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NO. COA03-1383

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2004

C.F. LITTLE DEVELOPMENT
CORPORATION,
Plaintiff,

v.

Cabarrus County
No. 01 CVS 2068

NORTH CAROLINA NATURAL
GAS CORPORATION,
Defendant.

Appeal by defendant from order entered 16 June 2003 by Judge Albert Diaz in Cabarrus County Superior Court. Heard in the Court of Appeals 17 June 2004.

Ferguson, Scarbrough and Hayes, P.A., by James E. Scarbrough, for plaintiff-appellee.

Hartsell & Williams, P.A., by Fletcher L. Hartsell, Jr. and Karla G. Eaves, for defendant-appellant.

GEER, Judge.

Defendant North Carolina Natural Gas Corporation ("NCNG") appeals from the trial court's order granting partial summary judgment to plaintiff C.F. Little Development Corporation ("CFL") on its claims for a mandatory injunction and for trespass stemming from NCNG's construction of an above-ground gas pipeline safety valve on its easement crossing CFL's property. Because we hold that placement of the safety valve above ground was not consistent with the terms of the easement, we affirm.

Facts

On or about 9 October 1958, NCNG acquired from Thomas M. Query and Ola T. Query an express easement across the Querys' farm. The granting clause in the 1958 Grant of Easement ("the granting clause") gave NCNG "the right to construct, maintain, inspect, operate, protect, repair, replace, change the size of, or remove a pipeline or pipelines and appurtenances, for the transportation of natural gas, . . . together with the right of ingress and egress to and from the same for the purposes aforesaid, over, under, through and across" the grantors' land. The Grant of Easement contained an additional clause ("the limiting clause"), providing: "It is agreed that the pipeline or pipelines to be laid under this grant shall be constructed at sufficient depth below the surface of the ground to permit normal cultivation, and Grantor shall have the right to fully use and enjoy the above described premises, subject to the rights herein granted."

In 1959, NCNG built a 16-inch-wide pipeline under and across a portion of the Querys' farm. The Querys used this portion of their property as pastureland with their barn located nearby. In the course of the construction, NCNG damaged the surface of the Querys' land and did not restore it. The estate of T. M. Query sued for compensation for the damage. In a settlement of the claim, NCNG paid \$1,250.00 for the damage and agreed that it would pay for any future damage to the Querys' livestock, crops, and

property resulting from maintenance of the existing gas line or construction of any new pipeline.

In 1990, CFL acquired the Querys' property and, in 1995, subdivided it for development as the Harrisburg Industrial Park. The NCNG pipeline diagonally bisects Lot 9 of the industrial park. In 2000, NCNG began construction of a new 30-inch-wide pipeline along the easement, but 36 inches below the surface. Because of an agreement with the railroad, entered into shortly before construction of the new pipeline, NCNG also installed above the ground, roughly in the center of Lot 9, a safety valve fenced in by a 20-foot by 30-foot enclosure. NCNG did not contact CFL prior to constructing the enclosure and the valve.

CFL filed this action on 4 September 2001, seeking a permanent injunction enjoining NCNG from maintaining the valve, ordering NCNG to remove the valve, and enjoining NCNG from trespassing on CFL's property. On 12 October 2001, NCNG filed an answer and counterclaim, alleging that CFL had trespassed on its easement by further burying the 16-inch-wide pipeline with debris. CFL filed an amendment to its complaint on 11 April 2002, adding a claim for damages.

The parties filed cross-motions for partial summary judgment on the issues of NCNG's liability and CFL's entitlement to injunctive relief. On 16 June 2003, the trial court entered an order granting partial summary judgment to CFL on its claims for a mandatory injunction and trespass, leaving the issues of damages

and NCNG's counterclaims pending. NCNG appealed that order on 7 July 2003. NCNG has also filed a petition for writ of certiorari.

We first observe, as NCNG has acknowledged, that this appeal is interlocutory: "A grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal." *Liggett Group, Inc. v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993). An interlocutory appeal is permissible only if (1) the trial court certified the order for immediate interlocutory appeal under Rule 54(b) of the Rules of Civil Procedure, or (2) the order affects a substantial right that would be lost without immediate review. *Embler v. Embler*, 143 N.C. App. 162, 164-65, 545 S.E.2d 259, 261 (2001).

Since the order at issue in this appeal does not contain a Rule 54(b) certification, we must determine whether the order affects a substantial right of defendant. This Court has held that "ordering the removal of substantial structures from real property affects [a] substantial right, and therefore, the partial summary judgment is immediately appealable." *Keener v. Arnold*, 161 N.C. App. 634, 637, 589 S.E.2d 731, 733 (2003), *disc. review denied*, 358 N.C. 376, 598 S.E.2d 136 (2004). *See also Steel Creek Dev. Corp. v. James*, 300 N.C. 631, 636, 268 S.E.2d 205, 209 (1980) (mandatory injunction ordering removal of concrete anchors placed on the plaintiffs' submerged lands affected a substantial right and was thus immediately appealable). The trial court's order requiring removal of the safety valve thus affects a substantial right of

NCNG. Because we hold that NCNG has a right to an immediate appeal, we dismiss its petition for writ of certiorari as moot.

Discussion

The North Carolina Rules of Civil Procedure provide that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). In deciding the motion, "'all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion.'" *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975) (quoting 6 James W. Moore et al., *Moore's Federal Practice* § 56-15[3], at 2337 (2d ed. 1971)).

The party moving for summary judgment has the burden of establishing the lack of any triable issue. *Collingwood v. General Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). Once the moving party meets its burden, then the non-moving party must "produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial." *Id.* In opposing a motion for summary judgment, the non-moving party "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." N.C.R. Civ. P. 56(e).

On appeal, this Court's task is to determine, on the basis of the materials presented to the trial court, whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. *Oliver v. Roberts*, 49 N.C. App. 311, 314, 271 S.E.2d 399, 401 (1980), *cert. denied*, 276 S.E.2d 283 (1981). A trial court's ruling on a motion for summary judgment is reviewed *de novo* since the trial court rules only on questions of law. *Va. Elec. & Power Co. v. Tillett*, 80 N.C. App. 383, 384-85, 343 S.E.2d 188, 191, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986).

In appealing the trial court's grant of partial summary judgment to CFL, NCNG argues solely that the trial court misconstrued the unambiguous language of the express grant of easement. It contends (1) that the granting clause, which contained no limitation on above-ground pipelines or appurtenances, controlled over any subsequent clauses; and (2) that the limiting clause, requiring placement of pipelines underground, does not govern the placement of appurtenances.

With respect to its first argument, NCNG points to *Bryant v. Shields*, 220 N.C. 628, 631, 18 S.E.2d 157, 159 (1942) (quoting *Boyd v. Campbell*, 192 N.C. 398, 401, 135 S.E. 121, 122 (1926)), holding that "'if there are repugnant clauses in a deed the first will control and the last will be rejected,'" regardless of the overall intent of the parties. Our Supreme Court has held, however, that this principle of deed construction does not apply to deeds of easement:

[B]ecause the . . . deed conveyed an easement rather than a fee, we find that the rules applicable to its construction are the rules for construction of contracts. . . . We hold that in construing a conveyance of an easement, . . . the deed is to be construed in such a way as to effectuate the intention of the parties as gathered from the entire instrument.

Higdon v. Davis, 315 N.C. 208, 215-16, 337 S.E.2d 543, 547 (1985).

The sole task for this Court is to determine whether, as NCNG contends, the language in the granting clause giving it "the right to construct . . . a pipeline or pipelines and appurtenances, for the transportation of natural gas . . . over, under, through and across" CFL's property allowed NCNG to install the safety valve and 600 square foot enclosure on the surface of CFL's property despite the easement's provision that "the pipeline or pipelines to be laid under this grant shall be constructed at sufficient depth below the surface of the ground to permit normal cultivation" Since a deed of easement is a contract, it is construed "so as to ascertain the intention of the parties as gathered from the entire instrument at the time it was created." *Intermount Distribution, Inc. v. Pub. Serv. Co. of N.C., Inc.*, 150 N.C. App. 539, 542, 563 S.E.2d 626, 629 (2002). As stressed by our Supreme Court, in addressing an easement deed, "[t]he intention of the parties is to be gathered from the entire instrument and not from detached portions." *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 719 127 S.E.2d 539, 541 (1962).

The issue arising in this case is over the extent of the easement. *Williams v. Abernethy*, 102 N.C. App. 462, 465, 402

S.E.2d 438, 440 (1991) (quoting Restatement of Property § 482 cmt. a, at 3009 (1944)) ("By the phrase "extent of an easement" is meant the limits of the privileges of use authorized by the easement.'). The first question is whether the easement grant contains language addressing the extent of the easement. When the terms of an easement grant are "perfectly precise" as to the extent of the easement, then the terms control. *Id.* at 464-65, 402 S.E.2d at 440 (quoting Restatement of Property § 483 cmt. d, at 3012 (1944)). At the other end of the spectrum, when "there is no language in the conveyance addressing the extent of the easement, extrinsic evidence is inadmissible as to the extent of the easement. However, in such cases, a reasonable use is implied." *Id.* at 465, 402 S.E.2d at 440. If the easement does contain language as to the extent of the easement, but is ambiguous, then "the grant may be interpreted by reference to the attendant circumstances, to the situation of the parties, and especially to the practical interpretation put upon the grant by the acts of the parties in the use of the easement immediately following the grant." *Id.* (internal quotation marks omitted).

Here, both parties contend that the easement conveyance is unambiguous regarding the extent of NCNG's easement. CFL points to the limiting clause requiring that NCNG's pipelines be built sufficiently underground to allow cultivation. NCNG, on the other hand, argues that since the granting clause references both pipelines and appurtenances, but the limiting clause mentions only pipelines, the latter clause should be construed as not restricting

the placement of appurtenances. NCNG further argues that the granting clause's use of the phrase "over, under, through and across lands" necessarily means that NCNG could construct appurtenances "over" the land. We find that both CFL's and NCNG's interpretations of the limiting clause are reasonable. See *Ostrem v. Alyeska Pipeline Serv. Co.*, 648 P.2d 986, 988 n.2 (Alaska 1982) ("Alyeska had argued that the valve control facility was an appurtenance of the pipeline, and that the easement did not require burying such appurtenances, only the pipeline itself. This was a plausible reading of . . . the easement, but clearly [plaintiff's] reading [prohibiting placing the valve above ground] was equally plausible."). If the language of a contract is susceptible of two constructions, it is ambiguous. *Lagies v. Myers*, 142 N.C. App. 239, 248, 542 S.E.2d 336, 342, *disc. review denied*, 353 N.C. 526, 549 S.E.2d 218 (2001).

While we agree that NCNG's construction of the easement — allowing the placement of the safety valve enclosure above ground — is reasonable, we do not agree that it is the only reasonable construction of the grant. The limiting clause's requirement that the pipelines be sufficiently below the surface of the ground to permit "normal cultivation" and the additional proviso that "Grantor shall have the right to fully use and enjoy the above described premises, subject to the rights herein granted" suggests that the word "pipeline" was intended to include appurtenances. If the intent of the parties was to allow full cultivation of the surface land, an above-ground appurtenance would be inconsistent

with that intent. The Louisiana Court of Appeals reached this conclusion as a matter of law in *Sigue v. Tex. Gas Transmission Corp.*, 154 So. 2d 800, 802 (La. Ct. App.), *cert. denied*, 244 La. 1025, 156 So. 2d 228 (1963), *cert. denied*, 379 U.S. 922, 13 L. Ed. 2d 335, 85 S. Ct. 277 (1964). When construing an almost identical easement, the court held: "Such a construction of the contract in question [to allow above-ground appliances] would ignore the plain language contained therein that the defendant 'agrees to bury all pipelines so that they will not interfere with the cultivation of the land. . . .'" *Id.*

While NCNG also points to the word "over" in the easement, courts in other jurisdictions have held that a conveyance's use of the word "over" or "upon" in the granting clause is not dispositive. *See, e.g., Consol. Foods Corp. v. Water Works & Sanitary Sewer Bd. of the City of Montgomery*, 294 Ala. 518, 522, 319 So. 2d 261, 264 (1975) ("The language 'in, upon, along and across' is not inconsistent with 'under the ground.' The former is only the prepositional litany denoting a right of access. It is general language granting the Board a right of ingress and egress across [plaintiff's] property."); *Elizabethtown v. Caswell*, 261 S.W.2d 424, 425 (Ky. 1953) (in construing a deed of easement for a sewer line "through, over and across the real estate," holding that "[i]t is necessary to go 'over' the right-of-way in order to construct, repair, renew, operate and maintain the sewer line, and we believe it is more consonant with sound reasoning to say that the word was inserted in connection with those privileges than to

interpret it to mean that the sewer pipe itself could properly be laid on top of the ground"); *Besser v. Buckeye Pipe Line Co.*, 57 Ohio App. 341, 342-43, 13 N.E.2d 927, 928 (1937) (even though the easement included the words "over and through," a pipeline was required to be built under the ground when the grantors reserved the "right to fully use and enjoy said premises except for the purposes hereinbefore granted"). Accordingly, we hold that CFL's construction of the easement is just as reasonable as NCNG's.

Since the language of the easement conveyance is susceptible of two reasonable constructions, it is ambiguous and we must look to "the attendant circumstances, to the situation of the parties, and especially to the practical interpretation put upon the grant by the acts of the parties in the use of the easement immediately following the grant." *Williams*, 102 N.C. App. at 465, 402 S.E.2d at 440 (quoting 2 G. Thompson, *Commentaries on the Modern Law of Real Property* § 385, at 528 (repl. 1980)). Here, the evidence is undisputed that the Querys used the property for farming (including the portion where the pipeline was located) and that the originally-constructed 16-inch pipeline and its accompanying valves were buried entirely underground. NCNG did not attempt to install any above-ground appurtenances until 42 years after the granting of the easement.

CFL also submitted the affidavit of the Querys' son, who had advised his parents in connection with their granting of the easement to NCNG. He stated:

It was never contemplated or intended
that the Gas Corporation would install

anything on the land above the surface because this was a farm and the surface was being used for a farm. That is why the easement states that the pipeline would be constructed at a sufficient depth below the surface to permit normal cultivation.

The Querys' son successfully brought suit against NCNG after construction of the 16-inch pipeline for damage to the surface of the farm and obtained a commitment from NCNG that "it would pay for any damage in the future to our livestock, crops, and property as [a] result of maintenance of [the] first gas line or the construction of another pipeline."

NCNG does not point to any evidence that rebuts CFL's showing, but rather argues that the valve is necessary for the safety of the public and that the fenced enclosure is due to federal regulations requiring that the valve be readily accessible and protected from tampering. NCNG's witnesses acknowledged in their depositions, however, (1) that NCNG only constructed the safety valve after it entered into an agreement with the railroad shortly before constructing the 30-inch pipeline in 2000, and (2) that the federal regulations only went into effect in 1971, 13 years after the granting of the easement. NCNG cites no authority suggesting that the recent railroad agreement and the 1971 federal regulations are relevant to the intent of the parties in entering into the easement agreement in 1958. Because NCNG has offered no evidence to counter that of CFL's regarding the intent of the parties with respect to the easement, we hold that the trial court properly granted partial summary judgment to CFL.

Although defendant urges that construing the 1958 easement to preclude the safety valve added in 2000 would be "inequitable and inappropriate," it cites no authority in support of this argument. We stress that NCNG has argued on appeal only that the express terms of the easement permitted it to construct the safety valve and fenced enclosure above ground. As the Supreme Court emphasized in *Weyerhaeuser*, however, "[i]t is the province of the courts to construe and not to make contracts for the parties." 257 N.C. at 719, 127 S.E.2d at 541. We cannot, as a matter of contract law, rewrite the easement 46 years later in a manner inconsistent with the intent of the original parties. Accordingly, we hold that the trial court properly granted partial summary judgment to CFL on its claim for a mandatory injunction and on the issue of NCNG's liability for trespass.

Affirmed.

Judges HUDSON and THORNBURG concur.

Report per Rule 30(e).