

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2009-279

OCTOBER TERM, 2010

Thomas L. Reynolds	}	APPEALED FROM:
	}	
v.	}	Windsor Superior Court
	}	
Daryl Snader, Dale W. Snader and	}	DOCKET NO. 679-10-07 Wrcv
Darlene Snader	}	

Trial Judge: Harold E. Eaton, Jr.

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

Defendants appeal from the judgment in favor of plaintiff in this contract dispute. They argue that the court erred in denying their motion for judgment notwithstanding the verdict. We affirm.

The record indicates the following. In February 2003, plaintiff loaned Daryl Snader \$160,000, and the loan was later guaranteed by Daryl's parents, Dale and Darlene Snader. In October 2007, plaintiff filed a breach-of-contract complaint against defendants, and later moved for summary judgment. Daryl admitted that he was in default on the note, and he did not oppose the summary judgment motion on the issue of liability. The court thus granted partial summary judgment to plaintiff on this issue.

A jury then considered defendants' claim that they did not owe the full \$160,000 and that they should be given credit for certain payments made under the note. The jury found through special interrogatories that defendants should be credited with a payment of \$25,000 between August and February 2006, and a payment of \$75,000 in May 2008. Following the verdict, the parties stipulated on the record that the first payment would be credited on the date midway between August 1, 2005 and February 28, 2006, and that the second payment would be credited on May 15, 2008. Plaintiff then submitted an accounting for costs, interest, late fees, and attorney's fees incurred in the collection of the debt. The court approved the accounting and found the attorney's fees reasonable, and thus ordered judgment in favor of plaintiff against defendants, jointly and severally, in the amount of \$242,889.52.

Defendants filed a motion for judgment notwithstanding the verdict and for a new trial, which the court denied. The court found that there had been considerable conflicting testimony about loans and payments at trial and that plaintiff and Daryl had engaged in a number of business transactions over several years. The parties presented little evidence to document payments relating to any of these multiple transactions. The jury found that defendants should be credited with a \$75,000 payment that had been made in connection with the settlement of a Minnesota case. The Minnesota case involved, among others, Gordon and Donna Hawk, who

were not parties to the instant suit. As part of the settlement agreement, the Hawks assigned a number of shares in a company, Carolina Building Solutions, L.L.C., to plaintiff. The court explained that the jury chose to believe that this assignment should be credited against defendants' debt obligation, even though that issue was vigorously contested. Defendants now claimed that the jury's finding was in error insofar as the date that the jury credited the payment, claiming that the stock was assigned on the date of the settlement of the Minnesota claims. The court noted that the issue was important because it affected the amount of interest that had accrued. Defendants also claimed that the jury erred by not crediting him \$38,500, which represented the value of certain stock in Snader Transportation issued to plaintiff.

The court explained that defendants had the burden of establishing both that payment had been made and the date of such payments. Defendants argued in their motion that the jury disregarded a date on the Carolina Building Solutions stock certificate, which they argued established the date of receipt by plaintiff sometime in 2005. The court found that only the front of the certificate was placed in evidence, and it did not show any transfer of ownership. It found that no evidence had been introduced as to the date of the actual transfer of the shares or receipt of the proceeds by plaintiff from the sales of the shares. There was testimony, however, that as of the time plaintiff was deposed in May 2008, the shares had been transferred to him. Thus, the court found that based on the evidence before it, the jury could reasonably conclude that May 2008 should be used as the date of receipt of the Carolina Building Solution shares.

The court also rejected defendants' argument concerning the \$38,500 credit they sought. The court explained that the testimony on this issue was directly conflicting. Defendants claimed that the transfer of stock was done in partial payment of the debt at issue in this case. Plaintiff testified that it was not related to this transaction. The jury chose to believe plaintiff, as was their province. The court thus denied defendants' motion, and this appeal followed.

Defendants first argue that the court should have granted their post-verdict motion as to the date that plaintiff received the \$75,000 payment discussed above. According to defendants, there was evidence that plaintiff received the Carolina Building Solutions stock in August 2005, when the Minnesota settlement agreement was executed, and there was no testimony to the contrary.

We reject this argument. Assuming *arguendo* that the issue was not waived by the post-verdict stipulation, defendants fail to show that the jury's verdict was devoid of evidentiary support. See *J.A. Morrissey, Inc. v. Smejkal*, 2010 VT 66, ¶ 8 (“[Supreme Court] will reverse the trial court’s denial of a motion for judgment as a matter of law only where no evidence exists that fairly and reasonably supports the jury’s verdict.”). In support of their argument, defendants rely on the 2005 Minnesota settlement agreement, which indicates that the Carolina Building Solutions shares were to be transferred forthwith. This document does not establish as a matter of law that the shares were actually transferred on that date. As the trial court explained, defendants produced no evidence as to the date of the actual transfer of the shares or the receipt of the proceeds by plaintiff from the sale of the shares. There was evidence presented at trial that as of the time of his deposition in May 2008, plaintiff had received the shares at issue. Based on this evidence, the jury could reasonably conclude that the May 2008 date should be used.

Daryl also reiterates his argument that the jury should have awarded him credit for stock in Snader Transportation that was given to plaintiff in February 2003. Plaintiff testified that this payment was not related to the \$160,000 debt, and the jury credited his testimony. It is for the jury, not the court, to weigh the evidence. See Claude G. Dern Elec., Inc. v. Bernstein, 144 Vt. 423, 426 (1984) (“It is the jury’s prerogative to weigh the testimony and to choose the evidence it finds persuasive.”). This claim of error is without merit.

Finally, Daryl argues for the first time on appeal that plaintiff’s claim should be barred by res judicata and collateral estoppel. He also suggests that there was an accord and satisfaction due to the Minnesota settlement. These issues were not raised at trial, nor in defendants’ post-verdict motion, and they were therefore waived. See Follo v. Florindo, 2009 VT 11, ¶ 14, 185 Vt. 390 (“In general, issues not raised at trial are unpreserved, and this Court will not review them on appeal.”); In re Entergy Nuclear Vt. Yankee, LLC, 2007 VT 103, ¶ 10, 182 Vt. 340 (“Preservation requires a party to present the issue with specificity and clarity to give the original forum a fair opportunity to rule on it.” (quotations omitted)).

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Brian L. Burgess, Associate Justice