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IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

PROPERTY MANAGEMENT, INC., Plaintiff,

v.

SHINJI INOUE, Defendant.

Civil Action No. 92-1455

DECISION AND ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter came before the Court on October 29, 1993, on Plaintiff's motion for partial summary judgment. Plaintiff asserts that Defendant Shinji Inoue was both partner and venturer with Ikuo Yoshizawa between September 1990 and June 1992 in: 1) obtaining leases for certain property located in Obyan, Saipan, for the purpose of developing a golf course and resort; 2) obtaining financing for those leases from Ohtani Co., Ltd. ("Ohtani") at an inflated price; and 3) sharing equally the profits from the land acquisition. Defendant opposes the motion, denying that he was a partner or joint venturer with Yoshizawa in the technical sense of that term with respect to the Obyan properties.

FOR PUBLICATION

I. FACTS

The evidence presented with the motions is as follows:[1/]

Messrs. Inoue and Yoshizawa are Japanese nationals who were active in business ventures together on Saipan beginning in 1989. Prior to the Obyan transactions which are the subject of this lawsuit, the two were involved in a corporation named NPDI which sought unsuccessfully to develop the port area in Saipan. *Deposition of Shinji Inoue*, February 9-11, 1993 ("Inoue Dep. I") at 87:17 24. Mr. Inoue and Mr Yoshizawa were also involved in purchasing certain properties in the Navy Hill area *Id.* at 108:12-110:1. Mr. Inoue described himself as Mr. Yoshizawa's "partner" with regard to both of these ventures. *Id.* Though the precise nature of these "partnerships" is not clear from the testimony, Mr. Yoshizawa testified that Mr. Inoue owned stock in NPDI. *Deposition of Ikuo Yoshizawa*, February 3-5, 1993 ("Yoshizawa Dep.") at 74:22-75:21.

According to Mr. Yoshizawa, he and Mr. Inoue initially planned use NPDI as the vehicle for acquiring properties in Obyan and developing them as a golf course and resort. *Id.* at 73:10-74:21. To that end, NPDI reached an agreement with Alpen, Inc. in which NPDI would acquire the land and act as Saipan agent while

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[1/] The evidence presented by the parties is drawn largely from the deposition testimony of three principal witnesses: Mr. Yoshizawa, Mr. Inoue, and Keisuke Ohtani, the President of Ohtani Co., Ltd. While the parties attached copies of excerpts from these depositions in support of their various factual contentions, the excerpts were often too brief to give the Court a proper understanding of the testimony excerpted. Thus, the Court was obliged to examine the full transcripts on file.

In the following recital, the Court does not make any findings of fact or judgments as to the veracity of any of the testimony reviewed; rather, the facts are presented here solely to determine whether there is a dispute of material fact between the parties as to matters relevant to this motion.

Alpen was to be responsible for the development of the property. *Id.* During the period of these negotiations, Mr. Yoshizawa "may have" introduced Mr. Inoue to an Alpen representative as his partner. *Inoue Dep. I* at 136:-137:3.

In September 1990, Mr. Yoshizawa learned that Mr. Ohtani was also interested in the Obyan project. Mr. Yoshizawa testified that he considered Mr. Ohtani and his company a better prospect for the project because of Ohtani Co.'s large size and reputation as a "financing company." *Yoshizawa Dep.* at 77:8 18 According to Mr. Yoshizawa, he did not handle the first dealings with Ohtani; another individual, Suichi Matsushima, conducted the early negotiations. *Id.* at 83:21-91:10. Mr. Matsushima obtained Mr. Ohtani's commitment to remit thirty million dollars to Saipan for the purposes of acquiring the Obyan leases. *Id.* Mr. Matsushima also obtained Mr. Ohtani's agreement to pay a cancellation fee of 500 million yen to Alpen. *Id.* at 82:5-10.

Apparently the first remittance of thirty million was in the form of a loan, because Mr. Ohtani required collateral from Messrs Matsushima and Yoshizawa in return. On December 10, 1990, Ohtani, Matsushima and Yoshizawa executed a Loan Agreement. *See Defendant's Exhibit G.* By that Agreement, Ohtani Co. would provide funds for the Obyan project and Matsushima and Yoshizawa would provide collateral in turn. Moreover, the three parties agreed to form a corporation, provisionally titled "Marianas Resort Development Corporation," to accomplish the development of the golf course. *Id.* at Art. 3. This corporation was subsequently titled Pacific Resorts Development Corp. ("PRDI").

Mr. Inoue was not a party to this Agreement and was neither an officer nor shareholder in PRDI. Moreover, he was never required to put up any collateral. *Yoshizawa Dep.* at 92:7-9; *Inoue Dep. I* at 187:1-21. When asked to explain Mr. Inoue's exclusion from the corporation, Mr. Yoshizawa testified:

> [...] President Matsushima was playing the major role carrying out this discussion or negotiation [....] And, of course, at that time, we didn't even finalize how we could be connected to this negotiation or deal. And, Mr. Matsushima at that time knew the relationship between myself and Mr. Inoue, however, I think Mr. Matsushima placed more trust in me That is the reason why he came to me and told me about this development and that is the reason why there was no discussion of a collateral with Mr. Inoue.

Yoshizawa Dep. at 92:11-22. On the same subject, Mr. Inoue testified as follows:

> When I found out that PRDI had been incorporated, Mr. Yoshizawa's explanation was that when all of the business permits, licenses had been obtained, then Inoue and Ben [Sablan] would become members. So, he told me to work hard so that the -- all of the business licenses, permits, would be obtained.

Inoue Dep. I at 187:6-11.

As to the subsequent dealings of the parties, both Mr. Yoshizawa and Mr. Inoue testified that they were "partners" in the Obyan project. *Yoshizawa Dep.* at 108:2-9; *Deposition of Shinji Inoue*, April 20-22, 1993 ("Inoue Dep. II") at 26:25-30:15. However, the meaning the deponents attached to this term was not always clear. Mr. Yoshizawa defined this term as follows: "partner is the one whom I can trust and whom I can believe and therefore the distribution of the profit should be done in a fair manner." *Yoshizawa Dep.* at 269:6-270:6. Mr. Inoue defined "partner" in a business context as "being together in a corporation or getting salary paid ...." *Inoue Dep. II* at 32:16-

17. Elsewhere, Mr. Inoue testified that "I do not understand the meaning of the word partner. [...] I was doing things as I was told by Mr. Yoshizawa. It's almost like I'm an employee of his ...." *Id.* at 27:24-28:1.

Both men testified that they agreed orally to split the difference between the per acre lease price they negotiated with the Obyan landowners and the per acre price they told Mr. Ohtani the land would cost. Both men testified that at one point in mid-1991 they drew up a handwritten document showing the terms of their division of the proceeds from the Obyan project. *Yoshizawa Dep.* at 166:16-168:19; *Inoue Dep. II* at 200:14-201:12. Mr. Yoshizawa consistently referred to this money as "profits" from the deal. *Yoshizawa Dep.* at 109:7-111:18. However, Mr. Inoue described this money variously as "profit" (*Inoue Dep. I* at 152:8-11) and as "commission" (*Id.* at 191:14-15; *Inoue Dep. II* at 93:15-94:2). With respect to one lease, according to Mr. Inoue, Mr. Yoshizawa refused to give him a "commission" because the negotiated price was too high. *Inoue Dep. I* at 190:20-192:2. According to Mr. Inoue, the two men did not discuss the sharing of any losses from the enterprise. *Defendant's Amended Response to Interrogatory No. 1.*

The subsequent history of the enterprise is not central to this motion. Ohtani Co. eventually transferred a total of over forty-one million dollars through three "affiliated companies" to PRDI. The actual cost of the Obyan leases was slightly under eighteen million dollars. Mr. Inoue received some 3.5 million in cash and other assets. After Mr. Ohtani learned the full nature of the transaction, Mr. Yoshizawa pledged all of his assets to

Property Management Inc., Mr. Ohtani's assignee and Plaintiff in this action.

II. ISSUE

A single issue is presented by Plaintiff's motion: whether, as a matter of law, Mr. Inoue and Mr. Yoshizawa were partners or joint venturers with respect to the Obyan project.

III. ANALYSIS

A. SUMMARY JUDGMENT STANDARD

Summary judgment is entered against a party if, viewing the undisputed facts in the light most favorable to the non-moving party, the Court finds as a matter of law that the moving party is entitled to the relief requested. *Cabrera v. Heirs of De Castro*, 1 N.M.I. 172, 176 (1990). Once the moving party has made a claim that the essential material facts are undisputed, the burden is placed upon the non-moving party to present evidence showing that material facts are disputed. If this burden is discharged, the motion must be denied. A trial court cannot weigh the evidence and make findings on disputed factual issues on a motion for summary judgment. *Rios v. MPLC*, 3 N.M.I. 512, 519 (1993).

B. PARTNERSHIP AND JOINT VENTURE

Commonwealth law is silent as to what relationship among businesspersons constitutes a partnership or joint venture. The Court therefore looks to *Restatement (Second) of Agency*, § 14A,[2] which defines a partnership as "an association of two or more

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[2] *See* 7 CMC § 3401.

persons to carry on as co-owners a business for profit," incorporating the definition of the Uniform Partnership Act, § 6(1).[3] A partnership is characterized by a voluntary agreement "share profits and losses [...] which may arise from the use of capital, labor or skill in a common enterprise, and an intention on the part of the principals to form a partnership for that purpose." *Kravitz v. Pressman, Frohlich & Frost, Inc.*, 447 F. Supp. 203, 210 (D. Mass. 1978). While no single factor is determinative in any given case, courts look most frequently to three factors: the right of a party to share in profits, her liability for losses, and her right to exert some control over the business enterprise. *Hayes v. Killinger*, 385 P.2d 747, 750 (Ore. 1963). While a joint venture is of shorter duration than a partnership, the same legal criteria govern the existence of a joint venture as define a partnership. *See McGhan v. Ebersol*, 608 F. Supp. 277, 282 (S.D.N.Y. 1985); *Institutional Management Corp. v. Translation Systems, Inc.*, 456 F. Supp. 661, 664 (D. Md. 1978); *Crest Const. Co. v. Ins. Co. of North America*, 417 F. Supp. 564, 568 (W.D. Okla. 1976). For the purposes of this motion, therefore, the Court will apply a single analysis to determine whether Messrs. Inoue and Yoshizawa were partners or joint venturers. As the party asserting the existence of the partnership or joint venture, Plaintiff has the burden of proving its existence. *Nessler v. Reed*, 703 S.W.2d 520, 523 (Mo. App. 1985).[4]

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[3] The UPA has been adopted in fifty-two U.S. jurisdictions, including forty-nine states, the District of Columbia, Guam and the Virgin Islands. 6 *Uniform Laws Annotated* (1990 Supp.) at 1.

[4] While *Nessler* describes the evidentiary standard as one of clear and convincing evidence, other authorities require only (continued...)

1 1. **Intention of Parties**

2 The starting point for an inquiry into the existence of a
3 partnership is an examination of the intent of the parties as
4 expressed in their agreement. *Cochran v. Bd. of Supervisors of*
5 *Del Norte County*, 149 Cal. Rptr. 304, 307 (Cal. App. 1978).
6 However, the actual terms used by the parties are not conclusive
7 of the nature of their relationship. *Fed. Sav. & Loan Ins. Corp.*
8 *v. Griffin*, 935 F.2d 691, 700 (1st Cir. 1991) (statement in
9 written agreement that no partnership is intended does not
10 preclude finding of partnership); *Bank of St. Louis v. Morrissey*,
11 579 F.2d 1311, 1136 (8th Cir. 1979) (use of term "joint venture"
12 in parties' testimony not conclusive); *Williams v. Biscuitville*,
13 235 S.E.2d 18, 20 (N.C. App. 1979) (employee's title as "managing
14 partner" does not establish partnership when other evidence showed
15 employment relationship).

16 Here, both Mr. Yoshizawa and Mr. Inoue described themselves
17 at various times as "partners," beginning with the port
18 development project through NPDI, the initial corporation in which
19 both men were shareholders. *Yoshizawa Dep.* at 74:22 75:21.
20 However, after the agreement with Alpen was cancelled, the Obyan
21 project was no longer pursued under the auspices of NPDI.
22 Instead, Mr. Yoshizawa, as an individual, executed the December,
23 1990 Agreement with Ohtani and Matsushima, explaining that "at
24 that time, we didn't even finalize how we would be connected to
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[4](...continued)
a preponderance of the evidence. *See Sta-Rite Ind., Inc. v. Johnson*, 335 F. Supp. 1311, (W.D. Okla 1969). As will be seen below, the outcome here does not depend on which evidentiary standard is used; therefore, the Court expresses no opinion at this time on this issue.

this negotiation or deal." *Id.* at 92:11-22. Mr. Inoue testified that he was not a part of the new corporation (PRDI) which resulted from this Agreement, but that Mr. Yoshizawa promised to bring him in "when all of the business licenses, permits had been obtained." *Inoue Dep. I* at 187:6-11. The parties did not present evidence that Mr. Inoue ever became a shareholder of PRDI.

The evidence presented overall gives rise to conflicting inferences, one of which is that despite their ongoing partnerships on other projects, Messrs. Inoue and Yoshizawa did not intend to be partners in the Obyan project at the time of the December 1990 Agreement with Ohtani. The evidence of partnership is stronger as of mid-1991, when the two men drew up a handwritten document showing their respective shares in the proceeds. *Yoshizawa Dep.* at 166:16-168:19. However, the parties dispute whether these proceeds were to be characterized as "profits" or "commissions." *Inoue Dep. I* at 190:20-192:2. Finally, the Court must consider Mr. Inoue's statement that "I was doing things as I was told by Mr. Yoshizawa." *Inoue Dep. II* at 27:24-28:1.

Viewing this conflicting evidence in the light most favorable to Mr. Inoue, the Court cannot say as a matter of law that it shows an intention of the parties to form a partnership in the technical sense of the term. Its repeated use by laymen who are non-native speakers of English must be given its proper evidentiary weight at trial

2. <u>Sharing of Profits and Losses</u>.

a. Profits. There is no doubt that the sharing of profits is essential to either a partnership or a joint venture. However, that fact alone does not establish a partnership per se. *Hayes, supra*, 385 P.2d at 751; *Brewer v. Central Const. Co.*, 43 N.W.2d 131, 136 (Iowa 1950). Rather, the sharing of profits is prima facie evidence of a partnership which may be rebutted by a showing that the profits were shared for another reason such as compensation for services, or as repayment of a loan or debt *UPA* § 7(4).

Here, there is strong evidence that the parties intended to share profits and in fact did so. *Yoshizawa Dep.* at 109:7-11:18; *Inoue Dep. I* at 152:8-11. That Mr. Inoue sometimes referred to this money as "commissions," standing alone, would not be sufficient to create a dispute of material fact. However, his testimony that he was once denied a commission on one lease because the negotiated price was too high (*Inoue Dep. I* at 190:20-192:2), and Mr. Inoue's testimony about being "almost like an employee," does rise to the level, albeit barely, of a material dispute.

b. Losses. The case law is less uniform in requiring an express agreement to share financial losses in order to find a partnership or joint venture. On one hand, some authorities hold that "it is the sharing of losses, not profit alone, which is the critical indicator." *Institutional Management, supra*, 456 F. Supp. at 666; *Gottshalk v. Smith*, 40 N.E. 937 (Ill. 1895). On the other hand, other cases hold that "an agreement to share in losses may be implied from an agreement to share in profits." *Crest*

Const. Co. v. Ins. Co. of North America, 417 F. Supp. 564, 569 (W.D.Okla. 1976); *see also Eagle Star Ins. Co. v. Bean*, 134 F.2d 755, 757 (9th Cir. 1943) (under Washington law, no explicit agreement to share losses necessary for joint venture); *Devereaux v. Cockerline*, 170 P.2d 727, 733 (Ore. 1946) (it is "probably the law" that sharing of losses not required, especially where one party provides capital and another provides services).

Here, Plaintiff concedes that the parties did not discuss the sharing of losses. *Plaintiff's Reply Memorandum* at 18. Further, Defendant points out that Mr. Inoue was not obligated to offer collateral under the December 1990 Agreement. *Defendant's Exh. G.* Plaintiff argues that Mr. Inoue stood to lose his time investment from the failure of the enterprise as a whole, and therefore implicitly agreed to share "losses." The Court agrees that there may be some circumstances in which a partner contributes only labor to an enterprise and yet stands to "lose" as much as another partner who contributes only capital if the enterprise as a whole fails. However, here there is evidence that Mr. Inoue received checks on an ad hoc basis throughout the project as he requested payment from Mr. Yoshizawa. *Yoshizawa Dep.* at 146-147. Viewing the facts in the light most favorable to Mr. Inoue, it would not appear that he stood to invest large amounts of time in the Obyan project without receiving compensation if the project failed.

3. <u>Conclusion</u>.

The Court finds that the above analysis reveals a sufficient dispute of fact to preclude summary judgment that Messrs. Inoue and Yoshizawa formed a partnership with respect to the Obyan project. It is therefore unnecessary to examine the parties'

contentions regarding the degree of control Mr. Inoue exercised over the enterprise, and the Court will refrain from discussing that issue.

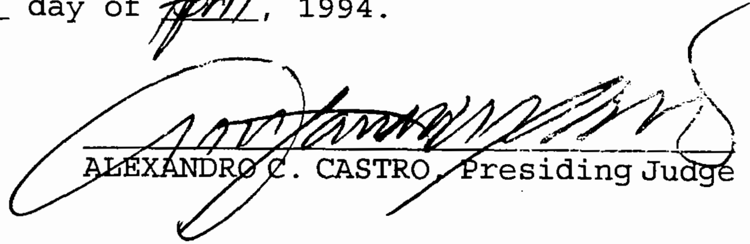
F. PARTNERSHIP BY ESTOPPEL

Plaintiff's final argument is that Mr. Inoue acquiesced to being introduced as Mr. Yoshizawa's "partner," both to an Alpen representative and to Mr. Ohtani. According to Plaintiff, this acquiescence amounts to a partnership or joint venture "by estoppel." Section 16 of the Uniform Partnership Act codifies "partnership by estoppel" as arising when a person represents himself, or allows another to represent him, as a partner in an enterprise, and the person to whom the representation is made extends credit "on the faith of such representation." Subsequent case law requires reliance on the representation of partnership, and prejudice resulting from the reliance, for estoppel to arise. *Giles v. Vette*, 44 S.Ct. 157, 160 (1924); *Pruitt v. Petty*, 134 S.E.2d 713, 716 (W.V. App. 1964). Here, the evidence of representations by Yoshizawa and by Inoue is not accompanied by evidence of any reliance by, or prejudice to, Ohtani. *See Ohtani Decl.*, ¶ 4. Such evidence may exist and be convincingly presented at trial; however, the evidence presented here is plainly inadequate for summary judgment.

IV. **CONCLUSION**

For the foregoing reasons, Plaintiff's motion for partial summary judgment that Defendant Shinji Inoue and Ikuo Yoshizawa were partners or joint venturers with regard to the acquisition and development of certain properties located in Obyan, Saipan, is hereby DENIED.

So ORDERED this 4th day of April, 1994.



ALEXANDRO C. CASTRO, Presiding Judge