

2001

D.A. Taylor Company v. Laurence Paulson & Windsor : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Pete N. Vlahos, Ronald Perkins; Vlahos and Knowlton; Attorneys for Appellant.

Richard M. Taylor; Attorney for Respondent.

Recommended Citation

Brief of Appellant, *D.A. Taylor Company v. Paulson*, No. 14402.00 (Utah Supreme Court, 2001).

https://digitalcommons.law.byu.edu/byu_sc2/1474

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DOCUMENT
KFU
45.9
.S9
DOCKET NO.

UTAH SUPREME COURT

BRIEF

14402 A

RECEIVED
LAW LIBRARY

SEP 15 1976

IN THE SUPREME COURT OF THE STATE OF UTAH
BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

D. A. TAYLOR COMPANY,

Plaintiff and
Respondent,

vs.

LAURENCE PAULSON and
WINDSOR HOUSE, INC.,

Defendants and
Appellant.

/
/
/
/
/
/

Case No. 14402

BRIEF OF APPELLANT

Appeal from the Judgment of the
District Court of Utah County
Honorable J. Robert Bullock, Judge

VLAHOS & KNOWLTON
PETE N. VLAHOS, ESQ.
RONALD PERKINS, ESQ.
Legal Forum Building
2447 Kiesel Avenue
Ogden, Utah 84401

Attorneys for Appellant

RICHARD M. TAYLOR, ESQ.
275 North Main Street
Spanish Fork, Utah 84660

Attorney for Respondent

FILED

MAR 15 1976

TABLE OF CONTENTS

STATEMENT OF THE KIND OF CASE.....1
DISPOSITION IN LOWER COURT.....1
RELIEF SOUGHT ON APPEAL.....2
STATEMENT OF FACTS.....2
ARGUMENT.....5
 POINT I
 EMPLOYEE HAS NO LIABILITY FOR DEBTS OF EMPLOYER.....5
 POINT II
 NOVATION RELIEVES OBLIGOR FROM LIABILITY.....9
CONCLUSION.....12

TABLE OF AUTHORITIES

CASE CITATIONS

Elliott v. Whitney
215 Kan. 256, 524 P.2d 699 (1974).....12

Tulsa Ice Company v. Liley
10 P.2d 1090, Sup.Ct. of Okla.....10

IN THE SUPREME COURT OF THE
STATE OF UTAH

D. A. TAYLOR COMPANY,

Plaintiff and
Respondent,

vs.

LAURENCE PAULSON and
WINDSOR HOUSE, INC.,

Defendants and
Appellant.

/

/

/

/

/

/

Case No. 14402

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This is an action seeking to recover from the Defendant, Windsor House, Inc., a corporate entity, on the basis of a Promissory Note and seeking recovery of the same sum from the individual Laurence Paulson on the basis of an open account indebtedness of the said Defendant.

DISPOSITION IN LOWER COURT

The corporate Defendant did not enter an appearance and Judgment by Default was entered against the corporate Defendant based upon the Promissory Note for the entire sum, with interest,

allegedly due and owing to the Respondent, and a further Judgment was entered by the Court for the same indebtedness as against the individual Defendant, Laurence Paulson, on the basis of an open account sale of merchandise to the individual Appellant.

RELIEF SOUGHT ON APPEAL

The Appellant in this matter is the individual Defendant, Laurence Paulson, and seeks a reversal of the final Order of the Lower Court on the basis of indebtedness being solely that of the corporate Defendant and not that of the Appellant.

STATEMENT OF FACTS

The Transcript in the Lower Court has not been marked in consecutive numbers with the Record and, therefore, references to the Transcript of Trial will be designated by "TR" and the Record of the Lower Court as to the pleadings will be referred to as "R".

The corporate Defendant is set forth in the Complaint as Windsor House, Inc., but the Record sets forth that the corporate entity was M&D Sales, Inc., which did business as Windsor House (TR-16) and also did business as Paulson Interiors, Paulson's, and as Factory Discount Center. (TR-26)

The Record further shows, that the Respondent did business

with Laurence Paulson Interiors, which was a d/b/a of Laurence Paulson from early part of 1973 to September 30, 1973 (TR-16), and that from September 30, 1973, to June 1, 1974, the individual Appellant, Laurence Paulson, was employed as a salesman and buyer by the Defendant Corporation. (TR-10,16)

The Record further shows that subsequent to the time of the closure of the business of the individual Appellant, that a settlement was made with the Respondent for accounts due and owing by the individual Appellant to the Respondent from his privately operated previous business, and that no further relationship of purchase and sale of merchandise was entered into by and between the Respondent and the individual Appellant or the Defendant Corporation until 1974. (TR-17)

The Record further shows that at the time of entering into a composition of the indebtedness, as between Laurence Paulson, as an individual operator and the Respondent, in 1973, that the Respondent took back its carpet samples and quit selling to the Appellant, Mr. Paulson. (TR-29)

The Respondent's President, David A. Taylor (TR-6), used a Sales and Used Tax Exemptions Certificate signed by the individual Appellant, Laurence Paulson, as owner of Laurence Paulson Interiors (Ex.1, TR-7), and was testified to as being necessary in order to make a sale of merchandise to an individual or business operation

in order to have a tax exempt number for such a dealer (TR-7), which is compatible with the testimony of Laurence Paulson, that he first engaged in the operation of the business known as Laurence Paulson Interiors as set forth hereinabove, which began in 1973. It should be noted that Exhibit 1 is not dated and no date was established as to the signing of same by the Respondent, nor was there any testimony submitted by the Appellant to establish such a date.

The testimony of the individual Appellant, Mr. Paulson, was that he was solicited by a salesman for the Respondent to engage in business as between the Respondent and the Defendant Corporation, and that Mr. Paulson advised both the Respondent's salesman and Mr. Taylor, that all purchases would be paid for by the Defendant corporate entity. (TR-17) It was further alleged by Mr. Paulson, that this conversation took place in March or April of 1974 prior to the re-establishing of business relations as between the Respondent with the Defendant Corporation. (TR-18)

The Record further shows that the Defendant Corporation did not promptly pay its bills to the Respondent and that the Respondent introduced Respondent's Exhibit 3, which clearly evidences a Promissory Note entered into by and between the Respondent and the Defendant Corporation for payment of the

entire amount due and owing by Defendants to the Respondent, including interest thereon, that the acceptance of the Promissory Note and the negotiation for same was made by the Respondent's President, Dave Taylor, that in fact five \$100.00 payments were made by the Defendant Corporation and the Defendant Corporation became in financial distress and payments stopped. (TR-10) The Respondent's President, Dave Taylor, further testified that "of course since I couldn't get paid, then I looked back to Mr. Paulson for the payment of the money". (TR-10)

No defense was offered by the Defendant Corporation in the instant matter before the Court and a Default Judgment was entered by the Lower Court for the full amount of the indebtedness allegedly due and owing to the Respondent. (R-9)

ARGUMENT

POINT I

EMPLOYEE HAS NO LIABILITY FOR DEBTS OF EMPLOYER.

The Record before the Court clearly evidences that Appellant, Paulson, began doing business individually with the Respondent in 1973, and that the business was terminated on September 30, 1973, when the operation of the business was sold to the corporate Defendant, Windsor House, at which time the individual Appellant became an employee of the Defendant Corporation. (TR-16)

The Record also clearly evidences on the testimony of the Respondent, that subsequent to the closure of the individual business of the Appellant, Paulson, that a composition of debts and a return of merchandise was made between Paulson and the Respondent evidenced by the following statements made by the Respondent's President:

Question: Speaking of payments in the past prior to this lapse of time, did Mr. Paulson have a fairly good record of paying bills?

Answer by Respondent: No. Mr. Paulson didn't have a good record with me anyway. May have paid other people promptly. In fact, before I went out of business with him, originally quit selling Mr. Paulson, I went up there and he and I settled the account and I took back our samples. (TR-29)

Mr. Paulson testified that Respondent's salesman solicited business from the Defendant Corporation through Mr. Paulson, and that Mr. Paulson advised both the salesman and the Respondent's President, that the merchandise would be sold to the Defendant Corporation and not to the Appellant (TR-31).

The Respondent admits that a conversation was had as between the Respondent's sales representative and the Appellant, Mr. Paulson, and that shortly thereafter an open account (TR-29 - 30) was established for the sale of merchandise, which is testified as having occurred and is evidenced by the invoices submitted by the Respondent as having commenced in the early part of April, 1974. (Pl.Ex.2)

The Respondent being the complainant, it is submitted that the burden of proof by a preponderance of the evidence is upon the Respondent. It would appear totally inconsistent, that the testimony of the Respondent's President as to the credit payment habits of the individual Appellant, coupled with the fact that a composition of the indebtedness of the Appellant, together with the repossession of Appellant's merchandise which occurred in the latter part of 1973, would be totally inconsistent with the establishment of an unsecured open account with the individual Appellant.

There is no evidence to controvert the fact, that the Appellant, Mr. Paulson, was an employee of the Defendant Corporation from September 30, 1973, to June, 1974, whereupon the Appellant, Paulson, terminated his relationship with the Defendant Corporation.

The Record further evidences that upon seeking to collect for merchandise delivered to the Defendant Corporation, the Respondent contacted Mr. Paulson, who directed him to the manager of Windsor House, and that the Respondent and the corporate Defendant entered into a Promissory Note for payment of the total amount allegedly due and owing between the Respondent and the corporate Defendant in the amount of \$1,804.58, and to be paid in monthly payments of \$100.00 a month (TR-14), and that subsequently \$100.00 payments were made by the Defendant

Corporation to the Respondent on October 10, 1974, October 19, 1974, October 29, 1974, and November 6, 1974, and November 13, 1974. (R-12)

It is submitted to the Court, that the knowledge and intention of the Respondent Corporation through its President, Mr. Taylor, is evidenced by the testimony in the Record, wherein the questions and answers were as follows:

Did you (referring to the President of the Respondent Corporation) have a course of business dealings with Paulson's Interiors, Laurence Paulson doing business as Paulson's Interiors?

Answer - Oh, yes. This dates back probably into '73 even when we did business with Mr. Paulson (Emphasis added) (TR-7).

The Respondent introduced into evidence Exhibit 2, which consists of 17 invoices which the Court marked once as a series, but each invoice is numbered numerically in the upper right hand corner by number. At the time of introduction, the following dialogue was had as between Counsel for the Respondent and the Respondent's President, Mr. Taylor, as follows:

Question - I show you what has been marked as Plaintiff's Exhibit 2 and ask if you recognize these documents?

Answer - (By Mr. Taylor) Yes. These are the billings to Mr. Paulson.

Question - Now do these billings constitute the claim or the basis of the claim which you are making before the Court today?

Answer - Yes. This is the basis for the claim.
(TR-7,8)

An examination of the first two Invoices will show that they were billed to Factory Discount Center and that most of the rest of the Exhibits were billed to Paulson Interiors, which is to be distinguished from the Exhibit 1 introduced by Plaintiff, wherein the firm name of the Appellant was set forth therein as Laurence Paulson Interiors.

It is further important to note that the 17th Invoice in the series is not only billed to Paulson Interiors, but it is addressed to 435 West 400 South, in Salt Lake City, Utah, which is the place of business of M&D Sales, d/b/a Windsor House, the corporate Defendant. The Appellant has already testified under oath and directly at time of trial, that Windsor House did business under the name of Paulsons and as Factory Discount Center as distinguished from the original business of the Appellant, which was as set forth in Plaintiff's Exhibit 1 as Laurence Paulson Interiors. (R-26).

POINT II

NOVATION RELIEVES OBLIGOR FROM LIABILITY.

It is submitted to this Honorable Court, that the argument set forth in Point I clearly establishes that there was only a relationship of employer-employee as between the Respondent

and the Appellant, and further, that the Appellant entered into an agreement with the corporate Defendant to assume any and all liability for the indebtedness claimed by the Respondent, and that the new agreement extinguished any agreement, if any, if it exists as between the Appellant and the Respondent.

It is set forth in Tulsa Ice Company v. Liley, 10 P.2d 1090, Sup.Ct. of Oklahoma, 1932, that the requisites of a novation are:

1. A previous valid obligation.
2. The agreement of all parties to the new contract.
3. The extinguishment of the old contract.
4. The validity of the new one.

(1) There is no denial, that there was a previous valid obligation as between the Respondent and either the individual Appellant or the corporate Defendant; (2) that the agreement of all of the parties to the new contract is evidenced by the manner of the billings for the merchandise as set forth in Plaintiff's Exhibit 1 consisting of the series of Invoices submitted thereat by the testimony of the solicitation of the business of the Defendant Corporation, and the Appellant testified under oath, that he was a salesman and a buyer for the Defendant Corporation, and that upon being solicited for business by the salesman of the Respondent, advised both the salesman and subsequently Mr. Taylor,

that purchases were to be made by Windsor House. (TR-17)

The timing of the alleged conversation is borne out as testified to by the Appellant, wherein he stated that the conversation occurred in March or April of 1974 and the Invoices represented by Plaintiff's Exhibit 1, which is allegedly the basis for the claim by the Respondent, and was commenced by deliveries in April 2, 1974, through June 4, 1974. (TR-18)

It has been previously set forth in Point I hereinabove, that a composition of creditors was entered into by and between the Respondent and the Appellant for the private business dealings as between the Appellant and the Respondent, which relationship was terminated subsequent to September 30, 1973 (TR-16), wherein the Respondent testified that he did make a consolidation of the indebtedness and repossessed all of the samples which were in the possession of the Appellant. (TR-29)

(3) It is submitted to the Court, that the extinguishment of the old contract, if any such contract exists, occurred when the Respondent obtained the Promissory Note of the corporate Defendant for the total amount due and owing to the corporate Defendant, and the payment to the Respondent by the corporate Defendant of five \$100.00 monthly installments upon the Promissory Note. (TR-14) (R-12)

(4) The corporate Defendant has never sought to allege the nonvalidity of its liability, in that a Default Judgment was entered against the corporate Defendant at time of trial, with no attempt whatsoever being made by the corporate Defendant to appear and defend itself against the claim of liability for the merchandise (R-14).

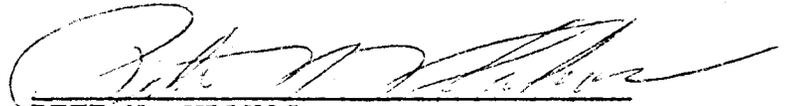
It is submitted to this Court, that whether or not a novation does exist depends upon construction of the written evidence and instruments before the Court and is a question of law for the Court to decide as set forth in Elliott v. Whitney, 215 Kan. 256, 524 P.2d 699 (1974).

CONCLUSION

It is submitted to this Honorable Court, that the relationship of the Appellant and the corporate Defendant was that of employer-employee, and further, that the Respondent having already characterized, as set forth above, the fact, that the Appellant was a poor credit risk, and further, that the Respondent had made a composition of its debts and repossessed its merchandise in the Fall of 1973, does not lend much credence to the fact, that the Respondent then again entered into an open account relationship with the Appellant and did not really intend to sell the merchandise to the Appellant as evidenced by Respondent's

Invoices set forth in Respondent's Exhibit 2, which show billings not only to the business entity as set forth in Exhibit 1, but including even a delivery to the address of the corporate Defendant rather than that of the place of employment of the Appellant, and that upon the insolvency of the corporate Defendant, the Respondent is seeking to hold the employee, the Appellant herein, liable for the debts of the corporation.

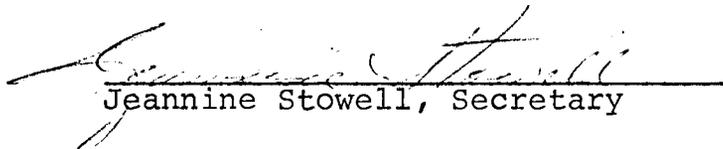
Respectfully submitted,



PETE N. VLAHOS
Attorney for Appellant
Legal Forum Building
2447 Kiesel Avenue
Ogden, Utah 84401

CERTIFICATE OF MAILING

A copy of the foregoing Brief of Appellant was posted in the U.S. mail postage prepaid and addressed to the Attorney for the Respondent, Richard M. Taylor, 275 North Main Street, Spanish Fork, Utah 84660, on this 13 day of March, 1976.


Jeannine Stowell, Secretary