

1958

Sugar & Ulmer v. Plateau Uranium Investment Corporation : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

APR 20 1958

PLATEAU URANIUM INVESTMENT
CORPORATION, a Utah corporation,

Clerk, Supreme Court, Utah

Plaintiff and Respondent,

vs.

SUGAR AND ULMER, a partnership,
and PAUL SUGAR and HARRY UL
MER,
Defendants and Appellants.

Case No.
8774

UNIVERSITY OF UTAH

DEC 19 1958

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BRIEF OF RESPONDENT

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8774

BRIEF OF RESPONDENT

STATEMENT OF FACTS

The Respondent does not agree with the Statement of Facts submitted by Appellants. The statement is incomplete and not objective. However, since the argument of Point One requires a complete review of the evidence, no attempt will be made by the Respondent to state the particular points of disagreement.

STATEMENT OF POINTS

POINT ONE: THERE IS SUFFICIENT COMPETENT EVIDENCE TO SUSTAIN THE FINDINGS OF THE COURT TO THE EFFECT THAT THE APPELLANTS AGREED TO PAY A RETAINER OF \$500, PLUS COSTS.

POINT TWO: THE OBLIGATION OF THE APPELLANTS WAS NOT DISCHARGED BY VIRTUE OF TITLE 15-4, U.C.A. 1953.

ARGUMENT

POINT ONE: THERE IS SUFFICIENT COMPETENT EVIDENCE TO SUSTAIN THE FINDINGS OF THE COURT TO THE EFFECT THAT THE APPELLANTS AGREED TO PAY A RETAINER OF \$500, PLUS COSTS.

Finding of Fact Number 2, which the Appellant claims is not supported by the evidence, is as follows:

“On April 12, 1955, the defendants (Appellants) agreed to pay the plaintiff's assignor (Respondent) the sum of \$500 and costs on a fee to be charged for services performed in connection with the organizing of Deseret Uranium Corporation and clearance with State and Federal regulatory bodies, for the purpose of permitting a public sale of stock of said company.”

The only factual issue for the court to decide was whether there was or was not an agreement as found in the Findings of Fact. The trial took less than two hours and involved the testimony of three witnesses. It is submitted that the evidence is not only sufficient to sustain the Findings of Fact, but rather compels such a finding.

Although the parties disagree as to whether the Appellants were personally liable on the first fee arrangement, there is no dispute but what Mr. Bushnell performed all of the legal work originally agreed upon and was not paid. After that time, he was again requested to prepare a new offering circular and to make new filings with State and Federal regulatory bodies for the purpose of securing authorization to commence a public sale of stock. Discussions concerning the first fee arrangement were had with Mr. Sugar. Although there was a preliminary discussion sometime prior to March 19, 1955, the final fee arrangement was consummated with Mr. Ulmer during the first part of April, 1955 (R. 16, 22). There is no dispute concerning the fact that the Appellants advanced \$175 to apply on costs in connection with the initial work (R. 8). There is also no dispute that if the underwriting had been successful the Appellants would have been the principal parties to benefit therefrom. They readily admitted that they would have received a substantial profit involving cash, royalties and stock (R. 11, 12, 42).

Mr. Bushnell testified in behalf of the Respondent to the effect that before agreeing to make the refilings a new fee arrangement was negotiated. More particularly, the Appellants agreed to pay all costs and advance a \$500 retainer. A contingent fee of \$3,000 cash and \$3,000 stock was to be paid by the corporation if the underwritings were successful. If the corporation paid such a fee, Mr. Bushnell would then reimburse the Appellants for the sums advanced by them. Whether such an agreement was made was the sole factual issue for the trial court. The testimony of the Appellants is sufficient to support

a finding that such an agreement was made, without relying upon the direct testimony of Mr. Bushnell.

Paul Sugar, one of the Appellants, called as an adverse witness, testified that he went to the hospital with a heart attack on March 19, 1955 (R. 45), and that Mr. Ulmer continued with the negotiations and arrangements for the refiling. He admitted that either while he was at the hospital or immediately thereafter while convalescing, Mr. Ulmer had a discussion with him concerning a demand made by Mr. Bushnell for the \$500 retainer plus costs (R. 46). It should be noted that it is the contention of Mr. Bushnell that the fee arrangement was finally agreed upon on April 12, 1955; that the final papers and material were submitted to him in May of 1955; that the filing was made with the Securities and Exchange Commission in June, and final approval was secured therefrom on July 8, 1955. Part of Mr. Sugar's testimony concerning the \$500 retainer is as follows:

“(Questions by Mr. Bushnell)

Answer: Well, he also said that you said, at that time, that I would give him five—give you \$500 towards this fee at that time; this I didn't tell you.

Question: See if we understand what you are saying; Mr. Ulmer said to you that I was taking the position that Sugar and Ulmer was to pay me a \$500 retainer—

Answer: Yes.

Question: —is that correct?

Answer: No; no, that you and I had made that arrangement.

Question: That is what he told you?

Answer: That is correct.” (R. 17).

Mr. Sugar admitted that he had testified as follows at the time of the taking of his deposition:

"Answer: That came up later when Harry Ulmer told me you were asking for \$500 as the advance retainer, and that was the first time I had heard of it.

Question: When did Harry Ulmer advise you of that?

Answer: I don't recall that with reference to the work being done, before or after it was done, or after the work had been started. Anyway, I don't know if it had been completed.

Question: All right, what did he tell you about the \$500?

Answer: He said you were looking for \$500 fee—a \$500 advance on the fee, and you didn't want to go ahead, and I said, 'You tell him to go ahead and do that work.' " (R. 18).

On cross-examination, Mr. Sugar testified concerning the same matter as follows:

"Question: And you have testified, have you not, that Mr. Ulmer told you, either when you were in the hospital or when you were convalescing, that I was making demand for \$500 retainer before I would go ahead. Didn't he tell you that?

Answer: Yes.

Question: And you testified that you told Mr. Ulmer to go ahead, did you not?

Answer: Yes, because—but, in line with the same thing, I attempted before to make out exactly what I did say to go ahead, it being understood you knew what—." (R. 46).

Although Mr. Sugar attempted to qualify the foregoing

statements, he had to admit that he had made no such attempted qualification at the time of the taking of his deposition.

Although Mr. Ulmer admitted that he was not involved in any discussions regarding the initial fee arrangement and that he did participate actively with reference to the refile with the second group of properties, (R. 20) he testified that he did know of a discussion concerning a \$500 fee. His testimony was as follows:

“Answer: Well, now, I don’t know whether Mr. Sugar told me, or I got that information from elsewhere, but, as I remember, the original fee was to be in the neighborhood of \$500. * * * (R. 22).

Question: But you do recall discussions concerning the \$500 fee—that that fee—

Answer: Not discussions; possibly, just mere statements.

Question: You do have in your recollection—

Answer: Yes.

Question:—that there was, at some time, a fee of \$500 discussed.

Answer: That’s correct, yes.

Question: And who was to pay that \$500 fee, according to your understanding?

Answer: As I remember, we were going to advance the money—Sugar and Ulmer.

Question: Do I understand your testimony correctly that, as to the \$500, it is your recollection that Sugar and Ulmer was to pay that amount?

Answer: Yes.” (R. 23).

Mr. Bushnell testified that he made a demand upon Mr. Sugar and Mr. Ulmer for the \$500 retainer in a telephone conversation in which he talked to both Mr. Sugar and Mr. Ulmer. He testified that the conversation in substance was as follows:

"He (Sugar) said, 'Son, what is it you want?' I said, I want my \$500 and costs.' He said, 'If that is all you are worried about, don't worry about it; we will take care of it.' He said, 'I have got to go and get to the airport. I will miss my plane.'"

Sugar, on direct examination by his counsel, admitted such a call. He testified as follows:

"Answer: Yes, Mr. Bushnell and Mr. Ulmer, I think, my memory is hazy on that.

Question: At least you had a conversation with him about the fees, shortly after you came back to the office after your illness?

Answer: Yes.

Question: Can you recall what the substance of that was?

Answer: I don't recall.

Question: Was a fee arrangement involved in the conversation in any way that you recall?

Answer: No, it was something about the \$500, but I don't recall the conversation.

Question: And was Mr. Ulmer present at that time?

Answer: I think so, either present or might have been three-way telephone conversation, or in the office. Truthfully, my memory is a little hazy on that." (R. 41).

The foregoing testimony and admissions by the Appellants would appear sufficient to support the position of the Respondent. However, in addition to those admissions, there is the direct testimony of Mr. Bushnell, based upon a written memorandum in his file, as follows:

"That would be 1955. Mr. Sugar told me, 'Well, I will see what I can work out getting these properties, and we will have further discussions.'

"Thereafter, I was advised by Mr. Ulmer that Mr. Sugar had become ill, and had gone to the hospital, and that he would take over working out these arrangements; and I procured from Mr. Ulmer properties, abstracts, geological reports, maps—usual information that goes into offering circulars.

"However, I advised Mr. Ulmer—and my thought—best recollection on that—would be some few days before April 12, 1955; that, if they wanted me to release them from personal liability, that I would be willing to take this case, as I had other cases, on, in essence, a contingent fee basis.

"I explained, many of these companies had never been successful, and it was problematical whether they would receive the money, and I had to work on percentage, that I would be willing to take the case on a fee of \$3,000 cash and \$3,000 worth of stock, and a \$500 retainer, which would have to be paid in advance, plus costs.

"If they paid the \$500 retainer and costs, then I would relieve them from personal liability, which I was claiming as to the \$1,250, and look to the company for payment if it were successful.

"He said, 'Well, this is new to me; I will have to discuss it with Mr. Sugar, and I will let you know.'

"A day or two later, he called back, and the exact date was April 12 at 3:50 in the afternoon, and advised that—and stated that he had talked to Mr. Sugar, and that the fee was satisfactory. With reference to that telephone conversation, which was taken by a stenographer in my office, I made the notation as to the fee which we discussed, which was \$3,000 cash, \$3,000 stock, if the underwriting were successful, and a \$500 down payment as a retainer, plus costs, and filed that memorandum in the file." (R. 29).

Having in mind the fundamental rule that, on appeal from factual issues, the evidence will be reviewed in the light most favorable to the Respondent and if there is any substantial competent evidence to support the finding of the trial court, such finding will be affirmed, it is submitted that the foregoing evidence is more than ample to justify on affirmance of the decision of the trial court on this factual issue.

POINT TWO: THE OBLIGATION OF THE APPELLANTS WAS NOT DISCHARGED BY VIRTUE OF TITLE 15-4, U.C.A. 1953.

The Appellants maintain that the claim of the Respondent is barred by reason of Title 15-4, U.C.A., 1953, which provides that if a joint obligor is released from liability and a reservation of rights against other joint obligors is not contained in that release, then all parties are released and discharged. The Respondent does not argue with the law cited by the Appellants based upon that particular statutory provision. However, it is submitted that there was no release of a joint obligor which would bring into operation the terms of this statute. A release is a contract by the terms of which one party, for a good and

valuable consideration, releases and discharges rights of another party. There is no document purporting to be a release, nor is there any agreement or consideration which would support such a contention. Rather, the only thing relied upon by the Appellants in support of their contention is the fact that the Respondent voluntarily reduced the amount of its claim against the corporation by \$700. Counsel for the Appellants, also representing Deseret Uranium Corporation, had stipulated that the Respondent could secure judgment against the corporation. At this time a decision by a City Judge in the identical matter now before this court was under advisement. Counsel for the Appellant was arguing that the securing of a judgment against the corporation for the full claim would prohibit the Respondent from securing a judgment against the Appellants for part of the same claim. To eliminate any substance to such a contention, and since the corporation was insolvent, the Respondent voluntarily reduced the amount of its requested claim by \$700. Such a reduction does not amount to a contract or a release, and was not supported by a consideration.

The annotation cited by the Appellants in their brief in 50 A.L.R. 1057 is entitled "Release of one tort-feasor as affecting liability of others." Although the annotation is dealing with release of tort feasors and the case now before the court is dealing with joint obligors pursuant to a contract, it is submitted that what amounts to a release would be the same in both cases. One of the subparagraphs of the annotation is as follows: "Dismissal or entry of nolle prosequi as to part." The general statement of the law under this subdivision is as follows:

"The discontinuance, as to one tort-feasor, of an action brought against several tort-feasors, does not release the others." (Citation of authorities.)

The annotation is supplemented in 66 A.L.R. 206, 104 A.L.R. 846, 124 A.L.R. 1298, and 148 A.L.R. 1270. In each of the subsequent annotations the general rule is stated to the same effect. Excerpts from some of those supplemental annotations are as follows:

104 A.L.R. 860.

"VI. Dismissal or entry of nolle prosequi as to part. (Supplementing annotations in 50 A.L.R. 1091 and 66 A.L.R. 213).

Neither a dismissal of a claim as against one or two joint tort-feasors, for conversion, nor even a settlement made with one of them, was held to effect a release of another, in *Day v. Smith* (1934) 46 Wyo. 515, 30 P. 2d 786.

In overruling the contention that the trial court's dismissal of a suit, as to a defendant who had obtained a covenant not to sue, thereby gave the agreement the effect of a release so as to discharge another defendant, who did not appeal therefrom, the court in *Cook v. City Transport Corp.* (1935) 272 Mich. 91, 261 N.W. 257, *supra*, IV., observed that plaintiff had a right to elect whom he would sue and to dismiss as to a defendant, and that he could accept the court's ruling as the equivalent of a voluntary dismissal by himself, which would not have discharged the other defendant; and it also stated that the dismissal did not change the other defendant's liability."

124 A.L.R. 1315.

"VI. Dismissal or entry of nolle prosequi as to part. (Supplementing annotations in 50 A.L.R. 1091; 66 A.L.R. 213; and 104 A.L.R. 860).

The general rule appears to be, as shown by the earlier annotations, that the discontinuance, as to one tort-feasor, of an action brought against several tort-feasors, does not release the others.

In *Shea v. San Bernardino* (1936) 7 Cal. 2d 688, 62 P. 2d 365, the court said: 'The discontinuance, as to one tort-feasor, of an action brought against several tort-feasors, no satisfaction having been received, does not release the others.' In that case plaintiff brought suit against a railway company and city, for damages sustained while driving over a rough railway crossing, and it was held that plaintiff's dismissal of the action as to the railway company did not release the city, where there was no showing that any satisfaction was received by plaintiff for the injury.

Plaintiff's dismissal of the cause of action as to the two joint tort-feasors, effectuated by voluntarily asking the clerk to enter such dismissal, in pursuance of a settlement and covenant not to sue, was held not to release other joint tort-feasors, in *Lewis V. Johnson*, (1939) 12 Cal. 2d 558, 86 P. 2d 99, set out more fully supra, IV a, wherein the court distinguished between such a voluntary dismissal by clerk's entry, which is presumed to be without prejudice to the bringing of another action, and a dismissal entered in open court pursuant to stipulation, which is ordinarily effective as a retraxit.' "

If the Respondent in this case could have dismissed the entire action as against the corporation and the same would not have been construed as a release of any liability, it is submitted that the Respondent may, in its discretion, waive a part of the claim against the corporation. The quotations from the annotations clearly state that the plaintiff may dismiss as to one joint tort-feasor or may even grant a covenant not

to sue, and such action does not amount to a release which will bar recovery against other joint tort-feasors. It is manifest, therefore, that a dismissal or a waiver against one joint tort-feasor or joint obligor does not amount to a release of liability. The complete argument of the Appellants is based up the assumption that there had been a release of liability by the Respondent. The evidence does not support such a contention. Even if it could be construed that a release had been granted, it is further submitted that the Appellants would be estopped to rely upon any benefits in their favor based thereon. The reduction in the amount of the claim against the corporation was made as a result of complaints and arguments then being made by the Appellants that the securing of a judgment against both the corporation and the individual appellants would be tantamount to double payment. Although it is submitted that the securing of judgments without satisfaction is not double payment, it would still be inequitable for the appellants to now contend that the Respondent by voluntarily reducing the amount of his claim against the insolvent corporation has released the individual Appellants from any liability.

The only case cited by the Appellant in support of its contention with reference to the release was a Tenth Circuit Court of Appeals case, *Greenhalch vs. Shell Oil Company*, 78 F. 2d 942. This case involved a document entitled "Release and Stipulation for Dismissal." It was clear that the document was a release granted in payment of a substantial consideration, and further the document, after releasing and discharging the liability of the one party, specifically reserved rights as against a doctor for malpractice. It did not reserve its rights as against the defendant in the particular case. The court, therefore,

held that the document was what it purported to be, a release and a stipulation for dismissal. In this case there was no contract, payment of consideration, or document purporting or intended to be a release or dismissal of any claims.

CONCLUSION

It is submitted that there is substantial competent evidence to support the factual determination of the trial court that the Appellants individually agreed to pay a \$500 retainer and costs. Further, it is submitted that there was no release granted to a co-obligor which would, therefore, bring into operation the terms of the statute cited by the Appellants. It is respectfully submitted that the decision of the trial court should be affirmed, with costs to the Respondents.

Respectfully submitted,

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The following articles discuss recent trends in products liability cases:

21 NACCA Law Journal 85, 419; 20 NACCA Law Journal 291; 4 Defense Journal 56; 2 Harper & James, The Law of Torts, page 1534 et seq. and particularly page 1555 § 28.10 which clearly shows that any acts on the part of Suhrmann would not be considered an intervening act breaking the proximate cause between defendants' negligence and breach of warranty and plaintiffs' injuries.

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