

1982

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARIUS BURKE, JR.)

Plaintiff and Respondent)

-vs-

)

No. 18033

NORMAN FARRELL)

Defendant and Appellant)

BRIEF OF RESPONDENT

Appeal from the Judgment of the Second Judicial District Court in and for Weber County, State of Utah, the Honorable Ronald O. Hyde, Judge, presiding.

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARIUS BURKE, JR.)
Plaintiff and Respondent)
-vs-) No. 18033
NORMAN FARRELL)
Defendant and Appellant)

BRIEF OF RESPONDENT

NATURE OF THE CASE

Plaintiff/Respondent brought this matter in equity, demanding to have adjudged and decreed the relationship between Defendant/Appellant and Plaintiff/Respondent in a certain business entitled "Fairfield Services", and to have Defendant/Appellant declared sole proprietor of said business during a certain period of time and to have determined the liabilities of the parties to each other and to third parties arising out of the operation of said business by Defendant/Appellant and subsequent take-over of said business by Plaintiff/Respondent.

DISPOSITION IN LOWER COURT

On August 13, 1981, the Honorable Ronald O. Hyde, District Judge, of the Second Judicial District Court in and for Weber County, found that Appellant operated the business entitled "Fairfield Services" as sole proprietor during the period from July 1, 1978 through December 31, 1979, and that the parties were no partners during said period; that Respondent was entitled to possession of the business entitled "Fairfield Services"; that Appellant had abandoned his interest

in "Fairfield Enterprises"; that Appellant had no further interest in a limited partnership entitled "Fairfield Enterprises"; that Appellant is liable for all unpaid liabilities which the business incurred during the period in question; and based on the accounting of all debits and credits between the parties, Respondent was ordered to pay the sum of \$10,565.51 to Appellant or for his benefit to the creditors of the business "Fairfield Services".

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the lower court's Judgment and Order.

STATEMENT OF FACTS

On or about June 1, 1978, Respondent purchased certain premises upon which a service station business entitled "Fairfield Services" was conducted. Subsequent thereto, Respondent formed a limited partnership entitled "Fairfield Enterprises", transferred said premises to said limited partnership. Before these occurrences Appellant and Respondent had known each other for some time and had discussed the purchase of the property and operation of the service station. It has been the general understanding between them that Respondent would buy the property and Appellant would operate the service station business - R.176,177.

During the month of June, 1978, Respondent helped Appellant to get started in the business and describes the relationship between the parties during this transition period as a loose type of partnership arrangement, R.75,76. On or about July 1, 1978, the parties formalized their arrangement, pursuant to their former understanding, whereby Respondent agreed to sell

to Appellant 50% of his interest in the limited partnership "Fairfield Enterprises", the owner of the premises, against certain installment payments over a period of 10 years, and Appellant entered into a lease of the premises with "Fairfield Enterprises" as proprietor of the service station business, which was to be operated by him on the premises and was entitled "Fairfield Services".

During the months April and May, 1979, Appellant experienced cash-flow problems in his service station business, R. 206; Appellant approached Respondent with the problem and Respondent agreed to help him out with a loan of \$16,000 to "Fairfield Services", which was to be paid back out of the business proceeds; R 148. No other documents were executed or agreements made concerning said loan. (P Exhibit 12, 13).

Later, during the summer of 1979, Appellant suggested to Respondent as general manager of "Fairfield Enterprises" the feasibility to increase the size of the building. He agreed to the addition of a cafe and a grocery store. After completion of the addition, the premises were refinanced by "Fairfield Services" and the rent raised.

Towards the end of 1979 the financial situation of the business deteriorated; Appellant fell into arrears with payments to "Fairfield Enterprises", suppliers, taxes, and the Respondent. Respondent examined the situation and found that there was not enough cash-flow to keep the business operative. R.77. The parties had a discussion and agreed that it would be in the best interest of the business and the parties, if Respondent would take over the business as per January 1, 1980; R. 76, a solution preferable to having to close the business.

The parties agreed that they would determine their debits and credits against each other - starting inventory, ending inventory, accounts receivable, accounts payable, Appellant's installment payments towards his interest in "Fairfield Enterprises", and others - and on the final balance Respondent would either pay to Appellant the difference or vice-versa. R. 95, 155-157.

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.

Appellant based his argument on the law in Graham vs. Street, 166 P.2d 524 (Utah, 1946). The facts in Graham vs. Street can be clearly distinguished from the facts as they appear in this case. In Graham vs. Street one Siegel had lead Graham and Street, two partners at that time, to believe that he lend them money and they were owing money to him for the purchase of a tractor, which he, in fact, had purchased himself and to which he had taken title. The court observed:

When did Siegel change his intention to treat the deal as his personally after apparently starting out with papers made to the Siegel Finance Company? All these facts and others, when fitted together and made to illuminate each other, lead us to conclude that there was an intention on Siegel's part to get control of the "cat", which he knew he had led Graham to believe he was financing for the partnership of Graham and Street. By taking title himself and the notes from Graham and Street, he was in a position to go either way what

events would dictate to be to his interest. If the tractor lost money, it would be a loan. If it made money, it would be his with a right to one third of the profits. (page 535).

No such dual situation existed in this case. It was clear from the beginning to the end that Appellant owned and operated the business "Fairfield Services", that "Fairfield Enterprises" owned the premises for which Appellant paid rent and that the money infusion by Respondent was a loan. During the months of April and May 1979, the business "Fairfield Services", operated by Appellant, experienced cash-flow problems. Appellant approached Respondent with the problem and Respondent agreed to help out with a loan of \$16,000 in total with the understanding that it would be paid back out of the profits of the business. R. 95, 96; 141, 142; 189, 190; R 198.

The confusion arises from the fact that Respondent in his original summary of debits and credits pursuant to the take-over agreement between the parties, tried to hold Appellant personally responsible for his loan. The lower court disallowed said claim and found it was a business loan and since Respondent had come into possession of the business, he had no right to claim said loan from Appellant personally (see Memorandum Decision).

POINT II

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

The law as cited by Appellant is not disputed. However, the Court, in examining the record, will find no breach of duty by Respondent. Appellant apparently refers to the re-

lationship of the parties as members of "Fairfield Enterprises", a limited partnership, in which Respondent was the general partner and Appellant one limited partner. The facts are, that Appellant knew that the service station was first bought by Respondent personally and then transferred into "Fairfield Enterprises", of which he was offered a 50% interest for payment of \$25,000 over a period of 10 years, which amounted to "half the payment on the gas station", R.178. He testified, that the idea was for him to lease the station and that he would also buy into the business as a limited partner, R. 177. He knew that his rent to "Fairfield Enterprises" was based on the mortgage payments, which "Fairfield Enterprises" owed to the mortgageholder. R.196, 197. Respondent testified that the accountant for "Fairfield Enterprises" did prepare an accounting. R. 11. Appellant himself testified, that he never asked for an accounting, because it was there and he had access to it. R. 207. Appellant knew how his total payments were allocated by Respondent and that first rent would come out of it, then equipment leases, landlord's share of profits and last his installment payments for his partnership interest in "Fairfield Enterprises".R.184 through 186; R. 209, 210. Respondent informed Appellant of his defaults. R. 76, 77. He knew the value of his business "Fairfield Services" at the time of the take-over and he knew the value of "Fairfield Enterprises", he testified to it.

Ergo, on the facts as they appear in this case, Respondent did not violate any duty to disclose and Appellant had knowledge of all material facts and no constructive fraud may be found.

The cases cited in support of Appellant's argument are clearly distinguishable.

W. A. McMichael Construction Co. vs. D. and W. Properties, Inc. 356, So.2d 1115 (La. App., 1978). Therein a partner intentionally and knowingly withheld information regarding a business opportunity, which he subsequently appropriated to himself. Plaintiff in this case testified that he would not have sold his interest if he would have known of the business opportunity.

Renshaw v. Tracy Loan and Trust Co., 49 P.2d403 (Utah, 1935). The case holds, that on establishment of a fiduciary relationship and transactions between parties thereof, equity will presume fraud and place the burden of proving good faith and fairness on the dominant party. And further:

It is always a question, therefore, of the actual relationship between the parties that must be inquired into and not whether the terms "fiduciary", "confidential" or "trust" can, with some degree of reason, be applied to the relationship.

Further, the court in "Lewis vs. Schafer", 163 Okl.94, 20 P.2d 1048, cited in the foregoing case, defines a confidential relationship on which a court may base a presumption of fraud, as follows:

A confidential relation arises by reason of kinship between the parties, or professional, business, or social relations that would reasonably lead an ordinarily prudent person in the management of his affairs to repose that degree of confidence in the defendant which largely results in the substitution of the will of the defendant for that of the plaintiff in material matters involved in the transaction.

On the record of this case the court may find that the actual relationship between the parties hereto may not even justify the presumption of fraud. The relationship, although formally general partner and limited partner, was very close and most decisions were made together until the fall-out during the last few months of 1979.

Also Blodgett vs. Martsch, 590 P.2d 298 (Utah, 1978) holds:

Breach of duty by the dominant party in a confidential relationship may be regarded constructive fraud.

However, the court further elaborates:

Reasonable diligence on the part of the trustee, where the trustor proclaims his confusion about the meaning of the instruments he is asked to sign, may require a full disclosure and explanation, particularly when the instruments impose a heavier burden.

Nowhere in his testimony does Appellant claim to have expressed confusion which remained unexplained by Respondent or that by execution of certain documents a heavier burden was imposed upon him than before and that he knew of.

POINT III

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

On the record the court may not find fraud either intentional or by breach of a purported "confidential relationship". Respondent did not create any of the circumstances leading to his take-over of the business. Such circumstances were

created by Appellant's mismanagement of the business "Fairfield Services" and his defaulting in his payment obligations.

On the record in this case before the court, the court may find that no such relationship existed between the parties that would justify the presumption of constructive fraud. In any event, however, Respondent did not breach his duty to disclose.

POINT IV

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

Respondent was not defrauded and failed to establish even constructive fraud, which under the theory of the before cited cases requires (1) a "confidential relationship" and (2) a breach of duty.

Atkinson vs. Marquart, 541 P.2d 556 (Ariz., 1975), which Appellant cites in support of Respondent's estimate of the value holds in detail:

Owner may estimate value of his real or personal property, whether he is qualified as expert or not; the fact that owner may not be expert goes to the weight of testimony, and not competency.

Respondent was not qualified as an expert. The case further holds with regard to the issue of breach of fiduciary duty:

A director does not breach his fiduciary duty so long as he acts honestly and in good faith and breaches no specific duty owing to the corporation.

Respondent's action may be measured against this holding and no breach of duty may be found.

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.

As a result of the discussions between the parties in December 1979, Appellant abandoned his interest in the business entitled "Fairfield Services" - R.76 through 78 - on the terms that "we would go through it and determine where the debits and credits were and he would either be paying me money or I would be paying him money". Plaintiff's testimony R.95, 155, 160, 162. Respondent was well aware of the value of the business, of the accounts receivable, accounts payable, inventory, although his figures were later proven far too optimistic. Defendant's Exhibit 6, 7, and R. 214, Respondent not only knew the value of the property that he abandoned, but according to his testimony he also saw no other way out of his predicament than turning it over to the Respondent. R. 197.

Regarding Appellant's interest in the limited partnership "Fairfield Enterprises", Respondent had informed him of his default under the purchasing agreement before the takeover of the business, R. 233, and Appellant himself testified that Respondent offered to return to him as credit the sum of \$2,300, which Appellant had paid toward the purchase of his interest in "Fairfield Enterprises", the land owner. R.199. Nowhere does the record show that Appellant objected to that proposal. Respondent abandoned his interest in the limited partnership for the credit of \$2,300, which he had paid in.

In the event the court cannot find abandonment, Appellant lost his interest in said partnership by defaulting on his installment payments and cancellation in accordance with the purchase agreement. He confirmed in his testimony as correct, Plaintiff's Exhibit 9, showing his total payments towards the purchase of his interest and his arrears. R.215. Pursuant to the Contract for the Sale of a Limited Partnership Agreement - Plaintiff's Exhibit 2 - Respondent cancelled said agreement - Plaintiff's Exhibit 8 - and was entitled to do so.

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.

The record repeatedly shows that Appellant understood and clearly knew the different business entities, their relations to each other and his relation to either one of them. Appellant's testimony:

R. 176: A. He was saying that he was thinking of buying a service-station and I would be interested in running it.

R. 177: Q. Was this put to you that he would buy it, or that both of you were buying it, or what were you both going to do with this gas station?

A. Okay, the idea was to lease it and also to buy into the business as a partner.

R. 201: A. Yes, he told me that he would buy it and then I would buy into the business, into the company, which was "Fairfield Enterprises".

Also R.201

R. 204, 205: Q. But you were aware that you, Norman Farrell, had a lease with a landlord, namely Fairfield Enterprises, who owns the business, is that right?

A. Right, and that's the way I looked at it.

Q. Very good. So there were two levels. You as the tenant and "Fairfield Enterprises as the landlord; is that correct?

A. Right.

Q. And you were acquiring a fifty % interest in the landlord, "is that correct"?

A. That is right.

Appellant would like to see all entities treated as one but they were distinct and the court may not make up a relationship between the parties that did not exist and the parties did not intent.

The record shows that Respondent did not deprive Appellant of the fruits of his labor. The fact is, that Appellant assumed a normal business risk by operating "Fairfield Services" and failed. He never had a clear picture of the actual profit situation. He looked at the business on a cash-flow basis.

R. 206. When questioned about the improvement of the business under his management, he testified that the buildup of his business consisted of an increase in accounts receivables from \$8,000 to \$33,000 over a six months period. At the same time he admits that an increase in accounts receivable does not actually reflect the health of a business, R. 206, and that as a result of the increase in accounts receivable he got into a cash-flow problem. R. 190. In the first incident

in April/May 1979 this problem was solved by an infusion of \$16,000 by Respondent. The situation repeated itself towards the end of the year - accounts payable \$38,112.95; accounts receivable \$16,744.99 - and when no additional working capital could be obtained because Respondent was financially exhausted, he saw no other way out than turning the business over to Respondent instead of closing it down. R. 197. He did not leave the business empty-handed as he argues. Mr. West, the accountant during part of the period of Appellant's operation of the business, testified on rebuttal that Appellant, for example, drew in October-November basically \$1,900 a month - \$1,000 into savings, \$900 direct draw - and draws in September and each of the months of approximately \$1,900 a month. R. 227, 228. Appellant was credited for his work done on the improvements to the premises for material and labor. R. 208. Respondent bought a home during the period in question and testifies to its financing as follows: R. 212. Respondent clearly drew money from the business for the purchase of his home:

Q. Now when you bought that house you have testified to, did you actually buy it, your home?

A. With my money?

Q. Did you actually buy it?

A. Right.

Q. Okay - and you said you had no money for the down-payment?

A. At that time, no.

Q. Where did you get the money for the down-payment?

A. I was expecting all the accounts receivable to come back, you know, in the later months. And I could foresee that I had a certain amount of

money that I could use, considering that I didn't get a pay-check every year, every week you know; so I thought to myself, well this could be a pay-check to me.

What goodies did Respondent get when he took over the business "Fairfield Services" and Appellant abandoned his interest in the limited partnership "Fairfield Enterprises?" He, through his interest in "Fairfield Enterprises", again became the full owner of the premises which he had bought and for which he had made the total down-payment in the first place. For the improvement a higher mortgage was assumed. Material and labor had been supplied by his company. For his small contribution to the improvements Appellant was credited. The business showed \$16,744.99 accounts receivable, of which only about \$12,000 were collectible, against \$38,112.95 accounts payable, \$24,764.80 inventory, and considerable tax liabilities. After his take-over he had to invest an additional \$50,000 to keep the business afloat.

R. 162.

POINT VII

IT IS THE PREROGATIVE OF THE FACT FINDER
TO HEAR EVIDENCE, MAKE FINDINGS OF FACTS
AND DRAW INFRENCES AND CONCLUSIONS OF LAW
THEREFROM TO SUPPORT ITS JUDGMENT.

The decision of the lower court is based on its findings of fact and conclusions of law and that it is its prerogative. Blodgett vs. Martsch, 590 P.2d 298 (Utah, 1978). Justice Crockett in the same case opines further:

that we should not presume to evaluate
the evidence, but that should be done
at trial.

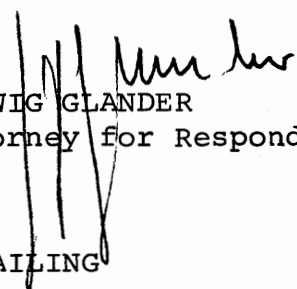
It is only:

When evidence is non-conflicting and undisputed and permits only one conclusion, finding or conclusion by trial court contrary thereto is not binding on appeal, and, where undisputed facts are conclusive of issue between parties, reviewing court will order judgment entered as required by facts and law. (see Woodmar vs. Knight, 38OP.2d 222, Idaho, 1963).

C O N C L U S I O N

The Judgment and Order of the lower court should be affirmed.

Respectfully submitted,


HERWIG GLANDER
Attorney for Respondent

CERTIFICATE OF MAILING

I hereby certify that I served two full, true and correct copies of the foregoing Brief of Respondent to DALE E. STRATFORD, Esq., Attorney for Appellant, at 1218 First Security Bank Building, Ogden, Utah, 84401, by U. S. Regular Mail, postage prepaid, this 18th day of January, 1982.


HERWIG GLANDER