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

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

THE STERLING PRESS,

Plaintiff and Respondent,

vs.

C. L. PETTIT and JOHN SYBROWSKY,
dba INVESTORS PUBLISHING COMPANY,

Defendants and Appellants.

Case No. 15304

RESPONDENT'S BRIEF

Appeal from the Judgment of the Third District Court for Salt Lake
County, Honorable Marcellus K. Snow, Judge.

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT
OF THE STATE OF UTAH

THE STERLING PRESS,]	
Plaintiff and Respondent,]	
vs.]	Case No. 15304
C. L. PETTIT and JOHN SYBROWSKY,]	
dba INVESTORS PUBLISHING COMPANY,]	
Defendants and Appellants.]	

RESPONDENT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

The Plaintiff-Respondent, as payee of a check, seeks recovery from the makers of their unpaid check.

DISPOSITION IN LOWER COURT

The Trial Court granted Judgment to Plaintiff-Respondent against Defendants-Appellants for the amount of their unpaid check together with an attorney's fee.

RELIEF SOUGHT ON APPEAL

The Plaintiff-Respondent seeks to have the Judgment of the Trial Court affirmed.

STATEMENT OF FACTS

The Plaintiff-Respondent, The Sterling Press, ("Plaintiff" hereafter) operates a printing business and printed the magazine, "The Utah Equestrian", for the Defendants-Appellants, C. L. Pettit and John Sybrowsky ("Defendants" hereafter). The Defendants signed and delivered to Plaintiff their check dated January 5, 1974¹ as payment for printing two issues of the Defendant's magazine. The check on its face shows it to be drawn on the account of Investors Publishing Company and it is signed by both Defendants. The check does not refer to any corporation nor have the signers shown that they signed in any representative capacity.

At the time the printing services were rendered and at the time the check was given, the Defendants had not registered the trade names of "Investors Publishing Company" or "The Utah Equestrian".²

The Plaintiff deposited the check and the check was returned without payment because at the time the check was issued and at all subsequent times the Defendants did not have any funds in their bank account with which to pay the check and the bank refused payment.³ Plaintiff has not been paid for the printing services represented by the check.⁴

The check was issued on January 5, 1974.⁵ Plaintiff commenced this action on March 12, 1974.⁶ Plaintiff forwarded their

¹Exhibit P-2; Record pages 13, 16, 18.

²Record page 43.

³Transcript pages 16, 17; Exhibits P-1, P-16.

⁴Transcript page 16; Record pages 13, 16, 18.

⁵Exhibit P-2; Record pages 13, 16, 18.

⁶Record page 4.

Requests for Admissions to Defendants on April 29, 1974.⁷ On May 16, 1974 the Defendants filed their certificate with the Secretary of State's Office registering the trade name "Investors Publishing Company" and the trade name "The Utah Equestrian" was never registered.⁸

The magazine at Page 1 states that it was published by Investors Publishing Company, C. L. Pettit, President.⁹ International Land Corporation is not mentioned anywhere in the magazine. Two real estate ads appear in the magazine without mention of International Land Corporation. The real estate advertisements are only two pages out of the fifteen pages of advertising in the magazine.

The Plaintiff sent its invoices to the Utah Equestrian for the printing services rendered.¹⁰ The invoices were paid except for the last two for which the subject check were given.

The two checks that Defendants introduced as evidence of a corporate payment are dated December 21 and 27, 1972, over one year before the subject check, and were payment for the first issue.¹¹ Although the Defendants state in their Brief at page 3 that all of the services were paid for by checks drawn on International Land Corporation, the Defendants did not choose to introduce any additional checks as supporting evidence, nor is there any testimony of such fact in the transcript.

⁷Record page 13.

⁸Record page 43.

⁹Exhibit P-3.

¹⁰Exhibit P-1.

¹¹Exhibits D-5, D-6, Transcript page 22.

The Plaintiff's officer testified that he thought he was dealing with the individuals and their invoices and the check received, together with the magazine, support his contention that he was working with the individuals and not with a corporation.¹²

ARGUMENT OF RESPONDEIT

POINT I

THE DEFENDANTS ARE PERSONALLY LIABLE FOR BUSINESS OBLIGATIONS INCURRED IN A TRADE NAME

At all times that the Defendants were doing business with the Plaintiff, the Defendants had not registered their trade names of "Investors Publishing Company" or "The Utah Equestrian".

The Utah State Legislature has imposed the burden upon anyone transacting business under an assumed name to register the assumed name:

"Every person. . .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, partnership, corporation or otherwise shall file in the office of the Secretary of State a certificate setting forth the name of. . .such business and the full true. . .names of the. . .persons owning and the. . .persons carrying on, conducting or transacting such business, the location of the principal place of business and the post office address of such. . .persons. . ."¹³

The Statute further makes it a misdemeanor to conduct business without the proper registration.

¹²Transcript pages 8, 11-15, 18-20, 24.

¹³Sec. 42-2-5, U.C.A., 1953, as amended.

Courts have held that where persons fail to register a trade name, the persons are deemed to be conducting the business for and on behalf of themselves only and not for any other entity and the individuals are personally liable for the obligations incurred in the assumed name.¹⁴

The Legislature has also imposed personal liability upon persons who conduct business as a corporation without proper registration.

"All persons who assume to act as a corporation without authority so to do shall be jointly and severally liable for all debts and liabilities incurred or arising as a result thereof."¹⁵

This Court in a recent case¹⁶ upheld the above statute and found personal liability against individuals who were transacting business as a corporation without proper statutory qualification of the corporation. In this case the Defendants, at the time they did business with the Plaintiff, had not properly qualified their assumed name either as a corporation itself or as an assumed name of a duly qualified corporation.

Only after Plaintiff commenced this action did the Defendants register one of their trade names, Investors Publishing Company.¹⁷ This belated filing was over a year after the Plaintiff commenced business dealings with the Plaintiff; was more than four months after the subject check was issued; was more than two months after this action was

¹⁴Oakason vs. Lisbon Valley Uranium Co., 154 F.Supp. 692;
Putnam vs. Industrial Comm. 80 U. 187, 14 P.2d 973.

¹⁵Sec. 16-10-139, U.C.A., 1953, as amended.

¹⁶Gillham Advertising Agency, Inc. vs. Ipson, 567 P.2d 163.

¹⁷Record page 43.

commenced; and, was more than two weeks after Plaintiff had submitted their Request for Admissions to the Defendant regarding the subject of the registration of the trade name.

The Plaintiff's officer thought that he was dealing with individuals¹⁸ and this was corroborated by the way the Plaintiff billed for the services on its invoices.¹⁹ The testimony in the deposition of Defendant's witness, Ann Garrett, was only based on her supposition and not from any clear recollection of the conversation regarding representative capacity. She was not involved with the management of the Defendants Company, nor was she an investor and had no responsibility for payment of their accounts.²⁰ Plaintiff's officer's recollections were of the specific discussions with Defendants of payment for Plaintiff's services.

The Plaintiff was further justified in thinking that it was doing business with individuals because all during the time that the parties had their business transaction the Secretary of State's Office had no registration of a trade name or a qualified corporation of the names used by Defendants. The documents introduced by the Defendant as exhibits to prove they were acting on behalf of a corporation were totally irrelevant. The bank account records are records owned by the bank and the Plaintiff would have no access to those records.

¹⁸Transcript pages 8, 11-15, 18-20, 24.

¹⁹Exhibit P-1.

²⁰Deposition page 13, 18.

The Plaintiff had no access to the corporate records of the International Land Corporation and was not even aware of that corporation. The magazine itself only refers to the trade name and not to a corporation. The tax commission registration and warrants, bulk mail permits and business licenses are totally beyond the scope of reasonable inquiry by the Plaintiff and most of which were obtained long after the initial business contract between Plaintiff and Defendant.

It would be an unreasonable, indeed impossible, burden upon the Plaintiff to make the thorough daily search that Defendant argues is required to be made to determine whether or not customers are either a duly qualified corporation or a duly registered trade name. Even if this is the burden upon the Plaintiff, the investigation would not have been fruitful because the various filings of the Defendants were made over an extended term rather than on one particular day and were made after Plaintiff started the printing jobs for Defendants.

It is not incumbent upon persons doing business with another to make daily checks of numerous sources just to determine whether or not they are in fact a corporation or a trade name. The Legislature established the burden of proper registration upon persons, such as the Defendants, who seek to hide behind the legislative effect of doing business as a corporation. Failure to properly register creates personal liability to the Defendants.

The business transaction involved in this case was routine and was not a large transaction for either party. Requiring the Plain-

tiff to check with the Secretary of State or other parties every day is an unreasonable burden upon commerce. The Legislature adopted a simple solution: Register a trade name with the Secretary of State.

The Trial Judge has complete discretion in determining which party is to be believed on disputed evidence and in this action there is substantial evidence and exhibits in the record to support Plaintiffs contentions and testimony that it was dealing with individuals and not with a corporation. The Trial Judge acted reasonably in determining that as far as the outside world was concerned, the Defendants were conducting the business of printing The Utah Equestrian as individuals and that the Plaintiff thought it was dealing with individuals in rendering its printing services and that the Defendants, therefore, are personally liable for the indebtedness to Plaintiff.

POINT II

DEFENDANT MAKERS OF A CHECK WHO DID NOT INDICATE REPRESENTATIVE CAPACITY ARE PERSONALLY LIABLE FOR PAYMENT OF THE CHECK

The subject check written by the Defendants and delivered to Plaintiff shows that it is drawn on the account of "Investors Publishing Company" and that it is signed by each Defendant.²¹ The check does not indicate anywhere on the instrument that the payer is a trade name or otherwise connected with any other entity. Likewise,

²¹Exhibit P-2; Record pages 13, 15, 16, 18.

there is no indication at the signature line of any representative capacity of the signers, the Defendants. The check was issued in payment of two invoices submitted by Plaintiff to Defendants. When the check was presented for payment on two occasions to the drawee bank payment was refused and Defendants did not have money in the bank account with which to pay the check.²²

The contract of the makers of a check is that they agree to pay it upon completion of the check, signing it and delivering it to the payee.²³ Furthermore, the maker of a check implies that he is not only liable for payment of the check but that the check will be paid upon presentment to the drawee bank.²⁴

The Uniform Commercial Code imposes a duty upon the Defendants to indicate their representative capacity. By failing to indicate the representative capacity on the subject check the Defendants become individually liable. The Code provides at Section 3-403:²⁵

"(2) An authorized representative who signs his own name to an instrument:

(a) is personally obligated if the instrument neither names the person represented nor shows that the representative signed in a representative capacity;

(b) except as otherwise established between the immediate parties, is personally obligated if the instrument names the person represented but does not show that the representative signed any representative capacity. . ."

²²Record pages 13, 16, 18; Exhibits P-16, P-2.

²³Sec. 70A-3-413, U.C.A., 1953, as amended.

²⁴Pollin vs. Hindy Mfg. Co., 211 Pa. Super. 87, 236 A.2d 542 (1967); Riley vs. First State Bank, 469 S.W.2d 812 (Texas 1971).

²⁵Sec. 70A-3-403, U.C.A., 1953, as amended.

The only indication of representative capacity on the check is the name "Investors Publishing Company". However, the Defendants had not registered any such entity name so that the Plaintiffs could not have known that the Defendants were acting in a representative capacity. As previously discussed under Point I of this Brief, there is substantial competent evidence to support the Trial Court's determination that the Plaintiffs believed they were conducting business with individuals and that the Plaintiff did not know that the Defendants were acting in a representative capacity.

Because the Defendants did not indicate on their check that they were signing as a representative, the Plaintiffs acted reasonably in relying on the check and in believing they were conducting business with individuals.

The Defendants could easily have indicated any representative capacity on the check by merely writing their title or agency relationship. The failure of the Defendants to state their representative capacity on the check or otherwise establish that they were an agent of another entity for the effect of making the check their personal check and, therefore, they are liable personally for its payment.²⁶

POINT III

DEFENDANTS ARE LIABLE FOR ATTORNEY'S FEES

Defendants issued their check to Plaintiff in payment of the printing services. The printing services would not have been

²⁶0. P. Ganjo, Inc. vs. Tri-Urban Realty Co., 108 N.J. Super. 517, 261 A.2d. 722 (1969); Industrial Finance Co. vs. Lovell, 9 Wash. App. 829, 515 P.2d. 1304 (1973). See similar holdings of cases cited in footnote 24.

rendered without the delivery of the check.²⁷ The check was not paid by the bank because of lack of funds in the account on which it was drawn and the check was returned to the Plaintiffs.²⁸ The Plaintiff contacted the Defendants by telephone and by personal visit after the check was returned and the Defendants told the Plaintiff that the check would be paid upon further presentment and to redeposit the check.²⁹ The Plaintiff redeposited the check and it was returned unpaid a second time by the drawee bank.³⁰ Neither the check nor the account for the printing services has been paid.

The Plaintiff has met the burdens of proof set forth in Chapter 15 of Title 7 U.C.A., 1953, as amended, and the Court found, under the statute, that the Defendants issued the checks to the Plaintiff for the value of the printing services so that Plaintiff would render the printing services and that the check was drawn on an account in which there were not sufficient funds to pay the check. The Plaintiff gave notice to the Defendant that the initial deposit had not been paid and thereafter, the Defendants made no attempt to either have the check paid or made any additional deposits to the account with which to pay the check.

The statute provides the basis for the Court to find that the check was issued and delivered wilfully with the intent to defraud the

²⁷Transcript pages 12, 13, 15.

²⁸Transcript page 16.

²⁹Transcript pages 16, 17.

³⁰Transcript page 17; Exhibit P-2.

Plaintiff. There is ample evidence in the record from which the Court found that Plaintiff is entitled under the statute to an award of an attorney's fee.

CONCLUSION

The Defendants' business dealings with the Plaintiff were personal and the obligations incurred in the transactions are personal liabilities of the Defendants. The Defendants failed to properly register the assumed name under which they claim they were doing business and they failed to indicate any representative capacity to Plaintiff in its business dealings or on the check issued. The check was issued against an account in which there were not sufficient funds to pay the check. The Defendants are personally liable, as the Trial Court found, for the amount of the check together with interest, a reasonable attorney's fee and the costs incurred. The Trial Court judgment should be affirmed.

Respectfully submitted,

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