

1995

Victor Ogden, Angie Ogden v. IB Printing Company : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Victor Ogden, Angie Ogden v. IB Printing Company*, No. 950725 (Utah Court of Appeals, 1995).
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DOCKET NO. 950725CA

IN THE SUPREME COURT OF THE STATE OF UTAH

VICTOR OGDEN and ANGIE OGDEN,
husband and wife,

Plaintiffs/Appellants,

vs.

IB PRINTING COMPANY, a Utah
joint Venture, and Gary
Richards, Mary Richards, and
Ronald Richards, and related
parties,

Defendants/Appellees.

95-0725-CA
Supreme Ct. Case No. 950126

Priority No. 15

[Dis. Ct. No. 940300038]

BRIEF OF APPELLEES

**Appeal from Final Order of Dismissal and Order
Affirming Dismissal as Entered by the Honorable John A. Rokich
a Judge of the Third District Court, Tooele County.**

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FILED

AUG 18 1995

**CLERK SUPREME COURT
UTAH**

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TABLE OF AUTHORITIES

REFERENCES TO THE UTAH CODE ANNOTATED, 1953, AS AMENDED,
WILL HEREAFTER BE CITED ONLY AS "UCA" FOLLOWED BY
THE SECTION DESIGNATION.

CASES CITED

	<u>Pages</u>
<u>Anderson v. American Society of Plastic and Reconstructive Surgeons</u> , 807 P.2d 825 (Utah 1990)	12,13
<u>Cate Rental Co., Inc. v. Whalen & Co.</u> , 549 P.2d 707 (Utah 1976)	12
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<u>Roskelly & Co. v. Lerco, Inc.</u> , 610 P.2d 1307 (Utah 1980)	11,12
<u>Summa Corp. v. Lancer Industries, Inc.</u> , 559 P.2d 544 App. 577 P.2d 136 (Utah 1957)	4,10,11
<u>Synergetic by and through Lancer Industries v. Marathon Ranching, Co. LTD</u> , 701 P.2d 1106 (Utah 1985)	12
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STATEMENT OF JURISDICTION

The statement of jurisdiction as contained in appellants' brief is accurate.

STATEMENT OF ISSUES

The appellees/defendants submits to this court that there is only one pertinent issue to be resolved and that is whether or not the trial court appropriately exercised its authority in dismissing the plaintiffs' complaint based upon forum non conveniens doctrine and jurisdictional concerns.

STANDARD OF APPELLANT/PLAINTIFF REVIEW ON SUPPORTING

AUTHORITY

The appropriate review standard is abuse of discretion. Mooney v. Denver and R.G.W.R. Co., 118 Utah 307, 221 P.2d 628 (Utah 1950) Summa Corp. v. Lancer Industries, Inc., 559 P.2d 544 App. 577 P.2d 136 (Utah 1957). The review standard is not correction of error as stated by plaintiffs/appellants.

STATEMENT OF FACTS

The defendants/appellees Richards were at all times concerned herein residents of Wendover, Nevada. The plaintiffs/appellants met with the defendants/appellees in Wendover, Nevada for the purpose of starting a printing business. The parties had anticipated printing documents which would be used

for the gaming industry in Nevada. Because of the questionable ability to have gambling documents in the state of Utah and because of the residence of the defendants/appellees it was agreed by the plaintiffs/appellants and the defendants/appellees that the Articles of Incorporation would be prepared and thereafter the business would be established in Wendover, Nevada. Pursuant thereto, IB Printing, was incorporated in the state of Nevada on February 11, 1994, with Michelle Richards as the registered agent, business address of 1450 Red Garter Street, Trailer No. 5, Wendover, Nevada 89883. The Board of Directors consisted of the named defendants/appellees and the plaintiff/appellant Victor Ogden. The plaintiff/appellant, Victor Ogden, also signed the Articles of Incorporation. The corporate charter of IB Printing, Inc., was issued by the Secretary of State of Nevada.

The defendants/appellees, took orders in Nevada and shipped orders from Nevada. The Board of Directors meetings were held in Nevada and at the Board of Directors meetings held on April 8, 1994, in Wendover, Nevada, both of the plaintiffs/appellants attended the same, as did each of the named individual defendants/appellees and Ed Walton who was nominated and became president of the defendant/appellee corporation, who was nominated by plaintiff/appellant, Victor Ogden. Ed Walton is a resident of

the state of Nevada and would be witness to all matters concerned in this action.

The only contact with the state of Utah dealt with the location and use of some of the printing equipment. Lease space had been rented on the Wendover Air Force Base, a Federal Reservation, which area is located in Wendover, Utah. When orders were received at the business office in Wendover, Nevada, the orders were thereafter prepared by the computer worker which was necessary, which computer work was all located in Nevada. Thereafter printing of the documents would be done in Wendover, Utah, and thereafter returned to Nevada for binding, completion activities and delivery.

IB Printing, Inc., never filed documents with the state of Utah to qualify it as doing business in Utah, because it was never the intent of said company to do business in Utah. The leased space area which was used in the state of Utah was done because of the fact that no such building availability exists at present on the Nevada side of Wendover.

The above are the Findings of Fact as made by the court and accepted by the court pursuant to its Minute Entry entered January 10, 1995 (ROA pp. 111-113) and pursuant to its Order of Dismissal entered March 8, 1995 and affirmed in the Order Affirming Dismissal entered February 23, 1995 (ROA pp. 127-131). The plaintiffs/

appellants acknowledge that there presently exists in the Fourth Judicial District Court of the state of Nevada in and for Elko County, which was filed on or about July 27, 1994 (prior to the filing of the action here) an action entitled Gary Richards, Michelle Richards, Donald D. Richards, Mary Richards and IB Printing, Inc. v. Victor Ogden which action is about and arises from the conduct and actions of the parties herein.

The appellants/plaintiffs further acknowledge that all of the equipment involved in this matter is located in the state of Nevada and has been there since May 1994 and nothing "executable" remains in the state of Utah (ROA 67).

ARGUMENT

THE TRIAL COURT APPROPRIATELY EXERCISED ITS AUTHORITY

IN DISMISSING THE ACTION.

The true question which must be answered by this court is whether or not the trial court appropriately used its inherent authority in dismissing the action of the plaintiffs/appellants based upon the doctrine of forum of nonconveniens. The trial court had all of the allegations as made by the each of the parties, by affidavits, as to where and what had occurred in this matter. The plaintiffs/appellants tried to state under some basis that they are not incorporators, officers and directors of IB Printing, a Nevada Corporation when the documents as presented to the court

specifically shows a signature of the plaintiff/appellant, Victor Ogden as one of the incorporators. It is incredulous to have Victor Ogden state that he knew nothing of the incorporation or that it wasn't supposed to occur.

The individually named defendants/appellees are all Nevada residents. The principle place of business of the defendant/appellee corporation is Nevada. Ed Walton, an un-named defendant/appellee who is the president of IB Printing, Inc., is a Nevada resident. The corporate meetings occurred in Nevada. The intentions of all concerned were to have this as a Nevada Corporation, doing business in Nevada so that it would not run into any problem manufacturing, printing and having in their possession gambling documents which were to be used to supply the Casinos in Nevada.

The trial court, reviewed the causes of action as were made by the plaintiffs/appellants. The plaintiffs/appellants set forth in paragraph 6 of their complaint that "this cause of action essentially rises out of the investment of monies by plaintiff's in IB Printing and the promise for return for such investment funds from the Richards to plaintiffs." The plaintiffs/appellants first cause of action is for breach of contract. The only contract which could have been entered into would have occurred in Wendover, Nevada, which is where the meetings and agreements would have taken

place. The appellees/defendants all live in Nevada and it is incredulous to think that the appellees would have left their residences, driven across the state line to Wendover, Utah and stood on some street corner making their agreements.

The second cause of action desires to have the dealings between the parties deemed as a partnership or joint venture by estoppel based upon claims by the plaintiffs/appellants that no Articles of Incorporation were ever filed. The evidence specifically shows that Victor Ogden signed the Articles of Incorporation of IB Printing to incorporate the same in the State of Nevada. All activities and formation of IB Printing occurred in Nevada and not in Utah.

Under the third cause of action which plaintiffs/appellants claim to be contract implied by law/unjust enrichment, the monies, accounts of IB Printing and the defendants/appellees as well as the equipment are all located in Nevada.

The fourth cause of action of the appellants/plaintiffs allege fraud, conversion and mis-management. Again, if any of those items occurred they would have occurred in Wendover, Nevada, which is where the meetings took place, agreements were entered and the operation of the business is located.

The fifth cause of action that the plaintiffs/appellants ask for is equitable relief and for a Writ to issue for the return of

the equipment. The equipment is located in Nevada and no Writ out of the Utah court has the authority to require the equipment to be returned back into Utah. Only a Writ out of a Nevada court can seek the return of the equipment.

In viewing all of these matters as well as everyone and everything involved, the trial court came to the conclusion that it should refuse to exercise its jurisdiction. The trial judge has the inherent right to dismiss a cause of action over which it has jurisdiction for the reason that there is a more convenient forum. Mooney v. Denver and R.G.W.R. Co., 118 Utah 307, 221 P.2d 628 (Utah 1950)

The trial court reviewed all of the facts in this matter and made a comparison to the same in determining whether the appropriate forum would be the court in Tooele or the court in Elko County, Nevada. The trial court reviewed the criteria in Summa Corporation v. Lancer Industries, Inc., 559 P.2d 544 (Utah 1977). The trial court here did a balancing test and stated in its Order of Dismissal as follows:

"The most convenient forum to hear this matter is in Nevada. The controversy arose in Nevada; the ease and access to prove or disprove the claims would be the state of Nevada; the costs involved are more readily adjudicated in the state of Nevada; and the availability of witnesses and the enforcement of the judgement would require that the matter be adjudicated in the state of Nevada." See Order of Dismissal dated March 8, 1995.

In addition to this and pursuant to Roskelly and Co. v. Lerco, Inc., 610 P.2d 1307 (Utah 1980), this court stated that you may also look at the economic realities of a case in determining whether or not it is the appropriate forum. In this action it has been noted that one of the major witnesses, Ed Walton, is located in Nevada and all of the other witnesses with the exception of the plaintiffs/appellants are located in Nevada. The trial court could not compel attendance of witnesses who live in Nevada nor could it enforce any judgement because all of the property and assets are located in Nevada.

As stated in Summa,

"the factors are proper to consider are the location of the primary parties, where the fact situation creating the controversy arose, the ease of access to prove, including the availability and costs obtaining witnesses, the enforceability of any judgement that may be obtained; and the burdens that may be imposed upon the court in question in litigating matters which may not be of a local concern. In determining whether such a motion should be granted, the court should analyze those factors in light of the particular fact of each case and balance the considerations..." Id. at 546.

All of these factors resolve the matter in the favor of the defendants/appellees and against the plaintiffs/appellants.

It has been the position of the plaintiffs/appellants that based upon the use of property, i.e., leasing of space at the Wendover Air Force Base for part of the printing operation, that this matter qualified this action to come under Utah's long arm

jurisdiction requirements as contained in the UCA §78-27-24(4). This is a misreading of the law. The mere fact that the defendants/ appellees, one and/or all, may have leased space in the state of Utah, does not give right to the cause of action in this case. No where in plaintiffs/appellants complaint is there any claims dealing with the leased space in Utah. There needs to be a substantial connection with the activity to the cause of action which arose in order for the court to have jurisdiction. Having leased space in Utah is not the activity which gives rise to the alleged cause of action of the plaintiffs/appellants. In Anderson v. American Society of Plastic and Reconstructive Surgeons, 807 P.2d 825 (Utah 1990) the court sets forth a two part inquire before personal jurisdiction can be addressed. This court states:

"First, do...claims arise from one of the activities listed in the statute? And second, are defendant's contacts with this forum sufficient to satisfy the due process clause of the 14th Amendment if the trial court exercises jurisdiction?" Id. at 826.

As noted, the leasing of the space in Wendover, Utah does not give rise to one of the claims in plaintiffs'/appellants' complaint and therefore they cannot use UCA §78-27-24(4) as a basis for granting jurisdiction. Thus the first part of the test fails. See also Roskelly and Co. v. Lerco Inc., 610 P.2d 1307 (Utah 1980); Synergetic by and through Lancer Industries, Inc. v. Marathon Ranching, Co. LTD, 701 P.2d 1106 (Utah 1985); Cate Rental Co., Inc.

v Whalen and Co., 549 P.2d 707 (Utah 1976); Also, Union Ski Company v. Union Plastics Corp., 548 P.2d 1257 (Utah 1976).

In reviewing the second part of the test under due process requirements this court stated:

"Defendants' contacts with Utah must be "such that the maintenance of the suit does not offend notions of fair play and substantial justice."...Defendants' must have "reasonably anticipate[d] being hailed into court" here... they must have "purposely avail[ed]" themselves of the privilege of conducting activities here. The trial court must also balance the "convenience of the parties" and weigh this forums interest in asserting jurisdiction." Anderson, Id. at 828 (Cites omitted)

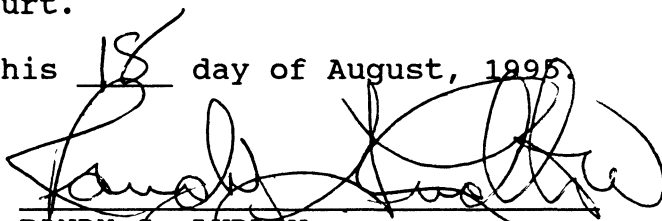
The defendants/appellees always were to be involved in the gaming industry in Nevada. Such activity is illegal in Utah. Printing of the forms and having printed forms for gambling might be viewed as a crime in the state of Utah. The defendants/appellees did not want to avail themselves of any controversy or problems in the state of Utah and therefore set themselves up as being a Nevada Corporation to do business in Nevada with its principle place of business located in Nevada and having minimal contacts with the state of Utah. Under this criteria the long arm jurisdiction statute does not apply.

CONCLUSION

The trial court had the inherent authority and ability to dismiss the cause of action herein. The plaintiffs/appellants consent for entering into and being part of a Nevada Corporation,

to do printing for the gaming industry of Nevada, with defendants/appellees all being Nevada residents, with requirements that any judgement that might be obtained would have to be exercised in Nevada all point to the court properly exercising its inherent authority and ability to dismiss the action. The plaintiffs/appellants are not without the ability to pursue any claim and left without any forum. As has been noted to this court an action presently exists in Elko County, Nevada by the same appellees against the plaintiffs/appellants. The Nevada court is the appropriate forum. The trial court thought that Nevada is the appropriate forum when it dismissed this action and required the plaintiffs/appellants to go to Nevada. The trial court's actions should be affirmed by this court.

RESPECTFULLY SUBMITTED this 18 day of August, 1995

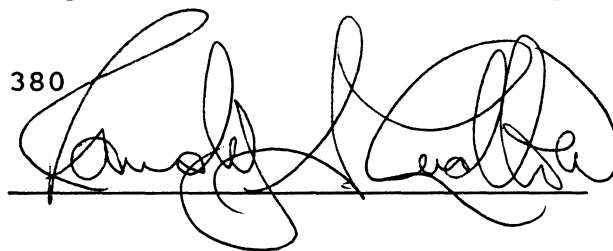


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HAND DELIVERY CERTIFICATE

I hereby certify that I hand delivered a true and correct copy of the foregoing BRIEF OF APPELLEES, by hand delivering the same in a sealed envelope, this 18 day of August, 1995 to the following:

JULIAN D. JENSEN
311 SOUTH STATE STREET, SUITE 380
SALT LAKE CITY, UTAH 84111

A handwritten signature in cursive script, appearing to read "Randolph L. Walker", is written over a horizontal line.