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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-437

MARCH TERM, 2002

James K. and M. Christine Murphy	}	APPEALED FROM:
v.	}	Addison Superior Court
Cedarbrook at Killington, et al.	}	DOCKET NO. 265-11-00 Ancv
	}	Trial Judge: Mary Miles Teachout

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

Defendants appeal the superior court's summary judgment order awarding plaintiffs approximately $4000 to compensate them for payment of a deposit toward a time share interest in a condominium unit. We affirm the judgment, but remand the matter for a determination as to whether plaintiffs actually paid the deposit to defendants.

On October 2, 2000, plaintiffs James and Christine Murphy attended a sales presentation regarding time share interests at the Cedarbrook Club at Killington, Inc., one of the named defendants. That same day, plaintiffs and defendant Robert Newsome, a representative of the Cedarbrook Club, executed a purchase and sales agreement for a time share interest in the Club. The agreement required immediate payment of a $3480 deposit toward the purchase price of $11,600. Plaintiffs paid the deposit and administrative fees by charging their credit card. Plaintiffs also executed a promissory note and a possession rights mortgage, but defendants retained the deed pending expiration of the rescission period. On October 9, 2000, plaintiffs contacted defendants by telephone and attempted to rescind the transaction, but defendants refused on the grounds that the rescission period had expired and the request was not in writing.

In November 2000, plaintiffs filed suit, alleging that defendants violated Vermont's Consumer Fraud Act by committing specified deceptive acts and breached the purchase and sales agreement by not according plaintiffs their right of rescission. They also alleged that the agreement failed for lack of consideration because defendants never delivered an executed deed to them, and that the agreement was void because the Cedarbrook Club did not exist as a corporate entity at the time the agreement was executed. Plaintiffs moved for summary judgment in April 2001. Defendants opposed the motion with a May 2001 memorandum and Robert Newsome's unsigned affidavit. On July 2, 2001, the superior court issued two orders on motion reaction forms. The first order stated that the court would assume the facts were as stated in plaintiffs' motion because defendants' affidavit was not signed and notarized until long after the extended due date. The court indicated that defendants' memorandum would be considered for its legal arguments, but would not be effective to place plaintiffs' material facts in dispute. The second order granted plaintiffs summary judgment on their breach of contract count, finding that defendants breached the terms of the parties' agreement by failing to deliver the deed at closing. According to the court, the statutory rescission period did not exempt defendants from adhering to the terms of their own contract requiring delivery of the deed at closing. Based on this ruling, the court issued a judgment order awarding plaintiffs approximately $4000 to compensate them for the deposit and fees paid to defendants. Defendants appeal that judgment.

Relying on Alpstetten Ass'n, Inc. v. Kelly, 137 Vt. 508, 511 (1979), defendants first argue on appeal that the trial court's failure to enter findings and conclusions requires reversal. We find no merit to this argument. In Kelly, reversal was required because the court's order provided "no clue" as to why the plaintiff was entitled to judgment as a matter of law with respect to the defendant's counterclaims. Id. Here, in contrast, the basis of the trial court's ruling is plainly stated and amenable to review by this Court.

Defendants complain, however, that the superior court granted summary judgment on grounds that were not briefed by either party. They contend that the court's order must be reversed because they were not put on notice that breach of contract for failure to deliver the deed was at issue, and thus they had no opportunity to respond on that issue. Again, we find no basis for reversal. In determining whether a legal theory supports the moving party's request for summary judgment,

the court is not confined to the particular propositions of law advanced by the parties on a motion for summary judgment. Once it is determined that there is no genuine issue as to any material fact and that a party is entitled to the benefit of a judgment as a matter of law, judgment should be entered even though the legal principles relied upon by the court may differ from those that have been urged upon it by the litigants.

10A C. Wright et al., Federal Practice and Procedure 2725, at 439-40 (3d ed. 1998 & 2001 Supp.).

Of course, courts must be cautious in granting summary judgment on a theory not raised by the parties because there is a greater chance that the party opposing summary judgment may have failed to raise a factual dispute that did not appear to be at issue. Id. at 440. For this reason, a court normally should provide notice to the parties if it intends to rely on a legal theory other than those briefed by the parties. Id.

Here, plaintiffs stated in their complaint that defendants failed to deliver a fully executed deed. Among the counts in their complaint, plaintiffs claimed that defendants had breached the parties' agreement by refusing to allow plaintiffs to rescind the transaction, and that defendants' failure to deliver the deed resulted in a lack of consideration with respect to the transaction. In their motion for summary judgment, plaintiff expanded on the latter claim, stating that because there was no transfer of ownership at the closing without delivery of the deed, the parties' agreement died as of the date of closing. Defendants responded by stating that, "[a]t best, the plaintiffs' claim regarding delivery of the deed is a claim for breach of the contract." Thus, defendants can hardly argue that they had no opportunity to address the issue upon which the court granted summary judgment. It may have been more prudent for the court to have put the parties on notice that it was considering granting plaintiffs summary judgment on the grounds that the failure to deliver the deed breached the parties' agreement, but defendants were on notice that they needed to raise any disputed facts concerning the delivery of the deed. Under the circumstances, reversal is not warranted.

Defendants argue, however, that the court erred in granting summary judgment based on their failure to deliver the deed because whether delivery is effected is a question of fact, not law, that hinges on the intention of the grantor. See Dwinnel v. Bliss, 58 Vt. 353, 356-57 (1885). According to defendants, because they planned on keeping the deed only until the rescission period passed, and they intended to give plaintiffs physical possession of the deed at that time, the deed was, in effect, delivered at the time of closing. We disagree. Dwinnel stands only for the proposition that an executed deed that comes into the possession of the grantee may be considered delivered by the grantor depending on the intent of the parties involved. None of the authorities cited by defendants support the proposition that delivery is effected by the grantor handing the grantee a blank deed while retaining the original executed deed.

Next, defendants argue that it was plaintiffs, not defendants, who breached the parties' agreement by purporting to rescind the agreement. Defendants did not raise this issue in their pleadings before the trial court, and thus we will not consider it for the first time here on appeal.

Finally, defendants argue that, even assuming they breached the contract by failing to deliver the deed, the trial court should not have granted summary judgment to the plaintiffs because they failed to prove that they suffered any damages as the result of defendants' breach. According to defendants, plaintiffs directed their credit card company not to pay the charge representing the deposit, and thus plaintiffs are being awarded compensatory damages for monies never spent.

Plaintiff's counsel admitted in oral argument that the credit card company has not paid defendants and is treating the

charge as disputed. Under these circumstances a money judgment against defendants is inappropriate. We agree that the matter must be remanded for relief that ensures the transaction is effectively rescinded without requiring defendants to repay a deposit it never received and will never receive.

Affirmed and remanded for a determination of relief consistent with the above entry order.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice