

1977

Wesley G. Harline and Richard Nilsson v. Executive Properties : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

| | | |
|-----------------------------|---|----------------|
| WESLEY G. HARLINE and | : | |
| RICHARD NILSSON, | : | |
| | : | |
| Plaintiffs and Respondents, | : | |
| | : | |
| vs. | : | Case No. 14701 |
| | : | |
| EXECUTIVE PROPERTIES, a | : | |
| limited partnership, | : | |
| | : | |
| Defendant and Appellant. | : | |

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an action in equity based upon the doctrine of unjust enrichment. Executive Properties, a limited partnership, the appellant herein, was the defendant in an action commenced by Drs. Wesley G. Harline and Richard Nilsson against Executive Properties, a limited partnership, and appellant herein, in the District Court of Weber County, Civil No. 61788.

The respondents had advanced the sum of Forty Thousand Dollars (\$40,000.00) to Frontiers West, the general partner of Executive Properties, to apply toward the purchase of an apartment complex known as Bellevue Estates. Frontiers thereafter filed under the Federal Bankruptcy Act, Chapter 11, in an attempt to work an arrangement with its creditors, which action was converted to a full bankruptcy in which

Frontiers was declared bankrupt in June of 1975. Action was brought by respondents to recover Forty Thousand Dollars (\$40,000.00) based on an alleged unjust enrichment to the Executive Properties, a limited partnership, appellants.

DISPOSITION IN LOWER COURT

This case was tried in the District Court of Weber County, State of Utah, with the Honorable Calvin Gould presiding on the 3rd and 4th days of May, 1976, the court handing down its memorandum decision on the 11th day of May, 1976, awarding to the plaintiffs, the respondents herein, a judgment of Twenty Thousand Dollars (\$20,000.00) each against the defendant, Executive Properties. The findings of fact and conclusions of law, together with a judgment by counsel for respondents, was signed and executed by the court on the 22nd day of June, 1976. An appeal was taken by Executive Properties, a limited partnership, through its counsel on the 21st day of July, 1976; thereafter a transcript of trial was ordered and prepared.

RELIEF SOUGHT ON APPEAL

Executive Properties, the appellant herein, seeks relief as follows:

1. A reversal of the trial court's decree of judgment based on misapplication of facts by the trial court to the law.
2. Dismissal of the trial court's granting of judgment in favor of plaintiffs and respondents.

STATEMENT OF FACTS

In late 1968, a Washington State partnership known as "Mastro and Gamel", whose partners were Mike Mastro and Issac Gamel and their respective spouses, (the Partnership is hereinafter referred to as Mastro), had constructed a 129 unit apartment complex in Bellevue, Washington. The apartment complex was referred to as "Bellevue" and any future reference to the apartment complex shall be referred to as "Bellevue".

On October 1, 1970, Mastro sold Bellevue on an installment contract to Apartment Enterprises, Inc., a Utah Corporation, whose president was Paul M. Hansen. The transaction conveyed all rights, title and interest to Apartment Enterprises, Inc. for One Million Five Hundred Fifty Thousand Dollars (\$1,550,000.00). The One Million Five Hundred Fifty Thousand Dollars (\$1,550,000.00) consisted of a first mortgage in the approximate amount of One Million Two Hundred Thousand Dollars (\$1,200,000.00) and Mastro's equity of a Three Hundred Fifty Thousand Dollars (\$350,000.00) to be paid in one lump sum of Three Hundred Fifty Thousand Dollars (\$350,000.00) in the year 1981. However, the contract provided for lump payments of interest in the amount of Fifty Thousand Dollars (\$50,000.00) on or before December 31, 1970, and another

Fifty Thousand Dollars (\$50,000.00) interest in 1971, with a final interest payment of Fifty Thousand Dollars (\$50,000.00) due on or before January 15, 1973.

Apartment Enterprises, Inc., shortly thereafter, transferred and conveyed its interest to B & L, a Utah Limited Partnership, of which Apartment Enterprises, Inc., was its general partner. One of the limited partners in said B & L Limited Partnership was the respondent, Dr. Richard Nilsson.

Because of the adverse employment situation in the Seattle area as a result of the termination of the SST Program resulting in huge lay-offs at Boeing, many of the tenants at Bellevue left the area for other employment. Thus caused financial difficulties for B & L. Thus, in late 1972, although contracts are dated August 3, 1972, Apartment Enterprises and B & L conveyed all its right, title and interest in said Bellevue to Frontiers West, Inc., a Utah Corporation, which was formed in 1971 for the purpose of syndicating and developing real property. The Respondents, Drs. Wesley G.

Harline and Richard Nilsson were two of the original incorporators of Frontiers West, along with Linford L. Theobald, who became the President of Frontiers West, Inc. hereinafter referred to as "Frontiers". Frontiers purchased Bellevue on contract by assuming all of Apartment Enterprises' remaining obligations

under the contract and agreeing to assume Thirty Thousand Dollars (\$30,000.00) in delinquent operating expenses, and agreeing to pay Apartment Enterprises its equity of One Hundred Thirty Thousand Dollars (\$130,000.00) in lump sum payments of Fifty Thousand Dollars (\$50,000.00) on or before June 30, 1974, another Fifty Thousand Dollars (\$50,000.00) on or before June 30, 1975, and finally Thirty Thousand Dollars (\$30,000.00) on or before June 30, 1976.

At the same time the purchase was made by Frontiers, Frontiers caused to have form a Utah limited partnership called "Executive Properties", of which Frontiers and Mr. Lynford L. Theobald were to be co-general partners. Frontiers on the identical date of the purchase, transferred and conveyed its interest in Bellevue to Executive Properties by contract for a total purchase price of One Million Eight Hundred Eighty Thousand Dollars (1,880,000.00), which figure was Three Hundred Sixty Seven Thousand (\$367,000.00) above the price just contracted from Apartment Enterprises and B & L. The contract provided further that it assumed all of the liabilities and obligations of the Frontiers contract and the Apartment Enterprises contract to Mastro. Thereafter Frontiers sold partnership interests in Executive Properties to ten (10) investors. Each investor was to pay Ten Thousand Dollars (\$10,000.00) in cash on or before December 31, 1972, and sign an installment note payable to Executive Properties

of Twenty Thousand Dollars (\$20,000.00), of which the first Eight Thousand Dollars (\$8,000.00) was to be paid on or before June 30, 1973, Six Thousand Dollars (\$6,000.00) due on or before June 30, 1974, Four Thousand Dollars (\$4,000.00) due on or before June 30, 1975, and Two Thousand Dollars (\$2,000.00) due on or before June 30, 1976.

The Plaintiff and Respondent, Wesley G. Harline, became one of the investors in Executive Properties. The remaining partnership interests were sold to various investors, among whom were Drs. Sheridan R. Daines, A. Dean McKee and Robert Morrow. These three (3) doctors purchased forty percent (40%) of the partnership interests. They did not have sufficient cash resources at the time to make the initial cash down payment, and as a result, were permitted by Frontiers and Lynford L. Theobald, the then general partners, to sign promissory notes for their initial contribution to the partnership. The other six (6) investors made their cash contributions and all partners obligated themselves for the Twenty Thousand Dollars (\$20,000.00) installment note.

In January 1973, Frontiers became delinquent on the Fifty Thousand Dollar (\$50,000.00) payment due Apartment Enterprises, which in turn was due Mastro. An extension of time was granted by all parties to Frontiers

until June 30, 1973 for the payment. On or before June 30, 1973, the limited partners of Executive Properties made their Eight Thousand Dollar (\$8,000.00) payment under the installment notes, all except Drs. Sheridan R. Daines, A. Dean McKee and Robert Morrow, who were again permitted by the general partners to sign additional promissory notes for their Eight Thousand Dollar (\$8,000.00) installment note payment. However, in January of 1973, Frontiers had secured a One Hundred Ninty Thousand Dollar (\$190,000.00) operating loan from Zion's National Bank of Ogden, Utah for purposes of developing other real estate syndications, which came due in September of 1973 and was later renewed. Frontiers pledged as security for the loan most of Executive Properties' installment notes receivable and the notes Executive Properties received in lieu of cash from Drs. Daines, McKee and Morrow. The rest of the partnership's notes were pledged to other Frontiers' creditors. During this same period, Frontiers had caused to be formed five (5) other limited partnerships with their respective investors.

In June, 1976, the Fifty Thousand Dollars (\$50,000.00) under the previous extension became delinquent. In October, 1973, Mastro commenced action in Washington against Apartment Enterprises for foreclosure on Bellevue pursuant to the terms of their contract. At approximately the same time, Apartment

Enterprises commenced action against Frontiers for the delinquent installment and to terminate Frontiers interest under the contract. Apartment Enterprises answered Mastro's complaint and alleged certain counter claims. However, Frontiers failed to answer Apartment Enterprises' complaint and in November, 1973, Apartment Enterprises obtained a Default Judgement against Frontiers depriving it of any interest in Bellevue.

After the entry of the Default Judgment, Frontiers began negotiations with Apartment Enterprises for reinstating its contract. It was agreed by the parties that if Frontiers could make arrangements with Mastro to settle the matter between Mastro and Apartment Enterprises, Apartment Enterprises would then reinstate Frontiers contract. Frontiers negotiated directly with Mastro for a solution to the Mastro law suit. The parties agreed to accept Forty-Two Thousand Dollars (\$42,000.00) and upon its payment by Frontiers to Mastro, Mastro would inturn reinstate its contract with Apartment Enterprises. However, because of the then fuel crisis and the internal affairs of Frontiers Frontiers did not have the Forty-Two Thousand Dollars (\$42,000.00). Frontiers made many loan applications at various banks in the Ogden area, however, in all cases were turned down. The various investors of the Executive Properties were requested to come up with the FortyTwo Thousand (\$42,000.00)

Drs. Daines, McKee and Morrow were asked to prematurely come up with cash on the original notes given in lieu of cash.

This was the first time, the investors were unaware of the delinquent installment and the subsequent Default Judgment. Attorney John P. Sampson was retained to investigate why the payment had not been made and the default taken. It was determined that the investors of Executive Properties had made Sixty Thousand Dollars (\$60,000.00) in cash payments to Executive Properties in 1972 and another FiftyFive Thousand (\$55,000.00) in cash in June of 1973. Yet the contracts between Executive Properties, Frontiers, and Apartment Enterprises only required an initial downpayment of Thirty Thousand Dollars and the January 15, 1973 payment of Fifty Thousand (\$50,000 00), which resulted in the Default Judgment. It was also determined that the General Partners, Frontiers and Lynford L. Theobald, had taken most of Executive Properties notes receivable from the investors and pledged them to Zion's National Bank as security for the One Hundred Ninty-Two Thousand Dollars (\$192,000.00) loan. The loan proceeds were used by Frontiers in its own operations and the acquisition of other properties for the formation of additional limited partnerships which Frontiers became the general partner. It was further determined by Mr. Sampson that in addition Frontiers owed Executive Properties on its books One Hundred

Nine Thousand Dollars (\$109,000.00) by means of inner office accounting. Furthermore, that Zion's National Bank would not return the promissory notes of Drs. Daines, McKee, and Morrow without receiving payment for them which in turn was to be applied against Frontiers then current loan balance. Futher investigation revealed that Frontiers in its formation of Executive Properties, and its simultaneous acquisition and sale of Bellevue to Executive Properties had failed to reveal to the investors its profit in the contract of an amount in excess of Four Hundred Thousand Dollars (\$400,000.00). Because sufficient monies had already been paid by the investors to Executive Properties for the delinquent payment, the One Hundred Nine Thousand Dollars (\$109,000.00) owed Executive Properties by Frontiers all partnership notes having been pledged to Zion's First National Bank, and finally the large undisclosed profits, the Investors informed the general partners that they had better obtain the funds to secure the defect as soon as possible from whatever sources they had available, and if they didn't litigation would be commenced against them.

In the meantime, Attorney Sampson on behalf of the Investors had negotiated with Apartment Enterprises and Paul M. Hansen to pay the delinquent Fifty Thousand Dollars (\$50,000.00) in the event the payment was not made by Frontiers, and futher,

in the event the default divesting Frontiers of any right, title, and interest to Bellevue was sustained. In the event the investors would assume directly the rights and obligations of the Frontiers contract with Apartment Enterprises.

Thereafter, Mr. Theobald, having been informed of the above information, sought financial assistance from Drs. Wesley G. Harline and Richard Nilsson, the directors of Frontiers. Each respondent gave Frontiers Twenty Thousand Dollars (\$20,000.00) and Frontiers in exchange gave its promissory note in the above amount, a promise to transfer 250,000 shares of investment stock in Frontiers to each respondent and finally a promise to pay to each respondent Twenty Thousand Dollars (\$20,000.00) from the profits of the contract between Frontiers and Executive Properties. In addition to the foregoing, Mr. Theobald promised that in the event Drs. Daines, McKee, and Morrow defaulted on their notes, then being held by Zion's National Bank, Frontiers West would foreclose the interests of the three doctors and transfer the doctors' interest to the respondents. The Forty Thousand Dollars (\$40,000.00) paid by the respondents was deposited in Frontiers bank account on a deposit slip marked "Loan from Drs. Harline and Nilsson." The next day the exact funds

were transferred to Attorney Merlin Casey in Seattle, Washington for the purpose of reinstating the contract between Mastro and Apartment Enterprises. At the same time the transfer was made to Attorney Casey, Frontiers charged Executive Properties through its inner office account for the Forty Thousand (\$40,000.00). Thus, reducing the debt owed Executive Properties from One Hundred Nine Thousand Dollars (\$109,000.00), to Sixty-Nine Thousand Dollars (\$69,000.00). Subsequently, Mastro reinstated Apartment Enterprises' contract and Apartment Enterprises removed the default judgment and Frontiers' contract was reinstated.

Approximately two weeks later, Frontiers advised Drs. Daines, McKee and Morrow, that their original notes given in lieu of cash were due and payable on December 29, 1973 and that if they were not paid immediately thereafter, their interests in the partnership would be forfeited and transferred to the respondents, Dr. Harline and Dr. Nilsson. Mr. Theobald was advised by Drs. Daines, McKee and Morrow's attorney, Mr. John P. Sampson, that such a forfeiture was not legally possible and that if Mr. Theobald wanted payment of the notes, he had to first get them from Zion's National Bank and commence appropriate legal action. Zion's National Bank was unwilling to release the notes without a corresponding reduction in the then outstanding loan of Frontiers.

Payment was not made by Drs. Daines, McKee and Morrow, and therefore Mr. Theobald notified the same three doctors of the transfer of their interest in Executive Properties to respondents, Dr. Harline and Dr. Nilsson. The transfer was made on the partnership books and records by giving respondents an equity interest in the partnership and increasing the debt owed the partnership by Frontiers by means of the inner office account. Thus the respondents were given a Forty Thousand Dollar (\$40,000.00) equity in the partnership and Frontiers owed the partnership One Hundred Nine Thousand Dollars (\$109,000.00) instead of the previous Sixty-Nine Thousand Dollars (\$69,000.00).

Because of the undisclosed profits, partnership notes pledged for other than partnership purposes, and the wrongful forfeiture of Drs. Daines, McKee and Morrow's partnership interests, an action to remove Frontiers and Mr. Theobald as general partners and for an accounting of the entire partnership was commenced in the District Court of Weber County under the title of Lowell R. Daines et. al. vs. Frontiers West and Lynn Theobald, Case No. . A trial was subsequently held and a decree of final judgment was entered by the Honorable John F. Wahlquist in the matter. The judgment provided for the removal of Frontiers and Lynford Theobald as general partners. It reinstated Drs. Daines, McKee and Morrow as true limited partners. Frontiers' entire equity

in the contract with Executive Properties was declared the property of the investors and further gave judgment for the value of all partnership notes misappropriated by Frontiers in the wrongful pledge to Zion's National Bank and other Frontier creditors. A final accounting for the court in the above matter was made to the Honorable John F. Wahlquist by Mr. Dran Alexander, accountant for Frontiers; and in said accounting, Frontiers was given credit for the Forty Thousand (\$40,000.00) received from respondents. Thereafter, because of the financial set backs of Frontiers, in the many limited partnerships it was functioning as general partner and its failure to make proper payments to the banks, Frontiers in December 1974 applied for bankruptcy under the reorganization provisions of Chapter 11 of the Federal Bankruptcy Act. Frontiers was declared bankrupt in July of 1975 when the reorganization plan failed.

In the meantime, Executive Properties, with its new general partner, Lowell R. Daines, managed the property and arranged for its sale in June of 1975 to the Development Corporation of Canada. After the completion of the sale and the final declaration of bankruptcy of Frontiers, the respondents made demand on Executive Properties for the Forty Thousand Dollars (\$40,000.00) advanced Frontiers in 1973. Thereafter, Executive Properties refused the payment and this action was commenced and heard by the Honorable Calvin Gould.

ARGUMENT

POINT I

THE WEIGHT OF THE EVIDENCE DOES NOT SUPPORT A FINDING THAT THE APPELLANT WAS UNJUSTLY ENRICHED BY THE ACTS OF THE RESPONDENTS.

This issue is laden with questions of fact which appellant submits were mistakenly understood by the trial court, when the trial court made its finding based upon the evidence that the defendant was unjustly enriched. The law of quasi-contracts, contracts implied by law, and the law of restitution are based upon the principal that no person should be unjustly enriched at the expense of another. "If there is no basis for unjust enrichment, there is no basis for restitution." 66 Am Jur 2d, "Restitution and Implied Contracts," Section 4. We submit that the elements of law are as follows:

1. That there must be services or benefits conferred on another,
2. With an expectation of being paid therefor,
3. With the donor not acting as a volunteer or as an intermeddler,
4. Allowing the one benefitted to retain the benefits without compensation therefor.

The facts of the instant case, although conferring a benefit of sorts, are such that the appellant herein is not the one upon whom the benefit was intended to be placed on

the date the respondents took their action. In the following dialogue, each witness and the facts each witness testified to are examined in the light of their intended acts and will show that by a preponderance of the evidence that the court erred and overlooked the same in finding that there had been an unjust enrichment.

THE FIRST AND SECOND ELEMENTS THAT THERE MUST BE A SERVICE OR A BENEFIT CONFERRED UPON ANOTHER AND THAT THERE WAS AN EXPECTATION OF BEING PAID FOR SUCH CONFERRING OF THE BENEFIT ARE HEREINAFTER EXAMINED WITH REGARD TO THE TRIAL TRANSCRIPT. Respondent Nilsson was a limited partner in the partnership known as B & L, having invested the sum of Ten Thousand Dollars (\$10,000.00) in October of 1970. (TR-119,120). Further, he had invested and was an incorporator as well as a member of the board of directors of Frontiers West, Inc., as of August of 1971. (TR-55). In Frontiers West, he had made an investment of Seven Thousand Dollars (\$7,000.00) (TR-120) and had become a creditor of Frontiers West, having assisted in its financial difficulties of the past by having loaned large sums of money to the corporation (TR-99). Respondent Harline, an incorporator and also a member of the board of directors of Frontiers West, Inc., since its inception (TR-55), had in his ownership prior to December 18, 1973, Seven Hundred Thousand (700,000) shares of outstanding stock, which had a value of five cents per share, or a total of

Thirty-Five Thousand Dollars (\$35,000.00) (TR-107). He also was a limited partner in appellant since its creation. (TR-109).

Further, respondents Harline and Nilsson volunteered in their testimony that they desired to benefit Frontiers West by their loans of Twenty Thousand Dollars (\$20,000.00) each to Frontiers West on or about the 18th day of December, 1973, (TR-112,124). Respondents' Exhibit "G", paragraphs one and two of number one further set forth that for and in consideration of the agreed to loans of Twenty Thousand Dollars (\$20,000.00) each, that the directors unanimously agreed to authorize compensation of Two Hundred Fifty Thousand (250,000) shares of Frontiers West stock to each and Twenty Thousand Dollars (\$20,000.00) profit from Frontiers West's own equity in Bellevue Estates. In addition, if Drs. Sheridan Daines, A. Dean McKee and Robert Morrow failed to honor their original promissory notes given in lieu of cash to Executive Properties, that their shares would be transferred to respondents Nilsson and Harline and their loans would then thereafter be converted to equity in the limited partnership.

It is clear from the testimony of Lynn Theobald that respondents Harline and Nilsson made a loan pursuant to plaintiff's Exhibit "G" to Frontiers West, Inc., which was ratified by the board of directors on or about the 18th day of December, 1973, (TR-64). It is further clear that it

was a loan to Frontiers West and in fact Mr. Theobald indicated in direct examination it was a loan to Frontiers; in fact, Mr. Theobald emphasized that at that point in time when the money was given, it could be nothing but a loan (TR-69). On cross-examination, he further stated that it was originally set up to be a loan in that it would be nothing but a loan (TR-75). In further support of this determination that it was a loan, Dr. Nilsson testified he had insisted that a note be made to guarantee his repayment by Frontiers West (TR-123). Mr. Theobald, in examining defendant's Exhibit 1, identified the same as the deposit slip of Frontiers depositing Forty Thousand Dollars (\$40,000.00) to Frontiers West account by setting forth on said deposit slip the following notation, "Loans from Doctors to cover Bellevue" (TR-81).

It is obvious from Lynn Theobald's testimony that he had given respondents promissory notes in an amount of Twenty Thousand Dollars (\$20,000.00) each from Frontiers based on monies loaned to Frontiers West "until we assigned the interest to them or paid them back." (TR-87,98). Further, that this was to include, if feasible, the forfeiture of interest of limited partners McKee, Daines, and Morrow, raising the question of a contingent possibility that said shares could in fact be forfeited. (TR-99,100).

In summary, the foregoing testimonies of respondents

Nilsson, Harline, and Lynn Theobald, represent the total

proposed arrangement upon which respondents testified that they would loan Forty Thousand Dollars (\$40,000.00) to Frontiers. This fact is supported in that they now testify that they were promised and were given additional collateral and for their Forty Thousand Dollars (\$40,000.00) loan to Frontiers West when they received the following: (a) a promissory note in the amount of Twenty Thousand Dollars (\$20,000.00) signed by Frontiers West, Inc., (b) Two Hundred Fifty Thousand (250,000) shares of Frontiers West stock, (c) Twenty Thousand Dollars (\$20,000.00) each from any future profit arising out of the sales contract between Frontiers West and Executive Properties, and (d) the promise to receive through a conveyance from Frontiers West the equity interest of Sheridan Daines, McKee, and Morrow, if and when their partnership interests were to be forfeited. In addition, the attempt to forfeit the equity interest of Drs. Daines, McKee, and Morrow, would be difficult, if not impossible, in that the notes they had given to appellant had been sold to Zions First National Bank, and Frontiers had received payment therefor, and as such, it would be Zions' action to sue on any default of payment on the same. (TR-61,83,84,181,195). Thus, the foregoing facts do not indicate that the benefit was being conferred upon another with the expectation that the other, the appellant herein, be required to discharge the obligation in that the benefit

in and of itself was conferred upon Frontiers West in which the respondents held a substantial interest and which business entity was in default and in need of removing itself from this liability.

IN THE THIRD ELEMENT OF THE LAW OF RESTITUTION, AN ACT OF A VOLUNTEER OR AN INTERMEDDLER CANNOT BE CONSTRUED TO MEAN ANY INCIDENTAL BENEFIT CONFERRED IS NECESSARILY A BENEFIT WHICH WOULD REQUIRE COMPENSATION. In the testimony of Paul M. Hansen, the president of Apartment Enterprises, Inc., which entity was the general partner of B & L limited partnership, which was the seller to Frontiers West of the Bellevue Apartment Estates, he did emphasize that there existed an alternative if Frontiers West, Inc., did fail to honor the contract (Plaintiff's Exhibit "B") by discharging a Fifty Thousand Dollar (\$50,000.00) indebtedness to B & L limited partnership. This alternative was that the limited partners of B & L would come forward with such sums and volunteer payment on the sums owed to Mastro, and thereby dissolve any actions at law which had been filed against the predecessor sellers of Frontiers West and Executive Properties (TR-20,22,23).

Secondly, there existed another alternative that if Frontiers West and B & L did fail to make arrangements for the payment of the required amount to Mastro, that the investors of Executive Properties would honor a commitment

to come through with the amount needed to set the contract back in order between Executive Properties and the predecessor seller. (TR-20,22,43,44).

Thus, the acts of the respondents had no basis in an attempt to benefit Executive Properties as appellant because of these alternatives, which were known to both Frontiers West and the predecessor sellers, B & L limited partnership and Apartment Enterprises, Inc. Thus, it could be concluded that the acts of the respondents herein was to benefit themselves and intermeddle into the affairs of their purchasers, the appellant. Respondents' acts in extending Forty Thousand Dollars (\$40,000.00) to Frontiers West, Inc., was a benefit conferred upon Frontiers West, Inc., and an attempt to save respondents' substantial investment in Frontiers West.

THE FINAL ELEMENT OF RESTITUTION WOULD BE TO ALLOW ONE WHO BENEFITTED TO RETAIN THE BENEFITS WITHOUT COMPENSATING THE ONE WHO HAD CONFERRED THE BENEFITS. The accounting record of appellant as of the end of 1973, as testified to and substantiated by Oren Alexander, the accountant for Frontiers and appellant's limited partnership, when he testified that subject to the lawsuit filed by Lowell R. Daines, A. Dean McKee, J. David Christensen, Robert T. Sena, Robert Morrow, and Sheridan L. Daines vs. Frontiers West, et al, Civil No. 59407, that the court in ordering a full accounting

and a rollback of excessive profits to Frontiers West, held that Executive Properties, although receiving a practical benefit of the Forty Thousand Dollars (\$40,000.00) invested by respondents (TR-44) did in fact pay back through accounting means in a demanded accounting by the District Court in a judgment, the sum of Forty Thousand Dollars (\$40,000.00) (TR-135,136,140,141), and that as of the date of the accounting entries of Forty Thousand Dollars (\$40,000.00) loaned to Frontiers West by respondents, that One Hundred Nine Thousand Dollars (\$109,000.00) was then due and owing to Executive Properties from Frontiers West and that this accounting entry reduced the figure of One Hundred Nine Thousand Dollars (\$109,000.00) to Sixty-Nine Thousand Dollars (\$69,000.00), remaining owed by Frontiers West to appellant (Defendant's Exhibit 6).

Mr. Alexander further verified that the sum of Forty Thousand Dollars (\$40,000.00) as loaned to Frontiers had been entered into the books and records of Frontiers as a loan to Frontiers as the second entry reducing the amount owed to appellant by Frontiers, in an amount of Forty Thousand Dollars (\$40,000.00) (TR-132,135,136,140,141). That the accounting as ordered by the prior court concluded that Frontiers, as of the date of this hearing, still owed Executive Properties limited partnership between Thirteen Thousand Dollars (\$13,000.00) and Seventeen Thousand Dollars (\$17,000.00)

(TR-136,141,151, and Defendant's Exhibit 6 Accounting).
Dr. Lowell Daines, the newly appointed general partner of Executive Properties limited partnership testified where he had made a demand against Frontiers West to discharge the obligation owed to the predecessor sellers on the basis that Frontiers had already received the money from appellant when he stated:

"But that we had money available to bail it out, but that Frontiers West owed the money and that they should pay the money because they had already gotten it from us and we didn't know where it had gone and so we felt that Frontiers West owed it and we wanted to get it from them. If we couldn't get it from them and ultimately save the property, we could dig the money up." (TR-43).

The foregoing facts as taken out of the trial record point to a substantial conclusion that because of the definite interest of respondents Harline and Nilsson and the predecessor business entities of B & L limited partnership and Frontiers West, Inc., that if they did not loan the Forty Thousand Dollars (\$40,000.00) to Frontiers West, the following would occur:

1. Nilsson would lose his interest in B & L Enterprises and his interest in Frontiers West, Inc.
2. Harline would lose his interest in Frontiers West and his limited partnership in Executive Properties.

This would conclude that the benefit they were conferring upon Frontiers West would come back to them in four-fold:

a. A Twenty Thousand Dollars (\$20,000.00) promissory note from Frontiers West to each respondent.

b. A Twenty Thousand Dollars (\$20,000.00) equity interest arising out of the sales contract of Bellevue Estates to appellant.

c. Two Hundred Fifty Thousand (250,000) shares each of Frontiers West Corporation stock at five percent (5%) per share, or Twelve Thousand Two Hundred Fifty Dollars (\$12,250.00).

d. The contingency that they may receive the equity ownership of forfeited limited partners McKee, Morrow and Daines.

All of these facts conclude that any benefit that was to have been conferred was conferred upon themselves and was only incidental to the appellant and that there was no expectation of being paid therefor from the appellant inasmuch as they were receiving substantial remuneration from the business entity of Frontiers West.

Further, they acted as an intermeddler and as a volunteer when they extended money to Frontiers by pretending to be benefitting an ailing limited partnership of the appellant when sufficient alternatives were known to respondents, both from the resources of B & L limited partnership and the appellant's own investors to salvage the contract defaulted upon by Frontiers West.

Finally, the accounting shows as of that date and later substantiated by another court action that One Hundred Nine Thousand Dollars (\$109,000.00) was owed to appellant by its general partner, to whom respondents' loan was made with the investors of the appellant demanding that

to discharge Frontiers' indebtedness to its predecessor sellers.

In final conclusion, the benefit, although being conferred upon the appellant, although it was an enrichment, was not an unjust enrichment, which may require compensation therefor.

Ample law is in existence in the State of Utah commencing with the Stanley v. Stanley, 97 Utah 520 94 Pac 2d, 465, (1939), and the Gibbons v. Brimm, 119 Utah 621, 230 Pac 2d, 983, (1951), cases which held that where there is a conflict in evidence in equity cases, the findings of trial courts will not be disturbed if evidence preponderates in favor of finding, nor if evidence thereon is evenly balanced or it is doubtful whether preponderance lies, nor, even if weight is slightly against finding, but it will be overturned and another finding made only if evidence clearly preponderates against the trial court's finding. In Pagano v. Walker, Utah, 539 Pac 2d, 452, 454, (1975), the court in an issue as to the dead man's statute, where the evidence did not warrant conclusion, the court held:

"However, it has long been established and reiterated by this court in numerous cases that due to the advantaged position of the trial court we will review its findings and judgments with considerable indulgence, and will not disagree with and upset them unless the evidence clearly preponderates against them, or the court has mistaken or misapplied the law applicable thereto."

The facts in this case represent a clear finding which clearly preponderates against the trial court's finding.

POINT II

ONE WHO OFFICIOUSLY CONFERS THE BENEFIT UPON ANOTHER IS NOT ENTITLED TO RESTITUTION.

Under the facts of the instant case, Apartment Enterprises and B & L limited partnership, had a duty to pay the indebtedness due and owing to its seller, Mastro, in the event Frontiers West did not pay its indebtedness. The investors of Executive Properties, under the direction of John P. Sampson, the attorney for the investors, verified that its group of investors from appellant were prepared to pay Mastro through B & L Limited Partnership and Enterprises, Inc., the sum that was then due and owing, if Frontiers West did fail to pay the same (TR-43,44). John P. Sampson in his testimony substantiated that if no payment had been made, that arrangements had been made and set in motion to pay the indebtedness of Forty Thousand Dollars (\$40,000.00) and thereafter commenced foreclosure actions against Frontiers West because of its failure to abide by its contract and other and further fiduciary irregularities (TR-184,194,206). Mr. Oren Alexander accepted and Mr. Sampson further testified that One Hundred Nine Thousand Dollars (\$109,000.00) was then due and owing to Executive

Properties from Frontiers West and that the limited partners he represented refused to come forth with additional funds when Frontiers West allegedly had in their account sufficient capital from Executive Properties, the appellant, to discharge the obligation to the sellers of the property. (TR-135,136,140,141,205,206, Defendant's Exhibit 6). The act of appellant was already set in motion to save the then existent contract with B & L and Mastro. Respondents were fully aware of these actions on the part of the investors of appellant. Therefore, any benefits conferred were an interference in the affairs of others not justified by the circumstances under which the interference took place. Where a person has officiously conferred a benefit upon someone, the circumstances would indicate that although there is an enrichment, it is not necessarily an unjust enrichment. Mehl v. Martin, 201 Minn. 203, 275 NW 2d, 843, 845, (1937). In this case, plaintiff is sued the balance of rent on farm properties. Defendant counterclaimed for money expended on grain sowed on the farm and for reasonable value as to the labor performed. Plaintiff acquired the crop sowed involuntarily and the court held that the plaintiff had acquired the benefit lawfully and without any inequitable conduct. In Baugh v. Darley, 112 Utah 1, 184, P 2d, 335,337, (1947), in an action on a real estate down payment and for benefit of real estate services in the

procuring of a purchaser of real estate, the court held:

"The mere fact that a person benefits another is not of a self-sufficient to require the other to make restitution therefor. Restatement of restitution, Section 1, Comment C. Services officiously or gratuitously furnished are not recoverable. Restatement of restitution, Section 2. Nor are services performed by the plaintiff for his own advantage, and from which the defendant benefits incidentally, recoverable. See Restatement of restitution, Section 40, Comment C, and Section 41(a)(i)."

In Restatement of Restitution, Section 2, "a person who officiously confers a benefit upon another is not entitled to restitution therefor." In Comment A, officiousness means "interference in the affairs of others not justified by the circumstances under which the interference takes place." The instant case is such that the problems in which B & L, Apartment Enterprises, Frontiers, and appellant were involved is such that appellant had made judgment under the circumstances to refuse to assist Frontiers because of the improprieties of the acts of Frontiers in its dealings with its limited partners, especially because there existed One Hundred Nine Thousand Dollars (\$109,000.00) indebtedness to appellant from Frontiers and that Frontiers continued to insist that the payment on notes assigned to Zions First National Bank be paid to Frontiers rather than to the bank itself. These circumstances alone would cause a reasonable man not to volunteer additional sums for a stalemated problem.

Thus, any act by respondents in thier payment would be an interference with the appellant and a benefit for themselves with the incidental benefit going to the appellant, which benefit would not be unjust, but in fact would be a fulfillment of the requirements of respondents in attempting to save their investment in Frontiers and an attempt to honor its position with appellant. If the respondents had not made their loan to Frontiers, their entire investment in Frontiers would have become valueless and Frontiers would have been bypassed by the investors of appellant in an attempt to save the property and to rid itself of a general partner who had acted in breach of its fiduciary relationship to its limited partners.

POINT III

IT WOULD BE INEQUITABLE TO DEMAND OF APPELLANT TO COMPENSATE RESPONDENTS FOR ANY BENEFIT CONFERRED BECAUSE OF A CHANGE OF CIRCUMSTANCES AND A MISTAKE OF LAW.

In December of 1973, respondents loaned to Frontiers West Forty Thousand Dollars (\$40,000.00) in an attempt to save Frontiers West from the default judgment duly entered against it in November of 1973, Apartment Enterprises v. Frontiers West. (TR-42). Further, to save from that contract of purchase the Bellevue Estate Apartments, Plaintiff's Exhibit "B", which contract of purchase was in default. In December of 1974, judgment under the District Court hearing in the Lowell Daines, et al v. Frontiers West, et al

case was duly entered against Frontiers and an accounting was ordered to set in order the books and records of Executive Properties limited partnership (TR-134,135). This accounting was one of the results of said hearing and substantiated the appellant's allegations that they had advanced some One Hundred Nine Thousand Dollars (\$109,000.00) to Frontiers West and that the Forty Thousand Dollars (\$40,000.00) of the respondents in its loan to Frontiers West was a credit to the appellant's account, reducing the amount owed by Frontiers West to appellant to the sum of Sixty-Nine Thousand Dollars (\$69,000.00). Thus, respondents conferring of a benefit upon appellant through respondents' loan to Frontiers West was given back to Frontiers West and the respondents as a credit against the indebtedness of Frontiers West to Executive Properties (TR-135,136,140, 141, and Defendant's Exhibit 6).

This credit allocation brought about by the actions of the court was such as to represent a change in circumstances sufficient to negate any conclusion that any enrichment to the appellant was unjust. In Restatement of Restitution, Section 69(2):

"Change of circumstances may be a defense of a partial defense if the conduct of the recipient was not ottrtious and he was no more at fault for his receipt, retention, or dealing with the subject matter than was the claimant."

In other words, to grant relief to respondents where circumstances have so changed by reason of the finding of the court and the action of Lowell Daines, et al v. Frontiers West et al, would be inequitable as against the appellant. Restatement of Restitution, Section 69(a), Comment A.

In a Michigan case, Moritz et al v. Horseman, 305 Mich 627, 9 NW 2d, 868, (1943), the court in a suit on restitution where defendant was one who had received estate proceeds, as the adopted son of the intestate deceased brother, the court held that even though by mistake of law they had believed that the adopted son should inherit by right of representation, the circumstances of inheritance and distribution were such that the court would not grant relief. It further stated on Page 871 of said decision, the restatement of the Law of Restitution, Section 69, that the right to restitution is terminated or adminished if circumstances have so changed that it would be inequitable to require the other party to make restitution.

In the instant case, the accounting of the foregoing lawsuit admitted as evidence in this hearing and its showing as of the date of 1974, that the appellant was owed by the respondents' corporation, the sum of One Hundred Nine Thousand Dollars (\$109,000.00) and that further the Forty Thousand Dollar (\$40,000.00) loan of the respondents was credited

against that amount owed to appellant, thereby giving back any benefit which may have been conferred, thereby benefitting the respondents' corporation by that same sum.

Mistake of Law

In the Restatement of Restitution, Section 44, a person who has paid money or otherwise conferred a benefit on another induced thereto by a mistake of law is not entitled to restitution if he would not have been so entitled had the mistake been one of fact. The instant case is posed in the circumstances that the respondents had acted on a mistake of law in loaning money to Frontiers West to save the contract with the seller and in their belief that this payment would give to them among other things an ownership equity interest in appellant's limited partnership, when in fact the promissory notes upon which said equity interest existed had been assigned to Zions First National Bank and were not legally returnable to Frontiers West except on payment of said notes. (TR-61,83, 84,181,195).

The factual significance in support of the principal of law is the mistake of fact in that the belief by respondents that they were conferring a benefit when in fact the sum of Forty Thousand Dollars (\$40,000.00) loan was only being credited to Frontiers West as a reduction of debt owed by Frontiers West to Executive Properties limited partnership,

appellant. Thus, this mistake in law and the conferring of the benefit would not entitle them to any restitution.

CONCLUSION


The facts, the points of dispute, and all of the argument presented to the court in the foregoing brief represents appellant's position that the Honorable Court in and for Weber County erred in its appraisal of the facts as they were litigated in that same court. It is appellant's submission to this court that although the facts are extensive, that three issues are of highest importance:

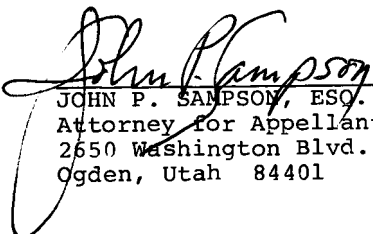
1. That the court ruled against the weight of evidence when taking all of the evidence as a whole.
2. That the actions of the respondents were such that they were interferences with the goals of the appellant and were primarily done to benefit the respondents' investment position.
3. The fact that a prior court judgment was rendered in favor of certain investments of the appellant and against the respondents' investment corporation, and that such judgment was fair and equitable and righted wrongs committed by said corporation, so much so that a change of circumstances would indicate that any benefit incurred by appellant was not an unjust enrichment.

It is therefore submitted to this Honorable Court that its relief sought should be granted reversing the

trial court's decree of judgment and that the trial court's judgment be dismissed and judgment be entered against plaintiffs and respondents.

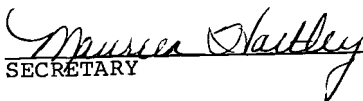
Respectfully submitted,


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CERTIFICATE OF MAILING

A copy of the foregoing Brief of Appellant was posted in the U.S. mail, postage prepaid, and addressed to the Attorney for Respondent, Richard Richards, at 2506 Madison, Ogden, Utah 84401, on this 25th day of February, 1977.


SECRETARY