

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

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

ENTRY ORDER

JUL 20 2009

SUPREME COURT DOCKET NO. 2008-512

JULY TERM, 2009

Carol Irons	}	APPEALED FROM:
	}	
	}	
v.	}	Orleans Superior Court
	}	
	}	
Kim Nova and Leslie Hook	}	DOCKET NO. 188-8-06 Oscv

Trial Judge: A. Gregory Rainville

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

Defendants appeal the superior court's judgment order entering a damage award in favor of plaintiff. On appeal, defendants claim that the court erred in admitting an exhibit without any foundation and using the exhibit as a basis for the damage award. We agree that the exhibit was improperly admitted, and thereby reverse the damage award and remand.

The relevant facts are as follows. Plaintiff purchased a parcel of land in Albany, Vermont in October 1999. She contends that she had a contract with defendants whereby they agreed to pay her half of the purchase price in exchange for part of the real property. Defendants moved onto the property, but they did not pay plaintiff. Consequently, plaintiff sued for breach of contract, alleging that defendants had lived on the property without paying her and had degraded the value of the property. Eventually, the parties entered a stipulation, which the court adopted as an order. The order granted plaintiff title to the property and required defendants to leave the premises and to remove junk and personal property from the premises by a date certain. Defendants failed to clean up the property by the time required, and plaintiff filed a motion for enforcement.

The court scheduled a hearing on the matter. Plaintiff attended the hearing with her attorney. Defendants did not appear for the hearing, but their attorney was there on their behalf. At the hearing, plaintiff requested a writ of possession for the property, damages for the cost of clean up, and attorney's fees for enforcing the stipulation. In support of the clean up costs, plaintiff offered Exhibit 1—a one-page estimate from a local body shop for \$7,021. Defendants' attorney objected to admission of the exhibit for lack of foundation. Although the person who created the estimate was not present, plaintiff's attorney proffered that his client could testify that the amount in Exhibit 1 was an accurate cost of the clean up. No witnesses testified at the hearing, however.

At the close of the hearing, the court granted plaintiff's request for a writ of possession, and denied the request for attorney's fees. As to damages, the court admitted Exhibit 1, explaining "there is a lack of foundation for it, perhaps; however, that's a technicality that could easily be overcome by plaintiff's testimony and it's proffered by plaintiff's attorney that his clients are prepared to testify as to the validity of the amount claimed here and the extensiveness of the material . . . that needs to be removed." In a subsequent written order, the court concluded that defendants were obligated to clean up the property and defendants had failed to do so as required by their own stipulation. The court found that the reasonable cost of clean up was \$7,021, and entered judgment against defendants in that amount.

On appeal, defendants claim that the trial court erred in admitting Exhibit 1 because there was no foundation and it was not properly authenticated. We agree. Evidence must be authenticated prior to admission. Authentication requires "a finding that the matter in question is what its proponent claims." V.R.E. 901(a). Evidence may be authenticated in a variety of ways including by a witness that can testify that "a matter is what it is claimed to be." V.R.E. 901(b)(1). Generally, the trial court has discretion over admission of evidence. See Trotier v. Bassett, 174 Vt. 520, 523 (2002) (mem.) (explaining that trial court has discretion in evidentiary rulings, specifically in deciding if there is an adequate foundation to admit evidence). Here, the trial court abused that discretion in admitting the exhibit without any testimony demonstrating "the source of the document." Stafford v. Stafford, 161 Vt. 580, 581 (1993) (mem.). There was no testimony concerning who had prepared the exhibit or what information was used to create the exhibit, and therefore no foundation for the exhibit's admission.

Plaintiff asserts that the trial court did not abuse its discretion in admitting the exhibit because plaintiff and her brother had testified at an earlier hearing on a different issue before a different judge regarding the extent of the damage. While this testimony may have indeed been previously offered, it could not authenticate the exhibit in question. Whatever the testimony at the prior hearing, this testimony was offered at a different time and was not related to the exhibit introduced at the hearing in question, and therefore could not authenticate the exhibit.

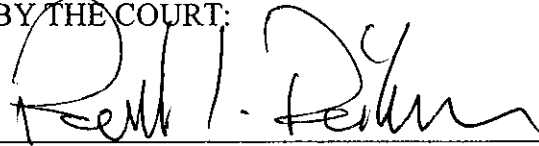
Plaintiff also contends that even if the exhibit was erroneously admitted, the error was harmless because there was other evidence in the record demonstrating the extent of damage to the property including photographs of the property, and plaintiff's own testimony about the damage. Again, even accepting plaintiff's representation that photographs and testimony were previously admitted, neither was offered at the hearing in question in conjunction with plaintiff's request for damages. Plaintiff offered no transcript of the prior hearing or request to admit the prior testimony. These items were not before the court when it issued the damage award. Thus, the photographs and the testimony could not support the court's damage award.

While the fact finder has discretion in determining the amount of damages, there must be some evidence to support the award. See Birkenhead v. Coombs, 143 Vt. 167, 173 (1983) (holding that "so long as sufficient evidence is introduced to permit with reasonable certainty an estimation of damages, the task of determining damages will be entrusted to the sound discretion of the factfinder"). Because the exhibit was erroneously admitted and no other evidence was introduced on the issue of damages, the damage award lacked any evidentiary support. See Dufresne-Henry Eng'g Corp. v. Gilcris Enters., Inc., 136 Vt. 274, 277 (1978) (explaining that

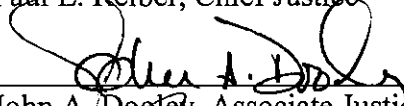
where there is no admissible evidence to support damage award, the judgment cannot be affirmed). We therefore reverse the award and remand the matter to the superior court.

Reversed and remanded.

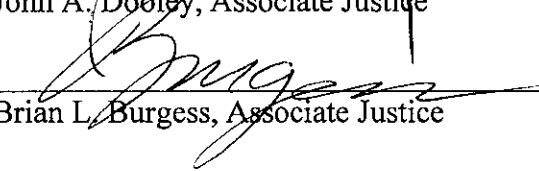
BY THE COURT:



Paul L. Reiber, Chief Justice



John A. Dooley, Associate Justice



Brian L. Burgess, Associate Justice