

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defenses of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

**LESLIE C. SHIVELY**  
Evansville, Indiana

ATTORNEYS FOR APPELLEE:

**TERRY G. FARMER**  
**CATHERINE A. NESTRICK**  
Evansville, Indiana

**IN THE  
COURT OF APPEALS OF INDIANA**



O &amp; F PROPERTIES, INC.,

Appellant-Plaintiff,

**VS.**

No. 82A01-1101-PL-11

TIMOTHY A. MILLS, ORSON OLIVER and  
RESTAURANTS THAT ARE GREAT, LLC,  
d/b/a MANGIAMO ITALIANO,

**Appellees-Defendants.**

APPEAL FROM THE VANDERBURGH CIRCUIT COURT  
The Honorable Carl A. Heldt, Judge  
Cause No. 82C01-0812-PL-560

AUGUST 25, 2011

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARTEAU, Senior Judge**

Plaintiff-Appellant O & F Properties, Inc. ("O & F"), appeals the trial court's grant of summary judgment to Defendant-Appellee Orson Oliver. We affirm.

### ISSUE

O & F raises one issue, which we restate as: whether the trial court erred by granting Oliver's motion for summary judgment.

### FACTS AND PROCEDURAL HISTORY

O & F owned a building in Evansville, Indiana. On February 15, 2008, O & F executed a Purchase Agreement ("the Contract") with Timothy A. Mills for the building. Mills and Oliver intended to put a restaurant, known as Mangiamo Italiano, in the building. Pursuant to the Contract, Mills "and/or his assigns" was/were obligated to pay rent to O & F for six months and then purchase the building at the end of the lease term. Appellant's App. p. 20.

On March 12, 2008, Mills and Oliver executed an Operating Agreement for Restaurants That Are Great, LLC ("the LLC"). Mills and Oliver were the only members of the LLC. On March 28, 2008, Mills and Oliver executed loan documents for the LLC with the Bank of Evansville. Mills and Oliver signed the documents in their individual capacities and as members of the LLC. The LLC paid property taxes, utility bills, rent, and other obligations by means of checks issued in the LLC's name.

Subsequently, the restaurant failed. O & F sued Mills, Oliver, and the LLC, alleging breach of contract. Mills and the LLC filed a cross-claim for declaratory judgment against Oliver, asking the court to determine that Oliver was Mills' partner and personally owed Mills damages arising out of the failure of the restaurant. Oliver filed a

motion for summary judgment as to O & F's complaint and Mills and the LLC's cross-claim. After a hearing, the trial court granted Oliver's motion, and O & F filed this appeal. Mills and the LLC are not appealing the trial court's grant of summary judgment in Oliver's favor on their cross-claim.<sup>1</sup>

### DISCUSSION AND DECISION

We review an appeal from summary judgment de novo. *Eads v. Cmty. Hosp.*, 932 N.E.2d 1239, 1243 (Ind. 2010). Summary judgment is proper when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Indiana Trial Rule 56(C). All facts established by the designated evidence and inferences therefrom are to be construed in favor of the nonmoving party. *Eads*, 932 N.E.2d at 1243. The moving party bears the burden of making a prima facie showing that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. *Dreaded, Inc. v. St. Paul Guardian Ins. Co.*, 904 N.E.2d 1267, 1270 (Ind. 2009). Once the movant satisfies the burden, the burden then shifts to the non-moving party to designate and produce evidence of facts showing the existence of a genuine issue of material fact. *Id.*

O & F contends that Oliver is not entitled to summary judgment on O & F's claim for breach of contract. Specifically, O & F contends that there is a dispute of fact as to whether Oliver was Mills' partner in leasing and purchasing the building. If a partnership existed, then O & F asserts that Oliver is personally liable for the breach of the Contract.

---

<sup>1</sup> Mills and the LLC are listed in the caption because a party of record in the trial court remains a party on appeal. See Ind. Appellate Rule 17(A).



Oliver responds that there is no evidence that Oliver and Mills formed a partnership, and even if there were, there is no evidence that Mills bound any partnership to the Contract.

In Indiana, a partnership is “an association of two or more persons to carry on as co-owners a business for profit and includes for all purposes of the laws of this state a limited liability partnership.” Indiana Code section 23-4-1-6(a) (1995). In determining whether a partnership exists, the following rules apply:

- (1) Except as provided by section 16 of this chapter, persons who are not partners as to each other are not partners as to third persons.
- (2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.
- (3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.
- (4) The receipt by a person of a share of the profits of a business is prima facie evidence that the person is a partner in the business, but no such inference shall be drawn if such profits were received in payment for the following:
  - (a) As a debt by installments or otherwise.
  - (b) As wages of an employee or rent to a landlord.
  - (c) As an annuity to a widow or representative of a deceased partner.
  - (d) As interest on a loan though the amount of payment varies with the profits of the business.
  - (e) As the consideration for the sale of a goodwill of a business or other property by installments or otherwise.

Indiana Code section 23-4-1-7 (1997). Additionally, to establish a partnership relation between parties, there must be: (1) a voluntary contract of association for the purpose of sharing profits and losses, which may arise from the use of capital, labor, or skill in a common enterprise; and (2) an intention on the part of the parties to form a partnership. *Copenhaver v. Lister*, 852 N.E.2d 50, 59 (Ind. Ct. App. 2006). This court has held that

the existence of a partnership is generally a question of fact. *Id.* at 58. The intention to form a partnership must be determined by examining all of the facts of the case, and the conduct of the parties reveals their true intentions and the construction they placed upon their own agreement. *Id.* at 59.

In this case, O & F's primary obstacle in demonstrating a dispute of fact as to the existence of a partnership between Mills and Oliver is that Mills and Oliver formed a different business relationship, specifically a limited liability company. O & F is arguing, in essence, that Mills and Oliver intentionally created a partnership to negotiate and execute the Contract and continued the partnership even after they created the LLC. The facts provide no support for that argument. Instead, Mills' and Oliver's conduct reflects an intent to form and operate the LLC, not a partnership. Mills stated in an affidavit that Oliver provided financial assistance with the leasing and purchase of the building, and their ultimate goal was to "transfer the property to the LLC." Appellant's App. p. 94. Thus, even before Mills and Oliver executed an Operating Agreement for the LLC, they intended to operate as that entity, not as a partnership. Furthermore, Oliver has stated, and O & F does not dispute, that Mills was the "managing member" of the LLC. Appellant's App. p. 82. Under the terms of the LLC's Operating Agreement, the managing member had the authority to "acquire property from any Entity . . . ." Appellant's App. p. 71. Thus, Mills' execution of the Contract is consistent with (1) the intent expressed in his affidavit to establish an LLC and (2) the powers of the managing member that were subsequently set forth in the LLC's Operating Agreement.



O & F asserts that Mills alone cannot be personally responsible for the contract because he signed it on behalf of his assigns. This fact does not necessarily indicate that a partnership exists. Chris Jackson, a real estate broker who arranged the Contract between O & F and Mills, stated that, in general, an assignee of a contract is an "LLC or some sort of corporation to hold the real estate." Appellee's App. p. 18. In addition, Mills stated in his affidavit that at the time the Contract was negotiated, the plan was to transfer the building to the LLC.

Next, O & F argues that there is no evidence of a lease agreement between Mills and the LLC or of rent payments from the LLC to Mills, which O & F argues undercuts Oliver's claim that Mills executed the Contract as an individual. However, the absence of a written lease or rent payments is consistent with Mills' statement that the goal was to transfer the property to the LLC, and so this fact does not provide proof that a partnership existed. Furthermore, there is no evidence of lease or rent payments from the LLC to Mills and Oliver as a partnership, either. In fact, there is no evidence of any payment of income to the alleged partnership or of any recorded partnership losses.

Similarly, O & F asserts that both Oliver and Mills controlled the bank account from which rent was paid to O & F, which O & F claims is indicative of a partnership. However, the account was in the LLC's name.

O & F further notes that Jackson e-mailed drafts of the Contract to Mills and Oliver for review and editing. In light of the parties' expressed intent to form an LLC, Oliver's participation in the Contract drafting process does not create a dispute of fact as to whether a partnership existed.

Finally, O & F asserts that Mills referred to Oliver as his “partner” during negotiations with Jackson. Appellant’s App. pp. 89, 90. However, Jackson testified that Mills made those statements when Oliver was not present, and Jackson could not recall if Mills introduced Oliver as a partner when all three of them met. In light of Mills’ statement in his affidavit that the building would eventually be transferred to an LLC, and his subsequent execution of the LLC’s Operating Agreement, Mills’ incidental, hearsay references to Oliver as a partner do not give rise to a dispute of material fact. *See Broadway Radiology Servs., Inc. v. Tricou*, 725 N.E.2d 435, 441 (Ind. Ct. App. 2000) (determining that a party’s “hearsay evidence” that doctors were referred to as “partners” did not support a conclusion that the parties formed a partnership in the absence of any other evidence to support the conclusion).

Although the existence of a partnership is generally a question of fact, in this case there is no dispute of material fact. The trial court did not err by granting Oliver’s motion for summary judgment on O & F’s complaint.

#### CONCLUSION

For the reasons stated above, we affirm the judgment of the trial court.

Affirmed.

BAILEY, J., and VAIDIK, J., concur.