1964

Raymond Otteson v. M. K. Baird et al : Plaintiff-Brief of Respondent

Utah Supreme Court

Udell R. Jensen; Attorney for Plaintiff-Respondent;
William H. Henderson; Attorney for Defendant-Appellant;

IN THE SUPREME COURT
OF THE STATE OF UTAH

RAYMOND OTTESON,

Plaintiff-Respondent,

vs.

M. E. BAIRD, et al.,

Defendants,

EUGENE E. WILKEY,

Defendant-Appellant.

Case No.
10018

PLAINTIFF-RESPONDENT'S BRIEF

On Appeal from a Judgment of the District Court of Juab County, Utah, Honorable C. Nelson Day, Judge.

Udell R. Jensen
125 No. Main St.
Nephi, Utah
Attorney for Plaintiff-Respondent.

William H. Henderson
711 Boston Building
Salt Lake City, Utah
Attorney for Defendant-Appellant.

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DEFENDANT WILKEY SHOULD HAVE EXPECTED TO PAY FOR SERVICES.

AUTHORITIES

IN THE SUPREME COURT

of the

STATE OF UTAH

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RAYMOND OTTESON,	:	
Plaintiff and Respondent	:	
	:	
vs.	:	
M. E. BAIRD, HUGO EMERY, FRED MICKELSON, EUGENE E. WILKEY, dba Silicon Milling Co., and SILICO MILLING COMPANY, a corporation,	:	Case No. 10018
	:	
Defendants,	:	
EUGENE E. WILKEY,	:	
Defendant and Appellant		

- -

RESPONDENT'S BRIEF

NATURE OF THE CASE

This is an action by laborer for wages.

DISPOSITION OF CASE

Judgment was entered in favor of plaintiff for $276.00 on the first count and for

$221.10 on the second count. As part of costs on the first count $100.00 was taxed for attorney's fees, pursuant to Section 34-9-1 U.C.A. '53, as amended by Ch. 69 S.L.U. '61. Judgment was against the defendants, M. E. Baird, Hugo Emery and Eugene E. Wilkey. The judgment dismissed the case against the defendants, Fred Mickelson and Silico Milling Company, a corporation.

RELIEF SOUGHT BY PLAINTIFF--RESPONDENT

To have the judgment of the lower court affirmed.

INTRODUCTION AND ISSUES

Herein the defendant, M. E. Baird, will be referred to as "Baird"; the defendant, Hugo Emery, will be referred to as "Emery"; the defendant, Eugene E. Wilkey, as "Wilkey"; the defendant, Fred Mickelson as "Mickelson" and the defendant, Silico Milling Company, a corpora-

tion, will be referred to as "Silico". The plaintiff, Raymond Otteson will be referred to as "Otteson" and his son, Donell Otteson, as "Donell". The same designation of "W" will be used to designate Wilkey's testimony; and "O" to designate plaintiff Otteson's testimony; and "D" to designate Donell Otteson's testimony. Except as otherwise designated, reference to August and September, mean August and September of 1961.

Otteson (respondent) does not agree with the statement of facts by appellant Wilkey. The essential facts were and are in dispute on the question of--at whose instance and request and for whom the plaintiff and his son, Donell, rendered their services for which no payment has been made? Wilkey contends it was Silico, Otteson maintains it was Wilkey, Baird and Emery. Whether the $75.00 credited on the

judgment was an advancement upon wages, is in dispute.

Otteson denies that the evidence reasonably or fairly established the following, or any of them:- (1) that the default of Silico admitted Ottesons were its employees; (2) that Ottesons' testimony established Ottesons agreed with Silico to work as Silico's employees; (3) that the Ottesons actually worked for Silico; and that Ottesons' services were accepted by Silico; (4) that between August 6 and September 1, physical possession of Wilkey's business properties were delivered to Silico; (5) that Silico worked the properties (Wilkey's at Nephi) and filled orders; (6) that on or about August 16, Wilkey discontinued his rock business; (7) that Wilkey had an agreement with Silico whereby Wilkey was to receive twenty per cent ownership of Silico; and (8) that either Wilkey or

Baird was an agent of Silico to employ Ottesons.

Otteson agrees that Silico was a foreign, (paper) corporation; that it qualified to do business in Utah, July 25, 1961. He agrees that Baird was its, or one of its promoters; and that Baird was not an officer or director of Silico until September 14, 1961. Baird was then made a director and Vice-President.

STATEMENT OF FACTS

During the summer and fall of 1961 Wilkey owned and was engaged in the rock-crushing business at Nephi, Utah. His rock crusher was located near Nephi, Utah. In July, 1961 he employed the plaintiff and his son, Donell, to work for Wilkey at or in connection with his rock-crushing (tr. "W" 11-13, "O" 40, "D" 57).

About the middle of August, Wilkey told Ottesons he was trying to--(they Wil-

keys) were going to sell his outfit, or lease it, or something, to Silico; and that when Wilkey did that, Ottesons would be working for them (tr. "O" 41).

Towards the end of August, 1961 Ottesons had a conversation with Baird, Emery and Wilkey. They wanted Ottesons to show them some rock samples; and they personally paid the Ottesons $10.00 to make the trip (tr. 42). Ottesons made the trip and did the work (tr. "O" 42, 52-3, "D" 58). Also, towards the end of August, 1961 there was a conversation between Ottesons and Wilkey, when Wilkey said he had his transaction completed with Baird and others and from the beginning of the 1st of September, Ottesons would be working for Silico with Baird; that Mr. Baird would pay Ottesons (tr. "O" 43). But there was no change on or after the 1st of September. Wilkey controlled the work and

told Ottesons where and what to do; and the rate of pay was the same (tr. "O" 44-5, "D" 66-7). Orders were taken from Wilkey (tr. "O" 44-5, "D" 66-7), by Ottesons until their last work on September 20, 1961 (tr. "O" 44-5, Ex P "3").

Wilkey had no other writing of an agency between himself and any of the other defendants concerning the employment of Ottesons or either of them (tr. "W" 21).

Baird was not employed by Silico. He was putting Silico together; he was a promoter for the purpose of putting this company together. He did many things without the company's knowledge in preparation for the final,--which was to be done by the officers of the company (tr. 35-36). Baird and Emery had talked with Wilkey about organizing Silico as early as May, 1961 (tr. 38).

Prior to September 1, Ottesons were paid about each two weeks. Wilkey did not dispute the amount the plaintiff and his son earned; and that they had not been paid (tr. "W" 19-20). Wilkey said he was to pay Ottesons for their work up to September 1, 1961, and from then on it was to be Baird (tr. "O" 43, 46).

About the middle of September, Ottesons asked Wilkey for their pay. Wilkey said Baird was to make the payments. Wilkey called (phoned) Baird. Wilkey reported Baird said he (Baird) would send the money down right away (tr. "O" 46-47).

Thereafter Otteson asked Wilkey several times for the money. It was always with the same result--Baird had not sent it (tr. "O" 45-6). After plaintiff asked Wilkey for the money, and he said Baird hadn't sent the money, Ottesons went to Salt Lake about September 16 to 20, and found Baird

and Emery at their crusher (in their trailer house). Ottesons then asked Baird and Emery who was going to pay Ottesons. Baird, in Emery's presence, answered, "We are going to pay you--that Emery's been making out the pay rolls today" (tr. "O" 48, "D" 59-61, 68-9). "We'll pay it" (tr. "D" 73, "W" 92). Wilkey said he'd called Mickelson and Mickelson had said that if they (Baird and Emery) didn't send the money he (Mickelson) would take it out of his own pocket and pay us (tr. "O" 49, "D" 72). Both Mickelson and Wilkey denied this (tr. "W" 85; tr. 109).

The last thing Ottesons did (together) was on September 20, when Ottesons helped take down Wilkey's crusher on Wilkey's land east of Nephi, preparatory to moving same (tr. "C" 50, Ex. P-3, P-5). When Donell presented his time for payment (Ex.P-6) about September 18, 1961, Wilkey kept it at

his place as part of "our" records (tr. "W" 96).

The last work Donell did was on September 26 and 27, 1961, getting some rock ready for shipment (tr. "O" 51, "D" 61-2, "W" 103, Ex. P-5, P-6). Donell did the work on September 26 and 27, 1961 at the request of Wilkey (tr. "D" 62). Wilkey told Donell that Wilkey had some rush orders for some rocks. Donell said he'd stick with him (Wilkey). No one else asked Donell to perform the services. He thought the crusher had left at the time he did his last two day's work (tr. "D" 61-2, 66, Ex P-5, P-6.

Donell requested Wilkey to let him have some money; and on September 23, Wilkey let him have his personal check for $10.00 (Ex. "D" 1) and on September 26 Wilkey let him have his personal check for $15.00 (Ex "D" 3). Donell promised he'd pay it back in a few days. Otteson told Wilkey he had to have some money; that he had to make a

thing about getting it back, as Donell, Wilkey then gave plaintiff his personal check for $50.00 ("D" Ex 2 "W" 86-89). On checks Wilkey wrote "Silicon". He wrote it to identify his business on Silico basis. It pertained to that part of the operation (tr. "W" 104).

On Exhibits "D"-1 and "D"-3 had written on their faces "Wages". This was written by Wilkey's wife, for book work (tr. "W" 90-91, 101). That the failure of writing "Wages" on Defendant's Exhibit 2 was just an oversight (tr. "W" 105).

When the money wasn't sent down from Salt Lake to pay Ottesons, Wilkey didn't go to or ask Mickelson, Secretary-Treasurer of Silico for the money to pay plaintiff and Donell. The people whom Wilkey asked for the money was Baird and Emery personally (tr. "W" 94-5).

In August and September, 1961 Mickelson was the Secretary-Treasurer of Silico,

In September, on behalf of said corporation, he turned down the requests of Otteson and Donell, for payments for the labor on which this case is brought (tr. 110). Their names were never on the payrolls of said corporation. Mickelson told Emery and Baird of the requirements of Silico, that its employees were to be furnished with W-2 forms; and its officers knew of such requirements. No such forms were furnished Ottesons (tr. 110-111). It wasn't Wilkey's decision that Ottesons were not listed as employees of Silico. It was for Mickelson or Emery (tr. "W" 100).

In answer to plaintiff's written interrogatory to Silico, number "3", filed May 10, 1962, whether Silico contended Ottesons worked for Silico, and if so, to disclose such records ("R" 24), Mickelson answered he did not contend Ottesons were employed by any person, firm or corporation (R 30).

Wilkey knew that Silico didn't in September, 1961, list Otteson and Donell as its workmen. Wilkey didn't know whose decision it was not to list them as employees of said corporation (tr. 99-100).

There are no minutes of Silico between July 25 and September 14, 1961; and there is nothing in the minutes of the corporation concerning the acquisition of any property of Eugene E. Wilkey, or the return of said property to Wilkey, designated in the Bill of Sale P-1 (tr. 77-78).

There was a conversation between Wilkey, Baird, and Emery and a Mr. Williams about August 16 in Silico's office at Salt Lake City (tr. "W" 25). There were other papers signed, but they all boiled down to the Bill of Sale, dated September 6, 1961 ("W" 27). By its terms Wilkey agrees to and does hereby sell to Silico for $500.00 and other valuable consideration paid by Silico, Wilkey's rock equipment, subject to certain mortgages (Ex P-1).

Wilkey executed plaintiff's Exhibit "1" (Bill of Sale) to help them get finances; and they never got the money. When he got back said Exhibit, Wilkey knew Silico didn't have the money to pay these bills (involved herein) (tr. "W" 99).

Wilkey testified he was to receive $600.00 as a monthly income. He called himself an employee; and the money wages (tr. "W" 30); Wilkey was working for them, or with them, for about 6 or 8 months (court-106). Wilkey expected a man by the name of Crossman to put in $5,000.00; and it wasn't put in (tr. "W" 106-7).

The court summarized Wilkey's testimony:--in substance that if "you" (Wilkey, Baird and Emery) got an operation that was working and so on, they would get capital from some place and make a financial success of it; but they didn't; and therefore the whole thing collapsed (tr. 107).

ARGUMENT

Wilkey attacks the judgment on the grounds that the evidence does not sustain the judgment. On such an appeal our court has said:

> "The plaintiff having prevailed, he is entitled to the benefit of the evidence viewed in the light most favorable to him, together with every inference and intendment fairly and reasonably arising therefrom."
> McCollum v. Clothier, 121 U. 311, Syl 1; 241 P2d 468.

Said case was an action to recover upon quantum merit for services rendered. Said McCollum case gives the rule of law which should govern this case. The lower court's judgment should be sustained.

Wulkey's statement that he resided at Nephi during the summer and fall of 1961; and that during that time he owned and was engaged in the rock business (tr. 11-12), of itself is sufficient to show Ottesons were his employees, when they at that time worked at his said business.

It was not until after September 20, 1961 that Wilkey took his rock-crushing equipment to Salt Lake City. It is a reasonable and fair deduction from the evidence that Wilkey offered the sale of said equipment, or a lease of same, to Silico; and that he took his machinery to Salt Lake City in an effort to accomplish the sale or lease. But he was not successful in so doing. He received no consideration on the executory contract (Ex. P-1).

Silico qualified in Utah, July 25, 1961. The evidence establishes that it was a paper or straw corporation without assets. The evidence is also clear that Baird was one of its promoters. Wilkey and Emery joined him as members of a promoters' syndicate, to try to secure equipment from Wilkey which the said corporation might accept as the basis for raising finances to launch the unfinanced corporation lacking assets into a hoped-for going business. Promoters are in law liable

There is an agreed novation between all parties by which the corporation is substituted as a debtor to third party creditors with the full knowledge and consent of the creditors to such novation.

There was no fair or reasonable deduction from the evidence that Wilkey was ever, at any time, appointed by corporate officers of Silico to employ Ottesons; or that he had any authority from said corporation so to do.

There is no substantial testimony that Baird was an agent or manager of Silico to employ workmen for Silico at Nephi during September, 1961. Baird was doing things which the officers of Silico knew nothing about towards the final--and to be later approved by the officers of Silico. It was only a few days after Baird first became an officer of "Silico", September 14, 1961, that its Secretary-Treasurer refused to pay the Ottesons. He refused to recognize that

they had been or were employed by said corporation. Ottesons' names were never put on its records as its workmen.

It is a logical deduction from the facts that when Baird became an officer of Silico on September 14, that if Ottesons were its employees, he would have seen that their names were put upon Silico's records as employees, and paid. But Baird did not, after becoming Vice-President, send Ottesons to the Secretary-Treasurer of Silico for payment. Instead, he said "We'll pay".

Silico had no rock-crushing equipment or business at Nephi during September. The rock-crushing equipment and business was Wilkey's. Wilkey was never a stockholder or officer of Silico. The only writing between Wilkey and Silico was plaintiff's Exhibit "1", a tendered, not not accepted Bill of Sale. This was in the nature of a continuing offer to purchase or subscribe for stock in exchange for said property, sub-

ject to the debts thereon. Wilkey received no payment for said Bill of Sale, either cash or stock.

There is no showing that plaintiff's Exhibit "1", Wilkey's Bill of Sale, as such was delivered to or accepted by Silico. It was Baird and Emery with whom Wilkey was dealing. They were to make the payments according to Wilkey.

The evidence shows no corporate authority to any person to acquire the property of Wilkey designated in the Bill of Sale for said corporation for issuance of its stock, or other basis. On the contrary the evidence shows there was no corporate meeting of the board of directors; and there was no general manager authorized to act for said corporation. Our Utah law appears to be that to bind a corporation there must be a meeting of the board as such and authority by them given. Lockwitz et al v. Pine Tree Mining

& Milling Co. 37 U. 349; 108 P. 1128 and Aggeller & Musser Seed Co. v. Blood, 73 U. 120, 272 P. 933.

The Bill of Sale does not meet Utah's statutory requirement of a transfer of property to Silico for its stock. Article four of the Articles of Incorporation of Silico authorizes the issuance of 100,000 shares at a par value of One Dollar per share, Section 16-10-17 U.C.A. '53 as amended by Sec. 17, Ch. 28, S.L.U. '61 provides that the said shares may be issued for such consideration expressed in dollars. Here the Bill of Sale provides the consideration of "$500.00 and other consideration". The record shows no consideration paid; and none authorized or agreed to be paid by Silico. The logical deduction from the evidence is that this Bill of Sale was delivered to a promoter to see if funds could be raised to effect a sale; that no funds were obtained;

that no sale was made; and the whole promotion scheme failed.

To hold otherwise than that Wilkey is liable herein would mean that he could ask workmen to perform labor on and with his property, and by a hopeful statement that some one else would pay, to thereby deprive workmen of their wages, and to give to those receiving their services rewards for their mis-statements. It would be an unjust enrichment by Wilkey, who received fruits of Ottesons' work, and then leave Ottesons without wages.

> "A promise to pay for services rendered will be implied against a wrongdoer who never intended to pay, or who intended deceitfully to avoid payment, ***"
> 71 C.J. Sec. 16 p. 52--Work and Labor.

It may be that Wilkey, by some strange construction, believed he was an agent for Silico when he told Ottesons that after September 1, 1961 they'd be working for "them". Neither the facts nor the law sus-

tain that construction. Even if he so believed, such does not entitle him to freedom from liability herein. In such event, it was a statement which was an implied warranty that he was such agent; and that failin this, he was and is personally liable.

> "According to the rule now prevailing in a majority of the jurisdictions, which is in accord with the rule adopted by the American Law Institute, an agent who, in contracting with a third party on behalf of his principal, so exceeds his authority that the principal is not bound upon the contract, becomes liable to the third party, assuming that such party has no knowledge of the agent's lack of authority, upon an implied warranty of authority though the agent acts in good faith and believes he has the authority which he assumes to exercise.
> 2 Am. Jur. p. 252, Sec. 322.

Mickelson's explanation of the connection of Baird with Silico does not give Baird authority for or on behalf of Silico, to employ Ottesons. Mickelson's answers to his own counsel questions in substance were: Baird's association with the company was that of a promoter. He was not employed by

said corporation--he was putting it together (tr. 36).

One observation on appellant's request for relief outside the usual construction of pleadings, asking for an affirmative judgment for the $75.00 advancement to Ottesons, if such relief is sought on behalf of said Wilkey, certainly he would be liable for a negligent misrepresentation that others would pay Ottesons, and estopped to say when Silico was insolvent, it is liable.

These are established by the facts, or are reasonable and fair deductions from the facts:- (1) that Baird, Emery and Wilkey, in the latter part of August, 1961 asked Ottesons to explore for rocks for them, and paid Ottesons therefor; and thereafter together, as a promoter syndicate, they tried to effect the transfer of Wilkey's rock-crushing equipment and business to Silico but failed to so do; (2) that Wilkey paid Otte-

sons for their labor in August. He said he paid them "what I owed them" (tr. 82); (3) that Ottesons looked to Wilkey for their pay; (4) that Wilkey never went to the Secretary-Treasurer of Silico for the money to pay Ottesons, but went to Baird and Emery personally; (5) that the work done by Ottesons was upon the property of Wilkey; (6) that the manner of performance was controlled by Wilkey, and occasionally directed by Baird; (7) that Ottesons were the employees of Wilkey, or of Wilkey, Baird and Emery; (8) that the benefits from said employment came to Wilkey as owner of the rock-crushing equipment, and indirectly to Baird and Emery as members of the unsuccessful promoters' syndicate; that neither Wilkey, Baird or Emery was an agent of Silico to employ Ottesons; (9) that Silico never ratified said employment, but on the contrary, refused it and refused to pay for said work; (10) that the $75.00 was an

advancement by Wilkey; and the credit of same on account by court was proper; (11) that when Ottesons asked Wilkey first and then Baird and Emery for the pay, Baird's answer in the presence of Emery was "We'll pay"; that when Wilkey said you'll be working for "them" he designated Wilkey, Baird and Emery, or it was but a forecast. This is strangthened by the fact that it was Wilkey who would get the benefit had the promotion been successful. He had a business to sell; and during its operation he received money.

The summary of the evidence by the court and Wilkey appears controlling:

The court: What you (Wilkey) are saying in substance is, that if you got an operation that was working and so on, then you would get eastern capital or capital from some place to make a financial success of it?

The witness: Well--

The court: You didn't get it set up and therefore the whole thing collapsed and that's the problem is it?

The witness: Yah.

SUMMARY

Summarizing Otteson's position, it was, and is, that in the summer and fall of 1961, Wilkey was the owner and operator of a rock-crushing business at Nephi; that in July he employed the Ottesons to work for him in Wilkey's business; that from July to November 22, 1961 Wilkey tried to effect a sale of his rock-crushing equipment to Silico, and also to secure for himself a position of employment with the prospective purchaser--Silico; that to accomplish this he joined hands with the promoter of said company, Baird, and one of its officers, Emery, as a promoter syndicate; and as an effort to produce this result Wilkey and his wife signed a Bill of Sale to offer to said Silico on Sept. 6, 1961; but that

it did not become effective as such because said Wilkey, Baird and Emery could not secure the finance to do what was required to join said Silico; and on November 22, 1961 said Bill of Sale was returned to Wilkey; that Ottesons never ceased to be employees of Wilkey; that Wilkey directed and controlled their services; until September 27, 1961 to fill orders for his crushed rock; and that Ottesons were aiding Wilkey to continue his operation to give him the opportunity to effect the sale.

It is a reasonable and fair deduction, as found by the court, that it was at the instance and request of Wilkey, Baird and Emery that said Ottesons did the work herein involved for Wilkey, Baird and Emery; and in fact and law they promised to pay therefor.

CONCLUSION

Accordingly Otteson submits the judgment should be affirmed with costs to respondent.

Dated May 18, 1964.

Respectfully submitted,

/s/ Udell R. Jensen

Udell R. Jensen,
Attorney for Plaintiff-respondent
125 North Main Street,
Nephi, Utah.

I hereby certify that I mailed two copies of the foregoing Plaintiff-respondent's Brief to Mr. William H. Henderson, Attorney for Defendant and Appellant, at 711 Boston Building, Salt Lake City, Utah, on the 18 day of May, 1964.

/s/ Udell R. Jensen