

1979

Royal Resources Inc. v. Gibraltar Financial Corp. et al : Reply Brief of Appellant Lynn Dixon

Utah Supreme Court

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IN THE SUPREME COURT 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. :

REPLY BRIEF OF APPELLANT LYNN DIXON

Appeal from a Judgment of the Third Judicial
District Court, in and for Salt Lake County,
the Honorable Jay E. Banks, Judge

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REPLY BRIEF OF APPELLANT LYNN DIXON

Pursuant to Rule 75(p)(1) and (2), Utah Rules of Civil Procedure, the appellant submits the following reply brief.

STATEMENT OF FACTS

The appellant calls to the Court's attention the following facts:

That the material contained on Page 4 of respondent's brief beginning with the last paragraph with reference to respondent's investigation with appellant's counsel of the possibility of recovery on behalf of the respondent the federal insurance program (SCIPIC) was not set forth in the record.

The appellant Dixon provided the respondent with all records of the defendant company which he had (Exh. 4-P and 5-P), but could not provide respondent with other records since he was not the custodian or otherwise in possession of such records. The respondent states that appellant was the

President of Gibraltar Securities Corp. This was true at one time, but not throughout the whole time respondent dealt with the company, nor at the time the production order was entered. At that time, appellant Dixon was not an officer of the company, and the company was in bankruptcy. The affidavit of the appellant in response to the discovery motions and orders () was specifically to the effect that appellant had produced what he had the power to produce. (). No motion was made pursuant to Rule 37(b), Utah Rules of Civil Procedure, for any special sanction against the appellant. None was appropriate since Rule 34, U.R.C.P. requires that person have "possession, custody or control" of the documents sought to be produced.

The action in the instant case was brought against the appellant Dixon and expressly in his capacity as "registered agent" of "Defendant Corporation". (R. 2) The respondent's amended complaint also referenced Dixon as "registered agent of Defendant Corporation". (R. 9-10) Although respondent sought to hold Dixon responsible in his individual capacity it was clear the respondent was moving against Dixon knowing he was a corporate agent.

The respondent made demands for payment on the checks from the corporation not Dixon. (R.). Respondent sued the corporation and took judgment first against the corporations (R. 24) and sought satisfaction of the judgment against Gibraltar, on the basis of a stipulation asking appellant's cooperation, against the federal insurer SCIPIC. The

Securities, was clearly to the effect that respondent Royal Resources and Dee Woolley did not have customer accounts because they were not true securities customers. (R. 80) Respondent was actually in the loan business, and had to be paid from general funds. Respondent was not paid because Gibraltar was broke. (R. 79-81). The funds due respondent were from a sale of stock by a customer of Gibraltar.

POINT I

RESPONDENT CANNOT BASE LIABILITY ON THE RIGHT
TO PIERCE THE CORPORATE STRUCTURE SO AS TO HOLD
APPELLANT LIABLE AS THE ALTER EGO OF THE CORPORATION.

In Point I of respondent's brief, it is recognized that in circumstances like those involved in the instant case that an agent may not be liable. The respondent, however, asserts: "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."

This is a new position urged by the respondent. At no time in this case has the respondent contended that it was seeking to pierce the corporate veil. Indeed, respondent's complaint expressly recognized the appellant as an agent for the corporate defendants. This is acknowledged in the respondent's recital of the facts. The doctrine of alter ego is not applicable in this case. This case involves a corporation with which respondent had done business on a number of occasions and which had an existence separate and apart from Lynn Dixon. Respondent made demands for payment against Gibraltar Securities without

ever addressing those demands to Lynn Dixon. The corporation existed during this period of time when Lynn Dixon was not a corporate officer. No evidence was introduced to show that the corporate entity was the alter ego of Lynn Dixon, but rather the respondent first sought recovery against the corporation and then when it could not bring itself within the indemnification provisions of a securities purchaser, and finding the corporation insolvent, sought recovery against Lynn Dixon whom respondent characterized in the pleadings as the agent of the corporation.

The respondent has alluded to factors that courts consider in making judgment as to whether a corporation is the alter ego of a person, or a mere sham to avoid individual responsibility, Amoco Chemicals Corp. v. Bach, 222 Kan. 589, 567 P.2d 1337 (1977). In that case, the court alluded to the "absence of corporate records." Such is not the case before the court. Gibraltar Securities Corporation was an ongoing enterprise with existence quite apart from appellant Lynn Dixon. It had corporate records in volume, some of which were produced at trial. This was hardly a sham enterprise. This position was not alleged or urged below. Respondent cites the above case and others for the proposition that fraud in the use of the corporation will justify abandoning the corporate status. No fraud was ever alleged in conjunction with respondent's complaint. Rule 9(b), Utah Rules of Civil Procedure, provides:

"In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

This provision was not complied with. General allegations are not sufficient, Milliner v. Elmer Fox & Co., 529 P.2d 806, 809 (Utah 1974). No fraud was either alleged or proved. Such a contention seems to be an afterthought. Respondent would have this Court impose liability against a disclosed agent simply because of insolvency of the principal. This is not the law of agency or responsibility of corporate agents. In Shaw v. Bailey-McCune Co., 11 Utah 2d 93, 355 P.2d 321 (1960), this Court affirmed dismissal of an action against individuals in a suit brought against a corporation and its officers and shareholders. In doing so, the Court stated:

"A corporation is a statutory entity which is regarded as having an existence and personality distinct from that of its stockholders even though the stock is owned by a single individual.

Under some circumstances the corporate entity may be disregarded in the interest of justice in such cases as fraud, contravention of law or contract, or public wrong. However, great caution should be exercised by the courts in disregarding the entity."
(Emphasis added)

No finding was made by the trial court that Gibraltar Securities Corporation was a sham or the alter ego of Lynn Dixon. No request for such a finding was made nor would the evidence justify such a conclusion. Gibraltar Securities existed independent of Lynn Dixon and therefore cannot be ignored so far as Dixon's liability is concerned. Cf. Utah State Bldg. Commission v. Great American Indemnity Co., 105 Utah 11, 18, 140 P.2d 763 (1943).

In Dockstader v. Walker, 29 Utah 2d 370, 510 P.2d 526 (1973) plaintiff brought action against a corporation and its president to recover the amount allegedly due under an employment contract. The corporation was in financial difficulty and couldn't meet the plaintiff's contract. In reversing the trial court's judgment against the corporate president who had allegedly negotiated the contract, this Court stated:

"The term 'alter ego' is used to describe a situation where the courts go behind the corporate entity and hold a stockholder liable for the debts of the corporation or to hold that it is the stockholder and not the corporation which owns the assets.

The doctrine is generally applied to situations known as 'one-man corporations,' i.e., where one man owns practically all of the stock, either directly or through others who hold it for his use and benefit, and where the stockholder uses the corporation as a shield to protect him from debts or wrongdoings. It cannot be applied to make a stockholder liable for the legitimate debts of a corporation unless he is so closely allied with the corporation through ownership and management as to enable the courts to see clearly that the corporate entity is but a sham and it is the stockholder who is doing business behind the corporate shield.

In the instant matter it is not shown that Walker owns a majority of the stock of either corporation of which he was president."

Most recently, in Centurian Corp. v. Fiber Chem, Inc., 562 P 1252 (Utah 1977), this Court rejected a contention that defendant could apply monies received against a corporate indebtedness for a corporation claimed to be the alter ego of the plaintiff. The Court stated that the trial court had not found facts to fit the defense. The Court noted that in order for the alter ego doctrine to apply there must be "something akin to fraud

or deception which thus placed defendant at a disadvantage and worked an injustice." In the instant case, no fraud was plead, no fraud was established. Testimony before the trial court was only that Lynn Dixon as an agent for Gibraltar Securities Corporation received monies in conjunction with a stock sale which because of Gibraltar's insolvency the return funds on the stock sale could not be paid to plaintiff.

It is apparent that respondent had no claim for relief either under a theory of liability of Lynn Dixon as an agent for Gibraltar Securities Corporation or under a theory that Lynn Dixon should be liable as the alter ego of Gibraltar Securities Corporation. The facts of the case disclose no basis for the trial court's judgment.

POINT II

THE RESPONDENT COULD NOT HOLD APPELLANT LIABLE
WHERE APPELLANT WAS AN ACKNOWLEDGED AGENT OF A
KNOWN PRINCIPAL.

The appellant in its initial brief asserts that the trial court improperly used appellant's inability to produce record evidence as affirmative evidence of the validity of the respondent's claim. The appellant in its initial brief has shown that such action by the trial judge was improper. First, it appears that appellant was, at the time of the suit, not connected with Gibraltar. Appellant, Lynn Dixon, did arrange for the production of what records there were of the transaction. See Testimony of Lois Crowder (Tr. 76).

There was no showing that any other specific and relevant records existed. Dixon took the stand and testified fully

as to the transaction. The trial court arbitrarily charged

the appellant with the burden of proof apparently treating a claim of non-production as affirmative evidence against appellant. As is shown in the appellant's brief such application of the rule on failure to produce relevant competent evidence is error. The trial court went beyond merely using the facts as inference. Nor was an inference justified since there is no showing of "actual suppression" by Dixon. Cf. 31 C.J.S. Evidence, § 156(b) cited p. 16 respondent's brief. In the same section, p. 853, it is observed:

"Inferences from the suppression of documents or failure to produce them on notice increase the weight of evidence produced by the other party as to the contents of the documents, or as to the facts to which the documents are relevant, but do not constitute independent evidence of a fact."

Thus the trial court went beyond the permissible rule.

The respondent relies on Rasbury v. Bainum, 15 Utah 2d 62, 387 P.2d 239 (1963) and Tucker v. Nunley, 16 Utah 2d 97, 396 P.2d 440 (1964). Neither case is in point, each case deals with a willful failure to make discovery justifying the trial court in either striking the errant party's cause of action or imposing default. This was not the action requested by respondent nor taken by the trial court.

Even so, the respondent would not be entitled to judgment if the facts as known and plead by respondent show no legal basis for relief. In this case respondent plead the agency of Dixon, all the facts show that Dixon was acting in an agency relationship with Gibraltar Securities. Woolley of Royal Resources had a pattern of dealing with Gibraltar, he acted and understood

that he was dealing with Gibraltar. Woolley made demand for payment on Gibraltar and not upon Dixon. The money that respondent was entitled to was from the sale of stock of a client of Gibraltar and not a personal obligation of Dixon. Therefore, in spite of any lack of discovery, Royal Resources was not entitled to relief against Lynn Dixon.

Further, appellant asserts that any claim against Dixon was barred by respondent taking judgment against Gibraltar and seeking Dixon's aid in satisfaction of that judgment against SCIPIC in Gibraltar's name. Only when it appeared that no claim against SCIPIC would satisfy the judgment did respondent then actively pursue Dixon. Appellant in his initial brief shows that under these circumstances that judgment was barred against Dixon. Restatement of Contract § 119(1).

Even so, since an agent is not liable for the duties and obligations of the principal under such circumstances judgment against Dixon would not otherwise be proper. See Point I, Appellant's Brief.

CONCLUSION

It is respectfully submitted that the respondent's arguments raised in opposition to the appellant's points on appeal demonstrate that the judgment below should be reversed. The respondent's contention that liability should be imposed against appellant under a theory of piercing the corporate veil is neither legally or factually well founded. The

respondent's contentions as to the application of the law on a claimed failure of appellant to produce documents is neither procedurally or conceptually proper. An analysis of the cases and theories raised by respondent in answer to the appellant's complaints of error in the trial below make it apparent that under the facts and law applicable to this case the judgment entered by the trial court was erroneous. This Court should reverse.

Respectfully submitted,

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