

1977

# The Sterling Press v. C. L. Pettit and John Sybrowsky dba Investors Publishing Co. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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THE STERLING PRESS,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	Case No.
	)	15304
C. H. PETTIT and JOHN	)	
SYBROWSKY dba INVESTOR'S	)	
PUBLISHING COMPANY,	)	
	)	
Defendants-Appellees.	)	

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BRIEF OF APPELLANT

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STATEMENT OF THE NATURE  
OF THE CASE

Plaintiff corporation sued individual Defendants, officers of another corporation (International Land Corporation) for \$1,314.00 for printing services and an insufficient funds check issued in payment therefor; Defendants defended on the ground that said obligation is the obligation of their employer, International Land Corporation, and that they are not personally liable for said corporation's debts.

DISPOSITION IN LOWER COURT

On April 25, 1977, the case was tried before the Honorable Marcellus K. Snow who rendered judgment for the Plaintiff as prayed including \$500.00 attorney's fees.

## RELIEF SOUGHT ON APPEAL

Defendants seek a reversal of the judgment of the trial court and that judgment of no cause of action be entered in favor of the Defendants.

## STATEMENT OF THE FACTS

International Land Corporation was incorporated under the laws of the State of Utah on January 18, 1972 (T-35; Exhibit D-15). Shortly thereafter on January 25, 1972, at its first meeting of its stockholders, the corporation resolved to set up a publishing company to be known as Investor's Publishing Company (T-36; Exhibit D-12). Thereafter International Land Corporation took specific steps to set up said publishing company as a dba of International Land Corporation as follows:

1. On December 20, 1972, the corporation opened a checking account at Zion's Bank in the name of Investor's Publishing Company with a proper corporate resolution of International Land Corporation on the signature card (T-41; Exhibit D-4).

2. On June 7, 1973, the corporation filed with the State Tax Commission of Utah an Application For License To Engage in Business, Form TC-69. Said application showed the name of its business as Investor's Publishing Company and the owner as International Land Corporation (T-37; Exhibit D-14).

3. On June 20, 1973, the corporation received a sales tax license in the name of Investor's Publishing Company (T-38; Exhibit D-8).

4. The corporation hired a full-time editor, Ann Garrett, who obtained several bids for typesetting and printing of the magazine, The Utah Equestrian. Said editor in the latter part of 1972 contacted representatives of the Plaintiff corporation and arranged for the printing of said magazine. At that time, she informed representatives of the Plaintiff corporation that

the magazine was published by Investor's Publishing Company which was owned by International Land Corporation (Garrett deposition, p. 4, line 18; p. 7, line 1). The initial checks paid to the Plaintiff corporation for printing services were paid by checks drawn on the account of International Land Corporation, e.g., see Exhibits D-5 and D-6. The bulk mailing permit used in mailing the magazine was in the name of International Land Corporation (R-43; Exhibit D-10).

The Plaintiff did the printing of The Utah Equestrian, the monthly publication of Investor's Publishing Company, from about December, 1972, until December, 1973. All of these services were paid for by checks drawn on the accounts of International Land Corporation, either the main account as represented by Exhibits D-5 and D-6, or the corporation's account in the name of Investor's Publishing Company, (Exhibit D-4). Exhibit P-2, the check for \$1,314.00 was given January 5, 1974, in payment for the final publication of The Utah Equestrian. Various financial problems plagued the International Land Corporation towards December, 1973, and January, 1974, and the said check did not clear the bank on account of insufficient funds. All of the checks given in payment for the publication were signed by the Defendants in their capacities as officers of International Land Corporation, although Exhibit P-2 shows on it only "Investor's Publishing Company" and does not specifically designate a representative capacity of Mr. Pettit and Mr. Sybrowsky.

#### ARGUMENT OF APPELLANT

#### POINT I

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDING OF

THE TRIAL COURT THAT THE PLAINTIFF CORPORATION DEALT WITH THE DEFENDANTS PERSONALLY WITH RESPECT TO THE PRINTING SERVICES RENDERED.

That the Plaintiff corporation printed the magazine, The Utah Equestrian, and is entitled to be paid the sum of \$1,314.00 for such services, is not in dispute. There is also no question that the magazine was the publication of Investor's Publishing Company (see the table of contents page of the magazine itself, Exhibit P-3, which lists the publisher as Investor's Publishing Company). The question for decision is whether Investor's Publishing Company was a dba of International Land Corporation, as claimed by Defendants, or whether it was a dba of Mr. Pettit and Mr. Sybrowsky personally as claimed by the Plaintiff and as is shown in the caption of the case. This latter was the finding of the trial court and is the basis for the judgment against the Defendants personally. It is Defendants' contention in this appeal that such finding is not supported by the evidence and is completely contrary to the clear meaning of all of the exhibits and the testimony of the witnesses, including that of the president of the Plaintiff corporation, Plaintiff's only witness.

In making the argument that the evidence is insufficient to support the findings, Appellants are well aware of the rules established by the Utah Supreme Court to the effect that if there is any substantial evidence in the record which is believable which supports the trial court's findings, the Supreme Court will not act as a trier of fact and reverse it even though there may be a greater volume of evidence to the contrary. Equally familiar, however, are the line of cases that establish that the trier of fact cannot disregard determinative evidence and that evidence in support of a finding must be appraised in light of all the attendant circumstances and

countervailing testimony. *Johnson v. Johnson & Co. Inc.*, 341 P.2d 215, 9 Utah 2d 195;

*Johnson v. Johnson & Co. Inc.*, 235 P.2d 783, 120 Utah 487; *Johnson v. Johnson & Co. Inc.*, 291 P.2d 890, 4 Utah 2d 228. In the present case, a reading of the testimony of the witnesses, which is not very long, and an examination of the Exhibits, will reveal that this is not just a case of more evidence against the finding than in favor of it; but on the contrary, while admittedly there are isolated statements and conclusions in the transcript by the president of the Plaintiff corporation to the effect that he dealt with the Defendants personally and individually, these are bare unsupported allegations and conclusions and are wholly inconsistent with all other evidence introduced, including his own testimony on cross-examination and the several exhibits.

The entire case of the Plaintiff consists of the testimony of the president of the Plaintiff corporation, less than 25 pages of transcript including cross-examination (see T-6-30). This brief will summarize the testimony relied on by the Plaintiff to support the finding that it dealt with the individual Defendants rather than the corporation, with notation as to the inconsistencies and countervailing evidence as follows:

On page 8, line 15 of the transcript, the president of the Plaintiff corporation testified that the editor of the magazine, Ann Garrett, told him at the time she negotiated with him to print the magazine that Mr. Pettit and Mr. Sybrowsky would be responsible for the payment. In the first place, the statement that Defendants would be responsible for the payment is not necessarily inconsistent with their defense inasmuch as they were officers in



International Land Corporation and as such oversee all of the corporate matters including payment of the accounts. But assuming that the statement is taken to mean that she told him that they would personally pay for it, the following inconsistencies and contrary testimony negate the statement and Plaintiff's case against the Defendants completely:

1. On page 18 and 19 of the transcript, on cross-examination, the Plaintiff's witness admitted that Ann Garrett had told the truth in her testimony. Ann Garrett had testified in his presence that as editor of The Utah Equestrian, she was employed by International Land Corporation (Garrett deposition, page 4, line 15-20) and that she had told him that the magazine was owned by International Land Corporation (Garrett deposition, page 10, line 18-20; see also page 17). She further testified that in response, representatives of the Plaintiff corporation had inquired why a real estate company would be publishing a magazine about horses, and that she had explained that one reason was to advertise its real estate (Garrett deposition, page 17). See especially the answer to the last question on page 18 of the transcript where the Plaintiff's president admits specifically remembering her telling him that International Land Corporation was publishing the magazine. Again, on page 19 he admits having had discussions with her at the time the deal was negotiated, relating to International Land Corporation being the real estate company that owned the magazine:

Q Well, in her testimony she mentions-- do you recall when you were there that she said that, the question was asked either by you or Mr. Parks why is the real estate company publishing a horse magazine, and her discussion there at that time about the International Land Corporation?

A Yes.

Q Do you feel like she was lying in her

testimony?

A No, I don't think that is a lie. Clearly, he has admitted his knowledge that International Land Corporation was the owner of The Utah Equestrian and that he knew that before he ever undertook to publish any issues of the magazine.

2. At the bottom of page 19 of the transcript he was asked on cross-examination if he checked it out with Mr. Pettit and Mr. Sybrowsky if they were to pay for it personally and he said "no". On further cross-examination he tried to change his story at the top of page 20 where he states that he met Mr. Sybrowsky and Mr. Pettit prior to publishing. Even then, he did not claim to have asked them if they were going to be personally liable for the bills in publishing the magazine. Close reading of the answer starting on page 20, line 14, will show that the witness is very confused or deliberately lying. In answer to the specific question whether he had asked Mr. Pettit and Mr. Sybrowsky whether they would be personally liable for the publication of the magazine he said "no"; then he tried to cover it with the weak conclusion, "I believe" we did state who will be responsible for the bill and they said they would. The rest of the answer to that question is confusion, and he never does say positively, though given numerous chances, that he ever asked the Defendants if they would be personally liable or that they ever agreed to. In any event, the question remains unanswered which is on line 2 of page 20, "So somebody comes in (Ann Garrett) that you never met before and says that somebody else that you had never met before (Mr. Pettit and Mr. Sybrowski) is going to pay a bill and you don't call them to find out?" The fact is that he never did call them to find out which shows the inconsistency of

his claiming that he was ever told they would accept personal liability for the bill.

3. Furthermore, upon further cross-examination, when asked a specific question as to whether he even met John Sybrowski (about whom he had been testifying for the last page or two about a conversation he allegedly had with him) on line 8 of page 20, he is not even sure if he even met the man. Again he uses words such as "I believe", "I think", "I just can't recall exactly", and after equivocating around for the rest of page 20, at the bottom of the page he states finally that he can't say positively whether he met Mr. Sybrowsky or not. Contrast this uncertain testimony of the Plaintiff's only witness as to the question of whether he had even met Mr. Sybrowsky with Mr. Sybrowsky's testimony (T-32-34), very positive and unequivocal, and which Plaintiff's counsel did not even bother to cross-examine, to the effect that he had never met the president of the Plaintiff corporation until after January, 1974, which would have been approximately a year after Plaintiff's president originally claimed to have had a personal discussion with him, but later was not sure of whether or not he had met Mr. Sybrowsky. So how can the trier of fact find that Plaintiff dealt personally with Mr. Sybrowsky when they did *not* even meet until after the transactions?

4. The Plaintiff corporation never sent any invoices to Mr. Pettit or Mr. Sybrowsky. All invoices were addressed to The Utah Equestrian at the post office box address of International Land Corporation. If the president of the Plaintiff corporation really believed that Mr. Pettit and Mr. Sybrowsky were going to be personally responsible for the printing expenses, why didn't he send them a bill? From all that appears in the record (and such is the fact) the first time the phrase "dba Investor's Publishing Company" was applied to Mr. Pettit and

Mr. Sybrowsky personally was in the caption on the complaint.

5. Exhibits D-5 and D-6, two checks showing examples of payment for services in printing The Utah Equestrian from International Land Corporation, were admitted in evidence. On page 22 of the transcript, Plaintiff's witness states in effect that although International Land Corporation was paying for the publication of The Utah Equestrian magazine, that this somehow was insufficient to put him on notice that International Land Corporation was the owner and the person paying for the magazine because as he put it, "Money is money as long as the check clears."

6. Another of Plaintiff's witness's statements inconsistent with his thesis that it was the individuals and not the corporation that was doing business as Investor's Publishing Company is found on page 24 of the transcript when he admitted that the soul reason that he sued Mr. Pettit and Mr. Sybrowsky individually is because of their signatures appearing on the final check (about one year after the first publication) and for no other reason. This shows that his claim that he had been told before he ever published the magazine that Mr. Pettit and Mr. Sybrowsky would personally be liable for it is something that was invented later with no basis of fact.

7. On page 25 of the transcript he admits being on the business premises of International Land Corporation in connection with a delivery of the magazines there, but he conveniently fails to take notice of signs, licenses, etc. on the premises that identify corporate structures although Defendants testified these were maintained in plain sight at all times. On page 24 of the transcript, he states he made no effort to check the ownership of The Utah Equestrian or Investor's Publishing Company such as looking at the premises,

checking out the bulk mailing permit, sales tax licenses, etc. Exhibit P-3 is a copy of one of the magazines that was published, and it shows on the table of contents page that the magazine was published by "Investor's Publishing Company, C. L. Pettit, President." On page 28 of the transcript, Plaintiff's witness, who is himself a president of a corporation, refuses to admit under cross-examination that this designation by use of words like "Company" and "President" of the company would put him on any notice that it is tied to a corporate structure. Can a Plaintiff get away with ignoring all the obvious indications, forget informative conversations, and after a course of dealing for a year and being paid for all but the last magazine, claim he was oblivious to the fact that he was providing services to and being paid by a corporation?

The above has been a brief discussion of the testimony of the Plaintiff's sole witness which is inconsistent with Plaintiff's claim that Investor's Publishing Company was a dba of Mr. Pettit and Mr. Sybrowsky individually rather than International Land Corporation. Add to that the overwhelming weight of the evidence of three other witnesses and ten Exhibits which show undisputedly that International Land Corporation operated the business of Investor's Publishing Company and The Utah Equestrian magazine for something over a year prior to its difficulties, and the conclusion is inescapable that the trial court erred in finding to the contrary. Admittedly, all of the facts concerning the corporate structure of the enterprise were not readily available to the Plaintiff corporation, such as the signature card on the bank account of Investor's Publishing Company showing International Land Corporation as the owner, but most of them would have been available to the Plaintiff had it made even the slightest inquiry and a good many of them were directly in front of the Plaintiff during the course of the dealings

between the parties. A brief summary is as follows:

1. Exhibit D-15: Articles of incorporation showing International Land Corporation incorporated January 18, 1972.

2. Exhibit D-12: One of the minutes of said International Land Corporation in which the dba of Investor's Publishing Company was established (long prior to any contact with the Plaintiff).

3. Exhibit D-4: Bank signature cards showing that the account on which the "insufficient funds" check was drawn on was the account of International Land Corporation.

4. Exhibits D-5 and D-6: Examples of checks used to pay for printing of prior issues drawn on the account of International Land Corporation.

5. Exhibit D-3: An example of the magazine that was printed by the Plaintiff indicating two things: (a) That the magazine was published by Investor's Publishing Company, C. L. Pettit, President, which should tip off any reasonable man that there probably is a corporate structure involved, and (b) The bulk mailing permit number which, if an inquiry had been made, would have revealed that it was the permit of International Land Corporation.

6. Exhibit D-10: Bulk mailing permit of International Land Corporation, the number of which corresponds to the number printed on the magazine.

7. Exhibit D-9: Invoices for billings for publishing the magazine not in the name of the Defendants.

8. Exhibit D-14: Application for License to Engage in Business in the name of International Land Corporation, dba Investor's Publishing Company.

9. Exhibit D-8: Sales Tax license in the name of International Land Corporation, dba Investor's Publishing Company. This was posted on the business premises of Investor's Publishing Company (T-39).

10. Deposition of Ann Garrett telling of her informing the Plaintiff of the corporate structure of the business prior to Plaintiff commencing printing.

11. Testimony of Defendants that they were officers of International Land Corporation dba Investor's Publishing Company, but that they personally did not do business as Investor's Publishing Company or agree to be personally liable for its debts (T-30-35).

The conclusion is inescapable that the true facts are that International Land Corporation was the owner of Investor's Publishing Company who published the magazine, The Utah Equestrian. Mr. Pettit and Mr. Sybrowsky were merely officers of said corporation, the secretary and the president, and that is their only connection. The record doesn't even indicate whether or not they had any ownership interest in the corporation. We would like to mention here two other Exhibits, No. D-13 and D-9 which were refused admission in evidence by the trial court, but not on any ground other than the fact that they were superfluous, that is, they indicated the same thing that had already been shown by other exhibits, namely, that the State Tax Commission was seeking the taxes relating to Investor's Publishing Company, not from Mr. Pettit and Mr. Sybrowsky individually, but from International Land Corporation, because they looked to International Land Corporation as the party liable for all debts relating to the publication of the magazine, The Utah Equestrian. The Defendants' point at the trial and on this appeal is simply that all of these indications of other people who looked to International Land Corporation, including governmental authorities, is conclusive evidence that International Land Corporation was in fact the publisher of the magazine and liable for its debts.

While it isn't clear in the findings, we are of the

opinion that the Plaintiff does not dispute the above, i.e., that Plaintiff does not dispute the facts represented by the exhibits shown above, to-wit: that International Land Corporation was established in 1972, set up Investor's Publishing Company to publish The Utah Equestrian, etc., and did so for approximately one year. As near as we can tell, the argument of the Plaintiff is that notwithstanding all this being the case, the Plaintiff was not aware of these facts or had any reason to become aware of them, and in fact were informed that Mr. Pettit and Mr. Sybrowsky were personally the owners and responsible for the magazine. Our argument is simply that such a position is untenable in the light of the amount of information discussed above that had come to Plaintiff's attention during the course of the dealings of the parties and prior to the issuance of the check which was sued upon in this case, and particularly in light of the admissions on cross-examination of Plaintiff's president, as discussed above. It is Defendants contention that reasonable minds could not possibly believe that the magazine was anybody's other than International Land Corporation's or that anyone other than the Corporation had paid any of its debts or had agreed to be liable for any of its debts, including the payment for printing services. It is true that while the initial checks in payment for the magazine were drawn on International Land Corporation's main account which clearly showed International Land Corporation on the check, the check in question, the last check in payment for the last magazine was drawn on a check which says on it Investor's Publishing Company and does not say International Land Corporation or even that Investor's Publishing Company had any corporate ownership or structure at all. However, to allow the Plaintiff to rely on the last check only, without



taking into consideration the entire course of conduct and dealings between the parties for over a year is clearly unfair to these Defendants, and such is against the law. The language of the Court's opinion in *Continental Bank and Trust Company v. Stewart*, supra, at 291 P.2d 892, is most appropriate for the present case; the Court states as follows:

While it is true that the testimony of a witness . . . would ordinarily be regarded as sufficient to compel the affirmance of the trial court's finding, that is not necessarily so under all circumstances. Defendant is correct in arguing that even though the testimony standing alone might be sufficient to support a finding, it must always be appraised in the light of all the attendant circumstances and countervailing testimony. If when so viewed, it appears so clearly and palpably unreasonable that no trier of fact acting fairly and reasonably could accept it, then it must be rejected as a matter of law, and the fact determined otherwise.

In summary, in support of the Plaintiff's case, there are but a few uncertain allegations and conclusions of one witness (the president of the Plaintiff corporation, one who has an obvious interest in the outcome), concerning that his corporation was dealing with Mr. Pettit and Mr. Sybrowsky personally, dba Investor's Publishing Company. These allegations did not stand up under cross-examination, showed many inconsistencies with exhibits which are not in dispute and other testimony from the same witness. The Plaintiff's case falls by its own incongruities, but in addition, we have the unequivocal statements of three witnesses, Mr. Pettit, Mr. Sybrowsky and a former employee of International Land Corporation, Ann Garrett, who was the editor of the magazine, which all tell in positive forthright terms that Plaintiff was dealing with International Land Corporation and knew it all the time.

Special reference is made here to the testimony of Ann

Garrett, the former employee and editor who is the only witness not a party to this action. She was employed only a short time (less than a year) four years ago and because of her unavailability for trial, it was stipulated by counsel at the deposition of Ann Garrett three days before the trial (Plaintiff's president was also present) that the testimony be part of the record as though given at the trial. Neither counsel had met her prior to the deposition. We point this out here to show that surely here is one witness with no interest or bias or even opportunity to be influenced, as one might expect in the case of testimony given in the trial itself. Her testimony is undisputed that she discussed International Land Corporation's ownership with Plaintiff's representatives at the time she negotiated for the printing. How can this be ignored by the trier of fact; the Plaintiff's witness himself admitted her testimony was the truth.

## POINT II

THE TRIAL COURT ERRED IN AWARDING ATTORNEY'S FEES TO THE PLAINTIFF, TO-WIT: (1) THE EVIDENCE IS INSUFFICIENT TO JUSTIFY SUCH AN AWARD, AND (2) IN ANY EVENT, THE PLEADINGS AND FINDINGS OF FACT ARE INSUFFICIENT TO SUPPORT SAID AWARD.

The stipulation in the record (T-31) reflects that if the Plaintiff were to establish its right to attorney's fees, \$500.00 would be the amount; but there was no evidence introduced, nor was there any proper pleading, finding or conclusion, to establish any right to attorney's fees. To support its claim for attorney's fees, the Plaintiff relies on Section 7-15-1, *Utah Code Annotated*, 1953, relating to awarding attorney's fees in insufficient funds check cases where the Defendant acts "willfully, with intent to defraud". However, fraud was neither pleaded, proved nor found by the trial court to be a fact.

Defendants respectfully submit that to award attorney's fees under said insufficient funds check statute, the conclusion is inescapable that "willfully, with intent to defraud", or words of similar effect, must be pleaded, proved and included in the Findings of Fact. It is true that said statute provides for prima facie evidence of such willfullness and intent to defraud when the Defendant has received notice (defined as notice given in person or in writing) of nonpayment of the check and fails to pay it within ten (10) days. Even if Plaintiff is relying on this prima facie evidence provision, it does not relieve it of the requirement of pleading fraud. No mention is made in the complaint of any willfullness or intent to defraud; and neither does it plead facts to bring it under the prima facie evidence portion, i.e., that notice (in person or in writing) of nonpayment was given to the Defendants. The complaint does state that Plaintiff relies on Chapter 15, Title 7, *Utah Code Annotated*, but that hardly meets the requirements of Rule 9(b) *U.R.C.P.*, which allows a general averment of intent to defraud, but requires that the "circumstances constituting fraud . . . shall be stated with particularity." Plaintiff's complaint does not even make a general averment of intent to defraud.

Even more important in this regard is the total lack of evidence on the question. Not one word was said about fraud, willfullness or words of like import in the entire transcript. Furthermore, there is no testimony upon which a finding could be based that Plaintiff gave notice (either in person or in writing) of nonpayment. The Plaintiff's witness did testify that he informed one of the Defendants, Mr. Pettit, by telephone, (not in person or in writing as required by statute). Even if that were to be construed as personal notice, there was no such telephone call to Mr. Sybrowsky, and so the statutory

requirements of prima facie evidence of fraud fall short at least as to Mr. Sybrowsky.

Without belaboring this point much further, it is sufficient to say that in the fourteen (14) paragraphs in the Findings of Fact, there is not one mention of any fraud, intent, willfullness or words of similar meaning. Nor is there a finding of notice of any type being given to either Defendant. Under the above-referred to statute, no judgment can be rendered for attorney's fees without such findings.

#### CONCLUSION

For the reasons stated above, Defendants respectfully request the Supreme Court of the State of Utah to reverse the judgment.

Respectfully submitted,

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