

1988

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

Utah Court of Appeals

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John L. McCoy, Peter N. Ennenga; attorney for respondent.

Marcus G. Theodore; attorney for appellants.

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DRIFT

D.

COURT OF APPEALS

Peter N. Ennenga
Attorney for Third Party Defendant and
Respondent
1225 East Ft. Union Blvd. #200
Midvale, Utah 84117

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Vernon E. Bush	:	
Plaintiff and Respondent	:	
vs.	:	
COMMERCE PROPERTIES, INC. a	:	Supreme Court
corporation, and RICHARD C.	:	
BENNION,	:	No. 880100
Defendants and Appellants	:	
and	:	Court of Appeals
PROCESS INSTRUMENTS & CONTROL,	:	No. 880254-CA
INC., and JOHN A. HALL	:	District Court
Defendants and Respondents	:	No. C87-1224

disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review. All statements of fact and references to the proceedings below shall be supported by citations to the record (See Paragraph (3)).

"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.

"25-5-4. Certain agreements void unless written and subscribed. In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith

(1) Every agreement that by its terms is not to be performed within one year from the making thereof.

(2) Every promise to answer for the debt, default or miscarriage of another...."

SUMMARY OF THE ARGUMENT

- a. Appellants properly cited the record in support of their appeal.
- b. Vernon E. Bush failed in its burden of proof to establish on the record that Richard C. Bennion acted in his individual capacity and was personally liable for payment of the architectural drawings in question.

c. Vernon E. Bush mis-applied the facts with respect to the Statute of Frauds, 70A-2-202, and 25-5-4, U.C.A., 1953, as amended.

d. Plaintiff/Respondent's 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 PROPERLY CITED THE RECORD

WHICH SUPPORTS THEIR APPEAL

Under Rule 24(a)(7) of the Utah Rules of Civil Procedure, the brief of the appellant shall contain a statement of facts relevant to the issues presented for review which shall be supported by *citations to the record* (emphasis added). Rule 24(a)(7) states:

Rule 24. Briefs.

(a) **Brief of appellant.** The brief of the appellant shall contain under appropriate headings and in the order here indicated:

... (7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review. *All statements of fact and references to the proceedings below shall be supported by citations to the record* (See Paragraph (3)).

The record on appeal constitutes the original papers and exhibits filed in the court, the transcript of proceedings, and the index prepared by the clerk, according to Rule 11 of the Rules of the Utah Court of Appeals. The Findings of Fact and Conclusions of Law are therefore part of the Record,

and can be referenced by appellants to support their statement of facts in their brief. Rule 11 states:

Rule 11. The record on appeal.

(a) **Composition of record on appeal.** *The original papers and exhibits filed in the court from which the appeal is taken, the transcript of proceedings, if any, and the index prepared by the clerk of that court shall constitute the record on appeal in all cases.* However, with respect to papers and exhibits, only those prescribed under Paragraph (d) of this rule shall be transmitted to the Court of Appeals.

Appellants therefore properly cited the transcript as well as the record below by referring to the court's findings of fact to support their statement of facts in their brief with respect to the establishment of the joint venture. Where the evidence was disputed, the findings of fact are the only proper way to reference the record. Rule 52 of the Utah Rules of Civil Procedure States:

Rule 52. Findings by the court.

"(a) **Effect.** In all actions tried upon the facts without a jury.....

....., the court shall find the facts specially and state separately its conclusions of law thereon..... Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous.....

Contrary to the representations in Plaintiff/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 drawings, which conflict with the court's findings in this regard.

Appellants therefore properly cited the record in support of their

statement of facts in support of their appeal.

POINT TWO

PLAINTIFF/RESPONDENT BUSH DID NOT MEET HIS BURDEN OF PROOF

ESTABLISHING RICHARD C. BENNION'S PERSONAL LIABILITY

Vernon Bush had the burden of proof to establish at trial that Richard C. Bennion was personally liable for payment for his architectural drawings. No evidence was presented in this regard, hence appellants did not cite in their brief any pages in the record to support these findings. Nor has respondent counsel pointed out any statements or writings in the record where Richard C. Bennion specifically told defendant that he was ordering the drawings on his own behalf. The April and May 1985 invoices upon which counsel relies are appended to Vernon E. Bush's brief and show that Vernon E. Bush invoiced Commerce Properties, Inc. The appended February 1, 1987 Bush invoice shows Vernon E. Bush invoiced P.I.C., Inc.

The undisputed testimony showed that Vernon Bush prepared customized drawings for John Hall's use. There simply was no evidence presented at trial establishing Richard C. Bennion at any time was acting in an individual capacity, and therefore the personal judgment entered against him was in error. Respondent's counsel is attempting to shift Vernon Bush's burden of proof onto Richard C. Bennion in this regard. Commerce Properties, Inc. is a real estate brokerage firm incorporated and licensed to do business in the State of Utah. All the documentary evidence indicated that Commerce Properties, Inc. was retained as project

manager, and was to receive a 10% contingent commission if the PIC Building was constructed.

There was no oral evidence which established that Richard C. Bennion was the alter ego of Commerce Properties, Inc., or that he was acting in an individual capacity. The findings and judgment against Richard C. Bennion, individually, were therefore entered without any support on the record, and should be set aside as being clearly erroneous; under the *Harker vs. Condominiums Forest Glen, Inc.*, 740 P.2d 1361 (Utah Ct. App. 1987).

POINT THREE

VERNON E. BUSH MIS-APPLIED THE FACTS WITH RESPECT TO THE STATUTE OF FRAUDS, 70A-2-202, AND 25-5-4, U.C.A., 1953, AS AMENDED

Vernon E. Bush brought this action for compensation for the preparation of certain custom designed plans and specifications for the the PIC building. Appellants contend that a writing was needed to bind them for any obligations to pay for these drawings and written specifications under Sec. 70A-2-202, and 25-5-4, U.C.A., 1953, as amended. It is appellant's position that these drawings constitute "goods" within the definition of 70A-2-202, U.C.A., 1953, as amended, where Mr. Bush did not agree to supervise or guarantee the construction of the PIC building, but only agreed to deliver the plans and specifications for a fixed price of \$13,000.00. Vernon Bush provided a fixed price for the drawings:

A. I am not aware of anything that we haven't discussed. I told them that I would do the drawings, the working drawings for the \$13,000, and I fully expected to visit the project on--at pertinent times during construction, both to protect my liability and to assure compliance.

Q. So the total services for architectural on this project was \$13,000?

A. I told them that I would do the drawings for \$13,000.

Q. How much would you charge for the balance of the work?

A. About \$500.

Q. That's to include the liability of supervising the project engineer?

A. I would not supervise the project. That's not something I am willing to take liability on. That's the contractor's prerogative. But I would stop by, visit the project at pertinent times during the construction to verify that the requirement of the drawings and specifications were being met pertinent to structural and code requirements. (TR. 60)

The Utah Supreme Court has not addressed the definition of "goods" within the definition of 70A-2-201, U.C.A., 1953, as amended. Nor have the courts nationwide adopted any uniform definitions. Although "services" are generally excluded from coverage under the UCC §2-201, special situations arise in the application of UCC §2-201, because the distinction between what are and what are not goods is not always clear and precise. Indeed, where a hybrid contract that involves both the supplying of goods and the rendition of services is involved numerous problems arise as to whether a contract is required. The "predominant focus test" referred to in respondent's brief is only one of many tests applied. In *Colorado Carpet Installation, Inc. vs. Palermo* (Colo) 668 P.2d 1384, 36 UCCRS 1516m the court adopted the standard where the contract involves both the sale of carpet and the rendering of installation services, the classification according to its dominant element or primary purpose. The court then held that the contract was the sale of goods, inasmuch as the carpet was movable, the ratio of the cost of the carpet exceeded the

installation costs.

There is a split of authority as to whether construction contracts involving the design and construction of a facility constitutes a transaction in goods within the scope of UCC Article 2. In *Omaha Pollution Control Corp. vs. Carver-Greenfield Corp.* (1976, DC Neb) 413 F.Supp 1069 (applying Nebraska law), an action arising out of a contractor's agreement to design, construct, and deliver a sewage processing plant, the court stated that the case could best be resolved by treating it as a sale of goods under the UCC. The court noted that the buyer relied on the seller's expertise to recommend, design, and manufacture a product which would produce a marketable product from sewage.

In *Worrell vs. Barnes* (1971) 87 Nev. 204, 484 P.2d 573, 9 UCCRS 76, an action against a contractor for fire damage to a house allegedly caused by a defective gas fitting installed by the contractor as part of remodelling work, the court stated that the case involved goods within the purview of UCC §2-105.

Space Leasing Associates vs. Atlantic Bldg. Systems, Inc. (1977) 144 Ga App. 320, 241 SE2d 438, 23 UCCRS 642, was an action arising out of a subcontract involving a portion of the construction of a warehouse and office complex for damages allegedly caused by a defective roof. Noting that the contract was entitled "Contract for Sale and Erection of Disisteel building(s)", the court, citing UCC §§2-102 and 2-105(1), stated that whether the UCC Article 2 statute of limitations was applicable presented a question of fact as to whether the subject of the transaction was

movable.

It is Appellant's position that where Vernon Bush was only retained to provide custom designed architectural drawings and written bid specifications for the PIC building, these drawings and specifications constitute "goods" within the definition of Sec. 70A-2-201, U.C.A., 1953, as amended. This is particularly the case where Vernon E. Bush's drawings cost \$13,000.00, and his supervisory services were only to cost \$500.00. The drawings and specifications were separate and distinct and readily movable as evidenced by John Hall's delivery of them for altering by another contractor, Vernon Felt (T.R. 118).

Q. In your deposition you indicated you paid Mr. Felt approximately \$500 for design changes--

A. That's correct.

Q. --is that correct?

A. That is correct.

Under Sec. 70A-2-201, U.C.A., 1953, as amended, except as otherwise provided in this section, a contract for the sale of goods for the price of \$500.00 or more (the \$13,000.00 Bush drawings and specifications for the PIC Building) is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.

Nothing in the Earnest Money Agreement appended to the Bush brief as Exhibit A shows that Commerce Properties, Inc. agreed to purchase these

plans and specifications from Vernon E. Bush. Nor does the building cost breakdown, Exhibit D-12 appended to the Bush brief, establish that Commerce Properties, Inc. agreed to pay for architectural services. Exhibit D-12 was the cost breakdown included in John Hall's financing package, wherein he applied to the SBA for funding to build the building and pay for the Vernon E. Bush's drawings.

Sec. 70A-2-201, U.C.A., 1953, as amended, was enacted to avoid the type of problems created by Vernon E. Bush's failure to enter into a written contract before he started the drawings. Respondents Hall and PIC for whom the plans and specifications were prepared have admitted liability, and have not cross-appealed. Third parties should not be held liable by implication, where there was no evidence presented that Commerce Properties, Inc. specifically agreed to pay Vernon E. Bush for the plans and specifications.

Liability for payment of the plans and specifications, must lie under the exceptions outlined in Sec. 70A-2-201(3): (a) production of custom designed goods for the benefit of the party to be bound, (b) admissions in the pleadings or on the record that a contract for sale was made, and (c) receipt and acceptance of the goods by the party to be bound. As outlined in appellant's brief, none of these exceptions apply.

Nor was there any writing where Commerce Properties, Inc. agreed to answer to the Bush debt incurred by Process Instruments & Control, Inc. as required under Sec. 25-5-4(2), U.C.A., 1953, as amended.

Recovery against Process Instruments & Control, Inc. can therefore

only be had under a quantum meruit or theory of unjust enrichment; see *Baugh vs. Darly* (1947) 112 U. 1, 184 P.2d 335. As Commerce Properties, Inc. received no benefit from these custom designed plans prepared for Process Instruments & Control, Inc. and used for their building loan application, Process Instruments & Control, Inc. should pay for the drawings; especially where it arbitrarily elected to drop the loan application after the same was approved. Process Instruments & Control has not cross-appealed, and has accepted liability in this case. Therefore, John Bush should proceed against them for any relief.

In summary, the judgment entered against Commerce Properties, Inc. violated the provisions of Sec. 70A-2-201, and 25-5-4(2), U.C.A., 1953, as amended.

POINT FOUR

VERNON E. BUSH'S CLAIM FOR ATTORNEY'S FEES IS FRIVOLOUS

IN VIEW OF THE SUPREME COURT'S PREVIOUS DENIAL OF

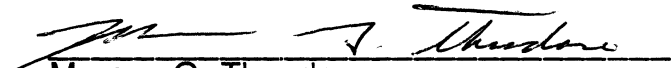
THE SAME MOTION TO DISMISS

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". This motion was denied on April 4, 1988 by the Utah Supreme Court, a copy of the denial is attached as Exhibit "B". Vernon E. Bush's 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% reimbursement of any amounts they are required to pay.

Dated this 20th 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 Brief to the following this 20th day of September, 1988:

John L. McCoy
310 South Main Street
Salt Lake City, Utah 804101

Peter N. Ennenga
1225 East Ft. Union Blvd. #200
Midvale, Utah 84117

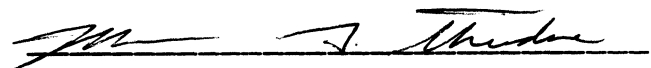


EXHIBIT "A"

JOHN L. MccOY (2164)
Attorney for Plaintiff
310 S. Main Street #1309
Salt Lake City, Utah 84101
Telephone: 355-6400

IN THE UTAH COURT OF APPEALS IN AND FOR THE

STATE OF UTAH

VERNON E. BUSH,)	
Plaintiff,)	MOTION TO DISMISS APPEAL
vs.)	
)	
COMMERCE PROPERTIES, INC., a)	Case No. CA-88-0093
corporation, RICHARD C. BENNION,)	
PROCESS INSTRUMENTS & CONTROL,)	
INC., and JOHN A. HALL,)	
Defendants.)	

The plaintiff-respondent, Vernon E. Bush, hereby moves this Court for an Order dismissing the Appeal filed herein on the following grounds and reasons:

1. The decision appealed from, a copy of which is attached hereto as Exhibit A, is a civil District Court decision, and no appeal from such a decision is provided to this Court in §78-2a-3(2), a copy of which is also attached hereto.

2. No Cost Bond was filed at the time of filing the Notice of Appeal as required by Rule 6, R. Ut. Ct. App.

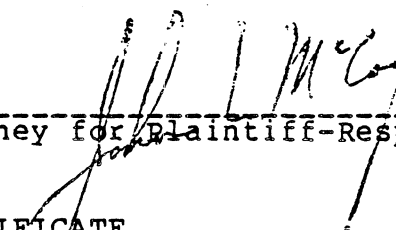
3. No request for a transcript has been filed within ten (10) days from the filing of the Notice of Appeal as required by Rule 11, R. Ut. Ct. App.

4. No Docketing Statement has been filed within 21 days of the filing of the Notice of Appeal as required by Rule 9,

R. Ut. Ct. App.

5. As to the judgment granted against the appealing defendant in favor of the plaintiff, all of the evidence at trial indisputably showed that the defendant, Richard C. Bennion, requested the plaintiff to perform architectural services, the plaintiff did perform architectural services upon a project from which said defendant would benefit, the appellant was billed without protest for said services and used the work product produced by said defendant to bid said building project thus the grounds for review are so insubstantial as to not merit further consideration by this Court.

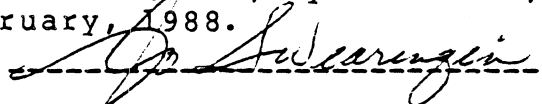
DATED this 19th day of February, 1988.



Attorney for Plaintiff-Respondent

MAILING CERTIFICATE

I hereby certify that I mailed a copy of the Motion to Dismiss Appeal to Peter Ennenga, attorney for PIC and John Hall, 1225 E. Ft. Union Blvd. #200, Midvale, Utah 84117, and to Marcus Theodore, attorney for defendants-Bennion and Commerce, 275 E. South Temple #303, Salt Lake City, Utah 84111, by U.S. Mail, postage prepaid, this 19th day of February, 1988.



J. L. McGee

SUPREME COURT OF UTAH

EXHIBIT "B"

STATE OF UTAH

SALT LAKE CITY, UTAH

April 4, 1988

OFFICE OF THE CLERK

Marcus G. Theodore
Attorney at Law
275 East South Temple, Suite 303
Salt Lake City, Utah 84111

Respondent's Motion to
Dismiss Appeal

Vernon E. Bush,
Plaintiff and Respondent,

v.

No. 880100

Commerce Properties, Inc., a
corporation, Richard C. Bennion,
Process Instruments & Control, Inc.,
and John A. Hall,
Defendants and Appellants.

THIS DAY, Respondent's Motion to Dismiss Appeal is denied.

Geoffrey J. Butler, Clerk