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

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.

EXECUTIVE PROPERTIES,
limited partnership,

Defendant and Appellant.

Appeal from the
Court in and for
Utah, the Supreme Court of the State of

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TABLE OF CONTENTS

NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	
POINT I	
THE WEIGHT OF EVIDENCE PRESENTED AT	
TRIAL CLEARLY SUPPORTS THE JUDGMENT	
OF THE LOWER COURT	9
POINT II	
THERE IS A PRESUMPTION OF CORRECTNESS IN	
THE FINDINGS AND JUDGMENT OF THE TRIAL	
COURT AND IF THEY ARE TO BE UPSET THE	
BURDEN IS UPON THE APPELLANT TO SHOW	
THAT THEY WERE IN ERROR	18
CONCLUSION	19

CASES CITED

Del Porto v. Nicolo, 27 Utah 2d 286, 496 P.2d	
811	18
Pagano v. Walker, 539 P.2d 452 (1975)	
454	18

IN THE SUPREME COURT OF THE STATE OF UTAH

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

NATURE OF THE CASE

This was an action in equity by the plaintiffs/respondents to recover the sum of \$40,000.00 paid by them to secure additional partnership interest in Executive Properties, a limited partnership.

The plaintiffs/respondents paid the sum of \$20,000.00 each to Frontiers West, the general partner of Executive Properties, on the 12th day of December, 1973, and said sum was immediately paid over to a creditor of Frontiers West and Executive Properties to satisfy a judgment divesting them of the real property which is the subject matter of this dispute. The action was commenced by the plaintiffs to recover the \$40,000.00 or to secure an interest in the partnership equivalent in value to their payment.

The defendant/appellant resisted, denying that they had received any benefit from the \$40,000.00 contribution and that the \$40,000.00 was in fact a loan to Frontiers West, the general partner in Executive Properties.

DISPOSITION IN LOWER COURT

The Honorable Calvin Gould tried the case without a jury, and determined that the \$40,000.00 paid by the plaintiffs/respondents was not a loan to Frontiers West but was paid over to the creditor of Executive Properties to preserve a substantial equity in the apartment complex, and it was the intention of the plaintiffs/respondents at the time the payment was made to acquire an additional interest in the partnership property. The court further found that Executive Properties received the direct benefit of the contribution and it would be unconscionable to allow them to retain that benefit without repaying the plaintiffs/respondents for their contribution. Judgment was rendered in favor of the plaintiffs in the sum of \$20,000.00 each against the defendant, Executive Properties.

RELIEF SOUGHT ON APPEAL

Plaintiffs/respondents herein seek affirmation of the trial court's determination.

STATEMENT OF FACTS

The property which is the subject matter of this dispute was a 129 unit apartment complex located in Bellevue, Washington. The apartment complex was constructed by Mike Mastro and Isaac Gammel, who together with their wives, were partners and sole owners of the property.

On or about October 1, 1970, Mastro and Gammel and their wives sold the Bellevue Apartment complex on an installment contract to Apartment Enterprises, Inc., a Utah

corporation. Paul M. Hansen was the President of that corporation. The purchase price was \$1,550,000.00. There was a first mortgage on the property in the sum of \$1,200,000.00 and the Mastro Gammel equity consisted of \$350,000.00 to be paid in a balloon payment in 1981. In the meantime, however, the contract provided for \$150,000.00 in interest payments to be paid as follows: the first payment was to be made on or before December 31, 1970; a second payment in the sum of \$50,000.00 in 1971, and the final payment was to be paid on or before January 15, 1973.

Apartment Enterprises, Inc. subsequently conveyed all of their right, title and interest in the contract to B & L Enterprises, Ltd., a limited partnership, of which Apartment Enterprises, Inc. was its general partner.

Subsequently, on or about the 3rd day of August, 1972, Apartment Enterprises, Inc., and B & L Enterprises, Ltd., conveyed all of their right, title and interest in the property to Frontiers West, Inc., a Utah corporation, which was formed in 1971 for the specific purpose of syndicating and developing real property. Mr. Lynford Theobald was the President of Frontiers West. Frontiers West purchased the Bellevue Apartments on contract by assuming all of Apartment Enterprises' remaining obligations under the contract, agreeing to assume the first mortgage in the amount of \$1,200,000.00, and paying the interest payments as provided in the contract between Mastro, Gammel and Apartment Enterprises.

At about the same time Frontiers West purchased the property, they formed a Utah limited partnership called Executive Properties in which Frontiers West was the general partner. Frontiers West conveyed all of its right, title and interest in the apartment complex to Executive Properties by contract for \$1,880,000.00. This figure was \$367,000 more than the price they had just purchased the complex from B & L Enterprises.

Frontiers West sold partnership interest in Executive Properties to a substantial number of doctors living in the Ogden-Salt Lake area. Some of the doctors purchased their interest with cash, others with promissory notes. The plaintiff, Dr. Wesley G. Harline, was one of the investors in Executive Properties, having paid cash into the limited partnership.

When the January, 1973, interest payment in the sum of \$50,000.00 became due, Frontiers West became delinquent in the payment because of lack of funds and did not make payment over to B & L Enterprises as provided by the contract. B & L Enterprises, therefore, became delinquent in their contract to Apartment Enterprises, who became delinquent in the contract to Mastro and Gammel, the original owners of the property.

Mastro and Gammel, in an attempt to accommodate all of the subsequent purchasers, extended the time for the \$50,000.00 interest payment until June 30, 1973.

Executive Properties, however, neglected to make the payment even by the 30th day of June, 1973, and B & L Enterprises and Apartment Enterprises also remained delinquent. So, in October, 1973, Mastro and Gammel commenced an action in the State of Washington against Apartment Enterprises to foreclose on the apartment complex and repossess the units as provided by the contract. Apartment Enterprises and B & L Enterprises commenced an action against Frontiers West to terminate any interest Frontiers West had in the properties and on the 26th day of November, 1973, Apartment Enterprises and B & L Enterprises secured a judgment against Frontiers West divesting them of any right, title and interest they had in the property, thus in turn divesting Executive Properties of any interest they had through Frontiers West. At that time it should be noted that no payments had been made by Frontiers West to their seller, Apartment Enterprises and B & L Enterprises. Apartment Enterprises and B & L Enterprises, however, had made substantial payments to Mastro and Gammel and they intended to preserve their equity in the contract by making the delinquent payment after Frontiers West had been divested of any interest they had.

Frontiers West, however, entered into negotiations directly with Mastro and Gammel to save the property for their benefit and Mastro and Gammel agreed to accept \$42,000.00 in full satisfaction of the \$50,000.00 claim that was due and owing to them. Frontiers West then entered

into negotiations with Apartment Enterprises and B & L Enterprises on the grounds that they could satisfy Mastro and Gammel's \$50,000.00 claim for \$42,000.00, and requested Apartment Enterprises and B & L Enterprises to accept \$42,000.00 in full satisfaction of their claim, which they did.

Notwithstanding the agreement to satisfy the claim for \$42,000.00, Frontiers West did not have \$42,000.00 to make said payment, and Mr. Lynford Theobald, President of Frontiers West, set out to locate \$40,000.00. He contacted Drs. Wesley G. Harline and Richard Nilsson, the plaintiffs/respondents herein, and asked them to each loan \$20,000.00 to Frontiers West.

Both Dr. Harline and Dr. Nilsson were already aware of the problems experienced by Executive Properties, and were well aware of the financial plight of Frontiers West. They knew that Frontiers West was without funds and both of the plaintiffs refused to loan money to Frontiers West. However, both of the doctors informed Lynford Theobald that they would be willing to provide \$20,000.00 each to save the Executive Properties complex, provided they could have an additional partnership interest by making said contribution.

Several of the other doctors who were investors in the limited partnership, Executive Properties, had not yet paid cash into the partnership for their investment. Mr. Theobald informed Drs. Harline and Nilsson that the

other doctors, knowing the plight of Executive Properties, knowing that the property would be lost if they did not come up with sufficient money to redeem the property, still refused to make payments and therefore, their partnership interest would be taken from them and if Dr. Harline and Dr. Nilsson would pay the \$40,000.00, they would receive the partnership interests of the defaulting doctors. Based upon those representations, the doctors each paid over to Frontiers West the sum of \$20,000.00 on the 12th day of December, 1973. That sum of \$40,000.00 was immediately deposited in Walker Bank & Trust in Ogden, and the next day a check in the sum of \$42,000.00 was drawn from the account in Walker Bank and sent to Seattle, Washington and delivered to Mastro and Gammel to satisfy their \$50,000.00 claim.

Mastro and Gammel then dismissed the action against Apartment Enterprises and B & L Enterprises, and Apartment Enterprises and B & L Enterprises then executed and delivered to Frontiers West a Satisfaction of Judgment, thus satisfying the \$50,000.00 claim by the payment of \$42,000.00.

The \$40,000.00 paid to Mastro and Gammel was in fact the same \$40,000.00 paid by Drs. Harline and Nilsson to Frontiers West. Subsequent to the payment by the plaintiffs/respondents, Frontiers West held a meeting of their Board of Directors on the 18th day of December, 1973, and agreed to protect the plaintiffs/respondents in their additional \$40,000.00 investment by giving them a promissory note to

evidence the indebtedness and agreed further to issue additional shares of stock in Frontiers West and as soon as the other doctors who had not made their payments to Frontiers West were legally defaulted, which should have been on or about the 31st day of December, 1973, Drs. Harline and Nilsson would receive their partnership interest in the value of \$40,000.00.

Subsequently, Executive Properties, Ltd., filed an action against Frontiers West and Lynford Theobald, the general partner of Executive Properties, claiming that they had made excess profits on the sale of the apartments to Executive Properties and asked the court to oust Lynford Theobald and Apartment Enterprises as the general partner and install Dr. Lowell R. Daines as the new general partner. The court granted their petition. Frontiers West ended up in bankruptcy, and the court also determined that Frontiers West could not divest the doctors who had refused to pay cash in their partnership in Executive Properties and ruled that the defaulting doctors' interest could not be transferred to Harline and Nilsson for their contribution. Harline and Nilsson were not parties to that action.

Dr. Harline and Dr. Nilsson thereafter demanded either partnership interest in the worth of \$40,000.00 or a return of their \$40,000.00 investment. Executive Properties refused their demand upon the grounds that the payment made by Harline and Nilsson to Frontiers West was a loan,

and denied that Executive Properties received any benefit from the payment of said \$40,000.00.

The plaintiffs then brought this action to recover their money or equivalent interest in the partnership property.

ARGUMENT

POINT I

THE WEIGHT OF EVIDENCE PRESENTED AT TRIAL CLEARLY SUPPORTS THE JUDGMENT OF THE LOWER COURT.

The appellant contends that they should have won this proceeding in the trial court because the contribution of the doctors was in fact a "loan" to Frontiers West and not them, and secondly, notwithstanding the payment of the doctors in the sum of \$40,000.00 that they, (Executive Properties) were not unjustly enriched and thirdly, the contribution of the doctors was an officious intervention into Executive Properties' affairs and the plaintiffs/respondents should not be reimbursed for their payments.

The arguments of the appellant fly in the face not only of the evidence presented at the trial, but the admissions of defense counsel at the time of trial in response to the court's specific questions.

The \$40,000.00 payment by the plaintiffs was not a loan.

Dr. Richard Nilsson testified at the trial that he was not willing to make a loan to Frontiers West because he was aware of their very shaky financial situation (T 115).

He further testified that at the time he made the \$20,000.00 payment to Lynford Theobald he believed that he was purchasing additional partnership interests in the complex, (T 115), and he actually received additional partner interests in that property for his payment (T 117).

Dr. Wesley Harline testified at trial that Lynford Theobald came to his clinic and asked him to loan money to Frontiers West on or about the 12th day of December, 1973, and that he refused to do so (T 103). He refused upon the grounds that he was aware of the shaky financial circumstances of Frontiers West and would not loan them money, but he knew that Executive Properties was in trouble and they needed \$40,000.00 to redeem the property that they had lost through the foreclosure action (T 102). Dr. Harline testified very specifically that on the 12th day of December, 1973, he gave \$20,000.00 to Lynford Theobald and the purpose of that contribution was to secure additional shares in the partnership property (T 103).

Appellants did not refute the testimony of the two doctors at trial but relied upon notations made by the bookkeeper of Frontiers West on the deposit slip or events that occurred 6 days thereafter to categorize the \$40,000.00 payment by the plaintiffs/respondents as loans. The evidence was abundantly clear that Frontiers West was in grave financial circumstances. They had not been able to make the payments on the property in accordance with their contract.

A judgment had already been taken against them and Frontiers West and Executive Properties had lost the apartment complex and any investment they may have had. It would have been most foolhardy for two doctors who were aware of these circumstances to "loan" money to Frontiers West.

The court, after having heard that testimony, determined specifically, as reflected in the Findings of Fact, paragraph 10 at page 3, that plaintiffs were not interested in loaning money to Frontiers West because of the severe financial difficulties at that time, however, they were interested in purchasing additional shares of the limited partnership known as Executive Properties, and were willing to invest money for that purpose.

The second contention of the defendant/appellant is that they were not unjustly enriched by the payment of the \$40,000.00 by plaintiffs/respondents.

It was uncontradicted at the trial that Frontiers West neglected to make their annual interest installment in the sum of \$50,000.00 in January, 1973. Even after the payment was extended to June, 1973, they still neglected to make payment, and thereafter, in November, 1973, a judgment was granted against Frontiers West divesting them of all right, title and interest they had in the property, and by so doing, their purchaser, Executive Properties, lost all of their right, title and interest in said property (T 64).

It is obvious that if the property had any economic value it was important to the defendant/appellant to cure the default and they, too, obviously believed it was in their advantage to save the property or else they would not have negotiated with Mastro and Gammel to cure the default. Without speculation as to the knowledge or intent of the parties, the evidence produced at trial clearly showed first, that Executive Properties was specifically formed for the purpose of buying the apartment complex which is the subject matter of this dispute (T 34). Executive Properties apparently paid \$100,000.00 to Frontiers West upon execution of the agreement to purchase the apartment complex (T 40). Dr. Daines testified at trial that he became aware sometime in November or December of 1973, that Frontiers West had defaulted in the annual interest installment (T 42), and that he was aware that a final judgment had been rendered against Frontiers West divesting the defendant/appellant of any interest they had in the apartment complex.

It was further clear to the court that the only way the property could be preserved was to pay the delinquent installment payments.

The defendant/appellant, through the testimony of Dr. Daines, recited many times that if the payments were not made by Frontiers West or the other doctors who were

limited partners in Executive Properties, he would see that it was paid. But the fact remains that the judgment divesting them of their interest was taken on the 26th day of November, 1973, and as late as December 12, 1973, Executive Properties or their limited partners had not come up with the money, so Lynford Theobald sought the money to preserve the property from Dr. Nilsson and Dr. Harline.

When the \$40,000.00 was received from Harline and Nilsson, it was deposited in Walker Bank & Trust in Ogden, Utah, and immediately thereafter, a check was drawn on that same account and sent to Seattle, Washington, to bring current the payments to Mastro and Gammel. It was the same \$40,000.00 contributed by Drs. Harline and Nilsson that was paid over to Mastro and Gammel (T 128-129).

Mr. Oran Alexander, the accountant for Frontiers West, further testified at the trial that the payment in the sum of \$40,000.00 reduced the liability Executive Properties had through their chain of contracts over to Mastro and Gammel. When asked the question at trial, "So Executive Properties did get the benefit of \$40,000.00?", he responded, "You bet" (T 144). It is abundantly clear that the payment by the plaintiffs/respondents caused the judgment to be satisfied and the defendant/appellant to be restored to their property.

At the conclusion of the trial the court asked Mr. Bachman, counsel for the defendant, "There is no question

under the facts of this case that at the time the \$40,000.00 was advanced by the doctors, Frontiers West had no interest in the Bellevue property, did they?", to which Mr. Bachman responded, "No, there was a question whether they did or not, Your Honor, because of the fact that the default judgment, whether it was going to be set aside; whether there was a question of it having any impact". The court continued, "But anything they had, they had sold off to Executive Properties, didn't they?" Mr. Bachman responded, "Every interest they had, they had sold to Executive Properties and were standing in the position of general partner" (T 228 - 229).

It becomes even more obvious that Executive Properties was enriched by the \$40,000.00 payment when we find that Executive Properties filed an action against Frontiers West to divest Frontiers West of any interest they had in the apartment complex, and the court rolled back the purchase price paid by Executive Properties from the sum of \$1,880,000.00 to \$1,500,000.00 (T 51). Subsequent to the rollback in the purchase price, Executive Properties sold the property again to Narod Corporation, for \$1,900,000.00 (T 51).

Therefore, the argument of the defendant/appellant that they received no benefit from the \$40,000.00 contribution is ludicrous. Clearly they owed an obligation to Mastro and Gammel in the sum of \$50,000.00. That claim was satisfied for the payment of \$42,000.00, \$40,000.00 of which

was paid by the plaintiffs. Therefore, the equity in the contract was increased by \$50,000.00, and since Frontiers West had lost any right, title or interest they had in the property pursuant to the order of Judge Wahlquist, Executive Properties increased their equity in the property by \$50,000.00. When the property was subsequently sold to Narod for \$1,900,000.00, Executive Properties turned that equity into a \$50,000.00 profit. Based upon these facts, the court found that the defendants did in fact receive the benefit of the \$40,000.00. It would be almost impossible to have found otherwise.

The last argument of the defendants, that the actions of the plaintiffs were officious and meddling, is likewise not sustained by the evidence. Notwithstanding the continued comments of the defendants that they would have saved the property if Drs. Harline and Nilsson had not paid the \$40,000.00, the clear and undisputed evidence is that they did not do so, they did not pay any money, and it was the doctors' \$40,000.00 contribution that preserved the property.

Dr. Harline was a limited partner in Executive Properties and had heretofore made a \$10,000.00 investment. Any action on his part to preserve that investment cannot by any stretch of the imagination be called meddling or officious. But more importantly, the plaintiffs were approached by Lynford Theobald on or about the 12th day of December, 1973, who was then the President of Frontiers West, the

general partner of Executive Properties, and specifically asked to make a contribution to save the property.

It is interesting to note that Dr. Daines, the now general partner in Executive Properties, discussed specifically with Dr. Harline the payment of money to save the property and said, "We offered him the choice to come through Executive Properties. He chose to go the other way." (T 49).

It was obvious at that time that there was some move afoot within Executive Properties to oust Frontiers West as general partner. But at that time, Frontiers West was the general partner (T 49), and it would have been improper to have paid the money over to anyone other than the general partner.

At any rate, the defendants did not refuse the \$40,000.00. The money was accepted. The money was transported to Washington to save the property. The judgment was satisfied and the defendant did not offer to return the money to the plaintiffs. They now contend that the payment was officious and meddling. The court correctly sized up the situation at the time of trial and asked counsel for the defendant, "When did you say to these plaintiffs, 'we don't want that deal, we don't want the benefit of that \$40,000.00, take it back, put it in your own bank accounts'?" (T 232). Counsel for the defendant did not give a direct answer and the court pressed the issue and finally said,

"Yes, what they in effect said then was, 'you guys put that money in Frontiers West, and it is bye bye to it', didn't they?", to which counsel for the defendant responded, "That's right" (T 232). The court continued, "Now you say he was an intermeddler here?", to which Mr. Bachman responded, "I say there was some interference here, Your Honor", to which the court asked further, "Here you have got the managing agent for Executive Properties issuing a call, 'please come and save our Bellevue properties', and you say he is an intermeddler?", to which Mr. Bachman responded, "...it is for the benefit of Frontiers West and their Board of Directors".

It was thus abundantly clear at the trial that the defendants sat back, watched the plaintiffs make their contribution, watched that contribution save the property, and cause the judgment to be satisfied, and further cause the defendant's equity in the property to be increased by \$50,000.00, and ultimately result in a profit to them. They now deny repayment of the \$40,000.00 to the plaintiffs or give them equivalent equity in the properties upon the ground that their payment constituted an officious and meddling conduct, or that they (Executive Properties) did not gain any benefit by the payment of that money or that the money was a loan to the general partner and therefore the limited partners had no responsibility.

The court saw through the scheme and found the issues in favor of the plaintiffs.

POINT II

THERE IS A PRESUMPTION OF CORRECTNESS IN THE FINDINGS AND JUDGMENT OF THE TRIAL COURT AND IF THEY ARE TO BE UPSET THE BURDEN IS UPON THE APPELLANT TO SHOW THAT THEY WERE IN ERROR.

It is abundantly clear in this state that the findings of the trier of fact should not be upset lightly. There is indulged a presumption of correctness of his findings in judgment. That was the holding of this court in Del Porto v. Nicolo, 27 Utah 2d 286, 495 P.2d 811, where the court said at page 812,

It is true, as plaintiff asserts, that this action to avoid deeds is one in equity upon which this court has both the prerogative and the duty to review and weigh the evidence, and to determine the facts. However, in the practical application of that rule it is well established in our decisional law that due to the advantaged position of the trial court, in close proximity to the parties and witnesses, there is indulged a presumption of correctness of his findings and judgment, with the burden upon the appellant to show they were in error; and where the evidence is in conflict, we do not upset his findings merely because we may have reviewed the matter differently, but do so only if evidence clearly preponderates against them.

Assuming the matter now before the court to be a case in equity in which the court may exercise its prerogative to review and weigh the evidence and to determine the facts, the presumption of correctness should continue.

This court also considered the same kind of argument as advanced by the appellants here in Pagano v. Walker, 539 P.2d 452 (1975), where the court said at page 454,

In determining whether the evidence meets this standard, in equity cases such as this is, this court may review the facts. 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. (emphasis added)

A host of cases can be cited in this jurisdiction and elsewhere around the country to support this position and further discussion here is unwarranted.

CONCLUSION

The court heard the testimony, observed the witnesses, and even questioned counsel following final argument. Based upon the facts and the evidence submitted at the time of trial, the court found that the contribution in the sum of \$40,000.00 by the plaintiffs/respondents was not in fact a loan, but a payment to secure additional partnership interest in Executive Properties. The doctors advancing the money were well acquainted with the financial circumstances and conditions of Frontiers West, and to have made a loan to them would have been foolish. The money was paid to secure an additional interest in the property and there was no evidence to the contrary.

Obviously, if the doctors had an interest in either Executive Properties or Frontiers West, they could not logically be construed as intermeddlers or their acts officious. In fact, quite the contrary. They were attempt-

ing to preserve the property even for the defendants. The defendants accepted their money. They have never rejected it or turned it down, and they have never offered to repay it. They came in after the fact and refused to repay and refused to grant any benefit for the \$40,000.00. For the court to have found in favor of the defendant and against the plaintiffs would have been truly an unconscionable result.

The major argument of the appellants that they did not receive any benefit from the contribution, defies all logic. The court clearly saw their benefit. They have never specifically denied it, having acknowledged that they received an additional equity in the sum of \$50,000.00 on the original contract, and having acknowledged that after the purchase price was rolled back by the court, they then sold the property for \$1,900,000.00, it logically follows that they reaped a profit of \$50,000.00.

The judgment of the lower court should be affirmed.

Respectfully submitted this 16 day of March, 1977.

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