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Ralph B. Stine and Margaret E. Stine v. Henry Girola and Diane Girola and State Underwriters, Inc. : Brief of Appellant

Utah Supreme Court

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**IN THE SUPREME COURT OF THE
STATE OF UTAH**

FILED

DEC 15 1958

RALPH B. STINE and
MARGARET E. STINE,
Plaintiff and Appellants,

vs.

HENRY GIROLA and DIANE GIROLA
and STATE UNDERWRITERS, INC. in
Nevada

Defendants and Respondent.

Clerk, Supreme Court, Utah

Case
No. 8965

BRIEF OF APPELLANT

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STATEMENT OF FACTS

This action was brought upon promissory notes and upon a check made by defendants Henry Girola and Diane Girola. All parties to this law suit are residents of the State of Nevada. The promissory notes total to the sum of \$41,750.00 and the check is in the sum of \$20,000.00. An amended complaint was filed alleging that defendants Henry Girola and Diane Girola owned all of the stock in State Underwriters, Inc., a Nevada Corporation, and that the defendants Henry Girola and Diane Girola had deposited funds and credits and had transferred property

to State Underwriters, Inc. with the intent to conceal said funds, credits and property from the creditors of the defendants Henry Girola and Diane Girola and thereby defraud said creditors. The amended complaint added as a party defendant the Nevada Corporation, State Underwriters, Inc.

Plaintiffs thereafter caused to be issued a writ of Garnishment after filing the required undertaking and affidavit for Garnishment. The Writ of Garnishment was served upon the Garnishee Continental Bank and Trust Company of Salt Lake City, Utah and the answers to the Interrogatories to the Garnishee showed that the Garnishee held \$15,144.05 of the funds of the defendant State Underwriters, Inc. Defendant State Underwriters appeared specially upon a motion to discharge the writ of Garnishment. The arguments upon the motion to discharge the Writ of Garnishment were heard in the Third Judicial District Court in and for Salt Lake County, State of Utah. Judge Ray Van Cott, Jr. heard the arguments and ordered the discharge of the Writ of Garnishment relating to the State Underwriters, Inc.

This appeal is taken from the order discharging the Writ of Garnishment. Subsequent to the appeal personal service was had upon defendant Henry Girola by service of summons upon him in Salt Lake County, State of Utah.

STATEMENT OF POINTS

Point I

THE COURT ERRED IN ABSOLVING GARNISHEE FROM ANY AND ALL LIABILITY BY REASON OF THE WRITS OF GARNISHMENT WITH

RESPECT TO THE DEFENDANT STATE UNDERWRITER, INC.

Point II

THAT A WRIT OF GARNISHMENT SHOULD ISSUE TO ATTACH FUNDS OF DEFENDANT CORPORATION IN THE HANDS OF GARNISHEE BANK WHERE DEFENDANT CORPORATION HAS RECEIVED SUCH FUNDS UPON A FRAUDULENT TRANSFER BY DEFENDANTS GIROLA'S AND WHERE SAID CORPORATION IS THE ALTER EGO OF THE DEFENDANTS GIROLA.

Point III

THAT THE AFFIDAVIT FOR GARNISHMENT WAS SUFFICIENT UPON WHICH TO ISSUE THE WRIT OF GARNISHMENT WHICH ATTACHED THE FUNDS OF THE DEFENDANT CORPORATION.

ARGUMENTS

Points I, II, III

THE COURT ERRED IN ABSOLVING GARNISHEE FROM ANY AND ALL LIABILITY BY REASON OF THE WRITS OF GARNISHMENT WITH RESPECT TO THE DEFENDANT STATE UNDERWRITER, INC. THAT A WRIT OF GARNISHMENT SHOULD ISSUE TO ATTACH FUNDS OF DEFENDANT CORPORATION IN THE HANDS OF GARNISHEE BANK WHERE DEFENDANT CORPORATION HAS RECEIVED SUCH FUNDS UPON A FRAUDULENT TRANSFER BY DEFENDANTS GIROLAS AND

WHERE SAID CORPORATION IS THE ALTAR EGO OF THE DEFENDANTS GIROLA.

THAT THE AFFIDAVIT FOR GARNISHMENT WAS SUFFICIENT UPON WHICH TO ISSUE THE WRIT OF GARNISHMENT WHICH ATTACHED THE FUNDS OF THE DEFENDANT CORPORATION.

The plaintiffs proceeded against the defendant State Underwriters, Inc. and caused to be issued the Writ of Garnishment attaching the funds of the corporation upon three theories. The first theory is that it is proper to proceed against property of a debtor which is being held by a third person in the same action against the debtor himself. The second theory is that the property and funds being held by the defendant State Underwriters, Inc. were transferred to the corporation by defendants Henry Girola and Diane Girola with the intent to frustrate and defraud their creditors. The third theory is that the State Underwriters, Inc. is in fact the alter ego of the defendants Henry Girola and Diane Girola and the funds of the State Underwriters are in fact the funds of the Girolas.

The obligations of the Girolas to the plaintiffs are substantial and in the total amount of \$61,750.00 evidenced by promissory notes and a check. The plaintiffs allege and stand ready to prove that the Girolas are the owners of all of the stocks of the State Underwriter, Inc.; that the Girolas are the principal officers in the defendant corporation; that the defendant corporation has not and does not enter into business other than to be the mere "other self" of the Girolas; that the funds transferred to the defendant corporation were transferred by the Girolas without consideration and purely for the purpose of defrauding their

creditors and with the intent to frustrate the claims of the creditors.

The action against one holding property of a debtor prior to recovery of a judgment against the debtor and in the same action against the debtor has been recognized in the jurisdictions in which the same Court administers both law and equity and where legal and equitable remedies can be granted in the same action. The Courts of Utah administer both law and equity and the matter was presented to the Utah Supreme Court in the case of Daniels vs. Smith, 51 Utah 144, 169 P. 267. Other citations supporting this rule of law are cited.

First National Bank of Glove vs. McDonough—
 Ariz. 168 P. 635
 14 Am. Jur. 696
 Booth vs. Mohr—Ga. 50 S. E. 173
 DeLacy vs. Hurst—9 S. E. 1052
 Vail vs. Hammond—60 Conn. 374 22 A 954
 Simonton vs. Simonton—Ida. 193 P. 386

The weight of authority supports the view that non-residence or absence of the debtor obviates the necessity of a prior judgment at law where such non-residence renders it impossible or impracticable to obtain a prior judgment against the debtor and there is no adequate remedy at law by which the debtors property can be reached. The defendants Girola and State Underwriters, Inc. are residents of the State of Nevada.

38 A. L. R. 269, 272
 14 Am. Jur. 697

Plaintiffs offer the foregoing authorities in support of their first theory of recovery and in support of their con-

tention that the funds and property of the State Underwriters should be reached by Garnishment proceedings.

In proceeding directly against defendant corporation plaintiffs rely upon the well established rules of law which allow such action where the corporation is in fact the alter ego of the debtors and where the transfer of the funds or property is made to defraud the creditors of the debtor—transferor. In such cases the corporation and the individuals owning all its stock and assets will be treated as identical.

13 Am. Jur. 160

1 A. L. R. 610

34 A. L. R. 597

Plaintiff's take the position that the defendant State Underwriters, Inc. and defendants Girola were identical and that the funds of the State Underwriters, Inc. which were on deposit with the Garnishee Continental Bank and Trust Co. were as much the object of legal attachment as would be the funds of the Girolas which may be on deposit with the said Garnishee. The matter may be stated simply that a person may not use a corporation to evade his contractual liability as an individual.

In ordering the discharge of the Garnishment the Third District Court Judge stated that plaintiff were "one step removed" from the Garnishment. Plaintiffs contend that if they are required to first reduce their claims against the Girolas and then to prove that the defendant State Underwriters, Inc. is the alter ego of the Girolas or the transfer of funds were fraudulently transferred then the funds which are sought to be attached would again be placed beyond the reach of legal attachment proceedings. The very pur-

pose of the garnishment prior to judgment statutes was to provide a procedure to hold funds or property pending the determination of the law suit to which the garnishment proceeding is ancillary. To discharge the Garnishment in this instance will make ineffective the statute which allows garnishment prior to judgment.

In the case of *Cole vs. Utah Sugar Co.*, Ut., 99 P. 681 the Utah Supreme Court stated that:

“We do not intend to establish a rule which requires an exact and literal compliance with our statute relating to attachment and garnishment. These statutes all require a liberal construction with the view of effecting their purpose.”

Plaintiffs further contend that their affidavit is sufficient under Rule 64 C. U. R. C. P. to entitle them to the Writ of Garnishment; that they have set out the nature and amount of the undebtedness which is required to confer prior upon the Court to issue the Writ. It is the averments of the affidavit, not the complaint, which is necessary to support the issuance of the writ.

H. L. Griffin Co. vs. Howell—Utah—113 P 326

CONCLUSION

From the facts as alleged in this case, the applicable rules of law, and the provisions of rule 64 D U. R. C. P. it is clear that the Writ of Garnishment should not have been discharged and that this Court should reverse the order of the Third District Court and reinstate the Garnishment.

Plaintiff respectfully submits that if the defendants Henry Girola and Diane Girola are allowed to reside

in one state and through a foreign corporation, owned solely by them, maintain their funds inviolable then the very purpose of the garnishment statutes is for naught.

Respectfully submitted,

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