

1964

Owyhee, Inc. v. Robbins Marco Polo et al : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

OWYHEE, INC., a corporation,

*Plaintiff, Garnishee Plaintiff
and Appellant,*

vs.

ROBBINS MARCO POLO, aka and
dba ROBBINS MARK-O-POLO, a
corporation, and ROBBINS TRAV-
EL INTERNATIONAL, INC., a
corporation,

Defendants and judgment debtors,

vs.

DWIGHT G. LUMAN,

*Garnishee defendant and
Respondent.*

FILED

AUG 17 1964

Clerk, Supreme Court, Utah

Case No.
10162

BRIEF OF RESPONDENT

Appeal of Owyhee, Inc., from the Judgment of the District Court
of Salt Lake County, State of Utah
Hon. Stewart M. Hanson, Presiding

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BRIEF OF RESPONDENT

ADDITIONAL STATEMENT OF FACTS

We feel it is pertinent to the issues of this case that the following facts should be called to the Court's attention. The record (Transcript—page 2) and the

pretrial order (Record Pages 8 & 9) will disclose that prior to the indebtedness incurred by Robbins to Owyhee, Inc. an action was filed by Luman against Robbins on the note given and Luman obtained a judgment. No defense to the action was interposed by either the corporation or by Robbins as an individual. We concede that appellant is not trying to collect the money paid as a result of the judgment.

ARGUMENT

Point 1

A SALE OF STOCK HAS NOT BEEN ESTABLISHED.

The evidence is not controverted that the original conversations contemplated a purchase of stock by the Respondent. There is evidence that an agreement was drawn (Tr. 5) but no evidence that the agreement was ever executed and no specific evidence as to its contents. All of the evidence in this matter is secondary evidence. There is no specific evidence as to how the \$4,000.00 was entered on the books of the company. The only act which would indicate an intention of a sale was the purported election of respondent as a director. He never qualified. (Tr. 20.)

All actions taken by the parties subsequently were that the \$4,000.00 was to be treated as a loan and to that end the corporation and Robbins executed and delivered the promissory note. The fact that Robbins

signed the note personally would indicate that the note was not given as a repurchase of stock.

There is nothing in the record to indicate that the note was given to repurchase stock which was never delivered and as far as this record is concerned that any entry of the transaction was made in the books of the corporation.

The record is so incomplete relating to the transaction that the Court would have to guess as to what transpired, and on the evidence could not possibly make a finding.

Point 2

IN GARNISHMENT APPELLANT HAS ONLY THE RIGHTS OF THE DEBTOR AGAINST THE GARNISHEE.

The law is stated in 6 Am. Jur. 2nd at page 610 as follows:

“The test of the liability of one as garnishee is ordinarily whether he has property, funds, or credits in his hands belonging to the principal debtor for the recovery of which the latter has a present subsisting cause of action. In other words, persons who are liable to suit generally and who have property of, or indebted to, the principal defendant, are liable to suit by the defendant with respect to such property or indebtedness.”

The record shows that an action was commenced

and judgment was obtained by Luman against the debtor corporation and Robbins.

Rule 13, Utah Rules of Civil Procedure, provides as follows:

(a) Compulsory Counterclaims: A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the Court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.

Any action which the corporate debtor had against Luman had to be plead at the time Luman sued, otherwise it is forever barred.

King vs. Firm, 3 U 2nd 419, 285 P. 2nd 1117

Slim Olsen, Inc., vs. Winegar, 122 U 80, 246 P. 2nd 608

This would include any claim the corporation might have had for the \$1,900.00 paid prior to the suit and now claimed by the appellant.

The appellant standing in the shoes of the corporate debtor is barred from claiming against the respondent.

Point 3

THE CASE OF PACE VS. PACE BROS. IS NOT APPLICABLE.

The appellant must premise his entire case on Pace vs. Pace Bros., 91 U 132, 59 P. 2nd, Page 1.

1. The facts in the two cases are not similar. Justice Wolfe premised his entire opinion on the following qualifications found at page 2 of 59 P. 2nd.

“ * * * We consider the question as to whether the defendant corporation, under the circumstances in which this purchase was made, had authority to buy its own stock held by Sidney Pace. Our decision on that question will be *strictly* as to the facts of this case.” (Italics ours).

The facts in the Pace case are that Sidney Pace was one of the founders and large stockholders of the corporation Pace Bros., a large landowner and stock raising company. Sidney Pace sold his stock to the corporation and as consideration for the stock received notes secured by mortgages on the land of the corporation. There was no cash paid to Sidney Pace, his estate, or his heir. The heir of Sidney Pace, his only son, commenced an action on the notes and to foreclose the mortgages. At the time the action was commenced the corporation, Pace Bros., was insolvent. Creditors of the corporation intervened in the foreclosure action claiming that the purchase of the Sidney Pace stock by the corporation was void. The Supreme Court of Utah so held.

The Court in its decision based it primarily on the theory that to foreclose on the land of the corporation would impair its capital to the detriment of its creditors. The capital of the corporation had not already been impaired and so there is no ruling relative to recoupment of impaired capital, if any.

In this present action, if there was an impairment of capital, which we deny, the impairment took place before the debt being collected was incurred. The reasoning in the Pace case that a creditor could look to the capital of a corporation in dealing with it does not apply, the capital was not there when Owyhee and Robbins did business.

CONCLUSION

The appellant in trying to collect from the respondent is reaching for the last straw. No person involved in a law suit could ever feel secure if actions such as this were successful.

Respectfully submitted,

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