

1982

Rodney L. Phillips v. JCM Development Corp et al : Reply Brief on Appeal

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

RODNEY L. PHILLIPS, :
Plaintiff-Respondent, :

vs. : CASE NO. 18211

JCM DEVELOPMENT CORPORATION, a :
Utah Corporation; JAMES C. Mc- :
GARRY, JR.,; LINDA McGARRY; :
JAMES R. GLAVAS, dba J.G. REALTY; :
JAMES GLEASON; ROBERT G. ANDER- :
SON; UNITED FARM AGENCY, INC., :
a Utah Corporation; CLAN :
STILSON; and DOES I through XV, :
Defendants-Appellants. :

REPLY BRIEF ON APPEAL

APPEAL FROM THE JUDGMENT OF THE SEVENTH JUDICIAL
DISTRICT COURT IN AND FOR GRAND COUNTY, HONORABLE BOYD
BUNNELL PRESIDING

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Utah Corporation

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IN THE SUPREME COURT OF THE STATE OF UTAH

RODNEY L. PHILLIPS, :
Plaintiff-Respondent, :
vs. : Case No. 18,211
JCM DEVELOPMENT CORPORATION, :
a Utah corporation; JAMES C. :
McGARRY, JR.; LINDA McGARRY; :
JAMES R. GLAVAS, d/b/a J. G. :
REALTY; JAMES GLEASON; ROBERT :
G. ANDERSON; UNITED FARM :
AGENCY, INC., a Utah corpor- :
ation; CLAN STILSON; and :
DOES I through XV, :
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REPLY BRIEF ON APPEAL

POINT I

THERE WAS INSUFFICIENT EVIDENCE INTRODUCED
AT TRIAL TO BASE A VERDICT AGAINST THE
DEFENDANT, UNITED FARM AGENCY, INC., A
UTAH CORPORATION.

Plaintiff assumes, without any substantiation, that in the instant transaction, Robert Anderson was United Farm Agency's agent and that United Farm Agency was Robert Anderson's principal. Plaintiff then proceeds to quote general principal-agent law, but in the context of the instant facts plaintiff fails to establish, based upon the record, either that United Farm Agency was actually Robert Anderson's principal or that an agency relationship of any type even existed. It is appellant's position that the plaintiff must demonstrate facts which would establish the legal relationship between Anderson and United Farm Agency. The facts in this case

are simply inadequate to establish an independent contractor relationship let alone an employment relationship between Anderson and United Farm. Appellant set out in detail the elements that must be established to prove an employment relationship (Appellant's Brief pp. 13-17), and the respondent simply has failed to refute the fact that there is no evidence in the record to support the finding of employment and the imputation of liability from Anderson to United Farm. Without alluding to the record, plaintiff reaches the unwarranted and unfounded conclusion that United Farm Agency is plaintiff's agent. Plaintiff reached this conclusion despite the fact that it's deal with Anderson was not consummated with United Farm Agency forms, was not closed with Mr. Snow, United Farm Agency's attorney, was in contravention of United Farm Agency policies and Utah statutes, and was done without the knowledge of United Farm Agency's broker or United Farm Agency.

Plaintiff knew at the time the Earnest Money Agreement in this action was signed, that it was not a United Farm Agency document. Neither United Farm Agency nor it's broker, Clan Stilson, were aware of nor involved with the closing. Plaintiff is attempting to establish that United Farm Agency was Anderson's principal in spite of the fact that the entire transaction that occurred on August 14, 1978, was in violation of United Farm Agency policies and practices as established and was for Anderson's sole benefit and interest.

Defendant's Brief on Appeal makes it clear that United Farm Agency was not Robert Anderson's principal with respect to the transaction in issue. Plaintiff, in his Brief of

Respondent, has shown nothing which would refute this fact.

Plaintiff has alleged negligence on the part of United Farm Agency for its failure to supervise the activities and conduct of Anderson. The allegation stems from a section of United Farm Agency's brief which plaintiff extracted and used completely out of context. (Brief on Appeal at 16). The statement by defendant in his brief referred only to the instant transaction. The reason that no supervision existed was that United Farm Agency was unaware of Anderson's activities.

Plaintiff relies on Wells v. Walker Bank & Trust Co., 590 P.2d 1251, 1254 (Utah 1979), to establish the fact that UFA knew or should have known that Anderson was mishandling plaintiff's affairs. However, the language from Wells upon which plaintiff in the instant case relies is not the language of the Court, but rather, language from the complaint in Wells. A careful reading of Wells will reveal that the Court is not endorsing the notion, as plaintiff in the instant action has supposed, that a principal always knows or should know all activities and conduct of its agent. Rather, the Court is saying that if that were true in that specific case, it would establish a basis for granting relief. Wells provide no authority for the instant plaintiff's conclusion that, as a matter of law, United Farm Agency knew or should have known of Anderson's activities and conduct.

Assuming, arguendo, that a principal-agent relationship existed in the instant case, the holding in Wells would dictate that United Farm Agency is not liable for the acts of Anderson. In discussing the liability of a principal for the acts of an

agent or employee when those acts are committed without the principal's authority or knowledge, the Court in Wells held:

It is, of course, to be recognized that if the employee is not so authorized and is acting for his own interest, and not in the furtherance of the employer's business, the latter would not be bound by his acts.

590 P.2d at 1264.

In the instant case, it is clear that Anderson was not acting with the authority and knowledge of United Farm Agency. The alleged "closing" was in contravention of United Farm Agency policies, no attorney was used, the documents used were not United Farm Agency's, United Farm did not receive a commission and no person from United Farm Agency ever knew of or approved of the "deal." Therefore, on the authority of Wells, United Farm Agency would not be bound by or liable for the acts of Anderson.

It is respectfully submitted that the decision imputing the conduct of Anderson to Clan Stilson and United Farm Agency, a Utah corporation, is without support in the record and should be reversed. The relationship between real estate salesman and broker is established by statute. Contravention of this statute as well as the established policies of the broker by the salesman should prevent any vicarious liability from arising with respect to such faulty transactions.

POINT II

AN INDIVIDUAL CANNOT MAINTAIN AN ACTION IN HIS OR HER NAME FOR WRONGS DONE BY THIRD PARTIES TO A CORPORATION WITH WHICH THE INDIVIDUAL IS ASSOCIATED.

In respondent's brief, plaintiff seems to be laboring

under the misconception that the plaintiff and Phillip's Construction Company, Inc., are the same entity. While plaintiff admits that a corporation, Phillip's Construction Company, Inc., was formed in 1978, he states in his brief that "the plaintiff did business personally as Phillip's Construction Company at all times." It is a contradiction in terms to say that "plaintiff did business personally at all times" while admitting that "business was intended to be carried on through the corporation." The only testimony in the record that relates to how the plaintiff conducted his business is that elicited from the plaintiff, Rodney Phillips. Phillips testified that after the formation of the corporation, all of the business and business assets were owned by the corporation, with the exception of the equipment which allegedly was retained by Mr. Phillis (Tr. 132).

It is crucial in this action that any damages suffered by plaintiff and any damages suffered by Phillip's Construction Company, Inc., be properly separated and recognized as distinct. Plaintiff was given, at the time of the transaction, promissory notes totaling \$79,000.00 which represented his equity in the business. However, the accounts receivable and accounts payable in issue are matters which touch and concern the corporation, Phillip's Construction Company, Inc. Plaintiff admitted at trial that he was never paid any of the obligations for which he is allegedly responsible on the corporation's behalf. He has, therefore, sustained no damages with respect to such obligations. As discussed in defendant's Brief on Appeal, the Court in Norman v. Murray

First Thrift & Loan Co., 596 P.2d 1023 (Utah 1979), emphasized the emnity that should exist between a shareholder and a corporation, such as plaintiff and Phillip's Construction Company, Inc., in the instant case. The Court in Norman held:

[F]or even though a shareholder owns all, or practically all, of the stock in a corporation such a fact does not authorize him to sue as an individual for a wrong done by a third party to the corporation.

Plaintiff's damages, if any, should properly be limited to any losses which he may have personally incurred. It is, therefore, irrelevant with respect to plaintiff's plea for damages that he sees himself as obligated in some manner for debts which he has never paid, and which are properly the debts of Phillip's Construction Company, Inc. The facts clearly show that the plaintiff did not prove that the corporation had been pursued or that any of the creditors had looked to him for payment. Finally, Phillis has filed bankruptcy and accordingly he cannot make a claim for debts he will never be obligated to pay.

POINT III

THAT PORTION OF THE JUDGMENT WHICH REFERS TO THE DEFENDANT'S OBLIGATION TO ASSUME CORPORATE LIABILITIES OF PHILLIP'S CONSTRUCTION COMPANY IS VOID AS A MATTER OF LAW IN VIOLATION OF THE STATUTE OF FRAUDS.

Plaintiff has alleged in his brief that the defense of the Statute of Frauds is unavailable to United Farm Agency with respect to plaintiff's obligations which JCM Development Company was allegedly to have assumed and paid. Nowhere in

plaintiff's brief has he alleged that a signed agreement existed pursuant to which any one of the defendants would assume the obligations and debts of the plaintiff. Even the moderate amount of debt set out in the Earnest Money Agreement was extinguished by the subsequent negotiation and execution of the warranty deed as explained in United Farm Agency's Brief on Appeal. (Brief on Appeal at 30-31). The absence of such an agreement, signed by the party to be charged, definitely brings the matter under the statute of frauds.

Plaintiff alleges that the statute of frauds is unavailable to the defendant because it was not affirmatively pled. United Farm Agency did not affirmatively plead the Statute of Frauds defense because plaintiff's obligations were not specifically delineated as part of plaintiff's damages. Furthermore, it was completely unclear whether the obligations were plaintiff's personal obligations, obligations of Phillip's Construction Company, Inc., etc. As pointed out in United Farm Agency's brief, plaintiff has waived his right to recover for the debts and obligations because they were not specifically stated as special damages. (Brief on Appeal at 32).

It is respectfully submitted that the plaintiff has waived his right to claim the debts as damages or, in the alternative, any duty the defendants had to make an affirmative defense is obviated by the plaintiff's failure to specify the items of special damage which he contended he was entitled to recover.

POINT IV

THERE IS INSUFFICIENT EVIDENCE IN THE RECORD
TO SUSTAIN A JUDGMENT AGAINST ROBERT ANDERSON
FOR BREACH OF DUTIES OWED TO THE PLAINTIFF.

Plaintiff has made several allegations in his brief that are not in line with the facts. Plaintiff states that on August 14, 1978, Robert Anderson expressed no concern at the manner of the closing when he knew things were not being done as they should. In fact, Anderson testified that he did not know that the meeting of August 14, 1978, was a "closing." Furthermore, plaintiff had reserved in the listing agreement the right to sell the property himself and had in fact dealt directly with the other parties at times without Anderson. Because of the nature of the listing agreement, Anderson could not force himself upon plaintiff and require that he, Anderson, be the one to sell the property and handle the deal. Anderson advised plaintiff as to the impropriety of executing the deal as a stock transfer, but regardless of that advice, plaintiff chose to proceed as requested by the other parties.

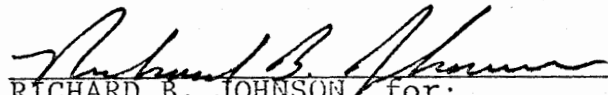
The trial court found that Anderson had a responsibility to see that the closing was handled by an attorney. However, plaintiff dealt directly with Gleason who handled the closing in a manner contrary to the advice Anderson had given plaintiff. Therefore, Anderson should have no obligation to provide an attorney for a closing he was not handling and for a seller who he was no longer representing and who was selling against his advice.

Plaintiff has suggested that Anderson was aware or knew of JCM Development's financial incapacity. This is out of

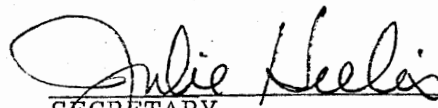
line with the facts. Anderson was contemplating making a sale of land to JCM. He would not have done so if he had the information plaintiff alleges he had. By making such suggestions, it would seem that plaintiff is attempting to exculpate his own unwise decision to accept unsecured notes from parties with whom he had dealt directly and of whom he knew nothing.

It is respectfully submitted that the evidence is insufficient as a matter of law to impose liability upon Anderson and that the legal test used by the Court in defining the standard of care to be imposed upon Anderson is improper.

Respectfully submitted this 23 day of September, 1982.


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MAILED two (2) copies of the foregoing Reply Brief on Appeal to Mr. Paul W. Mortensen, Attorney for Plaintiff-Respondent P.O. Box 339, Moab, Utah 84532-0339; dated this 23 day of September, 1982.


SECRETARY