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Utah Supreme Court

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UTAH SUPREME COURT
BRIEF

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J. Reuben C.

IN THE SUPREME COURT
OF THE STATE OF UTAH

ASSOCIATES OF OBSTETRICS and FEMALE SURGERY, INC., a Utah corporation,

Plaintiff-Respondent,

-against-

Case No. 13992

APOLLO PRODUCTIONS, INC., a Utah corporation; GORDON I. HYDE and GARRY B. WHETTON, individuals, and NATIONAL BANK OF NORTH AMERICA,

Defendants-Appellants.

BRIEF OF APPELLANT ON REMAND

Response to Mandate of
United States Supreme Court

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FILED

AUG 6 - 1976

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IN THE SUPREME COURT
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-against-	)	Case No. 13992
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POINT I

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IN THE SUPREME COURT OF THE STATE OF UTAH

ASSOCIATES OF OBSTETRICS and FEMALE SURGERY, INC., a Utah corporation,	)
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-against-	)
APOLLO PRODUCTIONS, INC., a Utah corporation; GORDON I. HYDE and GARRY B. WHETTON, individuals, and NATIONAL BANK OF NORTH AMERICA,	)
Defendants-Appellants.	)

BRIEF OF APPELLANT ON REMAND

STATEMENT OF THE KIND OF CASE

Pursuant to the mandate of the Supreme Court of the United States, this matter has been remanded for a determination of whether appellant, National Bank of North America is entitled to assert its right, pursuant to Section 94 of Title 12 of the United States Code to have this case tried in the Eastern District of New York or the Supreme

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Court for Queens County, New York or whether respondent has sustained its burden of proving a waiver of that right.

DISPOSITION IN THE LOWER COURT

This action was commenced in the Third Judicial District in and for Salt Lake County, Utah by the Associates of Obstetrics and Female Surgery, Inc. (hereinafter "Associates") claiming that Appellant, National Bank of North America (hereinafter the "Bank") had breached an implied fiduciary responsibility.* The Bank made a Motion to Dismiss the Complaint because, under the provisions of Section 94 of Title 12, U.S.C., venue of this action as against it as a national banking association did not lie in the forum in which Associates commenced this action. The District Court granted the Motion with leave to amend. Associates amended its Complaint and the Bank again filed a Motion to Dismiss on the same grounds. After a lengthy continuance of the matter and change of counsel, the District Court denied the Motion.

*The action arose out of a loan made by plaintiff to Apollo Productions, Inc., the payment of which was guarantied by the individual defendants. All of these defendants have defaulted in this action.

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On November 21, 1975, this Court affirmed the decision below. By order dated April 26, 1976, the Supreme Court of the United States reversed and remanded the case for a determination of whether the Bank had waived its right to answer the protection afforded by the federal statute.

RELIEF SOUGHT ON APPEAL

On this hearing the Bank seeks an order that Associates have not shown a waiver of the provisions of 12 U.S.C. 94 and pursuant to United States Supreme Court opinion requests this Court to grant the Bank's Motion to Dismiss.

STATEMENT OF FACTS

In June of 1972, Associates commenced this action seeking to recover damages from the Bank and certain individuals arising out of a loan which Respondent made to Apollo Productions, Inc. ("Productions"). Associates served the Bank at its office at 44 Wall Street, New York, New York, on July 5, 1972 (R-204).

The Bank appeared for the limited purpose of challenging the jurisdiction of the Utah courts and moved

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to dismiss the action as against it (R -170). Noting that it was a national banking association with its prinicpal place of business in the County of Queens, State of New York, the Bank relied on the provisions of 12 U. S. C. 94 which states:

> "Actions and proceedings against any association under this chapter may be had in any district or territorial court of the United States held within the district in which such association may be established, or in any state, county, or minicipal court in the county or city in which said association is located having jurisdiction in similar cases."

In opposing that Motion, Associates alleged that the Bank had waived its right to assert the protection of the statute (R-159). It based its position on a telegram sent by the Bank from New York to Paul Naisbitt, in Utah (R-167) and on an involuntary petition in bankruptcy filed by the Bank in the United States District Court against Apollo Corporation--which is not a party to this litigation. With these contentions before it, the District Court granted the Bank's Motion to Dismiss (R-106).

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Subsequently, Associates filed an Amended Complaint (R-104) in which all of the allegations of the original defective complaint were incorporated. The sole difference was that Associates asserted in its pleading that the acts alleged above constituted a waiver of the statutory privilege.

The Bank again filed a Motion to Dismiss challenging the jurisdiction (R-79) under 12 U.S.C. 94. In its supporting papers, the Bank pointed out that it had no offices or agents in Utah, that it did no business in the State of Utah, that it was not qualified to do business in Utah and that it herefore could not be held to have waived its privilege.

Nonetheless, the Motion to Dismiss the Amended Complaint was denied (R-18). On appeal, this Court affirmed the decision of the District Court holding that the provisions of 12 U.S.C. 94 were permissive and inapplicable. In its Order, this Court did not reach the issue of waiver.

The Bank petitioned the Supreme Court of the United States for a writ of certiorari and in a per curiam

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opinion dated April 26, 1976, the writ was granted. The Supreme Court held that Section 94 was mandatory and that a national bank may only be sued in a court in the county where it is located. The Court went on to hold:

> "Accordingly, we grant the petition for certiorari and vacate the judgment of the Utah Supreme Court. Since that court did not reach the respondent's contention that the petitioner had waived the provisions of § 94, the case is remanded for a determination of that issue." (footnote omitted).

This hearing is being held pursuant to that mandate.

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POINT I

THE BANK HAS NOT WAIVED ITS RIGHT TO ASSERT THE PRIVILEGE UNDER 12 U.S.C. 94

The standard by which a claim of waiver must be measured was set forth in Buffum v. Chase National Bank, 192 F.2d 58, 60-61 (7th Cir. 1951) where the Court said:

> "Waiver is a voluntary and intentional relinquishment or abandonment of a known existing right or privilege, which, except for such waiver, would have been enjoyed. 67 C.J. 289. It may be expressed formally or it may be implied as a necessary consequence of the waiver's conduct inconsistent with an assertion of retention of the right. It must be proved by the party relying upon it. And if the only proof of intention to waive rests on what a party does or forbears to do, his act or omissions to act should be so manifestly consistent with and indicative of an intent to relinquish voluntarily a particular right that no other reasonable explanation of his conduct is possible. 67 C.J. 311 and cases there cited."

See also: Northside Iron and Metal Company, Inc. v. Dobson and Johnson, Inc. 480 F.2d 798 (5th Cir. 1973); United States National

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Bank v. Hill, 434 F. 2d 1019 (9th Cir. 1970).*

In its attempt to meet its burden of establishing waiver, Associates can point to only three incidents.

A. On November 23, 1971, the Bank filed an involuntary petition in bankruptcy in the United States District Court for the District of Utah, Central Division against Apollo Corporation (R-144). Apollo Corporation is not a party to this action.

B. On January 12, 1971, the Bank sent a telegram to Paul Naisbitt (R-167).

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*Although the decision in this case is governed by federal law, it is clear that similar principles would be applied under state law. In American Savings & Loan Association v. Blomquist, 21 Utah 2d 289, 445 P. 2d 1, 3 (1968) this Court, quoting from Phoenix Insurance Co. v. Heath, 90 Utah 187, 61 P. 2d 308 (1968) said:

> ". . . A waiver is the intentional relinquishment of a known right. To constitute a waiver, there must be an existing right, benefit, or advantage, a knowledge of its existence, and an intention to relinquish it. It must be distinctly made, although it may be express or implied."

See also: Reed v. Union Central Life Ins. Co., 21 Utah 295 61 Pac. 21 (1900); In re Auerbach's Estate, 23 Utah 529, 65 Pac. 488 (1901).

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C. An alleged telephone conference call on January 11, 1971 with Associates, Productions and the Bank in which the parties discussed purported arrangements that could be made regarding collateral held by the Bank in New York. (R-224-225).

As shall be hereinafter demonstrated, this meagre showing is insufficient. For in those few cases where waiver has been found, the courts have required proof of an intensive and continuous course of dealing by the bank within the forum jurisdiction. Evidence of such activity is wholly lacking here.*

Thus, in Reaves v. Bank of America, 352 F. Supp. 745 (S.D. Cal. 1973), the Bank had 66 branches in the forum jurisdiction through which it carried on a diverse banking business. The bank had instituted 105 suits in that jurisdiction and had been sued without objection, on

*In its prior brief, Associates inferred that the Bank has obtained a security interest in Productions' assets located in Utah. However, the record does not support such a claim.

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338 occasions. In addition the Bank had perfected its security interest in that jurisdiction, had resorted to local law to protect that interest and had reinforced its position by resorting to self-help within the forum.

The Court, viewing the totality of the bank's activities declared at p. 750:

> "Taken together with the defendant's extensive activities in this district, plus the fact that all transactions herein involved occurred in this district, the defendant's previous failure to object to being sued in this district is inconsistent with its claim that it is not present for venue purposes. Its contacts with this district are much more than minimal. Further, its conduct warrants a strong inference of the relinquishment of a known right, the right to invoke the benefits of § 94."

In Michigan National Bank v. Superior Court, County of Contra Costa, 23 Cal. App. 3d 1, 99 Cal. Rep. 823 (1972) the bank solicited customers in California, financed purchases of planes located in California, took security interest under California law and apparently repossessed those planes with California.

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The Court, in finding a waiver said:

> "The foregoing precedents indicate that if the national bank seeks to use a state court, other than in the county or city in which it is located, to enforce obligations which are due it, it may be subject to countersuit for matters arising out of that transaction. This suggests that when self-help is used for the same purpose, claims arising out of the assertion of the bank's rights should be heard where they occur. 23 Cal. App. 3d at 11, 99 Cal. Rptr. at 830."

In Buffum v. Chase National Bank, supra, the bank qualified with the Illinois regulatory authorities to do a trust business in that state, opened an office, accepted trust deposits and appointed an agent for the receipt of process in connection with that business. The Court found that the bank had only waived its privilege with respect to the trust aspect of its business stating, at p. 61.

> "We are of the further opinion that defendant, by its acts, evinced no intention to waive in its entirety the privilege it had under the laws of being sued only in New York. We can not atribute to it an intent to waive anything other than what it did actually waive in consenting to be sued in Illinois in connection with trust business transacted in that state."

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In Gregor J. Schaefer Sons, Inc. v. Watson, 26 A.D. 2d 659, 272 N.Y.S. 2d 790 (2nd Dept. 1966), the Court listed a series of factors which would be germane to determining whether there had been a waiver of the privilege. Included in that list were:

Whether the bank had a branch office in the forum;

Whether the bank had consented to service of process in the forum;

Whether the bank held itself out to the public as doing business in the forum;

Whether the bank's charter* indicates that it is "present" in the forum;

Whether the bank, in the transaction in issue, committed itself to perform any acts within the forum.

The record in this case demonstrates that all of these questions must be answered in the negative.

*The charter of the Bank in this case appears at pp. 173 et seq. of the record.

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Indeed, Associates cannot show that any of the factors which induced the Courts in Reaves, Michigan National or Buffum to find a waiver are present here. To the contrary, Associates can only point to the bankruptcy petition, the telegram and the telephone call as support for its claim. As shall be seen, these sparse contacts are not sufficient, for courts have consistently refused to find a waiver of the privilege--even where the degree of activity in the forum was far greater.

Thus in Northside Iron and Metal Company, Inc. v. Dobson and Johnson, Inc., 480 F. 2d 798, 800 (5th Cir. 1973), the Court held:

> "Merely doing business in a foreign district even through a branch bank or a wholly owned subsidiary located there, does not constitute a waiver of the privilege." (Citing cases)

See also: First National Bank of Boston v. United States District Court, 468 F. 2d 180 (9th Cir. 1972); United States Bank v. Hill, 434 F. 2d 1019 (9th Cir. 1970); Rome v. Eltra Corp., 297 F. Supp. 314 (E.D. Pa. 1969); Gregor Schaefer Sons, Inc. v. Watson, supra.

In Helco, Inc. v. First National City Bank, 470 F. 2d

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883 (3rd Cir. 1972), the Bank had established two branch offices in the Virgin Islands and had engaged in a general banking business. In addition, the bank had commenced two litigations in the local courts seeking to enforce its rights against Virgin Island residents. The Court of Appeals held that these activities did not manifest an intent to waiver the statute.

Similarly, in Sulil v. Rye Motors, 45 Misc. 2d 458, 257 N.Y.S. 2d 111 (West Co.) aff'd 47 Misc. 2d 715, 262 N.Y.S. 2d 989 (App. T. 2nd Dept. 1965), the Court held:

> "We are also of the opinion that the invoking by respondent bank of the jurisdiction of this court in other unrelated actions does not constitute a waiver of its exemption and a general submission to this court's jurisdiction in respect of the instant proceedings to enforce the money judgments recovered by the plaintiffs in wholly unrelated actions."*

In this regard, it is appropriate to note that the filing of the involuntary petition against Apollo Corporation in the United States District Court is hardly deserving of the significance which Associates attaches thereto. The Bank had no discretion as to where to file

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*See also: Durabuilt Steel Locker Co. v. Berger Mfg. Co., 21 F. 2d 139 (N.D. Ohio, 1927); Austin v. Austin, 171 Ga. 21[illegible], 156 S.E. 667 (1931).

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for venue of such proceedings was at the time prescribed in Section 2a of the Bankruptcy Act.*

In addition, the Bank did not attempt to enforce any rights under Utah state law in that proceeding. Rather, it availed itself of its rights under the Bankruptcy Act--which would not be inconsistent with its right to assert the venue privilege herein. Tanglewood Mall, Inc. v. Chase Manhattan Bank, 371 F. Supp. 722 (W.D. Va.) aff'd 508 F.2d 838 (4th Cir.) cert. denied. 421 U.S. 965 (1975).

Nor is this singular act, when coupled with the Bank's participation in a telephone call and the sending of a telegram "so manifestly consistent with and indicative of" a waiver of the Bank's rights under 12 U.S.C. 94 "that no other reasonable explanation. . . is possible." Buffum v. Chase National Bank, supra. After

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*In Nevada National Bank v. The Superior Court of Los Angeles County, App. 119 Cal. Rptr. 778, 45 Cal. App. 3rd 966 (1975), one Bogart borrowed money from a Nevada bank and granted the bank a security interest in a car which interest was perfected in Nevada. Bogart moved the car to California and defaulted on his loan whereupon the Bank repossessed the car in California.
Finding that "the Bank had no choice" as to where it could repossess the car, the Court concluded:

> "In short, we can find in the record no voluntary act of the bank in California that was not compelled by the necessi

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all, if the opening of a branch office, which entails the maintenance of a physical facility, the presence of personnel, the acceptance of deposits and extensions of credit--all on a daily basis--is insufficient to manifest an intent to waiver, then the isolated transactions upon which Associates bases its claim are equally deficient.*

In the final analysis then, there is no basis in fact or law to support Associates' claim that National Bank of North America waived its right to avail itself of the provisions of 12 U.S.C. 94.

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*In point of fact, the actions on which Associates predicates its claim are, wholly apart from 12 U.S.C. 94, insufficient to subject the Bank to the jurisdiction of the Utah Courts. Hill v. Zale Corp., 25 Utah 2d 357, 482 P.2d 332 (1971); Conn v. Whitmore, 9 Utah 2d 250, 342 P.2d 871 (1959); Western Gas Appliances, Inc. v. Servel, Inc. 123 Utah 229 257 P.2d 950 (1953).

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CONCLUSION

Inasmuch as this is no showing of waiver the pur curium decision of the United States Supreme Court requires that the Amended Complaint must be dismissed.

Respectfully Submitted,

McKay, Burton, McMurray & Thurman

By William Thomas Thurman

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