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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. Levatic : Defendant-Appellees' Brief In Support of Petition For Rehearing

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

DEFENDANT-APPELLEES' BRIEF IN SUPPORT OF
PETITION FOR REHEARING

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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PETITION FOR REHEARING

STATEMENT OF THE CASE

These are companion cases by Producers Livestock Loan Company (hereinafter "Producers"), a Utah corporation, to recover an asserted indebtedness of John Clair Miller and Peter S. Levatich, defendant-appellees, both of whom are residents of New York State. Process was served upon defendants in New York State, pursuant to the Utah Long-Arm Statute (UTAH CODE

ANN. §78-27-22, et seq. (1977 Repl. Vol.)). Defendant-appellee deny plaintiff's claim of indebtedness and further deny the assertion of personal jurisdiction over them in the State of Utah (Plaintiff's substantive claim is identical to the claim which it is asserting by counterclaim in Levatich and Miller v. Producers Livestock Loan Co., et al., No. 77-CV-301 in the United States District Court for the Northern District of New York, a pending action by Messrs. Levatich and Miller for securities fraud.)

Defendants moved to dismiss this action for lack of personal jurisdiction, pursuant to the terms of UTAH R. CIV. P. 12(b)(2), and for insufficiency of process and service of process, pursuant to the terms of UTAH R. CIV. P. 12(b)(4),(5). The district court granted the motion. Plaintiff appealed. On May 26, 1978, this Court, in a divided decision, reversed that judgment. Appellees move for rehearing, respectfully urging that the plurality opinion was erroneous and that, if left standing, that opinion would create serious inconsistencies in the Utah law of agency and of extraterritorial jurisdiction.

The record herein reveals that defendants have never transacted business in Utah (R. 6. M., 8. L.); that they were solicited to execute promissory notes (which represented their alleged indebtedness to plaintiff) in New York State and made application for those notes in New York State (R. 6. M., 8. L.) and that the proceeds from those notes were applied to the

partial maintenance of a livestock feeding pool, known as the Norwood Pool, located in Yuma, Arizona and Riverside, California. R. 9, 73. M., 6, 76. L.; George L. Smith Deposition, p. 11, lines 7-10. The record further reveals that the Norwood Pool was managed in Arizona and California by one George L. Smith (hereinafter "Smith") or a company known as GLS Livestock Management, 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.

It is clear from the record that Smith at no time managed the Pool under, or subject to, defendants' supervision: the extent of their participation in the operation was "deciding that they either wanted to get in or they wanted to get out." Smith Dep., p. 21, lines 19-25, p. 25, lines 6-7. Defendants' relationship to the Pool was virtually identical to that of a stockholder to a corporation--without a stockholder's voting rights.

There is no evidence in the record that Smith managed the Norwood Pool from Salt Lake City, although he did maintain an office there.¹

¹Plaintiff offered in evidence an affidavit prepared by its counsel and signed by Mr. Smith. R. 66-68. L. The affidavit stated: (a) That for several years Smith had been engaged in the business of managing cattle and livestock on behalf of investors. R. 66. L.; (b) That in 1972 he arranged to manage defendants' investment. He did not say where that arrangement was made. R. 66-67. L.; (c) That GLS Livestock

This Court found that defendants were subject to Utah jurisdiction on the grounds that:

(a) Smith was defendants' agent; and

(b) Smith transacted "the business of buying, feeding, managing and marketing cattle ... for the defendants ... in and from Salt Lake City." Slip Op., pp. 3-4.

Defendants respectfully submit that the record does not reveal--and in fact the record negatives--an agency relationship between defendants and Smith. Defendants further submit that the record does not reveal that "the business of buying, feeding, managing and marketing cattle was carried on for defendants ... in and from Salt Lake City." Insofar as the record reveals where those acts occurred, it reveals that they occurred outside of Utah.

Management, Inc.'s only office was located in Salt Lake City, Utah. R. 67. L. (However, he testified that he actually performed his management during trips to Arizona and California. Smith Dep., p. 18, lines 16-25, p. 19, lines 1-25, p. 20, lines 1-25, p. 21, lines 1-7); (d) That he made many purchases and sales of livestock by telephone from Salt Lake City, Utah during his business career--but he did not state that any of these purchases or sales were made for Levatich, Miller or the Norwood Pool. R. 67. L. (In his deposition, Smith specifically stated that he purchased the Norwood Pool's cattle in Texas, Louisiana, Mississippi and Arizona and sold the cattle in Arizona and California--not Utah (Smith Dep., p. 11, lines 3-13).

ARGUMENT

THE DECISION HEREIN WAS BASED UPON AN INCORRECT APPLICATION OF THE LAW OF AGENCY AND OF THE UTAH LONG-ARM STATUTE. THEREFORE, REHEARING SHOULD BE GRANTED.

UTAH CODE ANN. §78-27-24 provides:

Any person ... who in person or through an agent does any of the following enumerated acts, subjects 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;

....

Section 24 imposes jurisdiction upon a nonresident only if he or his agent transacts business within Utah and if a claim arises from that in-Utah transaction.

1. George L. Smith was not defendants' "agent", as that term authoritatively has been defined by this Court and by other jurisdictions. The only means by which defendants conceivably could have transacted business within Utah would have been through the acts of George L. Smith. The plurality has found that Mr. Smith, by carrying on business in Salt Lake City on behalf of defendants, subjected them to Utah jurisdiction pursuant to the terms of §78-27-24. Under Section 24, Smith's activities on behalf of defendants could constitute "transaction of business within this State" only if:

- (a) He were their agent; and
- (b) He acted as their agent within this state.

This Court authoritatively defined the term "agent" for purposes of Utah law 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 Thiokol rule is fully in accord with a universally accepted demarcation of agents from independent contractors. E.g., People v. Miller, 143 Cal. App. 2d 843, 300 P.2d 760, 764 (1956); Losli v. Foster, 37 Wash. 2d 760, 222 P.2d 824, 832 (1950).

As the proponent of a claim of agency, plaintiff bore the burden of proving that relationship. Wilkerson v. Stevens, 16 Utah 2d 424, 426, 403 P.2d 31 (1964). However, there is nothing whatever in the record to suggest that appellees "exercise[d] the control over the means of accomplishing the result" which Mr. Smith was to achieve. Quite to the contrary.

Mr. Smith testified that his relationship with appellees was 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.

If Smith is to be deemed an agent, rather than an independent contractor, Thiokol must be repudiated. Appellees respectfully submit that this Court should reverse the instant decision, rather than create such an inconsistency with a well-defined rule of law.

2. Plaintiff has made no showing that its claim arose from George L. Smith's "transaction of ... business within this state." It is well established that, when personal jurisdiction is challenged, plaintiff 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); McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936). As is set forth at pages 2-4 above, there is no evidence in the record that "the business of buying, feeding, managing and marketing cattle was carried on for the defendants by George L. Smith in and from Salt Lake City." Indeed, the evidence is to the contrary. The instant decision accords jurisdiction to a plaintiff which utterly has failed to produce a record which demonstrates a factual basis for its claims. The district court's decision therefore should be affirmed.

3. Defendants' relationship to George L. Smith's operations was virtually identical to that of a minor stockholder to a corporation and should not form a basis for personal jurisdiction. Mr. Smith acknowledged on the record that investors in his cattle pools had only two options: "deciding that they wanted to get in or they wanted to get out." Smith Dep. p. 21, lines 19-25, p. 25, lines 1-7. Investors had no more control over his operation than minor stockholders have over the operation of a corporation. The plurality opinion here stated:

Nevertheless, we acknowledge the practical necessity and desirability of those limitations and we have neither any intention nor desire to go beyond them. Some examples which illustrate what we regard as necessary and practical limitations are these: where a person buys stock in

a corporation, such as U.S. Steel or General Motors, where the enterprise is located in and carried on in another state

Slip Op., p. 2.

Defendants submit that, inasmuch as Smith's investors' involvement in his operations was as passive and powerless as that of minor stockholders in a corporation, the plurality's suggested limitations should exclude them from personal jurisdiction in these premises.

CONCLUSION

For the foregoing reasons and based upon the authorities cited above, defendants respectfully urge that rehearing be granted.

DATED this 15th day of June, 1978.

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