THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2008-0611, Town of Jefferson v. Peter Estabrooks & a., the court on January 11, 2010, issued the following order:

The respondents, Peter and Esther Estabrooks, appeal orders of the superior court awarding the petitioner, the Town of Jefferson (town), civil penalties and attorney's fees following a hearing on the town's petition for injunctive relief, civil penalties, attorney's fees and contempt, and sua sponte imposing a lien upon their property. They argue that the trial court erred by: (1) finding that they violated the consent decree that had concluded prior litigation by constructing certain wood-framed tarp structures (tarps); (2) denying their motion to dismiss on res judicata or collateral estoppel grounds; (3) not concluding that a building permit encompassed the tarps; (4) ruling that later building permit applications would be governed by an amendment to the definition of "structure" under the town's land use ordinance; (5) dismissing, and precluding testimony that allegedly would have proved, their counterclaims; (6) awarding the town as contempt sanctions civil penalties and attorney's fees that were previously waived under the consent decree, and not ruling upon their objections to such an award; and (7) imposing the lien. We vacate only so much of the trial court's decision as imposed the lien. In all other respects, we affirm.

We will uphold the trial court's findings and rulings unless they lack support in the record or are legally erroneous, mindful of the substantial deference accorded the trial court to evaluate the evidence submitted at trial, resolve conflicts in the testimony, measure the credibility of the witnesses, and determine the weight to be given any particular item of evidence. See Cook v. Sullivan, 149 N.H. 774, 780 (2003).

The respondents first argue that the trial court erred by finding that they violated the consent decree by constructing the tarps. Although the respondents contend that the trial court made no finding that the tarps were, in fact, constructed after the decree was entered, they concede that such a finding is implicit in the trial court's conclusion that they constructed the tarps in contempt of the decree. The trial court is "presumed to have made all findings necessary to support its decision." Bennett v. Town of Hampstead, 157 N.H. 477, 486 (2008).

The record supports the trial court's implicit finding. Although the respondents claim that photographs showed the tarps to have been in place before the consent decree, we agree with the town that these photographs do not

depict the same wood-framed structures that appear in later photographs the town submitted. The respondents do not argue on appeal that the tarps, as shown in the later photographs, were not "structures" for which they were required by the consent decree to apply for a building permit. To the extent that the respondents contend that their evidence regarding when they modified the tarps was uncontroverted, we observe that the trial court was free to disregard such evidence even if it were uncontested. See In the Matter of Aube & Aube, 158 N.H. 459, 466 (2009) (finder of fact not required to believe even undisputed evidence). Under these circumstances, the trial court could reasonably have found that the respondents violated the consent decree by constructing the tarps after the decree was entered.

The respondents next argue that the trial court erred by denying their motion to dismiss on res judicata and collateral estoppel grounds. Collateral estoppel applies only to the extent an issue was actually litigated in prior litigation. See Petition of Concord Teachers, 158 N.H. 529, 536 (2009). Likewise, res judicata does not bar a claim that could not have been raised in prior litigation. See Grossman v. Murray, 141 N.H. 265, 270-71 (1996). Because the trial court sustainably found that the respondents constructed the tarps after the consent decree was entered, it did not err by denying the motion to dismiss on collateral estoppel or res judicata grounds.

The respondents next contend that the trial court erred by failing to conclude that their existing building permit allowed the tarps. To the contrary, the respondents' building permit stated, "The approval of this permit does not constitute approval of any . . . structures which have been erected in violation of state or local law." Because the trial court concluded that the tarps were erected in violation not only of the consent decree, but also of the town's land use ordinance, the permit did not constitute approval of the tarps. The trial court's analysis of this language relative to steel containers on the respondents' property is irrelevant to its consideration of the tarps. The tarps, unlike the containers, were "structures" for the purposes of the ordinance when the respondents obtained the permit.

To the extent the respondents next argue that the trial court violated their vested rights by ruling that future building permit applications would be governed by a new definition of the term "structure" in the ordinance, we agree with the town that they have failed to preserve the issue. "It is a long-standing rule that parties may not have judicial review of matters not raised in the forum of trial." Bean v. Red Oak Prop. Mgmt., 151 N.H. 248, 250 (2004). Although the respondents complained in their motion for reconsideration that the trial court had ruled that future building permit applications would be governed by the new definition of structure, they did so not upon the basis that they had acquired vested rights, but because the parties were deprived of an opportunity to present

evidence or legal argument concerning the issue. We decline to address the vested rights argument for the first time on appeal.

The respondents next assert that the trial court erred by dismissing and precluding live testimony to prove their counterclaims. In reviewing the trial court's order granting the town's motion to dismiss for failure to state a claim upon which relief may be granted, we assume the well-pleaded factual allegations in the respondents' counterclaims to be true, and construe all reasonable inferences from them in the respondents' favor. See Hilario v. Reardon, 158 N.H. 56, 61 (2008). We do not, however, assume the truth of allegations that were not well-pleaded, "including the statement of conclusions of fact and principles of law." Snierson v. Scruton, 145 N.H. 73, 76 (2000) (quotation omitted). "We then engage in a threshold inquiry that tests the facts in the [counterclaims] against the applicable law." Hilario, 158 N.H. at 61.

We find no error in the trial court's dismissal of the respondents' counterclaims in which they alleged legal conclusions such as that the town violated "the spirit and letter of the Consent Decree," or that the town's petition was commenced, prolonged or defended without a reasonable basis. The respondents' allegations constitute no more than "the statement of conclusions of fact and principles of law." Snierson, 145 N.H. at 76 (quotation omitted). Under these circumstances, the trial court did not err by dismissing the counterclaims and by precluding live testimony to prove them.

The respondents next argue that the trial court erred when it awarded the town civil penalties and attorney's fees the town had waived under the consent decree as a civil penalty for the respondents' violation of the consent decree. We assume, without deciding, that the respondents are correct that the trial court erred by denying their motion as untimely. We uphold the trial court's decision, however, on different grounds.

We agree with the town that, having found that the respondents violated the consent decree, the trial court had the discretion to impose the civil penalties and attorney's fees as a contempt sanction. See In the Matter of Kosek & Kosek, 151 N.H. 722, 727-28 (2005) (trial court has discretion to fashion a remedy under its contempt power that is remedial, coercive, and for the benefit of the complaining party); Town of Nottingham v. Bonser, 131 N.H. 120, 132 (1988) (trial court could properly award attorney's fees, despite earlier ordering that respondent's application for land use permits would absolve him of such liability, as a civil contempt penalty if respondent failed to abide by the order).

Finally, we address the respondents' contention that the trial court exceeded its authority by imposing a lien upon their property sua sponte. The town counters that the lien was permissible because it was entitled to a lien under RSA 498:16 (Supp. 2009) as a matter of right. RSA 498:16 provides that

"[t]he plaintiff in a bill of equity . . . shall have a writ of attachment . . . as of right . . . to secure the performance of any decree or order that may be in the suit." In Sindt v. Gilfoyle, 124 N.H. 315, 318 (1983), however, we ruled that the "as of right" language in RSA 498:16, as applied to pre-judgment attachments, was repealed by implication in part because of the statutory requirements of RSA chapter 511-A. Because, due to the present appeal, no final judgment has yet been entered, the trial court's lien is in the nature of a pre-judgment attachment, see Gautschi v. Auto Body Discount Center, 139 N.H. 457, 562 (1995), and under Sindt, compliance with RSA chapter 511-A was required. Accordingly, we vacate the July 3, 2008 order only to the extent it imposed a lien upon the property.

Affirmed in part; vacated in part and remanded.

DALIANIS, DUGGAN and CONBOY, JJ., concurred.

Eileen Fox,
Clerk