IN THE COURT OF APPEALS OF IOWA

KAYED ALAM,	)	
Plaintiff-Appellee,	)	Filed November 29, 1982 **1**
vs.	)	
CORNELIUS SEDAM,	)	2-250 / 2-66600
Defendant-Appellant.	)	

Appeal from Scott District Court - Charles Pelton, Judge.

Defendant appeals the trial court's conclusion that the parties had an oral partnership which, upon dissolution, entitled plaintiff to recover half the capital he had advanced toward that partnership enterprise. AFFIRMED IN PART; MODIFIED IN PART.

Harold J. DeLange II of Wehr & DeLange, Davenport, for defendant-appellant.

Stephen Ruth, Davenport, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, and Johnson, JJ.

DONIELSON, J.

Defendant appeals the trial court's conclusion that the parties had an oral partnership which, upon dissolution, entitled plaintiff to recover half the capital he had advanced toward that partnership enterprise. On appeal he asserts (1) that the trial court erred by permitting plaintiff to amend his petition to request an accounting in equity of partnership affairs; and (2) that the evidence did not support the conclusion that plaintiff was entitled to recovery. We affirm in part and modify in part.

This action having been maintained in equity, our scope of review is de novo. Iowa R. App. P. 4; Engle v. Vernon, 215 N.W.2d 506, 512 (Iowa 1974); Jenson v. Schreck, 275 N.W.2d 314, 316 (Iowa 1979). While we give weight to the trial court's findings, we are not bound by them. Id.

I.

Plaintiff, Kayed Alam, and defendant, Cornelius Sedam, collaborated in 1973 and 1974 on plans to operate a restaurant and bar. The bar and restaurant were to be housed in adjacent buildings with plaintiff to manage the restaurant and defendant to manage the bar. The parties went forward with the plan pursuant to their oral agreement. The plaintiff contributed about $11,500 toward the purchase of restaurant equipment. The defendant already owned and operated the bar which he was to manage. Defendant also contributed some labor toward the establishment of the restaurant. The parties fell into disagreement, however, and the plaintiff never began to operate the restaurant. The defendant attempted to operate both businesses alone, but he soon became insolvent. His creditors attached all of the furniture, equipment, and fixtures for both enterprises, including the restaurant items furnished by the plaintiff.

The plaintiff later filed an action at law against the defendant, alleging that the plaintiff was entitled to recover from the defendant half of his lost $11,500 capital contribution. The defendant filed a combined motion to dismiss and motion for directed verdict asserting that a partnership had existed and that an action between partners concerning partnership affairs can only be brought by means of an equitable proceeding seeking an accounting. The trial court declined to dismiss the petition and instead permitted the plaintiff to amend his petition to request an equitable accounting of partnership affairs. The plaintiff filed such an amended petition.

The trial court ruled in favor of the plaintiff concluding that an oral partnership had existed and that the plaintiff was entitled to recover half of his $11,500 capital contribution. Defendant then instituted this appeal.

We are unaware of any arguments of plaintiff as he has elected not to file a brief in this appeal. We note that "[t]he failure to file an appellee brief does not entitle petitioner to a reversal as a matter of right but does provide a basis for sanctions." State ex rel. Buechler v. Vinsand, 318 N.W.2d 208, 209 (Iowa 1982). In the present controversy, we limit our analysis to the controverted rulings of the district court as raised by defendant.

II.

Defendant's first contention is that the trial court should not have allowed plaintiff to amend his petition to request an accounting in equity of partnership affairs, but should have dismissed the plaintiff's petition on the ground that it had been improperly filed as a law action. We disagree.

A law action is not maintainable between partners to recover contributions to the partnership capital, share of the profits, or the proceeds of sale of the partnership property "unless there has been an accounting or settlement of the partnership affairs." Hanson v. Lassek, 261 Iowa 707, 711-12, 154 N.W.2d 871, 874 (1968). It is also clear that "[e]quity has exclusive jurisdiction of unsettled matters between partners." Id at 712, 154 N.W.2d at 874 (citations omitted). For these reasons, the court in Hanson held that it was error for the trial court to convert a "post-partnership accounting action standing in equity, to one at law for reimbursement." Id. at 711, 154 N.W.2d at 874. The court in Hanson improperly changed the action from one over which it could maintain jurisdiction to one over which it could not maintain jurisdiction. In the instant case we are faced with a different situation. Here, the court recognized that because the petition was filed as one at law for reimbursement, it had no jurisdiction to proceed since matters of the partnership were yet unresolved. The court thus allowed plaintiff leave to amend the petition to pray for equitable relief, an action over which it could properly maintain jurisdiction.

A change in the form of action from one at law to one in equity has been held permissible in Iowa. Esch Brothers v. The Home Insurance Company of New York, 78 Iowa 334, 340, 43 N.W. 229, 231 (1889); Carlson v. City of Marshalltown, 212 Iowa 373, 374, 236 N.W. 421, 422 (1931). This appears to be the general rule; courts are liberal in permitting the transfer of law and equity cases from one docket to another so long as it does not change entirely the nature of the cause of action. 61A Am. Jur. 2d Pleading § 325 (1981). If the amended pleading adheres to the transaction originally pleaded, the change in the form of the action will be allowed. Id.; see also Denecke v. Miller and Son, 142 Iowa 486, 493, 119 N.W. 380, 383 (1909). This approach is consistent with Iowa Rule of Civil Procedure 88 which provides that amendments "shall be freely given when justice so requires." It is within the trial court's considerable discretion to allow or refuse an amendment to the pleadings and its order will not be disturbed on appeal unless there is an abuse of discretion. Atlantic Veneer Corporation v. Sears, 232 N.W.2d 499, 503 (Iowa 1975).

In the instant case the court allowed plaintiff to amend his petition to an action in equity for an accounting of partnership affairs. The allegations in the amended petition are substantially identical to those set forth in the original petition. Both assert that there was an oral agreement, that plaintiff contributed $11,500 for the purchase of restaurant equipment, and that defendant has failed to return the money invested or to account to plaintiff for the assets and profits of the partnership. The nature of the action was not changed greatly by the amended petition, and defendant would not have been forced to alter the preparation of his case since the same basic issues are raised by the amended petition. We thus find the court did not err by permitting plaintiff to amend his petition to seek equitable relief.

II.

Defendant's second contention is that the plaintiff was not entitled to one-half of the losses sustained on his $11,500 capital contribution to the partnership. In his challenge, defendant takes exception to the finding that defendant contributed only labor in the formation of the restaurant and lounge; he does not quarrel with the court's statement of the law concerning distribution of assets upon dissolution of the partnership.

From the record it appears that defendant was the owner, bartender and manager of the lounge. He leased the lounge area from the shopping center and also negotiated the lease on the area which was to become the restaurant. It also appears that there was an understanding between the parties that defendant was to convey to plaintiff one-half interest in the lounge. Defendant asserted that an agreement to this effect was prepared and delivered to plaintiff but was never signed and returned. Plaintiff disputes that any action to transfer the interest was entertained. For our purposes, it is enough to note that, while the parties had agreed to it, the transfer never took place. This fact appears to be the core of the parties' dispute which resulted in the termination of their endeavor. Plaintiff testified that he told defendant that he wanted either 1) his one-half interest in the lounge, 2) his $11,500 investment returned, or 3) sole ownership of the restaurant and the bar, for which he would pay defendant $10,800 for defendant's total interest in the lounge. Defendant denies that any request was made before their attorneys became involved and this action was instituted.

When the cause was resolved at trial the court treated plaintiff's $11,500 as a capital contribution for partnership property and ordered contribution on the part of defendant for one-half of this amount as a loss sustained by the plaintiff. The court did not specifically address whether defendant's contribution of the lounge was also partnership property the loss of which should be born by both partners on dissolution of the partnership; it found that he had only contributed some labor.

In 1971, Iowa adopted the Uniform Partnership Act, now embodied in Iowa Code §§ 544.1-.43 (1981). Under the provisions of this act, all property originally brought into the partnership by those becoming partners is partnership property. Iowa Code § 544.8 (1981); 60 Am. Jur. 2d Partnerships § 83 (1972). The intention of the partners determined whether property owned by a partner prior to formation of the partnership remains individual property or becomes a partnership asset. 60 Am. Jur. 2d Partnerships § 98 (1972). Where there is an agreement that privately held property is to become a partnership asset upon formation of the partnership, the agreement will be given effect. Id.; Lefebure v. Henry Lefebure Sons Co., 202 Iowa 1053, 1057-58, 208 N.W. 853, 855 (1926). Unless there is a specific agreement to the contrary, neither partner owns any proportional part of any article of partnership property, but each has dominion over the entire partnership property. See Iowa Code § 544.25(2)(a); Tuller v. Leverton, 143 Iowa 162, 165, 121 N.W. 515, 516 (1909); Peterson Co. v. Freeburn, 204 Iowa 644, 646, 215 N.W. 746, 748 (1927).

In this case, the parties were to operate the restaurant and lounge together as one enterprise. To effectuate this plan defendant agreed to contribute his ownership interest in the lounge and, together with funds provided by plaintiff, built the restaurant in the adjacent area. We believe that it was the parties' intention that the lounge was to be partnership property, not the individual property of defendant. Their agreement that the lounge would be partnership property will be given effect regardless of whether the one-half interest was not transferred to plaintiff; there is no requirement that it be transferred in order to constitute partnership property. See Iowa Code § 544.8 (1981); 60 Am. Jur. 2d Partnerships § 83 (1972). We believe, therefore, that defendant contributed $10,800 to the partnership assets, this being the amount of his investment in the lounge. The plaintiff's contribution to capital was thus greater than defendant's by only $700. To read the record any other way would be inequitable; when their enterprise became insolvent both parties lost their investments as the fixtures and assets of both the lounge and restaurant were seized by creditors.

Citing 60 Am. Jur. 2d Partnerships § 280 (1972), the trial court concluded that:

> when there is no contrary agreement among the partners, the cash contributions of a partner is a debt of the partnership and if one partner furnishes more than a proportionate share of the capital or pays more than his share of the partnership debts and obligations, he is entitled to enforce contribution from the co-partners upon the settlement of the partnership affairs.

Applying this rule, we hold that plaintiff is entitled to enforce contribution for one-half of the $700 he contributed above and beyond that contributed by defendant. We therefore reduce the $5,750 judgment for plaintiff against the defendant to $350.

AFFIRMED IN PART; MODIFIED IN PART.