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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-242

NOVEMBER TERM, 2002

Valerie dePeyster	}	APPEALED FROM:
v.	}	Bennington Family Court
Robert F. Kostuck	}	DOCKET NO. 55-2-00 Bndm
	}	Trial Judge: John P. Wesley

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

In this divorce action, husband appeals the Bennington Family Court' s denial of his post-judgment motion seeking to prevent the sale of certain real property in the State of Indiana, and to revise the terms of the court' s final judgment relating to the property. We affirm.

On August 3, 2001, the Bennington Family Court issued a written order granting the parties a divorce, dividing their property, and setting forth the terms of parental rights and responsibilities for their minor son. The court based its order on a stipulation the parties executed, as modified by evidence taken at the final hearing on June 27, 2001. The key provision of the order at issue in this case is the disposition of real property in the State of Indiana owned by the parties' child. The property served as husband' s residence. In their stipulation, which was finally executed in April 2001, the parties agreed that husband would have an option to purchase the property; the option required husband to prepare and execute any documents necessary to effectuate the sale. Within days of the stipulation' s execution, husband notified wife that he wanted to set aside the agreement. Wife in turn sought an order from the family court to enforce the agreement. On May 21, 2001, the court ruled that the parties were bound by their stipulation.

By June 27, 2001, the date of the final divorce hearing, husband had not fulfilled the terms of the parties' agreement to purchase their son' s Indiana property. When questioned about his intent to do so, husband represented that his Indiana attorney had prepared the necessary papers, which were awaiting husband' s review and signature. Husband testified that he had no objection to the court ordering him to execute the documents within thirty days following the hearing. At the end of the hearing, the court put its findings and conclusions on the record. With respect to the purchase of the Indiana property held by the parties' son, the court stated:

> The Court will require that the Defendant, as agreed by him, to sign and execute any paperwork within 30 days which is required for him to purchase his son' s property in which he resides at this time. If he does not sign and execute those documents which are required within 30 days, he waives his right to purchase the property.

The court instructed the parties to submit a proposed final order incorporating the court' s modifications to the parties' stipulation as agreed at the hearing. The parties did so, and the court issued the final order on August 3, 2001.

Husband did not execute the necessary documents to consummate the sale within thirty days as the court ordered. On March 15, 2002, husband filed a motion entitled " Emergency Motion to Enforce Final Order." In his motion, husband asked the court to enforce his right to purchase the property immediately because wife, as the child' s guardian, was allegedly preparing to sell the property to a third party. Husband claimed he was unable to execute the documents required for the purchase for a variety of reasons, including: (1) he could not physically travel to his counsel' s office in time to review and execute the documents counsel prepared due to the visitation schedule with the parties' son; (2) he was in bankruptcy and could not afford to pay an attorney to draft the documents; and (3) documents wife' s counsel prepared for husband instead contained errors, and he was advised not to sign them.

The court denied husband' s motion. It observed that husband alleged facts in his motion clearly showing that he had not complied with the court' s order. It noted that the facts husband gave for his lack of compliance were known to him within days of the order yet he did nothing to modify the order as he could have under V.R.C.P. 59. Nor did husband pursue an appeal of the order. Although husband did not explicitly ask for relief from the order under V.R.C.P. 60, the court considered the V.R.C.P. 60 criteria before denying his motion. After the court rejected husband' s motion for reconsideration, husband timely appealed.

In his appeal, husband primarily challenges the court' s modification of the parties' original stipulation as embodied in the August 3 final order of divorce. Husband' s failure to timely appeal the August 3 order precludes any challenge to it. V.R.A.P. 4; In re Stevens, 149 Vt. 199, 200 (1987). The only orders susceptible to review on appeal in this matter are the trial court' s denials of husband' s Emergency Motion to Enforce Final Order, which the court considered under V.R.C.P. 60, and his motion for reconsideration.

We agree with the trial court that husband did not present grounds under V.R.C.P. 60 to relieve him from the terms of the final divorce order. V.R.C.P. 60 allows the court to relieve a party from a final judgment for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment.

V.R.C.P. 60(b); see also V.R.F.P. 4(a)(1) (Vermont Rules of Civil Procedure apply to divorce proceedings in family court). We will not set aside the court' s decision on a motion under Rule 60(b) unless the record clearly and affirmatively shows that the court withheld or otherwise abused its discretion. Richwagen v. Richwagen, 153 Vt. 1, 3-4 (1989). We find no abuse of discretion here.

Husband' s Emergency Motion did not allege any facts suggesting that he was entitled to relief under the rule' s criteria. The court based its decision relative to the Indiana property on the parties' stipulation and husband' s representation that he could comply with the thirty-day time frame for purchasing the property. Indeed, husband testified at the final divorce hearing that he was prepared to sign the necessary documents within thirty days of the hearing. Therefore, husband cannot claim that the court' s order requiring him to execute the necessary documents within thirty days or waive his right to purchase the property was a surprise or was founded upon a mistake or inadvertence.

The facts he alleged likewise show an absence of excusable neglect leading to husband' s agreement to the thirty-day time limit. The fact of husband' s bankruptcy and his financial condition were matters addressed at the final hearing. Thus, husband' s alleged inability to pay counsel to assist him in finalizing the purchase was not an unforeseen matter that arose after the final hearing on June 27 or after the final order issued on August 3. Husband represented to the court that he could meet the thirty-day time limit to exercise his option to purchase the property, and he knew of the consequences for failing to do so in a timely fashion. Moreover, the motion contained no allegations of newly discovered evidence, fraud, or misrepresentation. Finally, husband failed to provide any extraordinary reason to warrant relief under V.R.C.P. 60(b)(6). See Olde & Co., Inc. v. Boudreau, 150 Vt. 321, 324 (1988) (absent showing of hardship or injustice, relief under V.R.C.P. 60(b)(6) is available only in extraordinary circumstances).

Husband also argues the court should have granted his Emergency Motion because after the thirty days for purchasing the Indiana property had elapsed, wife allegedly promised husband that she would extend the deadline. Husband asserts the doctrine of promissory estoppel gives him the right to enforce wife' s promise. Whatever the merits of husband' s claim, he failed to argue that theory to the trial court in his Emergency Motion. He therefore did not preserve the argument for appeal, and we will not consider it. Bull v. Pinkham Eng' g Assocs., Inc., 170 Vt. 450, 459 (2000).

Finally, husband argues that the court committed reversible error by denying his Emergency Motion without a hearing. In support of his argument, husband cites our decision in Goshy v. Morey, 149 Vt. 93 (1987). In Goshy, we held that a trial court must generally hold a hearing on a motion under V.R.C.P. 60(b) where dismissal of the cause was " by default or in the nature of nonsuit." Id.at 99. Goshy is inapposite because this case was fully litigated and resulted in a final judgment on the merits. Where it appears on the face of the motion that the movant' s claim totally lacks merit, a hearing is not required. Blanchard v. Blanchard, 149 Vt. 534, 537 (1988). That standard was met in this case, and the court was authorized to dispose of husband' s motion without convening a hearing. V.R.C.P. 78(b)(2); V.R.F.P. 4(a)(1). There was no error.

Affirmed.

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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James L. Morse, Associate Justice