IN THE COURT OF APPEALS OF IOWA

No. 3-073 / 92-639

FILED
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CLERK SUPREME COURT

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JERALD E. JORGENSEN,

Appellant,

vs.

K. W. CLARK, Individually and as a Partner in **C & J CATTLE,**

Appellee.

Appeal from the Iowa District Court for Winneshiek County, John Bauercamper, Judge.

Plaintiff appeals the district court's denial of his petition to wind up a partnership. **AFFIRMED.**

James Burns of Miller, Pearson, Gloe, Burns, Beatty & Cowie, P.C., Decorah, for appellant.

Wythe Willey of Wythe Willey Law Office, Cedar Rapids, for appellee.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ.

HABHAB, J. 000304

Plaintiff Jerald E. Jorgensen appeals a district court order dismissing his petition to wind up an alleged partnership. The district court found that Jorgensen entered a joint venture, not a partnership, and voluntarily dissolved and abandoned the venture, ending his entitlement to any future profits from the venture's assets.

Jorgensen is part owner and manager of the Hilltop Feeders of Iowa. Hilltop's business included providing cattle feeding facilities to owners of beef cattle. K. W. Clark is a farm manager.

In January 1988, Jorgensen and Clark purchased 118 cows and three bulls. The cattle were purchased entirely with money borrowed from Cresco Union Savings Bank (bank). Both Jorgensen and Clark signed the bank note as individuals. The note contained a line on which to indicate the name of the borrowing corporation, partnership, or organization. No such notation was made.

The cattle were placed at Hilltop to be fed and cared for on a "custom feeding" basis. In February 1988, Jorgensen, Clark, and Wayne Halstead purchased 155 heifers and placed them at Hilltop. These cattle were also purchased with funds borrowed from the bank; the three men signed the bank note as individuals and left blank the line for the partnership name. In July 1988, Jorgensen and Clark purchased 104 more cattle in the same manner and placed them at Hilltop.

In November 1988, 44 additional cows were purchased. The parties disputed whether these cows were bought in the same manner as before, with Jorgensen and Clark acting together, or solely by Clark. Both Clark and the bank's vice-president testified that this final purchase was made by Clark alone, without Jorgensen's involvement or liability.

The parties never entered any written agreement governing their business relationship. They operated on their oral agreements and understandings. The cattle bought by Jorgensen and Clark were considered owned on "halves," and those bought by Jorgensen, Clark, and Halstead were considered owned on "thirds." Each party was responsible for his share of the expenses for the care and feeding of the animals plus repayment of the loans.

Hilltop billed Jorgensen, Clark, and Halstead for their proportionate costs for care and feeding which each party paid separately. Hilltop billed the expenses to Clark and Jorgensen as "C & J" cattle. Each party was entitled to receive a proportionate share of the net proceeds when cattle were sold.

In February 1989, Jorgensen, Clark, and Halstead agreed to terminate their business relationship. Halstead was given one-third of the remaining cows in which he had an interest. He assumed responsibility for one-third of the balance of the note he had signed. Jorgensen and Clark also decided to terminate their relationship. Jorgensen

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and Clark agreed that Clark would assume ownership of all remaining cattle and would be responsible for the balance of the debt to the bank. The parties dispute whether Jorgensen had an interest in the cows after February 20, 1989.

On February 21 and 22, 1989, Clark sold a portion of the remaining cattle at a sales barn, listing the name of "C & J" as seller. Clark applied the proceeds to the bank loans. He also informed the bank of the parties' decision to terminate their business relationship. A bank memorandum to the credit file dated 2-23-89 stated the following:

> From conversations I have had from both Casey [Clark] and Jerry [Jorgensen], it appears Jerry wants to get out from underneath the cow partnership as he feels there is no equity there and Casey has agreed to take over the balance the [sic] is owed on the existing notes. We advised that there is no problem on the bank's end of it, however, they should document their files for tax reasons either by swapping checks or a bill of sale. This was left strictly up to them for whatever they have decided. We will continue to carry the balance that is owed on the cows in addition to having a lien on the cows that Casey Clark owns 100% himself.

On January 11, 1990, Clark went to the bank and combined the notes into one note in his name only.

In February 1990, Jorgensen filed a petition to wind up the partnership. The district court found that no partnership was ever formed between Jorgensen and Clark or between Jorgensen, Clark, and Halstead. The district court found that there was no evidence in the record that any of

the parties intended to do business as a partnership. The district court found that the relationship between the parties could clearly be characterized as a joint venture and that the oral agreement between Jorgensen and Clark in February 1989 constituted an agreement for the dissolution of the joint venture. The district court found that Jorgensen had abandoned the joint venture and that Clark was not bound to account to Jorgensen for the profits subsequently made when cattle prices increased. Based upon these findings, the district court denied Jorgensen's petition to wind up a partnership.

Jorgensen appeals. We affirm.

This case was tried as an equitable action. Our review is therefore de novo. Iowa R. App. P. 4. Although we are not bound by them, we give weight to the district court's findings of fact, especially on the credibility of witnesses. Iowa R. App. P. 14(f)(7).

I. Partnership.

Jorgensen argues the oral agreements and actions of the parties evidenced a partnership between Jorgensen and Clark for which Clark owes a duty to account and wind up.

Iowa Code section 544.6(1) (1989) defines a partnership as "an association of two or more persons to carry on as co-owners of a business for profit." Four elements have been held necessary to create a partnership: (1) an intent by the parties to associate as partners; (2) a business;

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(3) earning of profits; and (4) co-ownership of profits, property and control. Thorpe Credit, Inc. v. Wuchter, 412 N.W.2d 641, 647 (Iowa App. 1987); Chariton Feed and Grain, Inc. v. Harder, 369 N.W.2d 777, 786 (Iowa 1985).

The intent of the parties to associate as partners is the crucial test. Chariton Feed & Grain, Inc., 369 N.W.2d at 787. "A partnership can be formed only upon mutual consent of the parties and a meeting of the minds; the intention of one party alone cannot create the relation." Id. (citing Heck & Paetow Claim Service, Inc. v. Heck, 286 N.W.2d 831, 836 (Wis. 1980). Since there was no written agreement between Jorgensen and Clark, or Jorgensen, Clark, and Halstead, we must examine the actual conduct of the parties to determine whether such conduct evidenced a partnership. Farmers Grain Co. v. Irving, 401 N.W.2d 596, 598 (Iowa App. 1986).

The trial court found that the parties did not intend to do business as partners. We agree. There were no partnership tax returns filed, no partnership bank account, no partnership stationery, address, or telephone number. The loans for the cattle from the bank were not treated as partnership loans. The bank's standard partnership forms were not used, and on each of the three bank notes, the space indicating whether or not the borrower was a partnership (and the title of the people signing) was left blank. Both Clark and Halstead testified that they did not consider their business association a partnership. In

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addition, Jorgensen admits there was not a particular discussion about whether the three men were a partnership.

We therefore affirm the trial court's finding that a partnership was not formed.

II. Abandonment of Joint Venture.

Jorgensen next argues the business association was a joint venture and that he is entitled to an accounting and winding up under joint venture law.[1] The district court found that although there was a joint venture, Jorgensen abandoned it when there was no equity in the cows.

> A joint venture is defined as an association of two or more persons to carry out a single business enterprise for profit; also as a common undertaking in which two or more combined their property, money efforts, skill or knowledge.
>
> As a general rule, a joint venture is characterized by a joint proprietary interest in the subject matter, a mutual right to control, a right to share in the profits and a duty to share the losses.

Farm-Fuel Products v. Grain Processing, 429 N.W.2d 153, 156 (Iowa 1988) (quoting Brewer v. Central Construction Co., 241 Iowa 799, 806, 43 N.W.2d 131, 136 (1950)).

No particular form of expression or formality of execution is necessary to create a joint venture.

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1. Clark argues that since Jorgensen did not plead the business relationship as a joint venture and did not request an accounting in a joint venture at the trial court, he should not be able to do so on appeal. We find the joint venture issue was tried by consent. The trial court clearly ruled the business association was a joint venture, but found that it was abandoned.

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Farm-Fuel Products, 429 N.W.2d at 156. Characterisitics of a joint venture are (1) a common undertaking; (2) a joint proprietary interest in the subject matter; (3) a mutual right to control; (4) a right to share in the profits; and (5) a duty to share the losses. Id.

We agree with the trial court that the parties had entered into a joint venture. Jorgensen and Clark's oral agreement created a one-half interest to each man in the cows owned by Jorgensen and Clark and a one-third interest to each in the cows owned by Jorgensen, Clark and Halstead. Each party was liable for the promissory notes as individuals. Also each man was billed separately for their share of the feed expenses. Each party was entitled to receive a proportionate share of the net proceeds when the cattle were sold.

We also agree with the district court that Jorgensen and Clark dissolved their joint venture by mutual agreement in February of 1989. Jorgensen admits he and Clark agreed that Clark would assume ownership of all the remaining cattle and Clark would be responsible for the balance of the debt to the bank. The terms of the oral agreement are disputed by the parties.

Jorgensen argues he and Clark agreed Clark would take selected cattle to sale, retain the better cows himself, and, based on the sale proceeds, value the cattle that were left and settle the business relationship.

Clark argues that Jorgensen wanted out of the cattle business, so instead of taking his portion of the cattle and assuming his portion of the debt, such as Halstead had, Jorgensen agreed to release his interest in the cattle to Clark. In return, Clark assumed all liability on the debt. Clark states that at the time, both men considered the deal a fair trade because neither believed there was equity in the cattle. The trial court found Clark's version of the agreement more credible.

The note in the credit file of the bank supported Clark's version of the agreement. Both men reported their agreement to the bank as seemingly a "done deal". The banker testified he thought the agreement was final, with only paperwork formalities remaining. Furthermore, our review of the record supports Clark's claim that there was not equity in the cattle in February 1989. We find the record does not support Jorgensen's claim that there were 206 cows and 11 bulls remaining in the joint venture in February of 1989. We find no evidence the 44 cows or the eight bulls in dispute were part of his and Clark's joint venture.

We conclude the cattle joint venture was terminated by an oral agreement of the parties in February of 1989. We find in that agreement Jorgensen released his interest in the cattle in exchange for Clark assuming all liability on

the debt. We conclude Jorgensen is not entitled to an accounting under joint venture law.

AFFIRMED.

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