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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-323

MARCH TERM, 2006

Edward Brady and Rosemary Brady	}	APPEALED FROM:
	}	
	}	
v.	}	Chittenden Superior Court
	}	
CU York Insurance Co., One Beacon Ins. Group and J.W. & D.E. Ryan, Inc.	}	DOCKET NO. S1223-02 CnC
	}	
		Trial Judge: Richard W. Norton

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

Plaintiffs Edward and Rosemary Brady appeal from the superior court=s judgment enforcing a settlement agreement reached by the parties following mediation. We affirm the court=s judgment but remand the matter for the court to consider anew plaintiffs= motion for relief from judgment.

Plaintiffs sued their homeowner=s insurance carrier, defendant CU York Insurance Company/One Beacon Insurance Group (York), and their plumber, defendant J.W. & D.E. Ryan (Ryan), after being offered what they believed was inadequate compensation for damages to their home caused by a cracked toilet tank. Following protracted litigation, the parties agreed to mediation, which took place on December 9, 2004. During the mediation session, in which all parties were represented by counsel, the following settlement agreement was executed:

> The parties agree that this matter is settled by payment of $40,000 (new money) by the defendants to plaintiffs. Plaintiffs to execute general releases to all defendants including standard ~~indemnification~~ language. Mutual release to be issued by One Beacon/CU York Insurance Company to Brady Galleries, Inc. to be included on releases.

On December 13, 2004, York sent plaintiffs= attorney a letter asking her to have plaintiffs sign the Aproposed@ release A[i]f this meets your approval.@ Ryan also sent plaintiffs= attorney a separate release. On December 22, 2004, plaintiffs= attorney forwarded the releases to plaintiffs for signature. Plaintiff Edward Brady, a retired attorney, objected to the scope of the releases, among other things, and plaintiffs refused to sign them. In a January 4, 2005 letter to plaintiffs, plaintiffs= attorney expressed frustration at her clients= unwillingness to follow through on the settlement agreement. She explained that she had already deleted the objectionable indemnity language from the Ryan release, and indicated that the releases could be drawn up to comport with the settlement agreement. She acknowledged, however, plaintiffs= refusal to sign any release sent to them, regardless of the language, and their professed desire to ensure that the settlement agreement fell apart. Shortly thereafter, plaintiffs discharged their attorney.

On January 13, 2005, York filed a motion to enforce the settlement agreement. Ryan filed a similar motion one

week later. At the same time, plaintiffs= attorney filed a AReport on Release Issue, Request for Lien on Proceeds and Motion to Withdraw,@ in which she acknowledged that: (1) the York release did not satisfy the terms of the settlement agreement in that it was overly broad in requiring plaintiffs to release non-parties; and (2) the Ryan release did not satisfy the settlement agreement in that it contained indemnity language, which the parties had expressly agreed to exclude from the releases. She also stated her belief that releases she had drafted and attached to her motion fairly reflected the agreement of the parties reached on December 9, 2004.

On January 21, 2005, acting pro se, plaintiffs filed a motion to deny the settlement agreement. The primary basis for the motion was that York=s attorney had improperly threatened plaintiffs with criminal prosecution if they did not sign the settlement agreement. On June 27, 2005, following a May 23, 2005 hearing, the superior court rejected plaintiffs= claims that York=s attorney threatened them and that the mediator had a conflict of interest, but concluded that defendants= proposed releases should not have contained any indemnification language and should not have included any non-parties except for Ryan=s liability carrier. Accordingly, the court ordered defendants to submit revised releases and a proposed judgment order based on a fully-integrated settlement agreement. Defendants did so, and the superior court entered a judgment order on July 7, 2005, requiring: (1) the parties to sign within thirty days the settlement agreements and releases submitted by defendants; and (2) defendants to issue settlement checks payable to plaintiffs and plaintiffs= attorney. On July 27, 2005, plaintiffs filed a motion for relief from judgment and a notice of appeal. On September 1, 2005, the superior court denied plaintiffs= motion for relief from judgment.

Plaintiffs appeal, arguing that the superior court should not have enforced a settlement agreement that defendants had breached by asking plaintiffs to sign releases that were inconsistent with the agreement. According to plaintiffs, once defendants breached the settlement agreement by asking them to sign releases that went beyond the agreement, defendants lost their right to enforce the agreement, and plaintiffs had the option of either enforcing the agreement or going to trial on the underlying claim. See Spaulding v. Cahill, 146 Vt. 386, 388 (1985) (A[I]f there is a breach of [a] settlement agreement, . . . the nonbreaching party may seek enforcement of either the original claim or the settlement agreement.@). We conclude that there was no uncured material breach entitling plaintiffs to repudiate the settlement agreement.

AFor there to be a breach of the settlement agreement that is sufficient to discharge a party from her obligations under the contract, and that would allow her to open up the underlying claims for further adjudication, the breach must be >material.= @ Malladi v. Brown, 987 F. Supp. 893, 905 (M.D.Ala. 1997); see Restatement (Second) of Contracts ' 237 (1981) (condition of party=s duty to render performance under exchange of promises is that there be Ano uncured material failure by the other party to render any such performance due at an earlier time@). Generally, A[a] material breach occurs only when an injured party has sustained a substantial injury by the breach.@ Malladi, 987 F. Supp. at 905. Section 241 of the Restatement suggests five criteria to consider in determining whether a material breach exists: (1) the extent to which the injured party will be deprived of a reasonably expected benefit; (2) the extent to which the injured party can be adequately compensated for deprivation of the benefit; (3) the extent to which the nonperforming party will suffer forfeiture; (4) the likelihood that the nonperforming party will cure the failure to perform, taking into account all of the circumstances; and (5) the extent to which the behavior of the nonperforming party comports with standards of good faith and fair dealing. Restatement (Second) of Contracts ' 241 (1981). Further, in determining the time after which a party=s uncured material failure to perform discharges the other party=s duty to perform, courts may also consider: (1) the extent to which it may reasonably appear to the injured party that delay may hinder him in making substitute arrangements; and (2) the extent to which the agreement provides for performance without delay. Id. ' 242.

Here, the settlement agreement required plaintiffs Ato execute general releases to all defendants including standard language.@ Plaintiffs did not execute the releases, as required by the agreement, because, for one thing, they were overly broad or contained language not contemplated under the agreement. The record indicates that plaintiffs= attorney believed she could draft releases that would cure the defects, but that plaintiffs had no interest in executing any release because they no longer wanted to be bound by the agreement. Indeed, in their motion to deny the settlement agreement, plaintiffs acknowledged that they told their attorney that Awe were not going to sign any releases and told her to file whatever is necessary with the Court to get the case tried.@ Although defendants asked the court, in their motion to compel, to order plaintiffs to sign the releases they had sent to plaintiffs, the agreement did not obligate defendants to submit releases to plaintiffs; rather, the agreement obligated plaintiffs to execute general releases to all

defendants. Yet, even when provided with drafts of releases that their attorney believed satisfied the agreement, plaintiffs adamantly refused to sign the releases.

Under these circumstances, there was no uncured material breach by defendants so as allow plaintiffs to repudiate the agreement. Although defendants= proposed releases, if signed, may have deprived plaintiffs of benefits reasonably expected under their agreement, the record suggests that the defect in the proposed releases could, and would, have been cured had plaintiffs executed more narrow releases and submitted them to defendants. Again, the agreement placed upon plaintiffs, not defendants, responsibility for performance with respect to the execution of general releases to all defendants. Thus, their conduct, more than defendants=, thwarted performance of the settlement agreement.

This case is plainly distinguishable from Spaulding, 146 Vt. at 389, wherein the parties agreed to settle their differences for $5000, but the defendant breached the agreement by not making any payment to the plaintiff during the seven-month period before plaintiff filed suit. Nor do we find persuasive, under the circumstances of this case, the out-of-state cases cited by plaintiffs in support of their position. Generally, those cases stand for the proposition that settlement agreements will not be enforced when there is no meeting of the minds as to all material terms of the agreement. See Greyhound Lines, Inc. v. Sherry, 98 Cal. App. 3d 604, 609 (Ct. App. 1979) (where substantial evidence supported Atrial court=s determination that the parties did not orally agree to all of the material provisions of the settlement,@ court did not abuse its discretion in denying motion to enforce agreement); Cheverie v. Geisser, 783 So. 2d 1115, 1120 (Fla. Dist. Ct. App. 2001) (no substantial evidence to support trial court=s finding that parties reached settlement agreement on all essential terms); Lavigne v. Green, 23 P.3d 515, 520 (Wash. Ct. App. 2001) (evidence showed that parties had agreed only to amount of settlement). In this case, in contrast, the parties had a complete, if brief, agreement on all material terms of their settlement. Indeed, plaintiffs acknowledged as much, but claimed a breach on defendants= partCa position that we reject.

Next, plaintiffs argue that the trial court lacked jurisdiction to consider their motion for relief from judgment, and in any case, erroneously denied the motion without holding a hearing. We agree that the superior court lacked jurisdiction to consider the motion. On July 7, 2005, the court issued its judgment order directing the parties to sign the documents submitted by defendants within thirty days and requiring defendants to issue settlement checks to plaintiffs and their former attorney. On July 27, 2005, plaintiffs filed a motion for relief from judgment under Vermont Rule of Civil Procedure 60(b)(3), alleging that defendants had committed fraud by not revealing that York and Ryan=s insurer, Peerless Insurance, were members of the same insurance group. According to plaintiffs, they would have been skeptical of an offer based on an assessment by essentially one rather than two insurers, and thus would have held out for more money if they had known that the insurers were members of the same group. That same day, plaintiffs filed a notice of appeal of the superior court=s June 27 decision and July 7 judgment. Plaintiffs asked the court to file their 60(b) motion before their notice of appeal so that the motion would be on the record before the case was sent to this Court.

On August 5, 2005, Ryan filed an opposition to plaintiffs= Rule 60(b) motion, arguing that York and Peerless were not in the same insurance group or affiliated in any way, and stating that, even if they were, there was no evidence of fraud. In support of its filing, Ryan submitted an affidavit from a Peerless claims manager stating that Peerless is owned by Liberty Mutual Insurance Company, and that York is not affiliated with Liberty Mutual or Peerless. In reply, plaintiffs argued that the superior court lacked jurisdiction to hear their motion until after this Court decided their appeal, and that, in any event, they should be given the opportunity to present evidence in support of their motion at an evidentiary hearing. On September 1, 2005, the court denied plaintiffs= motion for relief from judgment, stating on a motion-reaction form that it had the power and the discretion to decide the motion, and there was no clear and convincing evidence of fraud. On September 9, 2005, plaintiffs filed an amended notice of appeal that added an appeal of the superior court=s September 1 order denying their motion for relief from judgment.

We agree with plaintiffs that, once they filed their initial notice of appeal, the superior court had no authority to rule on plaintiffs= 60(b) motion Ain the absence of remand for that purpose.@ Kotz v. Kotz, 134 Vt. 36, 39 (1975). The case that the superior court relied on for authority to rule on the motion is inapposite in that this Court had remanded that case to the family court. See Stalb v. Stalb, 168 Vt. 235, 241 (1998). Accordingly, the superior court=s September 1 order denying plaintiffs= motion for relief from judgment is vacated, as is plaintiffs= September 9 notice of

appeal, and the matter is remanded for the court to consider the motion anew. Although generally a hearing should precede a decision on a motion to set aside a judgment order, a court may deny such a motion Awhen it finds the motion totally lacking in merit.@ Blanchard v. Blanchard, 149 Vt. 534, 537 (1988). Under V.R.C.P. 78(b)(2), a party requesting the opportunity to present evidence in support of motion Ashall include a statement of the evidence which the party wishes to offer.@ Based on this proffer, Athe court may decline to hear oral argument and may dispose of the motion without argument.@ Id.

The superior court=s June 27, 2005 decision and July 7, 2005 judgment order are affirmed. The matter is remanded for the court to consider anew plaintiffs= motion for relief from judgment.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Denise R. Johnson, Associate Justice

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Brian L. Burgess, Associate Justice