

1988

Vernon E. Bush v. Commerce Properties Inc., and Richard C. Bennion : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS

OF THE STATE OF UTAH

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Plaintiff and Respondent

VS.

COMMERCE PROPERTIES, INC.,
a corporation, and RICHARD C.
BENNION,

Defendants and Appellants

and

PROCESS INSTRUMENTS & CONTROL,
INC., and JOHN A. HALL

Defendants and Respondents

Supreme Court

No. 880100

Court of Appeals

No. 880254-CA

District Court

No. C87-1224

146

Appeal from the Third Judicial District Court of Salt Lake County,
the Honorable Scott Daniels, Judge, Presiding

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SEP 29 1988

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APPELLANTS' REPLY BRIEF

DISPOSITIVE STATUTES AND RULES

48-1-3. "Partnership" defined. A partnership is an association of two or more persons to carry on as co-owners a business for profit.

But any association formed under any other statute of this state, or any statute adopted by authority other than the authority of this state, is not a partnership under this chapter, unless such association would have been a partnership in this state prior to the adoption of this chapter; but this chapter shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith.

48-1-3.1. Joint Venture defined--Application of chapter.

(1) A joint venture is an association of two or more persons to carry on as co-owners of a single business enterprise.

(2) This chapter governs the property and transfer rights of joint ventures.

48-1-15. Rules determining rights and duties of partners. The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:

(1) Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property, and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits.

"Rule 52. Findings by the Court.

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) **Amendment.** Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

Rule 69. Execution and proceedings supplemental thereto.

....

(h) Contribution and reimbursement; how enforced.

When upon an execution against several persons more than a pro rata part of the judgment is satisfied out of the proceeds of the sale of the property of one, or one of them pays, without a sale, more than his proportion, and the right of contribution exists, he may compel such contribution from the others; and where a judgment against several is upon an obligation of one or more as security for the others, and the surety has paid the amount or any part thereof, by sale of property or otherwise, he may require reimbursement from the principal. The person entitled to contribution or reimbursement shall, within one month after payment, or sale of his property in the event there is a sale, file in the court where the judgment was rendered a notice of such payment and his claim for contribution or reimbursement. Upon the filing of such notice the clerk must make an entry thereof in the margin of the docket which shall have the effect of a judgment against the other judgment debtors to the extent of their liability for contribution or reimbursement.

SUMMARY OF THE ARGUMENT

a. Appellants are not estopped from asserting objections to the trial court's conclusions of law.

b. Section 48-1-15, Utah Code Annotated (1953), as amended, governs joint ventures.

c. Appellants are entitled to contribution from a joint venture partner.

d. Defendants/Respondents' claim for attorney's fees is frivolous in view of the Supreme Court's previous denial of the same motion to dismiss.

ARGUMENT

POINT ONE

**APPELLANTS ARE NOT ESTOPPED FROM ASSERTING OBJECTIONS
TO THE TRIAL COURT'S CONCLUSION OF LAW**

Under Rule 52(b) of the Utah Rules of Civil Procedure, when findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the findings may thereafter be raised without the necessity of filing objections before the lower court. Rule 52(b) states:

(b) **Amendment.** Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial. (emphasis added).

Appellants are therefore not precluded from challenging the findings of fact or conclusions of law on appeal by failing to object to the findings fact in the form of a motion for a new trial or amendment of judgment; see *Dugan vs. Jones* 724 P.2d 955 (Utah 1986). Findings of fact will not be set aside unless they are clearly erroneous, but conclusions of law are simply reviewed for correctness without any special deference; see *Western Kane County Special Serv. Dist. No. 1 vs. Jackson Cattle Co.*, 744 P.2d 1276 (Utah 1987).

Contrary to the representations in Defendant/Respondent's brief, appellants are not challenging the findings of fact which established the 90/10 joint venture. Appellants are challenging the conclusions of law with respect to 50% liability for the Bush drawings, which conflict with the court's findings that appellants only had a 10% interest in the joint venture. As the conclusions of law are entitled to no special deference, they should be amended to comply with the findings.

Under Rule 52 of the Utah Rules of Civil Procedure, Appellants are therefore not estopped by filing a direct appeal challenging the conclusions of law on appeal.

POINT TWO

SECTION 48-1-15, UTAH CODE ANNOTATED (1953), AS AMENDED,
GOVERNS JOINT VENTURES

In the event appellants Commerce Properties, and Richard C. Bennion are held responsible for the Bush bill, they should only be held accountable to the extent of their 10% interest in the joint venture. Under Section 48-1-3, Utah Code Annotated, 1953, as amended, a partnership is defined as an association of two or more persons to carry on as co-owners of a business for profit. Section 48-1-3, Utah Code Annotated, 1953, as amended, states:

48-1-3. "Partnership" defined. A partnership is an association of two or more persons to carry on as co-owners a business for profit.

But any association formed under any other statute of this state, or any statute adopted by authority other than the authority of this state, is not a partnership under this chapter, unless such association would have been a partnership in this state prior to the adoption of this chapter; but this chapter shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith.

Respondents Hall and PIC argue that the provisions of the General Partnership Act, Sec. 48-1-1, et seq., Utah Code Annotated, 1953, as amended, do not apply, because the venture related to an isolated building transaction. Such an argument ignores the long-standing ruling promulgated in *Forbes vs. Butler* (1925) 66 U. 373, 242 P. 950, which held that a joint venture for profitable disposal of an option for sale of land is

in the nature of a partnership, and the law of partnership applies respecting the substantial rights of the parties, even through a joint venture is ordinarily, but not necessarily, limited to a single transaction. A similar ruling that joint ventures are subject to the partnership provisions was issued in *Nupetco Associates vs. Jenkins* (Utah 1983) 669 P.2d 877. These rulings were subsequently codified in Sec. 48-1-3.1(2), Utah Code Annotated, 1953, as amended, which specifically states that joint ventures are governed by the provisions of Title 48, Chapter 1 of the General Partnership Act:

48-1-3.1. Joint Venture defined--Application of chapter.

(1) A joint venture is an association of two or more persons to carry on as co-owners of a single business enterprise.

(2) This chapter governs the property and transfer rights of joint ventures. (emphasis added).

PIC and John Hall's liability for the Bush billing was therefore governed by the provisions of Section 48-1-15, U.C.A., 1953, as amended.

Section 48-1-15 states:

48-1-15. Rules determining rights and duties of partners. The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:

(1) Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property, and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits.

As the joint venture did not materialize to generate any revenue, all costs became net losses under the *Potts vs. Lux*, 166 P.2d 694, 161 Kan 217 (12946); and *Duthweiler vs. Hansen*, 28 P.2d 210 (Idaho 1933) cases

cited by respondents PIC/Hall. The record before the trial court indicated that Commerce Properties, Inc. was retained as project manager, and was to receive a 10% contingent commission out of the cost of the building if the PIC Building was constructed. Based on this evidence, the lower court entered findings establishing that appellants Commerce Properties and Richard C. Bennion only had a 10% contingent commission joint venture interest to be paid out of the cost of the building at financial closing as part of the building costs (Exhibit D-12, TR. 96-99). Exhibit D-12 is appended to the Bush Brief, and outlines appellant Commerce Properties' 10% contingent commission interest:

PIC BUILDING 8850 Southwood			
Land Size	178	119	21182
Building Size			
Office		3500	
Warehouse		2500	
Total		6000	
TOTAL PROJECT COST			
Land @	2.10		\$45,000.00
Building Shell @			\$178,500.00
Permits and fees			6,000.00
Loan Points	1.5%		2,800.00
Architectural	6.00%		\$15,000.00
Const Loan Points	1.00%		\$1,845.00
Const Interest	15.00%		\$27,675.00
Appraisal			\$1,000.00
Legal			\$1,000.00
Miscellaneous	.03		\$5,000.00
Lease Guarantee			\$0.00
<u>Commission & Fees</u>	<u>10.00%</u>		<u>\$23,500.00</u>
Construction prof	10.00%		\$17,850.00
TOTAL COST			\$325,170.00

Under the long-standing *Bentley vs. Rossard* (1908) 33 U. 396, 94 P. 736 ruling referred to in the annotations under Sec. 48-1-15, U.C.A., 1953, as amended, where the obligation to share losses is not directly expressed in the partnership agreement, an agreement to share profits amounts to a prima facie agreement to share losses also, where nothing is said about losses.

Since the parties had a written agreement establishing their 90/10 apportionment of the returns from the joint venture, the *Kimball vs. McCornick*, 259 P. 313 (Utah 1927) presumption of an equal sharing of the profits and losses referred to in the PIC/Hall brief has no application. Respondents PIC/Hall have ignored the record before the lower court and cite instead *Webster's New Collegiate Dictionary*, G.& C. Merriam Company, 1981, p. 255 & p. 912 to contort the principles of partnership in support of their position. In view of respondent PIC/Hall's failure to challenge the lower court's findings on appeal, the conclusions of law establishing appellants 50% liability for the Bush billings should be corrected to be consistent with the findings and the law that appellants, if liable for the Bush billing, are only liable to the extent of their 10% interest in the venture.

POINT THREE

APPELLANT COMMERCE PROPERTIES IS ENTITLED TO CONTRIBUTION FROM A JOINT VENTURE PARTNER.

If Commerce Properties, Inc. is held liable for the Bush billing, it is

grossly inequitable for appellants to be responsible for one half of the \$13,000.00 Bush bill. Commerce Properties was only to receive \$23,500.00 from the venture, and respondents PIC/Hall were to receive \$301,500.00 if the joint venture succeeded. Commerce Properties liability should therefore be limited to 10% of the \$13,000.00 bill, as outlined above. Commerce Properties is therefore entitled to contribution from respondents PIC/Hall under Rule 69(h) of the Utah Rules of Civil Procedure if the judgment regarding joint liability for the Bush bill is not set aside.

POINT FOUR

RESPONDENTS PIC/HALL'S CLAIM FOR ATTORNEY'S FEES IS FRIVOLOUS IN VIEW OF THE SUPREME COURT'S PREVIOUS DENIAL OF A SIMILAR MOTION TO DISMISS

As outlined in appellants first reply brief, Vernon E. Bush filed a Motion to Dismiss the Appeal on February 19, 1988 in this Court alleging that the matters on appeal were so insubstantial as to warrant review, a copy of the motion is appended as Exhibit "A" to appellant's first reply brief. This motion was denied on April 4, 1988 by the Utah Supreme Court.

Respondents PIC/Hall's similar claim for attorney's fees is therefore moot, and should summarily be denied.

CONCLUSION

As outlined in appellant's brief, the personal judgment against Richard C. Bennion should be set aside as there was no evidence that he acted in an individual capacity to be personally responsible for the Bush

architectural services. Nor was there any writing upon which Commerce Properties, Inc. can be held responsible for the customized PIC drawings, and engineering prepared for John A. Hall, and Process Instruments & Control, Inc. In the event liability for the architectural drawings and engineering services is imposed against appellants under the facts of this case, liability should be reduced and apportioned to reflect appellants' contingent 10% interest in the venture. Alternatively, appellants should be entitled to judgment against defendants and respondents Hall and PIC for 90% contribution of any amounts they are required to pay.

Dated this 28th day of September, 1988.


Marcus G. Theodore
Attorney for Appellants

CERTIFICATE OF MAILING

I certify that I mailed two true and correct copies of appellant's, Commerce Properties, Inc.'s and Richard C. Bennion's, Reply to PIC/Hall Brief to the following this 28th day of September, 1988:

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