

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2010-023

JUNE TERM, 2010

Anthony Deyo	}	APPEALED FROM:
	}	
v.	}	Washington Superior Court
	}	
Andrew Pollito	}	DOCKET NO. 225-3-09 Wncv

Trial Judge: Geoffrey W. Crawford

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

Petitioner appeals the superior court's order granting defendant summary judgment. We affirm.

Petitioner is an inmate under the supervision of the Department of Corrections (DOC). He alleges that in May 2003, the DOC took his spare prosthetic leg and placed it in storage. He was subsequently transferred to a facility out-of-state and failed in his attempts to obtain the prosthesis from the DOC. In October 2005, petitioner filed a small claims suit seeking damages for items lost by the DOC during his transfer. He did not include the prosthesis in his list of lost items. He obtained a judgment in his favor. In July 2006, petitioner filed a second small claims action seeking reimbursement for his allegedly lost prosthetic leg. The court concluded that petitioner did not exhaust his administrative remedies and dismissed the action. In May 2007, petitioner filed a third action in superior court seeking compensation for the leg, and the court granted DOC summary judgment, finding petitioner had sought only compensation and punitive damages—a claim that had to be made against the state and not the Commissioner. The court noted that petitioner may have had a claim cognizable against the Commissioner for injunctive relief under Rule of Civil Procedure 75.

In March 2009, petitioner filed the instant action in superior court, seeking injunctive relief under Rule 75 for replacement or reimbursement of the lost prosthesis. The DOC moved for summary judgment on June 18, 2009, arguing that petitioner's claim was precluded on grounds of res judicata, was time barred, and was moot because DOC had returned the prosthesis to petitioner shortly after he was transferred. Petitioner filed a motion to extend time until December 31, 2009, to file a response to defendant's request for summary judgment. The court granted the motion in part, and, on September 30, 2009, the superior court ordered petitioner to respond by November 15, 2009. Petitioner failed to respond, and the court granted the DOC summary judgment on November 18, 2009. Petitioner's attorney then filed a motion to

reconsider, claiming that although the September 30 order was received in his office, he did not see it. The court denied the motion on grounds of “futility,” explaining that the loss occurred almost six years previously and was the subject of two prior lawsuits. Petitioner appeals.

In reviewing a grant of summary judgment, this Court uses the same standard as the trial court. Madden v. Omega Optical, Inc., 165 Vt. 306, 309 (1996). Summary judgment is appropriate where there are no issues of material fact and a party is entitled to judgment as a matter of law. V.R.C.P. 56(c)(3).

On appeal, petitioner argues that the superior court erred in concluding that his motion to reconsider the grant of summary judgment was futile. Petitioner argues that res judicata does not bar his action for injunctive relief because he has never actually litigated his claim for a replacement leg. He further alleges that he could not have brought this claim in small claims court due to the jurisdictional limit of that court.

We conclude that the trial court did not err in denying petitioner’s motion to reconsider its grant of summary judgment to the DOC. It was within the court’s discretion to deny the motion for reconsideration given that petitioner had been given five months to respond to the motion. See Peters v. Mindell, 159 Vt. 424, 426 (1992) (noting that trial court had discretion in deciding whether to grant motion to reconsider grant of summary judgment).

Given petitioner’s failure to contest defendant’s motion for summary judgment, we take as true the facts recited therein. See Tetreault v. Greenwood, 165 Vt. 577, 578 (1996) (mem.) (“It is well settled that a party opposing summary judgment must inform the trial court of legal and factual reasons for the opposition, at risk of losing the motion and waiving the unvoiced reasons on appeal.”). Therefore, we accept DOC’s factual statement, supported by petitioner’s medical records, that petitioner’s leg was returned to him soon after his transfer out of state. Given that petitioner now has his prosthetic leg, we conclude that the case is moot. “In general, a case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.” Houston v. Town of Waitsfield, 2007 VT 135, ¶ 5, 183 Vt. 543 (mem.) (quotation omitted). Therefore, we decline to address petitioner’s additional arguments.

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice