



Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

MARCH TERM, 2022

Vincent Buro & Lena D. Pierce v.	}	APPEALED FROM:
Heidi Levins*	}	
	}	Superior Court, Rutland Unit,
	}	Civil Division
	}	CASE NO. 20-CV-00446
	}	Trial Judge: Helen M. Toor

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

Defendant appeals from a judgment entered in plaintiffs' favor, enforcing a mediated settlement agreement that ended a prior partition action related to real property that the parties jointly owned. We affirm.

The following background is drawn from the trial court's decision on the merits following a trial. Defendant and plaintiffs were parties to a prior partition case regarding a residential property in Pittsford, Vermont. The property was at one time owned by defendant, plaintiff Buro, and plaintiff Buro's now-deceased former wife, who was defendant's mother. At the time of trial the property was owned by defendant, plaintiff Buro, and plaintiff Buro's current wife, who is plaintiff Pierce.

The parties resolved the prior partition matter with a settlement agreement, executed in October 2019. The settlement agreement gave defendant the right to buy out plaintiffs if she did so by February 15, 2020. Defendant was required to apply for financing by October 25, 2019.* The purchase price would be her lending bank's appraised value. The agreement provided further that the property would be advertised for sale immediately—by a sign on the property at \$125,500 and listed with a realtor at \$135,000. If defendant was unable to buy the property by February 15, 2020, the parties would have to sell to a willing buyer for any offer of \$125,000 or more, or the amount of a bank appraisal, whichever was lower.

The settlement agreement also addressed an existing mortgage on the property—a home equity line of credit, which plaintiff Buro, defendant, and defendant's mother had taken out

* Although the settlement agreement provided a date of October 25, 2020, the trial court found that this date was nonsensical given the requirement that defendant purchase the property by February 15, 2020. Based on the testimony of the parties and the context of other provisions of the settlement agreement, the court found that the parties had intended a financing deadline of October 25, 2019. Neither party contests this finding on appeal.

before defendant's mother's death. The settlement agreement stated that the mortgage payoff and closing costs would be deducted from the sale price and the parties would share any remaining proceeds equally.

There was a tenant living at the property at the time the settlement agreement was signed. The agreement provided that plaintiffs would be responsible for evicting the tenant and would do so by December 1, 2019. It contemplated that defendant would move in after the tenant vacated. Defendant could live there on two conditions: (1) she would vacate the property within thirty days of the parties' acceptance of an offer to buy the property; and (2) she would be responsible for all mortgage payments and "usual costs of use, occupancy and possession."

Finally, the agreement also contained a provision for the substantially prevailing party in any enforcement action to recover their reasonable attorney's fees.

Plaintiffs initiated this action against defendant, alleging that she breached the settlement agreement because she never obtained financing or purchased the property, but refused to sign a listing agreement to sell the property and continued to live at the property without paying all associated financial obligations. Plaintiffs sought to enforce the settlement agreement or other appropriate relief to be able to sell the property on the open market. Defendant counterclaimed, seeking to continue living in the house and have a further opportunity to buy out plaintiffs' interests. She claimed that the settlement agreement was void because she was induced to sign it by plaintiffs' allegedly fraudulent misrepresentations during the 2019 mediation that yielded the settlement agreement. In particular, she alleged that plaintiffs failed to inform her of the poor condition of the property and that it had an outstanding mortgage. In the alternative, defendant alleged that plaintiffs breached the settlement agreement by allowing the condition of the house to deteriorate to an uninhabitable condition and not timely evicting the tenant.

Following a bench trial, the court made the following findings and conclusions. Defendant promptly began an application for financing after the settlement agreement was signed, but she was unable to complete the application because she did not have details regarding the mortgage. The court found that defendant never took steps to obtain that information. Defendant argued that she should not have to contribute to paying off the mortgage because she did not know what the borrowed money was spent on. The loan statements did not list defendant's name, suggesting that she did not actively use the home equity loan. However, her name and signature appeared on the mortgage and she also entered into the settlement agreement, which made her and plaintiffs jointly responsible to pay back the mortgage. Ultimately, defendant did not obtain financing and was unable to buy the property.

Plaintiffs attempted to evict the tenant but were unable to do so by December 1, 2019. Serving the tenant with a notice to vacate necessitated a tack order, and the notice was not served until January 2020 with a date in March 2020 to vacate. The tenant vacated the property in February 2020. Defendant moved in during the last week of February, even though she had failed to timely obtain financing or purchase the property. As of the date of trial, defendant had not moved out. She had been paying utilities and taxes but made only one mortgage payment.

The house was in "terrible shape" at the time of trial and when defendant moved in. When defendant moved in, it had no appliances, no hot water, termites, squirrel carcasses, foundation issues, crumbling drywall, and piles of garbage. Defendant and her son did a lot of work to make the house livable, but it remained in poor condition. Defendant testified that she

had not seen the inside of the house when she signed the settlement agreement and did not know of its poor condition.

Plaintiffs signed a listing agreement with a realtor in July 2020. It was unclear why plaintiffs did not sign a listing agreement sooner, given that the settlement agreement required the parties to sign a listing agreement immediately. Plaintiffs—through their attorney and realtor—made multiple attempts to obtain defendant’s signature on the listing agreement, but defendant did not respond to these communications and never signed the listing agreement.

The court concluded that both sides had breached certain provisions of the settlement agreement. Plaintiffs failed to evict the tenant by December 1, 2019, and did not sign a listing agreement immediately after execution of the settlement agreement. Defendant failed to obtain financing or purchase the property by February 2020, and she did not cooperate in selling the property. The court concluded that plaintiffs’ breaches did not justify defendant’s nonperformance. It reasoned that plaintiffs’ failure to timely evict the tenant may have justified defendant in declining to move in and pay for the carrying costs of the house, or in seeking to extend the deadline to purchase the property. However, she waived her right to any such relief by moving in and asserting no objections. And plaintiffs’ relatively minor delays in performance did not mean that defendant was entitled to any of the relief she sought: to rescind the settlement agreement, live in the house indefinitely, have plaintiffs pay off the remainder of the mortgage, and have another opportunity to purchase the house.

By contrast, the court concluded that defendant’s breaches went to the heart of the settlement agreement. She still had not obtained financing at the time of trial, over one year beyond the deadline in the settlement agreement. At the same time, she continued not to cooperate in listing the house for sale. Given defendant’s noncompliance with these terms, the court gave plaintiffs sole power to sign listing agreements and purchase-and-sale agreements.

The court awarded plaintiffs their reasonable attorney’s fees and costs, consistent with the fee-shifting provision of the settlement agreement. The court also ordered defendant to comply with key provisions of the settlement agreement relating to vacating the property in the event of a sale and her obligations to pay for carrying costs of the property during her occupancy as well as her share of the outstanding mortgage balance.

On appeal, defendant argues that the trial court erred by not invalidating the settlement agreement; ruling that defendant would be responsible for her share of repaying the home equity loan; not finding that plaintiffs deceived defendant and acted in bad faith during the mediation that led to the settlement agreement; and awarding plaintiffs their attorney’s fees.

“This Court’s review of a trial court’s findings following a bench trial is limited.” Lofts Essex, LLC v. Strategis Floor & Decor Inc., 2019 VT 82, ¶ 17, 211 Vt. 204 (quotation and alteration omitted). “A finding will not be disturbed merely because it is contradicted by substantial evidence; rather, an appellant must show there is no credible evidence to support the finding.” Highgate Assocs., Ltd. v. Merryfield, 157 Vt. 313, 315 (1991). We will affirm the trial court’s conclusions “where they are reasonably drawn from the evidence presented.” Lofts Essex, LLC, 2019 VT 82, ¶ 17 (quotation omitted).

Defendant contends that the trial court should have invalidated the settlement agreement because during mediation plaintiff Buro misrepresented the nature of the home equity loan by calling it a mortgage, and he did not use this loan toward maintenance of the property. The trial

court did not address the parties' conduct at mediation, but we cannot determine whether it could or should have because defendant does not cite to any record evidence to support her factual assertions. See In re S.B.L., 150 Vt. 294, 297 (1988) (recognizing that it is appellant's burden "to demonstrate how the lower court erred warranting reversal" and that Supreme Court "will not comb the record searching for error"). To the extent defendant is attempting to introduce new evidence on appeal, we will not consider it. See Hoover v. Hoover, 171 Vt. 256, 258 (2000) ("[O]ur review is confined to the record and evidence adduced at trial. On appeal, we cannot consider facts not in the record."). Although defendant does not point to language in the mortgage or any agreement of the parties creating a restriction on use of the loan funds, to the extent such a restriction existed, we note that plaintiff Buro testified that he used these funds for repairs to the house. Defendant cites no contrary evidence.

Relatedly, defendant contends that the trial court should have relieved her from any financial responsibilities related to the loan because she did not sign it and was not aware of it. Again, defendant fails to cite to any record evidence supporting these factual assertions, and we "will not comb the record searching for error" on defendant's behalf. In re S.B.L., 150 Vt. at 297. Even assuming there was some evidence supporting defendant's version of events, such as her own testimony, we would nevertheless affirm the trial court's finding that she signed the loan, because it was supported by credible evidence in the record. Highgate Assocs., 157 Vt. at 315 (holding that to overturn finding "an appellant must show there is no credible evidence to support the finding."). The court found that defendant's name and signature appear on the mortgage, as is clear on the face of the document itself, which was admitted into evidence. Moreover, it found—and defendant does not contest—that defendant signed the settlement agreement which clearly provides that the mortgage would be paid off prior to dividing sale proceeds among the parties. Defendant does not contend that there existed any other mortgage encumbering the property that may have caused confusion regarding which mortgage was referenced in the settlement agreement.

Defendant also argues that plaintiff Buro failed to comply with her discovery requests for documentation related to the loan. Defendant does not explain whether or at what point she raised this argument before the trial court, how the trial court ruled on these issues, or how the trial court erred. See Bull v. Pinkham Eng'g Assocs., 170 Vt. 450, 459 (2000) ("Contentions not raised or fairly presented to the trial court are not preserved for appeal."); see also V.R.A.P. 28(a)(4) (requiring that appellant's brief explain what issues are, how they were preserved, and what appellant's contentions are on appeal, with citations to authorities, statutes, and parts of record relied upon). Discovery rulings are entrusted to the trial court's discretion, Schmitt v. Lalancette, 2003 VT 24, ¶ 9, 175 Vt. 284, and we will not assess defendant's argument for the first time on appeal.

As to the condition of the property, defendant suggests that she was unable to inspect the property before moving in or signing the settlement agreement, and that plaintiffs' neglect of the property violated her right of enjoyment in the premises. Defendant vaguely describes instances when various agents of plaintiffs failed to provide her with keys to the house during periods well before the mediation and settlement agreement, but she does not contest the trial court's finding that defendant failed to request or perform an inspection of the property before signing the settlement agreement. Moreover, she does not cite to any portion of the transcript or other record evidence. See Hoover, 171 Vt. at 258 ("[O]ur review is confined to the record and evidence adduced at trial.").

Defendant's challenge to the award of attorney's fees is largely derivative of her other arguments. She does not contest the reasonableness of the amount awarded or that the settlement agreement entitled the substantially prevailing party in any enforcement action to recover their reasonable attorney's fees. Instead, she argues that the award was improper because the court should have invalidated the settlement agreement on the basis of plaintiff Buro's misrepresentations at mediation. We rejected this argument above.

Defendant also contends that the award of attorney's fees was improper because plaintiffs breached the settlement agreement by failing to evict the tenant by the deadline set in the settlement agreement. We understand defendant to be arguing that plaintiffs were not the "substantially prevailing" party because they too breached the agreement. Trial courts have significant discretion in identifying the prevailing party for purposes of awarding attorney's fees. Nystrom v. Hafford, 2012 VT 60, ¶ 20, 192 Vt. 300. In this inquiry, courts take a "flexible and reasoned approach focused on determining which side achieved a comparative victory on the issues actually litigated or the greater award proportionally to what was actually sought." Id. (quotation omitted). Although the court here concluded that plaintiffs breached the agreement through delays in their performance, it determined that these breaches were relatively minor and did not justify defendant's nonperformance. It ruled that defendant's breaches were more detrimental and frustrated the core purpose of the settlement agreement, and the court therefore granted plaintiffs sole authority to list and sell the property. Ultimately, defendant obtained none of the relief she sought and plaintiffs were granted the relief they sought. There is no basis to disturb the court's award of attorney's fees.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice