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ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-294

APRIL TERM, 2005

Town of Hartford	}	APPEALED FROM:
	}	
	}	
v.	}	Windsor Superior Court
	}	
Marc Wood and Susan Wood	}	DOCKET NO. 542-10-02 Wrcv
		Trial Judge: Theresa S. DiMauro

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

Defendants Marc and Susan Wood appeal the superior court's order granting summary judgment to plaintiff Town of Hartford with respect to the Town's complaint seeking an injunction requiring defendants to remove their diner from the Town's right-of-way. We affirm.

For years, the parties have been involved in continuous legal disputes in several forums concerning defendants' attempt to develop their property in the Town of Hartford. In 1999, defendants filed with the Town an October 1998 survey that had been prepared for them as part of their effort to obtain the Town's approval to develop their property. The survey indicated that part of defendants' diner was within the Town's right-of-way. In August 1999, the Town's planning commission approved defendants' application to develop their property. The approval, however, was in the alternative. Defendants could either continue the encroachment for a three-year period upon executing and recording an easement approved by the Town board of selectmen, or demolish the portion of the diner within the Town's right-of-way. Defendants chose the second alternative and thus never signed or recorded the easement. Other permit disputes arose, however, and defendants never removed the encroachment. On February 8, 2002, the Town sent defendants a letter informing them that the diner had to be removed from the Town's right-of-way by March 2, 2002. Defendants did not do so.

In October 2002, the Town filed its complaint in the instant case seeking to require defendants to remove their diner from the Town right-of-way. The following month, defendants answered the complaint and filed counterclaims alleging harassment, intentional infliction of emotional distress, fraud, nuisance, discrimination, and denial of due process. According to a May 2003 pre-trial scheduling order, the parties were to complete discovery by November 1, 2003, and the case was to be ready for trial by March 1, 2004. On March 3, 2004, the Town filed a motion for summary judgment. Defendants countered with their own motion for summary judgment on April 6, 2004. On June 3, 2004, the superior court granted summary judgment to the Town with respect to defendants' counterclaims. On June 16, 2004, the court granted the Town's motion for summary judgment with respect to its complaint seeking injunctive relief. On July 2, 2004, defendants filed a notice of appeal and motions for a new trial and for reconsideration. In October 2004, following this Court's remand, the superior court denied defendants' post-judgment motions. Defendants now appeal, arguing that (1) the superior court erred in granting the Town's motion for summary judgment; (2) the Town abused the discovery process; (3) the survey relied upon by the Town and the superior court was wrong; (4) the superior court should have granted their post-judgment motions; and (5) the Town's encroachment claim was filed prematurely.

Defendants first argue that the superior court erred by granting summary judgment to the Town because there is a genuine issue of material fact in dispute, namely whether the Town right-of-way is 50 feet as the Town claims or only 34.2 feet as they claim. According to defendants, the state highway, which becomes Main Street in the Town of Hartford, ends at the Town lines, and thus the Town and the two surveys presented to the superior court incorrectly assume that the Town has a 50-foot right-of-way with respect to Main Street. See 19 V.S.A. § 32 (“A roadway width of one and one half rods on each side of the center of the existing traveled way can be assumed and controlled for highway purposes whenever the original survey was not properly recorded, or the records preserved, or if the terminations and boundaries cannot be determined.”). Defendants refer to a 1928 deed in which the Town obtained land to replace the bridge on the road adjoining their property and running perpendicular to Main Street. According to defendants, because the northern boundary of the land deeded to the Town is 17.1 feet from the centerline of Main Street, Main Street must be 34.2 feet wide. They reason further that if Main Street has only a 34.2-foot right-of-way, then they have more space in front of their diner on Main Street, and the funnel-shaped right-of-way from the bridge to Main Street would not cross part of the diner as depicted on the surveys relied upon by the superior court. Apparently, this reasoning depends in part on defendants’ claim that the bridge was shifted a few feet when it was rebuilt in 1929.

In response to these claims, the superior court noted that (1) the only two surveys submitted to the court—including a 1953 survey and the 1998 survey that was done for defendants—showed that defendants’ diner encroached upon the Town right-of-way; (2) the only evidence referred to in defendants’ statement of disputed facts is the 1953 survey, which supports the Town’s position; and (3) defendants’ theory explaining why their diner does not encroach upon the Town right-of-way is not supported by any professional surveys or expert testimony and thus does not undermine the surveys submitted to the court. The court concluded that because the facts to be proven are not “such that any lay person of average intelligence, from his knowledge and experience, could reach the necessary conclusions,” Houghton v. Leinwohl, 135 Vt. 380, 384 (1977), defendants had to either submit professional surveys or other expert evidence supporting their theory challenging the professional surveys relied upon by the Town, or demonstrate that Marc Wood had the proper qualifications to present his own expert opinion. The court then determined that Marc Wood failed to demonstrate that he had sufficient training or experience to offer expert testimony regarding the precise location of the Town’s right-of-way, and failed to show an adequate foundation for his opinions.

We agree with the superior court that defendants could not defeat the Town’s summary judgment motion by responding with theories, but rather had to provide some expert evidence or professional survey to counter the professional surveys showing that the diner encroached on the Town’s right-of-way. To be sure, as property owners, defendants could certainly have testified as to their personal knowledge of their property’s boundaries; however, resolving the principal issue in this case required expertise in land surveying. Furthermore, the superior court did not abuse its discretion in concluding that Marc Wood was not competent to provide expert testimony in this case. See O’Bryan Constr. Co. v. Boise Cascade Corp., 139 Vt. 81, 89-90 (1980) (“It is well established that the competency of an expert witness is, in the first instance, within the trial court’s discretion and that the trial court’s ruling will not be disturbed on appeal unless it appears from the evidence to be erroneous or founded upon an error of law.”). Mr. Wood based his claim of expertise on thirty years experience in building and excavating using blueprints, survey maps, and engineering plans. The court acted within its discretion in concluding that his experience as a builder did not make him competent to challenge the professional surveys submitted to the court. Because defendants failed to submit evidence raising a disputed issue of material fact concerning whether their diner encroached upon the Town’s right-of-way, the superior court properly entered summary judgment in favor of the Town. See 10B C. Wright et al., Federal Practice & Procedure § 2738, at 367-69 (3d ed. 1998) (“[I]f the only issue is one of the kind on which expert testimony must be presented, and nothing is presented to challenge the affidavit of the expert, summary judgment may be proper.”).

Defendants seek to explain their failure to present adequate evidence countering the Town’s summary judgment motion by claiming that the Town abused the discovery process and that the superior court should have given them more time to hire a surveyor. Both arguments are unavailing. With respect to their claim of discovery violations, defendants make a host of vague allegations against the Town, including that the Town obstructed defendants’ reasonable efforts at obtaining discovery, purged its public files of all incriminating evidence, and withheld a map showing that their diner is not within the Town’s right-of-way. We find no support for these allegations in the record, however, and we discern no basis for remanding this case for yet another round of discovery. The record demonstrates that defendants had ample opportunity to review the Town’s public records, and defendants have failed to demonstrate

that the superior court abused its discretion by denying their second motion to compel. The record also demonstrates, as the trial court found, that defendants had ample time to hire a surveyor but failed to do so. Cf. Darken v. Mooney, 144 Vt. 561, 566 (1984) (concluding that defendant had ample time to engage surveyor, but failed to do so until many months after trial). Moreover, the superior court was not compelled to reconsider its summary judgment ruling based on a post-ruling letter sent by a surveying company to defendants specifically stating that it was not offering an opinion on the accuracy of any documentation or the location of any of the boundaries in question. In sum, we find no reason to overturn the superior court's decision denying defendants' post-judgment motions.

Defendants also argue that the superior court erred by denying, as untimely filed, their motion for reconsideration or a new trial. According to defendants, because their motion was filed within ten days of the entering of the judgment, it was timely. Although the court mistakenly indicated that defendants' motion had been filed beyond the ten-day period, it nonetheless addressed the merits of the motion. Indeed, the court granted the motion in part, but concluded that, in all other respects, defendants had failed to provide the court with sufficient grounds to reconsider its decision or to reopen the record to allow more evidence. Defendants have not demonstrated here on appeal that the superior court erred in denying the motion on these grounds.

Next, defendants argue that the Town should not be given immunity because its employees and lawyers filed this claim illegally and then blocked Marc Wood's attempts to discover public records. Apparently, this brief argument is challenging the superior court's order granting the Town summary judgment with respect to defendants' counterclaims. The superior court granted the Town's motion based on res judicata and municipal immunity. In doing so, the court relied upon a federal district court's decision dismissing similar claims by defendants in another lawsuit that had been removed to federal court. As noted, the record does not support defendants' claims of discovery violations, and, in any case, defendants have failed to demonstrate that the superior court erred by dismissing their claims based on res judicata and municipal immunity.

Finally, defendants argue that the Town's claim of encroachment is premature because the environmental court's ruling in another case tolled expiration of their permit pending litigation, and thus the permit gives them at least another 189 days to decide whether to sign the June 1999 easement offered by the Town or to remove the encroachment. Again, we find this argument unavailing. The superior court accepted defendants' interpretation of the environmental court's decision without addressing the validity of that interpretation, allowing defendants to leave their diner in place until November 30, 2004. But, as the superior court explained, even if the Town were not entitled to immediate injunctive relief, defendants would retain only a temporary easement, and thus the Town's claim of encroachment was not premature. Since the superior court's decisions, defendants' diner has been destroyed by fire. Under these circumstances, we discern no basis for further delaying injunctive relief to the Town. Even assuming that defendants' permit is still valid, it was granted in the alternative, and defendants elected to go forward with the alternative that called for removing the encroachment rather than signing and recording the easement. Indeed, as noted, defendants never signed or recorded the easement, which explicitly provides that its term is not to exceed three years from execution. The Town executed the document on June 29, 2002. The easement cannot be reasonably interpreted to mean that the date of execution is when defendants sign it, even if that is years or decades later, rather than when the Town signed it and offered it to defendants.

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

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

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Specially Assigned