STATE OF VERMONT
CHITTENDEN COUNTY, SS.

JAMES M. GREGORY, ET AL.,)
Plaintiffs,)
)
v.)
)
LARJO CONSTRUCTION, ET AL.,)
Defendants.)

Chittenden Superior Court
Docket No. S253-01 CnC

ENTRY REGARDING MOTIONS

This case is before the Court on the Motion of Defendants Jacek and Cecilia Smolinski [hereinafter "Smolinskis"] for Summary Judgment filed May 21, 2001, and Plaintiffs' Motion for Partial Summary Judgment filed July 9, 2001. Oral argument was heard on September 24, 2001. The Smolinskis are represented by Guy L. Babb, Esq. Plaintiffs James and Catherine Gregory [hereinafter "Gregorys"] and Margaret Maynard are represented by William F. Ellis, Esq.

On January 14, 2002, the court issued an Entry Order bringing to the parties' attention a legal issue that they had not previously briefed. The parties were given an additional 15 days to file supplemental legal memoranda. Plaintiffs' attorney filed a memo on January 29, 2002. Defendants Smolinskis' attorney filed a memo on February 1, 2002.

Before addressing the respective motions, a brief review of the facts is necessary. This case concerns a plot of land located in Jericho, Vermont. On September 10, 1992, the then owners of the land, the Smolinskis, obtained a Subdivision Permit from the State of Vermont which allowed the Smolinskis to subdivide the property into three lots.[1] The issuance of the Permit was based on engineering drawings and site plans prepared by John H. Stuart, P.E., an engineer hired by the Smolinksis. The Permit authorized a shared on-site sewage disposal system to be located on Lot 2 and two drilled wells for each of two new single family residences, one on Lot 2 and one on Lot 3. The Permit also provided that any construction on Lots 2 and 3 "shall be completed as shown on the plans . . . prepared by" John H. Stuart, P.E. (Subdivision Permit, at 1.)

On November 28, 1994, the Smolinskis conveyed, by warranty deed, both Lots 2 and 3 to Larry and Joan Westall. At the time of the conveyance, the Westalls owned and operated Larjo Construction. Several days prior to the conveyance of Lot 2 from the Smolinskis to the Westalls on November 18, 1994, Larjo Construction had signed a Purchase and Sales Contract with the

[1] The subject of this suit concerns only Lots 2 and 3.

Gregorys to sell them Lot 2. On December 5, 1994, the Gregorys contracted with Larjo Construction for the construction of a house on the parcel, Lot 2, which the Gregorys had contracted to buy. Construction began and was completed on Lot 2, with Larjo building the shared on-site sewage disposal system as referenced in the Subdivision Permit. On February 24, 1995, Larjo conveyed, by warranty deed, Lot 2 and the house constructed thereon to the Gregorys.

After the conveyance of Lot 2 to the Gregorys and the construction of the Gregorys' home, Larjo and the Gregorys learned that a portion of Lot 2 was situated within a Class II wetland. Because the Gregorys' septic system had been constructed in the wetlands, a conditional use determination (CUD) from the Department of Environmental Conservation (DEC) was required in order to bring Lot 2 into compliance with the Vermont Wetland Rules. Larry Westall/Larjo applied for a CUD and the application was denied on April 28, 1999. In late May 1999, both Westall and the Gregorys appealed the denial of the application and on March 15, 2000, the Water Resources Board issued a CUD for Lot 2 to the Gregorys with the following conditions: the Gregorys shall limit encroachment of the mowed lawn into the buffer zone, plant cedar trees, maintain and replace trees as necessary, not disturb any native vegetation within the buffer zone, monitor for the presence of nuisance plant species, and allow representatives of the DEC access to the property covered by the CUD at reasonable times.

The Gregorys filed suit in this court against numerous parties asserting, *inter alia*, breach of contract, breach of implied warranty of fitness, breach of warranty, fraud, and negligent misrepresentation. The Gregorys claim damages arising from the cost of obtaining and maintaining the CUD and the costs associated with any further development of the property, which would require a CUD. For the purposes of the current motions, the only issue now before the court concerns whether the Smolinskis violated the covenant against encumbrances when they conveyed Lot 2 to the Westalls. An issue not before the court in this motion is any claim against the Westalls for violation of the warranty against encumbrances in the Westall/Gregory deed. The Gregorys are making this warranty claim directly against the Smolinskis, not the Westalls. The Smolinskis contend that they are not liable for any damages the Gregorys may have suffered because the property was not encumbered at the time of the conveyance from the Smolinskis to the Westalls. The Gregorys respond that the presence of a wetlands designation at the time of that conveyance constitutes an encumbrance such that a party is liable for breach of the warranty if it conveys title without excepting a wetlands designation as an encumbrance.

I. Whether the Gregorys may assert a claim against the Smolinskis based on the Covenant against Encumbrances in the deed from the Smolinskis to the Westalls.

This was the issue upon which the court sought supplemental legal memoranda in its Entry Order of January 14, 2002. Upon consideration of the supplemental memos and further research, the court concludes that the facts of this case are sufficiently similar to the facts in Cole v. Kimball, 52 Vt. 639 (1881) such that the holding in that case governs, permitting the Gregorys to assert a claim directly against the Smolinskis. At the time the Smolinskis conveyed to the

Westalls on November 28, 1994 by warranty deed, the Westalls had already previously contracted to sell the lot to the Gregorys by Purchase and Sales agreement dated November 18, 1994. Thus, at the time of the Smolinski/Westall conveyance, the owners of the equitable interest in the land were the Gregorys, pursuant to their Purchase and Sales Contract. The Gregorys were the ones holding the right to any interest that would be harmed by any covenant violation that took place at the time of the conveyance. Their interests came to them through the Westalls, whose role was similar to that of Florette in Cole v. Kimball, who, although an intermediate grantee and grantor, was simply an intermediary through whom the interests of others passed. Just as Florette's grantee, as the real party in interest, was permitted to recover against the covenantor from whom Florette acquired, the Gregorys in this case may assert a claim based on the covenant against encumbrances against the Smolinskis, because the Gregorys were the real party in interest at the time of the Smolinski/Westall conveyance.

II. Whether the Property was Encumbered at the time of the Smolinski-Westall Deed

In their Motion for Summary Judgment, the Smolinskis argue that the presence of a Class II wetlands designation on property at the time of conveyance does not constitute an encumbrance. They assert that an encumbrance arises only when a regulatory violation exists at the time of conveyance.

As a general rule, zoning or other governmental restrictions on the use of land do not constitute a breach of the covenant against encumbrances. 14 R. Powell & P. Rohan, Powell on Real Property, § 81A.06[2], at 81A-118 (1999). According to Powell:

> the existence of a zoning ordinance which limits the use of the land, even though its effect may be substantially similar to that of a restrictive covenant, is not considered a violation of the covenant. The attitude of the courts seems to be that these restrictions are public regulations equally applicable to all land in the district and are equally open for the grantor and grantee to investigate. Therefore, the purchaser takes title with the risk that such a regulation may exist.

Id. at 81A-118, 81A-119. The one exception to this general rule recognized by the Vermont Supreme Court occurs when a zoning or land use violation exists at the time of the conveyance that imposes on the grantees costs to bring the land into compliance with the regulation under which the violation exists. See e.g., Bianchi v. Lorenz, 166 Vt. 555 (1997) (grantor's failure to obtain the certificate of occupancy as required by ordinance prior to conveyance constitutes an encumbrance because of grantee's inability to use or occupy the residence); Hunter Broadcasting, Inc. v. City of Burlington, 164 Vt. 391 (1995) (grantor's failure to obtain the subdivision permit constitutes an encumbrance because the subdivision rule prohibited the resale of a subdivided lot without an original subdivision permit). If a violation exists at the time of conveyance that imposes on the grantee an inability to use the property on the terms upon which it was conveyed and such inability or loss thereby diminishes its value, then the land is encumbered and the

grantor is liable for breach of the warranty against encumbrances if he/she conveys title without excepting that encumbrance. This concept is consistent with the purpose of the covenant against encumbrances which is to indemnify the buyer for any encumbrances on the property at the time of conveyance which are not otherwise excepted. Powell, supra, § 81A.06[2], at 81A-118; Bianchi, 166 Vt. at 555, 562 (1997). The covenant assures that by accepting title, grantees are entitled to full use and enjoyment of the land (subject to identified exceptions) and if that turns out not to be the case, their grantors are held responsible. In both Bianchi and Hunter, the covenant was breached because the regulatory violation existed at the time of the conveyance, was discoverable in public records, and resulted in costs and/or diminished property value to the grantee.

Plaintiffs argue in this case that the Class II wetlands designation on the property is itself an encumbrance. According to the plaintiffs, the wetlands designation is an encumbrance within the meaning of the term as defined in Olcott v. Southworth. In Olcott, an encumbrance was defined as a "right to, or interest in, land which may subsist in third persons, to the diminution of the value of the estate of the tenant, but consistently with the passing of the fee." Olcott v. Southworth, 115 Vt. 421, 424 (1949) (quoting Bouvier Law Dictionary (Rawle's 3d rev.)). Plaintiffs assert that because the Department of Environmental Conservation had at the time of the conveyance, a third party interest in preserving and regulating the wetlands, and that interest operated to diminish the value of the land, the wetlands designation constituted an encumbrance.

While plaintiffs accurately restate the definition of encumbrance from Olcott, their analysis does not account for the nature of the regulation at issue in this case. At issue here is a public land use regulation that is generally applicable to any property in the State that contains wetlands. The Vermont Wetland Rules operate to identify and protect significant wetlands in a manner consistent with the public interest. Nothing in Vermont's statutory or case law suggests that the mere existence of a land use regulation, such as the existence of a wetlands designation, constitutes a encumbrance on property, even though it may have an effect on the market value of the land in the same manner as a zoning designation or any other land use regulation. Rather, the case law supports the principle that a public land use regulation constitutes an encumbrance only when a property is conveyed subject to a discoverable violation of the regulation at the time of conveyance, resulting in costs and/or diminished value. See Bianchi, 166 Vt. at 558 and Hunter, 164 Vt. at 393. In this case, Lot 2 was not in violation of any land use regulation at the time of conveyance from the Smolinskis to the Westalls. No action was needed and no expense was required to remove any impediment prior to obtaining full use and enjoyment of the property in the condition in which it was conveyed. Therefore, the wetlands designation does not constitute an encumbrance under either Bianchi or Hunter.

While the land was conveyed subject to a Subdivision Permit authorizing the construction of the septic system at a location later determined to be in the wetlands, at the time of the Smolinski/Westall conveyance the Permit had no effect of creating a violation of a land use regulation discoverable in the public records. The Permit had not yet been used and could have been allowed to expire unused, or the existence of the wetlands could have been discovered prior

to construction, or the grantees could have put the land to other use not requiring a permit and not in violation of any regulation. Plaintiffs assert that the requirement that they obtain a CUD permit diminished the value of their land because it restricted their use of the property. However, the event that triggered the need for a CUD permit was the construction of the septic system on Lot 2, not the selling of the property by the Smolinskis. Prior to the Smolinksi/Westall conveyance, a CUD permit was not necessary for Lot 2 even though part of the property was designated as wetlands because at that time nothing had been construction in the area designated as wetlands. In the event that the Gregorys never constructed a house on Lot 2, a CUD permit would not have been necessary. Breach of a warranty against encumbrances does not depend on the expectation or motive of the plaintiffs in buying the property, but on the status of the title and the condition of the property at the time of conveyance. The Westalls were the ones who created a violation when they built in the wetlands without obtaining a CUD permit. Before that, no violation could have existed because nothing was built on Lot 2.

That is not to say however, that the Gregorys cannot maintain *any* cause of action against the Smolinskis. If the Smolinskis knew or should have known that the Gregorys intended to build a septic system at a location later determined to be wetlands and the location was required pursuant to a Subdivision Permit the Smolinskis obtained in order to sell Lot 2 as a building lot, the Gregorys may well have other causes of action against the Smolinskis. The only issue the court is deciding in the context of the present motion is that for the purposes of the warranty against encumbrances, the wetlands designation did not constitute an encumbrance at the time of the Smolinski/Westall conveyance. Thus, the Smolinskis are not liable to the Gregorys for a breach of the covenant against encumbrances in their deed to the Westalls, by virtue of the wetlands designation on Lot 2 at the time of the Smolinski/Westall conveyance.

ORDER

For the foregoing reasons,

Defendants' Motion for Summary Judgment is *granted.*

Plaintiffs' Motion for Partial Summary Judgment is *denied.*

A status conference will be scheduled to sort out the status and scheduling needs of other claims in the case in light of this ruling.

Dated at Burlington, Vermont this 29 day of August, 2002.

Mary Miles Teachout

Hon. Mary Miles Teachout
Superior Court Judge