

1977

# Stanley Katz v. Ronald John Arnold and Janet Lee Arnold : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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STANLEY KATZ,

:

Plaintiff-Respondent,

:

vs.

:

Case No.  
15015

RONALD JOHN ARNOLD and  
JANET LEE ARNOLD, his wife,

:

:

Defendants-Appellants.

:

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BRIEF OF RESPONDENT

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Appeal from the Order of the Third Judicial District Court  
of Salt Lake County, Utah  
Honorable G. Hal Taylor, Judge

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BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

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This is an action commenced to terminate a Uniform Real Estate Contract whereby the Plaintiff was selling and the Defendants were purchasing, certain real property in Salt Lake County, Utah. The Defendants filed a Counterclaim wherein they claimed among other things, damages for forceable entry and detainer of the premises and for damage to personal property of the Defendants.

## DISPOSITION OF THE CASE BY LOWER COURT

After hearing and trial, the District Court of Salt Lake County entered judgment in favor of the Plaintiff and dismissed the Counterclaim of the Defendants for failure of the Defendants to prove a prima facie case against the Plaintiff for damages.

## RELIEF SOUGHT ON APPEAL

The Plaintiff-Respondent seeks to sustain the judgment of the Lower Court and the dismissal of the Counterclaim of the Defendants.

## STATEMENT OF FACTS

The Plaintiff-Respondent agrees with the Statement of Facts as set forth in the brief of the Appellants, except as to the particular statements and points as are hereinafter considered.

The Appellants make reference to the Answer to Interrogatories filed by the Plaintiff on February 14, 1974, as establishing the fact that one, Jerry Gardner, was acting for the Plaintiff. Therein said Interrogatories, it was clearly set forth that the said Mr. Gardner was an independent contractor who had performed assorted and occasional repair and remodeling jobs for the Plaintiff on different occasions during the previous six (6) months. (R. Page 30) Mr. Gardner was neither the agent nor employee of the Plaintiff.

The trial court sustained the Plaintiff's objection to the attempt of the Co-Defendant, Janet Lee Arnold, to testify as to an alleged conversation between herself and Jerry Gardner. (Trans. P. 98, L. 23) The Court determined that the proposed testimony was hearsay and an attempt to prove the existance of an agency between Mr. Gardner and the Plaintiff based upon the statement of the proposed agent and further, that the same was not admissible under Rule 63 (9) or (10) of the Utah Rules of Evidence as an exception to the Hearsay Rule. (Trans. P. 98, L. 22 to P. 100 L. 25) The Defendants thereupon made a proffer to the Court as to the testimony proposed to be given by Mrs. Arnold. That proffer was as follows:

We would proffer that Mr. Gardner stated to Mrs. Arnold at this time and also subsequently in the evening on this same day, Mr. Gardner stated to Mrs. Arnold that he had come to the premises to make repairs and to clean the premises on behalf of Mr. Katz, that he was told to do so on behalf of Mr. Katz, that in doing so he had removed property of the Arnolds from inside the home, placed it under the carport in order to get access to the premises, to (do) the repairs; also that he knew that -- or he was aware that the Paynes had removed the property -- other property of the Arnolds and that the Paynes had been instructed to do so by Mr. Katz. (Trans. P. 99 L. 20)

Upon the receipt of the proffer, the Court again refused the proposed testimony for the reasons as previously given. (Trans. P. 100 L. 24)

Upon Plaintiff's motion, the Counterclaim of the Defendants was dismissed. (R. 64-65, 72)

## ARGUMENT

THE TRIAL COURT DID NOT ERR IN REFUSING TO ADMIT THE HEARSAY EVIDENCE OF THE CO-DEFENDANT, JANET LEE ARNOLD, REGARDING HER CONVERSATION WITH JERRY GARDNER

The Appellants argue that the proposed testimony rejected by the Court was necessary to establish that the said Jerry Gardner, was the agent of the Plaintiff and absent its admission, that such an agency relationship could not be established. They submit that although such testimony was clearly hearsay, it nevertheless was properly admissible as an exception under either Rule 63 (9) or (10) of the Utah Rules of Evidence.

Rule 63 (9) of the Utah Rules of Evidence provides as follows:

Vicarious Admissions. As against a party, a statement which would be admissible if made by the declarant at the hearing if (a) the Judge finds the declarant is unavailable as a witness and that the statement concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of such relationship, or (b) the party and the declarant were participating in a plan to commit a crime or a civil wrong and the statement was relevant to the plan or its subject matter and was made while the plan was in existence and before its complete execution or other termination, or (c) one of the issues between the party and the proponent of the evidence of the statement is a legal liability of the declarant, and the statement tends to establish that liability; (Emphasis added)

The initial requirement for the acceptance of a hearsay statement under Rule 63 (9) (a) is a finding by the trial judge that the alleged

declarant was then unavailable as a witness. At no time during the trial, did the Defendants proffer to the Court any reason why Jerry Gardner was not called to testify at the hearing. The Defendants point out that the return of service executed by the Salt Lake County Sheriff on the Summons tendered for service upon Mr. Gardner in January of 1975, indicated Mr. Gardner could not then be located. (R. Page 50) Nevertheless, more than 21 months elapsed between the date of that return of service and the trial of the case. The Defendants failed to offer any explanation as to their efforts during the intervening period of time to locate Mr. Gardner. At the time that counsel argued to the Court the question of the admissibility of the proposed testimony, Plaintiff's counsel directed the Court's attention to the fact that no evidence had been submitted or proffered as to the unavailability of Mr. Gardner to testify. (Trans. P. 100 L. 19) Still, no attempt was made to justify the failure of the Defendants to call Mr. Gardner as a witness.

A further requirement of Rule 63 (9) (a) is that the hearsay statement proposed to be introduced, must concern a matter within the scope of an agency or employment of the declarant. In otherwords, the subject of the proposed testimony must have been determined to be within the scope of an agency between Mr. Gardner and the Plaintiff. In the instant case, and as is represented by the Defendants in their brief, the purpose of the proposed testimony was to establish the agency itself. The testimony was not directed to any matter within the scope of an established

agency. Reference to the Defendants' proffer evidences that no evidence was to be introduced to show that the Plaintiff had in any manner authorized or instructed Mr. Gardner to remove the property of the Defendants from the premises. The proffer was only that Mr. Gardner had come to the premises to make repairs and clean the premises on behalf of the Plaintiff and was told to do so by the Plaintiff. Completely lacking, was any proposed testimony to the effect that the Plaintiff had authorized or instructed Mr. Gardner to remove any property from the premises. In fact, the only evidence placed before the Court relative to any instruction or authorization given Mr. Gardner as to the removal of the property, was the testimony of the Plaintiff and of Mrs. Judy Mayne. Mrs. Mayne was employed by the Plaintiff in the management of his office and property (Trans. P. 17 L. 26). Upon direct examination by the Defendants, she testified that she had specifically instructed Mr. Gardner to put all of the property of the Defendants in one room of the house and not to throw anything away. (Trans. P. 43 L. 17-26; P. 44 L. 13) Furthermore, the Plaintiff had testified, as recalled by the trial court, that he had never authorized anyone to remove any property of any kind from the premises. (Trans. P. 102 L. 25) All evidence placed before the Court showed that Mr. Gardner was without any authority or instruction to move any of the property of the Defendants from the premises. Therefore, the proffered testimony would not have established the authority of Mr. Gardner to remove the property, but only that if he did in fact remove the same, that he was then proceeding contrary to the terms of the instruction.

and authorization received by him from the Plaintiff. In otherwords, the statement subject of the proffer clearly was not within the scope of an agency or employment with the Plaintiff.

In view of the fact that the proffer did not attempt to show the authority of Mr. Gardner to remove the Defendants' property from the premises, additional evidence or at least a proffer of the same, would have been necessary to have shown that the Plaintiff had authorized the removal of said property. The failure to provide that evidence or a proffer of the same, made it mandatory for the Court to reject the proffer made. 75 Am Jur 2d, Trial, Section 131. In Patrick v. Patrick, 397 P. 2d 273, the Wyoming Court, citing Lewis Hubbard v. Montgomery Supply Co., 59 W. Va 75, 52 S. E. 1017, ruled:

"An offer to prove facts which must be followed by other proof to connect it is inadmissible unless there is also an offer to prove the connection."  
397 P. 2d 273, 278

The Defendants further submit that the proposed testimony was admissible under Rule 63 (9) (b) as constituting a hearsay statement relative to a plan by the Plaintiff and Mr. Gardner to commit a civil wrong. Additionally, they argue that the said Jerry Gardner would have been liable to the Defendants for any removal of the property of the Defendants and therefore, that the proffered testimony was admissible as a declaration against interest pursuant to Rule 63 (10) of the Utah Rules of Evidence. Rule 63 (10) provides in pertinent part as follows:

Declarations Against Interest . . . (A) statement which the judge finds was made by a declarant who is unavailable as a witness and which was at the time of the assertion so far contrary to the declarant's pecuniary . . . interest or so far subjected him to civil or criminal liability . . . that the declarant under the circumstances existing would not have made the statement unless he believed it to be true; (Emphasis added)

The Defendants argue that Mr. Gardner's activities with . . . they find objection, transpired in January of 1974. The Court determined the right of possession of the Defendants' to the subject premises terminated November 21, 1973, and that the Defendants were unlawfully detaining the premises after that date. (R. Page 71) The Court did not find that the . . . was involved in or a party to the commission of a civil wrong. Nevertheless the subject proffer of evidence did not propose to show that the said Mr. . . . had been authorized or instructed by the Plaintiff to remove any of the premises of the Defendants from the premises. It was completely void of any facts which would have shown any conspiracy or plan to perpetrate a civil wrong. Therefore, the Court could not have found that the alleged statement of Mr. Gardner would have subjected him to any civil or criminal liability as well . . . be required to permit the admission of the proposed testimony under Rule 10. Additionally, Rule 63 (10), also required the trial judge to first find that Mr. Gardner was unavailable as a witness. Once again, no attempt was made by the Defendants to establish the unavailability of Mr. Gardner. Furthermore nothing was placed of record or proffered which could have suggested, yet . . . persuaded the trial judge that Mr. Gardner understood that in making the

alleged statement, he could thereby have been subjected to civil or criminal liability.

As argued by the Defendants, their subject proffer of testimony was not calculated to establish a matter within the scope of an alleged agency or employment between Mr. Gardner and the Plaintiff, but rather to establish that Mr. Gardner was in fact the agent of the Plaintiff. The Defendants attempted to establish the agency only by the extra judicial statement of the purported agent himself. This Court has ruled that the extra judicial declaration of an alleged agent may not, in of itself, be used to prove the fact of agency. State v. Erwin, 101 Utah 365, 390-392; 120 P. 2d 285, 298-299; Beard v. White, Green and Addison Associates, Inc., 8 Utah 2d 423; 336 P. 2d 125, 126.

Even in the event that the proffered testimony had been accepted by the Court, it would not have gone beyond that as previously offered and accepted. The prior testimony of the Plaintiff and of Mrs. Judy Mayne was to the effect that Mr. Gardner had been directed by them to go upon the premises to make repairs and to clean the same. There was still no evidence taken or offered which would have indicated that Mr. Gardner was anything other than an independent contractor and nothing further received or offered on the question of whether the Plaintiff had authorized Mr. Gardner to remove any of the property of the Defendants from the premises. With nothing further introduced, the Court would have been left with the obligation of finding that even if Mr. Gardner did in fact place certain of the Defendants' property outdoors on the carport, that in so doing, he operated contrary to the terms

of his authorization from the Plaintiff and outside the scope of his authority. The Court did not have placed before it any evidence which would have established that Mr. Gardner was the agent of the Plaintiff and incident to that agency, authorized to remove the property of the Defendants from the premises. Therefore, the admission of the proffered testimony would not have conformed to the testimony previously given and received.

It is noted that the proffer proposed that the Defendant, Janice Lee Arnold, be permitted to testify that Mr. Gardner had told her that he knew or was aware that a Mr. and Mrs. Payne had removed other property of the Defendants from the premises and had been instructed to do so by the Plaintiff. Such testimony would have clearly constituted multiple hearsay and would have been unacceptable as vague and uncertain. It would have been impossible to lay a proper foundation for that testimony which would establish how Mr. Gardner had acquired his alleged knowledge or become aware of the activities of Mr. and Mrs. Payne and the alleged instructions received by them from the Plaintiff. Furthermore, even if taken at face value, the same in and of itself could not establish an agency as between the Plaintiff and Mr. and Mrs. Payne, their having been introduced during the course of the trial on the evidence to the effect that Mr. and Mrs. Payne were proposed future Lessees of the subject premises. (Trans. P. 44 L. 14)

## CONCLUSION

The Respondent respectfully submits that the refusal of the

trial court to accept the proffer of the Appellants did not constitute prejudicial error and should be sustained.

Respectfully submitted,

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