

STATE OF VERMONT

SUPERIOR COURT
Orleans Unit

CIVIL DIVISION
Docket No. 256-10-11 Oscv

GREEN MOUNTAIN POWER)
CORPORATION,)
Plaintiff,)
)
v.)
)
DONALD AND SHIRLEY)
NELSON,)
Defendants.)

MOTION FOR PERMISSION TO APPEAL

NOW COME defendants Donald and Shirley Nelson pursuant to V.R.A.P. 5(b)(1) and move this court for permission to appeal from the court’s interlocutory order consisting of a preliminary injunction. The grounds for the motion are that the order “involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the termination of the litigation.”

Specifically, the court has issued a preliminary injunction that bars all persons from “being present within 1,000 feet of the northwesterly boundary of Donald and Shirley Nelson’s Lowell, Vermont property and adjoining GMP’s land for two hours before blasting and until the all clear whistle is sounded.”

That injunction sweeps within its scope persons who have a right to be on the Nelsons’ property and who lack any motive to prevent the GMP blasting. Without said motive, the basis for GMP’s nuisance claim is eliminated and, as a matter of law, such persons’ presence on the Nelsons’ property cannot be deemed to constitute a nuisance, even under the broad interpretation of nuisance being applied here.

Moreover, the Nelsons and their invitees have First Amendment Constitutional rights and to assemble and protest Green Mountain's activities, regardless of whether their purpose in doing so is to render the Nelson property unavailable for use by GMP as a blast safety zone.

The controlling questions of law as to which there is substantial ground for difference of opinion are

1. Did the Superior Court violate defendants' due process right to the exclusive possession of their property by enjoining the defendants from occupying a portion of their property in order to enable the plaintiff to use the defendants' adjoining land as a blasting "safety zone" when the plaintiff had no existing right to use the defendants' property and when the blasting could be accomplished without a need to use any portion of the defendants' property as a safety zone?
2. Did the Superior Court violate the defendants' Constitutional rights to free speech and assembly by enjoining as a private nuisance the defendants' right to assemble on the defendants own' property for the purpose of protesting the plaintiff's plan to blast away portions of a mountain ridge on property adjoining the defendants' property where the plaintiff had no existing right to use the defendants' land for any purpose.

Applying the law of nuisance to oust the Nelsons from a portion of their property is unprecedented in Vermont. It is inconsistent with the settled law of property rights and nuisance in the State of Vermont and violates the Constitutionally protected rights of the Nelsons and their invitees.

An immediate interlocutory appeal will materially advance the termination of the

litigation because it will result either in the dissolution of the preliminary injunction and the termination of the complaint for injunctive relief filed by plaintiff or it will confirm that plaintiff is entitled to permanent injunctive relief.

An expedited decision by this court is essential because GMP's blasting may be completed before the issue can be decided if the court does not act expeditiously on this motion.

WHEREFORE, defendants request that the court grant their motion for permission to appeal. If the court is not inclined to grant the motion, defendants request that the court deny the motion on an expedited basis so that defendants will have the opportunity to timely appeal the denial of the motion before GMP's blasting is completed.

Dated at Hartford, Vermont this 2 day of November, 2011.

DONADD NELSON and SHIRLEY NELSON

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