

1967

Reliance National Life Insurance Company v. James E. Caine Dba Caine Agency : Appellant's Brief

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In The Supreme Court of the State of Utah

RELIANCE NATIONAL LIFE INSURANCE COMPANY,
Plaintiff-Respondent,

- vs -

JAMES E. CAINE, dba CAINES, Inc.,
Defendant-Appellant.

APPELLANT

Appeal from Judgment of the
for Salt Lake County
Honorable Stewart

WYATT, IVERSON AND TAYLOR
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Salt Lake City, Utah 84111

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When there is no competent evidence in a law case to warrant the findings of fact and decision the Supreme Court may interfere and hold the finding and decision void.

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In The Supreme Court of the State of Utah

RELIANCE NATIONAL LIFE INSUR- ANCE COMPANY,	} Case No. 10940
Plaintiff-Respondent,	
- vs -	
JAMES E. CAINE, dba CAINE AGENCY,	} Defendant-Appellant.

APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an action for moneys allegedly advanced, moneys collected and not paid to Respondent Insurance Company by Appellant Caine, and related miscellaneous charges which Respondent claimed were due him from the Appellant in the sum of \$6,762.73, after deducting all credits due Appellant from Respondent, and which arose from a life insurance agency contract between the parties herein. Appellant's counterclaim is an action for an accounting, which Respondent has not furnished to Appellant, although such was provided for in the written contract between the parties, to determine the amounts due Appellant from Respondent. In conjunction with such accounting, and its de-

termination, it was necessary for the court to determine any breaches of this contract, and which party was responsible therefore.

DISPOSITION IN THE LOWER COURT

The case was tried to the Court. From a judgment for the Respondent in the sum of \$6,762.73 Appellant appeals.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the decision of the court in whole, or in part, in awarding this money judgment on the grounds that there is no evidence anywhere in the record to sustain this judgment and there is no evidence to support the Findings of Fact and Conclusions of Law made by the court. Appellant also seeks to have the case remanded to the lower court for further consideration of the evidence referred to, but never completed nor submitted, or in the alternative, for a new trial.

STATEMENT OF FACTS

Frank B. Salisbury, president of Respondent company, became acquainted with James E. Caine, a life insurance salesman, in December 1955 and negotiated a written contract with him, dated February 1, 1956 wherein Caine was hired as Agency Supervisor for Reliance Life Insurance Company, hereafter referred to as Reliance (Exh. P-1). The con-

tract was written by Mr. Salisbury, and contained 19 provisions, of which two are of vital interest here, together with testimony that an accounting to Caine was mandatory in order to enable him to know the extent of his earnings, because of the complicated nature of this insurance company's records. (R 142, 143).

The agreement continued until late July or early August 1956 at which time a series of charges and counter-charges and recriminations between Salisbury and Caine resulted, on August 20th, 1956 with Mr. Caine resigning from all of his duties with Reliance (Exh. P-3). The resignation was accepted, and Caine was next heard from later that year in Nevada where he set up an Insurance company. At the time Caine left Reliance, or shortly thereafter, seven agents of Reliance also left the company (R 75). Some of them apparently joined Caine, in Nevada, others did not. (R 88, 111, 112, 113). One employee of Reliance testified that he had heard Caine, before August 20th, 1956, mention to a group of salesmen "that there was money in Nevada, no Blue Sky law," and some comment about starting a company there. (R 92). Another employee testified that each agent received a statement each month from Reliance concerning his accounts, and that Caine had never complained that his statements were incorrect (R 145). One of the seven agents who reportedly left the company when Caine did testified that he resigned at least three weeks before Caine did because Salisbury, president of Reliance kept cutting

down his salary, and over-writes, or both when he made too much money, telling him, "You are making more than the President of the company." (R 135). This agent, a Mr. Dedmore, admitted that he later went to work for Caine, in Nevada and elsewhere, but denied that he was ever solicited by Caine before quitting Reliance. (R 82, 83)

At the end of the August 20th, 1956 trial, the attorney for Reliance stated he was going to submit a deposition from a Mr. Mortensen, concerning the going into business in Nevada and then wanted to meet with Caine's counsel to prepare a few interrogatories on the special issues to be found from the evidence. (R 166).

Of interest is the fact that nowhere in this 110 page transcript of the August 20th trial are any references to the commissions due Caine, or the advances due back to Reliance, nor is such contained in any of the five exhibits admitted in evidence at the trial, nor in the other two exhibits proposed by Caine, but not offered (R 24).

Also of interest is that the deposition of Mr. Mortensen, taken by Reliance on August 22, 1960, was nowhere ever offered in evidence, nor ordered opened by the Court and published. (R). Another deposition, of one Joseph Ashton Cosby, was never taken with notice to the Court, was never offered in evidence, nor ordered opened by the Court and published. However, each of these depositions.

according to the Register of Writs book were opened. Too, they were considered by the Court and the counsel for the parties. (R.....).

Caine has endeavored to bring to the Supreme Court, in this appeal, the total record for the Court's information to determine whether the Memorandum Decision of the Judge of the lower court, and the Findings of Fact, Conclusions of Law and Judgment are supported by the evidence and the record.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN CONSIDERING THE TWO DEPOSITIONS IN ITS DECISION, AND THE TESTIMONIES GIVEN THEREIN, BECAUSE OF ITS FAILURE TO COMPLY WITH RULE 30, UTAH RULES OF CIVIL PROCEDURE, WHICH PERTAINS TO DEPOSITIONS UPON ORAL EXAMINATION.

Rule 30 (f) (1), Utah Rules of Civil Procedure states in part that the officer who swears in the witness and certifies concerning the deposition "shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of (the witness)" and shall promptly file it with the court in which the action is pending or send it by registered mail to the clerk thereof for filing."

According to the Register of Actions Book these Depositions of August 8 and August 22, 1960 were

not received by the Court until January 5th, 1961, and they were "not sealed" according to the entry of such Register. (R.....).

Further, it has been the time-honored procedure in Utah Courts that after being sealed, the deposition shall be opened only by order of the Court, or by the Court's direction. Ordinarily, it is not permissible to open a deposition out of court, and to do so may render it inadmissible for all purposes. 23 Am. Jur 2d, "Depositions," (84). If the trial court received and read these two depositions, counsel for each party should have had an opportunity to rebut, clarify, or challenge such testimony. Nothing in the record indicates whether this was done. On the basis of the trial transcript alone, there seems to be no preponderance of the evidence that Caine persuaded any of Reliance's agents to quit, or to have any assured's cancel their policies with Reliance, which would have invoked the forfeiture clause in Caine's contract. If the depositions were used to advise the Court in this regard, there is no indication of it anywhere in the record. These depositions were taken after the trial of August 1st, 1960, but apparently were referred to in some later hearing or meeting before the Court, although the Clerk of the Court did not receive them until January 5th, 1961. (R). In Defendant's Statement of Case, dated November 23, 1960, he refers to the deposition of Mr. Cosby and points out certain weaknesses in the testimony he gave (R 29). He also plays down the deposition statements of Mr. Mortenson as relates to Caine hav

ing persuaded him to quit his job with Reliance. (R 30).

The counsel for Reliance, in Plaintiff's Statement of Case, also dated November 23, 1960, also referred to Mr. Cosby's deposition (R 33) in contending that Caine induced the agents to leave Reliance.

Perhaps counsel for each side used the information in the depositions referred to, without knowledge of the trial court; or perhaps they were used in conjunction with some hearing before the Court, or maybe they were properly ordered published by the Court. The point is, there is nothing in the record to indicate what, if anything, was done in this regard, and this was error.

POINT II

THE TRIAL COURT ERRED IN GRANTING JUDGMENT AGAINST CAINE FOR \$6,762. WITH NO ACCOUNTING RECORDS, NO TESTIMONY AS TO THE CONCLUSION REACHED, AND NO EVIDENCE OF ANY TYPE, KIND OR DESCRIPTION AS TO HOW THIS MONEY JUDGMENT WAS DETERMINED.

There is no information in the transcript of the trial of August 1st, 1956 to indicate how the trial court determined that Caine owed Reliance \$6,762. There are no accounting records, nor statements, anywhere in the file of the case, nor indicated in the Register of Actions Book that any evidence was ever offered or received in support of this amount,

or any other sum.

In the Defendant's Statement of Case, dated November 23, 1960, and filed with the Court on January 5, 1961, Caine's former counsel contends that an audit by a C.P.A. firm indicated that \$8,421.76 was owed to the defendant Caine from Reliance, "based upon defendant's interpretation of the existing contracts." (R 27 & 28).

In Plaintiff's Statement of Case, also dated November 23, and filed January 5 the following year, the counsel for Reliance stated that it had introduced its records into evidence showing that Caine owed Reliance \$6,762, but adds, however, "The audit of defendant's (Caine) account with plaintiff (Reliance) furnished by Richmond, Jones & Anderson shows that plaintiff is indebted to defendant. Counsel for Reliance then picks out five statements in the C.P.A. accounting under discussion to show it is not as accurate as that of the insurance company. He also refers to a "Schedule 2 attached" to explain how the commission was computed. However, there is no Schedule 2 attached, nor any other schedule. (R 33, 34 & 35). Nor is there anything in the record to indicate that such schedule was ever submitted, or submitted and withdrawn.

POINT III

WHEN THERE IS NO COMPETENT EVIDENCE

IN A LAW CASE TO WARRANT THE FINDINGS OF FACT AND DECISION, THE SUPREME COURT MAY INTERFERE AND HOLD THE FINDINGS AND DECISION VOID.

Rule 72 (a), Utah Rules of Civil Procedure states that an appeal in an equity case may be on questions of both law and fact. In cases at law, the appeal shall be on questions of law only. However, the conclusiveness of verdicts and findings is always open to review, by the Supreme Court, if the findings and judgment are not supported by the evidence. And, if the findings or judgment are so manifestly erroneous as to indicate oversight, or mistake, which affects the substantial rights of the appellant, the Supreme Court has full power to set aside such judgment. **McKay v. Farr**, 15 Utah 261, 49 Pac. 649 1897. **Klopenstine vs. Hays**, 20 Utah 45, 57 Pac. 712, 1899. **Elliot vs. Whitmore**, 23 Utah 342, 65 Pac. 70, 1901. 90 Am. St. Rep. 700.

Our Supreme Court has held in other law cases that when there is no competent evidence to warrant a finding of fact which materially affects rights of litigant, that the Supreme Court will interfere and hold the finding nugatory and void. **Whittaker vs. Ferguson**, 16 Utah 240, 51 Pac 980, 1898. Especially so where there is entire absence of supporting proof, as in the instant case, relating to the \$6,762. judgment. **Wild v. Union Pacific R. Co.**, 23 Utah 265, 63 P. 886, 1901.

In the case of **Jensen vs. Howell**, 75 Utah 64, 282

Pac. 1034, 1929, our Supreme Court reversed the findings of a trial court where it was manifest that the findings were so clearly against the weight of evidence as to indicate a misconception, or not a due consideration of it. In other Utah cases, such as **In Re Yowell's Estate.**, 75 Utah 312, 285 Pac. 285, 1930, for example, our Supreme Court has rightly held that it will not interfere in such cases unless the findings are so manifestly against the clear weight of evidence as to indicate it was not fairly or impartially considered by the Court below, or that portions of it were arbitrarily rejected or disregarded, or that undue weight was given other portions of the evidence, or that the trial court misconceived or misapplied the evidence, or was influenced through prejudice or bias. However, in the entire absence of supporting proof, the Court is free to examine, not only the evidence, but the entire record. (**Whittaker** case supra).

In the instant case there is some novelty because of the extent of time from the commencement of this action by Reliance in October 1956 to the one-day trial August 1st, 1960. There are twenty entries prior to the trial date, as shown in the Register of Actions book which indicates diligence on the part of the advocates of the causes. There are approximately fifteen additional entries in the Register of Actions Book commencing after the trial date of August 1st, 1960 to and including the present time. (R). On March 21st, 1966, Judge Hanson again

continued the case for further hearing, without date. When counsel for the parties met with the Court on March 21st, 1966, it was noted then that the record was incomplete. Neither the trial court Judge nor his court reporter could find entries of other hearings, or of evidence, or documents submitted after a diligent search of their own records. However, no further action was taken by either side and in April, 1967, counsel for Mr. Caine filed a motion to re-open the case or to permit him to file Final Papers inasmuch as counsel for Reliance had failed to do so. A few days after filing the Motion, counsel for Reliance filed the Judgment, Findings of Fact and Conclusions of Law herein. (R 47, 48, 49, 50, 51 & 52). From these Findings and Judgment the appeal was taken by counsel for Caine in May, 1967.

Appellant Caine does not contend that there was bias, fraud nor discrimination by the Court in this matter but does contend that the evidence and records needed to uphold the Findings and the Judgment are absent as supporting proof. Because of this fact and a hesitancy by both parties and the Court to go forward with additional hearings, because of the incomplete record, it is believed by the Appellant, at least, that a review of the matter by the Supreme Court and its subsequent directive or order would enable this action to be concluded in the foreseeable future, one way or the other.

In 5 Am Jur 2d, "Appeal and Error" paragraph

841 is laid down the general principle that a finding of fact will be not be supported on appeal if it is clearly against the weight or the preponderance of the evidence, or if it is not supported by any "substantial" evidence, or is clearly erroneous, or not supported by any reasonable view, taken of the evidence. Cited in support of this view are numerous cases including **Jackson vs. Jackson**, 201 Okla 292, 205 P 2d 297 (1949) and **Mugaas vs. Smith**, 33 Wash 2d 429, 206 P 2d 332 (1949). Also cited in support of this proposition is **Van Voast vs. Blaine County**, 118 Mont 395, 167 P 2d 572 (1946) and **Dillard v. McKnight**, 34 Cal 2d 209, 209 P 2d 387. A Washington case, **Lassiter vs. Guy F. Atkinson Company**, (CA 9 Wash) 176 F 2d 984 (1949) held that, If, on the entire evidence, the appellate court is left with the definite and firm conviction that a mistake has been committed, it has the duty to reverse the trial court's finding. The discussion in Am Jur further states than an appellate court always has the power to examine whether the Findings of Fact of the Court below are supported by competent evidence. If it is not, it will set aside the judgment of the trial judge where the facts as determined by him fail to support his legal conclusions drawn from them. In support of this case is **Italian-American Bank vs. Carosella**, 81 Colo 214, 254 Pac 771 (1927).

In his Defendant's Statement of Case, dated November 23rd, 1960, the then counsel for Caine stated "no evidence was introduced by either side

touching upon the amount owed by or to either party." (R 27). In the same Statement of November 23rd, counsel for defendant Caine states that when certain questions have been determined by the Court, that within ten days plaintiff would provide the defendant with a statement of account, based upon the rulings of the court. (R 32). The parties, in a five page stipulation of the same date, joined in asking the Court to rule on certain questions after which Reliance, within ten days, would provide Caine with a statement of accounts based on the rulings of the court.

However, the trial judge either overlooked or ignored the request of counsel for both parties to have certain questions determined by the Court and issued his memorandum decision on January 5, 1961. The substance of this decision was later incorporated into the Findings and the Judgment of the Court. (R 25 & 26: 47-52). The Findings and Judgment provided for the \$6,672 award to Reliance, invoked the forfeiture provision and stated that any prior breach by Reliance would not bar the application of such forfeiture provision. Of note is the fact that the judge relies on the "Depositions submitted with the statements of the parties" in reaching his decision. (R 25). In his decision the Court required that Reliance pay the costs of the accounting work done, because it had never been completed and furnished to Cain, as required by the contract but no amount was set out by the judge in his de-

cision although the findings and judgment set up the sum of \$675 which had been determined as due and owing to the date of the August 1st, 1960 trial for accounting services, but which were not yet complete as of that time because of the need to have certain questions determined by the Court. (R 48, 50, 51, 166). At the August 1st, 1960 trial, the judge proposed \$695. as a reasonable accounting fee. (R 166).

CONCLUSION

If one consults the Register of Actions Book or any other part of the Record here, there is no testimony, evidence nor exhibits indicated to sustain this money judgment against Caine for the sum of \$6,762.73.

If one refers to the transcript of the trial, in and of itself, it is highly doubtful whether the evidence therein and testimony given warrants the invoking of the forfeiture provision of Caine's contract with Reliance. The Judge in his Memorandum Decision placed emphasis on the testimony from the two depositions which were persuasive to him that the forfeiture clause should be applied. Caine contends that nowhere in the Record is there any indication that either or both of these depositions were properly authenticated, introduced nor rebutted, nor was he provided the opportunity to discredit these depositions.

In the event that the testimony given at the trial justifies invoking the forfeiture clause, clarifica-

tion is needed as to when and whether commissions Caine had earned, but not been paid, up to the time of his resignation would still be due and owing to him. Because these matters are not supported by the preponderance of the evidence and because of the total lack of accounting records to provide the basis for any money judgment, and because these depositions, according to the record were never introduced, properly or otherwise, this cause should be reversed, or remanded, or a new trial ordered. In the alternative the trial court should be directed to cure the record of the August 1, 1960 trial, and permit the parties to properly introduce the evidence and records needed to determine what relief should be given to Caine and Reliance, or either, and to clarify the previous decision of the trial court.

Respectfully submitted,

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