STATE OF MICHIGAN

COURT OF APPEALS

DAVID G. BYKER,

Plaintiff-Appellee,

v

THOMAS J. MANNES,

Defendant-Appellant.

UNPUBLISHED
February 1, 2000

No. 205266
Kent Circuit Court
LC No. 96-000256-CB

Before: Gage, P.J., and White and Markey, JJ.

PER CURIAM.

Plaintiff David Byker filed an action against defendant Thomas Mannes alleging that the parties created a "super partnership" in 1985 in which they agreed to split all profits and losses from their business ventures. Plaintiff sought to enforce the parties' agreement and demanded that defendant pay an equal share of capital contributions that had been advanced by plaintiff on behalf of the purported super partnership. Defendant appeals by right from two orders denying summary disposition to defendant and from the trial court's judgment that a super partnership existed between the parties and that defendant owes plaintiff $76,153, plus interest, costs, and mediation sanctions, as his unpaid share of partnership debts. We vacate the judgment against defendant and hold that the court erred in its determinations that a super partnership existed between the parties and that there is a monetary partnership obligation owing from defendant to plaintiff.

Defendant initially claims that the trial court erred in denying his motions for summary disposition because as a matter of law defendant is not personally liable for the debts of either the limited liability partnerships or the corporations. Defendant's argument misses the mark.

First, we note that plaintiff did not allege and the trial court did not hold that defendant is liable for the entities' debts as either a limited partner or a shareholder of a corporation. Rather, plaintiff alleged that defendant is liable as a general partner in a "super partnership," under whose protective umbrella the other entities were organized. Second, the basis of the trial court's denial of defendant's motions for summary disposition was the trial court's determination that material questions of fact existed whether such a super partnership existed, with the trial court ultimately resolving those factual issues against defendant in the bench trial that followed. Because defendant does not address the basis

of the trial court's ruling denying defendant's motions for summary disposition, we need not consider the issue defendant raises here. *Joerger v Gordon Food Service, Inc,* 224 Mich App 167, 175; 568 NW2d 365 (1997). Nonetheless, to the extent that defendant's argument pertains to the factual question of intent, it will be addressed as part of the discussion below.

Defendant next claims that the trial court erred in finding that a general or super partnership existed between the parties and that there was a partnership obligation owing from defendant to plaintiff in the amount of $76,153. We agree.

The parties stipulated that in 1985 they "agreed to engage in an ongoing business enterprise, to each furnish capital, labor and/or skill to such enterprise, to raise investment funds and to share equally in the profits, losses and expenses of such enterprise." The parties thereafter acquired interests in business ventures that purchased, leased or operated various properties, including the Anchor In Marina. The parties created at least seven separate entities through which they participated in the business ventures, including four limited partnerships of which the parties were general partners,[1] two corporations of which the parties were shareholders, and one partnership of which the parties were general partners.[2] Plaintiff and his accounting firm performed accounting services for the business entities, while defendant found real estate opportunities for investment.

The burden was on plaintiff to prove the existence of the super partnership he alleged existed. *Klein v Kirschbaum,* 240 Mich 368, 371; 215 NW 289 (1927); *Miller v City Bank & Trust Co,* 82 Mich App 120, 123; 266 NW2d 687 (1978). Whether such a partnership existed was a question of fact, the determination of which we review under the clearly erroneous standard. *Barnes v Barnes,* 355 Mich 458, 461-462; 94 NW2d 829 (1959); *Miller, supra.*

The court found the instant parties "began their relationship with a general agreement that they were partners and would share profits and losses equally," and that they had a general partnership whether they understood it or not. In reaching its conclusion, however, the court relied on the Uniform Partnership Act, § 202(a), 6 ULA 1 (1994), which has not been adopted in Michigan, for the proposition that "the association of two or more persons to carry on as co-owners of business for profit forms a partnership, *whether or not the persons intend to form a partnership*" (emphasis added). Compare MCL 449.6(1); MSA 20.6(1). The absence of intent to form a partnership contradicts the established law in this state that the *mutual* intent of the parties is of *prime* importance in ascertaining whether a partnership exists. *Barnes, supra; Moore v DuBard,* 318 Mich 578, 593-594, 596; 29 NW2d 94 (1947); *Lobato v Paulino,* 304 Mich 668, 675; 8 NW2d 873 (1943); *Klein, supra; Miller, supra* at 124. As noted by the trial court, plaintiff conceded that he did not realize that his relationship with defendant was a general or super partnership until nine years after the parties entered into their informal business relationship--specifically, when the Pier 1000 corporation collapsed and plaintiff's attorney determined that plaintiff and defendant had formed a super partnership whether or not it was their intent to do so.

We agree that, in the absence of an express agreement, the court appropriately looked to the acts and conduct of the parties in relation to the businesses in ascertaining the existence or nonexistence of a partnership, *Van Stee v Ransford,* 346 Mich 116, 133; 77 NW2d 346 (1956); *Moore, supra* at

595; *Miller, supra* at 124-126. We conclude that the indicia of a super partnership are lacking in this case and that the court clearly erred in this regard.

As noted, the parties agreed in 1985 to enter into as yet undefined business ventures and to share in the profits, losses and expenses of the business ventures. They manifested this agreement by engaging in agreed-upon business ventures through a structure of interrelated express agreements and formal limited liability business entities that the parties formed to facilitate their purchase, participation in and operation of the business ventures. A serious question arises as to why the parties--one an accountant and the other a businessman--would form the limited liability entities if they intended to be personally liable for the debts of these entities as general partners of a super partnership. We conclude the answer is: they did not have this intention.

Objective indicia of a super partnership are absent in this case. The alleged super partnership had no name and no formal partnership agreement, and no certificate of partnership was filed on its behalf. See *Moore, supra* at 592, 595; *Lobato, supra* at 677; *Miller, supra* at 126. The super partnership had no tax identification number and filed no partnership income tax returns. See *Moore, supra* at 592. Neither of the parties reported income as received from a super partnership. See *Miller, supra.* The super partnership had no bank account, and there was no common fund into which all of the money the various entities generated was placed for distribution by the super partnership. See *Moore, supra* at 595-596; *Lobato, supra* at 674, 677; *Miller, supra*. While the parties did split commissions and other disbursements and equally shared a loss incurred in the sale of BMW partnership, the sharing of gross returns or profits and losses does not of itself establish a partnership. MCL 449.7(3)(4); MSA 20.7(3)(4); *Lobato, supra* at 675, 676. The cash disbursements to the parties and the payment of syndication and accounting setup fees occurred on a transaction by transaction basis within the framework of the various limited liability entities and in proportion to the parties' ownership of these entities. We conclude that the above indicia fall far short of establishing a super partnership.

The trial court suggests that the parties' injection of capital into the marina entities, particularly Pier 1000, the corporation that actually operated the Anchor In Marina and that was subsequently reorganized as Riverview 1000, is evidence of their super partnership agreement. It may be; but it is a minor fact.

The Anchor In Marina involved four separate entities: Pier 1000 Ltd., a corporation; JTD Properties, Inc., a corporation; JTD Properties Limited Partnership I, a limited partnership; and M & B Properties Limited Partnership III, a limited partnership, all of which were organized under the laws of Michigan. Limited partnerships are distinct legal entitles, separate from the individuals who comprise the partnerships. *Lobato, supra* at 675-676. As to the limited partnerships here, however, the parties did not even own a direct interest in the partnerships; rather, they owned 100% of the JTD corporation, which was the general partner of the limited partnerships. The corporations were close corporations, owned by plaintiff and defendant as equal shareholders.[3] A corporation is a distinct entity from its shareholders, and the shareholders are not personally liable for its debts, MCL 450.1317; MSA 21.200(317), unless they specifically and expressly assume such personal liability. See, generally, 18A Am Jur 2d, Corporations, § 850, pp 722-723, § 918, p 782. It is not uncommon for shareholders in a

close corporation to personally guarantee loans made on behalf of the corporation, as was done here.[4] *Id.* at § 853, p 726. Nor is it uncommon for such shareholders to loan money to the corporation, perhaps in the form of a promissory note, as was executed in this case by defendant and his wife to Pier 1000 for $21,000. We disagree that such injection of capital into essentially corporate entities preponderates toward a finding that a formal partnership existed outside the limited liability entities. Moreover, the fact that equal contributions are made may merely reflect the proportional shareholder interest—not the existence of an equal partnership.

Where the parties' spouses were not partners in the purported super partnership and had no apparent reason to expose themselves to personal liability for debts of the limited liability entities, we conclude that the parties' personal guarantees for the loans evidence personal undertakings by the parties and their respective spouses on behalf of the limited liability entities; they do not evidence that plaintiff and defendant intended to create a super partnership. Further, although plaintiff unilaterally injected $92,000 into the marina after defendant refused to make further contributions, plaintiff's testimony indicates that his overriding intent in infusing this capital into the marina was to prevent personal bankruptcy rather than an intent to act out of obligations stemming from a super partnership agreement with defendant. He feared the banks might call due the personal guarantees on the bank loans. We conclude that on these facts, the parties' decisions to contribute capital to the entities was not reflective of a super partnership agreement between the parties.

We further conclude that the parties' dealings with plaintiff's accounting firm, which performed accounting services for the various entities related to the marina, does not establish the existence of a super partnership between plaintiff and defendant. The firm had separate files for each of the entities and separately billed each specific entity for its accounting services. The firm had no file for the purported super partnership and did not specifically charge a super partnership for accounting services. Although the firm apparently looked to both plaintiff and defendant as ultimately responsible for payment of the marina entities' accounting bills, which the firm allowed to accrue over a period of 6-1/2 years to an amount in excess of $90,000, the testimony at trial reveals that this understanding was based on plaintiff's unilateral representations to the firm that plaintiff and defendant would be responsible for the payment of the accounting bills.[5] As between the instant parties, whether the accounting firm may have believed that a general partnership existed between plaintiff and defendant does not establish such a partnership. *Lobato, supra* at 676.

Additionally, as to payment of the accounting debts, plaintiff could have, but apparently did not, seek either an informal assurance from defendant or a formal personal guarantee from defendant, as had been done for bank loans to the marina, that plaintiff and defendant would each be personally liable for payment of the accounting services if the marina entities could not pay the bills. There is no evidence that defendant agreed to personal payment of the accounting services for the marina entities apart from payment by the entities themselves—through which plaintiff enjoyed limited liability due to their corporate structures. Moreover, plaintiff never involved defendant in the negotiations with his accounting firm relative to the terms of the buy-out on his withdrawal from the firm, whereby he agreed to personally pay approximately $90,000 for the accounting services provided to the marina business entities.[6]

Both the accounting firm and plaintiff took the risk that defendant would not make personal payment for the accounting debts that had been allowed to accrue. Where plaintiff unilaterally decided to pay this debt, he could not then seek contribution from defendant based on an underlying partnership unless he established the existence of such a partnership, or he prevailed on a theory of partnership by estoppel or defendant's express agreement to pay the debt. There is no evidence that defendant himself represented or that he consented to plaintiff's representation to the accounting firm that he and plaintiff were general partners or were jointly liable for personal payment of the accounting services provided to the marina entities. Thus, defendant is not estopped to deny personal liability for payment of these services, either to plaintiff or to the accounting firm based on an alleged super partnership with plaintiff. MCL 449.16; MSA 20.16; *Western Shoe Co v Neumeister*, 258 Mich 662, 667; 242 NW 802 (1932); *Beecher v Bush*, 45 Mich 188, 193; 7 NW 785 (1881).

We hold that the trial court erred when it found that a super partnership existed between the parties. Although we appreciate the complexity of the task with which the trial court was faced, the trial court failed to accord due weight to (1) the lack of evidence of the parties' mutual intent to form such a partnership, (2) the lack of objective indicia of such a partnership, and (3) the other formalized structures, i.e., the limited partnerships and corporate entities, through which the parties conducted their business and limited their liability.

The judgment of the court is vacated, and this matter is remanded for entry of a judgment of no cause of action against defendant. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Jane E. Markey

[1] For two of the limited partnerships, the parties held general partner interests in their individual capacities. For the other two limited partnerships, the parties did not own a direct interest in the partnerships; rather, the parties were the shareholders of JTD Corporation, which in turn was the general partner of the limited partnerships.

[2] For this latter entity, the parties had a 66-2/3% general partner interest in BMW Properties, a Michigan partnership formed in 1991 to acquire a building on Grandville Avenue that was subsequently sold. This partnership is distinct from the general or super partnership at issue in this case.

[3] The parties originally had equal interest in 66-2/3% of the outstanding stock in the corporations, which increased to equal interest in 100% of the shares of the corporations when the third shareholder left.

[4] The parties and their respective spouses personally guaranteed over $4.5 million in loans to the marina.

[5] Plaintiff testified at trial that the business entities did not have sufficient funds to pay the accounting invoices and that the firm continued to provide services for the business entities and to allow the accounting bills to accrue based on plaintiff's representations to the firm that he and defendant would be personally liable to pay the outstanding bills.

[6] Based on plaintiff's testimony regarding the marina entities' lack of funds to pay the accounting bills, the accounting bills may have remained uncollectible but for plaintiff's payment of the accounting bills at the time he withdrew from the accounting firm.