

Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SUPREME COURT DOCKET NO. 2020-219

APRIL TERM, 2021

Sean Folley* v. Stella Martin	}	APPEALED FROM:
	}	
	}	Superior Court, Lamoille Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 177-9-19 Lecv
		Trial Judge: Mary Miles Teachout

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

Plaintiff Sean Folley appeals the civil division’s summary judgment ruling interpreting a 1984 partition deed to preclude him from providing vehicular and utility access from a right-of-way on his partitioned parcel to his contiguous parcel that was not subject to the deed. We affirm.

Plaintiff and defendant own adjoining parcels of land that were subject to a November 1984 partition deed entered into between previous tenants in common, the Nature Conservancy and Philip A. Goddard, Jr. The deed conveyed to Goddard a parcel identified in this litigation as Lot B, which included a right-of-way that provided a corridor to a public highway. The deed conveyed to the Nature Conservancy now comprises two parcels, identified in this litigation as Lots C and D. These lots use the Lot B right-of-way running from the public highway through Lot B to Lot D and enjoy exclusive use of a right-of-way that extended from the end of the Lot B right-of-way into Lot D.

The first part of the deed described the bounds of the parcels portioned to Goddard and the Nature Conservancy, respectively, stating that each party conveyed to the other party the parcel described therein subject to the “restrictions, reservations, and servitudes” set forth in the second part of the deed. The deed further stated that Goddard’s parcel, Lot B, was also subject to “two rights-of-way, the first being for the common benefit of lands conveyed hereby to Goddard and Conservancy, respectively, the second, which is an extension of the first right-of-way, being for the exclusive use and benefit of lands conveyed hereby to the Conservancy.” The deed reiterated that Goddard’s parcel was encumbered by: (1) the first right-of-way, labeled the “Common Right-of-Way,” which was “for the common benefit of the lands and premises conveyed hereby to Goddard and of those adjacent lands and premises conveyed hereby to the Nature Conservancy”; and (2) the second right-of-way, labeled the “Exclusive Right-of-Way,” which was “for the exclusive benefit of the adjacent lands of the Nature Conservancy.” By the same token, the deed conveyed to the Nature Conservancy, as appurtenant to its parcel, later identified as Lots C and D, a “right-of-way for the common benefit of the above described lands of Goddard and the lands of Conservancy,” as well as a continuation of that right-of-way “for the exclusive benefit of Conservancy.”

The second part of the deed, entitled “RESTRICTIONS, RESERVATIONS AND SERVITUDES,” set forth eight separate limitations on the subject properties, which applied to the parties and all future owners of the respective parcels: (1) each parcel created by the deed was limited to construction of one single-family residential dwelling and accessory structures; (2) construction on the Nature Conservancy’s parcel was limited to a designated area of that parcel; (3) construction on Goddard’s property was limited to a designated area of that parcel; (4) above-ground utilities had to follow as closely as possible designated property and tree lines; (5) the removal of trees was limited as indicated; (6) the costs of common utility construction for the two parcels was to be shared as set forth therein; (7) the parties could construct across the common right-of-way, which could also be used as a utilities corridor, a gravel driveway deemed sufficient to serve “two single-family residences and accommodate residential home construction traffic”; and (8) the exclusive right-of-way was “for exclusive, private access and egress to and from the lands of Conservancy,” which was responsible for all costs associated with that right-of-way.

In April 1985, plaintiff purchased the Nature Conservancy parcel, Lots C and D. At that time, he also owned a parcel of land contiguous to Lot C, identified as Lot A in this litigation. In January 1989, plaintiff sold Lot D to defendant. The 1989 warranty deed also conveyed to defendant, as appurtenant to Lot D: (1) the common right-of-way located on Lot B “for the common benefit of” the owners of the current and former Goddard and Conservancy lands; and (2) the continuation of that right-of-way “for the exclusive benefit of” defendant. The deed further stated that: (1) the lands described in the deed were “subject to easements, restrictions and servitudes and covenants”; and (2) plaintiff released to defendant “all right, title and interest in the above described rights of way,” as well as “the exclusive right to construct any dwelling and accessory structure as set out in [the 1984] partition deed.” In March 2007, plaintiff purchased Lot B from Goddard.

In September 2019, plaintiff filed a declaratory judgment action to determine property rights set forth in the 1984 partition deed. Defendant answered and filed a counterclaim. At the time of plaintiff’s lawsuit, per the transactions described above, defendant owned Lot D and plaintiff owned Lots B and C, as well as Lot A, a parcel contiguous to Lot C. In response to the parties’ cross-motions for summary judgment, the civil division filed a July 2020 ruling and a December 2020 declaratory judgment order addressing and resolving the parties’ various claims. Each party prevailed on different issues; however, relevant to this appeal, the court determined that plaintiff: (1) “is not entitled to use Lot B to provide an access road across the Common Right of Way to access Lot A”; (2) “cannot utilize Lot B to serve or benefit Lot A in any way”; and (3) “is not entitled to construct utilities across Lot B for the purpose of serving Lot A.” The court based these conclusions on its interpretation of provisions in the 1984 partition deed.

On appeal, plaintiff argues that: (1) the unambiguous plain language of the 1984 partition deed does not prohibit him from granting vehicular or utility access through Lot B and the common right-of-way or tapping into common utilities on Lot B to serve contiguous properties not subject to that deed; and (2) because the common right-of-way is an easement located on property he owns as the servient estate, he is free to use the right-of-way in any manner that does not interfere with defendant’s use of the right-of-way.

The proper interpretation of the 1984 partition deed is a question of law that we review without deference to the trial court. See Creed v. Clogston, 2004 VT 34, ¶ 13, 176 Vt. 436. “[I]n interpreting a deed, we 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 (1999). “Our master rule for the construction of deeds is that the intention of the parties, when ascertainable from the entire instrument, prevails over technical terms or their formal arrangement.” Id. (quotation

omitted). “We read the entire written instrument as a whole, giving effect to every part so as to understand the words in the context of the full deed.” Id. (quotation omitted). “In so doing, we construe the various clauses of the document, wherever possible, so that the deed has a consistent, or harmonious, meaning.” Id. “[I]f the language of a deed or of covenants within a deed is clear and unambiguous, judgment may be granted as a matter of law.” Fassler v. Okemo Mountain, Inc., 148 Vt. 538, 541 (1987). “To prevail on a motion for summary judgment, the moving party must demonstrate that (1) there are no material issues of fact between the parties, and (2) the moving party is entitled to judgment as a matter of law.” Id. at 540. We review a summary judgment decision de novo, applying the same standard as the trial court. Sabia v. Neville, 165 Vt. 515, 523 (1996).

In this case, there are no disputed material facts, and each party contends that the unambiguous language of the 1984 partition deed entitles them to judgment as a matter of law. In plaintiff’s view, he is entitled to judgment as a matter of law because no language in the deed explicitly prohibits him from using Lots B and C and the common right-of-way on Lot B to provide vehicular and utility access to contiguous parcels not subject to the deed. In support of this argument, he relies on our caselaw stating that “we may not insert terms into an agreement by implication unless the implication arises from the language employed or is indispensable to effectuate the intention of the parties.” Downtown Barre Dev. v. C & S Wholesale Grocers, Inc., 2004 VT 47, ¶ 9, 177 Vt. 70 (considering “whether implication arises directly from the contract language”); see also Fassler, 148 Vt. at 542 (“When doubt arises as to the extent of restrictive covenants, the rule applied is that restrictions will not be extended by implication to include anything not clearly expressed, and doubts must be resolved in favor of the free use of land.” (quotation omitted)). In addition, he cites § 4.9 of the Restatement (Third) of Property: Servitudes (2000) (updated 2021), for the proposition that “the holder of the servient estate is entitled to make any use of the servient estate that does not unreasonably interfere with enjoyment of the servitude.”

Defendant responds that plaintiff’s interpretation of the 1984 partition deed would frustrate the purpose of the document, which laid out a common plan for the parties to develop single family residences on each lot and to prevent any additional development to the land to preserve its natural state. Consistent with this common plan, construction of a driveway or access road across the common right-of-way is only permitted for residential traffic and residential home construction traffic to the allowed single-family dwelling on each parcel.

The first step in our analysis is to examine the terms of the 1984 partition deed. Section 4.1(1) of the Restatement provides that “[a] servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created.”* We have emphasized that “‘[t]he intent of the parties determines which estates or servitude interests are burdened or benefitted by a servitude’ and that such intent may be either express or ‘inferred from the circumstances.’” Tibbetts v. Michaelides, 2011 VT 52, ¶ 6, 190 Vt.

* As the Restatement acknowledges in a comment to § 4.1, “[t]he rule that servitudes should be interpreted to carry out the intent of the parties and the purpose of the intended servitude departs from the often expressed view that servitudes should be narrowly construed to favor the free use of land.” Restatement (Third) of Prop.: Servitudes § 4.1 cmt. a. The Restatement explains that the rule “is based in the recognition that servitudes are widely used in modern land development and ordinarily play a valuable role in utilization of land resources.” Id. (noting further that “[t]he rule is supported by modern case law”).

520 (mem.) (alteration in original) (quoting Restatement (Third) of Prop.: Servitudes § 2.5 cmt. a).

Examining the 1984 partition deed in its entirety, we agree with defendant, and the trial court, that the partition deed establishes a common plan of reciprocal servitudes that precludes use of Lot B and its common right-of-way to provide vehicular or utility access to parcels not subject to the deed, including Lot A. The deed makes the partitioned parcels subject to the restrictions, reservations, and servitudes, as well as to the rights-of-way, set forth therein. As noted above, the deed details restrictions, reservations, and servitudes encumbering the partitioned parcels. These provisions, among other things, limit each partitioned parcel to a single-family residence and accessory structures, restrict the location of structures and utilities, limit tree removal, and provide for shared access to utilities. In the context of these various servitudes, the common right-of-way at issue is “for the common benefit of the lands and premises conveyed” and described therein. The exclusive right-of-way is “for the exclusive benefit of” the Nature Conservancy’s lands. Notably, the deed permits a gravel driveway within the common right-of-way if an engineer determines the driveway is sufficient “to service two single-family residences and accommodate residential home construction traffic.”

In this context, we conclude that the proposed additional development and use of plaintiff’s parcel associated with providing access over the common right-of-way to a third party’s land is incompatible with the reciprocal covenants reflected in the 1984 partition deed. See Restatement (Third) of Prop.: Servitudes § 2.2 (“The intent to create a servitude may be express or implied. No particular form of expression is required.”); *id.* § 2.2 cmt. d (“Language stating that a conveyance is for residential or conservation purposes usually is intended to create a servitude restricting use of the land to the stated purpose.”). We further note that the deed contains provisions for the owners of the partitioned parcels to share equally the cost of constructing and maintaining the driveway, which would make little sense if either owner could extend use of the driveway to an unlimited number of parcels outside the partitioned parcels. Indeed, plaintiff’s interpretation of the deed theoretically would allow use of Lot B and the common right-of-way to serve dozens of residences or commercial enterprises on contiguous lands outside the partitioned parcels.

We reject plaintiff’s argument that the absence of the word “exclusive” to describe use of the common right-of-way, in contrast to the exclusive right-of-way, forecloses restricting use of the common right-of-way to the partitioned parcels. The distinction between the “exclusive” right-of-way and the “common” right-of-way relates to plaintiff’s access travel over the right-of-way, not that of third parties.

We also reject plaintiff’s argument that our analysis is governed by the principle that the holder of the servient estate can make any use of the servient estate that does not unreasonably interfere with dominant estate’s enjoyment of the servitude. See Restatement (Third) of Prop.: Servitudes § 4.9. If we were considering the deed provision establishing the common right-of-way in isolation, this analysis might make sense; but insofar as we have concluded that the 1984 partition deed establishes a common plan characterized by a host of express and implied reciprocal servitudes, the narrower analysis under § 4.9 is ill fitting. Notably, § 4.9 of the Restatement is explicitly limited by § 4.1 and is one of thirteen Restatement sections “used to supplement the terms of the servitude ascertained under the rules stated in § 4.1.” Restatement (Third) of Prop.: Servitudes § 4.2 (“If additional terms are necessary to determine the rights and obligations of the parties or their successors, terms that are reasonable under the circumstances are supplied by the court.”).

The Nebraska Supreme Court decision relied upon by plaintiff at oral argument does not persuade us otherwise. Walters v. Colford, 900 N.W.2d 183 (Neb. 2017). In that case, the court considered a claim that a neighboring property adjacent to a platted subdivision that had been sold to the neighbor by the developer of the subdivision was, by implication, subject to the restrictive covenants applicable to properties within the subdivision even though the neighbor's property was not expressly subject to any restrictive covenants. The court identified a host of factors to consider in determining whether a negative servitude had arisen by implication based on the servitudes imposed on other properties conveyed by a common grantor. Id. at 190. The servitudes at issue here did not arise by implication based on deeds to other parties within a common development; rather, they are part and parcel of the partition deed itself. For that reason, the Walters case is not persuasive here.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice