

VIRGINIA:

IN THE CIRCUIT COURT FOR FRANKLIN COUNTY

APPALACHIAN POWER COMPANY,)
)
 Plaintiff,)
)
 v.)
)
 WILLIAM W. NISSEN, II,)
)
 and)
)
 LORA J. NISSEN,)
)
 Defendants.)

Case No. CL17-1605

FINAL ORDER

On June 16, 2017, the parties appeared by counsel to be heard on Defendant Appalachian Power Company's ("APCO") Motion for Summary Judgment and its Motion for Protective Order. After reviewing the pleadings, responses to requests for admissions, exhibits, and other written submissions of the parties, and after hearing the arguments of counsel, the Court reached the following conclusions:

1. The language of the September 19, 1960 Flowage Right and Easement Deed ("Flowage Easement"), which the Defendants William W. Nissen, II, and Lora J. Nissen (collectively, the "Nissens") agree applies to their property on Smith Mountain Lake, is plain and unambiguous;
2. The Flowage Easement grants APCO the right to enter onto the Nissens' property at any time from time to time and, at its discretion, to cut, burn, and/or remove therefrom any and all structures and objects located below the 800-foot elevation contour.

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3. The Nissens have constructed a dock on the portion of their property that is located below the 800-foot elevation contour;

4. The Nissens have refused APCO's request that they remove the dock or allow APCO to enter and remove the dock;

5. APCO's rights under the Flowage Easement include the right to enter and cut, burn and/or remove the dock constructed on the Nissens' property below the 800-foot elevation contour;

6. APCO's rights, including the power to remove any and all structures and other things below the 800-foot elevation contour on the Nissens' property, includes the power to regulate the construction of and occupancy of the premises by any and all structures, including docks, on that portion of the property;

7. The Nissens' reserved right under the Flowage Easement to cross the portion of their property below the 800-foot elevation contour to reach the water of Smith Mountain Lake for recreational purposes does not include the right to construct any structures, including docks, on that portion.

8. There is no genuine issue of material fact in dispute between the parties.

Based on the foregoing and the other reasons stated on the record during the hearing, the Court GRANTS APCO's Motion for Summary Judgment and ENTERS judgment in favor of APCO and against the Nissens.

Given these conclusions and the ruling from the bench on June 16, 2017, the Motion for Protective Order, which pertained to discovery requests that were not due to be responded to until after the June 16, 2017 hearing date, is deemed to be moot.

The Court further ORDERS that, in light of the anticipated appeal of this ruling, the currently- unfinished Nissen dock is to be left in the condition it is as of the date of the June 16, 2017 hearing, with no further construction by the Nissens or their agents, or no removal or destruction by APCO or its agents, during the pendency of the appeal of this case.

AND IT IS SO ORDERED.

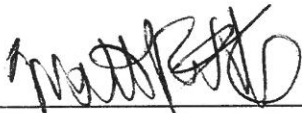
The Clerk of Court is directed to strike this matter from the docket and to furnish a copy of this Final Order to all counsel of record.

ENTERED this 28th of July 2017.

Circuit Judge



WE ASK FOR THIS:



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SEEN AND OBJECTED TO ON THE FOLLOWING GROUNDS: This Order does not accurately reflect the Court's June 16, 2017 ruling from the bench. Further object for the reasons stated and argued at the 6/16/17 hearing, for the reasons stated in Defendants' Response and Memorandum of Law in opposition to Motion for Summary Judgment, for the reason that the Court's ruling resulted from a misreading of the subject flowage easement deed, for the reason that there are genuine disputes as to material facts, and because the Court erred in ruling (1) that APCO's easement rights were tantamount to fee simple ownership rights, and (2) that the subject flowage easement deed granted APCO the absolute right to remove structures and to regulate the Defendants' property located below the 300 foot contour.



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