1965

Werner Kiepe v. Eli D. Lecheminant : Respondent's Reply Brief and Brief On Cross Appeal

IN THE SUPREME COURT OF THE STATE OF UTAH

WERNER KIEPE,
Plaintiff-Appellant and Cross Respondent,

vs.

Case No. 10310

ELI D. LECHEMINANT,
Defendant-Respondent and Cross Appellant

RESPONDENT'S REPLY BRIEF AND BRIEF ON CROSS APPEAL

Appeal from the judgment of the Third District Court for Salt Lake County, Honorable Marcellus K. Snow, Judge.

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BRIEF OF RESPONDENT

Respondent agrees with the Statement of Nature of the Case made by Appellant and with Appellant's statement of Disposition of the Case Made in Lower Court.

Respondent does not agree with all the Statement of Facts stated by Appellant and particularly as to Appellant's statement of overcharges to customers made by Respondent. Were this appeal from the final judgment, then that part of Appellant's Statement of Facts pertaining to the case resulting in the judgment entered on March 12, 1964 not herein objected to might be in order but the only record of the case on which this appeal is taken is that made subsequent to the judgment entered March 12, 1964. To go behind this record is unimportant and simply confuses the facts as to the real issue on this appeal.

Appellant states on pages 5 and 6 of his brief, that from January 1, 1963 to February 1, 1964, the partners continued to operate the business in the same manner as they had done prior to notice of dissolution. In this we do not fully agree. The fact as shown by the record is that while the partners continued on in the same office, appellant took into his possession and under his control, the appraisal business and records, claiming those assets as his own and not partnership assets and Appellant conducted his own independent appraisal business. He did not intend that Respondent participate in the income, therefrom, while Respondent carried on the mortgage loan and insurance business of the partnership, from which Appellant expected to and did at all times participate in the income, just as he did prior to the dissolution of the partnership. Appellant devoted the whole of his time to his appraisal business. The only question before the court is what is the equitable basis under which the parties

operated for a period of thirteen months, from the date of dissolution to the final breaking off date. The attention of the court is directed to the fact that this phase of the case was not made an issue by the pleadings. The trial court retained jurisdiction, after having entered its judgment on the case, at the request of counsel, to settle the controversy which had arisen between the parties as to this thirteen month period of time when the parties could not resolve their differences. The Order from which the appeal is taken was initiated not by any pleadings but upon application of Respondent for an Order to Show Cause why Appellant should not be found in contempt of court for having failed to comply with the judgment of the court which was made and entered on March 12, 1964. At this hearing, on Respondent's application, both parties initiated the matter of accountings for the thirteen month period subsequent to the date of dissolution.

ARGUMENT

POINT I

THE AWARD OF $2,500.00 TO RESPONDENT BY THE JUDGMENT OF NOVEMBER 9, 1964 IS NOT SUPPORTED BY PLEADINGS OR FINDINGS OF FACT.

As is heretofore stated, not only are there no pleadings or findings to support this award under the order appealed from as contended by Appellant,

but there are no pleadings, findings and conclusions to support that part of the order which appellant is willing to have stand and to have enforced against Respondent, that which benefits appellant, from which respondent takes his cross-appeal, that part of the judgment pertaining to salaries awarded to Ruth Barlow and R. L. Christensen and charged against partnership operation.

Appellant refers to the Order from which his appeal is taken as "this part of the judgment." We contend that this is not a part of the judgment but it is simply collateral to and in aid of the final judgment, in enforcement of the judgment. If it is not in enforcement of the judgment then the matters considered by the court and on which the Order appealed from was entered, was separate and apart from, and collateral to those issues framed by the pleadings and to those rights asserted in the action proper, and therefore no findings and conclusions were necessary. It is to be noted that the parties waived findings and conclusions in the case proper. That which brought the matter before the court was as is heretofore stated, on application of respondent for an Order to Show Cause why Appellant should not be found in contempt for having failed to comply with the judgment of the court.

The action is an equitable action, and contrary to the argument of Appellant that the court heard no evidence to support its order, the court did hear evidence and had theretofore indicated to counsel that it intended to award some compensation to Re-

spondent for his having preserved the mortgage loan asset of the partnership, and having retained jurisdiction of the case at the request of both counsel the case having been tried piece meal, exercised its equitable powers in entering its order allowing compensation to respondent for his services rendered. The parties agreed to submit this phase of the case to the court and to abide by its decision. Therefore an appeal from the ruling is not in order, nor is the order appealed from an appealable order.

Appellant cannot come into a court of equity and seek to avail himself of the benefits of that part of an order beneficial to him and object to that part of the order which is not beneficial to him, which it is apparent appellant seeks to do, this especially when he is faced with the same omission, if there is an omission, as that complained of. Here the court awarded, and charged against the partnership income, the salary of a clerk whom respondent had discharged and who had been rehired by appellant, after respondent had stated to appellant that if he reemployed the party discharged Appellant would be required to pay her salary; and a clerk whom appellant brought into his employment to learn the business, after dissolution, one who had never been an employee of the partnership, none of this is supported by pleadings, findings or conclusions.

Respondent finds no fault with the authorities cited and relied upon by appellant, but they are not applicable in this case.

Appellant points out the fact that the court adopted the recommendation of Respondent in ordering that all income received by each party from January 1, 1963 to February 1, 1964 is to be distributed in the same manner and as is provided by the partnership agreement and as has heretofore been received and distributed, and that neither partner will receive any compensation for services during this interim period. It is evident however that when such recommendation was made by Respondent's counsel it was assuming that the partnership agreement if invoked, would be invoked in all aspects. This would require the consent of Respondent to the employment of those not employed by the partnership. Thus Respondent would be protected and would not be compelled to pay one-half the salary of such employees. (See R. 83)

POINT II

THE ISSUE UPON WHICH THE AWARD OF $2,500 TO THE RESPONDENT WAS MADE BY THE JUDGMENT OF NOVEMBER 9, 1964 WAS TRIED ON FEBRUARY 13, 1964, AND WAS ADJUDGED AGAINST THE RESPONDENT BY THE JUDGMENT OF MARCH 12, 1964, WHICH JUDGMENT HAD BECOME FINAL AND WAS RES ADJUDICATA OF SAID ISSUE AT THE TIME OF THE ENTRY OF THE JUDGMENT OF NOVEMBER 9, 1964.

Appellant bases this argument on the ground that the award made by the court to respondent was

an issue, it was not made an issue by any pleading but was simply an announcement by a court of equity in its arriving at a settlement of a dispute arising after the court had rendered judgment, and after counsel for the parties had requested that the court retain jurisdiction of the case to settle the dispute. It is evident that appellant would take advantage of his having led respondent into believing that appellant's net income was considerably more than appellant later showed his net income to be, and in counsels in reliance on such representation and recommending to the court that which he considered a fair division of income and expenses, which recommendation the court adopted. Respondent later found when the true facts were made known, which facts were much different from those represented by appellant, that not only would respondent sustain a substantial loss from participating in any income of appellant but Respondent would expose his income to ridiculously high operation costs resulting in a much different award than had been anticipated.

Appellant testified as follows:

> Altogether I've had $28,825.00 of total appraisal work finished so that my income for 1963 amounts to over $30,000.00, to Mr. LeCheminant's $8,900.00. This is the problem we each have half of that 50-50. But I have against that some $10,000 personal expenses which I have paid. (R. 93)

Appellant did not deny having made such representation as is evidenced by the following testimony (R. 106, Vol. 2):

> Q. Do you recall, Mr. Kiepe, in the trial of this case the question arose as to what you you would estimate your income for 1963, and January of '64, would be? And the expenditures against that for the earning of it? If I remember correctly you stated that it would be approximately $28,000 income with expenditures of about $10,000 against that?
>
> A. Well, I remember being asked the question, and I did make some estimates, but now I have the true and actual facts, item by item.

In reliance on this representation, and assuming there would be approximately $20,000 go into the partnership account through appellant's earnings, the above referred to recommendation was made by respondent's counsel. It is evident that the court considered there would be sufficient income realized by respondent from appellant's earnings to offset any additional award which the court had therefore indicated it would make to respondent for his services in preserving the assets of the partnership represented by the mortgage loan business. The court realizing the inequity resulting, and to correct this inequitable situation stated that as it had retained jurisdiction of the case it made the award of the $2,500.00.

The evidence shows the difficulty respondent faced in compelling appellant to render an accounting of his earnings as ordered by the court, and in having appellant, each time the matter was brought before the court, furnishing a different account,

finally forcing Respondent to obtain an Order To Show Cause.

POINT III

THE AWARD OF $2,500 TO RESPONDENT BY THE JUDGMENT OF NOVEMBER 9, 1964 IS NOT ONLY NOT SUPPORTED BY PLEADINGS OR FINDINGS OF FACT, BUT IS NOT SUPPORTED BY THE EVIDENCE GIVEN AT THE HEARING OF FEBRUARY 13, 1964, AND IS CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE.

This point is covered by respondent's argument under Point II, with this additional statement. Appellant argues at page 26 of his brief that respondent took care of the mortgage loan asset for many years before 1963, but received no special compensation therefore in addition to his fees for making loans and commissions on insurance written with the loans. We point out however that respondent was, during that period of time participating in income from the appraisal business of appellant of which approximately 50% went into partnership income which was divided equally between the parties after the proportionate share of expenses had been charged against this income. This operating expense was agreed upon by the parties by their partnership agreement, that neither party would incur expense against the partnership in excess of $10 without first obtaining the approval of the other partner.

Appellant argues that the amount of time respondent devoted to the preservation of the mortgage loan business did not justify the award made by the court. The court having heard the evidence concluded that respondent had earned the amount awarded to respondent. As to the contention that the insurance company whose money was being loaned by the partnership severely reprimanded respondent for the manner in which their business was conducted is not borne out by the record when that part of the record containing the testimony of respondent in explaining the situation is considered.

POINT IV

THE AWARD OF A BONUS OF $535 TO EACH OF THE PARTIES IN THE JUDGMENT OF NOVEMBER 9, 1964 IS NOT SUPPORTED BY PLEADINGS OR FINDINGS OF FACT, NOR BY ANY EVIDENCE, AND IS CONTRARY TO THE EVIDENCE.

This point is predicated entirely upon an accounting principal which the court considered. Appellant had, according to his accounting submitted, received his revised bonuses over and above the 50% awarded in the original judgment and the court, in order to place both parties on the same bonus basis awarded this item to Respondent.

POINT V

THAT PORTION OF THE JUDGMENT OF NOVEMBER 9, 1964 WHICH READS: "THIS

BRINGS TOTAL CREDITS TO WHICH DEFENDANT IS ENTITLED THE SUM OF $20,101.93, LESS REFUNDS OF $3,668.71 *** RESULTS IN A NET BALANCE CREDIT TO WHICH DEFENDANT IS ENTITLED TO $16,433.23 OUT OF THE CASH ON HAND OF $28,723.98 IS NOT SUPPORTED BY FINDINGS OF FACT OR BY ANY EVIDENCE.

The same is true of this item as that item under Point IV. This is arrived at out of the accounting submitted not by Respondent but by Appellant. The trial court being an accountant himself concluded this was a correct interpretation of the account.

POINT VI

THE COURT ERRED IN DENYING APPELLANT'S MOTION TO AMEND THE JUDGMENT OF MARCH 12, 1964.

Appellant is most inconsistent in his position on the whole of this case, in arguing under Point II that the award of $2,500 made by the court is res adjudicata, then under this point Appellant would go back of the judgment which was entered on March 12, 1964, and he assigns as error the court's refusal to correct that which appellant contends was a typographical mistake many months after the judgment had been entered. True counsel for respondent did state that if there was an error he would consent to its being corrected, but after consulting with respondent it was determined that no error existed.

The court did not refuse to correct an apparent error as appellant would have this Honorable court believe.

That which the court did was to suggest to counsel if an error appeared to request the court to correct same. Respondent found no error as charged.

CROSS APPEAL OF RESPONDENT

STATEMENT OF NATURE OF THE CASE

This is an appeal from an Order made and entered on November 9th, 1964 awarding Respondent the sum of $2,500 for preserving the mortgage loan assets of a partnership when respondent had asked for $5,000; from the award under said order of compensation to Ruth Barlow and R. L. Christensen as partnership expense; from a charge against respondent of $400 (½ of $800) fee charged by Appellant's accountant and in awarding Respondent out of funds on hand the sum of $16,433.32 when Respondent was entitled to an amount in excess of said sum.

DISPOSITION OF CASE MADE IN LOWER COURT

The lower court entered an Order on November 9th, 1964 which provided among other things:

1. That the Respondent be awarded $2,500.00 for "preserving the mortgage loan assets of the partnership."

2. That a bonus of $535.00 be awarded to each of the parties.

3. Adjudging that the Respondent is entitled to total credits of $20,101.93, less refunds of $3,-668.71.

4. Adjudging that the Respondent is entitled to net credits of $16,443.22.

5. Adjudging that compensation paid to Ruth Barlow and R. L. Christensen should be allowed as partnership expense and be born equally by the partners.

6. Adjudging that the fee charged by Lawrence S. Pinnock, Certified Public Accountant, should be a partnership expense and borne equally by the partners.

7. Awarding Respondent a net balance credit of $16,433.22 out of cash on hand of $28,723.90.

RELIEF SOUGHT ON CROSS APPEAL

Cross Appellant seeks reversal of the following portions of the Judgment or Order dated November 9, 1964 and judgment in his favor as follows, to-wit:

1. Awarding to respondent (cross appellant) the sum of $5,000 for respondent's services in preserving the mortgage loan asset of the partnership.

2. Adjudging that the compensation paid to Ruth Barlow is not an expense of the partnership and should be borne by appellant.

3. Adjudging that the compensation paid to R. L. Christensen is not an expense of the partnership and should be borne by appellant.

4. Adjudging that the fee paid Lawrence S. Pinnock is not an expense of the partnership and should be borne by appellant.

5. Awarding to respondent out of the cash on hand of the partnership, the sum of $22,093.22 being the sum of $16,433.22 awarded, plus one-half the compensation of Ruth Barlow of $2,550.00 or $1,275.00; one-half the compensation of R. L. Christensen of $2,970.00 or $1,485.00; one-half the fee paid to Lawrence S. Pinnock of $800 or $400.00, and an additional $2,500 for services in preserving the mortgage loan asset of the partnership.

STATEMENT OF FACTS

Cross Appellant and Cross Respondent entered into a written partnership agreement the business of which partnership commenced under said agreement on October 1, 1943 (R 3), which provided among other things that each partner should work for the partnership on a basis of a salesman's commission, which should be 50% of any commissions accruing from the listing, sale, rental, or appraisal of real estate, or from insurance commissions. That

the partnership should be on a 50-50 basis as to costs and profits. That disbursements from a joint checking account shall be made over the signature of both partners, *and that neither partner will incur an obligation in the name of the partnership in excess of $10 without first obtaining the approval of the other partner.* That the agreement as to percentage of division of commissions was later orally amended which is unimportant on this cross-appeal.

Cross Respondent served written notice of dissolution of the partnership upon Cross Appellant on December 30, 1962, to become effective February 1, 1963. The partners continued to conduct business at the same location, under the same firm name, with some of the same employees, sharing the partnership office in the same manner after February 1, 1963 as before. Cross Appellant who had, prior to dissolution for many years, managed the mortgage loan business of the partnership, and who recognized this business as an asset of the partnership, continued to manage this business of the partnership as he had done previous to the dissolution, but Cross Appellant conducted some little real estate and insurance business of his own. Cross Respondent devoted the whole of his time to the conducting of his appraisal business, spending no time whatsoever in the mortgage loan business of the partnership, this relationship continued for a period of thirteen months after February 1, 1963. The parties were unable to agree on a division of assets, and in the winding up of the partnership business, as a result Cross

Respondent filed action against Cross-Appellant for an accounting which resulted in a judgment entered by the court on March 12, 1964. Neither party to the action had by any pleading asked for a determination of the rights of the parties during the thirteen month period subsequent to the cutting off date of the partnership as of February 1, 1963. When the parties were unable to agree on an equitable division of income and expenses during this thirteen month period the parties sought the aid of the court to settle this controversy which the court did and which resulted in the Order herein appealed from.

ARGUMENT

POINT I

THE COURT ERRED IN NOT AWARDING CROSS APPELLANT THE SUM OF $5,000 WHICH WAS THE SUM ASKED BY CROSS APPELLANT FOR HIS EFFORTS AND SERVICE DURING THE LAST THIRTEEN MONTHS IN PRESERVING THE MORTGAGE LOAN ASSET OF THE PARTNERSHIP.

It is evident from the testimony of Cross Appellant that at the time notice of dissolution of the partnership was served on him there was nearly seven million dollars of mortgage loan business handled by Cross Appellant for the partnership; that there were some 600 accounts which required some service every month in order to keep the accounts current. This business was carried on by Cross Ap-

pellant for the thirteen month period. As the mortgage loan account could have been cancelled by the mortgage loan company because of the dissolution, it was important that extra effort be made to service these accounts in a creditable manner. As a result of the service performed by Cross Appellant, this asset which it is evident was a very valuable one was preserved. Cross Appellant testified in detail to the service rendered by him in preserving this asset, (R 13-25, Vol. 2). Cross Respondent benefited through these services of Cross Appellant and received his share of the profits from this operation while at the same time Cross Respondent devoted the whole of his time to his appraisal business.

The sum of $5,000 asked for by Cross Appellant was most modest and should have been allowed by the court.

The case might be likened to one where instead of Cross Respondent remaining in the same office and conducting his private business therefrom, he takes a trip to Hawaii for a period of thirteen months during which time Cross Appellant carries on the partnership business. We think Cross Respondent would make no objection to an allowance by the court for Cross Appellant's services during that time. This case is no different. Or it is like a case where Cross Respondent might have died and have his interest pass to his estate, Cross Appellant carries on the business. Such was the holding in the case of *Puffer v. Merton*, 168 Wis. 366, 170 NW 368, 5 ALR 1288 involving a law partnership where

one of the partners died and the firm had on hand no contingent fee cases but all business held by it was on the usual general retainer basis where its clients could have dispensed with the services of the firm. The court said:

> Neither can it be said that the conducting to a conclusion of law business on hand at the time of the death of a partner is simply a winding up of the partnership. It is more than that; it is a continuation of business after the partnership has ceased to exist. Often such continuation may require years of hard work for completion. Hence it is not equitable that the estate of a deceased partner which has contributed nothing towards such work should share in its compensation. Citing *Rowell v. Rowell,* 122 Wis. 1, 99 N.W. 473.

POINT II

THE COURT ERRED IN ALLOWING COMPENSATION PAID TO RUTH BARLOW AS A PARTNERSHIP EXPENSE TO BE BORNE EQUALLY BY THE PARTNERS. THIS AMOUNTS TO THE SUM OF $2,550.00.

Cross Appellant discharged Ruth Barlow shortly before February 1, 1963, and after some period of time Cross Respondent rehired her. It is evident from the testimony in the record that Ruth Barlow devoted the greater part of her time in reviewing records and accounts in an effort to make a case out against Cross Appellant. Her services were not

needed by the partnership, neither were her services required in the winding up of the business of the partnership. At the time Cross Respondent rehired this party, Cross Appellant told Cross Respondent that if he hired Ruth, Cross Respondent would be required to pay her salary, that Cross Appellant would not, nor would he consent to the partnership paying same. Even when Cross Appellant signed salary checks for Ruth Barlow he advised Cross Respondent that he would look to the amount to come out of and be charged to the account of Cross Respondent.

The evidence shows by Exhibit 22, that on February 5, 1963, Cross Appellant addressed a letter to Cross Respondent which is in part as follows:

> Now concerning Ruth. I will not agree to increasing the overhead in any way during the period of the partnership dissolution. I told Ruth the day she went to the hospital of the dissolution and that I would call her as soon as this problem was resolved. At the present time we do not need more than a part time girl. Linda is doing in a half day all the work done by Ruth in a full day. If you insist on rehiring Ruth before the dissolution is complete you should pay her salary. I invoke the terms of the partnership agreement on this point.

If we apply the provisions of Section 48-1-27 UCA 1953 which is as follows:

> PARTNERSHIP NOT TERMINATED BY DISSOLUTION.

> On dissolution a partnership is not terminated, but continues until the winding up of partnership affairs is completed.

Cross Respondent had no right to reemploy Ruth Barlow inasmuch as the provisions of the partnership agreement continued in force until dissolution under the above quoted section.

The partnership agreement as to the right to incur obligations by either partner on behalf of the partnership provides that neither partner will incur an obligation in the name of the partnership in excess of $10.00, without obtaining the approval of the other partner.

If it should be contended that the partnership agreement is not in force after dissolution and during the winding up period, then Cross Respondent cannot claim this item as an expense inasmuch as Cross Respondent had not shown in any respect that Ruth Barlow's services were required in the winding up process of the partnership, or to complete transactions begun but not finished as provided by Section 48-1-30 UCA 1953 which reads as follows:

> Except as far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, *dissolution terminates all authority of any partner to act for the partnership.*

Therefore Cross Respondent cut off all authority to employ Ruth Barlow or anyone else, unless agreed to by Cross Appellant, by his having served notice of dissolution on Cross Appellant.

POINT III

THE COURT ERRED IN ALLOWING COMPENSATION PAID TO R. L. CHRISTENSEN AS A PARTNERSHIP EXPENSE TO BE BORNE EQUALLY BY THE PARTNERS. THIS ITEM AMOUNTS TO THE SUM OF $2,970.00.

R. L. Christensen was never an employee of the partnership. He was employed by Cross Respondent subsequent to dissolution to learn the business. It is evident that Mr. Christensen did not take the place of another employee of the partnership and the record contains not a word of evidence that the services of Mr. Christensen were necessary in the winding up of the business of the partnership. Cross Respondent was never consulted nor did he at any time consent to the employment of Mr. Christensen.

For the same reasons as argued under Point II, this charge against the partnership is not proper.

There are no pleadings or findings to support either this award or that under Point II.

POINT IV

THE COURT ERRED IN CHARGING THE FEE OF LAWRENCE S. PINNOCK, CERTIFIED PUBLIC ACCOUNTANT, AS A PARTNERSHIP EXPENSE, PAID FROM PARTNERSHIP FUNDS AND BORNE EQUALLY BY THE PARTNERS. THIS ITEM AMOUNTS TO THE SUM OF $800.00.

After Cross Appellant had objected to several accountings furnished to Cross Respondent, Cross Respondent engaged the services of Mr. Pinnock to examine accounts, not of the partnership, or of Cross Appellant, but accounts, items of which reflected the earnings of Cross Respondent during the thirteen month period subsequent to the February 1, 1963 date. Cross Appellant did not consent to, nor did he agree at any time that he would pay any part of the fee paid to Mr. Pinnock. For the same reasons as relied upon under Points II and III this is not a proper charge against the partnership.

POINT V

THE COURT ERRED IN ITS FINDING THAT CROSS APPELLANT IS ENTITLED TO RECEIVE THE SUM OF $16,433.22 OUT OF THE CASH ON HAND OF $28,723.98.

This item results in the assumption that the Cross Appeal of Cross Appellant will be favorable to Cross Appellant on all points relied upon, in which case the award to Cross Appellant should be $22,093.22 and not the sum of $16,433.22 awarded to Cross Appellant by the Order appealed from.

CONCLUSION

The Respondent and Cross Appellant submits that the law and the evidence requires:

That the Order appealed from by appellant be affirmed except as to those Points on which Cross

Appellant assigns as errors in the following particulars:

(a) That Cross Appellant be awarded the sum of $5,000 for services rendered by him in the preservation of the mortgage loan asset of the partnership.

(b) That the allowance of compensation paid to Ruth Barlow as a partnership expense to be borne equally by the partners be set aside.

(c) That the allowance of compensation paid to R. L. Christensen as a partnership expense to be borne equally by the partners be set aside.

(d) That the allowance of fee of Lawrence S. Pinnock, as a partnership expense be set aside.

(e) That the finding that Cross Appellant is entitled to receive the sum of $16,433.22 out of the cash on hand of $28,723.98 be set aside, and that Cross Appellant be awarded the sum of $22,093.22 out of said sum.

Respectfully submitted,

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