1978

Daniel P. Ream v. David L. Tizen : Appellant's Petition for Rehearing and Brief in Support

Utah Supreme Court

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William J. Cayias; John A. Snow; Ray H. Ivie; Attorneys for Respondents;

IN THE SUPREME COURT OF THE STATE OF UTAH

DANIEL P. REAM, Plaintiff and Respondent, vs. DAVID L. FITZEN, Defendant and Appellant,	)	
DAVID L. FITZEN, Counterclaim Plaintiff and Appellant, vs. PAUL REAM and BANK OF SALT LAKE, Counterclaim Defendants and Respondents, REAM'S BARGAIN ANNEX NO. 2, INCORPORATED, a Utah corporation, Defendant.	)	Case No. 15220

APPELLANT'S PETITION FOR REHEARING AND BRIEF IN SUPPORT

Appeal from the Judgment of the District Court of Salt Lake County
The Honorable Stewart M. Hanson, Jr., Judge

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CASES AND AUTHORITIES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

DANIEL P. REAM,	)	
Plaintiff and Respondent,	)	
vs.	)	
DAVID L. FITZEN,	)	
Defendant and Appellant,	)	
	)	
	)	Case No. 15220
DAVID L. FITZEN,	)	
Counterclaim Plaintiff and Appellant,	)	
vs.	)	
PAUL REAM and BANK OF SALT LAKE,	)	
Counterclaim Defendants and Respondents	)	
REAM'S BARGAIN ANNEX NO. 2, INCORPORATED, a Utah corporation,	)	
Defendant.	)	

PETITION FOR REHEARING

TO THE HONORABLE CHIEF JUSTICE AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF UTAH:

Comes now the appellant, David L. Fitzen, and respectfully requests a rehearing in the above-entitled cause, and that the decision and opinion of this Honorable Court filed herein on

June 13, 1978, be reversed for the reason that the Supreme Court has erred in the following particulars:

POINT I. THE SUPREME COURT ERRED IN DECLINING TO GRANT APPELLANT RELIEF BY WAY OF REDUCING BY $6,000 THE EQUITY OF THE RESPONDENT, DAN REAM, IN THE JOINT VENTURE.

POINT II. THE SUPREME COURT ERRED IN FAILING TO GIVE APPELLANT CREDIT FOR $6,047.47 ACTUALLY RECEIVED AND DEPOSITED IN THE JOINT VENTURE ACCOUNT.

POINT III. THE SUPREME COURT ERRED IN DETERMINING THAT IT WAS PROPER TO CHARGE FITZEN WITH $24,483 RENT.

POINT IV. THE SUPREME COURT ERRED IN HOLDING THAT THE ACTION TO DECLARE THE $6,000 SECURITY AGREEMENT (LIEN) VOID WAS A TORT ACTION AND HENCE A LAW ACTION.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

NATURE OF THE CASE

In this action, the respondent, Dan Ream, and the appellant, David L. Fitzen, were joint venturers, and each sought an accounting and a resolution of various disputes between them. David L. Fitzen, further seeks to have a purported $6,000 security agreement against the joint venture declared null and void as to all parties, and for damages.

DISPOSITION OF THE CASE BY THE LOWER COURT

The case was tried to the Court below, sitting without a jury. The Court below rendered judgment on plaintiff's Complaint against the defendant--no cause of action--and rendered judgment on defendant, Fitzen's, Counterclaim against plaintiff in the sum of $106.03. A "verdict of no cause of action" was entered by the Court in favor of the defendants, Bank of Salt Lake and Paul Ream, and against the defendant, Fitzen, on his said Counterclaim against said parties.

DISPOSITION OF THE CASE BY THE SUPREME COURT

The Supreme Court filed an opinion in this matter on June 13, 1978, affirming the decision of the lower court.

RELIEF SOUGHT ON THIS PETITION FOR REHEARING

Petitioner herein seeks a decision on rehearing reversing the judgment of the lower court in the following particulars:

1. Directing a judgment against the respondent, Daniel P. Ream, and in favor of appellant in the sum of $6,425.75, or in the alternative, for a new trial.

2. As to defendants, Bank of Salt Lake and Paul Ream, appellant seeks reversal of judgment in their favor and that this Court hold that the purported $6,000 security agreement to Paul Ream is void, and for a new trial on the issue of damages.

3. In the alternative, for a new trial on all issues.

ARGUMENT

POINT I. THE SUPREME COURT ERRED IN DECLINING TO GRANT APPELLANT RELIEF BY WAY OF REDUCING BY $6,000 THE EQUITY OF THE RESPONDENT, DAN REAM, IN THE JOINT VENTURE.

It was conceded by all parties that respondent, Paul Ream, loaned his son, respondent, Dan Ream, $6,000 with which Dan made his contribution to the joint venture, and also that Fitzen contributed $6,000 in cash and property to the joint venture. (No one has ever asserted that the Paul Ream loan was made to the joint venture.)

It was likewise undisputed that Dan Ream signed a $6,000 lien on a joint venture truck without the concurring signature of Fitzen, contrary to the joint venture agreement. It was disputed whether appellant, Fitzen, ratified the the lien. Even assuming ratification, however, the evidence was established (and it was uncontradicted) that the truck was lost to the joint venture by reason of that lien. The evidence also established (and it was likewise undisputed) that just before repossession by the first lienholder, the truck could have been sold and the joint venture would have realized $6,000 over and above the amount of the first lien. In Point III of his Brief (and Point III of his Reply Brief) appellant contended that Dan Ream's equity in the joint venture should have been reduced by $6,000, which was lost to the joint venture by reason of Dan Ream's personal indebtedness to his father secured by the lien for $6,000 on the truck. Also, the

Joint Venture Agreement provided in paragraph 11 thereof that

> "Each of the parties hereto agrees to assume and pay his own separate debts and to indemnify the other against the same and all expenses on account thereof."

In its opinion in this matter, the Supreme Court held that

> "While this contention may have substance, the record before us precludes us from resolving that issue."

In this, we think the Court has erred.

As we read the opinion of the Court, the Court apparently felt that the element that is lacking is an accounting of the "partnership assets". The opinion states:

> "The initial partnership assets consisted of the 1974 White truck and a Caterpillar tractor, and it is entirely possible that additional assets were acquired, yet neither of the partners saw fit to provide the trial court with any accounting of those assets."

We think that it is error to speculate as to other possible assets. We think it was error to withhold relief to appellant because the accounting didn't cover possible assets. Likewise it is error to deny appellant relief on the basis of lack of accounting as to the truck or the tractor for these reasons:

(1) We submit that the parties did include an accounting of the equipment to the extent possible. That is to say, the payments and expenses of the equipment were set forth. The equipment itself couldn't be shown in the accounting because

the joint venture had no equipment. The truck and the tractor were both lost to it, and that was undisputed, and that is certainly why neither party listed those "assets". The accounting and the 561 page record were silent as to "other" equipment because there was none.

(2) Furthermore, even if the parties had in fact failed to make a complete accounting of all of the equipment, that should not have precluded such relief as can be determined from the matters which are presented. The proper rule would seem to be that, as to items not presented in evidence by either party, such items must be deemed to be neutral; that is, to have no significant bearing on the outcome.

In this case, the circumstances of the loss of the truck and the extent of the loss to the joint venture were introduced in evidence, and relief as to that item should not be denied because details of some other equipment were not felt by either party to be material to the outcome of the case. (To avoid repetition, we refer the Court to page 17 of appellant's Brief and to pages 13 to 20 of appellant's Reply Brief.

To hold that this matter was not properly raised below not only brings about a serious injustice to appellant, but also reflects unfairly upon counsel.

POINT II. THE SUPREME COURT ERRED IN FAILING TO GIVE APPELLANT CREDIT FOR $6,047.47 ACTUALLY RECEIVED AND DEPOSITED IN THE JOINT VENTURE ACCOUNT.

In Point I of appellant's Brief (page 8) and in Point I of Appellant's Reply Brief (pages 7 to 10), appellant asserted that even if it were proper to charge appellant for theoretical earnings (rent) as opposed to actual earnings, that appellant should nevertheless receive credit against said sum for amounts actually collected and deposited in the Fitzen-Ream joint venture checking account. The receipt of these monies was not disputed, and copies of the deposit records (which were never contradicted) were introduced in evidence by plaintiff himself as part of Exhibit P-12. Copies of those records (5 pages) are set forth in full next to the end of Appellant's Abstract of the Transcript of Evidence heretofore filed with this Court on this appeal.

The Supreme Court has in its opinion denied this relief to appellant. The opinion refers to the power of the Supreme Court to review both law and fact, but in deference to the "better position" of the trial judge to judge "credibility" and observe "demeanor", the Court declined to change the trial court's accounting. In reaching this conclusion, the Court was apparently influenced by certain shortcomings in Fitzen's bookkeeping (as the Court appeared to feel). We think, however, that in reaching its decision, the Court has overlooked the fact that the correction

in the accounting which appellant seeks is based upon undisputed records. It is thus not a matter of the lower court's having an advantaged position, and certainly Fitzen should not be denied an undisputed credit because of shortcomings relating to other natters, even assuming such. The Supreme Court stated the correct rule in its opinion as follows:

> "As has been stated on numerous occasions, we shall not disturb the findings and judgment unless they are clearly against the weight of the evidence."

The Court failed to apply that rule to this case and in so doing has committed error. It is true that when faced with this rather obvious error on appeal, respondent has attempted to justify the error, not by claiming that the said $6,047.47 was not received and deposited properly, but by claiming that Fitzen's memory was incomplete on the Fitzen-Ream checking account transactions.

We think it an unfair requirement and not in accord with equity to insist that Fitzen remember every detail of those transactions as a condition to being allowed credit for undisputed deposits in that account. This is particularly so where the records of the Fitzen-Ream joint venture checking account were introduced into evidence by plaintiff himself. It should also be noted that plaintiff never did demonstrate a single error in those records at the trial. In fact, his position at trial was that all transactions should have been handled through said account. Only on appeal does he change his position.

1 Bear River State Bank v. Merrill, 101 Ut 176, 120 P2d 325 (1941) cited by the Court.

POINT III. THE SUPREME COURT ERRED IN DETERMINING THAT IT WAS PROPER TO CHARGE FITZEN WITH $24,483 RENT.

In Point I of appellant's Brief (pages 5 to 8) and in Point I of appellant's Reply Brief (pages 3 to 6), appellant claimed error by reason of the trial court's charging appellant with $22,483 rent. (The opinion of the Supreme Court refers to this sum as being $24,483.) Appellant claims that he should only be held to actual earnings of the equipment, not theoretical earnings or, in other words, rent. The Supreme Court nevertheless has held that it was proper to charge him with "rent". It would perhaps serve no useful purpose to repeat appellant's arguments on this point again except to point out that the decision of the Court appears to overlook and be in conflict with the case cited by appellant in his Reply Brief at page 6, to-wit: Street vs. Graham, 2 Ut2d 144, 270 P2d 456 (1954), where this Court held that it was improper to charge the defendant with the rental value of the partnership property used by him for his own purposes, but rather that the proper remedy was an award of one-half of the actual net profits from use of such equipment. The recovery was thus limited to actual receipts, not theoretical receipts.

In the Graham case, plaintiff claimed that defendant used the partnership equipment for his own purposes and that he should have to pay the reasonable rental value of the property. The Court wisely held that, since the parties were partners, it

would be improper to require more than an accounting for actual profits. The Court likewise refused to make the defendant be responsible to the plaintiff for "idle time" of the equipment.

It is respectfully submitted that this case should be governed by the Graham vs. Street case, but the opinion in this case appears to be in direct conflict with that case.

Dunn vs. Baugh, 95 Idaho 236, 506 P2d 463 (1973) is cited by the Court for the proposition that Fitzen, as managing partner, had the burden of proof and persuasion. That case does not stand for the proposition. It stands for the proposition that:

> " . . . the party called upon to render an accounting, has both the burden of producing evidence and the burden of persuasion." (page 465)

Since this is an action for a mutual accounting, Ream has the burden of establishing actual income claimed by him in the sum of $22,483. This he did not establish.

In the Dunn case, at page 465, the Court said:

> "We find no authority, and appellant fails to cite any for the somewhat bizzare proposition that a partner managing a partnership business must account to his fellow partner for all partnership debts when the income from the partnership business is insufficient to pay the debts."

We think it equally unfair to charge Fitzen for income never received.

POINT IV. THE SUPREME COURT ERRED IN HOLDING THAT THE ACTION TO DECLARE THE $6,000 SECURITY AGREEMENT (LIEN) VOID WAS A TORT ACTION AND HENCE A LAW ACTION.

This matter was first raised by respondent, Bank of Salt Lake, in its Brief, and appellant responded thereto in Point II of appellant's Reply Brief (pages 11 and 12). Those arguments will not be repeated here except to say that the Supreme Court, in concluding that the issue of the validity of the lien is not subject to review as being in law, looks to form that than substance. It is true that appellant used the word, "conspiracy", in his pleadings, but the thrust of the case was to set aside an instrument which appellant claimed was void. This is to say, the appellant sought relief in equity. It might be that the damage aspect of appellant's claim against respondents, Paul Ream and Bank of Salt Lake, is tort and in law, but the nullifying of a written instrument is equitable, and so far as the validity of the security agreement (lien) is concerned, the Supreme Court should not decline to review the facts as well as the law.

It should be noted that the conspiracy itself is not the actionable element, but rather the tort committed pursuant to the conspiracy, if any, and of course an action for damages will lie for that tort, whatever it may be. In support, we cite the following from 15A CJS, Section 21 (the same section cited in the Court's opinion) at page 665:

> "While an action may be for damages suffered by reason of torts committed pursuant to a conspiracy,

> the conspiracy itself, without any actionable wrongs being done thereunder, ordinarily cannot be made the subject of a civil action, and may be of no consequence except as bearing on the rules of evidence, the persons liable or aggravation."

It seems clear that use of the word "conspiracy" should not deprive appellant of equitable relief (quite apart from damages) and to a proper review by the Supreme Court of the equitable issue of the nullification of the written instrument. It requires no citation of authority, we think, to support the proposition that in Utah equitable issues and legal issues can exist in the same suit, and review should be forthcoming according to the nature of the issue.

CONCLUSION

We, therefore, respectfully submit that the decision of the Supreme Court entered on June 13, 1978, is in error and pray that the Supreme Court direct entry of judgment in favor of the appellant and against the respondent, Daniel P. Ream, in the sum of $6,425.75, or in the alternative, for a new trial. This sum is arrived at as follows: The accounting adopted by the lower court charged Fitzen with $22,483 rent. If the Supreme Court determines this to have been error, it is submitted that the most the record would support in actual income to the joint venture would be $15,795. From this figure should be deducted the sum of $6,047.47 actually received and deposited into the Fitzen-Ream joint venture checking account. This would leave a net figure of $9,747.53 chargeable to Fitzen. If that figure is substituted in the lower court's accounting for the $22,483, it will result in an increased judgment to Fitzen of $6,425.75. (These computations are more fully set forth at pages 6 to 8 of appellant's Brief.)

We further pray that the Court reverse the judgment of the lower court and adjudge that the purported $6,000 security agreement to defendant, Paul Ream, is void, and that a new trial be granted on the issue of damages; or, in the alternative, for a new trial on all issues.

The foregoing Petition for Rehearing and Brief in Support thereof is respectfully submitted this _____ day of June, 1978.

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Mailed two copies of the within Brief to each of the following attorneys, postage prepaid, this 30th day of June, 1978:

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