1959

Dee Schvaneveldt v. Noy-Burn Milling & Processing Corp : Brief of Appellants

Utah Supreme Court

Gordon A. Madsen; Attorney for Defendants and Appellants;

In the
Supreme Court of the State of Utah

DEE SCHVANEVELDT,
Plaintiff and Respondent,

—vs.—

NOY-BURN MILLING & PROCESSING CORPORATION, et al.,
Defendant and Appellants.

Case No. 9031

APPELLANTS' BRIEF

GORDON A. MADSEN
Attorney for Defendants and Appellants

ARROW PRESS, SALT LAKE

TABLE OF CONTENTS

AUTHORITIES CITED

CASES

STATUTES

TEXTS

In the
Supreme Court of the State of Utah

DEE SCHVANEVELDT,
Plaintiff and Respondent,

—vs.—

NOY-BURN MILLING & PROCESSING CORPORATION, et al.,
Defendant and Appellants.

Case No. 9031

APPELLANTS' BRIEF

STATEMENT OF FACTS

The facts are briefly that the plaintiff, through an acquaintance and friend, Mr. W. E. Beaves (one of the individual defendants) at his home in Preston, Idaho, learned of a uranium mine located in St. George, Utah, owned by the Epsolon Uranium Company. Sometime in the latter part of August, 1955, the plaintiff in company with his wife, and defendant Beaves and wife, journeyed

to the said mine located some 60 miles west of St. George, Utah to examine the mine. On this occasion the plaintiff met several of the individual defendants named and was informed of a milling process invented by two of the individual defendants, specifically Clark Chadburn and H. L. Newby. Plaintiff made a payment of $5,500 for stock in the enterprise and was given a receipt therefor (Exhibit P-10). The corporate defendant is a Utah corporation, whose Articles of Incorporation were filed with the Secretary of State on the 16th day of February, 1956. The individual named defendants signed the said Articles as incorporators. Several meetings were held by the individual defendants in company with the plaintiff, specifically one in November, 1955 at Salt Lake City, Utah, following the meeting with the attorney who drafted the corporate Articles, the second meeting in St. George in early December, 1955, and two or three meetings in January, 1955, at which the prospective corporation was discussed and the venture of milling uranium ore to be done by said prospective corporation was discussed. During the months of January and February 1956 plaintiff paid the sum of $8,000.00 as part payment on a commitment to pay $10,000.00 in order to obtain 15,000 shares of the defendant corporation stock. At the time of the above-noted payment by plaintiff, defendant corporation was not registered with the State Securities Commission. No certificate of stock was ever issued to the plaintiff. In connection with the stock purchase, it was agreed between the plaintiff and the defendants that upon payment of the full $10,000.00 and upon incorporation of the corpo-

rate defendant, plaintiff would be made a director of said corporation. On March 20, 1957, under Section 61-1-25, Utah Code Annotated 1953, as amended, plaintiff initiated an action to rescind the sale and request a refund of the $8,000.00 paid in by him in January and February of 1956. From judgment for the plaintiff, defendants appeal.

Additional detailed facts will be quoted and discussed in the body of this brief.

STATEMENT OF POINTS

POINT I

THE DISTRICT COURT ERRED IN HOLDING THAT PLAINTIFF WAS NOT A PROMOTER OF THE CORPORATE DEFENDANT.

POINT II

THE STATUTE RELIED UPON WAS NOT DESIGNED OR INTENDED TO APPLY TO PARTIES SUCH AS THE PLAINTIFF WHO ARE POSSESSED OF ALL THE FACTS SUCH A REGISTRATION WOULD PROVIDE.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN HOLDING THAT PLAINTIFF WAS NOT A PROMOTER OF THE CORPORATE DEFENDANT.

The Trial Court in this matter in an Order entered December 13, 1958 modifying the Pre-trial Order, said:

> "The court is of the opinion that there will be an issue of fact as to whether or not the plain-

> tiff was one of the actual promoters of the organization and will hold as a matter of law that if he was such a promoter, that the statute relied upon by the plaintiff does not apply in this case."

Appellants contend that the evidence was clear, convincing and overwhelming that the plaintiff was in fact a promoter of the defendant corporation.

A well-recognized definition of "promoter" is found in Fletcher Cyclopedia Corporations, Volume I, Section 189 at Page 597 and reads in part:

> ". . . includes those who undertake to form a corporation and to procure for it the rights, instrumentalities and capital by which it is to carry out the purposes set forth in its charter, and to establish it as fully able to do its business."

Continuing at Page 598:

> ". . . anyone who actively assists in promoting, projecting and organizing a corporation, whether as a business or in a single corporate instance, is a promoter."

And again at Page 599:

> "Those who contract with or otherwise join the first movers towards incorporation and to the same end are also promoters, and though a person does not become liable as a promoter by reason of the fact that his agent for a special purpose promotes a corporation with the idea of obtaining a personal advantage in executing his agency, it would seem that a very little will make a person a promoter if it can be seen that he was really doing something in the way of speculation for

> his own interest and was not acting merely as the agent of another."

Further, at Page 600:

> "In determining the question whether a person actually was a promoter, due consideration must be given to the facts of the particular case and in any event such question is one of fact for the jury."

The treatise above noted has collected in the footnotes to the above quotations a legion of cases either quoting the definition's language or giving rise to the language therein.

This Fletcher's definition of "promoter" has been adopted by this court in the case of *Powerine Company v. Russells, Inc.* (1943) 103 Utah 441, 135 Pac. 2nd 906, and the first sentence above quoted appears in the body of the court's opinion in that case.

Appellant therefore wishes to review those facts in this instant case which indicate that the plaintiff was an active promoter of the defendant corporation.

Plaintiff admitted on cross-examination (R. 97) and in his affidavit in support of the Motion for Summary Judgment (R. 22) that he first learned of the proposed corporate defendant in August of 1955, and admitted in the said affidavit that he paid $5,500.00 "which at his option" was to be issued either in Epsolon Uranium Company or in Noy-Burn Milling and Processing Company, the corporate defendant herein; as further evidenced by receipt introduced as Exhibit P-10. At the time of the

trial, plaintiff was insistent that all he purchased in August or September of 1955 was Epsolon stock, and the Chadburn process belonged to the said Epsolon Company. He said further that his first knowledge of the corporate defendant coming into being was at the December 3rd meeting at the Newby home. Yet, under cross-examination (R. 99-101.) he testified that he knew of the proposed defendant corporation; that further, he knew the process was the invention of Chadburn, and that the proposed defendant corporation was being organized to use that process. He learned all this as of August of 1955 and not for the first time in December of that year.

Plaintiff in his testimony claims the "offer" of stock in the defendant corporation that he "accepted" first occurred in a conversation with Dell Wood January 3, 1956 (R. 78-79), the substance of which was that if he did pay $10,000 into the Noy-Burn Company, he would be given 15,000 shares and a directorship on its board. In contradiction of this proposition there are several stubborn pieces of evidence. First, plaintiff's sworn statement in his affidavit above noted; Exhibit P-10 above noted; and the minutes of Noy-Burn organizers attached to the deposition of Dell Wood marked "Exhibit 1-C" and "Exhibit 1-D," dated respectively December 2 and 3, 1955 and January 13, 1956. The pertinent paragraph from the December minutes read:

> "Motion by Deloy Carter that we carry the working agreement of a joint venture as it stands with ten men and that we agree that the joint venture group back Mr. Clark Chadburn on his per-

sonal agreement in the stock issue he promised to Mr. Dee Schuaneveldt."

And from the January minutes:

> "Dell Wood and Ted Beavis was appointed to see Mr. Dee Schuaneveldt and again work out the differences in accepting his $10,000 for the Noy-Burn Milling and Processing Company. After some long discussions and everyone coming to agreement, the following was accepted:
>
> > "Mr. Dee Schuaneveldt agrees again that he will still accept the agreement set forth some weeks ago, which were on December 3, 1955, and he will give this milling joint venture the sum of $10,000 as soon as he receives this from the sale of his farm."

In addition is the testimony of Dell Wood (R. 188) that the "commitment" of Clark Chadburn to Mr. Schvaneveldt was a commitment to give the plaintiff 15,000 shares of Noy-Burn stock upon his investing $10,000.00.

The plaintiff's position seems to be that he felt the milling process was all the property of Epsolon Company in which he was interested; that in the December meeting he first learned of Noy-Burn and attempted to dissuade Mr. Chadburn from putting the milling process into this new corporation yet to be organized. That thereafter, upon learning of the formation of the new company, he bought stock in it, having been solicited to do so repeatedly by each of the individual defendants prior to his making any payment.

As above noted, the facts are the plaintiff knew of the separate corporation to be formed as of August or Sep-

tember, 1955. He knew the invention was not Epsolon's property, but rather Chadburn's, as further corroborated by the testimony of H. L. Newby (R. 160-163), and he attempted repeatedly to get stock in it, reminding Mr. Chadburn of a personal commitment to sell him Noy-Burn stock in December, and further negotiating to obtain a directorship in addition in January.

In that connection, the trial court (R. 151) pointed out the obvious inconsistency of plaintiff's position regarding the December meeting, and asked the plaintiff what business it would have been of the defendants organizing Noy-Burn to be concerned with or enter in their minutes any reference to a "commitment" of Chadburn to sell Epsolon stock to the plaintiff. The plaintiff's answer was evasive but in substance was that he was concerned about protecting the Epsolon Company in keeping the venture all as one big company.

Without multiplying words, the record is replete with references to the effect that plaintiff was intimately associated with all the defendants during this period of developing the mill; that he was familiar in detail with the proposed process; that he knew one reason for organizing the corporate defendant was to register the stock with the State Securities Commission, which had not been done with the Epsolon Corporation.

Further, during January of 1956 plaintiff sold some of his own stock in the Epsolon Company (at a 1500% markup) to the Jorgensens and Yearsleys, at the same time making his payments on the Noy-Burn stock. He

couldn't remember whether or not he used the money received from them to buy his Noy-Burn stock (R. 139). He further admitted that when he sold the Epsolon stock he told the Jorgensens and Yearsleys of the proposed Noy-Burn and the desirability of getting stock in that company. In his own testimony he insisted that he told them he was selling them his own personal Epsolon stock (R. 128-144). Later in the testimony plaintiff admitted he had not intended to sell his own stock and he did not wish to do so. In the "last conversation" (R. 159-160) he told them if he could not get the stock somewhere else, he would sell them his own. When Mr. Jorgensen testified, he said Schvaneveldt told them the Epsolon stock they were purchasing in January of 1956 was not his personal stock but rather belonged to a Nevada golf pro named Linstrom, and at the same time encouraged Jorgensens to buy into the Noy-Burn Company (R. 197). The Jorgensens did in fact pay plaintiff $1,000 for Noy-Burn stock in April of 1956. By way of defense plaintiff insisted that this sale was not to promote Noy-Burn Company, but rather a private sale of his own Noy-Burn stock. Jorgensen's testimony was that plaintiff never disclosed to him that the Noy-Burn stock that they were purchasing belonged to plaintiff; that in fact plaintiff helped the Jorgensens to sell some of their Epsolon stock in order to buy into the Noy-Burn Company (R. 200).

Sometime in January of 1956 plaintiff attended a meeting in Logan, Utah at the home of W. E. Beaves, at which meeting Epsolon Company stockholders were present. The testimony of Beaves (R. 176, 177) indicated that

Schvaneveldt indicated to the Epsolon stockholders at this meeting that Noy-Burn Company owned the milling process, thought it a good venture and told the Epsolon stockholders he would "negotiate" on behalf of Epsolon with Noy-Burn Company concerning the process, thus enhancing their own investment. Plaintiff, in his own testimony (R. 125), denied making any statement of negotiating on behalf of Epsolon with Noy-Burn to share the milling process and profits. When he was confronted, however, with Exhibit D-7 which was a letter containing words of that import, he admitted having written the letter.

Following payments made by the plaintiff, he admitted (R. 110-111) that it was explained to him the only reason he was not immediately made a member of the board of directors of the new company was that his name did not appear in the drafted Articles of Incorporation about to be filed; that he was further told that after incorporation he would be voted a member of the board of directors of the defendant corporation.

In summary, it appears this plaintiff knew of the proposed defendant corporation months before it came into being when he paid his first money in August or September of 1955 to reserve the option to buy into it. In December he reminded Chadburn of that commitment, and the others agreed to permit him to come into the enterprise upon a payment of $10,000 for which he would receive 15,000 shares of stock and a directorship. In January of 1956 he sold some Epsolon stock in order to buy into the enterprise, paying $8,000 of the $10,000 committed, at the same time telling others, specifically the Jor-

gensens and Yearsleys and Epsolon stockholders, of the Noy-Burn Company's prospects. He wrote a letter on behalf of Epsolon to Noy-Burn discussing division of profits. In February the Noy-Burn Company came into being. In April he in fact sold some Noy-Burn stock.

It would, therefore, appear that under Fletcher's definition, plaintiff has done a good deal more than "very little" in joining with the first movers to launch the Noy-Burn enterprise. He further was clearly doing "something in the way of speculation for his own interest and not merely acting as the agent of another."

POINT II

THE STATUTE RELIED UPON WAS NOT DESIGNED OR INTENDED TO APPLY TO PARTIES SUCH AS THE PLAINTIFF WHO ARE POSSESSED OF ALL THE FACTS SUCH A REGISTRATION WOULD PROVIDE.

It is the appellant's position that the statute relied upon by the plaintiff was designed to protect the stock-buying public by requiring issuers to divulge pertinent information through registration with the State Securities Commission. Appellant contends that the plaintiff was possessed of all possible information which a registration in this instance would have provided.

Appellant further urges that this court construe our Securities Act in the same manner as the United States Supreme Court has construed the registration portion of the Securities Act of 1933.

In the case of *Securities and Exchange Commission v. Ralston Purina Company*, 346 U.S. 119, 73 Supreme

Court 981, 97 Law Edition 1494, the court said in defining that Act, at page 124 the following:

> "Exemption from the registration requirements of the Securities Act is the question. The design of the statute is to protect investors by promoting full disclosure of information thought necessary to informed investment decisions. The natural way to interpret the private offering exemption is in light of statutory purpose. Since exempt transactions are those to which there is no practical need for (the bill's) application, the applicability of § 4 (1) should turn on whether the particular class of persons affected need the protection of the Act. An offering to those who are shown to be able to fend for themselves is a transaction not involving any public offering."

Again, continuing at page 125:

> "The exemption, as we construe it, does not deprive corporation employees, as a class, of the safeguards of the Act. We agree that some employee offerings may come within § 4 (1), e.g. one made to executive personnel who because of their position have access to the same kind of information that the act would make available in the form of a registrative statement. Absent such a showing of special circumstances, employees are just as much members of the investing 'public' as any of their neighbors in the community."

And finally, at page 127:

> "The focus of inquiry should be on the need of the offerees for the protections afforded by registration. The employees here were not shown to have access to the kind of information which registration would disclose. The obvious oppor-

> tunities for pressure and imposition make it advisable that they be entitled to compliance with § 5."

This Ralston case has since been often cited and approved by the United States Supreme Court--most recently in *Denver Union Stock Yard Company v. Producers Livestock Marketing Association,* 356 U.S. 282, 287; 78 Supreme Court 738, 741; 2 L. Ed. 2d 771, 775. It has also been quoted by the Colorado Supreme Court in *Central Bank and Trust Company v. Robinson,* 137 Colo. 409, 417; 326 Pac. 2nd 82, 87.

In relation to this argument the facts show that the plaintiff had virtually daily contact with most, if not all, of the other organizers of the corporate defendant, and he had long discussions with each of them about its prospects; that he knew about the process and the mill. He attended most, if not all, significant meetings of the group and was mentioned by name in the minutes of at least two of said meetings, and he encouraged other people to invest in the proposed corporation, all prior to its gaining a corporate existence. In short, it would appear he was as well informed about the corporation as any of the incorporators.

A registration, therefore, with the State Securities Commission could not afford him with any information that he did not already possess.

In that connection, the Record at Page 159, lines 12 through 15 read:

> "THE COURT: Go ahead, sir, whether you considered yourself one of the general public or

someone receiving special consideration in the purchase of this stock.

"A. I considered myself as someone being a special purchaser."

This testimony of the plaintiff indicated that he felt at the time of the purchase he was a special purchaser—in short—an insider.

CONCLUSION

For the foregoing reasons, appellants respectfully contend that this court should order that the judgment of the District Court be reversed.

Respectfully submitted,

GORDON A. MADSEN

Attorney for Defendants and Appellants