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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-222

JANUARY TERM, 2018

Michael Bandler, MB & Co, Ltd. a/k/a Michael Bandler & Company v. Cohen Rosenthal & Kramer, LLP	}	APPEALED FROM:
	}	Superior Court, Windsor Unit, Civil Division
	}	DOCKET NO. 471-8-14 Wrcv
	}	Trial Judges: Mary Miles Teachout, Robert P. Gerety, Jr., Theresa S. DiMauro

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

Plaintiffs Michael Bandler and his company MB & Co., Ltd. filed suit against defendant law firm alleging a variety of claims including breach of contract and fraud in the inducement. Prior to trial, the court precluded Mr. Bandler from representing the company and dismissed Mr. Bandler's personal claims. Following a trial, the jury found the law firm not liable to the company. Mr. Bandler and the company both appeal. Mr. Bandler argues that the court erred by: (1) failing to rule as a matter of law on whether the contract was ambiguous; (2) dismissing his claims against the law firm; and (3) precluding him from personally representing the company. The company has joined in Mr. Bandler's brief. We affirm.

In 2012, the company signed a written agreement with defendant law firm to provide representation for the company in a prospective class-action arbitration against Charter One Bank. The agreement stated that the law firm could withdraw as counsel

> if either
> (I) an irreconcilable difference arises between the company and the firm on a significant issue relating to the arbitration; or
> (ii) its professional or ethical obligations require it to withdraw on account of some conflict of interest or other grounds.

The agreement also stated that the company had "the sole prerogative" to, among other things, "decide whether to challenge any adverse award entered in the arbitration, or to forego any such challenge."

The arbitrator in the underlying case denied class-action certification. The law firm disagreed with Mr. Bandler on whether to move to dismiss the petition filed by Charter One Bank to confirm the denial of class certification. The parties dispute whether the law firm then withdrew representation or whether Mr. Bandler discharged the firm, but Mr. Bandler took over the underlying case. Mr. Bandler then initiated a suit against the law firm on behalf of him personally and the company. The complaint essentially alleged that the law firm had fraudulently induced Mr. Bandler and the company to engage the firm based on a false promise that the law firm would continue the litigation regardless of whether the class was certified.

The law firm moved to dismiss the suit on the ground that Mr. Bandler could not represent the company. The court denied the motion to dismiss, but disqualified Mr. Bandler from representing the company. Mr. Bandler appealed that interlocutory ruling, arguing that the trial court issued its ruling without giving him a chance to respond. This Court affirmed the procedure followed by the trial court but did not reach the merits of the ruling. See Bandler v. Cohen, Rosenthal & Kramer, LLP, 2015 VT 115, ¶ 1, 200 Vt. 333. Plaintiffs then filed an amended complaint, asserting claims by the company and Mr. Bandler personally. The law firm moved to dismiss Mr. Bandler's individual claims. The trial court granted the motion, explaining that the complaint failed to demonstrate that there was a contract with Mr. Bandler individually; the retainer agreement was signed by Mr. Bandler in his capacity as president of the company and not Mr. Bandler personally. A week or so prior to trial, Mr. Bandler moved for the court to reconsider its ruling that he could not represent the company. The court denied the motion for several reasons, including that it was filed just prior to jury draw and Mr. Bandler's representation of the company could cause confusion for the jury since he was also a fact witness. At trial, counsel for the company requested a jury instruction that the retainer agreement was ambiguous and should be construed against defendant. The court denied the request, explaining that the ambiguity of a contract was a matter for the court to decide and counsel for both parties agreed. The jury ruled in favor of defendant, and plaintiffs appealed.

We first address plaintiffs' argument that the court erred in dismissing his personal claims against the law firm. This Court reviews a motion to dismiss de novo, and will grant the motion if "there exist no facts or circumstances that would entitle the plaintiff to relief." Dernier v. Mortg. Network, Inc., 2013 VT 96, ¶ 23, 195 Vt. 113 (quotation omitted). In ascertaining the strength of the claims, we assume the facts plead in the complaint are true. Id. In an amended complaint, plaintiffs listed separate claims by Mr. Bandler personally. It alleged that the law firm knew Mr. Bandler had participated in the controversy as a named plaintiff and had advanced significant sums to fund the controversy, that the law firm stated it would apply for reimbursement of funds Mr. Bandler had personally advanced, and that Mr. Bandler was an intended third-party beneficiary of the contract between the company and the law firm.

We conclude that dismissal was appropriate here because the complaint failed to allege facts demonstrating that the law firm had a contractual or other duty to Mr. Bandler personally. As the trial court noted, the retainer agreement was signed by Mr. Bandler in his capacity as President of the company not individually, and there is nothing in the agreement to indicate an intent to benefit Mr. Bandler personally as a third-party beneficiary. Moreover, the agreement was complete and could not be enlarged with parol evidence. See Big G Corp. v. Henry, 148 Vt. 589, 591-92 (1987) (defining parol evidence rule and explaining that when "contracting parties embody their agreement of sale in writing evidence of a prior or contemporaneous oral agreement is not admissible to vary or contradict the written agreement" (quotation omitted)). On appeal, Mr. Bandler acknowledges that the written agreement did not include him personally and argues that he had an oral contract with the law firm. The complaint, even when construed in the light most favorable to Mr. Bandler, does not contain sufficient facts to demonstrate that he entered a separate oral contract with the law firm to his personal benefit. The fact that the law firm knew Mr. Bandler had participated personally in the litigation, advanced sums, and sought reimbursement is not sufficient to allege that Mr. Bandler and the law firm formed an oral contract with another. Therefore, dismissal of Mr. Bandler's personal claims was appropriate in this case.[1]

[1] The law firm argues that if we agree Mr. Bandler's personal claims were properly dismissed, then we should not consider the additional arguments in his appellant's brief. Because

Plaintiffs next contend that the trial court erred by failing to make a ruling on whether the contract between the company and the law firm was ambiguous. Plaintiffs fail to demonstrate how this argument was properly preserved for appeal. Plaintiffs point to the company's request to charge in which the company requested that the court charge the jury that "if a writing is ambiguous, the proper interpretation of the writing is a question of fact, to be determined by consideration of all relevant evidence." Plaintiffs assert that the court rejected the argument and ruled that ambiguity was a decision for the court, not the jury, but failed to decide on the question of ambiguity. The appellate rules require an appellant to produce a transcript of all parts of the proceeding below that are relevant to the issues the appellant raises on appeal, and to demonstrate how his or her claims of error were preserved. V.R.A.P. 10(b)(1) (requiring appellant to produce transcript "of all parts of the proceedings relevant to the issues raised by the appellant and necessary to demonstrate how the issues were preserved"). Plaintiffs did not order the transcript of the entire trial; instead, plaintiffs ordered excerpts from the trial on June 9, 2017, including what appears to be parts of the charge conference and the closing statements. Without a full transcript this Court is unable to determine if plaintiffs properly raised the claims now advanced on appeal and, if so, how the trial court ruled on those claims.[2] See State v. Gadreault, 171 Vt. 534, 538 (2000) (mem.) (declining to address appellant's claim where he failed to to provide transcript, on appeal because he did not show how issue was preserved for appeal); In re S.B.L., 150 Vt. 294, 307 (1988) ("[A]ppellant must bear the consequence of the lack of a transcript of the evidence.").

Plaintiffs also argue that if this Court remands the matter for a retrial, the Court should allow Mr. Bandler to personally represent the company. Because there is no remand, we do not reach the issue of Mr. Bandler's representation of the company.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Marilyn S. Skoglund, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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the company adopted the arguments made in Mr. Bandler's brief, we address these additional arguments. See V.R.A.P. 28(h) (allowing an appellant to join or adopt another appellant's brief).

[2] Plaintiffs contend that they are challenging the court's failure to provide guidance on the issue of ambiguity and not arguing that the jury instructions were faulty. Either way, plaintiffs must still demonstrate that the issue was properly preserved and have failed to do so.