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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

Record No. 740531

JOHN E. MOBLEY
CHRISTINE O. MOBLEY,
Appellants

v.

SAPONI CORPORATION,
Appellee

APPENDIX

STEPHEN H. HELVIN
HAUGH & HELVIN
435 Park Street
Charlottesville, Virginia

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BILL FOR INJUNCTION

Filed August 23, 1973

Your Complainant, John E. Mobley and Christine O. Mobley, respectfully represent:

1. That your Complainants are the fee simple owners as tenants by the entirety of a tract or parcel of land in Greene County, Virginia, near the Albemarle County line, known as Lot 3, Block F, Section II of Lake Saponi Subdivision, being the same property in all respects as was conveyed to the Complainants by deed of the Respondent dated July 31, 1970 and recorded in the Clerk's Office of this Court in Deed Book 49 at Page 173.

2. That such lot adjoins Lake Saponi, a man-made impoundment of a watercourse in Greene County, Virginia.

3. That in or about the month of August, 1972 the overflow pipe for Lake Saponi collapsed or required replacement.

4. That the Respondent replaced said overflow pipe with a new one which was seventeen (17) inches higher than the original overflow pipe.

5. That the raising of the height of the overflow pipe by the Respondents raised the level of the lake seventeen (17) inches, thus causing the waters of Lake Saponi to trespass on the property of the Complainants.

6. That the Complainants protested the raising of the water level to the Respondents both before and after such raising in writing.

WHEREFORE, your Complainants respectfully pray for a permanent injunction requiring the Respondent to restore the water level of Lake Saponi to its normal height before the replacement

of the overflow pipe and for such damages as to equity may seem meet together with the reasonable costs of this cause, and they will ever pray, etc.

PLEA OF NON JOINDER

Filed September 29, 1973

Comes now the Respondent, Saponi Corporation, by counsel, and files this plea of nonjoinder, and represents as follows:

1. That as shown by subdivision plat of Section II or Lake Saponi recorded in the Clerk's Office of this court in Plat Book 3, p 20, there are 13 subdivided lots in Block F on the lake described in paragraph 2 of the Complainant's Bill for Injunction.

2. That of said 13 lots, 10 have been conveyed by Saponi Corporation to third parties, and Saponi Corporation has title to only 3 lots. The lots in Block F which have been conveyed, with deed book references to the Clerk's Office of this court, are as follows: Lots 4 & 5, D.B. 49, page 39; Lot 10, D.B. 49, page 68; Lot 2, D.B. 49, page 325; Lot 7, D.B. 49, page 327; Lot 6, D.B. 50, page 360; Lot 9, D.B. 51, page 307; Lot 11, D.B. 52, page 207.

3. That all lot owners in Block F have a very material and vested interest in the height of the lake, as shown by the restrictions recorded in said Clerk's Office in D.B. 47, page 267, a copy of said restrictions being herewith filed and marked Exhibit "A", and are necessary parties to this cause.

4. That all lots in Section I of Lake Saponi have a vested interest in said lake, as all of said lots by restriction numbered 10 of said restrictions were granted the use to use said lake,

and all lot owners are necessary parties to this cause.

5. That in 1972 the dam was washed out by the unprecedented hurricane Agnes, and the Respondent did at its own expense of almost $3,000.00 repair said dam, and in doing so used much care in restoring the lake to its former height, and verily believes that it is within four to five inches of its original height, and denies that it is 17 inches higher than its original height.

6. That as the lake was built by the Respondent for the benefit of the ajoining lots, the Respondent believes that its legal title to the lake is in the nature of a quasi trust for the benefit of all lot owners and has informed the Complainant in writing that the Respondent has no objection to lowering the level of the lake if the Complainant could reach an agreement to do so with the other lot owners.

7. That the effect of this suit will be or may be to establish the lake level for all abutting lot owners as well as other lot owners in the subdivision.

WHEREFORE, your Respondent prays that this suit be dismissed on the grounds that all necessary parties are not before this court.

ORDER DENYING PLEA OF NON JOINDER

Entered October 16, 1973

Came this day, the Complainant, by his attorney, David C. Dickey and the Defendant, Lake Saponi, Inc., by its attorney, Jack N. Kegley, upon the papers formerly read and upon the Defendant's Motion of Non Joinder and the same was argued by counsel.

ON CONSIDERATION WHEREOF, the Defendant's plea is stricken and the Defendant is given twenty-one days from the 16th day of October, 1973 to answer the Bill of Complaint, to which ruling the defendant objected and his exceptions are herein noted.

ANSWER TO BILL

Filed November 5, 1973

Comes now, your Respondent, and answers as follows:

1. The allegations of paragraphs 1, 2 and 3 are admitted.

2. The allegations of paragraphs 4, 5 and 6 are denied.

3. That in 1972, after most of the respondents lots on the lake had been conveyed to third parties, the dam that had been constructed by Saponi Corporation was washed out by the unprecedented hurricane and flood "Agnes".

4. That there was no legal obligation on the part of Saponi Corporation to repair or replace said dam, but it did repair said dam at its own expense at a cost of at least $3,000.00, without assessing the individual lots.

5. That in making said repairs, it was necessary to replace the standpipe, and in doing so, your Respondent used much care, employing surveying instruments to restore the new standpipe to the height of the original pipe.

6. That contrary to paragraph 6 of the Bill for Injunction there was no protest or objection by the Complainants when your Respondent voluntarily did this work.

7. That since the dam has filled, but not before, the Complainant, John E. Mobley, has demanded that the water level be lowered 17 inches.

8. That since said demand, your Respondent contacted all lot owners but one, and all of them indicated their desire that the water level stay as it presently is.

9. That since the institution of this suit, your Respondent has checked with other lot owners and found that if the level of the lake was raised at all, it is not more than 4 - 5 inches.

10. That if there is any encroachment whatever on the lot of the Complainant, it is well within the limits of the easement reserved in restriction number 13 and 17, a copy of said restrictions being filed herewith and marked Exhibit "A".

WHEREFORE, your Respondent prays that this suit be dismissed.

FINAL ORDER

Entered February 7, 1974

This day came the Complainants, John E. Mobley and Christine Mobley, together with their counsel, David C. Dickey and also the defendant, Saponi Corporation and its counsel, Jack N. Kegley, and the Court heard evidence ore tenus. The Complainants presented evidence that on or about August 19, 1972, the defendant corporation, Saponi Corporation, in repairing damage to a dam at Lake Saponi in Greene County, installed a stand pipe higher than the original stand pipe of such lake, with the result that the waters of the said lake were caused to rise 13½ inches above a previous level at which the lake was discharging through the stand pipe thus inundating land held in fee simple by the Complainants, John E. and Christine

Mobley, and that previous to this date the land had already been flooded to a depth of 4 inches in at least one place, for a total of flooding of some 17½ inches. The Complainants also presented evidence of the builder of the Complainants' dock that when the dock was built, before the lake was filled, the builder had used the stand pipe in the lake as a reference point and had meant to build the dock platform 16 inches above the water, but for some unexplained reason, the platform was 22 inches above the water when the lake filled. The Complainant testified that now the water is 10 to 10½ inches below the dock platform.

The Defendant, by its president and owner, testified that in replacing the stand pipe it had used care to have the level of the lake the same as before, and that it was replaced by him within an accuracy of 2 to 3 inches. The Defendant also produced the evidence of a former lot owner, and engineer, that the raising of the lake could have been no more than 5½ inches. No other evidence was admitted concerning the raising of the waters of the lake. The Court finds that the Complainants, John E. and Christine Mobley waived their rights concerning the first inundation by not making a timely objection to the same.

The Court makes no determination as to how high the waters of the lake were raised above the first level by the second inundation, but does find that the waters at the lake were thus raised onto the Complainant's property. However, the Court finds as fact that the defendant corporation had been advised that it had no legal obligation to repair said dam or stand pipe and had no actual malice in, and secured no advantage by so raising the lake waters, and in fact, undertook to duplicate the height of the original stand pipe.

WHEREFORE, the Court doth ADJUDGE, ORDER and DECREE that absent any showing of intention on the part of the defendant corporation to raise the lake onto Complainant's property for its own benefit or

with the intent deliberately to injure the Complainant, and the amount of the raising of the waters being almost a de minimis situation, as a matter of law the Complainants, having purchased a lot in a subdivision whose main feature was an artificial community lake whose waters have since been raised, should not be granted injunctive relief to have the waters of the lake lowered again, since so to do would hinder the rights of the other lot owners on the lake who make no objection to the water at a higher level, but that Complainants would be entitled to actual damages to their lot and dock which they had constructed on the lake shore. The Complainants having offered no proof as to actual damages to the dock none are awarded, Complainants excepted to the courts ruling on the ground that it is contrary to the law, contrary to the evidence, and contrary to the law and evidence and their exceptions are hereby noted.

WHEREUPON, the Complainants moved this Court to set aside the verdict as contrary to the law, contrary to the evidence and contrary to the law and the evidence, which motion the Court doth overrule and Complainant's exceptions are noted.

ASSIGNMENT OF ERROR

Filed March 6, 1974

The following errors are assigned to the judgdment of the Circuit Court of Greene County:

1. That the Court erred as a matter of law in adopting as a standard for the granting of injunctive relief the "showing of intention on the part of defendant corporation to raise the lake onto Complainant's property for its own benefit or with the intent deliberately to injure the Complainant."

2. The Court erred as a matter of law and

evidence in holding that "as a matter of law the Complainants having purchased a lot in a subdivision whose main feature was an articial community lake whose waters have since been raised, "should not be granted injunctive relief to have the waters of the lake lowered again since so to do would hinder the rights of the other lot owners on the lake who make no objections to the water at a higher level.

3. That the Court erred in refusing to set aside the verdict complained of as contrary to the law for the reasons above stated.

4. That the Court erred as a matter of evidence in finding that there was a factual basis in the evidence for the holding that Lake Saponi Subdivision owners have waived their rights to object to a trespass upon their land, by the lake waters.

STIPULATION OF EVIDENCE

Filed April 26, 1974

It is stipulated that the Complainants were the fee simple owners of Lot 3F of a Subdivision in Greene County, Virginia, known as Lake Saponi, and that the lot bordered on a man made impoundment named Lake Saponi; that at the time of the purchase of the lot by the Mobleys in June, 1970 the Lake was under construction but not then filled, but that it filled at a later date; that there are 13 plotted lots on the lake and that all but one or two lots had been conveyed by Saponi Corporation to persons not parties to this suit; that the purchase of the lot, as well as other lots were by reference to a plat of William S. Roudabush, Jr. dated 29 June 1970.

Mr. Edwin Leake, a witness for the Complainants, testified that he had built the house and dock on Lot 3F for the Complainants in 1970; that

he constructed the dock in the lake after the stand pipe had been erected, but prior to the lake filling; that it had been his plan and intention to construct the dock so that the platform of the dock would be 16 inches above the water and that by means of a level he had used the stand pipe as a reference point; that he constructed an extension on Mr. Mobley's dock in 1971, and when he checked the level of the platform above the water at that time, he found the dock platform 22 inches above the water level; that he made no notes of the measurements, but he remembered them because he was upset with his mistake; and he was unable to explain how the mistake occurred.

Mr. John E. Mobley, the Complainant, testified that in the late spring of 1971 he measured the depth of the water at the N.E. corner of his lot and it was 4" deep, and at the S.E. corner of his lot it was 2¼" deep; that in April of 1973 after the dam had been repaired and filled, that while standing in a rowboat and placing a yardstick down to the ground, he measured the depth at the same corners at 17½ inches and 15 3/4 inches respectively. He stated that he had taken no action when the lake was originally filled and made no protest at the 4" and 2¼" inundation.

On cross examination about the pictures that the Complainant introduced in evidence, he knew that his wife had taken the pictures, but he was unable to say when they were taken or for what purpose, except for the picture that had been taken after the dam had been fixed. On the one picture that bore hand written date 15 June 1971, Plaintiff's exhibit , he testified that he had written the date on it, but did not know when or why he had written the date, or the significance of the date. He testified on cross examination that maybe the end of the dock furtherest from shore had settled, but not over 1/2 inch, and on inspecting the picture, Plaintiff's exhibit , that made it look like the dock was sloping appreciably, he still contended that it had not settled

over 1/2 inch.

Mr. J. F. Bishop testified that he was the president and sole owner of Saponi Corporation, the developer of Lake Saponi Subdivision; that this was the first lake that he had ever built and that it was done by an experienced builder according to plans furnished by U. S. Soil Conservation Service to the lake builder; that some time prior to June, 1972 the stand pipe had been settling and where the stand pipe was jointed, in the earth fill of the dam, the water had washed part of the dirt away that had been supporting the standpipe; that he tried to correct this about June of 1972 by lowering the water level of the lake below the joint, digging out with a backhoe around the joint and pouring concrete around it, which did not stop the settling of the standpipe and proved to be unsatisfactory; that later a flood in this area washed out part of the dam requiring the lake to be drained again to rebuild the washed out section; and that it was after that that he determined that the original construction of the standpipe and his subsequent repairs were inadequate, and that a completely new standpipe would have to be installed; that he then drained the lake and built a concrete base for the standpip; that after constructing the base he used a level to determine the required length of a new standpipe to the closest inch that would go from the concrete base to the former water level; that he used the old water mark around the lake and determined that the pipe would have to be 16 feet long, and that he then ordered a new steel standpipe 16 feet long and 4 feet in diameter and had it put in place with a crane; that he was being as accurate as he could, and thought that his accuracy was certainly within 2 or 3 inches of duplicating the original water level and still thought so; that the cost to him for these repairs were in excess of $3,000.00, which he had been advised was not his obligation; that he had made no assessment against the lot owners, as he was entitled to do by the restrictions; that the increased depth of

the lake if in fact it was increased, was of no benefit to him at all; that if he had to lower the lake it would be detrimental to the other lot owners because of the mud that would show between the old and new water line, and that it would not do the several thousand fish any good with which the lake had just been stocked if the water were lowered enough to allow the standpipe to be replaced.

He also testified that this was the third law suit that he had been in with Mr. Mobley. That the first was a suit by Saponi Corporation because of an alleged failure by Mobley to observe the building restrictions, and that this suit was voluntarily dismissed by Saponi Corporation. The second suit was by Mr. Mobley because of an alleged drainage problem, which was settled by Mr. Bishop digging a ditch on the side of the Complainant's lot. Mr. Bishop also testified that Mr. Mobley apparently had ill feelings toward Mr. Bishop, and frequently called him on the phone to fuss at him, using profanity, and that in some of the calls Mr. Mobley sounded intoxicated.

Mr. Kurt Gloeckner, a certified land surveyor, with an M. A. in engineering, testified that he bought a lot near Mr. Mobley, there being two lots in between, and built a house and dock. That in building the dock, he placed the vertical posts in the lake bed before the lake was filled but he did not install the cross members and platform until the lake was filled; that after the lake was filled and while standing in the water he placed the cross members on the vertical posts, and that the bottom of the cross members were 2" to 3" above the water level; that he intentionally constructed the dock close to the water so that he could easily step from the dock into the boat; that he had gone back several days before the trial, and found that the water was up 1 1/2" on the same cross members, indicating that the water had risen 3 1/2" to 4 1/2"; that this measurement of 1 1/2" was made in the presence of Robert Swain to whom he had

sold his house and lot. Mr. Gloeckner also testified that one of the posts that supported his dock was exactly at the shore line when the lake was first filled, and that upon measuring the water depth at the same point it was now 4 to 5 inches deep.

On cross examination, he stated that the 2" to 3" figure for the distance between the water and the bottom of the cross members of the dock was not based on an actual measurement, but on his recollection as to the height that he built the dock. It was further brought out on cross examination that Mr. Gloeckner had further checked on his recollection in the following manner: He recalled that when his wife sat on the dock after he completed it, with her feet hanging over the edge of the dock, that her heel was in the water about 1" to 1 1/2", and by ascertaining the length of her leg from her knee down to her heel, and deducting the thickness of the wooden members of the platform, that there would have been a distance of about 2 3/8" to 3 1/8" between the cross member and the water; that these calculations also showed that the water would not have raised over 4 5/8". Mr. Gloeckner also testified that he was associated with Mr. Roudabush in laying out the lots in the subdivision; that they did not attempt to follow the precise water line in laying out the lot lines; that the lot lines adjacent to the lake were determined by the height of the stand pipe after it was originally installed, and that after that bulldozers were used to clean up the approximate proposed shore line and that he had instructed the bulldozer operator to stay within 10 feet of the temporary lot corner markers, as he thought there was a 10 ft. easement for such purpose, and that the permanent iron pins along the lake designating lot corners were placed in place only after the bulldozers had cleaned up the shore line.

Mr. Ronald Swain, an engineer, testified that he had purchased the house and lot formerly belonging to Kurt Gloeckner from Mr. Gloeckner, and the

adjoining lot from Mr. Roudabush, both in the fall of 1972; that the water level at that time was 2" - 3" below the bottom of the cross members of his dock; that he was present when Mr. Gloeckner made the measurement of the water, before the trial, now being 1 1/2" upon the cross members of the dock; that until this suit, he was not aware that there was any question about the level of the lake; that as a property owner he felt that his rights in the matter would be violated if the lake were lowered; that he did not want to have the lake lowered because in his opinion it would decrease the monetary value of his lots and other lots, by exposing mud flats; that the usefulness of the lake for recreational purposes would be restricted. He also testified that the end of the dock furtherest out in the water had settled and that he had raised that end of the dock, but that that raising would not have affected the level of the dock at the point that Mr. Gloeckner had made his measurement of 1 1/2" just before trial, as entirely different posts were supporting that portion of the dock.

After the court's ruling that no injunctive relief would be granted, but that the complainants would be entitled to damages, Mr. Mobley retook the stand to testify concerning damages, and testified that the only damage was to some small native bushes, but that they did not have much value, and he was unable to say what their value was.

RESTRICTIONS APPLICABLE TO SECTION I
OF LAKE SAPONI,
Recorded in Deed Book 47, Page 267

* * * *

13. A permanent easement within 10 feet of the shore line is hereby reserved, for the benefit of the lake, for the purpose of maintaining the lake, such as cutting weeds, cutting the depth of the lake up to 3 feet deep at the shore line, if

desired by Saponi Corporation, picking up debris, etc.

* * * *

15. Saponi Corporation has the right to convey the land flooded by the lake and areas to be designated as community areas to some third party, corporation, Trustee or Association, for the sole benefit of lot owners.

* * * *

17. The developer reserves for itself, its successors and assigns a permanent easement within 5 feet of the boundary lines of each lot for the carrying and maintenance of water, sewer, gas, electric service, telephone service, T.V. cables, drainage easements, and other utilities.

* * * *