1949

Andy Vercimak v. Adam Ostoich : Brief of Respondent

Utah Supreme Court

Wendell C. Day; Attorney for Plaintiff and Respondent;

7295

IN THE
SUPREME COURT
OF THE
STATE OF UTAH

ANDY VERCIMAK,
Plaintiff and Respondent,

vs.

ADAM OSTOICH,
Defendant and Appellant,

Case No.
7295

RESPONDENT'S BRIEF

WENDELL C. DAY
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and Respondent

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STATEMENT OF FACTS

Appellant's statement of facts is neither fully accurate nor complete in the following particulars:

Defendant, at page 2 of his brief, quotes the amended complaint that defendant refused to adjust and settle all differences and claims of the plaintiff, except that defendant paid to the plaintiff, plaintiff's share of the profits earned from said business to and including the 12th day of February, 1948, in the sum of $318.79, whereas the allegation is "that

defendant has refused to adjust and settle all differences and claims of the plaintiff except that defendant paid to the plaintiff the plaintiff's share of the profits earned to and including the 12th day of February, 1948, and in addition thereto, the sum of $318.79 as a partial settlement of plaintiff's claims (Tr. p. 9).

There is no evidence to support defendant's allegation (Appellant's brief p. 3) that plaintiff violated any conditions of the oral agreement and failed to devote his time and energy to the business. Endeavoring to show misconduct by plaintiff, defendant by his own testimony and the testimony of his wife endeavored to convince the trial court that plaintiff had been drinking on the job and despite complete failure to do so is nevertheless still referring to it and makes at least two references to plaintiff's drinking in defendant's statement of facts (Appellant's brief pp. 6-7). An examination of defendant's and defendant's wife's testimony and the testimony of other witnesses clearly reveals the falsity of defendant's contention that plaintiff had been drinking on the job. Both plaintiff and Dancel Vercimak, his wife, testified plaintiff did not drink on the job (Tr. pp. 118, 119, 113) and both testified plaintiff did not so much as have a State of Utah liquor permit (Tr. pp. 75, 76, 113, 120). Plaintiff also testified that he and the defendant had never discussed his drinking on

the job (Tr. p. 75). Defendant was unable to produce a single independent witness to testify that plaintiff drank whiskey. Since defendant apparently relies so much upon the point, one wonders why he did not produce witnesses other than himself and his wife to testify regarding his claim of plaintiff's drinking. On cross examination plaintiff was asked by defendant's attorney if he had ever taken a drink with Mr. Fairbanks, who was one of defendant's witnesses (Tr. p. 120), to which plaintiff answered, "No, sir". Defendant's witness, Mr. Fairbanks, on direct examination, denied ever having drunk even so much as a glass of beer with the plaintiff (Tr. p. 165), and on cross examination further stated that from his observations the plaintiff conducted himself properly and that he wouldn't say more than he had seen plaintiff take a drink of beer a couple of times (Tr. p. 166). Josephine Bowen, who frequented the Horseshoe Inn, testified she had never seen the plaintiff take a drink and that she had never seen him drunk (Tr. p. 122). Her testimony was not that she was in the Horseshoe Inn *occasionally* as stated in defendant's statement of facts (Appellant's brief p. 7), but that she was in the place "almost every night" (Tr. p. 124).

Defendant states that "plaintiff also suggested going into the grocery business but defendant told him he would not be interested in that" (Appellant's

brief p. 4). The fact is that defendant suggested a grocery business and that plaintiff told defendant he wouldn't be interested (Tr. p. 65).

Defendant testified the Horseshoe Inn opened for business December 14, 1947, (Tr. p. 99), and plaintiff alleged in paragraph 4 of his amended complaint that the business opened to the public December 13, 1947, (Tr. p. 8), and in this connection compare appellant's brief, page 5.

With reference to defendant's claims that he thought full settlement had been effected (Appellant's brief p. 6) defendant admitted on cross examination that he knew plaintiff claimed more than his share of the profits and inventory (Tr. p. 107). Also defendant's tendering two receipts, one for share of receipts, defendant's Exhibit 2, and the other for share of stock, defendant's Exhibit 1, and the circumstances under which they were given clearly indicated a final settlement was not intended in connection therewith by either defendant or plaintiff (Tr. pp. 106-107).

Defendant refers to plaintiff's contention that the business made profits of $750.00 per month and that plaintiff admitted on cross examination the profit for December was only $380.00 (Appellant's brief p. 7). Of course, the business opened December 13, 1947, (Tr. p. 8, 99) and the profit for December was, therefore, for only one-half month's operations.

At the time of the negotiations for entering into the partnership, the plaintiff was gainfully employed in Rock Springs, Wyoming (Tr. pp. 64, 73, 74, 138) and the plaintiff was not disposed to enter into business with the defendant without some assurance of a reasonable duration (Tr. p. 64). The defendant requested the plaintiff to enter into the partnership (Tr. p. 64) and to do so the plaintiff necessarily had to leave his gainful employment in Wyoming and establish his residence in Murray, Utah. The defendant was plaintiff's uncle and naturally plaintiff placed confidence and trust in him which accounts for plaintiff not insisting on a written agreement in the first instance. Plaintiff's leaving his employment and expense of moving in order to enter into the partnership, together with plaintiff's initial contribution in labor in preparing the premises (Tr. pp. 136-137) at least offset defendant's claimed $2400.00 investment (Tr. p. 201). Also plaintiff's payment to defendant of $100.00 per month (Tr. pp. 60, 61, 81) during the term would have in two years fully reimbursed defendant for his investment, and of which the plaintiff paid for two months totaling $200.00. The plaintiff loaned to defendant $250.00 or $300.00 initial operating expenses (Tr. pp. 8, 101). The beer license was taken out in plaintiff's name (Tr. p. 98). The contributions to the partnership were not, therefore, one-sided in favor of the defendant.

There was considerable competent testimony as to the value of the business. Plaintiff, Josephine Bowen, defendant's witness John B. Fairbanks, Samuel L. Tedesco, Reed Van Quill and defendant's witness Harold Leonard all gave testimony relating to the value of the business.

Defendant makes much over the fact that plaintiff did not have a lease which, of course, is immaterial since the defendant was a partner with the plaintiff and owned the premises and continued to operate and to profit after February 12, 1948, from the value of the business established by the joint efforts of the partners.

ARGUMENT

1. THE AMENDED COMPLAINT STATES A CAUSE OF ACTION.

In his amended complaint, plaintiff in ordinary and concise language alleges that the partners had created a business reasonable worth $15,000.00, of which the defendant should be required to pay him one-half thereof, and alleging that the defendant continued to operate the business and that the defendant "has unjustly benefited and accrued to himself and is using for his own purposes the said business of the parties of the reasonable value of $15,-

000.00" (Tr. p. 9). It is clear from a reading of the complaint that all plaintiff claimed was settlement for his share of the value of the going business developed from the joint efforts of the parties.

Section 104-7-2 (2) Utah Code Annotated 1943, provides:

> "The complaint must contain: (2) A statement of the facts constituting a cause of action in ordinary and concise language."

Graham v. Street, 109 Utah 460; 166 Pac. (2d) 524 at page 526:

> "It is not necessary to designate the type of action."

Campbell v. Taylor, 3 Utah 325; 3 Pac. 445:

> "A complaint need allege no more than will constitute prima facie a cause of action or defense."

Geros v. Harries, 65 Utah 227; 236 Pac. 220; 39 A.L.R. 1297:

> "In determining sufficiency of allegations of complaint, one must not have recourse to only certain parts of complaint, but must determine effect that should be given to complaint when considered as a whole."

The partnership business as such having a value which was not divided between the partners, the plaintiff is entitled to his proportionate share in cash. (See Section 69-1-35 (1) Utah Code Annotated 1943.)

2. THE EVIDENCE SUSTAINS FINDING THAT THE PARTNERSHIP AGREEMENT WAS BREACHED BY THE DEFENDANT.

Appellant in his brief throughout makes constant reference to the proposed written partnership agreement which the plaintiff had his attorney prepare and present to the defendant for signing but which the defendant would not sign, discuss or make any recommendations (Tr. p. 78). Why didn't the defendant sign the agreement? Was it because it did not provide for a term of 5 years? It is apparent that defendant did not, after the business had commenced operations and its value was apparent, intend to sign any written agreement of partnership. It is fair to say that the defendant thought he saw an opportunity to take the value of the business for himself without having to share with the plaintiff and refused to enter into a written agreement (Tr. p. 67), or to continue in partnership with plaintiff (Tr. pp. 71-72).

Even though no definite time for the partnership term was agreed upon, a reasonable time should be implied and what would constitute a reasonable time would depend upon all the circumstances of the particular case. In this connection and as before discussed in plaintiff's and appellant's statement of facts herein, plaintiff was induced by defendant in order

to enter the partnership to leave gainful employment in Wyoming, contribute at least five weeks labor in preparing the premises before opening to the public, to bear the expense of moving from Wyoming to Utah, and the beer license was secured in the plaintiff's name. Certainly these circumstances would not imply a two months operation period for the partnership term, nor justify defendant's refusal to continue the partnership or to permit plaintiff on the premises for the purpose of operating the partnership at the end of two months operations, that is, on February 12, 1948, and the defendant, therefore, in refusing under the circumstances to go on with the partnership, breached the partnership agreement as alleged in plaintiff's complaint.

For the purpose of argument and illustration, assume that there had been no breach of partnership agreement by the defendant and that the partnership had continued to function and operate for the extended term of say five years and that at the end of five years the value of the then going business was reasonably worth $10,000.00. Would the defendant have been entitled to keep the value of the business and to continue operating the same without compensating plaintiff for his share as a partner thereof?

3. THERE WAS NOT A COMPLETE SETTLEMENT AND SATISFACTION BETWEEN THE PARTIES.

Defendant well knew the plaintiff claimed more than plaintiff's share of inventory and profits to February 12, 1948, as plaintiff's share of the business and on cross examination admitted as much (Tr. p. 107). Plaintiff's case is based on his position there was not a complete settlement and he so testified.

Obviously the fact that defendant issued two receipts rather than one (Tr. pp. 106-107) indicates that defendant was not intending a full settlement by either receipt, otherwise he would have issued but one receipt.

4. THERE IS COMPETENT EVIDENCE AS TO THE VALUE OF AND GOOD WILL OF THE BUSINESS.

The defendant advised the plaintiff that the business was worth $10,000.00 more than when opened (Tr. p. 67). Plaintiff testified as to the net profits the business was realizing and which averaged over the two months operations, December 13, 1947, to February 12, 1948, in excess of $750.00 per month (Tr. p. 147). The plaintiff had also worked for five weeks from eight to twelve hours per day putting the premises in condition prior to opening business (Tr. p. 137).

Josephine Bowen testified that she had been in the Horseshoe Inn almost every night during the

period of the partnership (Tr. p. 124), that there were about twenty-five stools in the establishment and the place was full (Tr. p. 124) and that customers were coming and going (Tr. p. 127). She was familiar with the operations of beer taverns since she worked for her uncle, Jack's Place, located a few doors to the south of Horseshoe Inn (Tr. pp. 121, 125).

Mary Sawaya, who owned and operated Sawaya Inn, considered a draft beer license valuable (Tr. p. 156). The draft beer license was applied for and issued in plaintiff's name (Tr. p. 98).

John B. Fairbanks, defendant's witness, testified the customers were heavy in the Horseshoe Inn on New Year's Eve (Tr. p. 164).

Reed Van Quill, bar tender by occupation, testified he had been in the Horseshoe Inn between December 12, 1947, and February 12, 1948, had observed the business and that the place was busy (Tr. p. 167). He further testified that beginning June 5, 1948, to September 4, 1948, he was employed in the Horseshoe Inn as bar tender for the defendant and that it was his observation that the business was about the same during his employment as between December 12, 1947, and February 12, 1948 (Tr. pp. 169-172), and that he was paid wages and commissions totaling $100.00 per week by the defendant.

His wages were but $10.00 per shift and his commissions made up the balance (Tr. p. 170), which reflects that the volume of business was considerable. It was no wonder that the defendant wanted to dissolve partnership and keep all the profits himself considering the business could afford to pay the bar tender $100.00 per week. Mr. Van Quill further testified the gross receipts were $75.00 per day (Tr. p. 174) and that the net profit was about $350.00 per week (Tr. p. 175) and throughout his testimony went into detail as to the source of the business receipts. Among other items sold, he testified that an average of two kegs of beer were sold per day and that Mr. Ostoich, defendant, had shown him set up for that quantity (Tr. p. 180).

Samuel L. Tedesco, real estate salesman for Brockbank Realty and at one time manager of four beer parlors, testified the value of the going business was in his opinion in the sum of $6500.00 (Tr. p. 188).

Harold Leonard, defendant's expert on values, testified after laying a foundation for his opinion that the value of the good will of the business alone was in the sum of $1,000.00 (Tr. p. 206).

As before mentioned, there is no advantage to defendant in his contention that plaintiff did not own a lease, since defendant owned the premises and

there is no dispute but that the defendant continued to operate the identical business at the same location and under the name of Horseshoe Inn after February 12, 1948, and presumably is still doing so and profiting from plaintiff's undistributed interest therein.

5. THE COURT'S FINDING NUMBER 4 IS DEFINITE AND CERTAIN AND SUPPORTED BY THE EVIDENCE.

The trial court was entitled to take into consideration all of the testimony on value of the business and good will, which testimony has been heretofore reviewed in finding what the value was and in this connection, there was substantial evidence on value as appears from the testimony of the witnesses heretofore summarized. All that is required to sustain the court's finding is that it be sustained by substantial evidence. *Dee v. San Pedro* L.A. & S.L.R. Co., 50 Utah 77; 167 Pac. 246, at page 252. It is true that not one witness testified that the value of the business as such, exclusive of furniture and fixtures, etc., was in the exact sum of $1600.00, but some testified the value was more than that sum and defendant's own expert, Harold Leonard, testified it was in the sum of $1000.00.

CONCLUSION

The judgment appealed from should be affirmed.

Respectfully submitted,

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and Respondent