STATE OF MICHIGAN

COURT OF APPEALS

EDWARD W. SNELL, Plaintiff-Appellant,	UNPUBLISHED June 12, 2001
v	No. 226068 Keweenaw Circuit Court
JOANNE E. MEYERS d/b/a SLIM'S CAFE, Defendant-Appellee.	LC No. 99-000397-CZ

Before: Sawyer, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of no cause of action in favor of defendant. We affirm.

This dispute concerns ownership rights to a business known as Slim's Cafe. Plaintiff and defendant, who never married, cohabited for approximately fourteen years. During that time, the business was purchased and the parties worked together to facilitate its success. Plaintiff alleges that the business was a partnership to which he contributed time, money and labor, and contends that he is entitled to ownership rights as a partner. Defendant contends that the business was a sole proprietorship, not a partnership, and that plaintiff was simply her live-in boyfriend and trusted employee. After a bench trial, the circuit court made a factual finding that the business was not a partnership and entered a judgment of no cause of action in favor of defendant. Plaintiff appeals as of right. We affirm.

Plaintiff first argues that the trial court's decision was clearly erroneous and that a partnership should have been implied from the circumstances of the parties' association. We disagree.

The determination of whether a partnership exists is a question of fact. *Miller v City Bank & Trust Co*, 82 Mich App 120, 123; 266 NW2d 687 (1978). "For a partnership to exist, it must be shown by an agreement, since it is the intention of the parties that is of prime importance in ascertaining the existence of a partnership. This is a question of fact for resolution by the trial judge." *LeZontier v Shock*, 78 Mich App 324, 333; 260 NW2d 85 (1977) (citations omitted). The burden of proving the existence of a partnership rests on the party alleging the partnership, and the burden is heavier when the alleged partners are relatives or one of the alleged partners is deceased. *Miller, supra* at 123-124.

This Court has held that the "elements of a partnership are generally considered to include a voluntary association of two or more people with the legal capacity in order to carry on, via co-ownership, a business for profit." *Id.* at 124. Further, the Uniform Partnership Act, MCL 449.7; MSA 20.7, provides some guidelines for determining when a partnership exists:

> (3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived;
>
> (4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:
>
> (a) As a debt by installments or otherwise,
>
> (b) As wages of an employe[e] or rent to a landlord.

In the present case, plaintiff supported his contention that the parties intended to form a partnership with his testimony that he was the driving force behind the creation of the business. Defendant testified that he co-signed the business loan and that he worked extensive hours in the restaurant during its first years of operation. He also argued that his responsibilities exceeded those of a typical restaurant manager and that his level of involvement necessitates a finding that he was an owner, rather than an employee.

Defendant supported her contention that the parties did not intend to form a partnership with evidence that she held sole title to real property, that the mortgage and the food establishment license were held in her sole name, and that she provided the majority of the funds used to purchase the business. In addition, the proofs indicated that only defendant reported profits from the business on her income tax returns. Further, the four employees of the business who testified at trial all indicated their belief that defendant owned the business and that plaintiff was the manager.

Trial testimony revealed that plaintiff received compensation for his labor from the restaurant's inception through July, 1997. However, the parties disputed the frequency of those payments. Defendant testified that plaintiff received checks every two weeks. Plaintiff testified that he received payment whenever the business was doing well and alleged that the business accountant issued him checks upon request. Plaintiff also contends that he shared in the profits of the business. Trial testimony revealed that defendant received a draw from the profits of the business, which she deposited into an account held solely in her own name. However, the parties agreed that this account served as a common fund for living expenses and agreed that plaintiff enjoyed full access to those funds.

The trial court reviewed the above evidence and found, as a factual matter, that the business was not a partnership. The trial court concluded that plaintiff had failed to carry his burden of proving the parties' intent to create a legal partnership. This Court reviews the findings of fact by a trial court sitting without a jury under the clearly erroneous standard. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). A finding is clearly erroneous

when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed. *Id*. Further, when this Court reviews a trial court's findings of fact, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C).

In *Miller*, *supra*, this Court rejected a similar claim that the plaintiff had been a partner in her deceased husband's business. As this Court held:

> It is not disputed that the parties were involved in a business venture for profit and had the legal capacity to form a partnership. However, the evidence relating to co-ownership does not indicate that a legal partnership was contemplated. . . . Even though plaintiff worked long and hard hours, this does not establish that the parties had an agreement to form a partnership. This evidence could also be viewed as consistent with an employee-employer relationship or that of a helpful wife who assisted her husband without their intending a legal partnership. [*Id*. at 124-125.]

We believe that the *Miller* analysis is helpful to our resolution of this case. Plaintiff clearly worked long and hard hours in the restaurant. However, given the parties' meretricious relationship, plaintiff's efforts could reasonably be viewed as consistent with that of a live-in boyfriend who assisted his girlfriend in her business, without their intending a legal partnership. On the record presented, we cannot conclude that the trial court committed clear error in finding that plaintiff failed to prove the existence of a partnership.

Plaintiff argues, in the alternative, that he is entitled to recovery in quantum meruit for services provided as an employee of the business from July, 1997 to April, 1999. In July, 1997, at plaintiff's request, he discontinued from the restaurant's payroll. Although the reasons behind this decision are less than clear, it appears that the parties agreed to remove plaintiff from the payroll so that defendant could receive a larger profit from the business. In his brief on appeal, plaintiff concedes that he did not expect to receive a wage for his labor at the restaurant during the above period. However, plaintiff claims that his services conferred a benefit on defendant and that defendant would be unjustly enriched if this Court did not require her to reimburse plaintiff for his labor.

In the case of *In re McKim Estate*, 238 Mich App 453, 458; 606 NW2d 30 (1999), this Court equated recovery under the equitable theory of contract implied in law with recovery in quantum meruit. This Court then explained the principles underlying contracts implied in law:

> A contract implied in law is not a contract at all but an obligation imposed by law to do justice even though it is clear that no promise was ever made or intended. A contract may be implied in law where there is a receipt of a benefit by a defendant from a plaintiff and retention of the benefit is inequitable, absent reasonable compensation. [*Id*. at 457, quoting *In re Lewis Estate*, 168 Mich App 70, 74-75; 423 NW2d 600 (1988).]

However, the Court explained that this type of recovery is not available when the parties enjoyed a special relationship:

> [T]his fiction is not applicable where there exists a relationship between the parties that gives rise to the presumption that services were rendered gratuitously. A presumption of gratuity arises where the plaintiff is related by blood or marriage to the decedent, and where the parties lived together as husband and wife although never married. [*McKim, supra* at 458, quoting *Lewis*, *supra* at 74-75.]

Under Michigan law, it is clear that "services rendered during a meretricious relationship are presumably gratuitous. To overcome this presumption, plaintiff must show that [he] expected compensation from defendant at the time [he] rendered services and that defendant expected to pay for them." *Featherston v Steinhoff*, 226 Mich App 584, 589; 575 NW2d 6 (1997) (citations omitted). Because plaintiff admitted that he did not expect compensation from defendant at the time he rendered his services, plaintiff can not overcome the presumption that his services were gratuitous. *Id.* at 592. Accordingly, we cannot conclude that the trial court clearly erred in holding that plaintiff was not entitled to recover under the theory of quantum meruit.

Finally, plaintiff argues that the trial court erroneously excluded the testimony of certain trial witnesses and erroneously curtailed plaintiff's direct examination. We disagree.

At trial, defendant objected to plaintiff's attempt to call certain witnesses. Defendant argued that plaintiff had not provided proper notice of his intent to call those witnesses and had failed to file a witness list. Plaintiff's counsel admitted that he had failed to provide defendant notice of his intent to call witnesses Waara, Salani, and Mattson. Plaintiff's counsel then stated that the testimony of those witnesses was not essential to plaintiff's case and he agreed that the witnesses should not be called to testify. On appeal, plaintiff again concedes that the testimony of these witnesses was not essential to his case. Nevertheless, plaintiff contends that their exclusion from trial caused an injustice and amounted to an abuse of discretion.

After questioning plaintiff on direct examination, plaintiff's counsel stated on the record that he had no further questions for the witness. The trial court accepted plaintiff's statement and recessed for a lunch break. Upon return from its recess, the court asked defendant's counsel to begin her cross-examination of plaintiff. Plaintiff's counsel objected, claiming that he was not finished with his direct examination. After the court reporter confirmed that plaintiff's counsel had closed his examination, plaintiff's counsel apologized and allowed the cross-examination to begin. On appeal, plaintiff argues that the trial court abused its discretion because it erroneously curtailed plaintiff's testimony and deprived plaintiff of an adequate opportunity to present his case.

Error requiring reversal must be that of the trial court, not error to which the aggrieved party contributed by plan or negligence. *Smith v Musgrove*, 372 Mich 329, 337; 125 NW2d 869 (1964). Further, a party cannot request a certain action of the trial court or stipulate to a matter and then argue on appeal that the resultant action was error. *Weiss v Hodge (After Remand)*, 223 Mich App 620, 636; 567 NW2d 468 (1997). A litigant "is not allowed to assign as error on appeal something which his or her own counsel deemed proper at trial since to do so would permit the party to harbor error as an appellate parachute." *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989). Because plaintiff's trial counsel agreed that the

undisclosed witnesses should not testify and withdrew his objection regarding the close of plaintiff's direct examination, plaintiff's argument is without merit.

Affirmed.

/s/ David H. Sawyer
/s/ Michael R. Smolenski
/s/ William C. Whitbeck