

1957

# Spencer Van Noy v. Richard Gibbs : Brief of Defendant and Appellant

Utah Supreme Court

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Taylor, Lund & Griffith; Attorneys for Defendant;

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## Recommended Citation

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# In the Supreme Court of the State of Utah

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SPENCER VAN NOY,

*Plaintiff and Respondent,*

vs.

RICHARD GIBBS,

*Defendant and Appellant.*

Clerk, Supreme Court, Utah

Case No. 8627

\_\_\_\_\_  
BRIEF OF DEFENDANT AND APPELLANT,  
RICHARD GIBBS  
\_\_\_\_\_

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# In the Supreme Court of the State of Utah

SPENCER VAN NOY,

*Plaintiff and Respondent,*

vs.

RICHARD GIBBS,

*Defendant and Appellant.*

Case No. 8627

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## BRIEF OF DEFENDANT AND APPELLANT, RICHARD GIBBS

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### STATEMENT OF FACTS

The facts of the case are for the most part not disputed. On the 24th day of January, 1955, the Plaintiff and Respondent herein, Spencer Van Noy, hereinafter referred to as Van Noy, executed and delivered to the Defendant and Appellant, Richard Gibbs, hereinafter referred to as Gibbs, an Assignment, Exhibit D-1 (R-87). By this Assignment, Van Noy purported to sell, transfer and assign all of his right, title and

interest to shares of capital stock in the Valley Amusement Enterprises, Incorporated, to Gibbs in consideration of the sum of Two Thousand Dollars (\$2,000.00), Seven Hundred Fifty Dollars (\$750.00) down, receipt of which was acknowledged, and the balance, or Twelve Hundred Fifty Dollars (\$1,250.00) payable within ninety days. Gibbs received the Assignment, Exhibit 1, and paid the amount of Seven Hundred Fifty Dollars (\$750.00), on or about the 24th day of January, 1955. The stock in the Valley Amusement Enterprises Corporation which Van Noy purported to sell to Gibbs was never issued by the corporation to Mr. Van Noy (R-61) and was never delivered by Van Noy to Gibbs. Both Van Noy and Gibbs at the time the Assignment was executed believed that the Valley Amusement Enterprises, Incorporated, owned a leasehold interest in certain property situated at 3793 South State Street in Salt Lake City. The Articles of Incorporation of Valley Amusement Enterprises, Incorporated, were filed with the Secretary of State on December 22, 1954. Spencer Van Noy subscribed to Nineteen Hundred Fifty (1950) shares of stock of a par value of Nineteen Hundred Fifty Dollars (\$1950.00) (R-89). The Articles of Incorporation recited that the capital stock of the corporation consisted of a lease dated the 1st day of December, 1953 covering the property located at 3793 South State Street, Salt Lake City. Whatever monies Van Noy spent in the venture at the Copa Supper Club were expended in building and remodeling the building prior to the time of the incorporation of Valley Amusement Enterprises, Incorporated (R 54) and after the incorporation of Valley Amusement Company, Van Noy paid nothing into the corporation (R. 61). Van Noy first became interested in the Copa Supper

Club in September of 1954 (R-50). At the time Gibbs became interested in the Copa Supper Club and Valley Amusement Company the premises at 3793 South State were pretty well completed and decorated and the business was ready to open. At that point, the Plaintiff and the Defendant, together with others, had a meeting for the purpose of incorporating the Valley Amusement Company (R-53). Mr. Van Noy wanted so much for his investment and he agreed to take stock in the newly formed corporation for money and work which he had already expended on the leasehold at the Copa Supper Club (R-54). Van Noy acknowledged on the stand that at the time of the taking of his deposition that he thought there was a lease on the building (R-58). Subsequently it was determined by Dr. Gibbs that there was no lease on the building and that there never had been. Gibbs was obtaining the outstanding interests in the Valley Amusement Company for the purpose of obtaining the leasehold interest which both Gibbs and Van Noy thought existed on the premises, and he would not have purchased the same had he known the leasehold interest did not exist (R-76). Gibbs, through his counsel, offered to return the Assignment to Van Noy and accept his Seven Hundred Fifty Dollars (\$750.00) back, which Van Noy refused to do (R-59). The evidence is uncontroverted that no leasehold existed.

## STATEMENT OF POINTS

### Point I.

THE COURT ERRED AS A MATTER OF LAW IN GRANTING JUDGMENT TO THE PLAINTIFF BECAUSE

NO STOCK CERTIFICATES WERE DELIVERED OR TENDERED TO THE DEFENDANT AS REQUIRED BY SECTION 16-3-1, U.C.A. 1953, AND HAVING FAILED TO DELIVER THE CERTIFICATES THE PLAINTIFF HAD NO CAUSE OF ACTION AGAINST THE DEFENDANT.

### Point II.

THE COURT ERRED AS A MATTER OF LAW IN GRANTING JUDGMENT TO THE PLAINTIFF IN THIS CASE BECAUSE THERE WAS A MUTUAL MISTAKE OF FACT AS TO THE EXISTENCE OF A LEASEHOLD INTEREST WHICH WAS THE ONLY SUPPOSED ASSET OF THE VALLEY AMUSEMENT COMPANY AND SUCH LEASE DID NOT EXIST AT THE TIME OF THE FORMATION OF THE CORPORATION OR AT ANY TIME, WHICH RESULTED IN A TOTAL FAILURE OF CONSIDERATION FOR THE CONTRACT.

### Point III.

THE COURT ERRED AS A MATTER OF LAW IN GRANTING NO CAUSE OF ACTION ON DEFENDANT'S COUNTER-CLAIM FOR THE REASON THAT THERE WAS A TOTAL FAILURE OF CONSIDERATION AND THE DEFENDANT IN THIS CASE WAS ENTITLED TO RESCIND THE CONTRACT AND RECEIVE BACK THE AMOUNT PAID.



## ARGUMENT

### Point I.

THE COURT ERRED AS A MATTER OF LAW IN GRANTING JUDGMENT TO THE PLAINTIFF BECAUSE NO STOCK CERTIFICATES WERE DELIVERED OR TENDERED TO THE DEFENDANT AS REQUIRED BY SECTION 16-3-1, U.C.A. 1953, AND HAVING FAILED TO DELIVER THE CERTIFICATES THE PLAINTIFF HAD NO CAUSE OF ACTION AGAINST THE DEFENDANT.

*Section 16-3-1 U.C.A. 1953* provides the exclusive manner for transfer of shares of stock in a corporation. This Section reads in part as follows:

"Title to a certificate and to the shares represented thereby can be transferred only:

(1) By delivery of the certificate indorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby; or

(2) By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign or transfer the same or the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person. \* \* \* "

An attempted transfer of shares of stock without delivery of the certificate is governed by Section 16-3-10 U.C.A. 1953, which reads as follows:

"An attempted transfer of title to a certificate or to the shares represented thereby without delivery of the certificate shall have the effect of a promise to transfer,

and the obligation, if any, imposed by such promise shall be determined by the law governing the formation and performance of contracts.”

These Sections of law must be considered to be incorporated into and become part of every contract for the sale of corporate stock. *Makris vs. Melis*, 50 Utah 544, 167 P. 802-804.

The evidence in the case at bar indicates conclusively that the Plaintiff cannot deliver the certificate of stock as required by law. The subscription to the 1950 shares of stock which Van Noy made was supposedly paid for by work and services performed in the construction and building of the Copa Supper Club prior to the incorporation of Valley Amusement Corporation. Had the lease been in existence, such work performed upon the leasehold interest would, no doubt, increase the value of the leasehold and become a proper subject for transfer into the corporation in consideration for the issuance for its shares of stock. However, in this case, no leasehold existed and therefore Van Noy is not entitled to have the shares of stock issued to him. Furthermore, the trial court recognized this by requiring the Plaintiff in this case to deliver the certificate or certificates of stock of the Valley Amusement Enterprises Corporation to the Defendant. Inasmuch as no certificates were delivered, nor can they be delivered, *Section 16-3-10 U.C.A.* 1953, heretofore quoted, would govern and the Plaintiff before bringing his cause of action would be required to tender delivery of the shares of stock or show that he could deliver the shares before bringing his lawsuit or before having a cause of action against the Defendant. *Section 16-3-10 U.C.A.* requires under the conditions existing in this case that the obligation to transfer the shares shall be governed

by the law governing the formation and performance of contracts generally. That Plaintiff is required to deliver the certificates, under the facts of this case, we believe is governed by *Section 60-3-2 U.C.A. 1953*, which provides as follows:

“Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.”

Thus we see under this Section the Plaintiff is obligated before having a cause of action to tender delivery of the shares of stock or the certificates of the shares of stock to the Defendant, which the evidence shows in this case clearly was not done. This principle was recognized by the Supreme Court of Utah in the case of *Rock vs. Gustavson Oil Company*, 204 Pac. 96. The Court considered a case in which there had been a failure to deliver the stock certificates as required by the contract. The Court held:

“Under our statute, Section 878 Compiled Laws, 1917, shares of stock in a corporation are deemed personal property. The certificates issued therefor are the evidence or muniments of title. Due performance of a contract of sale on the part of the seller of stock ordinarily imports and requires a delivery of a certificate to the buyer and until that is done by the seller the transaction will not be regarded as a completed one. *Corey Adm’r. v. Perry Irr. Co.*, 50 Utah 70; 166 Pac. 672. *Makris v. Melis*, 50 Utah, 544, 167 Pac. 802.”

The Defendant in this case believes in view of the foregoing facts that it will be impossible for the Plaintiff to comply with the order of the Court below and deliver the shares

of stock as required by the court order. We submit that a reading of the Order recognizes in principle that the delivery of the shares of stock and the payment of the price are concurrent conditions, as heretofore set forth, and that in view of this the action was prematurely brought. The Court should reverse the judgment of the lower court and hold that no cause of action existed against the Defendant in this case.

## Point II.

THE COURT ERRED AS A MATTER OF LAW IN GRANTING JUDGMENT TO THE PLAINTIFF IN THIS CASE BECAUSE THERE WAS A MUTUAL MISTAKE OF FACT AS TO THE EXISTENCE OF A LEASEHOLD INTEREST WHICH WAS THE ONLY SUPPOSED ASSET OF THE VALLEY AMUSEMENT COMPANY AND SUCH LEASE DID NOT EXIST AT THE TIME OF THE FORMATION OF THE CORPORATION OR AT ANY TIME, WHICH RESULTED IN A TOTAL FAILURE OF CONSIDERATION FOR THE CONTRACT.

The Plaintiff Van Noy and others were engaged in the construction of the premises at 3793 South State for the purpose of operating a non-profit social club, the Copa Supper Club. Having invested sums of money, it was the desire of all of the persons then engaged to form a corporation to hold the supposed leasehold interest in the property and lease the same to the Copa Supper Club. The Defendant Gibbs was the only one who furnished money after the formation of the Valley Amusement Enterprises, Incorporated, and the only one of

whom it can be said paid his subscription to the stock subscribed in Valley Amusement Enterprises, Incorporated. The Plaintiff and the Defendant had discussed the question of purchasing each other's interest in the club prior to the time the Assignment which is the subject matter of this lawsuit was executed. The testimony of both indicates that the thing they were dealing with was the Copa Supper Club and that they were intending to transfer this interest by the transfer of the shares of stock. Both were under the impression that the corporation was validly formed; that the leasehold interest existed; that the Valley Amusement Company was in a position to lease the premises to the Copa Supper Club and thereby to operate the business into which all of the incorporators had invested their money. Gibbs accepted the assignment with the understanding that he was obtaining the leasehold interest. Van Noy made the Assignment believing that the Valley Amusement Company had the leasehold interest and the right to operate the Copa Supper Club. In fact, it was the interest in the Copa Supper Club with which the parties were intending to deal. The Plaintiff so testified (R-42). In truth and in fact such lease was not in existence and in accepting the Assignment of the shares of stock the Defendant received nothing and there was a total failure of consideration.

The Supreme Court of the State of Kentucky in the case of *Neale vs. Wright*, 130 Ky. 146. 112 SW. 1115, considered a situation almost identical to the case at bar. In that case, one director of a corporation sold land to another director for stock in the corporation. Both parties were greatly deceived as to the value of the stock by the books of the corporation,

which indicated an inventory far in excess of that which actually existed. The Court ordered the deed to the land cancelled, and held:

‘Persons who deal in the stock of a corporation necessarily enter into speculative contracts and they will not be ordinarily released simply because the stock turned out to be worth less than it was supposed to be worth, but here the stock which Neal transferred to Wright for the land was of no value. As the facts proved, he received no consideration for his land. The parties were dealing upon the supposition that the corporation had about four times as much merchandise as it in fact had. Their trade was made upon the supposed condition of the corporation. There was a mutual mistake induced by the statements of the condition of the corporation which had been promulgated. They were both deceived, but when the truth appears and it is shown that there is a total failure of consideration for the deed it will be cancelled in equity.’

In the case at bar, both parties were greatly deceived with regard to the existence of the lease. In the Articles of Incorporation (R-95) the leasehold was transferred to the corporation by agreement of the incorporators. The Articles of Incorporation were signed by both parties to this agreement and both understood that the lease was in existence. Van Noy had been working on the premises remodeling and building the same and had paid rent on the premises for a period of some months prior to the formation of the Valley Amusement Company. We submit that in view of these facts that there was a mutual mistake which was induced by the Articles of Incorporation, if by nothing else. Now, after the truth appears, to-wit, that no leasehold existed, the Plaintiff would recover

from the Defendant the balance of the amount paid even though under such facts there is a total failure of consideration and that the contract is voidable having been entered into under a mistake of a material fact. See *Restatement of Contracts*, Section 502, which states in part:

“ \* \* \* Where parties on entering into a transaction that affects their contractual relations are both under a mistake regarding a fact assumed by them as the basis on which they entered into the transaction it is voidable, \* \* \* .”

Under Comment A, the following appears:

“Where both parties assume the existence of a certain state of facts as the basis on which they enter into a transaction, the transaction can be avoided by a party who is harmed if the assumption is erroneous.”

Here the parties were intending to deal with what was known as the Copa Supper Club. Certainly the Plaintiff in this case assumed that there was a lease inasmuch as he spent considerable sums of money and performed a considerable amount of labor in improving the leasehold. The Defendant Gibbs assumed a lease existed and what he was intending to purchase was the lease in order that he might lease the premises to the Copa Supper Club.

The Supreme Court of the State of Washington in the case of *Lindeburg vs. Murray*, 201 Pac. 759, considered a case similar to the one at bar. In that case, stock in a corporation was sold in the belief by both parties that the assets of the corporation were as shown by the books of the corporation. A defalcation of the bookkeeper had caused a material

reduction in the assets of the company. The Washington Court held:

“We think it is elementary that where there is a clear bona fide mistake regarding material facts without culpable negligence on the part of the person complaining the contract may be avoided and equity will decree a rescision.”

“We take it that the true test in cases involving mutual mistake of fact is whether the contract would have been entered into had there been no mistake.”

The Court in that case allowed rescision of the contract for the purchase of the stock. In the case at bar, as in the Washington case, there is a clear bona fide case of a material fact. The Plaintiff in this case cannot, therefore, recover the balance of the money which the Defendant agreed to pay by reason of the Assignment of the shares of stock.

### Point III.

THE COURT ERRED AS A MATTER OF LAW IN GRANTING NO CAUSE OF ACTION ON DEFENDANT'S COUNTER-CLAIM FOR THE REASON THAT THERE WAS A TOTAL FAILURE OF CONSIDERATION AND THE DEFENDANT IN THIS CASE WAS ENTITLED TO RESCIND THE CONTRACT AND RECEIVE BACK THE AMOUNT PAID.

The Defendant, through its counsel of record, offered to return the Assignment and asked for the Seven Hundred Fifty Dollars (\$750.00) which had been paid to be returned. This tender was refused (R-59). Under the facts, the reasoning



and the authorities heretofore set forth, the Defendant is entitled to rescind and receive back the amounts paid. This, we submit, is true because there was a mutual mistake of a material fact and a total failure of consideration.

## CONCLUSION

The evidence is undisputed in this case that the stock certificates in the Valley Amusement Company were never issued and were never delivered by the Plaintiff to the Defendant. The evidence established conclusively that the Valley Amusement Enterprises, Incorporated, did not have the leasehold on the premises located at 3793 South State Street, which was the subject matter of the transaction. We submit now that it would be unreasonable to require the Defendant to pay for nothing more than a piece of paper, to-wit, the assignment of shares of stock which in truth and in fact the Plaintiff did not own, having failed to pay his subscription into the corporation. We respectfully submit that in view of the foregoing authorities and reasoning that the judgment of the lower court should be set aside and a judgment of no cause of action entered in favor of the Defendant Richard Gibbs and that the Defendant be allowed to recover on his counter-claim the amount paid, he being entitled under the facts of this case to rescind the contract.

Respectfully submitted,

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