RICHARD E. SWISHER AND SHIRLEY M. SWISHER, HIS WIFE, Plaintiffs vs. DAVID L. BINKLEY AND DENISE BINKLEY, HIS WIFE, Defendants, C.P. Fraanklin County Branch, Civil Action - Law, No. 1999-20336

*Swisher v. Binkley*

*Contracting Parties; Breach of Contract; Contract Interpretation; Tenants by the Entireties; Separate Judgments; Compulsory Joinder; Fraudulent Transfers*

1) Where spouses attempt to hide ownership of a business held by tenants by the entireties to avoid liability in a breach of contract action against their entireties property, the court will not determine that one spouse was not a party to the contract where she admitts to being a partner in the business.

2) Where spouses own a business as tenants by the entireties, both will held liable in a breach of contract action against the business.

3) Contracts must be interpreted according to the intentions of the parties, and to determine those intentions, the court may consider the situation of the parties, the objects they had in view, the subject matter of the agreement, and the surrounding circumstances.

4) Separate but identical judgments for joint liability allow an entry of a joint and several judgment, which can permit a foreclosure lien on tenants by the entireties property.

5) While both spouses are indispensable parties and must be joined under Pa.R.C.P. 2227(a) in actions intended to affect title to property held by tenants by the entireties, the court will not dismiss a claim where one spouse was not joined properly because of the spouses' attempt to mislead plaintiffs as to the ownership status of their business.

6) The court will not allow evasive tactics, such as fraudulent transfers, to avoid liability in a breach of contract action.

*Donald L. Kornfield, Esquire,* Counsel for Plaintiffs
*William S. Dick, Esquire,* Counsel for Defendants

OPINION AND ORDER

HERMAN, J., December 30, 1999:

**Background**



Plaintiffs, the Swishers, originally filed suit in this matter on June 17, 1997 against Defendant, David Binkley, for breach of a contract executed on July 26, 1996, on a pole building that Mr. Binkley had built for Plaintiffs. Plaintiffs obtained a default judgment against Mr. Binkley on September 23, 1997, but were unable to collect. On August 14, 1997, between the time Plaintiffs filed suit against Mr. Binkley and judgment was levied, Mr. Binkley and his wife incorporated their construction business and moved their business assets to the corporation, which they named Home Tech Improvements, Inc. Plaintiffs received their first notice of the incorporation when Ms. Binkley filed a property claim on April 24, 1998, in objection to the property levy on Mr. Binkley from the judgment.

Plaintiffs challenged the transfer of assets to the Home Tech corporation in trial on June 18, 1999. By Order of Court on the same day, the transfers to Home Tech were held to be fraudulent under Section 5104 of the Fraudulent Transfers Act. The Court voided the transfers and made the properties "available for levy or any other legal action deemed necessary."

Plaintiffs have now filed suit against both David Binkley and Denise Binkley, jointly and severally, because Ms. Binkley had testified in the above-noted trial that she and her husband owned Home Tech together, including the time during which Mr. Binkley constructed the pole building for Plaintiffs. Plaintiffs believe, therefore, that both Binkleys should be liable for the breach of contract. They are proceeding now against Ms. Binkley as co-owner of the business. They have already obtained a separate judgment against Mr. Binkley in a previous action.

Defendants responded to this new complaint by filing preliminary objections, claiming primarily that Ms. Binkley was not a party to the contract, and alternatively, if Ms. Binkley was a partner in the business, she should have been named as a party in the original suit, and because she was

not joined at that time, Plaintiffs are barred from pursuing a claim against her now.

## Decision

Because of Binkleys' evasive behavior throughout these proceedings brought by Plaintiffs to recover losses on the original breach of contract, the Court will allow Plaintiffs to proceed in the present action against Binkleys jointly and severally, with Ms. Binkley as defendant and co-owner of Home Tech.

## Discussion

Defendants responded to the instant complaint by filing preliminary objections, asserting first that because judgment had already been determined against Mr. Binkley in a previous action on the same matter, he cannot be made part of this action. Plaintiffs agreed with this analysis, so this first point of contention is moot. Plaintiffs are not bringing an action against Mr. Binkley again, they are bringing the action jointly and severally against the Binkleys, as joint owners of the Home Tech business, by pursuing their claim against Ms. Binkley.

Ms. Binkley had insisted in the prior proceeding of *Swisher v. Home Tech Improvements, Inc.* that the business was owned by both her and Mr. Binkley. *Home Tech* transcript, at 28-41. The Court has only the testimony given under oath in that trial on which to determine ownership status of the Binkleys' business, and it finds that Ms. Binkley's testimony as to how the business was formed and her part in keeping the books and making purchases was credible in determining that she is indeed a joint owner. *Home Tech* transcript, at 28-33. The Binkleys are married, and thus own the business as tenants by the entireties. Under Pennsylvania law, ownership by the entireties is a single interest in the entire property by one legal entity composed of two natural (married) persons. *In re Barsotti*,



7 B.R. 205, 208 (Bkrtcy.W.D.Pa.1980); *McCormick v. Mid-State Bank & Trust Co.*, 22 B.R. 997 (W.D. Pa 1982).

In *United States v. Eglinton*, 1990 W.L. 69027 (E.D. Pa.), a tax lien case, a similar situation of separate judgments arose where defendants argued that a creditor could not reach property owned by the entireties where the liability was individually assessed against each of them. The court found that two separate but identical judgments for the defendants' joint liability entitled the plaintiff to entry of a joint and several money judgment, which gave rise to a joint judgment lien permitting foreclosure on the defendants' entireties property.

Additionally in their preliminary objections, Binkleys claim that pendency of the first action does not allow the instant action to proceed. This point is also moot because the earlier action is not pending. It is not disputed that judgment has already been entered against Mr. Binkley and that Plaintiffs have withdrawn execution of that judgment.

Further, Binkleys assert that Plaintiffs cannot sue Ms. Binkley because she was not a party to the original contract. While it is true that the signature of the husband on a contract does not automatically mean that he is also acting on behalf of his wife, as the court in *Roman Mosiac and Tile Co., Inc. v. Vollrath*[1] held, in the instant case, Plaintiffs

[1] 226 Pa.Super. 215, 313 A.2d 305 (1973). In this case, Mr. Vollrath signed a contract with plaintiff without indicating the capacity in which he acted, then forfeited on payment for the work done. The promisor named in the contract was Paul S. Vollrath Associates, a corporation held by Mr. Vollrath. When plaintiff determined that the laundromat where the work was performed was owned by both Mr. Vollrath and his wife together under a separate corporation called Vollrath Investments, plaintiff attempted to bring suit against both Vollraths. The court held there was no evidence that Mr. Vollrath had acted on behalf of his wife or their jointly owned corporation when he signed the contract. In this case, the court noted that there was no evidence to suggest that Vollraths' were attempting

believed they were dealing with the company, Home Tech Improvements. Mr. Binkley had given Plaintiffs his business card, with the company name of Home Tech imprinted on it when he first discussed the building project with them. The contract bears the name Home Tech, as does the invoice for the work.

> "The courts of Pennsylvania have held that contracts must receive a reasonable interpretation according to the intention of the parties and, to determine that intention, the court may consider the situation of the parties, the objects they apparently had in view, the nature of the subject matter of the agreement, and the surrounding circumstances."

*Winter v. Welker*, 174 F.Supp. 836 (E.D. Pa. 1959) (concluding that where defendants had tried to transfer assets into the wife's name to hinder creditors, judgment would be entered against defendants, individually, jointly, and as tenants by the entireties, and against their business entities, and, furthermore, the individual judgment entered against the husband would be superseded and revoked by the new order).

It is apparent from the circumstances that Plaintiffs believed they were contracting with Mr. Binkley's company, and that Mr. Binkley intended to act on behalf of the company. While Plaintiffs may have only dealt with Mr. Binkley when negotiating the contract and with the actual construction of the building, Ms. Binkley has stated under oath in court that she is co-owner of the business with her husband. *Home Tech* transcript, at 28. Ms. Binkley's work for the company was in purchasing equipment and bookkeeping, so Plaintiffs would had have no reason to deal with her directly. However, Plaintiffs believed they were dealing with Home Tech, and therefore, the contract Plaintiffs made with Home Tech was executed by Mr.

---

to juggle their assets to hinder creditors or otherwise attempting to work a fraud.



Binkley as a representative of the business, and also binds Ms. Binkley as co-owner of the business.

Because of the testimony in the *Home Tech* trial of Ms. Binkley claiming that she was co-owner of the business with her husband, the issues discussed above are readily resolved. The primary matter now on which this action revolves is whether Plaintiffs are barred from bringing the instant suit because they failed to join Ms. Binkley in the first suit against Mr. Binkley. Defendants rely on Pa.R.C.P. 2227, compulsory joinder, to assert that Ms. Binkley was an indispensable party to the first suit, and because Plaintiffs failed to join her then, they should be barred from bringing action against her now.

Plaintiffs and Defendants agree that the law is clear under Rule 2227, which states: "(a) Persons having only a joint interest in the subject matter of an action must be joined on the same side as plaintiffs or defendants." Pennsylvania common law further interprets that "[i]n actions intended to affect title to property which is either held or claimed by tenants by the entireties, both spouses are indispensable parties and must be joined . . . ." *Miller v. Benjamin Coal Co.*, 625 A.2d 66, 425 Pa.Super. 316 (1993), appeal denied 641 A.2d 311, 537 Pa. 612. "[U]nless all indispensable parties are made parties to an action, a court is powerless to grant relief." *Sprague v. Casey*, 520 Pa. 38, 550 A.2d 184 (1988).

However, joinder of the Binkleys in the original suit may not have been possible if Plaintiffs had no information that the business was owned by both of them. It is the burden of obtaining this information that is directly at issue. Plaintiffs believe Defendants should have revealed the ownership status of the business when Mr. Binkley was served with the original complaint. Defendants believe that Plaintiffs should have pursued the simple question of ownership in discovery as part of the due diligence expected in pursuing a claim, and at the least, should have amended their pleadings after

receiving a letter from Defendants' attorney stating that all the Binkleys' assets were owned jointly.

The court will first address the matter of the letter from Binkleys' attorney, which allegedly was intended to put Plaintiffs on notice that Home Tech was owned by both Binkleys. The relevant sentence in the letter, read into the *Home Tech* transcript at page 36, states:

> "If the matter is allowed to run its course, I simply note to you that Mr. Binkley is married and has no assets which would be available for execution regardless of the size of any judgment which Mr. Swisher obtained."

The court concludes that this statement does not per se inform Plaintiffs that the business was held by both parties. It could be said to have implied this, but other things could have been implied as well, such as that the business and Mr. Binkley have no assets. Mostly, it is just an evasive statement that does not give Plaintiffs any concrete information.

The law provides that joinder of tenants by the entireties who share ownership in property is compulsory under Rule 2227, as the court rules in *Moorehead v. Lopatin*, 300 Pa.Super. 81, 445 A.2d 1308 (1982). In *Moorehead*, however, the defendant informed plaintiffs in his answer and new matter that the subject property was owned by both he and his wife, and that a deed showing their joint ownership had been recorded. The plaintiff's case in *Moorehead* was dismissed on summary judgment because after such notice was given to the plaintiffs, plaintiffs still did not make any attempt to include defendant's wife as a party in the suit.

The facts of the instant case are clearly distinguishable. Here, Binkleys never informed Plaintiffs that the business was held by both of them. Plaintiffs had no reason to suspect such, as Mr. Binkley was the only one to show up on the job site, his name was alone on the business card, and it was he who negotiated the contract with Plaintiffs.



Because the Binkleys had not yet incorporated at the time the suit was filed, there would have been no record of ownership of the business on file with Commonwealth. Furthermore, Ms. Binkley was still employed in her parents' business during this time, as she stated in the *Home Tech* trial. She did not appear to be at all involved with the business with regard Plaintiffs, as she did not even know the hourly rate Mr. Binkley was charging Plaintiffs for his work. Home Tech transcript, at 12. Plaintiffs were not on notice as to the ownership of the business, and easily could have surmised from the outward appearances revealed by the Binkleys that Mr. Binkley was running the business alone.

Moreover, according to Mrs. Binkley's testimony, Binkleys made no attempt to inform Plaintiffs that the business was owned by both of them when they received the complaint naming only Mr. Binkley as defendant. *Home Tech* transcript, at 38. While Pa.R.C.P. 2327(3), on which Plaintiffs rely, only *permits* intervention by a party who could have joined as an original party, and does not compel such intervention, this Court believes, that in the context of this case, Ms. Binkley's failure to intervene and both Binkleys' failure to inform Plaintiffs of the ownership status of their business was done to hinder the Plaintiffs' claim.

The Court agrees with Plaintiffs that Defendants cannot have it both ways. In the instant case, Binkleys have attempted through various legal maneuvers to avoid liability to Plaintiffs. They have attempted to hold Mr. Binkley out as sole owner of the business, then they incorporated the business before judgment in a pending lawsuit, and said they were co-owners. Now they are attempting to use prior proceedings which were based on misinformation promoted by their actions to bar Plaintiffs from ever recovering from them. Given the evasive tactics by Binkleys in attempting to hold their assets out of reach, Plaintiffs will be permitted to proceed with their suit against Binkleys, jointly and severally, and under the Court Order of June 18, 1999

which holds all conveyances to the corporation of Home Tech Improvements are void in the suit against Plaintiffs.

**Order of Court**

NOW, this 30th day of December, 1999, the preliminary objections filed by the defendants are hereby DENIED in accordance with the attached Opinion.