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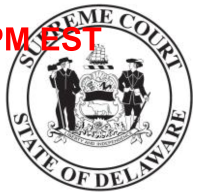

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GORDON SCOTT LEVEY, Plaintiff-Below Appellant, v. BROWNSTONE ASSET MANAGEMENT, LP, BROWNSTONE INVESTMENT PARTNERS, LLC, PINEBANK INVESTMENT PARTNERS, LLC, PINEBANK ASSET MANAGEMENT, LP, DOUGLAS LOWEY OREN COHEN, and BARRET NAYLOR, Defendants-Below, Appellees.	:	No. 563, 2014 On appeal from a judgment and final order of the Court of Chancery in C.A. No. 5714-VCL

REPLY BRIEF OF APPELLANT GORDON SCOTT LEVEY

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ARGUMENT

I. THE COURT OF CHANCERY ERRED BY FINDING THAT AN AD HOC AGREEMENT WHICH WAS NOT APPLIED TO MEMBERS OTHER THAN APPELLANT CONSTITUTED THE CREATION OF IMPLIED PARTNERSHIP AND OPERATING AGREEMENTS SO AS TO ELIMINATE HIS EQUITY INTEREST IN THE ABSENCE OF ANY EVIDENCE OF ACTIONS INDICATING AN INTENT TO CREATE SUCH AN OPERATING AGREEMENT APPLICABLE TO ALL PARTIES.

A. THIS APPEAL IS SUBJECT TO DE NOVO REVIEW.

In his opening brief, Levey asserted that the issue of whether the undisputed facts established an implied contract constituted an issue of law subject to de novo review.

Appellees dispute this, citing *Scharf v. Edgcomb Corp*., 864 A.2d 909, 916 (Del. 2004), for the proposition that the findings of fact are subject to the "clearly erroneous" standard of review. Levey does not disagree with that. However, in this appeal Levey is not disputing nor asking this Court to reassess the findings of fact. As this Court further stated in *Scharf*, "[o]nce the historical facts are established, however, the ultimate determination of the legal issue presented is reviewed by appellate courts de novo." *Id. See also Virdin v. State*, 780 A.2d 1024, 1030 (2001) ("[t]he...application of legal concepts to undisputed facts is reviewed de novo").

As noted in the opening brief, where, as here, the essential facts are not disputed, the question of whether an implied contract exists is one of law. *U.S. for Use of J.C. Schaefer Elec., Inc. v. O. Frank Heinz Const. Co.*, 300 F.Supp. 396, 399 (S.D. Ill. 1969); *Hartford Fire Ins. Co. v. Wade*, 257 P.2d 1064, 1067 (Okla. 1953). *See also Cortland Asbestos Products, Inc. v. J. & K. Plumbing & Heating Co.*, 304 N.Y.S.2d 694, 696 (N.Y.A.D. 3d Dep't 1969) ("while the existence of a contract is a question of fact, the question of whether a certain or undisputed state of facts establishes a contract is one of law for the courts...").[1]

B. LEVEY HAS NOT WAIVED THE RIGHT TO CHALLENGE THE SUFFICIENCY OF THE EVIDENCE.

Appellees argue that Levey did not fairly present to the trial court the issue of "the evidence it could consider in determining whether an implied agreement exists." (Appellees' Answering Brief ("AAB") 15). This is incorrect.

Appellees asserted the claim of an implied contract as a defense in their post-trial brief. (Appellant's Supplemental Appendix C-1-6). Levey argued in reply that the evidence did not establish an implied agreement. (*Id.* C-7-12). Thus, the issue of whether the evidence supported a finding of an implied contract was fairly raised before the trial court.

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[1] It is not disputed that Appellees had the burden of proof with regard to the issue of the existence of an implied agreement.

Significantly, Appellees did not specifically argue before the trial court that Levey's unexpressed antipathy toward them was evidence to be considered in deciding whether there was an implied contract. To the contrary, Appellees conceded that subjective beliefs are irrelevant. (C-3). Levey, therefore, was not put on notice of that issue and did not have a fair opportunity to address it. In such circumstance, it should not be deemed waived.

Alternatively, although this Court has not addressed this point, courts in other jurisdictions have held that "[i]n a civil, nonjury trial, a party who does not challenge the sufficiency of the evidence does not waive its right to do so on appeal." *Contreras v. Arkansas Dept. of Human Services*, 431 S.W.3d 297, 298 n.1 (Ark. 2014). *See also Tahoe Nat'l Bank v. Phillips*, 480 P.2d 320, 330 n.17 (Cal. 1971) ("[g]enerally, points not urged in the trial court cannot be raised on appeal. The contention that a judgment is not supported by substantial evidence, however, is an obvious exception to the rule," citation omitted). Further, it has been said that the issue of burden of proof "can be raised on appeal for the first time because it is a fundamental legal question." *McAfee-Guthrie, Inc. v. Division of Occupational Safety and Health of Indus. Commission of Arizona*, 627 P.2d 239, 241 (Ariz. App. 1981).

C. THE FACTS FOUND BY THE TRIAL COURT DO NOT SUPPORT A CONCLUSION OF AN IMPLIED AGREEMENT.[2]

In his opening brief, Levey argued that the factual findings of the trial court do not permit a finding of an implied agreement because the trial court relied, in large measure, on Levey's subjective feelings, or "antipathy", toward other equity owners. There was no evidence or finding that such attitude was communicated to the others by word or deed, or that the feeling was reciprocated. *See Cooper Companies, Inc. v. Cooper Development Co.*, 1989 WL 69395 at *9 (Del. Ch. June 15, 1989) ("[c]ontracts must be founded upon expressions of intent that are manifested and communicated, not those that are uncommunicated or disguised").

The trial court gave this fact undue weight in determining the existence of an implied contract. Op. at *8 ("the bottom line was that Gordon wanted to leave a business that was making him unhappy"[3]). As a result of the trial court's improper

[2] Throughout their brief, Appellees criticize Levey for not accepting the conclusions of the trial court. Of course, Levey is not required to accept conclusions on appeal. The issue is whether the facts warrant the conclusions. They do not.

[3] The phrase "bottom line" is defined as "the most important part of something: the most important thing to consider." *Merriam-Webster Online Dictionary* http://www.merriam-webster.com/dictionary/bottom%20line. The Court can take judicial notice of an online dictionary. *E.g., Franklin v. K-Mart Corp.*, 997 F.Supp.2d 453, 456 n.4 (W.D. Va. 2014); *Road Dawgs Motorcycle Club of the U.S., Inc. v. Cuse Road Dawgs, Inc.*, 679 F.Supp.2d 259, 286 n.65 (N.D. N.Y. 2009).

consideration of this unexpressed attitude (and Appellees do not deny that it was unexpressed and unknown to them), the analysis was tainted to Levey's prejudice.

As noted in Levey's opening brief, other than Levey's "antipathy," the only evidence of conduct at the time of alleged formation of an implied contract, as expressly found by the trial court, is that (I) Levey resigned his employment with BIG, (ii) he made demands for compensation for his interest in BIG, (iii) he cut up his company charge card and building identification cards, and (iv) none of the parties focused on BIP or BAM. Those objective actions, of themselves, are not sufficient to permit an inference that Levey clearly was withdrawing from or abandoning his equity interest in BIP and BAM. His desire to separate himself physically from the individuals does not equate to a desire to give up a property interest with a potentially lucrative revenue stream, any more than a director with vested stock options who resigns from a board is implicitly agreeing to forfeit those stock options.[4]

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[4] Appellees attempt to paint Levey as an opportunist instead of what he is, someone trying to recover his fair interest in a business that he spent years helping build and increase in value. Rather, it is Appellees who are trying to freeze Levey out unfairly and keep the spoils for themselves. Their questionable conduct in, among other things, suing him shortly after his departure, manufacturing a false K-1 and coyly avoiding addressing his demand for compensation for his interest speaks more loudly to the equities of the situation than an issue of *Barron's* which was published months after Levey's demand letters of January, 2007.

Appellees argue that it was appropriate for the trial court to consider Levey's antipathy in order to judge his credibility. (AAB 20). This is a red herring, as the trial court expressly relied on the fact of it in concluding that there was an implied contract.

Appellees fault Levey for focusing on the events at the time of the alleged formation of the alleged implied contract, and not considering subsequent acts. (AAB 19-20). Levey's approach is correct, and Appellees are wrong, for several reasons. First, the trial court, although discussing subsequent events in its statement of facts, relied on acts at the time of alleged formation in forming its legal conclusion (Op. at *8), and there is no indication of how the trial court would have weighed such subsequent events (especially if it had not included the improper subjective element).

Second, the relevant inquiry is whether the "[e]vidence of facts and circumstances, together with the words of the parties *used at the time*, from which reasonable persons in conducting the ordinary affairs of business, but with special reference to the particular matter on hand, would be justified in inferring such a contract or promise, is sufficient." *Linscott v. Shasteen*, 847 N.W.2d 283, 290 (Neb. 2014) (italics added). *See also Parker Drilling Co. v. Romfor Supply Co.,* 316 S.W.3d 68, 73 (Tex. App. 2010) (in determining whether implied contract has been formed, court views the conduct and circumstances surrounding the transaction from

a reasonable person's interpretation "at that particular point in time"). In the absence of clear evidence a meeting of the minds at the time, subsequent events cannot retroactively supply this omission.

Third, to the extent that subsequent events are relevant, the nature of the those events must be considered. Where such events involve interaction between the parties in conformity to the alleged agreement showing mutual understanding, such actions may reinforce evidence of the prior formation of intent. But that is not the evidence here. The post-resignation conduct includes:

- Lowey testified in a deposition another proceeding on February 17, 2006, that he did not know whether Levey was still a member of BAM (Op. at *4);
- "At some point after Lowey's deposition on February 17, 2006, the individual defendants appear to have decided that Gordon no longer was a member of [BIG], [BIP], or [BAM], because they stopped making any distributions to him." (*Id.*). (If this finding is accepted as a fact, this utterly negates the notion that, as of January 26, 2004, there was an agreement that Levey was no longer an equity holder);
- Appellees "manufactured an erroneous schedule K–1 for the Passive Manager with the goal of reducing Gordon's capital account to zero at year end" (Op. at *5);

- In June, 2006, approximately six months after Levey resigned (and after Appellees filed suit against Levey in federal court), Appellees unilaterally, and without notice to Levey, reported in an ADV filing with the SEC that Levey was not a member (Op. at *4, 9; AAB 7);

- "On January 25, 2007, the day before the one year anniversary of his resignation, Gordon gave written notice that he desired to withdraw from the [BIP] and [BAM]...The defendants offered a perplexing response. Rather than stating their belief that Gordon had withdrawn a year earlier, as they now maintain, their counsel sought 'additional information in order to assess [Gordon's] "demands."'" (Op. at *5).

Appellees may argue that this is simply a matter of weighing evidence, which was for the trial court. However, the issue is not weight. Rather, the issue is nature and sufficiency. The post-January 26 actions do not show the parties acting cooperatively and in conformity with a common understanding. Rather, they were acting adversarially. As such, post-January 26 events are not sufficient to establish a meeting of the minds and an implied contract. They certainly do not reveal a consistency of attitude between the parties regarding the events of January 26.[5]

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[5] Appellees cite a trio of cases from the U.S. Tax Court (or an appeal therefrom), where the burden is on the taxpayer to disprove the presumed existence of an implied agreement when there is a transfer of property but the taxpayer retains use thereof. *E.g., Estate of Rapelje v. C.I.R.*, 73 Tax. Ct. 82, 86 (U.S. Tax Ct. Oct. 15, (continued...)

Appellees argue that the trial court's ruling does not result in an inequitable forfeiture because the trial court ruled against Levey. That puts the cart before the horse. It has been long-recognized that "forfeitures...are not favored by the law, and conditions which undertake to create them must be free from ambiguity, uncertainty or doubt." *Old Time Petroleum Co. v. Turcol*, 156 A. 501, 505 (Del. Ch. 1931). The question before this Court is whether the record evidence is sufficiently "free from ambiguity, uncertainty or doubt." Levey respectfully submits that it is not.

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[5](...continued)
1979). As such, these cases are inapt.

In any event, those cases involved coordinated cooperative conduct by the contracting parties. *See Wilson & Co. v. U.S.*, 15 F.Supp. 332, 346-47 (Ct. Cl. 1936) (conduct of affiliated corporations owned by the same stockholder); *Estate of Thompson v. C.I.R.*, 382 F.3d 367, 370, 376 (3rd Cir. 2004) (father transferred his estate to family partnership, and daughter subsequently arranged to have partnership provide father with funds to cover his expenses); *Estate of Rapelje*, 73 Tax. Ct. at 86 (continued possession of home by father with daughters opting to remain in their own home rather than moving into the home, and court finding that subsequent events did not *disprove* existence of implied agreement). By contrast here, Appellees point only to unilateral acts of each side, not communicated to the other, which are inconsistent with the notion of a meeting of the minds.

D. THERE IS NO EVIDENCE SHOWING MUTUAL ASSENT TO THE CREATION OF A PARTNERSHIP AGREEMENT AND AN LLC OPERATING AGREEMENT.

Appellees' Answering Brief proves the absence of a meeting of the minds to create implied operating and partnership agreements (apparently having only one provision, relating to withdrawal), as well as the need for clear evidence of such an implied agreement.

In their Answer Brief, Appellees state that, after BIP and Bam adopted operating agreements, "Lowey and Naylor sought to withdraw from BIP and BAM. Like Levey, they were *permitted* to do so...." (AAB 143, italics added). Those subsequent written operating agreements provide that no member may unilaterally withdraw, and withdrawal may only be with the consent of the managing members or general partner (who have absolute discretion in deciding whether to permit such withdrawal), but managing members may withdraw at the end of any calendar quarter upon 90 days' notice. (B24-25, 62-63).[6]

Thus, according to Appellees, there was an implied agreement that Levey could withdraw only *if* the managing members/general partner granted permission, and this became fixed as oral operating and partnership agreements. Even if the Court were

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[6] Although the agreements are dated "As of July 1, 2004," the parties agree that such agreements were not in effect until after Levey's departure.

to find there was an implied agreement allowing Levey to withdraw (which it should not), there is absolutely nothing in the record to permit the conclusion that such withdrawal had to be conditioned on the permission of anyone, as opposed to being a unilateral decision. *See Otto v. Gore*, 45 A.3d 120, 138 (Del. 2012) (to have an enforceable contract, there must be "sufficiently definite terms..."); *In Re Taylor & Assoc., L.P.*, 249 B.R. 431, 469 (E.D. Tenn. 1997) (to find oral partnership agreement there must be "mutual assent to sufficiently definite terms") (applying Tennessee law).

Appellees failed to meet their burden of proving the existence of a mutual understanding on the terms of implied operating/partnership agreements.

CONCLUSION

WHEREFORE, for the foregoing reasons, as well as for the reason stated in his opening brief, Appellant respectfully requests that this Court reverse the decision of the Court of Chancery.

Respectfully submitted,

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