1988

Robin L. Hough v. Joel E. Colley : Petition for Rehearing

Utah Court of Appeals

B. L. Dart; Dart, Adamson & Kasting; Attorneys for Respondent.
J. Thomas Bowen; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

ROBIN L. HOUGH,

Plaintiff and Respondent and Cross-Appellant,

vs.

JOEL E. COLLEY,

Defendant and Appellant and Cross-Respondent.

Case No. 880123-CA

Before Judges Bench, Garff and Orme.

PETITION FOR REHEARING

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY

HONORABLE DEAN E. CONDER
District Judge

BERT L. DART #818
Dart, Adamson & Kasting
310 South Main, Suite 1330
CSalt Lake City, Utah 84101

Attorney for Plaintiff and Respondent and Cross-Appellant

J. THOMAS BOWEN #0396
1020 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111

Attorney for Defendant and Appellant and Cross-Respondent

IN THE UTAH COURT OF APPEALS

ROBIN L. HOUGH,	:	
Plaintiff and Respondent and Cross-Appellant,	:	
	:	Case No. 880123-CA
vs.	:	
	:	
JOEL E. COLLEY,	:	
Defendant and Appellant and Cross-Respondent.	:	

Before Judges Bench, Garff and Orme.

PETITION FOR REHEARING

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY

HONORABLE DEAN E. CONDER
District Judge

BERT L. DART #818
Dart, Adamson & Kasting
310 South Main, Suite 1330
CSalt Lake City, Utah 84101

Attorney for Plaintiff and Respondent and Cross-Appellant

J. THOMAS BOWEN #0396
1020 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111

Attorney for Defendant and Appellant and Cross-Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TEXTS

IN THE UTAH COURT OF APPEALS

ROBIN L. HOUGH,	:	
Plaintiff and Respondent and Cross-Appellant,	:	PETITION FOR REHEARING
	:	Case No. 880123-CA
vs.	:	
	:	
JOEL E. COLLEY,	:	
Defendant and Appellant and Cross-Respondent.	:	

Before Judges Bench, Garff and Orme.

* * * * * * * *

Pursuant to Rule 35 of the Rules of the Utah Court of Appeals, Joel E. Colley petitions the Court for a rehearing on the issues set forth hereafter.

ISSUES PRESENTED FOR REHEARING

ISSUE 1: There is no evidence to support the trial court's finding number 6 that "it was understood and agreed that the plaintiff would devote all her time and talents to the property and defendant would contribute money, but that both would share on an equal basis", and

ISSUE 2: A distribution to Miss Hough, other than profits from the partnership, based upon her rendition only of services, is contrary to the facts of the case and contrary to the law.

I

THERE IS NO EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING THAT MISS HOUGH'S OBLIGATION WAS LIMITED TO "TIME AND TALENTS" BUT THAT DR. COLLEY HAD THE ENTIRE FINANCIAL BURDEN

Defendant does still not know when or where the partnership between himself and Miss Hough arouse; the opinion of this court provides no guidance on that matter. Nevertheless, this court having determined that there is sufficient evidence to support the trial court's decision that a partnership in fact existed, defendant does not contest that determination further. Critical, however, to the trial court's scheme of distribution, which this court affirmed, was its finding number 6 that Miss Hough's obligation to the partnership was only to provide services but that Dr. Colley had the entire financial burden. This is not an issue upon which there is disputed evidence; rather, there is no evidence in the record to support this critical finding by the trial court. This court erred, therefore, in concluding that there was "substantial competent evidence" to support that finding. In deed, neither this court, nor Miss Hough's counsel have been able to cite to any evidence

in the record that supports that finding by Judge Conder. In her brief, Miss Hough merely restated the trial court's finding and then argued that since the court had made that finding there must have been evidence to support it; however, Miss Hough provided no reference to any specific facts, nor any citation to the record, that would support that finding. This court, similarly, appeared to gloss over that pivitol finding and apparently concluded that since there was evidence to support the trial court's finding of a partnership the other related finding must also be correct. Defendant submits, however, that such is not the case. The notion that Miss Hough had no financial obligation to the partnership was erroneously created by the trial court without any support in the evidence or record of this case. Dr. Colley admits that the trial court did, in fact, make its finding number 6 but that finding is totally unsupportable by the record. Dr. Colley requests, therefore, that this court rehear that matter.

A. <u>The plaintiff herself did not contend that her obligation to the partnership was limited to time and talent only</u>. Even Miss Hough herself, did not contend that her obligation to the partnership was limited to her time and talents only. She testified that her obligation included a financial commitment. Referring to the time the parties were in Texas, plaintiff testified:

> "We both contributed everything. We contributed all of our finances, we contributed all of our time, all of our talent, all of our efforts." R. Vol. I. p. 41 (emphasis added).

Plaintiff testified that their relationship in Pennsylvania also included a financial commitment. Miss Hough stated:

> "It was our understanding, that all of our efforts, our financial efforts, our physical efforts, our intellectual efforts were to be combined so that we -- our unit could grow." T. Vol. I, p. 55 (emphasis added).

Regarding their association in Utah, Miss Hough testified:

> "We committed 100% of everything, our finances, our mental, physical, emotional efforts up to the time that we separated. We still had a tremendous amount of contact after that up until November, 1982 and still a lot of financial involvement, talking, but the combination was not what it had been prior to our separation. Prior to our separation it was 100%. T. Vol. I. p. 175-176 (emphasis added).

Plaintiff also stated that:

> "We combined all of our income into our accounts, and all of our efforts, all of our energies into a common pool." T. Vol. I. p. 144 (emphasis added).

Plaintiff freely admitted that her agreement with Dr. Colley required her to contribute not only her time and talents but also all of her finances to their association. Plaintiff's own testimony is clearly contrary to the trial court's finding number 6.

B. Miss Hough's obligation did not change. There can be no contention that Miss Hough's obligation to contri-

bute money to the partnership ever changed. When asked, "Did the agreement ever change so far as you understood it?" Miss Hough responded, "Never." T. Vol. I. p. 44. According to plaintiff, she had an obligation to contribute not only her time, efforts, and talents, but also her money to the association. Also, according to plaintiff, that obligation never changed; therefore, the court's finding number 6 that plaintiff's obligation somehow did change and that defendant somehow became solely obligated to put up all of the money while plaintiff was relieved from her obligation to contribute her finances but only had to provide "time and talent", is clearly contrary to the testimony of both of the parties in this matter and is, contrary to this court's conclusion, totally unsupported by the evidence.

C. Miss Hough breached the terms of the agreement. The parties ceased residing together on October 30, 1981. Thereafter, the record is undisputed that Miss Hough completely abandoned her commitment to Dr. Colley and to the properties. After the parties separated Dr. Colley advanced ONE HUNDRED FORTY SIX THOUSAND TWO HUNDRED FORTY SEVEN DOLLARS ($146,247), for the purpose of preserving the property. T. Vol. II. p. 172-173, (Ex. 110). During that time Dr. Colley also performed all of the management duties for the properties; plaintiff performed none. After October 30, 1981, Miss Hough paid only FORTY TWO HUNDRED DOLLARS

($4,200) for property maintenance. T. Vol. II. p. 173. The fact that Miss Hough paid even that miserly amount shows, nevertheless, that she recognized a financial obligation to Dr. Colley and to the properties. During that same period of time Miss Hough devoted none of her time or talents to the properties; rather, she used them, and her money, to acquire assets in her own name. See pp. 24-28 of Appellant's Brief. The trial court held that the partnership was actually terminated upon trial of the case (February, 1985) some 3-1/2 years after the parties separated. It is undisputed that Dr. Colley continued to utilize his funds for the maintenance and preservation of the property while at the same time, Miss Hough turned her back on the properties and directed her efforts toward her own personal gain. It seems clear, therefore, that even the most generous reading of the trial court's findings shows that Miss Hough violated the terms of the agreement she had with Dr. Colley and that for 3-1/2 years she did not even devote her time or talents to the partnership.

II

A DISTRIBUTION OF A PORTION OF THE CAPITAL ASSETS OF THE PARTNERSHIP BASED UPON PLAINTIFF'S TIME, TALENT AND SERVICES IS ERROR

If Miss Hough is entitled to a distribution from the partnership, she is entitled to a share of the profits

only after Dr. Colley's capital contributions have been returned to him. It has been stated:

> Where one partner has contributed capital and the other services, the one contributing the capital is entitled to withdraw its value. 1 S. Rowley on Partnerships (2d ed. 1960) p. 453.

Under some circumstances personal services may constitute a capital contribution to a partnership; however, there must be a specific agreement to that effect; otherwise, a partner who contributes services is not entitled to share in the capital upon dissolution. Schymanski v. Conventz, 674 P.2d 281 (Alaska 1983). There is no evidence of the required specific agreement in this case. As has been noted elsewhere:

> A partner contributing only services and no capital, is ordinarily entitled to no share of capital on dissolution, the capital is returned to the partner supplying it. Tiffany v. Short, 22 Cal. 2d 531, 139 P.2d 939 (1943).

The partner contributing only services is limited to his share of the profits of the enterprise as compensation for his services. Hunter v. Allen, 174 Or. 261, 147 P.2d 213, modified on other grounds, 148 P.2d 936, (1944).

Generally where one partner contributes the capital of the firm while another contributes skill and labor, the partner who made the capital contribution is entitled, on dissolution, to repayment of such capital before any distribution of profits is made. A partner who furnishes no

capital, but contributes merely time, skill and services, is not entitled on dissolution to any part of the original firm capital, but must look for compensation for such time and services to a share of the profits. Vassallo v. Sexauer, 22 Mich. App. 188, 177 N.W.2d 470 (1970); Bass v. Daetwyler, 305 S.W.2d 339 (Mo. 1957); Baum v. McBride, 152 Neb. 152, 40 N.W.2d 649 (1950).

In the instant case, the trial court failed to require an accounting between the parties and also failed to determine whether or not there were any profits to distribute. The trial court's distribution scheme was, apparently, based upon its finding number 6 that plaintiff's obligation was limited merely to time and services. In any event, the trial court failed to properly apply the law since Miss Hough's distribution from the partnership, based upon time and services, should have been limited to profits from the partnership only and not to capital contributions. If finding number 6 is upheld, Miss Hough would only be entitled to a share of the profits. If Miss Hough's obligation to contribute financially to the partnership is recognized then there cannot be a distribution without a proper accounting. As it now stands, however, Miss Hough has received the best of both worlds; a portion of the partnership's capital without an obligation to contribute to that capital. Defendant submits that this is error and is contrary to the evidence

of this case and that this court erred in sustaining the trial court on that issue.

CONCLUSION

This court erred in determining that the trial court's finding number 6, that plaintiff would devote all her time and talents to the property and defendant would contribute money but that both would share on an equal basis, is supported by competent evidence in the record. Similarly, the distribution scheme that allowed Miss Hough to receive not only one-half of the profits, but also one-half of all of the capital contributed, is contrary to partnership law. Defendant requests, therefore, a rehearing based upon the issues presented in this petition.

DATED this 27th day of July, 1988.

J. Thomas Bowen

J. THOMAS BOWEN
Attorney for Defendant and
Appellant and Cross-Respondent

I certify that the foregoing Petition is presented in good faith and not for delay.

J. Thomas Bowen

J. THOMAS BOWEN

19.4

CERTIFICATE OF HAND-DELIVERY

I, hereby certify that on the _____ day of July, 1988, I caused four (4) true and correct copies of the foregoing, PETITION FOR REHEARING, to be served, by delivering the same by hand to:

Bert L. Dart
Dart, Adamson & Kasting
310 South Main, Suite 1330
Salt Lake City, Utah 84101