1980

Car Doctor, Inc v. Anthony Belmont And Gregory Olinyk : Brief of Defendants And Appellants

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

CAR DOCTOR, INC.,

Plaintiff and Respondent,

v. No. 17239

ANTHONY BELMONT and GREGORY OLINYK,

Defendants and Appellants.

BRIEF OF DEFENDANTS AND APPELLANTS

Appeal from Judgment of the
Third Judicial District Court for
Salt Lake County, State of Utah
Honorable G. Hal Taylor

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STATEMENT OF THE NATURE OF THE CASE

This is an action upon multiple causes of action for recovery of capital contribution to a partnership upon the basis that the partnership never came into existence; the counterclaim alleged breach of the partnership agreement resulting in prospective loss and continuing current loss from the operation of the business which was ongoing at that time.

DISPOSITION IN LOWER COURT

Upon trial before the court without a jury, judgment was entered in favor of plaintiff against the defendants for $25,000 plus interest and costs and the counterclaim was dismissed.

RELIEF SOUGHT ON APPEAL

Appellants seek a reversal of the lower court's decision and a finding that a partnership existed at all times and awarding defendants-appellants damages in an amount equal to plain-

tiff's participatory share in losses sustained in the operation of the business of the partnership.

STATEMENT OF FACTS

In January (R. 211, passim) or February (R. 105, lines 11-29), of 1977, Car Doctor, Inc., through its officers, Gordon Giles and David Robinson, negotiated with Anthony Belmont and Gregory Olinyk regarding formation of a partnership to operate a private liquor club and restaurant in Ogden, Utah. (R. 106, lines 5-30; R. 107; R. 175 and 176). On March 4, 1977, the parties entered into a preliminary agreement (Ex. 6-D) stating their intent to form a partnership and setting forth conditions to be met before the partnership would be effective, and granting Car Doctor the right to nullify and void the partnership agreement in the event the conditions were not met. At the time of execution of the agreement, Car Doctor delivered a portion of its capital contribution, $10,000, waiving the requirement of escrow of funds provided by the preliminary agreement. (R. 115, lines 20- 26). On March 9, 1977, (Ex. 7-D and attachment to Ex. 3-P) the parties entered into the partnership agreement, and on March 11, 1977, Car Doctor paid the balance of its capital contribution, $15,000, which was deposited to the account of The Winery (Ex. 4-P). Belmont's contribution for his twenty-five percent (25%) interest in the partnership was his expertise as chef and club operator and a sublease of the business premises of The Winery. (R. 107, lines 4-6; R. 176, lines 9-11; Ex. 7-D ¶3).

Olinyk's contribution of $10,000 (Ex. 7-D, ¶3) for a twenty five percent (25%) share, was made on or about July 6, 1977. (R. 213, lines 26-30; R. 214, lines 10-21). Prior to the grand opening of the private club on March 18, 1977, and thereafter, Robinson and Giles participated in initial operation of the business of The Winery, painting, remodeling, cleaning up, greeting customers, and the like. (R. 111, lines 6-24; R. 124, lines 10-30; R. 190, lines 22-30).

In early May, 1977, the parties to this action together with partners in Future Interests, Ltd., which owned the leasehold improvements utilized by The Winery in its business (R. 166) met for the purpose of discussing exercise of an option set forth in Paragraph 7A of the sublease agreement (Ex. 10-D) to purchase the leasehold improvements. (R. 132, lines 13-30). The following day, from his own funds, Belmont paid to Future Interests, Ltd., $10,000 (R. 164) to exercise the option to purchase (R. 166, lines 13-30; Ex. 8-D ¶1.(a)), and later, an additional $10,000. (R. 184, line 23).

After the meeting with Future Interests, Ltd., in May, Giles and Robinson "were trying to do anything to recover" their money (R. 153, lines 6 and 7); first negotiating for sale of their partnership interest (R. 193 and 194; Ex. 9-D) and thereafter simply denying the existence of the partnership. (R. 152, lines 16-30; R. 153, lines 1-11).

Operation of the business ceased in mid-August, 1977 (R. 182,

lines 24-28), having sustained a net operating loss of $36,7[illegible] (R. 148, lines 1-12), not including $20,000 paid by Belmont [illegible] his personal funds on behalf of the partnership to exercise [illegible] option to purchase the leasehold improvements (R. 184, lines 13-23) nor an additional $5,463 paid by Belmont from personal funds for business debt. (R. 184, lines 24-30; R. 185, lines [illegible]

On June 23, 1977, this action was filed.

ARGUMENT

Point I

A PARTNERSHIP BETWEEN THE PARTIES CAME INTO BEING PURSUANT TO WRITTEN AGREEMENT

Car Doctor relied upon the claim (R. 3, ¶8), and the Court upon the finding (F.F. 7, R. 88) that certain conditions of the preliminary agreement had not been met and thus, pursuant to the agreement, Car Doctor had the right to void the written partnership agreement and receive back its capital contribution.

While Belmont was hampered in his ability to document transactions demonstrating compliance with the conditions of the March 4 agreement owing to the circumstances in which the partnership business was terminated (R. 56-57), his undisputed testimony, conduct of the business, and conduct of the parties demonstrates de facto compliance or waiver of compliance which, of course, the parties had the right to do.

> "It is fundamental that where parties have rights under an existing contract, they have exactly the same power to renegotiate terms or to waive such rights as they had to make the contract in the first place.
>
> ***
>
> "'It is a well established rule of law that parties to a written contract may modify, waive, or make new terms....'" Chaney v. Rucker, 14 Utah 2d 205, 381 P.2d 86 (1963), quoting Davis v. Payne & Day, Inc., 10 Utah 2d 1053, 348 P.2d 337 (1960).

Referring to the agreement (Ex. 6-D):

1. Car Doctor did not dispute compliance with the condition numbered 1. (R. 3, ¶8).

2. As to condition number 2, the testimony of Lowell Stone, one of the trustees of Nottingham Mall Businessmen's Association, is clear that an agreement had in fact been executed for the management of The Winery by the performance of Belmont and the other partners. (R. 157-160). Robinson admitted that Belmont actually managed and operated The Winery during the period of the claimed partnership pursuant to agreement with Nottingham Mall Businessmen's Association (R. 127, lines 13-24).

3. The third condition, evidence by Exhibit 10-D, admission of which was refused by the trial court, required a sublease of space and equipment from Nottingham Mall. Exhibit 10-D was regarded by Lowell Stone, a partner of Future Interests, Ltd., and a

trustee of Nottingham Mall Businessmen's Association, dba The Winery, (R. 160, lines 12-24) and by Belmont (R. 178, lines 2[illegible] R. 179, lines 1-6), as the sublease and the authority under [illegible] The Winery was operated by Belmont as a partner.

4. The fourth condition does not require that a liquor license be issued in the name of Good Old Boys dba The Winery as the court implies (R. 204, lines 12-17; R. 230, lines 5-7), but simply that the Liquor Commission approve management and other contractual arrangements. Belmont explained (R. 203, lines 12-[illegible] that the partners anticipated obtaining a new license when the one in the name of Nottingham Mall Businessmen's Association dba The Winery, Inc., had expired, and further that all necessary approval of himself as manager of The Winery and the employees was obtained from the Liquor Commission. (R. 203, line 30; R. 204, lines 1-11).

5. While plaintiff claims that the fifth condition, an accounting of the funds contributed as of March 4 by Olinyk had not been made, Robinson testified (R. 108) that Olinyk told him that the partnership needed money to begin renovation and payment of rents and so forth, and that it was as a result of that urgent need that the $10,000 was not placed in escrow. (R. 115, lines 20-26). According to the testimony of Stone (R. 165), Belmont (R. 180) and Olinyk (R. 219), the $10,000 was accounted for in total of $9,600 delivered to secure the sublease and another $ for drafting of the partnership agreement. Robinson tests cre

dulity by claiming (R. 141, lines 1427) that while the initial money transactions were handled on a "fairly informal basis" and that he was frequently at the business prior to its opening, he had no knowledge regarding application of the funds.

Giles spoke the truth when he said (R. 153, lines 6 and 7) that, "we were trying to do anything to recover our money" when he and his partner Robinson relied upon the claim of non-performance of conditions precedent as a basis for disavowal of the Good Old Boys partnership.

Point II

THE PARTIES BY THEIR CONDUCT ARE ESTOPPED FROM DENYING EXISTENCE OF A PARTNERSHIP

Nothing in the law of the State of Utah requires that an agreement to form or operate as a general partnership need be in writing. Wholly apart from any writings which the parties to this suit may have entered into, if, by their conduct, they have held themselves out as partners, as they did, then no reference to a written document, executory or executed, can relieve them from the obligations they have assumed.

Robinson testified that he and Giles were involved in getting the business open, "painting and renovating, cleaning up the cellar and stuff like that" (R. 111, lines 8 and 9) and that his wife made the uniforms for the waitresses (R. 124, lines 28-30). After the business opened, according to Robinson's testimony (R.

111, lines 13-24), he and Giles acted as greeters at the door; "would also do certain chores or check on certain things, ask how things were going, making comments or suggestions that [they] felt were appropriate to the business." Giles stated (R. 151, lines 26-30; R. 152, lines 1-8) that persons managing other businesses in which he was involved are treated differently from the manner in which he dealt with Belmont because "we are not partners...they are employees," the clear inference being that Belmont was regarded as a partner.

Robinson testified that he and Giles met, in May, with Lon Stone and other partners of the Future Interests partnership (R. 132, lines 13-29) "to discuss the possibilities of exercising the purchase option." (R. 133, lines 1 and 2). Mr. Stone's recollection (R. 159, lines 7-11) was that "they were two gentlemen we met one evening after the club was operating. They represented themselves as Mr. Belmont and Mr. Olinyk's partners. And said that they also owned or were partners in a business called the Doctor."

William Buxton, an employee of The Winery, testified that he had been "introduced to [Giles and Robinson] as part owners" that he saw Robinson and Giles at The Winery when "things would come up maybe once a week" and they would be "checking on things, talking to Mr. Belmont, that sort of thing"; that he saw them at The Winery engaged in those activities as late as "sometime

around the end of May." (R. 223, passim). So clearly had it been impressed upon him that they were part owners of the business that he had no reservations about their simply walking into the kitchen of the business and removing food. (R. 224).

Robinson's and Giles' assertion of ownership interest by exercise of domain over partnership property shows clearly in the testimony of Robinson that in addition to the food, he and Giles removed chairs and a cash register from the business premises. (R. 142, lines 26-30). While Robinson claims that that property was "borrowed," and claimed that he could only guess from whom the property was borrowed, he did admit that the "borrowed" property was never returned to The Winery. (R. 143).

So completely had Robinson and Giles involved themselves in the operation of business of the partnership, that Belmont, who had principal authority and responsibility for operation of the business (R. 107, lines 4-6; R. 149, lines 6-16), excluded them from the restaurant. In explaining that exclusion, Belmont stated that he had "received some complaints from the employees as to who they were going to obey. My set of rules or what they came in and told them." (R. 191, lines 8-10).

Robinson minimized the involvement, saying that, "Tony was awfully mad at us for interfering with turning down the lights or some such item" (R. 118), but complained that Belmont's reaction to his "comments or suggestions that we felt were appropriate to

the business... was that we were meddling into the daily operations of the club and the restaurant." (R. 111, lines 16-20, lines 26 and 27).

The legislature of the State of Utah has mandated that:

> When a person by words spoken or written or by conduct represents himself, or consents to another's representing him, to anyone as a partner, in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made who has on the faith of such representation given credit to the actual or apparent partnership, and, if he has made such representation or consented to its being made in a public manner, he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by, or with the knowledge of, the apparent partner making the representation or consenting to its being made.
>
> (a) When a partnership liability results, he is liable as if he were an actual member of the parntership." 48-1-13 U.C.A. (1953), as amended.

The "person" in this matter "who has, on the faith of such representation, given credit for the actual or apparent partnership" is Belmont, he having satisfied the debts of trade creditors and others, who had likewise extended credit to the partnership. No person testified that Robinson or Giles objected when

they were introduced to employees as "part owners," and, in fact, they themselves "represented themselves as Mr. Belmont and Mr. Olinyk's partners." (R. 159, lines 7-11). No more "public manner" could be imagined by which a declaration of partnership could be made known to interested persons.

No reliance need be placed on the testimony of the defendants in this matter in concluding existence of a partnership; the plaintiff (essentially an incorporated partnership (R. 120, lines 1-10)) through its agents, has regaled the record with demonstrations of involvement with the business of the partnership, as a partner. Thus, while the court might have found that pre-conditions had not been met and that the written partnership agreement was therefore void, it could not properly ignore the plaintiff's own testimony describing involvement in and conduct of a true partnership business. Whether the plaintiff was heedless or careless of the written agreement or whether it, through its agents, acquiesced in or condoned operation of the partnership without performance of pre-conditions was rendered immaterial by actual operation of the partnership. The truth is, that to such extent as necessary, the pre-conditions were so far performed as to effect the practical result which was the accomplished goal of the partnership--operation of a private club and restaurant.

CONCLUSION

The plain facts are that the parties regarded and conduc themselves as partners; that at some point the plaintiff-respondent determined to do whatever was necessary to withdra from the partnership because of operating losses; that plaint respondent gave no indication of its intent until Belmont had personally advanced $20,000 (which, in any event, he was not required to do) to exercise an option on behalf of the partnership--resulting in a $20,000 loss which could have been avoided; that plaintiff-respondent seized upon conditions of a long ignored contract to escape pro rata liability for a $36,0 operating loss.

Neither law nor equity countenances such duplicity in bus ness dealings, and this Court should condemn the bad faith cond of the plaintiff-respondent which was given sanction by the tr court.

DATED this 29th day of October, 1980.

RESPECTFULLY SUBMITTED,

GEORGE H. SPECIALE
Attorney for Defendants-Appella

CERTIFICATE OF MAILING

I hereby certify that on this 30th day of October, 1980, I mailed two (2) true copies of the foregoing BRIEF OF DEFENDANTS-APPELLANTS to the attorney for the plaintiff-respondent herein, Ellen Maycock, of Kruse, Landa, Zimmerman & Maycock, Attorneys at Law, 620 Kearns Building, Salt Lake City, Utah 84101, by mailing said copies through the United States Mail, postage prepaid.