

1960

George D'Ambrosio and Theresa D'Ambrosio v. Francis C. Lund : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

GEORGE D'AMBROSIO and THERESA D'AMBROSIO,

Plaintiffs and Respondents,

—VS.—

FRANCIS C. LUND,

Defendant and Appellant.

Clerk, Supreme Court, Utah

RESPONDENT'S BRIEF

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—vs.—

FRANCIS C. LUND,

Defendant and Appellant.

Case No.
9202

RESPONDENT'S BRIEF

STATEMENT OF FACTS

In the summer and fall of 1954, defendant Francis C. Lund was an attorney practicing law in Salt Lake City, Utah (R. 7), and was setting up various "uranium corporations." Plaintiff asked about investing money in a corporation (R. 19). In September of 1954, defendant took plaintiffs' check in the sum of \$500.00 for investment in a company that was supposed to come out on

the market after clearing Securities Exchange Commission at 5c per share of stock. The names of several proposed companies were discussed at the time of delivery of the check (R. 23). On October 4th, the defendant deposited the check in his trust account in the First Security Bank of Utah, endorsed Francis C. Lund, Trustee (Exhibit P-1).

According to Mr. Lund's testimony, he paid the money shortly after October 8, 1954, to one Fred D. Kipp, a promoter (R. 13), but Lund did not produce the check. Kipp, according to Lund's testimony, put the money into a bank account used by the incorporators. The corporation was not formed until April 22, 1955 (Exhibit 2, R. 9).

Lund cleared the corporation through Securities Exchange Commission but "didn't know" when questioned regarding its assets (R. 10). The corporation has been inactive for a year or a year and a half.

Plaintiffs made demand many times for their money or their stock, all to no avail until they filed suit in May 1958, almost four years after payment of the money (R. 1). The defendant then procured a stock certificate for five hundred shares of \$1.00 per share stock (Exhibit 2), rather than the 5c per share stock claimed by the plaintiff (R. 19) or the 10c per share stock as claimed by the defendant (R. 26).

Mr. Lund further testified that the corporation at its inception had uranium claims paid for by stock (R.

11); that stock was never issued (R. 11); that it had sufficient assets to clear Securities Exchange Commission for public sale at \$1.00 per share par value.

As far as Mr. Lund knows, he never ceased to represent the corporation, but he knows nothing about the corporation records or assets (R. 12); that it has been inactive for a year or a year and a half (R. 15), or for more than a year prior to when the stock certificate (Exhibit 2) was issued. To the best of Mr. Lund's knowledge, no other stock has been issued (R. 22).

STATEMENT OF POINTS

POINT I

THE TRIAL COURT MADE FINDINGS OF FACT UPON THE MATERIAL ALLEGATION OF DEFENDANT'S ANSWER.

POINT II

THE TRIAL COURT'S FINDINGS ARE SUPPORTED BY EVIDENCE.

POINT III

THE COURT DID NOT ERR AS CONTENDED IN DEFENDANT'S BRIEF, POINT III.

POINT IV

THE COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTIONS.

ARGUMENT

POINT I

THE TRIAL COURT MADE FINDINGS OF FACT UPON THE MATERIAL ALLEGATION OF DEFENDANT'S ANSWER.

Tracing the \$500.00 admittedly paid by plaintiff to defendant shows the moneys going into defendant's trust account on the 4th day of October, 1958. The defendant contends that he paid the money to one Kipp immediately thereafter to go into the corporation (Cottonwood Uranium). However, Kipp was a promoter who was to be a director of the corporation (R. 13), and to the best of Mr. Lund's knowledge, Kipp put it in a bank account to be used by the incorporators. Mr. Lund didn't know whether Cottonwood Uranium ever had a bank account after it was incorporated (R. 14). The corporation was not set up for six months after Lund received the plaintiffs' money. The plaintiff was not an incorporator.

The court's Finding No. 8 that there is no evidence that plaintiffs' money ever went into the corporation is a direct and relevant finding of fact regarding the defendant's theory as stated in paragraph 2 of defendant's answer:

“That defendant purchased said stock pursuant to the instructions of the plaintiff in the Cottonwood Uranium Corporation, a Nevada Corporation.”

POINT II

THE TRIAL COURT'S FINDINGS ARE SUPPORTED BY EVIDENCE.

(a) See Point I.

(b) Regarding Finding No. 6, plaintiffs admit that said finding should read “to the best of the de-

fendant's knowledge" rather than "to the best of plaintiffs' knowledge (Cottonwood Uranium) has no assets, and no other stock has been issued except the 500 share certificate which was delivered in July, 1958, after this action was begun." However, there is evidence from the testimony of the defendant to support that finding. Mr. Lund, who to the best of his knowledge was still counsel for the company and had cleared the corporation with the Securities Exchange Commission, testified "that the property owned by the corporation was for uranium claims for which stock was issued," and further testified "that said stock was never issued" (R. 11-12) and that the company had been inactive for a year and a half (R. 15). He attempted to locate the officers who were in charge of the stock books and stock records so that he "could see if I couldn't get a certificate issued" (R. 26-27). He didn't know if any stock was ever issued (R. 15).

(c) Finding No. 7 states "said stock is without value." The evidence clearly shows that the stock is without value. The defendant testified (R. 12, line 15):

"Well, I don't know if I actually ceased to represent them to this day. There has just been no contact."

He testified that he was unable to contact the officers after repeated tries over a period of almost four years; that he didn't know if the corporation had any property (R. 12); that the corporation had been inactive for a year or a year and a half (R. 15); that the stock to

pay for the original properties was never issued (R. 11).

These matters were peculiarly in the knowledge of the defendant who set up the corporation, represented the corporation before the Securities Exchange Commission, and to his knowledge still represented the corporation.

(d) Finding No. 8: There is no evidence that the \$500.00 given to the defendant by the plaintiff ever went into the Cottonwood Uranium Corporation (as discussed under Point No. I).

POINT III

THE COURT DID NOT ERR AS CONTENDED IN DEFENDANT'S BRIEF, POINT III.

There can be no question from the evidence before the trial court that defendant was to purchase stock for the plaintiff in a corporation either at 5c per share as contended by plaintiff or at 10c per share as contended by defendant. While it is true, as the evidence indicates, that after suit the defendant procured by means known only to himself a certificate for five hundred shares of stock at \$1.00 par in Cottonwood Uranium Corporation, it is clear from the evidence that the stock at the time of procurement was not the stock Mr. Lund agreed to purchase for Mr. D'Ambrosio and, further, it is without value. Mr. Lund evasively refuses to divulge information regarding the corporation, affirmatively stating that he knew of no assets of the corporation; that it was inactive; that he had failed over a period of four years to get in touch with the

officers or to have a certificate issued. All the evidence is consistent with the second theory of the plaintiffs set forth in pretrial that defendant failed to deliver the stock, and there was a difference of value when the stock should have been delivered and the present time which would be the measure of damages, the defendant's own testimony being that at the time he cleared the corporation with the Securities Exchange Commission it had sufficient properties to substantiate a value of \$1.00 per share, and his further testimony to the effect that though, to the best of his knowledge, he was still the corporation counsel, he had no knowledge of any assets of the corporation; the corporation was inactive; and he was unable to locate its officers and directors; together with the fact that no other stock had been issued to pay for the properties, substantiate the original value of the stock. Further, as the record shows, the defendant had opportunity to present any additional defenses or newly discovered evidence in his motion for new trial and motion to amend findings of fact and conclusions of law.

POINT IV

THE COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTIONS.

As pointed out in Points I, II, and III, there is sufficient evidence to support the findings and conclusions of the court and to sustain either theory of the plaintiff. The stock certificate tendered to the court was neither the number nor the value of the shares as contended by plaintiff or defendant in their testimony. While respondent has no quarrel with the case of Van

Noy v. Gibbs as cited at page 19 of his brief in regard to the stock certificates being merely muniments of title, there is no evidence to show that the plaintiff was either a subscriber or incorporator of Cottonwood Uranium Corporation, nor any evidence to show that at the time the certificate was made to the plaintiff there was an existing corporation, nor that the stock had any value.

The defendant, Francis C. Lund, testified that he was an attorney and had set up the corporation on which the stock was purportedly drawn.

Mr. D'Ambrosio would be entitled to 5c or 10c stock at the time of the original incorporation if the money had been paid in for said stock, and not the purported \$1.00 stock which defendant and appellant contends should satisfy Mr. Lund's agreement to purchase stock for respondent.

SUMMARY

It is apparent from the transcript of testimony that there is sufficient evidence to support the findings and conclusions of the court, and there is no merit in the appellant's contention that judgment was granted on the theory which they had no opportunity to meet.

The judgment of the low court should be affirmed.

Respectfully submitted,

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