



*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**

DECEMBER TERM, 2021

John S. McDougall* v. Gregory C. Lamson	}	APPEALED FROM:
& Doris B. Campbell	}	
	}	Superior Court, Windsor Unit, Civil Division
	}	CASE NO. 305-7-17 Wrcv
	}	Trial Judge: Robert P. Gerety, Jr.

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

Plaintiff appeals from a summary judgment order in defendants' favor on his complaint. We conclude that disputes of material fact remain, and we therefore reverse and remand for additional proceedings.

Plaintiff filed a complaint against defendants in September 2017. He alleged that he and defendants orally agreed that plaintiff would transfer five acres of his land to defendant Gregory Lamson in exchange for Lamson paying plaintiff's property taxes of \$5200 and loaning plaintiff \$3300. Plaintiff asserted that he deeded a portion of his land to Lamson in February 2016. Plaintiff did not retain an attorney for this transaction; defendants had counsel and defendants' attorney drafted the closing documents. Plaintiff understood and intended that he would convey five acres to defendants. He asserted that defendants' attorney did not provide a fully drafted Warranty Deed to him or his wife for their review and signature at the time the document was executed; the attorney presented only the signature page to them, which they signed. This deed was recorded in mid-March 2016. Plaintiff asserted that at some point, defendant Lamson hired a former employee to relocate a survey pin on plaintiff's property, thereby increasing the size of the intended five-acre parcel. The deed that was recorded stated that plaintiff conveyed to defendants "10 acres, more or less," and the deed's metes and bounds description conveyed 14.33 acres of plaintiff's property. A Vermont Property Transfer Tax Return showed a conveyance of 9 acres at a cost of \$3600. Based on these and other allegations, plaintiff raised claims of constructive fraud and unjust enrichment against defendants. Plaintiff asked the court to quiet title to his land; declare that the parties' intended to convey five acres of plaintiff's property; find constructive fraud; declare the deed fraudulent; find that defendants were unjustly enriched and order land to be re-deeded to plaintiff; award plaintiff attorney's fees and costs; and grant other relief as may be just and equitable.

In September 2020, defendants moved for summary judgment. Defendants did not challenge plaintiff's description of the parties' verbal agreement; they instead argued that any such agreement was irrelevant given the existence of a written and executed deed, which they

argued was unambiguous. They do not specify the date of the deed they refer to. Defendants asserted that there were two deeds, with the first one signed in September 2015 at the home of defendant Lamson's attorney with the sole grantee as defendant Lamson. In support of this statement, defendants provided a copy of plaintiff's deposition testimony and a notarized but unrecorded warranty deed that defendants asserted was signed by plaintiff and his wife at the home of defendants' attorney in September 2015 conveying property to defendant Lamson. Neither defendants nor their attorney provided an affidavit attesting to this fact. Defendants also cited to a second deed executed in February 2016 and recorded in March 2016 conveying the same property identified in the first deed to defendant Lamson and defendant Campbell. Defendants asserted that plaintiff did not dispute that he was given documents to sign on both dates and that he signed "what was put in front of him." Defendants maintained that plaintiff's testimony regarding the parties' intent was inadmissible and that there was no evidence to show constructive fraud or unjust enrichment. Plaintiff opposed the summary judgment motion.

In a June 2021 decision, the court granted summary judgment to defendants. It cited the following evidence. Plaintiff and defendant Lamson had verbal discussions and agreed that plaintiff would transfer a portion of land to defendant Lamson in exchange for consideration in the form of cash and the payment of outstanding real estate taxes due. Following their discussions, plaintiff signed a deed in September 2015 at the home of defendant Lamson's attorney that conveyed his property to Lamson. The deed described the property being conveyed with a metes-and-bounds description and a statement that the property conveyed included ten acres, more or less. Plaintiff did not recall if he read the first deed before he signed it, but the court found it undisputed that he did sign the deed. The court found no evidence that defendant Lamson, or his attorney, made any statements to plaintiff about the contents of the deed, including the description of the property conveyed. There was no evidence that defendant Lamson or his lawyer did anything to conceal the content of the deed from plaintiff.

In February 2016, defendant Lamson asked plaintiff to sign a second deed to convey the same property to him and his then-partner defendant Campbell. According to plaintiff, he was not provided with a copy of this deed; he was shown only the signature page, which he signed. The court found the second deed identical to the first deed in all material respects. It found no evidence that defendants made any statements to plaintiff regarding the content of the second deed and no evidence that defendant Lamson or his lawyer did anything to conceal the content of the deed from plaintiff. The court found no genuine dispute that the entire deed was available at the signing for plaintiff to read had he asked to do so. The court found that there was no evidence of the parties' verbal agreement to convey five acres other than plaintiff's pre-trial testimony.

Based on this evidence, the court considered plaintiff's claims. It found that, to establish constructive fraud, plaintiff needed to show that he was injured by a "wrongful act . . . done without bad faith or malevolent purpose on the part of the perpetrator." Hardwick-Morrison Co. v. Albertsson, 158 Vt. 145, 150 (1992). The court concluded that plaintiff failed to show that defendants engaged in any wrongful act, that they were in a position of superior knowledge or influence, or that they had an unfair advantage that they used to take unfair advantage of plaintiff. It found no basis to conclude that plaintiff relied, justifiably or otherwise, on statements or actions on the part of defendants or their lawyer when he signed the documents that conveyed land to defendants. It thus concluded that defendants were entitled to judgment as a matter of law on this claim.

The court reached a similar conclusion with respect to plaintiff's unjust enrichment claim. To prevail on this claim, the court found that plaintiff needed to show that: "(1) a benefit was conferred on defendant[s]; (2) defendant[s] accepted the benefit; and (3) defendant[s] retained the benefit under such circumstances that it would be inequitable for defendant not to compensate plaintiff for its value." Reed v. Zurn, 2010 VT 14, ¶ 11, 187 Vt. 613 (mem.) (quotation omitted). The court found that unless there was a basis to conclude that the executed deed was void for fraud or otherwise unenforceable, there could be no unjust enrichment because it would not be inequitable for defendants to retain the benefit of the larger acreage conveyed by the deed. Taking the evidence in the light most favorable to plaintiff, the court found no support for a finding that the deed was procured by fraud, constructive or otherwise. It did not specify which deed it was addressing. The court saw no basis to set the deed aside because it found no evidence that defendants did anything wrongful when the deed was executed by plaintiff. The court found nothing inequitable about allowing defendants to have the benefit of the land deeded to them. This appeal followed.

Plaintiff argues on appeal that the court erred in finding the material facts undisputed with respect to his constructive-fraud and unjust-enrichment claims. He further contends that the court erred in refusing to consider the terms of the parties' oral agreement given the ambiguity in the deed.

"We review summary judgment de novo" using the same standard as the trial court. Stone v. Town of Irasburg, 2014 VT 43, ¶ 25, 196 Vt. 356 (quotation omitted). "Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Id. (citing V.R.C.P. 56(a)). "We consider the record evidence in the light most favorable to the nonmoving party," and give the nonmoving party "the benefit of all reasonable doubts and inferences." Id. (quotation omitted). "Where the moving party does not bear the burden of persuasion at trial, it may satisfy its burden of production by showing the court that there is an absence of evidence in the record to support the nonmoving party's case." Ross v. Times Mirror, Inc., 164 Vt. 13, 18 (1995). "The court may consider any material that would be admissible or usable at trial . . ." 10A M. Kane, Federal Practice and Procedure § 2721 (4th ed. 2021); see also Lussier v. Truax, 161 Vt. 611, 612 (1993) (mem.) (stating that "affidavits and documents, which for the most part consist of self-serving opinions as to the legal nature of the parties' transaction and of unrecorded or undelivered documents, are wholly insufficient to survive [a] motion for summary judgment").

We conclude that summary judgment was inappropriately granted here because material disputes of fact remain. There are unresolved questions about the various documents submitted by defendants in support of their motion. Defendants included as an exhibit an unrecorded but notarized document that they asserted "was signed [by plaintiff] in September, 2015, at the home office of Mr. Lamson's attorney, Marc Nemeth, Esq." Plaintiff made no mention of this document in his complaint and, in the deposition testimony provided by defendants in support of their asserted fact, plaintiff denied that this was a deed he signed in the office of defendant Lamson's attorney in September 2015. Plaintiff stated that he had not seen the deed submitted by defendants; he acknowledged that it looked like his signature on the signature page but he did not say that he "signed the documents that were put in front of him" as defendants' claimed. When asked if he had "already sold [his] land to Mr. Lamson" when he met defendants' attorney at the courthouse to sign a new deed in February 2016, plaintiff said "yes," but when asked if he had done so "by executing a deed," plaintiff responded that Lamson "paid me money for the land" and that he did not know "what was or . . . was not executed." Plaintiff later stated that he was "not going to dispute that [he] signed something" in September 2015," but he reiterated that

he did not sign the document submitted to the court by defendants. Taking the evidence in the light most favorable to plaintiff, it is not an undisputed fact that plaintiff “signed the deed” provided to the court by defendants in support of their motion for summary judgment. Plaintiff’s statements referenced above create a contested issue of material fact.

If in fact the September 2015 deed did validly convey property to defendant Lamson, it is not clear how plaintiff could then convey the same property six months later to Lamson and another person. At that point, plaintiff would have had nothing left to convey. See 4 Tiffany Real Property § 971 (3d ed. 2021) (“[N]o deed can convey an interest which the grantor does not have in the land described in the deed, even though the deed’s terms may purport to do so.”); see also *id.* § 989 (“An alteration made after the delivery of the conveyance is absolutely nugatory to divest property rights vested in the grantee by the conveyance. The operation of the instrument as a conveyance becomes, after delivery, a thing of the past, and the fact that the instrument is then altered, or even that it is destroyed, cannot well affect the property rights which it has previously vested in the grantee.” (footnotes omitted)).

We cannot address plaintiff’s legal claims until these key factual issues are resolved and it is clear which deed is the operative deed here and why. We therefore reverse and remand for additional proceedings.

Reversed and remanded for additional proceedings.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Harold E. Eaton, Jr., Associate Justice

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William D. Cohen, Associate Justice