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Rulon R. West v. Terry R. West and Flora E. West : Appellant's Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

RULON R. WEST,
Plaintiff and Appellant,

vs.

TERRY R. WEST and FLORA E. WEST,
Defendants and Respondents.

Case No. 10251

APPELLANT'S REPLY BRIEF

Appeal From a Judgment of the Third District Court
For Salt Lake County
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PRELIMINARY STATEMENT

There is disagreement not only as to the correctness of the findings below, but also as to what those findings are.

Respondents allege that certain of appellant's arguments on appeal are "will-o'-the-wisps" and not issues. (Respondents' brief, p. 20). Any reflection thereby cast upon this writer's sense of relevancy is

tolerable, because of the satisfaction concurrently derived from the simplification of the case which the charge encourages.

Argument III of appellant's main brief challenged the correctness of "the court's finding that amounts awarded to defendants were 'by way of gift' . . ." Respondents have replied by contending that "[T]he court did not award by way of gift. . . "; that "While the parties clearly intended and believed that a gift had been made it is completely academic . . . whether a gift was made or not. . ."; that the decision below follows solely from a determination of the rights and obligations arising from contract law, and that any "gift talk" is relevant only to show "contract intent". (Respondents' brief pp. 20-21.)

The only reference in the findings of facts below to the intention and understanding of the parties in regard to the *effect* of the partnership and dissolution agreements is Finding of Fact No. 10, which reads:

> "That the parties and particularly plaintiff, Rulon, and defendant, Terry, intended and understood that the effect of the agreements whereby Terry and Flora would receive, upon dissolution forty (40%) per cent and twenty (20%) per cent respectively of the amount paid into capital by Rulon as finally adjusted and determined herein, was *that such receipt was by way of gift* from Rulon to Terry and Flora." [Emphasis supplied].

This finding that the parties intended and understood

that the effect of the agreement was that Terry and Flora would receive their shares by way of gift is inconsistent with the contention that their shares were awarded by way of contract.

The general rule is that a valid contract must be supported by consideration. And consideration for a promise must be something "bargained for . . ." Restatement of Contracts, §75. Rulon, in executing these agreements, did not bargain for anything Terry either did or promised to do, and Terry was under no misconception that Rulon had bargained for anything Terry either did or promised to do, if both Rulon and Terry intended and understood that the effect of the agreements was that Terry and Flora would receive their shares by way of gift.

There are circumstances where informal contracts not supported by "bargained for" consideration are enforceable. 1 Corbin on Contracts, §116. But the exceptions are not applicable to this case.

If respondents are unwilling to meet the issue of whether there was a gift, the result is that the dissolution agreement is not a legally operative document. At the time this action was commenced, the partnership was being operated by Terry much as before, and no sale of any substantial part of the partnership assets had been made. There was no winding up of the partnership affairs. There had been no reliance by Terry on the dissolution agreement which might conceivably have made applicable an exception to the general rule

on "bargained for" consideration. Therefore, it could not have been effective as a contract, in view of Finding No. 10. Even apart from Finding No. 10, it was not valid as a contract for the reasons already detailed in Argument II of the main brief.

The dissolution agreement should be deemed relevant only as it sheds light on the intention and understanding of the parties at the time the partnership was created and at the various subsequent times when Rulon made additional financial contributions. As evidence of this earlier intention, however, it would seem to have little value. As said in the main brief, the 1960 talk between the parties about gifts, sharing capital accounts, and the desire of Rulon to make some provision for distribution of his estate, all occurred at about the time the parties were attempting to settle their differences. Almost three years had passed since the articles of partnership were entered into, and although those negotiations might have a bearing upon the interpretation and effect of the agreements of March and April, 1960, their bearing upon what the parties meant in September and October, 1957, is not discernible — except insofar as they seem to be negotiating about something *Rulon* owned.

Furthermore, if the respondents are unwilling to meet the issue of whether there was a gift, the result should be that the partnership agreement itself, insofar as it relates to the shares which the partners are to receive on dissolution, is also legally inoperative because

of Finding No. 10. It is true that pursuant to that agreement Terry began to manage the business, but there is no showing that the salary he was to receive was not adequate compensation for the services rendered. Indeed, when he undertook management of the business it would be difficult to believe that he was relying heavily on future contributions to be made by Rulon, because there was no assurance that such contributions would be made. In regard to Flora, there is no evidence of any significant reliance whatever. Consequently this is not a case for the application of any principal of promissory estoppel on behalf of either Terry or Flora, which might otherwise be an exception to the rule on consideration.

Before replying to the arguments on cross appeal, this writer would like to make brief reference to respondents' use of the record in their brief.

On page 9 of respondent's brief, the following question and answer from Flora's deposition (R. 179) are quoted:

> "Q.: Was it your thought, then, that if you received some share of the corporation (partnership) that it dated from that gift you are talking about?
>
> "A.: From the *beginning . . . from the begining . . . from the beginning of the partnership.* (R. 179 (Emphasis added)."

The court may find it helpful to read the next question and answer in the same deposition (R. 179).

"Q.: And, as I understand, you figured even at the moment you received this so-called gift that you already owned 40 per cent of the partnership?

"A.: I never give [sic] it a thought because I didn't go into detail there. I never thought of it being sold, to ever go into it that far. I was more worried about the losses in [sic] the profits than anything, because that concerned me more than anything."

In the answer quoted by respondents, Flora adamantly claims her interest in the partnership dated from the beginning of the partnership. In her very next answer, which respondents omitted from their brief, Flora said she never thought about when she got any interest in the partnership capital. She was more interested in profit and loss.

Similar observations might be made about the other quotation from Flora's deposition on that same page (p. 9) of respondents' brief.

On page 16 of respondents' brief, Flora's deposition is again quoted.

"Q.: It was your understanding that you would be the owner of 20 per cent of that (Terry's investment)

A.: Of what he put in?

Q.: Yes.

A.: That all depended. * * * *if the thing was sold, you know what happens.* If it isn't sold, I come in for profits. (R. 182) (Emphasis added)".

The last answer of Flora, without omissions, reads in its entirety (R. 182):

> "A.: That all depended. I don't know, if the thing was sold, you know, what happens. If it isn't sold, I come in for profit. I don't know that Terry's went into profits; I think it went into assets. I don't know; I have never asked him."

It is not inconceivable that Flora meant what respondents, by leaving out words and punctuation, quote her as saying. However, in view of Flora's earlier statements, as noted above, to the effect that she was more concerned about profit and loss than an interest in capital, the court may wish to conclude that Flora meant what she said, without leaving out any words or punctuation.

It is probably inevitable that in any case where it must be determined whether the evidence supports the findings below, the demands on the court's time are unusually great because a careful review of the record is required in order to reconstruct an accurate picture of what happened and what was said, in its proper context.

ARGUMENT

I

FINDING NO. 6 WAS NOT ERRONEOUS FOR THE REASONS ASSERTED BY THE RESPONDENTS.

Appellant urges that all sums paid into the partnership should be returned to him, subject to minor adjustments, and not just those sums put into the business after December 3, 1958. In any event, the sums paid into the partnership after that date should be returned to appellant and Finding No. 6 was not erroneous for the reasons asserted by respondents.

Respondents contend in Argument VII that Exhibits 9 and 10, which are letters written by Rulon to Terry, were improperly admitted in evidence. Exhibit 9 was a letter in which Rulon asked Terry to make up a series of notes representing the money Rulon had put into the business .Exhibit 10 was another letter to Terry referring to the same matter. Respondents argue that these letters were self-serving and the admission thereof was a violation of the hearsay rule.

If a statement is relevant without regard to the matters asserted therein, there can be no valid hearsay objection to its admission for the purpose simply of showing that the statement was made. *Mower v. Mower,* 64 Utah 260, 228 Pac. 911, 915.

In *Cowen v. T. J. Stewart Lumber Co.,* 177 Okl. 266, 58 P.2d 573, an important issue was whether the relationship between two companies was that of principal and agent or seller and buyer. Invoices sent by one company to the other were offered in evidence to show that the latter relationship existed. In upholding the trial court's admission of the evidence, the Oklahoma Supreme Court said:

"Great emphasis is made by the defendant that such evidence was self-serving. All evidence is self-serving at the time it is offered, else it would not be offered. Whether declarations or communications are self-serving is determined as of the time they are made. And though a declaration may be self-serving on one issue, it may have independent relevance on another issue, and for that reason be admissible. The rule of exclusion of self-serving declarations is a branch of the hearsay rule and its application is governed largely by the same tests. The invoices in the present case were not offered as evidence that the material was furnished, for that fact was admitted. They were offered for the purpose of establishing the relationship of the parties, circumstantially, and not as direct evidence of the truth of the subject-matter of the invoices themselves." 58 P.2d at 576-77.

Another case in which writings were held to have been properly admitted because not offered to prove the truth of the matters therein asserted is *McCord v. Ashbaugh,* 67 N. M. 61, 352 P.2d 641. An important issue in that case was whether a grantee (not a party in the case) had received any beneficial interest in the property. The grantor offered in evidence correspondence between his attorney and Forest Service officials to show the motivating factor in conveying the property. The court held the evidence admissible because it was not offered to prove the truth of anything contained in the correspondence.

Regardless of whether or not Rulon had put into the business the money he refers to in the letters, and

regardless of whether or not interest was to accrue at the rate of 5% per annum in accordance with their "mutual understanding," the letters are relevant because the mere fact that Rulon said what he did therein is only consistent with a finding that at least from that time forward money advanced by him was to be returned.

Another basis for upholding the trial court's admission of Exhibits 9 and 10 is that they are relevant to show Rulon's intent, and declarations showing intent are exceptions to the hearsay rule. As said in *First Security Bank of Utah v. Burgi,* 122 Utah, 445, 251 P.2d 297:

> "Delivery is essentially a matter of intent. Such intent is to be arrived at from all the facts and surrounding circumstances, both before and after the date of the deed, including declarations of the alleged grantor where it appears the declarations are made fairly and in the ordinary course of life. Stanley v. Stanley, 97 Utah 520, 94 P.2d 465; Mower v. Mower, 64 Utah 260, 228 Pac. 911, 914." 251 P.2d at 299.

The grantor in the Burgi case was deceased, but the court's statement is not limited to declarations of a deceased and in principle there is no reason why it should be.

None of the cases cited in respondents' brief in support of their argument that Exhibits 9 and 10 were improperly admitted involved situations where the evidence was relevant without regard to the truth of the

matters therein asserted or where the evidence was of intention where intention was a relevant issue.

Exhibits 9 and 10 were not only properly admitted in evidence, but counsel for the respondents did not adequately point out at the trial what he claimed was wrong with the exhibits in order to preserve an objection for review on appeal. See *In Re Richard's Estate,* 5 U. 2d 106, 297 P.2d 542. Counsel for respondents did not object to Exhibit 9 as being self-serving or hearsay. (R. 156). The objection was made to Exhibit 10 that it was "completely self-serving" (R. 157), but no reference was made to the hearsay rule. Appellant contends that this objection was not specific enough. There would hardly be any record in this case if everything which is self-serving were omitted. As revealed in respondents' brief (p. 31), the real objection raised on appeal is that the evidence was hearsay, which objection was not raised in the trial court.

Respondents contend in Argument VII that Finding No. 6 is also erroneous because "it seeks to impose a contract of loan which is always bilateral, upon the parties by proof only of a unilateral intent of one party." (p. 31) There is no elaboration of this point. The word "loan" is used frequently by all parties in this case and is perhaps a useful term to refer to advances by one party which are to be returned to him. The word is not used, however, in 48-1-15 Utah Code Annotated 1953 which states the usual rights and duties of partners, subject to any agreement between them. Subsection (1) thereof provides:

> "Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property . . ."

It is clear from this provision, contrary to respondents' assertion, that the bilateral intent is required to have money advanced by a partner *not* repaid to him. Whereas the word "loan" has been used by the parties, the word has been used in a very special sense and the general law on bank loans or any other kind of loans is not necessarily applicable.

II

FINDING OF FACT NO. 3 THAT "GROSS PROFITS" ARE TO BE DETERMINED BEFORE DEDUCTING SALARIES TO PARTNERS WAS NOT ERRONEOUS.

Respondents contend that salaries to partners should be deducted in calculating gross profits. Article 5 of the partnership agreement is cited to show that Terry's salary was an "expense item and not a distribution of profit to him." (Respondents' brief, p. 37).

Article 5 states that Terry's salary is to be deducted before "any division of *net profits* is made." (Emphasis supplied.) If net profits as used in article 5 are any different from gross profits as used in article 4, it is reasonable that Terry's salary might be deducted in calculating the former but not the latter.

Respondents suggest that Finding No. 3 in effect

means that Terry's salary is a "distribution of profit to him" Respondents' brief p. 37). Whatever respondents meant by this, they surely did not mean to imply that Terry's salary is part of the 40% share which the court found him entitled to, because that would not be true. See Finding No. 4 (R. 69).

CONCLUSION

The relief sought by appellant on appeal should be granted and the relief sought by respondents on cross appeal should be denied.

Respectfully submitted,

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