

1960

## Zion's Service Corporation v. H. A. Danielson : Brief of Defendant and Appellant

Utah Supreme Court

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Norman Wade; Attorney for Appellant and Defendant;

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# In the Supreme Court of the State of Utah

ZION'S SERVICE CORPORATION,

Plaintiff and Respondent,

V.

H. A. DANIELSON,

Defendant and Appellant.

FILED

SEP 15 1960

State Supreme Court, Utah

CASE

No. 9232

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## Brief of Defendant and Appellant

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NORMAN WADE

Attorney for Appellant  
and Defendant



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# In the Supreme Court of the State of Utah

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ZION'S SERVICE CORPORATION,

Plaintiff and Respondent,

V.

H. A. DANIELSON,

Defendant and Appellant.

CASE  
No. 9232

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## Brief of Defendant and Appellant

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### STATEMENT OF FACTS

The plaintiff in this action (respondent herein) filed suit against defendant (appellant herein) alleging that defendant owed plaintiff Three Thousand Six Hundred Twenty-Six (\$3,626.00) Dollars plus interest on a contract between plaintiff and defendant.

At the time the plaintiff Corporation was organized in December of 1955, the defendant was listed as one of the original incorporators. The Articles of Incorporation of Plaintiff's corporation states that one of the purposes of the corporation was to pro-



vide quantities estimates for Masonry Contractors on the jobs they were to bid, that is, to figure out the quantity of bricks, mortar, etc., which the contractor would have to use on the job so that he could make his estimate of costs from this quantities estimate.

The Minute Book of the Board of Directors of Plaintiff Corporation shows that on January 3, 1956, a motion was made and passed that the contractor members of the corporation were to pay to the corporation 1% on housing projects from one to ten houses; 2% on projects of eleven to twenty-five houses; and 3% on projects of more than twenty-five houses. Further, on projects other than houses, they were to pay 1% of jobs up to \$10,000.00, 2% on jobs up to \$25,000.00 and 3% on jobs over \$25,000.00. The Book further shows that the defendant was present at this meeting. However, all of the witnesses, for both the plaintiff and defendant, testified that at all times when the plaintiff corporation was formed and later while it was operating, that the defendant told all of the directors of the corporation that he would not pay the corporation any money either for stock or dues for services as long as a Mr. Duane White was connected with the corporation and that everyone knew this because the defendant thought that Mr. White was dishonest (see deposition of Gerald Whitaker, Page 7 and 8). It proved later that the defendant's estimation of Mr. White was correct, as he embezzled some \$2,000.00 from the corporation and was forced to leave the corporation for that reason in March of 1956.



After Mr. White left the corporation, defendant did pay for his stock and made certain "dues" payments to the corporation; however, not on the basis of the rate set up in the January 3, 1956 meeting. In fact, the plaintiff corporation did not change those rates to any of its members at that particular time. (See trial transcript pages

Thereafter, the plaintiff corporation attempted to bill the defendant on the basis of the January 3, 1956 minute entry, and defendant refused to pay on the basis but agreed to pay on the same basis of the other members of the corporation, stating that the jobs could not stand such a high fee for the materials estimate.

Issues were framed and the case proceeded to trial before the court without jury and resulted in a judgement by the court in favor of the plaintiff and against the defendant in the amount of \$3,626.00 plus \$435.12 interest and costs, on a contract which called for the payment of 1% of amount received by defendant for all jobs up to \$10,000.00; 2% of all jobs in excess of \$10,000.00 and not over \$25,000.00; and 3% on all jobs in excess of \$25,000.00.

Stotement of Points:

## POINT I

THE TRIAL COURT ERRED IN FINDING THAT ANY CONTRACT WAS EVER MADE BETWEEN PLAINTIFF AND DEFENDANT AS THERE IS NOT EVIDENCE TO SHOW SUCH A CONTRACT.



## POINT II

THE TRIAL COURT ERRED IN FINDING A CONTRACT BETWEEN PLAINTIFF AND DEFENDANT, BECAUSE UNDER ANY AGREEMENT BETWEEN THE TWO, PLAINTIFF WAS NOT BOUND TO DO ANYTHING, SO THERE WAS A LACK OF CONSIDERATION.

## POINT III

THE TRIAL COURT ERRED IN FINDING FOR THE PLAINTIFF BECAUSE ALL OF THE EVIDENCE SHOWS CLEARLY THAT IF THERE WAS AN AGREEMENT BETWEEN PLAINTIFF AND DEFENDANT, THAT PLAINTIFF FIRST BREACHED THE AGREEMENT AND SO SHOULD NOT BE ENTITLED TO RECOVER UNDER THE AGREEMENT.

## POINT IV

THE TRIAL COURT ERRED IN FINDING FOR THE PLAINTIFF BECAUSE IF THERE WAS AN AGREEMENT BETWEEN PLAINTIFF AND DEFENDANT, IT VIOLATES SECTION 25-5-4 U.C.A. 1953 AS AMENDED, IN THAT THE AGREEMENT WAS NOT IN WRITING.

## POINT V

THE TRIAL COURT ERRED IN FINDING FOR THE PLAINTIFF UNDER AN AGREEMENT BECAUSE SUCH AN AGREEMENT IS VOID AND UNENFORCEABLE BECAUSE IT VIOLATES PUBLIC POLICY AND SECTION 50-1-6 U.C.A. 1953, AS AMENDED, IN THAT IT IS A RESTRAINT OF TRADE.



## ARGUMENT

## POINT I

THE TRIAL COURT ERRED IN FINDING THAT ANY CONTRACT WAS EVER MADE BETWEEN PLAINTIFF AND DEFENDANT AS THERE IS NOT EVIDENCE TO SHOW SUCH A CONTRACT.

From the evidence submitted at the trial it becomes evident that plaintiff is depending upon one of two items submitted as evidence to support their claim that a contract was made between plaintiff and defendant. One would be the articles of incorporation in which the so-called or alleged purpose of the organization were set out. Of course, these articles of incorporation do not contain any provisions whatsoever for the defendant to do; they do indicate the purpose for which the organization was organized, but in no way do they bind anyone to deal with the plaintiff; therefore, there is a complete lack of a contract contained in the articles of incorporation. Plaintiff herein submitted to the court as evidence the memorandum of the meeting note in which it was listed that certain sums were to be paid to the corporation by members. At this time, there was nothing said whatsoever about what the plaintiff was to do for these services, only that certain sums were to be paid to it by certain members of the corporation. Further, at this particular time, all of the evidence from both plaintiff's and defendant's witnesses stated that the defendant in this action at the time this motion was made told



everyone connected with the organization that as long as Mr. White was connected with the organization, he would pay no sums of money to the organization. Therefore, at the time this motion was passed, the defendant specifically told everyone that he would not agree to anything, and therefore no contract was made.

It might be plaintiff's contention that later when the afore-said Mr. White was found to be dishonest after he stole in excess of \$2,000.00 from the corporation, that the defendant then paid some sums of money into the corporation, thereby agreeing to the terms of the agreement. However, the evidence is clear that at the time the defendant paid money into the corporation, the corporation was not itself following its own rules of the aforesaid meeting minutes in billing its members. It was merely placing figures, which apparently had no relationship to the meeting minutes as set out, and as shown by plaintiff's own witnesses on cross examination these figures were followed. (See transcript pages 91-98 ). In some instances these figures were higher than the aforesaid rates as contained in the minute meetings, and in most other instances they were many, many times lower than the aforesaid rates. Therefore, if plaintiff acquiesced to anything at all, he would acquiesce to paying only those rates the other members were paying, and not those rates as were indicated in the minutes of the meeting, which were submitted to the court as evidence in this case. It is defendant's position, however, that he acquiesced in nothing; that he merely



presented money to the corporation in order to go along with the rest of the group. The evidence clearly shows he at **no** time after specifically denying that he would pay any money to the corporation agreed later to pay any specific rates to the corporation; and therefore, no contract was ever made between the plaintiff corporation and the defendant.

## POINT II

THE TRIAL COURT ERRED IN FINDING A CONTRACT BETWEEN PLAINTIFF AND DEFENDANT, BECAUSE UNDER ANY AGREEMENT BETWEEN THE TWO, PLAINTIFF WAS NOT BOUND TO DO ANYTHING, SO THERE WAS A LACK OF CONSIDERATION.

If there was an agreement between the plaintiff and defendant, all the evidence shows that the plaintiff corporation was not bound to do anything whatsoever. Certain purposes for the existence of the said corporation were listed in the articles of incorporation, but there was nothing in them to bind them to do anything. The plaintiff corporation could have and **did** fail to supply defendant with many of the bids. This was admitted by plaintiff's own witnesses, and there was nothing that plaintiff could do about it. If that is what the corporation was supposed to do, they failed to do it; and there is no place in any agreement between the plaintiff and defendant which required the corporation to do this. Therefore, the corporation cannot claim that there was an agreement between the plaintiff and the



defendant because the corporation was not legally bound and there was no consideration on the part of the corporation for plaintiff's promises to do anything.

### POINT III

THE TRIAL COURT ERRED IN FINDING FOR THE PLAINTIFF BECAUSE ALL OF THE EVIDENCE SHOWS CLEARLY THAT IF THERE WAS AN AGREEMENT BETWEEN PLAINTIFF AND DEFENDANT, THAT PLAINTIFF FIRST BREACHED THE AGREEMENT AND SO SHOULD NOT BE ENTITLED TO RECOVER UNDER THE AGREEMENT.

If there was an agreement between plaintiff corporation and defendant, that agreement certainly contained terms other than those stated in the purpose of the existence of the organization. The plaintiff's own witnesses said that certain members of the organization joined the organization for the purpose of investing funds and that promises were made to the members of the organization that the profits and fees collected from this organization were to be invested and that this would be a very fine investment opportunity. (See Gerald L. Whitaker Deposition PP 17). Some members of the corporation joined **solely** for that purpose, and had no interest whatsoever in the so-called service provided by the corporation and of supplying quantity estimates to its members. Since that was part of the consideration for some of the members for joining, and the evidence is clear on the subject that the plaintiff corporation at no time while defendant



was a member of said corporation made any investments; the plaintiff failed to carry out the terms of its agreement with its members. Therefore, plaintiff should be denied any relief in this action since plaintiff first breached the so-called contract. Further, if it was definitely established that an agreement existed, it was a part of the agreement that plaintiff organization should supply all its members with all of the estimates on all of the jobs they did. The evidence is clear from all of the witnesses that the plaintiff failed to do this and thereby broke the terms of their agreement, if such agreement existed.

#### POINT IV

THE TRIAL COURT ERRED IN FINDING FOR THE PLAINTIFF BECAUSE IF THERE WAS AN AGREEMENT BETWEEN PLAINTIFF AND DEFENDANT, IT VIOLATES SECTION 25-5-4 U.C.A. 1953 AS AMENDED, IN THAT THE AGREEMENT WAS NOT IN WRITING.

This agreement was to run for an indefinite period of time, which was in the contemplation of all parties to be more than one year, and therefore the said agreement must be in writing in order to be in force under the aforesaid Utah statute. The case of *Burk vs Superflo Mfg. Co.*, 78 Atlantic 2d, 698, held where an agreement between two business concerns whereby plaintiff, a co-partnership, agreed to solicit orders for plumbing tools and supplies manufactured by defendant, contained no provisions for termination of the agreement, but left



time for performance enterely open; the agreement was unenforcible as a contract not to be performed within one year. The alleged agreement in this case is of the exact same type as the agreement in the above case. This agreement was of an indefinite period, and all the parties thereto contemplated that it would run for more than one year. There were no provisions made for termination of the agreement, which was a big factor in the above entitled case, and the said agreement has no memorandum or anything at all signed by the defendant with which the plaintiff can hope to show as a memorandum in writing of this agreement. Therefore, the agreement should not be enforced.

The case of Pochall vs Anderson, 91 Southwest 2d 1050, 127 Texas 251, is the case where an employer agreed to pay a ranch foreman an annual bonus. This agreement had no time provision and did not contain a method of termination and the court in that case held that it was within the statute of frauds and therefore unenforcible, since the agreement was not in writing. The following cases from the following states also contain the same provision: North Carolina; Choate Rental Company vs Justice, 193, S.E. 817, 212 NC 523; Kentucky: Utilities Co. vs Hurst 269 S.W. 525; Maine: Long Cope vs Lucerne 143 Atlantic 64; Mississippi: Garrachi vs Sherwin Williams Paint Co. 125 South 410; Tennessee: Deapon vs Tennessee Coal Co. 12 Heish 650; Texas: Harper vs Loftown & Improvement Co. 228 S.W. 188; Washington: Sish Clearing House vs Melchon Co., 25 Pac. 2d, 381. The Oklahoma courts



have also followed the above doctrine. Further, Corbin on contracts, Sec. 446, states that the courts of these jurisdictions and other follow this view. There can be no question in this case that there was no agreement in writing and therefore this contract is unenforcible as a violation of Utah statute of frauds.

### POINT V

THE TRIAL COURT ERRED IN FINDING FOR THE PLAINTIFF UNDER AN AGREEMENT BECAUSE SUCH AN AGREEMENT IS VOID AND UNENFORCIBLE BECAUSE IT VIOLATES PUBLIC POLICY AND SECTION 50-1-6 U.C.A. 1953 AS AMENDED, IN THAT IT IS A RESTRAINT OF TRADE.

Section 50-1-1 U.C.A. 1953 as amended, reads:

**"Combinations to control prices forbidden-** Any combination having for its object or effort the controlling of prices of any professional services, any products of the soil, any articles of manufacturing or commerce, or the cost of exxxchange or transportation, is prohibited and declared unlawful."

Section 50-1-6 U.C.A. 1953 as amended, reads:

**"Forbidden Contracts void-** Any contract or agreement in violation of any provision of this chapter shall be absolutely void."

17 C.J.S. Sec. 238 Page 622, reads as follows:

**"5. Agreement in restraint of trade in general.** - A contract which in its terms is an



unreasonable restraint of trade is invalid as against upblic policy. . . ."

12 Am Jur, Sec. 167 pp 662 has a similar statement, and Williston on Contracts Vol. 5, Sec. 1663, is in complete agreement with this statement.

And the Restatement of Contracts, Section 517, says:

"A bargain not to bid at an auction, or any public competition for a sale or contract, having as its primary object to stifle competition, is illegal."

Illustration 6 under Sec. 517 reads:

A, B, C and D, building Contractors, agree with one another to form X association and that in future bids for the award of building contracts the successful bidder shall pay X association 2% of the gross amount of the price fixed in the contract awarded. The agreement between A, B, C and D is illegal."

It is clear from the above that the present case is exactly the same as illustration 6. A group of contractors formed the plaintiff corporation and agreed to give it 1, 2 or 3% of the successful bidders' jobs. It is against public policy because it stifles competition among Masonry Contractors.

The courts throughout the nation have found this to be the case and have declared such contracts void as against public policy.

This case is so near the case of Masterbuilders Assn. of Kansas vs Carson 269 Pac 693, that it would be hard to find two cases with the fact situation as



similar. In the Masterbuilders Assn. of Kansas case there was a contract entered into whereby the defendant agreed to pay the plaintiff association 1/2 of 1 per cent of a contract price over \$10,000.00. One-half of this amount was to go to the association and the remaining one-half was to be distributed equally to the five lowest unsuccessful bidders in the contract. The association was an association of contractors in Kansas. Unlike the present case, this was not a corporation, and the corporation could not keep the profits itself. The defendant in that case contested the bill owed to the plaintiff on the grounds that this contract was against public policy. In that case, as in the present case, the plaintiff organization furnished quantities estimates to its members, just as the plaintiff corporation in this case does. The court says that a contract by members of a voluntary contractors' association in assessing a fee upon each member of a percentage of the contract price of any public contract secured by him is against public policy and void regardless of the lawful intent of the parties in making it; and it is a further fact that the public may not have been injured in a particular instance. The court held this contract to be void as against public policy for three specific reasons: (1) That the contractor is likely to add the cost of this service to his bid and therefore pass it on to the consumer. (2) That five others who did not do any services or any work for this, benefited from the contractor's bid, and (3) Free competition is diminished where all contractors use the same service from the same source.



This case is so close to the present case, that it is difficult to find any difference whatsoever. Under this case, the contractors formed an association, a profit making corporation, and that corporation was to supply quantities estimates to its members and the fees to be paid were a percentage of the winning contractor's winning bid. In this case, a much greater percentage than in the Kansas case. In the Kansas case the percentage was  $1/2$  of 1 per cent of the contract price over \$10,000.00. In the present case, the plaintiff is seeking to recover 1 per cent of the contract price on small contracts, 2 per cent on larger contracts and 3 per cent on even larger contracts.

This case fits on all fours with the Kansas case. Number 1, the contractor is likely to add the costs of this service to the consumer. This was in accordance with all of the evidence given in this case. Plaintiff's own witness, Mr. Whitaker, when his deposition was taken, stated in that deposition that when he figured the amount to be charged to each contractor, he would first subtract a percentage of the bid from the total contract price before taking the percentage, because it was his idea that the contractor had added that percentage to his bid before submitting the bid. Therefore, all the parties involved contemplated that the contractor would add this cost to the consumer and therefore the prices would go up. Number 2, those who did not give any service would benefit in the winning contractor's business. In the Kansas case, only the five other bidders were to benefit; but in the present



case, **all** of the other bidders were members of this organization and would benefit, because this is a profit making corporation, which was to invest the profits herefrom in other corporations and distribute the funds to all of its members, and therefore all of the members were to benefit, without giving service to the corporation. Number 3, the corporation, of course, contemplated that all of the contractors would use the same service from the same source and this service would be an **exceptionally high priced source**. The evidence given by plaintiff's own witnesses is that the cost to the winning member of the corporation which might be \$900 in one case for its service, to an outside member would run between \$20 and \$50. What a drastic increase for the so-called service provided by this corporation to its members; which increase was to be passed on to the public, and which increase was to be shared in by all of the unsuccessful bidders, as being members of this corporation. (See Deposition of Gerald Whitaker, page 19 and 20).

All the cases that can be found are in agreement with the Masterbuilders Assn. of Kansas vs Carson case; that is to say that where the above three factors are present, there is not a case on the books which does not hold that these contracts are against public policy. Kentucky Assn. vs Williams, 280 Southwest 937, was a case where a fee of 1/4 of 1 per cent on all work, plus \$50 was to be paid to the association contractors. Plaintiff argued that this fee was reasonable, and therefore not against public policy. The court held that the de-



termination is the general tendency at the time of the contract was made and if opposed to the interest of the public, then the contract is invalid even though no injury to the public would result in the particular case, and further took judicial notice of the fact that it is human nature to place the cost of this membership in this organization on the contract price and shift it to the public. A case of the Contractor's Association of Western Pennsylvania vs Seeds et al, 15 At 2d 467, was a case where the contractors were engaged in heavy building and construction work. Members were to pay 1/10 of 1 per cent of the gross amount of each contract in the area covered by the association. The contract was in the form of a by-law; and this contract was held void as against public policy. It is quoted in the Restatement of Contracts, Vol. II, P. 5-18 and the Kentucky Assn. case above. It is held that the defendant would recoup the fee by adding it to the contract price, and therefore was against public policy; and that the by-law has a direct tendency to injure the public and effect competitive building in that these parties were all using the same service and therefore there would be no competition whatsoever in this bid and it gave the members who were unsuccessful in the bidding an interest in the contract and this was against public policy.

The Associated Wisconsin Contractors vs Lathers Day of 1940, 291 N.W. 770, was a case where the plaintiff was seeking to recover from the members of a highway contractors group, who signed an agreement of the by-laws of the association,



wherein each member was to pay  $\frac{1}{4}$  of 1 per cent of the contract price. This court held that this was against public policy, for the same reason as the above cases. Case of Bailey et al vs. Association of Master Plumbers, 52 S.W. 853, is where plaintiff was a non-profit corporation; each member was required to report in open meeting his jobs and if his work was completed. They were to pay \$7.50 per bathtub and \$7.50 per water closet installed. The court held that this was against public policy, as it was destruction of free competition among its members; it increased the price to the consumer, and the provision was obviously an unreasonable restraint upon trade, and being so, it is contrary to the public policy and void under the common law of the country.

The case of the Electrical Contractors Assn. of Chicago vs. Shulman Electric 57 N.E. 2d 220, 324 Ill. Appellate 28, is a case where plaintiff had an action to recover dues resulting from by-laws wherein the members were to pay  $\frac{1}{4}$  of 1 per cent of all construction and merchandizing business to the organization. Here it was contended that this was against public policy and the court held in this case that this was **not** against public policy; however, this case is in complete agreement with the principles advanced in the foregoing cases. The difference in this case was that this corporation was a non-profit corporation and the losing bidders would **not** share in the bids of the successful bidders' contracts. Secondly, this court did not feel in this particular case that the percentage charged



would be added to the costs; and for these two reasons this court held this agreement to be **not** against public policy. However, the case itself indicates that **had** the court found these two factors present as was present in the other cases, and is present in the case here, that the contract would have been against public policy.

Griffits & Sprague Stove Co. vs Waterfront Emp. Assn. of Pacific Coast (C.A. 9) 162 Fed. 29th 1017, has been cited as holding opposite to the above cases. It is appellant's contention that the Griffith's case has no standing here as it is not at all similar to the present case. In that case, the plaintiff was a **non**-profit corporation, which is very important. The members are persons or firms engaged in the business of carrying cargo by water on Pacific Coast ports. The organization was formed to deal with the longshoremen and to represent the members in dealing with longshoremen on working condition and other factors. In other words, it was an employers' organization organized solely for the purpose of dealing with the unions. The membership dues were to be 2 1/2 cents per ton carried by the members. However, there is no showing in that case whatsoever that the members were directly bidding against each other to obtain jobs and that the 2 1/2 cents per ton were to be added to the job costs. The court in that case did find that the agreement was not against public policy and that defendant would have had to pay someone for these services had he not paid plaintiff corporation and that the fee in question was reasonable in light of the serv-



ices performed. In that case, many factors were not present which are present in this case. These factors are (1) Plaintiff corporation was a non-profit corporation and the other members therefore were not to share in the dues paid in by members of the corporation. (2) There was no showing of competition between the members of the corporation, and that the 2 1/2 cents per ton membership dues would be added to the cost to the ultimate consumer. Therefore the Griffith's case is **not** in point and should not even be considered when deciding the question now before the court.

A further element to this same question has been added by the testimony in this case. It has been brought out under the testimony that the members of the organization contended that a bid depository would be operated. (See Transcript pp. 99.) Although this was not done, it was a part of the contemplation of the parties. The bid depository was to be operated wherein bids would be opened before the public opening was had, and wherein the highest and lowest bid was to be thrown out. This, therefore, would raise the price of masonry work and increase the costs of masonry work to the public. This is without a question, against public policy and therefore should void the contract.

This type contract and organization is against public policy as it requires successful masonry contractors to support and maintain unsuccessful ones. The successful bidders would be paying for the entire costs of the services while those who never got any bids whatsoever would still reap a pro-



fit from the successful bidder and might even be maintained completely by him from the inefficient contractor and would be allowing him to stay in business, which is against the free enterprise system of America; wherein the doctrine of free competition, where the efficient survive and the inefficient must seek other types of work, is here violated and therefore this alleged agreement is void as against public policy.

### CONCLUSION

It is clear that there was no evidence from which the court could determine that the parties hereto had entered into a contract and that if there was an agreement, that plaintiff was not bound to do anything thereunder so that the agreement lacked consideration. Further that plaintiff did not perform as expected by the members of plaintiff corporation, so plaintiff first breached any agreement which existed. It is also clear that any agreement of this type is against public policy and is therefore void and unenforcible.

For these reasons, the judgment should be reversed, with directions to enter a judgment dismissing plaintiff's cause and awarding defendant his costs herein.

Respectfully submitted by:

NORMAN WADE,

Attorney for Appellant  
and Defendant