COURT OF APPEALS
DECISION
DATED AND FILED

January 3, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-1384

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

WAUKESHA COUNTY,

PLAINTIFF-APPELLANT,

V.

MICHAEL R. JOHNSON, PARTNER, D/B/A NASHOTAH BOULEVARD SENIORS' APARTMENTS, LTD.,

DEFENDANT-RESPONDENT,

NASHOTAH BOULEVARD SENIORS' APARTMENTS, LLC, ROBERT H. HERZOG, JR., HENRY ARMETTA, AND DAVID L. SAUER, PARTNER, D/B/A NASHOTAH BOULEVARD SENIORS' APARTMENTS, LTD.,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Waukesha County appeals from a judgment dismissing its claims against Michael R. Johnson for reimbursement of County block grant funds given to assist in financing the construction of low to moderate income elderly housing. Johnson is not liable under any of the theories advanced by the County. We affirm the judgment and deny Johnson's request that he be awarded costs and attorney's fees because the appeal is frivolous.

¶2 In the early part of 1994, Johnson, David L. Sauer, Robert H. Herzog, Jr. and Henry Armetta discussed the development of 118 low to moderate income elderly housing units. Johnson offered to purchase appropriate property in the Village of Nashotah. By a letter dated June 2, 1994, the County informed Herzog that the Waukesha County Community Development Block Grant Board (CDBG Board) had awarded $29,750 to assist in the development of the project.[1] On June 17, 1994, Johnson, Sauer, Herzog and Armetta executed an application with the Wisconsin Housing and Economic Development Authority (WHEDA) for tax credit approval. Johnson paid the application fee by personal check. The application indicated that the individuals were general partners of a limited liability partnership "to be formed" on July 15, 1994. On June 20, 1994, Johnson assigned his purchase rights to Nashotah Boulevard Seniors' Apartments, Ltd. (NBSA).

[1] The letter was addressed to "M. Johnson Development Corporation % [sic] Mr. Robert Herzog."

¶3 At the end of July, Johnson withdrew from further pursuit of the project. Johnson testified that he informed Herzog on August 3 or 4, 1994, that he was withdrawing.

¶4 On August 5, 1994, a subgrantee agreement was executed between NBSA and the County.[2] The agreement provided that the funds would be used for the required reservation fee due to WHEDA to secure tax credits. The agreement also provided that the funds would be returned in full if the project was not constructed. A check for $29,068 was issued to NBSA. The check was signed over to WHEDA by Herzog and Sauer as "general partners."

¶5 Unfortunately, the project was not completed. The reserved tax credits expired and the reservation fee paid with the block grant funds was lost. The County sought to recover the block grant funds from NBSA partners individually. It obtained a default judgment against Sauer, Herzog and Armetta. Johnson defended the County's claims on the ground that he had withdrawn from the project prior to the release of the block grant funds. The County claims that Johnson is liable because a general partnership was formed under WIS. STAT. § 178.04 (1997-98),[3] that Johnson was a partner by estoppel under WIS. STAT. § 178.13, and that Johnson was a promoter of the partnership. The claims were tried to the court. The court dismissed the action at the conclusion of the County's presentation of its evidence.

[2] The agreement recites that NBSA is a "private limited partnership registered with and operating under the laws of the State of Wisconsin, having a principal place of business at 3204 Menomonee River Parkway, Wauwatosa, WI." The listed address was Johnson's residence. Herzog signed the agreement on behalf of NBSA, identifying himself as a "partner."

[3] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶6 We first address whether the County met its burden of proof that a de facto partnership was formed by Johnson, Sauer, Herzog and Armetta despite the absence of any written partnership agreement. *See* ***Heck & Paetow Claim Serv., Inc. v. Heck***, 93 Wis. 2d 349, 359, 286 N.W.2d 831 (1980) (the burden of proof of establishing a partnership relationship is on the party claiming that the partnership exists). Four elements are necessary: "The parties must (1) intend to form a bona fide partnership and accept the accompanying legal requirements and duties, (2) have a community of interest in the capital employed, (3) have an equal voice in the partnership's management, and (4) share and distribute profits and losses." ***Tralmer Sales & Serv., Inc. v. Erickson***, 186 Wis. 2d 549, 563, 521 N.W.2d 182 (Ct. App. 1994). "The ultimate and controlling test as to the existence of a partnership is the parties' intention of carrying on a definite business as co-owners." ***Heck & Paetow***, 93 Wis. 2d at 360 (emphasis omitted). The determination of whether a party has met the burden of proof is a question of law we review de novo. *See* ***Wolfe v. Wolfe***, 2000 WI App 93, ¶14, 234 Wis. 2d 449, 610 N.W.2d 222.

¶7 The circuit court found that the four individuals "clearly set out with a common goal or plan to make this event happen; that is, to form a partnership of some form …." The court also found that the agreement was to form a partnership if certain conditions were met, particularly private financing, Johnson's ability to serve as the general contractor, and an agreement as to the form of the entity. Neither finding is clearly erroneous. *See* WIS. STAT. § 805.17(2). The findings demonstrate that at best the individuals had an agreement to agree when the conditions were met; the conditions precedent were never satisfied. Even the WHEDA application acknowledged that the partnership had yet to be formed. Johnson withdrew from the project when the conditions were not met and prior to

the acceptance of the grant funds. There is not a sufficient meeting of the minds to support the requisite intent to form the partnership. This is particularly true of that period of time preceding the County's June 2, 1994 letter indicating that grant funds were awarded. The County failed to meet its burden of proof as to the first element.

¶8 Despite the existence of the requisite intent to form a partnership, a partnership by estoppel may arise when a person represents himself or herself or consents to another representing him or her as a partner. *See* WIS. STAT. § 178.13. A party claiming partnership by statutory estoppel must prove the elements of estoppel, including reliance. *See* ***Tralmer Sales***, 186 Wis. 2d at 565.

¶9 The County cites Herzog's May 11, 1994 appearance before the CDBG Board to solicit grant funds for the project and Johnson's knowledge that Herzog was pursuing grant funding. Herzog's appearance was noted in the minutes of that meeting to be on behalf of "M. Johnson Development Corporation." That is not the same entity that the County now claims to be a partnership. It is not the same entity the County entered into the subgrantee agreement with some three months later. The CDBG administrator testified that at the public hearing on the funding request, Johnson was identified as the contractor for the project. Apparently there was no discussion about the nature of the development entity. The County looks to the WHEDA application as demonstrating representations made about the form of the entity the individuals were utilizing. However, that application made representations only to WHEDA, not to the County.[4] The County did not require a written application for funding.[5]

[4] Even if the County could rely on the WHEDA application, it identified the partnership as one of limited liability.

The administrator merely called WHEDA to verify that an application had been made for the project. Moreover, the administrator was not sure when he first received a copy of the WHEDA application and he admitted that he probably first received the amended application reflecting Johnson's withdrawal from the alleged partnership. As the circuit court aptly noted, the County could not rely on information it did not have. Finally, the administrator admitted that he had never spoken with Johnson about the project and that he was not aware that the business address listed on the subgrantee agreement was Johnson's residence. There was not sufficient evidence that the County relied on representations that Johnson was a partner.[6]

¶10 Even assuming a partnership was formed, the circuit court's finding that Johnson withdrew from the partnership prior to the County's release of the grant funds is the dispositive fact. The individual partners cannot draw Johnson into the partnership when they cashed the check with knowledge that Johnson had withdrawn. Since the County did not rely on Johnson's status as a partner, his withdrawal before the debt to the County was incurred relieves him of personal liability. The County suggests that what occurred here is analogous to apparent agency and creates binding authority. Such apparent authority only serves to bind the partnership of which Johnson was no longer a member. In short, Johnson is not personally responsible.

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[5] The administrator testified that the public hearing substituted for a written application.

[6] Based on the lack of reliance on Johnson's participation, we summarily reject the County's claim under a promoter liability theory. While the failed venture does not release a promoter from liability he or she may have for a breach of the duty to disclose all available information, *see* ***Killeen v. Parent***, 23 Wis. 2d 244, 252, 127 N.W.2d 38 (1964), the doctrine does not come into play when neither Johnson nor Herzog "promoted" Johnson as a partner.

¶11 Johnson argues that the appeal is frivolous. As a matter of law we determine whether an appeal is frivolous under WIS. STAT. RULE 809.25(3)(c). *See* ***Stern v. Thompson & Coates, Ltd.***, 185 Wis. 2d 220, 252, 517 N.W.2d 658 (1994). We conclude that the County had an arguable basis for the claims advanced on appeal. We deny Johnson's request for an award of costs and attorney's fees for a frivolous appeal.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.