2001

Richard F. Bassett v. Walter Baker : Brief of Appellant

Utah Supreme Court

Robert J. DeBry; Attorney for Appellant.
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IN THE SUPREME COURT OF THE STATE OF UTAH

RICHARD F. BASSETT,
Plaintiff and Respondent,

vs.

WALTER BAKER,
Defendant and Appellant.

Case No. 13799

BRIEF OF APPELLANT

Appeal from the Judgment of the Fourth District Court for Wasatch County Honorable J. Robert Bullock, Judge

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CASES AND AUTHORITIES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

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STATEMENT OF THE NATURE OF THE CASE

The plaintiff and the defendant were involved in the business of raising cattle for profit. This action was commenced by the plaintiff for an accounting, and to terminate the relationship. The plaintiff claims that the parties had entered into a partnership and that the accounting should allocate profits and losses on the basis of that partnership agreement. The defendant counter-

claimed that the parties had never entered into any agreement, and that the plaintiff should pay the defendant under *quantum meruit* the reasonable value of the services and goods supplied by the plaintiff to the defendant in caring for the cattle.

DISPOSITION IN THE LOWER COURT

By pre-trial order entered 1st April, 1974, the Honorable J. Robert Bullock appropriately bifurcated the case with the first trial to determine the relationship which existed between the parties, and the second trial to determine damages or an accounting growing out of that relationship.

On June 3, 1974 the case was tried to the court sitting without a jury. The court held that a joint venture existed between the parties and that a further accounting should be had on the basis of the joint venture.

The defendant moved that the lower court amend the findings of fact and conclusions of law, which motion was denied by the court on July 10, 1974.

RELIEF SOUGHT ON APPEAL

The defendant seeks reversal of the lower court's order denying the defendant's motion to amend, and an order to the lower court to modify and amend its find-

ings to conform as a matter of law to the points of this brief.

The only question before this Court is whether or not a joint venture existed between the parties. If this Court should adjudge that no joint venture existed, the further question of what, if any, relationship did exist between the parties should be decided at the trial court level.

STATEMENT OF FACTS

The plaintiff, an airline pilot by profession, decided to make his permanent home in Wasatch County, Utah (Tr. 18). The plaintiff owned some land and was anxious to start an adventure in farming. However, since the plaintiff was out of town flying a great deal of the time, and since the plaintiff had no knowledge of farming, the plaintiff turned to local people to aid his adventure (Tr. 14).

The defendant is a resident of Charleston, Utah, and is by profession a heavy equipment mechanic and farmer (Tr. 43).

The plaintiff and the defendant first met on the premises of a local farm equipment dealer where the defendant was employed, and from which the plaintiff had purchased some farm equipment (Tr. 43). A series of several casual conversations ensued during which the

parties explored their mutual interest in raising cattle (Tr. 24, 26-27, 44-48).

On or about September 9, 1972, the plaintiff purchased 26 cattle and delivered the said cattle to the defendant (Tr. 48). There was an uncontroverted understanding that the plaintiff would pay for the cattle and do bookkeeping services while the defendant did the actual work of managing and caring for the cattle, and that the parties would split the profits (Tr. 15, 46, 50). Nothing was said about losses (Tr. 16). The court's findings of fact characterize this September 9, 1972 understanding as a "joint venture."

The original plan was that the above mentioned 26 cattle were to be merely a first installment, and that the plaintiff would purchase and deliver an additional 74 cows for the defendant's care and management (Tr. 20, 46, 47). However, the plaintiff quickly became disenchanted with the defendant and the plaintiff failed to deliver the additional 74 cows to bring the herd up to the projected number of 100 (Tr. 21-22, 28).

The defendant cared for this herd of 26 cows from September 9, 1972, until the 19th day of June, 1973. During this period many of the cows had calves so that by the spring of 1973 the defendant was caring for a herd of approximately 42 cattle. (The defendant's answers to plaintiff's interrogatories #1).

During the period of the defendant's stewardship

the defendant frequently paid money out of his own pocket for materials and supplies (Tr. 17, 29-30).

During the period of the defendant's stewardship the defendant worked continually under the direct supervision and control of the plaintiff. The defendant exercised virtually no discretion in managing the cattle or in any of the business decisions. Specifically:

A. The plaintiff exclusively and unilaterally determined the number of cattle to be cared for by the defendant (Tr. 21-22).

B. The defendant had no authority to negotiate the sale of, or sell the cattle (Tr. 35).

C. The defendant moved the cows at the direction of and to suit personal pleasure and circumstances of the plaintiff (Tr. 50).

D. The defendant moved the cattle a second time to suit the personal pleasure of the plaintiff (Tr. 51).

E. The defendant moved the cattle a third time to suit the personal pleasure of the plaintiff (Tr. 51).

F. The plaintiff mixed animals at his personal pleasure (Tr. 52).

G. The plaintiff used his personal brand on the cattle (Tr. 31).

H. Accountings were held at the plaintiff's pleasure (Tr. 54, 17).

I. The length of the agreement was to be at the plaintiff's pleasure (Tr. 55).

J. Although the defendant kept the cows in his possession at times, the plaintiff exercised ultimate control (Tr. 56-57).

K. The defendant was expected from time to time to take care of the plaintiff's personal animals (Tr. 51, 62-64).

For reasons not clear in the record, the relationship between the plaintiff and the defendant steadily deteriorated until the spring of 1973 at which time the parties openly discussed some final settlement of their obligations (Tr. 55-56, 29). Since the parties could not amicably agree on a settlement, the plaintiff filed an Undertaking in Replevin and the sheriff of Wasatch County took the cattle from the defendant by Writ of Replevin on June 19, 1973.

ARGUMENT

POINT I.

AS A MATTER OF LAW A COMMUNITY OF INTEREST OR JOINT RIGHT OF CONTROL IS NECESSARY TO CONSTITUTE A JOINT VENTURE.

The cases all uniformly support the proposition that a necessary element of a joint venture or partner-

ship is a community interest or joint right of control. The leading Utah case on this point is *Johanson Brothers Builders, et. al., vs. Board of Review, Industrial Commission, et. al.*, 118 Utah 384, 222 P.2d 563 (1950). In *Johanson* the Court quotes *Black's Law Dictionary* and defines the test for a joint venture (at 393) as follows: "Method of operation where there is a community of interest in the objects and purposes of the undertaking and an equal right to direct and govern the conduct of each other with respect thereto, and each enterpriser must have a right to be heard."

POINT II.

AS A MATTER OF LAW A MERE SHARING OF PROFITS IS NOT A SUFFICIENT COMMUNITY OF INTEREST OR JOINT RIGHT OF CONTROL TO CONSTITUTE A JOINT VENTURE.

This proposition becomes important because there is testimony that the plaintiff and the defendant did agree to "split" the profits. The plaintiff urged in the lower court that this sharing of profits was a sufficient community of interest to characterize the arrangement as a joint venture.

The leading Utah case on this issue is again *Johanson, supra.* In *Johanson* an ingenious building contractor determined that he could avoid such trivia as un-

employment contributions simply by declaring that his employees were not really employees after all but joint venturers, each earning not wages but a share of the profits. Even though the parties may have had an agreement to share profits the Court stated: "Tested by that definition [*Black's Law Dictionary, 3rd Edition*] there can be no question but that this was not a joint enterprise . . . the facts of this case show that most of the workers did not have any voice in the control of management of the venture; they merely performed their work as directed." (*Johanson* at 393)

In the more recent Utah Supreme Court case of *Vern Shutte & Sons vs. Broadbent*, 24 Utah 2d 415, 473 P.2d 885 (1940), the Court (at 418) citing *Realty Development Company vs. Feit*, 154 Colo. 44, 387 P.2d 898, 899 (1963), states, ". . . three requirements were essential for a joint adventure and that *none alone was sufficient*: (1) there must be a joint interest in the property by the parties sought to be held as partners; (2) there must be agreements, express or implied, to share in the profits or losses of the venture; and (3) there must be actions or conduct showing cooperation in the project . . ." [emphasis added].

The Court in *Shutte, supra* further cites (at 417) with approval the well reasoned case of *Hayes vs. Killinger*, 235 Or. 465, 385 P.2d 747 (1963), which states (at 753) "Joint control as well as an agreement to share the profits and losses is generally essential to a joint adventure or partnership."

POINT III.

NO EVIDENCE WAS INTRODUCED FROM WHICH THE FACT FINDER COULD CONCLUDE THAT A COMMUNITY OF INTEREST OR JOINT RIGHT OF CONTROL EXISTED BETWEEN THE PLAINTIFF AND THE DEFENDANT.

The plaintiff has the burden of proving each of the elements of the alleged partnership or joint venture, *Peterson vs. Massey*, 53 NW 2d 912 (1952) at 916. The plaintiff may of course prove those elements by reference to the agreement of the parties, or by reference to the objective conduct of the parties. *Hayes vs. Killinger, supra* (at 750).

Here there was clearly no express agreement which gave the defendant any community of interest or joint right of control in the business enterprise. The uncontradicted testimony of both parties is that their "agreement" was limited to three elements: The plaintiff was to put up the money, the defendant was to do the labor, and the profits were to be split. (Tr. 15, 28, 50). None of these three elements conveys or implies any community of interest or joint right of control.

Looking then beyond the "agreement" of the parties to their objective conduct, it becomes clear that the plaintiff treated the defendant merely as a hired hand. As described more fully in the Statement of Facts, the defendant had absolutely no say in the management or

control of the business enterprise. The defendant merely did as he was told.

Indeed, from an objective point of view the dignity of the defendant's role in the enterprise was perhaps best summed up by the plaintiff himself, ". . . we should have probably written something down, but we didn't any more than I do with people who irrigate for me." (Tr. 19).

Finally and conclusively it is clear from the plaintiff's own conduct that a community of interest and joint right of control did not exist between the plaintiff and defendant. The plaintiff after all replevied the cattle from the defendant. In the affidavit for Writ of Replevin the plaintiff states, ". . . plaintiff has good reason to believe and does believe that Walter Baker has said calves in his possession and under his control, which property belongs to the plaintiff."

The plaintiff has thus made a judicial admission under oath that the cattle and the business enterprise were his and his alone. Moreover, the plaintiff has already had his remedy at law by his Writ of Replevin.

The plaintiff cannot now, in the face of that prior admission and remedy, take the new and inconsistent position that the defendant did after all have some community of interest and joint right of control in the animals and in the business enterprise.

CONCLUSION

The defendant strenuously contends that the lower court erred in inferring that a community of interest or joint right of control existed between the plaintiff and the defendant. Further the lower court erred in concluding that a joint venture existed between the plaintiff and the defendant.

A necessary element of any joint venture is a community of interest or joint right of control. As this brief conclusively demonstrates, no such community of interest or joint right of control existed between the parties. It is therefore respectfully submitted that the lower court erred in its holding and this Court should therefore order the lower court to amend its findings accordingly.

Respectfully submitted,

Robert J. DeBry

Attorney for Defendant
and Appellant