CASE LAW UPDATE:
A SURVEY OF RECENT TEXAS PARTNERSHIP AND LLC CASES

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I. Introduction

This paper summarizes recent Texas cases involving issues of partnership and limited liability company law (excluding federal tax). This paper only includes cases that have appeared since the paper for last year's program was prepared. Case law surveys that include cases from prior years are available on Professor Miller's profile page at the Baylor Law School web site.

II. Recent Texas Cases Involving Partnerships

A. Creation/Existence of General Partnership

Ogbonna v. Cruickshank, No. 14-21-00558-CV, 2024 WL 1925288 (Tex. App.—Houston [14th Dist.] May 2, 2024, no pet. h.) (mem. op.).

The court affirmed a judgment based on jury findings that three individuals created a partnership and that two of the individuals failed to comply with the agreement to form the partnership and committed fraud.

In early 2020, Cruickshank, Ogbonna, and Ekworomadu discussed creating a new business venture to supply a growing demand for personal protective equipment (PPE). They never memorialized their agreement in a formal writing. In order to get the business up and running quickly, the parties began by using an existing bank account of Olimax Group, Inc., a company owned by Ogbonna. The parties also incorporated Olimax Manufacturing as part of their PPE business. The business was referred to at times as Olimax Medical Supplies, and Cruickshank was referred to as CEO. The business made millions in profits in just a few months, but disputes began to arise regarding the nature of the business relationship between Cruickshank, Ogbonna, and Ekworomadu. Cruickshank sued in October 2020, asserting claims for breach of an agreement to form a partnership, fraud, fraud by nondisclosure, and breaches of fiduciary duties. At trial, Cruickshank asserted that she, Ogbonna, and Ekworomadu had agreed to form a partnership to sell PPE equipment and that she was entitled to an equal partnership share in the business. Ogbonna and Ekworomadu insisted that the two of them had started a PPE business and invited Cruickshank to participate on the basis of her receiving only a share of the profits she generated and not the profits of the business as a whole and not an equal partnership share.

The jury answered "yes" to a question asking whether Cruickshank, Ogbonna, and Ekworomadu had an agreement to form a partnership to sell PPE. The jury question included several instructions and a list of factors indicating the creation of a partnership. The jury also answered yes to a question asking whether Olimax Manufacturing was property of the partnership. The jury found that Ogbonna and Ekworomadu failed to comply with the agreement, and the jury did not find that any defenses or excuses for noncompliance applied. The jury found damages in the amount of $5,130,673 for the failure to comply with the agreement. The jury found that Ogbonna and Ekworomadu complied with their fiduciary duties but committed fraud against Cruickshank. The jury found the damages for fraud were $525,000. The trial court entered a judgment stating that the parties formed a partnership to sell PPE and that Cruickshank's interest terminated no later than November 16, 2020, and awarding damages for breach of the agreement and fraud plus attorney's fees. Ogbonna and Ekworomadu appealed.

Ogbonna and Ekworomadu argued on appeal that the business at issue could not have been a partnership because the evidence conclusively established that it was created as a corporation, relying on Tex. Bus. Orgs. Code § 152.051(c). The appellants pointed to evidence that the business temporarily used preexisting assets when it first started up (including a bank account) of Olimax Group, Inc., a corporation owned by Ogbonna. The court of appeals did not view the evidence as conclusively establishing that the new business was created as a corporation and not a partnership, stating that there was other evidence, including Cruickshank's testimony, supporting the conclusion that the parties agreed to form a partnership, not a corporation. A concurring justice elaborated on this point, stating that the appellants cited no case to support that use of a corporate bank account would somehow transform their partnership to a corporation. The concurring opinion pointed out that the corporation pre-existed the partnership

and did not include Cruickshank, and the concurrence went on to discuss why the evidence in this case distinguished it from the case relied on by the appellants, *Lentz Eng'g, L.C. v. Brown*, No. 14-10-00610-CV, 2011 WL 4449655, at *3–4 (Tex. App.—Houston [14th Dist.] Sept. 27, 2011, no pet.), which dealt with a written agreement between the parties creating an LLC.

The appellants' next argument was that the trial court erred in submitting questions on breach and damages and should have considered the case as a termination of partnership case governed by statutory termination rules rather than as a failure to comply with an agreement to form a partnership. The court of appeals held that the appellants failed to preserve this argument by failing to raise it in the trial court.

The court of appeals next concluded that the evidence was sufficient to support the jury's finding of fraud and that the award of damages for fraud did not duplicate the award for breach of the agreement to form a partnership. Based on the evidence, the court said that the jury could have reasonably determined Ogbonna and Ekworomadu promised Cruickshank an equal share of equity in the business and then concealed from her their withdrawal of some of the equity that had been built up by giving themselves employment contracts, salaries, and guaranteed bonuses. The court said that the equity disbursed in this way was not included in the damages awarded for breach of the agreement to form a partnership, which was based on the fair market value of Cruickshank's interest in the partnership as of the date her interest in the partnership terminated. In response to the appellants' argument that there was no evidence they intended to induce Cruickshank into any action by failing to disclose the contracts, salaries, and guaranteed bonuses, the court pointed out that the jury could have reasonably inferred from the evidence that by concealing the contracts, salaries, and guaranteed bonuses paid to themselves, Ogbonna and Ekworomadu intended to induce Cruickshank into continuing to work on behalf of the business in a CEO capacity without compensation (such as a salary or guaranteed bonus) but with the expectation that she ultimately would receive an equal share of the business's equity.

Next, the court rejected the appellant's argument that Cruickshank's theory of fraud by nondisclosure of salaries and bonuses was dealt with in the jury submission on breach of fiduciary duty, which stated that "[a] partner does not violate a duty or obligation merely because the partner's conduct furthers the partner's own interest." The court responded that Cruickshank's theory was not limited to the fact that the alleged conduct furthered Ogbonna's and Ekworomadu's own interests; it was based on the assertion the conduct deprived Cruickshank of her share of the equity in the business.

Peykoff v. Cawley, No. 4:23-CV-00404-O, 2024 WL 894449 (N.D. Tex. Jan. 15, 2024).

Applying the statutory factors that are considered to determine whether a partnership is formed, the court concluded that the plaintiff had not adequately alleged that a partnership was formed; therefore, the court dismissed the plaintiff's claim for breach of partnership agreement. Because the plaintiff failed to adequately allege formation of a partnership and did not allege another type of fiduciary relationship, the court also dismissed the plaintiff's claim for breach of fiduciary duty.

Alex Peykoff hired Game Changer Publishing ("GCP"), whose CEO was Charrissa Cawley, to promote a book written by Peykoff. While discussing publishing and promotion of the book, Peykoff and Cawley also considered hosting an entrepreneurial event called Mastermind to further promote Peykoff's book and, more generally, the brand of an organization run by Peykoff, Satisfied Life Foundation, Inc. ("SLF"). According to Peykoff and SLF, Cawley represented that she had a long track record of hosting successful events and that Mastermind would produce profits of at least $200,000. Peykoff and SLF alleged that a partnership was formed and that Peykoff and SLF provided significant funding, client contacts, and their valuable business reputation to help make Mastermind a success. Mastermind was unsuccessful and resulted in a financial loss of $216,000. The entire loss, which Peykoff and SLF believed should have been borne jointly with Cawley and GCP, was shouldered by Peykoff and SLF without reimbursement, and Peykoff and SLF sued Cawley and GCP, alleging various causes of action, including breach of partnership agreement and breach of fiduciary duty. The defendants sought dismissal for failure to state a claim.

The plaintiffs' primary claim was that the parties formed a partnership to put on the Mastermind event. No written partnership agreement was produced by either party, and the defendants argued that the plaintiffs' claim of a partnership was "impermissibly vague and unsupportable in light of the circumstances of this case." The court agreed with the defendants.

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