Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-528

JUNE TERM, 2002

Michael Quimby	}	APPEALED FROM:
v.	}	Lamoille Superior Court
Gaye Schaufus	}	DOCKET NO. 158-8-00 Lecv
	}	Trial Judge: Howard E. VanBenthuysen

In the above-entitled cause, the Clerk will enter:

Plaintiff Michael Quimby appeals from a summary judgment of the Lamoille Superior Court in favor of defendant Gaye Schaufus. Plaintiff contends that summary judgment was improper because: (1) the statute of frauds did not bar his claim that defendant had breached an agreement to repay monies advanced to improve defendant's property; and (2) material issues of fact remained in dispute regarding his claims for repayment and for an accounting of the parties' alleged horse business. We reverse.

The facts, as found by the trial court and adduced from the record, may be summarized as follows. Defendant is the sole owner of sixty acres and a pole barn in the Town of Lowell. Plaintiff and defendant entered into a relationship in 1994. Plaintiff alleged in his complaint and affidavit that he sold his own home and invested the proceeds, about $30,000, in defendant's property with defendant's agreement that she would sell her property and repay him if the relationship ended. Plaintiff also claimed that the parties agreed to conduct a business buying and selling horses, and the court found that the parties had co-mingled their funds and used the joint assets to buy, raise and support a number of horses.

After the relationship ended, plaintiff filed a complaint against defendant, seeking repayment of the $30,000 used to improve the property, and for an accounting of the alleged business partnership. Defendant moved for summary judgment. Following a hearing in which plaintiff testified, the court granted defendant's motion, ruling that the claim based on defendant's alleged agreement to repay plaintiff from the proceeds of sale of the farm was barred by the statute of frauds, and that the evidence was insufficient to establish the business partnership. This appeal followed.

Summary judgment is inappropriate if there is a disputed issue of material fact. See V.R.C.P. 56(c). In determining whether there is a disputed issued of material fact, the party opposing summary judgment is entitled to the benefit of all reasonable doubts and inferences. Carr v. Peerless Ins. Co., 168 Vt. 465, 476 (1998). Assessed in light of this standard, the record here compels the conclusion that plaintiff showed enough to avoid summary judgment. The trial court concluded that the claim for repayment was barred by the statute of frauds, 12 V.S.A. 181(5) (writing required for "contract for the sale of lands . . . or of an interest in or concerning them"), in part because the complaint sought a constructive trust or equitable lien on the property sufficient to trigger the statute. See, e.g., Muse v.Woyner, 698 S.W.2d 26, 30-32 (Mo. Ct. App. 1985) (equitable lien in favor of lender of funds advanced for improvement of another's property may not be created absent definite writing evidencing agreement). Plaintiff also sought, however, damages for breach of his alleged agreement with defendant for repayment. The fact that defendant would have to sell the property to

pay these damages is not alone sufficient to require a writing under 181(5). See Cameron v. Burke, 153 Vt. 565, 571-72 (1990) (statute of frauds does not apply to promise to repay debt from proceeds through resale of land, which does not create interest in property within statute).

Material issues also remain in dispute concerning plaintiff's allegation that the parties had an oral agreement to operate a business or joint venture buying and selling horses, and his claim for an accounting. Although defendant denied the agreement, asserting that she was engaged only in breeding horses to preserve the bloodline, the trial court found that the parties had co-mingled their funds, and plaintiff stated that defendant had placed advertisements in various horse magazines and periodicals soliciting buyers for the business.[(1)] This was sufficient to raise at least a genuine issue of disputed fact concerning the alleged business agreement. The court concluded that the claim must fail absent a writing, contract, or other document memorializing the alleged partnership. We agree, however, with plaintiff's contention that he did not have to show such formalities. See Harman v. Rogers, 147 Vt. 11, 14-15 (1986) (despite absence of express partnership agreement, court may order dissolution and accounting based on implied or "tacit agreement" as evidenced by conduct showing "manifestation of an intent to be so bound").

Although the court also found that the absence of specific evidence relating to profits and losses and record keeping was fatal to the claim, these are omissions that go more to the sufficiency of the evidence at trial. See Carr, 168 Vt. at 476 (party opposing summary judgment entitled to all reasonable doubts and inferences). Accordingly, we hold that the court erred in entering summary judgment for defendant on this claim also.

Reversed.

BY THE COURT:

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John A. Dooley, Associate Justice

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James L. Morse, Associate Justice

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Marilyn S. Skoglund, Associate Justice

1. Defendant has moved to strike references in plaintiff's brief to portions of the parties' answers to interrogatories dealing with their alleged expenditures on horses, asserting that they were not a part of the record below. Because we need not, and do not, rely on the challenged interrogatories in reaching our holding, the motion is denied.