

1979

Olympia Sales Co. v. John Long : Brief of Respondent

Utah Supreme Court

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Plaintiff and Appellant.

v.

JOHN LONG and JOHN LONG, JR.
JOHN'S KITCHEN KORMER,

Defendant and Appellant.

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BRIEF OF RESPONDENT

Appealed from the Judgment of
the Third Judicial District Court
for Salt Lake County, Utah
Hon. Hal G. Taylor, Judge

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FILED

1979

IN THE SUPREME COURT
OF THE STATE OF UTAH

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OLYMPIA SALES COMPANY, a)
Utah Corporation,)

Plaintiff and Respondent,)

Case No. 16216

v.)

JOHN LONG and JOHN LONG dba)
JOHN'S KITCHEN KORNER,)

Defendant and Appellant.)

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TABLE OF CONTENTS

NATURE OF CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL.	2
STATEMENT OF THE FACTS	2
ARGUMENT	
POINT I	
THE TRIAL COURT'S DENIAL OF DEFENDANT'S	
MOTION FOR CHANGE OF VENUE WAS CORRECT,	
NOT AN ABUSE OF DISCRETION, AND SHOULD	
BE UPHELD	3
CONCLUSION	7

STATUTES CITED

<u>Section 78-13-7, Utah Code Ann.</u> (as amended 1953).	3, 4, 7
----------------------------------------------------------------------	---------

CASES CITED

<u>Compressed Steel Company v. Pratt</u> 239 P.2d 396 (Okla. 1951).	5
<u>Anderson et al v. Johnson et al</u> 1 Utah 2d, 400, 268 P.2d 427 (1954).	6
<u>State v. Certain Intoxicating Liquors</u> 53 Utah 272, 177 P.235 (1918).	6

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JOHN'S KITCHEN KORNER,)

Defendant and Appellant.)

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BRIEF OF RESPONDENT

NATURE OF THE CASE

This is an action for collection of monies owed to the Plaintiff for merchandise purchased by the Defendant from the Plaintiff in Salt Lake County, State of Utah.

DISPOSITION IN LOWER COURT

In November, 1978, the Plaintiff filed a Complaint seeking a money Judgment against the Defendant in Salt Lake County, State of Utah. The Defendant then made a Motion for a change of venue alleging that venue in the action was

improper in that the Defendant was a resident of Iron County and necessarily the case must be tried in Iron County. The Trial Court denied Defendant's Motion and Defendant appealed from that denial.

RELIEF SOUGHT ON APPEAL

The Plaintiff prays that the Trial Court's Order be affirmed and that the matter be remanded for trial in Salt Lake County.

STATEMENTS OF THE FACTS

As set forth in Plaintiff's Affidavit (R-10), for approximately 8 years, the Defendant has ordered and purchased from Plaintiff kitchen cabinets and other related products. In every instance the Defendant ordered the merchandise from Plaintiff at Plaintiff's place of business in Salt Lake County. He often ordered in person and always, except for this case, paid Plaintiff at the Plaintiff's place of business. In each case, the Defendant would personally appear in Salt Lake and transport the merchandise purchased back to Iron County or pay all freight costs incurred in connection with transportation of the merchandise from Salt Lake County to his place of business in Iron County. This course of conduct continued between the parties over a period of approximately 8 years until the 19th day of

July, 1976, when the Defendant refused and failed to pay what was then due and owing the Plaintiff.

Consequently, Plaintiff filed a Complaint (R-39) in Salt Lake County for \$6,485.84, the amount then due and owing it. Defendant then filed a Motion for Change of Venue (R-29) and a Memorandum (R-32) in support thereof. Defendant failed to appear at the time his Motion was scheduled for oral argument and the Honorable G. Hal Taylor, after hearing argument of Plaintiff, denied Defendant's Motion for Change of Venue and an Order was entered accordingly (R-21). The hearing was held without a reporter. Defendant then filed a Petition for Interlocutory Appeal (R-25) and that Petition was granted by this Court (R-23).

ARGUMENT

POINT I

THE TRIAL COURT'S DENIAL OF DEFENDANT'S
MOTION FOR CHANGE OF VENUE WAS CORRECT, NOT
AN ABUSE OF DISCRETION, AND SHOULD BE UPHELD.

The Defendant, in its Brief, relies upon §78-13-7 Utah Code Ann. (1953) in support of his claim that he, as a matter of right, is entitled to have this case tried in Iron County. That Statute clearly does not create a right in all cases to have an action prosecuted within the County in which the Defendant resides.

Section 78-13-7, Utah Code Ann. (1953) in part specifically states that:

In all other cases, the action must be tried in the county in which the cause of action arises, or in the county in which the Defendant resides at the commencement of the action.
Id. (Emphasis added).

This Statute gives Plaintiff an option to commence an action either in the county in which the Defendant resides or in the county in which the cause of action arose. Plaintiff, in this case, chose the latter and the facts clearly support Plaintiff in filing in Salt Lake County. Therefore, Plaintiff is clearly within its rights to file the action where it did.

The relationship which existed between Plaintiff and Defendant for many years establishes a course of conduct and practice between those parties under which the items purchased were ordered and received by Defendant at Plaintiff's place of business (R-10 P.3) and all payments were made by Defendant directly to Plaintiff at Plaintiff's place of business (R-11 P.6). Defendant's failure to make the payment as agreed upon by the parties at Plaintiff's place of business, as he had done in the past, gave rise to a cause of action in the Plaintiff as against the Defendant and that cause of action, based upon Defendant's own conduct in the past and in the instant case arose in Salt Lake County and not in

Iron County (R-10; R-39). Defendant's Affidavit (R-7) disputes none of these allegations. That being the case, Plaintiff is entitled to sue the Defendant in Salt Lake County.

A similar result was reached in the case of Capital Compressed Steel Company v. Pratt, 239 P.2d 396 (Okla. 1951). In that case, the Oklahoma Supreme Court applied a statute involving venue of actions which is similar to the Utah statute in question. The Plaintiff had agreed to sell and the Defendant had agreed to purchase airplane steel scrap under a purchase order executed by the Defendant. The purchase order was signed in Oklahoma County, the residence of the Defendant. Price, under the purchase order, was to be paid F.O.B. at Altus, Oklahoma which is located in Jackson County, Oklahoma. In concluding that venue was proper in Jackson County, the Court succinctly and summarily stated:

Because the scrap metal sold the Defendant was delivered F.O.B. cars at Altus, Oklahoma, "the cause of action or some part thereof" arose in Jackson County and the District Court of Jackson County had venue of this action.

In this case the parties had, for over a period of 8 years (R-10 P.2-5), operated under the premise that all merchandise purchased by the Defendant from the Plaintiff was to be paid for at the Plaintiff's place of business (F.O.B. Salt Lake City).

The Court, in denying Defendant's Motion for Change of Venue, recognized the fact of that continuous course of conduct and correctly concluded that Plaintiff's cause of action arose in Salt Lake County.

It is also an accepted principle under Utah law that the granting or denial of a motion for change of venue by the Trial Court is discretionary and the Trial Court's decision will not be altered unless it is shown by the party challenging the Trial Court's action, that the Court acted arbitrarily or capriciously. In the case of Anderson et al v. Johnson et al, 1 Utah 2d, 400, 268 P.2d 427 (1954) the Court stated:

. . . A trial court's ruling on an application for a change of place of trial will not be considered to have been an abuse of discretion unless the court acted unfairly or by whim or caprice or practically denied justice in the case. . . The burden is upon the party who assails the trial court's ruling on a motion for change of place of trial to establish error or prejudice.

The Defendant, in this case, has in no way shown that the Trial Court abused its discretion, acted arbitrarily or capriciously and, therefore, Defendant's request for relief must necessarily fail. (See also State v. Certain Intoxicating Liquors, 53 Utah 272, 177 P.235 (1918).

It is clear that Plaintiff has the right to sue in the county in which the Defendant resides or in the county in which the cause of action arose. Plaintiff elected to sue in the county in which the cause of action arose. To prevent Plaintiff from so doing would leave Plaintiff, as well as other similarly situated merchants, in a position of unjust hardship without any reasonable recourse against a party who simply travels to the merchant's place of business, orders goods and materials there, promises to pay for them there, and then returns to a county of his residence fully knowing that the only access the defrauded merchant has to him is in the county in which he resides. Such a result would certainly impose an injustice upon and be unfair to the party who attempts to collect monies rightfully due and owing him from a debtor.

CONCLUSION

The Plaintiff has shown, to the satisfaction of the Trial Court that the cause of action upon which the Plaintiff sues arose in Salt Lake County and, therefore, is entitled under §78-13-7, Utah Code Ann. (1953) to file suit in Salt Lake County for collection of the amounts of money due and owing him from the Defendant. The Trial Court did not abuse

its discretion in denying Defendant's Motion for Change of Venue and its Order should be affirmed.

RESPECTFULLY SUBMITTED this 25th day of May, 1979.

GUSTIN, ADAMS, KASTING & LIAPIS

By Dean L. Gray
DEAN L. GRAY
Attorney for Plaintiff and
Respondent

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JOHN'S KITCHEN KORNER,)
)
Defendant and Appellant.)

MAILING CERTIFICATE

Case No. 16216

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COMES NOW Dean L. Gray, Attorney for Plaintiff-Respondent in the above-entitled matter, and certifies that two (2) true and correct copies of Respondent's Brief were mailed, postage prepaid, to Michael W. Park, Esq., Attorney for Defendant-Appellant, at 110 North Main Street, Suite H, Cedar City, Utah, 84720.

DATED this 25th day of May, 1979.

GUSTIN, ADAMS, KASTING & LIAPIS

By

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TABLE OF CONTENTS

	<u>Page</u>
NATURE OF THE CASE	1
DISPOSITION IN THE LOWER COURT	1
RELIEF SOUGHT ON APPEAL.	1
STATEMENT OF FACTS	2
ARGUMENT	8
POINT	8
THE TRIAL COURT ERRED AS A MATTER OF LAW BY ALLOWING THE PLAINTIFF TO RECOVER ON HER CONTRACT WHERE THE UNDISPUTED EVIDENCE DEMONSTRATED THAT THE PLAINTIFF ENGAGED IN THE BUSINESS OF CONTRACTING IN THE STATE OF UTAH AND ACTED IN THE CAPACITY OF A CONTRACTOR IN THE STATE OF UTAH WITHOUT BENEFIT OF A UTAH CONTRACTOR'S LICENSE	8
CONCLUSION	19

AUTHORITIES CITED

CASES

Mosley v. Johnson, 22 Utah 2d 348, 453 P2d 149 (1969).	10
Meridian Corporation v. McGlynn/Garmaker Company, 567 P2d 1110 (Utah 1977).	11
Olsen v. Reese, 114 Utah 411, 200 P2d 733 (1948).	9, 10, 11

STATUTES

Utah Code Annotated 1953, 58-23-1	9, 12, 13, 14, 15, 19,
58-23-3(3)	12, 14, 15, 16, 19
73-3-22	10
73-3-25	10
58-23-18	13