

**NOTICE**  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

NO. 4-10-0605

Order Filed 3/28/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

|   |                    |
|---|--------------------|
| PAUL E. OFFUTT; and SECURITY VENTURES, )        | Appeal from        |
| INC., an Illinois Corporation, )                | Circuit Court of   |
| Plaintiffs-Appellants, )                        | Vermilion County   |
| v. )  | No. 06L2           |
| STEVE SONGER, Individually; SWING WING, INC., ) |                    |
| an Indiana Corporation; and JERRY WALKER, )     | Honorable          |
| Individually, )                                 | Teresa K. Righter, |
| Defendants-Appellees. )                         | Judge Presiding.   |

JUSTICE APPLETON delivered the judgment of the court.  
Justices Turner and Pope concurred in the judgment.

**ORDER**

*Held:* (1) If parties orally agree to form a partnership and if they then purchase the airplane that is to be the profit-generating asset of the partnership, this action in reliance on the oral agreement tends to show that the parties regarded the oral agreement not merely as a preliminary negotiation but as a contract, even if the parties intended to reduce their agreement to writing later on but never did so.

(2) If property is purchased with partnership funds and for partnership purposes and title is placed in the name of a stranger, the legal title will be subject to a resulting trust in favor of the partnership.

Paul E. Offutt and his corporation, Security Ventures, Inc., sued Steve Songer; Swing Wing, Inc.; and Jerry Walker on several theories: fraud, constructive fraud, breach of fiduciary duty, and *replevin*. These theories are reducible to a single narrative. Offutt, Songer, and Walker entered into an oral agreement to form a partnership. The partnership was to consist of buying an airplane and renting it out for profit. The three men bought the

airplane, but afterward, Songer and Walker allegedly broke some promises regarding the airplane. For example, they hangared the airplane in Indiana instead of in Illinois, and they titled it in the name of Swing Wing instead of in the name of a partnership. After hearing the evidence in a bench trial, the trial court was unconvinced that these broken promises proved fraud or breach of fiduciary duty, and the court entered judgment in defendants' favor on the complaint.

Plaintiffs appeal, but in their brief, they really do not develop a reasoned argument about fraud or breach of fiduciary duty. Instead, they seem more concerned with challenging the trial court's finding that a partnership came into existence. Plaintiffs insist that although the parties contemplated the formation of a partnership, they never actually created a partnership and that consequently the funds that plaintiffs contributed toward the purchase of the airplane should be considered a loan to Songer and Walker, which Songer and Walker should repay. We conclude, on the contrary, that when the trial court found the existence of a partnership, it did not make a finding that was against the manifest weight of the evidence. Therefore, we reject the loan theory, and we affirm the trial court's judgment.

## I. BACKGROUND

### A. Preliminary Discussions Regarding the Purchase of an Airplane

Songer, Walker, and Offutt were longtime friends and business associates. Sometime in 2002, Songer told Walker he was considering buying a Lear jet, and he asked Walker if he "wanted in." Walker said he was interested. When Offutt learned of the plan, he said he was interested, too. So, the three men agreed on a price range, to be divided equally between them, and Songer traveled around the country looking at airplanes.

### B. The Intended Uses of the Airplane

Offutt testified that in 2001, he suffered from an illness that necessitated his hospitalization in Cleveland, Ohio, and that Songer, who was a pilot, flew him back home to Danville, Illinois, after he was discharged. Offutt found this service to be very helpful, and it piqued his interest in acquiring a Lear jet to be used as an air ambulance--not only for himself but for others as well, for a profit. Walker testified that according to the oral agreement between the three of them, each of the partners would be responsible for a third of the expenses and that if the airplane made any money, each of them would receive a third of the profit.

### C. Where the Airplane Would Be Hangared

In their discussions about buying an airplane, the three men assumed that the airplane would be hangared in Danville, where it would be readily accessible to Walker and Offutt.

### D. The Titleholder of the Airplane

Walker testified that although the three of them would be equal owners of the airplane, they agreed that Songer's corporation, Swing Wing, Inc., would hold the title to the airplane so that they would avoid incurring a sales tax. Songer testified he would not have agreed to buy the airplane unless it were to be titled in the name of Swing Wing. He was certain he had discussed this term with Offutt during breakfast meetings before purchasing the airplane. Offutt, however, denied ever having any discussions about titling the airplane in the name of Swing Wing.

### E. An Oral Versus a Written Partnership Agreement

Songer testified that he had an oral agreement with Walker and Offutt to form

a partnership and that they did "[n]ot necessarily" have an agreement to reduce the terms to writing. They never moved out of the "verbal stage" and into a written contract. Similarly, Walker testified that a "sort of verbal handshake agreement" was how he typically did business with friends.

Offutt, on the other hand, "anticipated a written agreement." He trusted that after Songer found an airplane and the three of them bought it, they would "iron out all the details." Plaintiffs' attorney asked Offutt what he meant by "details," and Offutt answered, "Well, the partnership, the paperwork, accounting. You know, I planned to depreciate it and use it as a business situation." A partnership agreement, however, was never drafted.

#### F. The Purchase of the Airplane

On April 20, 2003, Songer told Walker and Offutt that he had found a suitable airplane, a 1971 Learjet 25D, which could be bought for \$412,000. On April 25, 2003, the three of them pitched in and bought the airplane. Offutt contributed \$143,500 toward the purchase price and expenses.

#### G. The Hangaring of the Airplane in Monticello, Indiana

After the three men bought the airplane, it was titled in the name of Swing Wing and flown to Brandis Aviation in Taylorville, Illinois, for maintenance work. Then it was flown to Monticello, Indiana, where Songer conducted his airplane business.

According to Walker's testimony, there was no available hangar space in Danville, and although Offutt had looked into building a hangar there, he never did so. Offutt testified, on the other hand, that hangar space was available in Danville. Songer testified it was cheaper to hangar the airplane in Monticello and, besides, the pilots who would fly the airplane were he and John Townsend, both of whom resided in Monticello.

According to Songer, the decision to hangar the airplane in Monticello was made after a discussion between the three partners. Offutt denied ever agreeing with the decision or consenting to hangar the airplane anywhere except in Danville.

Songer and Walker testified that although the original plan to hangar the airplane in Danville fell through, the airplane was available for Offutt's use at any time. All he had to do was ask to use it. He never did so.

#### H. The Profitability of the Partnership

From the date of its purchase until the spring of 2006, the airplane generated \$32,025 in income while incurring \$164,548.60 in expenses, for a net loss of \$132,523.60.

In the spring of 2006, Songer negotiated a deal with Lance Letchworth, whereby Letchworth would pay \$9,000 a month to rent the airplane, together with an additional \$140 per flight hour to rent the engines. From August 2006 until the time of the bench trial in January 2010, the partnership received \$201,291.19 in revenue from this rental of the airplane to Letchworth. According to documentation that defendants presented at trial, the net profits from the Letchworth deal were \$33,013.66.

Nevertheless, this profit is complicated by a couple of additional factors. Letchworth testified in his evidence deposition that he had incurred expenses because the engines of the Lear jet no longer were operable. Also, he had paid for inspections which, properly speaking, were the obligation of the partnership.

Further, the engines of the airplane were disassembled and in Michigan at U.S. Turbine & Accessory. It would cost about \$310,000 to overhaul the engines.

#### I. Offutt Demands His Money Back

Offutt testified that "[p]robably within the first 45 days" after the purchase

of the airplane, he asked to "get out of the plane." On May 12, 2005, he wrote Songer and Walker a letter requesting a refund of "the monies advanced toward the airplane." It appears, from his letter, that he had three reasons for this request: (1) the failure to "come up with a business plan," (2) Walker's and Songer's failure to comply with his requests for information, and (3) his perception that his money had gone into an asset that was primarily for the "personal use" of Walker and Songer. Thus, Offutt requested a refund of \$143,500 ("Note from bank") plus \$10,677 ("Repairs/Inspection") plus \$283 ("Hangar Rent"), a total of \$154,200. Walker and Songer never complied with Offutt's request for a refund.

#### J. The Complaint and Counterclaim

On January 18, 2006, Offutt and his corporation, Security Ventures, Inc., filed a complaint against Songer, Walker, and Swing Wing. The complaint consists of four counts. The first three counts are directed against Songer and Walker, and the fourth count is directed against Swing Wing.

Count I, entitled "Fraud," alleges that Songer and Walker encouraged Offutt to enter into an agreement to purchase an airplane "as a partnership." The airplane was to be "for the personal use of each of the parties, as well as renting the airplane for charters and for an air ambulance in Florida." Walker and Songer allegedly made the following statements to Offutt, to induce him to join the proposed partnership: (1) the airplane would be hangared in Vermilion County, (2) the airplane would be titled in the name of the partnership, (3) a business plan would be prepared, and (4) records would be kept on the operation and expenses of the airplane. In reliance on those statements, Offutt "[paid] the money to Songer and Walker to buy the subject airplane and place it in a joint partnership."

The statements, however, turned out to be false in that (1) Songer and Walker had the airplane titled in the name of Swing Wing, (2) they refused to keep Offutt apprised of the whereabouts of the airplane, and (3) they refused to account for earnings from the airplane.

Count II of the complaint is entitled "Constructive Fraud," and count III is entitled "Violation of Confidential Fiduciary Relationship." Those counts basically repeat the allegations of count I. Count IV, entitled "Accounting and Replevin," requests the following relief: "that Swing Wing, Inc., be ordered to account to Offutt for all transactions which involve the subject airplane, be ordered to account for any and all financial compensation received from Offutt for his ownership interest in the subject airplane, and for an order of *replevin* on the subject airplane."

Defendants filed a counterclaim, in which they sought a judgment against Offutt for his share of the partnership losses, which, as of January 2006, they calculated as totaling at least \$130,000.

#### K. The Bench Trial and the Judgment

On January 29, 2010, the trial court held a bench trial. On February 10, 2010, the court entered a judgment order in which it noted that although the pleadings did not raise the issue of whether a partnership existed between the parties, Offutt argued at trial that a partnership never came into existence. The court found, to the contrary, that a partnership was formed. The court remarked that even though the partnership agreement "was not detailed and did not address every eventuality of change in circumstance," it "was sufficient to create a partnership in the purchase, ownership and operation of the plane."

Having found the existence of a partnership, the trial court then addressed the individual counts of the complaint. As for counts I and II, the statements that Songer and

Walker allegedly made to Offutt were not representations of past or presently existing facts but instead were promises to do something in the future; hence, the statements could not be the basis of an action for fraud.

As for count III, the alleged breach of fiduciary relationship occurred before the purchase of the airplane. Because Offutt, Walker, and Songer were not partners, and hence were not in a fiduciary relationship with one another, until the purchase of the airplane, the statements that Walker and Songer made to Offutt could not be the basis of an action for breach of fiduciary relationship.

As for count IV, the trial court granted Swing Wing's motion to quash service of process on the ground that the court lacked personal jurisdiction over Swing Wing.

As for Songer's and Walker's counterclaim, the trial court found as follows:

"The evidence produced reflects that as of the trial date the income generated by the rental of the plane exceeded the costs incurred and as of the trial date the Plaintiff's 1/3 of expenses have been paid by his share of the income generated. The Defendant/Counter-Plaintiffs are not owed any money by the Plaintiff/Counter-Defendant for expenses and costs as of the trial date. In fact, the Plaintiff/Counter-Defendant is due money pursuant to the partnership agreement. This does not include the current condition of the engines and the costs associated with the removal and dismantling of the engines for the 5000 mile overhaul or the costs to rebuild the engines."

Songer and Walker, however, do not appeal. Only plaintiffs appeal.

## II. ANALYSIS

### A. The Creation of a Partnership

In their complaint, plaintiffs allege that on April 25, 2003, "Songer and Walker encouraged and requested Offutt to enter into an agreement to purchase an airplane as a partnership. The purpose of said purchase was for personal use of each of the parties, as well as renting the airplane for charters, and for an air ambulance in Florida." Acceptance of this proposal would not have created a contract, because, obviously, there were many different airplanes on the market, of widely different values, and the particular airplane to be purchased was as of yet unspecified. The terms of a contract must "provide a basis for determining the existence of a breach and for giving an appropriate remedy." Restatement (Second) of Contracts §33(2) (1981). Without knowing which airplane the parties had agreed to buy, a court could not have determined the existence of a breach and awarded an appropriate remedy.

Subsequently, however, the parties decided on a particular airplane. It was a 1971 Learjet 25D, which could be bought for \$412,000. By tendering his one-third share of the purchase price, Offutt accepted the offer to create a partnership. He accepted by performance. See Restatement (Second) of Contracts §50(2) (1981). "Acts of performance by one party accepted by the other unquestionably indicate that the parties understand that definite terms have been agreed upon; so that even if the oral agreement prior to the act of performance did not constitute a contract, the subsequent tender of performance amounts to an offer, and the receipt of the performance without objection amounts to an acceptance of the offer." 1 W. Jaeger, *Williston on Contracts* §28A, at 75 (3d ed. 1957).

Granted, the terms of the agreement to which Offutt manifested assent were

rudimentary enough: going one-third each into buying the 1971 Learjet 25D, which then would be rented out for mutual profit. Nevertheless, these terms, rudimentary as they were, met the description of a partnership as defined by section 202(a) of the Uniform Partnership Act (1997) (805 ILCS 206/202(a) (West 2008)). Section 202(a) provides that "the association of 2 or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership." 805 ILCS 206/202(a) (West 2008). By making contributions toward the purchase of the airplane, with the intention that it would be a profit-generating asset, Offut, Songer, and Walker formed a partnership then and there, regardless of whether they intended to form a partnership at that point in time. See *id.*

#### B. "Formal Contract Contemplated"

Plaintiffs concede that a partnership can be created verbally, without a written partnership agreement (see *Rizzo v. Rizzo*, 3 Ill. 2d 291, 299 (1954)), but they insist that in this case, a partnership never came into existence because the parties never had a meeting of the minds on "how this airplane was going to be operated" or "any other important information necessary to reach a partnership agreement"--matters that would have been spelled out in the future, in a written partnership agreement.

Plaintiffs raise the problem of "formal contract contemplated." E. Farnsworth, *Contracts* §3.29 n.1 (2d ed. 1990). Parties sometimes reach an oral understanding, which they intend to put into writing later. They contemplate the subsequent drafting and execution of a formal writing. Farnsworth, *Contracts* §3.8 at 178. The question is, What is the effect of this expressed intention to draft an instrument later: does it postpone the creation of a contract until the signing of the instrument, or will the

execution of the instrument merely confirm and memorialize a contract that came into existence at the time of the initial agreement? *Id.* In answering this question, courts have given great weight to the parties' behavior after making the preliminary agreement. *Id.* at 184. If the parties begin to perform, this performance could be regarded as inconsistent with a later contention that no contract ever came into existence. *Id.* at 183-84. "A party's acquiescence in the other's reliance on the preliminary agreement may also be a compelling reason for enforceability." *Id.* at 184-85.

Surely, Offutt would not have paid \$143,500 if he thought that he, Songer, and Walker lacked a sufficiently definite agreement. After the fact, Offutt tries to re-characterize this \$143,500 as a loan, but in doing so, he forgets the action that Songer and Walker took in reliance on his agreement to form a partnership. Like Offutt, Songer and Walker each paid a third of the purchase price, and part of the consideration for their doing so was Offutt's agreement to pay a third. Buying this airplane was a risk, and for each of the parties, part of the benefit of the bargain was limiting his exposure to one-third (with respect to the purchase price). By transforming the transaction from a partnership into a loan to Songer and Walker, Offutt means to deprive Songer and Walker of part of the benefit of their bargain by increasing their exposure to one-half each.

In summary, by his own performance and by acquiescing to the performance by Songer and Walker in reliance on the preliminary agreement, Offutt entered into the contractual relationship known as a partnership, even if he thought the subsequent execution of a writing would be necessary to the existence of the partnership. "If the oral preliminary agreement constituted a contract, a subsequent erroneous supposition of the parties that a formal contract was necessary to make the bargain binding will be ignored."

1 W. Jaeger, Willison on Contracts §28, at 69-71. The supreme court has held:

"[I]f a contract is entered into and the terms agreed upon, and it is understood that it shall be in writing, and the parties perform the agreement, or one of them, without the objection of the other, enters upon the performance of the agreement, the contract, unless of the character required by the statute to be in writing, will be as binding as if reduced to writing as agreed. The writing gives no additional force or validity, except in cases arising under the statute of frauds. It is not the agreement, but the evidence of its terms and conditions." *Miller v. McManis*, 57 Ill. 126, 130-31 (1870).

In other words, even if the parties intend to sign a writing later, their preliminary oral agreement will be a contract if they begin performing the agreement, or if one of them begins performing it and the other parties are aware of the performance and do not object. In that event, the writing--if they ever eventually sign a writing--will merely be evidence, or a memorandum, of the pre-existing contract.

### C. A Resulting Trust

Plaintiffs argue there is no partnership because there is "no joint title to any property," and they argue there is no joint title to property because the airplane is titled in the name of Swing Wing instead of in the name of a partnership. Section 202(a) of the Uniform Partnership Act (1997) (805 ILCS 206/202(a) (West 2008)) defines a partnership as "the association of 2 or more persons to carry on *as co-owners* a business for profit." (Emphasis added.)

The supreme court has held, however, that if property is purchased with partnership funds, it is the property of the partnership regardless of how title is held. The supreme court has stated:

"Where real estate is bought with partnership funds for partnership purposes, and is applied to partnership uses or entered or carried on the account of the firm as a partnership asset, it is deemed to be firm property and, in such cases, it makes no difference in a court of equity, whether the title is in all the partners, in one of them, or in a stranger. If the real estate is purchased with partnership funds, the party holding the legal title will be regarded as holding it subject to a resulting trust in favor of the firm furnishing the money."

*Korziuk v. Korziuk*, 13 Ill. 2d 238, 242 (1958).

The same holding would apply to personal property. Because Offutt, Songer, and Walker bought the airplane for purposes of the partnership, Swing Wing holds the title to the airplane subject to a resulting trust in favor of the partnership.

### III. CONCLUSION

For the foregoing reasons, we affirm the trial court's judgment.

Affirmed.