THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2008-0716, James Faro & a. v. Land's End Association, the court on March 18, 2010, issued the following order:

The petitioners, James and Mary Jean Faro, appeal an order of the trial court issued in this equity action which sought to enforce a 1985 Agreement and a 1988 Consent Decree executed by the current parties' predecessors in interest. They argue that the trial court erred in: (1) applying the doctrine of laches; (2) failing to define with sufficient specificity in its order for permanent relief the rights and obligations of the parties; and (3) failing to award attorney's fees to them. We affirm.

The petitioners first contend that the trial court erred in applying the doctrine of laches because the respondent, Land's End Association, did not assert it as an affirmative defense. We have previously held that a trial court may raise an affirmative defense sua sponte. Exeter Hospital v. Hall, 137 N.H. 397, 399-400 (1993). In Exeter Hospital, the trial court found that although the defense was not raised, the plaintiff's action was barred by the statute of limitations. Id. at 398-99. While the petitioners correctly note that in Exeter Hospital, we remanded the case so that the plaintiff could present evidence relating to the statute of limitations defense, see id. at 400, they attempt to distinguish the case based upon the defendant's pro se status. But see, e.g., Town of Nottingham v. Newman, 147 N.H. 131, 137 (2001) (rules of appellate practice not relaxed for pro se litigants). We find more compelling that, in Exeter Hospital, the plaintiff cited evidence that it would have presented had the statute of limitations defense been pled, and thereby established that it was prejudiced by the trial court's sua sponte ruling. The same cannot be said of this case, where the trial court found in denying the petitioners' motion to reconsider and clarify that they did not "point to any argument they could make asserting that the doctrine should not apply in this case." Nor have they specified on appeal the evidence that they would have presented had the defense been pled at the outset.

The petitioners also contend that the trial court applied an incorrect standard in determining that laches barred enforcement of the 1988 Consent Decree. Citing Premier Capital, LLC v. Skaltsis, 155 N.H. 110 (2007), they argue that the court should have considered the knowledge of the petitioners, the conduct of the respondent, the interests to be vindicated and the resulting prejudice. See id. at 118. In Premier Capital, we noted that laches is not a mere matter of time, but is principally a question of the inequity of permitting the claim to be enforced – an inequity founded on some change in the conditions or relations of the properties or the parties involved. Id.

In this case, the trial court found that: (1) neither of the present parties were parties to the 1988 Consent Decree; (2) the tree plan developed in conjunction with the consent decree was never filed; and (3) the petitioners had known about the settlement agreement since 1994 but did not bring an action to enforce it until 2004. Because the trial court's application of laches is neither unsupported by the evidence nor erroneous as a matter of law, we affirm this ruling. See id. (trial court has broad discretion in determining whether circumstances justify application of laches).

Although the trial court declined to enforce the provision of the 1988 Consent Decree that required Land's End to plant trees in accordance with Exhibit A of the decree, the court did enforce the provisions of the 1985 Agreement and 1988 Consent Decree that required maintenance of a buffer zone. The trial court found that a 1987 photograph provided the best evidence of the original view, the maintenance of which was required by the agreements. The court ordered Land's End to restore and maintain the screen of trees contemplated in the original agreements. While there is evidence in the record that Land's End and its predecessor in interest failed to comply with the terms of those agreements in the past, the photograph and order of the court, drafted after taking a view of the area in dispute, provide sufficient description of the buffer zone to be maintained. As the respondent notes, the petitioners' original bill in equity and its amended version did not provide a suggested metes and bounds plan; nor did it seek enforcement of the unrecorded document drafted as a result of the 1988 Consent Decree.

The petitioners' final argument is that the trial court erred in denying them an award of attorney's fees. A prevailing party may be awarded attorney's fees when recovery is authorized by statute, an agreement between the parties or an established judicial exception to the general rule that precludes recovery of such fees. Bennett v. Town of Hampstead, 157 N.H. 477, 483 (2008). We review the trial court's denial of attorney's fees under an unsustainable exercise of discretion standard, giving deference to the trial court's decision. In the Matter of Martel & Martel, 157 N.H. 53, 63 (2008).

The trial court found that the petitioners did not prevail on all of their claims and that the respondent did not understand its obligations concerning maintenance of the buffer zone. Given our deferential standard of review of this issue and the record before us, we affirm.

Affirmed.

DUGGAN, HICKS and CONBOY, JJ., concurred.

Eileen Fox,
Clerk