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UNPUBLISHED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.

WHITE, J. (concurring in part and dissenting in part).

I agree that the trial court did not err in denying defendant's motion for summary disposition.

I respectfully dissent from the majority's reversal of the judgment in favor of plaintiff. The trial court's findings of fact were amply supported by the evidence produced at trial, including the stipulation of the parties. The trial court's interpretation of the law was also correct.

The parties stipulated that:

> . . . the Plaintiff . . .and Defendant . . . 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. . . . In order to facilitate investment of limited partners, Byker and Mannes created separate entities wherein they were general partners or shareholders for the purposes of operating each separate entity.

There was considerable evidence that the parties acted in a manner consistent with the existence of an overall partnership between them. Throughout the relationship, the parties equalized receipts, regardless of their source, and regardless of whether covered by the individual partnership agreements, and initially provided needed additional capital on an equal basis.

Further, defendant testified at deposition:

> *Q:* If there were to be a difference between the amount that Mr. Byker paid and the amount of monies you either loaned or paid such that Mr. Byker had more monies paid in, do you believe you would be responsible to make up the difference so that the payments were equal between you and Mr. Byker?
>
> *A*: [Mr. Mannes] I would have to be convinced that these monies came directly from Mr. Byker and not from other entities other than himself.

The trial court concluded:

> Having weighed the credibility of the witnesses, particularly plaintiff and defendant, we conclude that they began their relationship with a general agreement that they were partners and would share profits and losses equally. Whether they understood or not they had a general or super partnership. The evidence supports that both understood it. Defendant Mannes' comment on deposition is an example of that understanding. The amount of the losses sustained by plaintiff Byker are not controverted by any substantial or credible evidence. We conclude that there is a partnership obligation owing from defendant Mannes to plaintiff David G. Byker.

The stipulation of the parties and the evidence presented at trial, evaluated in light of the trial court's assessment of the witnesses' credibility, support the court's findings and conclusions.

The fact that the parties created a series of separate business entities to facilitate the investment of limited partners and to limit their liability to outside creditors does not negate the existence of an agreement between the parties that, as between the two of them, they would equally share overall profits and losses. Nor is plaintiff's allegation of an overall partnership inconsistent with the parties' decision to create limited liability entities to implement their investments. The existence of an overall partnership does not increase the party's liability to third parties or demonstrate an intent to be personally liable for the debts of the separate entities as general partners of a super partnership. All that is at issue here is the parties' obligations to each other.

Finally, the trial court committed no legal error in concluding that the intent of the parties is determinative, whether or not they attached the term "partnership" to that intent. Although Michigan has not adopted Section 202 of the Uniform Partnership Act, the law in Michigan is consistent with that provision. The trial court recognized that the provision had not been adopted in Michigan and observed that the comment following the section explains:

> The addition of the phrase "whether or not the persons intend to form a partnership," merely codifies the universal construction of UPA Sec. 6(1) that a partnership is created by the association of persons whose intent is to carry on as co-owners a business for profit, regardless of their subjective intention to be "partners."

> Indeed, they may inadvertently create a partnership despite their expressed subjective intention not to do so.[1] The new language alerts readers to this possibility.

The trial court did not depart from the necessary focus on the parties' subjective intent regarding their business relationship. The court found that both parties actually agreed that they were partners and would share profits and losses. The court looked to their conduct and their subjective understandings and found that both parties subjectively understood their agreement to be one of partners sharing in profits and losses. The court found that understanding dispositive without regard to the subjective intent that the label "super partnership" be applied to the relationship at the time. By focusing on the parties' intent, mutual agreement and understanding, the court conducted the proper inquiry. *LeZontier v Shock*, 78 Mich App 324, 333; 260 NW2d 85 (1977). There is no necessity that the parties attach the label "partnership" to their relationship as long as they in fact both mutually agree to assume a relationship that falls within the definition of a partnership.[2] In many cases, no *formal* partnership is formed, and the focus is then on the acts and conduct in relation to the business. *Van Stee v Ransford*, 346 Mich 116, 133; 77 NW2d 346 (1956). Recognizing that plaintiff, the party seeking to establish the partnership, had the burden of proof, I conclude that the trial court's findings in plaintiff's favor were not clearly erroneous, and that the court properly applied the law.

I would affirm.

/s/ Helene N. White

[1] This statement may be inconsistent with Michigan law, see 19 Callaghan's Mich Civ Jur, Partnership, § 5, p 474, but is not at issue here.

[2] 19 Callaghan's Mich Civ Jur, Partnership, § 10, p 479, states, in part:

> § 10. Tests and indicia of partnership.
>
> The existence of a partnership is not dependent upon the members calling themselves partners. However, in the absence of formal articles of partnership, the question as to 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. As has been seen, intention and consent of the parties are requisites of a valid partnership, and the filing of a certificate of partnership is among the important indicia of such an entity. Other indicia of a partnership are a community of interest, and a sharing in profits and losses. [Footnotes omitted.]