Partnership
Joint Venture
Fiduciary Duty
Summary Judgment

Pacific Western Development Corp. v. Pacific Capital Partners, et al., Adv. No. 94-3578
In re Pacific Western Development, Case No. 394-36013-dds11

2/13/97 Haggerty, reversing DDS Unpublished

The bankruptcy court held that the relationship between the parties was limited to a single transaction and granted summary judgment in favor of defendants on Debtor's claims that defendants had usurped a partnership opportunity. Debtor appealed.

The difference between a joint venture and a partnership is that a partnership is formed for the transaction of general business of a particular kind while a joint venture is limited to a single transaction. The essential test in determining the existence of a partnership is the intent of the parties. There is no question that the parties herein formed a partnership, but the issue is whether the partnership was intended to extend beyond the acquisition of the Emerald Valley Resort. The court held that the intent of the parties is not clear from the evidence with respect to the intended disposition of the initial capital contributions upon the expiration of the earnest money agreement. The bankruptcy court should not have granted summary judgment.

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DISTRICT OF OREGON
PORTLAND, OREGON
BY

CLERK, U.S BANKRUPTCY COURT
DISTRICT OF OREGON
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PACIFIC WESTERN DEVELOPMENT CORP.,

Debtor-in-Possession,

PACIFIC WESTERN DEVELOPMENT CORP.,

Plaintiff,

v.

PACIFIC CAPITAL PARTNERS, a Hawaiian partnership, and DICK GRIFFITH as a partner in Pacific Capital Partners and individually,

Defendants.

Case No. 394-36013-dds11

Adversary Proceeding No. 94-3578-HA

Civil No. 96-CV-1283 - HA

OPINION and ORDER

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Certified to be a true and correct copy of original filed in my office.
Date: 3-17-97
Donald M. Cinnamond, Clerk
By: _____, Deputy

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HAGGERTY, District Judge:

Pacific Western Development Corp. ("Plaintiff") appeals from the April 18, 1996 summary judgment in favor of defendants Pacific Capital Partners and Dick Griffith ("Defendants"), which resulted in the bankruptcy court's Judgment Dismissing Plaintiff's Complaint. For the reasons stated below, the judgment of the bankruptcy court is REVERSED.

FACTUAL BACKGROUND

Plaintiff, through its President, Kevin Warner, signed a land sale contract to purchase the Emerald Valley Resort, an $8 million golf resort in Creswell, Oregon, in April 1990. That land sale contract obligated Plaintiff to pay a $250,000 nonrefundable earnest money by June 20, 1990. On June 19, 1990, Warner and Robert Smith, Chief of Operations for Plaintiff, met with Defendant Pacific Capital Partners ("PCP") and an entity known as Emillion International, Inc. ("Emillion") to discuss investing in the Emerald Valley Resort. The following day, PCP and Emillion agreed to loan Plaintiff $250,000 to meet the earnest money deadline, and the parties, PCP, Emillion and Plaintiff, signed a letter of intent that contemplated a formal business relationship between the parties ("Letter of Intent"). Paragraph 6 of the Letter of Intent reflects an agreement to form a joint venture "to carry out the Emerald Valley Resort transaction." Defendants' Excerpt of Record at 21.

On July 11, 1990, PCP, Emillion and Plaintiff signed a Partnership Agreement that created an entity named the "Emerald Valley Resort Partners" ("EVRP"). Partnership Agreement at 1, Defendants' Excerpt of Record at 24. Paragraph 2 of the Partnership Agreement provides that, "[t]he purpose of this partnership shall be to acquire, hold and manage for investment real estate properties and other investments permitted under law." Id.

Paragraph 2 of the Partnership Agreement also contains the following exculpatory language with respect to future projects:

> Any partner may participate in any way in any other business venture of any type, whether or not such business venture competes with the business of the partnership, and neither the partnership nor any other partner shall have the right by virtue of this Agreement to participate in any way in such other independent venture or ventures or share in any way in the income, profits or proceeds thereof. No partner shall be required to give notice to any other partner of any other business venture or offer the opportunity to participate therein even though such opportunity to participate therein

> even though such opportunity [sic] may come to the attention of or be available to such partner through his participate [sic] in this partnership.

Id.

Paragraph 3 of the Letter of Intent addresses repayment of the $250,000 loan PCP and Emillion made to Plaintiff to fund the earnest money obligation. That language contemplates that if the purchase of the Emerald Valley Resort was not completed, resulting in the forfeiture of the earnest money, the loan would be transferred to the next project to be done by the parties and repaid as a part of the cost of the subsequent project. Although the Partnership Agreement does not incorporate this language, the Promissory Note, executed on July 10, 1990 (the "Note"), does. The Partnership Agreement, Note and Letter of Intent do not assign primary responsibility for arranging future projects. EVRP was unsuccessful in purchasing the Emerald Valley Resort, and the partners engaged in no further projects together.

In early July 1991, Smith, while still employed by Plaintiff as Chief of Operations, learned that the Tahkenitch Tree Farm ("Tahkenitch") was for sale. Smith did not notify Warner of the sale, nor did he pursue the purchase on behalf of Plaintiff or EVRP. Instead, Smith introduced Richard L. Griffith, president of PCP, to Mark McDevitt, who was Smith's friend and a personal acquaintance of the seller Tahkenitch. With Smith and McDevitt's assistance, PCP and an entity known as Yorkshire Partnership, Ltd., formed Tahkenitch Tree Farm Partnership, which acquired Tahkenitch.

Plaintiff contends that Defendants, as partners of Plaintiff, were obligated to offer Plaintiff the opportunity to participate in the acquisition of Tahkenitch. Failure to do so, asserts Plaintiff, constitutes a breach of the Letter of Intent, a breach of Defendants' fiduciary duty to plaintiff under the Partnership Agreement, and an usurpation of a partnership opportunity.

Plaintiff has filed two Chapter 11 suits in its efforts to settle and resolve these disputes, one of which resulted in the present adversary proceeding. By agreement, the parties filed cross-motions for summary judgment on the issue of liability only. Subsequent to oral argument on the cross-motions, Plaintiff filed its Third Amended Complaint to eliminate certain claims involving Smith, with whom there has been a settlement.

The bankruptcy court found that while the parties contemplated engaging in future ventures together, neither the Partnership Agreement nor the Letter of Intent created any contractual obligation requiring Defendants to do any future business with Plaintiff. The bankruptcy court also found that PCP's fiduciary duties as Plaintiff's partner were limited to the Emerald Valley Resort acquisition. Accordingly, the bankruptcy court granted summary judgment to Defendants on all of Plaintiff's claims.

STANDARD OF REVIEW

A bankruptcy court's decision is reviewed under the "clearly erroneous" standard for findings of fact and "de novo" as to conclusions of law. In re Nucorp Energy, Inc., 764 F.2d 655, 657 (9th Cir. 1985). Rulings on procedural matters within the discretion of the bankruptcy court are reviewed for abuse of discretion.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The materiality of a fact is determined by the substantive law on the issue. T.W. Elec. Serv., Inc. v. Pacific Electrical Contractors Asso., 809 F.2d 626, 630 (9th Cir. 1987). The authenticity of a dispute is determined by whether the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The moving party has the burden of establishing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the non-moving party must go beyond the pleadings and identify facts which show a genuine issue for trial. Id. at 324.

Special rules of construction apply to evaluating summary judgment motions: (1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; and (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the non-moving party. T.W. Electrical, 809 F.2d at 630.

DISCUSSION

Plaintiff's appeal from the bankruptcy court focuses on the nature of the relationship between the Plaintiff and Defendant PCP at the time that PCP entered into the Tahkenitch transaction. Specifically, Plaintiff claims that EVRP was a general partnership when Defendant PCP entered into the Tahkenitch transaction, and Defendant PCP breached its fiduciary duty to Plaintiff by excluding Plaintiff from the transaction. Plaintiff claims that EVRP's purpose was "to acquire, hold and manage for investment real estate properties and other investments permitted by law." Partnership Agreement at 1, Defendants' Excerpt of Record at 24. Plaintiff asserts that "[t]he purpose of the partnership agreement was not solely to develop Emerald Valley Resort; the partnership was to continue and potentially develop other projects." Appellant's Reply Brief at 4. Plaintiff further asserts that, because Plaintiff and PCP were general partners in EVRP, their partnership continued after the failed acquisition of the Emerald Valley Resort.

Defendants respond that PCP and Plaintiff were not partners at the time of the Tahkenitch transaction, and therefore neither PCP nor Griffith was a fiduciary of Plaintiff. Defendants assert that EVRP's limited purpose was to acquire the Emerald Valley Resort, a joint venture that was specifically limited in scope. Further, Defendants claim that exculpatory language in the Partnership Agreement absolves Defendants of Plaintiff's claims.

The principal difference between a joint venture and a partnership is that a partnership is ordinarily formed for the transaction of general business of a particular kind while a joint venture is usually limited to a single transaction. Hayes v. Killinger, 235 Or. 465, 470, 385 P.2d 747 (1963). Despite this distinction, the rules applicable in determining the existence of a partnership also form the criteria for determining the existence of a joint venture. Stone-Fox, Inc. v. Vandehey Development Co, 290 Or. 779, 783, 626 P.2d 1365 (1981). What elements are necessary and sufficient to constitute a joint venture is a question of law. Hayes, 235 Or. at 470. Whether the evidence shows that a joint venture existed between the parties is a question of fact. Pac. Gen. Contrs. v. Slate Const. Co., 196 Or. 608, 623, 251 P.2d 454 (1952). If no question of fact is presented, the existence of a joint venture between the parties remains a question of law. Preston v. State Ind. Accident Com., 174 Or. 553, 567, 149 P.2d 957 (1944).

The essential test in determining the existence of a partnership is whether the parties intended to establish such a relation. Hayes, 235 Or. at 471. If a partnership is formed, it imposes upon the partners the obligation of loyalty to the joint concern, and of the utmost good faith, fairness and honesty in their dealing with each other with respect to matters pertaining to the enterprise. Martinson v. Andrews, 219 Or. 280, 283-284, 347 P.2d 53 (1959). In the present case, there is no question that the parties formed a partnership; at issue is whether the partnership, EVRP, was *intended* by the parties to extend beyond the acquisition of Emerald Valley Resort. The intent of the parties on this point determines their relative rights and fiduciary duties. If the parties merely intended EVRP as a vehicle for the acquisition of the Emerald Valley Resort, EVRP was a joint venture that ceased to exist upon the failure of the acquisition. As a result, Defendants would have owed Plaintiff no fiduciary duty to inform it of the Tahkenitch transaction. If, however, the parties intended that EVRP was formed for the purpose of real estate investment transactions *generally*, then EVRP was a partnership that demanded a high level of honesty, loyalty and good faith between the parties. If EVRP was a partnership, Defendant PCP may have violated its fiduciary duty to Plaintiff when it did not inform Plaintiff of the Tahkenitch opportunity.

The best evidence of the parties' intent is the Partnership Agreement, Note and Letter of Intent. Defendants assert that the Letter of Intent must be excluded from this analysis due to the parole evidence rule. Because I find the parties' use of the term "partnership" ambiguous, the parol evidence rule does not bar consideration of the Letter of Intent. In Anderson v. Divito, 138 Or.App. 272, 908 P.2d 315 (1995), the Oregon Court of Appeals explained this principle:

> If contract language is ambiguous, extrinsic evidence of the parties' intent may be admitted, and interpretation of that language becomes a question of fact. The initial question of whether a contract is ambiguous is a question of law. In determining whether an ambiguity exists, the court may consider parol and other extrinsic evidence . . . . For a term to be legally ambiguous, it must be susceptible to at least two plausible interpretations when examined in the context of the contract as a whole.

Id. 138 Or.App. at 277-78 (citations and footnote omitted).

Plaintiff argues that the Partnership Agreement, Note and Letter of Intent support a finding that EVRP is a general partnership that continued to exist after the failed acquisition of EVRP. The Partnership Agreement, drafted by PCP and signed by PCP, Emillion and Plaintiff, recites

that "the partners desire to form a partnership for the purpose of acquiring, holding and managing for investment real estate properties *and other investments permitted under law.*" Partnership Agreement at 1, Defendants' Excerpt of Record at 24 (emphasis added). That recital provides evidence that the parties did not intend to limit their association to the Emerald Valley Resort Acquisition. See Standley v. Standley, 90 Or.App. 552, 752 P.2d 1284 (1988) (intent of parties to a property settlement agreement was suggested in recitals that delineated the parties' frames of mind at the time of entering into agreement). Further, the first numbered paragraph of the Partnership Agreement states that "[t]he partnership shall be governed by the Uniform Partnership Act (as adopted by the State of Oregon), except as herein specifically provided otherwise."[1] Id. Paragraph 10 of the of the Partnership Agreement provides specific events which will result in the dissolution of the partnership; failure of the Emerald Valley Resort acquisition is not listed as one of the events. Id. at 9. Finally, nowhere in any of the documents signed by any of the parties is the scope of EVRP expressly limited to acquisition of the Emerald Valley Resort.

The Note, drafted by PCP and signed by Smith, includes specific provisions revealing the intentions of the parties in the event that the Emerald Valley acquisition were to fail. The Note states:

> In the event that the parties fail to close the acquisition of Emerald Valley Resort, and the deposit of $250,000.00 with respect to that acquisition is forfeited, [Plaintiff] will repay the principal hereof plus interest from the proceeds of one or more other projects in which [Plaintiff] and [PCP and Emillion] are participants, *it being the intention of the parties that the principal plus interest will be treated as a cost of such project or projects.*

Note at 1, Defendants' Excerpt of Record at 37 (emphasis added). The Note provides two important points. First, it reveals an intention of the parties to enter into future transactions beyond the scope of the Emerald Valley acquisition. Second, by rolling the debt owed by Plaintiff

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[1] While the first paragraph of the Partnership Agreement states that the partnership shall be governed by the Uniform Partnership Act as adopted in Oregon, sub-paragraph 11(c) of the Partnership Agreement states that the "interpretation of this Agreement and the rights, duties and liabilities of the parties hereunder shall be governed by the state of Hawaii." Partnership Agreement at 11. Sub-paragraph 11(g), however, states that "[t]his Agreement shall for all purposes be construed in accordance with and governed by the laws of the State of Oregon." Id. Because neither party has raised this issue on appeal, I will assume, without deciding, that the parties intended Oregon law to control.

into a prospective project, the partners evidenced a desire to account for any loss incurred in the Emerald Valley Resort acquisition in future partnership projects.

In addition to the Partnership Agreement and the Note, the Letter of Intent provides further evidence of the partnership's intentions. That Letter provides, in pertinent part:

> If the purchase of the Emerald Valley Resort is not completed and the $250,000 deposit is forfeited, the loan (with interest) will be transferred to the next project to be done by Pacific Western and [a PCP and Emillion joint venture] and repaid as part of the cost of that project. The parties presently intend the next project to be Meadowland Heights . . . providing that agreement is reached by the parties within 30 days of this date. If for any reason the parties do not carry out the Meadowlands project, *they will enter into one or more other projects as soon as reasonably possible* (which projects will be used as a source to repay the $250,000 loan . . . .)

Letter of Intent at 1, Defendants' Excerpt of Record at 21. As Plaintiff points out, none of the writings places responsibility for locating and presenting future projects on specific parties.

Finally, Plaintiff asserts that as late as April 1991, Defendants considered EVRP a general partnership which encompassed further projects. By letter to Smith and Warner at Plaintiff company, Defendant Griffith stated that he was "anxious to get action underway either to recoup the $250,000 or earn our way out of the hole." Plaintiff's Supplemental Excerpt of Record at 9. Defendants began negotiations with Smith pertaining to the Thakenitch transaction in July 1991, four months later.

Defendants refer this court to the exculpatory clause contained in paragraph 2 of the Partnership Agreement (the "Exculpatory Clause") (See full text of that paragraph at p. 2). According to Defendants, the Exculpatory Clause is "crystal clear" evidence that neither party was obligated in any way to offer the other involvement in any future business deal. Defendants' argument begs the question. If EVRP was a joint venture limited to the acquisition of the Emerald Valley Resort, then the Exculpatory Clause absolves Defendants of any future obligations to the partnership upon the failure of that acquisition. If, however, the parties formed a general partnership or joint venture that anticipated future real estate acquisitions beyond Emerald Valley Resort, then the Exculpatory Clause is invalid and inoperative as a matter of law: a partner's fiduciary duties to the partnership may not be altered by contract. See ORS § 68.310 (1995) (limiting the parties' ability to modify the rights and duties of partners in relation to the

partnership).

The Partnership Agreement directs that EVRP shall be governed by Oregon's Uniform Partnership Law. ORS 68.110 (1995) defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit[.]" Both parties admit that a partnership existed as of the date of execution of the Partnership Agreement. Thus, the issue turns to when the partnership ended. If the partnership ended before either party learned of the Tahkenitch transaction, then there can be no breach of fiduciary duty between the parties.

No evidence was put forth by either party concerning the dissolution of the partnership. ORS § 68.530(1)(a) states that partnership dissolution is caused by, among other things, "the termination of the definite term or particular undertaking specified in the agreement." While this seems to mirror Defendants' contentions, the Partnership Agreement does not specify a "definite term" or "particular undertaking," but rather claims a general purpose and delineates specific events of dissolution. Defendants' Excerpt of Record at 24, 32-33. Those specific events of dissolution do not include a counterpart to ORS § 68.530 (1)(a). Id. Arguably, the only event which may have caused dissolution of EVRP was the "abandonment or disposal by the partnership of all or substantially all of its assets." Partnership Agreement at 9, Defendants' Excerpt of Record at 32. At the time of formation, EVRP's most valuable asset was its rights under the earnest money agreement. There is no question that EVRP's rights under the earnest money agreement expired prior to the Tahkenitch transaction. However, there is no evidence that the partner's initial capital contributions to EVRP were abandoned or disposed of prior to the Tahkenitch transaction.

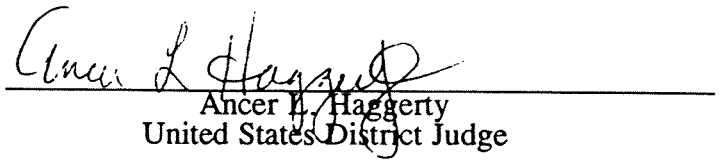
CONCLUSION

The relative duties and liabilities of Plaintiff and Defendants are determined by the nature of the EVRP relationship. The intent of the parties on this point is not clear from the evidence presented. Accordingly, there remains a genuine issue of material fact which precludes the granting of summary judgment.

Based on the foregoing, the order of the bankruptcy court granting summary judgment to Defendants is REVERSED, and the case is remanded to the bankruptcy court for further proceedings consistent with this Opinion.

IT IS SO ORDERED.

Dated this 13 day of February, 1997.



Ancer L. Haggerty
United States District Judge