1981

Al Taylor, dba "Persuasion" v. Hilton Hotel of Salt Lake; Pearson Enterprises; Dwain Pearson, Mike Squires, Charles Shaw, Prime Cut Room, Jim Michelson, dba Salt Lake Hilton : Brief of Appellants

Utah Supreme Court

IN THE SUPREME COURT OF

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AL TAYLOR, dba "PERSUASION"

Plaintiff and
Respondent,

-vs-

HILTON HOTEL OF
PEARSON ENTERPRISES
PEARSON, MIKE
SHAW, PRIME CUT
MICHELSON, dba

Defendant
Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

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AL TAYLOR, dba "PERSUASION", Plaintiff and Respondent, -vs- HILTON HOTEL OF SALT LAKE; PEARSON ENTERPRISES; DWAIN PEARSON, MIKE SQUIRES, CHARLES SHAW, PRIME CUT ROOM, JIM MICHELSON, dba SALT LAKE HILTON, Defendants and Appellants.	) :) :) :) :) :) :) :)	No. 17375

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BRIEF OF APPELLANTS

* *

Appeal from the Judgment of the
Third Judicial District Court for Salt Lake County
Honorable Jay E. Banks, Judge

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-vs-	:	BRIEF OF APPELLANTS
HILTON HOTEL OF SALT LAKE; PEARSON ENTERPRISES; DWAIN PEARSON, MIKE SQUIRES, CHARLES SHAW, PRIME CUT ROOM, JIM MICHELSON, dba SALT LAKE HILTON, Defendants and Appellants.	:	Case No. 17375

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STATEMENT OF THE NATURE OF THE CASE

This is an action brought by one musician to recover unearned salary for four terminated musicians previously hired under a contract to perform at the Salt Lake Hilton Hotel.

DISPOSITION IN THE LOWER COURT

The Trial Court held the Hotel should not have terminated the contract but also granted the one musician who sued a judgment for the contract price of services for all the musicians together with attorney's fees.

RELIEF SOUGHT ON APPEAL

The Appellants seek reversal of the Judgment.

STATEMENT OF FACTS

In May 1977 a group of musicians called "Persuasion" entered into a contract (P.R. 4, 5) to perform in the Salt Lake

Hilton Hotel during the period January 2 through February 4, 1978. The contract provided that "each musician may enforce this agreement" and that they also "severally agree to render services * * *" (lines 5 and 6, R. 4). The contract also provided that the musicians would perform under the "complete supervision, direction and control of the employer [Hilton]" (R. 4, ¶6). The musicians performing were the Plaintiff, Al Taylor, who lived in Spanish Fork (R. 165, 166), Eric Willoughby, Pat Cooper and Rick Card (R. 283, 284).

Willoughby, Cooper and Card are not parties to the action (R. 2).

Charles Shaw was manager of the Prime Cut Room in the Hilton Hotel and after the band had played for a couple of nights told them that "You folks don't fit the room" (R. 173). There were many discussions by patrons uncomplimentary to the band (R. 143-145) and business began dropping off sharply at the room (R. 299-301).

The band was paid in full for the first week $1,300.00 and were offerred $500.00 with which to satisfy any inconvenience by early termination. This latter offer was refused (R. 301).

Mr. Shaw complained to the musicians that people who frequented the Prime Cut Room did not like that type of music which was not right for the room. He testified that crowds would accumulate but they would immediately leave and "new people came in and old people left" (R. 303).

The only Plaintiff in the case is Al Taylor (R. 2). At the conclusion of the case the Court granted Judgment for Al Taylor in the amount of $1,808.00 interest and $603.00 attorney's fees. This figure was based on the circumstance that Taylor had not testified that his share of the contract amount was disproportionate to one-fourth that provided for the full band ($1,300.00 per week [R. 41]) and an agreement by counsel, predicated upon that omission in the record, was reached that if Al Taylor were sworn to testify he would state that the amount which he would be entitled to retain personally was $1,808.00. It was also agreed Taylor would have testified that Eric Willoughby would have been entitled to the same amount and that the other two musicians would have been entitled to lesser amounts (R. 127). The stipulation did not waive any deficiencies to any of those claims.

The next day the Trial Court, without hearing, revised the Judgment increasing it to $5,200.00 on the contract, interest and attorney's fees of $1,733.33 (R. 129).

Willoughby, Cooper and Card were neither parties to the action nor witnesses. The Defendants had no opportunity to cross-examine any of those individuals concerning the mitigation of damages or the proportionate amount out of any award to which they would have claimed entitlement. It is significant that Taylor claimed that he was entitled to $1,016.00 more than

either Pat Cooper or Rick Card and that Willoughby was entitled to an amount equal to Taylor but the Defendants had no opportunity to determine whether or not this was the agreement between the parties or whether Cooper, Card or Willoughby might bring an action against the Defendants claiming amounts similar to that maintained by Taylor.

AUTHORITIES

POINT I

PLAINTIFF CAN SUE ONLY FOR HIMSELF

The contract involved is not a contract with the association calling itself "Persuasion" or an agent for them but is with the individual musicians who would ultimately form the group "Persuasion" at the time of performance (R. 4). The contract specifically states that it is "between the undersigned purchaser of music (herein called 'employer') and the four musicians. The musicians are engaged severally on the terms and conditions on the face hereof * * *". (Lines 2-6, R. 4).

Under the Uniform Partnership Act, individuals associating themselves together to carry on activity for a profit [48-1-3, UCA, 1953] must all be joined in the same action. A partner may not sue alone on a cause of action belonging to a partnership and the action must be brought in the names of all the partners. Marx v. Lenske, 500 P.2d 715, 718 (Ore. 1972); Levins v. Stark, 57 Oregon 189, 110 P. 980 (1910); Keerins v. Mauney, 189 Oregon 651, 219 P.2d 753. See also 68 C.J.S. "Partnerships", §208A, page 680.

Taylor cannot claim that he has maintained a class action because he has made no allegation of that contention (R. 2-6) and this is not appropriate proceeding for class action relief. Rule 23(a) provides that one or more members of a class may sue or be sued as representative parties on behalf of all "* * * only if (1) the class is so numerous that joinder of all parties is impracticable * * *".

The four musicians who made up the group calling itself "Persuasion" were either a voluntary association or a partnership. There is no evidence that they were a corporation and no allegation appears of their status (R. 2-6).

An unincorporated association cannot, in the absence of statute or rule of procedure, maintain an action in its own name (7 C.J.S. p. 92, "Associations", §91).

The members of an unincorporated association are entitled as individuals having a common interest to sue in regard to matters affecting their interests; however, such an action should be brought in the names of all the members composing the association and not by one member in his own name (7 C.J.S. p. 93, "Associations", §41; see also State v. Rice, 291 P.2d 1019, 1022, 206 Oregon 237).

POINT II

PLAINTIFF TAYLOR IS NOT THE "PARTY IN INTEREST" FOR THE OTHER THREE

A. EACH OF THE FOUR MUSICIANS CONTRACTING WITH DEFENDANTS HAD A DUTY TO MITIGATE THEIR DAMAGES

B. DEFENDANTS COULD BE SUBJECTED TO LIABILITY FOR THE FULL AMOUNT IN SUBSEQUENT ACTIONS

A Defendant has the right to have a cause of action prosecuted by the real party in interest so that the judgment will preclude any action on the same demand by another, and so that the Defendant will be permitted to assert all defenses or counterclaims against the real owners of the cause of action. Shaw v. Jeppson, 121 Utah 155, 239 P.2d 745.

A. EACH OF THE FOUR MUSICIANS CONTRACTING WITH DEFENDANTS HAD A DUTY TO MITIGATE THEIR DAMAGES.

One of the defenses which the Appellants were precluded from asserting against Willoughby, Cooper and Card was their failure to mitigate damages. There is no evidence that Taylor himself mitigated his own damages but the record shows that Willoughby, Cooper and Card went to work at other places during the four-week period material to this action (R. 58-61). In Russell v. Ogden Union Railway and Depot Company, 247 P.2d 257, 122 Utah 107, (1952), this Court stated that the correct measure of damages for breach of an employment contract by an employer is the amount an employee would have received as wages had the

contract been performed less what he had earned during the period in question or what he might, by reasonable diligence, earn in other appropriate appointments subsequent to his discharge.

See also Thompson v. Jacobson, 463 P.2d 801, 23 Utah 2d 359, (1970).

B. DEFENDANTS COULD BE SUBJECTED TO LIABILITY FOR THE FULL AMOUNT IN SUBSEQUENT ACTIONS

In the federal case of American Newspaper Guild v. Mackinon, 108 F.Supp. 213, the U. S. District Court for Utah, applying Utah law, stated that while the laws of Utah confer upon an unincorporated association sufficient status to be sued in their own name as a party defendant, that Rule did not include a provision, and there is no other authority, permitting such association to institute an action in its own name as a party plaintiff and that statutes which authorized suits against an association in its common or associate name do not confer any reciprocal privilege permitting such associations to institute litigation in their own names. To rule otherwise would be to subject the Hotel Defendant to four separate lawsuits each for $5,200.00 and if each musician can sue for all the others, or four times its contract exposure and attorney's fees in each case.

POINT III

THE HOTEL HAD THE ABSOLUTE RIGHT TO TERMINATE THE MUSICIANS' SERVICES

The contract was drawn by the union for the benefit of

the musicians (R. 4, 14). It is elemental that its ambiguities and uncertainties or any omissions are to be resolved against the one on whose behalf it was drawn. 17 Am.Jur 2d, p. 689, 690, "Contracts", §276. Paragraph 6 of the contract (R. 4) states:

> The Employer shall at all times have complete supervision, direction and control over the services of musicians on this engagement and expressly reserves the right to control the manner, means and details of the performance of services by the musicians including the leader as well as the ends to be accomplished* * *"

This can have no meaning whatsoever unless it is interpreted to give the employer the right to terminate the musicians if their performance is sub-standard or they make no effort to comply with directions given them. The testimony of Mike Squires is uncontradicted that the group brought different musicians than those who auditioned (R. 276); that they did not perform suitably (R. 275) and that complaints about conduct that could have been corrected were numerous (R. 278, 279, 283).

It is entirely possible that other musicians did not commence their own or join in this action because they believed the termination was not unreasonable; but in any event, they did neither.

We submit that the Hotel's action was justified.

CONCLUSION

Taylor admits that there were disparate amounts to be paid to each of the musicians; however, those other musicians were not present in Court either to affirm or deny that claim.

The Hilton Hotel should not be vulnerable to a multiplicity of suits by each of the prospective plaintiffs.

Defendant Hotel is entitled to assert whatever defense it has against each real party in interest.

For the reason that Defendant has the right to have the cause of action prosecuted by the individual owning the claim so that all defenses against each individual can be properly presented, the Trial Court in making its award of the full amount of $5,200.00 together with attorney's fees to the single Plaintiff, Taylor, erred and the Judgment must be set aside. The personal claim made by Taylor for an amount almost three times that of two of his associates makes it appropriate to revise the case for a determination whether all should be joined and if joined, for a new trial.

Similarly, there is no evidence showing that the determination by the employer to terminate the services of the entire group was not reasonable and within the authority to grant it to the employer by the contract.

We respectfully submit that the Judgment of the District Court should be reversed.

OLSEN AND CHAMBERLAIN

By _____
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CERTIFICATE OF SERVICE

SERVED two full, true and correct copies of the foregoing Brief of Appellant on Mr. Dale E. Stratford, Attorney for the Respondent, 1218 first Security Bank Building, Ogden Utah (84401), by U. S. regular mail, postage prepaid, this 24th day of February, 1981.

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HILTON HOTEL OF SALT LAKE; PEARSON ENTERPRISES; DWAIN PEARSON, MIKE SQUIRES, CHARLES SHAW, PRIME CUT ROOM, JIM MICHELSON, DBA SALT LAKE HILTON) Case No. 17375

Defendant and Appellant)

Additions to Brief of Respondent Al Taylor, dba "Persuasion"

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In Re Taxes, Alea Dairy Ltd., 380 P2d 156 (Haw. 1963) Standing for the proposition that arbitration proceedings under the contract can have probative value, representing the understanding of the parties to the contract, and

Lindon City vs. Engineers Construction Co., Utah Supreme Court No. 17141 decided Sept. 21, 1981, standing for the proposition that an agreement to arbitrate future disputes is enforceable in determining ambiguous, vague or issues before bring suit.