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NO. COA05-1092

NORTH CAROLINA COURT OF APPEALS

Filed: 16 May 2006

LEONARD E. ANTONELLI and  
ANDREA L. ANTONELLI,  
Plaintiffs

v.

Guilford County  
No. 2004 CVS 5524

ECR OF NORTH CAROLINA,  
INCORPORATED,  
Defendant

Appeal by plaintiffs from an order entered 24 March 2005 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 8 March 2006.

*Forman Rossabi Black, P.A., by William F. Patterson, Jr., for plaintiff-appellants.*

*Browne Flebotte, by Daniel R. Flebotte, for defendant-appellee.*

HUNTER, Judge.

Leonard E. Antonelli and Andrea L. Antonelli ("plaintiffs") appeal from an order of summary judgment in favor of ECR of North Carolina, Inc. ("defendant"). Plaintiffs contend that an easement across a subservient lot owned by defendant was not terminated upon issuance of a septic system permit for the dominant lot owned by plaintiffs. We agree and therefore reverse the order of the trial court.

On 2 April 2004, plaintiffs filed a complaint for declaratory judgment in Guilford County Superior Court against defendant and Reeves Construction Company ("Reeves"). Plaintiffs alleged they owned Lot 11 in Polo Farms Subdivision located in Guilford County, and that such lot was dominant to adjoining Lot 10 under the terms of a recorded deed of easement. The deed of easement granted

as an easement appurtenant to the Dominant Tract, an easement over, under and across the Subservient Tract for the installation of pipes and other systems intended to give the Grantee access to and use of the septic field . . . located on the Subservient Tract for the use of a house and/or such other structures as are permitted by applicable covenants and restrictions to be erected and maintained on the Dominant Tract . . . .

The deed of easement provided that the easement granted would terminate upon several conditions, including the following:

By accepting this Deed of Easement, the Grantee for himself, his heirs and assigns agree that if at any time when sewer service has been extended to the Dominant Tract and is available to serve the Dominant Tract, the owner of the Subservient Tract shall pay the applicable connection costs to the owner of the Dominant Tract or to the appropriate authority providing such sewer service, then the owner of the Dominant Tract shall be required to connect to the water and sewer service and the easement granted herein shall terminate upon such connection. . . .

Plaintiffs alleged in their complaint that none of the conditions of termination had been met, and that the easement remained in full force and effect. Plaintiffs desired to build a house upon Lot 11 and, pursuant to the easement, connect their house to the septic field located on Lot 10. However, defendant and Reeves disputed plaintiffs' right to enter Lot 10 for the purpose of installing a

septic system. Plaintiffs requested the trial court enter declaratory judgment and a mandatory injunction allowing plaintiffs access to Lot 10 for the purpose of constructing a septic system.

In its answer to plaintiffs' complaint, defendant alleged that the easement over Lot 10 had been terminated because a septic system had been approved for Lot 11. Defendant attached to its answer a copy of the "New Residential Septic System Permit No. 9210368" issued by Guilford County for plaintiffs' property. Both plaintiffs and defendant filed motions for summary judgment, and the matter came before the trial court on 24 March 2005. Upon reviewing the matter, the trial court determined that defendant was entitled to summary judgment as a matter of law and granted defendant's motion. Plaintiffs appeal.

Plaintiffs contend that the septic easement did not terminate upon issuance of the septic system permit for Lot 11, because the deed of easement refers only to the extension of a "sewer service" rather than the availability of a "septic system." Plaintiffs contend that the plain meaning and common usage of the term "sewer service" does not encompass installation of a septic system, and that the deed of easement did not contemplate termination of the easement upon availability of a septic system. We agree.

"Where the language of a contract granting an easement is clear and unambiguous, the construction of the agreement is a matter for the court and reference to matters outside the contract itself is not required for a correct construction." *Leonard v. Pugh*, 86 N.C. App. 207, 210, 356 S.E.2d 812, 814 (1987). Here, the

deed of easement provides that it will terminate "when sewer service has been extended to the Dominant Tract."

We agree with plaintiffs that the common usage and understanding of the term "sewer service" does not include installation of a septic system. "Sewer" is defined as "an artificial usu[ally] subterranean conduit to carry off water and waste matter[,]" while "septic tank" is defined as "a tank in which the organic solid matter of continuously flowing sewage is deposited and retained until it has been disintegrated by anaerobic bacteria." See Webster's Third New International Dictionary Unabridged 2081, 2071 (1968). Thus, a sewer "carries off" waste matter for ultimate treatment elsewhere, in contrast to a septic system, which treats waste matter onsite through bacterial decomposition. The North Carolina General Statutes refer to "sewer service" and "septic systems" as distinct and different entities. See, e.g., N.C. Gen. Stat. § 160A-35(3)(b) (2005) (providing that "[i]n areas where the installation of sewer is not economically feasible due to the unique topography of the area, the municipality may agree to provide septic system maintenance and repair service until such time as sewer service is provided to properties similarly situated"); N.C. Gen. Stat. § 160A-47(3)(b) (2005) (same); N.C. Gen. Stat. § 113A-209(c) (2005) (referring separately to sewer and septic systems). Case law also differentiates between sewer service and septic systems. See, e.g., *Briggs v. City of Asheville*, 159 N.C. App. 558, 565, 583 S.E.2d 733, 738 (holding that the City of Asheville could not provide septic system

maintenance and repair in lieu of sewer service to an annexed area), *disc. review denied*, 357 N.C. 657, 589 S.E.2d 886 (2003); *State ex rel. Utilities Comm. v. Mackie*, 79 N.C. App. 19, 22, 338 S.E.2d 888, 891 (1986) (referring separately to sewer service and septic systems).

Although we conclude that the language of the easement is clear, we note that any ambiguity in the easement must be construed against defendant. *See, e.g., Novacare Orthotics & Prosthetics E., Inc. v. Speelman*, 137 N.C. App. 471, 476, 528 S.E.2d 918, 921 (2000) (noting that "when an ambiguity is present in a written instrument, the court is to construe the ambiguity against the drafter -- the party responsible for choosing the questionable language"). If the grantor had truly intended for the easement to terminate upon the issuance of a septic system permit for Lot 11, the grantor was free to draft appropriate language providing for such termination.

Moreover, the circumstances of the easement granted support our determination that the easement did not terminate upon issuance of the septic system permit. Defendant alleged in its answer to plaintiffs' complaint that the easement was granted because, at the time the community was developed, Lot 11 was not approved for a septic system and was therefore unavailable for development. Granting the easement allowed Lot 11 to be sold as a "buildable" lot. Defendant therefore enjoyed the benefit of the sale of Lot 11, and now plaintiffs are entitled to the benefit of the easement, which allows them to place their house upon Lot 11 without regard

to the building restrictions that an on-site septic tank and/or drain field would pose. Plaintiffs purchased Lot 11 pursuant to the easement and are entitled to rely on the easement's plain language permitting them access to the septic field on Lot 10 until connection to a sewer service is available.

We conclude that under the plain language of the easement, the term "sewer service" does not encompass the availability of a septic system. As such, plaintiffs' easement over Lot 10 did not terminate upon the issuance of the septic system permit for Lot 11. Plaintiffs were therefore entitled to judgment as a matter of law, and the trial court erred in granting summary judgment to defendant. Accordingly, we reverse the order of the trial court and remand this matter back to the trial court for entry of summary judgment in favor of plaintiffs.

Reversed and remanded.

Judges HUDSON and BRYANT concur.

Report per Rule 30(e).