Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-379

JUNE TERM, 2020

Kent Armstrong* v. Charles A. Wojack	}	APPEALED FROM:
	}	
	}	Superior Court, Windham Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 246-7-17 Wmcv
		Trial Judge: Robert P. Gerety, Jr.

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

Plaintiff appeals from a judgment in defendant's favor in this contract dispute. He argues the court erred in denying his motion for a new trial and allowing defendant to amend his counterclaims. We affirm.

Plaintiff sued defendant in July 2017. He argued in relevant part that defendant had not fully repaid a loan; defendant filed counterclaims.[1] Plaintiff was pro se below; defendant was represented by counsel. At the outset of trial, defendant indicated that he might seek to amend his counterclaims to seek a specific sum of money from plaintiff. He indicated that he had not received records from plaintiff that would have allowed him to make this claim before trial and, depending on what evidence was presented at trial, he might ask the court to conform the pleadings to the evidence. The court explained to plaintiff what this meant.

At the close of trial, defendant asked to amend his counterclaims. Specifically, he asserted that he had paid plaintiff more than he owed and he sought a refund of the excess payment. Defendant argued that he could not have made this claim earlier because he had been unable to obtain accurate records from plaintiff during discovery regarding the amount owed and he had no records before a certain date. Plaintiff objected. He asserted that he had provided the same information to defendant before trial that he presented during trial. When asked by the court about any prejudice he would suffer if the amendment were allowed, plaintiff stated that there was no evidence that he would have wanted to introduce had he known about the claim earlier. The court engaged in an in-depth discussion with the parties about this issue and gave plaintiff another opportunity to identify any prejudice. Plaintiff indicated that he would have sought additional records from defendant. The court noted, however, that the parties agreed on the amount that defendant had paid plaintiff and explained that—even absent the amendment—plaintiff had every

[1] We do not address the court's resolution of the parties' other claims as plaintiff does not challenge those rulings on appeal.

incentive to introduce evidence to show how much he loaned defendant to support his own claim. The court took the request to amend under advisement.

Eight months elapsed between trial and the court's issuance of a final judgment order. In its written decision, the court found that defendant had overpaid plaintiff and it ordered plaintiff to refund the overpayment.[2] It made the following findings. Plaintiff loaned money to defendant to help finance defendant's work on a joint venture. Between 2006 and 2009, plaintiff made payments and contributions to defendant of $97,627.95. Defendant repaid plaintiff $141,000 over a five-year period. He made these payments because plaintiff insisted more was due, and there was no documentation of the amounts contributed, the amounts repaid, or the terms of the repayment obligation. Defendant repeatedly asked plaintiff for an accounting, without success. Plaintiff gave defendant a copy of a handwritten notebook, which listed payments without any totals.

No written agreement was entered into evidence and the court did not find that there had been a written agreement signed by the parties. It found that the parties had entered into a verbal agreement that plaintiff would provide funds and other items needed to start a business and that defendant would repay the funds. There was no agreement to pay interest and no agreement as to when the funds would be repaid.

Based on its findings, the court entered judgment against plaintiff on all of his affirmative claims, including his breach-of-contract claim and a claim that defendant failed to return $32,000 worth of personal property to plaintiff. The court also rejected defendant's counterclaims with the exception of his claim for a return of his overpayment. The court found that this claim had been added at trial and implicitly denied by plaintiff. Based on the facts recited above, it concluded that defendant had mistakenly paid plaintiff $43,373 more than required under the parties' verbal agreement. Defendant had been uncertain about the amount due. He did not keep reasonable records, which led to the overpayment. Plaintiff accepted the overpayments because he honestly, but incorrectly, understood that the parties had agreed to terms that would have required the extra payments. The court concluded that the parties did not have a meeting of the minds about many details of their business relationship.

Citing the elements of unjust enrichment, the court concluded that there was no enforceable agreement that would have required defendant to pay plaintiff the amount that he did; plaintiff received a benefit from the overpayment; and it would be inequitable to allow plaintiff to retain the excess payments. Thus, applying the doctrine of unjust enrichment, the court awarded judgment to defendant for $43,373 on his counterclaim.

Several weeks later, plaintiff moved for a new trial. He asserted that that he had just discovered a signed written agreement between the parties in a strongbox in his closet. He included a note dated November 21, 2006. In a subsequent filing, plaintiff attached another note, dated December 12, 2007, for a different amount. He stated that this evidence had been unavailable to him because it was "located in a jointly accessible storage area that upon information and belief, [d]efendant has in his possession and [p]laintiff was denied." Defendant asserted that he was neither at fault nor negligent in failing to produce the evidence at trial. The court denied the

[2] The court indicated that defendant had amended his counterclaims at trial. We do not see in the record where the court explicitly granted defendant's request at trial, but it plainly concluded in its written decision that the counterclaim should be allowed.

motion. It was unpersuaded that plaintiff's new evidence had been unavailable to him before trial. This appeal followed.

We begin with plaintiff's assertion that the court erred in denying his motion for a new trial. Plaintiff relies on the second promissory note that he submitted. He asserts that this evidence was extremely important and would change the result in this case. Plaintiff states that he did not know where this document was in the months leading up to trial. He questions why the court did not give him the benefit of the doubt, and argues that, if the court found his motion alone unpersuasive, it should have held a hearing to allow him to explain his belated discovery of this document.[3]

As plaintiff acknowledges, we review the trial court's ruling on a motion for a new trial under Vermont Rule of Civil Procedure 59 for abuse of discretion. Brueckner v. Norwich Univ., 169 Vt. 118, 132-33 (1999). "Such abuse will be found only when the trial court has entirely withheld its discretion or where the exercise of its discretion was for clearly untenable reasons or to an extent that is clearly untenable." Id. (quotation omitted). Plaintiff fails to make the necessary showing here.

As we have explained,

> To warrant granting a new trial on the ground of newly discovered evidence, it must affirmatively appear that the evidence is such as will probably change the result if a new trial is granted; that the evidence has been discovered since trial; that evidence could not have been discovered before trial by exercising due diligence; and that the evidence is material to the issue and is not merely cumulative or impeaching.

Bonfanti v. Ayers, 134 Vt. 421, 423 (1976).

In this case, plaintiff proffered two different notes more than eight months after the trial concluded, one that he said he found in his clothes closet and another that he allegedly obtained from "a jointly accessible storage area." While plaintiff suggested that he was denied access to this storage area, he did not explain how he ultimately obtained this document or why it took him eight months following trial to submit it. The court acted well within its discretion in concluding that plaintiff failed to show that he could not have discovered this evidence before trial "by exercising due diligence." Bonfanti, 134 Vt. at 423. This conclusion is apparent from the face of plaintiff's filings and the court did not err by ruling on the motion without first holding a hearing, assuming that a hearing was requested. See Rubin v. Sterling Enters., Inc., 164 Vt. 582, 588 (1996) ("Although generally favored, hearings are not mandatory for V.R.C.P. 59 motions, particularly where the moving party has failed to show prejudice from the lack of a hearing.").

We thus turn to plaintiff's assertion that the court erred in allowing defendant to amend his counterclaim. He argues that the amended counterclaim involved a novel legal theory and that he was prejudiced by its inclusion because he did not have adequate notice of it.

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[3] Plaintiff also argues for the first time on appeal that he is entitled to relief under Vermont Rule of Civil Procedure 60(b)(6). Plaintiff did not seek relief below under Rule 60. Plaintiff cited Rule 59 in his motion to the court, and we thus do not address this argument. Duke v. Duke, 140 Vt. 543, 545, 442 A.2d 460, 462 (1982) ("[W]e do not ordinarily consider issues raised for the first time on appeal.").

The relevant portion of Vermont Rule of Civil Procedure 15(a) provides that "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." The trial court has discretion in considering motions to amend the pleadings. Desrochers v. Perrault, 148 Vt. 491, 493 (1987). "In general, amendments to the pleadings are freely allowed where there is no prejudice to the parties and when the proposed amendment is not obviously frivolous or dilatory." Id. "Pleadings may be amended, even after judgment, so as to conform to the evidence only when an issue not raised by the pleadings has been tried by express or implied consent of the parties." Id. at 494.

Plaintiff fails to show an abuse of discretion here. This is not a case, as plaintiff suggests, where "a post-judgment amendment . . . brings in an entirely extrinsic theory, or changes the theory on which the case was actually tried." Id. Defendant's amended claim was intrinsically related to plaintiff's claim and grounded in the same evidence. To support his claim against defendant, plaintiff needed to prove how much he loaned defendant and how much had been repaid. The parties agreed how much defendant had paid plaintiff; the only remaining question was the amount loaned. The court had to determine that amount in adjudicating plaintiff's claim and it relied on this same finding in granting relief to defendant. Defendant stated at the outset of trial the reasons why he was likely to request an amendment; he then did so, seeking a refund for his overpayment. Given the interrelated nature of the parties' claims and the fact that they relied on the same evidence, the court acted within its discretion in allowing the amendment. See C. Wright et al., 6 Federal Practice and Procedure § 1487 (3d ed.) (explaining that "courts have allowed amendments when it was established that doing so would not unduly increase discovery or delay the trial, and when the opponent could not claim surprise, but effectively should have recognized that the new matter included in the amendment would be at issue").

We note that plaintiff did not identify any specific prejudice below. The court was unpersuaded by his contention that he would have sought additional records from defendant given that the amount defendant repaid was undisputed. As the court found, plaintiff here had every incentive to prove the amount he loaned to defendant because it was key to his claim against defendant. While plaintiff complains for the first time on appeal that he was unaware he would be defending himself against an unjust enrichment claim, he concedes that the court's application of the law was correct. Plaintiff's position at trial was that there was no overpayment; defendant argued the opposite. Plaintiff fails to show how allowing defendant to amend his counterclaim at trial interfered with his ability to show that, if defendant had in fact overpaid, he should not be reimbursed. Cf. Ruotolo v. City of New York, 514 F.3d 184, 192 (2d Cir. 2008) (stating that "[u]ndue prejudice arises when an amendment comes on the eve of trial and would result in new problems of proof" (quotation and alteration omitted)); C. Wright et al., supra, § 1487 (explaining that denial of motion to amend might be appropriate "if the court determines that the proposed amendment would result in defendant being put to added expense and the burden of a more complicated and lengthy trial or that the issues raised by the amendment are remote from the other issues in the case and might confuse or mislead the jury"). The fact that the amendment exposed plaintiff to liability does not constitute prejudice. See C. Wright et al., supra, § 1487 (explaining that "plaintiff typically will not be precluded . . . from adding a claim to an otherwise proper complaint simply because that amendment may increase defendant's potential liability").

This case is not like Molleur v. Leriche, 142 Vt. 620, 622 (1983), cited by plaintiff. "The sole issue" in that case was "whether it was error for the court, on its own motion, to submit the case to the jury on an issue that was not pleaded." The plaintiff there did not move to amend his pleadings during trial, and we found that "the pleadings did not provide [the] defendant with notice of the issue" that the court submitted to the jury. Id. In the instant case, as reflected above,

defendant made clear at the outset of the trial that he would be seeking a judgment in his favor for his overpayment, during trial evidence was admitted related to this issue, and defendant sought to amend his counterclaims at trial to include this request for relief. Unlike Molleur, we conclude that plaintiff had notice of defendant's claim here.

We held in Perkins v. Windsor Hospital Corp., 142 Vt. 305, 313 (1982), that a motion to amend should not be denied simply "because it stated a new cause of action." We explained that Rule 15 "directs the trial court to consider not whether the amendment raises a new cause of action but 'whether the just and expeditious disposition of the controversy between the parties will be advanced by permitting the amendment.' " Id. (quoting 1A W. Barron & A. Holtzoff, Federal Practice and Procedure § 448, at 753 (C. Wright ed. 1960)). Thus, we stated that, rather than focusing on the new cause of action, "[t]he trial court should have considered the propriety of [the] plaintiff's motion to amend by examining several factors: (1) undue delay; (2) bad faith; (3) futility of amendment; and (4) prejudice to the opposing party." Id. (citing Forman v. Davis, 371 U.S. 178, 182 (1962)).

That is precisely what the trial court did here, as reflected in its discussion with the parties. Its decision to allow the amendment was within its discretion and consistent with Vermont Rule of Civil Procedure 15(a)'s requirement that "leave [to amend] shall be freely given when justice so requires." See also Forman, 371 U.S. at 182 ("If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.").

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Beth Robinson, Associate Justice

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Karen R. Carroll, Associate Justice