

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2004-205

JANUARY TERM, 2005

	}	APPEALED FROM:
	}	
William and Lorraine Miller	}	Lamoille Superior Court
	}	
v.	}	DOCKET NO. 201-9-02 Lecv
	}	
David Polomski	}	Trial Judge: Edward J. Cashman
	}	
	}	

In the above-entitled cause, the Clerk will enter:

Seller appeals from a summary judgment entered for buyers on buyers' claim under an escrow agreement related to the mislocation of a well and septic system. Seller contends the superior court misconstrued the agreement by requiring him to pay all expenses associated with fixing the problematic septic system. We affirm.

Because this case comes to us from a summary judgment, we review seller' s claim under the same standard used by the superior court. Wentworth v. Fletcher Allen Health Care, 171 Vt. 614, 616, 765 A.2d 456, 459 (2000) (mem.). Summary judgment is proper if the record reveals no genuine issue of material fact and any party is entitled to judgment as a matter of law. V.R.C.P. 56(c)(3).

In May 2001, buyers and seller entered into a purchase and sales contract for the sale of real property seller owned in Stowe, Vermont. After buyers' lawyer discovered that the well and septic system on the property did not comply with the state land use permit issued for the property, the parties entered into an escrow agreement, the relevant portions of which provided:

1. The premises are subject to State of Vermont Land Use Permit No. 5L0394 dated July 14, 1977, and any and all subsequent amendments thereto. The approved plans supporting this permit depict the water system and the septic system servicing the premises in a different location than where they were actually placed.
2. The parties acknowledge that a total of fifteen thousand and no/DOLLARS (\$15,000) is being withheld from the sale proceeds due from the sale of 370 Cross Road and shall be placed in an escrow account held by the law offices of Stackpole & French, of Stowe, Vermont, pending receipt of documentation fully satisfactory to Purchasers which will authorize the placement of the septic system and water system in their present location. The documentation shall include issuance of a letter from the State of Vermont, and/or amendment to the existing Land Use Permit, as well as other documents as may be required.
3. Should Bruce Pion certify in writing to attorney French that the required permit amendments can be obtained for an amount less than the full \$15,000, then the difference will be returned to [Seller] at that time.
4. Seller agrees to pay all expenses associated with obtaining approval from the State of Vermont, even if the costs exceed the amount escrowed. The date of completion shall be on or before September 1, 2001.

. . . .

7. Seller specifically agrees to fully remedy this issue, and to hold Purchasers harmless from, and indemnify them for any and all costs, expenses and attorneys fees arising out of or associated with obtaining said approval from the State of Vermont.

In August 2001, the parties received notice that the septic system was not only mislocated, but it could not be used in its present location. The fresh water well on the property was sited too close to the septic system, which was placed on soil that could not absorb enough waste water to comply with the permit. Coincidentally, the septic system failed in September 2001.

Ultimately, buyers had to install a new septic system at a cost of over \$29,000. They received payment from the escrow account, but sought additional compensation in superior court under the agreement to cover the full costs of fixing the septic problem. Seller counterclaimed for a return of funds paid out of the escrow account on grounds that the parties' agreement did not contemplate installing a completely new septic system at seller's expense.

The parties cross moved for summary judgment in the superior court. The court determined that the facts were undisputed, the escrow agreement was not ambiguous, and the buyers were entitled to reimbursement under the agreement for the full cost of remedying the problem with the septic system. Seller filed the present appeal.

Seller claims that the court misconstrued the escrow agreement by expanding its scope to include a new septic system. Seller argues that the agreement contemplated that he would obtain approval for the system in its present location only. Seller further argues that he did not breach that agreement because once the system failed, compliance with the contract became impossible. Seller also contends that the escrow agreement is ambiguous and that he should have an opportunity to present evidence on that issue to demonstrate why his interpretation of the agreement should prevail.

When determining the scope and meaning of a contract, we look to the " terms and the parties' intent as expressed in the contract language." Suchoski v. Redshaw, 163 Vt. 620, 622, 660 A.2d 290, 291 (1995) (mem.). Whether a contract is ambiguous is a question of law for the court to decide. New England P'ship v. Rutland City Sch. Dist., 173 Vt. 69, 75, 786 A.2d 408, 414 (2001). Contracts that are susceptible to multiple, reasonable interpretations are ambiguous. See 173 Vt. at 75-76, 786 A.2d at 414 (explaining that contract ambiguity exists where the writing can support a different and reasonable interpretation from that which appears when the contract is read in light of surrounding circumstances).

The trial court found no ambiguity in the scope of the escrow agreement at issue here. It interpreted the contract to require seller to fix the problem with the septic system to fulfill seller's duty to provide marketable title to the property. Whether or not this case presents an issue of marketable title, we agree with the court's conclusions that no ambiguity appears in the escrow agreement and that it required seller to pay for the costs of the new system to " fully remedy" the issue.

The plain language of the escrow agreement's first two paragraphs reflects that the parties intended to consummate the sale of the property even though a problem with the septic system and well existed. The agreement required seller to do what was necessary to remedy the problem of noncompliance with the land use permit, including seeking an amendment to the permit from the State. Although paragraph two of the agreement appears to limit seller's obligation to obtaining approval for the system in its present location, paragraph seven of the contract obligates seller to " fully remedy this issue," that is, the noncomplying and mis-sited septic system. When construed together, therefore, the limiting language in paragraph two reflects the parties' anticipation that a simple administrative solution to the problem was available. Notwithstanding that expectation, the parties also contemplated that the costs of remedying the problem could be expensive and could exceed the escrow amount. Therefore, paragraph 4 bound seller to pay " all expenses associated with obtaining approval from the State of Vermont." Taken as a whole, the agreement required seller to fix the septic problem even if that fix required re-siting the system at a cost exceeding the \$15,000 in escrow. Summary judgment in buyers' favor was proper because the facts were undisputed and the agreement is clear and unambiguous.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Denise R. Johnson, Associate Justice

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Frederic W. Allen, Chief Justice (Ret.),

Specially Assigned