IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

IN RE:	§	
	§	
KENNETH DEAN LAW and	§	Case No. 00-60796
LaVETA MARIE LAW	§	
	§	
Debtors	§	Chapter 7
BOB ANDERSON, Trustee of the	§	
Chapter 7 Bankruptcy Estate of	§	
Kenneth Dean Law and	§	
LaVeta Marie Law	§	
	§	
Plaintiff	§	
	§	
v.	§	Adversary No. 01-6027
	§	
MORRIS R. McPETERS	§	
	§	
Defendant	§	

MEMORANDUM OF DECISION[1]

This matter came before the Court for trial of the complaint of the Chapter 7 Trustee, Bob Anderson ("Trustee"), through which he sought a declaratory judgment regarding the ownership of certain real property and avoidance of an unperfected lien allegedly held by the Defendant. Subsequent to the conclusion of the trial, the Court on July 1, 2002, ordered the parties to submit briefings relating to several questions of partnership law. Upon the receipt of such post-submission briefings, the Court took this matter under advisement. This memorandum of decision disposes of all issues pending before the Court.[2]

---

[1]This Memorandum of Decision is not designated for publication and shall not be considered as precedent, except under the respective doctrines of claim preclusion, issue preclusion, the law of the case or as to other evidentiary doctrines applicable to the specific parties in this proceeding.

[2] This Court has jurisdiction to consider the complaint pursuant to 28 U.S.C. §1334 and 28 U.S.C. §157(a). The Court has the authority to enter a final judgment in this adversary proceeding since it constitutes a core proceeding as contemplated by 28 U.S.C. §157(b)(2)(A), (B), and (O).

24

Factual And Procedural Background

The parties stipulated to most of the pertinent facts in this dispute. Kenneth and LaVeta Law ("Debtors") and Morris McPeters ("Defendant") are cousins and were long-time friends. In 1995, they decided to begin a business to be known as the "Big Tex Marina" on Lake Fork in Wood County, Texas. No written agreement was ever executed between the parties; however, the parties orally agreed that the Debtors would be responsible for building the marina and for its subsequent operation. The Defendant's main responsibility in this endeavor was to contribute or obtain the financial resources necessary to acquire a suitable location for the marina and to finance its construction. In furtherance of this agreement, a tract of land located at Lake Fork (the "Property") was purchased by the Debtors and the Defendant on September 27, 1995, through the execution of vendor's liens to the two sellers. The named grantees in the deeds from the original sellers are "Kenneth Law and wife, LaVeta Law and Morris R. McPeters."[3] In that original transaction, the Debtors paid $500 in earnest money, in addition to $4,654.13 at closing, and the Defendant paid $10,000 at closing. The Defendant agreed to make all payments on the two vendor's liens until such time as the net cash flow from the "Big Tex Marina" was sufficient to reimburse the Defendant and to fund the subsequent note payments.

In March of 1996, the Defendant and Kenneth D. Law signed a promissory note payable to Wood County National Bank in the original amount of $77,000.00, secured by other real estate owned solely by the Defendant.[4] The proceeds of this loan were used to consolidate and satisfy the two prior vendor's liens, each in the amount of $24,567.83, and the remaining $26,507.84

---

[3] *See* Trustee's Ex. P-2 and P-3.

[4] *See* Trustee's Ex. P-10.

was deposited into a "construction account" at Wood County National Bank for use in constructing improvements on the Property. The Defendant again agreed to be responsible for making all payments due on the new Wood County National Bank Note until such time as the development of the Property generated sufficient income to fund the payments on said note.

Between August 21, 1995, and February 24, 1997, the Debtors advanced funds totaling $21,550.22 which were utilized for the construction of improvements to the Property, payments on the loan, and other financial obligations including the payment of property taxes and utility expenses. Some improvements were installed on the Property; however, disagreements between the Debtors and the Defendant eventually arose which resulted in the termination of their business arrangement. The Big Tex Marina was never built, no business was ever conducted, and only a few improvements were ever made to the Property. After the business arrangement between the Debtors and the Defendant collapsed, the Debtors sold some of the items of personal property acquired during the development process and retained all of the resulting proceeds. The Debtors' net cash contribution to the Big Tex Marina, after taking into account the amounts received from the sales of personal property, totaled approximately $9,315.22.[5]

On May 4, 2000, the Debtors filed a Chapter 13 petition, which was subsequently converted to a Chapter 7 case on November 30, 2000. The Defendant initially filed in that case a secured proof of claim for $111,483.56, but after the Trustee objected on various grounds, including the fact that most of the $111,483.56 indebtedness claimed by the Defendant was over four years old, the Defendant amended his proof of claim to reflect an unsecured claim for $41,000. The Defendant testified that this amount represents one-half of the amounts paid by the

---

[5] *See* Trustee's Ex. P-18 and P-19.

Defendant during the past four years for ad valorem taxes and for principal and interest due on the various notes on the Property.[6]

Discussion

Pursuant to TEX. REV. CIV. STAT. ANN. Art. 6132b-2.02(a), "an association of two or more persons to carry on a business for profit as owners creates a partnership, whether the persons intend to create a partnership and whether the association is called a 'partnership,' 'joint venture,' or other name." TEX. REV. CIV. STAT. ANN. Art. 6132b-2.03(a) then lists certain factors indicating the creation of a partnership,[7] while subsection (b) of Art. 6132b-2.03 lists those factors that do not, by themselves, necessarily indicate the creation of a partnership.[8] Much

---

[6] *See* Transcript of May 8, 2002, trial in adversary proceeding 01-6027, at p. 41 (hereafter, "Transcript at __").

[7] Factors indicating that persons have created a partnership include their:

(1) receipt or right to receive a share of the profits of the business;
(2) expression of an intent to be partners in the business;
(3) participation or right to participate in control of the business;
(4) sharing or agreeing to share:
    (A) losses of the business; or
    (B) liability for claims by third parties against the business; and
(5) contributing or agreeing to contribute money or property to the business.

[8] One of the following circumstances, by itself, does not indicate that a person is a partner in the business:

(1) the receipt of right to receive a share of profits:
    (A) as repayment of a debt, by installments or otherwise;
    (B) as payment of wages or other compensation to an employee or independent contractor; . . .
    (E) as payment of interest or other charge on a loan, regardless of whether the amount of payment varies with the profits of the business, and including a direct or indirect present or future ownership interest in collateral or rights to income, proceeds, or increasing value derived from collateral; . . .

(2) co-ownership of property, whether in the form of joint tenancy, tenancy in common, tenancy by the entireties, joint property, community property, or part

of the evidence adduced at the May 8, 2002, trial before the Court might lead one to conclude that a partnership existed between the Debtors and the Defendant under the Texas Revised Partnership Act ("TRPA") as to the Big Tex Marina venture.[9] However, neither party, including the party that might have benefitted from a partnership finding, pled the issue of partnership; nor does the term "partnership" appear in the pre-trial order; nor was the partnership issue ever raised at trial by consent or through a trial amendment so as to put any party on notice that this theory was being placed in issue. Consequently, the partnership issue has been waived. *Nesmith v. Berger*, 64 S.W.3d 110, 117-18 (Tex.App. — Austin 2001, pet. denied) ["In our review of the record, we find that (the plaintiff) never asserted to the trial court that the property was owned by a partnership. At best, he referred to the document as the 'partnership agreement,' but he did not advance the *legal argument* he asserts here. The argument, therefore, is waived."] (emphasis added); *Everett v. I-Net, Inc.*, 1990 WL 41953, *3 (4th Cir. 1990) [finding that the plaintiff "waived his partnership theory prior to trial" because he failed to inform the court of the proper theory of his case or the relief he was seeking, and because his closing argument failed to aver that he was entitled to recover under a partnership theory]; *see generally Wesco Manufacturing, Inc. v. Tropical Attraction sf Palm Beach, Inc.*, 833 F.2d 1484, 1487 (11th Cir. 1987) [reversing trial court finding that the primary shareholder was personally liable because the primary shareholder's liability for the debt "was not at issue" and was not supported in the pleadings]; *In*

---

ownership, whether combined with sharing of profits from the property;

(3) sharing or having a right to share gross returns or revenues, regardless of whether the persons sharing the gross returns or revenues have a common or joint interest in the property from which the returns or revenues are derived.

[9] *See* TEX. REV. CIV. STAT. ANN. Art. 6132b-1.01 to 6132b-11.04, made applicable to all partnerships "after December 31, 1998," by TEX. REV. CIV. STAT. ANN. Art. 6132b-11.03(c).

re Kanak, 85 B.R. 483, 488 (Bankr. N.D. Ill. 1988) ["However, when a plaintiff proposes under Rule 15(b) Fed. R. Civ. P. to amend pleadings to present an issue tried by 'implied consent,' even though that issue is relevant to a separate issue already present in the case, it would be unjust to the opposing party to consider a new theory of recovery after trial is complete. Where evidence claimed to show that an issue was tried by consent is relevant, as here, to an issue already in the case, and there was no indication when the evidence was offered that the plaintiff intended to raise a new issue or theory of recovery, amendment may be denied in the discretion of the trial court."] (citations omitted); *Dubinsky Realty Co. v. Lortz*, 129 F.2d 669, 673 (8th Cir. 1942) ["It is elemental that a party who has sued upon one cause of action may not recover upon another and different one."]; *C. C. Roddy, Inc. v. Carlisle*, 391 S.W.2d 765, 768 (Tex. Civ. App. — Ft. Worth 1965, writ ref'd n.r.e.) ["Partnership or joint adventure by estoppel must be specially pleaded and the burden of proof is upon the party so alleging."]; *Worth Steel Corp. v. Gartman*, 361 S.W.2d 426, 431 (Tex. Civ. App. — Ft. Worth 1962, writ ref'd n.r.e.) ["A defendant necessarily goes to trial on the case (the) plaintiff has alleged against him as well as upon the theory under which he defends."]; *Texas Emp. Ins. Ass'n v. Dillingham*, 262 S.W.2d 748, 752-53 (Tex. Civ. App. — Ft. Worth 1953, writ ref'd n.r.e.) ["A defendant necessarily goes to trial on the theory of recovery posed by the plaintiff's pleading, and is presumed to have prepared a defense accordingly. He may not be compelled to defend against a theory of recovery as to which he has no prior notice."].

These cases all comport with the holding in *Jiminez v. Tuna Vessel Granada*, 652 F.2d 415 (5th Cir. 1981). In *Jiminez*, the plaintiff filed suit demanding recovery for back injuries he allegedly suffered aboard the defendant vessel. The plaintiff's pleadings generally alleged

unseaworthiness, but his sole theory of recovery, as set forth in the pre-trial order submitted to the court, was that "his injury was caused solely by catching his hand in the net when the navigator reversed the power block pulling it in, snatching him high in the air and then dropping him precipitately." *Id.* at 417. After the trial, the trial judge filed a minute entry, "Reasons for Judgment," in which he expressly rejected the plaintiff's sole theory of recovery. However, despite this rejection, the trial judge proceeded to rule for the plaintiff by finding the defendant vessel to be unseaworthy on other grounds neither set forth in the plaintiff's pleadings nor raised in the pre-trial order. *Id.* at 418. After the entry of this judgment, the defendant moved for a new trial, but the trial court denied this motion after concluding that the "Defendant's failure to prepare to defend on such an obvious danger is no reason for a new trial." *Id.* at 420.

On appeal, the Fifth Circuit first discussed the "free amendment" features of FED. R. CIV. P. 15, and then declared that:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. So we avoid a parsing of the pleadings by the losing party in hopes that some issue, patently tried out with the knowledge of all, was not raised in them. *The coin has another side, however; each party is entitled to know what is being tried. . . . Notice remains a first-reader element of procedural due process, and trial by ambush is no more favored here than elsewhere.*

Jiminez, 652 F.2d at 420 (emphasis added).

Finding that the pre-trial order failed to allege unseaworthiness based upon the weather or upon the "condition or nature of the net and cork pile itself," and that these issues were clearly not tried by the express consent of the parties, the Fifth Circuit concluded in *Jiminez* that the only means by which these grounds could constitute the basis of the trial court's judgment in favor of

the plaintiff was if the parties had impliedly consented to try these issues. 652 F.2d at 420-21 [stating that if these new grounds of unseaworthiness "are to stand as a foundation for the judgment, it must be on the basis of an implied consent to try unpleaded issues"]; *see also* FED. R. CIV. P. 15(b) ["When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment."]. After discussing implied consent, the Fifth Circuit finally concluded that the trial court had "abused its discretion in determining that the unpled issues on which it decided against the [defendant] were tried by its implied consent." *Jiminez*, 652 F.2d at 421 [finding that if "evidence is introduced that is relevant to an issue already in the case and there is no indication that the party who introduced the evidence was seeking to raise a new issue," the other party cannot be deemed to have tried such new issue by implied consent] (*citing International Harvester Credit v. East Coast Truck*, 547 F.2d 888, 890 (5th Cir. 1977) *and Bettes v. Stonewall Ins. Co.*, 480 F.2d 92, 94-95 (5th Cir. 1973)); *see also* 6A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE §1493 (2d ed. 1990) [stating that implied consent is "difficult to establish and seems to depend on whether the parties recognized that an issue not presented by the pleadings entered the case at trial. If they do not, there is no consent and the amendment (of the pleadings under Rule 15) cannot be allowed"].

Similarly, the unpled partnership issue in the present case was not mentioned in the Agreed Pre-Trial Order submitted by the parties on May 8, 2002, nor was the word "partnership" ever mentioned during the hearing on this matter, except for a brief discourse near the end of the

parties' closing arguments when the Court questioned the parties on the issue. The parties certainly did not try the partnership theory by express consent, nor is the Court convinced that this issue was tried by implied consent. All of the evidence submitted to the Court was arguably relevant to the theories proposed by the parties and actually pled in this case. Neither party advanced any argument that the business entered into by the parties constituted a partnership, and in fact both parties expressly denied that the business was a partnership when the Court raised the issue *sua sponte*.[10] Therefore, the Court concludes that this issue was not tried by consent; and accordingly, the parties have waived any argument that the agreement between the Debtors and the Defendant created a partnership under Texas law.

The Court must now turn to the issues which actually were presented by the parties at the hearing. The Court's first task is to determine the Estate's interest in the Property. The Trustee argues that the bankruptcy estate is entitled to an undivided one-half interest in the Property based upon the presumption of co-ownership set forth in *Zephyr v. Zephyr*, 679 S.W.2d 553, 556 (Tex. App. — Houston [14th Dist.] 1984, writ ref'd n.r.e.). The Defendant contends, however, that the Estate's ownership interest in the Property is calculated as a fraction by adding the amount paid by the Debtors at closing and one-half of any amount claimed by Wood County National Bank as the numerator and by using the purchase price of $65,000 as the denominator. Under the facts as adduced from the evidence and testimony at the hearing, the Estate is entitled to an undivided one-half interest in the Property.

Zephyr sets forth the general rule that a deed to more than one grantee causes each grantee to receive an equal undivided interest in the property. 679 S.W.2d at 556; *Bray v. Clark*,

---

[10] *See* Transcript at 102-05.

9 S.W.2d 203, 205 (Tex. Civ. App. — Waco 1928, writ dism'd). This presumption can be overcome, however, by a showing that the grantees did not furnish consideration in equal amounts. *Zephyr*, 679 S.W.2d at 556; *see also In re Marriage of Murray*, 15 S.W.3d 202, 205-06 (Tex. App. — Texarkana 2000, no pet. history) ["The deed to the Pineview property named Murray and Butaud as grantees. Thus, they were each presumptively vested with title to an undivided one-half interest in the property. For Butaud to establish more than a one-half interest in the property, she had the burden to prove that she contributed a greater amount to the purchase price. Butaud would then own that percentage of the property that is proportional to the amount she contributed to the total purchase price."].

In the present case, it is undisputed that the original notes were signed by both Debtors and by the Defendant, and that the grantees under the original deeds from the Boyces and the Alberts were "Kenneth Law and wife, LaVeta Law and Morris R. McPeters."[11] Furthermore, both the Defendant and Debtor Kenneth D. Law signed the promissory note from Wood County National Bank on March 27, 1996. The makers of this note were "Morris Ray McPeters and Kenneth D. Law."[12] Accordingly, the *Zephyr* presumption applies to give the parties an equal ownership interest in the Property,[13] unless the Defendant has presented sufficient evidence to rebut the presumption of equal ownership.

---

[11] *See* Trustee's Ex. P-2 and P-3.

[12] *See* Trustee's Ex. P-10.

[13] Although the original Boyce deed and the Albert deed both could arguably give a one-third undivided interest to each of the three parties listed as a grantee, neither the Debtors nor the Trustee have produced any testimony or evidence alleging that the Estate's interest in the Property is an undivided two-thirds interest. In fact, the Trustee expressly disclaimed any such argument by his oral statement to the Court. Accordingly, the Court will only consider the Estate's claim to an undivided one-half interest.

In *Zephyr*, the Court was faced with a situation where two parties, purportedly having entered into a common-law marriage, had purchased property through a deed that listed both parties as grantees. 679 S.W.2d at 556. After stating the rebuttable presumption that each of the grantees is "vested with title to an equal undivided interest in the property," the court discussed the appellee's attempt to overcome the presumption of equal ownership in the property:

> Appellee attempts to rebut this presumption with evidence that 1) appellant did not sign the earnest money contract; 2) the earnest money paid came from appellee's tax refund; and 3) that appellant and appellee qualified for the Veteran's Administration loan for the purchase money on the basis of appellee's military service.

Id. at 557.

In finding this evidence to be insufficient to "overcome the basic presumption," the *Zephyr* Court relied heavily on the fact that both parties were liable on the note in concluding that the trial court had erroneously divested the appellant of her equal one-half undivided interest in the property. *Id.* ["The deed of trust securing the loan was executed by both appellant and appellee. . . . As appellant and appellee shared joint liability on the promissory note secured by the deed of trust, *we deem appellant and appellee to have furnished the consideration for the . . . property in equal proportions.* We therefore conclude that appellant and appellee as co-grantees in the deed each own an equal undivided interest in the . . . property."] (emphasis added).

In the present case, the Defendant attempted to rebut *Zephyr's* presumption of equal ownership by demonstrating that he had paid $10,000 at closing, while the Debtors paid only $4,654.13 plus an additional $500 in earnest money. Furthermore, the Defendant testified that he has paid the ad valorem taxes on the Property and has also paid every monthly payment on the

notes.[14] The Debtors admit that the Defendant paid more than they did at closing, and that Defendant has paid all the monthly note payments on both the original Boyce and Albert notes and the Wood County National Bank note. Likewise, it is undisputed that the principal balance on the Wood County National Bank loan has decreased from $77,000 to roughly $13,500[15] due to such payments by the Defendant.[16] The Debtors, while agreeing that they have not made any payments on any of the notes, do assert that they spent much time and incurred considerable expense in attempting to develop the marina. The Debtors' estimate that they spent roughly $30,707 on the Property,[17] but then sold some personal property located on the Property, allowing them to recoup roughly $21,400 of their expenses.[18]

Despite the evidence presented by the Defendant, it is clear that he has not overcome his burden of rebutting the equal-ownership presumption. First, although the Defendant did pay approximately twice the amount paid by the Debtors at closing, the Debtors testified that they contributed vast amounts of time and energy into preparing the Property for development. Perhaps of greater significance is the fact that the Debtors remained jointly liable for each note

---

[14] As evidenced by the Defendant's Amended Proof of Claim and his testimony at the hearing, the Defendant has paid approximately $82,000 for principal, interest, and taxes on the Property during the applicable four-year statute of limitations period, and the Defendant claims one-half of this amount, or $41,000, on his Amended Proof of Claim.

[15] *See* Defendant's Ex. A.

[16] Both the Defendant and the Debtors are liable for this loan, but the only security for such indebtedness is separate property owned by the Defendant and put up as collateral for this loan.

[17] *See* Trustee's Ex. P-19.

[18] *See* Trustee's Ex. P-18 (showing net expenditures of $9,315.22).

executed by the parties.[19] This factor was heavily relied upon by the *Zephyr* Court in its holding that the presumption of equal ownership had not been rebutted despite the fact that the appellant in *Zephyr* never signed the earnest money contract nor paid any earnest money on the contract. 679 S.W.2d at 557 ["As appellant and appellee shared joint liability on the promissory note secured by the deed of trust, we deem appellant and appellee to have furnished consideration for the Galena park property in equal proportions."]. Furthermore, it was always the intention and the agreement of the parties in the current dispute that the Defendant would make all payments on the notes until such time as the Property began producing sufficient income to make such payments. It certainly was not the agreement nor the intention of the parties for the Defendant to adhere to their agreement by making the monthly loan payments while simultaneously diminishing the Debtors' one-half interest in the Property each time such a payment was made.[20] Such a "silent, shifting equitable interest" in the Property cannot be endorsed by the Court, and consequently the Defendant's argument must fail. The Defendant voluntarily chose to enter into this business arrangement with the Debtors, and the Defendant agreed to make all monthly mortgage payments on the Property until such time as the Big Tex Marina would generate sufficient income to make such payments. While the Defendant testified that he had only agreed to make such payments for a one-year period before being reimbursed, he also acknowledged that the only source for reimbursement of such payments was from the income to be generated by the

---

[19] The Court recognizes that only Kenneth Law and Morris McPeters executed the promissory note payable to Wood County National Bank; LaVeta Law was not a party to this note.

[20] In all fairness, it must be acknowledged that it was not the agreement nor the intention of the parties for the Debtors to seek a discharge of any indebtedness which they might eventually owe to the Defendant. However, the obligations assumed by any party to a business transaction are subject to the rights and remedies afforded by the Bankruptcy Code and the availability of such relief cannot properly alter the legal analysis of these circumstances.

operation of the proposed business.[21] Such evidence proffered by the Defendant is insufficient to rebut the presumption of equal ownership of the property, and accordingly, the Estate is entitled to a one-half undivided interest in the Property.

Turning now to the Trustee's objection to the Defendant's Amended Proof of Claim in the unsecured amount of $41,000,[22] the Trustee offers several theories as to why the Defendant holds no right to reimbursement arising from his business association with the Debtors including: (1) that the Defendant's proof of claim failed to include adequate documentation evidencing the claim; (2) that the parties had agreed that the Defendant would pay the various loans until such time as the "Big Tex Marina" could do so; (3) that much of the Defendant's claimed right of reimbursement is based upon expenses not yet paid; and (4) that all or a part of the claim for reimbursement was more than four years old at the time of the filing of the Chapter 7 petition. After reviewing the evidence and testimony presented by the parties on this issue, as well as the applicable legal authorities, the Trustee's Objection to the Defendant's Amended Proof of Claim must be denied.

Initially, the Trustee argues that the Defendant's proof of claim is invalid because it fails to set forth sufficient facts and documentation to support the claim. This argument, however, is erroneous. In *In re Stoecker*, 5 F.3d 1022 (7th Cir. 1993), the Seventh Circuit dealt with an objection to a proof of claim based upon the failure of such claim to include proper documentation as required by FED. R. BANKR. P. 3001. 5 F.3d at 1025. The Seventh Circuit

---

[21] *See* Transcript at 36.

[22] Several of the issues raised by the Trustee's original Objection to Proof of Claim of Morris Ray McPeters, filed on February 4, 2002, were corrected by the Defendant when he subsequently filed his Amended Proof of Claim on February 19, 2002.

found that the failure to submit documentation as required under Rule 3001 merely prevented the creditor from resting on the prima facie validity of the proof of claim, but that it did not invalidate the claim altogether. *Id.* at 1027-28. ["If the documentation is missing, the creditor cannot rest on the proof of claim. It does not follow that he is forever barred from establishing the claim."]; *see also California v. Los Angeles Int'l Airport Hotel Assoc. (In re Los Angeles Int'l Airport Hotel Assoc.)*, 196 B.R. 134, 139 (B.A.P. 9th Cir. 1996) ["The failure to attach such a writing, when required, does not automatically invalidate the claim; it does, however, deprive the claim of prima facie validity under Rule 3001(f)."]; *In re Immerfall*, 216 B.R. 269, 272 (Bankr. D. Minn. 1998) ["Compliance with this Rule enables the proof of claim to achieve the status provided in Fed.R.Bankr.P. 3001(f). Failure to provide the supporting writing deprives the proof of claim of this evidentiary status."] (citations omitted). Moreover, the Trustee's objection to the Defendant's proof of claim was heard in the context of a fully-contested adversary proceeding. If the Trustee wished to request additional documentation from the Defendant regarding the calculation of the amount reflected in the Defendant's amended proof of claim, he had ample opportunity to do so during the course of discovery relating to this adversary proceeding. In fact, documentation evidencing the three promissory notes executed by the Defendant and the Debtors[23] was attached to the Defendant's amended proof of claim, along with a statement by the Defendant that "[p]roof of payments made by Claimant are available, but are too voluminous to attach to this Proof of Claim. Copies can be made available upon request."[24] Consequently, the Trustee's first argument fails.

---

[23] *See supra* note 19.

[24] *See* Trustee's Ex. P-27 — Addendum.

Likewise, the other arguments raised by the Trustee against the allowance of the Defendant's amended proof of claim are equally unpersuasive. "As a general proposition, a cotenant who pays more than his share of a debt secured by a mortgage or other lien on the common property, or who makes an outlay for necessary or proper preservation thereof is entitled to reimbursement from his co-tenants to the extent to which he paid their share of the indebtedness. *Wooley v. West*, 391 S.W.2d 157, 160 (Tex. Civ. App. — Tyler 1965, writ ref'd n.r.e.); *see also Siegler v. Ginther*, 680 S.W.2d 886, 890 (Tex. Civ. App. — Houston [1st Dist.] 1984, no writ) ["(T)he paying co-maker (of a note) has a cause of action against the nonpaying co-maker based on an implied promise to reimburse the paying co-maker for his share of their joint and several liability. *Caldwell v. Stevenson,* 567 S.W.2d 278 (Tex. Civ. App. — Austin 1978, no writ); *Dittberner v. Bell,* 558 S.W.2d 527, 534 (Tex. Civ. App. — Amarillo 1977, writ ref'd n.r.e.); *Charles v. Charles,* 478 S.W.2d 133 (Tex. Civ. App. — Dallas 1972, writ ref'd n.r.e.)."]; *Nelms v. Chazanow*, 404 S.W.2d 359, 362 (Tex. Civ. App. — Houston [1st Dist.] 1966, no writ) ["The law is well settled in this State that each joint obligor in a contract is liable to the other for contribution to indemnify him for any payments made in excess of his pro-rata share. The joint obligor making such payment in excess of his share has a right of action upon the implied promise of the other joint obligor for reimbursement."].

The Trustee appears to accept this general rule, but then argues that the agreement between the Defendant and the Debtors that the Defendant would be responsible for making all payments on the notes until such time as the business could generate sufficient income to take over these payments prevented the Debtors from having any reimbursement or contribution liability to the Defendant. Hence, the Trustee essentially claims that the successful construction,

operation, and profit-generation of the Big Tex Marina was a condition precedent to the Debtors' liability to reimburse the Defendant, and that the Defendant is absolutely precluded from bringing his claim for reimbursement because such condition never occurred. This argument by the Trustee is again unpersuasive.

Texas courts have defined "conditions precedent" as "those acts or events, which occur subsequently to the making of a contract, that must occur before there is a right to immediate performance and before there is a breach of contractual duty." *See II Deerfield Limited Partnership v. Henry Building, Inc.*, 41 S.W.3d 259, 264 (Tex. Civ. App. — San Antonio 2001, pet. denied). Courts do not favor conditions precedent because of their harshness when applied, and courts are therefore inclined to construe the provisions in a contract as covenants rather than as conditions. *Deerfield Limited*, 41 S.W.3d at 265; *see also Criswell*, 792 S.W.2d at 948; *Reilly v. Ranger Mgmt., Inc.*, 727 S.W.2d 527, 530 (Tex. 1987); *Hohenberg Bros.*, 537 S.W.2d at 3; *Longton v. Longton*, 2001 WL 1422344, *5 (Tex. Civ. App. — Austin 2001, pet. denied). In order to determine whether a condition precedent exists, the intention of the parties must be ascertained by looking at the entire contract. *See Criswell v. European Crossroads Shopping Ctr., Ltd.*, 792 S.W.2d 945, 948 (Tex. 1990). "While no particular words are necessary for the existence of a condition, such terms as 'if,' 'provided that,' 'on condition that,' or some other phrase that conditions performance, usually connote an intent for a condition rather than a promise." *Deerfield Limited*, 41 S.W.3d at 264-65; *see also Criswell*, 792 S.W.2d at 948. "If no such language is used, the terms will be construed as a covenant in order to prevent a forfeiture. While there is no requirement that such phrases be utilized, their absence is probative of the parties' intention that a promise be made, rather than a condition imposed." *Criswell*, 792

S.W.2d at 948 (*citing Hohenberg Bros. Co. v. George E. Gibbons & Co.,* 537 S.W.2d 1, 3 (Tex.1976)). More importantly, "[w]hen the intent of the parties is unclear or when construing a provision as a condition would impose an absurd or impossible result, the agreement will be interpreted as creating a covenant instead of a condition." *Longton,* 2001 WL 1422344 at *5 (*citing Criswell,* 792 S .W.2d at 948; *Hohenberg Bros. Co.,* 537 S.W.2d at 3).

Under these guidelines, it is clear that the provision of the parties' oral contract requiring the Defendant to look to the Big Tex Marina for reimbursement of his note payments was not a "condition." Because the parties in the present case had no written contract, there was certainly no words of limitation actually utilized in any written document. Thus, relying upon the evidence presented at the trial in its attempt to glean the intentions of the parties, the Court finds that the evidence falls far short of establishing that the parties intended for this repayment agreement to be a condition precedent. At trial, both parties testified that they never actually discussed how the Defendant would be repaid if the Big Tex Marina was not built.[25] It appears from the evidence that the Defendant's agreement to forbear enforcement of his right to reimbursement from the co-makers on the various notes cannot even be properly described as a "covenant," but rather as a simple gesture of goodwill by the Defendant based upon the realization, as clearly established by the trial testimony, that the Debtors would have no ability to pay until the marina began operating. However, regardless of whether one might conclude that the Defendant's forbearance should be characterized as a contractual covenant from which the Defendant would be excused from performing following the breach of contract by the Debtors, *see, e.g., Glass v. Anderson,* 596 S.W.2d 507, 511 (Tex. 1980); *Hampton v. Minton,* 785 S.W.2d

---

[25] *See* Transcript at 19, 66.

854, 857-58 (Tex. App. — Austin 1990, writ denied); *Conner v. Lavaca Hosp. Dist.,* 267 F.3d 426, 436 (5th Cir. 2001); and *generally* RESTATEMENT (SECOND) OF CONTRACTS §§ 235-49 (1981), or whether, as the Court surmises, that the forbearance agreement should be properly viewed as merely a gesture of goodwill from one relative to another, the one certainty arising from the evidence in this circumstance, particularly in light of the directive that conditions are strongly disfavored in contract interpretation, *see, e.g., Deerfield Limited,* 41 S.W.3d at 265; *Reilly,* 727 S.W.2d at 530, is that the Defendant's forbearance cannot be properly characterized as a condition. As such, the Defendant is not precluded from asserting his unsecured proof of claim in the Debtors' bankruptcy based upon his right to reimbursement from the Debtors.

Accordingly, upon the basis of the evidence presented, the Court concludes that judgment should be entered in favor of the Plaintiff-Trustee, Bob Anderson, that the Chapter 7 Bankruptcy Estate of Kenneth Dean Law and LaVeta Marie Law owns a one-half undivided interest in the subject property, along with the Defendant, Morris R. McPeters. The Court further concludes that the Trustee's Objection to the Defendant's Amended Proof of Claim must be denied and that the unsecured claim of Morris R. McPeters will be allowed in the amount of $41,000.

This memorandum of decision constitutes the Court's findings of fact and conclusions of law[26] pursuant to Fed. R. Civ. P. 52, as incorporated into adversary proceedings in bankruptcy cases by Fed. R. Bankr. P. 7052. An appropriate judgment and claim objection order will be entered which is consistent with this opinion.

---

[26] To the extent that any finding of fact is construed to be a conclusion of law, it is hereby adopted as such. To the extent any conclusion of law is construed to be a finding of fact, it is hereby adopted as such. The Court reserves the right to make additional findings and conclusions as necessary or as may be requested by any party.

SIGNED: SEP 3 0 2002.

BILL PARKER
UNITED STATES BANKRUPTCY JUDGE

cc: **Scott Ritcheson, Atty. for Trustee** **Fax: 533-8646**
Mike Gazette, Atty. for Defendant **Fax: 596-9922**

HP LaserJet 3100
Printer/Fax/Copier/Scanner

AD HOC BROADCAST REPORT for
TEXB Case Admin
903 590 1223
Sep-30-02 1:43PM

Job	Phone Number	Start Time	Pages	Mode	Status
559	9,5338646	9/30 1:32PM	21/21	BC	Completed
559	9,5969922	9/30 1:38PM	21/21	BC	Completed

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TEXAS
200 E. Ferguson, 2nd Floor
Tyler, Texas 75702
Voice:(903)590-1212 FAX:(903)590-1223

FAX COVER SHEET

To:	From: Neil J
Fax #:	Pages to follow: 20

Scott Ritcheson 533-8646

Mike Gazette 596-9922