IN THE SUPREME COURT OF THE STATE OF NEVADA[BM1]

ROBERT E. GLENNEN, III, AN INDIVIDUAL,
Appellant,
vs.
JOHN KEMPTHORNE,
Respondent.

No. 49390

FILED

JUL 31 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court judgment on a jury verdict in a legal malpractice action and a post-judgment order denying a new trial. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Based on the district court's partial summary judgment that the two attorneys were partners by estoppel, appellant Robert Glennen was found jointly and severally liable for compensatory and punitive damages resulting from Robert Knott's embezzlement of settlement funds belonging to respondent John Kempthorne.

On appeal, Glennen challenges the district court's partial summary judgment as to his partnership liability, contending that numerous genuine issues of material fact remained as to whether he and Knott were partners by estoppel. For the following reasons, we agree that summary judgment regarding a Glennen-Knott partnership was improvidently granted. Accordingly, we reverse the judgment of the district court and remand this matter for further proceedings. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

09-18737

Summary judgment as to a Glennen-Knott partnership

Glennen contends that numerous genuine issues of material fact remain to preclude summary judgment as to whether he and Knott were partners by estoppel. We agree.

Reduced to its core elements, a partnership by estoppel under NRS 87.160(1) requires (1) a representation that a partnership exists, and (2) detrimental reliance. See, e.g., First American Corp. v. Price Waterhouse LLP, 988 F.Supp. 353, 358 (S.D.N.Y. 1997); Facit-Addo, Inc. v. Davis Financial Corp., 653 P.2d 356, 360 (Ariz. Ct. App. 1982) (recognizing that section 16 of the Uniform Partnership Act codifies partnership by estoppel's common law elements). We review de novo whether any genuine factual issues remain as to these elements. See Wood v. Safeway, Inc., 121 Nev. 724, 729, 731, 121 P.3d 1026, 1029, 1031 (2005).

At the outset we note that the agreement on which Kempthorne relies to establish the claimed partnership is not as clear as he asserts. Assuming Glennen signed it, which is itself in dispute, the agreement says it is between Kempthorne and "THE LAW OFFICES OF ROBERT T. KNOTT, JR and ROBERT GLENNEN." This can be read as an agreement between Kempthorne and two separate law offices or between him and one law office comprising two separate lawyers. Viewing this evidence in the light most favorable to Glennen, Wood, 121 Nev at 729, 121 P.3d at 1029, genuine issues of material fact thus exist, making it appropriate to look to extrinsic evidence. In addition, it appers genuine issues exist regarding Glennen's alleged representations and Kempthorne's reliance on a Glennen-Knott partnership for purposes of handling his personal injury claim that require reversal of the partial summary judgment.

Glennen's alleged representations

Although the district court agreed with Kempthorne's uncorroborated assertion that Glennen represented himself as Knott's partner, there is substantial evidence pointing to the contrary, including Glennen's and Knott's sworn testimony.

During his deposition, Kempthorne asserted that Knott introduced Glennen as his partner, that Glennen mentioned that he was a former chief deputy district attorney experienced in trials, and that Glennen made a handwritten change to the contingency fee in the retainer agreement. Perhaps self-conscious that there was no independent proof of this assertion, in his motion, Kempthorne reassured the district court that his testimony on this point was "highly credible."

Despite this self-accreditation, Kempthorne's assertions regarding Glennen's alleged representations were vigorously disputed. Indeed, Kempthorne conceded as much at various points in his own motion by acknowledging that the exact substance of his conversations with Glennen, in addition to the number of times that the two may have met, "is in dispute."

Specifically, Glennen was unequivocal that he never "told anyone, let alone Mr. Kempthorne, that [he and Knott] were partners." Similarly, Glennen denied ever credentializing himself to Kempthorne, maintained that he never met face-to-face with Kempthorne in his office, and never made the handwritten change to the contingency fee in the retainer agreement. In fact, at his deposition, Knott explicitly recognized the handwriting to be his own.

Notably, given Glennen's sharply contrasting version of events, a genuine factual dispute existed as to whether Glennen sufficiently held himself out as Knott's partner to warrant imputing

liability to him under NRS 87.160(1) for Knott's embezzlement. See Gosselin v. Webb, 242 F.3d 412, 417 (1st Cir. 2001) ("[o]rdinarily, whether a partnership by estoppel exists is a question of fact." (internal quotation marks omitted)); Facit-Addo, 653 P.2d at 361 (same); cf. Mid-City Materials v. Heater Beaters, 674 P.2d 1271, 1275 (Wash. Ct. App. 1984) (conflicting affidavits in a partnership by estoppel case presents "a disputed factual issue requiring a trial").

Kempthorne's reliance

Given the absence of any outward indicia of a Glennen-Knott partnership and Kempthorne's course of conduct regarding his personal injury case (which Knott handled exclusively), whether Kempthorne justifiably relied on the existence of a Glennen-Knott partnership was genuinely in dispute.

Notably, Kempthorne incorrectly asserts that the signed retainer agreement alone conclusively satisfies the element of reliance because it was sufficient to color his beliefs that a Glennen-Knott partnership existed for the duration of the representation. See Armato v. Baden, 84 Cal. Rptr. 2d 294, 302-03 (Ct. App. 1999).

However, despite Kempthorne's alleged reliance on the signed retainer agreement, certain evidence belies Kempthorne's belief that a Glennen-Knott partnership existed. First, although they were based out of the same building, Glennen and Knott maintained physically separate practices, and advertised separately.

Second, while Kempthorne alleges that Glennen was co-handling his personal injury case, Knott settled Kempthorne's claim entirely by himself. Over the life of Kempthorne's claim, Kempthorne and Knott were in routine contact—Kempthorne received 6 letters on Knott's stationary, and signed roughly 15 separate documents for Knott, including

a power of attorney entrusting Knott with the exclusive authority to distribute his settlement funds. By contrast, Kempthorne had only two brief encounters with Glennen during this period of time, neither of which could be corroborated, and only one of which allegedly pertained to Kempthorne's personal injury case.

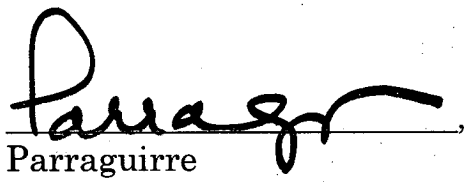
Lastly, despite becoming "very suspicious," Kempthorne failed to contact Glennen about the missing settlement funds until a year after his suspicions arose. And he did so only after exhausting other sources of information first, including calling an attorney for another injured party and the State Bar, both of whom were presumably less close than Glennen to Kempthorne's personal injury claim.

Considering Kempthorne's course of conduct, which was incongruous with Kempthorne's stated belief that Glennen was "his attorney," and based on the lack of observable indicia corroborating this belief, a genuine dispute remains as to whether Kempthorne relied on the existence of a Glennen-Knott partnership in good faith. For the same reasons, serious doubt remains from the record as to whether Kempthorne's reliance was objectively reasonable. See, e.g., Armato, 84 Cal. Rptr. 2d at 302 (requiring representations be such that a "reasonable and prudent person" would rely on them); Facit-Addo, 653 P.2d at 360 (requiring that reliance be reasonable).

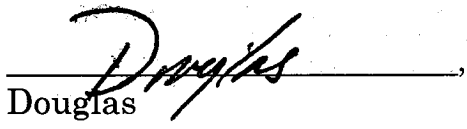
Because numerous genuine issues of material fact still remain as to whether Glennen and Knott were partners by estoppel, we conclude

that the district court erred in granting summary judgment as to a Glennen-Knott partnership.[1] Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.



_____, J.
Parraguirre



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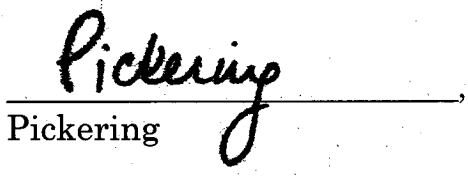

_____, J.
Pickering

cc: Hon. Michelle Leavitt, District Judge
Phillip Aurbach, Settlement Judge
Law Offices of James J. Ream
Lemons Grundy & Eisenberg
Shook & Stone, Chtd.
Eighth District Court Clerk

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[1]Because summary judgment was improper in this respect, we decline to reach the remaining merits of this appeal concerning the scope of impeachment, the sufficiency of the evidence regarding Kempthorne's fraud claim, and compensatory and punitive damages.