

1991

Jerold L. Davis v. Heath Development Company : Brief of Respondent

Utah Supreme Court

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J. Richard Bell; Bell & Bell; B.R. Parkinson; La Mar Duncan; Attorneys for Respondents.

C. Reed Brown; Armstrong, Rawlings, West & Schaerrer; Attorneys for Appellants.

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UTAH SUPREME COURT

BRIEF

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BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

JEROLD L. DAVIS, dba JERY DAVIS AND
ASSOCIATES,

Plaintiff-Respondent,

vs.

HEATH DEVELOPMENT COMPANY, a corporation
dba PIONEER TRAILER PARK, SANDRA H.
FLINDERS, KATHRYN B. HEATH, DOROTHY A.
HOUSLEY, BONNIE J. BRINTON, HELEN YOUNG,
MARY FRANCIS BENNION, LAWRENCE T. HEATH,
CAROLYN H. MARLER, NANCY H. FERRIN,

Defendants-Appellants.

DOROTHY A. HOUSLEY and BONNIE J. BRINTON,

Cross-Complainants-Respondents,

vs.

HEATH DEVELOPMENT COMPANY, a corporation,
dba PIONEER TRAILER PARK,

Cross-Defendant-Appellant.

FILED

JAN 21 1977

Clerk, Supreme Court, Utah

Case No. 14549

BRIEF OF RESPONDENT - PLAINTIFF

MOTION FOR REHEARING

ARMSTRONG, RAWLINS, WEST & SCHAERRER
1300 Walker Bank Building
Salt Lake City, Utah 84111

BELL & BELL
J. Richard Bell
303 East 2100 South
Salt Lake City, Utah 84115

Attorneys for Appellants and
Cross-respondents

B. R. PARKINSON
503 Phillips Petroleum Bldg.
Salt Lake City, Utah 84102

LA MAR DUNCAN
706 Phillips Petroleum Bldg
Salt Lake City, Utah 84102

Attorneys for Petitioner

IN THE
SUPREME COURT
OF THE
STATE OF UTAH

JEROLD L. DAVIS, dba JERY DAVIS AND)
ASSOCIATES,)

Plaintiff-Respondent,)

vs.)

HEATH DEVELOPMENT COMPANY, a corporation)
dba PIONEER TRAILER PARK, SANDRA H.)

FLINDERS, KATHRYN B. HEATH, DOROTHY A.)

HOUSLEY, BONNIE J. BRINTON, HELEN YOUNG,)

MARY FRANCIS BENNION, LAWRENCE T. HEATH,)

CAROLYN H. MARLER, NANCY H. FERRIN,)

Defendants-Appellants.)

DOROTHY A. HOUSLEY and BONNIE J. BRINTON,)

Cross-Complainants-Respondents,)

vs.)

HEATH DEVELOPMENT COMPANY, a corporation,)
dba PIONEER TRAILER PARK,)

Cross-Defendant-Appellant.)

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ARMSTRONG, RAWLINS, WEST & SCHAERRER
1300 Walker Bank Building
Salt Lake City, Utah 84111

BELL & BELL
J. Richard Bell
303 East 2100 South
Salt Lake City, Utah 84115

Attorneys for Appelants and
Cross-respondents

B. R. PARKINSON
503 Phillips Petroleum Bldg.
Salt Lake City, Utah 84102

LA MAR DUNCAN
706 Phillips Petroleum Bldg
Salt Lake City, Utah 84102

Attorneys for Petitioner

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DISPOSITION

This Court on December 22, 1976, in a unanimous opinion, reversed the holding of the District Court and dismissed plaintiff's complaint.

ARGUMENT

POINT I

THERE WAS A PROPER ACCEPTANCE.

As to the statement in the opinion that there never was a proper acceptance of the earnest money agreement we respectfully submit the following:

This was a small family corporation in which all of the transactions for many years had been done in an informal manner and without strict compliance with the statute upon which the Court relies in its ruling. To hold a familylike corporation such as the Heath Development Company must comply literally with the provisions of Sec. 16-10-74, Utah Code Annotated as amended, would result in declaring void practically every act of the corporation for years. The record certainly shows that all the stockholders agreed to the sale and were anxious that it be consummated and gave the purchasers until May 1, 1974 in which to secure financing.

Even the listing agreement entered into on November 13, 1973, was authorized by the President without complying with the statutes and NO evidence of any statutory notice for the shareholders meeting held in November at the suggestion of the plaintiff is indicated, nor was any objection by any stockholder ever

raised.

The signing of the name of the three absent shareholders by their relatives has not been objected to by the defendant or any individual shareholder or by this Honorable Court.

Many Utah cases recognize the validity of courses of conduct by small family type corporations where the stock is closely held that does not meet the rigid rules for large corporations. The statement that the earnest money agreement entered into for the sale was void, we believe to be inaccurate, possibly voidable but not void.

This Honorable Court held on a number of occasions in substance that where a party deals with a corporation in good faith he is not affected by the fact that proper steps were not taken to clothe the corporate officer with such authority.

In Peterson vs. Holmgren Land & Livestock Co., 12 Utah 2d 125 363 P.2d 786, Wade, J: stated at page 130-31:

"If a corporate officer assuming to contract on behalf of the corporation is one to whom authority to make such a contract may be given, a person dealing with him in good faith is not affected by the fact that the proper steps to clothe him with that authority were not taken.

* * * *

"Without belaboring the record any further, it is sufficient to say that there was nothing illegal or inequitable about the transaction when it was entered into by the parties thereto. Both parties had equal knowledge of all the facts and were motivated by a desire to arrange boundary lines so that each would benefit and there would be no interference with each other in their respective projects."

Again in Shaw vs. Bailey-McCune Company, et al., 11 Utah 2d 93, 355 P.2d 321, Callister, J. stated at page 95:

"Under some circumstances the corporate entity may be disregarded in the interest of justice in such cases as fraud, contravention of law or contract, or public wrong. * * *

"Moreover, the conditions under which the corporate entity may be disregarded or the corporation be regarded as the alter ego of the stockholders vary according to the circumstances in each case inasmuch as the doctrine is essentially an equitable one and for that reason is particularly within the province of the trial court."

The particular circumstances in this case we submit was the informality of the family corporate meetings.

In Grover vs. Garn, 23 Utah 2d 441, 464 P.2d 598, Faux, D.J. stated at page 445:

"So we have the owners of substantially all of the stock of the corporation, who were also the owners of the land before it came into the corporation as its primary asset, acting without the formality of a stockholders meeting or a written resolution in selling the primary asset of the corporation. More, they agreed in the name of the corporation, as part of the sale that all payments should go from the buyers to Mr. and Mrs. Grover individually and to turn over to the Garns property of Mr. Grover consisting of shares of water stock and rights for grazing cattle under the U.S. Taylor Grazing Act. While this latter facet of the whole contract may be termed a maverick and concededly not a model for all corporate dealings yet as tendered in defense by the Garn defendants and respondents we are not concerned here with a corporation having a multitude of stockholders situated over a wide expanse of the country. The two owners signed as vice president and secretary-treasurer of seller corporation on October 1, 1964. While we do not approve the method employed here and certainly

denounce it as a pattern to be followed by corporations generally, we cannot disagree in this instance with the statement of law:

"'* * * * but the trend of authority is to uphold as binding on the corporations acts or contracts on its behalf by a person or persons owning all or practically all the stock."

This case therefore held in substance that a contract for the sale of a dry farm executed by the owners of substantially all of the stock of the corporation is binding upon the corporation notwithstanding the fact that the sellers had not complied with the procedure set forth in 16-10-74 Utah Code Annotated as amended.

We submit that this is in all respects identical to the one at bar, it being a small family corporation in which the stockholders and officers operated in the manner of a partnership rather than the formality of a large corporation. One of the principal objectives, if not the principal objective, of this corporation, has been to sell the trailer court and distribute the money. The operation of the trailer court has been continued only because they could not find a buyer. The plaintiff and respondent produced a buyer and then made it possible for the buyer to make a cash deal.

POINT II.

THE AGREEMENT WAS NOT VOID BUT VOIDABLE

Plaintiff and respondent secured a purchaser for the property and the offer to purchase presented January 13th was

within the 90 day listing period agreement signed November 13th. The offer was presented to all qualified directors, and accepted by all. The four owned over 80% of the voting stock. If they approved as stockholders, another meeting would be superfluous. This contract was not void but at best only voidable. The plaintiff and respondent suggested a five day period to reconsider.

No attempt to disaffirm this contract was taken by defendant until after the 90 day listing contract expired.

To permit the defendant corporation to treat the contract as valid, which it cannot do until after the listing period expires and then exercise their voidable option, creates a loop hole that will enable a defendant to do a real estate concern out of its commission at will.

The facts are that the defendant treated the contract as binding for not only the balance of the listing period, thereby preventing the plaintiff from presenting any other offer to purchase during a substantial part of the listing period, but also continued to treat the contract as binding until April 8, 1974 when the plaintiff was devoting his time in securing financing to comply with the purchase agreement to pay cash in full.

To hold a family type corporation such as the Heath Development Company must comply literally with the provisions of Section 16-10-74, Utah Code Annotated as amended, would result in declaring invalid practically every act of the corporation for years.

Defendants had ample opportunity to disclaim or to

rescind the actions of the corporation taken on January 13, 1974, but instead chose to deprive the plaintiff and respondent of one-third of the listing period in which he well might have found another buyer and let plaintiff and his ~~as~~^{ss}ociates continue their efforts to finance the sale. The testimony of Mrs. Heath was in substance that she changed her mind about signing the deed without further consultation or a meeting with the stockholders, but only upon the advise of a husband of one of the minority stockholders (one Flinders). ^{Until} ~~at~~ that time no question of the validity of the sale had arisen by anyone of the members of this family corporation. It was only then that the president of the defendant corporation suddenly became hesitant.

We would again like to call to this Court's attention the recent case of Branch vs. Western Factors, Inc., 28 Utah 2d 61, 503 P.2d 510, and the language therein used by Mr. Justice Ellett at page 363:

"Where, as in the execution of the trust deed here under consideration, there is an entire absence of a want of good faith, fraud and collusion, and the corporation is yet a going concern, no sound principal of law prohibits a stockholder or director from dealing with the corporation. A corporation is an artificial entity, and one of the principal objects of its creation is to contract with individuals in du^e course of business. This it may do with its directors and stockholders as well as with others; and under the weight of American authority at least, contracts made by the corporation with its officers are not void per se, but at most voidable merely at the election of the corporation or its representatives, within a reasonable time.

"In the instant matter the transaction between Heaps and his corporation occurred September 3, 1963. Neither the corporation or any stockholder or creditor thereof ever complained about the deal. The cor-

poration collected the rentals until January, 1968, when it filed its petition in bankruptcy.

"The trial court found on sufficient evidence before it that 'the transaction between the cross-defendants, Arnell E. Heaps and Western National Investment, Inc., was in good faith and for a fair and adequate consideration.'

"An appellate court should not reverse a trial court when the evidence is such as to sustain the findings made and the judgment rendered is based upon the facts found and in accordance with the law of the case. The judgment is affirmed with costs to respondent."

Judge Ellett quotes from the language of *Singer vs. Salt Lake Copper Manufacturing Co.*, 17 Utah 143, 53 P. 1024, a very early case (1889).

"Where there is an entire absence of a want of good faith, fraud, and collusion, and the corporation is yet a going concern, no sound principle of law prohibits a stockholder or director from dealing with the corporation. Contracts made by the corporation with its officers are not void per se; but such contracts will be carefully scrutinized in equity, and will be set aside if not made in the utmost good faith."

In 19 Am. Jur.2d §1281 p. 689, we find the following:

"While occupying such a fiduciary relation, the officers and directors of a corporation are precluded from receiving any personal advantage without the fullest disclosure to, and assent of, all concerned. However, a corporation is entitled to repudiate a transaction made by directors for their own benefit must act promptly on knowledge of the facts and cannot wait and speculate upon the chances of delay. Also, the fiduciary duties of directors as such do not preclude the stockholders, as parties contracting by a bylaw unanimously adopted and agreed to, from vying in the directors a discretion which might be excused in their personal favor."

If the earnest money receipt is only voidable, then the act must occur within a reasonable time, and certainly before sub-

stantial rights or obligations have been created or terminated because of the failure of the corporation to act in a responsible manner.

Conflict of interest we believe to be an interest that is adverse to the corporation. In this case, all four of the qualified directors had substantially equal adverse interest as far as the corporation was concerned. They wanted to liquidate the corporation and had been trying to do so for years.

All four, and particularly the president, Katherine Heath and her sister, Essie Heath, because they were anxious to liquidate the corporation and receive their share of the money so they could enjoy it while they were still alive. None of the smaller stockholders who were all made defendants, originally challenged the transaction as a stockholder. All of the stockholders were aware of the terms of sale all along and if any claim otherwise, they certainly were aware when they were served with summons in the personal capacity. None objected as stockholders. The conduct of the plaintiff was certainly above reproach and considerable time was spent in the explaining not only to the directors, but to other stockholders as to the amount of money each would receive.

POINT III.

ESTOPPEL

Plaintiff further submits that the defendants are estopped from claiming any irregularity in the manner in which the sale was made.

In the case of Grover v. Garn, which we have heretofore cited, 23 Utah 2d 441, the Court held that "under the doctrine or principle of estoppel in pais one may by his acts or conduct away from the court prevent himself from denying in court the effect or result of those acts." We respect a definition of long standing taken from Black's Law Dictionary:

"An estoppel by the conduct or admissions of a party * * * it is, and always was, a familiar principal in the law of contracts. It lies at the foundation of morals and is a cardinal point in the exposition of promises, that one shall be bound by the state of facts which he has induced another to act upon.

"The trial court ruled that Mr. and Mrs. Grover by their acts and statements led the Garns to believe that they had authority to sell the farm. We fail to find evidence in the record that compels us to reverse that ruling."

We submit the following cases on the subject of estoppel:

"Where all the officers of a corporation participate without dissent in an informal meeting thereof, and thereafter execute an agreement entered into at such meeting, they are estopped to deny the legality of the meeting. Kearneysville Creamery Co. v. American Creamery Co., 51 ALR 938, 103 W Va 259. 137 SE 217."

"The disregard for over twenty years by the stockholders of a business corporation of bylaws governing the sale and transfer of stock of the corporation and giving stockholders the right to participate in the purchase of stock before any sale thereof by a stockholder, and the failure of the stockholders to object to any transfer or sale although the bylaws had not been complied with in any of the several sales and transfers during such period amounts to a waiver of such bylaws and precludes the stockholders from asserting the bylaws as a ground for setting aside a purchase of stock, although another bylaw provides the manner of amending or modifying the bylaws. Elliott v. Lindquist, 169 ALR 1369, 356 Pa 385, 52 A2d 180.

SUMMARY

The offer and acceptance placed another obligation on the plaintiff. To find some means to enable the purchaser to comply with the provisions of the agreement to sell. The sellers had been told to take time to consider the offer, be sure they wanted to sell on the terms presented.

The balance of the listing period expired and the plaintiff continued his efforts to find financing for the purchaser. Testimon in the record indicates the plaintiff did find the financing; this was one of the conditions of the agreement to sell. Only then did the same persons who agreed to sell make the decision not to sell. The court's opinion dismisses this by concluding the first agreement meant nothing. The trial court in listening to all the witnesses concluded Katherine Heath, as the president, or as a director, or as an individual could not do this. She had used her position as president, as director and as a stockholder to enter into the agreement and had remained quiet for this long period of time and now after the plaintiff had fully performed, she shouldnot be allowed to disavow the prior contract and agreement with impunity. This may be called estoppel, but by whatever name, to permit this to be done with impunity is not justice but injustice; to require the transaction involved in this case to be approved by a majority of a disinterested board of directors is not possible, as there are only four directors and if two are purchasers the transaction cannot be made. This seems like an undesirable result and onethe Court would not

wish to establish.

Sandra Flinders had never met the requirements stated in the Articles of Incorporation to become a director. To require an illegal or unqualified director as a necessary party to approve what the Court has otherwise designated as a void or illegal contract does not sound like good law. We must either assume the President had the power to approve the sale which is evident she did, or we must consider the sales agreement as being approved with over 80% of the stockholders. To go out of one's way to find a contract not binding and thereby establish a questionable principal, is also in conflict with case law of this State. (See Grover vs. Garn); to look at the facts with the view toward justice and integrity and hold people to their obvious intentions when it can be done with more attention to reality than to obstruct the obvious intent by looking for technical means to obstruct justice.

There was no directors' meeting called to authorize the listing agreement and the manner of calling the stockholders' meeting did not meet the statutory provisions and the signing of the name of three stockholders who were not present by other members of the family simply illustrates the informality with which the affairs of the corporation were conducted. Examination of the offer to purchase and its acceptance shows it was signed by stockholders owning over 80% of the corporation stock. These individuals signed as individuals, as stockholder, ^{or} ~~as~~ as directors. From the documents neither of those positions are plausible. One thing is abundantly

clear. They all intended to sell the property. They thought they had the authority to do what they were doing. The questions at the meetings explaining how much money each one would share personally. Everyone was to be paid out of the purchase price. At the time this offer was accepted, the plaintiff's listing agreement had another 30 days to run. The opinion of this Court seems to disregard that fact. On January 13, 1974, when defendant corporation, through its stockholders meeting accepted the offer, plaintiff's listing agreement had 30 days more to run.

The plaintiff's claim is generally disposed of by assumptions that are not in keeping with the facts of the case.

This plaintiff developed and presented an offer to purchase the property. There is no conflict in this statement as to the actual facts and the findings of the trial court. If the plaintiff was sufficiently alert and reasonably successful to find a purchase that defendants should have found, but did not, that fact in itself certainly should not detract from the credit due to the salesman.

The Heath Development Corporation had, over a number of years, as its primary objective - the sale of the trailer court - to distribute the money, and dissolve the corporation. The continued operation of the trailer court was an activity tolerated only because and until a sale could be made. To hold the contract to sell bad because the parties failed to follow the procedure of the Utah Code 16-10-74, constitutes reaching to justify a decision. If the Heath Development Company's activities were measured by the provisions of

Utah Code Annotated 16-10-74, it would result in voiding practically all of the actions of this small family corporation for years

CONCLUSION

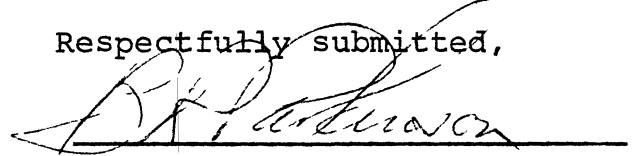
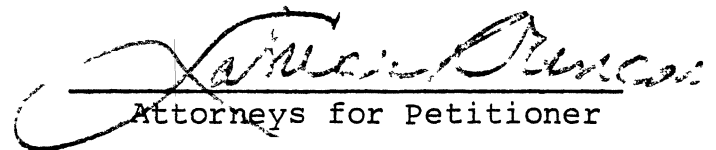
We therefore respectfully submit that this Honorable Court failed to consider (1) the past manner of doing business by this corporation; (2) the fact that it was a small family organization that operated informally, perhaps as a partnership; (3) that defendant had ample opportunity to nullify its actions which were agreed upon at the meeting of January 13, 1974, but failed to rescind the agreement, but instead let plaintiff and respondent complete its entire work and only then, on April 8, 1974, almost one month ahead of the optional time which it was granted to refinance and complete the transaction, did Mrs. Heath, acting only upon the advice of an outsider, Flinders, did the plaintiff become aware that the transaction would not be completed and that defendant was going to rescind (4) after plaintiff had completed all the requirements of the listing and the earnest money agreements, with full knowledge to defendants of plaintiff's activities, defendant should be estopped from rescinding the agreement at this late stage.

We therefore submit that the only possible reason for her refusal to sign the deed was plain "seller's remorse" and no other reason. Although the agreement on and shortly after January 13, 1974 may have been voidable, it was certainly not void and defendants had a duty to act within a reasonable time to avoid the corporation

being bound under the listing agreement and earnest money contracts.

We therefore submit that the plaintiff and respondent is entitled to have this Honorable Court reconsider its ruling.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "D. P. Peterson", written over a horizontal line.A handwritten signature in cursive script, appearing to read "James A. Benson", written over a horizontal line.
Attorneys for Petitioner