1965

Eastern Utah Development Company v. General Insurance Company of America, A Corporation, and Fred Reynolds : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

EASTERN UTAH DEVELOPMENT COMPANY, a corporation,
Plaintiff-Respondent,

vs.

GENERAL INSURANCE COMPANY OF AMERICA, a corporation, and FRED REYNOLDS,
Defendants-Appellants.

Case No. 10359

APPELLANT'S BRIEF

Appeal from Judgment of the Third District Court of Salt Lake County
Hon. Merrill C. Faux, Judge

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STATEMENT OF THE KIND OF CASE

Plaintiff brought this action against the defendants alleging that defendant Fred Reynolds had incurred a debt with the plaintiff for rental of plaintiff's equipment and that defendant General Insurance Company of America, as bonding company on the project under construction, was obligated to pay the plaintiff by

virtue of its labor and material bonds. Defendant Reynolds claims that plaintiff was his partner or a joint-venturer in the project, and therefore is only entitled to an accounting. Defendant General Insurance Company of America, as bonding company on said project, claims that plaintiff, as a joint-venturer or partner of Reynolds, is obligated to indemnify this defendant for any losses sustained on the project by virtue of its bonds and that plaintiff cannot make claim under its own bond.

The bonds were issued to Reynolds as principal. The insurance company was not told that plaintiff was Reynolds' partner when the bonds were written. The plaintiff also claims damages from Reynolds for his alleged negligence in the performance of the contract.

DISPOSITION IN LOWER COURT

The plaintiff brought its action against the defendants for money claimed to be due and owing. Plaintiff claimed a rental agreement with Reynolds for the use of its equipment. Reynolds denies the agreement. Plaintiff also claims that defendant General Insurance Company of America, as bonding company on said project, is obligated to the plaintiff by virtue of its bonds. Both defendants claim that plaintiff is a partner of Reynolds and, as such, is only entitled to an accounting from Reynolds. In no event can plaintiff make claim under its own bond.

The plaintiff, although admitting that is was a partner or joint-venturer with Reynolds at the commencement of the project, claimed that the partnership was terminated and that thereafter the plaintiff rented its equipment to Reynolds in order to complete the partnership project and has not been paid for said equipment. (R24-27, 36-44)

The case was tried before the Honorable Merrill C. Faux, District Judge, and upon completion of the plaintiff's evidence, and at the conclusion of all the evidence, motions to dismiss were made by counsel for the defendants. They were subsequently denied by the Court. (R333-334, 344-345, 418-419) The case was submitted to the jury at the close of the evidence. The issues were submitted to the jury in the form of special interrogatories. (R54-57) Based upon the answers made to these interrogatories, the Court entered judgment in favor of the plaintiff and against both defendants. (R95) Motions for judgment notwithstanding the verdict or in the alternative for a new trial were filed by both defendants and subsequently denied by the Court. (R93-95) Defendants thereafter filed this appeal. (R106)

RELIEF SOUGHT ON APPEAL

Both defendants seek reversal of judgment entered in the lower court and for an order requiring an ac-

counting between the plaintiff and defendant Reynolds.

STATEMENT OF FACTS

In order to promote clarity, the respondent will be referred to as plaintiff, appellant Fred Reynolds will be referred to as Reynolds, and appellant General Insurance Company of America will be referred to as the Insurance Company.

The plaintiff, upon receiving an invitation to bid the proposed construction of the irrigation canal by the Koosharem Irrigation Company, contacted its local insurance agent in an effort to obtain a bid bond. Plaintiff was told that the bonding company previously used by the plaintiff was no longer doing business in the state; that a bond could not be obtained for the plaintiff. (R135) It then solicited defendant Reynolds to become a join-venturer to bid the job, as Reynolds was able to obtain a bond. (R174-176) The plaintiff was to be a silent partner until the job was commenced. (R178-180) It was agreed that Reynolds and plaintiff would perform the contract as joint-venturers or partners in the event Reynolds was successful in his bid. (R143-144, 182-183)

Reynolds and a vice president of the plaintiff company, Max Fausett, visited the area where the canal was to be constructed and together estimated the cost of the project, whereupon Reynolds submitted a bid in his

name, as previously agreed upon between these parties. (R117-118, 140-141, 144) The bid was accepted. (R181)

Reynolds obtained bonds from the insurance company naming Reynolds as the principal under the bonds. The bonds were to guarantee the payment of labor and materials in the job, as well as the faithful performance of the contract.

An agent for the insurance company had previously told the plaintiff that he would not accept the plaintiff company as a client for the issuing of bonds because of the poor financial rating of the plaintiff. (R176, 342-343)

Thereafter, plaintiff and Reynolds obtained the necessary equipment to commence the project. Both the plaintiff and Reynolds owned various items of equipment necessary for the project and agreed that they would charge to this project a specified hourly rate for the use of their equipment. Any profits derived thereafter would be divided equally. (R143-144, Exhibits 4P and 5P) Both plaintiff and Reynolds moved their equipment and men on to the project and commenced work. Plaintiff furnished several employees from its company to assist Reynolds in the performance of the contract. (R141, 143-145, 147)

During the early stages of the project, plaintiff's vice president, Fausett, made numerous trips to the project in an effort to assist Reynolds in any difficulties

that he was encountering. (R154-155) Plaintiff also kept in touch with the progress of the project through its employees and by conversations had with Reynolds by telephone. (R157, 363)

After considerable work had been done on the project, it was discovered by plaintiff and Reynolds that a large portion of the ground wherein the canal was to be cut, was considerably more rocky than had been anticipated, and the expense of clearing the rocks from the path of the cutting machine was taking more time and creating more expense than was anticipated. This work was necessary, however, to maintain a straight cut and keep the floor of the canal level. (R158, 160) It was necessary to haul fill dirt from another area to fill the canal that was being cut. Various other problems were encountered as the work progressed, and it soon created conflict between Reynolds and the plaintiff as to the method of doing the work. The job was moving much more slowly than had been anticipated. Fausett informed Reynolds that he thought it advisable for them to prepare in writing an agreement setting forth the rental to be charged on the items of equipment being furnished by each of the partners and that the same be signed by plaintiff and Reynolds. Accordingly, their agreements were reduced to writing. (Exhibits 4P and 5P) Disputes between Reynolds and the plaintiff continued to cause problems. (R154, 158)

Plaintiff's vice president went to the project and informed Reynolds that his company was quitting the project and that Reynolds could keep any profit that

might be derived. In any event, the plaintiff was not going to have anything more to do with the performance of the contract. (R162, 195-196) Reynolds informed him that the plaintiff should not withdraw its support while the contract was being performed and that it was absolutely impossible for him to complete the project without some of the equipment and men that had been furnished by the plaintiff. (R162) Plaintiff then agreed to leave some of its equipment and men on the project as was necessary for its completion, but claimed that Reynolds was to pay plaintiff on a rental basis for the use of the employees and equipment. Thereafter plaintiff walked off the project leaving its completion in the hands of Reynolds. Reynolds objected to this action of the plaintiff, but remained on the project in an effort to complete the same. (R162, 364-366)

Plaintiff continued to show on its books the equipment on the project as well as the employees it was furnishing as part of the Koosharem Irrigation Project, joint venture, and did not bill the expenses directly to Reynolds. (R197, 210, Exhibits 7P-11P)

It should be noted that Reynolds has not paid himself any rental for his equipment nor has he received any wages or other compensation. (R367) A considerable sum of money has been paid to the plaintiff by Reynolds for its equipment in accordance with the terms of their written agreement. (Exhibit 5P, R367)

There remains a sum approximating $39,000 due from the irrigation company on the project. (R322)

Certain problems with the construction of the canal must be corrected before the final payment can be received. After having demanded full rental payment from Reynolds, this action was brought. Plaintiff claims to be a supplier of materials on the job and therefore makes claim under the bonds.

The insurance company did not discover that plaintiff and Reynolds were partners until after the bonds were executed and issued. (R339, 342-343) At no time did the plaintiff notify the bonding company that it was terminating or attempting to terminate its partnership with Reynolds nor was the bonding company told that plaintiff was leaving the project. (R198, 203-204)

POINTS URGED FOR REVERSAL

POINT I

THE COURT ERRED IN FAILING TO GRANT DEFENDANT INSURANCE COMPANY'S MOTION FOR DISMISSAL, AS A MATTER OF LAW.

POINT II

THE COURT ERRED IN FAILING TO RULE, AS A MATTER OF LAW, THAT PLAINTIFF REMAINED A PARTNER WITH DEFENDANT FRED REYNOLDS FOR THE PURPOSE OF WINDING UP PARTNERSHIP BUSINESS.

POINT III

THE COURT ERRED IN FAILING TO RULE, AS A MATTER OF LAW, THAT PLAINTIFF WAS LIABLE TO THE INSURANCE COMPANY BY INDEMNITY UNTIL THE COMPLETION OF PARTNERSHIP BUSINESS.

POINT IV

THE COURT ERRED IN FAILING TO SUBMIT TO THE JURY ANY OF DEFENDANTS' REQUESTED INSTRUCTIONS, ON THEIR THEORY OF THE CASE.

POINT V

THE COURT ERRED IN FAILING TO SUBMIT TO THE JURY THE ISSUE OF DAMAGES.

POINT VI

THE COURT ERRED IN FAILING TO FIND THE JURY'S ANSWERS TO INTERROGATORIES TWO AND THREE OF THE SPECIAL VERDICT TO BE INCONSISTENT.

POINT VII

THE COURT ERRED IN FAILING TO

RULE, AS A MATTER OF LAW, THAT PLAINTIFF IS ONLY ENTITLED TO AN ACCOUNTING FROM DEFENDANT FRED REYNOLDS IN WINDING UP PARTNERSHIP BUSINESS.

ARGUMENT

POINT I

THE COURT ERRED IN FAILING TO GRANT DEFENDANT INSURANCE COMPANY'S MOTION FOR DISMISSAL, AS A MATTER OF LAW.

The evidence adduced by the plaintiff shows as a matter of law that the plaintiff was not entitled to recover against the insurance company on its bonds. The evidence is uncontradicted that the vice-president of the plaintiff corporation, Max Fausett, knew that Reynolds was obtaining a bond on behalf of the joint venture. (R174-176, 178-180). The plaintiff also well knew that because of its financial position a bond would not be issued to the plaintiff. (R176, 342-343).

Plaintiff requested that Reynolds obtain the bonds in his name thereby concealing from the insurance company that the plaintiff was a partner in the performance of the contract. (R174-176). At no time has the plaintiff denied being a partner with Reynolds in the performance of the contract. (R24-27, 46-50,

143-144, 182-183). Plaintiff also admits that after the bonds were issued, the project was commenced and the work was being performed jointly by the plaintiff and Reynolds, as partners, up to the time the plaintiff attempted to withdraw from the partnership. (R137-138, 141-148, 152-155, 158, 162). Plaintiff also admits that at no time was the insurance company notified that it was attempting to withdraw from the partnership. (R198, 203-204).

The obligation of partners to fulfill partnership agreements and wind up partnership business remains after a termination of the partnership. (Title 48-1-27, Utah Code Annotated, 1953; Ferrin v. Ferrin, 7 Ut2d 5, 315 P2d 978). The partners may not, by their own actions, relieve themselves from partnership liability to a third person without that person's consent. (40 Am Jur, Partnerships, Section 273; Title 48-1-32, U.C.A. 1953).

The facts in the instant case show without dispute that plaintiff and Reynolds entered into a joint venture or partnership agreement for the performance of the contract to build the irrigation canal. Their respective rights and duties as joint venturers or partners are governed according to the law of partnerships. (Lane v. Peterson, 68 Utah 858, 251 P. 274; Bates v. Simpson, 121 Utah 165, 239 P2d 749; Cook v. Peter Kiewit Sons Company, 15 Ut2d 20, 386 P2d 616.)

A silent partner is bound by the authorized acts of his partner on partnership business in accordance

with the principles of agency. (30 Am Jur, Joint Adventures, Section 55, pages 980--982; 40 Am Jur Partnerships, Section 188, page 259; Title 48-1-6 Utah Code Annotated, 1953).

The plaintiff is therefore bound to indemnify the insurance company for any loss it may sustain as the result of its issuing bonds on the partnership project (40 Am Jur, Partnerships, Section 136, page 224 Bates v. Simpson, supra; Titles 48-1-6, 48-1-12, Utah Code Annotated, 1953).

It is conceded by the plaintiff that the awarding of the contract in question by the irrigation company would not have been possible without proper bonding. (R175-176). A partner cannot accept the benefits of a contract entered into by his partner in the performance of the partnership business, and with his approval, without sharing in the obligations and duties imposed upon the partnership by the contract. (Title 48-1-12, Utah Code Annotated, 1953).

The performance of partnership obligations is chargeable to all of the partners. The plaintiff could not terminate the partnership obligation it had to the insurance company until the partnership had been dissolved and its affairs wound up. (Ferrin v. Ferrin, supra, Titles 48-1-27, 48-1-28, and 48-1-30, Utah Code Annotated, 1953).

It is therefore respectfully submitted by the defendant insurance company that its bonds, and the obligations therein, issued in the name of Fred Rey-

nolds, in the performance of the canal project, were in fact a benefit to and an obligation of the partnership. The partnership subsequently entered into performance of the contract with its anticipated profits. The plaintiff, as a partner of Reynolds, accepted all obligations of the partnership agreement which included the obligation of indemnity to the insurance company in the event the partnership project was not completed in a successful manner. (Exhibit 33 D, Title 48-1-6 and 12, Utah Code Annotated, 1953, 27 Am Jur, Indemnity, Section 16, Page 345).

The Court therefore erred in failing to rule as a matter of law that the plaintiff could not secure a bond on the partnership project, it being a partner, and thereafter claim as an independent third party for labor and materials supplied in the performance of its own contract.

POINT II

THE COURT ERRED IN FAILING TO RULE, AS A MATTER OF LAW, THAT PLAINTIFF REMAINED A PARTNER WITH DEFENDANT FRED REYNOLDS FOR THE PURPOSE OF WINDING UP PARTNERSHIP BUSINESS.

The evidence clearly shows that the attempt by plaintiff to terminate the partnership with Reynolds was ineffectual as to the insurance company in the per-

formance of the contract in question. Plaintiff's vice-president testified that the company was fully aware of the fact that there was a bond on the project and that the terms of the contract must be complied with. In spite of this knowledge plaintiff attempted to walk off the job when it appeared that the probability of profit was rapidly diminishing. Reynolds did not consent to the plaintiff's request for termination of the partnership. (R162, 364-366). Plaintiff admits that Reynolds protested the plaintiff's leaving the job and that he admonished the paintiff that the job was bonded and must be completed. (R162, 364-366).

A partnership is not terminated on dissolution, but continues until the winding up of partnership affairs is completed. (Title 48-1-27, U.C.A. 1953; Ferrin v. Ferrin, supra). The plaintiff could not, by walking off the project, escape responsibility to the insurance company, defendant Reynolds, and to the irrigation company for the performance of the partnership contract. (Title 48-1-15, U.C.A. 1953).

The evidence clearly shows that plaintiff did not reach a mutual understanding with defendant Reynolds concerning the termination of the partnership (R162, 364-366). Plaintiff told Reynolds that it was quitting the project but it would leave its men and equipment on the project as needed by Reynolds to complete the contract. Plaintiff remained a partner until completion of the contract, and the trial court should have so ruled. (Ferrin v. Ferrin, supra).

POINT III

THE COURT ERRED IN FAILING TO RULE, AS A MATTER OF LAW, THAT PLAINTIFF WAS LIABLE TO THE INSURANCE COMPANY BY INDEMNITY UNTIL THE COMPLETION OF PARTNERSHIP BUSINESS.

The plaintiff not only ratified the acts of defendant Reynolds in obtaining the bond on the project for the benefit of the partnership, but induced him to do so because of the inability of plaintiff to obtain the necessary bonds in its own behalf. (R174-176, 178-180, 342-343). Plaintiff could not escape its obligation to indemnify the bonding company for any loss suffered on the project by attempting to terminate its partnership with Reynolds. (Title 48-1-15, 30, 31, 33 U.C.A. 1953). No notice was ever given to the insurance company that plaintiff was abandoning the project. (R198, 203-204). To permit plaintiff to withdraw from the partnership and avoid the consequences of the bond and the indemnity flowing therefrom would be a gross fraud upon both Reynolds and the insurance company. (23 Am Jur, Fraud & Deceit, Sections 79 and 93). The plaintiff actively concealed from the bonding company that it was a partner on the project when the bonds were obtained, knowing full well that it had no bonding capacity, or standing, with the insurance company and that the bond application would have been rejected had the insurance company known of

the plaintiff's position as a partner. (R343). Th plaintiff purposely requested that Reynolds obtain th bonds by withholding the fact that plaintiff was partner. (R178-179). This constitutes a clear frau on the bonding company. (23 Am Jur, Fraud & De ceit, Sections 79, 93 and 94). The plaintiff should b required to indemnify the bonding company for an loss suffered and should not be permitted to claim pay ment under its own bond.

POINT IV

THE COURT ERRED IN FAILING TO SUBMIT TO THE JURY ANY OF DEFENDANTS' REQUESTED INSTRUCTIONS, ON THEIR THEORY OF THE CASE.

At the conclusion of the evidence the defendants submitted their requested jury instructions to the Court. (R75-91). The Court rejected each and every request thereby effectively keeping from the jury the defendants' theory of the case. Exception to the Court's failure to instruct was taken by the defendants. (R420-421). The instructions given by the Court to the jury failed to inform the jury of the rights and duties of partners to each other in the performance of partnership obligations. The Court also failed to instruct the jury as to the rights and duties of the partners in regard to the insurance company. There was also a failure by the Court to instruct the jury on the obli-

gations of the partners in winding up the partnership business. (R58-68).

POINT V

THE COURT ERRED IN FAILING TO SUBMIT TO THE JURY THE ISSUE OF DAMAGES.

The Court failed to submit the issue of damages to the jury over the objection of defendants. (R58-68, R421). The plaintiff's claim for damages should have been decided by the jury. (Holland v. Wilson, 8 Ut2d 11, 327 P2d 250). The Court erred in its failure to instruct the jury on damages and left this issue totally unresolved by the jury. In fact, the Trial Court substituted its own opinion for that of the jury as to the damages.

Plaintiff claimed that Reynolds was negligent in performing the contract and that it was entitled to damages because of such negligence. The jury found that plaintiff and Reynolds were jointly negligent in the commencement of the project, but that after the plaintiff abandoned the project, Reynolds continued on with the work without negligence and performed the remaining work in a workmanlike manner. This finding by the jury would eliminate any further claims by plaintiff for damages flowing therefrom, as a result of any alleged negligence by Reynolds. (R54 57).

POINT VI

THE COURT ERRED IN FAILING TO FIND THE JURY'S ANSWERS TO INTERROGATORIES TWO AND THREE OF THE SPECIAL VERDICT TO BE INCONSISTENT.

The jury's answers made to interrigatories No. 2 and 3 clearly show that their findings were inconsistent. (R54-57). In answer No. 2, the jurors found that the plaintiff and defendant Reynolds modified their original partnership agreement in that the plaintiff agreed to permit its equipment to remain on the job until completion thereof, but instead of sharing in the profits, plaintiff was to receive only rentals. In answer to question No. 3, the jurors found that the plaintiff and Reynolds did not terminate their original agreement of partnership and that Reynolds did not agree to take over the job and rent plaintiff's equipment. (R54-57).

It is respectfully submitted that the answers to the interrogatories are clearly contradictory and should be totally disregarded. (53 Am Jur, Trial, Page 730, Section 1082). The remaining questions submitted to the jury were answered to the effect that both parties to the partnership were negligent in the performance to the contract when work was first commenced. The jury further found that after the plaintiff withdrew from the project Reynolds continued on with the work in a workmanlike manner without any further negligence on his part. (R54-57). By the jury's findings,

any loss that occurred as a result of negligent work should be rightly chargeable to both partners.

It is respectfully brought to the Court's attention that at no time did either the plaintiff or Reynolds claim a modification of the partnership agreement reducing the plaintiff's participation to mere rentals. It has at all times been claimed by the plaintiff that the partnership had been terminated and that thereafter plaintiff was not a partner on the project. (R46-50, 162).

The Court committed error by instructing the jury that there was a dispute as to whether or not the partnership had been completely terminated or merely modified as to its terms. (R54-57). The record will clearly show that Reynolds at all times maintained that the plaintiff was still a partner on the project according to the original agreement. (R162, 364-366). The jury's answers to interrogatories No. 2 and 3 were inconsistent and should have been disregarded by the Court.

POINT VII

THE COURT ERRED IN FAILING TO RULE, AS A MATTER OF LAW, THAT PLAINTIFF IS ONLY ENTITLED TO AN ACCOUNTING FROM DEFENDANT FRED REYNOLDS IN WINDING UP PARTNERSHIP BUSINESS.

The Court erred in not ruling as a matter of law that the plaintiff is only entitled to an accounting from Reynolds. By statute, as well as common law, the plaintiff is not entitled to dissolve the joint venture or partnership while a partnership contract is in the process of being performed, thereby leaving Reynolds to the task of completing the contract at his own risk. By previous pronouncement of this Court, as well as by statute, the plaintiff remains a partner for the purpose of performing the contract and winding up partnership affairs. (Ferrin v Ferrin, supra; Title 48-1-27, U.C.A. 1953). Reynolds has received no money for the rental of his equipment and has been required to advance approximately $22,000.00 of his personal funds to pay bills incurred by the joint venture. (R374). In no event would the plaintiff be entitled to make a claim against the insurance company on the bonds issued for the performance of the partnership contract.

It is conceded by the plaintiff that if the partnership had not been terminated by the actions of the plaintiff in walking off the job, no obligation was owing to the plaintiff from the insurance company by virtue of its bonds. Plaintiff's requested instruction No. 3 clearly reflects this position. (R72).

CONCLUSION

It is admitted without dispute that a joint venture or partnership was entered into between plaintiff

and Reynolds in bidding and performing the contract in question. It is also admitted by the plaintiff that because of its lack of bonding capacity, it induced Reynolds to obtain bonds fromthe insurance company in his name as principal and to deliberately withhold the fact that plaintiff was a partner. Viewing the evidence in a light most favorable to the plaintiff, it shows as a matter of law that the plaintiff has no cause of action against the insurance company and is only entitled to an accounting from its partner, Fred Reynolds.

The trial court misapplied the law in the instant case, as is clearly evidenced by its memorandum decision on file herein. (R102-103). The Court in substance said that it was clear from the evidence that there was no termination or dissolution of the partnership, and only a modification of the agreement between the partners whereby the plaintiff was not to share in any profit on the project, but merely to receive a rental for its equipment. (R102-103). The very nature of a partnership or joint venture requires that the partners share in profits and losses. Without this necessary element there can be no partnership or joint venture. (Title 48-1-23, Utah Code Annotated, 1953).

It is respectfully submitted as follows:

1. That the judgment as to both defendants should be reversed and vacated.

2. That the lower court be instructed to dismiss

the action as to the defendant, General Insurance Company of America.

3. That plaintiff and defendant Reynolds be required to make an accounting, one to the other, as partners on said joint venture.

4. That the lower court be instructed to award all costs, expenses, and attorneys' fees in favor of defendant, General Insurance Company of America and against plaintiff, Eastern Utah Development Company.

Respectfuly submitted,

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