STATE OF MICHIGAN
COURT OF APPEALS

TRANS-AMERICA CONSTRUCTION COMPANY,

Plaintiff-Appellant,

UNPUBLISHED
February 28, 2003

v

No. 237662
Wayne Circuit Court
LC No. 00-011016-NZ

COMERICA BANK,

Defendant-Appellee,

and

YVONNE WALLER-JORDAN, d/b/a C.A. WALLER & ASSOCIATES, LEMUEL A. WALLER, d/b/a L.W. SERVICES, MARCUS R. WALLER, MARCMOND BUILDERS, DEANNA P. WALLER, d/b/a PREFERRED BUILDING CONTRACTORS,

Defendants/Cross-Defendants,

and

BANK ONE MICHIGAN,

Defendant,

and

SAMI, INC.,

Defendant/Cross-Plaintiff/Cross-Defendant,

and

NATIONAL CITY BANK OF MICHIGAN/ILLINOIS,

Defendant/Cross-Plaintiff.

Before: Kelly, P.J. and White and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant Comerica Bank's (hereinafter "defendant") motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. Basic Facts and Procedural History

Plaintiff, a licensed builder but not a licensed lender, had a longstanding business relationship with Lemuel A. Waller, d/b/a L.W. Services, a building contractor. Plaintiff frequently furnished working capital to Waller to allow Waller to complete insurance repair projects.

In 1997, plaintiff provided monies to Waller to make insurance repairs to a home owned by Florence Bell and Earnest Bell. Plaintiff and Waller agreed that in addition to repaying the monies advanced, Waller would pay plaintiff fifty-percent of any profits on the project. If no profits materialized, plaintiff would receive only those funds it supplied to Waller. The parties did not execute a written agreement. Florence Bell executed a form letter requesting that the Bells' insurer, Michigan Basic Insurance Company, include Waller and plaintiff as payees on benefit checks. Plaintiff issued checks to Waller totaling $22,252.

Plaintiff later learned that Michigan Basic had issued three checks totaling $83,433.06 in connection with the Bell project. A signature purporting to be that of Pjeter Stanaj, plaintiff's president, appeared on the checks. Waller had cashed the checks without plaintiff's knowledge.

Plaintiff filed suit alleging that defendant converted its property by improperly negotiating two of the three checks issued by Michigan Basic for the reason that the signature of Pjeter Stanaj was fraudulent.[1] Defendant moved for summary disposition pursuant to MCR 2.116(C)(10). Defendant argued that the undisputed evidence showed that plaintiff and Waller formed a partnership, and that because partners have the implied authority to endorse checks on behalf of the partnership, it could not be held liable for negotiating the checks. Defendant also argued that if plaintiff was merely a lender, its agreement with Waller was usurious, illegal, and unenforceable. In response, plaintiff argued that the evidence showed that it merely loaned funds to Waller, and that it was not Waller's partner.

The trial court granted defendant's motion, finding that the undisputed evidence, and in particular the statements made by Stanaj, established that plaintiff and Waller were partners. The

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[1] Plaintiff also named as defendants other financial institutions, a party store that cashed checks on which it was named as a payee, individual members of the Waller family, including Lemuel Waller, and their business entities. The claims against these defendants, as well as cross-claims filed by various parties, were dismissed or resolved by entry of judgment, and are not relevant to the issue on appeal.

trial court did not address defendant's argument that plaintiff's agreement with Waller was usurious and unenforceable.

II. Analysis

Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition. We disagree and affirm. We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

A partnership is defined as "an association of 2 or more persons, which may consist of husband and wife, to carry on as co-owners a business for profit." MCL 449.6. If parties associate themselves in such a way as to carry on a business for profit they will be deemed to have formed a partnership, regardless of their subjective intentions. *Byker v Mannes*, 465 Mich 637, 645-646; 641 NW2d 210 (2002). The burden of proof is on the party seeking to establish the existence of a partnership, *Brown v Frankenmuth Mut Ins Co*, 187 Mich App 375, 381; 468 NW2d 243 (1991), and the existence of a partnership is a question of fact. *LeZontier v Shock*, 78 Mich App 324, 333; 260 NW2d 85 (1977).

Here, the undisputed evidence showed that, as they had done in other cases, plaintiff and Waller agreed to share equally in profits from the Bell project. A party's receipt of profits from a business is prima facie evidence that the party is a partner in the business. MCL 449.7. However, an agreement to share losses is not listed as a factor that must be considered in determining whether a partnership exists. MCL 449.7.

Furthermore, no evidence supported plaintiff's assertion that it merely acted as a lender. Plaintiff was not licensed as a lender as required by MCL 493.1. The parties did not sign a note or any document memorializing the transaction. Plaintiff did not charge Waller a fixed rate of interest. The amount of any profit to be gained by plaintiff depended solely on the success of the Bell project. Plaintiff did not obtain any collateral for the funds it advanced to Waller. The form letter signed by Florence Bell requesting that plaintiff and Waller be named payees on benefit checks issued by Michigan Basic did not constitute a security agreement between plaintiff and Waller. See MCL 440.9203. Stanaj testified that the funds advanced to Waller were treated as a business expense on plaintiff's tax return. Typically, a lender considers a loan to be a business asset. The trial court correctly found that the undisputed evidence showed that plaintiff and Waller formed a partnership. *Byker*, *supra*.

Each partner in a partnership is an agent of the partnership. The act of every partner for carrying on the usual business of the partnership binds the partnership, unless the partner in fact has no authority to act in the particular matter and the person with whom the partner is dealing is aware that the partner lacks authority. MCL 449.9(1). A partner who signs an agreement in his name in the context of representing the partnership binds the partnership. *Omnicom of Michigan v Giannetti Investment Co*, 221 Mich App 341, 345-346; 561 NW2d 138 (1997). Given that plaintiff and Waller formed a partnership, Waller was entitled to sign Stanaj's name on the checks from Michigan Basic. Defendant could not be liable for conversion of the checks under

the circumstances. See MCL 440.3420. The trial court did not err in granting summary disposition.[2]

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Joel P. Hoekstra

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[2] Defendant also argues that plaintiff's agreement with Waller was usurious, illegal, and unenforceable. The trial court did not address this issue, and did not rely on it as a basis for its decision. Therefore, we decline to address it. *Candelaria v B C General Contractors, Inc*, 236 Mich App 67, 83; 600 NW2d 348 (1999).