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C&J Industries, Inc. et al v. Edward O. Bailey et al : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

C & J INDUSTRIES, INC., a corporation, A. ROBERT COLLINS and GLADE N. JAMES,	:	
Plaintiffs-Appellants,	:	
vs.	:	
EDWARD O. BAILEY and RUTH C. BAILEY, his wife,	:	Case No. 18327
Defendants-Respondents.	:	

BRIEF OF DEFENDANTS-RESPONDENTS

Reply to an Appeal from a Judgment of
the Third District Court of Salt Lake County
Honorable Dean E. Conder, Judge

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RESPONDENTS' BRIEF

STATEMENT OF THE CASE

A further explanation is necessary as to the statement of the case. This is a declaratory judgment brought in behalf of C & J Industries, Inc., a corporation, A. Robert Collins and Glade N. James on the interpretation of a Uniform Real Estate Contract dated the 13th day of April, 1978, and a Guaranty Agreement dated the same date, for the interpretation of paragraph 3(a) of the Uniform Real Estate Contract, which provides as follows:

> "(a) In the event Buyer desires to sell or assign, transfer or convey Buyer's rights under this contract or Buyer's interest in said premises then and in that event the Buyer must pay in full the outstanding balance due on this contract prior to said transaction."

The interpretation also involves whether a subsequent sale, dated March 9, 1979, of the property by Glade N. James and A. Robert Collins, who were the president and secretary of C & J Industries, Inc., in their individual capacity accelerated paragraph 3(a) for the entire balance to become due and owing. The trial court held that paragraph 3(a) had been accelerated by the actions of C & J Industries, Inc. and A. Robert Collins and Glade N. James, president and secretary respectively of the corporation.

DISPOSITION OF THE LOWER COURT

This case was originally tried in the Third Judicial District Court of Salt Lake County, Utah, then appealed to the Utah Supreme Court, and on September 29, 1980, the Supreme Court of the State of Utah, with the Honorable Justice Wilkins, 618 P.2d 58, remanded the case, with the following instructions:

> "It is apparent from the second contract -- and the Baileys consistently point out -- that the buyer under the first contract, C & J is not the Seller under the second contract. It is, therefore, necessary to remand this matter for a determination of whether, in acting as sellers under the second contract, Collins and James were acting for C & J"

The case then was tried on the issues, as set forth and outlined by Justice Wilkins, before the Honorable Dean E. Conder on the 4th day of November, 1981. The following Findings of Fact were issued by the court:

> "4. That on the 9th day of March, 1979, Glade N. James and A. Robert Collins, the in fact owners of C & J Industries, entered into

a Uniform Real Estate Contract with Jay L. Burgie of Ogden, Utah, for the said part of the land as originally set forth in their Uniform Real Estate Contract and described more particularly as follows:

> 'All of Lots 17, 18 and 19, Block 6, Ten Acre Plat "A", Big Field Survey, Longview Park Addition, as recorded in the office of the Salt Lake County Recorder.'

"5. The individual plaintiffs signed the contract as Buyer, even though they were not named as Buyer in the first paragraph.

"6. That contemporaneously with the entering into the Uniform Real Estate Contract, designated as Exhibit "A" on the 13th day of April, 1978, A. Robert Collins and Glade N. James executed a Guaranty Agreement agreeing to be bound by all of the terms and conditions of the Uniform Real Estate Contract as follows:

> "'Buyer, and A. Robert Collins and Glade N. James are each jointly and individually bound to satisfy the obligations of said C & J Industries Incorporated under the terms of said Uniform Real Estate Contract, and to perform each of the covenants and agreements therein.
>
> "'Each and all of the parties to said Uniform Real Estate Contract are each severally and jointly bound to perform the obligations; covenants and agreements of said contract, said Edward O. Bailey and Ruth C. Bailey, his wife, as Seller, and said C & J Industries Incorporated, a corporation, as Buyer, and said A. Robert Collins and Glade N. James, individually and jointly.
>
> "'Dated this 13th day of April, 1978.

SELLER:

/s/ Edward O. Bailey
Edward O. Bailey

/s/ Ruth C. Bailey
Ruth C. Bailey

BUYER:

C & J INDUSTRIES INCORPORATED

/s/ A. Robert Collins

/s/ A. Robert Collins
A. Robert Collins

/s/ Glade N. James
Glade N. James'

"7. Paragraph 3(a) of said contract provides that in the event the Buyer sells or assigns the property or the rights under the contract, then the '. . . Buyer must pay in full the outstanding balance due on this contract . . .' On March 9, 1979, Collins and James, as Sellers, entered into a contract with Jay E. Burgie, as Buyer, to purchase 3 lots out of the original contract.

"8. The court also finds that the A. Robert Collins and Glade N. James were in fact Buyers under the first contract, or in the alternative, were acting as agents for C & J Industries in the second contract."

The court, as a result, found that A. Robert Collins and Glade N. James were in fact buyers under the Uniform Real Estate Contract or were acting as agents for C & J Industries in the second contract and as a result, determined that their actions had accelerated the provisions of the Uniform Real Estate Contract.

RELIEF SOUGHT ON APPEAL

Respondents seek to have the decision of the lower court affirmed.

STATEMENT OF FACTS

That in 1978 Glade N. James and A. Robert Collins decided to purchase certain land in Salt Lake County, Utah, from Edward O.

Bailey and Ruth Bailey, his wife, for the sum of approximately $220,000.00 (Exhibit 1). That prior to the formal execution of the contract of purchase, upon advice of their attorney, Dave Robinson, it was agreed that they would form for a tax shelter, and for other reasons, a corporation. The Articles of Incorporation were filed with the Secretary of State's Office on March 2, 1978, (Exhibit 13). The directors were Glade N. James, A. Robert Collins, and Dave Robinson. Glade N. James was the President and A. Robert Collins was vice president and their wives were secretary and treasurer. They were the owners of all of the stock (R. 194). The record is clear: (1) that the incorporators do not recall having ever placed any money in the corporation (R. 208), (2) that little or no stockholders meetings were held, that no state income tax return was filed, (R. 228), (3) that no federal income tax return was filed (R. 229), (4) that upon advice of counsel, rather than going through a formal dissolution, it was agreed under the direction of their attorney, Dave Robinson, that they would not pay any further taxes or file any further papers with the Secretary of State, and that they would allow the corporation to become defunct (R.208). (5) The record seems to indicate that they did not have a bank account (R. 208), (6) that the corporation never made any payments to Baileys on the Uniform Real Estate Contract (Exhibits 7, 8, 9, 10 & 11), (7) that the payments were in fact made by Glade N. James and A. Robert Collins (R. 178) and then later on when they subsequently resold the property to Jay

Burgie, the payments from Jay Burgie were then deposited in their own individual names (R. 178) and then the payments were made from that. A. Robert Collins testified that there was no need for a corporate resolution transferring the property or authorizing the sale of the corporation to the property because there was no corporation. He testified as follows:

(R. 208, L. 17-30)

"Q. (By Mr. Duffin) And then in 1978, immediately after you organized the corporation, you then contacted David Robinson about dissolving it, didn't you?

"A. Yes. I remember that.

"Q. And you both agreed that it would be more expensive to dissolve it formally than just abandon it and let the State forfeit the charter for non-payment of tax?

"A. I think that's correct.

"Q. So did you do that in one of your corporate meetings?

"A. As I recall we discussed that, yeah.

"Q. And was there any corporate resolution authorizing the corporation to sell the property to Jay Burgie?

"A. No, because at that time we felt there was no longer a corporation.

(R. 209, L. 2-14)

"Q. All right. In fact, at that time since you had guaranteed the obligations of the corporation from 1978 and immediately thereafter, the corporation then had been dissolved; so you just ignored it and proceeded as though it didn't exist?

"A. That's correct.

"Q. So because both of you are in fact all of the stockholders?

"A. Yes.

"Q. You were guaranteeing it, you were the corporation?

"A. We were officers in the corporation and we were guaranteeing it personally.

(R. 209, L. 19-30)

"Q. Line 11 'QUESTION: Why did you enter into it individually rather than in the name of the corporation when you had purchased it originally in the name of C & J Industries? ANSWER: Because we felt that the corporation was no longer in existence. It was defunct.'

"Isn't that true, that's what happened?

"A. Yes. That's true.

"Q. That was true then?

"A. Yes.

"Q. 'QUESTION: Therefore, you hadn't gone through the formal transfer of transferring the property from C & J Industries to yourself and Mr. James? ANSWER: I don't recall ever doing anything like that. QUESTION: But in your own mind, the corporation had been dissolved and then the property belonged to you? ANSWER: We were the ones that was guaranteeing it. We were the corporation. There was nothing else there. We were it, as I recall, and when the corporation no longer existed, we were the only ones there to make that--'

(R. 210, L. 8-11)

"Isn't that what you testified?

"A. We did.

"Q. And that was true?

"A. That was true to my knowledge, yes. . . ."

ARGUMENT

POINT I

THAT THE ACTION OF GLADE N. JAMES AND A. ROBERT COLLINS SELLING THE PROPERTY TO JAY L. BURGIE ACCELERATED THE PROVISIONS OF PARAGRAPH 3(a) OF THE UNIFORM REAL ESTATE CONTRACT.

The Uniform Real Estate Contract of the 13th day of April, 1978, Exhibit 1, in which Edward O. Bailey and Ruth Bailey, his wife, appear as Sellers, and C & J Industries, Inc. appears as Buyer, was signed and executed as follows:

"SELLER:

/s/ Edward O. Bailey
Edward O. Bailey

/s/ Ruth C. Bailey
Ruth C. Bailey

BUYER:

C & J INDUSTRIES INCORPORATED

By /s/ A. Robert Collins

/s/ A. Robert Collins
A. Robert Collins

/s/ Glade N. James
Glade N. James"

The Guaranty (Exhibit 4) dated the 13th day of April, 1978, as part of the Uniform Real Estate Contract, and signed contemporaneously, further defined the relationship between the parties in agreement as follows:

> "IN CONSIDERATION OF THE PREMISES, NOW, THEREFORE, IT IS HEREBY MUTUALLY COVENANTED AND AGREED:
>
> "Buyer, and A. Robert Collins and Glade N. James are each jointly and individually bound to satisfy the

obligations of said C & J Industries Incorporated under the terms of said Uniform Real Estate Contract, and to perform each of the covenants and agreements therein.

"Each and all of the parties to said Uniform Real Estate Contract are each severally and jointly bound to perform the obligations, covenants and agreements of said contract, said Edward O. Bailey and Ruth C. Bailey, his wife, as Seller, and said C & J Industries, Incorporated, a corporation, as Buyer, and said A. Robert Collins and Glade N. James, individually and jointly.

"Dated this 13 day of April, 1978.

SELLER:

/s/ Edward O. Bailey
Edward O. Bailey

/s/ Ruth C. Bailey
Ruth C. Bailey

BUYER:

C & J INDUSTRIES INCORPORATED

By /s/ A. Robert Collins

/s/ A. Robert Collins
A. Robert Collins

/s/ Glade N. James
Glade N. James"

The Uniform Real Estate Contract must be interpreted A. Robert Collins was signing as a corporate officer and as an agent of C & J Industries, Inc., because he signed for the corporation, and that A. Robert Collins and Glade N. James were signing as principals and as joint obligors of the contract. It should be noted that A. Robert Collins and Glade N. James after the corporate signature, did not qualify their signatures in any

manner or in any other capacity. This particular type of signature and this particular type of execution has been dealt with and considered by many courts and by many writers as to the legal implications.

In 19 Am. Jur. 2d, Corporations, §1343, Liability for Corporate Acts, Debts, or Contracts, considers this particular problem extensively. It indicates the intent and the method of executing corporate documents and obligations.

In 19 Am. Jur. 2d, Corporations, §1343, it further discusses liability for corporate acts, debts and contracts, it provides as follows:

> "In determining whether a corporate director, officer, or agent is liable upon a corporate contract, the particular form of the promise in, or signature of, such contract, is of prime importance in deducing the intention in such respect with which the contract was executed. A correct form of signature which is uniformly regarded as imposing no personal liability upon the officer signing is that of a signature containing the corporate name, followed by the word 'per' or 'by,' which in turn, is followed by the name of a corporate officer. When the word 'per' or 'by' is followed by the name of more than one officer, however, unqualified except that the first is preceded by 'per' or 'by', it has been held that the instrument becomes a joint obligation of the corporation and the signers or that a personal liability is imposed on all signers after the first; but where the signers also add a designation of their office, it has been held that the instrument is ambiguous and that parol evidence is admissible to explain its meaning." (Emphasis added)

See the cases of Taylor v. Reger, 18 Ind App 466, 48 NE 262; Savings Bank v. Central Market Co., 122 Cal 28, 54 p. 273; Denman v. Brennamen, 48 Okla 566, 149 P 1105; 33 ALR 1357, s. 51 ALR 320.

The reasoning behind the citations and the cases is very important. The basic premise is that if the corporation executed the Uniform Real Estate Contract by A. Robert Collins, its agent and President, there would be no reason to have a further signature such as A. Robert Collins and Glade N. James unqualified, unless it was the purpose of the said documents, for them to further quarantee, jointly and severally, the obligations of the corporation. This is supported out very clearly by the intent of the incorporators in the fact that the corporation had not even placed the first $1,000 into a corporate account, as a new corporation, and of course, did not have any assets to meet a $220,000.00 obligation without personal guarantees of the owners. It would have been ludicrous to think that the Baileys would have ever have accepted an "empty-shell corporation" which had not even complied with the basic characteristics of formation to be able to pay an obligation of this size. This is further borne out in the Guaranty Arrangement which states as follows:

> "Buyer, and A. Robert Collins and Glade N. James are each jointly and individually bound to satisfy the obligations of said C & J Industries Incorporated under the terms of said Uniform Real Estate Contract, and to perform each of the covenants and agreements therein.
>
> "Each and all of the parties to said Uniform Real Estate Contract are each severally and jointly bound to perform the obligations, covenants and agreements of said contract, said Edward O. Bailey and Ruth C. Bailey, his wife, as Seller, and said C & J Industries Incorporated, a corporation, as Buyer, and said A. Robert Collins and Glade N. James, individually and jointly.

Dated this 13 day of April, 1978.

SELLER:

/s/ Edward O. Bailey
Edward O. Bailey

/s/ Ruth C. Bailey
Ruth C. Bailey

BUYER:

C & J INDUSTRIES, INCORPORATED

By /s/ A. Robert Collins

/s/ A. Robert Collins
A. Robert Collins

/s/ Glade N. James
Glade N. James"

If it should be argued that Collins and James in signing the contract of purchase was meant that their individual, unqualified signatures were as guarantors and that the Guaranty Agreement is indicative of this, then it should be further borne out and all of the documents should be examined as to their true meaning.

Williston on Contracts, Third Edition, Jaeger, Volume 3, §465 states as follows:

> "The fact that a promise is called by the parties a guaranty is not conclusive evidence that the promise is not original, . . ."

"Guarantee" is an undertaking or promise on the part of the guarantor which is collateral to a primary or principal obligation and binds guarantor to performance in event of nonperformance of principal obligor. (Industrial Inv. Corp. v. Rocca, 596 P.2d 100, 100 Idaho 228.)

In the case of Commercial Credit Corp. v. Chisholm Bros. Farm Equipment Co., 525 P.2d 976, 96 Idaho 194, it states:

> "Guaranty is an undertaking or promise that is collateral to primary or principal obligation and that binds guarantor to performance in event of nonperformance by the principal obligor."

Again, an examination of the Guaranty Agreement would indicate that it is not based at all upon the nonperformance of C & J Industries, Inc. because it states very clearly as follows:

> "Each and all of the parties to said Uniform Real Estate Contract are each severally and jointly bound to perform the obligations, covenants and agreements of said contract, said Edward O. Bailey and Ruth C. Bailey, his wife, as Seller, and said C & J Industries Incorporated, a corporation, as Buyer, and said A. Robert Collins and Glade N. James, individually and jointly."

It is very clear that the Guaranty as designated is probably a misnomer, because it is in fact a primary obligation and each of the parties are jointly and severally, as principals on the entire obligation.

It is clear, even though they call it a Guaranty, that they are not guarantors, but are all principals.

This is further set forth in the case of Automobile Manufacturers Warehouse, Inc., a Utah corporation v. Service Auto Parts, Inc., 596 P.2d 1033, (1979) where the Utah Supreme Court said:

> "If parties had wanted guaranty agreement upon open account purchases made subsequent to execution of note and security agreement, they should have either executed separate documents or at the very least they should have made explicit provisions therefor in the note and security agreement."

This means clearly that if the parties had really wanted the two parties to sign as a guarantor, they would have then provided for a separate form in the sense of "upon the default of the corporation, that will be responsible for the payment of the obligations." But the guaranty in this case not only bound them for the performance of the financial obligations, but for each and every covenant. The court in the case of Automotive Manufacturers Warehouse, Inc., vs. Service Auto Parts, Inc., supra, says with the signature situation identically the same as this case, that:

> ". . . Peffer clearly incurred personal liability on the note by signing as individuals. By individually signing the security agreement which provided that 'the obligations of all Debtors are joint and several,' the parties merely recognized that the obligation of Peffer and Service on the note was a then existing obligation which would be deemed 'joint and several' in the enforcement of the security agreement. The further effect of individually signing the agreement is that any interest Peffer may have in the collateral which secured the agreement would be yielded up to be applied against the debt in the event of a default."

A reference to the said case indicates that in that situation that the document entitled Security Agreement was signed as follows:

_____
William E. Peffer

_____
Sharon A. Peffer

SERVICE AUTO PARTS, INC.

By _____
William E. Peffer,
Its President

The said case is on all fours with this case, holding them as principals.

By the terms and conditions of the Uniform Real Estate Contract of April 13, 1978, Glade N. James and A. Robert Collins were designated as Buyers. If there could be any question, a close examination of the Guaranty Agreement again designates the true relationship between the parties when they are again designated as Buyers in the Guaranty agreement. If this was a Guaranty agreement and Glade N. James and A. Robert Collins were in fact guaranteeing the corporation, then why are they jointly and severally designated as Buyers in the Guaranty? Both of the documents being executed at the same time must be construed together and in an examination of both of them being construed together could leave no one with any alternative but that the Guaranty is a further defining of the true relationship between A. Robert Collins and Glade N. James as jointly and severally being liable with the corporation for the debts and obligations being entered into with the Baileys. This being the case, their act triggered the acceleration clause because they were the purchasers in the Uniform Real Estate Contract, the purchasers and Guarantors in the Guaranty Agreement and they are bound by the terms and conditions of the agreement.

POINT II

THAT GLADE N. JAMES AND A. ROBERT COLLINS SIGNED THE UNIFORM REAL ESTATE CONTRACT AS ONE OF THE FOLLOWING:

(1) As agents of the corporation, pursuant to an agreed dissolution and distribution being the only stockholders;

(2) That if their actions were without authority or ultra vires, the corporation ratified their acts.

(1) That Glade N. James and A. Robert Collins signed the Uniform Real Estate Contract of April 13, 1978, as agents of the corporation pursuant to an agreed dissolution and distribution being the only stockholders:

The court at the conclusion of the case stated pursuant to Finding No. 8 as follows:

"8. The court also finds that the A. Robert Collins and Glade N. James were in fact Buyers under the first contract, or in the alternative, were acting as agents for C & J Industries in the second contract."

The court, as we have pointed in the record, (R. 208-209), the parties pursuant to the direction of legal counsel and in accordance therewith, the officers and directors of C & J Industries agreed that they would not go through a formal dissolution and distribution, that they would allow the corporation to forfeit its charter as the cheapest dissolution procedure that they could follow. This was in fact done. It was certainly within the authority of these officers and directors to pursue the type of dissolution and distribution that they saw fit. Utah Code Annotated, 1953, §16-10-101 states as follows:

> "Notwithstanding the dissolution of a corporation either (1) by the issuance of a certificate of dissolution by the secretary of state, or (2) by a decree of court, or (3) by expiration of its period of duration, the corporate existence of such corporation shall nevertheless continue for the purpose of winding up its affairs in respect to any property and assets which have not been distributed or otherwise disposed of prior to such dissolution, and to effect such purpose such corporation may sell or otherwise dispose of such property and assets, sue and be sued, contract, and exercise all other incidental and necessary powers."

In this case the charter was dissolved by the Secretary of State, (Exhibit 14) and, therefore, pursuant to the agreement between the shareholders and the stockholders, the distribution of the above entitled property to themselves was merely in furtherance of this particular action. The only act that remained to be done, that was not done, by the officers and directors of C & J Industries, was simply to fill out, complete and execute an unadulterated 10 cent quit-claim deed from C & J Industries to A. Robert Collins and Glade N. James to complete the transfer of the property in question.

This matter has been treated many times in courts of equity. 27 Am. Jur. 2d., Equity, §126, which states as follows:

> "One of the maxims of equity is that equity regards as done that which ought to be done. Thus, a court of equity, in determining a dispute between litigants, regards and treats as done that which, in fairness and good conscience, ought to be or should have been done. If, for instance, by means of fraud or misrepresentation, a litigant has prevented acts from being done, equity treats the case as though the acts had in fact been performed.
>
> The court considers as actually having been performed acts which have been agreed or intended to be

done, there being nothing to show that performance has in fact been prevented. Thus, where proof is made of an agreement to give security, the contract may be deemed to have been executed by the giving of security. Likewise, sums which are shown to have come into an obligee's hands may be deemed to have been applied toward the extinguishment of the obligation. The agreement is deemed to have been performed at the time which the parties have fixed as the time of performance. A stipulated act cannot be deemed to have been performed in advance of the time of performance. If the act was agreed to be done at a future time, equity will not regard it as having been performed at an earlier date.

The maxim is said to be the foundation of equitable property rights, estates, and interests. Inter alia, it is recognized as being the basis of the doctrine of equitable conversion. Money which has been covenanted or devised to be lakd out in land is treated as real estate in equity and descends to the heir, and on the other hand, land which has been contracted or devised to be sold is considered and treated as money. A conveyance which ought to have been made may be treated as having been made. Furthermore, a purchaser of property may be deemed to have become the owner thereof although the deed which has been executed by the vendor fails to convey what was intended to be transferred. Moreover, title under a will may be recognized by the court although the will has not yet been probated."

A very interesting case, to show what a court of equity should do in a case like this is Estate of D. M. Schultz, vs. First National Bank of Portland, 348 P.2d 22, (1959) in which the sole issue was a child in a probate proceeding claiming as an heir, under an agreement by one Dorothea M. Schultz to adopt Edward T. Schultz. The court stated as follows:

"This is not a suit for breach of contract, nor is it, strictly speaking, one for specific performance. It is a proceeding for the judicial determination whether status as an heir can be said to flow from the alleged agreement. In short, it stands as a

> petition to the court to apply to the agreement the equitable maxim treating as done that which parties intended should be done, namely a consummation of the adoption of plaintiff as a son and heir of the Schultzes. 19 Am. Jur. 315, 316, Equity §455, 457; Syverson v. Serry, 101 Or. 514, 529, 200 P.921; Ruth v. Cox, 134 Or. 200, 207, 291 P. 371. See also Wooley v. Shell Petroleum Corp., 39 N.M. 256, 45 P.2d 927, 931; Tutle v. Winchell, 104 Neb. 750, 178 N.W. 755, 757, 11 A.L.R. 814; and Wiseman v. Guernsey, 107 Neb. 647, 187 N.W. 55, where the maxim is applied to like agreements of adoption made in a foreign state.

As is stated in the Schultz case, supra, equity will treat that which should be done as being done. A sale was made by Edward O. Bailey to C & J Industries, Inc. which was taken over by the stockholders, and to allow Glade N. James and A. Robert Collins to sell the property and collect all of the money and thereby perpetrate a fraud upon the purchaser, by selling something which they did not own, and perpetrating an additional fraud upon the seller, when the seller and buyer agreed that there would be an acceleration clause that the total amount would be due upon sale, would only be on approval of creating two frauds instead of one.

They are in fact asking this court to participate, to assist blindly, ignore the realities of an actual transaction, to perpetrate a fraud upon the purchaser, Jay L. Burgie, and a fraud upon defendants, Edward and Ruth Bailey.

(2) That if the actions of Glade N. James and A. Robert Collins were without authority or ultra vires, the corporation ratified their acts:

If it should be argued that the act of Glade N. James and A. Robert Collins were without authority for and on behalf of

the corporation to make the sale and receive the payments, then the corporation subsequently ratified their actions. The original Uniform Real Estate Contract was entered into on April 13, 1978. The second contract with Jay Burgie for the sale of the corporate property in the names of Glade N. James and A. Robert Collins was on the 9th day of March, 1979. The corporation had knowledge, because of its officers, Glade N. James and A. Robert Collins had sold the corporate property. As heretofore stated, this was pursuant to an agreement in behalf of the corporation. As it is stated in 19 Am. Jur., Corporations, §1253:

> "The assent or approval of a corporation to acts done on its account may be inferred in the same manner as the assent of a natural person, and it is well settled that where a corporation with full knowledge of the unauthorized acts of its officers or agents acquiesces in and consents to such acts, it thereby ratifies them, especially where the acquiescence results in prejudice to a third person. Accordingly acquiescence in the acts of the directors binds the stockholders to the same extent as original authority by a vote would have done. Mere knowledge and approval, however, by even a majority in interest of the stockholders, of a course of action by the directors will not effect a ratification thereof if the stockholders do not act in such respect as a body in a meeting assembled. Likewise, the mere knowledge on the part of stockholders of a corporation that a bank holds its note does not effect a ratification, where the note was executed by the president without authority in satisfaction of his individual debt.
>
> "As an application of the above principles, where an officer or agent gave a mortgage on the corporate personal property and the corporation knew of the transaction and acquiesced therein, the mortgage cannot be avoided on the ground that the officer or agent is not authorized to give such a mortgage. The same is true as to an unauthorized pledge of corporate personal property."

19 Am. Jur., Corporations, §1254 goes on to say:

> "The acquiescence of a corporation which will amount to ratification of an unauthorized act may be evinced by mere silence under circumstances giving rise to a duty to repudiate the transaction; a corporation cannot stand by, after it has learned of an unauthorized act or contract made or entered into by its officer or agent, and have its benefit if it should prove to be favorable and reject it if it should prove unfavorable. As in the case of an individual principal, a corporation must, within a reasonable time after receiving information of the unauthorized transaction, repudiate the transaction and restore the proceeds of the transaction, or the silence in such respect will constitute strong evidence of ratification or may be sufficient to engender a presumption or constitute a prima facie case thereof."

It is further stated in 19 Am. Jur. 2d, Corporations, §1255 as follows:

> "It is the sell-established general rule that a corporation which, with knowledge of its officer's or agent's unauthorized act or contract and of the material facts concerning it, receives and retains the benefits resulting threfrom thereby ratifies the transaction if it is one capable of ratification by parol. This rule has been applied in many different kinds of transactions, among which are the following: contracts of employment, including the employment of agents, brokers, or attorneys; contracts to purchase or sell personalty, realty, or chattels real; contracts to lease or rent premises; contracts to rent, transfer, or assign personal property; contracts to construct, repair, or maintain corporate property; the issuance, indorsement, or acceptance of commercial paper; the issuance of mortgages or trust deeds; the issuance or receipt of bonds, debentures, or certificates of deposit; the pledge of personal property or securities; the borrowing of money; contracts of guaranty; agreements to extend the time of payment or to stay execution; agreements of compromise or settlement; and other miscellaneous contracts. . . ."

In this case, A. Robert Collins, being the president and Glade N. James being the secretary of C & J Industries, Inc., when the property was sold in their individual names, the corporation relieved itself of many obligations to the Baileys, therefore, there would be a ratification and estoppel by the corporation. In any event A. Robert Collins and Glade N. James were either acting as the agents of the corporation or the corporation ratified the act, having full knowledge of all of the facts. To allow Glade N. James and A. Robert Collins to sell the property and receive the payments and all of the benefits and perpetrate a fraud upon the Baileys and Jay Burgie would not be in the proper interests of justice.

POINT III

THAT C & J INDUSTRIES WAS THE ALTER EGO OF GLADE N. JAMES AND A. ROBERT COLLINS.

This corporation was discontinued a few months after its organization, no real formal meetings were held, no income tax statements, no formal transfer of the properties to the corporation, no $1,000.00 ever placed in the corporation, (R. 208) and as Mr. James said in his deposition, which was published in the above entitled matter on page 20:

> "Q. Did you make a determination, either by your corporate records or by conversations with you and Bob in 1978, that you'd discontinue C & J Industries?
>
> "A. Yes, that was one of the meetings, and whether we should declare--whether you tell them that you're going to discontinue a corporation, or whether we should just discontinue paying the corporate tax.

"Q. Did you contact any attorney in reference to this particular decision?

"A. Yes, I'm sure that I had the advice of David Robbins.

"Q. Robinson?

"A. Yes, Robinson.

"Q. Thank you.

"A. We wanted to do it--

"Q. Did you request him to file any articles or documents called dissolution?

"A. No, because he advised me that dissolution would be much more expensive than just not paying the franchise tax.

"Q. So we're talking, then, in terms, Mr. James, of a rich man's bankruptcy where you file down at the bankruptcy, and a poor man's bankruptcy where you just go to California?

"A. Uh-huh."(affirmative.)

The Supreme Court in the case of Norman v. Murray First Thrift, 596 P.2d 1028 (Utah 1979), ruled:

> "The ruling of the court cannot be deemed as predicated on the equitable alter ego doctrine, because in order to disregard the corporate entity, there must be a concurrence of two circumstances: (1) there must be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, viz., the corporation is, in fact, the alter ego of one of a few individuals; and (2) the observance of the corporate form would sanction a fruad, promote injustice, or an inequitable result would follow."

In this particular case the failure to hold that the Alter Ego of C & J Industries, Inc. was in fact Glade N. James and

A. Robert Collins, would be in fact sanction a fraud and promote injustice. In this case it would allow A. Robert Collins and Glade N. James without placing any money into a corporation at best, to take and appropriate all of the property as they have received all of the payments from the second sale of the property to Jay Burgie, and yet not be responsible for any of the terms and conditions of the original contract with the Baileys. It is ludicrous to believe that there could be a more obvious case to disregard the corporate entity and to in fact hold that the corporation from the beginning, was the alter ego of these two men.

This type of a situation was again reviewed by the Utah Supreme Court in the case of Dockstader v. Walker, 510 P.2d 526, (Utah 1973) where the Supreme Court said:

> " . . . However, the corporate veil which protects stockholders from liability for the debts of the corporation will be pierced and the true relationship between the stockholders and the corporation looked at where the legal entity is used to perpetrate a fraud, to justify a wrong, or to defeat justice."

The landmark case, which all of the cases subsequent thereto have referred, is the case of Geary v. Cain, 9 P.2d 396, (Utah 1932), in which it states:

> " . . . Courts of equity and courts of law as well, and courts which administer both law and equity in the same action, as do the courts of this state, will, to prevent fraud and accomplish justice, in proper cases ignore the legal fiction that a corporation is a person separate and distinct from the person or group of persons who own its stock. . . . The doctrine simply means that the courts, ignoring forms and looking to the substance of things, will

> regard the stockholders of a corporation as the owners of its property, or as the real parties in interest, whenever it is necessary to do so to prevent a fraud which might otherwise be perpetrated, to redress a wrong which might otherwise go without redress, or to do justice which might otherwise fail."

Again, the case of Stine v. Girola, 337 P.2d 62, (1959) involving a very similar situation to us states:

> " . . . Although the defendant State Underwriters, Inc., is a legal entity, nevertheless, such corporate existence as an entity separate and distinct from its shareholders may be ignored if necessary to circumvent the fraudulent purposes of shareholders in its organization or management. As stated in 13 Am. Jur., Corporations, §7, pages 160-162:
>
> > "'The doctrine that a corporation is a legal entity existing separate and apart from the persons composing it is a legal theory introduced for purposes of convenience and to subserve the ends of justice. The concept cannot, therefore, be extended to a point beyond its reason and policy, and when invoked in support of an end subversive of this policy, will be disregarded by the courts. Thus, in an appropriate case and in furtherance of the ends of justice, a corporation and the individuals owning all its stock and assets will be treated as identical, the corporate entity being disregarded where used as a cloak or cover for fraud or illegality.'"

CONCLUSION

The Findings, Conclusions and Judgment if the District Court should be affirmed, Glade N. James and A. Robert Collins were in fact Buyers under the original Uniform Real Estate Contract with the Baileys and were agents of the corporation, C & J Industries, at the time of the second sale of the property to Jay Burgie.

Respectfully submitted:

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