

1972

Empire Investment Corporation and Associates, A Limited Partnership v. Neilson Construction Company, A Utah Corporation, A. P. Neilson Construction Company, A Utah Corporation, Skiv-A-Ton, Incorporated, A Utah Corporation, and Edel Weiss Haus Condominium Project, By and Through Its Management Committee : Brief of Defendants and Respondents

Utah Supreme Court

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Recommended Citation

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IN THE SUPREME COURT
OF THE STATE OF UTAH

EMPIRE INVESTMENT CORPORATION
AND ASSOCIATES,
limited partnership,

Plaintiff and Appellant

- vs -

NELSON CONSTRUCTION COMPANY,
a Utah corporation, A
NELSON CONSTRUCTION COMPANY,
a Utah corporation, S
L, INCORPORATED, a
corporation, and EDELWEISS
CONDOMINIUM PROJECT
THROUGH ITS MANAGEMENT
COMMITTEE,

Defendants and Appellees

BRIEF OF DEFENDANTS
IN RESPONSE TO
PLAINTIFF'S MOTION FOR
REVERSAL

Filed from the Judgment
of the District Court,
Salt Lake County, Utah

W. LOWE
Bank Building
Salt Lake City, Utah 84119
Attorney for Plaintiff and Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

EMPIRE INVESTMENT CORPORATION AND ASSOCIATES,
a limited partnership,

Plaintiff and Appellant,

- vs -

NEILSON CONSTRUCTION COMPANY, a Utah corporation, A. P. NEILSON CONSTRUCTION COMPANY, a Utah corporation, SKIVATION, INCORPORATED, a Utah corporation, and EDELWEISS HAUS CONDOMINIUM PROJECT, BY AND THROUGH ITS MANAGEMENT COMMITTEE,

Defendants and Respondents.

Case No.
12977

BRIEF OF DEFENDANTS AND RESPONDENTS

STATEMENT OF NATURE OF CASE

This is an action by a limited partnership, Appellant, claiming to be an ownership in trust in central real property owned by Respondents.

DISPOSITION IN LOWER COURT

Respondents herein filed a Motion to Dismiss Plaintiff/Appellant's Complaint with prejudice claiming the issues herein had been previously settled in Civil Nos. 195930 and 197815. On June 6, 1972 a hearing on this Motion to Dismiss was held at which time Respondents orally moved for Summary Judgment in its favor. (R. 12, 20, 36)

The Court after considering the Pleadings, Affidavits, Deposition and the record in the two prior actions, granted the Motion for Summary Judgment dismissing Appellant's action with prejudice.

RELIEF SOUGHT ON APPEAL

Respondents seek to have the District Court ruling affirmed dismissing Plaintiff/Appellant's Complaint with prejudice.

STATEMENT OF FACTS

The property in which Appellants herein claim an interest was originally sold by Respondents (Neilson Companies) in November, 1969 to one David Brown as a "general partner" with no others mentioned. (R. 8, 40) Brown then sold the property to Empire Investment, Incorporated, a corporation, in December of 1969. (R. 8, 40) Thereafter, in September of 1971, Empire Investment, Incorporated, a corporation, sold the property by contract to Olympic Holding Corporation of America (R. 8, 9, 40). Shortly after this last transaction occurred Respondents, as sellers, served Notice of Default on David Brown and Empire Investment, Incorporated.

and repossessed the property. (R. 40, 41, 50) Whereupon two lawsuits were filed against Respondents, to-wit: *Empire Investment, Incorporated, a corporation, vs. Edelweiss Haus, a Condominium Project*, Civil No. 195930 and *Olympic Holding Corporation of America, Empire Investment, Incorporated vs. Neilson Construction Company, A. P. Neilson Construction Company, Skivation, Incorporated, Edelweiss Haus, a Condominium Project*, Civil No. 197815. (R. 10, 35, 41, 42) alleging that the Default was procured through fraudulent assessments by defendants (Respondents herein) and further that Olympic Holding Corporation had succeeded to the ownership interest of the property in question. (R. 41, 42)

The claims in the above cited cases were subject of a Pre-Trial (R. 41, 42) and the cases were set for trial (R. 42.). Affidavits and deposition of the Presidents of Empire Investment, Incorporated and Olympic Holding Corporation were taken (R. 8, 12, 43, 78). Affidavits and depositions of Elwood Bachman, President of Empire Investment, Incorporated and a director of Olympic Holding Corporation were to the effect that Empire Investment, Incorporated was the sole owner of the land here in question and as such had full right to bring the above named suits, (R. 80, 81) which statements also agreed with all the pleadings filed in those actions claiming ownership by the plaintiffs therein.

The depositions and Affidavits were ordered published in an effort to assist the Court to understand their relation to the facts in the instant case. (R. 8, 12, 45, 46). Following the Pre-Trial, negotiations for settlement were entered into and on the basis of the depositions, Affidavits and pleadings alleging ownership in the plaintiffs in the aforementioned suits a

settlement was affected on October 26, 1971 settling the rights between the parties in those suits. (R. 9, 42) Although upon receiving a letter from John Lowe, Attorney for Appellants herein, the parties stipulated that, ". . . the above situation (sic) doesn't settle or compromise any of the rights that may be brought by any of the parties not herein mentioned; namely, Empire Investment Corporation and Associates, a limited partnership, D. E. Fleenor and W. F. Fleenor." (R. 42, 45) Neither the partnership or the limited partners ever entered a formal appearance in either of those two suits. (R. 9)

Following these events and on February 4, 1972 Appellant, as a limited partnership consisting of Empire Investment, Incorporated by Jack Lords, Elwood Bachman and Oscar Hunter as general partners therein with W. F. Fleenor and D. E. Fleenor as limited partners therein, (R. 9, 22, 56; Ex. 1-D) filed suit against Respondents the same exact parties as were defendants in the two prior suits above mentioned (R. 35, 36, 45) seeking relief on the same claim and issues that were settled in the two previous suits. (R. 10, 46) However the record shows that in reality the suit in the instant case is to satisfy the claim of the Fleenors (limited partners of Appellant) for money allegedly given to David Brown prior to his entering into a purchase agreement from Respondents herein and that this suit is not for the benefit of the general partners Empire Investment, Incorporated, Bachman, Lords and Hunter, they having already settled in two previous lawsuits. (R. 9, 63, 64)

Respondents herein first became aware of the existence of the Fleenors' interest in a partnership in which Empire Investment, Incorporated and Bachman, Lords and Hunter

were general partners in a deposition of Mr. Bachman in May of 1971. This was after Empire Investment, Incorporated had sold their interest in the subject property to Olympic Holding Corporation. (R. 67) In that deposition of Mr. Bachman, he indicates that the Fleenors were involved in a limited partnership to some extent, however, in quoting from his deposition he said:

"I have a copy of the limited partnership where we assumed and took over the \$25,000.00 obligations (of Brown and Fleenor) as part of the purchase price from Brown." (R. 70)

Based upon the published depositions, pleadings and Affidavits in Civil Nos. 195930 and 197815 above referred to, and the hearing on the Motion to Dismiss and for Summary Judgment (R. 20), the Court below found the limited partnership did exist with Empire Investment, Incorporated, a corporation, together with Jack Lords, Elwood Bachman and Oscar Hunter, general partners, and W. F. and D. E. Fleenor, limited partners. (R. 9; Ex. 1-D) However, there was no evidence that there was ever any Deed, contract or other document relating to or transferring the title to the subject property from Empire Investment, Incorporated, to the limited partnership and that Plaintiffs/Appellants herein relied solely on the partnership agreement. (R. 9, 70, 71; Ex. 1-D) Further, that there was never any Deed or other writing of any kind executed between Respondents and Appellants herein including the partners, nor was any payment ever made by Appellants or by Fleenors to Respondents. (R. 9, 70, 71) The court further found that the rights of Empire Investment, Incorporated with Bachman, Lords and Hunter as sole stockholders, together with Olympic Holding Corporation with

Elwood Bachman as a director thereof, had been fully adjudicated on the issues subject to this suit. (R. 9, 10, 46, 63, 64) The only claim subject to the instant suit is that of the Fleenors as limited partners. (R. 9, 63, 64.

The Court thereupon determined that the "limited partnership known as Empire Investment Corporation and Association has no legal claims on the title to the property in Summit County described in the Real Estate Contracts in this cause." (R. 10, 12) "That any right existing between and among the limited partnership, W. F. Fleenor and D. E. Fleenor's, were not legally assertible against any of the defendants in this cause" (R. 10, 13) Whereupon the Court dismissed Plaintiff/Appellant's Complaint, entering its Findings of Fact and Conclusions of Law (R. 7-10) and granting Judgment in favor of Respondents herein. (R. 11-13).

ARGUMENT

POINT I

ACTS OF A GENERAL PARTNER WITH THIRD PARTIES ARE BINDING ON PARTNERSHIP UNLESS SAID THIRD PARTY HAD KNOWLEDGE OF ACTING PARTNER'S LACK OF AUTHORITY SO TO ACT; AND APPELLANT'S CANNOT THEREFORE ASSERT CLAIM AGAINST RESPONDENTS HEREIN, APPELLANT'S RIGHTS HAVING PREVIOUSLY BEEN SETTLED BY ACTS OF THE GENERAL PARTNERS.

Utah Code Annotated, Section 48-2-9 (1953) on limited partnerships provides:

"A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners. . . ." *Id.*

Utah Code Annotated, Section 48-1-6 (1953) on general partnerships provides:

"(1) Every partner is an agent of the partnership for the purposes of its business and the act of every partner, including the execution in the partnership name of any instrument for apparently carrying on in the usual way the business of the partnership of which he is a member, unless the partner has in fact no authority to act for the partnership in a particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

* * *

(4) No act of a partner in the controvention of a restriction on authority shall bind the partnership to any person having knowledge of the restriction." *Id.*

In the instant case Appellants are now before the Court as a limited partnership consisting of Empire Investment, Incorporated, a corporation, Jack Lords, Elwood Bachman and Oscar Hunter as general partners with D. E. and W. F. Flenor as limited partners. (R. 9, 22) That partnership is claiming that they are the lawful owners of the subject property. This, in spite of pleadings, depositions and Affidavits of the general partners in two previous lawsuits, both of which dealt with the same property and issues as the instant case. (R. 83, 86) In all the depositions, pleadings, Affidavits, etc. in the two previous lawsuits, to-wit: Civil Nos.: 195930 and 197815, it is alleged that Empire Investment, Incorporated in which Bachman, Lords and Hunter were the sole stockholders, was the owner of the subject property and as such was entitled to

bring the suit. (R. 82) This position is a complete reversal of the one now urged upon the Court by the same parties in the guise of a limited partnership rather than as individual partners (R. 83, 86)

In any event, defendants in the two prior lawsuits (Respondents herein) relying on the representatives of Empire Investment, Incorporated, a corporation, and its officers together with those of Olympic Holding Corporation and its officers, settled the above mentioned cases and the rights of Empire Investment, Incorporated and Olympic Holding Corporation were adjudicated. (R. 9)

During the period of these settlement negotiations in May of 1971 Respondent was informed that the Fleenors, limited partners of Appellant, had some type of interest with Empire Investment, Incorporated, although the exact nature of that interest was not disclosed. It was apparent that their interest had something to do with the \$25,000.00 allegedly given to David Brown, the original purchaser of the subject property, and that that \$25,000.00 obligation had been assumed by Empire Investment, Incorporated. (R. 70) Then, at a later date, approximately two or three days prior to settlement of the aforesaid suits, John Lowe, Attorney for Appellants herein, contacted litigants' attorneys informing them that he represented the Fleenors "who were partners in this deal somewhere and assert some claim." (R. 9, 42) However, at no time was any representation made to the defendants in the original suits (Respondents herein) by the partnership (Appellant) or any member thereof that Empire Investment, Incorporated did not have authority to act in regards to the property as it had previously done or enter a settlement in regards to the property.

Nor did the Fleenors ever enter an appearance of record to assert any right they claimed as limited partners. (R. 9, 86-88) Under these facts Appellant herein has no claim against Respondent for the reason that the general partners settled all claims which are subject to this lawsuit in the two previous suits referred to and the limited partner is bound by that settlement as the general partner was acting as agent for the partnership, if acting for the partnership at all, and that under the provisions of Utah Code Annotated previously cited, the general partner can bind other members of the partnership by his actions. Utah Code Ann. supra, 60 Am. Jur 2d, Partnerships, Section 131, pp 57-58.

Appellant, in any event should be estopped due to the inconsistent position taken by the general partners herein as compared to the previous suits referred to. (R. 80-86) 28 Am Jur 2d, Estoppel & Waiver, Sections 68 and 69. They should also be estopped for their failure to enter an appearance of record in the two previous suits where the issues herein sought to be litigated were disposed of with the knowledge of the partnership by and through its general partners and also with the knowledge of the limited partners herein, the Fleenors. (R. 9, 42)

Respondents therefore submit that the trial court was correct in dismissing Appellant's claim due to the fact that all issues in regards to the present lawsuit had already been settled and adjudicated in the previous two lawsuits (R. 9) and the rights of Empire Investment, Incorporated, a general partner of Appellant, had been settled therein. (R. 9) The record shows no evidence of any claim by the limited partnership that Empire Investment, Incorporated had no authority to act in

the manner in which it did until it was first alleged at the hearing below in June of 1972, (R. 80-86) eight months following settlement in the two original suits. Until that time all evidence was that Empire Investment, Incorporated, a corporation, was the owner. (R. 80-86)

Appellant's interests, if any, against Respondents have been adjudicated (R. 9) and any right that the Fleenors may have is subject to adjudication in a partnership accounting, a suit for which has already been filed in the District Court of Salt Lake County, in July of 1971 as Civil No. 200583. (R. 9)

POINT II

THE STIPULATION OF THE PARTIES TO TWO PREVIOUS LAWSUITS ALLOWED APPELLANTS HEREIN TO CLAIM THEIR RIGHT, IF ANY THEY HAD; THE COURT BELOW THEN MADE THE DETERMINATION THAT NO RIGHT EXISTED.

The Stipulation in question in this case in effect provides that:

"The above situation (sic) does not settle or compromise any of the rights that may be brought by any party not herein mentioned; namely, Empire Investment Corporation and Associates, a limited partnership, D. E. Fleenor and W. F. Fleenor." (R. 55)

The Stipulation allows the partnership to bring any right that it claims to have and this they did in the suit below, however, the Court determined that no rights existed. In the Stipulation Respondents do not admit that Appellant has any right whatsoever but simply agrees to let them assert whatever right

they claim. This has been done and having been done the Court determined no rights existed as to the partnership or to any members thereof, those rights having been previously settled. (R. 9-10, 12, 13)

CONCLUSION

Based upon the facts of this case and the argument above, Respondent submits that the ruling of the District Court must be upheld dismissing plaintiff's Complaint with prejudice and upon the merits.

Respectfully submitted,

KIPP AND CHRISTIAN

Carman E. Kipp

Brent J. Moss

Attorneys for Respondent