

1987

Winkel Distributing v. Elizabeth Dewsnap, dba Valley Twin Cinema and Citit Cinema : Brief of Appellee

Utah Court of Appeals

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BRIEF

DOCUMENT

10

DOCKET NO. 870563-CA IN THE UTAH COURT OF APPEALS

WINKEL DISTRIBUTING,

Plaintiff and
Respondent,

vs.

ELIZABETH DEWSNUP, dba VALLEY
TWIN CINEMA and CITI CINEMA,

Defendant and
Appellant.

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Court of Appeals
Case No. 870563-CA

Argument Priority #14b

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE
TENTH CIRCUIT COURT OF SEVIER COUNTY
HONORABLE DAVID L. MOWER, JUDGE

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COURT OF APPEALS

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TABLE OF CONTENTS

	<u>PAGE NO.</u>
TABLE OF AUTHORITIES.	iii
JURISDICTION AND NATURE OF PROCEEDINGS.	iv
STATEMENT OF ISSUE.	v
STATEMENT OF FACTS.	1
SUMMARY OF ARGUMENT	5
ARGUMENT.	5
 <u>POINT I:</u>	
THE APPELLANT HAS FAILED TO MEET THE THRESHOLD REQUIREMENT OF MARSHALLING ALL EVIDENCE IN FAVOR OF THE FINDINGS AND SHOWING THEY ARE CLEARLY ERRONEOUS	5
 <u>POINT II:</u>	
THE TRIAL COURT'S FINDINGS OF FACT ARE SUPPORTED BY SUFFICIENT EVIDENCE, AND ARE NOT CLEARLY ERRONEOUS AND THE JUDGMENT SHOULD BE AFFIRMED	6
CONCLUSION.	12

TABLE OF AUTHORITIES

CASES

PAGE NO.

Fitzgerald v. Critchfield, 744 P.2d 301 (Utah Ct. App. 1987)	6
Harker v. Condominiums Forrest Glen, Inc., 740 P.2d 1361 (Utah Ct. App. 1987).	6

RULES

Rule 52a Utah Rules of Civil Procedure.	5
---	---

OTHER AUTHORITIES

3 Am. Jur. 2d, Agency §18	8
3 Am. Jur. 2d, Agency §19	9
3 Am. Jur. 2d, Agency §316.	10
3 Am. Jur. 2d, Agency §317.	10

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a civil judgment in the amount of \$5,174.89 in favor of Plaintiff entered by the Honorable David L. Mower, Tenth Circuit Court, Sevier County, sitting without a jury. Defendant appealed said judgment pursuant to U.C.A. 78-4-11 and Rules 3 and 4 of the Rules of the Court of appeals.

STATEMENT OF ISSUES

WAS THERE SUFFICIENT EVIDENCE AT TRIAL TO SUSTAIN
THE FINDING THAT APPELLANT, ELIZABETH DEWSNUP, IS
LIABLE FOR THE DEBT OWING TO RESPONDENT, WINKEL,
FOR GOODS DELIVERED TO THE VALLEY TWIN CINEMAS?

STATEMENT OF FACTS

Respondent, Winkel Distributing, (hereinafter referred to as Winkel) is a wholesale food and beverage distributor in Richfield, Utah. The Valley Twin Cinema is a double movie theater which was constructed and began doing business in Richfield, Utah, on or about 1982 (T. 64). Brad Whittaker was the manager of the Valley Twin Cinemas from the commencement of operations throughout all times relevant herein (T. 64). When the Valley Twin Cinemas began doing business, Mr. Whittaker opened an account with Winkel under the designation of Modern Valley Twin Cinemas and directed Mr. Winkel to send statements to a Delta, Colorado address (T. 19). The account was kept current initially, but became delinquent in 1984 (T. 22). In the fall of 1984, Kim Winkel, owner and manager of Winkel Distributing, contacted Brad Whittaker on several occasions to attempt to have the account brought current. Mr. Whittaker was unable to get the account current and Winkel requested the name of the owner to contact to collect on the account. Mr. Whittaker informed him that the Appellant, Elizabeth Dewsnap, hereinafter Mrs. Dewsnap, was the individual to contact in order to get the account brought current. Mr. Whittaker provided a telephone number and Winkel

thereafter contacted Elizabeth Dewsnap on two or three occasions by telephone (T. 26). On each of these conversations, Winkel informed Elizabeth Dewsnap that he was calling regarding the Valley Twin Cinemas and their delinquent account in the approximate sum of \$4,000.00. Mrs. Dewsnap on each telephone conversation acknowledged the obligation, apologized for the delinquency, claimed she was behind in her bills, but she would try to get some money on the account within the next few days. At no time did Mrs. Dewsnap deny liability for the account (T. 28, 29).

As a result of Mrs. Dewsnap promises to pay, Winkel postponed taking action on the account and continued permitting the theatre manager to charge for goods delivered (T. 28). When payments on the account were not received as provided, Winkel discontinued credit with the last charge being in May, 1985. After further demands for payment without response, Mr. Winkel filed the present action. At no time prior to the filing of the action did Appellant, Mrs. Dewsnap, or her manager, Brad Whittaker, claim that liability for the account rested with a Colorado corporation. To the contrary, both Dewsnap and Whittaker repeatedly acknowledged liability on the account and promised payment. As noted in the copies of the invoices attached as a addendum to Appellant's brief, the

account originated in the name of Valley Twin Cinemas and was therefore referred to a Modern Twin Cinemas, Modern Cinema, Twin Cinema, Valley Cinemas and Cinema Twins. No where in any of the accounts, deposit slips or other accountings is there any evidence of a corporate existence.

As previously noted, Brad Whittaker was the manager of the Valley Twin Cinemas from their opening until December of 1985 when he purchased the same from Appellant, Elizabeth Dewsnap (T. 63, 64). Mr. Whittaker testified at trial that when he was approached by Winkel regarding the delinquent account, he referred them to Mrs. Dewsnap (T. 65); that if there were any problems regarding the Twin Cinemas, that he would contact Mrs. Dewsnap (T. 68), that Mrs. Dewsnap had, in fact, paid property taxes on the equipment prior to June, 1985, (alleged take over date), (T. 70, 71). Mr. Whittaker testified that he was operating not only the Valley Twin Cinemas, but also the Huish Theatre in Richfield during 1984 and that he received pay checks for managing both theatres from Elizabeth Dewsnap under her dba Citi Cinemas (T. 72, 73), that candy and gum and so forth were purchased jointly for both theatres and payment alternated between the theatres (T. 73). In the fall of 1984, Mr. Whittaker testified that he received new deposit slips and that all proceeds from the Valley Twin

Theatres were deposited directly in an account with the heading of Citi Cinema, the dba for Elizabeth Dewsnap (T. 80); that Mr. Whittaker did not have authority to withdraw money from the account and that all pay checks during this period were signed by Elizabeth Dewsnap (T. 81, 82).

When called to testify, Appellant, Elizabeth Dewsnap, acknowledged that she had picked up the payroll for the Valley Twin Cinemas in exchange for favors from Modern Cinema, with full knowledge that Modern Cinema was having difficulty paying their bills (T. 91, 92). That her reason for picking up the payroll was to keep the operation going until she could take over (T. 94). Mrs. Dewsnap also acknowledged that she had paid some utilities and other obligations during the later part of 1984 and deposited all proceeds from the Valley Twin Theatres in her account (R29.30). When questioned regarding the telephone calls with Winkel, Mrs. Dewsnap said she did not recall any telephone calls, but if there was any, it was only one (T. 96, 104). Mrs. Dewsnap testified that she was the only one who had access to the monies being deposited in her account from Valley Twin Cinemas (T. 104). Elizabeth Dewsnap testified that prior to her alleged purchasing in the fall of 1984, that she was acquainted with the manager, Brad Whittaker; that she had become acquainted by stopping in on

regular occasions to pick up papers or posters for Modern Cinema. If her other theatre was short on popcorn, she would have Valley Twin Theatre popcorn for them, or if she ran out of supplies, Valley Twin Theatre would provide supplies for her other theatres (T. 108). This sharing was going on despite Appellant's claim that Modern was the sole owner of the Richfield theatres and Elizabeth Dewsnap was the sole owner of the Beaver theatre (T 108, 109).

SUMMARY OF ARGUMENT

The judgment of the trial Court should be affirmed on the grounds that there is sufficient evidence in support of the findings of fact and that the Appellant has failed to meet the threshold burden marshalling all evidence in support of the findings and demonstrating that they are clearly erroneous.

ARGUMENT

POINT I

THE APPELLANT HAS FAILED TO MEET THE THRESHOLD REQUIREMENT OF MARSHALLING ALL EVIDENCE IN FAVOR OF THE FINDINGS AND SHOWING THEY ARE CLEARLY ERRONEOUS

Rule 52a of the Utah Rules of Civil Procedure sets the standard for review of civil judgments entered by the trial Court without a jury. This rule requires a showing by the individual attacking the findings of fact, that the same

are clearly erroneous in light of the evidence. Subsequent case law has placed the burden on the Appellant to marshal all evidence in favor of the findings and then demonstrate that the same are clearly erroneous in light of this evidence. Harker v. Condominiums Forrest Glen, Inc., 740 P.2d 1361 (Utah Ct. App. 1987) Fitzgerald v. Critchfield, 744 P.2d 301 (Utah Ct. App. 1987)

In the instant case Appellant has merely reiterated the facts as he viewed them at the trial in an effort to support his position. Findings of fact one through twelve do not appear to be in dispute. As to findings thirteen through sixteen, the Appellant has failed to marshall any of the supporting evidence nor has she attempted to discredit or illustrate that it is clearly erroneous. Instead, Appellant has simply reiterated evidence in support of his proposed position.

The failure of Appellant to meet this threshold is neither elective nor optional and the trial Court's findings and judgment should be affirmed. Fitzgerald v. Critchfield, supra.

POINT II

THE TRIAL COURT'S FINDINGS OF FACT ARE SUPPORTED
BY SUFFICIENT EVIDENCE, AND ARE NOT CLEARLY
ERRONEOUS AND THE JUDGMENT SHOULD BE AFFIRMED

As previously noted, findings of fact one through twelve of the Court have never been disputed and are supported by the evidence.

Finding of fact number thirteen is supported by the testimony of the manager, Brad Whittaker (T. 72, 73). Mrs. Dewsnap also acknowledged she had paid the manager but claimed it was merely to preserve the business until she could take over (T. 91, 92).

As to finding of fact number fourteen, Plaintiff's manager contacted the manager of Valley Twin Cinemas in Richfield, Utah, demanding payment for the goods supplied. He was told to contact the Defendant. This finding is supported not only by Mr. Winkel's testimony (T. 26) but also the testimony of Brad Whittaker, the manager (T. 65).

As to finding number fifteen, Winkel contacted Mrs. Dewsnap demanding payment for the goods supplied. Mrs. Dewsnap did not dispute the claim but asked for time to pay it since the business was short of money. Mr. Winkel testified unequivocally that he had discussed the Richfield account with Mrs. Dewsnap on two or three occasions. That on each occasion she had acknowledged the obligation, admitted that she was behind on her bills and promised she would make a payment within the next few days (T. 28, 29). When questioned

regarding these conversations, Mrs. Dewsnap stated she did not recall any telephone conversations but if there were any, there was only one (T. 96, 104). Later in her testimony Appellant, Elizabeth Dewsnap, testified she never agreed to pay Modern's bills and attempted to rationalize the conversation described by Winkel as merely a misunderstanding and that she thought he was talking about the Beaver theatre when demanding payment. As appropriately pointed out by the Court (T. 117), at the time of the alleged conversations, the Beaver account was at most \$64.00, while the account called on by Winkel was for over \$4,000.00. The Court clearly questioned the credibility of Mrs. Dewsnap and found the testimony of the Plaintiff Winkel to be more believable under the circumstances. Finding number fifteen is not "clearly erroneous".

Finding number sixteen of the trial Court is that Defendant is the alter ego of Modern Cinemas Inc. The alter ego concept under these circumstances should be analyzed under the principles of agency.

Elizabeth Dewsnap's relationship to the Twin Theatres could hardly be classified as anything less than an implied agency or agency by estoppel. As noted in 3 Am Jur 2d Section 18:

"The existence of an implied agency, for example, may be inferred from prior habits

or from a course of dealings of a similar nature between the parties, especially where the agent has repeatedly been permitted to perform similar acts in the past".

Under Section 19 of the same authority:

"an agency by estoppel may be created insofar as third persons are concerned .. that is, it may arise from acts and occurrences which lead third persons to believe that it has been created. Agency by estoppel may be apparent only and exist because of the estoppel of the principal or agent to deny the same after the third party has relied on such appearance, so that such third party would be prejudiced if the facts were shown to be otherwise."

If we review the conduct of Appellant Elizabeth Dewsnap in relation to the Valley Twin Cinemas it becomes patently obvious that she had more than a passing interest. For a period of over five years she visited the theatre frequently, either picking up papers or delivering posters (T. 108, 109). If her theatre in Beaver ran out of supplies, she would contact the manager at the Valley Twin Cinemas and have them prepare popcorn, etc. (T. 109); in 1984 she began depositing proceeds from the Valley Twin Cinemas in her account and then chose to pay certain obligations such as payroll, utilities and telephone payments while at the same time choosing not to pay suppliers such as Winkel (T. 29, 30, 94, and affidavit of Elizabeth Dewsnap). Upon contacting the manager of the Valley Twin Cinemas in the fall of 1984,

Mr. Winkel was directed to Elizabeth Dewsnap as the party responsible for obligations by the manager of the theatres (T.26). Upon contacting Mrs. Dewsnap on two or three occasions, Mr. Winkel testified and the Court so found, that she acknowledged the liability, requested more time for payment and promised to pay (R. 39, 40). The only logical conclusion that can be drawn from these facts is that Elizabeth Dewsnap was acting in at least an agency capacity for the corporation as to Winkel.

If we review the evidence in a light most favorable to Appellant, and determine that Elizabeth Dewsnap was, in fact, only an agent of Modern Cinema, Inc., then we must analyze what evidence would support her liability on the account and thus make her the "alter ego" of the principal Modern Cinema, Inc.

As stated in 3 Am Jur 2d, Section 316:

Thus, the agent of an undisclosed principal may be held liable on the contract as the real obligor because he contracted in that capacity, and an undisclosed principal may be held liable because as the recipient of the deal, he should also assume its burdens.

In Section 317 of the same authority it states:

It has generally been held that the liability of an undisclosed principal and his agent is an alternative liability rather than a joint liability or a joint

and several liability, and that the third party, after he becomes aware of the agency and identity of the principal, is put to an election to hold either the agent or the principal liable, but not both.

In the instant case Winkel testified that as far as he knew Elizabeth Dewsnap was the owner and responsible party for the Valley Twin Cinemas (T. 55). That his basis was that the manager had told him she was the responsible party and that he had called Mrs. Dewsnap and she had acknowledged it was her responsibility. It should also be noted that none of the documentation submitted by Appellant, including deposit slips for Modern Cinema, have any designation of a corporation. It is undisputed in the evidence that Mrs. Dewsnap was aware in the fall of 1984 that Modern Cinema, Inc. was having trouble paying their bills (T. 91, 92) but despite this knowledge when contacted by Mr. Winkel she did not refer him to any corporation, but rather acknowledged her own liability and promised payment (T. 28, 29). The result of Mrs. Dewsnap representation was that Winkel withheld collection efforts and, in fact, granted more credit to the Valley Twin Cinemas (T. 21, 28). This extension of additional consideration is sufficient to bind the agent for the entire obligation even if a portion is considered as preexisting debt. 3 Am Jur 2d, Agency, Section 308

Under this set of facts, the Court could have relied on undisclosed agency, estoppel or new consideration to find Mrs. Dewsnap liable as the alter ego of Modern Cinema, Inc.

CONCLUSIONS

The judgment of the trial Court should be affirmed.

Respectfully submitted this 16th day of June, 1988.

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MAILING CERTIFICATE

I herewith and hereby certify that four copies of the foregoing Brief of Respondents were placed in the United States mail at Richfield, Utah, with first-class postage thereon fully prepaid, this 16th day of June, 1988, addressed to Mr. Gayle Dean Hunt, Attorney at Law, 2121 South State Street, Salt Lake City, Utah 84115.



MICHAEL R. LABRUM