

The Nature Conservancy,

v.

**Harland Cantin, Dorothy Cantin, Maudetta Taylor,
Nancy Ouelette, Kathaleen Ames and Glenn Towne**

No. 2007-323

Supreme Court of Vermont

April, 2008

NOT PRECEDENTIAL

Appealed from Essex Superior Court Docket No. 6-1-05 ExcV, Thomas A. Zonay, Trial Judge.

ENTRY ORDER

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

In this boundary dispute, property owners, Harland and Dorothy Cantin, appeal the superior court's order granting partial summary judgment to plaintiff, The Nature Conservancy. Property owners contend that summary judgment was inappropriate because there are disputed issues of material fact. We affirm.

The parties own adjacent land in Guildhall, Vermont. In January 2005, plaintiff filed an action against adjoining landowners, Taylor, Ouelette, Ames, Towne and the Cantins, alleging, among other things, that they had trespassed on plaintiff's property and removed timber. Plaintiffs sought a declaration of ownership and injunctive relief. The Cantins denied the allegations and disagreed with plaintiff's assertion of where the proper boundary line lay between the two properties.

The Cantins previously litigated their theory of where their property boundary line is located in an action against different neighbors. *Cantin v. Boucher*, No. S31-89 Ec (Vt. Trial Ct. October 26, 1992), affirmed by *Cantin v. Boucher*, No. 92-615 (Vt. Jan. 26, 1995). Because it is relevant to the trial court's findings in the current action, the facts of that case are briefly recited here. In their previous litigation, the Cantins brought suit against several of their neighbors, claiming a right to land that their neighbors recognized as their own. As the trial court explained in that case, the Cantins' theory of the proper boundary is based on their assertion that one of their lots, Lot 12, is approximately 50% wider than the neighboring lots. Therefore, the Cantins contend that the boundary of the adjoining lots is shifted half a lot to the west. The trial court found that the Cantins had hired several surveyors in an effort to support their

theory, but none of them found the Cantins' theory credible. In particular, the Cantins hired a surveyor named Sutherland. When the Sutherland survey depicted the property line in the place asserted by the Cantins' opponents, the Cantins sought still a different opinion and hired Glenn Towne. Towne rendered an opinion favorable to the Cantins' boundary theory. The court found, however, that the credible evidence did not support the Cantins' theory or Towne's survey. In a subsequent proceeding to determine whether to award attorney's fees, the trial court found that the Towne survey was based "on falsely manufactured evidence." *Cantin v. Boucher*, No. S31-89 Ec, slip op., ¶ 36 (Vt. Trial Ct. June 18, 1997).

In the present litigation, plaintiffs and defendants Taylor, Ames and Towne entered a settlement agreement on June 1, 2006. As part of the settlement, Towne withdrew the survey he had performed for the Cantins in June 1992. In addition, Taylor, Ames and Towne all agreed that the correct boundaries of plaintiff's property is depicted in a survey dated October 26, 2004 done by Norbert Blais.

Plaintiff continued to prosecute its suit against the Cantins and in June 2006, plaintiff sought partial summary judgment on the issue of the location of the boundary between its lot and the Cantins' lot. In support of its motion for summary judgment, plaintiff submitted a survey drawn by Norbert Blais. This survey depicted the boundary line consistent with the earlier Sutherland survey. In response, the Cantins relied on the 1992 Towne survey to support their position of the proper boundary line.

The trial court granted plaintiff partial summary judgment on the location of the boundary line. Although the court recognized that the Cantins disputed the location of the property line, it held that the Cantins had the burden of presenting expert opinion to support their position and concluded that the Cantins were precluded from relying on the Towne survey for this purpose for several reasons. First, the court concluded that the doctrine of issue preclusion barred the Cantins from relying on the Towne survey because in the first litigation the court "directly and unambiguously discredited" it. Second, the court found the Towne survey unreliable because its author, Glenn Towne, disclaimed the accuracy of the work as part of his settlement with plaintiff. The court granted plaintiff's request for a final judgment order, and the Cantins appealed.

We review an appeal from summary judgment de novo and apply the same standard as the trial court. *O'Donnell v. Bank of Vt.*, 166 Vt. 221, 224 (1997). A party is entitled to summary judgment if there are no genuine issues of material fact and the party is entitled to judgment

as a matter of law. V.R.C.P. 56(c)(3). "In determining whether material facts exist for trial, we must resolve all reasonable doubts in favor of the party opposing summary judgment." *O'Donnell*, 166 Vt. at 224.

We conclude that there are no genuine issues of material fact, and that the trial court appropriately granted summary judgment. The material issue in the case is the location of the boundary between plaintiff's property and the Cantins' property. Plaintiff's statement of uncontested material facts contained the following statement: "The location of the Plaintiff's property is accurately reflected on the Blais plan." Plaintiffs attached, among other things, an affidavit from Norbert Blais, a licensed land surveyor who surveyed plaintiff's property and his survey depicting the boundaries of plaintiff's land. In response, the Cantins alleged that the Blais plan was invalid. As part of their answer, the Cantins also relied on the previous survey drawn by Towne, but did not otherwise respond to the affidavit of Norbert Blais.

When a motion for summary judgment is supported by affidavits, the opposing party may not rest upon mere allegations or denials of the adverse party's pleading, but must set forth specific facts showing there is a genuine issue through affidavits. V.R.C.P. 56(e). These supporting affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." V.R.C.P. 56(e).

We conclude that the Cantins may not rely on the Towne survey because the validity of this survey has been discredited in previous litigation, and the Cantins are now barred by issue preclusion from relitigating the issue. Without the survey, the Cantins have no basis to dispute the validity of the Blais survey and the property boundary depicted therein. Therefore, summary judgment on this issue is appropriate.

Issue preclusion bars relitigation of an issue that was actually litigated and decided in a prior case where that issue was necessary to resolution of the dispute. *In re Armitage*, 2006 VT 113, ¶ 4, 181 Vt. 241. For preclusion to apply, the issue must meet the following conditions:

(1) it is asserted against one who was a party in the prior action; (2) the same issue was raised in the prior action; (3) the issue was resolved by a final judgment on the merits in the prior action; (4) there was a full and fair opportunity to litigate the issue; and (5) its application is fair.

Id. All of these elements are met and discussed in turn.

First, as the plaintiffs therein, the Cantins were parties in the prior action. It is not necessary that the plaintiff in

this case was a party in the previous action because this requirement applies to the party to be bound by the earlier litigation, not the party asserting issue preclusion. *Scott v. City of Newport*, 2004 VT 64, ¶ 9, 177 Vt. 491 (mem.). Second, the same issue—whether the Towne survey accurately depicts the boundaries of the Cantins' property—was raised in the prior litigation. Although the Cantins argue that the *Boucher* case was about a different boundary and therefore inapplicable, the Cantins advanced the same boundary theory and relied on the same survey they are attempting to rely on again in this case. Therefore, we conclude that the same essential issue from the previous litigation is the one the Cantins are now attempting to relitigate. *See id.* ¶ 13 (explaining that it is of no matter if the cases arose in different contexts, as long as the issue is the same). Third, there was a final judgment in the prior litigation. And, finally, the Cantins had a full and fair opportunity to litigate the issue, and the application of issue preclusion in this case is fair. The proceeding took place in superior court with the same standard of proof as in this case, the Cantins had a full opportunity to litigate the issue in the previous case, and the Cantins actively participated in the prior proceeding. *See id.* ¶ 15 (listing considerations in evaluating the final two factors). As the trial court observed, "[the Cantins] enjoyed more than a full and fair opportunity to litigate the issues in the *Boucher* matter—so much so that the *Boucher* court noted that [the Cantins'] conduct in relying on the 'falsely created' evidence prevented summary termination of that matter." Under these circumstances, we conclude that issue preclusion bars the Cantins from relying on the Towne survey in this case.

Without the Towne survey, the Cantins lack evidence to rebut the location of the boundary line depicted in the Blais survey and to create a triable issue of fact. *Gore v. Green Mountain Lakes, Inc.*, 140 Vt. 262, 266 (1981) ("Time and again we have held that the opponent to a summary judgment motion may not rest on allegations in the pleadings to rebut credible documentary evidence or affidavits."). Therefore, there is no issue of material fact on the location of the boundary between the parties, and the court properly granted summary judgment.

The Cantins cite several other disputed facts; however, we conclude that these facts are similarly without documentary support, or are not material to this dispute. We briefly address these claims. The Cantins' contention that plaintiff is not the owner of Lot 15, Range 6 in Guildhall is not disputed; the Cantins have submitted no evidence to contradict plaintiff's deed. The Cantins' claims that some of the other defendants were coerced into signing a stipulation with plaintiffs are mere allegations and are not supported by any evidence. *See id.* ("Allegations alone cannot create triable issues of fact."). Finally, the Cantins' challenge to the validity of the Blais survey because counsel placed reference points on the survey for purposes of a request to

admit is without merit. These markings do not make the survey fraudulent and do not provide a basis to discredit it.

The Cantins' remaining arguments are similarly without merit. The Cantins argue that plaintiff's timber trespass claim is barred by the statute of limitations. Because the trial court did not address the timber trespass claim in its order granting partial summary judgment, there is no final order on the issue, and it is not before us on appeal. We are also not persuaded by the Cantins' argument that plaintiff lacks standing to bring this claim. The Cantins' assertion that they owned land claimed by plaintiff and plaintiff's allegation that the Cantins were trespassing onto its land, created a "particular injury that is attributable to [the Cantins] and that can be redressed by a court of law." *Bischoff v. Bletz*, 2008 VT 16, ¶ 15 (quotations omitted). This was sufficient to establish plaintiff's standing.

Affirmed.

Paul L. Reiber, Chief Justice, Denise R. Johnson, Associate Justice, Brian L. Burgess, Associate Justice.