

1955

Marinus Johnson and Arlin Davidson v. Joseph Koyle et al : Brief of Plaintiffs and Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

FILED

DEC 10 1955

Clerk, Supreme Court, Utah

Case No.
8404

MARINUS JOHNSON and
ARLIN DAVIDSON,
Plaintiffs and Respondents,

— vs. —

JOSEPH KOYLE, DUKE PAGE,
and JOHN DOE SYRETT,
Defendants,

DUKE PAGE,
Defendant and Appellant.

Brief of Plaintiffs and Respondents

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DUKE PAGE,
Defendant and Appellant.

Case No.
8404

Brief of Plaintiffs
and Respondents

STATEMENT OF FACTS

The present controversy arose out of a contract of joint adventure for the development of an irrigation project in Juab County, State of Utah.

In May of 1941, Plaintiff-Respondent, Marinus Johnson, was the owner of Water Filing No. 9873, as filed in the office of the State Engineer, State of Utah. This filing was an application to appropriate 19 c.f.s.

of water from a spring known as Bakers Hot Springs located in Juab County, Utah. (R-59)

A considerable amount of construction work had been done on a series of ditches, canals and levies in connection with this water filing (R-60), including one levy which was between a mile and a mile and one-half long (T-15); however, the work had not advanced to a point where the water could be put to a beneficial use.

There was considerable public land in and around the general area of Baker's Hot Springs which was open either to state selection or occupation under the Homestead Laws of the United States. (T-16) A small portion of this public land, approximately 440 acres, was occupied by one William F. Pratt under claim of some preferential entry right. Plaintiff-Respondent, Marinus Johnson, and defendant, Joseph Koyle, had a written agreement with William F. Pratt for the acquisition of this 440 acres. (R-59)

Plaintiff-Respondent, Marinus Johnson was desirous of completing the above referred to system of ditches, canals and levies so that the water from Baker's Hot Springs could be put to a beneficial use. However, Johnson, a carpenter by trade, lacked the financial means to accomplish the required work (T-17, T-23); in order to secure the needed capital to complete the irrigation project, he entered into the above mentioned contract with defendant-appellant, Duke Page. (T-17)

Duke Page is a successful business man of Spanish

Fork, Utah. At the time of entering into the aforementioned contract he had been doing business in Spanish Fork as "Duke Page Auto Company" for approximately 8 years. During that time he had been a party to numerous contracts and had had many dealings with attorneys. (T-97)

On May 21, 1940, Marinus Johnson and Duke Page went to A. H. Christensen, an attorney of Provo, Utah, and had a contract drawn concerning the development of an irrigation project involving the aforementioned Baker's Hot Springs. (R-35, T-53, plf. Ex. 3) Among other things, this contract contained the following recitals and provisions:

1. That Marinus Johnson was the owner of Application No. 9873, as filed in the Office of the State Engineer, State of Utah, to appropriate water from Baker's Hot Springs. (Plfs. Ex. 3, R-35, R-59)

2. That Marinus Johnson also owned certain levies and canals in connection with said water filing and *that said levies and canals had been constructed at a cost of in excess of \$7,000.00.* (Plfs. Ex. 3, R-35, R-60)

3. That it would take approximately \$1,000.00 to complete these levies and works so that the water appropriated under the aforesaid application could be put to a beneficial use. (Plfs. Ex. 3, R-35, R-60)

4. *That Marinus Johnson was financially unable to*

complete these canals and levies and that Duke Page was financially able to complete the same. (Plfs. Ex. 3, R-36)

5. Marinus Johnson agreed to convey to Duke Page a one-half interest in water filing No. 9873 and a one-half interest in all of the canals and levies constructed in connection therewith (*the value of said canals being in excess of \$7,000.00, according to the contract*). (Supra, Plfs. Ex. 3, R-36, R-60)

6. Page was also to have a one-half interest in any lands or interests in lands or land contracts held by Johnson. (There is no averment in the contract of any land which Johnson claimed to own or which he purported to convey to Page or any description of any such land.) (Plfs. Ex. 3, R-36, R-60)

7. Page was to furnish the equipment (with the exception of one truck to be provided by Johnson) and man power (with the exception of work to be performed by Johnson) to complete the levies and canals, together with all necessary supplies, gas, oil and repairs to equipment. (Plfs. Ex. 3, R-36, R-60)

8. *Page was to furnish the necessary filing fees and costs required to complete the appropriation for water, and to put the water to a beneficial use. (Plfs. Ex. 3, R-36, R-60)*

The contract further contemplated that in the development of the irrigation project, the parties were to acquire land and property other than that described in

the contract. In respect to any such land or property, the contract contained the following provisions:

9. Each party was to pay one-half of the purchase price of any land or property acquired other than the property specifically described in the contract. (Plfs. Ex. 3, R-36, R-60)

10. *Page was to advance all of the money for the purchase of any such land or property if Johnson was unable to pay his share.* Page was to be repaid for any money so advanced out of the proceeds derived from the irrigation project and was to have a lien on any property so purchased for any monies advanced on behalf of Johnson. (Plfs. Ex. 3, R-36, R-37 and R-60)

11. Both Johnson and Page were to have an equal interest in all property of every name and nature acquired by the parties in connection with the irrigation project. (Plfs. Ex. 3, R-37)

On June 27, 1940, Johnson executed and delivered to Page an Assignment of a one-half interest in water filing No. 9873 and also executed and delivered to Page a Power of Attorney authorizing Page to represent Johnson in all matters pertaining to said application. (R-60, R-61, Plfs. Ex. 4 and 5)

During the summer of 1940, Page sent men and equipment to work on the canals and levies herein referred to, and Johnson furnished one truck and Johnson

and the men furnished by Page worked on said canals and levies for a period of between 8 and 20 days. Page paid for all gasoline, oil and supplies during this period. Approximately 450 feet of the levies were repaired. Page then recalled his men and refused to provide any further supplies or equipment to complete the work. At this time the work contemplated by Page and Johnson under the contract was not completed and this work was never thereafter resumed. (R-61)

The parties initiated proceedings to acquire various State selections of land in the area of Baker's Hot Springs in connection with the irrigation project. These selections were never completed. (T-25)

William F. Pratt died some time subsequent to the making of the agreement between Johnson and Page. Thereafter Johnson and Page went to Cleo F. Taylor, a land agent (T-55), and Page employed Taylor to work out a means for acquiring title to the 440 acres previously occupied by Pratt. This was done through having Pratt's widow homestead the property and acquire a patent thereon. In order to perfect the homestead, Page and Johnson, et al., moved a house and other out buildings onto the property. (R-61) William F. Pratt's widow received a patent to said 440 acres and thereafter on May 7, 1943, she conveyed the land to Duke Page, receiving from Page a consideration of \$440.00. (R-61)

After acquiring title to the land, Page refused to continue with the development of the irrigation project

or the acquisition of the State selections applied for unless and until Marinus Johnson paid Page one-half of the expenses which Page had incurred in the repairs which had been made on the levy and in the acquisition of the land acquired. (T-99, T-103) On Page 103 of the Transcript Mr. Page testified as follows:

“I told Mr. Johnson that I wouldn’t go any further with it. . . . I didn’t intend to go any further with paying it all and getting half. I just told Mr. Johnson that I wanted him to pay me my half.”

On October 4, 1944, Page entered into a written agreement with one Oren Lewis for the sale of the entire tract to Lewis. However, only 40 acres of the tract was ever conveyed under this agreement. (R-61)

On October 1, 1949, Application No. 9873 was declared lapsed by the State Engineer. Page was notified by the State Engineer prior to the lapsing of the application but failed to submit proof or to obtain a further extension of time. (R-62)

Thereafter, plaintiff, Arlin Davidson, entered into a subsisting installment contract with Plaintiff, Marinus Johnson, for the purchase of all right, title and interest which Johnson might own in the lands involved herein. (R-62)

On February 25, 1952, plaintiffs, Marinus Johnson and Arlin Davidson, filed an action in the District Court of Juab County, State of Utah, against the defendant,

Duke Page, and others. Plaintiffs' Second Amended Complaint asked the Court (among other things) to decree that any right, title or interest held by defendant, Duke Page, in the land involved herein is held in trust for Marinus Johnson, and that the decree of the Court terminate the above mentioned agreement between Marinus Johnson and Duke Page and decree that Duke Page has no rights or interests thereunder. (R-34, 35)

On June 14, 1955, the Court entered its decree awarding the land herein involved to plaintiff-respondents, subject to the right of Duke Page to recover from plaintiff-respondents the sum of \$440.00 (the amount Page paid Mrs. Pratt for the deed to the land, *supra*) plus interest, the sum of \$78.10 (the amount of expense for attorney fees and recording fees which Page incurred in acquiring title to said land) plus interest, and one-half of the taxes paid by Page on the land, plus interest.

The Court decree also terminated the agreement between Johnson and Page, together with their rights thereunder except to the extent fixed by the terms of the decree.

Defendant-appellant, Duke Page, has appealed from the decree so entered.

STATEMENT OF POINTS

Point I.

THE AGREEMENT BETWEEN MARINUS JOHNSON AND DUKE PAGE CONSTITUTED AN AGREEMENT FOR A JOINT ADVENTURE AND THE PARTIES TO SAID AGREEMENT BECAME JOINT ADVENTURERS.

Point II.

THE HOLDER OF THE LEGAL TITLE TO REAL ESTATE ACQUIRED PURSUANT TO A CONTRACT OF JOINT ADVENTURE HOLDS THE TITLE AS TRUSTEE FOR HIMSELF AND FOR HIS CO-ADVENTURERS.

Point III.

BY REASON OF PAGE'S BREACH OF CONTRACT AND WRONGFUL REFUSAL TO CONTINUE WITH THE DEVELOPMENT OF THE IRRIGATION PROJECT, JOHNSON WAS ENTITLED TO EXCLUDE PAGE FROM FURTHER PARTICIPATION IN THE PROJECT, TO REIMBURSE PAGE FOR PAGE'S ACTUAL EXPENSES IN ACQUIRING THE LAND HERE UNDER CONTROVERSY AND TO PROCEED ALONE OR WITH OTHERS IN THE DEVELOPMENT OF THE PROJECT.

ARGUMENT

Point I.

THE AGREEMENT BETWEEN MARINUS JOHNSON AND DUKE PAGE CONSTITUTED AN AGREEMENT FOR A JOINT ADVENTURE AND THE PARTIES TO SAID AGREEMENT BECAME JOINT ADVENTURERS.

A joint adventure has been defined as “an association of two or more persons to carry out a single business enterprise for profit.” (Tompkins v. Comm. of Int. Rev. (C.C.A. 4th) 97 F. (2d) 396; Keiswetter v. Rubenstein, 235 Mich. 36, 209 N.W. 154, 48 A.L.R. 1049; Fletcher v. Fletcher, 206 Mich. 153, 172 N.W. 436; Elliott v. Murphy Timber Co., 117 Ore. 387; 244 P. 91, 48 A.L.R. 1043. See also 63 A.L.R. 910). It has its origin in contract, and can exist only by the voluntary agreement of the parties to it. (Edgerly v. Equitable Life Assur. Soc. of U. S., 191 N.E. 415, 287 Mass. 238; Henning v. Cox, 148 F. (2d) 586; Campagna v. Market Street Ry. Co., 149 P. (2d) 281, 24 Cal. (2d) 304.) There must be a community of interest and a common purpose in the performance of the agreement. (Eagle Star Ins. Co. v. Bean, 134 Fed. (2d) 755; Campagna v. Market St. Ry. Co., 149 P. (2d) 281, 24 Cal. (2d) 304.)

In the instant case the parties entered into a contract to develop an irrigation project for profit. Both of the parties were to perform certain acts and both were to be equally interested in the project. Clearly the parties were joint adventurers, and the District Court

was correct in so holding. (See also 30 Am. Jur. 277, 678, 679 and 48 C.J.S. 809 and 816.)

Point II.

THE HOLDER OF THE LEGAL TITLE TO REAL ESTATE ACQUIRED PURSUANT TO A CONTRACT OF JOINT ADVENTURE HOLDS THE TITLE AS TRUSTEE FOR HIMSELF AND FOR HIS CO-ADVENTURERS.

Co-adventurers have a fiduciary duty toward each other. The nature of this duty was aptly described by Chief Justice Cardozo in the case of *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545, 62 A.L.R. 1, in which he said:

“Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm’s length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the “disintegrating erosion” of particular exceptions. *Wendt v. Fischer*, 243 N. Y. 439, 444, 154 N. E. 303. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.”

The Utah Supreme Court, in the case of *Forbes v. Butler, et al.*, 66 Utah 373, has stated that “A ‘joint

venture' is in the nature of a partnership ordinarily, but not necessarily, limited to a single transaction, and subject to law of partnership so far as substantial rights are concerned."

In the case of *Rossman v. Marsh*, 286 N.W. 83, 287 Mich. 720, the Michigan Court, quoting *Corpus Juris*, discusses the status of property acquired under an agreement of joint adventure where title is taken in the name of one of the coadventurers. The Michigan Court states:

"It is immaterial in whose name the title to real estate purchased with funds put into a joint adventure, or a contract to be performed by joint adventurers, is taken, for the use of the member's name gives him no legal rights he would not otherwise enjoy, and subjects the property to no greater claim from his individual creditors than his interest therein can satisfy; nor do the other members suffer any diminution of their equitable rights to share in the property by reason of the fact that the legal title is taken in the name of one of them only. The holder of the legal title becomes a trustee for the benefit of his coadventurers, and is bound to deal with the property in that capacity. 33 C.P. pp. 858, 859." (See also: *Murphy v. Craft*, 147 So. 176, 226 Ala. 407; *Endries v. Paddock*, 271 N.Y.S. 848, 196 N.E. 562; *Barry v. Kern*, 199 N.W. 77, 184 Wis. 266; 48 C.J.S. 834; 30 Am. Jur. 692; 61 A.L.R. 24; *Lane v. Peterson*, 68 Utah 585, 251 P. 374.)

In the instant case *Johnson and Page* were joint adventurers. They had a contract, which both acknowledge, to develop an irrigation project. Under this contract *Page* was to supply the funds necessary to pur-

chase any property not specifically described in the contract (Plfs. Ex. 3, R-36, R-37 and R-60). The land here under controversy was acquired in connection with the irrigation project. In order that the land might be acquired both Johnson and Page visited Eli Taylor, a land attorney (T-55), both Johnson and Page aided in perfecting the homestead so that the land could be conveyed to them (R-61). After the homestead was perfected by Mrs. Pratt the land was deeded to Page. Clearly Page held the land as trustee for himself and for Johnson as coadventurers.

Point III.

BY REASON OF PAGE'S BREACH OF CONTRACT AND WRONGFUL REFUSAL TO CONTINUE WITH THE DEVELOPMENT OF THE IRRIGATION PROJECT, JOHNSON WAS ENTITLED TO EXCLUDE PAGE FROM FURTHER PARTICIPATION IN THE PROJECT, TO REIMBURSE PAGE FOR PAGE'S ACTUAL EXPENSES IN ACQUIRING THE LAND HERE UNDER CONTROVERSY AND TO PROCEED ALONE OR WITH OTHERS IN THE DEVELOPMENT OF THE PROJECT.

When a joint adventurer repudiates the contract of joint adventure and refuses to perform his contractual obligations he forfeits his right to participate in the joint adventure project. The rule is stated in 11 A.L.R. 432 as follows :

“The rule seems to be that failure of a party to a joint adventure to contribute his share of the expense is ground for abandonment of the enterprise by his coadventurers, and his exclusion from

further operations by them, provided they take definite steps to effect that result.”

Thus, the New York Court, in *Westwood v. Crissey*, 139 App. Div. 841, 124 N. Y. Supp. 97, 11 A.L.R. 435, stated as follows:

“a member of a firm who absolutely refuses to contribute his part of the necessary capital to carry on the firm business excludes himself from the firm and from any right to participate in its profits, if any there be.”

In the case of *Miller v. Chambers*, 73 Iowa 236, 5 Am. St. Rep. 675, 34 N.W. 830, the Iowa Supreme Court held that:

“where a member of a joint adventure for the prospecting of coal mines and mining coal undertook to appropriate the assets of the concern and carry them into a corporation to be formed with the aid of a third person, the court held that, by his active repudiation of the partnership contract and opposition of its interests, he had forfeited his right to share in the partnership assets.” (11 A.L.R. 433.)

American Jurisprudence adopts this view. In 30 Am. Jur. 690 the author states as follows:

“The rule seems to be that failure of a party to a joint adventure to contribute his share of the expenses is ground for abandonment of the enterprise by his coadventurers, and his exclusion from further operations by them, provided they take definite steps to effect that result. (Anno: 11 A.L.R. 432, L.R.A. 1918B 678.) If one of the parties refuses to perform his obligations, his

associates may either terminate their relations with him and themselves carry on the enterprise, with an action against him for damages for his breach, or they can hold the defaulter to the obligations of his contract and sue him for money or property agreed to be contributed to the common fund, or to be supplied for a specified purpose. But they cannot do both of these things. (Tompkins v. Commissioner of Internal Revenue (C.C.A. 4th) 97 F. (2d) 396, citing R.C.L.)

In this respect the court's attention is called to the following cases: Snyder v. O'Beirne, 132 Mich. 340, 93 N.W. 872; Turtur v. Isserman, 2 N.J. Misc. 1084, 128 Atl. 151; Goss v. Lanin, 170 Iowa 57, 152 N.W. 43; Yeager's Appeal, 100 Pa. 88; Denver v. Roane, 99 U.S. 356, 25 L.Ed. 476; Quinn v. Quinn, 81 Cal. 14, 22 P. 264; Devine v. Melton, 153 N.Y.S. 715; Schnitzer v. Josephthal, 202 N.Y.S. 77, 208 App. Div. 769.

The defaulting coadventurer, on expulsion from the coadventure project, is only entitled to a return of the amount which he contributed to assets still remaining as part of the coadventure project. In the case of Kaufman v. Catzen, 81 W. Va. 1, L.R.A. 1918B 672, 94 S.E. 388, the court in discussing a situation where a coadventurer had abandoned the enterprise, stated as follows:

"Such conduct may have afforded him ample ground for rescission of the contract, but he was bound to elect whether he would rescind and repay the money, thereby putting Kaufman in statu quo, or seek compensation for any damages he may have suffered in consequence of Kaufman's neglect, default, or misconduct in some other way."

In the case of *Turtur v. Isserman* (supra) 2 N.J. Misc. 1084, 128 Atl. 151, the court, in discussing this problem, states:

“... where such default is made in the form of an actual abandonment of the enterprise by the defaulting member, and a notification that he will have nothing further to do with it, the remaining members might be entitled in equity, where they take over the burden of supplying the deficit of the default, to exclude the defaulting member from participation in profits, or losses, beyond his capital paid in, so that, where the venture proved profitable, their obligation to the defaulting member would be only to return his paid-in capital, with or without interest . . .” (See 80 A.L.R. 48, 50; 62 A.L.R. 24; 11 A.L.R. 434.)

Furthermore, the United States Supreme Court has enunciated the rule regarding defaulting coadventurers and partners as follows:

“A partner who has not fully and fairly performed the partnership agreement on his part has no standing in a court of equity to enforce any right under the agreement.” (*Karrick v. Hannaman*, 168 U. S. 328; 18 S. Ct. 135; 42 L. Ed. 484.)

In the instant case Page breached the contract of joint adventure and then completely repudiated the same. His agreement called for him to furnish men, equipment and funds to complete the system of levies and canals in connection with the irrigation project, and to furnish the necessary fees and costs to complete the appropriation of water. This the trial court found that he did not do, and the water filing finally lapsed. (R-61)

Page further agreed to advance the necessary funds to complete the project and to acquire any land which might be acquired in connection with the project. The stated purpose of the contract was that Johnson did not have the funds to do these things but that Page did have such funds. (Plf. Ex. 3, R-36) Nevertheless, after Page acquired title to the land here under dispute in 1944 he refused to continue with the irrigation project unless Johnson paid him half of the sum he had expended. (T-99 and T-103)

In 1949, the water filing lapsed, and 19 c.f.s. of water was lost as well as dikes and canals constructed in connection therewith at a cost estimated by Johnson and Page to be in excess of \$7,000.00. (R-62, Plf. Ex. 3, R-35, R-60)

Johnson performed every part of the contract by him to be performed. He conveyed one-half his interest in the water filing to Page (Plf. Ex. 4, R-60) and in addition gave Page a Power of Attorney to deal with the other half interest. (Plf. Ex. 5, R-61) He provided a truck for the work to be done on the levies and worked on the levies until Page withdrew the funds and equipment. (R-61) *There is no showing that he was not at all times ready to return to the project to aid in completing the work.*

Johnson was perfectly justified in excluding Page from any further participation in the project, and this he did by filing the instant law suit in 1952. He was

further justified in seeking new capital and new partners with which and with whom to carry on the project.

After the water filing lapsed, in 1949, plaintiff, Arlin Davidson, filed on the identical water. (R-62) Thereafter, Johnson and Page entered into a contract concerning the irrigation project. (R-62)

No profits have ever been realized from the irrigation project. As of the time that this suit was filed the only asset belonging to the coadventure project was the land here under dispute. The only right which Page could possibly have had in the assets of the coadventure project was the amount which he had contributed to create any such assets. This the trial court awarded to Page. He was awarded the sum of \$440.00 (plus interest) which was paid to Mrs. Pratt for the deed to the property; he was awarded the amount which was expended for land attorney services; and in addition, he was awarded one half of the taxes paid on the land.

It is respectfully submitted that the holdings of the trial court were correct in each and every respect and should be affirmed by this court.

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