

2000

Holbrook Company, a Utah corporation v. Stanley S. Adams, Von H. Whitby, Tony M. Wand, a partnership, dba the exchange : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

HOLBROOK COMPANY, a Utah
corporation,)

)
Plaintiff and
Appellant,)

v.)

Case No.
14005

STANLEY S. ADAMS, VON H.)
WHITBY, TONY M. WAND, a)
partnership, dba THE)
EXCHANGE,)

)
Defendants and
Respondents.)

RESPONDENTS' BRIEF

Appeal from the Third District Court for
Salt Lake County, State of Utah
Honorable Stewart M. Hanson, Jr., Judge

* * * * *

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Appellant

FILED
JUL 9 1975

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HOLBROOK COMPANY, a Utah
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Defendants and
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Case No.
14005

RESPONDENT'S BRIEF

* * * * *

NATURE OF THE CASE

On November 1, 1974, Plaintiff-Appellant (hereinafter "Plaintiff") sued the Defendants-Respondents (hereinafter "Defendants") as a partnership doing business as "The Exchange," for the reasonable value of materials furnished and labor performed upon real property leased by The Exchange. The Complaint stated two claims for relief, one pursuant to Section 14-2-1, Utah Code Ann. (1953) and the other in quantum meruit.

Defendants moved for dismissal of the action on the grounds that Plaintiff had sued the wrong parties, said motion being verified (R. 4) and based, in substance, upon the following grounds:

1. That the three individuals named as defendants were not, nor had they ever been a partnership, a joint venture or a dba;
2. That they had never done business as The Exchange;
3. That The Exchange was the dba of The Exchange Place Social Association, a Utah non-profit corporation; and
4. That the Defendants individually had never contracted with plaintiff or with anyone.

DISPOSITION IN LOWER COURT

The District Court of the Third Judicial District in and for Salt Lake County, State of Utah, Judge Stewart M. Hanson, Jr., presiding, heard Defendants' motion to dismiss on January 21, 1975, and, after receiving additional exhibits, evidence and argument, determined that the three individual defendants named in Plaintiff's Complaint were not in fact a partnership or joint venture nor were they nor had they ever been doing business as "The Exchange" and therefore, dismissed Plaintiff's Complaint as to those defendants. In dismissing said Complaint, Judge Hanson granted Plaintiff ten days in which to refile its action against the proper

party, The Exchange Place Social Association, a Utah non-profit corporation.

On or about the 29th day of January, 1975, Plaintiff made a Motion to Reconsider. The motion was heard by Judge Hanson on February 11, 1975, and additional argument and evidence were presented after which Plaintiff's Motion to Reconsider was denied.

From that order of dismissal in favor of Defendants, Plaintiff has appealed.

RELIEF SOUGHT ON APPEAL

Defendants seek affirmance of the lower court's ruling dismissing Plaintiff's Complaint and for their costs of this appeal. In the alternative, should the Court decide in favor of Plaintiff upon this appeal, Defendants seek an order staying any award of costs in this matter, costs of appeal to be awarded to that party ultimately prevailing upon final disposition of this case.

STATEMENT OF THE FACTS

Defendants basically agree with the "Statement of the Facts" as set out by Plaintiff in its brief with the few exceptions and additions as set out hereinbelow. In stating this agreement, Defendants do wish to draw the Court's attention to the fact that, in presenting the facts in its brief, Plaintiff has for the most part (as Plaintiff itself

indicates throughout its Statement of Facts) set out only what was alleged in the Complaint and various other documents on their face and not what the facts actually are or what the facts have been determined to be.

Defendants' sole exception to Plaintiff's Statement of the Facts as set out in Plaintiff's brief is the language referring to two architects (Dan Losee and Raymond Jones) alleged by Plaintiff to have been "employed by Stanley Adams." Defendants take exception to this language only insofar as it may indicate or infer some employment of said architects by Mr. Adams in his individual capacity. At no time relevant to this case was Mr. Adams or any of the other defendants named herein acting in their individual capacities.

Defendants wish also to add the following clarifications with respect to the Certificates of Doing Business Under an Assumed Name (hereinafter "dba") filed May 9, 1973, (R. 36-37) and December 7, 1974, (R. 34-35) as referred to in Plaintiff's brief, which facts were also presented to the court below:

1. The Articles of Incorporation of The Exchange Place Social Association, a non-profit Utah corporation, were filed May 4, 1973, (R.29) and contained the following provision as Article I thereof:

The name of this corporation is
The Exchange Place Social Association.

(This corporation will also be known as (aka) and do business as (dba) The Exchange.)

2. The Secretary of State's office, upon approving said articles, telephoned the corporation's agent and trustee, Stanley S. Adams, and informed him that a formal Certificate of Doing Business Under an Assumed Name ("dba") form needed to be filed pursuant to the terms of Article I of the Articles of Incorporation (as set out fully above).

3. Pursuant to said request, and approximately five days after filing the said Articles of Incorporation, Mr. Adams filed said "dba" under the mistaken impression that the Secretary of State instructed that he list the actual names of the trustees of the corporation rather than simply the corporate name itself, which corporation was in fact doing business as The Exchange. Mr. Adams filed and signed this "dba" as trustee for the corporation. (See R. 36-37)

4. At no time were Stanley S. Adams, Von H. Whitby or Tony M. Wand doing business as The Exchange nor did they at any time hold themselves out to be doing so.

5. On or about December 7, 1974, after discovery of the mistaken and improper listing of the trustees' names upon the "dba" form, a corrected "dba" form, properly listing The Exchange Place Social Association as the principal doing business as The Exchange, was filed (R. 34-35) and the

mistaken "dba" was withdrawn.

Further, Plaintiff and its President, Ben Holbrook, had for several years done business with Defendant Stanley S. Adams and had done substantial work on another private club, The Winery, in connection with which Mr. Adams had (and still does) serve as trustee. Mr. Holbrook knew, at all times relevant herein and before, the corporate form and existence of said club and that the same was required by law. This fact was also brought to the attention of the trial court.

ARGUMENT

POINT I

THE LOWER COURT WAS CORRECT IN MAKING ITS RULING THAT THE INDIVIDUALS NAMED AS DEFENDANTS WERE NOT PROPER PARTIES AND IN DISMISSING PLAINTIFF'S COMPLAINT ACCORDINGLY.

At the outset Defendants wish to bring the Court's attention to the fact that Plaintiff has, with the sole exception of parts of Point III in its brief, not addressed itself to the sole issue of its own appeal. That sole issue is whether or not the Defendants "Stanley S. Adams, Von H. Whitby and Tony M. Wand" are proper defendants as named by Plaintiff in its Complaint. It is solely upon this issue which the lower court ruled and not as to the sufficiency of the allegations upon the two causes of action of the Complaint as is addressed by Plaintiff in its brief. For this

reason, and for purposes of organization in stating their position and replying to Plaintiff's brief, Defendants will address each formal "Point" as contained in Plaintiff's brief.

(A) REPLY TO POINT I:

Plaintiff spends its entire time and argument in Point I attempting to persuade the court that Plaintiff has on its face set out a short and plain statement of the elements of two separate causes of action ("a claim either under Section 14-2-1, Utah Code Annotated, 1953, [sic] or in quantum meruit." See Plaintiff's brief, Page 5).

While Defendants may agree that these allegations on their face allege causes of action in general (that is, that these allegations allege the prima facie elements of quantum meruit or Section 14-2-1 liability), the sufficiency of those allegations is not at issue on this appeal. It is whether those causes of action are properly claimed against the named Defendants which is at issue.

The trial court determined, upon the pleadings, evidence, exhibits and arguments that there was no question that the Complaint failed to show any claim against the named Defendants, Stanley S. Adams, Von H. Whitby and Tony M. Wand, regardless of the sufficiency of the claims themselves in general. Plaintiff does not even address itself to this

issue in Point I of its brief. Point I therefore need not and should not be considered by the court in its ruling.

(B) REPLY TO POINT II:

Most of Plaintiff's argument in Point II consists of distinguishing between dismissing "for failure to state a claim under Rule 12(b)(6)" and "for summary judgment under Rule 12(b)(6) and Rule 56." Presumably this is done in order that Plaintiff may "set up strawmen" to be knocked down later in Plaintiff's Point III. The fact is that in neither case is Plaintiff entitled to any relief upon this appeal.

While the District Court, upon all the evidence, could have properly found under Rule 12(b)(6) that Plaintiff's Complaint failed to state a claim against these defendants, nevertheless Defendants would agree with Plaintiff's allegation that, due to the acceptance of evidence and exhibits outside of the pleadings themselves, the lower court's ruling was technically one treating and granting Defendants' motion as a Motion for Summary Judgment.

In light of this agreement by both parties that the motion was treated as one for summary judgment, Defendants will next respond to Point III of Plaintiff's brief which is the sole attempt by Plaintiff to address itself to the actual issue of parties, which issue is the sole question

and reason for this appeal.

(C) REPLY TO POINT III:

The thrust of Plaintiff's argument in Point III of its brief is that the court could not have granted summary judgment in favor of these defendants in this case because there existed genuine issues of material facts. With this contention Defendants (and the court below) disagree.

Plaintiff sets out in Point III four issues which it believes show the existence of material facts sufficient to prevent, as a matter of law, the lower court from having granted a summary judgment. In fact these "issues" do not exist as determined by the lower court on all of the evidence submitted. Separate treatment of each issue here does indicate a basis upon which Judge Hanson could have ruled (and presumably did rule), determining upon the evidence before him that these Defendants did not act in an individual capacity and that, upon this sole question, no material issue genuinely existed. This fact in and of itself is sufficient to find in Defendants' favor upon this appeal under the well recognized and very basic legal principle long accepted and followed by the Utah Supreme Court that where orders appealed from are within the trial court's jurisdiction and discretion, they can be attacked only upon a showing that they were not supported by any proof or any

construction of the evidence below. (See: Culver v. Culver, 150 P.2d 292, 65 CA.2d 145, and Botkin v. Silveria, 49 Cal.2d 1, 120 P.2d 910, 1916-1917 (1942), specifically approved by the Utah Supreme Court in Papanikolas Bros. v. Surgar House Shopping Center, Utah Case No. 13821, May 27, 1975.)

The four purported "issues" raised by Plaintiff, together with a discussion of each one, follow:

1. Whether Plaintiff contracted with Defendants, or any of them, or the agent of any of them, prior to incorporation by the Defendants of The Exchange Place Social Association.
[Plaintiff's brief, page 12]

This first issue as stated by Plaintiff has no relevance to the question of parties insofar as whether or not any contract was made. Rather, the only basis upon which this issue effects the Court's judgment is as to the capacity of these Defendants in making any alleged contract. More specifically and importantly, the capacity of Defendant Stanley S. Adams is the only capacity pled or at issue here.

If the lower court determined that Defendant Stanley S. Adams was acting in other than an individual capacity and that, upon the evidence there existed no material question as to this fact, then Plaintiff is not entitled to any relief from the lower court's ruling on the basis of this purported issue.

The court in fact had more than ample evidence before

it upon which to rule that Defendant Adams was not acting in an individual capacity in any alleged contracts with Plaintiffs. Among other evidence, the lower court had the following before it:

1. The affidavit of Defendants (R. 4-6) which clearly showed no partnership, joint venture or other operation by these defendants as The Exchange.

2. The affidavit of Plaintiff's President, Ben Holbrook, (R. 12-13) which in fact no way contradicted the allegations of Defendants' affidavit showing no individual capacity.

3. The lower court was further apprised of the fact, in argument by counsel, that Defendant Stanley S. Adams was at all times relevant to Plaintiff's Complaint, President of Investestate, a Utah corporation, from which the premises in question were leased by The Exchange.

4. While Plaintiff's counsel attempted to use the "dba" filed upon May 9, 1973, as "proof" that the three Defendants were operating in an individual capacity, the court correctly observed that said dba was not even in existence for over two months after the alleged contracts were made and that, therefore, it was of no relevance nor could Plaintiff have relied thereon. Further, the court also correctly noted that this dba dated May 9 was filed five days after the Articles of Incorporation of The Exchange

Place Social Association which clearly set out the fact that The Exchange was a dba of this corporation.

5. An additional point was argued to and accepted by the lower court with respect to the dba form dated May 9 which mistakenly named the three individual trustees. Not only was evidence submitted to the court indicating that the three trustees named were mistakenly listed in place of the corporation, but the Plaintiff itself recognized that the dba was signed by Mr. Adams "as trustee" and not as an individual, thereby adding further support to the fact that the individual names of the trustees were listed simply by mistake as a result of a misunderstood communication and directive from the Secretary of State. (See R. 37 and Plaintiff's brief, bottom of page 3)

6. Additional evidence was presented at the hearing to show that Plaintiff and its president had worked on another private club owned and operated in exactly the same fashion and by the same parties and that Plaintiff knew of the corporate existence of this club and that the law required such private clubs to be corporations.

Upon the above evidence alone the lower court could clearly have found that no material issue existed upon this purported issue and the court in fact so ruled.

2. Whether the Defendants, or any of them, did business as The Exchange prior to the aforesaid

date of incorporation, and at the time the contract was entered into. [Plaintiff's brief, page 13]

Plaintiff's brief bases its argument here entirely upon the fact that there was a dba on file on May 9, 1973, stating that the three individuals were doing business as The Exchange. Plaintiff does not, however, apprise the court of the other evidence presented at the hearing which caused the lower court to clearly rule in favor of Defendants upon this issue and to find that there in fact existed no material issue as to this question.

This evidence was discussed in Paragraphs 5 and 6 under issue No. 1 above and, in order to avoid repetition, Defendants will not reprint that evidence here except by way of summary.

The lower court found that said dba dated May 9 was filed pursuant to a directive by the Secretary of State and that the names of the individual trustees were placed upon said form by mistake in place of the name of The Exchange Place Social Association. The Court found that the Articles of Incorporation, filed five days earlier, clearly set out the corporate existence and operation of The Exchange. The Court further found no reliance upon this dba in any event due to the fact that Plaintiff's contracts were made and performed in January and February of 1973 -- over three

months earlier. In addition, the incorrect dba filed was signed by Mr. Adams in his capacity as "trustee." This, when added together with all of the other evidence submitted at the hearing, would clearly have allowed the lower court to decide no genuine issue of material fact existed upon this purported issue.

3. Whether prior to the aforesaid date the Defendants, or any of them, were associated together as a joint venture or partnership. [Plaintiff's brief, page 14]

This issue is simply a restatement of "issue" No. 2. Plaintiff's entire argument and attempt to make a material issue appear here is again based in its entirety upon a dba which was mistakenly filed by one of the corporate trustees in the capacity of trustee after the Articles of Incorporation of The Exchange Place Social Association stating clearly The Exchange was a dba of that corporation. The same argument and facts as have been presented above (including the impossibility of reliance upon the same by Plaintiff in any way, shape or form) apply here to clearly show no material fact or issue exists on this point. The lower court so found and correctly ruled accordingly.

4. Also at issue is the question of the relationship between the Defendants prior to The Exchange Place Social Association, at which time Plaintiff had already commenced work to improve the leasehold. [Plaintiff's brief, page 14]

Plaintiff states in its brief, to support its contention that some issue exists here, that:

Nowhere in the record is it denied that the Defendants, nor any of them, had a leasehold interest in the real property commonly known as 39 Exchange Place.
[Plaintiff's brief, page 14]

This is simply not true. Not only does the affidavit of Defendants (R. 4-6) clearly by implication do so, but this fact was specifically and directly denied at the hearing, including the exhibition of certain leases and subleases showing the premises and all interests therein to be at all times relevant herein exclusively in the Salt Lake Stock Exchange, Investestate, or The Exchange. These leases together with argument made at the hearing showed that there was never any interest held by the individual defendants in the said premises at anytime. This was in fact the entire reason for the Stipulation allowing Plaintiff to refile within ten days against the proper defendant, The Exchange Place Social Association, and the sole reason for the waiver by said corporation of the statute of limitations provided by Section 14-2-1, Utah Code Ann. (1953).

After setting out the above four purported issues (which are in fact not issues at all) Plaintiff next in its brief states:

In light of these numerous material facts that are genuinely at issue, in order for

the trial court to have granted summary judgment, it must have determined these facts in Defendants' favor. This it cannot do! [Plaintiff's brief, page 15]

This is again another "bootstrap" operation designed by Plaintiff to lead the Court down the garden path to Plaintiff's next statement (a quote from Hill v. Grand Central Inc., 25 U.2d 121, 477 P.2d 150, 151 (1970)), that:

Summary judgment is never used to determine what the facts are, but only to ascertain whether there are any material issues in dispute. If there be any such disputed issues of fact, they cannot be resolved by summary judgment. . . [Plaintiff's brief, page 15]

This is referred to as a "bootstrap" operation because Plaintiff has assumed the very question at issue, i.e., whether there are in fact any material facts generally at issue. Defendants assert that the pleadings, evidence and argument below, all clearly admissible and properly considered by Judge Hanson (as correctly pointed out by Plaintiff in its brief and by Rule 12(b)(6) and Rule 56 cited therein) were, when viewed together, so clear as to compel the lower court to find that no material question genuinely existed as to whether these Defendants were doing business in their individual capacity. That is, the evidence was so clear that the Court, being fully advised and upon the entire record, argument and evidence before it, ascertained that there were no material issues of fact at dispute.

Plaintiff's position in its brief appears to be simply that in order for there to exist "a material fact" which is "genuinely at issue" counsel need only submit one affidavit or stand up at a hearing and make one statement which disagrees with another affidavit or statement of the opposing party. This is simply not the case even as is made clear by all of the authorities cited by Plaintiff itself in its brief.

Rule 12(b) states in part (cited at Page 11 of Plaintiff's brief):

. . . The motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.
[Emphasis added]

It is clear under the rule that the lower court properly admitted and considered all evidence in its determination. Rule 56 then (again as stated by Plaintiff in its brief at page 12) provides that:

The judgment sought shall be rendered forthwith if [all of the evidence presented to the court] show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The lower court did have a duty to examine the entire evidence and, upon that evidence, to "ascertain whether there are any material issues of fact in dispute." (Hill v. Grand

Central Inc., supra.) This is exactly what the lower court did and it determined that no such material facts genuinely existed.

The lower court and only the lower court had the opportunity to examine and be fully advised upon the entire evidence, exhibits and argument of counsel for both sides. It is for this reason that the Utah Supreme Court has unceasingly been committed to the basic principle that,

. . . reviewing courts will not interfere with the exercise of the trial court's discretion in the matter, unless it appears that a manifest injustice has been done, or the decision cannot reasonably be found to be supported by the evidence.
[Emphasis added] Papanikolas Bros. Enterprises v. Sugar House Shopping Center Associates, et al., supra.

Our case goes even further. Plaintiff, pursuant to its request, was given a rehearing on this question by the lower court. At the second hearing, held on this issue on February 11, Judge Hanson again gave both sides another opportunity to fully argue the question and to present any additional evidence or exhibits. In their motion and at that hearing, Plaintiff's counsel in fact specifically argued to the court the same arguments presented in Plaintiff's brief that there existed material facts. (R. 16-15) At the conclusion of that hearing, Judge Hanson disagreed and he again reaffirmed his ruling that the evidence was clear and that no material

facts genuinely existed and that the three Defendants named were not acting as individuals and were clearly not proper defendants.

Defendants respectfully request this court to affirm the lower court's well informed and proper decision upon this matter.

POINT II

IN THE EVENT THIS COURT RULES IN FAVOR OF PLAINTIFF, ANY AWARD OF COSTS SHOULD BE STAYED, THE SAME BEING AWARDED TO THAT PARTY WHICH ULTIMATELY PREVAILS AT THE CONCLUSION OF THIS MATTER.

This court clearly has equitable powers in deciding upon the most proper and equitable method for the awarding of costs upon an appeal such as this. Should Defendants prevail, as we believe to be the proper result, these Defendants will be dismissed from the lawsuit entirely and should, therefore, receive their costs.

In the alternative, however, should Plaintiff prevail upon this appeal the effect will be to continue the lawsuit in the lower court against these Defendants toward a determination upon the merits. In such a case, it is certainly foreseeable that these Defendants may win on the merits after a trial indicating that Plaintiff never in fact had any cause of action whatsoever. Indeed, Defendants submit that, should Plaintiff win here, it will nevertheless lose

in the resulting trial below.

Should Defendants lose on this appeal but be ultimately successful below, it would clearly be inequitable to order that they pay Plaintiff's costs in appealing a single issue in a lawsuit where it is ultimately determined Plaintiff has no cause of action.

For these reasons, Defendants request the Court to award them costs in affirming the lower court's decision. In the alternative, should this court find in favor of Plaintiff on this issue, Defendants request that any award of costs be stayed, the same to be awarded to whichever party prevails on the merits below.

CONCLUSION

The lower court twice had the opportunity for a full and complete hearing upon the single question at issue in this appeal. After being fully advised upon the pleadings, evidence, exhibits and argument by counsel for both sides, the lower court determined that the three named Defendants were not doing business as The Exchange nor were they acting in any individual capacity at any time or for any purposes relevant to Plaintiff's Complaint. The lower court found the evidence to be so clear as to indicate that no material facts were genuinely at issue on this question and the court properly dismissed Plaintiff's Complaint accordingly with

leave to refile against the proper Defendants.

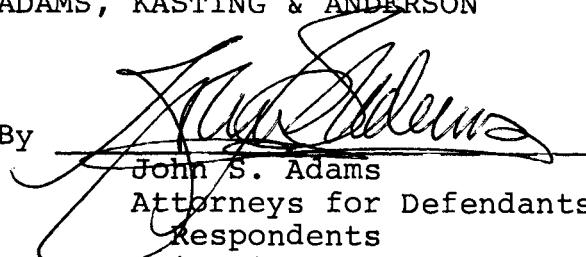
This court has long subscribed to the position that it will not interfere with the conclusion of the trial court in making such a ruling unless the decision cannot reasonably be found to be supported by the evidence. The lower court's decision in this case was amply if not overwhelmingly supported by the admissible evidence before the court and, as such, may not properly be overturned on appeal.

Defendants respectfully request this court to affirm the lower court's ruling dismissing Plaintiff's Complaint and to award Defendants their costs.

Respectfully submitted,

ADAMS, KASTING & ANDERSON

By



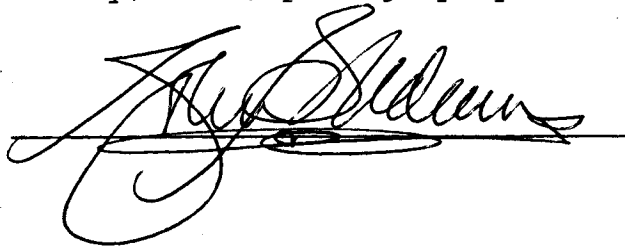
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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Respondents' Brief were mailed to F. Burton Howard and Charles C. Brown, Boyden & Kennedy, attorneys for Plaintiff-Appellant, 1000 Kennecott Building, Salt Lake City, Utah 84133, this 9th day of July, 1975, postage prepaid.

A handwritten signature in dark ink, appearing to read "F. Burton Howard", is written over a horizontal line. The signature is stylized with a large, looping initial "F" and a long, sweeping underline.

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