COURT OF APPEALS
DECISION
DATED AND RELEASED

September 25, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2062

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

PETER N. PAPPAS,

Plaintiff-Respondent,

v.

JOHN R. HUXHOLD,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Kenosha County: MICHAEL FISHER, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Nettesheim, JJ.

PER CURIAM. John R. Huxhold appeals from a judgment ordering a partition of apartment buildings he jointly owns with Peter Pappas. He argues that he should not have to make certain payments to Pappas and pay the 1994 real estate taxes out of personal funds if the income from the apartment buildings is insufficient to permit such payments. We conclude that the evidence support's the trial court's judgment and affirm it.

In order to settle litigation between them, Pappas and Huxhold entered into an agreement in 1986 regarding Huxhold's right to manage the jointly owned apartment buildings. The agreement provided that Huxhold would collect rents and make prompt payment of taxes, mortgage, insurance, utilities and maintenance. Huxhold was also to set aside $150 a month in escrow to be used for major repairs. Huxhold was permitted to keep the balance of income remaining. The agreement was for seven years, ending on June 13, 1993.

Pappas commenced this suit after the expiration of the agreement for an accounting of 1992 loan proceeds that were to be applied to major repairs and of that period of Huxhold's management after July 1, 1993. Huxhold counterclaimed for a partition of the property.

The matter was tried to the court. It determined that partition was appropriate and awarded one building and a storage unit to Huxhold. Huxhold was ordered to pay Pappas $2880 as compensation for Pappas's interest in the storage unit. Pappas was awarded the other building. The court also determined that the parties had agreed that after July 1, 1993, Huxhold would continue to manage the building and he would pay Pappas $1400 per month. Huxhold had made three payments for 1993, and judgment was entered for $23,800 for payments due through February 1995. The judgment further provided that during 1995 Huxhold would pay the real estate taxes which accrued in 1994 on the entire property.

At the outset, we address Huxhold's claim that the question of whether an agreement was made regarding apartment management after expiration of the seven-year contract was not properly before the court. He argues that Pappas did not allege the agreement in the complaint and offered no evidence of it in his case-in-chief. The issue was properly before the court. First, in his direct examination, Huxhold opened the door to inquiry about the agreement when asked whether an agreement had been made for management fees after the termination of the seven-year contract. Second, Pappas sought an accounting for the period after expiration of the seven-year contract. In attempting to provide the accounting, Huxhold "charged" Pappas with $4200 for the 1993 payments. An explanation of that item was required. Huxhold made no objection when on rebuttal Pappas explained the circumstances of the payments. Huxhold waived his claim that the court could not consider whether

an agreement had been made. Third, the pleadings are deemed amended to conform to the evidence. Section 802.09(2), STATS.

Huxhold argues that the trial court's finding that he agreed to pay Pappas $1400 per month while he continued to manage the apartments is clearly erroneous. For purposes of appellate review, the evidence supporting the court's findings need not constitute the great weight and clear preponderance of the evidence; reversal is not required if there is evidence to support a contrary finding. ***Bank of Sun Prairie v. Opstein***, 86 Wis.2d 669, 676, 273 N.W.2d 279, 282 (1979). Rather, the evidence in support of a contrary finding must itself constitute the great weight and clear preponderance of the evidence. ***Id.*** In addition, the trial court is the ultimate arbiter of the witnesses' credibility when it acts as the fact finder and there is conflicting testimony. ***Id.*** We accept the inference drawn by the trier of fact when more than one reasonable inference can be drawn from the evidence. ***Id.***

Pappas testified that he and Huxhold met to discuss apartment management after the expiration of the seven-year agreement. Huxhold asked that he be allowed to retain all the monies through the end of June even though the agreement expired on June 13, 1993. Pappas agreed. Pappas indicated that he offered to permit Huxhold to continue managing and pay him $2000 a month or that he manage and pay Huxhold $2000. In doing so, Pappas sought to reinvolve himself with the apartment operations after the expiration of the agreement giving Huxhold exclusive rights to apartment rents. His demand for payment was based on the large sums of money Huxhold appeared to be taking from the property. Pappas ultimately agreed to accept $1400 a month. Huxhold testified that Pappas never offered to manage the property. Obviously the conflict in the testimony was resolved by the trial court finding Pappas more credible.

Huxhold argues that it is inconceivable that he would agree to pay Pappas any amount when the apartments were operating at a loss and that such an agreement was not reduced to writing after the previous agreement. The court is not required to speculate as to the parties' reason for not reducing the agreement to writing. What is relevant is that the elements of a contract—offer, acceptance and consideration—were established. Consideration exists in that the agreement was in lieu of an accounting and Pappas's claim to share equally in the profits. Further, partial performance was made by Huxhold's three

payments in 1993, ceasing with the commencement of this action. The evidence supports the court's finding that an agreement was made.

Huxhold contends that even if there was an agreement to pay Pappas, it only required payments to be made out of partnership assets. Thus, Huxhold would not have to make the $1400 payment if there was not sufficient partnership income to pay it. Similarly, he claims that there is no evidence to support a finding that he must pay the 1994 real estate taxes out of personal funds if apartment income is insufficient.

Although it may be true that Pappas and Huxhold did not expressly agree on whether Huxhold would be personally responsible for the payments and taxes, the management arrangement after the termination of the seven-year contract implicitly continued Huxhold's duty to pay all expenses. There is no doubt that under the seven-year contract Huxhold was personally responsible for all liabilities. The trial court found that Pappas was not damaged by Huxhold's late payment of taxes because late payment meant that Huxhold "would simply receive less in the end if he had to pay late fees on the tax payments." The trial court found that Huxhold was to get "whatever was left over." The record establishes that the parties continued that arrangement but for Pappas seeking some return after his seven-year exile. Huxhold continued to be personally responsible for payments and taxes.

Because the agreement was made, partnership law does not control. The agreement to pay Pappas a fixed sum with Huxhold retaining all rents was itself outside the typical "partnership" concept which Huxhold now claims should be followed. The agreed upon sum was not tied to partnership profitability. The parties made certain arrangements to alter normal partnership sharing. Huxhold cannot now hide behind concepts of equality which the parties never adhered to.

Moreover, the trial court was acting as a court of equity in granting the requested partition. ***Watts v. Watts***, 137 Wis.2d 506, 534-35, 405 N.W.2d 305, 315 (1987). The court has the power to apply equitable remedies as necessary to meet the needs of the case and to do complete justice between the parties. *See* ***Syring v. Tucker***, 174 Wis.2d 787, 804, 498 N.W.2d 370, 375 (1993).

On Huxhold's motion for reconsideration regarding his personal liability, the trial court explained its attempt to do equity between these parties. The court implicitly found that Huxhold should be held responsible for the liabilities or the project's inability to generate sufficient income which resulted from his nine years of management. This was reasonable in light of the years of profit and high management fees Huxhold generated up until the termination of the seven-year contract. The trial court implicitly rejected Huxhold's assertion that there were insufficient rents in 1993 and 1994 to cover expenses. Huxhold held the records and was unable to give a clear picture of the claimed financial impoverishment. The trial court was within its discretion in fashioning the equitable remedy as it did.

In light of Huxhold's personal responsibility for payments to Pappas and real estate taxes, we need not address his contention that the trial court should have ordered that the payment of a five percent management fee to Huxhold was an expense to be paid before determining if sufficient income existed to make payments to Pappas.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.