1972

J. B. Walker And Mary Goff Walker v. Rocky Mountain Recreation Corporation, A Utah Corporation (Formerly Old Mill, A Utah Corporation) And J. Douglas Bowers : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

J. B. WALKER and MARY GOFF WALKER,
Plaintiffs-Respondents,

vs.

ROCKY MOUNTAIN RECREATION CORPORATION, a Utah Corporation (Formerly Old Mill, a Utah Corporation) and J. DOUGLAS BOWERS,
Defendants-Appellants.

Case No. 12,864

RESPONDENTS' BRIEF

Appeal from District Court of Salt Lake County
Honorable James S. Sawaya, Judge

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STATEMENT OF FACTS

Appellants' STATEMENT OF THE KIND OF CASE, DISPOSITION IN LOWER COURT, and STATEMENT OF FACTS is neither accurate nor clear. Therefore, the following STATEMENT OF FACTS is submitted to the Court for its consideration:

During the summer of 1970, J. Douglas Bowers contacted Mary Goff Walker and J. B. Walker for the purpose of leasing certain real property known as "The Old Mill." After several weeks of negotiations, a Lease Agreement (Exhibit "A") dated September 1, 1970, by and between Mary Goff Walker (the fee title owner of the Old Mill) and J. Douglas Bowers was executed. In

order to protect the title owner, Article V of the Lease Agreement provided that the lessor would have an equity interest in a corporation to be organized and known as "Old Mill Corporation" (J. B. Walker and Mary Goff Walker have not received any stock to date).

The Lease Agreement provides for the payment of $67,080 plus four percent of the gross sales in excess of the monthly payments over a five year period. In addition, the lessee must expend a minimum of $10,000 per year over a period of five years as a means of improving the real property. Therefore, it is clear that the lessee was subject to a minimum financial liability under the Lease of $117,080.

It should be noted that all of the contracting parties were intelligent businessmen who fully realized the nature and scope of the business transaction.

In accordance with the intent of the Lease Agreement it was provided in Article XVII that the Lease Agreement was to be assigned to a corporation to be organized and known as "Old Mill Corporation."

The Old Mill Corporation was organized in October of 1970 under the laws of Utah. The corporation promptly filed an application with the Utah Securities Commission for the purpose of registering and selling 2,000,000

shares for 10c per share. The Offering Circular (Exhibit "B") in the paragraph entitled "History and Business Objectives and Property" specifically outlined all of the parties, terms and conditions of the Lease Agreement. Furthermore, it appears that this Lease Agreement was the basis for inducing persons to purchase the stock.

It was not long before the "Old Mill Corporation" was in financial trouble and defaulted on the lease payments. Bowers who was the president of Old Mill Corporation contacted the Walkers and asked if the Lease Agreement could be cancelled. Old Mill Corporation through its counsel, Larry Lunt, met with Henry S. Nygaard, counsel for the Walkers, with the purpose in mind of determining whether or not the lease could be cancelled. As a direct result of that conference the Settlement Agreement (Exhibit "C") dated September 1, 1971, was prepared and executed by the parties. It should be noted, contrary to the statement of appellant on page 8 of Appellant's Brief, that said Settlement Agreement specifically provides for the continued personal liability of J. Douglas Bowers. J. Douglas Bowers also is a party to the complaint, which is the subject of this appeal.

By virtue of this compromise settlement, Old Mill Corporation and J. Douglas Bowers reduced their financial obligation from $117,080 to a maximum of $25,000.00. The board of directors recognizing the beneficial nature

of the Settlement Agreement by a unanimous vote on September 9, 1971 (a copy of the corporate resolution is Exhibit "D").

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY GRANTED PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT.

There is only one basic issue in this case. Did the Court properly grant plaintiffs' Motion for Summary Judgment?

The record clearly establishes that the defendants did not raise in its responsive pleadings to the plaintiffs' Motion for Summary Judgment any issue with respect to the appropriateness of February 16, 1972, as a hearing date. There was no suggestion that the hearing date was in any way contrary to Rule 56 (c) of the Rules of Civil Procedure. In fact, the appellants' Affidavit in opposition to plaintiffs' Motion for Summary Judgment did not raise the question of hearing the motion for Summary Judgment on February 16, 1972. The only argument presented with respect to time was to the effect that if defendants were allowed to pursue discovery procedures they may find some material facts which would be in dispute. The appellants not having raised the issue in the lower court cannot now raise it. Certainly the defend-

ants were not prejudiced in any way. The law is clear that in the event parties voluntarily appear and contest a motion they cannot object on appeal that there was any irregularity in entering the motion of record. The Court's attention is directed to 56 Am. Jur. 2d, page 16, § 18 which reads as follows:

> "Generally, a motion is filed with the clerk, who indorses the date on which it was received, and enters it on the motion docket making a brief statement of its nature, noting the names of the parties and their attorneys and, if the motion relates to a pending suit, the number of the suit. In some jurisdictions, the moving party sets his motion for hearing before the court on a day certain at the time he files it. The requirements of entry of a motion of record is not jurisdictional, and generally a respondent who voluntarily appears and contests the motion in the court below cannot object, on appeal, that there was any irregularity in entering the motion of record. On service of the motion papers, the proof of the service is also filed."

All of the pleadings and exhibits were before the court. After having heard oral argument and carefully reading the documents, the court granted the plaintiffs' Motion for Summary Judgment. The court upon the pleadings and supporting affidavits logically deduced that this was normal business transaction between adult businessmen and that all of the parties to the Lease Agreement and Compromise Settlement were in accord

that the Settlement Agreement was beneficial for all concerned under the circumstances. This position is certainly supported by the fact that J. Douglas Bowers' affidavit on file herein categorically declares that the settlement was a fair and reasonable one and was fully supported by the officers and directors of Old Mill Corporation.

The officers and directors resigned contemporaneously with the sale of all or substantial portions of their stock interests to another group of promoters who apparently had future plans for "Old Mill Corporation." It is these new officers who now contend that the acts of the past officers and directors are invalid.

It is interesting to note that while appellants are concerned about the Motion for Summary Judgment being argued on a nine day notice, they have filed their appeal brief on September 18, 1972, some 28 days after the second continuance expired on August 21, 1972. Perhaps the appellants have no standing before this court as a result of their failure to file their brief timely.

Point III of the defendants' Brief has no merit. The payment of $25,000 instead of the payment of $117,080 as required under the Lease is a substantial savings of $92,080. That kind of savings cannot be construed as a penalty. In fact if the Lease were in full force and effect the Lessee would owe $800.00 per month for 24 months

or a total of $19,200 as of September 1972. In addition, there would be $20,000 in improvements required. Thus appellants are presently in default in the sum of $39,200.

With respect to Point IV of the defendants' brief, the plaintiffs contend that § 16-10-74, Utah Code Annotated, does not apply to this factual situation and should not be considered by the Court. By no stretch of the imagination can this Settlement Agreement be construed as a sale or transfer of corporate property.

It is important to note that the alleged issues now being raised are ones propounded by the new officers and directors who apparently feel that they did not "buy as good a deal" as they thought they did. Therefore, they are making every effort not to pay the judgment of record.

The fact that present officers disagree with the acts of their predecessors does not make those prior acts invalid. J. Douglas Bowers and the past officers still consider that they have acted in good faith. The J. Douglas Bowers' affidavit reflects this opinion.

The appellant properly quotes the law that a corporation may adopt the promoters contract if that contract is beneficial, reasonable and made in good faith. The courts have consistently upheld the validity of un-

authorized acts of officers if ratified by the directors, *Fletcher Cyclopedia Corporations*, Vol. 2, Sec. 752, page 1057.

> "If the officers or the agents of a corporation assume to act for the corporation without any authority at all, or if they exceed their authority or act irregularly, and the act is one which could have been authorized in the first instance by the stockholders, board of directors or subordinate officers, as the case may be, it may be expressly or impliedly ratified by them, and thus be rendered just as binding, except as to intervening rights of third persons, as if it had been authorized when done, or done regularly. In this respect, a corporation is subject to substantially the same rules as a natural person. And as 'a large portion of the business of today is done by corporations, they are, and it is just that they should be, subjected to the rule.' It should be noted that the rule that where a contract is within the powers of a corporation, the members of the corporation may ratify the act of the officers or agents who acted beyond the scope of their authority in making it, applies to religious corporations the same as to other corporations. Accordingly, as a general rule, if the corporations, through the officer or body having authority to act, acquires or is charged with knowledge of the unauthorized act, the act not being prohibited by charter or by statute nor contrary to public policy, and does not repudiate it within a reasonable time, but without objection acquiesces therein, it is bound by the unauthorized act. . . ."

With respect to Point V, the plaintiff contends that the lower court acted properly within its province in granting the summary judgment. Although apellant is correct in stating that the summary judgment is a drastic remedy and should be granted with reluctance (*Housely v. Anaconda Company*, 427 P.2d 390, at page 393, 17 U2d 420), it is also the law that a summary judgment is an important means of avoiding costly and timely trials where there is no material dispute as to the facts or law. This proposition is enunciated in the case of *Transamerica Title Insurance Co. v. Resources, Inc.* 471 P2d 165, at page 167, 24 U2d 346, wherein the court states:

> ". . . The purpose of the discovery and of the summary judgment procedures provided for in our rules is to furnish a method for searching out and facilitating the resolution of issues which are not in dispute, and of settling the rights of the parties without the time, trouble and expense of a trial. . . ."

The lower court was fully satisfied, and justifiably so, that there was no dispute as to a material issue. To reverse the lower court simply because a new set of promoters desires to substitute its "notion" of what is a fair and reasonable settlement for the judgment of the former officers is not a sound basis for a new trial. Serious consequences could result to the Old Mill Corporation if there is a new trial and the plaintiffs prevail again. The consequences of granting a new trial may very well lead to the following:

(a) There must be a new trial with its accompanying time delays, substantial attorney's fees and costs of court.

(b) The Lease Agreement would be immediately reinstated and the Old Mill Corporation subjected to bringing current 24 monthly payments of $800.00 or a total of $19,200. Furthermore, the Lease provides that during the past two years at least $10,000 per year would have to be invested in improvements to the Old Mill property. Therefore, it is obvious that the Old Mill Corporation would immediately be liable for $39,200 in past financial obligations. In the light of such financial exposure, it would appear at this point that the $25,000 settlement was a very reasonable and satisfactory one.

CONCLUSION

In conclusion it would appear that as one objectively examines the alternatives with respect to this matter, it becomes increasingly obvious that the lower court was well advised in granting the summary judgment on the basis that the officers and directors acted prudently under the circumstances and that the shareholders were benefited by reducing the substantial liability.

Respectfully submitted,

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