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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2010-095

AUGUST TERM, 2010

Charles Perkins and Janet Perkins	}	APPEALED FROM:
	}	
v.	}	Lamoille Superior Court
	}	
Euro-Dec, Inc.	}	DOCKET NO. 243-9-07 Lecv
		Trial Judge: A. Gregory Rainville

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

Defendant appeals from the trial court's order granting judgment to plaintiffs on their claims and on defendant's counterclaims. We affirm.

Plaintiffs leased a commercial building to defendant. In September 2007, plaintiffs commenced an ejectment action against defendant for nonpayment of rent and damages. Defendant filed counterclaims against plaintiff. In February 2008, the court awarded partial judgment for possession and a writ of possession in plaintiffs' favor. Following a bench trial, the court found for plaintiffs on all remaining issues, and awarded them damages, attorney's fees, and other expenses.

In reaching its conclusions, the court made the following findings. In 1997, the parties executed a written lease, which expired in 2002. After 2002, the court found that the parties renewed the lease through their conduct. Defendant continued to occupy the premises and pay rent under the terms of the 1997 lease and plaintiffs accepted the rent. The 1997 lease also included an option to buy the leased property for $585,000. The court found that this option was not renewed through the parties' conduct based on numerous grounds. The court explained that on April 15, 2002, plaintiffs had written a letter to defendant offering to extend the option's duration for five years with a new purchase price of $775,000. The court found that this offer included specific conditions for acceptance, including the execution of a new lease and a new written addendum that recognized the terms of the option. These conditions were never satisfied. Because there was no option to purchase after 2002, the court found no credible evidence to support defendant's claim that plaintiffs breached the option agreement. The court cited additional reasons for its decision, including that defendant did not have the financing necessary to exercise the option.

The court also rejected defendant's claim of promissory estoppel. Defendant alleged that it had relied on representations made in plaintiffs' 2002 letter to its detriment by making renovations to the property in 2005. The court found that defendant was not entitled to the equitable relief it sought for many reasons, including unclean hands; failure to provide any actual documentation showing funds expended for renovations; and failure to show any reasonable reliance on the alleged promise. After awarding damages to plaintiffs on their claims, the court also found that plaintiffs were entitled to reasonable attorney's fees and legal expenses under the terms of the parties' contract. Defendant appealed from the court's final order.

Defendant challenges the court's ruling on its counterclaims. It maintains that it possessed an enforceable option to purchase the property, and that plaintiffs prevented it from exercising the option. It also argues that the court erred in excluding evidence of alleged damages it suffered more than six years prior to the filing of its counterclaim.

Our review of the court's decision is deferential. We will uphold the court's findings of fact unless clearly erroneous, and we will uphold its conclusions where they are reasonably supported by the findings. Bull v. Pinkham Eng'g Assocs., 170 Vt. 450, 454 (2000). We find no basis to disturb the court's decision here.

We begin with defendant's counterclaim for breach-of-contract. As stated above, the court found that after 2002, there was no binding option agreement between the parties. This finding is supported by the record. See Town of Rutland v. City of Rutland, 170 Vt. 87, 90 (1999) (noting that "existence of an agreement is ordinarily a question of fact for the trier"). Defendant relies on plaintiffs' 2002 letter, in which plaintiff Chuck Perkins indicated that he wanted to share some "thoughts" with defendant. This letter states in relevant part:

> In regard to your request for an extension of five years on the "option to purchase" the property at 2038 Mountain Road, I would offer this extension for an adjusted sale price of $775,000. This new price is based on five years of anticipated inflation and the escalation of land and property values in Stowe.
>
> We would need a lease amendment showing an option for you to purchase on May 31, 2007 the property at 2038 Mountain Road for $775,000 with a notification to the lessor of your intention to do so at least 90 days prior to May 31, 2007. This Addendum would be #3, following Addendum #1 dated September 24, 1999, and Addendum #2 dated November 18, 1999. Upon checking our present lease, I find that if you had wanted to purchase the property on May 31, 2002, then notice should have been given to us at least 90 days prior to May 31, 2002.
>
> I feel that this gives you the additional five year "option to purchase" extension that you requested, and it gives to [us] an adjusted price reflecting what I believe is fair market value.

Assuming arguendo that this was an offer, it was never accepted by defendant "formally" or otherwise. Starr Farm Beach Campowners Assoc., Inc. v. Boylan, 174 Vt. 503, 505 (2002) (mem.) (explaining that "[t]o be valid, an offer must be one which is intended of itself to create a legally binding relationship on acceptance," and "a mere expression of intention or general willingness to do something . . . does not amount to an offer" (citation omitted)). No lease addendum was ever signed and no binding agreement was ever formed. See id. ("An enforceable contract must demonstrate a meeting of the minds of the parties: an offer by one of them and an acceptance of such offer by the other."). Indeed, the court found that defendant never even made a request to purchase the property.

We reject defendant's assertion that no acceptance was required because this was a "continuation of an on-going relationship." Defendant's citation of Isbrandtsen v. North Branch Corp., 150 Vt. 575 (1988), and reference to a "course of dealing" is inapposite. See id. at 578 (in interpreting contract and determining if ambiguity exists in its terms, court may consider "course of dealing"

between parties). The new option proposal plainly contained different terms from that contained in the 1997 lease, and it required the execution of a new lease and lease addendum. Acceptance of the new terms was necessary to form a binding agreement. As the trial court found, moreover, defendant's sole shareholder acknowledged at trial that the option agreement was never completed. Additionally, as the court stated, any alleged attempt by defendant to "accept" this revocable offer three years after it was made is unreasonable. It is obvious, moreover, that plaintiffs did not acquiesce in the continuation of the option contained in the 1997 lease. In a similar vein, plaintiffs clearly did not waive notice of acceptance "by acquiescing to the improvements" allegedly made by defendant. In fact, the trial court found defendant liable for unauthorized improvements to the rental property. It explained that plaintiffs' attorney notified defendant in writing in 2003 that defendant was not to make any renovations to the property without prior approval and that there would be no reimbursement for such expenditures without prior approval.

To the extent that defendant reiterates its promissory estoppel theory, this claim fails for numerous reasons, including the fact that it would have been unreasonable for defendant to rely on any statements in the 2002 letter when no lease addendum had been drafted or signed. Defendant essentially challenges the court's evaluation of the weight of the evidence and the credibility of witnesses, matters reserved exclusively for the trial court. Cabot v. Cabot, 166 Vt. 485, 497 (1997) ("As the trier of fact, it [is] the province of the trial court to determine the credibility of the witnesses and weigh the persuasiveness of the evidence."). The failure to show acceptance of the new option offer is fatal to defendant's breach-of-contract claim, and we need not address defendant's remaining challenges to the court's ruling on this issue. The court correctly granted judgment to plaintiffs on this claim.

Defendant next argues that the court erred in excluding evidence of alleged damages that it suffered more than six years before its counterclaim was filed. According to defendant, it was deceived by plaintiff when it leased the premises regarding the availability of the second floor for retail space. Defendant admits knowing as early as 1995 that it could not use the second floor but claims that it learned for the first time in 2008 that the State fire and safety officials had not approved the use of the second floor. Defendant also asserts that it was misled about the condition of the roof, which apparently leaked in 2000. Defendant acknowledges that the statute of limitations for such claims is six years, and that six years had plainly passed by the time the counterclaim was filed. It makes no particular argument as to why evidence of damages related to the leaking roof should have been admitted. As to the use of the second floor, it asserts that while it was aware of the damages suffered in 1995, it did not know that it had a cause of action until June 2008.

The record shows that before trial, plaintiffs moved to exclude any testimony about damages incurred more than six years before the counterclaim was filed. The court granted the motion, noting that defendant offered essentially no response to it. Defendant agreed that the roof leak occurred in January 2000, more than six years before its claim was filed. As to the 1995 second-floor permitting issue, the court found that defendant appeared to be trying to raise a new claim regarding fraudulent concealment and the court would not entertain new claims on the eve of trial. It explained that the case had been filed two years earlier, and it was scheduled for trial in less than a week. Plainly, the claim needed to have been pled much earlier. The court also noted that, according to the pleadings, defendant was aware through discussions with its attorney that it needed to file any action within six years and it failed to do so. For these reasons, the court granted plaintiffs' motion to exclude this evidence.

The court identified numerous reasonable grounds for its decision, and defendant fails to show error. See Gilman v. Towmotor Corp., 160 Vt. 116, 122 (1992) ("Trial courts have great latitude in decisions to admit or exclude evidence, and such decisions will not be reversed absent an abuse of discretion resulting in prejudice."). As noted above, defendant makes no specific argument as to why evidence of damage allegedly caused by a leaking roof was wrongly excluded, and we agree with the trial court that such evidence is barred by the statute of limitations. Defendant's assertion regarding the occupancy issue is equally without merit. As an initial matter, this evidence was not relevant to any properly-pled claim. Additionally, as the court found, it was barred by the statute of limitations. See Rodrigue v. VALCO Enters., Inc., 169 Vt. 539, 541 (1999) (limitation period begins to run when party "has or should have discovered both the injury and the fact that it may have been caused by the defendant's negligence or other breach of duty" (citation omitted)). Defendant knew that it could not use the second floor of the building in 1995 because an additional egress was required. It was at that point that the limitations period began to run, regardless of whether defendant also knew that use of the second floor had not been approved by state and fire safety officials. See id. (limitation period begins to run when party "had information, or should have obtained information, sufficient to put a reasonable person on notice that a particular defendant may have been liable for the plaintiff's injuries"); Burgett v. Flaherty, 663 P.2d 332, 334 (1983) (test is whether plaintiff has information of circumstances sufficient to put reasonable person on inquiry, or has opportunity to obtain knowledge from sources open to his or her investigation, and if plaintiff believes that someone has done something wrong to cause her injuries, such fact is sufficient to alert her to investigate and pursue her remedies).

Finally, we reject defendant's challenge to the court's award of attorney's fees and fees for an expert witness. Defendant raises his arguments for the first time on appeal, and as plaintiffs note, these arguments are wholly at odds with the record. See Bull v. Pinkham Eng'g Assocs., 170 Vt. 450, 459 (2000) ("Contentions not raised or fairly presented to the trial court are not preserved for appeal."). Contrary to defendant's assertions, the trial court did not award fees for work done before the litigation began, and the expert witness identified by defendant did in fact testify at trial.

Affirmed.

BY THE COURT:

_____
Paul L. Reiber, Chief Justice

_____
Denise R. Johnson, Associate Justice

_____
Brian L. Burgess, Associate Justice