

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-082

OCTOBER TERM, 2008

Sylvie Valois	}	APPEALED FROM:
	}	
v.	}	Chittenden Family Court
	}	
Paul Valois	}	DOCKET NO. 975-10-95 Cndm

Trial Judge: A. Gregory Rainville

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

Husband appeals from a family court order granting wife’s motion to enforce a provision of the parties’ amended divorce decree and awarding wife prejudgment interest and attorney’s fees. Husband contends the court erred in several respects in granting the motion, miscalculated the award of prejudgment interest, and abused its discretion in awarding attorney’s fees. We affirm.

The parties were married in 1980 and divorced in 1998. The instant dispute centers upon a provision of the amended divorce judgment. The original divorce decree divided the marital estate roughly equally, awarding each party assets or funds in the amount of \$459,555. Husband was awarded his business, Contact Communications, the equity in the company office building, business-related property in Canada, and certain other personal assets. The award to wife consisted principally of assets that could be easily liquidated, including a \$197,000 promissory note to be paid in monthly installments over ten years, secured by a lien on the business property, and almost 2,000 shares of MCI stock, with a value of about \$67,000 at the time of the divorce.

The original divorce decree failed to note that the stock was held by the Franklin-Lamoille Bank as collateral for a business loan and therefore was not immediately available for transfer to wife. Wife therefore moved to amend the judgment to require that the stock be awarded to her unencumbered. The company’s total indebtedness to the bank was approximately \$600,000 at the time, however, and the bank was apparently unwilling to release the stock as collateral prior to December 2001. In response to wife’s motion, therefore, the court issued an amended judgment in April 1998, adding a provision as follows: “Husband shall make every

reasonable effort to remove the encumbrances from the MCI stock as soon as possible. All encumbrances shall be removed by no later than December 31, 2001.”¹

Shortly thereafter, wife moved to enforce the amended provision, asserting that husband had not made a reasonable effort to unencumber the shares. Following a status conference, a brief docket entry noted that husband had not been “able to comply as bank won’t do it until 12/31/01,” and wife eventually withdrew her motion. Husband subsequently negotiated a deal with the bank to release the stock if wife would agree to subordinate her lien on the business property to bank’s, but wife declined to do so. Husband ultimately failed to remove the encumbrances and transfer the stock to wife by the December 31, 2001 deadline. Although the stock had increased in value when MCI merged with WorldCom in 1999, it declined rapidly thereafter, so that as of December 31, 2001—the date when the stock was to be made available—its value was \$33,271. When the stocks were ultimately released to wife in June 2002, they were virtually worthless.

Wife moved in April 2006 to enforce the provision of the decree requiring all reasonable efforts to transfer the stock by December 31, 2001, seeking its value at the time of the divorce, which was \$67,000. Following a hearing, the court issued a written decision, finding that although husband had made some initial efforts to unencumber the stock, his efforts thereafter were inadequate and violated the court order. The court found in this regard that the company’s continued financial growth and increased cash flow would have permitted the bank to “release[] the stock in a timely fashion if [husband] had used all reasonable efforts to accomplish the result.” Finding that husband had failed to provide a reasonable explanation for his failure to deliver the stock by the December 31, 2001 deadline, the court awarded wife the value of the stock on that date, \$33,271, as well as prejudgment interest totaling \$28,280.35 and attorney’s fees in the amount of \$42,425. This appeal followed.

Husband contends the court erred in failing to treat wife’s motion as an untimely claim for relief from judgment under V.R.C.P. 60(b) rather than as a motion to enforce, noting that he had already transferred the stock (albeit after the deadline) when the motion was filed. He also contends wife’s claim for the value of the stock was res judicata, and that the court misconstrued or improperly modified the amended decree, because the decree provided for transfer of the stock itself rather than the value thereof. As the trial court here noted, however, wife’s motion sought an equitable remedy—performance of the terms of the amended decree—and therefore was properly characterized as a motion to enforce, and it was within the court’s equitable authority to order such performance or the equivalent value thereof if performance was inadequate. See State v. Irving Oil Co., 2008 VT 42, ¶ 11 (where party has not performed in timely manner court may award monetary damages as well as specific performance or injunctive relief); Aither v. Estate of Aither, 2006 VT 111, ¶ 5 (family court “has all of the equitable and other powers of the superior court”) (quoting 4 V.S.A. § 453(a)); Burlington Sav. Bank v. Rafoul, 124 Vt. 427, 431 (1965) (“Equity regards that as done which ought to be done.”) (quotation omitted); Dunning v. Alfred H. Mayer Co., 483 S.W.2d 423, 427 (Mo. Ct. App. 1972) (in suit for specific performance, court may award monetary damages where defendant has made

¹ The amendment also contained a provision stating that “[i]f the stock is redeemed by the Franklin-Lamoille Bank, husband shall be liable to Wife for the full value of the stock at the time of redemption.”

specific performance impractical); King v. Aircraft Sales, Inc. v. Lane, 846 P.2d 550, 555-56 (Wash. Ct. App. 1993) (where defendant by his own act has made specific performance impractical, court may award legal remedy of damages). Defendant also reasserts a claim of laches raised below, arguing that wife unreasonably delayed eight years in asserting her claim. The trial court, however, correctly noted that wife's action accrued in late 2001 when husband failed to transfer the stock by the deadline, not 1998 as husband claimed; that husband did not have "clean hands" in the matter, having unreasonably delayed the transfer until the stock was worthless; and that husband had failed to show any prejudice resulting from wife's delay in bringing the action. See Preston v. Chabot, 138 Vt. 170, 172 (1980) ("Laches is an affirmative equitable defense, and the burden is on the party relying on it."). Husband has not shown on appeal that the court's findings were erroneous or its conclusion unreasonable. Accordingly, we find no basis to disturb the award.²

Husband further contends the court erred in awarding prejudgment interest, arguing that the court erred in awarding interest from the date the stock was due, December 31, 2001, rather than from the date wife filed her motion in April 2006. Interest is measured from the date of the breach, which the court here reasonably found to be December 31, 2001. Smith v. Osmun, 165 Vt. 545, 547, 676 A.2d 781, 785 (1996) (mem.). Accordingly, we find no error.

Finally, husband asserts the court erred in awarding attorney's fees. Such an award lies within the sound discretion of the trial court and we will not disturb its ruling absent an abuse of that discretion. Willey v. Willey, 2006 VT 106, ¶ 26. The court's decision in this regard is not limited to the respective ability of the parties to pay. "Rather, the inquiry is an equitable one." Id. In its ruling here, the court cited the many motions and court appearances ultimately necessitated by husband's failure to comply with the amended decree, and the significant disparity in wealth and income between the parties. The court found in this respect that husband's business had continued to grow, amass equity, and provide husband with a lucrative yearly income in excess of \$100,000 and the opportunity to accumulate significant wealth and assets while wife's income and assets remained minimal.

Although husband asserts that certain specific motions which he filed or pretrial discovery in which he engaged were necessitated by wife's theory of recovery or trial strategy, the argument does not undermine the court's fundamental equitable finding that the fees incurred in bringing the action were necessitated by husband's failure to comply with the amended decree. Wife also presented expert testimony that the hourly rate charged by wife's attorney and the fees incurred were reasonable and necessary. Husband also contends that the court's findings concerning the parties' disparate wealth and income were unsupported by the evidence, but the record shows that the court had before it evidence of the parties' income and expenses and

² In his reply brief, husband raises several additional claims, asserting that the evidence was insufficient to support the court's findings that husband was aware of the decline in value of the MCI stock, that he benefitted from the use of the MCI stock as collateral, and that the bank would have released the stock by December 31, 2001. These claims were not clearly raised in appellant's opening brief and therefore were not properly preserved for review on appeal. See Windsor Sch. Dist. v. State, 2008 VT 27, ¶ 31 n. 7 (we do not address arguments raised for the first time in a reply brief).

extensive bank records demonstrating the success of husband's business. Accordingly, we find no error.³

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

³ Husband raises several additional factual claims in his reply brief, including assertions that the record does not support the court's finding that numerous court appearances were needlessly caused by husband, that four days of hearings were in fact needlessly caused by wife, that wife was the cause of her extensive fees because she unsuccessfully sought damages in excess of \$200,000, and others. Most of these claims were not raised in the opening brief, and furthermore none of them undermines the court's fundamental conclusion that the equities and the parties' disparate income justified an award of attorney's fees.