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Integrita, LLC, Wendy Harrison & Design-Build Solutions, LLC Appellants, vs. Utah Labor Commission & Scott Moulton, Respondents

Utah Court of Appeals

39140

IN THE UTAH COURT OF APPEALS

INTEGRITA, LLC, WENDY HARRISON & DESIGN-BUILD SOLUTIONS, LLC Appellants, vs. UTAH LABOR COMMISSION & SCOTT MOULTON, Respondents.	Appellate Case No. 20150110-CA

BRIEF IN REPLY TO RESPONSE BRIEF OF UTAH LABOR COMMISSION

Appeal from Decision of the Third Judicial District Court, Salt Lake County

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A. NO LIABILIY EXISTS FOR MOULTON'S WAGES UNDER ASSOCIATION ARGUMENT UNDER *U.C.A.* §34-28-2

The Respondent/Appellee the Utah Labor Commission (the "Commissioner") appears to argue that the Petitioners/Appellants Integrita, LLC, Wendy Harrison & Design-Build Solutions, LLC (collectively "Harrison" and separately "Integrita," Wendy Harrison or "DBS") argument "misses the point" and argues that *U.C.A.* §34-28-2 does not require "that the employees working for an unincorporated business organization that is not a separate legal entity must be employed by the association as opposed to the persons who created the association." [Arg. Pg 11 Appellee Brief]

The Commissioner is incorrect in claiming that *U.C.A.* §34-28-2 does not require that the employee must be hired by the association in order to hold Harrison liable for Moulton's wages as members of an association. *U.C.A.* §34-28-2 does require that the association itself had to employ Moulton in order to create liability of the association and its members. The Utah Supreme Court concurs. The Utah Supreme Court in *Heaps v. Nuriche, LLC*, 345 P.3d 655 at ¶14, 2015 UT 26 stated, "The statutory

definition of *employer* includes 'every person, firm, partnership, association, corporation, receiver or other officer of a court of this state, and any agent or officer of any of the above-mentioned classes, *employing any person in this state.'* UTAH CODE § 34-28-2(1)(c) (emphasis added). While the phrase 'agent or officer of any of the above-mentioned classes' encompasses a large group of individuals, that phrase is narrowed by the last clause of the definition. The last clause—'employing any person in this state'—modifies each of the terms in the preceding list. Thus, the statute limits the definition of *employer* to one who employs."

Harrison may have incorrectly assumed that the Trial Court concluded that the association between Integrita and TJ Enterprises & Acoustical, Inc. ("TJ Enterprises") operated under a common name, "Integrita." This assumption may have been in error as the Trial Court does not expressly state this conclusion, but kind of suggested a common name when it stated that the contracts with Horizon Retail & Construction, Inc. ("Horizon") were in the name of Integrita and "all work was carried on in that name." (*See* bottom of page 8, Findings of Fact and Conclusions of Law and Order [711-726]). Arguably this is incorrect as Horizon was also a party to the contracts and as the general contractor, "all of the work" would have been performed under its name as well. There was no common name for any association.

The Utah Supreme Court has also addressed the issue whether there is a culpable association. In *Weber County v. Ogden Trece,* 2013 UT 62, 321 P.3d 1067 (Utah 2013) the Utah Supreme ruled that criminal gangs can be sued as an association under *URCP* Rule 17(d). This Rule demonstrates that there are two requisites for suit to be filed against an association. First requisite is where two or more persons conduct business and the second requisite is such business is under a **common name** of the association. (Emphasis added) *See URCP* Rule 17(d) and *Weber County v. Ogden Trece,* ¶38, *id.* This is supported by the Utah Supreme Court's decision in *BYU v Tremco*, 110 P.3d 678, 684 (Utah 2005). The Court explained at ¶17, "Rule 17(d) is procedural, not substantive. It contemplates a situation where a plaintiff brings suit against two or more associates that have joined together under a common name to transact business. By its plain language, [3] rule 17(d) provides that an unincorporated association may be sued under the name used by the collective associates to carry out their business. Utah R. Civ. P. 17(d)." The Court in *BYU v Tremco*, *id.* at 684 ¶19 found that BYU's argument to find Tremco and others liable under a theory they were an unincorporated association failed since there was no common name of the alleged association and furthermore because they did not sue this alleged association under a common name.

In this case we do not have an "association" because we do not have a business operating under a common name. Our argument was and is that there has to be a common name before there is a culpable association and then in order to find the association liable [and its members] it must be the employer. In this case it was stipulated by the parties that Ted Gurule hired Scott Moulton. *See* page 2 Findings of Fact and Conclusions of Law and Order, Stipulated Facts No. 3 [711-726] It is important to note that even if there were an association under a common name, the fact that it did not employ Moulton negates liability of such association under *U.C.A.* §34-28-2.

Since the Commissioner claims that Petitioners were part of an association that employed Moulton, it should also be pointed out that the Trial Court determined that the members of the association were Integrita, LLC dba Design-Build Solutions and TJ Enterprises, not Ted Gurule or Wendy Harrison or Design-Build Solutions, LLC. *See* pages 8-9 Findings of Fact and Conclusions of Law and Order [711-726].

B. NO LIABILIY EXISTS FOR MOULTON'S WAGES UNDER JOINT VENTURE ARGUMENT

We disagree with the Commissioner's assertion that sharing of losses is not a deciding factor in determining whether there is as a joint venture or whether there is not a joint venture. We addressed the issue as the Trial

Court presented this as a factor evidencing a joint venture. It is instructive to note that the Trial Court's Findings of Fact appear on their face as demonstrating that there was no sharing of losses. Integrita may separately incur a loss related to defective work under the Horizon contracts; whereas, this did not fall on TJ Enterprises. TJ Enterprises on the other hand would have been solely liable for labor expenses exceeding income. *See* page 11 Findings of Fact and Conclusions of Law and Order [711-726]. The Utah Supreme Court made it clear that sharing of losses was one of the essential elements of a joint venture, unless there was an agreement to the contrary. In this case there was no evidence or anything presented evidencing a contrary agreement. *See Ellsworth Paulsen Constr. Co. v 51-SPR-L.L.C.,* 183 P.3d 248 at ¶ 16 (UT 2008) "The only element at issue in this appeal is the fifth element: a duty to share in the losses. The duty to share losses is an important element of a joint venture. Indeed, loss sharing is a critical distinction between an investment-type relationship-in which the first four elements may be present, but investors have no duty to share in the losses beyond the amount of their investment-and a joint venture relationship. For this reason, 'a contract not to share losses weighs heavily against partnership because it is so inconsistent with the standard partnership form.' *Bromberg and Ribstein on Partnership,* § 2.07(d)(2) (Supp.2006); *see also McCulley*

Fine Arts Gallery, Inc. v. "X" Partners, 860 S.W.2d 473, 479 (Tex.Ct.App.1993) ('Generally, the absence of a provision to share losses indicates the lack of intent to create a partnership.')."

As for the statement made by the Commission "That they agreed to different measures as to how much of the profit each should receive does not alter the fact that they each had a right to share the profit." If the proceeds from Horizon exceeded the cost of labor, materials and Integrita's 2 1/2% fixed income, that would amount to profit.[1] Harrison was not entitled to any portion or share of this profit as it all went TJ Gurule under the TJ Enterprise name. *See* page 6 ¶21, Findings of Fact and Conclusions of Law and Order [711-726]. Therefore, as a matter of fact there was no sharing of profit.

As for relying on *Vern Shutte & Sons v J.R. Broadbent*, 473 P.2d 885 (Utah 1970) "being misplaced," Harrison disagrees. This is still good Utah law and well cited case for the following point of Utah law: The Utah Supreme Court at page 886 stated, "In summary we see that in order to create a joint adventure it is not enough that the parties act in concert to achieve some economic objective. The ultimate inquiry is whether the

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[1] "A common definition for 'profits' is 'the excess of returns over expenditures in a transaction or series of transactions.'" *Penelko, Inc. v. John Price Assoc.*, 642 P.2d 1229, 1234 (Utah 1982), ref. Webster's New Collegiate Dictionary (1st Ed. 1973).

parties manifested by their conduct a desire to commingle their profits, control, and risks in achieving the objective. * * * An agreement, express or implied, for the sharing of profits among the coventurers is indispensable to the creation of the joint venture; and the profit accruing must be joint and not several." (*ref. Williston on Contracts* [3d Ed.], §318A, p. 571). The Supreme Court went on to state, "The California court observed that although the profits of each of the two participating corporate entities were dependent on the overall success of the project, neither was to share in the profits or losses that the other might realize or suffer. Although each received substantial payments, neither had an interest in the payments received by the other. The court concluded that under these circumstances no joint venture existed. In the instant action, the undisputed evidence indicated that the profits accruing to either party to the Broadbent-Fredrickson contract were several and not joint. Under such circumstances the cattle feeding transaction was not, as a matter of law, a joint venture."

In this case Harrison had absolutely no interest in the profit, if any, received by Ted Gurule and TJ Enterprises and they in turn had no interest in the fixed income received by Harrison. Therefore, Harrison contends that as a matter of law no joint venture exists in this case.

C. Wendy Harrison is not Personally Liable for Moulton's Unpaid Wages.

The Commissioner contends that "Harrison held herself out as the agent of the association and is liable for unpaid wages." The Trial Court on the other hand concluded that Wendy Harrison was personally liable to Moulton pursuant to U.C.A. §34-28-2 because she was an officer of Integrita and therefore an agent of the joint venture. The Utah Supreme Court was clear that an agent is not held personally liable, unless such individual personally hired the employee. There was never any evidence presented that indicated that Wendy Harrison personally employed Moulton and as such she is not liable under *Heaps v. Nuriche, LLC*, 345 P.3d 655 at ¶14, 2015 UT 26. The Utah Supreme Court made it clear at ¶18, "In summary, we hold that Managers are not personally liable under the UPWA because they did not personally employ Employees. Instead, Managers were acting as agents of Nuriche."

The Commissioner supports his theory that Wendy Harrison as agent of the association is liable for Moulton's unpaid wages, Citing *Grazer v Jones*, 2012 UT 58, ¶11, 289 P.3d 437. However, whether she was an agent with actual authority or as the Commissioner suggests, an agent with apparent authority does not change the *Heaps v. Nuriche, LLC, id.*

D. MOULTON NOT THIRD-PARTY BENEFICIARY UNDER INTEGRITA'S CONTRACTS AND LIEN WAIVERS WITH HORIZON

The Commissioner's argument is fatally flawed in that the Commissioner cites as his authority for arguing the Contract between Integrita and Horizon expressly provides for Moulton's wages, is the contract language used by the Court at page 14, Findings of Fact and Conclusions of Law and Order [711-726]. The language used by the Court is not the language actually found in the contract itself. [*See* Stipulated Exhibits 2, 3 & 4]. Although we recited the contract verbatim in the Appellants' Brief, it is worthy of again setting forth herein, as a reading of such will dispel any notion that such indemnity agreement expressly or even remotely makes Moulton a third-party beneficiary entitled to receive unpaid wages. This indemnification provision of the Contracts between Integrita and Horizon states, "To the fullest extent permitted by law, the Subcontractor shall defend, indemnify and hold harmless the Contractor, Landlord, Tenant and the Owner, their agents, consultants, and employees from any and all claims for bodily injury and property damage that may arise from the performance of the Subcontractors Work or anyone employed directly or indirectly by any of them or by anyone for whose acts any of them may be liable"

The Commissioner does not provide any argument or legal authority in support of his position that Harrison are liable for Moulton's unpaid wages because a lawsuit was settled between Horizon and Integrita.

CONCLUSION

Harrison respectfully prays that this Court reverse the Order of the Trial Court for the following reasons:

1. The Trial Court applied *U.C.A.* §34-28-2 to declare that TJ Enterprises and Integrita formed an association which in turn employed Moulton. However, Ted Gurule employed Moulton. Therefore, under this statute an association did not hire Moulton and Integrita is not liable for Moulton's wages.

Since the alleged association does not operate under a common name, there is no basis to assign liability thereunder.

2. There was no joint venture as a matter of law as there was no sharing of profits or of losses.

3. Wendy Harrison was not personally liable for Moulton's unpaid wages under *U.C.A.* §34-28-2 because she did not personally employ Moulton.

4. Moulton was not expressly made a third-party beneficiary under

the contracts and lien waivers between Horizon and Integrita and therefore not entitled to unpaid wages from Integrita.

Dated this 26th day of February, 2016.

David E. Ross II
Attorney for Petitioners

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he mailed two copies of a true and correct copy of the foregoing BRIEF IN REPLY to the following by U.S. Mail, first class, postage prepaid, this 26th day of February 2016:

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