

1980

Bill Anderson v. Jay Gardner et al : Brief of Appellant

Utah Supreme Court

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Neils E. Mortenson; Attorney for the Plaintiff-Respondent;

Gary Frank; Attorney for Defendant-Appellant;

Recommended Citation

Brief of Appellant, *Anderson v. Gardner*, No. 17050 (Utah Supreme Court, 1980).

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IN THE SUPREME COURT OF THE
STATE OF UTAH

BILL ANDERSON,)
)
 Plaintiff-Respondent)
)
 vs.)
)
 JAY GARDNER, KMOR RADIO)
 and SEAGULL ENTERPRISES,)
 INC.,)
)
 Defendants-Appellants)

CASE NO. 17050

APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, UTAH
HONORABLE PETER F. LEARY, JUDGE

BRIEF OF APPELLANT

GARY A. FRANK
5085 South State Street
Murray, Utah 84107
Attorney for Defendant-Appellant
Jay Gardner

E. NEILS MORTENSON
COHNE, RAPPAPORT & SEGAL
66 Exchange Place
Salt Lake City, Utah 84111
Attorneys for Plaintiff-Respondent

FILED

NOV 3 1980

Clerk, Supreme Court, Utah

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Murray, Utah 84107
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E. NEILS MORTENSON
COHNE, RAPPAPORT & SEGAL
66 Exchange Place
Salt Lake City, Utah 84111
Attorneys for Plaintiff-Respondent

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CASE NO. 17050

BRIEF OF APPELLANT JAY GARDNER

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from the Judgment granted by the Honorable Peter F. Leary, Judge of the Third Judicial District Court, in and for Salt Lake County, State of Utah, and entered in the above entitled matter on the 1st day of April, 1980.

RELIEF SOUGHT ON APPEAL

Appellant Jay Gardner, hereinafter referred to as "Gardner", seeks a reversal of the Judgment and a dismissal of

the above entitled matter as against appellant on its merits and with prejudice or, in the alternative, for a remand of the above entitled matter to the Third Judicial District Court, in and for Salt Lake County, State of Utah, for a full trial on the merits.

STATEMENT OF FACTS

By two agreements each under date of November 14, 1974, plaintiff-respondent, a country and western performer, agreed to present a show at Ogden, Utah on the 14th day of March, 1975 (Exhibit 2-P) and Salt Lake City, Utah on the 15th day of March, 1975 (Exhibit 1-P). The Ogden, Utah appearance was rescheduled to Roosevelt, Utah with both shows being performed by plaintiff-respondent on the scheduled dates.

At the conclusion of the Salt Lake City, Utah engagement on March 15, 1975, plaintiff-respondent received the amount of \$1,200.00 in cash, together with a check for \$2,300.00 for the Roosevelt, Utah performance and the amount of \$1,400.00 in cash, together with a check for \$2,100.00 for the Salt Lake City, Utah performance (R.109). Each check (Exhibit 3-P and Exhibit 4-P) was drawn on the account of Seagull Enterprises, Inc. to cover the difference between the gate cash proceeds, less expenses, and the guaranteed appearance fee.

The dispute between the parties arose when the two

checks, Exhibits 3-P and 4-P were not honored for payment and plaintiff-respondent subsequently initiated this action to collect the difference between the cash payment received and the guaranteed appearance fee.

The only witness who testified at the trial in the lower court with the exception of counsel for plaintiff-respondent who testified as to a reasonable attorney' fee, was appellant Jay Gardner. Mr. Gardner testified that in November, 1974, he was the general manager of radio station KMOR (R-107) and with regard to the subject agreements, Mr. Gardner testified in response to questions posed by counsel for plaintiff-respondent:

"Q. It was also your responsibility to, in connection with promotion of that radio station, obtain various country and western artists for singing concerts as well?

"A. Yes, it was.

"Q. Do you recall in that capacity having contracted and having an agreement with Mr. Bill Anderson for an appearance in Utah, two appearances?

"A. Yes, I did." (R.107)

Mr. Gardner further testified that the two agreements, Exhibit 1-P and Exhibit 2-P, were prepared by the Bill Goodwin Agency, the booking agent for plaintiff-respondent, and at the time Mr. Gardner received the agreements, the typed portions were completed (R.123). Mr. Gardner signed both agreements under the designation in each agreement, "Mr. Jay Gardner-KMOR RADIO".

Both the address and telephone number under Mr. Gardner's signature identified the broadcasting site of KMOR radio.

Mr. Gardner further explained that the designation KMOR were the call letters assigned to the licensee of the broadcasting license by the Federal Communications Commission (R.111) and that in November, 1974, Seagull Enterprises, Inc., a corporate entity (Exhibit 6-D) was awaiting formal approval by the Federal Communications Commission of the transfer of the broadcasting license from its previous holder to Seagull Enterprises, Inc. (R.120). Seagull Enterprises, Inc. had applied to the Federal Communications Commission for approval of the proposed transfer in July, 1974 (R.132) and was notified of the formal approval December 13, 1974 (R.120). Mr. Gardner never personally or individually held the broadcasting license (R.121).

The two checks tendered in payment of the balance of the appearance fee, Exhibit 3-P and Exhibit 4-P, were drawn on the account of Seagull Enterprises, Inc. and at the time the same were signed by Mr. Gardner, he believed there was sufficient funds in the account to accomodate payment (R.136). However, when the checks were presented for payment, the account balance had been diminished and the principal officer, stockholder and financier of the corporation had failed to deposit sufficient funds to satisfy operating expenses and the previously drawn

checks (R.136).

In explaining why the subject agreements had been executed without further limitation or restriction other than the typed "Mr. Jay Gardner-KMOR RADIO" Mr. Gardner testified:

"Q. Why didn't you indicate that on the contract, then?

"A. The contract came to me typed, as they always do from Bill and several of the other people I have dealt with over the years. And I merely signed them and sent them back as I had indicated to Bill and he had made them up.

"And many times booking agencies and radio people go strictly on 'KMOR RADIO' or 'KSL RADIO' or whatever the case may be.

"And maybe we overlooked the legalities of the thing, but that's the way a lot of people deal with it. But my conversations with Bill were in regards to Seagull Enterprises." (R.130)

The "Bill" referred to by Mr. Gardner in the foregoing testimony was Mr. Bill Goodwin owner of the Bill Goodwin Agency, plaintiff - respondent's booking agent.

To further establish that the parties with whom they were dealing at the time of the execution of the subject agreements, appellant introduced a letter under date of April 10, 1975 from Mr. Bill Goodwin to Mr. Jay Gardner that stated in part:

"I have made several attempts to contact you and so far you haven't returned my calls or corresponded with me in any manner concerning the checks that

were returned, insufficient funds on the Bill Anderson dates your corporation contracted for March 14-15, 1975 totalling \$4,400.00." (Exhibit 7-D).

Although this letter was introduced into evidence to establish that Mr. Goodwin knew that he was dealing with a corporate entity at the time of the execution of the subject agreements, the lower court determined that the restrictive endorsement prepared by Mr. Goodwin prior to Mr. Gardner's signature was not sufficient to preclude Mr. Gardner's individual liability under the agreements. This finding was determined notwithstanding the testimony of Mr. Gardner and the simple basic fact that Mr. Gardner received no personal gain or benefit as a result of plaintiff-respondent's personal appearances.

ARGUMENT

THE LOWER COURT ERRED IN FINDING THAT APPELLANT WAS PERSONALLY LIABLE FOR THE CORPORATE OBLIGATIONS OWING TO PLAINTIFF-RESPONDENT.

The issue presented by this appeal is whether the signature of Mr. Gardner on the subject agreements, Exhibit 1-P and Exhibit 2-P, indicates that Mr. Gardner signed the same in a representative capacity so as to preclude the imposition of a personal and individual liability. Both agreements were prepared by the booking agents for plaintiff-respondent and when submitted to Mr. Gardner for execution provided as follows:

"Mr. Jay Gardner-KMOR RADIO

4984 South 360 West
Murray, Utah 84107
801-266-4418"

(Exhibit 1-P and Exhibit 2-P)

As stated in 3A Fletcher Cyc. Corp. (Perm. Ed) Section
1118 at 163:

"Liability for corporate debts does not rest upon corporate officers personally. And directors, officers, and stockholders of a corporation are not jointly liable with the corporation for the performance of the obligations of the corporation's contracts, unless they joined in the making thereof or thereafter contract to assume such liability."

Additionally, it is stated at 7 Fletcher Cyc. Corp.
(Perm. Ed) Section 3034, at 166, 167:

"In the case of simple contracts, in order for them to be contracts of the corporation, it is not essential that they be signed with the corporate name. Even though a contract is not signed by the corporation, if, in its body, there is a disclosure of the principal, and the contract purports to be the agreement of the company and not of the signer and the signature itself indicates that it was executed in a representative capacity, the contract must be regarded as that of the corporation and not of the signer. The entire instrument must be considered in ascertaining the intention of the parties, for a determination of the question whether the corporation or individual is bound by the contract depends largely upon the intention of the parties."

The subject agreements clearly establish that at the time of their preparation, it was understood by and between Mr.

Bill Goodwin and Mr. Jay Gardner that the engagements were being undertaken to promote radio station KMOR. The agreements themselves clearly established that the services of plaintiff-respondent were being obtained for the sole purpose of promoting the radio station identified within the agreement as KMOR and not for the personal gain or gratification of Mr. Gardner.

The testimony is clear that at the time of the negotiations culminating in the preparation and execution of the subject agreements, Mr. Gardner conversed with Mr. Goodwin in terms of Seagull Enterprises, Inc. being the contracting party (R.130). Rather than identifying Seagull Enterprises, Inc. within the body of the agreements, Mr. Goodwin chose to identify the radio station by its call letters, to wit: KMOR Radio, this being the standard practice within the industry (R.130). In either case, it is clear that Mr. Goodwin knew and understood that Mr. Gardner was executing the subject agreements in a representative capacity.

Mr. Goodwin's awareness of Mr. Gardner's status is further illustrated by his letter under date of April 10, 1975 (Exhibit 7-D) wherein Mr. Goodwin notes:

"I have made several attempts to contact you and so far you haven't returned my calls or corresponded with me in any manner concerning the checks that were returned, insufficient funds on the Bill Anderson dates your corporation contracted for March 14, 15, 1975 totaling \$4400.00." (Exhibit 7-D, Emphasis added).

It is interesting to note that in this letter Mr. Goodwin did not claim a personal liability against Mr. Gardner or allege that during the negotiations Mr. Gardner had failed to reveal that Mr. Gardner was acting in a representative capacity. To the contrary, Mr. Goodwin specifically acknowledges that the contracting party was a corporation.

In 19 Am Jur 2d Corporations, Section 1341 the general rule is stated at 747:

"...So far as the liability on corporate contracts is concerned, directors and officers of corporations are in the same position as agents of private individuals. As is true of agents generally, it is well settled that the officers of a corporation are not personally liable on its contract if they do not purport to bind themselves individually."

It is equally clear that:

"...The principal and not the agent will be bound, despite the fact that the agent signs in his name alone, if the instrument as a whole clearly shows that that was the intent of the parties to the instrument, and the fact of the agency and identity of the principal are clearly disclosed." (3 Am Jur 2d Agency, Section 192 at 575).

The record is clear that at the time Mr. Goodwin prepared the subject agreements, it was recognized that Mr. Gardner was acting in a representative capacity. Mr. Gardner's signature was to follow the designation: "Mr. Jay Gardner-KMOR RADIO" and Mr. Goodwin's letter (Exhibit 7-D) referred to the corporation as the contracting party. Additionally, the uncontradicted testimony

of Mr. Gardner establishes the basis and understanding on which the negotiations were undertaken and the subject agreements executed.

The remaining evidence establishes that Seagull Enterprises, Inc. was a duly organized corporation in November of 1974 (Exhibit 6-D), and that the checks tendered in payment of the balance due were drawn on the account of Seagull Enterprises Inc. (Exhibit 3-P and 4-P). Not until the corporate checks failed to provide payment did plaintiff-respondent take the position that Mr. Gardner was personally liable for the unpaid balance. The cash proceeds from which plaintiff-respondent received a partial payment were the proceeds of Seagull Enterprises Inc. and the obligation to satisfy any remaining balance due plaintiff-respondent as a result of the insufficiency of the cash proceeds as against the guaranteed fee was also that of Seagull Enterprises, Inc.

CONCLUSION

For the reasons herein stated, it is respectfully submitted that the personal judgment against appellant Jay Gardner should be reversed and the complaint of plaintiff-respondent against appellant Jay Gardner dismissed on its merits and with prejudice or, in the alternative, the matter should be remanded to the Third Judicial District Court in and for Salt

Lake County, State of Utah, for a new trial.

Respectfully submitted this _____ day of _____,
1980.

Gary A. Frank
Attorney for Defendant-Appellant
Jay Gardner