

service road should be constructed and that pursuant thereto an agreement such as the plaintiffs claim was made by the Commissioner or with his authority, the State would be bound. The plaintiffs could then proceed under RSA 491:8, and the State's motion to dismiss should be denied.

The order is

*Remanded.*

All concurred.

Strafford,  
No. 4951.

HELEN M. TIMMINS *v.* MATHEW J. BRENNAN, *Ex'r.*

Argued October 3, 1961.

Decided October 27, 1961.

[REDACTED]

[REDACTED]

*Robert A. Carignan and Fisher, Parsons & Moran (Mr. Moran orally), for the plaintiff.*

*Burns, Bryant & Hinchey and E. Paul Kelly (Mr. Kelly orally), for the defendant.*

PER CURIAM. Rule 57 of the Superior Court provides that "all exceptions . . . shall be deemed waived and final judgment shall be entered" on the next or second succeeding judgment day (depending upon when the action excepted to is taken) "unless a bill of exceptions or proposed reserved case is filed before such judgment day or the court has otherwise ordered." *Lampesis v. Comolli*, 102 N. H. 306. The plaintiff contends that the ruling of the Trial Court denying her motion to strike the judgment of dismissal and for leave to file a reserved case should be set aside and permission granted because "[t]here is nothing in the record to show that the Court exercised any discretion in its ruling in this matter."

The record before us contains no transcript of the proceedings in the Trial Court at the hearing upon the motion to strike the entry of judgment, and it is undisputed that no record of the hearing was kept. The parties do not agree upon what there transpired.

The burden is upon the moving party to establish that discretion was not exercised, or if it was that it was abused. See *Dunne v. Carey*, 97 N. H. 43, 44. The Trial Court had undoubted authority to suspend Rule 57 if justice required. *Sanborn v. Railroad*, 76 N. H. 65; *Hall v. Insurance Co.*, 91 N. H. 6, 8. "We find nothing to indicate that the ruling was not made in the Court's discretion, and the presumption is that it was. *Vallee v. Company*, 89 N. H. 285, 291; *Perkins v. Associates*, 100 N. H. 247." *Maryland Cas. Co. v. Waumbec Mills*, 102 N. H. 200, 204. "It follows that so far as the record here shows, the court's duty in determining what justice required was properly performed." *LaMarre v. LaMarre*, 84 N. H. 553. See also, *Pike v. Scribner*, 101 N. H. 314, 316.

*Exception overruled.*