1967

Frank Riggle And Geneva H. Riggle, His Wife v. Daines Manufacturing Company, Inc. : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

FRANK RIGGLE and GENEVA H. RIGGLE, his wife,
Plaintiffs and Respondents,

—vs.—

DAINES MANUFACTURING COMPANY, INC., a corporation,
Defendant and Appellant.

Case No. 10948

RESPONDENTS' BRIEF

Appeal from a Judgment
of the Third Judicial District Court
in and for Salt Lake County
HONORABLE D. FRANK WILKINS, *Judge*

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NATURE OF THE CASE

The purpose of this case is to determine whether or not the Defendant-Appellant is liable for the balance due on its promissory note in favor of the Plaintiffs-Respondents.

DISPOSITION IN THE LOWER COURT

The District Court by Decree dated March 28, 1967, granted Summary Judgment for the amount due on the promissory note in favor of the Plaintiffs-Respondents, including interest, attorney's fees and court costs.

On March 28, 1967, the Defendant-Appellant, objected to the Findings of Fact, Conclusions of Law and Judgment, and by Order dated May 3, 1967, the Court denied the Defendant-Appellant's objections.

RELIEF SOUGHT ON APPEAL

Defendant-Appellant seeks to reverse the judgment of the District Court.

STATEMENT OF FACTS

This is an appeal from Summary Judgment granted in favor of the Plaintiffs-Respondents by the Salt Lake County District Court upon finding no genuine issue as to any material facts.

The statement of facts offered by the Defendant-Appellant, Daines Manufacturing Company, Inc., hereinafter referred to as "Corporation", is not entirely supported by the record in this cause. The Plaintiffs-Respondents are hereinafter referred to as "Riggle".

The following statements in Corporation's Brief are inconsistent with the facts or not supported by the record:

> (a). On page 2 of Corporation's Brief, it is stated: " . . . the makers of said promissory note executed an employment contract with the Plaintiff . . . " The note referred to was the $10,000.00 note, and no employment contract with the partnership has been offered or proposed in evidence.

(b). On page 3 of Corporation's Brief, it is claimed that the persons executing the $10,000.00 note were the incorporators of the Corporation. No evidence has been proposed in relation to this matter, and it is patently impossible, as at the time of incorporation, January 18, 1955, (R-18) the law required five incorporators (UCA 16-2-3). A check of the Secretary of State's office of the State of Utah indicates that the Corporation actually had ten (10) incorporators. Only four (4) parties constituted said partnership.

(c). On page 8 of Corporation's Brief, in arguing Point II, the Corporation refers to another case filed in the District Court by Riggle against the partnership, and there is no reference to this case or mention of it in the record.

(d). On page 9 of Corporation's Brief under Point II, Corporation states: " . . . The $9,612.58 'mentioned above' was payment made by the Defendant to the Plaintiffs. . . . " This statement is not supported by the evidence. The only payments made by the Corporation to Riggle in this action are the salary payments and note payments indicated in Riggle's affidavit (R-11), and under the terms of Corporation's affidavit (R-20) it is indicated that a major portion of such amount resulted from miscellaneous payments made by partnership.

(e). On page 10 of Corporation's Brief, the Corporation states: " . . . the Defendant . . . was substituted as the employer in the new contract . . . " There is no evidence to support this statement.

In order to obtain a clear representation of the facts and the chronology thereof, they are restated, eliminating those items not supported by the record.

On July 8, 1954, Riggle loaned a partnership $10,000.00, which loan was represented by a promissory note (R-36).

The Corporation was incorporated in the State of Utah on January 18, 1955, (R-18, 46) six months and ten days subsequent to the issuance of the note above referred to.

Five months and thirteen days after the birth of Corporation, it entered into an employment agreement with Riggle, such agreement requiring Riggle to act as a business and engineering consultant for Corporation and requiring Corporation to pay Riggle $150.00 per month (R-13).

Corporation was seven months delinquent in its payments on the employment contract on August 1, 1957, and Riggle agreed to terminate the employment contract and Corporation's further liability for payments thereon upon receipt of a promissory note covering past-due payments (R-12, 47). On August 1, 1957, Corporation delivered to Riggle its promissory note covering the accrued but unpaid installments required by the employment contract (R-2, 11). Corporation made intermittent payments on the note, reducing the balance to $344.94 as of February 11, 1958 (R-2, R-11 par. 3, 4, 5 and 6).

The promissory note is admitted as genuine and the signatures thereon are genuine (R-4, Admissions of Plaintiff).

The Corporation, in its Statement of Facts, quotes extensively from an Affidavit of Darrel R. Daines, an

officer of Corporation. Most of the Affidavit contains immaterial and inadmissible facts relating to events occurring before the birth of Corporation.

It is important to note that there is no claim that Riggle was an incorporator or stockholder of Corporation or that there were any other or additional contractual arrangements between Corporation and Riggle.

The record is silent on any fact that would establish an obligation on the part of Corporation to enter into the employment contract with Riggle.

ARGUMENT

POINT I

THE INITIAL TRANSACTION CANNOT BE RENDERED USURIOUS BY A SUBSEQUENT TRANSACTION.

Corporation does not claim that the promissory note in this action is usurious, but only that the Corporation's promissory note should be added to a prior partnership obligation, thereby making the prior obligation a usurious transaction (R-36). It is then claimed that since the subsequent corporate transaction has been added to the prior partnership transaction, a usurious arrangement is created and the corporate transaction is a product of the usurious partnership transaction. If this theory of Corporation is sustained, it has created legal perpetual motion, for unlike and unrelated transactions moving in concentric circles forever destroy one another.

Corporation's only obligations to Riggle arose some 12 months after Mr. Riggle had loaned $10,000.00 to a partnership (R-2, 36) when it executed an employment contract requiring Riggle's services (R-11, 12, 13).

Corporation now alleges that its obligation to Riggle was part of an earlier transaction between another party and the obligation should have a retroactive effect, thereby making the earlier transaction with the other party usurious.

The employment contract and resultant promissory note covering past due wages cannot be a part of a transaction with another party accomplished before Corporation was born.

Usury must exist in the original transaction. The contract or promissory note must be usurious at the time of its making. This rule has been adopted and affirmed in Utah:

> Page 427: " . . . The character of a contract with respect to usury is determined as of the time it is made. If it is then legal it cannot be rendered usurious by subsequent transactions . . . which . . . cannot impart the taint of usury to an antecedent, honest and legal agreement. . . " *Cobb* v. *Hartenstein,* 47 Utah 174, 152 P. 424 (1915).

This rule has been affirmed in Utah in *Seaboard Finance Company* v. *Wahlen, et al.,* 123 Utah 529, 260 P.2d 556 (1953). (See also 102 ALR 573-577.)

The subject $1,050.00 note is a separate, distinct contract. The note was not executed until over three

years after the occurrence of the instance claimed by Corporation to have been usurious, and has no causal connection with the partnership transaction.

If, as claimed by the Corporation, an employment contract existed between the partnership and Riggle, such employment contract could not have been binding upon the Corporation for as indicated in the Utah case of *Wall* v. *Niagara Mining & Smelting Co. of Idaho,* a contract of a predecessor to a corporation is merely an offer to the corporation which can either be accepted or rejected by the corporation.

> Page 401: " . . . Where a contract is made by and with promoters, which is intended to inure to the benefit of a corporation about to be organized, such contract will be regarded as in the nature of an open offer, which the corporation, upon complete organization, may accept and adopt or not, as it chooses. . . . The liability of the corporation . . . does not rest upon a supposed agency of the promoters, and a ratification of their acts, but upon the immediate and voluntary act of the company. . . . " *Wall* v. *Niagara Mining & Smelting Co. of Idaho,* 20 Utah 474, 59 P. 399.

Since the Corporation was under no obligation to employ Riggle then, when it agreed to employ him some 5½ months after its incorporation, it created a new contract and obtained new benefits.

Corporation cites from 55 Am Jur, Usury, 390 Section 96, wherein as a "black letter rule" it is in essence stated that a subsequent transaction will not cure a transaction which is usurious at the date of inception

and the taint of usury attaches to the subsequent obligation "if the descent can be traced". (page 12, Corporation's Brief.) In this case please note that the descent cannot be traced. The entire section of Am Jur deals with renewals of original obligations.

Each of the three cases cited by the Corporation in support of its position are factually distinguishable from the case in hand.

In the cases of *Richardson* v. *Foster, et al.*, 170 P. 321 (Washington), and *Westman* v. *Dye,* 4 P.2d 134 (California), cited by Corporation, the actions were actions on renewal transactions between identical parties. The continuity of the transactions was apparent.

In the *Aspeitia* v. *California Trust Company* case, 322 P.2d 265 (California), cited by Corporation, the action was by and for the benefit of the executor of the maker of the note and the Court indicated that the executor stood in the shoes of the maker and therefore continuity or identity of parties was preserved.

The Corporation has cited no other cases or authorities, and as noted in each of the cases cited by Corporation, there is a continuity of parties and a direct ability to trace the descent of the transaction.

POINT II

SUMMARY JUDGMENT WAS PROPER, FOR THERE ARE NO CONTESTED ISSUES OF MATERIAL FACTS.

As indicated in the Corporation's Brief, Summary Judgment should not be granted if there is a genuine issue as to any material fact, and the cases cited by the Corporation to support this point reflect the applicable law.

Corporation claims that it has raised issues in relation to usury and failure of consideration.

The determination as to whether or not there is failure of consideration is a legal determination and not a determination of a question of fact. The affirmative statement of a conclusion of law in the Complaint of the Plaintiff does not raise a factual question.

The promissory note executed by the Corporation recites that it is issued "for value received" (R-2).

The promissory note is admitted to be genuine and the signatures thereto genuine (R-4).

The promissory note was given to confirm an amount owed to Riggle by the Corporation by reason of an employment contract (R-11, Riggle's Affidavit, and R-20, Affidavit of Darrel R. Daines, Corporation's Agent), and therefore consideration for the note is admitted.

The agreed consideration for the promissory note was the cancellation of the employment contract (R-12, par. 8) which had a remaining term of 35 months, and the promise to pay the amount of accrued, past due salary payments (R-11, 20). It is apparent that there are no questions of fact relating to consideration. The

Court determined as a matter of law that the consideration was sufficient (R-47, par. 4, 5).

At the time Riggle loaned the partnership $10,000.00, the Corporation was not yet born and consequently, the Corporation could have no obligation to Riggle (R-47, par. 15).

The record contains no fact that raise a question on the consideration for the Corporation's promissory note.

The only claim remaining is that the employment contract, (the cancellation of which was a portion of the consideration for the promissory note), was a part of a usurious transaction. It therefore becomes necessary to determine what facts, if any, are claimed by the Corporation as supporting the contention that the employment contract was part of a usurious transaction, and if a legal conclusion of usury can be drawn from these facts.

The Corporation claims that over seven months prior to its organization, Riggle loaned a partnership $10,000.00, and the partnership agreed to pay such amount and employ Riggle.

Oral testimony as to existence of a five-year employment contract would not be admissible, as proof of the same would be prohibited by the Statute of Frauds (UCA 25-5-4 (1)).

Evidentiary matter relating to transactions occurring before the Corporation came into existence could

not be admissible, for such facts would not be material to the transactions of the Corporation.

Oral testimony as to the Corporation's agreement to assume and answer for the debt of the partnership would not be admissible under the Statute of Frauds (UCA 25-5-4 (2)).

The employment contract executed by Corporation was a separate agreement of the Corporation and no material admissible evidence has been proposed by Corporation that could relate this transaction to a prior partnership transaction and make it a part thereof.

In neither the pleadings nor Affidavit has Corporation offered to prove that Riggle owned or controlled Corporation. Further, there is no offer to prove any contractual relationship between Riggle and Corporation pre-dating the employment contract. The Court found no such relationship (R-47, par. 14, 15; and R-48, par. 6, 8).

The claim is that the Corporation entered into a contract of employment (R-19). The consideration for such employment was the services to be performed by Riggle as set forth in the contract (R-13).

Mr. Riggle paid to the partnership the $10,000.00 in consideration of the partnership promissory note on July 8, 1954, and the Corporation was organized six months later (R-18, 46). Further, Riggle did not at any time consent to the Corporation as an additional or substitute obligor on the $10,000.00 note owed by the

partnership, as indicated by the fact that in Case No. 155799 (referred to only in Corporation's Brief, page 10), Riggle sued the partnership and the partners and not the Corporation, and the partners did not interplead the Corporation.

It is axiomatic that the Corporation cannot be bound by the acts of its predecessors or creators. This rule has been adopted and affirmed by the Utah Supreme Court:

> Page 400: " . . . that which has no existence can have no agent, and, in the absence of any act authorizing them so to do, can enter into no contract, nor transact any business, which shall bind the proposed corporation after it becomes a distinct entity. . . . " *Wall* v. *Niagara Mining & Smelting Co. of Idaho,* 20 Utah 474, 59 P. 399.

and in the case of *Murry* v. *Monter:*

> Page 962: " . . . The general rule of law is that promoters who undertake to organize a corporation cannot bind the corporation by their contracts and agreements made before the corporation was organized. . . . " *Murry* v. *Monter,* 90 Utah 105, 60 P.2d 960.

(Also refer to 18 Am Jur 2d, Corporations, Section 18; 18 CJS, Corporations, Section 122; 149 ALR 787 and 797; 123 ALR 727.)

The rule is both logical and necessary, for otherwise there is no way that the stockholders of the Corporation could be protected as indicated by this Honorable Court:

> Page 589: " . . . The only protection of the stockholders, and of subsequent corporate creditors,

against such a result lies in the rule that the corporation is not bound by the contracts of its promoters. The rule is just and should not be weakened. . . . " *Tanner* v. *Sinaloa Land & Fruit Co.*, 43 Utah 14, 134 P. 586.

A contract with the predecessor of the Corporation is only an offer to the Corporation and if the Corporation chooses to accept such contract (offer), then a new contract arises as is stated in the *Wall* v. *Niagara* case (*supra*).

It ill behooves Corporation after it has negotiated the cancellation of $6,300.00 of indebtedness (the remaining unpaid amount of the employment contract) for only $1,050.00 and ratified the entire transaction by making payments thereon to reduce the balance to $344.94 to now claim that the entire transaction was an error.

The Corporation could have refused to enter into the employment contract, and Riggle would have had no recourse.

The Corporation need not have entered into the employment contract binding itself for four years, but of course, if it did not, it could not have required the services of Mr. Riggle during such period. After entering into the employment contract and defaulting in the performance thereof the Corporation need not have accepted the $5,250.00 net benefit resulting from the cancellation of the contract. In each instance, the Corporation acted without compulsion and to its own benefit.

It is apparent that most of the evidence claimed by Corporation would not be admissible, but even if admitted could not affect the legal conclusions in this case.

Corporation should not be allowed to avoid or delay the predictable consequences of its premeditated acts by alleging inadmissible and unrelated matters and requesting a trial thereof.

The Judgment should be affirmed and the Corporation required to pay its contract.

POINT III

THE GRANTING OF ATTORNEY'S FEES BY THE COURT WAS PROPER.

Corporation admitted that the promissory note provides for attorney's fees (R-9, 35).

The Court found the attorney's fees were reasonable (R-47, par. 12).

The rule controlling the reasonableness of attorney's fees is stated in *F.M.A. Financial Corporation* v. *Build, Inc.*, 17 Utah 2d 80, 404 P.2d 670 (1965):

> Page 673: " . . . Because both judges and lawyers have special knowledge as to the value of legal services, this is not always required to be proved by sworn testimony . . . . the judge may fix it in the basis of his own knowledge and experience; and/or in connection with reference to a Bar approved schedule . . . . these would have provided an evidentiary basis for making the determination . . . . "

The above case had a very similar fact situation to the subject case. The plaintiff was granted summary judgment on a promissory note and was awarded attorney's fees in accordance with a Bar schedule. No evidence of attorney's fees was introduced, but the Court did make a finding of fact of the reasonableness and granted judgment for fees. The defendant denied the reasonableness of attorney's fees, which this Court stated created an issue of fact.

The case was remanded only for the purpose of taking evidence on attorney's fees. Corporation has not denied reasonableness of claimed attorney's fees. It has admitted the note provides for attorney's fees, but denied that there should be an award of attorney's fees because it claims it has no liability on the promissory note (R-35).

Corporation has not made proffers of proof in respect to attorney's fees or denied the reasonableness of attorney's fees. The Corporation therefore has admitted the reasonableness of attorney's fees if it is found to be liable on the promissory note.

CONCLUSION

A simple case has been presented. A Corporation executed a promissory note (admitted genuine) to confirm a debt due and to obtain a contractual advantage. The Corporation did not pay the entire amount of the note and when sued, in search of a defense claimed that another entity had a usurious relationship with Riggle

before its existence and therefore that the Corporation is not liable. The defense is not proper. There is no continuity of parties. There is no possible way to connect the transactions. There is no unity of time, place, purpose or parties. The defense has no continuity, and any evidence tending to establish continuity would not be admissible.

Would the Court, in violation of common sense, the rules of evidence and the Statute of Frauds, allow Corporation to adduce oral proof of events transpiring prior to its existence in order to avoid its just debts as reflected by written contracts? After three novations, should the Court allow the Corporation to go back into ancient history in order to claim an "original sin" and taint all the descendants with such sin? The obvious answer is no.

There is no genuine issue of material fact nor legal theory that would justify trial of this cause.

It is respectfully submitted that in order to effect the purposes of the Rules of Civil Procedure, thereby providing for efficient and prompt administration of justice, this Court should sustain the Judgment of the District Court.

Respectfully submitted,

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