

1958

## Vinal Millett v. Gloria Langston : Brief of Respondent

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

Respondent's Brief

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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VINAL MILLETT,

*Plaintiff and Respondent*

vs.

GLORIA LANGSTON,

*Defendant and Appellant.*

Case

No. 8750

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## Respondent's Brief

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### STATEMENT OF FACTS

The problem involved in this lawsuit is relative to the nature of the business relationship between the Plaintiff, Vinal Millett, and the Defendant, Gloria Langston, concerning the erection, financing, running and other such matters of a trailer court in the City of Moab, Utah. There was no written agreement between the parties and their testimony shows a variance in what they apparently understood to be their business arrangements. Some points are basically clear and undisputed however.

In April and May 1954, Vinal Millett (Respondent in this Court and Plaintiff below) discussed trailer court possibilities

with several people, among whom was his niece, Gloria Langston, (who is the Appellant here and the Defendant below). No definite details had been reached at the time of these discussions, other than the general plan of such a business undertaking, and the City of Moab was the place located because at that time it was a scene of business activity stimulated by Uranium Ore Mining in the Area. The problem is: What was the arrangement or the agreement between the Plaintiff and Defendant for the building of a Trailer Court Business? If there was an agreement, what were the terms of the same? Was such partnership ever terminated, and if so, is there any money due and owing by either party to the other? This business venture was Plaintiff's idea.

Plaintiff was a carpenter, who, because of the weather in the Salt Lake City Area, was seasonally unemployed and while so unemployed was receiving unemployment compensation. With time on his hands he was planning and formulating a Trailer Court Business in the Moab area. They had discussed this with several people (line 28, page 35) and finally the matter was discussed with Vinal Millett's niece, Gloria Langston herein, (line 7, page 36) they were searching for someone to put up the money to finance such a venture and Vinal Millett was to go down there and do the carpentry and construction work and to run the business (line 1, page 36). Plaintiff testified that the arrangements between the parties were that the Defendant was to provide the financing and the Plaintiff was to do the building (line 23, page 37); furthermore the Plaintiff failed to put up adequate money to complete the matter in a hurry and it was necessary to build the project using funds derived from the business to assist in the expenses of further construction. On this basis, the Defendant did not live up to her part of the arrangements between the parties.

The Plaintiff remained in Moab for a period of 15 months from May, 1954, until July, 1955, during which time he built and constructed the Trailer Court called the RIVER SANDS TRAILER COURT, doing all of the work himself that he could do, with the exception of some electrical and plumbing work (line 11, page 38). Because of the close family ties, and not anticipating problems, very poor records were kept by the parties involved (line 25, page 38) (line 2, page 40).

The Plaintiff testified that they had about \$240.00 income per month from the operations of the Trailer Court and that out of this \$240.00 he was paying bills for materials (line 14, page 40) (line 20, page 41) and that he used approximately \$1.00 per day for his own personal use (line 22, page 41). In addition to this money, for his own keep, he had \$45.00 per month paid on his car for eight payments and also \$20.00 or \$25.00 per month sent to Plaintiff's wife. Upon completing the construction, the Plaintiff suggested to the Defendant that a woman could now run the Court and asked her if she would want to do it (line 30, page 42); and further that the Plaintiff would come back in the fall, after he had had a couple of months rest away from the property (line 7, page 43).

Apparently the business arrangements between the Plaintiff and Defendant varied and "grew like Topsy". The original arrangements was that they intended to rent land and afterward they decided to buy inasmuch as nothing could be rented (Ex. 2 deposition of VM 4: R. 37).

About May 20th, 1954, the Defendant purchased 5 acres of land from Frank Peterson for \$1100 per acre, paying \$1200 down and \$100 per month thereafter (pages 48 and 81). The Plaintiff contended that he was to have an interest in the land, but that the Defendant took title in her name alone. Later 7½ acres more at \$100.00 more per month was added.

In the beginning, apparently, Ira Millett, brother of the Plaintiff, was to be a partner in the matter on a  $\frac{1}{3}$  basis, because of supplying material for this undertaking. This arrangement was changed by the Defendant who paid approximately \$40.00 to Ira Millett for the lumber that he provided, which he claimed was worth \$1157.20. From the testimony of the parties, it was evident that the Defendant on visits to Moab would have an accounting on the collections made and receive the proceeds that were available.

Plaintiff testified that when he left, he intended to return and that he left tools down there, taking of course, his personal effects with him when he left. (Deposition VM page 30.)

The audit or accounting rendered by Mr. Vance of Ernst and Ernst Accounting Firm is of no practical value because it was not a certified audit and it was impossible to verify or certify the correctness of the accounting and the items in the accounting (line 1, page 148) (149, line 20) (line 27 page 149) page 154 line 17) (line 23 page 154) (page 155 line 23) (page 156 line 13) (page 160 line 30) (161 lines 1 and 5) (162 line 28) (page 164 line 5) (page 164 line 29) (page 166 line 23 to line 30).

The income tax of Defendant filed before this action was started is the best evidence of the profit from the operation of the business inasmuch as it is self evident that it is human nature to pay the least tax possible. After suit was filed, profits immediately decreased.

## STATEMENT OF POINTS

### POINT I.

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

### POINT II.

THE COURT DID NOT ERR 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 DID NOT ERR IN MAKING DISTRIBUTION OF THE PARTNERSHIP ASSETS IN THE MANNER ADJUDGED.

### POINT IV.

THE JUDGEMENT IS SUPPORTED BY THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND MUST STAND.



## ARGUMENT

### POINT I.

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

The Trial Court found from the evidence that:

“1. Plaintiff and Defendant entered into a partnership agreement for the Construction and running of a Trailer Court” (R. 187).

In reviewing the decision of a trial court this Court has stated that it will not overturn the decision of the Trial Court unless “it is manifest that the Trial Court has misapplied proven facts or made findings clearly against the weight of the evidence.” *Ofara vs. Findlay*, 6 Ut. 2d, 102, 396 P. 2nd 1073.

From the evidence presented below, it is quite clear that the intention of the parties was to venture into the trailer court business in an attempt to realize a profit from their efforts.

In *HANSEN vs. BOGAN*, 127 Oregon 399, 272 P. 668, the Supreme Court of Oregon defined a partnership, by quoting from Chancellor Kent as follows:

“A contract of two or more competent persons to place their money, efforts, labor and skill, or some of all of them in lawful commerce or business and to divide the profit and share the loss in certain proportions.”

In addition it is well established that:

“There need be no express agreement that each party shall bear a share of any losses which may occur in the business since as a legal consequence, one participating in the profits of a partnership is held liable for a share of the losses.”

20 RCL 826, *Bentley vs. Bossard*, 33 U. 396, 94 P. 736.

The testimony of each party expressly shows that a partnership was created by their participating in the creation of operation of the Trailer Court. The Plaintiff testified as follows:

“A. Well after she kicked my brother out, we was all going thirds, see. She kicked him out and then she says, ‘Well, now you and I will split this and go half.’ She says ‘Half of everything is yours.’ (Dep. V.M. P22, ex 2).

“Q. Did you understand that half meant one-half of the property, of the real property.

“A. Half of everything.

“Q. As of what time, as of the time you left or as of the time — as of now or as of the time of the purchase?

“A. As when I left and before and all times.

“Q. So you claim—

“A. I am half owner.

“Q. You claim you own one half of the property as it now exists?

“A. Yes. She has been sending word through her mother to me at least once a week for the last six months since I entered this Court and says, ‘Now, you tell him that I am going to bargain. I am giving him half of everything.’ She is just trying to get me to cancel it.

“Q. Do you have any such statement in writing?

“A. No. How would I get it in writing when it is handed over the phone? (Dep. V. M. page 231, ex. 2).

“Well, it was on thirds when we started, and then after she released him, then she says, ‘I will give you half’ (Rec. P. 45).

The Defendant testified as to the terms of the partnership agreement as follows:

“Q. Now if this developed into a good business venture that would make money, were you to get your original investment back.

“A. I was — with the business itself, then Vinal and I would, if there were good profits, then we were to divide the profits.

“Q. Then you —

“A. Over and above after the expenses were taken out.

“Q. When you would get your money back, and then you would divide the profits.

“A. What do you mean, get my money back?

“Q. Well, you had to buy the property.

“A. The property wasn’t considered.

“Q. That wasn’t considered?

“A. The property wasn’t considered in my own mind. It wasn’t talked about that way. We talked about the proceeds from the Trailer Court only (Dep. G. L. P. 8, ex. 4).

Defendant further indicated that she understood Plaintiff’s contribution to the partnership as indicated by her testimony:

“A. Well, he didn’t have any money, and I knew it, and I was willing to buy property in my name and upon the property start a Trailer Court or a business that he and I could venture into and maybe make some money.

“Q. And what were to be — what did you say was to be his contribution?

“A. His contribution was to manage and to build up the Trailer Court to a profitable business.

"Q. Was he to perform work?

"A. He was to perform work and in return he was getting the receipts and paying miscellaneous operation expenses.

"Q. Now, this is the agreement as you entered into it in Moab is it?

"A. In Moab, yes" (Rec. P. 84, 85).

Thus the Trial Court had before it conflicting testimony as to the inclusion of the property as partnership assets, however, both parties agreed that the profits from the operation of the Trailer Court would be divided between them and in addition both parties paid the bills incurred by the business. From this evidence the Trial Court concluded, in favor of the Defendant, that the property purchased was not an asset of the partnership and that only the profits of the business and the actual buildings of the business were subject to an accounting

While it is true that the Plaintiff withdrew monthly sums for his personal expenses it was understood by the Defendant that these sums would be part of the business expenses since Plaintiff was to devote his full time and effort to the construction and operation of the business, thereby requiring certain living expenses, and that any profit from the business thereafter would be divided. This is evidenced by Defendant's testimony found on page 23 of her deposition. (Dep. G. L. ex. 4):

"Q. Now did you ever agree to pay him a salary or much per day?

"A. No, there wasn't any agreement.

"Q. How was he to be compensated for his efforts?

"A. From the receipts from the trailer court.

"Q. He was to have all the receipts?

“A. If there were any profits over and above then we were — which he never said there were — well, we just didn’t talk about it. He said there wasn’t enough money, and he used them to pay this and that and the other, and so profits weren’t even talked about. We thought that maybe it might build up into something better than it was.”

We are certainly in accord with the testimony stated in 40 Am. Jur. Sec. 43, P. 156, as quoted in Appellant’s Brief, Page 14, since the intention of the parties to operate this business as partners were understood by them and known by members of Defendant’s family (R. 101).

At no place during the trial below did Plaintiff introduce any evidence concerning the receipts and expenditures, other than those expenditures personally made by them and introduced by oral testimony, the only documentary evidence on these matters were introduced by the Defendant. From the record it is shown the Plaintiff did not know what receipts and expenditures the Plaintiff received and made since the Defendant “just looked over the books and take — and do some of the collecting herself, take the money and I suppose it was all thrown in the same bag, you know” (Record page 66) Defendant’s brief, wherein she states, on page 17, that “the records of expenditures placed in evidence by the Plaintiff accounting for expenditures of \$947.13 (R. 185) is in error, since Defendant was the one introducing the evidence. Plaintiff never received nor was he shown a profit and loss statement, or any accounting until the trial of this matter, and in fact had no knowledge of any profit made by the business until Defendant’s income tax return for 1955 was introduced into evidence.

From the evidence it is apparent that the parties entered into an agreement to operate the business as a partnership with the Defendant furnishing the basic property and funds and the

Plaintiff constructing and commencing operation of the Trailer Court. Further, the evidence supports the Trial Court's findings that there was a partnership and that it was an existence during the period complained of by the Plaintiff.

## POINT II.

THE COURT DID NOT ERR 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.

By its findings the Trial Court ruled that in July, 1955, the parties had an accounting and employed a third person to operate the business for them (Finding 7 R. 188).

Plaintiff maintains that there was no termination of the partnership in July, 1955, but that he, "after an absence from his wife for about 15 months, only desired to go home for a short period and that he would return in about 2 months" to continue operations. Plaintiff further contends that when he left the business in July that everything was ready for full operation and that the business should show real profits thereafter and that he expected to enjoy for his labor and troubles, one half of the profits of the business (Dep. V. M. page 23-24, ex. 2).

Both parties had contributed a good deal, Plaintiff his time and labor and Defendant her money, in order to build the business to its operating condition in July, 1955. It is inconceivable to believe that Plaintiff, just at the time when the real profits were to be made from the business would call everything even between himself and the Defendant and leave the fruits of his labor to the Defendant.

In addition Plaintiff had established a credit rating with the various businesses of Moab in order to carry on the construction and operation of the Trailer Court and it was primarily of his responsibility to discharge the obligation created by reason of such credit even though the debts were those of the partnership (Dep. V. M. P. 18).

Both parties understood their business relationship and since each had paid obligations of the business it can readily be assumed that they each recognized their responsibilities for the partnership obligations. The fact that the defendant personally paid some of the obligations is not surprising since she agreed to furnish funds for the business as her contribution (Dep. V. M. P. 20). Plaintiff did not consider himself absolved from any responsibility for the debts of the partnership after July, 1955. In fact, the Plaintiff recognized that the business was, at that time, finally in a position to make money, and that the bills owing on the construction had been settled and the business was in a position to pay them some profits (Rec. P. 59).

It appears that Defendant was the one who kept the books and records of the business and in view of the fact that the Defendant introduced evidence covering a period ending in December, 1956, the Trial Court could only make its findings based upon that evidence. The evidence did not show a dissolution of the partnership even as of the Trial Date, and the Court indicated by its Conclusions of Law that the partnership would be dissolved when the assets thereof were disposed of in accordance with the Court's Decree (Conclusion of Law, 2, Rec. P. 188).

It is submitted that the partnership has not been terminated by mutual consent or otherwise and that there still exists a partnership agreement between the parties.



### POINT III.

THE COURT DID NOT ERR IN MAKING DISTRIBUTION OF THE PARTNERSHIP ASSETS IN THE MANNER ADJUDGED.

While it is true that Ira Millet testified that he furnished material for the construction of cabins on the property involved herein, and while he had not been paid for the material, the Trial Court had before it the testimony of Ira Millet that he had furnished the material as a partner and that he did not expect to get paid for the value of the material in the same way as if he had sold it to someone (R. 75). Reasonably it can therefore be assumed that the Trial Court did not place Ira Millet in that group of Creditors to be protected by Sec. 48-1-37, Utah Code Anno. 1953.

Defendant relies largely upon the figures presented by her at the trial, which figures were based upon an audit conducted by an auditing firm employed by her. Although this audit was conducted by a Certified Public Accountant, the audit could not be certified to be correct because the records were too incomplete (R. P. 148). In view of this, the Court accepted Defendant's income tax returns as being true, rather than to rely upon the purported audit submitted (R. 135). Based upon the returns the Court reached its Conclusions concerning the profits made by the partnership business.

In ordering the distribution of the partnership assets the Trial Court considered the fact that the parties had accounted to each other in July, 1955, and that distribution should be made only of profits made after that date. Plaintiff made no withdrawals after July, 1955, thus the Court did not consider that matter.



Assuming that the figures present by Defendant's audit on page 184 of the record are correct, and giving the Defendant the benefit of payments made, we find that from July, 1955, to December 31, 1956, the business had a gross income of \$9,-429.22.

"Business disbursements" for the same period were \$7,-121.50. Other disbursements other than land payments and interest thereon, which would be excluded since the land was not part of the partnership assets, including for Defendant's benefit, the taxes paid on the land, amounted to \$711.42, subtracting the total disbursements from the gross income, leaves a net profit of \$1,596.30, which indicates if the Court erred that it did so in favor of the Defendant.

Defendant complains that the Trial Court erred in granting an IN PERSONUM money judgment against the Defendant, and cites the general rule stated in *STEINER vs. GOLDSTEIN*, 129 Cal. App. 2nd, 682, 278 P. 2nd, 22. We do not dispute the general rule cited, however, there has been recognized an exception thereto where there are no debts or liabilities to settle except as between the partners themselves, such course — the sale of partnership assets, payment of debts and a final accounting — is not necessary. *HOOPER vs. BARRANTI*, 184 P. 2d 688, *HARPER vs. LAMPING*, 33 Cal. 641, 176 P. 447.

From the evidence it appears that the Trial Court's order of distribution was equitable and just and well within the exception above noted. In order to establish an equitable distribution of the property of the partnership the Court relied upon the occupying claimants Statutes, Utah Code Ann., 1953, (Secs. 57-6-1 through 8) as a realistic method of distribution thereby affording either party the opportunity of continuing the operation of the business. It does not force Defendant to sell her prop-

erty yet it does insure that she does not gain at her partner's expense.

It is true that the Trial Court made no Finding on the question of third party liabilities, however, it may be presumed that the absence of a specific finding concerning that particular point indicates that there was not sufficient evidence to warrant it.

*Calloway vs. Twin City Creamery Co.*

190 Wash. 173, 67 P. 2d 329;

*MacDiarmid vs. McDevitt,*

97 Cal. App. 414, 275 P. 500.

It does not necessarily infer a finding against the Plaintiff.

#### POINT IV.

THE JUDGEMENT IS SUPPORTED BY THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND MUST STAND.

From the facts and evidence outlined in the foregoing Point the Plaintiff submits to this Court that the judgment of the Trial Court is supported by the Findings of Fact and Conclusions of Law and that the judgment as rendered is an equitable distribution of partnership profits and assets.

## CONCLUSION

Plaintiff submits that the evidence establishes a partnership between the parties and that a distribution of the assets and an accounting of the profits is necessary and that the Trial Court had before it sufficient testimony and evidence to support the judgment entered in Plaintiff's favor.

The Plaintiff therefore prays that this Court will affirm the judgment of the lower Court, holding that there exists between the parties a partnership that the assets of such partnership should be equally distributed between the parties and that the Plaintiff should be awarded judgment against the Defendant for one-half of the profits from the operation of the partnership business as found by the Trial Court.

Respectfully submitted,

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