

DOCKET NO. CV97-0083602-S : SUPERIOR COURT
JANE GUIDA, ET AL. : J.D. OF MIDDLESEX
V. : AT MIDDLETOWN
HOWARD A. CROCKER, ET AL. : JANUARY 16, 1998

MEMORANDUM OF DECISION

The above-captioned case concerns the rights and obligations of some Middlefield residents who obtain their household water from a well on the property of a neighbor. The case began with an application for temporary injunction filed when the defendant operators of the well cut off the plaintiffs' water supply after the plaintiffs had refused to pay bills issued to them. The parties agreed to close the pleading on an expedited schedule so that the case could be heard on the merits rather than only as to interim relief. Trial on the merits of all claims was conducted on December 16 and 17, 1997, and the parties filed post trial briefs thereafter.

The plaintiffs are Jane Guida and Thomas Guida of 16 Lakeview Place, George and Sandra Ennever of 17 Lakeview Place, Christopher and Teresa Bracken of 19 Lakeview Place, Michael and Patricia Cluney of 18 Lakeview Place, and Cecil Breedlove and Denise Moore-Breedlove of 19 Lakeview Place. Lakeview Place is a residential street containing both single family and two family homes in the Lake Beseck area of Middlefield, Connecticut.

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The defendants are Howard A. Crocker and Catherine W. Crocker, who are the owners of #20A & B Lakeview Place, the property where the well is located, as well as two companies that have exercised a right to operate the well and the water distribution system to the plaintiffs' homes: REJA Acquisition Corp. and Aqua Treatment & Service, Inc.

The parties agree that the well and water distribution system at issue (hereinafter "the water system") is not a formally constituted water company or public utility and that the State of Connecticut Department of Public Utilities ("DPUC") does not exercise rate regulation powers over it.

The plaintiffs seek injunctive relief against the cessation of water delivery to their homes. They also seek a declaration of their right to receive water from the water system. They allege that the defendants' interruption of their water and the defendants' demands for payments of various amounts constitute violations of the Connecticut Unfair Trade Practice Act, § 42-110a C.G.S.

In their counterclaim, the defendants allege that the plaintiffs have failed to pay the defendants for the water received at the rate set by the defendants for the years since the defendants Howard and Catherine Crocker bought the property containing the well in 1993. The defendants allege that the plaintiffs have been unjustly enriched.

The court finds the facts to be as follows.

On November 17, 1941, Wilbrod Desroches became the owner of Lots 23, 24, 25 and 26, Section B on a map entitled "Map of Mountain Lake Park, Middlefield, Conn., July 1929." (Ex. 5). In 1968 Wilbrod Desroches and Marian E. Desroches conveyed a lot designated as Lot 21 to the predecessor in interest of plaintiffs Guida and Ennever "together with the right to draw

water in favor of the grantors, their heirs and assigns, for domestic purposes from the artesian well located on Lots Nos. 25 and 26 owned by the grantors, for an annual water charge. The charge from the date of conveyance to November 1, 1996 shall be Forty Dollars (\$40.00), and shall be mutually agreed upon annually thereafter." Lot 21 is 16 Lakeview Place, which has been owned by plaintiffs Jane Guida and her sister Sandra Ennever and their husbands, Thomas Guida and George Ennever, since December 13, 1995.

In addition to their interest in 16 Lakeview Place, George and Sandra Ennever have been the owners since September 8, 1987 of 17 Lakeview Place. Their deed recites the right deeded by Wilbrod and Maria Desroches to their predecessor in interest: "[t]ogether with the right to draw water in favor of the grantees, their heirs and assigns, for domestic purposes from an artesian well located on Lots Nos. 25 and 26 owned by the grantors, for an annual water charge. The charge for the date of conveyance to November 1, 1969 shall be Forty Dollars (\$40.00), and shall be mutually agreed upon annually thereafter." (Ex. 9).

Plaintiffs Michael and Patricia Cluney presented evidence that the deed by which they acquired their home described in the deed as Lots 27 and 28 on the 1929 map, conveyed ownership "[t]ogether with and subject to and [sic] agreement concerning the supply of water to the above-described premises, as set forth in a deed from Maria A. Desroches to Helen Matscn and Eileen Burnham dated April 2, 1962 and recorded in Volume 27, Page 604 of the Middlefield Land Records." (Ex. 8). The agreement and deed referred to were not introduced into evidence.

Denise A. Moore-Breedlove and Cecil B. Breedlove, Jr., introduced into evidence the deed to their residence at 19 Lakeview Place, which they acquired on March 11, 1994. The deed recites that the conveyance is "[t]ogether with the right, in common with others, to draw water for domestic purposes from an artesian well located on Lots 25 and 26 as shown on a map entitled, "Section B, Map of Mountain Lake Parks, made by H.E. Daggett, Civil Engineer." (Ex. 10). The same reference to the right to draw water appears in two predecessors' deeds, Exhibits 11 and 12. Within that chain of title, one owner agreed to pay "a reasonable yearly fee" to be determined by the Grantor. (Ex. 14).

Christopher and Teresa Bracken presented evidence that the deed by which they acquired their home on Lakeview Place on September 23, 1986 conveyed "the right to draw water. . . as more particularly set forth in a deed from Wilbrod Desroches and Maria Desroches to Carmelo P. Boccaccio and Sueelyn G. Boccaccio dated July 7, 1992 and recorded in Volume 39, Page 612 of the Middlefield land records. The Boccaccio deed referred to indicates the right of the Boccaccios to draw water from the well located on the property owned by Wilbrod and Maria Desroches for five years at the rate of forty dollars per year "and for such additional period, without limitation, until such time as the grantees have an alternative water supply" (Ex. 13).

By a deed dated April 23, 1990, defendants Howard and Catherine Crocker acquired the property where the well is located, along with the two houses located on it. The grantors were Raymond and Maureen Desroches. These grantors acquired the property from Wilbrod and Maria Desroches in 1980. The deed by which the Crockers acquired their property states that "[s]aid premises are subject to 1. Certain well rights as of record may appear..." (Ex. 6). The

Crockers referred to the well and the system of pipes that ran to their neighbors' properties as Rainbow Springs Water Co. By a letter dated April 26, 1990, the State Department of Public Health notified the Crockers as the new owners that the water system was a "community public drinking water supply" and that it was subject to monitoring by that department as to water quality and sampling and testing requirements. The Crockers maintained the system either by themselves or by hiring others, and they charged the owners of the properties to which the water was directed in underground pipes \$250.00 per year for 1990, 1991 and 1992. In 1993, the Crockers notified the users of the water system that the fee for the year beginning in August 1993 would be \$500.00 because of the expected costs of electricity, sampling and testing, and "up-dating the system."

When none of the users paid the 1993 charges, the Crockers decided to try to release themselves from the burdens of operating the system. While the witnesses were reluctant to characterize the arrangement, the court finds that the Crockers continued to own the system but contracted with defendant Aqua Treatment & Service, Inc. to operate it. The Crockers notified the users that the charge to them would be \$47.25 per month.

None of the plaintiffs has paid the requested charge for 1993 nor any charge from that date to the date of trial as to any year of ownership of a home that drew water from the water system.

The plaintiffs regarded the announced charges as unfair and sought help from various state agencies.

On July 9, 1997, Harold and Catherine Crocker transferred "all personal assets comprising the Rainbow Springs Water Company, including the right to maintain, operate and control said well and the right to supply water. . ." to defendant REJA Acquisition Corp. ("REJA"). The Crockers transferred to REJA the right to collect all accounts receivable. REJA notified all the users by a letter dated September 11, 1997 that it was the new operator of the water system and demanded payment in the amount of \$1,250.00, representing unpaid charges for 1993, 1994, 1995, 1996 and 1997.

REJA notified the users that it would cease providing them with water on October 1, 1997 if it did not receive the requested payment prior to October 1, 1997. On September 30, 1997, the plaintiffs wrote out checks in the requested amount and gave the checks to their own attorney. Their checks were not tendered to REJA before October 1, 1997, and it turned off the water to the plaintiffs' homes and returned their checks. REJA took the position that the plaintiffs must agree to pay current charges as well as back charges, and the plaintiffs refused. The court, Stanley, J., granted an ex parte temporary injunction ordering water service restored, and the parties agreed to have that order extended pending resolution of the issues on the merits.

As part of its plan to acquire the water system, which it hopes eventually to merge with other water supply systems it operates in the area, REJA performed work to relocate the access to the well and pumping facilities, which had previously been reached by passing through a bedroom into the basement of the Crockers' home. The defendants do not claim the cost of that work as an element of the charges they claim should be paid by the plaintiffs.

Declaratory Relief

The defendants have correctly observed that this court may not enter a declaratory judgment because one of the users of the water system, a family with the surname Thomasson, has not been provided with notice. The Thomassons are persons with an interest in the subject matter of the complaint. Section 390(d) P.B. precludes declaratory relief in this situation.

The plaintiffs suggest that their failure to provide notice to all persons to be affected by the declaratory judgment they seek "is not a fatal defect and can be remedied." It is quite true that a remedy - namely, a continuance to achieve formal notice - is possible where such lack of notice is raised at the pleading stage by a motion to dismiss the complaint. Such was the situation in Dawson v. Farr, 227 Conn. 780 (1993). In Kucej v. Town Clerk, 40 Conn. App. 692 (1996), the Appellate Court reversed a trial court's summary dismissal of a zoning appeal and found that on remand the plaintiffs could take action to remedy the failure to give the notice required by § 390 P.B. Neither of the cited cases involved a case in which a full evidentiary trial on the merits had been completed. The plaintiffs have not filed a requested order of notice pursuant to § 390 P.B. and they do not apparently seek a mistrial so that all interested parties may receive notice and participate in a repeated trial. Having gone to trial on a claim for declaratory relief without having complied with the requirements of § 390 P.B., the plaintiffs have created a situation in which remediation is no longer possible.

Section 390 P.B. provides that "[t]he court will not render declaratory judgment upon the complaint of any person . . . (d) unless all persons having an interest in the subject matter of the complaint are parties to the action or have reasonable notice thereof." The court must give effect to this limitation. Since the Thomassons' water supply is derived from the Crocker's well,

apparently on the same basis as the other plaintiffs, they plainly have an interest in the subject matter of the complaint. While the plaintiffs have argued in their briefs that they seek a declaration only as to their own rights, not as to the Thomassons', there is no basis for the implication that this court could adjudicate the rights of some of the users without having effectively determined the rights of the Thomassons, since the declaratory judgment that the plaintiffs seek in their demand for relief is

- A declaratory judgment determining
- a) the ownership of the water system;
 - b) the rights and responsibilities of the parties in and for the water system;
 - c) the legal rates and charges for the water system.

Declaratory relief must be denied pursuant to the provisions of § 390 P.B. stated above.

Injunctive Relief

The right that the plaintiffs claim is the right to receive household water from the well on the Crockers' property without agreeing to pay charges arising from their receipt of the water. They seek an injunction against the cutting off of the water supply by the defendants. The issue, then, is whether the plaintiffs are entitled to injunctive relief against the interruption of their water supply by the defendants.

In order to be entitled to permanent injunctive relief, a party must establish that he or she has suffered irreparable harm from a violation of a cognizable legal interest and that he or she has no adequate remedy at law. Karls v. Alexandra Realty Corp., 179 Conn. 390, 401 (1980).

While the plaintiffs have presented the deeds to their properties into evidence, they do not base their complaint on a violation of rights secured by those deeds. Rather, they assert that they have a prescriptive easement to take water from the water system. The only statement in their complaint identifying the right they claim appears at paragraph 5 of the first count:

5. The property of the Plaintiffs is connected to the water system, has been connected to said water system for more than 15 years, and enjoys the right to take water from said water system.

They also allege that the conduct of the defendants' constitutes a violation of the Connecticut Unfair Trade Practices Act. ("CUTPA").

In Kenny v. Dwyer, 16 Conn. App. 58, cert. denied 209 Conn. 815 (1988), the Appellate Court ruled that an implied easement to draw water from a well on the property of another was properly found when land in one ownership is conveyed and at the time of the conveyance a servitude exists that is reasonably necessary for the fair enjoyment of the latter property. The court noted that in the absence of common ownership, an easement by implication may arise based on the action of adjoining property owners. Kenney v. Dwyer, 16 Conn. App. 64, citing L. R. Thompson, Real Property § 352, p. 304. The court in Kenney v. Dwyer found that the two principal factors to be examined in determining whether an easement by implication has arisen are: 1) the intention of the parties; and (2) whether the easement is reasonably necessary for the use and normal enjoyment of the dominant estate. Id., citing Gager v. Carlson, 146 Conn. 288, 292-93 (1950); Schroder v. Battistoni, 151 Conn. 458, 460 (1964); D'Amato v. Weiss, 141 Conn. 713, 717-18 (1954).

In Kenny v. Dwyer, a landowner had granted the plaintiff's predecessor in interest a right to use the well on his property and to enter on the property to repair the well and associated

equipment. Since the plaintiff's property was thereafter connected to the municipal water supply and had stopped drawing water from the well, the Appellate Court found that an easement by implication did not exist and reversed the injunction entered by the trial court against interference with the right to draw water.

The plaintiffs, who have not been shown to have any other water supply and for whose property access to a water supply is necessary, have proved an easement by implication. While the defendant claim that the plaintiff could simply drill their own wells, the record contains no evidence to suggest the claim that there is water available on each of the lots and the plaintiffs presented testimony to the effect that a regulation, Regs. Conn. State Agencies § 19-13-B51m, prohibits the drilling of a well by a resident already connected to a community water supply.

While the court finds that the plaintiffs have established an easement by implication to draw water from the Crockers' well, this easement does not constitute an entitlement to have any of the defendants perform free services on their behalf. The right to draw water does not impose a duty on others to test, treat and pump the water to the plaintiffs. The owner of the servient estate is "under no duty to make repairs or improvements necessary for the reasonable enjoyment of [the dominant estate] of his easement. Gager v. Carlson, 146 Conn. 288, 292 (1959); Howard v. Wiehl, 144 Conn. 538, 540 (1957).

Because water is a necessity for the residential use of a property this court finds that the plaintiffs would be irreparably harmed in a manner not amenable to a remedy at law if their access to well water were interrupted.

If the Crockers were the only persons drawing water from their well, the well would not be subject to the testing requirements that have been required of it as a "water system" serving

neighboring properties; and the Crockers would not have the expenses of testing, sampling, and administration that use by others imposes. Accordingly, in fashioning injunctive relief, and in view of the fact that none of the defendants has a duty to perform free services on behalf of the plaintiffs, this court must consider the equities in order not to grant the plaintiffs a greater right than an easement by implication entails. In fashioning injunctive relief, a court must balance the competing interests of the parties; Berin v. Olson, 183 Conn. 337, 343 (1981); and the relief granted must be compatible with the equities of the case. Dukes v. Durante, 192 Conn. 207, 225 (1984); Dupuis v. Submarine Base Credit Union, Inc., 170 Conn. 344, 356 (1976). Since the plaintiffs are entitled by their implied easement to draw water from the Crockers' well, but not to have the Crockers or others pay to pump, test, treat, and otherwise pay the costs associated with their access, it is appropriate that access to the water be conditioned on payment of a reasonable fee reflecting those costs. The plaintiffs claim that \$250 per year per hook-up is a reasonable fee. That figure has not been shown to bear any relation to the costs associated with their access to the water supply.

The defendants did not present any documentary evidence to establish the cost of providing water to the neighboring properties. The payments demanded were based on REJA's charges to customers of the other water systems it operates. There is no reason supported by any evidence presented that the costs of the Crocker well attributable to the neighbors' use happens to match the costs upon which the charges to other consumers with unspecified sources are based. The only evidence as to the costs arising from the delivery of water from the Crocker well to the neighboring properties was the testimony of John Wittenzellner to the effect that in 1997 it had been necessary to complete two tests costing \$1,300.00 each, that is

\$2,600.00, plus \$334.50 for electricity. Some of the electricity charges related to the Crockers' use for their own three residential units. The other costs to which an accountant, Mr. Joslin, testified were revealed to be projections, not actual expenditures. The court finds that the proven extra expenses associated with the drawing of water from the Crockers' well by neighboring properties was \$2,834.15 (\$2,600.00 plus 7/10's of the \$334.50 electric bill). An equitable charge to each residential unit would therefore be one-seventh of that amount or \$404.88.

The evidence suggests that the same expenses will be incurred because of the neighbors' use of the water system in 1998, plus the cost of the monthly billing and accounting, which the court finds to be \$500.00. Accordingly, the equitable payment for each of the plaintiff's properties for 1998 is \$476.31. The court finds that the defendants should be and are prohibited from interrupting the water supply to any plaintiff who is current in payments in the amount of \$39.69 per month to REJA. Since the defendants have not been shown to have a legal duty to supply services to the plaintiffs, they are not obligated to continue to supply water if payment is not made.

CUTPA Claim

The plaintiffs have alleged that the defendants engaged in an unfair trade practice in terminating their water supply on October 1, 1997. The evidence indicates that the party in control of the water system at the time was REJA Acquisition Corp., and that none of the other named defendants was engaged in operating the system or demanding payment at that time. Accordingly, the CUTPA claim fails against defendants Howard Crocker, Catherine Crocker, and Aqua Treatment & Service, Inc. As to the CUTPA claim against REJA, the plaintiffs'

claim is that it was an unfair trade practice for REJA to refuse to continue to perform services on their behalf when they refused to pay for the future performance of those services. Applying the "cigarette rule" by which the courts of this state determine whether conduct constitutes a CUTPA violation, see Williams Ford, Inc. v. Hartford Court Co., 232 Conn. 559, 591-92 (1995); Conway v. Prestia, 191 Conn. 484, 492-92 (1983), this court does not find that it is an unfair trade practice to refuse to continue to perform services for others who do not agree to pay the cost of their provision.

Counterclaims

The defendants have filed counterclaims asserting that each of the plaintiffs owe them for water treatment and delivery services performed from the time each plaintiff acquired his or her property through 1997, beginning in 1993. It is undisputed that when REJA acquired the water system in July 1997 it acquired the accounts receivable of the Crockers; therefore, REJA is the only plaintiff with standing to assert the counterclaims.

REJA asserts that the costs due since 1993 are the costs demanded by the Crockers, that is, \$500.00 per year. The counterclaims do not identify any basis for that claim and the only evidence that REJA introduced as to the actual costs engendered by the services to the plaintiffs from 1993 - 1996 was the testimony of Stewart Joslin to the following costs:

	<u>1993</u>	<u>1994</u>	<u>1995</u>	<u>1996</u>
electricity	336.54	342.26	329.13	332.00
water testing	100.00	919.00	922.00	1,282.00

Since three of the ten residential units drawing water from the system were the Crockers', one-tenth of the electricity costs is attributable to each of the other seven residential units, such that the proven costs per unit of the counterclaim defendants is as follows:

1993:	47.94	per unit
1994:	165.51	per unit
1995:	164.63	per unit
1996:	216.34	per unit

The costs proven as to 1997, as detailed above, are \$404.88 per unit.

Because the plaintiffs did not receive bills calculated on the basis that this court has found to have been warranted in equity, there is no basis for charging them interest for failing to pay. The counterclaim plaintiff has, however, established that it and its predecessors, the Crockers, incurred expenses to benefit the plaintiffs under circumstances in which the plaintiffs had a duty to pay for such services. The amounts owed by the various plaintiffs are based on the date of the in acquisition of their property, and the court finds the amount due as to each to be as follows:

#16 - Jane Guida, Thomas Guida, George Ennever and Sandra Ennever;
1996 and 1997 = \$621.22

#17 - George Ennever and Sandra Ennever;
1993 - 1997 = \$999.30

#18 - Michael E. Cluney and Patricia Cluney;
July 1993 - 1997 = \$975.33

#19 - Denise Moore-Breedlove and Cecil B. Breedlove;
March 1994 - 1997 = \$909.98

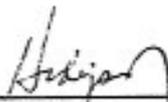
#23 - Christopher C. Bracken and Teresa C. Bracken;
1993 - 1997 = \$999.30

Conclusion

Judgment shall enter in favor of the defendants as to counts 2, 3, 5, 6, 8, 9, 11, 12, 14 and 15. As to the equitable claims set forth in counts 1, 4, 7, 10 and 13, it is hereby **ORDERED** that the defendants and their employees, agents, successors or assigns be and hereby are enjoined from interrupting the receipt of water from the well on the Crockers property by any of the properties owned by the plaintiffs so long as the plaintiffs pay current monthly charges based on the actual reasonable costs attributable to supplying them with water, which the court has found to be \$39.69 per month for 1998. Defendant REJA, its successors and assigns shall supply the owner of each property served by the well with a statement of such costs actually incurred in 1998 as a basis for an adjusted bill for 1998 and shall supply each owner with a detailed summary of such actual costs for each successive year, calculating a charge per residential unit that obtains its water from the well on the Crocker property. Such charges shall not include costs that would be incurred for the Crockers' own units in the absence of access to the well by the other users or costs for services not reasonably incurred in connection with the provision of water to those neighboring users.

Judgment shall enter in favor of REJA on its counterclaims as follows: with regard to Count One, judgment shall enter against Jane Guida, Thomas Guida, George Ennever and Sandra Ennever in the amount of \$621.22. With regards to Count Two, judgment shall enter against George Ennever and Sandra Ennever in the amount of \$999.30. As to Count Three, judgment shall enter against Michael E. Cluney and Patricia Cluney in the amount of \$975.33. As to Count Five, judgment shall enter against Christopher C. Bracken and Teresa C. Bracken in the amount of \$999.30. As to Count Four, judgment shall enter against Denise Moore-Breedlove and Cecil B. Breedlove in the amount of \$999.30.

Having prevailed both on their counterclaims and on their claims that the plaintiffs' right to continue to receive water is contingent upon payment for services in providing it, the defendants shall recover their statutory court costs.

 1/16/98

BEVERLY J. HODGSON
JUDGE OF THE SUPERIOR COURT