

1978

Royal Resources Inc. v. Gibraltar Financial Corp. et al : Brief of Plaintiff-Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE

ROYAL RESOURCES, INC., :

Plaintiff-Respondent, :

vs. :

GIBRALTER FINANCIAL CORP., :

GIBRALTER SECURITIES CORP., :

(a wholly owned subsidiary of :

Gibraltar Financial Corp.) :

LYNN DIXON and GEORGE PERRY :

Defendants-Appellants

BRIEF OF PLAINTIFF-RESPONDENT

Appeal from a judgment of the

District Court of the State of

Utah, in Case No. 10,000,000

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IN THE SUPREME COURT OF THE STATE OF UTAH

ROYAL RESOURCES, INC., :
Plaintiff-Respondent, :
vs. : No. 15817
GIBRALTER FINANCIAL CORP., :
GIBRALTER SECURITIES CORP., :
(a wholly owned subsidiary of :
Gibraltar Financial Corp.,) :
LYNN DIXON, and GEORGE PERRY, :
Defendants-Appellants. :

BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a decision granting plaintiff-respondent judgment in the sum of \$10,400 plus interest and costs.

DISPOSITION IN THE LOWER COURT

The plaintiff-respondent, Royal Resources, Inc., filed suit in the Third District Court on November 24, 1975, against Gibraltar Financial Corp., Gibraltar Securities Corp., a wholly owned subsidiary of Gibraltar Financial Corp., Lynn Dixon and George Perry, seeking damages for monies had and received by the defendants. On June 17, 1976 plaintiff's amended complaint (R. 9, 10) was duly filed seeking judgment in the sum of \$10,680 plus interest and costs from the defendants jointly and individually. An answer denying individual liability of Lynn Dixon and George

Perry was duly filed. (R. 11, 12) On July 12, 1977, trial was held by the Honorable Ernest Baldwin, Jr., Judge, (R. 18) and on July 22, 1977, judgment was entered in favor of plaintiff-respondent against the corporate defendants in the sum of \$10,680 plus interest and costs and trial was reserved by stipulation against the individual defendants and the court approved stipulation that the defendants would cooperate fully with plaintiff-respondent's attempts to seek federal insurance compensation with SCIPIC (R.24,25) On December 9, 1977, plaintiff-respondent moved for production of documents and order pursuant to Rule 34, Utah Rules of Civil Procedure (R. 26-33) granted by the Honorable David B. Dee, Judge, on December 13, 1977. (R. 39). On February 24, 1978, plaintiff-respondent again moved for production of documents from defendants (R. 35, 36). On March 6, 1978, the Honorable David K. Winder, Judge, granted said motion and order (R. 39) allowing 20 days for production. Defendants thereupon provided plaintiff-respondent with a computer printout daily transaction report (Exhibit 4-P) and copies of Gibraltar checks to Royal Resources (Exhibit 5-P). Non-jury trial was held as to the liability of the individual defendants on April 19, 1978, before the Honorable Jay E. Banks, Judge. At the time of trial, defendant George Perry was dismissed from the action (R. 41) and judgment was awarded in favor of plaintiff-respondent against appellant Dixon in the sum of \$10,400 plus interest and costs (R. 48). The appellant has appealed the judgment of the trial court.

RELIEF SOUGHT ON APPEAL

Plaintiff-respondent seeks affirmance of the judgment of the lower court together with all costs.

STATEMENT OF FACTS

On or about November 24, 1975, plaintiff-respondent filed a complaint (R.2) subsequently amended (R.9) with the Third District Court for the State of Utah against Gibraltar Securities Corp., Lynn Dixon and George Perry.

The aforesaid suit sought repayment of loans from the defendants individually and jointly in the following amounts:

\$1,000 (\$680 unpaid principal and \$320 unpaid fee), on an April 11, 1975 loan to defendant Gibraltar Securities Corp., and interest thereon.

\$10,400 (\$10,000 unpaid principal and \$400 unpaid fee on an April 16, 1975 loan to defendant Lynn Dixon. (Exhibits 1-P & 2-P)

Said loans had been made pursuant to an ongoing business relationship between plaintiff and defendants to make early settlements (Tr. 57) on stock sales. This business involved a practice whereby Royal Resources would advance money by way of early settlement for a stock sale so that an individual seller would realize his money before the normal seven day period. This early payment was discounted and Royal Resources would be paid at the end of the normal seven day period (Tr 57 to 60).

Under the normal course of business Royal Resources advanced money to customers of Gibraltar Securities and received an assignment of the proceeds of the customers stock sale (Tr.64). Royal Resources' Mr. Woolley would be verbally assured by officers and/or employees of Gibraltar Securities that the customer had sold the stock and the proceeds were forthcoming before he would issue a check for early settlement (Tr.65). At the end of the seven day period Gibraltar Securities would issue a check to Royal Resources to cover the transaction with the proceeds from the sale.

The transaction in question in the present suit occurred when Mr. Wooley was told the stock sale had been made (Tr.65) and issued the two checks to Lynn Dixon (Exhibits 1-P and 2-P), but subsequently received no repayment.

At the time of this transaction Lynn Dixon was President (Tr.75) and Registered Agent of Gibraltar Securities. Mr. Woolley made several requests for payment by Gibraltar Securities (Tr. 84) with no result. Royal Resources then commenced this suit.

During the latter part of 1976, plaintiff-respondent investigated, at its own initiative and with the encouragement of the individual defendants through their counsel, Jerry V. Strand, the possibility of recovering or being compensated from the federal insurance program, SCIPIC. To make such a claim it was necessary to secure the cooperation of the defendants. Therefore, plaintiff-respondent sought

judgment against the corporate defendants and court approved stipulation of the parties that defendants would cooperate with plaintiff's attempts for federal insurance compensation. On or about July 12, 1977, (R. 19) judgment was awarded plaintiff against the defendant corporations in the sum of \$10,680 plus interest and costs. The court further adjudged:

"(2) The trial of the remaining issues involving individual defendants is hereby continued without date, the court approving stipulation of the parties that defendants will cooperate fully with SCIPIC for the purpose of plaintiff seeking a federal insurance compensation for its loss herein." (R. 24)

Cooperation not forthcoming, on or about December 13, 1977, plaintiff-respondent's filed a motion for production of documents and order to permit inspection and copying of all records of transactions between defendants and plaintiff during the period January 1, 1975, to June 30, 1975, specifically the transactions of defendants Dixon, Perry and three other individuals. (R. 26-33).

Defendants' continued failure to produce documents and lack of cooperation forced plaintiff to move again on February 24, 1978 to compel defendants to comply with the July 22, 1977, judgment and to produce documents requested. (R. 35, 36)

On or about March 6, 1978, plaintiff-respondent's motion was granted by the Honorable David K. Winder, Judge, with 20 days given to produce the documents and to aid plaintiff's effort to recover from SCIPIC. (R. 39)

The only documents produced by defendants were copies of computer printouts called Gibraltar Securities Daily Transaction Report for Royal Resources and copies of Gibraltar checks to Royal Resources. (Exhibits 4-P & 5-P). No other corporate or personal records requested by plaintiff were produced by defendants. Defendant Dixon's affidavit of July 6, 1977, was also received. (R.37, 38) Dixon claimed not to be the custodian of records for Gibraltar Financial Corp., or Gibraltar Securities Corp., even though he was the President of the corporation. (Tr. 75) Further, he never produced records of his personal account which he later admitted, when questioned by the court, were in his possession. (Tr. 71 & 74)

Plaintiff-Respondent intended to assert to SCIPIC (R. 24) that it stood in the place of Gibraltar's customer, either defendant Dixon himself or his client and recover its loss through the federal insurance program. To make this claim plaintiff-respondent needed to secure the cooperation of defendants and the records necessary to find out what happened to the proceeds of the two checks to Lynn Dixon. (Exhibits 1-P and 2-P) All efforts to secure additional documents and cooperation were fruitless. Plaintiff-respondent could not find out if the proceeds of the checks,

payable to and cashed by the defendant Dixon (R.57), went to him personally, to a client of his, or to the corporate defendants. Indeed Dixon's recollections on the subject are, to say the least, hazy (Tr. 67 to 75). The only evidence available (Plaintiff's exhibit 3-P) indicates five transactions between Royal Resources and Lynn Dixon. (Royal Resources checks No. 36, January 10, 1975; No. 85, March 5, 1975; No. 122, April 7, 1975; No. 136 and 137, April 16, 1975 [the transaction at issue]; and No. 163, May 22, 1975.) Only one (No. 36) indicates that the transaction was for an individual other than defendant Dixon; in this case L. W. Fransen.

Though plaintiff's agent, Mr. Woolley, had been told by officers and/or employees of Gibraltar that stock had been sold in the April 16, 1975 transaction (Tr. 65), plaintiff's efforts to secure records which would show what stock, if any, was in fact sold and by whom, were fruitless. In fact, respondent could not find out anything from the defendant corporations or defendants Dixon and Perry, personally or as President and Registered Agent of the corporations, which would allow it to proceed on an insurance claim with SCIPIC.

The Daily Transaction Record and copies of Gibraltar Securities checks to Royal Resources (Exhibits 4-P & 5-P) show other transactions between Royal Resources and Gibraltar both before and after the April 16, 1978 transaction but it does not show a record of this transaction.

Respondent, being fully frustrated with the lack of cooperation of the defendants, sought individual recovery from the defendants. On or about April 19, 1978, trial was held before The Honorable Jay E. Banks, Judge. Defendant George Perry was dismissed from the case (Tr. 56) and the personal liability of defendant Dixon was at issue.

The Court's relevant Findings of Fact and Conclusions of Law (R. 46 & 47) are:

FINDINGS OF FACT

1. That the sum of \$10,400 is uncontroverted.
3. That essential records of defendants were not produced pursuant to discovery or at the trial of this case.
4. That the facts surrounding the transaction in this case, in the absence of clarifying documents, were particularly within the province and knowledge of defendant Dixon, in his dual role of President and customer's man or agent.
5. That the checks payable to defendant, in the absence of documents or sufficient evidence to the contrary, support a finding of monies had and received by Dixon.
6. That failure to produce such documents raises a presumption that their contents are adverse to position of defendants.
7. That plaintiff's prima facie case shifted the burden of proof to defendants, a burden they did not meet.

CONCLUSIONS OF LAW

2. That failure to produce essential documents through discovery and at trial is construed as a matter of law to deem the contents thereof adversely to defendants.
3. That defendants failed to meet the burden of proof, which shifted to them.
4. That defendant Lynn Dixon is liable personally to plaintiffs for money had and received and that judgment should be awarded against him personally in favor of plaintiffs in the sum of \$10,400 plus 6% to April 19, 1978, plus costs.

Judge Banks in awarding judgment to the plaintiff
stated:

"...there's no question about that if they accept an assignment they are looking to the assignee, but the thing that disturbs me here, you've got a man here with two hats. Use the corporation when he wants to. ...He's in the position where he can control - - it's a lax thing, these transactions. But sooner or later there's got to be some written evidence of something here... One, if it's -- if he's acting as the corporation, and he's President at this time, he's got company accounts. You've got your own accounts. Broker deals through his own accounts, through brokers accounts, but someplace there's got to be some records. That's the thing that disturbs me on it. If it's a company account, I mean an assignment, and so forth, someplace within that week there's got to be some records in his own account, either an assignment or something to show what he's got to do.

And I think there's a little heavier burden on somebody that's President of the company working through his own account as a customer and assigning.

He's in control of the situation whether it's company...but as President of the company he's privy to everything that's going on in the company. He's certainly privy to his own account. They made an effort to secure some records of that.

It's a failure of production of any records on this situation. He's in the position to maneuver.

...I think that under the situation that he--he either through the company or through his own records would have to show that this was actually assigned over to the company and it wasn't maneuvered.

I'll award judgment to the plaintiff. (Tr. 89 and 90) (Emphasis added)

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY HELD
APPELLANT PERSONALLY LIABLE
FOR FUNDS HAD AND RECEIVED

Defendant-appellant relies on Comment a of the Restatement of Agency 2d, §320, to urge that he is not a party to the transaction, only the principal is. The language of the cited material (Appellant's brief p. 9) reads in part:

"...In the absence of other facts, the inference is that the parties have agreed that the principal is, and the agent is not, a party." (Emphasis added)

The record, however, is notoriously silent on whether Gibraltar received the proceeds of the alleged stock sale, whether defendant paid over to a stock seller customer the funds advanced for "early settlement" by plaintiff, or whether defendant Dixon kept the proceeds. Dixon testified there were no records on the transaction except his personal account which he did not produce (Tr. 74, 75). This despite the fact that plaintiff-respondent had often sought such records. (Plaintiffs July 22, 1977 Judgment and Order (R.24); December 9, 1977 Motion for Production of Documents and Order (R. 26-33); December 13, 1977 Order (R. 34); February 24, 1978 Motion and Notice (R.35); and March 6, 1978 Order (R. 39)). The only evidence available, Dee

Woolley's journal (Plaintiff's exhibit 3-P), shows that the usual course of conduct was for Royal Resources to issue checks directly to individual stock seller customers of Gibraltar. It is clear from the exhibit that in these rare instances when Mr. Woolley issued checks to the customers man for a client, that he would so designate by indicating the name of the customers man and the client. See Royal Resources Exhibit P-3 checks no. 36, January 10, 1975 (R. 28); No. 65, February 14, 1975 (R. 29); No. 120, April 4, 1975 (R. 31); and No. 133, April 11, 1975 (R. 32). On only one of the five transactions between Royal Resources and Lynn Dixon is there indicated that the transaction was for a third party. (Royal Resources check No. 36, January 10, 1975). The other four transactions, including the April 16, 1975, transaction at issue, have no such designation. Without defendant Dixon's records it is impossible to determine where the money went in any of the transactions.

Defendant corporations bookkeeper Lois Crowder's testimony was that there had to have been a stock transaction and that the funds were held by Gibraltar in a general account and not paid over to plaintiff because Gibraltar went broke. (Tr. 79, 80) But again, with the evidence available (only Exhibits 4-P & 5-P had been received by plaintiff pursuant to discovery) she was unable to show any entry corresponding to an allegation that defendant Dixon made a stock transaction or that the funds found their way into the Gibraltar general account. (Tr 76, 78, 80)

We can only conclude that the funds did not reach Gibraltar's general account, and for whatever unexplained reasons, Lynn Dixon was, in this instance, acting for himself.

Appellant, further asserting his view, cites:

Generally, an agent is not responsible for money had and received where the money is paid over by the agent to his principal. 3 Am Jur 2d Agency, §§301, 302. (Defendant-Appellant's Brief, P. 10)

Plaintiff-respondent does not disagree with this as a general statement of the law, but, again, the record fails to reveal any facts supporting an allegation that funds ever reached the principal, a third party customer or Gibraltar.

If in fact the corporate defendant was the principal, defendant Dixon as its President is not the average "agent". It is well established that under various circumstances the corporate veil can be pierced to get at officers or directors when the facts warrant the application of equitable principles to go behind the corporate personality to the individual. (See Henn on Corporations §§146, 147 at 250-58 2d Ed. 1970)

In Shepherd v. Bering Sea Originals, 578, P2d. 587, 590 (Alaska, 1978), the Alaska Supreme Court discussed dis- regarding the corporate entity and stated:

"There are many decisions in which courts have pierced the 'veil of corporate fiction' ...Generally speaking, such decisions have been based on the requirements of justice or to prevent fraud, bad faith or other wrong."
(Citations omitted.)

In Amoco Chemicals Corp. v. Bach, 222 Kan. 589, 567 p2d 1337, 1341-42 (1977), the Kansas Supreme Court set forth a list of factors which it would consider in disregarding the corporation function:

"An examination of the cases discloses that some of the factors considered significant in justifying a disregard of the corporate entity are: (1) Undercapitalization of one man corporation; (2) Failure to observe corporate formalities; (3) Nonpayment of dividends; (4) Siphoning of corporate funds by the dominant stockholder; (5) Nonfunctioning of other officers or directors; (6) Absence of corporate records; (7) Use of the corporation as a facade for operations of the dominant stockholder or stockholders; and (8) The use of the corporate entity in promoting injustice or fraud. (Emphasis added)

And in Burns vs. Norwesco Marine, Inc., 13 Wash. App. 414, 535 P.2d 860, 863 (1975), the Washington Supreme Court stated:

Although the facts have varied from case to case, the corporation entity has been disregarded when it is used to perpetuate a fraud or wrong, gain an unjust advantage or evade an obligation (numerous citations omitted)...in some jurisdictions, directors and officers of a corporation may be held directly liable to corporate creditors for breaches of duty owed the corporation, especially during the corporation's insolvency. This may include acts of neglect. 19 C.J.S. Corporations §846 (1940).

See also Henn, Agency-Partnership at 117, (1972) Agents liability where principal is non-existent.

Failure of an officer to differentiate between personal activities and those of the corporation would certainly be grounds to "pierce the corporate veil" and establish

personal liability on the officer.

Defendant Dixon's testimony is unclear on exactly what happened concerning the April 16, 1975 transaction. He stated the stock was sold in his account (Tr. 67, Line 11), that he was not clear whether or not the stock was sold in his account (Tr. 67, Line 15), that he didn't know if the stock was in his account or someone else's (Tr. 70, 71); that he didn't recall who he wired the money to (Tr. 70), that he was unclear what happened to the money (Tr. 75), that he didn't know what stock it was (Tr. 69) and that a trade ticket would identify the particular trade (Tr. 68). The only evidence, before the trial court, of what happened to this particular transaction is Royal Resources journal (Exhibit 3-P) and the only individual indicated was defendant Dixon.

While it is not clear from the evidence which capacity defendant Dixon was acting in (personally, agent for Gibraltar, agent for a third party customer), it is clear that he had control of the records, as President of the corporation or his personal records, which could shed light on the transaction, and that he failed to produce such records. (Tr. 71, 74)

Defendant's failure to produce requested documents, records and his lack of cooperation thwarted plaintiff's efforts to recover from SCIPIC (July 12, 1977 Judgment (R. 24), and further brought about the trial court's finding of fact #6 and #7 shifting the burden to the defendant to show

what actually happened as well as the finding that defendant did not meet the burden. (R. 47) It is clear that neither the exhibits nor the record herein offer any compelling explanation of what really happened to the sums advanced. By the weight of appellant's own cited authority, he is not in this case entitled to the protection ordinarily afforded an agent for a disclosed principal.

While plaintiff-respondent, in amending (R.9, 10) its original complaint (R. 2, 3), thought that defendant Dixon was acting as agent for defendant Perry (Perry was dismissed at trial R. 46, 47, 48; Tr. 56), plaintiff still kept a cause of action against Dixon individually:

(8) That defendants are liable jointly and individually for monies had and received, or in the alternative are unjustly enriched in the amount claimed.

or if defendant Perry was actually the undisclosed principal (a fact that could not be ascertained by discovery through either individual defendant) there still would be a clear cause of action against defendant Dixon. Plaintiff's Amended Complaint states:

(7) That defendant Dixon is liable individually in that he was acting as an agent of George Perry in his personal, not corporate capacity; ...(R. 10)

Accordingly, this Court should affirm the judgment of the trial court for plaintiff-respondent.

POINT II

THE TRIAL COURT PROPERLY CONCLUDED THAT FAILURE ON PART OF APPELLANT TO PRODUCE DOCUMENTS AND RECORDS RAISED A PRESUMPTION THAT THE INFORMATION SOUGHT WAS UNFAVORABLE TO APPELLANT.

It is well settled that failure to comply with the Court's pre-trial discovery order may result in a presumption that the concealed information is unfavorable to the defendant. In 31 C. J. S. Evidence §156(b) it is stated:

"The unexplained failure or refusal of a party to judicial proceedings to produce relevant and competent documentary evidence or an article which would tend to throw light on the issues authorizes, under certain circumstances, an inference or a presumption unfavorable to such party.

Possession or control of such evidence by the party against whom the inference or presumption is sought to be invoked, is necessary; the rule does not apply where the evidence is equally available to both parties. Further, it must appear that there has been an actual suppression or withholding of the evidence; no unfavorable inference arises where the circumstances indicate that the document or article in question has been lost or accidentally destroyed, or where the failure to produce it is otherwise properly accounted for."

In fact, such failure can result in as stringent a result as awarding judgment. Rasbury v. Bainum, 15 Utah 2d 62, 387 P.2d 239 (1963). This court in Tucker v. Nunley, 16 Utah 2d. 97, 396 P.2d 410 at 412 (1964) established the following standard:

"We recognize that the granting of a judgment against a party solely for disobeying an order to cooperate in discovery procedure is a stringent measure which should be employed with caution and restraint and only where the failure has been willful and the interest of justice so demands. Except in very aggravated cases, less serious sanctions undoubtedly could be applied to accomplish the desired result, particularly where there is any likelihood of injustice by depriving a party of a meritorious cause of action or defense. Whether the failure to comply with the court's order has been willful and whether the circumstances are so aggravated as to justify the action taken is primarily for the trial court to determine. Unless it is shown that his action is without support in the record, or is a plain abuse or discretion, it should not be disturbed." (Emphasis added)

Plaintiff-appellant attempted on several occasions (plaintiff's Motion for Production of Documents and Order December 9, 1977, (R. 26) and the Court's order of December 13, 1977 (R. 39); plaintiff's second motion February 24, 1978, (R. 35) and the Court's Order of March 6, 1978) to get corporate and personal record of the defendants. Defendants produced a computer printout daily transaction sheet (Exhibit 4-P) and copies of checks from Gibraltar to Royal Resources (Exhibit 5-P) and defendant Dixon's Affidavit (R-37) stating that he did not have custody of any documents. It remains a mystery how defendant could produce the Royal Resources daily transaction records and none of the daily transaction records for Richard Macon, Lynn Dixon, Scott Taylor, M. C. Mason and George Perry called for in plaintiff's Motion for Production of Documents (R. 26). It is also unanswered why no personal records of at least the defendants Perry and Dixon were ever produced. Dixon in

fact admitted he had his own records (Tr. 71). The requested records were a necessary part of plaintiff's attempt to recover insurance from SCIPIC (as ordered July 22, 1977, R. 24). Plaintiff, both on its own initiative and after urging from defendants' counsel, Jerry V. Strand, was attempting to build a case that it stood in the place of the customer to whom it made the early settlement, as that customer surely would have been covered by the federal insurance. Plaintiff needed to know what stock was involved and who sold it, Dixon or a third person who was Dixon's client. If it was Dixon, his records would so indicate. If it was his client he still should have, as the customer's man, some record of it. If it, in fact, involved the corporate defendants, Dixon as President should have had access to the records.

Clearly in this case the trial court could justify the Findings of Fact (Tr. 46-47)

3. That essential records of defendants were not produced pursuant to discovery or at the trial of this case.
4. That the facts surrounding the transactions in this case, in the absence of clarifying documents, were peculiarly within the province and knowledge of defendant Dixon, in his dual role of President and customer's man or agent.
6. That the failure to produce such documents of the transactions raises a presumption that their contents are adverse to the position of defendants.
7. That plaintiff's prima facie case shifted the burden of proof to defendants, a burden which they did not meet.

and could have awarded judgment for plaintiff solely on defendants' refusal to produce.

Further, plaintiff-respondent notes that Rasbury and Tucker merely affirms the extent of the power of the trial court if not abused. In the instant case the trier of fact did not award judgment on the failure to produce alone, it merely shifted the burden to the defendant.

It is clear that the trier of fact may draw an unfavorable inference or there may be raised a presumption with reference to a failure to produce documents. (See Londerholm and NAACP v. Unified School District No. 500, 199 Kan. 312, 430 P.2d 188 at 197 (1967); Whitney v. Canadian Bank of Commerce, 374 P.2d 441 at 442 (Oregon 1962); State Tax Commission v. Graybar Electric Co., 86 Ariz. 253, 344 P.2d 1008 at 1011 (1959); Shehtanian v. Kenny, 156 Cal. App. 2d 516, 319 P.2d 699 at 702 (1958); Talbert v. Ostergaard, 276 P.2d 880 at 884,5 (Cal. 1954); Bengston v. Shain, 255 P.2d 892 at 895 (Wash 1953); Williams v. Commercial Nat. Bank of Portland, 90 P. 1012 (Oregon 1907). Such failure, quoting appellant's own cited authorities, does shift the burden and raises "an inference or a presumption unfavorable to such party" (31 C.J.S. Evidence, §156(b)). We concede the rule does not apply "where the evidence is equally available to both parties" id. However, the trial court here clearly found such was not the case, and indeed that "the facts surrounding the transaction in this case, in the absence of clarifying documents, were peculiarly within the province and knowledge of ..." (R. 46) defendant Dixon. The Court found, and as

trier of the fact, was entitled to find, that the failure to produce documents raises a presumption that their contents were adverse to defendants (R. 46-47) and that in the absence of documents or evidence to the contrary, a conclusion that the monies were had and received by defendant Dixon was proper. This failure to produce documents shifted the burden of proof to defendant and he failed to meet that burden. (R. 46-47)

Appellant urges that he had no access to the records of Gibraltar and that they were equally accessible to respondent. The record clearly fails to support that. Defendant Dixon was President of Gibraltar (Tr. 75) as well as its registered agent. Who else, if not he, would have access? Nor did he or others provide respondent with access despite strenuous efforts to compel discovery.

Appellant further urges that the trial court herein relieved respondent of plaintiff's burden to prove its claim and substituted a negative inference as substantive proof. We submit that whether the non-production of evidence is a mere inference or a true presumption, the trial court did not err. It is obvious from the record that the court found plaintiff's evidence credible and supportive of a prima facie case. Having produced such evidence, the burden shifts. Citing appellant's Utah authority, we direct the Court's attention to the three concluding paragraphs of Koesling v. Basamakis, 539 P.2d, 1043 (Utah 1975):

The proponent of a proposition has two burdens relative to his proof: to produce evidence which proves or tends to prove the proposition asserted; and to persuade the trier of fact that his evidence is more credible or entitled to the greater weight. Once the proponent has produced such evidence, the burden of producing evidence disproving or tending to disprove the proposition shifts to the opponent, and he must introduce such evidence as may be necessary to avoid the risk of a directed verdict or a peremptory finding against him as to the existence of the proposition.

The burden of persuasion does not shift, however, and remains upon the party asserting the proposition. Thus, where, as here, the proponent has the burden of persuading the trier of fact by a preponderance of the evidence, that it, that the asserted proposition is more likely than not, he carries that burden throughout the trial. Having adduced sufficient evidence to show or tending to show the existence of the proposition, and having thus met his burden of production, he nevertheless suffers the risk of nonpersuasion or disbelief.

Plaintiff produced evidence tending to prove the existence of a partnership. Defendant produced opposing evidence and further produced evidence which tended to prove a joint venture of the nature heretofore described. The trial court, exercising its prerogative as a trier of fact in a nonjury case, weighed the credibility of the witnesses, and was not persuaded by plaintiff's evidence. This court will not disturb such a determination when reasonable men could differ as to the weight to be given to conflicting evidence. (Citations omitted.) (Emphasis added)

The court's finding did not rest upon the non-production of documents alone, but rather, having found plaintiff's claim of monies had and received credible, shifted the burden to respondent. The non-production of documents giving rise to a presumption that the matters therein are unfavorable to him. Plaintiff-respondent need not urge that such presumption supplies a missing link in the case alone or that it is independent evidence of a fact otherwise

unproved. It remains uncontroverted that monies were had and received by appellant. A shift to the appellant to explaint that liability rested elsewhere was justified. This he failed to do by any compelling affirmative, probative evidence. Thus, coupled with the presumption to be drawn from non-production of documents, he cannot and should not prevail.

As this court, in Koesling, after noting the state of the law, distinguishing the burdens of producing evidence and of persuading the trier of fact, concluded:

"The trial court, exercising its prerogative as a trier of fact in a nonjury case, weighed the credibility of the witnesses, and was not persuaded by plaintiff's evidence. This court will not disturb such a determination when reasonable men could differ as to the weight to be given to conflicting evidence."
(Emphasis added)

This court should affirm the judgment of the trial court for plaintiff-respondent.

POINT III

RESPONDENT WAS NOT PRECLUDED FROM
JUDGMENT AGAINST APPELLANT WHEN IT
TOOK JUDGMENT AGAINST THE CORPORATE
DEFENDANTS.

The record is clear that defendants agreed to fully cooperate with plaintiff to seek redress in the form of federal insurance compensation through SCIPIC. Indeed, previous counsel for defendants, Jerry V. Strand, urged that plaintiff take judgment against the corporate defendants to support such a claim (R. 24). Pursuit of such a claim failed in large part, due to failure of defendants to produce documents. It is also clear from the record that plaintiff made no "election" which would preclude action against defendant Dixon. Plaintiff's amended complaint sought:

8. That defendants are liable jointly and individually for monies had and received, or in the alternative, are unjustly enriched in the amount claimed. (R. 10)

and prays for judgment against defendants jointly and individually. It is further clear that the Honorable Ernest F. Baldwin, Jr., taking the stipulated default judgment against the corporate defendants, acknowledged that the "big question is individual liability" (minute entry R. 17, 18) and also by stipulation that all rights were reserved against the individual defendants. See minute entry R. 17, 18, 19 and Judgment and Order which states:

2. The trial of the remaining issues involving individual defendants is hereby continued without date, the court approving stipulation of the parties that defendants herein will cooperate fully with SCIPIC for the purpose of plaintiff seeking federal insurance compensation for its loss herein. (R. 24)

As argued before, at that point in these proceedings, plaintiff-respondent was not privy to sufficient facts to fully make its case to SCIPIC. Hence its subsequent efforts to compel discovery.

Respondent further submits that the law requires appellant to have moved to compel respondent to elect.

Costello v. Kasteler, 7 Utah 2d 310, 324 P.2d. 772 (1958) is cited by appellant as follows:

"Appellants further contend that the court erred in granting judgment against both of them since the court found that at the time of the negotiations for the services appellant Kasteler did not disclose to respondent that he was acting as the agent for the appellant Uranium Chemical Corporation and the law is well settled that where a contract is entered into with the agent of an undisclosed principal for the use and benefit of the principal an election must be made as to whether the agent or the principal will be held liable, but a judgment cannot be obtained against both. As authority appellant cites Love v. St. Joseph Stock Yards Co., 51 Utah 305, 169 P. 951. That case does contain a dictum to that effect and respondent concedes that the majority rule in the United States is to the effect that after discovery of an undisclosed principal a judgment cannot ordinarily be obtained against both the principal and the agent. As stated in 118 A.L.R., page 704, note 111:

'It has generally been held that where the agent and undisclosed

principal are joined, the plaintiff may not have judgment against both, but must, prior to judgment, elect to hold one or the other.'

Ordinarily plaintiff would not be entitled to judgment against both."

but appellant fails to conclude the court's finding:

Ordinarily plaintiff would not be entitled to judgment against both. However, appellants did not demand or move for an election by respondent as to whether the principal or agent should be held and the failure to do so was a waiver. See note 111(b), 118 A.L.R. page 707 and cases therein cited. Since respondent in his brief has stated that if this court should find that he is not entitled to judgment against both appellants then he requests that he be allowed to make his election in this court and chooses to hold the agent Kasteler. We deem it proper to grant this request.

Affirmed with instructions to vacate the judgment against appellant Uranium Chemical Corporation.

It is clear that appellant must move to compel respondent to elect. In the instant case no such demand or move was made, and appellants failure, under Costello, constitutes a waiver by him.

Appellant cites the Restatement of Contract §119(1):

"A judgment rendered by a court of competent jurisdiction within the United States against one or more joint promisors, or against one or more joint and several promisors, upon a joint promise, discharges the joint duty of the other joint promisors."

And 3 AmJur. 2d Agency, §309:

"[T]he rule followed almost universally is that if the third party, after learning the facts and the identify of the principal, brings suit and recovers judgment against the agent, this is an election against the agent which will bar a subsequent action against the principal, regardless of whether the judgment is or is not satisfied. A judgment against the principal will likewise have the effect of barring a subsequent action by the third person against the agent." (Emphasis added.)

as further authority for his position. It is apparent that a requirement for election is knowledge of the identity of the principal. If this is the case, respondent could not have made an election because it was unable to determine through discovery, who, if not Dixon, the undisclosed principal was.

In fact, appellant is arguing that he is the agent of Gibraltar. Plaintiff urges that as President, Registered Agent and customer's man, he still must be held personally liable. He alone was in a position to show what actually happened and he would not do so.

Accordingly, this Court should affirm the judgment of the trial court for plaintiff-respondent.

POINT IV

A REVIEWING COURT WILL NOT DISTURB
THE TRIAL COURT'S FINDINGS IF THERE
IS REASONABLE BASIS IN EVIDENCE OR
LACK OF EVIDENCE TO SUPPORT THEM.

It is a well established rule that the appellant carries the burden of showing a substantial basis for upsetting the trial court's findings and judgment. This court in Elwell & Son, Inc. v. Salt Lake City Corp., 27 Utah 2d 188, 493 P.2d 1283 (1972) held that with respect to a lower court's verdict and judgment "all presumptions favor their validity." Elwell case paralleled the present case in that in both instances the records concerning the original controversy were incomplete. In Elwell, an action by a contractor against the city and railroads to recover money allegedly due beyond contractual amount for installation of sewer lines, the determination of the trial court, although based on incomplete information, was sustained since appellant could not overcome the presumption that favors the trial court's finding.

Similarly in Holman v. Sorenson, 556 P.2d 499 (Utah 1976) an action contractors brought to foreclose a mechanic's lien and to recover damages for breach of contract, this court held that the finding of damages would not be overturned since evidence could be found to support the

trial court's findings. This court again relied on the theory that appellants carry the burden of showing from the record that the trial court erred. A number of other Utah cases support the rule that if there is a reasonable basis either from the evidence or from the lack of evidence, the trial court will be upheld. Searle v. Searle, 522 P.2d 697 (Utah 1974); First Sec. Bank of Utah NA v. Wright, 521 P.2d 563 (Utah 1974); Latimer v. Kalz, 508 P.2d 542 (Utah 1973); Holly v. Federal American Partners, 507 P.2d 381 (Utah 1973); Brigham v. Moon Lake Electric Assn., 470 P.2d 393 (Utah 1970), see also Tucker v. Nunley cited on pages 16 and 17 herein.

From the record in the present case, the trial court held in favor of plaintiff-respondent based upon the fact that essential records of the defendants were not produced pursuant to discovery and that such records were peculiarly within the province and knowledge of defendant Dixon and therefore the Court shifted the burden to the defendant, a burden he did not meet. (Findings of Fact, Conclusions of Law and Judgment, R. 46-49.)

Accordingly, this Court should affirm the judgment of the trial court for plaintiff-respondent.

CONCLUSION

It is respectfully submitted that the trial court properly awarded judgment to plaintiff-respondent; that there was evidence that defendant-appellant had and received monies and that there was no evidence that said monies went to either the corporate defendants or to a third party customer of defendant Dixon. If, as appellant urges, defendant Dixon received the money as agent for the defendant corporations, the corporate veil should be disregarded because as President, customer's man and registered agent, he should have been able to produce evidence to indicate what actually happened to the monies.

Respondent further submits that the trial court properly concluded that failure on the part of the defendants to produce documents or records raised a presumption that was unfavorable to appellant and was justified in shifting the burden of proof to defendant Dixon to disprove respondent's prima facie case.

Respondent submits that under its pleading, facts and evidence of this case, no election was required as to which of the defendants it must pursue for judgment. Alternatively, even if such election must be made, appellant had the duty to move for such election.

Finally, respondent submits that the trial court's findings were based on the preponderance of evidence and fact and that this Court should affirm the judgment.