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. 2020-140

DECEMBER TERM, 2020

Richard J. Coburn v. David Creech* & William Deckelbaum*	}	APPEALED FROM:
	}	
	}	Superior Court, Windsor Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 261-5-16 Wrcv
		Trial Judge: Robert P. Gerety, Jr.

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

In this collection action, defendants appeal the civil division's order on remand denying their post-judgment motion to reopen the case to allow additional discovery. We affirm.

In March 2010, defendants and others who are not parties to this action signed a promissory note to repay plaintiff for the $175,000 he provided to allow for the refinancing of certain bank loans. The signatories jointly and severally promised to repay plaintiff that sum plus interest notwithstanding the release of any party or the discharge of any collateral for the note. Defendants paid plaintiff $30,000, leaving a remaining debt of $145,000 subject to the promissory note.

In March 2015, plaintiff released Robert Crowe, one of the nonparty signatories, from any liability he had on the note in exchange for Crowe (1) transferring to plaintiff his 7.75% interest in a limited liability corporation owned by the parties and others, and (2) promising to pay plaintiff $101,300 in periodic payments of $700 per month.

Plaintiff filed suit against defendants in May 2016, seeking to collect on the promissory note. In August 2017, plaintiff filed a motion for summary judgment. Defendants responded, in relevant part, by claiming that disputes over material facts remained and that further discovery was necessary to support their defenses. In May 2018, the civil division ruled that defendants were liable as a matter of law for any balance on the promissory note but that the amount of the balance remained in dispute, requiring a trial on that question. In that order, the court rejected defendants' argument that they had had insufficient time for discovery relating to their defenses. The court cited its previous order, which was based on the parties' stipulated discovery schedule, requiring that all written discovery requests be sent by April 30, 2017, and that all witness depositions take place by July 30, 2017. The court noted that defendants had had more than thirteen months to conduct discovery and yet they failed to explain either why they were unable to meet the agreed-upon discovery deadlines or what specific additional discovery was necessary to support a valid defense.

In March 2019, following an August 2018 hearing, the civil division entered judgment for defendants based on its conclusion that plaintiff had failed to carry his burden on the element of

damages because he did not present sufficient evidence on the monetary value of the consideration he received in exchange for releasing Crowe from his obligation on the note. Plaintiff appealed.

A three-Justice panel of this Court reversed, holding that defendants, not plaintiff, had the burden to prove "partial satisfaction of the note or a credit on account of consideration paid by Crowe for the release." Coburn v. Creech, No. 2019-153, 2019 WL 6049889, *3 (Vt. Nov. 14, 2019) (unpub. mem.), https://www.vermontjudicary.org/sites/default/files/documents/eo19-153.pdf [https://perma.cc/ 38KC-6SUJ]. Accordingly, we remanded the matter "for the trial court to determine based on evidence of record whether defendants have established any credit toward the outstanding balance on the note on account of Crowe's payments to plaintiff." Id. *4.

On remand, the civil division entered an amended judgment for plaintiff for the full amount of the remaining $145,000 on the promissory note after concluding that there was insufficient evidence for it to determine what portion of the $101,300 Crowe promised to pay plaintiff was in consideration for plaintiff releasing Crowe from his obligation under the note. Defendants then filed a motion pursuant to Vermont Rule of Civil Procedure 59 asking the civil division to reopen the evidence to allow defendants to conduct additional discovery to give them an opportunity to establish the value of the consideration Crowe gave plaintiff in exchange for plaintiff releasing Crowe from his obligation under the note. The civil division denied the motion, concluding that defendants had failed to conduct discovery in a timely manner and had failed to demonstrate excusable neglect for not doing so.

On appeal, defendants argue that the civil division abused its discretion by not granting their motion to reopen discovery and hold a new hearing on damages. See Lasek v. Vt. Vapor, Inc. & Downing Props., LLC, 2014 VT 33, ¶ 25, 196 Vt. 243 ("We review the trial court's denial of a motion for a new trial for abuse of discretion."). They contend that plaintiff stonewalled them in responding to their pretrial interrogatories and that his responses to their queries on the value of the consideration Crowe gave him were highly relevant. Defendants acknowledge that deposing plaintiff and Crowe before trial would have been helpful to their case, but they say they did not do so for strategic reasons—namely, fear of a prolonged and expensive discovery battle. They argue that because their decision not to depose plaintiff or Crowe was a strategic one, excusable neglect is not the appropriate standard, but that, even if it is, they met that standard. They further argue that because plaintiff failed to fully respond to their interrogatories regarding the value of the consideration he received from Crowe, they are entitled to relief from the civil division's amended judgment pursuant to the equitable "clean hands" doctrine.

We find these arguments unavailing. Under the circumstances, the civil division did not abuse its discretion in declining to reopen discovery in the case. Defendants have conceded that they made a strategic decision not to depose plaintiff or Crowe before trial concerning the nature and value, if any, of the consideration plaintiff received for releasing Crowe of his obligation under the promissory note. Nor did defendants file a motion to compel plaintiff to provide responses or produce information to which they believed they were entitled. Given defendants' failure to pursue this opportunity to depose plaintiff and Crowe before trial, the civil division acted well within its discretion in declining to reopen the case following final judgment to give defendants a further opportunity to depose plaintiff and Crowe. Cf. Rule v. Tobin, 168 Vt. 166, 174 (1998) (stating that Rule 60(b) does not protect parties from ill-advised tactical decisions).

Plaintiff testified at trial that the 7.75% interest in the limited liability company Crowe transferred to him was worthless and that the $101,300 Crowe agreed to pay him was attributable in significant part to other debts Crowe owed plaintiff. The court found that the evidence was "murky" on both components of the consideration Crowe paid plaintiff. The bottom line is that

defendants cannot fault the civil division for refusing to give them a post-judgment second bite of the apple after they made a deliberate choice not to pursue these matters in greater depth through pretrial depositions or a motion to compel. Further, even if we assumed that the equitable unclean hands doctrine is applicable in an action to collect on a promissory note, defendants cannot benefit from the doctrine based solely on their belief that plaintiff's responses to their interrogatories were incomplete, given their failure to file a motion to compel.

Affirmed.

BY THE COURT:

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice