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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 Respondents

Utah Supreme Court

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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 RESPONDENTS

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

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Defendant and Respondent.)

RESPONDENTS' BRIEF ON APPEAL

STATEMENT OF THE CASE

1. The Pleadings and Judgment

These are companion actions by Producers Livestock Loan Company (hereinafter "Producers"), a Utah corporation, to recover asserted indebtedness of defendant-respondants,

both of whom are residents of New York State. The operative allegations of the two Complaints practically are identical, differing only in the amounts of alleged indebtedness plaintiff seeks to recover from each defendant. R. 2-3. M., 3. L. As is stated in appellant's Brief, plaintiff has asserted personal jurisdiction over defendants pursuant to the terms of the Utah Long-Arm Statute (UTAH CODE ANN. §78-27-24, et seq. (1977 Repl. Vol.)) and process was served upon them in New York State. Br. 2.

Plaintiff's claim of personal jurisdiction was based upon allegations that

... defendant[s] made application for [their] loan[s] at Salt Lake City, Utah; that the terms of the note[s] provide for payment at Salt Lake City, Utah; that the purpose of the loan[s] was for the financing of livestock and feed; and that defendant[s'] livestock manager conducted all of its business activities on behalf of defendant[s] in Salt Lake City, Utah; and that the activities of defendant[s] within the State of Utah, both personally and by [their] managing agent, constitute the transaction of business within this State to satisfy the Utah Long Arm Statutes. [Sic]

R. 3. M., 3. L.

The Complaints were filed on October 10, 1976 (R. 1. M., 2. L.) and service was made some time later. On April 1, 1977, defendants, appearing specially, moved, pursuant to the terms of Rule 12(b)(2), (4), (5), Utah Rules of Civil Procedure, that the action be dismissed for lack of personal jurisdiction and, further and alternatively, for insufficiency of

process and/or of service of process. R. 15-16. M., 4-5. L. Substantial discovery was taken on those motions and supporting and opposing papers were filed with the court. The motions came on for hearing on June 27, 1977, when counsel, after being heard at length, submitted the matter.¹ On June 30, the trial court, "having heard the statements of counsel, reviewed the pleadings, affidavits, moving and opposing papers of the parties on file herein, and the deposition of George L. Smith taken on May 31, 1977 (which was received and published by stipulation of the parties)", dismissed the action for lack of personal jurisdiction over defendants. R. 49-50. M., 98-99. L.²

¹Appellant's claim that the trial judge decided the matter "without any evidentiary [sic] hearing" (Br. 9) simply is untrue. The court received affidavits, deposition testimony and exhibits--all the evidence which either side chose to present. R. 49. M., 98. L. The opposing parties' evidence turned out to be free of significant contradiction, although their inferences from that evidence were diametrically opposed.

²Appellant's statement that the trial court "noted ... that both parties relied solely on the deposition of George L. Smith as the sole matter of evidence" (Br. 5 n.2) is misleading and inconsistent with the Judgments and Orders of Dismissal which plaintiff's own counsel approved as to form. It is plain from the Judgments, and was plain from the trial judge's inquiries to counsel during oral argument, that the court based its decision upon the entire record. (Although two depositions were taken during discovery, neither party moved for publication of George M. Smith's deposition, although either could have done so.) The court's remark in its Memorandum Decision that "[George L.] Smith's deposition was received and published and both counsel rely upon this as the sole matter of evidence" (R. 47. M. 96. L.) obviously referred to counsel's election to publish only one of the two depositions. Judge Conder's inquiry into the parties' positions was thorough and painstaking; it would be irresponsible to suggest the contrary.

2. The Evidence

In proceedings before the trial court, defendants placed in evidence, by affidavit or deposition, a number of factual statements which were not controverted by any evidence offered by plaintiff. That evidence eliminated the completely unverified allegations (R. 3. M., 3. L.) that defendants had applied for loans in Salt Lake City, that the notes provided payment in Salt Lake City and that defendants had transacted business in person in Utah.

a. Neither defendant ever had transacted business in person in Utah. R. 6. M., 8. L.

b. Defendants were solicited to execute the promissory notes (which represented defendants' alleged indebtedness to plaintiff-appellant) in New York State and made application for those notes in New York State. R. 6. M., 8. L.

c. The notes did not specify a place of payment and, in fact, were discounted to the Federal Intermediate Credit Bank of Berkeley, California. Had the notes become payable, they would have been payable to the California bank. R. 72, 82-83, 85, 90. L.

d. The proceeds from the notes were applied to partial maintenance of a livestock feeding pool.

located in Yuma, Arizona and Riverside, California. R. 9, 73. M., 6. L.; George L. Smith Deposition, p. 11, lines 7-10.

Plaintiff-appellant's contention of jurisdiction, both at the hearing below and on appeal, was that one George L. Smith--or a company known as GLS Livestock Company, Inc., which apparently was his alter ego (Smith Dep., p. 3, lines 16-25, p. 5, lines 1-18, p. 34, lines 22-25, p. 35, lines 1-2)--had transacted business in Utah as defendants' agent, thus subjecting them to Utah jurisdiction. R. 36. M., 36. L. Plaintiff-appellant's contention before the trial court was identical to its contention on appeal: that "an agency relationship [existed] between George L. Smith and the defendants such as would establish long arm jurisdiction over them." Br. 11.

The record does not reveal significant dispute concerning the details of George L. Smith's relationship with defendants:

a. George L. Smith (hereinafter "Smith"), the son of George M. Smith, Producers' president (R. 38. M., 38. L.; Smith Dep., p. 39, lines 7-9), was an entrepreneur engaged in the business of managing herds or "pools" of cattle in which he sold interests to investors. Smith Dep., p. 5, line 25, p. 6, lines 1-25, p. 15, lines 12-16.

b. Defendants were two of a number of investors who invested in one of Smith's herds known as the "Norwood Cattle Feeding Pool". Smith Dep., p. 25, lines 21-25, p. 26, lines 1-12.

c. Smith purchased the livestock for the Norwood Pool in Texas, Louisiana, Mississippi and Arizona. He raised, and later sold, the cattle in Arizona and California. Smith Dep., p. 11, lines 3-13.

d. Smith managed his herds during periodic visits to the stockyards in Arizona and California in which they were kept. Smith Dep., p. 18, lines 16-25, p. 19, lines 1-25, p. 20, lines 1-25, p. 21, lines 1-7.⁴

e. Smith promoted Producers as a lender to defendants and to other investors. Smith Dep., p. 12, lines 19-25, p. 13, lines 1-4.

⁴Appellant has reproduced in its entirety an affidavit of George L. Smith which was prepared after his deposition filed in opposition to defendants' Motion to Dismiss. By certain paragraphs of that affidavit refer generally to Smith's several years of managing livestock for investors while refer specifically to his dealings with defendants Miller and Levatch. The affidavit states that Smith consummated "each purchase and sales of livestock ... by telephone from Salt Lake City", but avoids stating that any of those sales were cattle in the Norwood Pool.

f. Smith at no time had a written agreement with either defendant. Smith Dep., p. 12, lines 6-9.

g. Smith at no time acted under defendants' supervision. He was advised of their investment objective and pursued that objective as he saw fit. He testified as follows:

Q What active role, if any, did your clients take in your cattle management business?

A Through 1974 mostly deciding that they either wanted to get in or they wanted to get out. That probably should be expanded to say through 1975.

Q Was that the extent of their participation?

A They borrowed the money, provided the funds, received the tax benefits, if any, and generally just as I stated if they wanted in or they wanted out.

Q Would the statement you have just made about your clients' participation have been an accurate description of Mr. Miller's and Mr. Levatich's participation?

A I think it's accurate. They directed me to--that they needed "X" tax loss and I proceeded to generate it.

Smith Dep., p. 21, lines 19-25, p. 25, lines 1-7. Neither defendant ever instructed Smith concerning any aspect of the pool's management. Smith Dep., p. 23, lines 8-18.

ARGUMENT

THE TRIAL COURT PROPERLY DISMISSED THE INSTANT ACTION FOR LACK OF JURISDICTION.

1. Plaintiff has failed to discharge its burden of proof that defendants transacted business within the State, either in person or through an agent.

Plaintiff has predicated its claim of personal jurisdiction upon UTAH CODE ANN. §78-27-24(1) (1977 Supp.), which provides:

Any person ... who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising from:

- (1) The transaction of any business within this state;

....

Plaintiff's claim of jurisdiction over defendants based upon the allegation that George L. Smith transacted substantial business in Utah as defendants' agent. It is the law of this jurisdiction that a plaintiff asserting personal jurisdiction over a defendant bears the burden of proving the factual basis of that claim. Union Ski Co. v. Union Plastics Corp., 548 P.2d 1257, 1259 (Utah 1976). CF., McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936); O'Hare

International Bank v. Hampton, 437 F.2d 1173, 1176 (7th Cir. 1971). Similarly, a party alleging an agency between other persons bears the burden of proving the facts necessary to establish that relationship. Wilkerson v. Stevens, 16 Utah 2d 424, 426, 403 P.2d 31 (Utah 1965).

In the instant case, plaintiff has failed to establish that George L. Smith, defendants' alleged agent, performed a single act on their behalf in the State of Utah. Indeed, under extensive questioning, Mr. Smith testified that he had purchased livestock for defendants' accounts in Texas, Louisiana, Mississippi and Arizona and maintained and sold that livestock in Arizona and California and that he managed that herd during periodic visits to stockyards in Arizona and California; he testified to no acts in Utah. Smith Dep., p. 11, lines 3-13, p. 18, lines 16-25, p. 25, lines 1-25, p. 20, lines 1-25, p. 21, lines 1-7. Plaintiff has attempted to circumvent that testimony--which its counsel chose not to cross-examine--by offering an affidavit by Mr. Smith which carefully refrains from specifying that he had undertaken any transactions on defendants' behalf while in Utah. Note 4, supra. Plaintiff has failed to prove a single transaction in Utah by Smith as defendants' agent. In order to establish jurisdiction, plaintiff--in addition to proving agency--must prove substantial activity in Utah. This Court

... has consistently held that the transaction of business within the meaning of our [Long-Arm]

statute requires that defendant has engaged in some substantial activity with some degree of continuity within this State.

Union Ski Co. v. Union Plastics Corp., supra at 1259. Acco
Cate Rental Co. v. Whalen & Co., 549 P.2d 707, 708 (Utah

Plaintiff further has failed to demonstrate facts which George Smith could have been found to have been defendants' agent in any event. Smith has testified that defendant "directed me to--that they needed "X" tax loss and I proceeded to generate it." Smith Dep., p. 22, lines 6-7. Defendants exercised no control over how Smith managed the Arizona-California cattle pool and nothing in the record suggests that they were entitled or able (at three thousand miles' distance) to do so. One person or concern becomes an agent for another and subject to another only through a "consent" that he "shall act on behalf of [the other's] behalf and subject to his control... ." RESTATEMENT (SECOND) OF AGENCY (1957), §1. This was not the nature of Smith's relationship with defendants; although he periodically reported the pool's operations to his clients, the clients' role in the business consisted of "deciding that they either wanted to get in or ... get out." Smith Dep., p. 21, lines 21-22.

This Court held in Thiokol Chem. Corp. v. Peterson, 15 Utah 2d 355, 358-359, 393 P.2d 391 (1964):

The line of demarcation between one who operates as an independent contractor as opposed

to one who is the servant or agent of another is sometimes a bit blurred. This court has on a number of occasions confronted this problem and set forth various criteria to be considered in making the proper classification. The most fundamental one relates to the extent of control by the one who hires over the one who performs the service. If the employer's will is represented only by a desired result, the indication is of an independent contractor; whereas, if the employer exercises control over the means of accomplishing the result, this points toward an agent or servant relationship.

The question before the Court was whether properties used by Thiokol in missile research and development were immune from state taxation by reason of a purported agency relationship with the Federal Government. The Court held that Thiokol could not be deemed as agent of the Federal Government in its research and development operation, even though it performed that task pursuant to a written contract, because the contract's "import ... is to require of Thiokol to produce the end results, and it does not specify in detail how the research and development shall be conducted." Id., 15 Utah 2d at 359. Certainly, the "import" of defendants' relationship with Smith was to produce end results, not to specify how the livestock investment was to be managed.

Plaintiff has urged that "there is nothing whatsoever in the record before the Court even to remotely suggest that defendants ever contracted or gave up the right to control their agent." Br. 10. However, there is nothing in the record

to suggest that defendants ever had a right to control in the first instance. Plaintiff has offered no authority for the proposition that a person standing in Smith's relationship to defendants could be deemed their agent. Plaintiff's assertion that "[a]gency is created when there is a manifestation in some way ... that the agent may act upon the other [sic] account" (Br. 8) is unsound. In Thiokol, for example, there was no question that the alleged agent was authorized to act upon the Government's account. However, because Thiokol's responsibility to the Government was limited to achieving a desired result, rather than performing under the Government's control, it was found to be an independent contractor, rather than an agent.

Extraterritorial jurisdiction never has been based on a relationship as remote as that of Smith and the defendant. Indeed, in White v. Arthur Murray Co., 549 P.2d 439, 440 (Utah 1976), this Court found that not even a franchisee, whose operations were subject to some substantial review by its franchisor, was that franchisor's agent for purposes of the Uniform Franchise Offering Circular Statute. The sole authority which plaintiff cites in support of its agency claim, Packaging Corp. of America v. Utah, 561 P.2d 680 (Utah 1977) (cited at Br. 7), has no application to this case. In Packaging Corporation, plaintiff demonstrated that defendant's control of his Utah agent was sufficient

subject him to the State's jurisdiction. In this case, no such control has been demonstrated.

2. This Court should accord substantial weight to the trial court's findings.

It is this Court's wise and long-standing practice to accord substantial deference to trial courts in determining whether a defendant's alleged presence in Utah was sufficient to justify long-arm jurisdiction. Union Ski Co. v. Union Plastics Corp., supra at 1259. The trial court diligently reviewed the evidence and has reached a decision which more than adequately was supported by the record before it. That decision should be affirmed.

CONCLUSION

For the reasons set forth above, defendant-respondents respectfully urge that the Judgments and Orders of the trial court be affirmed.

DATED this 31st day of October, 1977.

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ADDENDUM

UTAH CODE ANN. §78-27-24

Jurisdiction over nonresidents - Acts submitting person to jurisdiction. - Any person, notwithstanding section 16-10-102, whether or not a citizen or resident of this state, in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising from:

- (1) The transaction of any business within this state;
- (2) Contracting to supply services or goods in this state;
- (3) The causing of any injury within this state whether tortious or by breach of warranty;
- (4) The ownership, use, or possession of any real estate situated in this state;
- (5) Contracting to insure any person, property or risk located within this state at the time of contracting.
- (6) With respect to actions of divorce and separate maintenance, the maintenance in this state of a matrimonial domicile at the time the claim arose or the commission in this state of the act giving rise to the claim.