

SUPREME COURT OF TEXAS

John Ganim v. J. Farouk (Frank) Alattar

No. 10-0592 · No. No. 10-0592 · Decided June 24, 2011

OPINION

PER CURIAM.

IN THE SUPREME COURT OF TEXAS ===== No. 10-0592 =====
John Ganim, Petitioner, v. J. Farouk (Frank) Alattar, Respondent
===== On
Petition for Review from the Court of Appeals for the Fourteenth District of Texas
===== PER
CURIAM <span style='mso-
spacerun:yes'> SEQ CHAPTER \h \r 1<span lang=EN-CA style='mso-ansi-language:EN-
CA'>Justice Guzman did not participate in the decision.

The issue in this case is whether an agreement to acquire real property for the benefit of a partnership was barred by the statute of frauds. The court of appeals held that it was. We disagree. We reverse the court of appeals' judgment and remand to that court for further proceedings. John Ganim and Farouk "Frank" Alattar were friends who began looking for properties to invest in together.

On March 17, 2004 they visited a 3,800 acre tract in Washington County that was for sale (the Property). Two days later Alattar, while accompanied by Ganim, executed an agreement as "Frank Alattar, Trustee" to purchase the Property.

In the days following Alattar's execution of the purchase agreement, Alattar, Ganim and their lawyers exchanged documents culminating in Alattar and Ganim executing an Agreement of Limited Partnership of Gates Bluebonnet Hills, LTD. (Gates Bluebonnet), which was to take effect March 29, 2004. But despite Ganim and Alattar each signing the Gates Bluebonnet agreement, they later disputed whether it correctly reflected the terms of their agreement.

Because of the disagreement, Alattar notified Ganim that he would not enter into a partnership and denied that Ganim had, or would have, any interest in the Property. Ganim subsequently sued Alattar. While suit was pending the sellers conveyed the Property by special warranty deed to "Farouk Alattar, Trustee." Neither the purchase agreement nor the deed identified a trust or named any trust beneficiaries.

The case was tried to a jury. Ganim's position at trial was that he and Alattar agreed to purchase the Property as partners and six documents, taken collectively, established that Alattar acquired

the Property on behalf of Gates Bluebonnet.

The six documents were introduced into evidence. Among the documents was an unsigned letter dated March 25, 2004 to Alattar from his attorney referencing the agreement to purchase the Property and referring to discussions Alattar and his attorney had “on proposed entity structure for this transaction.” Another of the documents was a letter to Alattar from his attorney dated March 26, 2004, which included the proposed partnership agreement for Alattar and Ganim’s review and execution.

Alattar contended he had no agreement with Ganim to acquire the Property as partners. He insisted that he had purchased the property for himself and his family. As relevant to the issue before us, the jury found (1) Ganim and Alattar did not mutually rescind the Gates Bluebonnet Hills Agreement of Limited Partnership, (2) six specified documents constituted an agreement that Alattar purchased the Property for the benefit of Gates Bluebonnet,¹ (3) Alattar failed to comply with the agreement, and (4) Ganim was damaged in the amount of \$2,446,800.

The trial court rendered judgment for Ganim on the jury verdict.² The court of appeals reversed and rendered judgment for Alattar. ___ S.W.3d ___, ___. It reasoned that under the agreement found by the jury the Property was sold either to Gates Bluebonnet acting through Alattar, or was sold to Alattar as trustee of an unidentified trust unrelated to the partnership.

Id. The appeals court concluded that either way, “the agreement is one for the sale of real estate and subject to the statute of frauds.” Id. It then determined that the agreement did not comply with the statute of frauds because no single document contained both the contract’s essential terms and the signature of the party to be charged, nor could the documents be construed together to satisfy the statute of frauds because the later documents did not refer to the earlier ones.

Id. Because it rendered judgment on the statute of frauds issue, the appeals court did not address the other issues raised by Alattar. In this Court Ganim argues that, in finding Alattar purchased the Property for Gates Bluebonnet, the jury determined Alattar purchased the Property for their mutual benefit.

Thus, Ganim contends, this was an agreement for the joint acquisition of real property, not a land-purchase agreement, and it is not subject to the statute of frauds. Alattar argues that Ganim has shifted positions on appeal: in the trial court he argued Alattar agreed to convey the Property to the partnership, but he now contends Alattar agreed to purchase the Property for the partnership and a second conveyance was not required.

Alattar further contends that both of Ganim’s positions fail because each requires Alattar to have purchased the Property as trustee for benefit of the partnership and such an agreement would be an express parol trust in land, which the Texas Trust Code makes unenforceable.

We conclude that neither the statute of frauds nor the Texas Trust Code bar the enforcement of the agreement. Chapter 26 of the Business and Commerce Code is entitled “Statute of Frauds.” It provides that “a contract for the sale of real estate” must be in writing. Tex. Bus. & Comm. Code § 26.01 (a), (b)(4). This Court long ago held that “an agreement between two or more persons for the joint acquisition of land is not a contract for the sale of land and is not required by our statute of frauds to be in writing.” *Gardner v. Randell*, 7 S.W.

781, 782 (Tex. 1888); *Reid v. Howard*, 9 S.W. 109, 110 (Tex. 1888); *James v. Fulcrod*, 5 Tex. 512, 1851 WL 3915, at *3 (1851). In *Gardner* the parties agreed to purchase land, with each to pay one-half of the purchase price and each to hold an equal interest in the property. *Gardner*, 7 S.W. at 781. *Gardner* purchased the property for \$3,250, paying \$500 of his own money and taking a bond for title in his own name.

Id. The parties then orally agreed that if *Randell* paid his half by the end of a 90-day period, *Randell* would own half of the property. *Id.* at 781-82. *Gardner* subsequently raised the money, completed the purchase, and obtained a deed to the property in his name. *Id.* at 782. When *Randell* tendered his share of the money, *Gardner* refused to convey, prompting *Randell* to file suit to recover his interest in the property.

Id. This Court characterized the transaction at issue as “an agreement between two parties to buy land jointly,” which did not fall within the statute of frauds. *Id.* The Court noted that the case did not involve a parol trust or a resulting trust, but a “parol contract by which two or more persons agree to purchase land for their joint benefit” with the “title to be taken in the name of one.” *Id.* *Alattar* concedes that *Gardner* and its progeny would support enforcement of the agreement *Ganim* alleges.

But he argues that the Trust Code abrogated *Gardner* by providing that an express trust must be in writing and signed by the settlor. See Texas Trust Act, ch. 148, § 7, 1943 Tex. Gen. Laws 232, 234 (former Tex. Rev. Civ. Stat. Ann. art. 7452b-7), repealed by Act of May 25, 1983, ch. 567, § 1, 1983 Tex. Gen. Laws 3658, 3658 (current version at Tex. Prop. Code § 112.004).

Section 112.004 of the Trust Code provides that a trust in real property “is enforceable only if there is written evidence of the trust’s terms bearing the signature of the settlor or the settlor’s authorized agent.” Tex. Prop. Code § 112.004; see also *Rankin v. Naftalis*, 557 S.W.2d 940, 944 (Tex. 1977).

The Trust Code’s provision applies only to express trusts. Tex. Prop. Code § 111.003 (“For the purposes of this subtitle, a ‘trust’ is an express trust only....”); see also *Omohundro v. Matthews*, 341 S.W.2d 401, 404 (Tex. 1960); *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 259 (Tex. 1951). An “express trust” is “a fiduciary relationship with respect to property which arises as a manifestation by the settlor of an intention to create the relationship and which subjects the person holding title

to the property to equitable duties to deal with the property for the benefit of another person.” Tex. Prop.

Code § 111.004(4). Ganim does not contend, and the jury did not find, that an express trust was created.³ Nor does Alattar contend there is evidence that he or someone else acting as settlor created an express trust in favor of Ganim or Gates Bluebonnet by a manifestation of “an intention to create the relationship” of trustee in Alattar. See id. § 111.004.

The dispute was over whether Alattar agreed to purchase the Property for Gates Bluebonnet, not over whether an express trust was created. Further, the only possible evidence supporting the creation of a trust agreement was the Purchase Agreement Alattar signed as “Frank Alattar, Trustee” and the deed conveying the Property to “Farouk Alattar, Trustee.” But “the mere designation of a party as ‘trustee’ does not create a trust.” *Nolana Dev.*

Ass’n v. Corsi, 682 S.W.2d 246, 249 (Tex. 1984). We conclude that no express trust was created as to the Property. Because no express trust was created, the Texas Trust Code does not apply. Moreover, after the Trust Code was adopted our courts have continued to enforce agreements for the joint acquisition of land, even though legal title is held in the name of one of the partners.

See, e.g., *King v. Evans*, 791 S.W.2d 531 (Tex. App.—San Antonio 1990, writ denied). In *King*, *Evans* sued *King* claiming that a 725-acre tract acquired by *King* was a partnership asset based on an oral partnership agreement. Id. at 532.

The jury found that the land was purchased by *King* for the benefit of the partnership. Id. On appeal, *King* argued that the jury’s finding was based on either an express trust or a constructive trust cause of action and was required to be in writing. Id. at 533.

The court of appeals disagreed, stating that when “land is acquired for partnership purposes but is held in one partner’s name, the partnership’s claim to the land is not barred by absence of a written document of conveyance.” Id. The court of appeals held that because there was no evidence a trust was formed, the statute of frauds did not apply to agreements between parties to jointly acquire land.

Id.; see also *Davis v. Sheerin*, 754 S.W.2d 375, 386 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (holding that the statute of frauds did not bar *Sheerin*’s claim to an interest in the real property held solely in *Davis*’s name because *Sheerin* was “not relying on an oral conveyance of land, but [was] contending that the six tracts were all purchased by and for the benefit of the partnership”); *Bradley v. Bradley*, 540 S.W.2d 504, 510 (Tex.

Civ. App.—Fort Worth 1976, no writ) (holding that the statute of frauds “does not apply to a contract between two or more parties, such as the one involved here, to acquire jointly realty from a third person”); *McDonald v. Sanders*, 207 S.W.2d 155, 157 (Tex. Civ. App.—Texarkana 1947,

writ ref'd n.r.e.) (holding that an oral agreement between two parties for one of them to purchase a mineral interest for the benefit of the other did not violate the statute of frauds).

In reaching its conclusion the court of appeals relied on *White v. McNeil*, 294 S.W. 928 (Tex. Civ. App.—1927, no writ). But *White* involved a different relationship between the parties to the land conveyance. There the partner was conveying land that he already owned to a partnership as a capital contribution. *Id.* at 929. *White* held that the transaction was a standard land conveyance, which was required to be in writing.

Id. In contrast, the jury in this case found that Alattar agreed to initially purchase the Property for Gates Bluebonnet, not that he agreed to contribute property he already owned to the partnership. The agreement found by the jury was that Alattar purchased the Property for Gates Bluebonnet. It was not an agreement for the sale of real estate nor did it create an express trust.

Thus, it was not required to comply with the provisions of either Business and Commerce Code section 26.01 or Property Code section 112.004. We grant Ganim's petition for review. Without hearing oral argument we reverse the court of appeals' judgment. See Tex. R. App. P. 59.1.

We remand the case to the court of appeals for further proceedings. OPINION DELIVERED: June 24, 2011 1 Jury question two read as follows: Do you find that the following writings as shown in the Plaintiff's Exhibits listed below constituted an agreement whereby the 3,800 acres purchased by Frank Alattar, trustee, was for the benefit of the Gates Bluebonnet Hills Limited Partnership? [list of six Plaintiff's exhibits] The jury answered "Yes." 2 The judgment was for damages of \$2,445,300.

Ganim has not complained of the amount of damages awarded. 3 Even if there had been evidence of an express trust, a question concerning its existence was not requested or submitted to the jury. Under such circumstances the existence of an express trust as a ground of defense or recovery was waived unless the evidence was conclusive on the question. Tex. R. Civ.

P. 279.