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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-333

APRIL TERM, 2008

Herbert Childs and Isabel Childs	}	APPEALED FROM:
	}	
	}	
v.	}	Windham Superior Court
	}	
	}	
Steven Valente	}	DOCKET NO. 503-12-05 Wmcv
		Trial Judge: John P. Wesley

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

Plaintiffs Herbert and Isabel Childs appeal from a judgment in favor of defendant Steven Valente and a subsequent order denying a motion to amend their complaint. Plaintiffs contend the court erred in finding that defendant owed no duty to control the conduct of others that resulted in damage to plaintiffs' residence, and abused its discretion in denying the motion to amend. We affirm.

The undisputed material facts may be summarized as follows. Plaintiffs own a residential unit adjacent to their home in West Dover. In November 2004, they rented the unit to defendant. On the evening of March 13, 2005, a fire erupted in plaintiffs' garage. Plaintiffs claim that the fire was the result of smoldering ashes from the rental unit's fireplace that were negligently placed in plastic garbage bags and then stored in the garage. Plaintiffs' complaint alleged that defendant had negligently placed the ashes in the garbage, but defendant denied handling the bags himself and plaintiffs adduced no evidence to contradict him, asserting instead in a subsequent pleading that one of defendant's guests during the period in question must have done so. The complaint sought damages for injuries suffered by plaintiff Herbert Childs in attempting to extinguish the fire, and for loss of consortium suffered by plaintiff Isabel Childs.

Defendant moved for summary judgment, asserting that he had breached no duty of care, and that he had no common law or contractual duty to control the actions of his guests. Plaintiffs opposed the motion, asserting that a tenant owes a duty arising, variously, from principles of tenancy and the law of negligence, not to damage the premises or injure the landlord, and may be liable for damage caused by third persons who are not strangers. They relied in this regard on the doctrine of res ipsa loquitor, and Prevo v. Evarts, 146 Vt. 216, 228-29 (1985), which held that a tenant could be liable for waste committed by his girlfriend's sons and their friends who were on the premises with the tenant's permission. In a written decision filed on June 20, 2007, the trial

court granted defendant's motion, ruling that, subject to certain exceptions not applicable here, Vermont law imposes no duty to control the conduct of another in order to protect a third person from harm, and that defendant therefore could not be held responsible for the fire. The court distinguished Prevo and several additional out-of-state cases cited by plaintiffs, finding that they could not "reasonably be stretched" to apply to harm caused to property or persons outside the confines of the leased premises. Based on its summary judgment ruling, the trial court issued a final judgment order on June 28, 2007, which stated that "final judgment is hereby entered in favor of Defendant Steven Valente and this action against him is hereby dismissed with prejudice."

On July 3, 2007, plaintiffs moved to amend their complaint to add a claim of waste. Defendant opposed the motion, asserting that it was "procedurally defective" because the case had already been dismissed with prejudice, that the court had considered and rejected the claim plaintiffs wished to add, and that the motion was unduly delayed, futile, and would result in prejudice to defendant. On July 31, 2007, the court issued an entry order denying the motion to amend. The court observed that plaintiffs had "provide[d] no support for the proposition that a complaint may be amended following the grant of summary judgment which had completely disposed of the claims for relief as originally framed." The court also found that plaintiffs had unduly delayed in asserting the claim for waste, and that the amendment would be futile in any event, as the court had already considered and distinguished the authority in support of the claim sought to be added.

Plaintiffs filed a notice of appeal on August 23, 2007. Defendant, in response, moved to dismiss the appeal as untimely, noting that the appeal was filed more than 30 days after the final judgment order issued on July 3, 2007. On September 21, 2007, we issued an order granting defendant's motion, explaining that a motion to amend does not toll the period for filing a notice of appeal. Plaintiffs thereupon moved for reconsideration, pointing out that the appeal was filed within 30 days of the order denying the motion to amend, and requesting that we reconsider our order "insofar as it dismissed their appeal of the denial of their motion to amend the complaint." We granted the motion and reinstated the appeal as requested.

Plaintiffs raise two claims on appeal. They contend that the judgment in favor of defendant was erroneously based on disputed findings of fact and a misinterpretation of the law governing the scope of a tenant's duty of care. As noted, however, the appeal from the final judgment was dismissed as untimely, and therefore the claim is not properly before us.

Plaintiffs also contend the court abused its discretion in denying their motion to amend the complaint. Our review of such rulings is generally quite limited. As we explained in Hickory v. Morlang, 2005 VT 73, ¶ 5, 178 Vt. 604 (mem.): "[w]hile we have instructed the trial courts to be liberal in allowing a party to amend its pleadings, we will reverse a court's decision to deny such a motion only where there is an abuse of discretion." The trial court here suggested, however, that the question had less to do with its discretion to grant the motion than its actual authority to do so once a final judgment has been entered. Apart from providing that a court may grant such a motion "when justice so requires," however, V.R.C.P. 15(a) is silent on this issue and we have not previously considered it, although we note that many federal circuits and a number of state courts interpreting identical rules have addressed the question. See State v. Oscarson, 2006 VT 30, ¶ 11, 179 Vt. 442 (recalling that while we are not bound by

interpretations of similar or identical federal rules in federal courts, we frequently consult and follow their rulings when they are persuasive).

In this regard, the federal courts have consistently held that, once a final judgment has been entered and the case dismissed with prejudice, there is essentially nothing left for the court to act on in response to a motion to amend. Accordingly, a plaintiff in such circumstances must either appeal the judgment or, if it wishes to amend the complaint, must first move to vacate or set aside the judgment under Rule 59(e) or 60(b). As the court in Paganis v. Blonstein, 3 F.3d 1067, 1072 (7th Cir. 1993), succinctly stated, "once a district court enters judgment upon a dismissal . . . the plaintiff may amend the complaint under Rule 15(a) . . . solely with 'leave of court' after a motion under Rule 59(e) or 60(b), Fed.R.Civ.P., has been made and the judgment has been set aside or vacated." (emphasis omitted). Accord Ahmed v. Dragovich, 297 F.3d 201, 208 (3d Cir. 2002); Lindauer v. Rogers, 91 F.3d 1355, 1357 (9th Cir. 1996); see also Wilcox v. Reconditioned Office Systs. of Colo., Inc., 881 P.2d 398, 400 (Colo. Ct. App. 1994) ("We agree with the conclusion reached by most federal courts that once a final judgment is entered, an amendment should not be allowed unless the original judgment is set aside or vacated under [Rule] 59 or 60(b)."); Jackson v. Russell, 491 N.E.2d 1017, 1020 (Ind. Ct. App. 1986) (adopting rule applied in most federal cases that trial court may not consider motion to amend complaint under Rule 15(a) after a final judgment has been entered unless the judgment has been vacated or set aside under Rule 59 or 60); Chokel v. Genzyme Corp., 867 N.E.2d 325, 331 (Mass. 2007) ("Once a claim has been dismissed, a court must first set aside judgment under Rule 59(e) or 60(b) before allowing a claim to be amended."); Greene v. Eighth Jud. Dist. Ct. of Nev., 990 P.2d 184, 185 (Nev. 1999) (adopting federal rule "that a trial court cannot allow amendment of the complaint unless the final judgment is first set aside or vacated under Rule 59(e) or 60 (b)"); see generally 6 C. Wright et al., Fed. Practice & Procedure § 1489 (2d ed. 1990) at 692-93 ("Most courts faced with the problem have held that once a judgment is entered the filing of an amendment cannot be allowed until the judgment is set aside or vacated under Rule 59 or Rule 60.").

This rule is generally viewed as essential to maintain the integrity of final judgments, while also providing some leeway to the otherwise liberal amendment policy embodied in Rule 15(a). See Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1111 (7th Cir. 1984) (observing that the rule "represents a compromise between the liberal amendment policy of [Rule 15] and the general judicial policy relating to quiescence and the finality of judgments") ; 6 C. Wright, supra, § 1489 at 694 ("To hold otherwise would enable the liberal amendment policy of Rule 15(a) to be employed in a way that is contrary to the philosophy favoring finality of judgments and the expeditious termination of litigation.").

Consistent with the weight of authority, therefore, we conclude that the trial court here was correct in effectively ruling that it lacked authority to amend the complaint after the final judgment was issued and while it remained in effect. Plaintiffs have not argued that we should construe the motion to amend as a motion to vacate or set aside the judgment, nor have they attempted to meet the more stringent standards applicable to such motions. Accordingly, we uphold the trial court order denying the motion to amend on this basis.

We conclude, as well, that even if we were to consider the merits of the motion, our decision would remain unaltered. In determining whether to allow a party to amend its

complaint, the trial court considers a number of factors, including any undue delay in bringing the motion, prejudice to the party opposing, and whether under the circumstances such an amendment would be futile. Hickory, 2005 VT 73, ¶ 5. The trial court here accurately observed that, in the course of granting the motion for summary judgment, it had already considered and rejected the authority advanced by plaintiffs in support of the claim for waste set forth in their amended complaint. Thus, the court correctly concluded that granting the motion to amend would be an exercise in futility, and properly denied it on this ground as well. Thus, we find no basis to disturb the court's ruling.

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