

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2004-014

AUGUST TERM, 2004

	}	APPEALED FROM:
	}	
Carl W. Wetherby and Marina	}	Franklin Superior Court
Wetherby	}	
	}	
v.	}	DOCKET NO. S331-03 Fc
	}	
Leland Vincent	}	Trial Judge: Howard E. Van Benthuisen
	}	
	}	

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

Defendant Leland Vincent appeals the superior court's summary judgment ruling granting plaintiffs Carl and Marina Wetherby specific performance with respect to the sale of Vincent's home to the Wetherbys. We affirm.

On July 31, 2003, the Wetherbys filed a complaint alleging that Vincent and his sister had entered into a written contract to sell their home and land to the Wetherbys, but that Vincent reneged on the contract when his sister died shortly before the closing date. The Wetherbys sought a writ of attachment and specific performance of the contract. On August 25, without having filed either an answer to the complaint or a counterclaim, Vincent filed a motion for summary judgment, contending that the contract lacked specific terms and was unsupported by consideration. On September 10, one day before the scheduled hearing on the Wetherbys' request for a writ of attachment, the parties filed the following stipulation:

Whereas this case is scheduled for an attachment hearing on September 11, 2003 and in the interim defendant has filed and moved for summary judgment, and whereas the plaintiffs will, within the time frame of Rule 56 file a responsive summary judgment pleading, the parties hereto stipulate and agree that the Court can issue an Order in effect until resolution of this case as follows:

1. The court may resolve the attachment hearing issue as well as the lawsuit on the merits by consideration and ruling upon the parties' summary judgment pleadings.
2. Defendant Leland Vincent shall not transfer, sell or otherwise encumber any interest in his Richford, Vermont real estate that is the subject matter of this lawsuit unless and until the case is resolved upon the merits.

On the same day that the parties filed the stipulation, the Wetherbys filed their motion for summary judgment. They argued that the contract was binding and that promissory estoppel applied. Two days later, on September 12, 2003, the superior court entered an order stating that in light of the parties' stipulation "contemplating resolution [of the case] based upon the cross summary judgment motions," it would resolve "the lawsuit on the merits by consideration and ruling upon the parties' summary judgment pleadings." The court ordered Vincent to brief the promissory estoppel issue by September 29. On October 3, not having received a response from Vincent, the court denied Vincent's motion for summary judgment and granted the Wetherbys' motion for summary judgment, concluding that the purchase and sales agreement had sufficient specificity to be binding, and that promissory estoppel should be invoked against Vincent. Five days later, on October 8, Vincent filed a motion for relief from judgment, stating that he had relented on the issue of

promissory estoppel, but assumed that V.R.C.P. 56(c)(1) gave him thirty days from service of the Wetherbys' motion for summary judgment to file a supplementary motion for summary judgment. According to Vincent, he had been preparing an affidavit indicating that he is legally blind and that he signed the contract only after Carl Wetherby told him the document was not an agreement to sell his property. On October 14, the court granted Vincent's motion, giving him until October 20 to file a supplemental motion, and giving the Wetherbys until October 27 to file a response.

On October 21, Vincent filed a supplementary summary judgment motion and a motion "to set up counterclaim," in which he argued that he and his sister had been induced into signing the contract by the Wetherbys' fraud and misrepresentation. On November 6, the court denied Vincent's motion to set up a counterclaim and his motion for relief from judgment, stating that the parties' stipulation had contemplated having the case resolved on the legal issues contained in the original cross motions for summary judgment, and that a late-filed affidavit containing facts that were known to Vincent before the litigation began could not be raised to overturn the court's September 12 summary judgment ruling in favor of the Wetherbys. Accordingly, the court entered judgment for the Wetherbys on November 6, 2003. On appeal, Vincent argues that the superior court erred by construing the parties' stipulation as restricting the legal issues that the parties could raise and by concluding that his opposition to the Wetherbys' motion for summary judgment was untimely.

Vincent first argues that the parties' stipulation addressed only the manner in which the parties agreed to resolve the litigation, and was not intended to limit the legal issues that could be raised. According to Vincent, the stipulation's reference to Rule 56 indicates that the parties expected Vincent to have a full thirty days to respond to the Wetherbys' summary judgment motion. We do not find this argument persuasive. At the time the parties signed their stipulation, Vincent had already filed his motion for summary judgment stating the issues that he believed entitled him to judgment as a matter of law. The same day the stipulation was filed, the Wetherbys filed their cross motion for summary judgment challenging the claims made by Vincent in his motion. Under normal circumstances, Vincent may have had up to thirty days to respond to the Wetherbys' motion, see Rule 56(c)(3), but, in this case, the superior court specifically gave Vincent until September 29 "nineteen days from the date the Wetherbys filed their motion" to respond to the Wetherbys' claim that promissory estoppel applied. In no way can the court's order be construed as requiring Vincent to respond only on the issue of promissory estoppel by September 29, but giving him additional time to raise new theories not previously addressed. Rather, the court's order could have been reasonably understood only as giving Vincent until September 29 to respond to the Wetherbys' motion for summary judgment, at which time the court would rule on the case based on the parties' cross motions for summary judgment. Notwithstanding the court's order, however, Vincent did not respond by September 29, and did not seek an extension of time to file a response. Under these circumstances, the court was fully justified in ruling based on the motions filed by the parties as of September 29.

Vincent argues, however, that because his motion for relief from judgment was filed within ten days of the court's summary judgment ruling, it was actually a motion to alter or amend the judgment, and thus the superior court retained jurisdiction to alter its judgment and give him an opportunity to raise his new defense. This argument is unavailing. Regardless of whether the motion is designated as a motion for relief from judgment or a motion to alter the judgment, Vincent has failed to show that the court abused its discretion in denying the motion. See Brueckner v. Norwich Univ., 169 Vt. 118, 132-33 (1999) (decision on Rule 59 motion lies within trial court's sound discretion and will not be disturbed on appeal absent showing that court entirely withheld its discretion or exercised its discretion on clearly untenable grounds); cf. Margison v. Spriggs, 146 Vt. 116, 119 (1985) (motion for relief from summary judgment was effectively Rule 60(b) motion made within ten-day limit of Rule 59(e), and party challenging court's order had burden to demonstrate abuse of discretion). The parties agreed that the case could be decided on their motions for summary judgment. The court gave Vincent a limited amount of time to file a response to the Wetherbys' motion. When Vincent failed to do so, and further failed to seek additional time for a response, the court entered its order based on the parties' cross-motions for summary judgment, just as the parties contemplated in their stipulation. Then, and only then, did Vincent attempt to file a renewed summary judgment motion with a completely new theory alleging facts that would have been known to him when the litigation started. Under these circumstances, the superior court acted well within its discretion in denying defendant's motion for relief from judgment. Cf. id. at 120 ("A late-filed affidavit sufficient to defeat summary judgment does not justify relief if it asserts facts that were known prior to judgment.").

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice