FILED
FEB 21 1984
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

379

| | | |
|---|---|---|
| **BRUCE E. RUSSELL** and **BETTY J. POWELL,** | ) | |
| Plaintiffs-Appellants/ Cross-Appellees, | ) | Filed February 21, 1984 |
| vs. | ) | |
| **J. C. HOLBERT, MARY C. HOLBERT,** | ) | |
| Defendants-Appellees, | ) | |
| **ORRIE C. RYAN, a/k/a O. C. RYAN,** individually; and **RED BARN SUPPER CLUB, LTD.,** a Corporation, | ) | 3-327 / 2-68528 |
| Defendants-Appellees/ Cross-Appellants. | ) | |

Appeal from the Iowa District Court for Boone County - Carl D. Baker, Judge.

The plaintiffs appeal the trial court's adverse decision in their action for declaratory judgment, in which they sought to establish an ownership interest in certain real estate and in the restaurant and residence situated on the real estate. AFFIRMED.

George G. West and Steven C. Jayne, Des Moines, for plaintiffs-appellants.

Donald G. Juhl, Nevada, for defendants-appellees Orrie Ryan and Red Barn Supper Club, Ltd.

Kirke C. Quinn and Ben T. Doran of Doran, Doran, Courter & Quinn, Boone, for defendants-appellees Holbert.

Heard by Oxberger, C.J., and Snell and Sackett, JJ.

This case arises from an astonishing set of circumstances surrounding ownership and management of a restaurant known as the Red Barn Supper Club, Ltd., the real property on which it was situated, and an adjacent residence, also on the real property.

Defendants J. C. and Mary Holbert sold the controverted real estate on contract to Cecil T. Jones and Dale E. Sterner. The contract was assigned, pursuant to a quit claim deed, to defendant O. C. Ryan on February 25, 1966. Ryan leased the property to a couple named Carlson. The Carlsons apparently were unable to run the restaurant successfully. The Red Barn liquor license was revoked. Ryan met plaintiff Bruce Russell at about this time and asked Russell to help out at the Red Barn.

At this point, Ryan's and Russell's versions of the course of events begin to differ. Ryan asserts he wanted to lease the business to Russell, that no arrangement was ever made regarding the residence or real property, and that he never agreed to give Russell a forty-nine percent partnership interest in the business. Russell, on the other hand, claims that he agreed to maintain and operate the Red Barn only because he understood he was doing so in return for forty-nine percent of the profits and losses. No agreement was formalized in writing. Plaintiffs allege another oral partnership agreement was made between Russell and plaintiff Betty J. Powell, whereby Powell was to receive half of Russell's interest in the business and real property in return for her assistance in the operation of the business and in the maintenance and improvement of the real estate.

The plaintiffs instituted the instant action and sought a declaratory judgment determining: that the plaintiffs were forty-nine percent owners of the business and the real property; that the plaintiffs had an equitable mortgage in the business and the real property for services rendered by the plaintiffs in the operation and development of the business and their maintenance and improve-

ment of the real estate; and that this equitable mortgage would be superior to the mortgage owned by defendants Holberts. Defendants Holberts and Ryan denied the plaintiffs' material allegations and defendant Ryan filed a counterclaim against plaintiffs for rent and damages.

The trial court concluded that neither plaintiffs' claims nor defendants' counterclaims had been established, and therefore dismissed the action.

On March 11, 1982, the plaintiffs filed a motion for new trial, motion to amend and enlarge findings and conclusions and motion for stay. Plaintiffs asserted in part that since the trial court found they were neither partners nor lessees in regard to the Red Barn Supper Club that they were entitled to compensation for their services in the operation of the business and in the maintenance of the real property. On April 7, 1982, the trial court entered an order denying the motion for new trial and motion to amend and enlarge findings and conclusions. The trial court concluded in part that the separate grounds raised by the plaintiffs in the motion were raised at trial and that the court did not believe that the findings of fact and conclusions of law were in error.

On May 5, 1982, the plaintiffs filed a notice of appeal. On May 10, 1982, defendants Ryan and the Red Barn Supper Club filed a notice of cross-appeal. On May 9, 1983, the plaintiffs filed a motion to dismiss the cross-appeal on procedural grounds. On May 27, 1983, the supreme court entered an order denying the motion. On June 15, 1983, the plaintiffs filed a motion to dismiss their appeal as it related to defendants Holberts. On July 18, 1983, the supreme court entered an order granting the plaintiffs' motion.

Our scope of review in equity cases is de novo. Iowa R. App. P. 4 (1981). We are not bound by the trial court's findings of fact, but we give them weight, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7) (1981). This is particularly important in this case regarding oral agreements, where the witnesses' testimony essentially determines the case.

**I. Partnership.** The plaintiffs' main contention is that the trial court erred in denying them a declaratory judgment which would give them an ownership interest in the Red Barn business. They claim this ownership interest is derived from an oral partnership agreement between Russell and Ryan.

Plaintiffs Russell and Powell have the burden of demonstrating by clear, satisfactory and convincing evidence that a partnership agreement existed. See Medd v. Medd, 291 N.W.2d 29, 33 n.3 (Iowa 1980); Miller v. Miller, 249 Iowa 979, 984, 89 N.W.2d 871, 874 (1958); Myers v. Blinks, 232 Iowa 1238, 1243, 7 N.W.2d 819, 822 (1943).

> The court must be able to ascertain from the evidence the terms of the very agreement entered into, as a matter of fact, and the effect of such agreement, as a matter of law, in order to determine whether it constitutes a partnership.

Myers v. Blinks at 1243, 7 N.W.2d at 822. "A partnership is usually a contract where two or more persons place their money, labor, and skill in some business to be carried on by the partnership, with an agreement to divide the profits and share the losses." Id. at 1241, 7 N.W.2d at 821. It is not necessary that a partnership agreement be in writing; the relationship may exist under a verbal agreement or be implied from the circumstances. Humboldt Livestock Auction, Inc. v. B & H Cattle Co., 261 Iowa 419, 431, 155 N.W.2d 478, 486 (1967). The existence of a partnership generally depends on whether there was a community of interest in profits and losses, whether there was a community of interest in capital employed, and whether there was a community of power in administration. Anderson v. Walker, 256 Iowa 1324, 1329, 131 N.W.2d 524, 526 (1964). See also Berry Seed Co. v. Hutchings, 247 Iowa 417, 427, 74 N.W.2d 233, 239 (1956); Danico v. Ford, 230 Iowa 1237, 1241, 300 N.W. 547, 549 (1941). "[A] partnership cannot exist except through an express or implied contract in which the profit and loss are to be shared." In re Estate of Hewitt, 245 Iowa 369, 371, 62 N.W.2d 198, 199 (1954). The mutual liability for losses may be implied where the fact of partnership is established by

other evidence. Malvern National Bank v. Halliday, 195 Iowa 732, 738, 192 N.W. 843, 846 (1923). However, the matter of sharing losses must be clearly established. Anderson v. Walker at 1329, 131 N.W.2d at 527.

No particular form of expression or formality of execution is necessary to constitute a partnership contract; it need not be express but may be implied in whole or in part from the conduct of the parties. Pay-N-Taket, Inc. v. Crooks, 259 Iowa 719, 724, 145 N.W.2d 621, 625 (1966). The plaintiffs argue that a partnership agreement may be inferred from the conduct of the parties in the instant case. If we assume, for the purposes of argument, that the trial court found all of the testimony of plaintiff Russell to be credible, we do not believe a partnership agreement was inferrable from the conduct of the parties.

According to Russell, the initial discussions between Russell and Ryan regarding the status of their business relationship began when Ryan called Russell from Florida, requesting Russell to help get back the restaurant's liquor license; the license had been revoked during the time the previous tenants, the Carlsons, had been operating the business because the Carlsons had not been paying the 15 percent liquor tax required of licenseholders. Ryan asked Russell at that time if Russell would like to lease the business from him; Russell refused. Russell picked up a check from Ryan for money needed to get the liquor license back. According to him, he had to assure the licensing board that Ryan was not actively involved in the operation of the restaurant in order to get the license because the board was not pleased with the way Ryan had run the business. Russell began to operate the Red Barn in October of 1973 despite the fact that no arrangement had been reached. He claims Ryan finally agreed to a partnership arrangement in November of 1973. They met with Ryan's attorney in a hotel room in February 1974, for the purpose of getting the agreement in writing, but Ryan and Russell again disagreed as to the type of relationship the arrangement would be. By the time they agreed to a partnership arrangement for the business, also agreeing that

the residence would not be involved, Russell testified that Ryan's attorney "unexpectedly had to leave town. The I.R.S. was after him." Thus, the agreement was never formalized in writing at that time and, apparently, no other attempt was ever made.

The residence had been rented to students, but in November 1974, the house was so damaged by the tenants that Russell moved into the residence, partly to help keep an eye on the restaurant, and partly because he was earning no income from the restaurant. Ryan evidently did not know that Russell had moved into the residence at the time, but later became aware of it and did not object. In fact, Ryan occasionally stayed at the house while Russell was living there. Russell claims Ryan never asked for rent on the house.

According to Russell, when he began operating the business, creditors and suppliers would not accept anything but cash from the Red Barn. Russell borrowed money personally for work that needed to be done on the property. He claims he would not have done so if he had not believed he held some interest in the business. In the financial statement he filled out to get the loans he called himself a partner in the business, however, Ryan was unaware of this categorization. Russell held himself out to customers, suppliers, and licensing bodies as part-owner of the Red Barn. In fact, Russell called himself an owner-manager of the Red Barn before the Iowa Liquor Control Commission, in Ryan's presence, but Ryan did not object. The liquor license was in Russell's name.

Russell was inconsistent in his assertions of partnership status. For example, the applications which he filled out for liquor licenses for the years 1974 through 1978 listed only Ryan as owner, however, on the line for "Name of Individual Applicant or Partners" he listed Ryan, Powell, and himself. On the application for the year 1974, in the space for the expiration date of the lease, he listed 1974; in the 1977 application he called the lease "perpetual." In the application for 1981, he listed Ryan as owning only 51 percent, but he named Powell as the owner of the other 49 percent.

In various court proceedings, Russell has disclaimed interest in the Red Barn. In an action by Glendona Burich, Ryan's former wife, against Ryan, in which Russell was named as a defendant, Russell admitted that he held a leasehold interest in the Red Barn. In financial statements used in a suit brought in 1974 by his ex-wife for child support payments in arrears, Russell listed his only asset as a "1965 Olds" worth $150. A later affidavit stated: "My personal income is determined by the Corporate profit from our business, the Red Barn Supper Club, Ltd. My compensation is 40% of the net profits." When asked on cross-examination about the discrepancy between the 40 percent in the affidavit and his claim of 49 percent interest in the instant case, Russell replied that the affidavit was made for the purpose of a divorce action and he was "trying to hold the income down." He denied receiving any income because the business had not made any profits. In an application for appointment of counsel for a 1978 charge of operating a motor vehicle under intoxication, in which he had to state his financial condition, he listed himself as a self-employed cook, his income as having been on a buy-sell agreement; he claimed he had no interest in real estate, no one owed him money, and wrote at the bottom of the form: "Defendant states he has no equity in his business, eats leftovers from the restaurant, has not filed income taxes last three years, lives on the premises, has no equity in the business."

Thus, Russell's testimony demonstrates that he only held himself out as a partner or part owner when it was not to his disadvantage to do so. As far as sharing profits and losses, a factor to be considered in demonstrating a partnership, Russell claims the business never made any profits, so he was unable to share any with Ryan. Russell testified that once he asked Ryan for money for a liquor license; Ryan told Russell he didn't have any and left Russell to cope with the situation. When Ryan would call and ask Russell for some of the profits, Russell would tell him there weren't any; if Ryan did not believe Russell, Russell would offer to let Ryan look at the books. Despite this, Russell claims the Red

Barn currently is earning 750 percent more money than it was when he began working there. Russell has filed neither personal income tax nor partnership income tax since 1975 because he claims there has been no income and any profits have been reinvested in the property. Furthermore he stated he didn't see it as his responsibility to see that taxes were paid. He did not believe his responsibility included carrying fire insurance on the property, either, and there has been none since 1975.

Russell's testimony does not demonstrate a community of interest in profits and losses, a community of interest in capital employed, or a community of power in administration. Russell has not shown by clear and convincing evidence that a partnership agreement, express or implied, existed. Thus, Russell had no partnership interest to share with Powell. Trial court committed no error in denying plaintiffs declaratory relief.

**II. Equitable Mortgage.** Plaintiffs claim the trial court erred in concluding that Russell and Powell were not entitled to an equitable mortgage for improvements made by them to the real property. We find their contentions to be without merit.

Equitable mortgages are recognized and enforced when there is a clearly ascertained intent of the parties that a specific lien on real property exists to secure the payment of money or the performance of some other obligation. They are granted when written instruments are not effective as mortgages at law; a court of equity will find that "the plain intent of the contract is shown by the instrument, aided by the surrounding facts and circumstances", so as to create an equitable mortgage. Parry v. Reinertson, 208 Iowa 739, 742, 224 N.W. 489, 490 (1929). "[W]henever a transaction resolves itself into a security, or an offer or attempt to pledge land as security for a debt or liability, equity will treat it as a mortgage, without regard to the form it may assume." Id. at 743, 224 N.W. at 490 (quoting 41 C.J. 293).

Plaintiffs have presented no claim, colorable or not, to title of the property. There is no agreement in writing on which to base an equitable mortgage. No personal funds were spent on the property; all monies spent came out of the business profits. No equitable mortgage was established.

**III. Leasehold.** Plaintiffs claim the trial court erred in not granting them an award for the reasonable value of the services they provided for the business and as reimbursement for monies spent maintaining and improving the disputed property. Defendant Ryan argues the trial court erred in denying his counterclaims for rents and other claimed advancements.

Russell admitted that all money he spent in the business came out of the profits from the restaurant. No personal money was spent. He lived rent-free in the residence on the property, though no agreement was ever reached on that point. No profits were ever shared with Ryan, though Russell claims no profits were ever made. Russell never made payments on the property mortgage, never filed personal or partnership income taxes, never paid fire insurance on the property. The evidence regarding repairs and maintenance to the property was written by Russell from memory over one lunch recess; there were no accompanying receipts. We do not find sufficient credible evidence on which to base a claim for remuneration.

Furthermore, Ryan's counterclaim of a leasehold interest also is unsubstantiated by the evidence. The parties continued for seven years without demands from Ryan for rent. Ryan claims he asked for rent, Russell says he just asked for money. Notwithstanding this lack of agreement, the parties continued operating the business for seven years. When, through his acts, words or silence, a party has led another to take a position such that the subsequent assertion of the first party's interest would be contrary to equitable principles, the doctrine of equitable estoppel may be applicable. Johnson v. Johnson, 301 N.W.2d 750, 753-55 (Iowa 1981). The doctrine of estoppel by acquiescence is applicable where a person

knows or ought to know that he is entitled to enforce his right and neglects to do so for such a time as would imply that he intended to waive or abandon his right. Davidson v. Van Lengen, 266 N.W.2d 436, 438 (Iowa 1978). If Ryan ever was entitled to rental payments from Russell, an issue we decline to decide, Ryan now is estopped from claiming rent has been unpaid all this time.

Furthermore, Ryan's allegations of a lease agreement do not comport with the statute of frauds, Iowa Code section 622.32 (1981). Although an agreement for a tenancy may be oral and may be inferred from the situation and surrounding circumstances, it may be subject to section 622.32. McCarter v. Uban, 166 N.W.2d 910, 913 (Iowa 1969). That section requires that leases of real estate for a term exceeding one year must be in writing. Part performance or payment of rent under an oral lease for a term of more than one year will not take the case out of the statute of frauds. Barker Development Co. v. Unibank & Trust Co., 314 N.W.2d 175, 177 (Iowa 1981). Russell's possession of the property for seven years does not release Ryan from the requirement that the lease agreement be in writing. Ryan is precluded now from claiming a lease agreement existed.

AFFIRMED.