1977

Producers Livestock Loan Company, A Utah Corporation v. John Clair Miller and Producers Livestock Loan Company, A Utah Corporation v. Peter S. Levatich : Brief of Appellant

Utah Supreme Court

Armstrong, Rawlings, West & Schaerrer; Attorneys for AppellantRicardo B. Ferrari; Attorney for Respondents

IN THE SUPREME COURT

OF THE

STATE OF UTAH

PRODUCERS LIVESTOCK LOAN COMPANY, a Utah Corporation, Plaintiff and Appellant, Vs. JOHN CLAIR MILLER, Defendant and Respondent.	Case No. 15324
PRODUCERS LIVESTOCK LOAN COMPANY, a Utah Corporation, Plaintiff and Appellant, Vs. PETER S. LEVATICH, Defendant and Respondent.	Case No. 15325

BRIEF OF APPELLANT

An Appeal from a Judgment of the District Court of the Third Judicial District, The Honorable Dean E. Conder, District Judge.

ARMSTRONG, RAWLINGS,
WEST & SCHAERRER
David E. West
1300 Walker Bank Building
Salt Lake City, Utah 84111

Attorneys for Appellant

RICARDO B. FERRARI
141 East First South
Salt Lake City, Utah 84111

Attorney for Respondents

TABLE OF CONTENTS

	Page
STATEMENT OF KIND OF CASE	1
DISPOSITION IN THE TRIAL COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	
POINT I THE TRIAL COURT ERRONEOUSLY CONCLUDED THAT THE COURT LACKED JURISDICTION OVER THE DEFENDANTS	6
CONCLUSION	11

AUTHORITIES CITED

International Shoe Co. Vs. Washington, 362 U.S. 310.	7
Johnson Vs. Hardman, 6 Utah 2d 431, 315 P.2d 854	10
Packaging Corp. of America Vs. Morris, (March, 1977) 561 P.2d 680.	7
SEC Vs. Howey Co., 328 U.S. 293.	10
3 Am Jur. 29 Agency, Section 359	10
Restatement of Agency 2d, Section 15	8
Restatement of Agency 2d, Section 26	8

STATUTES CITED

Utah Code Annotated, Section 78-27-22	6
Utah Code Annotated, Section 78-27-23	6
Utah Code Annotated, Section 78-27-24	6

IN THE SUPREME COURT

OF THE

STATE OF UTAH

PRODUCERS LIVESTOCK LOAN COMPANY, a Utah Corporation, Plaintiff and Appellant, Vs. JOHN CLAIR MILLER, Defendant and Respondent.	Case No. 15324
PRODUCERS LIVESTOCK LOAN COMPANY, A Utah Corporation, Plaintiff and Appellant, Vs. PETER S. LEVATICH, Defendant and Respondent.	Case No. 15325

APPELLANT'S BRIEF ON APPEAL

STATEMENT OF KIND OF CASE

These are companion cases filed by plaintiff, Producers Livestock Loan Company, against the respective defendants to collect the balances claimed due on promissory notes.

DISPOSITION IN THE TRIAL COURT

The actions were dismissed upon motions of the defendants,

the court holding that it lacked personal jurisdiction over the defendants.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Judgment of Dismissal and further seeks reinstatement of its action in the District Court.

STATEMENT OF FACTS

Plaintiff in these actions is a Utah Corporation with offices in Salt Lake City, Utah, and is engaged in the business of agricultural lending. Defendants are residents of the State of New York.

Plaintiff filed separate actions against each of the two defendants in the District Court of Salt Lake County alleging that they owed to plaintiff balances due on promissory notes (R-2-M, R-2-L).[1] Defendants were served in the State of New York and plaintiff claimed jurisdiction under the long arm statute by reason of the following allegations in plaintiff's complaint:

> "5. That plaintiff's only place of business is in Salt Lake City, Utah; that the defendant made application for his loan at Salt Lake City, Utah; that the terms of the note provide for payment at Salt Lake City, Utah; that the purpose of the loan was for the financing of livestock and

1. References to the Miller record will be followed with the letter "M" and references to the Levatich record will be followed by letter "L"

> feed; and that defendant's livestock manager conducted all of its business activities on behalf of defendant in Salt Lake City, Utah; and that the activities of defendant within the State of Utah, both personally and by his managing agent, constitute the transaction of business within this State to safisfy the Utah Long Arm Statutes. " (R-2-M, R-2-L).

Defendants filed motions to dismiss challenging the jurisdiction of the court (R-15-M, R-4-L). The motions contained affidavits from the defendants alleging in effect that all of their dealings with plaintiff were in the State of New York and that they understood when they signed the promissory notes that they were simply becoming passive investors in cattle herds in Arizona and California. Thereafter defendants took the depositions of George M. Smith (plaintiff's general manager) and George L. Smith (a former employee of plaintiff, engaged in the business of cattle management), and plaintiff filed affidavits in opposition to the motions to dismiss.

The facts upon which plaintiff primarily relies to establish long arm jurisdiction, and which for the purpose of defendant's motion and this appeal must be considered as true, are set forth in the affidavit of George L. Smith filed in opposition to the motion to dismiss (R-66-M, R-42-L). In that affidavit George L. Smith states as follows:

"1. That for several years he has been engaged in the business of managing cattle and livestock as an agent for others.

2. That in the late fall of 1972, he was contacted by a Mr. Walter Ulicny, who represented himself to be an investment advisor for Peter S. Levatich and John Clair Miller.

3. That Mr. Ulicny asked affiant if he would be willing to manage a livestock operation for his clients Levatich and Miller; that affiant agreed to manage the cattle through a corporation to be known as GLS Livestock Management, Inc. which affiant intended to form, and did in fact form in the year 1973.

4. That thereafter, Levatich and Miller applied for financing with Producers Livestock Loan Company in Salt Lake City, Utah and affiant learned a loan and a line of credit had been approved.

5. That thereafter, affiant and GLS Livestock Management, Inc. undertook to manage the livestock operations of Levatich and Miller and from November 30, 1972 through approximately June 10, 1974 made purchases of cattle and feed, placed the cattle in feed lots, assumed responsibility for the care of the cattle and made periodic inspections from time to time and made sales of cattle, all on behalf of Levatich and Miller.

6. That in addition, affiant and GLS Livestock Management, Inc. sent a written report directly to Levatich and Miller each month fully advising them as to all purchases, all sales, and the current value of their respective livestock.

7. That during the period of time in which affiant managed livestock for Levatich and Miller, affiant's office and the office of GLS Livestock Management, Inc. was located in Salt Lake City, Utah,

and that neither myself nor GLS Livestock Management, Inc. had offices in any other place.

8. That many purchases and sales of livestock were consummated by telephone from Salt Lake City, Utah.

9. That all monthly reports to Levatich and Miller were prepared in Salt Lake City, Utah, and sent to them on letterhead bearing a Salt Lake City address.

10. That I executed drafts against Miller and Levatich's lines of credit at Producers Livestock Loan Company, all of said drafts having been executed in Salt Lake City, Utah.

11. That I kept Miller and Levatich fully informed on a month to month basis as to the status of their loan and the amount of draws against their line of credit.

12. That up to the date of this affidavit, neither Levatich nor Miller, although receiving reports from me on a monthly basis, had never questioned my authority to purchase cattle on their behalf, to purchase feed on their behalf, to care for their cattle, to execute drafts against their line of credit, or to sell cattle on their behalf, and in general manage their livestock operations."

After the motion to dismiss was argued and submitted, the court in its memorandum decision concluded that the Utah Courts would have jurisdiction over the defendants if George L. Smith was their agent; then the court surprisingly concluded as a matter of law that he was not an agent of the defendants (R-96-M, R-47-M).[2] The trial court thereupon

2. The court noted in its memorandum decision that both parties relied solely on the deposition of George L. Smith as the sole matter of evidence; this statement is incorrect in that plaintiff relied upon the complete record and particularly the affidavit of George L. Smith which was argued from at the time the motion was heard.

dismissed plaintiff's actions. The sole issue on appeal relates to the question of jurisdiction.

ARGUMENT

POINT I

THE TRIAL COURT ERRONEOUSLY CONCLUDED THAT THE COURT LACKED JURISDICTION OVER THE DEFENDANTS.

Section 78-27-24, Utah Code Annotated provides that the courts of this state shall have jurisdiction as to any claim arising from:

> "(1) The transaction of any business within this state."

Section 78-27-23, Utah Code Annotated defines "transaction of business within this state" to mean "activities of a non-resident person, his agents, or representatives in this state which affect persons or businesses within the State of Utah". The policy of the legislature is further made clear in Section 78-27-22, Utah Code Annotated which mandates that jurisdiction over non-residents is to extend to the fullest extent permitted by the due process clause of the United States Constitution. The Constitution would allow jurisdiction if a defendant has sufficient minimum contacts with the forum state that traditional notions of fair play and substantial justice are not offended by the forum's

exercise of jurisdiction over the case. International Shoe Company Vs. Washington, 326 U.S. 310.

Many Utah cases have interpreted our long arm statute, but the most recent and most significant case relied upon by the plaintiff is Packaging Corporation of America Vs. Morris, (March, 1977) 561 P.2d 680. In Morris, a Nevada resident signed a document in which he agreed to guarantee to plaintiff the debt of a cookie business in Utah in which he had a financial interest as a stockholder. The cookie business failed and defendant was sued in Utah to make good on his guarantee. Defendant claimed he was not a resident here, that his contacts with the State of Utah were minimal, and that he could only be sued in the State of Nevada. The court held that the defendant was subject to suit in Utah and based jurisdiction primarily upon the presence of an agent. In its opinion the court stated as follows:

> ". . . the evidence does not disclose that defendant had a telephone listing or did advertising in his name and, of course, the offices and plants of Hawkeye were not in defendant's name. But, defendant's agent was in Utah and performed continuous duties in Utah in overseeing the business of Hawkeye and hence defendant's interests therein for most of 1971 and into 1972. The agent's duties and contacts were not sporadic and transitory. Certainly Hawkeye had local offices and property in Utah and activities of the defendant's agent at those offices constituted a substantial business presence in this state."

The instant case is essentially the same as above. Defendants had an agent in the State of Utah to manage their cattle business. The agent's contacts with Utah were not sporadic, but were continuous. Utah was the only place where the agent had an office, and was the place from where the agent's business was transacted. The activities of the agent at its office in Salt Lake City, Utah constituted a substantial business presence in the State of Utah.

The trial judge commented in his memorandum decision that just because George L. Smith referred to himself as defendant's agent did not make him so. Appellant most certainly agrees that the conclusion of any party as to his legal relationship is not very relevant. By the same token, the characterization by defendants that Smith was not their agent is likewise not very significant. The thing that is important is what the parties actually did. Agency is created when there is a manifestation in some way (including acquiescence by the principal in a series of acts) that the agent may act on the others account (Restatement of Agency 2d, §15). No written contract is required and the relationship is established by any conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him to so act on the principal's account. (Restatement of Agency 2d, §26).

The evidence in the case before the court shows that for a period of some one and one-half (1 1/2) years George L. Smith managed the livestock operations of the defendants; he made purchases on their behalf, placed cattle in feed lots, made inspections, assumed responsibility for care, and made sales from time to time. He sent the defendants monthly reports during the one and one-half (1 1/2) year period advising them as to the sales, purchases and values of their livestock. He executed drafts against plaintiff's line of credit in order to make purchases. During the entire one and one-half (1 1/2) years in which monthly reports were given, the authority of George L. Smith to manage defendants' livestock operations was never questioned or challenged by either of them. In light of these facts, it is difficult to see how the trial judge could have concluded without any evidenciary hearing that George L. Smith was not an agent of the defendants.

Defendants made the argument to the trial court that because, Smith, the manager, made decisions as to what cattle to buy, where to place them, when to sell, etc., that somehow they gave up their control, which changed the relationship from one of agency to that of buyer and seller of an investment contract. Smith did testify

that he did in fact make these decisions for the defendants (George L. Smith Deposition, Page 22). However, there is nothing whatsoever in the record before the court to even remotely suggest that defendants ever contracted or gave up the right to control their agent. In any event, the term "investment contract" is generally used in connection with Federal and State securities statutes to denote types of transactions requiring registration. Any common enterprise entered into with a profit motive wherein the investor relies upon a third person to manage the venture or otherwise make it profitable is an "investment contract". See SEC vs. Howey Company, 328 U.S. 293. Many types of investment contracts involve agency agreements, and the terms are not by any means mutually exclusive. Plaintiff is unaware of any authority holding the concept of investment contract to have any application to establishing the jurisdiction of the court.

It is further generally held that where conflicting inferences may be drawn from the evidence, the question of agency is one of fact for the jury or the trier of fact. 3 Am Jur 2d Agency, §359; see also Johnson vs. Hardman, 6 Utah 2d 421, 315 P.2d 854. In light of the plaintiff's allegations, as have been set forth in this brief, the

the trial court erroneously concluded that reasonable minds could not find an agency relationship between George L. Smith and the defendants such as would establish long arm jurisdiction over them.

CONCLUSION

Based upon the arguments and authorities as cited herein, appellant respectfully requests the court to reverse the judgment of the trial court.

Respectfully submitted,

ARMSTRONG, RAWLINGS,
WEST & SCHAERRER

David E. West
1300 Walker Bank Building
Salt Lake City, Utah 84111

Attorneys for Plaintiff/Appellant