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Corporations. *ultra vires* Liability for Acts Within Apparent Scope of Authority of Agents

J. Mapother
Jefferson Circuit Court

CORPORATIONS. ULTRA VIRES. LIABILITY FOR ACTS WITHIN APPARENT SCOPE OF AUTHORITY OF AGENTS.*

JEFFERSON CIRCUIT COURT
COMMON PLEAS BRANCH
SECOND DIVISION

No. 229736

THE C. J. KERMEL COMPANY, *Plaintiff,*

VS.

EMMART PACKING COMPANY, *Defendant.*

OPINION

At the time involved in this lawsuit the defendant, Emmart Packing Company, was a corporation, and its "Magnolia" brand of meats widely advertised. J. M. Emmart was its president. The corporation defendant admittedly employed plaintiff to supply material and labor at its plant on Story Avenue in Louisville, of the value of more than $2,000.00. During the course of such employment the defendant corporation similarly contracted with plaintiff for other work and material, amounting to nearly $800.00, to be installed at Magnolia Cafeteria, in another portion of the city, and defendant supplied certain of its workmen to assist plaintiff in its installation there. The entire account, covering both jobs, was charged by plaintiff to defendant corporation, which issued its checks to plaintiff in payment therefor until the balance due thereon was reduced to $305.55, for recovery of which plaintiff sues herein. Its itemized account, attached to petition, covers the job done at the Magnolia Cafeteria.

The answer of defendant is a traverse, and its proof was to the effect that plaintiff's service at Magnolia Cafeteria was not for the benefit of defendant corporation but for its then

*This is one of a series of opinions of circuit judges and federal district judges on questions of law, many of which have not been passed upon by the Kentucky Court of Appeals. This opinion is by Judge Thomas C. Mapother, of the Common Pleas Branch, Second Division, Jefferson Circuit Court, Louisville, Kentucky.

president, J. M. Emmart, who was the sole owner of the Magnolia Cafeteria; that in front of that establishment was a large electric sign showing J. M. Emmart as its proprietor; and that, while all payments on the account were made to plaintiff by vouchers of the corporation defendant, notations appear on the back thereof showing that they were for the account of Magnolia Cafeteria. No witness testified that when the account was contracted, nor at any other time prior to default in payment, was the plaintiff told that it was to extend credit therefor to J. M. Emmart or the Magnolia Cafeteria, nor that it was to look for payment to other than the corporation defendant with which it had steadily dealt at all times. The nearest approach to such testimony was a statement by the witness Hilton, in the employ of defendant corporation at the time, that certain of its officials were in doubt about whether to order this work done at Magnolia Cafeteria, and he, Hilton, was asked to consult its president, J. M. Emmart, on the subject; that he then and there went alone into the private office of President Emmart, who authorized it to be done; whereupon he came out and communicated that fact to agents of both plaintiff and defendant who were present together at the time, and plaintiff's agent was then and there directed in substance to go ahead with the work. While Hilton did attempt to say that plaintiff knew it was doing this work for the Magnolia Cafeteria and not for the Emmart Packing Company, he did not testify to a single fact even tending to so indicate, or at least indicating that it was contracted for Emmart individually, to the exclusion of the corporation defendant; and plaintiff's testimony is that, while it of course knew it was to do the work at Magnolia Cafeteria, it knew no one but the corporation defendant in connection with the contract for the work and knew nothing of the ownership of Magnolia Cafeteria. J. M. Emmart undertook to "take the rap" by testifying that the debt was incurred for his benefit and not for that of the corporation, but he did not say that he contracted it individually, nor did he testify to facts indicating that plaintiff had any reason to look to him for payment. The parties who negotiated with plaintiff were admittedly authorized agents of the corporation; and if otherwise, its

acceptance of the work and payment for more than half of it would amount to ratification. The Court accordingly at trial time took the view that defendant corporation, having contracted the debt and having paid more than half of it, was obligated for the balance, and so instructed the jury peremptorily.

The sole question then and now presented is whether the contract, under all the circumstances, was ultra vires—beyond the power of the corporation—and it is therefore absolved from payment. Assuredly there are limitations upon the powers of corporations as well as limitations upon the authority of their agents. They know these limitations better than anyone else, and if they can repudiate every unauthorized act they perform in dealing with the public, what chance has the latter? The public has no concern with and is not bound by their private and undisclosed reasons for what they do. A corporation can do business only by agents, and the general test of its liability for the acts of the latter is not whether they are authorized, but whether they are within the apparent scope of authority. Corporations are as much liable for their mistakes as are individuals. Defendant says it did not receive any benefit from the work done at Magnolia Cafeteria, but it manifested sufficient interest therein to contract for and supply its own agents to help install it, thereby causing plaintiff to render the service involved. The fact that defendant contracted for the work was an affirmative representation by it that it was interested therein, and plaintiff had the right to assume such interest. Payments were made by defendant corporation on the account until it tired thereof, and the only reason the record discloses for so tiring is that it was told by its officers in authority not to make any more payments but let Emmart take care of it himself. The plaintiff had done other work for the corporation, was called to the office of the corporation for the purpose of contracting for the work involved herein, and its president, in authorizing the work to be done, was speaking for the corporation when he failed to make it perfectly clear that he was doing so as an individual. Plaintiff, being engaged in serving the corporation when it received word from its president that further service was required, had

the right to treat it as service to the corporation, even though it was to be performed at the Magnolia Cafeteria, in the absence of clear direction to plaintiff that it was to be done for its president individually and on his credit.

Even if plaintiff knew that the Magnolia Cafeteria was reputedly owned by its president, the corporation might still have had a private and legitimate and profitable interest in furthering its prosperous operation, for the purpose of advertising its own products, or as the brewers used to install bar fixtures in corner saloons in order to hold their trade, or for other undisclosed reasons.

The proof for defendant indicates that, while plaintiff was not so told at the time, the order for this work was given by it for the mere accommodation of its president, and that it charged the amount of the account to its president on its books, reimbursing itself from funds accumulating to the credit of its president, and issuing its voucher to plaintiff in payment which bore notations that it was on account of Magnolia Cafeteria. Plaintiff was under no obligation to observe these notations, and, if observed, they merely identified the particular job involved. Plaintiff had already parted with its labor and materials on the faith of its credit extended to the corporation defendant, and to allow the latter to accept and meet more than half of the obligation and abandon the plaintiff in midstream, attempting to saddle the balance individually on its president, with whom the plaintiff had no contract, would seem violative of every principle of commercial law and justice. Indications are that the corporation was imposed upon by its president, but if the view contended for by defendant prevails, both used the corporation to impose upon the public. As between these two views the Court is committed to the first, and can give effect thereto only by making the corporation bear the loss. If there was a question of collusion between plaintiff and defendant's then president to assist the latter in swindling defendant corporation, we would have a different case; but the good faith of plaintiff is not impugned.

Defendant cites in support of its position the following authorities:

Rasnick v. *W. M. Ritter Lumber* Co., 187 Ky. 523;
Main Street Tobacco Whse. Co. v. *Bain Moore Tobacco Co.*, 198 Ky. 777;
Farmers' & Traders' Bank v. *Thixton, Millett & Co.*, 199 Ky. 69.

In the Rasnick case plaintiff had sued the defendant corporation's doctor and its bookkeeper and store manager individually for damages for slander and negligence in medical treatment. Plaintiff alleged that the superintendent of defendant corporation, claiming that its work was hindered by said suits, agreed for the corporation, in consideration of their dismissal, to give plaintiff a job with the corporation, and failed and refused to do so, thus violating its contract with plaintiff, to the damage of the latter. A demurrer was sustained to the petition, and judgment affirmed, the upper court holding that the petition showed no consideration for the contract nor authority in its superintendent, Kopp, to make it. The Court referred to consideration as: "A benefit to the party promising, or a loss or detriment to the party to whom the promise is made." It would seem that parting with something of value, as the plaintiff did in the case on trial, would come squarely within that definition. But the Court also held, what was manifest from the facts of that case, that a lumber corporation is without power to compromise lawsuits not filed against it, and that even if it had, such action is not within the apparent scope of the authority of its superintendent.

In the second case above cited, Cain, a bookkeeper for the Main Street Tobacco Warehouse Co., told the secretary of plaintiff over the telephone that his company would honor a certain draft of one Hitz and also honor future drafts drawn by Hitz for tobacco purchased by him. It appeared that the Main Street Tobacco Warehouse Co. only bought and sold tobacco on commission but that its president, Dannenhold, personally bought for himself and others; that Dannenhold had arranged with Hitz to buy for him personally certain tobacco, and as a matter of convenience directed him to draw on the Main Street Tobacco Warehouse Co., which was done, and Dannenhold reimbursed the company; that Cain, the bookkeeper, was without authority to pass on contracts for the corporation. It was held that a bookeeper ordinarily has only authority to make such entries of record as he is directed to make, and not to make contracts for the company. It was also held that

the authorization by Dannenhold, its president, to Hitz to draw two drafts on the corporation did not carry with it the right of Hitz to keep this up indefinitely, nor to draw the one involved in that case. If Dannenhold or other agents of the corporation, by his direction, had purchased the tobacco involved and charged it to the corporation of which he was president, and caused it to be delivered at a certain place, and the corporation had actually paid for half of it, that case would be more like the one under submission.

In the third case above cited, Thixton, Millett & Co., a corporation, became accommodation endorser on a note for P. D. O'Bryan to the appellant bank. Such action was held ultra vires and void as beyond the power of the corporation under its charter. O'Bryan traded a poolroom for a saloon in Owensboro, and Thixton, Millett & Co. endorsed his note for the money required to complete the deal. The question presented was: "May a trading corporation such as Thixton, Millett & Co., organized for a definite and specific purpose, with its powers and specifications set forth in its charter, become an accommodation endorser for another without consideration?" The Court's answer was no, and it would seem that a banker ought to know as much. If, however, Thixton, Millett & Co. had in fact purchased the contents of the saloon in its own name and executed its note therefor to the seller, can it be doubted that it would have been liable thereon? And would it, after making payments on the obligation, and being sued for a balance due, have been let out on a showing that it made the purchase for the accommodation of its president individually? If so, the public simply cannot know where it stands with reference to corporate obligations. The Court is cited to no authority for such conclusion, and is convinced that in principle it is not legally sound.

While a corporation cannot become a surety or guarantor for, or otherwise lends its credit to another, persons with whom it contracts such obligations are entitled to know that it is doing so in order to become the victims of such rule. To permit a corporation to contract ostensibly for itself concerning an ordinary transaction like the one we have here, and at settling time tell its creditor, who extended credit to it on the

faith of such agreement, that it was in reality doing so for the benefit of another without authority and must therefore be held excused, is more than I am able to approve.

While this Court, wherever possible, favors the decision of differences between litigants on substantial legal merit rather than on technicalities of practice, and its views above expressed, whether sound or erroneous, are directed at such result, the answer of defendant herein would seem not to support its defense of *ultra vires*, which must be specially pleaded.

Louisville Tobacco Whse. Co. v. *Stewart*, 70 S. W. 285; 24 K. L. R. 934;
Greene v. *Middlesboro Tobacco Co.*, 61 S. W. 288; 22 K. L. R. 1715;
Kentucky Lumber Co. v. *Greene*, 87 Ky. 257;
Martin v. *Ky. Land Investment Co.*, 146 Ky. 525.

With such defense eliminated, the only issue remaining is whether defendant in fact incurred the obligation involved, and on this the evidence was all one way—that it did.

The motion of defendant for a new trial will be accordingly overruled, with exception for it and 60 days for a bill of exceptions.

MAPOTHER, J.