1979

Michael W. Strand v. Jack Cranney et al : Reply Brief of Appellant

Utah Supreme Court

Bryce E. Roe; Attorneys for Defendants and Respondents;
Richard J. Leedy; Attorney for Plaintiff and Appellant;

Bryce Roe
Attorney for Respondent
340 East 4th South
Salt Lake City, Utah 84111

IN THE SUPREME COURT OF THE

STATE OF UTAH

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MICHAEL W. STRAND, :

Plaintiff-Appellant, :

vs. : Case No. 16176

JACK CRANNEY, et al., :

Defendants-Respondents. :

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REPLY BRIEF OF APPELLANT

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APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT IN AND FOR SALT LAKE COUNTY
STATE OF UTAH, THE HONORABLE G. HAL TAYLOR
JUDGE PRESIDING

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Richard J. Leedy
Attorney for Appellant
610 East South Temple
Salt Lake City, Utah 84102

Bryce Roe
Attorney for Respondent
340 East 4th South
Salt Lake City, Utah 84111

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STATEMENT

The appellant submits the following reply brief pursuant to Rule 75(p) of the Utah Rules of Civil Procedure. The appellant contends that the respondents have raised two issues in their brief on appeal that warrant a reply brief. The respondents have contended that even if the trial court's findings will not support respondents' contention in the trial court that a joint tenancy arrangement existed between appellant and respondent with reference to the Classic Mining Company stock, that respondent at least has a cotenancy arrangement in said stock. Second, respondent contends that since the transaction in this case was in the nature of replevin as initially maintained by the appellant that appellant has the burden of proof in the instant action. It is submitted that with reference

to both matters respondent is in error and that one of these contentions was not properly before the Court having been raised for the first time on appeal.

POINT I

APPELLANT HAS NO COTENANCY INTEREST IN THE PROPERTY OF CLASSIC MINING STOCK SINCE, (1) THE PLEA OF COTENANCY IS RAISED FOR THE FIRST TIME ON APPEAL AND (2) THERE IS NO LEGAL BASIS FOR SUCH CLAIM.

In Point II of the respondent's brief on appeal, it is asserted that even if the trial court's findings on a joint venture relationship between appellant and respondent are erroneous that this Court could affirm the judgment below based upon a theory that there was some form of cotenancy or joint ownership in the stock between the appellant and respondent. It is respectfully submitted that such a contention cannot be sustained. Appellant submits that if the Court were to find no joint venture relationship between the appellant and respondent the only other relationship cognizable from the posture of the case is that of a contractual relationship between the parties of borrower/lender.

Appellant filed his verified complaint alleging that there were a series of loans between appellant and respondents for which the appellant pledged the stock which was the subject of the complaint (R. 2-4). It was appellant's contention that appellant had pledged stock as security for loans from respondents and that respondents were wrongfully retaining the pledge (R. 2-4). Respondents filed an answer and a counterclaim (R. 39). Respondents' answer and counterclaim acknowledged the delivery of the shares and a pledge in the

stock as the original relationship between appellant and respondents (R. 39). Respondents plead as an affirmative defense to the plaintiff's claim for relief the joint venture relationship asserted in the trial court (R. 40). The respondents' counterclaim also alleged the creation of a joint venture relationship between appellant and respondents and respondents' prayer for relief was based on a contention of a joint venture (R. 41-43). The amended findings of fact and conclusions of law as entered by the court treated only the claim of a joint venture relationship (R. 114). At no time did the respondents assert in the trial court, either in their pleadings, evidence, or argument, that their assertions of the right to own and possess the stock in question was based on any other legal theory than one of joint venture. The record is devoid of any contention of a joint tenancy or tenancy in common relationship in the stock other than that emanating from the claim of joint venture. It is, therefore, submitted that respondents cannot now for the first time on appeal contend that if the trial court erred in finding a joint venture relationship that the judgment below can be sustained on the basis of a joint ownership either by joint tenancy or tenancy in common. In In re Estate of Ekker, 19 Utah 2d 414, 432 P.2d 45 (1967), this Court observed, citing several prior decisions:

> "Neither of the first two points were raised in the pleadings nor put in issue at the trial. Therefore, they cannot be considered for the first time on this appeal."

This Court has consistently followed the position that where matters have not been raised in the pleading or a part of the record in the

trial court they cannot be raised for the first time on appeal, Hanover Limited v. Field, 568 P.2d 751 (Utah 1977); Nelson v. Newman, 583 P.2d 601 (Utah 1978); Park City, Utah Corp. v. Ensign Company, 586 P.2d 446 (Utah 1978). It is therefore submitted that respondents' contention in Point II of their brief on appeal cannot be sustained since the issue was not properly raised and preserved in the court below.

It is further submitted that the evidence in the instant case will not support this Court's recognition of either a co-ownership in the nature of a joint tenancy or tenancy in common.

This Court has recognized that joint tenancies are basically creatures of contract. Hanks v. Hales, 17 Utah 2d 344, 411 P.2d 836 (1966). It has been generally recognized that joint tenancy interests can only be created by "grant or devise and never by way of dissent or other act of law." 20 Am.Jur.2d Cotenancy and Joint Ownership, §9, p. 100. Therefore, unless there was some actual intention on the part of appellant and respondents to create a joint tenancy interest none can be created by an incidental legal relationship. It has been stated that before a joint tenancy in property can be realized that there are four essential elements or unities. In 20 Am.Jur.2d Cotenancy and Joint Ownership, §4, it is stated:

> "In other words, there must be the following four unities: (1) unity of interest, (2) unity of title, (3) unity of time, and (4) unity of possession. If any one of these elements is lacking, the estate will not be one in joint tenancy. Hence, where two or more persons acquire an individual interest in property at different times or by different conveyances, the

estate created is not joint tenancy, for the unity of time or the unity of conveyance would be disregarded were this to be called a joint tenancy."

See Hanks v. Hales, supra. In the instant case, it is clear that there is no unity of time or possession and that the various transactions where characterized as loans or part of a joint venture occurred over an extended period of time. It is equally apparent that there was never intended by either appellant or respondent any relationship comparable to that of ~~joint~~ tenancy or joint ownership in the stock. It is apparent that if there was no joint venture, the contract and relationship is significantly deficient, based on the instant record, to make out a claim of joint tenancy. Further, the burden would be upon the respondents to establish a joint tenancy by "clear, satisfactory, and convincing evidence", 20 Am.Jur.2d Cotenancy and Joint Ownership, §9, p. 101.

It is further submitted that there is no co-ownership in the nature of a cotenancy or tenancy in common. It is well settled that stock or other personal property may be handed over to the possession of a third person as a pledge. Johnson v. Hibbard, 27 Utah 342, 75 Pac. 737 (1904); Brown, Personal Property, §128, p 566. This does not create a cotenancy and will terminate a joint tenancy. 20 Am.Jur.2d Cotenancy and Joint Ownership, §17. In order for there to be a cotenancy or a tenancy in common, there must be a unity of possession, 20 Am.Jur.2d Cotenancy and Joint Ownership, §§1, 23. As long as property is pledged or in the possession of another person for security no cotenancy or tenancy in common is created. Only

where there is a contractual relationship or a relationship intending to convey ownership would such a relationship be created. If the evidence is insufficient to establish a joint venture then the only evidence of record supporting any relationship between appellant and respondents supports the appellant's contention that the relationship was one of borrower/secured creditor. The facts in the instant case do not show that there was any contractual borrowing or dealing that would give rise to a claim of co-ownership. Although there was discussion concerning creation of a partnership relationship between the parties, the matter only involved preliminary discussion and was never consummated. Respondents simply held possession of the stock as pledgees to secure their loan. Respondents are entitled to the monies they advanced plus interest but nothing else.

POINT II

RESPONDENTS HAD THE BURDEN OF PROVING A JOINT VENTURE RELATIONSHIP AND THE EVIDENCE FAILED TO SUPPORT RESPONDENTS' BURDEN OF PROOF.

In Point III of respondents' brief they assert that the burden of proof was on the appellant to establish his right to possession of the stock, citing general statements from cases with reference to the law of replevin. In order to determine the appropriate burden of proof in the instant case, it is essential to analyze the pleadings of the parties. The appellant filed the initial action and his verified complaint plead that the stock in question was given as a pledge for loans made by respondents and that the respondents wrongfully retained the pledge (R. 2-4). The answer and counterclaim of

the respondents is particularly significant as to the burden of proof (R. 39). The answer in affirmative (first) defense admits that the appellants loaned Strand the sum of $20,000 and further admits the receipt of 10,000 shares of Classic Mining Corporation from Strand. Further, averments throughout the pleadings admit that Strand turned over the stock in question in one form or another to the respondents as part of their business arrangements (R. 39-41). The pleadings and evidence show appellant's willingness to extinguish the debt and interest in obtaining release of the pledged stock not sold by respondents. In Paragraph 6 of respondents' answer, they assert a transaction as being part of the contemplation of a joint venture arrangement (R. 40). In appellant's counterclaim, an allegation is made that a joint venture arrangement was entered into on May 4, 1977, and the counterclaim further asserts a joint venture arrangement as being a defense to the appellant's contentions and justifying the actions and claims of respondents. Therefore, the posture of the pleadings was to recognize that the stock in question was turned over to respondents by Strand and that Strand had at least a possessory interest in the stock and respondents affirmatively asserted a joint venture relationship as a defense to the contentions advanced by Strand. Under these circumstances, it is submitted that the burden of proof to establish the joint venture relationship was clearly upon respondents. This case brings into consideration maxims of burden of proof. The Latin phrase ei incumbit probatio qui dicit; non qui negat is generally applied as to the burden of proof and simply means that "the proof

lies upon him who affirms, not upon him who denies", Black's Law Dictionary, 4th Ed., p. 606. Another maxim, reus excipiendo fit actor is also applicable. This phrase provides that "the defendant, by excepting or pleading, becomes a plaintiff", Black's Law Dictionary, 4th Ed., p. 1482. As asserted in the same work where a party, instead of simply denying the plaintiff's cause of action, sets up some new matter in defense, the party bears the burden of proof. Thus, under these principles, respondents had the burden of proof.

The rules for allocating burdens of proof are succinctly stated in James & Hazard, Civil Procedure, 2d ed. §7.8, where it is stated: "* * * the party who must establish the affirmative proposition has the burden of proof on the issue", (2) "* * * that the burden of proof is upon the party to whose case the fact in question is essential * * *" and (3) "* * * the party who has the burden of pleading a fact must prove it." Applying each of the above principles, it is apparent that the burden of persuasion in the instant case, as to the joint venture relationship, was on the respondents on their counterclaim. The evidence was clearly to the effect that the stock in question was lawfully possessed by Strand and either given over to respondents as a pledge for loans or as part of a joint venture relationship. Respondents acknowledge receipt of the stock, acknowledge some loan transactions and affirmatively plead a joint venture relationship. Thus, the burden of persuasion, once it was established that Strand had an interest in the stock and that some of the transactions were loans, was upon the respondents to establish their joint venture contention.

In 46 Am.Jur.2d Joint Ventures, §69, the general rule is stated: "The burden of establishing the existence of a joint venture is upon the party asserting the relation exists." It is the generally recognized rule that a joint venture is never presumed and that the burden of persuasion is on the party alleging such a relationship. Preston v. The State Industrial Accident Commission, 174 Or. 553, 149 P.2d 957 (1944); Bunn v. Lucas, Pino, & Lucas, 172 Cal.App.2d 450, 342 P.2d 508 (1959). The standard is no different regardless of how the appellant's original claim for relief is characterized. Although appellant did not proceed in accordance with the replevin rules (see Rule 65b, Utah Rules of Civil Procedure) appellant's claim for relief in part was for the return of the remaining available stock. Even if this is characterized as an action in replevin, the right of the appellant to an interest in the stock is recognized in the respondents' answer and counterclaim. Therefore, the rule stated in 66 Am.Jur.2d Replevin §98 is applicable:

> "In case the defendant does not deny the allegations of the complaint, but relies entirely on an affirmative defense, the burden is on him throughout to establish his defenses."

Consequently, it is submitted that the burden of persuasion for the respondents to prevail below was on the respondents. For the reasons stated in appellant's original brief, that burden was not met. The evidence simply does not conform to the legal requirements for a joint venture and is insufficient to support the trial court's findings.

CONCLUSION

It is respectfully submitted that the assertions in the respondents' brief to the effect that if the trial court's conclusions were incorrect as to a joint venture that a cotenancy relationship can be sustained and that the appellant had the burden of proof on the issue of whether the respondent should prevail are incorrect statements of law. There is no basis to claim any relationship between the parties other than those encompassed within the parties' pleadings and evidence offered of record. On the right of the respondents to have an ownership interest in the stock sought by appellant in bringing the instant action, respondents bore the burden of establishing a joint venture relationship and as set forth in the appellant's principal brief on appeal, the evidence does not support the trial court's findings. This Court should reverse.

Respectfully submitted

RICHARD J. LEEDY
610 East South Temple
Salt Lake City, Utah 84102

Attorney for Appellant