CAZORT v. BAHNER.

Opinion delivered September 24, 1928.

1. PARTNERSHIP—SHARING IN PROFITS.—A contract to do work incident to a real estate business for a percentage of the net cash commissions during the time the work was done did not create a partnership, but merely created an agency or employment.
2. MASTER AND SERVANT—RIGHT TO SHARE IN PROFITS.—Under a contract to share in the profits from a real estate business on a percentage basis, including commissions on sales, regardless of whether the lands were listed for sale before such employment, the employee, on termination of the contract, was not entitled to share in money or profits derived from the subsequent sale of oil or gas leases, he not having rendered any service in connection therewith.

Appeal from Faulkner Chancery Court; *W. E. Atkinson,* Chancellor; affirmed.

STATEMENT OF FACTS.

Appellant brought this suit against G. L. Bahner to charge certain oil and gas mining leases held in his name with a trust for payment of a certain per cent. of the value thereof and the amount realized therefrom, and for an accounting of profits, etc.

G. L. Bahner, who had been engaged in the real estate, abstracting and insurance business in Conway for years prior to 1917, operated the abstracting business and insurance agency owned by a corporation, together with his real estate business under the firm name of Bahner & Company. On January 18, 1917, he employed W. S. Cazort, appellant, under a written contract by which he was to be paid for his services 45 per cent. of the net cash earnings of G. L. Bahner, operating under the firm name of Bahner & Company, during the year 1917. Under the contract it was stipulated that either party might terminate the employment upon 30 days' notice, in which event Cazort was to receive 45 per cent. of Bahner's net cash earnings during the time Cazort actually worked. The written contract reads:

"This memorandum of agreement, entered into this day between G. L. Bahner, doing a real estate agency business, and operating for the Bahner Abstract Company, Inc., the abstract plant and loan and insurance agency of Bahner Abstract Company, Inc., all under the firm name of Bahner & Company, and W. S. Cazort, witnesseth: That W. S. Cazort has agreed and engaged to work for the said G. L. Bahner for the term beginning this day and ending December 31, 1917, doing such work as is incident to the business of said Bahner & Company, and the compensation of the said W. S. Cazort shall be forty-five (45%) per cent. of the net cash commissions of the said real estate agency of Bahner & Company, and of amounts paid to Bahner & Company by Bahner Abstract Company, Inc., as commissions or compensation for operating the abstract plant and loan and insurance agency of said Bahner & Company, during the term beginning this day and ending December 31, 1917, after deducting from said real estate agency commissions or compensations received from the Bahner Abstract Company for the operation of its abstract plant and loan and insurance agency all the salaries of other employees of Bahner & Company and after all other expenses of said business of Bahner & Company have been paid.

"This contract may be terminated by either party hereto by his giving to the other party hereto thirty days' written notice, in which event the compensation of said W. S. Cazort for the time he worked shall be forty-five per cent. of the net cash earnings of the above described business of Bahner & Company for the time said W. S. Cazort has worked, first deducting the expenses as above set forth."

Appellant worked under this contract until some time in September, 1917, when he gave notice of its termination, and quit the employ of Bahner about September 25, 1917. He had worked for Bahner under a like contract during 1916 for 30 per cent. of the net cash earnings of the business.

Bahner, as part of his real estate business, was taking oil and gas leases in Faulkner County, where no well had been drilled to that time, and no oil or gas has ever been discovered. Bahner began taking these leases several years before 1917, which were granted without compensation, and was trying to interest oil and gas drillers in the purchase of them. The leases only gave Bahner and his associates the right to explore the land leased for gas and oil for a limited period, providing that, if exploration was not made, the leases could be extended only by payment of a stipulated rental to the landowners. During 1917, while Cazort was in Bahner's employ, he and Wilson, who was also employed by Bahner, took leases on about 7,000 acres of land in Faulkner County, and Johnson and Cheek, also in his employ, took leases on about 9,000 acres of land in Faulkner County, making about 16,000 acres upon which Bahner took leases during the year 1917. In March, 1918, after Cazort had terminated his employment under the contract in September, 1917, by giving written notice, Bahner, after considerable negotiations, transferred all the leases on the 16,000 acres of land, with leases on about 3,000 acres more taken by Bahner prior to 1917, to Arnold, receiving from him the sum of $2,100, a large part of which was paid for other services. Arnold forfeited his drilling agreement, and the leases were permitted to lapse for nonpayment of the rental, but in 1919, in order to get some one to pay the rentals, Bahner assigned the leases to Arnold without any consideration, for a contingent share of the oil and gas produced, and realized nothing further therefrom.

Cazort, after quitting the employment of Bahner, continued to procure oil and gas leases, and took leases on approximately 50,000 acres of land in Faulkner and adjoining counties, which he later transferred to a group of Pittsburg oil men, but these leases are not involved in the issue herein.

Suit was instituted by appellant on March 22, 1919, for an accounting between Cazort and Bahner and for

recovery of the amount found to be due Cazort. Bahner answered, denying any indebtedness, offered to submit all books and papers in his possession for appellant's inspection, and attached to his answer an itemized statement showing the entire year's business done by Bahner & Company during the year 1917 and the account between himself and Cazort in detail. He also filed a cross-complaint for the amount shown to be due him from appellant, according to this statement, of $197.50. Testimony was taken by depositions on both sides over a period of 8 years, and the case came up for trial in September, 1927, when appellant moved for the appointment of a master to state an account. The motion was submitted to the court along with the case, and it found that appellant was not entitled to judgment against the appellee, and that appellee was entitled to judgment upon his cross-complaint, and from the decree this appeal is prosecuted.

J. C. & Wm. J. Clark, Frauenthal & Johnson and *Coulter & Coulter*, for appellant.

R. W. Robins, for appellee.

KIRBY, J., (after stating the facts). Appellant insists that the court erred in holding him not entitled to recover an interest in the profits derived from the sale of the leases taken in the name of appellee during his employment. Appellant knew, when the contract of employment was executed, the kind of business Bahner was engaged in and that he had been taking oil and gas leases in 1915 and 1916 in Faulkner County, and is now claiming an interest in leases on 3,000 acres of land taken by Bahner in 1916, before his employment.

The terms of the written contract, the only one made between the parties, are plain and unambiguous. It recites the business engaged in and being operated by Bahner, and that Cazort "has agreed and engaged to work for Bahner for the term beginning on the day of its execution (January 18, 1917) and ending on December 31, 1917, doing such work as is incident to the business of said Bahner & Company, and the com-

pensation of the said W. S. Cazort shall be forty-five per cent. of the net cash commissions of the said Bahner & Company," after deducting certain commissions and expenses for the operation of the abstract business and the loan and insurance agency, and "all the salaries of other employees of Bahner & Company, and after all other expenses of said business of Bahner & Company have been paid." It further provides that the contract may be terminated by either party upon giving 30 days' written notice, and, in the event of its termination, that the compensation paid Cazort "for the time he worked shall be forty-five per cent. of the net cash earnings of the above described business of Bahner & Company for the time the said W. S. Cazort has worked, first deducting the expenses as above set forth." In other words, the contract fixes the amount of compensation to be paid to Cazort specifically, the method for arriving at it, and provides upon its termination that he shall be paid the fixed per cent. of the net cash earnings of the business for the time he worked. It is certainly, as between the parties, no more than a contract of employment, providing for appellant's compensation or salary a certain fixed amount of the net profits of the business during the time of his employment, and did not create a partnership between them. He was, notwithstanding he participated in the profits by being paid his compensation therefrom, but an agent or employee of the appellee in the performance of the services for which he was employed. *Hazard* v. *Hazard,* 1 Story, 371; 22 A. & E. Enc. Law (2 ed.) p. 32; *Haycock* v. *Williams,* 54 Ark. 384, 16 S. W. 3; *Christian* v. *Crocker,* 25 Ark. 327; *Clark* v. *Emery,* 58 W. Va. 637, 52 S. E. 770, 5 L. R. A. (N. S.) 503.

It is not contended that appellant advanced any money for the procuring of the leases, nor that he was not paid in accordance with the terms of the contract all the compensation out of the profits of the business realized during the time of his employment and before he terminated the contract, as he had the right to do.

Neither is it contended that the leases were sold or disposed of before he terminated his contract of employment, and the undisputed testimony shows, in fact, that any money realized from the disposition of the leases long after he terminated his contract was made or realized without any service whatever rendered by him in connection therewith. No profit was derived from the disposition or assignment of the leases which appellant helped to procure during the time of his employment, the disposition thereof having been made long after the termination of his contract. Certainly he could be entitled to no compensation or division of any profits for the disposition of the Howard-Johnson leases, which he did not help to procure and which were not disposed of until long after his employment had been terminated. The testimony shows that he received as his compensation the stipulated percentage of the profits derived from the business during the time of his employment, including commissions on the sales of real estate, regardless of whether the lands were listed for sale before he was employed.

It follows that the court did not err in holding the plaintiff, appellant, not entitled to any interest in the money or profits derived from the sale of the leases made after appellant's contract of employment was ended. The decree is accordingly affirmed.