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IN THE SUPREME COURT
of the
STATE OF UTAH

JOHN P. JONES,

Plaintiff-Appellant,

vs.

ACME BUILDING PRODUCTS, INC. and GORDON G. LEE,

Defendants-Respondents.

Case No. 11171

RESPONDENT'S BRIEF

Appeal from the Third District Court of Salt Lake County, The Honorable Leonard W. Elton, Presiding.

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IN THE SUPREME COURT
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NATURE OF CASE

The sole issue presented in this case is the construction of the term "net worth" as used in a written agreement entered into by the parties to this action on July 22, 1966, (Exhibit P-1).

DISPOSITION IN LOWER COURT

A full hearing was conducted in the lower court. The court made detailed Findings of Fact and Conclusions of Law and held that the term "net worth" was intended by the parties to be computed on the basis of the book value of the stock held by the respective parties.

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STATEMENT OF FACTS

In May, 1966, the plaintiff and the defendant, Gordon G. Lee, decided to terminate their relationship as shareholders and managers of the Acme Building Products, Inc.

In the latter part of May or the first part of June, the parties requested that Jerry Miles Branagan advise them as to how to equitably disassociate (R. 97-98). Mr. Branagan is a certified public accountant (R. 83) and had, for a long period of time, performed accounting services for the business (R. 84).

A meeting was held and attended by the plaintiff, defendant Gordon Lee, Mr. Branagan, and attorney Allan E. Mecham. At this meeting Mr. Branagan suggested that the stock be valued at the book value of the assets and divided accordingly (R. 97-98). At this time it had not been determined which of the parties would remain with the business, but both parties agreed that the book value would be an equitable valuation (R. 100). In accordance with this agreement, it was decided that Mr. Branagan would conduct an audit to show the book value of the stock (R. 97, 98). This audit is before the court as plaintiff's Exhibit 2.

Subsequently the parties decided that Mr. Lee would remain with the company and Mr. Jones would

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disassociate from the firm. Accordingly an agreement was drafted by Mr. Mecham (Ex. P 1). In accordance with the expressions of intent by the parties at the meeting described above, that the value of the stock would be determined according to book value, Mr. Mecham drafted a provision stating that Mr. Jones would receive his portion of the "net worth" of the business as determined by the audit.

Paragraph three of the agreement further stated that the entire agreement was conditional upon the results of further negotiations between the parties as to the terms upon which the disassociation would take place (Exhibit P 1, paragraph 3).

PRELIMINARY STATEMENT

Subsequent to the trial of this matter, defendant Acme Building Products, Inc. went into receivership. The receiver employed other counsel to represent Acme in the appeal of this matter.

Counsel employed by the receiver has reviewed the court record and the terms of the agreement in question and contends that the agreement is unenforceable because material terms effecting the basis of the agreement depend on the outcome of further negotiation and agreement.

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Paragraph three of the agreement states that the very basis of the contract, the amount and the terms of the consideration to be paid to the appellant, are to be determined in the future after further negotiation and agreement. Similar agreements have been held unenforceable. *Varcarce v. Bitters,* 12 Utah 2d 1961, 362 P.2d 427 (1961); *Sandeman v. Sayres,* 314 P.2d 428 (Washington 1957); *Reed v. Montgomery,* 175 P.2d 986 (Ore. 1947); *Coleman Engineering Company v. North American Aviation, Inc.,* 420 P.2d 713 (Calif. 1966); 17 CJS, Contracts, Section 49, page 394.

The validity of the agreement was not raised in the lower court and at this point is undecided. However, the invalidity of the agreement is apparent on its face and should be decided as a matter of law.

Since the validity of the agreement may not now be before the court, respondent addresses itself in this brief to the narrow issue of the meaning of the term "net worth" as used in the agreement and reserves the right to assert the invalidity of the agreement in the future.

ARGUMENT

POINT 1

THE COURT DID NOT ERR IN ADMITTING PAROL EVIDENCE TO CLARIFY THE TERM "NET WORTH."

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The term "net worth" has many meanings when standing alone because there are many different ways in which the value of the assets and liabilities may be determined (R. 113, 117). Thus, the term is ambiguous when not precisely defined. Since its use in the agreement in question is ambiguous, it was proper for the lower court to admit parol evidence to determine what the parties intended by the use of the term. The rule has been stated as follows:

> It is true that the express terms of an agreement may not be abrogated, nullified, or modified by parol testimony; but, where because of vagueness or uncertainty in the language used, the intent of the parties is in question, the court may consider the situation of the parties, the facts and circumstances surrounding the making of the contract, the purpose of its execution, and the respective claims thereunder, to ascertain what the parties intended. *Continental Bank and Trust Company v. Stewart,* 4 Utah 2d 228, 291 P.2d 890 (1955).

Thus, the trial court properly admitted parol evidence in its search for the intent of the parties.

POINT 2

THE DECISION OF THE TRIAL COURT THAT THE PARTIES INTENDED THE TERM "NET WORTH" TO BE COMPUTED ON THE BASIS OF BOOK VALUE OF THE STOCK IS AMPLY SUPPORTED BY THE EVIDENCE.

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This case involved a full trial on the merits, and the trial court, as the trier of the facts, found that the term "net worth" as used in the agreement between the parties was intended to be computed on the basis of the "book value" of the stock as shown on the books of the corporation (R. 47).

These findings of the trial court should be upheld unless not justified by the evidence. *Lym v. Thompson,* 112 Utah 24, 184 P.2d 667 (1947); *Dahnken v. George Romney & Sons Co.,* 111 Utah 471, 184 P.2d 211 (1947); *Horsley v. Robinson,* 112 Utah 227, 186 P.2d 592 (1947). Respondent submits that the finding of the trial court is not only justified by the evidence, but the evidence establishes beyond question that the parties intended "net worth" to be computed on the basis of the book value of the stock. The portions of the record, quoted below, establish this intent.

Prior to the time that the written agreement was drafted, both parties requested Mr. Branagan to suggest an equitable basis to evaluate the assets and divide the property (R. 97, 98). Mr. Branagan advised them that the stock should be valued at book value or less than book value; explained the reason for not using another measure of value; and testified that both parties agreed to this evaluation:

> I was asked to attend a meeting, which I described earlier, at Mr. Mecham's office. As I have

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said, that would have been perhaps towards the end of May or early part of June, 1966. The meeting was attended by Mr. Mecham, Mr. Jones, Mr. Lee and me. I was told at that meeting that Mr. Jones and Mr. Lee had decided that they would disassociate their business relationship; that they would terminate their business relationship and that they wanted to know whether or not I would have any ideas about what the business might be worth, and I said that I could only talk to them in general terms, tell them what my thinking would be; that the audit date would shortly be forthcoming and we would have figures at that time to look at, but on the basis of what Mr. Jones told me about what he expected the earnings of the company to be that year, I would think that the business would probably be more likely to sell at less than book value rather than more than book value. They asked me what I meant by that, and I said that in view of the historical earnings of the business, present market conditions, etc., that it would be difficult to justify the employment of the assets of Acme Building Products, Inc., at their book value because they would not return an attractive return to an investor. And I suggested that if they had, in fact, decided that they were going to disassociate with each other, that probably book value would be the best evidence of the value of the business. As I said, by book value, I meant book value determined in accordance with general accounting principles consistently applied that would be based upon personal audits unless we were instructed otherwise. (R. 97, 98).

. . . .

The general tone of the meeting was that both Mr. Jones and Mr. Lee agreed that probably the

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book value would be the fairest evidence of the value of the stock. (R. 100).

Mr. Mecham, who drafted the agreement in question, after consultation with both parties, understood that the term "net worth" as used in the agreement would be determined on the basis of book value:

Q. And do you recall whether or not Mr. Branagan made any recommendation or suggestions?

A. I don't recall any suggestion made by Mr. Branagan, only that his function was to prepare a financial statement from which we could determine the value of the assets. In other words, net worth of the assets so that we would then reach the point of one buying the other out.

Q. Do you recall whether or not he made any recommendation as to what might be the basis upon which evaluation of the corporation might be made?

A. As near as I can recall, the conversation was predicated upon book value. (R. 155).

The agreement itself is clear that the valuation of the assets were to be made on the basis of the audit of Mr. Branagan. On page 3, paragraph 3, of the agreement which is before the court as plaintiff's Exhibit 1, it is stated:

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> Gordon Lee and John P. Jones, with the aid of Jerry Branagan and Allen E. Mecham, will negotiate and enter into an agreement whereby Acme Building Products, Inc. will agree to pay John P. Jones upon terms set forth by John P. Jones as a result of said negotiation, the *balance due to him from an accounting which reflects the net worth of said Acme Building Products, Inc.* (Emphasis added.)

It is clear from the record that the value of the stock was to be measured by the results of Mr. Branagan's audit. The audit was no different in any significant aspect from any prior audits and all of the past audits used accelerated depreciation (R. 106).

The main import of appellant's argument is that since the assets were depreciated at an accelerated rate, the plaintiff would receive less than market value, and therefore it is logical to assume that the plaintiff could not have agreed to such an arrangement.

In response to this argument, it should first be noted that it seeks to have this Court reconsider the evidence. It is a well established principle that in a case involving a full hearing on the merits, the appellate court will not weigh the evidence but determine whether there was evidence to sustain the judgment. Even if the evidence could be reconsidered on this appeal, the appellant's argument fails to recognize much of the testimony in the case and the circumstances of the transaction invloved.

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The economic situation in the building trades was such that writing off an asset at an accelerated rate was not necessarily inconsistent with the worth of the asset, since the decline in market activity in the industry depressed the demand for the asset. The testimony established that the decline of activity in the building industry was such that assets were worth *less than book value* even though book value was based on an accelerated depreciation (R. 98).

Taking these factors into consideration, it is not unrealistic to find that the plaintiff would be willing or anxious to dispose of assets at a book value based on accelerated depreciation.

There were transfers of other assets and several other conditions in the memorandum of understanding and agreement (Ex. P-1) aside from the market conditions in the building industry which established that the book value figure, even though based on accelerated depreciation, was a just and reasonable arrangement. The argument that the arrangement was so inequitable that it could not have been intended, is completely unsupported by the evidence and is not a factor to be considered on appeal.

SUMMARY

The Judgment of the lower court must be upheld if there was sufficient evidence to sustain the Judgment.

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The evidence, portions of which have been quoted herein, amply supports the findings and Judgment of the lower court and the judgment should be affirmed.

Respectfully submitted,

WORSLEY, SNOW &
CHRISTENSEN

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