Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2016-419

APRIL TERM, 2017

John Lupien	}	APPEALED FROM:
	}	
	}	Superior Court, Lamoille Unit,
v.	}	Civil Division
	}	
	}	
Graham Taylor, and Catalyst Design Ltd, d/b/a Catalyst Design and Vermont Screen Printing	}	DOCKET NO. 121-6-15 Lecv
	}	

Trial Judge: Dennis R. Pearson

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

Defendants, Graham Taylor and Catalyst Design Ltd., d/b/a Catalyst Design and Vermont Screen Printing, appeal from the trial court's judgment in plaintiff John Lupien's favor for $39,495.28. They argue that rather than concluding that plaintiff was a creditor to defendants, the court should have found that the parties were engaged in a partnership and that plaintiff's financial contributions to defendants were capital investments in the parties' joint venture. We affirm.

Plaintiff filed suit against defendant in June 2015, raising breach-of-contract and unjust-enrichment claims. Plaintiff alleged in relevant part that defendants had agreed in writing to repay loans provided by plaintiff, and failed to do so.

Following a bench trial, the court made the following findings. In late 2013, defendant Graham Taylor, the principal of defendant Catalyst Design Ltd., was seeking financing to facilitate a move of his screen printing business from Burlington to Morrisville. Taylor and plaintiff discussed having plaintiff advance funds to defendants. Plaintiff agreed to serve as a funding source for Taylor and to loan him money. Plaintiff and Taylor also discussed the possibility that their financing arrangement might turn into some sort of partnership or joint venture with plaintiff eventually acquiring a stake in the screen printing business.

Plaintiff advanced funds to Taylor. The parties did not have a signed partnership/joint venture agreement; they instead entered into a series of letters of intent, or preliminary "agreements to agree." In the first such document, executed in November 2013, the parties expressed their "intent to create a limited partnership if a mutually agreeable document can be created." If such mutually agreeable document could not be produced, "then this intent to sign a limited partnership agreement shall become null and void." The document further provided that "[i]f an agreement cannot be reached then all funding provided shall be deemed a loan to [defendants]." After executing this document, plaintiff continued to advance funds to defendants. In January 2014, the parties signed a second letter of intent that contained the same

conditional language as the November 2013 agreement. This document also extended the deadline to reach a final agreement on any partnership or joint venture until February 28, 2014.

Plaintiff thereafter continued to advance funds for Catalyst's relocation. The court found that plaintiff "muddied the waters" and made the attendant circumstances somewhat more ambiguous by essentially acting as if he were already a partner with Taylor. In particular, he supervised and physically participated in some aspects of the relocation, and effectively became the on-site program manager in Morrisville. He ordered supplies, materials, and equipment for Catalyst and the new location. He hired laborers for the project and oversaw their work in Morrisville while Taylor was still involved in winding down operations at his Burlington location. On March 31, 2014, the parties entered into a third letter of intent, which was supported by an itemized list of the funds that plaintiff had advanced or paid. This agreement contained the same language as the two prior agreements providing that the funds advanced by plaintiff "shall be deemed a loan to [defendants]" if no final partnership or joint venture agreement was reached. The parties never executed an agreement to share in Catalyst's expenses and/or profits or signed a final written agreement defining their joint venture as called for by the letters of intent. Thus, the court explained, the default provision of those agreements controlled, i.e., all amounts advanced (with the exception of a small payment not at issue here) were loans by plaintiff to defendants.

In reaching its conclusion, the court found it irrelevant that Taylor may or may not have told plaintiff that he could "never pay him back" or that Taylor had gone ahead only on his own assumption that the parties already had a binding partnership agreement. The court found that Taylor's professed ignorance of basic contract principles and his unilateral misperception of the situation did not let him off the hook. The court noted that Taylor's testimony was contrary to the express terms of the written documents that he signed not once, but three separate times. Defendants had not yet repaid any of the loans, and the court thus awarded judgment in plaintiff's favor for $39,495.28. This appeal followed.

On appeal, defendants argue that rather than treating the sums advanced by plaintiff as a loan to defendant, the court should have found that the parties entered into an implied partnership. Specifically, they contend that the court failed to consider 11 V.S.A. § 3212, which provides that two or more people who carry on as co-owners of a business for profit form a partnership, whether or not the parties intend to do so. Defendants essentially argue that the trial court's findings were clearly erroneous and that the trial court's analysis was wrong as a matter of law insofar as the trial court relied on the absence of a written partnership agreement to support its conclusion that the parties did not enter into a partnership. They contend that through the course of their dealings, the parties manifested a mutual intent to operate as partners, even if they never reduced that agreement to writing.

Because defendants failed to order a transcript of the proceedings, this Court lacks a sufficient record to determine whether defendants' arguments are properly preserved for appeal and to review the substance of the trial court's rulings. See V.R.A.P. 10(b)(1) ("By failing to order a transcript, the appellant waives the right to raise any issue for which a transcript is necessary for informed appellate review."); State v. Gadreault, 171 Vt. 534, 538 (2000) (mem.) (explaining that without transcript court could not review errors alleged to have occurred during trial). Accordingly, to the extent that defendants argue that the trial court's findings are unsupported by the evidence, we cannot review their arguments.

With respect to defendants' argument that the trial court's findings do not support its conclusion that the parties did not enter into a partnership, we conclude that its findings do support its conclusions, and it applied the proper law. As stated in Harman v. Rogers, 147 Vt. 11, 14 (1986), "[i]n deciding whether a partnership has been created by tacit agreement, courts must examine the facts to determine whether the parties carried on as co-owners of a business for profit." Where, as here, "the issue hinges on

the rights of the parties inter se only, . . . there must be a manifestation of an intent to be so bound." Id.; see also Greene v. Brooks, 45 Cal. Rptr. 99, 102 (Cal. Ct. App. 1965) (similarly recognizing that "[t]he ultimate test of the existence of a partnership is the intention of the parties to carry on a definite business as co-owners"). "This intention may be shown by their express agreement or inferred from their conduct and dealings with one another." Raymond S. Roberts, Inc. v. White, 117 Vt. 573, 577 (1953); see also Brooks, 45 Cal. Rptr. at 102 (same).

The trial court recognized that plaintiff had personally participated in some aspects of opening up and running the business at its new location—the main factor defendants rely on to argue that plaintiff thereby entered into an implied partnership. But it concluded that these actions, while they "muddied the waters," did not reflect a mutual agreement to be bound. Instead, the court concluded that the three written agreements reflected the parties' intent that the sums advanced would be considered loans unless the parties reached a final partnership/joint venture agreement, and that they never reached such an agreement. The court's findings support its conclusions on these points. See White, 117 Vt. at 577 (explaining that "[a]n agreement to share the profits and losses of an adventure is an essential element of a partnership"). In fact, the trial court characterized Taylor's belief that a binding partnership agreement existed as a unilateral misperception. Given the trial court's finding that the parties never reached a partnership agreement, the trial court did not err in concluding that the parties' contracts require that the sums advanced be repaid. See Southwick v. City of Rutland, 2011 VT 53, ¶ 4, 190 Vt. 106 ("When the contract language is unambiguous, we take these words to represent the parties' intent and the plain meaning of this language governs its interpretation.") (citation omitted).

Nor did the trial court misapply the law or err in failing to expressly apply 11 V.S.A. § 3212. The court did not hold that a written agreement is a necessary prerequisite to a partnership, and it did not base its conclusion on the absence of a written partnership agreement. Instead, as noted above, it concluded that the facts taken as a whole did not support defendants' claim that the parties intended to operate as partners. The court considered the fact that the parties did not have a written partnership agreement in the context of the two prior agreements executed by the parties clearly contemplating that their business relationship may or may not evolve into a partnership and making it clear that in the absence of a partnership agreement, plaintiff would stand in the shoes of a debtor. The court did not err in granting judgment to plaintiff.

Affirmed.

BY THE COURT:

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Marilyn S. Skoglund, Associate Justice

_____
Beth Robinson, Associate Justice

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Karen R. Carroll, Superior Judge,
Specially Assigned