

1952

Rulon M. Keller v. R. V. Wixom : Brief of Respondent

Utah Supreme Court

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In the Supreme Court of the State of Utah

RULON M. KELLER,

Plaintiff and Respondent.

-vs-

R. V. WIXOM,

Defendant and Appellant.

CASE NO.

7778

BRIEF OF RESPONDENT

Appeal from the District Court of
Salt Lake County, Utah

Honorable A. H. Ellett, District Judge

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Logan, Utah

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In the Supreme Court of the State of Utah

RULON M. KELLER,

Plaintiff and Respondent.

-vs-

R. V. WIXOM,

Defendant and Appellant.

CASE NO.

7778

BRIEF OF RESPONDENT

STATEMENT OF FACTS

We have no quarrel with the first, second and third paragraphs of the statememnt of facts in appellant's brief, but the fourth paragraph, on page 2 thereof, contains some statements that are at least colored. There is set out the quotation a "preliminary agreement of parntership involving certain real property and 407 head of steers, all located in Elko County, Nevada", it does not appear to be disclosed by the record and certainly not by the agreement entered into. Mr. Wixom never at any time, insisted upon having a formal partnership agreement. (Tr. 313) Then it is further stated on page 2 of appellant's brief pursuant to the terms of Exhibit B, Wixom and Keller agreed to enter into a detailed partnership agreement whereby

Wixom would sell and Keller agreed to buy half interest in certain real estate and 407 head of cattle, when Exhibit B does not provide for any such thing. It is true that they agreed to enter into a formal partnership agreement but nothing is stated in said exhibit about a detailed partnership agreement as stated by counsel.

At the bottom of page 3 of appellant's brief and on page 4, some misstatements are made and they say that Keller never paid the \$7873.62 balance of the purchase price to Wixom, and cites several pages of the transcript and finally Keller's deposition, Exhibit 36, at page 54. The deposition of Keller shows that the money was paid; it was taken out of the profits of the business and we invite the court's attention to read the very page that they have cited. On page 4 of appellants brief, the statement is made again that the \$7873.62, with interest, was never paid, whereas the evidence shows that it was, taken from the operation of this partnership and after it was paid, Wixom still owes Keller the amount of this judgment (Exhibit 36, page 54). Again the statement is made that Keller never contributed any more funds until April 6, 1949 when he made available \$2,000.00. The only citation made for that is Exhibit K, and Exhibit B is the agreement entered into between Wixom and Keller when Keller paid over the \$10,000, but funds were available for operation through loans made with the Wasatch Livestock Loan Company. The fact is the banking account of the firm was kept with

the Wasatch Livestock Loan Company.

The statement is also made that Keller "by his own admission, is an experienced livestock man and livestock trader", and the only citation for that is Exhibit B which is the contract between Keller and Wixom and there is nothing said about anybody's experience in that contract.

Another misstatement is made in appellant's brief where it is stated that the agreement was that the Idaho Falls cattle were to be fed for \$30.00 a head and cites Exhibit K. Exhibit K does not make any such contention. Exhibit K is a letter from Wixom to Keller and it reads "I figure this \$49.62 each, for feed, plus \$2.75 each freight, having a cost of \$52.37, which is more than the \$30 which I had been figuring". Besides this, Exhibit K shows that the matter was agreed upon and settled. Keller positively denied any agreement for \$30.00 (Exhibit 36, page 18) we may pause to ask why counsel make so many misstatements in this case? Then again counsel states "the fact was shown that Keller charged Wixom \$49.62 for feeding the steers in Idaho Falls instead of \$30 per head as agreed on; (Ex. K) and upon that there was a definite misunderstanding (Exhibit K)". Exhibit K is the above mentioned letter in which it is shown that there was no understanding or agreement that \$30.00 a head was to be allowed for feeding the said cattle, and besides that a settlement was made on this item. Wixom himself stated in Exhibit K that he

had figured \$30 a head and no agreement is mentioned. We inquire why counsel is so reckless in making statements?

The statement is further made "Wixom, however, was the principal investor, and although agreed otherwise was because of Keller's wilful refusal and neglect to perform his obligations, required to protect the interests of the partnership in the entire operation". The only citation for this statement are the depositions of Wixom and Keller, Exhibits 72 and 36. No page of either Exhibit is referred to and we submit that the depositions do not bear out any such statement. The depositions of neither Wixom or Keller bear out this. There is utterly no evidence to support this statement and the citations to the record do not support it whereas Exhibit K shows that Keller was devoting time and attention to the partnership business by feeding the cattle in Idaho Falls, and the record is replete where Keller was making purchase on behalf of the partnership and was devoting a good part of his time to the partnership business. The evidence wholly fails to show abandonment on the part of Keller.

Wixom testified to his claim for \$12,500 extra compensation which, of course, the court disallowed (Tr-318) Mr. Wixom, when his desposition was taken before the trail, stated that he had arbitrarily charged up a salary of \$12,500. Also he charged up for trucking expenses \$6,000 (Ex. 72, page 44) There was no agreement at any

time for this allowance and there is utterly no showing that Keller abandoned the partnership (Ex. K, Tr. 354 and 355) It is even admitted in the appellant's brief that Keller was in complete charge of the entire feeding and selling operation of the cattle in Idaho Falls (Appellant's Brief, page 5) The record shows that Mr. Keller took employees to Nevada, also moved equipment and paid salaries (Tr. 388). Nothing was ever said in connection with the partnership agreement as to the amount of time each would put into the partnership (Ex. 36, page 12)

On October 19, 1951, the plaintiff tendered findings of fact and conclusions of law herein (Tr. Red numbered 69). After the above mentioned proposed findings filed a served on September 18, 1952 the defendant filed a motion to amend or change plaintiff's findings of facts and conclusions of law. (Tr. Red numbered 60). The plaintiff's first proposed findings were served upon the defendant's counsel on June 1, 1951. (Tr. Red numbered 74) Thereafter, the court made findings of fact and conclusions of law largely in accordance with the motion of the defendant (Tr. Red numbered 81) The question sought to be raised by Point 1 of the appellant's brief was not mentioned in the motion to correct and amend the proposed findings of the plaintiff that were first filed, and now the appellant should not be permitted to raise this question for the first time on appeal, after having made full objections and suggestions as to the

findings in the court below without mentioning the question now sought to be raised.

POINT I

The basic test as to certain findings of fact is whether they are sufficiently comprehensive and pertinent to the issues in the case to provide a basis for the purposes of decision.

Shapiro v. Rubens, 166 F. 2d 659

Klimkiewicz v. Westminster Deposit & Trust Company, 122 F2 957, 74 App. D.C. 333, Cer. den., 62 S Ct 633, 315 US 805, 86 L. Ed 1204

Odekerk v. Muncie Gear Works, 179 F2 821.

POINT II.

Where it is apparent that findings have a disposition on the issues involved in the case, it will be sufficient to support the judgement, though certain matter, sufficient as a counter-claim, was not mentioned, but was clearly inferred by the findings and the judgement.

First National Bank of Colorado Springs v. McGuire, 184 F.2d 620, Syl, 19

POINT III.

If findings of fact of the trial court are based upon evidence they may not be disturbed on appeal.

Woods v. Oak Park. Chateau Corp. 179 F.2d 611.

POINT IV.

Under the rules of civil procedre, if findings of fact

are sufficient to support the ultimate conclusion of the trial court, they are sufficient.

Norwich Union Indemnity Co. v. Haas, 179 F.2d 827

POINT V.

Under the rules, appellant's objection to omission of specific findings on certain points presents nothing for review where it was not pointed out that appellant was prejudiced by such omission.

Wells Fargo Bank & Trust Co. v. Imperial Irrigation District, 136 F. 2d 539

POINT VI

No partner is entitled to remuneration for acting in partnership business except that a surviving partner is entitled to receive compensation for services rendered in winding up partnership affairs.

Utah Code Annotated, 1943, Sec. 69-1-15

Forbes v. Butler, 73 Utah 522, 275 P. 772

Johnson v. Tri-Union Oil and Gas Co., 129 S.W.2d Ill, 278 Ky. 633.

2 Rowley, Modern Law of Partnership, Sec, 729, p 1008

Leslie v. Oakley, 1550 SE 226,—W Va.—

Nevills v. Moore Mining Co., 135 Cal 561, 67 P 1054

Peck v. Alexander, 40 Colo 392, 91 P 38

Efner v. Reynolds, 181 NW 552, 105 Neb 646

Cole v. Cole, 119 Ark 48, 177SW 915

Bemis v. Widows & Orphans Home of Christian Church, of Kentucky, 1991 Ky 316, 230 SW 310

POINT VII

Unless the rules of civil procedure have changed the law, the law in Utah is that the objection such as is made here would have to be made in the court below or it would be waived.

4 CJS. p 634. Sec 310

Callahan v. Simons, 64 Utah 250, 228 P 892

POINT VIII

In any case where objection to the findings of the trial court, whether or not findings are general or specific, or conclusions of law, are raised in the court below, only such points and objections as are embraced may be urged on appeal.

4 CJS, p 636, Sec. 310

ARGUMENT

The basic test as to the adequacy of findings of fact is whether they are sufficiently comprehensive and pertinent to the issues in the case so as to provide a basis for the purposes of decision.

Shapiro v. Rubens, 166 F2 659;

Klimkiewicz v. Westminster Deposit & Trust Company, 122 F2 957, 74 App. D.C. 333, Cer. den. 62 S Ct 633, 315 US 805, 86 L. Ed 1204

Odekerk v. Muncie Gear Works, 179 F2 821.

We submit that the Federal authorities are decisive since the Federal Rules of Civil Procedure and the New Rules of Civil Procedure of Utah are largely copied from or at least substantially patterned after the Federal rules and we believe that the rules dealing with findings are the same as the Federal Rules

The law under the Federal rules has been declared to be that where the District Court found, on ample evidence, that the defendant was not entitled to recovery from the plaintiff on defendant's counter-claim because the counter-claim was unsupported by evidence and the judgment was entered for plaintiff upon the findings of facts and conclusions of law, such judgment necessarily disposed of the counter-claim, though it did not mention it.

First National Bank of Colorado Springs v. McGuire, 184 F2 620.

In any even, if the findings of fact are based upon evidence in part disputed they will not be disturbed on appeal.

Woods v. Oak Park Chateau Corp., 179 F2 611.

Under the Federal rules relating to findings of trial court, the trial court is not required to make findings on all facts presented or to make detailed evidentiary findings, but if findings are sufficient to support ultimate conclusion of court they are sufficient.

Norwich Union Indemnity Co. v. Haas, 179 F2 827.

Under the Federal rules, the law is that omission of specific findings on certain points presents nothing for review where it is not pointed out how the appellant was prejudiced by such omission.

Wells Fargo Bank & Trust Co., v. Imperial Irrigation District, 136 F2 539,

No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs. (See authorities cited under Point VI.)

What we have said with reference to the claim for salary, applies also to the claims for advancement and the use of equipment that were made by the appellant.

2 Rowley Modern Law of Partnership, Sec. 729, p. 1008.

The Supreme Court of Colorado has held in discussing the question before the court "At page 774, Volume 2, Lindley on Partnership, it is stated that 'under ordinary circumstances the contract of partnership excludes any implied contract for payment for services rendered for the firm by any of its members. Consequently, under ordinary circumstances, and in the absence of an agreement to that affect, one partner cannot charge his co-partners with any sum for com-

pensation either in the shape of salary, commission or otherwise on account of his own trouble in conducting the partnership business, and in this regard he is in no different position from any other partner. See also *Nevills v. Moore Mining Co*, 135 Cal 561, 67 P 1054 and cases cited. In the later case, in addition to the rules laid down above, it is further stated: "the question is one of evidence, and it was for the trial court to determine whether, from the facts and conclusion, a contract was proven." "

Peck v. Alexander, 40 Colo. 392, 91 P 38.

The managing partner of a newspaper was denied compensation although the other partner contributed very little, if anything, to the partnership venture, other than the invested capital and the court held that in the absence of a specific agreement for compensation for services rendered by a partner, no such compensation would be allowed, even where he performed all of the services, because of the sickness or death of the other partners.

Cole v. Cole, 119 Ark 48, 177 SW 915.

See also *Bemis v. Widows & Orphans Home of Christian Church of Kentucky*, 191 Ky 316, 230 SW 310.

The written agreement in the case at bar of the engagement in this partnership relation is silent as to any compensation of either of the partners for

services rendered. Exhibit 72 is the deposition of Mr. Wixom taken before the trial and at a time when he was not advised as to what the law is with regard to his claiming compensation and on page 43 of that deposition, Mr. Wixom expressly stated that there was no partnership agreement as to compensation and in setting out the terms of partnership, in addition to the written agreement entered into, there is no mention of compensation to be allowed him. This attempt to collect compensation on the part of Wixom is an afterthought and trying to avoid accounting to Keller for any of the profits made. We believe that this disposes of Points I and II of appellant's brief.

The third point is so general that I do not believe it requires any attention.

We will now briefly notice the authorities cited by appellant, the first case cited by counsel for appellant is *Margolis v. Leonard and Holt*. This case deals with findings of fact and has nothing to do with the questions presented to this court. It seems that in the cited case the court merely made a finding as to the balance due and not a finding of different items going to makeup the account and this is different from the case we now have before the court. Here the defendant's items are discussed and set out and then concluded as to balance that is due.

The next case cited by counsel for appellant is

Schieff v. Bistline. This case, insofar as it could possibly have any pertinency, here merely holds that the court should make findings as to the correctness of defendant's accounting as respects accounts receivable assigned to it by a defunct corporation and we fail to see how this could have any bearing upon any question before the court in this case at bar.

The next case cited is Whann v. Doell. This case is apparently cited for the purpose of showing that a mere statement for balance due without setting out items or showing disposition of the controversy as to particular items is insufficient. We again submit that this case has no bearing on any question before the court in the case at bar. Aside from this the holding that findings as to a fair balance is insufficient is a mere dictum as it was not necessary to a decision of the court and the case of Margolis v. Leonard and Holt follows the dictum in this case. The case of Margolis v. Leonard and Holt is from the Court of Appeals of California and not from the Supreme Court. The case of Whann v. Doell holds that it is not necessary to follow approved bookkeeping methods in taking and stating an account. We call the court's attention to the language of Chief Justice Wilbur in this last citation; "It is obvious that a statement of the balance due in the findings of the court, without a reference, *and without an accounting or without exception being taken to this specific item*, is not sufficient disposition

of such an action, because the issues between the parties are not framed in such a manner as to show method by which the general result is reached, and the aggrieved party cannot successfully present his grievance to an appellant tribunal because on such an appeal this court must assume in support of the judgment that if controverted fact was determined in favor respondent and even if it was both the disposition and the power on the part of the appellant tribunal to re-examine the entire case, the presumption in favor of the action of the trial court as to the contested items would ordinarily render such action wholly negatory. We wish to stress the fact that Whann v. Doell is authority against appellant here because as the court said "It is obvious that a statement of the balance due in the findings of the court, without reference, *without an accounting or without exception being taken to specific items* is not properly disposition of such an action" In the case at bar there was an accounting taken as the record disclosed patiently and painstakingly by the trial court. There were exceptions taken in the form of a motion and the findings and conclusions are largely in accordance with the complaint made by appellant. We wish to stress to the court that by having made the motion in the court below for findings in accordance with the contention of the defendant and no complaint having been made as to findings of balance due the matter of arriving as it in such motion that such question cannot

now be argued on appeal and we also submit that before appellant can be heard, he would have to raise the question in the court below and especially after having filed a motion for amendment of the findings as was done here. In this connection see 4 CJS, page 634,636, Section 310. Calahan V. Simons, 64 Utah 250, 228 P 892

The only other case cited by appellant is Oliver v. Carl Uleberg and that case appears to hold that where one partner abandons the partnership venture and the other carries on that under some conditions he might charge for salary or wages. This has no application here.

We respectfully submit that the appeal in this case is without merit and the judgment of the trial court should be affirmed.

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