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Luther H. Thomas v. Glen Peterson : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

LUTHER H. THOMAS,

Plaintiff-Respondent,

vs.

GLEN PETERSON,

Defendant-Appellant.

Case No. ¹⁴⁰³⁴~~13547~~

APPELLANT'S BRIEF

APPEAL FROM THE JUDGMENT OF THE SEVENTH
DISTRICT COURT FOR EMERY COUNTY
THE HONORABLE EDWARD SHEYA, JUSTICE

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FILED
JUN 11 1975

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT
OF THE STATE OF UTAH

LUTHER H. THOMAS,

Plaintiff-Respondent)

vs.

CASE NO. 13547

GLEN PETERSON,

Defendant-Appellant.)

APPELLANT'S BRIEF

STATEMENT OF KIND OF CASE

This is an action to determine the rights of the appellant Glen Peterson and Joes Valley, Inc., to the possession of, or any interest in, the property that has formerly been associated with Joes Valley, Inc., and to quiet title to such property.

DISPOSITION IN LOWER COURT

A judgment was entered against the defendants, Joes Valley, Inc., and Glen Peterson, which stated that the plaintiff, Luther H. Thomas was the owner and entitled to possession of property known as Joes Valley Marina including the special use

permit of the United States Department of Agriculture dated September 18, 1967, and that the defendants, Joes Valley, Inc., Glen Peterson, and Omega Silver Corporation and all who claimed title under any of them to any such property had no right, title, interest, claim nor estate whatever in or upon such property, and all defendants or persons claiming through them were enjoined and debarred from claiming any interest in such property. Defendant's Motion for a New Trial was denied on January 31, 1975.

RELIEF SOUGHT ON APPEAL

Defendant Peterson seeks an order dismissing the plaintiff's Complaint and quieting title to property referred to, or formerly associated with Joes Valley Marina and the special use permit of the United States Department of Agriculture, in defendant Joes Valley Marina, Inc. Defendant Peterson further seeks an order establishing the validity of his lease to said property under a lease between defendant Peterson and defendant Joes Valley, Inc.

STATEMENT OF FACTS

The facts of the case are partially in dispute. The plaintiff formerly owned all of the assets of Joes Valley Marina and the special use permit of the United States Department of Agriculture as an individual (R. 6). The plaintiff then formed a corporation known by the name of Joes Valley Marine, Inc., which possessed the former assets of Joes Valley Marina and the special use permit (R. 11-17). New stockholders were taken into Joes Valley Marina, Inc., hereinafter referred to as Marina, Inc., and the capitalization of Marina, Inc., was increased.

The articles of incorporation of Marina, Inc., were then revised which changed the name of Joes Valley Marina, Inc., to Joes Valley, Inc., hereinafter Joes Valley, Inc., will be referred to as Valley, Inc., (R. 18-20).

The defendant Joes Valley, Inc., took possession of the referred to property and operated it until the Spring of 1973 at which time Valley, Inc., purported to sell all of its assets to the defendant Omega Silver Corporation (R. 20-27). The sale to Omega Silver Corporation has since disclaimed any interest in the agreement or the property of Valley, Inc., (R. 3).

On or about July 4, 1973, the defendant Valley, Inc., made and executed a written lease with the option to buy the property formerly known as Joes Valley Marina and which included the special use permit, in favor of the defendant Glen Peterson. It should be noted that defendant Glen Peterson had previously negotiated with Valley, Inc., on behalf of Omega Silver Corporation, and the lease between Valley, Inc., and defendant Glen Peterson was entered into after Omega Silver Corporation lost interest in the property acquisition (R. 147).

The dispute in the facts arises between the plaintiff and defendant Glen Peterson because the plaintiff contends that the property in Marina, Inc., was transferred by a sales agreement (Ex. 2) dated April 19, 1972, to Valley, Inc., (R. 10). The defendant contends that said property was transferred from Marina, Inc., to Valley, Inc., by the revised articles of incorporation and not by the sales agreement (Ex. 2).

This sales agreement (Ex. 2) between the plaintiff and defendant Joes Valley, Inc., was in default, and therefore, the plaintiff sought to reclaim the property in accordance with said sales agreement (Ex. 2). Therefore, the plaintiff contends that the defendant Glen Peterson has no leasehold estate since Valley, Inc.,

does not have any property to lease. The defendant Glen Peterson, on the other hand, claims that the sales agreement (Ex. 2) is inoperative as is set forth in defendant Glen Peterson's Argument on appeal.

ARGUMENT

POINT I.

PLAINTIFF'S SALES CONTRACT IS VOID AND OF NO EFFECT BECAUSE THE CONTRACT WAS ENTERED INTO WITHOUT THE AUTHORITY OF THE BOARD OF DIRECTORS OF JOES VALLEY, INC.

According to the Business Corporation Act, § 16-10-33, Utah Code Annotated (1953), "The business affairs of a corporation shall be managed by the board of directors." And according to § 16-10-38, Utah Code Annotated (1953):

A majority of the number of directors fixed by the bylaws, . . . shall constitute a quorum for the transaction of business unless a greater number is required by the articles of incorporation or the bylaws. The act of a majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors, unless the act of a greater number is required by the articles of incorporation or the bylaws.

And the defense of Ultra Vires, § 16-10-6 (a), Utah Code Annotated (1953) gives the authority to set aside unauthorized acts and states that:

If the unauthorized acts or transfer sought to be enjoined are being, or are to be performed or made pursuant to any contract to which the corporation is a party, the court may, if all of the parties to the contract are parties to the

proceeding and if it deems the same to be equitable, set aside and enjoin the performance of such contract . . .

The plaintiff stated that he was interested in selling the Joes Valley Marina, but that one J.R. Taylor persuaded him to turn the property into a corporation (R.7). The corporation was called Joes Valley Marina, Inc., hereinafter referred to as Marina, Inc., (R.9). It then appears that it is the plaintiff's contention that the property of Marina, Inc., was to be transferred to Joes Valley, Inc., hereinafter Valley, Inc., by a sales agreement (Ex.2). The plaintiff stated that the contract was purportedly executed at a board of director's meeting (R.10). The sales agreement shows Luther H. Thomas as seller and Joes Valley, Inc., by Julian R. Taylor as purchaser, but does not indicate in what capacity Mr. Taylor is serving (R.13).

There is no question that Mr. Taylor and Mr. Thomas signed the contract, but rather the question revolves around whether Mr. Taylor, under authority from the board of directors, executed the contract on behalf of Joes Valley, Inc.

It has long been recognized in the State of Utah that an officer or director of a corporation may only act with the express

or implied authority conveyed upon him or her by the board of directors. Of course, day to day activities may be carried on by the officers of the corporation, but with the purchase or sale of what appears to be the entire assets of Marina, Inc., and Valley, Inc., respectively, the board of directors must act directly.

Additionally, it should be remembered that while the plaintiff was a stockholder, the capitalization was increased and new stockholders has been taken into Marina, Inc., at the time of the purported sales transaction (Ex. 2).

With regard to the alleged sales transfer (Ex. 2) from Marina, Inc., it should be pointed out that § 16-10-74, Utah Code Annotated, (1953) states that:

A sale . . . or other disposition of all, or substantially all, the property and assets, with or without the good will, of a corporation, if not made in the usual and regular course of its business, may be made . . . in the following manner: (a) The board of directors shall adopt a resolution recommending such sale, . . . and directing the submission thereof to a vote at a meeting of shareholders . . . "

The rest of section 16-10-74 then goes on to specify what the procedure should be with regard to the shareholders meeting. Since it appears that the shareholders are the same persons as the officers

and directors, the real question comes down to whether or not a resolution was passed by the directors, and whether in fact any action, either orally or written, or formally or informally was ever taken by such board of directors. This is important with not only the sales of all of the assets of Marina, Inc., but also with regard to Valley, Inc., who cannot be bound to any such contract unless it has been taken pursuant to the authority vested in the board of directors.

It was stated in Lochwitz v. Pine Tree Min. & Mill Co., 37 U. 349, 108 P. 1128 (1910) that:

The board of directors to whom the authority to bind the corporation is committed is not the individual directors scattered here and there, whose assent to a given act may be collected by a diligent canvasser, but it is the board sitting and consulting together in a body. Individual directors, or any number of them less than a quorum, have no authority as directors to bind the corporation. And this is equally the rule, although the director who assumes to do so may own a majority of the shares. . . under our statute the powers of the corporation must be exercised by a quorum of the board of directors when assembled as a body. The president, therefore, could not make a binding contract . . . unless authorized to do so by such a quorum.

The Court in Lochwitz goes on to point out that if such were not the rule, contracts could easily be entered into to the ruin of the corporation and the stockholders.

It should be pointed out that our situation is not the same as presented in Westinghouse Credit Corp. v. Hydrosswift Corp.

 U. 2d , 528 P.2d 156 (1974) where the Court stated that:

It is not to be doubted that entering into such a contract by a corporation not only usually is, but should be done, by authorization of its board of directors. . . .this is subject to exceptions according to the requirements of justice and equity in individual cases. There is also a well recognized rule that a corporation may not represent to another party that it has executed a valid contract, induce the other to perform, accept the benefits, and then when it suits its interest, renege. . .

Our situation certainly does not fall into this category. Valley, Inc., certainly has not induced the plaintiff into any contact. The plaintiff was already into the business of which he wished to escape and his attempting to contract with Valley, Inc., was the means by which the plaintiff attempted to get out of such business. Therefore, the general rule must be followed which requires the board of directors to authorize such a sales contract.

It is further emphasized that action must be taken by the board of directors with regard to such a matter where the Court in Foster v. Blake Heights Corporation, U. 2d , 530 P.2d 815 (1974) noted that [N]o officer or agent of a corporation has authority to make a contract to sell its real estate without [action thereon by

the board of directors]." Again similar statements are made by the Court in Jackson v. Bonneville Irr. Dist., 66 U. 404, 243 P. 107 (1926).

The District Judge states in his Memorandum Decision in the present action that "the evidence indicates that the books and records of the corporation were so carelessly and imperfectly kept as not to show the acts of the corporation, and it has been held that in such event such acts and resolutions may be proved by parol, in the absence of a statute to the contrary. (See 29 Am. Jur. 2d p. 536)." The defendant has no disagreement with this statement and in fact quotes Copper King Mining Co., v. Hanson, 52 U. 605, 176 P. 623 (1918) wherein the Court states that, "Any act of the directors may be proven by oral testimony, when it is shown that no record was made of such action, or when it is shown that if such record was made it has been lost."

However, it should be noted that minutes and board resolutions were made and recorded for other actions taken by the board of directors. Such minutes and resolutions included a resolution recording the change in corporate name and a resolution was recorded in the board meeting recording the defendant Peterson's lease. In fact, it appears that the only resolution that was not recorded was the resolution with regard to the plaintiff's sales contract (Ex. 2).

The plaintiff does not claim that any records were lost, but it certainly must appear axiomatic, that the plaintiff has the burden of showing that the directors took such action or made any such resolution.

Therefore, let us look at the record to determine if the plaintiff ever made such a showing. The plaintiff stated that he could not remember all the details that went on at the meeting at which the corporate action was to have been taken with regard to the sales contract (R. 11), and that he read the contract while the meeting was being carried on. The plaintiff stated that he knew of no minutes of any meeting which would pertain to the sales contract (R. 13). The plaintiff stated that he did not know if the sales contract (Ex. 2) showed any designation of any officer of the Valley, Inc., (R. 13), and said contract does not infact contain any such notation (Ex. 2). It should also be noted that while § 16-10-4, Utah Code Annotated (1953) authorized a corporation to have a seal, that no such seal was placed on the sales contract (Ex. 2). Also, it does not appear that the secretary of the corporation signed the document (Ex. 2).

The Court in fact sustained the defendant's objection that the plaintiff had not sufficiently laid a foundation to introduce the sales

contract at that time (R. 14). A similar objection was sustained as to the bylaws of the corporation, Valley, Inc., and the Court suggested that the secretary of the corporation, Mr. Carnavali, be questioned to see if these documents could be introduced by him (R. 17).

When Mr. Carnavali was questioned with regard to the sales agreement (Ex. 2), he stated that he had a general understanding of the sales agreement (R. 75), but that he had never seen the agreement nor did he have a copy of it (R. 97). Again, the Court did not let the sales agreement be introduced into evidence (R. 77-79).

Finally the lower court stated with reference to the admissibility of the sales contract (Ex. 2), "I think I am going to admit the agreement as illustrative of his testimony only without any question about the legality of it. . . . But that does not establish now the validity of the agreement. That remains open." (R. 156). In fact, the plaintiff never at any time proved that the sales agreement (Ex. 2) was ever passed upon by a majority of the board of directors, and in fact, the trial court never at any time admitted the sales contract into evidence for any purpose other than to be

illustrative of the plaintiff's testimony. Therefore, there was never shown to be any action by the board of directors to authorize the sales contract.

POINT II.

THE SALES CONTRACT WAS VOIDABLE AT THE OPTION OF THE CORPORATION BECAUSE THE PLAINTIFF AS THE CHAIRMAN OF THE BOARD, A DIRECTOR, AND GENERAL MANAGER OF JOES VALLEY MARINA, INC., AND JOES VALLEY, INC., BREACHED HIS FIDUCIARY DUTY IN SUCH CONTRACT EXECUTION WITH THE CORPORATIONS.

The Court stated in Branch v. Western Factors, 28 U. 2d 361, 502 P.2d 570 (1972) that "A director occupies a fiduciary relationship to his corporation, and his personal dealings with the corporation may be avoided unless good faith and fairness are shown." In Sweeney v. Happy Valley, 18 U.2d 113, 417 P.2d 126 (1966) the Court said, " . . . when a fiduciary deals for his own interest with the beneficiary, in case any question arises, such dealings should be scrutinized with care, and the burden is upon him to show good faith in the transaction." Similar language is used in Hansen v. Holding Co., 117 U. 530, 218 P.2d 274 (1950), where the Court stated that " . . . courts of equity will carefully scrutinize the dealings of the mangement and set aside such transactions on

slight grounds."

Good faith and fairness obviously require a full and complete disclosure to an independent and disinterested board of directors. It follows that a full and complete disclosure would require the plaintiff to state such items as the contract price, the plaintiff's profit in the matter, possible alternatives open to the corporation, and the value of the property. Yet in the present situation, not only were these things not done, but in fact, there was never any discussion as to the matter and it appears that the only person that has been shown to be privy to the negotiation was Mr. J.R. Taylor, the apparent president of Marina, Inc., and later Valley, Inc.

As is stated in 19 Am. Jur.2d § 1281:

Personal dealings with the corporation or transactions with the corporation in which the director has some personal interest may be avoided unless good faith and fairness are shown. While occupying such a fiduciary relation, the officers and directors of a corporation are precluded from receiving any personal advantage without the fullest disclosure, and assent of, all concerned.

Again, it does not appear that the requirements stated in 19 Am. Jur.2d § 1281 have even attempted to be complied with since not only was there not full disclosure, but there was in fact, no disclosure whatsoever.

The Court noted in Hogan & Hall & Higgins, Inc., v. Hall, 18 U. 2d 3, 414 P 2d 89 (1966) that it was " . . . cognizant of the fact that there are thousands of directors who are unaware of the responsibilities of their positions, and do not realize that their personal interests are subordinated to that of their corporation in case of conflict." It cannot seriously be contended that the plaintiff was concerned about the interest of the corporation.

The plaintiff in fact stated that he wanted to get out of the business for health reasons (R. 6), and it certainly does not appear that the plaintiff realized that his interests were subordinated to that of his corporation.

There are many cases that assert what the duty of a fiduciary is to his corporation, Cox v. Berry, 19 U 2d 352, 431 P.2d 575 (1967): Rocket Min. Corp. v. Gill, 25 U. 2d 434, 483 P. 2d 897 (1971): Barker v. Glenwood, 82 U. 100, 21 P. 2d 889 (1933), but suffice it to say as quoted from Chapman v. Troy Laundry Co., 87 U. 15, 47 P. 2d 1054 (1935), if directors " . . . sell or dispose of corporate property with a view to gain personal advantage rather than for the purpose of enhancing the interests of the corporation,

they are guilty of bad faith."

Therefore, since the plaintiff did not deal with the corporation in good faith and fairness, the contract is voidable at the option of the corporation. And since the corporation has sought to set the contract aside, the Court should allow such action on the corporation's behalf.

POINT I I I.

THE PROPERTY REFERRED TO IN THE PLAINTIFF'S SALES CONTRACT WAS ALREADY THE PROPERTY OF JOES VALLEY, INC., AND AS SUCH, THE PLAINTIFF HAD NOTHING TO CONVEY BY CONTRACT.

The trial court stated in its Memorandum Opinion that the defendant Peterson can only assert his claim of right by reason of the plaintiff's sales contract (Ex. 2) and not otherwise, and therefore, if the plaintiff sales contract is invalid, the defendant Peterson will have no rights thereunder. However, the defendant Peterson does not claim to assert his leasehold estate through the sales contract (Ex. 2), but rather states that the property sought to be conveyed by the plaintiff to Valley, Inc., was already the property of Valley, Inc.

Therefore, even if the sales contract (Ex. 2) is otherwise valid, the plaintiff had nothing to convey to Valley, Inc., since said property

was already in Valley, Inc. And if the sales contract (Ex. 2) is found to be invalid, the invalidity of said contract doesn't affect the lessee's rights because the lessee does not claim to take property by reason of the sales contract, but rather the lessee's rights are independent of the sales contract since the property was already transferred to Valley, Inc.

It is axiomatic that a person cannot convey property which he does not own or which has otherwise been put beyond his personal control. The trial court stated in its Memorandum of Opinion that the plaintiff was 100% stockholder in Joes Valley Marina, Inc., (R. 48) i.e., Marina, Inc., and there does not appear to be any contention by the plaintiff to the contrary. However, it appears to be the plaintiff's position that the property transferred by Marina, Inc. to Valley, Inc., was by contract. The defendant Peterson's position is that the property was transferred by a revision to the articles of incorporation.

§ 16-10-61 Utah Code Annotated (1953) gives a corporation the power to change its name by amending its articles of incorporation. If such procedure is carried out, obviously the only change in the structure would be the name or any other matter referred to in the restated articles of incorporation.

The tax returns for the years of 1971 and 1972 of Joes Valley Marina, Inc., showed depreciation of the assets which had been the property of Joes Valley Marina before incorporation, and as such this supports the position that the assets had been treated by the plaintiff as though they were the property of Marina, Inc. (R. 54). The plaintiff testified that all the property under Marina, Inc., was his entirely (R. 47).

The plaintiff then testified that he amended the articles of incorporation of Marina, Inc., to increase the capitalization (R. 49). The plaintiff then stated that he once again amended the articles of incorporation to change the name from Joes Valley Marina Inc., to Joes Valley, Inc., and that he operated the marina personally, except in the winter time, up and until 1972 (R. 49-50). Therefore, by the plaintiff's own testimony, the amended articles of incorporation merely changed the name from Joes Valley Marina, Inc., to Joes Valley, Inc., and as such the property became Joes Valley, Inc., by such amendment.

Additionally, the plaintiff sought to transfer his use permit as a general manager to Joes Valley, Inc., (R. 56-57) prior to the sales contract (Ex. 2) (R. 142). And it appears that one of the reasons that

the sales agreement came about was because of some difficulty in having the Forest Service transfer the use permit from Marina, Inc., to Valley, Inc., because of an outstanding obligation owed to a third party, Mr. Falsone (R.57). The plaintiff also testified that he withdrew his use permit from the U.S. Forest service and obtained a special use permit for Joes Valley, Inc., while acting as a general manager for Joes Valley, Inc.,(R.58).

Finally, the plaintiff admits that Marina, Inc., and Valley, Inc., are one and the same entity other than the name (R.64-65). The plaintiff, however, denies that he ever transferred any property to Marina, Inc., (R. 65), but this appears inconsistent with his actions with regard to income tax and the ruling by the trial court. That is, it appears that Marina, Inc., treated the property as its own (R.54) and it does not appear that the plaintiff treated the property as his in his individual tax returns for 1971 and 1972.

Therefore, since the property had already vested in Valley, Inc., prior to the sales contract (Ex.2), the plaintiff had nothing to convey.

POINT IV.

IF THE PROPERTY FORMERLY OF JOES VALLEY MARINA, AND FORMERLY OF JOES VALLEY MARINA, INC., WAS NOT TRANSFERRED TO JOES VALLEY, INC., SO AS TO QUALIFY JOES VALLEY, INC., AS DE JURE CORPORATION, THE PLAINTIFF SHOULD BE ESTOPPED TO DENY THAT THE SAID PROPERTY WAS PROPERLY VESIED IN JOES VALLEY, INC., AS A DE FACTO CORPORATION.

18 Am. Jur. 2d § 51, states that:

It is ordinarily essential to the existence of a de facto corporation that there be (1) valid law under which a corporation with the powers assumed might be incorporated; (2) a bona fide attempt to organize a corporation under such law; and (3) an actual exercise of corporate powers.

In considering these elements, it appears that the Utah statutes allow a corporation such as Valley, Inc., and it also appears that there was a bona fide attempt to organize Valley, Inc., if it was in fact not organized. Additionally, it also appears that the corporation actually exercised its corporate powers when it executed a valid lease in favor of the defendant Peterson (R. 148-149).

De facto corporations have long been recognized in the State of Utah. In the case of Marsh v. Mathias, 19 U. 350, 56 P. 1074 (1899), the Court said:

Whether there are such defects in the organization as would render it vulnerable to an attack by the state itself is a question not necessary for use to decide in this case Moreover, where, as in the case at bar, there has been such a bona fide attempt to create a corporation, and in like good faith such an assumption and exercise of corporate function, as to constitute a corporation de facto, the legal existence of the corporation cannot, as a general rule be inquired into collaterally, even though there be an absence of compliance with some of the legal formalities . . . the complainants are stockholders, and have dealt with the corporation since its organization, and have recognized its powers and acquiesced in the exercise thereof for a large number of years, they are estopped from questioning in such a proceeding as this the rightful existence of the corporation . . . a stockholder who has participated in its acts as a corporation de facto is estopped to deny its rightful existence.

The case of Vincent Drug Co., v. Utah State Tax Comm., 17 U.2d 202, 407 P. 2d 683 (1965) reaffirms this position. This appears to be in line with our present situation. The plaintiff has allowed the corporation to carry on its existence as though it has owned all the referred to property, if in fact the corporation did not, and as such should be estopped from claiming to innocent third parties that he owns the property individually and that the corporation in fact owns nothing.

Additionally, equitable estoppel itself should preclude the plaintiff from asserting that Valley, Inc., did not have any property to convey. The case of Wilson v. Westinghouse Elec. Corp., 85 Wash 2d 78, 530 P. 2d 298 (1975) states that equitable estoppel may arise when a person commits:

(1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement or act; (3) injury to such other party resulting from permitting the first party to contradict or repudiate such admission, statement or act.

This appears to be the position taken by the Utah Court in Migliaccio v. Davis 120 U. 1, 232 P.2d 195 (1951) wherein the Court stated:

Equitable estoppel . . . is the principle by which a party who knows or should know the truth is absolutely precluded, both at law and in equity, from denying or asserting the contrary of, any material fact, which, by his words or conduct, affirmative or negative, intentionally or through culpable negligence, he has induced another, who was excusably ignorant of the true facts and who had a right to rely upon such words and conduct, to believe and act upon them thereby, as a consequence reasonably to be anticipated, changing his position in such a way that he would suffer injury if such denial or contrary assertion were allowed.

Therefore, the theory of equitable estoppel should be applied against the plaintiff because: First, the plaintiff had materially misled the defendant Peterson into believing that the Valley, Inc., was the owner

of the property formerly referred to as Joes Valley Marina, or Joes Valley Marina, Inc. The materially misleading act took place because the defendant Peterson had previously negotiated with the plaintiff on behalf of Omega Silver, and that while the plaintiff may have indicated that Valley, Inc., owed him money, the plaintiff did not indicate to the defendant Peterson that Valley, Inc., was not the true owner of the above referred to property (R.20-27). It should be pointed out that the plaintiff claimed to have shown defendant Peterson a sales agreement with Valley, Inc., (R. 22), but the plaintiff never proved his allegation and the defendant Peterson claims to the contrary (R.124); Second, the defendant Peterson entered into a lease with Valley, Inc., because of the material misrepresentation referred to, and obviously because the defendant Peterson believed that Valley, Inc., was the owner of said property (R.147); Third, the defendant Peterson will be adversely affected and materially injured if the plaintiff is allowed to contradict his previous position that Valley, Inc., was the owner of said property, and now state that Valley, Inc., is not the owner and additionally, it would be extremely inequitable to allow the plaintiff to assert such an inconsistent

position to the detriment of the defendant Peterson.

Also, it should be noted that the plaintiff was the one who allowed himself to be convinced by Mr. Taylor of the propriety of the original incorporation (R. 7), and it has been noted on several occasions by the Court that where one of two innocent parties must suffer, the loss should fall on the one who created the circumstances which made it possible for the wrong to be perpetrated. Allred v. Hinkley, 8 U. 2d 73, 328 P. 2d 726 (1958); Valley Bank & Trust Co. v. Gerber, ____ U. 2d ____, 526 P. 2d 1121 (1974).

Therefore, the plaintiff should be estopped from asserting that Valley, Inc., did not have the power to convey property to the defendant Peterson and this is by reason that if Valley, Inc., did not in fact have the actual power to so convey the property, the plaintiff still may not so assert under the theories of equitable estoppel and de facto corporation.

POINT V

ANY INTEREST CONVEYED BY THE PLAINTIFF'S SALES CONTRACT IS A SECURITY INTEREST AND SINCE THE PLAINTIFF NEVER PERFECTED HIS SECURITY INTEREST, THE PLAINTIFF MAY NOT NOW ASSERT SUCH SECURITY INTEREST.

§ 70A-9-102, Utah Code Annotated (1953) states:

- (1) . . . this chapter applies so far as concerns any personal property and fixtures within the jurisdiction of this state (a) to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattle paper, accounts or contract rights; . . . (2) This chapter applies to security interest created by contract including pledge, assignment, chattel mortgage . . . or title retention contract and lease or consignment intended as security.

The property referred to in the sales contract (Ex. 2) is a use permit to the property of the United States Department of Agriculture, and fixtures attached to said property. Additionally, the sales contract (Ex. 2) is a title retaining contract. Therefore, the transaction comes under the Uniform Commercial Code, Secured Transaction Title.

§ 70A-9-203, Utah Code Annotated (1953) states that:

. . . a security interest is not enforceable against the debtor or third parties unless . . . (b) the debtor has signed a security agreement which contains a description of the collateral. . .

The plaintiff admitted in his memorandum in support of summary judgment that the plaintiff has not filed a financing statement with the Secretary of State of Utah. A title retaining agreement must be filed in the Secretary of State's office in order to be perfected, § 70A-9-401 (1) (b), and it can be seen, therefore, that the plaintiff's security interest is not perfected.

Additionally, § 70A-9-301 (1), Utah Code Annotated (1953) states that:

Except as otherwise provided in subsection (2), an unperfected security interest is subordinate to the rights of . . . (c) in the case of good, instruments, documents, and chattel paper, a person who is not a secured party and who is a transferee in bulk or other buyer not in ordinary course of business to the extent that he gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected.

In the plaintiff's motion for summary judgment, he contends that the defendant Peterson did not (1) receive physical possession of the collateral, (2) the defendant Peterson did not receive delivery of the collateral without knowledge of the plaintiff's security interest, and (3) the defendant Peterson did not give value. The trial court in its memorandum opinion (p. 2-3) stated that the defendant Peterson had knowledge of the plaintiff's interest in said property, that the defendant never had possession of the property, that the

defendant failed to obtain the written approval of the U.S. Department of Agriculture, as required by the defendant's lease, nor did the defendant perform other terms of the lease.

It should be pointed out that the plaintiff was precluded from taking physical possession of the property. The defendant failed to obtain written approval of the U.S. Department of Agriculture and failed to perform any other terms of the lease by reason of the action of the plaintiff, third parties, or Valley, Inc., and therefore, such conditions may not preclude the plaintiff from enforcing his lease. It should be pointed out that with reference to these that no evidence was put into the record about such matters and the plaintiff never proved such to be the case.

Therefore, a consideration of § 70A-9-301 (1) (c) appears to be in order. First of all, while the defendant admits that he knew that Valley, Inc., may have owed the plaintiff some money, the defendant Peterson did not know that the plaintiff had a security interest in the property of Valley, Inc., (R. 124). Knowledge, as referred to in this section, means actual knowledge. Secondly, the defendant was precluded by acts of the plaintiff from performing the conditions of the lease. Additionally, § 70A-1-201 (44), Utah

Code Annotated (1953) defines value when it states that:

. . . a person gives "value" for rights if he acquires them. . . (d) generally, in return for any consideration sufficient to support a simple contract.

Finally, as indicated the defendant did not receive physical possession of the actual property by acts of the plaintiff. This point aside, § 70-A-9-301 (1) (c) refers to the delivery of collateral of chattel paper. § 70A-9-105, Utah Code Annotated (1953) states:

(b) "Chattel paper" means a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods. When a transaction is evidenced both by such a security agreement or lease and by an instrument or series of instruments the group of writings taken together constitutes chattel paper.

The defendant Peterson's writing, i.e., lease, evidences both a monetary obligation and a lease of specific goods, i.e., use permit and lease of fixtures attached thereto.

Therefore, there does not appear to be any reason why the plaintiff should be allowed to assert his security interest against the defendant Peterson.

POINT V I.

THE SALES CONTRACT WAS IMPROPERLY
ADMITTED INTO EVIDENCE BY THE TRIAL
COURT AND WAS, THEREFORE, REVERSIBLE
ERROR.

The plaintiff instituted a law suit to repossess certain personal property and a use permit purportedly sold on a conditional sales agreement attached to plaintiff's complaint. Because of the alleged default of defendant Joes Valley it was vital to the plaintiff's case to have said contract introduced into evidence, that it was a valid contract and that the commercial code pertaining to the filing of a security interest had been accomplished. The plaintiff made several attempts to introduce the contract over objection of the appellant. When it became obvious that the plaintiff could not introduce the contract as a contract, the Court admitted the contract as illustrative of plaintiff's testimony without any questions concerning its legality and that it did not establish the validity of the agreement (R. 156).

The trial judge in his findings then used the contract as a basis of then finding that there was a conditional sales agreement

and that the plaintiff was entitled to recover. The contract was not admissible under any circumstances and was not illustrative of plaintiff's testimony and should have not been admitted for any purpose.

Without a contract being properly admitted into evidence as a contract, the plaintiff has completely failed to establish his case and the Court should have as a matter of law dismissed plaintiff's complaint on file.

CONCLUSION

In conclusion, a thorough reading of the transcript shows that the purported sales agreement which is the subject matter of this lawsuit is not a valid contract because it was not approved by the board of directors. That the plaintiff did not have anything to sell because the corporation already owned the items listed on the purported contract and that the contract which is the basis of this action to begin with was never properly admitted into evidence as a contract and that the Court should have dismissed plaintiff's complaint and found as a matter of law no cause of action.

Respectfully submitted,

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