ENTRY ORDER

SUPREME COURT DOCKET NO. 2009-180

MARCH TERM, 2010

Ronald Davis	}	APPEALED FROM:
	}	
v.	}	Chittenden Superior Court
	}	
Bryon Gabaree and Jennifer Babcock	}	DOCKET NOS. S0867-02 & S0175-08 CnC
	}	

Trial Judge: Dennis R. Pearson

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

This case involves a dispute between neighbors regarding the location of the common boundary between the parties' adjacent residential lots. Defendants appeal the superior court's order locating the boundary to provide a fifteen-foot setback between plaintiff's house and the property line, claiming that this was legal error because the deed unambiguously established the boundary line next to plaintiff's home. Defendants also claim that the superior court erred in failing to grant further injunctive relief to prohibit plaintiff from harassing defendants. We affirm.

The trial court found the following facts. In 1977, plaintiff bought a two-acre parcel of land known as lot 1 from defendants' predecessors-in-interest, the Goumillouts. The land was subdivided along with adjoining lot 2 from a larger lot owned by the Goumillouts. Prior to actually purchasing the property and with the Goumillouts' consent, plaintiff began to construct a home on the lot. The concrete foundation of plaintiff's home was already erected when John Marsh surveyed the land in advance of the sale. The deed incorporated the Marsh survey map of the two lots, referred to as "revision #3, dated March 23, 1977." Due to a planning commission decision denying access for two curb cuts, it was decided that the two lots would share a driveway and plaintiff's lot would be granted a thirty-foot right-of-way on the adjacent lot 2, now defendants' property. The deed thus provided the following:

> Also included in this conveyance is a 30 foot right of way, extending from the southerly edge of West Oak Hill Road, 285.37 feet, more or less, to the northerly edge of the lot herein conveyed [plaintiff's lot]. Said right of way is adjacent to the easterly edge of [defendants' lot] as shown on said survey, and is to be used in common with [defendants' lot]. The grantee herein . . . [is] responsible for maintaining said right of way, however, should the Grantors, their successors, heirs and assigns use said right of way or a portion thereof, they shall be jointly responsible with the

> Grantee herein, for maintaining and repairing that portion of the right of way which they use.

Plaintiff's home was partially damaged by fire in 1991 and rebuilt. The foundation has remained in the same place it was originally built. At all relevant times, the Town of Williston has had a zoning regulation requiring a minimum fifteen-foot setback for side and rear yards.

In 1991, plaintiff's neighbor received permission to put in a second driveway to service lot 2. After installation of this driveway, plaintiff was the sole user of the right-of-way. For some years, plaintiff has not owned an operable vehicle. As a result, plaintiff has not undertaken regular maintenance of the drive and the right-of-way has deteriorated.

In 2002, defendants acquired the lot next to plaintiff. Trouble between the neighbors began in the summer of 2002 when defendants started exercising dominion over the right-of-way by mowing it. Apparently, plaintiff was displeased by the action. The acrimony between the neighbors grew steadily. Plaintiff placed several items in the right-of-way, including his mailbox, wooden pallets, logs, metal drums, and poles. He also attempted to cordon off the area with cable spool. In 2002, plaintiff filed for a restraining order against defendants. This case resulted in a stipulated order, in which the parties agreed not to have any substantial contact with each other. The order also prohibited defendants from trimming vegetation in the right-of-way. This stipulation did not resolve the conflict, however, and there continued to be issues between the parties. It is not necessary to recount the entire ensuing history of "mutual provocation" detailed in the trial court order. We do note, however, the trial court's findings that plaintiff has trespassed on defendants' property, and according to defendants, yells obscenities at them. Plaintiff's behavior has resulted in several criminal charges against him, and although he has faced trial, he has been acquitted of all charges. In 2008, defendants filed an action for a permanent restraining order against plaintiff. This case was consolidated with the ongoing boundary dispute.

In 2002, defendants retained a surveyor, Mr. Amblo, to establish the lot division line between the parties' properties and the exact location of the thirty-foot easement. The surveyor had difficulty correlating the various measurements in the historical record and in the Marsh survey with the features on the ground. As a result of this survey, in 2007, defendants set five new rebar pins into the ground. One pin was set right at the northwest corner of plaintiff's house. According to the Amblo survey, defendants' property line runs along the north wall of plaintiff's house, with almost no separation between plaintiff's home and the property line.

The trial court conducted a trial and made a site visit to resolve the boundary dispute and to consider defendants' request for a permanent restraining order against plaintiff. The trial court concluded that the Amblo survey did not properly set the location of the boundary line. The trial court found that "[i]t was the apparent, and obvious intent of the Goumillouts, and of Plaintiff Ronald Davis, . . . that the lot as conveyed, and its house already sited and under construction, would be in compliance with all Town regulations, including the 15-foot setback on the north side of the house." The court further found that Marsh failed to take the setback into account when describing the location of the northern boundary of plaintiff's property. The court concluded that the Marsh survey as referenced in the deed, establishing a distance of 285.37 feet from the road was in error and must yield to the location of the home and existing edge of the twenty-foot by thrity-two-foot foundation slab as an established monument. To accommodate a

fifteen-foot setback from plaintiff's house, the court declared that the common boundary between the lots is "270 feet along the eastern boundary of [defendants' lot]."

As to defendants' request for a permanent injunction, the court found that plaintiff has "repeatedly, if sporadically, trespassed onto defendants' property, at times intentionally," and found that injunctive relief was appropriate. The court ordered plaintiff to refrain from the following: entering onto defendants' lands, or photographing or videoing defendants. The court further ordered that plaintiff should maintain the easement area, and that defendants are authorized to mow the area if plaintiff does not do so. The court denied the parties' requests to amend the judgment. Defendants appeal.

On appeal, defendants claim that (1) the trial court's declaration of the boundary line is error because it is contrary to the language of the deed, and (2) the court's grant of injunctive relief is too narrow to protect defendants' right of privacy.

We first consider the court's conclusion regarding the location of the boundary line. Defendants argue that the court's order setting the boundary line 270 feet from the road is contrary to the deed distance of 285.37 feet, and therefore error. Defendants contend that the deed is unambiguous in its measurements and requires no extrinsic information to clarify its terms. Therefore, defendants argue, the court erred in resorting to surrounding circumstances in order to discover an ambiguity where none exists on the face of the instrument.

In interpreting a deed, a court must first look to "the language of the written instrument because it is assumed to declare the intent of the parties." Kipp v. Estate of Chips, 169 Vt. 102, 105, 732 A.2d 127, 129 (1999). To determine intent, we look to the entire instrument and give effect to every part to understand the context of the deed. Id. When interpreting language, the court must accept the plain meaning and not resort to construction aids if the meaning is unambiguous. Id. at 107. "A deed term is ambiguous if reasonable people could differ as to its interpretation." DeGraff v. Burnett, 2007 VT 95, ¶ 20, 182 Vt. 314, 939 A.2d 472 (quotation omitted). The question of whether an ambiguity exists is a matter of law, and "[a]mbiguity will be found where a writing in and of itself supports a different interpretation from that which appears when it is read in light of the surrounding circumstances, and both interpretations are reasonable." Isbrandtsen v. North Branch Corp., 150 Vt. 575, 579, 566 A.2d 81, 84 (1988).

In this case, to determine whether there was an ambiguity in the deed, the trial court considered "evidence as to the circumstances under which the conveyance was made." Id. at 580. In particular, these included the permitting problem that delayed the closing and prompted the Marsh survey in the first place, and the parties' objective of satisfying the setback requirement as reflective of grantor-grantee intent at the time of the conveyance. Whether it was within the court's authority to consider this historical inquiry to determine if the deed was ambiguous need not detain us because the ambiguity arises from the deed itself. The measurement of the right-of-way is ambiguous, when read in conjunction with the depiction of the boundary line in the Marsh survey incorporated into that deed by reference.

The right-of-way measurement specified in the Goumillout deed does not match the locations of the right-of-way and plaintiff's house as shown in the Marsh survey referred to in the same deed. As confirmed by the later Ablo survey, the 285-foot depth of the right-of-way declared in the deed's metes and bounds literally terminates at the corner of plaintiff's house, leaving no land to meet the setback regulation. The Marsh survey, however, portrays the 285-

foot right-of-way stopping at what appears, according to its scale, to be about fifteen feet short of plaintiff's house. Moreover, the Marsh survey depicts a buffer or strip of land of the same dimension consistent with the setback rule between plaintiff's house and the remaining Goumillout lot, now held by defendants. Thus the stated measurement is rendered uncertain by the survey to which it refers.

Therefore, although arrived at by a somewhat different analysis, the court was not incorrect in concluding that the deed supported two different interpretations of where the boundary line exists, both of which were reasonable, leaving the actual boundary ambiguous. Once ambiguity is found, "interpretation of the parties' intent becomes a question of fact to be determined based on all of the evidence—not only the language of the written instrument, but also evidence concerning its subject matter, its purpose at the time it was executed, and the situations of the parties." Main Street Landing, LLC v. Lake Street Ass'n, 2006 VT 13, ¶ 7, 179 Vt. 583, 892 A.2d 931 (mem.). Contrary to defendants' argument, the record evidence supports the court's finding that the original grantor intended to convey a conforming lot. "The location of a boundary line on the ground is a question of fact to be determined on the evidence. The trial court's findings of fact will not be overturned unless clearly erroneous despite inconsistencies or substantial evidence to the contrary." Monet v. Merritt, 136 Vt. 261, 265, 388 A.2d. 366, 368 (1978).

In this case, the evidence supports the trial court's finding that the original grantor intended to convey to plaintiff a lot in conformance with the town's fifteen-foot setback requirement. Plaintiff testified that when Marsh surveyed the land his foundation was in place. This survey was done at the direction of the town planning commission and in conjunction with obtaining necessary permits. The town issued all necessary approvals and permits for plaintiff's home, already under construction, on the basis that it was in conformance with town regulations. The trial court found plaintiff's testimony on this point credible, and it is within the court's discretion to determine issues of credibility.

We disagree with defendants' claim that Withington v. Derrick, 153 Vt. 598, 572 A.2d 912 (1990), supports judgment in their favor. In Withington, this Court reversed a trial court interpretation of a boundary line, which relied on conjecture as the meaning of deed language because the court's interpretation was not supported by the evidence. In contrast, as explained, the court's decision in this case was supported by the evidence regarding the grantor's intent at the time of the original conveyance.

Next, we turn to defendants' argument regarding the court's grant of injunctive relief. Defendants seek further injunctive relief to prevent plaintiff from: walking along or loitering upon the common boundary line; contacting defendants, following or approaching defendants; or storing personal property in the easement. "Courts have a wide range of discretion to mold equitable decrees to the circumstances of the case before them." Richardson v. City of Rutland, 164 Vt. 422, 427, 671 A.2d 1245, 1249 (1995) (quotation omitted). Further, injunctive relief should be no more burdensome than necessary to provide relief. Id., 671 A.2d at 1249 The court in this case properly weighed the equities on both sides and constructed an order to protect defendants' property rights while not prohibiting ambiguous acts that could only lead to more litigation between the parties. Therefore, we find no abuse of discretion and affirm the injunction.

On a final note, plaintiff's pro se brief is lengthy and largely indecipherable, but appears to raise arguments challenging the superior court order. Because plaintiff failed to file a cross-appeal in this case, plaintiff has no grounds to raise new issues in this court and we do not consider plaintiff's challenges to the trial court's order. See V.R.A.P. 4 (cross-appeal must be filed within fourteen days of the original notice of appeal); see also Baird v. Baird, 142 Vt. 115, 117, 454 A.2d 1229, 1230 (1982) (court without jurisdiction to consider cross-appeal that was not timely filed).

Affirmed.

BY THE COURT:

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice