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Guinn Rasbury v. Marvin L. Bainum : Appellant's Reply Brief

Utah Supreme Court

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OCT 16 1964

IN THE SUPREME COURT

OF THE

STATE OF UTAH

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FILED

OCT 15 1963

Clerk, Supreme Court, Utah

GUINN RASBURY,)
)
 Plaintiff and Respondent,)
)
 vs.)
)
 MARVIN L. BAINUM,)
)
 Defendant and Appellant.)

Case No. 98

APPELLANT'S REPLY BRIEF

Appeal from Judgment of the Third District Court
 for Salt Lake County, Utah
 HONORABLE STEWART M. HANSON, JUDGE

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IN THE SUPREME COURT
OF THE STATE OF UTAH

GUINN RASBURY,)
)
Plaintiff and Respondent,)
)
vs.) Case No. 983
)
MARVIN L. BAINUM,)
)
Defendant and Appellant.)

APPELLANT'S REPLY BRIEF

STATEMENT OF THE KIND OF CASE

The plaintiff in this action sued on two causes of action: (1) On a promissory note given by the defendant to the plaintiff pursuant to an agreement by the plaintiff that he would obtain funds for the defendant as operating capital for the defendant's business, and (2) For the reasonable value of professional accounting services rendered to the defendant.

The defendant counterclaimed against the plaintiff for an accounting and denied liability on both causes of action of the complaint.

DISPOSITION IN LOWER COURT

The lower court dismissed the plaintiff's first cause of action on the ground that the plaintiff had intentionally violated the court order to produce records and had concealed the records and upon the further ground that the plaintiff had failed to prove by preponderance of the evidence to the trial court that the plaintiff was entitled to recover. The lower court did grant judgment in the amount of \$1,300.00 for accounting services and denied the defendant the right to an account by the plaintiff.

RELIEF SOUGHT ON APPEAL

The defendant and appellant on appeal seek to reverse the lower court's award for accounting services and asks judgment for \$4,300.00 shown to be due the defendant by the plaintiff on records and seeks to have the case remanded to the trial court for a further accounting by the plaintiff and respondent.

STATEMENT OF FACTS

The statement of facts contained in respondent's brief does not accurately portray the facts as disclosed by the record.

The record clearly discloses that the plaintiff-accountant was not only employed to prepare tax returns for the defendant and his businesses, but occupied an active managerial position in connection with the businesses to the extent that he handled the funds and wrote checks through his own special account for the businesses (R. 44-46), printed menus for the business (R. 48), made arrangements with creditors (R. 48, R. 51), received all bank statements in his office (R. 50), maintained all of the records of the company (R. 50), wrote letters to people owing accounts to the business and actively collected these accounts (R. 61, R. 64), attempted to find a buyer for the club or investors to provide capital for its operation (R. 65), formed a business personally owned by him known as Houston Factors

and used this to factor accounts of the defendant's business (R. 68-69) without disclosing to the defendant that he was the principal in the business, drafted the assignment documents to Houston Factors for his client's signature without disclosing that he was the principal and owner of the factoring business (R. 76-77) and provided his client with a copy (pretrial Exhibit "1") of the assignment and thereafter made checks in his original copy, personally paid payrolls out of his personal account from monies belonging to the defendant which he had collected and had never accounted for (R. 91-94), and claimed to have the discretion to disburse the monies of the business on whatever accounts in his discretion determined (R. 104-106). Rasbury, in his answer to defendant's interrogatories under oath in October, 1961, stated that he had the books and records of the defendant but intended to retain them until his bill was paid and because he intended to use them to prove his case (R. 56). After failing to produce the records:

as ordered by the pretrial judge, he excused his failure by testifying that the records were stolen from him at a time some months prior to the date he answered the interrogatories under oath (R. 59) even though he admitted that his attorney had informed him that his attorneys had agreed that the records would be produced (R.61). Thus, the record impels the conclusion that the plaintiff, Rasbury, had virtual complete control of the fiscal affairs of the business and even a part in the non-fiscal management of the business.

The statement that Rasbury was authorized specifically to collect the accounts and to apply the same to monies owing to himself and to one Ed Lorraine is at complete variance with his sworn affidavit that he had only collected \$169.48 of the accounts receivable and the position he took at the pretrial hearing:

"The plaintiff contends * * * that he took the assignment of the accounts receivable of the defendant's business for the purpose of applying the proceeds received therefrom to the note and that the only money he ever received thereon is the sum of \$169.48 which he

has applied to the amount due and owing on the note." (Pretrial order, R. 19)

The completely inadequate accounting which Rasbury attempted to make at the trial shows his own evidence (Exhibit P. 4) that he had falsified his answers to the interrogatories in fact had collected \$4,469.43 and had curiously enough elected to apply all but \$169.48 on an account receivable other than his own. He admitted at trial that the defendant's explicit instructions were to collect these receivables and apply them on Rasbury's note (R. 107). The pretrial court ordered the plaintiff to produce all books and records of the defendant in the possession of the plaintiff and provided that unless he did so ten days prior to the trial the plaintiff would be denied the right to use any of the books and records in connection with establishing his case or any defense. The contention that this order was complied with in respondent's statement of facts is inaccurate.

The statement that appellant did not de

that the accounting services were reasonably worth \$1,300.00 is also inaccurate. The defendant and appellant denied that Rasbury was entitled to any sum whatsoever for services, having refused to account to the defendant and having refused to deliver the records into court which would enable an accounting to be made of the handling of the defendant's funds by the plaintiff.

ARGUMENT

POINT I.

THE PLAINTIFF-ACCOUNTANT AS A MATTER OF LAW HAVING BREACHED HIS FIDUCIARY DUTY TO HIS CLIENT AND HAVING VIOLATED THE ORDER OF THE COURT TO PRODUCE THE RECORDS CANNOT RECOVER FOR SERVICES RENDERED TO THE DEFENDANT.

The argument of the respondent under Point 1 of his brief that the evidence is sufficient to support an award of fees for services rendered the defendant-appellant is completely answered under Poin 2, page 14 of appellant's brief. The well established law provides that an agent who withholds information from his principal when he has a duty to disclose such information forfeits

all rights to compensations. (P. 15, appellant brief). The pretrial court, in recognizing the fiduciary relationship existing and the right to an accounting by the plaintiff, directed that the plaintiff produce all of the records at least ten days prior to the trial. The obvious purpose of this order was to enable the defendant to have access to the records in order to establish (1) whether or not any sums were due to Rasbury under the note, and (2) whether or not Rasbury earned any fee for services rendered by having properly discharged his fiduciary duty to the defendant. It seems inconsistent that the court could find that the plaintiff had intentionally violated the court's order and had lied to the court in excusing his failure to deliver the records and yet grant him any compensation for services. (R. 22).

POINT II.

THE DEFENDANT-APPELLANT IS ENTITLED TO A JUDGMENT OF \$4,300.00 AGAINST THE PLAINTIFF AND FOR AN ACCOUNTING FROM THE PLAINTIFF TO DETERMINE ANY POSSIBLE ADDITIONAL LIABILITY

The respondent under Point I of his argument contends that because of the legend contained on the income tax forms the defendant Bainum is estopped to demand an accounting of the plaintiff-respondent, Rasbury. Counsel states "appellant's signature on the income tax return is an admission by him that he knew full well the matters and things pertaining to his business and is incompatible with his claim that he has never received an accounting." (Respondent's brief, p. 6.) The record is quite to the contrary, i.e., that there was no way that Bainum could know anything about the contents of the tax return except through his accountant, Rasbury, who prepared his return. The record further shows that the tax returns were executed in blank while in Houston and the correspondence introduced shows that the returns were not even completed and filed by Rasbury until after Bainum had come to the State of Utah and had inadvertently discovered that

Rasbury had not filled in the returns and filed

the same. While it may not be good practice for taxpayers to rely upon their accountant to prepare the returns and insert the necessary computations it cannot be seriously contended that the ordinary taxpayer relies entirely upon his accountant to prepare and file his returns and unless especially qualified the ordinary taxpayer would have no way of determining whether or the accountant had properly computed and entered the information contained on the return. If Bainum is guilty of executing blank returns and relying upon his accountant to insert the proper information and to file the same on his behalf it is scarcely a factor that could be set up by the accountant as a defense to his client's right to an accounting. Counsel admits (Respondent's Brief, p. 7) that Rasbury obtained a number of extensions for Bainum for filing the returns and did not file the same until September of 1959 when Bainum was not even in the State of Texas and had not been in the State of Texas for

the statement that he was doing business with Rasbury and that Rasbury had the total responsibility for filing his tax returns and keeping his books and records and of accounting to him. The fact that Bainum had confidence in Rasbury up to and including September of 1959, as argued on page 7 of Respondent's Brief, does not in any way relieve Rasbury of the duty to account to his client for the handling of his client's money. The finding of the court (R. 29) that the plaintiff acted solely as an accountant and that he did not convert any money to his own use belonging to the defendant is not supported by the evidence and could not even be determined except by an accounting of what the accountant had done with the funds of his client which he admits he was receiving and disbursing. The \$4,300.00 collection which he had previously denied receiving under oath amply demonstrates the handling of Bainum's funds and the need for an accounting.

POINT III.

THE TRIAL COURT DID NOT ERR IN DISMISSING THE PLAINTIFF'S FIRST CAUSE OF ACTION.

It is difficult to see how the order of the pretrial court could be construed to give the plaintiff an option to conceal evidence with the sole penalty loss of his right to use Bainum's books to establish his own case. The record is clear that counsel had stipulated that these books would be produced and the court at pretrial order them produced. The fact that the court stated that Rasbury would be denied the right to use any of the books and records in connection with establishing his case if he failed to deliver them cannot be construed to relieve Rasbury of the duty of delivering his client's records prior to trial in order that Bainum could know what Rasbury had done with his funds. The technical argument contained under Point III of Respondent's Brief to this effect seems to us to be "tongue-cheek" evasion of the clear intention of the

pretrial judge that the books and records be delivered especially in view of the agreement between counsel that they would be delivered, which agreement was transmitted to Rasbury.

The obviously false explanation made by Rasbury to the trial judge as to why he had not delivered the records of his client, i.e., the burglary of the same from his office, abundantly demonstrates the unfaithfulness of this fiduciary to his client and makes suspect all of his testimony as to his conduct of his client's financial affairs.

It should be noted that respondent has not chosen to reply to Point III of appellant's brief. After both sides had rested and the matter was set for argument on the following day, Bainum moved to re-open the case to prove that Rasbury had talked to him that night and admitted that he had some of the records in his possession which he had previously testified were burglarized. The trial court denied the

since Rasbury was not entitled to recover on his note anyway the proffered testimony would be irrelevant. The proffered testimony was not irrelevant, however, because it re-enforces the defense of Bainum to the claim by Rasbury that he performed his duty to his client faithfully and was, therefore, entitled to recover for his services and this evidence should have been received. This evidence also would further establish the falsity of the testimony of Rasbury with reference to what had happened to the records and the unavailability and would relate to each of the issues involved in this case, i.e., the right of Bainum to an accounting, the willful suppression of evidence ordered to be delivered to his client prior to trial and the right of the accountant to compensation when the evidence shows he violated his duty to his client.

CONCLUSION

The trial court did not err in dismissing

the first cause of action of the plaintiff-respndent, Rasbury.

The trial court should have entered judgment in favor of the defendant and counterclaimant, Bainum, for \$4,300.00 and should have ordered Rasbury to account to Bainum for his handling of the funds and assets belonging to Bainum. It is respectfully submitted that the court should enter judgment in favor of Bainum and against Rasbury for \$4,300.00, dismiss Rasbury's second cause of action and remand the case to the trial court for an accounting.

Respectfully submitted,

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