FILED
AUG 31 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ROBERT CARROLL, d/b/a B & H INSURANCE AGENCY,

Appellant,

v.

HOWARD McCAULEY, d/b/a B & H INSURANCE AGENCY,

Appellee.

Filed August 31, 1978

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2-57914

Appeal from Polk District Court - Dale S. Missildine, Judge.

Plaintiff appeals from an adverse ruling in an action brought to establish the existence of a partnership agreement. Affirmed.

Michael Christensen, Martyn & Christensen, of West Des Moines, for appellant.

Michael E. Runyon and J. Blaine Phipps, Phipps, LeTourneau, Anderson, Phipps & Runyon, of Des Moines, for appellee.

Submitted to Donielson, Acting C.J., Snell, Oxberger and Carter, JJ.

PER CURIAM

The plaintiff, Robert "Bob" Carroll, appeals from the decree of the trial court which found that he had not established his claim that defendant, Howard McCauley, and he were partners in a casualty insurance enterprise known as B & H Insurance Agency. Because the issue was tried below as an equitable matter, our review is de novo. Rule 4, Rules of Appellate Procedure. We affirm the trial court.

Under both the statutory and case law of this state, a partnership has its origin in contract, express or implied. Section 544.6, The Code; Malvern National Bank v. Halliday, 195 Iowa 734, 736-37, 192 N.W. 843 (1923). This principle is recognized in the instant case by plaintiff who states in his brief on appeal "a partnership does not arise by operation of law as parties do not become partners except by express or implied agreement." Plaintiff alleged and testified to the existence of an express oral agreement creating a partnership between the parties for the operation of a casualty insurance agency commencing in May of 1972. Defendant, on the other hand, denies the existence of such an agreement and testified that the understanding between the parties was that plaintiff would come into defendant's casualty insurance office and work there until such time as plaintiff could obtain a license to sell casualty insurance in the state of Iowa. Defendant further testified that any agreement to form a partnership was contingent upon plaintiff's first obtaining such license.

It is undisputed that plaintiff never obtained a license to sell casualty insurance, having taken and failed to pass the examination several times. Plaintiff did, in May of 1972, come into the office previously leased by defendant and remain there until October of 1973. During this time plaintiff operated his previously existing life insurance business, in which defendant had no interest, out of this office. Also during this period defendant operated a previously existing retail shoe business, in which plaintiff had no interest, from this location. The present dispute relates solely to the casualty insurance business. Both defendant and plaintiff worked in the casualty insurance business carried on at this location until the insurance commissioner acted to preclude plaintiff's casualty insurance activities. At this time and admittedly for this reason plaintiff left the business and removed all of the physical assets (furniture and equipment) that he had brought with him when he came. Defendant subsequently sold

the casualty insurance business and plaintiff seeks an accounting, as a partner, of the proceeds of this sale.

We have carefully reviewed all of the evidence presented in the trial of this action and while certain factors point toward the existence of a partnership in the casualty insurance business, an equally persuasive case exists that this business was owned by defendant and there was no partnership between the parties. Stated somewhat differently we find and conclude on our de novo review that the evidence on the ultimate issue presented is in equipoise. Accordingly, relief must be denied the plaintiff because he bares the burden of proof and the risk of nonpersuasion. We do not disturb the trial court's decree.

AFFIRMED.