

1957

Vinal Millett v. Gloria Langston : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

FILED

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VINAL MILLETT,
Plaintiff and Respondent,

— vs. —

GLORIA LANGSTON,
Defendant and Appellant.

Clerk, Supreme Court, Utah

Case
No. 8750

Appellant's Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

VINAL MILLETT,
Plaintiff and Respondent,

— vs. —

GLORIA LANGSTON,
Defendant and Appellant.

} Case
No. 8750

Appellant's Brief

STATEMENT OF FACTS

The problems presented in this case are: What business agreement existed between the parties for establishing a trailer court in Moab, Utah; has such agreement been terminated and if so, when; and what are the present obligations of each party to the other. There was no written agreement between the parties (R. 45), and their testimony shows substantial disagreement on the above questions. The nature of the business agreement, its duration, and the obligations can be established only from the legal implications of the evidence.

In May, 1954, Vinal Millett (Respondent here, but Plaintiff below and so identified herein) discussed trailer court possibilities with his niece, Gloria Langston, (Appellant here, but Defendant below and so referred to herein). Plaintiff had no specific property in mind (R. 46, Ex. 2: Dep. VM 4). He discussed Moab, Utah, as a location because of its boom-town character, but had never gone there to investigate (R. 46, 79).

At that time, Plaintiff, a carpenter (R. 36), was seasonally unemployed (R. 51), and was on unemployment relief (R. 51). Plaintiff was a favorite brother of Defendant's mother (R. 104), and family ties had been very close (R. 106). Plaintiff needed financial help (R. 107), and in March and on May 17, 1954, Defendant gave Plaintiff \$60 to pay on a loan, a portion of which was for purchase of Plaintiff's car (R. 57, 83). Plaintiff was anxious to find security in some permanent work (R. 107, 108), and states he consented to let Defendant participate in his plan for trailer court development because she had a little money (R. 36, 37). Defendant states she was investigating a possible way to help him (Ex. 4: Dep. GL 7).

In May, 1954, Defendant and her mother, together with Plaintiff, drove to Moab (R. 36). The parties proposed to rent land and establish a trailer court, with the Defendant supplying necessary funds until money could be obtained from the operations, and with the Plaintiff providing the work required (R. 37, 46, 48, 79). Plaintiff stated:

“Well, we were to go in on this, and she was to furnish the necessary cash down payment and cash as far as it went until we got on paying basis and me stay down there and put it over.” (Ex. 2: Dep. VM 4; R. 37.)

Efforts to rent property in Moab were unsuccessful (R. 79). About May 20, 1954, Defendant purchased five (5) acres from a Frank Peterson for \$1,100 an acre, with payments of \$1200 down, and \$100 a month thereafter (R. 48, 81). Defendant paid the earnest money of \$500, and the balance of the \$1,200 down payment, took title in her name, and has made the payments subsequently (R. 54, 86, Ex. 2: Dep. VM 17). Plaintiff signed no papers, made no payments on the land, and assumed no obligations for paying for the land (R. 48, 54, 55, 56); nor was he to provide any money at any time (R. 56).

Plaintiff states he demanded a one-third interest in the land for himself and one-third for his brother, Ira, and that the Defendant refused to include their names in the transaction (R. 36). Plaintiff alleges and the Defendant denies that their names were to be included later (Ex. 2: Dep. VM 7, 8, R. 82). The Plaintiff, the Defendant and a real estate man named Bill Allen were present (R. 45). The Plaintiff recalled that Mrs. Boshard, his sister and the Defendant's mother, was also present (R. 45), but Mrs. Boshard denies this (R. 102).

The parties proceeded to establish a trailer court on the land purchased by Defendant (R. 45), with Plaintiff moving to Moab in May, 1954 and remaining

there until July, 1955 (Ex. 2: Dep. VM 5). During that period improvements were made and installations made for a trailer court. These include six small rental cabins, two bathhouses for use of trailer occupants, two wells, and two septic tanks, together with necessary bulldozer work, plumbing, electrical work, and similar work. (Ex. 2: Dep. VM 8, 12, R. 27 Answer #26, R. 90).

Plaintiff contends that all materials necessary for seven cabins were secured from Ira Millett and delivered precut to Moab in a truck hired by Defendant (R. 49, 50). The first cabin was erected by Ira in order to show Plaintiff how to assemble such cabins (R. 72, 113). The remainder were erected by Plaintiff with some help (R. 37, 38). Plaintiff states that the materials obtained from Ira were to entitle Ira to a one-third share of the property (R. 49, Ex. 2: Dep. VM 21). Ira stated he had received some \$25, or \$41 from Defendant, but no other payments (R. 70). He never submitted a bill to Defendant (R. 72). Defendant maintains that the materials were acquired by Ira in his name because he operated a sawmill and small lumber yard and it was thought he could get better prices, but that she made payments for such materials directly to Tri-State Lumber Co. and to Frank I. Larsen Lumber Company and that she does not owe Ira any balance (R. 111). She admits Plaintiff may have obtained some 2 x 2s from Ira but that she was not a party to any such transaction and knows no details (R. 113). The parties agree that Gloria terminated any relations with Ira shortly after Plaintiff moved to Moab (R. 39, 71).

Defendant signed a new contract to acquire additional acres, making a total of 14.57 acres, and agreed to pay an additional \$100 a month on the contract (R. 81). Defendant states the purchase was made by her after being offered to her by the real estate man (R. 81). Plaintiff states he arranged the second purchase and said he would take the deal if Defendant did not (R. 54).

The Plaintiff remained in Moab from May, 1954, until the middle of July, 1955 (R. 40, Ex. 2: Dep. VM 8), except for six or more visits to Salt Lake City to see his wife (R. 53). During this period the Plaintiff had no other employment or source of income (R. 52, Ex. 2: Dep. VM 26), except for the month of June, 1955, when he worked as a carpenter on the new Moab post office (R. 40). During Plaintiff's stay in Moab, Defendant visited the trailer court several times (R. 65).

Plaintiff performed labor on the construction of the trailer court, but also employed third parties to do certain of the work (R. 38, 63). Payment for the services of these persons was made either from the gross collections of the trailer court (R. 63, 64), from the Defendant's personal funds (R. 38, 63, 64), or in some instances by giving free rental or by the transfer of certain of the realty which Defendant had purchased (R. 63).

During the period from May, 1954, to July 1955, rentals for use of the trailer court facilities were collected (R. 62). The Plaintiff states that all such rentals were collected by third parties hired by him to represent

him for this purpose (R. 62, Ex. 2: Dep. VM 11, 18). Such third persons issued receipts for such money collected and retained a carbon copy of such receipts. The carbons, together with the money collected, were turned over to the Plaintiff (R. 62, Ex. 2: Dep. VM 18). Subsequently, Plaintiff delivered to the Defendant such carbons of the receipts, together with copies of bills and other records in his possession. None of the monies collected were turned over to or sent to the Defendant (R. 28, line 1; 54, 56, 134). At the trial the Plaintiff testified that the Defendant made some collections while visiting the trailer court (R. 66), but that he personally had made none (R. 62). The Defendant stated she had made some collections while at Moab (R. 85), but that none of the money collected by herself or by Plaintiff, or by those persons hired by Plaintiff, was ever retained by or delivered to her (R. 86).

Testimony as to the amount of monies collected by Plaintiff is conflicting. Plaintiff states that the average monthly collections came to approximately \$240 a month (R. 41). The receipts for the same period, as placed in evidence by the Plaintiff show collections by him in the total amount of \$5,569.39 (R. 185). Similar discrepancies exist as to the disposition of the money collected. Plaintiff stated that he paid trailer court bills (R. 41, Ex. 2: Dep. VM 18) and payments for labor and materials (R. 41, Ex. 2: Dep. VM 18). Plaintiff also stated that he made withdrawals for personal expenses, including a dollar a day for living expenses (R. 41, 53, 54, 56, Ex. 2: Dep. VM 26), \$45 a month for some seven months for car payments (R. 42, 53, Ex. 2: Dep. VM

27), and payments to his wife in Salt Lake City (R. 42, 53, Ex. 2: Dep. VM 27). Plaintiff further stated that insufficient funds were available for improvements to the trailer court, that he had to secure additional monies from Defendant, and that her failure to provide sufficient funds held him up (R. 41, 59, 63, 64).

During the trial, Defendant called as its witness, Frank Vance, a certified public accountant with the firm of Ernst and Ernst, who testified that he had examined Plaintiff's Exhibits 5 through 14, and Defendant's Exhibit D. 15, which were all the receipts and records of disbursements which were available to the parties (R. 144). Mr. Vance stated that he could not certify that the records were a complete record of the business transactions, but that based on the records before him, certain conclusions could be drawn (R. 148). The summary by Mr. Vance for the period of six (6) months ending December 31, 1954, and the six (6) months ending June 30, 1955, show the following (R. 185), with a twelve (12) month total added:

(Summary set forth on p. 8)

Defendant testified that she secured the money paid by her from some she had saved and some she borrowed (Ex. 4: Dep. GL 15, 21). In addition some payments were made by Defendant by conveying lots (Ex. 4: Dep. GL 16). Plaintiff stated that he withdrew money for his expenses from the business (R. 21, 23, 41) but that he had no savings, no other source of income than the one month of work on the post office (R. 52) and the one hundred dollars he borrowed from his brother (R. 52).

	Defendant		Plaintiff		Other		Total	
Cash Receipts	0		2,629.89		0		2,629.89	
	0	0	2,939.50	5,569.39	0	0	2,939.50	5,569.39
	<hr/>		<hr/>		<hr/>		<hr/>	
∞ Business Disbursements	2,250.33		422.14		138.91		2,811.39	
	2,492.33	4,742.66	524.99	947.13	485.69	624.60	3,503.01	6,314.39
	<hr/>	<hr/>	<hr/>	<hr/>	<hr/>	<hr/>	<hr/>	<hr/>
Excess (Deficit) of Cash Receipts Over Business Disbursements	(2,250.33)		2,207.75		(138.91)		(181.49)	
	(2,492.33)		2,414.51		(485.69)		(563.51)	
	<hr/>		<hr/>		<hr/>		<hr/>	
		(4,742.66)		4,622.26		(624.60)		(745.00)

Plaintiff stated that receipts were to be used for trailer court improvements when available (R. 37) but that very little was (R. 56). Defendant stated that Plaintiff was to get receipts and those were to compensate him (R. 116, 117, Ex. 4: Dep. GL 10, 23) but that she was to receive part of profits, if any (R. 116, Ex. 2: Dep. GL 23), and there was no understanding Plaintiff could keep receipts over and above expenses (R. 133).

Regarding disposition of receipts and withdrawals, Plaintiff stated that he considered the monies taken by him as expense money and not as either income or a loan (Ex. 2: Dep. VM 25). Defendant filed a Federal income tax for 1954 (Exhibit 13) taking a depreciation on installed property and furnishings valued at \$532.54 and on six cabins and one lavatory valued at \$2,097.57. Rent on six frame cabins was shown as \$2,118 and expenses as \$3,243.70. No item reflected any sums withdrawn by Plaintiff. The 1955 Federal income tax of Defendant (Ex. 14) covers the entire calendar year, and again reflects no monies withdrawn by Plaintiff.

About mid-July, 1955, the Defendant and a friend visited the trailer court in Moab (R. 97). At this time the improvements of the trailer court consisted of the six wood cabins, two bathhouses with washing facilities, two septic tanks, and two wells (Ex. 2: Dep. VM 8, 12). The Plaintiff testified that he stated that at this time the work of setting up the trailer court was finished (R. 37, Ex. 2: Dep. VM 23), and that he advised the Defendant that a woman could "take care of this part of it" (R. 42) and that he asked the Defendant if she

desired to “stay down there” (R. 42). Plaintiff also testified that he asserted a desire to return to his wife in Salt Lake City but that he desired to return to the trailer court in the fall or winter (R. 43, Ex. 2: Dep. VM 23, 24). Testimony by the Defendant was that Plaintiff said “he wasn’t happy, he was tired of Moab and had had all he wanted of that kind of life” (R. 98). The friend’s testimony was that she was with Plaintiff and Defendant most of the time they were together during the trip to Moab and that she did not hear Plaintiff make any statement of an intention to return (R. 98).

Plaintiff returned to Salt Lake City on July 20, 1955 (R. 40), in the company of the Defendant and her friend, with Defendant driving one of Plaintiff’s two cars, one of which had a trailer and the other of which was quite old (Ex. 4: Dep. GL 12). Plaintiff stated that he “left tools down there” (Ex. 2: Dep. VM 30), but Defendant testified that he took his possessions with him (R. 121). The Plaintiff stated that at the time he left Moab “everything that had been mutually owed from the receipts of the trailer court had been settled (R. 59, Ex. 2: Dep. VM 18). Defendant stated that Plaintiff moved out (R. 121) and that he wanted to leave Moab (R. 88).

On July 25, 1955, Plaintiff started work as a carpenter in Salt Lake City (Ex. 2: Dep. VM 28), and he testified both that he has been continuously employed since leaving Maob and that he had not (R. 64, Ex. 2: Dep. VM 29). Plaintiff has not returned to Moab since July, 1955 (Ex. 2: Dep. VM 25).

After Plaintiff left Moab, Defendant hired a woman to run the trailer court (Dep. VM 24). When the City of Moab passed a tax on trailer homes, the trailer court business declined drastically (Ex. 4: Dep. GL 19). Thereafter, the Defendant closed the trailer court, but allowed the woman to live there and make rentals if she wished, but to pay all bills and take care of the property (R. 123).

On July 27, 1956, Plaintiff filed this suit against the Defendant alleging a partnership agreement, the conduct of the trailer court business as a partnership, and the wrongful exclusion of the Plaintiff from the business (R. 1). Plaintiff prayed for a receivership, dissolution, accounting, distribution of partnership assets, and for punitive damages (R. 2).

On September 3, 1957, the court made findings of fact and conclusions of law (R. 187, 188, 189) and based thereon entered its judgment awarding a sum of money to the Plaintiff and against the Defendant, and also decreeing a system of equal distribution of the buildings and improvements upon the property (R. 190). It is from this judgment that the Defendant appeals.

STATEMENT OF POINTS

POINT I.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDING OF THE COURT THAT THE PLAINTIFF AND DEFENDANT ENTERED INTO A PARTNERSHIP

AGREEMENT FOR THE CONSTRUCTION AND RUNNING OF A TRAILER COURT.

POINT II.

THE COURT ERRED IN RULING THAT IN JULY, 1955, THE PARTIES HAD AN ACCOUNTING AS TO INCOME RECEIVED AND EXPENDITURES MADE AS OF THAT TIME WITHOUT THE BUSINESS ASSOCIATION OF THE PARTIES BEING DISSOLVED AND TERMINATED.

POINT III.

THE COURT ERRED IN MAKING DISTRIBUTION OF PURPORTED PARTNERSHIP ASSETS IN MANNER CONTRARY TO UTAH CODE ANN. 1953, SEC. 48-1-37.

POINT IV.

THE JUDGMENT MUST FAIL BECAUSE THE FINDINGS OF FACT AND CONCLUSIONS OF LAW DO NOT SUPPORT THE JUDGMENT.

ARGUMENT

POINT I.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDING OF THE COURT THAT THE PLAINTIFF AND DEFENDANT ENTERED INTO A PARTNERSHIP AGREEMENT FOR THE CONSTRUCTION AND RUNNING OF A TRAILER COURT.

One of the findings made by the trial court is:

“1. Plaintiff and Defendant entered into a Partnership Agreement for the construction and running of a Traylor (sic) Court.” (R. 187).

This court has the responsibility to review the evidence. *Nokes v. Continental Mining & Milling Co.*, 6 Utah 2d 177, 308 P. 2d 954, at 954 (1954).

That the parties' relationship might have resulted in a partnership with profit sharing aspects in the future was not unlikely, but the only reliable evidence in the record — the conduct of the parties themselves — is conclusive to the effect that such had not yet been their agreement. There is no disagreement that there was an understanding between the Plaintiff and the Defendant for the construction and running of a trailer court at Moab, Utah. It does not follow that such an understanding meets the legal requirements for a partnership. Unless a partnership is established the Plaintiff can not claim a partner's interest in the trailer court, nor can he claim a partnership interest during the period after the association is dissolved, nor a right to any returns from the business after the association is both dissolved and terminated. The plaintiff has the burden of proving the existence of a partnership.

Benson v. Rozzelle, 85 Utah 582, 39 P. 2d 1113 (1934);

Burnett v. Lemon, 185 Ore. 54, 199 P. 2d 910 (1948).

In *Burnett v. Lemon*, 185 Ore. 54, 199 P. 2d 910, 915 (1948) the Supreme Court of Oregon, in a case strikingly

similar on its facts to the present controversy, adopted the rule of 40 *Am. Jur.*, Partnership, Sec. 43, p. 156:

“In determining whether an actual partnership relation arises from or exists by virtue of a particular agreement, one of the most widely accepted tests applicable especially as between the parties themselves, irrespective of the rights of third persons, is whether it was the intention of the parties to be partners. As between the partners, partnership rests on mutual consent, which may be manifested by the terms of their agreement, the conduct of the parties to each other under it, or by the circumstances generally surrounding the transaction in question.”

Utah Code Ann. 1953, Sec. 48-1-3, defines a partnership as:

“... an association of two or more persons to carry on as coowners a business for profit.”

(Uniform Partnership Act, Sec. 6.)

There is no written agreement between the parties. In such cases the *Utah Code Ann. 1953*, Sec. 48-1-4 provides the following pertinent rules for determining the existence of a partnership:

“In determining whether a partnership exists these rules shall apply:

* * *

- (3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

- (4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

* * *

- b. As wages of an employee or rent to a landlord.”

Of all the possible elements included in a partnership agreement, an agreement to share profits is an essential element of the partnership relation. As stated in 68 C.J.S., Partnership, Sec. 17, p. 427:

“An agreement to share profits, although not necessarily express, is an essential element of the partnership relationship and, at least as between the parties themselves, there must be a community of interest, or right to participate in the profits of the business or venture before it can be said that an agreement of partnership has been entered into and exists. The absence of a mutual interest in the profits is conclusive that a partnership does not exist . . .”

Although a sharing of profits raises a presumption of a partnership (*Kimball v. McCornick*, 70 Utah 189, 259 P. 313 (1927)), such is not the result if such share is received as wages of an employee. *Utah Code Ann. 1953*, 48-1-4 (4) (b). To constitute an element of a partnership, profits which a partner is to share must be real profits, not wages.

Kuenzi v. Radloff, 253 Wis. 575, 34 N.W. 2d 798 (1948);

Roberts v. Wachter, 104 Cal. App. 2d 281, 231 P. 2d 540 (1951).

Jenkins v. Harris, 19 Tenn. App. 113, 83 S.W. 2d 562, 566 (1935) holds:

“An agreement to contribute labor in consideration of receiving a part of the profits of an enterprise does not create a partnership, where such profits are paid as compensation for the labor contributed. *Wagner v. Buttles*, 151 Wis. 668, 139 N.W. 425, Ann. Cas. 1914B, 144, 147.”

Further, in *Keller v. Wixon*, 123 Utah 103, 255 P. 2d 118 (1953) this court, in discussing admissibility of evidence relating to services rendered by a partner said, at page 119:

“Section 48-1-15 (6), U.C.A. 1953, provides that ‘No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.’ To the same effect is *Forbes v. Butler*, 73 Utah 522, 275 P. 772, 775, wherein we stated: ‘The amount of compensation either party in a partnership or joint venture is entitled to receive, in the absence of contract otherwise, is dependent upon the profits made from such joint venture’.”

The parties clearly agreed that Plaintiff was to be allowed to withdraw sums of money for his personal needs. However, the nature of such withdrawals and what amounts were to be withdrawn is not clearly stated by either party. Both testified that they expected proceeds from the trailer court operation to be used for

expenses of clearing the land and making other improvements, but that such receipts were not, or did not appear to be adequate to provide much help and that Defendant had to supply necessary funds from her personal funds. Regarding the withdrawals made by him, Plaintiff, when asked if he offered to pay back any of the money he had taken during the time he was in Moab, replied: "No. That wasn't the bargain." (Ex. 2: Dep. VM 25). He further stated: "My time was worth her money. Time is money." and denied that he considered the money a loan or salary or anything except possibly expense money. (Ex. 2: Dep. VM 25, 26). Whatever the understanding of the parties may have been, it was indefinitely stated by both at the trial.

Other evidence available in the record sheds more light on the nature of the arrangement between the parties, but indicates that there is no mutual understanding sufficient to support the finding of a partnership.

The Plaintiff's own evidence shows that a minimum of some \$5,569.39 for which receipts were issued or which he otherwise is shown to have received for the trailer court, came into Plaintiff's hand up to July 1, 1955 (R. 185). The records on expenditures placed in evidence by Plaintiff account for expenditures of \$947.13 (R. 185) in the same period, exclusive of withdrawals by Plaintiff. An additional \$624.60 was expended, which could not be identified as to whether paid by Plaintiff from business collections or from personal funds of Defendant (R. 185).

Even if the Plaintiff is placed in the most favorable position by crediting him with these expenditures, a balance of \$3,997.66 is left, the disposition of which is unexplained by Plaintiff. A specific breakdown on receipts and disbursements in July, 1955, is not shown in the summaries in evidence and so is omitted here. Further, whether Plaintiff was working elsewhere during July, 1955, is not clear.

The Plaintiff has failed to account for an average of \$70.13 for each week of the 57 weeks from May 20, 1954, to July 1, 1955. If Plaintiff is considered *not* to have also paid the additional \$624.60, the average would have been \$81.09 a week.

The Plaintiff testified he estimated the value of work performed by him to have been \$90.00 a week (R. 27, Line 27). Plaintiff also testified that he works for \$2.85 an hour; (Ex. 2: Dep. VM 30), but stated his present average monthly income to be \$380.00 (R. 26, line 27).

When four weeks are excluded to show the month or more during which Plaintiff had full-time outside employment, the weekly average of funds received by the Plaintiff without explanation of their disposition would then be either \$75.42 or \$87.20.

By the Plaintiff's own evidence, it is shown that from the trailer court operation and during his stay in Moab, Plaintiff received into his possession and is unable to account for a sum of money approximately

equal to his normal income for a like period. In addition he received his living quarters (Ex. 2: Dep. VM 9). This is the minimum and is shown by his evidence.

It is submitted that the evidence is preponderately against existence of a partnership because; (1) Plaintiff received sums of money approximating his normal income; (2) Plaintiff denies any obligation to repay such sums (Ex. 2: Dep. VM 25, 26); and (3) no agreement between the parties is shown which would make such arrangement a partnership understanding.

It is further submitted that only a finding that no partnership existed is consistent with the evidence of Plaintiff's need (R. 107); close family ties (R. 106); assumption of all trailer court debts by Defendant (Ex. 2: Dep. VM 18, lines 29, 30; 19, lines 1, 2); and termination of the business association of the parties in July, 1955, without requiring Plaintiff to account fully for collections and income received by him.

POINT II.

THE COURT ERRED IN RULING THAT IN JULY, 1955, THE PARTIES HAD AN ACCOUNTING AS TO INCOME RECEIVED AND EXPENDITURES MADE AS OF THAT TIME WITHOUT THE BUSINESS ASSOCIATION OF THE PARTIES BEING DISSOLVED AND TERMINATED.

In addition to finding that a partnership agreement was entered into between Plaintiff and Defendant for

the construction and running of a trailer court (Finding 1, R. 187), and that the land was not part of the partnership assets but belonged to Defendant (Finding 2, R. 187), the court also found that Plaintiff was to provide his own labor and supervise construction and that "profits were to pay for the improvements as far as possible" (Finding 3, R. 187). No finding was made regarding withdrawals made by Plaintiff or regarding termination of the partnership, except insofar as they may have been covered by finding 7 (R. 188), which is:

"7. In July, 1955, Plaintiff and Defendant had an accounting as to income received and expenditures made as of that time, and third person was hired to run the business."

It is difficult to determine the legal implication of the Court's Finding 7. "Income" might mean collection at the trailer court and not include payments by Defendant for capital and for operating expenses. "Expenditures" could mean capital and operating expenditures and still not include withdrawal of funds by the Plaintiff.

The Defendant's position is that the parties terminated their business relationship in the trailer court when Plaintiff left Moab in July, 1955; that Plaintiff thereafter had no further interest in the trailer court; and that based on this understanding an exact determination of what each owed the other was dispensed with and the accounts called even.

The discussion under Point I, *supra*, is hereby incorporated by reference for the purpose of showing the unreasonableness of any other conclusion.

The parties are not lawyers nor experienced in operations of the character of the trailer court. It is not likely that both parties understood that their business relations might be construed by law to be a partnership, nor that if they had so understood would have known the significance of such partnership as applied to their obligations. The questions involved are sufficiently disputed to require decision in this appeal. It is also unreasonable to assume that this niece, no matter how generous and no matter how conscious of family ties would knowingly agree to her uncle's having a continuing one-half interest in the trailer court and at the same time relinquish her right to repayment for monies advanced by her and give up her right to any excess of funds the Plaintiff may have withdrawn. The Defendant remained obligated for the debts of the trailer court; the Plaintiff considered himself absolved of any responsibility for such debts. Such actions, when coupled with a mutual agreement as to settlement, constitutes not only a dissolution but also a termination of such partnership. Plaintiff took his possessions, including two cars and a trailer, to Salt Lake City, and was assisted by the Defendant and her friend. Plaintiff obtained work immediately upon return to Salt Lake, and although his testimony is conflicting seems to have continued to work at all times thereafter.

In the absence of a partnership agreement, the business relation would clearly have been terminated. A finding that such a partnership existed as a matter of law required some determination as to whether such partnership continued after July, 1955, and if so, until when. The court makes no finding that the partnership has ever been dissolved, but by considering records of the operation of the trailer court only through December, 1956, in arriving at a purported accounting between the parties, implies that dissolution occurred then.

If at all, this was a partnership by consent. The rule regarding dissolution of such partnerships is stated in 68 *C.J.S.*, Partnership, Sec. 334, p. 847:

“No particular form of agreement is necessary to dissolve a partnership by consent. Such dissolution may be accomplished either by an express agreement or by words and acts implying an intention to dissolve. A partnership entered into verbally may be dissolved in the same manner. Dissolution may be sufficiently evidenced by acts of all the partners showing their intention that the partnership between them shall cease, or by acts or conduct participated in, or assented to, by all the partners, inconsistent with a continuation of the partnership between them, although liquidation is not completed or some appearance of partnership continue.”

In *Fisher v. Fisher*, 83 Cal. App. 2d 357, 188 P. 2d 802, (1948), at page 803, the court said:

“And, as stated in *Griffeth v. Fehsel*, 61 Cal. App. 2d 600, 605, 143 P. 2d 522, 524: ‘Parties to any sort of a business arrangement are their own best judges of the accounts between themselves.’

They understand their own plans and purposes as well as their settlements and after they have reached an understanding to dissolve and have agreed upon an accounting, courts must not undo such mutual, extra-judicial determinations. *Bran-ger v. Chevalier*, 9 Cal. 353, 363; 20 Cal. Jur. 819, 820'."

Utah Code Ann. 1953, Sec. 48-1-28, provides:

"Dissolution is caused:

(1) Without violation of the agreements between the partners:

(a) By the termination of the definite term or particular undertaking specified in the agreement.

(b) By the express will of any partner when no definite term or particular undertaking is specified.

* * * *

(2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time. * * *"

Even if a partnership existed, and even if the Plaintiff did not subjectively intend that it be terminated in July, 1955, his leaving and working elsewhere, the acts of the Defendant at that time, and, as the Plaintiff testified, her acts in preventing his return to Moab, dissolved the partnership. Such was the right of either party. An accounting or other settlement would follow such dissolution, leading to a final termination of the partnership.

If the accounting found by the Court (Finding 7, R. 188) was not coincident with a complete termination, the rights of the Plaintiff depend upon the time the dissolution did take place. A finding of wrongful exclusion is precluded because the partnership is one at will, and since there is neither evidence to support or a finding of any fraudulent conduct, the rule of *Graham v. Street*, 109 Utah 460, 166 P. 2d 524 (1946), which allowed sharing of profits after dissolution, is inapplicable.

It is submitted that the trial court erred in not finding as part of Finding 7 (R. 188), that coincident with the accounting between the parties, the partnership, if any, was dissolved and terminated with neither party having any claim against the other thereafter.

POINT III.

THE COURT ERRED IN MAKING DISTRIBUTION OF PURPORTED PARTNERSHIP ASSETS IN MANNER CONTRARY TO UTAH CODE ANN. 1953, SEC. 48-1-37.

Utah Code Ann. 1953, Sec. 48-1-37, provides in pertinent parts:

“In settling accounts between the partners after dissolution the following rules shall be observed, subject to any agreement to the contrary:

* * * *

(2) The liabilities of the partnership shall rank in order of payment, as follows:

(a) Those owing to creditors other than partners.

- (b) Those owing to partners other than for capital and profits.
- (c) Those owing to partners in respect of capital.
- (d) Those owing to partners in respect of profits.”

a. The trial court had before it a purported claim by Ira Millett which, if valid, would have to be paid before any distribution to the partners. (R. 72).

b. The trial court has before it evidence of capital contribution by Defendant in the amount of \$4,105.11 for buildings and improvements and for equipment in the period ending July 1, 1955, as well as additional business disbursements by Defendant in the same period of \$637.55, making a total of \$4,742.66 (R. 185). The court makes no provision for repayment of such expenditures by Plaintiff from her personal funds, nor for reimbursement to her of similar expenditures and advancement of capital subsequent to July 1, 1955.

In *Tiffany v. Short*, 22 Cal. 2d 531, 139 P. 2d 939, 940 (1943), the court said, concerning a joint venture to which it applied the rules of partnership law:

“The trial court found that the agreement was a joint venture. The general rule applicable to dissolution in such cases is that in the absence of an express agreement to the contrary, the person advancing capital is entitled to its return before there is a division of income or profits. . . . In the present case there was no specific agreement as to division of assets upon dissolution. Therefore a division and distribution into

equal parts before the return of capital, all of which had been advanced by one party, would be improper.”

This is the rule of *Utah Code Ann. 1953*, Sec. 48-1-37, but is not the rule applied by the trial court.

In addition there is authority for the rule that a non-capital contributing partner is not entitled to share in the capital upon dissolution. *Hunter v. Allen*, 147 P. 2d 213, 174 Ore. 261 (1944), modified on other grounds, 148 P. 2d 936, 174 Ore. 26.

c. The trial court had before it evidence of excess withdrawals by Plaintiff but makes no provision for repayment of withdrawals.

Finding 7 purports to discharge Plaintiff of any obligation to make such repayment, but as discussed under Point II, *supra*, which discussion is hereby incorporated by reference, such finding must imply a dissolution of the partnership and termination as well, with all claims by each partner against one another and against the partnership assets settled in full.

d. The trial court purported to distribute net profits after July, 1955, when in fact the net profit so determined included pre-July, 1955 items (Finding 8, R. 188).

On page 184 of the record, the certified public accountant shows cash receipts for the period July 1, 1954, to the end of 1956 by the three figures of \$5,569.39, \$5,067.18, and \$4,362.04, making total receipts of

\$14,998.61. “Business Disbursements” for the same periods are shown as \$6,314.39, \$3,146.82, and \$3,974.68, making a total of \$13,435.89. Subtracting the business disbursements from the cash receipts leaves a sum of \$1,562.72, which is to the penny the amount found by the trial court to be the net profits *since* July, 1955.

e. Further, the trial court failed to recognize the dissolution of such partnership as may have existed either in July, 1955, when Plaintiff left Moab, or at such time thereafter as Plaintiff testifies Defendant refused to allow him to return (R. 44). The dissolution having occurred at one time or the other, termination of the partnership would have proceeded thereafter (*Utah Code Ann. 1953*, Sec. 48-1-27) pursuant to the provisions of *Utah Code Ann. 1953*, Sec. 48-1-37.

f. The trial court failed to give consideration during the period after such dissolution to the respective capital interests of the parties.

This court stated several of the rules applicable to this type of controversy in *Graham v. Street*, 2 Utah 2d 144, 270 P. 2d 456, 459 (1954). Therein the court compared the rules applicable to a fraudulent dissolution and continued use of property with the rules applicable where the dissolution is not fraudulent. This court said:

“There is another reason why neither compensatory nor punitive damages should have been allowed. The Uniform Partnership Act, Utah Code Ann. 1953, 48-1-28, establishes in each partner an indefeasible right to dissolve the partnership even where the partners covenant

that the partnership will continue for a number of years, the only consequence being that in a partnership for a definite term the dissolving partner subjects himself to a claim for damages for breach of contract and for an accounting. *Atha v. Atha*, 303 Mich. 611, 6 N.W. 2d 897. This being so in a partnership for a definite term, a fortiori in a partnership for at will, where an accounting must be the exclusive remedy since no contract has been breached. Normally, this accounting encompasses that interval between formation of the partnership and the time when actual notice is brought home to the partner that the relationship is to be dissolved. *Fisher v. Fisher*, 83 Cal. App. 2d 357, 188 P. 2d 802. However, a different situation is presented where the expulsion is fraudulent and there is continued use of the partnership assets. * * *.”

Except in such cases as *Graham v. Street*, 109 Utah 460, 166 P. 2d 524 (1946) dealing with fraud, the general rule is that a partner is entitled to subsequently earned profits in the proportion that his interest in capital or assets used to earn such profits bears to the total capital or assets used to earn such profits. 40 *Am. Jur.* Partnership, Sec. 386, p. 397, n. 16. 80 A.L.R. 48. Where there is no interest in capital, such a partner does not share in subsequent profits. 80 A.L.R. 68.

40 *Am. Jur.*, Partnership, Sec. 390, p. 398 states the universally accepted rule applicable to the facts of this case:

“The right of a partner to share in the profits earned by the continuation of a partnership business after the dissolution of the firm is founded upon the use to which such partner’s

interest in the capital of the firm has been put in earning these subsequent profits, and if the partner claiming an interest in the profits earned after the dissolution of the partnership has no interest in the capital of the firm after dissolution, he is not entitled to share in the profits earned. The same result is reached where the complaining partner's interest in the capital is negligible. . . . It would seem that if, by reason of . . . the excessive indebtedness of the partner to the firm, the partner has no interest, or at least a nominal interest, remaining in the firm, he should not be entitled to a share of the subsequently earned profits.”

g. The trial court erred in granting an In Personam money judgment against the Defendant.

Because of the necessity for winding up affairs in accord with the law applicable to partnerships, it has been held that “. . . (a) personal judgment cannot be entered against a parnter in a suit for accounting and settlement until all the partnership assets have been converted into money, the debts paid and a final balance ascertained.” *Steinberg v. Goldstein*, 129 Cal. App. 2d 682, 278 P. 2d 22 (1955).

In *Driskill v. Thompson*, 141 Cal. App. 2d 479, 296 P. 2d 834 (1956) the court said that a personal judgment would not, as a general rule, lie until the assets had been converted into money, debts paid, and a final balance struck between the partners. An exception would be where there were found to be no third party liabilities. Such a finding cannot be inferred from the court's failure

to so find, for there was evidence to the effect that there were outstanding third party liabilities.

Even if an untermiated partnership existed, there has been no accounting as the complaint requested. The court found that the defendant had contributed her own funds for the construction and operation of the business, but has failed to consider repayment of such contributions ahead of a distribution of assets as profits. Such is required by *Utah Code Ann. 1953*, Sec. 48-1-37,

Hooper v. Barranti, 81 Cal. App. 2d 570, 184 P. 2d 688 (1947);

Olmo v. Olmo, 56 Cal. App. 2d 590, 133 P. 2d 866 (1943).

If upon a proper determination of the matter it should be determined that there are no third party debts owing, assuming an untermiated partnership, it would then be proper to ascertain the value of the partnership assets and to strike a balance between the parties without a sale, but not without a proper consideration of the withdrawals of the plaintiff which must be balanced against any interest in assets or profits he may have otherwise coming ot him, and not without a repayment of the advances and capital of the defendant. And in the event the assets are insufficient to repay the defendant her capital and advances and her share of the profits, if any, it will be incumbent upon the plaintiff to contribute his proportionate share of such loss, as well as account for his withdrawals.

Utah Code Ann. 1953, Sec. 48-1-37 (1) (b).

h. The trial court erred in applying the system provided in the Occupying Claimants Statute (*Utah Code Ann. 1953*, Secs. 57-6-1 thru 8) to distribution of purported partnership assets.

Even assuming that the buildings and improvements are partnership assets, the court's judgment (R. 190) is not in accord with the rules for distribution of partnership assets which provide a detailed system and set of priorities in the distribution of partnership assets. *Utah Code Ann. 1953*, Sec. 48-1-37.

The plaintiff and his brother, Ira, testified as to possible outstanding liabilities (R. 39, 72). The court made no finding on the question of third party liabilities. Since it is part of the plaintiff's case to prove he merits a distribution, such a finding is a necessary element to support his judgment. Its omission infers a finding against Plaintiff.

Mosley v. Magnolia, 45 N.M. 230, 114 P. 2d 740 (1941);

Coffinberry v. McClellan, 164 Ind. 131, 73 N.E. 97 (1905).

Further the plaintiff testifies that the defendant provided money from her own personal funds for the construction and operation of the trailer court (R. 39, 41, 59, 63). The court's sixth finding expressly recognizes that the defendant used some of her own money in the operation. (Finding 6, R. 188)

Still further, the court found that the "land was to be provided by the Defendant and not to be partnership assets" (Finding 2, R. 187). Evidence shows Defendant

made some payments for operation of the trailer court, by giving land. No credit has been given Defendant for such payments. Also, there is no indication of any payments or credits to Defendant for rent. By the purported use of the Occupying Claimants Statute, the court would be forcing Defendant to sell her land even though she may have no desire to do so. Such a ruling would be unreasonable against a third party landlord. It is no less unreasonable in this case.

POINT IV.

THE JUDGMENT MUST FAIL BECAUSE THE FINDINGS OF FACT AND CONCLUSIONS OF LAW DO NOT SUPPORT THE JUDGMENT

For the reasons outlined in this Point, and in the preceding points, the defendant submits that the judgment is not supported by the findings of fact and the conclusions of law. Since a judgment is based upon the findings of fact and the conclusions of law, it follows that the judgment must fall.

U. S. v. Seminole Nation, 299 U.S. 417, 57 S. Ct. 283, 81 L. Ed. 216 (1937).

Since the plaintiff has not seen fit to cross-appeal or file a statement of points in the manner provided in the Utah Rules of Civil Procedure, he cannot attack the court's failure to find.

U.R.C.P. 74(b);

U.R.C.P. 75(d);

Fowers v. Lawson, 56 Utah 420, 191 P. 227 (1920);

LeVine v. Whitehouse, 37 Utah 260, 109 P. 2d 1910);

3 *Witkin*, California Procedure 2229, Sec. 72;
Hemigson v. Bank of America, 32 Cal. 2d 240, 244,
195 P. 2d 777 (1948).

CONCLUSION

The Defendant submits that the evidence and the findings of fact do not support a judgment for the Plaintiff. Exercise of this court's responsibility to review the record and evidence before the trial court will substantiate the Defendant's position that there was no partnership between the parties, and that even if there were a partnership such partnership was dissolved and terminated with an account stated when the Plaintiff left Moab in July, 1955.

The remaining points in the Defendant's brief indicate wherein the judgment of the trial court is erroneous in case Defendant's above position is not sustained by this court.

Defendant prays that this court reverse the judgment of the lower court and order judgment entered for the Defendant, or if such reversal not be granted, that a new trial be ordered with instructions consonant with statutory law in order that the rights of the parties may be protected by a full and accurate accounting.

Respectfully submitted,

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