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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-410

APRIL TERM, 2005

WHM Corporation	}	APPEALED FROM:
	}	
v.	}	Windham Superior Court
	}	
Thomas Utter	}	DOCKET NO. 327-7-03 Wmcv
		Trial Judge: Karen R. Carroll

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

Defendant Thomas Utter appeals from the trial court's order, after a jury trial, awarding plaintiff WHM Corporation $12,650 in damages for unpaid rent. He argues that the court erred by: (1) holding him to a mistaken admission in his answer to plaintiff's complaint; (2) excluding relevant evidence; (3) precluding him from arguing that he should not be held personally liable for an alleged debt of Vermont Mountain Sports Corporation (VMSC); and (4) allowing him, as a pro se litigant, to answer on behalf of a corporation. He also asserts that the jury failed to follow the court's instructions.* We affirm.

In July 2003, WHM filed a complaint against Utter, individually, and VMSC. The complaint alleged that WHM had leased a ski shop to Utter based on an oral month-to-month lease, and VMSC was an occupant of the leased space. WHM alleged that Utter owed it over $10,000 in back rent, and it sought to evict defendants. In his answer to WHM's complaint, Utter admitted that WHM had leased the property to him on a month-to-month basis, and he admitted that VMSC was an occupant of the leased space. He denied owing WHM the back rent that it sought.

In May 2004, WHM filed a motion to remove VMSC as a defendant, explaining that because defendants had vacated the premises, its only remaining claim was against Utter for back rent. Utter did not respond to the motion, and the court granted WHM's request. A jury draw was held on June 14, 2004. On June 18, 2004, Utter moved to dismiss the case, asserting that the rental agreement had been between Walter Herrmann, individually, and VMSC. Utter stated that he, as an individual, had never been a tenant of WHM, nor had he had any transactions with it. He argued that the case should be dismissed because WHM was seeking back rent for a building that it did not own or manage, from him, individually, when he was never a tenant of the property. The court denied Utter's motion, finding it out of time as the jury had been drawn, and the matter was scheduled for trial in two days. The court also found the motion without merit as Utter had admitted in his answer to WHM's complaint that WHM owned the premises, and he had entered into a lease agreement personally with WHM.

A jury trial was held. At trial, Walter Herrmann testified that WHM had rented property to Utter, as a tenant, on a month-to-month basis. On cross-examination, Utter sought to introduce evidence that the lease had been between Herrmann, individually, and VMSC. WHM objected, and the court ruled that Utter was bound by his earlier admission in his answer that the lease had been between WHM and himself, individually. The court explained that it would be unfair at this stage of the proceedings to require WHM to present evidence that its claim was valid against Utter, and not VMSC, because both WHM and the court had relied on Utter's admission. The jury found Utter liable to WHM for $12,650 in damages, and the court issued a final judgment order to this effect. Utter filed a motion to set aside the judgment, which was denied. This appeal followed.

We first address Utter's assertion that he should not have been held to his admission because it disposes of Utter's related arguments. Pursuant to V.R.C.P. 8(b), Utter was required to file an answer to WHM's complaint admitting or denying the averments upon which WHM relied. Utter admitted in his answer that he had leased the property individually from WHM. As we have explained, the admission of a fact alleged in a complaint is a judicial admission that is "binding and conclusive." Barber v. Chase, 101 Vt. 343, 350 (1928); see also Dennis v. French, 135 Vt. 77, 78 (1977) (admitting fact alleged in complaint under V.R.C.P. 8(d) because it was not denied in answer). We find no merit in Utter's assertion that his answer is invalid because the court should have intervened, and informed him that he could not answer on behalf of VMSC. The court was under no obligation to so advise Utter, and in any event, the admission at issue in this case concerns Utter, individually. While Utter states that his admission was a mistake, the record shows that Utter did not file a motion to amend his answer. We reject Utter's assertion that his motion to dismiss, filed on the eve of trial, should have been construed as a motion to amend. We similarly reject Utter's allegation that he was "tricked" into making the admission, and that he could not have known that the court would have interpreted his answer as an admission that he, individually, was the tenant. The record refutes these arguments. In this case, as the trial court explained, both WHM and

the court relied on Utter's admission in preparing for trial and in dismissing VMSC from the case. Utter was properly held to his judicial admission, and the trial court did not abuse its discretion in refusing to allow Utter to introduce evidence at trial to contradict his admission.

Utter did not raise his remaining argument below, and it is therefore waived on appeal. See Bull v. Pinkham Eng'g Assocs., 170 Vt. 450, 459 (2000) ("Contentions not raised or fairly presented to the trial court are not preserved for appeal.").

Affirmed.

BY THE COURT:

_____
John A. Dooley, Associate Justice

_____
Denise R. Johnson, Associate Justice

_____
Frederic W. Allen, Chief Justice (Ret.),
Specially Assigned

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[*] Utter filed two briefs in this matter, both of which raise essentially the same claims.