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Utah Supreme Court

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Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

MELVIN BRADSHAW,
Respondent,

—vs.—

ENGENE N. DAVIE and
MRS. ENGENE N. DAVIE,
Appellants.

Case No. 9094

BRIEF OF RESPONDENT

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IN THE SUPREME COURT OF THE STATE OF UTAH

MELVIN BRADSHAW,
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—vs.—

ENGENE N. DAVIE and
MRS. ENGENE N. DAVIE,
Appellants.

Case
No. 9094

BRIEF OF RESPONDENT

STATEMENT OF FACTS

While in most instances the appellants' statement of facts is substantially correct, there is no question that it is intended to show that the respondent was the moving party in initiating the partnership agreement. Perusal of the testimony of both the appellant and the respondent will indicate that both parties took part in the negotiations and that they were over a considerable period of time. Regardless of what was the moving factor in these negotiations, on the 30th of March, 1957, a partnership agreement came out of these negotiations, which has been identified in the pleadings as plaintiff's Exhibit 1, which is the only written agreement that was actually

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signed by both of the parties. As a result thereof, the parties entered into said partnership and made some limited attempt to develop the property. The trial court had to find what property was involved in the partnership, who was responsible for the breach, and what damages should be awarded, if any. While it may have been the appellants intention not to pay to the respondent the $400.00 a month for his labor, at the same time the appellant well knew the agreement requiring the respondent to put in his time on the partnership, left no way for him to make a living for his wife and family. Under these conditions, when the $400.00 simply did not come, even though demanded by the respondent, and the appellant never refused to pay it, but simply failed and neglected to pay it, there can be only one conclusion, and that was that something had to happen. The Memorandum of Decision of the court and the Findings of Fact and Conclusions of Law take care of this fact situation and state the courts findings pertaining to this fact situation.

After the signing of the agreement on 30 March 1957, upon which this partnership was founded, the respondent went ahead and put in full time upon the claims and continued putting in full time on the work of the partnership, until such time as he was stopped from doing so because of the equipment being taken away from the partnership. This equipment was taken away from the partnership because of the failure of the appellant to make the payments on same, which he had agreed to make out of the partnership agreement of 30 March, 1957. At this time there is no question that the partnership had been breached by the appellant because he had failed to provide the equipment that he had agreed to provide. This failure to provide the equipment that the appellant had agreed to provide, was not caused by the respondent demanding money, but was caused specifically by the factor of the lack of profits and the appellant could see they were not going to get any contract and that the matter was not an economical, feasible operation. (See

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Report, page 104, line 20). "I would say that the factor of lack of profits and the fact that it did cost more to strip and mine and haul this material to the railroad is certainly an important thing. And it was obvious that the cost was higher than what we were getting out of it. And then there were other circumstances involved. And by that time I knew other things about this property; and we both know things about it now that haven't even been mentioned yet, that also increased the cost factor." Based upon the appellant's own testimony as cited above, it becomes quite apparent that he reached a conclusion that there was no profit in this matter and that it was his intention to break the contract. That he did so by failing to make the payment to keep the equipment around so that the claims could be worked.

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STATEMENT OF POINTS

Point I

THE TRIAL COURT DID NOT ERR IN FAILING TO DISMISS THE PLAINTIFF'S ACTION.

Point II

THE TRIAL COURT DID NOT ERR IN GRANTING JUDGMENT AGAINST DEFENDANT.

Point III

THE TRIAL COURT DID NOT ERR AS A MATTER OF LAW IN AWARDING PLAINTIFF THE JUDGMENT AGAINST THE DEFENDANT FOR $11,562.08.

Point V

THE TRIAL COURT DID NOT REFUSE IN ITS ACCOUNTING ALL FUNDS RECEIVED BY THE PLAINTIFF FROM ANY TRANSACTIONS.

Point IV

THE TRIAL COURT DID NOT ERR IN ALLOWING PLAINTIFF JUDGMENT AGAINST THE DEFENDANT.

Point VI

THE ACCOUNTING ADOPTED BY THE TRIAL COURT WAS NOT IN CONTRAVENTION OF THE RULES OF DISTRIBUTION AND ACCOUNTING OF PARTNERSHIPS.

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ARGUMENT

Point I

THE TRIAL COURT DID NOT ERR IN FAILING TO DISMISS THE PLAINTIFFS ACTION.

At any time when an accounting is refused or not furnished there is no question that an action may be maintained in equity for such an accounting and that this is a matter of equity jurisprudence. In the case of Decorso vs. Thomas et al. found in 89 Utah 160, 50 Pac. 2d 951, which is one of the later cases decided by the Utah State Supreme Court, it was held that the action of one partner for an accounting and for the dissolution of a co-partnership is a proper subject matter of equity jurisprudence. In this case the court cited 5 Pomeroy's Equity Jurisprudence, 2nd Edition, page 5223, Section 2363, in which this rule was enunciated.

The cases cited by the appellant in support of his Point I all contend that while at law it is not proper to bring an action for accounting, that it is a proper equity action. In the case cited by appellant of Bankers Trust Co. v. Riter, 56 Utah 525, 190 Pac. 1113, in which the universal rule has shown on Page 7 of Appellants' Brief was set forth, the case goes further and holds that the trial court judgment should be affirmed and in affirming this judgment that an action for accounting may be maintained if it appears necessary and a judgment rendered based upon said accounting. Also in the case of Jennings v. Pratt, 19 Utah 129, 56 Pac. 951, in which appellant quotes the rule, "The rule is doubtless well settled that, in the absence of a settlement of accounts, one partner cannot sue another at law upon a demand which has grown out of a partnership transaction, but, where the claim of one partner against co-partners arises out of a transaction which is not properly a partnership matter, the rule does not apply." In Jennings v. Pratt, the case was actually

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on a question arising outside the partnership and the court held that the rule was not applicable in that particular case. The general rule pertaining to this matter is found in 58 A. L. R. 623, and 168 A. L. R. 1091 and is set forth as follows: "The remedy of a co-partner who desires to recover his share of the firm assets is through an equity action for an accounting and a settlement of the partnership affairs."

It appears that appellant in his Brief has attempted to separate law and equity and has also failed to give effect to the joinder of law and equity. Every authority cited by the appellant in support of his position in Point I of his Brief carried to the conclusion actually holds that the proper remedy is to bring an action for accounting in equity. Certainly the joinder of law and equity into one court system, as we now have the matter, indicates that the proper place to bring an action for an accounting is in the present courts.

To carry appellant's position in Point I to its utter absurdity produces the following result. You can not have an action on a partnership without an accounting. You can not get an accounting at law, therefore, if a partner refuses to give an accounting, there is no remedy. Certainly, this is not the position our courts should hold and certainly, it is an utter absurdity to urge this position.

Point II

THE TRIAL COURT DID NOT ERR IN GRANTING JUDGMENT AGAINST DEFENDANT.

In relation to Point II of the Appellant, the Court's attention is invited to the following items: (1) There must be some great error in the report of this matter, the copy of the Report in the possession of the respondent, where cited at page 8 in Appellants' Brief at page 389-392 ap-

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parently does not read the same as the copy of the Report in the possession of Appellant. In the Appellants' Brief it is apparently questioning Dr. Davie, the defendant. In the copy of the Report in the possession of the respondent, this part of the testimony and the Report is the testimony of Mr. Bradshaw.

(2) On page 329, which in the Brief purports to be the testimony of the plaintiff in the copy of Report in possession of the respondent, it is the testimony of Dr. Davie.

(3) On page 12 of the Appellants' Brief where page 383-384 is cited, as testimony of defendant it actually appears in the copy in the possession of the respondent as the testimony of Mr. Elton. At the trial court in its Findings of Fact and Conclusions of Law in Finding No. 15, sets out "That the defendant did not advance any further money for purchase of equipment for use in operation of said mining claims and on account of the repossession of the Caterpillar tractor and diesel tractor mentioned and the failure of the defendant to furnish other equipment for operating said mining claims, the plaintiff ceased work upon said claims on or about September 14, 1957."

On page 13 of Appellants' Brief appellant cites Jordan V. Madsen, 69 Utah 112, 252 Pac. 570 in support for his contention that the plaintiff renounced that agreement and that said renouncement amounted to a breach of the agreement. This is, of course, a sales case that has been cited and is not a partnership case and in all probability, before this particular citation and the restatement of contracts and such items as are cited therein comes into effect, there must be a finding of renunciation by the plaintiff. At no time was there a renunciation of the agreement by the plaintiff. What the plaintiff demanded was a completion of the agreement and the payment of the moneys due under the agreement. The court's finding as quoted above to the effect that the plaintiff ceased

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work on a specific day, due to the defendant's failure to provide the equipment he was supposed to provide under the terms of the agreement amounts to a finding that up to that day, the plaintiff worked in conformity with the agreement and that the breach of the agreement was by the defendant failing to furnish this equipment.

Point III

THE TRIAL COURT DID NOT ERR AS A MATTER OF LAW IN AWARDING PLAINTIFF THE JUDGMENT AGAINST THE DEFENDANT FOR $11,562.08.

On page 15 of Appellants' Brief appellant cites Sec. 48-1-37, Utah Code Annotated 1953 as authority for his statement in his Point III that as a matter of law the trial court erred in awarding plaintiff the judgment against defendant for $11,562.08 based upon a partnership transaction and makes the amazing statement that Dr. Davie was a partner and as such had equal authority with plaintiff to buy or return equipmennt without such being regarded as wrongful conduct. Apparently the appellant takes the position that this is sufficient reason to give away valuable property without making any attempt to mitigate a loss or any other item thereon. Again to carry this position to its absurdity, as long as one of the partners gave away all of the partnership property there should be no liability to the other partner. If one were going to criticize the trial court's finding that the assets of the partnership were $14,889.49 less of the value due to the appellant giving away and allowing the repossession of these items of machinery, one should say that the value of the machinery as assets of the partnership were the purchase price of the machinery less the depreciation and that this was the loss, caused by the giving away of this property. If one took this position it would of course, mean that this machinery was a great deal more valuable than the $14,889.49, which the court found.

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While the respondent does not believe that the court erred in this finding and does not, by bringing these figures up, wish to make this complaint or any implication of error, certainly this figure adds to the loss to the partnership occasioned by the allowing of the repossession of this equipment is very conservative. The purchase price of the diesel tractor was $17,967.00. The diesel tractor to pull truck with at a purchase price of $3500.00. The total of these items amounts to S21,476.00. Had the appellant furnished the $20,000.00 for these purposes as he had agreed to furnish and had they been applied on these particular items, it is quite possible that the loss instead of being in the neighborhood of $14,000.00 was actually in the neighborhood of $21,476.00. Certainly the trial court's action in limiting this loss to the unpaid balance rather than the full purchase price was conservative and certainly the appellant is the last person in the world that should take exception to this finding in the trial court.

Point IV

THE TRIAL COURT DID NOT REFUSE IN ITS ACCOUNTING ALL FUNDS RECEIVED BY THE PLAINTIFF FROM ANY TRANSACTIONS.

In the first place the trial court did not refuse to consider the alleged "secret funds." Actually there was nothing secret about them. They were openly accounted for by the respondent in his direct examination. The trial court simply found there was no profit from the sale of such materials after allowance for expense of labor and transportation to market. If appellant takes exception to this finding, even though on page 15 of Appellants' Brief appellant cites "It is even more astound when one considers that an unprofitable operation is a basis, in and of itself, for dissolution." Apparently appellant takes the attitude that an unprofitable operation is

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grounds for dissolution and is grounds for the appellant not bringing forth the money, but even though it was unprofitable that all the operation that the respondent had should be accounted and paid. It appears to be rather inconsistent that on page 16 of Appellants' Brief, appallant takes the position "The Partnership is entitled to the reasonable market value of 1066 tons of the pumice material and Bradshaw is required by law to account for it." And yet in the Report on page 104 at line 20 appelant takes the position that the lack of profit and the cost items were the very items that caused the failure of this partnership and caused the dissolution. It would seem that it all depends upon who is conducting the operation whether or not a non-profit item of this nature should be considered. Appellant apparently failed to consider the Section of Utah Code Annotated same being 48-1--18, which is quoted by appellant on page 16, "Every partner must account to the partnership for any benefit, and hold as trustee for it any profits, derived by him without the consent of the other partners from any transaction connected with the formation, conduct or liquidation of the partnership or from any use by him of its property." Apparently appellant has entirely missed the gist of this Section. There is a part in this section to the effect that there has to be profit. When the trial court specifically found that no profit was realized from the sales of such material after allowing expense of labor and transportation to market, then certainly it takes this Point IV of appellants' Brief entirely out of consideration. The Code itself, removes this.

Point V

THE TRIAL COURT DID NOT ERR IN ALLOWING PLAINTIFF JUDGMENT AGAINST THE DEFENDANT.

Appellants' citation to B. T. Moran, Inc. v. First Security Corporation, 82 Utah 316, 24 Pac. 2d 384, is entirely

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out of line in this particular case. The B. T. Moran, Inc. v. First Security Corporation case has a question of a contract for the production of goods and there is no partnership question in it whatsoever.

Finding No. 27 is an express finding of an amount of money owed by the appellant to the respondent under the original agreement. Finding No. 28 of of the Findings of Fact and Conclusions of Law is an express finding that because certain items are lost to the partnership and assets of the partnership are reduced by the then value of said items, this is an express finding of a reduction of the value of the partnership. Certainly any item that reduces the assets of the partnership is harmful to all partners and is certainly a proper finding of damage.

Point VI

THE ACCOUNTING ADOPTED BY THE TRIAL COURT WAS NOT IN CONTRAVENTION OF THE RULES OF DISTRIBUTION AND ACCOUNTING OF PARTNERSHIPS.

It seems as though appellants' position is that appellant should be reimbursed for any advances made by appellant but that it would be improper to reimburse the respondent for the property contributed to the partnership by the respondent. Can it be any more said that a cash advancement for an interest in a partnership is any more of a contribution than the property which is the basis of the entire partnership? By the terms of the agreement, neither the contribution of the appellant was to be returned to him except by profits of the partnership, nor was the twenty-five cents per ton royalty to the amount of $20,000.00 to be returned to the respondent except on the profits of the partnership. Thus the court so found. Until there were profits of said partnership in an operation from which these items could be paid, there was no duty

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of the partnership to pay these items to either party. The court has very properly eliminated them from consideration. If a contribution is going to be considered, then it would be entirely proper to consider the contribution of the respondent and also at the time of the partnership agreement apparently both parties felt that the property being contributed by the respondent was of sufficient value to justify considerable expenditure in developing same. On page 21 of Appellants' Brief the appellant makes the following statement, " It is obvious and apparent that the contributions by the partners to the partnership were so manifestly disproportionate that a conclusion of law that the partners should be declared equal owners in the remaining assets cannot possibly be justified as a matter of law or equity." If this statement is correct, then it must be said that in entering into the partnership agreement on an equal basis neither of the partners had any idea of what they were doing There is no question that certain moneys were to be advanced and paid out of the partnership profits. There is no question that certain royalties were to be paid to the respondent out of partnership profits. The $5,000.00 to be paid by the appellant to the respondent was never to be repaid in any manner unless it was to be repaid out of the partnership profits. Until all these items accrued and there were profits, there was no provision whatsoever for the repayment of any item. Certainly if the appellant felt that the property was of sufficient value to justify the investment of this type of money in this operation then the property itself was of sufficient contribution to equal all of the moneys that were to have been contributed by the appellant.

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CONCLUSION

The judgment of the trial court should be affirmed.

Respectfully submitted,

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