

1960

Melvin Bradshaw v. Eugene N. Davie and Mrs. Eugene N. Davie : Brief of Respondent in Support of Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MELVIN BRADSHAW,

Plaintiff and
Respondent,

—Vs.—

EUGENE N. DAVIE and
MRS. EUGENE N. DAVIE,

Defendants and
Appellants.

FILED

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Supreme Court, Utah

Case
No. 9094

Respondent's Brief in Support of Petition for Re - Hearing

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STATEMENT OF FACTS

The above entitled matter was tried without a jury before the Honorable Will L. Hoyt, in the District Court of Beaver County, state of Utah, and resulted in a judgment in favor of the plaintiff, Melvin Bradshaw, which provided for payment of certain debts owed by the partnership, one half by each of the parties, provided that subject to the payments of the debts, the plaintiff and

the defendant shall each be, and are hereby adjudged and declared each to be the owner of an undivided one-half interest in and to the partnership property, which was described thereafter including accounts receivable, personal property and a long list of mining claims. Thereafter the judgment provided for judgement against the defendant for the sum of \$11,562.08 with interest thereon, at the rate of eight per cent per annum from the judgment date until paid. Said judgment date being the 23rd day of May, 1959. Thereafter, an appeal was taken by the defendants and appellants and the matter was duly argued before the above entitled court and resulted in a decision filed on 7 March, 1960, which ratified the trial court judgment with one exception and that was a portion of the trial court judgment which was supposedly based upon value of equipment and the sum affected by this modification was \$7,444.79.

STATEMENT OF POINTS

Point I.

The judgment of the trial court is not inconsistent with the opinion of the appellant court.

ARGUMENT

Point 1.

The judgment of the trial court is not inconsistent with the opinion of the appellant court.

This matter that was awarded by the trial court was a portion of consideration for the original agreement. Paragraph 2 of the original agreement upon which this entire partnership and action was based, provides as follows: For a fifty percent interest in these claims, Eugene

N. Davie agrees to advance what monies were needed to purchase equipment to operate these claims. The equipment costs and other costs of operating said claims are to be paid from the proceeds of the company plus six per cent raturum on all money advanced.

Parties at the time of the execution of the partnership agreement contemplated under this paragraph 2, that certain equipment would be furnished; this equipment in effect is, defendant's consideration for one half interest in the claims. The report, page 15, gives the defendant's concept of this equipment at the time the partnership agreement was drawn. On line 19 it reads as follows: "He stated that the capital that he needed would be somewhere between \$15,000 and \$18,000, and that specifically what he needed was a large truck, one that would carry around twenty tons of this type of material. And he specified a Diesel type of truck with a trailer attached to it, a semi.

And further there was overburden on this type of deposit and he needed a caterpillar tractor to remove the overburden so that he could mine it. He advised me that he had a piece of loading equipment there, a shovel, mechanical shovel, which would be satisfactory for the time being to load this material into the truck. And with this equipment in mind we could arrive at some financial figure that he would need to carry out this operation of mining and hauling the pumice to the railroad cars to fill the orders which he had."

Also paragraph 5 of the basic agreement reads "All equipment purchased and all claims owned now or in the future owned in this perlite area belong to the partners share and share alike." Under this paragraph there is no question that the machinery that was contemplated by paragraph 2 of the basic agreement which was to be paid by Dr. Davie was to belong to the partnership that any loss in this machinery was a loss to each of the partners.

The effect of the Supreme Court decision in this

matter is to turn over to the defendant and appellant one half of the benefits of the partnership but to free him from obligation of paying his purchase price for same.

In the reported proceedings of the trial on line 29 on page 62, in answer to the question "Doctor, will you read paragraph 5 and tell us what you meant by it when you wrote the agreement?" Dr. Davie stated, "It reads: All equipment purchased and all claims owned now or in the future owned in this perlite area belong to the partners share and share alike. It is understood that there may be other minerals of commercial grade, and if these are mined on claims owned by the partnership in the pumice-perlite area, any profits shall be equally shared by the two partners." The doctor's testimony continues on page 63 at line 7; "Now then in general the meaning of this first part here is that our claims and our equipment such as they were, meaning that I had agreed to get a Caterpillar tractor and a truck for him, and he had certain equipment there, and there were certain properties that we either owned at the time or planned to locate, and that we should own these things together on a fifty-fifty or share and share alike basis."

Under these conditions, there can be no question but that it was the duty of Dr. Davie to furnish this equipment as part of his purchase price for the claims and that the partners were to share the claims fifty-fifty and the equipment fifty-fifty.

An examination of the basic agreement as set forth in reply brief of appellants shows that the only thing that Bradshaw was getting out of this partnership was this equipment. Were it not for the need of this equipment there would have been no partnership. It does not seem equitable to form a partnership and then upon breaking the partnership up, split the assets half and half between the parties, with the exception of the purchase price of the party coming in. It should be remembered that when this partnership was agreed upon that Mr. Bradshaw had the claims and felt he had the market. The only thing he needed was a couple of pieces of additional equipment

to produce the property. The partnership agreement made provision whereby this equipment was to be provided by the defendant. In the event the court sees fit not to take into consideration this purchase price, then certainly there should be an attempt to place the parties back in their original positions and if Dr. Davie is not going to be held for the purchase price of the equipment, then all the claims should be returned to Mr. Bradshaw.

It was with this thinking that the matter was allowed to go to judgment in the trial court on the present basis upon the thinking that all the assets would be evenly divided between the two members of the partnership and that the assets included not only the claims and the few items of equipment still on hand, but also the debt to the partnership whereby Dr. Davie had agreed to provide certain equipment for one half interest in the partnership. The effect of the present Supreme Court decision on this matter is to allow Dr. Davie entirely free from any obligation, to give him the items that he bought with this equipment. It is the opinion of the undersigned that the equipment should have been accepted by the trial court at the total price not the unpaid portion as it is the total price of the equipment that the partnership has lost by the breach of the partnership agreement by Dr. Davie. Under these conditions, the only thing that can be said about the present opinion of the Supreme Court is that it allows failure of consideration on Dr. Davie but allows him to keep what he purchased.

In reading the decision of 7 March 1960 of the above entitled court it appears that the above entitled court endorses that portion of the trial court judgment whereby the assets of the partnership are divided between the two partners. This, I believe, we are all required as a matter of law to be heartily in accord with. Note 6 of the Supreme Court decision which reads, "To assert that because the balance was not paid, the value of partnership assets was reduced by the amount of such balance is not quite accurate. At the time of repossession the asset of the partnership was the equity in the equipment,

not the unpaid purchase price." The second statement is not entirely true. At the time of the repossession the asset of the partnership was the equity of the equipment plus the duty of Dr. Davie to pay the remaining purchase price. It is the belief of the undersigned that Dr. Davie still owed to the partnership, the unpaid portion of the purchase price at the time of the repossession and that in addition, partnership assets were reduced the paid portion of the purchase price. It can be said that because Dr. Davie breached the agreement and failed to pay the remaining portion of the purchase price that he should be free from any duty to the partnership to pay said remaining portion of the purchase price. To complete the partnership agreement without breach, it would have been necessary for Dr. Davie to advance this purchase price. There was no possibility of him getting his money back until such time as it could be paid from the proceeds of the company. He was provided interest on this money. The very item which has been found to be the breach of the partnership agreement by Dr. Davie by the trial court, the failure of Dr. Davie to complete the purchase of this equipment, and in which the Supreme Court has endorsed as the breach, is not allowed as a matter of damage by the Supreme Court. To the undersigned, this is quite hard to rationalize. If there was no duty on Dr. Davie to pay for this equipment, then the failure to pay should not have been a breach. If there was a duty to pay for this equipment, then the unpaid portion of the purchase price certainly is an asset of the partnership until it has actually been paid. The undersigned fails to see how we can say that failure to pay is reason for breach of agreement and is the breach of agreement, and at the same time it is not an asset of the partnership. There was no partnership without this equipment. The partnership agreement should be enforced especially as to consideration.

CONCLUSION

In conclusion respondent urges a further hearing on this matter and that upon same the above entitled court revise its opinion of 7 March 1960 in such a manner that the amounts for machinery still unpaid, which was the purchase price of one half interest in the partnership, be included as an asset of the partnership and that the judgment of the trial court be affirmed.

Respectfully submitted,
Patrick H. Fenton
Attorney for Plaintiff
and Respondent