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STATE OF VERMONT

SUPERIOR COURT Caledonia Unit	CIVIL DIVISION Docket No. 19-1-09 Cacv
Gerald Devost Plaintiff v. Deborah T. Bucknam & Associates, P.C. et al. Defendant	FILED AUG 12 2010 VERMONT SUPERIOR COURT CALEDONIA UNIT

Decision and Order on Motion for Reconsideration

Defendant Gloria Jackson (hereinafter Jackson) moves that this court reconsider its May 25 (entered May 27) opinion granting summary judgment regarding Count 6 and Count 8 of Defendant's cross-claim against Defendants Deborah T. Bucknam & Associates, P.C. and Deborah T. Bucknam (hereinafter Bucknam). Jackson has filed a Motion for Reconsideration, seemingly pursuant V.R.C.P. 59(e), which is correctly characterized as a Motion to Alter or Amend a Judgment. Jackson is represented by attorney Howard Ogden, Esq. Bucknam is represented by attorney John C. Gravel, Esq.

Vermont Rule of Civil Procedure 59(e), which is substantially identical to Federal Rule 59(e), "gives the court broad power to alter or amend a judgment on motion within ten days after entry thereof." *Drumheller v. Drumheller*, 2009 VT 23, ¶ 28 (citing V.R.C.P. 59, Reporter's Notes). Rule 59(e) is a codification of the trial court's "inherent power to open and correct, modify, or vacate its judgments." *Id.* (citing *West v. West*, 131 Vt. 621, 623 (1973)). Although there is no specific authorization for a motion to "reconsider" a decision, such motions are treated as motions to amend or alter a decision under Rule 59(e) as the Vermont Rules do not formally provide for reconsideration. See *Fournier v. Fournier*, 169 Vt. 600, 738 A.2d 98 (1999) (mem.); *In re Robinson/Keir Partnership*, 154 Vt. 50, 54, 573 A.2d 1188 (1990).

A Rule 59(e) motion "allows the trial court to revise its initial judgment if necessary to relieve a party against the unjust operation of the record resulting from the mistake or inadvertence of the court and not the fault or neglect of a party." *Rubin v. Sterling Enterprises, Inc.*, 164 Vt. 582, 588 (1996) (citing *In re Kostenblatt*, 161 Vt. 292, 302 (1994)). The limited functions of a motion to alter or amend a judgment include "correct[ing] manifest errors of judgment or [] present[ing] newly discovered evidence." *Brislin v. Wilton*, No. 2009-236, slip op. (Vt. Feb. Term 2010). The purpose of such options "is to examine the correctness of matters before the court at trial . . . [which includes] reconsideration of matters properly encompassed in a decision on the merits." *Bell v. Bell*, 162 Vt. 192, 195, 643 A.2d 846 (1994); see also *Drumheller v. Drumheller*, 2009 VT 23, 185 Vt. 417 (allowing a court to go beyond issues requested by the parties due to its broad authority to alter or amend under Rule 59 to address mistake, inadvertence, or reconsider an important part of a prior decision).

Conversely, such a motion may "*not be used* . . . to raise arguments . . . that could have been raised prior to the entry of judgment." *Northern Sec. Ins. Co. v. Mitec Electronics, Ltd.*, 2008 VT 96, ¶ 44, 184 Vt. 303 (unpublished mem.) (emphasis original). Simple disagreement between the moving party and the court is not grounds for reconsideration, there must be controlling law or data the court overlooked "that might reasonably be expected to alter the conclusion reached by the court." *Latouche v. North Country Union High School Dist.*, 131 F.Supp.2d 568, 569 (D.Vt.,2001) (citing *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir.1995)). "[A] motion to reconsider should not be granted where the moving party seeks solely to relitigate an issue already decided." *Id.* (concluding that the moving party cited no new controlling decisions or data the Court overlooked that could reasonably be expected to alter the Court's conclusion).

In the end, "[r]econsideration of a judgment after its entry is indeed an extraordinary remedy which should be used sparingly" *Kirkpatrick v. Merit Behavioral Care Corp.*, 128 F.Supp.2d 186, 189 (D.Vt.,2000), and "disposition of a Rule 59 motion is committed to the court's sound discretion." *Rubin*, 164 Vt. at 588 (citing *Kostenblatt*, 161 Vt. at 302); see also *Haven v. Ward's Estate*, 118 Vt. 499, 502 (1955) (Amending a

judgment "is a power, it is said, which should be used with great caution and is addressed solely to the discretion of the court.").

Conclusions

Jackson puts forth a number of arguments for reconsideration of the court's decision to grant summary judgment on two counts (Count 6: Professional Negligence Regarding Mortgages & Count 8: Breach of Fiduciary Duty Regarding Mortgages). In the court's view, the bulk of the motion for reconsideration is simply an attempt at relitigating old matters by arguing the same issues from different perspectives or raising arguments that could have been raised earlier. This includes Jackson's contention that the incorrect procedures were followed when the court requested further briefing, further argument regarding the elements and existence of slander of title, assertions regarding injunctive relief and damages, compliance with the divorce decree, the assignment, and fiduciary and professional duties. As is evident in its opinions, the court did not consider additional facts proffered by supplemental briefings except for appropriately submitted un-refuted documents.

There is one point, however, on which Jackson is correct that the court did not sufficiently address in its past decisions: that no duty exists that would prevent Bucknam from oversecuring the debt owed it. However, this inadvertent omission by the court did not result in an unjust outcome primarily because even if the court had found a duty against oversecuring, Defendant Jackson failed to show damages in both counts which is an essential element to the claim. As noted in the May decision, breach of either professional negligence or fiduciary duty requires damages and Defendant Jackson failed to show damages.

In her motion to reconsider Count 6 Jackson stresses that she is seeking injunctive relief to prevent future damages. A motion for reconsideration may not be used to raise arguments that could have been raised prior to the entry of judgment. Although Jackson did pray for injunctive relief, Jackson did not properly asserted the basis of those claims and currently makes only vague claims that she fears the future may bring legal complications related to the supposed breaches. The legal standard for injunctive relief is

a strict one and Jackson has not met that standard. As correctly noted by Bucknam, "[a]n injunction is an extraordinary remedy, the right to which must be clear." *Okemo Mountain, Inc. v. Town of Ludlow*, 171 Vt. 201, 212-13 (2000). An injunction "may issue only in cases presenting some acknowledged and well defined ground of equity jurisdiction, as when it is necessary to prevent irreparable injury or a multiplicity of suits." *Vermont Division of State Bldgs. V. Town of Castleton Bd. Of Adjustment*, 138 Vt. 250, 256-57 (1980). Jackson has failed to state with specificity the danger of irreparable harm required for issuance of an injunction, instead merely asserting vague suspicions that the future may bring legal complications.

Likewise, in her motion to reconsider Count 8, Jackson stresses that she is seeking injunctive relief. Here Jackson also seems to claim she is seeking damages but never addressed them in her many, lengthy pleadings. Jackson explains her damages in the motion to reconsider and then, again, presents argument regarding the existence of a fiduciary duty due Jackson by Bucknam. The court agrees that a fiduciary duty exists between attorney and client and that Jackson was Bucknam's client. However, Jackson failed to show either damages or a basis for an injunction and cannot not try to further argue points that should and could have previously been made.

Defendant Jackson also submitted additional case law regarding Count 8 of her cross-claim (breach of fiduciary duty). The supplemental authority is a Maine Business and Consumer Court order on cross motions for summary judgment of May 2010. In *Northern Mattress Co, Inc. v. Bernstein Shur Sawyer & Nelson*, No. BCD-WB-CV-09-07, Order on Cross Motions for Summary Judgment (May 3, 2010), the trial court briefly addressed the plaintiff's breach of fiduciary duty claim. The court states that the same rules of causation and standards of proof apply to a breach of fiduciary and professional negligence claim. *Id.* at 17. However, a breach of fiduciary duty may be compensable regardless of whether the breach also constituted professional negligence. *Id.* That court saw a deficiency in the causal link between the claimed damages and the alleged breach. *Id.* Nevertheless, a narrow aspect of the claim survived summary judgment. *Id.*

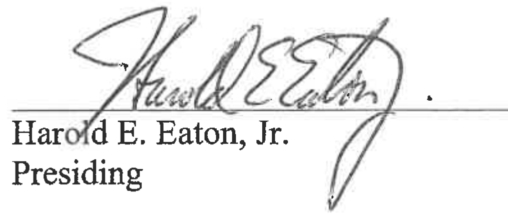
This court notes that the submission of this case is likely an attempt to provide a valid ground for reconsideration: providing new, controlling decisions or data that the court overlooked. The Maine Business and Consumer trial court is certainly not controlling on this court. Regardless, that court's reasoning is not persuasive in this matter. Although they both deal with professional negligence and fiduciary duty, the issues here and the issues in *Northern Mattress* are distinct. In that case the alleged breach led to a series of identifiable damages and ultimately the liquidation of the company. Furthermore, the court granted summary judgment for the defendant on several issues because of the plaintiff's "problems of proof with respect to the causal link between their claimed damages . . . and the Defendants' alleged actionable conduct." *Northern Mattress*, slip op. at 17.

Finally, Jackson moved to amend her complaint. The Vermont Rules on amended and supplemental pleadings are virtually identical to the Federal Rules. See Reporter's Notes, V.R.C.P. 15; see also *Childs v. Valente*, No. 2007-333, slip op. at 2 (Apr. 2008) (unpublished mem.) (citing *State v. Oscarson*, 2006 VT 30, ¶ 11, 179 Vt. 442 (recalling that while we are not bound by interpretations of similar or identical federal rules in federal courts, we frequently consult and follow their rulings when they are persuasive)). Regarding motions to amend, the trial court has sound discretion. See e.g. *Ferrisburgh Realty Investors v. Schumacher*, 2010 VT 6, ¶ 15, __ Vt. __. This discretion includes instances where an "amendment would have done no more than state an alternative theory for recovery." *Legacy Group of North America, Inc. v. North American Company for Health and Life Insurance*, 336 Fed.Appx. 87, 92 (2d Cir. 2009) (citing *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, (1962)). The proposed amendment is, at best, a reiteration of the grounds Jackson argues for reconsideration and a restatement of the initial pleadings.

ORDER

Defendant Jackson's motion to reconsider is DENIED.
Defendant Jackson's motion to amend is DENIED.

DATED August 10, 2010 at St. Johnsbury, Vermont.



Harold E. Eaton, Jr.
Presiding