

2000

# Lloyd Lewis v. Lynn S. Porter, dba Lynn S. Porter House Movers : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

LLOYD LEWIS,

Plaintiff and Respondent,

vs.

LYNN S. PORTER, dba

LYNN S. PORTER HOUSE MOVERS,

Defendant and Appellant.

Case No. 14486

RESPONDENT'S BRIEF

Appeal from the District Court of Cache County, Utah

Honorable VeNoy Christoffersen, Judge

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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LLOYD LEWIS,	)	
	)	
Plaintiff and Respondent,	)	
	)	
vs.	)	Case No. 14486
	)	
LYNN S. PORTER, dba	)	
LYNN S. PORTER HOUSE MOVERS,	)	
	)	
Defendant and Appellant.	)	

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RESPONDENT'S BRIEF

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STATEMENT OF KIND OF CASE

This is a civil action brought by Plaintiff to recover monies due and owing Plaintiff under an oral contract for services rendered to Defendant. In this brief Appellant shall be referred to as Defendant and Respondent shall be referred to as Plaintiff. References to the Clerk's Transcript shall be designated CT and references to the Reporter's Transcript shall be designated TR.

#### DISPOSITION IN LOWER COURT

The Court, sitting without a jury, gave judgment to Plaintiff on his Complaint in the amount of \$9,078.77 plus costs. From this judgment, Defendant appeals.

#### RELIEF SOUGHT ON APPEAL

Plaintiff seeks affirmance of the judgment of the trial court in his favor.

#### STATEMENT OF FACTS

Since 1947, Defendant had employed Plaintiff on various occasions as a laborer and foreman in moving houses and buildings for Defendant. (TR 31). In May, 1973 Plaintiff was once again employed by Defendant to run an outfit and move new and older houses. (TR 7, 8).

Pursuant to the agreement between the parties, Plaintiff moved a substantial number of new and older homes between June 1 and December 23, 1973. (TR 24, 25). As the work proceeded, Defendant withheld sums of monies from the Plaintiff and refused to pay Plaintiff even though demand was made by Plaintiff upon Defendant for payment. (TR 30). Defendant terminated the agreement on or about the 23rd day of December, 1973. (TR 10).

On March 20, 1974, Plaintiff filed a Complaint in the above entitled matter. (CT 1). On April 6, 1974, Defendant filed his Answer. (CT 5). Depositions of the parties were taken on April 17, 1975. (CT 14A). Defendant's counsel, Hillyard & Gunnell, Gordon J. Low, withdrew as attorneys for Defendant on October 20, 1975. (CT 7). Defendant's present counsel gave Notice of Change of Attorney on October 22, 1975. (CT 8). A Notice of Readiness for Trial was filed with the Clerk of said Court (CT 9), and on October 24, 1975, the Clerk gave Notice of Trial Setting with a second setting on December 3, 1975. (CT 10). On November 19, 1975, the Clerk gave notice that the Court would hear the matter on December 3, 1975. (CT 11).

On December 3, 1975, the Court convened for the trial of the case. Plaintiff was present together with his witnesses and was represented by his attorneys, Olson, Hoggan & Sorenson, David W. Sorenson. Defendant was not present, but was represented by his attorneys, Preston, Harris, Harris & Preston, George W. Preston. (CT 12). Defendant's counsel represented to the Court that he had advised the Defendant of the trial date and could not explain the absence of his



client except to state that Defendant had gone on vacation and asked for a continuance. (TR 3). Plaintiff's counsel objected to the continuance. The Court denied Defendant's motion, and the trial proceeded. (TR 4).

The trial was concluded on December 4, 1975, and at the conclusion of the case, the trial court while still sitting on the bench rendered a judgment in favor of Plaintiff and against the Defendant for the sum of \$9,078.77, together with costs of Court. (TR 87, 88). On December 10, 1975, Plaintiff's counsel forwarded to Defendant's attorney the Findings of Fact and Conclusions of Law and the Judgment and Decree for signature for approval as to form. (CT 15-19). On December 11, 1975, the Defendant filed a Motion to Reopen or in the Alternative for a New Trial. (CT 22). On the same day the Motion was filed, the Court signed the Findings of Fact, Conclusions of Law and the Judgment and Decree. (CT 17, 18). Plaintiff responded in opposition to Defendant's Motion and on January 20, 1976 (CT 25), the Court denied the Defendant's Motion. (CT 34, 36). On February 19, 1976, Defendant filed his Notice of Appeal, requesting that the

Supreme Court of the State of Utah review the District Court's refusal to reopen the case or in the alternative grant a new trial. (CT 40).

## ARGUMENT

### POINT I

THE TRIAL COURT WAS CORRECT IN REFUSING TO GRANT DEFENDANT'S MOTION TO REOPEN THE CASE OR IN THE ALTERNATIVE FOR A NEW TRIAL AND DID NOT ABUSE ITS DISCRETION IN SO DOING.

Defendant alleges that the trial court abused its discretion in denying his Motion to Reopen or in the Alternative for a New Trial. The burden to show an abuse lies upon the party claiming the abuse. Anderson v. Johnson, 268 P.2d 427, 1 Utah 2d 400 (1954). The Defendant elected to take a vacation to Hawaii rather than appear for trial.

" . . . I advised Mr. Porter, the defendant, of the trial date, and apparently notwithstanding the fact that I'd advised him there must be some mixup, because I thought he was advised of the trial date, yet he is obviously taking a vacation, which seems absolutely inconsistent with his best interests. I can't imagine a man knowingly taking a vacation having recognized he had his obligation to be in court, and particularly considering the sum involved." (TR 3).

"Q And you've heard counsel's testimony that he is in Hawaii? A Yes, sir." (TR 20, 21).

"That at said time I had made prior arrangements to go on a vacation with my family to Hawaii." (CT 23).

Defendant now claims that such conduct should be excused and that the Court should have allowed him additional trial time to present his testimony. In his Affidavit for his Motion before the Court, Defendant alleges that:

1. He had already planned to go to Hawaii and that his attorney was entering into negotiations and that the trial was not ready because the Defendant had not turned over certain materials to Plaintiff's attorney as requested,
2. He had offsets and claims which were not presented because Defendant did not know what was needed until the trial, and
3. That certain witnesses were not known until Plaintiff's testimony. (CT 23, 24). (Emphasis added).

The essential claims made by the Defendant relate, in actuality, to the conduct of the Defendant not the Plaintiff. At the time of trial, Defendant's attorney rather than saying that the continuance should be granted because of pending or continuing negotiations between the parties, or that the Defendant had failed to discover additional facts and

witnesses, stated that he was at a loss to explain why the Defendant was not present in Court. (TR 3).

Defendant had nearly 21 months to discover the evidence and witnesses that the Plaintiff would produce; yet, it was not until after the trial was over that Defendant made any allegation as to the need for additional discovery. (CT 22). The trial court issued its Memorandum Decision on January 20, 1976, in response to Defendant's Motions and stated:

"The defendant filed a motion to reopen or in the alternative for a new trial on the grounds the defendant claims that he assumed the trial would not be held and went on vacation. There is nothing in the record to show that he could make any such assumption. And on the further grounds that certain books, records, and documents need to be examined and that it was not known in a discovery procedure that such was needed until the time of trial.

The action was commenced March 20, 1974, and was tried on December 3, 1975, nearly two years later. It would appear that the defendant had ample time for whatever discovery was needed prior to trial and he could have determined what books, records, and documents the plaintiff was relying on to support his claim." (CT 34).

Certainly, Defendant failed to use reasonable diligence in producing his evidence at the time of trial, and such diligence is necessary for a Motion for New Trial. In the

case of Hydraulic Cement Block Co. v. Christensen, 114 Pac. 524,

38 Utah 525 (1911) the Court stated:

"Courts cannot grant new trials merely because a defeated party, after an adverse decision, makes a showing that upon a second trial he can produce additional evidence in support of his contentions which will probably turn the decision in his favor. He must use due diligence to produce his evidence when the case comes on for trial, and, unless he does so, the court is powerless to help him. In this case there is no showing whatever that the plaintiff used any diligence to produce the alleged newly discovered evidence at the trial. The court, therefore, committed no error in overruling the motion for that reason." 114 Pac. at 526.

See also Van Dyke v. Ogden Savings Bank, 161 Pac. 50, 48

Utah 606 (1916). And in Salt Lake Inv. Co. v. Stoutt,

180 Pac 182 the Utah Supreme Court stated:

"(3) But the serious question presented for our consideration is, Did the plaintiff use reasonable diligence to procure the proposed testimony for use at the trial of the case? If he did not, it does not matter how material or beneficial the testimony may have been on a new trial, his motion for a new trial should not prevail. The statute in relation to this ground for a new trial says: 'Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.'" (Emphasis by the Court.) 180 Pac. at 184.

It was the Defendant, by his own admission, (1) who chose a course of action which took him out of the state on vacation when he was to have been present for trial (CT 23), (2) who failed to present his alleged offsets and counter-claims, (3) who failed to ascertain the witnesses necessary to his defense, and (4) who failed to raise what he now considers proper objections, in a timely fashion. He was represented by counsel, had his witnesses testify and has had his day in court; he cannot now complain.

Rule 59 of the Utah Rules of Civil Procedure clearly allows the trial court discretion as to whether it will reopen a case or not. This court has stated in Tuft v. Brotherson, 150 P.2d 384, 106 Utah 499 (1944), that a motion to reopen a case after the trial court has taken it under advisement but before it has announced its decision is addressed to the trial court's discretion; and, in absence of a showing that such discretion has been abused, the trial court's ruling will not be disturbed. The same principle would certainly seem to apply in the present case where the trial court had announced its decision from the bench at the conclusion of the trial and before the Motion to Reopen was made. (CT 87, 88). In the instant case, the

court saw the witnesses and heard their testimony, made rulings during the trial and allowed and denied the admission of testimony and evidence. The trial court was close to the entire trial, and having taken into consideration the total circumstances of the case, rendered its judgment and denied the Defendant's Motions. In Barber v. Calder, 522 P.2d 700, 702 (1974), this Court, in discussing the deference to be given a trial court's discretionary rulings, stated:

" . . . In situations where the exercise of discretion is appropriate, considerable weight should be given to the determination of the trial court, whichever way it goes. This is true because due to his close involvement with the parties, the witnesses, and the total circumstances of the case, he is in the best position to judge what the interests of justice require in safeguarding the rights and interests of all parties concerned."

Finally, in addressing this specific point, the California Third District Court of Appeal, in a similar vein to that of this Court in the Tuft case, stated in Pocock v. Deniz, 286 P.2d 466, 134 C.A.2d 758 (1955) that whether a motion to reopen a case after the close of the evidence should be granted rests in the sound discretion of the trial court, and it is seldom that the record will justify a reversal

of the judgment on the ground that error was committed in denying a motion to reopen. The court goes on to further elucidate this point and says:

" . . . (N)umerous cases have held that such a motion (to reopen) is properly denied, unless the court is satisfied that there is good excuse shown why the evidence sought to be introduced after reopening could not have been produced before the close of the evidence. . ."

286 P.2d at 469. Defendant has failed to meet this burden in the present case.

The Defendant has failed to cite any specific grounds which support his allegation that the trial court abused its discretion in failing to grant Defendant's Motion to Reopen or in the Alternative for a New Trial. Indeed, he has failed in his burden to show whereon any charge of abuse of discretion could be adequately founded.

The Plaintiff respectfully submits that this Court should sustain the trial court's denial of the Defendant's Motion to Reopen or in the Alternative for a New Trial as no abuse of discretion whatsoever is evident.



POINT II

THE TRIAL COURT CORRECTLY ENTERED FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT AGAINST LYNN S. PORTER dba LYNN S. PORTER HOUSE MOVERS, AN INDIVIDUAL, AS THE DEFENDANT ENTERED THE CONTRACT AS AN INDIVIDUAL, ADMITTED HIS CAPACITY TO BE SUED INDIVIDUALLY AND FAILED TO RAISE TIMELY OBJECTIONS THERETO.

The Court's attention is respectfully directed to page 8 of the Defendant's Brief, where it is alleged that the trial court erred in entering judgment against ". . . Plaintiff, Lynn S. Porter dba Lynn S. Porter Housemovers, an individual." The word "Defendant" was likely intended since the allegation as written is not correct. Judgment was entered for Lloyd Lewis, Plaintiff, and against Lynn S. Porter dba Lynn S. Porter House Movers, an individual, Defendant. (TR 87, 88 & CT 18).

Assuming the Defendant meant to use the word "Defendant" as indicated above, it is submitted that the trial court was correct in entering judgment against the Defendant in his capacity as an individual. Two grounds of support for this contention are found in the law and the facts.

First, the Defendant admitted that he was a proper party to the lawsuit and that he was being sued in a proper capacity when he filed an Answer to the Plaintiff's Complaint and also in the Answer itself.

Plaintiff's Complaint alleges as follows:

"2. That on or about June 1, 1973, Plaintiff and Defendant entered into an Agreement whereby Plaintiff would render services to the Defendant in the form of moving houses for Defendant.

3. That between June 1, 1973, and December 31, 1973, Plaintiff moved houses for Defendant for which Defendant agreed to pay the Plaintiff."  
(CT 1).

Defendant's Answer to those allegations stated as follows:

"3. Answering paragraph two, Defendant admits the same.

4. Answering paragraph three, Defendant admits that Plaintiff moved houses between said dates but denies the balance of said paragraph."  
(CT 5).

It appears that the matter has been conclusively determined by Defendant's pleadings in this case. In 61 Am.Jur.2d, "Pleading," p. 604, it is noted:

"In thus pleading (to the merits or in bar), the defendant likewise admits the capacity in which he is sued."

This Court has treated this issue in McFarland's Estate v. Holt, 417 P.2d 244, 18 Utah 2d 127 (1966). The Court said:

"One who files a pleading asking the court to act thereon vouches for its verity and should not thereafter be permitted to repudiate it

for the purpose of upsetting the action the court has taken pursuant to his request."

417 P.2d at 245.

The State of Colorado has taken the same position in Skeens v. Kroh, 489 P.2d 347, 30 Col. App. 88 (1971). It states:

"Specific admissions in the pleadings preclude the pleader from later taking a position inconsistent with the existence of the facts admitted."

The second ground supporting the trial court's ruling is based on the fact that Defendant has raised no timely objection, as to the capacity in which he is sued. In fact the question of capacity was not raised during the trial nor, in any of Defendant's motions following trial. It was first raised in Defendant's Brief on appeal at page 8. Accordingly, Defendant should be deemed to have waived any objection to capacity.

If the Defendant had disagreed with the allegations in the Plaintiff's Complaint, he had ample time to raise objections and avenues were open to him to respond to an alleged misjoinder or nonjoinder, i.e., Rules 8(b), (d) and 12 of the Utah Rules of Civil Procedure. The fact remains, however, that the Defendant admitted the relationship between

the parties in his Answer (CT 5); and the record is silent as to any motions or objections prior to or during the course of the trial.

The following paragraphs demonstrate the stance of the law, and particularly the law in Utah, as it pertains to the failure to raise an objection to an alleged defect of parties.

This Court addressed the matter in Buhler v. Maddison, 166 P.2d 205, 109 Utah 245 (1946). The appellant had raised the objection of a defect of parties defendant. The Court found it to have been waived, however, as the cause had been tried twice before in the lower court and the same defect, if there was one, had been present and not raised. The fact that the present case has been tried only once in the lower court is not enough to take it out of the limits of the rule. The determinative factor is that no objection was raised below or at any time until now.

In 59 Am.Jur.2d, "Parties," p. 729, it states:

"As a general rule, unless the defendant promptly raises the question of defect of parties in the manner pointed out by the local practice provisions for taking objections to a defect of parties, he is deemed to waive the objection and it cannot be injected at a later stage of the proceedings."

In Steele v. Wilkinson, 349 P.2d 1117, 10 Utah 2d 159 (1960), this Court dealt with the assignment of error in the giving of certain instructions to the jury, said assignment not being made in the lower court. The Court stated:

" . . . Many of the objections now urged on appeal were not urged in the trial court and thus need not be considered by this court, there being no showing of special circumstances why these objections were not made below."

349 P.2d at 1119.

Finally, in Huber v. Newman, 145 P.2d 780, 106 Utah 363 (1944), this Court stated:

" . . . It is elementary that when a party does not raise objections below when he had notice and opportunity to object, he may not be heard to complain for the first time on appeal. We hold, therefore, that the defendant waived all of these defects, if any there were, by failing to object below and we shall not further consider them. . . ."

145 P.2d at 783.

The trial court was correct in entering Findings of Fact, Conclusions of Law and Judgment against Lynn S. Porter dba Lynn S. Porter House Movers, an individual, because Defendant has raised no objection whatsoever by way of pleadings, motion or oral protest from the filing of the

Complaint to the present appeal. Indeed, it seems clear that the relationship involved was that of a personal contract between the parties, irrespective of any other legal capacity the parties may have separately maintained. The trial court's action should be affirmed.

#### CONCLUSION

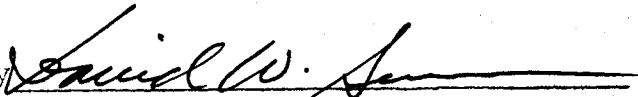
The Defendant, as an individual, entered into an agreement with the Plaintiff, whereby the Defendant agreed to pay the Plaintiff to move houses for him. In addition to moving houses for the Defendant, the Plaintiff advanced costs for and on behalf of the Defendant. Timely demand was made upon the Defendant for sums due and owing the Plaintiff. The Defendant refused to pay the sums, and suit was filed therefor. At the conclusion of a trial on the merits and while the Court was still on the bench a judgment was entered for the Plaintiff and against the Defendant in the amount of \$9,078.77.

This judgment should be affirmed over the grounds urged by the Defendant for reversal. No abuse of discretion has been shown on the part of the trial court in refusing to reopen the case or in the alternative, in refusing to grant a motion for a new trial. The Defendant admitted his

capacity to be sued individually or in the alternative,  
waived any objection he might have to the capacity in which  
he is sued by failing to raise timely objection.

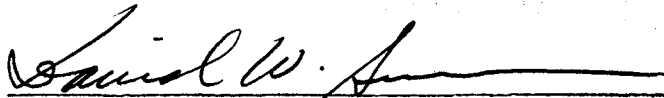
Respectfully submitted,

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MAILING CERTIFICATE

I hereby certify that I mailed ten (10) copies of the  
foregoing Respondent's Brief to Allen E. Mecham, Clerk of  
the Utah Supreme Court and two (2) copies to George W.  
Preston of Preston, Harris, Harris & Preston, Attorney for  
Defendant-Appellant, 31 Federal Avenue, Logan, Utah, 84321,  
on the 17<sup>th</sup> day of June, 1976.

  
David W. Sorenson