STATE OF MICHIGAN

COURT OF APPEALS

ROBIN RENEE HARPER,

Plaintiff-Appellee,

V

JOHN ALLAN WARJU,

Defendant-Appellant.

UNPUBLISHED
December 17, 1999

No. 211650
Tuscola Circuit Court
LC No. 96-014669 DZ

Before: Talbot, P.J., and Neff and Saad, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment dividing real and personal property entered pursuant to the trial court's ruling that the parties had a partnership agreement to mutually acquire certain rental property. We affirm in part and remand for further findings.

Defendant and plaintiff began living together in 1991. After the relationship ended in 1996, plaintiff filed suit for an equitable division of the parties' partnership assets. In support of her claim, plaintiff alleged that the parties had a partnership agreement to "accumulate assets and increase the cash flow of the parties by sharing expenses and acquisitions" and to "work towards asset accumulation by reason of shared finances," and that defendant breached the agreement. Defendant denied that the parties shared any property beyond the home they owned jointly, denied that the parties were involved in a partnership, and denied that the parties agreed to work toward the accumulations of assets.

In October 1993, the parties jointly purchased and moved into a house on Valley Drive in Caro. It was undisputed that the parties entered into a verbal cost-sharing agreement whereby each would pay half of the expenses. Specifically, defendant agreed to pay $400 per month against their $225 monthly mortgage obligation, plaintiff would buy the groceries, pay the utility, telephone, and cable bills, and they would equally share childcare expenses. Although disputed by defendant, plaintiff testified that she also agreed to pay certain "miscellaneous" expenses and that the parties agreed to periodically equalize their contributions if they were not balanced. Plaintiff further testified that, contrary to their agreement, she often exceeded her share of the expenses without reimbursement from defendant.[1]

Plaintiff testified that the parties' goal in purchasing the Valley Drive property was to repair and use it as a future rental and to ultimately acquire several rental units, which they would use to support themselves after retirement. Defendant disagreed, claiming that they discussed selling the home eventually and using the proceeds to purchase a larger home. In 1994, defendant approached plaintiff about acquiring a rental property on Milwood Street in Caro. Plaintiff opposed the purchase, believing that the parties had neither the time nor the money to invest in the property and wished to wait until they were more financially secure. Nevertheless, defendant obtained a loan to purchase and improve the property.

Following a bench trial, the trial court concluded that (1) the parties had a partnership under which they agreed to purchase and upgrade property with the goal of acquiring numerous rental properties, and (2) that while plaintiff did not approve of the Milwood Street purchase and the parties did not expressly agree that it would be partnership property, defendant was estopped from denying that it was a partnership asset in light of the actions and conduct of the parties, plaintiff's ongoing investments, the parties' underlying partnership goals, and defendant's breach of their cost-sharing agreement. In dividing the partnership assets, the trial court awarded the jointly owned Valley Drive property to plaintiff and the Milwood Street property to defendant.

On appeal, defendant first argues that the trial court erred in concluding that the parties had and that he breached a cost-sharing agreement with regard to miscellaneous expenses and that the parties established a partnership for the acquisition of rental property. We disagree. The determination of whether a partnership exists is a question of fact and is, therefore, reviewed for clear error. *Miller v City Bank & Trust Co*, 82 Mich App 120, 123; 266 NW2d 687 (1978); MCR 2.613(C). A finding is clearly erroneous when, although there is evidence to support it, a reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed. *Gumma v D & T Construction Co*, 235 Mich App 210, 221; 597 NW2d 207 (1999). The party alleging the partnership has the burden of proving that it exists. *Grosberg v Michigan Nat'l Bank Oakland*, 113 Mich App 610, 614; 318 NW2d 490 (1982), aff'd 420 Mich 707; 362 NW2d 715 (1984).

In determining the existence of a partnership the intention of the parties, which turns on the facts and circumstances of association between them, is of prime importance. *Miller*, *supra* at 124-125, citing *Barnes v Barnes*, 355 Mich 458, 461; 94 NW2d 829 (1959); *LeZontier v Shock*, 78 Mich App 324, 333; 260 NW2d 85 (1977); *Bernstein, Bernstein, Wile & Gordon v Ross*, 22 Mich App 117, 121; 177 NW2d 193 (1970). A partnership exists where the parties agree and intend to enter into a relation "in which the elements of partnership may be found." *Miller*, *supra* at 124, quoting *Beecher v Bush*, 45 Mich 188, 200 (40 Am Rep 465). The elements of a partnership are generally considered to include:

> . . . a voluntary association of two or more people with legal capacity in order to carry on, via co-ownership, a business for profit. Co-ownership of the business requires more than merely joint ownership of the property and is usually evidenced by joint control and the sharing of profits and losses. [*Miller*, *supra* at 124.]

See also *Employment Security Comm'n v Crane*, 334 Mich 411, 416; 54 NW2d 616 (1952) ("[p]artnership is a legal entity separate from the individuals composing it, and its essential elements are their contribution to it of whatsoever nature, whether capital, consisting of money, merchandise, et cetera, or credit, skill or labor.")

In addition, the Uniform Partnership Act (UPA) provides that a parties' co-ownership or receipt of a share of gross returns do not conclusively establish the existence of a partnership; however, the receipt of a share of the profits is prima facie evidence that a partnership exists. MCL 449.7(2)-(4); MSA 20.7(2)-(4) (setting forth the rules for determining the existence of a partnership); *Grosberg*, *supra* at 614-616. In the absence of a written partnership agreement, the existence or nonexistence of a partnership should be determined from the acts, declarations, and conduct of the parties and from the nature and scope of the business in which the acts are committed. See, generally, *Western Shoe Co v Neumeister*, 258 Mich 662, 665; 242 NW 802 (1932); *Miller*, *supra*; see also *Falkner v Falkner*, 24 Mich App 633; 180 NW2d 491 (1970)

We initially conclude that the trial court did not clearly err in finding that the parties entered into a partnership to mutually acquire rental property and that the partnership assets included the Valley Drive property. The parties agreed that their mutual goal with respect to the Valley Drive property was to pay the mortgage early and purchase another piece of property either, as plaintiff claimed, by using the Valley Drive property as equity for the purchase of an additional rental property or, as defendant claimed, by selling it and using it as a down payment on another home. In either case, the goal was to invest and realize a profit on the property. Moreover, both parties contributed a portion of the down payment, purchased the Valley Drive property together, and agreed to split the expenses equally with the primary goal of quickly building equity in the property.

In addition to acquiring the Valley Drive property together, there was further evidence to support the trial court's determination that the parties were operating as a partnership with the goal of mutually obtaining rental property. Defendant admitted that he and plaintiff discussed accumulating additional rental properties for their mutual benefit and that he discussed the subsequent purchase of the Milwood Street property before he purchased it. Also of significance was the trial court's finding that the Milwood Street expenses impacted the parties' agreement to share expenses equally. Although defendant claims that he used income from his other rental property to pay the Milwood Street mortgage payments, the evidence established that the income from defendant's other properties was insufficient to meet the Milwood Street mortgage payments, defendant was temporarily discharged from his job from the fall of 1995 until the summer of 1996, defendant's own summary of the parties' expenses indicates that he lowered the agreed upon $400 monthly mortgage payment for the Valley Drive property to $225, and that plaintiff paid more than $225 per month toward Valley Drive expenses. The cumulative effect of this evidence was to lend credibility to plaintiff's testimony that defendant paid the Milwood mortgage and ongoing maintenance with funds committed to the partnership. Based on plaintiff's testimony and the court's finding that she was a credible witness, the parties' joint purchase of the Valley Drive property, defendant's testimony that the parties discussed their plans to accumulate rental property, defendant's act of discussing the purchase of the Milwood

property with plaintiff, and the use of partnership money to acquire and maintain the Milwood Street property, we are not convinced that the trial court clearly erred in finding that a partnership existed between the parties for the acquisition and sharing of rental property and with an agreement to make contributions toward that goal.

Defendant nevertheless maintains that the trial court erred in finding that the Milwood property was a partnership asset subject to division upon dissolution of the alleged partnership. In support of his position, defendant cites to the undisputed testimony that plaintiff declined the opportunity to jointly purchase the property, that title to the property was in his name as the sole owner, that he never agreed to put plaintiff's name on the deed to the property, and that plaintiff refused to assist him in the repair and improvement of the home because she had and was attending their child. We do not agree. Whether particular property is partnership property or is the property of an individual partner is a question of fact is therefore reviewed for clear error. *Matthews v Wosek*, 44 Mich App 706, 714-715; 205 NW2d 813 (1973); MCR 2.613(C).

While joint property ownership does not, of itself, establish a partnership and is merely evidence that a partnership may exist, MCL 449.7(2); MSA 20.7(2), "joint ownership of property is not necessary to establish a partnership where the parties agree to share profits." *Grosberg*, *supra* at 616. In addition, partnership property includes all property subsequently acquired on account of the partnership. MCL 449.8(1); MSA 20.8(1). Whether property held in the partnership name or the individual partner's name is a copartnership property is generally a question of intent, to be gathered from the manner in which the parties dealt with the property. *McCormick v McCormick*, 342 Mich 525, 530; 70 NW2d 706 (1955); see also *Matthews*, *supra* at 714-715 ("[p]artnership property may be held, and frequently is held, in the name of one or more of the partners.").

Although defendant claimed that he intended to purchase the property for himself and share the proceeds with plaintiff if they stayed together, plaintiff testified that he repeatedly told her that they could afford it, that they would use the proceeds for their retirement, and that he would take care of the Milwood property while she took care of the Valley Drive property. Plaintiff's father also testified that defendant told him that Milwood belonged to both parties and explained that his income was going into that property for the parties mutual benefit.[2] In addition, plaintiff testified that while she initially disagreed with the purchase, she assumed responsibilities associated with both homes based on defendant's representations with respect to the Milwood property. Specifically, plaintiff testified that following the purchase of Milwood, she solely maintained Valley Drive while defendant worked on Milwood, that defendant shirked his financial responsibilities as to the Valley Drive property, and that she was therefore forced to use all her disposable income to maintain it, that she delivered meals to defendant while he worked on Milwood, that she participated in aesthetic matters, and that she screened renters for the Milwood property. While defendant disputed the majority of plaintiff's testimony, the trial court resolved the credibility issue in plaintiff's favor. Giving due regard to the trial court's opportunity to judge the credibility of the witnesses who appear before it, MCR 2.613(C); *Zeeland Farms Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733

(1996), we cannot conclude that the trial court erred in determining that the parties' partnership property consisted of the Milwood Street property as well as the Valley Drive property.

Defendant next argues that the trial court erred in concluding that it had equitable jurisdiction to distribute property in a case involving unmarried cohabitation. We disagree. Whether a court has jurisdiction over a matter is a question of law, which we review de novo on appeal. *Smith v Smith*, 218 Mich App 727, 729; 555 NW2d 271 (1996); *LT Elsey & Son, Inc v American Engineering Fabrics, Inc*, 191 Mich App 146, 147-148; 477 NW2d 483 (1991).

We initially note that defendant's argument and supporting case law is premised on the erroneous conclusion that the trial court treated the instant case as the distribution of property incident to the dissolution of a marriage. Although the court did state that it attempted to fashion an equitable remedy based on its finding that the parties established a partnership, it clearly recognized that there was no marriage and dismissed plaintiff's common law marriage claim. MCL 551.2; MSA 25.2. Consequently, defendant's contention is reduced to whether the trial court was without authority to fashion the remedy it granted.

Pursuant to a dissolution of a partnership, the trial court may award partnership property to the individual partners in lieu of requiring the property to be sold; however, this option may not be available where the partnership is liable for debts. MCL 449.38; MSA 20.38; *Rinke v Rinke*, 330 Mich 615, 628; 48 NW2d 201 (1951). Once the court concluded that a partnership existed and that the Milwood Street property was a partnership asset, plaintiff became liable for the debt against that property. Thus, because partners are jointly and severally liable for the partnership debts, if defendant fails to pay the mortgage, the bank could enforce its rights against the partnership, and consequently, against plaintiff. MCL 449.15; MSA 20.15. Similarly, defendant continues to be liable for the debt owed on the Valley Drive property.[3] Consequently, the trial court was required to satisfy the partnership liabilities before distributing partnership assets directly to the parties. MCL 449.40; MSA 20.40.

The record indicates that there were outstanding mortgages on both parcels of real property and it is unclear whether any other partnership property was subject to debt. The case is therefore remanded for a proper dissolution and winding up. In doing so, the court must determine what partnership liabilities exist. Plaintiff's liability on the Milwood Street property and defendant's liability on the Valley Drive property may be discharged upon dissolution of the partnership if the parties and their creditors agree to these terms. MCL 449.36; MSA 20.36. Absent an agreement however, the court may be required to order both properties sold to satisfy the mortgages.

Affirmed in part and remanded. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Henry William Saad

[1] Both parties provided the court with handwritten summaries of household expenses and contributions, including estimates of the other party's contributions gleaned from checking account ledgers exchanged during discovery. However, neither party was able to produce every ledger for the disputed time period.

[2] Although the court mistakenly indicated that plaintiff's father testified that defendant promised to put plaintiff's name on the property, we find this insignificant. The court acknowledged that its recollection of the specific testimony could have been incorrect, but that plaintiff's father's testimony went to defendant's general credibility.

[3] This would be true, in light of the partnership relationship, regardless of whether he is an obligor on the original mortgage. MCL 449.15; MSA 20.15.