

1970

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

FMA FINANCIAL CORPORATION,
Plaintiff-Appellant,

vs.

DELBERT OLSEN,
Defendant-Respondent.

Case No.

12112

APPELLANT'S BRIEF

Appeal from the Judgment of the First Judicial District Court in and for Cache County, Honorable VeNoy Christoffersen, Judge.

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(B) A LOAN TO THE CORPORATION.	
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APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This action arises out of a Lease of Personal Property between FMA, as lessor, and Olsen & Jensen Poultry, Inc. and Paul Olsen, as lessees. FMA obtained a Judgment against Olsen & Jensen Poultry, Inc., a Utah Corporation. Judgment was obtained in the Third Judicial District Court in and for Salt Lake County, State of Utah. The Judgment was in the amount of Fifty-four Hundred Twenty-eight Dollars Fifty-two Cents (\$5,428.52) plus interest. Judgment was entered July 3, 1968. The transcript of Judgment was filed in Cache County, State of Utah. An action was commenced to foreclose Plaintiff's Judgment Lien against certain real property owned by the Judgment debtor in Cache County. The Judgment Debtor Corporation then conveyed its real property to Delbert Olsen, one of its stock

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formed in October of 1960 (Ex. 3). Prior thereto, Paul Olsen and Milton Jensen had engaged as a partnership in the processing of chickens (Tr. 22). The Articles of Incorporation of Olsen & Jensen Poultry, Inc., provide that Delbert Olsen subscribed to Twenty-five Thousand Dollars (\$25,000.00) of the capital stock of the Corporation (Ex. 3). The Articles are signed by Delbert Olsen (Ex. 3). In fact, he only paid Five Thousand Dollars (\$5,000.00) (Tr. 28, 33). In April of 1961, he claims he "loaned" the Corporation Nineteen Thousand Dollars (\$19,000.00). The question is whether or not this was a loan or actually payment of his stock subscription. In any event, he acquired a Promissory Note and a Mortgage from the Corporation (Ex. 5, 6). Things went badly for the Corporation (Tr. 38, 22). In 1964, each of the three principals, Delbert Olsen, Paul Olsen and Milton Jensen took one aspect of the business (deliveries, raising, processing) and went his own way (Tr. 22). There was no formal winding up of the Corporation (Tr. 23, 35, 39). In fact, the Corporation continued with each of the three principals submitting his Federal Employee Withholding Tax and certain insurance payments to the Corporation and submitting the payments in the name of the Corporation (Tr. 38, 39).

On July 3, 1968, FMA obtained a Judgment against the Corporation Olsen & Jensen Poultry, Inc., in the amount of Fifty-four Hundred Twenty-eight Dollars Fifty-two Cents (\$5,428.52) with interest at Eight (8%) percent per annum (R. 1, 2, 9). FMA had leased to the Corporation certain personal property, specialized equipment for cleaning chickens, and the Lease was in Default. The Judg-

subscribers, shareholders, Vice-President and director. Plaintiff then amended its Complaint to include a count of fraudulent conveyance.

DISPOSITION IN LOWER COURT

The case was tried to the Court and the Court held that there had been no fraudulent conveyance.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks to establish:

1. That the conveyance was in fact fraudulent and that Plaintiff's Judgment Lien should attach to the property.

2. That the Judgment against Olsen & Jensen Poultry, Inc. is Res Judicata and cannot be collaterally attacked by Delbert Olsen.

3. That the Nineteen Thousand Dollar (\$19,000.00) payment characterized as a Note and Mortgage by the trial Court cannot be so characterized because at the time the transaction was entered into Delbert Olsen, in fact, owed Twenty Thousand Dollars (\$20,000.00) to Olsen & Jensen Poultry, Inc., on his unpaid stock subscription agreement.

4. That a claim by a Corporate Creditor to require Delbert Olsen to pay his unpaid stock subscription agreement is not barred by the Statute of Limitations.

STATEMENT OF FACTS

Chronologically the events occurred as follows:

The Corporation, Olsen & Jensen Poultry, Inc., was

The Articles of Incorporation were signed September 19, 1960 by Delbert J. Olsen and his signature was notarized. (See Page (6), Exhibit 3.) The certified copy of the Articles indicate that they were filed with the Utah Secretary of State's Office, October 6, 1960 (Ex. 3).

The Annual Report for 1963 filed with the Utah Secretary of State May 15, 1964 indicates that at that time Delbert Olsen was Vice-President and Director, (See Exhibit 3). There is no evidence he ever resigned.

Theron Lee, Accountant for Olsen & Jensen Poultry, Inc., testified that payments were made by Olsen & Jensen Poultry, Inc., on the Nineteen Thousand Dollars (\$19,000.00). There was a payment for Five Hundred Dollars (\$500.00) cash, (See Transcript 11). There was a credit of Fifteen Hundred Fifty Dollars (\$1,550.00), (See Transcript 12). There was a further credit of Ten Thousand Dollars (\$10,000.00) for good will, (See Transcript Page 12). This reduced the balance owing on the Note to Sixty-four Hundred Fifty Dollars (\$6,450.00), (See Transcript 13). Thereon Lee further testified that he remembers that the Nineteen Thousand Dollars (\$19,000.00) was set up initially at the time the books were set up, (See Transcript Page 20). It should be noted that the only cash payment on the Note made by the Corporation to Delbert Olsen or to First Security Bank in behalf of Delbert Olsen was made in 1961 (Tr. 11).

Owen Hall, also an Accountant, prepared certain tax returns for Olsen & Jensen Poultry, Inc. He testified that in 1964 and 1965 he prepared returns for the Corporation

ment was obtained in Civil No. 170490 (R. 1, 2, 9). The matter was entitled FMA LEASING COMPANY, a division of FMA FINANCIAL CORPORATION, a Utah Corporation, vs. OLSEN & JENSEN POULTRY, INC., a Utah Corporation. A Transcript of Judgment was obtained and filed in Cache County, State of Utah (R. 1, 2, 9). The Transcript of Judgment was filed July 19, 1968 (Tr. 5). On the day that FMA obtained its Judgment, July 3, 1968, Delbert Olsen commenced action to foreclose the Note and Mortgage (Ex. 1). On July 14, 1968 Olsen & Jensen Poultry, Inc., conveyed its only piece of real property to Delbert Olsen, who was then a subscriber, shareholder, director and Vice-President of the conveying Corporation (Ex. 2).

As soon as FMA was aware of the actual conveyance it amended its Complaint to add a count of fraudulent conveyance (R. 15-18).

It should be noted that Delbert Olsen subscribed to Twenty-five Thousand Dollars (\$25,000.00) worth of the capital stock of Olsen & Jensen Poultry, Inc. (Ex. 3). The Articles of Incorporation state in Article IV at Page (2) that "The amounts of capital stock to which each of the parties hereto have subscribed are as follows:

NAME	SHARE	AMOUNT
Delbert Olsen	250	\$25,000.00"

It should further be noted that Delbert Olsen was a member of the first Board of Directors. (See Page (3) of the Articles of Incorporation, Exhibit 3.) Delbert Olsen was also Vice-President.

Delbert Olsen testified that he paid Five Thousand Dollars (\$5,000.00) "to get in," (See Transcript Page 27). He was then asked, "Did you make any other payments?" He testified, "No, not at that time", (See Transcript Page 28). He was then asked, "Did you ever pay for them (the stock)?" His answer was, "No, and neither did they", (See Transcript Page 33).

Delbert Olsen testified that he was to pay off First Security Bank. There was an arrangement when each of the three principals went his own way that they would each assume various debts of the Corporation, (See Transcript Page 35).

Delbert Olsen was asked why he did not foreclose his mortgage, in 1964. He said that that was a good question, (See Transcript Page 36).

POINT I.

DELBERT OLSEN'S TRANSFER OF FUNDS TO THE CORPORATION, OLSEN & JENSEN POULTRY, INC., IN THE AMOUNT OF NINETEEN THOUSAND DOLLARS (\$19,000.00) CONSTITUTED EITHER:

- (A) PART PAYMENT ON AN UNPAID STOCK SUBSCRIPTION COVENANT OR;
- (B) A LOAN TO THE CORPORATION.

IN EITHER CASE, THE CORPORATION HAS A VALID CLAIM AGAINST DELBERT OLSEN

that included Health and Accident Insurance payments and payroll reports including State Insurance Fund Reports, Social Security Reports and Wage Withholdings, (See Transcript Pages 38 and 39).

Milton Jensen and Paul Olsen had been partners prior to the formation of the Olsen & Jensen Corporation in October of 1960. Delbert Olsen did not participate in the prior partnership (Tr. 22). A credit of Forty-seven Thousand Dollars (\$47,000.00) was transferred from the partnership to the Corporation. Paul Olsen and Milton Jensen then each paid Two Thousand Dollars (\$2,000.00) cash into the Corporation making a total of Fifty-one Thousand Dollars (\$51,000.00) credit, (See Milton Jensen's Deposition Pages 6 and 8). Delbert Olsen paid Five Thousand Dollars (\$5,000.00) cash into the Corporation and later Nineteen Thousand Dollars (\$19,000.00), (See Transcript Page 52). These total Seventy-five Thousand Dollars (\$75,000.00), which is also the amount of stated capital (Ex. 3).

Theron Lee in referring to the Nineteen Thousand Dollars (\$19,000.00) states at Page 22 of the Transcript "It could have been that that was the reason for loaning the money to the Corporation to become a stockholder as part of his contribution."

Delbert Olsen admits that he knew of the FMA Judgment at the meeting he held with Milton Jensen and Paul Olsen about a week or two weeks prior to July 14th, which is the date of the conveyance (See Transcript Page 26 and 54).

Thousand Dollars (\$1,000.00) short, but the conveyance was without consideration. If the Nineteen Thousand Dollars (\$19,000.00) were truly a loan secured by a Note and Mortgage, then Delbert Olsen is obviously Twenty Thousand Dollars (\$20,000.00) short on the stock subscription obligation.

In either case, the Corporation, Olsen & Jensen Poultry, Inc., has a valid claim against Delbert Olsen from which FMA, as a corporate creditor, is entitled to satisfy its Judgment. One or the other theories has to be correct.

POINT II.

THE CONVEYANCE FROM THE CORPORATION TO DELBERT OLSEN WAS FRAUDULENT.

- (A) THE CONVEYANCE WAS INTENDED AND DID HINDER AND DELAY FMA IN SATISFYING ITS PRIOR JUDGMENT AGAINST THE CORPORATION.
- (B) THE CONVEYANCE WAS GIVEN WITHOUT CONSIDERATION.

There was a fraudulent conveyance under the facts presented. Utah Code Annotated, Section 25-1-8 provides that every conveyance made with intent to delay, hinder or defraud creditors of their judgments shall be void. Delbert Olsen obtained his so-called mortgage in April of 1961. Each of the three principals went his own way and in 1965 they did file certain tax returns and made certain insurance payments through the Corporation. About three

FROM WHICH FMA, AS A CORPORATE CREDITOR, IS ENTITLED TO SATISFY ITS JUDGMENT.

Delbert Olsen signed the subscription agreement contained in the Articles of Incorporation. He subscribed to Twenty-five Thousand Dollars (\$25,000.00) of the capital stock of Olsen & Jensen Poultry, Inc. The Articles are dated September 19, 1960. They were filed in the Utah Secretary of State's Office October 6, 1960. By Delbert Olsen's own testimony, he paid only Five Thousand Dollars (\$5,000.00) towards his stock subscription agreement. He attempts to characterize the April 1, 1961 payment by him to the Corporation in the amount of Nineteen Thousand Dollars (\$19,000.00) as a loan. It is conceptionally unsound for a corporate subscriber, who has not paid his corporate subscription to characterize any payment at that point of time as a loan to the Corporation.

Delbert Olsen testified that the only payment he made on the Twenty-five Thousand Dollars (\$25,000.00) stock subscription was Five Thousand Dollars (\$5,000.00). He admits that he did not pay the Twenty Thousand Dollars (\$20,000.00) balance owing.

Delbert Olsen faces a dilemma. If the only payments he made to the Corporation were Five Thousand Dollars (\$5,000.00) and Nineteen Thousand Dollars (\$19,000.00), which he freely admits, then it becomes important to properly characterize these payments. If they are both characterized as payments on the subscription, they total Twenty-four Thousand Dollars (\$24,000.00) and he is only One

The second reason that the conveyance from Olsen & Jensen Poultry, Inc., to Delbert Olsen on July 14, 1968 was without consideration is that the Statute of Limitations had run against Delbert Olsen on his April 3, 1961 Promissory Note. In Utah the Statute of Limitations on a written obligation is Six (6) years. On April 4, 1967 Delbert Olsen was barred from asserting his claim.

POINT III.

FMA'S JUDGMENT AGAINST OLSEN & JENSEN POULTRY, INC., RENDERED BY THE THIRD JUDICIAL DISTRICT COURT IS VALID AND DELBERT OLSEN IS BARRED BY RES ADJUDICATA FROM CLAIMING THAT THE CORPORATION IS NOT LIABLE TO FMA AS PROVIDED IN SAID JUDGMENT.

The trial Court states in its decision:

"The Defendant (Delbert Olsen) has also raised an issue of defense on the basis of whether the agreement entered into with the plaintiff (FMA) upon which the judgment is based was between an individual and the plaintiff, who was an officer in the corporation solely and whether the corporation is bound by such agreement. However, there is insufficient evidence or information given during this trial to make any disposition or judgment in this matter. * * * This decision does not preclude the defendant from raising any issues of defense as to whether the defendant corporation here and the defendant, Delbert Olsen, is bound by the agreement entered into by the plaintiff upon which they claim their judgment exists, as this decision is not Res adjudicata as to those issues."

years later, on July 3, 1968, the very day that FMA obtained its Judgment in the Third Judicial District Court, Delbert Olsen commenced an action to foreclose his so-called mortgage. By his own admission he knew of the FMA Judgment at the time he met with Paul Olsen and Milton Jensen to discuss the Corporation conveying the real property to him. His real purpose, obviously, was to delay or hinder FMA in satisfying its Judgment. Otherwise why would he have waited so long.

Another reason the conveyance was fraudulent is that it was made without consideration. There are two reasons there was no consideration.

The first reason is that there was a novation of the Promissory Note. The parties, Milton Jensen, Paul Olsen, Delbert Olsen and the Corporation had made a new agreement. They split the business. One took the raising of the chickens, the second took the processing of the chickens and the third took the delivery of the finished product. Additionally, they had agreed to assume personally the various corporate obligations. Delbert Olsen, by his own admission, was to pay the First Security Bank transaction and other obligations. The other two principals were each assigned other corporate obligations to pay. Obviously because Delbert Olsen did not receive a Deed at the informal winding up in 1964 and because he waited until FMA obtained its Judgment in July of 1968, new arrangements were made and the promissory note obligation had been forgiven. The fact is that Delbert Olsen and the other principals had agreed that the old obligation on the April 3rd Promissory Note was no longer in effect.

SATISFY ITS JUDGMENT FROM SAID TRUST
FUND IS NOT BARRED BY THE STATUTE
OF LIMITATIONS.

The Statute of Limitations is no bar to FMA as a creditor of Olsen & Jensen Poultry, Inc., in asserting that defendant, Delbert Olsen owes Twenty Thousand Dollars (\$20,000.00) on his unpaid corporate stock subscription.

This Court has held in *Crowfoot v. Thatcher*, 19 Utah 212, 57 Pac. 170, that capital stock of a corporation is a trust fund for the benefit of the creditors of the corporation and that the statute of limitations has no application and creates no bar until the creditors have had an opportunity to enforce payment of the unpaid portion of their claims, irrespective of the time that has elapsed between the making of the subscription and the insolvency of the corporation; the insolvency of the corporation being the cause to make it necessary to collect such unpaid subscriptions. The Statute of Limitations does not commence to run until there is a cause of action. The Court goes on to state that the creditor of a corporation has no conceded right to call for unpaid subscriptions while the corporation is solvent regardless of the Statute of Limitations. The Court further states that if stockholders having the management of the corporation refuse or neglect to call for such payment, possibly with intent of permitting a bar of the Statute, the result might be to reduce the cancelled stock of the corporation to the wrong of the creditors and to the stockholders alike.

There never was a call by the corporation Olsen & Jen-

The Trial Court erred in stating that the Defendant may raise as an issue of defense that the defendant Corporation, Olsen & Jensen Poultry, Inc., is not bound by the Agreement entered into with Plaintiff, FMA. The Third Judicial District Court entered its Judgment July 3, 1968. The Judgment provides that the Corporation, Olsen & Jensen Poultry, Inc., is liable to FMA in the amount of Fifty-four Hundred Twenty-eight Dollars Fifty-two Cents (\$5,428.52) plus Eight (8%) percent per annum under said agreement. This is a valid Judgment and Delbert Olsen is barred by Res adjudicata from claiming that the Olsen & Jensen Poultry, Inc., is not liable to FMA as provided in said Judgment. Delbert Olsen may not collaterally attack this judgment.

In *Knight v. Flat Top Mining Company*, 6 Utah 2d 51, 305 Pac. 2d 503, this Court quotes the law of res adjudicata from American Jurisprudence as follows:

“It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action between the same parties or their privies, regardless of the form the issue may take in the subsequent action, * * *.”

POINT IV.

DELBERT OLSEN'S UNPAID STOCK SUBSCRIPTION IS A TRUST FUND HELD BY THE CORPORATION FOR THE BENEFIT OF THE CREDITORS AND FMA'S RIGHT TO

bert Olsen from which FMA, as a corporate creditor, is entitled to satisfy its Judgment of Fifty-four Hundred Twenty-eight Dollars Fifty-two Cents (\$5,428.52), plus Eight (8%) percent per annum from July 3, 1968.

The conveyance from Olsen & Jensen Poultry, Inc., to Delbert Olsen was fraudulent. It was fraudulent because the conveyance was intended and did in fact hinder and delay FMA in satisfying its prior Judgment against the Corporation. The conveyance was also fraudulent because it was without consideration.

FMA's Judgment in the amount of Fifty-four Hundred Twenty-eight Dollars Fifty-two Cents (\$5,428.52) against Olsen & Jensen Poultry, Inc., rendered by the Third Judicial District Court was valid and Delbert Olsen is barred by Res judicata from claiming that the Corporation is not liable to FMA as provided in said Judgment.

Delbert Olsen's unpaid stock subscription is a trust fund held by the Corporation, Olsen & Jensen Poultry, Inc., for the benefit of the creditors and FMA's right to satisfy said Judgment from said trust fund is not barred by the Statute of Limitations.

Respectfully submitted,

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sen Poultry, Inc., demanding that Delbert Olsen pay his full subscription agreement. Section 16-10-16 of the Utah Code Annotated provides :

“Unless otherwise provided in the subscription agreement, subscriptions for shares, whether made before or after the organization of a corporation, shall be paid in full at such time, or in such installments at such times, as shall be determined by the Board of Directors.”

The Utah Business Corporation Act, Utah Code Annotated, Section 16-10-23 provides :

“A holder of or *subscriber* to shares of a corporation shall be under no obligation to the corporation or *its creditors* with respect to such shares *other than the obligation to pay to the corporation the full consideration for which such shares were issued or to be issued.*”

In *Rolapp v. Ogden and N. W. R. Co.*, 37 Utah 540, 110 Pac. 364, this Court has stated :

“The subscribers for stock shall pay 100 cents on the dollar, or its equivalent, for the stock subscribed for by them, and until so paid, they are liable to creditors of the corporation in a proper proceeding for any balance remaining unpaid on their subscription.”

CONCLUSION

Delbert Olsen's transfer of funds to the Corporation, Olsen & Jensen Poultry, Inc., in April of 1961 constituted either the part payment on an unpaid stock subscription or a bona fide Note and Mortgage to the Corporation. In either case, the Corporation has a valid claim against Del-