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IN THE SUPREME COURT OF THE STATE OF UTAH

PRUDENTIAL FEDERAL SAVINGS & LOAN ASSOCIATION, a corporation, *Plaintiff and Appellant.*

vs.

FRANK H. FULLMER,, DAVID H. FULLMER and WILLARD L. FULLMER, JR., individually, and as co-partners doing business under the name and style of FULLMER BROS., a co-partnership; WILLIAM L. PEREIRA, doing business as WILLIAM PEREIRA & ASSOCIATES; WILLIAM L. PEREIRA & ASSOCIATES, a corporation; and ALLEN STEEL COMPANY, a corporation, *Defendants and Respondent.*

Case No. 10258

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BRIEF OF RESPONDENT

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IN THE SUPREME COURT OF THE STATE OF UTAH

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Defendants and Respondent.

Case No. 10258

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF A CASE

Three purported services of summons were made by plaintiff-appellant, Prudential Federal Savings and

Loan Association, a corporation, hereinafter referred to as Prudential or Appellant, on William L. Pereira & Associates, a corporation, the architect for Prudential's new Salt Lake City bank building, hereinafter referred to as Pereira or Respondent.

DISPOSITION IN THE LOWER COURT

The court below, after considering affidavits filed by both parties, extensive arguments, and statements of counsel for both parties in open court, entered its amended judgment on October 26, 1964, quashing all three services pursuant to Pereira's motions pertaining to all three services.

RELIEF SOUGHT ON APPEAL

Respondent, Pereira, seeks affirmance of the judgment of the court quashing the purported services of summons upon it and, further, by way of cross appeal, seeks to reverse the determination of the court below that Respondent, Pereira, was doing business in the State of Utah and the determination of the court that the departure of Pereira's representative, James S. Manning, from Salt Lake City, Utah, on or about June 10, 1964, was motivated in part by a desire on the part of the corporate defendant architect not to be served in the prospective Prudential lawsuit.

STATEMENT OF FACTS

Appellant has complicated this appeal and burdened the record herein by designating numerous pleadings, items, etc., in the file below which are in no way relative to any of the issues on appeal, and in its purported statement of facts makes reference to numerous unsupported allegations in its complaint and, further, makes reference to certain alleged portions of Pereira's architect contract which are not properly before the court. This matter was decided in the court below upon (1) affidavits submitted to the court by both parties below, (2) on the extensive arguments to the court at the time of the hearing on Respondent-Pereira's motions to quash, and (3) by statements of counsel made to the court during discussion of the issues involved at the time of the hearing. Appellant should not cite certain allegations in its complaint referring, for example, to claimed errors in design, construction and fabrication, etc., in an apparent attempt to color its version of the matter when, in fact, such allegations are wholly unsupported by any evidence and had nothing to do with the determination of the court below that the purported service of summons in this case were invalid.

This matter was submitted to the court, except for statements and arguments of counsel at the time of hearing, solely on the affidavits of the parties involved. The court determined which affidavits it would believe and entered its judgment accordingly and the state-

ment of facts herein should properly be confined to those matters. Accordingly, Respondent's statement of facts will confine itself to those matters properly in the record and properly before the court.

At the outset of the hearing, counsel stipulated (R. 10) that the corporate defendant was the only defendant involved in this case and that all motions to quash as to William L. Pereira, personally, be granted.

The affidavit of William L. Pereira, Respondent's president, commencing at R. 121, shows the following things: Since the inception of defendant corporation (R. 122) it has been engaged with approximately one hundred seventy-five architectural projects, only six of which have been out of the State of California. Two of such out-of-state projects are those of Appellant-Prudential, namely the building in Salt Lake City in question, and another bank building of Prudential at Butte, Montana. Another of the six out-of-state projects was in connection with a proposal that Pereira design a personal home for Mr. Gene Donovan, Prudential's president, which project never materialized. A fourth out-of-state project was a building for Brigham Young University at Provo, Utah.

In connection with the work done out of the State of California by Pereira, the evidence shows (R. 122) that except for periodic visits to the site or other supervisory services, the services of Pereira are performed at its offices in Southern California. The architectural

employment in connection with the Prudential building in Salt Lake City, Utah, was solicited by Appellant-Prudential in the offices of Pereira in Los Angeles, California, by Mr. Thomas Taylor, a senior officer of Prudential (R. 123), who made a trip to Los Angeles for that purpose.

The architect's agreement and the amendment thereto involved in this case were prepared in Los Angeles, California.

At Prudential's request (R. 123), one of Pereira's employees, James S. Manning, was stationed at Salt Lake City during the construction phase of Appellant's building; the office space in which to conduct and perform the duties of Pereira was provided to Mr. Manning without charge by Prudential. Said office was not used for conducting any of the business of Pereira whatsoever in connection with the Prudential building at Salt Lake City and incidentally, in connection with the engagement of Pereira with respect to the Brigham Young University building (R. 123). (See also Mr. Manning's affidavit R. 31.) Except for Appellant's request (R. 123, 124) no employee of Pereira's would have been stationed in Salt Lake City during the construction phase of Prudential's building and no employee of Pereira's would have been stationed in the State of Utah in connection with the Brigham Young University building.

The Pereira affidavit further shows that its representative, Mr. James S. Manning, did not solicit or

have the authority to solicit any business on behalf of Pereira in Salt Lake City.

Finally, the affidavit shows that at the times that the purported services of process were made upon both Mr. Manning and Mr. Mooney neither of such persons was the managing agent, chief clerk, or other agent or person having the management, direction, or control of any property of defendant corporation within the State of Utah, nor were either of such persons in charge of any office or any place of business of Respondent-Pereira within the State of Utah.

STATEMENT OF FACTS CONCERNING PURPORTED SERVICE OF SUMMONS UPON JAMES S. MANNING.

The facts with respect to the service of summons on Mr. Manning are found in two affidavits, the first at R. 29, et seq., and the second at R. 147, et seq. We will summarize in substance the facts as set forth in two affidavits. As will be pointed out in more detail later during the Argument, the affidavits filed by Prudential do not controvert the allegations of these affidavits of Mr. Manning nor in most instances even meet the issue head-on. A careful examination of the Prudential affidavits will show that for the most part, they neatly evade the critical statement of facts contained in Mr. Manning's affidavits. The Prudential building was substantially finished in May, 1964, (R. 147, et seq.) In the third week of May, Prudential's book-

keeping department and personnel occupied the fourth floor of the new building. All remaining personnel occupied the building by the end of May, 1964. Prudential began the operation of its business in the new building in the first week in June, 1964. All items involving the duties of supervision on the part of the architect were completed on or before June 11, 1964, and Pereira's representative, Mr. Manning, had returned to Los Angeles, California. Only administrative detail and verification of accounts and verification and completion of certain punch list items remained to be done after June 11, 1964, and Mr. Manning, Pereira's representative on the job, was in California performing other duties for Pereira which had nothing to do with the Prudential job. Mr. Manning was in Los Angeles, California, (R. 31, et seq.) at the time he received the critical phone call from Mr. Joseph D. Kershisnik, the administrative assistant to Mr. Gene Donovan, the president of Prudential. In this phone call, Mr. Kershisnik (at the very time he was consulting with Prudential's lawyers as Mr. Kershisnik's and Mr. Staten's affidavits will show) told Mr. Manning that a crisis existed in Salt Lake City. That failures of the contractor gave Prudential fears that the building would not be ready for the public opening—that the presence of Mr. Manning was absolutely necessary and immediately required. Because of these representations, none of which were true, Mr. Manning agreed to rearrange his own pressing work schedule in Los Angeles and come to Salt Lake City the following day. Mr. Ker-

shisnik agreed that he would arrange a meeting with the various people concerned to deal with the so-called crisis. At 8:00 o'clock p.m. the next evening, on June 24, 1964, Mr. Manning arrived in Salt Lake City pursuant to the urgent request and representations of Mr. Kershisnik. At that time Mr. Manning was told by Mr. Kershisnik that he, Kershisnik, did not feel like working that evening and therefore the meeting had been cancelled. Now that Mr. Manning was in Salt Lake City, no mention was made by Mr. Kershisnik concerning matters of a critical nature, nor did he mention anything about the urgent earlier request for Mr. Manning to come immediately to Salt Lake City. Mr. Kershisnik then stated that he would come to Mr. Manning's hotel room, in the Hotel Utah, the following morning at 7:00 o'clock a.m., June 25, 1964, at which time a pre-meeting would be had prior to the meeting with the contractor. The next morning, June 25, 1964, Mr. Kershisnik did not arrive at 7:00 a.m., but did arrive at Mr. Manning's hotel room at approximately 8:15 a.m. Immediately upon entering the room, Mr. Kershisnik stated to Mr. Manning that he had to call his office and then made a phone call. About fifteen minutes later a knock was heard on the door of Mr. Manning's hotel room and Mr. Earl Staten, Prudential's attorney, and a Deputy Sheriff entered the hotel room and served Mr. Manning the summons and complaint in question herein. Mr. Kershisnik then assured Mr. Manning that he knew nothing of the filing of the complaint or the intention to serve process

that morning in the hotel room, which statements were not true.

Mr. Manning then left the hotel and went over to the Prudential building site in order to deal with the so-called crisis that had induced him to come to Salt Lake City. When they got to the job site, Mr. Kershisnik advised that the project engineer would not even be there. An examination of the job and a discussion with one of the contractor's representatives later that day, June 25, revealed that in truth and fact there was no crisis and no critical matters required the presence of Mr. Manning in Salt Lake City. Mr. Manning was not required to nor requested to perform any supervision or make any decision. It was perfectly obvious and apparent that there was no necessity whatever for Mr. Manning's presence there at that time. Therefore, Mr. Manning left the night of June 25, 1964, and returned to Los Angeles, California. The sole accomplishment of the trip had been the service of summons and complaint upon Mr. Manning in the hotel room. The very next day, Mr. Manning received a phone call from Mr. Donovan, Prudential's president, and during the conversation, Mr. Donovan remarked, "I hear my people were playing cops and robbers with you yesterday".

Later on, the last part of June, 1964, during a dinner, Mr. Kershisnik admitted to Mr. Manning that he had misinformed Mr. Manning in the hotel room on the morning of the service when he, Kershisnik, had said

that he had no prior knowledge of the filing of the complaint or that service was to be made on Mr. Manning.

These are the true facts surrounding the service on Mr. Manning. As will be demonstrated under our Argument later, they are not fairly met or denied. The counter affidavits of Prudential are an involved, evasive, circuitous dissertation upon all sorts of happenings and do not meet the plain truth of the facts as stated in the affidavits of Mr. Manning.

STATEMENT OF FACTS CONCERNING PURPORTED SERVICE OF SUMMONS ON THE SECRETARY OF STATE OF UTAH.

On June 30, 1964, the summons and a copy of the complaint were served upon the Secretary of State of Utah. Respondent-Pereira's motion to quash did go to this summons as well as the summons on Mr. Manning and at the outset of the hearing before Judge Ellett it was definitely stated that three service of summons were involved—that on Mr. Manning, the Secretary of State, and Mr. Mooney. It is true that no further evidence or discussion was had at the hearing with respect to this service, but it was obvious to the trial court that this service on the Secretary of State was not authorized in any way under Utah law or procedure. Appellant now makes a big issue about this service, which will be met by Respondent's Argument later herein.

STATEMENT OF FACTS CONCERNING PURPORTED SERVICE OF SUMMONS ON GEORGE W. MOONEY.

On July 29, 1964, after Respondent-Pereira's motions to quash had been filed and were pending before the court, Prudential caused service of summons and complaint to be made upon George W. Mooney. The affidavit of Mr. Mooney (R. 118 et seq.) shows that Mr. Mooney was not and had never been an officer or director or managing or general agent of Pereira, nor an agent authorized by appointment or by law to receive service of process, nor was he a managing agent, chief clerk, or other agent or person having the management, direction or control of any property of Pereira within the State of Utah, nor was he in charge of any office or any place of business of Pereira within the State of Utah, Rule 4(e), (4). The only reason Mr. Mooney was at the job site was that Prudential had requested Pereira's help on certain problems that had arisen with respect to the air-conditioning system and during these discussions, Mr. Earl Staten and a Deputy Sheriff appeared and threw the summons and complaint on the floor and then left.

ARGUMENT

POINT I

UNDER UTAH LAW, THE ACTIVITIES OF RESPONDENT-PEREIRA IN THIS CASE

DID NOT CONSTITUTE DOING BUSINESS IN THE STATE OF UTAH AND PEREIRA WAS NOT DOING BUSINESS IN THE STATE OF UTAH AT THE TIME OF THE PURPORTED SERVICES IN QUESTION HEREIN.

The trial judge correctly quashed the three purported services involved in this case. However, in his amended judgment of October, 1964, he found in Paragraph 1 thereof (R. 155) that at all times herein pertinent the corporate defendant Pereira was doing business in the State of Utah. Respondent believes that the court was in error in this determinatoin and has cross appealed from that erroneous determination.

We do not believe that the Respondent-Pereira was ever at any time herein pertinent "doing business" in the State of Utah and if we are correct in this judgment, none of the purported services of summons meet the requirements of Rule 4(e), (4), U.R.C.P. and this appeal can be disposed of accordingly.

The question of whether or not a foreign corporation is doing business in a given state for jurisdictional purposes is a question of state law. It is of no help, as Appellant has done heretofore in this case, to cite all kinds of decisions from other states. There are hundreds of decisions from other states which are no help at all in this question. We intend to confine our discussions on this question as to the cases that have been decided by the Utah Supreme Court.

In the case of *Marchant, et al. vs. National Reserve Company of America, et al,* 137 P. 2d 331, 103 U. 530, the court makes a comprehensive review of prior Utah decisions and summarizes the Utah law at Page 338 of the Pacific Reporter as follows:

> "To summarize, then, the law may be stated to be, from the foregoing decisions, that to be 'doing business' in a state, a corporatoin must be engaged in a continuing course of business, rather than a few isolated transactions, whether those transactions are within the usual scope of that corporation's business or not. There must be at least some permanence about the presence and business transactions of the corporation within the state."

According to the decision, such things as listing in the telephone directory, having its name on the door of an office, the presence of a corporation officer on personal business in the state, isolated business transactions, in and of themselves do not amount to the doing of business. The court states at Page 337 of the Pacific Reporter that:

> "It is thus apparent that it is not *any* activity of a corporation in a state other than its residence which will justify the conclusion that it is 'doing business' there * * * but it is the combination of local activities conducted by such foreign corporations—their manner, extent and character—which becomes determinative of the jurisdictional question."

This principle that a corporation must be engaged in a continuing course of business with some permanence

about the presence of the business activities within the state has never been overruled.

In *Western Gas Appliances, Inc. vs. Servel, Inc.*, 257 P. 2d 950, 123 U. 229, the court held that a foreign corporation which had no office in this state and limited its activities in the State of Utah to occasional sales trips, general promotion and supervision of business for the purpose of promoting business in general, but not for the purpose of consummating particular sales, was not "doing business" in the state. The court stated further that even the isolated transaction of installing an air-conditioning unit and system would not create the status of doing business in Utah.

In *Conn vs. Whitmore,* 342 P. 2d 871, 9 U. 2 250, the court held that a Utah resident who entered into a contract by mail for the purchase of a horse in Illinois had not done business in the State of Illinois for the purpose of giving the Illinois court jurisdiction over him. The court stated at Page 874 in the Pacific Reporter:

> "Even under the liberalized view the foregoing cases represent as to the prerequisites to holding one subject to personal jurisdiction of the courts of a foreign state, this requirement remains: there must be some substantial activity which correlates with a purpose to engage in a course of business or some continuity of activity in the state so that deeming the defendant to be present therein is founded upon a realistic basis and is not a mere fiction. That this is so and that a single act or transaction does not suffice unless it fits into the above pattern is well established."

In the case of *East Coast Discount Corporation vs. Reynolds*, 325 P. 2d 853, 7 U. 2d 362, the defense was asserted that plaintiff corporation had failed to qualify to do business in the State of Utah and therefore was not entitled to sue in the State of Utah. The court held that the acts of sending guaranties to consumers in Utah upon request by the dealer, advertising through circulars to persons whose names were submitted by the dealers, sharing one-half of the expense of newspaper advertising, furnishing literature and advertising to the dealer, and sending an agent into the state when requested by the dealer to make calls with the dealer on prospects, would not constitute doing business. The court said that this case was not even as strong a case for doing business as the *Western Gas Appliances vs. Servel, Inc.*, supra.

In the case before the court, as clearly appears by the affidavits of Pereira (R. 121, et seq.), the contract in question for architectural services was entered into in California; it was solicited by Appellant-Prudential at the Pereira offices in Los Angeles; all the services of Pereira except visits and supervision at the site were performed at its offices in Southern California. In sum and substance what occurred in this case was the architectural designs and plans of the Prudential building and one other building, that of Brigham Young University, were conceived and executed in Los Angeles. The construction of two buildings in the State of Utah was not in any sense a continuity of activity or a permanent establishment of the

architect's business in the State of Utah. It seems to us that it is no different from the case of any other professional service rendered in the State of Utah by out-of-state professional people. A lawyer could come to Utah to try one or two cases; a doctor could come to the state to perform one or two operations; a highway engineering firm could design certain sections of the Utah interstate highway and supervise the work here. In none of these instances is there anything more than a casual, temporary, isolated performance of professional services in the State of Utah and the activities of the architect, even if they extend over a longer period of time as in this case, do not even come close to the "doing of business" as set forth in our Utah cases because there is no continuity of the architect's business, no intent or attempt at all to *permanently* engage in the profession in Utah. Appellant makes much of the fact that a resident architect was stationed here during the construction phase of the building. It must be remembered that it was only as an accommodation to the Appellant and at Appellant's request. Had it not been for this request, there would only have been periodic site visitations as in the normal course of performing architectural duties.

In any event, the second affidavit of Mr. Manning (R. 147, et seq.), (see also affidavit of Betty Earl, R. 144) shows that all phases of work requiring on-site supervision by the achitect were completed before he ever left Utah on June 11, 1964. Appellant, by citing numerous provisions of its complaint and alleged

contracts in force in this case, none of which were before the court below in connection with the hearing on this matter, makes all kinds of conclusions and judgments with respect to the construction of said contracts. Appellant then "rules" that the duties of the architect required his presence in Salt Lake City on or after June 11, 1964. The affidavit of Mr. Manning (R. 147) shows the opposite to be the fact. For example, on Page 24 of its brief, Appellant makes the statement that defendant (Pereira) was contractually "bound to offer such supervision during the *entire* construction period whether or not defendant thought such supervision was required. It was the defendant who breached this contract by removing the fulltime supervision from Salt Lake City, etc." What a gratuitous misstatement this is. In the first place, these questions of construction of the architect's agreement were not before the court below, but even if they had been the contract clearly provides (R. 78) in sub-paragraph (c) of Paragraph 5 of Page 2 of the contract as follows:

> "The architect and owner agree that the architect's full time supervision is necessary . . . during the construction period; and . . . a qualified superintendent shall reside in Salt Lake City during the construction period."

The affidavit of Mr. Manning clearly shows that the construction period was over. Appellant, on Page 24 of its brief, tells this court that such supervision was required during the *ENTIRE* construction period, meaning by this—until the last bill is paid and the final

certificate furnished. Thus completely changing the meaning of the contract as written and then attempt to offer that misstatement to the court as evidence that the architect breached his agreement.

The physical presence of Mr. Manning, Pereira's representative, in Salt Lake City seems to be the main basis for Appellant's claim that Pereira was doing business in the State of Utah and if that physical presence is a crucial factor, which Respondent disputes, then that argument itself fails because at the time of all services of summons in question in this case, Pereira's representative was no longer stationed in Salt Lake City, nor was there any necessity for his presence here.

Respondent also wishes to point out that there is no support anywhere in this record for the court's finding in Paragraph 2 of its amended judgment (R. 156) that "James S. Manning's departure from Salt Lake City, Utah, on or about June 11, 1964, was motivated in part by a desire on the part of the corporate defendant architect not to be served in the prospective Prudential lawsuit." The second affidavit of Mr. Manning (R. 147) clearly shows the reasons for his return to California.

For the reasons herein stated, Respondent believes that this court should reverse the trial court's determination that Pereira was "doing business" in the State of Utah.

POINT II.

THE JUDGMENT QUASHING SERVICE OF SUMMONS ON MR. JAMES S. MANNING IS CORRECT.

In its motion to quash (R. 27) Respondent alleged that the purported service of summons on Mr. Manning was obtained by fraud, trick, artifice, or deceit, or by inveighling or enticing one James S. Manning into the State of Utah for the purpose of attempting service of process in this case or by taking sharp advantage of the presence of the said James S. Manning in the State of Utah. Respondent further alleged in Paragraph 4 of said motion that the defendant had not been properly served with process in this action in any manner whatever, nor in accordance with the provisions of Rule 4(e)(4) U.R.C.P. The court in the judgment of October 26, 1964, (R. 157) found that the allegations of Paragraph 1 and 4 of the motion to quash were sustained. The court further found specifically in Paragraph 6 of its amended judgment that the purported service of summons on one James S. Manning is void for the reason that the said James S. Manning was induced to enter the State of Utah by plaintiff on or about June 25, 1964, for the sole purpose on part of plaintiff of obtaining service of summons and complaint on the said James S. Manning. Besides the statements and arguments of counsel made to the court at the hearing, the court had before it on this question the two affidavits of James S. Manning

(R. 29, 147). Also, the affidavits of Gene Donovan (R. 96), Joseph D. Kershisnik (R. 103), Earl P. Staten (R. 112), and Franklin Riter (R. 129). The two affidavits of Mr. Manning are concise, factual, clear and short. The opposing affidavits of Mr. Donovan, Mr. Kershisnik, Mr. Staten and Mr. Riter are long, diffuse, vague, and irrelevant, and repeatedly use, in substance, such phrases on the part of affiant as: "It was affiant's understanding"; "Affiant was advised"; "It was indicated to affiant"; and "Affiant believes". The opposing affidavits do not squarely meet the factual, simple allegations of the affidavits of Mr. Manning. Instead, they attempt to set forth a confusing narrative concerning the drafting of Prudential's complaint and other irrelevant matters. The affidavits are full of conclusions as to the meaning of certain contract documents, certain duties and obligations of the architect, none of which have any relevance to the question at issue at all.

In one important particular of Appellant's affidavits submitted to the court below there is a serious conflict between affidavits. Prudential's various affidavits all make reference to a conference on the morning of June 24, 1964, wherein it is claimed that the final draft of the complaint was being worked out. The affidavits all say in sum and substance that Mr. Joseph Kershisnik was called into this morning meeting and that that was the time that all the attorneys first knew of Mr. Manning's anticipated trip to Salt Lake City. In the affi-

davit of Mr. Staten, on the eighth line of Paragraph 5 (R. 114), he states as follows:

> "Mr. Kershisnik was then called into the meeting and questioned as to the exact arrival time for Mr. Manning and he indicated that he understood Mr. Manning would be arriving on an evening plane from Los Angeles. He stated that he had talked to Mr. Manning THAT MORNING to confirm the prospective arrival, etc."

In Mr. Kershisnik's affidavit with reference to this very point, stated, commencing at line four, Paragraph 9 of the Kershisnik affidavit (R. 107)that:

> "Later in the morning of June 24, affiant was called into conference between Mr. Donovan and the company's attorneys and first became aware that a complaint had been prepared in final form and that attempts would be made to serve Mr. Manning while he was in Salt Lake City. Affiant was requested to call Mr. Manning again and verify that he would becoming to Salt Lake City that evening WHICH AFFIANT DID, etc."

Not only is this a direct admission by Mr. Kershisnik that he knew that a final complaint had been drafted and that service would be made and thereafter called Mr. Manning and continued the inducement to come to Salt Lake, but it also is a conflicting story as to when the alleged phone call was made as compared with the statement in Mr. Staten's affidavits.

After all the lengthy affidavits of Appellant have

been read and re-read, these simple facts remain apparent and uncontradicted:

1. The construction period of the contract was over. Supervision of the architect was no longer required on the job and he had left Salt Lake City and returned to Los Angeles on June 11, 1964.

2. The architect's representative, Mr. Manning, was induced to return to Salt Lake City by Prudential's Mr. Joseph Kershisnik because an alleged situation of great urgency and crisis required his presence.

3. As a result of these representations, Mr. Manning did return to Salt Lake City.

4. There was no crisis or urgent situation requiring Mr. Manning's presence in Salt Lake City.

5. The net and only result of Mr. Manning's visit to Salt Lake City on June 25, 1964, at the request and inducement of Mr. Kershisnik, was the service of summons and complaint in this action.

Appellant goes to great lengths in its brief under its Point I and cites many cases in an attempt to show that the fine points of fraud with respect to the enticement question on Mr. Manning's service were not met according to the cases that they cite. Respondent believes that an analysis of the cases cited on this point by Appellant is not necessary. The trial judge was entitled to and did believe the affidavits of Mr. Manning. These affidavits, as we have pointed out, are not really met

by the counter affidavits of Appellant. The facts of the affidavits of Mr. Manning and the minimum logical inferences which must be drawn from them, easily meet the most exacting requirements of the fraud and enticement cases. Be this as it may, the situation in this case as found by the trial judge is clearly within the principles of immunity established by this court in *Western States Refining Company vs. Berry,* 313 P.2d 480, 6 U. 2d 336. The court in the *Berry* case stated that it was of the opinion that:

> "A showing of actual fraudulent intent and misrepresentation is not necessary in order to void service of process in cases of this type."

Appellant attempts to limit the *Berry* case to settlement negotiations. We believe that the holding of the court goes further and that the principal of the *Berry* case is, as stated in the language of the opinion:

> "Equity and good conscience will not permit plaintiff to take sharp advantage of defendant's presence in the jurisdiction so long as defendant is in the jurisdiction for the purpose for which the plaintiff invited him."

The facts in this case are also well within the principals of *Ultcht vs. Ultcht,* 96 N.J. Eq. 583, 126 Atl. 440, cited in the *Berry* case. In this New Jersey case the wife had caused a New Jersey service to be made on the husband by taking sharp advantage of his presence in New Jersey and the court stated:

> "The wife further contends that according to her husband's own proof he was constantly pass-

ing back and forth into this state and that therefore his privilege had been waived. I cannot agree with this either because while it is true as pointed out in *Case vs. Smith,* 152 Fed. 730, that had he been served upon any other visit to this state, it would have been effectual, that does not in the slightest change the situation where the action was taken at a time and place to which the husband had been invited (and it makes no difference whether expresssly or by implication) to attend by the adverse party."

See also the citations in the *Berry* case to the following authorities, 42 Am. Jur., Process, Sec. 35, and 72 CJS, Process, Sec. 39.

Regardless of how this court decides the question of whether or not the architect Pereira was "doing business" at all in the State of Utah, it is submitted that for the reasons herein stated the quashing of service of summons upon Mr. Manning was correct.

Appellant also suggests in Point I of its brief that since this matter was decided on affidavits by the court below that the court can ignore this determination and decide the matter anew on the same affidavits. Respondent disagrees with this contention. Rule 43(e), U.R.C.P. provides as follows:

> "(e) Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions."

Both Appellant — Prudential and Respondent — Pereira appeared at the hearing on this matter in the court below with the same persons who executed the various affidavits submitted to the court. Both sides were prepared to place the witnesses on the stand and both sides contended that the matters recited in the respective affidavits were incorrect. The trial judge stated that he did not want any oral evidence and would not receive any and informed the parties that the matter would be considered on affidavits and upon the arguments of counsel to the court. And this is the way the matter proceeded. Appellant states, for example, on Page 9 of its brief that:

> "It is highly significant that none of these arrangements made by Mr. Manning on June 21 are in any way denied by defendant."

Respondent challenges this statement. The court below required the parties to submit this matter on affidavits. The court decided that it would believe the affidavits of Respondent. Respondent stands on its affidavits and presentation to the court below.

POINT III

THE COURT'S RULING QUASHING SERVICE OF SUMMONS ON THE SECRETARY OF STATE WAS CORRECT.

In 1961, the Legislature enacted the Utah Business Corporation Act. This Act substantially repealed the

earlier corporate enactments. It adopted for Utah the Model Business Corporation Act prepared by the Committee on Corporate Laws of the American Bar Association. Article Four of said Act (16-10-2, et seq.) applies to foreign corporations. The Act provides in Sec. 16-10-102, Utah Code Annotated, that no foreign corporation shall have the right to transact business in this state until it shall have procured a certificate of authority to do so from the Secretary of State. The Act further provides in 16-10-120, that no foreign corporation transacting business in this state without a certificate of authority shall be permitted to maintain any action, suit or proceeding in any court of this state until such corporation shall have obtained a certificate of authority.*** A foreign corporation which transacts business in this state without a certificate of authority shall be liable to this state for the years or parts thereof during which it transacted business in this state without a certificate of authority, in an amount equal to all fees and taxes which would have been imposed by the laws of this state upon such corporation had it duly applied for and received a certificate of authority *** plus all penalties imposed by the laws of this state for failure to pay such fees and taxes. Appellant charges that the Respondent-Pereira herein violated these provisions of the Utah Business Corporation Act. After having thus made this determination, Appellant then seeks to impose additional sanctions other than and in addition to those provided by the Act itself and, in effect, re-write Section 16-10-111 to provide a punishment by way of what

Appellant terms an "estoppel." Section 16-10-111 provides that whenever a corporation authorized to transact business in this state (this means, of course, whenever a foreign corporation has procured a certificate of authority from the Secretary of State) shall violate the terms of its authorization certificate and fail to appoint or maintain a registered agent in this state or whenever any such agent cannot be found within the state or when the certificate of authority is revoked, then the Secretary of State shall be an agent of such corporation for the service of process. Appellant, by virtue of its so-called "estoppel" argument, would now have the court amend 16-10-111 and add in substance the following language:

> "And furthermore if a foreign corporation does business or transacts business in the State of Utah without securing a certificate of authority from the Secretary of State and without designating a registered agent in this state, said corporation shall be deemed to have obtained a certificate of authority and appointed the Secretary of State a process agent and said corporation shall be estopped to assert otherwise."

Not only would it be a perversion of the statute itself, it would be an injustice to apply any such doctrine of estoppel against Respondent under the facts and circumstances of this case.

Prudential's contention that the service upon the Secretary of State is valid is based on a misconception of the doctrine of estoppel. It is also based upon the presupposition that Pereira was doing business in the

State of Utah (Appellant's brief, Page 13). This supposition is denied by Pereira and is the subject of the cross appeal presented in Point I of this brief. If the court finds Pereira was not doing business in the State of Utah, then the issue of the validity of service on the Secretary of State becomes moot. *Industrial Commission vs. Kemmerer Coal Company,* **150 P. 2d 373, 106 U. 476.**

As pointed out in Respondent's argument in Point I of this brief, the activities of the Respondent architect Pereira in this case did not amount to the "doing of business" in the State of Utah. Even if the court should find against Pereira on this point, it would be a clear misapplication of the accepted principles of the doctrine of estoppel to reach the result contended for by Appellant in its argument in its brief attempting to overturn the ruling of the trial court with respect to the service on the Secretary of State.

Estoppel implies that one who by his deed or conduct has induced another to act in a particular manner will not be permitted to adopt an inconsistent position or attitude which thereby causes a loss or injury to the other person. 31 C.J.S., Estoppel, Sec. 1, Page 288.

Decisions by this court relative to the doctrine of estoppel support the position that for an estoppel to exist there must first be a representation by one party and a subsequent reliance by the other upon that representation. The case of *Kelly vs. Richards, et al,* 83 P. 2d 731, 95 U. 560, says:

> "This estoppel arises when one by his acts, representations or admissions or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts." Citing 21 C. J. p. 1113, 1114, 1115.

The Court further says:

> "It is an essential element of estoppel in pais that the person involving it relied upon the representation or conduct of the other party, was influenced in his own conduct by it, and would not have acted as he did but for the acts of which he now complains."

See also *Tanner vs. Provo Reservoir Company, et al,* 289 P. 151, 76 U. 335; *IXL Stores Company vs. Success Markets,* 97 P. 2d 577, 98 U. 124; *Wellsville Eastfield Irrigation Company vs. Lindsay Land and Livestock Co., et al,* 137 P. 2d 634, 104 U. 448.

There is nothing in the record of this case to show either a representation on the part of Pereira or reliance on behalf of Prudential which would invoke the application of the doctrine of estoppel. In fact, even if Pereira had through word or action indicated to Prudential that it had secured a certificate of authority to do business in the State of Utah, Prudential would be hard pressed to assert reliance upon these acts when a telephone call to the Secretary of State would have established whether or not Pereira had secured such a certificate.

Wein vs. Crockett, 113 Utah 301, 195 P. 2d 222, relied upon by Appellant in its brief deals with facts entirely different from those of this case and is not authority that our court has applied the principle of estoppel in the situation similar to the one at bar.

In the *Wein vs. Crockett* case, appellant was an individual who was a resident of the State of California and who had entered into a contract with a resident of the State of Utah. The action before the court was a motion to quash service of summons on an agent of appellant and the applicable statute which was being construed by the court provided:

> "Section 2. When a non-resident person is associated in and conducts business in the State of Utah in one or more places in his own name or a common trade name and said businesses are conducted under the supervision of a manager, superintendent, or agent, said person may be sued on any action arising out of the conduct of said business in his own name and a summons in such cases may be served on said person personally or may be served upon his manager, superintendent, or agent as the case may be as provided in Section 104-5-11 (10)."
>
> "Section 3. Every non-resident person doing business as provided in the preceding section shall file or cause to be filed a certificate under oath with the Secretary of State of the State of Utah setting forth the name of and place of business of his manager, superintendent, or agent upon whom service of summons may be had and shall file such certificate setting forth the name of said manager, superintendent, or

agent on or before the 15th day of January in each year with the Secretary of State of Utah."

The Supreme Court in holding that appellant's failure to appoint an agent as provided in Section 3 would not constitute a defense to a service on an actual agent as provided in Section 2 used this language:

> "Plaintiff was required to designate an agent on the effective date of the act and his failure to comply with the law cannot be used as a reason for defeating defendant's right to *claim the benefit of the statute.* Not having designated an agent, plaintiff cannot be heard to complain if the agent served is one designated by statute." (Emphasis added).

It should be noted in the *Wein* case the court used the doctrine of estoppel to permit the resident defendant to claim the benefit of the statute. It was not used to bar a party from the right to rely upon the clear wording of a statute as Prudential is proposing here.

With respect to the cases relied upon by Appellant in support of its position, it should be noted that three of the six cases, *Old Wayne Life Association vs. McDonough,* 204 U.S. 8, 21-22 (1907); *Flinn vs. Western Mutual Life Association,* 171 N.W. 711, (Iowa 1919); and *North American Union vs. Oliphant,* 217 S.W. 1 (Ark. 1919), involve defendants which are foreign insurance companies. It is clear that in the area of insurance, the state has a special interest in protecting its citizens as was recently expressed by our Legislature in the "Title of Chapter and Purpose of Act" section of the

Unauthorized Insurers Process Act, Title 31-35-1, Utah Code Annotated, which was passed in the 1963 session. It should also be noted that four of the cases, *Old Wayne Life Association vs. McDonough,* (1907) supra; *Flinn vs. Western Mutual Life Association* (1919) supra; *North American Union vs. Oliphant,* (1919) supra; *Yoder vs. Nu-Enamel Corporation,* (1941), 300 N.W. 840; predate the Model Business Corporation Act which did not even come into existence until 1950. (Model Business Corporation Act Annotated, Volume 1, Preface, p. v), and it is hard to accept that they construe statutes which are "substantially identical" to Section 16-10-111, Utah Code Annotated, as contended by Appellant.

Appellant, in contending that Pereira is estopped to assert that it was not authorized to do business in the State of Utah, implicitly asks the court to presume that Pereira was qualified to do business and therefore amenable to service under the provisions of Title 16-10-111, Utah Code Annotated. Yet Appellant in its own brief has asserted that Pereira never obtained the certificate of authority to do business in Utah which is the prerequisite of being authorized to do business in the state. The following statement is found on page 13 of Appellant's brief:

> "Defendant has never procured a certificate of authority to do business in Utah as required by Section 16-10-102 of the Utah Code. (Pereira affidavit R. 121, Paragraph 2; Staten Affidavit R. 117, Paragraph 12B)".

In the case of *Lubrano vs. Imperial Counsel, O.U.S.* 20 R.I. 27, 37 Atl. 345 (1897) the court was presented with a similar situation and disposed of it as follows:

> "It will also be seen that in those cases where judgment was rendered by default the return on the writ showed a valid service prima facie, and nothing was brought upon the record by the plaintiff to contradict the same, so that the court was fully warranted in exercising its jurisdiction; that is to say, the court, having no knowledge to the contrary, was bound to presume that the defendant had discharged its statutory duty by appointing the person therein designating as its agent to accept service, and hence that service upon such person was good. Here, however, no such presumption can be said to arise, in the face of the record before us, which shows that, as a matter of fact, the defendant had not complied with the statute first above quoted; and hence the court cannot stultify itself by holding that any such presumption exists. Indeed, it would be absurd to say that a presumption arises as to the existence of a certain jurisdictional fact when the court is judicially informed that it does not exist."

In effect, Appellant is asking the court to presume the existence of a fact which by Appellant's own admission does not exist. It does not seem relevant to argue that Pereira is estopped from asserting his non-compliance with the statutes when Prudential asserts the point itself.

When the Legislature enacted the Utah Business

Corporation Act in 1961, it had access to the three-volume work Model Business Corporation Act Annotated which was a research product of the American Bar Foundation, the originators of the Model Business Corporation Act. The relevant portion of Title 16-10-111 is taken directly from Section 108 of the Model Business Corporation Act which is found on page 605 of the Model Business Corporation Act Annotated, Vol. 2 and following it is an extensive annotation on this Section.

In reading this annotation, it is clear that the provisions of Section 108 of the Model Business Corporation Act were never intended to apply to a foreign corporation not authorized to do business in the state. On page 606 of this Volume, it is pointed out that several states which have adopted this section have, in addition, added provisions dealing with a foreign corporation which transacts business without being qualified. On page 620 of this Volume, under Comment, the following quotation is found:

> "Section 108 of the Model Act provides for the appointment of an agent by a foreign corporation authorized to transact business in the State and for service on the Secretary of State as agent in any case where the required agent is not appointed or cannot be found. It does not limited or affect the right to serve process upon a foreign corporation in any other manner now or hereafter permitted by law. *The effect of Section* 108 *is to leave to other statutes or to the common law the question of service of*

process on foreign corporations which do not qualify to transact business in the State." (Emphasis added).

The Utah Legislature having access to this publication at the time Title 16-10-111 was enacted could easily have added an additional provision as did Colorado, North Dakota, Wyoming and Oregon, providing that the Secretary of State shall be deemed to be an agent for the service of process when the corporation transacts business without being qualified. It did enact such a provision with respect to unauthorized foreign insurance companies in the 1963 session when it enacted Title 31-35-32, Utah Code Annotated, which provides that if a foreign insurer, not authorized to do business in the State of Utah does engage in business in the State of Utah, that such acts on its part shall authorize the Insurance Commissioner to be its agent upon whom service of process can be made.

The case of *Daoud vs. Kleven, Inv. Company,* 103 Atl. 2d 257, 30 N.J. S.Ct. 38 (1954), is a fairly recent opinion dealing with a statute essentially the same as the one at bar. In that case the New Jersey court stated its position as follows:

> "In addition to the requirement that a foreign corporation must be present when service is made, there is a second vital requirement, i. e., service must be made upon an authorized agent. Since a corporation has no actual corporeal existence but exists only because of a legal fiction, it is necessary to effectuate service upon an agent. An agent may be an actual agent of such cor-

poration, or some person so designated by statute for the purpose of service. Service as above noted was made upon the Secretary of State.

"There is no provision by way of statute or rule designating the Secretary of State an agent upon whom process may be served for a foreign corporation which is transacting business in this state without official authorization theretofore had."

"N.J.S. 2A: 15-26, N.J.S.A., provides in part as follows:

'In addition to any other method of service duly provided, process in any action commenced in any of the courts of this state against a domestic corporation or a foreign corporation authorized to transact business in this state may be served upon the Secretary of State or upon the chief clerk in his office, when * * *,

'Service upon the Secretary of State or his chief clerk as herein provided shall be had only as long as the circumstances authorizing such service shall continue.'

"Patently, this is authority to serve the Secretary of State only when a foreign corporation has been authorized to do business in the state, and even then, only so long as additional facts are extant."

The court concludes:

"In light of the foregoing, the service upon the Secretary of State is deficient in two particulars which are basic and vital requirements for legal and valid service, i. e., one, the corporation was not present in the state at the time

of the purported service and two, service was not had upon an authorized agent of the defendant."

See also, *Winston vs. Idaho Hardwood Company,* 23 Cal. App. 211, 137 P. 601 (1913); *Equity Life Association vs. Gammon,* 118 Ga. 236, 44 S.E. 987 (1903); *Rothrock vs. Dwelling-House Insurance Company,* 161 Mass. 423, 37 N.E. 206 (1894); *Vance vs. Pullman Company,* 160 F. 707 (1908); and Fletcher Cyclopedia Corporations, Vol. 18, Ch. 67, Sec. 8742, p. 627, et seq.

For the reasons herein stated, Respondent submits that it is clear that the trial court's ruling quashing service of summons on the Secretary of State is correct.

POINT IV

THE COURT'S RULING QUASHING SERVICE OF SUMMONS ON GEORGE W. MOONEY WAS CORRECT.

The court below in its amended judgment of October 26, 1964, (R. 155) sustained Respondent's motion to quash the service as to Mr. Mooney on two grounds which are pertinent here: first, in Paragraph 4 of its order (R. 157) the court found that the allegations of Paragraph 3 of Respondent's motion to quash the service of summons on Mr. Mooney were sustained; second, in Paragraph 7 of said amended judgment the court further found that the service on Mr. Mooney was void for the reason that the summons was issued and service

attempted after Respondent's motion to quash the serv-ice of summons on Mr. James S. Manning was filed and pending before the court and before the court had dis-posed of said motion to quash. Appellant in its brief discusses only the second ruling of the court, namely, that the original motion to quash was pending. The court's ruling was correct on the basis of either or both of the grounds stated in said amended judgment.

As to the first ground:

Respondent in Paragraph 3 of its motion to quash the service on Mr. Mooney (R. 42) alleged that the service on Mr. Mooney was not properly made in any manner whatever nor in accordance with the provisions of Rule 4(e)(4). The court sustained this allegation. This allegation is amply supported by both the affidavits of counsel (R. 43) and particularly by the affidavit of George W. Mooney (R. 118). Rule 4(e)(4) sets forth the manner in which service is accomplished upon a corporation not otherwise provided for. The Rule re-quires service upon an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process. Or, upon any such officer, agent, clerk, cashier, managing agent, chief clerk, or other agent having the management or direc-tion or control of any property of said corporation within the state. Or, if the corporate defendant adver-tises or holds itself out as having an office or place of business in this state or does business in this state, then upon the person doing such business or in charge of such

office or place of business. The affidavits effectively disclose that George W. Mooney was not a person pursuant to the Rule upon whom service could be made. At the most, he was merely in Salt Lake City en route to Los Angeles from Butte, Montana, and at the request of Prudential was discussing with Prudential certain problems which Prudential contended existed with respect to the air-conditioning equipment of the new Prudential building. There is no showing whatever that this was a part of the architect's contract in connection with its work on the Prudential building. In a word, the record is perfectly clear that Mr. Mooney was simply not a proper person upon whom service could be made in order to secure jurisdiction of Respondent Pereira. See *Beard vs. White, Green and Addison, Associates, Inc.*, 336 P. 2d 125, 8 U. 2d 423.

The court below was also correct in its second ground for quashing the service on Mr. Mooney. Namely, that the service was attempted while the original motion to quash was still pending before the court and before the court had acted thereon.

At 72 C.J.S., Process, Sec. 21, Page 1019, the following statement is made:

> "Issuance by plaintiff or attorney. In a jurisdiction wherein a summons is issued by the plaintiff or his attorney, the issuance of one summons does not exhaust the power (cites Washington case) or prevent the issuance of another summons; (citing the same Washington case) but it has been held that, without leave of court, a

> second summons cannot properly be issued by plaintiff while a motion to quash the first summons is pending. (Citing the Colorado case of *Farris vs. Walter,* 31 P. 231, 2 Colo. A.P. 450.)

The court below in this case followed the Colorado rule. Shepardization of the ***Farris*** case reveals that it has never been overruled or modified and has been cited many times. In this case, a suit was filed to recover on a promissory note. The action was commenced (as is the Utah practice) by the issuance of a summons in substantially the same language as a summons used in Utah at the present time.

In the Farris case defendant appeared specially and filed a motion to quash. Thereafter, while the motion was pending before the court, the plaintiff issued a second summons and due return of the service of this summons was made showing it to have been served approximately thirty days after the first service. The second summons was not attacked nor was any appearance made on the part of defendant in obedience to that summons.

Thereafter, the court denied the motion to quash on the first summons and entered judgment. The Supreme Court of Colorado reversed, saying that the motion to quash should have been granted on the first summons and held that judgment cannot properly have been entered under the second summons because the motion to quash was still pending, even though the second summons cured the defect in the first summons. The language of the court was as follows:

> "We are utterly unable to find satisfactory reasons which authorize us to say that the defendant in this case was under any obligation to appear and answer the complaint in obedience to the second summons, while his motion to quash was pending, and without any action or admission on the part of the plaintiff or the court indicating the necessity therefor."

Respondent submits that the Colorado decision is the better rule. Judge Ellett in this case felt that the court, of necessity, must have the power and the authority to determine legal questions submitted to it without any party unilaterally, in effect, requiring the court to perform useless adjudications. This would be the precise effect of permitting Appellant-Prudential to be upheld on the Mooney service. If a party can be permitted to serve an additional summons while a motion to quash is pending on its first service, there is no reason why they could not do it twice, or three, or four times, or, in fact, have seven summones pending before all divisions of the court on motions to quash. They could have the court at work determining questions made moot by plaintiff's unilateral action. It seems to Respondent that the service of further process while the validity of the first process is already in issue before the court amounts to an interference with the court's orderly disposition of matters before it.

In any event, Respondent submits that the *Washington* case cited by C.J.S. and the cases cited by Appellant in its brief are not in point with the situation at bar. The *Farris* case is squarely in point with the case

at bar and no case exists contrary to the Colorado court's determination on this question.

Respondent submits that the quashing of the service on Mr. Mooney should be upheld.

CONCLUSION

The activities of the Respondent architect Pereira in this case did not constitute the "doing of business" within the State of Utah within the meaning of the cases heretofore ~~cited~~ decided by the Utah court. Regardless of the court's determination on this point, the rulings of the trial court quashing each of the services of summons in question herein was correct and is supported by the record.

Respectfully submitted,

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