

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-375

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

MARCH TERM, 2009

MAR 5 2009

Michael Garbitelli, Joseph Garbitelli, Steven Garbitelli, Elizabeth Garbitelli, and Thomas Garbitelli	}	APPEALED FROM:
	}	
v.	}	Orange Superior Court
	}	
Central Vermont Public Service, Inc.	}	DOCKET NO. 101-6-06 Oecv

Trial Judge: Theresa S. DiMauro

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

Plaintiffs appeal pro se from a superior court order dismissing their trespass action against defendant Central Vermont Public Service, Inc. Plaintiffs contend that the court erred in dismissing the action for failure to prosecute and comply with court orders under V.R.C.P. 41(b)(2).¹ We affirm.

In June 2006, plaintiffs filed a complaint in superior court alleging that CVPS had trespassed on their property and trimmed trees without legal right or authority. All five plaintiffs are siblings who obtained title to the property from their parents, Vincent and Catherine Garbitelli. In July 2006, the court denied plaintiffs' motion for a temporary restraining order to prevent CVPS from entering the property. In June 2007, plaintiffs' counsel moved to withdraw, citing a potential conflict of interest arising from the fact that he had previously represented Vincent Garbitelli in another matter and might be compelled to file suit against him for defect of title in connection with the CVPS case. The trial court conditionally granted the motion, ordering counsel to assist plaintiffs in finding substitute counsel and ruling that it would grant final approval once that had been accomplished. Counsel filed a renewed motion in September 2006, indicating that plaintiffs had not cooperated with him in finding substitute counsel. Following a hearing in October 2007, the court granted the motion, advising plaintiffs to file notices of pro se appearance within thirty days. At the hearing, the court repeatedly admonished Vincent Garbitelli, who was present with plaintiff Michael Garbitelli, that he was not a party to the suit and could neither speak to the issues nor represent Michael. Pro se appearance forms were mailed to the parties following the hearing.

CVPS moved for summary judgment in October 2007, alleging that it held a valid easement across plaintiffs' property entitling it to install and maintain a power line. Thereafter, in late November 2007, CVPS moved to dismiss the action on the ground that plaintiffs had failed to file notices of appearance as required by the court and V.R.C.P. 79.1(g) (providing that when an attorney has been granted leave to withdraw, the clerk shall notify the party that failure to file a pro se appearance within thirty days will result in dismissal or default). In its motion, CVPS also noted that, contrary to the court's earlier admonition, plaintiffs had filed two documents in opposition to the

¹ This section provides that a defendant may move for dismissal of any claim "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of the court." V.R.C.P. 41(b)(2).

motion for summary judgment, one signed by Vincent Garbitelli purportedly on behalf of Michael Garbitelli, and another signed by Michael Garbitelli purportedly on behalf of the other family members.

In January 2008, the court issued a written decision, denying the motion to dismiss, and granting partial summary judgment in favor of CVPS. In denying the motion to dismiss, the court observed that plaintiffs had finally filed their notices of pro se appearance, but again warned plaintiffs that they could not represent each other because they were not attorneys. As for the summary judgment motion, the court concluded that CVPS had established the existence of a valid easement, but that issues remained as to whether all of CVPS's maintenance activities were within the scope of the easement.

The day after the court's ruling, the clerk of the court mailed to the parties a discovery/alternative dispute resolution stipulation and order with directions to file the form with the court within thirty days. See V.R.C.P. 16.3(c) (requiring filing of stipulation for alternative dispute resolution (ADR)). The following month, counsel for CVPS sent plaintiffs a discovery schedule and list of proposed mediators with a request that they individually review and execute it if it met with their approval, but plaintiffs did not respond. In May 2008, plaintiffs filed their responses to CVPS's first set of interrogatories. Michael Garbitelli purported to respond on behalf of Stephen. Their answers labeled nearly every request and interrogatory as irrelevant.

In July 2008, the court held a status conference. Vincent Garbitelli again appeared at the hearing purporting to represent Michael pursuant to a "power of attorney" executed by the latter. The court explained that this document did not authorize Vincent to represent Michael in court. The court further noted that none of the plaintiffs was present, that the case had been pending for over two years, and that plaintiffs had failed to return the discovery schedule and mediation stipulation. CVPS thereupon moved to dismiss for lack of prosecution. The court reserved ruling on the motion but scheduled another status conference for August 18, 2008, warning that it would grant the motion to dismiss if all of the plaintiffs were not present for the hearing. The court thereafter issued an order requiring that all plaintiffs appear at the August 18, 2008 conference with the exception of Joseph Garbitelli, who was granted permission to appear by telephone based on his active military status. Shortly thereafter, CVPS filed a written motion to dismiss and for costs.

At the August 18, 2008, conference, plaintiffs Michael, Thomas, and Elizabeth Garbitelli were present, but the court noted that it had received a fax that morning from plaintiff Stephen Garbitelli stating that he was in Maine and offering to participate by telephone. Plaintiff Michael Garbitelli represented to the court that Stephen was starting a new job and that it would have been difficult for him to appear. After reviewing the procedural history of the case, the court found that plaintiffs had failed to comply with its previous orders requiring their appearance and the filing of the ADR stipulation. Accordingly, the court granted CVPS's motion and awarded costs of \$753. This appeal followed.

In their pro se appeal, plaintiffs raise a number of separate claims, although most appear to center on the court's actions in dealing with their pro se status. We review the trial court's ruling solely for abuse of discretion. See State v. Snide, 144 Vt. 436, 440 (1984) ("A motion under V.R.C.P. 48(b)(2) is [] an exercise of the trial court's discretion and, absent abuse, will be upheld on appeal."). Abuse is generally defined as "the purported exercise of discretion on grounds or for reasons clearly untenable, or to an extent clearly unreasonable." In re Lunde Const. Co., 139 Vt. 376, 379 (1981). Applying this standard, we discern no abuse. As the procedural history of this case makes clear, the trial court had warned plaintiffs numerous times before the final status conference that they were required to appear and to file their ADR and discovery forms at the status conference or the matter would be dismissed. Despite the court's order, the forms were not filed. "A

trial judge acts well within his duties to assure that the most effective use be made of the court's resources[,] to supervise and control the movement of all cases on its docket from the time of filing through final disposition, and to apply sanctions when reasonable efforts to manage the court's caseload have failed." State v. Jones, 157 Vt. 553, 558-59 (1991) (quotations and emphasis omitted). Plaintiffs have not shown that the court's ruling here was an untenable or unreasonable response to plaintiffs' continued failure to comply with the court's efforts to ensure the expeditious prosecution of the case. Accordingly, we find no abuse of discretion warranting reversal of the judgment.

Plaintiffs' various arguments do not alter this conclusion. They appear to assert that the court somehow erred because plaintiff Thomas Garbitelli was a minor (sixteen years old) at the time of the final status conference, although neither the court nor CVPS appear to have been aware of his age; that the court ignored plaintiff Joseph Garbitelli's military status; that the court erred in failing to recognize Vincent Garbitelli's alleged authority to appear on behalf of his son Michael; and that the court abused its discretion in declining to allow plaintiff Stephen Garbitelli to appear by phone. None of the arguments, however, undermines the court's finding that plaintiffs repeatedly failed to file the ADR and discovery forms which it had previously ordered, a finding which fully justified the court's decision. Accordingly, we find no error.

Plaintiffs next assert that the court infringed their free-speech rights by dismissing the case during a status conference rather than an evidentiary hearing. Plaintiffs were plainly on notice of the court's determination to dismiss the action at the status conference if they failed to comply with its orders, and they have not shown what evidence they might have adduced at an evidentiary hearing, or how their rights were otherwise infringed by the court's failure to hold such a hearing. Accordingly, we find no error.

Plaintiffs further contend that the court erred in granting their attorney's motion to withdraw, but the court's ruling was a discretionary one, and plaintiffs have made no showing that the court abused its power in granting the motion. See In re S.W., 2008 VT 38, ¶ 9.

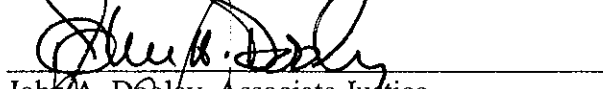
Finally, plaintiffs assert that the court granted preferential treatment to defendant by permitting the corporation to appear by counsel without requiring the CEO of the corporation or other corporation officer to attend. However, it was within the trial court's discretion to allow the corporation to appear only through its attorney for the hearings.

Affirmed.

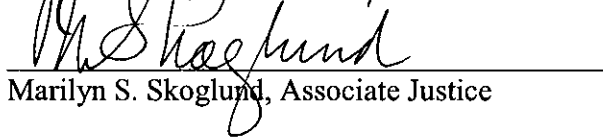
BY THE COURT:



Paul L. Reiber, Chief Justice



John A. Dooley, Associate Justice



Marilyn S. Skoglund, Associate Justice