1979

Globe Leasing Corporation, A Utah Corporation; Al Weigelt And Gloria Morrison, Individuals v. Bank of Salt Lake, A Utah Corporation, And Norton Parker, And Individual : Brief In Answer To Petition For Rehearing

Utah Supreme Court

IN THE SUPREME COURT

OF THE

STATE OF UTAH

GLOBE LEASING CORPORATION, a Utah corporation; AL WEIGELT and GLORIA MORRISON, individuals,

Plaintiffs-Respondent,

vs.

Case No. 15337

BANK OF SALT LAKE, a Utah corporation, and NORTON PARKER, and individual,

Defendants-Appellant.

BRIEF IN ANSWER TO PETITION FOR REHEARING

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CASES CITED

NATURE OF THE CASE

The action by plaintiff was for alleged tortious interference with the business relations of plaintiff; judgment was entered by the trial court in favor of plaintiff and that judgment was reversed on appeal.

RELIEF SOUGHT ON PETITION FOR REHEARING

Plaintiff seeks rehearing of this appeal and reinstatement of the judgment of the trial court awarding damages to plaintiff.

STATEMENT OF FACTS

Defendant relies for a statement of pertinent facts upon the "Statement of Facts" contained in the Brief of Appellant filed with this court, at pages 2-10.

ARGUMENT

THE PLAINTIFF HAS FAILED IN ITS PETITION AND BRIEF TO MAKE THE "STRONG SHOWING" WHICH IS A PREREQUISITE TO THE GRANTING OF A REHEARING OF THIS APPEAL AND ITS PETITION SHOULD BE DENIED.

A. A PETITIONER FOR REHEARING OF AN APPEAL MUST MAKE A "STRONG SHOWING" BEFORE SUCH PETITION WILL BE GRANTED

It is the well-established rule of this Court that "a strong case must be made" to justify rehearing an appeal. In Brown v. Pickard, 4 Utah 292, 11 P. 512 (1886) this Court further stated:

> "We must be convinced that the court failed to consider some material point in the

> case, or that it erred in its conclusions, or that some matter has been discovered which was unknown at the time of hearing. [citation omitted] Where a case has been fully and fairly considered in all its bearings, a rehearing will be denied. [citation omitted].

See also In re MacKnight, 4 U. 237, 9 P. 299 (1886)

B. PLAINTIFF HAS NOT MADE A SHOWING THAT (1) THE COURT FAILED TO CONSIDER SOME MATERIAL POINT OR (2) SOME MATTER HAS BEEN DISCOVERED WHICH WAS UNKNOWN AT THE TIME OF TRIAL

The plaintiff makes no claim that there is matter which has been discovered since the trial which materially affects the appeal before the Court.

The petition and brief of plaintiff claim that this Court failed to consider a material fact. At pages 1 and 2 of the petition and brief, plaintiff takes issue with the conclusion of the court that plaintiff made no profits in its one year of operation. Plaintiff there states that the Court failed to consider the salaries paid to its shareholder-officers, Mr. and Mrs. Weigelt, in calculating first year profits. However, the Court did consider those salaries in calculating net profits. The salaries of Mr. and Mrs. Weigelt were recognized as ordinary business expenses. The judgment before this Court on appeal was in favor of the corporation, Globe Leasing. Any complaint for loss of salaries would

have to be brought by Mr. and Mrs. Weigelt. Such a complaint is not before this Court and was never a part of the Complaint tried by the court below. The only claim alleged by the individual plaintiffs was the Sixth Claim of the Complaint which was voluntarily dismissed by them during trial. The deduction of salaries as an expense in calculating net profits is ordinary business acounting and does not constitute error by this Court.

Plaintiff has not claimed any other failure to consider material points, facts, or issues. Indeed, the remainder of plaintiff's brief simply requests that the court "reexamine the testimony of Mr. Stuart," "review the case law ... quoted in the brief submitted by plaintiff-respondent," and to "once again point out that the court below found...."

Rehearing of the appeal should not be granted since the Court has considered all material points, facts and issues in arriving at its decision.

C. PLAINTIFF HAS FAILED TO SHOW THAT THE COURT ERRED IN ITS CONCLUSIONS.

Plaintiff asserted that the Court erred in refusing to (1) follow the precedent of Gould v. Mountain States Telephone and Telegraph Company, 6 Utah 2d 187, 309 P.2d 802 (1957) establishing that "damages may be awarded for lost profits"; and (2) follow the opinion of the Tenth Circuit Court of Appeals in Randy's Studebaker Sales, Inc. dba Randy's Datsun

Sales v. Nissan Motor Corp. Inc. U.S.A., 533 F.2d 510 (10th Cir. 1976) supposedly establishing a "ten year rule" for measuring lost profits.

However, this Court did not hold either (1) that lost profits was an improper measure of damage, or (2) that the holding of the Tenth Circuit in Randy's Datsun, supra, was incorrect. The opinion does not reach those issues. Rather, this Court held that there is insufficient evidence (not "substantial evidence")[1/] to prove that defendant's wrongful actions (assuming arguendo that they were wrongful) caused plaintiff's inability to obtain financing. Plaintiff did not prove by substantial evidence that defendant's actions caused the termination of plaintiff's business. A careful review of the record shows that conclusion to be sound. (See, e.g. the various references in Brief of Appellant at 25-31) Therefore, the claims of plaintiff in its brief are logically not reached since they relate solely to the alleged measure of damages flowing from termination of plaintiff's business. Plaintiff has failed to show any error in the conclusions of this Court.

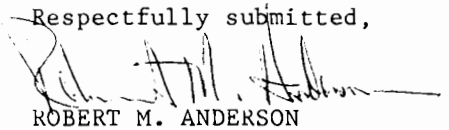
CONCLUSION

The appeal in this case has been fully and fairly

1/ Substantial evidence in the record will support a factual finding, and its existence vel non is the standard for appellate review of fact findings. Minshew v. Chevron Oil Co., 575 P.2d 192 (Utah 1978)

heard and considered by this Court. The petition for rehearing should be denied.

Respectfully submitted,



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