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2012 IL App (3d) 110285-U

Order filed May 2, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT  
A.D., 2012

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VILLENEAUVE DEVELOPMENT CO.,	)	Appeal from the Circuit Court
	)	of the 10 <sup>th</sup> Judicial Circuit
Plaintiff-Appellant,	)	Tazewell County, Illinois
	)	
v.	)	Appeal No. 3-11-0285
	)	Circuit No. 06-CH-35
ILLINOIS CENTRAL COLLEGE,	)	
	)	The Honorable
Defendant-Appellee.	)	Paul Gilfillan,
	)	Judge, Presiding.

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JUSTICE McDADE delivered the judgment of the court.  
Justice O'Brien concurred in the judgment.  
Justice Wright dissented.

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**ORDER**

¶ 1 *Held:* Where a warranty deed is capable of being understood by reasonably well-informed persons in two different ways, it is ambiguous, and a court may resort to extrinsic evidence to discover the real intention of the parties.

¶ 2 Plaintiff, Villeneuve Development Co., appeals from the trial court's judgment, holding that the warranty deed in question does not require defendant, Illinois Central College, to

construct an access road for plaintiff's benefit. We reverse and remand with directions.

¶ 3

## FACTS

¶ 4 Cone Property

¶ 5 Junior College District No. 514 (District No. 514), commonly known as Illinois Central College (ICC) was organized and established in 1966. At that time, the Board of Trustees of District No. 514 (the Board) acquired various parcels of real estate required for its planned East Peoria campus. One of the parcels purchased was a 25-acre parcel adjacent to the southerly right of way to U.S. Route 24. The parcel was acquired from Spencer B. Cone, Nancy H. Cone, Cicely Cone Beach and Leonard B. Beach. The four related sellers of the 25-acre parcel will be collectively referred to herein as "Cone" and the 25-acre parcel acquired by ICC as the "Cone Property."

¶ 6 Option to Purchase

¶ 7 The written documentation of the acquisition of the Cone Property by ICC began with an option to purchase (the Option) between District No. 514 and Cone. The Option granted ICC an exclusive option to purchase the Cone Property. Most relevant to this appeal are paragraphs 8, 9, and 10 of the Option.

¶ 8 Paragraph 8 stated that the Cone Property is a parcel of a larger 92-acre parcel of property owned by Cone south of Route 24. The larger 92-acre parcel will be referred to herein as "the remaining Cone Property." Paragraph 8 provided that access from Route 24 to the remaining Cone Property is located at Station 315 on Route 24, as provided under the terms and provisions of a court order entered in a previous condemnation case. Finally, it stated that Station 315 is located within the Cone Property, and ICC promised "upon the exercise of the Option that the

point of access shall not be changed from its present location except upon the written consent” of Cone.

¶ 9 Paragraph 9 addressed an easement for a public street reserved by Cone. Specifically, it stated:

“9. The undersigned [Cone] hereby reserve an easement sufficient in width for a public street from the point of access over such route as the undersigned may determine for the benefit and use of all that remaining part of the premises of the undersigned located in said Section and lying southerly of U.S. Route 24. Said easement shall be over such route as the undersigned shall determine to be required for their use and shall be for the benefit of the successors in title of the undersigned as well.”

¶ 10 Paragraph 10 addressed the construction of a public street or highway by ICC in favor of Cone. The public street or highway was to be constructed upon the easement. Specifically it states:

“10. As an additional consideration and as further payment for the premises, which are the subject of this Option, Purchaser agrees within one year after delivery of deed to build and construct a public street or highway from the point of access, mentioned in Paragraph 8 of this option, to that part of the premises of the undersigned retained by them. Said street or highway shall be built in conformity with the then existing requirements of the City of

East Peoria for a public street, and Purchaser shall enter into a separate agreement covenanting so to do at the time of the delivery of Warranty Deed to Purchaser in consummation of the transaction contemplated by this option.”

¶ 11 Option Exercised

¶ 12 On December 29, 1966, the Board exercised its option to purchase the Cone Property. In compliance with paragraphs 9 and 10 of the Option, ICC and Cone entered into an agreement (the Agreement), which granted Cone an easement and required ICC to construct a public street or highway upon the easement. The Agreement is dated May 12, 1967. The public street or highway will be collectively referred to herein as “the access road”

¶ 13 Paragraph 1 of the Agreement provided that Cone “designate in writing \*\*\* the route of the easement reserved by the Sellers” within 3 months of May 12, 1967. Cone promised to designate the route of the easement by providing ICC “a legal description and plat of survey thereof which shall be sufficient for the dedication or designation of a \*\*\* [access road] over the lands conveyed to Purchaser to the premises retained by Sellers.” Paragraph 1 further provided that the “easement shall extend from the existing highway access to the east line of the premises owned by Sellers.”

¶ 14 Paragraph 2 of the Agreement required that ICC, within one year of May 12, 1967, dedicate the route designated by Cone for use as a public access road. ICC also agreed, at its own expense, to “improve said land and build said \*\*\* [access road].”

¶ 15 Warranty Deed

¶ 16 Cone executed a warranty deed (the Deed) conveying to ICC the Cone Property. The

Deed was recorded on May 16, 1967. The Deed states, in pertinent part:

“Grantors, \*\*\* [Cone], for and in consideration of the sum of FIFTY THOUSAND DOLLARS (\$50,000) CONVEY AND WARRANT to \*\*\* [ICC] the \*\*\* [Cone Property]

\*\*\*

Grantors reserve unto themselves and their successors in title an easement over and upon said premises for the benefit of and use of all that part of the Northwest Quarter of said Section 13, Fondulac Township, T 26 N, R 4 W, of the Third Principal Meridian in Tazewell County, Illinois, owned by Grantors and lying west of the premises hereby conveyed and lying south of Federal Aid Route #172 (marked U.S. Route #24). Said easement shall extend from the point of entrance from the tract hereby conveyed \*\*\* to the lands of Grantors over the existing route until such time as Grantee shall dedicate and construct a public street from such point of access to Grantors’ said lands.

\*\*\*

This Warranty Deed is executed and delivered by Grantors in performance of an Option given by Grantors to Grantee \*\*\*, which option was exercised by Grantee by Notice dated December 29, 1966.”

¶ 18 On July 20, 1978, pursuant to the reservation of rights in the Deed, ICC dedicated 0.40 acres of land received under the Deed from Cone for the access road. Specifically, the Board approved Resolution 78-2, which authorized the chairperson and secretary of ICC to execute a dedication of a 0.40-acre tract within the Cone Property, “for the purpose of construction of the access road as provided in said Agreement of May 12, 1967.” The dedicated land provided access to the remaining Cone property from ICC’s property on the south side of Route 24.

¶ 19 Cone Sells Remaining Cone Property

¶ 20 On September 15, 1978, Cone and plaintiff’s agent entered into a real estate purchase agreement for the sale of the remaining Cone Property. On October 12, 1978, Cone conveyed title to the remaining Cone Property to the First National Bank of Peoria as trustee under a land trust agreement, dated September 20, 1978. On October 11, 1978, Cone assigned the beneficial interest in said land trust to plaintiff’s agent. Plaintiff’s agent subsequently assigned his beneficial interest in the trust to plaintiff.

¶ 21 Release

¶ 22 On January 18, 1979, almost four months after Cone conveyed the remaining Cone Property to plaintiff’s agent, a release was executed by Cone and ICC, which purported to release ICC from any duty to construct the access road (the Release). Negotiations concerning the Release began previously on May 4, 1978, when ICC’s attorney, Samuel G. Harrod, wrote Richard Molchan, Cone’s attorney, and proposed that ICC pay Cone the sum that ICC had appropriated for the construction of the access road, plus interest, in exchange for Cone releasing ICC from any obligation to construct the access road.

¶ 23 In a letter, dated November 16, 1978, Molchan confirmed that Cone was willing to accept

the amount of \$12,327.50 in exchange for releasing ICC from any obligation to construct the access road. The Release was then executed on January 18, 1979.

¶ 24 Plaintiff's Demand and Complaint

¶ 25 In 2001, plaintiff's agent contacted Emil Haefflinger, ICC's vice president, and demanded that ICC build the access road for plaintiff's benefit. In response, Haefflinger stated that ICC had no obligation to build the access road because it had paid Cone for a release of any such obligation. Plaintiff subsequently filed a two-count complaint for breach of covenant and declaratory judgment.

¶ 26 Trial Court's Ruling

¶ 27 Plaintiff's complaint proceeded to a bench trial. At the trial, plaintiff argued that the Deed unambiguously required ICC to build the access road. Upon considering the stipulated facts and exhibits, the court entered judgment in favor of ICC on counts I and II of plaintiff's complaint. The court's written order stated the following:

“2) Specifically, this court finds that the deed is clear and that what it ‘reserves’ to the grantor and its successors is an ‘easement’ of access ‘over and upon said premises’ for the benefit of the grantors land that lies west of the subject property. THIS is the covenant that runs with the land and nothing more.

VILLENEAUVES’s position that the deed clearly also creates a covenant that runs with the land requiring ICC to dedicate and construct a road into perpetuity is incorrect.

3) The phrase in the deed that reads ‘until such time as

Grantee shall dedicate and construct a public street from such point of access to Grantors' said lands' merely describes the length of time such easement shall last. The word 'until' is a word of limitation ordinarily used to restrict that which precedes it to what immediately follows it. [Citation.] In other words, the easement of access across the land will last until ICC dedicates and constructs a road on the parcel in question. Arguably, if ICC never dedicates or constructs a road itself, the easement of access will continue to exist. \*\*\*.

4) VILLENEAUVE has never contended that ICC has refused access to its property as a successor to the CONE interest over the affected parcel. In fact, VILLENEAUVE has constructed an access road on this parcel. Thus, VILLENEAUVE has received the benefit of the easement of access that runs with the land in question.

5) Even though VILLENEAUVE agrees that whatever rights it has flows from the deed alone, the ancillary documents referred to above (OPTION and AGREEMENT) also support this court's finding in this regard. The contractual obligation of ICC to build a road for VILLENEAUVE's predecessor was between those two parties and those two parties alone. But those documents are otherwise instructive for being carefully drafted in such a way as to



confirm that only a right of access was being reserved to CONE and its successors in the deed and not the obligation to construct a road. The OPTION contemplated a separate AGREEMENT between CONE and ICC \*\*\*.

6) VILLENEAUVE does not claim any third party beneficiary rights under the OPTION or the AGREEMENT. Indeed, the evidence also showed that any contractual rights and obligations between CONE and ICC were released by virtue of joint exhibit 15. Thus, at that time ICC was no longer contractually obligated to build such road.

7) Even if the language of the deed was ambiguous (the Court does not so conclude), then the language of the OPTION and AGREEMENT aforementioned makes clear the intent of the parties which is consistent with this Court's order herein. \*\*\*. In this case, if there is any doubt as to the language of the deed, it will be resolved against an interpretation that requires ICC or its successors to construct a public street on the land in question.”

¶ 28

#### ANALYSIS

¶ 29 At the outset, we note that plaintiff does not contend that he has not received the benefit of the easement of access that runs with the land in question. Instead, the sole issue before us involves construction of the access road. Both parties assert that the Deed is clear and unambiguous as to this issue. Because this appeal is based on the interpretation of the Deed and

there are no questions of fact to be resolved, our review is *de novo*. *Hot Light Brands, L.L.C. v. Harris Realty Inc.*, 392 Ill. App. 3d 493, 498 (2009).

¶ 31 Plaintiff believes the Deed unambiguously creates a covenant running with the land, which would have obligated ICC to construct the access road. In support of its claim, plaintiff calls our attention to the following language found in the Deed: “Said easement shall extend from the point of entrance from the tract hereby conveyed \*\*\* to the lands of Grantors over the existing route until such time as Grantee shall dedicate and construct a public street from such point of access to Grantors’ said lands.”

¶ 32 In response, ICC asserts that the Deed did not create a covenant to construct the access road. Instead, the Deed unambiguously effectuated two acts: (1) it conveyed the Cone Property to ICC, and (2) it reserved an easement for the benefit of Cone and Cone’s successors. ICC believes that the Deed’s language concerning the construction of the access road merely defined the point in time whereby the easement would cease to exist.

¶ 33 Our goal when interpreting a deed is to ascertain the intent of the parties. *Sadler v. Creekmur*, 354 Ill. App. 3d 1029, 1036 (2004). As with any other contract, the terms of the deed must be given their ordinary and natural meaning when they are clear and unambiguous. *Sadler*, 354 Ill. App. 3d at 1036. If the language of the deed is clear, a court must give effect to its plain and ordinary meaning without resort to any extrinsic evidence. *Sadler*, 354 Ill. App. 3d at 1036-37. However, if the Deed is capable of being understood by reasonably well-informed persons in two different ways, it is ambiguous, and a court may resort to extrinsic evidence to discover the real intention of the parties. *Reynolds v. Coleman*, 173 Ill. App. 3d 585, 593 (1988). With these principles in mind, we review the language of the Deed at issue.

¶ 34 First, the Deed conveyed the Cone Property from Cone to ICC. Specifically, it provides that Cone is conveying and warranting the Cone Property to ICC for and in consideration of \$50,000. The Deed later provides that a warranty deed is being “executed and delivered” by Cone in performance of the Option given by Cone to ICC, which ICC exercised on December 29, 1966. This language is unambiguous – the parties intended to conduct a real estate transaction whereby Cone conveyed and warranted its interest in the Cone Property to ICC.

¶ 35 Second, the Deed “reserve[d] \*\*\* an easement” for the benefit of Cone and Cone’s “successors” upon the Cone Property. The Deed then goes on to describe the general location of the easement. This language is unambiguous – the parties intended to reserve an easement in favor of Cone and Cone’s successors. The parties clearly intended this covenant to run with the land as evidenced by the fact that the parties expressly identified Cone’s successors.

¶ 36 The pertinent question remains, however, as to whether the Deed created a covenant running with the land, obligating ICC to construct the access road. The trial court found the Deed to be unambiguous as to this issue, in that it did not create such a covenant. Specifically, the court found the language concerning the construction of the access road merely defined the point in time whereby the easement would cease to exist. The language relied upon states: “Said easement shall extend from the point of entrance from the tract hereby conveyed \*\*\* to the lands of Grantors over the existing route until such time as Grantee shall dedicate and construct a public street from such point of access to Grantors’ said lands.”

¶ 37 While we believe that the trial court’s interpretation of the above language is rational and sound, we also believe that a reasonable person could interpret the language to create a covenant obligating ICC to construct the access road. The basis for this belief is grounded in the fact that

the Deed expressly states that ICC “*shall* dedicate *and* construct a public street.” (Emphasis added.) Generally, use of the term “shall” indicates an intention to impose a mandatory obligation. *People v. Houston*, 226 Ill. 2d 135, 155 (2007); *In re Marriage of Flannery*, 328 Ill. App. 3d 602, 606 (2002). The use of the conjunctive “and” ties the obligations to “dedicate” and to “construct” together. Thus, because this portion of the Deed is capable of being understood by reasonably well-informed persons in two different ways, we hold it to be ambiguous.

¶ 38 We have not decided whether in fact a covenant exists, that is, whether Cone and ICC intended that ICC be bound to construct the access road. We merely hold that their intent, based on the Deed alone, is ambiguous. Therefore, upon remand, the trial court must allow plaintiff and ICC to present other evidence of Cone's and ICC's intent. The trier of fact should then determine, based on the evidence and the Deed, whether Cone and ICC intended to create a covenant running with the land obligating ICC to construct the access road.

¶ 39 While we are mindful of the alternative holding found in paragraph 7 of the trial court's order, we note plaintiff's complaint only substantively references the Deed. The complaint frames the issues for the court and circumscribes the relief it can award. *Health Cost Controls v. Sevilla*, 307 Ill. App. 3d 582, 587 (1999). In this particular case, we believe remand is appropriate.

¶ 40 For the foregoing reasons, we reverse the judgment of the trial court and remand with directions.

¶ 41 Reversed and remanded with directions.

¶ 42 JUSTICE WRIGHT, dissenting:

¶ 43 I respectfully dissent. The unambiguous language of the deed contemplates two specific contingencies. First, Cone reserved an easement across ICC's land, for the benefit of Cone and Cone's successors in interest, which would terminate after ICC constructed an access road, at its own expense, and dedicated the road for public use. Second, until ICC constructed, and then dedicated, the road for public use, the easement continued and created a covenant which attached to the land.

¶ 44 In my view, ICC was solely responsible for building and dedicating the public access road. However, in the event a completed public roadway did not become a reality for any reason, Cone ensured access to their parcel by reserving an easement not only for Cone's benefit but also for the benefit of Cone's future successors' interest.

¶ 45 Here, ICC dedicated the land in 1978 but did not construct the road in a timely fashion. Thus, ICC's agreement to construct the road became an empty promise, binding only on Cone and ICC. As the trial court noted, Cone's successors received the benefit of an easement negotiated by Cone but these successors in interest did not acquire the ability to specifically enforce ICC's promise to the Cone's build a road at their expense within one year of the date of purchase .

¶ 46 Thus, I agree with the trial court's finding that the deed was not ambiguous. I also agree with the court's determination that while the easement runs with the land, ICC's promise to shoulder the construction costs of a public access road, does not. I conclude the trial court was absolutely correct and wrote a thoughtful and well-reasoned order which should be upheld by this court.

¶ 47 Finally, the trial court included specific findings, in Paragraph 7 of its order, which would not necessitate a remand in the event this court determined the deed was ambiguous. Based on those findings, I respectfully suggest remand is unnecessary and will result in the same outcome following remand.