Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-362

MARCH TERM, 2006

Lamoille Valley Property Owners= Association } APPEALED FROM:

}

}

v. } Lamoille Superior Court

}

Thomas Fuss and Christina Fuss }

} DOCKET NO. 259-12-02 Lecv

Trial Judge: Howard E. VanBenthuysen

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

Defendants Thomas and Christina Fuss appeal pro se from a superior court order denying their motion for an award of costs, attorneys= fees, and punitive damages. We affirm.

This case began when plaintiff Lamoille Valley Property Owners= Association (Association), which represents property owners in a development known as Ten Bends in the Town of Hyde Park, filed a complaint for declaratory and injunctive relief against defendants, who own a parcel within the development. The complaint alleged that an intersection between Town Highway 59 and an access road to the development is located on defendants= property; that the access road benefits other lots owned by members of the Association;

and that defendants were in the process of seeking municipal approval to relocate the intersection, contrary to the terms of their deed, and without the requisite consent of other owners who benefit from the access road.

Defendants answered and counter-claimed, and subsequently moved for summary judgment, arguing that they were entitled under the plain terms of their deed to relocate the intersection anywhere they wished on their property. The Association opposed the motion, arguing that any deeded right to relocate was personal to defendants= predecessor-in-interest and did not run with the land, and that the Association did not have the authority in the first instance to grant the right to unilaterally relocate the intersection.[1] The Association noted that the deeds of the other lot owners granted them common access to the road, and argued that their consent was therefore required for any relocation that would affect the common right-of-way.

The trial court (Judge Cheever) denied defendants= motion for summary judgment, finding that it was unclear from the face of their deed whether the right to relocate the intersection ran with the land and whether the Association had the authority to grant rights in an easement to one property owner that affected all of the other property owners. The Association later filed its own motion for summary judgment. The court (Judge VanBenthuysen) not only denied the Association=s motion, but also invited defendants to file a request to reconsider Judge Cheever=s earlier ruling. Defendants did so, and the court subsequently issued a written decision granting their motion for summary judgment. The court concluded that the deed language authorizing defendants to relocate the intersection was clear and unambiguous; that the deed contained additional language plainly indicating that the right runs with the land; and that there was no support for the Association=s claims that it lacked authority to grant a unilateral right to relocate the road, or that the other owners= consent was required. The court issued a supplemental order clarifying its decision to mean that the Association and its members were no longer entitled to use the old intersection and access road.

Following the court=s decision, defendants filed a pro se motion requesting an award of costs, attorneys= fees, and punitive damages.[2] The court denied the motion in a brief entry order stating that it did Anot find the kind of bad faith here necessary to justify a departure from the American Rule.@ This appeal of the court=s ruling on costs and fees followed.

We address preliminarily the Association=s claim, raised for the first time in its appellee=s brief, that the appeal should be dismissed because it is not from a final order. Although it appears that the court intended its summary judgment order to be finalCthe docket entries include the notation ASummary Judgment for Defendant. Case closed@Cthe court did not sign, and the clerk did not enter, a final judgment, as required by V.R.C.P. 58. AWithout such an order, the docket entry of the court=s decision does not constitute entry of judgment and does not commence the running of the appeal period.@ Powers v. Hayes, 170 Vt. 639, 640 (2000) (mem.). Nevertheless, because it does not appear that any material issues remain to be decided, the parties have briefed the issue on appeal, and a dismissal for entry of a final judgment would merely postpone our decision and incur additional costs, we exercise our authority under V.R.A.P. 2 to suspend the rules for good cause in order to address the instant appeal. See State v. CNA Ins. Cos., 172 Vt. 318, 322-23 (2001).[3]

Defendants= principal claim is that the court erred in denying their request for attorneys= fees. As the trial court correctly observed, however, under the AAmerican Rule@ that we follow in Vermont a party is generally not entitled attorneys= fees, regardless of the outcome, Aabsent a specific statutory provision or an agreement of the parties. Galkin v. Town of Chester, 168 Vt. 82, 91 (1998). In their motion, defendants did not argue that they were entitled to attorneys= fees under any statutory provision or agreement between the parties. Nevertheless, on appeal they assert that the standard provision of their warranty deed committing the grantor, the Association, to ADEFEND . . . against all lawful claims whatever@ represents such an agreement. This claim was not raised below, however, and therefore was not preserved for review on appeal. Monahan v. GMAC Mortgage Corp., 2005 VT 110, & 74. Furthermore, we note that the deed provision represents a warranty of title, not an undertaking to pay attorneys= fees in a dispute between the grantor and grantee over the meaning and scope of an easement within the deed. The decision cited by defendant, Keeler v Wood, 30 Vt. 242, 244 (1858), allowed recovery of damages, including attorneys= fees, in an action for breach of a covenant of title. That was not the claim here. See Albright v. Fish, 138 Vt. 585, 588-89 (1980) (distinguishing Keeler as limited to actions for breach of covenant of title and rejecting claim for attorneys= fees in action for breach of restrictive covenant).

Defendants also contend the court erred in finding that the Abad faith@ exception to the American Rule had not been met. See Cameron v. Burke, 153 Vt. 565, 576 (1990) (courts Amay grant [attorneys=] fees in exceptional cases as justice requires,@ such as where a litigant acts in bad faith, or vexatiously, or where a litigant=s conduct is obdurate). Although defendants allege that the Association=s lawsuit was patently unfounded, subjected them to multiple, unnecessary rounds of litigation, and contained an element of malice, the record does not support the claim. Indeed, the court initially denied defendants= motion for summary judgment, and although it later (under a different judge) concluded that the deed unambiguously favored defendants, the record does not demonstrate that the Association=s arguments were frivolous, made in bad faith, or advanced for improper purposes. Accordingly, we find no abuse of discretion. See Burlington Free Press v. Univ. of Vt., 172 Vt. 303, 307 (2001) (we review trial court=s discretionary ruling on award of attorneys= fees solely to determine whether court failed to exercise discretion or exercised it for reasons clearly untenable or unreasonable).

Defendants also contend the court erred in declining to award costs. The trial court enjoys broad discretion in a declaratory judgment action to award such costs Aas may seem equitable and just,@ 12 V.S.A. ' 4720, and its decisionCas in any other type of proceedingCwill not be disturbed absent an abuse of discretion. See Peterson v Chichester, 157 Vt. 548, 553 (1991) (although plaintiff prevailed at trial, court did not abuse discretion in denying award of costs); In re Gadhue, 149 Vt. 322, 327 (1987) (court enjoys broad discretion in awarding costs in litigation). Apart from seeking attorneys= fees, which are not generally included among a party=s Acosts, @ State v. Champlain Cable Corp., 147 Vt. 436, 438 (1986), defendants did not enumerate or substantiate in their motion any specific litigation costs incurred in the proceeding. For this reason, as well as those cited by the trial court in declining to award attorneys= fees, we cannot conclude that the court abused its discretion in failing to award costs.

Finally, defendants contend the court erred in failing to award them punitive damages. The claim lacks merit for two reasons. First, in their motion for costs and damages defendants did not cite any evidence to support an award of compensatory damages, and the court did not award compensatory damages, which are a prerequisite to punitive damages. Sweet v.Roy, 173 Vt. 418, 447 (2002). Second, defendants have not shown that defendants acted with such malice as to warrant a conclusion that the court abused its discretion in declining to award punitive, much less compensatory, damages. See Wharton v. Tri-State Drilling & Boring, 2003 VT 19, & 19, 175 Vt. 494 (mem.) (award of punitive damages requires showing of malice, and such damages are awarded at the trial court=s discretion). In support of their claim of malice, defendants refer to an e-mail from an officer of the Association which was attached as an exhibit to their memorandum submitted in response to the court=s invitation to reopen the motion for summary judgment. Defendants did not cite or rely upon the e-mail in support of their motion for costs and damages, and therefore cannot rely upon it on appeal. Monahan, 2005 VT 110, & 74. We observe, however, that the e-mail in question, which states the author=s view that the road issue is less important than dealing with the contentious relationship between defendants and the Association, does not demonstrate that the court clearly erred in failing to find malice. Accordingly, we discern no basis to disturb the judgment.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Denise R. Johnson, Associate Justice

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Brian L. Burgess, Associate Justice

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[1] The 1990 deed from the Association to George and Aimee Stearns, defendants= predecessor-in-interest, provided that the A[g]rantees shall be entitled, at their sole cost and expense, to relocate the existing intersection of the access road with current Town Highway No. 59 from its present location as shown on the survey plan . . . in a southerly direction to a point located between said present location@ and a certain point on Town Highway 59. The deed from the Stearns to defendants expressly preserved the rights, covenants and agreements contained in the prior deed from the Association to the Stearns.

[2] Although defendants had been represented by counsel thoughout the summary judgment proceedings, counsel later moved to withdraw, the court granted the request, and defendants thereafter appeared pro se.

[3] Although the Association cites language from the court=s last entry order referring to the possibility of Afurther proceedings in this, and ultimately, at the Supreme Court,@ nothing in the court=s decision indicates that issues remained to be resolved at trial, and the Association has not demonstrated otherwise.