

1981

Marius Burke, Jr. v. Norman Farrell : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARIUS BURKE, JR.)

Plaintiff and Respondent)

-vs-)

NORMAN FARRELL)

Defendant and Appellant)

No. 18033

BRIEF OF APPELLANT

Appeal from the Judgment of the Second Judicial District Court
In and For Weber County, State of Utah,
Honorable Ronald O. Hyde Presiding.

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ADDITIONS TO THE BRIEF OF

APPELLANT

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OCT - 5 1982

POINT II, page 6

Clerk, Supreme Court, Utah

Add as Citation: "Procedures and Remedies in limited partners suits for Breach of the General Partner's Fiduciary Duty", 90 Harvard Law Review 763, p. 763 N. 3, P. 764 N. 4 and pages 778-779.

POINT IV, Page 7

Add as Citation: Terry vs. Panek, 631 P2d 896 (Utah, 1981) p. 898.


DALE E. STRATFORD
Attorney for
Defendant and Appellant

CERTIFICATE OF SERVICE

I hereby certify that I mailed a copy of the foregoing Additions to the Brief of Appellant to HERWIG GLANDER, Attorney for Plaintiff and respondent at 466 East 500 South, Suite 101, Salt Lake City, Utah, 84102 this _____ day of October, 1982.

SECRETARY

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OCT--5 1982

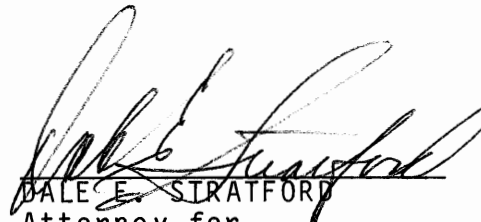
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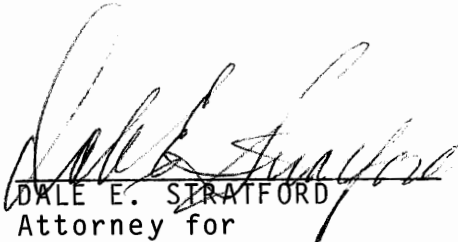
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IN THE SUPREME COURT OF THE STATE OF UTAH

MARIUS BURKE, JR.)

Plaintiff and Respondent)

-vs-)

NORMAN FARRELL)

Defendant and Appellant)

No. 18033

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an action in equity to have declared by Decree the relationship between the appellant and the respondent in certain property known as Fairfield Service, and Fairfield Enterprises, to have the alleged conduct of the Respondent treating himself as owner declared to be fraudulent, and to have respondent account for that property, or in lieu thereof, respond in damages.

DISPOSITION IN LOWER COURT

On August 13, 1981, the Honorable Ronald O. Hyde, District Judge, Second Judicial District, Weber County, Utah, entered a Judgment and order divesting appellant of all interest in Fairfield Enterprises by way of an abandonment of his interest, and divesting appellant of all interest in Fairfield Service, determining that the respondent owed appellant \$10,565.51 for that interest. Respondent was allowed to keep that \$10,565.51 for further payment to creditors of Fairfield Service, the order determining that all debts of

Fairfield Service contracted between July 1, 1978 and December 31, 1979, to be the sole responsibility of the appellant, and the appellant to further hold respondent harmless for all such debts.

RELIEF SOUGHT ON APPEAL

Appellant asks that the judgment of the lower court be reversed and vacated, and that this court direct entry of Judgment for the appellant against the respondent in the amount of \$66,331.33.

In the alternative, the appellant asks that the property be sold; that all of the creditors be paid; and that the remainder, if any, be distributed to the parties according to their equities therein.

STATEMENT OF FACTS

On or about July 1, 1978, the parties to this action entered into a partnership known as Fairfield Enterprises, with the respondent acting as managing partner and the appellant being vested with a 50% interest in the partnership (Plaintiff's Exhibit 1 through 6). R.65. On or about the same time, the parties organized a business entity known as Fairfield Service consisting of a service station and repair shop with the appellant as operator (Plaintiff's Exhibit 7) R.67. This has been described by the respondent as a loose partnership R.136-137.

Fairfield Enterprises provided a beginning inventory of \$7,831.00 and entered into a purported lease with the appellant by

which Fairfield Enterprises received lease payments from Fairfield Service. (Plaintiffs Exhibit 7).

Respondent acquired in his own name a special fuels dealer permit from the Utah State Tax Commission under which Fairfield Service was to, and did, operate (Defendants Exhibits 1 and 2), and Fairfield Enterprises, a partnership of Norman Farrell and Marius Burke registered with the Internal Revenue Service for employment tax purposes. (Defendants Exhibit 5) R.87. Other tax obligations were entered into as Fairfield Service, Marius Burke, or Marius Burke and Norman Farrell. (Defendant's Exhibits 8 through 10). Commercial accounts were charged under the name of Fairfield Service.

At a later date, both parties undertook to expand Fairfield Service adding to the building and adding a cafe and a line of groceries. R.90, R 92. Additional supplies, equipment, and inventories were added from the resources of Fairfield Service, and from \$16,000.00 put into Fairfield Service by the respondent. R.148. Monthly lease payments from Fairfield Service to Fairfield Enterprises were increased accordingly to cover additional costs of Fairfield Enterprises. R.148, R.149.

On or about December 31, 1979, respondent ousted the appellant from operating Fairfield Service, R.155, with the appellant remaining in the repair shop for a short time. The ouster was made with representations that the respondent would continue to operate Fairfield Service, pay creditors, and settle up with the appellant for inventories, accounts receivable, payments for

appellants interest in Fairfield Enterprises, and other equities. R.155 through 157.

In late January, 1980, Respondent declared the appellants interest in Fairfield Enterprises to be in default and gave the appellant written notice to that effect back dated to December 27, 1979. R.219, R.233.

Fairfield Enterprises, at the date of dissolution on or about January 1, 1980, had an equity of \$125,000.00 in the business property occupied by Fairfield Service.

Respondent says that the amount was due and owing to Estate Builders, his own private corporation, but there was no evidence of such indebtedness. R.128-129. In addition, Fairfield Enterprises had an asset of \$20,000.00 equity in an adjacent parcel of real estate., R.225, and claimed the \$7,831.00 beginning inventory of Fairfield Service. None of this was disclosed to the appellant at the time of his ouster from Fairfield Service or at the time of the dissolution of Fairfield Enterprises. R.219, R.155 through 158.

In addition there were cash and bank deposits of \$4,350.32 as of January 1, 1980, claimed by the Respondent and allowed to him by the Lower Court in settling the Accounts of Fairfield Service.

The facts show the appellant due \$14,915.83 from the settlement of Fairfield Service, and the net worth of Fairfield Enterprises as of January 1, 1980, to be \$152,831.00. Appellant concedes that his interest in Fairfield Enterprises should be diminished by the amount of \$25,000.00 R.219. For the settlement of

Fairfield Service, a one half interest in Fairfield Enterprises, and the deduction of \$25,000.00, the appellants true interest in Fairfield Service and Fairfield Enterprises, with some creditors and many taxes remaining unpaid, should be \$66,331.33.

ARGUMENT

POINT I

TO ALLOW ONE TO TAKE TITLE AS SECURITY FOR A LOAN
TO LATER EMBARK ON A SCHEME TO DEFRAUD ONE WHO
SOLICITED HIS SERVICES AS A LENDER IS ERROR.

Respondent claims title to Fairfield Service on the basis of what he claims to be a loan from him to the business known as Fairfield Service, claimed to be the sole proprietorship of the Appellant and as such, his sole property. The lower court has held it to be no loan at all, but an investment justifying the ouster of the appellant from his business. This constitutes a fraud on the appellant who solicited the respondent's services as a lender with the respondent purporting to make a loan. At some later time, he then ousted the appellant summarily of his entire property interest for purposes of conducting the appellant's business as his own. Such conduct is fraud. Graham v. Street, 166 P2 524 (Utah, 1946).

POINT II

THE BREACH OF A DUTY TO DISCLOSE BY THE DOMINANT
PARTY IN A CONFIDENTIAL RELATIONSHIP IS
CONSTRUCTIVE FRAUD.

The managing partner of a partnership owes the highest fiduciary duty to his co-partner. It is one of the oldest rules of law that a person in such a position shall not profit at his partners expense acquiring his partner's interest while not disclosing

his adverse interest to his partner. See: W.A. McMichael Construction Co. vs. D and W. Properties, Inc., 356 So. 2d 1115 (La. App. 1978). Presumption of fraud may be based on the relationship alone. Renshaw v. Tracy Loan and Trust Co., 49 P2d 403 (Utah, 1935) Blodgett v. Martsch, 590 P2d 298 (Utah, 1978).

POINT III

A COURT OF EQUITY SHOULD NOT ASSIST ONE IN CIRCUMSTANCES HE HIMSELF HAS CREATED. A PARTY STEEPED IN FRAUD SHOULD HAVE NO EQUITABLE RELIEF.

The decision of the lower court is a clear abuse of the powers of equity. Equity will not come to the aid of one who has placed himself in an inequitable position, nor will equity condone fraud. Battistone v. American Land and Development Co. 607 P2d 837 (Utah, 1980). State ex Rel Burke v. Oklahoma City, 522 P2d 612 (Okla., 1973).

POINT IV

THE CHOICE OF REMEDY BELONGS TO THE VICTIM OF THE FRAUD AND A CHOICE CANNOT BE FORCED UPON HIM.

As stated by this Court, the offended party in an action for fraud has the option to elect the choice of remedy, and the right to recover damages for the fraud is not easily lost. The party does not waive the fraud by an election to affirm an agreement, complete its performance and retain what was received under it; and such a party is not precluded from recovering damages sustained by reason of the fraud. The proper measure of damages is the difference between the value received and the value it actually had. Dugan vs. Jones, 615 P2d 1239 (Utah, 1980).

Also the Respondent as managing partner was a qualified witness to establish the true value of Fairfield Enterprises as of January 1, 1980. Atkinson vs. Marquart 541 P2d 556 (Ariz. 1975). Where such undisputed facts are conclusive of the issue between the parties, the appellate court may order judgment entered as required by the facts and law. See: Woodman vs. Knight, 380 P2d 222 (Idaho, 1963)

POINT V

IT IS ERROR TO FIND AN ABANDONMENT OF PROPERTY BASED ON AN AGREEMENT PROCURED BY FRAUD AND WHERE THE DEFRAUDED PARTY DOES NOT KNOW THE TRUE VALUE OF WHAT HE SUPPOSEDLY ABANDONS.

The lower court found that the appellant had abandoned whatever interest he had in Fairfield Enterprises. The abandonment would have had to have been upon the reliance upon his managing partner who stood in a fiduciary relationship to the Appellant. Huffington vs. Upchurch, 532 SW 2d 576, (Texas, 1976).

The finding of the lower court amounted to a holding that as a matter of law, appellant had abandoned any interest. However, one who relies upon an abandonment has the burden of establishing it, and there must be proof of an intent to relinquish a known right. Huffington vs. Upchurch, Supra. Where one has no knowledge of the extent of the interest he supposedly abandons, there can hardly be an abandonment of that interest.

POINT VI

IT IS NOT REQUIRED THAT A SERIES OF TRANSACTIONS SO CLOSELY RELATED IN TIME AND FACT TO BE GROUPED AND COMPARTMENTALIZED TO SEPARATE THEIR LEGAL EFFECT.

For the Court to find two separate and distinct business entities in Fairfield Service and Fairfield Enterprises flies in the face of reality, and is not required where the transactions were entered into at the same time and for a single purpose. This treatment exalts form over substance as an engine for injustice. See: Graham vs. Street, Supra. As the respondent stated:

"A. ... Mr. Farrell came in with nothing. He contributed nothing to the business.

Q. And he went out with nothing.

A. He went out with a lot that he took from The business. R.158 Lines 24-28.

and,

Q. So in March of 1980, you were still of the opinion that Farrell had to pay all of the bills and you got all of the goodies; is that true?

A. Yes, that's correct. R.159 lines 27-30.

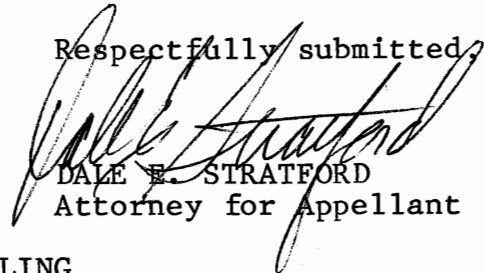
In other words, a man's total involvement and one and a half years building a business where none existed does not count for anything, because he contributed no money to the business. Instead he gets the total accounts payable accrued in building the assets. This is a case in equity, and it is for this Court to find the facts by a clear preponderance, and to do justice.

C O N C L U S I O N

The respondent should not have judgment in this matter to use to deny third parties their just claims. The judgment of the lower court should be vacated and reversed.

Principles of partnership law indicate that in this case, creditors should be satisfied from the assets of the business, and, if this is not possible, the Appellant should have judgment of \$66,331.33 against the respondent for damages from which to satisfy the claims of creditors.

Respectfully submitted,



DALE E. STRATFORD
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I served two full, true and correct copies of the foregoing Brief of appellant to Herwig Glander, Attorney for respondent at 466 E. 500 So., Suite 101, Salt Lake City, Utah, 84111, by U. S. Regular Mail, postage prepaid, this 17 day of December, 1981.

