

1978

Donald J. Richardson et al v. Arizona Fuels Corp. et al : Brief of Appellants in Support of Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

DONALD J. RICHARDSON, GROVE L.)
COOK and WAYNE WEAVER, indivi-)
dually and for and on behalf of)
all similarly situated share-)
holders of Major Oil Corporation,)

Plaintiffs and)
Respondents,)

vs.)

ARIZONA FUELS CORPORATION, a)
Utah corporation, EUGENE DALTON,)
an individual, DEANNA J. DALTON,)
an individual, and MAJOR OIL)
CORPORATION, a Utah corporation,)

No. 15691

Defendants and)
Appellants.)

BRIEF OF APPELLANTS IN SUPPORT OF
PETITION FOR REHEARING

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BRIEF OF APPELLANTS IN SUPPORT OF
PETITION FOR REHEARING

STATEMENT OF THE NATURE
OF THE CASE

This is a Class Action brought on behalf of the shareholders of Major Oil Corporation seeking the appointment of a receiver for Major Oil Corporation, as well as the recovery of funds allegedly diverted from Major Oil Corporation by its management and "controlling" shareholders.

DECISION OF THIS COURT

On May 1, 1980, this Court reversed the District Court's Order certifying this action as a Class Action

pursuant to 23(c)(1) of the Utah Rules of Civil Procedure. This Court affirmed the District Court's Order appointing a receiver for Major Oil Corporation.

RELIEF SOUGHT ON PETITION

Defendant-Appellant Major Oil Corporation (herein "Major") respectfully requests this Court to reconsider its earlier position and to hold as a matter of law that there was an insufficient and inadequate record before the Trial Court to support the appointment of a receiver.

STATEMENT OF FACTS

At the time of the hearing on Plaintiff's Motion to Appoint Receiver and Motion for Certification of Class, the only allegations of fact before the Trial Court were contained in Plaintiffs' Verified Complaint (R-2). There were no affidavits of record, no evidence was there presented and Defendants had yet to answer Plaintiffs' Complaint as a Motion to Dismiss was pending. At that time, Plaintiffs' Twelfth Cause of Action was the only cause which sought the appointment of a receiver. The only operative allegation of fact regarding the appointment of a receiver was made on information and belief, to wit:

46. That plaintiffs allege on information and belief that the conduct of the defendants has caused Major Oil to become insolvent or in imminent danger of insolvency.

On October 13, 1977, a hearing was held on Plaintiff's

Motion to Appoint Receiver (R-14). At the conclusion of the hearing, the Trial Court allowed Plaintiffs ten (10) days to amend their Complaint to join Major as a Party-Defendant (R-31). The Amended Complaint was filed eliminating the "information and belief" language of Paragraph 46, but leaving the paragraph otherwise intact (Paragraph 48 of the Amended Complaint). On January 24, 1978, the Trial Court entered its Order Appointing Receiver and Allowance of Class Action whereby a receiver was appointed for Major.

ARGUMENT

THE APPOINTMENT OF A RECEIVER FOR MAJOR IS NOT SUPPORTED BY THE RECORD.

In affirming the Trial Court's appointment of a receiver for Major, this Court stated:

Defendants attack the appointment on the ground that it is not justified by allegations on information and belief, even though these allegations were stated in a Verified Complaint. The Amended Complaint contained numerous allegations based on information and belief of fraudulent and otherwise wrongful conduct on the part of Defendants. The allegations specify suspect transactions and state details of alleged fraud. The allegations requesting appointment of a receiver, however, are made without any qualifications as to information and belief, and these allegations are not controverted by Defendants, either by pleading or affidavit. [Emphasis added.] No. 15691, Filed May 1, 1980, at p.2.

In reaching its conclusion that the allegations in the Amended Complaint are not controverted, this Court failed to consider whether the allegations were sufficient

as a matter of law to support the appointment of a receiver. The sole allegation which could support the appointment of a receiver is contained in Paragraph 48 of the Amended Complaint, to wit:

48. That plaintiffs allege that the conduct of defendants has caused Major Oil to become insolvent or in imminent danger of insolvency.

This bare, conclusory allegation does not satisfy the minimum evidentiary standards necessary for the appointment of a receiver.

It is a fundamental principle that an affidavit supporting a motion must set forth such facts as would be admissible in evidence. An affidavit merely reflecting the unsubstantiated conclusions and opinions of the affiant is insufficient as a matter of law to support the requested relief. Walker v. Rocky Mountain Recreation Corporation, 29 Utah 2d 274, 508 P.2d 538, 542 (1973); People v. Thompson, 5 Cal. App 2d 655, 43 P.2d 600 (1935).

The Amended Complaint clearly does not set forth such facts as would be admissible in evidence. There is no foundation laid for the Affiant Wayne Weaver's opinion that Major is "insolvent". There is no showing that Mr. Weaver possessed knowledge of the financial affairs of Major. There is nothing of record demonstrating that Major's current liabilities exceeded its assets. The declaration of "insolvency" is an unsubstantiated opinion which may not

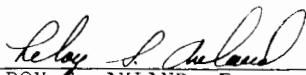
properly be set forth in an affidavit. See, Western States Thrift and Loan v. Blomquist, 29 Utah 2d 58, 504 P.2d 1019 (1972) (opinion testimony).

The only possible foundation for Mr. Weaver's opinions and conclusions consists of allegations of fraud and misconduct found elsewhere in the Amended Complaint. These allegations are uniformly made upon "information and belief" and must be disregarded. Walker v. Rocky Mountain Recreation Corporation, supra. The appointment of a receiver cannot be founded upon allegations made on information and belief. See, Appellants' Brief, Argument II.A., II.B. and II.C.

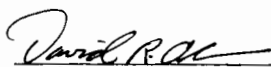
CONCLUSION

When stripped of allegations made on information and belief, the Amended Complaint consists solely of the unsubstantiated opinions and conclusions of the Plaintiff-Respondent Wayne Weaver. An application for the appointment of a receiver for a corporation must allege facts, rather than opinions and conclusions. The prerogatives of management were removed from the duly elected officers of Major based upon the barest of conclusory allegations. Major respectfully submits that its Petition for Rehearing should be granted and that the Trial Court's decision appointing a receiver should be reversed.

RESPECTFULLY SUBMITTED this 20th day of May, 1980.



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CERTIFICATE OF SERVICE

This is to certify that two true and correct copies, of the foregoing Brief in Support of Petition for Rehearing were mailed, postage prepaid, to Paul N. Cotro-Manes, Esq., 430 Judge Building, Salt Lake City, Utah 84111, and Parker M. Nielson, Esq., 320 Kearns Building, Salt Lake City, Utah 84101, this 20th day of May, 1980.

