

1979

## Amjacs Interwest, Inc. v. Carl Smith : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT  
OF  
THE STATE OF UTAH

AMJACS INTERWEST, INC., :

Plaintiff-Appellant, :

vs. :

No. 16236

CARL SMITH, :

Defendant-Respondent. :

BRIEF OF APPELLANT

APPEAL FROM A JUDGMENT AND ORDER OF THE  
SECOND JUDICIAL DISTRICT COURT FOR WEBER COUNTY, STATE OF UTAH  
The Honorable Calvin Gould, Judge

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Defendant-Respondent.:

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BRIEF OF APPELLANT

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STATEMENT OF THE CASE

In this suit, the plaintiff-appellant, Amjacs Interwest, Inc., seeks to recover for goods and services provided to Design Associates, a Utah partnership, on an open account.

DISPOSITION IN LOWER COURT

This action was commenced on June 30, 1977 in the Second Judicial District Court. Judgment by default was obtained against defendants Design Associates, Gerald Granquist and Richard Fletcher. The defendants Gordon Steed, Unico, Inc. ("Unico") and Carl Smith ("Smith") answered.

On or about June 20, 1978, plaintiff filed a Motion for Summary Judgment as against Unico and Smith on the grounds that both Unico and Smith were partners in Design Associates and thus individually liable for the partnership debts. Smith filed a cross-motion for summary judgment, seeking an Order of

Dismissal. After a hearing, the Honorable Calvin Gould entered an Order granting plaintiff's Motion for Summary Judgment against Unico, granting Smith's Motion for Summary Judgment against plaintiff, and dismissing plaintiff's Complaint as against Smith.

#### RELIEF SOUGHT ON APPEAL

Plaintiff-appellant requests reversal of the judgment entered in the District Court granting the Motion for Summary Judgment of Smith and dismissing plaintiff's Complaint with respect to that defendant.

#### STATEMENT OF FACTS

Design Associates is a partnership that, from November 1, 1976 to June 20, 1977, purchased goods and services valued at \$14,465.69 from the plaintiff. (R. 96). The partnership was created by an Agreement dated December 26, 1975. (R. 52).

One of the partners in Design Associates was Unico, Inc. (R. 52), which is a corporation solely owned by Carl Smith. (R. 91). Smith was in complete control of Unico. "Informal" shareholders meetings were held "periodically," with only Smith in attendance. (R. 93). Meetings of the Board of Directors were attended only by Smith and his wife, Mary A'lana. (R. 93). Transfers of property were made between Smith and Unico. (R 92).

Judgment against Carl Smith as an individual is sought by plaintiff premised upon two grounds. The first is

that Carl Smith was in fact a partner in Design Associates. The second asserted grounds for holding Smith liable is that Unico, Inc., an acknowledged partner in Design Associates, is the alter ego of Carl Smith and that Smith should therefore be personally responsible for the debts of his sham corporation. Smith's Motion for Summary Judgment addressed itself only to the partnership question; the District Court ruled that, as a matter of law, Carl Smith was not a partner in Design Associates. This ruling on the partnership question, as well as dismissal of the Complaint despite unresolved questions with regard to the alter ego issue, form the basis of the plaintiff's appeal.

#### ARGUMENT

THE DISTRICT COURT ERRED IN GRANTING SMITH'S MOTION FOR SUMMARY JUDGMENT AND IN ORDERING THE DISMISSAL OF PLAINTIFF'S COMPLAINT WITH RESPECT TO SMITH.

The judgment and order of the District Court ignored the presence of significant materials issues of fact with regard to Carl Smith's participation as a partner in Design Associates. Further, the District Court's dismissal of the Complaint was error, as it disposed of the plaintiff's claim that Unico, Inc. is the alter ego of Carl Smith even though that issue was not addressed by Smith in his Motion and despite the existence of admissions in the pleadings that raise the factual possibility of a sham corporation.

I. The District Court Erred in Ruling That Carl Smith Was Not, As a Matter of Law, a Partner in Design Associates.

This Court has often expressed the view that a motion for summary judgment, because it is a harsh measure, is to be considered in a light most to the advantage of the party resisting the motion, and that all doubts are to be resolved in favor of that party. Such a motion is patently improper where issues of material fact remain. See University Club v. Invesco Holding Corp., 504 P.2d 29 (Utah 1972); Controlled Receivables, Inc. v. Harman, 413 P.2d 807 (Utah 1966).

An example of such reluctance is contained in West v. West, 387 P.2d 686 (Utah 1963), in which summary judgment was granted by the district court in a dispute over the meaning of a partnership agreement. The Supreme Court vacated that judgment, stating that the documents in question were ambiguous and uncertain and that an evidentiary hearing was necessary in order to resolve the issue. Id. at 689.

An Arizona case dealt with a situation analogous to the one at bar. In Phoenix Feed and Seed Co. v. Adams, 279 P.2d 447 (Ariz. 1955), suit was brought to collect upon an open account. Summary judgment for one of the defendants was reversed, as the appellate court decided that a question of fact remained as to whether the defendants were engaged in a joint venture.

Precisely the same type of question of fact involved

in Phoenix Feed and Seed and the West cases is presented here. Design Associates was created by a partnership agreement that is, at least with regard to Carl Smith's asserted defense, at best uncertain and ambiguous.<sup>1</sup> The agreement begins by stating that it is entered into by Unico, Inc., Fletcher, Steed and Granquist. It then states:

"Whereas, Smith is in a position to assist in the business through initial financing through his solely owned corporation, Unico Inc. . . ." (Emphasis added). (R. 92 et. seq.)

Smith's participation is further discussed in the provisions found at paragraphs 4 and 6, which state:

"4. DIVISION OF PROFIT AND LOSS — All losses of the business shall be shared equally by the firm members, Fletcher, Steed and Granquist on an annual basis, i.e. one third each shall be paid by each member. The profits shall be shared and paid on an annual basis to the four parties i.e. one fourth each to Fletcher, Steed, Granquist and Smith. (Emphasis added).

"6. MANAGEMENT OF BUSINESS AND DUTIES — The business shall be jointly managed by the parties with the specific duties of each party being, but not limited to the following:

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1. Plaintiff below made a Motion for Summary Judgment on the grounds that the agreement showed clearly that Carl Smith in fact was a partner in Design Associates. Denial of that Motion by the court below in no way affects plaintiff's argument here, and certainly does not preclude plaintiff from arguing that a dispute as to material facts still exists. West v. West, supra, at 689.

Carl Smith — shall give direction on overall financing and shall coordinate with the accountant for the business." (R. 92 et. seq.)

The repeated references to Smith in the partnership agreement could very well substantiate a conclusion that Smith was a partner in Design Associates. These references are not, however, the only facts that raise the issue of Smith's status as a partner. Gordon Steed, a partner in Design Associates (R. 4), admitted in his Answer to the Complaint that Carl Smith is a partner in Design Associates. (R. 4). In addition, plaintiff mailed a letter to Smith in June, 1977 in which a demand for payment of the overdue account of Design Associates was made. (R. 96 et. seq.) In response, plaintiff received a financial statement which listed Carl Smith as a principal of Design Associates. (R. 96 et. seq.)

This appeal, of course, neither asks nor requires this Court to determine that Carl Smith was a partner in Design Associates. Plaintiff only seeks the chance to present the facts and circumstances of Carl Smith's involvement in Design Associates to a finder of fact. Plaintiff was improperly denied that opportunity by the District Court's order, and for that reason the Judgment below should be reversed.

II. The Plaintiff is Entitled to an Evidentiary Hearing with Respect to Its Claim that Unico Inc. is the Alter Ego of Carl Smith.

The arguments to the District Court of the parties only went to the question of whether one could conclude from the record, as a matter of law, that Carl Smith was not a partner in Design Associates. As was discussed supra the Court's ruling that Smith was entitled to judgment as to that issue was in error. Even assuming, arguendo, that the Court was correct with regard to the partnership issue, the Court nevertheless committed error in ordering dismissal of the plaintiff's Complaint against Smith, including the claim that Unico is the alter ego of Smith.

A suit in which it is claimed that the corporate entity should be disregarded is one in which an evidentiary hearing is nearly inevitable in order to resolve the issues presented. In Plotkin v. National Lead Company, 482 P.2d 323 (Nev. 1971), for example, an order granting summary judgment was reversed on the grounds that the question of whether the defendant corporation was the alter ego of an individual presented a question of fact.

That this kind of result will obtain in nearly every alter ego case is made clear by the following articulation of the theory by this Court in E.R. Shaw v. Bailey-McCune Company, 355 P.2d 321, 322 (Utah 1960):

"Moreover, the conditions under which the corporate entity may be disregarded

or the corporation be regarded as the alter ego of the stockholders vary according to the circumstances in each case inasmuch as the doctrine is essentially an equitable one and for that reason is particularly within the province of the trial court."

Carl Smith was, at all materially relevant times, the sole shareholder in Unico, Inc. (R. 91). As sole shareholder, he was the only person in attendance at the informal and occasional shareholders' meetings. (R. 93). He and his wife were the only participants in the meetings of the Board of Directors of Unico. (R. 93). Transfers of property were made between Smith and Unico. (R. 92). In the partnership agreement of Design Associates to which Smith signed his name, the names Smith and Unico were used interchangeably. (R. 92 et. seq.) The record as a whole quite clearly raises the factual issue of whether, under the circumstances at bar, it is appropriate to disregard the corporate veil of Unico, Inc. Plaintiff has been denied its rightful opportunity to have those facts presented and adjudicated.

#### CONCLUSION

The District Court's judgment and order of dismissal deprived plaintiff of its right to an evidentiary hearing on two questions as to which material issues of fact exist. Plaintiff is entitled to a factual determination as to whether Carl Smith was a partner in Design Associates, and/or whether his solely owned corporation Unico, Inc., which admittedly was

a partner in Design Associates, is in fact the alter ego of Mr. Smith. For these and all other foregoing reasons, plaintiff respectfully submits that the judgment and order of the District Court granting judgment in Carl Smith's favor and dismissing plaintiff's Complaint as against him should be reversed and the case remanded for trial.

RESPECTFULLY SUBMITTED THIS 19<sup>th</sup> day of March,

1979.

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CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the above and foregoing Brief of Appellant to be mailed, postage prepaid, this 19<sup>th</sup> day of March, 1979, to:

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