

BARBARA M. TURNER, : IN THE COURT OF COMMON PLEAS OF
 : LYCOMING COUNTY, PENNSYLVANIA
Plaintiff : NON-JURY TRIAL
 :
vs. : NO. 99-00,354
 :
HAROLD E. METZGER : CIVIL ACTION
d/b/a H.M. BUILDING CONTRACTOR, :
 :
Defendant : SUMMARY JUDGMENT MOTION

Date: September 15, 2000

OPINION IN SUPPORT OF ORDER OF SEPTEMBER 7, 2000

This Court has entered an Order granting the Summary Judgment Motion of Defendant Elaine F. Metzger filed July 19, 2000 and dismissing her as a party in this litigation. In this action Plaintiff seeks to recover damages from the Defendants due to their alleged failure to properly construct a house for Plaintiff in accordance with a written contract entered into on April 4, 1997.

The Summary Judgment Motion of Elaine F. Metzger asserted that she should be granted summary judgment and dismissed from the action because there is no evidence supporting any claim of Plaintiff against her as being an owner or partner, or otherwise liable to Plaintiff under the construction contract entered into by the Plaintiff and Defendant Harold E. Metzger, d/b/a H.M. Building Contractor, the other Defendants. By Order of July 21, 2000, argument on the Motion was scheduled for August 23, 2000, at the time set for the Pretrial Conference. The Order also directed that briefs be filed by the parties. At the time of argument on the Summary Judgment Motion, counsel stipulated that this Court should proceed to determine the issues raised in the Summary Judgment Motion based upon the exhibits attached to the Summary Judgment Motion and those attached to the Briefs. The Summary Judgment

Motion had attached as its sole supporting document, designated Exhibit A, the fictitious name registration of H.M. Building Contractor, which was filed with the Department of State on May 2, 1995. The document identifies Harold E. Metzger as the only individual interested in the business and indicates that the nature and character of the business is residential and commercial builder/remodeler. Defendants' brief was filed August 4, 2000 and contained as exhibits attached thereto the following depositions: depositions of Plaintiff, Barbara M. Turner, taken on October 21, 1999 and March 28, 2000. (Exhibit 1); deposition of Elaine F. Metzger, taken March 28, 2000 (Exhibit 2); deposition of Harold E. Metzger, taken October 21, 1999 (Exhibit 3). The Brief also had attached, as Exhibit 4, the fictitious name registration previously referred to. Plaintiff filed a responsive brief on August 15, 2000 and attached to that Brief two exhibits. The first, referred to as Exhibit A, is from a deposition and consists of the one-page contract at issue dated April 4, 1997. The Contractor signature line bears the signature Harold E. Metzger and also, in print, "H.M. Building Contractor." The Owner signature line bears the signature Barbara M. Turner. The contract also contains as signatures of witnesses the written names of Elaine F. Metzger and Dudley B. Turner, Plaintiff's husband. Plaintiff's Brief also contained, as deposition Exhibit B, thirteen pages of notes. This Court was advised at the time of argument that these notes were those referred to in the March 28, 2000 deposition of Elaine Metzger. *See*, Deposition of Elaine Metzger, 3/28/2000, pp. 9-10.

Essentially, the Summary Judgment Motion of Defendant asserts that Plaintiff has not produced sufficient evidence in the case to show that Defendant Elaine F. Metzger is liable as a party to

the contract, nor as a joint owner of the business known as H.M. Building Contractor. In summary judgment cases, the record must be reviewed in the light most favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact must be resolved against the party seeking the summary judgment. *Ertel v. Patriot News Company*, 674 A.2d 1038, 1041 (Pa. 1996). Pa.R.C.P. 1035.3 makes it clear that in this case, Plaintiff may not rest upon the mere allegations or denials of the pleadings, but must make a sufficient response to the summary judgment motion that identifies evidence in the record establishing those facts essential to the cause of action which Defendant asserts have not been produced. The Court also recognizes that oral testimony alone is generally insufficient to establish the absence of material fact necessary for the entry of summary judgment. See *Checchio v. Frankfort Hospital-Torresale Division*, 717 A.2d 1058 (Pa. Super. 1998). Accordingly, our role in this case is to determine whether there is a need for a trial based upon the evidence submitted that supports Plaintiff's cause of action against Defendant Elaine Metzger. In doing so, we must determine whether Plaintiff has adduced sufficient evidence of Mrs. Metzger's liability under the contract, as Plaintiff bears the burden of proof on that issue and, if Plaintiff has failed to adduce such evidence, there is no genuine issue of material fact and Defendant is entitled to judgment as a matter of law. See *Ertel*, *supra*, at 1042.

The cause of action asserted by Plaintiff in the Complaint is based upon a contract entered into on April 4, 1997. Under the terms of the contract, Plaintiff as the owner engaged the services of H.M. Building Contractor to provide materials and perform labor for the purposes of constructing a residential home. Plaintiff's Complaint at paragraph 2 asserts that "Defendants, Harold E. Metzger and

Elaine F. Metzger, his wife, are adult individuals who conduct business, both individually and jointly, and also do business at H.M. Building Contractor, located at Box 704, RR#4, Montoursville, Pennsylvania 17754.” The Complaint further asserts in paragraphs 4 and 5 that the Defendants executed the written agreement and that under the terms of the contract Defendants were engaged to construct the home. In subsequent paragraphs of the Complaint, Plaintiff alleges that Defendants had agreed to perform the work under the contract and that Defendants breached the contract by performing the work in an unworkman-like manner and also breached the implied warranties that had been extended by Defendants to Plaintiff. Defendants’ Answer to paragraph 2 of the Complaint provided as follows: “Denied. The Defendants’ correct address is 3486 Route 87 HWY, Montoursville, Pennsylvania 17754.” The response to paragraphs 4 and 5 admit that Defendant Harold E. Metzger did business as H.M. Building Contractor and had entered into the agreement with Plaintiff, but specifically deny that Elaine Metzger was a party to the agreement, asserting she signed the agreement only as a witness and denying that she was engaged by Plaintiff to construct the residential home. Other specific responses of Defendants throughout the Answer assert that Elaine Metzger was not a party to the contract, was not engaged by Plaintiff to do any work and had performed no work or services nor made any promise or agreement to do so, had extended no warranties, and had no obligation to perform under the contract.

Based upon the evidence submitted by the parties, this Court finds there is no dispute of material fact that, under the terms of the contract (*see*, Exhibit A to Plaintiff’s Brief filed August 15, 2000), Elaine F. Metzger is not a party. The contractor party is designated as being H.M. Building Contractor

and is signed by Harold E. Metzger. Elaine F. Metzger signed the contract only as a witness. The fictitious name registration for H.M. Building Contractor (*see* Exhibit 4 to Brief of Defendant, filed August 4, 2000) clearly identifies only Harold E. Metzger as the only individual interested in the business of H.M. Building Contractor. The Plaintiff's own deposition testimony acknowledges the following: the contract was between Plaintiff and Harold E. Metzger; she did not know the nature of the business entity H.M. Building Contractor, that is, whether it was a corporation or otherwise, nor did she know at the time of signing the contract whether Elaine F. Metzger was involved in H.M. Building Contractor; whether it was a family business had not been discussed; and, Elaine F. Metzger had not in any way represented that she was a part of H.M. Building Contractor, (*see*, e.g., Deposition of Barbara M. Turner, Plaintiff, October 21, 1999, pp. 9-10, 7-11; Exhibit 1 to Brief of Defendant filed August 4, 2000). Specifically, at page 9 of Plaintiff's deposition of October 21, 1999, Plaintiff stated:

I only knew that the contractor was Harold Metzger and that I was hiring H.M. Construction Company according to the card to build a home. . . . I didn't know what H.M. Contractor was. I didn't know. H.M. Contractors are the ones that signed the contract.

At page 10 Plaintiff stated:

I thought Elaine witnessed it. She did witness my line on the contract where it says witness. Elaine's name is on there. So I looked at it and said oh, Elaine acted as a witness.

Finally, at page 11, Plaintiff asserted:

I don't know if she was a party or not because I don't know what H.M. Building Contractors involves.

Responding to a further inquiry as to whether she was alleging that the Metzgers concealed anything from her she responded:

No. I thought it was a family business.

As might be suspected, there is nothing in the way of other documents submitted to the Court, particularly in the depositions of Defendants, from which there is any evidence to show that Elaine F. Metzger was a party to the contract. Clearly, under the evidence adduced by Plaintiff there is no evidence to say that Elaine F. Metzger was a party to the contract.

Unfortunately, this does not end the Court's inquiry into the matter. The Complaint raised an allegation that the husband and wife Defendants conducted the business jointly. *See*, Complaint, paragraph 2. Plaintiff's Brief also asserts that the evidence in the case supports a finding that "Elaine Metzger was a party to the contract either expressly [*sic*] or impliedly by virtue of the acts as well as her actions and work of the company." *See*, Plaintiff's Brief filed August 15, 2000, at page 2 (unnumbered). Plaintiff argues that there is sufficient evidence that Defendant Elaine F. Metzger was involved with the business and the particular contract based upon the Plaintiff's and Defendants' depositions. *Id.* at p. 3 (unnumbered). Plaintiff alternately argues in her Brief that ". . . it could be implied based upon the evidence presented that the Defendant Elaine Metzger could have been privy to the contract and/or was impliedly a part of the contract" based upon her actions, duties and responsibilities with the company. *Ibid.* A final assertion is also raised in Plaintiff's Brief that Defendant Elaine F. Metzger was an officer, agent or employee of the Defendant and acted in the scope of her duties at the time the contract was

entered into between the parties and thus, since she provided service to the corporation, she was liable.

Ibid.

In disposing of the last issue, Plaintiff clearly acknowledges throughout her depositions that Defendant Elaine F. Metzger had no part in the actual building and construction of the home, for which Plaintiff is claiming breach of the contract specifications and requirements and breach of implied warranty. Inasmuch as she was not the person acting in such a way as to cause the alleged breaches and defects in the home that are subject to the Complaint, her actions as an agent or employee cannot render her liable to Plaintiff.

Although Plaintiff has not asserted a specific basis for joint liability of Elaine F. Metzger, it appears to this Court that it can only arise if Elaine F. Metzger is regarded as being an owner of the business enterprise, which could include being a partner. Under a partnership theory, she could be a partner in fact or a partner by estoppel. This Court concludes that she is neither an owner, nor a partner in fact, nor a partner by estoppel.

Just as Plaintiff has not adduced any evidence that would establish that Defendant Elaine F. Metzger was a party to the contract, Plaintiff has not produced any evidence which would support a finding that she was an owner of the business known as H.M. Building Contractor. As noted above, Plaintiff in her own deposition did not know what connection, if any, Mrs. Metzger had to the business. Granted, Plaintiff did testify at various times that she assumed it was a family business. This Court is unaware of any facts in evidence which would establish a basis for Plaintiff making that assumption.

Further, it would be speculative to assume that denoting a business as a family business meant that all members of the family who worked in the business were owners. Plaintiff at best is able to point to Defendant Elaine F. Metzger's business involvement, particularly as it would relate to Plaintiff's contract, as constituting the following:

1. The business address was the same as the Defendants' home address.
2. Defendant Elaine F. Metzger was married to the individual who had registered the fictitious name.
3. The telephone calls to the business at times would be answered by Defendant Elaine F. Metzger and Plaintiff's first phone call to the business to initiate discussions about the contract was answered by Elaine Metzger.
4. Elaine Metzger typed the contract between Plaintiff and the business (*see* deposition of Elaine Metzger, pp. 5-6, 3/28/2000, Exhibit 2, Defendants' Brief filed August 4, 2000).
5. Elaine Metzger did other business typing for the business (*Id.* at 7-8). She took phone messages for the business and relayed them to her husband (*Id.* at 9-10). She delivered some items to the construction site on one occasion during the many months of construction and took some pictures of the project on one occasion while it was under construction and stated that they might be used to show to her future clients. (*See Id.* at 12-13 and Plaintiff's Deposition 3/28/2000, Exhibit 1, Defendants' Brief filed August 4, 2000, pp. 63-65).
6. In 1998, after disputes concerning the construction phase occurred, Elaine F. Metzger did not deny a statement made by Plaintiff to the effect that Plaintiff was demanding a receipt for the cash given to the "two," and Plaintiff was asking Elaine Metzger for this and an accounting of the bills. Plaintiff stated the following:

Elaine I am calling you because I think you are the business manager or a part of this business or running this business or something like that so I think you're the person to talk to and -- I said I'm calling you because I think you are managing this business for -- yes, I think it was managing because I think you manage this business. . . . Yes, I'm almost certain -- I'm almost certain and I think I started to say hello, Elaine I'm calling you because I believe you manage this business and I need these things. . . . She didn't deny it. She didn't say that she was managing the business. She did not deny it. Plaintiff's Deposition 3/28/2000 *supra*, at 59-60.

7. During the course of the construction process, the more Plaintiff worked with the two Defendants the more she realized there were two contractors; she came to an understanding of what kind of building company it was, who worked for it and the job done by each of the two (*Id.* at pp. 61-62).

While the foregoing testimonial references certainly establish that Mrs. Metzger was aware of the nature of the business dealings occurring between Plaintiff and Mr. Metzger and the business operations of H.M. Building Contractor, they do not attribute to Mrs. Metzger any aspects or incidents of ownership. It is certainly not unusual for a contractor in the Lycoming County area to operate a business out of his home, nor unusual that his wife would answer the phone, relay messages, attempt to be courteous and helpful to the business clients and perform incidental tasks that would benefit her husband and his business interest, such as making phone calls, typing and even mailing. Such does not constitute ownership. There is absolutely no evidence which would indicate that Defendant Elaine F. Metzger performed any significant task to benefit the project. There is no evidence that she had access to, control of, or did any transactions involving the business's bank accounts. There is no evidence that she wrote out any checks or receipts or did any ordering on behalf of the business. There is no evidence that she made any decisions in connection with the manner in which the business operations were to be conducted. There is no evidence that she ever provided any accounting to Plaintiff. There is no evidence that Elaine Metzger did any transactions on behalf of the business. Although Plaintiff at various times testified and asserted that the work was being done by the Metzgers, she also clearly did not know the extent of Elaine Metzger's relationship to the business.

For example, in Plaintiff's deposition of March 28, 2000, *supra*, at pages 49 and 52, she indicates that plans would have been ordered "by Harold or the Metzgers. I don't know who – I don't who contacted Harold – or who contacted Roger if it was Harold or if it was Elaine to get more framing work. . . . I was in touch with Harold once in a while. . ." and "either Elaine Metzger or Harold Metzger must have asked him (Roger Williams) to do that. I reiterate, I did not order it." In addition, she indicated clearly that it was Defendant Harold Metzger who changed plans and made decision as to what to build, how to build it and what to use in building it. *See, e.g.*, Plaintiff's Deposition, *supra* at pp. 57-58. While Plaintiff asserted that the Metzgers were the ones who she selected to build the project, she also indicated at the same time that it was Harold Metzger to whom she gave specific instructions. *See, e.g.*, testimony concerning specifications and building materials, Plaintiff's deposition 3/28/2000, *supra* at pp. 14-15 and 45. Specifically, Plaintiff stated at page 45:

. . . I came up with my own house picture which I liked. Harold did not build that picture which he contracted to build. Harold and Elaine were supposed to build a house from a picture but they didn't deliver what I had contracted for. . . . I gave Harold the picture of . . . done by my draftsman a picture of a house done by a draftsman,... (emphasis added).

In addition, although there were multiple subcontractors involved in this construction project, Plaintiff acknowledges having no evidence which would indicate that Elaine Metzger issued any orders to, exercised any supervision over, or had even the slightest contact with the subcontractors.

The Court also finds that just as there is no evidence produced by Plaintiff which would support a finding that Defendant Elaine F. Metzger was an owner of the business known as H.M. Building

Contractor, there is no evidence to support a finding that she was a joint owner, which this Court in the light most favorable to Plaintiff would regard as being a partner.

The Uniform Partnership Act, 15 Pa. C.S. §8301 *et seq.* recognizes a partnership as an association of two or more persons to carry on as co-owners a business for profit (§8311) and further states that persons who are not partners to each other are not partners to third persons. *See* §8312(1).

The Partnership Act further provides that sharing the gross returns does not of itself establish a partnership but does direct that the receipt by a person of a share of the profits of a business is *prima facie* evidence that the individual is a partner (with certain exceptions not relevant here). *See*, 15 Pa. C.S.A. §8312(3)(4). In this case, there is absolutely no evidence introduced that any money was actually paid to Elaine Metzger or that she shared in either the gross receipts or the profits of the business. Plaintiff has failed to show any agreement between Mr. and Mrs. Metzger to carry on a business for profit together as co-owners, has failed to show that they divided or shared any profits, or shared responsibility for making decisions and therefore has introduced no evidence indicating the Metzgers were partners to each other.

However, again, our holding that Plaintiff has failed to establish that an actual partnership exists between Mr. and Mrs. Metzger does not necessarily relieve her of liability. Even assuming she was not a partner nor considered to be a partner by her husband, if Mrs. Metzger by her acts and dealings held herself out to Plaintiff as a partner she is liable as a partner by estoppel. *See Lazarus v. Goodman*, 195 A.2d 90, 412 Pa. 442 (1963); *O'Brien and Gere v. Taleghani*, 525 F.Supp. 750 (1981);

Brubaker v. Williams, 57 Lancaster Law Review 245 (1960); *Rosenberger v. Herbst*, 210 Pa. Super. 127, 232 A.2d 634 (1967). The Uniform Partnership Act recognizes the doctrine of partner by estoppel under §8328 whereby liability could be imposed on Mrs. Metzger “when a person, by word spoken or written or by conduct, represents himself, or consents to another representing him to anyone, as a partner in an existing partnership or with one or more persons not actual partners” 15 Pa. §8328(a)(1). This holding out could impose liability to a plaintiff either if made directly to a plaintiff or made publicly. Plaintiff has neither asserted nor put forth any evidence that there would have been any public holding out.

Plaintiff has asserted, particularly in her Brief, although not particularly alleged in the Complaint, that Elaine Metzger’s acts of witnessing the contract, answering phone calls from Plaintiff, typing the contract, having the business address at the home address, acting in a secretarial capacity, attempting to collect funds and correct problems was such a course of conduct to impose liability on a “implied” basis. *See*, Plaintiff’s Brief filed August 15, 2000 at pp. 2-3 (unnumbered). It is significant to this Court that while there are allegations of Defendant attempting to collect funds and attempting to correct problems argued in the Brief, the evidentiary materials supplied to this Court contain no evidence that Defendant acted in those ways.

No acknowledged assertions of Plaintiff, to which there is no factual dispute, amount to acts from which Defendant Elaine F. Metzger can be held liable as a partner by estoppel. In this regard, the Court notes that in considering this evidence the principle of law imposing liability as a partner by

estoppel requires that Plaintiff would have changed her position, that is, have entered into the contract, on the faith of such representations. The point in time that Plaintiff changed her position in this case is April 4, 1997, the date she entered into the contract. Although there may have been some evidence (although not cited to this Court by Plaintiff) that after the contract was entered into, Defendant Elaine F. Metzger did some acts which cases have recognized as being acts and conduct or words which would constitute representation of one as a partner, there is no evidence adduced by Plaintiff which indicates that prior to or at the time of entering into the contract Plaintiff entered into the contract under the faith or belief that Elaine F. Metzger was a co-owner/partner in the business. Plaintiff acknowledges that at the time of entering into the contract she did not know whether H.M. Building Contractor was a corporation or other entity. Plaintiff's Deposition 10/21/99, pp. 7-8, 11, Deposition 3/28/2000, pp. 59-63. Plaintiff's testimony does state that she believed it to be a family business (Plaintiff's Deposition 10/21/99 *supra* at 11). However, this oral manifestation without any supporting facts does not constitute a sufficient production of evidence on this issue, where Plaintiff has the burden of proof so as to prevent summary judgment from being entered against her. This is particularly true where Plaintiff recognized at the time of signing the contract that Mrs. Metzger signed it as a witness and she acknowledges that she did not know at the time of signing the contract if Mrs. Metzger was a party to the contract. Plaintiff's Deposition 10/21/99, at pp. 10-11. It is also inconsistent with her statement that she knew that the contractor was Harold Metzger. *Id.*, at p. 9. Plaintiff's testimony was that when she contracted to build the house, a picture of which she had given to Mr. Metzger, she did not know what H.M. Building Contractor was,

just “H.M. Construction or Contractor.” *Id.* at p. 8. The evidence before the Court shows the only thing that Plaintiff knew of Mrs. Metzger at the time of entering into the contract was that her initial call to the business had been answered by Mrs. Metzger. Notably, Plaintiff is unable to testify that there was anything stated in that conversation which indicated that Mrs. Metzger took any action in response to the call other than to put the Plaintiff into contact with Mr. Metzger. Even that minimal action on Mrs. Metzger’s part would have to be implied from Plaintiff’s testimony.

Certainly there is no evidence that Defendant Elaine Metzger ever consented to, or was aware of, or spoke any words making a representation of partnership to Plaintiff prior to or at the time the contract was signed. Hence there can be no finding that Defendant Elaine F. Metzger is a partner by estoppel. *Rosenberger v. Herbst, supra*. This case is also quite factually distinct from the situation confronting the Court in *Brubaker v. Williams, supra*, where in addition to the defendant in that case being the wife and mother of acknowledged partners and receiving telephone calls for the business at the home she shared with her partner/husband, she had placed orders over the telephone with the party who sought to establish the partnership, gave directions as to where the materials were to be delivered, asserted to the other party that they would be paid appropriately for the business dealings and conducted business in the store that was operated by the partnership. *Brubaker v. Williams, supra*, at p. 246. No such actions have been demonstrated or substantiated by any of the evidence in this case. This Court recognizes that a partnership claim, particularly a case asserting partnership by estoppel, if supported by sufficient evidence would make the matter an issue for the jury, even in the face of countervailing oral

testimony. However, here there is simply no testimony or other evidence of a representation by Defendant Elaine F. Metzger prior to or at the time Plaintiff entered the contract from which Plaintiff can assert a basis for her entering into the contract arose. *See Lazarus v. Goodman, supra.* Elaine F. Metzger cannot be held liable as a partner by estoppel.

Conclusion

Accordingly, Plaintiff has not come forward with a showing of any evidence establishing the essential fact to her cause of action against Defendant Elaine F. Metzger, that she was individually or jointly liable in any manner to Plaintiff. There has been no fact or law cited to this Court to show any basis for sustaining the cause of action against her, and accordingly the Summary Judgment Motion of Defendant Elaine F. Metzger was granted by our Order entered on September 7, 2000.

BY THE COURT,

William S. Kieser, Judge

cc: Court Administrator
John Gummo, Esquire
Lori Rexroth, Esquire
Judges
Nancy M. Snyder, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)