ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-343

MARCH TERM, 2009

David Neylon and Janet Kling Neylon	}	APPEALED FROM:
	}	
v.	}	Orleans Superior Court
	}	
Hildegard Gay Bethea	}	DOCKET NO. 56-3-03 Oscv
		Trial Judge: Ben W. Joseph

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

Plaintiffs David and Janet Neylon appeal the superior court's decisions construing the limits of the view easement they obtained when they purchased from defendant Hildegard Bethea property located near Caspian Lake. We affirm.

In the summer of 1998, Ms. Bethea listed for sale four properties close to the lake. Two of the properties, including the so-called Option Lot, front the lake. The other two, including the subject property, are located landward from the lakefront lots, separated by a town highway. The Neylons were shown the subject property in May 1999, at which time Ms. Bethea had decided not to sell the Option Lot. In June 1999, through their attorney, the Neylons made an offer on the subject property. As part of the offer, they sought a view easement over the Option Lot toward the lake.

Initially, the Neylons proposed language that delineated the perimeters of the easement and prohibited any natural growth or construction of any improvements on the Option Lot. Ms. Bethea rejected this proposal, however, and the parties engaged in follow-up discussions regarding the language of the easement. In early August 1999, after several changes in the proposed easement language, the parties signed a purchase and sale agreement that gave the Neylons a right of first refusal to purchase the Option Lot and the following easement:

> View Easement. The Seller will grant to the Buyer a perpetual easement on the Option Property to preserve the view to Caspian Lake from the front porch of the existing house. The easement will prohibit any natural growth or the construction of any improvements that will impair the view to Caspian Lake from the front porch of the existing house.

The closing on the subject property took place on September 29, 1999, in the office of the Neylons' attorney. The Neylons were present. Ms. Bethea was not present, but a paralegal from

the office of her attorney was present and had a power of attorney to act on her behalf. Because the warranty deed did not contain the right of first refusal or the view easement that had been part of the purchase and sale agreement, the Neylons' attorney added those provisions to the deed. The language of the view easement added by Neylons' attorney reads as follows:

> The Grantor covenants for herself and her heirs, successors and assigns with the Grantee and his heirs, successor and assigns that no improvements will be constructed on the Right of First Refusal Property, nor any natural growth permitted to exist on the Right of First Refusal Property that will impair the view to Caspian Lake from the front porch of the dwelling house now existing on that portion of the within conveyed premises located westerly of Town Highway #5.

The paralegal representing Ms. Bethea signed the deed containing this language.

After living at the subject property for some time, Mr. Nelyon complained that there were trees on the Option Lot blocking the Neylons' view of the lake. Ms. Bethea had not trimmed any of the trees on the Option Lot since the Neylons purchased the subject property. In the spring of 2001, Ms. Bethea decided to sell the Option Lot. Ms. Bethea first offered the property to the Neylons, but they declined to purchase it. In March 2003, the Neylons filed a lawsuit against Ms. Bethea seeking injunctive relief that would determine the scope of their easement. In a May 2005 decision, the superior court denied the parties' cross motions for summary judgment, concluding that the deed language was ambiguous and that additional extrinsic evidence would be required to discern the parties' intent. A bench trial was held in October 2007. The Neylons argued that the Warranty Deed unambiguously prohibited the presence of trees or any other natural growth that inhibited in any way their view of the lake. They also argued that the deed unambiguously prevented any construction from occurring on the Option Lot.

Following the trial and a site visit, the superior court ruled that the deed unambiguously granted to the Neylons a "narrow corridor" view (as opposed to a panoramic view) that existed from the porch at the time the Neylons purchased the property. The court rejected the Neylons' argument that the warranty deed established a "no build zone" on the Option Lot. Accordingly, the court required Ms. Bethea "to preserve the view to Caspian Lake that existed at the time the Warranty Deed was executed, which includes a responsibility to remove natural growth that has further encroached on the view from the front porch since the date of the closing." The order allowed improvements "on the Option Lot, so long as those improvements do not impair the view from the Plaintiffs' porch to the lake which existed at the time the easement was created." In response to Ms. Bethea's motion to alter or amend the order by clarifying the scope of the easement, the trial court ruled that two exhibits, a photograph and a survey, would be referenced to establish the scope of the easement.

On appeal, the Neylons first argue that the superior court erred as a matter of law in concluding that the deed language unambiguously granted them only the view that existed at the time of the closing and did not prohibit construction on the Option Lot. According to the Neylons, the only fair and reasonable interpretation of the deed language is that it gives them an unimpaired view of the lake from their front porch. They further argue that the comma

separating the clauses in the deed language demonstrates the parties' intent to prohibit any construction on the Option Lot. Finally, the Neylons argue that the court erred by finding that the deed language was unambiguous but then relying on extrinsic evidence—the exhibits referenced in the court's ruling on Ms. Bethea's motion to amend—to determine the scope of the easement.

We find no error in the superior court's determination that the disputed provision in the warranty deed (1) granted the Neylons only a view that existed at the time of the closing, and (2) did not create a "no build zone" on the Option Lot. "When construing a deed or other written agreement, the 'master rule' is that the intent of the parties governs." Main St. Landing, LLC v. Lake St. Ass'n, 2006 VT 13, ¶ 7, 179 Vt. 583 (mem.). In discerning the parties' intent, the court must examine the deed language as a whole, id., but may also "consider the circumstances surrounding the making of the agreement" in determining whether the language is ambiguous. Isbrandtsen v. North Branch Corp., 150 Vt. 575, 579 (1988). As we recognized in Isbrandtsen, "plain meaning" does not exist in a vacuum, and thus numerous commentators and authorities favor allowing evidence on "the circumstances surrounding the making of the agreement as well as the object, nature and subject matter of the writing." Id. at 578; see Restatement (Second) of Contracts § 212, cmt. b (1981) ("Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties."). "Ambiguity 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, 150 Vt. at 579. But extrinsic evidence "may not be used to vary the terms of an unambiguous writing." Kipp v. Chips Estate, 169 Vt. 102, 107 (1999); see Tilley v. Green Mountain Power Corp., 156 Vt. 91, 93-94 (1991) (rejecting use of "verbal assurance" that "was not simply a context giving meaning to the written agreement," but rather "was an oral, contractual term directly contradicting the later written expression of agreement").

This case presents a good example of how evidence of the circumstances surrounding the execution of the deed clarifies whether the deed language is ambiguous. The parties' negotiations and the view easement provision in the purchase and sale agreement plainly demonstrate that the parties were seeking to preserve the view from the subject property rather than establish a "no build zone." There is no indication or claim that the parties at the closing intended the language in the deed to extend the purpose or scope of the easement beyond what had been agreed to in the purchase and sale agreement. Indeed, the disputed deed provision was added by the Neylons' attorney only because the view easement had been mistakenly left out of the deed. Moreover, extrinsic evidence of these circumstances does not directly contradict any language in the deed provision, which is vague as to the scope of the easement. Taken together, the deed language and evidence of the circumstances surrounding the making of the deed leave only one reasonable interpretation of the deed language: that the parties intended "to preserve" the view existing at the time the Neylons purchased the property, and did not intend to create a "no build zone."

The Neylons also argue that the superior court exceeded the scope of its authority under Vermont Rule of Civil Procedure 59 by adding substantive findings to bolster its determination that the disputed deed provision was unambiguous. We disagree. Rule 59 sets forth the courts'

"inherent, discretionary power to open and correct, modify, or vacate their judgments." West v. West, 131 Vt. 621, 623 (1973); see V.R.C.P. 59, Reporter's Notes ("Rule 59(e) gives the court broad power to alter or amend a judgment on motion within ten days after entry thereof."). In this case, Ms. Bethea wanted clarification of the court's order as to the scope of the easement so that she could comply with the requirement that she preserve the view existing at the time of the closing. Notwithstanding the Neylons' objection to the motion, the court identified exhibits from the trial that clarified the scope of the easement and incorporated them into the order as references to determine the scope of the easement. See Rubin v. Sterling Enters., Inc., 164 Vt. 582, 588 (1996) ("A motion to amend judgment allows the trial court to revise its initial judgment if necessary to relieve a party against the unjust operation of the record resulting from the mistake or inadvertence of the court and not the fault or neglect of a party."). We find no error.

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice