

1991

James Burrows v. Paul McGill, P M Engineers, INC : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES M. BURROWS,

Plaintiff-Respondent,

vs.

PAUL MC GILL, Individually,
P M ENGINEERS, INC., PAUL
MC GILL, RICHARD K. KLEIN,
GAIL O. PAYNE, as Administrative
Committee of the Profit Sharing
and Retirement Plan of P M
Engineers, Inc.,

Case No. 14621

Defendants-Appellants.

BRIEF OF DEFENDANTS PAUL MC GILL, INDIVIDUALLY,
P M ENGINEERS, INC., PAUL MC GILL, RICHARD K. KLEIN,
GAIL O. PAYNE, AS ADMINISTRATIVE COMMITTEE OF THE
PROFIT SHARING AND RETIREMENT PLAN OF P M ENGINEERS, INC.

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Appellants.

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Clerk, Supreme Court, Utah

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STATEMENT OF THE CASE

This case involves an action for recovery of certain profit sharing benefits pursuant to a Profit Sharing and Retirement Plan of the Defendant, P M Engineers, Inc., and the Counterclaim of P M Engineers, Inc. for breach of contract.

DISPOSITION BY THE THIRD DISTRICT COURT

On the 19th day of April, 1976, upon Plaintiff James M. Burrows' Motion for Summary Judgment, a hearing was had in the Third Judicial District Court in and for Salt Lake County, before the Honorable Earnest F. Baldwin. On the 5th day of May, 1976, the Court entered Summary Judgment for the Plaintiff and against the Defendant and dismissed Defendant's Counterclaim with prejudice.

RELIEF SOUGHT ON APPEAL

Defendant seeks to have the Summary Judgment vacated and remanded for trial or in the alternative for Summary Judgment for the Defendant and against the Plaintiff.

STATEMENTS OF THE FACTS

From May, 1959, to January 7, 1975, the Plaintiff, James M. Burrows, was an employee of P M Engineers, Inc. (TR-141). During that period of time, the Defendant, P M Engineers, Inc., had in force and effect a Profit Sharing and Retirement Plan (TR-71-163) of which the Plaintiff was a member (TR-228).

During 1974, the Plaintiff in his capacity as an employee of P M Engineers, Inc. worked as an inspector at the Main Post Office project (TR-210). In his capacity as an inspector at the Main Post Office project, the Defendant removed material from the construction site. (TR-473-476). Said removal of materials was without authorization of PM Engineers, Inc. (Deposition of Paul Mc Gill at Page 71). Additionally, while a stockholder and employee of Defendant corporation, Plaintiff worked for outside firms which were in direct competition with the Defendant (TR-494-495), and charged Defendant corporation with unauthorized mileage and overtime (TR-512-514).

While an employee of the Defendant corporation, the Plaintiff herein became a member of the company's Profit Sharing Plan. As a member of that Plan, the Plaintiff was entitled to certain contingent benefits by virtue of contributions made solely by Defendant corporation to the Profit Sharing Plan (TR-78, 81, 82, 85, 87, 88). Pursuant to the terms of said Profit Sharing Plan, the rights to the benefits were subject to divestment when a member of said Plan is terminated for Material Dishonesty or failure to follow the instructions of the Board of Directors (TR-91), and further subject to payment of benefits over a period of years not to exceed ten years if payment of benefits is appropriate (TR-85). When the Plaintiff had been terminated, the Defendant corporation notified the Administrative Committee of the Profit Sharing Plan that said termination of the Plaintiff was for acts it considered to be materially dishonest (Exhibit P-4 Deposition of Paul Mc Gill) and failure to follow the instructions of the Board of Directors.

The Administrative Committee upheld the determination of the Board of Directors and then notified the Plaintiff of the determination and invoked the Plan procedures, which called for arbitration of the dispute between the parties. (TR-unnumbered pages between 164 and 165, and TR-178). The Plaintiff then refused to arbitrate and filed this law suit (TR-506).

The Defendant corporation answered said law suit and filed its own Counterclaim, claiming damages by virtue of those acts perpetrated against the Defendant corporation by the Plaintiff (TR-204-212). That in addition, punitive damages are being sought by way of counterclaim based on the malicious actions of the Defendant, both prior to and subsequent to the filing of this action, which acts were intended to harm and to damage all of the Defendants herein (TR-204-212). On the 5th day of April, 1976, Plaintiff filed his Motion for Summary Judgment (TR-348). The matter came on for hearing before the Honorable Earnest F. Baldwin on the 19th day of April, 1976 (TR-350). On the 5th day of May, 1976, the Court entered the following Order:

1. "Plaintiff be the same is hereby awarded Judgment against the Defendants, P M Engineers, Inc., Paul Mc Gill, Richard K. Klein, and Gail O. Payne, as the Administrative Committee of the Profit Sharing and Retirement Plan of P M Engineers, Inc., in the sum of \$21,406.50 (which sum represents the balance of the Plaintiff's Profit Sharing Account as of December 31, 1974, in the sum of \$25,183.06 with 85% vesting), together with interest at the rate of 6% per annum from January 1, 1975 to the date of this judgment, the sum of \$1,712.45 together with interest at the rate of 8% from the date hereof until paid, and the Plaintiff's costs and disbursements.

2. The claim of Plaintiff's for punitive damages for wrongful termination of Plaintiff and attorney's fees, pursuant to the Utah Statute relating to wages is hereby dismissed with prejudice and upon merits.

3. The counterclaim of the Defendants is hereby dismissed with prejudice and upon the merits."

POINT I

THE TRIAL COURT ERRED IN FINDING THAT THERE WERE NO MATERIAL ISSUES OF FACT.

Rule 56 Utah Rules of Civil Procedure provides for Summary Judgment. Section (C) of the rule specifically provides as follows:

"...The judgment sought shall be rendered forthwith if the pleadings, dispositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In order for a Motion for Summary Judgment to be granted, there must be no material issues of fact in dispute, so as to entitle the moving party to a judgment as a matter of law.

Disabled American Veterans vs Hendrixson, 9 U. 2d. 152, 340 P. 2d 416.

The Court in determining whether or not to grant Summary Judgment must view the facts in a light most advantageous to the nonmoving party, and must resolve all doubts in favor of permitting the nonmoving party to go to trial and grant the Motion only when no right to recovery or setoff could be established See Controlled Receivables, Inc. vs Harmon, 17 U. 2d 420, 413 P. 2d 807 (1956); Foster vs Steed, 19 U. 2d 435, 432 P. 2d 60 (1967); Thompson vs Ford Motor Company, 16 U. 2d 30, 395 P. 2d 62 (1964).

Since a Summary Judgment prevents litigents from fully presenting their case in Court, therefore the Court should be reluctant to invoke this harsh remedy. Brandt vs Springville Banking Company, 10 U. 2d 350, 353 P. 2d 460. The remedy of Summary Judgment is invoked only in cases where the favored party makes a showing which precludes as a matter of law awarding of any relief to the losing party. Brenner vs Utah Poultry and Farmers Co-op, 11 U. 2d 353, 359 P. 2d 18. Summary Judgment should be granted with great caution. Watkins vs Simonds, 11 U. 2d 46, 354 P. 2d 852.

Finally the Court, in review of a pre-trial Summary Judgment of dismissal must accept the facts as the Appellant contends them to be. Reliable Furniture Company vs Fidelity and Guarantee Insurance Underwriters, Inc., 16 U. 2d 211, 398 P. 2d 685.

In the present case, the lower Court made two determinations which were inconsistent with the rules and cases cited above. Said inconsistencies are treated below.

A.

A FINDING THAT AS A MATTER OF LAW DEFENDANTS FAILED TO MAKE A DETERMINATION OF FORFEITURE CONSTITUTES AN ABUSE OF DISCRETION.

In his decision of May 5, 1976, (TR-432) the Honorable Earnest F. Baldwin stated:

"That the Defendants failed to follow provisions of the Profit Sharing Plan, having failed to make a "Determination of Forfeiture" as required by the Plan and having failed to establish the right to forfeit the Plaintiff's Profit Sharing account, are not entitled to retain the funds due Plaintiff and the Defendants having failed to determine the funds would be paid to the Plaintiff over a period of time and having failed to follow the provisions of the Plan, are obligated to pay Plaintiff the sums due the Plaintiff, together with interest accrued thereon."

It is respectfully submitted that the question whether or not the Committee failed to follow the Provisions of the Profit Sharing Plan presents a genuine issue of material fact, and therefore Plaintiff's Motion for Summary Judgment should have been denied and at the very least the matter should have been reserved for trial. The Profit Sharing and Retirement Plan of P M Engineers, Inc., Article VI, Paragraph 7 (TR-91) provides:

"If a participant's status as an employee ceases because of his discharge from employment for material dishonesty or material violation of, or refusal to follow the instructions of the Board of Directors of the Company, the Company shall promptly notify the Committee of the discharge of a participant for either of these causes and the Committee shall determine whether the Company had just cause for such discharge. Any determination by the Committee that the provisions of this Article are applicable shall be made within ten (10) days after the receipt by the Committee of notice of discharge, and written notice of such termination shall be given by the Committee to the employee, addressed by registered mail to his last known address. Within twenty (20) days after the mailing of such notice, the former employee may appeal for arbitration from the determination of the Committee. Failure to appeal within that time shall constitute an irrevocable consent by the former employee to the determination of the Committee."

The Plan provisions therefore require (a) that the Board of Directors of the Company promptly notify the Committee of the discharge of a participant for either material dishonesty or material violation of, or refusal to follow the instructions of the Board of Directors of the Company; (b) the Committee must determine whether the Company had just cause for such discharge; (c) within ten (10) days notify the employee that the provisions of the Plan are applicable in his case; (d) give such notice by registered mail.

As noted above, the Plaintiff, James M. Burrows, was notified of his termination on the 26th day of December, 1974, which said termination became effective on the 7th day of January, 1975. There is no evidence on the record to indicate the date upon which the Board of Directors notified the Administrative Committee of their determination that the Plaintiff had been terminated for cause; however, the minutes of the meeting of the Administrative Committee which was held February 21, 1975 (Exhibit P-4, Deposition of Paul Mc Gill) reflect as follows:

"The Committee has been notified by the Board of Directors of P M Engineers, Inc. that all of these employees have been terminated by management because of acts during the past year which it considered to be dishonest and not in the best interest of P M Engineers, Inc., of which they were all stockholders."

"...Mr. Green stated that if the terminations were for material dishonesty or refusal to follow the instructions of the Board of Directors, as the letter from the Board has stated, that no funds could be distributed under any circumstances until the Committee had determined whether or not the provisions of the Plan were applicable and, if so, that those employees be asked to arbitrate to determine the facts surrounding their actions."

"The Committee determined unanimously that the actions were serious enough to warrant the arbitration and Mr. Mc Gill stated that there were unanswered questions which had to be resolved prior to the distribution of any funds. He further stated that the Plan had provided a means to determine the fact and that those means should be utilized at this time."

Mr. Mc Gill stated that all of the employees in question should be contacted so that their side of the story could be told and the matter could be cleared up immediately and the first distribution made."

On the 24th day of February, 1975, the Administrative Committee notified the Plaintiff Burrows of their determination which was sent by registered letter, return receipt requested (TR-178).

Therefore, the uncontroverted facts indicate that Plaintiff was terminated because of certain dishonest acts perpetrated by him, that the Board of Directors so notified the Administrative Committee, that the Committee agreed with the determination of the Board of Directors, and so notified the Plaintiff of their determination. Once this was accomplished, the burden shifted to the Plaintiff to call for arbitration within twenty (20) days. Plaintiff failed to call for the arbitration and instead filed a law suit some fifty-one (51) days after receipt of said notification (TR-508-509). Provisions of the Plan provide that his failure to appeal within the time then constituted an irrevocable consent by the former employee to the determination that the Committee made relative thereto (TR-91). Therefore, it is respectfully submitted that forfeiture is an automatic process prusuant to the applicable provisions of the Plan, and as a matter of law, Defendants are entitled to Judgment in their favor.

It may be argued that genuine issues of a material fact remain. The primary one would be whether or not the Committee made their determination within the prescribed ten (10) day period. In addition, factual issues may remain whether the acts of the Plaintiff constituted material dishonesty or failure to follow the instructions of the Board of Directors. The latter will be dealt with in Point B below. However, if the Court finds that factual issues remain relative to the ten (10) day period should reverse and remand for trial on this particular issue.

B.

WHETHER DEFENDANT FAILED TO ESTABLISH THE RIGHT TO FORFEIT THE PROFIT SHARING ACCOUNT, RAISES GENUINE ISSUES AS TO MATERIAL FACTS AND THE LOWER COURT ABUSED ITS DISCRETION FINDING AS A MATTER OF LAW THAT THE DEFENDANTS FAILED TO ESTABLISH THAT RIGHT.

As a second basis for its ruling the lower Court stated in its Summary Judgment that the Defendants failed to establish the "right" to forfeit the Plaintiff's Profit Sharing account. This particular statement is unclear, since the right to forfeit is provided by the Plan itself, which obligates rather than grants a right to the Administrative Committee to forfeit in certain situations. This being the case, the Defendants need not establish the right, and the Court erred in placing the added burden on the Defendants.

If, on the other hand, the Court's contention relative to Defendants' failure to establish the so-called right to forfeit, relates to whether or not the reasons for termination constitute material dishonesty or material violation of, or refusal to follow the instructions of the Board of Directors, then we have an entirely different question.

Here, it is appropriate that we review the acts of Mr. Burrows which Defendants have complained and which ultimately led to his termination and established a basis for the right to forfeit. Those acts are: (a) the unauthorized removal of materials from the Main Post Office project; (b) removal of materials from the Main Post Office project during working hours (TR-253, 254, 255 and Deposition of Oscar Whitten at page 7); (c) working for competitors or clients of P M Engineers, Inc. while an employee of that firm (TR-258); (d) that Plaintiff charged P M Engineers, Inc. for

unauthorized mileage and unauthorized overtime. Since the lower Court had before it a Motion for Summary Judgment, these facts are assumed to be true. The question then became whether these acts constituted material dishonesty or failure to follow the instructions of the Board of Directors, so as to cause the Plan provisions relative to forfeiture to become operative.

The lower Court addressed itself to this particular question and found that, as a matter of law, the acts of the Plaintiff did not constitute material dishonesty or the failure to follow the instructions of the Board of Directors. At pages 477 through 482 of the transcript of the hearing on the Motion for Summary Judgment, the Court discussed a theory that the acts of the Plaintiff had to relate to his employment in order that the right to forfeit be invoked and, once again, the Court found, as a matter of law, these acts did not relate to his employment and, therefore, the right to forfeit was not established.

Clearly, the alleged acts perpetrated by the Plaintiff relate to employment. Certainly, the removal of materials from a Government project by a contract administrator's inspector during working hours, the working for competitors of the Defendant, and the unauthorized mileage and overtime charges relate to Plaintiff's employment. There is a conflict in the record relating to these particular acts and whether the acts do, in fact, relate to employment, they raise material issues of fact which the trier of fact must decide at time of trial. If capable of proof at time of trial, Defendant's right to forfeit would thereby be established.

It is submitted, therefore, that the lower Court found said acts of dishonesty not to be material. The word "material" is an often used term of art and is synonymous with substantial. Lewandoski vs Finkel, 129 Conn. 526 29 A. 2d 762. Both terms are obscure and incapable of determination as a matter of law. These words closely relate to those found in wrongful discharge cases where a primary issue is whether or not an employer had "good" and sufficient cause for discharge. Once again, these words are obscure and where the record contains conflict in this regard, the question is one that a jury must decide. Roberts vs Mays Mills, 184 N.C. 406, 114 S.E. 530. Here the facts conflict. The issue of materiality must be reserved for time of trial.

Plaintiff admits working for competitors' clients or perspective clients (TR-258). Defendants contend that the working for competitors falls within the framework of failing to follow the instructions of the Board of Directors in that said acts were clearly in violation of by-laws of Defendant corporation as well as policies thereof.

It can be argued that the Plan provisions relate only to participant's status as an employee and the by-laws would therefore not be applicable. However, the Plaintiff was a stockholder as well as an employee, as was every other member of the Plan. The by-laws do constitute policies of management of the corporation, (Section 16-19-25 U.C.A. 1953); therefore, the policies would reach the Plaintiff in his capacity as an employee-stockholder. The act of working for a competitor then would constitute a failure

to follow the instructions of the Board of Directors pursuant to the Plan provisions.

The record supports the proposition that alleged acts charged do fall within the scope of material dishonesty or failure to follow the instructions of the Board of Directors. The Plaintiff raises the point that Defendants' investigation disclosed certain dishonest acts after the fact (TR-469). Because of this, Plaintiff contends that the Court need take cognizance only of the one act alleged -- that of removing the material from the Government project. This, however, should not be the case. So long as the grounds exist, or Plaintiff has portrayed materially dishonest acts or acts which constitute failure to follow the instructions of the Board of Directors during the term of employment, the immediate reason for dismissal is not that important. See Bon Heyme vs Tompkins, 89 Minn. 77, 93 N.W. 901, Kike vs Bank Sav. L Ins. Co., 37 N.M. 346, 23 P 2d. 163. These cases did not relate specifically to Profit Sharing Plans, but rather were wrongful discharge cases. They do, however, have application here. The cases hold that it is sufficient that grounds existed at the time of discharge, Marnon vs Vaughn, 189 Or. 339, 119 P 2d 366, and further hold that it is not material that the employer assign another grounds as the cause for dismissal. Haag vs Renell, 28 Wash., 2d. 883, 184 P 2d. 442.

Therefore, all of Plaintiff's acts should be considered as the proverbial "straws" in the determination of whether Defendants established the right to forfeit. That determination is a genuine issue of material fact to be determined by the trier of fact and not on motion for Summary Judgment.

POINT II

THE COURT ERRED IN FINDING AS A MATTER OF LAW THAT DEFENDANTS SHOULD PAY BENEFITS IN A LUMP SUM WITH INTEREST THEREON.

In its Summary Judgment, the lower Court ordered that all of Plaintiff's benefits be paid with interest thereon. Article VI, Paragraph 2, of the Profit Sharing Plan (TR-85) provides that payment of benefits in cases of termination may be made over a period of years if the Committee so elects. The election is to be made within sixty (60) days of termination and cannot be controlling here insofar as Plaintiff is concerned since the issue of termination and payment of benefits has undergone judicial process.

The Profit Sharing Plan of Defendant, P M Engineers, Inc., gives rise to contractual obligations on the part of the employer and employee. Russel vs Princeton Laboratories, Inc., 321 A 2d. 800 N.J. (1967), Frazer and Torbett, CPA's vs Kunkel, 401 P.2d. 476 (Okla.). It has been held that a discharged employee was not entitled to immediate payment of vested benefits in profit sharing plans, but must abide by the employer's decision to defer payment. See Lano vs Rochester Germicide Co., 261 Minn. 556, 113 N.W., 2d. 460. Here the Plan provides for deferred payments, is contractual and the Court erred in ruling otherwise.

POINT III

THE LOWER COURT ERRED IN ITS CONTENTION THAT AS A MATTER OF LAW DEFENDANTS DO NOT HAVE THE RIGHT TO RECOVER FOR CLAIMS ARISING OUT OF THEIR COUNTERCLAIM BASED ON BREACH OF CONTRACTUAL DUTY ARISING OUT OF THE OWNERSHIP OF STOCK.

Section 16-19-25, U.C.A., 1953 supra, provides that by-laws may contain provisions for the regulation and management of a corporation.

Under the presumption which imputes notice of corporate by-laws, Sterling vs Head Camp, Pacific Jurisdiction, W. of W., 28 U. 526, 80 P. 375 (1905), by-laws which are within the corporate powers to adopt, bind the stockholders insofar as their rights are concerned, whether they have expressly consented to them or not. Ainsworth vs Southwestern Drug Corporation, 95 Fed. 2d 172, and more recently in Morrison-Knudsen Co., Inc. vs Rocky Mountain Chapter National Electrical Contractors Assn., 370 Fed 2d 463.

With regard to the relationship established between the stockholders in the corporation by the by-laws which are in existence at the inception of the relationship, the general rule is that a contract has been entered into between the stockholders and the corporation. Schroeter vs Barlett Syndicate Bldg. Corporation, 8 CAL. 2d. 12, 63 P. 2d 284. Said by-laws thus become an integral part of said contract or are in the nature and have the same force and effect of a contract as regards the rights between the corporation and the shareholders. In re: Campbell County Hardware Company, 15 F. 2d 78, and should be construed just as any other contract. Toler vs Clark Rural Electric Cooperative Corporation, Ky. 512 S.W. 2d 25 (1974).

By-Law No. VI of the By-Laws of P M Engineers, Inc. state as follows:

"All stockholders agree that any remuneration to them by an outside firm or individual for work performed of a nature engaged in by the corporation are monies or value due and payable to the corporation. In order words, stockholders may not engage in outside engineering or related services as an individual, nor may one or more stockholder enter into a business which provides such service and is intended to generate individual profit." (Deposition of Paul Mc Gill, Exhibit P-1).

"This paragraph illustrates the intent and wish and reason for the birth of this corporation, to-wit: the welding together of individual abilities of the stockholders in a team for the mutual benefit of the corporation and themselves. Furthermore, it is the intent and wish that each stockholder receive monetary benefit in direct proportion to his output, both efficiency wise and work wise. Therefore, in consequence, there will be no reason for outside work on the part of the stockholder and a high incentive remaining."

It is important to note that the above By-Law is to be read in the light of By-Law No. IV which provides with only one exception that stock may be sold only to individuals actively employed by the corporation. (Deposition of Paul Mc Gill, Exhibit P-1). Reading the two By-Laws together, we see the sense of By-Law No. VI, which was intended to mutually bind the stockholders in a mutually rewarding venture. It further intended to restrict and direct the energies of the stockholder-employee toward specific corporate ends. It was not intended to restrict one's activities after he was no longer a stockholder. Thus, it does not become a restrictive trade nor attempt to restrict one's right to seek employment whenever, or wherever, he so desires. Rather, the stockholder-employee simply agrees not to work for competing

firms or clients so long as he continues that unique stockholder-employee relationship. If he does work for competing firms, then pursuant to the contract, he is required to pay to the corporation those sums received while working for the competing company.

The By-Law in question was in existence at the inception of P M Engineers, Inc. and at the time the Plaintiff became a stockholder therein. Thus, pursuant to those cases cited above, said By-Law becomes a binding, contractual obligation on him. The lower Court in finding otherwise erred. Finding that as a matter of law, that Defendants did not have the right to their recovery. Once again, if the Defendants could prove a breach of contract and their damages at time of trial, they would be entitled to judgment in their favor. Therefore, it is submitted that this Honorable Court should reverse and remand for trial on the issues.

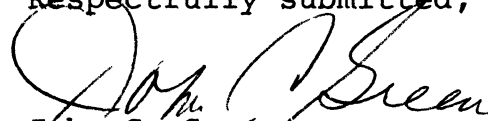
CONCLUSION

The Appellants are part of a company which established a non-contributory profit sharing program to benefit employees. The Plan placed certain contractual obligations on employer and employees alike. We have been primarily concerned with those provisions relating to payment of benefits where the employee is terminated for acts constituting material dishonesty or failure to follow instructions of the Board of Directors of said company. It is Appellants' position that the record is full of conflicts relating to material issues of fact and the Court erred in finding

as a matter of law that no dispute exists and that Plaintiff-Respondent was entitled to judgment.

Appellants' brief has pointed out said conflicts in detail and submits that if the conflicts can be resolved in the mind of the Court, they would be resolved in favor of the Appellants. This being the case, Appellants are entitled to judgment as a matter of law. We urge that the conflicts relate to genuine issue of material facts to be reserved for the trier of facts. Therefore, we further urge that the Court reverse the Summary Judgment of the lower Court and remand the case for trial and allow Defendants their day in Court.

Respectfully submitted,


John C. Green
Attorney for Appellants

Served two (2) copies of
the foregoing Brief of
Appellants on Respondent
by delivering to James H.
Faust at 721 Kearns
Building, Salt Lake City,
Utah, on this day of
October, 1976.
