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What is the outcome of Ben's action against Polly in the suit for declaratory relief to determine if the farm is burdened by the easement?

Easement (E) is a possessory estate in use of the land. Appurtenant easement consists of a dominant tenement entitled to use the land across the servient estate, which is burdened by the easement. The holder of dominant tenement has the burden of maintaining the easement. The easement can be created by prescription, grant, necessity, among others. Here, Al deeded an easement across the northern part of the farm to Ben. Because it is deeded, the easement was granted to Ben in writing. Therefore, an express easement has been created where Al's farm is the servient tenement and Ben holds the dominant tenement.

Subsequent purchaser of the dominant tenement purchases it with the benefit of the easement. Subsequent purchaser of the servient tenement takes it with the easement, unless the purchaser of the servient tenement is a Bonafide Purchaser for value (BPV). To be a BPV, the subsequent purchaser must purchase the property without notice of the easement. Here, Carol took the property from Al and Carol owns the servient tenement. Polly subsequently purchased from Carol. Because Polly bought the farm for \$100,000, she is a purchaser for value. To claim that Polly is a BPV, she will have to prove that she had no notice of the easement.

**Actual notice**

Actual notice is present when the person knows about the the easement either expressly or by implication. The facts are silent about Polly's actual knowledge of the easement. Therefore, she did not have actual notice.

**Constructive notice**

Constructive notice is presumed if the easement is recorded and can be discovered by the review of the chain of title. Here, Carol took the farm from Al in 2009 and the transfer to Carol was recorded. The easement was only recorded by Ben in 2011. Therefore, in her purchase of the property in 2012 from Carol, Polly was on a constructive notice of the easement because the chain of title would show the easement.

### **Inquiry notice**

A buyer has a duty to inspect the land. The inspection by Polly would have produced an inquiry about the easement when Polly saw Ben traveling in the northern part of the farm using the easement and said nothing. An inquiry into why Ben was allowed to travel would put Polly on inquiry and she would have found out about the easement. Hence, Polly had an inquiry notice.

Polly will try to claim that she is shielded from subsequent claims because when Carol took the property from Al, Carol was BPV, and she should hence take the benefit of BPV. However, she will likely not prevail because Al deeded the farm to Carol as her father. Given that Carol took from Al without value, Carol will be construed as a donee and Polly will not be able to claim the protection.

However, if Carol gave any consideration to Al for the purchase of the farm, Carol will be subject to analysis of whether she had notice to qualify for BPV. She will probably fail as well because of inquiry notice.

Ben will be able to show that the farm is burdened by the easement because Polly did not purchase it as a BPV.

### **2. Polly's suit against Carol for breach of contract for damages**

Polly purchased the property from Carol for 100,000 pursuant to a contract to sell the farm. The claim raised by Polly will likely be based on the contention that because of Carol's failure to disclose the easement to Ben, Carol breached

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the contract and the market value of the farm is \$5000 lower because of the easement.

### **Damages**

Compensatory damages are designed to compensate the injured party and put the party in the same position as she would have been should the breach not occur. In order to succeed, Polly will have to prove that there was a breach. A breach occurs if the plaintiff fails to receive substantial benefit of the bargain. The breach can be major or minor. Here, Polly will claim that the breach was major.

### **Major breach**

Polly will argue that the failure to disclose the easement and the drop in price was due to material misrepresentation by Carol in concealing the easement from Polly. She will further argue that even if Carol raises the defense of a unilateral mistake, Carol should have known about the easement because the property was owned by her father and she would have known about it. If Polly succeeds in proving a material breach, the court may allow her to get compensatory damages for the difference between the value of the property as taken and the fair market value, plus any incidental and foreseeable consequential damages. The difference would be \$5,000.

She can also try to rescind the contract if there was a major breach based on the misrepresentation. Given that the court finds that the initial contract was valid and the misrepresentation or unilateral mistake by Carol rises to the level of grounds for rescission, Polly can get the purchase price of \$100,000 back plus incidental damages.

### **Election of remedy**

Polly will need to file the suit for damages first before suing for rescission of the contract. If she sues for rescission first, she will be barred from seeking

compensatory damages.

### **Minor Breach**

Minor breach results if the P claims that she did not get the substantial benefit of the bargain, but in that case her performance is not discharged. Because this sale has already taken place and the property was transferred from Carol to Polly, the contract is no longer subject to performance. The minor breach issue will be addressed through the merger of contract and the deed and will be based on the warranties that are provided in the deed. The court will likely not address the minor breach of contract and try to resolve the issue with the warranty deed.

### Warranty deed

Plaintiff can sue under the warranty deed after the same of land has closed and the contract merges with the deed.

### *Easement appurtenant*

The deed did not provide information about the easement to Ben. However, because the easement is a possessory interest in use of the land and it runs with the land, the Polly will have had notice of the easement and cannot claim under the warranty against encumbrances.

### *Easement in gross*

Easement in gross is formed if there is no dominant tenement. When utilities run through the land, as is the case here, there is an easement in gross. The covenant that there are no exceptions runs with the land when it is agreed to by the parties and it touches and concerns the land. Here, the covenant was a part of the deed signed by both and it is about the sale of the land, hence it touches and concerns the land. The deed contained the exception for easement of to Water Co, therefore, Polly will be unable to claim under the warranty against encumbrances. The fact that deed was delivered in 2014 after a long delay will

affect the outcome because the warranty against encumbrances is a present warranty and can be used at the time of the transfer of the property. A proper warranty to be used in this case would be warranty for enjoyment, warranty and future assurances, which this deed does not contain.

Polly cannot prevail under the covenant of warranty deed.

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Question #2 Final Word Count = 1248