NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 1294

SKYLINE MANAGEMENT, INC.

VERSUS

MARION A. ALLEN, INC., OF GEORGIA D/B/A THE ALLEN GROUP, MARION A. ALLEN, INC. OF LOUISIANA AND MARION A. ALLEN

DATE OF JUDGMENT: DEC 2 2 2010

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 99-14856, DIV. A, PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE RAYMOND S. CHILDRESS, JUDGE

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Defendants-Appellants
Marion A. Allen, Inc. of Georgia,
d/b/a the Allen Group and
Marion A. Allen

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BEFORE: KUHN, PETTIGREW, AND KLINE, JJ,[1]

Disposition: AFFIRMED.

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[1] The Honorable William F. Kline, Jr. is serving *pro tempore* by special appointment of the Louisiana Supreme Court.

KUHN, J.

Defendants-appellants, Marion A. Allen, Inc., of Georgia d/b/a the Allen Group (MAAG) and Marion A. Allen, individually, appeal the trial court's judgment awarding $968,540.50 plus interest and costs to Skyline Management, Inc. (Skyline) based on a finding that MAAG and Skyline had entered into a joint venture and that in addition to MAAG's corporate liability, Allen was personally liable for breach of the joint venture agreement. We affirm.

In 1992, Skyline, through its consultant Earl Krenning, and MAAG, through its insurance agent Allen, began development and sales of several national insurance products for Transport International Pool, Inc., General Electric Modular Space, and General Electric Capital Insurance Agency, all subsidiaries of General Electric Capital Corporation (collectively the GE Entities). The trial court concluded that through Krenning and Allen, Skyline and MAAG orally entered into a joint venture agreement for which a share of any commissions and profits derived from the products would be allocated between Skyline and MAAG.

After commencement of the parties' efforts to develop products for the GE Entities but prior to the joint venture agreement between Skyline and MAAG, Krenning was convicted, on October 31, 1992, on federal charges in conjunction with his ownership and operation of Sovereign Casualty and Fire Insurance (Sovereign). Krenning was sentenced in December 1993, and began serving a prison sentence in March 1995, while his appeal was pending. The trial court determined that Allen was well informed by Krenning of the federal indictment and his resulting legal problems but nevertheless entered into the joint venture with

Skyline on behalf of MAAG in March 1994, and began sending monthly payments of $5,000.00 to Skyline.

While Krenning served the federal prison sentence, James Farrell began working on the development and sales of insurance products to the GE Entities on behalf of Skyline. On July 13, 1995, in a letter to Krenning's wife, Allen advised Skyline that "the GE deal is not prospering" and that he did "not see much reason to believe it will be any better." Thus, he discontinued the monthly payments of $5,000.00. But in April 1995, MAAG had entered into agency agreements with American Southern Insurance Company to provide the insurance products developed by the joint venture, and in June 1995, MAAG formalized an agreement with the GE Entities for those products. The trial court concluded that Allen knew the products had, in fact, been developed and issued when he sent Mrs. Krenning the letter and that his misrepresentation in the letter to her was "illustrative of both [Allen's] flagrant disregard for the truth ... and his intent to deceive his venture partner."

Krenning was released from prison in March 1998. Krenning subsequently learned through an industry trade magazine, which featured a picture of Allen on the front cover, that Allen had become prosperous as a result of the products MAAG and Skyline had developed for the GE Entities. After Allen told Krenning in January 1999 that he could not and would not pay Skyline for its interest in the products, this lawsuit was filed. After a trial on the merits, the trial court ruled in favor of Skyline, awarding damages. Appellants do not challenge the quantum of the award but suggest the trial court erred in its conclusions that a legal joint venture existed and that Allen was personally liable to Skyline for damages.

Appellants initially assert that because the evidence established that the parties contemplated a signed written agreement and neither the proposal offered by Krenning nor that by Allen was signed, the trial court erred in finding a joint venture existed. They maintain that a signed written agreement was a "condition precedent" to the formation of a joint venture. They also claim that resolution of Krenning's legal troubles was another "condition precedent" to a joint venture between Skyline and MAAG.

The existence or nonexistence of a joint venture is a question of fact, although what constitutes a joint venture is a question of law. ***Judson v. Davis***, 2004-1699, p. 21 (La. App. 1st Cir. 6/29/05), 916 So.2d 1106, 1120, ***writ denied***, 2005-1998 (La. 2/10/06), 924 So.2d 167. This court reviews factual findings under the manifest error/clearly wrong standard. ***See Stobart v. State***, 617 So.2d 880, 882 (La.1993). And with questions of law, we simply determine whether the trial court was legally correct. ***See Sanders v. Pilley***, 96-0196, p. 5 (La. App. 1 Cir. 11/8/96), 684 So.2d 460, 463, ***writ denied***, 97-0352 (La. 3/21/97), 691 So.2d 90.

We find no error in the trial court's conclusion that a joint venture was formed between Skyline and MAAG when MAAG began paying Skyline monthly payments of $5,000.00 as advances on Krenning's interest in the products he developed on behalf of Skyline. La. C.C. art. 1927; ***see O'Glee v. Whitlow***, 32,955, p. 6 (La. App. 2d Cir. 4/7/00), 756 So.2d 1288, 1292 (where the parties substantially comply with an oral agreement, neither one can later back out on grounds that they failed to execute a writing); ***see also Breaux Bros. Constr. Co. v. Associated Contractors***, 226 La. 720, 728-29, 77 So.2d 17, 20 (La. 1954) (where there is a

complete verbal contract, and a subsequent agreement that it shall be reduced to writing, failure to carry out the subsequent agreement does not impair the contract).

The trial court found, and the evidence supports the factual finding, that the parties began performing despite Krenning's articulation of reducing the agreement to writing. And MAAG continued to pay Skyline those monthly payments although a written agreement was not finalized between the parties. Thus, the record supports the trial court's conclusion that a reduction of the agreement to writing was not a condition precedent of the joint venture.

While appellees maintain that "it was undisputed that Krenning was told in September 1994 that there could be no agreement until he resolved his legal difficulties," Krenning testified that he apprised Allen of his legal problems. According to Krenning, Allen knew that Sovereign had been shut down, that as a result Krenning was facing federal charges, and that he had actually been tried on those charges. Krenning stated that he sent Allen a copy of the federal indictment and kept him informed of the changes in his litigation, including the appeal. Documentary evidence included a letter that Allen personally wrote the federal court judge requesting leniency for Krenning in his sentence; and a copy of a motion to dismiss, faxed to Allen in November 1994 while MAAG continued to tender payments of $5,000.00, containing a reference to Krenning's earlier conviction. Thus, despite appellants' strong assertions to the contrary, the record supports a finding that the resolution of Krenning's legal problems was not a condition precedent to the joint venture. Accordingly, the trial court was not manifestly erroneous in concluding a joint venture existed between Skyline and MAAG.

Appellants next contend that the joint venture is void and unenforceable because it violates public policy. The gist of their contention is that Krenning could not receive insurance commissions through Skyline since he was an unlicensed convicted felon.

The parties agree that La. R.S. 22:1113D(1) was applicable to this case at the time the parties entered into the joint venture agreement, and that it provided in relevant part:

> No insurer, insurance agent, insurance broker, surplus lines insurance broker, or insurance solicitor shall pay, directly or indirectly, any commission, brokerage, or other valuable consideration to any person for services as an insurance agent, insurance broker, surplus lines insurance broker, or insurance solicitor within the state unless such person held a valid license during the period the services were rendered for that line of insurance as required by law for such services. No person other than a person duly licensed by the Department of Insurance as an insurance agent, insurance broker, surplus lines insurance broker, or insurance solicitor at the time such services were performed shall accept any such commission, brokerage, or other valuable consideration. **Any person duly licensed under this Part may pay his commissions or assign his commissions, or direct that his commissions be paid, to a partnership of which he is a partner, employee, or agent, or to a corporation of which he is an officer, employee, or agent.** This Subsection shall not prohibit payment or receipt of any renewal or other deferred commissions or by any person entitled thereto under this Section.[2] (Emphasis and footnote added.)

The trial court stated in its written reasons for judgment:

> While it is clear that the intent of the statute is to prohibit unlicensed agents from receiving commissions so as to protect the [policyholder], the statute contains an exception for partnerships. The court is of the opinion that both [Krenning] and [Allen] were aware of this exception, aware of the licensing laws, aware of the profit potential for the new insurance product[s], and aware of what each man needed from the other to make a success of the their joint venture.

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[2] La. R.S. 22:1113 was amended by La. Acts 1997, No. 1412, § 1, to eliminate the provisions applicable to this case permitting payment of commissions by any person duly licensed under this Part to a partnership of which he is a partner.

We find no error in these conclusions by the trial court. In light of the plain language of La. R.S. 22:1113D(1), contrary to appellants' contention, we find that public policy was not violated since MAAG was a duly licensed agent that directed a portion of its commissions be paid to the joint venture partnership between it and Skyline. The agreement, as determined by the trial court, was that for Krenning's consultant's fee, Skyline was to be paid a set amount of the commissions based on the total number of sales; and that contingency commissions (profits) were to be divided equally. Because of the provisions of La. R.S. 22:1113D(1), which permitted MAAG to direct payment of its commissions to the joint venture, there was no violation of public policy.

Additionally, we note that appellants claim that Skyline, which was owned by Krenning's children, was a subterfuge for Krenning, an unlicensed agent, to receive commissions he could not otherwise legally claim. Michael Manes was accepted as an expert in the field of insurance licensing with respect to whether an individual needs a license to solicit certain types of business and whether an agency needs a license to receive commissions. Manes explained that the products that Skyline and MAAG were venturing to develop and sell jointly were affinity group programs, which were designed to mass market insurance to a specific group of organizations, in this case, the GE Entities. The essence of an affinity program is to create products and services on a mass basis to meet the fairly uniformed needs of individuals within specific groups. The products developed allow for efficiency and effectiveness that benefits the end-users.

According to Manes, Skyline created a mechanism that made it easy for the end-user lessees of GE Entities' products to do business with the GE Entities. Thus,

in their joint venture, Skyline was the idea person and MAAG, with its agency background, industry reputation, and resources, was the service person who would implement the products. Manes specifically noted that Krenning and Skyline were not acting as producers or sales agents in the development of the products because they were not interacting directly with the end-user lessees. Based on the duties Krenning undertook as established by the documentary and testimonial evidence, Manes described them as "backroom functions," which he described as the development phase functions of an affinity group program. Krenning discussed development of the products with the various GE Entities parties but he was not involved in the ultimate negotiations with the end users who actually purchased policies. Manes opined that the reason an insurance license is required for individuals engaged in the sales of insurance is to regulate the person's conduct with the end user, i.e., to protect the ultimate consumer. Based on that opinion, Manes had no problem concluding that Skyline and Krenning acted only in consulting functions and, therefore, did not need licenses to act. Although the joint venture expressed compensation for Skyline's efforts in terms of the allocation of commissions between the partners, Manes explained how the payment was simply a consultant's fee.

Based on the expert testimony of Manes, we find no error in the trial court's conclusion that Skyline was not merely a subterfuge for Krenning to divert commissions he could not otherwise legally receive. The trial court implicitly found that the allocation of a portion of the joint venture partnership's commissions to Skyline was a consultant's fee. This factual finding, supported by the evidence, is not manifestly erroneous. And in light of the provisions of La. R.S. 22:1113D(1),

payment of its commissions by MAAG to the joint venture was not against public policy.

In the final challenge of the trial court's judgment, appellant Allen claims that the finding that he is personally liable for the damages resulting from MAAG's breach of the joint venture contract between MAAG and Skyline is erroneous.

Skyline introduced into evidence a letter written by Allen in July 1995 informing Skyline that the "GE deal" was not prospering, that he did not have any reason to believe it would be profitable, and that he was discontinuing monthly payments of $5,000.00 to Skyline. But the record establishes that as of June 1995, the requisite agreements were in place between MAAG and the GE Entities for the insurance products that the joint venture had developed. The trial court's finding that Allen misrepresented the status of the products for the GE Entities and intentionally deceived his joint venture partner when he wrote the letter and discontinued allocating a portion of the commissions and profits to Skyline as agreed to in March 1994 is supported by the evidence and, therefore, not clearly wrong.

We find no error in the trial court's legal conclusion that Allen is personally liable for his misrepresentation. ***See*** La. R.S. 12:95 (where fraud or deceit has been practiced on a third party by the shareholder acting through the corporation, the courts may disregard the corporate entity and impose personal liability for those debts upon the shareholder);[3] ***see also McDonough Marine Serv., a Div. of***

[3] Although Skyline did not identify fraud as an affirmative defense in its petition, it did specifically plead facts sufficient to give defendants, including Allen in his individual capacity, fair and adequate notice of the nature of this defense. ***See Hanks v. Wilson***, 93-0554, pp. 6-7 (La. App. 1st Cir. 3/11/94), 633 So.2d 1345, 1348; ***see also LaCross v. Cornerstone Christian Academy of Lafayette, Inc.***, 2004-341, p. 5 (La. App. 3d Cir. 12/15/04), 896 So.2d 105, 109, ***writ denied***, 2005-0128 (La. 3/24/05), 869 So.2d 1037.

Marmac Corp. v. Doucet, 95-2087, pp. 4-6 (La. App. 1st Cir. 6/28/96), 694 So.2d 305, 308.[4]

For these reasons, we affirm the trial court's judgment awarding damages in the amount of $968,540.50 plus interest and costs to Skyline against Marion A. Allen, Inc. of Georgia d/b/a the Allen Group and Marion Allen individually, severally and *in solido*. Appeal costs are assessed against defendants-appellants.

AFFIRMED.

(Continued . . .)

[4] Allen urges that a finding that he intentionally interfered with the joint venture agreement between MAAG and Skyline cannot be supported. Initially we note that we have found the judgment imposing personal liability is supported by the theories of veil-piercing and fraud, ***see*** 8 Glenn G. Morris & Wendell H. Holmes, ***Louisiana Civil Law Treatise Business Organizations*** § 33.13 (1999), and thus will not reverse that portion of the judgment. To the extent that the trial court specifically determined that Allen intentionally interfered with the joint venture agreement, jurisprudence from this circuit supports that conclusion. ***See WKG-TV Video Electronic College, Inc. v. Reynolds***, 618 So.2d 1023 (La. App. 1st Cir. 1993). Although Allen asserts that his actions of interfering were justified because as a shareholder of MAAG he had a duty under 18 U.S.C §1033 to terminate the joint venture agreement with a convicted felon, the contract existed between MAAG and Skyline, which was not a convicted felon. And while Skyline did not have an insurance agency license, the evidence established that both its president and employee Farrell did. Thus, the trial court did not err in imposing personal liability against Allen.