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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-486

JULY TERM, 2009

Soo Schonbachler, Constantine Schonbachler and Stanti's, Ltd.	}	APPEALED FROM:
v.	}	Rutland Superior Court
John Canney	}	DOCKET NO. 548-8-07 Rdcv
		Trial Judge: Mary Miles Teachout

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

Plaintiffs appeal the superior court's decision granting summary judgment in favor of defendant with respect to their claims of legal malpractice and intentional and negligent misrepresentation. We affirm.

In August 2007, plaintiffs filed a complaint alleging that defendant (1) purported to represent them in negotiating an agreement to lease a building in which they intended to operate a restaurant; (2) told them that the rent for the property would be $8000 per month; and (3) induced them to execute the agreement without reading it before informing them that the base rent was actually $9400. Plaintiffs alleged that defendant's breach of his professional duty and misrepresentations caused them to take out excessive loans, which ultimately led to the failure of their business. During his deposition, defendant denied that he represented plaintiffs in connection with the lease agreement, that he ever told them the monthly lease payments would be $8000, or that he induced them to sign the lease without reading it. Plaintiffs never responded to defendant's interrogatories or any other discovery requests. The court's deadline for disclosing any experts passed without any submission from plaintiffs. On July 8, 2008, defendant moved for summary judgment and filed a memorandum of law and statement of material facts in support of the motion. Plaintiffs did not file a response to defendant's motion, and on August 22, 2008, the superior court granted the motion. The court later entered a final judgment and denied plaintiffs' motion for reconsideration.

On appeal, plaintiffs argue that the trial court erred (1) in dismissing their claim of legal malpractice based on their failure to produce expert testimony in support of the claim; and (2) in finding that their admission that they were aware of the actual amount of the rent at the time they delivered the first rent check demonstrated that they knew the amount of the rent when they signed the agreement. These arguments miss the mark in the sense the court did not make any findings and did not state the reasons for its granting summary judgment to defendant. Presumably, the court granted summary judgment to defendant because plaintiffs failed to object to his motion, which demonstrated that there were no genuine issues of material fact and that

defendant was entitled to judgment as a matter of law. The nonmoving party may not "rest on allegations in the pleadings to rebut credible documentary evidence or affidavits." Boulton v. CLD Consulting Eng'rs, Inc., 2003 VT 72, ¶ 5, 175 Vt. 413 (quotation omitted). "Where the moving party does not bear the burden of persuasion at trial, it may satisfy its burden of production by showing the court that there is an absence of evidence in the record to support the nonmoving party's case. The burden then shifts to the nonmoving party to persuade the court that there is a triable issue of fact." Id. (quotation omitted). Accordingly, "a plaintiff's failure to controvert facts in a counter statement requires that the moving party's undisputed facts be taken as true." Webb v. Leclair, 2007 VT 65, ¶ 4, 182 Vt. 559 (mem.).

Here, defendant submitted a statement of material facts citing evidence in the record to the effect that (1) he did not negotiate, draft, or prepare the lease agreement; (2) he did not represent plaintiffs with regard to the negotiation, preparation, or execution of the lease agreement; (3) he told plaintiffs that he represented the lessor, not them, with respect to the lease agreement; (4) he suggested to plaintiffs that they retain their own attorney; (5) at the time plaintiffs executed the lease agreement, they submitted a check for $28,200, which represented rent for three months at $9400 per month, as plainly stated on the first page in the agreement; and (6) plaintiffs were aware before they commenced improvements on the property that the base rent was $9400 per month. These facts, which must be taken as true in light of plaintiffs' failure to respond to defendant's motion for summary judgment, support the superior court's decision to grant defendant summary judgment on plaintiffs' claims of breach of a professional duty and misrepresentation. Plaintiffs' arguments on appeal rest solely on allegations set forth in the complaint and are insufficient to overcome defendant's motion for summary judgment, to which they did not respond. See Lane v. Town of Grafton, 166 Vt. 148, 153 (1997) ("Failure to raise a reason why summary judgment should not be granted at the trial level precludes raising it on appeal."); Tetreault v. Greenwood, 165 Vt. 577, 578 (1996) (mem.) ("It is well settled that a party opposing summary judgment must inform the trial court of legal and factual reasons for the opposition, at risk of losing the motion and waiving the unvoiced reasons on appeal.").

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice