

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-361

APRIL TERM, 2007

Garrett L. Brown, Jennifer Brown and Larry	}	APPEALED FROM:
Rowe	}	
	}	
v.	}	Rutland Superior Court
	}	
Charles E. Mulcahy, Sr., Barbara Mulcahy,	}	
Charles Mulcahy, Jr., Robert J. Mulcahy and	}	
Robert G. Rojecki	}	DOCKET NO. 558-9-04 Rdcv
		Trial Judge: Richard W. Norton

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

Defendants in this boundary dispute appeal from a superior court judgment in favor of plaintiffs, their adjoining landowners. Defendants contend the court erred in concluding that the terms of a deed unambiguously vested title to the disputed property in plaintiffs. We affirm.

The material facts may be summarized as follows. In 1977, defendant Robert G. Rojecki and his wife purchased a 180-acre parcel of land in Sudbury. The Rojeckis built a home on the property, and years later decided to sell a portion of it, including the home. In preparation for the sale, they commissioned a survey by George Stannard, a certified surveyor.

The Stannard survey showed that the eastern portion of the parcel to be conveyed was bounded in part by an old right-of-way known as the “Crown Point Military Road” or the “Old Military Road.” Stannard placed pins on the westerly side of the road to demarcate the boundary of the parcel to be conveyed, and noted in a footnote that the old road’s status and ownership were uncertain, observing “as far as is known, this road was never conveyed to or claimed by the Town of Sudbury. Present title to it is uncertain, if not nonexistent.” It is undisputed that the Town formally abandoned the road in question at a Town meeting in March 1899.

In 1997, the Rojeckis conveyed by warranty deed a 15-acre portion of their property, including the home, to Jason A. Newton and Carolyn J. Houston. The deed description of the conveyed parcel follows precisely the metes and bounds description of the property in the Stannard survey. It describes the eastern boundary of the conveyed parcel as proceeding south from an iron pin which Stannard had placed along “the apparently westerly line of the ‘Crown Point Military Road,’ ” to a second pin “in the apparent westerly line of said ‘Crown Point Military Road.’ ” Significantly, however, the metes and bounds description of the property to be conveyed concludes as follows: “Together with any rights or title in fee simple, if any, which the grantors herein may have in and to the roadways bounding the lands herein described.” (emphasis added.)

In 1998, the Rojeckis conveyed their remaining land to their neighbors to the east, the defendant Mulcahy. The Mulcahy deed purported to transfer all of the Rojecki's "remaining lands" with the exception of those parcels previously conveyed to others, including the Newton/Houston grant. In September 2000, Newton and Houston conveyed their parcel to plaintiffs herein, Garrett and Jennifer Brown. A dispute subsequently arose between plaintiffs and defendants over access to the strip of land known as the Old Military Road, which resulted in this lawsuit.

Following a one-day bench trial, the court issued a written decision in favor of plaintiffs. The court rejected defendants' claim that the metes and bounds description of the property line defined the eastern boundary of the Newton/Houston grant without reference to the concluding language conveying "any rights or title" to "the roadways bounding" the conveyed parcel. The court also declined to credit defendant Rojecki's later expressed intent, in an affidavit dated March 1, 2001, and recorded in the land records, indicating that his desire at the time of the conveyance was to transfer only his rights in roadways other than the Military Road. As the court explained:

Defendants' argument is unpersuasive. The deed in question states explicitly that it includes "any rights or title in fee simple, if any, which the Grantors herein may have in and to the roadways bounding the herein lands described." Construing this language to mean anything but the Military Road is illogical. Defendants do not suggest that they had any rights in other roadways bounding their lands. The Military Road can only be considered a "roadway," and it clearly bounds the lands described in that deed—in fact, the metes-and-bounds description thereof lists the "Old Military Road" as one of the boundaries. The language of the deed is thus clear on its face. Any rights the grantors had in the Military Road was transferred to Newton/Houston in 1997. As a result, extrinsic evidence of the intent of the parties at that time is not admissible to vary the terms of the deed.

The court accordingly entered judgment in favor of plaintiffs. Defendants later filed a motion to amend the court's findings in one minor respect, which the court granted. This appeal followed.

We review *de novo* the trial court's construction of the terms of a deed and whether it is ambiguous. Downtown Barre Dev. v. C & S Wholesale Grocers, Inc., 2004 VT 47, ¶ 8, 177 Vt. 70. While we may consider limited extrinsic evidence concerning the circumstances surrounding the making of the agreement to determine whether ambiguity exists, those circumstances "may not be used to vary the terms of an unambiguous writing." *Id.* (quotations omitted). Defendants here advance several arguments in support of their claim that the court erred in finding that the deed unambiguously conveyed the Military Road to plaintiffs' predecessors in interest. First, they note that both the Stannard survey and the deed on which it was based define the eastern boundary of the parcel to be conveyed as the westerly side of the Military Road, and argue that "[i]t is reasonable to take from this that the parcel intended to be conveyed did not include the strip." The argument simply ignores, however, the opening word of the clause conveying the roadway rights and title "together" with the 15 acre parcel described by metes and bounds, as well as the concluding language of the deed, which expressly incorporated into the conveyance any residual right or title "which the grantors herein may have in and to the roadways bounding the lands herein described."

Defendants also argue that the court overlooked the fact that two other “more obvious[]” roads border the parcel: Vermont Highway 30 to the west, and Sudbury Town Highway 10, also known as Schoolhouse Road, to the north. Coupled with the fact that the Military Road had been abandoned and was overgrown, and that defendant Rojecki testified that he did not consider the Military Road to be an actual road at the time, defendants suggest that the deed could reasonably be interpreted to apply only to the other two roads. The argument is flatly contradicted by the survey and deed, however, which repeatedly refer to the disputed property as the Military “Road” just as they refer to the Schoolhouse “Road.” Indeed, as the trial court here pointed out, the only road as to which there was any uncertainty of ownership and as to which the language vesting title to “any rights” the grantors “may have” was the Military Road. Thus, the court’s construction is the only one which avoids surplusage and harmonizes the deed provisions as a whole. See In re Verderber, 173 Vt. 612, 615 (2002) (mem.) (interpretation of agreement which harmonizes all its parts is preferable to one which focuses on only one provision out of context). Along similar lines, defendants argue that the “particular” metes and bounds description should control over the more “general” deed language granting title to any roadways bounding the land. Here again, however, the argument assumes a conflict or inconsistency between the two provisions where none has been shown to exist.

Defendants argue that ambiguity may also be inferred from defendant Rojecki’s testimony that when he showed Newton and Houston the property he identified a stone wall west of the Military Road as marking the boundary, as well as from the absence of any evidence that Newton or Houston expressed any interest in acquiring the Military Road and that the Rojeckis retained a portion of the land after the conveyance to Newton and Houston. Such circumstances do not, in our view, introduce any ambiguity into the otherwise plain language of the deed.

Finally, defendants rely on defendant Rojecki’s affidavit and testimony expressly disavowing any intent to convey the Military Road in the Newton and Houston deed, and defendant Mulcahy’s testimony that Rojecki later assured him that he would receive half of the Military Road in his deed for the remainder of the property. As the trial court here correctly concluded, however, absent any apparent ambiguity, such after-the-fact testimony is insufficient to alter the terms of the deed. Accordingly, we discern no basis to disturb the judgment.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Brian L. Burgess, Associate Justice