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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2009-053

JANUARY TERM, 2010

Town of Irasburg	}	APPEALED FROM:
	}	
v.	}	Orleans Superior Court
	}	
Harold N. Rock, Sr., Elaine A. Rock, Harold N. Rock, Jr. and Ronald Rock	}	DOCKET NO. 281-11-06 Oscv
		Trial Judge: Edward J. Cashman

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

Pro se defendants filed a notice of appeal following the superior court's issuance of an enforcement order imposing conditional fines on them for violating a previous order related to state and municipal efforts at forcing them to clean up unpermitted junk on their property and adjoining property owned by the State of Vermont and the Town of Irasburg. We reverse the court's April 7, 2008 order, and remand the matter for further proceedings with respect to the Town.

This case is confusing because there are two related, but separate, actions, one involving the State and one involving the Town. This appeal concerns the case brought by the Town. As far as we can tell from the record, the two cases, which have different trial court docket numbers and address independent claims, were never formally consolidated, but rather were joined for certain proceedings. The State filed its action first on October 4, 2006. The superior court issued a permanent injunction in favor of the State in that matter on November 30, 2007. The Town filed the instant action on November 22, 2006. On April 7, 2008, the court entered an order granting the Town summary judgment and making a previous preliminary injunction final. In that order, however, the court explicitly "reserve[d] for further hearing the issue of any damages due the town on any of its monetary claims." The court also indicated that it would join the Town and State cases for purposes of a scheduled on-site visit. Both the Town and the State participated in a hearing at the site on December 17, 2008, during which the court was to consider the State's motion for immediate enforcement of the November 30, 2007 final injunction and any other issues that needed to be addressed. On February 2, 2009, the court entered an order stating that defendants were not in full compliance with the November 30, 2007 order and imposing conditional fines unless they fully complied with the order by March 31, 2009. The order made the one-hundred-dollar-per-day conditional fine payable in equal parts to the State and the Town, and gave agents of both the State and the Town the right to enter onto the site and remove materials at a reasonable cost to be reimbursed by defendants.

The header on the order included both plaintiffs—the State and the Town—and both trial court docket numbers. Defendants timely filed an appeal in both cases. On October 8, 2009, a three-justice panel of this Court affirmed the February 2, 2009 enforcement order with respect to the State's case, concluding that most of defendants' arguments challenged aspects of the November 30, 2007 final order, from which defendants had failed to take a timely appeal. Agency of Transp. v. Rock, No. 2009-052 (Vt. Oct. 8, 2009) (unreported mem.). In the instant appeal concerning the Town's case, defendants' arguments similarly are directed at issues considered in earlier orders, particularly the April 7, 2008 order in which the court granted the Town summary judgment and made an earlier preliminary injunction final. The Town contends, as the State did with regard to the November 30, 2007 order in the earlier appeal, that defendants failed to appeal from the superior court's April 7, 2008 final order and thus are precluded from raising arguments challenging the trial court's findings, conclusions, and decision in that order.

We do not agree that defendant is barred from raising arguments challenging the April 7, 2008 order. In that order, as noted, the superior court explicitly stated that it "reserve[d] for further hearing the issue of any damages due the town on any of its monetary claims." As it turned out, to the extent the court dealt with that issue, it did so in its February 2, 2009 enforcement order following the December 17, 2008 on-site hearing. "The test of whether a decree or judgment is final is whether it makes a final disposition of the subject matter before the Court." Morissette v. Morissette, 143 Vt. 52, 58 (1983) (quotation omitted). Plainly, as the court itself acknowledged at the time, its April 7, 2008 order did not finally dispose of the subject matter before the court. Although the court granted the Town summary judgment and made an earlier preliminary injunction final, it also contemplated a further hearing and ruling on damages. Cf. Alexander & Alexander Inc. v. Coffey, No. A-91-918, 1992 WL 179452, at *8 (Neb. Ct. App. July 14, 1992) (citing cases in support of its holding that "when a plaintiff seeks both an injunction and damages in an action against a defendant, the case is not appealable until the trial court has issued an order which finally determines both issues"); Dallas County v. Sweitzer, No. 05-92-00467-CV, 1992 WL 333431, at * 2 (Tex. App. Nov. 9, 1992) (holding that there was no final judgment where court issued final injunction but appointed master to calculate damages). Nor did the court "direct the entry of a final judgment as to one or more but fewer than all of the claims or parties . . . upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment," as required under V.R.C.P. 54(b). Accordingly, the April 7, 2008 order was not a final judgment from which defendants were required to appeal to preserve any challenges to the order following final judgment.

The Town argues, however, that even if defendants have the right to challenge the April 7, 2008 summary judgment order, they cannot prevail because they have failed to demonstrate the existence of a material fact in dispute. Again, we disagree. Before the superior court, the Town moved for summary judgment on all issues except damages. Acknowledging in its motion a dispute as to the width of a town right of way upon which the Town claims defendants are trespassing, the Town stated that summary judgment could be granted on all claims except damages. The Town relied upon a statutory presumption to support its claim that the road was three rods wide, see 19 V.S.A. §§ 32, 702, stating further that "[i]f for some reason the Court concludes that there is a viable issue regarding the width of the road measured from the centerline, then [the Town] will submit certified records from the Town, as well as other 'ancient documents' . . . to support the location and existence of the road as a three-rod road . . . ." In its order granting the Town summary judgment, the superior court stated that the only issue that

involved a genuine issue of material fact is the width of the town road running through defendants' property, but concluded that defendants could not "substantiate their claim that the road is only 20 feet wide with any documentation or admissible testimony."

On appeal, defendants make several arguments regarding the width of the road and submit a highway department map and deed, as they did before the superior court, to support their claims. For its part, the Town relies upon the statutory presumption, as it did before the trial court; however, the Town also contends that defendants' arguments do not make any sense. The statutory presumption that the Town relies upon is a rebuttable presumption. See Town of South Hero v. Wood, 2006 VT 28, ¶ 15, 179 Vt. 417 (noting that "19 V.S.A. § 32 creates a rebuttable presumption"). In this state, rebuttable presumptions operate only to assign the burden of production. See V.R.E. 301(a). Once the party against whom the presumption operates bursts the bubble by presenting evidence that the fact is not as presumed, the function of the presumption is over, and the fact-finder must determine the fact based on the evidence and not the presumption. See id. 301(c)(3); Reporter's Notes, V.R.E. 301. The presumption is rebutted by any evidence that the fact is not as presumed.

Although the court summarily stated, without referring to defendants' evidence, that their submissions were inadequate to defeat the Town's motion, and the Town contends on appeal that defendants' arguments are without merit, we note that in an August 31, 2007 order, the superior court found that "defendants dispute the location of the town right of way and provide a written answer and evidence on site that raise a genuine question of fact as to the width of the right of way and the location of the centerline to the road." While the court could change its mind as to whether a genuine issue of material fact continued to exist, here we have no idea on what basis the court concluded that this genuine issue of material fact no longer exists. The superior court's April 7, 2008 order neither discusses the merits of defendants' contentions and submissions nor indicates why they are insufficient to raise a genuine issue of material fact or overcome the rebuttable statutory presumption. Nor are we in a position to sift through the record and explore the Town's contention that defendants' claims are without merit. We realize that the court noted in its order that defendants had filed an unsworn statement, in addition to a map and deed, rather than an affidavit or verified statement in opposition to the Town's motion for summary judgment, but "[n]othing in our case law or the language of Rule 56 supports . . . a requirement" that an adverse party file an affidavit or sworn statement to avoid summary judgment. Bingham v. Tenney, 154 Vt. 96, 100 (1990). Given these circumstances, the matter must be remanded for the superior court to address defendants' contentions. Our decision does not preclude the court from granting the Town summary judgment if it finds, based on a review of defendants' contentions and submissions, that there exists no genuine issue of material fact and that the Town is entitled to judgment as a matter of law.

Finally, it is not entirely clear from the record to what extent, if any, the superior court's February 2, 2009 enforcement order must be vacated as the result of our decision today. As noted, we have already affirmed the February 2 order in the context of defendants' appeal in the State's case. In affirming the February 2 order, we noted that most of defendants' arguments challenged the underlying November 30, 2007 permanent injunction, from which defendants did not appeal. The February 2 order appears to be based mainly, if not exclusively, on defendants' failure to comply with the November 30 injunction. To the extent that the February 2 order is

dependent upon the court's April 7, 2008 summary judgment order, however, it must be vacated with respect to the Town.

Reversed and remanded.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice