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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-452

MAY TERM, 2002

Agency of Natural Resources v. Hodgdon Brothers, Inc. and Darcy Hodgdon	}	APPEALED FROM: Washington Superior Court DOCKET NO. 291-5-99 Wncv Trial Judge: Matthew I. Katz

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

Plaintiff State of Vermont appeals from the superior court's order dismissing its collection action against defendants Hodgdon Brothers, Inc. and Darcy Hodgdon. We affirm.

In 1991, defendants obtained a land-use permit authorizing construction of a 8400-square-foot recycling building on its property. Some time between the summer of 1991, when the building was constructed, and March 1993, defendants scraped, widened, or graded roads and roadway ditches on the property, removing vegetative cover in the process. In March 1993, heavy precipitation caused storm water pooling and damage to the culvert on nearby Route 5, as well as large deposits of storm water and silt on a nearby property. As the result of the flooding, defendants were ordered to file a professionally written storm water management plan and to apply for an amended land-use permit. When defendants failed to file requested additional information in connection with their permit application, the district coordinator issued an administrative order imposing a $27,500 penalty. Defendants appealed to the environmental court, which issued its decision on December 27, 1995 imposing a $27,396.67 penalty, but allowing defendants to reduce the penalty by any funds already expended or to be expended in the following year on reinstallation of the culvert on Route 5. The court's order stated that if defendants wanted to reduce the penalty amount through a credit for monies paid or to be paid for repairing the culvert, they would have to file an affidavit from an Agency of Transportation (AOT) official, on or before February 1, 1996, accounting for the set-off amounts. Defendants appealed, and a three-justice panel of this Court affirmed the decision in an April 3, 1997 entry order.

After correspondences were filed between defendants and the environmental board concerning defendants' efforts to solve the flooding problem on Route 5, the State filed the instant action against defendants in May 1999 seeking payment of the $27,396.67 judgment plus interest. The superior court determined that the issue was how much money defendants had spent by the end of 1996 on repair of the culvert, and gave defendants several opportunities to submit evidence of monies spent toward that end. In an August 24, 2001 order, following a hearing, the superior court dismissed the case, concluding that defendants had paid all the sums toward repair of the culvert that they had claimed, which exceeded the penalty amount. The State appeals, arguing that the superior court (1) erred by not applying the doctrine of issue preclusion to defendants' claim that they were entitled to a credit against the penalty for sums expended on repairing the culvert; (2) incorrectly found that defendants were entitled to a credit for the entire penalty owed; and (3) abused its discretion by failing to add accrued interest to the amount of the penalty owed.

The State first argues that the superior court erred by not applying the doctrine of issue preclusion to defendants' claim that they were entitled to a credit against the penalty for sums paid to repair the culvert. We conclude that the State failed to preserve this argument. Although it briefly noted in its motion for summary judgment that the issue had been litigated in the underlying case, the State neither referenced the doctrine of issue preclusion nor examined the doctrine's

criteria, as it has done here on appeal. At best, as the State itself concedes, it merely implied an argument based on issue preclusion. "To properly preserve an issue for appeal a party must present the issue with specificity and clarity in a manner which gives the trial court a fair opportunity to rule on it." State v. Bent-Mont Corp., 163 Vt. 53, 61 (1994). That was not done here.

In any event, the State's argument is not persuasive. The doctrine of issue preclusion "bars the subsequent relitigation of an issue that was actually litigated and decided in a prior case between the parties." Bull v. Pinkham Eng'g Assocs., 170 Vt. 450, 461 (2000). Here, the issue concerning the extent to which defendants satisfied the court's order with respect to credits for sums expended to repair the culvert was not litigated in the previous action, nor could it have been because the environmental court order intended that credits be applicable until the end of 1996, a year after issuance of the order. Thus, even if it had been properly raised, the State's issue preclusion argument is unavailing.

Next, the State argues that the trial court erred in dismissing the case in its entirety because defendants' evidence of funds expended and the value of goods transferred was less than the amount of the penalty. The State contends that, following the June 22, 2001 hearing, defendants presented evidence of expenses totaling only $18,536, $8860.67 less than the penalty amount. Again, we disagree. In its December 12, 2000 order, the superior court required defendants to present admissible evidence of sums spent in the form of canceled checks, invoices, or other evidence of expenditures. Defendants presented evidence of funds expended, services rendered, and goods transferred totaling $28,036 more than the penalty amount. In its February 8, 2001 order, the court questioned the applicability of $8000 claimed with respect to an agreement between defendants and New England Wireless. Defendants submitted to the court a written explanation of the claim. Following the June 22 hearing, in its final order dismissing the case, the court found that defendants actually paid "all the sums it says that it did" as a credit against the penalty. Obviously, the court accepted defendants' explanation for the $8000 they claimed with respect to the Wireless agreement and further accepted a $1500 invoice for surveying work. The State has not shown that the court's acceptance of these sums was clearly erroneous. See Agency of Natural Res. v. Glen Falls Ins. Co., 169 Vt. 426, 432 (1999) (trial court's findings will not be set aside unless they are clearly erroneous, and its conclusions will not be disturbed as long as they are supported by its findings).

The State argues for the first time in its reply brief that we must reverse the superior court's dismissal of the State's action because, under the environmental court's order, the only credits available were those verified by an AOT official on or before February 1, 1996 and none were. The argument is waived because it was not directly raised in the State's opening brief. See id. at 435. In any event, considering that defendants appealed the environmental court's order, see 10 V.S.A. § 8013(d) (appeal to supreme court shall not stay environmental court's order, but shall stay payment of penalty), and that the superior court concluded that defendants had actually made payments toward repair of the culvert in the amount they claimed, the court did not abuse its discretion in ignoring the environmental court provision requiring defendants to obtain AOT verification of pre-1996 expenditures.

Finally, the State argues that the superior court abused its discretion by failing to grant the State accrued interest on the penalty. Given the court's conclusion that defendants had expended sums, rendered services, or transferred assets by the end of 1996 in an amount exceeding the penalty imposed, it did not abuse its discretion by failing to impose interest on those expenditures made after the December 27, 1995 order but before the end of 1996.

Affirmed.

BY THE COURT:

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James L. Morse, Associate Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice