

**STATE OF VERMONT
ORANGE COUNTY**

**JOSEPH TANSEY and
AMY TANSEY
Plaintiffs,**

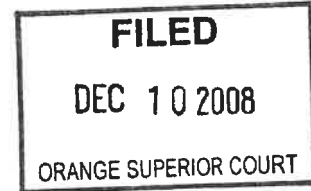
v.

**PAUL KRETSCHMER and
SUSAN KRETSCHMER
Defendants.**

v.

**HAROLD E. FISK and
JOYCE A. FISK
Third-Party Defendants.**

**Orange Superior Court
Docket No. 127-0-07 Oecv**



DECISION

**Defendants' Motion for Partial Summary Judgment filed May 8, 2008
Plaintiffs' Cross Motion for Summary Judgment filed June 27, 2008**

This action for ejectment and declaratory judgment concerns title to land located on Chelsea Road (also apparently also known as, or formerly known as, South Corinth Road), in the in the Town of Bradford, Vermont. The Plaintiffs, Joseph and Amy Tansey are represented by L. Brooke Dingleline, Esq., the Defendants Paul and Susan Kretschmer are represented by Frank H. Olmstead, Esq., and the third-party defendants Harold E. Fisk and Joyce A. Fisk are representing themselves. This matter comes before the court on cross motions for summary judgment filed by the Defendants and the Plaintiffs.

The undisputed facts are as follows:

In 1986, the defendants Paul and Susan Kretschmer made an offer to purchase land owned by Harold and Joyce Fisk. This land was a parcel consisting of approximately five acres that was part of larger parcel of land owned by the Fisks. Soon after making the offer, the Kretschmers learned that the land would have to be subdivided from the rest of the Fisk property and that in order to accomplish the subdivision, the Fisks would have to obtain a state land-use permit, including a plan for on-site water supply and septic disposal.

The Fisks filed for the permit. In that connection, Robert Carter, P.E., determined that the permit could not be issued for the parcel the Fisks had planned to sell because there was no suitable location on that parcel for either a septic system or a well. He advised the Kretschmers and the Fisks that a portion of the Fisks' adjoining cornfield, consisting of approximately ½ acre,

would have to be added to the original parcel and that the house, septic and well would have to be sited on that additional piece.

The subdivision plan was approved for the newly configured parcel, and on November 5, 1987, the Fisks delivered a deed to the Kretschmers. In 1992, the Kretschmers applied for a building permit and received approval. They constructed their house on the piece of land that was required to be added to the original parcel.

In 2000, the Fisks sold the 7-acre piece of land that lies to the west of the Kretschmer piece to Richard C. and Joanne B. Ballard.¹ The Plaintiffs Joseph and Amy Tansey took title to the Ballard piece on January 7, 2002, and in 2005, the Tanseys had their property surveyed by Thomas C. Otterman, a licensed surveyor. The survey indicated that the Tanseys, and not the Kretschmers, owned the parcel on which the Kretschmer house is located.

The Tanseys brought the present action against the Kretschmers on June 15, 2007. The action sounds in ejectment, and it seeks a declaratory judgment that the disputed ½-acre parcel belongs to the Tanseys. The Kretschmers filed a counterclaim. They claim that if the deed description does not include the disputed parcel, they have obtained title to it by adverse possession and they ask the court to reform the deed, if necessary, to include the disputed parcel. The Kretschmers also filed a third-party complaint in which they seek to hold the Fisks responsible in the event the Kretschmers suffer damage as a result of this lawsuit.

All of these claims and counterclaims hinge on the interpretation of one course contained in the Kretschmer deed. That course, which forms the western boundary of the Kretschmer piece and the eastern boundary of the Tansey piece, is described as follows:

“[Starting at] an iron pin at the edge of a barb wire fence [on the town road] thence turning an angle to the right [from the town road] and proceeding in a northerly and northwesterly direction, a distance of 625 feet, more or less, to a point where the cornfield and the West branch of the Waits River come together.”

In May 2008, the Kretschmers filed a motion for partial summary judgment, seeking to have the court declare that their deed from the Fisks includes the disputed piece where the Kretschmers' house is now situated. The Tanseys responded by filing a cross motion for summary judgment. Both motions must be denied.

In their motion, the Kretschmers rely on language in their deed that says, "These premises are subject to the conditions of land-use permit number EEC- 3-1437 dated August 14, 1987, issued by the Agency of Environmental Conservation." The Kretschmers argue that this language means that the deed description includes all the land that is the subject of the subdivision permit including the ½-acre parcel where their house is situated.

¹ In this opinion, to maintain consistency with the deed description, Chelsea Road will be considered as running generally in an east-west direction, even though in reality, the direction is northeast to southwest.

The Kretschmers mischaracterize the effect of the deed language. When a deed states that property is subject to the terms or conditions of something else, such as a permit, an easement, or a right of way, that language ordinarily operates to restrict the rights of the grantee; it does not define or clarify the bounds of the land granted and it cannot enlarge a grant. In the absence of direct clarifying language, i.e., something like, "Meaning to convey all the land that is the subject of land-use permit number EEC- 3-1437," the court cannot construe the reference to the subdivision permit to mean that the entire subdivision-approved piece was conveyed.

Regarding the location of the boundary line at issue, the Kretschmers have submitted extrinsic evidence in the form of various affidavits, and the Tanseys have submitted the Otterman survey and an affidavit from Otterman.

"Summary judgment is appropriate when the record clearly shows that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." *Madkour v. Zoltak*, 2007 VT 14, ¶ 12. Here, despite the evidence submitted by the parties, there are not sufficient undisputed facts to support a summary judgment. The disputed facts must be resolved by the trier of fact in the course of a trial in which a fuller evidentiary record can be developed.

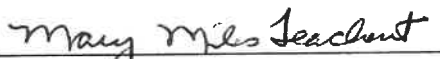
ORDER

For the foregoing reasons,

Defendants' Motion for Partial Summary Judgment filed May 8, 2008 is *denied*, and Plaintiffs' Motion for Summary Judgment filed June 27, 2008 is *denied*.

The parties shall complete mediation no later than January 16, 2009, unless an extension is granted by the court upon motion.

Dated at Chelsea, Vermont this 10th day of December, 2008.



Mary Miles Teachout
Superior Court Judge