State of New Hampshire

MERRIMACK, SS. DOCKET #2019-0476

Supreme Court
2020 Term
July Session

Richard Horton & a.

v.

David Clemens & a.

RULE 7 APPEAL OF RICHARD HORTON & a.

FROM THE FINAL DECISION OF THE

2nd CIRCUIT COURT

DISTRICT DIVISION - HAVERHILL

PLAINTIFF'S/APPELLANTS' REPLY BRIEF

July 24, 2020

By: Gabriel Nizetic, Esq. #6540
(presenting oral argument)
Plymouth Law Center
66 Highland Street
Plymouth, NH 03264
603-536-5900

TABLE OF CONTENTS

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 3

QUESTIONS PRESENTED 4

STATEMENT OF THE FACTS AND STATEMENT OF THE CASE 5

SUMMARY OF REPLY ARGUMENTS 6

ARGUMENT 7

I. THE CASES CITED BY TENANTS DO NOT STAND FOR THE GENERAL PROPOSITION THAT STRICT COMPLIANCE WITH RSA 540 IS REQUIRED OTHERWISE THE CASE MUST BE DISMISSED. 7

A. The cases cited by Tenants, *Buatti v Prentice*, 162 NH 228 (2011), *S. Willow Properties LLC v Burlington Coat Factory of NH*, 159 NH 494 (2009), *Matte v Shippee Auto Inc.*, 152 NH 216 (1998), and *Havington v Glover*, 143 NH 291 (1998), do not support the general proposition that strict compliance is required in this case. 7

B. The cases cited by Tenants, *Great Traditions Home Builders, Inc v O'Connor*, 175 NH 387 (2008), *AIMCO Props. v Dziewisz*, 152 NH 587 (2005), and *Havington v Glover*, 143 NH 291 (1998), do not stand for the general proposition that dismissal is the sole judicial remedy. . 9

II. THE TENANTS NEVER RAISED ANY CONSTITUTIONAL ISSUES OR ARGUMENTS BELOW. THE TRIAL COURT COULD NOT CONSIDER ISSUES NOT PROPERLY BEFORE IT, EVIDENCE THAT WAS NOT INTRODUCED, NOR ARGUMENTS WHICH WERE NEVER MADE 9

A. The Tenants are not entitled to introduce novel Constitutional arguments, in the first instance, in this appeal. 9

CONCLUSION 11

ORAL ARGUMENT AND CERTIFICATIONS 12

TABLE OF AUTHORITIES

New Hampshire Cases

AIMCO Props. v Dziewisz,
152 NH 587 (2005) 6, 9

Buatti v Prentice,
162 NH 228 (2011) 6, 7, 8, 9

Great Traditions Home Builders, Inc v O'Connor,
175 NH 387 (2008) 6, 9

Darbouze v. Champney, 160 NH 695 (2010)
..... 10

Havington v Glover,
143 NH 291 (1998) 6, 7, 8, 9

Lavoie v Szumiez,
115 NH 266 (1975). 8

Living Life Investments v Wood,
NH Supreme Court order dated October 13, 2017 8

Matte v Shippee Auto Inc.,
152 NH 216 (1998) 6, 7, 8, 10

S. Willow Properties LLC v Burlington Coat Factory of NH
159 NH 494 (2009), ... 6, 7, 8

Whiting v Ladd,
NH Supreme Court order dated June 30, 2008 9

New Hampshire Statutes

Part I, Article 14, New Hampshire Constitution 6, 10

RSA 540 .....6, 8, 9, 11

RSA 540:3 10

RSA 540:5 .....10, 11

RSA 540:8 7

RSA 540:9 7

New Hampshire Court Rules

Supreme Court Rule 20(2)..... 8

ADDITIONAL QUESTIONS PRESENTED FOR REVIEW

1. Whether the cases cited by Tenants support the general proposition that "strict compliance" is always required for an eviction to proceed.

2. Whether the cases cited by Tenants stand for the general proposition that dismissal is the sole available judicial remedy in cases of non-compliance.

3. Whether the trial court could have considered and decided arguments not raised and issues not preserved before it.

4. Whether the Supreme Court can decide issues that were not preserved and not accepted for appeal.

STATEMENT OF THE FACTS AND STATEMENT OF THE CASE

Richard and Janice Horton, Appellants/Landlords, rely on the Statement of the Case and Statement of the Facts as set forth in their opening brief.

On or about July 15, 2020, the New Hampshire Legal Assistance ("NHLA") filed an *amicus* brief in this case on behalf of the Appellees/Tenants. In its *amicus* brief NHLA raised entirely new issues or arguments which were neither raised in the trial court, preserved for appeal, nor accepted for judicial review as noticed in the Landlords' notice of appeal.

This reply brief addresses those novel arguments/questions raised in the Appellees'/Tenants' *amicus* brief as well as the attempt to unilaterally introduce new issues beyond those argued in front of, and considered by, the trial court.

SUMMARY OF REPLY ARGUMENTS

1. The cases cited by Tenants, *Buatti v Prentice*, 162 NH 228 (2011), *S. Willow Properties LLC v Burlington Coat Factory of NH*, 159 NH 494 (2009), *Matte v Shippee Auto Inc.*, 152 NH 216 (1998), *Havington v Glover*, 143 NH 291 (1998), do not support the general proposition that "strict compliance" with RSA 540 is required.

2. The cases cited by Tenants, *Great Traditions Home Builders, Inc v O'Connor*, 175 NH 387 (2008) *AIMCO Props. v Dziewisz*, 152 NH 587 (2005), *Havington v Glover*, 143 NH 291 (1998), do not stand for the general proposition that dismissal is the sole judicial remedy. There is nothing in RSA 540 which prohibits the trial courts from invoking other curative measures.

3. The Tenants are not entitled to introduce a novel Constitutional argument, in the first instance, in this appeal. The argument that the trial court had the inherent power pursuant to Part I, Article 14 of the New Hampshire Constitution was never argued nor developed before the trial court. The Supreme Court cannot review issues that were never considered by the trial court, nor accepted for judicial review.

ARGUMENT

I. THE CASES CITED BY TENANTS DO NOT STAND FOR THE GENERAL PROPOSITION THAT STRICT COMPLIANCE WITH RSA 540 IS REQUIRED OTHERWISE THE CASE MUST BE DISMISSED.

A. The cases cited by Tenants, *Buatti v Prentice*, 162 NH 228 (2011), *S. Willow Properties LLC v Burlington Coat Factory of NH*, 159 NH 494 (2009), *Matte v Shippee Auto Inc.*, 152 NH 216 (1998), and *Havington v Glover*, 143 NH 291 (1998), do not support the general proposition that strict compliance is required in this case.

The Tenants posit that several New Hampshire cases stand for the general proposition that "strict compliance" is required for success in every eviction, including this one. Tenants first cite *Buatti v Prentice*, 162 NH 228 (2011). The Court in *Buatti* reversed a trial court ruling on whether an eviction based on rent in arrears could be maintained when the trial court was unable to determine the amount of rent in arrears. The decision was based upon the Court's inability to determine what rent-if any-was in arrears. Interestingly enough, the holdings in *Buatti* actually provide support for Landlord's position that dismissal is not always required:

> "We note that if the trial court is able to determine by a preponderance of the evidence that some amount certain was due, even if other amounts claimed are not proven, it should so find. If that amount equals or exceeds the amount demanded, then the landlord will have demonstrated compliance with RSA 540:8. If the amount proven to have been due was less than the demand, however, then the issue may arise as to what remedies, if any, other than denial of the writ of possession, are available to the trial court. A range of other remedies might be available. For example, it may be that the trial court has discretion, in an appropriate case, to order that unless the tenant pays to the landlord or into court within a specified time the amount that the landlord was able to prove, a writ of possession will be issued. *Cf.* RSA 540:9. Such a remedy would arguably restore to the tenant his or her right to a reasonable opportunity to avoid the eviction by paying the proved arrearages due while protecting a landlord who may have in good faith served a demand

> that exceeded the arrearage that the landlord was able to prove. Under the circumstances of this case, however, where there is no finding as to the actual arrearage that was due, we need not decide this question. Here, we conclude that the proper remedy is reversal. Finally, we emphasize that it is within the power of the legislature to determine the proper remedy for a landlord's failure to prove compliance with RSA 540:8, should it wish to do so, by enactment of appropriate legislation.
>
> *Buatti v. Prentice,* 162 NH 228, 231 (2011)

In *S. Willow Properties LLC v Burlington Coat Factory of NH*, the issue was whether *res judicata* precluded a subsequent eviction when the first eviction was dismissed due to a defective eviction notice. *Matte v Shippee Auto Inc.* reversed the trial court permitting a tenant to offset against unpaid rent when no unpaid rent was sought by the landlord. Similar to the situation in *Lavoie v Szumiez*, 115 NH 266 (1975) the trial court granted a remedy it did not have the authority to grant-the decision had nothing to do with the landlord's strict compliance with the statute but rather the trial court's compliance. *Havington v Glover* reversed the trial court ruling that a tenant can waive the statutory time periods for eviction. Once again, the issue centered around the validity of the tenant's waiver of time limits, not the strict compliance of the procedural process within RSA 540.

The *Living Life Investments v Wood* order cited by the Tenants is of no value. The Supreme Court's own website clearly states: "The court has authorized the publication of these orders for informational purposes only. Readers should be aware that Supreme Court Rule 20(2) states that an order

disposing of any case that has been briefed but in which no opinion is issued, shall have no precedential value." It should not have been cited.

B. **The cases cited by Tenants, *Great Traditions Home Builders, Inc v O'Connor*, 175 NH 387 (2008), *AIMCO Props. v Dziewisz*, 152 NH 587 (2005), and *Havington v Glover*, 143 NH 291 (1998), do not stand for the general proposition that dismissal is the sole judicial remedy.**

In *Great Traditions Home Builders, Inc* the issue in contention was whether the landlord failed to notify the tenants that future violations of the lease would result in eviction. *AIMCO Props* was a case dealing with restricted properties, thus not factually applicable to this case since this eviction was from non-restricted property. The *AIMCO* court reversed after deciding that the landlord's notice to quit did not state with sufficient specificity the reason for the eviction. The *Whiting v Ladd* order cited by the Tenants is, again, of no value since it too is an informational order. As argued hereinabove, none of these cases raised the precise issue on appeal as to whether dismissal was the sole appropriate remedy. While adhering to the statutory procedure is always the best course, nothing in RSA 540 prohibits the trial courts from invoking other curative measures and the Supreme Court has at least implicitly recognized same in the *Buatti v. Prentice* quotation cited hereinabove.

II. THE TENANTS NEVER RAISED ANY CONSTITUTIONAL ISSUES OR ARGUMENTS BELOW. THE COURT COULD NOT CONSIDER ISSUES NOT PROPERLY BEFORE IT, ISSUES THAT WERE NOT PRESERVED, NOR ARGUMENTS WHICH WERE NEVER MADE.

A. **The Tenants are not entitled to introduce novel Constitutional arguments, in the first instance, in this appeal.**

In New Hampshire, a party is obligated to raise issues and make arguments for the trial court to consider. A trial court cannot consider issues or arguments not made and not preserved for appeal. None of the foregoing issues or arguments were ever raised in the court below.

The argument that the trial court had the inherent power pursuant to Part I, Article 14 of the New Hampshire Constitution was never argued nor developed before the trial court. The Supreme Court cannot review issues that were never considered by the trial court, nor accepted for judicial review.

While a Court may have some authority to create its own forms, it does not have the ability to expand such authority beyond that granted under an enabling statute, amend existing statutory law, nor to create forms that are repugnant to existing law. As the Landlords have previously argued, the holding in *Darbouze v. Champney*, 160 NH 695 (2010) which confirms the contents required to be included for all valid eviction notices pursuant to RSA 540:3, is still good law and a district court has no authority to expand, modify, or overrule said law. The inherent power of the courts is not unlimited. The power of lower courts of limited jurisdiction is limited to that given to it by the legislature. See *Matte v. Shippee Auto*, 152 NH 216, 223 (2005) rejecting tenant's argument that a district court could properly deny eviction based upon principles of equity because district courts lack general equity jurisdiction.

RSA 540:5 delegated the authority for providing eviction forms to the "district court". The drafting of such forms do not impact the procedures of the court, and do nothing in terms of prescribing rules of practice within the court

system or regulating proceedings before the courts of this State. Rulemaking authority lies with the Supreme Court. Nothing within RSA 540:5 authorizes the district court to create forms which extend beyond the statutory requirements of RSA 540 or purport to advise recipients of various available alternative courses of action.

Finally, if the stated goal for revising the old forms was to make them easier to understand, then the new forms do not appear consistent with that goal. A side by side comparison of the "old" demand and eviction forms used by the Landlords in this case and the "new" demand and eviction forms created by the district court reveals that the former language in both forms was not revised and that the only difference between the two forms is the inclusion of the supplemental advisory language addressed solely to the tenant-language which is neither included nor mandated anywhere in RSA 540. There is a difference with distinction between compliance with the law and compliance with the form.

CONCLUSION

The cases cited by Tenants do not support the general proposition that "strict compliance" is always required for every eviction to proceed. The cases cited by Tenants do not stand for the general proposition that dismissal is the sole available judicial remedy in cases of non-compliance. The trial court did not consider any Constitutional arguments since they were not raised and not preserved. The Supreme Court cannot decide issues that were never raised in the trial court, never preserved for appeal, and never accepted for appeal.

Dated: July 24th, 2020

Respectfully submitted,

Richard and Janice Horton,
Appellants/Landlords
By their Attorney,

Plymouth Law Center

__/s/Gabriel Nizetic_____
Gabriel Nizetic, Esq., NH Bar #6540
66 Highland Street
Plymouth, NH 03264
(603) 536-5900

REQUEST FOR ORAL ARGUMENT

Richard and Janice Horton request that their counsel, Gabriel Nizetic, Esq., be allowed 15 minutes for oral argument.

CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Sup. Ct. Rule 16(11) this reply brief is calculated to contain approximately 2532 words, which are fewer than the words permitted by this Court's rules. I relied upon the word count of my MS Word 2020 program used to create and edit this brief.

Dated: July 24th, 2020

__/s/Gabriel Nizetic_____
Gabriel Nizetic, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on July 24th, 2020, that copies of the foregoing will be forwarded via the Court's e-filing system to counsel for the *amicus*, New Hampshire Legal Assistance, Stephen Tower, Esq. and by US mail to David Clemens and April Hanks.

Dated: July 24th, 2020

__/s/Gabriel Nizetic_____
Gabriel Nizetic, Esq.