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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-251

JANUARY TERM, 2018

Fabio Piccoletti v. Germano Fogale & Industrial Space Realty LLC Federico Fogale v. Industrial Space Realty LLC & Vermont Milk Caramel LLC	}	APPEALED FROM: Superior Court, Chittenden Unit, Civil Division DOCKET NOS. 277-4-16 Cncv & 414-5-16 Cncv Trial Judge: Robert A. Mello

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

Defendants Germano and Federico Fogale appeal pro se from a judgment in favor of plaintiff, Fabio Piccoletti, in these consolidated civil cases.[*] We affirm.

These cases stem from the parties' unsuccessful efforts to develop a commercial milk caramel production facility in Vermont. In 2012, plaintiff and Germano formed two Vermont limited liability companies: Industrial Space Realty, LLC, to purchase and own suitable commercial real estate; and Vermont Milk Caramel, LLC, to equip and operate the milk caramel manufacturing facility and sell its products. Industrial Space Realty, LLC acquired real property but sold it to a third party in late 2014 before Vermont Milk Caramel, LLC commenced any manufacturing operations. By agreement, the proceeds from the real estate sale ($1,115,000) were held in escrow pending a court determination as to who was entitled to the funds.

Plaintiff and Germano, the sole members of Industrial Space Realty, LLC, sought a court order dissolving the company and distributing its sole remaining assets, which consisted of the funds held in escrow. Plaintiff claimed entitlement to the funds. Germano argued that he and his son Federico were entitled to a substantial share. Federico also sought an award of damages from Industrial Space Realty, LLC, for expenses he allegedly incurred and for the value of consulting services that he allegedly performed.

Following an evidentiary hearing, the court granted judgment to plaintiff. It made numerous findings, which we do not recount here. Essentially, it found that the Fogales made no monetary contributions to either company; their cash contributions were not due to be paid until the manufacturing facility was up and running and that time never arrived. Plaintiff provided all of the funds, including an initial $200,000 contribution and later additional contributions.

[*] For clarity, we refer to each Fogale defendant by his first name.

The court did not credit Federico's testimony that plaintiff agreed to a consulting contract. It found that the parties had agreed to pay Federico a stipend for his help in getting the business off the ground, and reimbursement for travel and his out-of-pocket expenses, and they had done so. The court found no promise or agreement, however, that Federico would receive compensation beyond the stipend for his work, nor was there any credible evidence that plaintiff made any misrepresentations that induced Federico to forego other employment opportunities. Once the manufacturing facility was up and running, Federico would have been entitled to begin receiving a salary at that time, but that time never came.

The court rejected the argument that Federico was a creditor of Industrial Space Realty. Instead, it found that plaintiff was a creditor and that his $1,070,000 of additional capital contributions must be treated as loans. It determined that none of those funds belonged to Germano and that he was not entitled to be treated as a creditor. The amount that plaintiff was entitled to recover from the company under 11 V.S.A. § 3106(a) exceeded the funds in the escrow account. The court thus awarded all of funds to plaintiff.[*] The court noted that even if there were any funds in the escrow account over and above the amounts needed to repay plaintiff his advances with interest, plaintiff would then be entitled to receive the next $220,000 of available funds before Germano would be entitled to begin sharing in any funds. Germano and Federico appealed.

Germano appears to argue that the court should have believed his version of events, particularly his argument that he contributed to the funds provided by plaintiff. He also appears to assert that plaintiff's contributions should not have been considered as loans. Finally, he challenges the court's finding as to the amount of money being held in escrow. Federico asserts that the court should have credited his position that plaintiff agreed to a consulting contract and that he is entitled to compensation for his work.

Both Germano and Federico waived their right to challenge any of the trial court's factual findings because they failed to order a transcript of the proceedings below. 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.") We thus "assume[] that the trial court's findings are supported by the evidence." Evans v. Cote, 2014 VT 104, ¶ 7, 197 Vt. 523. This includes the court's findings as to the source of the funds provided by plaintiff and the amount of money being held in escrow. It also includes the court's finding that there was no promise to pay Federico beyond the stipend he received, and no evidence that Federico had been induced to forego other employment opportunities. To the extent that Germano and Federico argue that the court should have credited their evidence over that submitted by plaintiff, we emphasize that it is the sole province of the trial court to weight the evidence and to evaluate the credibility of witnesses. Mullin v. Phelps, 162 Vt. 250, 261 (1994). This Court does not reweigh the evidence on appeal.

Finally, the trial court explained in detail why, by law, it had to consider plaintiff's $1,070,000 of additional capital contributions as loans, even though plaintiff did not intend them to be loans at the time that he wired them to the company. Under the Vermont Limited Liability Company Act, amounts contributed to a limited liability company by a member in excess of his or her agreed-upon contribution must be treated as a loan. See 11 V.S.A. § 3053(b)-(c). Under

[*] The distribution of assets in winding up the business of a limited liability company formed before July 1, 2015, is governed by the version of the Vermont Limited Liability Company Act that was enacted in 1995. A new version of this statute, 11 V.S.A. § 4106, went into effect on July 1, 2015. The court noted that the wording of the two versions of the statute was so similar that the outcome in this case would be the same if the court relied upon the current version rather than the earlier one. We have cited to the 1995 statute throughout this decision.

Industrial Space Realty, LLC's operating agreement, plaintiff agreed to a capital contribution of $220,000. Thus, all money subsequently sent to the company by plaintiff in excess of that $220,000 (i.e., the $1.07 million) must be treated as "a loan to the company upon which interest accrues." Id. § 3053(c). Plaintiff therefore was entitled to be treated as a creditor of the company, even though he is also a member. See id. § 3106(a) ("In winding up a limited liability company's business, the assets of the company must be applied to discharge its obligations to creditors, including members who are creditors."). The court went on to explain that because plaintiff did not intend his $1,070,000 of advances to be loans, he was not required under the company's operating agreement to obtain Germano's written consent before wiring those funds to the company. But even if Germano's written consent has been required, the court found that the evidence established that plaintiff obtained it. These findings, which we assume are supported by the evidence, support the court's conclusion. We find no error.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Harold E. Eaton, Jr., Associate Justice