

FORT SMITH BUILDING & LOAN ASSOCIATION *v.* LITTLE.

Opinion delivered June 23, 1930.

1. CORPORATIONS—COMPENSATION OF EMPLOYEES.—One who receives a salary from a corporation is not entitled to extra compensation for the performance of duties within the scope of those pertaining to his office or position, nor for services outside his regular duties in the absence of a regular agreement.
2. BUILDING AND LOAN ASSOCIATIONS—COMPENSATION OF SECRETARY.—The secretary and manager of a building and loan association who was paid a salary for his services, and whose duties required him to collect rents from the property of mortgagors in default, was not entitled to charge commissions for making such collections.
3. CUSTOMS AND USAGES—VARYING TERMS OF CONTRACT.—Proof of a custom is inadmissible to defeat the express terms of a contract.
4. BUILDING AND LOAN ASSOCIATIONS—COMMISSION FOR SELLING STOCK.—Under a contract entitling the secretary of a building and loan association to a commission for selling stock, the secre-

tary was not entitled to his commission for selling stock where the order for such stock was countermanded before the stock was delivered.

5. BUILDING AND LOAN ASSOCIATION—PAYMENT OF BONUS TO SECRETARY.—Where the secretary and general manager of a building and loan association, upon his resignation as such, was paid a bonus of \$1,000, it will be presumed that it was paid for any unusual or extraordinary services performed by him as such secretary and general manager.

Appeal from Sebastian Circuit Court, Fort Smith District; *J. Sam Wood*, Judge; reversed.

STATEMENT OF FACTS.

Fort Smith Building & Loan Association brought suit against R. T. Little to recover \$125 for moneys collected by defendant for plaintiff, and which he refused to account for in his settlement with the plaintiff. The case was commenced in the municipal court and was appealed to the circuit court where it was tried on substantially the following facts:

Plaintiff was a building and loan association doing business in the city of Fort Smith, Arkansas; and R. T. Little was duly elected secretary of said association by the board of directors at a salary of \$1,800 per annum, and in addition he was to receive four dollars per thousand on all unpledged investment stock sold. His duties were prescribed by § 5 of the by-laws which reads as follows:

“Section 5. Secretary. The secretary shall be manager of the association and shall keep a correct minutes of all meetings of the stockholders and directors, attest all certificates issued by the association, and all orders drawn on the treasurer for payment of all moneys to be legally disbursed by the said association. He shall have charge of the deeds, bonds, mortgages, contracts and other securities belonging to the association; and shall keep a correct account of all moneys received and paid out, in books provided for that purpose, which books shall at all times be subject to the call and inspection of the board of directors. He shall receive all

moneys paid to the association, and within two (2) days thereafter shall turn the same over to the treasurer, taking his receipt therefor. "He shall make a complete report of the condition of the association on the first day of July and January of each year, and shall cause the same to be published in one or more papers in the county where this association is located. He shall be empowered to make stock loans to the extent of ninety (90) per cent. of the withdrawal value of the stock held by a member at any time when there are sufficient funds in the treasury to make such loans. He shall receive for his services such compensation as may be agreed upon by the board of directors. He shall perform such other duties as may be imposed upon him by the board of directors."

The real estate mortgages of the plaintiff from its stockholders provided that the mortgagors assign to said association all rents of said real estate, and that the association shall have the power, in event the mortgagors make default in the payment of the mortgage indebtedness, to take possession of the mortgaged property and collect all rents thereon. Little collected certain rents under these mortgages from the mortgagors and made default in the payment of the mortgaged indebtedness and retained ten per cent. as his commission for collecting said rents.

According to the testimony of the president and of the two vice presidents of the association, the defendant never took any commissions for rent collections until he tendered his resignation, and not until then did they know that he was going to keep out commissions for collecting the rents. Little never got the permission of the directors to deduct said commissions. One of the vice presidents stated that in addition to Little's salary, the board gave him a \$1,000 bonus for services that he rendered. This \$1,000 bonus was given him at the first meeting after he had tendered his resignation as secretary.

Evidence was introduced by the defendant tending to show that it was the custom of other building and

loan associations to pay the secretary a commission of ten per cent. for collecting rents. According to the testimony of the defendant, the houses from which rents were collected and commissions taken were first turned over to him as a real estate broker, and he collected the rents for the mortgagors. After default in the payment of the mortgaged indebtedness, he collected the rents for the association and deducted a commission of ten per cent. until a receiver was appointed to collect the rents. His commission of ten per cent. on the rents collected amounted to \$105.

The defendant also retained \$20 for commissions on selling \$5,000 worth of stock to Otis Wingo. On December 28, 1928, Wingo wrote the secretary of the plaintiff that he wished to subscribe for fifty more shares of \$100 each of investment stock to be paid for in monthly payments of \$150. He enclosed his check for \$150 to cover the first payment. In his letter he stated that he would like for the new stock to start January 1, 1929. On December 31, 1928, Wingo wired Little to withhold his subscription for new stock until further notice. Before the telegram was received on the same day, the secretary had deposited Wingo's check for \$150 in the bank, and had mailed him the stock. In a letter dated February 16, 1929, to Wingo, Little stated that he had never been advised whether Wingo had permitted the stock to remain in force or had returned it to the building and loan association for cancellation. The record shows that it was returned and cancelled.

There was a verdict and judgment for the defendant, and the plaintiff has appealed.

Joseph R. Brown, for appellant.

Daily & Woods, for appellee.

HART, C. J., (after stating the facts). Counsel for the defendant seek to uphold the judgment upon the theory of our cases where it is held that a director or other fiduciary officer of a corporation may be entitled to compensation under an implied contract where ser-

vices clearly outside of his ordinary duty as such director or officer are performed under circumstances authorizing an inference that he was to be paid therefor. *Red Bud Realty Co. v. South*, 96 Ark. 281; and *Clifford v. Walker*, 180 Ark. 592. In such cases, the question of whether or not there is an implied contract for additional compensation is one of fact rather than of law. We are of the opinion, however, that, under the undisputed facts of the present case, this principle of law has no application.

It is equally well-settled that a person who receives a salary from a corporation is not entitled to extra compensation for the performance of duties within the scope of those pertaining to his office or position, and it is held that he is not entitled to compensation for services outside his regular duties, in the absence of a regular agreement. 14A C. J. 139; and *Carr v. Chartier Coal Co.*, 25 Pa. St. 370.

As will appear from our statement of facts, the duties of the secretary are prescribed in § 5 of the by-laws of the corporation. The section expressly provides that the secretary shall be the manager of the association, and shall have charge of the deeds, mortgages, and other securities belonging to the association. It further provides that he shall keep a correct account of all money received and paid out, and that he shall receive all moneys paid to the association. According to his own testimony, he first commenced to collect the rents from the mortgaged premises for the mortgagors and continued to collect them after the mortgages fell due and default was made in the payment of the mortgage indebtedness. The mortgages provided for an assignment of the rents to the association, and that, if default was made in the payment of the indebtedness by the mortgagors, the association should take possession of the property at once and collect all the rents. It thus clearly appears from the defendant's own testimony that the services in collecting rents after default made in the

payment of the mortgage indebtedness was in his character of secretary and manager of the association. His services were of the character which as manager he would ordinarily be expected to perform for his company. In addition, it will be noted that the by-laws expressly provided that the secretary should have charge of all the mortgages of the association and should keep a correct account of all money received and paid out. In another sentence, it provides that he shall receive all money paid to the association. Therefore, his own evidence shows that the rents collected by him after the default made by the mortgagors in the payment of their mortgage indebtedness were collected in his capacity of secretary and manager of the association, and were such duties as the by-laws expressly provided that he should perform. He was paid a salary annually of \$1,800 for his services as secretary and manager of the association. The commissions deducted from the rents he collected amounted to \$105, and the plaintiff was entitled to judgment for this amount.

Proof of the custom of other associations in charging commissions on rents collected was not admissible because the contract was unambiguous, and the proof would have the effect to defeat the express terms of the contract. *Batton v. Jones*, 167 Ark. 478; and *Ozark-Badger Co. v. Roberts*, 171 Ark. 1105.

Again, the defendant retained \$20 for the commission claimed to be due on investment stock sold to Otis Wingo. In his letter subscribing for the stock, Wingo stated that he wished the contract for the new stock to begin on January 1, 1929. On December 31, 1928, Wingo sent a telegram to withhold his subscription for new stock, and this was done. In his letter of February 16, 1929, Little wrote to Wingo to let him know whether he kept the stock, thereby recognizing that Wingo had a right to cancel his subscription before the first day of January, 1929. The contract provided that Little was to receive four dollars per thousand on all unpledged

investment stock sold. By the language used, it was contemplated that an actual sale should be made, and that payment to Little should be had from the price obtained. Until the price of the stock became payable or the association refused to issue it to Wingo, Little could not demand any commission for selling the stock or maintain an action for breach of the contract with him on the part of the association. *Vaughan v. O'Dell*, 154 Ark. 165.

Moreover, the defendant was not entitled to retain either the commissions for rent collected or for selling the investment stock for another reason. According to the testimony of Leon A. Williams, a vice president of the association, at the first meeting of the board of directors after Little resigned as secretary and manager, the board of directors gave Little a \$1,000 bonus for the services he had rendered the association. This bonus was accepted by Little, and must be deemed to have been given in payment of any unusual or extraordinary services which had been performed by him while he was secretary and manager of the corporation.

It follows that the court erred in not instructing a verdict for the plaintiff. For that error the judgment must be reversed, and, inasmuch as the case has been fully developed, judgment will be entered here in favor of the plaintiff against the defendant for the sum of \$125, with six per cent. interest from this date. It is so ordered.
