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2012 IL App (3d) 110566-U

Order filed September 13, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

ERIC CARLSON,) Appeal from the Circuit Court
) of the 10 th Judicial Circuit,
Plaintiff-Appellant,) Peoria County, Illinois,
)
v.) Appeal No. 3-11-0566
) Circuit No. 08-L-348
NASIM ISMAIL, SHOEB ISMAIL,)
JASMINE ISMAIL, and RICKY MAHER,) Honorable
) David J. Dubicki,
Defendants-Appellants.) Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices O'Brien and Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly granted the defendants' motion for summary judgment because, when we view the evidence in the light most favorable to the plaintiff, it does not support the existence of a partnership under the Partnership Act (805 ILCS 206/1, *et seq.* (West 2008)).

¶ 2 Eric Carlson, the plaintiff, filed a five-count complaint alleging theft by deception against defendants Nasim Ismail, his former girlfriend; Shoeb and Jasmine Ismail, Nasim's brother and sister; Ricky Maher, Jasmine's boyfriend; and Abby Humbles, Nasim's friend. Eric subsequently

filed an amended complaint, and added a count demanding that Nasim render an accounting of assets that the former couple had held in joint tenancy. The defendants filed a motion for summary judgment as to the original five counts, and the trial court granted it. Eric appeals, contending that he presented sufficient evidence to create triable factual issues concerning the existence of a partnership and the alleged conspiracy of the defendants to permanently deprive him of his share of the partnership's assets. We affirm.

¶ 3

FACTS

¶ 4 On November 19, 2008, Eric filed a five-count complaint, alleging one count of theft by deception against each defendant. The general basis for each count was his contention that he and Nasim had formed a *de facto* business partnership during the course of their 20-year romantic relationship, and that the defendants had conspired to commit theft by deception to permanently deprive him of his share of the partnership's assets after his relationship with Nasim ended. In count one, Eric alleged that Nasim intentionally dissipated assets of the partnership by: (1) selling a jointly held home at 1522 West Christine Street in Peoria, Illinois (the Peoria home), to Ricky for one-third of its value; (2) closing all cash and life insurance accounts that she jointly held with Eric and transferring the money into accounts in which he had no ownership interest; and (3) converting Eric's home furnishings and personal property. In this count, Eric also alleged that Nasim conspired with the other defendants to commit the above-mentioned acts which constituted theft by deception.

¶ 5 In count two of his original complaint, Eric alleged that Nasim's brother Shoeb, who was the former couple's financial advisor, aided Nasim in "stealing" his one-half interest in their jointly held assets and investments by secretly transferring all of these assets to Nasim alone.

Eric claimed that Shoeb's actions constituted a conspiracy to commit theft by deception.

¶ 6 Count three pertained to Abby Humbles, who is not part of the instant appeal.

¶ 7 In count four, Eric alleged that Jasmine aided Nasim in committing theft by deception by "supplying" Ricky, who was willing to "falsely purchase" the former couple's Peoria home, knowing that the sale was "fraudulent, false and illegal." Count five leveled similar allegations against Ricky; asserting that he "fraudulently" purchased the Peoria home for one-third of its fair market value, knowing that the deed purporting to transfer the property contained Eric's forged signature. Eric contended that this conduct by Jasmine and Ricky constituted a conspiracy to commit theft by deception. The record clarifies counts four and five, showing that Eric believed that Nasim executed a fraudulent power of attorney that contained his forged signature, and then conveyed the Peoria home pursuant to this power of attorney.

¶ 8 Eric subsequently filed an amended complaint pertaining only to Nasim, requesting an accounting because she allegedly transferred property held with him in joint tenancy to herself only, and then dissipated it.

¶ 9 Eric's Deposition Testimony

¶ 10 The parties deposed both Eric and Nasim. Eric's deposition revealed that he began dating Nasim in approximately 1989. Shortly thereafter, they moved to Florida, where Eric was a "partner, owner, and operator of a Mobile [*sic*] gas station" with Nasim's father. He drew income from this business consisting of a "small salary [and] also as a shareholder." After this employment ended, Eric was unemployed for six months to one year, after which worked as a partner and owner with Nasim's father of a Texaco gas station for three years. At Texaco, Eric "might or might not have drawn a small salary" and "had a shareholder interest." After what Eric

described was a "short hiatus," during which he worked at Sam's Club, he, Nasim and her father invested in another gas station. Eric later stated that typically, he, Nasim, and Nasim's mother and father were involved in the gas station partnership ventures.

¶ 11 After their alleged involvement in the third gas station ended, Eric and Nasim moved to Cincinnati and "again [he] work[ed] at a gasoline station and convenience store." His partner in this enterprise was Nasim's father, and Eric earned a small salary and a shareholder interest. This endeavor lasted for approximately 14 months, after which Eric began working as a gold prospector in Alaska during various times from 2003-2007. Eric stated that this venture was not a partnership, but that "was just informal, casual employment." He believed that Nasim was an "investor" in this line of work because they "owned everything in joint tenancy." During his time in Alaska, Eric entered into leases and agreements. He found gold as a result of this employment, but he does not know how much because Nasim allegedly removed it from a safe deposit box they jointly held. During the time between 2003-2007 that Eric was not in Alaska, he worked as an ironworker. Also, sometime during the latter part of 2007, Eric worked at a gas station owned by Nasim's sister, but he did not have a partnership interest in this gas station. After this time, Eric traveled to Mongolia at various times to work on drilling projects.

¶ 12 Eric explained that he did not report the "[p]artnership interest from the businesses with [Nasim's] family" on his tax returns, but he would have disclosed any salary that he earned from working at the gas stations. Eric described the partnerships in the gas stations as "informal[,]" explaining that "they weren't partnerships on paper[,]" but were "de facto partnerships." Eric did not have any records reflecting the amount of money he made pursuant to his partnership with Nasim.

¶ 13 The record contains affidavits from Eric and his mother, Donna Carlson. Donna averred that while she was at Eric and Nasim's Peoria home in September 2008, she saw that Nasim had business papers in plastic garbage bags, and Nasim informed her that she was "getting rid of old documents and collecting documents that she needed." Eric averred he "gained possession" of the Peoria house after he obtained an order of protection against Nasim, and he discovered that "all of the business records that [he and Nasim] had were cleared out." Eric concludes that Nasim disposed of these documents before he could access them.

¶ 14 Eric described his relationship with Nasim, and stated that their plan was to "pool [their] assets, grow [their] assets, and have a life together." They established jointly held bank and investment accounts, which were held in their individual names as joint tenants with the right of survivorship. Eric and Nasim had "many, many joint accounts over the years[,]" but Eric could not recall all of them and did not have supporting documentation for every one. He also explained that he was always paid his share of the partnership businesses in cash, which he deposited into their joint accounts.

¶ 15 Eric and Nasim did not reduce their partnership agreement to writing. There was "[n]othing in writing that [that Eric was] aware of that specifically addresse[d] a business relationship between [he] and Nasim." Eric, however, explained that "[t]he only time there was any formal written [partnership] agreement was in [an] Amoco [gas station] where [Eric] assumed the dealership on paper." He further explained that "[t]he only thing he was aware of at [that] point that was in any way [related to a business interest he shared with Nasim] was a lease agreement on some prospecting property in Alaska, which [Nasim was]—[Eric] believe[d] was a signatory to." Eric did not produce either of the above-mentioned documents at the time of the

deposition. Eric also stated that he and Nasim did not form an entity or corporation for their prospecting work, and they did not file tax returns relating to the prospecting work or any gold recovered.

¶ 16 Eric asserted that he and Nasim were a business partnership because they were "pooling all of [their] finances," and because they had lived together for nearly 20 years, established joint bank accounts, business interests and investments. He also cited a document signed by Nasim stating that all of her assets would transfer to Eric upon her passing as evidence of their business partnership. Eric stated that he did not remember whether he had ever filed a tax return indicating profits or losses for his alleged partnership with Nasim, but that he may have filed a partnership tax return with his individual return on one occasion.

¶ 17 Eric thought that the partnership terms were "50/50," but he "could not tell [anyone] exactly" its other terms. Although his complaint referenced a partnership agreement, he did not know "what [the agreement] was[.]" Eric did not continue to receive money once his employment or involvement in an alleged partnership business ended because "[t]here was no ongoing income when the business was sold." He and Nasim's profits from the partnership were pooled into joint assets and their bank accounts. Eric considered these profits to be used for his future with Nasim. He explained that the couple paid their bills from the joint accounts, and in early 2008, before Nasim allegedly hid or dissipated these assets, their joint accounts and holdings were worth just under \$1.25 million.

¶ 18 Eric explained the "fraudulent" power of attorney, contending that he did not recall knowingly signing such a document. Eric asserted that sometime in November 2008, he was at the Peoria home, and he saw Jasmine and Ricky changing the locks and removing bags and

boxes personal property, but he could not tell if it was his or Nasim's. Although Ricky had already purchased the home, Eric had obtained a temporary restraining order and emergency order of protection that prevented all parties from accessing the property. Nonetheless, on this day, Jasmine informed Eric that Nasim "used the [p]ower of [a]ttorney to take the house away from" Eric by selling it to Ricky.

¶ 19 Eric therefore concluded that Nasim, Jasmine and Ricky has conspired to take the Peoria home from him. In support of this assertion, Eric cited: phone records of the defendants that he believed would show "a tremendous amount of phone activity between all" defendants around the time of the sale; Ricky's ultimate purchase of the home for \$53,000—a fraction of what Eric estimated to be its \$140,000 value; that Ricky lived in Cincinnati but purchased a home in Peoria; and a statement by Jasmine to the effect that Eric "would never see the inside of the house again" because "Nasim had used the [p]ower of [a]ttorney to take the house and the house had been sold to Ricky to keep it away from" Eric. Eric also alleged that Jasmine was named the beneficiary of a policy that Eric and Nasim formerly held in joint tenancy. At another point in his deposition, Eric stated that during a November 2008 conversation with Nasim, she informed him that Jasmine and Ricky were going to keep him from ever having the Peoria house by using a forged power of attorney; Ricky and Jasmine "knew the whole thing was a set up"; and Ricky was going to "hold" the house for Nasim.

¶ 20 Eric further explained the count in his original complaint involving Shoeb, stating that Shoeb moved assets from joint accounts to accounts in which Eric had no interest. Shoeb, as the former couple's financial advisor, "uniquely could have done that to help [Nasim] keep [their] assets away from [him]." Eric could not recall any facts or evidence to support this allegation,

other than a statement by Nasim in November 2008 to the effect that Eric "would never see a dime of the money, and she and Shoeb would make sure of it[,]" and that Shoeb was going to move this money to a place where Eric could not find it.

¶ 21 Nasim's Deposition Testimony

¶ 22 During Nasim's deposition, she denied that she ever worked at a gas station during her relationship with Eric. According to her, she and Eric signed the power of attorney in New York where Eric was then working so that Nasim could put the Peoria house in his name. Nasim also contended that Eric "hardly even worked[,]" that she controlled the money, and that all of the money was hers.

¶ 23 Defendant's Motions for Summary Judgment

¶ 24 The defendants filed motions for summary judgment on Eric's original complaint. They essentially contended that Eric failed to prove that his relationship with Nasim was anything more than a long-term "boyfriend and girlfriend" who shared joint bank accounts, that Eric did not show that this relationship was a partnership under the Partnership Act (805 ILCS 206/1, *et seq.* (West 2008)) and thus, he was not entitled to ownership of one-half of the assets and capital of the alleged partnership.

¶ 25 The Trial Court Decision

¶ 26 The court granted the defendants' motions for summary judgment, concluding as a matter of law that there was no genuine issue of material fact that Eric and Nasim had never had a business partnership within the meaning of the Partnership Act. The court specifically noted the following evidence and made the following findings in support of this conclusion: Eric's statements that the partnerships in the gas stations were informal, that he worked at the gas

stations and was paid in cash. The only specific reference to any type of business for profit was to the gas stations, but there was not enough evidence to show the existence of a partnership. Specifically, Eric stated that the terms of the partnership were "50/50," but he could not provide any other terms. Thus, there were no facts from which the court could derive existence of a legally enforceable partnership under the Partnership Act. The trial court favorably compared the instant case with *Hewitt v. Hewitt*, 77 Ill. 2d 49 (1979), where the supreme court rejected the contention of a long-term girlfriend that she was entitled to half of her former boyfriend's assets because she had cohabitated with and supported him, and raised the couple's children. The court noted that "the idea that the whole relationship [in *Hewitt*] was a partnership within the meaning of the Uniform Partnership Act [the court believed] was implicitly, if not expressly rejected by the [supreme c]ourt."

¶ 27 Other than with regard to Abby, who is not a part of this appeal, the court only specifically commented on the count involving Nasim. The record indicates, however, that at the hearing on the defendants' motion for summary judgment, Eric acknowledged that if the court determined that there was no partnership between Eric and Nasim, then all of the counts in the original complaint would fail.

¶ 28 Eric moved to reconsider the court's grant of summary judgment, and attached to this motion a mining permit issued to him and Nasim on May 31, 2007. He contended that this permit was "clear evidence that show that [Nasim and Eric] were in business together" at that time. Thereafter, Eric and defendant Abby Humbles entered an agreed order denying the motion to reconsider as it pertained to her. Eric has not appealed this order, and Abby is not part of the instant appeal.

¶ 29 The trial court ultimately denied Eric's motion to reconsider and also entered an order pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) finding that there was no just reason to delay enforcement or appeal of its order granting summary judgment. Eric appealed.

¶ 30 ANALYSIS

¶ 31 (A) Partnership

¶ 32 On appeal, Eric contends that the trial court erred when it granted the defendants' motions for summary judgment because he put forth sufficient evidence showing both the existence of a partnership and that the defendants conspired to steal his share of the partnership's assets. The defendants assert that Eric's evidence only showed the existence of a long-term romantic relationship between Eric and Nasim, and was insufficient to establish a partnership under the Partnership Act. Since the existence of a partnership underlies all of the claims in Eric's original complaint, his inability to prove its existence is fatal to his claim that the defendants conspired to deprive him of his share of its assets.

¶ 33 Summary judgment is appropriate where the pleadings, depositions, admissions, and affidavits on file, viewed in the light most favorable to the nonmovant, reveal that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005© (West 2008); *Home Ins. Co. v. Cincinnati Ins. Co.*, 213 Ill. 2d 307 (2004). While summary judgment aids in the expeditious disposition of a lawsuit, it is a drastic measure, and should only be granted if the moving party's right to judgment is clear and free from doubt. *Land v. Board of Education*, 202 Ill. 2d 414, 432 (2002). Correspondingly, although the nonmoving party need not prove its case in response to a motion for summary judgment, this party must present some factual basis that would arguably entitle it to judgment.

Land, 202 Ill. 2d at 432. Specifically, "even though a complaint may purport to raise an issue of material fact, if such issue is not further supported by evidentiary facts, summary judgment is appropriate." *Golden v. Marshall Field and Co.*, 134 Ill. App. 3d 100, 101 (1985). We review a trial court's grant of summary judgment *de novo*. *Pekin Ins. Co. v. Recurrent Training Center, Inc.*, 409 Ill. App. 3d 114 (2011).

¶ 34 Pursuant to section 101(f) of the Partnership Act (805 ILCS 206/101(f) (West 2008)), a partnership is "an association of two or more people to carry on as co-owners of a business for profit." A partnership exists if the parties join together to carry on a business or venture for their common benefit, each party contributes property or services to the venture, and each has a community interest in the profits of the venture. *Maloney v. Pihera*, 215 Ill. App. 3d 30 (1991). There must be a meeting of the minds to create a partnership, as the intention of only one party is insufficient. *Maloney*, 215 Ill. App. 3d 30.

¶ 35 No writing is necessary to form a partnership, but it may arise by agreement or through the actions of the respective parties. See *Maloney*, 215 Ill. App. 3d 30 (court found that the parties did not enter into an oral partnership agreement because the record contained no evidence of the critical terms of the alleged partnership agreement, such as the scope of the parties' duties or the duration of the alleged partnership). In such an instance, the existence of a partnership is determined from the language and conduct of the parties and the facts and circumstances of the particular situation. *Argianas v. Chestler*, 259 Ill. App. 3d 926 (1994). Other factors that are relevant in determining the existence of a partnership include the manner in which partners deal with one another; the mode in which each alleged partner has, with the knowledge of the other partner, dealt with other persons in a partnership capacity; advertising using a firm name; and

sharing in the profits of the partnership. *Olson v. Olson*, 66 Ill. App. 2d 227 (1965). While the individual absence of partnership tax returns, a partnership agreement, or a partnership account would not necessarily be fatal to finding the existence of a partnership, "they may collectively be strong evidence that there was in fact no partnership." *In re Estate of Kime*, 42 Ill. App. 3d 505, 509 (1976).

¶ 36 Furthermore, pursuant to the Partnership Act, joint tenancy alone does not create a partnership, even if the owners share in the profits made by use of the jointly-owned property. 805 ILCS 206/202(c)(1) (West 2008). Additionally, the sharing of gross returns does not itself create a partnership, even if those sharing these returns have a joint right to the property from which the returns are derived. 805 ILCS 206/202(c)(2) (West 2008). Also, a person who receives a share of profits from a business is presumed to be a partner, unless the profits were payment of wages or other compensation to an employee. 805 ILCS 206/202(c)(3) (West 2008).

¶ 37 In this case, even when we view the evidence in the light most favorable to Eric, it does not show that he had a business partnership with Nasim. Here, there was no writing to indicate a partnership, thus, we must consider the conduct and language of Eric and Nasim to determine whether they ever operated a business partnership. On this record, the conduct and language of the parties does not indicate such an arrangement for three reasons.

¶ 38 First, other than Eric's own assertions, the record contains no evidence that he and Nasim ever had a meeting of the minds and agreed to go into business together; that they did, in fact, jointly operate a business; or that they ever made any profits pursuant to any joint efforts. Eric did not present any documents, receipts or other evidence to substantiate his claims. Quite simply, Eric's bald assertions that he and Nasim owned either a gas station or mining business

together do not establish that these parties, did, in fact, enter an agreement to jointly operate a business for profit, especially in light of the lack of supporting evidence, which Eric admits does not exist. This conclusion is buttressed by the fact that due to the parties' long-term relationship, the more likely scenario is that Nasim's family provided Eric employment at their various gas stations, and that Eric and Nasim decided to pool their earnings to pay for their mutual needs while they were a couple and resided together.

¶ 39 Second, Eric himself could not testify to the terms of his alleged partnership with Nasim, other than stating that they split profits "50/50." As we have already noted, the record does not show the existence of any profits, nor does it indicate an agreement between Eric and Nasim to split these profits in a particular manner. The record is also devoid of any evidence on the respective roles of the parties or any other conditions in the purported partnership arrangement. These facts support the conclusion that no partnership existed under the Partnership Act, and as the record contains none of the vital terms of the alleged partnership, that Eric could ever prove its existence.

¶ 40 Third, the record here does not contain any of the other indicia of a partnership. Specifically, Eric acknowledged that he did not file a partnership tax return or claim his interest in the partnerships on his own tax returns. Also, the record does not indicate that the purported partnership operated under or advertised using a trade name; that the parties dealt with one another in a partnership capacity; or that either party conducted dealings with other persons in a partnership capacity. While the absence of one of these factors may not be fatal to the finding of a partnership, the absence of all of them certainly supports the conclusion that no partnership existed.

¶ 41 Essentially, the evidence in the record indicates that Eric and Nasim were in a long-term romantic relationship. During the course of this relationship, the couple opened joint bank accounts and invested in joint property. Eric deposited his earnings into these joint accounts. According to Eric, the couple planned to pool and grow their assets. Even taking this testimony as true, it does not create a genuine issue of material fact as to whether Eric and Nasim agreed to co-own a business for profit. Rather, this conduct shows a couple planning for a future together. We also note that these actions, specifically holding property in joint tenancy and receiving a return on jointly held property, as well as Eric's receipt of a salary for the time he worked at Nasim's parents' gas stations, falls squarely into conduct that is statutorily defined as to not constitute a partnership. See 805 ILCS 206/202(c)(1)-(3) (West 2008).

¶ 42 Thus, even when viewing the evidence in this record in the light most favorable to Eric, the trial court correctly found that Eric did not and could not prove the existence of a partnership between him and Nasim and thus, it properly granted summary judgment.

¶ 43 (B) Conspiracy

¶ 44 Eric next contends that he presented sufficient evidence that the remaining defendants conspired with Nasim to deprive him of his one-half share of the partnership assets.

Nonetheless, the trial court correctly found, and on appeal, the defendants correctly assert, that Eric's inability to establish the existence of a partnership is fatal to this claim. Specifically, if there are no partnership assets to steal, there could be no conspiracy to steal them. Therefore, the trial court properly granted summary judgment on these counts of Eric's complaint.

¶ 45 CONCLUSION

¶ 46 For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed.

¶ 47 Affirmed.