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Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

FILED

APR 2 - 1964

RAYMOND OTTESON,

Plaintiff and Respondent,

vs.

M. E. BAIRD, et al.,

Defendants,

HERBERT E. WILKEY,

Defendant and Appellant

) Clerk, Supreme Court, Utah

) Case No.
) 10018

) UNIVERSITY OF UTAH

) JUN 3 0 1964

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BRIEF OF DEFENDANT AND APPELLANT

Appeal From a Judgment of the District Court
of Juab County, Hon. G. Nelson Day,
District Judge

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IN THE SUPREME COURT
OF THE STATE OF UTAH

RAYMOND OTERSON,)	
Plaintiff and Respondent,)	
vs.)	Case No.
)	19018
M. E. BAIRD, et al.,)	
Defendants,)	
ROBERT E. WILKEY,)	
Defendant and Appellant.)	

BRIEF OF DEFENDANT AND APPELLANT

NATURE OF CASE

Action by plaintiff against appellant (and other defendants who did not appeal) to recover wages and allowance of attorney's fees under the provision of Utah Code 34-9-1.

DISPOSITION OF CASE IN DISTRICT COURT

The District Court on July 15, 1963, entered Judgment against defendant and appellant and certain other defendants, in a sum totaling \$467.46 plus costs \$150.20 (including allowance of \$100.00 attorney's fee).

NATURE OF RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of Judgment of the District Court and Judgment ordered in the sum of \$75.00 in favor of appellant.

STATEMENT OF FACTS

1. The Complaint And The Judgment.

For convenience, defendant Silico Milling Co. will hereinafter be referred to as the Silico Corporation.

The essential facts in this case are undisputed.

The Judgment appealed from is for wages for work and son of plaintiff, from Sept. 1 to 26, 1961 (Exh. P. 2)

The amended Complaint upon which plaintiff went to trial was against the defendants M. E. Baird, Hugo Emery, Fred Michelsen, Eugene E. Wilkey, appellant

herein, and the Silico Corporation, for wages for said services rendered in September, 1961, as above mentioned. The Complaint was in two counts. One count was by plaintiff Raymond Otteson for his own services in the amount of \$276.00 plus \$100.00 attorney's fee, and one count was on an assigned claim from plaintiff's son Donell Otteson in the amount of \$229.35 and \$100.00 attorney's fee. (Clerk's Tr. 21-23). On the day of trial, the claim on the assigned claim was amended and reduced to \$221.10 (4:20). ¹ The Court entered Judgment in favor of defendant Silico Corporation and against appellant Wilkey.

The Judgment was for \$276.00 plus \$100.00 attorney's fee, and interest on the first claim, and for \$221.10 on the second assigned claim and that on said sums of \$276.00 and \$221.10, defendant should have a credit of \$75.00 (for moneys loaned by defendant Wilkey to the Ottesons as hereinafter mentioned), (Clerk's Tr. 44-47)

2. The Employment Of The Ottosons By The Silice Corporation.

Defendant Silice Corporation failed to answer the Complaint and its default was entered (3:24 to P. 4:3). Hence defendant Silice Corporation admitted the employment of the Ottosons.

But Further - The employment of the Ottosons by the Silice Corporation and not by appellant Wilkey personally, is established by the Ottosons' own testimony.

In the face of these facts the Judgment of the District Court against appellant Wilkey and in favor of the defendant Silice Milling Co. presents an anomaly.

In order to more conveniently present the admissions of the Ottosons that they were employed by and worked for Silice Corporation and not for appellant, personally, in our citations to the transcript, references to transcript of testimony by the Ottosons will be preceded by "O" - to be distinguished from appellant Wilkey's testimony, where the citation will

be preceded by a "V".

Defendant Silice Corporation was organized July 17, 1961, and qualified to do business in Utah July 25, 1961 (108:13 to 109:6; 37:16-19, Exh. D 4).

Defendant W. E. Baird at the time of employment of the Ottomans was a promoter and agent of the corporation. During the period for which wages was claimed (From Sept. 1 to Sept. 26, 1961, "V" Pl. Exh. 2) he became vice president and director (Sept. 14, 1961). Defendant Hugo Henry was at all times of said work and employment, director, president, and president of the Board of Directors of the Silice Corporation. Defendant Fred Michelson during said times was secretary-treasurer and director of Silice Corporation. (9:10 to 10:29; 114:10 to 22).

Prior to August 16, 1961, appellant Wilkey owned a rock business. ("V" 12:3-10).

Appellant Wilkey discontinued his rock business Aug. 16, 1961. ("V" 12:14-16).

Before Wilkey terminated his operations he had

entered into an agreement with Silice Corporation through defendants Lantry, Michelson and Beard, under which he was to receive 20% ownership in the Silice Corporation for transfer of his business. Wilkey was also hired as an employee at \$600.00 a month. Wilkey received some of his salary, but the stock was not delivered. ("V" 13:12 to 13:23; 30:20-22).

Between August 6 and Sept. 1, physical possession of Wilkey's business properties was delivered to Silice Corporation. ("V" 30:1-3; 31:21-25).

The Silice Corporation took possession of the properties. It worked the properties and filled orders through its sales agent, Wasatch Chemical Company, and this was the job that the Ottosons worked on. ("V" 31:1-8).

On Sept. 6, 1961, Wilkey and his wife gave the Silice Corporation a "Bill of Sale" to certain equipment of his business. (Exh. P.1) The machinery had been purchased under Conditional Sales Contract. Part of the agreement between Wilkey and Silice Corporation

was that the company was to keep up the payments. The company failed to do so and the equipment was about to be lost. Therefore, on Nov. 22, 1961 (after the period of e-pay-out) Silico Corporation released Wilkey from the transfer so that Wilkey could attempt to save his equipment. (Exh. P 1) ("V" 29:6-20).

About the middle of July 1961, the Ottosons went to appellant's house and asked him if he could give them a job working in Wilkey's mine, which Wilkey did. ("V" 39:11 to 40:7).

Before Wilkey discontinued his business (Aug. 16, 1961) Wilkey advised the Ottosons that he was going to work for Silico Corporation; that the Ottosons' employment with Wilkey was ceasing; that Silico Corporation was a corporation, and if the Ottosons wanted to, they could work for Silico Corporation and he would find out if they were willing to hire them. And the Ottosons said, fine. ("V" 82:30 to 83:30). Wilkey never agreed himself to pay any of the Ottosons' wages. ("V" 85:23-27).

The Ottosons testimony is even more specific, more complete, that beginning Sept. 1, 1961, they were employed by the Silico Corporation and not by Wilkey. Prior to Sept. 1, 1961, Ottosons had conversations with Baird and Wilkey. In these conversations the Ottosons were advised and they understood and they accepted, that beginning Sept. 1st the Ottosons would be working for the Silico Corporation. Near Sept. 1st the Ottosons were specifically advised by both Baird and Wilkey that Wilkey had closed his transactions with the Silico Corporation and that beginning Sept. 1st both Wilkey and the Ottosons would be working for the Silico Corporation, that Wilkey would be receiving his orders from Baird and he would tell the Ottosons what to do. The Ottosons talked several times to defendant Baird on this and it was specific. Wilkey was to pay for them for their services for the month of August, and from then on it was up to Baird. ("O" 40:29 to P. 43:26). Wilkey would receive his orders from Baird and he would show

the Ottosens want to do. Baird was out on the job several times and told the Ottosens how he wanted them to do things, and gave directions and told them what to do in the way of work. ("D" 34:17-19; P. 69 to P. 70:12).

The Silico Corporation received the fruits of Ottosens and Wilkey's labor (and his property) selling his rock through its sales agent, Westch Chemical Company ("V" 11:1-6).

Plaintiff's attorney apparently desiring to defend against a judgment against the defaulting Silico Corporation, showed that there was "nothing" in some minutes about the acquisition of Wilkey's equipment. (Exh. P. 1) But secretary-treasurer Nicholson testified:

"No, but there need not be." ("M" 77:16 to 78:12).

And the sales agreement was signed by president, Bury, on behalf of the Silico Corporation, attested by secretary, Nicholson, with the seal of the corpor-

ation (Exh. P. 1) (77:16 to 79:7).

Further, Mickelsen was advised by defendant Emery, president and director of Silico Corporation, of the Ottosons' employment. Mickelsen didn't complete the file or payroll, first, because he didn't have their W-2 Forms, but later, because the Silico Corporation didn't have the money. Mickelsen did know that the work had been done by the Ottosons for Silico Corporation. He had sent president, Emery, to get the forms filled out. (114:6 to 117:30). The corporation's finances had collapsed. (107:13-15). About the middle of September Ottosons went to Silico Corporation's plant in Salt Lake about their wages. They saw Baird (who was then Silico's vice-president) and president, Emery, and demanded their money. Baird asked why weren't they working. And they said, no money. And Baird said Emery was making out payrolls and checks probably were mailed, and promised if they didn't receive them he would bring them. He did not do so. ("D" 47:7 to P. 50:1).

During the latter part of September, Wilkey loaned Donell Otteson \$25.00 when Donell pleaded he "was hard up for money", and loaned Raymond Otteson \$50.00 when Raymond Otteson told him he "had a payment that he had to make". They promised to get it paid back to Wilkey before the checks had a chance to clear; Raymond Otteson advising, "I'm going over to the turkey plant to go to work". They never paid Wilkey back. ("W" 85:25 to 90:3).

ARGUMENT.

AN EMPLOYEE OF A CORPORATION IS NOT PERSONALLY LIABLE FOR COMPENSATION OF OTHER EMPLOYEES BY REASON OF THE FACT THAT HE HELPED ARRANGE THE EMPLOYMENT.

The Ottesons' own testimony establishes that for the period for which plaintiff seeks compensation (during September 1961) the Ottesons were employees of the Silico Corporation, a corporation in existence and doing business in Utah. They testified that agent Baird and Wilkey specifically employed them for this period for the corporation. The employment was

accepted by the president of the corporation (defendant Emery). Appellant Wilkey had delivered his assets to the Silico Corporation and had discontinued his business, and the work was done under the direction and for the benefit of Silico Corporation.

We respectfully ask the Court to examine this evidence. We submit, on the basis of the plaintiff's own testimony, it is established, that plaintiff had a cause of action against Silico Corporation for the wages sought, but not against appellant Wilkey. Yet, lo and behold, the District Court rendered Judgment just the opposite, i.e.: The Court rendered Judgment in favor of the Silico Corporation (who even had defaulted and hence admitted its liability) and against appellant Wilkey.

It is difficult to divine upon what theory the lower Court proceeded in rendering such Judgment. This was not a case of de-facto corporation - For the corporation was formed and doing business in Utah a month and a half at least before the employment of

the Ottosens. Further, the Ottosens' employment was accepted and arranged by the corporation president, and its agent, and the work was actually performed for the corporation who received the fruits of the labor.

Plaintiff submits: When a party accepts his employment from a corporation and understands and admits he was employed by the corporation, performs his services for the corporation, and has full knowledge that the corporation and only the corporation is to be responsible for his wages, he cannot hold personally liable, an employee of the corporation who participated in arranging such employment.

A corporation is an entity. Where the corporation is disclosed as the contracting party and is accepted as such by the employee, the party who acts for the corporation is not responsible to the employee under the employment contract.

15 C.J.S. Title Corporations Secs. 4-5
(corporation as entity)

19 C.J.S. Title Corporation Sec. 839.

13 Am. Jur. 7. 993. (Agent not personally responsible)

We will not dwell on the point. The principle of law involved is so elementary, it has been so long established as corporation law, that to do so would be "carrying coals to Newcastle".

It is respectfully submitted that the judgment appealed from against appellant, should be reversed.

In the order of reversal, appellant respectfully submits that the Court should order Judgment in favor of appellant and against plaintiff for the \$75.00 Wilkey loaned the Ottesons.

The Court will have noticed in Appellant's Statement of Facts, that in the latter part of September, the Ottesons prevailed upon Wilkey to loan them a total of \$75.00 which the Ottesons promised to pay back and which they failed to pay back. In the Judgment, the District Court provided that defendant should have a credit for this \$75.00. No counterclaim was pleaded for these loans, but the Court appeared to

effect". (See Clerk's Tr. P. 33). The Court could not treat the \$75.00 as pay-out of wages and still allow the \$100.00 attorney's fee under Utah Code 34-9-1. For if the \$75.00 was payment of wages, there would not have been "justly due", the amount plaintiff demanded before suit. The demand was on all defendants, including Ellice Corporation, for the amount of wages earned, without deduction of the \$75.00 loan, and the loan was not denied. Inasmuch, therefore, as the matter was litigated without objection as amount due Wilkey for a loan, appellant respectfully submits that the Court in reversing this Judgment should direct that Judgment should be entered in favor of the appellant Wilkey and against plaintiff, for the \$75.00.

Dated March 31, 1964.

Respectfully submitted,

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