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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 RESPONDENT

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TABLE OF CONTENTS

AUTHORITIES CITED

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IN THE SUPREME COURT OF THE

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BILL ANDERSON,	)	
Plaintiff-Respondent	)	
vs.	)	CASE NO. 17050
JAY GARDNER, KMOR RADIO, and SEAGULL ENTERPRISES, INC.,	)	
Defendant-Appellants	)	

BRIEF OF RESPONDENT BILL ANDERSON

STATEMENT OF THE NATURE OF THE CASE

Plaintiff obtained a 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 by the Court on the first day of April 1980. Said Judgment included a personal judgment against the Defendant, Jay Gardner, and from that personal Judgment the Defendant, Jay Gardner appealed.

RELIEF SOUGHT ON APPEAL

The Appellant attempts to have "Gardner" dismissed and reversal of the Judgment entered by the District Court or in the alternative, for a remand to the Third Judicial District Court for a full trial on the merits. Plaintiff-Respondent seeks to have the above entitled Judgment upheld in all aspects and

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for costs incurred in this Appeal. Plaintiff-Respondent submits that there has been a full trial on the merits of the issues and that it is determinative.

STATEMENT OF FACTS

Plaintiff-Respondent entered into two (2) agreements both on the date of November 14, 1974, for the performance of two (2) concerts to be held on the 14th day of March, 1975, and the 15th day of March, 1975. Said agreements were specifically entered into and signed by Bill Anderson on behalf of Plaintiff-Respondent and by Mr. Jay Gardner. Type writen above Mr. Gardner's signature was the indication KMOR Radio. (Exhibit 1-P and 2-P).

Plaintiff did, in fact, perform the engagements as agreed upon and received $1,200.00 cash for the Salt Lake performance and $1,400.00 cash for the Roosevelt performance. (R.109). The remainder of the total amount agreed upon was paid to Plaintiff in the form of two (2) checks; one in the amount of $2,100.00 and one in the amount of $2,300.00. (Exhibits 3-P and Exhibit 4-P Both of said checks were drawn on the account of Seagull Enterprises, Inc. and were personally signed by Jay Gardner. Both of said checks were returned by the bank in question marked "Refer to Maker" and there is not dispute that Plaintiff-Respondent has not been paid the remainder of $4,400.00 due and owing him.

KMOR Radio was not a dba of Seagull Enterprises, Inc. and was not a corporation. (R-88 and R-111). Seagull Enterprises, Inc. was involuntarily dissolved as of October 10, 1978. (Exhibit 6-D).

The Court found that Mr. Gardner had personally executed

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the agreements for the payment of monies for the performances in question and was personally liable for those sums remaining due and outstanding at this point in time. (R-88 through 91).

KMOR Radio did not receive FCC Approval to operate under the corporate entity of Seagull Enterprises, Inc. until after the contract between KMOR Radio and Jay Gardner had been entered into. Prior to that time O.J. Wilkinson operated KMOR and Seagull had not received authorization. (R-120, R-118).

ARGUMENT

POINT I

THE LAW IS CLEAR THAT AN OFFICER OR DIRECTOR OF A CORPORATION IS LIABLE FOR THOSE CONTRACTS THAT HE EXECUTES WITHOUT THE NECESSARY INDICATION THAT HE IS ACTING FOR AND ON BEHALF OF THE CORPORATION.

The clear, plain and unambiguous language of the contracts in question, does not indicate that Mr. Gardner is signing on the behalf of any corporation. The addition of the type written words KMOR adds nothing to his claim. In fact, KMOR was a dba of O.J. Wilkinson and Mr. Gardner indicates that it was being transferred to Seagull Enterprises, Inc. (R-120). However, there is no indication that Mr. Gardner was, in fact, signing on behalf of Seagull at the time that he entered into these contracts.

Defendant cites a quotation from 19, Am. Jur. 2d Corp., Section 1341, which states the general rule as to corporate liability. Defendant-Appellant, however, fails to continue on with the next sentence in regard to the first part of that quotation which on Page 747 states:

> "However, a director or officer of a corporation may be liable to a creditor upon a contract which he executes in such a way as to make himself personally liable or for wrong or tort

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> in which he participates and which directly effects a creditor or third person and causes him to suffer injury or sustain a loss".

In fact, 19 Am. Jur. 2d Corp. Section 1342 deals with the situation confronting the Court in the present case. That Section states the general rule as follows:

> "If it appears that it was clearly the intention of a corporate officer to assume the obligation of a corporation as a personal liability and that he has been informed that credit extended to him alone, there can be no question as to the liability of the officer. Where directors or officers contract with a third person who is unaware of the existance of the corporation, and to whom no disclosure of its existance is made, the director or officer is personally liable on the contract. Moreover, if in executing a contract for the corporation, a director or officer employes terms which in legal effect charge himself, he may be sued upon the instrument itself as a contracting party, for the reason that by the use of such terms, he has made the contract his own."

The Plaintiff-Respondent submits that Jay Gardner, at the time of executing the contract in question, did not use any terms indicating the corporation, and therefore cannot escape legal effect of his personal signature. He is personally liable on this obligation.

Defendant did not sign on the behalf of Seagull Enterprises. This fact remains clear and undisputed. FCC Approval for KMOR to conduct business under Seagull Enterprises, Inc. had not been obtained at the time the contract was entered into. The legal effect of the Defendant's signature was to bind him personally. Defendant admits as much in response to a question found in the record as follows:

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Q. Did you make any indication on Plaintiff's Exhibit Nos. 1 and 2 that you were contracting on behalf of Seagull Enterprises, Inc.?

A. I did contract for Seagull Enterprises.

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

A. The contracts came to me typed, as they always do, from Bill and several other people I have dealt with over the years. I merely sign them and send them back as I indicated to Bill and he had them made up.

At 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 some of the legalities of the thing but thats the way alot of people deal with it. But my conversation with Bill were in regard to Seagull Enterprises. (Emphasis added) (R-130-131)

Defendant was thus aware that he had ignored some of the legalities which might have made this contract an obligation of the corporation.

Defendant-Appellant submits that there is no way that Plaintiff could have been put on notice at the time this contract was entered into, that they were dealing with a corporate entity. Defendant, in response to questioning indicates that he received FCC Approval for Seagull Enterprises to function under KMOR in December of 1974 which would have been nearly a month after this contract was entered into. And in response to questioning the Defendant indicated the following:

Q. So prior to that time there was no notice of any connection between KMOR Radio and Seagull Enterprises?

A. Only in my conversations with Mr. Gynn. (R-127)

A Substantial body of case law has been built around the fact of whether corporate officers or directors could be held personally liable for signatures indicating that they were signing "for" the corporation or indicating that they were

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signing the corporation name "by" a specific corporate officer and the like. However, the general rule seems to be undisputed and is set forth in 19 Am. Jur. 2d Section 1344 at 750:

> "On the other hand a contract containing a promise in the proper form for an individual and signed individually by a corporate officer agent is generally regarded as a personal obligation of the signer".

There seems to be no dispute that this was a personal obligation and the Court as a finder of fact could determine any contrary intention of the parties. The Court has made those finding and its findings were both supported by the evidence at the time of trail, and based upon the correct application of the law.

POINT II

THE CONTRACTS ARE CLEAR ON THEIR FACE AND DO, IN FACT, INDICATE THAT MR. JAY GARDNER PERSONALLY SIGNED THE CONTRACTS AND BECAME PERSONALLY LIABLE FOR THE DEBTS AND OBLIGATIONS INCURRED IN REGARD TO THOSE CONTRACTS.

KMOR Radio was not a dba, not a corporation nor was it any other business entity. KMOR Radio was merely letters assigned by the FCC. Seagull, the corporate entity in question, had not received approval for the use of said letters until after the contracts in question had been entered into. Defendant-Appellant attempts to argue that it is not encumbant upon the person signing a contract to clearly deliniate and indicate the corporate entity which it proports to be representing in order to escape personal liability. Plaintiff-Respondent submits that is incorrect, especially in this particular situation. This, in fact, was not a corporate obligation but an obligation incurred by Mr. Jay Gardner personally to promote KMOR. As previously indicated the FCC had not granted approval to Seagull [illegible] to commence

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functioning under the call letters "KMOR Radio" and consequently any debts and obligations incurred in that period of time would, in fact, be the debts and obligations of the person incurring those debts, to wit: Mr. Jay Gardner. Certainly KMOR Radio engaged in a substantial advertising campaign in regard to the presentation of the concerts and received a substantial benefit, which benefit would, in no way be effected by the approval or disapproval of the application submitted to the FCC. The Radio Station was functioning as KMOR Radio, no legal entity existing having that same name and Mr. Gardner is thus personally liable for the debts and obligations he personally incurred.

Defendant attempts to establish that Mr. Gardner did not receive any personal gain or gratification from the entering into of subject agreement. Plaintiff submits that that is contrary to the facts before the Court. Mr. Gardner indicated that he was, in fact, the general manager of KMOR Radio during this period of time (R-107) . As a general manager of KMOR Radio the promotional campaign established in regard to these concerts would inure directly to the benefit of Mr. Gardner. In fact, in response to questioning by his own attorney, Mr. Frank, Mr. Gardner answered as follows:

Q. Now in November of 1974 by whom were you employed?

A. I was employed by KMOR Radio in Murray, Utah.

Q. Is that Seagull Enterprises?

A. At that time it was being transferred from Mr. O.J. Wilkinson to Seagull Enterprises. (R-120)

Even Mr. Gardner frankly admits that at the time these contracts were entered into he was, in fact, functioning and working for KMOR Radio, or O.J. Wilkinson, not Seagull Enterprises.

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behalf of Bill Goodwin to Bill Anderson. Defendant-Appellant attempts to reinforce his argument in this regard by statements contained in Defendant's Exhibit D-7. This letter was written months after the contracts were executed and after the two (2) Seagull Enterprises checks had been returned. Any reference to the corporation could have come from those checks and need not relate back to the time of execution. Exhibit D-7 makes reference to "your corporation". It is clear that Bill Goodwin was looking to Jay Gardner. Also, any indication from Bill Goodwin Agency can not be imputed to Mr. Bill Anderson based solely upon the information presently in the record.

At the time that payment was made by Seagull Enterprises, Inc. and the checks were returned, then the Bill Goodwin Agency and/or Mr. Gardner was looking for payment based upon the checks and therefore, the resulting letter, which became Defendant's Exhibit 7. Certainly the Plaintiff-Respondent would have a right pursue action against Seagull Enterprises, Inc., based upon the checks and that would, in no way, effect the personal action against Mr. Jay Gardner for breach of the contract in question.

Therefore, Plaintiff-Respondent submits that Defendant-Appellant's arguments in this regard are not well taken.

CONCLUSION

This contract was a personal contract imposing personal liability to Jay Gardner for the obligation incurred in the performance of the contract by country and western performer Bill Anderson. There is no indication on the contract to vary that clear and plain meeting. There is no ambiguity in the contract and the Court has decided and made a finding as to the

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intention involved. The ruling of the District Court should thus be upheld and Mr. Gardner should not be allowed to excape personal liability.

The Court was well within its discretion to make the findings and the evidence that supports those findings and based upon the applicable law Defendant's Appeal should be dismissed and the findings and judgment by the Third Judicial District Court should be upheld. Plaintiff should be granted costs incurred herein.

Respectfully submitted this 15th day of January, 1981.

Nells E. Mortenson
Attorney at Law
Attorney for Plaintiff-Respondent

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I hereby certify that on the 19th day of January, 1981 I mailed, postage prepaid, a true and correct copy of the above and foregoing Brief of Respondent to Gary Frank, Attorney at Law 5085 South State Street, Murray, Utah 84107.

Neils E. Mortenson

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