

2004

# Sysco Intermountain Food Services, Inc. v. Vasilios Priskos, individually and dba Crowne Plaza-Ogden Eccles Center : Brief of Appellee

Utah Court of Appeals

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**UTAH COURT OF APPEALS  
BRIEF**

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DOCKET NO. 20040773**

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IN THE UTAH COURT OF APPEALS

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SYSKO INTERMOUNTAIN FOOD  
SERVICES, INC.,

Plaintiff and Appellant,

v.

VASILIOS PRISKOS, individually and d/b/a  
CROWNE PLAZA-OGDEN ECCLES  
CENTER,

Defendant and Appellee.

**BRIEF OF APPELLEE  
VASILIOS PRISKOS**

App. Ct. No. 20040773  
Category (b)(15)

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APPEAL FROM THE THIRD DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH  
JUDGE WILLIAM B. BOHLING

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UTAH APPELLATE COURTS

**MAR 24 2005**

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IN THE UTAH COURT OF APPEALS

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SYSCO INTERMOUNTAIN FOOD  
SERVICES, INC.,

Plaintiff and Appellant,

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VASILIOS PRISKOS, individually and d/b/a  
CROWNE PLAZA-OGDEN ECCLES  
CENTER and PRISKOS INVESTMENTS,  
INC. d/b/a CROWNE PLAZA-OGDEN  
ECCLES CENTER,

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## DETERMINATIVE STATUTES, ORDINANCES AND RULES

Utah Rule of Civil Procedure 12(b)(6) provides:

**How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: ... (6) failure to state a claim upon which relief can be granted ... .

Utah Code Ann. § 25-5-4 provides, in pertinent part:

### **25-5-4. Certain agreements void unless written and signed.**

(1) The following agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement: ...

(b) every promise to answer for the debt, default, or miscarriage of another..

## STATEMENT OF FACTS

1. Priskos Investments, Inc. is a Utah corporation that, at all relevant times, was duly authorized to do business in the State of Utah. R. at 29.
2. At all relevant times, Priskos was an officer of Priskos Investments. R. at 29.
3. Priskos and Priskos Investments did business jointly under the assumed name "Crowne Plaza-Ogden-Eccles Center". R. at 29.
4. On or about February 27, 2002, Priskos Investments entered into a contract with Plaintiff, which contract is the subject of this litigation. R. at 29.
5. On the first page, the contract asks for the applicant/owner's name. In the

accompanying space, the name "Priskos Investments" has been written, and it is further noted in the contract that Priskos Investments is a corporation. R. at 7-8.

6. Vasilios Priskos' name appears only once on the contract - to indicate that Priskos is an officer of Priskos Investments, the corporation. R. at 7-8.
7. On the second page of the contract, in a section entitled "Terms and Conditions", the applicant is listed as "Priskos Investments / DBS Crowne Plaza Hotel - Ogden". R. at 7-8.
8. Priskos is not familiar with or associated with any entity known as "Crowne Plaza Hotel-Ogden." R. at 29.
9. At no time did Priskos individually enter into a contract or sign anything with Plaintiff. R. at 7-8, 29.
10. At no time did Crowne Plaza-Ogden-Eccles Center enter into a contract with Plaintiff. R. at 7-8, 29.

### **SUMMARY OF THE ARGUMENT**

The lower court properly ruled, based on all of the evidence before it, that, as a matter of law, Priskos is not personally responsible for the Priskos Investments account with Sysco. Plaintiff alleges that it relied on a written contract in providing goods and services to Defendants. However, the contract specifies Priskos Investments, not Priskos, as the applicant. Thus, the lower court could disregard the conflicting affidavit testimony and, for



purposes of summary judgment, focus on the terms within the four corners of the contract. In addition, any promise Priskos may have made to pay the Priskos Investments obligation is void under the Utah Statute of Frauds. Finally, Plaintiff cannot argue, for the first time on appeal, that Priskos is liable under a partnership law theory.

### ARGUMENT

#### **I. THE LOWER COURT'S RULING IS SUPPORTED BY THE PARTIES' UNAMBIGUOUS CONTRACT**

The primary thrust of Plaintiff's argument is that the affidavit testimony of Diane Barker sufficiently contradicted the testimony of Priskos so as to create an issue of fact, rendering summary judgment inappropriate. As support for this argument, Plaintiff contends that it "only takes one sworn statement under oath to dispute the averments on the other side of the controversy and create an issue of fact." Holbrook Co. v. Adams, 542 P.2d 191, 193 (Utah 1975). This clearly applies to instances where the only evidence of a fact is the disputed testimony of two parties. The principle is inapposite, however, where a written document governs the relationship between those parties. If this were not the case, dispositive motions would never be granted since, to survive one, a party would need only submit an affidavit stating that the terms of the written document do not apply.

In this case, the lower court did not only have the testimony of Priskos and Barker before it. The lower court also had the parties' contract. That contract specified Priskos Investments as the sole applicant. The applicant is identified as a Utah corporation. While

Priskos is identified on the contract as an officer of the corporation, Priskos never signed the document. Thus, the lower court could properly disregard, or give less weight to, the testimony of Barker and find that Priskos was not personally liable under the unambiguous terms of the contract, which Priskos never even signed.

It should be noted that Plaintiff misrepresents the evidence before the lower court.

In its appellate brief, Plaintiff states the following:

After receiving a credit application from Defendant Priskos Investments, Inc. and refusing to approve that credit application Sysco testifies, through the Affidavit of Diane Barker, a director of credit, that Mr. Priskos approached Sysco individually as well as in his capacity as an operating partner of the Crowne Plaza.

Appellant's Brief, 10. In fact, the Barker Affidavit does not discuss whether Plaintiff approved or rejected the credit application. *See* R. at 62-64. Rather, Plaintiff has always alleged that it provided goods in reliance on that contract:

On or about February 27, 2002, Defendant submitted to Plaintiff an Account Application to obtain credit accommodations from Plaintiff. ... Based on the submitted account application, during the period March 16, 2002 through September 27, 2002, Plaintiff, in good faith supplied and sold to Defendants certain goods on open account.

R. at 2. This allegation actually supports the lower court's decision that Plaintiff contracted with Priskos Investments but not Priskos individually.

## **II SYSCO'S CLAIM THAT AN ORAL PROMISE WAS MADE IS BARRED BY THE UTAH STATUTE OF FRAUDS.**

Plaintiff also asserts that, even if Priskos did not execute the contract, Priskos is still

liable because he later personally guaranteed the contract:

Mr. Priskos has on multiple occasions met with representatives of Sysco, personally, to assure Sysco of his continued obligation to meet the contractual obligations. ... Mr. Priskos has always known and led Sysco to understand that he was personally good for the balance due and owing on the contract.

R. at 63. However, the Utah Statute of Frauds states that a "promise to answer for the debt, default, or miscarriage of another," such as a personal guaranty, is void unless written and signed. Utah Code Ann. § 25-5-4. In this case, it is undisputed that Priskos did not execute a written guaranty. Thus, even if Barker's testimony that Priskos verbally promised to pay the Priskos Investments obligation were true, such promise was void and unenforceable *ab initio*.

### **III. SYSCO CANNOT RAISE NEW ARGUMENTS FOR THE FIRST TIME ON APPEAL.**

In its appellate brief, Sysco argues for the first time that Priskos is personally liable on the contract based on general principles of partnership law. Sysco did not raise this argument in the pleadings below or in its memorandum opposing Priskos's motion for summary judgment. It is inappropriate for Sysco to raise new arguments on appeal:

We will not address any new arguments raised for the first time on appeal. A review of the record and the briefs in this case reveals that Plaintiffs did not previously argue this theory.

Coombs v. Juice Works Development Inc., 81 P.3d 769, 772 (Utah App. 2003).

Accordingly, the Court should not consider Sysco's new argument raised for the first time on appeal.

Sysco's argument also fails on its face. In essence, Sysco contends that, since Priskos and Priskos Investments applied together to do business under the assumed name "Crowne Plaza-Ogden-Eccles Center", then Priskos and Priskos Investments are equally liable on the credit application. However, the credit application specifies the sole applicant as "Priskos Investments [d/b/a] Crowne Plaza Hotel-Ogden." That assumed name does not exist in the Utah Division of Corporations database. Nor is Priskos associated with a "Crowne Plaza Hotel-Ogden." R. at 29. Because "Crowne Plaza Hotel-Ogden" is a legal non-entity, the assumed name can be ignored, leaving Priskos Investments as the sole applicant.

Moreover, Sysco's new argument employs faulty logic. When two individuals (say A and B) apply to do business under the same assumed name (say A&B Properties), A can still enter into contracts on an individual basis without implicating B, and vice versa. For example, if A enters into a contract with a third party as A (not A&B Properties), B has no liability. Similarly, when A enters into a contract as A d/b/a A&B Properties, A is the only liable party, since the assumed name only designates the name under which A is individually operating. On the other hand, B would be liable where the contract applicant is listed as A&B Properties, but where the identity of the individual applicant is not ascertained. Applying similar logic to the instant case, Priskos would only be personally liable if the Sysco application had been opened under the assumed name "Crowne Plaza-Ogden-Eccles Center", without reference to whether the applicant was Priskos, Priskos Investments, or both. Because the applicant is clearly listed as Priskos Investments doing business under an

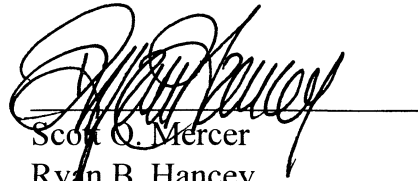
assumed name (albeit an incorrect one), the lower court was correct in ruling Priskos has no liability under the Sysco contract.

**CONCLUSION**

For the foregoing reasons, this Court should affirm the order of the lower court, holding that Priskos is not personally liable under the terms of the parties' contract.

DATED this 23<sup>rd</sup> day of March 2005.

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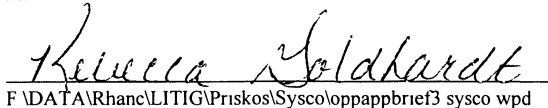
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**CERTIFICATE OF SERVICE**

I hereby certify that I caused to be delivered by the method indicated below two true and correct copies of the foregoing **BRIEF OF APPELLEE VASILIOS PRISKOS** in Case No. 20040773, postage prepaid, this 24 day of March 2005 to:

- FEDERAL EXPRESS
- U.S. MAIL
- HAND DELIVERY
- TELEFAX TRANSMISSION

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