

1969

Glenwood Irrigation Company, A Corporation v. John R. Meyers : Respondent's Brief

Utah Supreme Court

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IN THE SUPREMACY OF THE STATE

WORLD HERITAGE

VERNEER

North Main Street

Field, Utah

Journey for Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

GLENWOOD IRRIGATION COMPANY,
A Corporation,
Plaintiff and Respondent

— vs. —

JOHN R. MEYERS,
Defendant and Appellant.

Case
No. 11524

RESPONDENT'S BRIEF

THE NATURE OF THE CASE

The Plaintiff irrigation company brought an action requesting the court to determine that the Defendant had no right, title, or interest in and to any of the water belonging to the Plaintiff company other than as a stockholder of the company. The Plaintiff specifically contends that the Defendant has no right to divert water from its system for non-consumptive power use .

DISPOSITION IN THE LOWER COURT

Plaintiff and Defendant both filed separate Motions for Summary Judgment. The Court denied Defendant's Motion for Summary Judgment and granted Plaintiff's Motion for Summary Judgment and entered a Judgment and Injunction dated October 8, 1968 (R. 25 and 26). The Defendant then moved the Court to reconsider the orders and motions theretofore filed. The Court on January 23, 1969 entered an

order affirming the Judgment and denying the Defendant's applications for review after hearing extensive argument on October 31, 1968. (R. 36).

RELIEF SOUGHT ON APPEAL

Plaintiff seeks to have affirmed the Judgment of the Trial Court.

STATEMENT OF FACTS

The Plaintiff is in substantial agreement with the Statement of Facts made by the Defendant. However, since the facts before the Court on admissions and affidavits have not been fully developed, a further statement is necessary.

The Plaintiff is a non-profit irrigation company organized to distribute water to its various stockholders in the area of Glenwood, Sevier County, State of Utah. The Defendant owns water stock in the Plaintiff company and is entitled to use some of the waters distributed for irrigation purposes.

In addition to his rights as a shareholder, the Defendant claims to be the owner of a non-consumptive power right and entitled to the use of the entire water flowing from Glenwood Springs and into Glenwood Ditch. The Defendant claims to have acquired the right by reason of a Warranty Deed executed by Mr. and Mrs. Gleed Utley to John R. Meyers and Emily M. Meyers, dated August 3, 1967 and recorded in the records of Sevier County, in Book 68 at Page 127 (See Abstract of Title, Page 79; R. 11A). The Grantors, Mr. and Mrs. Gleed Utley, were in possession of said property during the calendar years of 1955 and 1956 (See Affidavit, R. 136).

On December 22, 1960, the Defendant caused an application for extension of time within which to resume use of

a non-consumptive power right to be left for filing in the Office of the Utah State Engineer. The application stated the water was last beneficially used in the "year 1956," (R. 15, L. 12). The application was not filed by the Engineer until December 30, 1960 and at the time the filing fee was received from the Defendant. The Defendant requested an extension of time within which to resume use to and including April 24, 1964. (R. 15, Notice To Public R. 13A).

A protest to the application for an extension of time was filed by the Plaintiff and the matter was heard and an order entered granting the Defendant to December 30, 1965 for the filing of proof of resumption of use of said water (R. 16). The order entered by the Engineer granted to the Defendant substantially more time than requested, although there was no amendment of the application or additional notice to the public.

The use of the water was not resumed during the extended period of time and an additional application was filed for the further extension. The application was received by mail in the Office of the State Engineer on December 30, 1965, five years and one day after the filing of the first application for extension. The required filing fee was not paid until January 5, 1966. (See State Engineer's Endorsements, 1, 2, and 4; R. 09). A hearing was had upon the protest of the Plaintiff to the extension. The Engineer then entered a decision granting the application and contained no specific extension date. No proof of the resumption of use of the water was shown up to and including July 1, 1966 as requested by the applicant.

An Affidavit of Mr. Gleed Utey, the owner who granted the property and other right appurtenant to it to John R. Meyers and Emily Meyers on August 3, 1967, was filed showing the water had not been used for power purposes since August 1, 1955 (R. 135). The Affidavit demonstrated that the water had not been used for considerably more than five years prior to the filing of the first application by Defendant.

The District Court heard the Motion of the Defendant for Summary Judgment and also the Motion of Plaintiff for Summary Judgment and again re-heard all of said matters on October 31, 1968, thereafter entering a final order affirming the decision granting Plaintiff's Motion for Summary Judgment on January 31, 1969 (R. 36).

ARGUMENT

POINT 1

THE COURT CORRECTLY GRANTED PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

A studied review of the pleadings and affidavits before the Court demonstrates there was no question of fact which remained for the Court to determine. The Court, therefore, correctly granted the Plaintiff's Motion for Summary Judgment.

The District Court found the Defendant had forfeited the alleged non-consumptive power water right by non-use for periods of more than five years, and that the various applications for additional time within which to resume use filed in the Office of the State Engineer were not effective to extend the time.

Section 73-1-4, Utah Code Annotated, 1953, provides for the reversion to the public of water rights where there is a failure to use within a period of five years.

The Defendant recognized that because of long periods of non-use, his right was in jeopardy unless an extension of time was acquired from the Utah State Engineer. Therefore, he filed for an extension of time within which to resume the use of the water in December of the year 1960. He forwarded his application to the State Engineer and it was received December 22, but was not filed until December 30, 1960, at which time the Defendant paid the required filing fee. The application requested an extension of time

within which to resume the use of the water right up to and including April 24, 1964. Section 73-1-4, Utah Code Annotated, limits the right of any applicant to secure an extension of time for a period of not more than five years.¹ The statutory procedure limits the granting of an extension for more than five years. The decision of the State Engineer apparently recognized this limitation and granted an extension to (but not including) December 30, 1965. (R. 16).

Thereafter, the Defendant failed to resume use of the water right and filed a second application for an extension of time within which to resume use of the water (R. 7, 8-9). His application requested an extension to July 1, 1966. The application was left in the State Engineer's Office for filing on December 30, 1965, which was five years and one day after the filing of the first application and one day beyond the extension to but not including December 30, 1965. The filing fee was not paid until January 5, 1966. Thereafter and on January 5th, the application was examined in the Office of the State Engineer. (See R. 9, State Engineer's Endorsements 1, 2, and 4). The Defendant's failure to comply with the Statute as demonstrated by the Engineer's records terminated the Engineer's jurisdiction to extend time for the Defendant to commence use of the water right. This Court has specifically determined the issue of failure to comply with the Statute permitting an extension in which

"73-1-4. Reversion to public by abandonment or failure to use within five years—Extending time—. When an appropriator or his successor in interest shall abandon or cease to use water for a period of five years the right shall cease and thereupon such water shall revert to the public, and may be again appropriated as provided in this title, unless before the expiration of such five-year period the appropriator or his successor in interest shall have filed with the state engineer a verified application for an extension of time, not to exceed five years within which to resume the use of such water . . ." .

to resume use of water in the case of Baugh vs. Criddle, 19 Utah 2d 361; 431 P 2d 790:

“When a statute gives a new and unusual remedy, and directs how the right to the remedy is to be acquired or enjoyed, and how it is to be enforced, the act should be strictly construed; and validity of all of the acts done under the authority of such an act will depend upon the compliance with its terms.”

The filing date for the second application for an extension was January 5, 1966, when the Defendant paid the required filing fee. Section 73-2-14, Utah Code Annotated — Fees of State Engineer, requires:

“The State Engineer shall collect the following filing fees which shall be paid into the general fund . . .”.

The section then goes on to specify the filing fees and particularly the filing fee for an extension application under Paragraph (2) thereof.

This Court has on many occasions held:

“** * mere leaving of a paper with a filing officer does not constitute filing where statute requires a fee to be paid in advance.” (Jacobsen vs. Jeffries, 86 Utah 587; 47 P2d 892.)

Section 73-1-4, Utah Code Annotated, 1953, also provides:

“The filing of such application for extension of time shall extend the time during which non-use may continue until the order of the State Engineer thereon.”

This language does not appear to permit a construction that the physical leaving of an application for extension in the State Engineer’s Office is sufficient without the required fee. The Engineer will take no action regarding the application until the filing fee is paid and his inactivity should not extend the applicant’s right until such time as an order is made.

The second deficiency in the attempt to extend the period of non-use by the Defendant appears to have been when the Plaintiff requested an extension of time by his second application up to and including July 1, 1966. A protest hearing was held by the State Engineer and at the conclusion of the hearing he entered an order granting Defendant's application (to July 1, 1966) (R. 10). No additional extension was entered in the order and no record of use of the water or proofs of use were filed in the Office of the State Engineer by July 1, 1966.

The third, and probably most persuasive and conclusive, matter before the District Court was the Affidavit of Gleed Utley who was then the owner and in possession of the property later sold to the Defendant. (See R. 135.)

This specific affidavit states that the water was not used for power purposes since August 1, 1955 and was not used in the entire calendar year of 1956. This affidavit conclusively showed that the engineer did not have any jurisdiction to extend the period of non-use at the time the first application was filed in his office on December 30, 1960.

It is admitted that the affidavit was not filed at the time of Plaintiff's Motion for Summary Judgment and was not filed at the time of the hearing; however, the Affidavit was served upon the Defendant on October 2, 1968 and filed with the District Court on October 4, 1968. The required ten day service of the Affidavit supporting the Motion was not met and if the record went no further, it is conceded that the Affidavit should not be considered under the circumstances. However, Defendant thereafter, and on October 13th, eleven days after receiving a copy of the Affidavit, filed a Motion with the District Judge requesting a reconsideration of all matters before it. (R. 30). The Motion was noticed up for rehearing on October 31, 1968. The Motion of the Defendant specifically objected to the Affidavit of Gleed Utley, the owner and person in possession of the property during the years in question; however, Defendant

has at no time filed countering affidavits or other items of proof which would counter the Affidavit.

Rule 56(e) of Utah Rules of Civil Procedure as amended does not permit a general allegation to counter a specific affidavit. The applicable portion of the rule provides:

When a Motion for Summary Judgment is made and supported, as provided in this rule, an adverse party may not rest upon the mere allegation or denials of his pleadings, but his response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, should be entered against him.

The general statements of counsel contained in his motion were not sufficient to overcome the requirement.

CONCLUSION

We respectfully submit that the Utah State Engineer had no jurisdiction to grant an extension of time within which to resume the non-consumptive power use in issue and that the Plaintiff's Motion for Summary Judgment against the Defendant was properly granted for the following reasons, any one of which was sufficient:

1. The property owner's affidavit showing non-use from August 1, 1955 together with the Defendant's application for an extension of time within which to resume use of water, proved use had not been made up to and including December 30, 1960, a period of more than five years.

2. Defendant's failure to reapply or file proof that he had resumed use of the water right in question prior to December 29, 1965.

3. The filing of a second application resulted in the second order by the Utah State Engineer after the contested hearing in which he granted the extension (R. 10). However, the order entered granted the request of the Defen-

dant to July 1, 1966. No additional evidence was submitted by the Defendant showing he had filed any proof of resumption of use in the Office of the State Engineer or in fact had resumed use prior to July 1, 1966.

Respectfully submitted.

OLSEN AND CHAMBERLAIN

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