Texas Supreme Court Holds That Parties Can Conclusively Agree That, As Between Themselves, No Partnership Will Exist Unless Certain Conditions Are Satisfied

Article By
David Fowler Johnson
Winstead
Texas Fiduciary Litigator

- Constitutional Law
- Corporate & Business Organizations
- Litigation / Trial Practice
- Texas

Wednesday, February 5, 2020

In Energy Transfer Partners, L.P. v. Enter. Prods. Partners, L.P., one pipeline company sued another for breaching a duty of loyalty that allegedly arose out of a partnership to develop a pipeline. No. 17-0862, 2020 Tex. LEXIS 46 (Tex. January 31, 2020). One company decided to no longer work with the other and developed the project with other parties. The company that was left out of the project sued. The jury answered “yes” to the question of whether the parties had created a partnership to market and pursue a pipeline project and found that the defendant company had not complied with its duty of loyalty. The jury found that $319,375,000 would compensate the plaintiff for its damages and that the value to the defendant of the benefit gained as a result of its misconduct was $595,257,433. The trial court reduced the disgorgement award to $150 million and otherwise rendered judgment on the verdict for the plaintiff for a total of $535,794,777.40 plus post-judgment interest. The court of appeals reversed and rendered for the defendant, holding that the parties had not created a partnership. The plaintiff appealed to the Texas Supreme Court.
The Texas Supreme Court first reviewed the Texas statutes that discuss the creation of a partnership. The Court stated:

Section 152.051(b) of the TBOC states that “an association of two or more persons to carry on a business for profit as owners creates a partnership, regardless of whether: (1) the persons intend to create a partnership; or (2) the association is called a ‘partnership,’ ‘joint venture,’ or other name.” Under § 152.052(a), factors indicating that persons have created a partnership include the persons’: (1) receipt or right to receive a share of 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) agreement to share or sharing: (A) losses of the business; or (B) liability for claims by third parties against the business; and (5) agreement to contribute or contributing money or property to the business. Section 152.003 provides that “[t]he principles of law and equity and the other partnership provisions supplement this chapter unless otherwise provided by this chapter or the other partnership provisions.”

The Court held that it had never squarely addressed whether parties’ freedom to contract for conditions precedent to partnership formation can override the statutory default test, in which intent is a mere factor.

The Court held that an agreement not to be partners unless certain conditions are met would ordinarily be conclusive on the issue of partnership formation as between the parties. However, the Court also noted: “Performance of a condition precedent, however, can be waived or modified by the party to whom the obligation was due by word or deed.” The Court did not have to address the exception to the rule, however, because it agreed with the court of appeals that the plaintiff had waived the issue as it was required either to obtain a jury finding on waiver or to prove it conclusively, and it had done neither.

The Court then provided guidance on what evidence a court should look at in determining the intent to form a partnership:

Courts should only consider evidence not specifically probative of the other factors. In other words, evidence of profit or loss sharing, control, or contribution of money or property should not be considered evidence of an expression of intent to be partners. Otherwise, all evidence could be an “expression” of the parties’ intent, making the intent factor a catch-all for evidence of any of the factors, and the separate “expression of intent” inquiry would be eviscerated. Similarly, where waiver of a condition precedent to partnership formation is at issue, only evidence directly tied to the condition precedent is relevant. Evidence that would be probative of expression of intent under § 152.051(a)—such as “the parties’ statements that they are partners, one party holding the other party out as a partner on the business’s letterhead or name plate, or in a signed partnership agreement”—is not relevant. Nor is evidence that would be probative of any of the other § 152.052(a) factors. Otherwise, a party in ETP’s position could claim waiver in virtually every case.

The Court held that it had never squarely addressed whether parties’ freedom to contract for conditions precedent to partnership formation can override the statutory default test, in which intent is a mere factor.

The Court held that an agreement not to be partners unless certain conditions are met would ordinarily be conclusive on the issue of partnership formation as between the parties. However, the Court also noted: “Performance of a condition precedent, however, can be waived or modified by the party to whom the obligation was due by word or deed.” The Court did not have to address the exception to the rule, however, because it agreed with the court of appeals that the plaintiff had waived the issue as it was required either to obtain a jury finding on waiver or to prove it conclusively, and it had done neither.

The Court then provided guidance on what evidence a court should look at in determining the intent to form a partnership:

Courts should only consider evidence not specifically probative of the other factors. In other words, evidence of profit or loss sharing, control, or contribution of money or property should not be considered evidence of an expression of intent to be partners. Otherwise, all evidence could be an “expression” of the parties’ intent, making the intent factor a catch-all for evidence of any of the factors, and the separate “expression of intent” inquiry would be eviscerated. Similarly, where waiver of a condition precedent to partnership formation is at issue, only evidence directly tied to the condition precedent is relevant. Evidence that would be probative of expression of intent under § 152.051(a)—such as “the parties’ statements that they are partners, one party holding the other party out as a partner on the business’s letterhead or name plate, or in a signed partnership agreement”—is not relevant. Nor is evidence that would be probative of any of the other § 152.052(a) factors. Otherwise, a party in ETP’s position could claim waiver in virtually every case.

The Court held that it had never squarely addressed whether parties’ freedom to contract for conditions precedent to partnership formation can override the statutory default test, in which intent is a mere factor.

The Court held that an agreement not to be partners unless certain conditions are met would ordinarily be conclusive on the issue of partnership formation as between the parties. However, the Court also noted: “Performance of a condition precedent, however, can be waived or modified by the party to whom the obligation was due by word or deed.” The Court did not have to address the exception to the rule, however, because it agreed with the court of appeals that the plaintiff had waived the issue as it was required either to obtain a jury finding on waiver or to prove it conclusively, and it had done neither.

The Court then provided guidance on what evidence a court should look at in determining the intent to form a partnership:

Courts should only consider evidence not specifically probative of the other factors. In other words, evidence of profit or loss sharing, control, or contribution of money or property should not be considered evidence of an expression of intent to be partners. Otherwise, all evidence could be an “expression” of the parties’ intent, making the intent factor a catch-all for evidence of any of the factors, and the separate “expression of intent” inquiry would be eviscerated. Similarly, where waiver of a condition precedent to partnership formation is at issue, only evidence directly tied to the condition precedent is relevant. Evidence that would be probative of expression of intent under § 152.051(a)—such as “the parties’ statements that they are partners, one party holding the other party out as a partner on the business’s letterhead or name plate, or in a signed partnership agreement”—is not relevant. Nor is evidence that would be probative of any of the other § 152.052(a) factors. Otherwise, a party in ETP’s position could claim waiver in virtually every case.
ETP has not pointed to any evidence that Enterprise specifically disavowed the Letter Agreement’s requirement of definitive, board-of-directors-approved agreements or that Enterprise intentionally acted inconsistently with that requirement. ETP’s challenge to the court of appeals’ holding is premised on the argument we have already rejected that the effect of the conditions precedent in the Letter Agreement was subsumed in Question 1. The only record evidence that ETP points to—the parties held themselves out as partners and worked closely together on the Double E project—is not relevant to the issue of waiver of definitive, board-approved agreements.

*Id.* The Court concluded that because parties can conclusively negate the formation of a partnership through contractual conditions precedent, the evidence showed that the parties did so in this case and that there was no evidence that the defendant waived those conditions. The Court affirmed the court of appeals’s judgment for the defendant.

© 2020 Winstead PC.

**Source URL:** https://www.natlawreview.com/article/texas-supreme-court-holds-parties-can-conclusively-agree-between-themselves-no