

1977

Howells Inc. A Corporation v. William Nelson, Aka William Lord Associate : Brief of Appellant

Utah Supreme Court

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Dale R. Kent; Attorney for Appellant S. Rex Lewis; Attorney for Respondent

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IN THE SUPREME COURT
OF THE STATE OF UTAH

HOWELLS, INC.,
a corporation,

Plaintiff-Respondent,

-vs-

WILLIAM NELSON, aka
WILLIAM LORD ASSOCIATES,

Defendant-Appellant.

Case No. 15028

BRIEF OF DEFENDANT

Appeal from Judgment of the

Honorable

S. REX LEWIS

120 East 300 North Street
Provo, Utah 84601

Attorney for Respondent

IN THE SUPREME COURT
OF THE STATE OF UTAH

HOWELLS, INC.,)	
a corporation,)	
)	
Plaintiff-Respondent,)	Case No. 14829
)	
-vs-)	
)	
WILLIAM NELSON, aka)	
WILLIAM LORD ASSOCIATES,)	
)	
Defendant-Appellant.)	

BRIEF OF APPELLANT

Appeal from Judgment of the Fourth District Court
for Utah County
Honorable J. Robert Bullock

DALE R. KENT
Suite 100 Commercial Club
Salt Lake City, Utah 84111

Attorney for Appellant

S. REX LEWIS
120 East 300 North Street
Provo, Utah 84601

Attorney for Respondent

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IN THE SUPREME COURT
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HOWELLS, INC.,)	
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-vs-)	
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WILLIAM NELSON, aka)	
WILLIAM LORD ASSOCIATES,)	
)	
Defendant-Appellant.)	

BRIEF OF APPELLANT

STATEMENT OF THE NATURE
OF THE CASE

The Appellant, Howells, Inc., appeals from a judgment of the Fourth Judicial Court of Utah County, Honorable J. Robert Bullock presiding.

DISPOSITION IN THE LOWER COURT

On September 1, 1976, the Fourth Judicial District Court awarded Judgment against Defendant in an amount of \$2,852.66 for a bad check which had been written by Defendant to Plaintiff in that amount. The trial court, however, refused to hold Defendant, William Nelson personally liable for said check and further refused to grant Plaintiff attorney's fees for the prosecution of the action. Thereafter Appellant filed notice of appeal.

RELIEF SOUGHT ON APPEAL

Appellant seeks a ruling from this Court as a matter of law that Defendant, William Nelson is personally liable for the amount of said check and that Plaintiff should have been awarded reasonable attorney's fees.

STATEMENT OF FACTS

On February 5, 1976, Defendant, William Nelson issued a check to Howells, Inc., in an amount of \$2,852.66. The check was drawn on an account entitled "William Lord Associates," and was signed by William Nelson. When the check was given to Plaintiff's agent, Ettie Mosher, the Defendant asked Mrs. Mosher to hold the check for two weeks before depositing the same for payment. Said check was deposited on February 26, 1976, after which it was returned to Plaintiff unpaid, by reason of insufficient funds in the account of "William Lord Associates." The check was again submitted on approximately March 2, 1976, with the same result. The check still has not been paid.

At the time of trial on September 1, 1976, the Defendant did not appear, but was represented by his Counsel, Mr. Rex Lewis. The Plaintiff appeared

through it's agent Ettie Mosher, who testified concerning the issuance of the check to Plaintiff. Evidence was introduced to show that there was no corporation "William Lord Associates" nor was there any certificate filed for an assumed name with the Secretary of State. Evidence was also introduced to show that "William Lord Corporation" was a corporation incorporated in the State of Utah.

The trial court in its Findings of Fact, found that "William Lord Associates" was intended by Defendant to be an assumed name for "William Lord Corporation" and therefore refused to hold William Nelson personally liable for said check. The trial court also found that since the check had been given to Plaintiff by Defendant with a request to hold it for two weeks before depositing it, the check was a promissory note and not a check within the meaning of chapter 15 of title 7, Utah Code Annoated, as amended 1953.

ARGUMENT

THE TRIAL COURT ERRED IN NOT AWARDING
ATTORNEY'S FEES TO PLAINTIFF.

Chapter 15 of Title 7, Utah Code Annoated,
as amended, 1953, provides:

7-15-1. Drawing or issuing against non-existent account or insufficient funds-Intent to defraud-Civil liability-Damages.-(1) Any person who willfully, with intent to defraud, makes, draws or issues any check, draft or order upon any bank, banking association or other depository for the purpose of obtaining from any person, firm, partnership or corporation any money, merchandise, property, or other thing of value or paying for any services, wages, salary or rent, which check, draft or order which is not honored upon presentment because the maker, drawer or issuer does not have the account with the depository upon which the check, draft or order has been made or drawn, or does not have sufficient funds in such account or sufficient credit with such depository for payment of the check, draft or order in full, shall be liable to the holder of the check, draft or order in a civil action as provided in this section.

2) In such civil action the person making drawing or issuing the check, draft or order shall be liable to the holder of it for the amount thereon, for interest and all costs of collection, including all court costs and reasonable attorney's fees.

7-15-2. Civil action-Evidence of intent.- In any such civil action any of the following shall be prima facie evidence that the person making, drawing or issuing the check, draft or order did so willfully with an intention to defraud:

1) Proof that at the time of issuance, the maker, drawer or issuer did not have the account with the depository upon which the check, draft or order was made or drawn or did not have sufficient funds in his account or credit with the depository for payment in full of the check, draft or order, and that he failed within ten days after receiving notice of nonpayment or dishonor to pay the check, draft or order; or

2) Proof that when presentment was made

within a reasonable time, the maker, drawer or issuer did not have the account with the depository upon which the check, draft or order was drawn or made or did not have sufficient funds in such account or credit with such depository for payment in full of the check, draft or order, and that he failed within ten days after receiving notice of nonpayment or dishonor to pay the check, draft or order.

The trial court refused to award attorney's fees because it was of the opinion the check was not a check within the definition of the Uniform Commercial Code (R.9,10). Section 70A-3-103, Utah Code Annotated defines a check as an instrument drawn on a bank which meets the following requirements:

- 1) signed by the maker or drawer;
- 2) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation, or power given by the maker or drawer except as authorized by this chapter;
- 3) be payable to order or to bearer.

The problem the trial court apparently found with the check was whether it was payable on demand or at a definite time. Section 70A-3-108, Utah Code Annotated, as amended, 1953, defines payable on demand as "instruments payable on demand include those payable at sight or upon presentation and those in which no time for payment is

stated." The latter is certainly the situation in the instant case. This entire section of the Uniform Commercial Code also makes it quite clear that all of the requirements set forth, must appear on the face of the instrument itself. It is therefore obvious that the instrument in question in this case is undoubtedly a check as it meets all these requirements on its face. No matter what statements accompanied its presentation, this instrument was still a check within the definition of the Utah Uniform Commercial Code.

The trial court also refused to grant attorney's fees on the basis that there was no evidence of fraudulent intent on the part of the Defendant because at the time the check was issued to Plaintiff it was accompanied with a statement that there were in sufficient funds in the bank to clear the check but that a deposit would be made and the check could be deposited in two weeks. Such a position by the trial court however, was clearly contra to the provisions of Section 7-15-2 (2), Utah Code Annotated, as amended, 1953. This section, as quoted above states what is prima facie evidence of the intent to defraud. The statute provides that proof that the check was dishonored upon presentation to the payee bank by reason of insufficient funds in the account and failure

of the maker to pay the check within ten days after he is given notice of the dishonor constitutes prima facie evidence that the check was fraudulently issued within the meaning of the statute. In the instant case there was clearly no problem about notice having been given to the Plaintiff that his check had been dishonored upon presentment to the bank. Mrs. Mosher testified that she personally notified the Defendant that his check had been dishonored upon two different occasions and the check still had not been paid at the time of trial (R. 4). The trial court's argument that the statements accompanied with the check removed any intention to defraud would apply only to the sub paragraph one of Section 7-15-2. However, the situation in the instant case comes under sub paragraph two in that at the time of presentment of the check for payment there was insufficient funds in the account for payment of the same. The Defendant's statements to the Plaintiff at the time of issuance of the check clearly have no bearing upon the second subparagraph of this statute.

It is readily apparent that the trial court erred in not awarding Plaintiff reasonable attorney's fees for this action in that first, the instrument in question was indeed check within the meaning

of the Utah Uniform Commercial Code and, second, that the situation involved is clearly the situation contemplated in Section 7-15-2(2) Utah Code Annoated, as amended, 1953. Therefore reasonable attorney's fees should have been awarded.

POINT TWO

THE TRIAL COURT ERRED IN NOT HOLDING
DEFENDANT WILLIAM NELSON PERSONALLY
LIABLE AND HOLDING THAT THE CHECK WAS A
CORPORATE OBLIGATION.

In this case the trial court refused to hold the Defendant, William Nelson personally liable for the issuance of the bad check in question and awarded judgment against William Lord Corporation. The court based its ruling upon its finding "That William Lord Associates was intended by Defendant to be an assumed name for William Lord Corporation." (Findings of Fact, No. 8) Such a finding by the trial court was clearly against the weight of the evidence and contra to Utah Law.

It is a clearly recognized legal principal and this court has held on numerous occasions that a corporation is clearly and uniquely a creature of statute, Shaw v Bailey-McCune Co., 355 P.2d 321, 11

Utah 2d 93; Utah State Building Commission v Great American Indemnity Company, 140 P.2d 763. 105 Utah 11.

In order for such a legal entity to come into being strict statutory requirements concerning the creation of the corporation must be followed if the corporation is to become incorporated and thereby afford the incorporators the protection from liability for which such corporations are created.

Most courts will, as has this Court, in some instances however, infer the existence of a defacto corporation where it is apparent that substantial efforts have been made to fullfill the requirements of the statutes regarding incorporation but the incorporation has failed due to some technicality which was unforeseen or unknown by the incorporators. In cases of this type however, it must be shown that substantial efforts were made on the part of the incorporators to conform to the requirements of Chapter 10, Title 16, Utah Code Annoated, as amended 1953. Vincent Drug Co. v. State Tax Comm., 17 Utah 2d 202, 407 P.2d 183.

In the instant case, however, we have no such shwoing, In fact we have no evidence whatsoever concerning any attempt of any person to incorporate a

company known as "William Lord Associates." All we have in this case is the inference of the trial court that since there was a corporation known as William Lord Corporation then William Lord Associates was intended to be an assumed name for that corporation. There clearly was no evidence to support this finding by the court as there was no evidence at all concerning any intentions of the Defendant. The only conclusion supported by the evidence is that the Defendant William Nelson be held personally liable.

This position has been supported by this Court in Merchants Bank v. Goodfell, 140 P.2d 759. In that case the court ruled that where a draft was signed by one person, but had the name of another person or entity on both the upper and lower corner of the check, the person signing the check was the one liable for its payment. The court in its opinion based its conclusions on the fact that the name of the account on which a draft was drawn was not necessarily the only person who should be held liable for payment of the check or draft. This was clearly the situation in the instant case.

The trial court also did not have sufficient evidence on which to base its finding that William

Lord Associates was intended to be an assumed name for William Lord Corporation in that Defendant had not complied with the provisions of Section 42-2-5, Utah Code Annoated, as amended, 1953. This section requires:

Every person or persons who shall carry on, conduct or transact business in this state under an assumed name, whether such business be carried on, conducted or transacted as an individual, association, ownership, corporation or otherwise, shall file in the office of the Secretary of State a certificate setting forth the name under which such business is, or is to be carried on, conducted or transacted....

This statute is quite clear in its purpose and scope and its requirements are clearly mandatory and prerequisite to the transaction of any business within the State of Utah. In the instant case the dictates of the statute clearly were not followed. No certificate of assumed and true name was filed entitling William Lord Corporation to conduct business in the State of Utah under the name William Lord Associates. Therefore any obligation entered into by "William Lord Associates" would necessarily have to be, in effect, an obligation entered into by the person who had attempted to obligate the company; in this case the Defendant William Nelson.

The trial court's reasoning and holding in

this case sets a very dangerous precedent. The allowance of an inference by any court that any given entity was actually an assumed name for some corporation is a very dangerous precedent in that it opens the door for any person, when sued upon a personal obligation, to always raise the defense that "this really isn't a personal obligation, because I always intended to be a corporation but never quite got around to it."

From the foregoing it is quite evident that due to the fact that no certificate for an assumed name was filed with the Secretary of State and also that there is no Utah corporation named "William Lord Associates" that the Defendant William Nelson should be personally liable.

POINT THREE

EVEN IF THE COURT HAD SUFFICIENT GROUNDS TO CONCLUDE THAT THE CHECK IN QUESTION WAS PROPERLY A CORPORATE OBLIGATION, THE DEFENDANT, WILLIAM NELSON SHOULD STILL BE PERSONALLY LIABLE.

Even if the Court did have sufficient grounds to find that the Defendant William Nelson had always intended and was in fact doing business as William Lord Corporation, he should still be held personally liable. Most courts hold that generally a director or officer of a corporation does not incur personal liability for its wrongful acts merely by reason of his

official character. However, due to the unique circumstances of this case, William Nelson should be held personally liable for the amount of said check by reason of his being a director of the corporation and participating in an attempt to defraud the Plaintiff through William Lord Corporation.

The main basis of this theory is the fact that the checks were fraudulently issued by a director of this corporation and, as argued in point one of this brief, the court must presume that the check was issued with the wilfull intent to defraud the plaintiff. In Klockner v Keser, (1971) 20 Colo App 476, 488 P.2d, 1135, the Colorado Supreme Court held the directors of a corporation personally liable for bad checks which were issued on the corporation account and signed by the Defendant. The pertinent rule, indicated the Colorado Court, was that although officers and directors of a corporation may not be held liable for the torts of the corporation solely by reason of their office, they may be held liable personally for the results of tortious, fraudulent misrepresentations where they approved of and sanctioned the making of such representations and knew or should have known of the fallcity of the rep-

resentations and the consequential damages which were likely to result therefrom.

A similar holding was also reached in the 1973 case of Meehen v. Adams Enterprises, Inc., 507 P.2d 849, 211 Kan 253. In that case, as in Klockner, the Kansas Supreme Court ruled that the officers or directors of a corporation shall be personally liable for a bad check "if it was apparent that at the time the checks were drawn the officers or directors knew or should have known that there were no funds in the bank to pay the check." *supra*, 851, 852.

This same result was also reached in a New York case, Lippman Packing Corporation v. Rose, (1953) 120 NYS 2d 461. In that case the court again ruled that officers or directors of the corporation would be personally liable for a bad check where the Defendant was chargeable with the knowledge of the state of the corporation's bank account. In Lippman it was again emphasized that the Defendant's conduct amounted to actionable fraud and therefore held him personally liable.

In each of the above cases it was noted that the major reason for the Court granting relief to the Plaintiffs against the Defendant officer or director

of the corporation personally was that there was substantial evidence that the Defendant knew or should have known the status of the bank account of the corporation and that, nonetheless, he still wrote a check which was subsequently dishonored upon presentation. This is exactly the situation in the instant case. In this case, by the presumption of Section 7-15-2(2), Utah Code Annotated, argued in point one, we have prima facie evidence that this check was issued with the wilfull intent to defraud the Plaintiff with no evidence to rebut that presumption. It therefore follows that the situation in this case is directly analogous to the three cases quoted above. This Court then, in recognizing the soundness of the logic behind the holdings in the above three cases, is therefore urged to adopt a similar rule and hold the Defendant, William Nelson personally liable for the amount of this check.

CONCLUSION

Appellant respectfully submits that the trial court erred in not awarding Plaintiff reasonable attorney's fees and in not holding Defendant William Nelson personally liable for the amount of said check plus interest, costs of court, and reasonable attorney's fees. The trial