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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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GERALD ESTAL,	)	
Plaintiff-Appellant,	)	Filed April 24, 1984
vs.	)	
MARVIN ROZENBOOM and JEAN ROZENBOOM,	)	4-54 83-644
Defendants-Appellees.	)	

Appeal from the Iowa District Court for Mahaska County - Richard J. Vogel, Judge.

Plaintiff appeals from a judgment for defendants in an action for an accounting of an alleged joint venture to develop real estate. AFFIRMED.

M. H. Pothoven and Randall C. Stravers of Clements, Blomgren & Pothoven, Oskaloosa, Iowa, for plaintiff-appellant.

Garald F. Heslinga and John F. Heslinga of Heslinga & Heslinga, Oskaloosa, Iowa, for defendants-appellees.

Considered by Donielson, P.J., and Snell and Schlegel, JJ.

Plaintiff, Gerald Estal, appeals from a judgment for defendants in an action for an accounting of an alleged joint venture to develop real estate. Plaintiff sought to have the trial court enter a decree dissolving the joint venture, order an accounting and sale of the assets, and order the equal distribution of the assets to the plaintiff and defendants. The court held that plaintiff failed to establish by clear and convincing evidence that the disputed real estate was intended by the parties to be partnership property, and that even assuming an agreement existed between the parties as alleged by plaintiff, plaintiff was himself unable to carryout that agreement. We affirm.

The general rule, with exceptions not applicable here, is that the burden is upon the one who claims a right to an accounting to prove such a right. Randolph Foods, Inc. v. McLaughlin, 253 Iowa 1258, 1264-65, 115 N.W.2d 868, 871-72 (1962). The law governing operations of, and accountings in, joint ventures is that generally applicable to partnerships. Jensen v. Schreck, 275 N.W.2d 374, 378 (Iowa 1979). See Iowa Code section 544.22 (1981) (right to an account). The proof required to establish a partnership between alleged partners must be clear, satisfactory, and convincing. 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). The rules for determining the existence of a partnership applicable to this case are contained in Iowa Code section 544.7 (1981).

Actions for accounting upon dissolutions of partnerships are in equity and our review is **de novo**. Jensen v. Schreck, 275 N.W.2d at 378. In equity cases, especially when considering the credibility of witnesses, we give weight to the fact findings of the trial court, but are not bound by them. Iowa R. App. P. 14(f)(7).

The parties were owners of adjacent forty acre tracts of land. Plaintiff approached the defendants with a proposition to develop a creek which ran across

both properties. It is undisputed that the parties agreed to build a dam over the creek that would serve both properties and to jointly install rural water that would also serve both properties. As a method of financing the project, the parties agreed to each sell a lot or lots and to divide the proceeds from such sales until the improvements were paid for. There were two sales made, one from each forty acre tract, and each party received one-half of the proceeds from each sale. The proceeds from these sales covered the costs of the project as completed to that point.

It is also undisputed that the parties discussed a larger project whereby the entire acreage around the resulting body of water would be joined together and subdivided. Because of the proximity of the project to a city, the parties would have been required to plat the subdivision pursuant to Iowa Code chapter 409 (1981). The defendants testified that they had been involved in negotiations concerning the possibility of entering into this joint venture with the plaintiff, but that no agreement had been reached. The plaintiff testified that the parties had reached an oral agreement to combine the properties and that the work successfully completed up to that point had been in furtherance of the joint venture. No plat, however, was ever completed.

The outstanding difference between a joint venture and a partnership is that the joint venture relates to a single transaction while a partnership relates to a general and continuing business. Johanik v. Des Moines Drug Co., 235 Iowa 679, 685, 17 N.W.2d 385, 389 (1945).

> A partnership or joint adventure, a limited 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. To constitute such a contract no particular form of expression or formality of execution is necessary. It need not be express but may be implied in whole or part from the conduct of the parties.

Pay-N-Taket, Inc. v. Crooks, 259 Iowa 719, 724, 145 N.W.2d 621, 625 (1966) (citations omitted). A joint venture is characterized by a joint propriety interest in the subject matter, a mutual right to control, a right to share in the profits and a duty to share the losses. Brewer v. Central Construction Co., 241 Iowa 799, 806, 43 N.W.2d 131, 136 (1950).

The forty acre tracts of land were owned individually by the parties prior to the construction of the dam. After the dam was initially completed, further work was done to extend the body of water onto the plaintiff's property to the point originally agreed upon by both parties. The land owned by the defendants is valued at nearly twice that of the land owned by plaintiff. Portions of the plaintiff's land have been strip-mined. After completion of the dam and the sale of enough property to pay the costs of that project, the parties have ceased further development. The next step in the alleged development, platting a subdivision, would require a substantial investment of time and assets. There has been no move to complete this phase of the alleged project.

The evidence shows that the proceeds received from the sale of the two lots were not put into partnership accounts. Title to the properties sold to recover costs was given to the purchasers by the individual owners of the forty acre tracts and not by the partnership. Throughout this period both parties continued agricultural uses of the property and retained all profits personally. Each party paid all taxes, insurance premiums, and fencing expenses for their respective tracts of land. The defendants have continued to clear land for agricultural use at their own expense on their forty acre tract of land. Finally, the evidence shows that plaintiff has twice mortgaged his forty acre tract without consulting his alleged partners, the defendants, and without sharing the proceeds.

We do not believe the joint receipt of proceeds from the sale of property in this case establishes that the defendants are plaintiff's partners in the alleged joint venture to develop a subdivision. The sharing of proceeds was mutually

agreed to by the parties as a method of financing the building of the dam and installation of rural water. The distribution of the proceeds was analogous to the repayment of a debt. See Iowa Code section 544.7(4) (1981). The plaintiff has failed to show, either in writing, orally, or by the parties' acts, that the defendants assented to the joint venture as alleged by plaintiff. The manifestation of mutual assent is essential to the making of a contract for a joint venture. Goering v. Jefferson, 159 N.W.2d 409, 412 (Iowa 1968).

We hold that the evidence was insufficient to establish a joint venture to combine the parties' respective tracts of land for the development of a subdivision. Therefore, plaintiff has failed to meet his burden of showing he is entitled to an accounting.

Assuming arguendo that we had found a joint venture between the parties, we do not believe plaintiff would have been entitled to an accounting. The plaintiff's expert valued the entire eighty acre tract at $79,000. Plaintiff has already received $43,000 from the mortgages placed on his forty acre tract which was valued at approximately $25,000. Plaintiff, through his actions, is unable to perform his obligations under the parties' alleged agreement. One who seeks equity must do equity. Khabbaz v. Swartz, 319 N.W.2d 279, 282 (Iowa 1982).

Accordingly, the decision of the trial court is affirmed.

AFFIRMED.