

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2009 TERM

Case No.2009-0366

Yvon Rivard

Plaintiff

v

Patrick Broderick and April Broderick

Defendant

BRIEF FOR PLAINTIFF

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Oral Argument Requested
To Be Argued By
John G. Cronin

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STATEMENT OF FACTS

On or about May 27, 1909, the plan entitled "Plan of Lots Belonging to Sam B. Tarrante at Franklyn Park, Manchester, New Hampshire" dated September 1903 and revised January 1909 was recorded in the Hillsborough County Registry of Deeds (the "Registry") as Plan No. 315 (hereinafter, the "Franklyn Park Plan").¹ The Franklyn Park Plan showed the intersection of New York Avenue and Ohio Avenue, which included lots 1 through 64 of Block 26. It also showed that Ohio Avenue served as the sole means of access to lots 34 through 64 of Block 26.

On or about November 26, 1946, Alphonse Bourque acquired title to "lots belonging to Sam B. Tarrante at Franklyn Park" including "lots one to sixty-four (1 to 64) inclusive in block 26."

In 1983 and 1984, Yvon Rivard Construction Company, Inc. (hereinafter, "Rivard Construction") began to acquire lots in the vicinity of New York Street and Ohio Avenue. The Hillsborough County Superior Court quieted title in Rivard Construction relative to the parcels of land abutting New York Street between Ohio and Connecticut Avenues. On or about June 7, 1984, Rivard Construction acquired title by warranty deed from J.A. Bourque &

¹ The facts set forth herein are adopted from the trial court's April 15, 2009 order. The Respondent-Appellants have not produced any documents constituting the record below, N.H. Supreme Court Rule 13(2) [Appellant responsible for producing sufficient record for review], and, therefore, the Court assumes that the trial court had a reasonable basis to make the factual findings that it did based upon those documents.

Sons, Inc. to certain tract of land (hereinafter, the "Bourque Parcel") consisting of lots 33 through 64, inclusive, of Block 26 as shown on the Franklyn Park Plan. In March 1984, Rivard Construction began developing the land, including the creation of a cul-de-sac on Ohio Avenue and the consolidation of lots 62 to 64 with 25-foot strip of New York Street adjacent to those lots. Planning documents showed that the lots abutted Ohio Avenue.

On February 15, 1985, Rivard Construction conveyed the above-referenced consolidated tract which it had acquired to Stephen P. Menard (hereinafter, "Menard"). The deed to Menard described the conveyed property (hereinafter, the "Menard Tract") as follows:

Beginning at the southeasterly intersection of Ohio Avenue and the former New York Street, said point being the northeasterly corner of Lot 64 as shown on Block 26 of plan entitled "Franklyn Park"...thence, southerly by the westerly line of said Ohio Avenue 75.0 feet to the northeasterly corner of Lot 61 as shown on said plan; thence wasterly by the northerly line of said Lot 61 100.0 feet to a point, said point being the corner of Lots 61, 62, 29, and 30, as shown on said plan; thence northerly by the easterly line of Lots 30, 31, and 32, as shown on said plan 100.0 feet to a point in the center line of the former New York Street said point being in the southerly line of Lot 2 to a point in a cul-de-sac in said Ohio Avenue; thence by a curve to the left of radius of 57.00, 63.02 to the point of beginning.

Being Lots 62, 63, 64 and a portion of the former New York Street as shown on said plan of "Franklyn Park".

Around March 1985, residents and owners on Ohio Avenue petitioned the City of Manchester to discontinue a portion of

Ohio Avenue. Yvon Rivard (hereinafter, "Rivard") signed the petition with the provision "[s]ubject to approval of planned development and variance of four apartment buildings in the same area." On March 5, 1985, the City held a public hearing on the discontinuance petition at which Rivard spoke. After the hearing, the City voted to discontinue six hundred feet of Ohio Avenue from the former New York Street southerly, but reserved any utility easements therein. Rivard understood that Rivard Construction would continue to be able to develop its property and would have full rights through the centerline.

On or about March 9, 1992, Rivard Construction conveyed by quitclaim deed its remaining interest in the land along the discontinued Ohio Avenue to Rivard. The deed specifically conveyed "Lots 42 to 61 inclusive in Block 26 on a plan of lots of Sam B. Tarrant at Franklyn Park." In 1993 or 1994, Rivard planted trees and shrubs in the discontinued portion of Ohio Avenue. He has paid the taxes on this property.

On or about April 17, 1998, EVCO Corporation, Menard's successor-in-interest, conveyed the Menard Tract to Patrick and April Broderick (collectively, "Broderick"). The deed to Broderick had the same metes and bounds description as the deed to Menard. In 2007, Broderick hired a surveyor and that surveyor produced a survey of the Menard Tract which did not include any portion of Ohio Avenue.

ARGUMENT

A. Standard of Review

This is an appeal from an order quieting title in land in name of Rivard. The Court will uphold such an order unless it is erroneous as a matter of law or unsupported by the evidence. Greene v. McLeod, 156 N.H. 724, 726 (2008). In addition, on mixed questions of fact and law, such as the intent of the parties, see e.g., Gephart v. Daigneault, 137 N.H. 166, 173 (1993) [With its focus on the intent of the parties at the time of creation, the construction of a restrictive covenant represents a mixed question of law and fact], the Court will not overturn the trial court's ruling unless it is clearly erroneous. Greene, 156 N.H. at 726. If the trial court misapplies the law to its factual findings, the Court's review is *de novo*. Id. The trial court's order was neither erroneous as a matter of law or unsupported by the evidence and, therefore, should be affirmed.

B. The Trial Court did not err as a matter of law or lack evidentiary support for its determination that Rivard had title to the discontinued portion of Ohio Avenue.

As Broderick correctly states, the general rule in this State is that a conveyance of property bounded by a street or highway is presumed to convey title to the center of the boundary street, unless clearly contrary language appears in the deed. Duchesnaye v. Silva, 118 N.H. 728, 732 (1978). This general presumption itself is based upon two other presumptions. Avery

v. Rancloes, 123 N.H. 233, 236 (1983). First, it is presumed that "the owners of property adjoining the street originally furnished the land for the right of way in equal proportions." Id. Second, it is also presumed that an owner selling land bounded by the highway did not intend to retain the narrow strip of land which constituted the road, and therefore intended to sell to the centerline of the street." Id. Properly construed, the language in the deed to the Menard Parcel clearly manifests a contrary intent, particularly with respect to the second presumption underlying the general rule.

The general rule in construing a deed is to determine the parties' intent in light of the surrounding circumstances at the time of the conveyance and to give effect to that intent absent a contrary public policy. Red Hill Outing Club v. Hammond, 143 N.H. 284, 286 (1998); see also, Robbins v. Lake Ossipee Village, Inc., 118 N.H. 534, 536 (1978) (citation omitted) [In construing language of deed, "the finder of facts must place himself as nearly as possible in the position of the parties at the time of the conveyance and gather their intention in light of surrounding circumstances."]. The starting point for determining the parties' intent is the language of the deed itself. Flanagan v. Prudhomme, 138 N.H. 561, 565-566 (1994); Smart v. Huckins, 82 N.H. 342, 347 (1926) ["The boundary is doubtful only because the meaning of the language of the deed is doubtful, and the problem

is not how or where to establish bounds answering the calls of the deed but to say what the calls of the deed are.”]. If the language of the deed is unambiguous, then it is deemed to reflect the parties’ intent and there is no need to resort to outside or extrinsic evidence to clarify the parties’ intent. Flanagan, 138 N.H. at 566. In short, an unambiguous deed speaks for itself as to the parties’ intent. However, if a deed is ambiguous, outside or extrinsic evidence may be relied upon to clarify, but not contradict, the ambiguous language in the deed. Id. at 566.

Turning to the language of the deed, the description of the Menard Tract has remained the same since its creation. The deeds to that property have expressly referenced the westerly line of Ohio Avenue as the easterly boundary of the tract. By contrast, the same deeds have referenced the centerline of the former New York Street and a point within Ohio Avenue in establishing the westerly and southerly boundaries respectively of the Menard Tract. In short, as the trial court properly observed, this contrast in language demonstrated that if Rivard Construction, the original grantor of the Menard Tract, intended to include a portion of an adjacent street within the bounds of the Menard Tract, it expressly incorporated that portion of the adjacent street within the description of the tract. The portion of Ohio Avenue adjacent to the Menard Tract’s eastern boundary was not expressly included with the description of the Menard Tract and,

therefore, was not intended to be included within its conveyance; a construction shared by Broderick's own surveyor.

Broderick does not offer any meaningful alternative explanation for the contrasting references to points within adjacent streets within the deeds to the Menard Tract. Broderick instead focuses upon the lack of a right-of-way easement to them over the relevant portion of Ohio Avenue in asserting a lack of a clear, contrary intent in the deed language. While such an easement together with other reservations may be sufficient to rebut the general presumption, see, e.g., Davis v. Lemire, 122 N.H. 749 (1982), there is no authority suggesting that it is the sole circumstance under which the general presumption may be rebutted. Cf. Avery, *supra*. [General presumption rebutted where road discontinued]. In short, Broderick's argument does not truly address the actual language in the deeds to the Menard Tract.

In addition, the circumstances surrounding Rivard Construction's conveyance of the Menard Tract merely reinforce the construction of the deed adopted by the trial court, Rivard, and Broderick's surveyor. Red Hill Outing Club, *supra*. At the time that it conveyed the Menard Tract, Rivard Construction had formally consolidated the portion of New York Street with the adjacent Lots 62 to 64; an act which would be unnecessary had Rivard Construction intended the general rule to simply apply.

In addition, the Menard Tract had represented a portion of a larger tract that Rivard Construction owned off of Ohio Avenue. Rivard Construction had already begun to develop the property and, as Rivard's caveat to his later signature on the petition to discontinue evinced, it intended to continue that development after the conveyance of the Menard Tract. The only access to the remaining property from the public street system would have been the portion of Ohio Avenue east of the Menard Tract. In short, contrary to the general presumption that an owner has little interest in retaining title to a strip of land constituting a portion of the street, Rivard had a very definite interest in retaining title to the strip of land between the Menard Tract and the centerline of Ohio Avenue which connected its remaining land to the public street system and which, upon the discontinuance of Ohio Avenue, would afford that land some frontage on that same public street system. *Cf.* RSA 674:41 [Limiting issuance of building permits on lots not fronting on public road.]. Broderick does not address these surrounding circumstances at all. In short, one of the two presumptions underlying the general rule does not apply in the circumstances of this case and, therefore, the trial court properly held that the application of the general rule was inappropriate in this case.

CONCLUSION

For the reasons set forth, the trial court's decision quieting title to the discontinued portion of Ohio Avenue adjacent to the Menard Tract in Rivard should be affirmed.

REQUEST FOR ORAL ARGUMENT

Rivard requests oral argument. John G. Cronin will argue on his behalf.

Respectfully submitted,
YVON RIVARD,
By his attorneys,
CRONIN & BISSON, P.C.

October 16, 2009

By: Daniel D. Muller Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of October, 2009, two copies of the foregoing Brief were mailed by first class mail, postage prepaid, to Christopher J. Pyles, Esquire.

Daniel D. Muller Jr.
Daniel D. Muller, Jr.

DECISIONS BELOW

THE STATE OF NEW HAMPSHIRE
Northern District of Hillsborough County
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- 07-E-0415 Yvon Rivard v. Patrick Broderick, et al

You are hereby notified that on April 15, 2009, the following order was entered in the above matter

re: PETITION TO QUIET TITLE:

(see copy of order attached hereto)

(Smukler, J.)

4/16/2009
Date

/s/ John Safford
Clerk of Court

cc: John G Cronin, Esq.

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

Yvon Rivard

v.

Patrick Broderick and April Broderick

No. 07-E-0415

ORDER

The petitioner, Yvon Rivard, seeks to quiet title to a parcel of land located on Ohio Avenue—a discontinued street in Manchester, New Hampshire. The respondents, Patrick Broderick and April Broderick own land at 250 Ohio Avenue. They dispute Mr. Rivard's claims that he owns the property or has an easement on the property. The court convened a bench trial and viewed the property on March 10, 2009. Because the language of the Brodericks' deed sufficiently rebuts the presumption that a conveyance of land bordered by a street conveys title to the center of the street, the court finds that Mr. Rivard has title to the discontinued portion of Ohio Avenue adjacent to 250 Ohio Avenue.

The genesis of this action was the May 27, 1909 recording of Plan #315, which contained lots of Sam B. Tarrante at Franklyn Park ("the Franklyn Park Plan"). Exh. A, Tab 1. The Franklyn Park Plan depicted the intersection of New York Street and Ohio Avenue, including block 26, which contains lots 1 through 64. Ohio Avenue served as the sole means of access to block 26, lots 34-63. *Id.* On November 26, 1946, Alphonse Borque acquired title to "lots belonging to Sam B. Tarrante at Franklyn Park" including "lots one to sixty-four (1 to 64) inclusive in block 26." Exh. 1, Tab 3.

In 1983 and 1984, Yvon Rivard Construction Company, Inc. ("Rivard Construction") began to acquire lots in the vicinity of New York Street and Ohio Avenue. On January 17, 1984, the Superior Court entered a quiet title decree relative to the parcels of land abutting New York Street situated between Ohio and Connecticut Avenues, vesting title in Rivard Construction. Exh. 1, Tab 4. On June 7, 1984, Rivard Construction obtained title via warranty deed to a parcel of the Franklyn Park Plan, consisting of block 26, lots 33 through 64, from J.A. Bourque & Sons, Inc. Exh. 1, Tab 5. In March of 1984, Rivard Construction began developing the land, including creating a cul-de-sac on Ohio Avenue and consolidating lots 60, 61, 62, 63, 64, and 25 feet of New York Street. Exh. A, Tabs 2 and 3. Planning documents show that the lots abut Ohio Avenue.

On February 15, 1985, Rivard Construction conveyed a tract of land to Stephen P. Menard via warranty deed ("Menard deed"), which described the property, *inter alia*, as follows:

Beginning at the southeasterly intersection of Ohio Avenue the former New York Street, said point being the northeasterly corner of Lot 64 as shown on Block 26 of plan entitled "Franklyn Park" ... thence, **southerly by the westerly line of said Ohio Avenue 75.0 feet to the northeasterly corner of Lot 61** as shown on said plan; thence westerly by the northerly line of said Lot 61 100.0 feet to a point, said point being the corner of Lots 61, 62, 29, and 30, as shown on said plan; thence northerly by the easterly line of Lots 30, 31, and 32, as shown on said plan, **100.0 feet to a point in the center line of the former New York Streets** said point being in the southerly line of Lot 2 ... thence, S 72-02-41 E 45.61 feet by the southerly line of said Lot 2 **to a point in a cul-de-sac in said Ohio Avenue**; thence, by a curve to the left of radius of 57.00, 63.02 to the point of beginning.

Being Lots 62, 63, 64 and a portion of the former New York Street as shown on said plan of "Franklyn Park".

Exh. 1, Tab 9 (emphasis added).

On or around March of 1985, the residents of Ohio Avenue petitioned the City of Manchester (the "City") to discontinue a portion of Ohio Avenue. Mr. Rivard signed the petition, and wrote, "Subject to approval of planned development and variance of four apartment buildings in same area." Exh. 1, Tab 6. On March 5, 1985, the City conducted a hearing on the discontinu-

ance petition, at which Mr. Rivard spoke. Exh. 1, Tab 7. The City voted to discontinue 600 feet of Ohio Avenue from the former New York Street southerly, reserving any utility easements. *Id.* Mr. Rivard understood that Rivard Construction would continue to be able to develop the property and would have full rights through to the centerline.

On March 9, 1992, Rivard Construction conveyed portions of the Borque parcel to Mr. Rivard through a quitclaim deed. Exh. 1, Tab 8. Specifically, the deed conveyed, "Lots 42 to 61 inclusive in Block 26 on a plan of lots of Sam B. Tarrante at Franklyn Park." *Id.* In 1993 or 1994, Mr. Rivard planted trees and shrubs in the discontinued portion of Ohio Avenue. Mr. Rivard paid and continues to pay taxes on this property.

On April 17, 1998, the Brodericks acquired title to the Menard parcel by quitclaim deed from EVCO Corporation, a successor in interest to Mr. Menard. Exh. 1, Tab 13. The Brodericks' deed contained the same metes and bounds description as the Menard deed. *Compare* Exh. 1, Tab 13 with Exh. 1, Tab 9. According to Patrick Broderick's testimony, he did not know at the time of the sale how Ohio Avenue was described in the deed. In 2007, the Brodericks hired a surveyor. The resulting survey did not include any portion of Ohio Avenue.

Mr. Rivard argues that he has title to the property because the Menard deed did not include any portion of Ohio Avenue within the description, but expressly referenced the westerly line of Ohio Avenue as one of the lot's bounds. Further, Mr. Rivard argues that the Menard deed was written that way because a petition to discontinue the portion of Ohio Avenue adjacent to the Menard parcel was pending before the City, and the language of the deed must be read in light of those circumstances. The Brodericks argue that they own to the centerline of discontinued Ohio Avenue because the chain of title references a subdivision plan, which depicts their lot as abutting Ohio Avenue and the Brodericks' deed references Ohio Avenue in the description. The

Brodericks also argue that Mr. Rivard's claim to a fee ownership in any portion of the Menard parcel is barred by the 20-year statute of limitations. See RSA 508:2.

There is a presumption that "a conveyance of land bordered by a street conveys title to the center of that street." *Davis v. Lemire*, 122 N.H. 749, 750 (1982), citing *Duchesnaye v. Silva*, 118 N.H. 728, 732 (1978). "This presumption, however, may be rebutted by showing a clear declaration of contrary intent in the deed." *Id.* The interpretation of a deed is a question of law. *Tanguay v. Biathrow*, 156 N.H. 313, 314 (2007) (citation omitted). "The general rule in interpreting a deed is to determine the parties' intent at the time of conveyance in light of the surrounding circumstances." *Red Hill Outing Club v. Hammond*, 143 N.H. 284, 286 (1998) (citation omitted). "If the language of the deed is clear and unambiguous, [the court] will interpret the intended meaning from the deed itself without resort to extrinsic evidence." *LeBaron v. Wright*, 156 N.H. 583, 586 (2007).

Here, the parties do not dispute that the Brodericks' property borders the discontinued portion of Ohio Avenue. Therefore, the issue is whether the language in the Menard deed manifests a clear intent not to convey a fee simple interest in the land to the centerline of Ohio Avenue.

The Menard deed specifically states that the eastern boundary of the property is the "westerly line" of Ohio Avenue. Ordinarily this language would not be sufficient to overcome the presumption that the deed conveyed property to the centerline of Ohio Avenue. See *Luneau v. MacDonald*, 103 N.H. 273, 276-277 (1961), citing *Woodman v. Spencer*, 507, 511 (1874). In this case, however, the deed read, in its entirety, manifests the intent of the grantor, Rivard Construction, to convey property only to the Ohio Avenue border—not to the centerline. The deed states that the western boundary of the property extends "100.0 feet to a point in the center line of the

former New York Streets” and that the southern boundary is a specific point in the middle of the cul-de-sac in Ohio Avenue. If Rivard Construction had intended to make the eastern boundary of the property the centerline of Ohio Avenue, it would have stated such, just as it did in other parts of the deed. Further, because the other boundaries are described as extending to the middle of the road, a purchaser would be made aware that the deed did not convey the usual rights associated with a discontinued road. Thus, the description of “westerly line,” coupled with other descriptions listing portions of the property extending to the middle of the road, clearly establishes that Rivard Construction did not intend to convey the land to extend to the centerline of Ohio Avenue. Because the Brodericks’ deed contains language identical to that in the Menard deed, the Brodericks’ deed likewise contains a clear declaration that the parcel did not include any portion of the discontinued road.

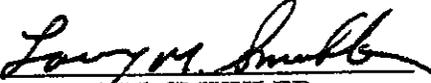
Mr. Rivard’s claim to fee ownership is not barred by the 20-year statute of limitations. *See* RSA 508:2. The Brodericks argue that because Rivard Construction conveyed the property to Menard in 1984, Mr. Rivard is barred from claiming ownership. Mr. Rivard argues that the 20-year period did not begin to run until Mr. Rivard had reason to know that an adverse claim was being made on the property, which is well within the 20-year period. Mr. Rivard’s argument is persuasive. RSA 508:2 (2009) states, “No action for the recovery of real estate shall be brought after 20 years from the time the right to recover first accrued to the party claiming it or to some persons under whom the party claims.” The 20-year statute of limitations does not begin to run until the party receives notice of the adverse claim. *Brooks v. Toperzer*, 122 N.H. 139, 142 (1982); *see also Riverwood Comm. Prop. v. Cole*, 138 N.H. 333, 334-335 (1994) (possession of the land must be adverse, open, continuous, and exclusive, so as to give notice to the record owner of the adverse claim being made to the land). Mr. Rivard did not have notice of the

Brodericks' adverse claim until he attempted to develop the discontinued portion of Ohio Avenue to include a home and a driveway. Further, neither the Brodericks nor Mr. Menard developed or used that portion of land in any clearly visible way. This analysis applies even though the precise date that Mr. Rivard should have been placed on notice of an adverse claim has not been established. Because the Brodericks did not own 250 Ohio Avenue before 1998, Mr. Rivard is clearly within the 20-year statute of limitations.

Because Rivard Construction did not intend to convey the discontinued portion of Ohio Avenue to Mr. Menard and because Rivard Construction deeded that property to Mr. Rivard, Mr. Rivard owns a fee simple in the property starting from the westerly edge through the centerline of the discontinued Ohio Avenue. Accordingly, Prayer C of Mr. Rivard's petition to quiet title is GRANTED.

So ORDERED.

Date: April 15, 2009


LARRY M. SMUKLER
PRESIDING JUSTICE