to sell the property within 90 days for \$3,000,000. It further provided for the procedures to be followed in the event the property remained unsold following those attempts.

Specifically, the stipulation provides that

...the parties agree to list the Land for sale with a reputable and experienced real estate broker. The broker shall seek to sell the land at a reasonable price to be agreed upon unanimously by the parties at the time the Land is listed for sale with the real estate broker. The parties must agree unanimously on a sale price if they wish to sell the Land for any amount less than the listed sale price. However, any offer for the purchase of the Land at or above the listed purchase price must be accepted by the parties, and the parties must cooperate in all respects in the sale of the Land for the listed amount.

Paragraph 9 of Agreement Concerning Real Estate, Exhibit B. Thus, the parties obligated themselves to sell the property and to: 1) use a broker; 2) agree on a broker; and 3) agree on a listing price.

3. Since 1993, the property has not been sold. The property has never been listed with a broker since April of 1993. Limited appraisal information has been obtained, but no appraisal of the value of the property for commercial purposes has been done. All parties have been eager to sell, and have explored possible buyers without expenditure of funds. Three or four attempts to elicit interest among commercial purchasers and others have fallen through.

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4. Recently, a Mr. Brown of Windsor, who served as one of the Commissioners in this partition action, made an offer to purchase the property for \$85,000. At least two of the owners wish to accept this offer. Prescott Evarts is opposed.

5. The parties have developed different opinions about the value of the property, and whether or not it still has value as a specialty property for a buyer interested in the commercial use of water. The parties have also developed different opinions about the characteristics of the realtor who should be engaged to list the property. The cost of an appraisal to determine the value of the property for commercial water use purposes is approximately \$3,000-8,000, depending on the extent of the appraisal. Alexander Evarts has outstanding obligations and does not have the financial ability to contribute to the cost of such an appraisal. Jeremiah Evarts does not have the ability to contribute to this cost. No such appraisal is required by the parties' agreement of April 1993. Prescott Evarts does not wish to list the property for sale without having the benefit of professional appraisal advice.

6. The parties have a long history of discord. Considering that history, the present disparity in their thinking about the value of the property, the present disparity in their thinking about the best approach to marketing the property through a broker, and the lack of independently determined value information, it is virtually certain that the parties will not be able to agree on a listing price or a specific broker with whom to list the property.

7. Alexander Evarts filed his Motion for Relief from Judgment under V.R.C.P. 60(b)(6) requesting the Court to remove the brokerage requirement and to require Prescott Evarts to deal in good faith with the other parties in considering the offer of Mr. Brown. Alexander Evarts wants to eliminate the brokerage requirement for three reasons: 1) the parties will not be able to agree on a broker; 2) the parties will not be able to agree on a listing price; and 3) the expense of

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a broker will diminish the net proceeds to be derived from a sale. He wishes to be able to proceed with a sale of the property to Mr. Brown for \$85,000 without the involvement of a broker. The parties are not in agreement to do this. Jeremiah Evarts supports the Motion filed by Alexander Evarts, and further requests that if the Court denies it, that the Court establish a mechanism to enable the parties to avoid a stalemate and proceed toward sale of the property.

8. At the close of the evidence at the hearing on October 28, 1996, Prescott Evarts offered to buy out the interests of the other owners based on a total property value of \$85,000. Alexander Evarts and Jeremiah Evarts indicated their desire to accept the offer. John Evarts was not present and not available, and specific terms were not defined. The Court agreed to reserve ruling on the Motion until after 4:30 pm on Thursday, October 31, 1996 to enable the parties to reach a stipulation on the proposal. The Court received fax copies of a proposed stipulation signed by Jeremiah, John, and Alexander Evarts, but not by Prescott Evarts, by the deadline. After the deadline, the Court received a fax copy of a different proposed stipulation signed by Prescott Evarts only. While both proposals are for a sale based on a value of \$85,000, the terms are not identical. It is clear that the parties did not reach a stipulation by the deadline. Therefore, the Court will proceed to rule on the Motion.

Conclusions of Law

1. The parties' 1993 agreement required the property to be sold and required the sale to take place through the use of a listing broker. Alexander Evarts asks the Court to eliminate the brokerage requirement, primarily on the grounds that the use of a broker would reduce the net proceeds available to the owners. This was as true in 1993 as it is at the present time. The use of a broker can serve to provide formal structure to facilitate the sale among parties who are unable

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to agree, and this benefit is still available. Alexander Evarts has not shown any extraordinary circumstances that justify a request to eliminate a term agreed to in 1993 that remains useful at present for the same reasons the parties agreed to it in 1993. Therefore, he has not shown entitlement to relief under V.R.C.P. 60(b)(6) with respect to elimination of the brokerage requirement. The fact that he now considers the property to be worth less than he did in 1993 is not sufficient to show hardship or injustice, since there will still be a net return after deduction of a broker's commission. He is really asking the Court to reform the contract because it will result in less financial return to him than he would like, but that is not a reason to eliminate a provision of a stipulation that was agreed to and will serve a useful purpose, and works no hardship or injustice on any party. "Extraordinary circumstances" justifying elimination of the brokerage requirement have not been shown. Olde & Co., In. v. Boudreau, 150 Vt. 321 (1988).

2. Nonetheless, the evidence admitted and the filings subsequent to the hearing clearly establish that the parties are generally unable to reach agreements on specifics, and will be unable to reach an agreement on a broker and a listing price because of their fundamental disagreements over the potential of the property in the marketplace. Therefore, the Plaintiffs have shown a basis for relief from the provisions of the 1993 stipulation that require the parties to agree on both a particular broker and a listing price. It is clear that unless these requirements are lifted, the parties will be perpetually locked in a hopeless stalemate that will result in hardship to all parties since it will prevent all of them from enjoying the benefits of their interests in the property, and entail ongoing contributions for property taxes and other expenses of the property. This would produce a result counter to their 1993 agreement to dispose of the property by sale. A Motion under V.R.C.P. 60 is addressed to the discretion of the trial court. Pella Products v. Krutak, 150 Vt. 81

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(1988). The Court exercises its discretion under V.R.C.P. 60(b)(6) to establish a structure for determining the selection of a single broker to list the property, and for determining the listing price to which all parties are bound under the terms of their 1993 agreement.

ORDER

Based on the foregoing Findings and Conclusions, IT IS HEREBY ORDERED THAT:

1. All parties shall submit to the Court no later than December 31, 1996 the names of specific brokers they wish the Court to appoint as the listing broker for the sale of the subject property, together with proof in affidavit form of the amount at which the broker is willing to list the property. Parties may submit as much detailed description about their reasons for proposing the particular broker as they wish. Failure to submit information by the deadline means the party is precluded from submitting supplemental information after the deadline.

2. Upon consideration of the proposals submitted by the parties, the Court will designate the listing broker and the listing price for purposes of implementation of Paragraph 9 of the parties' agreement of April 1993 as set forth in Exhibit B.

Dated at Woodstock, Vermont this 4th day of November, 1996.

Mary Miles Teachout
Mary Miles Teachout
Presiding Judge

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